

TRANSPARENCY IN FORENSIC EXAMS

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Medical examination of injured plaintiffs by doctors hired by defendants is a staple of modern tort litigation. Federal Rule of Civil Procedure 35 and its state counterparts authorize such examinations when the plaintiff's physical or mental condition is at issue. Although typically dubbed "independent" medical examinations or IMEs, their use often appears to be anything but independent in that defense-retained medical professionals have a strong financial incentive to dispute or diminish injury claims in order to obtain or retain a steady stream of lucrative work from defendants and their insurers.

Although often tainted, defense-driven medical examinations remain necessary as a matter of due process. Defendants are entitled to test plaintiff claims. But they are not entitled to disparage those claims through a black box process in which the defense expert fails to sufficiently disclose or accurately describe the nature of the examination, including administration of tests or environmental factors impacting the examination.

Empirical study reveals that defective, inaccurately reported defense examinations take place with disturbing frequency. To prevent tainted examinations from tainting justice, video recording, observation of the process, and production of testing and diagnostic materials should be the norm and not the exception. Unless forensic examination is made fully transparent it can easily promote error and unjust results.

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INTRODUCTION

Personal injury lawsuits are characterized by extensive use of expert witnesses.¹ After an injured person files a lawsuit, he or she can be subject to multiple defense expert examinations from the medical or psychological (or neuropsychological²) disciplines.³ These experts conduct physical and mental exams and then render assessments regarding the existence or extent of the plaintiff's injury.⁴

Admissibility of expert witness testimony is the province of the trial judge.⁵ A trial judge must determine the reliability of expert testimony before publishing the testimony to the jurors.⁶ The stated purpose of this gate-keeping function is to allow only the evidence that will be useful to the jury and to exclude testimony that does not rest on sound scientific or technical foundation.⁷ The standards for admissibility have expanded over the years from the early decision of *Frye*⁸ through the more recent *Daubert*⁹ and *Kumho*¹⁰ decisions. Generally, both federal and state courts will require that expert testimony rest on generally accepted knowledge within that expert community, that it employs a standardized methodology, and that it can reliably apply both method and knowledge to the facts at hand.¹¹

In this Article we suggest that some trial courts are struggling to properly evaluate defense medical experts in personal injury cases. This problem

¹ M. Neil Browne et. al., *The Epistemological Role of Expert Witnesses and Toxic Torts*, 36 AM. BUS. L.J. 1, 37 n.189 (1998) (citing CAROL A.G. JONES, *EXPERT WITNESSES: SCIENCE, MEDICINE, AND THE PRACTICE OF LAW* 128, 129 (1994)); see also *Sears v. Rutishauser*, 466 N.E.2d 210, 212 (Ill. 1984) ("The modern personal injury trial often becomes a battle between expert witnesses.").

² See generally Browne, *supra* note 1. (discussing the use of neuropsychological experts in litigation).

³ FED. R. CIV. P. 35.

⁴ See *id.*

⁵ FED. R. EVID. 702 Advisory Committee's Note to 2000 Amendment; see also *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 579–80 (1993); *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 141 (1999).

⁶ *Kumho Tire Co.*, 526 U.S. at 139.

⁷ *Id.* at 147.

⁸ J. L. Hill, *The States of Daubert After Florida*, LEXVISIO, <https://www.lexvisio.com/article/2019/07/09/the-states-of-daubert-after-florida> [<https://perma.cc/7CT2-DMS8>] (Aug. 7, 2023) (highlighting that forty-two states have adopted the *Daubert* standard or a substantially similar standard.).

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

has primarily arisen because some defense medical and psychological experts have convinced courts that much of their work and results must remain hidden from the court and the plaintiff. For example, these experts have on occasion convinced a judge that their examinations cannot be video recorded.¹² Additionally, defense experts attempt to withhold materials and data produced during examination, specifically their written testing materials and testing data.¹³

In effect, some trial courts have allowed defense medical experts to expropriate the legal standards governing admissibility of expert testimony. If an expert need not produce the testing materials or testing results to the lawyer representing the other party, then it becomes impossible to examine the expert's application of facts to methodology. Similarly, if the court does not permit the video recording of defense expert examinations, then it becomes impossible to evaluate whether the expert followed standardized methodology for testing an injured plaintiff or even whether the expert followed any methodology at all. When an expert fails to disclose the basis of his or her opinions, it is particularly concerning when it comes to psychological experts. The field of psychology is considered a "soft science[]." ¹⁴ In some instances, the field of psychology may lack the typical hallmarks of a science, such as repeatability in testing, which makes full disclosure even more important to verify how testing is performed and scored.¹⁵

In some courts, the defense medical expert industry is now the tail wagging the dog. The directives of defense experts have prevented these courts from conducting its proper gatekeeping function. Testimony that would be stricken in other contexts due to its lack of reliability is then admitted.¹⁶ We suggest that greater transparency in the underlying basis of testimony from defense experts is long overdue.

This Article addresses the rights of a party to determine the underlying basis of an expert's opinion and the dangers that arise in the absence of transparency both as to the examination itself as well as the test results.

¹² See *infra* note 55 and accompanying text.

¹³ See *infra* notes 49–52 and accompanying text.

¹⁴ Margaret A. Berger, *The Admissibility of Expert Testimony*, in *REFERENCE MANUAL ON SCI. EVIDENCE* 16 (3rd ed., 2011).

¹⁵ See *infra* note 203 and accompanying text.

¹⁶ See *infra* note 186, 204–05 and accompanying text.

I. SOME COURTS ARE ALLOWING DEFENSE EXPERTS TO WITHHOLD THE
BASES FOR THEIR OPINIONS

A. *Defense Expert Forensic Examinations*

Any person injured who seeks recompense through the legal system will find themselves navigating a byzantine legal system. But what may surprise a plaintiff the most is that they will have to submit themselves to an array of examinations from defense medical and psychological experts.¹⁷

Some people may end up having to be examined by more defense doctors than they would ordinarily see over the course of a year if, for example, the defendant insists that the plaintiff see an orthopedist, psychiatrist, and psychologist.¹⁸

Defense expert exams can involve physical and psychological testing.¹⁹ For example, a person physically injured in a car wreck may have to subject themselves to a physical examination by an orthopedic doctor hired by the defendant.²⁰ A person who suffers a traumatic brain injury may find themselves being examined by a variety of doctors hired by the defendant, including a neurologist.²¹

If the injured person has suffered emotional injuries due to, for example, sexual assault or the trauma of a car wreck, the defense may require them to be examined by a psychological expert.²² If the plaintiff sustained a traumatic brain injury, the defense may insist upon a psychological examination, possibly by an expert who considers themselves a neuropsychologist.²³ And even in cases where the injuries have resulted from a car wreck or debilitating fall, a defense psychologist may perform an examination under the premise that they are able to conclude that the person is faking her injury, which is often called malingering.²⁴

¹⁷ FED. R. CIV. P. 35 (explaining that when a party's physical or mental condition is in controversy—a personal injury case—the court may order a medical examination to access their physical condition, mental condition, or both).

¹⁸ *Ambulatory Care Use and Physician Office Visits*, CDC, <https://www.cdc.gov/nchs/fas tats/physician-visits.htm> [<https://perma.cc/67KM-QAB5>] (showing that nearly 17 percent of adults have not had any visits with their doctor in the past year).

¹⁹ Browne, *supra* note 1.

²⁰ Andrew Owen, *The Defense Medical Examination*, ADVOCATE, Oct. 2019.

²¹ JAMES J. MANGRAVITI ET AL., SURVEY OF EXPERT WITNESS FEES 111–12 (2021).

²² See, e.g., Ord. Granting Motion for Rule 35 Examination, Denying Request that it be Recorded, and Granting Ltd. Extension of Expert Discovery, *Romero v. Bradford*, No. 08-1055, 2009 U.S. Dist. LEXIS 153497, at *4 (D.N.M. Apr. 30 2009).

²³ See *Best Colleges and Majors for Neuropsychologists*, ZIPPIA, <https://www.zippia.com/neuropsychologist-jobs/education/> [<https://perma.cc/75C8-AYLH>] (July 21, 2023) (Showing that very few neuropsychologists have degrees in neuropsychology. Their training and education are in psychology.).

²⁴ See *infra* note 294 and accompanying text.

People generally find it anxiety-provoking to be examined by a stranger with adverse interests.²⁵ The defense expert has a conflict of interest because she is paid by the side that stands to benefit from opinions adverse to the patient. Because the expert is paid by the defendant, the expert can expect future business or referrals if her testimony is successful at defeating the claim or suppressing the settlement value of the claim in the event the jury goes with the defense expert's opinion. One troubling example of this conflict was demonstrated by a defense doctor who was required to permit his plaintiff-examination video to be recorded.²⁶ When the expert witness realized the exam was to be video recorded, he then required the plaintiff to undergo the exam *completely naked*.²⁷

A doctor who reviewed this exchange with the board of medicine, found that the defense expert's conduct to be "very unusual" and "very cruel."²⁸

B. Some Courts Do Not Require Full Disclosure from Defense Experts

1. Greater Disclosure Is Necessary for Expert Witnesses

Expert witnesses differ from lay witnesses because experts are not first-hand witnesses.²⁹ They do not need to observe an event to offer testimony about what happened or the resulting consequences of an injury.³⁰ Expert witnesses gather information after the fact and then develop opinions based upon their expertise.³¹ Consequently, disclosure and production of the facts, data, and information that an expert relies upon are necessary to determine

²⁵ Robert P. Archer et al., *Introduction to Forensic Uses of Clinical Assessment Instruments*, in FORENSIC USES OF CLINICAL ASSESSMENT INSTRUMENTS 1, 4-5 (Robert P. Archer ed., 2006).

²⁶ Transcript of Board of Medicine Probable Cause Panel Meeting 10 (Apr. 24, 1996) [<https://perma.cc/Y5SL-2UAX>].

²⁷ *Id.*

²⁸ *Id.*

²⁹ See *Hinton v. Alabama*, 571 U.S. 263, 272 (2014) ("An 'expert witness' is one who can enlighten a jury more than the average man in the street. . . . An expert witness, by definition, is any person whose opportunity or means of knowledge in a specialized art or science is to some degree better than that found in the average juror or witness." (quoting *Charles v. State*, 350 So. 2d 730, 733 (Ala. Crim. App. 1977))).

³⁰ *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 592 (1993) ("Unlike an ordinary witness, an expert is permitted wide latitude to offer opinions, including those that are not based on firsthand knowledge or observation. Presumably, this relaxation of the usual requirement of firsthand knowledge—a rule which represents 'a "most pervasive manifestation" of the common law insistence upon "the most reliable sources of information,"' is premised on an assumption that the expert's opinion will have a reliable basis in the knowledge and experience of his discipline." (quoting FED. R. EVID. 602 Advisory Committee's Notes) *superseded by statute*, FED. R. EVID. 702.).

³¹ See *Daubert*, 509 U.S. at 592.

whether the expert's opinions are admissible.³² Whether in state or federal court, most jurisdictions require that expert testimony be based on sufficient facts or data, generally accepted methods, and reliable application of facts to methods.³³

Disclosure and production can happen in two phases. Depending on the forum, the form and type of disclosure can differ. In federal court, an expert is required to write a report that contains all facts, data, and bases for the opinions.³⁴ Some state courts, however, do not require a written report or such an extensive disclosure.³⁵ Under the Federal Rules of Civil Procedure, and under state rules based on the federal rules, parties to a lawsuit may use the power of the court to compel, or subpoena, the production of documents and tangible things, including copies of the materials an expert has relied upon in forming their opinion.³⁶

Jurisdictions throughout the United States are generally consistent on the court's role as a gatekeeper tasked with only admitting expert opinions that are both relevant and based on a reliable foundation.³⁷ As a result, full production of the information relied upon by the expert is necessary to allow an opposing party to properly cross-examine the expert.³⁸ In the end,

³² See, e.g., FED. R. CIV. P. 26(a)(2) (requiring that experts disclose, *inter alia*, (i) a complete statement of all opinions the witness will express and the basis and reasons for them; (ii) the facts or data considered by the witness in forming them; (iii) any exhibits that will be used to summarize or support them); *Daubert v. Merrell Dow Pharm. Inc.*, 43 F.3d 1311, 1316 (9th Cir. 1995) (explaining that in performing their "gatekeep[er]" role, judges must satisfy themselves that scientific evidence meets a "certain standard of reliability before it is admitted. This means that the expert's bald assurance of validity is not enough. Rather, the party presenting the expert must show that the expert's findings are based on sound science, and this will require some objective, independent validation of the expert's methodology." (quoting *Daubert*, 509 U.S. at 597)).

³³ See, e.g., FED. R. EVID. 702 (requiring expert testimony be based on sufficient facts or data that is the product of reliable principles and methods and has been reliably applied to the facts of the case); ALASKA R. EVID. 702; ARIZ. R. EVID. 702; DEL. R. EVID. 702; FLA. STAT. ANN. § 90.702 (LexisNexis 2023); GA. CODE ANN. § 24-7-702 (2023); KAN. STAT. ANN. § 60-456 (2023); KY. R. EVID. 702; LA. CODE EVID. ANN. art. 702; MICH. R. EVID. 702; MISS. R. EVID. 702; N.C. GEN. STAT. § 8C-1, R. 702 (2023); OHIO EVID. R. 702; WIS. STAT. § 907.02 (2023); *State v. Sharpe*, 435 P.3d 887, 894 (Alaska 2019); *Commonwealth v. Lanigan*, 641 N.E.2d 1342, 1348-49 (Mass. 1994); *State v. Brooks*, 643 A.2d 226, 229 (Vt. 1993); *Mayhorn v. Logan Med. Found.*, 454 S.E.2d 87, 91-93 (W. Va. 1994).

³⁴ FED. R. CIV. P. 26(a)(2)(B).

³⁵ See, e.g., MO. SUP. CT. R. 56.01(b)(6) (2023); CAL. CIV. PROC. CODE § 2034.260(c) (2023).

³⁶ FED. R. CIV. P. 34(a) (items in the responding party's possession, custody, or control); FED. R. CIV. P. 30(b)(2) (items in the possession, custody, or control of a person to be deposed).

³⁷ *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 582-84 (1993).

³⁸ *Darling v. Charleston Cmty. Mem'l Hosp.*, 211 N.E.2d 253, 259 (Ill. 1965) ("An individual becomes an expert by studying and absorbing a body of knowledge. To prevent cross-examination upon the relevant body of knowledge serves only to protect the igno-

vigorous cross-examination serves as one of the final bastions between admissibility and juror confusion.³⁹

2. *The Problem Arises in Courts that Do Not Require Disclosure*

Some courts permit the recording of defense exams by the plaintiff's lawyer, whether physical or psychological, as well as production of the test data to the plaintiff's lawyer by the defense expert.⁴⁰ Nevertheless, despite the generally accepted requirement in nearly every jurisdiction that experts fully disclose the bases for their opinions, certain courts have not permitted either (1) the recording of physical and psychological examinations,⁴¹ or (2) the disclosure of test materials used or raw data generated in psychological examinations to the opposing side's attorneys.⁴²

When courts deny an injured party's request to videorecord their examination by a defense medical or psychological expert, the court deprives the injured party of a meaningful way of determining whether the expert

rant or unscrupulous expert witness. In our opinion expert testimony will be a more effective tool in the attainment of justice if cross-examination is permitted as to the views of recognized authorities, expressed in treatises or periodicals written for professional colleagues.”); *see also* CAL. EVID. CODE § 721 (2023) (expressly authorizing the expert witness to “be fully cross-examined as to . . . the matter upon which his or her opinion is based and the reasons for his or her opinion”).

³⁹ *See Daubert*, 509 U.S. at 595–96.

⁴⁰ *See, e.g., Randy's Trucking, Inc. v. Superior Court*, No. F084849, 2023 Cal. App. LEXIS 389, at *27 (Cal. Ct. App. Apr. 26, 2023) (holding that the trial court's broad discretion in discovery matters provides it with the discretion to order the production of test data and the recording of exams).

⁴¹ *See, e.g., In re Soc'y of Our Lady of Most Holy Trinity*, 622 S.W.3d 1, 17, 20 (Tex. Ct. App. 2019) (vacating trial court order allowing video recording of defense expert's psychological exam because the plaintiff expert's exam was not video recorded, and the experts should have the “same opportunity” to fully develop their opinions (quoting *In re H.E.B. Grocery Co.*, 492 S.W.3d 300, 304–05 (Tex. 2016))); *Russo v. APL Marine Servs.*, No. 2:14-cv-3184-ODW(JCGx), 2015 U.S. Dist. LEXIS 122318, at *8 (C.D. Cal. Sept. 14, 2015) (holding that there is no right to record a mental examination, and a party cannot take it upon themselves to unilaterally decide that an exam is to be recorded); *Fitzpatrick v. Bc Walnut St.*, No. 1777CV00402, 2018 Mass. Super. LEXIS 3204, at *3 (Mass. Super. Ct. Feb. 16, 2018) (stating that the court should only allow such recordings in the most extreme cases); *Bruggemann v. Gail Ann Towns & Metro. Council*, No. 62-CV-20-4450, 2021 Minn. Dist. LEXIS 1453, at *4 (Minn. Dist. Ct. May 3, 2021) (holding that such recordings “would create an evidentiary sideshow that would be a distraction to the jury, rather than being helpful to it”).

⁴² *See, e.g., Roman v. Fusion Indus. Int'l*, No. 16-CA-003121, 2017 Fla. Cir. LEXIS 12387, at *15–16 (Fla. Cir. Ct. Nov. 20, 2017) (holding that disclosure may only be made to a licensed psychologist because neither plaintiff's Counsel nor the potential non-psychologist attorney consultant have been shown to be qualified to use or interpret test data or test materials); *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 315, 320 (1979) (vacating an NLRB order requiring disclosure of psychological testing because disclosure could compromise the empirical validity of the tests, and the relationship between secrecy and test validity).

properly administered the test and then correctly reported the results. Nevertheless, some courts have endorsed an assortment of arguments to block video recording of such examinations.⁴³

Likewise, some courts also have denied an injured party's request that a defense expert produce the written materials and raw data from a psychological examination to the plaintiff's attorney or the retaining attorney.⁴⁴ Many of the psychological examinations given by defense experts comprise a series of questions asked of the injured plaintiff whose answers are then compared to the normative populations on which the tests have been standardized.⁴⁵ In most cases, members of the psychological profession develop the tests and then publishers print and sell the examinations.⁴⁶ The American Psychological Association ("APA") defines "test materials" as the test manuals, instruments, protocols, and test questions or stimuli.⁴⁷ To that end, the APA defines "test data" as 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.⁴⁸

Defense medical experts give several reasons for refusing video recording or disclosing written materials and raw data, such as:

- Observer bias: Some defense experts contend that having an observer present or a video camera recording the examination creates an observer bias that will cause the injured person to act differently and skew the results.⁴⁹
- Copyright or integrity of the test: Some defense experts contend that recording a psychological examination or producing the testing material risks violating the copyright in the test materials owned by the publishing company. Also, some have argued that the recording

⁴³ See cases cited *supra* note 41.

⁴⁴ See cases cited *supra* note 42.

⁴⁵ William E. Foote et al., *Civil Forensic Evaluation in Psychological Injury and Law: Legal, Professional, and Ethical Considerations*, 13 PSYCH. INJ. & L. 327, 341–42 (2020).

⁴⁶ *Id.* at 342 (discussing the seven criteria for selection of an appropriate forensic exam to include commercially available and normatively constructed for a given population); see also *Pearson Assessments*, PEARSON, <https://www.pearsonassessments.com> [<https://perma.cc/J3MD-J6C2>] (selling over 300 assessments to industry professionals).

⁴⁷ AM. PSYCH. ASS'N, ETHICAL PRINCIPLES OF PSYCHOLOGISTS AND CODE OF CONDUCT § 9.11 (2017) [hereinafter ETHICAL PRINCIPLES].

⁴⁸ ETHICAL PRINCIPLES, *supra* note 47, at § 9.04.

⁴⁹ See, e.g., *Underwood v. Fitzgerald*, 229 F.R.D. 548, 549–50 (M.D. Tenn. 2005) (stating that the mere presence of an observer during a defense medical exam could unintentionally send signals or distract the plaintiff during the course of the examination, and that video recording would be too distracting); *Whitfield v. Superior Court of L.A. Cnty.*, 246 Cal. App. 2d 81, 85–86 (1966) (noting that a neutral, unbiased, and objective psychiatric examination of a patient, requires that the examination not be hampered by verbatim recording of statements made or by the presence of other distracting influences or persons).

or materials could be released publicly, allowing future examinees to game the test by knowing the questions ahead of time.⁵⁰

- Ethical concerns: Defense experts have asserted that ethical codes or guidelines preclude them from allowing video recording or production of test materials and raw data.⁵¹
- HIPAA: Defense experts have argued that they cannot produce raw testing data because they may violate the provisions of the Health Insurance Portability and Accountability Act of 1996 (“HIPAA”).⁵²

Typically, as in the majority of the examples listed above, defendants make these nondisclosure arguments to the court via objections to, among other things, requests for documents, motions for protective orders, or oppositions to motions to compel.⁵³ Some courts rule on these issues without the benefit of an evidentiary hearing during which opposing counsel can challenge an expert’s testimony regarding the need to limit disclosure while the expert is under oath.⁵⁴ In those cases, the defense is intrinsically not re-

⁵⁰ See, e.g., *Glennon v. Performance Food Grp., Inc.*, No. 2:20-cv-38, 2021 U.S. Dist. LEXIS 137799, at *16–17 (S.D. Ga. July 23, 2021) (defendant argues production of the test materials used would interfere with copyright and contractual obligations with the company that produces the test); *Carpenter v. Superior Court*, 141 Cal. App. 4th 249, 275, (2006) (vacating a trial court order that endorsed defendant’s argument that the underlying test questions from psychological testing could not be provided to plaintiff due to copyright law); *Butt v. Ariz. Structural Laminators LLC*, No. CV-21-08208-PCT-DWL (MTM), 2023 U.S. Dist. LEXIS 18557, at *17 n.5 (D. Ariz. Feb. 2, 2023) (defense expert contends that release of test protocols to anyone but a psychologist would jeopardize the integrity of the exam).

⁵¹ See, e.g., *Randy’s Trucking, Inc. v. Superior Court*, No. F084849, 2023 Cal. App. LEXIS 389, at *35 (Cal. Ct. App. Apr. 26, 2023) (“Defendants assert [that even] a protective order is insufficient to protect test security because (1) the transfer of testing materials to plaintiffs’ attorney is an ethical and professional violation even with a protective order; (2) protective orders do not erase knowledge an attorney may acquire concerning the test, which can be used to educate future clients about the test; and (3) the harm caused by a single violation of the protective order, whether intentional or inadvertent, outweighs the necessity of providing the testing materials to a nonpsychologist.”); *Collins v. TIAA-CREF*, No. 3:06CV304-C, 2008 U.S. Dist. LEXIS 67282, at *7–8 (W.D.N.C. Aug. 22, 2008) (defense expert argues that producing testing materials to a non-psychologist would violate his ethical and contractual obligations surrounding the testing materials); *Burchfield v. Renfree*, No. E2012-01582-COA-R3-CV, 2013 Tenn. App. LEXIS 685, at *72 (Tenn. Ct. App. Oct. 18, 2013) (Defense expert asserting that he cannot “ethically disclose the raw testing materials because they involve[] sensitive proprietary information that could compromise the efficacy of the tests if placed in the public domain.”).

⁵² See, e.g., *Ioane v. Noll*, No. 1:07-cv-00620-AWI-EPG, 2020 U.S. Dist. LEXIS 130567, at *12 (E.D. Cal. July 22, 2020) (defendant argues that disclosure of psychological test information would subject him to potential liability for violation of both copyright law and the HIPAA Privacy Rule); *Fint v. Brayman Constr. Corp.*, No. 5:17-cv-04043, 2019 U.S. Dist. LEXIS 3770, at *5–6 (S.D. W. Va. Jan. 8, 2019) (analyzing the standards governing the tension between HIPAA and the release of psychological test materials).

⁵³ See cases cited *infra* notes 55–58.

⁵⁴ See cases cited *infra* notes 55–58.

quired to produce all the data the expert has relied upon. This, in turn, means the victim and counsel are deprived of valuable material for cross-examination. The injured person is also denied access to evidence, in the form of a video recording, of whether the expert properly administered an examination or faithfully reported the facts from such examination.⁵⁵ For example, did the doctor claim to have conducted tests that were never performed, misrepresent what the patient told the doctor, or even alter test results or the test administration? The defense doctor's notes may or may not accurately reflect the examination or the victim's response. Without a recording, the plaintiff will never know.

Courts allowing these acts of nondisclosure creates an intractable problem. As explained in the next Part, under the law of nearly every jurisdiction, expert witness testimony is subject to legal standards of admissibility. But without disclosure of the techniques, methods, and data used by an expert, the court and the plaintiff have no way to properly evaluate whether the expert's testimony should be admissible.

II. THE RULES: EXPERT TESTIMONY MUST ARISE FROM ACCEPTED METHODOLOGY AND ANALYSIS

Expert testimony is not automatically admissible.⁵⁶ Federal courts have developed the legal principles that govern admissibility of expert testimony, which many state courts have adopted in whole or part.⁵⁷ For decades, the most used standard was the "general acceptance" test outlined in *Frye v.*

⁵⁵ See *Zabkowicz v. West Bend Co.*, 585 F. Supp. 635, 636 (E.D. Wis. 1984) ("The defendants' expert is being engaged to advance the interests of the defendants; clearly, the doctor cannot be considered a neutral in the case. There are numerous advantages, unrelated to the emotional damage issue, which the defendants might unfairly derive from an unsupervised examination. In sum, I do not believe that the role of the defendants' expert in the truth-seeking process is sufficiently impartial to justify the license sought by the defendants."); see also *Jacob v. Chaplin*, 639 N.E.2d 1010, 1011, 1013 (Ind. 1994) ("In permitting the examination ordered in this case to be recorded, the trial court properly exercised its discretion and recognized the justness of permitting recording to take place in an open manner, in the absence of some overriding reason to prohibit that recording.").

⁵⁶ *Medical Assurance. Co., Inc. v. Miller*, 779 F. Supp. 2d 902, 912 (N.D. Ind. 2011) ("[E]xpert testimony is not automatically admissible as evidence."); *United States v. Martinez*, 3 F.3d 1191, 1193–97 (8th Cir. 1993) ("The fact that we have taken judicial notice of the reliability of the technique of DNA profiling does not mean that expert testimony concerning DNA profiling is automatically admissible under *Daubert*.").

⁵⁷ See, e.g., *Ranes v. Adams Labs., Inc.*, 778 N.W.2d 677, 685–86, 697 (Iowa 2010) (commenting on historical treatment of *Frye* and *Daubert*); *Lahey v. Puget Sound Energy, Inc.*, 296 P.3d 860, 863–65 (Wash. 2013) (same); *Grady v. Frito-Lay, Inc.*, 839 A.2d 1038, 1041–44, 1053 (Pa. 2003) (same).

United States.⁵⁸ Much more recently, the United States Supreme Court decided *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,⁵⁹ and *Kumho Tire Co. v. Carmichael*.⁶⁰ These decisions emphasize the gatekeeping function of trial judges by adding additional factors to the admissibility analysis.⁶¹ But *Daubert* and *Kumho* are hardly a rejection of *Frye*, whether the expert's methodology and techniques are generally accepted within the expert's discipline remains an essential consideration in admissibility.

A. *The Development of Legal Standards Regarding Expert Testimony*

1. *The Frye General Acceptance Test*

Prior to 1993, most federal courts governed the admissibility of expert testimony by reference to *Frye v. United States*, a decision from the Court of Appeals for the District of Columbia.⁶² Under *Frye*, expert opinion was admissible under the "general acceptance" test.⁶³ The question was whether the expert's methodology was generally accepted within the particular field from which the expert was drawn.⁶⁴ Although the *Frye* decision was not much more than a page long and cited no authority, it remained the standard for approximately seventy years.⁶⁵

⁵⁸ *Frye v. United States*, 293 F. 1013, 1013–14 (D.C. Cir. 1923); *Milward v. Acuity Specialty Prod. Grp., Inc.*, 639 F.3d 11, 13–14 (1st Cir. 2011) (mentioning the *Frye* test as "displaced" by FED. R. EVID. 702); *Schneider v. Fried*, 320 F.3d 396, 399–400, 406 (3d Cir. 2003) (observing that *Frye* made "general acceptance" the exclusive test for admitting expert scientific testimony prior to FED. R. EVID. 702).

⁵⁹ *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 597 (1993).

⁶⁰ *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 138 (1999).

