

# Navigating Threats to Test Security

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*Special appreciation to C. Marreiro, Ph.D. for many of the graphics included in this presentation*



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Importance of Test Security and Defining Terms

## PART 1

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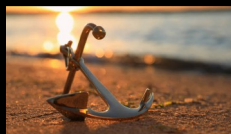
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## Why is test security important?

**Key Concept:  
The Anchor is  
Public Safety**



**Failure to ensure test security  
jeopardizes test effectiveness  
resulting in negative impact to society**

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To: Chief Justice Guerrero and Associate Justices of the Supreme Court of California  
 From: Dominic Carone, Ph.D., ABPP-CN  
 re: Uber Techs, Inc., et al v. Superior Court of Los Angeles.

President Carone advocates for the right of "all persons to access to and benefit from the contributions of psychology and to equal quality in the processes, procedures, and services being conducted by psychologists" as is enshrined in the core principles of the 2017 American Psychological Association's Ethical Principles of Psychologists and Code of Conduct.

He goes on to highlight that the issue of test security is of utmost importance to the public at large.

<https://theaacn.org/wp-content/uploads/2025/03/Uber-v-Superior-Court-Los-Angeles-AACN-amicus-letter-2025.pdf>

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### Sample Declaration & AACN Toolkit

I'm also attaching a sample declaration that fully lays out test security issues should you have to argue this issue in front of a judge.

Welcome to the AACN FNSIGI

As of this most recent court, we have over 100 members in the FNSIGI and we continue to grow every month. Interest in the practice of forensic neuropsychology among neuropsychologists has now been righted and access to our services should be high and administrative proceedings in following. The FNSIGI forum provides an excellent venue for discussion of topics relevant to forensic neuropsychology practitioners.

In the past six years, we have held FNSIGI meetings at our annual AACN Conferences and each year we have supported many honorarily granted conference attendees. We intend 2025 annual conference is available to all members. We will have a 100th year of forensic practitioners as we have had every year from the very beginning of our annual conference 11 years ago.

The Forensic Neuropsychology SIG Toolkit is available to all members, both chapters and the above listed practitioners. Some of the publications are available in the below listed links and are free to use.

- Forensic Neuropsychology SIG Forum
- Forensic Neuropsychology History and Current Status Bibliography
- Forensic Neuropsychology SIG Toolkit

AACN Forensic SIG Toolkit

Tool Kit: Log on, Go to Members and the Forensic SIG, then sign up.

It's that simple.

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In light of the **threat of considerable public harm** posed by the general release of proprietary test information, several governing bodies have adopted formal requirements and issued statements pertaining to the release of test-related materials.

Then cite relevant documents: Official Position of the American Academy of Clinical Neuropsychology on Test Security (2022), Update on Third Party Observers in Neuropsychological Evaluation: An Interorganizational Position Paper, dated 2021, National Academy of Neuropsychology's "Test Security: An Update," dated October 13, 2018; Ethical Principles for Psychologists and Code of Conduct of the APA (Exhibit D), Standards 9.11 (Maintaining Test Security) and 9.07 (Assessment by Unqualified Persons) are especially relevant to the release of sensitive test materials.

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### Public Safety **HINGES** on Damage to Test Effectiveness



Test effectiveness and accuracy is contingent on examinee **NAIVETE** to the test materials and procedures,

If test takers have access to tests in advance:

- They can score **higher** than actual ability, and under-report true symptoms
- They can score **lower** than actual ability, thereby depicting deficits they do not truly have, and over-report symptoms



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### **FIREWALL**

"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

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### There is a Detriment to Society When There is Damage to Test Effectiveness

**Tests require years of development** at considerable cost and major investment of professional time

Once test effectiveness and validity are compromised (through pre-testing exposure to materials, instructions, or test-taking strategies),

- Practitioners **lose the tools** on which the psychological and neuropsychological assessment enterprise is based
- Performance Validity Tests (PVTs) are particularly vulnerable due to incentive for "coaching" to pass.



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### There is a Detriment to Society When Protected and Highly Specialized Tools for Assessment Are Compromised

Objective test data are more accurate than self-report and collateral report

Reliance on self-report results in diagnostic error

Without accurate objective test data there is negative impact and threat to

- Public safety
- Judicial decisions
- Medical care
- Educational resources
- Public and private services



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### Detriment to Society Impact to Public Safety

Some jobs involve public safety, and objective test data can help determine if these workers can safely execute their jobs

- Police officer candidates
- Pilots
- Physicians and other medical personnel
- President of the United States



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### Detriment to Society Impact to Public Safety

If pilots, physicians, police academy candidates, and presidents were to obtain psychological and cognitive test information prior to testing.

- they would be able to "study up," thus rendering the tests ineffective in identifying public safety risk
- Macopulos, Kaufmann and Patel, 2023

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Detriment to Society

Impact to Judicial Decisions:

Judges and juries rely on test data for determination of

- psychological and cognitive damages/injuries in personal injury and medical malpractice cases
- competency to stand trial, and insanity defenses and mitigation for criminal offenses

- If examinees become aware of the tests used to determine symptom severity and validity,
  - they could adjust test performances to reflect more severe psychological/cognitive dysfunction, resulting in incorrect judicial decisions



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Detriment to Society

Impact to the Educational System

When determining suitability for advanced or high ability programs,

If examinees learn of test content prior to testing, their higher scores are inaccurate and do not reflect their skill level, thereby receiving opportunities and benefits to which they are not truly qualified.

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Detriment to Society

Impact to the Educational System

When determining suitability for test and class accommodations,

If examinees learn of test content prior to testing, they can attain lower scores than actually reflect their skill level, thereby receiving accommodations to which they are not truly entitled.



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### The “Rich Kids Loophole” is magnified without valid PVTs

An excessively high percentage of students from affluent neighborhoods are identified as having a disability and given extra time when taking college entrance tests (see Harrison, Lee & Suhr, 2021).

- 2000 California State Auditor Results
  - Reported that the basis for extra time accommodations on the SAT was questionable for 18% of cases. Accommodations were provided disproportionately to White or affluent families or to those who attended private schools. The number of accommodations provided in inner-city Los Angeles schools was zero.
- The 2020 highly publicized “college cheating scandal” illustrates manipulation of test scores for college placement

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### NY Times: “Need Extra Time on Tests? It Helps to Have Cash.”

“You’ll get what you’re looking for if you pay the \$10,000.”

Without valid PVT data, there is no mechanism to differentiate feigned from legitimate disability, which disproportionately benefits the wealthy.

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### Detriment to Society Impact to the Medical Care System

When determining extent and veracity of medical symptoms (e.g., for pain, ADHD, etc.)

- If test takers learn of the assessment methods that document whether reports of medical symptoms are valid,
  - they could learn to “game” the tests, thereby allowing them to obtain medications (such as opiates and stimulants) to which they should not have access

**FAKING OUT PARENTS**

1. Fake a Stomach Cramp
2. Moan and Wail
3. Lick Palms



### The Art & Science of Gaming the System

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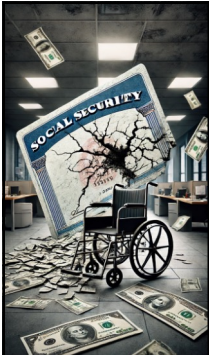
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### Detriment to Society

#### Impact to Public & Private Services & Resources

- Social Security Disability program: cost of feigned mental disorders as of 2011 = \$20 billion (Chafetz & Underhill, 2013)
- Motor vehicle injury costs submitted to insurers: 34% to 40% were "excessive," and added \$13-\$16 billion to the country's total automobile insurance bill, which is an average of \$100 per individual policy; excess claims were also associated with \$4 billion in additional health care utilization (The Rand Corporation; Carroll et al., 1996)
- Workers' Compensation fraud: \$30 billion annually in US (California Department of Insurance)

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### PVTS – Central to Test Security

Establishing Accurate Effort  
Value of Expert Testimony

- Sensitivity, Specificity, Base Rates
- Limitations
  - Nature of cutoff scores & adjustments
  - Use of multiple PVTs
  - Influence of culture, age and other demographic factors



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### The Importance of Test Security

Neuropsychological and psychological testing, particularly when performance and symptom validity tests are included

- are able to accurately measure actual cognitive ability and psychiatric symptoms, and to detect when individuals are misrepresenting the extent of cognitive and psychiatric dysfunction
- When tests are compromised, the ability to detect actual and feigned conditions markedly declines, at a substantial cost to society and citizens.



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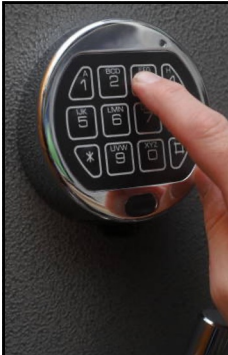
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**THUS,**

it is essential that psychological and neuropsychological test security **be tightly maintained**

- so that the tests continue to provide the critical information they are designed and validated to measure
- And **ensure the public safety.**

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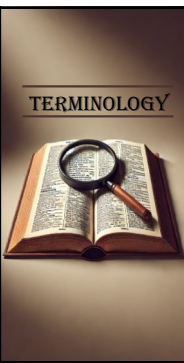
**Terminology:**

1) “Tests”:

- This category refers to actual tests (e.g. test booklets and stimuli, computerized methods of test administration) and test manuals

**Contain protected test information**

\*Boone et al., 2024. Attorney demands for protected psychological test information: Is access necessary for cross examination or does it lead to misinformation? An interorganizational<sup>®</sup> position paper. The Clinical Neuropsychologist, 38(4), 889-906.



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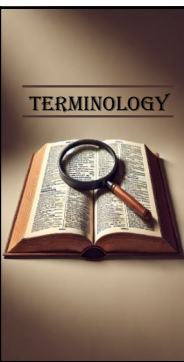
**What are “Test Data”?**

2) “Raw test data”:

- Actual forms onto which an examinee’s responses and time to complete answers are recorded
- Any recordings of test procedures

**Contains protected test information**

\*Boone et al., 2024. Attorney demands for protected psychological test information: Is access necessary for cross examination or does it lead to misinformation? An interorganizational<sup>®</sup> position paper. The Clinical Neuropsychologist, 38(4), 889-906.



