Are Psychologists Hiding Evidence?

A Need for Reform

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Psychological claims have grown steadily in the last 20 years. Psychological claims include allegations of emotional distress, brain damage (neuropsychological deficits) and fear of future illness. A growing problem in these cases is the unwillingness of some psychologists to disclose their tests and test data to attorneys wishing to depose or cross-examine them.

Many psychologists produce their data promptly when asked to do so by litigating attorneys. Others refuse, claiming that it is unethical to disclose tests or test data to insurers, attorneys or jurors. **It is irresponsible for the courts to permit psychologists retained by parties in litigation to determine what is relevant for juries to review.** Doing so allows psychologists to displace the court. Without seeing the tests and test data, an attorney cannot possibly fully understand the methodology or the reasoning process used to draw conclusions from test data, and cannot possibly fully cross-examine the expert on the reliability and validity of the allegedly scientific methodology. Giving psychologists this power is not in the best interests of consumers and is against social policy.

To prevent psychologists from hiding and withholding evidence, there needs to be a generally accepted policy for temporary, controlled disclosure of tests and test data in court proceedings. These policies and procedures should be consistent with applicable law. Until psychologists are required to comply with a systematic protocol for handling test data, they will continue to mislead adjusters, judges and attorneys with contradictory and erroneous claims about what is ethical and legal. Is it ethical?

Psychologists who claim that the ethical code of psychologists prohibits disclosure of tests and raw test data to attorneys, judges and jurors are misinformed. There is no such prohibition anywhere in the ethical principles and code of conduct of psychologists and there never has been. On the contrary, in the currently applicable ethics for psychologists, set by the American Psychological Association (APA) in 1992, Ethical Standard 1.23(b) specifies that psychologists involved in legal proceedings have the responsibility to create and maintain documentation in detail, of sufficient quality to allow reasonable scrutiny in court proceedings. Competent psychologists know from the outset that their work will be scrutinized in the context of trial proceedings.

The claim that the ethics of the APA permit psychologists to release data only to other psychologists is equally inaccurate. The APA ethical standards explicitly say psychologists can release data to patients or clients as appropriate and they do not say psychologists can release it to other psychologists. The standards permit disclosure to persons who are "qualified to use" the information. However, there is no generally accepted agreement or guideline about who is qualified to use such information, and there is no generally accepted definition of what is meant by "use" the information, so psychologists are compelled to interpret this standard idiosyncratically and inconsistently. For example, if a psychologist claims an attorney is not qualified to use the data, one must ask, 'Who is better qualified than an attorney to use the data to cross-examine a psychologist?"

When Standard 2.02(b) is cited as a basis for not producing data for critical review, many questions arise. For example, why are patients or clients with far less education in general and far less relevant specialized education than adjusters, judges or attorneys considered "qualified" to use such information? And if psychologists can give the data to a patient or client, who is a plaintiff, then in effect they are giving it to the plaintiff attorney, but not the defense attorney. So, how can they claim to be unbiased?

Finally, if an attorney is the client, why would the psychologist not be able to release the data to the attorney, since 2.02(b) makes an exception of clients? Some opponents of disclosure argue that this last suggestion is inconsistent with the meaning and intent of the ethics code, arguing that what it says is not what it means. However, when asked to explain the correct interpretation and to respond to specific questions about this correct interpretation, psychologists produce inconsistent answers; there is no authoritative manual to which to refer for answers.

In some states, psychologists have persuaded their legislatures to make it illegal for psychologists to release test questions and test data to non-psychologists. This is a bizarre achievement in light of the widespread disclosure of tests, answers to tests and sample test data to the public. **Copies of copyrighted tests and test manuals are sent to the Library of Congress. There, they are available to any library patron who asks**, and accessible to residents of other areas through inter-library loan services, consultants and professional research services. The contents of many of the most widely used tests are available to the public in texts that can be purchased through public bookstores or borrowed from libraries.

In other words, psychologists in some states have succeeded in making it illegal for psychologists to exchange books and related materials any citizen can obtain in a public setting. This set of circumstances places psychologists in an absurd position. For example, is the ethical expert supposed to

infer that it is unethical or illegal for a psychologist to tell judges they can obtain these data at a public library or at Barnes & Noble? Would that be criminal or unethical conduct? The law in California, for instance, is worded so generally that, if it means what it says, many of the best-known authors in psychological testing and their publishers are guilty of violating California law by selling their books in public bookstores.

