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## APPENDIX

[For Kaufmann, P.M. (2009). Protecting raw data and psychological test materials from wrongful disclosure: A primer on the law and other persuasive strategies. *The Clinical Neuropsychologist*.] Vol 23 (7) 2009 pp. 1130 – 1159.

The law cited herein was operative as of April 2009, but is subject to change through new legislation, regulation, or judicial decision. For current information in your jurisdiction, the reader is advised to seek legal counsel.

### STATUTES:

740 Ill. Comp. Stat. Ann. § 110/3-c

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.

Ariz. Rev. Stat. Ann. § 12-2293(B)

B. A health care provider may deny a request for access to or copies of medical records or payment records if a health professional determines that either:

1. Access by the patient or the patient's health care decision maker is reasonably likely to endanger the life or physical safety of the patient or another person.
2. The records make reference to a person other than a health professional and access by the patient or the patient's health care decision maker is reasonably likely to cause substantial harm to that other person.
3. Access by the patient's health care decision maker is reasonably likely to cause substantial harm to the patient or another person.

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4. Access by the patient or the patient's health care decision maker would reveal information obtained under a promise of confidentiality with someone other than a health professional and access would be reasonably likely to reveal the source of the information.

Ark. Code Ann. § 12-12-917(d)(2)(A)(ii)

(d) (1) Records and information obtained under this section shall not be subject to the Freedom of Information Act of 1967, § 25-19-101 et seq., unless otherwise authorized by law.

(2) (A) (i) The sex offender or sexually violent predator shall have access to records and information generated and maintained by the committee.

(ii) These records shall include any reports of the assessment and the tape of the interview but do not include restricted source documents of commercial psychological tests or working notes of staff.

Cal. Bus. & Prof. Code § 4982(q) as applied to marriage and family therapists

The board may deny a license or registration or may suspend or revoke the license or registration of a licensee or registrant if he or she has been guilty of unprofessional conduct. Unprofessional conduct includes, but is not limited to, the following:

(q) Reproduction or description in public, or in any publication subject to general public distribution, of any psychological test or other assessment device, the value of which depends in whole or in part on the naivete of the subject, in ways that might invalidate the test or device.

Cal. Bus. & Prof. Code § 4992.3(q) as applied to social workers

The board may deny a license or a registration, or may suspend or revoke the license or registration of a licensee or registrant if he or she has been guilty of unprofessional conduct. Unprofessional conduct includes, but is not limited to, the following:

(q) Reproduction or description in public, or in any publication subject to general public distribution, of any psychological test or other assessment device, the value of which depends in whole or in part on the naivete of the subject, in ways that might invalidate the test or device.

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### Iowa Code Ann. § 228.9

Except as otherwise provided in this section, a person in possession of psychological test material shall not disclose the material to any other person, including the individual who is a subject of the test. In addition, the test material shall not be disclosed in any administrative, judicial, or legislative proceeding. However, upon the request of an individual who is the subject of a test, all records associated with a psychological test of that individual shall be disclosed to a psychologist licensed pursuant to chapter 154B designated by the individual. An individual's request for the records shall be in writing and shall comply with the requirements of section 228.3, relating to voluntary disclosures of mental health information, except that the individual shall not have the right to inspect the test materials.

### Md. Code Ann., Health-Gen. I § 4-307(e)(1), (2), & (3)

(e) Disclosure relating to psychological tests. --

(1) Except as otherwise provided in paragraphs (3), (4), and (5) of this subsection, if the disclosure of a portion of a medical record relating to a psychological test would compromise the objectivity or fairness of the test or the testing process, a mental health care provider may not disclose that portion of the medical record to any person, including a subject of the test.

(2) The raw test data relating to a psychological test is only discoverable or admissible as evidence in a criminal, civil, or administrative action on the determination by the court or administrative hearing officer that the expert witness for the party seeking the raw test data is qualified by the appropriate training, education, or experience to interpret the results of that portion of the raw test data relating to the psychological test.

