REDACTED

DISTRICT COURT, ARAPAHOE COUNTY, COLORADO 7325 South Potomac Street Centennial, Colorado 80112 **PEOPLE OF THE STATE OF COLORADO,** v. **HOLMES, JAMES EAGAN,** Defendant.	▲ **COURT USE ONLY** ▲
JOHN W. SUTHERS, Attorney General ALICIA CALDERÓN, First Assistant Attorney General TANYA E. SMITH, Assistant Attorney General* Ralph L. Carr Colorado Judicial Center 1300 Broadway, 6th Floor Denver, CO 80203 Telephone: (720) 508-6550 FAX: (720) 508-6041 E-Mail: tanya.smith@state.co.us Registration Number: 37089 *Counsel of Record	Case No.: 12CR1522 Division: 22
MOTION TO QUASH SUBPOENA DUCES TECUM	

The Colorado Department of Human Services (the "Department") and its subordinate agency, the Colorado Mental Health Institute at Pueblo ("CMHIP"), through the Office of the Attorney General, and on behalf of its employees [redacted] PhD, ABPP, and [redacted], PhD ABPP, respectfully requests that this Court enter an order quashing the subpoenas duces tecum issued by the People, and in support thereof states:

CERTIFICATE OF CONFERRAL

Undersigned counsel certifies that she conferred with Deputy District Attorney Rich Orman concerning this matter. According to Mr. Orman, the People object to the relief requested herein.

INTRODUCTION

1. On or about May 13, 2013, Mr. Holmes' counsel tendered a plea of Not Guilty by Reason of Insanity in this matter. Consequently, on June 4, 2013, this Court entered an order for inpatient sanity examination of Mr. Holmes at CMHIP.

2. The sanity examination of Mr. Holmes included psychological and neuropsychological testing by [redacted] and [redacted] as permitted by Colo. Rev. Stat. § 16-8-106 (2012).

3. [redacted] is a licensed psychologist in the State of Colorado and is Board Certified in Forensic Psychology by the American Board of Forensic Psychology (ABFP) and the American Board of Professional Psychology (ABPP). [redacted] is a member of professional organizations including the American Psychological Association (APA), the American Academy of Forensic Psychology (AAFP) (Fellow), the Colorado Psychological Association (Board of Directors) and Association of Threat Assessment Professionals (pending).

4. [redacted] is a licensed psychologist in the State of Colorado, is Board Certified in Clinical Neuropsychology by the American Board of Clinical Neuropsychology (ABCN) and Board Certified in Forensic Psychology by the American Board of Forensic Psychology (ABFP) under the auspices of the American Board of Professional Psychology. [redacted] is a member of professional organizations including the American Psychological Association (APA), the National Academy of Neuropsychology (NAN), the American Academy of Clinical Neuropsychology (AACN) and the American Academy of Forensic Psychology (AAFP).

5. To complete the psychological and neuropsychological testing of Mr. Holmes, [redacted] and [redacted] utilized various materials and tools, which generated raw data. [redacted] reviewed and interpreted that raw data and reached the conclusions set forth in the report CMHIP submitted to the Court on or about September 6, 2013.

6. On September 11, 2013, the People issued subpoenas duces tecum PSDT-4 and PSDT-5 to [redacted] respectively (collectively the "Subpoenas"). Each Subpoena requires these clinicians to produce "[y]our entire file related to the evaluation of James Eagan Holmes, including all tests, notes, testing results, raw data, and raw data print-outs."

7. The Department, CMHIP and [redacted] have no objection to producing notes regarding psychology and neuropsychology testing of

Mr. Holmes. However, the remainder of the Subpoenas is unreasonable and oppressive. As such, the Department, CMHIP, and [redacted] do object to producing the remainder of the subpoenaed materials. Requiring [redacted] and [redacted] to produce these materials would compromise their professional ethical obligations, violates trade secret and copyright agreements with test manufacturers, and is contrary to public policy.

ARGUMENT

8. A subpoena in a criminal matter may be quashed if production would be unreasonable or oppressive. *United States v. Nixon,* 418 U.S. 683, 700 (1974) (superseded by statute on other grounds); *People v. Spykstra,* 234 P.3d 662 (Colo. 2010). For a subpoena to be valid, the issuing party has the burden of demonstrating that: (1) a reasonable likelihood that the subpoenaed materials exist by setting forth a specific factual basis; (2) the materials are evidentiary and relevant; (3) the materials are not otherwise procurable reasonably in advance of trial by exercising due diligence; (4) the party cannot properly prepare for trial without [the materials] and the failure to obtain inspection may tend to unreasonably delay trial; and (5) the application is made in good faith and is not intended as a general fishing expedition. *Id.* Against this background, the subpoenaing party "must clear three hurdles: (1) relevancy; (2) admissibility; (3) specificity." *Spykstra,* 234 P.3d at 669.

9. In adopting this five-part test, the *Spykstra* court emphasized the limited purpose for which a pretrial subpoena is intended, namely that such a subpoena "is not an investigatory tool." *Id.* The test also recognizes that Crim. P. 17 "does *not* create an equivalent to the broad right of civil litigants to discovery of all information that is relevant to or may lead to discovery of relevant information" and is not intended to "provide a means of discovery for criminal cases." *Id.* (emphasis added).

10. The *Spykstra* court further found that where a subpoena seeks materials that are protected by a privilege or right to confidentiality, the issuing party must make a greater showing of need, and might not gain access to the information depending on the nature of the interest against disclosure. *Spykstra,* 234 P.3d at 670. More specifically, "the heightened sensitivity of protected information requires a proportionately greater showing of need before disclosure may be justified." *Id.* A court must conduct a balancing test when considering whether to allow disclosure of privileged and confidential materials.

11. Here, the People have issued a third-party subpoena to the Department seeking disclosure of confidential materials of CMHIP's clinicians. Thus, the *Spykstra* analysis applies.

12. The Department does not argue whether the People can meet the five-part *Spykstra* test. Rather, in order to determine whether disclosure of the subpoenaed materials is appropriate, this Court should turn to the balancing test applicable to requests for confidential materials.

13. As demonstrated below, the People cannot demonstrate a greater showing of need, sufficient to outweigh the interest against disclosing [redacted] and [redacted] confidential records. As such, the Subpoena should be quashed.

Disclosure of Testing Materials and Raw Data Is Contrary to [redacted] and [redacted] Professional Ethical Obligations

14. [redacted] membership in the aforementioned professional organizations requires them to practice in accordance with the APA Ethical Principles of Psychologists and Code of Conduct (the "Code"). According to the Sections 9.04 and 9.11 of the Code, psychologists have an ethical duty to protect the integrity of secure tests by maintaining the confidentiality of the questions and answers to the test. *See* APA Code 9.04 and 9.11, attached as Exhibit 1. AACN practice guidelines and the official AACN position on disclosure of neuropsychological test data further encourage psychologists to maintain the integrity and security of test materials. *See* AACN Practice Guidelines, attached as Exhibit 2. [redacted] are bound by these ethical duties. Consequently, requiring them to comply with the Subpoena creates an ethical conflict for [redacted] and is contrary to the tenants of their professional obligations.

Disclosure of Testing Materials and Raw Data Would Cause Violation of Trade Secret and Copyright laws, and CMHIP Contractual Agreements

15. In conjunction with their examinations, [redacted] used certain standardized testing materials and assessment tools. These standardized testing materials and assessment tools are copyrighted trade secrets of the companies that have created them. These companies stand by the validity of their tests and assessments, and strive to maintain the integrity of their testing materials. Widespread dissemination of test questions and answers that comprise the raw data would render the test instruments invalid and make them useless to the clinical community. Therefore, the companies place restrictions on the users of these assessment tools. To protect the secrecy of testing materials the companies will

only sell them to qualified individuals who are bound by the ethical standards of their profession to protect the integrity of the testing materials, by maintaining their confidentiality.

16. For instance, Pearson Assessments ("Pearson") and Psychological Assessment Resources ("PAR") publish tools purchased by CMHIP and utilized by [redacted] and [redacted] in conducting psychological and neuropsychological testing. The Subpoenas seek production of all tests, testing results, raw data and raw data print-outs relevant to Mr. Holmes. However, Pearson conditions sale and continued use of their testing materials upon acceptance of their "Terms and Conditions for Sale and Use of Pearson Products." Among the applicable terms and conditions which CMHIP and its clinicians have accepted, are: 1) use of Pearson products in accordance with applicable professional guidelines; 2) non-dissemination of copyrighted/trade secret testing materials, including test items, scoring algorithms, scored direction, or other content; and 3) non-reproduction of test materials in any electronic manner. Additionally, Pearson reserves the right to revoke CMHIP's right to purchase its testing materials, for violation of any Terms and Conditions. Similarly, PAR's position is that when purchasing copyrighted materials from it, as a condition of purchase CMHIP agrees not to reproduce or adapt their copyrighted materials in any way or for any purpose. *See* Correspondence to the customer from Psychological Assessment Resources, Inc., attached as Exhibit 3.

17. Owners of the intellectual property that comprise these testing materials and results do not enter into license agreements with just anyone. They only permit access to persons or entities that are qualified in the field to interpret and use it. In fact, due to the restricted nature of PAR's products, customers must provide their professional qualifications prior to purchase. The owners of the intellectual property at issue here have a legitimate expectation of non-disclosure based upon their copyright and license agreement with CMHIP.

18. Presently, the Subpoenas require [redacted] to produce materials in a manner that would result in violation of Pearson's Terms and Conditions and PAR's conditions of purchase. CMHIP has a license to use the intellectual property of these entities—an agreement that does not permit distribution of the materials in the manner sought here. CMHIP is also bound by the copyright.[1] Disclosure of the materials and data in the manner sought by the

[1] CMHIP is bound to exercise its best efforts to protect the confidentiality of the testing materials based upon the licensing agreement. The licensing agreement indicates the owners' objection to unfettered disclosure.

prosecution amounts to a disclosure of trade secrets and a violation of the copyright. The penalty for such violation could result in revocation of CMHIP's right to purchase testing materials, which would have consequences beyond this specific case.

19. Because [redacted] have a duty to maintain the confidentiality of materials and raw data that are confidential commercial information, trade secrets and copyrighted intellectual property, the Court should also protect these materials.[2] *See* Colo.R.Crim.Pr. 57(b) (permitting the court to incorporate the rules of civil procedure if no rule of criminal procedure exists); Colo.R.Civ.P. 26(c) (permitting orders that disclosure not be had of confidential commercial information or trade secrets).

<u>There is a Strong Public Policy in Favor of Maintaining the Confidentiality of Testing Materials and Raw Data</u>

20. Finally, and perhaps most compelling, are policy implications related to disclosure of testing materials and raw data. Test security is an important goal aimed at protecting the objectivity, fairness, and integrity of the tests. In *Detroit Edison Co. v. National Labor Relations Board*, 440 U.S. 301 (1979), the United States Supreme Court commented on "the strong public policy against disclosure of...tests", opining that test security is necessary to maintain the validity of the tests. *Detroit Edison*, 440 U.S. at 314. *See also* APA Amicus Brief in *Detroit Edison Co. v. National Labor Relations Board*, attached as Exhibit 4.

21. Here, disclosure runs directly contrary to the public's interests. Defendants in criminal proceedings statewide, who raise the issue of sanity, competency, mental condition, and any other mental statuses, are subject to evaluation by CMHIP's clinicians pursuant to statute. The testing materials and raw data sought in this case are the same instruments utilized in completing any of those statutory evaluations.

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[2] As a practical matter, many of the tests are also not in a format that can be copied and produced. [redacted]

22. As such, disclosure would likely dilute and seriously impair the effectiveness and use of the materials in psychological and neuropsychological evaluations statewide. Disclosing the testing instruments and raw data is similar to publishing test questions with the answers. The test becomes useless when those taking it know how to answer the questions. Disclosure allows defendants to use the materials to determine how to answer the test questions in order to achieve evaluation results that aid in their defense. The consequence is that either the instruments become useless, or defendants will be able to deceive CMHIP's evaluators, resulting in widespread misleading results and inappropriate recommendations to courts throughout Colorado. Moreover, if CMHIP is unable to keep testing materials and raw data confidential, CMHIP's clinicians can either continue to use them, knowing that the results could be misleading and incorrect, or CMHP can attempt to contract with different entities for different testing materials. Replacing the testing materials on a regular basis to avoid reliance upon exploited information is expensive, impractical, and avoidable.

23. Further, allowing the prosecution to obtain a copy of the test materials and raw data is akin to allowing public access to it. Colo.R.Crim.P. 16 places an extraordinary obligation on the prosecution to disclose all materials and information within their possession or control to the defense. This includes results of mental examinations. *See* Colo.R.Crim.P. 16(a)(1)(III). It is logical then, to presume that upon receiving any testing materials and raw data from [redacted], the prosecution would be required to turn the same information over to the defense. Upon receiving such information, Mr. Holmes' counsel cannot be expected to erase the details of test materials and raw data from their memory and not to use the benefit of the information therein to assist future clients.[3] Even if the Court were to enter a protective order requiring the parties not to share the confidential information under any circumstances, it would be impossible to ensure compliance with such an order, and CMHIP could not be assured that the evaluation tools are safe to use in the future. *See* Test Security – Official Position Statement of the National Academy of Neuropsychology, attached as Exhibit 5.

24. Ultimately, each of these consequences demonstrates the potential harm to the public in disclosure of the testing materials and raw data. There is a strong interest in maintaining confidentiality of the materials, which in turn

[3] CMHIP is not alleging that any counsel would intentionally engage in unethical conduct. Instead, CMHIP urges that as a practical matter, a protective order is unlikely to protect the interests at stake because it is not feasible to expect counsel to forget the information and never to use it again—even inadvertently.

protects the public's interest in appropriate and reliable results of psychological and neuropsychological testing in criminal cases.

[redacted] Are Not Prohibited from Disclosing Test Materials and Raw Data to Another Licensed Psychologist

25. The companies that produce various assessment tools, including Pearson and PAR, recognize that a second opinion may be sought regarding the results of a test. The companies have no objection to the materials and raw data being sent to another qualified individual for that purpose, but request that they pass from professional-to-professional and not through the hands of an attorney or other outside party. Additionally, another licensed psychologist is bound by the same ethical duties as [redacted] nd [redacted] o. Consequently, [redacted] an [redacted] may provide raw data directly to such a professional without violating their own ethical duties. Both clinicians are prepared to do so immediately by electronic transfer. [redacted] nd [redacted] are also willing to provide this individual with a narrative specifying the number of pages being transferred, to ensure that all information is provided.

Conclusion

26. CMHIP requests that the Court deny any access to the confidential tests and raw data from [redacted] and [redacted] psychological and neuropsychological testing.

WHEREFORE, the Colorado Department of Human Services, its subordinate agency the Colorado Mental Health Institute at Pueblo, and its employees [redacted] and [redacted], respectfully request that this Court enter an order quashing the Subpoenas Duces Tecum as it relates to disclosure of any raw data and/or testing materials from psychological and neuropsychological testing on Mr. Holmes, or in the alternative, enter a protective order related to such raw data and testing materials.

Respectfully submitted this 27th day of September, 2013.

JOHN W. SUTHERS
Attorney General

TANYA E. SMITH, 37089*
Assistant Attorney General
Human Services Unit
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Attorneys for the Colorado Department of Human Services

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CERTIFICATE OF SERVICE

This is to certify that I have duly served the within **MOTION QUASH SUBPOENA DUCES TECUM** upon all parties herein by email transmission, this 27th day of September, 2013 addressed as follows:

Karen Pearson
Rich Orman
Amy Jorgenson
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DISTRICT COURT, ARAPAHOE COUNTY, COLORADO 7325 South Potomac Street Centennial, Colorado 80112	
PEOPLE OF THE STATE OF COLORADO, v. **HOLMES, JAMES EAGAN,** Defendant.	▲ **COURT USE ONLY** ▲
	Case No.: 12CR1522 Division: 22
ORDER	

THIS MATTER comes before the Court on the Colorado Department of Human Services' Motion to Quash Subpoena Duces Tecum. The Court, having reviewed the file, and being otherwise sufficiently advised in the premises,

HEREBY FINDS:

1. [redacted] is a board-certified psychologist who conducted psychological testing on Mr. Holmes as a part of the sanity examination conducted pursuant to Colo. Rev. Stat. § 16-8-106.

2. [redacted] is a board-certified neuropsychologist who conducted neuropsychological testing on Mr. Holmes as a part of the sanity examination conducted pursuant to Colo. Rev. Stat. § 16-8-106.

3. The People served subpoenas duces tecum upon [redacted] on September 11, 2013, requiring them to produce "[y]our entire file related to the evaluation of James Eagan Holmes, including all tests, notes, testing results, raw data, and raw data print-outs."

4. [redacted] and [redacted] professional ethical obligations require them to maintain the confidentiality of testing materials and raw data used and compiled in conducting the psychological and neuropsychological evaluation of Mr. Holmes.

5. In conjunction with their evaluations [redacted] and [redacted] used certain standardized testing materials and assessment tools. These standardized testing materials and assessment tools are copyrighted trade secrets of the companies that have created and stand by the validity of these tests and assessments.

6. Widespread dissemination of tests questions and answers would render the test instruments invalid making them useless to the clinical community and to the courts.

7. Public policy favors maintaining the confidentiality of testing materials and raw data used and compiled in conducting the psychological and neuropsychological evaluations of criminal defendants who have raised mental status defenses. Maintaining confidentiality of the materials protects the public's interest in appropriate and reliable results of psychological and neuropsychological testing in criminal cases.

8. There has been no showing of need sufficient to outweigh the interest against disclosing [redacted] and [redacted] confidential tests and data directly to counsel for the People.

IT IS THEREFORE ORDERED THAT:

The Motion to Quash is granted as it relates to tests, testing results, raw data, and raw data print-outs utilized by [redacted] and [redacted] in their examinations of Mr. Holmes.

DATED THIS _____ DAY OF_____, 2013.

BY THE COURT:

_____
DISTRICT JUDGE

Copies: Counsel for Defendant
Deputy District Attorney
Assistant Attorney General

Ethical Principles of Psychologists and Code of Conduct

CONTENTS

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Exhibit 1

INTRODUCTION AND APPLICABILITY

The American Psychological Association's (APA's) Ethical Principles of Psychologists and Code of Conduct (hereinafter referred to as the Ethics Code) consists of an Introduction, a Preamble, five General Principles (A–E), and specific Ethical Standards. The Introduction discusses the intent, organization, procedural considerations, and scope of application of the Ethics Code. The Preamble and General Principles are aspirational goals to guide psychologists toward the highest ideals of psychology. Although the Preamble and General Principles are not themselves enforceable rules, they should be considered by psychologists in arriving at an ethical course of action. The Ethical Standards set forth enforceable rules for conduct as psychologists. Most of the Ethical Standards are written broadly, in order to apply to psychologists in varied roles, although the application of an Ethical Standard may vary depending on the context. The Ethical Standards are not exhaustive. The fact that a given conduct is not specifically addressed by an Ethical Standard does not mean that it is necessarily either ethical or unethical.

This Ethics Code applies only to psychologists' activities that are part of their scientific, educational, or professional roles as psychologists. Areas covered include but are not limited to the clinical, counseling, and school practice of psychology; research; teaching; supervision of trainees; public service; policy development; social intervention; development of assessment instruments; conducting assessments; educational counseling; organizational consulting; forensic activities; program design and evaluation; and administration. This Ethics Code applies to these activities across a variety of contexts, such as in person, postal, telephone, Internet, and other electronic transmissions. These activities shall be distinguished from the purely private conduct of psychologists, which is not within the purview of the Ethics Code.

Membership in the APA commits members and student affiliates to comply with the standards of the APA Ethics Code and to the rules and procedures used to enforce them. Lack of awareness or misunderstanding of an Ethical Standard is not itself a defense to a charge of unethical conduct.

The procedures for filing, investigating, and resolving complaints of unethical conduct are described in the current Rules and Procedures of the APA Ethics Committee. APA may impose sanctions on its members for violations of the standards of the Ethics Code, including termination of APA membership, and may notify other bodies and individuals of its actions. Actions that violate the standards of the Ethics Code may also lead to the imposition of sanctions on psychologists or students whether or not they are APA members by bodies other than APA, including state psychological associations, other professional groups, psychology boards, other state or federal agencies, and payors for health services. In addition, APA may take action against a member after his or her conviction of a felony, expulsion or suspension from an affiliated state psychological association, or suspension or loss of licensure. When the sanction to be imposed by APA is less than expulsion, the 2001 Rules and Procedures do not guarantee an opportunity for an in-person hearing, but generally provide that complaints will be resolved only on the basis of a submitted record.