⁶¹ *Primiano v. Cook*, 598 F.3d 558, 564 (9th Cir. 2010) (explaining that the *Daubert* factors are flexible); *Jaurequi v. Carter Mfg. Co., Inc.*, 173 F.3d 1076, 1083 (8th Cir. 1999) ("[T]he *Daubert* reliability factors should only be relied upon to the extent that they are relevant."); *Oglesby v. Gen. Motors Corp.*, 190 F.3d 244, 250–51 (4th Cir. 1999) (affirming a district court's determination that an engineer's opinion was unreliable because he did not properly draw on specialized knowledge); *United States v. Mitchell*, 365 F.3d 215, 244 (3d Cir. 2004) ("That a particular discipline is or is not 'scientific' tells a court little about whether conclusions from that discipline are admissible under Rule 702; at best, there will be some overlap between the factors that bear on a field's status as 'science' and *Daubert's* factors addressed to reliability. Reliability remains the polestar.").

⁶² *Frye*, 293 F. at 1014.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 585 (1993) ("In the 70 years since its formulation in the *Frye* case, the 'general acceptance' test has been the dominant standard for determining the admissibility of novel scientific evidence at trial. Although under increasing attack of late, the rule continues to be followed by a majority of courts, including the Ninth Circuit." (citing ERIC GREEN & CHARLES NESSON, PROBLEMS, CASES, AND MATERIALS ON EVIDENCE 649 (1983)); Paul Giannelli & Edward Imwinkelried, *Scien-*

2. *The Daubert Scientific Factors Test*

In 1993, the United States Supreme Court issued *Daubert v. Merrell Dow Pharmaceuticals, Inc.*⁶⁶ The Court concluded that the *Frye* standard no longer applied because Federal Rule of Evidence 702 superseded the decision.⁶⁷ At the time of the *Daubert* decision, Rule 702 stated that, “[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.”⁶⁸

The Court noted that the language of Rule 702 did not mention a “general acceptance” test and the drafting history of the Rule did not reference *Frye*.⁶⁹ Nevertheless, the Court did not eliminate the “general acceptance” test as an important factor in determining the admissibility of expert opinion.⁷⁰

The Court derived several factors from Rule 702. According to the Court, the following factors should guide a trial court in evaluating admissibility of expert witness testimony:

- Whether the particular theory has been tested;
- Whether the theory has been subjected to peer review and publication;
- The known or potential rate of error, including standards controlling the technique’s operation; and
- Whether the technique has achieved general acceptance in the relevant scientific or expert community.⁷¹

The *Daubert* Court created these factors, but then also explained that they do not represent a “definitive checklist or test.”⁷² The use and efficacy of any particular factor depends upon the facts of the case and the expertise being evaluated.⁷³

The Court explained that the “overarching” purpose of the gatekeeping function is to ensure that expert opinion rests on scientifically valid princi-

tific Evidence: The Fallout from Supreme Court’s Decision in Kumho Tires, 14 CRIM. JUST. 12, 13 (2000).

⁶⁶ *Daubert*, 509 U.S. at 579.

⁶⁷ *Id.* at 587.

⁶⁸ *Id.* at 588 (quoting FED. R. EVID. 702).

⁶⁹ *Id.*

⁷⁰ *Id.* at 594 (observing that “‘general acceptance’ can yet have a bearing on the inquiry”).

⁷¹ *Id.* at 593–94.

⁷² *Id.* at 593.

⁷³ *Id.* at 591.

ples and methodology.⁷⁴ Given the factors the Court identified, it is no surprise that the admissibility of expert opinion seems to mimic the principles of scientific methodology with the emphasis on scientific testing, peer review, standardized methodology and error rate, and acceptability within the scientific community. But these factors can create a difficult standard for trial judges, who may find themselves in the position of being an evaluator of what constitutes valid science while having no scientific background.

3. *The Kumho Decision: A Return to the General Acceptance Test for Certain Types of Experts*

As explained above, the *Daubert* Court set factors for the admissibility of experts but also explained that they do not represent a “definitive checklist or test.”⁷⁵ Thus, several years later, in *Kumho Tire Co. v. Carmichael*, the Court evaluated expert testimony seemingly without reference to any of the specific *Daubert* factors.⁷⁶ In *Kumho*, the Court considered the admissibility of expert opinion that was not typical scientific knowledge.⁷⁷ Instead, the witness’s expertise in *Kumho* originated in technical knowledge combined with experience.⁷⁸ He sought to offer testimony based on viewing wear patterns on tires.⁷⁹

The *Kumho* Court held that the trial court must still act as a gatekeeper for technical knowledge.⁸⁰ Nevertheless, the Court recognized that because the list of *Daubert* factors “was meant to be helpful, not definitive,” they may not always have application.⁸¹ “It might not be surprising in a particular case, for example, that a claim made by a scientific witness has never been the subject of peer review, for the particular application at issue may never previously have interested any scientist.”⁸²

The Court’s analysis is interesting, however, because it seems to rely only on the “general acceptance” test combined with the Court’s own empirical review of the tire evidence:

The particular issue in this case concerned the use of Carlson’s two-factor test and his related use of visual/tactile inspection to draw conclusions on the basis of what seemed small observational differences. We have found no indication in the record that other experts in the industry use Carlson’s two-factor test or that tire experts such as Carlson normally make the very fine distinc-

⁷⁴ *Id.* at 594–95.

⁷⁵ *Id.* at 593.

⁷⁶ *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 141 (1999).

⁷⁷ *Id.* at 148.

⁷⁸ *Id.* at 156.

⁷⁹ *Id.* at 144.

⁸⁰ *Id.* at 147.

⁸¹ *Id.* at 151.

⁸² *Id.*

tions about, say, the symmetry of comparatively greater shoulder tread wear that were necessary, on Carlson's own theory, to support his conclusions. Nor, despite the prevalence of tire testing, does anyone refer to any articles or papers that validate Carlson's approach.⁸³

4. Amended Rule 702—Codification of *Daubert* and *Kumho*

Following the Supreme Court's *Kumho* decision, Congress amended Federal Rule of Evidence 702, which addresses the admissibility of expert testimony.⁸⁴ In 2000, Congress amended Rule 702 to state the following:

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if . . . :

- a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
- b) the testimony is based on sufficient facts or data;
- c) the testimony is the product of reliable principles and methods; and
- d) the expert has reliably applied the principles and methods to the facts of the case.⁸⁵

Amended Rule 702 technically superseded the *Daubert* and *Kumho* decisions.⁸⁶ Rule 702 does not replicate the *Daubert* factors, but the drafting notes to Rule 702 affirm the gatekeeper function of trial judges:

Rule 702 has been amended in response to *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and to the many cases applying *Daubert*, including *Kumho Tire Co. v. Carmichael*, 119 S.Ct. 1167 (1999). In *Daubert* the Court charged trial judges with the responsibility of acting as gatekeepers to exclude unreliable expert testimony, and the Court in *Kumho* clarified that this gatekeeper function applies to all expert testimony, not just testimony based in science. . . . The amendment affirms the trial court's role as gatekeeper and provides some general standards that the trial court must use to assess the reliability and helpfulness of proffered expert testimony.⁸⁷

⁸³ *Id.* at 157. The Court's decision to perform its own review of the facts was surprising. Justice Stevens dissented to state:

Part III answers the quite different question whether the trial judge abused his discretion when he excluded the testimony of Dennis Carlson. Because a proper answer to that question requires a study of the record that can be performed more efficiently by the Court of Appeals than by the nine Members of this Court, I would remand the case to the Eleventh Circuit to perform that task.

Id. at 159 (Stevens, J., concurring in part and dissenting in part).

⁸⁴ *Micro Chem., Inc. v. Lextron, Inc.*, 317 F.3d 1387, 1391 (Fed. Cir. 2003).

⁸⁵ FED. R. EVID. 702.

⁸⁶ *E.g.*, *United States v. Parra*, 402 F.3d 752, 758 (7th Cir. 2005).

⁸⁷ FED. R. EVID. 702 Advisory Committee's Note to 2000 Amendment.

The Advisory Notes to Rule 702 recognize the challenge of evaluating the admissibility of expert opinion that would not be considered classically “scientific”:

Some types of expert testimony will be more objectively verifiable, and subject to the expectations of falsifiability, peer review, and publication, than others. Some types of expert testimony will not rely on anything like a scientific method, and so will have to be evaluated by reference to other standard principles attendant to the particular area of expertise. The trial judge in all cases of proffered expert testimony must find that it is properly grounded, well-reasoned, and not speculative before it can be admitted. The expert’s testimony must be grounded in an accepted body of learning or experience in the expert’s field, and the expert must explain how the conclusion is so grounded.⁸⁸

Therefore, when expert opinion concerns subject matters such as “economic principles, accounting standards, property valuation or other non-scientific subjects, it should be evaluated by reference to the ‘knowledge and experience’ of that particular field.”⁸⁹ Once again, dealing with the question of admissibility becomes whether the expert is employing methods that are typical and generally accepted in the given area of expertise, in line with *Frye* and *Kumho*.⁹⁰

III. COURTS ARE UNABLE TO EVALUATE DEFENSE EXPERT OPINION WITHOUT DISCLOSURE

Simply because one is an expert does not mean his or her testimony is always fully admissible.⁹¹ The admissibility issue becomes even more important when considering a defense psychologist’s opinion that an injured plaintiff is “malinger,” given that such opinions may not rely on scientifically developed methods.⁹² In fact, as discussed below, when evaluations are videorecorded, it often can be observed that such testing is not administered according to any sort of methodological or repeatable process.⁹³ Consequent-

⁸⁸ *Id.*

⁸⁹ *Id.* (quoting AM. COLL. TRIAL LAWS., *Standards and Procedures for Determining the Admissibility of Expert Testimony After Daubert*, 157 F.R.D. 571, 579 (1994)).

⁹⁰ *United States v. Baptiste*, 596 F.3d 214, 222 (4th Cir. 2010).

⁹¹ *Medical Assurance Co., Inc. v. Miller*, 779 F. Supp. 2d 902, 912 (N.D. Ind. 2011); *United States v. Martinez*, 3 F.3d 1191, 1197 (8th Cir. 1993).

⁹² *Small v. Cuer*, 812 Fed. Appx. 45, 48 (2d Cir. 2020) (“The District Court precluded [the defendant’s] proffered expert from testifying about three tests that purported to identify exaggeration or malingering by [the plaintiff], but only after concluding that [the defendant] failed to offer any evidence in favor of the reliability of any of the tests or otherwise rebut [the plaintiff’s] challenge to the tests.”); *see also* *Yu v. Idaho State Univ.*, 15 F.4th 1236, 1247 (9th Cir. 2021) (“An expert should not be permitted to opine on that question using a methodology that requires her to assume its answer.”).

⁹³ *See infra* Section III.A.

ly, it is necessary for a trial court to allow an injured party to obtain evidence on the testing process, including video recording the examination and obtaining the raw data and testing materials in order to properly evaluate the admissibility of such opinions.

A. Video Recording Defense Medical/Psychological Experts Necessary to Ensure the Opinions Are the Product of Reliable Methodology and Facts

All psychologists who engage in forensic assessment are encouraged to “avoid partisan presentation of unrepresentative, incomplete, or inaccurate evidence that might mislead finders of fact.”⁹⁴ However, research consistently demonstrates that highly-trained psychologists deviate from standardized test scoring and administration procedures,⁹⁵ to the extent that scores estimating general ability levels are incorrectly calculated in up to 88 percent of evaluations.⁹⁶ In a large review of published studies on the issue, 73 percent of overall ability scores changed when errors were discovered and corrected.⁹⁷ The study revealed that 99.7 percent of tests contained at least one error, including failures to accurately record what the test taker actually said.⁹⁸ Professional psychologists tend to make many more errors per protocol than graduate students in training, although those errors are statistically insignificant.⁹⁹ Even board-certified psychologists in high-stakes forensic mental health evaluations had at least one scoring error in 35 percent of records evaluated.¹⁰⁰

Video recordings of assessments to document what actually transpired is extremely important because it can reveal substantial errors in testing. One of the authors has viewed multiple recorded test sessions for plaintiffs conducted by defense-retained board-certified neuropsychologists.¹⁰¹ Many of

⁹⁴ AM. PSYCH. ASS'N, *Specialty Guidelines for Forensic Psychology*, 68 AM. PSYCH. 7, 9 (2013) [hereinafter *Specialty Guidelines*].

⁹⁵ Kara M. Styck & Shana M. Walsh, *Evaluating the Prevalence and Impact of Examiner Errors on the Wechsler Scales of Intelligence: A Meta-Analysis*, 28 PSYCH. ASSESSMENT 3, 3 (2016).

⁹⁶ *Id.*

⁹⁷ *Id.* at 10.

⁹⁸ *Id.* at 9.

⁹⁹ *Id.*

¹⁰⁰ Elizabeth A. Tyner & Richard I. Frederick, *Rates of Computational Errors for Scoring the SIRS Primary Scales*, 25 PSYCH. ASSESSMENT 1367, 1367 (2013).

¹⁰¹ See, e.g., Affidavit of Richard Fredrick, Ph.D. at ¶¶ 18–20, *Valdes v. U.S. Sugar Corp.*, No. 502012CA017292XXXXMBA, 2015 Fla. Cir. LEXIS 9981 (Fla. Cir. Ct. July 31, 2015); Affidavit of Richard I. Fredrick, Ph.D. at ¶¶ 9–10, *Camp v. Brevard Achievement Ctr., Inc.*, No. 05-2013-CA-028522 (Fla. Cir. Ct. Oct. 30, 2018); Affidavit of Richard Fredrick, Ph.D. at ¶¶ 19–27, *Valle v. Proficient Auto Transp., Inc.*, No. 2019-CA-006428, 2022 Fla. Cir. LEXIS 1531 (Fla. Cir. Ct. Mar. 28, 2022); Affidavit of Richard Fredrick,

these recordings revealed serious problems in the evaluation session that contradicted or nullified many of the claims of the neuropsychologists in their forensic neuropsychological assessments.¹⁰² Without the video recording, these serious problems would have gone undiscovered. As discussed below, routine and common problems in the review of video recorded examinations by board-certified neuropsychologists include the following: non-standard administration of tests by failure to adhere to required instructional sets; failure to present stimulus items within strictly defined time limits; conducting examinations in noise-filled environments; failure to safeguard intrusions and interruptions from cell phones; and testing possibly disengaged examinees who are in pain, who appear sedated, or who have actually been asleep during the testing.¹⁰³

The following Sections are examples of problematic testing that was discovered thanks to a recording of the exam and testing.

1. Testing Conducted by a Secretary vs Trained Psychologist and Outright Misrepresentations in Medical Exams

Perhaps the most disturbing omission discovered when the author compared the video records to the exam reports was a defense expert claiming to have given tests that were never administered by any trained professional. In another case, an untrained secretary actually administered the test instead of a doctor or a trained psychometrist.¹⁰⁴

Some courts may require the plaintiff to establish an expert's bias or prejudice before allowing video recording,¹⁰⁵ which misses the point regarding the necessary foundation for expert testimony. This is the tail wagging the dog. Video recording is necessary to be able to prove bias.

Ph.D. at ¶¶ 16, 27, *Estate of Brantley v. UPS Ground Freight, Inc.*, No. 3:16-CV-352 (DPM), 2019 U.S. Dist. LEXIS 234231 (E.D. Ark. July 3, 2019).

¹⁰² See *supra* note 101.

¹⁰³ See Affidavit of Richard I. Fredrick, Ph.D. at ¶ 12, *Camp v. Brevard Achievement Ctr., Inc.*, No. 05-2013-CA-028522, (Fla. Cir. Ct. Oct. 30, 2018).

¹⁰⁴ Affidavit of Richard Fredrick, Ph.D. at ¶¶ 41–42, *Estate of Brantley v. UPS Ground Freight, Inc.*, No. 3:16-CV-352 (DPM), 2019 U.S. Dist. LEXIS 234231 (E.D. Ark. July 3, 2019).

¹⁰⁵ See, e.g., *Heath v. Isenegger*, No. 2:10-CV-175, 2011 WL 2610394, at *2 (N.D. Ind. July 1, 2011); *J.H. v. Sch. Town of Munster*, 38 F. Supp. 3d 986, 988–89 (N.D. Ind. 2014); *Stefan v. Trinity Trucking, LLC*, 275 F.R.D. 248, 250 (N.D. Ohio 2011); *Frazier v. Nash-Finch Co.*, No. 3:10-CV-45 RM-CAN, 2011 WL 294875, at *2 (N.D. Ind. Jan. 25, 2011); *Scheriff v. C.B. Fleet Co., Inc.*, No. 07-C-873, 2008 WL 2434184, at *3 (E.D. Wis. June 16, 2008); *Morrison v. Stephenson*, 244 F.R.D. 405, 406–08 (S.D. Ohio 2007); *EEOC v. Grief Bros. Corp.*, 218 F.R.D. 59, 63–64 (W.D.N.Y. 2003); *Galieti v. State Farm Mut. Auto. Ins. Co.*, 154 F.R.D. 262, 264 (D. Colo. 1994).

Another recent study demonstrated the highly prevalent practice of misrepresenting what occurs in defense examinations.¹⁰⁶ The study compared twenty consecutive defense medical expert reports to the video recording of the examination.¹⁰⁷ The study revealed that the forensic expert misrepresented the exam in *every single case*.¹⁰⁸ This occurred even when the forensic doctor knew he or she was being recorded.¹⁰⁹ The review uncovered forensic experts misrepresenting doing the tests at all, misrepresenting the results, and failing to conduct the test correctly. For example, rather than gowning the patient and testing sensation directly on the skin, some doctors tested it *over* the patient's clothing.¹¹⁰ One examiner claimed the patient had a normal gait when the video shows very clearly this claim to be false.¹¹¹ One examiner claimed the patient's reflexes were normal when, in fact, they were diminished or completely absent.¹¹² The results of the study concluded, "Analysis of the data found that 100 [percent] of doctors' reports misrepresented the testing and results of the forensic physical examinations."¹¹³

Again, all of the experts misrepresented what happened *even knowing they were being video recorded*. At least, in those cases the existence of the video recording allows the plaintiff to demonstrate the misrepresentations. What chance does the plaintiff have if the exam is not recorded at all?

2. Complete Abandonment of Standardized Procedure

In other instances, the prescribed method of test administration was routinely ignored and ad hoc methods were inserted. Examples of improper behavior—some of which were caught on the recording—that can invalidate the tests includes testing and examinees being interrupted and examiners never reporting those interruptions. Furthermore, because the exams were recorded, additional alteration of standardized testing was documented:

¹⁰⁶ Oregon K. Hunter, Jr., *Evaluation of the Scientific Validity of Forensic Medical Evaluations*, PHYSIATRIST'S VOICE, Dec. 2019, at 37; *see also* Oregon K. Hunter, *Evaluation of the Scientific Validity of Forensic Medical Evaluations*, Abstract, in *Abstracts of Scientific Papers and Posters Presented at the ISPRM World Congress and Annual Meeting of the Association of Academic Physiatrists*, 99 AM. J. PHYSICAL MED. & REHAB. a1, a304 (2020), https://journals.lww.com/ajpmr/fulltext/2020/03001/abstracts_of_scientific_papers_and_posters.1.aspx [<https://perma.cc/765G-LEPW>].

¹⁰⁷ *Evaluation of the Scientific Validity of Forensic Medical Evaluations*, *supra* note 106, at 33.

¹⁰⁸ *Id.* at 37.

¹⁰⁹ *Id.* at 38.

¹¹⁰ *Id.* at 36–37.

¹¹¹ *Id.* at 37.

¹¹² *Id.*

¹¹³ *Id.*

- Failing to give actual instructions for a test as required in a manual.¹¹⁴
- Concluding poor effort when the actual exam revealed the opposite.¹¹⁵
- Altering the answers of the examinee.¹¹⁶
- Ignoring the instructions on a malingering test known as the Test of Memory Malingering and failing to follow the instructions, which can increase the potential for the examinee to fail the test; after this was discovered, the defense expert withdrew the test.¹¹⁷
- Misrepresenting the purpose of the test by not following a manual's instructions on administration and instead minimizing the importance of the testing and the importance of good effort on the part of the test taker by falsely calling it a "game."¹¹⁸
- Rewarding a child after each test by providing stickers in a sticker book clearly visible to the child. Thereafter, on the third day when testing for effort, removing the visible sticker book, and then concluding the child's poor scores meant poor effort.¹¹⁹
- Having an unqualified untrained receptionist give psychological testing when the doctor was not even in the room.¹²⁰
- Giving nonstandard administration of psychological testing with an inability to determine if the test giver followed any standardized testing instructions. If the expert fails to follow the instructions of the test publisher on how to give and interpret the test it becomes 'nonstandard'.¹²¹
- Conducting a test while the subject being evaluated was sitting in a room next to an area with active construction: the evaluatee was

¹¹⁴ Plaintiff's *Daubert* Challenge and Motion *in Limine* Regarding Defense Expert Psychologist, *Cafrá v. Constable*, No. 18-CA-000028 (Fla. Cir. Ct. Oct. 6, 2020).

¹¹⁵ *Id.*

¹¹⁶ Report Attached to Affidavit of Dr. Richard Frederick, Ph.D. at 8, *Valle v. Proficient Auto Transp., Inc.*, No. 2019-CA-006428, 2022 Fla. Cir. LEXIS 1531 (Fla. Cir. Ct. Mar. 28, 2022).

¹¹⁷ Transcript of Hearing at 10, *Valle v. Proficient Auto Transp., Inc.*, No. 2019-CA-006428, 2022 Fla. Cir. LEXIS 1531 (Fla. Cir. Ct. Mar. 28, 2022).

¹¹⁸ *Id.* at 12.

¹¹⁹ Plaintiff's *Daubert* Motion to Exclude, or Alternatively Limit the Testimony of Dr. Jacqueline Valdes at 13, *Teran v. Piloto*, No. 2019-013322-CA-01 (Fla. Cir. Ct. May 31, 2023).

¹²⁰ Affidavit of Richard Fredrick, Ph.D. at ¶ 27(a)–(d), *Estate of Brantley v. UPS Ground Freight, Inc.*, No. 3:16-CV-352 (DPM), 2019 U.S. Dist. LEXIS 234231 (E.D. Ark. July 3, 2019).

¹²¹ *Id.* at ¶¶ 27(h)–35; *see also* COMM. ON PSYCH. TESTING, INCLUDING VALIDITY TESTING, FOR SOC. SEC. ADMIN. DISABILITY DETERMINATIONS, INST. OF MED., PSYCHOLOGICAL TESTING IN THE SERVICE OF DISABILITY DETERMINATION 98, 102–104 (2015).

bombarded with construction noise including jackhammering for three days of testing. This behavior can interfere with effort testing.¹²²

- Having a young female aerobics instructor administering psychological tests to a male examinee; the deponent neuropsychologist admitted that if the tester dressed provocatively and tested a red-blooded, healthy American male, the tester could possibly be a distraction.¹²³
- Documenting numerous pervasive and important changes to standardized procedures and failing to admit such non-standard administrations in reports.¹²⁴
- Noisily re-loading paper into his copier machine while the examiner is performing a paper and pencil test.¹²⁵
- When the plaintiff gives one answer, changing the answer and inputting the changed answers for scoring and failing to admit the same.¹²⁶
- Prompting a response when prompts are explicitly prohibited by the test instructions.¹²⁷
- Teaching the plaintiff how to solve certain problems when this is explicitly prohibited by the publisher and then giving the plaintiff credit for responses following the teaching of the task.¹²⁸

It is unscientific for an expert to claim the patient gave poor effort because he or she did not perform well on tests of effort requiring focus and concentration in spite of the fact that the failure was *caused* by the examiner. When a test is given in a noisy environment, including jackhammering, then reaching the conclusion the test-taker was exaggerating because he or she was unable to concentrate is profoundly improper and misapplies the

¹²² Report Attached to Affidavit of Dr. Richard Frederick, Ph.D at 16–17, *Hancock v. Cantillo*, No. 11-2020-CA-002477-0001-XX (Fla. Cir. Ct. Aug. 4, 2022).

¹²³ Dr. Glenn Larrabee Dep. 158, 159, *Alexander v. Krehling Indus. Inc.*, No. 03-212-CA (Fla. Cir. Ct. June 29, 2005).

¹²⁴ Affidavit of Richard I. Fredrick, Ph.D. at ¶¶ 9, 12, *Camp v. Brevard Achievement Ctr., Inc.*, No. 05-2013-CA-028522 (Fla. Cir. Ct. Oct. 30, 2018).

¹²⁵ *Id.* at ¶ 12(d).

¹²⁶ Dr. K.B. Dep. at 479, 480, 481, 482, *Babin v. Safety Nat'l Ins. Co.*, (La. Dist. Ct. Aug 2, 2023).

¹²⁷ Affidavit of Richard I. Fredrick, Ph.D. at ¶ 12(b)(ix), *Camp v. Brevard Achievement Ctr., Inc.*, No. 05-2013-CA-028522 (Fla. Cir. Ct. Oct. 30, 2018).

¹²⁸ *Id.* at ¶ 12(b)(xi).

test¹²⁹ Without a video of the actual testing, this non-standard administration would be missed and the test-taker could be branded a malingerer.¹³⁰

3. *Important Emotional or Attentional Information Was Unreported or Disputed*

In other cases, author Dr. Frederick observed examiners speaking to subjects in demeaning or mocking tones.¹³¹ In one case, the Plaintiff appeared to be sedated or falling asleep and this was not noted by the examiner.¹³² With a video recording, the evidence offered by the neuropsychologist can be subject to review and refutation.¹³³ A correctly placed camera captures the faces of both individuals, as well as the testing materials.¹³⁴ This allows for an evaluation of adherence to standardized practice and the nature of interactions between the two parties.¹³⁵

4. *Communication of Subjective Impressions*

A psychologist's report is a narrative of what happened in the forensic examination.¹³⁶ The psychologist's subjective impressions of the subject's emotions, attitudes, and behavior are included in the report.¹³⁷ No matter how hard psychologists strive for objectivity, their opinions, conclusions, and assertions rely on their subjective impressions.¹³⁸ But in spite of this subjectivity, if a psychologist says the subject was angry and defensive, that subjective opinion effectively becomes a fact in front of a judge or jury.¹³⁹ If the expert claims that rapport was established, then factfinders at trial are

¹²⁹ Report Attached to Affidavit of Dr. Richard Frederick, Ph.D at 16–17, *Hancock v. Cantillo*, No. 11-2020-CA-002477-0001-XX (Fla. Cir. Ct. Aug. 4, 2022).

¹³⁰ Steven E. Pitt et al., *Preserving the Integrity of the Interview: The Value of Videotape*, 44 J. FORENSIC SCI. 1287, 1288–89 (1999).

¹³¹ Affidavit of Richard I. Fredrick, Ph.D. at ¶ 12(c), *Camp v. Brevard Achievement Ctr., Inc.*, No. 05-2013-CA-028522, (Fla. Cir. Ct. Oct. 30, 2018).

¹³² *Id.* at ¶ 12(d).

¹³³ Pitt et al., *supra* note 130, at 1288–89.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ See *Specialty Guidelines*, *supra* note 94, at 16; see also Howard Kaplan, *The Forensic Psychology Report*, ABA (Nov. 27, 2018) https://www.americanbar.org/groups/public_education/publications/teaching-legal-docs/the-forensic-psychology-report/?login [<https://perma.cc/Z84W-HWPV>]; Lisa Drago Piechowski, *Conducting Personal Injury Evaluations*, in HANDBOOK OF FORENSIC PSYCHOLOGY 174 (Irving B. Weiner & Randy K. Otto eds., 4th ed. 2013).

¹³⁷ See Kaplan, *supra* note 136.

¹³⁸ See ETHICAL PRINCIPLES, *supra* note 47, at §§ Preamble, 2.06; see also Lonnie R. Snowden, *Bias in Mental Health Assessment and Intervention: Theory and Evidence*, 93 AM. J. PUB. HEALTH 239, 241 (2003).

¹³⁹ See Foote et al., *supra* note 45, at 333–34.

effectively forced to conclude that was the case unless the plaintiff can convince them otherwise, and this can be quite difficult when the plaintiff is mentally or cognitively challenged.¹⁴⁰ If the psychologist says the subject was sneaky and attempted to pretend not to know certain answers, this characterization then becomes a fact that cannot be refuted except by the protests of the victim, who may be dismissed as a self-interested witness or misperceiving reality secondary to mental illness or brain damage.¹⁴¹ Without a way to monitor the assessment, these assertions offered by the expert are almost always accepted as true regardless of their actual accuracy.¹⁴² By contrast, a video recording of the forensic examination allows for a complete record of what really happened and provides a basis to evaluate the validity and reliability of the examiner's assertions.

