**Discovery of Psychological Testing Materials and Raw Data in Cases Arising Under the Longshore Act and its Extensions**

By Yelena Zaslavskaya, Senior Attorney for Longshore, Office of Administrative Law Judges, U.S. Department of Labor, Washington, D.C.

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## Introduction

In cases involving psychological injury claims under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901, *et seq*. ("Act" or "Longshore Act"), and its extensions, including the Defense Base Act ("DBA"), 42 U.S.C. § 1651, *et seq*. ("DBA"), it is common for employer to request a psychological examination of claimant pursuant to Rule 18.62 of the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges ("OALJ Rules"). *See* 29 C.F.R. § 18.62 (*Physical and mental examinations*); *see generally* 33 U.S.C. § 7(d)(4). Such examinations often involve psychological and/or neuropsychological testing. Rule 18.62 provides that the party who initiated the examination must deliver a complete copy of the examination report to the party examined no later than seven days after it receives the report, together with like reports of all earlier examinations of the same condition. *Id*. § 18.62(c)(1). "The examiner's report must be in writing and must set out in detail the examiner's findings, including diagnoses, conclusions, and the results of any tests." *Id*. § 18.62(c)(2). This disclosure must be made without a discovery request, and even if the expert does not testify. *Id*. § 18.51(d)(4). *See also id*. § 18.50(c)(2) (*Disclosure of expert testimony*).[1]

The OALJ Rules protect from disclosure certain expert hearing-preparation materials, including draft reports, *id*. § 18.51(d)(2), and communications between a party's expert and counsel other than the specific exceptions set forth in the rules, *see id*. § 18.51(d)(3).[2] A party withholding information as privileged or protected must expressly make the claim and provide a "privilege log" that complies with the requirements of Rule 18.51(e).

When psychological test materials and/or test data are not disclosed to claimant, claimant may seek to discover such information via a subpoena and/or a motion to compel. Standard 9.11 of the

[1] Rule 18.50(c)(2)(ii) provides that a witness retained to provide expert testimony in the case must provide a written report containing: (A) a complete statement of all opinions the witness will express and the basis and reasons for them; (B) the facts or data considered by the witness in forming them; (C) any exhibits that will be used to summarize or support them; (D) the witness' qualifications, including a list of all publications authored in the previous 10 years; (E) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial, a hearing, or by deposition; and (F) a statement of the compensation to be paid for the study and testimony in the case.

[2] Pursuant to Rule 18.51(d)(3), communications between a party's representative and an expert witness required to provide a report under Rule 18.50(c)(2)(ii) are not protected if they (1) relate to the compensation of the expert, (2) identify facts or data that counsel provided and the expert considered, and (3) identify assumptions that counsel provided and the expert relied on. *See id*. § 18.50(c)(2)(ii) (experts who must write reports).

American Psychological Association's Ethical Principles of Psychologists and Code of Conduct ("APA Ethical Principles") provides that "[t]he term *test materials* refers to manuals, instruments, protocols, and test questions or stimuli and does not include *test data* as defined in Standard 9.04, Release of Test Data." APA Ethical Principles, § 9.11 (2017).[3] Standard 9.04 of the APA Ethical Principles 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. Those portions of test materials that include client/patient responses are included in the definition of *test data*." *Id.* § 9.04 (italics in original).

While some states have enacted statutes or regulations that address mental examinations in detail, *see, e.g.*, *Carpenter v. Superior Court*, 141 Cal. App. 4th 249, 269, 272-75 (Cal. Ct. App. 2006),[4] the Longshore Act, as well as the pertinent regulations and procedural rules, do not provide the same level of detail. 29 C.F.R. § 18.62; Fed. R. Civ. Pro. 35. A recent survey of state court decisions identifies grounds that may be cited by defense medical experts for refusing to disclose test materials and raw data, including:

> • Copyright or integrity of the test: Some defense experts contend that . . . producing the testing material risks violating the copyright in the test materials owned by the publishing company. Also, some have argued that the . . . materials could be released publicly, allowing future examinees to game the test by knowing the questions ahead of time.
> • Ethical concerns: Defense experts have asserted that ethical codes or guidelines preclude them from allowing . . . production of test materials and raw data.

