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SECOND JUDICIAL DISTRICT COURT
COUNTY OF BERNALILLO
STATE OF NEW MEXICO

No. CR XXXXXXX

STATE OF NEW MEXICO, Plaintiff,

vs.

XXXXXXXXXXXXX, Defendant.

STATEMENT OF OPPOSITION TO RELEASE OF FORENSIC TEST MATERIALS

Forensic Evaluator, Sharon J. Kernan, Ph.D., hereby enters on the record an objection to the release of copyrighted and licensed psychological assessment protocols to personnel who are unqualified to interpret or evaluate the test results. As grounds for this objection:

1. I am a licensed clinical psychologist/neuropsychologist, who has also completed the required supervised training to provide forensic evaluations. Meeting their credentialing requirements, I am contracted through Behavioral Health Services Division (BHSD) and OptumHealth New Mexico (OHNM) to provide forensic competency evaluations for indigent clients in Bernalillo County, New Mexico, Second Judicial District.
2. These evaluations are ordered under Rules 5-502 and 5-602 of the District Court Rules.
3. Pursuant to the Court's Order, and my contract, I did do a forensic evaluation of the above named Defendant and reported the results to his defense attorney.
4. However, as part of the contract with OptumHealth and the State of New Mexico, I am required to comply with the American Psychological Association (APA) professional guidelines and the Specialty Guidelines for Forensic Psychologists as well as the Standards for Educational and Psychological Testing.
5. It is a breach of professional ethics for confidential testing documents to be released to an untrained non-psychologist. These testing materials undergo years of research and administration to various populations, in order to establish standardized assessments with guidelines for normative performances. Specifically, the 2002 Ethics Code of the APA (Standard 9.04, Release of Test Data) and the Specialty Guidelines for Forensic Psychologists (VII, A2a and A2b Public and Professional Communications), and the Standards for Educational and Psychological Testing (Standards 11.7, 11.8 and 11.9) all

prevent me from releasing these materials unless they are to be reviewed by a trained professional.

6. I have received a subpoena from the Second Judicial District Attorney's office requesting the submission of all testing materials to the District Attorney in this matter without the requesting party's office providing the name of a licensed psychologist who will knowledgably interpret the results.
7. These materials have been provided in the past pursuant to protective order and have been used as a basis to harass and annoy the forensic psychologist. They have consumed numerous unnecessary hours of the Court's time in an effort to discredit testing data that they are not trained to interpret. Therein is the reason the materials should be submitted to a licensed psychologist, who has the ability to understand and interpret the results and could, as the state's expert, provide informed testimony.

WHEREFORE, the undersigned respectfully requests that the Court quash the subpoena issued in this matter by the District Attorney until the requesting party designates a licensed psychologist qualified to interpret evaluation data.

Respectfully submitted,

Sharon J. Kernen, Ph.D., LLC
Licensed Clinical Forensic Neuropsychologist
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I hereby certify that I mailed/delivered
A copy of the above to the District Attorney, XXXXXX
And attorney for the Defendant, XXXXXX, on this date:
XXXXXXXXXXXX

CC: The Honorable XXXXXXXXXX,
Second Judicial District Court Judge

Suggestions on Releasing Test Templates and Raw Data Information

Do we have to release tests and underlying data?

Grounds for Opposition to release of tests and underlying data based upon APA guidelines and New Mexico Administrative Code:

New Mexico Administrative Code: NMAC 16.22.2.16

TEST SECURITY

A. Limits of reproduction and description of test materials. The psychologist shall not reproduce or describe in public or in publications subject to general distribution any psychological tests or other assessment devices, the value of which depends in whole or in part on the naiveté of the subject, in ways that might invalidate the techniques. The psychologist shall limit access to such tests or devices to persons with professional interests who will safeguard their use.

B. Safeguarding test materials. The psychologist shall safeguard testing materials in accordance with the necessity to maintain test security. The psychologist should take all reasonable measures to protect test manuals, testing stimuli, and raw test data from disclosure to those who are not qualified to properly appraise those materials. **The psychologist is required to release such materials only to those licensed and qualified in the use and interpretation of psychological tests and testing materials. If test materials are sought by subpoena or discovery request, the psychologist shall seek a protective order from a court of competent jurisdiction in order to maintain test security. Thereafter, the psychologist shall comply with the court order.**

Subpoena sufficient? State need a court order?

Normally a “**court order**” is required, in other words a subpoena signed by a judge or a written order. There is an exception, however, for a subpoena received with “satisfactory assurances.” Here is an HHS FAQ on the subject:

What “satisfactory assurances” must a covered entity that is not a party to the litigation receive before it may respond to a subpoena without a court order?

Answer:

Under 45 CFR 164.512(e)(1)(ii) of the Privacy Rule, a covered entity that is not a party to the litigation may disclose protected health information in response to a subpoena, discovery request, or other lawful process if the covered entity receives certain satisfactory assurances from the

party seeking the information. **Specifically, the covered entity must receive a written statement and accompanying documentation that the requestor has made reasonable efforts either (1) to ensure that the individual(s) who are the subject of the information have been given sufficient notice of the request, or (2) to secure a qualified protective order. (Alternatively, the covered entity may make such disclosures if it itself makes reasonable efforts to notify the individual(s) or seek a qualified protective order.) If the conditions above have been met, a court order is not required to make the disclosure.**

For notice to the individual(s), the written statement and accompanying documentation must demonstrate that the requestor has made a good faith attempt to provide written notice to the individual; and that the notice included sufficient information about the litigation to permit the individual to raise an objection with the court, the time for the individual to raise an objection has elapsed, and no objections were filed or all objections filed were resolved and the request is consistent with the resolution. Such statements and documentation may include, for example, a copy of the notice mailed to the individual that includes instructions for raising an objection with the court and the deadline for doing so, and a written statement or other documentation demonstrating that no objections were raised or all objections raised were resolved and the request is consistent with the resolution. To the extent that the subpoena or other request itself demonstrates the above elements, no additional documentation is required.

For a qualified protective order, the written statement and accompanying documentation must demonstrate that the parties to the dispute have agreed to a qualified protective order and have presented it to the court or administrative tribunal; or the party seeking the protected health information has requested a qualified protective order from the court or administrative tribunal. See the definition of "qualified protective order" at 45 CFR 164.512(e)(1)(v). Such statements and documentation may include, for example, a copy of the qualified protective order that the parties have agreed to and documentation or a statement that the order was presented to the court, or a copy of the motion to the court requesting a qualified protective order.

What is state law on medical record privacy?

Greater or lesser protection than HIPAA?

New Mexico typically affords great protections to private officials, but I could not find any case law that specifically says that with regards to HIPAA. The general rule is whichever is the most strict regarding keeping confidences (fed or state law) governs.

New Mexico - NMSA § 14-6-1. Health information; confidentiality

A. All health information that relates to and identifies specific individuals as patients is strictly confidential and shall not be a matter of public record or accessible to the public even though the information is in the custody of or contained in the records of a governmental agency or its agent, a state educational institution, a duly organized state or county association of licensed physicians or dentists, a licensed health facility or staff committees of such facilities.

B. A custodian of information classified as confidential in Subsection A may furnish the information upon request to a governmental agency or its agent, a state educational institution, a duly organized state or county association of licensed physicians or dentists, a licensed health facility or staff committees of such facilities, and the custodian furnishing the information shall not be liable for damages to any person for having furnished the information.

C. Statistical studies and research reports based upon confidential information may be published or furnished to the public, but these studies and reports shall not in any way identify individual patients directly or indirectly nor in any way violate the privileged or confidential nature of the relationship and communications between practitioner and patient.

D. This section does not affect the status of original medical records of individual patients and the rules of confidentiality and accessibility applicable to these records continue in force. This section does not affect the status of vital statistical records of the health and environment department.

Federal Law – HIPAA, 45 CFR 160

The Health Insurance Portability and Accountability Act of 1996 (HIPAA) is codified at PL 104-191, 45 CFR §160. The HIPAA Privacy Rule regulates the use and disclosure of Protected Health Information (PHI) held by "covered entities" (generally, health care clearinghouses, employer sponsored health plans, health insurers, and *medical service providers that engage in certain transactions*.) By regulation, the Department of Health and Human Services extended the HIPAA privacy rule to independent contractors of covered entities who fit within the definition of "business associates".

