

**IN THE SUPREME COURT OF NEVADA**

LYFT, INC.,  
Petitioner,

vs.

EIGHTH JUDICIAL DISTRICT COURT  
OF THE STATE OF NEVADA, in and for  
the County of Clark, and THE  
HONORABLE MARK R. DENTON,  
Respondents,

and

KALENA DAVIS,  
Real Party in Interest.

District Court No. A-18-777455-C

Electronically Filed  
Dec 02 2020 01:41 p.m.  
Elizabeth A. Brown  
Clerk of Supreme Court

**PETITIONER'S APPENDIX  
VOLUME 2 (Pages 251-500)**

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## CERTIFICATE OF SERVICE

I certify that I am an employee of Lewis Brisbois Bisgaard & Smith LLP, and that on this 2nd day of December, 2020, I did cause a true copy of the foregoing **PETITIONER'S APPENDIX VOLUME 2 (Pages 251-500)** to be served via the Court's electronic filing and service system ("E-Flex") to all parties on the current service list:

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*Respondent Court*

By /s/ Heidi Davis  
An Employee of Lewis Brisbois Bisgaard  
& Smith LLP

It will be shown that:

***Allowing a non-neuropsychologist, particularly an attorney, access to protected test material through third party observation, or direct access to raw test data,***

- a) violates the neuropsychologist's ethical guidelines and the published positions of professional organizations,***
- b) goes against the stated position of the Nevada Board of Psychological Examiners,***
- c) violates NAC 641.234,***
- d) presents a risk to public safety,***
- e) diminishes the validity of test results,***
- f) diminishes the usefulness of the neuropsychologist to the tier of fact, and***
- f) diminishes the viability of the neuropsychologist by denying him/her the tools necessary to conduct valid neuropsychological assessments.***

The argument:

1. Rebuttal of neuropsychological test interpretation can be accomplished by a retained expert who reviews the protected raw test data provided by the original examiner. There is little to be gained, and much to be lost by allowing non-psychologists direct access to protected test material and evaluation techniques, whether through third party observation, or through possession of the actual raw test data (raw test data often contains protected test material on the forms themselves).
2. The Nevada Board of Psychological Examiners clearly indicates that the results of neuropsychological assessment conducted under third party observation can invalidate the test results and the practice "poses a significant threat to public safety" (see **Appendix A**).
3. The practice of third party observation runs counter to the guidelines and positions of all professional organizations that oversee psychological and neuropsychological practice (see **Appendix B**).

4. Psychologists and neuropsychologists are required by law to protect test material from any type of disclosure that might invalidate the test or procedures (NAC 641.234). **Allowing non-psychologists to witness, record, or otherwise see protected test materials violates NAC 641.234**, particularly in the case of disclosure to attorneys. See the letter written by the Nevada Board of Psychological Examiners that supports this interpretation.
5. Test development takes years between conceptualization, standardization, and publication. It is costly and involves teams of examiners. Standardization often includes thousands of test subjects, stratified demographically across the United States. **Neurocognitive measures are years in the making**. Scientific research on each measure continues for many years after the measure is published. Neuropsychologists depend on each measure to be useful for decades. **Exposure of protected test material to non-psychologists effectively renders the test invalid once it is widely released to attorneys**. The many years of research and work that goes into test development and standardization are then wasted.
6. Research clearly indicates that examinee behavior changes when being observed, recorded, or otherwise monitored by a third-party. A sampling of research on the effects of third party observation can be found in **Appendix C**. Some examinee's get anxious when they know they are being recorded or observed, and their cognitive efficiency declines. Some examinees "play it up" for the recording in an effort to "prove their case", and some will simply get thrown off balance. **The presence of such third party observers have been shown repeatedly in research to reduce the validity of neuropsychological measures**. Memory, attention, and processing speed seem to be particularly vulnerable to the third party observation effect. Observation skews the findings in a way that is unique to each examinee; and because it is an unknown quantity, cannot be factored in or out of the equation when interpreting the test results. For example, how would a



neuropsychologist know how a reaction time, memory, or processing speed test was affected by ongoing knowledge that an agent of his attorney was observing or recording everything the examinee does? Neuropsychologists have no way of knowing how each examinee might be affected, but can only state that the examinee was placed in a condition that was not present during the standardization of the measure. Ethically, the neuropsychologist must indicate that the test performance was almost certainly affected and may be entirely invalid, due to non-standardized test conditions that have been shown to alter performance.

**Any results obtained in the presence of a third party observer are, by definition, of unclear validity, and thus useless to the trier of fact.** This very issue could be raised by the very attorney who demanded the third party observation. It would be a clever argument if the results did not favor her/his client.

7. Neuropsychological measures are standardized, and are administered in the same fashion to every examinee (thus the term "standardized"). Psychologists are ethically bound to adhere to standardized test administration with few exceptions, and when standardization is broken, neuropsychologists are obligated to discuss the breach in the body of the final report. While minor breaches may be inconsequential, major changes in standardized administration can invalidate a measure. There are sometimes good reasons to do so, for example reading a test question to a blind patient on a test that was standardized with the standardization research subjects reading the question. Such a break from standardized administration would be detailed in the report. Neuropsychologists who examine the raw data of another neuropsychologist can take any nonstandardized approach to a given measure into account in any rebuttal.
8. The argument will be made that the attorney should be able to go over a video or audio recording of an evaluation with their retained expert. However, we all know net result; The provision of a recording or third-party observation will

result in a sharp increase in many picayune criticisms by an overzealous rebuttal expert. However, the litany of criticisms will do little in the way of providing the trier of fact additional information, and will only serve to confuse the trier of fact with meaningless smoke.

9. Psychologists and neuropsychologists are bound by strict ethical standards and are regulated by the Nevada Board of Psychological Examiners. **They are ethically obliged to protect test security to protect public safety.** This places the offending psychologist at risk of losing his license and of being disciplined by his or her professional associations.
10. **Public safety is compromised when non-psychologists have access to the measures, test items, and evaluation techniques that neuropsychologists use.**

Neuropsychologists are very frequently asked to assess high risk professionals, including airline and fighter pilots, surgeons, police officers, and high clearance government officials who have been ordered to undergo neurocognitive or personality assessment, often because some concerns were raised regarding their fitness for duty. Knowledge of the test items, for example on a memory test, or a measure of frontal lobe functioning, could result in test results that might release this individual to return to duty prematurely or in cases where they might pose a risk to others. For this reason, test protection is a matter of public safety, a responsibility that is taken seriously by neuropsychologists. Similarly, IQ measures are critical in death penalty cases. Learning about the test items (even by reviewing the answer sheet) could skew a test in a favorable direction for a defendant who is trying to fake mental retardation or mental illness.

11. **Allowing third party observation or access to raw data will give attorneys and others access to protected measures that are used to detect exaggeration and malingering.** As of 2020, only five or six of the dozen or so neuropsychologists in Nevada are formally trained in measures used to detect exaggeration and malingering. The measures are well researched and are securely

protected by researchers and neuropsychologists. As with all protected test materials we are required to withhold them from the general public and non-psychologists. They are locked on premises. These measures used to detect malingering and exaggeration need protection. The measures involve tricks and cognitive processes that are known to remain preserved, even in severe brain injury. The names of the tests are often not even placed on final reports but are transferred directly to the rebuttal expert, primarily because neuropsychologists do not want unscrupulous attorneys and others to research them and inform their clients on what to look for when being evaluated. We know from multiple research studies that between 30% and 40% of litigating examinees exaggerate or outright feign symptoms. There is well documented evidence of attorney coaching in litigation, and recently, with large NFL brain injury settlement (see **Appendix D**). Neuropsychologists are the designated holders of these protected measures. No other medical discipline has conducted the same level of research on the detection of deception, nor has any other medical discipline developed and researched measures to detect deception. For this reason, other medical professionals have come to rely on neuropsychologists to help them identify cases of exaggeration, malingering, and psychosomatic illness. It is a standard of care for neuropsychologists to administer several in general clinical settings. National surveys on best practices, indicate that forensic neuropsychologists administer an average of six or more of these measures during a full neuropsychological evaluation. Retained neuropsychologist-experts who are asked to review the raw data of another neuropsychologist should be familiar with these measures and the research supporting their use. They are, however obligated to protect the identity of these measures and do not discuss them in detail with retained attorneys. This is considered ethical practice.

12. Neuropsychologists routinely conduct independent medical (neuropsychological) examinations for both workers compensation companies, and disability companies. Again, the rate of exaggeration and outright malingering is well over 30%. Many injured workers have their own attorneys. Regular distribution of the neuropsychological and validity measures to attorneys would increase the probability of coaching by the attorney, or self-teaching by the plaintiff, thus destroying the usefulness of the tests.
13. Neuropsychologists, as holders of the measures have been successful in keeping protected test material protected from the general public. It is patently unreasonable for neuropsychologists to share this material with a law firm in the hopes that they and their office staff will feel bound by the same ethical principles, and who are not bound by NAC 641.234, and may have no appreciation for the importance of test security. Over time the once-protected test materials will slip from the draws of attorneys to the pages of websites. This is an undeniable fact. Once in possession of the test items, attorneys will feel compelled to use the material to win their case. These attorneys, nor the court have requisite knowledge of what they can or cannot use from a recording, or a test form that constitutes protected test material. This opens the risk for the material to be presented in a public forum, in a courtroom hearing, and between attorneys over dinner. Thus, by giving the protected test material to a non-psychologist, events that follow will result in loss of test security. In this sense, the moment that the material is turned over by the neuropsychologist, she/he has violated ethical guidelines and the law. This is unacceptable, and is unreasonable to ask of the neuropsychologist.
14. Weakening test security, or otherwise causing invalidity of a neuropsychologist's battery of measures will, in effect, **deny the neuropsychologist the tools of his or her trade**. Neuropsychologists earn their living through these neurocognitive measures and tools. Allowing non-psychologists access to these protected materials and techniques will essentially destroy the usefulness of

neuropsychologists in our public safety evaluations, in criminal hearings and civil litigation cases, and in their care for patients. How can they practice if they do not know whether their examinee has studied the test prior to coming in. How can they be expected to opine on matters related to deception, when all of the techniques and measures are given to attorneys and make their way into public domain?

15. Neuropsychological test measures have copyright protection and the test publishers have a vested interest in the tests remaining secure. Neuropsychologists typically sign licenses to use test material and thus the test material is owned by the test publisher. Allowing proprietary test material to non-psychologists will, in some cases, break copy-write protection and will violate the contract between the neuropsychologist and the test publisher. This can result in the neuropsychologist losing rights to a given tool of his/her trade. Attached is a letter from a test publisher (Green Publishing) that clearly illustrates this threat. see **Appendix E**.
16. Disclosure of protected test material by witness, recording, or otherwise, will allow for these protected materials to slowly accumulate in law offices across the state. Attorneys and law office employees are not obliged in any way to follow the ethical and legal obligations that licensed psychologist must follow as it relates to protecting this protected test material. Despite the honor of most professionals in the legal profession, there is little doubt that these materials will end up being shared, used in seminars on how to beat expert witnesses, and on the internet for public consumption. Office help in law offices will have easy access to material that is held under lock and key by neuropsychologists. It is thus understandable how this issue presents a problem within the community of professionals who have been entrusted by law and ethics to hold these protected measures secure.

17. Allowing for third-party observation is also concerning because it will allow for eight hours or more of one-on-one interaction to be scrutinized in a manner that will only confuse jurors and will not assist them as triers of fact. Every cough, hiccup, and observed behavior will be taken out of context, and made to appear to be an important error. Jurors have no training in how to put any alleged errors into context when reviewing an entire day of test administration. Attorneys will feel compelled to use portions of recording during court hearings to prove their case, thereby exposing the public to protected test material.
18. In most cases, when a third party observer (which refers to witnessing, recording, or monitoring) is requested, the request is lopsided in that the examiner on the opposing side was not forced to do the same. This obviously presents problems and issues of fairness. The monitored examiner will essentially be turning over an extraordinary amount of information that will not be provided by the examiner on the opposing side.
19. Case law does support the protection of test material (see **Appendix F**).

Respectfully,



Thomas F. Kinsora, Ph.D.  
Clinical Neuropsychologist  
Adjunct Professor, University of Nevada, Las Vegas, Dept. of Psychology

## Appendix A: Nevada Board of Psychological Examiners Position



STATE OF NEVADA  
BOARD OF PSYCHOLOGICAL EXAMINERS

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Reno, Nevada 89502  
Telephone 775 / 688-1268 • Fax 775 / 688-1060  
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October 1, 2018  
Governor

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

Michelle G. Paul, Ph.D.  
President, Las Vegas

Whitney E. Koch-Owens, Psy.D.  
Secretary/Treasurer, Las Vegas

John H. Krogh, Ph.D.  
Board Member, Reno

Stephanie Holland, Psy.D.  
Board Member, Las Vegas

Anthony Papa, Ph.D.,  
Board Member, Reno

Pamela L. Becker, M.A.  
Public Board Member, Reno

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

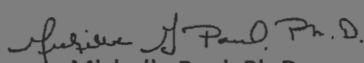
Dear Ms. Brown:


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

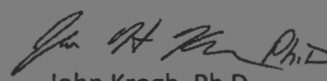
  
Morgan Gleich  
Executive Director

  
Michelle Paul, Ph.D.  
Board President

  
Whitney Owens, Psy.D.  
Board Secretary/Treasurer

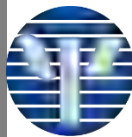
  
Pam Becker, MA  
Public Member

  
Stephanie Holland, Psy.D.  
Board Member

  
John Krogh, Ph.D.  
Board Member



## Appendix B: Position Papers by Professional Organizations



AMERICAN  
PSYCHOLOGICAL  
ASSOCIATION  
Services, Inc.

Assemblyman Jason Frierson  
7925 W. Russell Road, No. 400187  
Las Vegas, NV 89140-8009

SENT VIA EMAIL

Dear Assemblyman Frierson,

The Inter Organizational Practice Committee (IOPC) is a coalition of representatives of the major neuropsychology organizations in the US<sup>1</sup>. The IOPC is tasked with coordinating and advancing national neuropsychology advocacy efforts that relate to the practice of clinical neuropsychology in the United States and represents approximately 8,000 neuropsychologists from all regions of the country.

We write to share our concerns about A.B. 285 in the Nevada Assembly, which would mandate that Third Party Observers (TPOs) can attend medical and psychological examinations. We oppose the application of the bill to neuropsychological testing because:

- TPO's can greatly affect the results of tests
- Most neuropsychological tests have been designed and validated for situations where a TPO is not present
- The bill would generally override the neuropsychologist's or the court's judgment that a TPO is not appropriate.

The presence of TPOs can greatly influence the outcome of neuropsychological testing in certain situations, which can invalidate results. Unlike most medical examinations, psychological examinations, which include neuropsychological examinations, are complex processes that require concentration and an environment free from distraction. The presence of a TPO is inconsistent with the requirements for standard test administration for this reason. Extensive social psychological research on the social

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<sup>1</sup> The IOPC includes the American Academy of Clinical Neuropsychology (AACN), The Society for Clinical Neuropsychology (SCN; Division 40 of the American Psychological Association), the National Academy of Neuropsychology (NAN), the American Board of Professional Neuropsychology (ABN), as well as APA Services, the companion professional organization to the American Psychological Association.

facilitation effect indicates that the mere presence of a TPO may influence cognitive performance in a variety of settings.

Additionally, neuropsychological testing is a complex process based on sound scientific research and evidence. Test measures have not been standardized in the presence of TPOs. In other words, the presence of a TPO adds a variable to the set of highly controlled environmental factors that were used when validating these examinations to make sure that they accurately test or measure certain things, like a person's level of cognitive functioning after a stroke. Thus, adding a TPO to the test environment potentially compromises the legitimacy of the results. Furthermore, research studies show that TPOs affect test results in a way that may alter the outcome of testing.<sup>2</sup>

The IOPC is also concerned that the bill allows the examiner to suspend the examination only if the TPO disrupts the examination or attempts to participate; however, TPOs may interfere in other ways. For example, the examiner may observe that the TPO is distracting the test subject or making him/her uncomfortable, affecting their test performance. TPOs also affect performance in less obvious ways, by leading to alterations in a person's performance and may potentially cause test scores to be lower than an individual's true ability level. Psychologists who conduct these examinations must be able to use their clinical judgment when deciding whether the examination will be compromised, or is being compromised, by the presence of a TPO.

The bill also appears to remove a court's discretion to determine that a TPO should not be present for neuropsychological testing that it has ordered. The only remedy would be pursuant to a protective order, which could only be filed *after* an examiner suspends the exam for one of the limited reasons.

For the reasons outlined above, IOPC opposes A.B. 285 as written.

Sincerely,

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<sup>2</sup> The American Academy of Clinical Neuropsychology and the National Academy of Neuropsychology have published positions that TPOs should not be allowed when their presence is clinically inappropriate.

<https://www.tandfonline.com/doi/abs/10.1076/clin.15.4.433.1888>

<https://www.nanonline.org/docs/PAIC/PDFs/NANPositionThirdParty.pdf>



Chris Morrison, Ph.D., ABPP  
President, American Academy of Clinical Neuropsychology

Jared Skillings, Ph.D.  
Chief of Professional Practice, American Psychological Association Services Inc.



Tresa Roebuck Spencer, Ph.D., ABPP  
President, National Academy of Neuropsychology



Michael McCrea, Ph.D.  
President, Society for Clinical Neuropsychology (APA Division 40)



Renee Low, Ph.D., ABN  
President, American Board of Professional Neuropsychology



PII S0887-6177(00)00055-X

Axelrod, B., Heilbronner, R., Barth, J., Larrabee, G., Faust, D., Pliskin, N., & ... Silver, C. (2000). Test security: Official position statement of the National Academy of Neuropsychology. *Archives Of Clinical Neuropsychology*, 15(5), 383-386.

## 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 Heilbrunner, 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.*



## 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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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

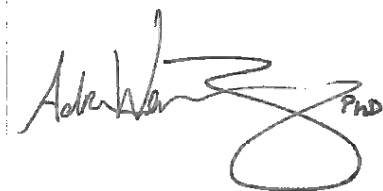
patients can be coached or (inappropriately) prepared for IMEs. Additionally, the tests used in psychological and neuropsychological IMEs are the same tests used across a wide range of evaluations. These include, but are not limited to, determinations of fitness or competency to: (a) parent; (b) pilot 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

## **2018 Policy Statement On The Presence Of Third Party Observers In Forensic Neuropsychological Assessments Performed In The Commonwealth Of Virginia**

Clinical neuropsychologists rely in part on administration of tests to assist the trier of fact in reaching a well-informed decision on medical diagnoses and causation in instances of presumptive neurobehavioral dysfunction. Neuropsychological tests have been shown to be reliable and valid measures when administered in a standardized fashion. The undersigned chose to issue this position statement in order to emphasize the importance that the administration of the neuropsychological measures remain consistent with this standardization procedure. We are aware that there have been instances when attorneys have requested that a third party observer be present in the examination room when neuropsychological tests are administered to a litigant and we wish to be on record as opposing such practices as harmful to standardized neuropsychological assessment procedures and interpretation.

We are in support of the position taken by the American Academy of Clinical Neuropsychology (2001) and the National Academy of Neuropsychology (1999), on the presence of observers during neuropsychological testing. Neuropsychological test measures have not been standardized in the presence of an observer. Rather, neuropsychological test administration has been standardized using a rigorous set of controlled conditions, which did not include the presence of a third party. In addition, the presence of a third party observer and/or the videotaping the administration of formal test procedures is inconsistent with positions set forth in American Psychological Association (APA). Manuals for a number of common standardized neuropsychological tests (for example, the WAIS III, WMS-III, and others) specifically state that third party observers should be excluded from the examination room to keep it free from distraction.

The primary rule governing the admissibility of expert testimony in Virginia is Federal Rule of Evidence (FRE) 702 which states:

*If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise.*

We believe that the presence of a third party observer (which includes but is not limited to attorney's, their representatives, the use of one-way mirrors or other electronic means such as video/audio taping), during the formal testing significantly jeopardizes the validity of the generated data, and opinions which are subsequently generated. This violation in test administration standardization will significantly jeopardize the neuropsychologist's ability to provide admissible testimony as well as testimony which assists the trier of fact. Our professional opinion is that the use of a third party observer during a forensic psychological and/or neuropsychological evaluation does not meet an acceptable standard of practice in the Commonwealth of Virginia and is not permissible under current professional and ethical standards.

In 2006, the following individuals agree to the above Policy Statement

(Alphabetical Order)

Jeffrey T. Barth, PhD, ABPP-CN

Robert P. Hart, PhD, ABPP-CN

Jeffrey S. Kreutzer, PhD, ABPP-RP  
ABPP-CN

Bernice A. Marcopoulis, PhD,

Edward A. Peck III, PhD, ABPP-CN  
CN

Thomas V. Ryan, PhD, ABPP-

Scott W. Sautter, PhD, ABPN

James B. Wade, PhD, ABPP-CN

Thus far in 2018, the following Licensed Clinical Psychologists have agreed to be added to the above Policy Statement – which is unchanged from the original 2006 wording.

Vivian Begali, PsyD, ABN  
Ronald Federici, PhD, ABN  
David Hess, PhD, ABPP-RP  
Bethany Gilstrap, PhD, ABN  
Melissa, Hunter, PsyD, ABN  
John Mason, PsyD

GUEST EDITORIAL

## Policy Statement of the American Board of Professional Neuropsychology regarding Third Party Observation and the recording of psychological test administration in neuropsychological evaluations

Alan Lewandowski<sup>a</sup>, W. John Baker<sup>b</sup>, Brad Sewick<sup>c</sup>, John Knippa<sup>d</sup>, Bradley Axelrod<sup>e</sup>, and Robert J. McCaffrey<sup>f</sup>

<sup>a</sup>Neuropsychology Associates and Western Michigan University, School of Medicine, Kalamazoo, MI, USA; <sup>b</sup>Psychological Systems, Royal Oak, MI, USA; <sup>c</sup>Spectrum Rehabilitation, Southfield, MI, USA; <sup>d</sup>Coast Psychiatric Associates, Long Beach, CA, USA; <sup>e</sup>John D. Dingell Department of Veterans Affairs Medical Center, Detroit, MI, USA; <sup>f</sup>Department of Psychology, University at Albany, SUNY, Albany, NY, USA

### General

Neuropsychologists are frequently presented with requests from parents, attorneys, nurse case managers, insurance representatives, school personnel, allied health professionals, family members, or other interested parties who have some type of relationship with a patient or client examinee to directly observe or record the administration of psychological and neuropsychological tests. Consequently, a number of practice concerns have been raised that include, but are not limited to, the effects on the examinee's performance and the neuropsychologist administering the assessment, violations of testing guidelines, the impact on standardization procedures, the appropriateness of applying test findings to normative samples established under standardized circumstances, and test security. These requests can become even more problematic and complicated when the request occurs within the adversarial process associated with the legal system, such as competency hearings, custody evaluations, divorce proceedings, civil litigation, and criminal investigations (Bush, Pimental, Ruff, Iverson, Barth & Broshek, 2009; Duff & Fisher, 2005; Howe & McCaffrey, 2010; Lynch, 2005; McCaffrey, Fisher, Gold, & Lynch, 1996; McCaffrey, Lynch, & Yantz, 2005; McSweeney et al., 1998; Sweet, Grote, & Van Gorp, 2002).

### Definition of Third Party Observation

Third Party Observation (TPO) is defined in this practice guideline as the direct or indirect presence of an individual other than the patient or client and the psychologist or their technician administering a published psychological test in order to obtain objective data under standardized conditions for clinical, counseling, or forensic purposes in order to render

clinical conclusions, opinions, interpretations, or recommendations based on the data collected. Direct presence means a person(s) physically present in the room other than the psychologist or his/her technician and the examinee. Indirect presence means viewing through a window, two-way mirror, use of any camera, or audio or video recording device, or any electronic or communication device. The act of recording includes the on-site transcription by a court recorder or reporter during an examination by either direct or indirect involvement (Barth, 2007; Constantinou, Ashendorf, & McCaffrey, 2002; Constantinou, Ashendorf, & McCaffrey, 2005; Eastvold, Belanger, & Vanderploeg, 2012; McCaffrey, Fisher, Gold, & Lynch, 1996).

### Ethical considerations

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

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

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

**Principle A: Beneficence and nonmaleficence**

Principle A is applicable and is described as follows:

Psychologists strive to benefit those with whom they work and take care to do no harm. In their professional actions, psychologists seek to safeguard the welfare and rights of those with whom they interact professionally and other affected persons, and the welfare of animal subjects of research. When conflicts occur among psychologists' obligations or concerns, they attempt to resolve these conflicts in a responsible fashion that avoids or minimizes harm. Because psychologists' scientific and professional judgments and actions may affect the lives of others, they are alert to and guard against personal, financial, social, organizational, or political factors that might lead to misuse of their influence. Psychologists strive to be aware of the possible effect of their own physical and mental health on their ability to help those with whom they work (American Psychological Association, 2010, p. 3).

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

**Principle B: Fidelity and responsibility**

Principle B is applicable and is described as follows.

Psychologists establish relationships of trust with those with whom they work. They are aware of their professional and scientific responsibilities to society and to the specific communities in which they work. Psychologists uphold professional standards of conduct, clarify their professional roles and obligations, accept appropriate responsibility for their behavior, and seek to manage conflicts of interest that could lead to exploitation or harm.

Psychologists consult with, refer to, or cooperate with other professionals and institutions to the extent needed to serve the best interests of those with whom they work. They are concerned about the ethical compliance of their colleagues' scientific and professional conduct. Psychologists strive to contribute a portion of their professional time for little or no compensation or personal advantage (American Psychological Association, 2010, p. 3).

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

**Principle C: Integrity**

Principle C is applicable and is described as follows.

Psychologists seek to promote accuracy, honesty, and truthfulness in the science, teaching, and practice of psychology. In these activities psychologists do not steal, cheat, or engage in fraud, subterfuge, or intentional misrepresentation of fact. Psychologists strive to keep their promises and to avoid unwise or unclear commitments. In situations in which deception may be ethically justifiable to maximize benefits and minimize harm, psychologists have a serious obligation to consider the need for, the possible consequences of, and their responsibility to correct any resulting mistrust or other harmful effects that arise from the use of such techniques (American Psychological Association, 2010, p. 3).

The practice and promotion of clinical assessment requires that neuropsychologists present themselves and their work to others in an accurate and honest manner and avoid any misrepresentation of their findings. A considerable body of research supports that TPO can affect the accuracy of test findings, and to purposefully disregard its potential impact can be construed as a misrepresentation of the data

**Principle D: Justice**

Principle D is applicable and is described as follows.

Psychologists recognize that fairness and justice entitle all persons to access to and benefit from the contributions of psychology and to equal quality in the processes, procedures, and services being conducted by psychologists. Psychologists exercise reasonable judgment and take precautions to ensure that their potential biases, the boundaries of their competence, and the limitations of their expertise do not lead to or condone unjust practices (American Psychological Association, 2010, p. 3–4).

In an attempt to provide fair and just treatment to all patients and clients, neuropsychologists do not modify assessment procedures or alter their work on the basis



of personal opinion or professional bias, nor do they neglect to maintain an awareness of their competency level and the limitations of their expertise. To this end, the American Psychological Association (APA), psychological state organizations, and neuropsychological specialty organizations, provide multiple continuing education opportunities for neuropsychologists to learn, maintain, and improve their professional expertise, and avoid practices that are irregular or not commensurate with accepted clinical practice. Given the body of literature that exists regarding observer effects, it is incumbent on neuropsychologists who provide evaluations to make clear to patients, clients, families, and other professionals that they do not endorse TPO and to try to avoid this type of intrusion in the assessment.

### ***Ethical standard 2: Competence***

Ethical Standard 2 is applicable to TPO and the recording of test administration. Section 2.04, Bases for Scientific and Professional Judgments states the following:

Psychologists' work is based upon established scientific and professional knowledge of the discipline. (American Psychological Association, 2010, p. 5; see also Standards 2.01e, Boundaries of Competence).

### ***Ethical standard 2.04***

Ethical Standard 2.04 requires neuropsychologists to conduct their practice within the boundaries of scientific knowledge. Texts on psychological testing have long cited the need to conduct testing in a distraction-free environment (Anastasi & Urbina, 1997). For example, the Wechsler Adult Intelligence Scale-Third Revision (WAIS-III) requires that, "As a rule, no one other than you and the examinee should be in the room during the testing" (1997, p. 29). The manual further directs, "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" (Wechsler, 1997, p. 29). The requirement to avoid interference from others is noted in the Wechsler Intelligence Scale for Children-Fourth Edition (WISC-IV), which advises that no one other than the examiner and the examinee should be in the room during test administration (Wechsler, 2003, p. 23).

The concept of being free from distractibility is also emphasized in the Wechsler Adult Intelligence Scale-Fourth Revision (WAIS-IV) that instructs the examiner to provide a physical environment "free from distractions and interruptions" and stresses that "External distractions must be minimized to focus the examinee's attention on the tasks presented and not on outside

sounds or sights, physical discomfort, or testing materials not in use" (Wechsler, 2008, p. 24). This is also emphasized in the administration manual for the Rey Complex Figure Test (Meyers, 1995, p. 6). Similarly, the scoring manual for the California Verbal Learning Test-Second Edition (CVLT-II) instructs that only the examiner and examinee be present in the room during testing (Delis et al., 2000, p. 8). By eliminating the presence of third parties, the examiner eliminates potential interference and the possibility of their distracting from or influencing the testing process, hence variables that are inconsistent with test standardization.

Most test manuals specify that the examiner is responsible for ensuring that the testing environment is quiet and free from distractions (Meyers, 1995; Williams, 1991; Urbina, 2014) and are often very specific about the testing room being limited to "A table or desk and two chairs" (Meyers, 1995). Similarly, the manual for the California Verbal Learning Test- Second Edition (CVLT-II) states "as a rule, no one other than you and the examinee should be in the room during testing" (Delis, Dramer, Kaplan & Ober, 2000, p. 8). As described above, these instructions serve to emphasize the importance of controlling distraction as an important factor in assessment.

### ***Ethical standard 9: Assessment***

Ethical Standard 9 is applicable to TPO and recording. In Section 9.01, Bases for Assessments, the code notes "(a) Psychologists base the opinions contained in their recommendations, reports, and diagnostic or evaluative statements, including forensic testimony, on information and techniques sufficient to substantiate their findings" (American Psychological Association, 2010, p. 12; see also Standard 2.04, Bases for Scientific and Professional Judgments).

Test results generated by nonstandard methods that negatively impact the validity of the findings are insufficient. In forensic settings, neuropsychologists are often required to use their findings in comparison with other evaluations. The ability to compare separate data sets, when one evaluation was conducted following proper testing procedures and the other evaluation had inherent threats to validity such as a third party observer is dubious.

Under 9.01:

(a) the psychologist cannot provide opinions or evaluative statements because TPO presence yields the evaluation of questionable validity. (b) Except as noted in 9.01c, psychologists provide opinions of the psychological characteristics of individuals only after they have conducted an examination of the individuals adequate to

support their statements or conclusions. When, despite reasonable efforts, such an examination is not practical, psychologists document the efforts they made and the result of those efforts, clarify the probable impact of their limited information on the reliability and validity of their opinions, and appropriately limit the nature and extent of their conclusions or recommendations. (American Psychological Association, 2010, p. 12; see also Standards 2.01, Boundaries of Competence, and 9.06, Interpreting Assessment Results). (c) When psychologists conduct a record review or provide consultation or supervision and an individual examination is not warranted or necessary for the opinion, psychologists explain this and the sources of information on which they based their conclusions and recommendations.

### **Section 9.02: Use of assessments**

Section 9.02 describes the following:

(a) Psychologists administer, adapt, score, interpret, or use assessment techniques, interviews, tests, or instruments in a manner and for purposes that are appropriate in light of the research on or evidence of the usefulness and proper application of the techniques. (b) Psychologists use assessment instruments whose validity and reliability have been established for use with members of the population tested. When such validity or reliability has not been established, psychologists describe the strengths and limitations of test results and interpretation. (c) Psychologists use assessment methods that are appropriate to an individual's language preference and competence, unless the use of an alternative language is relevant to the assessment issues (American Psychological Association, 2010, p. 12).

Section 9.02 (a) suggests that tests administered by a neuropsychologist in a manner that is inconsistent with the standardization of the instrument and contrary to the test manual, may be in violation of this standard. When an exception exists, it is incumbent on the neuropsychologist to provide a rationale or need that supports altering standardization in the report. Otherwise, TPO is contrary to this standard.

### **Section 9.06: Interpreting assessment results**

Section 9.06 describes the following:

When interpreting assessment results, including automated interpretations, psychologists take into account the purpose of the assessment as well as the various test factors, test-taking abilities, and other characteristics of the person being assessed, such as situational, personal, linguistic, and cultural differences, that might affect psychologists' judgments or reduce the accuracy of their interpretations. They indicate any significant limitations of their interpretations (American Psychological Association, 2010, p. 13; see also Standards 2.01b and c, Boundaries of Competence).

Many authors and organizations (Anastasi & Urbina, 1997; National Academy of Neuropsychology, 2000a; Oregon Psychological Association, 2012; Michigan Psychological Association, 2014) emphasize that, during test development, procedures are standardized without the presence of an observer. Subsequently the data obtained outside of those parameters lacks corresponding assurance of validity and interpretive significance.

### **Section 9.11: Maintaining test security**

Section 9.11 raises the importance of maintaining test security. "Psychologists make reasonable efforts to maintain the integrity and security of test materials and other assessment techniques consistent with law and contractual obligations, and in a manner that permits adherence to this Ethics Code" (American Psychological Association, 2010, p. 13). Test security is a critical issue, as it addresses the prevention of unnecessary exposure of psychometric materials that can result in diminishing a test's ability to accurately distinguish between normal and abnormal performance.

Several professional organizations have emphasized the importance of maintaining test security. The APA, the National Academy of Neuropsychology (NAN), and several state associations (among others) emphasize test security as essential to the practice of psychology, and that it is incumbent on neuropsychologists to protect the integrity of psychological test materials (American Psychological Association, 1999; National Academy of Neuropsychology, 2003; Michigan Psychological Association, 2014).

Other state and national psychological organizations as well as a number of authors have raised concerns about the potential for testing material to be used inappropriately by attorneys or become part of the public domain (American Academy of Clinical Neuropsychology, 2001; American Psychological Association, 1999; Bush et al., 2009; Canadian Psychological Association, 2009; Essig, Mittenberg, Petersen, Strauman, & Cooper, 2001; Kaufman, 2005, 2009; McCaffrey et al., 1996; Michigan Psychological Association, 2014; Morel, 2009; National Academy of Neuropsychology, 1999; Oregon Psychological Association, 2012; Victor & Abeles, 2004; Wetter & Corrigan, 1995). Public accessibility allows individuals involved in litigation to self-educate or be coached as to how to perform on certain measures or how to selectively pass or fail key components of the neuropsychological evaluation and thus invalidate the results of the assessment. As a result, several psychological organizations have taken a formal position against the presence of TPO during assessment.

The National Academy of Neuropsychology (Axelrod et al., 2000) advises that TPO is inconsistent with psychological guidelines and practices, as it threatens the validity, reliability, and interpretation of test scores. The position of the academy is that TPO should be avoided whenever possible outside of necessary situations involving a nonforensic setting where the observer is both neutral and noninvolved (e.g., student training or an interpreter). This view is also held by the Canadian Psychological Association (CPA) that advises "It is not permissible for involved third parties to be physically or electronically present during the course of neuropsychological or similar psychological evaluations of a patient or plaintiff" (CPA, 2009).

The American Academy of Clinical Neuropsychology (AACN; 2001) has taken the position that "it is not permissible for involved third parties to be physically or electronically present during the course of an evaluation assessment of a plaintiff patient with the exception of those situations specified below" (p. 434). Exceptions are described that include as an example, the assessment of young children who require the presence of a family member.

The executive committee of the Oregon Psychological Association (2012) adopted a clear and unequivocal policy that the observation by a third party compromises test validity and security and therefore advises against the presence of TPO during assessment. Similarly, the Michigan Psychological Association Ethics Committee has advised against TPO for the same reasons (Michigan Psychological Association, 2014).

## Research evidence

In support of professional ethics, there is a significant body of research indicating that TPO cannot be assumed as inconsequential to test findings. A review of the pertinent literature overwhelmingly supports the negative consequences of either direct or indirect TPO or recording on the behavior of both the examiner and the examinee, and the validity of findings obtained in a neuropsychological assessment.

It is self-evident that neuropsychological evaluations be conducted in a standardized fashion consistent with the publisher's directives to ensure valid and reliable results. Consistent with other major neuropsychological organizations, it is the position of the American Board of Professional Neuropsychology that altering test procedures to accommodate observation or recording compromises test standardization and affects the subsequent data set obtained. As there is no basis for accepting as valid an assessment under nonstandard (observed or recorded) conditions, it is questionable if findings

reflect a reasonable degree of certainty or fall within an accepted range of probability. Test results therefore lack the normal and accepted parameters of validity and, more importantly, do not reflect the expected standards of psychological care. Given current research it is not surprising that most publishers of psychological tests have cautioned against TPO in their instruction manuals and national organizations have advised against TPO (National Academy of Neuropsychology, 2000a; Committee on Psychological Tests and Assessment, 2007).

The issue of TPO has been investigated by numerous researchers, including an early case study by Binder and Johnson-Greene (1995). Multiple studies have established and replicated the dubious validity of data obtained during recorded or observed evaluations. A considerable amount of research now exists demonstrating the deleterious effect on data obtained during nonstandard evaluations involving executive functioning (Horowitz & McCaffrey, 2008), attention and processing speed (Binder & Johnson-Greene, 1995; Kehrer, Sanchez, Habif, Rosenbaum, & Townes, 2000), and memory/recall of information (Eastvold et al., 2012; Gavett, Lynch, & McCaffrey, 2005; Lynch, 2005; Yantz & McCaffrey, 2005). Eastvold et al. (2012) meta-analysis found negative effects on multiple cognitive measures and that attention, learning, and memory (delayed recall) were most adversely impacted by the presence of an observer.

## Exceptions to TPO

### *Third party assistant (TPA)*

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

A TPA may be deemed appropriate in clinical examinations in which the examiner is acting as a clinical treater with an established patient-doctor relationship, as opposed to an independent psychological examination for an insurance company or a forensic assessment in civil or criminal proceedings. A TPA may be appropriate in a testing situation in which the presence

of a parent, family member, guardian, family friend, or interpreter is necessary, and without whose presence the examination could not proceed because of a mental disability or clinical limitation that requires an accommodation. Examples might include a child with suspected or diagnosed autism, developmental disorders affecting intelligence, confirmed brain injury that precludes independent living, children who are either too young or severely anxious that they cannot be left alone, elderly adults with compromised cognition who are unwilling to participate without the presence of a trusted family member or friend, or patients who have a thought disorder impacting reality testing, among others.

Alternatively, there are cases in which a language barrier precludes valid test administration. While the preference is for the examination to be conducted in the examinee's native language, in some these cases an interpreter may be necessary because a native speaking psychological examiner is not available or within a practical distance. In these situations, to avoid potential conflicts of interest, if it is at all possible the interpreter should have no relationship (i.e., such as family member, close friend or social affiliation) to the person being examined.

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

Training presents another situation in which a TPA is considered appropriate. Not unlike medical students, psychology students and technicians learning the administration of psychology test procedures require direct observation, practice, and supervision to ensure accuracy and competence.

In the aforementioned cases, the examiner is ethically required to document in the neuropsychological report the use of a TPA and any deviations of standardization or modifications in test administration. The limitations of normative data with subsequent impact on the generalization of findings should be clearly noted.

### **Forensic examinations, independent medical examinations, and acting as an expert witness**

Neuropsychologists who choose to perform forensic assessments are ethically required to be aware of the specialty guidelines pertinent to this area of expertise. In order to avoid potential conflict, neuropsychologists who regularly provide forensic consultations should inform referral sources that if TPO or recording

develops as an issue or is required by legal proceedings, they may elect to remove themselves from the assessment.

When retained as an expert witness in forensic situations, neuropsychologists should resist demands for TPO if requested by opposing counsel, retaining counsel, or the court. The neuropsychologist should educate the court or those involved as to the APA Ethics Code and the existing scientific research that supports the negative effects of this type of intrusion. However, it is recognized that often in forensic situations professional ethics and the adversarial nature of the legal system may not agree. If attempts to educate those involved fail and counsel insists, or the court directs to proceed with TPO, the neuropsychologist can consider removing himself/herself from the assessment.

In those exceptions in which a neuropsychologist is *compelled* by the court to evaluate with a TPO because of existing state statutes or if the neuropsychologist is placed in a situation whereby withdrawing will bring clear and substantial harm to the examinee, the manner in which test validity and clinical findings are affected and may be compromised should explicitly documented. The neuropsychologist should then follow existing recommendations and guidelines for protecting test security including requesting that test material and intellectual property be provided only to another licensed psychologist who would be bound by the same duty to protect.

If this is not possible, the neuropsychologist should request a protective order specifically prohibiting either party from copying test material or intellectual property, using them for any other purpose than the matter at hand, and directing that they be returned uncopied directly to the psychologist or destroyed in a manner verifiable by the psychologist.

### **Conclusion**

Requests for TPO frequently create an ethical dilemma for neuropsychologists as any observation or recording of neuropsychological tests or their administration has the potential to influence and compromise the behavior of both the examinee and the administrator, threatens the validity of the data obtained under these conditions by, and consequently limits normative comparisons, clinical conclusions, opinions, interpretations, and recommendations. For these reasons, APA ethical standards support the position that TPO in neuropsychological testing should be avoided.

Ethical standards of practice compel neuropsychologists to avoid or resist requests for conducting assessments complicated by TPO, except for those situations

as described. Neuropsychologists should therefore not engage in, endorse, abet, or conduct assessments complicated by TPO or recording of any kind other than under the order of a court after all reasonable alternatives have been exhausted. It would be entirely appropriate for a neuropsychologist to decline to perform an examination under these conditions.

As an exception, TPA is acceptable under infrequent clinical circumstances that necessitate the involvement of an assistant or in a rare forensic case that might require a neutral or uninvolved party such as a language interpreter. A neuropsychologist is obligated to clarify in the report the rationale for the use of TPA, identify what procedures and standards have been modified, and how or to what degree the findings, results, and conclusions may be impacted. This should include limitations in the generalization of the diagnostic data and the impact on assessment's findings.

In summary, it is the position of the American Board of Professional Neuropsychology that it is incumbent on neuropsychologists to minimize variables that might influence or distort the accuracy and validity of neuropsychological assessment. Therefore, it is the recommendation of the American Board of Professional Neuropsychology that neuropsychologists should resist requests for TPO and educate the referral sources as to the ethical and clinical implications.

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# **Policy Statement On The Presence Of Third Party Observers In Forensic Neuropsychological Assessments Performed In The Commonwealth Of Virginia**

Clinical neuropsychologists rely in part on administration of tests to assist the trier of fact in reaching a well-informed decision on medical diagnoses and causation in instances of presumptive neurobehavioral dysfunction. Neuropsychological tests have been shown to be reliable and valid measures when administered in a standardized fashion. The undersigned chose to issue this position statement in order to emphasize the importance that the administration of the neuropsychological measures remain consistent with this standardization procedure. We are aware that there have been instances when attorneys have requested that a third party observer be present in the examination room when neuropsychological tests are administered to a litigant and we wish to be on record as opposing such practices as harmful to standardized neuropsychological assessment procedures and interpretation.

We are in support of the position taken by the American Academy of Clinical Neuropsychology (2001) and the National Academy of Neuropsychology (1999), on the presence of observers during neuropsychological testing. Neuropsychological test measures have not been standardized in the presence of an observer. Rather, neuropsychological test administration has been standardized using a rigorous set of controlled conditions, which did not include the presence of a third party. In addition, the presence of a third party observer and/or the videotaping the administration of formal test procedures is inconsistent with positions set forth in American Psychological Association (APA). Manuals for a number of common standardized neuropsychological tests (for example, the WAIS III, WMS-III, and others) specifically state that third party observers should be excluded from the examination room to keep it free from distraction.

The primary rule governing the admissibility of expert testimony in Virginia is Federal Rule of Evidence (FRE) 702 which states:

*If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise.*

We believe that the presence of a third party observer (which includes but is not limited to attorneys, their representatives, the use of one-way mirrors or other electronic means such as video/audio taping), during the formal testing significantly jeopardizes the validity of the generated data, and opinions which are subsequently generated. This violation in test administration standardization will significantly jeopardize the neuropsychologist's ability to provide admissible testimony as well as testimony which assists the trier of fact.

Our professional opinion is that the use of a third party observer during a forensic psychological and/or neuropsychological evaluation does not meet an acceptable standard of practice in the Commonwealth of Virginia and is not permissible under current professional and ethical standards.

The following individuals endorse the above Policy Statement

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# *florida* **PSYCHOLOGIST**

**President's Message**

## **Ethics in our Practice**



# Psychological Ethics and Third Party Observers (TPO): We've Observed Their Effect And Now Need To Act

Laura Howe, J.D., Ph.D., Warren J. Rice, Ph.D., and Valerie Hoese, Ph.D.



effect 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). Several studies have demonstrated that the mere presence of TPOs, even if they are not disruptive (e.g., observers sitting quietly in the room and out of sight) impact neuropsychological measures.

***The Baker Act prohibits admission of individuals to state institutions without just cause.***

A *third party observer* (TPO) is any person or observational process that is present during a psychological evaluation aside from the psychologist and the client. Frequently attorneys, most often plaintiff attorneys, demand to be present during their client's psychological evaluation. These demands range from having another psychologist, the attorney themselves, a paralegal, a court stenographer, and a videographer present or having the interaction monitored by electronic devices such as a tape recorder or video recorder, or observation via a one-way mirror.

Two types of TPOs have been distinguished in the literature. An involved third party observer is one who, in civil litigation, has an interest in the outcome of a specific plaintiff's evaluation, usually an attorney or someone working for them. An uninvolved third party observer is one who, in civil litigation, has no specific interest in the outcome of the case such as a student in training, or an interpreter.

## Research on the Effects of TPOs

Neuropsychological examinations are very vulnerable to the presence of a TPO. The research literature documents that TPOs adversely impact the validity of neuropsychological examinations.

The fundamental concern with permitting TPOs is their impact on the validity of standardized psychological measures. Psychological tests are developed under standardized conditions with the assumption that only the examiner and the examinee are present during the evaluation. Every departure from standardized conditions may result in unknown effects on the validity of test measures and possibly render the normative data no longer applicable. In the instance of TPOs, change is attributed to social facilitation, which is the effect of the presence of others on test performance. Research studies in the area of social facilitation demonstrate the effect TPOs have on an individual's performance on psychological tests. The social facilitation

The effect has been demonstrated when the TPO is an electronic extender such as an audio recorder (Constantinou, Ashendorf, & McCaffrey, 2002) or a video recorder (Constantinou, Ashendorf, & McCaffrey, 2005). These disruptive effects extend to when the observer is a significant other (Kehrer, Sanchez, Habif, Rosenbaum & Townes, 2000) and someone posing as the examiner's supervisor (Yantz & McCaffrey, 2005).

The areas of functioning most influenced by the presence of a TPO in neuropsychological assessments are attention, sustained concentration, verbal fluency, learning and memory. The average effect size on memory tasks has been shown to be approximately one standard deviation but may be as large as one and a half standard deviations (Gavett, Lynch, & McCaffrey, 2005). This may diminish an average memory score of 100 to a borderline memory score of 78 making the data difficult to interpret. When a client scores outside of the normal and expected range, there is a question of whether the results are due to true brain pathology or stem from the presence of the TPO. The client is thereby denied the opportunity for an accurate measurement of their cognitive functioning and the legal system is left to make decisions on the basis of data that is of questionable validity. Due to the importance of this issue within the field of neuropsychology, the American Academy of Clinical Neuropsychology and the National Academy of Neuropsychology have each published official statements on the topic of TPOs (American Academy of Clinical Neuropsychology, 2001; Axelrod et al., 2000a).

TPOs result in a failure of test security and expose tests for potential misuse and public access. Many tests used for psychological examination 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). Although psychologists are bound by their ethics to protect psychological materials, no such restraint is placed on others who are not



psychologists, which puts the test materials in a vulnerable position. When new tests must be developed and standardized the process requires an incredible amount of time and financial investment. Replacement of the WAIS-III and WMS-III took over five years and cost several million dollars (Axelrod et al., 2000b). Furthermore, psychologists often have to sign purchasing agreements when obtaining materials stating they will uphold test security and protect copyright.

Breaches in test security may result in coaching when examinees are given information about psychological tests that may lead to their being able to alter their presentation to appear a certain way. Wetter & Corrigan (1995) surveyed 70 practicing attorneys and 150 law students and found that 22 percent of students and 42 percent of attorneys believe that an attorney should provide as much specific information as possible about psychological assessment to their client. Youngjohn (1995) reported a case in which an attorney admitted that he deliberately coached his client before testing. This is of concern since coaching may impact assessment procedures. For example, providing detailed information on the validity scales was shown to enable one-third of examinees to successfully elevate their responses on the MMPI-2 clinical scales yet not raise the validity scales (Rogers, Bagby, & Chakraborty, 1993).

The presence of TPOs conflicts with psychologists' ethical obligations and constraints. The Ethical Principles of Psychologists and Code of Conduct (APA, 2002) outline the governing principles that guide psychologists in the US. Psychologists are encouraged to adhere to standardized procedures and utilize test materials in a manner appropriately based upon the current research (APA at ES 9.02. Use of Assessments). Similar obligations are cited in the Standards for Educational and Psychological Testing [AERA] (1999) and "test users have the responsibility of protecting the security of test materials at all times (AERA at St. 5.7)." This 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)." They must protect against misuse and misrepresentation of their work (APA at ES 1.01 Misuse of Psychologists' Work) that 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)."

#### TPOs and Current Florida Law

In Florida, no distinction is made between psychological and medical examinations when someone wishes to exclude a TPO in civil forensic examinations. Florida courts currently apply a two-part test to determine if an involved TPO should be excluded during a

medical-legal examination. The party seeking to prevent the TPOs presence must demonstrate with case specific facts why a TPO will be disruptive to the examination and also that no other qualified provider in the area would be willing to conduct the examination with a TPO (Broyles v. Reilly, 1997). As shown, there are fundamental reasons applicable to all examinations regarding why TPOs should not be present during neuropsychological examinations. That the current standard requires case specific reasons demonstrates a fundamental misunderstanding between the fields. The burden of proof should be on the party requesting to have a TPO present. They should be required to show case specific justification allowing for TPOs sufficient to override the damaging effects involved TPOs have on neuropsychological examinations.

Currently, the TPO problem is dealt with variably and on a case-by-case basis. Some practitioners may allow an involved TPO if not familiar with the adverse affects. Other practitioners object and present their technical and ethical concerns to the circuit court judge via their attorney. Many accept the final order of the judge and either withdraw from the case or conduct the examination and then add caveats to their report regarding the questionable validity of the test results due to the TPO.

In Florida, a small number of cases regarding TPOs during psychological examinations have been appealed to the District Court of Appeals (DCA). As stated, Florida courts do not currently make a consistent distinction between medical and psychological examinations. The two-part test is often applied and exceptions are made on a case-by-case basis and there has been some variability shown at the district court level, though no court has made a global exception or altered the rule for psychological examinations. The Florida Supreme Court has not considered the issue of a TPO during a neuropsychological examination.

In August 2006, FPA signed onto an Amicus Curiae Brief written by The Group Protecting the Integrity of Psychological Examinations (G-PIPE) in *Berman v. Flocar*. In the Berman case, the circuit court denied the presence of a TPO. The plaintiff's attorney appealed this decision to the 5th DCA. G-PIPE and the Florida Defense Lawyers Association (FDLA) each submitted Amicus Curiae Briefs asking the Court to not allow the presence of third party observers in civil psychological examinations. The DCA upheld the decision of the circuit court denying a TPO, but did so via a court order and not a written decision so the ruling cannot be used as precedence in other cases and the court order neither amended the two-part test nor distinguished between psychological and medical examinations.

