

Environmental Considerations in Forensic Interviewing: Third party presence, reliability, self-disclosure and ethical implications related to practice.

Podcast Transcript

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While certainly not a new phenomenon, third party presence in forensic evaluations continues to be a topic of interest among various practitioners. Specifically, environmental considerations in forensic interviewing and evaluation have been a topic of discussion among various neuropsychological evaluators, psychologists, criminal investigators and continue to be a topic of discussion among various state and federal level court systems. There is however a distinct lack of empirical research addressing environmental considerations in forensic interviewing. Some of the most detailed considerations and instructions regarding interviewing environments and third party presence have been involving child abuse cases, where evaluators are interviewing children who have been the victims of child abuse.

There has, however, been a variety of literature and editorials published in psychiatry and psychology journals discussing third party presence as well as the practitioner's opinions on how third party presence may influence the outcome of the assessment.

This podcast will specifically address environmental considerations in forensic interviewing as well as third party presence in forensic evaluation, most specifically how those types of evaluations can accommodate or fail to accommodate third party observation. We will also briefly discuss the differences between clinical and forensic evaluations as well as their related purposes. Lastly, this podcast will review practitioner's aspirations and points of view regarding third party observation as well as a review of literature regarding social facilitation as well as various ethical implications of third party observation, specifically privacy and confidentiality concerns.

In 1996 in the *Journal of Psychiatry and Law*, Dr. Robert Simon purported that a forensic psychiatric examination is conducted best in privacy. The title of his federal legal publication was *Three is a Crowd*; the presence of third parties during forensic psychiatric examination. Simon (1996) addressed one of the most distinct and accurate aspects of forensic evaluation, in that forensic practitioners independent of the evaluative context seek to maintain privacy as much as possible. In interviewing various attorneys, Simon was able to conceptualize two good faith reasons why lawyers seek to be present during forensic evaluations. He first noted that there was a concern with providing an accurate record of the examination and there needs to be a means to effectively challenge any misrepresentations or inaccuracies of the results at trial. He also addressed that lawyers seek to address limitations in questioning, specifically inappropriate subjects, methods or procedures that could be administered during a forensic evaluation. Also of importance, and which will be discussed a little bit later in this podcast, is the possible violation of tasks germane to the interview, and the rapport that needs to be established between the examiner and the examinee in order to gather objective and reliable information.

Some jurisdictions in the United States do allow attorneys to be present during forensic examinations of both civil and criminal cases, though stipulation usually exists that they must not

interfere with the conduct of the evaluation. In 2012, a Michigan workers' compensation magistrate restricted a plaintiff attorney from accompanying his client during a forensic rehabilitation evaluation based on similar concerns brought forth by the defense. Simon indicates that regardless of the presence of third parties during the examination, both parties should be agreeable to the presence of third party observers. This implies that if there remain concerns or an opposition to having the evaluation supervised, additional facilitation and mediation may be warranted prior to the evaluation taking place.

In Simon's article, a variety of case examples were provided that allows us to better conceptualize how certain situations can pose professional and ethical challenges for forensic evaluators under these circumstances. In one specific example, the author indicates that an attorney was allowed to be present during an examination of a client claiming a severe head injury. Since the attorney was unable to be present at the evaluation, she sent a nurse paralegal in her place. The paralegal never said a word during the examination. The paralegal was later offered as a witness to impeach the alleged improper conduct of the forensic psychiatrist during the examination of the plaintiff.

Another interesting concept brought forth by Simon is that the present of third parties not working under the supervision of the evaluator could alter the confidentiality status of the evaluation. In formulating this opinion, Dr. Simon spoke with psychiatrist who voiced concern regarding the attorney-client privilege, implying that the evaluation should it not be helpful to the retaining attorney's case may or may not ask for the report to be disclosed by the expert. As can be seen, any third party presence could potentially jeopardize the protective status of the information and violate any potential work product provisions available under current case law. Dr. Simon lastly notes that the fact that an evaluation that is court ordered does not necessarily mean that the confidentiality of the evaluation does not exist.

One of the most common objectionable aspects of an attorney's presence during a forensic evaluation would be leading the examinee to answer questions a certain way, interfering with the free flow of information, the presence could alter the meaningfulness and the emergence of information, and could potentially disrupt and/or destroy any rapport needed between examiner and examinee to obtain reliable and valid information. Dr. Simon went as far as to indicate that should any of these conditions exist, a psychiatric evaluation would be invalid. This too would apply to a variety of evaluative environments, including forensic rehabilitation.

