

IN THE SUPREME COURT OF IOWA
NO. 24-0030

JESSENIA BURTON, NANCY BURTON, AND TRACY BURTON,

Plaintiffs/Appellants,

v.

WEST BEND MUTUAL INSURANCE COMPANY,

Defendant/Appellee.

APPEAL FROM THE IOWA DISTRICT COURT FOR POLK COUNTY
CASE NO. LACL151685
HON. ROBERT B. HANSON, DISTRICT COURT JUDGE

**BRIEF OF AMICUS CURIAE IOWA PSYCHOLOGICAL
ASSOCIATION IN SUPPORT OF PLAINTIFFS–APPELLANTS**

Stephanie A. Koltookian, AT0012724
Jennifer E. Lindberg, AT0013329
BROWN, WINICK, GRAVES, GROSS
AND BASKERVILLE, P.L.C.
666 Grand Avenue, Suite 2000
Des Moines, IA 50309-2510
Telephone: 515-242-2418
Facsimile: 515-283-0231
Email: stephanie.koltookian@brownwinick.com
Email: jen.lindberg@brownwinick.com

ATTORNEYS FOR AMICUS CURIAE

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IDENTITY AND INTEREST OF AMICUS CURIAE

The Iowa Psychological Association (“IPA”) is a non-profit organization committed to providing advocacy, education and training, and professional support for psychologists in Iowa. The IPA is the Iowa affiliate of the American Psychological Association (“APA”). The IPA has more than 250 members. Since 1949, the IPA has worked to promote the science and practice of psychology for the benefits of Iowans. In that role, the IPA advocates for the psychology profession within the state and Federal government.

The IPA is committed to ensuring the continued integrity of the psychology profession, including its members’ ability to ethically support their conclusions using scientifically valid measures of their patients’ or clients’ mental abilities. The district court’s order undermines that goal. The disclosure of test materials or test data in the manner envisioned by the district court will have an immense impact on the IPA’s members and the continued use of psychological testing in clinical, occupational, and litigation settings. The IPA’s members should never have to choose between acting ethically to protect the continued viability of psychological testing and obeying a court order mandating disclosure with broad implications beyond this present dispute.

The IPA has an important interest in the outcome of this case that is distinct from the interests of the parties. The greatest impact of the district court's ruling is not on the plaintiff or the defendant. It is on the psychologist, the psychology profession, and the Iowa citizens who rely upon viable psychological tests. In this matter, the expert neuropsychologist was not provided an independent voice in this proceeding. The dispute was litigated solely by counsel representing non-psychologist clients.

The IPA writes to help the Court understand why psychologists have an ethical obligation to protect test security, including certain test materials and test data, and why the strict confidentiality afforded to psychological test materials and test data does not violate the Iowa Rules of Civil Procedure. With this background, the IPA urges this Court to enforce Iowa Code section 228.9 as written and recognize that psychologists and neuropsychologists should not be compelled to produce test data and materials to non-psychologists in litigation.

RULE 6.906(4)(d) STATEMENT OF AUTHORSHIP

This amicus curiae brief was authored entirely by counsel for IPA. No party, party's counsel, or other person contributed money to fund the preparation or submission of this brief.

ARGUMENT

The ethical and legal protections afforded to psychological test materials and test data are firmly rooted in science and sound public policy. These statutory and ethical guardrails¹ protect the continued viability of performing accurate and statistically validated psychological assessments in civil litigation, criminal trials, clinical evaluation, and occupational fitness-for-duty assessments. The district court's ruling gave these considerations short shrift, and instead relied on a tortured interpretation of Iowa Code section 228.9² to hold that a retained neuropsychologist, Dr. Daniel Tranel,

¹ Plaintiffs' counsel raised the ethical issues associated with the improper disclosure of psychological test materials and test data in their Resistance to the Motion to Compel. *See* D0046, Resistance to Motion to Compel ¶ 28 (8/21/2023). The district court appeared to acknowledge the argument and responded by criticizing Dr. Tranel for "making the decisions when it comes to interpreting the legal, professional, and ethical limitations on disclosure of Jessenia's mental health information." *See* D0056, Ruling on Defendant's Motion to Compel, to Strike, and to Continue Trial 5 (9/14/2023) ("Ruling"). This criticism was wholly unwarranted. Psychologists and neuropsychologists, like all medical professionals, should *always* strive to abide by the legal ethical standards governing their profession. To do otherwise would open the door to the unscrupulous practice of psychology and neuropsychology.