#### Future Approaches on the TPO issue

Presenting research articles and organizational position papers in opposition to TPOs allows the individual practitioner to act on a case-by-case basis yet these actions are time consuming and costly. Additionally, every time a case is appealed to the DCA there is a risk its ruling may have a devastating impact on the practice of psychology due to the misunderstandings between psychology and the law.

Due to the risks inherent in having psychologists deal with the issue on a case-by-case basis, proposing legislation to effectively deal

*Continued on Page 35*

# 2007 PAC Contributors

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### *Psychological Ethics and Third Party Observers* *Continued from Page 19*

with this issue is the best defensive recommendation for psychologists. The proposed legislation would espouse a policy that would exclude TPOs during civil psychological examinations except in rare extenuating circumstances to be determined by the retained psychologist and based on their clinical judgment and expertise. This would shift the burden of proof to the party requesting the presence of a TPO. They would have to show case specific reasons why a TPO should be present in the particular examination.

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Author Note: Due to a printing error during production the acknowledgment and references below were not included in the published article. Laura L.S. Howe

#### Acknowledgment

The authors thank Drs. Robert J. McCaffrey and David S. Bush for their review and constructive comments.

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## Appendix C: Research



# Third Party Observers: Why All the Fuss?

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**ABSTRACT.** Following a brief discussion of the emergence of third party observation as an issue in neuropsychology, this article reviews the social psychological theory of social facilitation. Social facilitation refers to the impact of another person, whether as an observer or a performer of the same activity, on an individual's performance. Both performance enhancements and impairments can be caused by this phenomenon. The article concludes with a review of the empirical studies that have demonstrated that a third party observer significantly impacts an individual's performance on some neuropsychological tests. *[Article copies available for a fee from The Haworth Document Delivery Service: 1-800-HAWORTH. E-mail address: <docdelivery@haworthpress.com> Website: <<http://www.HaworthPress.com>> © 2005 by The Haworth Press, Inc. All rights reserved.]*

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Journal of Forensic Neuropsychology, Vol. 4(2) 2005  
Available online at <http://www.haworthpress.com/web/JFN>  
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Digital Object Identifier: 10.1300/J151v04n02\_01

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**KEYWORDS.** Social facilitation, third party observer, forensic, standardized test administration

The issues raised about the presence of a third party observer during neuropsychological testing were first formally addressed a decade ago at the annual meeting of the National Academy of Neuropsychology (NAN) where a special topics workshop entitled “Presence of Third Party Observers During Neuropsychological Evaluations: Who Is Evaluating Whom?” was presented by two clinical neuropsychologists and an attorney (McCaffrey, Fisher, & Gold, 1994). The workshop focused on the existing professional guidelines and factors to be considered by the clinical neuropsychologist faced with the request for a third party observer to be present during neuropsychological testing. This involved a discussion of the pertinent Ethical Principles of Psychologists and Code of Conduct (American Psychological Association, 1992), the relevant sections from the *Standards for Educational and Psychological Testing* (AERA, APA, & NCME, 1999) and the Specialty Guidelines for Forensic Psychologists (1991). The social psychological literature dealing with the phenomena of “social facilitation” was reviewed as it applied to studies of recognition memory and free recall. The seminal clinical case report by Binder and Johnson-Greene (1995) was still in press in *The Clinical Neuropsychologist*; however, it was widely available as a preprint and was used to highlight the link between the social psychological studies on social facilitation and clinical neuropsychological practice. Lastly, legal issues pertaining to requests for a third party observer to be present were examined, including the Federal Rules of Civil Procedure (2001) and the New York Civil Practice Law and Regulations (CPLR, 2003) since the presenters practiced in New York State.

When Mr. Gold had completed his comments on the legal issues and third party observers, the panel opened the floor to questions from the audience for the remaining 45 minutes. The room size was typical for a special topic workshop at NAN, but there was standing room only. Among those in attendance were Antonio E. Puente, PhD, and Jeffrey T. Barth, PhD, both of whom commented that the profession needed to address this issue formally. The questions, comments and discussions among all of those in attendance served as catalysts that initiated practice suggestions in the clinical neuropsychological literature, as well as the impetus for additional research and, ultimately, the development of official policy statements by the National Academy of Neuropsychology



(Axelrod et al., 2000; <http://nanonline.org/paoi/thirdparty.shtm>) and, later, by the American Academy of Clinical Neuropsychology (Hamsher, Lee, & Baron, 2001; [http://www.theAACN.org/position\\_papers/tc154433.pdf](http://www.theAACN.org/position_papers/tc154433.pdf)).

While much has transpired over the past 10 years, clinical neuropsychological practitioners continue to confront many of these same matters in their daily practice. This special issue of the *Journal of Forensic Neuropsychology* is intended to provide an overview of the salient issues practitioners must consider when faced with requests for third party observers, as well as an update and review of the research in this area since that initial NAN meeting in 1994. In addition, we will present original research findings that bear directly on the issue of third party observers. Finally, we hope that this special issue will provide clinical neuropsychological practitioners with an important resource that will assist them in their daily practice. Also, this issue can aid in the education of the legal community on the myriad of issues concerning the presence of a third party observer during neuropsychological testing, such as the caveats that must be included when interpreting neuropsychological test data from evaluations contaminated by the presence of a third party observer.

### ***AN OVERVIEW OF SOCIAL FACILITATION***

In the 1990s, requests for the physical presence of third party observers during neuropsychological testing and professional concerns regarding whether such observers would impact the examinee's performance on testing led us to examine the social psychology literature and, specifically, social facilitation theory. The impact of the presence of others on an individual's performance has been an area of scientific study in social psychology for more than a century. Beginning in the late 1800s, psychologists began to recognize that an individual's task performance could be altered just by the inclusion of other individuals simultaneously performing the same task. This was first reported by Triplett in 1898 who found that cyclists rode faster when racing in groups than when racing alone (Triplett, 1898). Subsequent research found that, in addition to the presence of others engaged in the same activity, referred to as "co-actors" in the social psychology literature, the presence of an *observing audience* could alter an individual's performance. An early documentation of the influence of an observing audience was provided by Meumann [1904, as cited in Cottrell (1972)].

Using a finger ergograph, he found individuals pulled a finger-weight a greater distance in the presence of an observer than when alone. Additional studies followed providing converging evidence that the presence of others was a salient social force. This form of social influence eventually became known as *social facilitation*. This term was adopted because the earliest studies had shown that the presence of an audience was associated with performance increments (Aiello & Douthitt, 2001). A more precise term, however, would be *social facilitation and inhibition*, as later work showed that the presence of an audience can inhibit performance on some tasks.

Social facilitation is the influence that the presence of another person has on an individual's performance. Zajonc (1965) described social facilitation as a "fundamental" form of social influence, as it occurs in the absence of any direct effort or intention of the observer or co-actor to alter the individual's performance. An individual's performance can either be facilitated or impaired by the presence of others. A general framework that has been offered within the social facilitation literature is that simple or well-learned tasks will be performed better in the presence of another person while difficult or novel tasks will be performed worse in the presence of another person. This general framework, however, may oversimplify the social facilitation phenomenon. There are a number of factors, in addition to task complexity or novelty, which have been considered to be important in the social facilitation and inhibition of task performance. Many social psychologists place particular importance upon the characteristics of the observer. Whether the observer is an expert or non-expert, evaluator or non-evaluator, a friend or stranger, or attentive or non-attentive to the performer may have a differential impact on the individual's performance. Characteristics of the individual may also be important, such as personality characteristics, prior experience with the task, or prior experience with being observed or evaluated (Aiello & Douthitt, 2001; Butler & Baumeister, 1998; Geen, 1989; Geen & Gange, 1977; Guerin, 1983). Some researchers of the social facilitation phenomenon consider these factors as non-essential. According to Zajonc (1965), the principal proponent of this view, the "sheer" or "mere" presence of another person is all that is required for social facilitation to occur. This group does recognize, however, that characteristics of the observer, performer, or situation can influence the magnitude of the social facilitation effect.

Another potentially important factor in social facilitation is audience size. A number of studies have demonstrated a relationship between audience size and the magnitude of social facilitation effects. Many social

theorists contend that social facilitation and inhibition effects increase as the audience size increases, and there have been empirical studies in support of this view (Jackson & Latané, 1981; Knowles, 1983; Latané, 1981; Latané & Harkins, 1976; Mullen, 1983; 1985). Another group of social theorists do not consider an increase in audience size to necessarily result in a larger impact on task performance (Seta, Crisson, Seta, & Wang, 1989; Seta, Wang, Crisson & Seta, 1989). According to these theorists, the impact of an additional observer is a function of the evaluative status of that observer. If the new observer poses little threat of evaluation to the performer, the addition of this observer to the audience may actually serve to decrease the overall social influence associated with the audience and, consequently, a reduction in the social facilitation effect. If, however, the additional observer is perceived as highly evaluative, then social facilitation and inhibition effects would be expected to increase.

An interesting finding that has emerged from the research is that the *physical presence* of another person in the same room as the performer is not essential for the social facilitation effect. The social psychological literature contains several empirical studies demonstrating that observation from behind a one-way mirror, on closed-circuit television, or by video-recording the performer can impact an individual's task performance. It appears that the individual's belief that his/her performance is observed is the essential factor here. This is sometimes referred to as the "implied presence" of another person. As examples of this literature, Putz (1975) found that individuals' accuracy on a visual vigilance/signal detection task was significantly better when they believed that performance was observed through a one-way mirror, monitored on a closed-circuit television by a video camera in the room, or observed by an expert in the testing room. Geen (1973) found that presence of another person, either in the room or observing from another room by closed circuit video during learning of letter-number pairs, significantly impacted later recall. On the recall trials, the letters were presented, and the individuals were required to supply the number that had been paired with these letters. Individuals who were observed during learning, even with observation by videocamera, recalled significantly fewer numbers on the immediate recall trial compared to individuals who had been alone during learning. On the 45 minute delayed recall, individuals observed during learning recalled significantly more numbers than those not observed during learning. As a final example of this research, Seta, Seta, Donaldson, and Wang (1988) found that an individual's recall of a word list was less organized when the performer believed that he/she

was observed by an audience behind a one-way mirror than when performed alone; however, the number of words recalled was not significantly different between the two experimental conditions.

### ***THEORETICAL EXPLANATIONS OF SOCIAL FACILITATION***

Several theoretical models have been offered to account for the social facilitation phenomenon. Guerin and Innes (1984) have organized these frameworks into three categories: drive/arousal theories, social valuation theories, and attention theories. The drive theory, proposed by Zajonc (1965), is based on the Hull-Spence drive theory. According to the Hull-Spence equation (Spence, 1956), the tendency to make a response is a function of drive level and the habit strength of that response. Drive energizes and, therefore, increases the probability of a well-learned or dominant (i.e., habit) response. If the dominant response is incorrect, performance will be inhibited by increased drive. If the dominant response is correct, performance will be enhanced by increased drive. This theory predicts, then, that difficult tasks will be impaired by social presence since the tendency to fail at such a task is greater than the tendency to succeed.

While many social psychology theorists have accepted the drive theory of social facilitation, there is disagreement as to the reason for an increase in drive when in the presence of others. Zajonc (1965) considered this increase in drive to be an innate or instinctual response that enhances the individual's preparedness to interact with social stimuli. Unlike physical stimuli, social stimuli are unpredictable, and, consequently, the individual needs to be alert and prepared to produce any number of responses. Others have suggested that the threat of evaluation, often referred to as evaluation apprehension, associated with the presence of others results in increased drive. Further, this group of social psychologists considers the increased drive to be a learned, rather than instinctual, response to social stimuli that is acquired from experience with positive and negative evaluations throughout their social development (Cottrell, Wack, Sekerak, & Rittle, 1968; Weiss & Miller, 1971). Still others have proposed that an increase in drive is in reaction to the distracting influence of an observer's presence during task performance. Essentially, this theory suggests that the performer experiences an increase in arousal as he/she is confronted with conflicting demands for attention (Sanders & Baron, 1975; Sanders, Baron, & Moore, 1978).

The social valuation theories refer to three separate but related explanations for social facilitation: objective self-awareness theory (Wicklund & Duval, 1971), control systems theory (Carver & Scheier, 1981a, 1981b), and self-presentational theory (Bond, 1982). These theories de-emphasize generalized drive and emphasize the individual's active efforts to manage his/her public self-image when performing in the presence of others. The presence of others increases the individual's awareness of any discrepancies between his/her actual behavior and an idealized behavioral standard. The facilitating effect of the presence of others on easy or well-learned tasks occurs as the individual performs at a higher level to reduce the discrepancy between the actual and idealized performance. Performance on novel or complex tasks will be worse for a variety of reasons. It may be that the individual attempts to prematurely perform at a higher level than his/her current ability allows which results in errors, or the individual may withdraw effort from the task due to his/her low expectations of meeting the idealized performance standard. An additional explanation is that the individual may become embarrassed by the discrepancy between his/her actual performance and the ideal standard, and it is the disruptive impact that this sense of embarrassment has on task performance that results in a poor performance.

Finally, the attentional theories of social facilitation focus on the observer's impact on the performer's cognitive functioning. In a re-conceptualization of his drive theory of social facilitation, Baron (1986) proposed that the attentional conflict caused by the presence of another person during task performance leads to information overload. As a result, the individual allocates attention to information that is central to the task at hand at the expense of peripheral information. Presumably, simple or well-learned tasks require attention to relatively few peripheral cues, whereas difficult or novel tasks require attention to many cues. According to this theory, the narrowing of attention facilitates performance on simple tasks by eliminating irrelevant information. On novel or complex tasks, the narrowing of attention eliminates task-relevant cues, impairing performance. Manstead and Semin (1980) offer another attention-based theory of social facilitation. According to their theory, the presence of another person during task performance invokes controlled processing of information. Simple or well-learned tasks, typically completed using automatic processing, will be completed better when the performer uses controlled processing. However, complex or novel tasks already require controlled information processing. The presence of another person serves to increase the attentional demands

and divert limited attentional resources away from the task, resulting in task performance impairment.

Presently, there remains disagreement in the field of social psychology regarding these explanations of social facilitation. It seems, however, that there is growing recognition that no single explanation can account for this phenomenon. Social facilitation is probably mediated by a number of factors including increased arousal, evaluation apprehension, increased information processing demands, or increased concern with one's self-image and public image introduced by the observer's presence. There have been some attempts to develop a model of social facilitation that integrates the various theories. For example, Paulus (1983) proposed that the presence of others during task performance evokes three states in the performer: (1) arousal, (2) effort, and (3) task-irrelevant processing. An increase in arousal (i.e., drive) influences task performance by energizing the dominant response. An increase in effort stems from the performer's desire to maintain a favorable self-image. Task irrelevant processing arises in response to the attentional demands that another person places on the performer's cognitive processes. The weight of these three states in any social situation determines whether social facilitation or inhibition of task performance will occur. Sanders (1981) offered another integrative model of social facilitation, called the Attentional Processes model. According to this model, the social facilitation effect is due to an increase in drive that results from the attentional conflict caused by the presence of another person during performance of a task. The other models of social facilitation provide explanations as to the reason that the presence of others is a source of distraction that ultimately results in the attentional conflict. A shift in attention from the task, whether to monitor the social presence, self-evaluate performance, or manage one's public image, sets the stage for attentional conflict and an increase in drive.

Despite the lack of consensus regarding the mechanism(s) underlying social facilitation and inhibition effects, the social psychological research has repeatedly demonstrated that the presence of a passive observer alters the behavior of children and adults.

### ***SOCIAL FACILITATION AND THE NEUROPSYCHOLOGICAL EVALUATION***

Social facilitation has received considerable scientific attention since initial documentation of this phenomenon in the 19th century, and there



is extensive empirical evidence that the social facilitation effect does occur across different situations. The social facilitation literature spans a wide variety of activities, including tasks primarily of athletic or physical skill as well as cognitively-based tasks. Social facilitation effects have been found on word generation tasks (Gates, 1924); paired associates learning (Baron, Moore, & Sanders, 1978; Geen, 1983; Guerin, 1983; Houston, 1970); concept attainment (Laughlin & Jaccard, 1975; Laughlin & Wong-McCarthy, 1975); maze learning (Rajecki, Ickes, Corcoran, & Lenerz, 1977; Shaver & Liebling, 1976); running speed (Strube, Miles, & Finch, 1981; Worringham & Messick, 1983); and gymnastic routines (Paulus, Shannon, Wilson, & Boone, 1972). Social facilitation effects have also been found with samples of young children. The presence of a passive audience has been found to influence the intensity of lever pulling (Clark & Fouts, 1973) and balance beam performance (MacCracken & Stadulis, 1985) in preschoolers. In grade school children, the presence of a passive audience has been shown to impact ladder climbing (Landers & Landers, 1973), letter cancellation speed and accuracy (Baldwin & Levin, 1958), reaction time (Fouts, 1980), and digit recall forward and backward (Quarter & Marcus, 1971). While this literature provides a basis to suspect that social facilitation effects may extend to neuropsychological tests conducted in the presence of third party observers, it is, of course, important to examine this hypothesis empirically.

Although third party observation is of great importance for the clinical neuropsychologist, especially the forensic neuropsychologist, only a handful of studies have examined the effect of third party observation on neuropsychological test performance. The first documented investigation of the observer effect in the context of a neuropsychological evaluation appeared in 1995. In their paper, Binder and Johnson-Greene (1995) presented a case study of a 26-year old woman with intractable seizures who was seen for neuropsychological evaluation as part of a medical work-up for the seizure disorder. As part of the neuropsychological evaluation, the woman was administered the Portland Digit Recognition Test (PDRT) following discontinuation rules for accurate performances on the PDRT. The examiner later returned to the patient's room to administer the PDRT in full, since a complete administration was in keeping with the epilepsy protocol. The patient's mother was visiting and requested to remain in the room while the test was administered. The examiner allowed the mother to remain but then requested that she leave the room after noticing a decline in the patient's accuracy compared to her earlier performance on this measure. After mother's

departure, the patient's accuracy increased. Apparently curious to see if this pattern would repeat, the examiner administered the remaining items first with mother present and then absent. The pattern of worsening performance in the presence of her mother and improving performance in her absence continued. In total, the patient's accuracy significantly declined from 65.4% under standard testing conditions to 38.5% when her mother remained in the room.

Binder and Johnson-Greene's single case study provided initial evidence that the social facilitation phenomenon might extend to neuropsychological testing. The findings from that study were in concert with the predictions of the social facilitation literature. The patient's accuracy on difficult items of the PDRT declined in the presence of a significant-other observer. Subsequent research has provided further evidence that an observer during neuropsychological testing significantly impacts the individual's test performance. Huguet, Galvaing, Monteil, and Dumas (1999) examined social facilitation effects on a computerized version of the Stroop test with a sample of 48 undergraduate females. The students completed the test alone or in the presence of an observer. The observer was identified as another student waiting to participate in a separate study. There were three different observer conditions: an attentive observer who sat opposite to the performer and watched her complete the task for 60% of the time; an inattentive observer who sat opposite the performer but never looked at her (e.g., read a book); and an "invisible" observer who sat behind the performer and was therefore out of view. The presence of an attentive observer and an invisible observer was associated with a significantly faster completion of the Interference trial. The presence of an inattentive observer who did not watch the test taker at any time did not significantly impact performance.

Kehrer, Sanchez, Habif, Rosenbaum, and Townes (2000) examined the effects of a significant-other observer's presence on performance on a repeatable neuropsychological battery. The study sample was 30 undergraduate students referred for neuropsychological testing to determine eligibility for special education accommodations. The students enrolled in the study were informed that the purpose of the research was to examine "the effects of an observer on examiner-examinee interaction" (p. 68). The observer was a parent, spouse, friend or sibling of the student. During test administration, the observer sat out of the direct view of the student, watched the testing attentively, and did not interact with the student. Each participant was administered a subset of the neuropsychological battery twice (using alternative forms for some tests), once under standard conditions and once with the significant-



other present. Test administration followed an A-B-A-B design of observer absence and presence. Difference scores between the unobserved and observed conditions were calculated for each measure. Findings showed that, in the presence of a significant-other observer, students produced significantly more perseverative responses on the Rey Auditory Verbal Learning Test and performed significantly lower on Digit Span; Stroop word reading, color naming, and color/word trial; the Paced Auditory Serial Addition Test; and the Controlled Oral Word Association Test. There was no observer effect found on the Trail Making Test, Finger Tapping Test, or on total words recalled and number of intrusions on the Rey Auditory Verbal Learning Test.

Constantinou, Ashendorf, and McCaffrey (2002) examined the impact of audio-recording on neuropsychological test performance of 40 undergraduate university students. In this study, each student's neuropsychological testing session was audio-taped, but only half of the students were aware that the testing session was recorded. In the "Aware" group, the audio-recorder was placed on the testing table in close proximity to the student. In the "Non-Aware" group, the audio-recorder was hidden under the testing table. The findings showed that students who were aware of the audio-recording performed significantly lower on several subtests from the Memory Assessment Scales. Specifically, the Aware group performed significantly lower on List Acquisition, Immediate Cued Recall, Delayed List Recall, and Delayed Cued Recall. There were no significant group differences on the Finger Tapping Test, Lafayette Grooved Pegboard, Grip Strength, or the List Recall or Verbal Span subtests from the Memory Assessment Scales. These findings extend third party observer effects on neuropsychological testing to include electronic observation.

This literature has demonstrated that presence of an observer during administration of neuropsychological testing significantly reduces the examinee's test performance. The next three articles in this special issue will report on additional empirical studies of the impact of an observer on neuropsychological test performance. The first paper demonstrates the impact of a third party observer on neuropsychological tests among closed head injury survivors. The next article deals with the effect of a video-recorder as the third party observer on neuropsychological testing. The last empirical article focuses on the situation in which an examinee is told that a supervisory third party observer (e.g., clinical supervisor or "trained observer") is present specifically to observe the examiner's administration of the neuropsychological testing and not the examinee's performance. Each of these studies provides evidence that

neuropsychological testing in the presence of an observer, whether physically present or present through electronic means, results in a decrement in performance on some neuropsychological measures.

The importance of maintaining standardized testing procedures has always been recognized by clinical neuropsychological practitioners. Less appreciated has been the clinical significance of breaking standardized procedures. It is hoped that the research presented in this issue will serve to highlight the importance of following a standardized test protocol. There have been several empirical studies that have shown that changes in seemingly minor aspects of the standardization procedures results in a significant change in test performance. For example, changing the mode of presentation (reading, computerized vs. audiotape), deviation from prescribed test instructions, or changing the rate of stimulus presentation have been found to significantly impact performance (see Lee, Reynolds, & Willson, 2003, for review). The research on third party observers of neuropsychological evaluation provides additional confirmation that adherence to standardized test procedures is essential.

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

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

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**KEYWORDS.** Third party observer, forensic neuropsychology, examiner reactivity, clinical training

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Journal of Forensic Neuropsychology, Vol. 4(2) 2005  
Available online at <http://www.haworthpress.com/web/JFN>  
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Digital Object Identifier: 10.1300/J151v04n02\_07

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Clinical neuropsychologists are called upon to assist physicians, attorneys, school districts, parents, and the courts in a number of very important ways—for example, in differential diagnosis for appropriate early interventions, providing input to Committees on Special Education and parents regarding the best program of instruction for a student with a disability, determination of the presence and extent of a brain-related disability for either a governmental agency or private insurance carrier, assisting in sorting out secondary gain-related issues from brain dysfunction in personal injury litigation referrals, and in the mitigation phases of death penalty cases, to name but a few. The work that we do is very important and serves as a significant factor in the overall decision making processes by our referents. The quality of our work should benefit the referent in the decision making process; however, data from an evaluation with a third party observer present can lead to an unintended result. The empirical studies contained in this special issue of the *Journal of Forensic Neuropsychology* focus on different types of third party observers and their influence upon examinees' performance on neuropsychological tests. The presence of a quiet, unobtrusive third party observer present in the testing room was shown to have a negative impact on test results in a sample of CHI survivors. A second study showed that the third party observer effect occurs when the examinees were tested in the presence of a video recording device. Finally, the third party observer effect was found in a simulated clinical training situation where the supervisor was present in the room to observe the examiner's test administration. Regardless of the format of third party observation, each of these studies demonstrated that the examinees' performance on memory testing was negatively impacted. This issue also contained an article that demonstrates that the third party observer effect has both a statistically significant and clinically meaningful influence on the examinees' performance. These findings add to the previous work in this area and argue against the presence of third party observers in any format during neuropsychological testing.

There is also a small but growing body of literature that demonstrates that the presence of a third party observer actually has a negative impact on the results of at least two symptom validity measures: the Portland Digit Recognition Test (Binder & Johnson-Greene, 1995) and the Test of Malinger Memory (Constantinou & McCaffrey, 2003). The impact of third party observers on other symptom validity measures remains to be examined; however, for any individual, performance on symptom validity measures may be skewed in the direction of suspect effort. This could result in an opinion of suspect effort or dissimulation when in reality the data may represent a false positive finding due to the

presence of the third party observer. The implications of this scenario in any neuropsychological evaluation are obvious, especially in neuropsychological evaluations involving capital murder cases.

In addition to the negative impact on neuropsychological test performance, third party observers challenge test security. Preventing the dissemination of neuropsychological and psychological testing materials to the general public is essential to maintaining the integrity and utility of all tests. Test developers strive to maintain the integrity of their copyrighted and intellectually protected property by having clinical neuropsychological practitioners sign copyright, licensing and maintenance of test security agreements as a pre-condition to the sale and purchase of their products. The litigation policy of Harcourt Assessment, Inc., reads as follows:

Harcourt does not wish to impede the progress of legal proceedings; however, we are equally unwilling to jeopardize the security and integrity of our test instruments by consenting to the release of copyrighted and confidential material to those not professionally qualified to obtain them. Should litigation in which a psychologist is involved reach the stage where a court considers ordering the release of proprietary test materials to non-professionals such as counsel, we request that the court issue a protective order prohibiting parties from making copies of the materials; requiring that the materials be returned to the professional at the conclusion of the proceedings; and requiring that the materials not be publicly available as part of the record of the case, whether this is done by sealing part of the record or by not including the materials in the record at all.

In addition, testimony regarding the items, particularly that which makes clear the content of items, should be sealed and again not be included in the record. Pleadings and other documents filed by the parties should not, unless absolutely necessary, make specific reference to the content of or responses to any item, and any portion of any document that does so should be sealed. Finally, we ask that the judge's opinion, including both findings of fact and conclusions of law, not include descriptions or quotations of the items or responses. We think this is the minimum requirement to protect our copyright and other proprietary rights in the test, as well as the security and integrity of the test.<sup>1</sup>

While this litigation policy from Harcourt Assessment does not specifically mention third party observers, the concerns addressed within



the policy regarding release of test content are relevant to third party observation.

### ***CLINICAL VS. FORENSIC SETTINGS***

The issues associated with a third party observer are applicable to neuropsychological evaluation in both the forensic and clinical settings. In the clinical setting, the practitioner, using his/her best clinical judgment, makes the decision to allow another person to be present for part or all of the formal testing. This is particularly likely to occur in the evaluation of children where having a parent present for the early portions of the examination may facilitate the cooperation of the child. Nonetheless, the literature on third party observers and the potential impact on the outcome of an evaluation of a child must be factored into the clinical decision making process. It is common for practitioners to permit a parent to be present during the initial testing in order to engage the child and then to proceed to conduct the remainder of the examination with the parent absent. The policy statements from both the NAN and AACN indicate that there may be circumstances where the presence of a third party may be permissible in order to conduct evaluations of children. AACN further indicates that a third party may be present to assist with adults who have extreme behavioral difficulties. The role of the third party in these situations is to assist with managing the behavior of the examinee and not to observe the test procedures *per se*. Nonetheless, the clinical literature on third party observers indicates that the presence of a third party in such clinical situations does impact test performance. Binder and Johnson-Greene (1995) found that inclusion of a patient's mother during administration of the Portland Digit Recognition Test resulted in a significant decline in the patient's accuracy. Kehrer, Sanchez, Habif, Rosenbaum, and Townes (2000) found that the presence of a significant other during testing resulted in a significant decline in performance on several neuropsychological measures. There is an additional study from the social psychology literature that demonstrated that the presence of a supportive person during performance of difficult tasks (i.e., backward counting by 13s and a videogame) was associated with a worse performance in the presence of a supportive observer than in the presence of a stranger or adversarial observer (Butler & Baumeister, 1998). These researchers described the individuals within the supportive-observer condition as more cautious in their approach to the tasks in that they decreased speed; however, the cautious approach did not result

in a higher accuracy rate. Subjectively, the individuals observed by supportive persons described a sense of decreased stress and a generally positive feeling about the presence of a supportive individual. They did not recognize the detrimental impact that the supportive presence had on their performance. In light of the research, the clinician who makes the decision to permit a family member to be present during some or all of the testing must factor into the final interpretation of the test findings the impact that the family member had on test performance.

Unlike a clinical setting where clinical necessity dictates the presence of a third party observer, the neuropsychologist conducting an evaluation in a forensic setting may not be making the decision as to whether or not a third party will be permitted during testing. There are likely to be competing and conflicting legal issues as to the presence or absence of third party observers that have nothing to do with clinical necessity.

### ***IMPLICATIONS FOR CLINICAL TRAINING***

The findings from the Yantz and McCaffrey study (2005) highlight the concern that the mode of training our students and postdoctoral fellows in assessment techniques and methods needs to be reconsidered, as their presence may not be as benign as we have thought it to be for the past 60 years. While additional research is warranted, it would be prudent nonetheless for clinical neuropsychological practitioners not to utilize for clinical training purposes cases that involve serious matters such as personal injury litigation, competency evaluations, and death penalty-related matters. It would also seem that the recommendation by McSweeney et al. (1998) that audio recording and/or video recording of a clinical neuropsychological evaluation as a compromise to the physical presence of a third party observer not be adopted in light of current literature. Moreover, these “compromises” also involve the unknown impact of reactivity in the examining clinical neuropsychologist’s efforts to perform a standardized administration.

### ***EXAMINER REACTIVITY: UNCHARTED TERRITORY***

To date, the research associated with the presence of a third party observer has focused on the *examinee*. An issue that has been overlooked is the cognitive, physiological and emotional reactivity of the *examiner*

while conducting an examination in the presence of a third party observer. Specifically, there is no guarantee that either the reliability or the validity of the assessment process is not impacted by the examiner's obvious knowledge that his/her actions, comments, questions and so forth are being scrutinized by a third party observer or memorialized in living color. Imagine how you might react if Ralph M. Reitan, PhD, were sitting in the room taking notes about your administration of the Halstead-Reitan Neuropsychological Test Battery for Adults. What impact would the presence of a video recorder have on your ability to conduct an evaluation?

### ***AN OUNCE OF PREVENTION IS WORTH A TON OF CURE***

Practitioners are not likely to know which forensic evaluations will involve requests for a third party observer. As such, it would be prudent to be prepared to address this issue for every forensic neuropsychological evaluation, particularly given the complexity of professional, ethical and legal issues that accompany requests for third party observers. Waiting until the examinee and his/her attorney are in your waiting room is probably too late. The practitioner should be up-to-date on the current research and policy statements from national organizations regarding third party observers, applicable ethical standards, and the applicable statutes in the state(s) where he/she practices. All of these relevant materials should be maintained in a readily accessible file that can be shared with counsel should the issue arise. Many times, the request may be withdrawn once both sides understand fully the implications of having a third party observer present during testing and the impact on the validity and reliability of the data.

If this initial attempt to dissuade the request for a third party observer is unsuccessful, then you need to be prepared to assist counsel in the preparation of an affidavit to be submitted to the court. The intent of an affidavit is to educate the court. Towards this end, counsel should be educated about and provided copies of all relevant literature and documents pertaining to third party observers. You should be aware, however, that the courts will look to the law regarding this issue as well as expert affidavits. Other potentially useful materials to provide counsel in preparing the affidavit are the formal policy statements from the legal departments of test publishers regarding the release of copyrighted and confidential material that deal with the measures to be utilized during

your evaluation. Affidavits from other clinical neuropsychologists, especially those who have developed neuropsychological tests, may also assist the trier of fact in understanding the salient issues.

If the court rules that a third party observer may be present during your evaluation, you must decide whether or not to conduct the evaluation. If you decide to conduct the evaluation, then the major issue becomes one of maintaining the security and integrity of the assessment instrument. At this point, counsel should petition the court for a protective order to safeguard the confidentiality of the test publisher's intellectual and copyrighted property. The potential need for a protective order to safeguard the test materials is an issue that counsel should be made aware of at the time that your services are retained. A statement regarding the circumstance under which counsel agrees to seek a protective order could be included in your standard letter of agreement, such as:

Counsel understands that neuropsychological testing and/or psychological testing services involve raw test data, test manuals, and testing apparatus, and other copyrighted materials. These materials are made available to the neuropsychologist pursuant to "Copyrights, Permissions, Licensing and Maintenance of Test Security" agreements. Counsel agrees to promptly apply for a protective order to safeguard the confidentiality of test materials. The cost of applying for such protective order shall not be the responsibility of the neuropsychologist.

Counsel requesting the presence of a third party observer should be informed that the written report will contain a section outlining the myriad of problems in the interpretation of their client's test performance caused by the presence of the third party observer. Furthermore, the written report should contain a behavioral observation section that focuses exclusively on the behavior of the third party observers and/or any disruptions/distraction of the examinee or the examiner caused by the third party observer. For example, did the examinee turn around to look at the observer during testing, did the examinee or the third party observer initiate conversation between them, or did the observer leave and then re-enter the room without permission during the testing?

The neuropsychologist always has the option to refuse to conduct a forensic evaluation with a third party observer present. It is important to be cognizant of the possibility that opposing counsel's underlying agenda may have been to not have you conduct the evaluation. If a sub-

set of the legal community can control who does and who does not perform forensic neuropsychological evaluations, then the entire legal process may not be well-served.

### **ONE FINAL POINT**

Clinical neuropsychologists undergo years of rigorous training in the appropriate administration of assessment instruments in order to ensure that the test results are a reliable and valid indication of the examinee's cognitive, neuropsychological, academic achievement, and behavioral/emotional functioning. In order to assure that the testing findings are reliable and valid, the clinical neuropsychologist must adhere to each assessment instrument's standardized test administration guidelines. This is essential, since the normative data for each battery or individual test was produced by following the standardized administration guidelines. Failure to follow a test's standardized administration guidelines negates the clinical neuropsychologist's ability to utilize the norms for the tests, since they were developed under the standardized administration guidelines. Any deviation from a standardized administration may render the testing findings unreliable and invalid, since the norms may no longer be applicable, and the error rates and terms may also be affected. Deviation from the standardized administration outlined in a test manual has been found to have profound effects on examinees' performance on cognitive/neuropsychological testing, achievement/educational testing, and personality/emotion testing. Included among the deviations from standardized administration are the test setting, presentation of test stimuli, examinee's response mode, and alteration in test instructions (Lee, Reynolds, & Willson, 2003). The presence of a third party observer is also a deviation from standardized administration.

Deviation from standardized administration in forensic neuropsychological evaluations may have profound negative consequences for everyone involved. As Lee et al. (2003) point out, three United States Supreme Court cases have addressed the issue of error rates and reliability of data upon which an expert's opinion is formulated. The conclusions reached by the Court are that, if the data used by an expert to form an opinion are unreliable, then any opinion derived from those data, even in part, is considered unreliable and not admissible as testimony. Given that the presence of a third party observer during testing is both a deviation from a standardized test administration and has been demonstrated to skew the results of the testing, it would appear that the data ob-

tained from an evaluation with a third party observer present would be deemed to be unreliable, and any opinion based upon those data inadmissible. Perhaps, this would be the ultimate unintended consequence of a third party observer.

## NOTE

1. (<http://harcourtassessment.com/hai/Templates/GeneralPurposeTemplate.aspx?NRMODE=Published&NRORIGINALURL=%2fhaiweb%2fCultures%2fen-US%2fFooter%2fLegal%2bPolicies%2html&NRNODEGUID=%7bB506C9EF-0DA3-42C3-A3AF-12CEAC9B0792%7d&NRCACHEHINT=NoModifyGuest#release> Harcourt Legal Affairs may be reached at 800-228-0752).

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## When the Third Party Observer of a Neuropsychological Evaluation is an Audio-Recorder

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Constantinou M, Ashendorf L, McCaffrey R. When the Third Party Observer of a Neuropsychological Evaluation is an Audio-Recorder. *Clinical Neuropsychologist* [serial online]. August 2002;16(3):407. Available from: Academic Search Premier, Ipswich, MA. Accessed December 4, 2016.

### ABSTRACT

The presence of third parties during neuropsychological evaluations is an issue of concern for contemporary neuropsychologists. Previous studies have reported that the presence of an observer during neuropsychological testing alters the performance of individuals under evaluation. The present study examined whether audio-recording affects the neuropsychological test performance of individuals in the same way that third party observation does. In the presence of an audio-recorder the performance of the participants on memory tests declined. Performance on motor tests on the other hand, was not affected by the presence of an audio-recorder. The implications of these findings for business neuropsychological evaluations are discussed.

The presence of an observer during neuropsychological evaluations is, not unusual, this is especially true for evaluations that are conducted for litigation reasons (McSweeney et al., 1998). A large number of social psychology studies exhibited that the presence of an observer tends to affect positively or negatively the task performance of individuals (Cialdini, 1986). These findings are tightly related to the phenomenon of *social facilitation*, which is generally defined as the tendency of an individual to exhibit enhanced performance on simple tasks and inhibited performance on complex tasks in the presence of observers. This phenomenon is also called *arousal*, which is defined in similar lines as: "the tendency of the behavior to change when and because it is under observation" (Russell, Russell, & Milnerstein, 1992). Clearly then, the presence of an observer during neuropsychological evaluation, should be a cause of unwanted headaches many of which will be discussed in more depth

shortly, by neuropsychologists who are concerned with the validity of obtained test scores and the violation of standardized test administration. For these reasons, the National Academy of Neuropsychology (NAN) recommends that the presence of third party observers during neuropsychological testing should be avoided when possible (Archival et al., 2000). In addition, in 1999 the American Psychological Association (APA), along with the American Educational Research Association (AERA) and the National Council on Measurement in Education (NCME) identified in the *Standards for Educational and Psychological Tests* that the administrators of tests should adhere to standard procedures set by test publishers and that testing should be carried out with no distraction. As a whole, today's neuropsychologists aim to obtain test results that are not influenced by extraneous factors so that they can draw the most immediate conclusions possible about evaluated individuals. The

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Accepted for publication June 27, 2002.

influence of third party observation during neuropsychological testing can be determined by examining the findings of past neuropsychological studies.

Binder and Johnson-Greene (1995) demonstrated, in a single case study, that the performance of an epileptic woman under neuropsychological evaluation deteriorated significantly when her mother was present in the examination room. All course the limitations of a single case study are obvious. Nevertheless, similar outcomes were reported by group studies. Kishner, Sanchez-Hahn, Rosenbaum, and Townes (2000) found that participants' performance was significantly poorer when a "significant other" observer was present during the administration of neuropsychological test battery. Specifically, this study demonstrated that the performance of participants on attention, processing speed, and verbal fluency measures was negatively impacted by the presence of a "confederate" observer; no such outcome was observed on motor and cognitive flexibility tests. Lynch (1997) found that a third party observer negatively affected the performance of participants on a subtest of the Wechsler Memory Scale (WMS) that involved delayed recall. As in the previous study, Lynch (1997) did not find any third party observer effects for motor tests (i.e., Finger Tapping Test, Grip Strength, and Grooved Pegboard Test). In short, all of the above studies reported that the presence of a third party observer appears to exert some negative influence on the neuropsychological test performance of individuals.

McKewen et al. (1998) proposed that the need for the presence of a third party observer (i.e., a lawyer or their representative) in the examination room during neuropsychological evaluation may be diminished if the potential third party observer could have access to a video or audio recording of the neuropsychological evaluation. Then, again, there is no evidence on how such recordings would affect the "examining" neuropsychological test performance. Outside of the neuropsychological area, contrasting results were reported with respect to the effects of individual recording on task performance. For example, Singer (1974) and Cohen and Davis (1973) reported that audiovisual recording had an attenuating

arousal effect, measured by psychophysiological instruments, that, in turn, had a negative impact on the performance of participants who were asked to solve a series of word problems. On the other hand, Lechten and Wachtel (1999) demonstrated that audiovisual recording did not affect participants' scores on assessment measures of anxiety.

The present study was conducted in order to investigate whether audio-recording affects individuals' neuropsychological test performance. Forty undergraduates were assigned to one of two groups, either the Tape-Recording-Aware group or the Non-Aware group, who were and aware that responses were tape-recorded. The participants were administered selected subtests of the Memory Assessment Scale (MAS; Williams, 1991b) and a series of motor tests.

It was hypothesized that audio-tape observation (i.e., through the audio-recording) would produce results that resemble those reported by Lynch (1997) and Kishner et al. (2000) in which a third party was observing the performance of participants. Specifically, it was hypothesized that in the Tape-Recording-Aware group the participants' performance on the memory subtests of the MAS would be poorer than that of the participants in the Non-Aware group, while it was hypothesized that no group differences would be found on the motor tests.

## METHOD

### Participants

After obtaining approval from the Human Subjects Institutional Review Board, 42 undergraduate students were recruited from introductory psychology classes. Participants were randomly assigned to one of two groups, either the Tape-Recording-Aware group or the Non-Aware group. Participants were assigned from 18 to 45 years of age,  $M = 20.08$ ,  $SD = 4.76$ . In addition, participants also standing ranged from freshmen to senior year, while their mean ethnic education was 1.82 years,  $SD = .08$ . Two of the participants requested that their data not be used for the study, therefore the total number of participants was 40 (22 men and 18 women) with 20 participants in each group. Independent sample *t* tests and chi-square tests did not reveal any demographic differences between the two groups with respect to age, gender, or class standing.



# Verbal

Each participant was administered a brief battery of measures in the following order:

1. *Fast Verbal FL*. From the Verbal Association Scale (MAS; Williams, 1991) involves the verbal presentation of 22 common words, each belonging to one of the four categories: countries, fruits, colors, or cities. The list is normally presented to participants in the types in which all 22 words are successfully recalled on a one trial. Each list presentation is followed by a test trial of recall and during which participants attempt to recall as many list words as possible. The total score (Fast Association Score, LAS) for the participants consists of the total number of words that were recalled successfully. FL represents an immediate memory measure and a measure of the ability to learn over consecutive presentations of the same material.
2. *Fast Recall FL* (MAS; Williams, 1991). During the administration of this subtest the participants are required to recall the words that were presented in the FL subtest. In addition, the participants are asked to recall the words that belong to each category (countries, fruits, colors, or cities) when the examiner prompts them to do so. This subtest is called Fast Recall (FR). The participants receive a Fast Recall Score (FRS) and a Fast Recall Score (FRS) on this subtest of the MAS. In a typical MAS administration, FL and FR are separated by the administration of another MAS subtest, which lasts about 5 min. In the study, the administration of FL and FR were also separated by an interval of 5 min. Thus, FR can be considered as a short-term memory measure. FR measures the ability to learn similar information into meaningful categories.
3. *Image Tapping*. The Image Tapping test from the Unusual Items Neuropsychological Battery for Adults (URNEA; was administered and scored following the protocol outlined in Rutter and Wolfson (1993, p. 61).
4. *Crossed Baground*. As described in Layke, 1993, p. 685). In this measure the participants are asked to match the words of one word to the words of a preboard and place the pieces into the holes of the preboard as fast as possible. The preboard consists of two rows and five columns of holes (for a total of 10 holes). The total time spent in placing the pieces into the preboard and the total number of pieces dropped are the measures of performance on this test. For this study the Unusual Baground test consisted of a combination of the right and left hands from to complete the task. The total number of pieces dropped was not used in the analysis of the data—most likely that the participants dropped any piece once it had been dropped only one or two pieces.

5. *Group Strength*. This measure from the URNEA was administered and scored following the protocol outlined in Rutter and Wolfson (1993, p. 66).
6. *Visual Span 198 MAS* (Williams, 1991). This measure of two sections. In the first subsection, the participants are verbally presented with a series of single-unit images that they subsequently attempt to recall in the second order. In the second subsection, the participants are verbally presented with a series of single-unit images that they have to recall in reverse order. The target series (recognition from sections) are added together for a composite series Verbal Span Score (VSS). This is a measure of immediate recall, that is, the result of the direct measurement, after their presentation.
7. *Delayed Verbal Recall* (DLR; MAS; Williams, 1991). DLR administration is identical to the administration of the FL subtest, which includes the recall of the 22 word list and a final recall. During a typical administration of the MAS, FL and DLR are separated by an interval of 15–20 min during which other MAS subtests are administered. In the study, FL and DLR were separated by the administration of three more tests and VSS before administration and lasted about 25 min. Hence, DLR can be considered a long-term memory measure. A Delayed Fast Recall Score (DLFRS) and a Delayed Fast Recall Score (DLFRS) are obtained in DLR in the same fashion as FRS and FR, respectively, in the FL subtest.

## Procedure

All of the participants' answers were administered in order to increase the reliability of the scoring of the memory tests. The experimenters placed an audio-recorder under recording device measures. However, there is a time penalty about 45 min away to the participants of the Tape-Recording device group to the 30-min away group. The audio-recorder was hidden under the participant table. In both conditions, the audio-recording commenced after the participants gained a consent form. The Tape-Recording device participants were informed that the measure was going to be online recorded while the 30-min away participants were not informed that their responses were being recorded.

Each participant was administered a total of seven tests and received a total of nine scores (LAS, FRS, FR, DLR, Image Tapping, Crossed Baground, Group Strength, VSS, DLFRS, and DLFRS) which constituted the dependent variables of the study. The total testing was approximately 40–45 min.

At the end of the experiment, the participants of both groups were debriefed and asked whether they would allow the experimenter to use their audio-taped data. All participants allowed, only two participants from the 30-min away condition requested that their data not be used in the study.

## RESULTS

A one-way Multivariate Analysis of Variance (MANOVA) was conducted in order to determine the effects of the presence of an audio recorder on the participants' neuropsychological test performance. The one-way MANOVA was significant, Wilks'  $\Lambda = .588$ ,  $F(9, 30) = 2.19$ ,  $p = .05$ ,  $\eta^2 = .41$ ; the multivariate observed power was .82. Subsequently, a series of one-way Analyses of Variance (ANOVA) were conducted on the nine dependent variables. After applying the Bonferroni correction for control of Type I error for multiple pair-wise comparisons, each one-way ANOVA was tested at the .006 level (.05/9). These follow-up tests revealed that the Non-Aware group's scores were significantly higher than the Tape Recording Aware group's scores on four of the six MAS scores listed: (a) List Acquisition Score (LAS;  $M = 22.6$ ,  $F(1, 38) = 9.66$ ,  $p = .006$ ), (b) Cued Recall Score (CRS;  $M = 15.62$ ,  $F(1, 38) = 12.29$ ,  $p = .006$ ), (c) Delayed List Recall Score (DLRS;  $M = 9.05$ ,  $F(1, 38) = 9.09$ ,  $p = .006$ ), and (d) Delayed Cued Recall Score (DCRS;  $M = 15.62$ ,  $F(1, 38) = 12.03$ ,  $p = .006$ ). The means and standard deviations of the two groups' performance on the MAS and other measures are displayed in Table 1. No significant effects were observed in two MAS scores: Learning Recall Scores (LRS) and Verbal Span Score (VSS). As hypothesized, the two groups did not significantly differ with respect to the three motor measures (i.e., Finger Tapping, Grooved Pegboard, and Grip Strength).

In order to assess which dependent variables were affected more noticeably by the presence of an audio recorder, an effect size was calculated for each dependent variable ( $f^2$ ) at .01, .06, and .04 are generally regarded as small, medium, and large effect sizes, respectively. The effect sizes and corresponding observed powers for the dependent variables that were significantly affected by the presence of an audio recorder are presented in Table 2. In summary, it appeared that both cued recall scores (i.e., CRS, DCRS) were the most affected by the participants' awareness of their responses being audio-recorded.

Table 1 Means and Standard Deviations of the Test Groups on the Nine Dependent Variables on the Order They Were Administered to the Participants

Dependent variable	Non-Aware group		Tape Recording group	
	df	SD	M	SD
LRS	65.18	11.09	20.00	8.47
LRS	15.35	6.03	10.00	9.2
CRS	14.30	5.88	10.00	1.25
Finger Tapping	93.50	13.00	91.09	11.20
Grooved Pegboard	14.98	13.98	16.13	20.69
Grip Strength	70.48	24.12	73.77	18.28
LRS	10.85	2.30	11.80	1.73
DLRS	14.55	2.8	10.66	1.11
DCRS	14.60	2.5	10.8	1.42

Note: LAS = List Acquisition Score; LRS = Learning Recall Score; CRS = Cued Recall Score; VSS = Verbal Span Score; DLRS = Delayed List Recall Score; DCRS = Delayed Cued Recall Score.   
 Therefore, the Non-Aware group's mean performance is significantly better than the Tape Recording Aware group's mean performance at the .006 level.

Table 2 Effect Sizes and Observed Power for the Dependent Variables that Were Significantly Affected by the presence of an Audio Recorder

Dependent variable	Effect Size	Observed power
LAS	.29	.86
CRS	.25	.93
DLRS	.19	.84
DCRS	.24	.92

Note: LAS = Learning Acquisition Score; CRS = Cued Recall Score; DLRS = Delayed List Recall Score; DCRS = Delayed Cued Recall Score.

## DISCUSSION

The present study investigated whether or not audio-recording to and of itself any influence candidates' performance during neuropsychological testing. The present study supported the aforementioned hypothesis—demonstrating that audio-recording of an examinee's performance during neuropsychological testing is not a benign procedure. In fact, the current findings are in line

With three of previous reports on the presence of third party observers during neuropsychological testing (i.e., Binder & Johnson-O'Brien, 1995; Lynch, 1991). Specifically, having the laboratory that their performance was being tape-recorded adversely affected the test performance of examinees on two MAS subtests. As predicted from previous studies, there was no effect on the main measures in either condition. Presumably due to the fact that our sample was comprised of university students, the performance of all participants of both groups on the brief neuropsychological battery fell within the average range—the deviations from average were not significant. However, the significant differences between the two groups that exceeded the stringent Bonferroni correction for control of Type I error are almost certainly not spurious and the detrimental impact of audio-recording is clear. Of course, in order to avoid further the clinical significance and generalizability of the present findings, future studies of this sort should aim at sampling clinical populations with identified neuropsychological impairments.

Most neuropsychologists are likely to be faced with requests to permit audio demands to allow the presence of a third party observer (e.g., an attorney, another clinical neuropsychologist, a professor, etc.) during formal neuropsychological testing. Authoritative figures in the area of clinical neuropsychology openly suggest that such requests ought to be handled with caution and refusal, when possible, as an observer could be a threat to the validity of the obtained scores, not standardization and ethical standards of neuropsychology (McCaffrey, Fisher, 1996; & Lynch, 1996; McKeown et al., 1998). In fact, as mentioned previously, the National Academy of Neuropsychology has issued a formal position statement that recommends against the presence of third parties during neuropsychological testing (Axelson et al., 2000). According to the statement, third party observation during neuropsychological assessment may pose a threat to the validity and reliability of the data obtained from such sessions and may compromise the validity of normative data in interpreting test scores (Axelson et al., 2000). The NAC statement also points out that observer effects are potentially due to the physical presence of other individuals

(e.g., an attorney, another neuropsychologist, an technician, etc.) or even the mere presence of electronic recording devices.

This study indicated that the *observer presence* in an observer, through tape-recording, affected all the neuropsychological test performance in examinees. These findings are in accordance with the social facilitation theory, which suggests that the presence of observers (in the present study the *observer presence*) affects performance (Cialdini, 1980; McCaffrey et al., 1996). While McKeown et al. (1998) recommended that an observer to third party observation could be audio or audiovisual recording that could be considered unethical professional, the present findings indicate that such an alternative does not control for the confounding effects of tape-recording.

Attorneys sometimes argue that in order to gain both motivation and access to assessment sessions clinical neuropsychologists should tape-record their assessment sessions without the examinee being aware of the recording. As mentioned above, in the present study, two examinees from the Non-Aware group requested that their responses not be used by the study after they were identified at the end of the assessment. Although these two participants represent only about 2% of the total sample, clinicians should note that the negative feelings of some examinees about being audio taped without their approval are rather strong and may even be stronger in clinical settings.