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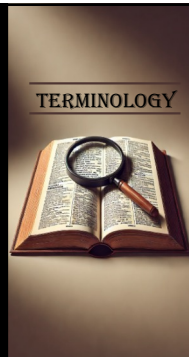


## What are “Test Data”?

### 2) “Protected test data”

- includes raw test data, and
- narrative reports and score summaries provided by test publishers based on raw test data input

Contains protected test information



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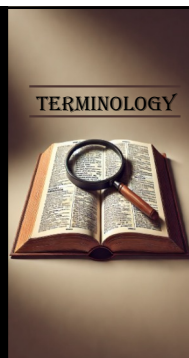
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## What are “Test Data”?

### 3) “Test data” includes

- Raw and protected test data, and
- Numerical data (raw scores, percentiles, scaled scales, z-scores, and T-scores)
- Numerical data do not contain protected test information and are included in neuropsychological reports per recommended report writing guidelines (Tzotzoli, 2012)



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Coaching Clients to Take Psychological and Neuropsychological Tests:  
A Clash of Ethical Obligations

Tara L. Victor  
Michigan State University and Veterans Affairs Hospital,  
Westland, Michigan

Norman Abeles  
Michigan State University

The coaching of clients to take psychological tests is the subject of a disability litigation case that raises issues for the practice of psychological assessment. The reported literature addresses the ethical implications of psychological assessment in the field of disability litigation. The author argues that the field of assessment psychology might deal with this challenge. This review highlights the ethical implications of psychological assessment in the field of disability litigation.

1992), Wetter and Corrigan (1995) pointed out that “attorneys’ beliefs about their responsibilities in this area reflect . . . [their own] ethical obligation to act as zealous and diligent advocates for their clients” (p. 476). Likewise, Youngjohn (1995) also noted that

Randy’s Trucking, The Collective Statement and the Test Security Toolkit

# PART 2

**Norman Abeles, PhD, awarded 2025 Presidential Citation**

Norman Abeles, PhD, had an illustrious career in psychology, significantly contributing to the field and the American Psychological Association (APA). His dedication to advancing public awareness of psychology and applying psychological principles to social issues is commendable. Having overcome numerous challenges, including APA membership in 1997, he was instrumental in the establishment of a continuing APA Committee on Aging and the development of the APA Guidelines for the Evaluation of Dementia and Age-Related Cognitive Decline.

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Randy's Trucking:Essential Case Details

Retained in October 2021: MVA which plaintiff alleged occurred when tractor-trailer rear-ended the school bus she was driving Plaintiff sued the driver of the truck and his employer, Randy's Trucking company

Claimed Damages: severe TBI and emotional distress

Step 1: November 2021: Motion to Compel Defense IME: included declaration regarding scope of examination and test security conditions

December 2021: Declaration on importance of Test Security Harmful effects to public safety (pilots, physicians, etc)

- a. Harmful effects to tests themselves
- b. CA Code of Regulations, Title 16, Division 13.1, Article 8, section 1336.3
- c. Position Papers
- d. Standards for Educational and Psychological Testing
- e. APA Ethical Standards
- f. "Obvious solution" → forward to licensed psychology expert
- g. "Allowing nonpsychologists to receive protected test materials,...poses a serious threat of widespread social harm...."



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Randy's Trucking:Essential Case Details

January to March 2022: Correspondence re: Test Security  
*Carpenter v. Yamaha Motors (2006)*

- left open the option that professional ethical obligations could preclude disclosure of test materials

Many months of "meeting and conferring" - no agreement

June 2022: Trial court ordered:

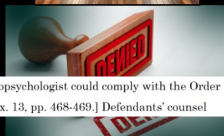
- a. Plaintiff to undergo neuropsychological evaluation and
- b. Plaintiff's attorney would receive all raw test data and audio recording of testing under a limited protective order

Received new MTC .....and recused myself from the case.

Step 2: Defense Counsel appealed this decision with a Motion for Reconsideration with "new facts" (i.e., my recusal)

Argument: Trial court order deprives defense from retaining a neuropsychological expert which renders them powerless to fight against TBI claim. Two other experts in the LA area also declined to take the case under these conditions.

Motion denied by the trial court: There defendants would not be able to retain a neuropsychology expert who would comply that "no licensed neuropsychologist could comply with the Order as written." [2 App., Ex. 13, pp. 468-469.] Defendants' counsel



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## Randy's Trucking: Essential Case Details

Step 3: Defense filed a **writ mandate with the appellate court** on the basis of not having a fair opportunity to litigate their case

- Appellate court found **in its discretion** to release raw data.
- This was based on **the evidence**.

\*\*\*Randy's Trucking is **not legally binding**.\*\*\*

*Roe v. Superior Court*, 243 Cal. App. 4th 138, 196 Cal. Rptr. 3d 317 (2015) - at a minimum *Roe* clarifies that the trial court is **not required** to order the production of test materials or test data under section 2032.610 (a) (1). "Results of all tests made" does not = written test materials

Writ

DEAL DECLARATION OF DR. GEORGE K. HENRY & DAVID LECHUGA

We, Drs. GEORGE K. HENRY & DAVID M. LECHUGA hereby declare the following:

1. We are over the age of eighteen and have personal knowledge of the facts set forth herein, except as to those stated on information and belief, and as to those, we are informed and believe them to be true. If called as a witness, we could and would competently testify to the matters stated herein.
2. We are board certified clinical neuropsychologists and professional psychologists. We are licensed to practice psychology in California. We specialize in clinical and forensic neuropsychology. Our curricula vitae are attached to this declaration as Exhibit 1.

or authority

"Legally binding" means that a contract, agreement, or document is enforceable by law, meaning the parties involved must abide by its terms, and failure to do so can result in legal consequences. If

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## Plaintiff's Argument

- We have a **right to take discovery** and **cross-examine** defendant's expert witnesses
- **Without the raw data and audio recording**, we can't do this effectively
  - How was the data collected?
  - Were there any discrepancies?
  - We need this to effectively cross-examine her and to determine the reasons for her opinion
- Will help **protect against abuse and disputes** over what transpired during the exam (as explained in *Goffland* which is the purpose of the audiotape)



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## Defense Argument

- Plaintiff's **attorneys cannot interpret test materials** and they do not need to do this for cross-examination
- It is **sufficient to transmit raw data and audio recording** to plaintiff's retained **licensed psychology expert**
- A protective order (**PO**) is **insufficient** to protect test security
  - POs do not erase knowledge an attorney may acquire which can be used to educate future clients about the test
  - The harm caused by a single violation of a PO outweighs the necessity of providing test materials to nonpsychologist



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## Randy's Protective Order

Allowed for "raw data, test materials, and other medically private information" to be disclosed to:

1. Plaintiff's counsel
2. Defense Counsel
3. All experts, consultants and employees of the respective firms
4. "Trier of fact at the time of trial, or such other time as may be necessary..."

### Randy's Protective Order

"Such raw data, test materials and other medically private information may be disclosed to plaintiff's counsel, defense counsel and all experts, consultants and employees of the respective firms for use in the case. Such disclosure and disclosure may be deemed to be in the best interest of justice and necessary for the adjudication of the above-captioned matter."

"These materials may be used for the medical purposes, may not be disseminated to any other party without prior written consent of the court, and all reasonable steps to maintain the confidentiality of the above-captioned materials."

"The order further requires the parties to 'protect the above-captioned materials and the contents of the same in accordance with the provisions of the California Rules of Professional Conduct.'"



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## Plaintiff's Argument

- We **shouldn't be forced to** prematurely retain and **disclose an expert** to gain access to raw test data and test materials
- Even if we did, the expert can only assist the attorney in preparing for cross-examination
- To prepare and conduct an effective cross-examination, **the attorney must themselves possess more than a secondhand understanding of the information being scrutinized**



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## Defense Argument

- We are **left without the means to evaluate** or defend **the claims** of damage
  - Introduced **declarations** explaining their conversations with other **neuropsychologists**
  - Given the MFC has to be filed within 10 days, the trial court acted **unreasonably to require a canvas in that time period**
- Asserted the **AACN position paper** discussed potential consequences if test materials became public (e.g., coaching, destroy validity of test)
- Plaintiff is entitled to the detailed written report (2032.610 subd. (a)(1)), **but this statute is limited** and does not include production of raw data or audio recording so Plaintiff's can't demand production of these nor can the trial court order their production



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## Summary of Decisions

### Trial court:

- Denied Motion to Reconsider based on new evidence (my request)
- The two additional experts who refused to do the exam under the court's existing order was "hardly a canvas."

### Appellate court:

- Will not consider evidence not presented to trial court
- There is no evidence that attorneys regularly violate POs. Defendants have not shown there is substantial risk of abusive intentional dissemination or an unacceptable risk of inadvertent disclosure to make the trial court find a PO would not adequately address my concerns about test security
- The trial court did not abuse its discretionary privilege to order release of raw data to nonpsychologist.



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## What did we learn?

Trial courts have a **broad discretion** in deciding discovery disputes

...trial court retains "authority to control discovery, including its right to issue, modify, or vacate protective orders."

(Mercury Interactive Corp. v. Kline (2007) 158 Cal.App.4th 60, 106.)

Attorney framing needs to include evidence that providing test materials will create hardship for:

- the **tests themselves**
- the **expert** in terms of ethical and professional obligations
- To **counsel** trying to retain an expert
- The **practice of law**
- To **society** at large



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## What did we learn?

Present to the **trial court**:

- Declaration on test security with reference to **APA ethical standards**
- Explain why protective order (PO) would not be adequately protective
- Explain, why ethical obligations would be violated if court ordered you to disclose test materials subject to a PO
- Show a "**canvas**" of neuropsychologists would not agree to these conditions

\*\*Include all original sources



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## What did we learn?

