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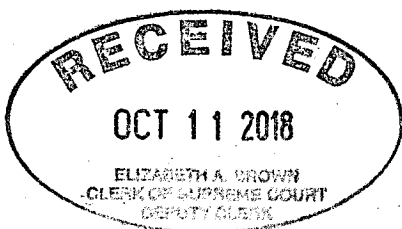
OCT 11 2018

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY *[Signature]*
CHIEF DEPUTY CLERK

Affidavit pertaining to proposed amendment to Rule 35. Physical and Mental Examinations

I, Robert A. Leark, Ph.D., make the following declaration based on personal knowledge and under penalty of perjury:

1. I am a licensed Clinical Psychologist in the state of Nevada. I make this declaration based on my own personal knowledge.
2. As part of my practice I administer psychological measures to individuals. I am well versed in the standards and practices for the administration of such examinations.
3. Extraneous factors that affect performance on testing would render the test results invalid and would affect opinions that could be offered regarding a given examinee.
4. As set forth there, I am opposed to recording because 1) it skews test results, 2) it violates the ethics code for my profession and 3) it violates my profession's obligation to protect test security.
5. The canon of ethics for my profession obligates me to refuse to perform an examination and testing that would be observed, video (or audio) taped, both because these conditions have been shown to skew the examination results, and to protect the confidentiality of the testing materials and methods as required by state law, my contracts with the test publishers, and the ethical guidelines in my profession.
6. Recording during psychological testing is inappropriate because the presence of an observer can taint the proceedings and impair the validity of the testing. Controlled research studies that were published in peer-reviewed journals have demonstrated that observation of testing has a significant negative effect on test results. If the testing was recorded and the test results were abnormal, it could be difficult to distinguish the effect of recording from the effect of other factors, including any injury or psychological problem suffered by the examinee.
7. In addition to the concerns about effects on the validity of the testing, set forth above, the Ethics Code of the American Psychological Association obligates me to protect the security of the test materials. In the same way that the organization responsible for the LSAT or the bar examination would not allow a test taker to make a record of the test items during administration of the LSAT or bar examination, psychologists cannot permit a recording of psychological test items.



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8. In 2000 the National Academy of Neuropsychology published an "Official Statement" about the "Presence of Third Party Observers During Neuropsychological Testing", Archives of Clinical Neuropsychology, Vol 15, No 5, pp 379-380 (2000). This professional organization's opinion was that

"[t]he presence of a third party observer during the administration of formal test procedures is inconsistent with recommendations promulgated in [published standards], that the psychological testing environment be distraction free." Id. at p. 379.

The same publication noted another reason why observation should not be permitted:

"Neuropsychological test measures have not been standardized in the presence of an observer. In fact, neuropsychological test measures have been standardized under a specific set of highly controlled circumstances that did not include the presence of a third party observer. The presence of a third party observer introduces an unknown variable into the testing environment which may pervert the examinee's performance from being compared to established norms and potentially precludes valid interpretation of the test results (Citation omitted)."

The same Statement noted that observer effect can cause performance on more complex tests to decline, leading to a ***"spuriously magnified picture of neuropsychological deficit"***. (Citation omitted). It can also ***"fundamentally alter the test session"***, particularly in comparison to an earlier standardized test without an observer. Id. The report went on to conclude that

"the presence of a third party observer during formal testing may represent a threat to the validity and reliability of the data generated by an examination conducted under these circumstances, and may compromise the valid use of normative data in interpreting test scores." Id. at 380.

I agree with these opinions.

9. The authors of Policy Statement on the Presence of Third Party Observers in Neuropsychological Assessments also cite to APA Ethical Standard 1.02, Relationship of Ethics and Law, which explicitly explains that,

"If psychologists' ethical responsibilities conflict with law, psychologist make known their commitment to the Ethical Code and take steps to resolve the conflict in a responsible manner."

10. Psychologist are ethically bound to provide reports that are as accurate as possible, and are prevented from doing so when factors that skew test results, such as recording, are introduced into the test environment.