Covered entities include but are not limited to a business associate of another covered entity. 45 CFR §160.103 (B)(3). Certainly, the forensic evaluator would be a covered entity which would require compliance with the privacy rule. The definitions section of HIPAA further provides that "Health information means any information, whether oral or recorded in any form or medium, that....(2) *relates to the past, present, or future physical or mental health or condition of an individual....*" 45 CFR §160.103 (emphasis added). Similarly, health care includes but is not limited to "preventative, *diagnostic, therapeutic*, rehabilitative, maintenance, or palliative care, and counseling, services, *assessment or procedure with respect to the physical or mental condition, or functional status, of an individual....*" 45 CFR §160.103. As noted by Justice Chavez, a forensic evaluation certainly seems to fall within assessing the mental condition and functional status of a defendant.

Justice Chavez believed that protective orders should be provided and referenced part 512

(e) of HIPAA. Indeed, Part 512 (e) is replete with references to protective orders. In its entirety, and giving emphasis to those sections which address protective orders, 45 CFR §164.512 (e) provides:

(1) Permitted disclosures. A covered entity may disclose protected health information in the course of any judicial or administrative proceeding:

(i) In response to an order of a court or administrative tribunal, provided that the covered entity discloses only the protected health information expressly authorized by such order; or

(ii) In response to a subpoena, discovery request or other lawful process, that is not accompanied by an order of a court or administrative tribunal, if:

(A) The covered entity receives satisfactory assurance, as described in paragraph (e)(1)(iii) of this section, from the party seeking the information that reasonable efforts have been made by such party to ensure that the individual who is the subject of the protected health information that has been requested has been given notice of this request; or

(B) The covered entity receives satisfactory assurance, as described in paragraph (e)(1)(iv) of this section, from the party seeking the information that *reasonable efforts have been made by such party to secure a qualified protective order that meets the requirements of paragraph (e)(1)(v) of this section.*

(iii) For the purposes of paragraph (e)(1)(ii)(A) of this section, a covered entity receives satisfactory assurances from a party seeking protecting health information if the covered entity receives from such party a written statement and accompanying documentation demonstrating that:

(A) The party requesting such information has made a good faith attempt to provide written notice to the individual (or, if the individual's location is unknown, to mail a notice to the individual's last known address);

(B) The notice included sufficient information about the litigation or proceeding in which the protected health information is requested to permit the individual to raise an objection to the court or administrative tribunal; and

C) The time for the individual to raise objections to the court or administrative tribunal has elapsed, and:

(1) No objections were filed; or

- (2) All objections filed by the individual have been resolved by the court or the administrative tribunal and the disclosures being sought are consistent with such resolution.
- (iv) For the purposes of paragraph (e)(1)(ii)(B) of this section, a covered entity receives satisfactory assurances from a party seeking protected health information, if the covered entity receives from such party a written statements and accompanying documentation demonstrating that:
- (A) The parties to the dispute giving rise to the request for information have *agreed to a qualified protective order* and have presented it to the court or administrative tribunal with jurisdiction over the dispute; or
- (B) the party seeking the protected health information has requested a *qualified protective order from such court or administrative tribunal.*
- (v) *For purposes of paragraph (e)(1) of this section, a qualified protective order means, with respect to protected health information requested under paragraph (e)(1)(ii) of this section, an order of a court or of an administrative tribunal or a stipulation by the parties to the litigation or administrative proceeding that:*
- (A) *Prohibits the parties from using or disclosing the protected health information for any purpose other than the litigation or proceeding for which such information was requested; and*
- (B) Requires the return to the covered entity or destruction of the protected health information (including all copies made) at the end of the litigation or proceeding.
- (vi) Notwithstanding paragraph (e)(1)(ii) of this section, a covered entity may disclose protected health information in response to lawful process described in paragraph (e)(1)(ii) of this section without receiving satisfactory assurance under paragraph (e)(1)(ii)(A) or (B) of this section, if the covered entity makes reasonable efforts to provide notice to the individual sufficient to meet the requirements of paragraph (e)(1)(iii) of this section or to seek a qualified protective order sufficient to meet the requirements of paragraph (e)(1)(iv) of this section.

Can we demand payment in advance of copying? Yes – with court.

This is a very muddy issue. Since the doctor is doing the correct thing and requesting a hearing to quash the subpoena, I think the issue could be raised with the court at that hearing. As you

may recall, the Supreme Court dodged that issue (well, found that it was 'not preserved') in *State v. Harper*, 2011-NMSC-044, para. 26 et. seq.

Can we demand payment in advance for interview? Yes.

The doctor can ask the judge to order that she be paid in advance, or at least rule that she can bill the DA. But the whole issue of payment is very controversial and the courts bend over backwards to not have to rule on the specifics.

The Release of Psychological Data to Nonexperts: Ethical and Legal Considerations

Daniel Tranel

Psychologists are often requested to provide "raw" psychological data (scores, test stimuli, client or patient responses) to nonexperts, especially in personal injury litigation cases in which there may be a court order or subpoena for such information. The new Ethical Principles of the American Psychological Association prohibit the release of raw test results and data to unqualified persons; hence, requests from judges and attorneys frequently place the psychologist in a conflict in which legal and ethical considerations point in opposite directions. In this article, ethical and legal issues regarding this conflict are discussed, particularly the manner in which the new APA Ethical Principles speak to the salient considerations. A course of action is recommended for sharing raw data whereby the psychologist can conform to the spirit of legal considerations while remaining in compliance with the Ethical Principles.

Practitioner psychologists, especially those in the fields of clinical and counseling psychology and clinical neuropsychology, are often asked to provide "raw" psychological data to other parties. The sharing of such data, particularly with non-expert persons outside the field of psychology (e.g., attorneys, judges, laypersons), has been a controversial issue. The matter has a number of complex ethical and legal considerations, with far-reaching consequences for many components of psychological work. In the field of clinical neuropsychology in particular, such issues are encountered frequently, especially in the context of the increasing number of personal injury litigation cases in which brain injury is a principal claim of the plaintiff.

The purpose here is to discuss ethical and legal considerations pertaining to the release of raw psychological data, in the context of the new Ethical Principles of Psychologists and Code of Conduct (hereinafter, the Ethical Principles) recently approved by the American Psychological Association (APA, 1992). The guidelines provided in the new Ethical Principles are more clear and specific than those available previously, enabling psychologists to take a more definitive position on the issue of whether or not to share raw psychological data with others. In the comments that follow, the principles that speak directly to this and related issues have been highlighted. Also discussed are several pertinent legal precedents. The analysis is aimed at help-

ing to shape a viable course of action that psychologists might follow with regard to the release of raw psychological data.

It should be noted that the issues discussed herein, particularly those concerning matters of ethics, do not necessarily apply to all practitioner psychologists. One reason for this is that requirements for licensure to practice psychology are not uniform across all 50 states in the U.S. Licensing regulations in many states require psychologists to practice in accord with the Ethical Principles, but this is not true of all states. Also, APA membership itself is voluntary, and although most practitioner psychologists belong to the APA (and thereby are behooved to practice in accord with the Ethical Principles), not all do, and those who do not belong have no obligation to comply with the APA ethics. Finally, although there is considerable commonality in the fundamental topic areas covered by licensing exams, licensure per se does not imply necessarily that a given psychologist will have obtained a certain level of competency in a given content area. In the discussion below, it is assumed that psychologists (a) are APA members, (b) are licensed in such a way that adherence to the Ethical Principles is mandatory, and (c) have passed a written licensing examination in which basic content areas including reliability and validity, test construction, and psychological appraisal, were covered by the examination.¹

A Definition of Raw Psychological Data

What are raw psychological data? In keeping with the Ethical Principles, and following distinctions proposed by Matarazzo (1990) regarding the nature of psychological assessment and psychological testing, several different types of psychological information can be distinguished:

¹ In most states, licensing examinations cover the following areas: school, developmental, and community psychology; statistics; research design; test construction; neuropsychology; perception; cognition; history and systems; learning; personality, clinical, and abnormal psychology; group processes; behavior therapy; psychopharmacology; psychological assessment; industrial/organizational psychology; social psychology; ethics.

