

IN THE SUPREME COURT OF THE STATE OF NEVADA

TROY MOATS,

Petitioner,

vs.

The Eighth Judicial District Court of
the State of Nevada ex rel the County
of Clark and the Honorable Judge
Adrianna Escobar,

Respondents.

Troy Burgess,

Real Party in Interest.

Supreme Court No. 81912

Electronically Filed
Mar 06 2021 04:35 a.m.
District Court Case No. A-18-79440-2
Elizabeth A. Brown
Clerk of Supreme Court

PETITION FOR A WRIT OF MANDAMUS OR OTHER EXTRAORDINARY
RELIEF

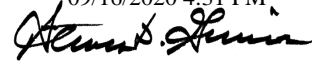
REAL PARTY IN INTEREST'S APPENDIX

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ALPHABETICAL INDEX TO REAL PARTY IN INTEREST’S APPENDIX

Defendant Burgess’ Objection to the Discovery Commissioner’s
Report and Recommendations and Request for Hearing on
Order Shortening Time,

Dated September 16, 2020 RA01-22


CLERK OF THE COURT

OBJ
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Attorneys for Troy Burgess

EIGHTH JUDICIAL DISTRICT COURT
CLARK COUNTY, NEVADA

TROY MOATS, an individual,

Plaintiff,

vs.

TROY BURGESS, an individual; Does I
thorough X, inclusive and Roe Business
Entities I through X, inclusive,

DEFENDANT(S)

CASE NO.: A-18-769459-C
DEPT. NO.: XIV

**DEFENDANT BURGESS' OBJECTION
TO THE DISCOVERY
COMMISSIONER'S REPORT AND
RECOMMENDATIONS AND REQUEST
FOR HEARING ON ORDER
SHORTENING TIME**

Defendant, TROY BURGESS, hereby submits the following as his Objection to the Discovery Commissioner's Report and Recommendations Regarding the Rule 35 Parameters for the upcoming Rule 35 psychological examination of Plaintiff with Lewis Etcoff, Ph.D. on October 12, 2020 and October 13, 2020.

Defendant Burgess hereby requests that the Court set this matter for hearing on an Order Shortening Time due to the Rule 35 psychological examination fast approaching and the two terms at issue needing to be determined in advance thereto. Discovery in this matter has been extended on account of Plaintiff's withholding and late disclosure of medical treatment that is directly relevant to his personal injury claims. In turn, the Discovery Commissioner ruled that a Rule 35 psychological examination is permitted, with no objection thereto having been filed by Plaintiff, and the parties were able to resolve all but two of the parameters. The two parameters at issue

1 being (1) the presence of third-party observer and (2) audio recording of the same.

2 While NRCP 35 holds a higher standard for permitting the same at a psychological Rule
3 35 examination given the confidentiality and proprietary information concerns as well as the
4 validity thereto, unfortunately NRS 52.380 was passed by the Nevada legislature thereafter and
5 runs directly in contradiction to the revised NRCP 35. This presents a separation of powers issue
6 that must be addressed by the Court as the Nevada constitution and Nevada case law clearly hold
7 that the legislature cannot usurp procedure in Nevada courtrooms, rendering NRS 52.380 moot.

8 Defendant Burgess files this Objection within the time allotted by rule, and, the Report and
9 Recommendation filed by the Discovery Commissioner on September 8, 2020.¹ The Objection
10 and Request for hearing is based on the papers and pleadings previously filed with the Court, the
11 attached Points and Authorities, and any argument the Court deems necessary at the hearing of
12 said motion.

13 DATED this 11th day of September, 2020.

14
15 WINNER & SHERROD

16 

17 _____
18 Thomas E. Winner
19 Nevada Bar No. 5168
20 Caitlin J. Lorelli
21 Nevada Bar No. 14571
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23 Las Vegas, Nevada 89102
24 *Attorneys for Troy Burgess*

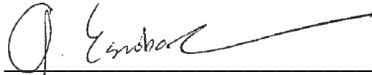
25
26
27 _____
28 ¹ See Discovery Commissioner Report and Recommendation, electronically filed on September 8, 2020,
attached hereto and referred to herein as **Exhibit G**.

ORDER SHORTENING TIME

It appearing to the satisfaction of the Court, and good cause appearing therefore,

IT IS HEREBY ORDERED that the foregoing **DEFENDANT BURGESS' OBJECTION TO THE DISCOVERY COMMISSIONER'S REPORT AND RECOMMENDATIONS AND REQUEST FOR HEARING ON ORDER SHORTENING TIME** shall be heard on the 29th day of September, 2020 at the hour of 9:30a.m. or as soon thereafter as counsel can be heard.