The Ethics Code is intended to provide guidance for psychologists and standards of professional conduct that can be applied by the APA and by other bodies that choose to adopt them. The Ethics Code is not intended to be a basis of civil liability. Whether a psychologist has violated the Ethics Code standards does not by itself determine whether the psychologist is legally liable in a court action, whether a contract is enforceable, or whether other legal consequences occur.

The modifiers used in some of the standards of this Ethics Code (e.g., *reasonably*, *appropriate*, *potentially*) are included in the standards when they would (1) allow professional judgment on the part of psychologists, (2) eliminate injustice or inequality that would occur without the modifier, (3) ensure applicability across the broad range of activities conducted by psychologists, or (4) guard against a set of rigid rules that might be quickly outdated. As used in this Ethics Code, the term *reasonable* means the prevailing professional judgment of psychologists engaged in similar activities in similar circumstances, given the knowledge the psychologist had or should have had at the time.

This version of the APA Ethics Code was adopted by the American Psychological Association's Council of Representatives during its meeting, August 21, 2002, and is effective beginning June 1, 2003. Inquiries concerning the substance or interpretation of the APA Ethics Code should be addressed to the Director, Office of Ethics, American Psychological Association, 750 First Street, NE, Washington, DC 20002-4242. The Ethics Code and information regarding the Code can be found on the APA Web site, http://www.apa.org/ethics. The standards in this Ethics Code will be used to adjudicate complaints brought concerning alleged conduct occurring on or after the effective date. Complaints regarding conduct occurring prior to the effective date will be adjudicated on the basis of the version of the Ethics Code that was in effect at the time the conduct occurred.

The APA has previously published its Ethics Code as follows:

American Psychological Association. (1953). *Ethical standards of psychologists*. Washington, DC: Author.

American Psychological Association. (1959). Ethical standards of psychologists. *American Psychologist, 14*, 279–282.

American Psychological Association. (1963). Ethical standards of psychologists. *American Psychologist, 18*, 56–60.

American Psychological Association. (1968). Ethical standards of psychologists. *American Psychologist, 23*, 357–361.

American Psychological Association. (1977, March). Ethical standards of psychologists. *APA Monitor*, 22–23.

American Psychological Association. (1979). *Ethical standards of psychologists*. Washington, DC: Author.

American Psychological Association. (1981). Ethical principles of psychologists. *American Psychologist, 36*, 633–638.

American Psychological Association. (1990). Ethical principles of psychologists (Amended June 2, 1989). *American Psychologist, 45*, 390–395.

American Psychological Association. (1992). Ethical principles of psychologists and code of conduct. *American Psychologist, 47*, 1597–1611.

Request copies of the APA's Ethical Principles of Psychologists and Code of Conduct from the APA Order Department, 750 First Street, NE, Washington, DC 20002-4242, or phone (202) 336-5510.

In the process of making decisions regarding their professional behavior, psychologists must consider this Ethics Code in addition to applicable laws and psychology board regulations. In applying the Ethics Code to their professional work, psychologists may consider other materials and guidelines that have been adopted or endorsed by scientific and professional psychological organizations and the dictates of their own conscience, as well as consult with others within the field. If this Ethics Code establishes a higher standard of conduct than is required by law, psychologists must meet the higher ethical standard. If psychologists' ethical responsibilities conflict with law, regulations, or other governing legal authority, psychologists make known their commitment to this Ethics Code and take steps to resolve the conflict in a responsible manner. If the conflict is unresolvable via such means, psychologists may adhere to the requirements of the law, regulations, or other governing authority in keeping with basic principles of human rights.

PREAMBLE

Psychologists are committed to increasing scientific and professional knowledge of behavior and people's understanding of themselves and others and to the use of such knowledge to improve the condition of individuals, organizations, and society. Psychologists respect and protect civil and human rights and the central importance of freedom of inquiry and expression in research, teaching, and publication. They strive to help the public in developing informed judgments and choices concerning human behavior. In doing so, they perform many roles, such as researcher, educator, diagnostician, therapist, supervisor, consultant, administrator, social interventionist, and expert witness. This Ethics Code provides a common set of principles and standards upon which psychologists build their professional and scientific work.

This Ethics Code is intended to provide specific standards to cover most situations encountered by psychologists. It has as its goals the welfare and protection of the individuals and groups with whom psychologists work and the education of members, students, and the public regarding ethical standards of the discipline.

The development of a dynamic set of ethical standards for psychologists' work-related conduct requires a personal commitment and lifelong effort to act ethically; to encourage ethical behavior by students, supervisees, employees, and colleagues; and to consult with others concerning ethical problems.

GENERAL PRINCIPLES

This section consists of General Principles. General Principles, as opposed to Ethical Standards, are aspirational in nature. Their intent is to guide and inspire psychologists toward the very highest ethical ideals of the profession. General Principles, in contrast to Ethical Standards, do not represent obligations and should not form the basis for imposing sanctions. Relying upon General Principles for either of these reasons distorts both their meaning and purpose.

Principle A: Beneficence and Nonmaleficence

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.

Principle B: Fidelity and Responsibility

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.

Principle C: Integrity

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.

Principle D: Justice

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 pre-

cautions 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.

Principle E: Respect for People's Rights and Dignity

Psychologists respect the dignity and worth of all people, and the rights of individuals to privacy, confidentiality, and self-determination. Psychologists are aware that special safeguards may be necessary to protect the rights and welfare of persons or communities whose vulnerabilities impair autonomous decision making. Psychologists are aware of and respect cultural, individual, and role differences, including those based on age, gender, gender identity, race, ethnicity, culture, national origin, religion, sexual orientation, disability, language, and socioeconomic status, and consider these factors when working with members of such groups. Psychologists try to eliminate the effect on their work of biases based on those factors, and they do not knowingly participate in or condone activities of others based upon such prejudices.

ETHICAL STANDARDS

1. Resolving Ethical Issues

1.01 Misuse of Psychologists' Work

If psychologists learn of misuse or misrepresentation of their work, they take reasonable steps to correct or minimize the misuse or misrepresentation.

1.02 Conflicts Between Ethics and Law, Regulations, or Other Governing Legal Authority

If psychologists' ethical responsibilities conflict with law, regulations, or other governing legal authority, psychologists make known their commitment to the Ethics Code and take steps to resolve the conflict. If the conflict is unresolvable via such means, psychologists may adhere to the requirements of the law, regulations, or other governing legal authority.

1.03 Conflicts Between Ethics and Organizational Demands

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

1.04 Informal Resolution of Ethical Violations

When psychologists believe that there may have been an ethical violation by another psychologist, they attempt to resolve the issue by bringing it to the attention of that individual, if an informal resolution appears appropriate and the intervention does not violate any confidentiality rights that may be involved. (See also Standards 1.02, Conflicts Between Ethics and Law, Regulations, or Other Governing Legal Authority, and 1.03, Conflicts Between Ethics and Organizational Demands.)

1.05 Reporting Ethical Violations

If an apparent ethical violation has substantially harmed or is likely to substantially harm a person or organization and is not appropriate for informal resolution under Standard 1.04, Informal Resolution of Ethical Violations, or is not resolved properly in that fashion, psychologists take further action appropriate to the situation. Such action might include referral to state or national committees on professional ethics, to state licensing boards, or to the appropriate institutional authorities. This standard does not apply when an intervention would violate confidentiality rights or when psychologists have been retained to review the work of another psychologist whose professional conduct is in question. (See also Standard 1.02, Conflicts Between Ethics and Law, Regulations, or Other Governing Legal Authority.)

1.06 Cooperating With Ethics Committees

Psychologists cooperate in ethics investigations, proceedings, and resulting requirements of the APA or any affiliated state psychological association to which they belong. In doing so, they address any confidentiality issues. Failure to cooperate is itself an ethics violation. However, making a request for deferment of adjudication of an ethics complaint pending the outcome of litigation does not alone constitute noncooperation.

1.07 Improper Complaints

Psychologists do not file or encourage the filing of ethics complaints that are made with reckless disregard for or willful ignorance of facts that would disprove the allegation.

1.08 Unfair Discrimination Against Complainants and Respondents

Psychologists do not deny persons employment, advancement, admissions to academic or other programs, tenure, or promotion, based solely upon their having made or their being the subject of an ethics complaint. This does not preclude taking action based upon the outcome of such proceedings or considering other appropriate information.

2. Competence

2.01 Boundaries of Competence

(a) Psychologists provide services, teach, and conduct research with populations and in areas only within the boundaries of their competence, based on their education, training, supervised experience, consultation, study, or professional experience.

(b) Where scientific or professional knowledge in the discipline of psychology establishes that an understand-

ing of factors associated with age, gender, gender identity, race, ethnicity, culture, national origin, religion, sexual orientation, disability, language, or socioeconomic status is essential for effective implementation of their services or research, psychologists have or obtain the training, experience, consultation, or supervision necessary to ensure the competence of their services, or they make appropriate referrals, except as provided in Standard 2.02, Providing Services in Emergencies.

(c) Psychologists planning to provide services, teach, or conduct research involving populations, areas, techniques, or technologies new to them undertake relevant education, training, supervised experience, consultation, or study.

(d) When psychologists are asked to provide services to individuals for whom appropriate mental health services are not available and for which psychologists have not obtained the competence necessary, psychologists with closely related prior training or experience may provide such services in order to ensure that services are not denied if they make a reasonable effort to obtain the competence required by using relevant research, training, consultation, or study.

(e) In those emerging areas in which generally recognized standards for preparatory training do not yet exist, psychologists nevertheless take reasonable steps to ensure the competence of their work and to protect clients/patients, students, supervisees, research participants, organizational clients, and others from harm.

(f) When assuming forensic roles, psychologists are or become reasonably familiar with the judicial or administrative rules governing their roles.

2.02 Providing Services in Emergencies

In emergencies, when psychologists provide services to individuals for whom other mental health services are not available and for which psychologists have not obtained the necessary training, psychologists may provide such services in order to ensure that services are not denied. The services are discontinued as soon as the emergency has ended or appropriate services are available.

2.03 Maintaining Competence

Psychologists undertake ongoing efforts to develop and maintain their competence.

2.04 Bases for Scientific and Professional Judgments

Psychologists' work is based upon established scientific and professional knowledge of the discipline. (See also Standards 2.01e, Boundaries of Competence, and 10.01b, Informed Consent to Therapy.)

2.05 Delegation of Work to Others

Psychologists who delegate work to employees, supervisees, or research or teaching assistants or who use the services of others, such as interpreters, take reasonable steps to (1) avoid delegating such work to persons who have a multiple relationship with those being served that would likely lead to exploitation or loss of objectivity; (2) authorize only those responsibilities that such persons can be expected to perform competently on the basis of their education, training, or experience, either independently or with the level of supervision being provided; and (3) see that such persons perform these services competently. (See also Standards 2.02, Providing Services in Emergencies; 3.05, Multiple Relationships; 4.01, Maintaining Confidentiality; 9.01, Bases for Assessments; 9.02, Use of Assessments; 9.03, Informed Consent in Assessments; and 9.07, Assessment by Unqualified Persons.)

2.06 Personal Problems and Conflicts

(a) Psychologists refrain from initiating an activity when they know or should know that there is a substantial likelihood that their personal problems will prevent them from performing their work-related activities in a competent manner.

(b) When psychologists become aware of personal problems that may interfere with their performing work-related duties adequately, they take appropriate measures, such as obtaining professional consultation or assistance, and determine whether they should limit, suspend, or terminate their work-related duties. (See also Standard 10.10, Terminating Therapy.)

3. Human Relations

3.01 Unfair Discrimination

In their work-related activities, psychologists do not engage in unfair discrimination based on age, gender, gender identity, race, ethnicity, culture, national origin, religion, sexual orientation, disability, socioeconomic status, or any basis proscribed by law.

3.02 Sexual Harassment

Psychologists do not engage in sexual harassment. Sexual harassment is sexual solicitation, physical advances, or verbal or nonverbal conduct that is sexual in nature, that occurs in connection with the psychologist's activities or roles as a psychologist, and that either (1) is unwelcome, is offensive, or creates a hostile workplace or educational environment, and the psychologist knows or is told this or (2) is sufficiently severe or intense to be abusive to a reasonable person in the context. Sexual harassment can consist of a single intense or severe act or of multiple persistent or pervasive acts. (See also Standard 1.08, Unfair Discrimination Against Complainants and Respondents.)

3.03 Other Harassment

Psychologists do not knowingly engage in behavior that is harassing or demeaning to persons with whom they interact in their work based on factors such as those persons' age, gender, gender identity, race, ethnicity, culture, national origin, religion, sexual orientation, disability, language, or socioeconomic status.

3.04 Avoiding Harm

Psychologists take reasonable steps to avoid harming their clients/patients, students, supervisees, research participants, organizational clients, and others with whom they work, and to minimize harm where it is foreseeable and unavoidable.

3.05 Multiple Relationships

(a) A multiple relationship occurs when a psychologist is in a professional role with a person and (1) at the same time is in another role with the same person, (2) at the same time is in a relationship with a person closely associated with or related to the person with whom the psychologist has the professional relationship, or (3) promises to enter into another relationship in the future with the person or a person closely associated with or related to the person.

A psychologist refrains from entering into a multiple relationship if the multiple relationship could reasonably be expected to impair the psychologist's objectivity, competence, or effectiveness in performing his or her functions as a psychologist, or otherwise risks exploitation or harm to the person with whom the professional relationship exists.

Multiple relationships that would not reasonably be expected to cause impairment or risk exploitation or harm are not unethical.

(b) If a psychologist finds that, due to unforeseen factors, a potentially harmful multiple relationship has arisen, the psychologist takes reasonable steps to resolve it with due regard for the best interests of the affected person and maximal compliance with the Ethics Code.

(c) When psychologists are required by law, institutional policy, or extraordinary circumstances to serve in more than one role in judicial or administrative proceedings, at the outset they clarify role expectations and the extent of confidentiality and thereafter as changes occur. (See also Standards 3.04, Avoiding Harm, and 3.07, Third-Party Requests for Services.)

3.06 Conflict of Interest

Psychologists refrain from taking on a professional role when personal, scientific, professional, legal, financial, or other interests or relationships could reasonably be expected to (1) impair their objectivity, competence, or effectiveness in performing their functions as psychologists or (2) expose the person or organization with whom the professional relationship exists to harm or exploitation.

3.07 Third-Party Requests for Services

When psychologists agree to provide services to a person or entity at the request of a third party, psychologists attempt to clarify at the outset of the service the nature of the relationship with all individuals or organizations involved. This clarification includes the role of the psychologist (e.g., therapist, consultant, diagnostician, or expert witness), an identification of who is the client, the probable uses of the services provided or the information obtained, and the fact that there may be limits to confidentiality. (See also Standards 3.05, Multiple Relationships, and 4.02, Discussing the Limits of Confidentiality.)

3.08 Exploitative Relationships

Psychologists do not exploit persons over whom they have supervisory, evaluative, or other authority such as clients/patients, students, supervisees, research participants, and employees. (See also Standards 3.05, Multiple Relationships; 6.04, Fees and Financial Arrangements; 6.05, Barter With Clients/Patients; 7.07, Sexual Relationships With Students and Supervisees; 10.05, Sexual Intimacies With Current Therapy Clients/Patients; 10.06, Sexual Intimacies With Relatives or Significant Others of Current Therapy Clients/Patients; 10.07, Therapy With Former Sexual Partners; and 10.08, Sexual Intimacies With Former Therapy Clients/Patients.)

3.09 Cooperation With Other Professionals

When indicated and professionally appropriate, psychologists cooperate with other professionals in order to serve their clients/patients effectively and appropriately. (See also Standard 4.05, Disclosures.)

3.10 Informed Consent

(a) When psychologists conduct research or provide assessment, therapy, counseling, or consulting services in person or via electronic transmission or other forms of communication, they obtain the informed consent of the individual or individuals using language that is reasonably understandable to that person or persons except when conducting such activities without consent is mandated by law or governmental regulation or as otherwise provided in this Ethics Code. (See also Standards 8.02, Informed Consent to Research; 9.03, Informed Consent in Assessments; and 10.01, Informed Consent to Therapy.)

(b) For persons who are legally incapable of giving informed consent, psychologists nevertheless (1) provide an appropriate explanation, (2) seek the individual's assent, (3) consider such persons' preferences and best interests, and (4) obtain appropriate permission from a legally authorized person, if such substitute consent is permitted or required by law. When consent by a legally authorized person is not permitted or required by law, psychologists take reasonable steps to protect the individual's rights and welfare.

(c) When psychological services are court ordered or otherwise mandated, psychologists inform the individual of the nature of the anticipated services, including whether the services are court ordered or mandated and any limits of confidentiality, before proceeding.

(d) Psychologists appropriately document written or oral consent, permission, and assent. (See also Standards 8.02, Informed Consent to Research; 9.03, Informed Consent in Assessments; and 10.01, Informed Consent to Therapy.)

3.11 Psychological Services Delivered to or Through Organizations

(a) Psychologists delivering services to or through organizations provide information beforehand to clients and when appropriate those directly affected by the services about (1) the nature and objectives of the services, (2) the intended recipients, (3) which of the individuals are clients, (4) the relationship the psychologist will have with each person and the organization, (5) the probable uses of services provided and information obtained, (6) who will have access to the information, and (7) limits of confidentiality. As soon as feasible, they provide information about the results and conclusions of such services to appropriate persons.

(b) If psychologists will be precluded by law or by organizational roles from providing such information to particular individuals or groups, they so inform those individuals or groups at the outset of the service.

3.12 Interruption of Psychological Services

Unless otherwise covered by contract, psychologists make reasonable efforts to plan for facilitating services in the event that psychological services are interrupted by factors such as the psychologist's illness, death, unavailability, relocation, or retirement or by the client's/patient's relocation or financial limitations. (See also Standard 6.02c, Maintenance, Dissemination, and Disposal of Confidential Records of Professional and Scientific Work.)

4. Privacy and Confidentiality

4.01 Maintaining Confidentiality

Psychologists have a primary obligation and take reasonable precautions to protect confidential information obtained through or stored in any medium, recognizing that the extent and limits of confidentiality may be regulated by law or established by institutional rules or professional or scientific relationship. (See also Standard 2.05, Delegation of Work to Others.)

4.02 Discussing the Limits of Confidentiality

(a) Psychologists discuss with persons (including, to the extent feasible, persons who are legally incapable of giving informed consent and their legal representatives) and organizations with whom they establish a scientific or professional relationship (1) the relevant limits of confidentiality and (2) the foreseeable uses of the information generated through their psychological activities. (See also Standard 3.10, Informed Consent.)

(b) Unless it is not feasible or is contraindicated, the discussion of confidentiality occurs at the outset of the relationship and thereafter as new circumstances may warrant.

(c) Psychologists who offer services, products, or information via electronic transmission inform clients/patients of the risks to privacy and limits of confidentiality.

4.03 Recording

Before recording the voices or images of individuals to whom they provide services, psychologists obtain permission from all such persons or their legal representatives. (See also Standards 8.03, Informed Consent for Recording Voices and Images in Research; 8.05, Dispensing With Informed Consent for Research; and 8.07, Deception in Research.)

4.04 Minimizing Intrusions on Privacy

(a) Psychologists include in written and oral reports and consultations, only information germane to the purpose for which the communication is made.

(b) Psychologists discuss confidential information obtained in their work only for appropriate scientific or professional purposes and only with persons clearly concerned with such matters.

4.05 Disclosures

(a) Psychologists may disclose confidential information with the appropriate consent of the organizational client, the individual client/patient, or another legally authorized person on behalf of the client/patient unless prohibited by law.

(b) Psychologists disclose confidential information without the consent of the individual only as mandated by law, or where permitted by law for a valid purpose such as to (1) provide needed professional services; (2) obtain appropriate professional consultations; (3) protect the client/patient, psychologist, or others from harm; or (4) obtain payment for services from a client/patient, in which instance disclosure is limited to the minimum that is necessary to achieve the purpose. (See also Standard 6.04e, Fees and Financial Arrangements.)

