DISCOVERING THE TRUTH

Why Plaintiffs Need Raw Neuropsychological Test Data

By Evan J. Lide

From the plaintiff's perspective, raw test data from psychological and neuropsychological evaluations is not a luxury; it is the evidentiary foundation that allows counsel to test, and often to expose, the defense expert's work product. When that data is withheld or restricted to a defense-favored "gatekeeper," the litigation process is distorted in ways that undermine accuracy, fairness, and ultimately the jury's truth-finding function.

This article addresses that dispute from the standpoint of New Jersey plaintiffs' counsel, using recent motion practice and illustrative neuropsychological reviews of defense examiners as practical examples of why access to raw data is essential and how defense arguments can be effectively answered.[1]

I. Why Raw Data Matters

Neuropsychological opinions rise or fall on the integrity of the underlying data: the examinee's actual responses, scoring sheets, and protocols. Reports are filtered narratives; raw data is where errors, omissions, and bias are actually found.

From a plaintiff's standpoint, access to raw data is indispensable for several reasons:

A. It is the true basis of the opinion

New Jersey discovery rules permit a party to obtain the "substance of the facts and opinions" to which the opposing expert is expected to testify, and "a summary of the grounds for each opinion." In the neuropsychological context, the "grounds" are not simply the polished report. They include:

- The test protocols and score sheets
- The plaintiff's verbatim responses and performance
- Any examiner notes concerning behavior, effort, or symptomatic complaints during testing

Without that material, it is impossible to know whether the expert's description of scores, symptom validity testing, or behavioral observations is faithful to what actually occurred in the examination room.

B. Reports often do not match the data

Experienced brain-injury litigators know that reports are not neutral summaries. They are advocacy documents, consciously or unconsciously shaded toward the party who hired the expert. Leading neuropsychological commentators have long recognized that:

- Errors in scoring and interpretation are common
- Reports may omit low scores or relabel impaired performances as "borderline" or "mild," and
- The only way to detect these maneuvers is to obtain the expert's complete file and re-score the data

If counsel is limited to the four corners of the defense report, these discrepancies remain invisible. Cross-examination devolves into a battle of adjectives instead of a grounded challenge to the expert's methods.

C. Cross-examination without raw data is illusory

Meaningful cross-examination of a neuropsychologist requires more than asking whether the plaintiff "tried hard" or whether "the tests were valid." It requires the ability to confront the expert with specifics:

- Which subtests were impaired, and by how much?
- Were standard scoring rules followed, or were "judgment calls" consistently made in one direction?
- Were there unreported scores in the impaired range that undercut the expert's reassuring summary?

Without access to raw data, plaintiff's counsel cannot show the jury the actual questions missed, the true percentile scores, or the ways in which interpretation deviated from published manuals. The jury hears only the expert's conclusion that performance was "within normal limits," with no way to verify whether that characterization is justified.

II. Ethical Codes vs. Discovery Obligations

Defense neuropsychologists typically justify withholding raw data by invoking professional ethics and test security. The argument runs roughly as follows: test publishers and ethical codes require that raw data be kept out of the hands of nonpsychologists to preserve test integrity and prevent coaching or misuse.

That argument is overstated on its own terms and, more importantly, cannot override New Jersey's discovery rules.

A. What the ethics actually say

The American Psychological Association's Ethics Code draws a clear distinction between "test data" and "test materials."[2] Test data includes raw and scaled scores, client responses to items or stimuli, and psychologists' notes and recordings concerning the client's behavior during testing. Test materials, by con-

trast, are the manuals, instruments, protocols, and test questions themselves.

The ethics provisions allow release of test data to the client or to "other persons identified in the release," and in the absence of a release, require production "as required by law or court order."[3] Forensic psychology guidelines likewise recognize that documentation reasonably related to expressed opinions—including raw data and drafts—is subject to legal process.[4] In short, the profession's own standards anticipate that courts will compel production of test data when litigation demands it.

B. No 'ethics privilege' in civil discovery

New Jersey has broad discovery rules and recognizes no "ethics privilege" that allows a psychologist to unilaterally trump Rule 4:10-2.[5] Trial-level practice in this state has required neuropsychologists to produce raw test data, subject to reasonable protections. Courts in other jurisdictions confronted with identical disputes have made the same point explicitly: while courts "acknowledge and appreciate" ethical principles, those principles must yield to the rules governing discovery.[6] These decisions treat ethical concerns for test security as a factor to be addressed by protective orders—not as a basis to withhold the data altogether.