Dated this 16th day of September, 2020



DISTRICT JUDGE

Submitted by:

WINNER & SHERROD

3FB E4F A91E 8D2B
Adriana Escobar
District Court Judge



Thomas E. Winner
Nevada Bar No. 5168
Caitlin J. Lorelli
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Attorneys for Troy Burgess

AFFIDAVIT OF CAITLIN J. LORELLI, ESQ. IN SUPPORT OF DEFENDANT
BURGESS' OBJECTION TO THE DISCOVERY COMMISSIONER'S REPORT AND
RECOMMENDATIONS AND REQUEST FOR HEARING ON
ORDER SHORTENING TIME

I, Caitlin J. Lorelli, Esq., declare as follows:

I am an attorney at law licensed to practice before the Courts of the State of Nevada and before this Court. I am an associate with the law firm WINNER & SHERROD, attorneys of record for the Defendant, TROY BURGESS, in this matter.

If called as a witness, I would and could competently testify to all facts stated herein from my personal knowledge except where stated upon information and belief and, as to those matters, I am informed and believe them to be true.

I make this Affidavit in support of Defendant Burgess' Objection to the Discovery Commissioner's Report and Recommendation concerning the Rule 35 psychological parameters and the request this Objection be heard on an Order Shortening Time.

I hereby swear and attest:

1. That this Affidavit and Motion are not made for the purpose or intention of delay.
2. My office brings the instant Motion in good faith and in accordance with NRCP 35, Nevada case law, the Nevada constitution, and the persuasive authority contained herein.
3. That discovery in this matter has been continued for limited purposes in accordance with the Court's ruling on the same and by agreement between the parties on the same.²
4. That the Discovery Commissioner recommended a Rule 35 psychological examination be permitted in this matter, with no objection to the same being filed.³
5. That at the hearing before the Discovery Commissioner on May 28, 2020, a status hearing was set to address the parameters of the Rule 35 psychological examination.

² See Notice of Entry of Stipulation and Order to Extend Discovery – Second Request, attached hereto and referred to herein as **Exhibit A**.

³ See Discovery Commissioner's Report and Recommendation for May 28, 2020 hearing, attached hereto and referred to herein as **Exhibit B**.

- 1 6. That a Rule 35 psychological examination is currently scheduled with Lewis Etcoff, Ph.D.
- 2 on October 12, 2020 and October 13, 2020.
- 3 7. That the parties, in good faith, conferred multiple times and were able to reach an
- 4 agreement on 29 parameters and only 2 parameters were at issue. The 2 issues being the
- 5 presence of a third-party observer and an audio recording of the Rule 35 psychological
- 6 examination.
- 7 8. In advance of the July 31, 2020 status hearing, on July 22, 2020 Defendant Burgess
- 8 submitted a Memorandum Regarding Rule 35 Psychological Examination Parameters and
- 9 Status Hearing on the Same.⁴
- 10 9. That on July 23, 2020, Plaintiff submitted a Memorandum Regarding Rule 35
- 11 Psychological Examination Parameters.⁵
- 12 10. In response, on July 24, 2020, Defendant Burgess submitted an Opposition to Plaintiff's
- 13 Memorandum Regarding Rule 35 Psychological Examination Parameters.⁶
- 14 11. That on July 31, 2020, both parties appeared telephonically for the status hearing. That the
- 15 status hearing was inadvertently removed from the Discovery Commissioner's calendar
- 16 and proceeded to oral argument absent review of the submitted memorandums.
- 17 12. That Defendant Burgess's counsel made a separation of powers argument, arguing NRC
- 18 35 is controlling in the instant matter and that no good cause has been shown by Plaintiff
- 19 to permit an observer be present and an audio recording be made of the Rule 35
- 20 psychological examination. That additional argument was presented regarding the pressing
- 21 issues that arise from the presence of a third-party observer and audio recording as it
- 22 pertains to the accuracy of the examination itself as well as the protection of confidential
- 23

24 ⁴ See Defendant Burgess' Memorandum Regarding Rule 35 Psychological Examination Parameters and
25 Status Hearing on the Same, attached hereto and referred to herein as **Exhibit C**.

26 ⁵ See Plaintiff's Memorandum Regarding Rule 35 Psychological Examination Parameters, attached hereto
and referred to herein as **Exhibit D**.

27 ⁶ See Defendant Burgess' Opposition to Plaintiff's Memorandum Regarding Rule 35 Psychological
28 Examination Parameters, attached hereto and referred to herein as **Exhibit E**.

1 and proprietary information for future testing of this nature.

2 13. That the Discovery Commissioner ruled, in part, in favor of Plaintiff, permitting a third-
3 party observer and an audio recording for the verbal question and answer portion of the
4 Rule 35 psychological examination, contending NRS 52.380 is controlling as it was
5 enacted after the extensive revisions to NRCP 35.