An important consideration prior to conducting a forensic evaluation where a third party observer has been recommended is to ask oneself whether or not the presence of this third party enhances or inhibits the process and/or goals of the evaluation. Of significant importance is when the attorneys are unable to be present for the evaluation and instruct the opposing expert to attend. In vocational rehabilitation, Certified Rehabilitation Counselors and Disability Management Specialists work hand in hand in helping return individuals to work. In forensic rehabilitation, these same professional conduct a variety of independent evaluations that are used to assess vocational and earnings capacity that are used in various administrative hearings and civil litigation. When an attorney is unable to be present and the opposing expert attends the forensic evaluation, this can create an adversarial context that breeds a distrust and tolerance among opposing experts.

Depending on the training and professional preparation, forensic experts may use different methodologies or clinical procedures in conducting an evaluation which may be perceived by the other party as deviant or unprofessional. Dr. Simon notes that conflicting modes of evaluation does not imply that they are unethical and/or unjust in reaching objective conclusions. There are many biases associated with litigation and stakeholders have invested interests in particular points of view. This author makes very clear that information will become jeopardized if the consultation room turns into a courtroom.

The conclusion of this literature indicates that whenever possible forensic evaluations need to be conducted in private, and while the majority of these evaluations are taken within adversarial and litigated contexts, it should be anticipated that third parties would likely be asked to attend. This does not, however, imply that they should or will be able to attend and further consideration and consultation should be taken. Questions such as whether or not the presence of a third party would inhibit or enhance the goals of the evaluation should be considered. This literature indicates that if third parties are present that the observation, they should remain silent without interference as to not jeopardize the disclosure of information.

So at this point it's imperative that we understand the differences between a clinical and a forensic evaluation. Bonner and Chaffin (1998); Silovsky (1996); Steinmetz (1995) provide useful information in determining the differences between forensic and clinical settings. First and foremost, clinical settings provide an environment to where the goal is to provide certain treatments or assessment of symptoms that are used in making various recommendations that have a therapeutic focus. The goal in forensic interviews is to obtain information as reliable and accurate as possible and has a fact finding focus centered on objectivity and neutrality and avoidance of biases. It is not uncommon in clinical interviewing that the counselor and/or expert forms a therapeutic or working alliance, voices support, and advocates for the client and is expected to be empathetic.

In forensic evaluations, the court serves as the client where the evaluator is responsible for providing objective and unbiased information to aid the trier of fact in making various judicial decisions. Interviews in forensic environments are formal and restrictive, and confidentiality is restricted. Many times the competency and reliability of information posed by the client is questioned and investigated. In clinical settings, traditional confidentiality exists and various interviewing strategies can be used without any specific methodology. The competency of the client is not a concern and validation of reported information may not be undertaken. The primary goal of a forensic interviewer is to gain facts, and is typically governed by judicial systems and rules of evidence. Of importance, the forensic interviewer must maintain a mutual objective stance with a goal of maintaining the most reliable and valid information (Bonner and Chaffin (1998); Silovsky (1996); Steinmetz (1995)).

In 2000, the University of Oklahoma Health Services Center under the grant from the United States Department of Justice published an article on the differences between forensic interviews and clinical interviews. This particular publication addressed issues related to child abuse and neglect and the interviewing environments associated with such, however many of the same environmental concerns regarding information reliability and disclosure apply to all types of

forensic settings. A variety of empirical research and literature was reviewed and the authors recommended that the interview be conducted with the child only, having no caregivers, family or family members present. It was found that the presence of family members during the interview can disrupt the interview process and may accidentally modify the information provided by the child. It appears that independent of the forensic evaluative setting, these types of considerations and concerns continue to be voiced by practitioners.

An important concept related to forensic evaluation is that of self-disclosure. An historical literature review conducted by Cozby in 1973 addressed the parameters of self-disclosure within the interview environment. Cozby identified that basic parameters of the self-disclosure as the breadth or amount of information disclosed, the depth and intimacy of the information disclosed, and the duration of time spent describing each item of information. In the review of research, he noted that actual disclosure, intimacy and duration of disclosure appear to be partially independent with the correlation of .42 between the two variables, indicating a modest, positive relationship between the two variables. An inverse relationship was identified between the amount of disclosure and intimacy or depth of information disclosed implying that individuals tend to disclose less about more intimate perceived topics, and that this effect also appeared to hold consistent across various cultures. This was confirmed over a variety of research conducted between 1958 and 1971 by various authors. Of interest, specifically when conducting forensic interviews, Levin and Gergen found that individuals tend to disclose more positive aspects of themselves when trying to be ingratiating than when trying to be honest.