The present study investigated only the impact of audio-recording, that is, the quantitative and qualitative impact of audiovisual recording on neuropsychological performance remains untested. The findings from the social facilitation literature regarding the effects of audiovisual recording have been inconsistent (e.g., Cohen, 1977; Lohman & Woodier, 1999). Clearly then, additional studies using neuropsychological tests are warranted. Future investigations about the impact of electronic recording devices may want to expand to include a larger variety of examinees and/or environments and measures of affect, such as functioning (e.g., attention, executive functioning, visuospatial functioning, etc.). Such expansion may also extend measures such as the main measures in the present study that

are not influenced by the presence of electronic devices, therefore potentially suggesting that (a) such measures are 'resistant' to the adverse effects of electronic recording and (b) problems of neuropsychological testing can be recorded without problems. Furthermore, future replications of the present study should sample clinical populations, such as individuals with sustained traumatic head injuries, strokes, or other neurological damage, so that the generalizability of the present findings gain more clinical significance.

In summary, neuropsychologists should be aware of the issues raised in the present study and strive to assist the legal community in understanding the impact that the myriad types of third party observers may have on the validity of an individual's neuropsychological test performance.

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# Effects of a Third Party Observer During Neuropsychological Assessment: When the Observer Is a Video Camera

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

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Journal of Forensic Neuropsychology, Vol. 4(2) 2005

Available online at <http://www.haworthpress.com/web/JFN>

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Digital Object Identifier: 10.1300/J151v04n02\_04

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formance, and also replicates our earlier work with an audio recorder as third party observer. [Article copies available for a fee from The Haworth Document Delivery Service: 1-800-HAWORTH. E-mail address: <docdelivery@haworthpress.com> Website: <<http://www.HaworthPress.com>> © 2005 by The Haworth Press, Inc. All rights reserved.]

**KEYWORDS.** Third party observer, video recorder, audio recorder, neuropsychological evaluation, standardized test administration

The physical presence of an observer in the testing room during neuropsychological assessments is an issue that should concern contemporary neuropsychologists. Neuropsychological evaluations that are conducted for legal purposes are often conducted in the presence of a third party. However, past literature revealed that an audience tends to have a negative or positive effect on the performance of motor and cognitive tasks (Guerin, 1986). Such audience effects have been attributed to the social psychology phenomenon of *social facilitation*, defined as “the tendency of an individual to exhibit enhanced performance on simple tasks and inhibited performance on complex tasks in the presence of passive or evaluative observers” (Constantinou, Ashendorf, & McCaffrey, 2002).

In an effort to provide an alternative to the physical presence of a third party observer in the examination room during the actual neuropsychological testing, McSweeney et al. (1998) proposed that the examination be recorded either by audio or video recordings. This compromise raises ethical concerns that are discussed by Duff and Fisher in this issue. In addition to any ethical concerns, there is some evidence in the social psychology literature that social facilitation effects occur when the individual believes that his/her performance is being videotaped for observation. The presence of a videocamera has been found to significantly improve performance on a visual vigilance task (Putz, 1975) and immediate paired associates recall (Geen, 1973) but impair performance on delayed paired associates recall (Geen, 1973). Landers, Bauer, and Feltz (1978) found the presence of a videocamera to have a detrimental impact on visuomotor task performance. Two other studies (Cohen, 1979; Henchy & Glass, 1968) have shown that individuals performing a task in the presence of a videocamera more frequently provided domi-

nant responses during the task than did those individuals performing alone.

In addition to the social facilitation literature, Constantinou, Ashendorf, and McCaffrey (2002) examined the effect of an audio recorder on examinees' performances during neuropsychological testing. While the test performance of all participants was audiotaped, they found that the participants who were aware that the testing was audiotaped performed significantly worse on memory testing than those who were not aware of the audiotaping. The present study sought to investigate whether or not McSweeney et al.'s other suggestion, that the neuropsychological examination be video recorded, would be a more viable method of addressing the effects of a third party observer.

## METHOD

### *Participants*

Sixty-five students were recruited from undergraduate psychology courses, after obtaining approval from the human subjects institutional review board. Participants were randomly assigned to one of two groups, either the visual recording group (VR) where testing took place in the presence of a video-recording device, or the no visual recording group (NVR) where testing occurred in the absence of this device.

Participants were administered the Beck Depression Inventory-II (BDI-II; Beck, Steer, & Brown, 1996) and the State Trait Anxiety Inventory (STAI; Spielberger, 1983) to screen for clinically significant anxiety or depressive symptomatology. Only one person was excluded from the statistical analyses due to a BDI-II score in the severe range. This reduced the total number of participants to 64 with the VR group having 31 members (14 men and 17 women) and the NVR group having 33 members (18 men and 15 women). Medical background information was also obtained by self-report from each participant. Five individuals reported a medical/surgical history (e.g., traumatic brain injury, brain cancer, brain surgery, or Lyme disease) or mental health problems (e.g., depression, mania, or anxiety). These participants were not excluded from the study.

The 64 participants' chronological ages ranged from 17 to 31 ( $M = 19.63$ ,  $SD = 2.55$ ); educational level ranged from 1 to 4 years of college ( $M = 1.64$  years,  $SD = .90$ ). The two groups did not differ statistically on

any of the demographic variables, level of depression, level of state/trait anxiety, or the proportion of those with a significant medical, surgical, or psychological history.

### **Material**

Each participant was administered the following tests in the order presented:

1. *List Learning* (from the MAS; Williams, 1991) involves the oral presentation of 12 common words belonging to one of four categories. Each list presentation is followed by a trial during which the participant attempts to recall as many list words as possible. The word list is presented a maximum of six times, or until all 12 words are successfully recalled on a trial. The total List Acquisition score is the total number of words that were recalled successfully across all the learning trials. The total number of errors, such as related words, unrelated words, or repetitions, over all the administered acquisition trials were counted. In addition, for the purposes of this study, the *number of learning trials* (minimum = 1; maximum = 6) to reach a recall of all 12 words from the list was noted as a measure of learning speed/rate. Because the task has six possible learning trials, the maximum number of learning trials (6) was entered for the participants who had not recalled all 12 words on any trial.
2. *Prose Memory* (from the MAS; Williams, 1991). In this subtest, the participant is orally presented a short story and asked to recall as much of the story as possible after the presentation. In addition, the participants are asked to answer nine "yes-no" questions about the story. The total Prose Memory score consists of the number of correct answers to each of the questions.
3. *List Recall* (from the MAS; Williams, 1991). This is the recall of the 12-item word list immediately following presentation of the short story. A cued recall trial is also administered where the participant is asked to recall word list items belonging to specific categories. The participant receives a List Recall Score and a Cued Recall Score. In addition, the number of errors on both the List Recall and Cued Recall are counted.
4. *Finger Tapping*. The Finger Tapping test from the Halstead-Reitan Neuropsychological Battery for Adults (HRNB-A) was administered and scored following the protocol outlined by Reitan and Wolfson (1993). Since there were no statistical dif-



ferences between the performances with the left and right hands for any subject, the average performance for each hand was combined into a single composite score.

5. *Grooved Pegboard* (see Lezak, 1995). The total time to place all the pegs into the pegboard is the measure of performance on this motor test. The average performance for each hand was combined into a single composite score since there were no statistical differences between performances with the left and right hand for any subject.
6. *Grip Strength*. This motor test from the HRNB-A was administered and scored following the protocol outlined in Reitan and Wolfson (1993). As was the case for the other motor measures, there were no statistical differences between the right and left hands, and therefore, the average score for each hand was combined into a composite score.
7. *Verbal Span* (MAS, Williams, 1991). This test consists of digit span backward and forward. The longest series recalled on each section are added together for a composite Verbal Span score.
8. *Delayed List Recall* (MAS, Williams, 1991). Delayed List Recall administration is identical to that of the List Recall subtest, and follows it by an interval of about 20 minutes. A Delayed List Recall score and a Delayed Cued Recall score are obtained from this subtest. The total number of errors is noted in both Delayed List Recall and Delayed Cued Recall.
9. *Delayed Prose Memory* (MAS, Williams, 1991). This subtest of the MAS is administered about 20 minutes after the presentation of the Prose Memory short story. It is scored in the same manner as Prose Memory.
10. *Forced Recognition* (MAS, Williams, 1991). In this last subtest of the battery, each of the 12 words from List Learning is matched with a distractor word for a total of 12 word pairs. The participant is asked to recognize and circle the familiar word in each of the 12 pairs.

### ***Procedure***

Each testing session required approximately one hour. During the administration of the test measures to the VR group, who were informed that their performance was being recorded, the experimenter placed the video camera (measuring 30 cm × 15 cm × 5 cm) on a tripod approximately 1.0 meter away from and in the plain view of the participant.

All of the participants were administered the measures, outlined above, which produced a total of 18 scores: (1) List Acquisition, List Acquisition Errors, Number of Learning Trials; (2) Prose Memory; (3) List Recall, List Recall Errors, Cued Recall, Cued Recall Errors; (4) Finger Tapping; (5) Grooved Pegboard; (6) Grip Strength; (7) Verbal Span; (8) Delayed List Recall, Delayed List Recall Errors, Delayed Cued Recall, Delayed Cued Recall Errors; (9) Delayed Prose Memory; and (10) Forced Recognition. These 18 scores constituted the dependent variables, except for the Forced Recognition score which was not entered in the statistical analysis because all 64 participants received perfect scores of 12 on this subtest.

## RESULTS

The data were analyzed with a series of independent *t*-tests while controlling for Type 1 error using Holm's Sequential Bonferroni Method (Jaccard & Turrisi, 2003). Table 1 presents the *t*-value and obtained *p*-value of each of the pair-wise comparisons.

An examination of Table 1 reveals that the NVR and VR groups were significantly different on 8 out of the 18 dependent variables, namely List Acquisition, List Acquisition Errors, Number of Learning Trials, Prose Memory, Cued Recall, Delayed List Recall, Delayed Cued Recall, and Delayed Prose Memory.

There were no significant differences between the NVR and VR group on any of the composite motor measures (i.e., Finger Tapping, Grooved Pegboard, and Strength of Grip tests) or Verbal Span.

In order to evaluate the relative impact of the presence of the video recorder on the eight dependent variables found to significantly discriminate between the NVR and VR groups, the obtained effect-size (i.e., eta squared;  $\eta^2$ ) for each of the pair-wise comparisons was calculated. Typically,  $\eta^2$ s with values of 0.01, 0.06, and 0.14 are considered small, medium, and large effect-sizes, respectively (Green, Salkind, & Akey, 2000). Eta squared for each comparison was calculated with the use of the following statistical formula:

$$\eta^2 = t^2/t^2 + (N1 + N2 - 2)$$

The observed power for each of the significant pair-wise comparisons was also computed. The effect-sizes ranged from .13 to .38, and observed power ranged from .84 to .99 (see Table 2).

TABLE 1. Means and standard deviations of the two groups on the 18 dependent variables.

Dependent Variable	NVR	VR	<i>t</i> (62)	<i>p</i> -value
List Acquisition	64.55 (5.12)	56.97 (7.20)	4.87	< .001*
List Acquisition Errors	0.94 (1.67)	3.32 (2.61)	-4.37	< .001*
Number of Learning Trials	3.67 (1.45)	5.52 (0.89)	-6.10	< .001*
Prose Memory	6.69 (1.90)	5.35 (1.64)	3.02	.004*
List Recall	11.00 (1.22)	10.41 (1.36)	1.80	.08
List Recall Errors	0.15 (0.36)	.39 (0.72)	-1.68	.10
Cued Recall	11.21 (1.02)	9.81 (1.54)	4.33	< .001*
Cued Recall Errors	0.21 (0.55)	.48 (0.63)	-1.86	.07
Verbal Span	13.06 (1.95)	12.19 (2.16)	1.68	.10
Finger Tapping	103.02 (16.59)	102.14 (12.19)	0.24	.81
Grooved Pegboard	148.50 (23.61)	144.46 (22.37)	0.70	.49
Grip Strength	72.99 (21.72)	75.64 (27.47)	-0.43	.67
Delayed List Recall	11.30 (0.92)	10.25 (1.61)	3.21	.002*
Delayed List Recall Errors	0.09 (0.29)	.29 (0.69)	-1.52	.134
Delayed Cued Recall	11.36 (0.96)	9.87 (1.67)	4.41	< .001*
Delayed Cued Recall Errors	0.09 (0.29)	.39 (0.62)	-2.49	.016
Delayed Prose Memory	6.64 (1.99)	5.29 (1.57)	2.98	.004*
Forced Recognition	12.00 (0.00)	12.00 (0.00)	—	—

\* NVR mean performance is statistically significantly better than VR mean performance at the  $\alpha = \text{npc}-1$  level (npc = number of pair-wise comparisons).

Note. No pair-wise comparisons were computed for Forced Recognition because the two groups had identical Forced Recognition means and standard deviations.

TABLE 2. Effect-size statistic and observed power for the eight dependent variables that were significantly affected by the experimental manipulation.

Dependent Variable	Effect-Size ( $\eta^2$ )	Observed Power
List Acquisition	.28	.99
List Acquisition Errors	.24	.99
Number of Learning Trials	.38	.99
Prose Memory	.13	.84
Cued Recall	.23	.98
Delayed List Recall	.14	.89
Delayed Cued Recall	.24	.99
Delayed Prose Memory	.13	.84

## DISCUSSION

The current investigation aimed to investigate the effects of indirect observation, using a video camera, on the neuropsychological test performance of young adults. In addition, the present study was designed to be a follow-up research study to the original study by Constantinou et al. (2002), which found that the presence of an audio recorder impaired the performance of young adults on measures of immediate, short-term, and delayed recall.

The presence of a video camera as the third party observer resulted in adverse performance on memory testing. The performance of the observed group was detrimentally affected on measures of immediate recall and delayed recall (see Table 1). Specifically, List Acquisition, Cued Recall, Delayed List Recall, and Delayed Cued Recall performances on the Memory Assessment Scales were found to be negatively impacted by the presence of a video camera as third party observer. In addition, the VR group required a greater number of trials to learn a list of words than did the NVR group and committed more errors than the NVR group when attempting to recall the same list of words. The presence of a video camera as third party observer did not influence any of the motor measures (i.e., Finger Tapping, Grip Strength, and Grooved Pegboard).

The findings from this study are similar to the study examining an audio recorder as third party observer (Constantinou et al., 2002). The effect sizes associated with video recorder as third party observer were larger on List Acquisition and Delayed List Recall than had been reported with an audio recorder as third party observer (see Table 3). This suggests that the presence of a videocamera may have a greater impact on memory testing than an audiorecorder. The results of the Constantinou et al.

TABLE 3. Effect sizes and observed power for the dependent variables that were significantly affected by the presence of an audio-recorder.\*

Dependent Variable	Effect-Size ( $\eta^2$ )	Observed Power
List Acquisition	.20	.86
Cued Recall	.25	.93
Delayed List Recall	.19	.84
Delayed Cued Recall	.24	.92

\*adapted from Constantinou et al. (2002, p. 410)

studies provide empirical evidence that neither audio recording nor video recording are any more acceptable than the physical presence of a third party observer.

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## Third Party Observers: The Effect Size Is Greater Than You Might Think

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

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*Journal of Forensic Neuropsychology*, Vol. 4(2) 2005  
Available online at <http://www.haworthpress.com/web/JFN>  
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Digital Object Identifier: 10.1300/J151v04n02\_05

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observer during a neuropsychological evaluation should be expected to have a clinically meaningful impact on an examinee's test performance, with memory measures particularly vulnerable. [Article copies available for a fee from The Haworth Document Delivery Service: 1-800-HAWORTH. E-mail address: <docdelivery@haworthpress.com> Website: <<http://www.HaworthPress.com>> © 2005 by The Haworth Press, Inc. All rights reserved.]

**KEYWORDS.** Third party observer, effect size, social facilitation

In recent years, the field of clinical neuropsychology has begun to focus on the effect of the presence of a third party observer on an examinee's performance in testing situations (McCaffrey, Fisher, Gold, & Lynch, 1996; McSweeney et al., 1998). Although neuropsychological assessment is intended to be a one-to-one interaction between the psychologist and the examinee, there are some instances when another person requests to remain present during the evaluation. For example, a parent may wish to watch over the proceedings to ensure the safety of the child or to help manage the child's behavior. In cases involving litigation, the client or the client's attorney may wish to document or witness the assessment for legal purposes. The decision to permit a third party observer rests with the examining neuropsychologist.

Much of the published literature on the effect of an observer on test performance has come from the social psychology field where the effect is referred to as *social facilitation*. Social facilitation has been discussed in an earlier article in this special issue of the *Journal of Forensic Neuropsychology* (see McCaffrey, Lynch, & Yantz, 2005). Briefly, social facilitation refers to the influence of an observer on the individual's behavior. An observer has been found to either facilitate or inhibit an individual's performance on a variety of activities. As summarized in the McCaffrey et al. article, the social facilitation literature contains many empirical studies demonstrating that the presence of an observer influences performance on tasks involving motor skills, attention, reaction time, vigilance, memory, visual-spatial abilities, problem solving, and conceptual reasoning.

The theory of social facilitation became relevant to neuropsychological assessment with the advent of requests for third party observations of testing conducted in the context of litigation. This theoretical framework and empirical literature provided a foundation for understanding the potential implications of including additional parties in the

testing room during the administration of neuropsychological testing. The social facilitation literature provided empirical demonstrations that performance on a variety of activities involving many of the types of skills assessed by neuropsychological measures was significantly improved or impaired when performed in the presence of an observer. Key to understanding the potential implications of third party observers for the neuropsychological evaluation is the fact that normative data for neuropsychological tests are developed without observation by a third party. Therefore, there is reason to question the accuracy of interpretations based upon standard normative data when an examinee's test data has been obtained in the presence of a third party given research that task performance is different in the presence of an observer.

Over the past decade, there have been several empirical investigations of the impact of a third party observer on neuropsychological test performance. These studies have found that the presence of a third party observer has a significant and negative impact on some neuropsychological measures, including the Memory Assessment Scales (Constantinou, Ashendorf, & McCaffrey, 2002; Constantinou, Ashendorf, & McCaffrey, 2005; Yantz & McCaffrey, 2005); Rey Auditory Verbal Learning Test, Stroop Color-Word Test, Controlled Oral Word Association Test, Paced Auditory Serial Addition Test, Digit Span (Kehrer, Sanchez, Habif, Rosenbaum, & Townes, 2000), Portland Digit Recognition Test (Binder & Johnson-Greene, 1995), and the Wechsler Memory Scale-Revised (Lynch, 2005).

Each of these studies has shown that, compared to testing with only the examiner present, there is a significant difference in performance on neuropsychological measures when a third party observes the test administration. Statistical significance, however, does not indicate the magnitude of the difference between neuropsychological test performance conducted under standard conditions and neuropsychological testing conducted with a third party observer. In order to quantify the influence of an observer on test performance, the effect size statistic can be used. Null-hypothesis significance tests may produce statistically significant results despite a small treatment effect, especially when sample sizes are large. Therefore, statistical significance in and of itself may often be an inadequate tool for the clinician wishing to gauge the degree to which a variable produces an effect. Null-hypothesis significance tests can be buttressed by effect size statistics, which provide the clinician with additional information about the degree to which a variable may influence an individual patient.



Several effect size measures are often reported in the literature, including Cohen's  $d$ ,  $\eta^2$ , Glass and Stanley's  $D$ , and Hedge's  $g$ . Cohen (1988) suggested a common convention for labeling effect sizes. In terms of the  $d$  statistic, he described an effect size of .2 as small, .5 as medium, and .8 as large. Cohen also illustrated how the  $d$  statistic could be converted into a measure of variance explained,  $r^2$ , when the two populations under comparison are equally numerous (see Cohen, 1988, p. 23). This conversion is useful because, while  $d$  provides information regarding the number of standard deviations by which two samples differ,  $r^2$  indicates the proportion of the total variance explained by the variable of interest. In this form, it can be directly compared to other effect size measures that indicate proportion of variance explained, such as  $\eta^2$ , which are labeled .01 = small, .06 = medium, and .14 = large.

While Cohen (1988) acknowledges that these labels are somewhat arbitrary, he argues that the utility of a standard nomenclature outweighs the absence of common reference points. To provide a slightly better understanding of "small," "medium," and "large," Cohen (1988) provides the following descriptions that aid in the understanding of these labels:

[Small] It is the order of magnitude of the difference in mean IQ between twins and nontwins, the latter being the larger . . . . It is also approximately the size of the difference in mean height between 15- and 16-year-old girls (i.e., .5 in where the  $\sigma$  is about 2.1). Other examples of small effect sizes are adult sex differences in the Information and Picture Completion Subtests of the Wechsler Adult Intelligence Scale, favoring men, while a difference favoring women on the Digit Symbol Test which is twice as large . . . .

[Medium] A medium effect size is conceived as one large enough to be visible to the naked eye. That is, in the course of normal experience, one would become aware of an average difference in IQ between clerical and semiskilled workers or between members of professional and managerial occupational groups . . . .

[Large] Such a separation . . . is represented by the mean IQ difference estimated between holders of the PhD degree and typical college freshmen, or between college graduates and persons with only a 50-50 chance of passing in an academic high school curriculum. . . . These seem like grossly perceptible and therefore large

differences, as does the mean difference in height between 13- and 18-year-old girls, which is of the same size ( $d = .8$ ) (p. 25-27).

This paper provides a consolidation of the effect sizes that have been found in research on the impact of a third party observer on neuropsychological test performance. In addition, effect sizes from selected social facilitation research studies are presented. The intent of this review is to provide a summary of the clinical significance associated with an observer's presence on task performance in general, and neuropsychological testing specifically. This information should be a useful resource for clinical neuropsychologists faced with requests for third party observation.

### **METHOD**

In order to provide a complete review of empirical research on third party observers and neuropsychological testing, we have included the findings from three studies presented in this issue (Constantinou, Ashendorf, & McCaffrey, 2005; Lynch, 2005; Yantz & McCaffrey, 2005). In addition to neuropsychological studies, social facilitation studies from the social psychology literature were selected for inclusion if the dependent variable in the study was a task that appeared to involve similar skills to those measured by neuropsychological instruments. Forty-two published reports were found, from which 98 measures and their corresponding effect sizes were obtained. Thirty-six reports came from the social facilitation literature, which included 45 effect size measures, and six reports were from the neuropsychology literature, which included 51 effect size measures.

Effect sizes were extracted from the literature examining the impact of a third party observer on neuropsychological testing. Effect size estimates reported in terms of Cohen's  $d$  were converted into  $r^2$  values in order to report equivalent effect size statistics across studies (only Cohen's  $d$  and  $\eta^2$  values were reported in the literature reviewed). Following this conversion, each effect size provided an indication of the proportion of variance explained by the observer's presence. Effect sizes were not typically reported in the social facilitation literature and were therefore calculated if enough data were available. The reported effect sizes from the literature were categorized as small (.01), medium (.06), or large (.14).

A listing of each report obtained from the social facilitation literature, including the author(s), task, and effect size is shown in Table 1, organized by task. Studies that included the experimenter in the “no-observer” condition have been noted. The reason for this is that many social facilitation studies were designed so that the individual in the “no-observer” condition performed the task without *anyone* in the room. This does not parallel the no-observer condition in the neuropsychological evaluation where the test administrator is present. There is a subgroup of social facilitation studies, as indicated in Table 1, where the experimenter remained in the room for the no-observer condition. These studies are perhaps more comparable to the neuropsychological studies on third party observers in that another person is present in the no-observer condition as is necessarily the case for the neuropsychological testing. Therefore, we were interested in looking at effect sizes for these studies separately. Table 2 provides a listing of the author(s), task and effect sizes for the neuropsychological literature.

## RESULTS

The average effect size reported in the all of the literature reviewed is .13 ( $Mdn = .10$ ,  $SD = .12$ ). This average effect can be considered medium; the average effect of an observer accounts for approximately 13% of the variance in task performance. Of the 98 measures in the literature reviewed, 19 were affected by the presence of an observer to a small degree, 25 to a medium degree, and 39 to a large degree based on the reported effect size. No effect was found for 15 measures. Overall, 66.7% of the measures were affected to a medium or large degree. This distribution can be seen in Figure 1.

In the social facilitation literature, the average effect size associated with the presence of an observer is .17 ( $Mdn = .15$ ,  $SD = .15$ ), an average considered to be in the large effect size range. In those studies where the examiner remained in the room in the no-observer condition and therefore more closely paralleled the no-observer condition in neuropsychological studies, the average effect size is .16 ( $n = 23$ ,  $Mdn = .10$ ,  $SD = .12$ ). In conditions where there was a “true” no-observer conditions (i.e., the individual performed the task absent anyone, including the experimenter), the average effect size is .19 ( $n = 24$ ,  $Mdn = .16$ ,  $SD = .16$ ). In considering all of the social facilitation studies reviewed, the effect sizes can be categorized as 9 small, 10 medium, and 24 large. Four measures showed no effect associated with the presence of an observer (see

TABLE 1. Social Facilitation Literature Categorized by Effect Size

Category	Author(s)	Task	Effect size <sup>a</sup>
No effect			
	Pessin & Husband (1933)	Maze learning (accuracy)	.00
	Pessin & Husband (1933)	Maze learning (speed)	.00
	Berkey & Hoppe (1972)*	Paired associates (I) <sup>b</sup> (easy)	.00
	Berkey & Hoppe (1972)*	Paired associates (I) <sup>b</sup> (easy)	.00
Small			
	Landers et al. (1978)*	Coincidental timing task <sup>c</sup>	.02
	Laughlin & Wong-McCarthy (1975)*	Concept attainment	.03
	Laughlin & Jaccard (1975)	Concept attainment	.04
	Baldwin & Levin (1958)	Letter cancellation accuracy	.01
	Baldwin & Levin (1958)	Letter cancellation speed	.01
	Knowles (1983)	Maze learning	.02
	Pessin & Husband (1933)	Maze learning (trials to criterion)	.04
	Cottrell et al. (1967)*	Paired associates (I) <sup>b</sup>	.02
	Berkey & Hoppe (1972)*	Paired associates (I) <sup>b</sup> (hard)	.05
Medium			
	Quarter & Marcus (1971)*	Digit span recall	.10
	Miyamoto (1979)*	Maze learning (accuracy)	.10
	Miyamoto (1979)*	Maze learning (trials to criterion)	.09
	Houston (1970)*	Paired associates (I) <sup>b</sup>	.06
	Geen (1973)	Paired associates (I) <sup>b</sup>	.11
	Bond (1982)	Paired associates (I) <sup>b</sup>	.12
	Baron et al. (1978)*	Paired associates (I) <sup>b</sup> (hard)	.06
	Berkey & Hoppe (1972)*	Paired associates (I) <sup>b</sup> (hard)	.07
	Guerin (1986)	Rotary pursuit task <sup>d</sup>	.11
	Fedor et al. (1985)	Video game	.11
Large			
	Pessin (1933)*	3 Syllable recall (accuracy)	.39
	Pessin (1933)*	3 Syllable recall (trials to criterion)	.30
	Martens (1969)*	Coincidental timing (errors during learning) <sup>c</sup>	.17
	Martens (1969)*	Coincidental timing (post-learning performance) <sup>c</sup>	.24
	Martens (1969)*	Coincidental timing (trials) <sup>c</sup>	.22
	Guerin (1989)	Copying prose	.16

TABLE 1 (continued)

Category	Author(s)	Task	Effect size <sup>a</sup>
	Rajeki et al. (1977)	Maze learning (accuracy)	.33
	Rajeki et al. (1977)	Maze learning (speed)	.30
	Innes & Young (1975)	Mirror drawing	.30
	Deffenbacher et al. (1974)*	Paired associates (I) <sup>b</sup>	.23
	Geen (1979)	Paired associates (I) <sup>b</sup>	.23
	Guerin (1983)	Paired associates (I) <sup>b</sup>	.23
	Baron et al. (1978)*	Paired associates (I) <sup>b</sup> (easy)	.14
	Geen (1973)	Paired associates (D) <sup>c</sup>	.15
	Deffenbacher et al. (1974)*	Paired associates (D) <sup>c</sup>	.25
	Fouts (1980)	Reaction time	.45
	Lombardo & Catalano (1978)*	Rotary pursuit task <sup>d</sup>	.21
	Miller et al. (1979)	Rotary pursuit task <sup>d</sup>	.55
	Hanawalt & Ruttiger (1944)*	Story recall	.39
	Schmitt et al. (1986)	Typing (easy) <sup>g</sup>	.31
	Schmitt et al. (1986)	Typing (hard) <sup>h</sup>	.17
	Kimble & Rezabek (1992)	Video game	.26

<sup>a</sup>Cohen's *d* values have been converted to  $r^2$  values; effect sizes listed are either  $r^2$  or  $\eta^2$ .

<sup>b</sup>(I) indicates an immediate recall task.

<sup>c</sup>The task required subjects to anticipate the movement of a visual stimulus.

<sup>d</sup>The task required subjects to track a moving visual stimulus with a stylus or cursor.

<sup>e</sup>(D) indicates a delayed recall task.

<sup>f</sup>The task required the subjects to type their names backward with a number between each letter.

<sup>g</sup>The task required subjects to type their name.

\*Indicates that the experimenter was included in the no-observer condition.

Figure 2). In total, 72.3% of the measures studied in the social facilitation literature were associated with a medium or large effect size.

The results obtained by examining only neuropsychological measures are depicted in Figure 3. The average effect size reported on the neuropsychological measures was .10 ( $Mdn = .08$ ,  $SD = .09$ ), which is considered to be in the medium effect range. The effect sizes reported for the 51 neuropsychological measures were categorized as 13 small, 15 medium, and 15 large, in addition to 11 reporting no effect. The presence of a third party observer was found to have a medium to large effect on 58% of the neuropsychological tests studied.

Effect sizes from the neuropsychological studies were also summarized by cognitive domain (see Figure 4). On tests of memory, the aver-

TABLE 2. Neuropsychology Literature Categorized by Effect Size

Category	Author(s)	Task	Task Type	Effect size <sup>a</sup>
No effect				
	Lynch (2005)	Finger Tapping Test-D	Motor	.00
	Lynch (2005)	Grooved Pegboard-D	Motor	.00
	Lynch (2005)	Grooved Pegboard-ND	Motor	.00
	Yantz & McCaffrey (2005)	List Recognition <sup>†</sup>	Memory	.00
	Yantz & McCaffrey (2005)	Names-Faces Recognition <sup>†</sup>	Memory	.00
	Yantz & McCaffrey (2005)	Names-Faces Recognition (D) <sup>b†</sup>	Memory	.00
	Lynch (2005)	Paired associates (I) <sup>c</sup>	Memory	.00
	Yantz & McCaffrey (2005)	Short-term Memory <sup>†</sup>	Memory	.00
	Lynch (2005)	Trails B	A/E <sup>d</sup>	.00
	Yantz & McCaffrey (2005)	Visual Recognition (I) <sup>c†</sup>	Memory	.00
	Yantz & McCaffrey (2005)	Visual Recognition (D) <sup>b†</sup>	Memory	.00
Small				
	Kehrer et al. (2000)	Digit Span	A/E	.05
	Lynch (2005)	Finger Tapping Test-ND	Motor	.02
	Lynch (2005)	Grip Strength-D	Motor	.05
	Yantz & McCaffrey (2005)	List Acquisition Errors <sup>†</sup>	Memory	.03
	Kehrer et al. (2000)	RAVLT Perseverations	Memory	.05
	Kehrer et al. (2000)	Stroop color/words	A/E	.04
	Kehrer et al. (2000)	Stroop color-reading	A/E	.04
	Lynch (2005)	Trails A	A/E	.02
	Yantz & McCaffrey (2005)	Verbal Span <sup>†</sup>	Memory	.01
	Yantz & McCaffrey (2005)	Visual Span <sup>†</sup>	Memory	.02
Medium				
	Kehrer et al. (2000)	COWAT	A/E	.11
	Yantz & McCaffrey (2005)	Cued Recall <sup>†</sup>	Memory	.10
	Lynch (2005)	Grip Strength-ND	Motor	.08
	Yantz & McCaffrey (2005)	List Acquisition <sup>†</sup>	Memory	.13
	Yantz & McCaffrey (2005)	List Recall (D) <sup>b†</sup>	Memory	.10
	Lynch (2005)	Paired associates (D) <sup>b</sup>	Memory	.09
	Kehrer et al. (2000)	PASAT	A/E	.06

TABLE 2 (continued)

Category	Author(s)	Task	Task Type	Effect size <sup>a</sup>
	Constantinou et al. (2005)	Prose Memory <sup>†</sup>	Memory	.13
	Yantz & McCaffrey (2005)	Prose Recall <sup>†</sup>	Memory	.11
	Yantz & McCaffrey (2005)	Prose Recall (D) <sup>b†</sup>	Memory	.07
	Constantinou et al. (2005)	Prose Recall (D) <sup>b†</sup>	Memory	.13
	Kehrer et al. (2000)	Stroop word-reading	A/E	.10
	Yantz & McCaffrey (2005)	Visual Memory <sup>†</sup>	Memory	.08
	Yantz & McCaffrey (2005)	Visual Reproduction <sup>†</sup>	Memory	.08
Large				
	Constantinou et al. (2005)	Cued Recall <sup>†</sup>	Memory	.23
	Constantinou et al. (2002)	Cued Recall <sup>†</sup>	Memory	.25
	Yantz & McCaffrey (2005)	Cued Recall (D) <sup>b†</sup>	Memory	.16
	Constantinou et al. (2005)	Cued Recall (D) <sup>b†</sup>	Memory	.24
	Constantinou et al. (2002)	Cued Recall (D) <sup>b†</sup>	Memory	.24
	Yantz & McCaffrey (2005)	Global Memory <sup>†</sup>	Memory	.21
	Constantinou et al. (2002)	List Acquisition <sup>†</sup>	Memory	.20
	Constantinou et al. (2005)	List Acquisition <sup>†</sup>	Memory	.28
	Yantz & McCaffrey (2005)	List Acquisition Trials <sup>†</sup>	Memory	.17
	Constantinou et al. (2005)	List Acquisition Errors <sup>†</sup>	Memory	.24
	Constantinou et al. (2005)	List Recall (D) <sup>b†</sup>	Memory	.14
	Constantinou et al. (2002)	List Recall (D) <sup>b†</sup>	Memory	.19
	Yantz & McCaffrey (2005)	List Recall <sup>†</sup>	Memory	.16
	Constantinou et al. (2005)	Number of Learning Trials <sup>†</sup>	Memory	.38
	Yantz & McCaffrey (2005)	Verbal Memory <sup>†</sup>	Memory	.18

Note. D = Dominant Hand; ND = Non-Dominant hand; RAVLT = Rey Auditory Verbal Learning Test; PDRT = Portland Digit Recognition Test; PASAT = Paced Auditory Serial Addition Test; DCRS = Delayed Cued Recall Score.

<sup>a</sup>Cohen's *d* values have been converted to  $r^2$  values; effect sizes are listed as either  $r^2$  or  $\eta^2$ .

<sup>b</sup>(D) indicates a delayed recall task.

<sup>c</sup>(I) indicates an immediate recall task.

<sup>d</sup>A/E = Attention/Executive Functioning.

<sup>†</sup>A component of the Memory Assessment Scales.

age effect size associated with the presence of a third party observer is in the medium range ( $n = 37$ ,  $M = .12$ ,  $Mdn = .11$ ,  $SD = .10$ ). On tests of attention/executive functioning ( $n = 8$ ,  $M = .05$ ,  $Mdn = .04$ ,  $SD = .04$ ) and motor ability ( $n = 6$ ,  $M = .03$ ,  $Mdn = .01$ ,  $SD = .03$ ) the average effect sizes are small.

FIGURE 1. Distribution of effect sizes found in both neuropsychological and social facilitation research.

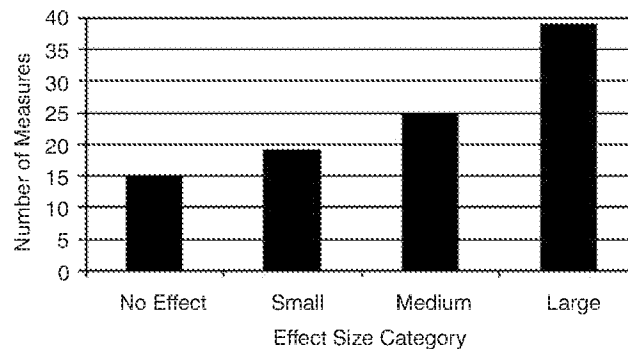
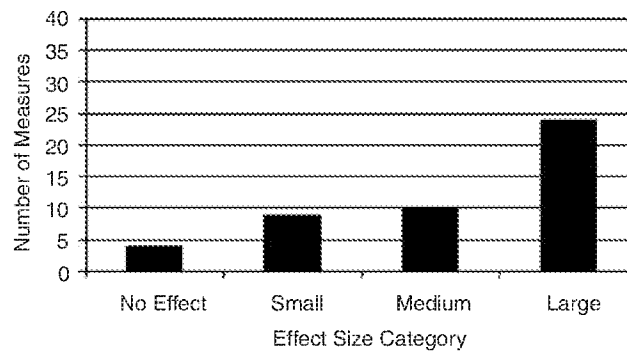


FIGURE 2. Distribution of effect sizes found in social facilitation research.



## DISCUSSION

This review of the effect sizes associated with an observer's presence indicates that an observer during completion of a task or neuropsychological testing can result in a meaningful change in the individual's performance. In the social facilitation literature, the mean effect size is large on tasks involving learning, graphomotor skills, attention, processing speed, and fine motor skills. This finding differs from the small mean effect size found by Bond and Titus (1983) in their meta-analytic review of 241 social facilitation studies. The discrepancy may be due to the fact that our review was limited in scope in that we included only 47 social facilitation studies that examined an observer's effect on mea-



FIGURE 3. Distribution of effect sizes found in neuropsychological research.

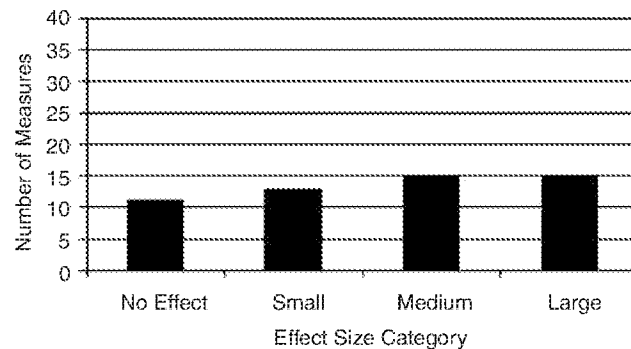
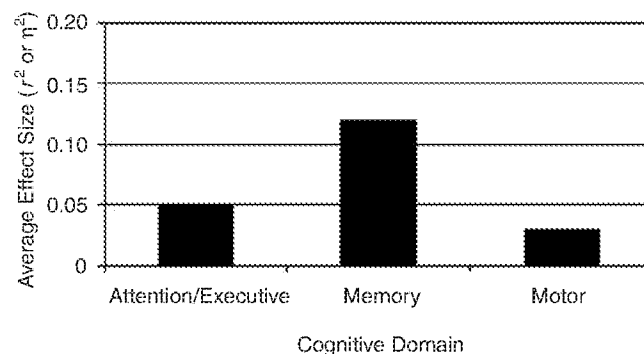


FIGURE 4. Average effect sizes for three cognitive domains measured by neuropsychological tests.



asures that appeared to involve cognitive or motor skill similar to those assessed by neuropsychological measures. Thus, it was not our purpose in reviewing the social facilitation literature to provide a comprehensive overview of the effect sizes found in this literature but rather to review research that would provide information about the potential impact of an observer on tasks relevant to the neuropsychological evaluation. Toward this end, we also separately examined those social facilitation studies that had included the experimenter in the no-observer condition. Theoretically, the test administrator qualifies as an observer that might elicit social facilitation effects, and it might be suggested that the effects of an observer (i.e., the test administrator) on performance is accounted

for within the normative data since the test administrator is present during testing. The mean effect size for those studies that included an experimenter in the no-observer condition was large (.16), and comparable to the mean large effect size for those studies with a "true" no-observer condition (.19). Bond and Titus (1983) also found the effect of an observer on task performance to be similar in the two experimental designs, that is, designs where the no-observer condition had the experimenter present and those where the individual was actually alone in the no-observer condition.

On neuropsychological testing, the presence of a third party has, on average, a medium effect on test performance. Similar to findings from the social facilitation literature, the effect of a third party observer on neuropsychological testing is variable. Performance on memory testing shows the greatest vulnerability to the presence of a third party. The average memory effect size of .12, (Cohen's  $d = .74$ ) represents a medium-size effect, and indicates that third party observation results in neuropsychological memory test scores that could differ by approximately three quarters of a standard deviation from memory test scores obtained during a standard test administration. Measures of attention/executive function and motor skills appear to be influenced only to a small degree when a third party observer is present.

These findings show that the inclusion of a third party observer in a neuropsychological evaluation results in clinically meaningful changes in test performance. The full extent of the impact on test findings is not known since only a handful of neuropsychological measures have been studied to date. The measures that have been examined, however, demonstrate a decline in tests scores, especially memory test scores, when the evaluation is conducted in the presence of a third party. Consequently, the neuropsychologist should expect that performance on some aspects of the testing will represent an underestimation of the individual's true ability when the testing is conducted in the presence of a third party observer.

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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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Accepted for publication: March 12, 2010.

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, Habib, 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 malingering, 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; Heilbrunner 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 be 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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## **Observation Compromises the Credibility of an Evaluation**

*by Robert J. Barth, PhD\**

Impairment evaluations often occur within an adversarial context, involving a claimant or plaintiff versus a defense or benefits system. This adversarial context sometimes precipitates a proposal for the observation of a clinical evaluation. Reasons for those proposals might include concern from the examinee's attorney that the examinee might reveal self-incriminating information, or a fear that the evaluation might be conducted in some inappropriate and biased manner.<sup>1</sup> Such proposals for observation can take several forms, including:

- an attorney who represents the examinee sitting in on the evaluation;
- attorneys from both parties sitting in on the evaluation;
- a court reporter sitting in on the evaluation and recording the entire process;
- the evaluation being audio or video recorded;
- a clinical expert working for the examinee or the examinee's attorney sitting in on the evaluation; or
- some other consultant hired by the examinee or examinee's attorney sitting in on the evaluation.

Evaluators sometimes allow such observation. Even when the evaluator does not explicitly agree, judges sometimes order evaluators to allow such observation. Some systems (for example, the Oregon workers compensation system) actually have standing regulations which specify that such observations are always allowed.

Some professional sources have endorsed this practice of allowing observation, pointing out the benefit that it provides for the evaluator.<sup>2</sup> Specifically, the observation process can help the evaluator avoid being dragged into the adversarialness of the examinee's claim. For example, if the examinee or the examinee's representatives accuse the evaluator of some wrong-doing, a recording of the evaluation could be used to demonstrate a lack of merit for such accusations, and anyone who observed the evaluation could similarly testify upon the evaluator's behalf. Additionally, by agreeing to the observation, the evaluator could demonstrate his or her desire for a cooperative interaction. However, such benefits do not truly provide justification for allowing the evaluation to be observed.

For any enterprise which is ostensibly based on science (as is the case for medical and psychological evaluations), this practice of permitting observation is misdirected. A century of scientific research is available on this subject. That research has reliably

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indicated that any such observation changes an examinee's presentation. While the finding of a change in the examinee's presentation is reliable, the nature of the change is not predictable. Subsequently, an observed evaluation can precipitate results that are different from a non-unobserved evaluation, but the nature of the difference is not identifiable for any one case. Because the history of health science on which the evaluation is based does not involve this form of observation, the results of an observed evaluation cannot be credibly interpreted based on health care science. This leaves the evaluation results without any basis for a scientifically credible analysis. In other words, scientific studies of the effects of observation have reliably indicated that such observation destroys the credibility of the evaluation process, and any subsequent findings. As such, an observed evaluation is a futile exercise at best, and a source of misinformation at worst.

The contaminating nature of observation is crucial for the evaluator and all stakeholders to recognize. For example, when the evaluation process produces conclusions that reflect negatively on either side of the adversarial process, the negatively affected side could rightfully claim that the conclusions are invalid because the evaluation was observed. To provide a practical illustration of the futility, it can be noted that when any party asks the evaluator, "Doctor, are your conclusions offered to a reasonable degree of certainty?", the only credible answer would be "No." The answer would have to be "No" because there is simply no scientific knowledge base which could be used for analyzing an observed consultation. Obviously, it is not in the best interest of any judicial or administrative system to allow circumstances which automatically invalidate an otherwise approved evaluation process. Any decision or policy that allows observation is therefore misdirected.

This article provides an overview of relevant scientific considerations, some of the subsequent ethical problems, and recommendations for evaluators who find themselves faced with such proposals.

### **Relevant science**

Most of the scientific research that is of relevance to this issue has been conducted in the field of social psychology. The topic matter is called "social facilitation and inhibition." This label refers to the impact that observation by other people has on an examinee's presentation. Research on this issue has been conducted repeatedly since the late 1800's.<sup>3,4</sup>

That research has reliably demonstrated that any form of observation results in a change in the examinee's presentation.<sup>3-5</sup> The change in the examinee's presentation is directly attributable to the simple fact that he or she is being observed. In other words, the presentation changes even when the observer does not intend to have any effect on it, even when the observer makes no effort to change it, even though there is not any interaction between the observer and the examinee, even though the observation (and the observer) is completely passive, and even when the observer is not visible to the examinee.

The nature of the change is largely unpredictable. Observation has been demonstrated to cause impairment under certain circumstances, and enhancement under others. Research on this subject has identified numerous variables which can play a role in predicting the direction and magnitude of the effect. The list of scientifically established factors includes:

- the complexity of the issue that is being evaluated;
- the novelty of the issue that is being evaluated;
- whether the observer is perceived by the examinee to possess some form of expertise;
- whether the observer is perceived by the examinee to be an evaluator;
- whether the observer is perceived by the examinee to be a stranger;
- whether the observer is perceived by the examinee to be an ally;
- whether the observer is perceived by the examinee to be attentive;

- the personality characteristics of the examinee;
- the examinee's prior experience with undergoing evaluations;
- the examinee's prior experience with being observed while being evaluated;
- the number of observers, and
- the examinee's perception of the status of the observers.<sup>5-8</sup>

There is no mechanism which allows an evaluator to systematically account for the impact of all such variables for any one evaluation. Subsequently, there is no mechanism that allows an evaluator to specify the manner in which a proposed observation will effect the examinee's presentation, or to identify how the observation of a completed evaluation affected the results.

The physical presence of the observers is not necessary in order for the social facilitation and inhibition effect to occur. Studies of this phenomenon have demonstrated that it occurs when the observation takes place from behind a one-way mirror, through closed-circuit television, through audio recording, and through video recording.<sup>9-15</sup> The only essential factor is the examinee's awareness or belief that the evaluation is being observed, will be observed, or can be observed.<sup>5,9</sup>

Research has also demonstrated that the effect occurs even when the examinee has been assured that the observation is not being directed toward him or her. When the examinee is specifically told that the observation is focused on the evaluator, rather than on the examinee, the social facilitation and inhibition effect occurs nonetheless.<sup>16</sup> Such findings are especially relevant to clinical evaluations, because proposals for observation of those evaluations are often motivated by a desire to monitor the behavior of the evaluator.

Sometimes the proposal for observation calls for a clinician to be the observer. Subsequently, it is important to note that such observation by a clinician has been specifically demonstrated to create the social facilitation and inhibition effect, even when the clinician has the exact same specialty as the evaluator.<sup>16</sup> Therefore, it is not credible to claim that, because the observation will be provided by a relevant clinical specialist, such observation should be allowed. In fact, published discussions have indicated that there is a significant risk that observation by a clinician will actually produce an especially strong effect.<sup>6-8</sup>

The long history of research on this subject has demonstrated that social facilitation and inhibition is a fundamental form of social influence.<sup>3</sup> Given its fundamental nature, it is not surprising that it has been specifically demonstrated for medical and psychological evaluations.<sup>17, 18</sup>

Because proposals for such observation often call for the examinee's attorney to be present (or some representative of the attorney), it is also especially relevant to note published findings of an examinee's presentation changing specifically in response to the presence of the examinee's attorney.<sup>19</sup>

Similarly, it is especially relevant to note that professional literature which has considered the relevance of various factors that play a role in determining the nature and magnitude of the social facilitation and inhibition effect has concluded that research findings may underestimate the magnitude of the effect in real-like forensic settings.<sup>6</sup> For example, research has demonstrated that when the examinee perceives the observer to be of a higher status, the magnitude of the effect is greater.<sup>7,8</sup> Because many real-life observers are attorneys, clinicians, or some other type of recognized professional, they would be perceived by examinees to have a status that exceeds the status of typical experimental observers, thereby enhancing the magnitude of the effect.

Research has provided some empirical support for this conclusion that the social facilitation and inhibition effect would be especially pronounced for the type of observation that is being discussed in this article. Specifically, meta-analyses have produced an average effect size for the entire history of social facilitation and inhibition research which is significant but small (according to conventions of effect size classification).<sup>4</sup> But when meta-analysis is limited to clinically relevant issues, the average effect size was large (according to classification conventions, this means that the effect is sufficiently strong to make the resulting differences grossly perceptible).<sup>18</sup> In order to grasp the significance of the effect size for such clinically relevant studies, it can be noted that the effect size is comparable to that which has been documented for the differences in height between 13-year old girls and 18-year old women.

When the author of this article has been faced with this set of circumstances, examinees have reliably volunteered their assurance that their presentation would not be altered by the presence of the observer. Because examinees appear to be reliably eager to volunteer such reassurance, it is subsequently important to note that research findings from studies of social facilitation and inhibition have documented reports from the participants that they had no awareness of the impact of the observation on their presentations.<sup>20, 21</sup> Therefore, such well-intentioned assurances from examinees are actually meaningless.

The significance of the social facilitation and inhibition research for clinical evaluations goes beyond the obvious implications that have been inherent in the above discussion. Evaluators must also consider the fact that allowing an evaluation to be observed disqualifies that evaluation from credible comparison to the entire history of health care science. In explanation, health care science has not involved any effort to include the type of observation that is being discussed in this article (this form of observation is an alien concept, having no relevance to health care whatsoever, and subsequently there has never been any reason to include such observers in research efforts). In fact, given the numerous factors that influence the nature and magnitude of the effect, it does not seem to be feasible, and maybe not even possible, to conduct research which would allow for the development of a scientific

*Continued on page 8*

# Observation Compromises the Credibility of an Evaluation (continued)

*Continued from page 3*

knowledge base that involves such observation. Credible analysis of an examinee's presentation is contingent upon the evaluator's ability to compare that individual presentation to the relevant tradition of health care science. When the evaluation is observed, there is no relevant tradition of health care science to which the examinee can be compared. An observed examinee is different from all of the non-observed examinees on whom the entire tradition of health care science has been based. Subsequently, attempting to compare the results from an observed evaluation to the entire history of health care science is equivalent to comparing apples to oranges. This creates a lack of scientific credibility for any efforts to interpret the results of an observed evaluation.

## Ethical considerations

This discussion of relevant ethical considerations begins with the simplest model: An evaluator is faced with a proposal for the evaluation to be observed, and the evaluator allows that observation (in the interest of self-protection and cooperation). In this scenario, ethical concerns include the fact that the evaluator is potentially misleading all involved parties. By allowing observation, the evaluator is sending an implicit message that a credible evaluation can be conducted with an observer present. Given the science that has been discussed above, that message would be false. In reality, the evaluator has deprived the referring party of the credible results that the referring party is expecting to receive (because the credibility of the evaluation has been compromised by the presence of an observer). Similarly, all other involved parties would be misdirected if they attempted to accept the results as having resulted from a credible evaluation.

A slightly more complex scenario involves court rulings or standing regulations which mandate that observation be allowed. In those circumstances, the evaluator cannot refuse the observation. The evaluator's decisions are instead:

- Should he or she move forward with an evaluation which will not be credible because it is being observed?
- What should he or she say about the circumstances?

If the evaluator moves forward with the evaluation without commenting on the evaluation's lack of credibility, then an ethical concern once again emerges along the lines of potentially misleading all involved parties. By moving forward without acknowledging the evaluation's lack of credibility, the evaluator is sending an implicit message that a credible evaluation can be conducted with an observer present. As was the case for the previously discussed scenario, that message would be false.

