

## 2023 NJSBA Fall Conference

### Case Studies in Complex Personal Injury Cases

A panel of respected New Jersey personal injury attorneys will share their experiences and strategies for building, defending and presenting cases involving complex issues in specific liability and damage scenarios. You will learn tools and techniques to secure the best outcome for your client. Gain insight from leaders in the field on:

- Preparing, defending and presenting construction injury claims
- Preparing, defending and presenting traumatic brain injury cases
- Coverage issue considerations
- Plus added perspective from a New Jersey mediator

Moderator/Speaker:

Michael G. Donahue, Esq.  
Past Chair, NJSBA Civil Trial Bar Section  
*Stark & Stark, Hamilton*

Speakers:

Hon. Georgia M. Curio, AJSC (Ret.)  
*Georgia M. Curio Alternative Dispute Resolution and Related Services, Vineland*  
Marco P. Di Florio, Esq.  
*Salmon, Ricchezza, Singer & Turchi LLP, Sewell and Philadelphia*  
Jennifer M. Jones, Esq.  
*McElroy, Deutsch, Mulvaney & Carpenter, LLP, Morristown*  
Bruce H. Stern, Esq.  
*Stark & Stark, Hamilton*

# Neuropsychological Testing and Third Party Observers

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# Neuropsychological test data

## Why does the attorney need the data?



# Neuropsychological test data

## Why wont neuropsychologists turn over test data?

 AMERICAN PSYCHOLOGICAL ASSOCIATION

### ETHICAL PRINCIPLES OF PSYCHOLOGISTS AND CODE OF CONDUCT

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Adopted August 21, 2002  
Effective June 1, 2003  
(With the 2010 Amendments  
to Introduction and Applicability  
and Standards 1.02 and 1.03,  
Effective June 1, 2010)

With the 2016 Amendment  
to Standard 3.04  
Adopted August 3, 2016  
Effective January 1, 2017

 APA 125  
AMERICAN PSYCHOLOGICAL ASSOCIATION

### 9.11 Maintaining Test Security

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

# Neuropsychological test data

## Why wont neuropsychologists turn over test data?



“Should litigation in which a psychologist is involved reach the stage **where a court considers ordering the release of proprietary test materials to non-professionals such as counsel**, we request that the court issue a protective order prohibiting parties from making copies of the materials; requiring that the materials be returned to the professional at the conclusion of the proceeding; and requiring that the materials not be publicly available as part of the record of the case, whether this is done by sealing part of the record or by not including the materials in the record at all” (bolding added).

# Neuropsychological test data

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Pursuant to a client/patient release, psychologists provide test data to the client/patient or other persons identified in the release. Psychologists may refrain from releasing test data to protect a client/patient or others from substantial harm or misuse or misrepresentation of the data or the test, recognizing that in many instances release of confidential information under these circumstances is regulated by law. (See also Standard 9.11, Maintaining Test Security.)

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

# APA Specialty Guidelines for Forensic Psychology

## Specialty Guidelines for Forensic Psychology

American Psychological Association

In the past 50 years forensic psychological practice has expanded dramatically. The American Psychological Association (APA) has a division devoted to matters of law and psychology (APA Division 41, the American Psychology-Law Society), a number of scientific journals devoted to interactions between psychology and the law exist (e.g., *Law and Human Behavior*, *Psychology, Public Policy, and Law*, *Behavioral Sciences & the Law*), and a number of key texts have been published and undergone multiple revisions (e.g., Grisso, 1986, 2003; Mahon, Petrus, Poythress, & Slobogin, 1987, 1997, 2007; Rogus, 1988, 1997, 2008). In addition, training in forensic psychology is available in predoctoral, internship, and postdoctoral settings, and APA recognized forensic psychology as a specialty in 2001, with subsequent recertification in 2008.

Because the practice of forensic psychology differs in important ways from more traditional practice areas (Molman, 1980) the "Specialty Guidelines for Forensic Psychologists" were developed and published in 1991 (Committee on Ethical Guidelines for Forensic Psychologists, 1991). Because of continued developments in the field in the ensuing 20 years, forensic practitioners' ongoing need for guidance, and policy requirements of APA, the 1991 "Specialty Guidelines for Forensic Psychologists" were revised, with the intent of benefiting forensic practitioners and recipients of their services alike.

The goals of these Specialty Guidelines for Forensic Psychology ("the Guidelines") are to improve the quality of forensic psychological services, enhance the practice and facilitate the systematic development of forensic psychology, encourage a high level of quality in professional practice, and encourage forensic practitioners to acknowledge and respect the rights of those they serve. These Guidelines are intended for use by psychologists when engaged in the practice of forensic psychology as described below and may also provide guidance on professional conduct to the legal system and other organizations and professions.

For the purposes of these Guidelines, *forensic psychology* refers to professional practice by any psychologist working within any subdiscipline of psychology (e.g., clinical, developmental, social, cognitive) when applying the scientific, technical, or specialized knowledge of psychology to the law to assist in addressing legal, contractual, and administrative matters. Application of the Guidelines does not depend on the practitioner's typical areas of practice or expertise, but rather, on the services provided in the case at hand. These Guidelines apply in all matters in which psychologists provide expertise to judicial, administrative, and

educational systems including, but not limited to, examining or treating persons in anticipation of or subsequent to legal, contractual, or administrative proceedings; offering expert opinion about psychological issues in the form of amicus briefs or testimony to judicial, legislative, or administrative bodies; acting in an adjudicative capacity; serving as a trial consultant or otherwise offering expertise to attorneys, the courts, or others; conducting research in connection with, or in the anticipation of, litigation; or involvement in educational activities of a forensic nature.

Psychological practice is not considered forensic solely because the conduct takes place in, or the product is presented in, a tribunal or other judicial, legislative, or administrative forum. For example, when a party (such as a civilly or criminally detained individual) or another individual (such as a child whose parents are involved in divorce proceedings) is ordered into treatment with a practitioner, that treatment is not necessarily the practice of forensic psychology. In addition, psychological testimony that is solely based on the provision of psychotherapy and does not include psychological opinions is not ordinarily considered forensic practice.

For the purposes of these Guidelines, *forensic practitioner* refers to a psychologist whose engagement in the practice of forensic psychology as described above. Such professional conduct is considered forensic from the time the practitioner reasonably expects to, agrees to, or is legally mandated to provide expertise on an explicitly psychological issue.

The provision of forensic services may include a wide variety of psychological roles and functions. For example, as

This article was published Online First October 1, 2012.

These Specialty Guidelines for Forensic Psychology were developed by the American Psychology-Law Society (Division 41 of the American Psychological Association [APA]) and the American Academy of Forensic Psychology. They were adopted by the APA Council of Representatives on August 3, 2011.

The previous version of the Guidelines ("Specialty Guidelines for Forensic Psychologists"; Committee on Ethical Guidelines for Forensic Psychologists, 1991) was approved by the American Psychology-Law Society (Division 41 of APA) and the American Academy of Forensic Psychology in 1991. The current revision, now called the "Specialty Guidelines for Forensic Psychology" (referred to as "the Guidelines" throughout this document), replaces the 1991 "Specialty Guidelines for Forensic Psychologists."

These guidelines are scheduled to expire August 3, 2021. After this date, users are encouraged to contact the American Psychological Association Practice Directorate to confirm that this document remains in effect.

Correspondence concerning these guidelines should be addressed to the Practice Directorate, American Psychological Association, 750 First Street, NE, Washington, DC 20002-4242.

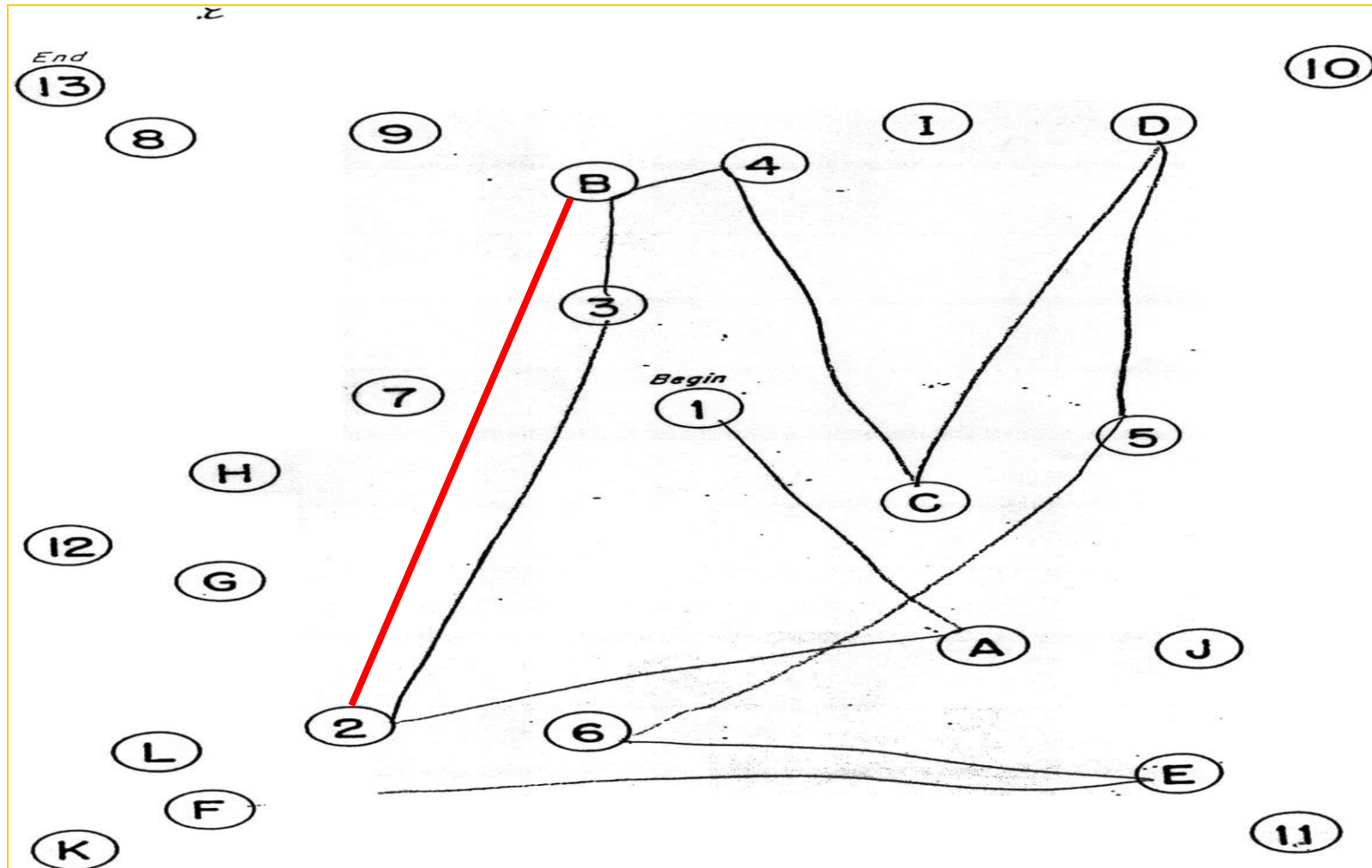
**10.07 Provision of Documentation Pursuant to proper subpoenas or court orders, or other legally proper consent from authorized persons, forensic practitioners seek to make available all documentation**

If you **can't** trust the  
administration of the  
testing

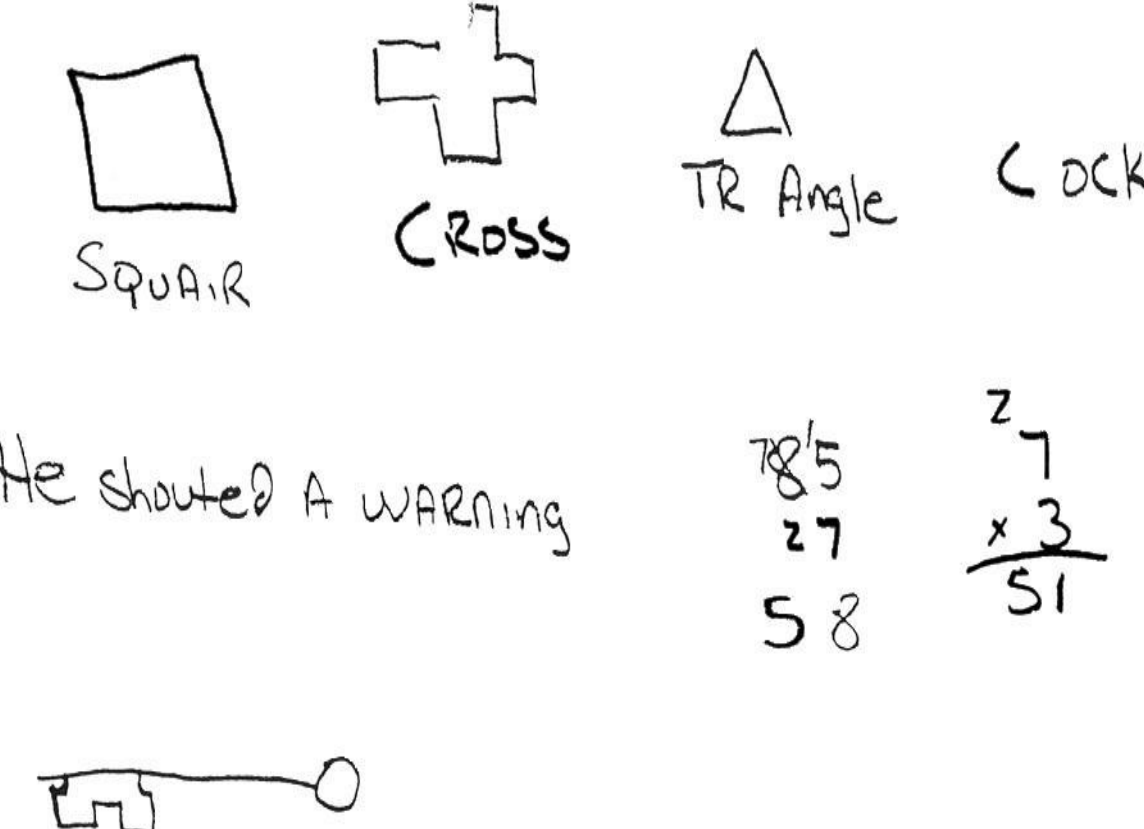


How can you trust the  
interpretation

# Trail Making B



# Aphasia Screening



SQUAIR

CROSS

TR Angle

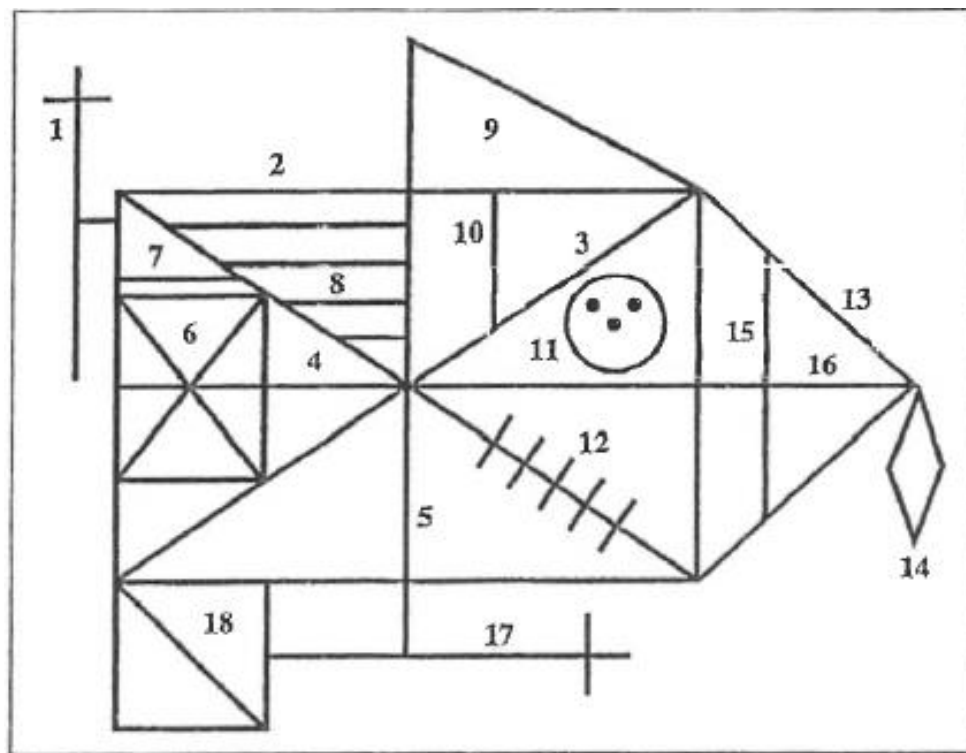
COCK

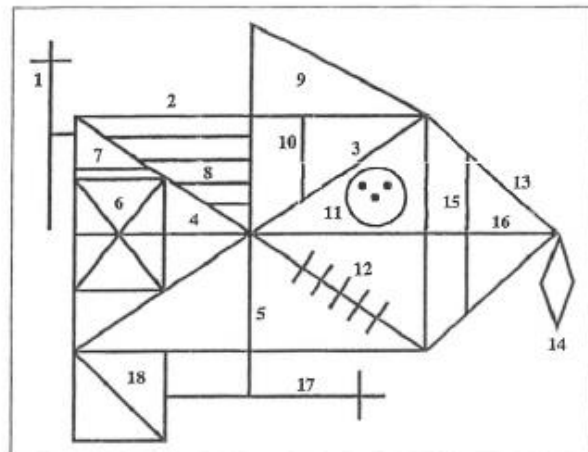
He shouted A WARNING

$$\begin{array}{r} 78 \\ 5 \\ \hline 27 \\ 58 \end{array}$$
$$\begin{array}{r} 27 \\ \times 3 \\ \hline 51 \end{array}$$

A hand-drawn sketch of a key with a rectangular bit and a circular head.

# Rey Complex Figure





Scoring Criteria for RCFT Drawings

Score	Accuracy	Placement
2	Accurately drawn	Correctly placed
1	Accurately drawn	Incorrectly placed
1	Inaccurately drawn	Correctly placed
0.5	Inaccurately drawn, but recognizable	Incorrectly placed
0	Inaccurately drawn and unrecognizable, or omitted	Incorrectly placed

Scoring Element

Scoring Element	Copy	Recall	Delay
1. Vertical Cross	2 1.50	2 1.50	2 1.50
2. Large Rectangle	2 1.50	2 1.50	2 1.50
3. Diagonal Cross	2 1.50	2 1.50	2 1.50
4. Horizontal Midline of Large Rectangle (2)	2 1.50	2 1.50	2 1.50
5. Vertical Midline of Large Rectangle (2)	2 1.50	2 1.50	2 1.50
6. Small Rectangle	2 1.50	2 1.50	2 1.50
7. Small Horizontal Line above Small Rectangle	2 1.50	2 1.50	2 1.50
8. Four Parallel Lines	2 1.50	2 1.50	2 1.50
9. Small Triangle above Large Rectangle	2 1.50	2 1.50	2 1.50
10. Small vertical Line within Large Rectangle	2 1.50	2 1.50	2 1.50
11. Circle with Three Dots	2 1.50	2 1.50	2 1.50
12. Five Parallel Lines	2 1.50	2 1.50	2 1.50
13. Sides of Large Triangle on Large Rectangle	2 1.50	2 1.50	2 1.50
14. Diamond	2 1.50	2 1.50	2 1.50
15. Vertical Line within Large Rectangle	2 1.50	2 1.50	2 1.50
16. Horizontal Line within Large Triangle	2 1.50	2 1.50	2 1.50
17. Horizontal Cross	2 1.50	2 1.50	2 1.50
18. Square attached to Large Rectangle	2 1.50	2 1.50	2 1.50

does not reach midline

these are all squares

Not at midpoint

must join exactly at corners

this is a rectangle

Did not meet corners

? same square scored as a 1pt answer

Raw Scores	36	14	10
95th Percentile	31	9	4.5

same as Brandi

got 8.5 before Brandi

same as Brandi



# The Research

# Norman Triplet (1898)







# Explanations

- **Evaluation apprehension-Henchy & Glass (1968)**
- **Trigger uncertainty- Guerin (1983)**
- **Distraction affect- Sanders & Baron (1975 & 1978)**
- **Cognitive overload- Baron (1986)**

# Neuropsychological Studies

- **Seta (1988) ability to categorize information reduced**
- **Binder & Johnson-Greene (1995)-child's performance decreased in presence of her mother- a case study**
- **Lynch (1997) test of delayed recall on WMS impaired while performance on motor tests unimpaired**
- **Kehrer et al (2000) found complex testing impaired in presence of third party observations**

# Neuropsychological Studies and Litigation

- McCaffrey, Fisher, Gold & Lynch (1996)
  - Reviewed literature and noted negative social facilitational effects from both live observers, audiotaping and videotaping
- Lynch (2005)-Impairment on Verbal Paired Associates, but not on Trail Making or Finger Tapping
- Yantz & McCaffrey (2005)- impaired scores on the Global and Verbal Memory (MAS) summary scores significantly lower
- Constantinou, Ashendorf & McCaffrey (2005)- presence of video recorder had a negative impact on memory test scores

# Linda S. Lindman, Ph.D.

## Doctoral dissertation- LSU (2004)

- Hypothesis
  - Subjects being observed will perform as well on simple tasks
  - Subjects being observed will perform significantly more poorly on complex tests
  - Presence of third party will have greater negative impact than presence of audiovisual recording equipment
  - Higher level of arousal for those subjects being observed

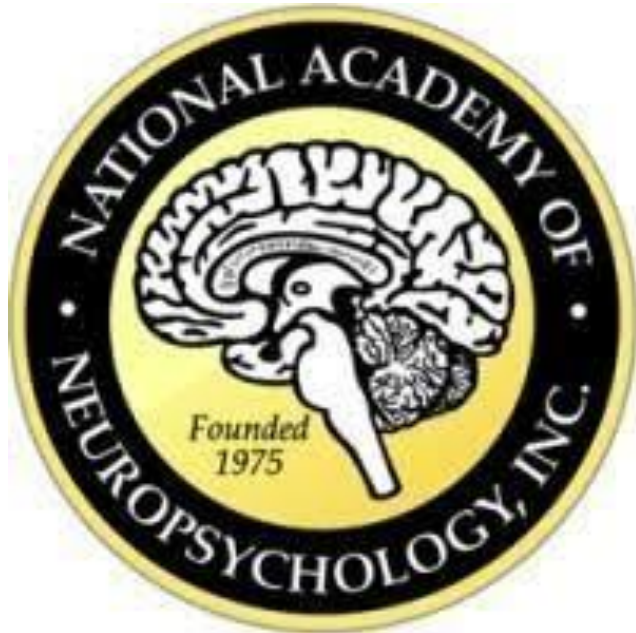
# Lindman's Study

- **75 psychology students**
- **Participants advised of purpose of study**
- **Three observation conditions**
  - **No observers**
  - **Third party observers**
  - **Video taped**
  - **Observers and equipment placed behind and to the right of the testee**

# **Lindman's Study**

**No significant  
differences found**

# Positions of Professional Organizations



Update on Third Party Observers in  
Neuropsychological Evaluation: An  
Interorganizational Position Paper (2021)



# Concerns Regarding Third Party Presence in Examinations

- Threatens test security and integrity
- Threatens validity of test results because of break with standardization procedures and norms\*\*\*
- Affects the development of rapport
- \*\*\*Note that the forensic examination context is wholly different from the context in which almost all psychological tests have been developed, but there is rarely an argument against using psychological tests in this context because of this discrepancy

# **Some Examples of Inconsistent and Illogical Applications**

- Arguing that concerns over observer effects and test standardization should only apply in some contexts (i.e., forensic) and not other contexts (i.e., treatment), AACN Statement, 2001, pp. 433-434**
- Arguing that third party observation by a professional or trainee in an educational context differs from third party observation in a forensic examination context (NAN Statement, 1999)**

# Some Examples of Inconsistent and Illogical Applications

- Arguing that third party observation by a professional or trainee in an educational context differs from third party observation in a forensic examination context (NAN Statement, 1999)
- Arguing that, because psychological tests have not been standardized in the presence of third party observers, it is inappropriate to compare the examinee's results to normative results (AACN Policy Statement, 2001, p. 436) while, at the same time, routinely comparing a forensic examinee's test performance to normative data using tests that have not been standardized on persons completing the measures in a litigation context

# Some Examples of Inconsistent and Illogical Applications

- **Arguing that presence of a third party threatens the reliability/validity of an unstructured, non-standardized assessment approach (the reliability and validity of which is unknown)**
- **Arguing that it is acceptable for psychologists to allow third party presence in some evaluation contexts (i.e., criminal) yet unacceptable to allow their presence in other contexts (e.g., civil) (AACN Policy Statement, 2001, p. 434)**

# Some Examples of Inconsistent and Illogical Applications

- **Arguing that, because psychological tests have not been standardized in the presence of third party observers, it is inappropriate to compare the examinee's results to normative results (AACN Policy Statement, 2001, p. 436) while, at the same time, routinely comparing a forensic examinee's test performance to normative data using tests that have not been standardized on persons completing the measures in a litigation context**

**As early as 1999 at the annual NAN meeting, Drs Sewick and Blasé wrote, “The use of third party observers in neurological examinations has become a heated issue in recent years.”**

# **Sewick Blasé & Besecker Survey**

**Is the Use of Third Party Observers and video recording acceptable practice?**

- **3167 surveys sent out to USA NAN membership**
- **867 responses**
- **50 eliminated (appeared to come from the same individual)**
- **70% acceptable to have a neuropsychologist or trained technician observe**
- **63% acceptable to videotape**
- **Including rejected 50 votes changed results by only 4 %**

# **DeFiore v. Pezic**

## **254 NJ 212 (2023)**

- **A disagreement over whether to permit third-party observation or recording of a DME shall be evaluated by trial judges on a case-by-case basis, with no absolute prohibitions or entitlements.**
- **Defendant has the burden to show why a 3<sup>rd</sup> party observer should not be permitted.**
- **Given advances in technology since 1998, the range of options should include video recording, using a fixed camera that captures the actions and words of both the examiner and the plaintiff.**
- **Protective order**
- **if the court permits a third party to attend the DME, it shall impose reasonable conditions to prevent the observer from interacting with the plaintiff or otherwise interfering with the exam.**



# NEUROPSYCHOLOGICAL EXAMS AFTER DIFIORE

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Marco DiFlorio Esq.