III. Defense Arguments and Plaintiff Responses

Despite the legal and ethical framework favoring production, defense counsel and experts tend to repeat several themes when resisting raw-data discovery. Each can be answered directly.

A. 'Test security' and 'coaching' concerns

Defense experts warn that releasing raw data to lawyers or plaintiffs will expose proprietary test materials, allow future examinees to be coached, and erode the validity of widely used instruments. There are several plaintiff-side responses:

1. **Protective orders work.** Courts handle sensitive material all the time—trade secrets, proprietary software, confidential medical records—through confidentiality agreements and orders that restrict use to the litigation, limit disclosure to counsel and experts, and require sealing or in camera review if the data must be filed. That same toolbox is available for neuropsychological data.
2. **The material is far from secret.** Many commonly used tests and manuals can be found in research libraries, through inter-library loan, or in commercially available texts. Test content is described extensively in the scientific literature. The idea that a single plaintiff's counsel, working under a protective order, will meaningfully threaten national test validity is not persuasive.
3. **Ethics defer to law.** As noted above, the APA explicitly contemplates court-ordered release of data; it does not empower psychologists to ignore subpoenas or discovery orders.

Contemporary neuropsychological literature also undermines the notion that withholding raw data from plaintiffs' counsel is necessary to prevent coaching. Surveys summarized by Boone and colleagues document that some attorneys openly acknowledge coaching clients in advance of psychological and neuropsychological testing, and that such coaching can threaten test validity if it involves item-level content or strategy.[7] But Boone et al. conclude that the proper response is to safeguard test materials and item content—not to insulate defense experts from scrutiny by blocking access to the data and work product that courts require for meaningful cross-examination.[8]

The practical compromise, adopted by multiple courts, is to compel production

> Without access to raw data, plaintiff's counsel cannot show the jury the actual questions missed, the true percentile scores, or the ways in which interpretation deviated from published manuals.

EVAN J. LIDE *is a shareholder and member of Stark & Stark's personal injury group and a certified civil trial attorney by the Supreme Court of New Jersey. He focuses his practice on representing clients who have suffered traumatic brain injuries, spinal cord injuries and other catastrophic injuries, including death, arising from automobile crashes, product liability and premises liability. An experienced litigator, he has tried cases to verdict throughout New Jersey, and his verdicts and settlements have been featured in several legal and news publications. He serves on the Board of Governors of the New Jersey Association for Justice, co-chairs its Civil Practice Committee and is a board member of the Brain Injury Alliance of New Jersey.*

From the plaintiff's perspective, the fair and practical approach is direct production to counsel (subject to a protective order), with the understanding that counsel will share the data with consulting or testifying experts as needed.

of raw data subject to a robust confidentiality order. That solution respects both the plaintiff's need for discovery and the profession's desire to limit uncontrolled dissemination.

B. 'Only a licensed neuropsychologist can see the data'

Another common defense position is that raw data may be shared only with another licensed neuropsychologist, not with counsel. This position is problematic on multiple levels.

First, New Jersey discovery practice is party-centered. It is the litigant and counsel who are entitled to discover the facts and data considered by the opposing expert. Narrowing access to a single professional category (neuropsychologists) effectively creates a quasi-privilege that the rules do not recognize.

Second, routing all data through a "gatekeeper" expert imposes a forced-expert model on plaintiffs. Many plaintiffs intend to rely primarily on treating providers, supplemented by counsel's own experience with brain-injury litigation. Requiring an additional retained neuropsychologist solely to serve as a conduit for raw data adds cost and delay, and may be strategically unsound if that expert will not ultimately testify.

Third, trial courts elsewhere have expressly criticized the notion that forwarding data only to another expert solves the problem. Without direct access to the manuals, scoring, and data, counsel cannot prepare for or conduct a thorough cross-examination of the defense expert on issues such as malingering, effort, and subtle scoring choices.

From the plaintiff's perspective, the fair and practical approach is direct production to counsel (subject to a protective order), with the understanding that counsel will share the data with consulting or testifying experts as needed.

C. 'Plaintiff can rely on their own experts'

Defense counsel sometimes argue that any prejudice is cured because the plaintiff can have their own expert repeat testing or otherwise respond. That sidesteps the core issue. Plaintiffs are not seeking raw data merely to build affirmative cases; they need it to test and impeach the defense expert's methodology and conclusions.

