

# The Release of Psychological Data to Nonexperts: Ethical and Legal Considerations

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Psychologists are often requested to provide "raw" psychological data (scores, test stimuli, client or patient responses) to nonexperts, especially in personal injury litigation cases in which there may be a court order or subpoena for such information. The new Ethical Principles of the American Psychological Association prohibit the release of raw test results and data to unqualified persons; hence, requests from judges and attorneys frequently place the psychologist in a conflict in which legal and ethical considerations point in opposite directions. In this article, ethical and legal issues regarding this conflict are discussed, particularly the manner in which the new APA Ethical Principles speak to the salient considerations. A course of action is recommended for sharing raw data whereby the psychologist can conform to the spirit of legal considerations while remaining in compliance with the Ethical Principles.

Practitioner psychologists, especially those in the fields of clinical and counseling psychology and clinical neuropsychology, are often asked to provide "raw" psychological data to other parties. The sharing of such data, particularly with non-expert persons outside the field of psychology (e.g., attorneys, judges, laypersons), has been a controversial issue. The matter has a number of complex ethical and legal considerations, with far-reaching consequences for many components of psychological work. In the field of clinical neuropsychology in particular, such issues are encountered frequently, especially in the context of the increasing number of personal injury litigation cases in which brain injury is a principal claim of the plaintiff.

The purpose here is to discuss ethical and legal considerations pertaining to the release of raw psychological data, in the context of the new Ethical Principles of Psychologists and Code of Conduct (hereinafter, the Ethical Principles) recently approved by the American Psychological Association (APA, 1992). The guidelines provided in the new Ethical Principles are more clear and specific than those available previously, enabling psychologists to take a more definitive position on the issue of whether or not to share raw psychological data with others. In the comments that follow, the principles that speak directly to this and related issues have been highlighted. Also discussed are several pertinent legal precedents. The analysis is aimed at help-

ing to shape a viable course of action that psychologists might follow with regard to the release of raw psychological data.

It should be noted that the issues discussed herein, particularly those concerning matters of ethics, do not necessarily apply to all practitioner psychologists. One reason for this is that requirements for licensure to practice psychology are not uniform across all 50 states in the U.S. Licensing regulations in many states require psychologists to practice in accord with the Ethical Principles, but this is not true of all states. Also, APA membership itself is voluntary, and although most practitioner psychologists belong to the APA (and thereby are behooved to practice in accord with the Ethical Principles), not all do, and those who do not belong have no obligation to comply with the APA ethics. Finally, although there is considerable commonality in the fundamental topic areas covered by licensing exams, licensure per se does not imply necessarily that a given psychologist will have obtained a certain level of competency in a given content area. In the discussion below, it is assumed that psychologists (a) are APA members, (b) are licensed in such a way that adherence to the Ethical Principles is mandatory, and (c) have passed a written licensing examination in which basic content areas including reliability and validity, test construction, and psychological appraisal, were covered by the examination.<sup>1</sup>

## A Definition of Raw Psychological Data

What are raw psychological data? In keeping with the Ethical Principles, and following distinctions proposed by Matarazzo (1990) regarding the nature of psychological assessment and psychological testing, several different types of psychological information can be distinguished:

<sup>1</sup> In most states, licensing examinations cover the following areas: school, developmental, and community psychology; statistics; research design; test construction; neuropsychology; perception; cognition; history and systems; learning; personality, clinical, and abnormal psychology; group processes; behavior therapy; psychopharmacology; psychological assessment; industrial/organizational psychology; social psychology; ethics.

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1. Written reports, in which the psychologist typically summarizes the history, test findings, and other pertinent data, and then presents conclusions, diagnoses, and perhaps recommendations and predictions.

2. Notes, which generally include the handwritten information recorded by a psychologist in the course of interviewing, observing, and testing a client or patient.

3. Scores, typically numerical, which can be raw (e.g., the number of items answered correctly on a test) or standardized (e.g., IQ scores, percentile scores).

4. Test stimuli, which are the actual items used by the psychologist to elicit responses from the client or patient that form the basis for determining levels of cognitive and behavioral function.