An evaluator who is faced with a legally imposed requirement for the evaluation to be observed might develop the false impression that he or she can behave in an ethically

sound fashion by refusing to accept any involvement in such a case. But this superficially noble stance actually creates an ethical problem. If evaluators refuse to become involved in cases where an evaluation must be observed, then the referring parties will be unfairly denied consultation to which they are entitled. In other words, the referring parties could be stripped of their rights, subsequent to the misdirected ruling of a judge, a misdirected regulation, or manipulative interference from an examinee's attorney. Further, if ethical evaluators refuse to become involved in such matters, then those matters would become dominated by unethical evaluators. Subsequently, it would appear that a truly ethical posture would involve the evaluator finding a way to stay in the case, and provide consultation to the referring party, without basing conclusions on an observed evaluation.

Because there is some reason to argue that the social facilitation and inhibition effect does not occur if the examinee is not aware of the observation<sup>9</sup>, a temptation arises to create circumstances which will allow for observation to take place without the examinee's awareness. The author of this article was once asked by a judge to investigate whether professional health care associations and licensure boards would consider such secret observation to be ethical. The only professional body who responded to that request for commentary was the National Academy of Neuropsychology, and their response included the simple principle that it is unethical to observe or record without the examinee's informed consent.

An additional ethical problem is created when a clinician is asked to serve as an observer of an evaluation that is being conducted by another clinician. The observing clinician's presence will actually sabotage the credibility of the evaluation. It is difficult to imagine that such sabotage can be construed as ethical behavior.

## Recommendations

Every effort should be made to exclude observers from any clinical evaluation. The evaluator who is faced with such a proposal should try to communicate to all involved parties an explanation of the critical importance of conducting the evaluation without observation. In order for the evaluation to have the greatest degree of reliability and validity, the evaluator must make every effort to follow professional standards, and thereby maintain consistency with the history of health care science. Allowing the evaluation to be observed would be a significant departure from professional and scientific standards, thereby compromising the credibility of the evaluation. Subsequently, the evaluator's primary goal should be to arrange for the evaluation to move forward without any observation.

If observation is somehow mandatory, then the evaluator has been denied an opportunity to conduct a credible evaluation. The evaluator should then refuse to base any eventu-



al conclusions on the results of an observed evaluation. The evaluator might meet with the examinee under the mandated observation, in order to eliminate any concerns that the evaluator would be offering conclusions for an examinee that he or she had never met (such concerns are regularly raised within claims contexts, even when vast amounts of evidence is already available in existing records). However, because the results from an observed evaluation would not be credible, the examiner's conclusions should be based on a review of the examinee's records, rather than on the results of an observed evaluation.

Despite having been denied an opportunity to provide a credible direct evaluation, the evaluator should not totally refuse to offer any consultation in the case. Such a refusal would compound the unfairness that has been imposed on the referring party. Such a refusal would also increase the probability that the referring party, and the case as a whole, would be subjected to the unethical behavior of some other clinician who might be willing to claim that a credible evaluation could be conducted under observation.

When observation is mandatory, the evaluator should clearly document and communicate that a credible direct evaluation was rendered impossible, that the referring party has subsequently been denied the right that they might otherwise have had to results from a direct evaluation, and that the system as a whole has been deprived of credible information.

When a clinician is asked to observe an evaluation that is being conducted by another clinician, he or she should refuse to provide such observation, and should explain to the requesting party that such observation would involve an unethical sabotage of the evaluation's credibility.

### Editor's Commentary

This article provides excellent insight to the negative impact that may occur as the result of involving an observer. This guidance is of greatest relevance for the interview. During the physical examination the presence of a staff member is often appropriate to facilitate the examination process and to serve as a "chaperone."

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## The effect of a third party observer and trait anxiety on neuropsychological performance: the Attentional Control Theory (ACT) perspective

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### ABSTRACT

**Objective:** Studies have reported that the presence of a third party observer (TPO) during neuropsychological assessments negatively affects the test performance of the examinee. The present study aimed to investigate the effects of a TPO and trait anxiety on neuropsychological performance according to Attentional Control Theory (ACT). **Method:** A sample of college students was recruited ( $n = 318$ ) and then 80 participants were selected to represent the high and low trait anxiety groups. Participants of each of group were randomly assigned to either the NTPO (non-TPO) or TPO conditions. The State-Trait Anxiety Inventory – Trait measure (STAI-T), Wisconsin Card Sorting Test (WCST-64), Stroop test, and Rating Scale for Mental Effort (RSME) were administered to both groups. To analyze the data, univariate ANOVAs were conducted. **Results:** The results indicated that under the conditions without a TPO the group with high trait anxiety had poorer processing efficiency, but under the conditions with a TPO they had poorer processing efficiency and poorer performance effectiveness than the group with low trait anxiety. In addition, the group with low trait anxiety showed poorer processing efficiency in the TPO compared to non-TPO condition. **Conclusions:** These findings provide support for the hypotheses of ACT regarding the relation between observer presence and poorer performance on neuropsychological tests, with individuals with higher trait anxiety showing greater negative effects. Implications and suggestions for further research are discussed.

### ARTICLE HISTORY

Received 26 July 2016

Accepted 23 November 2016

### KEYWORDS

Attentional Control Theory; performance effectiveness; processing efficiency; third party observer; trait anxiety

## Introduction

Third party observer (TPO) is a term used in psychological assessment that is best described as an individual whose sole purpose is to observe (and perhaps document) – but not affect – the psychological evaluation (Otto & Krauss, 2009). An observer has been found to affect an individual's performance on a variety of activities (Gavett, Lynch, & McCaffrey, 2005). The presence of a third party observer in the exam room during neuropsychological assessments is an issue that has occupied contemporary neuropsychologists (McCaffrey, Lynch, & Yantz, 2005). In some cases, conditions arise when a third party (e.g. a legal delegate, parents, or a test overseer) requests to observe the neuropsychological assessment along with the testing

professional and the participant. In these situations, there are a number of ethical issues for neuropsychologists, especially regarding security of tests, standardized test administration plans, normative data applicability, and most importantly, concerns relating to the impact of a TPO on test performance (Howe & McCaffrey, 2010; Otto & Krauss, 2009). Previous studies which dealt with the effect of the TPO in the context of neuropsychological testing have shown that TPO is related to a poorer performance on measures of memory and learning including perseverative errors on the Rey Auditory-Verbal Learning Test (Kehrer, Sanchez, Habif, Rosenbaum, & Townes, 2000), attention, executive functions, and fluency; alternately, it has also been associated with faster performance on simple motor measures (Constantinou, Ashendorf, & McCaffrey, 2005; Gavett & Mccaffrey, 2007; Horwitz & Mccaffrey, 2008; Kehrer et al., 2000; Lynch, 2005; Yantz & McCaffrey, 2009).

Most of the studies mentioned above have investigated the effects of a TPO on the performance of neuropsychological tests at the group level, while only a few studies in the neuropsychological literature have investigated the contribution of individual examinee characteristics such as anxiety and TPO on neuropsychological test performance. The relationship between anxiety and reduced cognitive performance has been considered by several researchers (for reviews, see Eysenck & Calvo, 1992; Eysenck, Derakshan, Santos, & Calvo, 2007; Sarason, Sarason, & Pierce, 1990). Most recently, Attentional Control Theory (ACT; Eysenck et al., 2007) has created considerable research interest, and many of its main hypotheses have received empirical support (Berggren & Derakshan, 2013; Derakshan & Eysenck, 2009; Eysenck & Derakshan, 2011). According to ACT, anxiety consumes resources within the limited capacity working memory system. Following Baddeley's (1986) working memory model, ACT assumes that under high cognitive load processing, performance on tasks that involve inhibition and shifting functions of the central executive system are adversely affected by anxiety (Miyake & Friedman, 2012). ACT also makes predictions regarding how these deficits will be manifested by drawing an important distinction between performance effectiveness and processing efficiency. Effectiveness refers to the quality of task performance indexed by standard behavioral measures (generally, response accuracy). In contrast, efficiency refers to the effort or resources spent in task performance (generally, completion time and mental effort), with efficiency decreasing as more resources are invested to attain a given performance level (Eysenck et al., 2007).

ACT predicts that efficiency will always be impaired by anxiety before effectiveness. This means that anxiety will not affect effectiveness under conditions in which anxious individuals are able to use additional processing resources (e.g. through increased mental effort and completion time) which enables them to perform at a similar level of accuracy to those lower in anxiety. In other words, if additional processing resources are available, impaired performance effectiveness is less likely to occur but at the cost of reduced efficiency. If these resources are unavailable, especially in the performance conditions that the worry and other irrelevant thoughts to the task are activated, performance effectiveness will be impaired (Edwards, Moore, Champion, & Edwards, 2015; Eysenck & Derakshan, 2011).

TPO is a performance condition (e.g. see Kehrer et al., 2000). According to ACT, performance conditions trigger worry and irrelevant thoughts to the task. The worrisome thoughts consume the limited attentional resources of working memory and make them less available for concurrent task processing, then impair the performance on a concurrent task (e.g. see Eysenck & Calvo, 1992).

Therefore, it is important the effect of TPO be considered according to ACT assumptions. Many previous studies have observed that anxiety impairs performance on neuropsychological tests (Edwards et al., 2015; Iorfino, Hickie, Lee, Lagopoulos, & Hermens, 2016; Johnson & Gronlund, 2009; Modi, Kumar, Kumar, & Khushu, 2015; Sharp, Miller, & Heller, 2015; Yochim, Mueller, & Segal, 2013), and the presence of a TPO impairs performance on neuropsychological tests (Howe & McCaffrey, 2010; Yantz & McCaffrey, 2009). The present study aims to explore the possible role of anxiety as a mediating factor of neuropsychological performance in the presence of a third party according to the assumptions of the ACT (Eysenck et al., 2007). Drawing on ACT, we predict that high trait anxiety (but not low trait anxiety) impairs processing efficiency under both conditions of presence of an observer and non-presence of an observer. Also, performance effectiveness is likely to suffer only in the presence of observers in the high trait anxiety group.

## Method

### Participants

Three steps were conducted to choose participants who were truly representative of the groups with high and low trait anxiety. In the first step, a sample of first year female Persian speaking college students from Shiraz University, Iran, were selected ( $n = 318$ ) through a multi-stage sampling method<sup>1</sup>. The participants completed the trait measure of the State-Trait Anxiety Inventory (Spielberger, Goruch, Lushene, Vagg, & Jacobs, 1983). In the second step, after scoring, in accordance with the previous studies were used the 25th percentile (i.e. Alves et al., 2007), so that the participants belonging to the upper 25% of the distribution ( $n = 81$ ) and the participants belonging to the lower 25% of the distribution ( $n = 79$ ) were selected. Then, with regard to the exclusion criteria and emphasizing the right of voluntary participation in this study, 42 participants from the upper 25% of the distribution who have highest trait anxiety scores (scores between 50 and 69) were assigned to the high trait anxiety group and 42 participants from the lower 25% of the distribution who have lowest trait anxiety scores (scores between 20 and 36) were assigned to the low trait anxiety group. In the third step, the scores of the samples were rechecked to ensure that their scores were consistent with the cut-off points in the previous research (i.e. Alves et al., 2007; Amiri, Mohamadpour, Salmalian, & Ahmadi, 2010; Byrne & Eysenck, 1995; Walkenhorst & Crowe, 2009). It was apparent that the scores of high trait anxiety group were the higher the cut-off point in the literature and the scores of low trait anxiety group were the lower the cut-off point in the literature.

Data from two participants in the high trait anxiety group and two participants in the low trait anxiety group were discarded for the following reasons: two participants withdrew before completing all tests, one of them was not present at the designated time, and one case was discarded due to experimenter error. Thus, 80 participants were included in the final analysis, 40 in high trait anxiety group (mean age:  $19.16 \pm .52$  years; scale scores:  $59.3 \pm 2.9$ ), and 40 in low trait anxiety group (mean age:  $19.28 \pm .6$  years; scale scores:  $31.1 \pm 3.2$ ).

Participants were excluded if they had: 1) a history of substance abuse, 2) a head injury that resulted in a loss of consciousness, 3) a medical illness that could affect neuropsychological performance, 4) a psychiatric/psychological condition that could affect

neuropsychological performance, and 5) used psychiatric drugs that could affect neuropsychological performance or cognitive functioning.

The study was approved by the research ethics board of Faculty of Educational Sciences of Shiraz University. Written consents were received from the participants to participate in the testing.

## Measures

### *State-Trait Anxiety Inventory Form Y (STAI-T – Form Y)*

The trait (STAI-T) version of the State-Trait Anxiety Inventory was used to assess trait anxiety (Spielberger et al., 1983). The STAI-T comprises 20 statements that provide an index of how participants 'generally' feel. For each item, participants were requested to give a graded response to self-descriptive statements. Responses for each item range from 1–4, resulting in total scores ranging from 20 to 80, with higher scores reflecting higher levels of trait anxiety.

The STAI-T has reported test–retest reliability over a 104-day period of  $\geq .73$  (Spielberger et al., 1983). In general, the Iranian version of the STAI-T can be considered reliable and valid. Cronbach's alpha of the test has been found to be .86, and convergent validity with the Taylor Manifest Anxiety Scale has been found to be .85 (Sharifi, 2003).

### *Wisconsin Card Sorting Test-64 (WCST-64)*

The WCST-64 (Kongs, Thompson, Iverson, & Heaton, 2000) is a card-sorting task generally accepted to measure cognitive flexibility – specifically, interference control, problem solving, and shifting response in accord with feedback (Topçuoğlu, Fistikci, Eklinci, Gönentür, & Agouridas, 2009). In this study the following scores are used in the evaluation of WCST-64 performance: total number of errors (number of cards that are not matched correctly with a stimulus card); number of perseverative errors (incorrect perseverative responses); and categories achieved (number of categories in which 10 consecutive correct matches were made).

In the present study, the three scores mentioned above were used to assess performance effectiveness and time to complete the task was used as a measure of processing efficiency. Lezak (1995) reported the validity of this test to measure cognitive deficits after brain damage was good ( $r = .86$ ). The test–retest reliability of this test in an Iranian population was also high ( $r = .85$ ; Ghadiri, Jazayeri, Ashayeri, & Ghazi Tabatabaei, 2006).

### *Stroop color-word test*

The Stroop test (Stroop, 1935) is the best-known of a larger class of Stimulus- Stimulus/ Stimulus-Response compatibility tasks (Kornblum, 1992). In this study completion time was used as a measure of processing efficiency. The overall number of errors served as a measure of performance effectiveness. The Stroop has been validated with both clinical and healthy samples and demonstrates good test–retest reliability (Dikmen, Heaton, Grant, & Temkin, 1999; Golden & Freshwater, 2002) and the Iranian version of the Stroop test demonstrates good validity and reliability (Zarghi, Zali, Tehranidost, Zarindast, & Khodadadi, 2011).



### Rating scale for mental effort (RSME)

Zijlstra (1993) described the RSME as a suitable self-report measure of mental effort in which participants are asked to mark a point on the scale that reflects the amount of mental effort spent on task performance. The RSME consists of a vertical axis scale with a range of 0–115, with nine descriptive pointers ranging from 3 (not effortful) to 114 (awfully effortful).

The reliability of the scale across a range of laboratory and real-life situations has been shown to be acceptable in laboratory ( $r = .88$ ) and in work situations ( $r = .78$ ) (Zijlstra, 1993). The scale has also been found to correlate strongly with validated psychophysiological indices of mental effort such as spectral variations in heart period variability (Zijlstra, 1993). The Persian version of this scale which was used in this study has satisfactory psychometric properties. Hosseini Ramaghani, Hadian Fard, Taghavi, and Aflaksair (2015) reported the test–retest reliability of this instrument as .86. Moreover, RSME along with time to complete the tasks were used to assess the processing efficiency.

### Procedure

The high trait anxiety (HTA) and low trait anxiety (LTA) participants were randomly assigned to a condition with TPO (TPO) or a condition without TPO (NTPO), resulting in a 2 (trait anxiety: low vs. high)  $\times$  2 (TPO condition: TPO vs. NTPO) between-participants design. There were 20 participants in each of the four conditions: low trait anxiety/no TPO (LTA/NTPO), low trait anxiety/TPO (LTA/TPO), high trait anxiety/no TPO (HTA/NTPO), and high trait anxiety/TPO (HTA/TPO).

Following Horwitz and McCaffrey (2008), the present study used the same examiner for both groups, and all tests were administered while the same observer was present during the administration of the tests. A female observer and a female examiner were recruited to perform the present study.

Regarding the presence of the observer, participants were informed that an observer would be in the room, although the reason for the observer's presence was not clear to either examinees or the examiner. The observer sat approximately 1 meter behind the examinee on the left side, facing the examiner. Although the observer took occasional notes during testing, she did not interrupt or directly interfere with the testing process, and tried to remain as unobtrusive as possible. After each participant performed the Wisconsin and Stroop tasks according to standard procedures, she was given the mental effort scale to estimate the invested amount of the mental effort. Each testing session lasted approximately 45 min for both groups.

### Results

The data were analyzed using univariate 2-way ANOVAs using WCST-64 and Stroop effectiveness and efficiency indices as dependent variables, and group (HTA vs. LTA) and condition (TPO vs. NTPO) as independent variables. ANOVAs were followed up with *post hoc* Tukey's tests when appropriate. Table 1 shows the descriptive statistics for performance effectiveness and efficiency of processing on the WCST-64 and Stroop tests.

**Table 1.** Group means and standard deviations for observation condition and trait anxiety groups.

Measure		Groups (N = 80)			
		HTA (n = 40)		LTA (n = 40)	
		TPO (n = 20)	NTPO (n = 20)	TPO (n = 20)	NTPO (n = 20)
Effectiveness	WCST-64-Category	4.20(1.15)	4.10(1.33)	4.00(1.41)	3.80(1.43)
	WCST-64-Preservation error	9.10(1.44)	8.95(1.43)	9.20(2.06)	9.00(1.68)
	WCST-64-Total error	22.20(3.90)	22.60(3.34)	22.55(3.83)	28.00(4.70)
	Stroop-Total error	1.70(.76)	1.90(.78)	2.00(.85)	3.60(.67)
Efficiency	WCST-64-Effort	49.70(10.15)	60.00(11.80)	61.25(11.23)	71.25(12.31)
	WCST-64-Time (min)	19.75(9.58)	28.50(11.10)	31.75(11.30)	41.70(9.77)
	Stroop-Effort	48.25(6.93)	58.50(11.80)	59.50(10.80)	68.75(10.90)
	Stroop-Time (s)	371.20(30.30)	322.00(17.35)	416.50(39.63)	451.00(23.42)

Notes: LTA: low trait anxiety; HTA: high trait anxiety; NTPO: condition without third-party observer; TPO: condition with third-party observer; WCST-64: Wisconsin Card Sorting Test-64; Time: test completion time; Effort: invested mental effort on the Rating Scale for Mental Effort (RSME).

**Table 2.** *F* value and Effect sizes ( $\eta^2$ ) for univariate comparisons for performance effectiveness and efficiency of processing in the Wisconsin Card Sorting test and Stroop test.

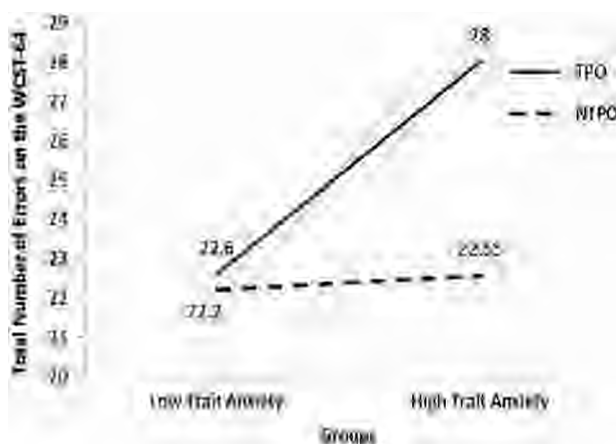
Dependent variable		<i>F</i> value ( $\eta^2$ ) of Source		
		Group	Condition	Group*condition
Effectiveness	WCST-64-Categories	.69 (Ns)	.25(Ns)	.02(Ns)
	WCST-64-Perseverative	.04(Ns)	.21(Ns)	.04(Ns)
	WCST-64-Total error	8.98(.11)**	9.29(.11)**	6.29(.09)**
	Stroop-Total error	14.68 (.16)**	11.16 (.13)**	8.37(.09)**
Efficiency	WCST-64-Effort	19.80(.20)**	15.72(.17)**	.02(Ns)
	Stroop-Effort	21.66(.22)**	17.82(.19)**	.82(Ns)
	WCST-64-Time (min)	33.38(.30)**	18.41(.19)**	.77(Ns)
	Stroop-Time (s)	181.68(.70)**	1.29(Ns)	41.89(.35)**

Note: \*\* $p < .01$ ; WCST-64: Wisconsin Card Sorting Test-64; Time: test completion time; Effort: invested mental effort on the Rating Scale for Mental Effort (RSME).

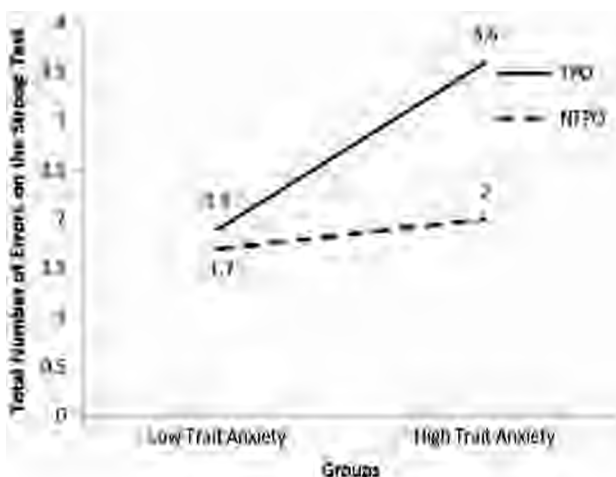
## Effectiveness

Univariate 2-way ANOVAs (see Table 2) indicated that, using the WCST-64 total errors as the dependent variables, there was a main effect for both group ( $F = 8.98, \eta^2 = .11$ ) and condition ( $F = 9.29, \eta^2 = .11$ ). There was also a significant interaction between group and condition ( $F = 6.29, \eta^2 = .09$ , all  $p < .01$ ). However, no statistical significant results emerged for the other WCST-64 variables (i.e. categories and perseverative errors). Regarding performance effectiveness on the Stroop test, main effects for group and condition were also found ( $F = 14.68, \eta^2 = .16$ ; and  $F = 11.16, \eta^2 = .13$ , respectively) as well as a significant interaction effect ( $F = 8.37, \eta^2 = .09$ , all  $p < .01$ ).

To examine the nature of the interactions, *post hoc* comparisons were conducted using Tukey's test. These analyses showed that participants who were in the TPO condition and exhibited HTA made more errors on both the WCST-64 and the Stroop test, as compared to those who were in the NTPO condition or those who exhibited LTA (all  $p$  values  $< .001$ ). These results suggest that the presence of a TPO is associated with greater impairment of performance effectiveness (i.e. fewer errors) on the WCST-64 and Stroop test among the HTA group as compared with the LTA group (see Figures 1 and 2). This means that the TPO effect on performance effectiveness on the WCST-64 and Stroop test may be influenced by trait anxiety level.



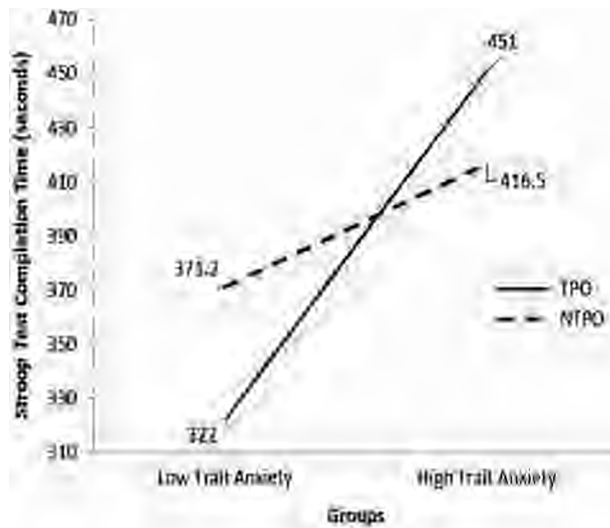
**Figure 1.** Observation condition by trait anxiety interaction on performance effectiveness in the Wisconsin Card Sorting Test-64; NTPO: condition without third-party observer; TPO: condition with third-party observer; sample sizes in each group and condition = 20.



**Figure 2.** Observation condition by trait anxiety interaction on performance effectiveness in the Stroop test; NTPO: condition without third-party observer; TPO: condition with third-party observer; sample sizes in each group and condition = 20.

### Efficiency

For invested effort on the WCST-64, univariate 2-way ANOVAs (see Table 2) indicated that there was a main effect for both group and condition ( $F = 19.8, \eta^2 = .20, p < .01$ ; and  $F = 15.72, \eta^2 = .17, p < .01$ , respectively), such that TPO condition was associated with greater effort investment than NTPO, and HTA was associated with greater effort investment than LTA. There was not, however, a significant interaction between group and condition ( $F = .02, \eta^2 = .00$ ). For invested mental effort on the Stroop test, there were again significant main effects for group and condition ( $F = 21.66, \eta^2 = .22, p < .01$ ; and  $F = 17.82, \eta^2 = .19, p < .01$ , respectively), such that, again, greater effort was associated with TPO condition and HTA group. Again, however, there was no significant interaction between group and condition ( $F = .82, \eta^2 = .001$ ).



**Figure 3.** Observation condition by trait anxiety interaction on efficiency of processing (completion time) in the Stroop test; NTPO: condition without third-party observer; TPO: condition with third-party observer; sample sizes in each group and condition = 20.

For invested time (i.e. the completion time) on the WCST-64, there were again significant main effects for group and condition ( $F = 33.38, \eta^2 = .30, p < .01$ ; and  $F = 18.41, \eta^2 = .19, p < .01$ , respectively) such that completion time was longer for the TPO condition and HTA group; again, there was no significant interaction between group and condition ( $F = .77, \eta^2 = .001$ ). Finally, for invested time (i.e. completion time) on the Stroop test, there was a significant main effect for group and an interaction between group and condition ( $F = 181.68, \eta^2 = .70, p < .01$ ; and  $F = 41.89, \eta^2 = .35, p < .01$ , respectively), but no significant main effect of condition ( $F = 1.29, \eta^2 = .017$ ). To examine the nature of this interaction, *post hoc* comparisons using Tukey's test were performed. The results indicated that all four groups (HTA/TPO, LTA/TPO, HTA/NTPO, LTA/NTPO) differed from each other (all  $p$  values  $< .003$ ), such that the TPO condition was associated with greatest investment of time on the Stroop test among the HTA individuals and the least investment of time among the LTA individuals. See Figure 3.

## Discussion

The present study investigated the effects of trait anxiety and TPO on the effectiveness and efficiency of performance on neuropsychological tests. Specifically, the assumptions of ACT were tested regarding in which circumstances there would be dysfunction of the central executive system on complex cognitive tasks under performance conditions.

The results indicated that in the two conditions of with and without a TPO, there was a significant difference in the amount of mental effort and time invested in those with HTA vs. LTA. Although the group with high trait anxiety invested more mental effort compared with the group with low trait anxiety, the interaction between anxiety level and TPO conditions was not significant. This indicates that even the group with low trait anxiety invested both more mental effort and time in the TPO condition compared with the NTPO condition. In other words, the presence of a TPO led to a decrement in the processing efficiency in both

groups, whether they had high or low trait anxiety. Results suggested that the TPO effect produces the need for more mental effort (both during the WCST-64 and Stroop test) and invested time (only on the WCST-64) regardless of trait anxiety level. On the Stroop test, however, the TPO effect produces the need for more time in those with high trait anxiety and less time in those with low trait anxiety.

Results also indicated that in the NTPO condition there was no significant difference between the two groups regarding performance effectiveness. When a TPO was present, the group with high trait anxiety made a higher number of total errors on both tests administered as compared with the group with low trait anxiety. This means with the presence of a TPO, the group with high trait anxiety has poorer performance effectiveness. Therefore, performance effectiveness in the TPO condition was adversely affected by the trait anxiety level.

Results are in line with a number of the central assumptions of ACT (Eysenck et al., 2007). The results confirm that anxiety creates more deficiency in processing efficiency than performance effectiveness on tasks involving the central executive system. The finding that trait anxiety did not impair performance effectiveness in the NTPO condition supports the ACT assumption that individuals with high trait anxiety might deploy greater task effort, enabling their performance effectiveness to be indistinguishable from those lower in anxiety (Edwards et al., 2015).

The finding that performance effectiveness (i.e. the number of total errors on the WCST-64 and Stroop test) in individuals with high trait anxiety was adversely affected by the presence of a TPO can be explained using the assumptions of ACT. ACT hypothesizes that worry is activated in stressful situations (especially in evaluative, performance, or monitoring conditions) and is most likely to occur in individuals with high trait anxiety. Worry has two effects; firstly, worrisome thoughts expend the limited attentional resources of working memory, so there are less available resources for concurrent task processing. Secondly, it involves increased motivation to minimize the detrimental anxiety (e.g. increased mental effort). Thus, processing efficiency is more impaired than performance effectiveness in these conditions. If auxiliary resources are unavailable, then performance effectiveness will be impaired (Eysenck et al., 2007). In this study, the presence of a TPO can act as a performance or stressful situation that leads to an increase in the production of worrisome thoughts. Consequently, these thoughts consume available auxiliary resources, and as a result there remain less available resources for concurrent task processing which then leads to a deficiency in performance effectiveness.

However, another result, which at first glance seems inconsistent with ACT, is the fact that in the group with low trait anxiety in the presence of an observer there was impaired processing efficiency. This was manifested as more mental effort both on the WCST-64 and on the Stroop test as well as more invested time, although this was only on the WCST-64. This finding is compatible with previous studies regarding the effects of TPO on neuropsychological test performance (e.g. Otto & Krauss, 2009; Yantz & McCaffrey, 2009). The primary difference is that these studies only examined the effects of a TPO on performance and did not examine the interaction of anxiety with presence of a TPO. Therefore, results of the present study suggest that the TPO effect produces the need for more mental effort regardless of trait anxiety level.

In explaining this finding that the LTA/TPO group improved in processing efficiency on the Stroop test, the hypothesis would be that the presence of a TPO provided additional

motivational function so the optimal level of arousal for high level performance was reached. An alternative explanation is that perhaps speed-driven tasks (e.g. Stroop test) may be differentially affected by an observer, which would be consistent with studies examining the effect of an observer on speed and physical performance (Eastvold, Belanger, & Vanderploeg, 2012). So since processing efficiency on the Stroop test (but not the WCST-64) in the LTA/TPO group was better than the LTA/NTPO group it can be inferred that the effect of trait anxiety levels on processing efficiency in the presence of an observer vary depending on task characteristics.

According to the findings of this study it is recommended that when a TPO is present during neuropsychological evaluations the evaluatee's level of trait anxiety be considered. If a person's level of trait anxiety is high, his performance (both processing efficiency and performance effectiveness) is probably weaker than if a TPO was not present (regardless of the task characteristics). But if a person's level of trait anxiety is low, the individual can be encouraged to increase motivation and minimize the effect of having a TPO present (e.g. through increased mental effort). In this case, processing efficiency is impaired but performance effectiveness should be indistinguishable from normal testing conditions. Also, for an individual with low trait anxiety test characteristics must be noted so that possible improved performance on speed-driven tasks can be taken into consideration.

Future studies can shed light on other possible factors which may influence variation in performance on an individual level when a TPO is present. Since the effect of TPO is a form of social influence that could differ from one culture to another, generalization of these findings should be made with caution. A limitation of this study is that all participants were first year female college students. It is suggested that future research be conducted on the effects of observer presence and anxiety on performance on neuropsychological tests in other populations.

## Note

1. Multistage sampling is a type of sampling which involves dividing the population into groups (or clusters). Then, one or more clusters are chosen at random and everyone within the chosen cluster is sampled. The technique is used frequently when a complete list of all members of the population does not exist and is inappropriate.

## Disclosure statement

No potential conflict of interest was reported by the authors.

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# The influence of an adaptation period in reducing the third party observer effect during a neuropsychological evaluation<sup>☆,☆☆</sup>

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Accepted 3 May 2007

## Abstract

Individuals have been shown to perform suboptimally on memory measures when a third party observer (TPO) is present. The current study attempted to use adaptation to reduce the inhibitory effect of a TPO on memory performance. Undergraduate participants ( $N=80$ ) were randomly assigned to one of four groups in a  $2 \times 2$  ( $\pm$ adaptation period,  $\pm$ observation) design in order to investigate the interaction between adaptation period and observation status. Results indicated that the adaptation period had a negligible inhibitory effect over the recall of observed participants ( $d=-0.11$ ), but unexpectedly, when unobserved participants were not given an adaptation period, recall was inhibited by a sizeable degree ( $d=-1.11$ ). These findings suggest that the presence of the TPO may have prevented participants from benefiting from adaptation to the general testing situation. To date, there are no known methods for eliminating the TPO effect.

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**Keywords:** Observers; Adaptation; Neuropsychological assessment; Memory

## 1. Introduction

The presence of a third party during a neuropsychological evaluation has been associated with decreased validity of the test results; memory measures in particular are prone to artificial suppression (e.g., Gavett, Lynch, & McCaffrey, 2005; McCaffrey, Lynch, & Yantz, 2005). This effect is problematic for many neuropsychologists faced with requests for third party observation. Although many recommendations to avoid third party observers (TPO) have been issued (e.g., Axelrod et al., 2000; Hamsher, Lee, & Baron, 2001; McCaffrey, Fisher, & Gold, 1994; McCaffrey, Fisher, Gold, & Lynch, 1996; McSweeney et al., 1998), it is not possible to eliminate third party observers from all situations (e.g., training situations). Therefore, neuropsychologists are likely to face situations in which a third party observer is inevitable. In these situations, the best alternative may be the use of methods to reduce the third party observer effect. Unfortunately, empirically developed methods for reducing the third party observer effect do not presently exist. The

<sup>☆</sup> This work is based on the first author's doctoral dissertation; parts of this manuscript were presented as a poster at the Annual Meeting of the National Academy of Neuropsychology, San Antonio, TX.

<sup>☆☆</sup> Cecil R. Reynolds, Ph.D. served as the guest action editor for this manuscript.

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current study draws from work in naturalistic and behavioral observation to better understand the third party observer effect in an attempt to minimize its influence.

The negative consequences of a third party observer are often interpreted from a *social facilitation* perspective (see McCaffrey et al., 2005). The social facilitation literature is one of the most abundant in the field of psychology. Scientific reports of social facilitation effects date back to Triplett (1898), who observed a facilitative effect of observation on bicycle racing and fishing reel turning. However, following Triplett (1898), numerous studies found that the presence of an observer led to an inhibition of performance (e.g., Pessin & Husband, 1933), leading some to refer to this effect as *social facilitation/inhibition* (for the sake of simplicity, the term social facilitation will be used here).

As a thorough review of the third party observer effect in neuropsychology has been published elsewhere (see McCaffrey et al., 2005; also see Gavett et al., 2005), this will not be pursued here. However, a study by Yantz and McCaffrey (2005) is particularly relevant to the current study. One of the many situations where third party observation is difficult to avoid is in training environments, as observation is often used as a training method. Yantz and McCaffrey (2005) measured the extent to which an observer – present explicitly for training purposes – influenced the performance of examinees. The observer was introduced as the examiner's supervisor; participants were told that the supervisor was present to monitor the quality of the examiner's test administration skills, and not to evaluate the examinee's performance. The supervisor's presence was found to exert an influence over test performance. Several summary scales from the Memory Assessment Scales (MAS), including Verbal Memory and Global Memory, differed significantly between observed and unobserved groups. Analysis of more specific subscales did not yield statistically significant group differences; this was attributed to a loss of power that resulted from experimentwise alpha correction of 17 pairwise comparisons. The effect sizes resulting from the supervisor's presence ranged from 0.00 to 0.21. Although the effects were not consistent across all measures, this inconsistency suggests that the third party observer may introduce uncontrolled variance into the test results, providing an additional argument for unobserved evaluations.

The overall trend witnessed in the third party observer literature indicates that memory measures are most negatively affected by the presence of a third party observer. On the other hand, motor measures appear to be relatively unaffected by the observer's presence (Gavett et al., 2005). The findings from this body of literature, especially those contributed by Yantz and McCaffrey (2005), raise an important question for neuropsychologists. Training is one area of the discipline where the presence of a third party observer (i.e., the supervisor or the trainee) is necessary. This poses a significant problem for neuropsychologists involved in training when it comes to interpreting data and estimating the magnitude of the effect produced by observation. Although it would seem to be prudent to eliminate third party observers from all assessment sessions, this practice would provide a serious hindrance to students in training. Further, a third party observer is unavoidable or even preferred in many other situations. For instance, when assessing prison inmates, a neuropsychologist has no choice but to conduct the evaluation under video surveillance and/or in the presence of a correctional officer. Many child evaluations are aided by the presence of a parent during testing, whether the purpose is to control the child's behavior, to facilitate communication, or for other reasons. Neuropsychologists may occasionally be called on to assess an individual who speaks a language different from their own; in this situation, the presence of a translator is obviously indicated if the assessment is to take place. And as pointed out by Duff and Fisher (2005), neuropsychologists practicing in rural areas may be faced with the ethical dilemma of being the only available practitioner for a client who requires or requests the presence of a third party, such as a lawyer.

These examples highlight the fact that reducing the third party observer effect is of great importance within neuropsychology. Certainly, third party observers should be avoided when possible, at the very least because the normative data does not reflect an observer's presence during standardized test administration. However, a greater understanding of potential strategies for reducing the third party observer effect is likely to benefit practitioners conducting an assessment with a third party observer present. Fortunately, the influence of observation on behavior has been extensively studied in other areas of psychology. This line of research may provide additional knowledge that could help reduce or eliminate the third party observer effect.

### 1.1. Reactivity to observation

The hallmark of psychology has always been the use of observation as a way of measuring and understanding behavior. Psychologists and other behavioral scientists have long understood that obtrusive observation alters the way in which persons behave – a phenomenon referred to as *reactivity to observation*, or simply, *reactivity*.

Haynes and Horn (1982) presented a review of reactivity in behavioral observation, which addressed the issues of reliability and validity of the behavioral assessment. These authors stated, “reactive effects occur when the process of observing a subject or subjects alters, either permanently or temporarily, their behavior” (Haynes & Horn, 1982, p. 370). In this review, the authors proposed five mediating factors responsible for reactivity to observation, one of which was social facilitation. In addition, the authors suggested several methods to reduce reactivity. These included:

- (a) use of participant observers or other alternative and supplementary (e.g., product of behavior) measures;
- (b) use of covert observation;
- (c) minimization of the obtrusiveness of the observers and observation process;
- (d) use of telemetry, video cameras, or tape recorders;
- (e) minimization of subject–observer interaction and other discriminative properties of the observers;
- (f) instructions to subjects to “act natural”;
- (g) allowing sufficient time for dissipation of reactive slope and variability in observation data; and
- (h) use of a number of observers or observation procedures so that differential effects cancel out. (Haynes & Horn, 1982, p. 382)

From the perspective of the neuropsychological evaluation, suggestions (a), (b), (f), and (h) can be eliminated as potential methods for reducing the impact of a third party observer for logistic or ethical reasons. Much research into “mere presence” effects of social facilitation has revealed that suggestion (c) is insufficient in reducing the effect (e.g., Bond & Titus, 1983; Markus, 1978; Schmitt, Gilovich, Goore, & Joseph, 1986; Zajonc, 1965), and as addressed by past third party observer studies (Constantinou, Ashendorf, & McCaffrey, 2002; Constantinou, Ashendorf, & McCaffrey, 2005), suggestions (d) and (e) have been ineffective at eliminating the effect of observation. However, suggestion (g) has yet to be scrutinized empirically to any sufficient degree, especially in the neuropsychology literature. This suggestion proposed that providing time to allow the examinee to adapt (or habituate) to the observer’s presence could reduce reactivity and lead to valid measurements. As Kazdin (1982) stated,

A frequent assumption is that any reactive effects will most likely be transient, because subjects will adapt to the conditions over time. If this assumption is correct, perhaps reactivity can be controlled by introducing an observer on a preliminary basis to allow subjects to adapt to the observer’s presence before formal data collection begins. (pp. 14–15)

## 1.2. Adaptation

In discussing the implications of adaptation and reactivity, Haynes and Horn (1982) remarked that “assuming the occurrence and habituation of reactive effects, data derived from early observation sessions are likely to have less external validity or generalizability than data derived from later sessions” (p. 381). Similarly, Kazdin (2003) wrote “when behavior is directly observed . . . there may be a novelty effect, and the early data may not represent performance . . . . It is assumed that after a period of time, obtrusive assessment will become less reactive and exert little or no influence” (p. 390).

The conclusions and recommendations offered by Haynes and Horn (1982) and Kazdin (2003) may provide the basis for reducing the effect of a third party observer in neuropsychological evaluations. If examinees can become adapted to the presence of a third party observer during an evaluation, the influence of the observer may be reduced, and the results of the evaluation may be more valid. However, there are no empirically established guidelines for eliciting adaptation in the presence of an observer. Due to the lack of relevant research, it is also difficult to predict how long it should take subjects to adapt to the presence of a third party observer, which behaviors can and cannot adapt, and the extent to which adaptation will occur.

A reasonable approach, then, is to select a practical adaptation strategy that can be implemented within a standard neuropsychological evaluation. Motor measures are typically administered during a neuropsychological battery (Rabin, Barr, & Burton, 2005), provide an efficient and billable use of time, are administered by the neuropsychologist, are evaluative in nature, and are relatively insensitive to the presence of a third party observer (Gavett et al., 2005). Therefore, motor measures appear to be a suitable choice for inclusion in the adaptation period. The effect of the third party observer on the motor measures used in the current study will be measured in order to ensure a lack of sensitivity.

### 1.3. The current study

The current study sought to determine whether or not the inhibitory effect produced by a third party observer on memory measures could be eliminated by providing examinees with an adaptation period. It was assumed based on prior work in the area that memory measures are sensitive to the effects of a third party observer and motor measures are not. Therefore, motor measures were sequenced prior to memory measures to allow the examinee time to adapt to the presence of an observer. Adaptation was measured in two ways; first, *between-test adaptation* was defined as any differential performance arising as a result of the motor measure adaptation period. Second, *within-test adaptation* was defined as any differential performance trend over time, across 10 list-learning trials. If the adaptation period reduces the third party observer effect, clinicians will be provided with an empirically based strategy for assessing patients in the presence of an observer that is easy to implement within most batteries.

## 2. Method

### 2.1. Participants

Eighty undergraduate students enrolled in one or more psychology courses at a large northeastern university during the spring 2006 semester participated in the study in order to receive course credit or course extra credit. Potential volunteers were screened through a centralized computer database prior to participation. Participants meeting exclusion criteria were not provided access to enroll in the study, or were asked not to enroll if certain conditions were met (exclusion criteria: learning or other developmental disabilities, acquired head injuries, seizure disorders, medications or medical conditions that may interfere with cognitive functioning, severe depression or anxiety, under age 17 or over age 24, non-native English speaker). These exclusion criteria were implemented in order to ensure that groups were free from non-systematic biases that could potentially influence performance.

The participants consisted of 36 women and 44 men, ranging in age from 17 to 21 ( $M = 18.71$ ,  $S.D. = 0.92$ ). The sample consisted of 52 (65.0%) Caucasian participants, 13 (16.3%) African American participants, 8 (10.0%) Latino/a or Hispanic participants, 5 (6.3%) Asian participants, and 1 (1.3%) participant of mixed ethnic and racial origin; 1 participant declined to provide this information. At the time of the study, 54 participants (67.5%) were freshmen, 11 (13.8%) were sophomores, 13 (16.3%) were juniors, and 2 (2.5%) were seniors. Seventy-five of the participants (93.8%) were right-handed; the remaining five were left-handed.

### 2.2. Measures

All participants were administered the same battery of tests. These tests consisted of two portions: a memory component and a motor component. The administration sequence of these two components was experimentally manipulated (see Section 2.3).

#### 2.2.1. Memory measures

A series of 10 lists of words, each list consisting of 8 word-pairs (16 words per list; 160 words total), was administered to participants. Word lists were constructed using words from the original Auditory Verbal Learning Test (AVLT; Rey, 1941, 1964) and six alternate AVLT forms (Crawford, Stewart, & Moore, 1989; Geffen, Butterworth, & Geffen, 1994; Lezak, 1983; Majdan, Sziklas, & Jones-Gotman, 1996; Shapiro & Harrison, 1990; Taylor, 1959; also see Hawkins, Dean, & Pearlson, 2004). To create these 10 word lists, 191 unique words from the AVLT and its alternate forms were identified. These words were imported into a Microsoft® Excel spreadsheet, and each of the 191 words were randomly assigned to a unique integer ranging from 1 to 191, using a random sequence generator found at <http://www.random.org>. The words paired with numbers one and two were added to the list first, and so on, until all eight of the word pairs were added, completing the first list. This process was continued 10 times to create 10 lists of words. Word lists were constructed in this fashion for several reasons. First, ten lists of words were desired, but the AVLT and its alternate forms provided only seven lists of words. Second, independent measurements were sought (to track performance over time), but several of the same words appear on more than one AVLT form. Third, lists were required to be free from systematic bias in terms of difficulty or other factors (e.g., semantic relatedness between words within a list); therefore, random

assignment was used to assign words to lists. The lists that were constructed were administered to all participants in the same order.

In administering the word lists, the examiner read each pair of words in a two-second interval; each subsequent word pair was read following a two-second pause. As soon as the examiner finished reading the final word on the list, the participant was prompted to recall as many words from the list as possible, in any order (i.e., not necessarily in pairs). Following recall, the examiner introduced the next list of words by instructing participants to try to remember only the new list of words and to ignore words from previous lists. After the recall portion of each list, the examiner recorded the overall time that had elapsed since the start of the memory portion of testing.

The primary dependent variables for the memory test block were the total number of words recalled from each of the 10 trials and the average of scores across the 10 trials. The number of intrusions, repetitions, and perseverations were also measured. Intrusions were defined as words not read by the examiner (including words that may have appeared on a subsequent list). Repetitions were defined as any word that was uttered more than once per list by the participant. Perseverations were defined as any response that would have been correct on a previous list.

This paired list learning paradigm was chosen for several reasons. First, list learning and paired associates tasks have been utilized often in the social facilitation and third party observer literature, and therefore a reasonable effect size estimate was possible. Further, in order to measure within-task performance (i.e., performance on different versions of the same task over time), the memory measure chosen necessitated the ability to undergo repeated administration without the influence of differential carryover/practice effects; because each list of words was independent of previous lists, the participants' list learning performance could be measured over time without systematic interference.

### 2.2.2. Motor measures

Motor measures were used as an adaptation mechanism. Because the memory measures were the primary variable of interest, arranging motor measures before memory measures provided an adaptation period that preceded the memory component. The administration sequence of these two components (and therefore the presence or absence of an adaptation period) was experimentally manipulated (see Section 2.3).

The first motor task administered to participants was the Finger Tapping Test (FTT) from the Halstead-Reitan Neuropsychological Battery for Adults (Reitan & Wolfson, 1993). The Lafayette Grooved Pegboard Test (Trites, 1989) and a test of Static Motor Steadiness followed the administration of the FTT.

The FTT is a test of finger oscillation speed; participants were instructed to place their palm flat on the test apparatus (a wooden board with a tapping and counting mechanism), and to tap the key using their index finger, first with the dominant hand, then with the nondominant hand. Standardized test administration was followed (see Reitan & Wolfson, 1993, pp. 229–234), with the exception that all participants performed 10 trials per hand in order to ensure that all participants spent an equal amount of time in the adaptation period. The average number of taps across all 10 trials for both the dominant and nondominant hands was measured.

The Grooved Pegboard test, which involves sequentially placing pegs into holes in a pegboard using each hand separately, was administered in accordance with its standardized instructions (Trites, 1989). The time taken to fill the pegboard and the number of dropped pegs for both the dominant and nondominant hands was recorded.

The Static Motor Steadiness Test is a test of hand and arm steadiness. Participants were instructed to place a stylus into a hole in a metal apparatus for 15 s and to avoid touching the sides by keeping their hand and arm as steady as possible. Participants were given three trials per hand with successively smaller holes. The number of contacts with the sides was recorded for each hand. Initially, the duration of time spent in contact with the side of the holes was to be measured; however, equipment malfunction prevented this from being recorded accurately.

Following the Finger Tapping, Grooved Pegboard and Static Motor Steadiness tests, the examiner recorded the total time that had elapsed since the initiation of the motor measures.

### 2.3. Procedure

Based on the two between-groups independent variables (observation and adaptation period), each with two levels (unobserved/observed; not given/given), four groups were established. Participants were randomly assigned to one of these groups. Random assignment was conducted using 20 predetermined blocks of random sequences of the numbers one, two, three, and four, corresponding to the four groups. This blocking method of random assignment was conducted



in order to ensure that an equal number of participants ( $n = 20$ ) were assigned to each group while maintaining random assignment (see Kazdin, 2003).

In keeping with the  $2 \times 2$  between-subjects design, two groups of participants were tested in the presence of an observer, and the other two groups were tested without an observer present. To complete the design, two groups of participants were administered memory measures following the adaptation period (motor tests), and two groups were administered memory measures without an adaptation period (i.e., motor tests following memory tests).

Upon each participant's arrival to the testing location, the experimenter (a Caucasian male graduate student) introduced himself to the participant. Under conditions where an observer was present, the experimenter then introduced the observer (a Caucasian male undergraduate research assistant) by stating "This is [name]; he's a student in training. He'll be watching for training purposes, OK?" No participant voiced concern or disapproval with the observer's presence. At all times, the observer was seated approximately one meter behind and to the right of the examiner, facing the participant. The observer remained as unobtrusive as possible; he did not speak to any participant and pretended to take occasional notes on a clipboard in a discreet manner. Due to the nature of the observer's presence, deception was used; participants were not made aware of the true purpose of the observer's presence until debriefing occurred.

Next, under both observed and unobserved conditions, the experimenter administered informed consent and double checked whether participants were eligible to participate based on the aforementioned exclusion criteria. Two potential participants were eliminated at this stage for meeting exclusion criteria: one due to a prior history of head injuries, the other due to having taken medication that was known to interfere with cognitive functioning. Using blocked random assignment, participants were assigned to one of the predetermined experimental conditions based on order of arrival.

Once participants signed the informed consent document and were verified as eligible based on the exclusion criteria, the experimenter introduced the study and proceeded to administer the tests. Participants not given an adaptation period were administered the memory measures first, followed by the motor measures. Participants given an adaptation period were administered the motor measures first, followed by the memory measures. The adaptation period lasted an average of 21 min and 18 s.

Following completion of the study, participants were given a debriefing form indicating that full debriefing would occur upon completion of all data collection, and participants were asked to provide a method of contact (e.g., e-mail address) to be debriefed at a later date. Delayed debriefing was implemented because participants may have had the opportunity to communicate with prospective participants about the hypotheses and the true role of the observer. This delayed debriefing, in conjunction with the use of deception, was implemented in order to minimize demand characteristics and other potential confounds. The above methodology received human subjects IRB approval prior to the outset of the study.

### 3. Results

The composition of the four groups was examined to confirm that the blocked random assignment resulted in an equal distribution of demographic characteristics among groups. A one-way ANOVA indicated that there were no significant age differences between the four groups,  $F(3, 76) = 1.38$ ,  $p = 0.25$ . Chi-Square tests for independence revealed no significant group differences in terms of sex,  $\chi^2(3, N = 80) = 2.02$ ,  $p = 0.57$ ; ethnicity,  $\chi^2(3, N = 79) = 9.61$ ,  $p = 0.65$ ; handedness,  $\chi^2(3, N = 80) = 5.76$ ,  $p = 0.12$ ; or class standing,  $\chi^2(3, N = 80) = 7.36$ ,  $p = 0.60$ . The amount of time spent by the observed ( $M = 1282.40$  s,  $S.D. = 66.21$ ) and unobserved ( $M = 1272.95$  s,  $S.D. = 107.04$ ) participants in the adaptation period was not significantly different,  $t(38) = -0.34$ ,  $p = 0.74$ .