4.06 Consultations

When consulting with colleagues, (1) psychologists do not disclose confidential information that reasonably could lead to the identification of a client/patient, research participant, or other person or organization with whom they have a confidential relationship unless they have obtained the prior consent of the person or organization or the disclosure cannot be avoided, and (2) they disclose information only to the extent necessary to achieve the purposes of the consultation. (See also Standard 4.01, Maintaining Confidentiality.)

4.07 Use of Confidential Information for Didactic or Other Purposes

Psychologists do not disclose in their writings, lectures, or other public media, confidential, personally identifiable information concerning their clients/patients, students, research participants, organizational clients, or other recipients of their services that they obtained during the course of their work, unless (1) they take reasonable steps to disguise the person or organization, (2) the person or

organization has consented in writing, or (3) there is legal authorization for doing so.

5. Advertising and Other Public Statements

5.01 Avoidance of False or Deceptive Statements

(a) Public statements include but are not limited to paid or unpaid advertising, product endorsements, grant applications, licensing applications, other credentialing applications, brochures, printed matter, directory listings, personal resumes or curricula vitae, or comments for use in media such as print or electronic transmission, statements in legal proceedings, lectures and public oral presentations, and published materials. Psychologists do not knowingly make public statements that are false, deceptive, or fraudulent concerning their research, practice, or other work activities or those of persons or organizations with which they are affiliated.

(b) Psychologists do not make false, deceptive, or fraudulent statements concerning (1) their training, experience, or competence; (2) their academic degrees; (3) their credentials; (4) their institutional or association affiliations; (5) their services; (6) the scientific or clinical basis for, or results or degree of success of, their services; (7) their fees; or (8) their publications or research findings.

(c) Psychologists claim degrees as credentials for their health services only if those degrees (1) were earned from a regionally accredited educational institution or (2) were the basis for psychology licensure by the state in which they practice.

5.02 Statements by Others

(a) Psychologists who engage others to create or place public statements that promote their professional practice, products, or activities retain professional responsibility for such statements.

(b) Psychologists do not compensate employees of press, radio, television, or other communication media in return for publicity in a news item. (See also Standard 1.01, Misuse of Psychologists' Work.)

(c) A paid advertisement relating to psychologists' activities must be identified or clearly recognizable as such.

5.03 Descriptions of Workshops and Non-Degree-Granting Educational Programs

To the degree to which they exercise control, psychologists responsible for announcements, catalogs, brochures, or advertisements describing workshops, seminars, or other non-degree-granting educational programs ensure that they accurately describe the audience for which the program is intended, the educational objectives, the presenters, and the fees involved.

5.04 Media Presentations

When psychologists provide public advice or comment via print, Internet, or other electronic transmission, they take precautions to ensure that statements (1) are based on their professional knowledge, training, or experience in accord with appropriate psychological literature and practice; (2) are otherwise consistent with this Ethics Code; and (3) do not indicate that a professional relationship has been established with the recipient. (See also Standard 2.04, Bases for Scientific and Professional Judgments.)

5.05 Testimonials

Psychologists do not solicit testimonials from current therapy clients/patients or other persons who because of their particular circumstances are vulnerable to undue influence.

5.06 In-Person Solicitation

Psychologists do not engage, directly or through agents, in uninvited in-person solicitation of business from actual or potential therapy clients/patients or other persons who because of their particular circumstances are vulnerable to undue influence. However, this prohibition does not preclude (1) attempting to implement appropriate collateral contacts for the purpose of benefiting an already engaged therapy client/patient or (2) providing disaster or community outreach services.

6. Record Keeping and Fees

6.01 Documentation of Professional and Scientific Work and Maintenance of Records

Psychologists create, and to the extent the records are under their control, maintain, disseminate, store, retain, and dispose of records and data relating to their professional and scientific work in order to (1) facilitate provision of services later by them or by other professionals, (2) allow for replication of research design and analyses, (3) meet institutional requirements, (4) ensure accuracy of billing and payments, and (5) ensure compliance with law. (See also Standard 4.01, Maintaining Confidentiality.)

6.02 Maintenance, Dissemination, and Disposal of Confidential Records of Professional and Scientific Work

(a) Psychologists maintain confidentiality in creating, storing, accessing, transferring, and disposing of records under their control, whether these are written, automated, or in any other medium. (See also Standards 4.01, Maintaining Confidentiality, and 6.01, Documentation of Professional and Scientific Work and Maintenance of Records.)

(b) If confidential information concerning recipients of psychological services is entered into databases or systems of records available to persons whose access has not been consented to by the recipient, psychologists use coding or other techniques to avoid the inclusion of personal identifiers.

(c) Psychologists make plans in advance to facilitate the appropriate transfer and to protect the confidentiality of records and data in the event of psychologists' withdrawal from positions or practice. (See also Standards 3.12, Interruption of Psychological Services, and 10.09, Interruption of Therapy.)

6.03 Withholding Records for Nonpayment

Psychologists may not withhold records under their control that are requested and needed for a client's/patient's emergency treatment solely because payment has not been received.

6.04 Fees and Financial Arrangements

(a) As early as is feasible in a professional or scientific relationship, psychologists and recipients of psychological services reach an agreement specifying compensation and billing arrangements.

(b) Psychologists' fee practices are consistent with law.

(c) Psychologists do not misrepresent their fees.

(d) If limitations to services can be anticipated because of limitations in financing, this is discussed with the recipient of services as early as is feasible. (See also Standards 10.09, Interruption of Therapy, and 10.10, Terminating Therapy.)

(e) If the recipient of services does not pay for services as agreed, and if psychologists intend to use collection agencies or legal measures to collect the fees, psychologists first inform the person that such measures will be taken and provide that person an opportunity to make prompt payment. (See also Standards 4.05, Disclosures; 6.03, Withholding Records for Nonpayment; and 10.01, Informed Consent to Therapy.)

6.05 Barter With Clients/Patients

Barter is the acceptance of goods, services, or other nonmonetary remuneration from clients/patients in return for psychological services. Psychologists may barter only if (1) it is not clinically contraindicated, and (2) the resulting arrangement is not exploitative. (See also Standards 3.05, Multiple Relationships, and 6.04, Fees and Financial Arrangements.)

6.06 Accuracy in Reports to Payors and Funding Sources

In their reports to payors for services or sources of research funding, psychologists take reasonable steps to ensure the accurate reporting of the nature of the service provided or research conducted, the fees, charges, or payments, and where applicable, the identity of the provider, the findings, and the diagnosis. (See also Standards 4.01, Maintaining Confidentiality; 4.04, Minimizing Intrusions on Privacy; and 4.05, Disclosures.)

6.07 Referrals and Fees

When psychologists pay, receive payment from, or divide fees with another professional, other than in an employer–employee relationship, the payment to each is based on the services provided (clinical, consultative, administrative, or other) and is not based on the referral itself. (See also Standard 3.09, Cooperation With Other Professionals.)

7. Education and Training

7.01 Design of Education and Training Programs

Psychologists responsible for education and training programs take reasonable steps to ensure that the programs are designed to provide the appropriate knowledge and proper experiences, and to meet the requirements for licensure, certification, or other goals for which claims are made by the program. (See also Standard 5.03, Descriptions of Workshops and Non-Degree-Granting Educational Programs.)

7.02 Descriptions of Education and Training Programs

Psychologists responsible for education and training programs take reasonable steps to ensure that there is a current and accurate description of the program content (including participation in required course- or program-related counseling, psychotherapy, experiential groups, consulting projects, or community service), training goals and objectives, stipends and benefits, and requirements that must be met for satisfactory completion of the program. This information must be made readily available to all interested parties.

7.03 Accuracy in Teaching

(a) Psychologists take reasonable steps to ensure that course syllabi are accurate regarding the subject matter to be covered, bases for evaluating progress, and the nature of course experiences. This standard does not preclude an instructor from modifying course content or requirements when the instructor considers it pedagogically necessary or desirable, so long as students are made aware of these modifications in a manner that enables them to fulfill course requirements. (See also Standard 5.01, Avoidance of False or Deceptive Statements.)

(b) When engaged in teaching or training, psychologists present psychological information accurately. (See also Standard 2.03, Maintaining Competence.)

7.04 Student Disclosure of Personal Information

Psychologists do not require students or supervisees to disclose personal information in course- or program-related activities, either orally or in writing, regarding sexual history, history of abuse and neglect, psychological treatment, and relationships with parents, peers, and spouses or significant others except if (1) the program or training facility has clearly identified this requirement in its admissions and program materials or (2) the information is

necessary to evaluate or obtain assistance for students whose personal problems could reasonably be judged to be preventing them from performing their training- or professionally related activities in a competent manner or posing a threat to the students or others.

7.05 Mandatory Individual or Group Therapy

(a) When individual or group therapy is a program or course requirement, psychologists responsible for that program allow students in undergraduate and graduate programs the option of selecting such therapy from practitioners unaffiliated with the program. (See also Standard 7.02, Descriptions of Education and Training Programs.)

(b) Faculty who are or are likely to be responsible for evaluating students' academic performance do not themselves provide that therapy. (See also Standard 3.05, Multiple Relationships.)

7.06 Assessing Student and Supervisee Performance

(a) In academic and supervisory relationships, psychologists establish a timely and specific process for providing feedback to students and supervisees. Information regarding the process is provided to the student at the beginning of supervision.

(b) Psychologists evaluate students and supervisees on the basis of their actual performance on relevant and established program requirements.

7.07 Sexual Relationships With Students and Supervisees

Psychologists do not engage in sexual relationships with students or supervisees who are in their department, agency, or training center or over whom psychologists have or are likely to have evaluative authority. (See also Standard 3.05, Multiple Relationships.)

8. Research and Publication

8.01 Institutional Approval

When institutional approval is required, psychologists provide accurate information about their research proposals and obtain approval prior to conducting the research. They conduct the research in accordance with the approved research protocol.

8.02 Informed Consent to Research

(a) When obtaining informed consent as required in Standard 3.10, Informed Consent, psychologists inform participants about (1) the purpose of the research, expected duration, and procedures; (2) their right to decline to participate and to withdraw from the research once participation has begun; (3) the foreseeable consequences of declining or withdrawing; (4) reasonably foreseeable factors that may be expected to influence their willingness to participate such as potential risks, discomfort, or adverse effects; (5) any prospective research benefits; (6) limits of confidentiality; (7) incentives for participation; and (8) whom to contact for questions about the research and research participants' rights. They provide opportunity for the prospective participants to ask questions and receive answers. (See also Standards 8.03, Informed Consent for Recording Voices and Images in Research; 8.05, Dispensing With Informed Consent for Research; and 8.07, Deception in Research.)

(b) Psychologists conducting intervention research involving the use of experimental treatments clarify to participants at the outset of the research (1) the experimental nature of the treatment; (2) the services that will or will not be available to the control group(s) if appropriate; (3) the means by which assignment to treatment and control groups will be made; (4) available treatment alternatives if an individual does not wish to participate in the research or wishes to withdraw once a study has begun; and (5) compensation for or monetary costs of participating including, if appropriate, whether reimbursement from the participant or a third-party payor will be sought. (See also Standard 8.02a, Informed Consent to Research.)

8.03 Informed Consent for Recording Voices and Images in Research

Psychologists obtain informed consent from research participants prior to recording their voices or images for data collection unless (1) the research consists solely of naturalistic observations in public places, and it is not anticipated that the recording will be used in a manner that could cause personal identification or harm, or (2) the research design includes deception, and consent for the use of the recording is obtained during debriefing. (See also Standard 8.07, Deception in Research.)

8.04 Client/Patient, Student, and Subordinate Research Participants

(a) When psychologists conduct research with clients/patients, students, or subordinates as participants, psychologists take steps to protect the prospective participants from adverse consequences of declining or withdrawing from participation.

(b) When research participation is a course requirement or an opportunity for extra credit, the prospective participant is given the choice of equitable alternative activities.

8.05 Dispensing With Informed Consent for Research

Psychologists may dispense with informed consent only (1) where research would not reasonably be assumed to create distress or harm and involves (a) the study of normal educational practices, curricula, or classroom management methods conducted in educational settings; (b) only anonymous questionnaires, naturalistic observations, or archival research for which disclosure of responses would not place participants at risk of criminal or civil liability or damage their financial standing, employability,

or reputation, and confidentiality is protected; or (c) the study of factors related to job or organization effectiveness conducted in organizational settings for which there is no risk to participants' employability, and confidentiality is protected or (2) where otherwise permitted by law or federal or institutional regulations.

8.06 Offering Inducements for Research Participation

(a) Psychologists make reasonable efforts to avoid offering excessive or inappropriate financial or other inducements for research participation when such inducements are likely to coerce participation.

(b) When offering professional services as an inducement for research participation, psychologists clarify the nature of the services, as well as the risks, obligations, and limitations. (See also Standard 6.05, Barter With Clients/Patients.)

8.07 Deception in Research

(a) Psychologists do not conduct a study involving deception unless they have determined that the use of deceptive techniques is justified by the study's significant prospective scientific, educational, or applied value and that effective nondeceptive alternative procedures are not feasible.

(b) Psychologists do not deceive prospective participants about research that is reasonably expected to cause physical pain or severe emotional distress.

(c) Psychologists explain any deception that is an integral feature of the design and conduct of an experiment to participants as early as is feasible, preferably at the conclusion of their participation, but no later than at the conclusion of the data collection, and permit participants to withdraw their data. (See also Standard 8.08, Debriefing.)

8.08 Debriefing

(a) Psychologists provide a prompt opportunity for participants to obtain appropriate information about the nature, results, and conclusions of the research, and they take reasonable steps to correct any misconceptions that participants may have of which the psychologists are aware.

(b) If scientific or humane values justify delaying or withholding this information, psychologists take reasonable measures to reduce the risk of harm.

(c) When psychologists become aware that research procedures have harmed a participant, they take reasonable steps to minimize the harm.

8.09 Humane Care and Use of Animals in Research

(a) Psychologists acquire, care for, use, and dispose of animals in compliance with current federal, state, and local laws and regulations, and with professional standards.

(b) Psychologists trained in research methods and experienced in the care of laboratory animals supervise all procedures involving animals and are responsible for ensuring appropriate consideration of their comfort, health, and humane treatment.

(c) Psychologists ensure that all individuals under their supervision who are using animals have received instruction in research methods and in the care, maintenance, and handling of the species being used, to the extent appropriate to their role. (See also Standard 2.05, Delegation of Work to Others.)

(d) Psychologists make reasonable efforts to minimize the discomfort, infection, illness, and pain of animal subjects.

(e) Psychologists use a procedure subjecting animals to pain, stress, or privation only when an alternative procedure is unavailable and the goal is justified by its prospective scientific, educational, or applied value.

(f) Psychologists perform surgical procedures under appropriate anesthesia and follow techniques to avoid infection and minimize pain during and after surgery.

(g) When it is appropriate that an animal's life be terminated, psychologists proceed rapidly, with an effort to minimize pain and in accordance with accepted procedures.

8.10 Reporting Research Results

(a) Psychologists do not fabricate data. (See also Standard 5.01a, Avoidance of False or Deceptive Statements.)

(b) If psychologists discover significant errors in their published data, they take reasonable steps to correct such errors in a correction, retraction, erratum, or other appropriate publication means.

8.11 Plagiarism

Psychologists do not present portions of another's work or data as their own, even if the other work or data source is cited occasionally.

8.12 Publication Credit

(a) Psychologists take responsibility and credit, including authorship credit, only for work they have actually performed or to which they have substantially contributed. (See also Standard 8.12b, Publication Credit.)

(b) Principal authorship and other publication credits accurately reflect the relative scientific or professional contributions of the individuals involved, regardless of their relative status. Mere possession of an institutional position, such as department chair, does not justify authorship credit. Minor contributions to the research or to the writing for publications are acknowledged appropriately, such as in footnotes or in an introductory statement.

(c) Except under exceptional circumstances, a student is listed as principal author on any multiple-authored article that is substantially based on the student's doctoral dissertation. Faculty advisors discuss publication credit with students as early as feasible and throughout the research and publication process as appropriate. (See also Standard 8.12b, Publication Credit.)

8.13 Duplicate Publication of Data

Psychologists do not publish, as original data, data that have been previously published. This does not preclude republishing data when they are accompanied by proper acknowledgment.

8.14 Sharing Research Data for Verification

(a) After research results are published, psychologists do not withhold the data on which their conclusions are based from other competent professionals who seek to verify the substantive claims through reanalysis and who intend to use such data only for that purpose, provided that the confidentiality of the participants can be protected and unless legal rights concerning proprietary data preclude their release. This does not preclude psychologists from requiring that such individuals or groups be responsible for costs associated with the provision of such information.

(b) Psychologists who request data from other psychologists to verify the substantive claims through reanalysis may use shared data only for the declared purpose. Requesting psychologists obtain prior written agreement for all other uses of the data.

8.15 Reviewers

Psychologists who review material submitted for presentation, publication, grant, or research proposal review respect the confidentiality of and the proprietary rights in such information of those who submitted it.

9. Assessment

9.01 Bases for Assessments

(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. (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.)

9.07 Assessment by Unqualified Persons

Psychologists do not promote the use of psychological assessment techniques by unqualified persons, except when such use is conducted for training purposes with appropriate supervision. (See also Standard 2.05, Delegation of Work to Others.)

9.08 Obsolete Tests and Outdated Test Results

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

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

9.09 Test Scoring and Interpretation Services

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

(b) Psychologists select scoring and interpretation services (including automated services) on the basis of evidence of the validity of the program and procedures as well as on other appropriate considerations. (See also Standard 2.01b and c, Boundaries of Competence.)

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

9.10 Explaining Assessment Results

Regardless of whether the scoring and interpretation are done by psychologists, by employees or assistants, or by automated or other outside services, psychologists take reasonable steps to ensure that explanations of results are given to the individual or designated representative unless the nature of the relationship precludes provision of an explanation of results (such as in some organizational consulting, preemployment or security screenings, and forensic evaluations), and this fact has been clearly explained to the person being assessed in advance.

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.

10. Therapy

10.01 Informed Consent to Therapy

(a) When obtaining informed consent to therapy as required in Standard 3.10, Informed Consent, psychologists inform clients/patients as early as is feasible in the therapeutic relationship about the nature and anticipated course of therapy, fees, involvement of third parties, and limits of confidentiality and provide sufficient opportunity for the client/patient to ask questions and receive answers. (See also Standards 4.02, Discussing the Limits of Confidentiality, and 6.04, Fees and Financial Arrangements.)

(b) When obtaining informed consent for treatment for which generally recognized techniques and procedures have not been established, psychologists inform their clients/patients of the developing nature of the treatment, the potential risks involved, alternative treatments that may be available, and the voluntary nature of their participation. (See also Standards 2.01e, Boundaries of Competence, and 3.10, Informed Consent.)

(c) When the therapist is a trainee and the legal responsibility for the treatment provided resides with the supervisor, the client/patient, as part of the informed consent procedure, is informed that the therapist is in training and is being supervised and is given the name of the supervisor.

10.02 Therapy Involving Couples or Families

(a) When psychologists agree to provide services to several persons who have a relationship (such as spouses, significant others, or parents and children), they take reasonable steps to clarify at the outset (1) which of the

individuals are clients/patients and (2) the relationship the psychologist will have with each person. This clarification includes the psychologist's role and the probable uses of the services provided or the information obtained. (See also Standard 4.02, Discussing the Limits of Confidentiality.)

(b) If it becomes apparent that psychologists may be called on to perform potentially conflicting roles (such as family therapist and then witness for one party in divorce proceedings), psychologists take reasonable steps to clarify and modify, or withdraw from, roles appropriately. (See also Standard 3.05c, Multiple Relationships.)

10.03 Group Therapy

When psychologists provide services to several persons in a group setting, they describe at the outset the roles and responsibilities of all parties and the limits of confidentiality.

10.04 Providing Therapy to Those Served by Others

In deciding whether to offer or provide services to those already receiving mental health services elsewhere, psychologists carefully consider the treatment issues and the potential client's/patient's welfare. Psychologists discuss these issues with the client/patient or another legally authorized person on behalf of the client/patient in order to minimize the risk of confusion and conflict, consult with the other service providers when appropriate, and proceed with caution and sensitivity to the therapeutic issues.

