IN THE SUPREME COURT OF NEVADA

LYFT, INC.,
Petitioner,

vs.

EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, in and for the County of Clark, and THE HONORABLE MARK R. DENTON,
Respondents,

and

KALENA DAVIS,
Real Party in Interest.

District Court No. A-18-777455-C

PETITIONER'S APPENDIX
VOLUME 5 (Pages 1001-1250)

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CERTIFICATE OF SERVICE

I certify that I am an employee of Lewis Brisbois Bisgaard & Smith LLP, and that on this 2nd day of December, 2020, I did cause a true copy of the foregoing **PETITIONER'S APPENDIX VOLUME 5 (Pages 1001-1250)** to be served via the Court's electronic filing and service system ("E-Flex") to all parties on the current service list:

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By /s/ *Heidi Davis*
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recommendations went to the full Supreme Court of Nevada, they rejected our changes for reasons we are still not clear on. At that point, we reassessed our position.

Contrary to the opponents of this bill who want to say this is a procedural matter, this is not a procedural matter; it is a substantive right. It is the right to protect and control your own body. The scenario we often see in this situation is that our clients are going through a green light or sitting at a stop sign, and somebody blasts through the light and clocks them, injuring them. They are then required to go to an examination by an expert who is hired by the defense. These are experts that are trained, sophisticated, and weaponized. They put our clients through an examination and, in the process, the clients are interrogated. Our clients have to go through this without any representation.

This is not a criminal situation, but in the criminal field, you often hear the terms "right to counsel," "right of cross examination," and "due process." Those terms do not necessarily transfer over into the civil arena. In the civil arena, we have what is called "fundamental fairness." Is it fundamentally fair that an injured person is required to go to a hired expert—an expert whose sole goal is to further the defense side of the litigation—have their body inspected, have their body examined, and then be interrogated without there being a lawyer present to represent that individual? There is nothing in the law in any arena where that occurs except for the personal injury field. That is what A.B. 285 is designed to do: bring some fundamental fairness to the process and to level the playing field. It is not a procedural rule. That is how it is being characterized by the opponents of this bill. It is a fundamental right that you should have representation in such an important situation. I will turn it over to my colleague who will explain the nuts and bolts of the bill.

George T. Bochanis, representing Nevada Justice Association:
This bill is very important to individuals who are being subjected to these insurance company examinations. The reason we are before you today is because this bill protects substantive rights. This is not a procedural rule, which you would usually find within our NRCP. Our *Nevada Rules of Civil Procedure* involve things such as how many years someone has to file a lawsuit and how many days someone has to file a motion or an opposition to a motion. This bill does not involve those types of issues but, instead, involves a substantive right of a person during an examination by a doctor whom he did not choose, does not know, and has no relationship with whatsoever, a doctor who was chosen by an insurance defense attorney. This is a doctor who is going to handle this patient. It is not really a patient because there is no doctor-patient relationship. This examinee is going to be touched and handled by this doctor with whom he has zero relationship. It is being forced upon him as part of this examination. That is why this is a substantive right, and this is why we are before you here today.

What I would like to discuss with you are the two components of this bill. The first is that we are requesting that an observer be present during these types of insurance company evaluator examinations. That observer can be anyone; it can be a spouse, parent, friend, or it could be the person's attorney or a person from that attorney's staff. Really, when you look at the current rule, the attorney/observer portion of it is really the only difference between the

current rule and what we are asking for as part of this bill. I am surprised there is any opposition to the attorney/observer portion of this bill. As Ms. Brasier said, this is already allowed by every other state that surrounds Nevada. California, Utah, and Arizona already allow attorney observers.

I can tell you from representing clients in workers' compensation cases in Nevada for more than 30 years, we already attend doctor examinations in workers' compensation cases—"we" being attorneys or our staff. It happens on every permanent partial disability evaluation. An attorney is present. To me, the reason is very obvious; you want openness during this process. You already have an agent of the insurance company, the doctor, present. This bill levels the playing field by having an attorney or attorney staff member present. Is an attorney going to attend every one of these examination? No, probably not. How about an attorney's staff member? Probably. A family member? Yes. These are options that a person who is being subjected to this type of examination should have. All we are seeking is a level playing field where during these examinations you have an agent of the insurance company—the doctor—present, along with an observer who could be an attorney or someone from the attorney's office.

The language in the proposed bill is very clear: the observer is just an observer. They cannot participate. They cannot interrupt. If anything like that happens, the doctor can terminate the examination, and you can go to court to work out your problems or differences. I can tell you that in attending workers' compensation permanent partial disability evaluations, I have never had a doctor terminate an exam during the hundreds of exams I have attended over 30 years. Never once have we ever had a problem with the doctor. Do the doctor and I get along at all times in these evaluations? No, probably not. However, we are able to keep it civil. We are able to keep it professional, and there is no reason an attorney observer being at the exams in this context is going to be any different. That is the observer component of this bill.

I should also mention that having an observer prevents abuse during these examinations as well, because it keeps everything open and transparent. Think about it in a practical sense. We have had doctors who have had some issues during these exams, and we felt as though we should not need to have a hearing for every examination to show that a doctor is having problems with taking advantage of people during some of these examinations. Fortunately, it is a minority of doctors with whom we have had these issues. This observer keeps it open.

The second portion of the bill is audio recording. It is not video recording. This can be done as simply as using a cellphone, or it can be done as complicatedly as bringing in a court reporter. In practicality, how many times is a court reporter going to be brought in even though this language allows it? Probably 1 percent of the time, if at all. There are so many other means of communication whereby you are able to record. Again, this promotes openness and transparency during these examinations. The beauty of the language of this bill is that the doctor can also record it. You have a recorded version by the doctor, you have a recorded version by the patient or observer, and you know what happened. There is none of this "he said, she said." I cannot tell you how many cases I have had to litigate over an issue

where an examinee goes to one of these exams, we receive the report back, and there are things in it that are totally unfamiliar to me. I ask the client and she says to me, "I never told him that." Now we have this dispute over what was said during the exam. Now it is in the report by a doctor who will be testifying to that during trial. Again, audio recording by both the patient or observer and the doctor prevents this from happening. It keeps us out of court, and it keeps these cases moving.

In fact, before she was appointed to the Nevada Court of Appeals, the discovery commissioner in the Eighth Judicial District Court in Clark County already allowed audio recording on all cases. The problem with the current language in the current rule is that audio recording is only allowed for good cause. Now, what "for good cause" means is uncertain. Every time there is an examination where audio recording is requested, we are going to have litigation of these cases. It is going to cause delays. It is going to cause additional costs. It is going to cause clients' access to justice to be delayed on these types of cases. That is why this bill before you today does not provide or require this "for good cause" standard on audio recordings. As I stated before, the discovery commissioner had already allowed this type of audio recording without a showing of good cause. Again, we want to keep these examinations open and transparent, and we want these clients of ours to be able to move on with their cases without having to litigate every single issue because this examination is being requested by the insurance defense attorney.

These are the two elements, and these are the differences between what the existing rule says and what this bill says. Again, we are before you today because an examination by a doctor who is not of this person's choosing involves a substantive right. It is something that should be within a statute and not a procedural rule.

Chairman Yeager:
I want to make sure we have the record clear in terms of the process that got us here. The Supreme Court of Nevada was looking to make substantial changes to the NRCP, and those changes went into effect March 1, 2019. We are talking about Rule 35. It sounds as though there was a subcommittee that I believe Mr. Galloway chaired.

Graham Galloway:
That is correct.

Chairman Yeager:
So there were eight members of that subcommittee, and there was a 7-to-1 vote in favor of advancing what appears in A.B. 285. That was the recommendation, 7-to-1, out of the subcommittee to the entire Supreme Court of Nevada. Do I have that right?

George Bochanis:
There were some changes made such as the observer only being a person who was not the attorney and not associated with the attorney's staff. For the audio recording, there was nothing about the "for good cause" requirement being involved.

Chairman Yeager:
Essentially, the recommended language that came out 7-to-1 was not adopted by the Supreme Court. We do not know why, but it simply was not adopted.

Graham Galloway:
That is correct.

Chairman Yeager:
I just wanted to make sure we had that clear on the record.

Assemblywoman Backus:
I noticed you were both on the subcommittee, and I just read our new NRCP. When looking at the separate branches of government, the court can implement court rules consistent with Nevada law. I was trying to put these two together, and I am thinking about how the language is presented in section 1, subsection 1 of A.B. 285 where it says "An observer may attend," for example. The current Rule 35 is almost on par with that rule. I am not sure if that was your intent. It does not sound as though it was.

I also just want to clarify how an independent medical examination works. It is either by stipulation or by order. It looks as though this new rule keeps it by order. What will end up happening? When I was reading the very lengthy comments to the rule, it seemed as though the court and committee spent a lot of time working on that. Someone could raise the issue of having an observer being present, and likewise with the audio. That could be agreed to, or it could be put into the opposition if they are challenging a request for the examination. When I was looking at Rule 35 and A.B. 285 this morning, I could almost read them in sync. The only thing that was glaring to me was the issue of the attorney. I have to admit, I kept asking my friends who are attorneys if they really want to be present for this. That was the only thing I thought was agreed upon by all three amendments that were sent over to the Nevada Supreme Court with the petition. It seemed as though each of them excluded the attorney. That was the one thing I noticed. If you could clarify that for me, that would be great.

Graham Galloway:
You are correct that the language is similar, but it is distinct. From a practical standpoint, you are also correct that most of these examinations are done by stipulation. You work out the details ahead of time. With some attorneys, you can hash out the details. With other attorneys, you cannot. We have made changes that are not very dramatic, but they are substantial. Instead of having to show good cause, if you cannot agree with the other side as to the parameters of the examination, and you have to go the motion route, the rule provides that this can be done by motion or agreement. Most of the time it is by agreement. Under the existing rule, if you can agree, you have to show good cause for an observer. The big change we are proposing here is that you do not have to show that good cause; you automatically have the right to have an observer present, whether he or she be an attorney, an attorney's staff member, or a family member or friend.

The other point you raised about the differences between the current rule and our bill is that this would allow for an attorney observer. In reality, I do not foresee myself going to any of these examinations. I really have no interest in doing that. I think I could use my time better elsewhere. It would be a staff member or a family member. Currently, what I do—which, perhaps, is not necessarily authorized by the rule—is have all my clients take a family member. No one has ever objected to that. That, in practicality, is what is going to happen in most cases. There are certain experts who are marked for special treatment because they have been proven to be extremely biased. Those individuals may end up having a staff member from the law firm attending their examinations. Again, I think in the run-of-the-mill case, you are sending a family member or a friend.

George Bochanis:
As far as the mechanics of the examinations we have experienced in my office, we get a letter from the insurance defense attorney where the attorney says, "We want to examine your client on this date at this time. Bye." Of course, it does not work that way. We call them and say, "Sure, pursuant to these conditions." Or, under the rules, we can file a motion. My experience has been that we were able to agree less than half the time on these conditions. Since this rule has gone into effect on March 1, we have received three letters requesting clients to submit to examinations, and we have not been able to agree to the conditions once. That is because of the "for good cause" showing on the audio recording portion. We disagree as to what that means, and this was our concern when the current rule came out. When you allow that type of vagueness over this type of examination, there is just not agreement on it. This rule has been in effect for 27 days. We have received three letters in 27 days requesting these exams. We have not been able to agree to one of them. That is because of this audio recording "for good cause" requirement as well as the observer issue. I have told attorneys I should be able to send a staff member to one of these, and their objection is that it is not what the rule says. The rule says it has to be a family member. On some of these more complicated examination-type cases, we want a staff member there. This law we have proposed provides and allows for that. I think these are important distinctions.

Again, this is a substantive right. The procedural part of Rule 35 is, how do you get there? You agree to it or you file a motion. That stays with NRCP 35. The mechanics of the actual examination is a whole other issue. That is a person being handled and touched by a doctor who is not chosen by them but selected by an insurance defense attorney. That is why that is a substantive right. That is why we have proposed A.B. 285. This is something we thought about after the NRCP committee. We said to ourselves, You know, this really is not a procedural rule. I hope that helped.