² Appellants briefed the Iowa Code section 228.9 statutory interpretation issue, and the IPA does not repeat that analysis here. However, this brief does address (1) how the legislative history of Iowa Code section 228.9 reflects an understanding of the scientific concerns and public policy considerations that underlie the APA Ethical Standards regarding test security and (2) how to reconcile Iowa Code section 228.9 with the Iowa Rules of Civil Procedure.

must produce all psychological test materials and test data to a wide array of non-psychologists.³

The district court’s reasoning suffered from a host of flaws. As a preliminary matter, the Ruling approached the protection of psychological test materials and test data as a plaintiff-sided issue. *See* D0056, Ruling 5 (“[T]he court cannot emphasize enough that it is *Plaintiffs who are personally responsible* for the importance of Jessenia’s mental health information in this matter.” (emphasis added)). It is not. Psychologists and neuropsychologists have an ethical and legal duty to protect psychological test materials and data from being misused by *all* non-psychologists. It does not discriminate between plaintiffs and defendants. In fact, the last time an issue involving the disclosure of psychological test materials and test data was before the Iowa Supreme Court, an insurance company defendant relied on the plain language of Iowa Code section 228.9 to argue that it “unambiguously states that psychological test material can only be disclosed to another licensed

³ After this interlocutory appeal was retained, the district court entered a protective order that allowed the disclosure of test materials and test data to counsel of record, “Defendant’s adjusters involved with the claim,” non-psychologist expert witnesses, and, after an additional hearing, potentially all “empaneled jurors in this case.” D0069, Protective Order ¶ 3 (1/12/2024). This protective order falls far short of sufficiently protecting the documents at issue.

psychiatrist.”⁴ Appellant’s Brief, *Ham v. IMT Ins. Co.*, No. 03-1740, 2004 WL 4907463 *16 (Feb. 13, 2004).

Litigation does not excuse or justify undermining the validity of psychological assessments. The ethical standards governing psychologists and neuropsychologists are tailored to protect the profession’s ability to continue using batteries of scientifically sound tests. It is only in maintaining valid and reliable tests, which requires strict test security, that psychologists can provide thorough and accurate assessments for use by the courts, social services, schools, parents, and patients for the best interests of the patient and the broader public. Importantly, if test materials are used by bad actors, there is no quick or cost-effective way for psychologists or neuropsychologists to replace the compromised test with a new one. The Iowa Legislature recognized this and provided strong statutory protections for psychological test materials.

⁴ In *Ham*, the district court denied a motion to compel the psychological test materials because such materials were not in the insurance company’s possession but granted a motion to exclude the neuropsychologist’s expert opinion for failure to disclose the facts and data related to the tests. *See id.* * 7–8. *Ham* was retained by the Iowa Supreme Court and oral argument was held, but the district court’s opinion was affirmed by operation of law. *See Order, Ham v. IMT Ins. Co.*, No. 03-1740 (Iowa Sept. 1, 2004). Chief Justice Lavorato and Justices Carter and Wiggins voted to affirm the judgment of the district court, and Justices Ternus, Cady, and Streit voted to reverse the judgment of the district court. *Id.*

Moreover, psychologists should not be deterred from serving as an expert witness due to the procedural requirements established by the Iowa Rules of Civil Procedure. When read as a whole and in the context of the statutory framework that governs psychological test materials and test data, the Iowa Rules of Civil Procedure do not require psychologists or neuropsychologists to ignore their ethical and legal obligations when they agree to serve as expert witnesses. This Court should hold that the judicial system cannot be used to interfere with the Legislature's clear intent to protect psychological test materials. The district court erred when it ordered such disclosure, and the protective order it ultimately imposed does not sufficiently protect psychological test materials or test data.

I. Psychologists' ethical duty to protect psychological test data and materials from disclosure to non-psychologists is grounded in sound science and strong public policy that has been adopted by the Iowa Legislature.

A. Disclosure of psychological test materials threatens the ongoing validity of available psychological testing.

Scientific validity is the key driver of the psychology profession's ethical standards which prevent psychological test data and materials from being disseminated to non-psychologists. Psychological and neuropsychological testing transforms subjective inputs into objective outputs to compare individuals to a normative level of psychological functioning. *See*

Kaufman, P.M. (2005), *Protecting the Objectivity, Fairness, and Integrity of Neuropsychological Evaluations in Litigation. A privilege second to none?*, *The Journal of Legal Medicine*, 26, 95-131, 97. These tests have been widely used for forensic psychological analysis.

Most psychological and neuropsychological test instruments are validated using naïve test subjects. *See, e.g.*, National Academy of Neuropsychology, *Test Security: An Update*, 2 (10/13/2003), <https://www.nanonline.org/docs/PAIC/PDFs/NANTestSecurityUpdate.pdf> (hereinafter “*Test Security: An Update*”). This means that to continue using validated psychological tests in practice (whether in a litigation context, an occupational context, or a clinical context), valid results are best achieved if test subjects are not aware of the test questions and/or how the tests are scored prior to taking the psychological test battery. The American Academy of Clinical Neuropsychology explained the issue as follows:

because psychological and neuropsychological tests were developed and validated on individuals who were naive to the tests (i.e., participants in studies that established test normative values did not have knowledge of the tests prior to test administration), allowing examinees to have awareness of test stimuli and procedures before testing represents a violation of standardized test administration procedures. Departures from standardized test administration can render normative data or other patient comparison data inappropriate.