There are other practices that further confuse psychologists who believe there may be ethical problems with test disclosure.

For example, the APA "statement on the disclosure of test data" states that: "The reprinting or description of individual test items in a publication (e.g., popular press, paper presentation, research article, book, technical report, handout) may jeopardize the integrity of many standardized tests." APA Ethical Standard 2.06 further states: "Psychologists do not promote the use of psychological assessment techniques by unqualified persons." Standard 2.02 directs us to persons "qualified to use" the information.

However, consider the book titled "The MMPI, MMPI-2, & MMPI-A in Court: A Practical Guide for Expert Witnesses and Attorneys," published by the APA (K.S. Pope, J.N. Butcher and J. Seelen, 1993). This text provides all of the questions in the MMPI and MMPI-2 to attorneys. Because APA actively markets this book to attorneys, it seems reasonable to infer that there is some sense in which attorneys are qualified to use the information APA sells to them -- if not, then APA is violating its own ethical standard by promoting the sale of test items to persons who are not qualified to use the information. But would a psychologist who believes it is unethical to disclose tests to attorneys assert that it is unethical for a psychologist to give an attorney a copy of a book sold to attorneys by the APA?

One problem thwarting reform efforts is a misguided sense of loyalty to the guild. Although vigorous criticism is a respected and important element in the advancement of science, some psychologists are critical of colleagues who criticize the profession. Some psychologists openly oppose permitting criticism of their own profession, suggesting that guild interests are more important than are public policy interests.

In 1995, an edition of the APA Monitor newsletter claimed that a recent past-president of the association recommended the development of enforceable ethical standards to cope with scientists who "harm" the profession of psychology by "publicly criticizing" unscientific practices by psychologists. Such a policy would be contrary to the "Ethical Principles of Psychologists and Code of Conduct" (APA, 1992) as well as to basic principles of good science. Psychologists are expected to make known their reservations about their data, not suppress potentially disconfirming evidence (see also "Law and Human Behavior, 15," the Committee on Ethical Guidelines for Forensic Psychologists, 1991).

Who can use test information?

Some experts who refuse to disclose data indicate that it is unethical for them to release the data to anyone other than a licensed psychologist or neuropsychologist. However, competent psychologists know that licensure does not indicate testing expertise. Claiming that it is unethical to release data, except to a licensed psychologist, implies that eminently qualified psychologists who are not licensed are incompetent. This includes psychologists who work for the government, universities and private companies, who are not licensed for private practice.

The simple truth is that numerous experts other than licensed psychologists are qualified to interpret test data, depending on the test and the context. And many psychologists and neuropsychologists are not qualified to use most tests. (No criticism is implied here -- many psychologists are not interested in testing.) By insisting that the recipient of tests and test data be licensed, opponents of disclosure are, in effect, insisting that it is ethical to disclose the data to licensed psychologists who are not qualified, and unethical to disclose the data to unlicensed psychologists who are qualified.

Psychologists who refuse to disclose tests and test data to attorneys but offer to send it to another psychologist virtually never make any genuine effort to verify that they are sending the data to someone qualified to interpret the tests. In recent debates on this issue, opponents of disclosure have belittled the suggestion that they check to see that the person is qualified as excessive. They argue that it is sufficient to identify the recipient as a psychologist because they assume that psychologists will handle the data ethically. Since many psychologists are not members of APA or their state psychological associations, and not all psychologists agree with APA ethics, your attorney can show judges that this is an absurd claim.

States in which psychologists have persuaded legislators to enact codes restricting the release of tests or test data have generally enacted legislation based on a misinterpretation of the ethical guidelines. Therefore, these states' licensing boards are in the awkward position of enforcing a code based on misinterpretation of APA ethics against a psychologist who, in fact, is acting in a manner consistent with APA ethics.

On Oct. 24, 1995, in the case of *Sharon L. and Warren E. Campbell v. Barry A. Mashek* (Iowa District Court Consolidated Law Case No. 65070), the Fifth Judicial District of Iowa found the

section of the Iowa code restricting release of test data to be unconstitutional under both federal and state law. In that case, several experts, including the renowned testing expert Dr. Paul Meehl, testified by affidavit that, "Allowing a psychologist to offer opinions at trial, which are not subject to full and fair examination, based on the underlying test data, is repugnant to the basic principles of science and would fundamentally hinder any neutral body, such as a jury, in trying to arrive at valid conclusions about the condition of an individual who has put their psychological condition at issue by bringing a lawsuit."