Assemblywoman Backus:
It did. I was just trying to correlate what we have now as our rule and what the law is going to provide for. We all know as practitioners that we are going to continue experiencing the court reading of this law if it gets implemented along with Rule 35. I think we will have to deal with it through offers of judgment, as well as certain interpleader actions depending on what remains in our statutory provisions. Just so I am clear, it looked as though everyone had originally agreed that attorneys would not be present. The type of work I do sometimes

is more product liability. When an attorney shows up, I show up. It seems as though on a personal injury case, the goal is now to basically eliminate this from the rule and allow attorneys or someone from their office to be present. Another thing that looked as though it came out of nowhere was the whole examination of neuropsychological, psychological, or psychiatric examinations wherein an observer was going to be completely eliminated. I take it that through the proposal of A.B. 285, it would negate that provision as well.

George Bochanis:
The carve-out for psychological examinations completely took us by surprise. It was never discussed. No exceptions were ever allowed for psychologists under this bill. I have to be honest with you; I do not know who is more vulnerable and who more requires an observer with them during these examinations than a person with a traumatic brain injury. That came to us as a complete surprise. That was something that was never discussed during the NRCP committee and was never provided as being a carve-out for this type of specialty area.

As a result of that occurring, we have provided to the Committee as exhibits some documents we think support our view that there should not be some special exception for psychologists on these examinations [pages 51-76, (Exhibit C)]. A few psychologists appeared at the Supreme Court of Nevada hearing on this rule, and they testified that what they do is secret—the tests and the way they grade their tests are trademarked, secret items so they cannot be disclosed—and as a result of that, you cannot have an observer present. Well, that is not so. I have submitted to you 74 websites that contain copies of these exams and how they are graded and how they are evaluated [pages 51-59, (Exhibit C)]. So much for the proprietary or secret nature of these examinations.

These psychologists also testified that an observer being present during a psychological evaluation destroys the entire evaluation because if somebody is present, the examinee is not going to be as open. We have also submitted an affidavit from a psychologist with 20 years of experience who states that the mere fact this psychological exam is conducted by someone this person did not select, really puts the examinees in a position where they are not going to be entirely forthcoming [pages 60-76, (Exhibit C)]. They are going to hold things back because it is an examination that has been forced on them. Simply having somebody present is not going to change the nature of the examination at all. In fact, an observer being present during this examination is more required than any other type of examination because certain distractions—the inflection of the voice of this psychologist examiner and other things like that—could have a huge impact on the findings of the examination. Not having an observer present affects that. We have submitted these items, the affidavit and the 74 websites, as further evidence that there should not be a carve-out for psychologists.

Assemblywoman Nguyen:
You have mentioned workers' compensation. It is my understanding that those provisions that are similar to those which are contained here are also statutory as a part of *Nevada Revised Statutes* (NRS) 616C.490. In addition to the workers' compensation, are there any other provisions that are statutory as well? Obviously, there is some precedent here, so I was wondering if you are aware of anything else.

George Bochanis:
I am sure there are; I just cannot think of any right now. I can tell you that in our survey of looking at other states where an observer is allowed to be present, it is a mix between procedural rules and statutes. Other states have considered it to be a statutory right. It is a good point. There are a lot of other statutes and a lot of other things within our NRS that are partially statutory and are partially procedural, which are covered by NRCP. It does occur commonly.

Assemblywoman Nguyen:
As far as how workers' compensation works, do you not have the same concerns that you do under these current rules as they have been implemented in March?

George Bochanis:
We have found in workers' compensation cases that we have had zero problems with attorney observers being present. Although it is true that I certainly am not there at 100 percent of these permanent partial disability examinations, 99 percent of the time my staff is. It is not a family member. That is because there are certain mechanics of how these examinations on workers' compensation cases are supposed to be performed. If they are not performed in a certain way, it invalidates the exam. So we always have a staff member present at these. We have never had a doctor terminate an examination. I have never received a call from a doctor saying my staff member did something inappropriate, or from the insurance adjuster or defense attorney for the workers' compensation case objecting to something we did. An observer is an observer. That is our intention on this bill, and that is what occurs in workers' compensation cases now.

Assemblywoman Krasner:
In looking at some of the opposition cases, they say this is an attempt to narrow the pool of doctors willing to conduct these Rule 35 examinations. Can you please address that?

Graham Galloway:
Of all the other states that allow attorney observation and allow audio or video recording, there has never been an issue about the availability of defense experts. If you read the comments presented by the opposition, it is a fear, but there is no actual evidence. This, unfortunately, is a lucrative area of practice. There are going to be experts who will participate in this arena. There is no evidence—absolutely none—that this prevents the defense from hiring somebody. In the workers' compensation arena, there is never an issue. When I read that argument, I start seeing smoke. I see nothing else. From the experience of our neighboring sister states, there is absolutely no evidence that occurs.

Alison Brasier:
I think this idea that it is going to narrow the pool of doctors is kind of just a scare tactic—a red herring—to distract from the actual issues. In my view, I do not see why this would narrow the pool. It provides protection for the doctors so there is an objective record of what happened during the examination. If there is a dispute, everyone has a record of what happened. It is a protection for the claimant, but also for the doctor. I think this idea that it

will narrow the pool of doctors because we are going to create an objective record really has no basis in fact.

Chairman Yeager:
Can you give the Committee a sense of how much these examinations typically cost? I know they are paid by the defense, but is there a range in terms of what a physician would charge to do an examination such as this?

George Bochanis:
We have provided as an exhibit testimony from a doctor, Derek Duke, where the district court conducted 15 days of hearings on the appropriateness of this specific doctor conducting Rule 35 examinations [pages 9-43, (Exhibit C)]. This doctor testified that over the course of a year, he earned more than $1 million performing just these examinations. We have seen doctors charge anywhere from $1,000 to $10,000 for these examinations. That includes the review of medical records and the examination of the injured person.

Chairman Yeager:
The reason I ask that—I am not trying to drag anyone through the mud—is because I wanted to dovetail off Assemblywoman Krasner's question about the availability of doctors. It does sound as though it can be lucrative, so I do not know that it would come to pass if we were to enact this bill. We have heard some bills in this Committee in the criminal context about the importance of recording confessions. We have also had body camera bills. Some of the reasoning there is just what Ms. Brasier said: if you have to go into court later and have a dispute about what was said or what happened, it is obviously very helpful to have a video recording. I know in this circumstance we are not talking about video, because it is a medical examination. We are talking about audio. Is part of the reason you brought this bill forward to try to eliminate some of the litigation costs that happen after these examinations in front of the court?

Graham Galloway:
Exactly. That is the intent, or at least a major component of the intent of this bill: to eliminate the squabbling, the fighting, the extra unnecessary litigation, and the expense involved in that. That is part of the intent of the bill.

Chairman Yeager:
At this time, I will open it up for testimony in support.

David Sampson, Attorney, Law Offices of David Sampson, Las Vegas, Nevada:
I have seen some of the issues brought up in dispute of this particular bill. There is a clear understanding among the defense bar, the plaintiffs' bar, and in the insurance industry, of the importance of operating in the sunlight. When an insurance company learns of an incident—whether it is someone falling somewhere, a car crash, or whatever else goes on—one of the very first things they try to do is get a recorded statement. It is always important to them that they have a tape recording or some kind of digital record of what the individual has to say about what took place and what their injuries are. I have never once heard of an insurance

adjuster doing a statement of someone who has been injured and not making a record of that. So they understand and appreciate the importance of operating in the sunlight and making sure we have a record. Every time a deposition is taken, we have a record that is made. That is not just pursuant to the rules. It is important to understand and have a court reporter write down everything that goes on. More and more nowadays, we have a large percentage of depositions taking place with a video recording because it is important that we catch not only what is said, but inflections in voice, facial features, body language, et cetera. The defense bar, the plaintiffs' bar, and the insurance industry clearly understand it is important to have a clear, accurate record of what goes on. Whenever there are written questions submitted—they are called interrogatories in legal proceedings and discovery—they wisely always insist that those be signed under oath, verified, and notarized so we have a clear depiction of what the individual said and what took place when these different things happen.

Then, miraculously, when we turn to these Rule 35 examinations and when it comes time to take one of my clients and put him or her in a room with a highly paid expert from the defense and shut the door, all of a sudden, the insurance industry and the defense bar—and I would imagine any other opponents to this particular bill—do not want any record made. They want the conversation to have no witnesses, no transcript, no recording, and no idea as to what went on other than the proverbial "he said, she said." As Ms. Brasier mentioned, when you have a "he said, she said" situation come down to a layperson who did nothing wrong but was sitting at a stoplight when someone came through and hit him from behind with their car, and the person on the other side is a doctor who has been practicing in Nevada for 20 years, there is a tendency of jurors—no matter who is right, who is wrong, or what the truth is—to side with the defendant's expert and say whatever they are saying took place must actually be what happened. It is extremely unfair. I have seen, personally, on multiple occasions, the defense come back from the examining doctor with a report that contains information my client says is not true. If you review the order regarding Dr. Duke, there were multiple times when Dr. Duke said things took place in the examination that actually could not be true.

I would like to share two quick examples. When I was a very young attorney, in 1999 and 2000, I was involved in a case where my client was sitting in a lawn chair one evening in his driveway when a drunk driver drove across the road, up over the curb, across part of the lawn, and into the driveway, hit my client who was sitting in the lawn chair, and hit the house he was sitting in front of. My client was asked to attend an examination because his leg was shattered. He had $60,000 in medical bills as a result of his first night in the emergency room. They had the defense and the insurance company for the drunk driver hire a doctor to examine my client. When that report came out, I was astonished to read the doctor's report which said my client indicated he was walking in what the defense attorney later argued was the road when he was hit by this car. Of course, I went to my client as a young attorney not realizing what was going on—I even wanted to give deference to the doctor—and asked him why he told the doctor he was walking in the road when we had eyewitnesses and knew he was sitting in a chair in his driveway. Of course, my client was very insistent that was not what he said. We had to have this "he said, she said" dispute between the doctor saying, "Oh no, Mr. Johnson told me he was walking in the road," and my client saying, "No, I told the

doctor I was sitting in a chair." We had to get into this big mess with additional eyewitnesses who, thankfully, were there to say, "No, he was sitting in a chair and not trying to walk." In my opinion, they are trying to manufacture an issue that, first of all, has nothing to do with medical treatment. Why the doctor would even be talking about whether you were walking in the road or sitting in a chair is beyond me. It shines a light on the issues. It would have been nice, in that case, to have a record or an observer to say, "No, I was there. I heard exactly what Mr. Johnson said, and he said he was sitting in a chair as he said every other time he has talked about what happened in this horrific incident."

I had a situation recently in a case that I had where another doctor who had examined my client came out and said my client had misrepresented to me facts about a magnetic resonance imaging scan she had. My client said that was not what took place. I have seen it a number of times. I know Mr. Galloway had mentioned the experts are weaponized. I am not going to comment on whether that is the case or not, but I would like you to consider this: in 20 years of practice I have had hundreds of clients go and have an examination by a doctor who was hired and retained by the defense and the insurance company. Out of all of those cases, I can remember one time where the doctor examined my client and said these injuries that this individual sustained were due to this particular crash. In every other case I can recall, the doctors have invariably said the injuries were either not caused by this crash or they were not to the extent that the treating doctor had claimed.

The arguments related to the chilling effect simply do not hold. We see in our neighboring states that it is not the case. I would ask you to please consider this: I have had both male and female clients call me in tears from the doctor's office saying they were subject to being yelled at—what they considered to be abuse—and they did not know what to do. Please have these examinations take place in the sunlight and allow the citizens of Nevada to have the same rights as our sister states to be protected and to have an accurate depiction of what takes place in these examinations.

Chairman Yeager:
Is there additional testimony in support? [There was none.] Is there anyone opposed to A.B. 285?

Dane A. Littlefield, President, Association of Defense Counsel of Nevada:
I will stick mostly to my prepared statement (Exhibit D), but I do have additional comments that I will work into that. In support of my testimony today, I have provided the Committee with a copy of the current version of Rule 35 (Exhibit E), the former version of Rule 35 (Exhibit F), the Supreme Court of Nevada administrative order enacting the amendments to NRCP (Exhibit G), and various statements in opposition to the bill by members of the Association of Defense Counsel (Exhibit H). I have also provided a Supreme Court of Nevada case addressing the separation of powers issue that is implicated by this bill (Exhibit I).

One of the things we heard earlier was an attempt to characterize Rule 35 as affecting a substantive right and distinguish it from a procedural rule. That is simply not the case.

The *Nevada Rules of Civil Procedure* are made to address civil litigation through all phases, including the discovery phase, whether that is dealing with a Rule 35 examination or interrogatories as was addressed by the supporters of the bill.