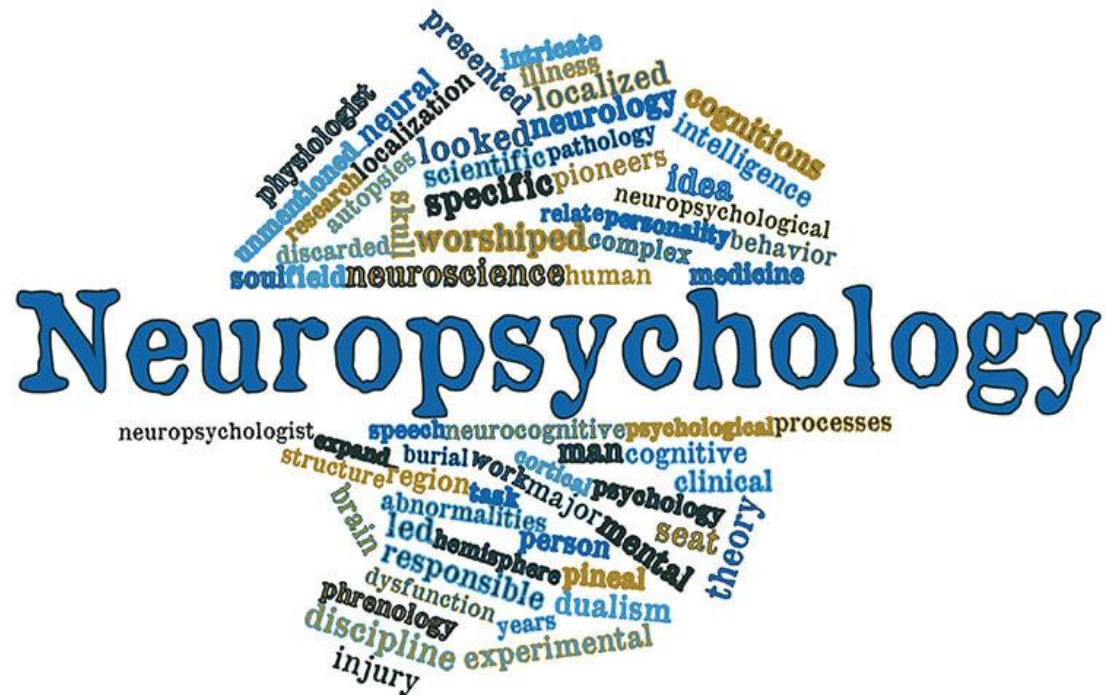
Salmon Ricchezza Singer &Turchi LLC

NJ, PA and DE

(856)842-0730

# Agenda

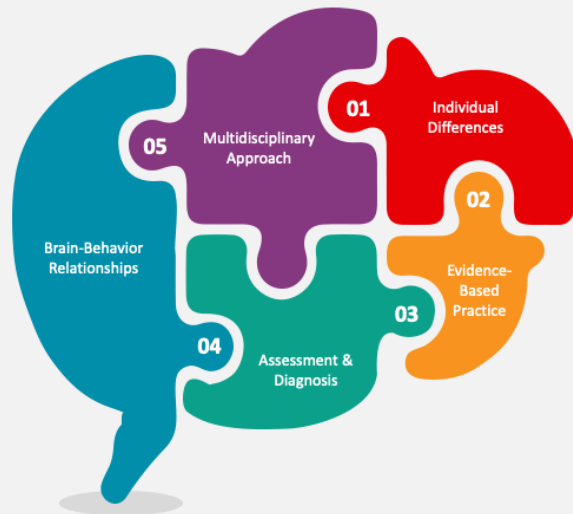
- Neuropsychologists
- Discovery of raw data
- Third Party Observation under DiFiore



# WHAT IS NEUROPSYCHOLOGY?

## CLINICAL NEUROPSYCHOLOGY

Key Principles of Clinical Neuropsychology



The Supreme Court in DiFiore quoted from the Cleveland Clinic to help define neuropsychology as follows:

- A specialty field that joins the medical fields of neurology, psychology and psychiatry
- Neuropsychology involves determining how well the brain is working when it is disrupted by a brain injury or psychological disorder
- A neuropsychological assessment is a comprehensive test of a wide range of mental functions and behaviors

# According to the American Psychological Association:

- Clinical Neuropsychology is a specialty field within clinical psychology dedicated to understanding the relationships between brain and behavior ... applied to the (1) diagnosis of brain disorder, (2) assessment of cognitive and behavioral functioning and (3) the design of effective treatment.
- The required expertise for this area is based on the way that behavior and skills are related to brain structures and systems.
- Neuropsychological evaluations are requested specifically to help understand how the different areas and systems of the brain are working. . . This may be signaled by a change in concentration, organization, reasoning, memory, language, perception, coordination or personality. The change may be due to any of a number of medical, neurological, psychological or genetic causes.

# WHAT IS NEUROPSYCHOLOGICAL TESTING?

- The examination typically consists of the administration of standardized tests using oral questions, paper and pencil, computers, the manipulation of materials such as blocks and puzzles, and other procedures.
- Depending on the scope and intent of the evaluation, testing may focus on a wide range of cognitive functions including attention, memory, language, academic skills, reasoning and problem solving, visuospatial ability and sensory-motor skills. The neuropsychologist may also administer tests and questionnaires concerning psychological aspects of mood, emotional style, behavior and personality.



# EXCERPTS FROM KATHLEEN DIFIORE V. TOMO PEZIC (A-58/59/60-21) (087091)

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Argued January 3, 2023 -- Decided June 15, 2023

# WHAT HAPPENED IN DIFIIORE?

“We are asked here to clarify procedures regarding who may attend a defense medical examination -- as well as whether and how such examinations may be recorded -- when a plaintiff has alleged cognitive limitations, psychological impairments, or language barriers.”

# DEFENDANT'S CHOSEN EXPERT?

- “In personal injury actions and other cases in which the mental or physical condition of the plaintiff is in controversy, Rule 4:19 allows defendants to require plaintiffs to be physically or mentally examined by the defendants’ **chosen** expert.”
- “**Often**, the doctor who conducted the defense medical examination (DME) will testify at trial for the defense.”



# SIX-PART HOLDING BY THE APPELLATE DIVISION IN DIFIORE

- First, a disagreement over whether to permit third-party observation or recording of a DME shall be evaluated by trial judges on a case-by-case basis, with no absolute prohibitions or entitlements.
- Second, despite contrary language in Carley, ~~it shall be the plaintiff's burden henceforth to justify to the court that third-party presence or recording, or both, is appropriate in a particular case.~~
- Third, given advances in technology since 1998, the range of options should include video recording, using a fixed camera that captures the actions and words of both the examiner and the plaintiff.

# SIX-PART HOLDING BY THE APPELLATE DIVISION IN DIFIORE cont...

- Fourth, to the extent that examiners hired by the defense are concerned that a third-party observer or a recording might reveal alleged proprietary information about the content and sequence of the exam, the parties shall cooperate to enter into a protective order, so that such information is solely used for the purposes of the case and not otherwise divulged.
- Fifth, if the court permits a third party to attend the DME, it shall impose reasonable conditions to prevent the observer from interacting with the plaintiff or otherwise interfering with the exam.
- Sixth, if a foreign or sign language interpreter is needed for the exam (as is the case in two of the appeals before us) the examiner shall utilize a neutral interpreter agreed upon by the parties or, if such agreement is not attained, an interpreter selected by the court. [Id. at 106-07.]

# SUPREME COURT'S HOLDING

- We depart from the Appellate Division only in that **we decline to place the burden on the plaintiff to show special reasons why third-party observation or recording should be permitted** in each case. Instead, once the defendant issues notice to the plaintiff of a Rule 4:19 exam, the plaintiff should inform the defendant if they seek to bring a neutral observer or unobtrusively record the examination. If the defendant objects, the two sides should meet and confer to attempt to reach agreement. **If agreement is impossible, the defendant may move for a protective order** under Rule 4:10-3 seeking to prevent the exam from being recorded, or to prevent a neutral third-party observer from attending.
- Factors including a plaintiff's **cognitive limitations, psychological impairments, language barriers**, age, and **inexperience with the legal system** may weigh in favor of allowing unobtrusive recording and the presence of a neutral third-party observer. Although defense neuropsychologists cannot dictate the terms under which DMEs are held, they can raise concerns that may weigh against recording or third-party observation in particular instances.

# SUPREME COURT'S HOLDING cont...



- Factors including a plaintiff's cognitive limitations, psychological impairments, language barriers, age, and inexperience with the legal system may weigh in favor of allowing unobtrusive recording and the presence of a neutral third-party observer. Although defense neuropsychologists cannot dictate the terms under which DMEs are held, they can raise concerns that may weigh against recording or third-party observation in particular instances.

# UNRESOLVED BY THE SUPREME COURT

- Finally, we note that the question presented in this case involves only defense medical examinations, which are conducted solely for purposes of litigation, not treatment. Defendants never argued that recording or third-party observation should be available at examinations conducted by plaintiffs' treating physicians. . . .
- . . . We therefore refer to the Civil Practice Committee whether there should be any provision to allow defendants to record or observe examinations by nontreating doctors arranged by plaintiffs' counsel solely for the purposes of litigation.
-

# RAW DATA v. TEST DATA v. TEST MATERIALS

**American Psychological Association (Citation 2002) ethical principles of psychologists and code of conduct, standards 9.04 versus 9.11**

- 9.04 Release of Test Data. (a) The term **test data** refer to raw and scaled scores, client/patient responses to test questions or stimuli, and psychologists' notes and recordings concerning client/patient statements and behavior during an examination. **Those portions of test materials that include client/patient responses are included in the definition of test data.** Pursuant to a client/patient release, psychologists provide test data to the client/patient or other persons identified in the release. Psychologists may refrain from releasing test data to protect a client/patient or others from substantial harm or misuse or misrepresentation of the data or the test, recognizing that in many instances release of confidential information under these circumstances is regulated by law. (See also Standard 9.11, Maintaining Test Security.)
- (b) In the absence of a client/patient release, psychologists provide test data only as required by law or court order.

# RAW DATA v. TEST DATA v. TEST MATERIALS

## cont...

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

-

# Defense Evidence

- AACN's 2022 "Official Position of the American Academy of Clinical Neuropsychology on test security."
- ABN's 2016 "Policy Statement of the American Board of Professional Neuropsychology regarding Third Party Observation and the recording of psychological test administration in the neuropsychological evaluations."
- Affidavit form your neuropsychologist (and others.)



# Two Neuropsychology Boards

- ABCN/ABPP: The American Board of Clinical Neuropsychology is a specialty board of the American Board of Professional Psychology. The ABCN administers and certifies exams for competence in the specialty of Clinical Neuropsychology. AACN: The American Academy of Clinical Neuropsychology is a membership organization comprised solely of ABCN certified neuropsychologists, and it promotes their interests.
- ABN: American Board of Professional Neuropsychology is a free-standing, post-doctoral level ( i.e. Ph.D., Psy.D.) Diplomate granting certification board established in 1982. The ABN Diplomate process involved a rigorous examinations of credentials, including education and post doctoral training, a written examination, work sample review, and a two-hour oral examination.

# Published Board Policies

- AACN's Official position of the American Academy of Neuropsychology on test security."
- ABN's 2016 "Policy Statement of the American Board of Professional Neuropsychology regarding Third Party Observation and the recording of psychological test administration in neuropsychological evaluations."

# Defense Arguments

- The problems expressed with TPO and/or recording the examination include: (1) compromised validity of future neuropsychological test results; (2) anticipated misuse and misinterpretation of tests by the 3<sup>rd</sup> party observations who have no compelling interest to protect copyrighted test content; (3) conflicts with the APA Ethical Standards and key principles for Specialty Guidelines for Forensic Psychology of the American Psychological Association; (4) increased likelihood test content and instructions will be disseminated, which raises the risk that motivated parties will coach and prepare examinees for testing in advance, specifically to influence test results; and (5) lawyers involved in brain injury litigation have acknowledged they coach their clients on how to approach neuropsychological testing to their advantage.

# Defense Arguments

- 3<sup>rd</sup> party observations confers no overriding benefits that offset the significance costs of exposing test materials. The defense will suffer the irreparable harm of losing the basic legal right to conduct a defense mental examination through an expert of defendant's choosing, and potential for any neurological expert.
- Subjecting defendants to that deprivation of rights, simply in the name of allowing plaintiffs' attorneys to receive test information directly from defense experts, is unjust, and also unnecessary, since plaintiffs can receive the information through their own experts.

# Unresolved by the Supreme Court

- Finally, we note that the question presented in the case involves only defense medical examinations, which are conducted solely for purposes of litigation, not treatment. Defendants never argued that recording of third-party observation should be available at examinations conducted by plaintiffs' treating physicians...
- ...We therefore refer to the Civil Practice Committee whether there should be any provision to allow defendants to record or observe examinations by nontreating doctors arranged by plaintiffs' counsel solely for the purposes of litigation.

# Questions Raised By DiFiore

- Will the most highly credentialed and experienced neuropsychologists generally refuse to offer their expertise in response to DiFiore?
- Will defendants notice a significant increase in damages exposure directly related to challenges finding a top qualified neuropsychologist?
- What strategic advantages will plaintiffs have over defendants from a marked decline in available defense neuropsychologists?
- Will we see more neuropsychologists retained by defendants testifying at trial solely based on record reviews? If so, will they get to explain to a jury why there was no IME/DME?

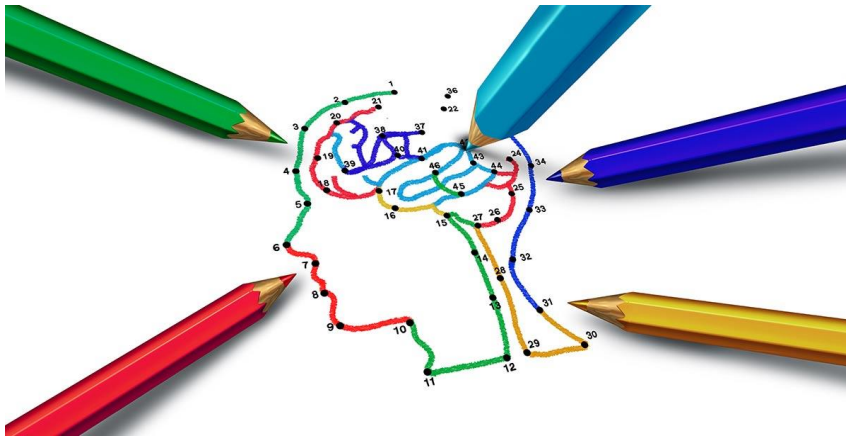
# “Test Data” Includes Raw Data And Recordings

American Psychological Association ( Citation 2002) ethical principles of psychologists and code of conduct, standards 9.04 versus 9.11

## 9.04 Release of Test Data

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# Test Materials cont...



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# For more information . . .

## Contact:

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# Complex Case Studies in Personal Injury Cases

Liability Aspects in a Construction Case

PANELISTS:

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STARK & STARK

# Who are the players?

- ▶ Plaintiff
- ▶ Plaintiff's employer
- ▶ Owner
- ▶ Project Manager
- ▶ Engineer
- ▶ General Contractor
- ▶ Subcontractor
- ▶ Sub-subcontractor

# Worker's Compensation

- ▶ Typically, a plaintiff is barred from asserting a common law claim against his or her employer or co-workers under the New Jersey Workers Compensation Act, N.J.S.A. 34:15-1 et seq.
  - ▶ Unless there is a claim of intentional wrong by the employer or the co-worker.
    - ▶ To establish intentional wrong, a plaintiff must show: (1) the employer/co-worker acted with the subjective desire to injure the plaintiff, or with the knowledge that their conduct was substantially certain to injure the plaintiff, and (2) the accident was not part and parcel of everyday industrial life. Laidlow v. Hariton Machinery Co., Inc., 170 N.J. 602, 614-15 (2002).
    - ▶ The Supreme Court of New Jersey has held: "The first condition embodies what has become known as Millison's 'conduct' prong; the second condition reflects the 'context' prong." Mull v. Zeta Computer Products, 176 N.J. 385, 391 (2003); Millison v. E.I. du Pont de Nemours & Co., 101 N.J. 161 (1985).
- ▶ A plaintiff can have more than one employer for purposes of the Workers Compensation Act
  - ▶ Case study: one entity was the payroll company, which issued payroll checks and W2s to the plaintiff and entered into the CBA with the plaintiff's union, but the plaintiff worked on the jobsite for a different, related entity, which was the "special employer."
    - ▶ Courts consider five factors in determining whether an employer is a "special employer" for purposes of the WCA: (1) whether there is an express or implied contract for hire between the employee and the employer; (2) whether the work being done is that of the employer; (3) whether the employer has a right to control the details of the work; (4) whether the employer pays the employee's wages or benefits; and (5) whether the employer can hire or fire the employee. See Blessing v. T. Shriver & Co., 94 N.J. Super. 426, 430 (App. Div. 1967).

# Third-Party Complaints

- ▶ Although a plaintiff cannot typically pursue a claim against his or her employer under the Workers Compensation Act, a third-party is permitted to assert a contractual indemnification claim against an employer.
  - ▶ Must be expressed in clear and unequivocal terms.
- ▶ This becomes a very slippery slope with respect to what role the employer can play at trial.
  - ▶ See Kane v. Hartz Mountain Indus., Inc., 278 N.J. Super. 129 (App. Div. 1994) (holding that the employer has no legal right to participate in the trial of the employee's personal injury claim); Est. of D'Avila ex rel. D'Avila v. Hugo Neu Schnitzer E., 442 N.J. Super. 80 (App. Div. 2015) (allowing the employer to participate in the trial).
- ▶ Consider how this impacts the verdict sheet and the jury's assessment of liability.

# What are the contractual relationships between the players?

- ▶ Are there Indemnification Provisions?
- ▶ Are there Additional Insured Requirements?
- ▶ Is there a basis to tender your defense?

# Additional Insured Status v. Indemnification

- ▶ Additional insured status means that Defendant A is afforded direct coverage under Defendant B's policy.
  - ▶ There may be coverage questions here about which policy is primary.
- ▶ Indemnification language means that if Defendant A is found liable to the plaintiff, it can seek recovery of its share of damages from the party that owes it indemnification.
- ▶ Indemnification provisions sometimes also include a duty for Defendant B to defend Defendant A.
- ▶ In the construction context, you will usually find a requirement that subcontractors add the general contractor (and often times the owner as well, as an additional insured on their policies).
- ▶ Depending on the contractual language, a tender may be appropriate.

# What is a tender?

- ▶ A tender letter generally requests that another party assume the defense of the party sending the tender letter.
  - ▶ Example 1: Defendant A and Defendant B entered into a contract for work on a project, and the contract requires Defendant B to name Defendant A as an additional insured on its insurance policy. Defendant A might choose to send a tender letter to Defendant B requesting that Defendant B assume the defense of Defendant A because it is considered an additional insured on the policy.
    - ▶ Cross-claim for breach of contract if Defendant B failed to comply with the contractual requirement.
  - ▶ Example 2: Defendant A and Defendant B entered into a contract for work on a project, and the contract requires Defendant B to indemnify and defend Defendant A for any claims arising out of work performed on the project. Defendant A might choose to send a tender letter to Defendant B requesting that Defendant B assume the defense of Defendant A.
- ▶ There is usually a request for attorney's fees from the date of the tender letter if it is not accepted.
- ▶ There may be coverage questions.



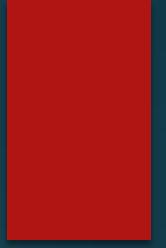
# Indemnification Provisions

- ▶ Which law applies?
- ▶ NJ – requires specific language or evidence of intent for an indemnitee to recover indemnification for its own negligence.
  - ▶ Azurak v. Corp. Prop. Investors, 175 N.J. 110 (2003) – express and unequivocal language with specific reference to fault of the indemnitee.
- ▶ Public policy prohibits indemnification for an indemnitee's sole negligence.
- ▶ Thus, the indemnitee can recover indemnification if the indemnitor is 1% at fault, assuming the contract provision is sufficient.

# Third Party Complaints and Crossclaims

- ▶ If the plaintiff is injured in the scope of his/her employment, he/she will not be permitted to seek recovery from his/her employer due to workers compensation.
  - ▶ However, if there is a contractual indemnification provision in a contract with the Plaintiff's employer, there is a basis to bring the employer in as a third-party defendant.
- ▶ Cross-claims against other defendants for indemnity, contribution, and breach of contract in some circumstances.

QUESTIONS?



# Complex Case Studies in Personal Injury Cases

## Liability Aspects in a Construction Case





*Contract*



# Contract is King

 **AIA**<sup>®</sup> Document A104<sup>™</sup> – 2017

**Standard Abbreviated Form of Agreement Between Owner and Contractor**

AGREEMENT made as of the 17 day of September in the year 2020  
*(In words, indicate day, month and year.)*

**BETWEEN** the Owner:  
*(Name, legal status, address and other information)*

Alliance HSP Pennsauken, LLC  
40 Morris Avenue  
Bryn Mawr, PA 19010

and the Contractor:  
*(Name, legal status, address and other information)*

B. Tait Builders, LLC  
6646 Westfield Avenue  
Pennsauken, NJ 08110

**ADDITIONS AND DELETIONS:**

The author of this document has added information needed for its completion. The author may also have revised the text of the original AIA standard form. An *Additions and Deletions Report* that notes added information as well as revisions to the standard form text is available from the author and should be reviewed. A vertical line in the left margin of this document indicates where the author has added necessary information and where the author has added to or deleted from the original AIA text.

