
Discovery

Understanding and Combating the Secrecy of Neuropsychological Exams

by Justin W. Curcio

A person suffering a traumatic brain injury (TBI) can suffer lifelong neurological and cognitive issues. Proving these injuries in a plaintiff's case can be difficult, especially with a lack of objective findings. As the plaintiff has the burden of proof, it is common to have a neurologist and/or psychiatrist testify as an expert witness on their behalf, explaining to the jury what past and current symptoms the plaintiff is suffering from and the cause. Typically, TBI symptoms include amnesia, irritability, photophobia, anxiety, and depression, which are all difficult symptoms to test for objectively.

To combat this at trial, the defense would also hire an expert of its own to opine that the plaintiff's injuries are nonexistent, minimal, should have resolved already, not causally related to the injury caused by the defendant, or some combination of these. Rule 4:10 of the Rules of Supreme Court of Virginia allows an adverse party to move the Circuit Court to have a plaintiff examined when their mental or physical condition is at issue. This is particularly problematic when an adverse party moves to have a party examined by a neuropsychologist, as it has been customary for neuropsychologists to object to producing the test data, test materials, and raw data, as well as permitting the examination to be video recorded. The neuropsychologist can then testify in court about their observations of the plaintiff, plaintiff's demeanor and answers to test questions, without having to disclose any of the material on which they are basing their opinions.¹ Preventing open discovery to get this information undermines the civil process and a party's right to cross-examination.

Test data, test material & raw data

Neuropsychological tests can include a series of questions formatted in certain ways to test the "credibility" of the subject.² Such tests can include asking the patient similar questions with different wording, the patient's response time in answering, and *how* the questions are answered.³ The American Psychological Association (APA), the professional and scientific organization representing psychology in the United States, provides guidelines for psychologists practicing in the country. It is important to understand and note the terminology the APA uses, specifically how the terms "test data," "test material," and "raw data" are defined.

Test Data: "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*."⁴

Test Material: "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."⁵

Raw Data: "the original measurements on a variable as collected by the researcher, prior to data cleaning, recoding, transformations, and quantitative or qualitative analysis. For example, a survey may

ask respondents to enter their annual income in dollars: The figures supplied by respondents would be the raw data.”⁶

When requesting records from a neuropsychologist’s examination of your client, it is important to be as specific as possible in what you are requesting, as you do not want to leave any stone unturned or provide an opportunity for the neuropsychologist not to disclose a pertinent piece of information. When you fight it out in court regarding the disclosure of this material, any order should be clear on what must be provided.

Neuropsychologists’ arguments against disclosing test data, test material, raw data and the videorecording of the examination.

Neuropsychologists object to providing the disclosure of test data, test material, and raw data for the same reasons they object to having the examination videotaped. The three common objections are that it is unethical to produce such documentation, it is protected copyrighted material, and video recordings can skew test results.

Ethical argument for nondisclosure

Neurologists frequently object to providing testing material, results, and having any examinations recorded as unethical.⁷ The position is that releasing test material will jeopardize the effectiveness of the test because it will then be readily available to the public. This will create a society that is now informed of the contents of these neuropsychological tests, resulting in the public being able to prepare to take such exams, therefore undermining their legitimacy. A linchpin of the effectiveness of these tests is that the patient is not aware of the content of them and therefore cannot practice or be deceitful when the tests are administered. Accordingly, it is unethical to release this information as it would harm the greater good of society by destroying the validity of any future tests, while jeopardizing the scientific method.

When defense counsel objects to providing test data, test material, and raw data, there is no shortage of academic institutions that have published papers stating it is unethical for neuropsychologists to produce such information. However, these are academic institutions that exist to promote their own self-interests and have no authority to require their members to follow their publications.

There are no ethical rules preventing disclosure

There are no ethical rules preventing neuropsychological test data, test material and raw data from being disclosed. Psychologists practicing in Virginia are governed by the Virginia Board of Psychology and, arguably, the APA, as that is the accrediting association for psychology doctoral programs. As of the publication of this article, there are no ethical opinions or rules from the Virginia

Board of Psychology or the American Psychological Association preventing the disclosure of this information.

APA Ethical Principles §9.04(a) states: “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.”⁸ Per the APA’s own guidelines, psychologists can produce test data to the patient. The argument that it is unethical to produce test data as it may “substantially harm” or be “misuse[d]” by the general public if released contradicts the preceding sentence, which allows psychologists to release the data to the patient. If disclosing data to a patient would be unethical and undermine the validity of these tests, then the ethical rule would say do not release the data.

Additionally, HIPAA law gives an individual the right to obtain copies of their medical records.⁹ This is echoed in Virginia Code §32.1-127.1:03(A), which states: “Health care entities shall disclose health records to the individual who is the subject of the health record, including an audit trail of any additions, deletions, or revisions to the health record, if specifically requested...”

Copyright

Neuropsychologists may object to producing test materials because of copyright law. This is a meritless position and counterintuitive to actual copyright law. First, chances are the neuropsychologist is not actually the holder of any of the copyrighted material for which they are asserting copyright protection. Second, copyrighted work is not absolute. Section 107 of the Copyright Act allows for reproduction of copyrighted work for what is called the “fair use” exclusion, which includes “criticism,” “comment,” “teaching,” or “research” among its exceptions. The section also provides additional fair use factors that can be considered, including commercial nature vs. nonprofit educational purposes, nature of copyrighted work, and effect of the use of the work on the potential market.¹⁰

Neuropsychologists producing test materials are not violating any copyright law, as such production is limited to court proceeding at issue and aids in cross-examination, which is a fundamental right of our legal system. Additionally, any copyright concerns can be alleviated with an order to seal such documents. There is no copyright issue when such material is requested in this limited capacity.