Importance of **advocacy efforts**

- Must differentiate work as **advocate** for field while serving as forensic expert
- In line with proposed **advocacy competence** associated with upcoming Minnesota Conference guidelines
- **Involvement** in state psychological associations
- Through our practice **we are shaping our professional activities and concerns at the state/local level**



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## What did we learn?

APA ethical standards

- **9.11 (Maintain Test Security)**: "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**."

Plaintiff: This standard doesn't require a psychologist to defy a court order and releasing test materials subject to a protective order satisfies 9.11 and CA Code because Plaintiff is a person "with interests who will safeguard their use." (CA Code Regs, title 16, 1309.30)

**"So the question is: What does 'reasonable' mean?"**



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## What did we learn?

APA **Introduction** to the Ethics Code

- Among many other important points (e.g., the ethical standards are not exhaustive and may vary by context), it also discusses how to interpret the ethics code and defines modifiers and key terms
- e.g. "**reasonable**" used in 9.11 = "**the prevailing professional judgment of psychologists engaged in similar activities in similar circumstances, given the knowledge the psychologist had or should have had at the time.**"



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## What did we learn?

### APA ethical standards

- 9.04 (Release of Test Data) allows for the release of "test data" which is defined as "raw and scaled scores, ...responses to questions or stimuli, ...notes and recordings, ..." pursuant to client/patient release. In the absence of release, "psychologists provide test data only as required by law or court order."

Plaintiff: So standard not violated when court orders release of test data

### In Randy's:

- I was being asked to perform an examination knowing in advance the test materials would be handed over to a nonpsychologist.
- Not whether or not I should obey a court order to produce the data from an exam I already conducted.

9.04 actually doesn't address this particular situation (forensic context in which exam has not yet taken place).



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## What did we learn?

### APA ethical standards

- 9.07 (Assessment by unqualified persons): prohibits unqualified individuals from using psychological assessment techniques except when doing so is for the purpose of training the individual and the individuals is provided with appropriate supervision.
- Not considered by the court; we are not permitted to promote scoring, interpreting tests by attorneys



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## What did we learn?

### AACN 2022 Position Paper on Test Security

Alternative to, and/or in addition to, use of protective orders, some practitioners may opt for other methods of maintaining test security, such as when faced with attorney demands for access to audio recordings of testing and test data sheets that show questions and answers, they proactively adjust test batteries and materials to protect tests. For example, when under a judge's order to allow audio

When faced with a judicial order that a neuropsychologist believes undermines test security, the practitioner can choose to withdraw from the case, and can also opt to document, through canvassing of other local neuropsychologists, that the broader neuropsychology community refuses to conduct exams under invasive parameters that threaten the validity of the assessment process. This latter action may



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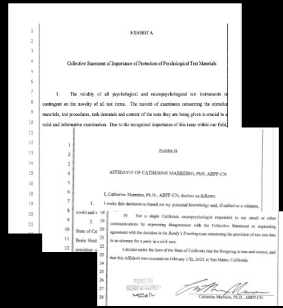
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## A Canvas: The Collective Statement

In August/September of 2023, Dr. Cat Marreiro drafted the Collective Statement:

- Identified board-certified neuropsychologists who practice in the state of CA through three online directories: ABPP-CN, ABN, ABPPdN
- Personally emailed every individual identified, inviting them to sign (Fall 2023)
- Nonresponders:
  - Repeat emails
  - LinkedIn
  - Emails from other signers
  - Verified active license through CA BOD
- Process updated Fall 2023/Spring 2024 with new ABPP members
- Invited non-boarded neuropsychologists to sign by posting on national listservs and direct emails



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## A Canvas: The Collective Statement

ABPP: 134/141 (95%)

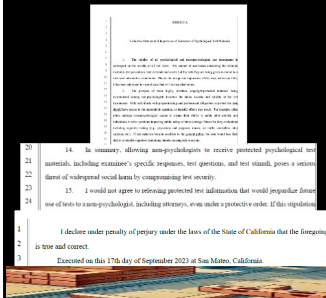
ABN: 28/ ~36

ABPPdN: 8/16

Neuropsychologists Without Board Certification: 107 Signers

Total: 269

Conclusion: Professional Prevailing Opinion Has Been Established.



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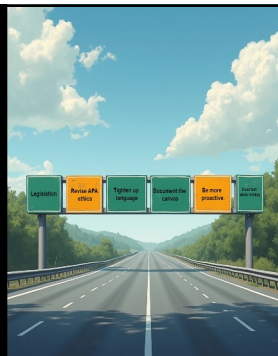
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## Reframing Randy's: A Roadmap

- Legislation - codified expert-to-expert limitation on the transmission of raw test data and audiorecording of testing
- Revise APA ethics code
- Tighten up language of test publishers
- Document the canvas
- Take a more proactive role at the legal level



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## Reframing *Randy's*: How psychologists can lay the **foundation** for the trial court

- **Proactive Role** at legal level from the beginning
  - Be vigilant to ensure attorney is expressing the nature of the problem correctly
  - Ensure the evidence includes all necessary exhibits (APA ethics code, position papers, statements from test publishers, Collective Statement of CA Psychologists)
- Ensure declarations and motions filed address:
  - Impact on **professional ethics**; explain why the standards are violated by agreeing to perform an exam under these conditions
  - Impact on **society**
  - **Counter claims** that attorneys need our test materials to effectively cross-examine experts
  - Why **protective orders are insufficient** safeguards



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## Test Security **Legal** Toolkit: What's In It?



- Also includes:  
Dr. M's Declaration Materials including 15 exhibits:
- Her Affidavit and CV
  - **Publisher's Qualification Guidelines - Pearson, WPS, PAR**
  - Other relevant publications
    - Release of Protected Test Information under Protective Order: *Veritas Solutions vs. Henry Rodriguez*. An Interorganizational Position Paper (Baker et al., 2020)
    - Attorney Requests for protected psychological test information: Do courts necessarily find some examinations or data to be in the public domain? An Interorganizational Position Paper (Baker et al., 2020)
    - Update on third party observers in neuropsychological evaluation: An Interorganizational position paper (Baker et al., 2020)
    - WPS Statement of Test Security (Signed by Chief Operating Officer, David Burdette, PhD, March, Western Inc. 2019)
  - **Position Statements on Test Security**
    - Official position statement of the American Academy of Clinical Neuropsychology on test security (Baker et al., 2020)
    - Test Security: Official Position Statement of the National Academy of Neuropsychology (The NAN Policy and Planning Committee, 2019)
    - Test Security: An Update. Official Statement of the National Academy of Neuropsychology (The NAN Policy and Planning Committee, 2020)

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## Test Security **Legal** Toolkit: How Do I Use It?

Can and should be shared with attorney **at the start of a case**. On the initial call:

- Are you familiar with *Randy's Trucking*?
- If not, describe the case and initial goal
- If can't reach agreement on test security conditions then they need to go to court and get the judge to rule on the issue
  - Provide test security legal toolkit and describe what it includes
- If the judge rules against test security then we move to alternative methods



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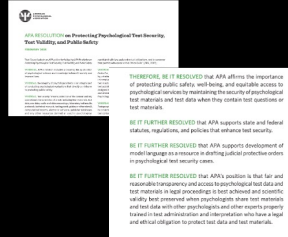
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## What other authoritative sources can we use in defending test security?

- Standards for Educational and Psychological Testing (*American Educational Research Association et al., 1999, Standard 5.7, and 2014, Standards 10.10 and 10.18*)
- Statement on the Use of Secure Psychological Tests in the Education of Graduate and Undergraduate Psychology Students (*American Psychological Association Committee on Psychological Tests and Assessment, 1994*)
- International Test Commission (2014) Guidelines on the Security of Tests, Examinations, and Other Assessments
- The National Association of School Psychologists (2000)



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## Post-Randy's

With Collective Statement  
Majority have ruled in favor of test security  
Multiple post-Randy's decisions siding in favor of test security

1. *NE Johnson Associates, LP v. Milwaukee v. County of Milwaukee*
2. *Miller et al. v. Performance Transportation, LLC*
3. *Monaghan et al. v. Charter Communications, Inc. et al.*
4. *Boehm v. Trivadis*
5. *Gerritsen et al. v. Young's Logistics, Inc.*
6. *Palmer v. CNA Insurance Corp.*
7. *Lindner v. Bailey Heavy Equipment Hauling*
8. *Madison v. City of Villard*
9. *Madison v. City of Villard*
10. *Madison v. City of Villard*
11. *Madison v. City of Villard*
12. *Madison v. City of Villard*

The issue remains **AT THE DISCRETION** of the trial court. In other words, this issue will continue to be decided on a case-by-case basis and the key is what is submitted to the trial court as **foundation**.



because the factual record differs materially, that a different outcome is appropriate in this case.

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Protective Orders, Decision-Tree and Methods of Redaction: Threading The Needle

## PART 3

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## BALANCING DISCOVERY RIGHTS

Claims that attorneys need our protected test information to cross-examine us is a

**“false” argument**

Bonne et al. (2021). Attorney demands for protected psychological test information: Is access necessary for cross-examination or does it lead to misinformation? An interorganizational position paper. The Clinical Neuropsychologist, 36(1), 889-906.