6 14. That given the separation of powers set forth in the Nevada constitution and in accordance
7 with Nevada case law, Defendant Burgess respectfully contends NRCP 35 is controlling
8 relative to the two outstanding Rule 35 psychological parameters and he respectfully
9 objects to the DCRR for the reasons set forth herein.

10 15. That in order to protect both the validity of Plaintiff's Rule 35 psychological examination
11 results and the confidentiality and proprietary information contained in the Rule 35
12 psychological examination materials, no third-party observer should be present for the Rule
13 35 psychological examination and no audio recording of the same should be taken.

14 16. That the concerns listed herein are echoed by Dr. Lewis Etcoff, a licensed psychologist and
15 neuropsychologist, and a declaration from Dr. Lewis Etcoff is attached for this Court's
16 review.⁷

17 I declare under penalty of perjury that the foregoing is true and correct.

18 DATED this 11th day of September, 2020.

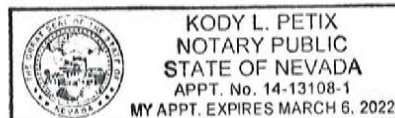
19 WINNER & SHERROD

20 *Caitlin Lorelli*

21 Caitlin J. Lorelli, Esq.

22
23 Subscribed and sworn to before me

24 this 11th day of September, 2020



[Signature]
NOTARY PUBLIC in and for said County and State

⁷ See Declaration of Dr. Lewis Etcoff, attached hereto and referred to herein as **Exhibit H**.

MEMORANDUM OF POINTS & AUTHORITIES

I.

INTRODUCTION

Defendant Burgess respectfully submits the following objection pursuant to Local Rule 2.34(f) to the Discovery Commissioner's Report and Recommendation on the two outstanding parameters for the Rule 35 psychological examination.

II.

STATEMENT OF RELEVANT FACTS

The instant matter arises from an alleged pedestrian-versus-vehicle event that occurred in a private shopping center parking lot on November 8, 2016. The facts and circumstances surrounding the underlying event are dispute. Plaintiff TROY MOATS (hereinafter referred to as "Plaintiff") alleges he was struck by a truck operated by Defendant TROY BURGESS (hereinafter referred to as "Defendant Burgess") while walking through a Home Depot parking lot. At St. Rose Dominican Hospital, Siena Campus, on November 8, 2016, Plaintiff presented with left leg pain which he reported was caused after being hit by a truck at 2 mph. Plaintiff also reported that he rolled up on the hood of the truck but denied hitting his head.

Defendant Burgess asserts that he was parked in the first stall of one of the Home Depot parking lanes, he placed his truck in reverse when it was safe to do so, he turned the knob in his truck to place the truck in drive, and when he looked up, Plaintiff's hands were on the hood of the truck, Plaintiff was staring at him with sunglasses on, Plaintiff proceeded to take four steps back, and Plaintiff proceeded to bring himself to the ground.

On February 13, 2018, Plaintiff filed his Complaint in the Eighth Judicial District Court, Clark County, Nevada, therein alleging negligence and negligence *per se* against Defendant Burgess based on his assertion that Defendant Burgess pulled his truck forward, striking Plaintiff throwing Plaintiff to the ground, and causing severe injuries and other losses. Thereafter, on November 26, 2018, Plaintiff filed a Request for Exemption from Arbitration, claiming a traumatic brain injury resulting in memory loss, feelings of inadequacy, and "hypoactive sexual desire

disorder.” Discovery thereafter ensued. A hearing before the Court on February 13, 2020 permitted additional limited discovery be afforded to Defendant Burgess on account of late disclosed medical records from the Veterans Affairs Hospital and undisclosed medical records from CognitiveFX. The parties entered a Stipulation and Order regarding the same.⁸

As part of the additional discovery, Defendant Burgess requested Plaintiff appear for a Rule 35 psychological examination with Lewis Etcoff, Ph.D. On May 28, 2020, the parties appeared before the Discovery Commissioner at which time it was ordered Plaintiff submit for a Rule 35 psychological examination and for the parties to discuss the parameters thereto.⁹ Plaintiff did not object to the recommendation for the Rule 35 psychological examination. Multiple discussions ensued thereafter, and the parties were able to agree on 29 different parameters. The two parameters at issue were presence of a third-party observer and an audio recording. Defendant Burgess’ suggested the following:

1. Pursuant to NRCP 35(a)(4)(B) and the 1999 Official Statement of the National Academy of Neuropsychology, Plaintiff may not have an observer present.
2. Pursuant to Advisory Committee Note 2019 and the 1999 Official Statement of the National Academy of Neuropsychology, the Rule 35 Examination will not be audio recorded as psychological and neuropsychological examinations contain confidential and proprietary testing materials.

In support of his position, Plaintiff deferred to NRS 52.380.