Dorothy Sims, Chris Dove, Richard Frederick, *Transparency in Forensic Exams*, 24 Nev.L.J. 531, 541-42 (2024) (citations omitted).[5] Similar objections have been raised in cases arising under the

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[3] *Available at*: https://www.apa.org/ethics/code (last visited Jan. 6, 2025).

[4] The court observed that "[the California statute] requires the trial court to list by name the diagnostic tests and procedures to be employed in the mental examination." *Id.* at 269.

[5] Standard 1.02 of the APA Ethical Principles provides:

> **1.02 Conflicts Between Ethics and Law, Regulations, or Other Governing Legal Authority**
> If psychologists' ethical responsibilities conflict with law, regulations, or other governing legal authority, psychologists clarify the nature of the conflict, make known their commitment to the Ethics Code, and take reasonable steps to resolve the conflict consistent with the General Principles and Ethical Standards of the Ethics Code. . . .

APA Ethical Principles, § 9.11; *see also id.*, *2010 Amendments*. Further, the APA provides the following guidance on disclosure of testing materials and data:

> **13. What are the relevant parameters for conforming to federal and state statutes and rules?**
>
> Federal and state statutes, rules and regulations, and court precedents address disclosure requirements that vary by the setting, use or purpose of testing, and the party requesting disclosure. Court decisions have been largely case specific, relying on decisions based on the specific facts of a case, and usually balancing the rights of participants with the degree to which the protected information is considered necessary for resolution of legal issues. . . .

Longshore Act and the DBA. The remainder of this commentary surveys pertinent rulings of the U.S. Department of Labor's Administrative Law Judges ("ALJ").[6]

**Standing**

A threshold objection commonly addressed by ALJs is whether or not employer has standing to object to discovery on behalf of its expert. Some ALJs found that employer has standing to object. *See* *Qazimi v. Fluor Federal Global Projects*, 2022-LDA-00619 (ALJ Aug. 25, 2022).[7] Other ALJs found that employer does not have standing, *Gajer v. Fluor Conops Ltd.*, 2022-LDA-01582 (ALJ May 2, 2023), *Kabaale v. Reed, Inc.*, 2020-LDA-01302 at 6 (ALJ Nov. 25, 2020), *Luzinda v. SOC, LLC*, 2022-LDA-01968 (ALJ May 24, 2024), or expressed doubt, *Kryzeiu* v. AECOM, 2020-LDA-01310 (ALJ May 3, 2021),[8] but nevertheless proceeded to address the merits of the discovery dispute.

**Test Materials**

Employers and their experts have cited various reasons for refusing to produce test materials. ALJs consistently rejected objections implying that test materials are "privileged."[9] *See* *Stefanovikj v. KBR Government Operations*, 2021-LDA-03826 (ALJ May 25, 2023) (as of the date of the order, there is no privilege against production of psychological tests and test data); *see generally* *Durkin v. Vectrus Systems, Inc.*, 2022-LDA-00392 (ALJ June 16, 2022).

By contrast, objections premised on the need to maintain the secrecy and integrity of psychological test materials gained significant traction. Employers often rely on the Supreme Court decision in *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 315, 320 (1979), in support of this objection.[10] *See also*

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> **16. Can I release test data or test materials in response to a court order or subpoena issued by a judicial officer?**
> Psychologists are generally expected to comply with lawful court orders, but legal requirements vary substantially from state to state. . . .

*See* FAQs: Disclosure of Test Data and Test Materials (*available at*: https://www.apa.org/science/programs/testing/data-disclosure-faqs; last visited Jan. 13, 2025).

[6] This commentary cites ALJs' procedural orders identified by date, rather than final decisions.

[7] In *Quazimi*, the ALJ concluded that employer had standing to protect the interest of its expert, Dr. Hervey, by seeking a PO. Dr. Hervey was employer's retained expert, the issues related directly to the testing and information prepared at employer's request, and Dr. Hervey provided a declaration permitting employer to address his concerns. It would be unfair to Dr. Hervey to require him to hire his own counsel to object to the subpoena when employer is familiar with the issues, has a stake in the outcome, and the documents concern its expert's opinions.

[8] In *Kryzeiu*, the ALJ could conceive of no personal right or privilege of employer in keeping the records of its expert witness confidential; only claimant had such a personal right. As no party addressed this issue, the ALJ addressed the merits of the motion.