5. Responses (i.e., the actual verbal, written, or other responses generated by the client/patient to test stimuli).

6. Test manuals, which typically comprise, in addition to the test stimuli, information regarding how the test was constructed, its reliability and validity, normative data, appropriate applications, and detailed instructions for administration.

### Sharing Raw Psychological Data With Others

When a client or patient places his or her mental or emotional condition into litigation, this produces a waiver of privilege, and all pertinent information is “discoverable” by both sides of the case.<sup>2</sup> Given that the privilege has been waived, there is usually no great concern regarding the sharing of written reports and summaries among different parties involved in a case. It is also generally accepted that notes, which are usually not considered to constitute raw data or results, may be shared among different parties in a case. (See the subsection *Recording Psychological Information* later in this article for further discussion of this issue.)

A much different situation obtains, however, when it comes to the types of information defined in 3 to 6 above (viz., test scores, stimuli, responses, and manuals). The test scores, stimuli, and responses compose what is commonly known as raw psychological data, raw test results, or simply raw data.<sup>3</sup> At the center of the problem is the fact that there is a direct conflict between law and ethics when it comes to the release of raw psychological data. The law says one thing (“Provide the data”); the ethics code says the opposite (“Do not provide the data”). Detailed below is a discussion of pertinent issues regarding this problem and a recommended course of action for resolving such a conflict.

### Preventing Misuse of Psychological Data

The new Ethical Principles, which went into effect officially on December 1, 1992, state the following in Ethical Standard 2.02(b):

Psychologists refrain from misuse of assessment techniques, interventions, results, and interpretations and take reasonable steps to prevent others from misusing the information these techniques provide. This includes refraining from releasing raw test results or raw data to persons, other than to patients or clients as appropriate, who are not qualified to use such information.

It is clear that the APA has taken a position against the release

of raw data to unqualified persons. There are two main reasons behind this, both of which pertain directly to several standards explicated in the new Ethical Principles (e.g., Sections 2.02, 2.06, 2.10).

*Potential misuse.* Release of raw data creates numerous potentialities for misuse. For example, laypersons lack an appreciation of the context in which psychological test stimuli are administered and may reach erroneous conclusions about the meaning of individual answers. When this occurs, for example, in a courtroom, by lawyers, judges, and jurors, the ramifications of the errors may be great.

By way of example, consider the following scenario. An attorney for the defense has obtained all the raw data from a neuropsychologist in a case in which a plaintiff is claiming permanent cognitive disability from a brain injury. In the courtroom, the attorney attempts to convince the jury that the plaintiff cannot possibly be suffering the extent of memory impairment claimed, because the plaintiff was able to complete several difficult items on a test of nonverbal memory. The attorney also points out that the items the plaintiff failed are so difficult that it would be unreasonable to expect any normal person to pass them. This line of arguing, perhaps accompanied by exhibits depicting the “difficult” memory items that the patient passed, may be quite compelling to laypersons. In all likelihood, however, the attorney and other nonexperts in this situation do not appreciate several fundamental and critical components of the assessment process. Most tests, for example, include both easy and difficult items, and most tests include very difficult items in order to avoid ceiling effects. Also, the testing process is usually arranged so that even a very impaired person can pass some items in order to form the right “set” and to have “success” experiences. Thus, analysis of individual items taken out of context can be quite misleading. Add the likelihood that laypersons have limited understanding of how factors such as age, gender, and educational background may play a role in performance on the test, and one is left with a potentially extremely misleading depiction of the plaintiff’s abilities.

*Raw data may become part of the public domain.* Release of raw data may allow psychological test stimuli to become part of the public domain, the domain of information that is in principle accessible by virtually anyone. This opens up the possibility that test stimuli could be disseminated among the public, perhaps even widely. A potential consequence of this is that future test takers (i.e., persons receiving psychological tests) would not be naive. As one example, a particular individual may have studied all the questions on the Information subtest of the Wechsler Adult Intelligence Scale—Revised (WAIS-R; Wech-

<sup>2</sup> The discussion focuses on individuals who are capable and competent to enter litigation voluntarily, and in particular, on personal injury litigation cases. Not considered are situations involving minors, dependent persons, and other individuals who may be involved in litigation involuntarily (including child custody cases). Ethical and legal issues regarding the latter types of cases may be different from those discussed here.