In conclusion, Cozby (1973) noted that self-disclosing behavior can be seen as the product to opposing forces, one attempting to increase the disclosure while the other operates to inhibit the disclosure. Bennett (1967) pointed out that the critical problem one faces is not how to keep secrets from one another, but how to facilitate the readiness to communicate. The balance requires rapport between the examiner and the examinee and could be compromised to varying extents under third party observation.

In 2005, Gavett (incorrectly dictated in podcast as Brandon, which is authors first name) et. al conducted a study titled Third Party Observers; the effect size is greater than you might think. This literature review was published in the Journal of Forensic Neuropsychology identified that third party observers have been found to significantly impair neuropsychological test performance on measures of attention, verbal memory, verbal fluency, and cognitive symptom validity. The findings indicated that an observer during a neurological evaluation should be expected to have a clinically meaningful impact on the examinees test performance, with memory measures being particularly vulnerable. These findings may also imply that third party presence during vocational testing could compromise results and lead to invalid results, or worse invalid vocational opinions.

In 1977, in the Journal of Counseling and Psychology, Holahn and Slaikeu (1977) conducted a study to investigate the effect of reduced privacy in the counseling setting on client self-disclosure. This study created three environmental conditions. The first was a private setting where they interviewer and the subject were alone in the interview setting. The second introduced in a third party observer who entered the interview room shortly after the session began and remained throughout the duration of the interview, and the third experimental

condition where a third party observer invaded the interview and remained behind a three foot wall partition, basically exposing the interview subject to a third party that remained within ears length of the conversation although was not visible throughout its duration.

A total of 74 volunteers, 22 male and 52 female participated in this study. The results identified that self-disclosure was higher in the private condition than in either the invasion or spatial invasion conditions posed by the third party presence. Interestingly, it was found that self-disclosure in the invasion condition, whereas the third party observer remained present and visible in the room was slightly higher than when the third party observer hid behind a spatial divider. The authors indicated that the results of this study demonstrate that reduced privacy decreases client self-disclosure in a counseling setting. The results also reinforce that self-disclosure is under situational control (Altman and Haythorne, 1965; Chittick and Himmelstein, 1967; Erlich and Graven, 1971; Taylor et al, 1969) and discussions should be carried out with all parties of interest to preserve the integrity of the evaluation.

Some of the most recent and empirical literature on third party presence was conducted by Shealey, Cramer, and Pirelli in 2008. These authors conducted empirical research regarding third party presence during criminal forensic evaluations, specifically psychologist opinions, attitudes and practices. This article was published in *Profession Psychology; Research And Practice* journal in 2008. The authors indicated that this study represented the first formal attempt to assess forensic clinician's attitudes, knowledge and practice in this area. They noted concern for the impact of third party observers was grounded in social psychology, with specific mention in social facilitation research, where previous research has identified that passive observers facilitate easy or well learned in task performance and inhibit complex or novel performance (Bomb and Titus, 1983). Significant negative effects on tasks measuring delayed recall, attention, concentration, speed of information and processing, and verbal fluency were noted among many of these studies. In additional research conducted by Constantinou et. al (2002, 2005) it was determined that there was a negative impact on neuropsychological evaluations when audio taped or videotaped.

Also assessed in this particular research study were various motivations for third party presence, which identified that attorneys often cited the fifth and sixth amendments as grounds of being present during their client's court ordered criminal forensic evaluations. In 1973 the *United States versus Ash* indicated that the right to counsel is only attached at stages of the criminal prosecution that involved the trial like confrontation of the defendant. The U.S. Supreme Court and *Estelle versus Smith* in 1981 agreed with the lower court's opinion that the presence of an attorney during a forensic evaluation would have little benefit and could actually harm the evaluation process. There are times, however that it appears that attorney's presence could be practical on those rare occasions when a defendant is unwilling to participate without the presence of an attorney although previous literature and research suggests that the attorney should be a silent observer rather than a participant in the evaluation.

