Lewis M. Etcoff, Ph.D., A.B.N.

Nevada Licensed Psychologist No. 129
Diplomate, American Board of Professional Neuropsychology #257
Fellow, National Academy of Neuropsychology
Fellow, The American College of Professional Neuropsychology

October 4, 2018

ADKT 0522

Supreme Court Clerk's Office
201 S. Carson Street
Carson City, NV 89701

RE: "Pertaining to proposed amendment to Rule 35. Physical and Mental Examinations."

Dear Rule 35 Committee Members:

I am writing to your committee regarding proposed Rule 35 modifications, in particular, Recording the Examination and Observing the Examination. I have conducted Rule 35 examinations as a Nevada licensed psychologist and board certified neuropsychologist for three decades.

With all due respect, I would ask you not to rule that psychological and neuropsychological tests can be audio-recorded, video-recorded, or observed by any third party even a "noninvolved third party." Psychologists use copyrighted IQ, academic achievement, neuropsychological and objective personality tests. Each test was developed using very exact administration rules in which examiners were alone in the testing office with an examinee. There were no audio or visual recording devices or third party observers in the formal testing office during test development. Should you decide to allow recording of psychological and neuropsychological tests, they will become useless to psychologists and neuropsychologists throughout the United States because some attorneys will disseminate the test questions to other attorneys. Some attorneys will provide test questions to their clients in preparation for Rule 35 examinations. Test publishing companies would "go through the roof" if tests they have developed and sold became useless and were no longer able to be used by our profession.

Every national psychological and neuropsychological professional organization, including the American Psychological Association, in particular Division 40 Neuropsychology and Division 41 Psychology and the Law, the National Academy of Neurology, and the American Academy of Clinical Neuropsychology have published professional ethics codes requiring psychologists to protect test security and to administer tests as prescribed in each test's Administration Manual.

Regarding "noninvolved third party observers," all of the above-mentioned psychological associations allow for a psychological intern or postdoctoral psychology student/trainee to be present as a third party observer during test administration because it is an accepted method of teaching the psychologist how to administer tests, answer examinee questions during tests, and score tests. Your committee has recognized, "The examiner may have a member of the examiner's staff present during the examination if it is necessary in order for the examiner to comply with accepted standards of care or reasonable office procedures" (NRCP 35 ALT 1-Proposed, page 4).

Unlike other psychologists in the state of Nevada who are submitting to your committee their opinions regarding precluding third party observers from any and all parts of NRCP 35 examinations, I allow a

8475 S. Eastern Avenue • Suite 205 • Las Vegas, NV 89123
(702) 876-1977 • FAX (702) 876-0238
www.dretcoff.com

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noninvolved third party observer audiotaping and videotaping of my examinee interviews. I do so to accommodate the legitimate concerns of personal injury attorneys, as your committee expressed in NRCP 35 ALT 1-3 Proposals wherein it stated the following: "It is envisioned that the primary purpose of such transcription would be to address by motion any irregularity that occurred during the examination" (page 3). I recognize that attorneys need to feel comfortable, for example, that an IME doctor refrain from asking their client any causation-related questions, or that the IME doctor, whether purposely or unconsciously, biased the interview questions toward the side that retained the professional. In the past several years, I have allowed audiotaping and videotaping of my interviews with plaintiffs so as to accommodate the attorney and the discovery commissioner and to aid the Trier of Fact. On occasion, I have allowed an employee from the examiner's attorney's office to sit in on the interview. I do not know any other Nevada psychologist who provides such accommodations, but I do so because I am confident that my interview questions are case appropriate and demonstrate the thoroughness I demand of myself as an expert.

Not every personal injury litigant was born and raised in this country. Many do not have sufficient command of the English language. In such situations, I insist upon having, in the interview and in the testing office, a certified interpreter. One can say that the interpreter is a "noninvolved third party." In such cases, I always indicate in my report that the validity and reliability of the psychological tests are, by definition, less robust than would be the case of an English-fluent American-born examinee. I also avoid evaluating verbal skills in these examinees.

In closing, I thank you for your consideration of my opinions in this very important matter. I will not include a list of professional references because I know that such a list will be submitted by Thomas Kinsora, Ph.D. and others in affidavits to you.

I would recommend one authoritative reference that I think you, as attorneys, would appreciate. It is written by Paul M. Kaufmann, J.D., Ph.D. who is a faculty member at the University of Nebraska, Lincoln. Dr. Kaufmann's article is entitled, "Protecting raw data and psychological tests from wrongful disclosure: A primer on the law and other persuasive strategies" (2009). The journal is *The Clinical Neuropsychologist*, 23, 1130-1159. I am enclosing a copy of this article for your committee's perusal.

Sincerely yours,

Lewis M. Etcoff Ph.D.

Lewis M. Etcoff, Ph.D., ABN
Nevada Licensed Psychologist #129
Diplomate, American Board of Professional Neuropsychology
Fellow, National Academy of Neuropsychology

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FROM: Lewis M. Etcoff, Ph.D.
8475 S. Eastern Ave. #205
Las Vegas, Nevada 89123

CE PROTECTING RAW DATA AND PSYCHOLOGICAL TESTS FROM WRONGFUL DISCLOSURE: A PRIMER ON THE LAW AND OTHER PERSUASIVE STRATEGIES

Paul M. Kaufmann
Nebraska Department of Health and Human Services, University of Nebraska, Lincoln, NE, USA

Psychologists must advocate for more stringent legal protection of psychological test materials because using standardized tests is the most distinguishing and exclusive feature of psychological evaluation practice. With the rapid growth in forensic consulting, unrestrained discovery of raw data and psychological test materials during litigation erodes the reliability and validity of the test procedures. Dissemination of test materials reduces the interpretive value of the tests and promotes cheating, turning our best methods into junk science in the courtroom. This article proposes to reform the law and to revise the professional ethics of psychologists consistent with the strong public policy of test security as described by the U.S. Supreme Court in Detroit Edison v. NLRB (1979). Currently, federal courts and about 20 states protect psychological tests as a unique methodology, with some states enacting a psychologist nondisclosure privilege/duty to safeguard test materials from wrongful disclosure. The record management practices of psychologists vary considerably and are vulnerable to legal attack unless psychologists are aware of legal arguments to protect test materials from wrongful release. Although this article does not offer legal advice, it describes the most common records management problem confronting neuropsychologists and some practical solutions to the raw data problem. Best practice for protecting psychological tests requires the psychologist to understand the law and to assert the psychologist nondisclosure privilege. Other strategies are presented and evaluated. Organized psychology and the legal community should advocate for a uniform rule to protect the objectivity, fairness, and integrity psychological methods in litigation.

Keywords: Raw data; Test materials; Forensic consulting; Expert; Law.

INTRODUCTION

"You are commanded to appear and present copies of all reports, notes, statements, responses or other materials made or utilized in connection with this case, including, but not limited to, results of a mental examination, interview notes, ***raw data, scientific or psychological tests and testing materials***, experiments, ***technical manuals, testing or comparisons made*** in connection with this case. Your failure to comply with this subpoena will subject you to punishment for contempt of this court." [emphasis added]

Address correspondence to: Paul M. Kaufmann, University of Nebraska, Lincoln, Nebraska Department of Health and Human Services, Lincoln NE, USA. E-mail: pkaufmann2@unlnotes.unl.edu
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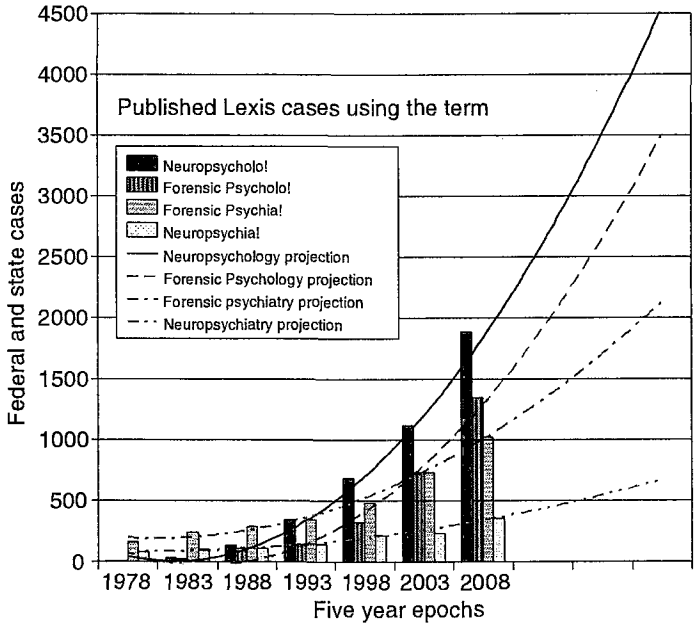

Figure 1 Number of United States federal and state cases using the root terms Neuropsycholo!, Forensic Psycholo!, Forensic Psychia!, and Neuropsychia! in 5-year epochs for the past 30 years used as a basis for polynomial regression projections for the next 15 years.