No third-party observers/ videographer

Neurologists will also object to a videographer being present, claiming this is unethical and against copyright rules to disclose this information.¹¹ These

arguments are outlined above. Additionally, they will further object to a videographer or third-party observer being present as this will skew and undermine the legitimacy of the test results.¹² The rationale for this is that because psychological tests and scoring are not done routinely in the presence of observers, such observers will breach the standardized requirements of the test. Another common argument is that an observer will put undue pressure or anxiety on the patient, further skewing the test results.

There are numerous counterarguments to allow for video testing, including preserving the most accurate record of what occurred during the neurological examination and ensuring opinions are based on reliable methodology and facts.¹³ Videotaping the examination prevents misrepresentation in the exam results, ensures that standardized procedures are followed (including the *timing* of tests/answers), documents when emotional information was correctly reported or underreported and underscored, and protects against the changing or influencing of answers. Even if test material, test data, and raw data are disclosed, they still will not accurately capture what actually occurred during these several-hour exams. The neuropsychologist's notes are always going to be filtered through their bias and cannot preserve the record of *how* the party responded.

There are no definitive studies that show videotaping a neuropsychological test will have a negative effect.¹⁴ Additionally, the APA 2022 statement regarding third party observers allows psychologists to have flexibility when deciding to allow for a videographer or third-party observer to be present.¹⁵ This further illustrates that there is no clear position on the matter. Moreover, a neuropsychological exam being conducted by a hired-gun expert by the defense is incredibly stressful for the patient. This is a doctor the party does not want to be examined by and is being compelled to see by court order, which is being conducted for the sole purpose of collecting evidence to be used against them. If anything, a videographer would make the party feel more comfortable in that situation, knowing that a third party is recording everything so that nothing can be misconstrued. The person being examined is requesting the videographer; denying that request would only exacerbate the stress of this unwelcome exam.

Right to Cross-Examination/Patient Records

A party should have an absolute right to see their medical records created by a doctor, especially one who is expected to testify against them in court. The very idea of withholding records, whether it be test material, test data, or raw data, prevents the fundamental right to cross-examine a party. Withholding this material allows an adverse expert to interrogate a party without counsel being present,

then testify in court against that party about what that expert witnessed. This is an expert hired to examine and then testify against an adverse party, all without having to disclose what exam was performed, what questions were asked, and *how* they were answered. This prevents any type of meaningful cross-examination. No doctor would be allowed to testify that a patient suffered from a fracture while simultaneously objecting to disclosing the imaging that shows such fracture. Psychologists must be held to the same standard.

A video recording is the most accurate way to preserve the record of what *actually* transpired. A neuropsychologist's opinion would be based on the patient's answers, demeanor, and notes taken. A video recording would preserve what the patient's "demeanor" was, as that is an incredibly subjective data point which should be scrutinized. This further ensures that a meaningful cross-examination can take place, as a judge and jury can actually see *how* a party responded to a series of questions without having to be told by the adversary's expert how they responded.

Conclusion

Neuropsychologists put up tremendous roadblocks to prevent the disclosure of test material, test data, raw data, and recordings of neuropsychological exams. This creates a barrier in the discovery process and any meaningful cross-examination. Without being compelled by a court, it is unlikely that an attorney would get any meaningful records from a neuropsychologist who was hired by the opposition to testify against the very person they are examining. The only way to combat this is by complete transparency in the process.

Endnotes

1. It is worth noting that neuropsychologists are not medical doctors, but rather hold a Ph.D., and cannot testify to the issue of causation. *See John v. Im*, 263 Va. 315 (2002).
2. The American Psychological Association defines neuropsychology as "the branch of science that studies the physiological processes of the nervous system and relates them to behavior and cognition, in terms both of their normal function and of the dysfunctional processes associated with brain damage." *See* Am. Psych. Ass'n, *APA Dictionary of Psychology*, (last updated Apr. 19, 2018), <https://dictionary.apa.org/neuropsychology>.
3. *See* Dorothy Sims, et al. *Transparency in Forensic Exams*, 24 Nev. L.J. 531, at 570 (2024).
4. Am. Psych. Ass'n, *Ethical Principles of Psychologists and Code of Conduct*, §9.04 (2017).
5. *Id.* at §9.11.
6. *See* Am. Psych. Ass'n, *APA Dictionary of Psychology*, (last updated Apr. 19, 2018), <https://dictionary.apa.org/raw-data>.

7. See Kyle Brauer Boone, et al. Attorney Demands for Protected Psychological Test Information: Is Access Necessary for Cross Examination or Does it Lead to Misinformation? An Interorganizational Position Paper, 38 *Clinical Neuropsychologist*, 889 (2024).
8. Ethical Principles, *supra* note 4.
9. See 45 CFR § 164.524 (2014). It is important to note that the article above discusses neuropsychological testing and not psychotherapy notes. Psychotherapy notes have different disclosure requirements and are separate material all together that are not part of the neuropsychological testing discussed in this article.
10. 17 U.S.C. §107 (1992).
11. See Kyle Brauer Boone, et al. Official Position of the American Academy of Clinical Neuropsychology on Test Security, 36 *Clinical Neuropsychologist*, 523, 525-530 (2022).
12. Committee on Psychological Tests and Assessment, Statement on Third Party Observers in Psychological Testing and Assessment: An Updated Framework for Decision Making, Am. Psych. Ass'n (2022).
13. See Sims, Transparency, *supra*, note 3 at 547-555.
14. See *id.* at 578.
15. See Committee, Statement on Third Party Observers, *supra*, note 12 at 4.



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