<sup>3</sup> The current discussion focuses on raw data that are associated with psychological appraisal and assessment. Data collected in the context of research endeavors are covered by specific ethical principles (see Ethical Standard 6.).

sler, 1981). This would invalidate the test. Most psychological tests, particularly those used in measurement of intellect, memory, and other aspects of cognition, assume complete or near-complete naivete on the part of the client or patient. (Even in the case of practice effects, which refer to improvements in test performance attributable to prior exposure to the test and not to a change in ability level, it is assumed that all test exposures have occurred under standard, controlled conditions prescribed by the test instructions.) Psychologists cannot risk invalidating tests due to widespread dissemination among the public. It is unreasonable and impractical that psychologists would have to recreate tests on a frequent basis. This onus would not be in the best interests of anyone, including psychologists, attorneys, and clients or patients.

There are, of course, numerous published works that contain considerable detail regarding various psychological and neuropsychological tests (e.g., Lezak, 1983; Spreen & Strauss, 1991), many of which are readily available from bookstores, libraries, and publishers. It could be argued that much test information, including enumerations of actual test items, is already available in the public domain, rendering moot the point made just above concerning raw data in the public domain. There is a key difference, however, between reference books such as Lezak's and test protocols that contain a "raw" roster of test items (e.g., parts of the WAIS-R record form). In reference books, test items (typically a few illustrative examples, but occasionally an entire listing of all items on a test) are presented in the context of a discussion of pertinent background information (e.g., how the items are administered and scored, what mental capacities are measured by such items, and other relevant issues). By contrast, a "raw" record form contains no such context. Thus, although it may be possible to glean raw test items from reference books, there is at least some assurance that the items were presented with a qualifying discussion that would foster appropriate usage. Such assurance would be largely or entirely lacking in the case of test forms and protocols that contain no context or qualification.

The new APA Ethical Principles imply that raw data should only be released to another qualified individual (i.e., someone who is competent to interpret the data). A qualified individual is someone who, by virtue of his or her training and experience, is in a position to appreciate fully the meaning of raw data, including considerations of reliability and validity. In most cases, this will be a licensed psychologist who meets recognized standards of training and experience. In most states, licensure can be taken as evidence that the psychologist has acquired a minimum level of knowledge regarding pertinent issues of reliability and validity, test construction, and psychological appraisal. Licensure also indicates (again, in most states) that the psychologist is responsible for operating in accordance with the Ethical Principles.<sup>4</sup> For the types of raw data typically under consideration in personal injury litigation cases, such as raw test results from neuropsychological and psychological tests, the clearest example of a qualified recipient would be a licensed clinical psychologist or clinical neuropsychologist. In both fields, there are explicit criteria specifying the types of training, experience, and credentials that can be taken as evidence of competency (e.g., *The Clinical Neuropsychologist*, 1989).

Shapiro (1991) has written about the problems surrounding

the release of raw psychological data and how one should go about resolving the conflict between law and ethics (also see Stromberg, Lindberg, Mishkin, & Baker, 1993). Shapiro reasons very cogently that the only acceptable strategy is to release raw data only to another qualified individual. He points out that the "courts have essentially recognized the legitimacy of this demand, though none has commented on the specific practice" (p. 236). Shapiro goes on to cite legal precedent for this, including one case in which the court denied the claim that a psychiatrist could serve as a "qualified person" to receive raw psychological data. The court ruled that psychiatrists are not, without special training, qualified to interpret psychological tests.<sup>5</sup>

A comment should also be made here regarding the statement in the Ethical Principles that raw test results or raw data may be released to "patients or clients as appropriate." This wording does not imply that raw data should be released directly to clients or patients but rather that it is appropriate for a psychologist to explain and interpret the findings to the client or patient and provide other pertinent feedback. In many circumstances, it would be appropriate for the client or patient to have access to the written report authored by the psychologist. (The client or patient has a legal right to this report in virtually all situations.) But with regard to raw data, including raw test results, it is not advisable in most cases to provide clients or patients with meaningless or misleading test scores, stimuli, and responses. This topic is dealt with directly in Section 2.09 of the Ethical Principles. (The reader is also referred to a special section of *Psychological Assessment*, 1992, that deals with the topic of providing feedback to clients or patients.)