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ARTHUR BENTON AND JAKE SINES provided helpful comments on earlier drafts of this article. Also, three anonymous reviewers called attention to several important issues.

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1. Written reports, in which the psychologist typically summarizes the history, test findings, and other pertinent data, and then presents conclusions, diagnoses, and perhaps recommendations and predictions.

2. Notes, which generally include the handwritten information recorded by a psychologist in the course of interviewing, observing, and testing a client or patient.

3. Scores, typically numerical, which can be raw (e.g., the number of items answered correctly on a test) or standardized (e.g., IQ scores, percentile scores).

4. Test stimuli, which are the actual items used by the psychologist to elicit responses from the client or patient that form the basis for determining levels of cognitive and behavioral function.

5. Responses (i.e., the actual verbal, written, or other responses generated by the client/patient to test stimuli).

6. Test manuals, which typically comprise, in addition to the test stimuli, information regarding how the test was constructed, its reliability and validity, normative data, appropriate applications, and detailed instructions for administration.

Sharing Raw Psychological Data With Others

When a client or patient places his or her mental or emotional condition into litigation, this produces a waiver of privilege, and all pertinent information is "discoverable" by both sides of the case.² Given that the privilege has been waived, there is usually no great concern regarding the sharing of written reports and summaries among different parties involved in a case. It is also generally accepted that notes, which are usually not considered to constitute raw data or results, may be shared among different parties in a case. (See the subsection *Recording Psychological Information* later in this article for further discussion of this issue.)

A much different situation obtains, however, when it comes to the types of information defined in 3 to 6 above (viz., test scores, stimuli, responses, and manuals). The test scores, stimuli, and responses compose what is commonly known as raw psychological data, raw test results, or simply raw data.³ At the center of the problem is the fact that there is a direct conflict between law and ethics when it comes to the release of raw psychological data. The law says one thing ("Provide the data"); the ethics code says the opposite ("Do not provide the data"). Detailed below is a discussion of pertinent issues regarding this problem and a recommended course of action for resolving such a conflict.

Preventing Misuse of Psychological Data

The new Ethical Principles, which went into effect officially on December 1, 1992, state the following in Ethical Standard 2.02(b):

Psychologists refrain from misuse of assessment techniques, interventions, results, and interpretations and take reasonable steps to prevent others from misusing the information these techniques provide. This includes refraining from releasing raw test results or raw data to persons, other than to patients or clients as appropriate, who are not qualified to use such information.

It is clear that the APA has taken a position against the release

of raw data to unqualified persons. There are two main reasons behind this, both of which pertain directly to several standards explicated in the new Ethical Principles (e.g., Sections 2.02, 2.06, 2.10).

Potential misuse. Release of raw data creates numerous potentialities for misuse. For example, laypersons lack an appreciation of the context in which psychological test stimuli are administered and may reach erroneous conclusions about the meaning of individual answers. When this occurs, for example, in a courtroom, by lawyers, judges, and jurors, the ramifications of the errors may be great.

By way of example, consider the following scenario. An attorney for the defense has obtained all the raw data from a neuropsychologist in a case in which a plaintiff is claiming permanent cognitive disability from a brain injury. In the courtroom, the attorney attempts to convince the jury that the plaintiff cannot possibly be suffering the extent of memory impairment claimed, because the plaintiff was able to complete several difficult items on a test of nonverbal memory. The attorney also points out that the items the plaintiff failed are so difficult that it would be unreasonable to expect any normal person to pass them. This line of arguing, perhaps accompanied by exhibits depicting the "difficult" memory items that the patient passed, may be quite compelling to laypersons. In all likelihood, however, the attorney and other nonexperts in this situation do not appreciate several fundamental and critical components of the assessment process. Most tests, for example, include both easy and difficult items, and most tests include very difficult items in order to avoid ceiling effects. Also, the testing process is usually arranged so that even a very impaired person can pass some items in order to form the right "set" and to have "success" experiences. Thus, analysis of individual items taken out of context can be quite misleading. Add the likelihood that laypersons have limited understanding of how factors such as age, gender, and educational background may play a role in performance on the test, and one is left with a potentially extremely misleading depiction of the plaintiff's abilities.

Raw data may become part of the public domain. Release of raw data may allow psychological test stimuli to become part of the public domain, the domain of information that is in principle accessible by virtually anyone. This opens up the possibility that test stimuli could be disseminated among the public, perhaps even widely. A potential consequence of this is that future test takers (i.e., persons receiving psychological tests) would not be naive. As one example, a particular individual may have studied all the questions on the Information subtest of the Wechsler Adult Intelligence Scale—Revised (WAIS-R; Wechs-

² The discussion focuses on individuals who are capable and competent to enter litigation voluntarily, and in particular, on personal injury litigation cases. Not considered are situations involving minors, dependent persons, and other individuals who may be involved in litigation involuntarily (including child custody cases). Ethical and legal issues regarding the latter types of cases may be different from those discussed here.

³ The current discussion focuses on raw data that are associated with psychological appraisal and assessment. Data collected in the context of research endeavors are covered by specific ethical principles (see Ethical Standard 6.).

sler, 1981). This would invalidate the test. Most psychological tests, particularly those used in measurement of intellect, memory, and other aspects of cognition, assume complete or near-complete naivete on the part of the client or patient. (Even in the case of practice effects, which refer to improvements in test performance attributable to prior exposure to the test and not to a change in ability level, it is assumed that all test exposures have occurred under standard, controlled conditions prescribed by the test instructions.) Psychologists cannot risk invalidating tests due to widespread dissemination among the public. It is unreasonable and impractical that psychologists would have to recreate tests on a frequent basis. This onus would not be in the best interests of anyone, including psychologists, attorneys, and clients or patients.

There are, of course, numerous published works that contain considerable detail regarding various psychological and neuropsychological tests (e.g., Lezak, 1983; Spreen & Strauss, 1991), many of which are readily available from bookstores, libraries, and publishers. It could be argued that much test information, including enumerations of actual test items, is already available in the public domain, rendering moot the point made just above concerning raw data in the public domain. There is a key difference, however, between reference books such as Lezak's and test protocols that contain a "raw" roster of test items (e.g., parts of the WAIS-R record form). In reference books, test items (typically a few illustrative examples, but occasionally an entire listing of all items on a test) are presented in the context of a discussion of pertinent background information (e.g., how the items are administered and scored, what mental capacities are measured by such items, and other relevant issues). By contrast, a "raw" record form contains no such context. Thus, although it may be possible to glean raw test items from reference books, there is at least some assurance that the items were presented with a qualifying discussion that would foster appropriate usage. Such assurance would be largely or entirely lacking in the case of test forms and protocols that contain no context or qualification.

The new APA Ethical Principles imply that raw data should only be released to another qualified individual (i.e., someone who is competent to interpret the data). A qualified individual is someone who, by virtue of his or her training and experience, is in a position to appreciate fully the meaning of raw data, including considerations of reliability and validity. In most cases, this will be a licensed psychologist who meets recognized standards of training and experience. In most states, licensure can be taken as evidence that the psychologist has acquired a minimum level of knowledge regarding pertinent issues of reliability and validity, test construction, and psychological appraisal. Licensure also indicates (again, in most states) that the psychologist is responsible for operating in accordance with the Ethical Principles.⁴ For the types of raw data typically under consideration in personal injury litigation cases, such as raw test results from neuropsychological and psychological tests, the clearest example of a qualified recipient would be a licensed clinical psychologist or clinical neuropsychologist. In both fields, there are explicit criteria specifying the types of training, experience, and credentials that can be taken as evidence of competency (e.g., *The Clinical Neuropsychologist*, 1989).