The Clinical Neuropsychologist actively encourages psychologists to engage in advocacy because "most critical decisions that affect neuropsychological practice are made by non-neuropsychologists" (Howe, Sweet, & Bauer, in press). Psychologists must act to protect test materials because neuropsychological evidence is increasingly used in legal proceedings[1] (Heilbronner, 2004; Sweet, King, Malina, Bergman, & Simmons, 2002), and courts increasingly order disclosure of test materials during discovery[2] (example above), because such materials are relevant to a claim or defense. Lawyers seek neuropsychological consultation on an expanding set of legal issues in part because clinical neuropsychologists apply a scientific approach that meets judicial standards for expert testimony (Larrabee, 2005) and also because expert neuropsychologist opinions can assist the trier of fact[3] (FED R. EVID. 702). A recent Lexis search revealed 4358 cases using the root "*neuropsycholo-*" during the past 70 years,[4] 71% of which were adjudicated in the last decade (Kaufmann, 2009). The growth of legal cases referencing neuropsychology is outpacing every related area of brain–behavior expertise and this growth is accelerating. Figure 1 shows recently updated frequencies of legal cases using neuropsychological terms during the past 30 years with projections for the next 15 years.

[1]Legal proceedings include criminal, civil, administrative, legislative, or alternative dispute resolution.
[2]Discovery is compulsory disclosure of relevant facts and documents pertaining to a lawsuit. *Black's Law Dictionary* (8th edition).
[3]Trier of fact is the individual(s) who make findings of fact—a jury; may be a judge in a bench trial.
[4]Earliest use of the term appears in *Smith v. Metropolitan Life Ins. Co.*, 447 N.E.2d 330, (Il. App. Ct., 1943), noting a "consultant in neuropsychology for the United States War Department."

As a practicing neuropsychologist who participated in this growth in forensic practice while attending law school, adding law to my professional practice provides a more complete understanding of the forensic consulting relationship. With the rapidly increasing use of neuropsychology in our courts, practitioners of law and psychology would benefit from understanding the nature of neuropsychological evidence and the standards for its admissibility (Kaufmann, 2008a). Although those standards are not addressed here, this article focuses on the most common problem confronting practicing neuropsychologists who engage in forensic consulting—responding to discovery demands to disclose raw data and psychological test materials to nonpsychologists.

The numerous statutes, regulations, and case law relevant to the content of this paper are too lengthy to list within these journal pages. The interested reader can access an Appendix containing the relevant law at the publisher's website for The Clinical Neuropsychologist *(found within* http://www.informaworld.com/*), where it is located as a separate file next to the online PDF of this article. The Appendix is also available at the website for the American Academy of Clinical Neuropsychology (http://www.theaacn.org/) where it is located on the page that lists downloadable "Papers/Policies/Research." The reader is also advised that the law cited was current in April 2009, but may change through new legislation, regulation, or judicial decision.*

This article outlines specific legal tactics and other persuasive strategies that neuropsychologists may use to protect raw data and test materials from inappropriate disclosure. However, if neuropsychologists engage in forensic consulting practice, they have an ethical duty to be reasonably informed about the rules governing their roles. Moreover, every state licensing board requires minimal competency in state laws governing the practice of psychology. Even though this article takes the perspective that practicing neuropsychologists *must* be increasingly familiar with administrative and judicial rules that apply to forensic consulting, reasonable neuropsychologists may disagree.

THE RAW DATA PROBLEM IN FORENSIC CONSULTING PRACTICE

Forensic consulting in neuropsychology begins like many other aspects of clinical evaluation practice, by collecting and comparing raw data with normative data from neuropsychological tests. This scientific approach to the investigation of brain–behavior relations provides forensic neuropsychology its unique professional standing (Kaufmann, 2005; Sweet, 1999) that is increasingly recognized by the legal community (Alexander, 2006; Keckler, 2006; Khoshbin & Shahram, 2007; Kulynych, 1997; Morse, 2006; Redding, 2006). Lawyers who zealously advocate[5] for their clients have a right to see the basis for expert opinions under the rules[6] and parties use discovery rules to demand the raw data and psychological test materials forming the basis thereof. For more than three centuries the common law has

[5]As referenced in ABA Model Rules of Professional Responsibilty Rule 1.3 Diligence (2008).

[6]See respective rules from civil and criminal procedure as follows, in pertinent part: Fed R Civ. Pro 26(2)(B) "The report shall contain a complete statement of all opinions to be expressed and the basis and reasons therefore the data or other information considered by the witness in forming the opinions"; Fed R Crim. Pro 16(a)(1)(G) "The summary provided under this subparagraph must describe the witness's opinions, the bases and reasons for those opinions."

recognized the public right to "every man's evidence"[7] as a fundamental discovery maxim (*Jaffee v. Redmond*, 1996). However, the law of privilege runs counter to this evidentiary principle, recognizing that under narrowly defined conditions testimonial privileges exclude relevant evidence from discovery (FED. R. EVID. 501). Stated alternatively, all relevant evidence is admissible, unless privileged. So the question becomes whether raw data and psychological test materials that form the basis of an expert neuropsychologist's opinion are discoverable, thereby requiring release of those data and materials to nonpsychologists and into the public domain as part of court proceedings.

Neuropsychologists commonly attempt to resolve the question of releasing test materials through ethical analysis, while making only cursory reference to the law (Attix et al., 2007; Bush & Martin, 2006; Grote, 2005). While some courts may find an analysis of professional ethics interesting, they rarely find it dispositive[8] of the issue and frequently find that discovery rules supersede the professional ethics of psychologists (*Svejda v. Roldan*, 2002). Yet the American Academy of Clinical Neuropsychology (AACN) practice guidelines (2007) and the official AACN position on disclosure of neuropsychological test data (2007) encourage psychologists to maintain "the integrity and security of test materials as far as the law and practice guidelines of psychology apply in the relevant jurisdictions" (p. 216). Although the APA Ethics Code (hereinafter "Code") introduction states that if professional ethics establish "a higher standard of conduct than is required by law, psychologists must meet the higher ethical standard," the Code also requires under standard 2.01(f):

> When assuming forensic roles, psychologists are or become reasonably familiar with the judicial or administrative rules governing their roles.

The purpose of this article is to increase reasonable familiarity with judicial or administrative rules governing the release of psychological test materials and to outline legal arguments and other strategies that may persuade a court to protect psychological test materials from wrongful disclosure to nonpsychologists.

In order to understand how lawyers and judges analyze "the raw data problem" (*Chiperas v. Rubin*, 1998) and the rules that apply to this problem, it is important to understand the public policy[9] debate underlying test security and how courts resolve that debate. Concerns about test security extend well beyond the professional ethics of psychological associations and encompass competing policy goals about which reasonable people may disagree within the body politic.

[7]Constitutionally compulsory legal process by which accused criminal defendants are allowed access to all evidence supporting charges or defenses, as first articulated in English common law (1742) under the *Bill for Indemnifying Evidence* and later adopted at the U.S. Constitutional Convention (1788) to provide a means of producing witnesses and calling for evidence.

[8]Dispositive refers to a deciding factor that brings about a final legal determination. *Black's Law Dictionary* (8th edition).

[9]Principles or standards regarded by the legislature or courts as being of fundamental concern to the state or society as a whole.

PUBLIC POLICIES IN CONFLICT: TEST SECURITY AND DISCOVERY

Public policy debates in civil society are frequently resolved through legislation that sometimes results in arbitrary rules for the sake of predictability. Such legislation may simply strike a balance between equally important, yet competing, policy goals. Test security is an important goal to protect the objectivity, fairness, and integrity of the tests and the intellectual property rights of those who create tests and bring them to market. However, discovery is an important goal because parties have a fundamental right to see evidence that is relevant to a claim or defense in a law suit. States must strike a balance between the right to discover information in a law suit and the right to protect standardized tests from disclosure in ways that will invalidate them. Ultimately, judges look to the controlling and persuasive legal authority[10] presented by the parties in order to determine whether to require a psychologist to release raw data and psychological test materials to nonpsychologists. In this regard, U.S. Supreme Court decisions are controlling legal authority in all federal courts and persuasive legal authority in state courts. Although there are no U.S. Supreme Court holdings directly addressing whether psychologists must release test materials to nonpsychologists or may refuse to release those materials, in *Detroit Edison Co. v. National Labor Relations Board* (NLRB) (1979) the High Court spoke to the public policy of test security for standardized psychological instruments.

In *Detroit Edison*, although the primary issue was the scope of the NLRB authority, the Court commented on the "strong public policy against disclosure of... tests" (p. 314). In a 5–4 decision, the Court held that the NLRB abused its discretion when it ordered consulting I/O psychologists to release to the union standardized test questions, answers, and results from psychological aptitude tests that were used in an employee selection program. While the dissenters argued that the case should not have been subject to judicial review, all parties and written opinions recognized the important public policy of test security necessary to maintain the validity of the tests. The right of the psychologists to refuse disclosure of standardized test material was not disputed by any party to the litigation, and the *Detroit Edison* Court found that the rights of the psychologists to refuse release of the test materials superseded the rights of a Union to discovery such information. The implications of *Detroit Edison* have been noted in subsequent decisions, see *EEOC v. C & P Telephone Co.* (1993) ("test secrecy is critical to the validity" p. 876); and *Fla. DOT v. Piccolo* (2007) ("the United States Supreme Court recognized the psychological profession's legitimate interest in preserving the security of test materials" p. 776). Additional federal appellate cases and NLRB decisions uniformly recognize that discovery of psychological tests is restricted under *Detroit Edison*.[11] Some cases and commentators claim that *Detroit Edison*

[10] A legal writing or court ruling taken as definitive or decisive; described as controlling when it is binding on the court or persuasive when it carries some weight, but is not binding. Decisions from a higher court within a jurisdiction are controlling, while decisions from outside the jurisdiction are merely persuasive, with higher appellate courts being more persuasive than lower courts.