#### *A Recommended Course of Action for the Release of Raw Psychological Data*

The APA Ethical Principles prohibit the release of raw data to unqualified individuals, and with rare exception, attorneys are not qualified individuals. A viable course of action if an attorney should request raw data from a psychologist (A), would be to advise the attorney to engage the consultation of another psychologist (B), who is qualified, by virtue of licensure, training, and experience, to receive the data. Psychologist A then could send the raw data to Psychologist B (provided the client or patient has given appropriate consent). Psychologist B could then interpret the data to the attorney. Needless to say, Psychologist B must operate under the same rules and standards of ethics and confidentiality as Psychologist A.

By and large, attorneys and judges are reasonably understanding of the dilemma faced by psychologists regarding the sharing of raw data. When given an explanation about why psychologists are restricted from releasing raw data to unqualified persons, attorneys and judges tend to be amenable to the course of action recommended above. This explanation is likely to be

<sup>4</sup> Obviously licensure does not guarantee that such characteristics are extant; it does, however, serve as a useful minimal standard and reasonable starting point.

<sup>5</sup> There is an implication here that with special training, psychiatrists may be qualified to interpret psychological tests (and receive raw psychological data). This issue is discussed here in the section titled Other Considerations.

more effective, however, if the particular reasons are explained (e.g., that psychologists cannot afford to have test stimuli disseminated in the public domain; that raw data are difficult or impossible for a nonexpert to interpret), rather than simply citing the Ethical Principles that prohibit such release.

There may be instances in which attorneys will be quite insistent on receiving raw data and will go to considerable lengths to secure it. In the well-known series of books by Ziskin and Faust (1988; Faust et al., 1991), the authors recommend strongly that lawyers secure raw data from psychologists in all cases. Lawyers familiar with this series of books can be expected to make adamant requests for raw data. The principal aim of this strategy, though, is to have an opportunity to scrutinize the psychologist's work product for incorrect scoring, miscalculations, misuse of test manuals, and other errors that might be used by the opposing attorney to impugn the psychologist's competence. Obviously another psychologist would be in a much better position than the attorney to conduct such an analysis; thus, there would appear to be little justification for not following the course of action recommended above (i.e., insisting that the attorney secure the consultation of a qualified expert). In short, there is considerable precedent, legal and professional, for holding to the position that the raw data can only be sent to another qualified individual, and this course of action should be pursued unless there are unusually compelling reasons not to do so.

If a psychologist is served with a subpoena ordering the release of raw data, the psychologist should explain why she or he cannot comply with the request and recommend an alternative course of action (as detailed above). The explanation might be provided to the judge in the case, as well as to the attorneys. In some cases, psychologists may want to consult legal counsel of their own, which will help clarify the particular legal considerations of the matter. Psychologists may be intimidated by being served a subpoena; legal counsel and full understanding of the operative contingencies are usually quite reassuring. Psychologists need not automatically translate the serving of a subpoena into prompt acquiescence to legal demands without regard for the ethics of the situation. One additional point that psychologists should understand is that a subpoena can be resisted (e.g., through a "motion to quash"). A court order, by contrast, cannot be legally resisted (only appealed). If a psychologist is given a court order to produce raw data, manuals, and so on, the psychologist should take immediate steps to clarify for the court the ethical dilemma this creates. In such situations, psychologists are strongly encouraged to seek their own legal counsel.

### *Recording Psychological Information*

Another topic relevant to the current discussion pertains to the manner in which information is recorded in the course of psychological assessment and test administration. The new Ethical Principles (Section 1.23(b)) state the following:

When psychologists have reason to believe that records of their professional services will be used in legal proceedings involving recipients of or participants in their work, they have a responsibility to create and maintain documentation in the kind of detail and quality that would be consistent with reasonable scrutiny in an adjudicative forum.