[9] In state courts, additional protections may be available. *Cf.* Paul M. Kaufmann, *Protecting Raw Data and Psychological Tests from Wrongful Disclosure: A Primer on the Law and Other Persuasive Strategies*, The Clinical Neuropsychologist, 23:7, 1130-1159 (*available at*: https://doi.org/10.1080/13854040903107809) ("If you practice in a state with a statute, regulation, or case law that provides a duty or privilege not to disclose raw data and psychological test materials to nonpsychologists, this state law should be the primary basis and first argument for a psychologist to refuse to release protected materials to an attorney.").

[10] *See* Kaufmann, *supra*, note 7 ("[i]f your state does not have any law providing for a psychologist nondisclosure privilege or duty to safeguard test materials, then the most legally persuasive basis for

*DirectSat USA LLC v. N.L.R.B.*, 925 F.3d 1272, 1277 (D.C. Cir. 2019) (discussing *Detroit Edison*). *Detroit Edison* addressed the release of psychological test questions and materials, stating that "[t]est secrecy is concededly critical to the validity of any such program." *Detroit Edison*, 440 U.S. at 304. The Court found that the National Labor Relations Board ("NLRB") abused its discretion when it ordered the disclosure of testing materials without considering the company's established confidentiality interest when crafting an administrative remedy. Specifically, the NLRB ordered the release of testing materials to the requesting party directly, rather than to a qualified psychologist as requested by the company, with the direction that the information should not be disclosed to third parties. *Detroit Edison*, 440 U.S. at 310–311. The Court held that "[i]t is obvious that the remedy selected by the Board does not adequately protect the security of the tests," in part because restrictions on disclosure to third parties are "only as effective as the sanctions available to enforce them" and "there is substantial doubt whether the [requesting party] would be subject to a contempt citation were it to ignore the restrictions." *Id*. at 315.

In cases arising under the Act, several ALJs concluded that concerns with test integrity did not justify denying discovery altogether, but did call for the issuance of a protective order ("PO"). *See* 29 C.F.R. § 18.52; *accord* Fed. R. Civ. P. 26(c); *Luzinda*, 2022-LDA-019684;[11] *Durkin v. Vectrus Systems, Inc.*, 2022-LDA-00392 (ALJ May 20, 2022) (PO collecting ALJ decisions); *Durkin*, 2022-LDA-00392 (June 16, 2022) (The ALJ amended his prior PO by adding that employer's expert was not required to produce test materials, as distinct from test data, to claimant, but employer was required to make the test materials available to claimant's counsel to review.);[12] *Filipovikj v. KBR Government Operations*, 2021-LDA-03046 at 4 (ALJ Mar. 29, 2023) (The Supreme Court's reasoning in *Detroit Edison* leaves open the possibility that a more focused and meaningfully conditioned disclosure would be acceptable to the Court as it held only that the order requiring unconditional disclosure of testing materials was erroneous, citing *Taylor v. Erna*, No. 08-10534-DPW, 2009 WL 2425839, at *2–3 (D. Mass. Aug. 3, 2009)).

Objections based on copyright and proprietary concerns have been rejected by some ALJs, *see Stefanovikj*, 2021-LDA-03826, *Kabaale*, 2020-LDA-01302 at 6,[13] while others mentioned them as

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refusing to release raw data and test materials to nonpsychologists is by reference to public policy described in *Detroit Edison v. NLRB*.")

[11] In *Luzinda*, employer retained InSpectre Solutions to provide a defense medical examiner. InSpectre, in turn, contacted Neurocognitive Specialty Group, PLLC ("NSG") to arrange the examination. Claimant served a subpoena on NSG seeking, *inter alia*, NSG's computer generated scoring mechanism for scoring tests and licenses for any tests used by NSG experts. NSG file a motion to quash the subpoena. The ALJ agreed with NSG that the burden of producing the licenses outweighed any minimal benefit of their production. The ALJ found that production of test materials pursuant to a subpoena was consistent with law and not unduly burdensome. To the extent that NSG has created its own scoring mechanism, the ALJ ordered it to be produced. To protect any privacy and security interests, claimant's counsel was not permitted to disclose the information to anyone other than her client; members of her firm assisting in the litigation; and claimant's expert psychologist, with instructions to keep it confidential.