On July 22, 2020, Defendant Burgess submitted a memorandum to the Discovery Commissioner supporting his position that Rule 35 psychological examinations have unique considerations pertaining to confidentiality and proprietary concerns regarding the materials and the effectiveness of psychological testing as a whole as well as the case specific concerns of the validity of the testing results with a third party present.¹⁰ Plaintiff filed his memorandum

⁸ See Exhibit A.

⁹ See Exhibit B.

¹⁰ See Exhibit C.

supporting his position on July 23, 2020¹¹ and Defendant Burgess filed his opposition thereto on July 24, 2020.¹²

On July 31, 2020, the parties appeared telephonically for the scheduled hearing with the Discovery Commissioner. Unfortunately, the matter was inadvertently removed from calendar and the hearing proceeded absent the submitted memorandum. The Discovery Commissioner recommended that NRS 52.380 control the issue given the affect on a substantive right inherent in a physical examination and further recommended that Plaintiff have a third-party observer present and be permitted to audio record the question answer portion of the examination, not the written question portion, giving rise to the instant objection.¹³ The parameters of a rule 35 psychological examination are procedural in nature, not substantive, as set forth below. As such, the Nevada Rules of Civil Procedure are controlling on these two outstanding issues, not the Nevada Revised Statutes.

III.

LAW & PERSUASIVE AUTHORITY

On March 1, 2019, the extensive revisions to NRCP took effect. In part, NRCP 35, the controlling authority for Rule 35 examinations, holds as follows. NRCP 35(a)(4)(B) holds “[t]he party may not have any observer present for a neuropsychological, psychological, or psychiatric examination, unless the court orders otherwise for good cause shown.” Importantly, the Advisory Committee Note 2019 explains “[p]sychological and neuropsychological examinations raise subtler questions of influence and confidential and proprietary testing materials that make it appropriate to condition the attendance of an observer on court permission, to be granted for *good cause shown*.”

Further, NRCP 35(a)(3) holds, in part, “[o]n request of a party or the examiner, the court may, for good cause shown, require as a condition of the examination that the examination be

¹¹ See Exhibit D.

¹² See Exhibit E.

¹³ See Exhibit G.

audio recorded.” Advisory Committee Note 2019 explains “[a] generalized fear that the examiner might distort or inaccurately report what occurs at the examination is not sufficient to establish good cause to audio record the examination.”

In conjunction with the extensive revisions to NRCP 35, which set forth the unique and special considerations for Rule 35 psychological examinations, there is abundant persuasive literature suggesting that Rule 35 psychological examinations should neither permit a third-party observer or an audio recording.

Whether a third-party observer may attend a Rule 35 psychological examination was discussed in the United States District Court, District of Nevada on June 29, 2020 in *Freteluco v. Smith’s Food and Drug Centers, Inc.*¹⁴ Within the discussion of the Order, the Court held as follows:

1. **NRS 52.380 is a Nevada Rule of Evidence.**¹⁵ Chapter 52 of the Nevada Revised Statutes is titled “Documentary and Other Physical Evidence” and NRS 52.380 is the only statute under the title “Mental or Physical Examination.” This statute was added to Nevada’s Documentary and Other Physical Evidence Chapter following the 2019 legislative session.

2. **The testimony at a legislative hearing regarding NRS 52.380 is not compelling.**¹⁶ The testimony was given by Graham Galloway, a named partner in a personal injury firm in Reno, Nevada representing the Nevada Justice Association.¹⁷ In response to Mr. Galloway’s testimony, Dane A. Littlefield, the President of the Association of Defense Counsel of Nevada, testified the then-proposed changes to Nevada law were **procedural not substantive**. Notably, Mr. Littlefield said “**This is why the plaintiffs’**

¹⁴ See *Freelance v. Smith’s Food and Drug Centers, Inc.*, Order filed on June 29, 2020, attached hereto and referred to herein as **Exhibit F**.

¹⁵ *Id.* at 4: 14-22.

¹⁶ *Id.* at 4: 23-28 and 5: 1-23.

¹⁷ See Minutes of the Meeting of the Assembly Committee on Judiciary 18th Sess. (March 27, 2019) at 2 and 3-4, <http://gallowayjensen.com>.

bar is trying to cast this proposed statute as affecting a substantive right rather than a procedural one; it is the only way they can try to get away from the Supreme Court’s independent ability to draft and promulgate their own procedural rules. The Supreme Court of Nevada has enacted a comprehensive set of rules dealing with discovery, the NRCP, which includes Rule 35.”¹⁸ Further, the legislative history shows the Chairperson of the Assembly Judiciary Committee, Steve Yeager, confirmed the language of the Assembly Bill, which became **NRS 52.380, was proposed to and rejected by the Nevada Supreme Court.**¹⁹ Furthermore, a review by the Court of the entirety of the Meeting Minutes shows that no legislator comments on whether NRS 52.380 is substantive or procedural.²⁰ The Court looks to the *Erie* doctrine to make a determination on whether NRS 52.380 is substantive or procedural in nature.