This standard has important implications for the types of

notes that are recorded for a particular client or patient. Obviously one intent is to ensure that psychologists will record information in a manner that allows subsequent accurate reconstruction; that is, the recording should be complete, accurate, and legible.

There is another aspect of this standard, however, that also merits careful consideration. It is common for attorneys to request the handwritten notes from a patient's file, even if the raw data (test scores, stimuli, and responses) are allowed to remain confidential. With this in mind, and given the position that notes are probably not subsumed under the rubric of raw data, a psychologist should be cautious about writing things down on paper that might later be used in a legal proceeding. For example, the jotting down of initial impressions or judgmental observations must be done in a circumspect fashion, with thoughtful consideration of how such statements might later be used, perhaps out of context, to the detriment of the patient or psychologist. Notes should never comprise unsupportable judgments or pejorative descriptors.

### Test Manuals

An attorney or the court will occasionally request the test manuals on which the psychologist relied to score and interpret psychological tests. The considerations here are much the same as those that pertain to the release of other raw psychological data—test manuals should not be released to unqualified persons. Several portions of the Ethical Principles speak to this issue:

Psychologists do not promote the use of psychological assessment techniques by unqualified persons. (2.06)

Psychologists make reasonable efforts to maintain the integrity and security of tests and other assessment techniques consistent with law, contractual obligations, and in a manner that permits compliance with the requirements of this Ethics Code. (2.10)

Standard 2.02(b), quoted above, also speaks to this issue. Test manuals contain data and information that are part of a specialized discipline (e.g., psychological appraisal, neuropsychological assessment). It is simply not permissible for a layperson (unqualified individual) to attempt to use such information. Use and dissemination of such information by an unqualified person could reduce or vitiate entirely the value of the tests. Many manuals are distributed by reputable test publishers, who require evidence of purchaser qualification (e.g., a license to practice psychology) before selling such manuals. If publishers fail to respect such guidelines and engage in practices that would be considered a violation of law and APA Ethics, this matter should be brought to the attention of the APA. Ziskin and Faust (1988) recommend that lawyers hire an expert consultant to deal with the types of information that are part of test manuals.

If a psychologist receives a court order or subpoena for test manuals, the psychologist might consider one of the following courses of action: (a) The psychologist could request to provide the test manuals in person, in a situation in which the psychologist could explain appropriately various qualifications, limitations, and other important contextual information; or (b) the psychologist could ask the requestor to retain an expert (e.g.,

licensed psychologist) who would be qualified to interpret the test manuals. The manuals could then be provided to that expert.

### Test Scores

As mentioned above, test scores, both raw and standardized, constitute yet another domain of psychological information that may be requested for release. When the requestor is a qualified person (i.e., a licensed psychologist), there is no problem in releasing the scores. In fact, in many cases it is actually the scores (rather than the test forms, responses, etc.) in which the requesting psychologist is most interested (e.g., for purposes of comparing performances across time). There are a few other special situations, such as in the determination of disability by social security officials or in a worker's compensation claim, in which it may be permissible to release test scores. These agencies often have employees with special expertise in the interpretation of psychological data (especially IQ scores). Provided the psychologist is confident the test scores will be used appropriately, it is reasonable in these situations to provide requested test scores (assuming the client or patient has given appropriate consent).

For unqualified persons, the matter of releasing test scores should be treated in the same way as the release of other raw psychological data. That is, psychologists should refrain from releasing scores to unqualified individuals, and if asked for such information by attorneys or other nonexperts, psychologists should follow a course of action along the lines elaborated here earlier under the heading *A Recommended Course of Action for the Release of Raw Psychological Data*.