10.05 Sexual Intimacies With Current Therapy Clients/Patients

Psychologists do not engage in sexual intimacies with current therapy clients/patients.

10.06 Sexual Intimacies With Relatives or Significant Others of Current Therapy Clients/Patients

Psychologists do not engage in sexual intimacies with individuals they know to be close relatives, guardians, or significant others of current clients/patients. Psychologists do not terminate therapy to circumvent this standard.

10.07 Therapy With Former Sexual Partners

Psychologists do not accept as therapy clients/patients persons with whom they have engaged in sexual intimacies.

10.08 Sexual Intimacies With Former Therapy Clients/Patients

(a) Psychologists do not engage in sexual intimacies with former clients/patients for at least two years after cessation or termination of therapy.

(b) Psychologists do not engage in sexual intimacies with former clients/patients even after a two-year interval except in the most unusual circumstances. Psychologists who engage in such activity after the two years following cessation or termination of therapy and of having no sexual contact with the former client/patient bear the burden of demonstrating that there has been no exploitation, in light of all relevant factors, including (1) the amount of time that has passed since therapy terminated; (2) the nature, duration, and intensity of the therapy; (3) the circumstances of termination; (4) the client's/patient's personal history; (5) the client's/patient's current mental status; (6) the likelihood of adverse impact on the client/patient; and (7) any statements or actions made by the therapist during the course of therapy suggesting or inviting the possibility of a posttermination sexual or romantic relationship with the client/patient. (See also Standard 3.05, Multiple Relationships.)

10.09 Interruption of Therapy

When entering into employment or contractual relationships, psychologists make reasonable efforts to provide for orderly and appropriate resolution of responsibility for client/patient care in the event that the employment or contractual relationship ends, with paramount consideration given to the welfare of the client/patient. (See also Standard 3.12, Interruption of Psychological Services.)

10.10 Terminating Therapy

(a) Psychologists terminate therapy when it becomes reasonably clear that the client/patient no longer needs the service, is not likely to benefit, or is being harmed by continued service.

(b) Psychologists may terminate therapy when threatened or otherwise endangered by the client/patient or another person with whom the client/patient has a relationship.

(c) Except where precluded by the actions of clients/patients or third-party payors, prior to termination psychologists provide pretermination counseling and suggest alternative service providers as appropriate.

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AMERICAN ACADEMY OF CLINICAL NEUROPSYCHOLOGY (AACN) PRACTICE GUIDELINES FOR NEUROPSYCHOLOGICAL ASSESSMENT AND CONSULTATION

Board of Directors
American Academy of Clinical Neuropsychology

This document is the first set of practice guidelines to be formally reviewed and endorsed by the AACN Board of Directors and published in the official journal of AACN. They have been formulated with the assumption that guidelines and standards for neuropsychological assessment and consultation are essential to professional development. As such, they are intended to facilitate the continued systematic growth of the profession of clinical neuropsychology, and to help assure a high level of professional practice. These guidelines are offered to serve members of AACN, as well as the field of clinical neuropsychology as a whole.

INTRODUCTION

Clinical neuropsychology has experienced tremendous growth in recent years, whether measured in terms of the number of practitioners, scientific studies, meetings, journals, training programs, or assessment tools. Organizations devoted to neuropsychology have formed and have become well established, yet are still maturing. Within the American Psychological Association (APA), the Division of Clinical Neuropsychology (Division 40) was formed in 1980 and clinical neuropsychology was recognized as a specialty in 1996. Definitions of "neuropsychology" and core training requirements have been developed (Hannay et al., 1998) and a number of general approaches to performing valid and appropriate neuropsychological assessment are recognized as having common core features (cf. Lezak, Howieson, & Loring, 2004).

Identification of professional issues and explication of standards is essential to providing quality neuropsychological services to the public and to developing neuropsychology as a science and clinical specialty. Development of guidelines for neuropsychological assessment is the next logical step in the growth, development, and maturation of the field of clinical neuropsychology. In the era of evidence-based practice in psychology (EBPP), such guidelines should be "... based on careful

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Exhibit 2

systematic weighing of research data and clinical expertise" (APA, 2006). The present document is founded on the assumptions that standards for neuropsychological assessment and consultation are essential to professional development and protection of the public, and that such standards can be articulated as general aspirational guidelines despite theoretical and practical diversity within the field (APA, 2005). Consistent with its mission, the American Academy of Clinical Neuropsychology (AACN) is in a position to take on this responsibility. The present Guidelines are offered to serve members of AACN, as well as the profession of neuropsychology as a whole.

The American Board of Clinical Neuropsychology (ABCN) is a member specialty examining board under a unitary governing body, the American Board of Professional Psychology (ABPP). Founded in 1947, ABPP is the oldest peer-reviewed board for psychology and grants board certification in several specialty areas of psychology, including clinical neuropsychology. Within ABPP, ABCN is responsible for the examination process for clinical neuropsychology board certification candidates, with AACN being the membership organization for individuals who have been awarded board certification by ABCN. Inherent in this examination process are de facto and consensually accepted standards for training, knowledge, and clinical practice in neuropsychology (updated policy and procedures are available online at http://www.theabcn.org).

This document is intended to serve as a guide for the practice of neuropsychological assessment and consultation and is designed to promote quality and consistency in neuropsychological evaluations. Psychologists may use these Guidelines to evaluate their own readiness to perform neuropsychological evaluations and as a framework for performing this type of work. Psychologists who desire to upgrade skills, knowledge, and experience may also use these Guidelines as a reference. Other organizations, disciplines, professionals, entities, and individuals are encouraged to consider these Guidelines as principles for the provision of neuropsychological services. Because they apply to the current practice of clinical neuropsychology, these Guidelines will require periodic review and are intended to remain in effect until a point in time at which the AACN Board of Directors (BOD) determines that a revision is necessary.

The present Guidelines are intended to be compatible with the current APA (2002b) Ethical Principles of Psychologists and Code of Conduct (EPPCC) and follow the recommendations of other APA documents, including the Criteria for Practice Guideline Development and Evaluation (2002a) and Determination and Documentation of the Need for Practice Guidelines (2005). The EPPCC are intended to describe standards for competent and adequate professional conduct. In contrast to applicable codes of ethics, the present Guidelines are intended to describe the *most desirable and highest level professional conduct* for neuropsychologists when engaged in the practice of clinical neuropsychology. In the event of a conflict, the EPPCC or other AACN policy statements can inform the practical use of these Guidelines. Similarly, applicable federal and state laws supersede these guidelines.

The term "guidelines" refers to statements that suggest or recommend specific professional behavior, endeavors, or conduct for psychologists. The primary purpose of practice guidelines is to promote high-quality psychological services by providing the practitioner with well-supported practical guidance and education in a particular

practice area. Practice guidelines also "inform psychologists, the public, and other interested parties regarding desirable professional conduct" (APA, 2005). Guidelines differ from "standards" in that standards are mandatory and may be accompanied by an enforcement mechanism, whereas guidelines are aspirational in intent. Guidelines are intended to facilitate the continued systematic development of the profession and to help assure a high level of professional practice (APA, 2005). They are not intended to be mandatory or exhaustive, and may not be applicable to every professional and clinical situation. They are not to be promulgated as a means of establishing the identity of a group or specialty area of psychology. Likewise, they are not created with the purpose of excluding any psychologist from practicing in a particular area, nor are they intended to take precedence over a psychologist's judgment.

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1. DEFINITIONS

Clinical neuropsychology has been defined as "an applied science concerned with the behavioral expression of brain function and dysfunction" (Lezak et al., 2004). Vanderploeg (2000) noted that neuropsychology studies "the impact of brain injury or disease on the cognitive, sensorimotor, emotional, and general adaptive capacities of the individual." In a similar vein, Prigatano (2002) offered that neuropsychology is "the scientific study of how the brain produces mind and how disorders of the brain cause a variety of mental and personality disturbances." Integrating these statements, *clinical neuropsychology is an applied science that examines the impact of both normal and abnormal brain functioning on a broad range of cognitive, emotional, and behavioral functions.* The distinctive features of neuropsychological

evaluations and consultations in assessing brain function and dysfunction include the use of objective neuropsychological tests, systematic behavioral observations, and interpretation of the findings based on knowledge of the neuropsychological manifestations of brain-related conditions. Where appropriate, these evaluations consider neuroimaging and other neurodiagnostic studies and inform neuropsychologically oriented rehabilitation interventions.

2. PURPOSE AND SCOPE

Clinical neuropsychologists conduct their professional activities in accord with the EPPCC (APA, 2002b), and any AACN position statements that apply to particular issues or areas of practice that are relevant to their professional activities. They are also aware of and may seek guidance from the standards of practice and principles of other relevant professional organizations (e.g., American Academy of Forensic Psychology, American Academy of Pediatrics).

While the professional standards for the ethical practice of psychology are addressed in the EPPCC, these principles are not fully inclusive with respect to the current aspirations of desirable professional conduct for clinical neuropsychologists. By design, none of the present Guidelines contradicts any of the principles of the EPPCC; rather, they exemplify those principles in the context of the practice of clinical neuropsychology, as herein defined. The Guidelines have been designed to be national in scope and are intended to conform to applicable state and federal law. In situations in which the clinical neuropsychologist believes that the requirements of law are in conflict with these Guidelines, attempts to resolve the conflict should be made in accordance with the procedures set forth in the EPPCC.

The present Guidelines specify the nature of desirable professional practice by clinical neuropsychologists within any sub-discipline of this specialty (e.g., child, forensic). The term "psychologist" designates any individual whose professional activities are defined by APA and by regulation of title by state registration or licensure, as the practice of psychology. "Clinical neuropsychologist" refers to psychologists who engage in the practice of clinical neuropsychology as defined above.

3. EDUCATION AND TRAINING

Early in the development of the field of clinical neuropsychology, neuropsychologists were in limited demand, and there were few formal training programs. By 1979, the International Neuropsychological Society (INS) had published broad guidelines indicating alternative pathways for obtaining competence in this discipline (Rourke & Murji, 2000). At one point, a formal re-specialization program of continuing education was suggested as one means of helping psychologists gain the necessary skills to practice neuropsychology. Continuing education, however, is only intended to expand or elaborate on established skills and is not regarded as an adequate modality for establishing competence in neuropsychology (Bornstein, 1988a). Formal training programs are now widely available (Cripe, 2000; Donders, 2002), and the nature of specialized neuropsychological training has been defined (Bornstein, 1988b; Hannay et al., 1998) and is the basis for the Guidelines proposed herein.

As evident from the definition of *neuropsychology*, a neuropsychologist possesses skills beyond simply administering and scoring a particular set of tests (Matarazzo, 1990; Meyer et al., 2001). A neuropsychologist is "a professional psychologist trained in the science of brain-behavior relationships" (Hannay et al., 1998). Kane, Goldstein, and Parsons (1989) pointed out that "the unique competence of the neuropsychologist is that of conceptualizing assessment results within a brain-behavior framework." The prefix "neuro" in neuropsychologist means that the psychologist is a specialist who has had explicit training in neuroscience and neurological bases of behavior. To fulfill this role, neuropsychologists must have specialized knowledge and training, a fact that is incorporated into the existing definitions of a neuropsychologist (Barth et al., 2003; Bieliauskas, 1999). Both APA Division 40 (Clinical Neuropsychology) and the National Academy of Neuropsychology (NAN) definitions require 2 years of specialized training. The APA Division 40 definition requires formal university training in neuropsychology and the neurosciences, and recommends a peer review process as an indicator of competency. The NAN definition (National Academy of Neuropsychology, 2001) requires, for individuals receiving training after 2001, "the equivalent of two (fulltime) years of experience and specialized training, at least one of which is at the post-doctoral level, in the study and practice of clinical neuropsychology and related neurosciences. These two years include supervision by a clinical neuropsychologist."

4. WORK SETTINGS

Clinical neuropsychologists comprise a relatively small group compared with other specialists in the healthcare marketplace. Indeed, according to recent SAMHSA Mental Health Information Center statistics (http://www.mentalhealth.samhsa.gov/publications/allpubs/SMA01-3537/chapter20.asp), there are over 77,000 licensed doctoral-level psychologists in the United States. At present, there are roughly 4,000 individuals purporting to practice clinical neuropsychology in the United States as reflected by membership in APA Division 40. This is a small number relative to other organizations including the 7,000 members of Division 12 (Clinical Psychology) of APA, 17,000 members of the American Academy of Neurology (AAN), and over 150,000 members of APA. Nonetheless, from the beginning of its development in the United States in the 1950s and 1960s, clinical neuropsychology has flourished as a discipline because of its unique focus and clinical utility.

The settings in which clinical neuropsychologists practice are richly varied. To illustrate, a neuropsychological text edited by Lamberty, Courtney, and Heilbronner (2003) includes chapters from practitioners who work in independent practice, collaborate with physicians in a medical practice, forensic settings (e.g., civil and correctional), or have adult and child practices in rural or urban communities, university-affiliated medical centers, university-based attention deficit-hyperactivity disorder (ADHD) and learning disorder clinics, Veterans Affairs medical centers, general hospital settings, medical rehabilitation units, or schools. Other practice environments include military bases, pharmaceutical companies, surgical centers, and practices in which patients for social security and disability benefits are evaluated (Sweet, Peck, Abramowitz, & Etzweiler, 2000). Neuropsychologists have established themselves

and the utility of neuropsychology as a specialty practice, in a number of medical, legal, social service, and other professional settings (Prigatano & Pliskin, 2003).

5. ETHICAL AND CLINICAL ISSUES

The following section identifies four ethical and clinical issues that are particularly relevant to the practice of clinical neuropsychology and to the development of these guidelines. However, many other practice-related issues, such as effects of third-party observers and the use of psychometricians, are not covered. The reader is referred to relevant AACN position papers or documents from other membership organizations for discussion of these and other issues (see www.theaacn.org and www.nanonline.org).

A. Informed Consent

Neuropsychologists are aware of, and sensitive to, ethical and legal issues of informed consent, confidentiality, autonomy, and related human rights that arise in the context of evaluating children and adults. This is also true for "vulnerable adults," such as patients with mental retardation, developmental disabilities, or dementia, including those who already have designated legal guardians. The limits of confidentiality are explained to all examinees (or to parents or guardians, when appropriate) at the outset of a neuropsychological evaluation. The neuropsychologist establishes a clear understanding of examiner–examinee relationship issues, and ensures that this understanding is shared with the examinee and, if necessary, with relevant third parties, such as a referring physician, social worker, special education administrator, or attorney, and in some cases with insurers (Johnson-Greene & NAN Policy & Planning Committee, 2005). Consideration of such relationships is critical in identifying the person legally entitled to consent to the evaluation and to a release of information about the examinee. The following questions might be asked in these situations: For a patient with dementia or mental retardation, is there a court-appointed guardian? For a child, if the parents are divorced, who has legal custody to give consent for the evaluation and who has a right to receive full disclosure of the findings?

B. Patient Issues in Third-Party Assessments

Neuropsychologists may evaluate someone at the request of a third party (e.g., insurance carrier, attorney, judge, or special education hearing officer), as part of a legal proceeding, a disability evaluation, or special education due process hearings. In such cases, the neuropsychologist clarifies the nature of the relationship with the referring third party by establishing that the neuropsychologist will provide a candid and objective opinion based on the evaluation results (Bush & NAN Policy & Planning Committee, 2005a). In a legal dispute, such an opinion is offered regardless of whether the referral comes from someone advocating for the examinee or for a different party.

At the outset of the evaluation, the neuropsychologist establishes the aims of the assessment, describes in clear language the sorts of information requested of the patient and types of testing procedures to be performed; the general information-gathering procedures to be followed (e.g., whether the evaluation will involve

formal standardized testing, interview, observation in the office, observations in natural settings such as school, home, or daycare, or collection of information from collateral sources where deemed appropriate, such as care providers, teachers, health aides, parents, spouse), the means of providing feedback (e.g., oral and/or written), and to whom and when a neuropsychological report will be sent. The neuropsychologist and referring parties discuss in advance who will pay for the evaluation, what costs are anticipated, and what payment arrangements can be made. In the case of a third-party referral, the neuropsychologist explains to the examinee (or guardians) that the party requesting the evaluation, rather than the patient being evaluated, is considered the "client," at least in the sense that it is this party that will receive the evaluation findings and report. The examinee is helped to understand that his/her responses, and the neuropsychologist's opinions about him/her, will be shared with the referring party, and that the referring party will decide how to use the information (e.g., whether it will be given to opposing attorneys, read aloud in court, etc.). The information from the examination may also be used in future or separate legal or administrative proceedings. The examinee is entitled to decline to participate, but the neuropsychologist should advise him/her to consult with his/her attorney or agent to clarify the possible consequences of consenting, or refusing, to be evaluated. Written reports, in these circumstances, clearly avoid the implication of patienthood or ongoing treatment and identify the examinee as distinct from the name and social/legal identity of the referral source.

In forensic cases, neuropsychologists are careful to distinguish between the role of an "expert" and the role of a "clinician." The expert's role is to inform the attorney(s), as well as the "trier of fact" (e.g., a judge, jury, or hearing officer) of the neuropsychological findings and to present unbiased opinions and answers to specific questions pertinent to the case, based on relevant scientific and clinical evidence (i.e., to be an "advocate of the facts") of the case. In contrast, the treating clinician's role is to be an advocate for his/her patient. Taking on the role of a patient advocate in a forensic situation might be perceived as biasing the clinician's opinions in favor of the patient. The neuropsychologist acting as a forensic expert typically does not conduct a feedback and treatment-planning conference with examinees (or their representative). A neuropsychologist who has treated a patient generally will decline to serve as an expert with regard to that case. If called upon to testify, the treating clinician responds in a manner consistent with original role limitations and qualifies his/her role when answering questions about the patient.

Neuropsychologists may provide a "second opinion" based on a review of another neuropsychologist's report, at the request of a judge or an attorney, an insurance company, or another psychologist. In this situation, the neuropsychologist is careful to base such an opinion only on available data and to express caution when lacking the information to provide a more substantive basis for their opinion(s). For example, the neuropsychologist may not be certain about the quality of examiner–examinee rapport or the accuracy of test administration procedures for the evaluation under review, or may find it difficult to form opinions based on the tests administered. Therefore, the "second opinion" might be limited to statements regarding whether or not the other examiner chose appropriate tests, reported the scores accurately, and made inferences, conclusions, and recommendations that are supported by the data provided in the report; whether alternative conclusions

or recommendations, not mentioned in the report, should be considered; and whether any further neuropsychological tests or other information gathering (e.g., medical examinations) should be carried out to answer questions relevant to the case.

C. Test Security

Appropriate test security is the assumed responsibility of any practicing neuropsychologist and reflects several different levels for maintaining the safekeeping and utility of any test. Likewise, how the test results are disseminated to patients also falls under the guidelines for test security (NAN, 2000c) and for copyright protection. It is inappropriate and unethical to make copies of actual tests for patients or other parties as a means of providing feedback on assessment findings (EPPCC; APA, 2002b). Because of the time and expense in properly standardizing psychological and neuropsychological instruments, the clinician is entrusted to safeguard and protect the proprietary aspects of such tests to the fullest degree possible. Test publishers routinely include a section on their recommendations for test security and these should be strictly followed in the best manner possible by each clinician. Unique pressures may arise in certain forensic settings, but again the responsibility of the clinician is to maintain the integrity and security of test materials as far as the law and practice guidelines of psychology apply in the relevant jurisdiction(s) of service or practice. In particular, neuropsychologists are aware of the EPPCC and federal, state, provincial, or local policies that govern the content, security, and release of psychological and neuropsychological reports, test protocols, and raw test data or responses, including mandates from state boards of psychology, the Health Insurance Portability and Accountability Act (HIPAA) and the Centers for Medicare and Medicaid Services (CMS).