The first issue is that A.B. 285 appears to be an attempt to reduce the pool of doctors willing to conduct Rule 35 examinations and create an unfair advantage, which has already been addressed by the Supreme Court of Nevada and the committee assigned to revise NRCP. This bill would allow the observer of a Rule 35 examination to be the plaintiff's attorney or a representative of the attorney, as you are aware. This could lead to unnecessary confrontations with doctors and unnecessary motion practice. Assembly Bill 285 only allows the plaintiff's attorney to attend a Rule 35 examination. There is no provision for the defendant's attorney or an observer representative of the attorney to be present. This creates a situation in which the plaintiff's attorney has an unfair, and perhaps unethical, opportunity to engage in direct communications with the doctor selected by defense counsel without defense counsel being present. The solution to that would be to simply not allow attorneys in the room. Under the current rule, there is a provision to allow recording by audio means for a showing of good cause. I would submit that good cause could be if a plaintiff's attorney has concerns about a doctor who has been retained by the defense who—I will remind the Committee—is already subject to the Hippocratic oath. A doctor is not an insurance company hitman.

The bill would allow the plaintiff's attorney to make a stenographic recording of the examination as an alternative to audio recording. This contemplates the presence of a court reporter. It is my understanding that many doctors would decline to participate in Rule 35 examinations where a lawyer and a court reporter would be present in the examination room. This would create an atmosphere in which many doctors would no longer be willing to participate in the examinations, and this would create an unfair advantage for the plaintiff's personal injury bar by substantially reducing or, perhaps, eliminating the defense bar's ability to retain them.

The bill allows audio or stenographic recording and limits the audio or stenographic recording to "any words spoken to or by the examinee during the examination." This suggestion is unworkable and would require the recorder or stenographer to stop recording anytime a word is spoken to anyone else in attendance at the examination. Additionally, A.B. 285 contemplates that the examination might need to be suspended for misconduct by the doctor or the attorney observer, with potential court review. However, because an audio or stenographic recording cannot include anything the lawyer said to the doctor or the other way around, there would be no record of the alleged misconduct and no way for a court to decide a "he said, she said" dispute. These concerns are already addressed by the current Rule 35.

Assembly Bill 285 allows the plaintiff's attorney to suspend the exam if the lawyer decides that the doctor was "abusive" or exceeded the scope of the exam. However, the plaintiffs' bar is concerned with eliminating motion practice caused by differences in opinion of what occurred at the examination. Something we would likely have differences of opinion on is

the definition of "abusive." To what extent do actions and/or words within the examination room become "abusive"? This is a highly subjective and highly prejudicial rule and provides no clear standard for the lawyer to make the highly disruptive decision on whether to suspend the examination. Moreover, the defendant is burdened with the cost of an examination that may abruptly be suspended for no real reason other than the plaintiff's attorney's subjective determination.

Further, section 1, subsection 6 of A.B. 285 states that if the exam is suspended by the lawyer or the doctor, only the plaintiff may move for a protective order. There is no reciprocal provision that allows the defendant to move for a protective order or a motion to compel to prevent abuse by the plaintiff's attorney during the exam or to seek sanctions against the offending attorney. Allowing one side in a lawsuit to seek relief while denying the availability of such relief to the other side would be grossly unfair and, most likely, a violation of due process.

In addition, A.B. 285 invites a clear and direct violation of constitutional separation of powers. This is why the plaintiffs' 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. The Court consistently holds that the Legislature violates separation of powers by enacting procedural statutes which conflict with preexisting procedural rules or which interfere with the judiciary's authority to manage litigation. If it were to become law, this new statute would directly and inappropriately contradict important parts of the newly amended NRCP and therefore violate the separation of powers doctrine.

Finally, the Supreme Court of Nevada's Nevada Rules of Civil Procedure Committee, in its drafters note to the new version of Rule 35, explicitly and directly rejected that an attorney or an attorney representative should be present at Rule 35 examinations in Nevada. That issue has already been considered duly and rejected in turn.

Assemblywoman Backus:
While you were speaking, I was trying to take a look at Rule 35 of the *Federal Rules of Civil Procedure*. It starts off looking similar to our new Rule 35 of NRCP. Are there any federal statutory provisions that address independent medical examinations to your knowledge?

Dane Littlefield:
Not to my knowledge, but I have not researched that topic.

Assemblyman Edwards:
I have a question about something you said about it being unfair to have one side represented in the room and not the other side. However, if you do have a representative of the plaintiff, the doctor is actually serving as a representative of the defendant. Is that correct?

Dane Littlefield:
That is correct. However, there would not be a defense attorney present in the room.

Assemblyman Edwards:
However, you do have representation, and you have trained representation that can actually take care of the defendant's side of the story.

Dane Littlefield:
Well, that assumes the expert witness who has been retained has a knowledge of what the scope of the procedural discovery rules are and what they can and cannot say. The fact that the bill as it stands does not allow for the recording of any statements that are not made directly to or from the plaintiff would mean there is no record for what is said in the room. It would become another "he said, she said" dispute.

Assemblyman Edwards:
How would an audio tape stop recording something that is being said in the room?

Dane Littlefield:
That seems to be the problem. That would be an issue where the audio recording would record everything, but to submit that to the court with a protective order or a motion, the plaintiffs' bar could make an argument that we would have to redact anything in a transcript that would be derived from that audio record and remove anything that could actually be back and forth between the doctor and the attorney.

Assemblyman Edwards:
If this goes through, that does not happen, right? If this bill is approved, the redaction does not take place. You have the full story there from both sides, correct?

Dane Littlefield:
Not the way the bill is written. The way the bill is written directly minimizes what can be recorded by stenographic or audio means to only the statements to or from the plaintiff. Under the current rule, audio recording can be done for good cause, and I do not believe it limits statements that are made. I would direct the Committee to the current Rule 35(a)(3) of the NRCP, which addresses audio recording of an examination.

Assemblyman Edwards:
I do not see where you are saying that anything is redacted or eliminated in the audio tape.

Dane Littlefield:
In the bill it would be section 1, subsection 3. It says, "Such a recording must be limited to any words spoken to or by the examinee during the examination."

Assemblyman Edwards:
So if that is between the examiner and the examinee, should that not give you the story of what is going on?

Dane Littlefield:
Not if there is a third party in the room. This would only be the examiner and the examinee. It would exclude any statements between the doctor and the observer, whether that is an attorney, an attorney representative, or a family member.

Chairman Yeager:
We can have the sponsors address that when they come back up. The way I read it was that it would not allow the attorney or representative to just start making arguments on the audio recording, but I believe the intent was to make sure whatever was said in the room is available for the judge. We can let the sponsors address the intent of that provision when they come back up.

I have a question. I understand where you are coming from. However, at the same time, to the extent there are disputes about what happened in the room and what was said, would it not be helpful to have at least an audio recording to be able to present to the discovery commissioner in helping to decide that? Do you just believe that would make it more difficult? The way I see it, it would be more helpful for the judge in making a decision to have a recording of what happened.

Dane Littlefield:
I do not necessarily disagree with that. A recording can be appropriate in certain circumstances, and the current rule actually provides for an audio recording for good cause. I think that is the intent of the Nevada Supreme Court and of its committee. I would submit that good cause would be if a plaintiff's attorney does have a concern that an expert witness who has been chosen by the defense may be problematic. Whether that is well-founded or not, that can be established via motion practice if the parties cannot stipulate to an audio recording. At that point, it would go before a judge who would be neutral and determine whether there is good cause to believe that an audio recording would be necessary to protect any party's rights.

Chairman Yeager:
I know we are just about three weeks into the new civil rules, but are you aware of any judges actually finding good cause in allowing an audio recording of an independent medical examination?

Dane Littlefield:
I have not been personally involved in any decisions of that nature.

Chairman Yeager:
I know it might be too early for this to work its way through the system, but I just wanted to ask that.

Assemblywoman Krasner:
Going back to the statement about this allowing for confrontations with only a plaintiff's attorney being in the room with the doctor and not the defense counsel being present,

obviously, the doctor is not an attorney. I have to agree with you there. Is it your position that if the defense were allowed to have an attorney or representative present as well, you would be okay with this bill?

Dane Littlefield:
Not necessarily. I think the issue with that is, I cannot imagine any plaintiff's attorney ever agreeing to have a defense attorney in the room during a medical examination that could become very private. That is why the most clear-cut solution is to not allow any attorneys or their representatives in the room. Of course, if a plaintiff and the plaintiff's attorney were amenable to something like that, it would be worth considering from a defense perspective.

Assemblywoman Torres:
I have some concerns about not allowing for another person to be in the room. I think back to my own father whose first language is not English. Sometimes, he has difficulty expressing himself. Although my mom would not get involved in the middle of a doctor's appointment, I think having her present allows him to feel more at ease because it is a setting where he does not feel comfortable and her being in the room would provide for an additional level of comfort. Additionally, my father is not the most reliable witness because he does not necessarily understand all the medical jargon that is being thrown around. I think it benefits both sides. It would benefit the plaintiffs and the defendants in that it allows for both of them to have a reliable story of what occurred if either another individual is present or if that encounter is recorded.

Dane Littlefield:
I agree with you. The rules currently do allow for an independent observer in the room; it just provides that the observer will not be an attorney or an attorney's representative. Family members are currently allowed in the room.

Assemblywoman Torres:
Are they allowed to record currently, or only with the judge's permission?

Dane Littlefield:
It would be with a showing of good cause. In a situation such as that where there is an issue with a language barrier, that could be grounds to assert good cause and have the judge rule on that or the parties stipulate to that.

Assemblywoman Torres:
In how many cases have they shown good cause for the mere fact of translation or additional assistance over the last year?

Dane Littlefield:
At this point, I do not have that information. However, I do not know if there is actually a data tracking capability for that. I would be happy to look into it to see if there is precedent for that. I just believe the language barrier issue would be a strong argument from the plaintiff's side.

Assemblywoman Cohen:
Continuing with Assemblywoman Torres' father as an example, say he is in the Eighth Judicial District Court. We have heard from the judges of the Eighth Judicial District Court and the other district courts throughout the state that their dockets are full, they need more judges, and there is too much going on. Can you tell us how long it would take if a plaintiff's attorney filed a motion saying they have good cause to have someone else in the room? How long would that process take in the Eighth Judicial District Court?

Dane Littlefield:
My practice area is pretty restricted to the Second Judicial District Court and some other northern Nevada courts. I cannot speak to the Eighth Judicial District Court particularly. I can offer that if there is good cause, at least up here in northern Nevada, we, as defense attorneys, are amenable to stipulating to reasonable requests. We may be portrayed as sticks in the mud who are not willing to compromise, but that is not the case. We are willing to work with people when there is a showing of good cause. If a motion to compel or a motion for a protective order requiring audio recording—a family observer is already allowed without a court order—is requested, I do not imagine it would be a very long process. It would go to a discovery commissioner, and the commissioner can work on that relatively expediently. My experience in the Second Judicial District Court is that we are fortunate to have a discovery commissioner who is extremely expeditious and very quick. Unfortunately, I cannot speak to the Eighth Judicial District Court.

Assemblywoman Cohen:
Once a motion would be filed in front of a discovery commissioner, how long would that take before it is heard?

Dane Littlefield:
As a former law clerk, I know internal rules of the court are, generally, they try to have a turnaround within 60 days. It is not guaranteed; it is just a general target goal. When matters get sent to the discovery commissioner, it can be anywhere between a week and 60 days. Generally, my experience is that it is much quicker than the 60-day rule of thumb.

Assemblywoman Cohen:
As attorneys, we are not supposed to file pleadings right away. We are supposed to work with each other. The discovery commissioner is going to want to know what the plaintiff's attorney did to try to work this out, so there would be phone calls, letters, and emails going back and forth beforehand for a few weeks on top of this. Is that correct?

Dane Littlefield:
That is correct. I would submit that the rules already provide a mechanism to remedy that. If an attorney is engaging in bad faith and if the discovery commissioner determines that any objections were not made from a good-faith basis, it opens that attorney up to discovery sanctions that can be levied against him. If it is found that the attorney is needlessly wasting the court or the other party's time, that would be a route the plaintiffs could go down.

Assemblywoman Cohen:
So we could go around 90 days before we have this resolved. Also, I think you can talk to any attorney who practices in this state, and that attorney would tell you that opposing counsel has acted inappropriately and that attorney could not get results from the court.

Chairman Yeager:
I will open it up for additional opposition testimony for A.B. 285. [There was none.] Is there anyone neutral? [There was no one.] I will invite our presenters to come forward to address Assemblyman Edwards' question and make any concluding remarks.