Shapiro (1991) has written about the problems surrounding

the release of raw psychological data and how one should go about resolving the conflict between law and ethics (also see Stromberg, Lindberg, Mishkin, & Baker, 1993). Shapiro reasons very cogently that the only acceptable strategy is to release raw data only to another qualified individual. He points out that the "courts have essentially recognized the legitimacy of this demand, though none has commented on the specific practice" (p. 236). Shapiro goes on to cite legal precedent for this, including one case in which the court denied the claim that a psychiatrist could serve as a "qualified person" to receive raw psychological data. The court ruled that psychiatrists are not, without special training, qualified to interpret psychological tests.⁵

A comment should also be made here regarding the statement in the Ethical Principles that raw test results or raw data may be released to "patients or clients as appropriate." This wording does not imply that raw data should be released directly to clients or patients but rather that it is appropriate for a psychologist to explain and interpret the findings to the client or patient and provide other pertinent feedback. In many circumstances, it would be appropriate for the client or patient to have access to the written report authored by the psychologist. (The client or patient has a legal right to this report in virtually all situations.) But with regard to raw data, including raw test results, it is not advisable in most cases to provide clients or patients with meaningless or misleading test scores, stimuli, and responses. This topic is dealt with directly in Section 2.09 of the Ethical Principles. (The reader is also referred to a special section of *Psychological Assessment*, 1992, that deals with the topic of providing feedback to clients or patients.)

A Recommended Course of Action for the Release of Raw Psychological Data

The APA Ethical Principles prohibit the release of raw data to unqualified individuals, and with rare exception, attorneys are not qualified individuals. A viable course of action if an attorney should request raw data from a psychologist (A), would be to advise the attorney to engage the consultation of another psychologist (B), who is qualified, by virtue of licensure, training, and experience, to receive the data. Psychologist A then could send the raw data to Psychologist B (provided the client or patient has given appropriate consent). Psychologist B could then interpret the data to the attorney. Needless to say, Psychologist B must operate under the same rules and standards of ethics and confidentiality as Psychologist A.

By and large, attorneys and judges are reasonably understanding of the dilemma faced by psychologists regarding the sharing of raw data. When given an explanation about why psychologists are restricted from releasing raw data to unqualified persons, attorneys and judges tend to be amenable to the course of action recommended above. This explanation is likely to be

⁴ Obviously licensure does not guarantee that such characteristics are extant; it does, however, serve as a useful minimal standard and reasonable starting point.

⁵ There is an implication here that with special training, psychiatrists may be qualified to interpret psychological tests (and receive raw psychological data). This issue is discussed here in the section titled Other Considerations.

more effective, however, if the particular reasons are explained (e.g., that psychologists cannot afford to have test stimuli disseminated in the public domain; that raw data are difficult or impossible for a nonexpert to interpret), rather than simply citing the Ethical Principles that prohibit such release.

There may be instances in which attorneys will be quite insistent on receiving raw data and will go to considerable lengths to secure it. In the well-known series of books by Ziskin and Faust (1988; Faust et al., 1991), the authors recommend strongly that lawyers secure raw data from psychologists in all cases. Lawyers familiar with this series of books can be expected to make adamant requests for raw data. The principal aim of this strategy, though, is to have an opportunity to scrutinize the psychologist's work product for incorrect scoring, miscalculations, misuse of test manuals, and other errors that might be used by the opposing attorney to impugn the psychologist's competence. Obviously another psychologist would be in a much better position than the attorney to conduct such an analysis; thus, there would appear to be little justification for not following the course of action recommended above (i.e., insisting that the attorney secure the consultation of a qualified expert). In short, there is considerable precedent, legal and professional, for holding to the position that the raw data can only be sent to another qualified individual, and this course of action should be pursued unless there are unusually compelling reasons not to do so.

If a psychologist is served with a subpoena ordering the release of raw data, the psychologist should explain why she or he cannot comply with the request and recommend an alternative course of action (as detailed above). The explanation might be provided to the judge in the case, as well as to the attorneys. In some cases, psychologists may want to consult legal counsel of their own, which will help clarify the particular legal considerations of the matter. Psychologists may be intimidated by being served a subpoena; legal counsel and full understanding of the operative contingencies are usually quite reassuring. Psychologists need not automatically translate the serving of a subpoena into prompt acquiescence to legal demands without regard for the ethics of the situation. One additional point that psychologists should understand is that a subpoena can be resisted (e.g., through a "motion to quash"). A court order, by contrast, cannot be legally resisted (only appealed). If a psychologist is given a court order to produce raw data, manuals, and so on, the psychologist should take immediate steps to clarify for the court the ethical dilemma this creates. In such situations, psychologists are strongly encouraged to seek their own legal counsel.

Recording Psychological Information

Another topic relevant to the current discussion pertains to the manner in which information is recorded in the course of psychological assessment and test administration. The new Ethical Principles (Section 1.23(b)) state the following:

When psychologists have reason to believe that records of their professional services will be used in legal proceedings involving recipients of or participants in their work, they have a responsibility to create and maintain documentation in the kind of detail and quality that would be consistent with reasonable scrutiny in an adjudicative forum.

This standard has important implications for the types of

notes that are recorded for a particular client or patient. Obviously one intent is to ensure that psychologists will record information in a manner that allows subsequent accurate reconstruction; that is, the recording should be complete, accurate, and legible.

There is another aspect of this standard, however, that also merits careful consideration. It is common for attorneys to request the handwritten notes from a patient's file, even if the raw data (test scores, stimuli, and responses) are allowed to remain confidential. With this in mind, and given the position that notes are probably not subsumed under the rubric of raw data, a psychologist should be cautious about writing things down on paper that might later be used in a legal proceeding. For example, the jotting down of initial impressions or judgmental observations must be done in a circumspect fashion, with thoughtful consideration of how such statements might later be used, perhaps out of context, to the detriment of the patient or psychologist. Notes should never comprise unsupportable judgments or pejorative descriptors.

Test Manuals

An attorney or the court will occasionally request the test manuals on which the psychologist relied to score and interpret psychological tests. The considerations here are much the same as those that pertain to the release of other raw psychological data—test manuals should not be released to unqualified persons. Several portions of the Ethical Principles speak to this issue:

Psychologists do not promote the use of psychological assessment techniques by unqualified persons. (2.06)

Psychologists make reasonable efforts to maintain the integrity and security of tests and other assessment techniques consistent with law, contractual obligations, and in a manner that permits compliance with the requirements of this Ethics Code. (2.10)

Standard 2.02(b), quoted above, also speaks to this issue. Test manuals contain data and information that are part of a specialized discipline (e.g., psychological appraisal, neuropsychological assessment). It is simply not permissible for a layperson (unqualified individual) to attempt to use such information. Use and dissemination of such information by an unqualified person could reduce or vitiate entirely the value of the tests. Many manuals are distributed by reputable test publishers, who require evidence of purchaser qualification (e.g., a license to practice psychology) before selling such manuals. If publishers fail to respect such guidelines and engage in practices that would be considered a violation of law and APA Ethics, this matter should be brought to the attention of the APA. Ziskin and Faust (1988) recommend that lawyers hire an expert consultant to deal with the types of information that are part of test manuals.

If a psychologist receives a court order or subpoena for test manuals, the psychologist might consider one of the following courses of action: (a) The psychologist could request to provide the test manuals in person, in a situation in which the psychologist could explain appropriately various qualifications, limitations, and other important contextual information; or (b) the psychologist could ask the requestor to retain an expert (e.g.,

licensed psychologist) who would be qualified to interpret the test manuals. The manuals could then be provided to that expert.

Test Scores

As mentioned above, test scores, both raw and standardized, constitute yet another domain of psychological information that may be requested for release. When the requestor is a qualified person (i.e., a licensed psychologist), there is no problem in releasing the scores. In fact, in many cases it is actually the scores (rather than the test forms, responses, etc.) in which the requesting psychologist is most interested (e.g., for purposes of comparing performances across time). There are a few other special situations, such as in the determination of disability by social security officials or in a worker's compensation claim, in which it may be permissible to release test scores. These agencies often have employees with special expertise in the interpretation of psychological data (especially IQ scores). Provided the psychologist is confident the test scores will be used appropriately, it is reasonable in these situations to provide requested test scores (assuming the client or patient has given appropriate consent).

For unqualified persons, the matter of releasing test scores should be treated in the same way as the release of other raw psychological data. That is, psychologists should refrain from releasing scores to unqualified individuals, and if asked for such information by attorneys or other nonexperts, psychologists should follow a course of action along the lines elaborated here earlier under the heading *A Recommended Course of Action for the Release of Raw Psychological Data*.

