

Leotis M. Etkoff, Ph.D., A.B.N.

Nevada Licensed Psychologist No. 129
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CLERK OF SUPREME COURT
BY *[Signature]*
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October 24, 2018

Supreme Court Clerk's Office
201 S. Carson Street
Carson City, NV 89701

RE: "Pertaining to proposed amendment to Rule 35. Physical and Mental Examinations."

Dear Rule 35 Committee Members:

I submitted a letter (see enclosed) to your committee regarding my professional stance on the appropriateness of allowing non-involved third party observers into Rule 35 IMEs – specifically, forensic psychological and forensic neuropsychological examinations.

Much to my chagrin, I received a letter on Friday, October 19, 2018 from Thomas Kinsora, Ph.D., a colleague and another clinical neuropsychologist, who attended and spoke at the public meeting having to do with this matter. Dr. Kinsora wrote: "An attorney came up to comment and seemed to apologize that you [Dr. Etkoff] could not be here today but that in your letter to the Supreme Court you expressed a willingness to allow witnesses into your examination, implying also that you allowed such during test administration. She seemed to imply that she represented that you had asked her to represent you because you were unable to attend this meeting. She used your letter to argue that the comments made by Dr. Jones-Forrester and me are 'outside the mainstream.' I am assuming that she did not accurately represent what you wrote in your letter to the Supreme Court. You might wish to reclarify what your opinion is with the Supreme Court Justices."

To this end, I want the Nevada Supreme Court Justices to understand that I do not know this woman and, as such, did not request her to represent the opinions I expressed in my letter. The only difference I am aware of between the opinions expressed by me, Dr. Kinsora, and Dr. Jones-Forrester is that I allow audiotaping or videotaping of my Rule 35 interviews of examinees in order to accommodate the concerns of personal injury attorneys. This decision represents a conscious attempt on my part to enable a fair compromise between the positions of personal injury attorneys and defense attorneys while still maintaining test copyright laws and psychological ethical rules and professional standards.

In closing, I reiterate that I do not support audiotaping, videotaping, or observation of psychological and neuropsychological test administration for the reasons I noted in my original letter.

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OCT 29 2018
ELIZABETH A. BROWN
CLERK OF SUPREME COURT
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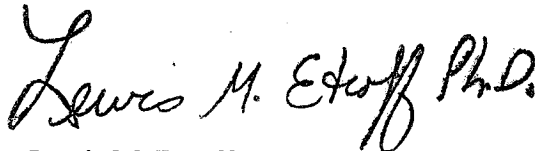
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RE: RULE 35
OCTOBER 24, 2018
PAGE 2

Thank you so much for your time and effort in this regard.

Sincerely yours,

A handwritten signature in black ink that reads "Lewis M. Etcoff Ph.D." The signature is written in a cursive style with a large initial 'L'.

Lewis M. Etcoff, Ph.D., ABN
Nevada Licensed Psychologist #129
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LME/jhs
T: 10/24/18

Leu M. Etkoff, Ph.D., A.B.N.

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October 4, 2018

Supreme Court Clerk's Office
201 S. Carson Street
Carson City, NV 89701

RE: "Pertaining to proposed amendment to Rule 35. Physical and Mental Examinations."

Dear Rule 35 Committee Members:

I am writing to your committee regarding proposed Rule 35 modifications, in particular, Recording the Examination and Observing the Examination. I have conducted Rule 35 examinations as a Nevada licensed psychologist and board certified neuropsychologist for three decades.

With all due respect, I would ask you not to rule that psychological and neuropsychological tests can be audio-recorded, video-recorded, or observed by any third party even a "noninvolved third party." Psychologists use copyrighted IQ, academic achievement, neuropsychological and objective personality tests. Each test was developed using very exact administration rules in which examiners were alone in the testing office with an examinee. There were no audio or visual recording devices or third party observers in the formal testing office during test development. Should you decide to allow recording of psychological and neuropsychological tests, they will become useless to psychologists and neuropsychologists throughout the United States because some attorneys will disseminate the test questions to other attorneys. Some attorneys will provide test questions to their clients in preparation for Rule 35 examinations. Test publishing companies would "go through the roof" if tests they have developed and sold became useless and were no longer able to be used by our profession.

Every national psychological and neuropsychological professional organization, including the American Psychological Association, in particular Division 40 Neuropsychology and Division 41 Psychology and the Law, the National Academy of Neurology, and the American Academy of Clinical Neuropsychology have published professional ethics codes requiring psychologists to protect test security and to administer tests as prescribed in each test's Administration Manual.

Regarding "noninvolved third party observers," all of the above-mentioned psychological associations allow for a psychological intern or postdoctoral psychology student/trainee to be present as a third party observer during test administration because it is an accepted method of teaching the psychologist how to administer tests, answer examinee questions during tests, and score tests. Your committee has recognized, "The examiner may have a member of the examiner's staff present during the examination if it is necessary in order for the examiner to comply with accepted standards of care or reasonable office procedures" (NRCP 35 ALT 1-Proposed, page 4)

Unlike other psychologists in the state of Nevada who are submitting to your committee their opinions regarding excluding third party observers from any and all parts of NRCP 35 examinations, I allow a

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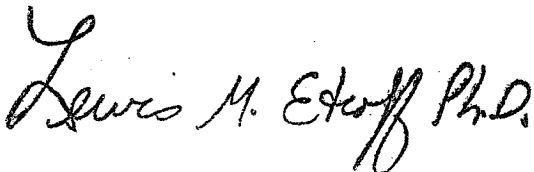
noninvolved third party observer audiotaping and videotaping of my examinee interviews. I do so to accommodate the legitimate concerns of personal injury attorneys, as your committee expressed in NRCP 35 ALT 1-3 Proposals wherein it stated the following: "It is envisioned that the primary purpose of such transcription would be to address by motion any irregularity that occurred during the examination" (page 3). I recognize that attorneys need to feel comfortable, for example, that an IME doctor refrain from asking their client any causation-related questions, or that the IME doctor, whether purposely or unconsciously, biased the interview questions toward the side that retained the professional. In the past several years, I have allowed audiotaping and videotaping of my interviews with plaintiffs so as to accommodate the attorney and the discovery commissioner and to aid the Trier of Fact. On occasion, I have allowed an employee from the examiner's attorney's office to sit in on the interview. I do not know any other Nevada psychologist who provides such accommodations, but I do so because I am confident that my interview questions are case appropriate and demonstrate the thoroughness I demand of myself as an expert.

Not every personal injury litigant was born and raised in this country. Many do not have sufficient command of the English language. In such situations, I insist upon having, in the interview and in the testing office, a certified interpreter. One can say that the interpreter is a "noninvolved third party." In such cases, I always indicate in my report that the validity and reliability of the psychological tests are, by definition, less robust than would be the case of an English-fluent American-born examinee. I also avoid evaluating verbal skills in these examinees.

In closing, I thank you for your consideration of my opinions in this very important matter. I will not include a list of professional references because I know that such a list will be submitted by Thomas Kinsora, Ph.D. and others in affidavits to you.

I would recommend one authoritative reference that I think you, as attorneys, would appreciate. It is written by Paul M. Kaufmann, J.D., Ph.D. who is a faculty member at the University of Nebraska, Lincoln. Dr. Kaufmann's article is entitled, "Protecting raw data and psychological tests from wrongful disclosure: A primer on the law and other persuasive strategies" (2009). The journal is *The Clinical Neuropsychologist*, 23, 1130-1159. I am enclosing a copy of this article for your committee's perusal.

Sincerely yours,



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LME/jhs
T: 10/04/18