

# Raw Data: Mandatory Disclosure of all Facts and DATA Under NRCP 16.1

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Under Nevada law, defendants can move for a court-ordered medical examination with a doctor of their choice. The plaintiff community in Nevada has made significant efforts in recent years to increase transparency during these examinations. With the passage of AB 244 (2023), codified as NRS 629.620, a person compelled to attend an examination now has the right to have the examination videotaped with an observer present taking notes. Laws like these are crucial to ensure the client's rights are respected and that doctors are accurately reporting their results.

Unsurprisingly, defense doctors have found a way around transparency by refusing to produce the written material that belies their test results—the raw data. This most often occurs in the field of psychology and neuropsychology, but in some circumstances may occur in other medical fields. This is problematic. By using the data to support their opinions, but then refusing to turn it over under the guise of confidentiality, defense doctors use the data as both a sword and a shield.

## ***Nevada Rules of Civil Procedure, Rule 16.1 Requires Production of Raw Data. Failure to Turn It Over Can Result in Exclusion.***

Under NRCP 16.1(a)(2)(B)(ii), experts who provide a written report must disclose all "facts or data" considered by the witness in forming their opinions. This language unequivocally requires experts to produce their raw data. Yet, few experts actually comply. It may be that Nevada courts are not often faced with interpreting this provision of the rule as it relates to the production of raw data. It also may be that plaintiff lawyers for so long have accepted the argument that the medical community is required to keep this information confidential. But that is not the case, and attorneys should always argue that NRCP 16.1 controls.



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These "duties" of confidentiality are usually exaggerated. Most often cited in the field of psychology is the American Psychological Association ("APA"). The APA requires a doctor to "make reasonable efforts to maintain the integrity and security of test materials and other assessment techniques **consistent with the law** and contractual obligations. . . ." APA Ethics 9.11 (emphasis added). In Nevada, NRCP 16.1 is the relevant law that requires disclosure and therefore, consistent with the law and the APA, doctors can turn over their raw data free from ethical violations.

If that still is not enough, APA 9.04 specifically contemplates turning over the raw data when there is a court order:

### **APA 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.

(b) In the absence of a client/patient release, psychologists provide test data only as required by law or **court order**.

APA Ethics 9.04 (b) (emphasis added).

While raw data should be interpreted as an automatic disclosure under the rules of civil procedure, if an attorney moves for the raw data under NRCP 16.1, the court may issue an order compelling production of that data. Under the APA, producing the raw data in compliance with a court order is authorized. The defense contention that the raw data is confidential should never be taken at face value. The governing law is NRCP 16.1 which stands in favor of full disclosure.

### ***Why is Access to Raw Data Important?***

Gaining possession of an expert's raw data is critical. The first reason is obvious: to ensure that what the expert is reporting is accurate. For instance, if the client meets the criteria for a diagnosis based on their answers, but the expert reports they do not, the data will serve as undisputed evidence the expert misinterpreted the results. This occurs more than one might think. But raw data is important for other reasons, too. Understanding why your client answered questions the way they did, examining the cultural appropriateness of the questions, accounting for any language barriers or simply asking your client why they answered the way they did will provide invaluable insight even if the score is reported accurately by the defense doctor. Raw data must be examined because it is the basis for the expert's opinion.

### ***The Raw Data Should be Provided to Counsel***

Some experts may not refuse to provide the data altogether; instead, they will agree to exchange the results with the plaintiff's expert. Almost always, the defense doctors will refuse to provide the data to counsel. This approach should also be rejected. Having possession of the data yourself is key. While

a similarly-situated expert may issue a supplemental report that criticizes the defendant's interpretation of the test, your expert cannot cross-examine the defense expert at trial, nor can they take a deposition of the defense doctor. As counsel, you should be entitled to a fair opportunity to cross-examine the defense doctor on the results of their tests and how they reached those conclusions. This is impossible without the raw data.

There are very few cases in Nevada addressing whether raw data must be provided to experts or to counsel. Of course, the argument is that NRCP 16.1(a)(2)(B)(ii) does not create a carveout for raw data to go to anyone other than counsel, and therefore, it must be disclosed to counsel just like the report, CV, list of testimony and every other material contained within this rule. Defendants' reasoning also does not make practical sense. Under the defense logic, if the goal is to preserve the proprietary nature of the data, then a jury would be prohibited from hearing about any part of the data. In that scenario, even the plaintiff's expert would be prohibited from testifying on direct examination about the data. If that were the case, regardless of who possessed the data (plaintiff or an expert), the production would be rendered useless. Plaintiff has a fundamental right to understand the raw data and cross-examine the defense doctor on the same.

The Nevada Supreme Court addressed the importance of cross examination in the context of raw data in one, unpublished decision: *State v. Eighth Jud. Dist. Ct. (Ayala)*, Order Granting Petition, Dkt. No. 60468 (Nev. July 26, 2012) (unpublished). In that case, a criminal defendant was awaiting trial on murder charges. He used a psychologist to support his theory that he was unduly susceptible to certain questions posed by the police. The district court ordered the psychologist to turn over, to the prosecutor, testing materials from that evaluation, and the defendant filed a motion for reconsideration. The district court double backed by granting reconsideration and not allowing the prosecutor access to the materials. On appeal the Nevada Supreme Court granted the petition, holding that the district court abused its discretion. Importantly, the Supreme Court held that the raw data from the psychologist's test must be provided to opposing counsel to facilitate meaningful cross examination. The Supreme Court also rejected all arguments related to trademark and privacy claims, citing to Nevada's broad discovery rules.

Regardless of how clear the law may be, defense doctors will go to extreme lengths to ensure the raw data is not turned over. Recently, our client underwent a defense medical examination with a defense doctor who refused to provide his raw data to us. Our firm moved to exclude the testimony, arguing the defendants failed to abide by the disclosure requirements contained in

NRCP 16.1(a)(2)(B)(ii). The defendants were ordered to produce the data. Instead of producing the raw data to us, the defendants filed a motion for reconsideration. In support of their motion for reconsideration, the defendants' doctor attached a declaration with over 200 pages in support of why attorneys should not be able to access the data. Among other things, he argued that attorneys can effectively cross-examine the medical expert without direct access to the data. But most importantly, the doctor's declaration admitted that their own ethical guidelines (in this case, the APA) **allows** for disclosure of the raw data to counsel.

The declaration confirmed the only supporting evidence in favor of the defendants' non-disclosure argument is a body of non-authoritative opinion papers drafted by other doctors in the psychology community. It was overwhelmingly clear that the defendants' position as to the proprietary nature of their data was not supported by any authoritative law.

**Conclusion**

The requirement to disclose raw data is an area of law that will continue to develop, especially now in light of NRS 629.620. Defendants are likely to push back on turning over, recording or otherwise

disclosing any portion of their test which they deem "proprietary." Considering this, courts should stick with the mandatory language contained in NRCP 16.1 and exclude experts who fail to comply with the clear disclosure requirements contained in the rules.

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