This document has important legal consequences. Consultation with an attorney is encouraged with respect to its completion or modification.

**Contractor shall be responsible for initiating, maintaining and supervising all safety precautions and programs in connection with the Work. Contractor will take all necessary precautions required in order not to jeopardize the safety of Owner's personnel or property, or members of the general public.**

# Contract is King

## **AIA**® Document A104™ – 2017

### **Standard Abbreviated Form of Agreement Between Owner and Contractor**

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This document has important legal consequences. Consultation with an attorney is encouraged with respect to its completion or modification.

**§ 9.2 Supervision and Construction Procedures**  
**§ 9.2.1 The Contractor shall supervise and direct the Work, using the Contractor's best skill and attention. The Contractor shall be solely responsible for and have control over construction means, methods, techniques, sequences and procedures, and for coordinating all portions of the Work under the Contract.**



# Epic Management

## What did it promise in its contract?



**October 10, 2017  
Contract signed by  
Epic Management**

(each herein. The Contractor shall require that its Subcontractors abide by all provisions of the General Conditions related to non-discrimination and affirmative action.

2.1. Neither the Owner nor the A/E assumes any responsibility for defining the basis on any Subcontract on account of the organization of or amendments made to the specifications or drawings. The Contractor shall ensure that the Subcontractors are coordinated so that all of the Work is properly and timely allocated, assigned, and assigned to the Contractor and Subcontractors without overlap, conflict, or duplication. The Contractor shall carefully review all Subcontractors to ensure that:

- (1) All subcontracted parts of the Work are assigned to the appropriate Subcontractor;
- (2) Provisions are made for temporary facilities and utilities necessary for the performance of the Work;
- (3) Provisions are made for the Owner and the A/E to access the Work;
- (4) Responsibility for Project safety is properly assigned; and
- (5) They are in compliance with Applicable Laws.

2.4. The Contractor's subcontracting of the Work, and the Owner's consent and approval of the Contractor's subcontracting with any Subcontractor, shall not relieve the Contractor from any liability or obligation under the Contract Documents or under any Applicable Laws. The Contractor shall be responsible for the acts and omissions of its Subcontractors, and shall be and remain liable and obligated to the Owner for all Work subcontracted. It is agreed that no relationship of agency, employment, service, or otherwise shall be created between the Owner and any Subcontractor or consultant of the Contractor. In no event shall the Owner be liable to any of the Contractor's Subcontractors for Work performed by such Subcontractor on behalf of the Contractor or for the Project. The A/E and the Owner will not be asked to resolve disputes between the Contractor and any Subcontractor or disputes between Subcontractors. The Contractor shall endeavor to, and shall, resolve all disputes between the Contractor and any Subcontractors, and/or disputes between Subcontractors, at its own cost and expense.

7.3. If requested by the Owner, the Contractor shall supply to the Owner a list of key project personnel for any Subcontractor. Before any substitution or replacement of Subcontractors by the Contractor, the Contractor shall submit to the Owner detailed justifications for such replacements. If any such substitution or replacement of Subcontractors by the Contractor causes any expense incurred as a result of such substitution or replacement shall be borne by the Contractor.

The Contractor's [Epic Management] subcontracting of the Work, and the Owner's consent and approval of the Contractor's subcontracting with any Subcontractor, shall not relieve the Contractor [Epic Management] from any liability or obligation under the Contract Documents or under any Applicable Laws. The Contractor [Epic Management] shall be responsible for the acts and omissions of its Subcontractors, and shall be and remain liable and obligated to the Owner for all Work subcontracted.

**In its contract to build the RWJBarnabas Health Athletic Performance Center, Epic Management promised to take responsibility for all the work on the construction site, including any safety violations by subcontractors. Epic Management agreed it could not pass off its responsibility to anyone else.**

# RWJBarnabas Health Athletic Performance Center

## Who was responsible for safety at the construction site?

**KMS**

**Owner's representative**

KMS promised Rutgers to make sure Epic Management complied with all safety provisions in the construction contract & with OSHA regulations.



**General contractor (prime contractor)**

Epic Management, as the general contractor, was responsible for all worker safety at the construction site, including subcontractors

**FORCE**

Concrete subcontractor &  
Mike Agabiti's employer

**Alloway v. Bradlees, Inc., 157 N.J. 221 (1999)**

**VS.**

**Tarabokia v. Structure Tone, 429 N.J. Super.  
103 (App. Div. 2012)**

# *Alloway v. Bradlees*



The dispositive issue is whether the general contractor on this construction project, owed a duty of care to ensure the safety of plaintiff, an employee of a subcontractor or of a subcontractor. The analysis is guided by the principles adopted by the Court in *Alloway v. Bradlees, Inc.*, 157 N.J. 221 (1999).

## *Alloway v. Bradlees factors*

- **Foreseeability**
- **Relationship between the parties**
- **Opportunity and capacity to take corrective action, i.e., control,**
- **Public policy interest in the result.**

# Tarabokia v. Structure Tone, 429 N.J. Super. 103 (App. Div. 2012)





In *Alloway*, the Supreme Court made clear that, when analyzing whether a general contractor owes a duty of reasonable care to the employee of a subcontractor, the inquiry "necessarily involves consideration of the relevance of statutory and regulatory requirements, more specifically, OSHA regulations." [157 N.J. at 229](#).

## OSHA's Multiemployer Citation Policy

Curious about how OSHA decides which employer to cite for violations when there's more than one company involved?

This infographic will give you an overview of OSHA's Multiemployer Citation Policy and help you understand your safety responsibilities depending on your role in a project.

**4** types of employers:



An employer can fall into **MORE THAN ONE** category.

For more detail on these definitions, check out BLR's article, "Safeguarding Contract Workers."

**Free for a limited time!**

<http://tinyurl.com/mg7fgf9>

### CREATING

The employer that creates a hazardous condition

### EXPOSING

The employer whose employees are exposed to a hazard

### CORRECTING

The employer responsible for correcting a hazardous condition

### CONTROLLING

The employer with general authority over the worksite

Each type of employer has certain

**SAFETY RESPONSIBILITIES.**



# OSHA regulations

## Who is responsible for safety on construction sites?



### US Department of Labor OSHA regulations

The screenshot shows the OSHA website interface. At the top, it says "UNITED STATES DEPARTMENT OF LABOR" and "Occupational Safety & Health Administration". Below that, there's a navigation menu with "Home", "Regulations", "Enforcement", "Data & Statistics", "Training", "Publications", "Newsroom", "Small Business", and "OSHA". The main content area displays the regulation details for 1926.16(c). The "Part Number" is 1926, "Part Title" is "Safety and Health Regulations for Construction", "Subpart Title" is "General Interpretations", and "Title" is "Rules of construction". The "Applicable Standards" are listed as 1926.11, 1926.12, 1926.15, and 1926.18. The regulation text states: "In the event that a subcontractor of any tier agrees to perform any part of the contract, he also assumes responsibility for complying with the standards in this part with respect to that part. Thus, the prime contractor assumes the entire responsibility under the contract and the subcontractor assumes responsibility with respect to his portion of the work. With respect to subcontracted work, the prime contractor and any subcontractor or subcontractors shall be deemed to have joint responsibility."

1926.16(c)

To the extent that a subcontractor of any tier agrees to perform any part of the contract, he also assumes responsibility for complying with the standards in this part with respect to that part. Thus, the prime contractor assumes the entire responsibility under the contract and the subcontractor assumes responsibility with respect to his portion of the work. With respect to subcontracted work, the prime contractor and any subcontractor or subcontractors shall be deemed to have joint responsibility.

**The prime contractor is always responsible for safety on its construction site even if it contracts work out to subcontractors.**

**This means that even though subcontractors shared responsibility for safety, ultimately Epic Management was responsible for *all* worker safety on its construction site.**

# OSHA regulations

## Who is responsible?

1926.16(a)

...In no case shall the prime contractor be relieved of overall responsibility for compliance with the requirements of this part for all work to be performed under the contract.

UNITED STATES DEPARTMENT OF LABOR  
OSHA  
Occupational Safety & Health Administration We Can Help

Resolutions (Standards - 29 CFR) - Table of Contents

Part Number:	1926
Part Title:	Safety and Health Regulations for Construction
Subpart:	0
Subject Title:	General Interpretations
Standard Number:	1926.16
Title:	Rules of construction.
Applicable Standards:	1910.11; 1918.12 ; 1910.16 ; 1918.29

**1926.16(a)**

The prime contractor and any subcontractors may make their own arrangements with respect to obligations which might be more appropriately treated as a joint responsibility rather than individually. Thus, for example, the prime contractor and his subcontractors may wish to make an express agreement that the prime contractor or one of the subcontractors will provide all required first-aid or first-aid facilities, thus relieving the subcontractors from this duty, but not any legal responsibility (i.e., in the case may be, relieving the other subcontractors from this responsibility). In no case shall the prime contractor be relieved of overall responsibility for compliance with the requirements of this part for all work to be performed under the contract.

**1926.16(c)**

By contracting for full performance of a contract subject to section 107 of the Act, the prime contractor assumes all obligations prescribed as employer obligations under the standards contained in this part, whether or not he subcontracts any part of the work.

**1926.16(c)**

To the extent that a subcontractor of any tier agrees to perform any part of the contract, he also assumes responsibility for complying with the standards in this part with respect to that part. Thus, the prime contractor assumes the entire responsibility under the contract and the subcontractor assumes responsibility with respect to his portion of the work. With respect to subcontracted work, the prime contractor and any subcontractor or subcontractors shall be deemed to have joint responsibility.

**1926.16(d)**

Where joint responsibility exists, both the prime contractor and his subcontractor or subcontractors, regardless of tier, shall be considered subject to the enforcement provisions of the Act.

OSHA

How is OSHA supposed to work?







# OSHA

What happens when the circle of safety isn't followed?



# Skanska

What industry standards applied to Skanska's conduct?

-  The American National Standards Institute
-  The Associated General Contractors of America
-  The National Safety Council
-  Construction Industry Institute

# Skanska

## Why wasn't the Skanska work site safe?



Alex Herceg  
Skanska Safety Manager

	Yes	No
Do you hold an OSHA certificate in metallurgy?	<input type="checkbox"/>	<input checked="" type="checkbox"/>
Have you ever fabricated a relieving angle?	<input type="checkbox"/>	<input checked="" type="checkbox"/>
Have you ever been a certified welder?	<input type="checkbox"/>	<input checked="" type="checkbox"/>
Have you ever done welding on a construction job?	<input type="checkbox"/>	<input checked="" type="checkbox"/>
Do you hold any OSHA certifications referable to brick work or masonry-type work?	<input type="checkbox"/>	<input checked="" type="checkbox"/>

# Ferandes v. Dar 222 N.J. 390 (2015)



# FOLLOW THE MONEY





# INDEMNITY AGREEMENT

INDEMNITY AGREEMENT (the "Agreement") is made and entered into as of  
] day of [ ] 200[ ] (the "Effective Date")  
(the "Indem  
-AND

STARK & STARK, A Professional Corporation  
Mailing Address: PO Box 5315, Princeton, NJ 08543  
Office Location: 993 Lenox Drive, Lawrenceville, NJ 08648  
(609) 896-9060

**Bruce H. Stern, Esq., Attorney ID#: 01483-1981**  
**Attorneys for Plaintiff, Rachel Wenner**

RACHEL WENNER  
  
Plaintiff(s),  
  
vs.  
  
MERCK and CO., INC. MERCK SHARP  
DOHME CORP., and FRANKLIN S.  
CHANDLER, JR.  
  
Defendant(s).

SUPERIOR COURT OF NEW JERSEY  
MERCER COUNTY LAW DIVISION

Docket No. MER-L-00957-18

**CIVIL ACTION**  
**Brief In Support of Plaintiff's Motion To**  
**Compel The Production Of The Raw Data**  
**From Dr. Gibson's Neuropsychological**  
**Examination and To Permit Plaintiff to Video**  
**Record the Neuropsychological Evaluation**

**STATEMENT OF FACTS**

On August 18, 2017, plaintiff Rachel Wenner was injured in a motor vehicle crash caused by the negligence of defendant Merck and its employee Franklin Chandler, Jr. Plaintiff sustained severe injuries including a traumatic brain injury. (See report of Brian Greenwald, M. D. attached as Exhibit A).

Defendants requested plaintiff undergo a defense neuropsychological evaluation with David S. Masur, Ph.D. On May 11, 2020, the Court entered an Order, compelling the production of the raw data generated during Dr. Masur's neuropsychological evaluation. (A copy of the

order is attached as Exhibit B). Due to Covid restrictions, that evaluation did not occur.

In late 2021, defendants replaced their defense counsel. Defendants' new counsel has requested Ms. Wenner undergo a defense neuropsychological examination with Douglas P. Gibson, Psy.D, a well-known out of state defense psychologist<sup>1</sup>. The initial appointment is scheduled for May 5, 2022.

On March 24, 2022, plaintiff's counsel wrote to defense counsel, requesting Dr. Gibson provide a copy of the raw data generated during the evaluation, his scoring summary sheet, his notes and any computer-generated reports. (A copy of the March 24, 2022, letter is attached as Exhibit C). Plaintiff's counsel agreed to keep the documents confidential to protect test security. On April 7, 2022, Plaintiff's counsel requested permission to video record the defense neuropsychological evaluation. (A copy of plaintiff's counsel's letter dated April 7, 2022, is attached as Exhibit D).

In response defense counsel advised Dr. Gibson opposed providing his raw test data (Copies of defense counsel's letters dated April 5, 2022, is attached as Exhibits E).

Plaintiff moves to bar defendants from compelling a defense neuropsychological evaluation with Dr. Gibson or requiring defendants to produce the raw test data, scoring summary sheets and any computer-generated reports and to permit plaintiff to video record the neuropsychological evaluation. Plaintiff relies on the affidavit of Richard I. Frederick, Ph. D, attached as Exhibit F with multiple attachments).

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<sup>1</sup> In 2016 Dr. Gibson presented at the 7<sup>th</sup> Annual Atlanta Trucking Conference, presenting: "Identifying, Evaluating, and Defending Traumatic Brain Injury (TBI) Claims".

In 2016 and 2017 Dr. Gibson gave a presentation entitled, "Claims Management-Handling Traumatic Brain Injury Claims", at the CLM Conference. CLM is the largest professional association in the insurance industry.

”

## LEGAL ARGUMENT

Cross-examination is a hallmark of civil and criminal justice. It has been called the “greatest engine” ever devised for ascertaining the truth, and it is considered essential to due process because it is the most reliable and effective way of testing witness credibility, knowledge and recollection. Goldberg v. Kelly, 397 U.S. 254, 269-270 (1970). Due process requires that all parties “must be fully apprised of the evidence submitted or to be considered, and must be given opportunity to cross-examine witnesses, to inspect documents and to offer evidence in explanation or rebuttal. In no other way can a party maintain its rights or make its defense. Katzin v. Workers (Comp. Appeals BD. 5 Cal. App. 4<sup>th</sup> 703, 711 (1992)).

### **I. Dr. Gibson must provide the raw data and other requested documentation.**

Because the “raw data” forms the sole basis of scoring the testing, the only way plaintiff can ascertain whether Dr. Gibson accurately scored the tests and/or accurately reported the results is to review the raw data. Dr. Gibson will undoubtedly agree with this statement. It is also the only way that the undersigned can prepare for cross-examination of Dr. Gibson. However, years of practice experience has shown that absent a court order, despite case law and psychologist ethics to the contrary, for reasons of confidentiality that only they can explain, both defense and treating neuropsychologists often are loath to release raw data and/or test booklets. Without it, it is impossible to validate Dr. Gibson’s administration and interpretation and impossible to cross-examine him regarding his opinions and conclusions. Dr. Gibson cannot withhold the data on which his opinion will be based, and still expect to have his opinion admitted in evidence. Plaintiff also requests the Court permit her to video record the evaluation to ensure the tests were properly

administered.

**A. INTRODUCTION: THE IMPORTANCE OF NEUROPSYCHOLOGIC TEST DATA TO THE LITIGATION PROCESS**

Plaintiff sustained, among other injuries, a traumatic brain injury (TBI). Defendants will dispute this, and have retained Douglas Gibson, Psy.D.. to support their position. As with all neuropsychological evaluations, Dr. Gibson's opinion is based on the neuropsychological tests he administered, scored, and interpreted. Plaintiff's actual response to Dr. Gibson's tests is known as "raw testing data." Lest there be any doubt about the importance of reviewing such information, consider the following from David Faust, *Coping With Psychiatric and Psychological Testimony*, 6<sup>th</sup> Edition, Oxford University Press (2012):

"There are various reasons it is vital to obtain the expert's complete file. For one, the underlying data and information typically form a major basis, if not the major basis, for the expert's conclusions. How can one properly scrutinize these conclusions without the underlying data upon which they were based?"

"For a variety of reasons, reports may not provide accurate or faithful representations of the underlying data, but one often cannot determine this unless the full file is obtained. For example, scores that appear in the report might not be correct because of errors in tallying the results." *Id.* at 981.

Dr. Gibson has traditionally refused to provide his data directly to plaintiffs' counsels.

Rather, Dr. Gibson has suggested that he will forward his data only to another licensed psychologist. Since the undersigned must represent the Plaintiff and to prepare to cross-examine Dr. Gibson, the data must go to the undersigned directly, and not to a surrogate. Professor Faust comments:

"Often, when requests are made for the expert's file, experts offer to send the material (assuming needed releases) to the lawyer's expert...I believe this is almost always the nonpreferred option because of the various problems and limitations that commonly result, a number of which will be reviewed here. The overriding reason, however, is that the lawyer needs to obtain this material for himself or herself, and having a retained expert receive the data usually will not solve this problem." *Id.* at 984.

Neuropsychologists, like Dr. Gibson, typically refuse to produce raw data due to an antiquated ethical concern over the integrity of neuropsychological testing instruments. When neuropsychologists attempt to service the litigation industry, they must recognize that their parochial ethical concerns must accede to the demands of the law. Stated otherwise, neuropsychologists' ethical concerns provide no immunity from legal process.

“The APA is not a state or federal regulator body, but simply a voluntary organization which a psychologist may or may not choose to join. It has no regulatory or persuasive authority over this Court or any other court.” Astore v Farmers Ins Exchange, Montana First Judicial District Court, Lew and Clark County, Cause No. BDV-2008-915 (December 4, 2009). (A copy is attached as Exhibit G).

Leading neuropsychologists have long advised their colleagues to comply with legal process. In Sweet's 1999 book on Forensic Neuropsychology, Lees-Haley and Cohen commented:

“Neuropsychologists who refuse to disclose their tests and test data should be aware that they are bucking a recent trend toward greater openness in civil discovery. Judges and lawyers in jurisdictions across the country have become frustrated with the extent of the gamesmanship taking place in discovery proceedings...Finally, there seems to be a general consensus that greater sharing of information about each side's position is likely to encourage earlier and more productive discussions about settlement, and thus avoid the time and expense involved in litigation generally.” Jerry Sweet on Forensic Neuropsychology: Fundamentals and Practice, Chapter 15, Lees-Haley and Cohen “The Neuropsychologist As Expert Witness: Toward Credible Science In the Courtroom”, 443, 459, Swets & Zeitlinger (1999).

The Court is also directed to an article by Lees-Haley “Are Psychologists Hiding Evidence? A Need for Reform,” Claims Magazine 10/2/2003, in which Dr. Haley, the proprietor of the Lees-Haley Fake Bad Scale (FBS) contained within the MMPI-2, and a noted defense

neuropsychologist, clarifies that anyone can go to the Library of Congress and obtain these tests.

At page two of the article Dr. Haley states:

Moreover, numerous copies of copyrighted tests and test manuals are sent to the Library of Congress. There, they are available to any library patron who asks, and accessible to residents of other areas through inter-library loan services, consultants and professional research services. The contents of many of the most widely used tests are available to the public in texts that can be purchased through public bookstores or borrowed from libraries.

Principle authorities address the release and distribution of psychological test data. All recognize that neuropsychologist's ethical principles are subject to the demands of the legal process. First, the APA ethics rules require only a release from the patient or a court order/subpoena for production of data:

**“9.04 Release of Test Data(a)** The term test data refers to raw and scaled scores, client/patient responses to test questions or stimuli, and psychologists' notes and recordings concerning client/patient statements and behavior during an examination. Those portions of test materials that include client/patient responses are included in the definition of test data. **Pursuant to a client/patient release, psychologists provide test data to the client/patient or other persons identified in the release.** Psychologists may refrain from releasing test data to protect a client/patient or others from substantial harm or misuse or misrepresentation of the data or the test, recognizing that in many instances release of confidential information under these circumstances is regulated by law. (See also Standard 9.11, Maintaining Test Security.)  
**(b) In the absence of a client/patient release, psychologists provide test data only as required by law or court order.”<sup>2</sup>**

(A copy of the APA Guidelines is attached as Exhibit H).

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<sup>2</sup> A separate rule draws a distinction between test data and testing materials:

“9.11 Maintaining Test Security. The term test materials refers to manuals, instruments, protocols, and test questions or stimuli and does not include test data as defined in Standard [9.04, Release of Test Data](#). Psychologists make reasonable efforts to maintain the integrity and security of test materials and other assessment techniques consistent with law and contractual obligations, and in a manner that permits adherence to this Ethics Code.” APA, Ethical Principles of Psychologists and Code of Conduct (2002), Emphasis supplied.

Second, Division 41 of the APA is the Forensic Psychology Division. In 1991, Division 41 adopted “Specialty Guidelines For Forensic Psychologists.” (A copy is attached as Exhibit I). The Guidelines were revised in 2011. The Guidelines clarify that documentation prepared by forensic psychologists are subject to legal process:

**10.07 Provision of Documentation**

Pursuant to proper subpoenas or court orders, or other legally proper consent from authorized persons, forensic practitioners seek to make available all documentation described in 10.05, all financial records related to the matter, and any other records including reports (and draft reports if they have been provided to a party, attorney, or other entity for review), that might reasonably be related to the opinions to be expressed.”<sup>3</sup>

Defendants cite to the position of Pearson Assessments, the publisher of many of the tests Dr. Gibson will administer. Pearson’s position (as found on their website) is this: “Should litigation in which a psychologist is involved reach the stage **where a court considers ordering the release of proprietary test materials to non-professionals such as counsel**, we request that the court issue a protective order prohibiting parties from making copies of the materials; requiring that the materials be returned to the professional at the conclusion of the proceeding; and requiring that the materials not be publicly available as part of the record of the case, whether this is done by sealing part of the record or by not including the materials in the record at all” (bolding added).

Defendants claim that the American Psychological Association’s (APA) Code of Ethics prohibits disclosure of test data. The APA is not a state or federal regulatory body, but simply a voluntary organization, which a psychologist may or may not choose to join. It has no regulatory or persuasive authority over this court or any other court. Nevertheless, the APA Code of Ethics

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<sup>3</sup> Pdf version can be found online at:  
<http://www.apa.org/practice/guidelines/forensic-psychology.aspx>



requires release of raw data to a patient and pursuant to a court order. Nowhere does this Code of Ethics say that psychologists who choose to join the APA are precluded from producing testing materials to plaintiff's attorneys under a court's protective order. Requiring a protective order is certainly a reasonable effort to maintain the integrity and security of test materials.

The National Academy of Neuropsychology in its "Test Security: An Update" also sanctions the release of test data and test materials under a protective order. The update states:

Different solutions for problematic requests for the release of test material are possible. For example, the neuropsychologist may respond by offering to send the material to another qualified neuropsychologist.... The individual making the original request for test data (e.g., the attorney) will often be satisfied by this proposed solution, although others will not. Other potential resolutions involve protective arrangements or protective orders from the court.