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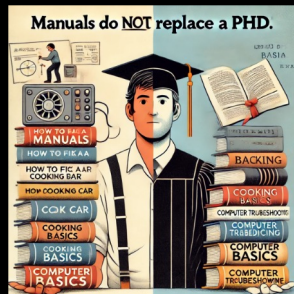
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## “First-hand” knowledge is over-rated by the court

Attorneys do have not the training and expertise to accurately identify administration, scoring or interpretation errors

- **Instead they introduce misinformation when they attempt to craft cross examination questions**



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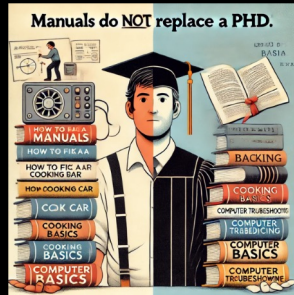
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## “First-hand” knowledge is over-rated by the court

### SCORING EXAMPLE: WAIS-IV VOCABULARY

While the manual provides examples of 0, and 1- and 2-point responses,

- **formal training in testing guides understanding the distinction between score categories and in accurately selecting the correct score for each item**



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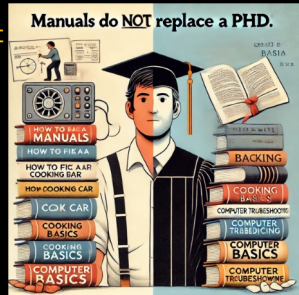
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## "First-hand" knowledge is over-rated by the court

Items are not interpreted in isolation, but rather the total score, converted to a "scaled score" adjusted for age and potentially other demographic factors, such as education

Neuropsychologists keep abreast of peer-reviewed literature

guides interpretation such as consideration of the impact of English-as-a-second language status on ability to define vocabulary items in English



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## "First-hand" knowledge is over-rated by the court

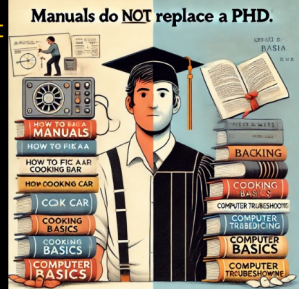
Attorneys may claim they need a description of actual test procedures and stimuli to understand the "foundation" of our opinions

"How can I evaluate your methods if I don't know what you asked my client to do?"

### Analogy of "shoe-tying" PVT

Hearing the test instructions gives no information as to the accuracy and effectiveness of the test. Instead, Daubert criteria provide means for evaluating the technique:

- Standardized instructions
- Real world validation
- Peer-reviewed and published
- In common use
- Known error rate (test classification statistics)



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Attorneys who have accessed protected materials from MMPI instruments (manuals, test items, and narrative score reports), have asked the following type of question:

- "Isn't presence of 'X' an item on FBS (physical and/or cognitive symptom over-reporting scale)? Because my client said that he has the physical symptom 'X,' he gets a point on this scale that says that he is lying?"

Examining individual items in isolation is like coming to conclusions regarding the final picture of a jigsaw puzzle based on one piece

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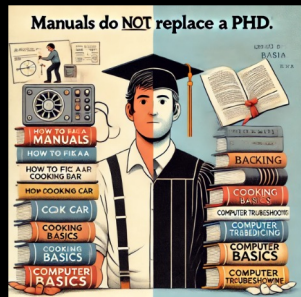
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If you were a party in a lawsuit

Would you want your attorney analyzing and critiquing psychological and neuropsychological test data, or an expert?



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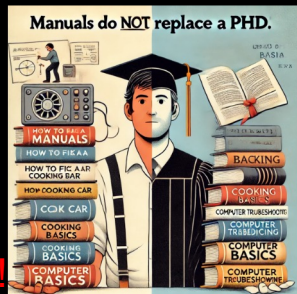
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As an analogy:

Neuropsychologist: 4 years of graduate training plus ≥2 years of post-doctoral training specifically in neuropsychological assessment

Would it be appropriate for you to be handed test data sheets on day 1 of clinical psychology graduate program, and told to analyze and interpret them, with your interpretations then inserted into questions in a trial?

**This is ludicrous!**  
Our Mantra:



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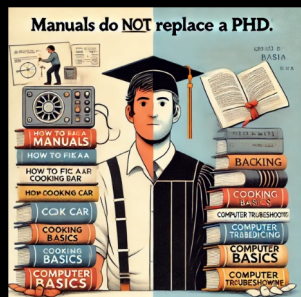
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To Be Clear:

Attorney demands for our protected test materials are a **direct assault** on the value of neuropsychologists' extensive training and acquired expertise in objective assessment



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[illegible]

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## 2) The fox is guarding the hen house

- Perceived **Ethical Obligation** to future clients
  - Attorneys view it as their obligation to inform/coach clients regarding psychological tests and exams (Essig et al., 2003; Spengler et al., 2020; Wetter & Corrigan, 1995; see Boone et al., 2022, for further discussion)
- Attorneys have a **Financial Conflict**
  - Dramatic increase in the value of a case if clients can be coached to successfully feign brain injury over and above other claimed injuries
    - Orthopedic case can increase from \$100,000 to a million if converted to a brain injury case

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## 2) The fox is guarding the hen house

- Releasing test materials to attorneys is analogous **turning over trade secrets to a competitor**
- Protective orders are to protect confidential information for those who are party to a lawsuit
  - With the assumption and expectation that the attorneys in the case have no financial investment or interest in the materials protected
    - But test materials can be used to coach future clients on how to present symptoms and conditions they do not truly have
  - Protective orders were never intended to govern the behavior of attorneys who have a financial interest in not complying with the order

**This is ludicrous!**

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## 3) Destruction of value

Greater potential damage compared with other "trade secrets"

- DNA example: breach of DNA techniques does not compromise the techniques themselves
  - The company may face a financial cost due to dissemination of trade secret, but the validity of the methods remains intact
  - I.e., one cannot "study up" for a DNA test
- Dissemination of protected neuropsychological testing has the potential to
  - invalidate the scientific validity of testing by allowing potential test takers to "study up" on the released tests,
  - thereby **fundamentally altering the accuracy of the test results**

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### 3) Destruction of value

No "stockpile" of back up tests  
to replace tests destroyed by test security breaches

How does society then determine  
If workers are cognitively and psychologically capable to carry out job tasks involving public safety?

Make fair and accurate judicial decisions?  
Make fair and accurate determinations regarding need for ? academic accommodation

Does society instead use tea leaves?  
Tarot cards? Palm readings?  
Flip a coin?

**This is ludicrous!**

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### 4) Protective orders are not adequately enforced

- Protective "orders have been abused occasionally and perhaps even regularly." (Childs, 2007, p. 567)
- Per Randy's Trucking, "there is no evidence that attorneys regularly violate protective orders"
  - But Plaintiff provided no evidence that protective orders are adequately enforced or even monitored
  - The courts do not track details of protective orders or their enforcement
- **Absence of evidence is not evidence of absence**
- The California Psychological Association in July of 2023 issued a "Statement of Concern"
  - "Protective orders from the Court, while important, are often loosely enforced and do not eliminate the potential compromise of test materials."

**This is ludicrous!**

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### 5) Protective orders may be challenged long after the case at issue has been concluded

- Hotchkiss and Fleming (2004) note that a "protective order [...] does not guarantee that those documents will be protected from public dissemination for all time. Protective orders increasingly are being challenged and modified or vacated during the course of litigation – even years after the underlying action is resolved" (p. 161).

there is no true end to the risk to tests once they are released under protective order

**This is ludicrous!**

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### 5) Protective orders may be challenged long after the case at issue has been concluded

- If a neuropsychologist releases protected test information 10 times per year under protective order
  - That psychologist would be involved in 100 protective orders over 10 years
  - Is the expectation that this psychologist is to track the status of these protective orders on an ongoing basis with more added with each year of practice?
  - We are not a party to the lawsuits in which we are retained, and therefore none of the attorneys represent us or our tests
- We would literally be on our own in terms of any ongoing monitoring of protective orders

**This is ludicrous!**




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### 6) The sheer number of requested protective orders virtually guarantees breaches

- In a survey of 1677 U.S. clinical neuropsychologists (Sweet et al., 2021), more than half reported engaging in forensic practice
  - If each has 10 cases per year in which protected test materials are placed under protective order = 8000+ protective orders/yr
- Further, the protective orders would be covering the same finite set of test materials
  - In other words, the same test information would be released over and over, thereby allowing for multiple repeated chances that the information will be breached
- In contrast, protective orders were intended for confidential information specific to a particular case on a one-time basis

**This is ludicrous!**




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### 6) The sheer number of requested protective orders virtually guarantees breaches

- Even inadvertent breaches of protective orders would become routine given this volume of protective orders
- It was never anticipated by, nor would it be acceptable to,
  - test publishers
  - the APA ethics code
  - authors of state regulations
- that release of protected test information to non-psychologists under protective order would occur in thousands of cases per year




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### 7) Access to Protected Test Information under Protective Orders Extends Well Beyond Attorneys

- Paralegals, office staff, consultants, and other experts involved in a case all would have access to protected test information
  - In other words, upwards of 30 or more individuals would be given direct access to test materials under protective order in each case
  - Assuming at least 100,000 personal injury cases are filed per year in the US (per US District Courts – Judicial Business 2021),
    - if 10% involve psychological and/or neuropsychological testing, this would result in upwards of 300,000 non-psychologists being given direct access to test materials each year
- Sanctions would not likely apply to these individuals

**This is ludicrous!**

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### 8) Sanctions for Protective Order Breaches are rare and typically minor

- Childs (2007) observed that "Historically, violations of protective orders have been a relatively low priority for the courts; the people involved receive minor or no sanctions for their actions" (p. 567)
- Legal literature appears to show that sanctions for violations of protective orders involve paying of attorney's fees for the side sustaining the protective order breach, or at worst, dismissal of the case (see Bishop, 2015; Fitzsimmons, 2013)
  - None of these punishments appear to have applicability regarding release of, and thereby damage to, the tools of psychologists/neuropsychologists who are not parties in litigated cases
  - Any sanctions are likely to be viewed as the 'cost of doing business'

**This is ludicrous!**



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### Information gained can be misused without a violation of a protective order

- When non-psychologists are able to view
  - tests
  - administration
  - scoring
  - interpretation procedures
- It is highly likely that they will recall a substantial amount of the information (and they can supplement their recall if they write down information after they view the materials)
- An attorney could abide by a protective order but still use acquired knowledge of the tests to prepare and coach a future client

**This is ludicrous!**

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## Conclusion:



- Psychologists and neuropsychologists **cannot** release protected test information under protective order
  - If we want to protect the profession of psychological and neuropsychological assessment

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## Decision Tree

### Steps to Take when an Opposing Attorney Requests Protected Test Data and Tests

Neuropsychologists need to adopt a "new stance" vis a vis the court system



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### "Decision Tree:" Step 1

You are asked to potentially serve as an expert on a medical-legal case

- Send your **retention letter** (*see sample*) that addresses test security, to be signed by retaining counsel
  - To ensure that retaining parties are well aware of your concerns and policies in this area prior to retention
    - Your retention letter is your "contract"



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Section from sample retention letter:

Psychological Test Security:

"Dr. \_\_\_\_\_'s examinations involve standardized administration of objective and validated psychological and neuropsychological assessment procedures whose effectiveness is compromised when the protected test questions are released to non-psychologists. The publishers of the neuropsychological exam questions and answers and other materials divulging test questions and answers, consider them to be trade secrets as defined in Cal. Civ. Code, § 3426.1 and it is Dr. \_\_\_\_\_'s practice to respect and comply with this position. Release of such protected psychological test information is also listed as a violation of the Ethical Principles of Psychologists and Code of Conduct ("Ethics Code") promulgated by the American Psychological Association, and would be in violation of the Test Security position statement issued by the American Academy of Clinical Neuropsychology (AACN) in 2022...."