[11] *NLRB v. Pfizer, Inc.*, 763 F.2d 887, 889 (7th Cir., 1985), *NLRB v. U.S. Postal Service*, 17 F.3d 1434, 1434 (4th Cir., 1994) and eight additional NLRB administrative decisions.

created an implied federal common law psychologist nondisclosure privilege (*Chiperas v. Rubin*, 1998; Kaufmann, 2005; *Florida Dept. of Trans. v. Piccolo*, 2007).

In *Chiperas*, Sherry D. Molock, Ph.D. conducted a psychological evaluation of the plaintiff and diagnosed a "Major Depressive Disorder that resulted from the incidents that are described in the complaint" (p. 2). The plaintiff intended to rely on Dr. Molock's testimony in support of his contention that the discrimination he suffered caused him "severe and permanent psychological damage" (p. 2). Defense counsel entered a motion to compel production of Dr. Molock's raw data and test results. Pursuant to Fed. R. Civ. P. 45(c)(2)(B), plaintiff's counsel objected to producing the requested materials on the grounds that they were privileged, citing *Detroit Edison*. The psychologist asserted test security based on a 1987 *Casebook on Ethical Principles of Psychologists* (1987, p. 109) statement:

> Psychologists make every effort to maintain the security of tests and other assessment techniques within the limits of legal mandates. They strive to ensure the appropriate use of assessment techniques by others.

The *Chiperas* Court was unimpressed with the objection, finding that the plaintiff had no standing to quash a subpoena issued to someone who is not a party to the action, "*unless that party* claims some personal right or privilege with regards to the documents sought." (p. 5). In what is the only published case in which a *Detroit Edison* privilege was asserted, we learn that if the psychologist does not assert a privilege, then there is no basis to object to the release of psychological test materials. As it turns out, *Chiperas* never ruled on the question of a psychologist nondisclosure privilege because the defense decided to hire an expert psychologist to receive the raw data, rendering the privilege question moot. It is noteworthy that this resolution is exactly what *Detroit Edison* contemplated to resolve the raw data problem. That is, opposing sides should hire psychologist experts to exchange and interpret the raw data, while maintaining test security throughout the proceeding.

TO RELEASE OR NOT RELEASE: PSYCHOLOGISTS PRACTICES VARY

Psychologists must act to sharpen the court's understanding of the public policy underlying the raw data problem, so as to raise the legal question for the court to resolve. As a reflection of sound ethical training (but absent legal orientation), many psychologists approach the raw data problem as an ethical dilemma that they should resolve, rather than a legal question that courts will decide (Behnke, 2003; Bush & Martin 2006; Fisher, 2003a; Rapp & Ferber, 2003). The typical ethical analysis often begins with the definitions of test data and test materials, then focuses primarily on ethical standards 9.04a *Release of Test Data* and 9.11 *Test Security* (APA Ethics Code, 2003). However, application of these standards to the raw data problem presents irresolvable internal contradictions that are impractical, resulting in an "illogical" requirement (Bush, Rapp, & Ferber, in press). Put simply, it is impossible for psychologists to maintain test security when they are ethically required to release test data contained on test materials. These current standards are even more bewildering when noting that previous standards directed psychologists to only release test materials to those who were qualified to interpret them (Standard 2.02, APA Ethics Code 1992). The former presumption

Table 1 Workshop participant responses

Audience response ($n = 101$)	Pre-training	Post-training
Release psychological test materials	23%	9%
Refuse to release psychological test materials	8%	20%
Retain legal counsel for advice	20%	28%
Notify parties of ethical obligations, then refuse to release materials	49%	44%

Percentage of pre- and post-training workshop participant responses to the question of what they would do "upon receipt of a valid order for release of patient responses to all psychological test questions to an attorney, duly authorized by the patient."

to withhold raw data was converted into a presumption of raw data release (Behnke, 2003) in what is described as the "most significant shift" in the APA Ethics Code (Fisher, 2003b). I will not belabor the strained ethical analyses in what so many others have attempted to explain, except to say that professional psychology has not set forth a consistent and workable standard that helps practitioners resolve the raw data problem.

Not surprisingly, the practice policies of psychologists vary tremendously, with practitioners implementing the full spectrum of responses to discovery, ranging from routine release of test materials to absolute refusal (Essig, Mittenberg, Petersen, Strauman, & Cooper, 2001). Greiffenstein and Cohen (2005) describe this spectrum of responses from release (legal primacy) to refusal (exceptionalism). Kaufmann (2007a) informally surveyed 68 psychologists, 18 attorneys, and 15 other health professionals attending a CE Workshop on test material records management, asking what audience members would do "upon receipt of a valid order for release of patient responses to all psychological test questions to an attorney, duly authorized by the patient." Kaufmann (2007b) informally reported the results given in Table 1 before and after his training.

The results in Table 1 not only show the wide range of practices currently employed, but also the malleability of opinion on this issue as a result of 45 minutes of continuing education. During his workshops Kaufmann notes that, following *Detroit Edison*, some states barred disclosure of psychological test materials to nonpsychologists and he encourages psychologists to refuse release of psychological test materials when first confronted with discovery demands. Some authors have taken more extreme exceptionalist positions, advocating that psychologists not provide test scores in reports out of concern for potential misuse (Tranel, 1994).

In contrast, Lees-Haley and Courtney (2000a, 2000b) describe refusal to release test materials in litigation as "irresponsible" and claim that laws restricting the release of psychological test materials are unconstitutional and "bizarre." More recently, Lees-Haley, Courtney, and Dinkins (2005) question whether it is unethical or illegal for a psychologist to tell nonpsychologists that they can obtain test materials through other sources, even though they also acknowledge that direct release of test materials by psychologists is illegal in certain jurisdictions. Lees-Haley suggests that refusal to release psychological test materials in litigation may be

"damaging the credibility" of professional psychology.[12] Greiffenstein and Cohen (2005) favor the civil rights and due process arguments of Lees-Haley, and recommend "graded disclosure subordinated to the requirements of local law" (p. 40). Although this range of contrary recommendations reflects the competing public policy debate underlying test security versus discovery, it does not embody the guidance provided by the U.S. Supreme Court nor does it address the best practice for psychologists.

Psychologists may form subjective impressions about allegedly irresponsible practices or purportedly bizarre state laws protecting psychological test materials from wrongful disclosure, but assertions of unconstitutionality can be objectively evaluated by courts based on existing case law. Although the constitutionality of prohibiting disclosure of psychological test material to nonpsychologists has not been directly litigated in any case, *Detroit Edison* teaches that "the duty to supply information . . . turns on 'the circumstances of the particular case,' and much the same may be said for the type of information that will satisfy that duty" (p. 413) *NLRB v. New England Newspapers, Inc.*, (1988). Federal courts develop privileges by interpreting "the principles of common law . . . in light of reason and experience" FED. R. EVID. 501. However, state law and state courts establish most privileges. For example, recent state court cases have applied *Detroit Edison* to conclude that a trial court's order to release a videotape of a neuropsychological IME failed to strike a proper balance with "the psychological profession's legitimate interest in preserving the security of test materials" (concurring opinion, *Piccolo* p. 776). Asserting a privilege requires the appropriate holder to claim the proper type of privilege for narrowly specified information in an appropriate proceeding (Carlson, Imwinkelried, Kionka, & Strachan, 2007). Consequently, if a psychologist does not assert a *Detroit Edison* test security privilege to refuse the release of psychological test materials in litigation, that psychologist is depriving the state court of the opportunity to rule on whether or not the privilege applies.

Many psychologists have written treatises, standards, guidelines, decision trees, and position papers that eloquently describe the raw data problem, identify its ethical dilemmas, and provide astute insights (American Academy of Clinical Neuropsychology, 2007; American Psychological Association, 2006; Attix et al., 2007; Barth, 2000; Bush, 2005; Bush & Lees-Haley, 2005; Bush & Martin, 2006; Bush, Rapp, & Ferber, in press; Erard, 2004; Fisher, 2003a, 2003b; Freides, 1993; Freides, 1995; Frumkin, 1995; Greiffenstein & Cohen 2005; Grote, 2005; Kaufmann, 2005; Lees-Haley & Courtney, 2000a, 2000b, 2000c; National Academy of Neuropsychology 2000, 2003, 2004; Naugle & McSweeny, 1995, 1996; Rapp & Ferber, 1994, 2003; Rapp, Ferber, & Bush, 2008; Roger, 2004; Shapiro, 2000; Sweet, 1990; Tranel, 1994, 2000). National psychology organizations—American Psychological Association (APA), National Academy of Neuropsychologists (NAN), AACN)—have recently conducted continuing education workshops in efforts to develop a consensus approach to the raw data problem (Kaufmann, 2006, 2007c, 2008b). Nonetheless, confusion persists and practices vary.