Absent a video recording of interviews and the actual assessment process and the sharing of all protected test materials, the evidence of what happened in the assessment session is necessarily incomplete and potentially inaccurate.¹⁴³ A video recording can capture whether standardized procedures were followed and can clarify the subjective reporting of the examiner (for example, was the client angry and defensive as reported).¹⁴⁴

5. *Changing or Otherwise Influencing Answers*

Recently, an expert admitted that his psychometrist who administered the tests for the neuropsychologist changed the plaintiff's answer.¹⁴⁵ The examinee, for example, answered a question as "false," but the psychometrist entered "true."¹⁴⁶ It was revealed by the test data that several answers were changed.¹⁴⁷ And in another case an expert "alter[ed] the responses of the plaintiff."¹⁴⁸ In another instance, an examiner assisted the examinee in taking the test, which can result in the expert claiming the patient had no cognitive deficits based on the test scores.¹⁴⁹

¹⁴⁰ *See id.*

¹⁴¹ *See id.*

¹⁴² *See id.*

¹⁴³ Pitt et al., *supra* note 130, at 1288–89.

¹⁴⁴ *See id.*

¹⁴⁵ *See supra* note 126 and accompanying text.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ Affidavit of Richard Fredrick, Ph.D. at ¶ 23, Valle v. Proficient Auto Transp., Inc., No. 2019-CA-006428, 2022 Fla. Cir. LEXIS 1531 (Fla. Cir. Ct. Mar. 28, 2022).

¹⁴⁹ Affidavit of Richard I. Fredrick, Ph.D. at ¶¶ x–xi, Camp v. Brevard Achievement Ctr., Inc., No. 05-2013-CA-028522, (Fla. Cir. Ct. Oct. 30, 2018).

6. *Speeding Up Test Administration*

The author has also observed examiners who have sped up effort test administration by decreasing the time examinees have to answer questions.¹⁵⁰ Giving a timed test for effort but then shortening or enlarging the time to take the examination could profoundly change the results making it falsely appear as though the plaintiff was giving poor effort.¹⁵¹ For example, the Test of Memory Malinger requires the examiner to show the examinee fifty drawings, each for three seconds.¹⁵² Thereafter, the examinee is tested to determine which images he or she recalls.¹⁵³ If the defense expert speeds up the test only permitting the examinee to observe the images for one second, thus cutting the time by two thirds, then the examinee will likely fail and certainly perform more poorly. The only way to know if this occurred is to have a video recording at the time of administration.

B. *Production of Test Materials and Raw Data Is Necessary to Ensure the Opinions Are the Product of Reliable Methodology and Facts*

Test materials and test data are the documents that are a part of a psychological or neuropsychological examination.¹⁵⁴ A psychologist may focus on emotional conditions and provide therapy; a neuropsychologist specializes in how diseases and injury affect behavior.¹⁵⁵ As discussed, the test materials are the written test and the test manual, which can include the procedures for administering and scoring the examination.¹⁵⁶ The raw data or testing data are the answers the examinee gave to the test questions.¹⁵⁷ The raw data can be a piece of paper with answers circled or electronic data stored in a testing program.¹⁵⁸ In addition to test materials and raw data, the

¹⁵⁰ Report Attached to Affidavit of Dr. Richard Frederick, Ph.D at 8, *Valle v. Proficient Auto Transp., Inc.*, No. 2019-CA-006428, 2022 Fla. Cir. LEXIS 1531 (Fla. Cir. Ct. Mar. 28, 2022).

¹⁵¹ AM. EDUC. RSCH. ASS'N ET AL., STANDARDS FOR EDUCATIONAL AND PSYCHOLOGICAL TESTING 80, 111 (2014) [hereinafter STANDARDS].

¹⁵² TOMM—*Test of Memory Malinger*, ANN ARBOR PUBLISHERS, https://www.annarbor.co.uk/index.php?main_page=index&cPath=416_597_576# [https://perma.cc/PN26-D85U].

¹⁵³ *Id.*

¹⁵⁴ See ETHICAL PRINCIPLES, *supra* note 47, at §§ 9.04, 9.11.

¹⁵⁵ *Psychologist, Neuropsychologist, and Psychiatrist: Physical Rehabilitation*, JOHNS HOPKINS MED, <https://www.hopkinsmedicine.org/health/treatment-tests-and-therapies/psychologist-neuropsychologist-and-psychiatrist> [https://perma.cc/648M-24NK].

¹⁵⁶ ETHICAL PRINCIPLES, *supra* note 47, at § 9.11; STANDARDS *supra* note 151, at 123, 125, 128.

¹⁵⁷ ETHICAL PRINCIPLES, *supra* note 47, at § 9.04.

¹⁵⁸ Laura M. Rees et. al., *Five Validation Experiments of the Test of Memory Malinger-ing (TOMM)*, 10 PSYCH. ASSESSMENT 10, 18 (1998).

neuropsychologist might generate additional documents in the form of notes about the examinee taken during the exam or while writing a report.¹⁵⁹

1. Written Materials Are Necessary to Evaluate the Admissibility of Expert Opinion

It is essential to obtain the test materials and raw data to determine whether a defense expert's testimony should be admissible. Federal Rule of Evidence 702 states that expert testimony must rely on sufficient data, reliable methodologies, and a reliable application of methods to data.¹⁶⁰ The test materials are evidence of the expert's methodology in the following ways: the testing manual often provides instructions on how a test should be given and scored, which is the testing methodology;¹⁶¹ the raw data is the data obtained from the testing;¹⁶² and the expert's report and notes provide evidence on whether there was a reliable application of testing methodology (instructions) to data (test answers).¹⁶³ A plaintiff has the right to obtain these pieces of evidence to test the admissibility of the expert's opinions. To determine whether the tests were administered or scored properly, the plaintiff first needs to understand what the tests are, including what questions make up the tests, in order to be able to explain her answers and offer alternative explanations contrary to the defense expert's opinion.

In many instances, the test materials and raw data are necessary to understand what happened during an examination and to understand a video recording of the examination. The test manual is necessary to determine whether proper testing procedures were followed. The raw data is essential to evaluate whether the examinee's answers were properly recorded. Requiring the production of test materials and raw data will also help plaintiffs (and the court) determine whether certain tests were given or not.

Consider, as an example, the defense expert's conduct in *Sales v. Summerlin Hospital and Medical Center, LLC*.¹⁶⁴ The defense expert testified that he administered a specific cognitive test.¹⁶⁵ The Plaintiff's attorney asked the Defense expert if the testing results would be invalid if the required protocols were not followed.¹⁶⁶ The expert responded, "You know, I

¹⁵⁹ ETHICAL PRINCIPLES, *supra* note 47, at § 9.04.

¹⁶⁰ FED. R. EVID. § 702.

¹⁶¹ *See generally* STANDARDS, *supra* note 151, at 123.

¹⁶² ETHICAL PRINCIPLES, *supra* note 47, at § 9.04.

¹⁶³ *Id.* § 9.01; William E. Foote et al., *supra* note 45, at 346.

¹⁶⁴ *Sales v. Summerlin Hosp. & Med. Ctr.*, No. A-17-758060-C, 2019 Nev. Dist. LEXIS 1305 (8th Jud. Dist. Ct. Nev. Oct. 22, 2019).

¹⁶⁵ Transcript of Jury Trial at 87, *Sales v. Summerlin Hosp. & Med. Ctr.*, No. A-17-758060-C, 2019 Nev. Dist. LEXIS 1305 (8th Jud. Dist. Ct. Nev. Oct. 22, 2019).

¹⁶⁶ *Id.* at 90.

think it depends on who's—who's—who's making the opinion."¹⁶⁷ This is not sound, reproducible science, but instead permits the expert to reach conclusions in the absence of standards. The Defense expert's assertion certainly contradicts the American Psychological Association's Standards for Educational and Psychological Testing, which state that "[t]he usefulness and interpretability of test scores require that a test be administered and scored according to the developer's instructions," not the impressions of the test administrator.¹⁶⁸ In effect, the Defense expert essentially testified that he was not constrained by the methodology developed to administer a test and used his own "version" of the test. Such behavior makes the results far less standardized and thus less reliable.¹⁶⁹ But without production of the test materials or video recording, neither the Plaintiff nor the court could have been able to discover the expert's disregard for the proper methods of the testing and thus have an opportunity to challenge it.

2. *Written Materials Are Necessary to Cross-Examine the Defense Expert's Conclusions*

A court also should order production of testing materials and raw data to allow a plaintiff a fair chance to cross-examine an expert in front of a jury. If a defense neuropsychologist opines that a plaintiff is malingering (by faking or exaggerating her injuries) based on the examinee's answers to test questions, the plaintiff should be permitted to examine how the expert reached that conclusion. The plaintiff needs the opportunity to explain why the answers may not, in fact, reflect malingering; however, the plaintiff cannot offer such an explanation without knowledge of the questions and the answers.

The need for cross-examination regarding the basis for the defense expert's opinion becomes obvious when many of the questions used by such experts are revealed. For example, defense experts may use a measure, such as the Fake Bad Scale, to conclude that a plaintiff is malingering.¹⁷⁰ The Fake Bad Scale is a scale that may be used as part of the MMPI-2, a personality inventory.¹⁷¹ This scale is nothing more than forty-three statements to

¹⁶⁷ *Id.*

¹⁶⁸ STANDARDS, *supra* note 151, at 111 (emphasis added).

¹⁶⁹ See Transcript of Jury Trial, *supra* note 165, at 90.

¹⁷⁰ See, e.g., David S. Nichols & Carlton S. Gass, *The Fake Bad Scale: Malingering or Litigation Response Syndrome—Which Is It?*, 5 ARCHIVES ASSESSMENT PSYCH. 5, 5 (2015) ("The Fake Bad Scale . . . [is] widely used to detect 'faking bad,' 'noncredible symptom reporting,' and 'somatic malingering.'") The test has failed several challenges as to its scientific credibility and admissibility as evidence. *Id.*

¹⁷¹ James N. Butcher et al., *The Construct Validity of the Lees-Haley Fake Bad Scale Does This Scale Measure Somatic Malingering and Feigned Emotional Distress?*, 23 ARCHIVES CLINICAL NEUROPSYCHOLOGY 855, 855 (2008).

which the examinee responds either “true” or “false.”¹⁷² If the examinee honestly admits to symptoms of a legitimate injury, he or she gets points; and the more points received, the higher the score.¹⁷³ High scores may be interpreted by some as malingering.¹⁷⁴

But, with respect to the Fake Bad Scale, the plaintiff has a point counted against her as malingering or lying just by admitting to common physical health or mental health problems,¹⁷⁵ which could include things like having trouble concentrating, becoming tired quickly, feeling like she cannot overcome difficulties, having pain in the neck, and having headaches.

If a plaintiff has an elevated score on the Fake Bad Scale, the defense expert may opine that the plaintiff is faking her symptoms.¹⁷⁶ But even a cursory examination of the questions reveals that many of them have to do with pain or symptoms of an injury (which a still-injured plaintiff would be experiencing),¹⁷⁷ nausea (a common side effect of medications prescribed to injured people),¹⁷⁸ or nightmares and sleeping problems which can be caused by an injury.¹⁷⁹ Thus, while answering “yes” to these questions is entirely reasonable for an injured plaintiff, the creator of this test also indicates that elevations on this scale can instead mean “[s]ignificant and/or multiple medical conditions.”¹⁸⁰

A defense expert withholding the testing materials and answers leads to a “secret science” that precludes the plaintiff from discovering the very basis of an expert’s opinion. If the plaintiff is not allowed to examine the expert over the questions asked, then the jury has no idea how a conclusion of malingering was reached. The basis of the conclusions is hidden from the jury—an effective black-box. Without the testing material and raw data, the plaintiff’s lawyer cannot explain to the jury or the judge *what* questions were asked or *what* the answers to those questions were. A jury is required to take the word of the defense expert. The plaintiff is not even permitted the opportunity to explain *why* she answered the questions the way she did or offer alternative more likely hypothesis, such as fatigue from ongoing

¹⁷² Paul R. Lees-Haley et al., *A Fake Bad Scale on the MMPI-2 for Personal Injury Claimants*, 68 PSYCH. REPS. 203, 210 (1991).

¹⁷³ Butcher et al., *supra* note 171, at 859.

¹⁷⁴ *Id.* at 856.

¹⁷⁵ *See id.* at 859–60.

¹⁷⁶ *See id.* at 862–63.

¹⁷⁷ *See id.* at 857, 860–62.

¹⁷⁸ *See id.* at 857, 862; *see also* Ramsin Benyamin et al., *Opioid Complications and Side Effects*, 11 PAIN PHYSICIAN 105, 111, 114–16 (2008); Frank Porreca & Michael H. Ossipov, *Nausea and Vomiting Side Effects with Opioid Analgesics During Treatment of Chronic Pain: Mechanisms, Implications, and Management Options*, 10 PAIN MED. 654, 659 (2009).

¹⁷⁹ *See* Butcher et al., *supra* note 171, at 857, 862.

¹⁸⁰ YOSSEF S. BEN-PORATH, INTERPRETING THE MMPI-2-RF (2012).

pain or nausea. This leaves the jury with relying on a trained and highly educated expert witness or a potentially psychologically damaged, unreliable plaintiff, with poor memory.

By failing to produce the testing materials and raw data, the defense expert effectively becomes the sole arbiter of the plaintiff's credibility. However, credibility determinations are for the jurors, not the parties or their experts. Jurors are denied this role if the plaintiff is not allowed to present this material as part of cross-examination.

IV. THE PARTICULAR PROBLEM OF PSYCHOLOGICAL EXPERT TESTIMONY

Testimony from psychological experts raises unique issues regarding its admissibility because, unlike chemistry or biology, psychology is not considered a traditional hard science.¹⁸¹ Psychology suffers from the normal problems that all social sciences are confronted with studying humans. That makes the results less precise, accurate, and reliable, because human behavior is variable, difficult to predict, and subject to various biases (both from the person studying and the person being studied).¹⁸² Both the law and the field of psychology recognize this as fact.¹⁸³

A test and methodology may be created for the purposes of litigation.¹⁸⁴ These tests may have been adopted or altered from their original purpose and recast as a test of the credibility of a plaintiff. For example, the Modified Somatic Perception Questionnaire was created for use with individuals with back pain to measure "somatic and autonomic perception."¹⁸⁵ This measure is nothing more than twenty-two statements to which the examinee responds "[n]ot at all;" "[a] little, slightly;" "[a] great deal, quite a bit;" or "[e]xtremely, could not have been worse;" and simply asks about various symptoms that can be explained by injury and disability, including stomach

¹⁸¹ Eduardo Martí, *The Need for Epistemological Vigilance*, 54 INTEGRATIVE PSYCH. & BEHAV. SCI. 677, 677–79 (2020).

¹⁸² See, e.g., Jennifer L. Tackett et al., *It's Time to Broaden the Replicability Conversation: Thoughts for and from Clinical Psychological Science*, 12 PERSPS. ON PSYCH. SCI. 742, 743–45 (2017); NAT'L ACADS. OF SCIS., ENG'G. & MED., REPRODUCIBILITY AND REPLICABILITY IN SCIENCE 83, 85, 90–91 (2019).

¹⁸³ See, e.g., Tackett et al., *supra* note 182, at 743; Kenneth R. Morel, *Test Security in Medicolegal Cases: Proposed Guidelines for Attorneys Utilizing Neuropsychology Practice*, 24 ARCHIVES CLINICAL NEUROPSYCHOLOGY 635, 636, 638, 642 (2009).

¹⁸⁴ See Nichols & Gass, *supra* note 170, at 6 (detailing how the Fake Bad Scale was developed using a sample of forty-five personal injury litigants which Lees-Haley pulled from his private practice to determine when a personal injury litigant is malingering).

¹⁸⁵ Chris J. Main, *The Modified Somatic Perception Questionnaire (MSPQ)*, 27 J. PSYCHOSOMATIC RSCH. 503, 503 (1983).

pain, weakness in legs, or aching muscles.¹⁸⁶ The examinee has no opportunity to clarify further, such as providing a reason for these symptoms.¹⁸⁷ However, it is now frequently being used by defense experts to conclude malingering.¹⁸⁸

Because of the “soft science” characteristics of social science, which includes psychological testing, it becomes even more important in those cases that the methodology be produced. Reliability becomes an even bigger question if the methods and results cannot be reviewed by video or confirmed from the raw data and written materials.

A. Psychology has a Replicability Issue, and its Tests Can be Unreliable and Imprecise for Their Use in Litigation

As the *Daubert* decision explained, there are certain hallmarks of the scientific method that are employed in traditional sciences, including whether the results can be reviewed or tested for reliability and whether standard techniques or methods exist.¹⁸⁹ Not all aspects of the field of psychology share these characteristics. Some psychological tests and theories have come under criticism for their failure in accuracy and their inability to be replicated.

Within the psychological field, researchers have recognized that the field suffers from a “reproducibility crisis.”¹⁹⁰ For example, a well-recognized study concluded that humans have a finite amount of willpower that can be depleted.¹⁹¹ The results of the study were published decades ago and have been cited thousands of times, but recent efforts to test the theory have been unable to reproduce its results, calling into question its now-accepted conclusions.¹⁹² In a much more wide-ranging study, psychologists initiated a meta-study to address ongoing concerns about the reliability of conclusions being reached from psychological research.¹⁹³ They re-

¹⁸⁶ Zack Cernovsky et al., *Inappropriate Use of the Modified Somatic Perception Questionnaire (MSPQ) to Diagnose Malingering*, 3 ARCHIVES PSYCHIATRY & BEHAV. SCIS. 10, 12 (2020).

¹⁸⁷ See *id.*

¹⁸⁸ See *id.* at 13–14.

¹⁸⁹ *Daubert v. Merrell Dow Pharms, Inc.*, 509 U.S. 579, 593–94 (1993).

¹⁹⁰ Daniel Engber, *Everything Is Crumbling*, SLATE (Mar. 6, 2016, 8:02 PM), https://www.slate.com/articles/health_and_science/cover_story/2016/03/ego_depletion_an_influenial_theory_in_psychology_may_have_just_been_debunked.html [https://perma.cc/LKJ7-ARZA]; Am. Psych. Ass’n, *A Reproducibility Crisis?*, 46 MONITOR ON PSYCH. 39 (2015) (noting that the problem is not unique to the field of psychology).

¹⁹¹ See generally Roy F. Baumeister et al., *Ego Depletion: Is the Active Self a Limited Resource?*, 74 J. PERSONALITY & SOC. PSYCH. 1252 (1998).

¹⁹² Engber, *supra* note 190.

¹⁹³ Ian Sample, *Study Delivers Bleak Verdict on Validity of Psychology Experiment Results*, GUARDIAN (Aug. 27, 2015, 2:00 PM), <https://www.theguardian.com/science/2015/au>

examined 100 studies published in top psychology journals and “found that they could reproduce only 36% of original findings.”¹⁹⁴ Their conclusion, that the results from a significant proportion of these psychological studies cannot be replicated indicates that the reliability of psychological testing should be questioned to a greater degree.¹⁹⁵

The law also recognizes that certain disciplines, such as psychology, are not hard science. The Federal Reference Manual on Scientific Evidence, published by the Federal Judicial Center, categorizes the field of psychology as a soft science.¹⁹⁶ Although there is no formal definition of a “hard science” or a “soft science” in the academic literature, the difference is colloquially understood by what the fields study: hard sciences study the natural world, and soft sciences study human behavior.¹⁹⁷ Because human behavior is more difficult to study and efforts to study them are less accurate and reliable, there is a public understanding that soft sciences do not carry the same respect or prestige as physics, math, or chemistry.¹⁹⁸ Hard sciences, such as physics, “have more control over the variables and conclusions.”¹⁹⁹ Soft science uses empirical data and the results are more difficult to predict.²⁰⁰ Humans are more difficult to study and efforts to study them are less accurate.

When Rule 702 was amended, the Advisory Committee Notes provided more context for dealing with expert testimony:

Some types of expert testimony will not rely on anything like a scientific method, and so will have to be evaluated by reference to other standard principles attendant to the particular area of expertise. The trial judge in all cases of proffered expert testimony must find that it is properly grounded, well-reasoned, and not speculative before it can be admitted. The expert’s testimony must be grounded in an accepted body of learning or experience in the

g/27/study-delivers-bleak-verdict-on-validity-of-psychology-experiment-results [https://perma.cc/HPC9-TH6E].

¹⁹⁴ *Id.*; Christopher J. Anderson et al., *Estimating the Reproducibility of Psychological Science*, 349 SCI. 943, aac4716-1 (2015); Brian A. Nosek, *An Open, Large-Scale, Collaborative Effort to Estimate the Reproducibility of Psychological Science*, 7 PERSP. PSYCH. SCI. 657, 657 (2012).

¹⁹⁵ Anderson et al., *supra* note 194, at 943.

¹⁹⁶ FED. JUD. CTR., REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 15 (2d ed. 2000), https://www.fjc.gov/sites/default/files/2012/sciman00.pdf [https://perma.cc/Y9KU-LA79].

¹⁹⁷ Anne Marie Helmenstine, *What is the Difference Between Hard and Soft Science?*, THOUGHTCO., https://www.thoughtco.com/hard-vs-soft-science-3975989 [https://perma.cc/GT3V-9LAX] (Nov. 29, 2019).

¹⁹⁸ *See id.*

¹⁹⁹ *What’s the Gripe Between ‘Hard’ and ‘Soft’ Sciences? The Debate Rages On*, UTAH STATE UNIV. (June 11, 2004), https://www.usu.edu/today/story/whats-the-gripe-between-hard-and-soft-sciences-the-debate-rages-on [https://perma.cc/J25B-PY6J].

²⁰⁰ *Id.*

expert's field, and the expert must explain how the conclusion is so grounded.²⁰¹

The Federal Reference Manual and the Rule 702 Advisory Notes describe the state of psychological testing.²⁰²

B. Some Psychological Testing Used in Litigation Was Not Created Through a Scientific Method

As discussed above, the field of psychology suffers from a reproducibility crisis that should make courts wary of the reliability of psychological opinion testimony.²⁰³ But the problem is compounded when dealing with testimony that rests on psychological testing done for purposes of litigation. There are concerns that some psychological tests may not have been created using a scientific process that has generated reproducible results.²⁰⁴ Furthermore, experts may rely on a test that gives points associated with expected symptoms of an injury towards a scale purporting to measure an exaggeration condition.²⁰⁵

As mentioned in the previous Section, the Modified Somatic Perception Questionnaire was created to assess types of symptoms that may also indicate anxiety or depression. But, multiple external factors—like sweating in a hot climate or a narcotic-caused stomach pain—can provide high scores which the defense will then use to show malingering.²⁰⁶ The Modified Somatic Perception Questionnaire was created to assess types of symptoms that may also indicate anxiety or depression.²⁰⁷ However, in spite of the lack of an administration and interpretation manual from any test publisher, defense experts may claim that high scores indicate that the examinee is faking or exaggerating.²⁰⁸ This test seems to have been appropriated by the defense to conclude that legitimate symptoms from very real illnesses or injuries are, in fact, proof of malingering, which by definition means dishonesty.²⁰⁹ One definition of malingering is, “intentional production of false or grossly exaggerated physical or psychological symptoms, motivated by external incentives such as avoiding military duty, avoiding work, obtaining financial

²⁰¹ FED. R. EVID. 702 Advisory Committee's Notes to 2000 Amendments.

²⁰² See FED. JUD. CTR., REFERENCE MANUAL ON SCIENTIFIC EVIDENCE at xv (3rd ed. 2001); see also FED. R. EVID. 702 Advisory Committee's Notes to 2000 Amendments.

²⁰³ Tackett, *supra* note 182, at 743; NAT'L ACADS. OF SCIS., ENG'G. & MED., *supra* note 182, at 83. See generally David Faust, *Forensic Neuropsychology: The Art of Practicing a Science that Does Not Yet Exist*, 2 NEUROPSYCHOLOGY. REV. 205 (1991).

²⁰⁴ See Main, *supra* note 185, at 506; see also Cernovsky et al., *supra* note 186, at 11.

²⁰⁵ Cernovsky et al., *supra* note 186, at 10.

²⁰⁶ See *supra* notes 177–80 and accompanying text.

²⁰⁷ Main, *supra* note 185, at 505.

²⁰⁸ See Cernovsky et al., *supra* note 186, at 11.

²⁰⁹ *Id.*

compensation, evading criminal prosecution, or obtaining drugs.”²¹⁰ Malingering is often considered when there is any combination of the following:

1. Medicolegal context of presentation (e.g., the person is referred by an attorney to the clinician for examination)
2. Marked discrepancy between the person’s claimed stress or disability and the objective findings
3. Lack of cooperation during the diagnostic evaluation and in complying with the prescribed treatment regimen
4. The presence of Antisocial Personality Disorder²¹¹

Therefore, to satisfy the definition of malingering, one possible consideration is that the patient be in a lawsuit. This allows a doctor to include the patient being in a lawsuit to determine whether that patient is malingering to show that their lawsuit is frivolous. This is similar to a diagnosis of leukemia being dependent upon the patient being in a lawsuit. Furthermore, when a defense expert concludes that malingering has occurred, it means the expert purports to (1) know the patient’s *intent*; and (2) know *why* the patient allegedly lied—that is, for secondary gain, such as obtaining financial compensation from a lawsuit.²¹² But there is no such “malingering” test that can determine intent or motive because no test questions *why* the patient gave a particular answer.²¹³

Obviously, unless the plaintiff and her attorney know what the actual questions are on the test, there is no way they can explain to a jury why the plaintiff gave the answer she did and how her answer does not indicate that the plaintiff was malingering. Imagine an immigrant to the United States taking the Structured Inventory of Malingered Symptoms test, which is a series of questions used to test for malingering. One of the questions asks how many states there are in a country.²¹⁴ Someone from another country may not know this and get the answer incorrect and then be denied the information to explain *why* the answer was incorrect. Accusing a plaintiff of malingering is a laden charge. It can be used to support criminal charges of insurance fraud and perjury in deposition if the expert claims the plaintiff’s statements were under oath, such as in a deposition or court hearing. Refusing to permit the attorney to investigate the underlying information pre-

²¹⁰ AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 739 (5th ed. 2013).

²¹¹ *Id.*

²¹² MICHAEL SHAHNASARIAN, A CLAIMANT’S GUIDE TO UNDERSTANDING AND PRESENTING INJURY DAMAGES: A DAMAGES EXPERT’S PERSPECTIVE 52 (2014).

²¹³ See *Program Operations Manual System (POMS)*, SOC. SEC. ADMIN. (Feb. 22, 2023), <https://secure.ssa.gov/poms.nsf/lnx/0422510006> [<https://perma.cc/B238-Y3VE>].

²¹⁴ M. Cima et al., *Strukturierter Fragebogen Simulierter Symptome: Die Deutsche Version des “Structured Inventory of Malingered Symptomatology: SIMS”*, 74 NEUROLOGIST 977, 983 (2003) (German Version of the “Structured Inventory of Malingered Symptomatology”).

vents a fair presentation to the jurors of what the plaintiff's answers actually indicate.

1. The Development of Psychological Testing for Use in a Clinical Setting

Researchers primarily create psychological tests by giving the test under design to “normal” individuals who have no reason to be tested other than their willingness to be helpful to researchers or to earn a nominal fee for their time.²¹⁵ For example, researchers create IQ tests by collecting a large sample of individuals who have no obvious problems, disorders, or defects.²¹⁶ The researchers carefully screen for problems by using questionnaires.²¹⁷ The researchers include the individuals that are deemed “normal” in all the important respects in the test’s “development sample” according to other characteristics: age, gender, race, education, income, and other demographic characteristics.²¹⁸ The goal of the test developers is to generate a sample of “normal” individuals that closely matches the characteristics of the population to which the test will be given—this development sample will be a “representative” sample for the use of the test in the general population.²¹⁹

a. The Normative Sample

The development sample is called the “normative sample” because the test characteristics of the development sample are normalized to generate percentiles of performance or, as in the case of personality tests, symptom experiences, such as depression or anxiety, or attitudes, such as narcissism or assertiveness.²²⁰ If the test sample percentages of demographic characteristics closely matches the population percentages of demographic characteristics, then the test can potentially speak to the level at which a test subject’s measured characteristic, such as IQ, ranks in the population.²²¹ A test sample that is, for example, predominated by White, college-educated men is problematic when used on different populations—the results would be less pre-

²¹⁵ See ANNE ANASTASI & SUSANA URBINA, PSYCHOLOGICAL TESTING 48–73 (Pete Janzow et al. eds., 7th ed. 1997).

²¹⁶ DAVID WECHSLER, WAIS-IV WECHSLER ADULT INTELLIGENCE SCALE®: TECHNICAL AND INTERPRETIVE MANUAL 30–31 (4th ed. 2008).

²¹⁷ *Id.* at 30.

²¹⁸ *Id.* at 32.

²¹⁹ *Id.* at 33.