A few other considerations pertaining to test scores warrant mention. As noted earlier, two types of test scores can be specified—raw and standardized. Raw scores (e.g., the fact that a patient earned a score of "6" items correct on a test) are often uninterpretable to nonexperts, which may more or less preclude opportunities for misuse. However, this should not justify the release of such scores to unqualified persons, because the psychologist has no way of assuring that even apparently uninterpretable raw scores would not eventually be used inappropriately. Standardized scores, including IQs and percentiles, clearly fall under the domain of raw psychological information that should not be released to unqualified persons. These scores, unlike raw test scores, are often open to possible "interpretation" by nonexperts. For instance, an attorney may conclude that an IQ score of 100 indicates intact intelligence, when in fact it could indicate a major impairment if the patient's premorbid intelligence had been in the superior range. The nonexpert cannot be expected to appreciate critical considerations such as standard error of measurement, the nature of the underlying distribution of scores, the importance of background information for determining whether the observed score differs or not from the expected score, and numerous other factors.

Another consideration regarding test scores is the question of whether such scores should be included in the text of a psychological report. As discussed earlier, reports are generally shared rather freely among various parties in a case, including nonexperts. Obviously if test scores are included in reports, the scores will be shared along with the reports. This has the potential of creating opportunities for misuse. Some scores are especially

vulnerable in this regard, and considerable care should be taken by a psychologist in deciding whether or not to include them in narrative reports. For example, IQ scores have a great deal of connotative value for most persons, experts and laypersons alike; however, the meaning can vary widely from one individual to the next, and may in many cases fail to reflect accurately the intended meaning. Hence, the inclusion of IQ scores in reports should be done only with careful consideration of the consequences. As a general policy, test scores should be included in narrative reports only when the psychologist is confident that such inclusion is in the best interests of the client or patient and that those scores will not be subject to misuse.

Other Considerations

Determination of the qualifications of a requesting party (or the party named as the intended recipient of raw data) is the responsibility of the psychologist from whom the data are being requested. It is recommended that if a psychologist is unsure of the credentials of an intended recipient, the psychologist should request evidence on which a judgment regarding competency can be made. In most cases, the curriculum vitae (CV) of the intended recipient would provide such evidence.

When an intended recipient is a licensed psychologist with specific training in psychological assessment (or neuropsychological assessment, if pertinent), there is little difficulty in establishing that person's competence. In some cases, however, it may be hard to judge the competency of an intended recipient, especially persons such as nonlicensed psychologists, psychologists in nonclinical fields, social workers, and physicians working in neurology or psychiatry. Consultation with one's colleagues in such cases would probably help to judge the appropriateness of raw data release. The case of a psychiatrist can be especially hard to appraise, because psychiatrists are often trained in some of the same assessment procedures as are psychologists (especially personality measures). There is no black-and-white standard for deciding whether such persons are or are not "qualified"—each case must be dealt with on its own merits. Inspection of the psychiatrist's CV will usually help decide, and if the psychologist is confident that the psychiatrist has appropriate expertise with regard to a particular assessment procedure, test, and so on, then there is little justification for withholding raw data.

As alluded to above, the attitude or demeanor of the psychologist can influence substantially the degree of cooperation from members of the legal profession (lawyers, judges, etc.). When an attorney senses that the psychologist is trying to conceal something, or to resist cooperation, the attorney is likely to mount an all-out effort to get everything possible out of the psychologist. By contrast, if the attorney senses that the psychologist is attempting to cooperate fully with the spirit of the proceedings, within the bounds of his or her ethical principles, the attorney is far more likely to go along with the psychologist's recommended course of action. The Ethical Principles do not, in fact, have force of law; thus, it is very much in the best interest of psychologists to solicit cooperation and collegiality from attorneys.

Concluding Comments

One cannot deal in this amount of space with all of the myriad considerations that obtain with regard to ethical and legal

**Restatement of Principles
Relating to the Responsibilities of Attorneys and Psychologists
and Their Interprofessional Relationships**

Adopted September 23, 2011
by the Board of Bar Commissioners
of the State Bar of New Mexico

Adopted October 19, 2012
by the New Mexico Board of
Psychologist Examiners

These Principles should govern the inter-professional relations of psychologists and attorneys.

I. THE PATIENT-CLIENT

The welfare of the patient-client is the paramount and joint goal of these principles.

II. PSYCHOLOGISTS AND THE LAW

- A. Psychologists shall refrain from giving legal advice.
- B. Psychologists shall refrain from interfering with established lawyer-client relationships.

III. ATTORNEYS AND PSYCHOLOGICAL CARE

- A. Attorneys shall refrain from giving psycho-diagnostic opinions.
- B. Attorneys shall refrain from interfering with established psychologist-patient relationships.

IV. AN ATTORNEY'S RESPONSIBILITIES

An attorney's responsibility is always first to the attorney's client. However, in his or her relationship with psychologists, an attorney has the following responsibilities:

- A. **Testimony:** An attorney should keep the psychologist informed about the status of the litigation and in particular inform the psychologist sufficiently in advance of:
 - 1. deposition and trial settings;
 - 2. vacated deposition and trial settings; and
 - 3. pre-trial settlements.
- B. **Fees:** The services of a psychologist in a legal matter involve the consumption of the psychologist's time and the utilization of the psychologist's facilities and expertise. As a result, the attorney shall make proper arrangements with all involved psychologists beforehand for payment for the psychologist's services, either directly by the attorney's client or by the attorney through the advancement of costs.

An attorney is not expected to advance costs for psychologist services involving treatment.

An attorney who requests information from a psychologist solely to advance the attorney's knowledge of psychology is responsible personally for prompt payment of those services.

- C. **Background:** An attorney should attempt to familiarize himself or herself with the psychological literature in order that the attorney have some initial understanding of the problem and so that the attorney might be able to specify the information requested from the psychologist and understand the psychologist's explanation and report. An attorney should also be familiar with Rule 16-114 NMRA of the Rules of Professional Conduct ("Client with Diminished Capacity") and the commentary thereto.
- D. **Confidentiality:** An attorney must know the applicable law relating to privilege and confidentiality in the psychologist-patient relationship, including the psychotherapist-patient privilege under

Rule 11-504, NMRA of the Rules of Evidence; the HIPAA Privacy Rule; and 42 CFR Pt. II (Confidentiality of Alcohol and Drug Abuse Patient Records). The attorney shall refrain from asking a psychologist to disclose confidential information other than as provided by law and shall be familiar with the requirements under the HIPAA Privacy Rule with respect to patient authorization for release of protected health information and also the special treatment accorded to psychotherapy notes by the Privacy Rule. The attorney should also be familiar with the special consent and authorization requirements under New Mexico law which pre-empt the HIPAA Privacy Rule, in particular Section 43-1-19 of the New Mexico Mental Health and Developmental Disabilities Code, NMSA 1978; Section 32A-6A-24 of the New Mexico Children's Mental Health and Developmental Disabilities Code, NMSA 1978.

- E. Client Preparation: An attorney should inform the attorney's client about the nature and purposes of any psychological evaluation and should identify the potential uses of information to be gathered during the evaluation.

V. A PSYCHOLOGIST'S RESPONSIBILITIES

A psychologist's primary responsibility is always the well-being of the psychologist's patient. The psychologist must maintain the confidentiality of patient communications as provided by New Mexico law. The psychologist acting as psychotherapist must claim the psychotherapist-privilege on behalf of the psychologist's patient, recognizing that this privilege may be waived or accepted under the New Mexico law. In any event, the psychologist must obtain a valid authorization from the psychologist's patient or the patient's guardian before confidential information may be disclosed. A psychologist involved in the legal process has the following responsibilities:

- A. Records: Given a valid authorization, the psychologist should promptly transfer information from the psychologist's records to the requesting attorney. Psychologists have no proprietary interest in test or interview responses, whether written, taped, or otherwise recorded.
- B. Reports: Given a valid authorization, reports covering a summation of psychological facts and opinions and their significance shall be furnished upon request by the treating psychologist or the psychologist specifically engaged to do such work. The attorney should specify the items the attorney wishes covered in that report.
- C. Psychological Testing Materials: Secured instruments, such as Rorschach or TAT cards, testing manuals, or other copyrighted materials should be forwarded only to licensed psychologists retained by the requesting attorney.
- D. Psychological Evaluations: Before evaluating a person, the psychologist must inform the person of the nature and purposes of the psychological evaluation and must identify the potential uses of the information to be gathered during the evaluation.
- E. Conferences: Given a valid authorization, attorneys may confer with psychologists either to:
 - 1. gain psychological information on a topic of the attorney's interest, or
 - 2. discuss psychological aspects of the case of a particular client with the treating psychologist or with one engaged to render such opinions. This may include a discussion of testimony that may be elicited at trial.
- F. Testimony: Psychologists may be requested to testify either in court or by deposition. Cooperation between both attorneys and psychologists should allow for setting of court or deposition testimony for mutual convenience; while a subpoena may be necessary, it is not

a substitute for direct communication between the attorney and psychologist for the purpose of setting a time for testimony.