As a matter of discovery, the raw data on which an expert bases his/her opinion is within the scope of discoverable information. Specifically, regarding expert opinion, New Jersey R. 4:10-2 provides that parties may discover the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. While no reported New Jersey cases deal with this issue, New Jersey trial courts have required a neuropsychologist to turn over his raw test data. (See order attached as Exhibit J).

While Dr. Gibson refuses to provide plaintiff's counsel with his raw test data, Dr. Gibson has in the past agreed to provide the data to plaintiff's counsel where there is a protective order in place. (See *Pitman v. Metropolitan Washington Airport Security* attached as Exhibit K). In *Pitman*, the Court rejected Dr. Gibson's position, ordered the data to be provided and entered a protective order.

In another case involving Dr. Gibson and his refusal to provide his raw data, a Federal Court required him to do. Booker v. Sysco Corp., Civil Action No. 3:21cv14 (E.D. U.S. D. C. May 5, 2021). (A copy of the Booker order is attached as Exhibit L).

Decisions in other jurisdictions support the relief sought.

In Carpenter v. Superior Court, 141 Cal. App. 4<sup>th</sup> 249 (2006) the court addressed the publication company's interest in maintaining their integrity. There, the court stated:

[B]oth Pierson and Harcourt also suggest a satisfactory means by which the tests can be provided after the mental examination. In essence, the publishers propose the test questions and answers may be given to plaintiff's counsel... subject to a protective order strictly limiting the use and further disclosure of the material and providing for other safeguards against access that would compromise the integrity and validity of the test. Carpenter, Id. at 836-839.

Defendants claim that the American Psychological Association's (APA) Code of Ethics prohibits disclosure of test data. The APA is not a state or federal regulatory body, but simply a voluntary organization, which a psychologist may or may not choose to join. It has no regulatory or persuasive authority over this court or any other court. Nevertheless, the APA Code of Ethics requires release of raw data to a patient and pursuant to a court order. Nowhere does this Code of Ethics say that psychologists who choose to join the APA are precluded from producing testing materials to plaintiff's attorneys under a court's protective order. Requiring a protective order is certainly a reasonable effort to maintain the integrity and security of test materials.

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In Castro v. Edwards, Case No. BC604952 (CA. Super. Ct. L.A. October 18, 2017), defendants sought to compel the neuropsychological evaluation of plaintiff by noted defense neuropsychologist Kyle Boone. Plaintiff sought to compel the production of the raw test data. The California Superior Court entered an order compelling production of the raw data. (A copy of the Court's order is attached as Exhibit M).

In State Ex Rel Svejda v Roldan, 88 SW3d 531 (Mo Ct App 2002), the Missouri Court considered a dispute virtually identical to here. The Court clarified that psychological ethical principles are superseded by our legal discovery imperatives:

“We do not find any exception to Missouri’s broad discovery rules that permits a psychologist to interpose his profession’s ethical principles to bar otherwise legitimate discovery. On the contrary, Rule 56.01(b)(1) plainly says that a party ‘may obtain discovery regarding *any* matter, not privileged, which is relevant to the subject matter involved in the pending action...’ (Emphasis added). A psychologist such as Dr. Cowan should not be able to unilaterally interpret his professional rules and then decide that they bar discovery under this state’s legal system. While we acknowledge and appreciate the ethical principles governing Dr. Cowan’s work, those principles must yield to Missouri’s legal rules governing discovery of evidence.”

The Missouri court ordered that the neuropsychologist “must produce these data directly to Mr. Svejda’s attorneys...”<sup>4</sup>

To the same effect is the Pennsylvania Federal Court decision in Keefer v. Erie Ins. Exch., 2014 U.S. Dist. LEXIS 29282, 19-20 (US Dist. Ct. M.D. Pa. Mar. 7, 2014):

“The extent of Plaintiff’s injuries is a central issue in this case. The requested data pertains to the tests and results therefrom that were conducted to assess the extent of Plaintiff’s injuries. Thus, the liberal discovery policies dictate that the material is discoverable. However, to lull Defendant’s concerns regarding uncontrolled disclosure,

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<sup>4</sup> The Court did permit a protective order that would confine the attorney from producing the data to people other than duly designated experts. This is precisely the opposite of what Dr. Gibson proposes in the present case, i.e., to produce only to duly designated experts, and not to the attorney.

the court will order that the raw test data be produced following the execution of a confidentiality agreement designed to protect the confidential nature and trade secrets of the tests conducted by Dr. Sacchetti. The court is confident such an arrangement would satisfy both Plaintiff's need for discovery and Defendant's concern for test confidentiality. [\*20] Accordingly, Defendant will be compelled to produce the raw test data provided to the court following the execution of a confidentiality agreement.”

In Tibbs v. Adams, 2008 WL 2633233 (U.S.D.C. E.d. Cal. 2008), the court analyzed this issue in the context of a writ of habeas corpus, according to the federal rules of evidence. The court rejected the very arguments defendants make here about the APA codes and ordered a psychologist to immediately produce all of her raw data and other materials. The court concluded that its order requiring her to produce the information, alone, alleviated any alleged ethical concerns and did not issue a protective order.

In Andruszewski v. Cantello, 247 A.D.2d 876, 668 N.Y.S.2d 297 (4th Dept. 1998) the plaintiff failed to exchange the raw test data of plaintiff's neuropsychologist. In response thereto, the trial court precluded the plaintiff from calling the neuropsychologist to testify during the trial. The plaintiff appealed. The appellate court affirmed the lower court's order of preclusion based upon issues of fairness in a party adequately preparing for trial. Of further note, the court also held that the fact that the plaintiff's treating neuropsychologist was not cooperating in producing the data did not relieve the plaintiff from the burden of producing the documents.

In Knauer v. Anderson, 709 N.Y.S.2d 386 (N. Y. Sup. Ct., Erie County 2000), in which the plaintiff allegedly sustained a traumatic brain injury and underwent neuropsychological testing, the defendants requested an authorization to obtain the raw data from the plaintiff's neuropsychologist. The plaintiff moved for a protective order seeking to preclude the release of the raw data to the defendants. In opposition, defense counsel submitted an affidavit from a notorious defense expert neuropsychologist, Dr. Jerid Fisher -- who co-authored with Dr. Robert McCaffrey a book entitled “The Practice of Forensic Neuropsychology: Meeting Challenges in the

Courtroom”, Plenum Press 1997 -- in support of their application to compel the plaintiff to release the raw data from the plaintiff’s neuropsychological testing. In his affidavit, Dr. Fisher advocated the position that the raw data was not only discoverable, but necessary to evaluate whether the conclusions reached by the plaintiff’s neuropsychologist were correct. In denying the plaintiff’s application, the court, referring specifically to “raw data”, held that “what plaintiff is trying to do is prevent disclosure of relevant data.

In Drago v. Tishman Construction Corp., 4 Misc. 3d 354, 777 N.Y.S. 2d 889 (NY Sup. Ct., New York County 2004), the plaintiff sustained a traumatic brain injury that allegedly resulted in cognitive impairment and diminution of employment opportunities. The plaintiff subsequently underwent neuropsychological testing, the results of which his psychologist relied upon to confirm his cognitive impairment. After the plaintiff refused to exchange the “raw data”, the defendants moved to compel production of the same. In granting the defendants’ application, the court held that procedural fairness required disclosure of the raw data to grant the defendants an opportunity for proper trial preparation. Of further note, the Court also held that the **failure of plaintiff to exchange the raw data could result in the preclusion of plaintiff’s expert** (777 N.Y.S.2d at 892, 893 (citing People v. Almonor) [emphasis added]).

Although a criminal matter, The People of the State of New York v. Almonor, 93 N.Y.2d 571, 693 N.Y.S.2d 861 (1999) relates to the discussion from the perspective that the defendants appealed their respective convictions because the court precluded certain psychologists from testifying. The basis for the court upholding the convictions stemmed from the defendant’s refusal to exchange the raw data from neuropsychological testing which one of its psychologists, Dr. Broner, relied upon in rendering opinions and conclusions that supported an insanity defense. Of note, the Court of Appeals held that “the People’s objection to Dr. Broner’s testimony was

plausible on the basis that the defense had not furnished Dr. Broner's raw data from the underlying tests." 93 N.Y.2d at 583.

In Marable v. Hughes, 38 A.D. 3d 1344, 830 N.Y.S.2d 686 (4th Dept., 2007), an action was commenced on behalf of the plaintiff seeking damages for exposure to lead. The defendant moved for an order seeking to compel the plaintiff to provide the defendant with all records regarding neuropsychological testing of the infant. The court recognized the importance of the raw data and granted the defendant's application. The plaintiff appealed. The Appellate Court recognized the propriety of the lower Court's decision and affirmed its exercise in discretion.

In a matter similar to Marable, in Jessica H. v. Spagnolo, 41 A.D.3d 1261, 839 N.Y.S.2d 638 (4th Dept., 2007), an action was commenced on behalf of the plaintiff seeking damages for exposure to lead. The lower court denied the defendant's motion seeking to compel the production of the records and raw data from the plaintiff's neuropsychological testing. On appeal, citing to the decision in Marable, the Appellate Court held that the lower court erred in not compelling the production of raw data.

To the same effect is the Colorado Federal Court decision in Ogburn v Am. Nat'l Prop & Cas Co, 2014 US Dist LEXIS 150915 (D. Colo, Oct 23, 2014). See also Dejan v. Nabors Drilling USA, 2011 WL 6157490 (W.D. La. June 8, 2011) and Hairston v. Ed Nelson Transport, CASE NO. 3:13-cv-1457-J32JBT, 2015 WL 12843867 (M.D. Fla. Aug. 10, 2015).

Defendants may indirectly aver that any perceived prejudice in preparing for cross-examination can be eliminated by defendants exchanging the requested materials with plaintiff's treating neuropsychologist or forensic neuropsychologist. However, he/she is not the one who will be cross-examining Dr. Gibson. This proposal was directly rejected by a trial court in Montana.

Astore v. Farmers Insurance Exchange, (Mont. Ist Jud. Dist. Ct. Lewis and Clark County 12/4/09).

(A copy is attached as Exhibit H). The Court reasoned:

Without the ability to look at the testing manuals and examine the scoring and conclusions, plaintiff's ability to meaningfully cross-examine a doctor who seeks to opine that she is/was malingering is impaired.

...

The administration and interpretation of psychological tests are rife with potential abuse.

First, neither plaintiff's treating neuropsychologist or "retained psychologist" will not be cross-examining Dr. Gibson. Plaintiff's counsel will be doing the cross-examination, and without the raw data, counsel will be denied the opportunity to properly prepare. Even assuming plaintiff were to retain a neuropsychologist, the flaw in defendant's argument is further highlighted by defendant's position that Dr. Gibson is ethically barred from sharing the raw data with anyone other than another licensed psychologist. Not only is this inaccurate, more important, if followed to its illogical conclusion, even if plaintiff did retain a neuropsychologist, like Dr. Gibson, he/she would also be barred from sharing the raw data with counsel. Since the raw data is the only way to determine whether Dr. Gibson scored the assessment correctly, if plaintiff's own retained expert can't share the raw data other than verbally, how could plaintiff's counsel, or any attorney, challenge Dr. Gibson's scoring? If questioned about the accuracy, all he would have to do is respond that he scored it correctly. With the raw data in hand, he can be directly challenged.

Another flaw in Dr. Gibson's refusal is that by requiring the raw test data and scoring protocol to be produced only to a licensed psychologist, defendants indirectly mandate that plaintiff retain an expert witness who may not otherwise be retained and/or one who may not be called to testify. While the undersigned is not a licensed psychologist, as an experienced practitioner in brain injury litigation, the undersigned can interpret the raw data and use it to prepare for cross-examination without the need to retain an expert psychologist.

The Montana Court addressed this as well:

Claiming that the material can be forwarded to plaintiff's expert as a solution is no solution at all.

Dr. Gibson may opine that plaintiff is not suffering the residuals of a traumatic brain injury.

These opinions and others are based on Dr. Gibson's administration of neuropsychological tests and his interpretation of the test data. Without the data one cannot tell what questions plaintiff got wrong. Further without the test data plaintiff cannot demonstrate to a jury that Dr. Gibson improperly administered the testing nor that he improperly scored and interpreted the data.

Defendants' reliance on neuropsychological associations' convenient, self-imposed guidelines protecting themselves from any outside scrutiny is overreaching. What's next? A self-adopted rule they cannot be cross-examined when they testify? "[T]he defense psychologist does not have the right to dictate the terms under which the examination shall be held. This is a discovery psychological examination, not one in which plaintiff is being treated. Plaintiff's right to preserve evidence of the nature of the examination, the accuracy of the examiner's notes or recollections, the tones of voice outweigh the examiner's preference there be no recording device." B.D. v. Carley, 307 N.J. Super. 259 (App. Div. 1998).

For the reasons discussed above plaintiff's counsel is entitled to the raw data.

**II. Plaintiff is entitled to video record the defense neuropsychological evaluation.**

Plaintiff has requested that she be permitted to video record Dr. Gibson's defense neuropsychological evaluation. Dr. Gibson refuses. Plaintiff's need for audio and video recording the neuropsychological examination is supported by the Affidavit of Richard I. Frederick, Ph.D. (**EXHIBIT G**). Dr. Frederick is a forensic psychologist who has reviewed and



analyzed scores of neuropsychological examinations and conducted hundreds of forensic examinations. Dr. Frederick shows why video recording forensic neuropsychological examinations is critically important to a fair legal process. Dr. Frederick addresses the objections raised by neuropsychologists to having their examinations recorded. Dr. Frederick states forensic neuropsychological evaluations frequently depart from standardized practice and actively misrepresent what happened during an assessment. The errors uncovered by video recording the examinations are numerous. Video recording the forensic neuropsychological evaluation is the best way to document what actually happened during an assessment and often the only way to uncover examination errors. This is especially true when the person examined has cognitive deficits which may prevent accurate recall of what happened and what was said during an examination lasting up to a full day.

This is not an indictment of Dr. Gibson. Regardless of the identity of the examiner, anyone undergoing a forensic neuropsychological examination is entitled to evaluate the reliability of the evidence to evaluate its reliability.

Regarding ethical concerns raised by neuropsychologists against recording exams, Plaintiffs note New Jersey does not license neuropsychologists, only psychologists. The American Psychological Association (APA) encourages forensic psychologists to document all data and bases of what the examiner does “to allow for reasonable judicial scrutiny and adequate discovery by all parties” including “recordings, and transcriptions.”

Finally, video recording neuropsychological exams is not disruptive or intrusive. This Court has the discretion to order recording of the exam. Plaintiff notes many other courts around the country have done so.

These same issues have been addressed by numerous courts in many states across the country. As explored below, such decisions make four points also recognized under, and consistent with, New Jersey law:

- (1) Defense neuropsychological examinations are adversarial in nature and therefore require protection to the plaintiff;
- (2) The generalized shibboleth recited by a small minor of neuropsychologists that observation has the “potential” to influence test results is not sufficient to overcome the need for a video;
- (3) Video recording is superior to a human observer because it is less obtrusive, unbiased, and provides a more complete and accurate record of what transpires; and
- (4) A video record is especially necessary under “special circumstances” as in this case, where the plaintiff’s condition prevents her from being able to review the examination or testify at trial as the manner in which the examination was conducted.

Although holdings from other states and federal courts are not binding on this court, both the reasoning in them, and the large extent to which these many jurisdictions require the need for, and superiority of video recording should be persuasive. This is especially so, since many if not most have virtually identical facts and apply similar law.

A good example of several factors outlined above, and addressing the precise issue on this motion is an Ohio case, Iden v. White Leather, 2017 W.L. 10397943 (Ohio Com. P.L.). There, “which is on all fours,” with this case, plaintiff did not seek to have his attorney attend the examination, but requested that it be video recorded. The court noted the “cognitive abilities of the plaintiff are directly at issue,” which the court found to be “especially important.” In ordering that the exam be video recorded, the court specifically found:

[A video record would] be less intrusive than having a legal advocate or medical representative present, and far less likely to disrupt the examination. Moreover, a video recording of such examination would presumably provide the best evidence of precisely what occurs during the examination, should such evidence become necessary at any stage of the proceedings.

Another Ohio case, Elizabeth Caulkins-Jones v. Hatfield, Case No. 13-CV-003606 (Ct. Common Pleas Franklin Cty. (October 22, 2013), citing to other jurisdictions which have permitted video recording, the court also recognized the superiority of video recording over a human observer. (A copy is attached as Exhibit N). The court wrote:

While a true “observer,” who would be present for the examination without uttering a single word would be rather unobtrusive, its value in preventing errors and addressing the concerns espoused by plaintiff’s counsel would be quite low. Put differently, if a dispute arises about a statement made during the examination, it would still come down to a matter of credibility... On the other hand, a video recording of the examination would be even less obtrusive and wholly objective. The court sees it as the best solution the potential problems.

Eisfeller-Ferrelli v. Silvestro, Superior Court, Rockingham Co., No. 218-2015-CV-139 New Hampshire (2016) is also on all fours with this case. (A copy is attached as Exhibit O). In Eisfeller-Ferrelli the court stated:

The court agrees with plaintiff, based on her counsel’s argument, that her claimed cognitive difficulties include memory problems which can be at times debilitating and which could prevent her from recalling her discussions during the IMEs and therefore prevent her from rebutting any mischaracterization of her statements during the IMEs.

In a 2018 federal court decision, Dekany v. City of Akron, 2018, U.S. Dist. Lexis 4530 (N.D. Ohio January 10, 2018), the court ordered video recording of a neuropsychologic examination under the federal rules. (A copy is attached as Exhibit P). There, the court rejected the same objections made by the defendants here, that video recording might interfere her “report” with Dr. Gibson and thus impact test results. In Dekany, the court described the plaintiff’s condition in finding “good cause”:

Assuming, arguendo, that plaintiff must demonstrate good cause to allow the proceeding to be videotaped, the court finds that such standard has been met....

Initially, the court would note that it was required for view many of plaintiff’s medical records in camera due to the discovery dispute between the parties. As such, the court is aware of the extents of psychological and physical trauma that is

alleged to have occurred in those records. That fact alone provides significant weight to plaintiff's assertion that there is a need to videotape the examination to offer some form of emotional support. In addition, this court will reluctantly allow two separate experts to conduct their own examinations and to examine plaintiff for up to six hours. Such a process would be taxing on any individual, let alone an individual alleging extensive psychological damage....

Contrary to the position taken by defendant's expert, the court declines to find that videotaping the examination makes it more likely that plaintiff will exaggerate or emphasize certain responses. If it is truly plaintiff's desire to falsify answers to manipulate the examination, then videotaping the examination will not alter that desire....

The court also finds that introducing a videographer to the process will not inject a greater degree of the adversarial process. First, the examination itself is already a part of the adversarial process. Despite its name, it is not truly an independent examination. Two experts, retained and paid by defendants, will conduct the examination. That fact alone injects the adversarial process into the examination. A neutral, disinterested videographer will not add anything adversarial to the process.

See also, Jesenovec v. Marcy, CV-07-614436 2010 Ohio Misc., Lexis 21789 No. (CT Com. Pl. July 14, 2010) where the court not only ordered that the neuropsychological examination be recorded, but also analyzed the state of the law across the country as of 2010. (A copy is attached as Exhibit Q). The court reasoned:

A video record of the examination protects both the physician and the plaintiff from unsubstantiated allegations of impropriety. The objective verification of propriety during a medical examination for litigation purposes is also less objectionable because the plaintiff is placed in the awkward position of being physically examined by someone not of his or her choosing, with whom the plaintiff has no past, current or future relationship, who has no interest in the plaintiff's well-being, and for purposes not related to medical treatment....

The court finds that the placement of unobtrusive video camera to record to the follow up examination of plaintiff will protect all of the parties' interests and promote more orderly, concise and clinically accurate presentation of objectively verifiable evidence at trial.

These are just a small sampling of the cases which have addressed this issue. Clear, however, courts across the United States are essentially universal. All recognize that a defense examination is adversarial in nature, a plaintiff may have protection by, at a minimum, a

representative attending the examination; and an observer or videorecording outweighs any concern that the neuropsychological testing may be adversely impacted and videorecording provides the most objective, most complete and least intrusive means of observation.

For the reasons discussed above and in the affidavit of Dr. Fredericks, the Court should permit plaintiff to video record the evaluation.

STARK & STARK  
A Professional Corporation  
Attorney for Plaintiff

*/s/ Bruce H. Stern*

By: \_\_\_\_\_  
BRUCE H. STERN

Dated: April 12, 2022

SUPERIOR COURT OF NEW JERSEY  
LAW DIVISION, CIVIL PART  
MERCER COUNTY, NEW JERSEY  
DOCKET NO.: MER-L-957-18  
APP. DIV. NO. \_\_\_\_\_

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<b>RACHEL WENNER,</b>	:	
	:	
Plaintiff,	:	
	:	
v.	:	TRANSCRIPT
	:	OF
	:	MOTION
<b>MERCK AND CO., INC., MERCK</b>	:	
<b>SHARP DOHME, CORP., FRANKLIN</b>	:	
<b>S. CHANDLER, JR.,</b>	:	
	:	
Defendants.	:	

---

PLACE: Mercer County Courthouse

(Heard via Zoom)

DATE: May 20, 2022

**BEFORE :**

THE HONORABLE. R. BRIAN McLAUGHLIN, J.S.C.

**TRANSCRIPT ORDERED BY:**

BRUCE H. STERN, ESQ. (Stark & Stark)

**APPEARANCES :**

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Attorney for the Plaintiff

JEFFREY L. O'HARA, ESQ. (Connell Foley, LLP)  
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 BY: Mr. O'Hara 11, 21

THE COURT - Decision 23

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THE COURT: Is 2:34 p.m. on May 20th, 2022.  
 Judge Brian McLaughlin, Mercer County Superior Court.

This is the matter of Rachel Wenner versus  
 Merck and Company Incorporated, et al., Docket Number,  
 MERCER-L-957-18. Lequanna Butler is recording this  
 proceeding on CourtSmart. May I have the appearances  
 of counsel, beginning with plaintiff's counsel.

MR. STERN: Good afternoon, Your Honor.  
 Bruce Stern, the law firm of Stark & Stark on behalf of  
 the plaintiff, Rachel Wenner.

MR. O'HARA: Good afternoon, Your Honor.  
 Jeffrey O'Hara from Connell Foley on behalf of Merck  
 and Co. and Franklin Chandler.

THE COURT: Well, we have before the Court  
 two remarkably similar motions. Mr. Stern's is to  
 compel the raw data of Dr. Gibson, and to permit the  
 plaintiff to be -- have her neuropsychological  
 evaluation with Dr. Gibson be videotaped. The motion  
 followed by -- filed by defendants is -- seeks to  
 compel Ms. Wenner to appear for the neuropsych eval  
 with Dr. Gibson, prohibit a recording of it, and order  
 that the raw data and information not be turned over to  
 plaintiff's counsel but to a qualified psychologist of  
 plaintiff's counsel's choosing.

So the only fair way to do this is by who --

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1 which motion came in first and Mr. Stern's came in by  
2 minutes, so we'll let him go first.

3 MR. STERN: Thank you, Your Honor. First, by  
4 way of background, I supplied Your Honor with the  
5 medical reports of Dr. Greenwald, Dr. Brock, as well as  
6 the life care plan, which I think gives you a pretty  
7 fair understanding of Rachel's present medical  
8 condition. I've also provided Your Honor with a short  
9 certification from Dr. Greenwald giving his opinion  
10 that it's not going to be possible for Rachel to at all  
11 render or/and comprehend all of the instructions that  
12 would be given in a neuropsychological evaluation,  
13 which I'll provide and discuss later in my comments.

14 So defendants originally retained Dr. Masur  
15 as their neuropsychologist. When new counsel came in,  
16 the decision was made to hire Dr. Gibson, who is a  
17 psychologist who resides now in -- in Florida. Dr.  
18 Gibson, a hundred percent of his forensic work is for  
19 defendants. Not that that in of itself is  
20 disqualifying, but when you look at the background of  
21 Dr. Gibson, we see number one, one of his major  
22 research interests is malingering and exaggeration.  
23 Also, he's of the opinion that everyone who sustains a  
24 concussion or a mild traumatic brain injury gets  
25 better.