[12] In *Durkin*, the ALJ stated that most courts have allowed discovery of test materials with a PO against disclosure to third parties, while other courts have only allowed counsel access to the materials without reproduction/copying (collecting cases). Since the parties did not propose a PO, the ALJ ruled that claimant's counsel could have access to the test materials, but not copy them; employer was required to make them available to counsel for use in any deposition of employer's expert. If claimant subsequently obtained an expert, employer and its expert were required to produce the test materials to claimant's expert.

[13] In *Kabaale*, the ALJ stated that where a court has ordered the disclosure of standardized test materials that have been copyrighted, there is no basis for the owner of the copyright to assert copyright infringement

one potential basis for entering a PO, particularly where evidence was presented in support of the objection, *see Gajer*, 2022-LDA-01582;[14] *Kryzeiu*, 2020-LDA-01310 at 3.[15] *See also* 24 Nev.L.J. 585-590 (opining that copyright law does not prevent production of testing materials; copyright owners do not object to production if covered by a PO). In this regard, several ALJs found *Carpenter*, 141 Cal. App. 4th 249, instructive.[16] In *Carpenter*, the state appellate court vacated a trial court's order that endorsed defendant's argument that test questions from psychological testing could not be provided to plaintiff due to copyright law. The record contained statements from two test publishing companies. NCS Pearson, Inc. ("Pearson") asserted its intellectual property interests in the MMPI-2, and Harcourt Assessment, Inc. ("Harcourt") asserted its copyright interests in several psychological tests. Both publishers indicated that POs provide a ''satisfactory means'' by which the tests can be provided after the evaluation, acknowledging that ''the copyrighted tests could be provided without violation of copyright law or harm to the secrecy, validity and integrity of the tests.'' *Id*. at 274. The court concluded that, while the trial court has discretion regarding disclosure of test questions and answers, on the record presented, it erred in relying on copyright law. Recognizing the trail court's discretion, the appellate court remanded the matter for further consideration.[17]

Further, employers and/or their experts have routinely objected to the release of testing materials citing Standard 9.11 of the APA Ethical Principles, which provides that "[p]sychologists make reasonable efforts to maintain the integrity and security of test materials and other assessment techniques consistent with law and contractual obligations, and in a manner that permits adherence to this Ethics Code." APA Ethical Principles, § 9.11. Several ALJs rejected the assertion

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against the psychologist disclosing the material, citing *Carpenter*, 45 Cal. Rptr. 3d at 837. Employer sought to quash claimant's subpoena and did not request a PO.

[14] In *Gajer*, the ALJ quoted guidance from two different test publishers suggesting language for a PO order sufficient to address their concerns with security and integrity of test materials that are being released in a legal proceeding to non-professionals such as counsel.

[15] In *Kryzeiu*, employer filed a motion to quash a subpoena for the records of its examining physician (both translated into Albanian, and originals) and for PO, asserting that the physician should not be required to produce "proprietary psychological symptom validity testing." The ALJ rejected this argument, noting that employer provided no evidence. If, upon further discussion between counsel, it was established that the testing is proprietary, the materials would have to be protected from disclosure to those who do not need to see them. Claimant's counsel could only disclose them to his client; members of his firm assisting in this litigation; and claimant's expert psychologist, with instructions to keep them confidential.

[16] *Carpenter* has been criticized by some commenters. *See* Kaufmann, *supra* note 7 (The author posited that "[POs] are essentially impossible to monitor and enforce" and that "[t]he court's confidence in the security of [POs] stands in sharp contrast to the uniform skepticism of such orders by the United States Supreme Court in *Detroit Edison*." Nevertheless, the author acknowledged that "in *Carpenter*, test entities relinquished certain intellectual property claims when tests are the subject of discovery in lawsuits. Therefore, psychologists claiming breach of user agreement as a basis to refuse release of raw data and psychological test material to attorneys will likely fail when test entities have outlined [PO] procedures for such release of tests in litigation." (Citation omitted).).