Boone, K., et al., *Official position of the American Academy of Clinical Neuropsychology on test security*, *The Clinical Neuropsychologist*, 36 (3), 523, 526 (2022).

The risk of having test subjects prepped on the psychological test materials is reflected by research and case law. Research has demonstrated that “individuals who gain access to [psychological] test content can and do manipulate tests and coach others to manipulate results, and they are also more likely to circumvent methods for detecting test manipulation.” *See Test Security: An Update*, 3; *see also* Boone, at 525, 529 (“[F]ailures in test security can invalidate test results.”).

Case law has also recognized that the disclosure of test materials can be a legitimate and substantial threat to test validity. The United States Supreme Court recognized the importance of test secrecy in the context of a psychological battery of aptitude tests used in an occupational setting in *Detroit Edison Co. v. N.L.R.B.*, 440 U.S. 301, 305–06, 314 (1979). In *Detroit Edison*, the Supreme Court recognized that the aptitude test materials should not be disclosed in the context of a collective bargaining dispute due to the employer’s “legitimate and substantial” concern for “empirical validity of the tests, and the relationship between secrecy and test validity.” *Id.* at 314, 316–17.

Against this backdrop, psychological associations and professional boards have enacted ethical standards and rules to protect the continued validity of psychological assessments.

B. Psychologists' ethical obligations, reflected and strengthened by the Iowa Board of Psychology's administrative rules, are tailored to protect the profession's ongoing ability to use scientifically valid testing materials.

The APA's Ethical Principles for Psychologists and Code of Conduct addresses the release and use of test materials and test data in various rules, including Standard 9.11 (Maintaining Test Security) and 9.07 (Assessment by Unqualified Persons). See American Psychological Association, Ethical Principles of Psychologists and Code of Conduct <https://www.apa.org/ethics/code> (hereinafter "APA Ethics Code"). For purposes of the APA's Ethical Standards, test materials and test data are defined separately and are governed by slightly different standards.

Test materials are defined by the APA as "manuals, instruments, protocols, and test questions or stimuli and does not include *test data* as defined in Standard 9.04, Release of Test Data." *Id.* § 9.04. Standard 9.11 instructs psychologists to use the following approach when handling test materials:

Psychologists 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.

Id. § 9.11. The Iowa Board of Psychology’s administrative rules likewise strictly limit the disclosure of psychological test materials to licensed psychologists who have been designed in writing by the test subject to receive the materials. Iowa Admin. Code r. 645-243.4(3).

Test data is treated slightly differently. APA Ethical Standard 9.04(a) defines test data to include

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*.

The permissible use of test data is limited. If there is no client/patient release, “psychologists provide test data only as required by law or court order.” *See* APA Ethics Code § 9.04(b). If there is a client or 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.

Id. § 9.04(a). The Iowa Board of Psychology’s rules are even stronger. They provide that test data cannot be disclosed except to a licensed psychologist

designated by the patient or examinee. *See* Iowa Admin. Code r. 645-243.4 (2).⁵

The Iowa Board of Psychology’s stronger rules protecting test data reflect the practical reality of administering many psychological tests. In practice, the disclosure of test data often results in the disclosure of test materials. For example, the Wechsler Adult Intelligence Scale, Fourth Edition

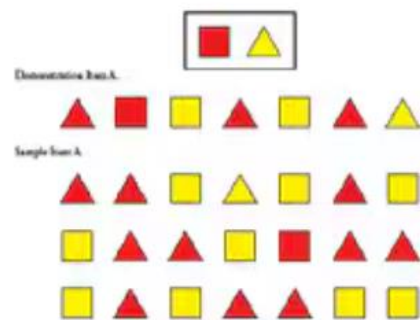
⁵ While unclear on this point, the district court in this case might have reasoned that because Dr. Tranel’s report “revealed the percentile of Jessenia’s performance on various tests administered to her” and “produced some testing materials,” that Dr. Tranel should be required to disclose *all* test materials and test data from Jessenia’s evaluation. D0056, Ruling 4. This logic ignores that (1) the disclosure of the percentile ranks of Jessenia’s performance on various tests did not disclose the test materials, which have the strongest statutory protection under Iowa Code section 228.9, and (2) Dr. Tranel was attempting to be reasonable in producing certain testing materials after West Bend’s counsel demonstrated that those materials were all previously publicly available. *See* D0045, Motion to Compel Discovery ¶ 43 (8/11/2023). With respect to the percentile rankings, percentile rankings like those in Dr. Tranel’s report are not scaled scores (which are defined as test data) and do not reveal the substance of the test. With respect to the testing materials that were previously publicly available, Dr. Tranel did not originally disclose those materials to non-psychologists — a third party did, and therefore his subsequent disclosure arguably did not violate the intent of section 228.9.