²²⁰ ANASTASI & URBINA, *supra* note 215, at 68.

²²¹ See, e.g., WECHSLER, *supra* note 216, at 34–38.

cise, less accurate, and less reliable.²²² The test has its greatest use when its normative sample represents the domain of individuals likely to be tested.²²³ Using the test outside of the domain of individuals represented leads to potentially false conclusions about the rank of ability or characteristics of the examinee.²²⁴ When psychologists test individuals not represented by the development sample, they are obligated to explain what the implications are for the use of the test in the way it was used.²²⁵

b. The Development of Test Questions

The development of tests themselves involves item creation and item selection to determine what is being studied and how it should be studied.²²⁶ For example, a test may be created to assess personality, such as the Minnesota Multi-Phasic Personality Inventory. The test is developed by creating a series of statements to which the examinee responds with “true” or “false.”²²⁷

Test developers generate many candidate test items and conduct preliminary studies to evaluate the usefulness of such items to help capture the abilities and characteristics of individuals who take the test.²²⁸ This process may entail many preliminary studies and involve many individuals who take the candidate tests prior to a final or near-final version of the test used in the development sample.²²⁹ The preliminary studies are used to evaluate the usefulness of test items; to identify and eliminate or improve items with poor discriminability (that is, items not likely to help clarify the characteristics being studied); to identify and eliminate superfluous items; and to identify the need for newer, more useful items.²³⁰

Certain abilities, such as mathematical ability, might best be evaluated and characterized by exhaustive testing on the domain of mathematical knowledge. Oral examinations of doctoral candidates, for example, often use

²²² JAMES A. HOLDNACK ET AL., WAIS-IV, WMS-IV, AND ACS: ADVANCED CLINICAL INTERPRETATION 189 (James A. Holdnack et al. eds., 2013).

²²³ STANDARDS, *supra* note 151, at 126 (psychological tests are adapted for use in specialty examinations, such as neuropsychological assessment, rehabilitation assessment, and forensic assessment).

²²⁴ *Id.* at 128–29. *See generally* SHARON-ANN GOPAUL MCNICOL & ELEANOR ARMOUR-THOMAS, ASSESSMENT AND CULTURE: PSYCHOLOGICAL TESTS WITH MINORITY POPULATIONS (2001).

²²⁵ STANDARDS, *supra* note 151, at 126.

²²⁶ R. MICHAEL FURR & VERNE R. BACHARACH, PSYCHOMETRICS: AN INTRODUCTION 186 (2d ed. 2014).

²²⁷ Rebecca Joy Stanborough, *What to Know About the MMPI Test*, HEALTHLINE (Apr. 20, 2020), <https://www.healthline.com/health/mmpi-test#whats-the-mmpi-2> [<https://perma.cc/9HT4-4WQ2>].

²²⁸ FURR & BACHARACH, *supra* note 226, at 186.

²²⁹ ANASTASI & URBINA, *supra* note 215, at 175.

²³⁰ *Id.* at 172.

the method of exhaustive questioning, attempting to identify the breadth and depth of a candidate's knowledge.²³¹ But most psychological cognitive tests typically employ a sampling method in which only a few items are used to estimate a person's knowledge or abilities.²³²

Similarly, some self-report questionnaires might use only a few items to identify problematic emotions. For example, the PTSD scale (anxiety-related experiences, "ARX") on the MMPI-3 has only fifteen statements to which the examinee responds.²³³ A scale with such few questions may under—or over—report pathology without permitting the subject's lawyer to inquire as to the makeup of the questions in order to further explain why the responses may or may not represent pathology. The sampling method of estimating ability assumes that a person with a certain ability level will have knowledge of certain test items by virtue of having a certain overall ability level—for example, "individuals with x ability will usually know that A is the capital of B ."

If individuals with y -level ability can answer or solve the test item only because they were coached on the correct answers or had them revealed in some other way, such as by an internet search, then there is a risk that the test will falsely rate them at x -level ability instead of y -level ability. Public disclosure of protected test information, absent a protective order, can ruin or "spoil" a test, making it useless for its intended purpose.²³⁴ Consequently, test developers and test users work hard to protect the test information from being publicly disclosed.²³⁵ Psychologists are ethically and contractually obligated to protect this information absent a court order compelling its release.²³⁶ Test publishers review potential purchases of their products and sell them only to professionals with requisite training and experience.²³⁷

²³¹ *PhD Oral Exam*, MIT BIOLOGICAL ENG'G, <https://be.mit.edu/academic-programs/current-graduate/phd-oral-exam> [<https://perma.cc/4NN9-A3QQ>].

²³² See ANASTASI & URBINA, *supra* note 215, at 79; see also W. Gerrod Parrott & Paula T. Hertel, *Research Methods in Cognition and Emotion*, in HANDBOOK OF COGNITION AND EMOTION 68 (Tim Dalgleish & Mick J. Power eds., 1999).

²³³ YOSSEF S. BEN-PORATH & MARTIN SELLBOM, INTERPRETING THE MMPI-3 404 (2023).

²³⁴ *FAQs: Disclosure of Test Data and Test Materials*, AM. PSYCH. ASS'N (Apr. 11, 2019), <https://www.apa.org/science/programs/testing/data-disclosure-faqs> [<https://perma.cc/3PAJ-JKY8>].

²³⁵ Am. Psych. Ass'n, Comm. on Legal Issues, *Strategies for Private Practitioners Coping with Subpoenas or Compelled Testimony for Client/Patient Records or Test Data or Test Materials*, 47 PRO. PSYCH.: RSCH. & PRAC. 1, 2–4 (2016); *FAQs: Disclosure of Test Data and Test Materials*, *supra* note 234.

²³⁶ *FAQs: Disclosure of Test Data and Test Materials*, *supra* note 234; see ETHICAL PRINCIPLES *supra* note 47, at § 4; see also *Legal Policies*, PEARSON (June 15, 2021), <https://www.pearsonassessments.com/footer/legal-policies.html> [<https://perma.cc/L6ZB-FK6K>].

²³⁷ *Legal Policies*, *supra* note 236.

In some instances, states legislate that psychologists must protect this information from disclosure to non-psychologists unless there is a protective order in place.²³⁸ Plaintiffs' counsel can agree to protective orders to keep this very thing from happening thus rendering the argument moot. If the parties stipulate that the test material is not to be placed in the public domain, is only to be used for direct or cross-examination of an expert, and is destroyed at the conclusion of the case, those concerns are alleviated.

c. Standardized Methods for Administering Psychological Tests

Once the test items are created, the methods for presenting the items in a test are prescribed in various levels of detail.²³⁹ Some procedures are fairly lax (such as, ask the person to read the instructions silently and complete the questionnaire) and others are highly detailed and specific (for example, instructions are presented verbatim, time limits for test completion are specified, time of exposure to certain pictures or rate of lists read to subjects is prescribed).²⁴⁰ The test items are created, the specific procedures for presenting the test items are established, a development sample is selected, the test is administered to the development sample, and then the norms are generated. Then the test is said to be "standardized," and the development sample (the normative sample) is now referred to as the standardization sample.²⁴¹

d. The Uses of Psychological Testing

Psychological tests are adapted for use in specialty examinations, such as neuropsychological assessment, rehabilitation assessment, and forensic assessment.²⁴² But there are no specific neuropsychological tests, rehabilitation tests, or forensic tests—there are only *psychological tests*.²⁴³ The Standards,

²³⁸ FLA. ADMIN. CODE ANN. r. 64B19-18.004 (2023) ("(3) A psychologist who uses test instruments may not release test data, such as test protocols, test questions, assessment-related notes, or written answer sheets, except (1) to a licensed psychologist or school psychologist licensed pursuant to Chapter 490, F.S., or Florida certified, or (2) after complying with the procedures set forth in Rule 64B19-19.005, F.A.C., and obtaining an order from a court or other tribunal of competent jurisdiction, or (3) when the release of the material is otherwise required by law. When raw test data is released pursuant to this paragraph, the psychologist shall certify to the service user or the service user's designee that all raw test data from those test instruments have been provided. Psychologists are expected to make all reasonable efforts to maintain the integrity of the test protocols, modalities and instruments when releasing information as provided herein." (emphasis added)).

²³⁹ STANDARDS, *supra* note 151, at 111.

²⁴⁰ *Id.* at 111–12.

²⁴¹ *See id.* at 111.

²⁴² ANASTASI & URBINA, *supra* note 215, at 509–10.

²⁴³ *Id.*

however, apply to all psychological tests.²⁴⁴ The neuropsychologists use the same rules as psychologists in conducting testing. The *Standards for Educational and Psychological Testing* promotes standard methodology of all psychological tests in the various assessments in which they are employed: “Assessment . . . refer[s] to a process that integrates test information with information from other sources.”²⁴⁵ Any assessment that occurs in the legal area is a *forensic* assessment, whether it is a forensic neuropsychological assessment, forensic rehabilitation assessment, or forensic mental health assessment.²⁴⁶

Psychological testing is big business, and test publishers—some of them million- and billion-dollar companies that are publicly traded on the stock exchange—look to maximize profit.²⁴⁷ Companies such as Pearson Clinical, Psychological Assessment Resources, Western Psychological Services, Pro-Ed, and Multi-Health Systems sell thousands of psychological assessment tools, many of which are revised and republished with updated versions over time.²⁴⁸ Many of these tools are sold for hundreds of dollars, and there are usually recurring per-use costs for items such as answer sheets, record forms, or online administration and scoring programs.²⁴⁹

It is no small matter to create a test and to generate a standardization sample with the final version of the test. Test developers and test publishers may spend millions of dollars in this process.²⁵⁰ The process may take many years: Some tests take as long as a decade to develop.²⁵¹ For a variety of reasons, many tests have quite limited shelf lives,²⁵² and test publishers begin the process of developing the next version of many tests as soon as they release the most recent version.²⁵³ Because of limited shelf life, many tests are

²⁴⁴ STANDARDS, *supra* note 151, at 1–3; Lynn A. Schaefer et al., *Neuropsychological Assessment*, STATPEARLS, <https://www.ncbi.nlm.nih.gov/books/NBK513310/> [<https://perma.cc/S3V4-Q53S>] (May 16, 2023).

²⁴⁵ STANDARDS, *supra* note 151, at 2.

²⁴⁶ *Specialty Guidelines*, *supra* note 94, at 7.

²⁴⁷ Tess M. S. Neal et al., *Psychological Assessments in Legal Contexts: Are Courts Keeping “Junk Science” Out of the Courtroom?*, 20 PSYCH. SCI. IN PUB. INT. 135, 136 (2019).

²⁴⁸ See generally *Products A–Z*, PEARSON, <https://www.pearsonassessments.com/professional-assessments/products/products-a-z.html> [<https://perma.cc/E7G2-4D8Y>]; *Neuropsychology*, PSYCH. ASSESSMENT RES., <https://www.parinc.com/Products/NEUROPSYCHOLOGY> [<https://perma.cc/4H93-5SLM>].

²⁴⁹ See, e.g., Marshal F. Folstein et al., *MMSE Mini-Mental State Examination*, PSYCHOLOGICAL ASSESSMENT RESOURCES, <https://www.parinc.com/Products/Pkey/237> [<https://perma.cc/87TE-5MJZ>].

²⁵⁰ See Neal et al., *supra* note 247, at 136.

²⁵¹ Kim-Yin Chan et al., *What Is the Shelf Life of a Test? The Effect of Time on the Psychometrics of a Cognitive Ability Test Battery*, 84 J. APPLIED PSYCH. 610, 610 (1999).

²⁵² *Id.*

²⁵³ See JAMES N. BUTCHER ET AL., DEVELOPMENT AND USE OF THE MMPI-2 CONTENT SCALES 132–34 (1990).

currently well into their third or fourth revision; some are even further along.²⁵⁴ Because publishers may only make money during the shelf life of the test, they generally wish to prolong the shelf life as long as possible and are vigilant to threats thereto by, for example, exposure of the test items to the public.²⁵⁵ While this is clearly appropriate, the published code of ethics does not say that says releasing the data in a litigated case subject to a protective order is unethical or inappropriate.²⁵⁶ In fact, encouraging an expert to violate a court order is unethical.²⁵⁷ If the expert feels uncomfortable with the conditions under which the exam is to take place, he or she can always refuse the case. The concerns of the publisher are protected with the protective order.

2. *Psychological Tests Are Not Developed or Tested for Use in Litigation*

Psychologists potentially generate meaningful information from tests if they use the test for a person whose characteristics were part of the normative sample and give the test in the standardized manner prescribed by the test publisher.²⁵⁸ Test administrators should follow carefully the standardized procedures for administration and scoring specified by the test developer, unless the situation or test taker's disability dictates that an exception should be made.²⁵⁹ The only way to know if the defense expert actually followed this recommendation is to video record the exam. It is insufficient to take the examiner's word.

It is important to be aware of departures from representativeness and departures from standardized procedure because the meaning of test scores, such as the percentiles derived, may be altered if the conditions under which or procedures by which percentiles were generated for the standardization sample are not followed exactly.²⁶⁰ Some departures are obvious, such as giving adult tests to minors, but some departures from standardized practice are not evident without actual observation of the testing. Keep in mind

²⁵⁴ See *Products A-Z*, *supra* note 248.

²⁵⁵ See Neal et al., *supra* note 247, at 136; see also Alan Lewandowski et al., *Policy Statement of the American Board of Professional Neuropsychology Regarding Third Party Observation and the Recording of Psychological Test Administration in Neuropsychological Evaluations*, 23 APPLIED NEUROPSYCHOLOGY: ADULT 391, 394 (2016).

²⁵⁶ See *Randy's Trucking, Inc. v. Superior Court*, No. F084849, 2023 Cal. App. Unpub. LEXIS 2392 at *27, *37–*38 (Apr. 26, 2023); see also ETHICAL PRINCIPLES *supra* note 47, at §§ 9.04, 9.11.

²⁵⁷ MODEL RULES OF PRO. CONDUCT r. 3.4(c) (AM. BAR ASS'N. 2019).

²⁵⁸ STANDARDS, *supra* note 151, at 111–12, 154.

²⁵⁹ *Id.* at 111.

²⁶⁰ *Id.* at 115 (“Changes or disruptions to standardized test administration procedures or scoring should be documented and reported to the test user.”).

that many of the “neuropsychologists” who administer these tests often have no license or degree in neuropsychology.²⁶¹ And if psychiatrists give psychological tests, it is entirely possible that the medical doctor has taken no courses in testing and measurements or had no formal training in the administration and scoring of the tests.²⁶²

For example, many tests have strict requirements for how materials are placed before examinees, exactly what is said to them, how questions by examinees are answered, how instructions are administered, how the process is explained, how much time is given to complete a task, how long materials are presented, how much time is given for a correct response, and so forth.²⁶³ It may not be possible to know if a test giver departed from standardized administration without a video record or without direct observation by a knowledgeable third party.

An obvious example of departure from standardized testing is testing an individual whose primary language is not the same as that of the standardization sample or the language in which the test can be administered—some tests have, for example, both English and Spanish versions.²⁶⁴ A threat to reliable interpretation occurs when the language skills of the examinee are significantly different from those of the standardization sample.²⁶⁵ Testing a highly intelligent individual whose first language is not English with a test presented in English, and based on a standardization sample of native English speakers, can lead to the wrong conclusion that the individual has below average intelligence.²⁶⁶

Psychologists are ethically obligated to speak to threats to the validity of interpretations of test scores.²⁶⁷ Forensic psychologists are exhorted to examine “the issue or problem at hand from all reasonable perspectives and seek information that will differentially test plausible rival hypotheses.”²⁶⁸ Practice guidelines for neuropsychologists indicate that interpretation of test

²⁶¹ See *Best Colleges and Majors for Neuropsychologists*, *supra* note 23.

²⁶² Steven J. Kingsbury, *Cognitive Differences Between Clinical Psychologists and Psychiatrists*, 42 AM. PSYCH. 152, 155 (1987).

²⁶³ ANASTASI & URBINA, *supra* note 215, at 6.

²⁶⁴ *MMPI-2, MMPI-2-RF, MMPI-A, MMPI-A-RF, MMPI-3 Translations*, PEARSON (Sept. 7, 2023), <https://support.pearson.com/usclinical/s/article/MMPI-2-MMPI-2-RF-MMPI-A-Translations#:~:text=https://perma.cc/Y5X8-DRRZ>.

²⁶⁵ STANDARDS, *supra* note 151, at 49–50.

²⁶⁶ *Id.* at 151–54.

²⁶⁷ ETHICAL PRINCIPLES *supra* note 47, at § 9.06 (“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.”).

²⁶⁸ *Specialty Guidelines*, *supra* note 94, at 14–15.

scores include consideration of environmental influences, patient behavior and background characteristics, and the effect of medication and physical factors.²⁶⁹

It is worth noting that a forensic assessment may already deviate significantly from the standardized process in which tests were developed. For example, a psychological test developed using college students may be administered to a plaintiff in a personal injury case being examined by a doctor she does not trust. Forensic assessment and clinical assessment differ in many important ways.²⁷⁰ IQ tests and personality tests are normed with cooperative relationships, but many forensic assessments are obviously adversarial in nature because they are performed by an expert whose interests do not align with the examinee.²⁷¹

Except for tests evaluating psycho-legal abilities (such as competency to stand trial) and certain malingering tests, no test examinee during test development was undergoing evaluation to resolve any disputed legal matter.²⁷² This is especially significant when considering that test results can be affected by the fact that the examinee does not trust the doctor giving the test, which can cause increased anxiety, especially if tested during a pandemic.²⁷³ Everyone in the normative samples for ability tests and personality instruments were tested by individuals with whom they had a neutral or positive relationship.²⁷⁴ No one had been hired by a party adverse to their interests to administer tests and to try and use that information to interfere with, contravene, or damage their interests. And yet that is exactly what occurs when psychologists hired by the defense agree to interview and test claimants. In personal injury litigation, millions of dollars may be at stake. In the case of a criminal defendant, the defendant can permanently lose her civil liberties or even be executed. There is too much at stake in these situations to preclude a deep and meaningful investigation into the expert's opinion.

Psychologists are aware that testing in a legal situation departs so significantly from standardized testing that an entire industry has arisen to evaluate the effects of testing individuals outside of standard conditions—the in-

²⁶⁹ Bd. Dirs. Am. Acad. Clinical Neuropsychology, *American Academy of Clinical Neuropsychology (AACN) Practice Guidelines for Neuropsychological Assessment and Consultation*, 21 CLINICAL NEUROPSYCHOLOGIST 209, 223 (2007).

²⁷⁰ *Specialty Guidelines*, *supra* note 94, at 15.

²⁷¹ Daniel C. Murrie et al., *Are Forensic Experts Biased by the Side that Retained Them?*, 24 PSYCH. SCI. 1889, 1890, 1893 (2013); WECHSLER, *supra* note 216, at 2–3.

²⁷² Archer et al., *supra* note 25, at 12–13.

²⁷³ See Megan A. Dorenkamp & Peter Vik, *Neuropsychological Assessment Anxiety: A Systematic Review*, 3 AM. PSYCH. ASS'N: PRAC. INNOVATIONS 192, 204 (2018).

²⁷⁴ See Archer et al, *supra* note 25, at 5.

dustry of malingering testing.²⁷⁵ Malingering tests may not be given in clinical assessments but are routinely given in forensic cases.²⁷⁶ Neuropsychologists promulgate professional policy statements. Those policies include recommendations that neuropsychological assessments contain malingering testing to evaluate for the possible effect of faking or feigning on the part of the examinee.²⁷⁷

Ironically, the defense expert's claim that an examination cannot be video recorded because it would alter the conditions under which the test was developed, such as there being no observers or a recording, would render *all* litigation-based testing unreliable. If the policy statement indicates the test must be administered exactly as it was developed—that is, given in the absence of recording because the test was not developed using recording—then the tests are so sensitive to other factors that they cannot be replicated, thus making them effectively invalid. For example, if the psychological tests that defense experts employ were not developed or tested (normed) on people who were being tested for purposes of litigation, and who knew they could not trust the examiner because the examiner's job was to demonstrate the person was not being truthful about their injuries, then there would be no data to support its use with a forensic population.²⁷⁸ Also, in many cases, the tests are to be administered over several sessions rather than in a single day.²⁷⁹ In a litigation context, numerous aspects of testing deviate from the standardized conditions for administering the examinations.²⁸⁰ It is the video recording, which captures the examiner's behavior, to which defense experts object. If the tests are unreliable because a new variable is introduced that was not considered when the test was developed, and that new variable—that is, recording—invalidates the tests, then other variables must have the same effect thus rendering the tests useless.

3. *Many Psychological Tests Are Being Misused*

In other cases, defense experts have taken general psychological tests and attempted to use them for purposes other than those for which they were created. One way in which tests have been misused by defense experts

²⁷⁵ Natasha E. Garcia-Willingham et al., *Assessment of Feigned Cognitive Impairment Using Standard Neuropsychological Tests*, in CLINICAL ASSESSMENT OF MALINGERING AND DECEPTION 329, 330–31 (Richard Rogers & Scott D. Bender eds., 2018).

²⁷⁶ Archer et al, *supra* note 25, at 3, 10, 12, 14.

²⁷⁷ Robert L. Heilbronner et al., *American Academy of Clinical Neuropsychology Consensus Conference Statement on the Neuropsychological Assessment of Effort, Response Bias, and Malingering*, 23 CLINICAL NEUROPSYCHOLOGIST 1093, 1096–97 (2009).

²⁷⁸ Archer et al, *supra* note 25, at 6.

²⁷⁹ See Stipulation and Order Regarding Rule 35 Examination at 2, 4, Mitchell v. Freeman Expositions LLC, No. A-20-811621-C (Nev. 8th Jud. Dist. Ct. June 26, 2021).

²⁸⁰ Archer et al, *supra* note 25, at 3–5.

is using them to determine if a plaintiff is malingering. For example, an expert may claim a certain Pain Disability Index score is evidence of malingering.²⁸¹ However, this is a test that was created to determine how chronic pain interferes with the patient's activities.²⁸² There is no *per se* test for malingering because no test can actually identify the reason or intent for poor test performance and malingering requires intent.²⁸³ No test provides intent.²⁸⁴ Instead, these experts attempt to use test results to make a credibility determination as to whether the examinee is telling the truth. These experts claim that they can gauge the credibility of a litigant.²⁸⁵ In fact, a key finding on this topic demonstrates that psychologists are considerably worse than teachers and some other professions in evaluating credibility in people.²⁸⁶

The best example of this phenomenon is the Fake Bad Scale ("FBS"), Paul Lees-Haley adapted this from the Minnesota Multiphasic Personality Inventory-2 ("MMPI-2").²⁸⁷ A group of psychological professionals developed the MMPI-2 as a diagnostic tool to identify and treat mental health disorders.²⁸⁸ Researchers developed and empirically verified the MMPI-2 for use in a clinical setting.²⁸⁹

By contrast, Paul Lees-Haley developed a test for use in personal injury litigation called the FBS.²⁹⁰ The FBS uses a subset of questions from the MMPI-2 but with a very different purpose. Lees-Haley developed the FBS to allegedly determine whether a personal injury plaintiff is "malingering."²⁹¹ According to Lees-Haley, but without citation to any source, "[m]alingering is a serious problem in the evaluation of patients who are involved in mak-

²⁸¹ Adam H. Crighton et al., *Can Brief Measures Effectively Screen for Pain and Somatic Malingering? Examination of the Modified Somatic Perception Questionnaire and Pain Disability Index*, 14 SPINE J. 2042, 2043, 2048–49 (2014).

²⁸² Raymond C. Tait et al., *The Pain Disability Index: Psychometric Properties*, 40 PAIN 171, 172 (1990).

²⁸³ *Program Operations Manual System (POMS)*, *supra* note 213.

²⁸⁴ *Id.*

²⁸⁵ Anne Bowen Poulin, *Credibility: A Fair Subject for Expert Testimony?*, 59 FLA. L. REV. 991, 994 (2007).

²⁸⁶ Michael G. Aamodt & Heather Custer, *Who Can Best Catch a Liar?: A Meta-Analysis of Individual Differences in Detecting Deception*, 15 FORENSIC EXAM'R 6, 7, 9 (2006).

²⁸⁷ Paul R. Lees-Haley et al., *supra* note 172, at 204–05.

²⁸⁸ *Minnesota Multiphasic Personality Inventory-2 (MMPI-2): Overview*, PEARSON, <https://www.pearsonassessments.com/store/usassessments/en/Store/Professional-Assessments/Personality-%26-Biopsychosocial/Minnesota-Multiphasic-Personality-Inventory-2/p/100000461.html> [<https://perma.cc/M72J-BTKU>].

²⁸⁹ Mike Drayton, *The Minnesota Multiphasic Personality Inventory-2 (MMPI-2)*, 59 OCCUPATIONAL MED. 135, 135 (2009).

²⁹⁰ Paul R. Lees-Haley et al., *supra* note 172, at 203.

²⁹¹ JAMES N. BUTCHER, PREPARING FOR COURT TESTIMONY BASED ON THE MMPI-2, 22 (4th ed. 2012).

ing claims for financial compensation.”²⁹² Therefore, Lees-Haley developed his own scoring system to purportedly catch the lying plaintiffs.

Lees-Haley picked forty-three questions from the original 567 questions on the MMPI-2.²⁹³ He then predetermined if a plaintiff was malingering based on whether she answered certain questions as “[t]rue” or “[f]alse.”²⁹⁴

To test his scale, Lees-Haley formed one group of personal injury claimants that “appeared” credible and another group that “appeared” to be malingering.²⁹⁵ He gave no indication that he knew whether any member of those groups were *actually* credible or lying.²⁹⁶ He also formed a group of people that he instructed to fake the symptoms of emotional distress that a personal injury victim would exhibit.²⁹⁷ He had members of the groups answer the questions he chose and then arbitrarily chose a threshold score above which a person was considered to be malingering about her symptoms.²⁹⁸

Lees-Haley’s testing apparatus is faulty because it rests on circular reasoning. He predetermined which participants in his test were credible and came up with an arbitrary scoring threshold to confirm his conclusions.²⁹⁹

These testing deficiencies are also apparent in the types of questions he developed and how he scored the answers. Consider, for example, a person who has a neck injury and traumatic brain injury. Under the FBS scale, that person would have one point counted against her as lying—with a higher the score purportedly indicating a greater likelihood of “lying”—if she

- Admits to having more trouble concentrating;
- Admits to becoming tired quickly;
- Admits to feeling like they are going to pieces;
- Admits to feeling like they cannot overcome difficulties;
- Denies that they rarely have pains;
- Admits to having pain in the neck;
- Admits to having headaches;
- Admits to having head pain;
- Admits to having nightmares;
- Admits to having stomach problems;

²⁹² Paul R Lees-Haley et al., *supra* note 172, at 204.

²⁹³ *Id.* See generally Karen Lamoreux, *All About the MMPI Personality Test*, PSYCHCENTRAL, <https://psychcentral.com/lib/minnesota-multiphasic-personality-inventory-mmip-2/> [https://perma.cc/6QKZ-ABNH] (Apr. 29, 2022) (discussing the format of the exam, including the number of questions it contains).

²⁹⁴ Paul R Lees-Haley et al., *supra* note 172, at 210.

²⁹⁵ *Id.* at 205.

²⁹⁶ See *id.* at 205–06.

²⁹⁷ *Id.* at 205.

²⁹⁸ See *id.* at 207.

²⁹⁹ See *id.* at 207–08.

- Admits to being sick of it all and wanting to get out of it all;
- Admits to feeling pressure or stress;
- Admits to having dizzy spells;
- Admits to having a lump in one's throat;
- Admits to having a hard time keeping one's mind on a task; or
- Admits to feeling tired a lot.³⁰⁰

The problems with these questions are legion. Depending on the day, even a completely healthy person could answer many of these questions in a way that would indicate she is malingering—these are normal physical or mental symptoms that people have from time to time. When being questioned by a medical doctor who the plaintiff may have just met and whose job it is to tell a jury that the plaintiff is malingering, the plaintiff (as the person being tested) would likely admit that they are experiencing mental stress while being questioned on that topic.³⁰¹ For other questions, a point is scored against the plaintiff if the plaintiff denies they are experiencing pain.³⁰² If the plaintiff admits to symptoms they legitimately have, they can be branded a fraud. If the plaintiff denies them, there is nothing wrong with them. This presents a win-win situation for the defense.