D. Underserved Populations/Cultural Issues

The present guidelines augment the "cultural competence" provisions of the EPPCC by defining the issues to be considered and recommending some specific competencies for the neuropsychological evaluation of individuals belonging to minority and underserved populations. Consistent with these provisions, neuropsychologists are aware that cultural, linguistic, disability, and other demographic and socioeconomic factors influence individuals' participation in the process of neuropsychological assessment, and may alter the meaning of the information obtained from testing (see, for example, Artiola i Fortuny et al., 2005; Brauer, 1993; Cohen, Mounty, & Martin, 2005; Manly et al., 1998; Mason, 2005; Ortiz, 2001; Perez-Arce & Puente, 1998; Vernon, 2005; Wong & Fujii, 2004). Neuropsychologists are also aware of the risks inherent in administering and interpreting tests with individuals from groups for whom there are insufficient or limited test adaptations, normative data, or validity studies (see Artiola i Fortuny, Heaton, & Hermosillo, 1998; Manly, 2005). These groups include individuals with unusually low levels of education (in the United States or elsewhere), those whose primary language is other than English and who belong to distinctive cultural or sociodemographic groups, and those with physical or mental disabilities that limit the ability to participate meaningfully in the examination as originally intended.

Neuropsychologists who agree to evaluate members of special populations are specifically educated about issues and have experience in administering and interpreting procedures relevant to the patient in question (Echemendia & Westerveld, 2006; Hauser, Wills, & Isquith, 2006; Ortiz, 2001; Vernon, 2005; Wong & Fujii, 2004). Alternatively, neuropsychologists show (1) that they have sought a local colleague better qualified to accomplish the task, (2) that the potential harm to the patient of deferring or declining the referral has been assessed and is considered to outweigh the potential dangers of proceeding with an evaluation, notwithstanding acknowledged limitations in the neuropsychologist's population-specific competencies, and (3) that they have attempted to ameliorate or compensate for all such limitations by consulting appropriate colleagues and research literature.

Neuropsychologists describe in their report how well they have communicated with the patient, their own level of fluency in the patient's language, and their uncertainty about the fidelity of interpreter-mediated translation and quality of interpersonal communication, including not only literal content, but also culturally mediated meanings, affective tone, and nonverbal "body language." They further note the inevitable effects of using an interpreter on the validity of the test results and interview data (Dean & Pollard, 2005; Glickman & Gulati, 2003; Harvey, Artiola i Fortuny, Vester-Blockland, & De Smedt, 2003; Hindley, Hill, & Bond, 1993; Marcos, 1979). Interpreters are employed in a manner that respects the patient's autonomy and competence (Artiola i Fortuny et al., 2005; Cohen et al., 2005; Dean & Pollard, 2005). Neuropsychologists avoid using family members, friends, or other untrained individuals as interpreters, whenever possible, to preserve patient confidentiality and autonomy as well as to optimize the fidelity of translation.

Neuropsychologists recognize the threats to validity that can occur with the introduction of cultural bias in both translated and adapted instruments. These threats may occur at three levels: item, method, and construct (Van de Vijver & Hambleton, 1996). When working with populations for whom tests have not been standardized and normed, neuropsychologists place particular emphasis on using direct observation and relevant supplementary information about a patient's adaptive functioning within his or her "real-world" community. They may employ assessment strategies that do not require a standardized normative approach, including, but not limited to, direct observation, charting of behavioral changes over time, criterion-referenced testing, direct comparisons with a group of demographically similar peers, or comparison with demographically similar groups in published research studies (Manly, 2005; Simeonsson & Rosenthal, 2001).

6. METHODS AND PROCEDURES

A. The Decision to Evaluate

Before initiating neuropsychological testing, the neuropsychologist clarifies the referral source and the referral questions, determines that he or she is competent to evaluate the patient and answer the referral question(s), concludes that it is ethically acceptable to do so, and decides that a neuropsychological evaluation is pertinent to the issues raised. Otherwise, the neuropsychologist contacts the referral source and discusses whether some other type of evaluation may be better to address the referral

questions, such as a psychodiagnostic evaluation, functional behavior assessment, clinical interview, psychiatric evaluation or other medical assessment. Alternatively, the neuropsychologist suggests that the evaluation may be more appropriately conducted by a different neuropsychologist owing to conflict of interest or the fit of the patient's needs to the neuropsychologist's clinical competencies or cultural or language expertise.

B. Review of Records

Having access to information from sources other than the patient and their family members usually allows for a more comprehensive neuropsychological evaluation. Memories may be inaccurate or historical reports distorted, previous information may have been misunderstood or pieced together from the recollections of others, or patients simply may not know important facts. When conducting a comprehensive evaluation, the neuropsychologist attempts to obtain relevant background information from written records whenever possible. By gathering historical information, the neuropsychologist may improve diagnostic predictive accuracy, better describe cognitive and behavioral functioning, and assist treatment planning. In the case of an injury, medical condition, or neurological event, medical records from emergency personnel, hospitals, and outpatient facilities help to establish facts related to the time frame of the presenting problems, presence or absence of critical medical factors, type and degree of injury or impairment, and circumstances under which problems may have become manifest. Historical information is also relevant in assessing patients with histories of psychiatric illness, developmental disabilities, or learning or attentional disorders, and for whom the time sequence of the problems and interventions used to manage these problems may be important in clinical decision making.

In the case of suspected cognitive changes, an attempt to obtain a patient's earlier medical records is advisable in most cases. Although not a common practice in adult neuropsychological assessment, information gathered from available childhood health records helps to determine if pre-existing difficulties may account, in part, for a patient's current level of functioning. In the evaluation of children, adolescents, and young adults, information contained in the school records often enhances understanding of the child's past and current cognitive and behavioral functioning. Records of school or work histories for adults may be similarly useful in providing information on premorbid level of functioning, but are often unavailable.

The aims of the evaluation typically determine the extent to which the neuropsychologist gathers information from collateral sources. Extensive review of records may be a worthwhile goal in conducting some assessments, but may not be warranted in all cases and will depend on the nature of the referral questions. In many routine clinical scenarios, such as evaluations undertaken to facilitate ongoing medical care, the patient's best interests may be better served when an interpretive report is provided expeditiously, without the delays that often accompany a request to complete a review of external records. Writing a subsequent addendum summarizing a review of obtained records may be considered as a means to supplement information not available at the time of the original report.

Finally, the nature of the questions asked of a neuropsychologist in a forensic evaluation may require a more extensive review of records than is typically required for a clinical evaluation. In a forensic case, the neuropsychologist reviews as much relevant information about the past and present functioning of the patient as can be made available to him/her. Neuropsychologists do not, when conducting an examination for a forensic purpose, assume primary responsibility for the discovery and production of historical records.

C. Interview of Patient and Significant Others

A neuropsychological evaluation consists of more than a review of records and the administration of psychological and neuropsychological tests. Indeed, some information critical to the evaluation may only be available via a patient interview. Information from the patient may enable the clinician to gain perspective on the patient's experience, including self-perceptions of problems and stresses, and to integrate this information with data from other sources (e.g., test results, record reviews, interviews with significant others). In this way, the clinician may come to a more complete understanding of the patient's history and current situation and be better able to apprehend how the patient or examinee views his/her life circumstances.

Neuropsychologists may employ actuarial (i.e., purely data-driven) approaches to understanding and interpreting brain–behavior relationships, including those that focus solely on lateralization and/or localization of brain dysfunction (Russell, Russell, & Hill, 2005). However, a comprehensive neuropsychological evaluation generally entails identification and description of the cognitive and behavioral correlates of brain disease or neurodevelopmental disorder, opinions regarding prognosis, and formulation of treatment plans. A clinical interview and gathering of historical information, often including neuroimaging or other medical findings, is critical to this process.

When interviewing a patient, the neuropsychologist typically considers the events that led to the referral for an evaluation, the duration of the presenting problems or condition, the primary symptoms and changes in symptom presentation over time, the effect of the presenting symptoms or condition on daily functioning, the results of previously conducted tests and procedures, and the patient's strengths and interests. Relevant historical details may include prenatal history, birth and developmental background, educational history (including any history of learning disabilities or weaknesses), work history, current and past medical and psychiatric history, history of alcohol or substance abuse, current and past medications, legal history, and family medical, psychiatric, and substance abuse history.

Although interviewing a family member or friend of the patient is not always possible, doing so may yield useful information not otherwise available. Because of problems with motivation, memory, language, reduced awareness of their illness, or other neurobehavioral symptoms, patients may not always be reliable informants for past or current events. Information from a person who knows the patient and who can talk about the patient's premorbid history, and the effects that the illness/injury has had on the patient and family, can be critical in understanding the functional consequences of the illness/injury. Such individuals may sometimes be the only source of information regarding the onset, clinical course, and magnitude of deficits. However, it is important to communicate to the family or significant other that a

doctor-patient relationship does not exist; thus, issues such as confidentiality, release of records, etc., should be discussed in advance. Whether used in evaluating the patient or to obtain information from other informants, a structured interview can help to reduce bias and ensure thoroughness and consistency across examinations. It may also provide a means for standardizing data collection of potential use in clinical research.

D. Measurement Procedures

Neuropsychological evaluations vary in content depending on their purpose but they typically assess multiple neurocognitive and emotional functions. Primary cognitive domains include: intellectual functions; academic skills (e.g., reading, writing, math); receptive and expressive language skills (e.g., verbal comprehension, fluency, confrontation naming); simple and complex attention; learning and memory (e.g., encoding, recall, recognition); visuospatial abilities; executive functions, problem-solving and reasoning abilities; and sensorimotor skills. Ideally, assessments should also include measures designed to assess personality, social-emotional functioning, and adaptive behavior. In some settings (e.g., testing the acutely medically ill), comprehensive testing may be contra-indicated; in such situations, measurement of selected neurocognitive domains and/or a screening of cognitive skills is preferred. Additional guidelines for test selection can be found in APA's Standards for Educational and Psychological Testing (1999).

Neuropsychological tests and measures used for clinical purposes must meet standards for psychometric adequacy (with exceptions as noted below). These standards include: (1) acceptable levels of reliability, (2) demonstrated validity in relation to other tests and/or to brain status, including evidence that the test or measure assesses the process, ability, or trait it purports to assess, and (3) normative standards that allow the clinician to evaluate the patient's scores in relation to relevant patient characteristics, such as age, gender, and sociodemographic or cultural/linguistic background. In general, tests published with large, stratified normative samples—"Heaton norms" (Heaton, Avitabile, Grant, & Matthews, 1999); Mayo's Older Americans Normative Studies (MOANS; Ivnik et al., 1992, 1996), and Mayo's Older African Americans Normative Studies (MOAANS; Lucas et al., 2005)—provide a sound foundation for accurate interpretation. Comparisons of results from tests that are co-normed are advantageous in examining differences between two or more cognitive domains. The neuropsychologist is aware of the source of normative data and is cautious about using tests for which sample sizes are small or restricted (e.g., by geographic region or sociodemographic characteristics). Sample size considerations are particularly important in child assessments, where developmental changes in skills demand adequate sampling across a variety of ages.

Measures that show promise, but have not met the most rigorous standards, may be considered to assess skills, behaviors, or influences that are deemed important to elucidate patients' or others' concerns. However, these more "provisional" tests and measures are selected to complement rather than replace those with better-established properties. Preliminary evidence for psychometric adequacy is needed even for measures considered provisional in nature; and the neuropsychologist is aware of the level of support for their use in interpreting the findings.

Some common conditions that justify exceptions to the general principles elucidated above include: the need to evaluate an individual whose neuropsychological functioning falls at the extremes of the normal distribution (e.g., those with mental retardation or the exceptionally gifted), individuals with sensory or motor disabilities that require modifications to standardized test administration (e.g., creating a bedside assessment for a patient with neglect following a right hemisphere stroke), and individuals from linguistic or cultural groups for whom no normed test exists. In such cases, the neuropsychologist recognizes the importance of ecologic validity or external "real-world" validation of the test findings and for determining the reliability of the findings across multiple tests. The neuropsychologist also explicitly acknowledges in the report the modifications of test administration and scoring and their potential effect on the validity of the assessment results.

A comprehensive neuropsychological evaluation should be thorough but also efficient and respectful of a patient's time and resources. Some patients, such as those who fatigue easily, may require more than one session. Furthermore, in clinical practice, clinical neuropsychologists often find it necessary and advisable to administer a selected set of subtests instead of the complete test battery or test. An advantage of using multiple tests from single or co-normed test batteries is that patient strengths and weaknesses, including levels or laterality of performance, can be assessed relative to the same normative sample. A further advantage is that administration of test batteries can provide for the assessment of a broad range of functions. Disadvantages include a predetermined number and restricted selection of subtests in the existing test batteries, and associated time constraints, which may preclude administration of complete batteries when given in combination with other measures of interest. Breadth of assessment can be provided by administering multiple individual tests and/or combinations of subtests from different test batteries, depending on the goals of the evaluation. The practice of using selected subtests or individually developed tests can be justified by reference to research literature employing these measures and the availability of appropriate normative standards (e.g., Baron, 2004; Heaton et al., 1999; Lucas et al., 2005; Steinberg & Bieliauskas, 2005).

E. Assessment of Motivation and Effort

A growing literature suggests that the assessment of motivation and effort is critical when conducting a neuropsychological evaluation (Bush & NAN Policy & Planning Committee, 2005b). This area has received the greatest emphasis in forensic assessment, in which symptom magnification, impression management, or even feigning of impairment can occur (Mittenberg, Patton, Canyock, & Condit, 2002). However, the assessment of effort and motivation is important in any clinical setting, as a patient's effort may be compromised even in the absence of any potential or active litigation, compensation, or financial incentives. Approaches for assessing motivation and effort include: behavioral observations from interview or testing of behaviors such as avoidance, resistance, hostility, and lack of cooperation; examination of the pattern of performance among traditional neuropsychological measures; identification of unexpected or unusually slow and/or impaired levels of performance; identification of cognitive profiles that do not fit with known patterns typical of brain disorders; and consideration of suspect performance on objective measures of effort. Clinicians

utilize multiple indicators of effort, including tasks and paradigms validated for this purpose, to ensure that decisions regarding adequacy of effort are based on converging evidence from several sources, rather than depending on a single measure or method.

Neuropsychologists utilize commonsense methods to optimize patient performance, such as attending to the lighting, seating, and other aspects of physical comfort during testing; treating patients respectfully; establishing rapport; asking the patient about his/her understanding and acceptance of the evaluation process; and encouraging and reinforcing effort. The purpose of these methods is to establish a physically and interpersonally comfortable testing environment, with the goal of minimizing anxiety, resistance, physical discomfort, or other factors that may interfere with optimal motivation and effort.

F. Assessment of Concurrent Validity

The neuropsychologist typically draws inferences about a given skill or ability from more than one test or test score, and considers the influences of the patient's state of engagement, arousal, or fatigue on test performance. To illustrate, issues of test validity may be raised when performance on an attention measure early in a test battery is better than performance on another attention task toward the end of the battery. Cultural and language-mediated effects on test performance are also considered, and caution is exercised in administering and interpreting tests to individuals from a demographic, linguistic, or cultural group for which the tests have not been appropriately normed, validated, and translated (see section 5C). The neuropsychologist should be aware of limitations of making comparisons among standard scores arising from different normative samples and should make efforts to include norms that are most similar to the demographics of the patient being examined.

G. Test Administration and Scoring

Standard procedures are followed in test administration and scoring (see *Standards for Educational and Psychological Testing*, APA, 1999). Tests are administered, scored, and interpreted in ways that are consistent with evidence regarding the utility and appropriate application of these methods. The clinician attempts to prevent misuse of the test materials, and to determine and report circumstances in which norms may have limited applicability or test procedures may be inapplicable or require modification (EPPCC). Neuropsychologists may "test limits" (e.g., by changing test demands or providing extra time) to investigate the effects of accommodations on test performance, but findings from such procedures are clearly labeled as such and norms that apply to standard administrations are not used to describe the results. The presence of third-party observers during test administration is also strongly discouraged (AACN, 2001; NAN, 2000a). If a third party or monitoring device is present, the neuropsychologist states how and to what extent this circumstance may have affected the test results.

Accuracy of scoring is essential for appropriate interpretation of test results. The neuropsychologist is familiar with scoring methods and criteria for specific items, procedures for aggregating scores, and the meaning of the scores (i.e., the normative base used for converting raw to standard, or derived scores). Scoring is

performed with care, with double-checking of scores, sums, and conversion tables to ensure accuracy. If novel scoring procedures are used, they should be justified by previous research. Computer scoring programs, because of the "hidden" nature of their operations, are used only if validated against other reliable and previously validated procedures. Neuropsychologists are responsible for the accuracy of scores when a psychometrist or computerized scoring program are utilized (APA, 1992; NAN, 2000b).

H. Interpretation

Accurate interpretation of neuropsychological test data requires extensive relevant training and experience, and knowledge of current empirically based professional opinions gathered from continuing education and the published literature. A neuropsychologist's clinical interpretation of the evaluation findings is based on information regarding the patient's history and problems, direct observation of the patient, levels or patterns of test performance associated with specific clinical presentations, and the current theory and knowledge regarding the neurological and psychosocial/cultural influences on test performance and daily functioning. This interpretation is highly individualized and does not follow a "cookbook" approach. Results from computer scoring and interpretation programs are also considered within the context of the individual patient; the neuropsychologist does not exclusively use automated computer printout interpretation as a substitute for a carefully considered and individually tailored clinical interpretation.

Information about the patient's sociodemographic status, cultural and linguistic background, and work, school, and family characteristics can be obtained through interview or formal measures. These factors are taken into consideration in making judgments as to the extent to which the test performance deviates from expected levels (see section 5C). This information is also useful in determining if environmental or motivational factors are contributing to or exacerbating the patient's problems.

The inferences made by neuropsychologists in interpreting the evaluation findings include judgments regarding: (1) the nature of the cognitive deficits or patterns of strengths and weaknesses, (2) the likely sources of, or contributors to, these deficits or patterns, and (3) their relation to the patient's presenting problems and implications for treatment and prognosis. The first type of inference is based on knowledge of the cognitive constructs measured by neuropsychological tests. Judgments regarding relative strengths and weaknesses also rely on knowledge of expected levels of test performance relative to background patient characteristics or to the patient's performance on other tests (as in making judgments regarding inter-test score discrepancies). In rendering conclusions regarding a patient's strengths and weaknesses, the clinician considers the consistency of findings across multiple tests and alternative explanations for high or low test scores (e.g., development of compensatory test-taking strategies, poor effort) or the overall pattern and profile of neuropsychological test scores.

The second type of inference, regarding causal or contributing factors, relies on knowledge of the cognitive, behavioral, and emotional consequences of brain insults or constitutional-genetic anomalies. If a brain insult or neurodevelopmental

anomaly is *known*, a judgment is made as to whether the insult or anomaly has contributed in some way to the patient's problems. The insult or anomaly may be a primary cause of the problems. In circumstances in which several causal factors are potentially contributory, it may be difficult to conclude with reasonable certainty that a particular event or disease is the primary cause, or to isolate the specific influence of a particular condition on a behavior or learning problem. Inferences regarding causation take into account not only the pattern of the test results, but also the history of the patient's problems, the nature of the potential causal event and its relation to symptom presentation, the strength of research supporting a relation between the type of brain insult or anomaly of the patient and the test findings, the base rate of the problem in the general population, and alternative explanations for the patient's test findings. These same considerations apply if the brain insult or anomaly is *unknown*. In this latter instance, the judgment to be made involves the extent to which the problems are consistent with or suggest the presence, nature, or localization of a neurological abnormality. Inferences in this regard are again based on the degree of consistency of the patient's test results to those of other patients with similar insults or anomalies, the likelihood of a neurological insult or anomaly as having occurred, the patient's history and timing of symptoms in relation to a potential insult or anomaly, and consideration of other possible causes for the patient's problems.

In making judgments regarding brain insult or anomaly as a cause for the patient's presenting problems, co-morbidities, or ability deficits, the neuropsychologist considers factors that may ameliorate or exacerbate these effects. Such moderating variables may include patient behavior and background characteristics, environmental supports or stressors, the effects of various medications, and the patient's current level of cognitive functioning. Environmental and maturational influences on outcomes of brain insult or anomaly are also considered in making judgments regarding causation.

The third type of inference pertains to the validity of neuropsychological test results in identifying and forecasting social-behavioral or learning problems and in predicting responsiveness to different interventions. Test validity in this sense is supported to the extent that the patient's identified deficits, or patterns of strengths and weaknesses, have been related in past research to problems similar to the patient's. Further support for validity comes from studies indicating that specific deficits or patterns of strengths and weaknesses predict other difficulties or future outcomes, or inform treatment for the patient's problems. In drawing conclusions about the relevance of cognitive skills to identification and management of a patient's problems, the neuropsychologist considers the possible contributions of non-cognitive factors (e.g., the effects of pain, sleep disruption, medication effects, psychological distress or history of maladaptive behavior unrelated to the patient's cognitive deficits, social or educational supports).