Table 1 presents the average list learning scores for each level of the between groups independent variables. It can be seen in Table 1 that three of the four groups exhibited similar recall performance. The exception was the unobserved group that received an adaptation period; this group recalled approximately one more word per list than the other three groups. Looking across the rows in Table 1, the raw and standardized differences between the observed and unobserved groups can be seen at each level of adaptation period. Similarly, looking down the columns in Table 1 reveals the raw and standardized differences between adaptation periods at each level of Observation. Collapsing across adaptation period, participants tested in the presence of a third party observer ( $M = 7.07$ ,  $S.D. = 1.15$ ) recalled 0.40 fewer words than participants tested without a third party observer ( $M = 7.48$ ,  $S.D. = 1.22$ ), an effect size of  $d = -0.34$  (95% CI =  $-0.78$  to  $0.10$ ).

The extent to which the adaptation period moderated the effect of the third party observer is presented graphically in Fig. 1. The right side of Fig. 1 shows that when a third party observer was present, the adaptation period had a

Table 1  
Simple main effects of observation and adaptation period

Adaptation period (AP)	Observation		Difference	Effect of observation <i>d</i>
	Unobserved	Observed		
Not given				
<i>M</i> (S.D.)	6.88 (0.85)	7.14 (1.00)	0.26	0.28
95% CI	6.48–7.28	6.67–7.60		–0.35 to 0.90
Given				
<i>M</i> (S.D.)	8.07 (1.26)	7.01 (1.30)	–1.06	–0.83
95% CI	7.48–8.66	6.40–7.62		–1.47 to –0.18
Difference	1.19	–0.13		
Effect of AP				
<i>d</i>	1.11	–0.11		
95% CI	0.44–1.77	–0.73 to 0.51		

negligible to small effect on recall performance. On the contrary, unobserved participants saw a sizeable benefit from the adaptation period (seen on the left side of Fig. 1). The overall data (collapsing across Observation) indicate that there were 0.53 ( $d = 0.46$ , 95% CI = 0.01–0.90) more words per list recalled when an adaptation period was given ( $M = 7.54$ , S.D. = 1.37) than when an adaptation period was not given ( $M = 7.01$ , S.D. = 0.93).

These data were analyzed using a  $2 \times 2$  between-groups ANOVA; the results are presented in Table 2. Of note is the significant main effect of observation and the significant observation  $\times$  adaptation period interaction.

Fig. 2 presents the performance of each of the four groups across the 10 list learning trials. Mauchly's test of Sphericity (Mauchly, 1940) indicated that the sphericity assumption of the error covariance matrix was violated; therefore, a Greenhouse-Geisser  $\epsilon$  correction of 0.82 was applied to tests of within-subjects effects. Following this correction, the  $2 \times 2 \times 10$  within-subjects ANOVA revealed a significant main effect of Trial and a significant Trial  $\times$  Observation interaction (see Table 2).

A follow-up within-subjects polynomial contrast on the significant main effect of Trial indicated that the slope of the linear performance pattern across the 10 list learning trials differed significantly from a slope of zero,  $F(1, 76) = 13.79$ ,  $p < 0.01$ ,  $\eta^2 = 0.15$  (95% CI = 0.03–0.30), observed power = 0.96. From visual inspection of Fig. 2A and B, it appears that the general linear trend across the 10 trials was negative in slope. Follow-up polynomial contrasts on the significant Trial  $\times$  Observation interaction indicated that the observed and unobserved groups differed significantly

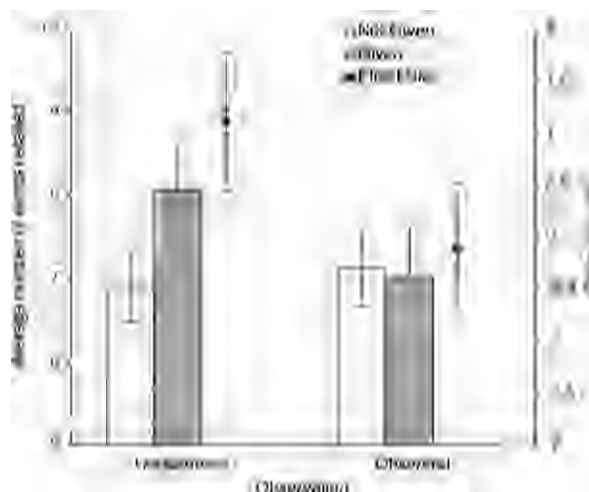


Fig. 1. The columns correspond to the left ordinate and indicate the mean number of words recalled by each group. The dark circles correspond to the right ordinate and represent the effect size ( $d$ ) produced by the adaptation period, for both unobserved ( $d = 1.11$ ) and observed ( $d = -0.11$ ) conditions. Error bars represent 95% confidence intervals.

Table 2

Results of the analysis of variance for between groups and within subjects effects

Source	d.f. <sup>a</sup>	<i>F</i>	<i>p</i>	Observed power	Effect size	
					$\eta^2$	95% CI
Between groups						
O	1, 76	2.59	0.11	0.36	0.03	0.00–0.13
A	1, 76	4.54*	0.04	0.56	0.05	0.00–0.17
O × A	1, 76	6.92*	0.01	0.74	0.08	0.00–0.21
Within subjects						
T	7.40, 562.44	7.99*	<0.01	1.00	0.09	0.04–0.13
T × O	7.40, 562.44	2.10*	0.04	0.82	0.02	0.00–0.04
T × A	7.40, 562.44	1.61	0.12	0.69	0.02	0.00–0.03
T × O × A	7.40, 562.44	0.96	0.46	0.43	0.01	0.00–0.02

Note: O: observation; A: adaptation period; T = trial.

<sup>a</sup> A Greenhouse-Geisser  $\epsilon$  correction of 0.82 was applied to the within subjects d.f.\*  $p < 0.05$ .

in the cubic performance trend across the 10 learning trials,  $F(1, 76) = 9.46$ ,  $p < 0.01$ ,  $\eta^2 = 0.11$  (95% CI = 0.01–0.25), observed power = 0.86 (see Fig. 2). No significant trial × adaptation period or trial × observation × adaptation period interactions were found (see Table 2).

The effects produced by a third party observer on motor tasks were also calculated. Table 3 presents the mean scores and standard deviations for each motor test, grouped into unobserved and observed groups. In addition, Table 3 provides an estimate of the effect size ( $d$ ) produced by the observer on the three motor tasks. The estimated overall effect size produced by a third party observer on motor performance (across the three motor tests) was  $d = -0.02$  (95% CI = -0.46 to 0.42).

#### 4. Discussion

The results reveal that the motor test adaptation period was ineffective in promoting adaptation and reducing the third party observer effect. Adaptation was investigated both between- and within-tests. Between-test adaptation was

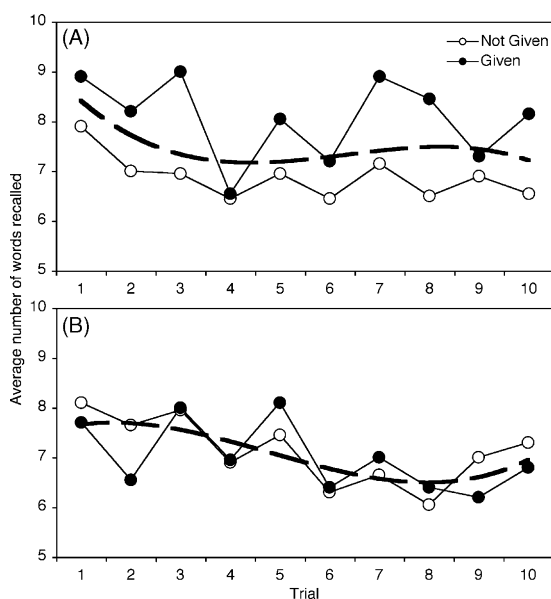


Fig. 2. Average number of words recalled on Trials 1–10 by groups given and not given an adaptation period, at both the unobserved (A) and observed (B) conditions. The broken line represents the cubic trend in the data.



Table 3  
Third party observer effect on motor measures

Measure	Unobserved		Observed		Effect size	
	<i>M</i>	S.D.	<i>M</i>	S.D.	<i>d</i>	95% CI
FTT-D	48.42	6.47	47.30	6.34	−0.17	−0.61 to 0.27
FTT-ND	46.66	6.12	44.65	6.34	−0.32	−0.76 to 0.12
GP-D	66.55	11.20	68.14	12.23	−0.14	−0.57 to 0.30
GP-ND	72.96	12.06	70.77	12.61	0.18	−0.26 to 0.62
SMST-D	11.85	6.72	10.64	6.32	0.19	−0.25 to 0.62
SMST-ND	14.59	7.08	13.33	7.35	0.17	−0.27 to 0.61

Note: FTT: Finger Tapping Test; GP: Grooved Pegboard; SMST: Static Motor Steadiness Test; D: Dominant Hand; ND: Nondominant Hand.

not observed; administering motor tests prior to memory tests actually reduced recall by 0.11 standard deviation units, with 95% confidence intervals surrounding this effect size estimate ranging from −0.73 to 0.51. This suggests that the adaptation period employed in the current study had an effect that could not be reliably differentiated from a null effect. However, given the relatively wide confidence interval range around this effect size estimate, it is not possible to rule out the proposition that the true population effect size parameter is much more positive or negative. Replication is therefore indicated.

There was also no evidence that within-test adaptation occurred. Although a difference in cubic trend was seen when comparing the performance of the observed and unobserved groups across the 10 list learning trials (see Fig. 2), it is unclear what this cubic trend difference signifies. Participants' performance trend across the 10 list learning trials did not vary as a function of observation status or adaptation period. Because recall performance did not vary as a function of time spent in the presence of an observer, there was no evidence that within-test adaptation occurred.

Why did adaptation not occur? There are two likely explanations. First, the participants may not have spent enough time in the adaptation period for adaptation to occur. It is possible that additional motor measures should have been included to increase the duration of the adaptation period. However, the inclusion of additional motor tasks may have made the design less useful to neuropsychologists, who may have neither the time nor the desire to administer four or more motor measures at the beginning of the testing session. Inclusion of additional motor measures in the current study may have increased the likelihood of adaptation, but at the same time, this may have reduced the applicability of the findings to the average practitioner.

A second explanation for the lack of adaptation may be that adaptation is simply not possible or feasible within a single assessment session. For the sake of simplicity, the current study attempted to elicit adaptation within the context of a single testing session, in part to improve applicability to clinical practice. Practitioners may not ask patients to return for multiple sessions, and if they do, the spacing of subsequent returns is not standardized. Therefore, attempting to design a study investigating adaptation over multiple sessions was considered less likely to produce clinically useful results. However, because adaptation was not elicited by the current method, it may be useful to replicate this study using assessments that continue over the course of several sessions to determine if a different strategy leads to adaptation. Several studies utilizing an adaptation paradigm reported that adaptation successfully occurred over the course of several days (e.g., Gittelsohn, Shankar, West, Ram, & Gnywali, 1997; Purcell & Brady, 1966; Zegiob, Forehand, & Resick, 1979). This provides some indication that adaptation to the presence of a third party observer may occur if the examinee is exposed to the observer over the course of several assessment sessions. Future research should explore this possibility further.

Despite the lack of support for the original hypotheses, the results revealed several interesting patterns. Of the four experimental groups, three groups did not differ in recall across the 10 trials. The fourth group, unobserved/adaptation period given, recalled an average of approximately one more word per list than the other three groups. Although this pattern ran contrary to expectations, it is interpretable in the context of what is known about the third party observer effect and adaptation. It appears that optimal performance was elicited when unobserved participants were given an adaptation period prior to the administration of memory measures. When unobserved participants were not given an adaptation period, they performed suboptimally; in fact, this degree of performance suppression was roughly equivalent to that seen in the presence of a third party observer. It appears that under standard conditions (i.e., unobserved), the adaptation period may have allowed the unobserved participants to adapt to the testing situation itself, leading to

optimal performance. Under nonstandard conditions (i.e., observed), the observer may have prevented the participants from adapting to the testing situation. It follows from this assumption that adaptation to the third party observer and adaptation to the testing situation may be independent or sequential processes.

Adaptation to the testing situation may result from an increased sense of comfort or familiarity with neuropsychological tasks and the experimenter. With an observer present, participants may not be able to achieve this sense of comfort or familiarity. While this theory appears to be a likely explanation for the results, it should be noted that the current study was not designed to determine whether adaptation to the testing situation occurred during motor measures, for reasons of logistics. Nevertheless, if this theory is correct, then in order for adaptation to the testing situation to occur, adaptation to the third party observer must occur first. This would appear to require a longer or different adaptation period than the 21-min motor adaptation period provided in the current study.

The current study is limited in several ways. One limitation of the study is the sample size. Although the sample size was sufficient to achieve adequate statistical power for between groups main effects of  $d \geq 0.5$  at an alpha level of 0.05, the study lacked the statistical power necessary to detect within-subjects effects and their single d.f. contrasts. In addition, the sample size did not allow for high degrees of precision in point estimates of means and effect sizes.

Because undergraduate psychology students from a single university with no known or suspected neurological or psychiatric illness volunteered to participate, the findings cannot be generalized beyond this population. Further, the testing took place in a university research environment. Generalizations to clinical settings are therefore inappropriate as well; for example, the current study did not utilize a clinical interview prior to the onset of testing. In clinical situations, the examinee usually spends more time discussing the presenting problem or referral question with the neuropsychologist, who often gathers information pertaining to the patient's social and medical history, cognitive and behavioral sequelae, and so forth.

Although the results do not generalize to a more relevant neuropsychological context, the third party observer effect witnessed in the current study is in line with a large body of research indicating that observation alters performance. There should be very little doubt remaining that third party observation is detrimental to the validity of neuropsychological assessment results, especially memory measures. Unfortunately, this study did not support the use of an adaptation period as a strategy for reducing the third party observer effect.

Despite these limitations, the study makes several important contributions. One contribution is that the study confirms many previous findings showing that the third party observer is a threat to the validity of assessment results. Related to this, the study utilized a trainee as the third party observer. Yantz and McCaffrey (2005) evaluated the influence of a supervisor's presence on test performance, but the influence of observation by a trainee had not been investigated prior to this study. As expected, the presence of the trainee influenced performance in a manner similar to the influence exerted by other types of observers.

Motor measures have been utilized often in third party observer research. The most common have been the Finger Tapping and Grooved Pegboard tests. This study added to the growing body of third party observer data on these two tests, and extended this research by investigating the effect of a third party observer on a test of Static Motor Steadiness. The results indicated that the third party observer effect on this test could range from a magnitude of  $-0.26$  to  $0.61$  standard deviation units. This estimate is clearly imprecise, but can be improved with additional research. Across all motor measures, the average effect size produced by the presence of a third party observer was estimated to be  $d = -0.02$  (95% CI =  $-0.46$  to  $0.42$ ).

#### 4.1. Conclusions

Many have recommended that neuropsychologists deny third parties the opportunity to observe evaluations when possible; the findings presented here lend further empirical support to these recommendations. At this time, researchers have employed all of the relevant suggestions offered by Haynes and Horn (1982) for reducing the influence of an observer, none of which have eliminated the third party observer effect. The current study found that observation suppressed recall performance by  $0.34$  standard deviation units (95% CI =  $-0.78$  to  $0.10$ ); this estimate, while on par with other studies, may nevertheless be low due to the fact that recall in one half of the unobserved comparison sample (the group not given an adaptation period) was suppressed.

It is possible that the adaptation period would have been more successful reducing the third party observer effect if a clinical interview was used in conjunction with – or in lieu of – motor measures, if a longer adaptation period was

provided, or if adaptation was allowed to occur over the course of several assessment sessions. Future research should attempt to answer these questions.

The best interpretation that can be made based on the current data is that participants adapted to the standard testing conditions (i.e., unobserved), but were unable to do the same when evaluated in the presence of a third party observer. It is possible that before adaptation to the testing situation can occur, adaptation to the third party observer must occur, and that adaptation to both requires more than a single 21-min adaptation period. Another possibility is that adaptation to the observer cannot occur, which would completely prevent adaptation to the testing situation from occurring. Regardless of which possibility is most accurate, eliminating the third party observer effect appears to be a difficult task that may not be feasible within the context of a neuropsychological evaluation.

## Acknowledgment

The authors would like to acknowledge the research assistant on this project, Zach Sletten, for his role as the third party observer and for his assistance with data collection. Special thanks to Julie K. Lynch, Ph.D. and Drew Anderson, Ph.D. for their thoughtful contributions.

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## **CE** Does a Third Party Observer Affect Neuropsychological Test Performance? It Depends

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This study is a meta-analysis of available literature examining the effect of an observer on cognitive task performance. Of the 210 identified relevant articles, 62 met inclusion criteria yielding a final sample with 4405 individuals (2496 observed cases, 1909 not observed). The overall effect size was significant ( $d = -0.24$ ), i.e., the presence of an observer was associated with poorer performance. However results were moderated by the effect size calculation method, cognitive domain, visibility of the observer, and number of observers. Attention, learning/memory, and delayed recall tasks were most adversely impacted by the presence of an observer.

**Keywords:** Third party observer; TPO; Social facilitation; Social inhibition.

## **INTRODUCTION**

Clinical neuropsychologists are frequently presented with requests from attorneys to observe or record evaluations of litigants. This has raised a number of ethical concerns for neuropsychologists, particularly issues regarding test security, standardized test administration guidelines, applicability of normative data, and perhaps most importantly, concerns pertaining to the impact of a third party observer (TPO) on neuropsychological test performance (Duff & Fisher, 2005; Howe & McCaffrey, 2010; Lynch & McCaffrey, 2004; McSweeney et al., 1998; Otto & Krauss, 2009).

Such concerns are derived from classical social psychology literature, specifically the social facilitation phenomenon. The term *social facilitation*, initially coined by Allport (1924), is used to describe a situation in which the mere presence of another alters one's behavior, either positively or negatively (Zajonc, 1965). This line of research has generally shown that the mere presence of others may facilitate performance on simple or well-learned tasks and can impair performance on complex or novel tasks; although the overall effect is small, explaining only 0.3–3% of total variance (Bond & Titus, 1983). It has been hypothesized this effect may be moderated by characteristics of the observer, i.e., whether they are an expert or

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Accepted for publication: January 25, 2012. First published online: March 15, 2012.

authority figure, their level of attentiveness, their relationship to the participant, the degree to which the participant can monitor the observer, and whether or not they are evaluating the observed (for reviews see Aiello & Douthitt, 2001; Bond & Titus, 1983; Geen & Gange, 1977; Guerin, 1986; Guerin & Innes, 1982; McCaffrey, Lynch, & Yantz, 2005; Strauss, 2002). Others have since proposed that self-esteem and past learning experiences (Baumeister & Leary, 1995) or personality traits, i.e., tendency towards extraversion and optimism or neuroticism and pessimism may be greater determinants of behavior than task complexity in the presence of others (see review by Uziel, 2007).

However, much of this literature is not directly analogous to the setting in which neuropsychological evaluations take place. In many of these experimental investigations comparisons are typically made between those performing a self-administered task alone versus in the presence of another (often the experimenter). Given that all neuropsychological testing takes place in the presence of an examiner, relying on the social facilitation literature to infer effects of a *third* presence on neuropsychological test performance may be inappropriate. Additionally, the difficulty level of tasks in a typical neuropsychological test battery varies considerably, even within measures, as tests often begin with easier items and progress to harder items. Thus, based on the social psychology literature, it is possible that an observer may have both a facilitating and inhibiting effect on performance within the context of a neuropsychological evaluation.

A small number of studies have specifically examined the effect of a TPO in the context of neuropsychological testing (Binder & Johnson-Greene, 1995; Constantinou, Ashendorf, & McCaffrey, 2002, 2005; Gavett & McCaffrey, 2007; Horowitz & McCaffrey, 2008; Kehrer, Sanchez, Habif, Rosenbaum, & Townes, 2000; Lynch, 2005; Yantz & McCaffrey, 2005, 2007, 2009). These studies have generally reported TPO to be associated with poorer performance on measures of verbal learning, memory, fluency, attention, and executive functions, and faster performance on simple motor measures. However results of these studies were somewhat inconsistent. For example, some reported TPOs to have an adverse effect on list learning and recall (Constantinou et al., 2005; Yantz & McCaffrey, 2005), but Kehrer et al. (2000) found no effect. Similarly Yantz and McCaffrey (2005) reported TPOs to have an adverse effect on immediate but not delayed story recall; whereas Lynch (2005) found an adverse effect on delayed but not on immediate recall of word pairs. Additionally there was little overlap of tests and cognitive domains measured among studies and magnitude of effects varied from no effect to large effects, therefore definitive conclusions regarding the effect of TPOs are difficult to make.

Gavett, Lynch, and McCaffrey (2005) published a summary of 36 social psychological and 6 neuropsychological studies examining the effect of an observer's presence on task performance. They reported an overall  $r^2$  of 0.13 in the 42 studies they reviewed, i.e., 13% of the variance in task performance was explained by the presence on an observer. Of the measures they included in their review, 67% were affected by the presence of an observer to a medium or large degree and 15% of studies showed no effect at all. What Gavett and colleagues (2005) failed to report is whether the observer had a facilitating or inhibiting effect on performance, a potentially very important distinction. While knowing that the



presence of an observer can influence performance is important, neuropsychologists are most interested in factors that interfere with clients' ability to give their best performance so that they may accurately measure their *capability*. Thus potential adverse effects must be avoided if possible. Furthermore, a mere listing of  $r^2$  values does not allow one to draw any conclusions about the overall effect of an observer, particularly given that the listed effects range from zero to large effects. This format also does not allow for consideration of sample sizes; certainly very small and large samples sizes should not be given equal weight when evaluating any given overall effect. Lastly, Gavett et al. (2005) derived many of their effect sizes from  $F$  and  $t$  statistics. Using effect size conversion formulas is not as precise as calculating effects from measures of group differences (means and standard deviations). The method for converting effect sizes from  $t$  and  $F$  statistics has been criticized for producing falsely inflated effect sizes (Dunlap, Cortina, Vaslow, & Burke, 1996; Fern & Monroe, 1996; Hullet & Levine, 2003). Also, converting effect sizes from  $F$  statistics is only appropriate when it applies to direct comparisons between two conditions of interest, i.e., when the numerator degrees of freedom is 1 (Thalheimer & Cook, 2002) and this information isn't always specified in study method sections, particularly for many of the older social psychological studies. Thus it is suspected that some of the effect sizes reported in Gavett et al. (2005) might represent inaccurate or falsely inflated effect sizes.

The aim of this fixed effect meta-analytic review was to quantify the published empirical investigations on the effect of an observer's presence on task performance in general, and more specifically, the effects of a TPO on neuropsychological test performance. By accumulating a large number of research studies across a variety of study types, methodologies, and populations, a standardized measure of an overall effect can be derived, thereby providing a more powerful estimate of the "true" effect of a TPO. In addition the current study set out to investigate potential moderators of the TPO effect on task performance, such as effect size calculation method; study type (social or neuropsychology); cognitive domain; type of observer (electronic recording device versus human); number of observers; and the visibility of observers.

## METHOD

### Study selection criteria

Articles were identified through a literature search of online databases (PUBMED, PsychINFO) including years 1925 (the first relevant paper identified examining the effect on cognitive performance, not physical performance or speed) to May 2011. The search was limited to those published in English using human participants. Key words included: "third party observer," "social facilitation," and "social inhibition." Additionally, reference sections of all papers were searched to ensure relevant papers were not missed in the online database searches. Additional databases (BioMed Search, Open Thesis, Dissertation.com) were searched and informal inquiries and requests were made of colleagues in attempts to secure relevant unpublished data.



Studies were included if they met the following criteria. First, they had to entail comparisons between observed and unobserved task performance, regardless of whether the observer was a third party or not. Both between- and within-participants designs were included. Studies in which the observer was co-acting (performing a task alongside the participant) were not included. Second, studies had to include sufficient statistical data in order to calculate effect sizes, i.e., means and standard deviations, or  $F$  and  $t$  values for the appropriate group comparisons (without the addition of covariates). Third, the task had to be a clinical or experimental measure that assessed aspects of cognition commonly included in neuropsychological evaluations, i.e., tasks measuring physical performance (such as jumping height, bicycling speed, gymnastic routines) were not deemed relevant. Additionally, studies involving tasks that did not clearly pertain to one specific cognitive domain were excluded (e.g., pinball game performance, lever pulling in response to lights blinking).

### Data extraction and statistical analysis

Tasks were categorized according to cognitive domain (intellectual/academic, attention/processing speed, executive functions, learning/memory, delayed recall, and motor), as commonly conceptualized in the neuropsychological literature (Lezak, 1995). Note, verbal fluency was originally a separate cognitive domain, but because there were only four studies that included such measures and this single domain produced a non-significant effect size, fluency measures were ultimately collapsed into the executive function domain, based on the established association of frontal dysfunction and reduced verbal fluency (e.g., Delis, Kaplan, & Kramer, 2001, Henry & Crawford, 2004). Collapsing these measures had no impact on the significance or the magnitude of effects involving executive functions. For studies that provided more than one measure of performance within a cognitive domain, such measures were averaged to represent one effect size per cognitive domain for each study. Measures included within each of six domains are as follows:

- *Intellectual/Academic*: Test of Nonverbal Intelligence Third Edition (TONI-3; Brown, Sherbenou, & Johnsen, 1997), spelling test from Wide Range Achievement Test (WRAT; Jastak, Bijou, & Jastak, 1978), experimental multiplication and arithmetic tasks.
- *Attention/Processing speed*: Digit Span and Digit Symbol Coding subtests from the Wechsler Adult Intelligence Scales (Wechsler, 1997), Stroop Color Naming and Word Reading (Sacks, Clark, Pols, & Geffen, 1991), Trail Making Test Part A (Reitan & Wolfson, 1993), Paced Addition Serial Addition Test (Stuss, Stethem, & Poirier, 1987), verbal and visual span subtests from the Memory Assessment Scales (MAS; Williams, 1991), Woodsworth-Wells Color-Naming task (Woodworth & Wells, 1911), experimental letter copying, cancelation, and visual vigilance tasks.
- *Executive functions*: Trail Making Test Part B (Reitan & Wolfson, 1985), Wisconsin Card Sorting Task (Heaton, 1981), Woodsworth-Wells Analogies test (Woodworth & Wells, 1911), Controlled Oral Word Association Test (Benton & Hamsher, 1976), FAS (Benton, Hamsher, & Sivan, 1994), Animal

Fluency (Benton, Hamsher, & Sivan, 1994), experimental noun fluency, maze, anagram, Stroop interference, working memory, cognitive-shifting and problem-solving tasks.

- *Learning/Immediate Memory*: Verbal Paired Associates from Wechsler Memory Scales, Revised (WMS-R; Wechsler, 1987), Rey Auditory Verbal Learning Test (Schmidt, 1996), list learning, prose recall, facial memory tasks from MAS (Williams, 1991), Selective Reminding Test (Morgan, 1982), experimental paired associate, maze-learning, list-learning, and memory tasks (of note, memory measures used to assess effort were not included in this study).
- *Delayed Recall*: Verbal Paired Associates delayed recall (WMS-R; Wechsler, 1987), delayed list recall, delayed cued recall, delayed prose recall, delayed name–face recognition, delayed visual recognition from MAS (Williams, 1991); experimental paired associate and delayed recall memory tasks.
- *Motor*: Finger Tapping (Reitan & Wolfson, 1993), Grooved Pegboard (Trites, 1989), Grip Strength (Reitan & Wolfson, 1993), Static Motor Steadiness Test (SMST; Lafayette Instruments, 2004), and experimental pursuit rotor and fine motor coordination tasks.

In addition to cognitive domain effect sizes, if studies included measures across multiple domains all measures were averaged to create one overall study effect size. For experimental studies with multiple conditions and groups, only the group comparisons of interest, i.e., those directly related to effects of being observed on performance were used. If papers included reports of more than one experiment, i.e., experiments with different study samples and/or methodologies, such effect sizes were calculated separately, resulting in one paper having more than one overall effect size (Berger et al., 1981).

An estimated effect size (Cohen's  $d$ ) was calculated using group means and standard deviations whenever possible (i.e., observed group mean minus the non-observed group mean, divided by the pooled standard deviation). When these data were unavailable, effect sizes were derived from  $t(d = (2t)/(\text{degrees of freedom})$  or  $F$  statistics ( $d = (2) * ([F/\text{degrees of freedom in denominator}])$ ) (Thalheimer & Cook, 2002), providing *approximate estimates* of effect size. Although this latter effect size calculation method is clearly inferior to using means and standard deviations, this method was used to maximize the literature included in this review. To assess comparability, effect size calculation method was used as a moderator. A positive effect size indicates a better performance and a negative effect size represents a worse performance in the presence of an observer. All averaged  $d$  values were then weighted by each study's sample size ([effect size \*total N]/N).

### Moderator analyses

In order to examine the homogeneity of effect sizes across studies,  $Q$  statistics were calculated. The null hypothesis of homogeneity among obtained effect sizes suggests that the observed results represent a single population effect and differences among the obtained effect sizes are due to sampling error. Therefore a significant  $Q$  value indicates heterogeneity of results among the studies and thus possible

moderator effects.  $Q$  is computed by dividing the variance of the sample-weighted  $d$  by the sampling error variance then multiplying this quantity by the number of studies (Hunter & Schmidt, 1990, p. 428). The  $Q$  statistic is evaluated on the  $\chi^2$  distribution at  $k-1$  degrees of freedom, where  $k$  equals the total number of studies. If  $Q$  exceeds the upper tail critical value of the  $\chi^2$  distribution, then the null hypothesis of homogeneity is rejected and potential moderators of the effect size may be explored.

Because our interest was ultimately to assess the impact of an observer specifically in the context of a neuropsychological evaluation, the data were broken down a number of different ways in an attempt to assess precisely how a TPO impacts neuropsychological test performance. The following moderators were examined: (a) effect size calculation method (mean group differences versus conversion from inferential statistics), (b) cognitive domain (intelligence/academic, attention/processing speed, executive functions, learning/immediate memory, delayed recall, motor), (c) study type (neuropsychology, social psychology), (d) study methodology involving the observer (i.e., individual performance observed by one person relative to working alone, or performance observed by a third party), and (e) observer characteristics (number of observers [1 or >1], visibility of observer [seated within sight or out of sight of participant], nonhuman [audio/video recorder]). If a study included more than one of these conditions, effect sizes were calculated separately and only the relevant comparisons were included in each individual moderator analysis.

## RESULTS

A total of 207 relevant articles were initially identified, from which 64 met all inclusion criteria. Three studies were deemed outliers (overall effect size > 2.5 standard deviations from the mean) and thus excluded.<sup>1</sup> Searches for unpublished data resulted in identification of an additional three studies, one of which met inclusion criteria. The final sample included 62 studies with 4405 individuals (2496 observed cases, 1909 not observed), yielding a total of 63 overall effect sizes. The basic characteristics of each study are displayed in Table 1, including the overall unweighted effect size ( $d$ ) for each study. Figure 1 displays the frequency of unweighted effect sizes, independent of sample size.

All but four studies entailed between-participants designs; for the four within-participants design studies, the total  $n$  was displayed in the "observed"  $n$  column (see Table 1) but appropriately calculated for each condition. Of the 62 studies, 5 involved children/adolescent populations (Baldwin & Levine, 1958; Kiefer, 1977; Meddock, Parsons, & Hill, 1971; Quarter & Marcus, 1969; Yantz & McCaffrey, 2009). Two studies involved potential clinical samples: a sample of college-aged

<sup>1</sup> Wagstaff et al. (2008) assessed visual memory in an eyewitness format, which is qualitatively different from neuropsychological literature and therefore removed. Two other studies (Cox, 1966; Sawyer & Noel, 2000) were removed because the study effect size was greater than 3 SD from the effect sizes of other studies employing similar tasks. Removal of these two latter motor tasks resulted in an overall motor domain effect size that appeared to be a more accurate representation of the combined effect of all the motor studies.

Table 1. Summary of studies

	First author	Year	Cognitive domains*	Observed <i>n</i>	Unobserved <i>n</i>	Mean ES
1	Berkey & Hoppe	1972	LM	40	40	−0.49
2	Burri	1927	DR	40	20	−1.46
3	Constantinou et al.	2002	AT, LM, DR	20	20	−0.84
4	Constantinou et al.	2005	AT, LM, MT	31	33	−0.29
5	Corston & Colman	1996	MT	48	24	−0.71
6	Feinberg & Aiello	2006	LM	23	23	−0.28
7	Feinberg & Aiello	2010	EF	45	38	−0.15
8	Gates	1924	AT, EF, MT	26	25	−0.16
9	Gavett & McCaffrey	2007	LM, MT	40	40	−0.18
10	Grant & Dajee	2003	IN	60	60	0.92
11	Guerin	1989	AT	36	12	0.75
12	Hanawalt & Ruttiger <sup>c</sup>	1944	LM	20	–	0.35
13	Horowitz & McCaffrey	2008	AT, EF	35	35	−0.12
14	Huguet et al.	1999	AT, EF	72	22	0.21
15	Kawamura-Reynolds	1977	LM	36	36	−0.29
16	Kehrer et al. <sup>b, c</sup>	2000	AT, EF, LM, MT	30	–	−0.19
17	Kieffer <sup>a</sup>	1977	MT	40	40	0.41
18	Kumar & Acharya	1982	LM	40	40	0.55
19	Landers et al.	1978	MT	30	15	0.14
20	Lindman	2004	IN, AT, EF, MT	50	25	−0.21
21	Lynch <sup>b</sup>	2005	AT, EF, LM, DR, MT	30	30	−0.21
22	Miyamoto	1979	LM	30	30	−0.67
23	Musick et al.	1981	LM	80	40	0.66
24	Pessin & Husband	1933	LM	30	30	−0.21
25	Pick et al.	1991	IN	32	32	−0.18
26	Quarter & Marcus <sup>a</sup>	1971	AT	34	34	−0.68
27	Seidel et al.	1998	AT	48	24	−0.51
28	Yantz & McCaffrey	2005	AT, LM, MT	24	22	−0.24
29	Yantz & McCaffrey	2007	EF	37	37	−0.15
30	Yantz & McCaffrey <sup>a</sup>	2009	IN, LM	53	53	−0.08
31	Baldwin & Levin <sup>a</sup>	1958	AT	24	24	−0.51
32	Baron et al.	1978	LM	27	28	−0.19
33	Berger et al.	1981	LM	48	48	−0.56
	Berger et al.	1981	LM	22	22	0.68
34	Berger et al.	1982	LM	48	48	−0.44
35	Blascovich et al.	1999	EF	42	42	−0.56
36	Bond & Titus	1982	LM	36	36	−0.74
37	Cottrell et al.	1967	LM	66	66	−0.28
38	Davis et al.	1968	EF	23	22	−1.22
39	Deffenbacher et al.	1974	LM, DR	8	8	0.17
40	Fraser <sup>c</sup>	1953	AT	18	–	−1.54
41	Ganzer	1968	LM	36	36	−0.62
42	Geen	1974	LM	120	120	−0.62
43	Geen	1973	LM, DR	80	80	0.08
44	Geen	1979	LM	40	40	0.22
45	Guerin	1983	LM	20	10	−1.07
46	Hartwick & Nagao	1990	LM	60	60	0.04
47	Houston	1970	LM	24	24	0.89
48	Khalique	1980	LM	12	12	−2.16
49	Knowles	1983	EF	108	24	−0.33

(continued)

Table 1. Continued.

	First author	Year	Cognitive domains*	Observed <i>n</i>	Unobserved <i>n</i>	Mean ES
50	Kushnir & Duncan	1978	AT	12	14	−0.80
51	Laughlin & Jaccard	1975	EF	90	18	−0.41
52	Lombardo & Catalano	1978	MT	31	30	−1.04
53	Lombardo & Catalano	1975	MT	24	48	−0.63
54	Manstead & Semin	1980	LM	24	24	−0.92
55	Martens	1969	MT	48	48	−1.40
56	Meddock et al. <sup>a</sup>	1971	MT	32	32	0.64
57	Miller et al.	1979	MT	40	10	1.07
58	Park & Catrambone <sup>c</sup>	2007	IN, EF	108	—	−0.11
59	Rajecki et al.	1977	LM	20	10	1.26
60	Schmidtt et al.	1986	EF	15	15	−0.90
61	Seta & Hassan	1980	LM	16	16	−1.54
62	Seta et al.	1988	EF	14	14	−0.86

\*Cognitive domains: IN=intelligence/academic; AT=attention/processing speed; EF=executive functions, LM=learning/memory; DR=delayed recall; MT=motor. Populations: <sup>a</sup>Child/adolescent population, <sup>b</sup>Potential clinical population, <sup>c</sup>Within-participants study design.

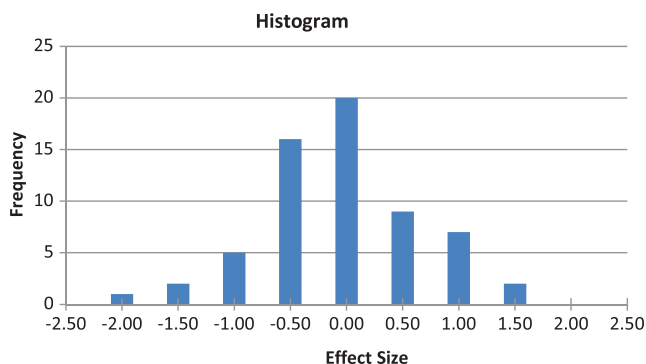


Figure 1. Frequency of 63 unweighted effect sizes from 62 studies

individuals referred for neuropsychological evaluations by Disabled Student Services (Kehrer et al., 2000) and a group of individuals with remote self-reported closed head injuries, of which 46% ( $n = 27$ ) were classified as having suffered a mild traumatic brain injury, 6% moderate ( $n = 4$ ), and 48% severe ( $n = 29$ ) (Lynch, 2005; mean time since injury: 126 months [ $SD = 136.9$ ]). All remaining studies involved healthy adult populations, primarily undergraduate students. Of note, most of the social psychological studies did not include mean demographics for study participants; therefore such information could not be summarized.

The overall sample effect size ( $d$ ) was  $-0.24$  ( $p < .05$ ); i.e., those who were observed performed 0.24 standard deviations worse than those who were not observed (see Table 2). Because meta-analyses are often criticized for being biased (null results tend to remain unpublished), a fail-safe  $N$  was calculated (significance

Table 2. Effect sizes by calculation method

	# of studies ( <i>k</i> )	Observed <i>n</i>	Unobserved <i>n</i>	<i>d</i>	95% CI	<i>Q</i>	Fail safe <i>N</i>
Total Sample	63	2496	1909	0.24*	−0.30/−0.18	23555*	369
Calculated from M/SD <sup>a</sup>	30	1160	880	−0.09	−0.18/0.00	4050*	84
Calculated from <i>t</i> / <i>F</i> <sup>b</sup>	33	1336	1029	−0.38*	−0.46/−0.30	6997*	283

\**p* < .05. <sup>a</sup>Includes studies 1–30 from Table 1. <sup>b</sup>Includes studies #31–62 from Table 1.

criterion of 0.05), which provides an estimation of the number of non-significant studies that would be necessary to reduce the effect size to a non-significant value (Orwin, 1983). Results suggest that 372 additional studies with non-significant findings (effect size < 0.05) would be needed to eliminate the overall effect size of this study. In an attempt to understand the unaccounted for variance (heterogeneous sample denoted by significant *Q* values), a number of moderators were examined.

Moderator analyses

**Effect size calculation method.** Because traditional conversion formulas for calculating effect sizes from inferential statistics (e.g., *t* or *F* statistics) can produce falsely overinflated effect sizes (Dunlap et al., 1996, Fern & Monroe, 1996; Hullet & Levine, 2003), a moderator analysis was performed to separately examine those studies for which effect sizes were calculated from standardized measures of group differences (i.e., group means and standard deviations) and for those studies in which effect sizes were calculated from *t* and *F* statistics. As can be seen in Table 2, and consistent with reported criticisms, the latter overall effect size (*d* = −0.38, *p* < .05) was over four times that which was calculated from group means (*d* = −0.09, *ns*). Due to these statistical concerns and the resulting questionable comparability of effect size calculation methods, we chose to exclude studies with effect sizes calculated from *t* and *F* statistics from all remaining analyses. Results from the remaining 30 studies indicate the overall effect of a TPO is negligible, although a significant *Q* suggests there are moderators contributing to this effect.

**Cognitive domains.** Examination of individual cognitive domains revealed significant effect sizes in the attention/processing speed (*d* = −0.18), learning/memory (*d* = −0.16), and delayed recall (*d* = −0.93) domains (see Table 3). Specifically, the presence of an observer had an adverse effect on attention/processing speed, learning/memory<sup>2</sup> and delayed recall tasks, with the largest

<sup>2</sup> One study examined the effects of a TPO on effort testing (Yantz & McCaffrey, 2007). The combined, unweighted effect size for these measures, i.e., computerized Test of Memory and Malingering (Tombaugh & MHS Staff, 2001) and Word Memory Test (Green, 2003) revealed a *facilitating* effect of a TPO (immediate recall: *d* = 0.26; delayed recall: *d* = 0.21). Because these tests are typically used to measure effort and not cognition (i.e., memory), they were not included in this meta-analysis.

**Table 3.** Effect sizes by cognitive domain

	# of studies ( <i>k</i> )	Observed <i>n</i>	Unobserved <i>n</i>	<i>d</i>	95% CI	<i>Q</i>	Fail safe <i>N</i>
Intellectual/Academic	4	195	170	0.17	−0.04/0.37	108*	9
Attention	12	436	282	−0.18*	−0.33/−0.03	263*	55
Executive	8	325	212	−0.04	−0.21/0.13	53*	14
Learning/Memory	15	527	437	−0.16*	−0.28/−0.03	789*	62
Delayed Recall	4	114	92	−0.93*	−1.22/−0.64	30*	78
Motor	9	325	232	−0.03	−0.19/0.14	142*	14

\* $p < .05$ .

negative impact on delayed recall performance. The presence of an observer did not have a significant effect on intellectual/academic, executive or motor performance.

**Study type.** Studies were divided into different categories based on study methodology (see columns 4–7 in Table 4). First, neuropsychological and social psychological studies were examined separately. Neuropsychological studies were defined as those that employed an examiner, used clinically validated measures to assess cognition and were published in a known peer-reviewed neuropsychological journal. Neuropsychological studies revealed an overall significant effect size ( $d = -0.22$ ), whereas social psychological studies did not have a significant effect size ( $d = -0.03$ ) (see Table 5). Second, studies were divided into two categories based on the observer: (a) studies in which a participant was either observed or not observed while doing a particular task (i.e., they were either alone or observed; they may have been observed by the experimenter, another study participant, or a study confederate), and (b) those studies in which an examiner was present and a TPO was either present or not (this latter situation is most analogous to a neuropsychological evaluation). Interestingly, for those who were either observed or worked alone, the presence of an observer facilitated performance ( $d = 0.18$ ,  $p < 0.05$ ) (see Table 5). In contrast, for those who were observed by a TPO, performance was adversely affected ( $d = -0.23$ ,  $p < 0.05$ ).

**Third party observer characteristics.** As indicated in Table 6, of those observed by a TPO, a TPO had an adverse impact on performance irrespective of whether the TPO was visible ( $d = -0.21$ ,  $p < .05$ ) or not ( $d = -0.24$ ,  $p < .05$ ). However, more than one TPO had a greater adverse impact on performance ( $\text{TPO} > 1$ ;  $d = -0.25$ ,  $p < .05$ ) relative to a single observer ( $\text{TPO} = 1$ ;  $d = -0.13$ , *ns*). Interestingly, being video or audio-taped also had a negative impact on performance ( $d = -0.37$ ,  $p < .05$ ). While the effect size for this latter group suggests the greatest effect, the small sample size ( $n = 4$ ) makes the true strength of this effect difficult to interpret.

## DISCUSSION

This meta-analysis quantifies the literature examining the effect of being observed while performing a cognitive task. Results indicated that, overall,



Table 4. Summary of studies by select moderators

First author	Year	Neuro Psych ( <i>n</i> = 10)	Social Psych ( <i>n</i> = 20)	Observed by 1 ( <i>n</i> = 10)	Observed by TPO ( <i>n</i> = 20)	TPO ( <i>n</i> = 20)		TPO ( <i>n</i> = 20)		TPO = 1 human ( <i>n</i> = 9)	
						Visible ( <i>n</i> = 16)	Not Visible ( <i>n</i> = 4)	TPO = 1 ( <i>n</i> = 9)	TPO > 1 ( <i>n</i> = 9)	Visible ( <i>n</i> = 7)	Not Visible ( <i>n</i> = 2)
1 Berkey & Hoppe	1972		•	•							
2 Burri	1927		•		•	•			•		
3 Constantinou et al.	2002	•			•	•					
4 Constantinou et al.	2005	•			•	•				•	
5 Corston & Colman	1996		•	•							
6 Feinberg & Aiello	2006		•	•							
7 Feinberg & Aiello	2010		•	•							
8 Gates	1924		•		•	•			•		
9 Gavett & McCaffrey	2007				•	•		•		•	
10 Grant & Dajee	2003		•	•							
11 Guerin	1989		•	•							
12 Hanawalt & Ruttiger	1944		•		•	•			•		
13 Horowitz & McCaffrey	2008	•			•	•		•		•	
14 Hugel et al.	1999		•	•							
15 Kawamura-Reynolds	1977		•		•		•		•		
16 Kehr et al.	2000	•			•		•	•			•
17 Kieffer	1977		•		•	•		•		•	
18 Kumar & Acharya	1982		•		•	•			•		
19 Landers et al.*	1978		•		•	•			•		
20 Lindman	2005	•			•	•		•		•	
21 Lynch	2005	•			•	•		•		•	

22	Miyamoto	1979	•	•	•	•	•	•	•
23	Musick et al.	1981	•	•					
24	Pessin & Husband	1933	•	•	•	•		•	
25	Pick et al.	1991	•	•	•	•		•	
26	Quarter & Marcus	1971	•	•	•	•		•	
27	Seidel et al.	1998	•		•				
28	Yantz & McCaffrey	2005	•	•	•	•	•		•
29	Yantz & McCaffrey	2007	•	•	•	•			•
30	Yantz & McCaffrey	2009	•		•				

\*The Landers (19) and Lindman (#20) studies each comprised of two different conditions which were collapsed to calculate the overall study effect size, but separated for these moderator analyses.

Table 5. Effect sizes by study type

	# of studies ( <i>k</i> )	TPO <i>n</i>	NTPO <i>n</i>	Domains included <sup>^</sup>	<i>d</i>	95% CI	<i>Q</i>	Fail safe <i>N</i>
Neuropsychological studies	10	350	295	IN(2), AT(7), EF(5), LM(7), DR(2), MT(6)	−0.22*	−0.37/−0.06	49*	53
Social psychology studies	20	810	585	IN(2), AT(5), EF(3), LM(8), DR(1), MT(4)	−0.03	−0.14/0.07	2527*	33
Observed vs alone	10	489	320	IN(2), AT(3), EF(2), LM(4), MT(1)	0.18*	0.04/0.31	520*	25
Observed by third party	20	635	524	IN(3), AT(10), EF(6), LM(10), DR(3), MT(9)	−0.23*	−0.34/−0.11	1137*	112

\**p* < .05; <sup>^</sup>This column notes the cognitive domains (and number of studies measuring this domain) that comprised the overall study effect size for each of the studies in these analyses; cognitive domains: IN = intelligence/academic; AT = attention/processing speed; EF = executive functions, LM = learning/memory; DR = delayed recall; MT = motor.

observers have a negative impact on performance. However, the effect depended on several factors. In particular, calculating effect sizes from inferential statistics produced a highly inflated effect size, one that was over four times greater than that calculated from measures of group differences. This finding is consistent with criticisms of calculating effect sizes using conversion formulas (Dunlap, Cortina & Vaslow, 1996, Fern & Monroe, 1996; Hullet & Levine, 2003). Calculating the effect size from the “gold standard” group comparison method resulted in a minimal, non-significant effect of TPO on task performance (*d* = −0.09, *ns*). This brings into question previously reported effect sizes of TPO (Gavett et al., 2005), and underscores the need for caution when conducting any future meta-analyses.

Moderator analyses revealed the TPO effect varied with cognitive domain and type of task. Specifically, an observer negatively impacted performance on tasks assessing attention, learning/immediate memory and delayed recall; but did not significantly affect performances on tasks associated with assessing general intellectual and academic abilities, executive functions, and motor tasks. The majority of the effects are considered small by convention (*d* = −0.18 to −0.16) (Cohen, 1988), with the exception of delayed recall, which was large (*d* = −0.93). Effect sizes less than 0.25 standard deviations are unlikely to lead to misinterpretation of clinical data and may be considered by many within the range of normal error variance. On the other hand, in cases in which detecting subtle change is essential, a small effect size may be clinically meaningful. Nevertheless, because assessment of memory is central to most neuropsychological evaluations, a large effect size on delayed recall performance warrants concern.

No effect on executive functioning tasks was surprising because it contradicts the notion that performance on complex, novel tasks is likely to be most susceptible to observer effects. Examination of the individual effect sizes that comprised the overall executive domain effect size revealed a range of −0.23 to 0.43, with seven of the eight effect sizes in the negative direction. The one study with a positive effect size was derived from an experimental Stroop task. Thus perhaps speed-driven tasks may be differentially affected by an observer, which would be consistent with studies

Table 6. Effect sizes by third party observer characteristics

	# of studies ( <i>k</i> )	TPO <i>n</i>	NTPO <i>n</i>	Domains measured <sup>^</sup>	<i>d</i>	95% CI	<i>Q</i>	Fail safe <i>N</i>
A 3 <sup>rd</sup> Party Observer (TPO)	20	635	524	IN(3), AT(10), EF(6), LM(10), DR(3), MT(9)	−0.23*	−0.34/−0.11	1137*	112
TPO = Within sight	16	551	472	IN(2), AT(7), EF(5), LM(7), DR(3), MT(7)	−0.21*	−0.33/−0.09	909*	83
TPO = Out of sight	4	120	88	AT(2), EF(1), LM(4), MT(2)	−0.24*	−0.51/−0.01	1	23
TPO = 1 person	9	307	275	IN(1), AT(5), EF(5), LM(5), DR(1), MT(6)	−0.13	−0.29/0.04	95*	32
Within sight	7	237	235	IN(1), AT(3), EF(4), LM(3), DR(1), MT(4)	−0.13	−0.31/0.06	74*	25
Out of sight	2	70	40	AT(2), EF(1), LM(2), MT(2)	−0.18	−0.56/0.20	<1	9
TPO = >1 person	9	273	232	IN(1), AT(2), EF(1), LM(4), DR(1), MT(2)	−0.25*	−0.43/−0.08	379*	54
TPO = Audio/Video	4	91	93	IN(1), AT(3), EF(1), LM(2), DR(1), MT(3)	−0.37*	−0.67/−0.08	13*	34

\**p* < .05; <sup>^</sup>This column notes the cognitive domains (and number of studies measuring this domain) that comprised the overall study effect size for each of the studies in these analyses. Refer to Table 4 to see which studies contributed to each moderator analysis; cognitive domains: IN = intelligence/academic; AT = attention/processing speed; EF = executive functions, LM = learning/memory; DR = delayed recall; MT = motor.

examining the effect of an observer on speed and physical performance (Triplett, 1898). However, even with this study removed, the overall effect size was still negligible ( $d = -0.12$ , *ns*). It is likely that the variance inherent in executive measures, i.e., the broad array of constructs conceptualized as “executive,” contributed to the variance in the range of effect sizes observed in this meta-analysis. Furthermore, given that the study sample was primarily comprised of non-neurologically impaired individuals, the performances likely represent a restricted range that perhaps prohibited detection of a notable TPO effect.

Similarly the lack of significant effect on motor measures is inconsistent with many published reports of improved performance on simple motor measures. The motor measures in this study varied from simple to complex, with effect sizes ranging from  $-0.71$  to  $0.41$ , with five studies yielding overall positive effects and three studies yielding negative effects. It may just be that the motor measures included in this study were varied enough to wash out the overall effect, particularly considering that several of the overall study effect sizes were comprised of an average of several motor measures of varying degrees of difficulty.