3. **Under the *Erie* Doctrine, federal law governs the procedures applicable to Plaintiff’s Rule 35 examination by Dr. Etcoff.**²¹ Under the *Erie* doctrine, a federal court sitting in diversity must apply the substantive law of the forum state and federal procedural law.²² Applying these standards, the Court finds that **whether an observer is present in the neuropsychological examination is not substantive but procedural.**²³ NRS 52.380 sets forth procedures applicable to observers who may attend independent medical examinations. The statutory provisions therein are not outcome or case determinative, but **instead reflect a “procedural preference.”**
4. **Plaintiff failed to establish good cause for overcoming the majority rule that**

¹⁸ *Id.* at 15.

¹⁹ *Id.* at 7.

²⁰ *Id.* generally.

²¹ See Exhibit F at 5: 24-28, 6: 1-28, and 7: 1-17.

²² See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938)

²³ See Exhibit F at 6: 16-17.

excludes third parties from Rule 35 examinations.²⁴ The United States District Court, District of Nevada, agrees with the majority rule adopted by federal courts that **exclude third parties from observing medical and psychiatric examinations.**²⁵ Notably, **the introduction of a third party “changes the nature of the proceeding, much in the way that television ‘coverage’ of events qualitatively changes what occurs in front of the camera.”**²⁶ Importantly, in *Flack*, the California District Court noted **“Courts are often reluctant to permit a third party or recording device out of concern that the intrusion would (1) potentially invalidate the examination results; (2) fail to provide a level playing field[] as plaintiff was not required to tape record his examinations with his own health care providers; and (3) inject a greater degree of the adversary process into an evaluation that is to be neutral.”**²⁷

a. It was further found that relative to the good cause standard for permitting a third-party observer present at plaintiff’s examination with Dr. Lewis Etkoff, no good cause was shown as there is **nothing to support a concern that Dr. Etkoff has ever been or, in this case, will be abusive to someone he is examining.**

The *Freteluco* Court ultimately held that F.R.C.P. 35 governed the plaintiff’s medical examination and NRS 52.380 is not properly applied.²⁸ Moreover, the *Freteluco* Court found that the plaintiff failed to provide the Court with any evidence or information, other than generic concerns, warranting an observer present at Plaintiff’s Rule 35 examination.²⁹

Moreover, the 1999 Official Statement of the National Academy of Neuropsychology

²⁴ *Id.* at 7: 18-26

²⁵ See e.g. *Flack v. Nutribullet, LLC*, 333 F.R.D. 508, 517 (C.D. Cal. 2019), citing *Smolko v. Unimark Lowboy Trans.*, 327 F.R.D. 59, 63 (M.D. Penn. 2018).

²⁶ *Tirado v. Erosa*, 158 F.R.D. 294, 299 (S.D.N.Y. 1994).

²⁷ See *Flack*, 333 F.R.D. at 518 (citations and internal quote marks omitted).

²⁸ See Exhibit F at 8: 26-27.

²⁹ *Id.* at 8: 27-28 and 9: 1-2.

indicates in part:

“A major practice activity of neuropsychologists is the evaluation of behavior with neuropsychological test procedures. Many tests, for example, those of memory or ability to solve novel problems, depend to varying degrees on a lack of familiarity with the test items. Hence, **there is a need to maintain test security to protect the uniqueness of these instruments**. This is recognized in the 1992 and 2002 Ethical Principles of Psychologists and Code of Conduct (APA, 1992; Code 2.1, and APA, 2002; Code 9.11, Maintaining Test Security) ... In the course of the practice of psychological and neuropsychological assessment, neuropsychologists may receive requests from attorneys for copies of test protocols, and/or requests to audio or videotape testing sessions. Copying test protocols, video and/or audio taping a psychological or neuropsychological evaluation for release to a non-psychologist potentially violates the Ethical Principles of Psychologists and Code of Conduct (APA, 1992; APA, 2002), by placing confidential test procedures in the public domain 2.10, and by making tests available to persons unqualified to interpret them (APA, 1992; Codes 2.02, 2.06 and 2.10; APA, 2002; Codes 9.04 and 9.11).³⁰

IV.

LEGAL ARGUMENT

At the time of the hearing before the Discovery Commissioner, Plaintiff relied upon NRS 52.380 for the proposition that he is permitted to have a third-party observer present at his upcoming Rule 35 psychological examination along with the ability to audio record the same. Respectfully, under the separation of powers set forth in the Nevada constitution and in accordance with Nevada law, NRCP 35 is controlling on these two issues. In applying NRCP 35 to the instant matter, Plaintiff has failed to establish good cause for a third-party observer or audio recording of his Rule 35 psychological examination and the same should be denied.