Current standards of practice

Another claim made by non-disclosing psychologists is that the normal standard of practice is not to permit anyone except clinical psychologists or neuropsychologists to have access to tests and raw test data. If your attorney will provide the judge with the facts, the judge will realize that **this claim is not merely inaccurate, it is outrageous.** The data to the contrary are overwhelming. The evidence unequivocally demonstrates that the standard of practice is to make tests and test data available to non-psychologists and persons who are not clinical psychologists or neuropsychologists throughout the U.S., Canada and elsewhere.

Numerous persons have access to psychological tests and test data, with the knowing cooperation of psychologists. They include teachers at all levels, from preschool through high school and beyond. Other occupations with access include, among others:

* teachers' aides
* principals and assistant principals
* special education teachers
* speech pathologists
* physical therapists
* managers
* executives
* supervisors
* training and development specialists
* personnel managers
* human resources managers
* industrial psychologists
* licensed and unlicensed school psychologists
* licensed and unlicensed educational psychologists
* guidance counselors
* vocational experts
* rehabilitation consultants
* clerical and administrative personnel at all levels
* licensed and unlicensed counseling psychologists and school counselors
* research scientists
* court reporters
* attorneys

Journals that present extensive information about the raw data associated with psychological and neuropsychological tests are routinely made available to lay persons in public bookstores (see sidebar at end of story). The book "Neuropsychological Assessment" provides a good illustration because it is owned by many attorneys and presents entire tests, along with enough information to enable examinees to cheat on the tests.

Obviously the goal of the authors of these texts is to advance science, not to do something improper. However, their work serves as a valid illustration of what psychologists actually do in practice, as distinct

from the representations of those psychologists who claim that the normal standard of practice is not to disclose tests and test data to the public.

APA's "Standards for Educational and Psychological Testing" (AERA, APA, NCME, 1985) -- arguably the most authoritative treatise for testing standards -- instructs psychologists to write test manuals in a style that will "communicate information to many different groups [because]... sometimes tests are selected for use by highly qualified people but are actually used by people with minimal training in testing." The point of this citation is not to imply that the authors approve, rather it is to note that this authoritative treatise depicts the true state of affairs with respect to psychological testing.

Other sections of the above standard acknowledge that non-psychologists use tests. For example: "In special education, tests are selected, administered and interpreted by school psychologists, classroom teachers, special educators and other professionals, such as speech pathologists and physical therapists. This diverse group of test users includes professionals with varying levels of training in measurement and evaluation, and with varying degrees of technical expertise in testing."

The APA also published "Responsible Test Use" specifically to address the problem of misuse of test data (see sidebar). Yet not once in 244 pages, 78 assessment case examples or 12 appendices, is there a statement that responsible test users must disclose test data only to clinical psychologists or neuropsychologists, or even to psychologists at all.

One of the grounds alleged as a basis for refusing to disclose test information is the assertion that attorneys will use the data in a misleading fashion before the jury or judge. We have no quarrel with the assumption underlying this argument, based on the way attorneys handle other information in courtrooms, but what is not clear is why psychologists feel they should receive unique treatment. Attorneys, after all, have abundant opportunities to correct misleading use of psychological test data. Counsel may retain a consultant or introduce witnesses to expose and correct any erroneous conclusions or misleading impressions. Counsel may cross-examine witnesses who mislead the jury. Motions in limine can block juror access to sensational, prejudicial or misleading data. Rebuttal witnesses can explain why misleading conclusions are erroneous and offer alternative conclusions.

A related objection to disclosure is that attorneys are not qualified to interpret the raw test data or the test questions and will use this information improperly. Part of the use an attorney intends -- impeaching the witness -- is normal courtroom practice, but some experts do not like it.

Psychologists are fairly easy to ridicule with inkblots and tests like the Thematic Apperception Test, Draw-a-Person test and selected items from other tests blown up as exhibits before the jury. Such ridicule ranges from misleading distortions of valuable, valid procedures to insightful, accurate criticisms. In either case, however, there is no basis for claiming that psychologists should be exempt from vigorous cross-examination on the grounds for opinions, or from having their work scrutinized and criticized by persons who are not members of the guild.