[17] In *Carpenter*, the appellate court did not reach objections based on ethical or professional obligations. It was unclear whether the trial court would have denied production of the test questions absent its erroneous reliance on the copyright law; *e.g.*, the court could find it sufficient to give plaintiff the names of the tests and the ability to audiotape the session (including test questions and answers); on the other hand, it could conclude that having plaintiff read the questions and answers aloud during the test would present an undue burden, or unduly interfere with the examination. The court left this matter, as well as the issue of providing plaintiff with a copy of his test answers, to the trial court's discretion.

that Standard 9.11 precludes disclosure of testing materials to claimant and/or claimant's counsel and only allows disclosure to a licensed psychologist. *See* *Stefanovikj*, 2021-LDA-03826;[18] *Gajer*, 2022-LDA-01582;[19] *Kabaale*, 2020-LDA-01302 at 5, n.2 (By releasing the test questions and answers pursuant to a lawful subpoena, the psychologist has made "reasonable efforts to maintain the integrity and security of test materials."). At the same time, several ALJs acknowledged that a PO serves to alleviate any potential concerns premised on ethical or professional obligations, particularly in cases where the parties presented relevant evidence. *See* *Stefanovikj*, 2021-LDA-03826; *Gajer*, 2022-LDA-01582. In a subset of cases, particularly those where parties did not propose a PO, ALJs have only allowed counsel access to the testing materials without allowing the reproduction of the actual materials. *See* *Durkin*, 2022-LDA-00392 at 7 (June 16, 2022) (citing *Wayne v. Kirk*, No. 13 C 8540, 2016 WL 492338, at *9 (N.D. Ill. Feb. 9, 2016)).

At the same time, based on the record presented, some ALJs disallowed discovery of testing materials altogether or significantly limited the disclosure. *See* *Reynolds v. Limetree Bay Terminals LLC*, 2018-LHC-01046 at 2 (ALJ Sept. 4, 2019); *Fejzuli v. Rik, Ltd.*, 2022-LDA-04251 (ALJ June 10, 2024) (The ALJ did not allow disclosure of test materials or test data that revealed testing materials.). In particular, in DBA cases, some ALJs have disallowed, or significantly limited, disclosure of test materials to claimants and/or experts who were neither residents, nor located within the territorial jurisdiction, of the United States. *See* *Filipovikj*, 2021-LDA-03046;[20] *see also* *Qazimi*, 2022-LDA-00619. *Cf.* *Kato v. SOC, LLC*, 2022-LDA-03009 (ALJ March 14, 2024).[21]

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[18] In *Stefanovikj*, the ALJ stated there is no privilege against production of psychological tests and data. There could be no professional repercussions or copyright concerns, as production would be pursuant to his order. Short of an evidentiary privilege, parties or judges may craft POs. The ALJ ordered employer and their expert to produce test materials and data to claimant's counsel, subject to the following PO: Claimant's counsel was not allowed to disclose the information to third parties not involved in this matter; the information could only be used in the prosecution of this matter and could not be used in other cases; regarding the tests and test results, in English and in translation, counsel was allowed to receive one set of copies, not allowed to make additional copies, and ordered to return or destroy them when no longer needed for this case. If claimant were to obtain an expert, this information would also have to be provided to the expert.

[19] In *Gajer*, the ALJ concluded that the APA's Ethical Principles establish that there are no ethical constraints upon a psychologist providing test questions or test data to claimant and his attorney pursuant to a court order. Employer's expert also expressed concerns that she was prohibited from disclosing proprietary test information due to confidentiality provisions issued by the testing companies. The ALJ stated that claimant should not be required to retain a qualified psychologist expert in the United States solely to review the test data and test materials. At the same time, claimant conceded that a PO would be appropriate, and the ALJ was sympathetic to the expert's concerns. The ALJ ordered the parties to submit a proposed PO providing, at a minimum, that the test materials will not be disclosed to third parties (other than claimant's experts) without court authorization and will only be used in the prosecution of this matter, and that all information will be returned to employer's expert at the close of the litigation.

[20] In *Filipovikj*, the ALJ did not allow discovery of test materials based on his finding that he lacked the authority to order or otherwise compel a non-party foreign citizen located outside the United States to comply with a PO. *Detroit Edison* instructed that restrictions against dissemination of the testing materials are only as effective as the sanctions available to enforce them. On the record presented, the ALJ concluded he could not issue a PO that would sufficiently protect the confidentiality of the test materials. The ALJ concluded that, while he could compel a party to comply with a PO by imposing evidentiary sanctions, this authority was insufficient to provide a meaningful sanction if a non-party foreign national located outside the United States were to decline voluntarily to comply with the terms of the order.