(3) (i) A recipient who has been the subject of a psychological test may designate a psychologist licensed under Title 18 of the Health Occupations Article or a psychiatrist licensed under Title 14 of the Health Occupations Article to whom a health care provider may disclose the medical record.

### Minn. Stat. Ann. § 148.965 Test Security

Notwithstanding section 144.292, subdivisions 2 and 5, a provider shall not be required to provide copies of psychological tests, test materials, or scoring keys to any individual who has completed a test, or to an individual not qualified to administer, score, and interpret the test, if the provider reasonably determines that access would compromise the objectivity, fairness, or integrity of the testing process for the individual or others. If the provider makes this determination, the provider shall, at the discretion of the individual who has

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completed the test, release the information either to another provider who is qualified to administer, score, and interpret the test or instead furnish a summary of the test results to the individual or to a third party designated by the individual.

### REGULATIONS:

The most common regulatory scheme that is relevant to the psychologists privilege are those states that incorporate the APA Ethics Code to reference and use it to define unprofessional conduct.

Ala. Admin. Code r. 750-X, app. III, n. 26

Support for the principle of privileged communication is found in the Model Act for State Licensure of Psychologists (APA, 1987b):

In judicial proceedings, whether civil, criminal, or juvenile; in legislative and administrative proceedings; and in proceedings preliminary and ancillary thereto, a patient or client, or his or her guardian or personal representative, may refuse to disclose or prevent the disclosure of confidential information, including information contained in administrative records, communicated to a psychologist licensed or otherwise authorized to practice psychology under the laws of this jurisdiction, or to persons reasonably believed by the patient or client to be so licensed, and their agents, for the purpose of diagnosis, evaluation, or treatment of any mental or emotional condition or disorder. In the absence of evidence to the contrary, the psychologist is presumed authorized to claim the privilege on the patient's or client's behalf.

This privilege may not be claimed by the patient or client, or on his or her behalf by authorized persons, in the following circumstances:

2. where the validity of a will of a former patient or client is contested;
6. where the patient or client, by alleging mental or emotional damages in litigation, puts his or her mental state at issue;
7. where the patient or client is examined pursuant to court order, or
8. in the context of investigations and hearings brought by the patient or client and conducted by the Board, where violations of this Act are at issue. (pp. 702-703)

Specific provisions for the maintenance of confidentiality are spelled out in each of the Specialty Guidelines for the Delivery of Services (APA, 1981b).

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**ILLUSTRATIVE STATEMENT:** Raw psychological data (e.g., test protocols, therapy or interview notes, or questionnaire returns) in which a user is identified are ordinarily released only with the written

consent of the user or of the user's legal representative, and are released only to a person recognized by the psychologist as competent to interpret the data. Any use made of psychological reports, records, or data for research or training purposes is consistent with this General Guideline. Additionally, providers of psychological services comply with statutory confidentiality requirements and with those embodied in the Ethical Principles of Psychologists (APA, 1981a).

Ariz. Admin. Code tit. 4, R4-26-106(B)

A psychologist shall release, with a client's written consent, the client's raw test data or psychometric testing materials to another licensed psychologist. Without a client's consent, a psychologist shall release a client's raw test data or psychometric testing materials only to the extent required by federal or Arizona law or court order compelling production.

Cal. Code Regs. tit. 16, § 1396.3 Test Security for Psychologists

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

Cal. Code Regs. tit. 16, § 1858 Unprofessional Conduct for Licensed Educational Psychologists

The Board may suspend or revoke the license of a licensee who:

a) Impersonates a licensee or allows another person to use his or her license.

(b) Permits a person under his or her supervision or control to perform or permits such person to hold himself or herself out as competent to perform professional services beyond the level of education, training and/or experience of that person.

Cal. Code Regs. tit. 16, § 1881 Unprofessional Conduct for Licensed Clinical Social Workers

The board may suspend or revoke the license of a licensee or may refuse to issue a license to a person who:

(a) Misrepresents the type or status of license held by such person or otherwise misrepresents or permits the misrepresentation of his or her professional qualifications or affiliations.