Alison Brasier:
Going to section 1, subsection 3, about allowing recording, I think we would be open to working on the language of that section. The intent was to capture exactly what happens in the room. That would include any dialogue with the observer. I think we would be open to dialogue about changing that section to alleviate any concerns. I was sitting and thinking about why this needs to be codified in NRS and we cannot just take care of it through the current rules. Something that has not been talked about before was that there are certain examinations that take place called "underinsured or uninsured motorist coverage" in which a person's own insurance company is, under contract, allowed to have them submit to one of these types of examinations prior to litigation being filed. Going along with the substantive rights we have been talking about and this right to control your body—even outside the litigation context—when you are dealing with an examination being compelled by an insurance company, I think it is important that we have those protections codified in our NRS.

George Bochanis:
It was our intention that the audio recording captures everything from the moment the person walks into the examination room to the second that person leaves the examination room. What you are hearing from the opposition is a very narrow interpretation. It certainly was not supposed to be so diced up. We want everything that is being said by everyone during these examinations to be part of the record. That, again, goes along with the whole concept of keeping this out in the open. It should not be some secret proceeding.

The other thing I wanted to comment on was Assemblywoman Cohen's remarks about the time element. An objection to this type of examination and having to litigate it is going to involve a meet and confer or a telephonic call first between both attorneys, which is going to take several weeks to arrange. It is going to require a motion before the discovery commissioner which adds 30 to 60 days. If one of the attorneys does not like the results of the discovery commissioner report recommendations—that report sometimes takes a month because there are objections to the language—it then goes to district court. Add another 30 to 60 days. If you are going to allow litigation on every examination request for good cause showing on audio recordings, you should give the Eighth Judicial District Court every new judge they want because you are going to need them. It is really going to cause an issue of access to justice for these types of cases.

Graham Galloway:
The argument that somehow this bill will lead to the suppression of the availability of experts for the defense side is still unsupported. I did not hear and I have not seen any evidence that will occur. What I did hear is one expert down south is making $1 million per year doing this kind of work. It is a lucrative business. There will be experts available.

Chairman Yeager:
I will now close the hearing on A.B. 285. [(Exhibit J) was submitted but not discussed and will become part of the record.]

I will now open the hearing on Assembly Bill 20.

Assembly Bill 20: Revises provisions governing judicial discipline. (BDR 1-494)

Kevin Higgins, Chief Judge, Sparks Justice Court; and representing Nevada Judges of Limited Jurisdiction:
We have offered an amended version of the bill (Exhibit K), and that is what I will be discussing this morning. The preamble to Assembly Bill 20 declares, "It is in the best interest of the citizens of the State of Nevada to have a competent, fair and impartial judiciary to administer justice in a manner necessary to provide basic due process, openness and transparency." Just as we work every day to ensure everyone who appears in our courts are treated fairly and given due process of law, the judiciary should enjoy the same treatment and guarantees of law if they are subject to review or discipline by the Nevada Commission on Judicial Discipline.

Section 1 of Assembly Bill 20 amends *Nevada Revised Statutes* (NRS) 1.440, which already provides for the appointment of two justices of the peace or two municipal court judges to sit on these judicial discipline proceedings once they go to hearing, and merely adds that the Supreme Court of Nevada will consider the advice of our association when making those appointments. We are only asking that the association offer who they think would be a good member to sit on that commission. Of course, the Supreme Court is free to appoint anybody it wants. We have no veto power or anything other than offering advice as to who we think would be an appropriate member.

Section 2 of the bill amends NRS 1.462, subsection 2 to provide that the *Nevada Rules of Civil Procedure* (NRCP) apply to all proceedings after the filing of formal charges. When the Commission receives a complaint from the public, it may choose to investigate, it may choose to ask the judge to respond, and it may file formal charges. Only after the filing of formal charges would this amendment apply. The *Nevada Rules of Civil Procedure* set forth pretrial procedures for discovery, interrogatories, requests for admission, and would also establish rules for pretrial motions. There are no such rules now. Many boards and commissions are subject to NRS Chapter 622A. Those are the NRS Title 54 boards. The Nevada Commission on Judicial Discipline is not a Title 54 board. For those boards it applies to, the rules for pretrial discovery, admission, and motions are set forth in statute.

Section 1, subsection 3 would adopt a procedure followed by many professional regulatory boards in Nevada that the investigative and prosecutorial functions are separated so the board members who decide whether to investigate and file a formal complaint are not the same members who decide whether a judge has violated the judicial canons of the *Revised Nevada Code of Judicial Conduct* and should be disciplined. This is important because, oftentimes, the evidence that is considered in the investigative phase is not the evidence that is introduced in the adjudicative phase, but the board members are aware of it and it is unclear how they disregard it when making a judicial decision. Simply put, the police and prosecutors should not be serving as the judge and jury. Due process requires that discipline decisions be made only on evidence introduced at the hearing, not evidence considered in closed, secret sessions before the public hearing. This is the procedure followed by many boards and commissions. I will draw the Committee's attention to the procedure followed by the Board of Medical Examiners in NRS 630.352: any member who sits on the investigative committee that makes a decision on whether or not a formal complaint should be filed cannot sit on the hearing panel to decide whether the physician should be disciplined.

Section 2 of the bill sets forth some specific due process protections. Section 2, subsection 4, paragraph (a) provides that the venue for a hearing will be in the county where the judge resides. Right now, frequently, northern judges' hearings are held in southern Nevada, and southern judge's hearings are held in northern Nevada. The judges, their attorneys, and their witnesses have to travel to the far end of the state to have their cases heard. This would just provide that the venue resides where the judge is.

Section 2(4)(b) provides that there would not be any interrogatories until after the formal statement of the charges. Just like a regular civil case, interrogatories and requests for admission are not appropriate until a complaint is filed and the person understands what the actual complaint is. Right now, the practice is to ask judges to respond to interrogatories and requests for admissions before the filing of formal charges, before the judge knows what they are actually going to be charged with, and judges are required to testify against themselves before they know what they are being charged with. This would just require them to wait until the formal filing of charges. There are pending cases, even a Nevada Supreme Court case, where judges object to these interrogatories. With a failure to answer them, they are deemed admitted, and you are also subject to additional discipline for failing to cooperate with the investigative process.

Section 2(4)(c) would provide that the Commission would provide all parties with the reports and investigative materials appropriate to the case once a complaint is filed, and no later than ten days before the hearing, including any exculpatory materials. There is no such requirement now that the Commission provide exculpatory materials. Discovery to requests, which are subject to ongoing litigation, have been denied by the Commission in the past. I think it is simply fair that any evidence that is going to be used or relied on by the Commission at the time of the hearing be presented to the judge and their attorney before the hearing. There is ongoing litigation about prehearing motions. Section 2(4)(d) provides that those motions be heard in an open preceding in the county where the hearing is set unless the parties agree to submit it.

Section 2(4)(e) would require that the prehearing motions be decided ten days before the hearing. These motions are commonly motions to dismiss or motions to limit the charges or discovery motions. Currently, it is the practice of the Commission to not hear those until the full Commission hearing. The defense of the judge may be contingent upon how some of those pretrial motions are heard—whether some of those charges are dismissed or not considered or are not violations of the canons of judicial discipline. Having to wait until an actual hearing to have the pretrial motions considered means the attorney providing the judge their defense really does not know what defense they will be able to provide until the time of the hearing.

Section 2(4)(f) would require that every party be entitled to provide all evidence necessary and relevant to support the case and be given time to do so, and that time limits not be placed upon the presentation of the defense. It has been the practice of the Commission to ask the prosecutor how long he needs to present, and then the defense is given the same amount of time and told they cannot exceed that. It is practice in court that defense has all the time it needs to present its defense; it is not limited by artificial rules. It would have to be necessary and relevant evidence, of course. Section 2(4)(g) provides that if any commission rule conflicts with the NRCP, the NRCP will take precedence.

The additional sections clarify some of the evidentiary standards that are used in making these decisions. Section 3 would reword NRS 1.4655(3)(e) to provide that a decision to authorize the filing of a formal statement of the charges would be made when there is a reasonable probability, based upon clear and convincing evidence, to establish grounds, so there is an evidentiary standard now provided in the statute. Section 4 removes the phrase that investigations would only be conducted pursuant to the Commission's own procedural rules. Section 5 rewords NRS 1.4667(1) so the decision to file a formal complaint is based on "whether there is a reasonable probability, supported by clear and convincing evidence, to establish grounds for disciplinary action," which just rewords the current language of the statute.

Section 6 amends NRS 1.467 so that a judge has an opportunity to respond to the initial complaint made to the Commission, but is not required to do so. Now, when the complaint from the public comes in, the judge is asked to respond to that. However, that could be premature based upon the filing of a later formal complaint. If a judge wants to respond, he can, but he is not required to make statements or admissions until he knows what the actual charges against him are, after which the Commission can decide, based on clear and convincing evidence, whether to file a formal complaint.

Section 7 amends NRS 1.468(2) to clarify that the evidentiary standard to determine whether to enter into an agreement to defer discipline is based on whether there is clear and convincing evidence to establish grounds. Section 8 sets forth the provisions on how the amendments apply prospectively into existing cases, and section 9 makes the act effective on passage and approval.

The judges in the state are expected to apply due process rights and give everybody a fair and open hearing. I think it is reasonable to expect that if we are subject to discipline, we enjoy the same due process rights as anybody who appears in front of us. There is a legal maxim that is a question in Roman law about "Who watches the watchers?" Who decides whether the police are doing a good job? Who keeps track of that? The Commission on Judicial Discipline is an independent commission. They report to no one. They are not supervised in any way, and the only way to resolve a dispute is to appeal a matter directly to the Supreme Court of Nevada. I am sure we are more than willing to hear from the Commission and have a discussion with them about possible amendments to this bill, but I do not think it is unfair to expect that due process rights apply when judges are brought before the Commission.

John Tatro, Senior Judge; and representing Nevada Judges of Limited Jurisdiction:
I do not want to understate the issue and the importance of it. I have an understanding of how the judges feel and of issues that have come up over the years. I was president of the Nevada Judges of Limited Jurisdiction (NJLJ) twice. None of us want bad judges. It reflects on all of us because when you read about a bad judge, it is as though they group us together, and we certainly do not want that. We want a remedy for finding out bad judges and people who violate ethics rules or other rules. I think the Commission is a very important thing, and I think the work they do is admirable and good. However, this discussion has been at the top of the NJLJ's agenda for over 24 years. I am not talking about war stories about the Commission; it is just this unknown. Why can we not have the same due process rights that litigants have in court on the civil side? We think it is extremely important.

You all received a letter from former Justice of the Supreme Court of Nevada Nancy Saitta (Exhibit L). In the second paragraph, she says we "must not ignore the most basic notion of fair and equal treatment under the law." We are judges, but we should be afforded that same treatment. When something is brought before us, we should have the same rights as everyone else does. I think Justice Saitta's statement sums it up.

Richard Glasson, Judge, Tahoe Justice Court; and representing Nevada Judges of Limited Jurisdiction:
I have been involved with NJLJ for the last 19 years. I am a former president and member of the board. Our mission with NJLJ is education, especially ethics education. We know and can assist the Supreme Court of Nevada in nominating these judges who will sit in judgement of other judges rather than getting that telephone call saying, "I do not know what I am doing. How do I respond to the Supreme Court? How do I sit?" We know who is capable, we know who is able, and we would like to be able to make those nominations to the Supreme Court rather than the same names over and over again being pulled out of a hat.

Ann E. Zimmerman, Judge, Las Vegas Township Justice Court; and representing Nevada Judges of Limited Jurisdiction:
I want to point out to the Committee that in *Mosley v. Nevada Com'n on Judicial Discipline* 117 Nev. 371 (2001), the Supreme Court of Nevada recognized that judges in Nevada have a protected liberty and property interest in the continued expectation of judicial office, especially where they are elected and serve designated terms. We believe that under the

current system we are being denied the basic rights of due process enjoyed by all civil litigants. It is kind of ironic that when you take your judicial oath of office, you swear to uphold the *Constitution of the State of Nevada* and the *Constitution of the United States*, but we do not enjoy those same rights before the Commission on Judicial Discipline.

Assemblywoman Backus:
With the new proposed bill, when would a complaint of charges become public? My understanding right now is that the pre-investigation is not a public proceeding. Is that correct?