The lack of a significant TPO effect on academic/intellectual measures was less of a surprise. The tasks comprising this domain (reading, spelling, arithmetic, vocabulary) purportedly measure fixed abilities. Although not significant, the effect size was positive indicating a facilitating effect on performance, which is consistent with social facilitation theory; individuals tend to perform better on well-learned tasks when observed.

Neuropsychologists are most interested in the negative effect of a third party on client's or patient's performance. Examining only those studies that had a TPO and thus mirrored the typical context of a neuropsychological evaluation revealed a negative, albeit small effect size ( $d = -0.23$ ). The effect size was similar whether the TPO was visible ( $d = -0.21$ ) or positioned out of sight of the examinee ( $d = -0.24$ ). More than one TPO had a greater impact on performance than just one TPO; in fact the effect of merely one TPO had a minimal impact on performance (whether visible or not). Interestingly, a nonhuman observer (audio or video recorder) had a negative impact on performance that was of a medium effect size. One might speculate that the presence of a video recorder increases awareness and attention on self, particularly if the monitor is within plain view. It is also possible that the potential permanency of a recording could induce greater concern about performance. However, this finding is based on only four studies, two of which were by the same investigator. Therefore replicability of these findings and confirmation of the magnitude is needed.

While these results generally make intuitive sense, conclusions are tentative, given the small number of studies in some of the examined moderator analyses. Significant effect sizes tended to be associated with larger *ns* and with categories comprised of greater loads on learning/memory and delayed recall tasks. Since these cognitive domains appear to be particularly susceptible to the effects of a TPO, it is certainly possible that these domains may be driving the results. However these domains (learning/immediate memory and delayed recall) are likely the most important in medical-legal settings where TPOs are most frequent. Findings from

the current study suggest the presence of a TPO may lower scores on delayed memory tasks by nearly one standard deviation. While findings based on a small number of studies should always be interpreted with caution, neuropsychologists in this practice setting should be aware of the potential adverse effect of a TPO.

A major limitation of this study, and all meta-analyses, is related to the file drawer problem. For the most part, only significant results are published, and for many of the social psychological studies included in this meta-analysis the statistical information for non-significant comparisons was often not reported and only referred to as “non-significant” in the text of the paper. Unfortunately the majority of the studies were from social psychology, and thus the comparability and appropriateness of using such studies to draw inferences regarding a TPO within a neuropsychological setting is questionable. The moderator analyses allowed for a more precise look at the TPO effect in a neuropsychological setting; although the *ns* diminished in some of these moderator analyses thus the reliability of findings is unknown. Furthermore, some of the smaller *ns* in the moderator analyses were associated with small fail-safe *Ns*, adding to the tenuousness of the results. Additionally, the majority of studies were experimental in nature. While there is documentation of adverse effects when the TPO was a parent or significant other (Kehrer et al., 2000,  $d = -0.19$ ; Yantz & McCaffrey, 2009,  $d = -0.08$ ) or a supervisor (Yantz & McCaffrey, 2005,  $d = -0.24$ ), as well as two studies documenting a TPO effect with potential clinical populations (Kehrer et al., 2000,  $d = -0.19$ ; Lynch, 2005,  $d = -0.21$ ), it is unknown to what extent the results of this meta-analysis generalize to neuropsychological evaluations of typical clinical or forensic populations, to training situations involving trainee and/or supervisor observations, or to contexts involving an interpreter. It is possible an observer whose purpose is to facilitate the examinee may have an entirely different effect, if any at all. Future empirical studies examining the effect of a TPO in actual clinical or forensic contexts are greatly needed. However, this line of research is challenged by the fact that clinical patients have varying levels of cognitive impairments, as well as ethical concerns arising from potential compromise of clinical assessments. In addition, ethical and legal tactical concerns in forensic settings may prohibit such studies.

The current meta-analysis provides an overview of the literature, as well as empirical evidence that supports position statements published by NAN (2000) and AACN (2001) all of which advocate against the presence of TPOs. While the negative effect of a TPO may not be global and consistent across all cognitive domains, it is clear that the presence of a TPO has a measurable effect on task performance. Confounded test scores can lead to inaccurate interpretation of test data and ultimately patient conceptualization.

In sum, what is the effect of a TPO in a neuropsychological evaluation? It depends. The effect of a TPO varies across cognitive domains and the effect increases when there is more than one TPO. Although not examined in this study, it is suspected that such differential effects may be further mediated by mood and personality characteristics of the observed, the context of the evaluation, as well as the complexity of the task.

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## Appendix D: Attorney Coaching

## CONFIRMED ATTORNEY COACHING PRIOR TO NEUROPSYCHOLOGICAL EVALUATION

James R. Youngjohn  
Independent Practice

Even though it has been speculated that attorneys might educate or "coach" their clients prior to forensic neuropsychological examinations, there have been no documented instances of this to date. It might be particularly tempting for attorneys to coach their clients on symptom validity scales. A case in which it was strongly suspected that attorney coaching had occurred is presented. The attorney representing the patient actually admitted to an administrative law judge that he had educated his client prior to examination. Strategies for reducing the effectiveness of attorney coaching, thereby increasing the validity of neuropsychological test results, are suggested.

The effectiveness of psychological validity scales and neuropsychological tests designed to measure cooperation and motivation during evaluation is dependent upon the examinee being naive to the nature and purpose of these instruments. However, because the outcome of forensic psychological and neuropsychological assessment can influence the distribution of considerable amounts of money, professionals involved in the adversarial judicial process, including attorneys and psychologists, might be tempted to "educate" examinees regarding these tests before they are administered. This behavior would clearly be unethical for psychologists, but the ethical restrictions are less clear for attorneys. Indeed, it is felt by some attorneys that a failure to coach clients on symptom validity techniques prior to psychological assessment constitutes legal malpractice (J. Stevenson, personal communication, October 15, 1993).

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The author would like to thank Dr. Laurence Binder and Dr. Martha Wetter for their helpful critiques of the manuscript. The author also thanks Todd Lundmark and Kerrie Andersen for their assistance with the legal research and writing.

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Even so, the Arizona Supreme Court Rules of professional conduct for attorneys clearly state that a lawyer shall not falsify evidence or assist a witness to testify falsely and shall not counsel clients to engage in conduct that the lawyer knows is fraudulent (Arizona St S CT Rule 42 RPC ER 1.2 & 3.4, 1994). Even though educating clients regarding psychometric tests has not been specifically addressed, case law also suggests that coaching patients is improper. In *Slottow v. American Casualty Company*, 1 F.3d 912 (9th Cir. 1993), the court discussed the coaching problem. It cited *Betts v. Allstate Insurance Company*, 154 Ca. App. 3d 688, 201 Cal. Rptr. 528 (1984) in which the California state court imposed punitive damages upon Allstate because it had "willfully manipulated its own client through...coaching." Finally, in *State ex rel. Collins v. Superior Court of Arizona*, 132 Arizona 180, 644 P.2d 1266 (1982), the Arizona Supreme Court stated, "Coaching a witness...may run afoul of tenets of ethics this court has promulgated."

In spite of these apparent prohibitions, some authors have speculated that attorney coaching prior to forensic psychological assessment might occur and thereby invalidate the results of these types of evaluations (Ziskin & Faust, 1988). Other



authors have speculated that attorneys might coach clients regarding specific instruments, such as the Minnesota Multiphasic Personality Inventory-2 (MMPI-2; Butcher, Dahlstrom, Graham, Tellegen, & Kaemmer, 1989) validity scales (Pope, Butcher, & Selen, 1993). Wetter and Corrigan (in press) surveyed 70 practicing attorneys and discovered that four fifths of them believe that they should educate their clients regarding psychological testing prior to forensic evaluations. One half of the practicing attorneys in the survey felt that they should routinely provide specific information regarding symptom validity scales to their clients prior to psychological testing.

It is common practice for some attorneys and psychologists to show their clients lists of symptoms associated with various psychological disturbances, such as Posttraumatic Stress Disorder and/or closed head injury, before or during examination (C. Miller, personal communication, September 20, 1993; Lees-Haley, 1992). Indeed, a "how to" manual on preparing mild head injury plaintiffs has been published in the legal literature (Taylor, Harp, & Elliott, 1992). However, there has yet to be a confirmed report in the literature of explicit attorney coaching before psychological or neuropsychological assessment. This is not surprising, given the rules governing attorney-client and psychologist-patient privilege.

Even though there are no confirmed reports of attorney coaching, a number of investigators have been sufficiently concerned about the possibility of it that they have conducted analog studies to assess the effects of this practice. These have included analog investigations of the effects of coaching on the MMPI-2 (Lamb, Berry, Wetter, & Baer, 1994; Rogers, Bagby, & Chakraborty, 1993) and the effects of coaching on neuropsychological symptom validity tests (Martin, Bolter, Todd, Gouvier, & Niccolls, 1993; Martin, Gouvier, Todd, Bolter, & Niccolls, 1992). All of these studies have shown that coaching has allowed simulated malingerers to successfully modify their response patterns to appear more like patients with actual disorders, as well as to improve their chances of avoiding detection of their simulation efforts.

Until now, the existence of attorney coaching has been merely speculative. This article describes a case in which attorney coaching was thought to have occurred, with the patient's attorney actually admitting to an administrative law judge that he had educated his client.

### Case History

Patient 1 was a 27-year-old college-educated, left-handed man who suffered a minor head injury when an aircraft cargo door fell on him. In the emergency room, he reported a 15 to 20 second loss of consciousness, with no retrograde or posttraumatic amnesia. Doctors' notes reveal that there was "no evident trauma to the head or neck" and the neurologic exam was "completely within normal limits." The patient left the emergency room after about an hour. In spite of the relatively trivial nature of this injury, Patient 1 claimed vague symptoms and disabilities that were persisting more than 2 years later.

A neuropsychological examination was requested by Patient 1's workers' compensation carrier. Patient 1's neuropsychological test scores are presented in Table 1. Inspection of Table 1 reveals the presence of several impaired neuropsychological test performances (e.g., Wechsler Adult Intelligence Scale-Revised [WAIS-R; Wechsler, 1981] and Tactual Performance Test [TPT; Reitan & Wolfson, 1985]), relative to the expected performances of a young man with a bachelor's degree. Two cooperation measures were also administered (see Table 2), the Dot Counting Test (Lezak, 1983) and a short form of the Portland Digit Recognition Test (PDRT; Binder, 1990, 1992, 1993a, 1993b; Binder & Willis, 1991). While Patient 1's response latencies on the ungrouped portion of the Dot Counting Test did not fit the expected performance curve (Lezak, 1983; Rogers, Harrell, & Liff, 1993), his PDRT responses were 100% accurate, suggesting that he was cooperative during testing and that his neuropsychological impairments were valid.

Toward the end of the examination, the patient let it slip that prior to the examination he had been provided with an article written by the examiner

Table 1  
*Neuropsychological Tests Taken by Patient 1*

Test	Score
<b>WAIS-R</b>	
Full Scale IQ	97
Verbal IQ	108
Performance IQ	87
Age Corrected Subtest Scaled Scores	
Information	10
Digit Span	13
Vocabulary	11
Arithmetic	13
Similarities	11
Picture Completion	10
Picture Arrangement	10
Block Design	8
Digit Symbol	4
<b>Trail Making Test A<sup>a</sup></b>	34 s, 0 Errors
<b>Trail Making Test B<sup>a</sup></b>	67 s, 0 Errors
<b>Finger Tapping Test<sup>a</sup></b>	
Right hand	46.8
Left hand	43.8
<b>Grip Strength<sup>a</sup></b>	
Right hand	49.5
Left hand	44.5
<b>Sensory Perceptual Examination<sup>a</sup></b>	
Total errors	1
<b>Tactual Performance Test<sup>a</sup></b>	
Right hand	9 min
Left hand	8 min
Both hands	2.7 min
Total time	19.7 min
Memory	7
Location	6
<b>Wechsler Memory Scale<sup>b</sup></b>	
Logical Memory Immediate Raw Score	31
Delayed Raw Score	25

<sup>a</sup>Reitan and Wolfson (1985). <sup>b</sup>Wechsler (1945).

Table 2  
*Symptom Validity Tests Taken by Patient 1*

Test	Score
<b>Dot Counting Test</b>	
Total Errors	0
Ungrouped Out of Sequence Response Latencies	2
Response Latency on Grouped Card Equal or in Excess of Analogous Ungrouped Card	0
<b>Portland Digit Recognition Test</b>	
5 s Delay	9 of 9 Correct
15 s Delay	9 of 9 Correct
30 s Delay	18 of 18 Correct

(Youngjohn, 1991) describing the nature of the PDRT. Upon further questioning, he indicated that he had a life-long interest in neuropsychology and that he had been given the article by a "friend from New York." This statement was felt to have low credibility. Indeed, Patient 1's attorney, who was not from New York, admitted to the administrative law judge presiding over proceedings at the Industrial Commission of Arizona that he had supplied the article to his client. While Patient 1 lost his case, his attorney was not subjected to any rebuke, disciplinary action, or even comment from the judge.

## Discussion

The patient described in this report sustained a mild head injury at most by all criteria. The head injury outcome literature (e.g., Dikmen, Machamer, Winn, & Temkin, 1995) suggests that persisting disability more than 2 years later would be highly unusual after an injury of this severity. When patients who have suffered mild head injuries complain of severe, persisting disability, these complaints may frequently be a function of their pursuit of financial compensation, rather than actual neuropsychological deficits (Youngjohn, Burrows, & Erdal, 1995).

Psychologists and neuropsychologists performing forensic examinations typically assume that their patients have not been prepared or "educated" prior to examination. This assumption may not

be accurate in every case. Indeed, Wetter and Corrigan's (in press) survey of practicing attorneys suggests that forensic patients who have not been prepared for the examination by their attorneys before it takes place may be the exception, rather than the norm.

The present case and previous analog studies demonstrate that attorney coaching not only occurs, but that it can help malingerers avoid detection. Consequently, it is recommended that those forensic psychologists and neuropsychologists who want to protect the validity of their data not rely exclusively on one or two measures of cooperation and/or symptom validity scales.

Ideally, a cooperation/validity battery should include multiple instruments that change frequently. Fortunately, this is presently a popular area of test development. Future researchers are encouraged to continue to create new, effective instruments to measure motivation and validity of self-report during examination.

Finally, psychologists who have evidence of attorney coaching are urged to consider filing a complaint with their state bar. Psychologists are ethically obligated to maintain test security. The practice of attorney coaching could potentially undermine the usefulness of psychometric evidence and psychological expert testimony to the courts.

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**UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

IN RE: NATIONAL FOOTBALL  
LEAGUE PLAYERS' CONCUSSION  
INJURY LITIGATION

No. 2:12-md-02323-AB

MDL No. 2323

Kevin Turner and Shawn Wooden,  
*on behalf of themselves and  
others similarly situated,*

Plaintiffs,

v.

Civ. Action No.: 14-cv-00029-AB

National Football League and  
NFL Properties, LLC,  
successor-in-interest to  
NFL Properties, Inc.,

Defendants.

THIS DOCUMENT RELATES TO:  
ALL ACTIONS

**THE NATIONAL FOOTBALL LEAGUE AND NFL PROPERTIES LLC'S  
MOTION FOR THE APPOINTMENT OF A SPECIAL INVESTIGATOR**

The National Football League and NFL Properties, LLC (together, the "NFL Parties") respectfully move, pursuant to Federal Rule of Civil Procedure 53, for the immediate appointment of a Special Investigator to assist the Claims Administrator and the Court in investigating the submission of fraudulent claims to the NFL Concussion Settlement Program and recommending appropriate sanctions.

Dated: April 13, 2018

Respectfully submitted,

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**UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

IN RE: NATIONAL FOOTBALL LEAGUE PLAYERS' CONCUSSION INJURY LITIGATION	No. 2:12-md-02323-AB  MDL No. 2323
Kevin Turner and Shawn Wooden, <i>on behalf of themselves and others similarly situated,</i>  Plaintiffs,  v.  National Football League and NFL Properties, LLC, successor-in-interest to NFL Properties, Inc.,  Defendants.	Civ. Action No.: 14-cv-00029-AB
THIS DOCUMENT RELATES TO: ALL ACTIONS	

**MEMORANDUM OF LAW IN SUPPORT OF THE NATIONAL FOOTBALL LEAGUE  
AND NFL PROPERTIES LLC'S MOTION FOR  
THE APPOINTMENT OF A SPECIAL INVESTIGATOR**

The National Football League and NFL Properties LLC (together, the "NFL Parties") respectfully submit the following memorandum of law in support of their Motion for the Appointment of a Special Investigator, pursuant to Federal Rule of Civil Procedure 53, to assist the Claims Administrator and the Court in investigating the submission of fraudulent claims to the NFL Concussion Settlement Program and recommending appropriate sanctions.



### **PRELIMINARY STATEMENT**

This motion seeks the appointment of a Special Investigator to stop the widespread fraud infecting the NFL Concussion Settlement Program and to ensure that deserving Retired NFL Football Players are compensated in accordance with the terms of the Settlement Agreement in a timely manner. The NFL Parties, Co-Lead Class Counsel and the Claims Administrator have worked tirelessly to ensure robust registration in, and efficient operation of, the Settlement Program, which—in its first year of a sixty-five year term—has registered over 20,000 Settlement Class Members and issued notices of claim determinations for over 375 Retired NFL Football Players, with the NFL Parties having funded over \$225 million in finalized claims. But those efforts have been hampered by the extraordinary number of fraudulent claims clogging the system.

The independent Claims Administrator placed into audit approximately 46% of the total claims submitted because of red flags or other signs of potential fraud. Of those audited claims, the Claims Administrator has already recommended that over 400 claims (or 23% of the total claims submitted) be denied, including all claims submitted by a certain law firm, and that thirteen neurologists or neuropsychologists and one Retired NFL Football Player be permanently disqualified from the Program, due to the misstatement, omission or concealment of material facts. Approximately 230 claims remain under audit and continue to be investigated for possible fraud.

The fraud discovered in the Program so far is deep and widespread. Some examples:

- A law firm representing more than 100 Settlement Class Members “coached” retired players on how to answer questions during their neuropsychological evaluations and directed at least one retired player to show up for his evaluation hungover and on Valium.

- A law firm representing more than 50 Settlement Class Members charged players more if they obtained an Alzheimer's diagnosis, and virtually all of those players were evaluated by a *pediatric* neurologist who, in turn, diagnosed 75% of the players he/she evaluated with Alzheimer's, many of whom were in their 30s and 40s and one of whom was just 29 years old. Many of those claimants, notwithstanding their purported Alzheimer's, traveled from out of state to be evaluated by that particular neurologist.
- At least 21 medical reports submitted by that same neurologist included *identical* vital signs for different players – a medical improbability of the highest order.
- A neuropsychologist whose testing was relied on by over 150 claimants attested under penalty of perjury that she had evaluated at least three players (and as many as eight players) on each of 25 different days, including eight players on New Year's Eve. On two separate occasions, the neuropsychologist claimed to have spent more than 130 hours evaluating claimants in just a 24-hour window.
- In multiple cases, a neuropsychologist whose testing was relied on by seven claimants submitted two reports for a single player with different test results, and then provided conflicting explanations when asked about the discrepancy.
- Text messages and other communications reveal a disturbing pattern of a claims service provider coaching players to "beat" the neuropsychological tests. In one such message, a representative of the claims service provider told a player, "the doctors and myself went through your reports and we found some things that we think we can take advantage of so you can pass the test the second go around." Another retired player was told, "your [sic] smart enough to perform the right way," to which the player replied, "That's what I'm saying I can do what I need to do, just let me know what I need to do." The claims service provider replied, "we will brother . . . a few days before it's game time!!! LoL."

Significantly, in many instances the Settlement Class Members appear to have been knowing participants in the fraud. Notwithstanding claims of purportedly severe impairment and limited functional abilities, many Settlement Class Members traveled long distances to be evaluated by self-selected medical professionals, likely identified by their lawyers, and, upon receiving purported diagnoses of Alzheimer's or dementia, did not even seek follow-up medical treatment. In many cases, performance validity testing showed clear evidence of malingering and exaggeration – that is, cheating. Some Settlement Class Members lied about

their purported impairment and functional abilities and/or deliberately concealed employment and other activities that were inconsistent with—and thus would have undermined—their supposed impairment and diagnoses. Some examples:

- A Retired NFL Football Player diagnosed with purported Level 2 Neurocognitive Impairment (*i.e.*, moderate dementia) in January 2017 at the age of 32 claimed that he was unable to work in any capacity due to his cognitive impairment. Videos available online show that same player giving lengthy and fully coherent motivational speeches, often without the assistance of notes, on numerous occasions subsequent to the supposed diagnosis.
- A Retired NFL Football Player diagnosed with purported Alzheimer's Disease in June 2016 at the age of 54 claimed that he had stopped coaching football by the time of his evaluation due to his severe cognitive impairment. Yet, subsequent to his evaluation, the same retired player participated in multiple videotaped interviews in which he discussed—without any apparent difficulty—his current head coaching duties, and as recently as October 2017, was interviewed by reporters about his ongoing role as a head football coach.
- A Retired NFL Football Player diagnosed with purported Alzheimer's Disease in July 2015 at the age of 39 claimed to have significant cognitive impairments that made him incapable of even doing errands without assistance. Yet, information available from public sources shows that the same retired player is the head coach of a minor league football team, a developmental football coach and a motivational speaker. When that player submitted a form to the Claims Administrator asking for his employment history subsequent to his diagnosis, he concealed his coaching position.
- A Retired NFL Football Player diagnosed with purported Level 2 Neurocognitive Impairment (*i.e.*, moderate dementia) in December 2016 at the age of 32 reported that he was unemployed, had significant issues with memory and completing tasks and frequently would go into a room and forget why he was there. That retired player concealed that he was working as a registered wealth manager for a large investment firm.
- A Retired NFL Football Player diagnosed with purported Level 1.5 Neurocognitive Impairment (*i.e.*, early dementia) in May 2017 at the age of 31 reported, among other things, that he had short-term memory problems, difficulty completing tasks, difficulty helping his son with homework, and that he had to quit his job because he had difficulty staying organized. He did not disclose, however, that he was attending graduate school and received an MBA degree in 2017 in the same month as his evaluation.

The pervasive fraud by doctors, lawyers and certain players cannot be allowed to continue. The victims are not only the NFL Defendants, but also deserving, cognitively impaired players whose claims have not been able to be processed promptly as a result of the significant efforts required of the Claims Administrator to thwart fraud. Ironically, some of the lawyers who are complaining most vociferously and publicly about the slow pace of claims administration are themselves associated with the submission of questionable claims and the true cause of the delay.

This extensive and persistent pattern of fraud unquestionably warrants the appointment of a Special Investigator, as the Court previously recognized in directing that “an investigator will be appointed by [the Court], as needed, to look into possible fraudulent claims.” The time for that appointment is now. Given the serious fraud uncovered to date, the appointment of a Special Investigator is necessary to preserve the integrity of the Program, safeguard against the payment of fraudulent claims and provide adequate deterrence to those intent on exploiting the Program for their own financial gain. The Special Investigator would assist the Court, the Special Masters and the Claims Administrator by investigating potential fraud and recommending appropriate remedies, including, without limitation, denial of claims, permanent disqualification from the Program, referral to appropriate medical and legal licensing authorities, referral to criminal authorities (including the Department of Justice) for potential prosecution, contempt sanctions and sanctions against nonparties, pursuant to Rule 53.

### **FACTUAL BACKGROUND**

The Settlement Agreement became effective on January 7, 2017. It provides for Monetary Awards to be paid to Retired NFL Football Players who are diagnosed with a Qualifying Diagnosis under the terms of the Settlement Agreement. The Program has a 65-year term and is uncapped, meaning that the NFL Parties have agreed to provide full compensation to

all Retired NFL Football Players with valid claims, with no ceiling on the total amount of monetary awards.

**A. The Settlement Agreement's Fraud Protections**

Recognizing the potential for fraud in a Settlement Program of this magnitude, the parties agreed to rigorous fraud protection measures in the Settlement Agreement.

Among other fraud detection and prevention procedures, the Settlement Agreement tasks the Claims Administrator with identifying and conducting audits of potentially fraudulent claims. The Claims Administrator selects a random sample of 10% of claims on a monthly basis for audit and, in addition, identifies potentially fraudulent claims based on, among other things, the presence of red flags or other suspicious circumstances, information provided through anonymous tips, analysis of claims by independent experts and data analytics. When a claim is selected for audit, the Settlement Class Member may be required to submit additional records, including other medical records, employment information and other relevant documents or information.

The Claims Administrator's audit is limited to determining whether there is a reasonable basis to support a finding that there has been a misrepresentation, omission or concealment of a material fact in connection with the claim. If the Claims Administrator determines there is no reasonable basis to support such a finding, the process of issuing a Monetary Award proceeds. If, on the other hand, the Claims Administrator determines there is a reasonable basis to support such a finding, it notifies Co-Lead Class Counsel and the NFL Parties, and as long as at least one of those parties concurs, the Claims Administrator refers its Audit Report to the Special Masters for review and findings and the imposition of remedies.

The Claims Administrator does not attempt to determine whether the misrepresentation, omission or concealment was intentional. Instead, Section 10.3 of the

Settlement Agreement provides that the Special Masters' review and findings shall take into account whether the misrepresentation, omission or concealment was intentional, and the Special Masters may order the following relief, without limitation: (a) denial of the claim in the event of fraud, (b) additional audits of claims from the same law firm or physician, (c) referral of the attorney or physician to the appropriate disciplinary boards, (d) referral to federal authorities, (e) disqualification from further participation in the Settlement, and/or (f) if a law firm is found to have submitted more than one fraudulent submission, claim submissions by that law firm will no longer be accepted, and attorneys' fees paid to the firm by Settlement Class Members will be forfeited and transferred to the Monetary Award Fund. The Special Masters are charged with overseeing fraud detection and prevention procedures, and their responsibilities expressly include reviewing and deciding the appropriate disposition of potentially fraudulent claims under the supervision and oversight of the Court.

**B. The Significant and Widespread Fraud in the Settlement Program Uncovered to Date**

To date, the Claims Administrator, through its various fraud detection procedures, has determined that approximately 46% of the total claims submitted warranted audit due to red flags or other signs of potential fraud. The Claims Administrator has completed a number of those audits, and the information it has uncovered leaves no question that there has been substantial and pervasive fraud targeting the Settlement Program.

In particular, the Claims Administrator has prepared eight audit reports describing evidence supporting its conclusion in each of those reports that there was a reasonable basis to support a finding of a misstatement, omission or concealment of a material fact. As illustrated and summarized below, this evidence of fraud is egregious and poses a grave threat to the integrity of the Program.

1. Law Firm-A

The Claims Administrator developed credible evidence from multiple sources that a law firm that represents more than 100 Retired NFL Football Players who have already submitted claims (“Law Firm-A”) improperly coached players on how to answer questions during their neuropsychological testing to receive a Qualifying Diagnosis. More specifically:

- One of the neuropsychologists who evaluated players represented by Law Firm-A expressed concern that a lawyer from Law Firm-A would call and ask what answer to a question would make a difference to the outcome. The Claims Administrator also obtained evidence that Law Firm-A told players that Law Firm-A could secure qualifying diagnoses and that it was willing to pay doctors directly out of their pocket for those diagnoses.
- In addition, the Claims Administrator developed evidence that Law Firm-A directed at least one Settlement Class Member to show up for his diagnosing appointment hungover and on Valium, in order to make it appear that he had cognitive impairment.

It is not known, however, and cannot be determined without further investigation, how many of the Settlement Class Members represented by Law Firm-A may have received similar coaching or instructions, or participated in the fraudulent conduct identified. Nor is it possible without further investigation to determine the full extent of the relationships and financial arrangements between Law Firm-A and the physicians to whom it referred claimants. The Claims Administrator also reported that the neuropsychologist who confirmed that a lawyer from Law Firm-A would call and ask about answers to test questions stated that other law firms would also call him to ask similar questions. The Claims Administrator specifically identified in its Audit Report certain additional investigative steps that were not part of its audit.

2. Claims Service Entity-A

At the request of Co-Lead Class Counsel, through Court-authorized discovery, Co-Lead Class Counsel obtained text messages and other communications from a claim service entity retained by over 300 Retired NFL Football Players who have registered in the Program

(“Claim Service Entity-A”). Those communications reveal that Claim Service Entity-A attempted to coach players to help them secure qualifying diagnoses, including the following specific examples:

- In one communication, a representative of Claim Service Entity-A told a retired player, “We train you for the test brother. It’s a Neurocognitive level that is judged by two tests! Don’t cost you nothing to let us walk you through the process!” The retired player asked, “How long is the training,” to which the Claim Service Entity-A representative replied, “We just have our Director of Psychological Development call you and do it over the phone.”
- In another exchange between a representative of Claim Service Entity-A and a retired player, the player wrote, “Because God forbid if I ever do really get messed up I want need y’all lol. But that’s kinda the reason why I signed ya know.” The Claim Service Entity-A representative wrote in response, “Everybody odds are different man . . . . your probably one of the most intelligent clients I have . . . . your odds aren’t as high as some other guys I have . . . but your smart enough to perform the right way as well!” The retired player replied, “That’s what I’m saying I can do what I need to do, just let me know what I need to do.” The representative from Claim Service Entity-A assured the player, “We will brother . . . . a few days before it’s game time!!! LoL.”
- On another occasion, a representative of Claim Service Entity-A told a retired player, “the doctors and myself went through your reports and we found some things that we think we can take advantage of so you can pass the test the second go around.”
- Finally, a representative of Claim Service Entity-A told a retired player, “We have our own doctors we have gotten inside the BAP . . . . that’s why our situation is better . . . . unlike majority of the folks . . . you wont have to go to those NFL sides dr’s with us!”

Again, without further investigation, it is unknown precisely what “coaching” was provided and to whom, and the nature of the relationship between Claim Service Entity-A and associated physicians and lawyers.

### 3. Law Firm-B and Doctor-A

The Claims Administrator has also uncovered troubling relationships between certain law firms and doctors, including the following example:



- According to the Claims Administrator, a law firm that represents more than 50 players who have submitted Claim Packages (“Law Firm-B”) charged higher fees to players for whom they secured an Alzheimer’s diagnosis, as opposed to Level 1.5 or Level 2 Neurocognitive Impairment, and virtually all of those players were evaluated by the same doctor – a *pediatric* neurologist (“Doctor-A”).
- Doctor-A, in turn, diagnosed a staggering 75% of the players he/she evaluated (or 36 out of 48) with Alzheimer’s Disease. Almost all of the Alzheimer’s diagnoses from Doctor-A were for young claimants. Indeed, 21 of the 36 claims were for players in their 30s and 40s, and one player was just 29 years old when he received his Alzheimer’s diagnosis from Doctor-A. Doctor-A was singlehandedly responsible for more than 60% of *all* of the Alzheimer’s claims in the Program for players under 40 years of age.

The Claims Administrator further determined that Doctor-A’s reports included demonstrably false information, including for example:

- 21 of the 48 reports submitted by Doctor-A included *identical* vital signs across claimants. When questioned about that medical impossibility by the Claims Administrator, Doctor-A was unable to provide a credible explanation.
- According to the Claims Administrator, in certain cases, Doctor-A submitted affidavits claiming that his/her diagnosis was based on neuropsychological testing “conducted contemporaneously” with his/her assessment when, in fact, the neuropsychological report did not exist at the time of the diagnosis.

The Claims Administrator also uncovered substantial evidence that Settlement Class Members were complicit in this conduct. For example:

- When the Claims Administrator obtained the players’ other medical records from healthcare providers unrelated to the Settlement Program, those records were in many instances inconsistent with the diagnosis alleged.
- In one case, a player who was diagnosed with Alzheimer’s Disease in July 2015 by Doctor-A completed and signed a medical history questionnaire nearly two years later, in May 2017, in which he denied any problems with speech, memory or concentration.
- Some of the players were evaluated by other medical professionals who did not find any cognitive issues.
- Certain players saw other physicians subsequent to their purported diagnosis from Doctor-A, and the medical records from those physicians contained no reference to the supposed diagnosis from Doctor-A.

- Other players sought no treatment at all following Doctor-A's evaluation, despite being purportedly diagnosed with early or moderate dementia or even Alzheimer's Disease.

Moreover, as to a number of the players evaluated by Doctor-A, there is evidence from social media and other public sources that raises serious concerns about the veracity of their claimed impairment and purported diagnoses. Without further investigation, though, the extent of this behavior, and how many claimants (and other parties) participated in this deceptive conduct, is unknown. Several examples are provided below for illustrative purposes:

- Player-1 is a Retired NFL Football Player who was diagnosed with Alzheimer's Disease by Doctor-A in June 2016 at the age of 54. Player-1 reported severe cognitive issues during his neurological evaluation and submitted a third-party affidavit that stated he was a head football coach but had hired people to do all the administrative work because he could not focus on it. As part of an audit, the Claims Administrator requested clarification from Player-1 regarding his employment status. In response, Player-1 claimed that he had discontinued coaching football by the time of his evaluation in June 2016 and had to relinquish all administrative work to others. However, even after June 2016, Player-1 participated in multiple videotaped interviews about his present coaching duties and, as recently as October 2017, was interviewed by reporters about his role as a head football coach.
- Player-2 is a Retired NFL Football Player who was diagnosed with Alzheimer's Disease by Doctor-A in July 2015 at just 39 years of age. Player-2 reported significant cognitive impairments, including memory loss, becoming easily confused and being incapable of even doing errands without assistance. But publicly-available information reflects that Player-2 is the head coach of a minor league football team, a developmental football coach and a motivational speaker. Of particular concern, when asked by the Claims Administrator to complete a form listing current and past employment, Player-2 still did not list his coaching positions. When the Claims Administrator obtained medical records for Player-2 from other healthcare providers post-dating the Alzheimer's diagnosis by Doctor-A, those records included no reference to Player-2's supposed Alzheimer's Disease.

#### 4. Law Firm-C and Doctors-B&C

The Claims Administrator received an anonymous tip from two separate sources that two neurologists ("Doctors-B&C") who practiced together had rendered Qualifying Diagnoses to every player they had seen and also had used questionable techniques in rendering

these diagnoses, including diagnosing players in the offices of a law firm. Doctors-B&C, together, diagnosed 84 claims valued at over \$98.5 million; the law firm in question was associated with 92% of these claims. Following an audit, the Claims Administration concluded, for example:

- Doctors-B&C provided functional impairment ratings that were contrary to the player's apparent abilities. For example, one player was assigned a score of 2—which indicates “no pretense of independent function outside the house”—yet, the player was still actively involved in volunteer work and in no way indicated any inability to function independently or a need for assistance. Further, Doctors-B&C assigned the exact same score across all relevant areas for 79 of the claims diagnosed.
- Of particular concern, the report concluded that Doctor-B submitted an affidavit, under penalty of perjury, that he evaluated certain players in person, when in fact there is no evidence that he did so.

Because the Claims Administrator's audit focused on the practices of Doctors-B&C, additional investigation is necessary to determine the extent that Law Firm-B and/or individual players were complicit in this conduct.

##### 5. Doctor-D and Doctor-E

The Claims Administrator also identified two neuropsychologists (“Doctor-D” and “Doctor-E”) who made material misrepresentations in connection with medical records submitted as part of Claim Packages and, in some cases, thereafter provided conflicting explanations for those misrepresentations, which explanations were deemed not credible by independent experts.

For example, 70 claims relied on evaluations from Doctor-D, a neuropsychologist, to support the diagnosis alleged. The Claims Administrator determined that:

- Doctor-D improperly concluded that a player's test results demonstrated a “valid assessment” of the player's functioning, when in fact that player had clearly failed all reported validity indicators—that is, the player's test results indisputably showed that the player exaggerated impairment to achieve a specific result. Doctor-D also did not report scores on two out of the five

validity tests administered—and always omitted the same two test scores in each report.

Similarly, the Claims Administrator determined that Doctor-E, a separate neuropsychologist, also displayed suspect practices. By way of example:

- Doctor-E submitted two distinct reports for a single claimant with the same evaluation date, same report date, and same patient background and history, but with different tests allegedly conducted in each report and, for the tests that overlapped between the two reports, different scores. When asked about this discrepancy, Doctor-E provided inconsistent and conflicting explanations to the Claims Administrator and to an attorney for one of the claimants who also noticed the discrepancy.
- Doctor-E repeated this practice of submitting two reports from the same date with conflicting information in multiple cases.

The Claims Administrator's audits of these claims focused on the practices of the individual doctor. The Claims Administrator specifically noted that Doctor-D worked closely with two local neurologists, but those neurologists were not interviewed. The Claims Administrator also observed that at least 32 of the players diagnosed with Level 2 Neurocognitive Impairment (*i.e.*, moderate dementia) reported that they were actively employed at the time of their assessments. Further investigation is warranted to determine the full extent of any fraudulent conduct associated with Doctor-D and Doctor-E.

#### 6. Dr. Serina Hoover and Related Neuropsychologists

In December 2017, following a referral by the Claims Administrator, the Special Masters found that reports submitted by neuropsychologist Dr. Serina Hoover included misstatements, omissions or concealments of material facts and, as a result, disqualified her from the program. Among other issues:

- Dr. Hoover claimed to have evaluated at least three (and as many as eight) players on each of 25 days, including eight players on New Year's Eve.
- Based on her own sworn statements regarding the amount of time spent on each evaluation and report, Dr. Hoover claimed to have spent 139 hours

evaluating and preparing reports for retired players in a 24-hour window, and 134 hours in another 24-hour window.

- Dr. Hoover submitted “template” reports, including with a comment left in the report that stated “these are scores from sample report.”
- The Claims Administrator subsequently determined that seven other neuropsychologists also used the same template report that Dr. Hoover used and that those claims also included a misstatement, omission or concealment of a material fact.

Significantly, there is also evidence that Settlement Class Members who were evaluated by Dr. Hoover and the other template physicians were aware of and complicit in the misconduct. On behalf of the Claims Administrator, an independent expert reviewed a sample of seven claims that relied on testing by the template physicians and in all seven, the performance validity tests showed malingering by the Retired NFL Football Players; that is, that the players were exaggerating impairment to achieve a specific result. The expert also found “clear indications of exaggeration and unbelievable symptoms on a standardized, validated test,” and one report characterized the player’s complaints and reported symptoms as “unbelievable.”

In some cases, publicly available information appears to show that the Settlement Class Members made deliberate misrepresentations and/or concealed employment or other activities. For example:

- Player-3 is a Retired NFL Football Player who was diagnosed with Level 2 Neurocognitive Impairment (*i.e.*, moderate dementia) by Dr. Hoover in January 2017 at the age of 32. During his evaluation, Player-3 reported significant cognitive impairment, including that he struggles to follow instructions, has poor attention and is highly distractible. He reported significant memory issues, claiming he could not remember common daily events. According to his medical records, Player-3 was unable to work in any capacity. However, videos available online show Player-3 delivering lengthy and fully coherent motivational speeches, often without the assistance of any notes, on numerous occasions post-dating his evaluation and diagnosis. Moreover, social media profiles show Player-3 traveling around the world and engaging in recreational activities like riding motorcycles, hiking, swimming, and playing golf, all subsequent to his evaluation and purported moderate dementia diagnosis.

- Player-4 is a Retired NFL Football Player who was diagnosed with Level 1.5 Neurocognitive Impairment (*i.e.*, early dementia) by Dr. Hoover in May 2017 at the age of 31. Player-4 reported, among other things, that he had short-term memory problems, difficulty completing tasks, difficulty helping his son with homework, and that he had to quit his job because he had difficulty staying organized. He did not disclose, however, that he was attending graduate school and received an MBA degree in 2017 in the same month as his evaluation.
- Player-5 is a Retired NFL Football Player who was diagnosed with Level 2 Neurocognitive Impairment (*i.e.*, moderate dementia) by Dr. Hoover in December 2016 at the age of 32. At the time of his evaluation, he reported that he was unemployed, had significant issues with memory and completing tasks, and frequently would go into a room and forget why he was there. Yet, publicly-available information reflects that he was working at the time as a registered wealth manager for a large investment firm.

As with the other instances of fraud, without further investigation, it is not known which other players, law firms and physicians may also have participated in or been aware of these deceptive practices.

In sum, in only a year of this Program's long life, the Claims Administrator has uncovered significant fraud and a substantial need for a Special Investigator to conduct further investigation to ensure that the appropriate remedies are imposed to preserve the integrity of the program and to ensure that deserving players are paid without delay caused by a continued influx of false claims.

### **ARGUMENT**

It is well established that under Rule 53 and the Court's inherent authority, the Court may appoint a Special Master to investigate allegations of misconduct and preserve the integrity of its judgments. Courts have appointed a Special Master tasked specifically with investigating misconduct in connection with large class action settlement programs like this one. *See, e.g., In re Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mex., on Apr. 20, 2010*, No. MDL 2179, 2014 WL 12788985, at \*1, \*5 (E.D. La. Apr. 29, 2014) (appointing

special master specifically to “investigate allegations of misconduct within the Settlement Program”); *In re Engle Cases*, No. 3:09-CV-10000, 2015 WL 12843860, at \*1 (M.D. Fla. Dec. 22, 2015) (appointing special master to investigate potential misconduct by counsel in settlement, including whether “counsel made any material misrepresentations to the Court”); *Ark. Teacher Ret. Sys. v. State St. Bank & Tr. Co.*, No. 11-10230, Order, ECF No. 173 (D. Mass. Mar. 08, 2017) (appointing special master to investigate and report on accuracy and reliability of representations made in connection with request for attorneys’ fees, and the reasonableness of the award); *see also Trentadue v. U.S. Cent. Intelligence Agency*, No. 2:08-CV-0788, 2015 WL 1968263, at \*5–6 (D. Utah Apr. 30, 2015) (appointing special master to investigate compliance with order and allegations of witness tampering).

Here, the Court has already acknowledged the potential need to supplement the Program’s existing anti-fraud resources. In a November 13, 2017 oral order, the Court directed that an “an investigator will be appointed by [the Court], as needed, to look into possible fraudulent claims.” For good reason. As set forth above, the fraudulent behavior identified to date has been serious and widespread and the need for further investigation and additional remedies is pressing. Accordingly, the NFL Parties submit that the appointment of a Special Investigator is needed immediately.<sup>1</sup>

#### **I. A Special Investigator is Needed to Protect the Integrity of the Program**

As reflected above, and as further described in the April 9, 2018 Response by the Claims Administrator to Joinder and Motion by Neurocognitive Football Lawyers and in the April 13, 2018 Declaration of Orran L. Brown, Sr., the Claims Administrator has conducted effective and time-consuming audits and uncovered significant evidence of fraud. But the need

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<sup>1</sup> The Claims Administrator has advised that it has no objection to the appointment of a Special Investigator and will cooperate fully with a Special Investigator as the Court and the Special Masters direct.

for further investigation is far from over and a Special Investigator is essential to supplement the work of the Claims Administrator and provide the Court and Special Masters with the information needed to identify all culpable parties, fashion appropriate remedies, provide effective deterrence and protect against payment of fraudulent claims.

To that end, the NFL Parties propose that the Special Investigator would have the authority under Rule 53 to conduct investigations and make recommendations regarding appropriate remedies and sanctions. The role of the Special Investigator would include, without limitation, the following: (1) assisting the Special Masters in determining questions of knowledge and intent, (2) assisting in determining the full scope of fraud (including by identifying all culpable parties), and (3) otherwise assisting the Claims Administrator and Special Masters as needed.

**A. The Special Investigator Will Assist the Special Masters in Determining Knowledge and Intent**

Pursuant to its duties under Section 10.2 of the Settlement Agreement, the Claims Administrator's audits are intended to determine whether there is a reasonable basis to support a finding of a misstatement, omission or concealment of a material fact. The Claims Administrator then prepares an Audit Report with its findings on that specific question and provides its recommendations for appropriate remedies to be imposed by the Special Masters.

In light of its narrow mandate, the Claims Administrator generally does not take additional investigative steps once it has reached that determination. The Claims Administrator does not determine whether a misrepresentation, omission or concealment was intentional. Instead, the Settlement Agreement tasks the Special Masters with assessing questions of intent and then fashioning appropriate remedies, which, under the Settlement Agreement, may include, without limitation, referral of a physician or lawyer to appropriate disciplinary boards, referral to



federal authorities, additional audits of related claims and forfeiting of attorneys' fees paid by a Settlement Class Member to a law firm that engaged in fraud. These and other more stringent remedies are necessary, where the facts warrant them, in order to provide meaningful deterrence and sufficiently guard against the payment of fraudulent claims.

Without the assistance of a Special Investigator, however, the Special Masters are generally limited to the information developed by the Claims Administrator, which only seeks to determine whether there has been a misstatement, omission or concealment of a material fact. In order to ensure that the Special Masters have all of the information necessary to evaluate and determine which of the remedies available under the Settlement Agreement are appropriate, it is imperative to have a Special Investigator continue certain investigations of relevant individuals and entities following the completion of the Claims Administrator's audit.

Indeed, the Claims Administrator has recognized this need. In its Audit Report on Law Firm-A, for example, the Claims Administrator noted that its audit did not attempt to confirm all allegations about Law Firm-A and expressly recognized that there were specific follow-up investigative steps that could be taken to potentially reveal intent.

Moreover, when the Claims Administrator referred Dr. Hoover to the Special Masters, based on a finding that Dr. Hoover had made material misstatements or omissions, the Special Masters disqualified her from the Program and denied the corresponding claims without prejudice, but did not impose additional remedies at that time based on the Audit Report. The NFL Parties respectfully submit that it is critical to continue the investigation of Dr. Hoover, Law Firm-A, and other similarly situated parties because if a physician or law firm has engaged in *intentional* misconduct, mere disqualification from the Program is not a sufficient remedy and will not serve to provide adequate deterrence to others. Thus, a Special Investigator should

continue these investigations, determine whether the parties acted intentionally and report its findings and recommendations to the Special Masters so that they may meaningfully evaluate the full range of remedies and sanctions provided for in the Settlement Agreement and available under Rule 53.

**B. The Special Investigator Will Help Determine the Full Scope of Fraud, Including by Identifying All Culpable Parties**

Relatedly, in addition to determining the intent of the primary subject(s) of an audit report, a Special Investigator is needed to determine the full scope of any fraud, including identifying all of the individuals and entities who knowingly participated in it. Otherwise, remedies imposed based only on the Claims Administrator's audit may not adequately address all of the conduct or bad actors and may enable those who engaged in fraud to submit new claims without any penalty. By helping to determine the full extent of any fraudulent conduct, the Special Investigator will protect against the payment of fraudulent claims and deter further fraudulent conduct.

For instance, the Claims Administrator concluded that there was a reasonable basis to support a finding that Doctor-A made material misstatements and therefore recommended that Doctor-A be disqualified and that the associated claims be denied without prejudice. But, as discussed above, there is already extensive evidence, based largely on publicly-available information obtained without powers of discovery, that a number of these Settlement Class Members were knowing and active participants in the deceptive conduct and in fact made material misrepresentations themselves. However, without further investigation to determine which Settlement Class Members participated in the misconduct, so that appropriate remedies may be imposed, a retired player who knowingly engaged in fraud would suffer no penalty other than the minimal inconvenience of having to submit a new claim. This would

provide no deterrence at all and, in fact, would actually incentivize players to engage in precisely this type of behavior.

As another example, the Claims Administrator uncovered credible evidence that Law Firm-A improperly “coached” players on how to approach neuropsychological testing to obtain specific diagnoses. Absent a full investigation, merely disqualifying that law firm would be an inadequate remedy as to the Settlement Class Members, because players who were coached cannot “unlearn” that coaching and should not be allowed to participate in the Settlement Program and receive future awards without further safeguards to ensure any new claims they submit are valid.

**C. The Special Investigator Also Will Assist the Claims Administrator and Special Masters as Needed**

Finally, in light of the breadth of fraud already detected, and the volume of potentially fraudulent claims, a Special Investigator should be appointed to assist the Claims Administrator and Special Masters with additional investigation, as they deem necessary.

**II. The Authority of the Special Investigator**

The NFL Parties respectfully submit that the Special Investigator should be granted the full authority permitted under Rule 53 to carry out the duties and responsibilities described above, including but not limited to the power to issue subpoenas and to compel and take testimony. The Special Investigator should report directly to the Court and the Special Masters, and should provide a status update to the Court on at least a monthly basis. The Special Investigator also should work in consultation with the Claims Administrator and have the discretion to communicate *ex parte* with the Court, the Claims Administrator, Co-Lead Class Counsel, and/or counsel for the NFL Parties, as the Special Investigator deems appropriate.

**CONCLUSION**

For the foregoing reasons, the NFL Parties respectfully submit that the Court should promptly appoint a Special Investigator to carry out the responsibilities described herein.

Dated: April 13, 2018

Respectfully submitted,

PAUL, WEISS, RIFKIND, WHARTON &  
GARRISON LLP

/s/ Brad S. Karp \_\_\_\_\_

Brad S. Karp

Bruce Birenboim

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*Attorneys for Defendants the National Football  
League and NFL Properties LLC*

**CERTIFICATE OF SERVICE**

I, Brad S. Karp, hereby certify that on the 13th day of April 2018, I electronically transmitted a true and correct copy of the foregoing documents, THE NATIONAL FOOTBALL LEAGUE AND NFL PROPERTIES LLC'S MOTION FOR THE APPOINTMENT OF A SPECIAL INVESTIGATOR and MEMORANDUM OF LAW IN SUPPORT OF THE NATIONAL FOOTBALL LEAGUE AND NFL PROPERTIES LLC'S MOTION FOR THE APPOINTMENT OF A SPECIAL INVESTIGATOR, to the Clerk of the Court using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to all attorneys of record who are ECF registrants.

Dated: April 13, 2018

/s/ Brad S. Karp  
Brad S. Karp

## Appendix E: Test Company Letters

## Appendix F: Case Law

## GREEN'S PUBLISHING

(a division of Green & Kramar ACT Ltd.)



Paul Green, Ph.D.

Matt Steffen

John Hermary

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#105 1726 Dolphin Ave

Kelowna, British Columbia

V1Y 9R9, Canada

---

Dr. Thomas F. Kinsora, Ph.D.  
716 South 6<sup>th</sup> Street  
Las Vegas, Nevada  
89101, USA

Dear Dr. Kinsora,

Re: Release of Green's Publishing test materials used under license to yourself

As you know, I am the owner of Green's Publishing and I am the inventor of validity tests published by that company, such as the WMT, MSVT and NVMSVT. These validity tests are used to determine objectively whether other cognitive test data are valid or not. There are many published papers which lay out the validity studies supporting the use of these tests and they are available to the general public.

These tests are not sold to you. You are granted a license to use the tests. The conditions of use of these tests are laid out partly in the contract agreed by yourself on installing the tests. They are also laid out by various professional organizations.

The license agreement is very clear. You are free to communicate the results of the tests. In fact, the programs are made to facilitate such communication. Another expert can easily tell which responses were made by the client if they are given the report created using REPORTING and PER ITEM REPORT. This yields a one page report with all responses detailed in a convenient format.

However, in order to protect the integrity of the tests, it is essential that proper test security should be enforced. This means that the actual test materials should not be copied and sent to others. Members of the public should not have access to the test materials because making these test materials public would threaten to undermine the usefulness of these tests. The court needs to have information based on valid data. If the tests are known to the public, it would be possible for people to circumvent these validity tests. To prevent this happening;

- You are not allowed to copy any parts of the tests without my permission.
- You are not allowed to distribute any copy of Green's Publishing test materials or actual test materials without my permission.



- If you violate the contract, you will not be allowed to renew your license to use my tests. I have removed the licenses of certain professionals for unethical and incompetent use of these tests.
- The possibility of legal action is mentioned in the contract and any litigation that arises regarding these test materials shall be conducted in the Province of Alberta, Canada.

Lawyers have admitted in published papers that they learn about tests and then coach their clients to circumvent the tests. I wish to prevent this from happening to my tests. We have to bear in mind that tests like the WMT (Word Memory Test) are not just another addition to a long list of cognitive tests. These tests are used to determine whether other test data in the same assessment are valid or not. Hence they are far more susceptible to being undermined than most psychological tests. I have invested many years and large amounts of money developing these tests and my livelihood depends on keeping certain aspects of how the tests work secret. I wish to stop the tests being rendered useless by improper exposure in public.