A. Under separation of powers, that being procedural versus substantive mandates, NRCP 35 is controlling as the parameters of a Rule 35 examination are procedural.

As set forth in *Freteluco v. Smith's Food and Drug Centers, Inc.*, NRS 52.380 is procedural, not substantive. Meaning, NRCP 35 is applicable to the consideration of Rule 35 psychological examination parameters. This is a separation of powers issue and NRS 52.380 is neither controlling nor persuasive. While *Freteluco* is persuasive authority, the outcome in

³⁰ See The Official Statement of the National Academy of Neuropsychology (NAN) regarding Test Security: An Update which as approved by the NAN Board of Directors on 10/13/03, and was first published in the Archives of Clinical Neuropsychology (2000, 15, 383-386).

Freteluco is equally supported by the Nevada constitution and Nevada case law.

On March 1, 2019, Nevada’s revisions to NRCP took effect after a lengthy editing process. The revised rules significantly changed NRCP 35. On March 18, 2019, Assembly Bill 285 was introduced, which later implemented NRS 52.380, a legislative statute that runs in contravention to the judiciary’s NRCP 35. However, the Nevada constitution mandates NRCP 35 is controlling, not NRS 52.380.

The constitutional problem arises because the separation of powers is built into Nevada’s constitution.³¹ All of the three branches of government are equal. “In keeping with this theory, *the judiciary has the inherent power to govern its own procedures*.”³² NRS 2.120 expressly recognizes this authority.³³ “The judiciary is entrusted with rule-making and other incidental power reasonable and necessary to carry out the duties required for the administration of justice and to economically and fairly manage litigation.”³⁵ This means “the *legislature may not enact a procedural statute that conflicts with a pre-existing procedural rule*, without violating the doctrine of separation of powers, and *such a statute is of no effect*.”³⁶

Even when a rule of procedure is promulgated in conflict with a pre-existing procedural

³¹ See Nev. Const. Art. 3, § 1.

³² See *Berkson v. Lepome*, 126 Nev. 492, 499 (2010) (quotation omitted) (emphasis added).

³³ NRS 2.120(1). The Supreme Court may make rules not inconsistent with the Constitution and laws of the State for its own government, the government of the district courts, and the government of the State Bar of Nevada. Such rules shall be published promptly upon adoption and take effect on a date specified by the Supreme Court which in no event shall be less than 30 days after entry of an order adopting such rules.

³⁴ NRS 2.120(2). The Supreme Court, by rules adopted and published from time to time, shall regulate original and appellate civil practice and procedure, including, without limitation, pleadings, motions, writs, notices and forms of process, in judicial proceedings in all courts of the State, for the purpose of simplifying the same and of promoting the speedy determination of litigation upon its merits. Such rules shall not abridge, enlarge, or modify any substantive right and shall not be inconsistent with the Constitution of the State of Nevada. Such rules shall be published promptly upon adoption and take effect on a date specified by the Supreme Court which in no event shall be less than 60 days after entry of an order adopting such rules.

³⁵ See *Berkson*, 126 Nev. at 499.

³⁶ *Id.*

statute, *the rule of procedure supersedes the statute and controls*.³⁷ What is more, in addition to the constitutionally mandated bases for keeping separate those inherent powers of the judiciary, leaving control of court rules and the administration of justice to the judiciary, and thereby placing the responsibility for the system's continued effectiveness with those most familiar with the latest issues and the experience and flexibility to more quickly bring into effect workable solutions and amendments, makes good sense.³⁸

B. The Report and Recommendation permitting a third-party observer and an audio recording of the oral examination portion of Plaintiff's Rule 35 psychological should be vacated and an Order entered disallowing a third-party observer and any audio recording of the Rule 35 psychological examination in accordance with NRCP 35.

a. No third-party observer should be permitted.

With NRCP 35 controlling, Plaintiff should be precluded from having a third-party observer present and from audio recording any portion of the examination with Dr. Lewis Etcoff. Regarding a third-party observer, Plaintiff fails to provide the Court with any evidence or information, other than generic concerns, warranting an observer at his Rule 35 psychological examination. Plaintiff's suggestion that he may be nervous when appearing before Dr. Etcoff is the generic type of concern that does not support an exception to the rule and permitting Plaintiff to have a third-party observer present.