Other researchers have tested the accuracy of the FBS and found that, rather than being reliable, it is biased against injured people—the very people being tested. Dr. James Butcher, the lead creator of the MMPI-2, and other researchers, tested the FBS using more than 19,000 people.³⁰³ Butcher and his team found that the FBS scale results in a high false positive rate among people genuinely injured.³⁰⁴ The FBS is scored in a way that concludes that someone is malingering if they answer “true” to having a symptom of a physical or emotional injury.³⁰⁵ For example, a plaintiff with a brain injury could suffer headaches, nausea, dizziness, poor sleep, or fatigue.³⁰⁶ A plaintiff with post-traumatic stress disorder could experience frequent nightmares.³⁰⁷ Someone who has a herniated disc in the neck will have head pain and neck pain, which interferes with sleep, and which in turn causes problems with concentration and fatigue.³⁰⁸ Also, the side effects of pain

³⁰⁰ Nichols & Gass, *supra* note 170, at 3.

³⁰¹ *See id.* at 2.

³⁰² *Id.* at 3.

³⁰³ Butcher et al., *supra* note 171, at 477.

³⁰⁴ *See id.* at 483.

³⁰⁵ *See id.* at 475–76.

³⁰⁶ MARCIA VITAL, TRAUMATIC BRAIN INJURY: HOPE THROUGH RESEARCH 3 (2002).

³⁰⁷ *See* Ali A. El-Solh, *Management of Nightmares in Patients with Posttraumatic Stress Disorder: Current Perspectives*, 10 NATURE & SCI. SLEEP 409, 409 (2018).

³⁰⁸ *See* Mustafa Ogden et al., *An Evaluation of the Quality of Sleep Before and After Surgical Treatment of Patients with Cervical Disc Herniation*, 61 J. KOREAN NEUROSURGICAL SOC. 600, 606 (2018).

medications can cause many of these symptoms.³⁰⁹ But, as it turns out, any plaintiff who reports any of these symptoms also has a point scored against them for malingering.³¹⁰ Therefore, the FBS test has the potential to label as a liar anyone with physical and mental symptoms from injury—the rate of false positives is “unacceptably high.”³¹¹

C. Courts Are Admitting Psychological Testing with Low Reliability

Courts struggle in deciding whether to admit psychological testimony. However, if a party seeking to introduce a test relies solely on the expert giving the opinion that the test is reliable, then there is the potential for institutional bias, meaning the proponent of the test has a personal stake in the procedure.³¹² From the outside, it may seem reasonable to assume that tests sold by reputable publishers will also be high in quality. But in a review of 283 psychological tests, psychological researchers rated 59.5 percent of them as unfavorable, mixed, or neutral.³¹³ This does not even consider the many tests that have not been validated.³¹⁴

Given that psychologists themselves have questioned the reliability of large numbers of tests, the question becomes how many of these tests end up being used in litigation. Researchers identified three hundred sixty-four tests that psychologists specifically have used in litigation.³¹⁵ Of those tests “only about 67% of the tools used by clinicians in forensic settings could clearly be identified as generally accepted, and only about 40% received generally favorable reviews in authorities such as the MMY [*Mental Measurements Yearbook*].”³¹⁶ The authors were careful to note that even if a test is “general[ly] accept[ed]” that does not mean the test is valid.³¹⁷

Perhaps most surprising is that the admissibility of a test is rarely challenged. Out of 372 cases in which a test was used, a party challenged admissibility in only nineteen cases.³¹⁸ From a trial lawyer’s perspective, the low percentage of challenges may be due to the low chance of success. In those

³⁰⁹ *Percocet – Uses, Side Effects, and More*, WEBMD, <https://www.webmd.com/drugs/2/drug-7277/percocet-oral/details> [<https://perma.cc/T6W7-56WP>].

³¹⁰ Butcher et al., *supra* note 171, at 475–76.

³¹¹ Paul A. Arbisi & James N. Butcher, *Failure of the FBS to Predict Malingering of Somatic Symptoms: Response to Critiques by Greve and Bianchini and Lees Haley and Fox*, 19 ARCHIVES CLINICAL NEUROPSYCHOLOGY 341, 343 (2004); Butcher et al., *supra* note 171, at 473.

³¹² *Sybers v. State*, 841 So. 2d 532, 544 (Fla. Dist. Ct. App. 2003).

³¹³ Neal et al., *supra* note 247, at 136.

³¹⁴ *Id.*

³¹⁵ *Id.* at 139.

³¹⁶ *Id.* at 144–45.

³¹⁷ *Id.* at 145.

³¹⁸ *Id.* at 150.

nineteen cases, the challenge succeeded only 32 percent of the time.³¹⁹ The success of the challenge may also have little to do with the quality of the test. The authors concluded that “some of the weakest tools tend to get a pass from the courts.”³²⁰

These empirical findings illustrate that courts may not be capable of distinguishing a valid psychological test or methodology from an invalid one, nor can the plaintiff’s lawyer know how to challenge it. The court may rely only on competing affidavits from expert witnesses to determine whether a test is valid or even generally acceptable for use in the litigation context. As a result, courts may conclude it is just an instance of plaintiff’s and defendant’s experts not agreeing and then admit unreliable tests and results.

V. THERE IS NO FACTUAL BASIS FOR DEFENSE MEDICAL EXPERTS’ ARGUMENTS AGAINST TRANSPARENCY

When it comes to defense medical and psychological exams, a court may be willing to accept the statements from these experts claiming they are not permitted to allow video recording or to produce testing material and data. Defense experts may argue to a court that their examinations cannot be video recorded, and that they cannot produce the written materials or raw data from the examinations.³²¹ Some courts have accepted these arguments uncritically, but a review of 152 state and federal courts revealed that 66 percent of courts disclosed test data to non-psychologists.³²²

A. Video Recording Examinations Does Not Bias Results

Some neuropsychologists claim that the process of video recording produces a negative effect on test performance.³²³ Furthermore, they claim that because no one in the standardization sample completed testing while being video recorded, the introduction of video recording violates the standardized administration of tests.³²⁴

³¹⁹ *Id.* at 152.

³²⁰ *Id.* at 153. The SIT/S-FRIT test was admitted in 15 cases. The RISB was cited as being admitted once. Both of these tests have been rated as unfavorable and not generally accepted. *Id.*

³²¹ Bruce G. Borkosky, *Releasing Test Data and the Emperor’s New Clothes: The Need for Disclosure in Plain Sight?*, AM. PSYCH. ASS’N: PRAC. INNOVATIONS 1, 3, 7–11 (Aug. 2, 2023) (forthcoming manuscript) (on file with the Nevada Law Journal).

³²² *Id.* at 5.

³²³ See, e.g., Affidavit of Mark Schachter, Ph.D. at ¶¶ 21, 27, *Heary v. Birchmeier*, No. 2010001067, 2013 WL 9890993 (N.Y. Sup. Ct. Mar. 7, 2013).

³²⁴ See, e.g., Affidavit of Kristjan Olafsson, Ph. D. at ¶ 12, *Beasley v. Highwoods Props., Inc.*, No. 02-04043-CA, 2012 WL 6549682 (Fla. Cir. Ct. Jun. 28, 2012); Affidavit of Shelley Leininger, Ph.D. at ¶ 7(b), *Fiello v. Daimler Trucks N. Am. LLC.*, No. 1:20-CV-182-LCB-LPA, 2021 WL 3679165 (M.D.N.C. Jan. 29, 2021).

1. *Video Recording of Assessments Produces Little-to-No Systematic Negative Effect*

Some defense experts claim that studies reveal systematic negative effects of being recorded while being administered a battery of psychological tests.³²⁵ This is misleading. When arguing against being video recorded, neuropsychologists have selectively pointed to some studies that reveal a negative effect of being recorded while being tested.³²⁶ However, there are more studies that show no effect or a positive effect than show a negative effect.³²⁷ One must ignore most of the studies to be able to argue that there is a negative effect.

A published metareview of articles dealing with the effects of being observed or recorded during cognitive task performance shows no *systematically important* effect of video recording.³²⁸ The authors of the article found 210 articles studying the effects of third-party observers on test performances, and they included sixty-two that were satisfactory for comparisons in their review.³²⁹ There were no important systematic phenomena that resulted from being recorded.³³⁰ The results showed the appearance of random effect—only trivial effects were evident.³³¹

But there is a more important point. None of these sixty-two studies included individuals who were involved in forensic neuropsychological assessments.³³² No one in testing standardization samples was ever tested in the circumstances faced by litigants or defendants, and there is no reason at all to believe that any possible negative effect of being recorded while testing can begin to come close to the effect of being evaluated against your will by a person you do not trust and who was hired by someone who is actively working against your interests.

³²⁵ See Affidavit of Mark Schachter, *supra* note 323.

³²⁶ *Abdulwali v. Wash. Metro Area Transit Auth.*, 193 F.R.D. 10, 13 (D.D.C. 2000) (quoting *Tirado v. Erosa*, 158 F.R.D. 294, 295 (S.D.N.Y. 1994)). (“In the instances in which the presence of a third party has been allowed, [e]ach of these rulings has been grounded in the particular facts of the case.” (quoting *Tirado v. Erosa*, 158 F.R.D. 294, 295 (S.D.N.Y. 1994))).

³²⁷ See Angela D. Eastvold et al., *Does a Third Party Observer Affect Neuropsychological Test Performance? It Depends*, 26 CLINICAL NEUROPSYCHOLOGIST 520, 521–34 (2012).

³²⁸ *Id.* at 520, 526–35.

³²⁹ *Id.* at 520.

³³⁰ *Id.*

³³¹ *Id.*

³³² *Id.* at 535.

2. *Psychologists Conduct Examinations by Televideo*

When neuropsychologists conduct their assessments remotely, by video, in order to provide services to individuals who live in underserved rural communities, or because a pandemic prevents the examiner and examinee from meeting in person, there is no argument by neuropsychologists that video recording in any way prevents ethical and responsible billable hours for service. Before the COVID-19 pandemic, the argument was tendered that permitting a camera in the room invalidated the results.³³³ However, any ethical concerns were apparently no longer present when the effects of the pandemic made it difficult or even impossible to examine someone other than by video and thus to charge for the services.³³⁴

The Inter Organizational Practice Committee is a committee of the practice chairs of the American Academy of Clinical Neuropsychology, American Board of Clinical Neuropsychology, the National Academy for Neuropsychology, the American Board of Professional Neuropsychology, and the certain subgroups of neuropsychologists within the American Psychological Association.³³⁵ Its task is “coordinating advocacy efforts and improving the practice climate for neuropsychology.”³³⁶ The Committee recommended that neuropsychologists proceed with remote, video assessments and “report modifications of standard procedures,”³³⁷ with guidance limited to technology issues, practical limitations created by physical separation from the examinee, interstate licensing matters, and billing issues.³³⁸ The Committee’s recommendation to proceed with the assessments and report modifications to standard procedures is exactly what the *Standards of Educational and Psychological Testing* has always recommended.³³⁹

Part of the Committee’s report was a review of the literature that shows that the use of televideo for conducting neuropsychological assessment is longstanding and widespread (over five continents) with remote testing still

³³³ *Freeman v. Latherow*, 722 So. 2d 885, 886 (Fla. Dist. Ct. App. 1998) (“The doctor also asserted that the presence of a video camera in the room would affect the results of the examination.”); *United States v. Mills*, 385 F. Supp. 3d 566, 574 (E.D. Mich. 2019) (“Dr. Denney has ‘taken the position that videotaping, or the hidden recording of testing, raises ethical concerns.’”).

³³⁴ *See, e.g., Knight v. Safelite Grp.*, No. 34-2020-00277573-CU-PA-GDS, 2022 Cal. Super. LEXIS 42927, at *8 (May 26, 2022) (“Defendants proposed protocol seeks to separate the oral history and psychiatric interview from the in-person physical examination by Dr. Strassberg for the purpose of minimizing exposure due to COVID-related concerns.”).

³³⁵ Robert M. Bilder et al., *InterOrganizational Practice Committee Recommendations/Guidance for Teleneuropsychology (TeleNP) in Response to the COVID-19 Pandemic*, 34 CLINICAL NEUROPSYCHOLOGIST 1314, 1314 (2020).

³³⁶ *Id.* at 1332.

³³⁷ *Id.* at 1314–31.

³³⁸ *See id.* at 1318–19, 1321, 1326–27.

³³⁹ STANDARDS, *supra* note 151, at 111.

developing,³⁴⁰ and extensive research reveals there are no meaningful differences between assessments employing a wide variety of psychological tests given in person or by televideo.³⁴¹

3. *There Also Is No Reliable Evidence that the Presence of Third-Party Observers Significantly Skews Results*

It would be understandable that defense neuropsychologists objected to a third party in a testing session of an injured plaintiff if they never allowed an observer in any other setting. But third-party observers are routinely a part of testing.³⁴² Furthermore, if a psychologist is training a psychometrist to administer tests to patients, during the training the psychologist may herself become the third-party observer as she trains her psychometrist. An expert may have psychometricians who are in the room and participating in the examination.³⁴³ Also, neuropsychologists train individuals who are going to become test-givers, such as psychometricians and budding neuropsychologists, who may be present during examinations while they are being trained.³⁴⁴ In other cases, defense experts have the assistance of other people in the examination room, such as interpreters for examinees who are not English speakers or who are deaf, or other medical assistants or trainees.³⁴⁵

³⁴⁰ See Dustin B. Hammers et al., *A Survey of International Clinical Teleneuropsychology Service Provision Prior to and in the Context of COVID-19*, 34 CLINICAL NEUROPSYCHOLOGIST 1267, 1267, 1279 (2020).

³⁴¹ See David E. Marra et al., *Validity of Teleneuropsychology for Older Adults in Response to COVID-19: A Systematic and Critical Review*, 34 CLINICAL NEUROPSYCHOLOGIST 1411, 1413–14 (2020); see also Kelsey C. Hewitt et al., *Transitioning to Telehealth Neuropsychology Service: Considerations Across Adult and Pediatric Care Settings*, 34 CLINICAL NEUROPSYCHOLOGIST 1335, 1340–41 (2020); Kathryn M. Harrell et al., *Telemedicine and the Evaluation of Cognitive Impairment: The Additive Value of Neuropsychological Assessment*, 15 JAMDA 600, 601, 604 (2014); Jeanine M. Galusha-Glasscock et al., *Video Teleconference Administration of the Repeatable Battery for the Assessment of Neuropsychological Status*, 31 ARCHIVES CLINICAL NEUROPSYCHOLOGY 8, 10 (2016); Maria C. Groesch et al., *Video Teleconference-Based Neurocognitive Screening in Geropsychiatry*, 225 PSYCHIATRY RSCH. 734, 735 (2015); Timothy W. Brearly et al., *Neuropsychological Test Administration by Videoconference: A Systematic Review and Meta-Analysis*, 27 NEUROPSYCHOLOGY REV. 174, 181 (2017).

³⁴² *Abdulwali v. Wash. Metro Area Transit Auth.*, 193 F.R.D. 10, 13 (D.D.C. 2000) (“In the instances in which the presence of a third party has been allowed, ‘[e]ach of these rulings has been grounded in the particular facts of the case.’” (quoting *Tirado v. Erosa*, 158 F.R.D. 294, 295 (S.D.N.Y. 1994))).

³⁴³ Randy K. Otto & Daniel A. Krauss, *Contemplating the Presence of Third Party Observers and Facilitators in Psychological Evaluations*, 16 ASSESSMENT 362, 367–68 (2009).

³⁴⁴ *Id.*

³⁴⁵ *Ayat v. Societe Air Fr.*, No. C 06-1574 JSW (JL), 2007 WL 1120358, at *7 (N.D. Cal. Apr. 16, 2007) (denying attendance of attorney or tape recorder at Rule 35 examination, but permitting interpreter with the defendant’s agreement).

During these times, there may be three or more individuals in the room: the test-giver, the subject, the observer, and possibly an interpreter.³⁴⁶ Many states permit the defense attorney to be present during his or her client's psychological examination of criminal defendants.³⁴⁷ In fact, a survey revealed that 75 percent of the respondents have conducted criminal forensic examinations with third parties present.³⁴⁸ A court order can remedy any concerns that the observers may behave disruptively. Absent a disruptive observer, a meta-analysis of the presence of others on human task performance demonstrated that an observer in the room causes no significant systematic decrement in test performance—the range of variability across 241 studies and 24,000 participants was close to zero.³⁴⁹

4. Videorecording and Observers Are Permanent Features of Litigation

Defense experts' arguments against video recording and third-party observation also ignore the reality of litigation. At numerous stages of a case, a plaintiff must undergo verbal examination while being recorded and with multiple other people present.³⁵⁰ During depositions, hearings, and trial, a plaintiff must answer questions and be evaluated for credibility while being recorded on video or audio, or both³⁵¹—and multiple people may be present in the room while the questioning is occurring.³⁵² This would appear to be another instance in which defense experts believe they should be entitled to operate outside of the normal boundaries of litigation. Courts should—and must—resist this temptation to allow expert witnesses to establish separate rules in litigation for their testimony.

Furthermore, most of the third-party observer research conducted before the age of video may need to be revisited because people now understand they are constantly being recorded, whether by themselves or by

³⁴⁶ Michael Malek-Ahmadi et al., *The Use of Psychometrists in Clinical Neuropsychology: History, Current Status, and Future Directions*, 19 APPLIED NEUROPSYCHOLOGY: ADULT 26, 29 (2012); see also *Ayat*, 2007 WL 1120358, at *7; *Abdulwali*, 193 F.R.D. at 13 (“In the instances in which the presence of a third party has been allowed, ‘[e]ach of these rulings has been grounded in the particular facts of the case’” (quoting *Tirado v. Erosa*, 158 F.R.D. 294, 295 (S.D.N.Y. 1994))).

³⁴⁷ *Otto & Krauss*, *supra* note 343, at 363.

³⁴⁸ *Id.*

³⁴⁹ Charles F. Bond, Jr. & Linda J. Titus, *Social Facilitation: A Meta-Analysis of 241 Studies*, 94 PSYCH. BULL. 265, 265 (1983).

³⁵⁰ See, e.g., FED. R. CIV. P. 30(a)(1) (allowing a party to orally question any person, including a party); *McCarthy v. Mobile Cranes, Inc.*, 199 Cal. App. 2d 500, 506 (Cal. Ct. App. 1962) (holding “[a]n improper denial of the right of cross-examination constitutes a denial of due process”).

³⁵¹ See FED. R. CIV. P. 30(b)(3) (allowing recording of the deposition).

³⁵² See, e.g., FED. R. CIV. P. 30(a)(1) (allowing a party to orally question any person, including a party); FED. R. CIV. P. 30(b)(3) (allowing recording of the deposition).

someone else.³⁵³ With the invention of the cell phone, most people carry a video recorder they can employ at a moment's notice. The average American is on video at least 238 times per week.³⁵⁴ Therefore, being recorded has far less chance of altering behavior now that people are used to being recorded.³⁵⁵ Precluding the plaintiff from recording the exam affords the defense expert more protection than if she simply walked across the street and was video recorded by CCTV cameras or other people.

In fact, the defense may hire private investigators to follow the plaintiff and secretly record her as she interacts with numerous other people in a decidedly non-clinical environment.³⁵⁶ Here, however, plaintiff lawyers are merely seeking to record another witness, the defense doctor, with knowledge ahead of time.

B. Transparency Does Not Violate Defense Experts Ethical Codes

1. No Binding Ethical Code Precludes Video Recording

Academies of neuropsychologists have published policies opposing video recording.³⁵⁷ It is important to note, however, that these academies have no authority to require that their members adhere to any such policy—these are academies that exist solely to promote the interests of their guilds.³⁵⁸ A neuropsychologist who claims that her neuropsychology academy does not allow them to video record forensic assessments is clearly misrepresenting or misunderstanding their relationship to the academy. A policy for guid-

³⁵³ Mary Madden & Lee Rainie, *American's Attitudes About Privacy, Security and Surveillance*, PEW RSCH. CTR. (May 20, 2015), <https://www.pewresearch.org/internet/2015/05/20/americans-attitudes-about-privacy-security-and-surveillance/> [https://perma.cc/PP73-PHZW].

³⁵⁴ Dan Avery, *Most Americans are Recorded 238 Times a Week by Security Cameras and a Majority of Filming Happens when Driving, Study Reveals*, DAILY MAIL, <https://www.dailymail.co.uk/sciencetech/article-8774151/Most-Americans-recorded-238-TIMES-week-security-cameras-study-reveals.html> [https://perma.cc/3NPN-SURC] (Feb. 17, 2021, 5:45 PM).

³⁵⁵ See generally Jim McCambridge et al., *Systematic Review of the Hawthorne Effect: New Concepts are Needed to Study Research Participation Effects*, 67 J. CLINICAL EPIDEMIOLOGY 267 (2014) (systematic review showing the heterogeneous effects, and sometimes no effects, when studying the Hawthorne Effect).

³⁵⁶ See *Cox v. Copperfield*, 507 P.3d 1216, 1221 (Nev. 2022) (Defendants hired private investigator to conduct sub rosa surveillance video on a plaintiff during trial).

³⁵⁷ Nat'l Acad. Neuropsychology, *Test Security: An Update*, (Oct. 13, 2003), <https://www.nanonline.org/docs/paic/pdfs/nantestsecurityupdate.pdf> [https://perma.cc/HS8A-WGX D]; Lewandowski et al., *supra* note 255, at 391, 396.

³⁵⁸ ARTICLES AND BYLAWS OF AM. ACAD. OF CLINICAL NEUROPSYCHOLOGY Art. 2 (2020); *About NAN*, NAT'L ACAD. OF NEUROPSYCHOLOGY, https://nanonline.org/nan/About_NAN/NAN/AboutNAN.aspx?hkey=e534bc49-ad90-436d-8537-b97132a16b85 [https://perma.cc/A49C-WFJC].

ance published by an academy has no binding effect as a professional standard or ethical principle.³⁵⁹ States, through their licensure boards, govern psychologist behavior, typically through the current APA Ethics Code, and psychologists are governed in their actions by educational, institutional, and employment settings.³⁶⁰

When it comes to binding ethical guidelines, neither the American Psychological Association (which promulgates the ethical standards for psychologists), nor the state licensing boards (almost all of which use the APA Ethics Code to define professional behavior),³⁶¹ prohibits audio or video recording, third-party observers, or the sharing of protected test information.³⁶² The requirement is to “make reasonable efforts to maintain the integrity and security of test materials.”³⁶³ A protective order fulfills that ethical requirement.

Not even members of the neuropsychological academies consider the policies to be binding. One academy, the National Academy of Neuropsychology, warns that neuropsychologists who allow video recording of examinations potentially violate APA ethics codes and state laws regulating psychiatry and would affect the validity of test performance.³⁶⁴ Yet, one of the signatories to that statement has admitted to conducting “numerous” examinations recorded by video or transcription, or both.³⁶⁵

Indeed, we have observed neuropsychologists in lawsuits argue against recording by referencing neuropsychology academy policy statements.³⁶⁶ But, when a court orders the video recording, they *still* perform the examination. An academy has no authority over practitioners. As we noted previously, there is no ethical prohibition against supplying protected test information or having a third-party present to see what happens or recording the evaluation pursuant to a court order.³⁶⁷ A protective order is sufficient to address any concerns that the psychologist or neuropsychologist is being

³⁵⁹ ARTICLES AND BYLAWS, *supra* note 358; *About NAN*, *supra* note 358.

³⁶⁰ *Strategies for Private Practitioners Coping with Subpoenas or Compelled Testimony for Client/Patient Records or Test Data or Test Materials*, *supra* note 235, at 2.

³⁶¹ *Id.*

³⁶² *Id.* at 7.

³⁶³ ETHICAL PRINCIPLES *supra* note 47, at § 9.11.

³⁶⁴ *Test Security: An Update*, *supra* note 357.

³⁶⁵ Affidavit of Glenn J. Larrabee, Ph.D. Regarding Release of Video or Transcription of Testing or Copies of Raw Test Data to Plaintiff Counsel at ¶ 3, *Scheuer v. Brannock*, No. 2017-CA-1822 (Fla. Cir. Ct. Sept. 24, 2018).

³⁶⁶ Affidavit of Jaqueline Valdes, Psy. D., Regarding Non-Disclosure of Raw Data, Testing Booklets, and Video Recording of Plaintiff's Neuropsychological Examination at ¶¶ 4, 6, 8, *Evey v. Waldron*, No. 19-CA-005083 (Fla. Cir. Ct. June 23, 2021).

³⁶⁷ See *Strategies for Private Practitioners Coping with Subpoenas or Compelled Testimony for Client/Patient Records or Test Data or Test Materials*, *supra* note 235, at 7.

made to violate ethical, professional, or legal requirements to protect the data.

2. *APA Ethical Rules and HIPAA Require Disclosure of Testing Data*

The American Psychological Association has been very clear that raw data must be disclosed during litigation. When the APA adopted its current Ethics Code in August 2002, it made clear that release of raw test data to non-psychologists is permissible.³⁶⁸ APA Ethics Code 9.04, Release of Test Data, enumerates that “[p]ursuant to a client/patient release, psychologists provide test data to the client/patient or other persons identified in the release.”³⁶⁹ In the absence of a client/patient release, psychologists must provide test data as required by law or court order.³⁷⁰

“[T]o be consistent with patients’ rights under HIPAA to access protected health information,”³⁷¹ the APA revised its Ethical Principles of Psychologists and Code of Conduct (“APA Ethics Code”) in 2002. The revision defines what “test data” includes as: “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.”³⁷²

The APA defines test materials as follows: “The term *test materials* refers to manuals, instruments, protocols, and test questions or stimuli and does not include test data.”³⁷³ Therefore, any patient that requests their test data must be provided not only their raw and scaled scores (their responses to any test questions or stimuli), but also (1) the psychologists’ notes; (2) the psychologists’ recordings concerning their statements and behavior during any examination; and, significantly, (3) any and all portions of the test materials that include their responses to any test questions or stimuli.³⁷⁴ Psychologists are ethically obligated to share test data with the person being examined (or their representatives or their retained experts).³⁷⁵

³⁶⁸ Robert E. Erard, *An Ethical Prohibition That Isn’t—And Never Really Was*, ETHICAL PSYCH. (March 11, 2013), <https://www.ethicalpsychology.com/2013/06/an-ethical-prohibition-that-isnt-and.html> [<https://perma.cc/9SE4-NLLG>].

³⁶⁹ ETHICAL PRINCIPLES, *supra* note 47, at § 9.04; *see also* Borkosky, *supra* note 321, at 7–8.

³⁷⁰ Borkosky, *supra* note 321, at 2.

³⁷¹ Donna Vanderpool, *Requests for Disclosure of Psychological Testing Information*, INNOVATIONS CLINICAL NEUROSCIENCE, Nov.–Dec. 2014, at 41.

³⁷² ETHICAL PRINCIPLES, *supra* note 47 at § 9.04.

³⁷³ *Id.* § 9.11.

³⁷⁴ Vanderpool, *supra* note 371.

³⁷⁵ ETHICAL PRINCIPLES, *supra* note 47, at § 9.04.

C. Copyright Law Does Not Prevent Video Recording or Production of Testing Evidence

In some cases, an expert witness working for a defendant may refuse to allow video recording or produce copies of test materials by claiming it is precluded by copyright law.³⁷⁶ An expert witness' argument can be confusing to a court because the expert is not the holder of the copyright.³⁷⁷ The expert cannot assert the copyright because they are not the copyright holder.³⁷⁸ Instead, the argument appears to be that the expert is concerned that she would violate the publisher's copyright by producing copies of the testing materials.³⁷⁹

In the United States, copyright law is statutory.³⁸⁰ Copyright law protects "original works of authorship fixed in any tangible medium of expression," which includes literary, musical, pictorial, and other creative works.³⁸¹ For example, the publishers of psychological tests can claim copyright in the printed or otherwise tangible versions of their test materials. But, as with any right, a copyright holder's rights are not absolute.³⁸²

The most significant exception to a copyright is fair use, which also is codified by statute.³⁸³ Under Section 107 of the Copyright Act, the use of a work for purposes such as commentary, reporting, teaching, and scholarship is not an infringement because it is fair use:

[T]he fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

1. the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
2. the nature of the copyrighted work;
3. the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

³⁷⁶ *Randy's Trucking, Inc. v. Superior Court*, 91 Cal. App. 5th 818, 834 (Cal. Ct. App. 2023) (ordering that raw data may be produced to lawyers pursuant to a protective order). The authors are unaware of any instances of a *plaintiff's* expert refusing to produce test materials based upon this argument. Caselaw searches also have identified no instances.

³⁷⁷ See *How Do I Find Out Who Owns the Copyright in a Book?*, NEW MEDIA RTS., https://www.newmediarights.org/book/how_do_i_find_out_who_owns_copyright_book# [https://perma.cc/L2ZR-9CQF] (Oct. 27, 2020, 8:43 PM).

³⁷⁸ *Id.*; see also *Randy's Trucking*, 91 Cal. App. 5th at 835.

³⁷⁹ *Randy's Trucking*, 91 Cal. App. 5th at 829.

³⁸⁰ See 17 U.S.C. § 101.

³⁸¹ See 17 U.S.C. § 102(a).