To that end, I will refuse to allow any of the validity tests to be shown in a public place, including the internet (especially the internet). We all know how easily confidential documents get spread around the world when they are leaked. We have systems in place to ensure that only qualified psychologists have access to these tests and they are ethically bound to protect test integrity. We have implemented special license codes for installation and copy protection on the computer programs. The biggest measure taken to stop the tests from losing their integrity has been to forbid, within the license agreement, any copying or distribution of test materials. There are very many published papers in which the way the tests work can be studied but the actual test materials and cutoffs are not stated in these papers for good reasons: to retain test integrity.

Let me repeat myself. If you release test materials to any lawyer or any member of the public, I will treat this as a breach of contract and I shall not renew your annual license to use my tests. I will also not allow any unauthorized person to install copies of my tests for scrutiny by the public. If any licensed test user does release my tests without my permission, I will take legal action.

I hope this is clear enough.

Yours Sincerely



Paul Green, Ph.D.  
 Clinical Neuropsychologist  
 Fellow, National Academy of Neuropsychology  
 President, Green's Publishing  
 105, 1726 Dolphin Avenue  
 Kelowna, British Columbia,  
 Canada V1Y 9R9  
 Phone: 236 420 4531  
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 Email: [greenspublishing@gmail.com](mailto:greenspublishing@gmail.com)



June 8, 2018

Dr. Kinsora,

Dear Dr. Kinsora,

As you may be aware, Pearson takes a strong position against any release of secure test materials to anyone other than qualified professionals; including but not limited to test items, responses and normative data. Pearson considers the test protocols a trade secret. The test questions and answers, manuals and other materials divulging test items or answers constitute highly confidential, proprietary testing information which Pearson takes every precaution to protect from disclosure beyond what is necessary for the purpose of administering these tests in order to preserve their validity as psychological assessment instruments.

The question of disclosure of secure testing material in connection with court proceedings is difficult because of the concerns surrounding the validity of the tests and their proper administration and interpretation.

While Pearson does not wish to impede the legal process and recognizes that compelling reasons for disclosure of secure testing materials may arise in the litigation context, we also do not want to jeopardize the security and integrity of our test instruments by consenting to their unrestricted release or display (whether by video or audio recording) to persons not ethically or legally obligated to protect their confidentiality or professionally qualified to use and interpret them.

Therefore, if the disclosure of secure test materials is deemed necessary by a judge, Pearson respectfully requests that the court issue a protective order governing the use and access to such materials which:

- (a) Restricts access to the materials and any testimony regarding the materials to the most limited audience possible, preferably only to counsel and experts engaged by the parties who are professionally qualified to use and interpret the tests;
- (b) Restricts use of the test materials only to that required for the resolution of the pending proceeding;
- (c) At the conclusion of the proceeding, requires the prompt return of the materials produced and the destruction of any copies made (and confirmation to Pearson of such return and destruction); and
- (d) Seals the record (including any findings of fact and conclusions of law) to the extent any portion of such materials are disclosed in pleadings, testimony, exhibits or other documents which would otherwise be available for public inspection.

We believe such a protective order is essential to protect our trade secrets, copyrights, and the continuing validity of these tests.



Clinical Assessment-Legal  
19500 Bulverde Road Ste. 201  
San Antonio, TX 78259  
Telephone: 210-339-5195  
[Pas.licensing@pearson.com](mailto:Pas.licensing@pearson.com)

Please feel free to provide a copy of this letter to any judge or counsel for parties involved in the pending legal matter where the disclosure of Pearson secure test materials has become an issue and refer them to me if there are further questions regarding the disclosure of these test materials.

I hope that this information is helpful. Should you require any additional information, please let me know.

Sincerely,

Carl W. Covert, Jr. JD  
Senior Counsel and Vice President  
Pearson Clinical Assessment  
10900 Bulverde Road, Building 2, San Antonio, TX 78259  
Telephone: 210-339-5195  
[Carl.covert@pearson.com](mailto:Carl.covert@pearson.com)



# EXHIBIT E



Earning Capacity Evaluation  
Life Care Planning  
Medical Record Review  
Expert Testimony

The Authority on  
Vocational Assessment  
& Litigation Planning

February 14, 2020

**VIA EMAIL:** [blake.doerr@lewisbrisbois.com](mailto:blake.doerr@lewisbrisbois.com);  
[Abigail.Prince@lewisbrisbois.com](mailto:Abigail.Prince@lewisbrisbois.com)

Lewis Brisbois Bisgaard & Smith, LLP  
6385 S. Rainbow Blvd, Suite 600  
Las Vegas, NV 89118

ATTN: BLAKE DOERR, ESQ.

RE: KALENA DAVIS V. ADAM DERON BRIDEWELL, ET AL.  
CLARK COUNTY, NV DISTRICT COURT  
OUR FILE NO.

: A-18-777455-C  
:19L 1497-11099

Dear Mr. Doerr:

It is our practice to request a clinical interview with the plaintiff in all cases where claims for lost wages, diminished or lost earning capacity and/or future care needs are being made and where we are retained as expert(s) to evaluate the nature and extent of these claims. Please consider this to be a formal request to meet with Mr. Davis for purposes of clinical interview and administration of a vocational test battery. The reasons for this are set forth below.

1. I am a Licensed Professional Counselor by the Arizona Board of Behavioral Health Examiners, Certified Rehabilitation Counselor by the Commission on Rehabilitation Counselor Certification, and Certified Life Care Planner by the International Commission on Health Care Certification.
2. In the above matter, you have requested that I evaluate the ability of Mr. Davis to work and earn wages but for and considering the injuries he allegedly sustained in the subject incident and to determine his future care needs arising from his claimed injuries. In the context of my retention in this matter, I am referred to as a "Vocational Expert" and "Life Care Planner."
3. Vocational experts are called upon by both plaintiffs and defendants alike to provide expert opinions in literally thousands of cases every year. A simple Westlaw search shows that parties have relied upon vocational experts in more than 10,000 reported cases alone. As many of those cases make clear, the vocational expert's testimony is often crucial to the trier of fact's ability to make an informed decision regarding the impact of the defendant's conduct on the plaintiff's earning capacity, and ultimately to determine the amount of economic damages to be awarded in the case. And vocational

Colorado  
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Office: 720-441-6004  
Fax: 720-441-6013

Arizona  
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Suite 600  
Phoenix, AZ 85012  
Office: 602-264-4625  
Fax: 602-264-4638

Wisconsin  
2715 Linwood Dr.  
PO Box 748  
Sun Prairie, WI 53590  
Office: 608-846-4520  
Fax: 608-857-9050



rehabilitation experts are, in most cases, the only type of experts qualified to give opinions about a plaintiff's employability and earning capacity. Those qualified as Life Care Planners are the only ones who have the special training and expertise to identify the future care needs arising from a claimed injury, disability and the costs associated with those future care needs.

4. In evaluating the impact of a personal injury upon a plaintiff's ability to work and earn wages and employment options, the vocational expert conducts a detailed analysis of many different factors. At the outset of the evaluation, the vocational expert reviews the physical and mental limitations associated with the claimed injury. The existence, nature, and severity of those limitations and work restrictions (if any) are established by examinations conducted by physicians and psychologists. In the typical personal injury case, the parties retain medical and psychological experts to determine the nature of the plaintiff's injury and the degree of impairment. The vocational expert relies upon such medical and psychological evaluations to determine how the physical and/or mental limitations identified by the medical experts affect an individual's ability to work.
5. In addition, the vocational expert analyzes the plaintiff's individual job-related capabilities. Job-related capabilities are determined from a wide range of personal factors which have the potential to influence a person's vocational options. Vocational experts refer to the personal factors collectively as "worker traits." Worker traits include such things as physical capacity, education, skills, abilities, aptitudes, motivation and various personality characteristics. The worker traits of a particular person are determined from a careful review of that person's academic and vocational skills, attitudes, personality, interests and temperaments. By examining such traits, the vocational expert is able to make an accurate assessment of the job options available to the plaintiff, both prior to and following the event in question.
6. In order to obtain the necessary information about worker traits, the vocational expert employs a variety of methods. One treatise summarizes the key aspects of a vocational assessment and the basic means of data collection as follows:

Physical functioning obtained from review of medical records, self-description, dexterity testing;

Intellectual and aptitude functioning obtained from educational records review, **interview information** and self-description, intelligence and academic testing;

Emotional functioning obtained from verified work history, **interview information** and self description, personality assessment;

History, leisure time activities, standardized inventories, interest;

Interest Exploration obtained from **personal interview**, review of work;

Functioning in particular areas of employability and placeability obtained from job readiness inventories, **personal interview**, prior work experiences, interview information. (Emphasis added).

Parker & Szymanski, Rehabilitation Counseling: Basics and Beyond, (PRO-ED. 1992).

7. The vocational expert gathers a wide variety of relevant information through the process of personal interviews and vocational testing. Because of the broad range of worker traits that are relevant to future earning capacity, personal interviews may cover many topics and typically vary greatly from one case to the next, depending on the nature of the plaintiff's injuries, educational background and job history. Thus, the evaluation is a highly individualized process. As one authority notes, the vocational information is not necessarily gathered in an orderly process; rather, the various items of information are analyzed, synthesized and interpreted as they are collected. Weed & Field, The Rehabilitation Consultant's Handbook, p.91 (2nd ed. 1994). As such, an interactive meeting between the vocational expert and the plaintiff allows the vocational expert to identify and explore the specific types of information that will assist in the evaluation of that individual, and to immediately follow-up with the most effective methodology in order to obtain further pertinent information as part of the interview process. Indeed, nearly every text book, journal article, and other authority that addresses the practice of the vocational expert speaks to the advantages and importance of in-person interviews.
8. A personal interview with Mr. Davis is very important to fully explore his work and earnings history and the functional exertional demands of these jobs (both cognitive and physical) so that a comprehensive assessment of his ability to work and earn wages can be carried out.
9. More so, as a Licensed Professional Counselor and Certified Rehabilitation Counselor, my license and certification allows me to make clinical observations that are significant to an assessment of his ability to work that can also be correlated with records from other providers and data sources. This ultimately allows for clinical judgment to be applied, a critical component of any earning capacity evaluation and assessment of future care needs (Field, Timothy M., Choppa, Anthony A., and Weed, Roger O., "Clinical Judgment: A Working Definition for the Rehabilitation Professional," The Rehabilitation Professional, 17 (4), pp. 185-194 (2009, released 01/04/10).
10. A very important component to the vocational evaluation process includes the administration of a vocational test battery. This is also a one-on-one meeting where standardized tests are administered to evaluate the subject's academic levels of achievement, aptitudes, interests and work values. In order to preserve the integrity of the tests and protocols, vocational testing can only be performed on a one-to-one basis with no other observers present.

11. Much of the information that needs to be obtained cannot be obtained through the traditional discovery process. Vocational experts, like physicians and psychologists, apply a specific methodology to their assessment and evaluation process. Just like a physician, psychologist or other allied health professional would be expected to perform their own in-person meeting with the subject of the analysis, rehabilitation counselors who serve as vocational experts also expect to perform their own in-person assessment and administer the battery of tests consistent with their background, training, experience, licenses and certifications. Information and data obtained through a clinical interview and vocational test battery cannot be obtained through any other method.
12. I estimate that my clinical interview with Mr. Davis will last approximately 2-3 hours; administration of the vocational test battery will probably take 2-3 hours. Therefore, accounting for the need for breaks and the testing, the total evaluation could take as long as 6 hours.

Please let me know if you have any questions regarding the above. If the clinical interview and vocational test battery is to go forth, please contact Maggie Arzola in our office at [maggiea@vocationaldiagnostics.com](mailto:maggiea@vocationaldiagnostics.com) to discuss dates.

Sincerely,  
VOCATIONAL DIAGNOSTICS, INC.



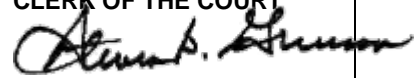
Aubrey A. Corwin, M.S., L.P.C., C.R.C., C.L.C.P.

Director

*Licensed Professional Counselor (Arizona Board of Behavioral Health Examiners)*  
*Certified Rehabilitation Counselor (Commission on Rehabilitation Counselor Certification)*  
*Certified Guidance Counselor, PreK-12 (Arizona Department of Education)*  
*Certified Life Care Planner (International Commission on Health Care Certification)*  
[aubreyc@vocationaldiagnostics.com](mailto:aubreyc@vocationaldiagnostics.com)

AAC/ma





**BREF**  
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jared@clearcounsel.com  
dustin@clearcounsel.com  
*Attorneys for Plaintiff*  
*Kalena Davis*

**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

KALENA DAVIS, an individual  
Plaintiff,

vs.

ADAM DERON BRIDEWELL, an  
individual; LYFT, INC., a foreign  
corporation; THE HERTZ CORPORATION,  
a foreign corporation; DOE OWNERS I  
through X; and ROE LEGAL ENTITIES I  
through X, inclusive,  
Defendants.

Case No.: A-18-777455-C  
Dep't. No.: XIII

**PLAINTIFF'S BRIEF REGARDING  
NRCP 35 AND NRS SECTION 52.380**

PLAINTIFF KALENA DAVIS by and through his counsel of record, Jared R. Richards,  
Esq. and Dustin E. Birch, Esq. of Clear Counsel Law Group, hereby submits his Brief Regarding  
NRCP 35 And NRS Section 52.380.

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**DECLARATION OF JARED R. RICHARDS, ESQ.  
IN SUPPORT OF PLAINTIFF'S BRIEF REGARDING  
NRCP 35 AND NRS SECTION 52.380**

I, JARED R. RICHARDS, ESQ., being first duly sworn, depose and say:

1. I am an attorney licensed to practice law in the State of Nevada and the owner of Clear Counsel Law Group, counsel to Plaintiff in this matter.
2. This Declaration is submitted in support of Plaintiff's Brief Regarding NRCP 35 And NRS Section 52.380.
3. A true and correct copy of Minutes Of The Meeting Of The Assembly Committee On Judiciary, Eightieth Session, dated March 27, 2019, is attached hereto as Exhibit 1.
4. A true and correct copy of MINUTES OF THE SENATE COMMITTEE ON JUDICIARY, Eightieth Session, dated May 6, 2019, is attached hereto as Exhibit 2.

I declare under penalty of perjury that the foregoing is true and correct.

*/s/ Jared R. Richards*

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JARED R. RICHARDS

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1 **I. INTRODUCTION**

2 A single question confronts this Court: whether NRS Section 52.380 is substantive or  
3 procedural. Nevada law clearly provides that a statute is substantive (and therefore within the  
4 prerogative of the Legislature) if it creates, recognizes, or expands rights, duties and obligations.

5 Moreover, Nevada law fiercely protects the separation of powers between the co-equal  
6 branches of government, requiring a Court to presume the constitutional validity of a statute. The  
7 attacking party has a heavy “burden of making a clear showing” that the Constitution has been  
8 “clearly violated.” In conducting its analysis, this Court must make “every possible  
9 presumption . . . in favor of the constitutionality of a statute[.]”

10 In the face of this Herculean task, Defendant proffers mere assertions and *ipse dixits* that  
11 the statute is instead procedural—failing to address the myriad rights, duties, and obligations clearly  
12 recognized, created, or enhanced by the statute. Defendant follows this poor showing by recounting  
13 the disapproval of Defense experts regarding the statute and its purported negative effects—opinions  
14 which might have been relevant to the Legislature’s consideration of the statute, but which can play  
15 no role in this Court’s evaluation of its constitutionality.

16 In short, Defendant makes little effort to acknowledge or meet its heavy burden to make a  
17 “clear showing” that the Constitution has been “clearly violated.” Defendant’s argument falls far  
18 short of that goal. In light of the rights, duties, and obligations recognized, created, or enhanced by  
19 the statute, and the absence of any real argument to the contrary, NRS Section 52.380 must be  
20 recognized as substantive and therefore constitutional.

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1       **II.       LEGAL ARGUMENT**

2               **A.       NRS SECTION 52.380 CONTROLS THE PRESENCE OF**  
3               **OBSERVERS IN THE EXAMINATION ROOM—SUPERSEDING**  
4               **NRCP 35—IF NRS SECTION 52.380 ESTABLISHES A**  
5               **SUBSTANTIVE RIGHT.**

6               Nevada law is extraordinarily clear regarding the interrelation of court rules and legislative  
7 statutes. As the Nevada Supreme Court has noted,

8               The judiciary has the inherent power to govern its own procedures, and this power  
9 includes the right to promulgate rules of appellate procedure as provided by law.  
10 [ ] Although such rules may not conflict with the state constitution or “abridge,  
11 enlarge or modify any substantive right,” NRS 2.120, the authority of the judiciary  
12 to promulgate procedural rules is independent of legislative power, and may not be  
13 diminished or compromised by the legislature. [ ] We have held that the legislature  
14 may not enact a procedural statute that conflicts with a pre-existing procedural rule,  
15 without violating the doctrine of separation of powers, and that such a statute is of  
16 no effect. [ ] Furthermore, where, as here, a rule of procedure is promulgated in  
17 conflict with a pre-existing procedural statute, the rule supersedes the statute and  
18 controls. [ ]

19               *State v. Connery*, 99 Nev. 342, 345 (1983) (internal citations omitted).

20               Thus, the judiciary has the exclusive prerogative to make rules governing its own  
21 procedures, while the Legislature has the exclusive prerogative to enact statutes governing the  
22 substance of the law. This distinction is predicated upon the “separation of powers” doctrine, which  
23 is specifically recognized in the Nevada State Constitution. *Berkson v. LePome*, 126 Nev. 492, 498  
24 (2010) (citing Nev. Const. art. 3, § 1(1)).

25               This division of powers between three separate departments (Legislative, Executive, and  
26 Judicial) is fiercely guarded under Nevada law—in fact, the Nevada Supreme Court has noted that,  
27 while the United States Constitution implicitly divides power through its creation of three branches,  
28 “Nevada’s Constitution goes one step further; it contains an express provision prohibiting any one  
branch of government from impinging on the functions of another.” *Comm’n on Ethics v. Hardy*,  
125 Nev. 285 (2009) (citing *Secretary of State v. Nevada State Legislature*, 120 Nev. 456, 466  
(2004)) (emphasis added).

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As noted in *Connery*, the prohibition on the Legislature’s enactment of a statute that conflicts with a pre-existing procedural rule, without violating the doctrine of separation of powers,” is limited to any “procedural statute.” *Connery*, 99 Nev. at 345. A “procedural statute” that conflicts with a “procedural rule” is “of no effect, irrespective of which was enacted first. *Id.*

However, consistent with this separation of powers among co-equal branches of government, the courts likewise may not promulgate a rule that would “abridge, enlarge or modify any substantive right[.]” *Id.*

Thus, the entire question of whether NRS Section 52.380 properly governs the presence of an observer (or the conducting of a recording) in Defendant’s examinations of Plaintiff in this matter hinges on a single question—does NRS 52.380 recognize a substantive right? If so, the doctrine of separation of powers mandates that the statute supersedes NRCP 35. *Connery*, 99 Nev. at 345 (court rules cannot “abridge, enlarge or modify any substantive right”).

**B. NEVADA LAW PRESUMES THE CONSTITUTIONALITY OF THE STATUTE AND REQUIRES THE “EVERY POSSIBLE PRESUMPTION” BE MADE IN ITS FAVOR, WHILE PLACING ON THE DEFENDANT A HEAVY “BURDEN OF MAKING A CLEAR SHOWING THAT THE STATUTE IS UNCONSTITUTIONAL.”**

As Defendant notes in its brief, it may be appropriate to look to the legislative history to determine whether NRS Section 52.380 was intended to convey a substantive right. Under Nevada law, the proper approach for evaluation of the constitutionality of a statute has been explicitly defined by the Nevada Supreme Court,

begin[ning] with the presumption of constitutional validity which clothes statutes enacted by the Legislature. [ ] All acts passed by the Legislature are presumed to be valid until the contrary is clearly established. [ ] In case of doubt, every possible presumption will be made in favor of the constitutionality of a statute, and courts will interfere only when the Constitution is clearly violated. [ ] Further, the presumption of constitutional validity places upon those attacking a statute the burden of making a clear showing that the statute is unconstitutional. [ ]

*List v. Whisler*, 99 Nev. 133, 137-38 (1983) (internal citations omitted) (emphases added).

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1 It is vital to recognize proper judicial scrutiny if a statute mirrors the legislative passage of  
2 that statute—during either process, the separation of powers must at all times be strictly maintained.  
3 Thus, just as the Legislature would invade the province of the Judiciary by enacting a procedural  
4 statute conflicting with a court’s procedural rule, the Judiciary would likewise invade the province  
5 of the Legislature by striking down a statute that is within the prerogative of the Legislature.

6 To that end, to show respect for the province of the Judiciary, the Nevada Supreme Court  
7 has repeatedly recognized that a statute may be invalidated only if it “clearly violate[s]” the  
8 Constitution—in this case, by “clearly violat[ing]” the prerogative of the Judiciary to make its own  
9 rules governing its own procedure. *Connery*, 99 Nev. at 345. Such a statute must be afforded  
10 “every possible presumption . . . in favor of . . . constitutionality[,]” and the burden of “mak[ing] a  
11 clear showing that the statute is unconstitutional[ ]” is properly placed on the party challenging the  
12 statute.

13 It is impossible to ignore the parallels to the “presumption of innocence” afforded to the  
14 defendant in a criminal trial. *Watters v. State*, 129 Nev. 886, 889 (2013) (presumption of innocence  
15 “is a basic component of a fair trial under our system of criminal justice.”).

16 As the criminal law presumes the innocence of the accused in order to force the prosecution  
17 to meet the strictest possible standard (“beyond a reasonable doubt”) in order to obtain a conviction,  
18 the Nevada Supreme Court’s standard of review presumes the constitutionality of a challenged  
19 statute (making “every possible presumption”) and places on the challenging party a heavy “burden  
20 to make a clear showing that the statute is unconstitutional.” *List*, 99 Nev. at 137-38.

21 Thus, just as our approach to criminal law strongly prefers acquittal of the guilty over  
22 conviction of the innocent, the civil law likewise strongly prefers upholding of an unconstitutional  
23 statute over invalidation of a constitutional one. *Id.*

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1           **C.     DEFENDANT FAILS EVEN TO ATTEMPT TO MEET ITS**  
2           **“BURDEN OF MAKING A CLEAR SHOWING THAT THE**  
3           **STATUTE IS UNCONSTITUTIONAL.”**

4           As established above, this Court must presume the constitutionality of the statute, and also  
5 must make “every possible presumption in favor of its constitutionality,” interfering only if the  
6 Constitution is “clearly violated.” *List v. Whisler*, 99 Nev. 133, 137-38 (1983). The statute may be  
7 found unconstitutional only if Defendant (the party “attacking a statute”) meets its “burden of  
8 making a clear showing that the statute is unconstitutional.” *Id.* (emphasis added).

9           As further established above, the sole constitutional issue presented here is an alleged  
10 violation of the separation of powers—that is, Defendant “attack[s] a statute” by claiming that it  
11 invades the prerogative of the Judiciary to make rules governing its own procedures. *Defendant’s*  
12 *Brief*, 9:17 – 13:27. Because the Judiciary is entitled to make procedural rules, while the Legislature  
13 is entitled to enact substantive statutes, the sole question here is whether NRS Section 52.380 is a  
14 procedural statute or a substantive statute. *Cf. Connery*, 99 Nev. at 345.

15           Therefore, Defendant’s burden here is to make a “clear showing” that the statute is  
16 procedural rather than substantive. Absent such a showing, the statute stands. As its brief makes  
17 painfully obvious, Defendant comes nowhere close to meeting its burden. In fact, Defendant  
18 attempts to meets this “heavy burden,” if at all, merely by assertion and *ipse dixit*.

19           Defendant asserts:

20           At its core, NRS [Section] 52.380 is a procedural rule on top of the procedural rule  
21 of NRCP 35. NRS [Section] 52.380 also sets forth how to enforce the rights and  
22 duties of an individual ordered by the Court to undergo a physical and, or mental  
23 examination. The statute stipulates that an observer may attend the examination,  
24 whom the observer may be, the ability to audio record the examination or create a  
stenograph, and the way in which the observer or examiner may suspend the  
examination. The plain language of NRS [Section] 52.380 does not create rights,  
duties or obligations. This statute creates and extends ways in which to enforce  
rights and duties of a physical and[/]or mental examination. [sic]<sup>1</sup>

25           *Defendant’s Brief*, 13: 9-16.

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28 <sup>1</sup> Obviously, “a physical and[/]or mental examination” has no “rights and duties.” Defendant presumably intended to  
reference the “rights and duties,” respectively, of those undergoing or requesting an NRCP 35 examination.

Defendant reaches this conclusion, of course, only by simply ignoring the actual meaning of “substantive law,” as well as the actual content of the statute and similar provisions of Nevada law. The law cited *by Defendant* provides that

[s]ubstantive law is defined as “the basic law of rights and duties . . . as opposed to procedural law (. . . law of jurisdiction, etc.).” Black’s Law Dictionary 1281 (5th ed. 1979).” *Meadows v. Dominican Republic*, 817 F.2d 517, 524 (9th Cir. 1987). Further, the United States Supreme Court defined “a substantive standard is one that ‘creates duties, rights and obligations,’ while a procedural standard specifies how those duties, rights, and obligations should be enforced. Black’s Law Dictionary 1281 (5th ed. 1979) (defining ‘substantive law’).” *Azar v. Allina Health Servs.*, 139 S. Ct. 1804, 1811 (2019).

*Defendant’s Brief*, 12:16-26.

On that basis, Defendant simply *asserts* that NRS Section 52.380 does not create rights, duties, or obligations. This assertion is false on its face. The statute creates substantive rights, including the *right* of the examinee to have his attorney or his attorney’s representative serve as the observer, the *right* to have an observer present for a neuropsychological, psychological, or psychiatric examination without making a showing of “good cause,” and the *right* to have the observer record the examination without making a showing of “good cause.”

Prior to the enactment of this statute, the examinee had no right to have his attorney or his attorney’s representative serve as the observer, and in fact was expressly barred from doing so. *See Nev. R. Civ. P. 35(a)(4)*. To assert, as Defendant does, that this statute did not create any substantive rights for the examinee is simply wrong.

Likewise, prior to this statute, the examinee did not have an unfettered right to have an observer present for a neuropsychological, psychological, or psychiatric examination, or to record the examination, but instead had to make a showing of “good cause” to the satisfaction of the court. *Id.* The statute created those unfettered rights. *See Nev. Rev. Stats. § 52.380(2), (3)*. Moreover, creation of these rights is accompanied by a corresponding duty or obligation of the requesting party and the examinee not to interfere with the examinee’s exercise of these rights.

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As the proponents of the statute testified before the Legislature, creating these substantive rights for the examinee, and thereby protecting the examinee while he is being handled, touched, prodded, and examined by a doctor—a doctor chosen by his adversary in litigation, usually an insurance company—a doctor whom the examinee did not choose and with whom the examinee has no relationship (not even a doctor-patient relationship) was the very purpose of NRS Section 52.380:

This bill does not involve those types of [procedural] issues [such as a limitations period or the response time permitted for a motion] but, instead, involves a substantive right of a person during an examination by a doctor whom he did not choose, does not know, and has no relationship with whatsoever, a doctor who was chosen by an insurance defense attorney. This is a doctor who is going to handle this patient. It is not really a patient because there is no doctor-patient relationship. This examinee is going to be touched and handled by this doctor with whom he has zero relationship. It is being forced upon him as part of this examination. That is why this is a substantive right, and this is why we are before you here today.

*Exhibit I*, 4; see also Declaration of Jared R. Richards, Esq., *supra*, ¶ 3 (authenticating Exhibit 1).<sup>2</sup>

<sup>2</sup> Defendant correctly notes that, under Nevada law, “[where language is ambiguous], a court should consult other sources such as legislative history, legislative intent, and analogous statutory provisions.” *Defendant’s Brief*, 7: 11-14 (citing *Madera v. State Indus. Ins. Sys.* 114 Nev. 253, 257 (1998)).

However, no “ambiguity” exists here. Nevada law defines “ambiguous” as “subject to more than one reasonable interpretation[.]” *Nev. Dep’t of Corrs. v. York Claims Servs.*, 131 Nev. 199, 204 (2015) (citing *Savage v. Pierson*, 123 Nev. 86, 89, (2007)). As the *Madera* court itself noted,

[w]here the language of a statute is plain and unambiguous and its meaning clear and unmistakable, there is no room for construction, and the courts are not permitted to search for its meaning beyond the statute itself.

*Madera*, 114 Nev. at 257 (quoting *Erwin v. State of Nevada*, 111 Nev. 1535, 1538-39 (1995)).

Defendant expressly acknowledges that neither the Rule nor the Statute at issue here contains any ambiguous language. *Defendant’s Brief*, 6: 14 – 7: 9 (reviewing language of Rule and Statute and concluding that “NRS [Section] 52.380 as enacted creates a true and plain conflict with NRCP 35.”) (emphasis added).

Defendant attempts to circumvent this contradiction by heading its discussion of “ambiguity” with the sentence “When a Conflict Exists Between a Statute and a Rule, Courts are to Look Beyond the Plain Meaning and Review of the Legislative History is Warranted.” *Id.* at 7: 10-11. Thus, Defendant simply substitutes “conflict” for “ambiguity” in order to invoke *Madera* and its progeny. *Id.* at 7: 10-15.

While Plaintiff agrees that review of the legislative history is appropriate here in order to evaluate the Legislature’s intent, it is not correct, as Defendant states, that “the legislative history of NRS 52.380 requires evaluation,” as this matter involves no “ambiguity,” and therefore “there is no room for construction, and the courts are not permitted to search for meaning beyond the statute itself.” *Id.* at 7: 14-15 (emphasis added); *Madera*, 114 Nev. at 257 (emphasis added).

1 As the proponents testifying before the Legislature noted, under NRCP 35, the examinee  
2 was deprived of his substantive rights, forced into an adversarial examination without his chosen  
3 observer (his attorney or the attorney’s representative), without the right to record the examination  
4 unless the court approved, and without any observer at all in certain types of examinations. The  
5 Legislature, through enactment of NRS Section 52.380, sought to create and protect these  
6 substantive rights of the examinee, to protect the victim’s interests against those of the insurance  
7 company on the other side. *See Nev. Rev. Stats. § 52.380.*

8 Moreover, the recognition of these substantive rights by the Legislature brought Nevada’s  
9 civil law into step with the laws of surrounding states, as well as Nevada’s own workers’  
10 compensation laws—all of which already recognized these substantive rights. *See*  
11 *Exhibit 1, 3-5, 10.*

12 The proponents of the bill expressly noted that

13 this bill addresses substantive law, dealing with fundamental rights such as liberty  
14 and to control your own body. [ ] Assembly Bill 285 protects injured victims. The  
15 NRCP Rule 35 examination governs some of the practices in place but not enough  
to protect an alleged victim’s rights [from] intrusion.

16 *Exhibit 2, 4-5; see also Declaration of Jared R. Richards, Esq., supra, ¶ 4 (authenticating*  
17 *Exhibit 2).*

18 Defendant’s mere assertion (*Defendant’s Brief*, 13: 20-21) that “[b]oth NRCP 35 and NRS  
19 [Section] 52.380 are clearly procedural by their impact in regards to the litigation between  
20 parties[ ]” ignores the obvious fact that wide swaths of Nevada statutory law have “impact in  
21 regards to the litigation between parties,” but are nonetheless substantive rather than procedural,  
22 and are therefore constitutional. To cite merely the most obvious examples, such substantive  
23 statutes impacting litigation include NRS Chapter 48 (admissibility of evidence); Chapter 49  
24 (privileges); Chapter 50 (witnesses); Chapter 51 (hearsay); and Chapter 52 (documentary and other  
25 physical evidence).

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1 Thus, the fact that a particular statute may have an “impact in regards to the litigation  
2 between parties[ ]” has no bearing on whether the statute is substantive or procedural. To the  
3 contrary, as Defendant notes—before completely ignoring these basic definitions—substantive  
4 law recognizes or defines the rights, duties, and obligations of the parties, while procedural law  
5 defines how those rights, duties, and obligations are to be enforced. *Defendant’s Brief*, 12: 21-26.

6 Defendant, while citing to opinions of the opponents of A.B. 285 and of its own experts in  
7 support of its assertions, makes no actual showing (let alone the required “clear showing”) that  
8 NRS Section 52.380 is procedural rather than substantive. Defendant fails to address any of the  
9 substantive rights created, recognized, or expanded by the statute, and in fact fails to meaningfully  
10 address the distinction between substance and procedure as defined by Nevada law.

11 Viewing Defendant’s argument as charitably as possible, one could potentially say that  
12 Defendant has raised a negligible question as to whether the statute is procedural—certainly not a  
13 “clear showing that the statute is unconstitutional,” nothing that remotely overcomes the  
14 “presumption of constitutional validity” with “every possible presumption [being] made in favor  
15 of the constitutionality of a statute.” *List v. Whisler*, 99 Nev. 133, 137-38 (1983). Defendant’s  
16 argument falls far short of meeting, or even attempting, Defendant’s actual burden in challenging  
17 the statute. *Id.*

18 **D. THE OPINIONS OF DEFENDANT’S EXPERTS AND THE**  
19 **POTENTIAL IMPACT OF THE STATUTE ON THE “POOL” OF**  
20 **AVAILABLE EXPERTS ARE IRRELEVANT TO THE**  
21 **CONSTITUTIONALITY OF THE STATUTE.**

22 Defendant inexplicably presents “objections” by its experts in this matter, Thomas Francis  
23 Kinsora and Aubrey Corwin, as well as opinions by others, regarding the advisability of the  
24 substantive rights created for an examinee by NRS Section 52.380. *Defendant’s Brief*, 13: 28 – 17:  
25 4; *see also id.*, Exhibits D and E thereto.

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Obviously, such considerations can play no role in this Court’s evaluation of the constitutionality of the statute, as the sole question presented here was whether the Legislature had the prerogative to enact this statute, not whether such enactment was wise or virtuous or advisable.

It is hornbook Nevada law that the wisdom of a particular statute is the sole province of the Legislature and the Executive:

But whether a statute represents sound or wise policy is for the political branches of government to decide, not the judiciary. See *In re Fontainebleau Las Vegas Holdings*, 128 Nev. [556] (2012) (“When a statute is clear, unambiguous, not in conflict with other statutes and is constitutional, the judicial branch may not refuse to enforce the statute on public policy grounds. That decision is within the sole purview of the legislative branch.” (quoting *Beazer Homes Nev., Inc. v. Eighth Judicial Dist. Court*, 120 Nev. 575, 578 n. 4 [ ] (2004))). See generally *Griswold v. Connecticut*, 381 U.S. 479, 482 [ ] (1965) (“We do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions.”). When the Legislature has acted and its intention is clear and unambiguous, we must enforce the statute as written even if we think that the statute operates in an unfair way or was just a bad idea. See *Pellegrini v. State*, 117 Nev. 860, 878 [ ] (2001) (“[E]quitable principles will not justify a court’s disregard of statutory requirements.” (internal footnote omitted)).

*Moultrie v. State*, 131 Nev. 924, 938 (Nev. App. 2015) (as modified Dec. 29, 2015).

It is hornbook law that it is not for the Judiciary to judge the impact or wisdom of a statute duly enacted by the Legislature. *Id.* Rather, opinions such as those of Dr. Kinsora and Ms. Corwin and their colleagues could have been presented to the Legislature during its consideration of A.B. 285 (which became NRS Section 52.380), to attempt to persuade the Legislature that the statute “operates in an unfair way or was just a bad idea.” *Id.* Such opinions in fact were presented to the Legislature by opponents of A.B. 285, but the Legislature enacted the statute despite those opinions. *Exhibit 1*, 13-19; *Exhibit 2*, 10-11. That decision cannot be revisited by this Court.

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Nevada law places a heavy burden on the party attacking a statute as unconstitutional. That party must make a “clear showing” that the Constitution has been “clearly violated.” Moreover, this Court must presume the constitutionality of the statute and make every possible presumption in favor of its validity.

Defendant’s argument comes nowhere close to satisfying this heavy burden, instead simply asserting that the statute is procedural and ignoring the rights, duties, and obligations recognized by the statute. Defendant also spends a vast portion of its brief arguing against the wisdom of the statute, a factor that can play no role in this Court’s consideration.

Because Defendant has failed to meet its heavy burden to show that the Constitution has been “clearly violated,” the “presumption of constitutional validity” remains intact, and the statute must be preserved as constitutional.

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**CERTIFICATE OF SERVICE**

I certify pursuant to NRCP 5(b)(4) that on the 6th day of April 2020, I caused a true and correct copy of the foregoing, **PLAINTIFF'S BRIEF REGARDING NRCP 35 AND NRS SECTION 52.380**, to be served as follows:

- ☐ by placing a true and correct copy of the same to be deposited for mailing in the U.S. Mail at Henderson, Nevada, enclosed in a sealed envelope upon which first Class postage was fully prepaid to ; and/or
- ☐ pursuant to EDCR 7.26, by sending it via facsimile; and/or
- ☐ by hand delivery
- ☒ E-service

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/s/ Terri D. Szostek

An employee of Clear Counsel Law Group

# EXHIBIT 1

**MINUTES OF THE MEETING  
OF THE  
ASSEMBLY COMMITTEE ON JUDICIARY**

**Eightieth Session  
March 27, 2019**

The Committee on Judiciary was called to order by Chairman Steve Yeager at 8:04 a.m. on Wednesday, March 27, 2019, in Room 3138 of the Legislative Building, 401 South Carson Street, Carson City, Nevada. The meeting was videoconferenced to Room 4406 of the Grant Sawyer State Office Building, 555 East Washington Avenue, Las Vegas, Nevada. Copies of the minutes, including the Agenda ([Exhibit A](#)), the Attendance Roster ([Exhibit B](#)), and other substantive exhibits, are available and on file in the Research Library of the Legislative Counsel Bureau and on the Nevada Legislature's website at [www.leg.state.nv.us/App/NELIS/REL/80th2019](http://www.leg.state.nv.us/App/NELIS/REL/80th2019).

**COMMITTEE MEMBERS PRESENT:**

Assemblyman Steve Yeager, Chairman  
Assemblywoman Lesley E. Cohen, Vice Chairwoman  
Assemblywoman Shea Backus  
Assemblyman Skip Daly  
Assemblyman Chris Edwards  
Assemblyman Ozzie Fumo  
Assemblywoman Alexis Hansen  
Assemblywoman Lisa Krasner  
Assemblywoman Brittney Miller  
Assemblywoman Rochelle T. Nguyen  
Assemblywoman Sarah Peters  
Assemblyman Tom Roberts  
Assemblywoman Jill Tolles  
Assemblywoman Selena Torres  
Assemblyman Howard Watts

**COMMITTEE MEMBERS ABSENT:**

None

**GUEST LEGISLATORS PRESENT:**

None





**STAFF MEMBERS PRESENT:**

Diane C. Thornton, Committee Policy Analyst  
Bradley A. Wilkinson, Committee Counsel  
Lucas Glanzmann, Committee Secretary  
Melissa Loomis, Committee Assistant

**OTHERS PRESENT:**

Alison Brasier, representing Nevada Justice Association  
Graham Galloway, representing Nevada Justice Association  
George T. Bochanis, representing Nevada Justice Association  
David Sampson, Attorney, Law Offices of David Sampson, Las Vegas, Nevada  
Dane A. Littlefield, President, Association of Defense Counsel of Nevada  
Kevin Higgins, Chief Judge, Sparks Justice Court; and representing Nevada Judges of Limited Jurisdiction  
John Tatro, Senior Judge; and representing Nevada Judges of Limited Jurisdiction  
Richard Glasson, Judge, Tahoe Justice Court; and representing Nevada Judges of Limited Jurisdiction  
Ann E. Zimmerman, Judge, Las Vegas Township Justice Court; and representing Nevada Judges of Limited Jurisdiction  
Paul C. Deyhle, General Counsel and Executive Director, Commission on Judicial Discipline  
Jerome M. Polaha, Judge, Second Judicial District Court  
John J. Piro, Deputy Public Defender, Legislative Liaison, Clark County Public Defender's Office  
Kendra G. Bertschy, Deputy Public Defender, Washoe County Public Defender's Office  
John T. Jones, Jr., Chief Deputy District Attorney, Clark County District Attorney's Office; and representing Nevada District Attorneys Association

**Chairman Yeager:**

[Roll was taken. Committee protocol was explained.] Today, we have three bills on the agenda. I will now open the hearing on Assembly Bill 285.

**Assembly Bill 285: Enacts provisions relating to a mental or physical examination of certain persons in a civil action. (BDR 4-1027)**

**Alison Brasier, representing Nevada Justice Association:**

What I would like to do is explain what these examinations are in their current form. They are unique to personal injury litigation. I want to lay the foundation for what these examinations are and then turn it over to my colleagues in Carson City to explain more about the history of how we got here and what this bill proposes to do.

What we are talking about in this bill is commonly referred to as a "Rule 35" examination. They are very unique to personal injury cases because these examinations happen when someone is alleging injury. When a person alleges an injury, he or she can be forced to appear at an examination by an expert witness who is hired by the insurance company and to whom that claimant has no relationship. Under the current state of our rules, that claimant—the victim—has no right to have an observer present. They do not have a right to record what happens. What we have seen is, if there is a dispute in what happens in the examination, most of the time deference is given to the person who is being presented to the judge or jury as an expert witness rather than the victim or plaintiff who was forced to present at that examination. That is the current state of the law. The reason I used the word "unique" at the beginning of my testimony is because the way it currently stands in these forced examinations, the claimant has no rights as part of that examination.

When we look at it in different contexts, we would never expect people to submit to an examination under this current set of conditions. Outside of litigation, if you have an important medical examination, it would be commonplace for you to bring a friend or family member with you, maybe to ease anxiety and to make sure you are capturing all the important information. If you went to a doctor who said, "No, you do not have any right to have someone present with you during this examination," you would have the choice to pursue another doctor if you did not feel comfortable in that scenario. Under the current rules for these Rule 35 examinations, that is not the situation for personal injury victims.

Also, this is very unique to Nevada personal injury cases. Washington, California, and Arizona—all of our neighboring states—currently allow what this bill proposes. They allow an observer to be present during the examination and they also allow a recording to happen. Nevada is really an outlier with our western neighbors as far as not providing these protections for the injured party during the examination.

Additionally, in the workers' compensation context in Nevada, observers are allowed to be present during workers' compensation examinations. Again, this is really an outlier for Nevada personal injury cases where we do not already have these protections afforded to the claimants. I will turn it over to my colleagues to explain why that is important and how we got here.

**Graham Galloway, representing Nevada Justice Association:**

The origins of this bill flow from a committee formed by the Supreme Court of Nevada two years ago to review, revise, and update our *Nevada Rules of Civil Procedure* (NRCPP)—the rules that govern all civil cases. The committee was made up of two Nevada Supreme Court justices, various district court judges from throughout the state, a number of attorneys who represent the various fields of practice in the civil side of litigation, and a member of the Legislative Counsel Bureau. The committee was broken down into subcommittees, and I chaired the subcommittee that handled this Rule 35 medical examination issue. Our subcommittee recommended substantial changes to the rule. Mr. Bochanis was a member of the committee. We voted 7-to-1 to make substantial changes, the changes that are set forth or embodied in the bill before you, Assembly Bill 285. Unfortunately, when our

recommendations went to the full Supreme Court of Nevada, they rejected our changes for reasons we are still not clear on. At that point, we reassessed our position.

Contrary to the opponents of this bill who want to say this is a procedural matter, this is not a procedural matter; it is a substantive right. It is the right to protect and control your own body. The scenario we often see in this situation is that our clients are going through a green light or sitting at a stop sign, and somebody blasts through the light and clocks them, injuring them. They are then required to go to an examination by an expert who is hired by the defense. These are experts that are trained, sophisticated, and weaponized. They put our clients through an examination and, in the process, the clients are interrogated. Our clients have to go through this without any representation.

This is not a criminal situation, but in the criminal field, you often hear the terms "right to counsel," "right of cross examination," and "due process." Those terms do not necessarily transfer over into the civil arena. In the civil arena, we have what is called "fundamental fairness." Is it fundamentally fair that an injured person is required to go to a hired expert—an expert whose sole goal is to further the defense side of the litigation—have their body inspected, have their body examined, and then be interrogated without there being a lawyer present to represent that individual? There is nothing in the law in any arena where that occurs except for the personal injury field. That is what A.B. 285 is designed to do: bring some fundamental fairness to the process and to level the playing field. It is not a procedural rule. That is how it is being characterized by the opponents of this bill. It is a fundamental right that you should have representation in such an important situation. I will turn it over to my colleague who will explain the nuts and bolts of the bill.

**George T. Bochanis, representing Nevada Justice Association:**

This bill is very important to individuals who are being subjected to these insurance company examinations. The reason we are before you today is because this bill protects substantive rights. This is not a procedural rule, which you would usually find within our NRCP. Our *Nevada Rules of Civil Procedure* involve things such as how many years someone has to file a lawsuit and how many days someone has to file a motion or an opposition to a motion. This bill does not involve those types of issues but, instead, involves a substantive right of a person during an examination by a doctor whom he did not choose, does not know, and has no relationship with whatsoever, a doctor who was chosen by an insurance defense attorney. This is a doctor who is going to handle this patient. It is not really a patient because there is no doctor-patient relationship. This examinee is going to be touched and handled by this doctor with whom he has zero relationship. It is being forced upon him as part of this examination. That is why this is a substantive right, and this is why we are before you here today.

What I would like to discuss with you are the two components of this bill. The first is that we are requesting that an observer be present during these types of insurance company evaluator examinations. That observer can be anyone; it can be a spouse, parent, friend, or it could be the person's attorney or a person from that attorney's staff. Really, when you look at the current rule, the attorney/observer portion of it is really the only difference between the

current rule and what we are asking for as part of this bill. I am surprised there is any opposition to the attorney/observer portion of this bill. As Ms. Brasier said, this is already allowed by every other state that surrounds Nevada. California, Utah, and Arizona already allow attorney observers.

I can tell you from representing clients in workers' compensation cases in Nevada for more than 30 years, we already attend doctor examinations in workers' compensation cases—"we" being attorneys or our staff. It happens on every permanent partial disability evaluation. An attorney is present. To me, the reason is very obvious; you want openness during this process. You already have an agent of the insurance company, the doctor, present. This bill levels the playing field by having an attorney or attorney staff member present. Is an attorney going to attend every one of these examination? No, probably not. How about an attorney's staff member? Probably. A family member? Yes. These are options that a person who is being subjected to this type of examination should have. All we are seeking is a level playing field where during these examinations you have an agent of the insurance company—the doctor—present, along with an observer who could be an attorney or someone from the attorney's office.

The language in the proposed bill is very clear: the observer is just an observer. They cannot participate. They cannot interrupt. If anything like that happens, the doctor can terminate the examination, and you can go to court to work out your problems or differences. I can tell you that in attending workers' compensation permanent partial disability evaluations, I have never had a doctor terminate an exam during the hundreds of exams I have attended over 30 years. Never once have we ever had a problem with the doctor. Do the doctor and I get along at all times in these evaluations? No, probably not. However, we are able to keep it civil. We are able to keep it professional, and there is no reason an attorney observer being at the exams in this context is going to be any different. That is the observer component of this bill.

I should also mention that having an observer prevents abuse during these examinations as well, because it keeps everything open and transparent. Think about it in a practical sense. We have had doctors who have had some issues during these exams, and we felt as though we should not need to have a hearing for every examination to show that a doctor is having problems with taking advantage of people during some of these examinations. Fortunately, it is a minority of doctors with whom we have had these issues. This observer keeps it open.

The second portion of the bill is audio recording. It is not video recording. This can be done as simply as using a cellphone, or it can be done as complicatedly as bringing in a court reporter. In practicality, how many times is a court reporter going to be brought in even though this language allows it? Probably 1 percent of the time, if at all. There are so many other means of communication whereby you are able to record. Again, this promotes openness and transparency during these examinations. The beauty of the language of this bill is that the doctor can also record it. You have a recorded version by the doctor, you have a recorded version by the patient or observer, and you know what happened. There is none of this "he said, she said." I cannot tell you how many cases I have had to litigate over an issue

where an examinee goes to one of these exams, we receive the report back, and there are things in it that are totally unfamiliar to me. I ask the client and she says to me, "I never told him that." Now we have this dispute over what was said during the exam. Now it is in the report by a doctor who will be testifying to that during trial. Again, audio recording by both the patient or observer and the doctor prevents this from happening. It keeps us out of court, and it keeps these cases moving.

In fact, before she was appointed to the Nevada Court of Appeals, the discovery commissioner in the Eighth Judicial District Court in Clark County already allowed audio recording on all cases. The problem with the current language in the current rule is that audio recording is only allowed for good cause. Now, what "for good cause" means is uncertain. Every time there is an examination where audio recording is requested, we are going to have litigation of these cases. It is going to cause delays. It is going to cause additional costs. It is going to cause clients' access to justice to be delayed on these types of cases. That is why this bill before you today does not provide or require this "for good cause" standard on audio recordings. As I stated before, the discovery commissioner had already allowed this type of audio recording without a showing of good cause. Again, we want to keep these examinations open and transparent, and we want these clients of ours to be able to move on with their cases without having to litigate every single issue because this examination is being requested by the insurance defense attorney.

These are the two elements, and these are the differences between what the existing rule says and what this bill says. Again, we are before you today because an examination by a doctor who is not of this person's choosing involves a substantive right. It is something that should be within a statute and not a procedural rule.

**Chairman Yeager:**

I want to make sure we have the record clear in terms of the process that got us here. The Supreme Court of Nevada was looking to make substantial changes to the NRCP, and those changes went into effect March 1, 2019. We are talking about Rule 35. It sounds as though there was a subcommittee that I believe Mr. Galloway chaired.

**Graham Galloway:**

That is correct.

**Chairman Yeager:**

So there were eight members of that subcommittee, and there was a 7-to-1 vote in favor of advancing what appears in A.B. 285. That was the recommendation, 7-to-1, out of the subcommittee to the entire Supreme Court of Nevada. Do I have that right?

**George Bochanis:**

There were some changes made such as the observer only being a person who was not the attorney and not associated with the attorney's staff. For the audio recording, there was nothing about the "for good cause" requirement being involved.

**Chairman Yeager:**

Essentially, the recommended language that came out 7-to-1 was not adopted by the Supreme Court. We do not know why, but it simply was not adopted.

**Graham Galloway:**

That is correct.

**Chairman Yeager:**

I just wanted to make sure we had that clear on the record.

**Assemblywoman Backus:**

I noticed you were both on the subcommittee, and I just read our new NRCP. When looking at the separate branches of government, the court can implement court rules consistent with Nevada law. I was trying to put these two together, and I am thinking about how the language is presented in section 1, subsection 1 of A.B. 285 where it says "An observer may attend," for example. The current Rule 35 is almost on par with that rule. I am not sure if that was your intent. It does not sound as though it was.

I also just want to clarify how an independent medical examination works. It is either by stipulation or by order. It looks as though this new rule keeps it by order. What will end up happening? When I was reading the very lengthy comments to the rule, it seemed as though the court and committee spent a lot of time working on that. Someone could raise the issue of having an observer being present, and likewise with the audio. That could be agreed to, or it could be put into the opposition if they are challenging a request for the examination. When I was looking at Rule 35 and A.B. 285 this morning, I could almost read them in sync. The only thing that was glaring to me was the issue of the attorney. I have to admit, I kept asking my friends who are attorneys if they really want to be present for this. That was the only thing I thought was agreed upon by all three amendments that were sent over to the Nevada Supreme Court with the petition. It seemed as though each of them excluded the attorney. That was the one thing I noticed. If you could clarify that for me, that would be great.

**Graham Galloway:**

You are correct that the language is similar, but it is distinct. From a practical standpoint, you are also correct that most of these examinations are done by stipulation. You work out the details ahead of time. With some attorneys, you can hash out the details. With other attorneys, you cannot. We have made changes that are not very dramatic, but they are substantial. Instead of having to show good cause, if you cannot agree with the other side as to the parameters of the examination, and you have to go the motion route, the rule provides that this can be done by motion or agreement. Most of the time it is by agreement. Under the existing rule, if you can agree, you have to show good cause for an observer. The big change we are proposing here is that you do not have to show that good cause; you automatically have the right to have an observer present, whether he or she be an attorney, an attorney's staff member, or a family member or friend.