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(b) Impersonates a licensee or who allows another person to use his or her license.

(e) Commits any dishonest, corrupt, or fraudulent act which is substantially related to the qualifications, functions or duties of a licensee.

(l) Reproduces or describes in public or in publications subject to general public distribution, any psychological test or other assessment device, the value of which depends in whole or in part on the naivete of the subject, in ways that might invalidate such test or device. The licensee shall limit access to such test or device to persons with professional interest who are expected to safeguard their use.

Fla. Admin. Code Ann. r. 64B19-18.004(3)

64B19-18.004 Use of Test Instruments.

(3) A psychologist who uses test instruments may not release test data, such as test protocols, test questions, assessment-related notes, or written answer sheets, except (1) to a licensed psychologist or school psychologist licensed pursuant to Chapter 490, F.S., or Florida certified, or (2) after complying with the procedures set forth in Rule 64B19-19.005, F.A.C., and obtaining an order from a court or other tribunal of competent jurisdiction, or (3) when the release of the material is otherwise required by law. When raw test data is released pursuant to this paragraph, the psychologist shall certify to the service user or the service user's designee that all raw test data from those test instruments have been provided. Psychologists are expected to make all reasonable efforts to maintain the integrity of the test protocols, modalities and instruments when releasing information as provided herein.

Fla. Admin. Code Ann. r. 64B19-19.005(3)

64B19-19.005 Releasing Psychological Records.

(3) The psychologist's notes pertaining to psychological services rendered may be considered raw data as provided by subsection 64B19-18.004(3), F.A.C., at the discretion of the psychologist and therefore can be released only (1) to a licensed psychologist or school psychologist licensed pursuant to Chapter 490, F.S., or Florida certified, or (2) when the release of the material is otherwise required by law.

Ga. Comp. R. & Regs. r. 510-4-.02(9)(k), (d)(1)(a)-(b)

510-4-.02(9)(k) Maintaining Test Security.

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

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(d)(1)(a)-(b)

1. (a) 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. (See also Standard 9.11, Maintaining Test Security.)

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

### Ill. Admin. Code tit. 68, § 1400.80(k) Unethical, Unauthorized, or Unprofessional Conduct for Clinical Psychologists

b) Revealing facts, data, or information relating to a client or examinee, except as allowed under Section 5 of the Act or under the Mental Health and Developmental Disabilities Confidentiality Act [740 ILCS 110]. The release of information "with the expressed consent of the client" as provided for in Section 6 of the Act is interpreted to mean that the psychologist, prior to the release of the information, obtained written consent and made certain that the client understood the possible uses or distributions of the information. Case history material may be used for teaching or research purposes or in textbooks or other literature, provided that proper precautions are taken to conceal the identity of the clients or examinees involved;

k) Pursuant to Section 15(7) of the Act, the Department hereby incorporates by reference the "Ethical Principles of Psychologists and Code of Conduct". American Psychological Association, 750 First Street, NE, Washington D.C. 20002, American Psychologist, June 1, 2003, with no later amendments or editions.

### Mo. Code Regs. Ann. tit. 20, § 2235-5.030(12)(E) Ethical Rules of Conduct for Psychologists

(12)(E) Protection of Integrity of Assessment Procedures. The psychologist shall not reproduce or describe in popular publications, lectures or public presentations, psychological tests or other assessment devices in ways that might invalidate them.

### N.M. Admin. Code tit. 16, § 16.22.2.16(A)-(B) 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 naivete of the subject, in ways that might invalidate the techniques.

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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.

Neb. Amin. Code tit. 172, § 156.010(01) Regulations defining Unprofessional Conduct by a Psychologist

010 ASSESSMENT AND TREATMENT TECHNIQUES. A psychologist shall make reasonable efforts to preclude misuse in the development, publication and utilization of psychological assessment techniques for use with clients. Unprofessional conduct includes but is not limited to:

010.01 Failure, in reporting assessment results, to indicate any serious concerns or special circumstances that exist regarding validity or reliability because of the circumstances of the assessment or the inappropriateness of the norms for the person tested.