³⁸² See 17 U.S.C. §§ 107, 108.

³⁸³ 17 U.S.C. § 107.

4. the effect of the use upon the potential market for or value of the copyrighted work.³⁸⁴

In the Note accompanying Section 107, Congress listed numerous examples of “the sort of activities the courts might regard as fair use under the circumstances,” including “reproduction of a work in legislative or judicial proceedings or reports.”³⁸⁵

1. *The Use of Test Materials Constitutes Fair Use*

Courts have been dealing with the use of copyrighted materials as evidence in litigation for decades. *Bond v. Blum* involved a manuscript introduced as evidence during a custody hearing.³⁸⁶ The manuscript was entitled *Self-Portrait of a Patricide: How I Got Away with Murder*.³⁸⁷ The author, Mr. Bond, then filed suit for violating his copyright in the manuscript.³⁸⁸ The Fourth Circuit upheld the trial court’s determination that use of the manuscript in the custody case was a fair use exception to copyright infringement.³⁸⁹ The trial court evaluated the four fair use factors under Section 107.³⁹⁰ Especially as it relates to litigation, the court concluded, under the first factor, that “the purpose and character of the defendants’ anticipated use of the manuscript was not one against which the Copyright Act sought to protect.”³⁹¹ Similarly, under the fourth factor, the court concluded that the use of the manuscript during the litigation would not harm its commercial value.³⁹²

The use of a copyrighted work during litigation is not a misappropriation of the copyrighted work for commercial gain. Instead, the work is being used as an exhibit to introduce the *content* of the work. The difference is important and can be easily confused. As the Fourth Circuit noted, a copyright “does not secure an exclusive right to the use of facts, ideas, or other knowledge.”³⁹³ Put another way, “copyright protection does not extend to ideas or facts even if such facts were discovered as the product of long and hard work.”³⁹⁴ Copyright law protects only the “manner of expression,” not

³⁸⁴ *Id.*

³⁸⁵ H.R. REP. NO. 94-1476, at 65 (1976).

³⁸⁶ See *Bond v. Blum*, 317 F.3d 385, 390 (4th Cir. 2003) *abrogated by* *Kirtsaeng v. John Wiley & Sons*, 136 S. Ct. 1979 (2016).

³⁸⁷ *Bond*, 317 F.3d at 390.

³⁸⁸ *Id.* at 391.

³⁸⁹ *Id.* at 397.

³⁹⁰ *Id.* at 394.

³⁹¹ *Id.* at 392.

³⁹² *Id.*

³⁹³ *Id.* at 394.

³⁹⁴ *Id.* (quoting *Superior Form Builders v. Chase Taxidermy Supply Co.*, 74 F.3d 488, 492 (4th Cir. 1996)).

the content or ideas of the protected work.³⁹⁵ Therefore, use of a book or article in litigation does not violate copyright law because a party is communicating the *content* of the written work.

Copyright could be implicated when a party asks for “copies” of a copyrighted work, but even then, the fair use exception would preclude a finding of infringement. As the Fourth Circuit explained,

Purpose and character of [the defendants’] use has nothing whatsoever to do with any interest that the copyright law was designed to protect. The copyright law was never designed to protect content as distinguished from mode of expression. . . .

It was certainly never intended to utilize, to keep from the public the ability to state the facts in a document as compared to the mode of expression. . . .

[Moreover], the effect of [defendants’] use on the potential market for value of the copyrighted work is absolutely zero.³⁹⁶

“Reproduction of copyrighted material for use in litigation or potential litigation is generally fair use, even if the material is copied in whole.”³⁹⁷ As one federal court has explained, “Overwhelming legal authority indicates that use of a copyrighted work in judicial proceedings generally cannot support a claim of copyright infringement.”³⁹⁸ The court explained, “the Second, Fourth, Ninth, and Tenth Circuits have held that the use of copyrighted material as an exhibit in court proceedings constitutes fair use.”³⁹⁹ District

³⁹⁵ *See id.*

³⁹⁶ *Id.* at 397.

³⁹⁷ *Stern v. Does*, 978 F. Supp. 2d 1031, 1047–48 (C.D. Cal. 2011) (citing and discussing *Jartech, Inc. v. Clancy*, 666 F.2d 403 (9th Cir. 1982) and *Hustler Magazine, Inc. v. Moral Majority, Inc.*, 796 F.2d 1148 (9th Cir. 1986)).

³⁹⁸ *Mizioznikov v. Forte*, No. 16-61616-Civ-Scola, 2017 U.S. Dist. LEXIS 45587, at *8 (S.D. Fla. Mar. 27, 2017).

³⁹⁹ *Id.* (“[T]he district court . . . correctly determined that [the defendant’s] use of [the plaintiff’s] essays [in judicial proceedings] was a fair use.” (quoting *Hollander v. Steinberg*, 419 F. App’x 44, 47 (2d Cir. 2011)); *Bond v. Blum*, 317 F.3d 385, 397 (4th Cir. 2003) (“[T]he district court did not err in concluding that the defendants’ use of the manuscript as evidence in the state-court proceeding fell within the scope of fair use.”) *abrogated by* *Kirtsaeng v. John Wiley & Sons*, 136 S. Ct. 1979 (2016); *Jartech, Inc. v. Clancy*, 666 F.2d 403, 407 (9th Cir. 1982) (holding that substantial evidence supported a jury’s finding that the local government’s use of copies of films as evidence in nuisance abatement proceedings constituted fair use); *Religious Tech. Ctr. v. Wollersheim*, 971 F.2d 364, 367 (9th Cir. 1992) (“[W]orks are customarily reproduced in various types of judicial proceedings, including obscenity and defamation actions . . . and it seems inconceivable that any court would hold such reproduction to constitute infringement either by the government or by the individual parties responsible for offering the work in evidence.” (quoting 3 M. NIMMER & D. NIMMER, NIMMER ON COPYRIGHT § 13.05(D) at 13–91 (1991))); *Shell v. DeVries*, No. 07-1086, 2007 U.S. App. LEXIS 28317, at *4 (10th Cir. Dec. 6, 2007) (affirming district court’s decision that the Defendants’ reproduction of pages from the Plaintiff’s website for use as evidence in judicial proceedings constituted fair use).

courts also have consistently held that use of copyrighted materials during litigation constitutes fair use.⁴⁰⁰

2. *The Actual Copyright Owners Do Not Object to Production if Covered by a Protective Order*

As explained above, some courts have placed too much reliance on the arguments of defense experts regarding copyright protections. But even if those arguments were valid, a protective order resolves the issues that prevent transparency.

Protective orders can be entered in cases involving intellectual property. It likely would be impossible to file a lawsuit involving a patent or trade secret without the use of a protective order. Courts commonly enter such orders to facilitate disputes between parties without revealing confidential and valuable information to the general public.⁴⁰¹

In fact, test publishers, such as Pearson, anticipate court orders will be entered ordering the release of testing materials and data: “[O]f course, there are situations that require disclosure of test material, but these are rare and *are addressed with legal protective orders*.”⁴⁰² Test publishers publicly state that the confidentiality of their tests can be maintained by

prohibiting parties from making copies of the materials; requiring that the materials be returned to the professional at the conclusion of the proceeding; and requiring that the materials not be publicly available as part of the record of the case, whether this is done by sealing part of the record or by not including the materials in the record at all.⁴⁰³

Courts that have addressed the issue have confirmed that the copyright owners understand that the testing materials will be produced in connection with a protective order. For example, in *Carpenter v. Superior Court* the Defendant refused to disclose testing materials used to examine the Plaintiff, claiming that it would violate the publishers’ copyrights.⁴⁰⁴ The court reject-

⁴⁰⁰ See *Mizioznikov*, 2017 U.S. Dist. LEXIS 45587, at *9 (“[F]inding that the Defendants’ archiving and printing screenshots from the Plaintiff’s webpage for supporting documentation in a separate lawsuit constituted fair use.” (citing *Healthcare Advocates, Inc. v. Harding, Earley, Follmer & Frailey*, 497 F. Supp. 2d 627, 636–37, 642 (E.D. Pa. 2007))); see also *Denison v. Larkin*, 64 F. Supp. 3d 1127, 1135 (N.D. Ill. 2014) (finding that the Defendant’s use of copyrighted blog entries in attorney disciplinary proceedings constituted fair use).

⁴⁰¹ Peter J. Toren, *Defending Trade Secrets with Protective Orders*, IPWATCHDOG (Oct. 27, 2020, 7:15 AM), <https://ipwatchdog.com/2020/10/27/defending-trade-secrets-protective-orders/id=126726/> [<https://perma.cc/N4L7-7RDB>].

⁴⁰² *Legal Policies*, PEARSON, (June 15, 2021), <https://www.pearsonassessments.com/footer/legal-policies.html> [<https://perma.cc/X9WH-KLVA>] (emphasis added).

⁴⁰³ *Id.*; *PAR’s Position on the Release and Photocopying of Test Materials*, PAR, <https://www.parinc.com/IP-Position> [<https://perma.cc/BLX8-HX3U>].

⁴⁰⁴ See *Carpenter v. Superior Court*, 141 Cal. App. 4th 249, 272–74 (2006).

ed this argument because the publishers stated that such materials could be produced in connection with a protective order:

What Yamaha fails to mention, however, is that both Pearson and Harcourt also suggest a satisfactory means by which the tests *can* be provided after the mental examination. In essence, the publishers propose, the test questions and answers may be given to plaintiff's counsel or a designated psychologist, subject to a protective order strictly limiting the use and further disclosure of the material, and providing for other safeguards against access that would compromise the integrity and validity of the tests. . . . Thus, Pearson and Harcourt have indicated a means by which a copy of the copyrighted tests *could* be provided without violation of copyright law or harm to the secrecy, validity and integrity of the tests.⁴⁰⁵

Numerous other courts have resolved possible intellectual property issues involving testing materials using protective orders.⁴⁰⁶ For example, one party or the other can file a motion for a protective order to protect the psychologist's concerns.⁴⁰⁷ In fact, both plaintiff and defense lawyers can stipulate to the language in a protective order requiring nothing more than a pro forma filing of the stipulation with the court and a proposed order.⁴⁰⁸ If a lawyer violates a protective order, there are multiple avenues to seek recompense against the lawyer. The aggrieved party can file a motion seeking sanctions and damages.⁴⁰⁹ The mere possibility that a lawyer may violate a

⁴⁰⁵ *Id.* at 274.

⁴⁰⁶ See *Taylor v. Erna*, No. 08-10534-DPW, 2009 U.S. Dist. LEXIS 69033, at *8 (D. Mass. Aug. 3, 2009) (ordering production of raw data and testing materials conditioned on a protective order); see also *Ioane v. Noll*, No. 1:07-cv-00620-AWI-EPG, 2020 U.S. Dist. LEXIS 130567, at *12-14 (E.D. Cal. July 22, 2020) (entering a protective order to address any possible confidential or intellectual property information in psychological testing material); *Frazier v. Bd. of Cnty. Comm'rs*, No. 08-cv-02730-WYD-BNB, 2010 U.S. Dist. LEXIS 14785, at *11 (D. Colo. Feb. 3, 2010) (requiring production of testing materials and raw data because protective order "adequately protects any trade secrets which may reside in the Psychological Tests"); *Schmitt v. Beverly Health & Rehab. Servs.*, No. 96-2537-EEO, 1997 U.S. Dist. LEXIS 18636, at *11-12 (D. Kan. Nov. 19, 1997) (entering protective order over raw data and testing materials to protect any trade secrets or proprietary information contained in the psychological tests); *Wayne v. Kirk*, No. 13 C 8540, 2016 U.S. Dist. LEXIS 17692, at *28 (N.D. Ill. Feb. 9, 2016) (same).

⁴⁰⁷ APA's Comm. on Legal Issues, *Protecting Patient Privacy When the Court Calls*, AM. PSYCH. ASS'N (July/Aug. 2016), <https://www.apa.org/monitor/2016/07-08/ce-corner> [<https://perma.cc/J2GT-8T3F>].

⁴⁰⁸ See *Ioane*, 2020 U.S. Dist. LEXIS 130567 at *12-14 (referencing the ability of the parties to stipulate to a protective order should they agree to the terms); see also *Strategies for Private Practitioners Coping with Subpoenas or Compelled Testimony for Client/Patient Records or Test Data or Test Materials*, *supra* note 235, at 3.

⁴⁰⁹ *Smith & Fuller v. Cooper Tire & Rubber Co.*, 685 F.3d 486, 488 (5th Cir. 2012) ("FED. R. CIV. P. 37(b) empowers the courts to impose sanctions for failures to obey discovery orders. In addition to a broad range of sanctions, including contempt, FED. R. CIV. P. 37(b)(2) authorizes the court to impose a concurrent sanction of reasonable expenses, including attorney's fees, caused by the failure to obey a discovery order." (quoting *Falstaff Brewing Corp. v. Miller Brewing Co.*, 702 F.2d 770, 784 (9th Cir. 1983))); *Pressey v. Pat-*

protective order is not a basis to preclude sharing the basis of one's opinions. Enforcement authority belongs to the court, not the psychologist.

VI. CERTAIN STATES ALREADY PERMIT VIDEO RECORDING AND REQUIRE DISCLOSURE OF TEST DATA

Courts in different jurisdictions have different views regarding the disclosure of psychological testing written materials and raw data and the video recording of expert examinations and testing.

A. *Many Courts Now Require Production of Testing Materials and Data*

With respect to testing materials, many courts have concluded that testing material or raw data, or both, must be produced during litigation. A Montana state court decision is particularly instructive on this issue. In *Astore v. Farmers Insurance Exchange*, the Defendant resisted production of psychological raw test data and testing manuals by arguing such production would violate the APA code of ethics.⁴¹⁰ The court quickly rejected this argument, ruling that:

The APA is not a state or federal regulatory body, but simply a voluntary organization which a psychologist may or may not choose to join. It has no regulatory or persuasive authority over this Court or any other court. Additionally, nowhere in the APA's code does it prohibit a doctor from releasing test data upon court order.⁴¹¹

The court then turned its attention to the reason why production of this information is essential with respect to psychological testing.⁴¹² First, the court raised the problem of the non-scientific nature of psychological testing:

Specifically, psychology and psychiatry are perhaps the most imprecise scientific fields of medicine. Conclusions drawn from psychologists are not based on objective radiographic evidence but, predominately in the field of psychology, are based upon comparison and profiling. For example, the MMPI-2

terson, 898 F.2d 1018, 1021 (5th Cir. 1990) (The district court "has broad discretion under Rule 37(b) to fashion remedies suited to the misconduct"; this discretion, however, is limited: "[U]sually, . . . a finding of bad faith or willful misconduct [is required] to support the severest remedies under Rule 37(b)—striking pleadings or dismissal of a case."); *id.* (explaining that lesser sanctions do not require a finding of willfulness); *Chilcutt v. United States*, 4 F.3d 1313, 1322 n.23 (5th Cir. 1993) (District courts "have authority to grant a broad spectrum of sanctions" under Rule 37(b), and "neither this Court nor the Supreme Court has ever determined that the lack of willful, contumacious, or prolonged misconduct prohibits all sanctions.").

⁴¹⁰ *Astore v. Farmers Ins. Exch.*, No. BDV-2008-915, 2009 Mont. Dist. LEXIS 569, at *1–2 (Mont. 1st Dist. Ct. Dec. 4, 2009).

⁴¹¹ *Id.* at *3.

⁴¹² *Id.* at *6.

is one of the most commonly administered psychological inventories in the world. Here, Dr. Cory administered it to Plaintiff. The MMPI-2 consists of 567 true/false questions. The conclusions are not based on the patient's actual answers, but rather on how those answers compare to other individuals who answer those same questions and on whom diagnosis may or may not have been made. In other words, the patient is compared to a group of subjects who also took the test and estimations are drawn on how he/she compares to that sample.⁴¹³

Next, the court agreed that it would be impossible to evaluate the conclusions of the defense expert without access to the testing material that provide the basis for the opinion:

Without the ability to look at the testing manuals and examine the scoring and conclusions, Plaintiff's ability to meaningfully cross-examine a doctor who seeks to opine that she is/was malingering is impaired. The same is true with a relative quantity of the psychological batteries which cannot diagnose with specificity or exactness any conditions, but really tell us simply how an individual compares to other individuals who have taken the same test.⁴¹⁴

Thus, the court also concluded that the raw data must be produced if the Plaintiff has any hope of verifying the accuracy of the testing results:

There are many ways in which a psychologist can control the ultimate conclusion by manipulating the data. The only way to determine whether this manipulation is present is to account for the control dealing with the administration and interpretation of the test data. The raw data is necessary to:

1. verify Plaintiff's answering and handwriting;
2. confirm the answers were not erased by anyone, including Plaintiff;
3. verify the DME's conclusions based on the data. For example, the DME may conclude the test results show no evidence of depression when, in fact, a review of the Beck Depression Inventory as well as the depression scale in the MMPI-2 show severe depression.⁴¹⁵

The court also rejected defendant's effort to circumvent production to Plaintiff's counsel because counsel's review of the materials was also essential to evaluate errors in administering and scoring the tests.

Claiming that the material can be forwarded to plaintiff's expert as a solution is no solution at all. In doing so, it requires plaintiff to undergo additional expense to pay the expert to review the raw data and precludes plaintiff's attorney from reviewing the scores and printout directly which may contain evidence that supports plaintiff's position. The plaintiff's own psychologists may refuse to share the raw data directly with the attorney. In fact, a psychologist may choose only to describe the raw data in vague terms without giving the questions or answers in the data to the lawyer. Even if

⁴¹³ *Id.* at *6-7.

⁴¹⁴ *Id.* at *8.

⁴¹⁵ *Id.* at *9.

the psychologist agrees to talk about what's in the data, this precludes the lawyer from having a confidential conversation with the plaintiff to ask *why* items were answered a certain way. Inserting a third party, a psychologist, into the conversation obviates attorney client privilege.⁴¹⁶ A review of the data by plaintiff's counsel may reveal:

1. Erasure marks. Doctors may instruct their psychometrist to complete all testing in pencil vs pen.⁴¹⁷ Having tests completed in pencil presents a higher likelihood for improper modification. Patients also erase answers because of uncertainty which may bear upon the test results.
2. Incorrect scoring. Some doctors may score tests and testify that the patient scores as not brain injured in concentration tests. However, the doctor can do something as simple as inadvertently inputting the birth date and comparing the patient to much older and mentally feeble individuals. When the correct birth date is used, the results would indicate impaired cognition.
3. Incorrect scoring. Some doctors simply score the results incorrectly, giving points for correct answers when they were incorrect or the other way around.
4. Using the wrong tests. Some doctors may testify that certain malingering scales reflect lack of motivation. Often these tests, in fact, reveal concentration problems.
5. Playing with cut-off scores. Some doctors may testify that an individual flunked a "malingering test."
6. Giving too many tests. Research shows that the more effort or malingering tests administered by a psychologist, the greater the false positive rate.⁴¹⁸

The *Astore* decision rejects the attempt by the defense expert to hide behind alleged ethical restrictions.⁴¹⁹ As this Article demonstrates, there are no actual ethical prohibitions on disclosing testing materials or raw data.

The court's decision is particularly instructive because it accurately explains why such materials must be produced in our adversarial system. The plaintiff must have an opportunity to examine and test the bases for the opinion that she is "malingering" or misrepresenting her symptoms.

⁴¹⁶ See *Attorney-Client Privilege*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/attorney-client_privilege [<https://perma.cc/9EDF-EAXP>].

⁴¹⁷ See e.g., Deposition of K. K. at 104–05, *Beaver v. Probst* (E.D. La. Sept. 21, 2015).

⁴¹⁸ Lena Berthelson et al., *False Positive Diagnosis of Malingering Due to the Use of Multiple Effort Tests*, 27 *BRAIN INJ.* 909, 909 (2013).

⁴¹⁹ *Astore*, 2009 Mont. Dist. LEXIS 569 at *11–12.

Other courts agree regarding the necessity for disclosure. For example, in *State ex rel. Svejda v. Roldan*, the court ordered a defense psychologist to produce the raw data from testing, holding:

We do not find any exception to Missouri's broad discovery rules that permits a psychologist to interpose his profession's ethical principles to bar otherwise legitimate discovery. On the contrary, Rule 56.01(b)(1) plainly says that a party "may obtain discovery regarding *any* matter, not privileged, which is relevant to the subject matter involved in the pending action. . . ." A psychologist such as Dr. Cowan should not be able to unilaterally interpret his professional rules and then decide that they bar discovery under this state's legal system.⁴²⁰

A New York court diagnosed the issue precisely:

This Court fails to understand how a party can show bias on the part of the evaluator a deficiency in the report without the careful review of the raw data and notes of the forensic evaluator. Otherwise, the litigator is limited to cross examination of the forensic evaluator and a forensic report without knowing which questions to ask and without being able to properly establish to the Court, the trier of fact in matrimonial cases, any deficiencies in the report or bias on the part of the evaluator.⁴²¹

Several other courts, in states such as California, Florida, and Michigan, have also required full disclosure.⁴²² Appendix A lists orders from many courts around the country requiring disclosure of raw data and testing materials.⁴²³ These decisions have been accumulated over the years and have been combined, and Appendix A sets forth the dates and parties involved in each.

B. Some Courts Are Failing to Require Disclosure Through Videorecording of Examinations

Certain courts struggle to understand the necessity for video recording of defense medical examinations. On the one hand, the Florida Supreme Court, in *United States Security Insurance Company v. Cimino*, long ago recognized why a plaintiff must be permitted to video record defense expert examinations.⁴²⁴ The Florida Supreme Court's reasoning remains valid today:

The Third District correctly noted "the potential for fraud at the confluence of the medical, legal and insurance industries is virtually unlimited." Howev-

⁴²⁰ *State ex rel. Svejda v. Roldan*, 88 S.W.3d 531, 533 (Mo. Ct. App. 2002) (quoting Mo. R. Civ. P. 56.01(b)(1)).

⁴²¹ *J.F.D. v. J.D.*, 3 N.Y.S.3d 285, 285 (N.Y. Sup. Ct. 2014).

⁴²² *See, e.g.*, *Carpenter v. Superior Court*, 141 Cal. App. 4th 249, 272–75 (Cal. Ct. App. 2006); *Turner v. Jordan Smith & Allshred Servs.*, No. 18-166376-NI, 2019 Mich. Cir. LEXIS 1188, at *1 (Mich. 6th Jud. Cir. Ct. Apr. 15, 2019).

⁴²³ *See* Appendix A pp. 598–623

⁴²⁴ *U.S. Sec. Ins. Co. v. Cimino*, 754 So. 2d 697, 697 (Fla. 2000).

er, by allowing the examination to be observed by a third party or videotaped, the potential for harm to either party is reduced, not increased. As the Second District noted when discussing a rule 1.360 examination in *Wilkins v. Palumbo*, 617 So. 2d at 852:

There is nothing inherently good or bad about the credibility function of an IME. If there is no court reporter or other third party present at the examination, however, a disagreement can arise between the plaintiff and the doctor concerning the events at the IME. *Plaintiffs' attorneys are understandably uncomfortable with a swearing contest at trial between an unsophisticated plaintiff and a highly trained professional with years of courtroom experience.* They have searched for ways to level the playing field on the credibility issues arising from such examinations.⁴²⁵

Many other courts also have permitted video recording defense expert examinations. The attached Appendix B lists orders from many courts around the country requiring video recording of defense expert examinations.⁴²⁶ These orders have been accumulated and shared between plaintiff's lawyers throughout the United States.⁴²⁷

But some courts may have allowed themselves to be persuaded by the arguments against video recording. For example, in 2020, a Michigan appellate court reversed the trial court's order allowing the Plaintiff to video record her examination.⁴²⁸ The appellate court concluded that the trial court did not have the authority to order the video recording.⁴²⁹ The decision required the Plaintiff to seek relief from the Michigan Supreme Court. The Michigan Supreme Court agreed with the trial court and remanded the case back to the appellate court.⁴³⁰

A court in New York agrees that plaintiff's counsel is entitled to attend the examination under special circumstances in order to video record the examination.⁴³¹ California has a statutory code expressly permitting a party to audio record an examination.⁴³² At least one court has interpreted that statutory language against allowing video recording.⁴³³

⁴²⁵ *Id.* at 701–02 (emphasis added) (citation omitted) (first quoting U.S. Security Ins. Co. v. Silva, 693 So. 2d 593, 596 (Fla. Dist. Ct. App. 1997); then quoting *Wilkins v. Palumbo*, 617 So. 2d 850, 852 (Fla. Dist. Ct. App. 1993)).

⁴²⁶ See Appendix B pp. 624–41.

⁴²⁷ See, e.g., Clayton v. Kenworthy, 475 P.3d 310, 313 (Ariz. Ct. App. 2020) (ruling the court erred in ordering the Plaintiff to undergo an unrecorded examination).

⁴²⁸ Schaumann-Beltran v. Gemmete, 335 Mich. App. 41, 53 (Mich. Ct. App. 2020).

⁴²⁹ *Id.* at 53–54.

⁴³⁰ Schaumann-Beltran v. Gemmete, 509 Mich. 979, 979 (Mich. 2022).

⁴³¹ See Nieto v. CLDN NY LLC, 2019 NY Slip Op. 32989(U), at *3 (N.Y. Sup. Ct. Oct. 7, 2019).

⁴³² CAL. CIV. PROC. CODE § 2032.510 (West 2006).

⁴³³ See Grigorescu v. Siracusa, No. CIV530973, 2015 Cal. Super. LEXIS 15351, at *7 (Cal. Super. Ct. Oct 27, 2015) (citing CAL. CIV. PROC. CODE § 2032.610).

But it is the federal courts that have been primarily opposed to video recording of defense expert examinations. Federal courts do recognize that “state courts often permit observation and recording.”⁴³⁴ Nevertheless, some federal courts remain opposed to video recordings of examinations.⁴³⁵ While federal courts seem to understand the adversarial nature of such examinations and that video recording would help ensure accuracy of what occurred at the examination, some of them remain mired in their position.⁴³⁶

Some federal courts’ (and some state courts’) adherence to their past practices of denying requests to video record examinations is difficult to understand because it directly conflicts with the law relating to experts, such as *Daubert* and Federal Rule of Evidence 702. To be admissible, a federal court must find that expert testimony rests on an accepted methodology and application of facts to the methodology.⁴³⁷ But if the court does not allow an examination to be video recorded, then it never has access to the evidence regarding the methodology or application. This is even more important when the expert is engaging social science which intrinsically means it is more vulnerable to bias.⁴³⁸ As described in detail above, only through a video recording can it be determined whether a defense expert followed proper test administration protocols, introduced bias through examiner behavior, or actually administered examinations. In place of established law relating to experts, these federal courts appear to be basing their decisions on nothing more than the rationale that that is what they have done in the past. In this instance, these federal courts may wish to consider the reasons that state courts have been permitting video recording and recognize that these reasons are entirely consistent with federal law on the admissibility of expert testimony. Furthermore, if the state courts permit video recording, such as in Florida, and the expert has conducted examinations under those circumstances, the failure of the federal courts to require or permit video recording is illogical.

⁴³⁴ *Lahar v. Oakland*, No. 05-72920, 2006 U.S. Dist. LEXIS 55235, at *21–22 (E.D. Mich. Aug. 8, 2006).

⁴³⁵ *Id.*

⁴³⁶ *See Mager v. Wis. Cent., Ltd.*, 924 F.3d 831, 839 (6th Cir. 2019).

⁴³⁷ *See Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 592–93 (1993); *see also* FED. R. EVID. 702.

⁴³⁸ *Weatherred v. State*, 15 S.W.3d 540, 542 n.5 (Tex. Crim. App. 2000) (“The ‘hard’ sciences, areas in which precise measurement, calculation, and prediction are generally possible, include mathematics, physical science, earth science, and life science. The ‘soft’ sciences, in contrast, are generally thought to include such fields as psychology, economics, political science, anthropology, and sociology.”); *Tillman v. State*, 354 S.W.3d 425, 435–36 (Tex. Crim. App. 2011).

VII. VIDEO RECORDING OF PLAINTIFF'S EXPERT EXAMINATIONS

The preceding discussion focused on the need for video recording examinations conducted by defense experts. In some instances, there might also be reasons to video record examinations performed by the plaintiff's expert witness. But it is important to understand that the conditions under which a plaintiff's expert performs examinations are quite different.