The other point you raised about the differences between the current rule and our bill is that this would allow for an attorney observer. In reality, I do not foresee myself going to any of these examinations. I really have no interest in doing that. I think I could use my time better elsewhere. It would be a staff member or a family member. Currently, what I do—which, perhaps, is not necessarily authorized by the rule—is have all my clients take a family member. No one has ever objected to that. That, in practicality, is what is going to happen in most cases. There are certain experts who are marked for special treatment because they have been proven to be extremely biased. Those individuals may end up having a staff member from the law firm attending their examinations. Again, I think in the run-of-the-mill case, you are sending a family member or a friend.

**George Bochanis:**

As far as the mechanics of the examinations we have experienced in my office, we get a letter from the insurance defense attorney where the attorney says, "We want to examine your client on this date at this time. Bye." Of course, it does not work that way. We call them and say, "Sure, pursuant to these conditions." Or, under the rules, we can file a motion. My experience has been that we were able to agree less than half the time on these conditions. Since this rule has gone into effect on March 1, we have received three letters requesting clients to submit to examinations, and we have not been able to agree to the conditions once. That is because of the "for good cause" showing on the audio recording portion. We disagree as to what that means, and this was our concern when the current rule came out. When you allow that type of vagueness over this type of examination, there is just not agreement on it. This rule has been in effect for 27 days. We have received three letters in 27 days requesting these exams. We have not been able to agree to one of them. That is because of this audio recording "for good cause" requirement as well as the observer issue. I have told attorneys I should be able to send a staff member to one of these, and their objection is that it is not what the rule says. The rule says it has to be a family member. On some of these more complicated examination-type cases, we want a staff member there. This law we have proposed provides and allows for that. I think these are important distinctions.

Again, this is a substantive right. The procedural part of Rule 35 is, how do you get there? You agree to it or you file a motion. That stays with NRCP 35. The mechanics of the actual examination is a whole other issue. That is a person being handled and touched by a doctor who is not chosen by them but selected by an insurance defense attorney. That is why that is a substantive right. That is why we have proposed A.B. 285. This is something we thought about after the NRCP committee. We said to ourselves, You know, this really is not a procedural rule. I hope that helped.

**Assemblywoman Backus:**

It did. I was just trying to correlate what we have now as our rule and what the law is going to provide for. We all know as practitioners that we are going to continue experiencing the court reading of this law if it gets implemented along with Rule 35. I think we will have to deal with it through offers of judgment, as well as certain interpleader actions depending on what remains in our statutory provisions. Just so I am clear, it looked as though everyone had originally agreed that attorneys would not be present. The type of work I do sometimes

is more product liability. When an attorney shows up, I show up. It seems as though on a personal injury case, the goal is now to basically eliminate this from the rule and allow attorneys or someone from their office to be present. Another thing that looked as though it came out of nowhere was the whole examination of neuropsychological, psychological, or psychiatric examinations wherein an observer was going to be completely eliminated. I take it that through the proposal of A.B. 285, it would negate that provision as well.

**George Bochanis:**

The carve-out for psychological examinations completely took us by surprise. It was never discussed. No exceptions were ever allowed for psychologists under this bill. I have to be honest with you; I do not know who is more vulnerable and who more requires an observer with them during these examinations than a person with a traumatic brain injury. That came to us as a complete surprise. That was something that was never discussed during the NRCPC committee and was never provided as being a carve-out for this type of specialty area.

As a result of that occurring, we have provided to the Committee as exhibits some documents we think support our view that there should not be some special exception for psychologists on these examinations [pages 51-76, ([Exhibit C](#))]. A few psychologists appeared at the Supreme Court of Nevada hearing on this rule, and they testified that what they do is secret—the tests and the way they grade their tests are trademarked, secret items so they cannot be disclosed—and as a result of that, you cannot have an observer present. Well, that is not so. I have submitted to you 74 websites that contain copies of these exams and how they are graded and how they are evaluated [pages 51-59, ([Exhibit C](#))]. So much for the proprietary or secret nature of these examinations.

These psychologists also testified that an observer being present during a psychological evaluation destroys the entire evaluation because if somebody is present, the examinee is not going to be as open. We have also submitted an affidavit from a psychologist with 20 years of experience who states that the mere fact this psychological exam is conducted by someone this person did not select, really puts the examinees in a position where they are not going to be entirely forthcoming [pages 60-76, ([Exhibit C](#))]. They are going to hold things back because it is an examination that has been forced on them. Simply having somebody present is not going to change the nature of the examination at all. In fact, an observer being present during this examination is more required than any other type of examination because certain distractions—the inflection of the voice of this psychologist examiner and other things like that—could have a huge impact on the findings of the examination. Not having an observer present affects that. We have submitted these items, the affidavit and the 74 websites, as further evidence that there should not be a carve-out for psychologists.

**Assemblywoman Nguyen:**

You have mentioned workers' compensation. It is my understanding that those provisions that are similar to those which are contained here are also statutory as a part of *Nevada Revised Statutes* (NRS) 616C.490. In addition to the workers' compensation, are there any other provisions that are statutory as well? Obviously, there is some precedent here, so I was wondering if you are aware of anything else.



**George Bochanis:**

I am sure there are; I just cannot think of any right now. I can tell you that in our survey of looking at other states where an observer is allowed to be present, it is a mix between procedural rules and statutes. Other states have considered it to be a statutory right. It is a good point. There are a lot of other statutes and a lot of other things within our NRS that are partially statutory and are partially procedural, which are covered by NRCP. It does occur commonly.

**Assemblywoman Nguyen:**

As far as how workers' compensation works, do you not have the same concerns that you do under these current rules as they have been implemented in March?

**George Bochanis:**

We have found in workers' compensation cases that we have had zero problems with attorney observers being present. Although it is true that I certainly am not there at 100 percent of these permanent partial disability examinations, 99 percent of the time my staff is. It is not a family member. That is because there are certain mechanics of how these examinations on workers' compensation cases are supposed to be performed. If they are not performed in a certain way, it invalidates the exam. So we always have a staff member present at these. We have never had a doctor terminate an examination. I have never received a call from a doctor saying my staff member did something inappropriate, or from the insurance adjuster or defense attorney for the workers' compensation case objecting to something we did. An observer is an observer. That is our intention on this bill, and that is what occurs in workers' compensation cases now.

**Assemblywoman Krasner:**

In looking at some of the opposition cases, they say this is an attempt to narrow the pool of doctors willing to conduct these Rule 35 examinations. Can you please address that?

**Graham Galloway:**

Of all the other states that allow attorney observation and allow audio or video recording, there has never been an issue about the availability of defense experts. If you read the comments presented by the opposition, it is a fear, but there is no actual evidence. This, unfortunately, is a lucrative area of practice. There are going to be experts who will participate in this arena. There is no evidence—absolutely none—that this prevents the defense from hiring somebody. In the workers' compensation arena, there is never an issue. When I read that argument, I start seeing smoke. I see nothing else. From the experience of our neighboring sister states, there is absolutely no evidence that occurs.

**Alison Brasier:**

I think this idea that it is going to narrow the pool of doctors is kind of just a scare tactic—a red herring—to distract from the actual issues. In my view, I do not see why this would narrow the pool. It provides protection for the doctors so there is an objective record of what happened during the examination. If there is a dispute, everyone has a record of what happened. It is a protection for the claimant, but also for the doctor. I think this idea that it

will narrow the pool of doctors because we are going to create an objective record really has no basis in fact.

**Chairman Yeager:**

Can you give the Committee a sense of how much these examinations typically cost? I know they are paid by the defense, but is there a range in terms of what a physician would charge to do an examination such as this?

**George Bochanis:**

We have provided as an exhibit testimony from a doctor, Derek Duke, where the district court conducted 15 days of hearings on the appropriateness of this specific doctor conducting Rule 35 examinations [pages 9-43, ([Exhibit C](#))]. This doctor testified that over the course of a year, he earned more than \$1 million performing just these examinations. We have seen doctors charge anywhere from \$1,000 to \$10,000 for these examinations. That includes the review of medical records and the examination of the injured person.

**Chairman Yeager:**

The reason I ask that—I am not trying to drag anyone through the mud—is because I wanted to dovetail off Assemblywoman Krasner's question about the availability of doctors. It does sound as though it can be lucrative, so I do not know that it would come to pass if we were to enact this bill. We have heard some bills in this Committee in the criminal context about the importance of recording confessions. We have also had body camera bills. Some of the reasoning there is just what Ms. Brasier said: if you have to go into court later and have a dispute about what was said or what happened, it is obviously very helpful to have a video recording. I know in this circumstance we are not talking about video, because it is a medical examination. We are talking about audio. Is part of the reason you brought this bill forward to try to eliminate some of the litigation costs that happen after these examinations in front of the court?

**Graham Galloway:**

Exactly. That is the intent, or at least a major component of the intent of this bill: to eliminate the squabbling, the fighting, the extra unnecessary litigation, and the expense involved in that. That is part of the intent of the bill.

**Chairman Yeager:**

At this time, I will open it up for testimony in support.

**David Sampson, Attorney, Law Offices of David Sampson, Las Vegas, Nevada:**

I have seen some of the issues brought up in dispute of this particular bill. There is a clear understanding among the defense bar, the plaintiffs' bar, and in the insurance industry, of the importance of operating in the sunlight. When an insurance company learns of an incident—whether it is someone falling somewhere, a car crash, or whatever else goes on—one of the very first things they try to do is get a recorded statement. It is always important to them that they have a tape recording or some kind of digital record of what the individual has to say about what took place and what their injuries are. I have never once heard of an insurance

adjuster doing a statement of someone who has been injured and not making a record of that. So they understand and appreciate the importance of operating in the sunlight and making sure we have a record. Every time a deposition is taken, we have a record that is made. That is not just pursuant to the rules. It is important to understand and have a court reporter write down everything that goes on. More and more nowadays, we have a large percentage of depositions taking place with a video recording because it is important that we catch not only what is said, but inflections in voice, facial features, body language, et cetera. The defense bar, the plaintiffs' bar, and the insurance industry clearly understand it is important to have a clear, accurate record of what goes on. Whenever there are written questions submitted—they are called interrogatories in legal proceedings and discovery—they wisely always insist that those be signed under oath, verified, and notarized so we have a clear depiction of what the individual said and what took place when these different things happen.

Then, miraculously, when we turn to these Rule 35 examinations and when it comes time to take one of my clients and put him or her in a room with a highly paid expert from the defense and shut the door, all of a sudden, the insurance industry and the defense bar—and I would imagine any other opponents to this particular bill—do not want any record made. They want the conversation to have no witnesses, no transcript, no recording, and no idea as to what went on other than the proverbial "he said, she said." As Ms. Brasier mentioned, when you have a "he said, she said" situation come down to a layperson who did nothing wrong but was sitting at a stoplight when someone came through and hit him from behind with their car, and the person on the other side is a doctor who has been practicing in Nevada for 20 years, there is a tendency of jurors—no matter who is right, who is wrong, or what the truth is—to side with the defendant's expert and say whatever they are saying took place must actually be what happened. It is extremely unfair. I have seen, personally, on multiple occasions, the defense come back from the examining doctor with a report that contains information my client says is not true. If you review the order regarding Dr. Duke, there were multiple times when Dr. Duke said things took place in the examination that actually could not be true.

I would like to share two quick examples. When I was a very young attorney, in 1999 and 2000, I was involved in a case where my client was sitting in a lawn chair one evening in his driveway when a drunk driver drove across the road, up over the curb, across part of the lawn, and into the driveway, hit my client who was sitting in the lawn chair, and hit the house he was sitting in front of. My client was asked to attend an examination because his leg was shattered. He had \$60,000 in medical bills as a result of his first night in the emergency room. They had the defense and the insurance company for the drunk driver hire a doctor to examine my client. When that report came out, I was astonished to read the doctor's report which said my client indicated he was walking in what the defense attorney later argued was the road when he was hit by this car. Of course, I went to my client as a young attorney not realizing what was going on—I even wanted to give deference to the doctor—and asked him why he told the doctor he was walking in the road when we had eyewitnesses and knew he was sitting in a chair in his driveway. Of course, my client was very insistent that was not what he said. We had to have this "he said, she said" dispute between the doctor saying, "Oh no, Mr. Johnson told me he was walking in the road," and my client saying, "No, I told the

doctor I was sitting in a chair." We had to get into this big mess with additional eyewitnesses who, thankfully, were there to say, "No, he was sitting in a chair and not trying to walk." In my opinion, they are trying to manufacture an issue that, first of all, has nothing to do with medical treatment. Why the doctor would even be talking about whether you were walking in the road or sitting in a chair is beyond me. It shines a light on the issues. It would have been nice, in that case, to have a record or an observer to say, "No, I was there. I heard exactly what Mr. Johnson said, and he said he was sitting in a chair as he said every other time he has talked about what happened in this horrific incident."

I had a situation recently in a case that I had where another doctor who had examined my client came out and said my client had misrepresented to me facts about a magnetic resonance imaging scan she had. My client said that was not what took place. I have seen it a number of times. I know Mr. Galloway had mentioned the experts are weaponized. I am not going to comment on whether that is the case or not, but I would like you to consider this: in 20 years of practice I have had hundreds of clients go and have an examination by a doctor who was hired and retained by the defense and the insurance company. Out of all of those cases, I can remember one time where the doctor examined my client and said these injuries that this individual sustained were due to this particular crash. In every other case I can recall, the doctors have invariably said the injuries were either not caused by this crash or they were not to the extent that the treating doctor had claimed.

The arguments related to the chilling effect simply do not hold. We see in our neighboring states that it is not the case. I would ask you to please consider this: I have had both male and female clients call me in tears from the doctor's office saying they were subject to being yelled at—what they considered to be abuse—and they did not know what to do. Please have these examinations take place in the sunlight and allow the citizens of Nevada to have the same rights as our sister states to be protected and to have an accurate depiction of what takes place in these examinations.

**Chairman Yeager:**

Is there additional testimony in support? [There was none.] Is there anyone opposed to A.B. 285?

**Dane A. Littlefield, President, Association of Defense Counsel of Nevada:**

I will stick mostly to my prepared statement ([Exhibit D](#)), but I do have additional comments that I will work into that. In support of my testimony today, I have provided the Committee with a copy of the current version of Rule 35 ([Exhibit E](#)), the former version of Rule 35 ([Exhibit F](#)), the Supreme Court of Nevada administrative order enacting the amendments to NRCP ([Exhibit G](#)), and various statements in opposition to the bill by members of the Association of Defense Counsel ([Exhibit H](#)). I have also provided a Supreme Court of Nevada case addressing the separation of powers issue that is implicated by this bill ([Exhibit I](#)).

One of the things we heard earlier was an attempt to characterize Rule 35 as affecting a substantive right and distinguish it from a procedural rule. That is simply not the case.

The *Nevada Rules of Civil Procedure* are made to address civil litigation through all phases, including the discovery phase, whether that is dealing with a Rule 35 examination or interrogatories as was addressed by the supporters of the bill.

The first issue is that A.B. 285 appears to be an attempt to reduce the pool of doctors willing to conduct Rule 35 examinations and create an unfair advantage, which has already been addressed by the Supreme Court of Nevada and the committee assigned to revise NRCP. This bill would allow the observer of a Rule 35 examination to be the plaintiff's attorney or a representative of the attorney, as you are aware. This could lead to unnecessary confrontations with doctors and unnecessary motion practice. Assembly Bill 285 only allows the plaintiff's attorney to attend a Rule 35 examination. There is no provision for the defendant's attorney or an observer representative of the attorney to be present. This creates a situation in which the plaintiff's attorney has an unfair, and perhaps unethical, opportunity to engage in direct communications with the doctor selected by defense counsel without defense counsel being present. The solution to that would be to simply not allow attorneys in the room. Under the current rule, there is a provision to allow recording by audio means for a showing of good cause. I would submit that good cause could be if a plaintiff's attorney has concerns about a doctor who has been retained by the defense who—I will remind the Committee—is already subject to the Hippocratic oath. A doctor is not an insurance company hitman.

The bill would allow the plaintiff's attorney to make a stenographic recording of the examination as an alternative to audio recording. This contemplates the presence of a court reporter. It is my understanding that many doctors would decline to participate in Rule 35 examinations where a lawyer and a court reporter would be present in the examination room. This would create an atmosphere in which many doctors would no longer be willing to participate in the examinations, and this would create an unfair advantage for the plaintiff's personal injury bar by substantially reducing or, perhaps, eliminating the defense bar's ability to retain them.

The bill allows audio or stenographic recording and limits the audio or stenographic recording to "any words spoken to or by the examinee during the examination." This suggestion is unworkable and would require the recorder or stenographer to stop recording anytime a word is spoken to anyone else in attendance at the examination. Additionally, A.B. 285 contemplates that the examination might need to be suspended for misconduct by the doctor or the attorney observer, with potential court review. However, because an audio or stenographic recording cannot include anything the lawyer said to the doctor or the other way around, there would be no record of the alleged misconduct and no way for a court to decide a "he said, she said" dispute. These concerns are already addressed by the current Rule 35.

Assembly Bill 285 allows the plaintiff's attorney to suspend the exam if the lawyer decides that the doctor was "abusive" or exceeded the scope of the exam. However, the plaintiffs' bar is concerned with eliminating motion practice caused by differences in opinion of what occurred at the examination. Something we would likely have differences of opinion on is

the definition of "abusive." To what extent do actions and/or words within the examination room become "abusive"? This is a highly subjective and highly prejudicial rule and provides no clear standard for the lawyer to make the highly disruptive decision on whether to suspend the examination. Moreover, the defendant is burdened with the cost of an examination that may abruptly be suspended for no real reason other than the plaintiff's attorney's subjective determination.

Further, section 1, subsection 6 of A.B. 285 states that if the exam is suspended by the lawyer or the doctor, only the plaintiff may move for a protective order. There is no reciprocal provision that allows the defendant to move for a protective order or a motion to compel to prevent abuse by the plaintiff's attorney during the exam or to seek sanctions against the offending attorney. Allowing one side in a lawsuit to seek relief while denying the availability of such relief to the other side would be grossly unfair and, most likely, a violation of due process.

In addition, A.B. 285 invites a clear and direct violation of constitutional separation of powers. This is why the plaintiffs' bar is trying to cast this proposed statute as affecting a substantive right rather than a procedural one; it is the only way they can try to get away from the Supreme Court's independent ability to draft and promulgate their own procedural rules. The Supreme Court of Nevada has enacted a comprehensive set of rules dealing with discovery, the NRCP, which includes Rule 35. The Court consistently holds that the Legislature violates separation of powers by enacting procedural statutes which conflict with preexisting procedural rules or which interfere with the judiciary's authority to manage litigation. If it were to become law, this new statute would directly and inappropriately contradict important parts of the newly amended NRCP and therefore violate the separation of powers doctrine.

Finally, the Supreme Court of Nevada's Nevada Rules of Civil Procedure Committee, in its drafters note to the new version of Rule 35, explicitly and directly rejected that an attorney or an attorney representative should be present at Rule 35 examinations in Nevada. That issue has already been considered duly and rejected in turn.

**Assemblywoman Backus:**

While you were speaking, I was trying to take a look at Rule 35 of the *Federal Rules of Civil Procedure*. It starts off looking similar to our new Rule 35 of NRCP. Are there any federal statutory provisions that address independent medical examinations to your knowledge?

**Dane Littlefield:**

Not to my knowledge, but I have not researched that topic.

**Assemblyman Edwards:**

I have a question about something you said about it being unfair to have one side represented in the room and not the other side. However, if you do have a representative of the plaintiff, the doctor is actually serving as a representative of the defendant. Is that correct?

**Dane Littlefield:**

That is correct. However, there would not be a defense attorney present in the room.

**Assemblyman Edwards:**

However, you do have representation, and you have trained representation that can actually take care of the defendant's side of the story.

**Dane Littlefield:**

Well, that assumes the expert witness who has been retained has a knowledge of what the scope of the procedural discovery rules are and what they can and cannot say. The fact that the bill as it stands does not allow for the recording of any statements that are not made directly to or from the plaintiff would mean there is no record for what is said in the room. It would become another "he said, she said" dispute.

**Assemblyman Edwards:**

How would an audio tape stop recording something that is being said in the room?

**Dane Littlefield:**

That seems to be the problem. That would be an issue where the audio recording would record everything, but to submit that to the court with a protective order or a motion, the plaintiffs' bar could make an argument that we would have to redact anything in a transcript that would be derived from that audio record and remove anything that could actually be back and forth between the doctor and the attorney.

**Assemblyman Edwards:**

If this goes through, that does not happen, right? If this bill is approved, the redaction does not take place. You have the full story there from both sides, correct?

**Dane Littlefield:**

Not the way the bill is written. The way the bill is written directly minimizes what can be recorded by stenographic or audio means to only the statements to or from the plaintiff. Under the current rule, audio recording can be done for good cause, and I do not believe it limits statements that are made. I would direct the Committee to the current Rule 35(a)(3) of the NRC, which addresses audio recording of an examination.

**Assemblyman Edwards:**

I do not see where you are saying that anything is redacted or eliminated in the audio tape.

**Dane Littlefield:**

In the bill it would be section 1, subsection 3. It says, "Such a recording must be limited to any words spoken to or by the examinee during the examination."

**Assemblyman Edwards:**

So if that is between the examiner and the examinee, should that not give you the story of what is going on?

**Dane Littlefield:**

Not if there is a third party in the room. This would only be the examiner and the examinee. It would exclude any statements between the doctor and the observer, whether that is an attorney, an attorney representative, or a family member.

**Chairman Yeager:**

We can have the sponsors address that when they come back up. The way I read it was that it would not allow the attorney or representative to just start making arguments on the audio recording, but I believe the intent was to make sure whatever was said in the room is available for the judge. We can let the sponsors address the intent of that provision when they come back up.

I have a question. I understand where you are coming from. However, at the same time, to the extent there are disputes about what happened in the room and what was said, would it not be helpful to have at least an audio recording to be able to present to the discovery commissioner in helping to decide that? Do you just believe that would make it more difficult? The way I see it, it would be more helpful for the judge in making a decision to have a recording of what happened.

**Dane Littlefield:**

I do not necessarily disagree with that. A recording can be appropriate in certain circumstances, and the current rule actually provides for an audio recording for good cause. I think that is the intent of the Nevada Supreme Court and of its committee. I would submit that good cause would be if a plaintiff's attorney does have a concern that an expert witness who has been chosen by the defense may be problematic. Whether that is well-founded or not, that can be established via motion practice if the parties cannot stipulate to an audio recording. At that point, it would go before a judge who would be neutral and determine whether there is good cause to believe that an audio recording would be necessary to protect any party's rights.

**Chairman Yeager:**

I know we are just about three weeks into the new civil rules, but are you aware of any judges actually finding good cause in allowing an audio recording of an independent medical examination?

**Dane Littlefield:**

I have not been personally involved in any decisions of that nature.

**Chairman Yeager:**

I know it might be too early for this to work its way through the system, but I just wanted to ask that.

**Assemblywoman Krasner:**

Going back to the statement about this allowing for confrontations with only a plaintiff's attorney being in the room with the doctor and not the defense counsel being present,



obviously, the doctor is not an attorney. I have to agree with you there. Is it your position that if the defense were allowed to have an attorney or representative present as well, you would be okay with this bill?

**Dane Littlefield:**

Not necessarily. I think the issue with that is, I cannot imagine any plaintiff's attorney ever agreeing to have a defense attorney in the room during a medical examination that could become very private. That is why the most clear-cut solution is to not allow any attorneys or their representatives in the room. Of course, if a plaintiff and the plaintiff's attorney were amenable to something like that, it would be worth considering from a defense perspective.

**Assemblywoman Torres:**

I have some concerns about not allowing for another person to be in the room. I think back to my own father whose first language is not English. Sometimes, he has difficulty expressing himself. Although my mom would not get involved in the middle of a doctor's appointment, I think having her present allows him to feel more at ease because it is a setting where he does not feel comfortable and her being in the room would provide for an additional level of comfort. Additionally, my father is not the most reliable witness because he does not necessarily understand all the medical jargon that is being thrown around. I think it benefits both sides. It would benefit the plaintiffs and the defendants in that it allows for both of them to have a reliable story of what occurred if either another individual is present or if that encounter is recorded.

**Dane Littlefield:**

I agree with you. The rules currently do allow for an independent observer in the room; it just provides that the observer will not be an attorney or an attorney's representative. Family members are currently allowed in the room.

**Assemblywoman Torres:**

Are they allowed to record currently, or only with the judge's permission?

**Dane Littlefield:**

It would be with a showing of good cause. In a situation such as that where there is an issue with a language barrier, that could be grounds to assert good cause and have the judge rule on that or the parties stipulate to that.

**Assemblywoman Torres:**

In how many cases have they shown good cause for the mere fact of translation or additional assistance over the last year?

**Dane Littlefield:**

At this point, I do not have that information. However, I do not know if there is actually a data tracking capability for that. I would be happy to look into it to see if there is precedent for that. I just believe the language barrier issue would be a strong argument from the plaintiff's side.

**Assemblywoman Cohen:**

Continuing with Assemblywoman Torres' father as an example, say he is in the Eighth Judicial District Court. We have heard from the judges of the Eighth Judicial District Court and the other district courts throughout the state that their dockets are full, they need more judges, and there is too much going on. Can you tell us how long it would take if a plaintiff's attorney filed a motion saying they have good cause to have someone else in the room? How long would that process take in the Eighth Judicial District Court?

**Dane Littlefield:**

My practice area is pretty restricted to the Second Judicial District Court and some other northern Nevada courts. I cannot speak to the Eighth Judicial District Court particularly. I can offer that if there is good cause, at least up here in northern Nevada, we, as defense attorneys, are amenable to stipulating to reasonable requests. We may be portrayed as sticks in the mud who are not willing to compromise, but that is not the case. We are willing to work with people when there is a showing of good cause. If a motion to compel or a motion for a protective order requiring audio recording—a family observer is already allowed without a court order—is requested, I do not imagine it would be a very long process. It would go to a discovery commissioner, and the commissioner can work on that relatively expeditiously. My experience in the Second Judicial District Court is that we are fortunate to have a discovery commissioner who is extremely expeditious and very quick. Unfortunately, I cannot speak to the Eighth Judicial District Court.

**Assemblywoman Cohen:**

Once a motion would be filed in front of a discovery commissioner, how long would that take before it is heard?

**Dane Littlefield:**

As a former law clerk, I know internal rules of the court are, generally, they try to have a turnaround within 60 days. It is not guaranteed; it is just a general target goal. When matters get sent to the discovery commissioner, it can be anywhere between a week and 60 days. Generally, my experience is that it is much quicker than the 60-day rule of thumb.

**Assemblywoman Cohen:**

As attorneys, we are not supposed to file pleadings right away. We are supposed to work with each other. The discovery commissioner is going to want to know what the plaintiff's attorney did to try to work this out, so there would be phone calls, letters, and emails going back and forth beforehand for a few weeks on top of this. Is that correct?

**Dane Littlefield:**

That is correct. I would submit that the rules already provide a mechanism to remedy that. If an attorney is engaging in bad faith and if the discovery commissioner determines that any objections were not made from a good-faith basis, it opens that attorney up to discovery sanctions that can be levied against him. If it is found that the attorney is needlessly wasting the court or the other party's time, that would be a route the plaintiffs could go down.

**Assemblywoman Cohen:**

So we could go around 90 days before we have this resolved. Also, I think you can talk to any attorney who practices in this state, and that attorney would tell you that opposing counsel has acted inappropriately and that attorney could not get results from the court.

**Chairman Yeager:**

I will open it up for additional opposition testimony for A.B. 285. [There was none.] Is there anyone neutral? [There was no one.] I will invite our presenters to come forward to address Assemblyman Edwards' question and make any concluding remarks.

**Alison Brasier:**

Going to section 1, subsection 3, about allowing recording, I think we would be open to working on the language of that section. The intent was to capture exactly what happens in the room. That would include any dialogue with the observer. I think we would be open to dialogue about changing that section to alleviate any concerns. I was sitting and thinking about why this needs to be codified in NRS and we cannot just take care of it through the current rules. Something that has not been talked about before was that there are certain examinations that take place called "underinsured or uninsured motorist coverage" in which a person's own insurance company is, under contract, allowed to have them submit to one of these types of examinations prior to litigation being filed. Going along with the substantive rights we have been talking about and this right to control your body—even outside the litigation context—when you are dealing with an examination being compelled by an insurance company, I think it is important that we have those protections codified in our NRS.

**George Bochanis:**

It was our intention that the audio recording captures everything from the moment the person walks into the examination room to the second that person leaves the examination room. What you are hearing from the opposition is a very narrow interpretation. It certainly was not supposed to be so diced up. We want everything that is being said by everyone during these examinations to be part of the record. That, again, goes along with the whole concept of keeping this out in the open. It should not be some secret proceeding.

The other thing I wanted to comment on was Assemblywoman Cohen's remarks about the time element. An objection to this type of examination and having to litigate it is going to involve a meet and confer or a telephonic call first between both attorneys, which is going to take several weeks to arrange. It is going to require a motion before the discovery commissioner which adds 30 to 60 days. If one of the attorneys does not like the results of the discovery commissioner report recommendations—that report sometimes takes a month because there are objections to the language—it then goes to district court. Add another 30 to 60 days. If you are going to allow litigation on every examination request for good cause showing on audio recordings, you should give the Eighth Judicial District Court every new judge they want because you are going to need them. It is really going to cause an issue of access to justice for these types of cases.

**Graham Galloway:**

The argument that somehow this bill will lead to the suppression of the availability of experts for the defense side is still unsupported. I did not hear and I have not seen any evidence that will occur. What I did hear is one expert down south is making \$1 million per year doing this kind of work. It is a lucrative business. There will be experts available.

**Chairman Yeager:**

I will now close the hearing on A.B. 285. [([Exhibit J](#)) was submitted but not discussed and will become part of the record.]

I will now open the hearing on Assembly Bill 20.

**Assembly Bill 20: Revises provisions governing judicial discipline. (BDR 1-494)**

**Kevin Higgins, Chief Judge, Sparks Justice Court; and representing Nevada Judges of Limited Jurisdiction:**

We have offered an amended version of the bill ([Exhibit K](#)), and that is what I will be discussing this morning. The preamble to Assembly Bill 20 declares, "It is in the best interest of the citizens of the State of Nevada to have a competent, fair and impartial judiciary to administer justice in a manner necessary to provide basic due process, openness and transparency." Just as we work every day to ensure everyone who appears in our courts are treated fairly and given due process of law, the judiciary should enjoy the same treatment and guarantees of law if they are subject to review or discipline by the Nevada Commission on Judicial Discipline.

Section 1 of Assembly Bill 20 amends *Nevada Revised Statutes* (NRS) 1.440, which already provides for the appointment of two justices of the peace or two municipal court judges to sit on these judicial discipline proceedings once they go to hearing, and merely adds that the Supreme Court of Nevada will consider the advice of our association when making those appointments. We are only asking that the association offer who they think would be a good member to sit on that commission. Of course, the Supreme Court is free to appoint anybody it wants. We have no veto power or anything other than offering advice as to who we think would be an appropriate member.

Section 2 of the bill amends NRS 1.462, subsection 2 to provide that the *Nevada Rules of Civil Procedure* (NRCP) apply to all proceedings after the filing of formal charges. When the Commission receives a complaint from the public, it may choose to investigate, it may choose to ask the judge to respond, and it may file formal charges. Only after the filing of formal charges would this amendment apply. The *Nevada Rules of Civil Procedure* set forth pretrial procedures for discovery, interrogatories, requests for admission, and would also establish rules for pretrial motions. There are no such rules now. Many boards and commissions are subject to NRS Chapter 622A. Those are the NRS Title 54 boards. The Nevada Commission on Judicial Discipline is not a Title 54 board. For those boards it applies to, the rules for pretrial discovery, admission, and motions are set forth in statute.

Section 1, subsection 3 would adopt a procedure followed by many professional regulatory boards in Nevada that the investigative and prosecutorial functions are separated so the board members who decide whether to investigate and file a formal complaint are not the same members who decide whether a judge has violated the judicial canons of the *Revised Nevada Code of Judicial Conduct* and should be disciplined. This is important because, oftentimes, the evidence that is considered in the investigative phase is not the evidence that is introduced in the adjudicative phase, but the board members are aware of it and it is unclear how they disregard it when making a judicial decision. Simply put, the police and prosecutors should not be serving as the judge and jury. Due process requires that discipline decisions be made only on evidence introduced at the hearing, not evidence considered in closed, secret sessions before the public hearing. This is the procedure followed by many boards and commissions. I will draw the Committee's attention to the procedure followed by the Board of Medical Examiners in NRS 630.352: any member who sits on the investigative committee that makes a decision on whether or not a formal complaint should be filed cannot sit on the hearing panel to decide whether the physician should be disciplined.

Section 2 of the bill sets forth some specific due process protections. Section 2, subsection 4, paragraph (a) provides that the venue for a hearing will be in the county where the judge resides. Right now, frequently, northern judges' hearings are held in southern Nevada, and southern judge's hearings are held in northern Nevada. The judges, their attorneys, and their witnesses have to travel to the far end of the state to have their cases heard. This would just provide that the venue resides where the judge is.

Section 2(4)(b) provides that there would not be any interrogatories until after the formal statement of the charges. Just like a regular civil case, interrogatories and requests for admission are not appropriate until a complaint is filed and the person understands what the actual complaint is. Right now, the practice is to ask judges to respond to interrogatories and requests for admissions before the filing of formal charges, before the judge knows what they are actually going to be charged with, and judges are required to testify against themselves before they know what they are being charged with. This would just require them to wait until the formal filing of charges. There are pending cases, even a Nevada Supreme Court case, where judges object to these interrogatories. With a failure to answer them, they are deemed admitted, and you are also subject to additional discipline for failing to cooperate with the investigative process.

Section 2(4)(c) would provide that the Commission would provide all parties with the reports and investigative materials appropriate to the case once a complaint is filed, and no later than ten days before the hearing, including any exculpatory materials. There is no such requirement now that the Commission provide exculpatory materials. Discovery to requests, which are subject to ongoing litigation, have been denied by the Commission in the past. I think it is simply fair that any evidence that is going to be used or relied on by the Commission at the time of the hearing be presented to the judge and their attorney before the hearing. There is ongoing litigation about prehearing motions. Section 2(4)(d) provides that those motions be heard in an open proceeding in the county where the hearing is set unless the parties agree to submit it.

Section 2(4)(e) would require that the prehearing motions be decided ten days before the hearing. These motions are commonly motions to dismiss or motions to limit the charges or discovery motions. Currently, it is the practice of the Commission to not hear those until the full Commission hearing. The defense of the judge may be contingent upon how some of those pretrial motions are heard—whether some of those charges are dismissed or not considered or are not violations of the canons of judicial discipline. Having to wait until an actual hearing to have the pretrial motions considered means the attorney providing the judge their defense really does not know what defense they will be able to provide until the time of the hearing.

Section 2(4)(f) would require that every party be entitled to provide all evidence necessary and relevant to support the case and be given time to do so, and that time limits not be placed upon the presentation of the defense. It has been the practice of the Commission to ask the prosecutor how long he needs to present, and then the defense is given the same amount of time and told they cannot exceed that. It is practice in court that defense has all the time it needs to present its defense; it is not limited by artificial rules. It would have to be necessary and relevant evidence, of course. Section 2(4)(g) provides that if any commission rule conflicts with the NRCPP, the NRCPP will take precedence.

The additional sections clarify some of the evidentiary standards that are used in making these decisions. Section 3 would reword NRS 1.4655(3)(e) to provide that a decision to authorize the filing of a formal statement of the charges would be made when there is a reasonable probability, based upon clear and convincing evidence, to establish grounds, so there is an evidentiary standard now provided in the statute. Section 4 removes the phrase that investigations would only be conducted pursuant to the Commission's own procedural rules. Section 5 rewords NRS 1.4667(1) so the decision to file a formal complaint is based on "whether there is a reasonable probability, supported by clear and convincing evidence, to establish grounds for disciplinary action," which just rewords the current language of the statute.

Section 6 amends NRS 1.467 so that a judge has an opportunity to respond to the initial complaint made to the Commission, but is not required to do so. Now, when the complaint from the public comes in, the judge is asked to respond to that. However, that could be premature based upon the filing of a later formal complaint. If a judge wants to respond, he can, but he is not required to make statements or admissions until he knows what the actual charges against him are, after which the Commission can decide, based on clear and convincing evidence, whether to file a formal complaint.

Section 7 amends NRS 1.468(2) to clarify that the evidentiary standard to determine whether to enter into an agreement to defer discipline is based on whether there is clear and convincing evidence to establish grounds. Section 8 sets forth the provisions on how the amendments apply prospectively into existing cases, and section 9 makes the act effective on passage and approval.

The judges in the state are expected to apply due process rights and give everybody a fair and open hearing. I think it is reasonable to expect that if we are subject to discipline, we enjoy the same due process rights as anybody who appears in front of us. There is a legal maxim that is a question in Roman law about "Who watches the watchers?" Who decides whether the police are doing a good job? Who keeps track of that? The Commission on Judicial Discipline is an independent commission. They report to no one. They are not supervised in any way, and the only way to resolve a dispute is to appeal a matter directly to the Supreme Court of Nevada. I am sure we are more than willing to hear from the Commission and have a discussion with them about possible amendments to this bill, but I do not think it is unfair to expect that due process rights apply when judges are brought before the Commission.

**John Tatro, Senior Judge; and representing Nevada Judges of Limited Jurisdiction:**

I do not want to understate the issue and the importance of it. I have an understanding of how the judges feel and of issues that have come up over the years. I was president of the Nevada Judges of Limited Jurisdiction (NJLJ) twice. None of us want bad judges. It reflects on all of us because when you read about a bad judge, it is as though they group us together, and we certainly do not want that. We want a remedy for finding out bad judges and people who violate ethics rules or other rules. I think the Commission is a very important thing, and I think the work they do is admirable and good. However, this discussion has been at the top of the NJLJ's agenda for over 24 years. I am not talking about war stories about the Commission; it is just this unknown. Why can we not have the same due process rights that litigants have in court on the civil side? We think it is extremely important.

You all received a letter from former Justice of the Supreme Court of Nevada Nancy Saitta ([Exhibit L](#)). In the second paragraph, she says we "must not ignore the most basic notion of fair and equal treatment under the law." We are judges, but we should be afforded that same treatment. When something is brought before us, we should have the same rights as everyone else does. I think Justice Saitta's statement sums it up.

**Richard Glasson, Judge, Tahoe Justice Court; and representing Nevada Judges of Limited Jurisdiction:**

I have been involved with NJLJ for the last 19 years. I am a former president and member of the board. Our mission with NJLJ is education, especially ethics education. We know and can assist the Supreme Court of Nevada in nominating these judges who will sit in judgement of other judges rather than getting that telephone call saying, "I do not know what I am doing. How do I respond to the Supreme Court? How do I sit?" We know who is capable, we know who is able, and we would like to be able to make those nominations to the Supreme Court rather than the same names over and over again being pulled out of a hat.

**Ann E. Zimmerman, Judge, Las Vegas Township Justice Court; and representing Nevada Judges of Limited Jurisdiction:**

I want to point out to the Committee that in *Mosley v. Nevada Com'n on Judicial Discipline* 117 Nev. 371 (2001), the Supreme Court of Nevada recognized that judges in Nevada have a protected liberty and property interest in the continued expectation of judicial office, especially where they are elected and serve designated terms. We believe that under the

current system we are being denied the basic rights of due process enjoyed by all civil litigants. It is kind of ironic that when you take your judicial oath of office, you swear to uphold the *Constitution of the State of Nevada* and the *Constitution of the United States*, but we do not enjoy those same rights before the Commission on Judicial Discipline.

**Assemblywoman Backus:**

With the new proposed bill, when would a complaint of charges become public? My understanding right now is that the pre-investigation is not a public proceeding. Is that correct?

**Judge Higgins:**

That is correct. Our bill does not change that at all. The pre-formal complaint process stays the same. Sometimes, it is confusing because the complaint comes in from the public, saying "Judge Higgins did XYZ." Then, after the process—the Commission makes a decision about whether to investigate, then a decision about whether I should respond, and then eventually presents a decision to file their formal complaint—the formal public complaint is filed by a Commission prosecutor. There are two complaints, but we do not change anything from how the Commission considers that complaint from the public now. Once the formal written complaint is there, NRCP would apply after that point.

**Assemblywoman Backus:**

That was my understanding. I am a licensed attorney, and I know that if someone sends a letter to the State Bar of Nevada they may not do any pre-investigation work. I get a letter shipped off to me saying, "You are in violation," but if someone took a look at the order, my name is not even in it. So it behooves me to easily just respond, and no formal complaint is filed. I was concerned that now imposing NRCP clear and convincing evidence standards may not just easily dispose of this, and there will end up being more backlog and maybe even more publicity for judges who run for office and who may not want this known. I was just trying to rectify this in my head.

**Judge Higgins:**

I do not think it changes that part. A judge can make a decision whether to respond. I think if somebody said, "Judge Higgins called me a jerk on the stand," I could say, "No, I did not. Here is the videotape. I asked him to sit down because he was making a scene." That would be quickly resolved, I would hope, by my responding to that public complaint. If the public complaint is that someone violated the canons and violated the criminal law and is subject to criminal prosecution—for some judges, that has been the case—I think, until the filing of the formal charges, judges have to make a decision about whether to give up those rights before they respond or are forced to respond. If you do not know what the formal charges are, it is hard to respond in those more complicated cases.

**Assemblywoman Peters:**

Would this pertain only to judicial duty disciplines, or does it extend to a situation in which a judge is taken into court for other issues?



**Judge Higgins:**

It would pertain to the workings of the Commission. It would not pertain to judges going into court for other issues.

**Assemblywoman Peters:**

Is a judge taken to the Commission only for actions done under the judicial office, or for any action that has consequences under the judicial system?

**Judge Glasson:**

A judge is a judge 24/7. What we do off the bench is subject to discipline, just as what we do on the bench. Judges must be patient, dignified, and courteous and must follow the "Boy Scout code" throughout their life. Oftentimes, a judge is brought up on a complaint and then perhaps a formal statement of charges on things that were totally unrelated to his or her duties on the bench. The old idiom is "sober as a judge." Well, if they are not, they should not be a judge anymore.

**Assemblywoman Hansen:**

I am a layperson. I know the law can get complicated, so this makes sense to me. You mentioned getting this fixed has been at the top of the list for several years. I was just curious about the history. Has this come before this body before? I am curious how we got here.

**Judge Tatro:**

No, we have not brought this bill forward. It has been talked about and talked about. This was the time when we decided to bring it forward. It has not come forward in the past.

**Judge Zimmerman:**

I think the reason why the bill has been proposed at this time is because judges have started to have lengthy conversations amongst themselves about the lack of due process before the Commission. Experiences have been compared, and many people are concerned about this. That is why we decided the time was right to bring this bill forward.

**Assemblywoman Tolles:**

It seems to me that what has been in place is an administrative process. When we start to move into language such as "clear and convincing evidence" and "due process," if there is criminal activity, it would go into court and that would have all of those applied. If it is an administrative process, it seems appropriate that it would stay at the current level to be dealt with as an administrative personnel issue. Can you speak to that?

**Judge Higgins:**

Both activities can come before the Commission. There was a judge in Las Vegas who was removed from the bench and was accused of mortgage fraud and was prosecuted for that. I think he went to prison. He still could be disciplined. If you are appearing in front of the Commission and have potential criminal liability for your conduct, I would assume the person would want some of it to be done before the other so you would not have to make

admissions. Both kinds of activities can come before the Commission. Judges have been disciplined for having a DUI, and that comes before the Commission. They have been dealt with and served their DUI sentence, but they still are disciplined following the criminal case.

**Assemblywoman Tolles:**

By asking that question, I meant putting clear and convincing evidence standards for administrative types of disciplinary action. I think that is more where my question is coming from.

**Judge Higgins:**

Several sections currently refer to "clearly convincing evidence." It has just been reworded to "clear and convincing" to make it clear that is the evidentiary standard. It currently refers to that. In some of the other sections it is added. That is true. I am sure there will be opposition to that, but we were trying to make it clear what the evidentiary standard is at each point of the proceeding.

**Judge Zimmerman:**

I think when you are talking about possibly disciplining judges or removing judges from office, their due process rights should be in place and not kick in at the level where you are appealing to the Supreme Court of Nevada. Due process should apply from the moment the formal statement of charges is filed. I want to caution or instruct that a complaint comes from an individual; it can be a citizen, it can be a lawyer, and it can be anybody that can file a complaint before the Commission. Once the Commission votes to proceed with a matter with the judge, they file what is called a "formal statement of charges." The formal statement of charges is when the matter becomes public and when the judge is formally charged. I wanted to make that important distinction.

**Assemblyman Watts:**

I see the current language speaks of a "reasonable probability . . . could clearly and convincingly," and this is changing it to "supported by clear and convincing evidence." Again, I am still learning about the variety of evidentiary standards in the law. It seems to me a little bit contradictory to have a reasonable probability supported by clear and convincing evidence. I have seen some things that indicate those are two separate standards. I am wondering why, in your proposal, you did not just eliminate "reasonable probability" and say "based on a finding that there is clear and convincing evidence."

**Judge Higgins:**

Well, there is a story about the elephant designed by a committee, right? A committee worked on this bill together, so it does not satisfy everybody's drafting needs. I think the intent was not that they use the same level of evidence at the investigative phase that they would at the conviction stage. That is where reasonable probability comes in, but whatever evidence they rely on is clear and convincing. If you are using a scale, "preponderance of the evidence" is just slightly tipped. "Beyond a reasonable doubt" would be tipped all the way; I cannot have any doubt in my mind. "Clear and convincing" is between that; it is more than just slight evidence, but it does not have to be beyond a reasonable doubt. There is case law

that explains what "clear and convincing" is. If there was a question, a judge could go to a Supreme Court of Nevada decision that explains what clear and convincing is if they were going to appeal it. I think that was the intent, to have an evidentiary standard but not force them to have the same decision level at the investigative phase and the conviction phase.

**Assemblywoman Torres:**

I have a two-part question. To clarify for my own understanding, if a judge were to commit a criminal act, he or she would go through the normal court process and also go through the Commission, correct?

**Judge Higgins:**

Correct.

**Assemblywoman Torres:**

I am wondering how this piece of legislation would compare with how other employees of the state have to go through their own employer. For example, as an educator, if I have a DUI, I get reprimanded through my occupation as well. I am wondering how this piece of legislation compares to our expectations of other employees of the state.

**Judge Higgins:**

I think it would bring it more in line with how it is applied. *Nevada Revised Statutes* Chapter 622A applies to all Title 54 boards. That includes almost everybody except a few commissions. That sets forth these procedures. It would be more parallel and similar to what happens to everybody else. If you are convicted of a crime by proof beyond a reasonable doubt, it is pretty much a given that you are going to be disciplined because boards' and commissions' standards are not as high. They can use the evidence of your conviction. Essentially, you do not have much defense to the discipline at that point because you have already been proven guilty. My experience is that most judges who have had a DUI, for example, just admit they had a DUI and throw themselves at the mercy of the Commission and hopefully have mended their ways. I think it brings it closer to how everybody else is treated.

**Assemblywoman Torres:**

I am not sure I see how that is different than what we do at my profession because if I were to have a DUI and there is a conviction, the district is going to see that. They have access to that. I do not understand what the difference would be.

**Judge Higgins:**

As a judge, you can be removed from office for habitual intemperance. You would lose your elected position. I would assume, as a teacher, while your employer might discipline you, I am not sure the State Board of Education would. Maybe that is the distinction. Here, the Commission has the authority to order us to go to treatment, suspend us, and even remove us from office. Apparently, habitual intemperance was a problem years ago, and it is written right into all of the proceedings that you can be removed from office. You would lose that

position. I do not believe the State Board of Education would revoke your license for a DUI, but I am not familiar enough with that.

**Judge Glasson:**

Oftentimes, it proceeds at the same time. I was called once to sit in a case in Clark County with regard to a judge who was accused of battery that constitutes domestic violence. At the very same time, the judge was up on those same charges before the Commission of Judicial Discipline. It is not always the "chicken and the egg." Sometimes it is happening at the same time.

**Chairman Yeager:**

Going to the amendment in section 2, subsection 4, some of the language says that "Any procedural rules adopted by the Commission . . . must provide due process," and then it says, "including, but not limited to," and provides a few different areas where the due process is specified. I wondered, with the language "including, but not limited to," are there some topic areas you have not enumerated in here where you feel as though there is not due process in the rules that have been promulgated by the Commission? I know sometimes they say "including, but not limited to," because they do not want to miss something in an exhaustive list. Does this list lay out what the current concerns are, or are there others that are not included in the list?

**Judge Zimmerman:**

These are the most pressing issues of due process the judges feel need to be addressed to make the process fairer. I just want to emphasize that as a judiciary association, we are not asking for more than average citizens receives when they litigate a matter in any court in the state of Nevada; we are asking for the same due process protections. It is problematic that under the current procedural rules of the Commission, they have the sole authority to determine where the venue lies. They decide venue based upon their own convenience and for no other reason. In any other case, venue would be decided based on where the conduct occurred or where the party resided. We believe venue should be the jurisdiction where the judge sits.

Judge Higgins previously went over the issue of never having prehearing motions determined until the minute before the hearing starts. These motions could include excluding witnesses, excluding evidence, adding witnesses, or adding evidence. How do you prepare for trial if you do not know what evidence you will be allowed to present? It would be no burden upon the Commission to hear those motions and issue a decision ten judicial days before the hearing. That would make the process fairer to the judges. I know we like to say "including, but not limited to" in case we forget something, but these are the big issues we think would make the process fairer.

**Chairman Yeager:**

With respect to venue, is that typically always in Carson City for these proceedings? My understanding is that is where the Commission on Judicial Discipline is housed. I wonder if any of you are aware of a venue being located outside of Carson City for the hearings?

**Judge Zimmerman:**

Most of the time, the southern judges' hearings are scheduled for Carson City. Most recently, maybe based upon numerous complaints, they have scheduled a couple of hearings in Las Vegas. It is still their decision where to schedule a hearing. It would be important to us to have venue determined by where the judge resides. The short answer is yes, sometimes the hearings occur in Las Vegas and sometimes they occur up north. I do not believe there is any rhyme or reason to how that is determined.

**Assemblywoman Hansen:**

Just to clarify, for several sections we were talking about the "clearly and convincingly" language, and then "supported by clear and convincing evidence" is the new language. Is it the same evidentiary standard?

**Judge Higgins:**

Clear and convincing evidence is an evidentiary standard. I think that was intended by the way it was worded. It is not necessarily the same. I think this would give us a reason, if there were a dispute, we could tell the Supreme Court based upon your history of litigating what clear and convincing means, we would have case law one way or another. I think it is the same standard, although I am not sure the opponents of the bill will agree to that. It is just a clearer standard.

**Chairman Yeager:**

I will open it up for additional testimony in support of A.B. 20. [There was none.] I will now take opposition testimony.

**Paul C. Deyhle, General Counsel and Executive Director, Commission on Judicial Discipline:**

I have with me today the full Commission, which comprises district court judges appointed by the Supreme Court of Nevada, attorneys appointed by the State Bar of Nevada Board of Governors, and lay members appointed by the Governor of this state. They are all in opposition to this bill. Gary Vause is our chairman. He very much wanted to come today, but his wife had a medical procedure, so he did prepare a letter that was submitted and uploaded to Nevada Electronic Legislative Information System ([Exhibit M](#)). In addition to that, I have also submitted the letter I sent to each of the Committee members in January ([Exhibit N](#)), as well as two cases and Commission orders that were filed in public cases that discuss the constitutionality of some of the issues that were discussed today.

A picture has been painted today that a certain group of judges in this state do not receive due process. That is simply inaccurate. I am going to do my best to scratch the surface, because underneath the surface of those allegations are the facts.

The current statutes and procedural rules reflect a number of competing interests: the interests of the public, the interests of judges, and many other interests. That is where we are today. Just ten years ago, this Legislature enacted sweeping changes to the Commission's statutes and rules at the recommendation of the Article 6 Commission. The Article 6