1 So the defendants had started by selecting  
2 someone who already comes with a bias that there's no  
3 way Rachel Wenner can have -- still have any residuals  
4 from a mild traumatic brain injury. He believes that  
5 somewhere between 20 and 50 percent of all people  
6 asserting psychological, or psychiatric, or brain  
7 injury problems are malingerers, and as I said,  
8 everyone gets better.

9 When we look at his website, we see a  
10 published article after article, all written by defense  
11 neuropsychologists as -- as himself. So I think, as I  
12 said, there is a bias here.

13 Dr. Gibson's methodology in administering  
14 neuropsychological testing starts with the  
15 administration of effort or malingering test. It's Dr.  
16 Gibson's belief that you start with these validity  
17 tests, because if a patient fails the validity test,  
18 there's a -- no -- well, no reason to continue testing  
19 because you can't count that the testing's going to be  
20 valid if the initial validity testing was not valid.

21 So I don't know exactly which validity test  
22 that Dr. Gibson will administer. I've seen numerous  
23 reports by him. He doesn't always administer the same  
24 effort test. I've provided Your Honor with a copy of  
25 the fake bad scale, which is part of the MMPI. It was



1 developed by Paul Lees-Haley, who again is a notorious  
2 defense expert. I believe a hundred percent of his  
3 forensic work is on behalf of the defendants.

4 I provided it to you so that you could get  
5 some appreciation about these validity tests. And I  
6 went through this fake bad scale, and just by virtue of  
7 the medical problems that Rachel has, I counted up 17,  
8 18 of the questions that she would mark as true or  
9 false, which accurately represent her medical  
10 condition. And I provided it so that -- and another  
11 validity test that Dr. Gibson often gives a test called  
12 the Structured Inventory of Malingered Symptomatology,  
13 also known as SIMS. Again, this is a 75 item, true  
14 false questionnaire.

15 And I provided the fake bad scale to Your  
16 Honor so you could see what problems someone like  
17 myself would have in cross-examining Dr. Gibson at  
18 trial. So assume Dr. Gibson gives this fake bad scale  
19 or he gives the SIMS, it's true or false, and he --  
20 let's assume he then concludes she wasn't giving good  
21 effort. And so he comes into Court and says I gave her  
22 validity tests and she failed those tests.

23 How do I dispute that? I don't have the --  
24 the scoring. I don't know what questions he based that  
25 on. I provided Your Honor on Wednesday with excerpts

1 from the dep- -- video deposition where Dr. Gibson was  
2 testifying at trial, and I provided them to you so you  
3 could see what happens in trial. Dr. Gibson makes a  
4 statement and then says, but I can't give -- explain  
5 the data because of security reasons. And then the  
6 plaintiff's attorney has nothing to cross-examine him  
7 with.

8 I, in this case, initially I filed a motion  
9 to get the raw data when Dr. Masur was selected as the  
10 defense neuropsychologist. That motion was granted. I  
11 recognized from Mr. O'Hara position where that -- there  
12 was no significant opposition to it, probably because  
13 the former counsel read my brief and realized I was  
14 entitled to it.

15 I provided Your Honor with the --

16 THE COURT: Okay. Let me just -- let me stop  
17 you there, Mr. Stern. Why -- why should, why then  
18 should a different result obtain because now it's Dr.  
19 Gibson instead of Dr. Masur?

20 MR. STERN: I don't think a different result  
21 should. I --

22 THE COURT: That's when I realized that  
23 someone was off (inaudible), but I mean, I -- I just.

24 MR. STERN: Yeah, no, I just --

25 THE COURT: It just -- it just seems that

1 that matter was before Judge Massi and defendants were  
2 represented, albeit by prior counsel, but why should it  
3 lead to a different result?

4 MR. STERN: I provided you with a -- with the  
5 decision from Virginia where Dr. Gibson was the defense  
6 neuropsychologist. And there, based on the  
7 representation of defense counsel, Dr. Gibson indicated  
8 that he'd be willing to provide the raw data, as long  
9 as there was a Protective Order, which I have from the  
10 very beginning in writing to Mr. O'Hara advised I'm  
11 willing to have a Protective or Confidential Order  
12 entered so that there is no dissemination of the raw  
13 data to outside sources.

14 I provided Your Honor with numerous orders  
15 from courts, trial courts in New Jersey. I should  
16 represent, as I believe I'm required, I'm not aware of  
17 any New Jersey decision in which that it's been denied.  
18 I've supplied Your Honor with decisions from Federal  
19 courts. I've provided Your Honor with decisions from  
20 out of State courts. And I believe the only case the  
21 defendants cite is an unreported case from Florida.

22 I've also supplied in my brief quotations  
23 from Paul Lees-Haley and David Faust to defense  
24 neuropsychologist that have written in defense  
25 textbooks the need to -- for defendants to obtain the

1 raw of data. Now, under the APA guidelines, which  
2 Judge Sabatino in his decision in DiFiore discusses at  
3 length, in there it indicates that neuropsychologists  
4 are to provide the raw data on a release from the  
5 plaintiff and I'm more than happy to supply a HIPAA  
6 release. I think under HIPAA, my client's entitled to  
7 all medical records, and I think her testing would fall  
8 under that. The APA guidelines also indicate that they  
9 are to supply it with -- when provided with a Court  
10 Order.

11 So -- and Dr. Gibson's, excuse me, concern  
12 that there may be an ethical violation if he turns it  
13 over, I think he's covered by a Court Order. Also the  
14 Pearson website acknowledges that if a Court is to  
15 order the data to be turned over a Protective Order or  
16 should be put in place.

17 Now the defendant's solution to all this is,  
18 hey, but we'll give it to whatever neuropsychologist  
19 you want. But that doesn't do me any good. And it's  
20 not an answer to say, well, your neuro- -- my  
21 neuropsychologist can give me the raw data. If it's a  
22 violation for Dr. Gibson to give it to me, it would be  
23 a violation, theoretically, then for any  
24 neuropsychologist to give me the raw data. So simply  
25 to say, well, we'll give it to anybody of your choice

1 doesn't solve the -- the problem.

2 Also, it would require me to disclose who my  
3 consulting expert would be. I don't know -- I mean,  
4 one thing I may end up doing is hiring a rebuttal  
5 expert that would review Dr. Gibson's testing and be  
6 willing to testify. On the other hand, I may just want  
7 to look at it myself. I'm competent to make some  
8 understanding, but I may want to hire a -- just a  
9 consultant, and I'm not required to disclose a  
10 consulting non-testifying expert.

11 And, finally, again, as Judge Sabatino said  
12 in DiFiore, and I'll get to the video in one moment. A  
13 -- a Protective Order certainly would provide  
14 protection with regard to the raw of data.

15 Coming then to the second part of the relief  
16 is my request to have this video recorded. First,  
17 thing, I don't think that anybody on this call could  
18 accurately (inaudible) how tests were administered and  
19 at all know, remember what the instructions were that  
20 he or she would (inaudible). This isn't like a 20  
21 minute neurologic exam or orthopedic exam where the  
22 plaintiff is able to relate what occurred during that  
23 examination.

24 You know, what (inaudible) were the test  
25 given it becomes very important. In reading one of Dr.

1 Gibson's deposition, I think it was in Love (phonetic),  
2 he talked about how the plaintiff's own exam was no  
3 good and invalid because the neuropsychologist failed  
4 to document the times and the order the tests were  
5 given. And certainly my client wouldn't know the names  
6 of the tests, let alone the order they were given.

7 So ,then you take somebody with Rachel's  
8 condition. She's not at all competent to relay enough  
9 information to me. Yesterday, for instance, we took --  
10 or Mr. O'Hara's associate took the deposition of the  
11 plaintiff. At 41 minutes into that deposition, she  
12 needed a break, at an hour of 15 minutes into that  
13 deposition, she had to stop the deposition. That her  
14 fatigue was too much and she couldn't continue.  
15 Obviously, were going to finish the depositions. I  
16 think we have another once rescheduled for next week.  
17 But certainly my client is not in a position. So I  
18 think I've met the burden of going forward.

19 And then finally, I've supplied Your Honor  
20 with the affidavit from Dr. Fredericks. It talks about  
21 why one ought to be able to video record these  
22 neuropsychological evaluations.

23 THE COURT: Thank you. Mr. O'Hara.

24 MR. O'HARA: Yes. Thank you, Your Honor.

25 So a couple of things and it -- and it, since

1 they're -- I'm going to take them in -- first in the --  
2 the order in which we've presented them in our  
3 application, and then I'll address the number of the  
4 points raised by Mr. Stern.

5 First, it's uncontroverted that the  
6 proprietary and protected nature of the tests exists in  
7 this case. It's set forth extensively in the  
8 submission of Dr. Gibson, and Mr. Stern has not in any  
9 way, shape, or form suggested that the terms of the  
10 ability to use those tests by any neurolo- -- any  
11 neuropsychologist, that the terms are not applicable.  
12 Okay? There -- there is a -- there is a contractual  
13 right to the proprietary, protected nature of those  
14 tests, and only people that are licensed and only  
15 people that agree to comply with the terms of the test  
16 owners are permitted access to and the ability to use  
17 those tests.

18 I can't go out and get them. Bruce can't go  
19 out and get them. They are a protected test that is  
20 recognized in the field of neuropsychology as  
21 appropriate for usage when evaluating  
22 neuropsychological conditions at issue, as those are in  
23 this case. So that's -- that's the -- the -- something  
24 that no matter what the position is with respect to the  
25 -- the validity or the -- or the -- the -- the weight

1 that that testing might have in a courtroom, the simple  
2 fact is the owner of that test has a requirement by  
3 which only certain people are permitted to have access  
4 to that and you must be a licensed neuropsychologist  
5 that agrees to comply with those terms.

6 Hence our willingness to give to Mr. Stern's  
7 neuropsychologist the very same thing that our  
8 neuropsychologist will have. And that's exactly what  
9 the Court said in DiFiore when -- when responding to  
10 the suggestion that a lawyer doesn't have the ability  
11 to -- to competently cross-examine the  
12 neuropsychologist under those conditions. The Court  
13 specifically noted --

14 THE COURT: Mr. O'Hara, I mean, I realize  
15 that you weren't on the, you weren't on duty then, but  
16 we just ignore what happened with Judge Massi and Dr.  
17 Masur.

18 MR. O'HARA: I -- I -- I don't -- I don't  
19 think you -- you ignore anything that happens in any  
20 case, Judge. I don't -- I don't -- I think that there  
21 is a position that was taken by a prior lawyer with a  
22 prior physician who has not i- -- who did not identify  
23 the -- the nature and extent of the test that he  
24 intended to use. I can't tell you what tests Dr. Masur  
25 intended to use. I can't tell you whether there were

1 restrictions into some or all of those tests, and I  
2 can't tell you what Dr. Masur ultimately intended, how  
3 he intended to -- to apply those tests. I can simply  
4 tell you that Dr. Gibson has identified the specific  
5 tests that he's going to use, the -- the -- the  
6 limitations on his ability to -- to disclose that  
7 information and the condition under which he's  
8 comfortable that if it is disclosed that he honors the  
9 contractual terms that are set forth.

10 From my understanding, based upon his  
11 affidavit and interaction with him, And I would suggest  
12 that before the court were to rule otherwise, it would  
13 be appropriate to have him testify about this so if  
14 there are nuances that might allow for some disclosure,  
15 for example, in camera disclosure, that -- that he's  
16 given the opportunity to explain it, because as Mr.  
17 Stern points out, either he nor I are  
18 neuropsychologists. But the fact is --

19 THE COURT: And -- and let the record reflect  
20 -- the record reflect that neither is the Court.

21 MR. O'HARA: And -- and I think that's --  
22 that's the -- the -- the import, excuse me, the -- the  
23 themes that you see in all of the cases that deal with  
24 this is that the neuropsychological community as a  
25 whole is limited in its ability to number one, have

1 access to the tests and, number two, share the data  
2 that is -- and the results that are generated. They  
3 can share it with licensed practitioners in the field.

4 And so it's -- it's a common accommodation  
5 that if -- if -- if -- including in litigation, that if  
6 Mr. Stern had a neuropsychological testing done to  
7 date, his expert would insist that they could not give  
8 it to Connell Foley, but they could give it to Dr.  
9 Masur or to Dr. Gibson, provided they -- they satisfied  
10 the -- the -- the proprietary protection requirements  
11 and the license requirements. So they get access to  
12 the information.

13 The suggestion that they're ill equipped to  
14 conduct a cross-examination files in the face of what  
15 the DiFiore Court specifically said -- that -- that if  
16 an examiner has unfairly or incorrectly opined about a  
17 plaintiff's condition, plaintiff's counsel is well  
18 equipped to counter those opinions through cross-  
19 impeachment evidence and the testimony of the competing  
20 expert wit- -- witness. That is how the system works.  
21 Fact-finders benefit from the -- from the -- due the --  
22 the endpoint, the opinions the dueling experts provide.

23 So he has the absolute ability to meet this  
24 evidence. He has the ability to, if he's so -- and  
25 keep in mind, there's a determination that's made

1 preliminarily that somehow that the -- the  
2 neuropsychological testing by Dr. Gibson is going to be  
3 negative, and that he's going to conclude that -- that  
4 the plaintiff in this case is a faker or -- or -- or  
5 not giving full effort.

6 We don't know what the results of the test  
7 are going to be until he applies the test and he's  
8 ethically bound as a medical practitioner to  
9 objectively apply those tests and provide those  
10 opinions. We're obligated to produce his opinions  
11 based upon the examination. So, if, despite what Mr.  
12 Stern has suggested, he feels it a fait accompli  
13 doesn't happen, and if Dr. Gibson reviews the testing  
14 and concludes that she's not in the percentage that he  
15 -- he noted about faking or malingering and, in fact,  
16 she does have neuropsychological conditions that are  
17 attributable to this accident, he's going to concede  
18 that, and he's going -- he's not going to be able to  
19 give that information because we're putting him in  
20 touch with the plaintiff.

21 So -- so in some respects we're putting the  
22 cart before the horse. The man hasn't offered any  
23 opinions yet. We're simply trying to get the  
24 opportunity to have a full, fair, and valid testing of  
25 the neuropsychological condition of this plaintiff.

1 Because the second piece of the plaintiff's argument  
2 is, and we've consented to videotaping of the  
3 interview. But these tests of the -- the actual  
4 neuropsychological testing cannot be recorded, cannot  
5 be observed by a third party because by very -- the  
6 very definition of the norms against which they're  
7 being compared that invalidates the test results. The  
8 norm pra- -- the norm tests against which they compare  
9 the data are not circumstances under which a third  
10 party is present and/or the testing is videotaped.

11 So it changes the circumstances under which  
12 the plaintiff is being tested, thereby invalidating  
13 what the tests show at all, because to the extent that  
14 there's a videographer or to the extent that there is a  
15 third party in the room, that's different from the  
16 testing and how they came up with the test compared to  
17 in the first place.

18 So based upon all of this and -- and -- and  
19 keep in mind and this -- I -- I wouldn't -- I wouldn't  
20 attribute this to Mr. Stern. We go -- we go back a  
21 very long way. But I would say is in -- in -- in cases  
22 where this issue has arisen in the past, you do not see  
23 circumstances where the plaintiff in a -- in -- in  
24 seeking to compel this information, the raw data, and  
25 in seeking to mandate a videographer or a third party

1 in the neuropsychological testing, you do not see cases  
2 where they've done that on their own for -- with their  
3 own expert and given to us as part of their production.

4 So there's not going to be a circumstance  
5 where Mr. Stern is going to agree to give us the raw  
6 data of his neuropsychologist in -- in a given case.  
7 And there's not going to be a circumstance where he  
8 videotapes a neuropsychological testing. In the cases  
9 that have been cited the plaintiffs don't do that.

10 And so if part of the analysis is the  
11 underlying fairness of the process, aren't they giving  
12 that to us in the first place. And they -- they don't  
13 give it to us in the first place, because number one,  
14 they know that you cannot share that raw data with  
15 Connell Foley. That must be given to a licensed  
16 practitioner. And, number two, you invalidate the test  
17 if you put a videographer in the room and you record  
18 those tests.

19 And Dr. Gibson, if the Court is inclined to  
20 allow it, would testify to that very -- those two very  
21 -- uncontroverted position.

22 THE COURT: Uh-huh. Mr. Stern?

23 MR. STERN: Yes. First of all, if Mr. O'Hara  
24 wants the raw data from plaintiff's neuropsychologist,  
25 I would consent for him to have it. I've done that in

1 numerous cases. And actually --

2 THE COURT: So the record is clear, you would  
3 consent for Mr. O'Hara to have it and not his -- not  
4 Dr. Gibson or someone else?

5 MR. STERN: Oh, no. I would -- if -- if they  
6 requested that I supply it to Dr. Gibson and Mr.  
7 O'Hara, I would ask the -- the Court to, I said I'd  
8 sign a Consent Order --

9 THE COURT: Uh-huh.

10 MR. STERN: -- to provide it. I've done that  
11 in other cases. I actually was on a call yesterday  
12 with another attorney and I said, no, submit a Consent  
13 Order.

14 I don't think that data should be protected  
15 if there's a Protection Order -- as long as there's a  
16 Protection Order in place.

17 I don't intend to have a third party observer  
18 in the room during the testing as Judge Sabatino  
19 indicated in DiFiore. It's very easy today to set up  
20 an iPhone or a camera that can video record the -- the  
21 -- the testing. So I have no inclination to have a  
22 third person in the room.

23 Mr. O'Hara and Dr. Gibson talk about  
24 invalidating it. Well, first of all, the test that Dr.  
25 Gibson is going to give I'm sure has never been

1 validated on a control sample that has Chronic Fatigue  
2 Syndrome, Ehlers-Danlos Syndrome and a traumatic brain  
3 injury. So it's questionable whether the data's going  
4 to be valid at all anyway. But having said that, Dr.  
5 Fredricks addresses that in his affidavit. He -- he  
6 cites to, and I believe we submitted the references, to  
7 articles dealing with more a recent study dealing with  
8 third party observations. I -- I appreciate Your Honor  
9 is not as conversant as maybe I or Mr. O'Hara is in  
10 third party observations. Most of the previous  
11 literature has all been written by defense  
12 neuropsychologists.

13 Also in terms of reporting, in criminal  
14 cases, it's standard -- the process to have them video  
15 recorded. In neuropsychological testing, they video  
16 record it, or have a third party involved in it. It's  
17 only -- somehow only in civil cases that one shouldn't  
18 have a -- an observer, never.

19 Mr. O'Hara makes reference to these are such  
20 protected. Well, these publishers, a) they know  
21 they're going to be used in forensic settings. They  
22 know from all the cases I cited to Your Honor. The  
23 courts often compel the raw data to be produced. And  
24 it's for that reason why Pearson puts on its website,  
25 you know, that if a -- a Court is going to order its

1 raw data to be provided, that it should be done with a  
2 Protective Order. So I think that puts to rest Mr.  
3 O'Hara's argument with regard to test security.

4 And I think that pretty much covers my  
5 argument.

6 THE COURT: Mr. O'Hara, anything -- any final  
7 words?

8 MR. O'HARA: No -- no, Your Honor. Other  
9 than just to -- to renew the suggestion, but this --  
10 this is -- is clearly a hotly contested issue, not only  
11 in New Jersey, but in other jurisdictions. And the  
12 positions of both the plaintiff's Bar and the defense  
13 Bar are relatively consistent. The DiFiore decision is  
14 clear that it's a case by case determination. And so  
15 the Court has the ability to craft what it believes to  
16 be a reasonable conclusion, based upon the unique facts  
17 and circumstances of a given case.

18 This is a mild traumatic brain patient that  
19 was able to sit through 75 minutes of a deposition  
20 yesterday, in which she was able to answer every  
21 question other than taking a short break before  
22 suddenly saying I need to shut this down. So the  
23 suggestion that somehow that she doesn't have the  
24 ability to participate in a -- in a setting and be able  
25 to recount information flies in the face of what she



1 did yesterday.

2 She also had the exact same ability to sit  
3 down and sit through the evaluations from Dr. Greenwald  
4 and recount both historical information, as well as  
5 incident specific information. And -- and so the --  
6 the -- there -- there's nothing about her case that  
7 suggests that she is so debilitated that she doesn't  
8 have the ability to recall information and to protect  
9 her that this, frankly, very progressive approach needs  
10 to be put in place for her.

11 The Court speaks to in -- when -- in DiFiore  
12 case about people that don't have, for example, the  
13 language ability to -- to -- to communicate what's  
14 going. This is a -- this is a litigant that has been  
15 involved in countless examinations with countless  
16 medical providers, none of which on the plaintiff's  
17 side have been videotaped.

18 And now when there is a test that or -- or a  
19 -- a fundamental medical basis to demonstrate why  
20 videotaping it is inappropriate in that particular  
21 field, the argument is, well, she just doesn't have he  
22 ability to -- to recount the information. How did she  
23 do it for Dr. Greenfold [sic] -- Greenwald? When you  
24 look at the length of his -- this -- his reports and  
25 the time that he spent with her.

1 MS. STERN: Well, that's really apples and  
2 oranges. One is she's simply reciting long term  
3 misinformation. That's not the deficit she has. She  
4 has short term memory issues. She has concentration  
5 issues. She has attention issues. And this isn't what  
6 some of the cases in DiFiore were talking about, as I  
7 said, a 20 minute neurologic exam or a 20 minute  
8 orthopedic exam, and it's not something that's normal  
9 to any of us.

10 I mean, if I said to her -- if I said to Your  
11 Honor, what tests were you given and what order were  
12 they given? What instruction did Dr. Gibson give you?  
13 A normal person wouldn't re- -- know that information,  
14 let alone somebody with all the deficits that she has.

15 THE COURT: Thank you. This matter has come  
16 before the Court on two -- two Motions to Compel  
17 discovery. The first filed one is by plaintiff's  
18 counsel, seeking to compel Dr. Gibson, the -- it's not  
19 so much new, but the -- the second designated  
20 neuropsycholo- -- neuropsychologist to turn over raw  
21 data from the neuropsychological evaluation to  
22 plaintiff's counsel, as opposed to what defendants are  
23 arguing should be to a -- a psychologist of the  
24 plaintiff's counsel's choosing.

25 And also the plaintiffs are also seeking to

1 have the videotaped -- the -- the neuropsychological  
2 evaluation videotaped, with the understanding that it  
3 would be subject to a consent Protective Order, and it  
4 would be done in the least intrusive means  
5 technologically possible.

6 The defendant's position is they oppose the  
7 -- the videotaping and, likewise, the production of raw  
8 data to plaintiff's counsel, rather than to a -- a -- a  
9 psychologist of the plaintiff's counsel's choosing.  
10 This, just like DiFiore, which Sabatino ruled -- I  
11 mean, this -- these cases are very fact sensitive, and  
12 I think there are some unique facts to this -- this  
13 particular case and the alleged in- -- injuries and  
14 deficits that -- that the plaintiff allegedly has  
15 sustained as a result of the -- the incident that's the  
16 subject matter of this litigation.

17 There's certainly a -- plaintiff has  
18 certainly cited both in terms of -- by affidavit and by  
19 case law in New Jersey and elsewhere, in Federal and  
20 State courts certainly precedent for the raw data to be  
21 turned over to plaintiff's counsel and, indeed, that  
22 was -- that was what Judge Massi ordered with respect  
23 to -- to Dr. Masur, who was the previously designated  
24 neuropsychologist that had been moved out, selected in  
25 consultation with defendant's prior counsel.

1 Now, in response to, in colloquy with the  
2 Court, defense counsel indicated, well, we don't know  
3 for sure. I mean, this is now the past -- in the  
4 neuropsych eval was never conducted. We don't know  
5 exactly what tests Dr. Masur would have done vis à vis  
6 what Dr. Gibson proposes do. But I also want to just  
7 indicate it is fair comment with respect to -- the  
8 Court is not giving way to be alleged bias of Dr.  
9 Gibson and -- and agrees with defense counsel that we  
10 -- we don't know at this point before any neuropsych  
11 eval is -- is conducted exactly what Dr. Gibson may or  
12 may not conclude. So, I just put that off to the side.