[12]Subsequently, Dr. Paul Lees-Haley acknowledged that his writings have been used by attorneys to make improper demands for disclosure of psychological test materials in litigation (personal communication, 2007) with a more recently expanded list of qualifications noted on selective list serves (2009).

The remainder of this article attempts to reduce confusion and to promote a uniform practice, by outlining a proposed best practice for psychologists, with legal arguments and persuasive strategies for protecting the objectivity, fairness, and integrity of psychological test materials in litigation. This proposal begins by providing a rationale for why psychologists may use a legal rationale to set aside the current APA ethical standards related to the raw data problem and advocate for substantial change in the next revision of the Code. That rationale begins with current Ethical Standard 9.04a, which states:

> The term *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 an examination. Those portions of test materials that include client/patient responses are included in the definition of *test data*. Pursuant to a client/patient release, psychologists provide test data to the client/patient or other persons identified in the release. Psychologists may refrain from releasing test data to protect a client/patient or others from substantial harm or misuse or misrepresentation of the data or the test, ***recognizing that in many instances release of confidential information under these circumstances is regulated by law***. [Emphasis added.]

The Code instructs psychologists that "in many instances release of confidential information under these circumstances is regulated by law" then psychologists should look to the law to decide whether to release raw data and psychological test materials. The law resolves the raw data problem and the law supersedes the APA Ethics Code, professional position papers, and personal preferences that some clinicians have developed in their practices.

PROPOSAL FOR REFORM

The following proposal outlines suggested changes to APA Ethical Standard 9.04a, some suggested reform of the law, and specific steps that psychologists can consider in striving toward best practices to resolve the raw data problem.

A new ethical standard

The most essential element of Ethical Standard 9.04a is the closing "regulated by law" clause, because it recognizes controlling legal authority. However, eliminating others words contained in the last sentence of 9.04a would more fully acknowledge legal supremacy in resolving the raw data problem, as follows:

> Psychologists may refrain from releasing test data, ***recognizing that in many instances release of confidential information under these circumstances is regulated by law***.

In approximately 2012 organized psychology is due for another Code revision and based on the legal authority referenced in this article, the current presumption of release should be changed to one in which psychologists do not release raw data or psychological test materials to nonpsychologists. When the issue arises in litigation, psychologists should assert a privilege not to release raw data or psychological test materials based on the strong public policy of test security, thereby allowing the court an opportunity to rule on the privilege.

A uniform psychologist nondisclosure privilege

About 20 states have enacted some form of protection for psychological tests, through statute, regulation, or case law.[13] Noteworthy examples include statutes[14] (Arizona, Arkansas, California, Illinois, Iowa, Maryland, and Minnesota) and regulations[15] (Alabama, California, Florida, Georgia, Illinois, Missouri, Nebraska, New Mexico, Ohio, Oregon, South Carolina, Texas, and Washington) restricting the release of psychological test materials to nonpsychologists. However, approaches vary significantly, ranging from legal duties and evidentiary nondisclosure privileges, to regulatory professional conduct standards (Kaufmann, 2005). Some states (New York) have carved out common law exceptions to discovery rules, protecting the release of psychological test materials in special circumstances.[16]

As one example, the Illinois statute sets forth a clear and unambiguous legal duty for psychologists, as follows:

> Psychological test material whose disclosure would compromise the objectivity or fairness of the testing process may not be disclosed to anyone including the subject of the test and is not subject to disclosure in any administrative, judicial or legislative proceeding. However, any recipient who has been the subject of the psychological test shall have the right to have all records relating to that test disclosed to any psychologist designated by the recipient. 740 ILCS 110/3(c).

This language presents the common elements of the psychologist nondisclosure privilege, including: (1) the objectivity and fairness standard; (2) assertion only by psychologists; (3) patient autonomy to direct disclosure to other psychologists; and (4) denial of direct patient access to psychological test materials

[13]Statutes are passed by the legislature and enacted into law by the executive; statutes are often clarified by administrative rules and regulations drafted by executive agencies, as delegated by the legislature and enacted by the executive; case law often interprets statutes and regulations as applied to specific cases or controversies heard by courts; case law holdings contribute to the oldest source of legal authority; that is, judge-made common law. Statutes, regulations, and case law carry equivalent legal authority subject only to the applicable state or federal Constitution under which they operate. Statutes may be attacked if they are unconstitutional; regulations may be attacked if they exceed the scope of legislative authority; case law may be attacked by appellate review or by passage of a statute, regulation, or Constitutional amendment.

[14]740 Ill. Comp. Stat. Ann. § 110/3-c; Ariz. Rev. Stat. Ann. § 12-2293(B); Ark. Code Ann. § 12-12-917(d)(2)(A)(ii); Cal. Bus. & Prof. Code § 4982(q); Cal. Bus. & Prof. Code § 4992.3(q); Iowa Code Ann. § 228.9; Md. Code Ann., Health-Gen. I § 4-307(e)(1), (2), & (3); Minn. Stat. Ann. § 148.965.

[15]Ala. Admin. Code r. 750-X, app. III, n. 26; Ariz. Admin. Code tit. 4, R4-26-106(B); Cal. Code Regs. tit. 16, § 1396.3; Cal. Code Regs. tit. 16, § 1858; Cal. Code Regs. tit. 16, § 1881; Fla. Admin. Code Ann. r. 64B19-18.004(3); Fla. Admin. Code Ann. r. 64B19-19.005(3); Ga. Comp. R. & Regs. r. 510-4-.02(9)(k), (d)(1)(a)-(b); Ill. Admin. Code tit. 68, § 1400.80(k); Mo. Code Regs. Ann. tit. 4, § 2235-5.030(12)(E); N.M. Admin. Code tit. 16, § 16.22.2.16(A)-(B); Neb. Amin. Code tit. 172, § 156.010(01); Ohio Admin. Code § 4732-17-01(F)(2); 41-11 Or. Bull. 29(2)(c)(H)(iv); 39-8 Or. Bull. 181 151-020-0070(7); 100 S.C. Code Ann. Regs. 4J(4); 22 Tex. Admin. Code § 465.16(b)(2), (d); 22 Tex. Admin. Code § 465.22(b), (c)(4) Wash. Admin. Code § 246-930-310(7)(a).

[16]Child custody *Ochs v. Ochs*, 749 N.Y.S.2d 650 (N.Y. Gen. Term 2002); work product completed in reasonable anticipation of litigation *Martinez v. KSM Holding Ltd.*, 294 A.D.2d 111, (NY App. Div., 2002).

(Kaufmann, 2005). Although not expressly stated in the statute, the objectivity and fairness standard implicitly includes the uniform sampling of behavior and standardized scoring of psychometric test performance, followed by comparison of the patient's performance to the norms, when drawing quantitative conclusions about level of functioning. The nondisclosure privilege protects the reliability and validity of the psychometric tests and promotes accuracy of these quantitative conclusions. Whether by enacting state statutes and regulations or interpreting the common law, a privilege shielding psychological test materials from public disclosure protects the objectivity, fairness, and integrity of psychometric testing.

Some states already exercise prudent legislative intent to protect the best technology available for evaluating certain legal claims. When presented with an appropriate case, it is within the reason and experience of courts to interpret the common law consistent with a psychologist nondisclosure privilege. Recognizing a psychologist privilege not to disclose psychological test materials promotes the truth-seeking function of the judiciary and serves public policy.

Proposed best practice

Best record release practices recognize the supremacy of the law, and that legal requirements vary with the jurisdiction in which the case is being heard. Psychologists managing a forensic consulting practice must be aware of jurisdictional law governing their roles, even when the court and the attorneys involved may not. After conferring with appropriate counsel, the most effective strategy for informing the court of these matters is for the psychologist to assert a privilege not to release raw data and psychological test materials when first confronted with discovery demands, thereby providing the court with the opportunity to rule on the asserted privilege. The subsequent section outlines the most effective general approaches to asserting the psychologist nondisclosure privilege, recognizing that successful strategies will vary with jurisdiction, court rules, local custom, and judge idiosyncrasies.