In any event, disclosures that do not implicate section 228.9 and/or do not endanger test security cannot be used to require disclose *more* test materials or *more* test data that *will* create potential harm to the public and to the psychological profession by jeopardizing test validity. *See generally* *Burke v. Reiter*, 42 N.W.2d 907, 913 (Iowa 1950) (“Two wrongs do not make a right.”).

(WAIS-IV)⁶ contains a subtest that requires test takers to draw a line through certain items, as demonstrated by the published exemplar below:

Cancellation

Contributes to Processing Speed
Composite, imbedded Stroop Effect,
provides scores.



When I say "go," draw a line through each red square and yellow triangle.

See Wechsler Adult Intelligence Scale Fourth Edition, Product Details, <https://www.pearsonassessments.com/store/usassessments/en/Store/Professional-Assessments/Cognition-%26-Neuro/Wechsler-Adult-Intelligence-Scale-%7C-Fourth-Edition/p/100000392.html?tab=product-details> (last accessed July 26, 2024). Although the client's drawing of a line through the triangles is test data under the APA Ethical Standards and the Iowa Board of Psychology's administrative rules, it would be impossible for the psychologist to disclose the test data (the line drawn by the client) without also disclosing

⁶ Dr. Tranel administered the WAIS IV to Ms. Burton, although this subtest was not administered. D0046, Ex. 1, Tranel Report 009.

the test material (the question). For that reason, psychologists are also expressly prohibited from disclosing test data in Iowa. *See* Iowa Admin. Code r. 645-243.4 (2); *see also* APA Ethics Code § 9.04 (a).

C. Psychologists' ethical and legal obligations protect the public.

Maintaining psychological test security advances legitimate public policy. The ethical obligation to protect test security is compelling in the psychological test setting because test subjects are not uniformly motivated to test worse (i.e., show lower psychological function) than their actual abilities.⁷ Although this issue is currently presented in a lawsuit where an individual is claiming cognitive impairment, psychological tests are also given in a variety of other settings. The public has an interest in preventing manipulation of psychological test scores, regardless of whether that intended manipulation is to show an artificially healthier or unhealthier psychological function. *See generally* Boone, 527–28.

First, there is a public safety interest in preventing artificially healthier psychological function scores. Psychological testing is used in occupational

⁷ This distinguishes a psychological exam from a typical physical IME. Few people are motivated to test better in an IME. Further, a physical therapist may observe or even manipulate a patient's body during an IME to evaluate effort or malingering. Psychologists are not trained or qualified to directly observe or manipulate their clients' minds.

settings, where test subjects are motivated by their livelihoods to test better to keep their jobs or obtain initial employment. In this occupational context, psychological testing is often used to ensure that people filling key roles in society are fit for duty, including law enforcement officers, correctional officers, pilots, physicians, surgeons, nurses, air traffic controllers, and ship captains. *See, e.g.*, Iowa Code § 80B.11D(1)(g) (“The rules shall include . . . providing a battery of psychological tests to determine cognitive skills, personality characteristics, and suitability of an applicant for a law enforcement career.”); Iowa Code § 904.108(f) (“[T]he director shall by rule require a battery of psychological tests to determine cognitive skills, personality characteristics and suitability of all applicants for a correctional career.”).

The concern for cheating to test better can be easily illustrated through an occupational example. If psychological test data and materials were readily available, an airline pilot hoping to maintain his license could study various psychological test batteries to obtain an artificially better score. *See generally* Boone, 529 (“[W]hen examinees are ‘coached’ as to . . . the measures used to determine performance and symptom validity, test takers are better able to adjust their test responses to match target conditions . . .”). If he succeeded, that pilot could endanger the innocent civilians he transports after clearing the

psychological functioning tests. The FAA has taken the risks inherent in this possibility seriously. In fact, “[t]o promote test security, itemized lists of tests comprising psychological/neuropsychological test batteries” required by the FAA were “moved to a secured site” that is only accessible to authorized professionals. *See* Federal Aviation Administration, Guide for Aviation Medical Examiners, https://www.faa.gov/ame_guide/dec_cons/disease_prot/ppevals (last visited 7/26/2024). If the Iowa judicial system begins opening the door to allow access to psychological testing materials, test security safeguards put in place by the FAA and others could be threatened.