[21] In *Kato*, the ALJ ordered employer to disclose raw test data. The ethical rules cannot be wielded as a shield to preclude the disclosure of raw test data if the examining expert is to testify as an expert witness. To the extent that disclosure of the test questions was required to understand the data, they had to be produced.

**Test data**

There appears to be a consensus among ALJs that test data is discoverable, although several ALJs have issued a PO limiting disclosure of the test data to third parties. In particular, ALJs have rejected the argument that testing data is "privileged." *See* Stefanovikj, 2021-LDA-03826; *Durkin*, 2022-LDA-00392 at 7 (June 16, 2022).[22]

Further, several ALJs rejected the argument that test data, including examination notes, is protected from disclosure as work product under 29 C.F.R. § 18.51(d), *accord* Fed. R. Civ. Pro. 26. *See* *Durkin*, 2022-LDA-00392 (May 20, 2022);[23] *Durkin*, 2022-LDA-00392 at 7 (June 16, 2022);[24] *Qazimi*, 2022-LDA-00619 at 8 (Aug. 25, 2022)[25] (citing *Republic of Ecuador v. Mackay,* 742 F.3d 860,

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Employer was also required to disclose questions contained in any written self-assessments. Other test materials would not be part of mandatory expert disclosures. The disclosures were limited to claimant's counsel and expert, and further: All documents had to be labeled confidential; disclosure to third parties not involved in this litigation was prohibited; the information could only be used in this case; test questions could not be copied, recorded, or reproduced; and all such information had to be destroy or return to employer's expert within sixty days upon the conclusion of this matter. The ALJ noted that defense experts often assert that they may only release this information to an American psychologist, irrespective of any PO. The ALJ declined to preclude the release of the raw data to an expert located abroad, stating that he had numerous avenues to address potential violations of the PO, *e.g.*, by excluding the testimony of claimant's expert or sanctioning claimant's counsel. Because the ALJ's authority over an expert based in a foreign nation is more limited compared to a domestic expert, the ALJ allowed claimant's counsel to disclose copies of the question sheets containing claimant's answers to an American-based expert, but not a foreign expert. Counsel was allowed to verbally discuss the questions with a foreign expert and had to ensure that any foreign expert did not reproduce or copy the test questions verbatim. Employer was not allowed to determine the sufficiency of claimant's expert's qualifications. The ALJ also rejected employer's contention that claimant had to pay for the production costs, stating that these disclosures are mandatory under Rule 18.50. The parties were allowed to agree to a more robust PO.

[22] In *Durkin,* the ALJ stated that the court in *Collins v. TIAA-CREF,* Civil No.3:06CV304-C, 2008-WL-3981462 (W.D.N.C. Aug. 22, 2008), likely erred when it stated that the raw testing data was privileged.

[23] In *Durkin*, the ALJ reasoned that the intention of the work product rule is to protect the mental impressions and legal theories of a party's attorney, not its experts. Whether or not notes taken by a doctor are subject to disclosure depends on the nature of the notes. Generally, notes of a testifying expert are not protected from disclosure because they are not attorney work product. The ALJ stated that Rule 18.51(d)(2) was intended to protect the opinion work-product of attorneys in the context of expert discovery. Further, whether or not the notes of an expert could be viewed as a draft expert report is a fact-dependent inquiry; employer failed to make this showing. The fact that the notes may have been used in drafting the reports did not automatically subject them to protection. The ALJ directed employer to provide claimant with a privilege log specifying the nature of the documents withheld. The ALJ noted he could conduct an *in camera* review to determine whether or not the notes constituted a draft report.

[24] In his amended order in *Durkin*, the ALJ joined "the numerous other courts" in declining to follow *Collins,* Civil No.3:06CV304-C, 2008-WL-3981462, the "lone case" cited by employer for the proposition that its expert could only disclose information to another doctor. He stated that *Collins* involved a plaintiff proceeding *pro se* in a Title VII action, and the Magistrate Judge directed that the disclosure of the underlying materials in the subpoena could be released only to a licensed psychologist. The ALJ found *Collins* unpersuasive and chose to follow numerous other federal courts that have concluded that there are no ethical constraints upon a psychologist providing test data to a plaintiff/client and his or her attorney. In a case where claimant is proceeding *pro se*, additional considerations might dictate a different result.