A psychologist should familiarize himself or herself with the basic requirements of court procedure.

A psychologist should limit his testimony to the psychologist's opinion and its basis. The psychologist should leave the representation of the psychologist's patient and advancement of the patient's interests to the patient's attorney.

- G. Fees: Psychologists may use the expenditure of their time, office facilities, and funds as a basis for arriving at a reasonable fee for services rendered pursuant to these principles. If an attorney fails to give timely notification of a change in the scheduled time for the psychologist's services, which makes the psychologist unavailable for other remunerative work, the psychologist may charge for the time set aside. A reasonable fee for the psychologist's time spent in preparation for testimony by deposition or in the courtroom is the same rate charged for usual psychological services. A reasonable fee for deposition or courtroom testimony is no more than double the usual rate for psychological services.

VI. GRIEVANCE PROCEDURE

- A. Any grievance regarding the principles set forth above shall be referred to a grievance panel for hearing. The State Bar of New Mexico and the New Mexico Board of Psychologist Examiners will each provide six committee members and one co-chair to serve on grievance panels which will be composed of two lawyers, two psychologists and one co-chair. The co-chairs will alternate in chairing grievance panels. The chair for a grievance panel will choose two panel members from each profession.
- B. Grievance Panels are intended to resolve disputes arising out of principles set forth above; they are not intended as a substitute for the bodies governing the ethical conduct of the respective professions. Breaches of the ethical code of either profession or violations of law are to be referred to the appropriate body for consideration.

1.02 Relationship of ethics and law

If psychologists' ethical responsibilities conflict with law, psychologists make known their commitment to the Ethics Code and take steps to resolve the conflict in a responsible manner

2.03 Test construction

Psychologists who develop and conduct research with tests and other assessment techniques use scientific procedures and current professional knowledge for test design, standardization, validation, reduction or elimination of bias, and recommendations for use.

2.04 Use of assessment in general and with special populations

(a) Psychologists who perform interventions or administer, score, interpret, or use assessment techniques are familiar with the reliability, validation, and related standardization or outcome studies of, and proper applications and uses of, the techniques they use.

(b) Psychologists recognize limits to the certainty with which diagnoses, judgments, or predictions can be made about individuals.

(c) Psychologists attempt to identify situations in which particular interventions or assessment techniques or norms may not be applicable or may require adjustment in administration or interpretation because of factors such as individuals' gender, age, race, ethnicity, national origin, religion, sexual orientation, disability, language, or socioeconomic status.

2.05 Interpreting assessment results

When interpreting assessment results, including automated interpretations, psychologists take into account the various test factors and characteristics of the person being assessed that might affect psychologists' judgments or reduce the accuracy of their interpretations. They indicate any significant reservations they have about the accuracy or limitations of their interpretations.

2.06 Unqualified persons

Psychologists do not promote the use of psychological assessment techniques by unqualified persons. (See also Standard 1.22, Delegation to and Supervision of Subordinates.)

2.07 Obsolete tests and outdated test results

(a) Psychologists do not base their assessment or intervention decisions or recommendations on data or test results that are outdated for the current purpose.

(b) Similarly, psychologists do not base such decisions or recommendations on tests and measures that are obsolete and not useful for the current purpose.

2.08 Test scoring and interpretation services

(a) Psychologists who offer assessment or scoring procedures to other professionals accurately describe the purpose, norms, validity, reliability, and applications of the procedures and any special qualifications applicable to their use.

(b) Psychologists select scoring and interpretation services (including automated services) on the basis of evidence of the validity of the program and procedures as well as on other appropriate considerations.

(c) Psychologists retain appropriate responsibility for the appropriate application, interpretation, and use of assessment instruments, whether they score and interpret such tests themselves or use automated or other services.

2.09 Explaining assessment results

Unless the nature of the relationship is clearly explained to the person being assessed in advance and precludes provision of an explanation of results (such as in some organizational consulting, pre-employment or security screenings, and forensic evaluations), psychologists ensure that an explanation of the results is provided using language that is reasonably understandable to the person assessed or to another legally authorized person on behalf of the client. Regardless of whether the scoring and interpretation are done by the psychologist, by assistants, or by automated or other outside services, psychologists take reasonable steps to ensure that appropriate explanations of results are given.

2.10 Maintaining test security

Psychologists make reasonable efforts to maintain the integrity and security of tests and other assessment techniques consistent with law, contractual obligations, and in a manner that permits compliance with the requirements of this Ethics Code. (See also Standard 1.02, Relationship of Ethics and Law.)

7.02 Forensic assessments

(a) Psychologists' forensic assessments, recommendations, and reports are based on information and techniques (including personal interviews of the individual, when appropriate) sufficient to provide appropriate substantiation for their findings. (See also Standards 1.03, Professional and scientific relationship; 1.23, Documentation of professional and scientific work; 2.01, Evaluation, diagnosis, and interventions in professional context; and 2.05, Interpreting assessment results.)

(b) Except as noted in (c), below, psychologists provide written or oral forensic reports or testimony of the psychological characteristics of an individual only after they have conducted an examination of the individual adequate to support their statements or conclusions.

(c) When, despite reasonable efforts, such an examination is not feasible, psychologists clarify the impact of their limited information on the reliability and validity of their reports and testimony, and they appropriately limit the nature and extent of their conclusions or recommendations.

7.03 Clarification of role

In most circumstances, psychologists avoid performing multiple and potentially conflicting roles in forensic matters. When psychologists may be called on to serve in more than one role in a legal proceeding — for example, as consultant or expert for one party or for the court and as a fact witness — they clarify role expectations and the extent of confidentiality in advance to the extent feasible, and thereafter as changes occur, in order to avoid compromising their professional judgment and objectivity and in order to avoid misleading others regarding their role.

7.04 Truthfulness and candor

(a) In forensic testimony and reports, psychologists testify truthfully, honestly, and candidly and, consistent with applicable legal procedures, describe fairly the bases for their testimony and conclusions. (b) Whenever necessary to avoid misleading, psychologists acknowledge the limits of their data or conclusions.

7.05 Prior relationships

A prior professional relationship with a party does not preclude psychologists from testifying as fact witnesses or from testifying to their services to the extent permitted by applicable law. Psychologists appropriately take into account ways in which the prior relationship might affect their professional objectivity or opinions and disclose the potential conflict to the relevant parties.

7.06 Compliance with law and rules

In performing forensic roles, psychologists are reasonably familiar with the rules governing their roles. Psychologists are aware of the occasionally competing demands placed upon them by these principles and the requirements of the court system, and attempt to resolve these conflicts by making known their commitment to this Ethics Code and taking steps to resolve the conflict in a responsible manner. (See also Standard 1.02, Relationship of ethics and law.)

8.02 Confronting ethical issues

When a psychologist is uncertain whether a particular situation or course of action would violate this Ethics Code, the psychologist ordinarily consults with other psychologists knowledgeable about ethical issues, with state or national psychology ethics committees, or with other appropriate authorities in order to choose a proper response.

8.03 Conflicts between ethics and organizational demands

If the demands of an organization with which psychologists are affiliated conflict with this Ethics Code, psychologists clarify the nature of the conflict, make known their commitment to the Ethics Code, and to the extent feasible, seek to resolve the conflict in a way that permits the fullest adherence to the Ethics Code.