11. Psychologists are also ethically bound to protect the security of testing materials and methods. Plaintiff's proposed videotaping (or even audio taping) of the test procedures would violate these standards.

12. Nevada Board of Psychological Examiners has formed an official position on third-party observers in psychological evaluations. This statement has been provided to the Nevada State Supreme Court as public comment regarding the proposed changes to Rule 35 of Nevada Civil Procedure.

"In the interest of protecting the needs of the public, it is the position of the Nevada Board of Psychological Examiners that allowing third-party observers, monitors, and/or electronic recording equipment during psychological and neuropsychological evaluations poses a significant threat to public safety. Observation, monitoring, and recording can significantly alter the credibility and validity of results obtained during psychological and neuropsychological medical evaluations, as well as forensic evaluations completed for judicial proceedings. Research indicates that the presence of observers, monitors and recorders during patient clinical interviews and evaluations directly impacts patient behavior and performance such that patients may avoid disclosing crucial information essential to diagnosis and clinical recommendations. Additionally, (neuro)psychological tests and measures are developed and standardized under highly controlled conditions. Observation, monitoring, and recording of these tests is not part of the standardization. Observation, monitoring, and recording of psychological assessment components (i.e., testing) of evaluations may distort patient task performance, such that patient weaknesses and strengths are exaggerated, yielding inaccurate or invalid test data. Furthermore, research highlights that this impact on performance is independent of method of observation. In other words, there is no "good" or "safe" way to observe, monitor, or record such (neuro)psychological evaluations without impacting and potentially invalidating the evaluation. Ultimately, deviations from standardized administration procedures compromise the validity of the data collected and compromise the psychologist's ability to compare test results to normative data. This increases the potential for inaccurate test results and erroneous diagnostic conclusions, thus impacting reliability of results and future treatment for the patient. In addition, the risk of secured testing and assessment procedures being released to non-Psychologists poses risk to the public in that exposure of the test and assessment confidentiality can undermine their future validity and utility."

13. The Board of Directors of the Nevada Psychological Association on September 25, 2018 formulated a position statement regarding third-party observation. The statement covers concerns over how third-party observation would impact patient disclosure, test validity, test performance, long term test security. The conclude that:

"...proposed changes which would allow third party observation, monitoring, or recording in IMEs would have a profound deleterious impact on the ability of licensed psychologists to appropriately conduct valid psychological and neuropsychological IMEs."

14. The authors of Policy Statement on the Presence of Third Party Observers in Neuropsychological Assessments noted above, also addressed the issue of security for

the test materials, and the neuropsychologist's ethical obligation to maintain such security:

"Involved third party observers may undermine the neuropsychologist's ethical responsibility to maintain test security. This ethical principle is most clearly presented in Ethical Standard 9.11 Maintaining Test Security (American Psychological Association, 2002; 2017):

"The term test materials refers to manuals, instruments, protocols, and test questions or stimuli..... 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." 2014).

15. If ordered to conduct the IME with audio or video taping I will be obligated to decline to perform the IME at all or perform an IME without testing of the mental abilities that are an issue in this case. It is my opinion too that other reputable qualified practitioners would decline to perform an exam or decline to perform testing of the mental abilities that are an issue in this case as well.

16. Requiring a third-party observer in psychological evaluations would eliminate all psychologists from participating in judicial matters due to ethical, legal, and test security concerns. This would have a deleterious effect on the judicial system's ability to assist the tries of fact in matter important to the pursuit of justice.

I HEREBY DECLARE THAT THE ABOVE STATEMENT IS TRUE TO THE BEST OF MY KNOWLEDGE AND BELIEF, AND THAT I UNDERSTAND IT IS MADE FOR USE AS EVIDENCE IN COURT AND IS SUBJECT TO PENALTY FOR PERJURY.

DATED this 6th day of October 2018.



Robert A. Lark, Ph.D.
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Member, Nevada Psychological Association