New technologies for evaluating brain–behavior relationships are emerging, including advances in neuroimaging, genetic analyses, metabolic tests, and other measures that reflect physiological and psychological functions. All of the major areas of clinical psychometric assessment, as defined earlier in these guidelines, are being standardized for research and clinical purposes using an array of neuroimaging methods, such as functional magnetic resonance imaging (fMRI). To illustrate, APA

Division 40 has endorsed the role of neuropsychologists in clinical use of fMRI (APA, 2004). In the coming years, standardized assessment protocols for assessing a broad spectrum of neuropsychiatric and cognitive disorders are likely to be developed wherein clinical neuropsychologists will use neuroimaging as part of their neuropsychological evaluation and assessment.

I. The Evaluation Report

Neuropsychological findings generally are summarized in a written report to be provided to the referral source or responsible party (Axelrod, 1999), except in special circumstances (e.g., certain forensic or research contexts). The EPPCC (APA, 2002b, 6.01: Documentation of Professional and Scientific Work) notes that the written report serves "... to facilitate provision of services later; to ensure accountability; and to meet other requirements of institutions or the law."

Report-writing styles vary with the purpose of the report, background and training of the neuropsychologist, requirements of the work setting, and even, on occasion, the specific guidelines established by the referring party. Neuropsychological evaluations are typically requested for a specific purpose or to answer specific referral questions. The purposes of the assessment may include provision of differential diagnoses, documentation of cognitive strengths and weaknesses, delineation of functional implications of the identified deficits, and recommendations regarding interventions. Generally speaking, the aims of the report are (1) to describe the patient and record the findings, (2) to interpret the patient's performance on tests in light of other assessment information, (3) to answer questions and make judgments regarding the nature and sources of the presenting complaints/concerns, (4) to assess prognosis and make recommendations for future care, and (5) to communicate the results to the patient or significant others with permission, to the referral source, and other service providers such as teachers and therapists (Axelrod, 1999).

Despite the absence of a universally accepted outline or format, the report usually is organized to assist the reader in identifying the patient and learning of the reason for referral and presenting problems, the patient's history and level of functioning, the patient's behavior during the evaluation, the test results, and the clinician's impressions, interpretations, and recommendations. Some of the most commonly used report sections include: Identifying Information and Reason for Referral; Background Information/History; Tests Administered; Behavioral Observations; Test Results/Interpretations; Summary & Conclusions; Diagnostic Impressions; and Recommendations. Consultations or short reports are more annotated versions of the above format, typically consisting of a few paragraphs describing the test results and recommendations. Abbreviated reports are more common when evaluating patients whose background is already known to the referral source (e.g., primary physician) or when the assessment is being conducted for more circumscribed reasons (e.g., to assess cognitive function as part of a multidisciplinary inpatient assessment). Test reports contain information regarding the patient's age, gender, educational level, occupational background, need for special services or accommodations in conducting the assessment, racial identity/ethnicity, the persons who conducted the assessment (neuropsychologist, psychometrist) and others

present during testing (e.g., translator, student trainee), and (as appropriate) the language(s) in which testing was conducted and the examiner's and patient's fluency in the language(s).

One recommended practice in clinical neuropsychology is to include numerical data (including scaled scores or percentile ranks) in reports (Donders, 2001; Friedes, 1993). Neuropsychologists may choose to append test scores in a summary sheet, or insert scores in the report text. Including test scores allows for the comparison of a patient's performance over repeated evaluations, minimizes the need for obtaining multiple releases of information, and increases the efficiency with which raw data can be shared with other professionals for the purpose of further assessment or management of the patient. Inclusion of scores also increases accountability and may even minimize and clarify any interpretation biases or idiosyncrasies on the part of the writer (Matarazzo, 1995). Finally, in certain situations, such as documenting a learning disability or ADHD for higher education, the guidelines issued by testing organizations and used by academic institutions universally require the reporting of test scores (Educational Testing Service (1998a, 1998b). When used in conjunction with scores, use of words describing test scores (e.g., "below average," "impaired") may facilitate understanding of test data.

Multiple normative data sets are available for many neuropsychological instruments, and test score percentiles or standard scores may differ depending on which norms are employed. As appropriate, citations may be provided for the normative sets, which can assist the reader in understanding how specific standard scores were derived. Further, because some test norms allow adjustment for age, while others also correct for additional factors, such as education, gender, and/or ethnicity, some practitioners may choose to specify the demographic characteristics that were considered in deriving norm-based scores (e.g., 10th percentile for age and education; Selnes et al., 1991).

J. Providing Feedback

Although documentation of the results from a neuropsychological evaluation usually takes the form of a written summary or report, feedback is often provided directly (i.e., in a face-to-face meeting or phone call) to referral sources, patients, families, third-party payers, and the legal system. Feedback to clinical referral sources is provided in a timely manner and addresses the relevant referral questions and concerns. The neuropsychologist also makes additional inferences and recommendations as appropriate for the benefit of the patient or referral source. For example, the need for patient counseling or special school placements may be advised, even if questions regarding these matters were not raised by the referral source.

Feedback regarding the evaluation findings and recommendations are provided in a manner that is comprehensible to intended recipients and which respects the well-being, dignity, and rights of the individual examinee. Ethical and legal guidelines pertaining to the provision of feedback should be identified and followed. As noted earlier (section 5B), feedback typically is not given in forensic evaluations, but it is part of most clinical evaluations. The neuropsychologist adheres to professional ethics (EPPCC) and federal, state, and local laws related to the autonomy

and decision-making capacities of patients who are legally competent. When cognitive impairments interfere with the patient's ability to understand the implications of the test results, or in the case of a child examinee, feedback may be provided to a responsible party (legal guardian or parent), with or without the patient present. The neuropsychologist consults with the responsible party to decide whether or not to provide direct feedback to a minor child or vulnerable adult. In some such cases, sensitive and developmentally appropriate discussion of results and recommendations may enhance the person's well-being; in other cases, direct feedback about test findings could be detrimental, particularly if the child or vulnerable adult misconstrues what is said.

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APPENDIX 1: BACKGROUND OF THE GUIDELINE DEVELOPMENT PROCESS

At its June 2003 annual meeting in Minneapolis, MN, AACN sponsored a forum, chaired by Robert Heilbronner, to discuss the need for and feasibility of developing practice guidelines for neuropsychology. There was general support for considering this project, with due circumspection, and there were no dissenting opinions. Subsequently, noting that such a project was consistent with its mission and bylaws, the AACN Board of Directors (BOD) approved the formation of a Practice Guidelines Working Group under the auspices of its Practice Committee, initially co-chaired by Robert Heilbronner and Michael Schmidt. Beginning in 2004, following Dr. Schmidt's resignation, the group was chaired by Dr. Heilbronner.

The working group was assembled from AACN members by invitation of the co-chairs, to include individuals who would provide broad representation in the field of neuropsychology. The group included neuropsychologists who work in a variety of settings, including independent practice, clinics, hospitals, and universities (see Practice Guidelines Subcommittee below). Professional emphases encompassed the adult, child, forensic, and research arenas. The group included individuals who had held elected offices in various neuropsychological organizations and who had served on the editorial boards of a number of professional journals.

The co-chairs assembled a packet of core references, including a number of published position papers relevant to the practice of clinical neuropsychology, as well as policy statements and ethical guidelines of APA and other scientific and professional organizations. The references were provided to each working group member. In addition, individual working group members used their professional judgment and discretion in considering the professional literature within their areas of expertise.

An initial working group meeting was held during the 2004 INS meeting in Baltimore, MD. A general outline of the guidelines was approved, and group members volunteered to take primary responsibility for portions of this outline, based on their specific areas of interest and expertise. To ensure a broader perspective, at least two individuals were assigned to each area. Initial drafts were compiled, and revisions were made based on input from all working group members.

The committee met again in St. Louis, MO at the 2005 INS Meeting and further revisions were made. After that meeting, the draft document, including literature citations, was approved by a general consensus from working group members. The document was then submitted to an independent peer-review panel of senior neuropsychologists for comments (see Senior Level Peer-Reviewers below). Following further revisions based on this review, a revised document was submitted to the AACN BOD and reviewed first by the President (R. Mapou) and Vice-President (J. Sweet). Revisions were recommended and made by Dr. Heilbronner and selected group members. The document was submitted to the BOD on November 15th where it was reviewed by all members of the BOD. Consolidated comments were provided from the BOD to the Practice Guidelines Committee on January 7th, 2006. A number of revisions and changes were recommended. These were made and a final document was submitted to the BOD on May 1st 2006. It was reviewed by all members of the BOD and accepted in its current form on June 16th, 2006.

Practice Guidelines Subcommittee

Robert L. Heilbronner (chair), H. Gerry Taylor, Karen Wills, Kyle Boone, Erin Bigler, Lidia Artiola i Fortuny, Neil H. Pliskin, Richard F. Kaplan, Greg Lamberty, and Michael Schmidt.

Senior Level Peer-Reviewers

Ken Adams (chair), Carl Dodrill, Wilfred van Gorp, and Ida Sue Baron.

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Dear Customer,

In response to your request, I am writing to provide you with a statement of our position related to providing attorneys with photocopies of copyrighted psychological test materials.

In order to protect the integrity, objectivity, security, and copyrights of our psychological test materials and the fairness of the testing process, we are unwilling to consent to the release of copyrighted and confidential material to individuals not professionally qualified to obtain, review and/or interpret them.

Copyrighted test materials include test manuals, test booklets, instruction booklets, answer sheets, and scoring and interpretive information, and any other copyrighted materials for administration, scoring and interpretation of our tests. It is our position that when you choose to purchase these copyrighted materials from PAR, as a condition of purchase you agree to not reproduce or adapt those copyrighted materials in any way or for any purpose.

If a court insists on requiring the release of proprietary test materials for use by non-psychologists or other professionals who do not have the appropriate training and expertise to review and interpret the tests such as attorneys and individuals who may have taken the tests, we request that the test materials and any records relating to the tests be disclosed for review only to a licensed psychologist or appropriately trained professional designated by the non-psychologist involved in the case. We also request that the court issue a protective order prohibiting parties from making any copies of the materials, require the materials be returned to the proceedings, and prohibit the materials from being made publicly available as a part of the record of the case. We believe that these are the minimum procedures and requirements necessary to protect our copyright and other proprietary rights in the test materials, as well as the security, integrity, and objectivity of the test instruments and the testing process.

I appreciate your concerns with regard to this issue. If I can be of any further help, please let me know.

Sincerely,

[redacted]

[redacted], PhD
Chairman and CEO

Exhibit 3

IN THE

Supreme Court of the United States

October Term, 1977

No. 77-968

THE DETROIT EDISON COMPANY,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

BRIEF OF AMERICAN PSYCHOLOGICAL ASSOCIATION AS AMICUS CURIAE

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Exhibit 4

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IN THE

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NATIONAL LABOR RELATIONS BOARD,
Respondent.

BRIEF OF AMERICAN PSYCHOLOGICAL ASSOCIATION AS AMICUS CURIAE

CONSENT TO FILING

This Amicus brief is filed, pursuant to Supreme Court Rule 42(2), with the written consent of both parties. Letters to that effect have been filed with the Clerk of this Court.

INTEREST OF AMICUS CURIAE

The American Psychological Association ("APA"), a non-profit professional organization founded in 1892, is the major association of psychologists in the United States. The purpose of the Association, as set forth in its Bylaws, is to "advance psychology as a science and profession, and as a means of promoting human welfare by the encouragement of psychology in all its branches in the broadest and most liberal manner."

The Association has 47,000 members and includes the vast majority of psychologists holding doctorate degrees

from accredited universities in the United States. Approximately half of the members have a direct interest in psychological testing — the specific matter at issue in this case. However, because questions of confidentiality, privilege and privacy, as they pertain to the relationship between psychologists and their clients, are central to this case, all members of the Association, all other psychologists, and the clients whom they serve, could be directly and adversely affected by the decision of the National Labor Relations Board ("Board") as enforced by the United States Court of Appeals for the Sixth Circuit.

One of the APA's central functions is to establish ethical standards for the guidance of psychologists. The Association's code of ethics, binding on all members, is enforced by an ethics committee of APA designated specifically for this purpose. The committee, with the concurrence of APA's Board of Directors, has the authority to impose sanctions against members who violate the ethical code, including suspension or expulsion from the Association. Further, the APA's code of ethics has been incorporated in the laws of many states, thus governing the professional conduct of many nonmember psychologists licensed in those states.

APA also has been instrumental in developing testing standards for the validation and administration of psychological aptitude and other tests. The standards enunciated by Amicus have been referenced by the Equal Employment Opportunity Commission, the Office of Federal Contract Compliance, and the Department of Justice in their respective guidelines on nondiscriminatory employee selection procedures.

Amicus has a direct interest in the outcome of this case because the decision of the Court of Appeals, if allowed to stand, undermines several principles of its ethical code pertaining to confidentiality and client relationships as well as important standards relating to test security necessary to assure the validity of psychological testing.

SUPPLEMENTAL STATEMENT OF THE CASE[1]

This matter arises from a decision of the United States Court of Appeals for the Sixth Circuit enforcing an order of the National Labor Relations Board requiring Detroit Edison ("Company") to provide to the Utility Workers Union of America ("Union") employees' raw test scores and test papers from psychological aptitude tests without their consent, and copies of the actual test battery.

Detroit Edison has, for many years, used aptitude tests to predict job performance and to select applicants most likely to succeed in specific positions, including the Instrument Man position (A. 75, 178-79). One of the requirements for promotion to the Instrument Man job is a minimum grade of "recommended" on a battery of aptitude tests consisting of two widely used exams, the Minnesota Paper Form Board Test (MPFB)[2] and the Engineering and Physical Science Aptitude Test (EPSAT)[3] (A. 189, P.A. 20a). The tests are administered to the employees by the Company's Industrial Psychology Division, headed by Dr. William L. Roskind, a licensed psychologist in the state of Michigan and a member of the American Psychological Association (A. 74-77).

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[1]The Supplemental Statement is not a complete statement but rather sets forth those facts germane to the arguments propounded by Amicus.

[2]The Minnesota Paper Form Board Test is a widely employed aptitude test designed to predict the ability to visualize the interrelationship of parts in three-dimensional spaces, a skill shown to be important to perform the Instrument Man position (A. 193-95).

[3]The six-part Engineering and Physical Science Aptitude Test is used to examine aptitudes in the areas of mathematics and physical sciences (A. 198-99). EPSAT has been used for over thirty years to predict success in jobs relating to the physical sciences such as the Instrument Man position (A. 198, 204-05).

The test battery for the Instrument Man position has been validated on three separate occasions, twice by Detroit Edison and a third time, in 1972, by an independent testing organization (A. 190, 238, 343-67). All three studies showed a very high correlation between successful performance on the test battery and in the Instrument Man position, a fact uncontested by the Union (A. 190, 206, 239, 367). The validation studies also verified the appropriate cut off to predict successful performance in the Instrument Man position (P.A. 64a).

Employees are given the test battery by professional psychologists who assure them, before they take the test, that their actual test scores will be kept in confidence and that the only information that will be released is an interpretation of overall performance (A. 85, 445). To guard the confidentiality of this information, management is not given actual numerical scores, only a general evaluation of the applicants' performances on the test battery (A. 77, 83, 91, 127). Further, the test data are kept in a locked file to which only the Company's professional psychologists have access (A. 83).

Confidentiality of scores is maintained to prevent their misuse and to protect employees from damaging harassment and ridicule (A. 83-84). In fact, prior to the Company's institution of measures to safeguard test scores, several employees suffered ridicule at the hands of their peer employees because of indiscrete disclosure of low scores and terminated their employment with the Company (A. 84).

The Company's psychologists restricted access to the test battery and the actual test papers (A. 83) in order to ensure the validity of the tests (A. 77-78). The reliability of the selection process would be destroyed if copies of the test questions were disseminated to future applicants for promotion to the jobs for which the battery had been fully validated (A. 77-78).

In late 1971, Detroit Edison's professional psychologists administered the above-described test battery to employees seeking promotion to the Instrument Man position. When ten employees who took the battery were rejected for promotion for failure to obtain a "recommended" on the battery (P.A. 20a-21a), the Union filed a grievance against the Company. The central issue in the arbitration and NLRB proceedings which followed concerned what testing data the Company would make available to the Union. During the course of the proceedings, the Company and its professional psychologists furnished all of the following information to the Union:

(1) A written explanation of the test battery (A. 127-31).

(2) Representative samples of the kinds of questions that appear on both the Minnesota Paper Form Board and the EPSAT Tests (A. 125, 280).

(3) The Company's 1970 revalidation report (A. 343-53).

(4) The 1972 validation report conducted by the outside consultant, the National Compliance Company (A. 354-78).

(5) The raw test scores of all applicants, without employee identification (A. 279-80).

In further attempts to accommodate the Union's demands, the Company made the following proffers of information, each of which was refused by the Union:

(1) The Union demanded copies of each applicant's raw test score and test paper (A. 164). The Company offered to supply the raw test scores and test paper of any employee who consented (A. 7). However, the Union flatly refused to seek such consents (A. 44).

(2) The Union insisted that the Company provide it with copies of the actual test battery. The Company, having provided all the requested validation studies, a written explanation of the test battery, and sample questions, offered to permit the Union

(A. 6). The Union refused to accept this offer. The Company also offered to disclose the test battery and other requested testing materials to a qualified psychologist of the Union's choosing (A. 6). The Union also rejected this offer even though the test battery would have been useless to a lay person without the assistance of such a psychologist (A. 27, 50-51, 71-72, 79).

Although the Company's attempts at accommodation were rejected by the Union, the Board, in a two-to-one decision, ordered the Company to give the Union the raw test scores and actual test papers of the employees, without their permission, and the test battery (P.A. 16a). The only ostensible protection provided to safeguard the information was to order the Union not to copy the tests or to disclose them to past or future examinees (P.A. 16a). The dissenting Board member, who would have required the Company to divulge the test batteries only to a qualified psychologist of the Union's choosing, noted the futility of the Board's ineffectual restriction (P.A. 17a). Moreover, the Board's purported safeguards, limited as they were, did not cover the confidential test scores of the employees (P.A. 16a).

When the Company declined to comply with the Board's order, the Board sought enforcement by the Court of Appeals. The court, in a two-to-one decision, enforced the Board's order forcing disclosure of all the testing data demanded by the Union, including the confidential test scores of the employees, and the validated test battery (P.A. 7a-8a).

Judge Weick, dissenting, acknowledged the need to accommodate the competing interests at issue (P.A. 12a). Recognizing the confidential and privileged relationship between the administering psychologists and the examinees, he held that:

> "The disclosure of the test papers, as well as the individual scores, would subject the psychologists to the sanctions of disciplinary action which could result in their suspension or even revocation of their licenses by the state of Michigan" (P.A. 9a).

He further noted that the test battery was "in the custody of qualified psychologists" and that "disclosure of such papers would violate the Code of Ethics of the American Psychological Association which has been recognized by the statutes of the state of Michigan, Mich. Stat. Ann. §§ 14.677(1)(b)" (P.A. 8a, 9a).

In addition, Judge Weick pointed out the futility of the Board's proposal to protect the test materials from improper dissemination, labeling them as "really naive" (P.A. 11a) and concluded that the Board's order constituted a gross abuse of discretion because it recognized only the interests of the Union and failed to consider any of the other conflicting interests involved (P.A. 12a).

SUMMARY OF ARGUMENT

The Court of Appeals has enforced an order of the National Labor Relations Board which, if not reversed, will require the disclosure to a union by professional psychologists of raw test scores and actual test papers of examinees without their consent, and of a validated test battery. The order constitutes an intrusion into the confidential relationship between the psychologist and the client, a relationship which is recognized in the over 35 states which accord it a testimonial privilege.[4] Disclosure of the raw test scores and actual test papers by the professional psychologist also contravenes the ethical principles of Amicus, principles which have been incorporated in the licensing laws of most of the states in the country.[5]

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[4] *See* note 12, *infra.*

[5] *See* note 31, *infra.*

These principles give paramount importance to the protection of clients' welfare, including the maintenance of the confidentiality of potentially embarrassing information such as test scores.