Judge Higgins:
That is correct. Our bill does not change that at all. The pre-formal complaint process stays the same. Sometimes, it is confusing because the complaint comes in from the public, saying "Judge Higgins did XYZ." Then, after the process—the Commission makes a decision about whether to investigate, then a decision about whether I should respond, and then eventually presents a decision to file their formal complaint—the formal public complaint is filed by a Commission prosecutor. There are two complaints, but we do not change anything from how the Commission considers that complaint from the public now. Once the formal written complaint is there, NRCP would apply after that point.

Assemblywoman Backus:
That was my understanding. I am a licensed attorney, and I know that if someone sends a letter to the State Bar of Nevada they may not do any pre-investigation work. I get a letter shipped off to me saying, "You are in violation," but if someone took a look at the order, my name is not even in it. So it behooves me to easily just respond, and no formal complaint is filed. I was concerned that now imposing NRCP clear and convincing evidence standards may not just easily dispose of this, and there will end up being more backlog and maybe even more publicity for judges who run for office and who may not want this known. I was just trying to rectify this in my head.

Judge Higgins:
I do not think it changes that part. A judge can make a decision whether to respond. I think if somebody said, "Judge Higgins called me a jerk on the stand," I could say, "No, I did not. Here is the videotape. I asked him to sit down because he was making a scene." That would be quickly resolved, I would hope, by my responding to that public complaint. If the public complaint is that someone violated the canons and violated the criminal law and is subject to criminal prosecution—for some judges, that has been the case—I think, until the filing of the formal charges, judges have to make a decision about whether to give up those rights before they respond or are forced to respond. If you do not know what the formal charges are, it is hard to respond in those more complicated cases.

Assemblywoman Peters:
Would this pertain only to judicial duty disciplines, or does it extend to a situation in which a judge is taken into court for other issues?

Judge Higgins:
It would pertain to the workings of the Commission. It would not pertain to judges going into court for other issues.

Assemblywoman Peters:
Is a judge taken to the Commission only for actions done under the judicial office, or for any action that has consequences under the judicial system?

Judge Glasson:
A judge is a judge 24/7. What we do off the bench is subject to discipline, just as what we do on the bench. Judges must be patient, dignified, and courteous and must follow the "Boy Scout code" throughout their life. Oftentimes, a judge is brought up on a complaint and then perhaps a formal statement of charges on things that were totally unrelated to his or her duties on the bench. The old idiom is "sober as a judge." Well, if they are not, they should not be a judge anymore.

Assemblywoman Hansen:
I am a layperson. I know the law can get complicated, so this makes sense to me. You mentioned getting this fixed has been at the top of the list for several years. I was just curious about the history. Has this come before this body before? I am curious how we got here.

Judge Tatro:
No, we have not brought this bill forward. It has been talked about and talked about. This was the time when we decided to bring it forward. It has not come forward in the past.

Judge Zimmerman:
I think the reason why the bill has been proposed at this time is because judges have started to have lengthy conversations amongst themselves about the lack of due process before the Commission. Experiences have been compared, and many people are concerned about this. That is why we decided the time was right to bring this bill forward.

Assemblywoman Tolles:
It seems to me that what has been in place is an administrative process. When we start to move into language such as "clear and convincing evidence" and "due process," if there is criminal activity, it would go into court and that would have all of those applied. If it is an administrative process, it seems appropriate that it would stay at the current level to be dealt with as an administrative personnel issue. Can you speak to that?

Judge Higgins:
Both activities can come before the Commission. There was a judge in Las Vegas who was removed from the bench and was accused of mortgage fraud and was prosecuted for that. I think he went to prison. He still could be disciplined. If you are appearing in front of the Commission and have potential criminal liability for your conduct, I would assume the person would want some of it to be done before the other so you would not have to make

admissions. Both kinds of activities can come before the Commission. Judges have been disciplined for having a DUI, and that comes before the Commission. They have been dealt with and served their DUI sentence, but they still are disciplined following the criminal case.

Assemblywoman Tolles:
By asking that question, I meant putting clear and convincing evidence standards for administrative types of disciplinary action. I think that is more where my question is coming from.

Judge Higgins:
Several sections currently refer to "clearly convincing evidence." It has just been reworded to "clear and convincing" to make it clear that is the evidentiary standard. It currently refers to that. In some of the other sections it is added. That is true. I am sure there will be opposition to that, but we were trying to make it clear what the evidentiary standard is at each point of the proceeding.

Judge Zimmerman:
I think when you are talking about possibly disciplining judges or removing judges from office, their due process rights should be in place and not kick in at the level where you are appealing to the Supreme Court of Nevada. Due process should apply from the moment the formal statement of charges is filed. I want to caution or instruct that a complaint comes from an individual; it can be a citizen, it can be a lawyer, and it can be anybody that can file a complaint before the Commission. Once the Commission votes to proceed with a matter with the judge, they file what is called a "formal statement of charges." The formal statement of charges is when the matter becomes public and when the judge is formally charged. I wanted to make that important distinction.

Assemblyman Watts:
I see the current language speaks of a "reasonable probability . . . could clearly and convincingly," and this is changing it to "supported by clear and convincing evidence." Again, I am still learning about the variety of evidentiary standards in the law. It seems to me a little bit contradictory to have a reasonable probability supported by clear and convincing evidence. I have seen some things that indicate those are two separate standards. I am wondering why, in your proposal, you did not just eliminate "reasonable probability" and say "based on a finding that there is clear and convincing evidence."

Judge Higgins:
Well, there is a story about the elephant designed by a committee, right? A committee worked on this bill together, so it does not satisfy everybody's drafting needs. I think the intent was not that they use the same level of evidence at the investigative phase that they would at the conviction stage. That is where reasonable probability comes in, but whatever evidence they rely on is clear and convincing. If you are using a scale, "preponderance of the evidence" is just slightly tipped. "Beyond a reasonable doubt" would be tipped all the way; I cannot have any doubt in my mind. "Clear and convincing" is between that; it is more than just slight evidence, but it does not have to be beyond a reasonable doubt. There is case law

that explains what "clear and convincing" is. If there was a question, a judge could go to a Supreme Court of Nevada decision that explains what clear and convincing is if they were going to appeal it. I think that was the intent, to have an evidentiary standard but not force them to have the same decision level at the investigative phase and the conviction phase.

Assemblywoman Torres:
I have a two-part question. To clarify for my own understanding, if a judge were to commit a criminal act, he or she would go through the normal court process and also go through the Commission, correct?

Judge Higgins:
Correct.

Assemblywoman Torres:
I am wondering how this piece of legislation would compare with how other employees of the state have to go through their own employer. For example, as an educator, if I have a DUI, I get reprimanded through my occupation as well. I am wondering how this piece of legislation compares to our expectations of other employees of the state.

Judge Higgins:
I think it would bring it more in line with how it is applied. *Nevada Revised Statutes* Chapter 622A applies to all Title 54 boards. That includes almost everybody except a few commissions. That sets forth these procedures. It would be more parallel and similar to what happens to everybody else. If you are convicted of a crime by proof beyond a reasonable doubt, it is pretty much a given that you are going to be disciplined because boards' and commissions' standards are not as high. They can use the evidence of your conviction. Essentially, you do not have much defense to the discipline at that point because you have already been proven guilty. My experience is that most judges who have had a DUI, for example, just admit they had a DUI and throw themselves at the mercy of the Commission and hopefully have mended their ways. I think it brings it closer to how everybody else is treated.

Assemblywoman Torres:
I am not sure I see how that is different than what we do at my profession because if I were to have a DUI and there is a conviction, the district is going to see that. They have access to that. I do not understand what the difference would be.

Judge Higgins:
As a judge, you can be removed from office for habitual intemperance. You would lose your elected position. I would assume, as a teacher, while your employer might discipline you, I am not sure the State Board of Education would. Maybe that is the distinction. Here, the Commission has the authority to order us to go to treatment, suspend us, and even remove us from office. Apparently, habitual intemperance was a problem years ago, and it is written right into all of the proceedings that you can be removed from office. You would lose that

position. I do not believe the State Board of Education would revoke your license for a DUI, but I am not familiar enough with that.

Judge Glasson:
Oftentimes, it proceeds at the same time. I was called once to sit in a case in Clark County with regard to a judge who was accused of battery that constitutes domestic violence. At the very same time, the judge was up on those same charges before the Commission of Judicial Discipline. It is not always the "chicken and the egg." Sometimes it is happening at the same time.

Chairman Yeager:
Going to the amendment in section 2, subsection 4, some of the language says that "Any procedural rules adopted by the Commission . . . must provide due process," and then it says, "including, but not limited to," and provides a few different areas where the due process is specified. I wondered, with the language "including, but not limited to," are there some topic areas you have not enumerated in here where you feel as though there is not due process in the rules that have been promulgated by the Commission? I know sometimes they say "including, but not limited to," because they do not want to miss something in an exhaustive list. Does this list lay out what the current concerns are, or are there others that are not included in the list?

Judge Zimmerman:
These are the most pressing issues of due process the judges feel need to be addressed to make the process fairer. I just want to emphasize that as a judiciary association, we are not asking for more than average citizens receives when they litigate a matter in any court in the state of Nevada; we are asking for the same due process protections. It is problematic that under the current procedural rules of the Commission, they have the sole authority to determine where the venue lies. They decide venue based upon their own convenience and for no other reason. In any other case, venue would be decided based on where the conduct occurred or where the party resided. We believe venue should be the jurisdiction where the judge sits.

Judge Higgins previously went over the issue of never having prehearing motions determined until the minute before the hearing starts. These motions could include excluding witnesses, excluding evidence, adding witnesses, or adding evidence. How do you prepare for trial if you do not know what evidence you will be allowed to present? It would be no burden upon the Commission to hear those motions and issue a decision ten judicial days before the hearing. That would make the process fairer to the judges. I know we like to say "including, but not limited to" in case we forget something, but these are the big issues we think would make the process fairer.

Chairman Yeager:
With respect to venue, is that typically always in Carson City for these proceedings? My understanding is that is where the Commission on Judicial Discipline is housed. I wonder if any of you are aware of a venue being located outside of Carson City for the hearings?

Judge Zimmerman:
Most of the time, the southern judges' hearings are scheduled for Carson City. Most recently, maybe based upon numerous complaints, they have scheduled a couple of hearings in Las Vegas. It is still their decision where to schedule a hearing. It would be important to us to have venue determined by where the judge resides. The short answer is yes, sometimes the hearings occur in Las Vegas and sometimes they occur up north. I do not believe there is any rhyme or reason to how that is determined.

Assemblywoman Hansen:
Just to clarify, for several sections we were talking about the "clearly and convincingly" language, and then "supported by clear and convincing evidence" is the new language. Is it the same evidentiary standard?

Judge Higgins:
Clear and convincing evidence is an evidentiary standard. I think that was intended by the way it was worded. It is not necessarily the same. I think this would give us a reason, if there were a dispute, we could tell the Supreme Court based upon your history of litigating what clear and convincing means, we would have case law one way or another. I think it is the same standard, although I am not sure the opponents of the bill will agree to that. It is just a clearer standard.

Chairman Yeager:
I will open it up for additional testimony in support of A.B. 20. [There was none.] I will now take opposition testimony.

Paul C. Deyhle, General Counsel and Executive Director, Commission on Judicial Discipline:
I have with me today the full Commission, which comprises district court judges appointed by the Supreme Court of Nevada, attorneys appointed by the State Bar of Nevada Board of Governors, and lay members appointed by the Governor of this state. They are all in opposition to this bill. Gary Vause is our chairman. He very much wanted to come today, but his wife had a medical procedure, so he did prepare a letter that was submitted and uploaded to Nevada Electronic Legislative Information System (Exhibit M). In addition to that, I have also submitted the letter I sent to each of the Committee members in January (Exhibit N), as well as two cases and Commission orders that were filed in public cases that discuss the constitutionality of some of the issues that were discussed today.

A picture has been painted today that a certain group of judges in this state do not receive due process. That is simply inaccurate. I am going to do my best to scratch the surface, because underneath the surface of those allegations are the facts.