Ohio Admin. Code § 4732-17-01(F)(2) Rules of Professional Conduct for Psychologists

(2) Test security. Psychological tests and other assessment devices shall not be reproduced or described in popular publications in ways that might invalidate the techniques. Test materials means manuals, instruments, protocols, and test questions or stimuli and does not include test data except as specified in paragraph (F)(3)(a) of rule 4732-17-01 of the Administrative Code. Psychologists and school psychologists make reasonable efforts to maintain the integrity and security of test materials and other assessment techniques consistent with law and contractual obligations. Access to such devices is limited to persons with professional interests who will safeguard their use.

41-11 Or. Bull. 29(2)(c)(H)(iv) Code of Professional Conduct for Psychologists

(iv) Protection of integrity of assessment procedures. The licensee shall not disseminate, reproduce, or describe in popular publications, lectures, or public presentations psychological tests or other assessment devices in ways that might invalidate them, except by court order.

39-8 Or. Bull. 181 151-020-0070(7) Confidentiality--Release of Participant Records

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(7) A person qualified to interpret psychometric and vocational tests shall be able to show evidence of proper training to make such interpretations. Evidence of proper training consists of the approval of the test publishing company, usually through a test user's qualification statement.

### 100 S.C. Code Ann. Regs. 4J(4) Code of Ethics for Psychologists

(4) Protection of integrity of assessment procedures. The psychologist shall not reproduce or describe in popular publications, lectures or public presentations psychological tests or other assessment devices in ways that might invalidate them.

### 22 Tex. Admin. Code § 465.16(b)(2), (d) Evaluation, Assessment, Testing, and Reports for Psychologists

(b) Reliability and Validity.

(2) Licensees administer, score, interpret or use assessment techniques or tests only if they are familiar with the reliability, validation and related standardization or outcome studies of, and proper applications and use of, the techniques they use.

(d) Test Security and Validity. Licensees conduct testing and maintain and release test protocols and data in a secure manner that does not compromise the validity of the test.

### 22 Tex. Admin. Code § 465.22(b), (c)(4) Psychological Records, Test Data and Test Protocols(b) Maintenance and Control of Records and Test Data.

(1) Licensees shall maintain records and test data in a manner that protects the confidentiality of all services delivered by the licensee.

(2) Licensees are responsible for the maintenance, confidentiality and contents of, and access to, all records and test data.

(3) Licensees shall make all reasonable efforts to protect against the misuse of any record or test data.

(4) Licensees shall maintain control over records and test data to the extent necessary to ensure compliance with all applicable Board rules and all state and federal laws.

(5) In situations where it becomes impossible for a licensee to maintain control over records and test data as required by applicable Board rule and state and federal law, the licensee shall make all necessary arrangements for transfer of the licensee's records to another licensee who will ensure compliance with all applicable Board rules and state and federal laws concerning records.

(6) Records and test data of psychological services rendered by a licensee as an employee of an agency or organization remain the property of the employing agency upon termination of the employment of the individual unless legal ownership of such records is controlled by applicable state or federal law or legal agreement.

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### (c) Access to Records and Test Data.

(1) Records shall be entered, organized and maintained in a manner that facilitates their use by all authorized persons.

(2) Records may be maintained in any media that ensure confidentiality and durability.

(3) A licensee shall release information about a patient or client only upon written authorization by the patient, client or appropriate legal guardian pursuant to a proper court order or as required by applicable state or federal law.

(4) Test data are not part of a patient's or client's record. Test data are not subject to subpoena. Test data shall be made available only:

(A) to another qualified mental health professional and only upon receipt of written release from the patient or client, or

(B) pursuant to a court order.

Wash. Admin. Code § 246-930-310(7)(a) Standards for professional conduct and client relationships.

(7) The department neither requires nor prohibits the use of psychological or physiological testing. The use of these and other treatment and evaluation techniques is at the discretion of the provider, subject to the terms of the court order in a particular case. The following standards apply when such techniques are used.