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"In recognition of the importance of test security and adherence to standardized test administration procedures, pursuant to *Goffland Entertainment Centers, Inc. v. Superior Court of San Joaquin County*, 108 Cal.App. 4th 739 (2003), no videotaping or third-party observation (by any person, including but not limited to attorneys and court reporters) is allowed in connection with any forensic neuropsychological evaluation. Opposing parties have a right to have evaluations audiorecorded, but release of these audio recordings to non-psychologists conflicts with the AACN (2022) Test Security position statement (because protected test questions are contained on the audio recordings)."

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".....The best method for balancing an opposing party's right to an audio recording of the exam (if requested) and the mandated protection of psychological tests, is for plaintiff to record the interview (as will Dr. \_\_\_\_\_), and for Dr. \_\_\_\_\_ to conduct separate audiorecording of the testing portion of the exam, and to subsequently convey via dropbox file link, the audiorecording to the opposing party's retained licensed psychologist expert. For the same test security reasons, copies of the psychological test answer sheets completed by Dr. \_\_\_\_\_ during examination of opposing parties shall only be sent directly to the opposing party's retained licensed psychologist expert. Dr. \_\_\_\_\_ requests that her retaining party and/or attorney consult with her regarding discussions with opposing party's counsel relating to how Dr. \_\_\_\_\_'s neuropsychological exam of the opposing party is to be conducted. Dr. \_\_\_\_\_ should be provided with any and all responses from opposing party's counsel regarding her retaining party and/or attorney's Demand for Neuropsychological Evaluation of the opposing party...."

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*"To the extent that demands are made for test materials that violate Dr. \_\_\_\_\_'s professional obligations and responsibilities regarding test security, with Dr. \_\_\_\_\_'s compliance ordered by the court, this retention letter will be considered null and void, and Dr. \_\_\_\_\_ will have the option of withdrawing from the case."*

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## **"Decision Tree:" Step 2**

You are then retained as an expert and asked to conduct an exam

- 1) Provide **sample language** (see **sample**) for the demand for IME which
  - Explains your policy of releasing protected test information only to licensed psychologists
- 2) provide **sample stipulations** and/or **sample protective orders** (see **samples**) to be signed by both counsel (and, in the case of the latter, a judge)
  - to preclude post-exam demand/orders to release protected materials



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## **Sample IME language:**

*Pursuant to *Golfland Entertainment Centers, Inc. v. Super. Ct.*, 108 Cal. App. 4th 739 (2003), no videotaping or third-party observation (by any person, including but not limited to attorneys and court reporters) will be allowed in connection with the examination. Plaintiff may audio-record the interview, but only Dr. \_\_\_\_\_ will audio-record the testing portion of the examination and she will subsequently convey the audio-recording directly to Plaintiff's retained licensed psychologist expert only, in order to ensure compliance with position papers issued by neuropsychological organizations which prohibit the release of certain protected psychological test information to non-psychologists. Likewise, and for the same test security and protection reasons, copies of the psychological test data sheets used to document Plaintiff's test performance can only be forwarded to plaintiff's retained, licensed psychologist expert."*

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## “Decision Tree:” Step 3

- 3) Opposing counsel refuses to participate in stipulation or protective order, and demands conditions that compromise test security
- You respond to your client that you cannot comply with these demands
  - You offer to provide the protected test information to the opposing retained licensed psychologist expert.
  - But if not agreed to by opposing counsel
    - request retaining counsel to have the judge rule on the matter, and you provide a declaration/affidavit as to test security issues that includes position papers, the California Collective Statement, and other published authoritative information
    - you can offer to be available to testify in judicial hearings on the matter



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## “Decision Tree:” Step 4a

Opposing counsel refuses to adjust their demands, and the judge rules that you are to turn over protected test information; your options include

- If the demand is for **actual tests and/or manuals**
  - Withdraw from the case, or
  - Testify based on record review (and potentially interview of plaintiff)
    - You have much on which to testify regardless as to whether you conduct an exam (e.g., >80% of testimony does not relate to your exam)
      - For the opinions I am offering, I did not need to conduct an exam
- Serve as a non-testifying consultant



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## “Decision Tree:” Step 4b

If the demand is for **test data sheets**, you have the above options, or

- Use redacted test forms in which protected psychological test information is removed (release under “protective order”)
  - WPS statement on test security
- Consider using such forms routinely
- If we turn over redacted test data sheets to attorneys, we provide no additional information
  - E.g., no “tutorial” on test administration, scoring, interpretation



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## Removing Protected Test information from test forms

- Redacting existing forms (see statement by WPS)
- Reconfiguring forms: RAVLT
- Creating carbonless forms: Trailmaking and Rey 15-item recognition
- Use of sheet protectors
  - insert test forms into plastic sheet protectors, then use a "sharpie" to write information (onto the sheet protector), then remove the test form and replace with blank page, and xerox

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	Trial 1	Trial 2	Trial 3	Trial 4	Trial 5	B		Trial 7	Trial 8
de						de	de		
cu						ca	cu		
ba						bi	ba		
co						sh	co		
ac						st	ac		
pa						mn	pa		
mo						al	mo		
ga						to	ga		
ba						cl	ba		
fa						bu	fa		
no						la	no		
ba						an	ba		
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ho						ch	ho		
di						ti	di		
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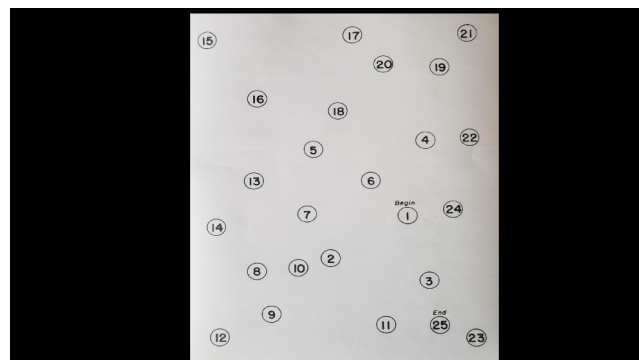
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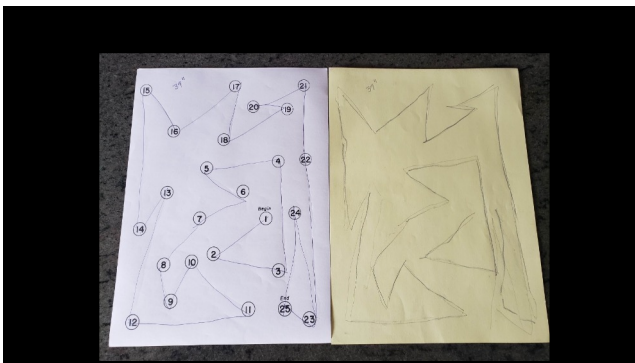
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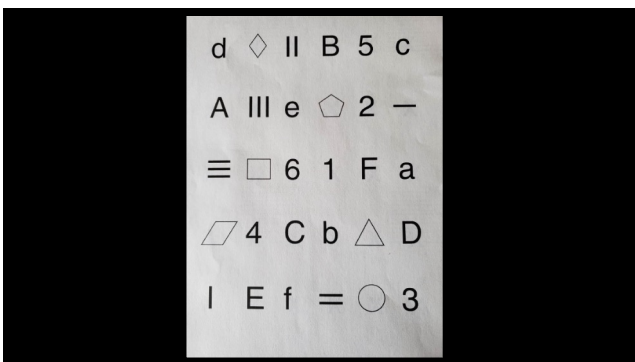
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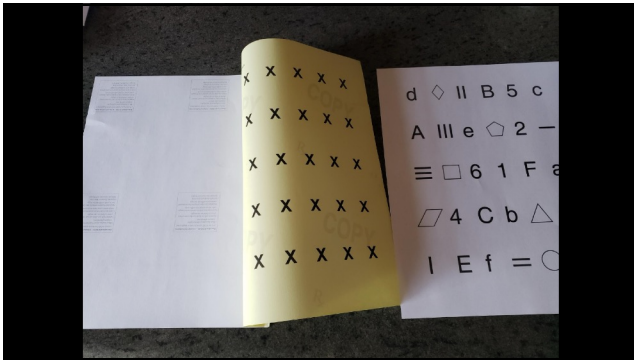
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- *It is also preferable that test booklets and forms visible to examinees contain no test names*
  - If they have "studied up" on tests ahead of time, if they do not know what tests are being administered when
    - Harder to implement their learned strategies