Second, the public has an interest in maintaining psychological test security to avoid the abuse of procedural and constitutional safeguards. These concerns usually arise when there is an incentive to test worse than the test subject’s actual cognitive ability. For example, a criminal defendant may try to test worse to establish that he should be held incompetent to stand trial or to excuse himself from criminal responsibility. *Cf. Ryan v. Clarke*, 387 F.3d 785, 791–92 (8th Cir. 2004) (discussing psychological testing in context of competency evaluation). Likewise, a prospective student could seek to test worse on a psychological battery to obtain an accommodation for the SAT, LSAT, MCAT, or other placement tests to which she is not entitled. *See*

Independent Educational Consultants Association, SAT and ACT Accommodations, 4 (2014), https://www.iecaonline.com/wp-content/uploads/2016/12/ieca_brochure-accommodations.pdf. In certain circumstances, lower testing results can also lead to improper access to certain medications, such as medications for ADHD. *See, e.g., CHADD, Diagnosis of ADHD in Adults*, <https://chadd.org/for-adults/diagnosis-of-adhd-in-adults/> (last accessed 7/25/2024) (discussing role of psychological and neuropsychological testing in diagnosing ADHD in adults).

As these examples demonstrate, public policy is advanced through nondisclosure of psychological test materials to non-psychologists. The district court's decision to compel production of such materials in contravention of the neuropsychologist's ethical obligations founded on public policy should be reversed.

D. Psychologists cannot claw back the consequences of breaches in psychological test security once a psychological test has been widely circulated.

Psychological testing is unique in that the disclosure of the tests can render the tests less valid or accurate for cognitive assessment with future patients or clients. This is a unique problem for the psychology profession. For most other types of analytical testing, the disclosure of the test itself does not impact the validity of using the test in the future. This can be illustrated

through DNA analysis in criminal proceedings. If a party obtained the precise method by which a company analyzes DNA, it would not prevent the company from analyzing DNA in the future. Nor could future DNA test subjects manipulate the test — one cannot “coach” DNA to test differently.

This validity problem occurs because the validity measures for most psychological tests are derived from “known group[] studies in which examinees were not aware of the test procedures or stimuli prior to testing.” *See Boone*, 526. If the validity measure is not tailored to the actual population (i.e., individuals who have been exposed to the actual test questions), the psychological test results will be less accurate and may not detect altered effort in the test subject.

If these harms come to pass, there is no easy fix. Psychological tests are not universally interchangeable. It takes a substantial amount of time and effort that to produce a reliable and validated psychological test. *See Test Security: An Update*, 3 (noting the re-standardization of the WAIS-III and WMS-III “cost several million dollars, took over five years to complete, and required testing of over 5000 individuals”). Additionally, the fact that a test is validated on one demographic does not mean that it can be used on everyone. This practical consideration further supports the protection of psychological test materials.

E. The Iowa Legislature’s enactment of Iowa Code section 228.9 is well supported by public policy and ethical considerations.

The Iowa Legislature’s adoption of Iowa Code section 228.9 demonstrates an endorsement of the public policy and practical considerations described above. When this provision was first introduced in 1994 as Senate File 2287, the bill expressly tied the duty to not disclose psychological test material to the obligation to prevent “compromis[ing] the objectivity of fairness of the testing process.” *See* S.F. 2287, 75th G.A. (Iowa 1994); *see also* S.F. 2287, 75th G.A. explanation (Iowa 1994) (“If disclosure of the material would compromise the objectivity of the testing process, the disclosure is prohibited except as provided in the bill.”); *see generally* *Hummel v. Smith*, 999 N.W.2d 301, 308 (Iowa 2023) (“We have relied on bill explanations . . . as interpretive aids, noting that the internal rules governing the general assembly require such explanations to be accurate.”). This bill strongly supports that the Legislature was aware of, and wanted to protect the public from, the risks associated with the dissemination of psychological testing materials to non-psychologists.

Before the bill was passed, the bill’s text was amended to articulate a blanket prohibition against disclosure of psychological test materials to non-psychologists. Specifically, the bill’s opening phrase was modified to unequivocally state that “[e]xcept as otherwise provided in this section, a

person in possession of psychological test material *shall not disclose the material to any other person.*” S.F. 2287, H-5708 (Filed 3/25/1994, adopted 4/8/1994) (emphasis added). This revision removed the factual and/or legal predicate for determining when psychological test materials could be legally disclosed to non-psychologists. Instead, the statutory language, which has never been amended since its adoption in 1994, expressly prohibits the disclosure of psychological test material to non-psychologists.

II. The disclosure of psychological test materials and test data to non-psychologists is not required under the Iowa Rules of Civil Procedure.

Iowa courts should not compel psychologists or neuropsychologists to violate the law and their ethical duties as a prerequisite to serving as an expert witness in civil litigation. The district court’s order compelling production of psychological test materials broadly and vaguely relied on “the Iowa Rules of Civil Procedure governing discovery” to support its conclusions. *See* D0056, Ruling 4. It is unclear if the district court was referring to the Iowa Rules of Civil Procedure governing the general scope of discovery or the expert disclosure rules. Those rules were minimally briefed by West Bend in its reply. *See* D0050, Reply to Plaintiffs’ Resistance to Motion to Compel Discovery ¶¶ 1–2, 4 (9/7/2023). However, no rule mandates the disclosure of the psychological test materials or test data to non-psychologists.