(a) Psychological testing: Psychological testing may provide valuable data during the assessment phase and in determining treatment progress. However, psychological testing should not be conducted by a provider who is not a licensed psychologist, unless the specific test(s) standardized administration procedures provide for administration by a nonpsychologist.

Psychological assessment data provided by a psychologist, other than the examiner, shall not be integrated into an assessment report unless the provider is familiar with the psychological instruments used and aware of their strengths and/or limitations.

The interpretation of psychological testing through blind analysis has significant limitations. Providers reporting psychological test data derived in this manner shall also report the way in which the information was derived and the limitations of the data.

It is important to report any information which might influence the validity of psychological test findings. Examples of such information include, but are not limited to, the context of the evaluation, the information available to the professional who interpreted the data, whether the interpretations were computer derived and any special population characteristics of the person examined.

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### CASE LAW from New York:

#### *Martinez v. KSM Holding Ltd.*, 294 A.D.2d 111 (NY App Div1st 2002) Work Product Exemption

Defendants seek disclosure of the complete files of four experts retained by plaintiffs, three psychologists and a neuro-psychiatrist, who performed what defendants describe as "psychological, neuro-psychological, IQ, achievement, behavioral observations, general intellectual functioning, verbal reasoning, abstract/visual reasoning, quantitative reasoning, short-term memory and social/emotional testing." With regard to such experts, plaintiffs more than complied with their disclosure obligations by providing not only the information called for in CPLR 3101 (d) (1) (i) but also a copy of each expert's report. There being no support for defendants' assertion that the files were prepared for purposes other than litigation, the files are exempt from disclosure under CPLR 3101 (d) (2), unless defendants can show that they have a "substantial need" for the files and cannot obtain the substantial equivalent thereof by other means without "undue hardship," or that "special circumstances" exist within the meaning of CPLR 3101 (d) (1) (iii) necessitating production of the files. No such showings are made. While the "raw data" that defendants claim to need may be open to interpretation, the substantial equivalent thereof can be obtained by means other than turning over plaintiffs' experts' files. Indeed, defendants failed to take advantage of a preliminary conference order giving them the right to conduct neuro-psychological testing, and then, while attempting to compel disclosure of the files, declined plaintiffs' offer to submit to examinations by a neuro-psychologist, who, it appears, could have conducted tests equivalent to those performed by plaintiffs' experts.

#### *Ochs v. Ochs*, 193 Misc. 2d 502 (NY SC Worchester, 2002) Child Custody Exception

In light of all this, it is apparent to the court that pretrial disclosure of the notes and raw data of the court-appointed neutral forensic psychologist is likely to make custody litigation lengthier and more expensive without providing any concomitant benefit sufficient to justify its costs. While it would always be better to have more information, if there were no human or financial cost from obtaining it, that is not the case here. This is not to say that there are no circumstances in which such disclosure is warranted. The court is obligated to exercise its discretion in each case so as to balance the benefit to be achieved by permitting such disclosure against the detriment it causes. As with the additional evaluations at issue in *Rosenblitt* (107 A.D.2d at 295-296), a showing of bias or other reason to doubt the credibility of the report, other than mere displeasure with its result, would cause the balance to weigh in favor of disclosure. Thus, such requests should be evaluated in the same manner as requests for additional psychological examinations, and should be granted only upon a showing, on the basis of the report itself or through extrinsic evidence, of special circumstances, such as a deficiency in the report, a potential bias or other cause.

Here, the defendant has made no such showing. There is simply nothing on the face of the report or in the facts that have been related with respect to its development that would justify inquiry into its foundations.

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The defendant's motion for an order directing the court-appointed neutral forensic psychologist to disclose her notes and the raw data of the psychological testing she has conducted is therefore denied. The court-appointed neutral forensic psychologist is directed, however, to produce her notes at the time of her testimony, in the event that sufficient cause is established at that time for the review of those notes by the defendant's counsel.