RECOMMENDED PRACTICE FOR RECORD RELEASE[17]

Be reasonable and communicate closely with the retaining attorney

Psychologists who fail to comply with court-ordered discovery of psychological records do a disservice to the profession by taking the extreme position of refusal to release *any* materials or to even deny knowing the patient. Such positions are not only unreasonable and ignorant of the law, but also a failure to respond is illegal and may subject the psychologist to a contempt of court citation. Some may assert such positions claiming no authorization to release material from any such patient or that the records are absolutely confidential. Others are simply unaware that when a patient files a lawsuit that places their mental status at issue, that patient waives confidentiality and voluntarily places his or her condition into a public forum. Consequently, all records relevant to a claim or defense in that

[17]This section offers general recommendations from the neuropsychologist/attorney author and does not represent the opinions of any professional organization, nor is any legal advice contained herein.

lawsuit are generally discoverable, if that same condition was the reason that patient sought psychological services. For example, if a patient seeks neuropsychological services for symptoms caused by an accident, the filing of a lawsuit by that current or former patient, alleging personal injury arising from that accident, is the legal equivalent of consent to release records from those services provided. Psychologists must comply with these discovery demands promptly, unless and until they assert a professional privilege not to do so. A lawsuit is public record that voluntarily relinquishes the confidentiality of any materials relating to a claim or defense in that lawsuit. General confidentiality is not a legal privilege to refuse compliance with discovery.

The psychologist nondisclosure privilege only applies to a narrow range of test materials and raw data generated on those materials, which *does not* include many paper and electronic records. Patient materials that are subject to release under discovery include, but are not limited to, schedules, telephone messages, e-mails, calendars, logs, invoices, billing information, insurance forms, letters, history forms, generic symptom checklists, and reports. According to APA Record Keeping Guidelines (2007) and rules governing expert opinions (FED R. EVID. 703), psychologists may also be required to release third party medical, educational, and occupational records if those records were used by the psychologist to formulate expert opinions in the case. Raw notes and audio/videotapes of collateral or patient interviews are subject to discovery and there is no legal basis to withhold interview information, absent a showing of substantial risk of imminent and significant harms to identified individuals resulting directly from release.

The most reasonable response to court-ordered discovery is to promptly disclose relevant materials and to include a written explanation for why test materials and raw data were withheld and will not be released. That rationale for withholding selected materials will vary by jurisdiction and will rely on different legal arguments that may be specific to the relevant facts and circumstances presented by the case. Once it is clearly established that certain materials exist that will not be disclosed, psychologists should employ a hierarchical and multi-pronged strategy to protect psychological test materials and raw data from wrongful disclosure to nonpsychologists. The most effective and efficient strategies that reduce judicial intervention should be applied first to resolve the raw data problem, including informal efforts, motion practice, legal arguments, procedural safeguards, and persuasive techniques aimed at convincing the court that the strong public policy of test security for all cases supersedes the right of discovery in the specific case at bar.[18]

Preliminary informal efforts to avoid wrongful disclosure

1. Agree to release test materials and raw data to the opposing psychologist expert. Attorneys may seek psychological test materials and raw data informally by telephone call, e-mail, or letter. Probably the most common preliminary solution to the raw data problem for the psychologist is to offer to send the protected materials and raw data to the requesting attorney's psychologist expert

[18]Current case being heard by the court.

after credentials can be confirmed. Some experienced attorneys will accept this option without complaint. Most state licensing boards offer an Internet web link to confirm the license of the opposing expert and some even provide information about founded ethical violations involving licensees. When this solution works, most psychologists include a brief cover letter to the opposing expert, outlining test security policies and a warning against disclosure of test materials to nonpsychologists.

Lawyers may not agree to this informal arrangement because direct exchange among experts may not be in keeping with their litigation strategy and what they feel is necessary to zealously advocate for their client. Attorneys may demand psychological test materials and raw data because they believe they are legally entitled to discover the information contained therein and because that approach is what their client prefers. It is also possible that the attorney has not found an expert or they are asserting the right to withhold the identity of their expert during the preliminary phases of discovery. Under the rules, attorneys may delay identification of their experts to opposing counsel until so required.

There are a few simple solutions for the attorney who does not wish to disclose his or her expert before it is required under the rules. The psychologist whose records are sought may strike an agreement with the attorney to seal the records and to deliver them to the anonymous opposing expert through a neutral carrier. Alternatively, the attorney may provide the name of the psychologist expert with an agreement that the psychologist releasing the records will not disclose the expert's name to the opposing attorney. Finally, some psychologists have turned over psychological test materials to attorneys under an agreement that they will not open them. Then the attorney may forward the materials to their expert. None of these solutions may be optimal for all parties involved, but they do offer the advantage of easy and prompt resolution of the raw data problem.

2. Do not raise concerns about the opposing expert, before having grounds to do so. Some psychologists resist the release of neuropsychological raw data and test materials to psychologists who they believe are insufficiently trained to practice neuropsychology. There is no basis in the law to withhold raw data and psychological test materials from another licensed psychologist, when the patient-examinee directs that release of such information. In fact, it is generally illegal to refuse such release when duly authorized by the patient-examinee, whether by written request or through the filing of a lawsuit. Although some psychologists may identify potential ethical violations by opposing experts as a cause for hesitations, the filing of adversarial ethical complaints is generally discouraged, until litigation is resolved (AACN Official Position, 2003).

Motion practice to protect test materials may require an attorney

Every jurisdiction (state or federal), court (criminal, civil, or administrative), and alternative dispute resolution process (arbitration, mediation, negotiation, and conciliation) has rules for discovering information relevant to a claim or defense.

Although discovery rules are similar across jurisdiction and court proceedings, they are never identical and they are subject to routine amendment.[19] Discovery rules may be suspended in some administrative proceedings and arbitration, and formal rules are commonly set aside in mediation, negotiation, and conciliation. For example, information disclosed during settlement negotiations is confidential and generally not admissible should subsequent litigation be unavoidable (FED R. EVID. 408).

This article does not elucidate the complex relationships between Rules of Procedure and Evidence in criminal and civil cases as they relate to expert opinions rendered by neuropsychologists in every jurisdiction. Such information is well beyond the scope of this article and would only appear in publications like *American Law Reports*, *Corpus Juris*, or *50 State Surveys*. Expectations and rules vary, prompting some psychologists to hire their own attorneys to assist in resolving discovery disputes pertaining to psychological test materials and raw data. Consequently, the next section briefly outlines a legal analysis of the Federal Rules of Civil Procedure and Federal Rules of Evidence that prompt attorneys to seek raw data and test materials from neuropsychologist experts retained in federal cases. Although many states use rules that model these federal rules, significant variability exists. However, in order to demonstrate typical motion practice, the Federal Rules are used to illustrate common legal filings during pretrial advocacy.[20]

Discovery of expert testimony begins with understanding Federal Rule of Civil Procedure (FED. R. CIV. PRO.) 26 and Federal Rules of Evidence (FED. R. EVID.) 702, 703, and 705. FED. R. CIV. PRO. 26(b)(1) states:

> ***Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense*** — including the existence, description, nature, custody, condition, and location ***of any documents*** or other tangible things and the identity and location of persons who know of any discoverable matter. For good cause, ***the court may order discovery*** of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. [Emphasis added.]

Courts may order discovery, even though some of the information discovered may not be admissible. FED. R. EVID. 702, 703, 705 set standards for expert testimony, beginning with Rule 702:

> 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, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Rule 703 elaborates that the facts and data upon which the expert relies in formulating opinions must be "of a type reasonably relied upon by experts in the particular field." Regarding these facts and data, Rule 705 adds:

> The expert may testify in terms of opinion or inference and give reasons therefor without first testifying to the underlying facts or data, unless the court

[19]Federal courts and each of 50 state courts operate under similar, yet non-identical, rules.
[20]Federal Rules of Criminal Procedure are not addressed.

requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

Facts and data of the type used by experts in formulating opinions are typically subject to cross examination and these rules strongly predispose attorneys to expect and demand raw data and psychological test materials that form the basis of expert opinions offered by neuropsychologists.

Absent a psychologist claim that some materials are privileged, attorneys *are* entitled to receive all materials that the psychologist possesses, if those materials are relevant to the lawsuit. The court will order these materials released directly to the attorney demanding discovery, unless the psychologist asserts a nondisclosure privilege. More relevant to our discussion, privileged materials are exempt from discovery. The exemption that is the most germane for this article is noted in FED. R. CIV. PRO. 26(b)(5) as follows:

> (A) Information Withheld. When a party withholds information otherwise discoverable ***by claiming that the information is privileged*** or subject to protection as trial-preparation material, the party must:
>
> (i) ***expressly make the claim***; and
>
> (ii) describe the nature of the documents, communications, or tangible things not produced or disclosed — and do so in a manner that, ***without revealing information itself privileged or protected***, will enable other parties to assess the claim.
>
> (B) Information Produced. If information produced in discovery is subject to a claim of privilege or of protection as trial preparation material, ***the party making the claim may notify any party that received the information of the claim and the basis for it***. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved. [Emphasis added.]

In summary, when the neuropsychologist releases a report containing expert opinions, under FED. R. CIV. PRO. 26(a)(2)(B)(iii), the attorney is entitled to "the data or other information considered by the witness in forming them" *unless* the psychologist asserts a privilege not to release raw data contained on psychological test materials. Procedures governing discovery of documents are described in FED. R. CIV. PRO. 34. If the psychologist asserts the privilege and refuses to release the data used in forming his or her expert opinions, then the opposing attorney is likely to obtain a court order or subpoena[21] demanding production. If the psychologist objects, the attorney will file a motion to compel production under FED. R. CIV. PRO. 37 and the court may respond with a subpoena *duces tecum*.[22] Procedures governing subpoenas are described under FED. R. CIV. PRO. 45.