Disclosure of the raw test scores and actual test papers to union representatives, who have no professional obligation to safeguard their confidentiality or to refrain from misusing them, also constitutes an invasion of the examinees' rights of privacy.

Finally, the order of the court below requiring that a validated test battery be given to the Union conflicts with the mandate of Title VII, 42 U.S.C. §§ 2000e, *et seq.*, and other fair employment practice laws and regulations which require that methods of employee selection and promotion be nondiscriminatory. Pursuant to guidelines issued by three federal agencies charged with responsibility to insure nondiscriminatory employment practices,[6] only tests which have been validated according to standards developed by the APA may be used in employee selection and promotion. Disclosure of such tests to persons with no professional obligation to protect their security will destroy the tests' validity.

ARGUMENT

I. FUNDAMENTAL INTERESTS OF EMPLOYEES AND PSYCHOLOGISTS ARE IGNORED BY UNLIMITED DISCLOSURE TO THE UNION OF PSYCHOLOGICAL TEST SCORES AND TEST PAPERS LINKED WITH THE NAMES OF THOSE TESTED

In ordering Detroit Edison to provide the Union with the actual test scores and test papers of individual examinees, the NLRB and the Court of Appeals have respected only the

[6] *See* note 40, *infra*.

asserted interests of the Union,[7] and have ignored important interests of the tested employees and the psychologists.[8] Detroit Edison attempted to accommodate all competing interests by providing to the Union the test scores of all the examinees, without matching the scores with their names, information unavailable to Company management. The Company did offer to match test scores with the identities of those examinees who consented; however, the Union refused to seek such consents.

A. Disclosure of Employee-Linked Psychological Scores and Test Papers Ignores the Employee's Interest in a Confidential Relationship with the Psychologist

Confidentiality is crucial to fostering the degree of openness between the psychologist and tested employees necessary to the provision of professional psychological services.[9] The Detroit Edison employees consented to take the

[7] *See Kroger Co. v. NLRB*, 399 F.2d 455, 457 (6th Cir. 1968), where the court recognized that "the critical issue appears to be how to recognize and how adequately to protect each of the conflicting interests that are involved here."

[8] The NLRB has asserted that no employee has raised any objection to the disclosure of his test scores. However, neither has any employee *consented* to disclosure. Moreover, no employee is a party to this action. The administering psychologists have a duty imposed by their code of ethics and state licensing laws to maintain the confidentiality of test results unless the client consents to disclosure.

[9] The Court of Appeals dispensed summarily with the claim of confidentiality and privilege by analogizing to a case which held that a promise made by a company that it would not disclose economic data gathered from neighboring companies was not a valid defense to a union's request for information. *General Electric Co. v. NLRB*, 466 F.2d 1177, 1185 (6th Cir. 1972). The confidentiality required to foster a fruitful relationship between psychologists and their clients and to protect the clients' privacy rights is quite different from a corporation's interest in preservation of economic data.

psychological aptitude tests with specific assurances that their test scores and responses would be held in strictest confidence.[10] The effective operation of psychological tests requires that individuals be placed in an atmosphere in which they can display candor and honesty. Whether in a testing or therapeutic situation, a psychologist's clients may be called upon to reveal personal thoughts, experiences, and memories. The psychologist's clients would refrain from making such revelations without the assurance that their communications would be held in confidence.

To ignore the confidential relationship between the examinee and the psychologist would have a substantial chilling effect on prospective test takers. If those who agree to be tested face disclosure of their responses, many will choose test answers they feel will not subject them to embarrassment or harassment, thereby destroying the accuracy of the examination and the psychologist-client relationship. Others will refrain entirely from participating in the tests, even if it means foregoing the opportunity of employment or advancement.

These considerations underlie the many state licensing laws that assure confidentiality in the psychologist-client relationship.[11] These states have thereby recognized the injury to the professional relationship and to the individual client that can result from disclosure of psychological test scores. Legislatures in a large majority of states also have

[10]Even had these assurances not been given, the employees could justifiably rely on their relationship with the psychologist to protect their test scores from disclosure. The fact that the psychologist was retained by the employer does not alter the client-psychologist relationship. *See Tweith v. Duluth, M & I Ry. Co.*, 66 F. Supp. 427 (D. Minn. 1946).

[11]*See* footnote 31, *infra*.

recognized the need for confidentiality by granting a testimonial privilege to client communications with a psychologist.[12]

Amicus does not urge that this Court must find a privileged relationship in this case. Rather, APA submits that the interests of the psychologist and employee should

[12]The following states have recognized a psychologist-client privilege: Ala. Code tit. 34, § 26-2 (1975); Alaska Stat. § 08.86.200 (1977); Ariz. Rev. Stat. Ann. § 32-2085 (1976); Ark. Stat. Ann. § 72-1516 (1957); Cal. Bus. & Prof. Code § 2918 (Deering 1975) and Cal. Evid. Code §§ 1010-1028 (Deering 1966 & Supp. 1978); Colo. Rev. Stat. § 13-90-107(g) (1973); Conn. Gen. Stat. § 52-146c (1977); Del. Code Ann. tit. 24, §3518 (1974); D.C. Code Ann. §§ 2-496, 14-307 (1973); Fla. Stat. Ann. § 490.32 (Aupp. 1978) (released July 1, 1978), § 90.503 (Special pamphlet 1978) (effective July 1, 1978); Ga. Code Ann. § 84-3118 (1975); Idaho Code § 54-2314 (Supp. 1977); Act of Aug. 15, 1963, 1963 Ill. Laws 2912, § 6, *reprinted in* Ill. Ann. Stat. ch. 91-½, § 406 (Smith-Hurd 1966); Ind. Code Ann. § 25-33-1-17 (Burnes 1974); Kan. Stat. § 74-53-23 (1972); Ky. Rev. Stat. § 319.111 (1978); La. Rev. Stat. Ann. § 2366 (West 1974); Me. Rev. Stat. tit. 14 R. Evid. 503 (Supp. 1975); Md. Cts. & Jud. Proc. Code Ann. § 9-109 (1974 & Supp. 1977); Mass. Ann. Laws ch. 233, § 20B (Michie/Law. Co-op. 1974 & Supp. 1978); Mich. Comp. Laws Ann. § 338.1018 (1976); Minn. Stat. § 595.02(7) (1976); Miss. Code Ann. § 73-31-29 (1972); Mo. Rev. Stat. § 337.055 (Supp. 1978); Mont. Rev. Codes Ann. § 66-3212 (Supp. 1977); Neb. Rev. Stat. § 27-504 (1975); Nev. Rev. Stat. §§ 49.215-49.245, 49.290 (1977); N.H. Rev. Stat. Ann. § 330-A:19 (1966); N.J. Stat. Ann. § 45:14B-28 (West 1978); N.M. Stat. Ann. § 67-30-17 (1974); N.Y. Civ. Prac. Law § 4507 (McKinney 1963 & Supp. 1977); N.C. Gen. Stat. § 8-53.3 (1969); N.D. Cen. Code R. Evid. 503 (Supp. 1977); Ohio Rev. Code Ann. §§ 4732.17)d), 4732.19 (Page 1977), 2717.02 (Page 1953 & Supp. 1978); Okla. Stat. tit. 59, § 1372 (1971); Or. Rev. Stat. § 44.040(h) (1977); Pa. Stat. Ann. tit. 63, § 1213 (Purdon Supp. 1977); S.D. Compiled Laws Ann. § 19-2-3.1 (Supp. 1977); Tenn. Code. Ann. § 63-1117 (1976); Utah Code Ann. § 58-25-8 (Supp. 1977); Va. Code § 8.01-399 (1977); Wash. Rev. Code § 18.83.110 (1976); Wyo. Stat. § 33-27-103 (1977).

be given appropriate consideration and not totally subordinated to the asserted interests of the Union.[13]

B. Recognition of the Confidentiality of the Employee's Test Scores and Test Papers Protects the Employee's Privacy.

Confidentiality is also essential to protect the client's privacy.[14] Tested employees now face the prospect that their psychological and intelligence test scores and their personal responses may become common knowledge of the Union and their peers. Disclosure of the test scores to persons unqualified to interpret them and possibly hostile to the very concept of testing subjects the tested employees to the risk of damaging harassment and embarrassment.[15] A

[13]The court ordered disclosure without any demonstration of need by the Union. Presumably, the Union hoped that the matched test scores would somehow be useful in its grievance with Detroit Edison, but the mere assertion that information is necessary does not require an employer to supply the information in the exact form requested. *See National Labor Relations Board v. Truitt Mfg. Co.*, 351 U.S. 149 (1956).

[14]*See* Krattenmaker, *Interpersonal Testimonial Privileges Under the Federal Rules of Evidence*, 64 GEO. L.J. 613, 647-57 (1976), which recognizes that a psychologist-client privilege is essentially a corollary of a right to privacy.

[15]Unlike the psychologist, the Union is under no professional or ethical duty to safeguard against the improper dissemination of the test scores and papers. Indeed, the Union has an incentive to encourage dissemination. The Company's use of psychological testing as a criterion for job placement thwarts the attainment of the Union's goal of seniority as the sole criterion for job advancement. It is therefore in the Union's self-interest to create disrespect for the tests. One method to accomplish this aim would be to publish the scores of "top-notch" employees who fared poorly on the tests or to ridicule the test answers of those who did well, in the guise of showing that the test is not a valid predictor of job success. The Union has not demonstrated any interest in, or appreciation for, the nature and severity of the effect of disclosure

severe societal stigma attaches to any suggestion of mental deficiency.[16] Even those tests that do not, in fact, measure mental deficiency are often perceived as such by the uninformed when such tests are administered by a psychologist.

In the context of psychological testing, the employees' right to privacy must, at a minimum, include the freedom to choose the circumstances under which their intelligence scores, aptitudes and opinions are to be divulged.[17] This Court has acknowledged that the individual's right of privacy protects against disclosure of personal data.[18] In *Whalen v. Roe*, 429 U.S. 589 (1977), this Court upheld the constitutionality of a

[16]The court in *Merriken v. Cressman*, 364 F. Supp. 913 (E.D. Pa. 1973), recognized the danger to the individual of the dissemination of school-administered psychological test results. The court found that publication of such test scores could result in "scapegoating in which a child might be marked out by his peers for unpleasant treatment . . . ." *Id.* at 915.

[17]It has been said that:

> "The essence of privacy is no more, and certainly no less, than the freedom of the individual to pick and choose for himself the time and circumstances under, and most importantly, the extent to which, his attitudes, beliefs, behavior and opinions are to be shared with or withheld from others. The right to privacy is, therefore, a positive claim to a status of personal dignity — a claim for freedom, if you will, but freedom of a very special kind."

Reubhausen & Brim, *Privacy and Behavioral Research*, 65 COL. L. REV. 1184, 1189-90 (1965).

[18] "The cases sometimes characterized as protecting privacy have in fact involved at least two different kinds of interests. One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions."

Whalen v. Roe, supra, 429 U.S. at 589-600 (notes omitted).

New York law which required the state to keep records of the names and addresses of all individuals obtaining certain drugs by prescription. The state law strictly prohibited disclosure of the patients' names. The Court recognized the privacy interests of the plaintiffs and the potentially embarrassing and harmful effect of disclosure, but found that the statutory scheme "evidence(s) a proper concern with, and protection of, the individual's interest in privacy," *id.* at 605, since access to the confidential information was rigidly safeguarded, *id.* at 601-02.[19]

No such safeguards or concern for the rights of the individual are evident in the Court of Appeals' approach to the present case. To the contrary, the Union has successfully rejected all offers by the Company which would safeguard the data from indiscriminate use.[20]

Congress, the courts, numerous states, and the psychologists' code of ethics all recognize that the disclosure of personal information akin to that involved here can invade the individual's privacy. The individual's

[19]Justice Brennan, concurring, summarized the Court's opinion as follows:

> "The Court recognizes that an individual's interest in avoiding disclosure of personal matters is an aspect of the right of privacy, *ante*, at 598-600, and nn. 24-25, but holds that in this case, any such interest has not been seriously enough invaded by the State . . . .
>
> "In this case, as the Court's opinion makes clear, the State's carefully designed program includes numerous safeguards intended to forestall the danger of indiscriminate disclosure."

429 U.S. at 606-07.

[20]The Court of Appeals adopted the Board's restrictions on the use of the actual test battery. Amicus asserts that this restriction is no more than an ineffective admonition. But even this insignificant protection was not afforded to the employees' test scores or answer sheets

right to personal privacy has been protected either by assuring confidentiality or providing very limited and protected disclosure.

Thus, in the Professional Standard Review Law, 42 U.S.C. §§ 1320c, *et seq.* (Supp. V 1975), Congress accommodated the government's need for access to information concerning the cost and use of Medicare and Medicaid aid with the individual's rights of privacy by requiring the coding of the patient's name so as to "provide maximum confidentiality as to the patient's identity . . . ." 42 U.S.C. § 1320c-4(a)(4). To assure compliance, Congress attached criminal penalties for the unauthorized disclosure of the data. 42 U.S.C. § 1320c-15. A three-judge district court, in upholding the statute's constitutionality, reiterated that "maximum confidentiality is to be maintained concerning the information furnished by the physicians to the Professional Standards Review Organizations." *Association of American Phys. & Sur. v. Weinberger*, 395 F. Supp. 125, 136-37 (N.D. Ill.), *aff'd*, 423 U.S. 975 (1975).

Similarly, the Freedom of Information Act permitting public access to a wide range of government reports and information, exempts from disclosure those requests seeking "personal and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). The Court of Appeals for the District of Columbia explained that the exemption is "designed to protect individuals from public disclosure of intimate details of their lives, whether the disclosure be of personnel files, medical files, or other similar files." *Rural Housing Alliance v. United States Dept. of Agr.*, 498 F.2d 73, 77 (D.C. Cir. 1974) (note omitted). In another FOIA suit, *Department of the Air Force v. Rose*, 425 U.S. 352 (1976), this Court held that disclosure of material contained in personnel and medical files that

would otherwise "constitute a clearly unwarranted invasion of privacy" would be permissible only if the names and identifying characteristics of the subjects were deleted.

Even in the absence of congressional mandate, courts have attempted to accommodate the individual's need for privacy in personal information with competing interests.[21] In *Lora v. Bd. of Ed. of City of New York*, 74 F.R.D. 565 (E.D.N.Y. 1977), the court accommodated the interests of students in the privacy of psychological diagnostic files with those of a litigant asserting a class action civil rights claim on the students' behalf. The plaintiff sought production of randomly selected, *anonymous* diagnostic and referral files. In determining whether to permit even this limited disclosure, a disclosure similar to that voluntarily made by Detroit Edison, the court asked the following four questions:

> "First, is the identification of the individuals required for effective use of the data? Second, is the invasion of privacy and risk of psychological harm being limited to the narrowest possible extent? Third, will the data be supplied only to qualified personnel under strict controls over confidentiality? Fourth, is the data necessary or simply desirable?"

Id. at 579.[22]

[21] *See Merriken v. Cressman*, 364 F. Supp. 913 (E.D. Pa. 1973), which held that a school-administered psychological personality test, seeking answers to personal and intimate questions, violated the students' right to privacy. The test invaded the privacy of the students because they were given no real choice but to take the test and because the students' responses were not safeguarded. In the instant case, although the examinees did consent to taking the tests, failure to safeguard the examinees' scores and responses would in itself invade their privacy — particularly in view of the assurance they were given that their scores would be held in confidence.

[22] The court in *Lora* recognized that "[m]ost persons protest not the rather the concomitant disclosure of identifying data." 74 F.R.D. at 580. However, the court noted that even the elimination of all identifying data, "while undoubtedly reducing the degree of invasion of privacy attendant upon dissemination, does not necessarily, then,

In the instant case, neither the Board nor the Court of Appeals addressed these important questions. Amicus submits that the answers to these questions would preclude production of the test scores and papers. The Union, dissatisfied with the information provided in anonymous form, made no showing that the correlation of the names of the examinees with their scores was useful. The Court of Appeals ordered unbridled disclosure of the materials to Union personnel who are not qualified to interpret them without any consideration of whether the disclosure would invade the examinees' privacy or result in a risk of psychological harm.

C. Requiring the Psychologist to Disclose A Client's Test Scores and Test Papers Breaches the Confidential Relationship Established with the Client and Violates the Psychologist's Code of Ethics.

Not only did the NLRB and the Court of Appeals ignore the interest of the tested employees, but they also disregarded the professional responsibilities of the psychologist. Disclosure of the test scores and papers to the Union requires that psychologists breach the confidential relationships established with their clients. Denying confidentiality of the relationship has the potential to destroy not only the trust the examinees placed in the psychologist, but also public trust in psychologists generally. The court's decision may well force psychologists to refrain entirely from

keeping records in order to preserve their clients' privacy and the integrity of the relationship,[23] resulting in inferior service to their clients.

Moreover, the court's order is in direct conflict with the psychologists' ethical standards[24] and state licensing laws,[25] including Michigan's,[26] which incorporate those standards. The *Ethical Standards of Psychologists* promulgated by the American Psychological Association were designed expressly to assure confidentiality and protect the privacy of those served by psychologists.[27] The denial of these interests would, in the words of Principle 3 of the *Ethical Standards*, "reduce the trust in psychologists held by the general public." Only if the integrity of these standards is respected by the courts can they continue to serve as guidelines to the practicing psychologist and a force for ethical treatment of the public. The Court of Appeals' order profoundly discourages the enforcement of ethical standards for psychologists.

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[23] *See* Slovenko, R., *Psychotherapy, Confidentiality, and Privileged Communication*, 116 (1966):

> "[T]he best protection that can be ensured to the patient is the exercise of extreme caution in writing records. . . . Incomplete clinical records, of course, are not scientifically desirable, but the therapist is in the unfortunate position of having to choose between keeping incomplete records or no records at all, or, on the other hand, of subjecting his patient to the possibility of having his most intimate confidences revealed. . . ."

[24] American Pschological Association, *Ethical Standards of Psychologists* (1977 Revision).

[25] *See* note 31, *infra*.

[26] Mich. Stat. Ann. § 14.677(1)(b) (Cum. Supp. 1975).

[27] During the period 1970 through 1976, APA's committee on ethics took punitive action, ranging from censure to expulsion, against seven psychologists for violation of the code's requirement that client communications be kept strictly confidential.

The Ethical Standards place upon the psychologist a "primary obligation" to safeguard "information about an individual that has been obtained . . . in the course of . . . teaching, practice or investigation . . . ." Preamble to Principle 5. The court's decision to order disclosure of the matched test scores to the Union directly contravenes this confidentiality standard. The order totally ignores the psychologist's efforts to assure "the dignity and worth of the individual and honor the preservation and protection of fundamental human rights." Preamble to *Ethical Standards of Psychologists.*

Further, the *Ethical Standards* specifically safeguard the individual's test scores by directing that psychologists "strive to insure that the test results and their interpretation are not misused by others." Principle 8c. According to the *Standards for Educational and Psychological Tests*, a companion document to the *Ethical Standards of Psychologists*, "[t]est scores should ordinarily be reported only to people who are qualified to interpret them."[28] Neither the Union nor its members are qualified to interpret or use the scores properly. The Union's refusal to place the scores in the hands of a psychologist qualified to interpret them suggests to Amicus that the Union may in-

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[28] American Psychological Association, *Standards for Educational and Psychological Tests*, J2. The comment to Standard J2 recognizes that "curious peers should not have access" to test scores. While Amicus does not contend that the Union itself is a curious peer, its members would be considered such. Moreover, the Union has an incentive to publicize these scores. *See* note 15, *supra*. Further, the comment does not, as asssrted by the NLRB in its brief opposing the petition for a writ of certiorari, leave open the question "whether untrained people should be given test scores." Rather, the unanswered question involves whether untrained persons who must make a decision to admit or hire based on the tests should be given training necessary for the interpretation of scores or the interpretation. The Union was given the interpretation of the test scores; the training of a Union employee has never been an issue in this case.

deed intend to use the scores in a manner harmful to those tested. "Psychologists know that they bear a heavy social responsibility because their recommendations and professional actions may alter the lives of others." Principle 1e. Untrained Union officials may not appreciate the potential effect the improper use of test results may have on others.

