

## Trial Courts Have Discretion to Limit Presence of Third-Party Observers during Independent Neuropsychological Examinations, Pennsylvania Superior Court Holds for the First Time

The Pennsylvania Superior Court recently held it was "well within" a trial court's discretion to enter a protective order prohibiting the presence of attorneys and other third-party observers during the standardized test portion of an independent neuropsychological examination (INE). The issue of whether an attorney is allowed to be present during an INE, though one of first impression in Pennsylvania, arises often in the civil discovery process in cases involving claims for cognitive injuries.

In *Shearer v. Hafer*, 2016 Pa. Super. LEXIS 157 (Pa. Super. Ct. Mar. 9, 2016), the defendant, Scott Hafer, allegedly pulled his vehicle into the path of a vehicle operated by one of the plaintiffs, Dana Shearer, thereby causing an accident. As a result, the plaintiffs sought recovery under claims for cognitive injuries triggered by the accident. Shearer was evaluated by Dr. Paul Eslinger, a neuropsychologist with the Hershey Medical Center, who employed standardized testing procedures without the presence of the plaintiffs' counsel or any other third party. In response, defense counsel hired Dr. Victor Malatesta to conduct an INE.

The plaintiffs' counsel demanded to audiotape and be present during all components of Dr. Malatesta's INE, to which Dr. Malatesta fervently objected: "[T]he attorney's request to audiotape the testing evaluation poses significant challenges. I am bound by the ethical principles of psychologists and code of conduct by the American Psychological Association and the National Academy of Neuropsychology to both protect the integrity of the examination and the security of the test materials." Dr. Malatesta further indicated he would permit the plaintiffs' counsel to be present during the interview portion of his examination; however, he would not permit either the presence of counsel or audiotaping during the standardized test phase of his evaluation. The plaintiffs' counsel objected to this compromise requiring court intervention.

The trial court entered an order granting the defendant's request for a protective order, permitting the plaintiffs' counsel to be present during only the interview phase of the INE. The order did not allow counsel's presence or any recording device in the evaluation room during the standardized test phase. The plaintiffs appealed, but the Pennsylvania Superior Court affirmed the trial court's order, finding no error in the trial court's analysis of Dr. Malatesta's various concerns about the presence of counsel and audiotaping.

First, the Superior Court observed the official statements from the National Academy of Neuropsychology and the American Psychological Association's Ethical Principles of Psychologists and Code of Conduct stated "third party observers should be excluded from the standardized test portion of the examination to keep it free from distraction." Second, the trial court was right to afford great weight to the National Academy of Neuropsychology's official position "that neuropsychologists should strive to minimize all influences that may compromise accuracy of assessment and should make every effort to exclude observers from the evaluation." Finally, the trial court was right to take seriously "the fear that forcing Dr. Malatesta to conduct the neuropsychological examination in the presence of counsel would place the doctor at odds with his ethical duties[.]" The Superior court concluded the protective order would "safeguard the integrity and reliability of the [INE]."

**Comment:** This is a significant decision in Pennsylvania as the issue, while common in civil litigation involving claims of cognitive injuries, has never been resolved by a Pennsylvania appellate court. It is also significant because it establishes that, despite rules purportedly enshrining the right to counsel's presence during an INE, a trial court has discretion to limit the right to ensure the "integrity and reliability" of a

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distraction-free INE. The concerns raised in *Shearer*, echoing those stated by the American Psychological Association and the National Academy of Neuropsychology, provide future litigants with a reasonably predictable strategy for obtaining an appropriate protective order restricting counsel's presence and audiotaping during standardized testing.