A. Any conflict between the Iowa Rules of Civil Procedure and Iowa Code section 228.9 must be resolved in a manner that gives Iowa Code section 228.9 purpose.

The Iowa Rules of Civil Procedure do not require psychologists or neuropsychologists to violate their ethical and legal duties. The interplay between the Iowa Rules of Civil Procedure and the Iowa Code must be resolved through statutory interpretation. *See generally Ronnfeldt v. Shelby Cnty. Chris A. Myrtue Mem. Hosp.*, 984 N.W.2d 418, 421 (Iowa 2023) (“Our rules of civil procedure ‘have the force and effect of statute.’” (quoting *Helland v. Yellow Freight Sys., Inc.*, 204 N.W.2d 601, 604 (Iowa 1973) (en banc))).

As the Iowa Supreme Court recently explained,

In the event of an apparent conflict between statutes, they shall be construed, if possible, so that effect is given to both. We do not apply one statute over another unless the conflict between the provisions is irreconcilable. If more than one statute relating to the subject matter at issue is relevant to the inquiry, we consider all the statutes together in an effort to harmonize them. Harmonization of the applicable statutes evidences the true intent of the legislature.

Ronnfeldt, 984 N.W.2d at 421–22 (cleaned up). If harmonization is not possible and the conflicts between the provisions are irreconcilable, “the special or local provision prevails as an exception to the general provision.”

See Iowa Code § 4.7.

The application of these principles demonstrates that under Iowa law, the disclosure of test materials and test data cannot be disclosed in litigation to non-psychologists.

B. The Iowa Rules of Civil Procedure expressly allow the court, on its own, to impose limits to discovery.

Iowa Rule of Civil Procedure 1.503 provides protection against expanding the scope of discovery beyond what is allowed by statute. This rule outlines the general scope of discovery. Iowa R. Civ. P. 1.503 (“[T]he scope of discovery shall be as provided in this division.”). Pursuant to Iowa Rule of Civil Procedure 1.503(1)(b), “*all* discovery is subject to the limitations of rule 1.503(8).” (emphasis added).

Iowa Rule of Civil Procedure 1.503(8) gives the trial court discretion, “on its own” to “limit the frequency or extent of discovery otherwise allowed by the rules” if it makes certain findings. *See* Iowa R. Civ. P. 1.503(8). Applicable here, the court can limit the extent of discovery if it determines that “[t]he burden . . . of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties’ resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.” Iowa R. Civ. P. 1.503(8)(c).

The harmonization of Iowa Code section 228.9 and the Iowa Rules of Civil Procedure can be realized through the application of Iowa Rule of Civil Procedure 1.503(8)(c) to the disclosure of psychological test materials. The Iowa Legislature has determined through Iowa Code section 228.9 that the burden of producing psychological test materials to non-psychologist litigants is so high that such materials “shall not be disclosed in any . . . judicial . . . proceeding.” The Iowa Board of Psychology has demanded that Iowa licensed psychologists cannot produce test data to non-psychologists. *See Iowa Admin. Code r. 645-243.4(2)*. Therefore, on its own, the district court should always prevent the disclosure of test materials and test data to non-psychologists.

To be clear, this discovery limitation would not mean that a client’s psychological test materials and test data would never be disclosed to the opposing party. Instead, the discovery order should limit the disclosure of test materials or test data to another licensed psychologist consistent with Iowa Code section 228.9. Here, Dr. Tranel has already offered to share the test materials and test data with another licensed psychologist consistent with his ethical obligations. *See D0046, Ex. 2, Tranel Decl. ¶ 12 (8/21/2023)*. If a party did not (or could not) retain a psychologist or neuropsychologist to review the data, the court could appoint a licensed psychologist as an expert. *See Iowa*

R. Evid. 5.706.⁸ Moreover, if West Bend truly believes that Dr. Tranel only “purport[ed] to have performed neuropsychological tests on Plaintiff,” a court-retained expert or a retained psychologist or neuropsychologist could easily determine whether the tests were administered and give an opinion on Dr. Tranel’s interpretation of Jessenia’s test data. *See* D0047, Motion to Strike ¶ 15 (8/25/2023).

In addition to protecting test security, which furthers the numerous public policies described above, limiting the disclosure of test materials and test data to licensed psychologists also advances other ethical standards applicable to the psychological profession. Pursuant to APA Ethical Standard 9.07, “Psychologists do not promote the use of psychological assessment techniques by unqualified persons, except when such use is conducted for training purposes with appropriate supervision.” If an Iowa licensed psychologist violates this standard, she could be subject to discipline by the Iowa Psychological Board. *See* Iowa Admin. Code r. 645-243.2 (“A licensee may be disciplined for any violation of this chapter or the APA Code of Ethics.”). Psychologists should not be required to choose between evaluating

⁸ This would also protect litigants from arguing that the failure to disclose test materials or test data renders the psychologist’s or neuropsychologist’s opinions to be unreliable.

a client and potentially exposing themselves to discipline from the Iowa Board of Psychology.