13 What I find compelling about this case, I --  
14 I think really the -- the way that the case law and --  
15 and the fairness to -- to the -- to counsel, and I say  
16 counsel because Mr. Stern has indicated that he would  
17 -- he would -- he would abide by his own by the  
18 standard that he's demanding of -- of defendants in  
19 this matter, the turnover of raw data to -- to his  
20 adversary.

21 I think there is a -- it -- it could -- could  
22 result in a fundamental unfairness to a plaintiff or a  
23 similar situated defendant if -- if she were on the  
24 other foot, for -- with respect to cross-examination  
25 and to have to rely upon an inter- -- intermediary

1 neuropsychologist to sort of interpret what Dr. -- Dr.  
2 Gibson's methodology, and then translate that for the  
3 purpose of counsel on cross-examination.

4 I think another point that's well taken is  
5 the fact that it might -- it might also require  
6 disclosure of trial strategy insofar as counsel may  
7 choose to use a consulting neuropsychologist, that if  
8 they were not to testify would not be required to be  
9 disclosed.

10 So there are -- this is, of course, like many  
11 things, a -- a -- a balancing test. There's legitimate  
12 -- there's legitimate concerns professionally for Dr.  
13 Gibson, but there's also the search for truth, which  
14 has to be fundament of -- of the Court's ruling. And I  
15 -- I find that a -- a carefully constructed consent  
16 Protective Order could address all of the concerns that  
17 are identified on behalf, both Dr. Gibson in -- in this  
18 matter. And I -- I find that I -- I -- without making  
19 this, you know, finding that doc- -- that Judge Massi's  
20 determination with respect to Dr. Masur is the law of  
21 the case, it just, I -- I don't think the circumstances  
22 are different regardless of -- of how Dr. Masur would  
23 have conducted the neuropsychological eval, compared to  
24 Dr. Gibson.

25 And again part of the other balancing is that

1 the defendants have the right to -- subject to any  
2 ethical bounds, to select the -- the neuropsychological  
3 expert of their choice. But it -- it strikes me that I  
4 find the plaintiff's counsel, they shown a compelling  
5 need for the raw data, with the protection of Dr.  
6 Gibson through a Protective Order, which has never been  
7 -- that that's always been on the table. It's never  
8 been a unilateral turn over the raw data.

9 And I find that it -- in -- in a case as  
10 complex as this, that it would require, and again, the  
11 case is complex at best and the learned counsel on both  
12 sides of this, of -- of this Zoom call are -- know  
13 quite a bit for laypersons, for lawyers, with respect  
14 to neuropsychological exams and brain injuries. So  
15 they're -- they're -- they're much more than just  
16 sophisticated laypersons.

17 But in -- in so doing, I find that it's  
18 necessary in order for there to be proper vigorous  
19 representation. Both are -- this is for both counsel.  
20 Again, Mr. Stern has conceded that if the shoe were on  
21 the other foot he would -- he would hold himself up by  
22 the standard he urges on the Court.

23 So I find that the -- I grant the Order  
24 compelling the raw data of Dr. Gibson to be presented  
25 to -- to Mr. Stern.

1                   Turning then to the second issue about the  
2 videotaping, I am -- I am persuaded by the arguments of  
3 counsel and the -- and the supporting documentation in  
4 the motion record that -- and -- and -- and likewise  
5 with respect to the allegations of the cognizant --  
6 cogniti- -- cognitive deficits that the plaintiff is --  
7 is undergoing now. It -- at certain point in this  
8 colloquy between counsel, it almost called upon the  
9 Court, never having seen Ms. Wenner, to determine  
10 whether she's capable of relating to Mr. Stern what  
11 exactly -- what -- what test, in -- in what order that  
12 Dr. Gibson would have related to her.

13                   I think the point is well taken that a person  
14 without the alleged cognitive deficits that Ms. Wenner  
15 had would have difficulty in -- in reciting anything in  
16 -- in -- in proper order, even though they might be  
17 more capable of -- of giving the gist to their counsel  
18 of what -- what the -- of what the defense IME was --  
19 was undergoing.

20                   And, again, that just goes back to DiFiore,  
21 and perhaps if we were presented with a plaintiff with  
22 a -- presenting with different -- a -- a -- a different  
23 medical history than Ms. Wenner, perhaps the Court  
24 might have made a different ruling with respect to  
25 videotaping.

1                   And I -- I -- I find that I -- I -- I believe  
2 that a -- a tightly worded consent Protective Order can  
3 deal with counsel agreeing upon the least obtrusive  
4 means of recording so as to not to interfere with the  
5 underlying neuropsych eval. And, again, I -- I can  
6 find that it would be much less obtrusive than to have  
7 a third party observer as to which there is -- could be  
8 legitimate concerns about the -- its impact upon a  
9 defense neuropsychological exam.

10                   I -- I do find the fact specifically with  
11 respect to -- regardless of the -- the -- the counsel  
12 each presented with a glass that's half-full, the glass  
13 is half-empty regarding Ms. Wenner's deposition or the  
14 portion of it that was taken yesterday. And, you know,  
15 that's -- that's subjective and anecdotal and it's  
16 certainly not basis for the Court to make a  
17 determination.

18                   It strikes me that in the interest of  
19 transparency it is -- its is beneficial to make a  
20 record, provided that there is concern for the least  
21 obtrusive means by which the recording is done. And I  
22 think that in -- in -- in plaintiff's motion papers and  
23 responses, it has been pointed out the very -- the very  
24 same nuances that defense counsel urges could affect  
25 the conducting of the test in terms of when somebody

1 walks into the room, or there's a phone call, or any of  
2 the other examples that were cited -- cited in -- in  
3 the affi- -- in the supporting affidavit. And I think  
4 the best way to in -- in, again, in terms of the search  
5 for truth, it would include transparency, is to have a  
6 recording. And, again, with the understanding that  
7 it's going to be the least obtrusive means possible.

8 Mr. Stern has been quite clear that he does  
9 not see the need for a videographer present. That some  
10 other kind of electronic device. I -- I leave that to  
11 counsel to work out, but I think in balancing all the  
12 equities and in terms of very fact specific nature of  
13 -- of this inquiry, I find that in order for both  
14 parties to be able to vigorously prosecute and defend  
15 this lawsuit that the raw data should be turned over to  
16 plaintiff's counsel, and that an unobtrusive video  
17 recording of the neuropsychological evaluation should  
18 be conducted.

19 I appreciate the offer to have a hearing with  
20 Dr. Gibson, or to have information shared to the Court  
21 in camera. But in -- in some ways, from a -- from a  
22 logical point of view, it seems that the same alleged  
23 evils that were addressed in trying to prevent this  
24 data from being shared, it's -- it seems attenuated for  
25 a Court to -- to be treading into these waters.

1 So I think the best way is to let the counsel  
2 both have as -- as unimpeded as possible a means of  
3 preparing their case and defending -- and defending the  
4 case. But being able to ensure there's a proper record  
5 for complex traumatic brain injury such as been  
6 presented, or allegedly presented by the plaintiff in  
7 this case.

8 So for those reasons, I will grant  
9 plaintiff's application and deny the cross-motion of  
10 defendants. Thank you.

11 MR. O'HARA: Thank you, Your Honor.

12 THE COURT: Have a good weekend.

13 MR. STERN: You too.

14 (Proceedings Concluded)  
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CERTIFICATION

1  
2  
3 I, Rebecca Y. Natal, the assigned  
4 transcriber, do hereby certify the foregoing transcript  
5 of proceedings, Digitally Recorded, Index Numbers from  
6 2:34:35 to 3:17:33 is prepared in full compliance with  
7 the current Transcript Format for Judicial Proceedings  
8 and is a true and accurate compressed transcript of the  
9 proceedings as recorded.

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12 June 15, 2022

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17 Rebecca Y. Natal AD/T 557

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19 AUTOMATED TRANSCRIPTION SERVICES  
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**Attorneys for Plaintiff, Rachel Wenner**

RACHEL WENNER

Plaintiff(s),

vs.

MERCK and CO., INC. MERCK SHARP  
DOHME CORP., and FRANKLIN S.  
CHANDLER, JR.

Defendant(s).

SUPERIOR COURT OF NEW JERSEY  
MERCER COUNTY LAW DIVISION

Docket No. MER-L-00957-18

**CIVIL ACTION**

**Brief In Support of Plaintiff's Motion To  
Compel The Production Of The Raw Data  
From Dr. Gibson's Neuropsychological  
Examination and To Permit Plaintiff to Video  
Record the Neuropsychological Evaluation**

**STATEMENT OF FACTS**

On August 18, 2017, plaintiff Rachel Wenner was injured in a motor vehicle crash caused by the negligence of defendant Merck and its employee Franklin Chandler, Jr. Plaintiff sustained severe injuries including a traumatic brain injury. (See report of Brian Greenwald, M. D. attached as Exhibit A).

Defendants requested plaintiff undergo a defense neuropsychological evaluation with David S. Masur, Ph.D. On May 11, 2020, the Court entered an Order, compelling the production of the raw data generated during Dr. Masur's neuropsychological evaluation. (A copy of the

order is attached as Exhibit B). Due to Covid restrictions, that evaluation did not occur.

In late 2021, defendants replaced their defense counsel. Defendants' new counsel has requested Ms. Wenner undergo a defense neuropsychological examination with Douglas P. Gibson, Psy.D, a well-known out of state defense psychologist<sup>1</sup>. The initial appointment is scheduled for May 5, 2022.

On March 24, 2022, plaintiff's counsel wrote to defense counsel, requesting Dr. Gibson provide a copy of the raw data generated during the evaluation, his scoring summary sheet, his notes and any computer-generated reports. (A copy of the March 24, 2022, letter is attached as Exhibit C). Plaintiff's counsel agreed to keep the documents confidential to protect test security. On April 7, 2022, Plaintiff's counsel requested permission to video record the defense neuropsychological evaluation. (A copy of plaintiff's counsel's letter dated April 7, 2022, is attached as Exhibit D).

In response defense counsel advised Dr. Gibson opposed providing his raw test data (Copies of defense counsel's letters dated April 5, 2022, is attached as Exhibits E).

Plaintiff moves to bar defendants from compelling a defense neuropsychological evaluation with Dr. Gibson or requiring defendants to produce the raw test data, scoring summary sheets and any computer-generated reports and to permit plaintiff to video record the neuropsychological evaluation. Plaintiff relies on the affidavit of Richard I. Frederick, Ph. D, attached as Exhibit F with multiple attachments).

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<sup>1</sup> In 2016 Dr. Gibson presented at the 7<sup>th</sup> Annual Atlanta Trucking Conference, presenting: "Identifying, Evaluating, and Defending Traumatic Brain Injury (TBI) Claims".

In 2016 and 2017 Dr. Gibson gave a presentation entitled, "Claims Management-Handling Traumatic Brain Injury Claims", at the CLM Conference. CLM is the largest professional association in the insurance industry.

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## LEGAL ARGUMENT

Cross-examination is a hallmark of civil and criminal justice. It has been called the “greatest engine” ever devised for ascertaining the truth, and it is considered essential to due process because it is the most reliable and effective way of testing witness credibility, knowledge and recollection. Goldberg v. Kelly, 397 U.S. 254, 269-270 (1970). Due process requires that all parties “must be fully apprised of the evidence submitted or to be considered, and must be given opportunity to cross-examine witnesses, to inspect documents and to offer evidence in explanation or rebuttal. In no other way can a party maintain its rights or make its defense. Katzin v. Workers (Comp. Appeals BD. 5 Cal. App. 4<sup>th</sup> 703, 711 (1992)).

### **I. Dr. Gibson must provide the raw data and other requested documentation.**

Because the “raw data” forms the sole basis of scoring the testing, the only way plaintiff can ascertain whether Dr. Gibson accurately scored the tests and/or accurately reported the results is to review the raw data. Dr. Gibson will undoubtedly agree with this statement. It is also the only way that the undersigned can prepare for cross-examination of Dr. Gibson. However, years of practice experience has shown that absent a court order, despite case law and psychologist ethics to the contrary, for reasons of confidentiality that only they can explain, both defense and treating neuropsychologists often are loath to release raw data and/or test booklets. Without it, it is impossible to validate Dr. Gibson’s administration and interpretation and impossible to cross-examine him regarding his opinions and conclusions. Dr. Gibson cannot withhold the data on which his opinion will be based, and still expect to have his opinion admitted in evidence. Plaintiff also requests the Court permit her to video record the evaluation to ensure the tests were properly

administered.

**A. INTRODUCTION: THE IMPORTANCE OF NEUROPSYCHOLOGIC TEST DATA TO THE LITIGATION PROCESS**

Plaintiff sustained, among other injuries, a traumatic brain injury (TBI). Defendants will dispute this, and have retained Douglas Gibson, Psy.D.. to support their position. As with all neuropsychological evaluations, Dr. Gibson’s opinion is based on the neuropsychological tests he administered, scored, and interpreted. Plaintiff’s actual response to Dr. Gibson’s tests is known as “raw testing data.” Lest there be any doubt about the importance of reviewing such information, consider the following from David Faust, *Coping With Psychiatric and Psychological Testimony*, 6<sup>th</sup> Edition, Oxford University Press (2012):

“There are various reasons it is vital to obtain the expert’s complete file. For one, the underlying data and information typically form a major basis, if not the major basis, for the expert’s conclusions. How can one properly scrutinize these conclusions without the underlying data upon which they were based?”

“For a variety of reasons, reports may not provide accurate or faithful representations of the underlying data, but one often cannot determine this unless the full file is obtained. For example, scores that appear in the report might not be correct because of errors in tallying the results.” *Id.* at 981.

Dr. Gibson has traditionally refused to provide his data directly to plaintiffs’ counsels.

Rather, Dr. Gibson has suggested that he will forward his data only to another licensed psychologist. Since the undersigned must represent the Plaintiff and to prepare to cross-examine Dr. Gibson, the data must go to the undersigned directly, and not to a surrogate. Professor Faust comments:

“Often, when requests are made for the expert’s file, experts offer to send the material (assuming needed releases) to the lawyer’s expert...I believe this is almost always the nonpreferred option because of the various problems and limitations that commonly result, a number of which will be reviewed here. The overriding reason, however, is that the lawyer needs to obtain this material for himself or herself, and having a retained expert receive the data usually will not solve this problem.” *Id.* at 984.

Neuropsychologists, like Dr. Gibson, typically refuse to produce raw data due to an antiquated ethical concern over the integrity of neuropsychological testing instruments. When neuropsychologists attempt to service the litigation industry, they must recognize that their parochial ethical concerns must accede to the demands of the law. Stated otherwise, neuropsychologists' ethical concerns provide no immunity from legal process.

“The APA is not a state or federal regulator body, but simply a voluntary organization which a psychologist may or may not choose to join. It has no regulatory or persuasive authority over this Court or any other court.” Astore v Farmers Ins Exchange, Montana First Judicial District Court, Lew and Clark County, Cause No. BDV-2008-915 (December 4, 2009). (A copy is attached as Exhibit G).

Leading neuropsychologists have long advised their colleagues to comply with legal process. In Sweet's 1999 book on Forensic Neuropsychology, Lees-Haley and Cohen commented:

“Neuropsychologists who refuse to disclose their tests and test data should be aware that they are bucking a recent trend toward greater openness in civil discovery. Judges and lawyers in jurisdictions across the country have become frustrated with the extent of the gamesmanship taking place in discovery proceedings...Finally, there seems to be a general consensus that greater sharing of information about each side's position is likely to encourage earlier and more productive discussions about settlement, and thus avoid the time and expense involved in litigation generally.” Jerry Sweet on Forensic Neuropsychology: Fundamentals and Practice, Chapter 15, Lees-Haley and Cohen “The Neuropsychologist As Expert Witness: Toward Credible Science In the Courtroom”, 443, 459, Swets & Zeitlinger (1999).

The Court is also directed to an article by Lees-Haley “Are Psychologists Hiding Evidence? A Need for Reform,” Claims Magazine 10/2/2003, in which Dr. Haley, the proprietor of the Lees-Haley Fake Bad Scale (FBS) contained within the MMPI-2, and a noted defense

neuropsychologist, clarifies that anyone can go to the Library of Congress and obtain these tests.

At page two of the article Dr. Haley states:

Moreover, numerous copies of copyrighted tests and test manuals are sent to the Library of Congress. There, they are available to any library patron who asks, and accessible to residents of other areas through inter-library loan services, consultants and professional research services. The contents of many of the most widely used tests are available to the public in texts that can be purchased through public bookstores or borrowed from libraries.

Principle authorities address the release and distribution of psychological test data. All recognize that neuropsychologist's ethical principles are subject to the demands of the legal process. First, the APA ethics rules require only a release from the patient or a court order/subpoena for production of data:

**“9.04 Release of Test Data(a)** The term test data refers to raw and scaled scores, client/patient responses to test questions or stimuli, and psychologists' notes and recordings concerning client/patient statements and behavior during an examination. Those portions of test materials that include client/patient responses are included in the definition of test data. **Pursuant to a client/patient release, psychologists provide test data to the client/patient or other persons identified in the release.** Psychologists may refrain from releasing test data to protect a client/patient or others from substantial harm or misuse or misrepresentation of the data or the test, recognizing that in many instances release of confidential information under these circumstances is regulated by law. (See also Standard 9.11, Maintaining Test Security.)  
**(b) In the absence of a client/patient release, psychologists provide test data only as required by law or court order.”<sup>2</sup>**

(A copy of the APA Guidelines is attached as Exhibit H).

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<sup>2</sup> A separate rule draws a distinction between test data and testing materials:

“9.11 Maintaining Test Security. The term test materials refers to manuals, instruments, protocols, and test questions or stimuli and does not include test data as defined in Standard [9.04, Release of Test Data](#). Psychologists make reasonable efforts to maintain the integrity and security of test materials and other assessment techniques consistent with law and contractual obligations, and in a manner that permits adherence to this Ethics Code.” APA, Ethical Principles of Psychologists and Code of Conduct (2002), Emphasis supplied.

Second, Division 41 of the APA is the Forensic Psychology Division. In 1991, Division 41 adopted “Specialty Guidelines For Forensic Psychologists.” (A copy is attached as Exhibit I). The Guidelines were revised in 2011. The Guidelines clarify that documentation prepared by forensic psychologists are subject to legal process:

**10.07 Provision of Documentation**

Pursuant to proper subpoenas or court orders, or other legally proper consent from authorized persons, forensic practitioners seek to make available all documentation described in 10.05, all financial records related to the matter, and any other records including reports (and draft reports if they have been provided to a party, attorney, or other entity for review), that might reasonably be related to the opinions to be expressed.”<sup>3</sup>

Defendants cite to the position of Pearson Assessments, the publisher of many of the tests Dr. Gibson will administer. Pearson’s position (as found on their website) is this: “Should litigation in which a psychologist is involved reach the stage **where a court considers ordering the release of proprietary test materials to non-professionals such as counsel**, we request that the court issue a protective order prohibiting parties from making copies of the materials; requiring that the materials be returned to the professional at the conclusion of the proceeding; and requiring that the materials not be publicly available as part of the record of the case, whether this is done by sealing part of the record or by not including the materials in the record at all” (bolding added).

Defendants claim that the American Psychological Association’s (APA) Code of Ethics prohibits disclosure of test data. The APA is not a state or federal regulatory body, but simply a voluntary organization, which a psychologist may or may not choose to join. It has no regulatory or persuasive authority over this court or any other court. Nevertheless, the APA Code of Ethics

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<sup>3</sup> Pdf version can be found online at:  
<http://www.apa.org/practice/guidelines/forensic-psychology.aspx>

requires release of raw data to a patient and pursuant to a court order. Nowhere does this Code of Ethics say that psychologists who choose to join the APA are precluded from producing testing materials to plaintiff's attorneys under a court's protective order. Requiring a protective order is certainly a reasonable effort to maintain the integrity and security of test materials.

The National Academy of Neuropsychology in its "Test Security: An Update" also sanctions the release of test data and test materials under a protective order. The update states:

Different solutions for problematic requests for the release of test material are possible. For example, the neuropsychologist may respond by offering to send the material to another qualified neuropsychologist.... The individual making the original request for test data (e.g., the attorney) will often be satisfied by this proposed solution, although others will not. Other potential resolutions involve protective arrangements or protective orders from the court.

As a matter of discovery, the raw data on which an expert bases his/her opinion is within the scope of discoverable information. Specifically, regarding expert opinion, New Jersey R. 4:10-2 provides that parties may discover the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. While no reported New Jersey cases deal with this issue, New Jersey trial courts have required a neuropsychologist to turn over his raw test data. (See order attached as Exhibit J).

While Dr. Gibson refuses to provide plaintiff's counsel with his raw test data, Dr. Gibson has in the past agreed to provide the data to plaintiff's counsel where there is a protective order in place. (See *Pitman v. Metropolitan Washington Airport Security* attached as Exhibit K). In *Pitman*, the Court rejected Dr. Gibson's position, ordered the data to be provided and entered a protective order.

In another case involving Dr. Gibson and his refusal to provide his raw data, a Federal Court required him to do. Booker v. Sysco Corp., Civil Action No. 3:21cv14 (E.D. U.S. D. C. May 5, 2021). (A copy of the Booker order is attached as Exhibit L).

Decisions in other jurisdictions support the relief sought.

In Carpenter v. Superior Court, 141 Cal. App. 4<sup>th</sup> 249 (2006) the court addressed the publication company's interest in maintaining their integrity. There, the court stated:

[B]oth Pierson and Harcourt also suggest a satisfactory means by which the tests can be provided after the mental examination. In essence, the publishers propose the test questions and answers may be given to plaintiff's counsel... subject to a protective order strictly limiting the use and further disclosure of the material and providing for other safeguards against access that would compromise the integrity and validity of the test. Carpenter, Id. at 836-839.

Defendants claim that the American Psychological Association's (APA) Code of Ethics prohibits disclosure of test data. The APA is not a state or federal regulatory body, but simply a voluntary organization, which a psychologist may or may not choose to join. It has no regulatory or persuasive authority over this court or any other court. Nevertheless, the APA Code of Ethics requires release of raw data to a patient and pursuant to a court order. Nowhere does this Code of Ethics say that psychologists who choose to join the APA are precluded from producing testing materials to plaintiff's attorneys under a court's protective order. Requiring a protective order is certainly a reasonable effort to maintain the integrity and security of test materials.

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Different solutions for problematic requests for the release of test material are possible. For example, the neuropsychologist may respond by offering to send the material to another qualified neuropsychologist.... The individual making the original request for test data (e.g., the attorney) will often be satisfied by this proposed solution, although others will not. Other potential resolutions involve protective arrangements or protective orders from the court.

In Castro v. Edwards, Case No. BC604952 (CA. Super. Ct. L.A. October 18, 2017), defendants sought to compel the neuropsychological evaluation of plaintiff by noted defense neuropsychologist Kyle Boone. Plaintiff sought to compel the production of the raw test data. The California Superior Court entered an order compelling production of the raw data. (A copy of the Court's order is attached as Exhibit M).

In State Ex Rel Svejda v Roldan, 88 SW3d 531 (Mo Ct App 2002), the Missouri Court considered a dispute virtually identical to here. The Court clarified that psychological ethical principles are superseded by our legal discovery imperatives:

“We do not find any exception to Missouri’s broad discovery rules that permits a psychologist to interpose his profession’s ethical principles to bar otherwise legitimate discovery. On the contrary, Rule 56.01(b)(1) plainly says that a party ‘may obtain discovery regarding *any* matter, not privileged, which is relevant to the subject matter involved in the pending action...’ (Emphasis added). A psychologist such as Dr. Cowan should not be able to unilaterally interpret his professional rules and then decide that they bar discovery under this state’s legal system. While we acknowledge and appreciate the ethical principles governing Dr. Cowan’s work, those principles must yield to Missouri’s legal rules governing discovery of evidence.”