[21]A writ commanding a person to appear before a court, subject to a penalty for failing to comply.
[22]A subpoena ordering the witness to appear and to bring specified documents or records.

Unanswered motions are adopted and the court must take steps to enforce a subpoena. Consequently, attorneys acting on behalf of the psychologist may recommend taking the following legal actions to protect test security.

1. Informal negotiation and agreement among the parties. Courts typically prefer informal agreements worked out among the parties that do not require judicial intervention, because it saves time. I have participated in such negotiations even in capital murder trials after the judge issued a subpoena *duces tecum* (*State v. Baumruk*, 2006). In *Baumruk*, once the judge was clearly informed about the state regulation and strong public policy of test security, the subpoena was modified. Ultimately, the parties negotiated a resolution that the opposing experts would exchange test materials directly without disclosing those materials to the attorneys. Although the subpoena remained in place, when the judge heard that the parties had fashioned an exchange agreement, the judge decided not to enforce the subpoena.

2. File a motion to modify or quash the subpoena. Pursuant to FED. R. CIV. PRO. 45(c)(3), an attorney representing the psychologist may move to modify or quash a subpoena for a variety of reasons. For example, a psychologist may seek to modify a subpoena because it failed to provide adequate notice of time to comply. A discovery demand may also be modified if it involves items that are irrelevant or if the request is unduly burdensome. Most relevant to this discussion, a psychologist may move to quash a subpoena if compliance would require "disclosure of privileged or other protected matter" FED. R. CIV. PRO. 45(c)(3)(A)(iii).

Before I became a lawyer, I unknowingly moved the court to modify or quash a subpoena *duces tecum*, when I appeared to render testimony about why I would not release psychological test material to a psychiatrist (*Flanagan v. Wilson & Huene*, 1999). In this civil proceeding, I testified, "My interpretation of the Confidentiality Act indicates that the release of psychological test material can be made only to a psychologist in the state of Illinois. I have reservations in a number of domains, one of which is the law." In jurisdictions with laws prohibiting disclosure of test materials to nonpsychologists, modification may simply involve informing the judge of the law, then showing the court how and when it applies.

3. File motion to intervene as a right. Psychologists may employ another motion to maintain test security when neither party to the lawsuit seems adequately concerned about the harmful effects of test material disclosure. FED. R. CIV. PRO. 24(a)(2) allows anyone to intervene as a right when the third party has a relevant stake in a matter pending before the court, if neither party to the lawsuit adequately represents the interests of the intervener. If the actions of the original parties to the lawsuit "may as a practical matter impair or impede the movant's [psychologist's] ability to protect its interest" then the psychologist has a right to intervene to protect that interest. Here, the interest would be maintaining test security in order to protect the methods and techniques required for practice. I used this strategy in an effort to limit disclosure of test materials without success, when retained as an expert who had conducted an evaluation in a setting in which I was not the custodian of the test materials. (*Fox v. Lowe's Home Center, Inc.*, 2003).

4. Consider contempt citations carefully. Avoid contempt citations whenever possible. After an exhaustive search of electronic legal research databases, there are no cases in which a psychologist has been found in contempt for refusing to disclose psychological test materials. However, if confronted with a potential contempt citation, another method for successfully avoiding the release of raw data and psychological test materials would be to negotiate a $1 contempt citation with the judge, for the purpose of packaging the issue for immediate interlocutory appeal[23] before an appellate court. Be advised that legal representation is essential for success of this strategy and the lawyer must be prepared for the rigor of appellate advocacy in order to prevail. I have never attempted this strategy and would only do so if a reasonable opportunity and amenable judge presented in a proper jurisdiction. To my knowledge, this strategy has never been employed by a psychologist and should only be contemplated with an attorney as a last option in rare circumstances.

Legal arguments against disclosure of test materials

1. Assert psychologist nondisclosure privilege based on state and federal law. If you practice in a state with a statute, regulation, or case law that provides a duty or privilege not to disclose raw data and psychological test materials to nonpsychologists, this state law should be the primary basis and first argument for a psychologist to refuse to release protected materials to an attorney.

If your state does *not* have any law providing for a psychologist nondisclosure privilege or duty to safeguard test materials, then the most legally persuasive basis for refusing to release raw data and test materials to nonpsychologists is by reference to public policy described in *Detroit Edison v. NLRB*. This decision is not binding on state courts and consequently a state court judge may ignore legal arguments based on federal references to test security. However, the inherently reasonable public policy of test security garners respect from most judges once they understand that it is based on a U.S. Supreme Court decision *that provides a practical solution to the problem.* Referencing U.S. Supreme Court authority also casts the opposing party seeking discovery as having insufficiently researched this issue or being unwilling to hire an appropriate expert to receive and review the material. If the argument is not raised, the court will have no opportunity to consider the issue in light of the U.S. Supreme Court authority. Psychologists report some success using this strategy in states that have no law protecting raw data and psychological tests from wrongful release to nonpsychologists.

2. Assert intellectual property restrictions and contractual obligations. Although test manufacturers, publishers, marketers, sellers, and distributors can and do provide some assistance to practicing neuropsychologists in protecting intellectual property interests (copyright, trademark, and trade secret) of the test industry, the practitioner's only obligation in this domain is based on

[23]An appeal of a trial court ruling that must be made before a final ruling; also referred to as the collateral order doctrine. *Black's Law Dictionary* (8th edition). Although allowed in federal court, many states do not have this option.

a user's contract. These intellectual property arguments may be useful, but have been described elsewhere (Bush et al., in press) and are increasingly ineffective. Recent decisions have challenged intellectual property arguments used in efforts to deny disclosure of psychological tests (*Carpenter v. Yamaha Motor Corp.*, 2006).

In *Carpenter*, NCS Pearson defended its intellectual property interests in the MMPI-2 and Harcourt Assessment, Inc. defended its copyright for the Wechsler Adult Intelligence Scale–Third Edition (WAIS-III), the Wechsler Memory Scale–Revised and Third Editions (WMS-R & WMS-III), the California Verbal Learning Test–Second Edition (CVLT-II), and the Raven's Standard Progressive Matrices. However, both Pearson and Harcourt suggested that protective orders provide a "satisfactory means" by which the tests can be provided after the evaluation, indicating "the copyrighted tests could be provided without violation of copyright law or harm to the secrecy, validity and integrity of the tests" (p. 274). Beyond these admissions by test entities, the *Carpenter* court implied that copyright restriction may not apply to "secure tests" subject to discovery, when noting that protective orders assure that a test remains under the ownership and control of the test sponsor or publisher. The court's confidence in the security of protective orders stands in sharp contrast to the uniform skepticism of such orders by the United States Supreme Court in *Detroit Edison*, with the majority expressing concern about intentional violations and the minority noting problems from inadvertent disclosure.

Although protective orders are essentially impossible to monitor and enforce, in *Carpenter*, test entities relinquished certain intellectual property claims when tests are the subject of discovery in lawsuits. Therefore, psychologists claiming breach of user agreement as a basis to refuse release of raw data and psychological test material to attorneys (Chadda & Stein, 2005) will likely fail when test entities have outlined protective order procedures for such release of tests in litigation.

Procedures to protect test materials

1. Move for protective orders. Despite acknowledged limitations, properly written protective orders may play an interim step in a comprehensive legal strategy to protect raw data and psychological test materials from disclosure to nonpsychologists. Although these orders are of unknown effectiveness, they may be the only means by which a psychologist may raise the issue of test security with the court. Negotiations among the parties regarding the content, scope, monitoring, and enforcement of the order may provide an avenue for the court to understand the true risks of test disclosure and to fully appreciate the fallacy of such protective directives as applied to test materials. Some judges may hear the ensuing discussion and decide they would like to review the materials in question "off the record" in chambers. Psychologists should seize such opportunities to educate the court about psychological tests and the importance of test security, as the court conducts an *in camera* review[24] of materials.

[24]Meaning "in the judge's private chambers" *Black Law Dictionary* (8th Edition); a review off the record not open to the public or the press.

2. Seek an *in camera* review of test materials. If the judge decides that she or he must actually see the raw data and test materials before ruling on whether they can become part of the public record in a court proceeding, the psychologist should embrace the privacy of the judge's chambers to help explain the sound public policy of test security. While reminders about legal arguments that the psychologist should have already presented in open court from *Detroit v. NLRB* are always useful, the informality of judge's chambers yields itself to much more casual interaction and application of common-sense arguments. These informal arguments should emphasize the social harm associated with test disclosure. This approach should include, but not be limited to, the "LSAT/Bar Exam analogy", an appeal that cheating is an affront to justice, and a description of documented cases in the literature of attorney coaching. Psychologists must always be cognizant not to exceed their authority and may suggest the appointment of a special master[25] to address the issue.