Statement on the Disclosure of Test Data

Committee on Psychological Tests and Assessment, American Psychological Association

Preamble

The issue of disclosure of test data raises a number of concerns for psychologists who develop, validate, and use tests in a variety of settings. The statement that follows was formulated to help psychologists with these issues. Its intent is to be consistent with the *Ethical Principles of Psychologists and Code of Conduct* (APA, 1992; hereinafter referred to as the Ethics Code) and the *Standards for Educational and Psychological Testing* (1985; hereinafter referred to as the Testing Standards).¹ Psychologists should refer to the above documents, other appropriate guidelines and standards, and relevant legal statutes in resolving legal and ethical conflicts.

This statement should be interpreted in light of its educational and aspirational intents, advances in assessment, and the professional judgment of the psychologist. It is not intended to establish guidelines or standards of conduct or care for psychologists relative to disclosure of test data. This statement does *not* provide legal advice,

settings (e.g., schools, organizations, health care) or uses for test data. Psychologists may wish to obtain legal or other professional advice concerning relevant federal and state statutes, regulations, and rules, relevant to the release of test data. Guidance may be provided by a variety of standards or guidelines such as state licensing laws, the Ethics Code, and the Testing Standards.

When psychologists are mandated by law, or otherwise required to release data to persons they believe to be unqualified or in instances that may impair the security of the test materials or intellectual property/copyright interests, they should inform others (e.g., employers, schools, courts, test takers) of their obligations to the Ethics Code (APA, 1992; which may have the force of law in some jurisdictions), Testing Standards (1985), and other relevant professional standards.

Psychologists should be aware that professional standards and practices as well as legal mandates governing the disclosure of test data often differ substantially depending on the setting, intended purpose, and use of

OPINION & DECLARATORY RULINGS

Regarding Release of Raw Test Data

This correspondence is in response to a change in the Ethical Standards of the American Psychological Association regarding the release of raw psychological test data to clients which was necessitated by the requirements of the Health Insurance Portability and Accountability Act of 1996 (HIPAA).

In a prior Opinion & Declaratory Ruling, the Kentucky Board of Examiners of Psychology concluded that psychologists credentialed by the Board must follow the Code of Ethics of the American Psychological Association (1992) and must not release raw psychological test data directly to clients. The Board's Code of Conduct, 201 Kentucky Administrative Regulation (KAR) 26:145 Section 10(1) mandates that "the credential holder shall treat an assessment result or interpretation regarding an individual as confidential information." Furthermore, the credential holder is bound to ensure the "protection of integrity of assessment procedures. 201 KAR 26:145 Section 10(2). In its prior Opinion and Declaratory Ruling, the Board concluded that the raw, psychological data must not be disclosed directly to the patient, but only to "other credentialed mental health professionals who have training and experience in psychological testing."

The 2002 APA Ethical Standards (effective June 1, 2003) supersedes the 1992 Code. The change in the Code results in the Board Ruling regarding the release of

24 psychological test data being in conflict with current standards of practice for
25 psychologists as set forth by the 2002 APA Ethical Standards.

26

27 This correspondence is an opinion of the Board based solely on the facts
28 summarized below. The Board has authorized this opinion as an Opinion and
29 Declaratory Ruling pursuant to KRS 13A. 130(3) and KRS 13A .010(2)(b) as the agency
30 with jurisdiction to interpret the statutes and regulations in KRS Chapter 319 and 201
31 KAR Chapter 26 which govern the practice of psychology in the Commonwealth of
32 Kentucky

33

34 **I. Whether a psychologist may release raw psychological test data directly**
35 **to clients.**

36

37 In performing psychological testing of clients, psychologists interpret the raw test
38 data from administration of the psychological test(s). That raw test data is mandated to
39 be retained by the psychologist under the Board's Code of conduct, 201 KAR 26:145
40 Section 3(6)(a)4. ("The credential holder rendering professional services to an individual
41 client, or services billed to a third-party payor, shall maintain professional records that
42 include: . . . Test results or other evaluative results obtained and the basic test data from
43 which the results were derived;")

44

45 Such psychological tests are part of various psychological assessment procedures
46 that are routinely used by psychologists in the practice of psychology.

47

48 Other provisions of law mandate that a “healthcare provider,” which the board
49 interprets clearly includes psychologist credentialed by the Board, provide one (1) copy
50 of a clients’ record without charge. KRS 422.317 (1) states in relevant part:

51 Upon a patient’s written request, . . . a health care provider shall provide,
52 without charge to the patient, a copy of the patient’s medical record. A
53 copying fee, not to exceed one dollar (\$1.00) per page, may be charged by
54 the health care provider for furnishing a second copy of the patient’s
55 medical record upon request either by the patient or the patient’s attorney
56 or the patient’s authorized representative.

57

58 The issues thus arises as to whether the client is entitled to the raw psychological
59 test data as part of the client’s “medical record” as mandated by KRS 422.317

60

61 The Board is of the opinion that the Board’s own Code of Conduct governs the
62 psychologist’s duty in addition to KRS 422.317. 201 KAR 26: 145 Section 10(2) states:
63 “Protection of integrity of assessment procedures. The credential holder shall not
64 reproduce or describe in a popular publication, lecture, or public presentation of a
65 psychological test or other assessment device in a way that might invalidate them.”

66

67 According to 201 KAR 26:145 Code of Conduct Section 7 (8) Release of
68 confidential information. The credential holder shall release confidential information
69 upon court order or to conform with state or federal law or regulation.

70

71 The Health Insurance Portability and Accountability Act of 1996 (HIPAA)
72 requires that a health care provider also make available a copy of the patient's health care
73 record to the patient upon request. The newly effective APA Ethical Principles reflect
74 these mandates.

75

76 According to the American Psychological Association *Ethical Principles of*
77 *Psychologists and Code of Conduct* (December 2002) ETHICAL STANDARDS: 9.
78 ASSESSMENT

79 **9.04 Release of Test Data**

80 (a) The term *test data* refers to raw and scaled scores, client/patient
81 responses to test questions or stimuli, and psychologists' notes and
82 recordings concerning client/patient statements and behavior during an
83 examination. Those portions of test materials that include client/patient
84 responses are included in the definition of *test data*. Pursuant to a
85 client/patient release, psychologists provide test data to the client/patient
86 or other persons identified in the release. Psychologists may refrain from
87 releasing test data to protect a client/patient or others from substantial
88 harm or misuse or misrepresentation of the data or the test, recognizing
89 that in many instances releases of confidential information under these
90 circumstances is regulated by law. (See also Standard 9.11, Maintaining
91 Test Security)

92 (b) In the absence of a client/patient release, psychologists provide test
93 data only as required by law or court order.

94 **9.11 Maintaining Test Security**

95 The term *test materials* refers to manuals, instruments, protocols, and test
96 questions or stimuli and does not include *test data* as defined in Standard
97 9.04, Release of Test Data. Psychologists make reasonable efforts to
98 maintain the integrity and security of test materials and other assessment
99 techniques consistent with law and contractual obligations, and in a
100 manner that permits adherence to this Ethics Code.

101 As set forth above, the APA has differentiated between “test data” and “test
102 materials.” The APA now concludes that, in accord with HIPAA, a psychologist must
103 release the test data, as defined above, but shall not release the test materials, which
104 would, of course, invalidate the use of that psychological test. Consistent with this
105 interpretation, the Board now interprets its Code of Conduct to allow the credential
106 holder to release test data, but not to release test materials.

107

108 **II. Conclusion.**

109

110 As the agency authorized by the Kentucky General Assembly to regulate the
111 practice of psychology in this state, the Board is empowered to interpret its statutes and
112 regulations. In summary, psychologists credentialed by the Board must follow the Code
113 of Conduct and must release raw psychological test data directly to clients and in accord
114 with KRS 422.317 and the requirements of HIPAA. However, in such release,

115 reasonable efforts must be made to maintain the integrity and security of test material and
116 other assessment techniques consistent with law and contractual obligations. A credential
117 holder in Kentucky shall not release test material in order to ensure the “protection of the
118 integrity of assessment procedures.” 201 KAR 26:145 Section 10(2).