Often, the records withheld on the grounds that raw data are not interpretable by attorneys include plain-language questionnaires completed by the plaintiff, family members and other lay persons. These questionnaires often contain material admissions concerning the plaintiff's functioning -- material admissions expressed in plain language that is clear to the jury, not technical language that can only be understood by a psychologist.

Another objection to the disclosure of test information is that copyrights will be lost and tests will be released into public domain if the data are revealed. In theory, this has a ring of truth. However, this claim buckles under thoughtful analysis. Copyrights pervade all disciplines; psychology has no unique objection to the photocopying of documents. Moreover, what motive would attorneys, judges and jurors have for copying and circulating psychological tests? Psychologists are the ones with an incentive to reproduce test materials, not attorneys, judges or jurors.

In fact, we often see examples of improper copying in the files of psychologists, e.g., photocopying tests instead of purchasing them through test distributors. We challenge colleagues who claim copyrights will be lost or the testing industry will be harmed by disclosing tests in forensic settings to produce evidence to support their allegations. We are not aware of a single case in the entire history of psychology in which a test publisher's copyright was lost because a test was disclosed to attorneys in litigation, photocopied for use in litigation or displayed in a public courtroom. In view of the widespread availability of tests in bookstores and libraries, claims that showing tests to attorneys or juries leads to a loss of copyright have little, if any, credibility.

Finally, some psychologists object to the disclosure of test information on the grounds that non-psychologists cannot appreciate the subtleties and technical nature of psychological tests. They argue that jurors will reach erroneous conclusions about the meaning of the data. Although it is reasonable to believe that jurors are not psychological testing experts, once again it is not clear why psychologists should be entitled to unique status. Complexity of data is not unique to psychology. Jurors may not understand physics, toxicology, epidemiology, statistics, aerospace, genetics or chemistry, but experts in these fields are expected to produce all their raw data and submit to public cross examination on the data and how they reason with it.

Psychologists appearing as experts in court claim to offer scientifically verifiable opinions -- opinions that express scientific knowledge. But **it is unscientific for experts to come to court with mere conclusions**. Experts are responsible for being prepared to show the trier of fact what data they relied upon and how they reasoned with these data to reach their conclusions. Experts cannot achieve this goal while hiding the data.

Science in a closet is not science, and testimony based upon undisclosed data is contrary to the constitutional right to cross-examine witnesses. Decisions like *Daubert v. Merrill Dow Pharmaceuticals*, 509 U.S. 579 (1993), and *Kumho Tire v. Carmichael,* 119 S. Ct. 1167 (1999), require the courts to have access to the elements of the expert's methodology in order to evaluate its reliability [see Claims, June 1999, p. 32, for related article].

Psychologists' refusals to disclose tests and test data, in the context of court proceedings, have gone too far. Psychologists are testifying to contradictory assertions of fact and claiming to follow ethical standards that are contrary to their conduct.

It is irresponsible to permit psychologists retained by parties in adversarial proceedings to determine what is relevant or acceptable for juries to review. **Psychologists are not competent to replace judges and should not be allowed to keep evidence in secret**, shielded from the eyes of the trier of fact. Psychologists who refuse to disclose their data and submit to cross-examination in the normal manner are, in effect, claiming they are above the normal standards of the courts. This is contrary to the best interests of consumers and against social policy.

There is a need for a reasonable procedure for disclosure of psychological test information during court proceedings, after which the material may be sealed or returned. By providing this disclosure, psychologists can participate in open forums like other scientists, instead of adopting the peculiar practice of hiding data like a cult. We recommend that such a procedure be developed by a joint panel of the American Psychological Society, American Bar Association, American Judicature Society, American Psychological Association and American Association for the Advance-ment of Science, with input from consultants who are experienced expert witnesses in a variety of jurisdictions.

This procedure should contain guidelines for the maintenance of forensic records, including tests and test data. It is important to obtain suggestions and criticisms from diverse geographical areas and different types of proceedings because procedural rules, case law and code vary substantially among the states, in federal court and in various administrative forums. This panel should consider the views of those who may recommend avoiding disclosure of psychological data. We recommend that such an expert panel address not only disclosure procedures but also the issue of attorney coaching of clients in preparation for interviews and testing by psychologists. Otherwise, as often happens in this life, the solution to one problem will complicate another problem.

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