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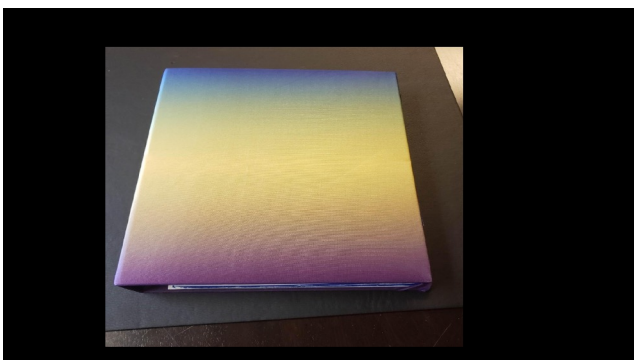
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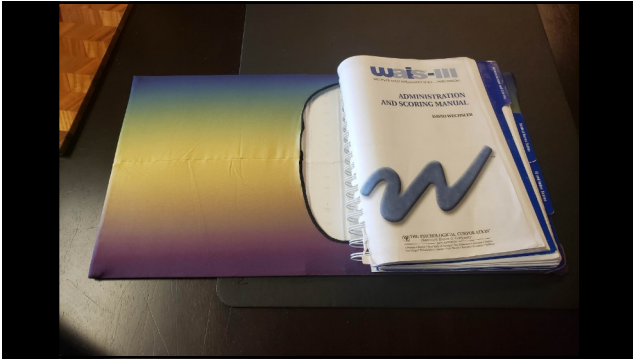
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**“Decision Tree:”  
Step 4c**

If the demand is for *audio recordings of testing*, you have the above options in 4a, or

- Agree to release the recordings but only administer tests not harmed (or minimally harmed) by turning over audio recordings to nonpsychologists
  - e.g., tests with solely visual stimuli, personality testing, self- and/or computer administered cognitive tests
- In your report describe how your exam was adjusted to concurrently meet the conditions placed on your exam while also maintaining test security
- Be prepared for attacks on your opinions (e.g., “a non-comprehensive battery was administered”, but point out that you measured virtually all cognitive domains, and have adequate data for your opinions)

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**“Decision Tree:”  
Step 4d**



If the demand is for *videorecording of testing*

- Video recording is not permitted in California per the Golfland ruling

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## “Decision Tree:” Step 5



- You receive notice days or hours in advance of an IME of a *planned recording of testing*
- Notify your client immediately, indicating that this conflicts with your retention letter and executed pre-exam stipulation or protective order
  - Ask for judicial ruling (and if ruled against)
    - If you wish to proceed with the exam, use a “visual” test battery

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## “Decision Tree:” Step 6

- *After the exam*, which you conducted with the understanding that test security would be maintained, opposing counsel *demand tests, test data sheets and narrative/summary test score reports, and/or recordings of the exam*, your options include
  - Offer to provide the materials to the opposing licensed psychologist expert
- If that option is rejected
  - Obtain a judicial ruling

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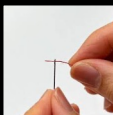
106

When demands are made for our protected test materials

- True “**agenda**” is to get us to withdraw because our test data are so compelling

In a recent case in which opposing attorneys indicated that they needed my test data sheets in order to depose me, I provided redacted forms

- What do you think happened.....
  - No questions were asked about the test data sheets (so demand for them was a “red herring”)



**Punchline:** We are going to “**thread the needle**” and continue to provide our critical information while also protecting our tests

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## “Decision Tree:” Step 6

- If the judge rules that you are to turn over protected test information, your options include
  - If the demand is for *tests or audio recording of testing*
    - Offer to testify regarding interview and record review information only, but if that is not accepted
    - Withdraw from the case (in consultation with your attorney), or
  - If the demand is for *test data sheets*
    - The above options, or
    - Redact protected test information from the forms and then release them

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## APA Resolution on Protecting Psychological Test Security, Test Validity, and Public Safety (February 2025)

*“BE IT FURTHER RESOLVED that APA’s position is that fair and reasonable transparency and access to psychological test data and test materials in legal proceedings is best achieved and scientific validity best preserved when psychologists share test materials and test data with other psychologists and other experts properly trained in test administration and interpretation who have a legal and ethical obligation to protect test data and test materials.”*

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Dealing with Test Security Challenges in the Northeast and Middle East Coast

## PART 4

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## New Hampshire Case #1

### Wanting to videotape the exam

#### Plaintiff Argument

- In anticipation of trial by jury, they believe videotaping is necessary to make the process of determining which version of the various disputed facts is true.
- They dispute that observation could affect the results and believed a protective order would be sufficient to maintain the security of the test data and materials.

Note: Plaintiff had undergone two prior evaluations, neither of which were videotaped.

#### Defense Argument

- Videotaping would alter the standardized conditions under which the tests are supposed to be performed.
- Videotaping would serve as a distraction and introduce conditions that might influence plaintiff to "perform."
- Allowing videotaping would violate psychologist guidelines and ethical mandates.

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## The Court's Initial Response

The Court requests that a hearing be scheduled because "[t]he Court does not understand how a video camera could compromise or alter the testing. The neuropsychologist's ethical rules do not trump the right to preserve evidence."

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## The Court's Final Ruling

- The Court "rejects defendant's suggestion that the presence of the video camera will make the results of the testing meaningless. The purpose of the examination is to gain evidence. The plaintiff will know this is going in. That fact that the evidence will be recorded, as evidence at a deposition or in-court, will not make the evidence useless."
- Conditions: only a single, stationary video camera, recording both video and sound; the video operator must remain outside the room and be non-obtrusive; and a copy of the video must be provided to defendants' counsel.
- A "protective order" was issued, "limiting" the videotape to 1. counsel, 2. parties, 3. claims professionals, 4. court reporters and recorders, 5. court and clerks, 6. contractors and experts, and 7. others by consent.

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## Following the Court's Decision

Both parties then entered into the following stipulation:

- The plaintiff will attend the evaluation and **no one other than the plaintiff and the examiner will be in the room during the testing portion** of the evaluation.
- **No recording device** will be present in the testing room during the testing portion of the evaluation.
- Following the testing portion, **the interview will commence and may be recorded** provided there is no camera on the examiner's face and the camera is unobtrusive; no third party will be present during the interview.

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## What happened?

- Plaintiff showed for the evaluation but **refused to go forward** when told they could record only the examiner's voice and not her image as there was no assurance of protection of privacy.
- A report was prepared based on **record review** of all available medical records, neuroimaging reports, educational records, the raw data and report from two prior evaluations and one re-evaluation, psychotherapy notes, eyecare records, speech and occupational therapy records, the expert report of a neurologist hired by defense, and deposition transcripts.
- **The case settled before trial.**

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## New Hampshire Case #2 Wanting to videotape the exam

### Plaintiff Argument

- Believe they are **entitled** to discovery of all information that is "relevant and reasonably calculated to lead to the discovery of admissible evidence."
- Does not object to examination but **insists** that any such exam be video-recorded.

### Defense Argument

- Recording equipment is especially **disruptive and intrusive** in the examination process.
- To obtain reliable and valid neuropsychological test data there can be **no third-party observation**, whether by physical or mechanical presence, including audio or video recording during the administration of tests.
- **Video-recording is essentially prohibited** by the test publishers and psychology guidelines and ethics.

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## The Court's Ruling

- The Court finds that the record before the Court makes this **an easy decision** and does not find that the plaintiff's examination should be video-recorded.
- "On the one hand, the Court has an affidavit from Dr. Hebben, who plaintiff admits is a **"highly-respected" expert**, detailing why video-recording the examination is inappropriate.
- "On the other hand, the Court **has little to nothing from the plaintiff...** In her written objection, the plaintiff did not articulate any reason why the examination should be video-recorded, nor did she explain how she intends to use such a recording should it be made. And, at the hearing on this matter, the plaintiff did not do much better, merely citing vague "concerns" about "what happens in the testing atmosphere" and noting that she wanted the recording "so that we know exactly what is being asked and how this is all going down."

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## The Court's Ruling I (con't)

"In fact, Dr. Hebben's **concerns regarding psychological test secrecy have been recognized by this Court in other cases.** For instance, in one case, the Court noted that:

In a court proceeding, the demands of pretrial discovery...confront professional standards of confidentiality and test security when neuropsychologists' test materials [are demanded] for a patient who has placed a mental condition at issue. **Yielding to discovery demands may result in wrongful release of privileged psychological test materials in administrative, legislative, or judicial proceedings.** Disclosure of psychological test material allows other litigants and attorneys to review test protocols, obtain test items, discover answers, and "cheat" on the test in the future.

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## The Court's Ruling II (con't)

"Dufresne v. MacMillan, No. 226-2017-CV-397, Court Doc. 28, at 4 (Nov. 9, 2018) (Temple, J.) (quoting **Paul Kaufmann, Protecting the Objectivity, Fairness and Integrity of Neuropsychological Evaluations in Litigation**, 26 J. Legal Med. 95, 99-100 (2005)); see also Bachman v. Hou. No. 226-2017-CV-79, Court Doc. 108, at 8-9 (Nov. 30, 2018) (Temple, J.) (declining to find discovery violation for plaintiff's failure to disclose raw psychological testing data and test questions because of need to protect test secrecy)."

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### What did we (I) learn from the NH cases?

Trial courts have a **broad discretion** in deciding discovery disputes

...trial court retains "authority to control discovery, including its right to issue, modify, or vacate protective orders."

(Mercury Interactive Corp. v. Klein (2007) 158 Cal.App.4th 60, 106.)

The Court takes different approaches, but the **rulings help us shape the creation of future affidavits or declarations** so the Court can come to understand the importance of test security.

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### Vermont Case #1

Workers' comp rules allows observation

#### Plaintiff Argument

- Making a **video recording of an examination** is the right of an injured worker under 21 v.s.a. § 655.

#### Defense Argument

- Claimant is **free to videotape the interview** portion of the evaluation, but professional ethical standards preclude videotaping the testing portion.

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### Case Course I

- Neuropsychologist offers two concerns to justify her prohibition of videotaping:

1. **Videotaping an exam might affect an examinee's performance.**

2. **Videotaping an exam might disseminate proprietary test materials inappropriately.**

- Neuropsychologist considered these concerns of such magnitude that she would not proceed with the evaluation unless Claimant agreed to limit her videotaping to the interview portion only, not the testing itself.