The Missouri court ordered that the neuropsychologist “must produce these data directly to Mr. Svejda’s attorneys...”<sup>4</sup>

To the same effect is the Pennsylvania Federal Court decision in Keefer v. Erie Ins. Exch., 2014 U.S. Dist. LEXIS 29282, 19-20 (US Dist. Ct. M.D. Pa. Mar. 7, 2014):

“The extent of Plaintiff’s injuries is a central issue in this case. The requested data pertains to the tests and results therefrom that were conducted to assess the extent of Plaintiff’s injuries. Thus, the liberal discovery policies dictate that the material is discoverable. However, to lull Defendant’s concerns regarding uncontrolled disclosure,

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<sup>4</sup> The Court did permit a protective order that would confine the attorney from producing the data to people other than duly designated experts. This is precisely the opposite of what Dr. Gibson proposes in the present case, i.e., to produce only to duly designated experts, and not to the attorney.



the court will order that the raw test data be produced following the execution of a confidentiality agreement designed to protect the confidential nature and trade secrets of the tests conducted by Dr. Sacchetti. The court is confident such an arrangement would satisfy both Plaintiff's need for discovery and Defendant's concern for test confidentiality. [\*20] Accordingly, Defendant will be compelled to produce the raw test data provided to the court following the execution of a confidentiality agreement.”

In Tibbs v. Adams, 2008 WL 2633233 (U.S.D.C. E.d. Cal. 2008), the court analyzed this issue in the context of a writ of habeas corpus, according to the federal rules of evidence. The court rejected the very arguments defendants make here about the APA codes and ordered a psychologist to immediately produce all of her raw data and other materials. The court concluded that its order requiring her to produce the information, alone, alleviated any alleged ethical concerns and did not issue a protective order.

In Andruszewski v. Cantello, 247 A.D.2d 876, 668 N.Y.S.2d 297 (4th Dept. 1998) the plaintiff failed to exchange the raw test data of plaintiff's neuropsychologist. In response thereto, the trial court precluded the plaintiff from calling the neuropsychologist to testify during the trial. The plaintiff appealed. The appellate court affirmed the lower court's order of preclusion based upon issues of fairness in a party adequately preparing for trial. Of further note, the court also held that the fact that the plaintiff's treating neuropsychologist was not cooperating in producing the data did not relieve the plaintiff from the burden of producing the documents.

In Knauer v. Anderson, 709 N.Y.S.2d 386 (N. Y. Sup. Ct., Erie County 2000), in which the plaintiff allegedly sustained a traumatic brain injury and underwent neuropsychological testing, the defendants requested an authorization to obtain the raw data from the plaintiff's neuropsychologist. The plaintiff moved for a protective order seeking to preclude the release of the raw data to the defendants. In opposition, defense counsel submitted an affidavit from a notorious defense expert neuropsychologist, Dr. Jerid Fisher -- who co-authored with Dr. Robert McCaffrey a book entitled “The Practice of Forensic Neuropsychology: Meeting Challenges in the

Courtroom”, Plenum Press 1997 -- in support of their application to compel the plaintiff to release the raw data from the plaintiff’s neuropsychological testing. In his affidavit, Dr. Fisher advocated the position that the raw data was not only discoverable, but necessary to evaluate whether the conclusions reached by the plaintiff’s neuropsychologist were correct. In denying the plaintiff’s application, the court, referring specifically to “raw data”, held that “what plaintiff is trying to do is prevent disclosure of relevant data.

In Drago v. Tishman Construction Corp., 4 Misc. 3d 354, 777 N.Y.S. 2d 889 (NY Sup. Ct., New York County 2004), the plaintiff sustained a traumatic brain injury that allegedly resulted in cognitive impairment and diminution of employment opportunities. The plaintiff subsequently underwent neuropsychological testing, the results of which his psychologist relied upon to confirm his cognitive impairment. After the plaintiff refused to exchange the “raw data”, the defendants moved to compel production of the same. In granting the defendants’ application, the court held that procedural fairness required disclosure of the raw data to grant the defendants an opportunity for proper trial preparation. Of further note, the Court also held that the **failure of plaintiff to exchange the raw data could result in the preclusion of plaintiff’s expert** (777 N.Y.S.2d at 892, 893 (citing People v. Almonor) [emphasis added]).

Although a criminal matter, The People of the State of New York v. Almonor, 93 N.Y.2d 571, 693 N.Y.S.2d 861 (1999) relates to the discussion from the perspective that the defendants appealed their respective convictions because the court precluded certain psychologists from testifying. The basis for the court upholding the convictions stemmed from the defendant’s refusal to exchange the raw data from neuropsychological testing which one of its psychologists, Dr. Broner, relied upon in rendering opinions and conclusions that supported an insanity defense. Of note, the Court of Appeals held that “the People’s objection to Dr. Broner’s testimony was

plausible on the basis that the defense had not furnished Dr. Broner's raw data from the underlying tests." 93 N.Y.2d at 583.

In Marable v. Hughes, 38 A.D. 3d 1344, 830 N.Y.S.2d 686 (4th Dept., 2007), an action was commenced on behalf of the plaintiff seeking damages for exposure to lead. The defendant moved for an order seeking to compel the plaintiff to provide the defendant with all records regarding neuropsychological testing of the infant. The court recognized the importance of the raw data and granted the defendant's application. The plaintiff appealed. The Appellate Court recognized the propriety of the lower Court's decision and affirmed its exercise in discretion.

In a matter similar to Marable, in Jessica H. v. Spagnolo, 41 A.D.3d 1261, 839 N.Y.S.2d 638 (4th Dept., 2007), an action was commenced on behalf of the plaintiff seeking damages for exposure to lead. The lower court denied the defendant's motion seeking to compel the production of the records and raw data from the plaintiff's neuropsychological testing. On appeal, citing to the decision in Marable, the Appellate Court held that the lower court erred in not compelling the production of raw data.

To the same effect is the Colorado Federal Court decision in Ogburn v Am. Nat'l Prop & Cas Co, 2014 US Dist LEXIS 150915 (D. Colo, Oct 23, 2014). See also Dejan v. Nabors Drilling USA, 2011 WL 6157490 (W.D. La. June 8, 2011) and Hairston v. Ed Nelson Transport, CASE NO. 3:13-cv-1457-J32JBT, 2015 WL 12843867 (M.D. Fla. Aug. 10, 2015).

Defendants may indirectly aver that any perceived prejudice in preparing for cross-examination can be eliminated by defendants exchanging the requested materials with plaintiff's treating neuropsychologist or forensic neuropsychologist. However, he/she is not the one who will be cross-examining Dr. Gibson. This proposal was directly rejected by a trial court in Montana.

Astore v. Farmers Insurance Exchange, (Mont. Ist Jud. Dist. Ct. Lewis and Clark County 12/4/09).

(A copy is attached as Exhibit H). The Court reasoned:

Without the ability to look at the testing manuals and examine the scoring and conclusions, plaintiff's ability to meaningfully cross-examine a doctor who seeks to opine that she is/was malingering is impaired.

...

The administration and interpretation of psychological tests are rife with potential abuse.

First, neither plaintiff's treating neuropsychologist or "retained psychologist" will not be cross-examining Dr. Gibson. Plaintiff's counsel will be doing the cross-examination, and without the raw data, counsel will be denied the opportunity to properly prepare. Even assuming plaintiff were to retain a neuropsychologist, the flaw in defendant's argument is further highlighted by defendant's position that Dr. Gibson is ethically barred from sharing the raw data with anyone other than another licensed psychologist. Not only is this inaccurate, more important, if followed to its illogical conclusion, even if plaintiff did retain a neuropsychologist, like Dr. Gibson, he/she would also be barred from sharing the raw data with counsel. Since the raw data is the only way to determine whether Dr. Gibson scored the assessment correctly, if plaintiff's own retained expert can't share the raw data other than verbally, how could plaintiff's counsel, or any attorney, challenge Dr. Gibson's scoring? If questioned about the accuracy, all he would have to do is respond that he scored it correctly. With the raw data in hand, he can be directly challenged.

Another flaw in Dr. Gibson's refusal is that by requiring the raw test data and scoring protocol to be produced only to a licensed psychologist, defendants indirectly mandate that plaintiff retain an expert witness who may not otherwise be retained and/or one who may not be called to testify. While the undersigned is not a licensed psychologist, as an experienced practitioner in brain injury litigation, the undersigned can interpret the raw data and use it to prepare for cross-examination without the need to retain an expert psychologist.

The Montana Court addressed this as well:

Claiming that the material can be forwarded to plaintiff's expert as a solution is no solution at all.

Dr. Gibson may opine that plaintiff is not suffering the residuals of a traumatic brain injury.

These opinions and others are based on Dr. Gibson's administration of neuropsychological tests and his interpretation of the test data. Without the data one cannot tell what questions plaintiff got wrong. Further without the test data plaintiff cannot demonstrate to a jury that Dr. Gibson improperly administered the testing nor that he improperly scored and interpreted the data.

Defendants' reliance on neuropsychological associations' convenient, self-imposed guidelines protecting themselves from any outside scrutiny is overreaching. What's next? A self-adopted rule they cannot be cross-examined when they testify? "[T]he defense psychologist does not have the right to dictate the terms under which the examination shall be held. This is a discovery psychological examination, not one in which plaintiff is being treated. Plaintiff's right to preserve evidence of the nature of the examination, the accuracy of the examiner's notes or recollections, the tones of voice outweigh the examiner's preference there be no recording device." B.D. v. Carley, 307 N.J. Super. 259 (App. Div. 1998).

For the reasons discussed above plaintiff's counsel is entitled to the raw data.

**II. Plaintiff is entitled to video record the defense neuropsychological evaluation.**

Plaintiff has requested that she be permitted to video record Dr. Gibson's defense neuropsychological evaluation. Dr. Gibson refuses. Plaintiff's need for audio and video recording the neuropsychological examination is supported by the Affidavit of Richard I. Frederick, Ph.D. (**EXHIBIT G**). Dr. Frederick is a forensic psychologist who has reviewed and

analyzed scores of neuropsychological examinations and conducted hundreds of forensic examinations. Dr. Frederick shows why video recording forensic neuropsychological examinations is critically important to a fair legal process. Dr. Frederick addresses the objections raised by neuropsychologists to having their examinations recorded. Dr. Frederick states forensic neuropsychological evaluations frequently depart from standardized practice and actively misrepresent what happened during an assessment. The errors uncovered by video recording the examinations are numerous. Video recording the forensic neuropsychological evaluation is the best way to document what actually happened during an assessment and often the only way to uncover examination errors. This is especially true when the person examined has cognitive deficits which may prevent accurate recall of what happened and what was said during an examination lasting up to a full day.

This is not an indictment of Dr. Gibson. Regardless of the identity of the examiner, anyone undergoing a forensic neuropsychological examination is entitled to evaluate the reliability of the evidence to evaluate its reliability.

Regarding ethical concerns raised by neuropsychologists against recording exams, Plaintiffs note New Jersey does not license neuropsychologists, only psychologists. The American Psychological Association (APA) encourages forensic psychologists to document all data and bases of what the examiner does “to allow for reasonable judicial scrutiny and adequate discovery by all parties” including “recordings, and transcriptions.”

Finally, video recording neuropsychological exams is not disruptive or intrusive. This Court has the discretion to order recording of the exam. Plaintiff notes many other courts around the country have done so.

These same issues have been addressed by numerous courts in many states across the country. As explored below, such decisions make four points also recognized under, and consistent with, New Jersey law:

- (1) Defense neuropsychological examinations are adversarial in nature and therefore require protection to the plaintiff;
- (2) The generalized shibboleth recited by a small minor of neuropsychologists that observation has the “potential” to influence test results is not sufficient to overcome the need for a video;
- (3) Video recording is superior to a human observer because it is less obtrusive, unbiased, and provides a more complete and accurate record of what transpires; and
- (4) A video record is especially necessary under “special circumstances” as in this case, where the plaintiff’s condition prevents her from being able to review the examination or testify at trial as the manner in which the examination was conducted.

Although holdings from other states and federal courts are not binding on this court, both the reasoning in them, and the large extent to which these many jurisdictions require the need for, and superiority of video recording should be persuasive. This is especially so, since many if not most have virtually identical facts and apply similar law.

A good example of several factors outlined above, and addressing the precise issue on this motion is an Ohio case, Iden v. White Leather, 2017 W.L. 10397943 (Ohio Com. P.L.). There, “which is on all fours,” with this case, plaintiff did not seek to have his attorney attend the examination, but requested that it be video recorded. The court noted the “cognitive abilities of the plaintiff are directly at issue,” which the court found to be “especially important.” In ordering that the exam be video recorded, the court specifically found:

[A video record would] be less intrusive than having a legal advocate or medical representative present, and far less likely to disrupt the examination. Moreover, a video recording of such examination would presumably provide the best evidence of precisely what occurs during the examination, should such evidence become necessary at any stage of the proceedings.

Another Ohio case, Elizabeth Caulkins-Jones v. Hatfield, Case No. 13-CV-003606 (Ct. Common Pleas Franklin Cty. (October 22, 2013), citing to other jurisdictions which have permitted video recording, the court also recognized the superiority of video recording over a human observer. (A copy is attached as Exhibit N). The court wrote:

While a true “observer,” who would be present for the examination without uttering a single word would be rather unobtrusive, its value in preventing errors and addressing the concerns espoused by plaintiff’s counsel would be quite low. Put differently, if a dispute arises about a statement made during the examination, it would still come down to a matter of credibility... On the other hand, a video recording of the examination would be even less obtrusive and wholly objective. The court sees it as the best solution the potential problems.

Eisfeller-Ferrelli v. Silvestro, Superior Court, Rockingham Co., No. 218-2015-CV-139 New Hampshire (2016) is also on all fours with this case. (A copy is attached as Exhibit O). In Eisfeller-Ferrelli the court stated:

The court agrees with plaintiff, based on her counsel’s argument, that her claimed cognitive difficulties include memory problems which can be at times debilitating and which could prevent her from recalling her discussions during the IMEs and therefore prevent her from rebutting any mischaracterization of her statements during the IMEs.

In a 2018 federal court decision, Dekany v. City of Akron, 2018, U.S. Dist. Lexis 4530 (N.D. Ohio January 10, 2018), the court ordered video recording of a neuropsychologic examination under the federal rules. (A copy is attached as Exhibit P). There, the court rejected the same objections made by the defendants here, that video recording might interfere her “report” with Dr. Gibson and thus impact test results. In Dekany, the court described the plaintiff’s condition in finding “good cause”:

Assuming, arguendo, that plaintiff must demonstrate good cause to allow the proceeding to be videotaped, the court finds that such standard has been met....

Initially, the court would note that it was required for view many of plaintiff’s medical records in camera due to the discovery dispute between the parties. As such, the court is aware of the extents of psychological and physical trauma that is



alleged to have occurred in those records. That fact alone provides significant weight to plaintiff's assertion that there is a need to videotape the examination to offer some form of emotional support. In addition, this court will reluctantly allow two separate experts to conduct their own examinations and to examine plaintiff for up to six hours. Such a process would be taxing on any individual, let alone an individual alleging extensive psychological damage....

Contrary to the position taken by defendant's expert, the court declines to find that videotaping the examination makes it more likely that plaintiff will exaggerate or emphasize certain responses. If it is truly plaintiff's desire to falsify answers to manipulate the examination, then videotaping the examination will not alter that desire....

The court also finds that introducing a videographer to the process will not inject a greater degree of the adversarial process. First, the examination itself is already a part of the adversarial process. Despite its name, it is not truly an independent examination. Two experts, retained and paid by defendants, will conduct the examination. That fact alone injects the adversarial process into the examination. A neutral, disinterested videographer will not add anything adversarial to the process.

See also, Jesenovec v. Marcy, CV-07-614436 2010 Ohio Misc., Lexis 21789 No. (CT Com. Pl. July 14, 2010) where the court not only ordered that the neuropsychological examination be recorded, but also analyzed the state of the law across the country as of 2010. (A copy is attached as Exhibit Q). The court reasoned:

A video record of the examination protects both the physician and the plaintiff from unsubstantiated allegations of impropriety. The objective verification of propriety during a medical examination for litigation purposes is also less objectionable because the plaintiff is placed in the awkward position of being physically examined by someone not of his or her choosing, with whom the plaintiff has no past, current or future relationship, who has no interest in the plaintiff's well-being, and for purposes not related to medical treatment....

The court finds that the placement of unobtrusive video camera to record to the follow up examination of plaintiff will protect all of the parties' interests and promote more orderly, concise and clinically accurate presentation of objectively verifiable evidence at trial.

These are just a small sampling of the cases which have addressed this issue. Clear, however, courts across the United States are essentially universal. All recognize that a defense examination is adversarial in nature, a plaintiff may have protection by, at a minimum, a

representative attending the examination; and an observer or videorecording outweighs any concern that the neuropsychological testing may be adversely impacted and videorecording provides the most objective, most complete and least intrusive means of observation.

For the reasons discussed above and in the affidavit of Dr. Fredericks, the Court should permit plaintiff to video record the evaluation.

STARK & STARK  
A Professional Corporation  
Attorney for Plaintiff

*/s/ Bruce H. Stern*

By: \_\_\_\_\_  
BRUCE H. STERN

Dated: April 12, 2022



## Presence of Third Party Observers During Neuropsychological Testing

### Official Statement of the National Academy of Neuropsychology

Approved 5/15/99

Forensic neuropsychological evaluations are often constrained by the demand that a third party observer be present during the course of interview and formal testing. This demand may originate from counsel's desire to ensure that the neuropsychologist does not interrogate or unfairly question the plaintiff with respect to issues of liability and to ascertain if test procedures are accurately administered. In general, neuropsychologists should have the right to carry out their examination in a manner that will not in any way jeopardize, influence or unduly pressure their normal practice.

The presence of a third party observer during the administration of formal test procedures is inconsistent with recommendations promulgated in *The Standards for Educational and Psychological Testing* (APA, 1985) and Anastasi (1988), that the psychological testing environment be distraction free. More recently, standardized test manuals (for example, *The WAIS-III, WMS-III Technical Manual*; The Psychological Corporation, 1997) have specifically stated that third party observers should be excluded from the examination room to keep it free from distraction. The presence of a third party observer in the testing room is also inconsistent with the requirements for standardized test administration as set forth in the APA's *Ethical Principles Of Psychologists and Code Of Conduct* (APA, 1992) in that it creates the potential for distraction and/or interruption of the examination (McSweeney et al., 1998).

A second issue that relates to the potential influence of the presence of a third party observer is the reliance upon normative data. Neuropsychological test measures have not been standardized in the presence of an observer. In fact, neuropsychological test measures have been standardized under a specific set of highly controlled circumstances that did not include the presence of a third party observer. The presence of a third party observer introduces an unknown variable into the testing environment which may prevent the examinee's performance from being compared to established norms and potentially precludes valid interpretation of the test results (McCaffrey, Fisher, Gold, & Lynch, 1996). Observer effects can be such that performance on more complex tasks declines, in contrast to enhanced performance on overlearned tasks, leading to a spuriously magnified picture of neuropsychological deficit (McCaffrey et al., 1996). Likewise, observation of an examination being conducted for a second opinion may fundamentally alter the test session, in comparison to the initial examination that the patient has already undergone, potentially creating an adversarial atmosphere, and increasing the risk of motivational effects related to secondary gain. Observer effects can be magnified by the presence of involved parties who have a significant relationship with the patient (e.g.

legal representatives who have a stake in the outcome of the examination; cf. Binder and Johnson-Greene, 1995). Thus, the presence of a third party observer during formal testing may represent a threat to the validity and reliability of the data generated by an examination conducted under these circumstances, and may compromise the valid use of normative data in interpreting test scores. Observer effects also extend to situations such as court reporters, attorneys, attorney representatives, viewing from behind one-way mirrors and to electronic means of observation, such as the presence of a camera which can be a significant distraction (McCaffrey et al., 1996). Electronic recording and other observation also raises test security considerations that are detailed in the National Academy of Neuropsychology's position statement on Test Security.

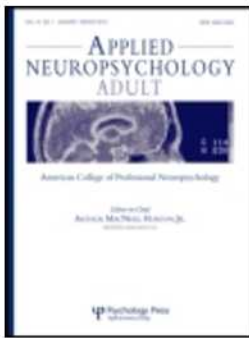
It should be noted that there are circumstances that support the presence of a neutral, non-involved party in nonforensic settings. One situation might be when students or other professionals in psychology observe testing as part of their formal education. These trainees have sufficient instruction and supervision in standardized measurement and clinical procedures, such that their presence would not interfere with the assessment process. Other situations might include a parent's calming presence during an evaluation of a child.

The weight of accumulated scientific and clinical literature with respect to the issue of third party observers in the forensic examination provides clear support for the official position of the National Academy of Neuropsychology that neuropsychologists should strive to minimize all influences that may compromise accuracy of assessment and should make every effort to exclude observers from the evaluation.

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## Policy Statement of the American Board of Professional Neuropsychology regarding Third Party Observation and the recording of psychological test administration in neuropsychological evaluations

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GUEST EDITORIAL

## Policy Statement of the American Board of Professional Neuropsychology regarding Third Party Observation and the recording of psychological test administration in neuropsychological evaluations

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### General

Neuropsychologists are frequently presented with requests from parents, attorneys, nurse case managers, insurance representatives, school personnel, allied health professionals, family members, or other interested parties who have some type of relationship with a patient or client examinee to directly observe or record the administration of psychological and neuropsychological tests. Consequently, a number of practice concerns have been raised that include, but are not limited to, the effects on the examinee's performance and the neuropsychologist administering the assessment, violations of testing guidelines, the impact on standardization procedures, the appropriateness of applying test findings to normative samples established under standardized circumstances, and test security. These requests can become even more problematic and complicated when the request occurs within the adversarial process associated with the legal system, such as competency hearings, custody evaluations, divorce proceedings, civil litigation, and criminal investigations (Bush, Pimental, Ruff, Iverson, Barth & Broshek, 2009; Duff & Fisher, 2005; Howe & McCaffrey, 2010; Lynch, 2005; McCaffrey, Fisher, Gold, & Lynch, 1996; McCaffrey, Lynch, & Yantz, 2005; McSweeney et al., 1998; Sweet, Grote, & Van Gorp, 2002).

### Definition of Third Party Observation

Third Party Observation (TPO) is defined in this practice guideline as the direct or indirect presence of an individual other than the patient or client and the psychologist or their technician administering a published psychological test in order to obtain objective data under standardized conditions for clinical, counseling, or forensic purposes in order to render

clinical conclusions, opinions, interpretations, or recommendations based on the data collected. Direct presence means a person(s) physically present in the room other than the psychologist or his/her technician and the examinee. Indirect presence means viewing through a window, two-way mirror, use of any camera, or audio or video recording device, or any electronic or communication device. The act of recording includes the on-site transcription by a court recorder or reporter during an examination by either direct or indirect involvement (Barth, 2007; Constantinou, Ashendorf, & McCaffrey, 2002; Constantinou, Ashendorf, & McCaffrey, 2005; Eastvold, Belanger, & Vanderploeg, 2012; McCaffrey, Fisher, Gold, & Lynch, 1996).

### Ethical considerations

The Ethical Principles of Psychologists and Code of Conduct of the American Psychological Association (hereafter called the Ethics Code) helps guide the thinking and behavior of psychologists, and provides direction with regard to clinical practice standards. Relevant to TPO and the Ethics Code are both the General Principles and a number of the Ethical Standards.

Within the Ethics Code a series of General Principles are outlined with the intent of guiding psychologists to practice at the highest professional level. Relevant to TPO are General Principle: A (Beneficence and Non-maleficence), B: (Fidelity and Responsibility), C (Integrity), and D (Justice).