Persuasive techniques to protect test materials

1. "LSAT/Bar Exam analogy". Judges and lawyers inherently understand test security because they guard it closely in matters related to law school admission and entry into the legal profession. Perhaps the most persuasive nonlegal argument for maintaining test security, when talking informally with judges, is provided by analogy to the Law School Admissions Test (LSAT) and the Bar Examination. The legal profession vigorously defends the confidentiality of materials used in these examinations because they understand the consequences of disclosure—destroying the reliability, validity, and value of the examinations and diminishing the credibility of the profession. Test secrecy is essential to regulating the legal profession and courts are particularly unforgiving of their own. For example, those caught cheating on the Bar Examination fail character and fitness requirements for the profession and are permanently barred from practicing law.[26] The legal profession is well aware of the risks associated with the wrongful release of test materials. The "LSAT/Bar Exam analogy" reads as follows:

> Your honor, suppose a student filed a lawsuit claiming that he or she was wrongfully denied admission to a law school or the State Bar. The complaint reads that the LSAT or Bar Examinations were used to improperly exclude them from studying or practicing law. As part of that lawsuit, the student sought to discover all items, answers, and materials used in these examinations. Would you grant a motion to compel production of the requested materials and risk the release of those materials into the public record?

[25]Special masters are officers of the court who assist the court on specifically identified tasks, when the complexity or exceptional nature of a case requires.

[26]See *In re Bedi*, (2007) ("cheating on the bar exam is a particularly egregious act of dishonesty which cannot be easily excused" p. 672); *In re Rojas*, (2006)(Rojas permanently barred from practice of law after finding that she "spoke to the applicant seated next to her during the Civil Code III examination ... such conduct constituted cheating" p. 1230); *In re Cummings*, (1942) (an older attorney was disbarred and a younger attorney was severely sanctioned after the court concluded, "Cummings, for a monied consideration, attempted to assist several candidates taking the bar examinations to cheat their way through, and is guilt of a reprehensible act, repugnant of good morals and ethics, constituting gross professional misconduct" p. 619).

> The request for psychological raw data and test materials in the present litigation is no different than what the student would be requesting in my hypothetical. For this reason, I respectfully request that *if* you order production of the raw data and psychological test materials, that you restrict access to those materials exclusively to an opposing psychologist expert who must also safeguard those materials. It is really no different that what is done in protecting the legal profession. Your honor would not want to risk the consequences of improper disclosure of protected test materials to the general public.

The analogy should be used to help judges appreciate how compromised security of psychological tests poses a social threat that extends well beyond the case at bar.

2. Cheating is wrong whether perpetrated by psychologists or attorneys. Another persuasive argument for withholding test materials involves references to character and fitness requirements in the legal profession and how disclosure of raw data and psychological test materials promotes cheating among examinees. Judges will appreciate the risk of cheating in future cases posed by disclosure of test items and how release of test materials into the public record erodes justice in our courts. In some respects this argument is an extension of the aforementioned analogy, expanding application of the concrete example in a manner that members of the legal profession will find evermore persuasive.

3. Attorneys wrongfully coach clients. Another persuasive argument is to remind judges of documented cases in which attorneys coach their clients, claiming there are no expressed rules against the practice. Despite character and fitness requirements, some zealous advocate attorneys believe they have a duty to prepare their clients for psychological evaluations by reviewing information available about tests that is available in the public domain. Published cases document examples of confirmed attorney coaching before neuropsychological evaluations (Youngjohn, 1995) and the problems associated with giving warnings (Youngjohn, Lees-Haley, & Binder, 1999). Surveys reveal that more than half of practicing attorneys would spend at least 1 hour preparing their client for an independent evaluation, including psychometric methods and other techniques used to evaluate symptom validity (Essig et al., 2001).

Kaufmann (2005) explains why justice for all cases under judicial review must outweigh the needs of a single client. Psychologists evaluate clinical impressions from interviews, behavioral observations, and informal assessment, with the added benefit of comparing the individual's test performance to norms. Unlike other mental health professionals, psychologists use objective psychological tests to refine clinical impressions when formulating working diagnoses, initial treatment plans, and expert opinions. Neuropsychology adds the brain–behavior knowledge base and incorporates neuroimaging, neurodiagnostic, and other neurologic findings to the aforementioned evaluation techniques, thereby creating the unique practice of forensic neuropsychology consulting. Neuropsychological evaluations provide the best means for objectively evaluating mental states related to certain legal claims, but only if test materials are protected and patients are not coached. In calling for a uniform rule, Kaufmann (2005) concludes that it is time for all states to protect the objectivity, fairness, and integrity the best technology available to evaluate certain

legal claims. Absent a uniform rule, attorneys coach their clients, thereby eroding the independence and integrity of the judiciary.

4. Zealous advocacy without candor violates the professional responsibility of attorneys. It may be helpful to point out to judges that some zealous advocates neglect the obligation to express candor before the court. Some attorneys have become so blind to the harm associated with test disclosure, and so caught up in the rule of diligent zealous advocacy for their client, that they fail to temper their legal advocacy with candor before the court. In addition to coaching clients, some attorneys have taken to direct attacks on the reliability and relevance of neuropsychological methods and techniques. Nowhere is this current practice more evident than in the application of symptom validity science in neuropsychological evaluation techniques (SVT), as explained in greater detail elsewhere (Ben-Porath, Greve, Bianchini, & Kaufmann, 2009).

Attorneys may exercise poor professional discretion in how they engage in zealous advocacy for their clients, but a failure to exercise candor before the court is a violation of professional responsibility. A good recent example of this imbalance, as observed in motion practice from forensic neuropsychology, is the perpetual attack on SVT science, noted in a set of Florida cases that successfully excluded expert testimony based on the MMPI-2 symptom validity scale (FBS)—*Vandergracht v. Progressive Express*, 2005; *Williams v. CSX Transportation, Inc.*, 2007; *Davidson v. Strawberry Petroleum, Inc.*, 2007; *Stith v. State Farm* (2008); *UpChurch v. Broward Co. School Board*, 2008; *Limbaugh-Kirker v. Decosta*, 2009—and from those that were not successful in excluding such testimony (*Nason v. Shafranski*, 2008; *Solomon v. TK Power*, 2008; *Behrmann v. Liberty Mutual Ins. Co.*, 2008). However, the orders in these Florida cases cannot be neatly categorized. For example, although the *Limbaugh-Kirker* judge excluded FBS after a lengthy *Frye* challenge, all other SVT evidence was allowed and the plaintiff was shown to be exaggerating symptoms. The implications of these Florida decisions remain hotly debated (Williams, Butcher, Gass, Cumella, & Kally, in press).

At a minimum, psychologists should understand and use the ABA Model Rules of diligence and candor to advantage in providing deposition and trial testimony to signal attorneys that certain misleading techniques will not be tolerated. There is a lengthy history of assessment of deception and malingering in clinical practice (Rogers, 2008). The scientific evidence supporting application of SVT science in clinical neuropsychology practice is overwhelming and widely accepted (Boone, 2007; Larrabee, 2007; Morgan & Sweet, 2008). Psychologists should not hesitate to use adverse legal authority to bolster the science and practice of neuropsychology and to protect the objectivity, fairness, and integrity of neuropsychological evaluations in litigation.

5. Appointment of a special master. Most judges acknowledge little or no expertise in the science and practice of clinical neuropsychology—many have no scientific training, let alone any fluency in brain–behavior relations. Kaufmann (2008) highlights the confused jurisprudence in questions of admissibility of neuroimaging and neuropsychological evidence in criminal proceedings. When highly technical or scientifically complex evidence is presented, courts may consider

appointing a special master to address questions of fact and law. FED. R. CIV. PRO. 53 provides for this contingency as follows:

> Unless otherwise provided in statute, a court may appoint a master only to:
> (A) perform duties consented to by the parties;
> (B) hold trial proceedings and make or recommend findings of fact on issues to be decided without a jury ***if appointment is warranted by***:
> (i) ***some exceptional condition***; or
> (ii) the need to perform an accounting or resolve a difficult computation of damages; or
> (C) address pretrial and posttrial matters that cannot be effectively and timely addressed by an available district judge or magistrate judge of the district. [Emphasis added.]

Detroit Edison has taught us that psychological test materials are an exceptional condition. Such exceptions may warrant appointment of a special master to resolve discovery disputes and other questions about the admissibility of neuropsychological evidence in court.

FAQ: WHAT ABOUT HIPAA AND TEST MATERIALS?

In 1996 Congress passed the Health Insurance Portability and Accountability Act (HIPAA) to improve privacy protection and promote transferability of health insurance benefits. In April, 2003, HIPAA implemented privacy rules allowing patient access to their own health records, except psychotherapy notes and information compiled in reasonable anticipation of litigation 45 C.F.R. § 164.524(a)(i), (ii) (2009). Despite efforts made by the APA to exclude test materials, HIPAA did not expressly bar patient access to raw data contained on psychological test protocols.[27] However, psychological test materials administered in anticipation of consulting on a legal matter are exempt from HIPAA access requirements. Therefore, forensic neuropsychological consultation would meet the reasonable anticipation of litigation exception and test materials used in such consultation would not be subject to patient access under HIPAA.