Finally, the burden imposed by disclosing test material and test data is particularly heavy because of the detrimental effect it may have on future assessments. If a psychologist did not follow the law and disseminated test materials, the opinions derived in future assessments using those tests may ultimately become unreliable due to the invalidation of the tests themselves. This Court should not enable discovery tactics that diminish the value of psychological opinions in litigation. *Cf. Hutchison v. Am. Family Mut. Ins. Co.*, 514 N.W.2d 882, 886 (Iowa 1994) (“There seems to be little dispute that a psychologist may testify as to the existence of a brain injury, or at least the condition of the brain in general.” (collecting cases)).

Against these heavy burdens, the benefit of having a non-licensed psychologist review the test material or test data is minimal. Litigants already have access to ample information about psychological tests. For example, PAR, the publisher of the Wisconsin Card Sorting Test⁹ has many publicly available resources and descriptions of what occurs during the test and the three “dimensions” that clients are evaluated on during the test (Correct-

⁹ Dr. Tranel administered the Wisconsin Card Sorting Test to Ms. Burton in this matter. D0046, Ex. 1, Tranel Report 009.

Incorrect, Ambiguous-Unambiguous, perseverative-nonperseverative). *See, e.g.,* WCST: Wisconsin Card Sorting Test, Technical, <https://www.parinc.com/Products?pkey=478> (last visited July 22, 2024).

Similarly, non-attorneys should be able to determine the basic contours of the testing through publisher materials or scholarly articles. It is unclear what meaningful benefit could be gained from showing the actual prompts and responses to an attorney, as opposed to having the test data or materials reviewed by a licensed psychologist who is able to interpret the information.

Additionally, attorneys and other non-psychologists should not be encouraged to play expert with sensitive test materials. It takes years of formal training for a psychologist or neuropsychologist to understand how to administer, score, and interpret psychological tests correctly. Only psychologists are qualified to determine whether another psychologist performed the test correctly. If there is a defect in the manner of test administration or scoring of the test, the way to establish that defect would be through a competing psychologist expert.

C. Iowa Rules of Civil Procedure 1.500(2) and 1.508(1)(b), governing the disclosure of expert witnesses, do not require the disclosure of test materials and test data to non-psychologists.

The expert disclosure rules, including Iowa Rule of Civil Procedure 1.500(2) and 1.508(1)(b), do not lead to a different result. These rules, which

also govern discovery, are subject to the limitations that may be set by the court under Iowa Rule of Civil Procedure 1.503(8). Therefore, the same benefit-burden framework should be applied, and the test data and test results should never be disclosed to non-psychologists. This framework is expressly built into Iowa Rule of Civil Procedure 1.508(1)(b).

Notably, there is no *per se* violation of Iowa Rule of Civil Procedure 1.500(2)(b)(2) when the expert report both (1) identifies the tests administered, and (2) provides a thorough narrative of the examination and results. *See, e.g.*, D0046, Ex.1, Tranel Disclosure/Report 008–13 (8/21/2023). These narrative descriptions provide the facts and data considered by the psychologist to the extent that they are ethically and legally allowed to share them. Therefore, a psychologist or neuropsychologist can satisfy Iowa Rule of Civil Procedure 1.500(2)(b)(2) by providing a thorough report.

Iowa Rule of Civil Procedure 1.508, which requires discovery of “facts known” to the expert, and all “compilations of data” or “tangible reports” cannot independently mandate the disclosure of psychological test materials and test data to non-psychologists. To the extent that Rule 1.508(1)(b) purports to require the production of test data and test materials, it is irreconcilable with Iowa Code section 228.9, which prohibits disclosure of psychological test materials to non-psychologists in “any . . . judicial . . .

proceeding.” There is no exception for personal injury cases or cases where a party has elected to not retain a psychologist or neuropsychologist.

If either these generally applicable rules of civil procedure could apply to require the production of test materials or test data, the more specific statute, Iowa Code section 228.9, applies as an exception to the rule. *See* Iowa Code § 4.7. There can be no doubt that between the two authorities, the Iowa Rules of Civil Procedure are general provisions, and Iowa Code section 228.9 is a special provision, narrowly applicable to psychological test materials. Therefore, the application of section 228.9 must prevail over any requirements in the Iowa Rules of Civil Procedure.

D. Iowa Rule of Civil Procedure 1.503(5)(a), governing objections to discovery requests, does not require the disclosure of test materials and test data to non-psychologists.

Iowa Rule of Civil Procedure 1.503(5)(a) does not allow a litigant to waive the statutory and ethical protections afforded to psychological test data. That rule only applies to “information otherwise discoverable.” *See* Iowa R. Civ. P. 1.503(5)(a). Psychological test data and test materials are not otherwise discoverable. Nor is psychological test data or test materials information that is within the possession of the parties. Psychologists possess the documents and information, and any privileges related to those materials

are controlled by the psychologists. Therefore, this rule cannot support the district court's decision.