Based on NRCP 35(a)(4)(B) and NRCP 35(a)(3), as well as the persuasive authority listed herein, including the declaration of Dr. Etcoff,³⁹ the examiner himself, it is not appropriate for Plaintiff to have an observer at the Rule 35 psychological examination with Dr. Lewis Etcoff on October 12, 2020 and October 13, 2020. There are measurable and valid concerns with the validity in performing the testing on Plaintiff, the confidentiality and propriety of the testing material utilized by Dr. Etcoff, Covid-19 concerns, and Plaintiff has failed to demonstrate good cause for

³⁷ *State v. Connery*, 99 Nev. 342, 345 (1983) (emphasis added).

³⁸ *See Berkson*, 126 Nev. at 499.

³⁹ *See* Exhibit H.

1 requesting the same.

2 Importantly, as well, NRS 52.380(4) is wholly inapplicable and the observer, if permitted
3 by this Court for good cause, cannot suspend the examination. It is important that this provision is
4 not contemplated by NRCP 35 because an unaffiliated, lay person observer, who may be permitted
5 by the Court for good cause, is not qualified to determine if the examination exceeds the scope of
6 the examination or is abusive. NRCP 35 contemplates that a qualified examiner will act with
7 professionalism and should the scope of the examination be exceeded, as set forth in the
8 accompanying report, the issue may be addressed via motion practice.

9 **b. No audio recording should be permitted.**

10 Regarding audio recording, under NRCP 35 it is only permissible if the Court finds good
11 cause, which does not include a generalized fear of distorted or inaccurate reporting. It is not
12 simply permissible as suggested by NRS 52.380(3), which again is not the applicable standard..
13 Importantly, NRCP 35 favors no audio recording of psychological examinations, again for
14 concerns of confidentiality and proprietaries of the materials used and the validity of the outcome
15 of these examinations should the confidential and proprietary materials be exposed.

16 What is more, it is not the lay person observer as suggested by NRS 52.380(3), who is an
17 affiliate of the examinee, who may audio or stenographically record the examination. Should the
18 Court permit audio recording, on a finding of good cause, the Court must ensure the validity of the
19 audio recording itself. A friend and/or family member of the examinee audio recording the
20 examination, when he or she may alter the same, and whom has a bias in favor of the examinee, is
21 not reliable. An audio recording, if permitted, should be by a professional, uninterested third-party.
22 This would not include a third-party *medical* professional as suggested by Plaintiff who has no
23 training in audio recording.

24 **c. Plaintiff cannot establish good cause as required by the controlling statute NRCP**
25 **35, thereby precluding a third-party observer or audio recording of any portion**
26 **of the upcoming Rule 35 psychological examination.**

27 As evidenced by the Nevada Constitution and Nevada case law, the proper analysis for the
28

1 two proposed Rule 35 psychological examination parameters is NRCP 35 as this concerns a
2 procedural not substantive right. In reviewing Plaintiff's memorandum for good cause, Defendant
3 Burgess contends there is no good cause for permitting an observer and/or an audio recording at
4 the Rule 35 psychological examination with Dr. Etkoff. Dr. Etkoff is a professional who will treat
5 Plaintiff with the utmost respect and courtesy while also accurately reporting his findings.

6 Plaintiff's "good cause" for requesting the same is he may be nervous, and it may affect
7 the results of his testing.⁴⁰ With all due respect, being nervous going into an examination is natural
8 to all persons and in performing Rule 35 psychological examinations a situation Dr. Etkoff is
9 familiar with and can handle accordingly. As a professional, who seeks accurate results, if
10 nervousness was a concern to Dr. Etkoff in reaching accurate results, he may suggest observers in
11 these types of tests. However, for good reason, neither Dr. Etkoff nor other qualified examiners
12 make this suggestion.

13 Moreover, Plaintiff's medical records do not indicate that he brought his lawyer, his wife,
14 or another person to all other medical appointments, negating this concern. Plaintiff underwent
15 psychological examinations with his treating physicians by himself and the instant examination
16 should be treated no differently. All of Plaintiff's treating physicians were at one-point persons
17 whom he did not know, and the instant scenario is no different.

18 Plaintiff cites to rote check boxes on medical documentation for symptoms he may at times
19 experience, such as anxiety and low energy, to support his position that it is necessary to have an
20 observer and audio recorder. However, as evidenced by discovery and Plaintiff's social media,
21 Plaintiff routinely functions on his own in day-to-day activities and places himself in social
22 scenarios with no degradation. It is speculative at best to claim that being in a room with Dr. Etkoff,
23 a seasoned professional, will cause severe stress and/or some of the symptoms he has experienced
24 previously may arise. It is also speculative that Plaintiff has concerns Dr. Etkoff will not treat him
25 with respect necessitating recording of the same. In fact, the defense has already agreed to a
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27 ⁴⁰ See Plaintiff's Memorandum at 2: 27-28 and 3: 1-3.
28

parameter that Dr. Etcoff will treat Plaintiff with respect, as all medical examiners should. It is also unclear how the ability to listen to the audio recording *later* will provide Plaintiff comfort *now* in terms of being treated with respect as Plaintiff suggests.⁴¹ There is simply no evidence to support these positions.