The more common question asked by practicing neuropsychologists involves patients, not pursuing litigation, who demand test protocols under HIPAA access requirements. In those states that bar the release of psychological test materials to nonpsychologists, such patient demands pit federal HIPAA regulations against state law. Kaufmann (2005) briefly described the complex preemption and stringency analyses that should ensue following such a request. One pertinent HIPAA provision addressing this question involves a determination by the

[27]As a proposed amendment to President Barak Obama's stimulus package, APA suggested an expansion of the HIPAA psychotherapy notes definition to include "test data related to direct responses, scores, items, forms, protocols, manuals, and other materials that are part of treatment or an evaluation." On February 11, 2009, the US Department of Health and Human Services objected to this language and the US Congress conference committee rejected the amendment, inserting an agreement for HHS to study APA's newly proposed psychotherapy notes definition.

Secretary of DHHS that a provision of state law is necessary "for purposes of serving a compelling need related to public health, safety, or welfare" 45 C.F.R. § 160.203(a)(1)(iv) (2009). In addition, if a specification of the privacy rule is at issue, the Secretary "determines that the intrusion into privacy is warranted when balanced against the need to be served." The strong public policy of test security and implied psychologist nondisclosure privilege in *Detroit Edison* would weigh in that balance. Moreover, Kaufmann (2005) noted that Illinois preemption analysis indicates HIPAA regulations do not preempt the psychologist nondisclosure privilege/duty to safeguard psychological test materials, because the Illinois statute provides greater privacy protection and is more stringent than the HIPAA privacy rule. Neuropsychologists are encouraged to seek counsel familiar with state laws applicable in the relevant jurisdiction to determine the best response to a HIPAA demand to release test protocols to the patient who is not pursuing legal action.

FAQ: WHAT ABOUT UNDULY BURDENSOME DISCOVERY DEMANDS?

Overly broad discovery demands are a challenging litigation tactic exercised by some trial attorneys in an effort to intimidate novice neuropsychologist experts. In a recent case I received a "Notice of Deposition *Duces Tecum*" from opposing counsel, demanding that I produce 31 items, such as:

> 2. ...your entire file, including but not limited to, hard copies of emails sent and received, and all reports, letters, memoranda and/or notes, handwritten or otherwise, graphs, computer printouts, all documents completed by the plaintiff, copies of tests, test results completed by your office or at your direction, ***any and all raw data***, and all models, illustrations, photographs, exhibits, or documents of any kind which you intend or contemplate using to explain, illustrate, or support your testimony at trial of this matter. This includes computer printouts.
>
> 11. ***Any and all testing manuals*** used in your evaluation. The ***actual test booklets*** used to determine cutoff scores for the application, interpretation, and administration of any and all tests given; ***any and all instruction manuals/booklets concerning any and all tests given.***
>
> 14. ***Any and all scoring manuals*** used in your evaluation.

These demands were void in the issuing jurisdiction,[28] due to regulations safeguarding psychological test materials from wrongful disclosure. Perhaps more absurdly, these demands were made even though I had not conducted an evaluation in the case. The request went on to demand past job applications, University IRB applications, University Notice of Outside Activities/Income, litigation calendar, advertising materials, and identification of all litigation consultation cases. Moreover, this information request was provided about 24 business hours before my deposition was scheduled. Some colleagues report demands for books from their private library, personal banking information, divorce decrees, bankruptcy

[28]See, *Campbell v. Papell*, Florida 12th Circuit, Sarasota County (March 19, 2009 Order denying release of raw data and psychological test materials to the plaintiff attorney who had relied in part on Lees-Haley & Courtney (2000) publications in a failed motion to compel release); see also *Sierra v. Reyes* Florida 13th Circuit, Hillsborough County (February 16, 2009 Order denying release of raw data).

settlements, and both federal and state tax returns.[29] Fortunately, the jurisdiction in which these demands were made provides some protection from oppression, undue burden, or expense, when an expert is confronted with such unprofessional demands.[30]

Although jurisdictional rules addressing unduly burdensome discovery demands vary, FED. R. CIV. PRO. 45 presents a common model as follows:

> (c) Protecting a Person Subject to a Subpoena.
>
> (1) Avoiding Undue Burden or Expense; Sanctions.
>
> A party or attorney responsible for issuing and serving a subpoena ***must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena***. The issuing court must enforce this duty and impose an appropriate sanction — which may include lost earnings and reasonable attorney's fees — on a party or attorney who fails to comply.
>
> (3) On timely motion, the issuing court must quash or modify a subpoena that:
>
> (i) fails to allow ***a reasonable time to comply***;
>
> (ii) ***requires disclosure of privileged or other protected matter***, if no exception or waiver applies; or
>
> (iii) ***subjects a person to undue burden***. [Emphasis added.]

Again, the novice neuropsychologist expert is advised to seek legal counsel in determining the best response to unduly burdensome discovery demands in the appropriate jurisdiction.

WHY BOTHER RESISTING THE RELEASE OF PSYCHOLOGICAL TEST MATERIALS TO ATTORNEYS?

Psychologists must act to protect psychological test materials because the discovery and dissemination of test materials in court turns the best available technology for evaluating mental states relevant to legal claims into junk science. Unrestrained disclosure of psychological test materials erodes reliability and validity, reducing the interpretive value of the tests. Handing test answers to test takers or their attorneys violates the court's rational means of ascertaining the truth. Among many others sources of data, techniques, and procedures involved in drawing neuropsychological inferences, rendering diagnoses, and formulating expert opinions, neuropsychological methods require appropriate selection, administration, scoring, and interpretation of reliable and valid psychometric tests. Consequently, individual practitioners and the profession must take a more active role in protecting the objectivity, integrity, and fairness of neuropsychological methods in litigation. It is time for organized psychology to advocate for a uniform

[29]For more examples of unprofessional litigation tactics, see http://www.doereport.com/article_crossexamining.php (last visited January 15, 2009).

[30]I notified counsel that I would not comply with this "overly broad, unduly burdensome, and absurdly impracticable" request for documents, but that I would be happy to estimate costs for production that would need to be paid in advance for all the materials contained in the 31 items. In the end I released an opening statement, a page of handwritten notes, e-mails exchanged with the retaining attorney, my CV, and a few publications contained therein.

rule and ethical standard to remedy the inconsistent application of the psychologist nondisclosure privilege/duty to safeguard test materials.

Neuropsychologists may disagree about the level of reasonable familiarity with the law that is necessary for neuropsychology practice. Some neuropsychologists may judiciously avoid forensic cases and may not feel compelled to understand the application of law in neuropsychology practice. However, forensic practice is the most rapidly developing area of new expansion and revenue for neuropsychologists (Kaufmann, 2008b) even as the medically necessary patient/family neuropsychological consultation remains our core professional service. Our professional organizations shape policy, refine practice standards, advocate for the profession, and guide members confronting new challenges as they increasingly interact with attorneys. As members ask more questions, we are ever more aware of how our profession is regulated by jurisdictional law in matters involving conflicts of interest in the treater/expert interface, informed consent procedures, test security policies, records management, third party observers, admissibility of evidence, scope of practice, expert opinions, and ethical dilemmas. Knowledge of laws and procedures can increase self-efficacy, reduce vulnerability to lawyer tactics, lower stress in forensic consulting, and enhance credibility with attorney clientele.

As a practicing neuropsychologist and forensic consultant, I understand how the board-certified practitioners apply psychometric tests in conjunction with the brain–behavior knowledge base to address legal issues. Such applications created the unique practice of forensic neuropsychology consulting. Credible expert neuropsychologists require competence and knowledge in science, clinical practice, *and the law*. When assuming forensic roles, psychologists have an ethical obligation to be reasonably familiar with the judicial or administrative rules governing their roles. As a practicing attorney, I appreciate how much the trier of fact needs assistance that neuropsychologists are uniquely positioned to provide, when resolving certain legal claims. There is no profession that is better suited to address this vital need and justice demands that clinical neuropsychology continue to help courts adjudicate cases.

CONCLUSION

Whether by enacting state statutes and regulations or interpreting the common law, a privilege shielding psychological test materials from public disclosure would protect the objectivity, fairness, and integrity of psychometric testing. Some states already exercise prudent legislative intent to protect the best technology available for evaluating mental states at issue in certain legal claims. When presented with an appropriate case, it is within the reason and experience of courts to interpret the common law consistent with a psychologist nondisclosure privilege. In states that do not have laws protecting psychological test materials from wrongful disclosure, this article attempted to provide the most comprehensive set of legal arguments and strategies for persuading a court to recognize the psychologist nondisclosure privilege. However, that process of protecting neuropsychological methodology begins with a psychologist asserting a privilege not to release psychological test materials to nonpsychologists.

In keeping with *The Clinical Neuropsychologist*'s call to become involved and make a difference (Howe et al., in press), this article offers specific solutions to the raw data problem and a coherent proposal for reform to the fledgling neuropsychologist advocate. Recognizing a psychologist privilege not to disclose psychological test materials to nonpsychologists ensures a reliable service for our clients, promotes the truth-seeking function of the judiciary, protects the profession, and serves public policy.

Supplementary data (Appendix) published online alongside this article at www.psypress.com/tcn

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