Repeat testing may be clinically inappropriate due to practice effects, symptom exacerbation, or the practical burden on a brain-injured plaintiff. More fundamentally, no amount of independent testing will reveal:

- Whether the defense expert misscored a particular subtest
- Whether low scores were omitted from the report, or
- Whether interpretive "judgment calls" consistently favored the defense narrative

Those questions can only be answered by looking at the defense expert's own data.

IV. What Happens When Plaintiffs Get the Data: A Case Study

In a separate case involving a plaintiff with cognitive complaints following a fall, a reviewing neuropsychologist was asked to analyze the raw test data underlying a defense neuropsychologist's report.

The analysis, based entirely on that raw data and the medical records, revealed multiple categories of concern:

A. Systematic scoring and interpretation errors

Rescoring the defense expert's protocols using the publishers' manuals, and having them blind-scored by colleagues, the reviewer found that:

- Scores the defense expert placed in the "average" range were, under standardized norms, in the low or clearly impaired percentiles
- Subtests central to the plaintiff's occupational functioning (such as processing speed and language tasks) were understated or reframed in ways that minimized their impact, and
- When there was room for subjective interpretation, decisions consistently favored higher, more reassuring scores

These were not random errors that might be expected in any human scoring; they were systematic and directionally consistent. Without raw data, none of this would have been detectable.

B. Selective use and mischaracterization of the medical record

The reviewing expert also documented how the defense expert's report:

- Highlighted tangential treatment records (for example, chiropractic vis-

its) while omitting contemporaneous notes diagnosing concussion, vestibulo-oculomotor dysfunction, vision problems, and ongoing headaches
- Downplayed the plaintiff's reduction from full-time to part-time work and the persistence of symptoms well beyond six months, and
- Recast specific, medically documented complaints (such as moderate-to-severe headaches and balance problems) into vague, easily minimized descriptions

Again, the ability to juxtapose the raw test data with the complete medical record was essential to exposing this pattern.

C. Data-handling and ethical irregularities

Finally, the reviewer identified irregularities in how the defense expert handled test materials and data, including:

- Use of photocopied and cobbled-together test forms in apparent violation of publishers' copyright agreements
- Failure to identify the examinee on original protocols, creating uncertainty about which data belonged to which client, and
- Incomplete production of raw data, requiring repeated requests to obtain missing pages

These issues go directly to reliability and professional credibility. They would have remained completely hidden had raw data not been produced and scrutinized.

Taken together, such analyses underscore why plaintiffs' counsel cannot simply accept the defense expert's summarized conclusions. Access to raw data allows plaintiffs both to verify and, where necessary, to dismantle a polished but misleading narrative.

V. Practice Pointers for New Jersey Plaintiffs' Counsel

New Jersey does not yet have a reported appellate decision squarely resolving raw-data discoverability in civil neuropsychological exams, but *DiFiore*'s recognition of the inherently adversarial nature of defense medical exams and the plaintiff's need for meaningful oversight strongly supports broad discovery of the facts and data considered by defense examiners.[9] Nonetheless, trial-level orders, persuasive authority from other jurisdictions, and the structure of our discovery rules give plaintiffs' attorneys a workable roadmap.

A. Address raw data at the DME stage

When a defense medical or neuropsychological examination is first noticed, plaintiffs' counsel should:

- Put the defense on written notice that raw data, scoring sheets, and complete test protocols will be produced
- Identify any observer and recording arrangements, and
- Request a proposed protocol and confidentiality agreement that explicitly provides for direct transmission of raw data to plaintiff's counsel within a defined time after testing

Embedding these expectations from the outset normalizes the idea that raw data is part of the standard DME package, not an extraordinary request.

B. Use tailored confidentiality agreements

A thoughtfully drafted confidentiality agreement can neutralize most test-security concerns. Typical provisions include:

- Defining "Confidential Information" to include raw data, protocols, and related materials
- Restricting use of the data to the pending litigation
- Limiting disclosure to counsel, retained experts, necessary support staff, and the court
- Providing procedures for filing such materials under seal or for in camera review, and
- Requiring return or destruction of the data at the conclusion of the case, with written confirmation

In one recent New Jersey matter, a plaintiff's proposed agreement required the examining neuropsychologist to supply raw data directly to plaintiff's counsel within 72 hours of the examination, subject to standard confidentiality terms. That sort of language both protects the material and ensures timely, direct access.

C. Anchor your motion practice in rules and precedent

If the defense expert or insurer refuses to produce raw data, plaintiffs should be prepared to move promptly for a protective or compelling order, grounding their argument in:

- New Jersey's broad discovery standard and the specific requirement to disclose the "facts and data considered" by testifying experts
- The APA Ethics Code and forensic guidelines, which explicitly defer to law and court orders regarding test data, and
- A line of persuasive cases from other jurisdictions compelling production of raw neuropsychological data, often subject to confidentiality protections

Counsel should also be prepared to request appropriate remedies—up to and including preclusion—if a defense expert insists on testifying while withholding the foundation of their opinions.