The current statutes and procedural rules reflect a number of competing interests: the interests of the public, the interests of judges, and many other interests. That is where we are today. Just ten years ago, this Legislature enacted sweeping changes to the Commission's statutes and rules at the recommendation of the Article 6 Commission. The Article 6

Commission was formed by the Supreme Court of Nevada in 2006. The goals of that commission were to increase transparency of the Commission on Judicial Discipline, to improve its effectiveness, the fair treatment of judges—which certainly would include due process issues—and the timeliness of issuing decisions. The participants of this Article 6 Commission were experts from all over the country: law professors, judges, attorneys, and representatives from the Nevada Press Association and the American Civil Liberties Union of Nevada. The Commission on Judicial Discipline at that time fully participated in this effort. This took two years, where our rules and our statutes were under a microscope. As a result of that work, there was a report written. That report formed the basis in the 2009 Session for sweeping changes to both the statutes and the rules. Those were enacted just ten years ago.

I have heard testimony today that none of these issues were addressed. That is not true. All of these issues were addressed just ten years ago. I would respectfully request that if this Committee is seriously considering entertaining any of these requests, they do it the right way like they did ten years ago and convene an Article 6 Commission—which is named Article 6 after the section of the *Nevada Constitution* that deals with the judiciary—and get the input from all of these interests: the public, the judges, the lawyers, et cetera.

This is extremely important because you have only heard one side of the story here today from the proponents of A.B. 20. You have heard there is this rampant violation of their due process rights. That is, as I said, simply not the case. These changes from the 2009 Session reflect the national standards for judicial conduct and are in conformity with the judicial discipline commissions throughout the United States. This is nothing new here in this state. The structures may be different, but the rules and the laws that govern this Commission are followed around the country.

I will briefly go into the analysis of the bill. I know they filed an amendment to the bill. I can tell you, with all due respect, the commissioners unequivocally viewed that amendment as just as unreasonable as the original bill. I will tell you why: it has no regard for the process that has developed over 40 to 50 years, not just in this state, but across the country. It has no regard for the public or the taxpayer. Section 1 of the bill grants advice authority to limited jurisdiction judges only for judicial appointments for the Commission. I believe this is highly questionable on constitutional grounds. The Commission does not really have a dog in that fight. It does not directly affect the Commission, but I would think the Supreme Court of Nevada would have a problem with that because it is the appointing authority under the *Nevada Constitution*. The *Nevada Constitution* makes no mention of anyone having advice authority over their decisions, no more than the Governor or the State Bar of Nevada. I believe the Governor and the Board of Governors of the State Bar of Nevada are more than capable of appointing qualified individuals to these commissions.

This is just one group of judges within this judiciary, which is made up of over 600 judges, and I do not see any representation from the Nevada District Judges Association, the Supreme Court of Nevada, or the Nevada Court of Appeals. It is just one group of judges within Nevada that want to provide advice to the Supreme Court. I do not want to speak on

behalf of the Nevada Supreme Court, but I think they would have a big problem with this. It also sets a bad precedent as other groups will petition the Legislature for advice authority to influence appointing authorities to select members as well—not just this commission, but boards and commissions at every level.

Section 2 of this bill deletes the application of NRS and the procedural rules of the Commission. Now, I know the amendment to this bill took away the deletion of the application of the NRS, but it still deletes the procedural rules of the Commission. What a lot of people, even judges, do not know is that the procedural rules of the Commission were drafted and adopted by the Supreme Court of Nevada. They formed part of the Supreme Court's rules for decades. The Commission did not draft these rules; they are our rules now based upon constitutional amendments over the last two decades. We did not draft the actual rules that are being challenged by the proponents of this bill. The rules that they are attacking were adopted by the Supreme Court. I think we can all agree that the Supreme Court knows a thing or two about constitutionality.

The *Nevada Constitution* specifically and expressly empowers the Commission to adopt its own procedural rules. This is extremely important. We are not a district court. The proponents of this bill try to equate the Commission with any other court in this state. It is not true. We are a court of judicial performance. It is completely unique. It is not a district court. The same rules do not apply. That is why the *Nevada Constitution* itself empowers the Commission to draft its own procedural rules. We adopted those rules after a constitutional amendment in 2003. The same rules exist now, for the most part, in the statute as they existed ten years ago after this two-year effort to review all of these commissions and rules. These issues have been vetted by experts all over the country—by lawyers, judges, the public, and all these organizations. It is not true that these issues are the first time this Committee is hearing them.

The other part of section 2 is that the application of the NRCP applies to all stages. They did change that in the amendment, but as I said, they are requiring the procedural rules be simply negated, which I find constitutionally questionable. Section 2 also requires that the Commission's procedural rules provide due process to judges. This is not necessary. The *Nevada Constitution*, NRS Chapter 1, the procedural rules of the Commission, and Nevada case law already give all judges in this state due process rights. This is not necessary.

Section 3 revises the standard of proof required in judicial discipline proceedings. The current standard of proof is consistent with the standards of proof found in all jurisdictions in this country. Their change to this is a radical departure to what is customary and normal in all jurisdictions in this country. As I indicated in my letter to each of you in January, it does not make sense. To everybody that I speak to about this issue, it is contradictory. It requires the Commission to prove its case before a trial, before examining witnesses, and before conducting a trial on the merits. It just does not make any sense.

It also eliminates the Commission's ability to consider all evidence available for introduction at a formal hearing. They deleted this portion of the statute. All the Commission will be able

to do in this case is focus on the investigation report—nothing else, no other evidence. The investigation report is drafted by one individual. It is an independent contractor hired by the Commission to do an investigation of the facts. We would not be able to look at the transcript. We could not look at other evidence that may come in after the investigation but before the decision is made to file a formal statement of charges. We just have to focus on the investigation report, which could have some issues; for example, if the factual evidence does not support the conclusions in the report or if there is new evidence that comes to the attention of the Commission after the investigation. The Commission has a right to follow up with the judge and ask the judge to respond to that evidence. It really handcuffs the Commission in doing its job, which is to get to the facts. A thorough investigation is what is needed. That actually provides more due process to the judges because we are trying to get it right. We have judges' reputations and livelihoods on the line. We have to get it right. This is an investigation. They are trying to impede and obstruct our investigation. I do not know a lot of judges, other than the proponents of this bill, who are okay with it.

Section 5 of the bill refers to not compelling a judge to respond to a complaint during the investigative phase of a judicial discipline proceeding. Again, I will be standing tall next week in Las Vegas before the en banc Supreme Court on an issue of whether or not the Commission can ask judges written questions during its investigative phase. This change in section 5 does not have anything to do with that particular question. The current statute requires a judge to respond to a complaint. They are looking to change that. They do not want to respond to the complaint; they want an option to respond to the complaint. Again, I have to stress that this is an investigation.

There are only two phases of the Commission process: the investigative phase and the adjudicative stage. The investigative stage starts with the filing of a complaint by a member of the public, and it ends upon the filing of the formal statement of charges. Everything before the formal statement of charges is an investigation. The adjudicative phase of judicial discipline proceedings starts at the filing of the formal statement of charges. This is the complaint the judges are talking about. This is where their adjudicative and due process rights start. This is in accordance with not only the Nevada Supreme Court, but the United States Supreme Court. This is clear and settled law.

This change, again, is a radical departure from what other jurisdictions have done and do across this country. The sole issue on Tuesday is whether we can ask written questions during an investigation. I am not going to belabor that point here, but I am going to say, again, this is an investigation. If investigative bodies cannot ask questions during an investigation, I think we should just pack it all up and go home. I do not know what the purpose of an investigation is if these investigating bodies—not just the Commission, but any investigating body—cannot get to the truth and the facts. That is what I will be arguing on behalf of the Commission next week before the Supreme Court of Nevada. As I indicated before, the Commission's statutes and the procedural rules being challenged by the proponents here are the same that existed in 2009 following the implementation of the Article 6 Commission report.

We have heard a lot of testimony today that the current judicial discipline process does not afford due process for judges. As I indicate in my opposition outline (Exhibit O), judges have more due process rights than any litigant in any court in this country. Eighteen to twenty-four months prior to the filing of a public complaint, there is a review of the complaint and there is an investigation that commences. The Commission holds three meetings. They review the complaint and there is an investigation. They come together again and review the investigation report and all other evidence. Then they vote again for the judge to respond. They have to respond, by law, to the complaint. They have the opportunity to clarify anything they want. They already know what the complaint is. Please do not get confused by the definition of complaint. Complaint is defined by statute as is the formal statement of charges. A complaint is one filed by the public, and the complaint by the Commission is one filed by the Commission. They are more than knowledgeable of the allegations against them early on in the process. If the Commission decides to investigate, they send an investigator out, the judge sees the complaint, participates in an interview, and can provide any documents or arguments to that investigator that the Commission will review and consider. The Commission also goes out and speaks with all other witnesses that are relevant to this allegation—not just the complainant, but everyone else—and considers all of that evidence, not just in the investigation report, but everything else, including videos, court documents, etc. The Commission meets again after they receive the judge's response and answers to questions and they vote again. In the response process, judges can provide legal arguments. They can correct mistakes. They may have misstated something in the interview because they are nervous or they forgot something. They can address new evidence the Commission has received. It is a perfect opportunity for judges to correct the record and reconcile any inconsistencies or ambiguities in witness testimony or even their own testimony. They can even submit legal arguments to the Commission. The Commission will consider all of that, every bit of it, before they decide to file a formal complaint against the judge.

When I hear they do not get any due process rights, it is simply not true. Look at the typical litigant in any court. They do not get advance notice of a complaint being filed almost a year and a half to two years beforehand. They do not have an opportunity to come in and talk to an investigator, have an interview, and submit legal arguments. They do not have an opportunity to petition the Supreme Court of Nevada on perceived due process violations. They do not have any of those rights. Yet a year and a half to two years prior to the decision of the Commission to file a formal complaint, all of this is taking place. The commissioners behind me and I cannot imagine how anybody can argue there is no due process rights for judges. It is simply not true.

With respect to the argument that the Commission blatantly violates due process rights, two years ago, I testified before this Committee on Assembly Bill 28 of the 2017 Session, which specifically expanded due process rights for this particular group of judges: limited jurisdiction judges. I drafted the bill. I testified before the Judicial Council. I worked with the Administrative Office of the Courts prior to the bill being introduced, and I testified before the Assembly and Senate Judiciary Committees. This bill was for their benefit.

It expanded their rights. The Commission is not out to get these judges. That is simply not the case.

As you know, discipline is imposed against all judges. We have 600 judges in this state or more—district court judges, hearing masters, Nevada Court of Appeals judges, and Supreme Court justices. Our decisions are all unanimous decisions. There are seven members on our Commission. There are two judges, two attorneys, and three lay members. Two of their own colleagues have decided, based upon the facts, they have committed misconduct. As far as the discipline that was imposed, these two judges agreed the discipline was appropriate under the circumstances. This is not a case of lay members and attorneys ganging up on the judges. That is not happening. These are unanimous decisions. I think that is very telling. Their own colleagues are finding them to be in violation of the code and the law and disciplining them accordingly. There is simply no consensus regarding the lack of due process protections among the Nevada judiciary.

I attached, as part of one of my documents, a public order for the Commission [pages 24-34, (Exhibit O)]. I am not going to discuss that order, I just want you to know who signed that order. That was Judge Thomas Armstrong. He was appointed by the Nevada Supreme Court. He is an alternate commissioner, and he was the past president of NJLJ, just four months ago. That order debunks all of the constitutional arguments you heard here today. This is from a municipal judge and justice of the peace to his own colleagues. The other order [pages 13-22, (Exhibit O)] addresses the arguments you have heard today that we need more than one keeper of judicial discipline because it is unfair. If you look at the highlighted portions, that is the law. This is settled law by the United States Supreme Court and the Nevada Supreme Court. They have already ruled on these issues. There is absolutely no evidence that a one-tier or a two-tier system is any more or less fair. In fact, the overwhelming majority of jurisdictions in this country have a one-tier system as we have here today. There is no evidence that our system is less fair or doles out less due process protections. There is simply no evidence of it. This was born out by a Stanford study not too long ago that said the same thing. They did a study. It is the only study of its kind. This hypothesis was not proven, but one thing in that study that was proven is that if there is a two-tier system, it is going to cost a lot more money, and you are going to get the same results—more money and more time.

I wanted to counter what was testified toward the end about venue. We do not have a policy of bringing judges up here from Las Vegas or vice versa. Nine times out of ten if it is a southern judge, we go down to Las Vegas. The only time we have brought a judge up here was for a one-day hearing when we could not have the trial within a few months. We have seven commissioners. It is literally like herding cats to try to get them together. It is very difficult. They are all professionals, judges, and attorneys. If it is a one-day trial and we have to wait another three months just to have the trial, I think having these done quickly based upon the public's need for these cases to go forward in a timely and efficient matter overweighs those concerns. There is no law they can point to that says it is a violation of due process because they may have to get on a plane for one day and go back home the next day. There is case law on this by the Supreme Court of Nevada and other jurisdictions.