Rather than presenting good cause, these requests appear to be an attempt of Plaintiff's counsel to inappropriately commandeer the Rule 35 psychological examination, as the evidence demonstrates Plaintiff's counsel has dictated medical treatment, at least in part, and/or improperly interrupt and/or terminate the Rule 35 psychological examination. Respectfully, Plaintiff has not demonstrated good cause for permitting an observer or an audio recording. Plaintiff's concerns, which again do not appear valid, also do not supersede the concerns of the confidentiality and proprietary materials utilized in these types of examinations and the concern of inaccurate findings by permitting outside persons in attendance at psychological examinations. Just as Plaintiff is permitted to present his theory of the case, Defendant Burgess is likewise permitted to present his theory of the case which is, in part, predicated on the validity of the Rule 35 psychological examination to be performed by Dr. Etcoff.

For these reasons, Defendant Burgess respectfully requests no observer and no audio recording be permitted during any portion of the Rule 35 psychological examination in accordance with NRCP 35.

C. In the alternative, the Report and Recommendation permitting a third-party observer and an audio recording of the oral portion of Plaintiff's Rule 35 psychological examination should be amended and an Order entered disallowing a third-party observer entirely and permitting limited audio recording by a disinterested third party professional.

While Defendant Burgess maintains no third-party observer or audio recording of any portion of the Rule 35 examination should occur, for the reasons and concerns set forth herein and

⁴¹ *Id.* at 3: 17-20.

1 in accordance with NRCP 35, should the Court be inclined to permit either the third-party
2 observation or the audio recording, Defendant Burgess suggests only audio recording of the oral
3 examination should be allowed. Further, the limited audio recording should be done by a
4 professional court reporter, not a medical professional as suggested by Plaintiff. While both an
5 third-party observer and an audio recording cause ample concern of the veracity of the results and
6 the confidentiality of the testing materials, an audio recording is less detrimental to the accuracy
7 of the results as opposed to a third-party observer.

8 During the oral portion of the examination, Plaintiff will be asked questions that are
9 sensitive in nature and he is less likely to provide honest and complete answers when a third-party
10 observer is present. While this concern is present for both third-party observers and audio
11 recordings, the third-party observer will be more detrimental than an audio recording in this regard.
12 However, again and importantly, both a third-party observer and audio recording affect the
13 accuracy of the results of the testing and the confidentiality of the proprietary materials.

14 **V.**

15 **CONCLUSION**

16 For the reasons set forth above, Defendant Burgess respectfully objects to the Discovery
17 Commissioner's recommendation permitting a third-party observer and an audio recording of the
18 oral portion of Plaintiff's Rule 35 neuropsychological examination with Dr. Etcoff on October 12,
19 2020 and October 13, 2020. As set forth herein, the two outstanding issues present a procedural
20 matter, not substantive, and NRCP 35 is applicable under separation of powers. In applying NRCP
21 35, no third-party observer or audio recording of a Rule 35 psychological examination is permitted
22 absent a showing of good cause, which Plaintiff has failed to demonstrate. Moreover, for purposes
23 of the validity of the test results and protecting the confidential and proprietary materials in this
24 matter, as well as all future psychological and neuropsychological testing, no third-party observer
25 and no audio recording should be permitted in any portion of Plaintiff's Rule 35
26 neuropsychological examination.

27 However, in the alternative, if the Court is inclined to limitedly permit either a third-party
28

1 observer or an audio recording of the oral portion of the examination only, Defendant Burgess
2 respectfully suggests that only an audio recording of the oral portion of the examination be
3 permitted as it is less intrusive and therefore less damaging to the accuracy of the results. This will
4 also alleviate concerns of social distancing during the ongoing Covid-19 pandemic. Further, if
5 permitted, the limited audio recording should be performed by a professional court reporter, not a
6 medical professional.

7 DATED this 11th day of September, 2020.

9 WINNER & SHERROD

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11 _____
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18 *Attorneys for Troy Burgess*

1 **CSERV**

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3 DISTRICT COURT
CLARK COUNTY, NEVADA

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6 Troy Moats, Plaintiff(s)

CASE NO: A-18-769459-C

7 vs.

DEPT. NO. Department 14

8 Troy Burgess, Defendant(s)

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10 **AUTOMATED CERTIFICATE OF SERVICE**

11 This automated certificate of service was generated by the Eighth Judicial District
12 Court. The foregoing Objection was served via the court's electronic eFile system to all
13 recipients registered for e-Service on the above entitled case as listed below:

14 Service Date: 9/16/2020

15 Matt Pfau	matt@mattpfaulaw.com
16 Ronald Pehr	rpehr@geico.com
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