As discussed, an adversarial relationship inherently exists between a plaintiff and a defense expert.⁴³⁹ Up to 86 percent of cases involve the use of expert witnesses.⁴⁴⁰ Therefore, understanding motivation is key.⁴⁴¹ Studies show that 77 percent of expert witnesses felt manipulated by lawyers to weaken unfavorable testimony.⁴⁴² The defense expert is incentivized to demonstrate that the plaintiff is malingering or at least exaggerating the severity of her injuries or that she is not injured at all to reduce exposure. The defense expert, while a medical or psychological professional, has no traditional doctor-patient relationship with the examinee and is hired by the defendant who may not have the patient's best interest in mind. Doctors that testify in a way that is hurtful to the defense may find themselves no longer retained by insurers, or their policyholder defendants, and they may have a strong financial incentive to please the person paying their checks. Defendants, insurers, and their counsel are aware that retaining a defense expert who will refute or devalue a claim serves their interests. A common defense narrative is that the plaintiff is lying regarding her injuries in order to increase her possible recovery.⁴⁴³ Consistent with the non-treating role of defense experts, a recent survey shows that defense experts may collect more per case than plaintiff's experts do.⁴⁴⁴ For example, the survey reveals that plaintiff experts earn less than defense experts in some cases.⁴⁴⁵

In cases in which the plaintiff's expert is the treating physician, the treating physician is acting according to their duties and obligations to help the plaintiff and have a doctor-patient relationship. Also, because the plaintiff has been evaluated and is receiving treatment immediately after being injured and long before anticipating litigation, the timeline of the case often does not allow for video recording of such examinations. In some cases, the plaintiff's retained expert may not even perform additional evaluation at all

⁴³⁹ See, e.g., *U.S. Sec. Ins. Co. v. Cimino*, 754 So. 2d 697, 701 (Fla. 2000).

⁴⁴⁰ Andrew W. Jurs, *Expert Prevalence, Persuasion and Price: What Trial Participants Really Think About Experts*, 91 IND. L.J. 353, 357 (2016).

⁴⁴¹ See Zachary Crockett, *The Lucrative Economics of Expert Witnesses*, HUSTLE (June 4, 2022), <https://thehustle.co/the-lucrative-economics-of-expert-witnesses/> [<https://perma.cc/Q2D7-TZGQ>].

⁴⁴² *Id.*

⁴⁴³ SHAHNASARIAN, *supra* note 212, at 59.

⁴⁴⁴ MANGRAVITI ET AL., *supra* note 21, at 5–6.

⁴⁴⁵ *Id.*

for purposes of the litigation because the expert is primarily used by plaintiff at trial to summarize and testify regarding plaintiff's treatment and prognosis. Therefore, there may be no exam to record. Even for the retained experts, they are acting in a non-adversarial role to the plaintiff, making the relationship very different.

CONCLUSION

Some courts continue to struggle with their gatekeeping function with respect to defense medical and psychological expert testimony. Under federal and state evidentiary law, expert testimony must pass minimum standards for admissibility. But in some cases, courts may not require sufficient disclosure of information to determine whether those standards are satisfied. If a court prohibits the video recording of a physical or psychological examination, then the methodology of an expert cannot be fully examined. The court cannot determine if the defense expert followed proper protocols or even gave certain exams.

As illustrated above, when examinations are video recorded, they often contain discrepancies between what an expert says happened and what really happened. Also, if the defense medical expert is not required to produce the test materials, then the court cannot examine whether an expert followed standard testing protocols. Finally, if the defense expert is not required to disclose the testing data (plaintiff's answers and scoring), it is equivalent to not requiring an expert to show his or her work. In each of these cases, the absence of full disclosure allows the defense expert to state conclusions that are utterly unverifiable. A court's refusal to require full transparency cannot be squared with the standards for expert opinion admissibility.

But, as a practical matter, courts may not have the resources to properly evaluate expert testimony and leave it to the parties to address on cross-examination at trial. This reality makes full disclosure even more important. Without full disclosure, a court ends up "blessing" unreliable expert testimony by admitting it but then denying the plaintiff access to the information she needs to challenge the testimony before the jurors.

The issues raised in this Article appear to be unique to defense experts in personal injury lawsuits. In part, the struggle of some courts is probably due to the unusual nature of this testimony, particularly experts who claim to be able to conclude that a plaintiff is lying about her symptoms. Under the cloak of expertise, some experts have successfully argued that the basis for their opinions cannot be disclosed to the court or the plaintiff. But courts cannot allow such experts to operate under different rules. Every court requires full transparency from defense medical and psychological experts, and it is long overdue.

APPENDIX A: ORDERS ALLOWING RAW DATA TO PLAINTIFF/DEFENDANT¹

| | Date | Case | State | Expert(s) | Finding |
|----|------------|-----------------------------------|-------|------------------------|--|
| 1. | 07/06/2023 | Morris v. Pace | FL | Dr. Laurence S. Levine | “When the report is served upon Plaintiffs’ counsel, the exam raw data must be served upon Plaintiffs’ counsel as well.” |
| 2. | 01/25/2023 | Zaalishvili v. Fluor Conops, Ltd. | CA | Dr. David Formwalt | “The undersigned also ORDERS Employer to produce the raw testing data from the expert examination with Dr. Formwalt to Claimant’s counsel within ten (10) days of the entry of this Order” |
| 3. | 06/22/2023 | Schram v. Deng | CA | Dr. Hamilton | “The raw data must be disclosed to Plaintiff’s attorney.” |

¹ All files are on hand with the Nevada Law Journal.

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| 4. | 05/31/2023 | Hernandez v. Pella Corp. | TX | Dr. Corwin Boake | “Further, Dr. Boake must deliver any notes or work papers concerning this matter and all raw data, scoring sheets, and copies of any instructional materials or manuals concerning this examination.” |
| 5. | 04/26/2023 | Randy’s Trucking v. Superior Ct. | CA | Dr. Tara Victor | “[T]he trial court did not abuse its discretion in ordering transmission of raw data and audio recording to plaintiffs’ attorney subject to a protective order” |
| 6. | 02/03/2023 | Butt v. Ariz. Structural Laminators LLC | Federal (AZ) | Dr. Tsanadis | “After a telephonic hearing, Magistrate Judge Morrissey, to whom this matter has been assigned for all pretrial proceedings, granted the request.” |
| 7. | 10/03/2022 | Tennille v. S A Welding LLC | TX | Dr. Corwin Boake | “The court finds Dr. Corwin Boake is in contempt of court and shall provide the data he was ordered to provide no later than October 8, 2022 without any restrictions which would prevent Plaintiff’s expert from reviewing the data as needed.” |
| 8. | 08/25/2022 | Gilbert v. Lebeuf | FL | Dr. Barry Crown | “[T]he raw data shall be released to Plaintiff’s counsel and Plaintiff’s counsel may provide copies to Plaintiff’s experts.” |

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|-----|------------|---------------------------|----|-----------------------|---|
| 9. | 05/20/2022 | Wenner v. Merck & Co. | NJ | Dr. Douglas Gibson | “IT IS . . . ORDERED that the raw data from Plaintiff’s neuropsychological evaluation by Douglas Gibson, Ph.D. is to be produced to Plaintiff’s counsel within 10 days of Dr. Gibson scoring the tests” |
| 10. | 05/18/2022 | Hurtado v. Nieves | FL | Dr. Jacqueline Valdes | “The Court Orders the Release of the raw data subject to a Protective Order and/or agreement between the parties as to the confidentiality of the raw data” |
| 11. | 02/08/2022 | Archer v. Rasmussen | VA | Dr. Scott Sautter | “Scott Sautter shall send to counsel for the Defendant . . . all ‘test data’ and ‘test materials’” |
| 12. | 02/02/2022 | Wall v. Connell Oil, Inc. | WA | Dr. Elizabeth Ziegler | “After any psychological testing of Plaintiff, a copy of the actual tests, test answers, interpretative materials used, reports of tests, raw data generated, scoring and all test results regarding Plaintiff shall be forwarded to Plaintiff’s attorney with the report.” |

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| 13. | 10/26/2021 | Garcia v. Henriquez | TX | Kate Glywasky, Psy.D. | “The video and audio recordings of Defendant’s Retained Witness’s examination, as well as the raw test data and the results, may only be shared with any of Plaintiff’s experts who are licensed psychologists.” |
| 14. | 10/12/2021 | Gutierrez v. J3 Co., LLC | TX | Dr. Jesus Aranda-Cano | “The video and audio recordings of Dr. Aranda-Cano’s examination, as well as the raw test data and the results, are subject to this protective order and may only be shared with any of Plaintiff’s experts who are licensed psychologists.” |
| 15. | 10/08/2021 | Cotan v. Ali | WA | Drs. Alan Breen & Harold Rappaport | “[E]xaminer Dr. Breen will send all files and records, including raw data, to a psychologist or neuropsychiatrist designated by Plaintiff” |
| 16. | 10/04/2021 | Schlenker v. G & R Integration Servs., Inc. | ND | Dr. Susan McPherson | “Pursuant to Rule 35(b)(3), within seven days after G and R provides the reports and raw test data to Schlenker, Schlenker must provide ‘like reports of all earlier or later examinations of the same condition,’ including providing all raw neuropsychological test data to Dr. McPherson, if he has not previously done so.” |

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| 17. | 08/24/2021 | Indep. Bank v. Welch | KY | Dr. Timothy Allen | “The raw data produced during Dr. Allen’s CR 35 Examination of Plaintiff shall be provided to Plaintiff’s counsel within ten (10) days of the entry of the Order below.” |
| 18. | 03/04/2021 | Stephens v. Lyft Fl., Inc. | FL | (unnamed examiner) | “The ‘raw data’ from the defense examination shall be produced to the Plaintiff’s counsel following the examination.” |
| 19. | 03/25/2021 | Sanchez v. Waterpark, LLC | NV | Dr. Harvey Edmonds | “[T]he raw data will be disclosed to Plaintiff’s expert and Plaintiff’s attorney, and be designated for ATTORNEYS’ EYES ONLY” |
| 20. | 03/02/2021 | Camacho v. Macy’s Fl. Stores, LLC | FL | Dr. Melissa Friedman | “Defense counsel will produce all raw data, testing material, handwritten notes and actual tests utilized by the defense expert, Dr. Melissa Friedman, in reaching any conclusion in this case directly to plaintiff’s counsel” |
| 21. | 01/19/2021 | Cook v. Nation Express, LLC | OH | Dr. Vijaykumar Balraj | “Defendants are ORDERED to produce the raw data from [Dr. Balraj’s] exam.” |

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| 22. | 10/16/2020 | Velvin v. Makhkamov | CO | Dr. Gregory Thwaites. | "[T]he Court orders the raw data from any defense neuropsychological examination of Mr. Velvin to be produced to Dr. Frederick, subject to the terms of the protection order." |
| 23. | 09/24/2020 | Sevin v. Office | FL | Dr. Edwin Bercaw | "In addition to the report, the examiner shall provide all raw data, including copies of all notes, tests, test results, scoring and test protocols, to Plaintiff's treating or retained psychologist or neuropsychologist" |
| 24. | 09/18/2020 | Parham v. FedEx Corp. | VA | Dr. Morote | "Dr. Morote can't just produce the raw data to anybody. It has to be to another licensed psych -- neuropsychologist. And I have no problem with her doing that." |
| 25. | 09/17/2020 | Prieto v. James River Ins. Co. | FL | Dr. Melissa Friedman | "Defense counsel will produce all raw data, testing material, handwritten notes and actual tests utilized by the defense expert, Dr. Melissa Friedman" |
| 26. | 07/31/2020 | Moreaux v. Clear Blue Ins. Co. | LA | Dr. Kevin Greve | "It has also agreed to provide plaintiffs with the raw data from each test Dr. Greve administers along with Dr. Greve's testing file." |

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| 27. | 07/31/2020 | Lambaria-Gonzalez v. UPS | TX | Dr. Corwin Boake | “The video and audio recordings of Dr. Boake’s examination, as well as the raw test data and the results, may only be shared with any of Plaintiff’s experts who are licensed psychologists.” |
| 28. | 07/07/2020 | Felix v. McCoy | FL | Dr. Jason Demery | “This raw data will be produced to Christopher Felix’s counsel when the report of the examination is produced” |
| 29. | 07/06/2020 | Glencross v. Lockwood | TX | Robert Collins (Ph.D., ABPP) | “The report and raw data of Dr. Collins will be submitted within[] ten (10) days after the examination to Plaintiff’s Counsel or Plaintiff’s Counsel’s designated consulting expert” |
| 30. | 11/06/2020 | Shanks v. Mercury Indemnity Co. of Am. | FL | Dr. Friedman | “Plaintiff has indicated her willingness to destroy the raw data upon completion of the case and execute a confidentiality agreement, therefore, the Court does not find that test security is an issue nor should the test results be compromised.” |

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| 31. | 02/13/2020 | Salinas v. Ortiz | CA | Dr. Kyle Boone | “Defendants and Dr. Kyle Boone are ordered to produce all materials related to Dr. Boone’s neuropsychological evaluations of Plaintiff Shanel Salinas, including all raw data, tests administered, test result, scores, interpretative materials, literature” |
| 32. | 02/12/2020 | Jarnutowski v. Vick | FL | Dr. Jason Demery | “Jason Demery, Ph.D. is required to produce to Paul Jarnutowski’s counsel all ‘raw data’ used by Dr. Demery during the examination” |
| 33. | 12/13/2019 | Brasher v. Paul | FL | Dr. D’Arienzo | “All raw data, test material, and/or test manuals shall be produced to Plaintiff’s counsel and may be shared with Plaintiff’s neuropsychologist, psychologist, or any expert within those fields to address such information.” |
| 34. | 08/02/2019 | Carvale v. N.J. Mfrs. Ins. Co. | NJ | Dr. Thomas Swirsky-Sacchetti | “IT IS . . . ORDERED that the raw data from Plaintiff’s neuropsychological evaluation by Dr. Swirsky-Sacchetti is to be produced to Plaintiff’s counsel within 10 days of receipt of this Order” |

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| 35. | 04/30/2019 | Gergel v. Gergel | TN | Dr. Catherine Grello | “That Dr. Catherine Grello (expert witness for the Defendant) shall provide to Dr. Eric Engum (as expert for the Plaintiff) all the testing material she utilized in conducting her psychological evaluation of the Defendant, James Gergel.” |
| 36. | 07/12/2019 | Cooper v. Beshel Holdings, LLC | NC | Dr. Manish Fozdar | “The Plaintiff consents to providing Defendants’ Neuropsychiatrist and/or Neuropsychologist the raw data” |
| 37. | 11/15/2018 | Romero v. Fields Motorcars of Fla., Inc. | FL | Dr. Thomas Boll | “All raw test data including test administration manuals and scoring manuals published by the publisher of the test, as well as any documents that constitute test instruments, shall be produced to the Court under seal, for the Court to forward same to Plaintiff’s counsel.” |
| 38. | 06/21/2018 | Lewis v. D.A.B. Constructors, Inc. | FL | Dr. Louise Gaudreau | “In addition to the report, the examiner shall provide all raw data, including copies of all notes, tests, test results, scoring and test protocols, to Plaintiff’s treating or retained psychologist or neuropsychologist within 21 days of the examination” |

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| 39. | 01/09/2018 | Pacher v. Bull | NM | (unnamed “psychiatrist”) | “A copy of the recording, the psychiatrist’s notes, the raw test data, including the scoring of the evaluation shall be provided to Plaintiff’s Counsel within 10-days of the exam.” |
| 40. | 04/05/2018 | Jones v. Greater Richmond Transit Co. | VA | Dr. Scott D. Bender | “[N]europsychological testing raw data to be produced by Dr. Bender to Plaintiff’s counsel” |
| 41. | 12/08/2017 | Pitman v. Metro. Wash. Airports Auth. | VA | Dr. Douglas P. Gibson | “Defendant shall . . . produce ‘test data’ and ‘test materials’” |
| 42. | 10/30/2017 | Parker v. Hawes | FL | Dr. Leli | “As to Dr. Leli’s examination, the parties agree the raw test data used and test results obtained by him and the videotape of his examination shall, with Plaintiff’s proper written authorization, be released within 21 calendar days of the examination to Plaintiff’s treating neuropsychologist, Dr. Kristjan Olafsson” |

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| 43. | 02/23/2017 | Zerr v. WPX Energy Williston, LLC | ND | Drs. Brent Van Dor- sten & Robert Klein- man | “Dr. Van Dorsten and Ms. Burns shall produce the following documents relevant to the examinations conducted by them or their offices: (a) all raw testing data, (b) all diagrams, drawings, illustrations, or writings made by Mr. Zerr, (c) all scoring sheets, and (d) all printed profiles or results from any testing. The term ‘raw testing data’ shall include all raw and scaled scores, responses to test questions or stimuli, and all notes or memorializations made by the examiner concerning Mr. Zerr’s statements, responses, or behavior.” |
| 44. | 01/25/2017 | Arasim v. Residential Mgmt Grp., LLC | NY | Dr. William Barr | “[T]he Residential defendants are directed to provide to plaintiffs’ counsel such raw data and testing materials (including testing manuals), within 30 days of Arasim’s examination by Dr. Barr” |
| 45. | 08/11/2016 | Ferland v. Lee | NY | (unnamed examiner) | “[P]laintiffs shall be entitled to have their attorney receive all raw data and testing materials from the neuropsychologist examination of defendant’s expert.” |

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| 46. | 08/01/2016 | Maldonado v. Clark | FL | Dr. Ernest Bordini | “Dr. Ernest Bordini is to provide directly to Plaintiffs’ counsel all raw data/test data, including all test results, print outs, scored and/or unscored tests, digital or otherwise and all documents in Dr. Bordini’s file.” |
| 47. | 05/25/2016 | Gunter v. TCB Tallahassee Woodlake, LLC | FL | Dr. Joseph Sesta | “Defendant . . . shall provide Plaintiff’s counsel all raw data used and obtained by Dr. Joseph Sesta” |
| 48. | 06/16/2016 | Mini v. Mena | FL | Dr. Elizabeth Tannahill Glen | “Raw data is only to be released to any neuropsychologist(s) and any psychiatrist of the Plaintiff’s choosing.” |
| 49. | 07/21/2016 | Hollenberger v. RJB Dev., LLC | NY | (unnamed examiner) | The judge “den[ied] the motion for protective order to the extent that it [sought] to limit the disclosure of the raw data and the test booklets to the attorney for the plaintiff.” |

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| 50. | 03/25/2016 | Lojanica v. Beale | VA | Dr. Susan Trachman | “Dr. Trachman shall provide all raw data, including . . . notes, tests, tests results, scoring sheets, to Plaintiff’s counsel . . . [and] is to bring any test booklets and scoring protocols in her possession to her deposition” |
| 51. | 02/09/2016 | Wayne v. Officer Ralph Kirk #21 | Federal (IL) | Drs. Daniel Yohanna & Joseph Fink | “[T]he Court finds that an appropriate Protective Order is one that allows Plaintiff to receive (through counsel) copies of the first three items that he seeks: the Raw Data Sheet, the Personality Assessment Inventory (PAI) Clinical Interpretive Report, and the Neuropsychological History Questionnaire (‘NHQ’).” |
| 52. | 11/13/2015 | Flatau v. Nagaraj | FL | Drs. Alan J. Raphael & Charles J. Golden | “In addition to the report, within fifteen (15) days of the exam, the Defendant’s examiner shall send to Plaintiff’s counsel legible copies of all raw data, including copies of all notes, emails, tests, tests results, scoring and test protocols.” |

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| 53. | 09/30/2015 | Ogburn v. Am. Nat'l Prop. & Cas. Co. | Federal (CO) | Drs. Thomas Wo- dushek and Mark Zacharewicz | “Plaintiff shall produce all documents in his possession, custody, or control responsive to Defendant’s July 23, 2015 request for <i>neuropsychological</i> test materials” |
| 54. | 05/26/2015 | Collins v. Preschern | NY | Dr. Robert J. McCaf- frey | “[D]efendant shall produce all raw data from the neuropsychological testing and the testing materials, including test manuals, within 30 days of plaintiff’s testing.” |
| 55. | 09/11/2014 | Hairston v. Ed Nelson Transp. | FL | Dr. Tannahill Glen | “Defendants shall provide Plaintiff’s counsel with the raw data of the examination, including any videotapes, audiotapes, transcriptions, copies of test materials, test record forms, test instructions, and test items.” |
| 56. | 08/06/2014 | Mavour v. Montaque | FL | Dr. Esther Feldman | “[R]aw data shall be provided directly to Dr. Lester” |

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| 57. | 08/29/2014 | McCabe v Bulldog Off. Prods., Inc. | PA | Drs. Gorske, Collins, Fazio-Sumrok, & Fur- man. | “[The doctors] are Ordered to produce all raw data, test data, test protocols, scores, notes, and all other file materials re- lating to Michael McCabe within ten (10) days of the date of this order or suffer sanctions.” |
| 58. | 03/28/2016 | Schoppenhorst- Taylor v. Figueroa | FL | Dr. Jason Demery | “The neuropsychological ex- aminer is hereby ordered to provide directly to Plaintiffs’ counsel all raw data/test da- ta” |
| 59. | 03/24/2014 | Brown v. Clark | FL | Dr. Glenn Larrabee | “The neuropsychologist shall furnish a copy of his or her re- port and opinion to the Attor- ney for the Plaintiff within 30 days, along with a legible copy of the ‘test data’ and ‘test ma- terials’” |
| 60. | 12/26/2013 | Blair v. Vann | VA | Drs. Barry Gordon & Sarah Reusing | “Dr. Barry Gordon and Sarah Reusing, Ph.D. shall forward [to Plaintiff’s designated medi- cal doctor] . . . [a]ll neuropsy- chological testing, neuropsy- chological battery and raw data” |

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|-----|------------|-------------------------------------|----|--|--|
| 61. | 12/19/2013 | Bagwell v. Charter Commc'ns, Inc. | VA | Dr. Barry Gordon | "Without limiting the expert's obligations under Rule 4:10(c), the examiner will identify all tests performed and produce all raw data for each test, as well as all calculations of scores for each test." |
| 62. | 12/02/2013 | Sworin v. Harris | FL | Drs. Charles Golden, Alan Raphael, & Kenneth Fischer | "[The doctors] shall produce to counsel for the respective opposing party and counsel for the party by whom they have been retained, exact copies of the raw data produced during all neuropsychological, psychological and neurological tests administered" |
| 63. | 05/31/2013 | Patel v. Christy | FL | Drs. Elizabeth Tan-nahill Glen | "Raw data will be mailed directly to Dr. Jennifer Barror-Levine, a neuropsychologist identified by Plaintiff's counsel" |
| 64. | 05/10/2013 | Cantrell v. Valley Health Sys., LLC | NV | Dr. Lewis Etcoff | "Commissioner RECOMMENDS the raw data and test booklets will be under an appropriate Protective Order" |

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|-----|------------|---|----|---|---|
| 65. | 02/27/2013 | Menard v. Travelers Indem. Co. of Am. | LA | Dr. Kevin J. Bianchini | “Dr. Kevin J. Bianchini, Ph.D, [shall] produce to PETITIONERS . . . [t]esting materials, including testing questions, and all manuals for the testing materials and test questions, regarding Tonya Menard” |
| 66. | 08/03/2012 | Nakasato v. 331 W. 51 St. | NY | (unnamed neuropsychologist) | “[I]t is hereby ORDERED that plaintiff’s motion is granted and defendant is to provide plaintiff with the records, raw data, test results, computer printouts and scoring booklets” |
| 67. | 04/09/2012 | Bethard v. Scottsdale Ins. Co. | LA | Drs. Kevin Bianchini & James Quillin | “[The doctors] are ordered . . . to turn over to the attorneys for the opposing parties all tests, tests booklets, scoring sheets, scoring data, and master test booklets” |
| 68. | 06/30/2011 | Calisti v. Lugo | FL | Dr. David Bush | “The raw test data and results shall be given by Dr. Bush to any of Plaintiff’s experts designated by the Plaintiff and that data and results may be shared by the expert with Plaintiff’s attorney.” |

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| 69. | 06/08/2011 | Dejean v. Nabors Drilling USA | LA | Dr. Kevin J. Bianchini | “Dr. Bianchini shall produce . . . copies of all test data to counsel for plaintiff” | |
| 70. | 02/03/2010 | Frazier v. Bd. of Cnty. Comm’rs | Federal (CO) | Dr. Suzanne Kenneally | Raw data and psychological tests to plaintiff counsel. | |
| 71. | 02/10/2010 | Whitehead v. Lozano | NY | Dr. Robert J. McCaffrey | “In this Court’s view, plaintiffs are entitled to disclosure of ‘raw data’ generated during the course of McCaffrey’s independent medical examination of plaintiff to aid in preparation of trial” | |
| 72. | 12/20/2010 | Smith v. Giordano | FL | Dr. Leli | “Dr. Leli shall provide Plaintiffs’ counsel with ‘raw data’ from the testing performed on Plaintiff” | |

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|-----|------------|------------------------|----|--|---|
| 73. | 04/29/2010 | Kouroupis v. GEICO | FL | Dr. Harold H. Smith | “[T]he Court holds that following the compulsory examination all raw data, testing material, handwritten notes, and actual tests as well as the test booklets are to be provided to plaintiffs’ counsel.” |
| 74. | 04/16/2012 | Jean v. McDonald | FL | Drs. Tannahill Glen, Kristjan Olafsson, & David Seaton | “[I]t is hereby ORDERED AND ADJUDGED that Plaintiff’s Motion to Compel Release of Raw Data is hereby GRANTED” |
| 75. | 04/30/2010 | Polito v. Le Dunckel | WA | Dr. Frederick Wise | “Dr. Wise will provide copies of his report, all raw data related to the psychometric testing, [and] his notes” |
| 76. | 12/04/2009 | Astore v. Farmers Ins. | MT | Dr. Jeffery Cory | “From the foregoing, the Court hereby ORDERS Dr. Cory to release all raw data to the attorneys in this case.” |

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| 77. | 09/16/2009 | Krause v. Wal-Mart Stores, Inc. | FL | Dr. Ryan C.W. Hall | “The final report and all raw data shall be produced no later than 10 days following the exam to counsel for the plaintiffs.” |
| 78. | 07/31/2009 | Meginley v. Sween | FL | Dr. Frederick Schaerf | “Plaintiff’s Motion to Compel Release of Raw Data and Test Booklets is hereby granted.” |
| 79. | 07/XX/2009 | Maislen v. Associated Materials, Inc. | WA | Dr. Frederick Wise | “The video tape and test data shall be provided to plaintiff[s] counsel” |
| 80. | 08/20/2008 | Rose-Meucci v. Safe-lite Glass Corp. | FL | Dr. Larrabee | “The Defendants shall produce documents responsive to Plaintiff’s July 9, 2008 Request to Produce within twenty (20) days of the date of the Court’s Order, including all raw data.” |

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|-----|------------|--------------------------------|-----------------|--------------------------------|--|
| 81. | 06/25/2008 | Tibbs v. Adams | Federal (CA) | Dr. Laura Geiger | “Dr. Laura Geiger is directed to release all the raw data and other materials she considered in reaching her expert opinion to counsel for respondent” |
| 82. | 02/10/2009 | Pabst v. Meadvin | FL | (unnamed neuropsychologist) | “All neuropsychological test data, including, but not limited to raw data, from Plaintiffs’ and Defendants’ neuropsychologists shall be disclosed and exchanged to attorneys for both parties and their experts within ten (10) days of this Order.” |
| 83. | 10/16/2007 | Purvis v. Waste Mgmt., Inc. | FL | Dr. Harry Krop | “Dr. Krop . . . shall provide to Plaintiff . . . a copy of all raw data” |
| 84. | 03/23/2009 | Pompey v. McRae | FL | Dr. Michael Shahnasarian | “Defense counsel is directed to have Dr. Michael Shahnasarian, Ph.D. produce all raw testing materials [and] . . . testing books . . . to the Plaintiff’s attorney” |

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|-----|------------|--------------------------------|----|--------------------------|---|
| 85. | 04/03/2009 | Gojmerac v. Moore | FL | Dr. Michael Shahnasarian | “Plaintiff shall be entitled to Dr. Shahnasarian to receive the raw data for the clinical testing” |
| 86. | 05/12/2008 | Johnson v. McPhie | FL | Dr. Thomas Boll | “Dr Boll will provide . . . copies of all raw data . . . to Plaintiff’s counsel” |
| 87. | 05/05/2008 | Rodriguez v. U.S. Parking Ltd. | FL | Dr. Bush | “Defendant’s expert neuropsychologist, Dr. Bush, is hereby ordered to produce to Plaintiff’s attorney, a copy of Dr. Bush’s Raw Test Data, answers, testing books, and scoring sheets.” |
| 88. | 05/08/2007 | Zuleta v. Pancoast | FL | (unnamed examiner) | “[Defendant] shall provide to Plaintiff’s Counsel all Raw Data” |