In conclusion, I would like to stress that if a jurisdiction is to have a judicial system that has the confidence of its citizens, it must have a judicial system that is effective. From myself and all of these commissioners here today, we have utmost respect for judges. They do a noble job for the citizens of this state, and our mission is to protect judges.

Chairman Yeager:
You mentioned a Nevada Supreme Court argument next Tuesday. Is that going to be here in Carson City and do you know what time that will be?

Paul Deyhle:
That is in Las Vegas at 10 a.m.

Chairman Yeager:
Just one thing I wanted to put on the record so we are clear: all the bills from the Judicial Branch come through the Supreme Court of Nevada for submission to the Legislative Counsel Bureau. That is in the rules of the Legislative Counsel Bureau. If you look at A.B. 20, it does say "On behalf of the Nevada Supreme Court." That is the process that is set up in statute. In case anyone was wondering, as we have heard, there is at least one and maybe more cases pending in front of the Supreme Court of Nevada on some of these issues. Because of that, the Supreme Court of Nevada is not able to be here to express opinions on this matter due to ongoing litigation. I just wanted to make that clear for the record; under their rules, they are not going to be able to weigh in on this bill given the pending litigation. I will now open it up to questions from Committee members for Mr. Deyhle.

Assemblywoman Cohen:
Is there anything in the amendment that is acceptable to you?

Paul Deyhle:
No.

Chairman Yeager:
Do we have any additional testimony in opposition to A.B. 20?

Jerome M. Polaha, Judge, Second Judicial District Court:
I have been on the Commission since 2002. I have had a lot of hearings and a lot of experience with the Commission. The question was asked: Is there anything the Commission agrees to in this proposed bill? It is unnecessary. As far as the due process that has been argued here, it is afforded. Think about this: there are seven people on the Commission. We have an investigator. As far as the request for a two-tier system, to be able to make that work, we are going to have to split the panel. However, the law says four constitute a quorum for all reasons except for handing out discipline, for which I need five. Right there we have a problem that has to be addressed. The obvious way to address it is to expand the Commission, spend more money. Consequentially, there will be more delay.

The other aspect of the law which is a big selling point for them is that the investigation be founded on clear and convincing evidence rather than a reasonable possibility that there could be clear and convincing evidence after a complete hearing. Think about that. You have an investigator. That would be like police officers finding proof beyond a reasonable doubt before they took their case to the justice court. The court could say, "Well, there is obviously, by law, a requirement that proof beyond a reasonable doubt has to be established by the investigator. I got an investigation report; there had been proof beyond a reasonable doubt. What am I going to do? Pass it on to district court." Then district court gets it and says, "Why do we need a jury? We already have proof beyond a reasonable doubt, so my job is to punish you." That is the effect of what they are proposing, and it will not work. It is not due process.

Chairman Yeager:
Is there anyone else in opposition? [There was no one.] Is there anyone in neutral? [There was no one.] I will invite our presenters back to the table for any concluding remarks.

Judge Higgins:
Sitting here, I was starting to think I had drawn the short straw by agreeing to come testify today, but I did because I was available and I think this is an important bill. I think I need to disagree with my friend Judge Polaha. I think it is necessary to have some of these due process rights written into the statute because each of these touches a point where, in the past, the Commission has denied these issues. Prehearing motions are not being decided before the hearing. They are not being ruled on soon enough in advance for somebody to craft his or her defense. I think it is only fundamentally fair that the judges get all the evidence that is going to be relied upon by the Commission when they make their decisions and that everybody has a chance to present their side of the case. I have been told of cases in Las Vegas where the prosecution says they only need two hours, so the Commission says the defense only gets two hours even though they have a lot more than that. They are limited, then, by what the prosecution puts on. Each of those is in response to something that has been pending and that we think needs to be resolved.

I was trying to figure out how there are 600 judges in the state. I guess there are a lot of hearing masters and commissioners, but our association represents 95 judges. There are approximately 100 other elected district court judges and court of appeals judges, so I think we represent about one half of the elected judges in this state. Frankly, we do not agree on everything. Getting 95 judges to agree to go to lunch is difficult enough. Some people are big proponents of this bill. To some people, it does not bother them so much. I do not think I am a member of a minority radical group of judges that is seeking to change the rules. Many states have two-tiered systems. It only seems fair to me that whatever body decides what you are going to be disciplined for has not already been in charge of the investigation and decided what questions to ask and where the investigation goes. Those ought to be changed. I do not think we ever said there is rampant violation of every due process right. I think our testimony was that there are some things we think could be improved.

I might have to disagree that having to respond to an investigator's questions or be sanctioned for failure to cooperate with the Commission, I am not quite sure how that is a due process right afforded to the judges. We have to answer those questions or we are disciplined and sanctioned for failure to do so. I had hoped to be able to work on this bill and come to a conclusion. I was actually on the Article 6 Commission and spent hours and hours in hearings on the subcommittee I was on. I am aware there were a lot of things that did not get addressed. I do not think just because something is written one way it means we cannot change it ten years later. I think there is room for improvement. I do not think we are being radical; we are just asking for some basic fundamental fairness. I think we are still willing to sit down and meet with the Commission if they would like to. It does not sound as though there is a comma or a semicolon in this bill they agree with. We are still willing to sit down with them and discuss it if possible.

Judge Tatro:
When I started my testimony, I pointed out that we think the Commission does great work. They need to be there. They are very important. I have never once questioned if they made a right decision. It is just these issues that are our concern. Ten years ago, the Article 6 Commission happened, but things have changed. It is just like the NRCP recently being changed. Everything gets changed because things change. Time goes on, and they have to change.

There was one thing Mr. Deyhle said that I need to respond to. He indicated that Judge Armstrong, when he served on the Commission, signed that order. I am not saying whether he opposes or supports this bill, but when he was president, the way it works is we have a committee and then the whole body of judges decides what bills we are going to take forward to the council, and ultimately to this body. He was the president. It was a unanimous vote to bring this bill forward.

Judge Zimmerman:
I want to clarify and disagree with Mr. Deyhle on some of his remarks. None of the judges are saying that if there is a complaint made against them it should not be investigated and we should not be questioned. Our objection is to answering interrogatories that we have to swear under oath that could be used against us in the future if the Commission chooses to proceed with the formal statement of charges. If you do not answer the interrogatories, they are deemed admitted and you are slapped with an additional charge of failure to cooperate. The purpose of this is not that judges do not want to cooperate in investigations—they certainly should—it is the way the interrogatories are presented before formal statement of charges are filed that we object to.

I thought it was interesting that Mr. Deyhle testified that we have more due process rights than anybody else. However, he failed to address any of our specific concerns about pretrial motions being ruled upon, how much time is allocated to the defense to present their case, interference with the witnesses the defense wants to present, and standing on venue. He glossed over all of those and did not answer anything about those.

I also want to point out that I think it is very important that the investigative and prosecutorial functions are separate. When they are not separate, the outcome has always been predetermined. I am sure, if you reviewed the decisions of the Commission, they are always unanimous because they have been involved in the investigative part and heard that evidence and then hear the trial part. I also thought it was interesting to note that Mr. Deyhle said there are no district court judges here in favor of the bill. Well, there are no district court judges here in opposition either, but I can tell you from my own personal experience working in the Regional Justice Center, I am stopped constantly and encouraged. I have been encouraged by Supreme Court justices. I have been encouraged by district court judges. I have been told repeatedly that this is crazy to bring this bill before the Legislature because now I have made myself a target by the Commission. I do not believe that is true, but I have had that said to me repeatedly. For him to say this is a small minority of judges that want this, I have received encouragement from judges from all over the state in proceeding with this bill, so it is just not true.

Chairman Yeager:
I will now close the hearing on A.B. 20. I will hand this meeting over to Vice Chairwoman Cohen as I am going to present the next bill on the agenda.

[Assemblywoman Cohen assumed the Chair.]

Vice Chairwoman Cohen:
I will open the hearing on Assembly Bill 423.

Assembly Bill 423: Revises provisions relating to certain attempt crimes. (BDR 15-1117)

Assemblyman Steve Yeager, Assembly District No. 9:
It is my honor to present Assembly Bill 423 to you this morning. This bill allows certain people to petition the court for a reduction of charge once they finish their sentence. This bill only applies to crimes known as "wobblers," which is kind of a funny name. A wobbler means that when the person is sentenced for a crime, the judge can either adjudicate the person for a felony or a gross misdemeanor. Essentially, the crime wobbles between a felony and a gross misdemeanor. I think that is where the name came from, but I am not sure. Those are the limited circumstances where this bill would apply. The only crimes that we are talking about where A.B. 423 would apply would be an attempted crime of a category C, D, or E felony. If you plead guilty to or are found guilty of attempting to commit one of those categories, those are the wobbler offenses we are talking about where the judge makes the determination.

The language of the bill itself is pretty straightforward. What it says is that if a judge decides to give the offender a felony at the time of sentencing, the offender would be able to come back to the court after the completion of the sentence and petition the court to modify that felony down to a gross misdemeanor. This would only apply in circumstances where: (1) the

offender has a wobbler offense, and (2) the judge actually gives the offender the felony rather than the gross misdemeanor.

The procedure in the bill is that notice must be given to the prosecuting attorney, and then the prosecuting attorney has 30 days to respond. If the prosecuting attorney either agrees with the request or does not oppose it, a judge would be allowed to simply grant that motion and reduce the charge without a hearing. If the prosecuting attorney opposes the motion, the court must hold a hearing. The court would have total discretion in terms of what evidence to consider at such a hearing. I anticipate that a court would look at how the offender did on probation or in prison, how the offender is doing in life currently when they file the motion—including whether they are employed, whether they are going to school—the offender's complete criminal history, and obviously any input from the victim of the crime and the district attorney about the crime itself, and then make a decision about what to do. If the judge denies the motion, the petitioner cannot appeal, so that would be the last stop.

Even if a judge denies the motion to reduce the charge, the offender would still be eligible to seal his or her records after the waiting period that is in statute. Right now, that is five years for a category D felony and two years for a category E felony. Keep in mind that the record-sealing process, as we have heard, is burdensome and can be expensive. This would be a better procedure where a judge could, on his or her own, reduce it down from a felony to a gross misdemeanor.

In the real world, I anticipate these would only be granted when the petitioner has shown extraordinary success on probation. Honestly, I do not think a judge would reduce a charge after someone was given a prison sentence because that would be a reflection of the seriousness of the crime in the first place. I think we are talking about situations where the offender did really, really well on probation. I trust our judges to use their discretion appropriately when deciding these petitions. We are not talking about a lot of cases, so I do not think this is going to clog the court system.

Finally, under the terms of the bill, this is not retroactive. If we were to enact this legislation, it would only apply to offenses committed on or after October 1, 2019. People who now have felonies on their records as a result of wobblers would not be able to go back now under this bill. That should limit the amount of petitions that would be filed because it would only be on a future basis. With that being said, I am open to any questions.

Assemblywoman Peters:
In this language, we talk about the petition having to go to the original prosecuting attorney. What if that attorney is retired or otherwise unavailable? Who would be a default?

Assemblyman Yeager:
There are a couple components here. In section 1, subsection 3, it talks about petitioning the court of original jurisdiction. Essentially, that means it would have to go back to the same court. Now, judges shuffle around all the time. What would happen is that it stays in the department it started in. If there is a new judge in that department, it would stay there. With

respect to the prosecuting attorney, there may very well be a different prosecuting attorney. That prosecuting attorney may have retired or moved on. I would just expect somebody from the district attorney's office to comment, so it would not necessarily preclude someone from asking if there was a shuffling of the case. The reason we have that language about the original jurisdiction is that we do not want someone to go in front of one judge and get the felony and then try to petition another judge and sort of "forum shop" to get a reduction. It would have to be the same judge who would make the determination unless there was some kind of switch in the departments.

Assemblywoman Peters:
I also wonder about whether there is any victim input in this. My question comes about as a result of Marsy's Law.

Assemblyman Yeager:
It is not specifically listed in here. I would certainly be willing to include that. We left the proceeding pretty open-ended in terms of what evidence a judge would want to hear, but I would think, under Marsy's Law, a victim would have to be noticed and, at least, have an opportunity to come and weigh in. To the extent that is not the case or it is unclear, I would be happy to add that to the language.