The ethical standards make every effort to protect the privacy rights and integrity of the relationship not only by safeguarding dissemination of personal information to outsiders but also by regulating the psychologist's own use of the data. The psychologist may discuss a client's case only for professional purposes with persons having a particular concern with the case. Principle 5b. Written and oral reports must be made with "every effort . . . to avoid undue invasion of privacy," Principle 5b, and "clinical and other materials [may] be used in classroom teaching and writing only when the identity of the persons involved is adequately disguised." Principle 5c. The psychologist must also provide "for the maintenance of confidentiality in the retention and ultimate disposition of confidential records." Principle 5f.[29]

Finally, the court's order directly contravenes the psychologist's responsibility to inform the client of the limits of confidentiality. Principle 5d.[30] The decision of the

[29]To assure confidentiality, Dr. Roskind, Detroit Edison's psychologist, maintains the records in a locked file cabinet in his office. No one, other than professional psychologists, has access to the scores (A.83).

[30]The NLRB asserts in its brief opposing the petition for a writ of certiorari that "it is highly speculative that the Code of Ethics would in fact be breached by the Board's order" as the APA's contentions are based on violation of the court's restrictions by the Union. While the Board and the Court did place restrictions on the Union's use of the test battery itself, neither the Board nor the Court of Appeals restricted the Union's use of the test scores and papers.

Court of Appeals requires the psychologist to violate this principle and to repudiate the assurances of confidentiality given to the employees prior to their taking the tests.

If the Court of Appeals' decision is not reversed, psychologists will be forced to give a disclaimer of confidentiality when testing clients. Such a disclaimer could result in employees foregoing the opportunity of job advancement in fear that their test papers and scores will become the subject of public knowledge and comment. Those who take the test will do so without the candor necessary for valid testing.

Requiring Detroit Edison psychologists to breach professional confidences places them in a crossfire of conflicting demands. The Court of Appeals demands disclosure while the psychologists' professional ethics and obligations require confidentiality. The Union has asserted no justification to compel such a result.

The *Ethical Standards* of the APA govern not only the conduct of APA's members but also that of many nonmember psychologists since over thirty states, including Michigan, require compliance with the APA *Ethical Standards* by licensed psychologists.[31] Psychologists who violate

[31]*See* Ala. Code tit. 34, § 26-3 (1975); Ark. Stat. Ann. § 72-1517 (1957); Conn. Gen. Stat. § 20-186 (1977); Del. Code Ann. tit. 24, § 3513(a)(8) (1974); D.C. Code Ann. § 2-491(e) (1973); Ga. Code Ann. § 84-3105 (1975); Idaho Code § 54-2305(b)(1) (Supp. 1977); Ill. Ann. Stat. ch. 91-½, § 415(7) (1966 & Supp. 1978); Ind. Code Ann. § 25-33-1-3(h) (1974 & Supp. 1977); Iowa Code Ann. § 147.76 (Supp. 1977); Kan. Stat. § 74-5308(a) (1972); Ky. Rev. Stat. § 319.081 (1978); Me. Rev. Stat. tit. 32, §§ 3816, 3837 (1977); Md. Ann. Code, art. 43, § 627 (1971); Mass. Ann. Laws ch. 112, § 119(d) (Michie/Law. Co-op. 1975); Mich. Comp. Laws Ann. § 338.1001(b) (1976); Minn. Stat. § 148.98 (1976); Miss. Code Ann. § 73-31-21(a)(1) (1972); Mont. Rev. Codes Ann. § 66-3209(1)(d) (Supp. 1977); Neb. Rev. Stat. § 71-3807 (1976); N.J. Stat. Ann. § 45:14B-24(e) (West 1978); N.C. Gen. Stat. § 90-270.15(a)(4) (1975 & Supp. 1977); N.D. Cen. Code § 43-32-27(7) (Supp. 1977); Okla. Stat. tit. 59, § 1261 (1971); Or. Rev. Stat. § 675.110(10) (1977); S.

the standards are subject to suspension or revocation of their licenses.[32] Disclosure of test scores and papers violating the official standards could subject the psychologist to such discipline.[33]

The failure of the Board and the Court of Appeals to consider the interests of the employees and the psychologists must be corrected. "The material which the company did furnish to the union was . . . sufficient to permit the union to process adequately the grievance pending before the Arbitrator, or to perform its duties under the collective bargaining agreement." (P.A. 11a) (Judge Weick, dissenting).

Moreover, the court's and Board's total rejection of the interests of the psychologist and the employee was not limited to the context of industrial psychological aptitude testing for employment promotions. The court has placed the interests of psychologists and tested employees in a totally subservient position to the naked claim of the Union for information. It is evident that any disclosure of con-

Code § 40-56-60 (1976); S. D. Codified Laws Ann. §§ 36-27-27, 36-27-38(6) (1977); Tenn. Code Ann. §§ 63-1118, 63-1119 (1976); Tex. Rev. Civ. Stat. Ann. art. 4512C(8)(a) (Vernon 1976); Utah Code Ann. § 358-25-11(10) (1974 & Supp. 1977); W. Va. Code § 30-21-6-(a)(3) (1976). *See also* the following states which have patterned their codes of ethics after the APA *Ethical Standards:* Colo. Rev. Stat. § 12-43-104(3)(a) (1973); Haw. Rev. Stat. 465-6(4) (1967); Mo. Rev. Stat. § 337.035(1)(4) (Supp. 1978); N.M. Stat. Ann. §67-30-5(B)(1) (1974); Pa. Stat. Ann. tit. 63, § 1205(2) (Supp. 1977); Wis. Stat. Ann. § 455.08 (1974).

[32]*See* Mich. Stat. Ann. § 14.677(10)(6) (Cum. Supp. 1975).

[33]Amicus does not assert that the State of Michigan or the APA would discipline Dr. Roskind, Detroit Edison's industrial psychologist, for disclosing the test scores or papers pursuant to the court's order. However, the fact that Michigan and the APA would not place Dr. Roskind in such an untenable position in no way justifies the fact that the court's order does violence to the ethical standards and the licensing laws of Michigan.

fidential and private communications between an industrial psychologist and his clients could be ordered based upon such a precedent. By refusing to recognize any confidential relationship between the industrial psychologist and the tested employee, the court has threatened every aspect of the confidentiality of that relationship — whether involving psychological testing or counseling at a school, in an institution, at work, or in private psychotherapy.

II. DISCLOSURE TO THE UNION OF PSYCHOLOGICAL APTITUDE TESTS WILL DESTROY THE VALIDITY OF THE TESTS AND RESULT IN VOIDING OBJECTIVE AND NONDISCRIMINATORY EMPLOYEE SELECTION PROCEDURES

The decision of the Court of Appeals, requiring a professional psychologist to provide directly to the Union a standardized, validated test battery, poses a substantial threat to the continued use of objective, nondiscriminatory employee selection devices, such as validated psychological aptitude tests. The Court of Appeals' decision is directly at odds with the nondiscriminatory employee selection procedures mandated by Title VII, 42 U.S.C. §§ 2000e, *et seq.*, Executive Order 11246, and the guidelines issued pursuant thereto by federal agencies charged with enforcement of equal employment laws and orders.

The use of psychological aptitude tests for employment purposes has become widespread in the United States both in the private and public sectors. Its usefulness as an aid toward objective and nondiscriminatory selection of employees has been demonstrated in several surveys,[34] in-

[34]*See, e.g.*, Personnel Policies Forum in September, 1976 (PPF Survey #114, p. 1 (BNA, 1976)).

cluding a study conducted by the United States Civil Service Commission.[35]

With the increasingly widespread use of such tests, APA has adopted guidelines to insure the validity and fairness of those tests. Thus, the *Ethical Standards of Psychologists* promulgated by the Amicus and binding on all APA members, as well as on many nonmembers through incorporation in state licensing laws,[36] establishes standards for test administration, including procedures for test security.[37]

Further, APA, in conjunction with the American Educational Research Association and the National Council on Measurement in Education, has developed *Standards for Educational and Psychological Tests.*[38] The *Standards* have been developed to aid in assuring reliability and validity of testing by the psychological profession and in part to assure that psychological testing conforms with the requirement of Title VII and other fair employment practice laws that employee testing be nondiscriminatory. The *Standards* set forth with specificity the measures that must must be taken to provide evidence of testing reliability and validity. *See Standards* at 25-55. In order to protect test validity, the *Standards* require that "the test user share

[35]Status of Test Usage in FY 77, Test Services Section, Personnel Research and Development Center, United States Civil Service Commission (Dec. 1977).

[36]*See* statutes cited at note 31, *supra.*

[37]Principle 8 states in pertinent part that "test users avoid imparting unnecessary information which would compromise test security, but they provide requested information that explains the basis for decisions that may adversely affect that person . . . ." American Psychological Association, *Ethical Standards of Psychologists 6 (1977* Rev.).

[38]American Psychological Association, *Standards for Educational and Psychological Tests* (1974).

with the test developer or distributor a responsibility for maintaining test security." *Standards* at 67.[39] In the accompanying comment the rationale for test security is made clear:

> "In many cases, however, prior knowledge of test items or scoring procedures could destroy validity . . . security may be compromised where examinees have had much prior experience with a public test, have been taught specific test items or have heard a lot about the test."

Standards at 67.

The Court of Appeals, in enforcing the Board's order requiring full disclosure of the test battery to the Union, failed to consider either the interests of employers, or of professional psychologists in maintaining test security. As a result, professional psychologists are placed in the position of being required under court order to violate the *Ethical Standards* of the American Psychological Association which have been incorporated in the licensing laws of numerous states, including Michigan, as well as the *Standards for Educational and Psychological Tests,* by making available to the Union a test battery which it does not have the necessary skills or knowledge to use. Both the Board and the Court of Appeals arbitrarily refused to consider the logical alternative: to provide the test battery to a qualified psychologist of the Union's choosing for review.

If this Court does not reverse the order below, the test battery which has been validated on three separate occasions will be distributed to persons without responsibility to secure the tests. The likely consequence of disclosure to

[39]*See also* American Psychological Association, *Principles for the Validation and Use of Personnel Selection Procedures,* published by the Division of Industrial-Organizational Psychologists (1975). These principles similarly require that the psychologist or other test user be responsible for maintaining test securitty. *Id.* at *15.*

lay persons, particularly to those who may in the future take the test battery, may well be to destroy the validity of the battery which necessarily depends on the naivete of the test taker.

Since the passage of the 1964 Civil Rights Act, 42 U.S.C. §§ 2000e, *et seq.*, a major objective in the use of psychological tests for employee selection has been to ensure that such tests are nondiscriminatory. By requiring disclosure of a validated test battery to a union representative, the Board and the Court of Appeals totally ignored the requirements of Title VII and the guidelines which have been issued by various enforcing agencies to ensure objectivity and nondiscrimination in employee selection procedures.

In guidelines issued by three of the agencies responsible for overseeing compliance with Title VII and related executive orders, the requirements of test validity and security have been recognized and the standards developed by the Amicus specifically incorporated.[40] The guidelines require that tests be validated pursuant to standards consistent with generally accpeted professional standards such as those developed by the APA in the *Standards for Educational and Psychological Tests.*[41]

[40] *See, e.g.*, 29 C.F.R. § 1607.5(a) (Equal Employment Opportunity Commission); 28 C.F.R. § 50.14 (Department of Justice); 41 C.F.R. § 60-3.5 (Office of Federal Contract Compliance).

[41] *Id.* Further, the four federal government agencies charged with enforcement of fair employment practice laws, EEOC, Civil Service Commission, Department of Justice, and Department of Labor, recently proposed Uniform Guidelines on Employee Selection Procedures. 42 FED. REG. 65,542 (December 30, 1977). The proposed guidelines require test users to demonstrate validity of the tests, consistent with generally accepted professional standards "such as those described in the Standards for Educational and Psychological Tests," 42 FED. REG. § 5C, at 65,544, and provide for test security, 42 FED. REG. § 12, at 65,546.

On at least three separate occasions, this Court has recognized the importance of test validation to the enforcement of Title VII and similar laws. In the first case in which this Court considered this issue, *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), the Court held that the guidelines of the EEOC on testing were entitled to great deference, 401 U.S. at 433-34, and that tests were to be sanctioned only when they provided a "reasonable measure of job performance." 401 U.S. at 436. The Court's mandate in *Griggs v. Duke Power* can be met only if tests are validated; the irresponsible disclosure ordered by the Board and the Court of Appeals would make validation impossible.

In a second case, *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975), the Court reemphasized the deference to be given to EEOC's testing guidelines. The Court specifically noted that "these guidelines draw upon and make reference to professional standards of test validation established by the American Psychological Association." 405 U.S. at 431. Further, the Court made clear that tests used for selection and promotion of employees were to be judged by whether they comported with the guidelines for validation set forth by the Amicus. *See also Washington v. Davis*, 426 U.S. 229, 247 & n.13, 251 & n.17 (1976); *Kirkland v. New York St. Dept. of Correctional Serv.*, 520 F.2d 420, 426 (2d Cir. 1975), *cert. denied*, 429 U.S. 823 (1976).

The Court of Appeals for the Second Circuit, when faced with an issue similar to that addressed by the Board and the Court of Appeals in this case, recognized the importance of test security and the prejudice to future test takers if tests were disseminated to future examinees. In *Kirkland v. New York St. Dept. of Correctional Serv., supra*, 520 F.2d 420, a race discrimination case, the Second Circuit overturned that part of a district court's order requiring the defendant to make available for plaintiffs' review a new promotion

test. 520 F.2d 427, 431. The Court of Appeals in *Kirkland* recognized that tests, to be sanctioned as objective and nondiscriminatory, must be validated in accordance with EEOC guidelines and specifically addressed and upheld the need for test security:

> "The District Court ordered that the new test prepared by defendants be submitted to the plaintiffs for review. We find this requirement difficult to comprehend. Presumably, this examination will be taken by members of the plaintiff class in competition with others. Permitting advance review by plaintiffs would place all others at a competitive disadvantage. If the District Judge is seeking professional assistance from plaintiff's expert, his order should so provide; and proper steps should be taken to insure confidentiality."

520 F.2d at 427.

Unlike the Board and the Court of Appeals in this case, the court in *Kirkland* reached an equitable balance by holding that if tests are to be provided to adverse parties, they should be disclosed only through the agency of an expert professional psychologist. As this Court and the Sixth Circuit have recognized, the National Labor Relations Board should seek to acknowledge and accommodate all legitimate interests involved in a proceeding before it. *See, e.g., National Labor Relations Board v. Truitt Mfg. Co.*, 351 U.S. 149, 153-54 (1956); *Kroger Co. v. NLRB*, 399 F.2d 455, 457 (6th Cir. 1968).

Even before passage of Title VII, the General Counsel of the Board refused to find a violation of the National Labor Relations Act, 29 U.S.C. §§ 151, *et seq.*, by an employer for refusing to disclose copies of psychological test questions to a union. In that case, as here, the company had explained to the Board that advance inspection would allow the con-

the usefulness of the test." NLRB G. C. Adm. Rul. No. SR-657, 46 L.R.R.M. 1387, 1388 (1960). *See also* NLRB G. C. Adm. Rul. No. SR-477, 46 L.R.R.M. 1252 (1960).

Detroit Edison has offered to provide the test battery, which is in the possession of psychologists professionally obligated to guard its security, to a qualified psychologist of the Union's choosing. Clearly this would accommodate the interests of the Company, the Union, professional psychologists, and future examinees. At the same time, it would balance the mandate of the National Labor Relations Board to insure informed collective bargaining with the equally significant mandate of Title VII and the professional standards of psychologists to insure objective and nondiscriminatory employee selection procedures. *See, e.g., National Labor Relations Board v. Truitt Mfg. Co.*, 351 U.S. 149 (1956); *Kroger Co. v. NLRB*, 399 F.2d 455, 457 (6th Cir. 1968).

CONCLUSION

Amicus American Psychological Association respectfully submits that for the above stated reasons this Court should reverse the decision of the United States Court of Appeals.

Respectfully submitted,

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Test Security

Official Position Statement of the National Academy of Neuropsychology

Approved 10/5/99

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

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

Threats to test security by release of test data to non-psychologists are significant. Formal research (Coleman, Rapport, Millis, Ricker, & Farchione, 1998; Wetter & Corri-

The Policy and Planning committee wishes to acknowledge the important contribution of Mr. John Craver for his careful analysis and helpful comments on this project.

Exhibit 5

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

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

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

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APPENDIX: HANDLING REQUESTS TO RELEASE TEST DATA, RECORDING AND/OR REPRODUCTIONS OF TEST DATA

Please note that these are general guidelines that may not apply to your specific jurisdiction. It is recommended that all psychologists seek advice from personal counsel to determine if these guidelines are appropriate for their specific jurisdiction.

1. Is the request in written form?
   If ***yes***, go on to 2.
   If ***no***, ask that the request be placed in written format.
2. Do you have a signed release from a competent patient?
   If ***yes***, go on to 3.
   If ***no***, obtain a signed release from the patient or, if the patient is not competent, from his or her legal guardian. (If competency is uncertain, e.g., the patient has deteriorated or competency has not been determined, an alternate course of action will be necessitated, e.g., contact the person who made the request and indicate you are not certain if the patient meets requirements to sign a release.)
3. Is the material to be released to a professional qualified to interpret the test data?
   If ***yes***, go to 4.
   If ***no***, go to 5.
4. Has the request included an assurance that test security will be maintained?
   If ***yes***, release the material.
   If ***no***, especially in certain circumstances (e.g., the psychologist is not known to you, litigation is ongoing), it may be prudent to ask for written assurance that test security will be maintained. The statement might indicate something like the following, "I agree to protect the test materials in accordance with the principles set forth in the APA Ethical Principles."
5. Is the request in the form of a subpoena (*not* a court order)?
   If ***yes***, respond in a timely fashion by indicating that complying with the request to release test data under these circumstances places the psychologist in conflict with professional practice guides and ethical principles and places him/her at risk for serious professional sanctions due to the need to maintain test security. Sections of the "APA Ethical Principles" and/or of the NAN Test Security Position Statement can be provided. The need to protect test security can be explained, and proposed solutions can be presented such as release to a qualified professional who agrees to maintain test security. If this is not satisfactory, alternative arrangements can be proposed; for example, all parties given access to test data

can assent to enter into a written agreement that contains the elements for protection of test materials. Alternatively, the suggestion can be made that a court order be issued containing these elements, at which time the data will be released.
If ***no***, go on to 6.

6. Is the request in the form of a *court order* (i.e., signed by a judge)?
   If ***yes***, go to 7.
   If ***no***, the request should fall under one of the previously listed categories (e.g., an informal request, a subpoena), and the reader should consult that section.
7. Does the court order contain adequate provisions for maintaining test security?
   If ***yes***, release the material
   If ***no***, go to 8.
8. Does the court order require release to an unqualified individual?
   If ***yes***, go to 9.
   If ***no***, go to 10.
9. Court orders are expected to be obeyed in a timely fashion and failure to do so can place the professional in direct conflict with the law and at risk for serious penalties (e.g., award of attorney fees, contempt orders). If the court order does not appear to maintain adequate test security because it instructs release to a non-psychologist, possible options include:
   a. Respond to the court by immediately releasing the data, but at the same time request that appropriate safeguards be put in place to maintain test security. For example, the need to maintain test security might be, briefly described, the NAN Statement and/or sections of the APA Ethical Principles might be provided, and the following arrangements requested:
      "I would ask that the test materials not be circulated beyond those directly involved in the case, that no unauthorized copies or reproductions be made, that the presentation of the test materials in the courtroom be minimized to the extent possible, that exhibits and courtroom records containing test materials be protected or sealed, and that all test materials be destroyed or returned upon the completion of the case".
   b. Seek personal counsel immediately from an attorney licensed within your jurisdiction, and, if counsel deems it appropriate, inform the court that the request to release test data creates a potential problem. A solution to the problem can be proposed as in 9.a. above.
10. Court orders are expected to be obeyed in a timely fashion and failure to do so can place the professional in direct conflict with the law and at risk for serious penalties (e.g., award of attorney fees, contempt orders). If the court order commands release to a qualified professional and contains adequate provisions for maintaining test security, release the material. If adequate provisions are not contained the same type of suggestions described under 9.a. or 9.b. can be presented. It is not recommended that you disobey a court order without seeking advice of personal counsel licensed within your jurisdiction.