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## Case Course II (con't)

- Claimant **refused to accede to the videotaping limitations**.
- Defendant sought relief from the Commissioner.
- The Commissioner denied Defendant's motion and instead imposed various safeguards she believed adequately addressed the neuropsychologist's concerns (i.e., videotape via a one-way mirror to minimize its intrusive effect and the recording be disclosed only to another qualified expert to protect it from unauthorized distribution), recognizing that the neuropsychologist would refuse to conduct the evaluation if Claimant were permitted to videotape the testing portion.
- The Commissioner expressed **"reasonable confidence"** that Defendant would be able to identify another equally competent neuropsychologist who would be willing to proceed even if the original neuropsychologist declined to go forward.

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## Case Course III (con't)

- Defendant filed a Motion to Reconsider.
- After the pending motion was filed but before the evidentiary hearing, the original neuropsychologist became unavailable to testify or to evaluate the Claimant for reasons unrelated to the case.
- An evidentiary hearing was convened, during which both parties were afforded the opportunity to present witnesses and offer exhibits.
- A new neuropsychologist is identified and testifies at the evidentiary hearing that **the presence of a TPO contaminates the testing environment** to such an extent as to invalidate the results and presents position papers from NAN, AACN, and ABN that advocate so strongly against the presence of a TPO during testing in a forensic setting as to suggest that a neuropsychologist who allows it violates professional ethics.

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## The Commissioner's Considerations

- The Commissioner carefully considered possible alternatives (videotaping just the interview portion, recusal of the expert, use less sensitive tools less susceptible to interference from observation) but found none that would offer an effective solution.
- The Commissioner noted that "[i]ronically, the litigant who demands that a third-party observer be present at a forensic neuropsychological evaluation may thereby be afforded an "irrefutable impeachment tool," on the grounds that the results are invalid."
- The Commissioner, after viewing the videotape of an interview conducted by the expert, noted that videotaping of the testing portion **would have added to the weight of the expert's argument** as she found the testimony of the person interviewed did not survive attack on cross-examination.

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## The Commissioner's Ruling

- Ultimately, the Commissioner acknowledged that she could not escape the fact that not a single qualified neuropsychologist was identified who was willing to allow Claimant to videotape the testing portion of Claimant's evaluation. She noted that "[a]ll ten of the board-certified neuropsychologists licensed to practice in the New England area who responded to defense counsel's inquiry to that effect stated that doing so would violate their professional ethics" and "upon learning that violating the APA Ethics Code would jeopardize his Vermont license, even Claimant's expert, admitted on cross examination that he would not allow his exam to be observed or videotaped."
- Claimant was ordered to submit to an examination, during which only the interview portion, not the testing portion, could be recorded.

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## What did we (I) learn from this Vermont WC's case?

The Commissioner made her ruling so as to safeguard the interests underlying Defendant's right to an examination. She wrote: "Certainly, there is no legal basis for me to order an examiner to conduct an evaluation he or she is unwilling to conduct, particularly if doing so might violate professional ethics and thereby jeopardize his or her career. Thus, if I side with Claimant on this issue, Defendant will effectively be denied the right to test a central theory underlying her case in chief – that her claimed learning disability has so narrowed her prospects for re-employment as to render her permanently and totally disabled."

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## Vermont Case #2

### Attorney demands before exam is scheduled

- Accuses neuropsychologist of not being "fair or appropriate," based on what he has "heard."
- Wants to attend the interview portion of the exam and videotape it.
- Wants to set limits on questions that can be asked in interview.
- Wants produced to him the expert's entire file, including test data.
- Says if his demands are not met, or if defense attorney is not willing to use a different examiner, he will seek answers from the Court.

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### The exam: What happened

- Knowing that plaintiff's counsel was demanding raw test data, and the Court might allow this demand, the examination was done using nonstandard test data forms, where possible.
- Videotaping of the interview was allowed but interview was done at the end of the examination.
- The videographer had to remain outside the testing room.
- The videotape had to be shared with Defense counsel.
- The videographer was not allowed to capture the examiner's image.
- The exit survey was done verbally on camera because plaintiff's counsel insisted plaintiff was not to complete any forms, surveys or written statements other than that part of a standardized pencil and paper neuropsychological instrument.

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### After the exam: What happened

- Examiner's complete file of test data was shared with plaintiff's expert and then on the Court's order with the plaintiff's attorney.
- Plaintiff's expert accused examiner of not sending the "complete file" because it did not contain all that he would have had in his file.
- Plaintiff's counsel accepted his expert's assertion that the file was incomplete and filed a motion to preclude defense expert from testifying unless the "complete file" was produced.
- A 3-hour hearing was held after which the Court dismissed the plaintiff's expert opinion about the examiner's file and, after hearing from the defense expert, said he was satisfied that the file was complete.
- The Court admonished the plaintiff's attorney for his behavior during the hearing.

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### What did we (I) learn from this case?

- Be prepared in those cases where you suspect there may be an order to release test data to a non-psychologist.
- Be aware that there are psychologists willing to distort the facts and try to harm an expert's reputation when being paid to do so.

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### Vermont Case #3

Wanting "audiovisual" recording of the exam

#### Plaintiff's Argument

- AV recording prevents the examiner from asking "improper questions" and acting as a **proxy "inquisitor"** for the defendant.
- Have **forensic psychologist (not a neuropsychologist)** who submits his standard affidavit saying video recording is unobtrusive and will not disrupt the testing process and will prevent the examiner from deviating from standardized test scoring and administration procedures.
- Imply that the neuropsychologist is a **"hired gun"** who will manipulate the plaintiff and/or fail to accurately report the plaintiff's performance.

#### Defense Argument

- Videotaping **would alter the standardized conditions** under which the tests are supposed to be performed.
- Videotaping **would serve as a distraction** and introduce conditions that might influence plaintiff to "perform."
- Allowing videotaping **would violate psychologist's guidelines** and ethical mandates.

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### Context

- **Plaintiff Attorney** in this case had previously deposed the neuropsychologist and during the deposition it became apparent he had **illegally downloaded copies of the neuropsychologist's book**:

Witness: We don't know that it's a copy of my book. It was never put online.

Defense Attorney: Did you buy this?

Plaintiff Attorney: **I did not buy this.**

Defense Attorney: It's a little awkward here to be marking an apparently illegal copy of the witness's text but then to make copies of it and pass it out and then on top of that to use it as a deposition exhibit, I mean, the author whose copyrights are being violated is sitting here --

After an off-the-record discussion, the book was not mentioned again, and the plaintiff attorney gave over the 4 copies of the illegally downloaded book he made to the witness.

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### Context (con't)

In the same deposition, the plaintiff attorney produced what he said were other "assessments" of hers from other cases. He asserted that one report was from a prior client of his from whom had permission to use the report, and he said he redacted personal information.

Defense Attorney: **Do you have the release with you?**

Plaintiff Attorney: **I do not.**

Defense Attorney: Well, you've just put her in an almost impossible situation because of HIPAA. **(Reviews report and sees identifying info, including his client's name)** So, all of a sudden, we've got identifying information that makes this a disclosure of a confidential assessment.

In an off-the-record discussion, the witness said she had concerns that answering questions about the report could cause her to run afoul of her professional obligations and **it was decided she was not going to answer any questions specifically about report.**

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## What Happened

- The Court ruled there would be no videorecording, but the plaintiff could **audiorecord** the interview and exam.
- Subsequently, both the examinee and the examiner audiorecorded the interview and entire exam. With the exception of the interview, the recordings were silent for the greater majority of time.
- The examiner gave only tests that required only stating the instructions aloud but **did not release any test material**.

After the exam, the Court ordered that the test data and test materials (which the plaintiff attorney slipped into his motion unbeknownst to the expert) be produced to the **FOUR** plaintiff attorneys under a protective order and if it was not she would not be allowed to testify. The same attorney who illegally downloaded and made copies of the neuropsychologist's book and tried to get her to violate confidentiality asserted he always abides by protective orders.

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## What Happened (con't)

- The **raw data was produced** as ordered (after it had already been released to their non-examining psychologist).
- The plaintiff attorney **demanding the test materials as well**.
- The Court would not reconsider.
- The **neuropsychologist refused to release test materials**, and a decision was made that if she testified at trial, it would only be about her interview and the medical records.
- The case settled at mediation.

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## What did we (I) learn from this case?

- Trial courts have a **broad discretion** in deciding discovery disputes.
- When you know there is a known **aggressive** attorney on the other side, plan accordingly.
- In some cases (many cases) all that is really necessary may be a **record review**, especially if plaintiff is not hiring their own neuropsychologist.
- **Know what you are willing to do and where you will draw the line.**
- Make certain the retaining attorney knows what your limits are.
- **If necessary**, recuse yourself from a case.

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## 2016 Criminal Trial: Raw Data Issues

### Prosecution Argument

- They have a right to the data, so their experts know which tests the defendant has already taken and how the defendant performed on them before giving their own tests.
- They expressed concern that any further delay in getting the data will affect the trial schedule

### Defense Argument

- They believe that releasing the raw data would violate their client's Fifth amendment right against self-incrimination.
- They plan to refuse to comply and file an interlocutory appeal

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## Raw Data Decisions

- The Court ordered the defense team to turn over the raw data of psychological testing to the prosecution experts.
- Defense says case law says the way to respond is to refuse to comply.
- The Court offers a compromise in which the data would be submitted to the court under seal.
- The defense team then demands the appointment of another prosecutor to serve as a "firewall" between that person and the prosecution team.
- Eventually, an agreement is reached and the raw data is released by both the prosecution and defense experts through an intermediary to each other [allegedly] bypassing the attorneys.

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## The Twist

- Prosecution team builds a "firewall" and passes the raw data between the experts without retaining a copy.
- Defense team accepts and keeps the prosecution experts' raw data.
- This does not become apparent until the prosecution expert is on the stand.
- The defense team announces they plan to ask in open court some of the questions posed to the defendant from two tests designed to detect malingering.

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## The Voir Dire on the Issue of Test Security

- In a voir dire, the prosecution expert testified that a public airing of the questions could compromise future exams and require the development of new testing tools.
- The Court had his clerk search the Internet for any evidence that the test questions were in the public domain; no evidence of such was found.
- As this trial was being videotaped, The Court expressed concern that media coverage of the questions could jeopardize assessment and treatment of the mentally ill; "I can't have the mental health tools of neuropsychologists to be impaired."