III. A district court's discretion to enter a protective order regarding the psychological test data and test materials does not provide sufficient protections to advance the purposes of Iowa Code section 228.9.

A trial court's discretion to enter a protective order is not enough to safeguard psychological test security.¹⁰ The protective order that was ultimately entered in this case illustrates why. *See* D0069, Protective Order. In this case, the district court entered a protective order that required disclosure of test materials and test data to the court, counsel of record to the Parties, Defendant's adjusters involved with the claim, licensed psychologists retained by a party as an expert witness, non-psychologist expert witnesses, court reporters for depositions, and after additional argument and hearing, the empaneled jurors. *See* D0069, Protective Order ¶ 3. Although the protective order is detailed, the individuals who are most likely to be impacted by the disclosure of the test materials and test data are Iowan psychologists and neuropsychologists — nonparties to this litigation.

¹⁰ Although the protective order was entered after Plaintiffs sought interlocutory appeal, if this Court affirms the trial court decision in any respect, it should address the adequacy of the protective order entered in this case. *See Thornton v. Am. Interstate Ins. Co.*, 897 N.W.2d 445, 472 (Iowa 2017) (analyzing issue that was fully briefed and was likely to arise on remand).

The parties and the court do not have the same incentive to protect the integrity of psychological test results as do licensed psychologists. Dr. Tranel, the closest nonparty to this dispute, will almost certainly not be informed of the individuals who will receive the test data and materials. For example, if West Bend retains an expert, obtains that expert's signature on the protective order, but does not disclose them, Dr. Tranel has no realistic recourse if that retained expert elects to share the psychological materials or test data. This disclosure would be harmful, regardless of whether it was within a small, enclosed group (the expert's office) or on the internet. Likewise, it is often standard practice for clients receiving documents from litigation (like the unnamed insurance adjusters) to save documents on internal document management systems that can be searched by other individuals within the organization. Even if, at the end of the litigation, the document is deleted from that system, Dr. Tranel would have no mechanism to identify or destroy copies lurking on local desktops.

If the Legislature believed that disclosure of psychological test materials pursuant to a protective order was enough to protect psychological test data, it could have said so. *Cf.* Iowa Code § 236.5 (allowing courts to “grant a protective order” with certain provisions). It did not. Therefore, this

Court should not endorse using a protective order as an end run around Iowa Code section 228.9.

CONCLUSION

The district court's order compelling the production of psychological test materials and test data undermines the sound public policy underlying Iowa Code section 228.9. Therefore, the district court's ruling should be reversed with sufficient instructions to ensure that Dr. Tranel is not required to produce the test data or test materials to non-psychologists.

Respectfully submitted,

/s/ Stephanie A. Koltookian

Stephanie A. Koltookian, AT0012724

Jennifer E. Lindberg, AT0013329

BROWN, WINICK, GRAVES, GROSS

AND BASKERVILLE, PLC

666 Grand Avenue, Suite 2000

Des Moines, Iowa 50309

Telephone: (515) 242-2425

Facsimile: (515) 283-0231

E-mail: stephanie.koltookian@brownwinick.com

E-mail: jen.lindberg@brownwinick.com

ATTORNEYS FOR AMICUS CURIAE IOWA
PSYCHOLOGICAL ASSOCIATION

CERTIFICATE OF COMPLIANCE

This brief complies with the typeface and type-volume limitation of Iowa R. App. P. 6.903(1)(d), 6.903(1)(e)(1), and 6.903(1)(g)(1) because this brief has been prepared in a proportionally spaced typeface using Times New Roman, in font size 14 and contains 6,403 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

/s/ Stephanie A. Koltookian

Stephanie A. Koltookian

Jennifer E. Lindberg

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on July 29, 2024, I electronically filed the foregoing document with the Clerk of the Iowa Supreme Court using the Electronic Document Management System, which will send notification of such filing to the following counsel of record.

Robert R. Conklin
Elizabeth A. Boyer
James R. Lawyer
LAWYER, LAWYER, DUTTON, DRAKE & CONKLIN
2469 106th Street
Urbandale, Iowa 50322
E-mail: rconklin@lidd.net
E-mail: eboyer@lidd.net
E-mail: jlawyer@lidd.net

ATTORNEYS FOR PLAINTIFFS-APPELLANTS

Allyson F. Aden
Adam D. Zenor
ZENOR KUEHNER, P.L.C.
111 E. Grand Ave., Ste. 400
Des Moines, Iowa 50309
E-mail: allyson@zenorkuehner.com
E-mail: adam@zenorkuehner.com

ATTORNEYS FOR DEFENDANT-APPELLEE

/s/ Stephanie A. Koltookian _____
Stephanie A. Koltookian
Jennifer E. Lindberg