A particular study authored by Shealey et. al (2008) posed a variety of questions to 400 randomly sampled licensed psychologists who were members of the American Psychological Association. Examples of questions included: Do you believe that a third party presence might negatively affect the results of a criminal forensic evaluation? As well as, do you believe that

third party presence might positively affect the results of a criminal forensic evaluation? Four-hundred persons were randomly selected and 160 responded. Of the 160 survey participants 58% believed that a third party presence might negatively affect the results, 33% of the sample were unsure. Only 4% disagreed that it would negatively affect the results of the evaluation. Conversely, 33% believe that the presence might positively affect the evaluation and 38% were unsure.

When assessing levels of agreement with third party attitudinal statements survey respondents were provided a variety of statements as to whether they agreed or disagreed or had no opinion.

- A total of 19 statements were reviewed by respondents.
- 84% of respondents agreed that the defendant's attorneys may try to shape or limit the defendant's responses during a criminal forensic evaluation.
- 91% agree that the presence of a criminal defendant's family member or significant other during pretrial forensic evaluation may lead to different conclusions and/or interpretations than one might have obtained if the family member or significant other had not been present.
- 80% agreed that the presence of a criminal defendant's attorney during the pretrial forensic evaluation may lead to different conclusions and interpretations than one might have obtained if the attorney had not been present.
- 90% agreed that the presence of third parties during a pretrial forensic evaluation of a criminal defendant may interfere with the establishment of rapport between the defendant and the examiner, and
- 76% agreed that third party presence during the criminal forensic evaluations alters the standardization of the forensic evaluation.
- 72% disagreed that during pretrial forensic evaluations criminal defendants have the right to third party members of their choice being present.

The results of this attitudinal statement survey indicated that practitioners have negative views as to third party presence, in that they can affect the standardization of the process, and influence the validity and reliability of the results. The highlights of this particular survey by Shealey et. al indicate that most psychologists surveyed believed that third party presence may have a negative impact on forensic evaluations, but were less sure about any positive effects. The research also identified that there were a significant amount of ethical and legal challenges to conducting research that could elicit the true effects of third party presence in forensic evaluations. In fact, the presence of family members during criminal forensic evaluations was identified as more negative than attorney presence.

From a more ethical and practical perspectives, confidentiality status and the standardization of the evaluation appear to be jeopardized with third party presence. 90% of psychologists agree that third party presence interfered with rapport building; a key component to successful evaluation. It is also important to note that three-quarters of respondents believe that third party presence was a threat to test security when used in a forensic evaluation. This would also apply to copyrighted methodologies, report formatting and structured questionnaires, etc.

An article published in the British Journal of Psychiatry by Sanson-Fisher and Martin regarding standardized interviews and psychiatry issues of reliability provides additional information regarding the means of data collection in forensic evaluations and components of reliability. While this literature reviewed does not address forensic interviewing specifically, various topics such as the reliability of interview administration, when reliability should be assessed, and the reactivity of reliability during the assessment process provides important information when assessing interview outcomes and its validity. As defined by Mitchell in 1979, an instrument or evaluation can be said to have been used reliably when there are small errors in mid-measurement and when there is stability of consistency dependability scores for individuals on the trait characteristics or behavior in which is being assessed or evaluated (1979).

The literature reviewed identified that many of the types of evaluations in psychiatry (as would be expected in related occupations) are semi structured in nature. This tends to result in various disagreements in the interview and administration and would unbearably be reflected in reliability assessment. Sanson-Fisher and Martin noted that of 17 studies reviewed which presented reliability figures, only eight studies had reliability assessed throughout the period of investigation. Research by Taplin and Reid (1973) indicates that if observers note that reliability is being assessed, the observers apply the rating standards more stringently in an effort to achieve the required level of agreement. This implies that third party presence in evaluations could actually facilitate that evaluators ask more specific questions become more focused in obtaining answers specific to their assessment and therefore gather more reliable data used to formulate opinions.

In conclusion, the literature has identified that reliability is not a constant feature of the interview instrument and should be monitored whenever possible. One way to monitor the reliability of semi-structured evaluations are to supplement the review of data with various records that can be provided either prior to or after the evaluation.

For additional information regarding ethical dilemmas with third party observers please reference the Journal of Forensic Neuropsychology, Volume 4, 2005, as well as the Handbook of Forensic Neuropsychology which provides specific chapters on third party information and forensic assessment.

For further information regarding this podcast or any other previous podcast please free to contact us at 517-622-4878 or by email at anay@hfarehab.com. Transcripts of our podcasts can be accessed on the educational podcast section of our webpage located at www.hfarehab.com.

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