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## The Court's Ruling

- The Court, unable to prevent the defense attorney from asking the test questions in open court, ordered that there would be no videorecording and the media could not reveal the test questions in their tweets and other coverage.
- When the media argued for freedom of the press, The Court took the unusual step of closing the courtroom to the media and the public while any test questions (i.e., M-FAST and SIRS) were read aloud and then impounded that portion of the trial transcript.

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## What did we (I) learn?

Some judges understand the issue of test security and how releasing this information to the public can be detrimental to future defendants and individuals with mental health issues.

Note: This judge was ultimately appointed to Massachusetts Supreme Court.

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## Another Massachusetts Case

A recent Court ruling in MA:

Endorsement on motion to compel (#9.0): Rule 35 Examinations  
Other action taken

"This is an area in which there is a significant amount of discretion. Given the fact that I am satisfied that an extra person in the examination room would alter the results I am declining to order that the exam be videotaped or witnessed by an outside person."

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## What's Happening in Other East Coast States

Results of an informal survey of neuropsychologists practicing in Maryland, Virginia, New York, North Carolina and D.C.:

- Most would allow recording of the interview, some with a court reporter, others with their own recorder.
- None would willingly share raw data with a non-psychologist but some would produce it if ordered to but only with a protective order in place.
- None would allow audio or videorecording of the testing portion and would recuse themselves from a case in which it was ordered.

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## Rules from One East Coast Practice

1. The raw test data from a neuropsychological IME will be shared directly with a licensed psychologist of plaintiff's choosing who is trained to read, understand, and interpret such data and who will adhere to the various professional guidelines and policies of test developers and publishers to prevent the materials from falling into the public domain.
2. Plaintiff's licensed psychologist must agree to abide by the American Psychological Association's Resolution of February 2025.\*
3. The examining neuropsychologist agrees to have plaintiff's counsel's representative present to observe the clinical interview portion of the evaluation; however, the clinical interview may not be recorded by any means or methods.
4. The examining neuropsychologist will not agree to the presence of a Third Party Observer or any means or methods of recording of the actual administration of the neuropsychological testing.

\* <https://www.apa.org/about/policy/resolution-test-security.pdf>

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146

Experience with Low Audio Battery, Methods of  
Redaction and Pediatric Cases

## PART 5

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### IME Low Audio Battery (LAB)



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### IME LAB – ORIGIN STORY



Randy's Trucking – The Bomb Gets Detonated –  
Attorney's start demanding the entire audio  
tape exams and raw data.

Example: You find out the day before (or the morning of) the IME that  
opposing counsel wants the exam audio taped in its entirety AND they want  
the raw data.

- Sometimes less experienced attorneys will agree to a demand that  
includes audio recording and raw data; they didn't think it was a big  
deal, or they weren't aware of test security issues.

Right from the start I am educating attorneys about test security issues,  
making sure it's on their radar.

- Now I ALWAYS get a copy of the demand for IME at least a  
week in advance.
- Now it's more common that attorney's have me review the  
demand before it goes out to counsel (see the AACN Tool Kit  
for Sample Demand document)

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## Test Security Swag – Packaging Matters

Have your email ready to go:

"Below is a link to a "toolkit" for attorneys which has materials ready to use for test security issues, including motions to compel that have been successful."

Test Security Attorney Toolkit link:

<https://testsecuritymatters.com/test-security-attorney-toolkit/>

password: TestSecurityMatters

More Swag – includes additional documents specific to your state, from national organizations, recent rulings, key publications and useful sample documents:

- The collective statement signed by 90% of the board-certified neuropsychologists in California
- 12 Randy's Tracking rulings
- Position Papers (AMCN, NAN, APA)
- Protective Orders Article
- Sample Demand

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## IME LAB Trends



These are usually the cases that I am most likely to see noncredible effort

END GAME: Opposing counsel may want me to step down from the case.

An attorney told me "Your name and credentials are the weapon."

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## The LAB is not downgrade or a compromise...it is an important new tool.

- Intellectual ability
- Processing Speed
- Learning & Memory
- Attention & Executive Functioning
- Visual Perception
- Fine Motor Functioning
- Effort
- Pre-morbid IQ Estimates
- Psychosocial Functioning & Personality



W can still capture a comprehensive, objective, and psychometrically valid measure of cognitive function

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## The LAB : Let's Get Into It.



Keep ONE overall test battery

- One battery for adults
- One battery for children

DO NOT PROVIDE A LIST OF  
ONLY LAB TESTS.

### DIFFERENT BATTERIES

- Currently I am favoring the LAB for all cases
- Use Regular IME battery:
  - audio and raw data only goes to opposing counsel's expert
- Use LAB:
  - When raw data will go to opposing counsel's expert, but the entire audio goes to an attorney
  - or both raw data and audio will go to an attorney
  - If I have reason to believe that opposing counsel's expert may not adhere to test security

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## The Protein



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## LAB Basics – De-identify



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## Like Really De-Identify



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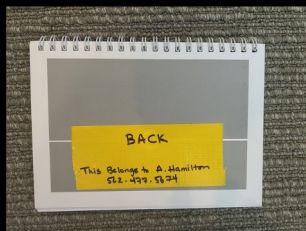
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## Even the publishing company...



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## Materials to De-identify the Data



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## LAB: Recording The Data



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159

...and  
don't  
forget!



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## Demos

### CARBON PAPER

- Slightly more prep, but don't have to worry about smudging or smearing
- Every mark shows up
- No visual feedback
- Keep hand wipes handy

### PAPER PROTECTORS

- Slightly less prep
- More precise visual feedback
- More work on the backend because you have to make copies
- Save on protocols
- Slippery

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## Redacted Protocols

Stimulus	1st E	Co.E	Om. E
1			
2			
3			
4			
5			
6			
7			
8			
9			
10			
11			
12			
13			
14			
15			

TRE: \_\_\_\_\_ Mn. TPS: \_\_\_\_\_

E Score: \_\_\_\_\_

Interpretive Range: \_\_\_\_\_

Card	CC	Ex. C	E	RT
1				
2				
3				
4				
5				
6				
7				
8				
9				
10				
11				
12				

1-6 TRE: \_\_\_\_\_ Mean UGT: \_\_\_\_\_

7-12 TRE: \_\_\_\_\_ Mean G Time: \_\_\_\_\_

ES: \_\_\_\_\_

Interpretive Range: \_\_\_\_\_

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## Keep It Simple.

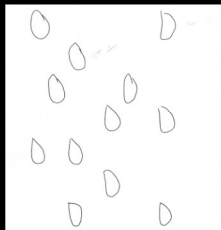
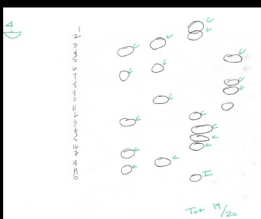
11 Total:	11 LG	21 LG	31 LG	41 LG
1 LG	12 LG	22 LG	32 LG	42 LG
2 LG	13 LG	23 LG	33 LG	43 LG
3 LG	14 LG	24 LG	34 LG	44 LG
4 LG	15 LG	25 LG	35 LG	45 LG
5 LG	16 LG	26 LG	36 LG	46 LG
6 LG	17 LG	27 LG	37 LG	47 LG
7 LG	18 LG	28 LG	38 LG	48 LG
8 LG	19 LG	29 LG	39 LG	49 LG
9 LG	20 LG	30 LG	40 LG	50 LG

12 Total:	11 LG	21 LG	31 LG	41 LG
1 LG	12 LG	22 LG	32 LG	42 LG
2 LG	13 LG	23 LG	33 LG	43 LG
3 LG	14 LG	24 LG	34 LG	44 LG
4 LG	15 LG	25 LG	35 LG	45 LG
5 LG	16 LG	26 LG	36 LG	46 LG
6 LG	17 LG	27 LG	37 LG	47 LG
7 LG	18 LG	28 LG	38 LG	48 LG
8 LG	19 LG	29 LG	39 LG	49 LG
9 LG	20 LG	30 LG	40 LG	50 LG

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## Protocols Using Carbon



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## Adults & Adolescents

- I've used an adolescent battery several times with only minor limitations.
- Know the literature on adjusting cut-off scores for age, language, cognitive ability, socio-economic factors, culture.
- Collect additional data, even if they fail multiple PVTs. This allows the testing experience to be diluted, provides more information about the examinee's functioning, which prevents my opinion from being dismissed (e.g., Gibson Federal Case).

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- Really not much extra work or cost
- Keep a hard copy file with your revised protocols: remember each one has to be unique to you (to comply with publishing restrictions)
- keep and extra LAB battery ready to go

The best LAB preparation is informed by knowledge of the Plaintiff (e.g., record review), the literature (e.g., appropriate cutoff scores) and then knowing how they are doing in real time and make strategic adjustments to the battery

Pressure is Relieved by Preparation.  
~ Rick Bizet

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## Other Tips & Info.

- Once I complete a task, I set the protocols and materials over on another table separate from the file.
- Sometimes I need to score a few items to determine the rest of my battery, so I give them a survey to buy some time.
- I've never had to worry about finishing too quickly, the LAB takes about the same amount of time.
- If I am relying on scoring guides, I keep pics of them in a pw protected file on my iPad

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## Surprises: But Not In A Good Way

EXAMPLE: When you didn't see the demand and now are being told that you have to audio record the entire exam

### KNOW YOUR STATE LAWS!

TAKE A BEAT – Have a colleague or two on speed dial, text, e-mail.

### YOU HAVE OPTIONS

- Record review, clinical interview, MMPI-3,
- Rebuttal: get the raw data and look at the integrity of the validity testing
- Keep Calm and Carry On with your Visual Battery



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## Questions?



How to redact forms?  
Is it "legal"?

Will I be in jeopardy if I  
withdraw from cases?

Can't opposing experts  
that I send test data to  
just turn it over to the  
attorney?

Does HIPAA require me to release test data  
sheets?

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