[25] In *Qazimi*, the ALJ found that an expert's relied-upon handwritten notes are not protected under Fed. R. Civ. Pro. 26(b)(4) as they are not draft reports. "[T]he amendment to [Fed. R. Civ. Pro.] 26 'was to protect

870-71 (9th Cir. 2014);[26] *Republic of Ecuador v. Hinchee,* 741 F.3d 1185, 1194-95 (11th Cir. 2013)[27]); *Filipovikj*, 2021-LDA-03046 at 2-3 (expert's handwritten notes, intake documents, and documents relied on by the expert to form his opinions regarding claimant are not protected work product).[28]

Employers' experts have also asserted that Standard 9.04 of the APA Ethical Principles[29] only allows release of test data to a qualified medical professional, not to claimant or claimant's counsel. Standard 9.04 provides:

> **9.04 Release of Test Data**
> (a) . . . . Pursuant to a client/patient release, psychologists provide test data to the client/patient or other persons identified in the release. Psychologists may refrain from releasing test data to protect a client/patient or others from substantial harm or misuse or misrepresentation of the data or the test, recognizing that in many instances release of confidential information under these circumstances is regulated by law. (See also Standard 9.11, Maintaining Test Security .)
> (b) In the absence of a client/patient release, psychologists provide test data only as required by law or court order.

APA Ethical Principles, § 9.04. ALJs overwhelmingly rejected the argument that this provision precludes disclosure of test data to claimant and claimant's counsel. *See Vladevski v. Fluor*

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opinion work product — *i.e.*, attorney mental impressions, conclusions, opinions, or legal theories — from discovery' and not to [protect] any information used by the expert in forming his opinion." *Id.* at 8 (internal citations omitted).

[26] In *Mackay*, the Ninth Circuit held that testifying expert materials were not entitled to presumptive work product protection as trial preparation materials. Materials containing factual ingredients are discoverable, while opinion work product is not discoverable. Fed.R.Civ.P. 26 advisory committee's notes pertaining to the 2010 amendments indicate that any material considered by the expert, from whatever source, that contains factual ingredients are discoverable, while theories or mental impressions of counsel are excluded from discovery. Any ordinary work product protection, *i.e.*, for trial preparation materials prepared by non-attorneys that do not reflect an attorney's mental impressions, conclusions, opinions, or legal theories, typically is waived where the materials are disclosed to a testifying expert.

[27] In *Hinchee*, the court held that an expert's personal notes and e-mail communications were not exempt from disclosure under work-product doctrine. The documents sought were not draft expert reports or attorney-expert communications. To the extent any attorney core opinion work-product was embedded in personal notes and e-mail communications prepared by the expert, such information could be appropriately redacted prior to disclosure, subject to providing a privilege log and submitting the materials for *in camera* review if requested by the requesting party and directed by the district court. Fed. R. Civ. P. 26(b)(5), (a)(2)(B).

[28] In *Filipovikj*, the ALJ granted claimant's motion to compel production of all handwritten notes, intake documents, and documents relied on by employer's expert to form his opinions regarding claimant. The ALJ rejected employer's argument that these requests violated Fed. R. Civ. Pro. 26(b)(4), which protects draft reports from disclosure. Claimant was not requesting protected information, but rather the information used by the expert in forming his opinion on claimant in this matter.

[29] While occasionally cited by employers, Standard 9.11, by its own terms, does not apply to test data.

*Conops*, 2020-LDA-02606 (ALJ Mar. 8, 2022);[30] *Durkin*, 2022-LDA-00392 (May 20, 2022);[31] *see generally* 24 Nev.L.J. at 585-86 (opining that the APA Ethical Principles and HIPAA require disclosure of test data). At the same time, several ALJs deemed it prudent to enter a PO limiting dissemination of test data by claimant and claimant's counsel. *See Kato*, 2022-LDA-03009; *Qazimi*, 2022-LDA-00619 (Oct. 18, 2022);[32] *Stefanovikj*, 2021-LDA-03826; *Gajer*, 2022-LDA-01582. Yet other ALJs found that, although Standard 9.04 allows production of test data pursuant to a subpoena or a court order, it was prudent to only allow disclosure of the test data to a qualified medical professional. *See Fejzuli*, 2022-LDA-04251;[33] *Selimovic v. Dyncorp*, 2021-LDA-04625 (ALJ Apr. 27, 2023).[34]