119

HSDani, PhD

120

121

Adopted February 7, 2005



Test Security: An Update

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

Introduction

The National Academy of Neuropsychology's first official position statement on *Test Security* was approved on October 5, 1999 and published in the Archives of Clinical Neuropsychology in 2000 (Volume 15, Number 5, pp. 383-386). Although this position statement has apparently served its intended purposes, questions have arisen regarding the potential impact of the 2002 revision of the APA Ethics Code (APA Ethical Principles of Psychologists and Code of Conduct, 2002) on the original position statement, which was based upon the 1992 APA Ethical Principles of Psychologists and Code of Conduct. The 2002 revised APA Ethics Code seems to necessitate no basic changes in the principles and procedures contained in the original *Test Security* paper, and requires only some alterations and clarification in wording. Specifically, the 2002 revised APA Ethics Code distinguishes between test data and test materials. According to Code 9.04:

Test data “refers to raw and scaled scores, client/patient responses to test questions or stimuli, and psychologists’ notes and recordings concerning client/patient statements and behavior during the examination. Those portions of test materials that include client/patient responses are included in the definition of test data.”

According to Code 9.11:

Test materials “refers to manuals, instruments, protocols, and test questions or stimuli and does not include test data” (as defined above).

Psychologists are instructed to release test data pursuant to a client/patient release unless harm, misuse, or misrepresentation of the materials may result, while being mindful of laws regulating release of confidential materials. Absent client/patient release, test data are to be provided only as required by law or court order. In contrast, psychologists are instructed to make reasonable efforts to maintain the integrity and security of test materials and other assessment techniques consistent with such factors as law and contractual obligations.

The distinction between test data and test materials increases conceptual clarity, and thus this language has been incorporated into the updated *Test Security* position statement that follows. Beyond this change, we do not believe that the 2002 revision of the APA Ethics Code calls for additional changes in the guidelines contained in the original *Test Security*

paper. That is, if a request is made for test materials, the guidelines in the original position paper remain fully applicable. Further, despite the intended distinction between test materials and test data and the differing obligations attached to each, a request for test data still appears to necessitate the safeguards described in the original position statement in most circumstances in which neuropsychologists practice. The release pursuant to client/patient consent alone is still likely to conflict not only with the NAN original Test Security position statement, but also with one or both of 2002 revised APA Ethics Codes 9.04 and 9.11. This is because release of test responses without the associated test materials often has the potential to mislead (and is also often impractical given the manner in which test responses are often embedded in test materials). Further, in many cases, test data and test materials overlap, given the current state of many neuropsychological test forms, and thus to release the test data is to release the test materials. In other cases, test materials might easily be inferred from test data, and although release of the data might not technically violate the 2002 revised APA Ethics Code 9.11, it may well violate the intent of the guideline. Thus, even if requirements are met under 9.04, such test release may well still conflict with the procedures or principles articulated in 9.11.

Thus, requests not only for release of test materials (manuals, protocols, and test questions, etc.), but also for certain test data (test scores or responses where test questions are embedded or can be easily inferred) will typically fall under the guides and cautions contained in the original and restated Test Security position papers. True raw test scores or calculated test scores that do not reveal test questions, do not require such test security protection. It is unfortunate that the new 2002 revised APA Ethics Code, while clearly attempting, and for the most part achieving, clarity in endorsing the release of raw and scaled test scores, test answers, and patient responses, does not address the very practical problem of releasing data which imply or reveal test questions. This is not a trivial concern when state licensure board ethics committees may be forced to investigate charges that relate to such ambiguities. Until such clarifications are offered by APA, we suggest a conservative approach that protects these imbedded and inferred questions, and treating them as one would test materials as proffered by the NAN Revised Test Security Paper below. Further revisions of the NAN Test Security guidelines will follow any clarifications by APA of the Ethics Code.

Revised Test Security Paper

A major practice activity of neuropsychologists is the evaluation of behavior with neuropsychological test procedures. Many tests, for example, those of memory or ability to solve novel problems, depend to varying degrees on a lack of familiarity with the test items. Hence, there is a need to maintain test security to protect the uniqueness of these instruments. This is recognized in the 1992 and 2002 Ethical Principles of Psychologists and Code of Conduct (APA, 1992; Code 2.1, and APA, 2002; Code 9.11, Maintaining Test Security), which specify that these procedures are to be used only by psychologists trained in the use and interpretation of test instruments (APA, 1992; Codes 2.01, 2.06; Unqualified Persons; and APA, 2002; Code 9.04; Release of Test Data).

In the course of the practice of psychological and neuropsychological assessment, neuropsychologists may receive requests from attorneys for copies of test protocols, and/or requests to audio or videotape testing sessions. Copying test protocols, video and/or audio taping a psychological or neuropsychological evaluation for release to a non-psychologist potentially violates the Ethical Principles of Psychologists and Code of Conduct (APA, 1992; APA, 2002), by placing confidential test procedures in the public domain (2.10), and by making tests available to persons unqualified to interpret them (APA, 1992; Codes 2.02, 2.06 and 2.10; APA, 2002; Codes 9.04 and 9.11). Recording an examination can additionally affect the validity of test performance (see NAN position paper on Third Party Observers). Such requests can also place the psychologist in potential conflict with state laws regulating the practice of psychology. Maintaining test security is critical, because of the harm that can result from public dissemination of novel test procedures. Audio- or video recording a neuropsychological examination results in a product that can be disseminated without regard to the need to maintain test security. The potential disclosure of test instructions, questions, and items by replaying recorded examinations can enable individuals to determine or alter their responses in advance of actual examination. Thus, a likely and foreseeable consequence of uncontrolled test release is widespread circulation, leading to the opportunity to determine answers in advance, and to manipulate test performances. This is analogous to the situation in which a student gains access to test items and the answer key for a final examination prior to taking the test.

Threats to test security by release of test data to non-psychologists are significant. Research confirms what is seemingly already evident: individuals who gain access to test content can and do manipulate tests and coach others to manipulate results, and they are also more likely to circumvent methods for detecting test manipulation (Coleman, Rapport, Millis, Ricker and Farchione, 1998; Wetter and Corrigan, 1995; Youngjohn, 1995; Youngjohn, Lees-Haley & Binder, 1999). Consequently, uncontrolled release of test procedures to non-psychologists, via stenographic, audio or visual recording potentially jeopardizes the validity of these procedures for future use. This is critical in a number of respects. First, there is potential for great public harm (For example, a genuinely impaired airline pilot, required to undergo examination, obtains a videotape of a neuropsychological evaluation, and produces spuriously normal scores; a genuinely non-impaired criminal defendant obtains a recorded examination, and convincingly alters performance to appear motivated on tests of malingering, and impaired on measures of memory and executive function). Second, should a test become invalidated through exposure to the public domain, redevelopment of a replacement is a costly and time consuming endeavor (note: restandardization of the many measures of intelligence and memory, the WAIS-III and WMS-III, cost several million dollars, took over five years to complete, and required testing of over 5000 individuals). This can harm copyright and intellectual property interests of test authors and publishers, and deprive the public of effective test instruments. Invalidation of tests through public exposure, and the prospect that efforts to develop replacements may fail or, even if successful, might themselves have to be replaced before too long, could serve as a major disincentive to prospective test developers and publishers, and greatly inhibit scientific and clinical advances.

If a request to release test data or a recorded examination places the psychologist or neuropsychologist in possible conflict with ethical principles and directives, the professional should take reasonable steps to maintain test security and thereby fulfill his or her professional obligations. Different solutions for problematic requests for the release of test material are possible. For example, the neuropsychologist may respond by offering to send the material to another qualified neuropsychologist, once assurances are obtained that the material will be properly protected by that professional as well. The individual making the original request for test data (e.g., the attorney) will often be satisfied by this proposed solution, although others will not. Other potential resolutions involve protective arrangements or protective orders from the court. (See the attached addendum for general guidelines for responding to requests).

In summary, the National Academy of Neuropsychology fully endorses the need to maintain test security, views the duty to do so as a basic professional and ethical obligation, strongly discourages the release of materials when requests do not contain appropriate safeguards, and, when indicated, urges the neuropsychologist to take appropriate and reasonable steps to arrange conditions for release that ensure adequate safeguards.

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