D. Insist on direct production to counsel

Finally, plaintiffs should resist the "neuropsychologist-only" compromise.

Direct production to counsel, under a protective order, respects the attorney's central role in case preparation and allows counsel to:

- Review the data personally, especially where counsel has developed deep experience in brain-injury litigation;
- Decide strategically when and how to involve consulting or testifying experts; and
- Prepare focused cross-examination that integrates raw scores, medical records, and functional evidence.

Forcing all raw data through a professional gatekeeper may be convenient for the defense, but it is not consistent with our discovery rules and it is not necessary to protect legitimate professional interests.

VI. New Jersey Supreme Court Guidance: *DiFiore v. Pezic*

Although there is still no reported New Jersey decision squarely deciding the discoverability of raw neuropsychological data in civil cases, the Supreme Court's opinion in *Kathleen DiFiore v. Tomo Pezic* provides powerful guidance for plaintiffs' counsel.[10] In *DiFiore*, the Court held that defense medical exams are inherently adversarial and rejected a host of defense-oriented restrictions, placing on defendants the burden to show why an unobtrusive recording or neutral third-party observer should not be permitted in a particular case.[11]

The Court emphasized that plaintiffs have a legitimate need for tools that allow them to test what actually happened during a defense medical exam and that defense concerns about "test security," "coaching," or examiner discomfort are not, standing alone, sufficient to bar mechanisms that preserve an accurate record.[12] That reasoning fits hand-in-glove with the argument for raw-data production: if New Jersey recognizes that plaintiffs need transparency into what occurred in the exam room, it follows that they must also have access to the underlying data that forms the basis of the defense expert's opinions, subject to reasonable protective orders rather than categorical withholding.[13]

VII. Conclusion

The dispute over discoverability of raw data from psychological and neuropsychological evaluations is not merely an esoteric clash between ethics codes and civil procedure. It is, in practice, a contest over who controls the story of the brain-injured plaintiff.

From the plaintiff's side, securing that data—through careful defense medical exam conditions, well-drafted confidentiality agreements, and focused motion practice—is essential to exposing distortions, correcting misinterpretations, and giving the jury a full and accurate picture of the plaintiff's cognitive and emotional injuries.

As the case study in Section IV demonstrates, once plaintiffs obtain the raw data, the defense narrative often looks very different. Scores that were described as "mild" turn out to be clearly impaired. Symptoms that were downplayed prove to be well-documented and persistent. Methodological shortcuts and ethical lapses, invisible in the glossy report, become unavoidable. That is precisely why plaintiffs must insist that raw data is discoverable, produced directly to counsel, and subject only to reasonable safeguards—not to unilateral veto by the examining expert.

For New Jersey practitioners, the lesson is straightforward: treat raw neuropsychological data as central, not peripheral, discovery. Build your defense medical exam protocols, confidentiality orders, and motion practice around that premise, and use the data you obtain to restore balance to a field long dominated by defense-controlled experts. ■

Endnotes

1. The author has relied on recent motion practice in New Jersey superior courts and on published guidance from neuropsychologists regarding the necessity of access to raw test data in litigation contexts.
2. American Psychological Association, *Ethical Principles of Psychologists and Code of Conduct* § 9.04 (Release of Test Data) (2017).
3. *Id.*
4. American Psychological Association, *Specialty Guidelines for Forensic Psychology* § 10.08 (2d ed. 2013) (requiring that documentation regarding expert's work product be preserved and made available as required by law or court order).
5. N.J. R. Civ. Prac. 4:10-2 (scope of discovery).
6. *See, e.g.*, cases cited in discussion of discovery protections in state and federal appellate decisions addressing expert discovery; the principle that procedural rules governing discovery cannot be overridden by professional ethics codes acting unilaterally.
7. K. B. Boone et al., *Attorney Demands for Protected Psychological Test Information: Is Access Necessary for Cross-Examination or Does It Lead to Misinformation? An Interorganizational Position Paper*, 38 Clinical Neuropsychology 1 (2024), doi.org/10.1080/13854046.2024.2323222.
8. *Id.*
9. *Kathleen DiFiore v. Tomo Pezic,* 272 N.J. 1 (A-58/59/60-21) (2023).
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*