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|-----|------------|-------------------------------|--------------------|--------------------------|--|
| 89. | 09/14/2007 | Lee v. Hasani | FL | Dr. Michael Shahnasarian | "[I]t is ORDERED and ADJUDGED that Plaintiff's Motion Requesting Order to Produce Raw Data is hereby GRANTED" |
| 90. | 08/23/2007 | Karpicky v. Aqua Beauty, Inc. | MD | Dr. Spector | "ORDERED, that Plaintiff's request that Dr. Spector's report, raw data and tests be received by Plaintiff's Counsel . . . is hereby GRANTED" |
| 91. | 10/11/2006 | Richardson v. Farnsworth Farm | FL | Dr. Harry Krop | "[I]t is hereby ORDERED AND ADJUDGED that Dr. Harry Krop shall forthwith produce directly to all counsel of record a complete copy of his 'raw data' regarding Harry Richardson." |
| 92. | 07/28/2006 | Perry v. Varnado | FL | Dr. Michael Herkov | "With respect to Dr. Herkov's report, all raw data, including copies of all notes, tests, test results, scoring and test protocols and any other items used in conducting, scoring and evaluating the tests shall be provided to Plaintiff's treating psychological experts" |

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|-----|--------------|--|----|---|---|
| 93. | 07/24/2006 | Blackley v. Busen | FL | Dr. Daniel Marson | “Copies of the testing materials utilized by Dr. Marson and his ‘raw data’ will be released only to qualified neuropsychologists and the attorneys of record in this case” |
| 94. | 05/10/2006 | Davidson v. Strawberry Petroleum, Inc. | FL | Dr. Harold H. Smith | “The raw data of any psychological tests administered by Dr. Smith shall be made available directly to Plaintiff’s psychologist expert within ten (10) days of the examination” |
| 95. | 09/23/2005 | Strunk v. Exxon Mobil | FL | Dr. Sally Kolitz Russell | “Dr. Russell will provide the raw test data only to Plaintiff’s licensed psychologist expert” |
| 96. | 09/16/2005 | Beekman v. Besinger | FL | Drs. Ernest J. Bordini & Lawrence H. Salmansohn | “Drs. Bordini and Salmansohn shall produce copies of the raw data, test results and copies of the exact versions of all neurodiagnostic tests” |

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| 97. | 07/28/2005 | Livingston v. S. Baptist Hosp. | FL | Dr. Russell | “A copy of raw test data, answers, and scoring sheets from the evaluation by Dr. Russell shall be produced to counsel for the Plaintiff” |
| 98. | 06/14/2005 | Rice v. Lemmon | FL | Dr. Joseph Sesta | “Dr. Sesta will provide . . . a copy of his report and all raw data, including copies of all notes, tests, test results, scoring and test protocols and any other items used in conducting, scoring and evaluating the tests to Plaintiff’s counsel for review and use in this litigation by Plaintiff’s counsel [and] Plaintiff’s treating psychological experts or medical experts” |
| 99. | 05/20/2005 | Heying v. Buchert | FL | Dr. Ernest Bordini | “Dr. Bordini will provide his . . . report and copies of all raw data from testing reviewed, performed, or used by him . . . to . . . Plaintiff’s counsel” |
| 100. | 09/22/2004 | Laberenz v. Conway | CO | (unnamed examiner) | “Defense counsel will have 14 days from the date of each examination to get the examiner’s report and materials (including neuro-psychological raw data) to Plaintiff’s counsel.” |

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| 101. | 05/28/2004 | Drago v. Tishman Constr. Corp. | NY | Dr. Jason W. Brown | “[T]he court finds it proper to compel the disclosure of the raw data of the multiple tests administered to plaintiff. The moving party shall not to be precluded from access to raw testing data merely because the opposing expert’s testing was done and report prepared after this matter was on the trial calendar. The raw data shall be provided within ten days of the date of this decision.” |
| 102. | 04/04/2003 | Jenkins v. Averbach | FL | Drs. Bonnie Levin, Michael Shahnasarian, Norman Schatz & Ross Zafonte | “Each defense witness shall provide to defense counsel all writing, test booklets, test questions, score sheets and drawings, and all raw data” |
| 103. | 01/19/2000 | Lifemark Hosps. of Fla. v. Hernandez | FL | Dr. Bonnie Levin | <p>“The trial court ruled in favor of plaintiffs and quashed the hospital’s subpoena directed to Dr. Levin. The hospital has petitioned for a writ of certiorari.”</p> <p>“For the stated reasons and because Dr. Levin’s testimony is material to the central issue in the case, . . . we grant the petition for writ of certiorari and quash the order now before us.”</p> |

APPENDIX B: ORDERS ALLOWING VIDEO TAPING OF DEFENSE EXPERT EXAMINATIONS²

| | Date | Case | State | Expert | Finding |
|----|------------|--------------------------------|-------|------------------------|---|
| 1. | 07/06/2023 | Morris v. Pace | FL | Dr. Laurence S. Levine | “Plaintiff may have a videographer present to record the entire evaluation and testing, without restrictions.” |
| 2. | 05/04/2023 | Rath v. Ziemnik | OH | Dr. Swales | “Plaintiff is permitted to have an observer present for the subject psychological examination and to have the examination and testing recorded by an independent videographer.” |
| 3. | 04/26/2023 | Randy’s Trucking v. Super. Ct. | CA | Dr. Tara Victor | “In sum, the trial court did not abuse its discretion in ordering transmission of raw data and audio recording to plaintiffs’ attorney subject to a protective order, as plaintiffs demonstrated a need for the materials and the protective order would address the concerns about test security and integrity.” |

² All files are on hand with the Nevada Law Journal.

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| 4. | 06/15/2023 | DiFiore v. Pezic | NJ | Dr. Keith Benoff | "[The Court] further affirm[s] that video recording, in addition to audio recording, should be included in the range of options" |
| 5. | 02/02/2022 | Wall v. Connell Oil | WA | Dr. Elizabeth Ziegler | "Defendants shall allow a video tape [recording] of the entirety of the exam." |
| 6. | 10/12/2021 | Gutierrez v. J3 Co., LLC | TX | Dr. Jesus Aranda-Cano | "The interview shall be recorded by video" |
| 7. | 10/26/2021 | Garcia v. Henriquez | TX | Kate Glywasky (Psy.D) | "The interview shall be recorded by video" |
| 8. | 10/04/2021 | Schlenker v. G & R Integration Servs. | ND | Dr. Susan McPherson | "If the neuropsychological examination is performed by Dr. Susan McPherson, Schlenker may record the examination, using an unobtrusive audio-only recording device." |
| 9. | 10/08/2021 | Cotan v. Ali | WA | Drs. Alan Breen & Harold Rapaport | "THE COURT HEREBY . . . ORDERS that plaintiff may have a representative present at the examination, but not during the testing portion of a neuropsychological exam when only an unattended and unobtrusive video camera is permitted" |
| 10. | 08/10/2021 | Tapia v. Wal-Mart Stores E., LP | NM | Dr. Hartman | "Plaintiff's motion to record the examination by videotape is GRANTED." |

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| 11. | 03/04/2021 | Stephens v. Lyft Fl. Inc. | FL | (unnamed examiner) | “The defense’s neuropsychological medical examination shall be videotaped as requested by the plaintiff and permitted by Florida law.” |
| 12. | 03/02/2021 | Camacho v. Macy’s Fl. Stores | FL | Dr. Melissa A. Friedman | “Subject to the constraints requested by the defendant, the Plaintiff can audio and video record the neuropsychological evaluation of the Plaintiff.” |
| 13. | 10/16/2020 | Velvin v. Makhkamov | CO | Dr. Gregory Thwaites | “The video recording is to be conducted by a certified videographer at the Plaintiff[']s expense.” |
| 14. | 09/24/2020 | Sevin v. Office | FL | Dr. Edwin Bercau | “Plaintiff’s counsel may also send a court reporter or a videographer to the examination” |
| 15. | 09/18/2020 | Parham v. FedEx | VA | Dr. Morote | “[T]he Court believes that it would be appropriate to have a video camera running, but without the videographer in the room thereby creating a potential distraction.” |
| 16. | 09/17/2020 | Prieto v. James River Ins. Co. | FL | Dr. Melissa Friedman | “Subject to the constraints requested by the defendant, the Plaintiff can audio and video record the neuropsychological evaluation of the Plaintiff.” |
| 17. | 07/31/2020 | Moreaux v. Clear Blue Ins. Co. | LA | Dr. Kevin Greve | “The examination will be videotaped.” |

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| 18. | 07/31/2020 | Lambaria-Gonzalez v. UPS | TX | Dr. Corwin Boake | "The interview shall be recorded by video" |
| 19. | 07/07/2020 | Mullen v. State Farm Mut. Auto Ins. Co. | LA | Dr. Darren Strother | "Alternatively, Brian Mullen shall have the right to have the examination video recorded." |
| 20. | 07/07/2020 | Felix v. McCoy | FL | Dr. Jason Demery | "Plaintiff is permitted to have her attorney, a court reporter, and a videographer present for the examination" |
| 21. | 07/03/2020 | Glencross v. Lockwood | TX | Robert L. Collins (Ph.D., ABPP) | "The examination shall be video, and audio recorded, and copy will be provided to Plaintiff's counsel and Defendants' counsel" |
| 22. | 11/06/2020 | Shanks v. Mercury Indem. Co. of Am. | FL | Dr. Friedman | "Plaintiff may videotape all portions of the administration of the psychological/neuropsychological portion of the compulsory medical examination" |
| 23. | 05/22/2020 | Canell v. Island Cnty. | WA | Dr. Breen | "[T]he court finds that it is appropriate for the testing portion of the CR 35 examination to be video recorded under the protocols outlined" |
| 24. | 03/02/2020 | Nixon v. Publix Supermarkets, Inc. | FL | Dr. Laurence S. Levine | "Plaintiff shall be allowed to bring her attorney, and a videographer to the examination." |

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| 25. | 02/12/2020 | Jarnutowski v. Vick | FL | Dr. Jason Demery | "Plaintiff Paul Jarnutowski is entitled to have a videographer present at the compulsory examination performed by Dr. Demery." |
| 26. | 01/15/2020 | Willard v. Pla-Fit Franchise, LLC | NH | Dr. Ronald Schouten | "Recording of the examination is particularly essential." |
| 27. | 10/10/2019 | Comer v. Elite Carriers LLC | OH | Dr. Burke & Dr. Barber | "The examination may be recorded by a neutral party, at Plaintiff's cost." |
| 28. | 08/14/2019 | Taylor v. Easton | WV | Dr. Kari Law & Dr. Colleen Lillard | "However, the Court also finds the Plaintiffs' request that these examinations be videotaped in a discreet manner to be reasonable as well." |
| 29. | 07/12/2019 | Cooper v. Beshel Holdings, LLC | NC | Dr. Manish Fozdar | "The above examination, if conducted, be video recorded at cost to the Plaintiff." |
| 30. | 05/31/2019 | Reisz v. Jones | KY | Dr. Timothy Allen | "The Plaintiff shall be allowed to have the neuropsychiatric examination pursuant to CR 35 by the office of Dr. Timothy Allen videotaped by a third-party videographer" |
| 31. | 04/26/2019 | McBride v. Bros. Produce, Inc. | TX | Dr. Corwin Boake | "ORDERED, ADJUDGED and DECREED that all portions of Dr. Boake's examination will be videotaped by a videographer at Plaintiff's expense." |

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| 32. | 03/12/2019 | Cooper v. Benchmark Constr. Co. | IL | Dr. David Hartman | "Plaintiffs' counsel is permitted to arrange for all neuropsychological examinations and testing of Sandra Cooper conducted by Dr. David Hartman to be video recorded" |
| 33. | 11/15/2018 | Romero v. Fields Motorcars of Fla., Inc. | FL | Dr. Thomas Boll | "Plaintiff shall be allowed to bring her attorney, a court reporter, and a videographer to the examination." |
| 34. | 09/27/2018 | Dow v. Kubiak | IN | (unnamed examiner) | "The videography of the neuropsychological examination to be performed by Kubiak's expert shall be conducted under the following conditions" |
| 35. | 07/30/2019 | Peters v. Safeco Ins. Co. | MT | Dr. William Boyd | "The examination will be videotaped, but the videographer will not be present during the examination." |
| 36. | 06/21/2018 | Lewis v. D.A.B. Constructors, Inc. | FL | Dr. Louise Gaudreau | "Plaintiff's counsel may also send a court reporter or a videographer to the examination" |
| 37. | 02/27/2018 | Iden v. Whiteleather | OH | Dr. Galit Askenazi | "With regard to Plaintiff's request to video-record the examination, the Court finds the request reasonable and the same is hereby GRANTED." |

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| 38. | 01/09/2018 | Pacher v. Bull | NM | (unnamed psychiatrist) | “The psychiatrist performing the evaluation shall audibly, audio record all the verbal instructions given to Plaintiff about the evaluation, and the entire oral interview of Plaintiff.” |
| 39. | 10/30/2017 | Parker v. Hawes | FL | Drs. Leli & Bonenberger | “The parties agree that Plaintiff shall be allowed to bring his attorney and a videographer to the examination, and shall be allowed to have the examination videotaped.” |
| 40. | 10/11/2017 | Pollard v. Comm’r State of Conn. Dep’t of Transp. | CT | (unnamed medical examiner) | “The examination (scheduled, as requested by the plaintiff . . .) is to be recorded.” |
| 41. | 08/15/2017 | Frausto v. First Nat’l Ins. Co. of Am. | WA | (unnamed medical examiner) | “Plaintiff shall be permitted, at Plaintiff’s expense, to make an audio or video recording of the entire CR 35 examination in an unobtrusive manner.” |
| 42. | 08/30/2017 | Dekany v. City of Akron | Federal (OH) | (unnamed medical examiner) | “Accordingly, Plaintiff’s motion to allow her independent medical examination to be videotaped is GRANTED.” |

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|-----|------------|--------------------------------------|-----------------|--|--|
| 43. | 02/23/2017 | Zerr v. WPX Energy Williston, LLC | Federal (ND) | Drs. Brent Van Dorsten & Robert Kleinman | “The representative shall be permitted to be in the examination room only before the examination commences and then for the sole purpose of ascertaining that the recording equipment allowed by this Order has been properly set up and that the placement of the microphones will permit proper [audio] recording of the examination.” |
| 44. | 08/01/2016 | Maldonado v. Clark | FL | Dr. Ernest Bordini | “Plaintiffs are permitted to have their attorney, a court reporter[,] and a videographer present for the examination” |
| 45. | 06/29/2016 | Prunty v. Christopher | FL | (unnamed medical examiner) | “Plaintiff shall be allowed to bring his/her attorney, a court reporter, and videographer to the exam.” |
| 46. | 06/16/2016 | Mini v. Mena | FL | Dr. Elizabeth Tannahill Glen | “The diagnostic interview and testing may be observed by Plaintiff’s attorney, videographer, and court reporter from another room via live video feed, and may be recorded in its entirety by Plaintiff’s counsel.” |
| 47. | 04/22/2016 | Eisfeller-Ferrelli v. Silvestro | NH | (unnamed examiner) | “The Court denies Defendants’ motion to reconsider the videotaping requirement” |

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| 48. | 03/30/2016 | Quito v. PCS Mgmt., LLC | NY | Dr. William Barr | "If the parties consent[,] the examination may be videotaped or conducted behind a two-way mirror" |
| 49. | 03/28/2016 | Schoppenhorst-Taylor v. Figueroa | FL | Dr. Jason Demery | "Plaintiff is permitted to have her attorney, a court reporter, and a videographer present for the examination" |
| 50. | 07/07/2015 | Clemans v. Foley | WA | (unnamed neuropsychologist) | "Plaintiff shall have a right to make an audio or video recording of the entire examination" |
| 51. | 11/13/2015 | Flatau v. Nagaraj | FL | Drs. Alan J. Raphael & Charles J. Golden | "Plaintiff is permitted to have his attorney, court reporter, and a videographer present for the . . . examination and . . . testing." |
| 52. | 10/19/2015 | Estate of Byrd v. U.S. Xpress, Inc. | OH | Dr. Barry Gordon | "[T]he Court orders that a video/audio recording is to be made of all interactions between the defense expert(s) and Mr. Harrison, including the administration of standardized psychological tests." |
| 53. | 01/21/2015 | Ramirez v. 45 Overlook Terrace Owners Corp. | NY | Dr. Barr | "[V]ideotaping . . . can only be done if both parties consent to it" |
| 54. | 10/01/2015 | McAndrews v. Ryder Sys., Inc. | MA | Drs. Gordon, Reusing & Anderson | "The examination and testing may be conducted in New Hampshire and shall be recorded." |

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|-----|------------|-------------------------------|----|---------------------|--|
| 55. | 11/13/2014 | Neary v. GEICO | FL | (unnamed examiner) | "Plaintiff shall be entitled to videotape the examination if requested." |
| 56. | 09/11/2014 | Hairston v. Ed Nelson Transp. | FL | Dr. Tannahill Glen | "The entire examination will be videotaped, audio recorded, and/or transcribed by a court reporter." |
| 57. | 06/19/2014 | Fisch v. Stuart | OK | (unnamed examiner) | "Under the clear terms of our statute, when a party to a lawsuit is required to submit to a medical examination by a physician chosen by the other side, the party undergoing the examination is entitled to bring a third party representative. At his or her option, we have held the examination may be tape recorded." |
| 58. | 03/24/2014 | Russell v. Young | FL | (unnamed examiner) | "The Plaintiff's attorney, a videographer, a Court Reporter and/or other representative may attend the examination and record and videotape the examination." |
| 59. | 03/12/2014 | Gagnon v. Wenski | FL | Dr. Robert J. Cohen | "One of Plaintiff's counsel, or a representative thereof, a videographer, a court reporter, an interpreter, if necessary, and/or, if a minor, a parent or guardian may attend the compulsory neuropsychological examination." |

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| 60. | 10/23/2013 | Deaton v. Turner | OH | (unnamed examiner) | "Plaintiff shall be permitted to have the examination recorded by an unobtrusive videographer." |
| 61. | 10/22/2013 | Caulkins-Jones v. Hatfield | OH | Dr. Martin Gottesman | "Plaintiff may videotape Dr. Gottesman's examination at Plaintiff's cost via unobtrusive video recording equipment." |
| 62. | 12/26/2013 | Blair v. Vann | VA | Drs. Barry Gordon & Sarah Reusing | "The examiner shall make an audio and video recording of the examination, interview, and neuropsychological testing and shall provide a digital copy of such recording to Plaintiff's counsel." |
| 63. | 12/19/2013 | Bagwell v. Charter Commc'ns, Inc. | VA | Dr. Barry Gordon | "The examiner shall make an audio and video recording of the entire [e]xamination and shall provide a digital copy of such recording to Plaintiff's counsel." |
| 64. | 03/12/2012 | Jesenovec v. Grange Mut. Cas. Co. | OH | Drs. Donald Mann & Christopher Layne | "Plaintiff is permitted to videotape the physical examination by Dr. Mann via unobtrusive video recording equipment; and . . . Plaintiff is permitted to videotape the neuropsychological examination by Dr. Layne via unobtrusive videographer" |

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|-----|------------|---|--------------|------------------------|--|
| 65. | 08/10/2012 | Voluck v. State Farm Mut. Auto Ins. Co. | FL | Dr. David Bush | "The entire [Neuropsychological Compulsory Medical Exam] may be videotaped, however, that portion of the videotape that shows the test protocols/stimuli may only be reviewed by Plaintiff's neuropsychologist." |
| 66. | 07/02/2012 | Pennella v. ING Clari-on Partners | CT | (unnamed examiner) | "The exam shall be videotaped." |
| 67. | 03/16/2012 | Kuslick v. Roszczewski | Federal (MI) | Dr. R. Scott Stehouwer | "Plaintiff's request to have the session recorded is not unreasonable and Defendant does not suggest that doing so would in any way interfere with the exam." |
| 68. | 06/30/2011 | Calisti v. Lugo | FL | Dr. David Bush | "The examination and testing procedures may be videotaped, audio-taped, recorded and/or transcribed by a court reporter on behalf of the Plaintiff." |
| 69. | 07/20/2010 | Day v. Valley Forge Ins. Co. | LA | Dr. Michael Chafetz | "IT IS . . . ORDERED that the neuropsychological IME be recorded via videotape behind a one-way mirror at a place and facility to be determined and worked out by the parties" |
| 70. | 04/30/2010 | Polito v. Le Dunckel | WA | Dr. Frederick Wise | "Plaintiff may record the Examination on audiotape or videotape at her own expense" |

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|-----|------------|---------------------------------------|----|-------------------------------------|--|
| 71. | 04/23/2010 | Prince v. Mallari | FL | (unnamed medical examiner) | "A plaintiff is entitled to record any or all of his or her examination as he or she sees fit, so long as it does not interfere with the examination." |
| 72. | 04/29/2010 | Kouroupis v. GEICO | FL | Dr. Harold Smith | "The videotape of the plaintiff's compulsory examination by Mr. Smith is attorney work product and shall not be disclosed to defense counsel until such time as it is reasonably determined that the videotape will be used at the trial of this action" |
| 73. | 02/05/2010 | Oshana v. Suburban Iron Works | IL | (unnamed examiner) | "Just set it up and kind of leave it." [referring to use of camera equipment] |
| 74. | 01/06/2010 | McMullen v. Goas | FL | Dr. Wing Kun | "[T]here shall be no extra fee for videotaping the examination by Dr. Wing Kun." |
| 75. | 09/16/2009 | Krause v. Wal-Mart Stores, Inc. | FL | Dr. Ryan C.W. Hall | "The Plaintiffs will be permitted to videotape the entire examination" |
| 76. | 12/04/2009 | Aftabi v. Com. Crating, Inc. | WA | Drs. Frederick Wise & Daniel Neuzil | "Plaintiff shall be allowed to videotape all aspects of any CR 35 examinations" |
| 77. | 08/10/2009 | Maislen v. Associated Materials, Inc. | WA | Dr. Frederick Wise | "[T]he test, as well as [the] exam, shall be videotaped." |
| 78. | 04/03/2009 | Gojmerac v. Moore | FL | Dr. Michael Shahnasarian | "Plaintiff may have the examination videotaped" |

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| 79. | 05/19/2008 | Maraman v. State | FL | (unnamed examiner) | “Accordingly, we quash the order. On remand, if the State continues to object to the attendance of a videographer at Maraman’s mental examination, it may present more detailed, case-specific evidence to meet its burden.” |
| 80. | 05/12/2008 | Johnson v. McPhie | FL | Dr. Thomas Boll | “Plaintiff may have a videographer and/or court reporter and/or attorney” |
| 81. | 02/12/2008 | Irish v. Dempsey Lin-en Uniform & Supply, Inc. | PA | Drs. Badgio & Patrick Fricchione | “The neuropsychological examination scheduled for tomorrow February 6, 2008 with Dr. Badgio may be videotaped . . . The pending physical exam by Dr. Patrick Fricchione may also be videotaped.” |
| 82. | 10/16/2007 | Purvis v. Waste Mgmt., Inc. | FL | Dr. Harry Krop | “Plaintiff shall be allowed to have present during the examination a videographer and/or court reporter and/or counsel” |
| 83. | 03/28/2007 | Grooms v. Serv. Max Delivery & Installation | FL | (unnamed examiner) | “In this petition for writ of certiorari, Petitioners argue that the trial court departed from the essential requirements of the law when it granted Respondent’s motion to allow a compulsory neuropsychological examination without a videographer present. <i>We agree with Petitioners and grant the petition.</i> ” (emphasis added). |

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| 84. | 02/12/2007 | Ramsey v. Hubner | FL | (unnamed examiner) | "The Plaintiff may have a videographer and/or court reporter and/or her attorney present at this examination" |
| 85. | 05/10/2006 | Corvin v. Gayle | WA | (unnamed examiner) | "The plaintiff shall have the right to audiotape and/or videotape the neurology proceedings in an unobtrusive manner." |
| 86. | 07/21/2006 | Rose-Meucci v. Safelite Glass Corp. | FL | Dr. Glenn J. Larabee | "The videographer may take video of both the examiner and the Plaintiff." |
| 87. | 07/24/2006 | Blackley v. Busen | FL | Dr. Daniel Marson | "The evaluation may be videotaped" |
| 88. | 07/28/2006 | Perry v. Varnado | FL | Dr. Michael J. Herkov | "Further, pursuant to such legal authority, there exist in this action no case specific reasons to exclude from the examination Plaintiff's videographer from recording the examination." |
| 89. | 07/11/2006 | Carpenter v. Super. Ct. | CA | (unnamed examiner) | "The court . . . order[ed] that Carpenter could audiotape the mental examination, and that Carpenter could read the written questions (and presumably his answers) onto the tape, but that the written test questions could not be provided to him due to copyright law." |
| 90. | 05/10/2006 | Davidson v. Strawberry Petroleum, Inc. | FL | Dr. Harold H. Smith, Jr. | "The entire examination shall be video taped by one stationary video camera." |

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| 91. | 10/05/2006 | Ainsworth v. Figaro USA, Inc. | KS | (unnamed examiner) | "[T]he Court allows the Plaintiffs to arrange the creation of video and/or audio recordation of examinations of all Plaintiffs in this proceeding simply." |
| 92. | 09/23/2005 | Strunk v. Exxon Mobil Corp. | FL | Dr. Sally Kolitz Russell | "The CME will be videotaped with Plaintiff's counsel viewing the CME via monitor outside of the testing room." |
| 93. | 07/28/2005 | Livingston v. S. Baptist Hosp. of Fla. | FL | Dr. Russell | "The entire examination shall be videotaped" |
| 94. | 06/14/2005 | Rice v. Lemmon | FL | Dr. Joseph Sesta | "Plaintiff may have a videographer and/or court reporter and/or attorney or other representative attend the examination and record the examination." |
| 95. | 06/27/2005 | Powell v. City of Hammond | LA | Dr. Roniger | "[A] videographer can be present at this IME to record the same." |
| 96. | 05/20/2005 | Heying v. Buchert | FL | Dr. Ernest Bordini | "Plaintiff may have a videographer and/or court reporter and/or attorney or other representative attend the examination and record the examination." |
| 97. | 10/08/2004 | Fritz v. Shellen | FL | Dr. David Bush | "Plaintiffs' Motion for Rules Governing Compulsory Medical Examination by Dr. David Bush regarding the request that a videographer/court reporter be present at said examination is GRANTED." |

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| 98. | 02/11/2005 | Henricksen v. Koleff | WA | Dr. Frederick Wise | "Plaintiff shall have the right to audio-tape and video-tape the proceeding" |
| 99. | 02/05/2004 | Sawdy v. Kwoka | FL | (unnamed examiner) | "Plaintiffs shall be allowed to have anyone of their choosing attend the examination and shall be permitted to video tape the same" |
| 100. | 09/22/2004 | Laberenz v. Conway | CO | (unnamed examiner) | "A tape recorder may be brought into the examinations by Plaintiff" |
| 101. | 06/04/2003 | McPhee v. Lawnwood Med. Ctr. | FL | Drs. David S. Bush & Michael Shahnasarian | "The parties and their undersigned counsel hereby stipulate and agree that the video tape or recording of all or any portion of the examinations" |
| 102. | 05/13/2003 | Golfland Ent.Ctrs., Inc. v. Super. Ct. | CA | Dr. Epperson | "[T]he entire examination shall be recorded on audio tape by Dr. Epperson." |
| 103. | 04/04/2003 | Jenkins v. Averbach | FL | Drs. Bonnie Levin, Norman Schatz, Michael Shahnasarian & Ross Zafonte | "Plaintiff's motion to videotape neuropsychologist and other defense expert evaluations is GRANTED." |
| 104. | 07/19/2002 | Tornetta v. Williams | PA | Dr. Peter Badgio | "The interview portion of the neuropsychological examination and testing may be memorialized via audio recording" |

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| 105. | 11/26/2001 | Wason v. Myer | CT | (unnamed examiner) | "The Court is going to order video recording of the I.M.E., the complete I.M.E." |
| 106. | 08/06/2001 | Moss v. Rollins Leasing Corp. | FL | Dr. Bonnie Levin | "That although Cady's chosen neuropsychological expert has raised certain reasonable case-specific concerns about plaintiff's neuropsychological evaluation being videotaped with counsel present, said concerns are not insurmountable." |
| 107. | 03/09/2000 | U.S. Sec. Ins. Co. v. Cimino | FL | (unnamed examiner) | "Cimino's rights must prevail over the concerns of the examining physician." |
| 108. | 01/21/1998 | Brompton v. Poy-Wing | FL | (unnamed examiner) | "I would have had no compunction with regard to the appearance of a court reporter under these circumstances and I think that would be apropos." |
| 109. | 11/20/1997 | Richardson v. Settoon | LA | (unnamed examiner) | "This Court rules that the videotaping of the [Plaintiff's medical examination] can proceed . . ." |
| 110. | 04/23/1992 | P v D | LA | (unnamed examiner) | "The motion to prohibit plaintiff's counsel from attending video taping the said medical examination is hereby denied at cost of defendants." |

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