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[30] In *Vladevski*, claimant did not request test questions, but did request test data. Employer asserted that test answers revealed test questions. It argued that the test answers and notes should be provided only to a licensed neuropsychologist; or, alternatively, claimant should be compelled to execute a non-disclosure agreement prohibiting the dissemination of test materials and test data. The ALJ rejected these arguments. Employer's expert was provided with a release, and there was no ethical prohibition on the release of the test data. There were two court orders directing disclosure of date: the ALJ's subpoena and her order compelling production. Further, there is no requirement that the test data be provided only to a licensed psychologist. The ALJ directed claimant's counsel to take reasonable steps to protect the test data from dissemination into the public domain.

[31] In *Durkin*, the ALJ stated that employer's assertion that its expert could only provide test data to another doctor was neither supported by the APA's Ethical Principles nor any legal authority provided by employer. The discretionary provisions of Standard 9.04 were not applicable where claimant answered questions as part of an examination related to litigation.

[32] In *Qazimi*, claimant did not request test materials, but did request test data, including the expert's notes. The ALJ found that employer's expert's concerns about disclosure of confidential, proprietary information, as well as ethical concerns were allayed by the entry of a PO. The ALJ required claimant's counsel to do the following: not to disclose the test data to third parties not involved in this case; take reasonable steps to protect the test data and other materials from dissemination into the public domain; not to use the test data in the prosecution of other cases; and to return or destroy all copies of these documents to employer's counsel within ninety days of the conclusion of this case.

[33] In *Fejzuli*, the ALJ granted in part and denied in part employer's expert's motion to quash claimant's subpoena for the production of test data and test materials. She concluded that, upon court order, employer's expert could produce both types of materials without violating her ethical and professional obligations under the APA Ethical Principles. Nevertheless, the ALJ was concerned about the potential misuse of that data and materials. She ordered production of test data subject to a PO limiting who may view it. To the extent claimant's test results would reveal specific test question, production was not required. The expert was required to produce claimant's test results to a mental health professional with the same professional and ethical standards as herself; and claimant was directed to choose the psychiatrist or psychologist and inform employer of same. The expert was not required to produce test materials (including Albanian translations) or the expert's communications with test publishers, authors, and/or copyright holders.

[34] In *Selimovic*, claimant sought records of employer's neuropsychological examination, including answer sheets and the test publishers' interpretations generated from claimant's answers. The ALJ found that if a psychologist is legally mandated to disclose test data, Standard 9.04(b) brings the disclosure within ethical bounds. Nevertheless, the ALJ was reluctant to require the expert to take action that, without his order, his profession would consider unethical. The ALJ ruled that these records could only be disclosed to a psychologist, noting that claimant's counsel could inadvertently and unintentionally misinterpret the test data. The ALJ entered the following PO. Claimant would have to engage a mental health professional with expertise in the tests that were administered; and employer could request a copy of the expert's *curriculum vitae*. The materials produced had to be treated confidentially. Claimant's expert could only disclose them to claimant, his other retained experts, and his counsel. These other individuals could disclose the documents only to the ALJ and his staff, counsel's staff with a need to know, and any court reporter or court

**Conclusion**

The continued influx of DBA claims involving psychological injury claims has brought to the forefront the issues surrounding discovery of psychological testing materials and test data. ALJs have discretion in matters of discovery, and their rulings on these issues depend, in part, on the facts of each case. The trends outlined above are likely to continue, but variations may continue to emerge. Several ALJs have encouraged parties to arrive at stipulated POs as an effective way of resolving discovery issues in psychological injury cases.

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personnel. At the conclusion of the litigation (including any appeals), all copies of these documents had to be returned to employer's expert. Any party offering these documents as evidence had to file them under seal; if a witness was questioned about these documents, it had to be done without introducing the document as an exhibit. Any person making a disclosure was required to supply a copy of this order to the recipient. (Claimant also requested articles, publications, and/or documents that employer's expert cited or relied on in his report, and the ALJ ruled that the request to copy each publication in full was unduly burdensome.)