In contrast to the General Principles, the Ethics Code offers specific standards that represent obligations to which psychologists are bound, and consequently form the basis for ethical violations and consequently the basis for sanctions. Most relevant to TPO are Ethical Standards 2 (Competence) and 9 (Assessment). (American Psychological Association, 2010).

**Principle A: Beneficence and nonmaleficence**

Principle A is applicable and is described as follows:

Psychologists strive to benefit those with whom they work and take care to do no harm. In their professional actions, psychologists seek to safeguard the welfare and rights of those with whom they interact professionally and other affected persons, and the welfare of animal subjects of research. When conflicts occur among psychologists' obligations or concerns, they attempt to resolve these conflicts in a responsible fashion that avoids or minimizes harm. Because psychologists' scientific and professional judgments and actions may affect the lives of others, they are alert to and guard against personal, financial, social, organizational, or political factors that might lead to misuse of their influence. Psychologists strive to be aware of the possible effect of their own physical and mental health on their ability to help those with whom they work (American Psychological Association, 2010, p. 3).

It is incumbent on neuropsychologists to be vigilant regarding the impact of their professional opinion on others, particularly with regard to diagnostic testing. Scientific and professional judgments and conclusions should be based on data from neuropsychological assessments gathered in a standardized manner and, therefore, without the influence of extraneous factors that might influence the collection of behavior samples. Neuropsychologists must always be mindful that their verbal and written opinions affect the medical, social, and legal lives of others and, therefore, must safeguard those with whom they interact professionally to do no harm.

**Principle B: Fidelity and responsibility**

Principle B is applicable and is described as follows.

Psychologists establish relationships of trust with those with whom they work. They are aware of their professional and scientific responsibilities to society and to the specific communities in which they work. Psychologists uphold professional standards of conduct, clarify their professional roles and obligations, accept appropriate responsibility for their behavior, and seek to manage conflicts of interest that could lead to exploitation or harm.

Psychologists consult with, refer to, or cooperate with other professionals and institutions to the extent needed to serve the best interests of those with whom they work. They are concerned about the ethical compliance of their colleagues' scientific and professional conduct. Psychologists strive to contribute a portion of their professional time for little or no compensation or personal advantage (American Psychological Association, 2010, p. 3).

It is the responsibility of all psychologists who elect to perform diagnostic testing, to do so within the established parameters of the instrument(s) they employ and therefore in a standardized manner. Whether or not a neuropsychologist is engaged in a patient-doctor relationship, acting as an independent clinician, a clinician for an institution, state or federal agency, or an independent examiner for an insurance carrier or legal counsel, a professional obligation exists to uphold standards for the delivery of scientific work commensurate with the responsibilities to the profession, community, and society in general.

**Principle C: Integrity**

Principle C is applicable and is described as follows.

Psychologists seek to promote accuracy, honesty, and truthfulness in the science, teaching, and practice of psychology. In these activities psychologists do not steal, cheat, or engage in fraud, subterfuge, or intentional misrepresentation of fact. Psychologists strive to keep their promises and to avoid unwise or unclear commitments. In situations in which deception may be ethically justifiable to maximize benefits and minimize harm, psychologists have a serious obligation to consider the need for, the possible consequences of, and their responsibility to correct any resulting mistrust or other harmful effects that arise from the use of such techniques (American Psychological Association, 2010, p. 3).

The practice and promotion of clinical assessment requires that neuropsychologists present themselves and their work to others in an accurate and honest manner and avoid any misrepresentation of their findings. A considerable body of research supports that TPO can affect the accuracy of test findings, and to purposefully disregard its potential impact can be construed as a misrepresentation of the data

**Principle D: Justice**

Principle D is applicable and is described as follows.

Psychologists recognize that fairness and justice entitle 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. Psychologists exercise reasonable judgment and take precautions to ensure that their potential biases, the boundaries of their competence, and the limitations of their expertise do not lead to or condone unjust practices (American Psychological Association, 2010, p. 3–4).

In an attempt to provide fair and just treatment to all patients and clients, neuropsychologists do not modify assessment procedures or alter their work on the basis

of personal opinion or professional bias, nor do they neglect to maintain an awareness of their competency level and the limitations of their expertise. To this end, the American Psychological Association (APA), psychological state organizations, and neuropsychological specialty organizations, provide multiple continuing education opportunities for neuropsychologists to learn, maintain, and improve their professional expertise, and avoid practices that are irregular or not commensurate with accepted clinical practice. Given the body of literature that exists regarding observer effects, it is incumbent on neuropsychologists who provide evaluations to make clear to patients, clients, families, and other professionals that they do not endorse TPO and to try to avoid this type of intrusion in the assessment.

### **Ethical standard 2: Competence**

Ethical Standard 2 is applicable to TPO and the recording of test administration. Section 2.04, Bases for Scientific and Professional Judgments states the following:

Psychologists' work is based upon established scientific and professional knowledge of the discipline. (American Psychological Association, 2010, p. 5; see also Standards 2.01e, Boundaries of Competence).

### **Ethical standard 2.04**

Ethical Standard 2.04 requires neuropsychologists to conduct their practice within the boundaries of scientific knowledge. Texts on psychological testing have long cited the need to conduct testing in a distraction-free environment (Anastasi & Urbina, 1997). For example, the Wechsler Adult Intelligence Scale-Third Revision (WAIS-III) requires that, "As a rule, no one other than you and the examinee should be in the room during the testing" (1997, p. 29). The manual further directs, "Attorneys who represent plaintiffs sometimes ask to observe, but typically withdraw this request when informed of the potential effect of the presence of a third person" (Wechsler, 1997, p. 29). The requirement to avoid interference from others is noted in the Wechsler Intelligence Scale for Children-Fourth Edition (WISC-IV), which advises that no one other than the examiner and the examinee should be in the room during test administration (Wechsler, 2003, p. 23).

The concept of being free from distractibility is also emphasized in the Wechsler Adult Intelligence Scale-Fourth Revision (WAIS-IV) that instructs the examiner to provide a physical environment "free from distractions and interruptions" and stresses that "External distractions must be minimized to focus the examinee's attention on the tasks presented and not on outside

sounds or sights, physical discomfort, or testing materials not in use" (Wechsler, 2008, p. 24). This is also emphasized in the administration manual for the Rey Complex Figure Test (Meyers, 1995, p. 6). Similarly, the scoring manual for the California Verbal Learning Test-Second Edition (CVLT-II) instructs that only the examiner and examinee be present in the room during testing (Delis et al., 2000, p. 8). By eliminating the presence of third parties, the examiner eliminates potential interference and the possibility of their distracting from or influencing the testing process, hence variables that are inconsistent with test standardization.

Most test manuals specify that the examiner is responsible for ensuring that the testing environment is quiet and free from distractions (Meyers, 1995; Williams, 1991; Urbina, 2014) and are often very specific about the testing room being limited to "A table or desk and two chairs" (Meyers, 1995). Similarly, the manual for the California Verbal Learning Test- Second Edition (CVLT-II) states "as a rule, no one other than you and the examinee should be in the room during testing" (Delis, Dramer, Kaplan & Ober, 2000, p. 8). As described above, these instructions serve to emphasize the importance of controlling distraction as an important factor in assessment.

### **Ethical standard 9: Assessment**

Ethical Standard 9 is applicable to TPO and recording. In Section 9.01, Bases for Assessments, the code notes "(a) Psychologists base the opinions contained in their recommendations, reports, and diagnostic or evaluative statements, including forensic testimony, on information and techniques sufficient to substantiate their findings" (American Psychological Association, 2010, p. 12; see also Standard 2.04, Bases for Scientific and Professional Judgments).

Test results generated by nonstandard methods that negatively impact the validity of the findings are insufficient. In forensic settings, neuropsychologists are often required to use their findings in comparison with other evaluations. The ability to compare separate data sets, when one evaluation was conducted following proper testing procedures and the other evaluation had inherent threats to validity such as a third party observer is dubious.

Under 9.01:

(a) the psychologist cannot provide opinions or evaluative statements because TPO presence yields the evaluation of questionable validity. (b) Except as noted in 9.01c, psychologists provide opinions of the psychological characteristics of individuals only after they have conducted an examination of the individuals adequate to



support their statements or conclusions. When, despite reasonable efforts, such an examination is not practical, psychologists document the efforts they made and the result of those efforts, clarify the probable impact of their limited information on the reliability and validity of their opinions, and appropriately limit the nature and extent of their conclusions or recommendations. (American Psychological Association, 2010, p. 12; see also Standards 2.01, Boundaries of Competence, and 9.06, Interpreting Assessment Results). (c) When psychologists conduct a record review or provide consultation or supervision and an individual examination is not warranted or necessary for the opinion, psychologists explain this and the sources of information on which they based their conclusions and recommendations.

### **Section 9.02: Use of assessments**

Section 9.02 describes the following:

(a) Psychologists administer, adapt, score, interpret, or use assessment techniques, interviews, tests, or instruments in a manner and for purposes that are appropriate in light of the research on or evidence of the usefulness and proper application of the techniques. (b) Psychologists use assessment instruments whose validity and reliability have been established for use with members of the population tested. When such validity or reliability has not been established, psychologists describe the strengths and limitations of test results and interpretation. (c) Psychologists use assessment methods that are appropriate to an individual's language preference and competence, unless the use of an alternative language is relevant to the assessment issues (American Psychological Association, 2010, p. 12).

Section 9.02 (a) suggests that tests administered by a neuropsychologist in a manner that is inconsistent with the standardization of the instrument and contrary to the test manual, may be in violation of this standard. When an exception exists, it is incumbent on the neuropsychologist to provide a rationale or need that supports altering standardization in the report. Otherwise, TPO is contrary to this standard.

### **Section 9.06: Interpreting assessment results**

Section 9.06 describes the following:

When interpreting assessment results, including automated interpretations, psychologists take into account the purpose of the assessment as well as the various test factors, test-taking abilities, and other characteristics of the person being assessed, such as situational, personal, linguistic, and cultural differences, that might affect psychologists' judgments or reduce the accuracy of their interpretations. They indicate any significant limitations of their interpretations (American Psychological Association, 2010, p. 13; see also Standards 2.01b and c, Boundaries of Competence).

Many authors and organizations (Anastasi & Urbina, 1997; National Academy of Neuropsychology, 2000a; Oregon Psychological Association, 2012; Michigan Psychological Association, 2014) emphasize that, during test development, procedures are standardized without the presence of an observer. Subsequently the data obtained outside of those parameters lacks corresponding assurance of validity and interpretive significance.

### **Section 9.11: Maintaining test security**

Section 9.11 raises the importance of maintaining 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" (American Psychological Association, 2010, p. 13). Test security is a critical issue, as it addresses the prevention of unnecessary exposure of psychometric materials that can result in diminishing a test's ability to accurately distinguish between normal and abnormal performance.

Several professional organizations have emphasized the importance of maintaining test security. The APA, the National Academy of Neuropsychology (NAN), and several state associations (among others) emphasize test security as essential to the practice of psychology, and that it is incumbent on neuropsychologists to protect the integrity of psychological test materials (American Psychological Association, 1999; National Academy of Neuropsychology, 2003; Michigan Psychological Association, 2014).

Other state and national psychological organizations as well as a number of authors have raised concerns about the potential for testing material to be used inappropriately by attorneys or become part of the public domain (American Academy of Clinical Neuropsychology, 2001; American Psychological Association, 1999; Bush et al., 2009; Canadian Psychological Association, 2009; Essig, Mittenberg, Petersen, Strauman, & Cooper, 2001; Kaufman, 2005, 2009; McCaffrey et al., 1996; Michigan Psychological Association, 2014; Morel, 2009; National Academy of Neuropsychology, 1999; Oregon Psychological Association, 2012; Victor & Abeles, 2004; Wetter & Corrigan, 1995). Public accessibility allows individuals involved in litigation to self-educate or be coached as to how to perform on certain measures or how to selectively pass or fail key components of the neuropsychological evaluation and thus invalidate the results of the assessment. As a result, several psychological organizations have taken a formal position against the presence of TPO during assessment.

The National Academy of Neuropsychology (Axelrod et al., 2000) advises that TPO is inconsistent with psychological guidelines and practices, as it threatens the validity, reliability, and interpretation of test scores. The position of the academy is that TPO should be avoided whenever possible outside of necessary situations involving a nonforensic setting where the observer is both neutral and noninvolved (e.g., student training or an interpreter). This view is also held by the Canadian Psychological Association (CPA) that advises “It is not permissible for involved third parties to be physically or electronically present during the course of neuropsychological or similar psychological evaluations of a patient or plaintiff” (CPA, 2009).

The American Academy of Clinical Neuropsychology (AACN; 2001) has taken the position that “it is not permissible for involved third parties to be physically or electronically present during the course of an evaluation assessment of a plaintiff patient with the exception of those situations specified below” (p. 434). Exceptions are described that include as an example, the assessment of young children who require the presence of a family member.

The executive committee of the Oregon Psychological Association (2012) adopted a clear and unequivocal policy that the observation by a third party compromises test validity and security and therefore advises against the presence of TPO during assessment. Similarly, the Michigan Psychological Association Ethics Committee has advised against TPO for the same reasons (Michigan Psychological Association, 2014).

## Research evidence

In support of professional ethics, there is a significant body of research indicating that TPO cannot be assumed as inconsequential to test findings. A review of the pertinent literature overwhelmingly supports the negative consequences of either direct or indirect TPO or recording on the behavior of both the examiner and the examinee, and the validity of findings obtained in a neuropsychological assessment.

It is self-evident that neuropsychological evaluations be conducted in a standardized fashion consistent with the publisher's directives to ensure valid and reliable results. Consistent with other major neuropsychological organizations, it is the position of the American Board of Professional Neuropsychology that altering test procedures to accommodate observation or recording compromises test standardization and affects the subsequent data set obtained. As there is no basis for accepting as valid an assessment under nonstandard (observed or recorded) conditions, it is questionable if findings

reflect a reasonable degree of certainty or fall within an accepted range of probability. Test results therefore lack the normal and accepted parameters of validity and, more importantly, do not reflect the expected standards of psychological care. Given current research it is not surprising that most publishers of psychological tests have cautioned against TPO in their instruction manuals and national organizations have advised against TPO (National Academy of Neuropsychology, 2000a; Committee on Psychological Tests and Assessment, 2007).

The issue of TPO has been investigated by numerous researchers, including an early case study by Binder and Johnson-Greene (1995). Multiple studies have established and replicated the dubious validity of data obtained during recorded or observed evaluations. A considerable amount of research now exists demonstrating the deleterious effect on data obtained during nonstandard evaluations involving executive functioning (Horowitz & McCaffrey, 2008), attention and processing speed (Binder & Johnson-Greene, 1995; Kehrer, Sanchez, Habif, Rosenbaum, & Townes, 2000), and memory/recall of information (Eastvold et al., 2012; Gavett, Lynch, & McCaffrey, 2005; Lynch, 2005; Yantz & McCaffrey, 2005). Eastvold et al. (2012) meta-analysis found negative effects on multiple cognitive measures and that attention, learning, and memory (delayed recall) were most adversely impacted by the presence of an observer.

## Exceptions to TPO

### *Third party assistant (TPA)*

In selected circumstances, the presence of an unbiased, impartial, and neutral third party observer may be necessary to proceed with or complete a neuropsychological assessment. In these cases, rather than an involved third party observing or monitoring the behavior of the test administrator or examinee, the third party holds a neutral position and acts in an indirect manner to assist or expedite the completion of the assessment. Given this significant difference of purpose, we suggest that the presence of an uninvolved and neutral observer during an evaluation is more accurately identified as a third party assistant (TPA).

A TPA may be deemed appropriate in clinical examinations in which the examiner is acting as a clinical treater with an established patient-doctor relationship, as opposed to an independent psychological examination for an insurance company or a forensic assessment in civil or criminal proceedings. A TPA may be appropriate in a testing situation in which the presence

of a parent, family member, guardian, family friend, or interpreter is necessary, and without whose presence the examination could not proceed because of a mental disability or clinical limitation that requires an accommodation. Examples might include a child with suspected or diagnosed autism, developmental disorders affecting intelligence, confirmed brain injury that precludes independent living, children who are either too young or severely anxious that they cannot be left alone, elderly adults with compromised cognition who are unwilling to participate without the presence of a trusted family member or friend, or patients who have a thought disorder impacting reality testing, among others.

Alternatively, there are cases in which a language barrier precludes valid test administration. While the preference is for the examination to be conducted in the examinee's native language, in some these cases an interpreter may be necessary because a native speaking psychological examiner is not available or within a practical distance. In these situations, to avoid potential conflicts of interest, if it is at all possible the interpreter should have no relationship (i.e., such as family member, close friend or social affiliation) to the person being examined.

Similarly, if an examinee is deaf or hearing impaired, an individual versed in American Sign Language (ASL) or a member of the deaf community would be necessary to complete an examination. Absent a qualified examiner fluent in sign language, a certified specialist or ASL interpreter may be needed.

Training presents another situation in which a TPA is considered appropriate. Not unlike medical students, psychology students and technicians learning the administration of psychology test procedures require direct observation, practice, and supervision to ensure accuracy and competence.

In the aforementioned cases, the examiner is ethically required to document in the neuropsychological report the use of a TPA and any deviations of standardization or modifications in test administration. The limitations of normative data with subsequent impact on the generalization of findings should be clearly noted.

### **Forensic examinations, independent medical examinations, and acting as an expert witness**

Neuropsychologists who choose to perform forensic assessments are ethically required to be aware of the specialty guidelines pertinent to this area of expertise. In order to avoid potential conflict, neuropsychologists who regularly provide forensic consultations should inform referral sources that if TPO or recording

develops as an issue or is required by legal proceedings, they may elect to remove themselves from the assessment.

When retained as an expert witness in forensic situations, neuropsychologists should resist demands for TPO if requested by opposing counsel, retaining counsel, or the court. The neuropsychologist should educate the court or those involved as to the APA Ethics Code and the existing scientific research that supports the negative effects of this type of intrusion. However, it is recognized that often in forensic situations professional ethics and the adversarial nature of the legal system may not agree. If attempts to educate those involved fail and counsel insists, or the court directs to proceed with TPO, the neuropsychologist can consider removing himself/herself from the assessment.

In those exceptions in which a neuropsychologist is *compelled* by the court to evaluate with a TPO because of existing state statutes or if the neuropsychologist is placed in a situation whereby withdrawing will bring clear and substantial harm to the examinee, the manner in which test validity and clinical findings are affected and may be compromised should explicitly documented. The neuropsychologist should then follow existing recommendations and guidelines for protecting test security including requesting that test material and intellectual property be provided only to another licensed psychologist who would be bound by the same duty to protect.

If this is not possible, the neuropsychologist should request a protective order specifically prohibiting either party from copying test material or intellectual property, using them for any other purpose than the matter at hand, and directing that they be returned uncopied directly to the psychologist or destroyed in a manner verifiable by the psychologist.

### **Conclusion**

Requests for TPO frequently create an ethical dilemma for neuropsychologists as any observation or recording of neuropsychological tests or their administration has the potential to influence and compromise the behavior of both the examinee and the administrator, threatens the validity of the data obtained under these conditions by, and consequently limits normative comparisons, clinical conclusions, opinions, interpretations, and recommendations. For these reasons, APA ethical standards support the position that TPO in neuropsychological testing should be avoided.

Ethical standards of practice compel neuropsychologists to avoid or resist requests for conducting assessments complicated by TPO, except for those situations

as described. Neuropsychologists should therefore not engage in, endorse, abet, or conduct assessments complicated by TPO or recording of any kind other than under the order of a court after all reasonable alternatives have been exhausted. It would be entirely appropriate for a neuropsychologist to decline to perform an examination under these conditions.

As an exception, TPA is acceptable under infrequent clinical circumstances that necessitate the involvement of an assistant or in a rare forensic case that might require a neutral or uninvolved party such as a language interpreter. A neuropsychologist is obligated to clarify in the report the rationale for the use of TPA, identify what procedures and standards have been modified, and how or to what degree the findings, results, and conclusions may be impacted. This should include limitations in the generalization of the diagnostic data and the impact on assessment's findings.

In summary, it is the position of the American Board of Professional Neuropsychology that it is incumbent on neuropsychologists to minimize variables that might influence or distort the accuracy and validity of neuropsychological assessment. Therefore, it is the recommendation of the American Board of Professional Neuropsychology that neuropsychologists should resist requests for TPO and educate the referral sources as to the ethical and clinical implications.

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# ETHICAL PRINCIPLES OF PSYCHOLOGISTS AND CODE OF CONDUCT

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Adopted August 21, 2002

Effective June 1, 2003

(With the 2010 Amendments  
to Introduction and Applicability  
and Standards 1.02 and 1.03,  
Effective June 1, 2010)

With the 2016 Amendment  
to Standard 3.04

Adopted August 3, 2016

Effective January 1, 2017

tion and techniques sufficient to substantiate their findings. (See also Standard 2.04, Bases for Scientific and Professional Judgments.)

(b) Except as noted in 9.01c, psychologists provide opinions of the psychological characteristics of individuals only after they have conducted an examination of the individuals adequate to support their statements or conclusions. When, despite reasonable efforts, such an examination is not practical, psychologists document the efforts they made and the result of those efforts, clarify the probable impact of their limited information on the reliability and validity of their opinions, and appropriately limit the nature and extent of their conclusions or recommendations. (See also Standards 2.01, Boundaries of Competence, and 9.06, Interpreting Assessment Results.)

(c) When psychologists conduct a record review or provide consultation or supervision and an individual examination is not warranted or necessary for the opinion, psychologists explain this and the sources of information on which they based their conclusions and recommendations.

## 9.02 Use of Assessments

(a) Psychologists administer, adapt, score, interpret, or use assessment techniques, interviews, tests, or instruments in a manner and for purposes that are appropriate in light of the research on or evidence of the usefulness and proper application of the techniques.

(b) Psychologists use assessment instruments whose validity and reliability have been established for use with members of the population tested. When such validity or reliability has not been established, psychologists describe the strengths and limitations of test results and interpretation.

(c) Psychologists use assessment methods that are appropriate to an individual's language preference and competence, unless the use of an alternative language is relevant to the assessment issues.

## 9.03 Informed Consent in Assessments

(a) Psychologists obtain informed consent for assessments, evaluations, or diagnostic services, as described in Standard 3.10, Informed Consent, except when (1) testing is mandated by law or governmental regulations; (2) informed consent is implied because testing is conducted as a routine educational, institutional, or organizational activity (e.g., when participants voluntarily agree to assessment when applying for a job); or (3) one purpose of the testing is to evaluate decisional capacity. Informed consent includes an explanation of the nature and purpose of the assessment, fees, involvement of third parties, and limits of confidentiality and sufficient opportunity for the client/patient to ask questions and receive answers.

(b) Psychologists inform persons with questionable

capacity to consent or for whom testing is mandated by law or governmental regulations about the nature and purpose of the proposed assessment services, using language that is reasonably understandable to the person being assessed.

(c) Psychologists using the services of an interpreter obtain informed consent from the client/patient to use that interpreter, ensure that confidentiality of test results and test security are maintained, and include in their recommendations, reports, and diagnostic or evaluative statements, including forensic testimony, discussion of any limitations on the data obtained. (See also Standards 2.05, Delegation of Work to Others; 4.01, Maintaining Confidentiality; 9.01, Bases for Assessments; 9.06, Interpreting Assessment Results; and 9.07, Assessment by Unqualified Persons.)

## 9.04 Release of Test Data

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

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

## 9.05 Test Construction

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

## 9.06 Interpreting Assessment Results

When interpreting assessment results, including automated interpretations, psychologists take into account the purpose of the assessment as well as the various test factors, test-taking abilities, and other characteristics of the person being assessed, such as situational, personal, linguistic, and cultural differences, that might affect psychologists' judgments or reduce the accuracy of their interpretations. They indicate any significant limitations of their interpretations. (See also Standards 2.01b and c, Boundaries of Competence, and 3.01, Unfair Discrimination.)