A few other considerations pertaining to test scores warrant mention. As noted earlier, two types of test scores can be specified—raw and standardized. Raw scores (e.g., the fact that a patient earned a score of "6" items correct on a test) are often uninterpretable to nonexperts, which may more or less preclude opportunities for misuse. However, this should not justify the release of such scores to unqualified persons, because the psychologist has no way of assuring that even apparently uninterpretable raw scores would not eventually be used inappropriately. Standardized scores, including IQs and percentiles, clearly fall under the domain of raw psychological information that should not be released to unqualified persons. These scores, unlike raw test scores, are often open to possible "interpretation" by nonexperts. For instance, an attorney may conclude that an IQ score of 100 indicates intact intelligence, when in fact it could indicate a major impairment if the patient's premorbid intelligence had been in the superior range. The nonexpert cannot be expected to appreciate critical considerations such as standard error of measurement, the nature of the underlying distribution of scores, the importance of background information for determining whether the observed score differs or not from the expected score, and numerous other factors.

Another consideration regarding test scores is the question of whether such scores should be included in the text of a psychological report. As discussed earlier, reports are generally shared rather freely among various parties in a case, including nonexperts. Obviously if test scores are included in reports, the scores will be shared along with the reports. This has the potential of creating opportunities for misuse. Some scores are especially

vulnerable in this regard, and considerable care should be taken by a psychologist in deciding whether or not to include them in narrative reports. For example, IQ scores have a great deal of connotative value for most persons, experts and laypersons alike; however, the meaning can vary widely from one individual to the next, and may in many cases fail to reflect accurately the intended meaning. Hence, the inclusion of IQ scores in reports should be done only with careful consideration of the consequences. As a general policy, test scores should be included in narrative reports only when the psychologist is confident that such inclusion is in the best interests of the client or patient and that those scores will not be subject to misuse.

### Other Considerations

Determination of the qualifications of a requesting party (or the party named as the intended recipient of raw data) are the responsibility of the psychologist from whom the data are being requested. It is recommended that if a psychologist is unsure of the credentials of an intended recipient, the psychologist should request evidence on which a judgment regarding competency can be made. In most cases, the curriculum vitae (CV) of the intended recipient would provide such evidence.

When an intended recipient is a licensed psychologist with specific training in psychological assessment (or neuropsychological assessment, if pertinent), there is little difficulty in establishing that person's competence. In some cases, however, it may be hard to judge the competency of an intended recipient, especially persons such as nonlicensed psychologists, psychologists in nonclinical fields, social workers, and physicians working in neurology or psychiatry. Consultation with one's colleagues in such cases would probably help to judge the appropriateness of raw data release. The case of a psychiatrist can be especially hard to appraise, because psychiatrists are often trained in some of the same assessment procedures as are psychologists (especially personality measures). There is no black-and-white standard for deciding whether such persons are or are not "qualified"—each case must be dealt with on its own merits. Inspection of the psychiatrist's CV will usually help decide, and if the psychologist is confident that the psychiatrist has appropriate expertise with regard to a particular assessment procedure, test, and so on, then there is little justification for withholding raw data.

As alluded to above, the attitude or demeanor of the psychologist can influence substantially the degree of cooperation from members of the legal profession (lawyers, judges, etc.). When an attorney senses that the psychologist is trying to conceal something, or to resist cooperation, the attorney is likely to mount an all-out effort to get everything possible out of the psychologist. By contrast, if the attorney senses that the psychologist is attempting to cooperate fully with the spirit of the proceedings, within the bounds of his or her ethical principles, the attorney is far more likely to go along with the psychologist's recommended course of action. The Ethical Principles do not, in fact, have force of law; thus, it is very much in the best interest of psychologists to solicit cooperation and collegiality from attorneys.

### Concluding Comments

One cannot deal in this amount of space with all of the myriad considerations that obtain with regard to ethical and legal

issues surrounding the release of raw psychological data. Nonetheless, it can be noted that the new Ethical Principles are very helpful inasmuch as they contain clear and direct statements regarding some of the most frequent and problematic considerations. Several other pertinent references include the books written or edited by Blau (1984), Doerr and Carlin (1991), Dywan, Kaplan, and Pirozzolo (1991), Golden and Strider (1986), Sbordone (1991), and Weiner and Hess (1987). The book by Shapiro (1991) is particularly helpful. Finally, there is a considerable amount of relevant information regarding these issues, as well as other matters of forensic psychology and neuropsychology, in the series of books by Ziskin and Faust (1988; Faust & Ziskin, 1991).

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