Vice Chairwoman Cohen:
I will open it up for testimony in support.

John J. Piro, Deputy Public Defender, Legislative Liaison, Clark County Public Defender's Office:
There are often times when we take a person to sentencing on a wobbler. Other states do not necessarily have this mechanism, so when we describe to attorneys in other jurisdictions that a person will not necessarily know whether they are getting a felony or a gross misdemeanor prior to sentencing, they think we are kind of crazy in doing that. Cases can certainly be negotiated to allow us the opportunity to argue for a gross misdemeanor. Sometimes we lose that. Then you have a client who goes on to successfully complete probation, do all of these things, and really wants to get a good hold on their life, but there is that felony on their record. This would be a carrot at the end to allow them to apply for a gross misdemeanor at that time.

Kendra G. Bertschy, Deputy Public Defender, Washoe County Public Defender's Office:
I believe this really helps clarify the wobbler provisions. More importantly, it provides that carrot to ensure our clients are really working toward being successful. It allows them the opportunity to have that felony removed from their record so they are able to become better members of our society.

Vice Chairwoman Cohen:
Is there any more support? [There was none.] We will move on to opposition.

John T. Jones, Jr., Chief Deputy District Attorney, Clark County District Attorney's Office; and representing Nevada District Attorneys Association:

We are in opposition to A.B 423 as it is currently written. I do not have an amendment yet, but I did have an opportunity to speak with Chairman Yeager yesterday about our opposition. I appreciate his taking the time to meet with me on such short notice. Generally, a judge loses jurisdiction to modify a sentence once a judgment of conviction is filed unless the defendant can show a material misrepresentation of fact or some sort of clerical error. District attorneys, in general, do not want to set the precedent of opening up judgments of conviction once the sentence has been rendered.

That being said, I think we are open to some changes in this bill that would achieve the same result but do it in a slightly different way. For example, our position is that this would be better done at sentencing. In fact, in Clark County, what often happens on wobbler cases is that the judge will ask the state if we have an objection to allowing for a drop-down to a gross misdemeanor. When I say "drop-down," I mean the judge would adjudicate the defendant of a felony, and if they complete probation, the judge would then vacate the felony conviction and enter a gross misdemeanor at the end. The reason why the district attorney stipulation is important is because that is how we get around the fact that the judge loses jurisdiction to modify the judgment of conviction after the sentence is rendered.

I think it is better done at sentencing for several reasons. First, the victim will have finality at sentence. In cases where it is a wobbler, the victim will know the judge has, at least, given the defendant an opportunity to earn a reduction to a gross misdemeanor and has given the defendant a road map of how to get there. The judge can say, "If you stay out of trouble," or, "If you comply with terms X, Y, and Z, and if you pay restitution, I will allow you to earn a reduction to a gross misdemeanor." The victim will know at sentencing what is going to happen ultimately with the case instead of waiting for a period of time to potentially receive a notice of this new hearing set out in the current version of the bill in which we would have to basically relitigate sentencing and instances where the victim has a problem with the reduction.

Further, this bill should not apply in situations where the parties have stipulated to a particular sentence. In other words, I, as a deputy district attorney, have often offered a negotiation of a wobbler offense to a defendant, but as part of that negotiation, the defendant is required to stipulate to felony treatment. This bill does not speak to those instances. I think the way it is currently read, they could apply or make a motion to ask for a reduction despite the agreement to the contrary.

Finally, this should not apply to people who have prior felony or gross misdemeanor convictions or who have already received the benefit of this bill in the past. I think there is an avenue for us to get to the ultimate goal of allowing judges to do this, but we think it should be at the front end where the victim has had input at sentencing and the judge specifically spells out a road map in the judgment of conviction to how a defendant could earn that gross misdemeanor reduction.

Vice Chairwoman Cohen:
Is there anyone here in neutral? [There was no one.] I will invite Chairman Yeager back for concluding remarks.

Assemblyman Yeager:
I agree with Mr. Jones that the parties would be able to agree in a guilty plea agreement, which is essentially a contractual relationship, about someone getting a felony. I think, if that is important enough, they could put that in there to not have this bill apply. Other than that, I heard there is a willingness to continue working on this. I am committed to continuing to work with Mr. Jones to see if we can find a way to enact this provision which, I think, would apply in a very small number of cases but would be a huge benefit to an offender getting his or her life back on track.

Vice Chairwoman Cohen:
Thank you. [(Exhibit P) was submitted but not mentioned and will become part of the record.] I will close the hearing on A.B. 423.

Is there anyone here for public comment? [There was no one.] This meeting is adjourned [at 10:54 a.m.].

RESPECTFULLY SUBMITTED:

_____
Lucas Glanzmann
Committee Secretary

APPROVED BY:

_____
Assemblyman Steve Yeager, Chairman

DATE: _____

EXHIBITS

Exhibit A is the Agenda.

Exhibit B is the Attendance Roster.

Exhibit C is a set of documents in support of Assembly Bill 285, submitted by Kaylyn Kardavani, representing Nevada Justice Association, and presented by George T. Bochanis, representing Nevada Justice Association.

Exhibit D is a written testimony dated March 25, 2019, written and presented by Dane A. Littlefield, President, Association of Defense Counsel of Nevada, in opposition to Assembly Bill 285.

Exhibit E is the current *Nevada Rules of Civil Procedure* Rule 35, submitted by Dane A. Littlefield, President, Association of Defense Counsel of Nevada.

Exhibit F is the former *Nevada Rules of Civil Procedure* Rule 35, submitted by Dane A. Littlefield, President, Association of Defense Counsel of Nevada.

Exhibit G is a Supreme Court of Nevada order, submitted by Dane A. Littlefield, President, Association of Defense Counsel of Nevada.

Exhibit H is a packet of written statements in opposition to Assembly Bill 285, from various members of the Association of Defense Counsel and submitted by Dane A. Littlefield.

Exhibit I is a copy of a Supreme Court of Nevada case, *Berkson v. LePome*, 126 Nev. 492 (2010), submitted by Dane A. Littlefield, President, Association of Defense Counsel of Nevada.

Exhibit J is a packet of letters in support of Assembly Bill 285.

Exhibit K is a proposed amendment to Assembly Bill 20, submitted by Nevada Judges of Limited Jurisdiction.

Exhibit L is a statement submitted by Justice Nancy M. Saitta, retired, in support of Assembly Bill 20.

Exhibit M is a letter dated March 25, 2019, to Chairman Yeager and members of the Assembly Committee on Judiciary, submitted by Gary Vause, Chairman, Nevada Commission on Judicial Discipline, in opposition to Assembly Bill 20.

Exhibit N is a letter dated January 3, 2019, to Chairman Yeager, submitted by Paul C. Deyhle, General Counsel and Executive Director, Nevada Commission on Judicial Discipline, in opposition to Assembly Bill 20.

Exhibit O is a set of documents in opposition to Assembly Bill 20, submitted by Paul C. Deyhle, General Counsel and Executive Director, Nevada Commission on Judicial Discipline.

Exhibit P is a letter dated March 26, 2019, to members of the Assembly Committee on Judiciary, submitted by Jim Hoffman, Legislative Committee, Nevada Attorneys for Criminal Justice, in support of Assembly Bill 423.

JOIN
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DISTRICT COURT

CLARK COUNTY, NEVADA

KALENA DAVIS, an individual; Plaintiff, vs. ADAM DERON BRIDEWELL, an individual; LYFT, INC., a foreign corporation; THE HERTZ CORPORATION, a foreign corporation; DOE OWNERS I through X; and ROE LEGAL ENTITIES I through X, inclusive, Defendants.	CASE NO.: A-18-777455-C DEPT. NO.: XIII **DEFENDANT ADAM BRIDEWELL'S JOINDER TO DEFENDANTS LYFT, INC. AND THE HERTZ CORPORATION'S OBJECTION TO REPORT AND RECOMMENDATION OF DISCOVERY COMMISSIONER**

COMES NOW Defendant Adam Bridewell and files his Joinder to Defendants Lyft, Inc. and The Hertz Corporation's Objection to Report and Recommendation of Discovery Commissioner, which was filed on August 31, 2020. Defendant Bridewell joins each of Defendants' arguments and adopts them as his own. Defendant Bridewell further highlights the fact that the adoption of the Discovery Commissioner's Report and Recommendation (which states that NRS §52.380 creates substantive rights—and that "it is substantive rather than procedural" and that it supersedes NRCP 35) could have unforeseen, negative consequences on NRCP 35's federal counterpart, Fed. R. Civ. P. 35, within the United States District Court, District of Nevada, under the federal *Erie* doctrine and its progeny. Therefore, the Court should reject the Discovery Commissioner's Report and

Recommendation and deny Plaintiff's request to have the examinations recorded and an observer present.

DATED this 3rd day of September 2020.

HARPER | SELIM

JUSTIN GOURLEY
Nevada Bar No. 11976
1707 Village Center Circle, Suite 140
Las Vegas, NV 89134
Attorneys for Defendant Adam Deron Bridewell

CERTIFICATE OF SERVICE

Pursuant to Rule 5(b) of the Nevada Rules of Civil Procedure, I hereby certify under penalty of perjury that I am an employee of HARPER | SELIM and that on the 3rd day of September 2020, the foregoing **DEFENDANT ADAM BRIDEWELL'S JOINDER TO DEFENDANTS LYFT, INC. AND THE HERTZ CORPORATION'S OBJECTION TO REPORT AND RECOMMENDATION OF DISCOVERY COMMISSIONER** was served upon those persons designated by the parties in the E-Service Master List for the above referenced matter in the Eighth Judicial District Court eFiling System in accordance with the mandatory electronic service requirements of Administrative Order 14-2 and the Nevada Electronic Filing and Conversion Rules:

Jared R. Richards, Esq.
Michael Stein, Esq.
CLEAR COUNSEL LAW GROUP
1671 W. Horizon Ridge Parkway, Suite 200
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Attorneys for Plaintiff

Jason Revzin, Esq.
Blake A. Doerr, Esq.
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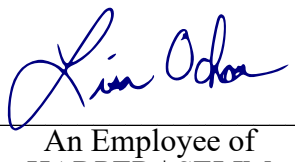
Las Vegas, NV 89118
Attorneys for Defendants Lyft, Inc. and
The Hertz Corporation



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DISTRICT COURT

CLARK COUNTY, NEVADA

KALENA DAVIS, an individual,

Plaintiff,

vs.

ADAM DERON BRIDEWELL, an individual; LYFT, INC., a foreign corporation; THE HERTZ CORPORATION, a foreign corporation; DOE OWNERS I through X; and ROE LEGAL ENTITIES I through X, inclusive,

Defendants.

Case No.: A-18-777455-C

Dept. No.: XIII

PLAINTIFF'S OPPOSITION TO DEFENDANTS LYFT, INC. AND THE HERTZ CORPORATION[']S OBJECTION TO REPORT AND RECOMMENDATION[S] OF DISCOVERY COMMISSIONER

PLAINTIFF KALENA DAVIS by and through his counsel of record, Jared R. Richards, Esq. and Dustin E. Birch, Esq. of Clear Counsel Law Group, hereby submits his Opposition To Defendants Lyft, Inc. and The Hertz Corporation[']s Objection To Report and Recommendation[s] of Discovery Commissioner.

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DECLARATION OF JARED R. RICHARDS, ESQ. IN SUPPORT OF PLAINTIFF'S OPPOSITION TO DEFENDANTS LYFT, INC. AND THE HERTZ CORPORATION[']S OBJECTION TO REPORT AND RECOMMENDATION[S] OF DISCOVERY COMMISSIONER

I, JARED R. RICHARDS, ESQ., being first duly sworn, depose and say:

1. I am an attorney licensed to practice law in the State of Nevada and the owner of Clear Counsel Law Group, counsel to Plaintiff in this matter.

2. This Declaration is submitted in support of Plaintiff's Opposition To Defendants Lyft, Inc. and The Hertz Corporation[']s Objection to Report and Recommendation of Discovery Commissioner.

3. A true and correct copy of Discovery Commissioner's Report and Recommendation in this matter, filed August 18, 2020, is attached hereto as Exhibit 1.

4. A true and correct copy of Defendants' Brief On Rule 35 Examination and NRS [Section] 52.380, filed March 20, 2020, is attached hereto as Exhibit 2.

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

/s/ Jared R. Richards

JARED R. RICHARDS

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I. INTRODUCTION

Defendants' Objection, like their briefing before the Discovery Commissioner, is based solely upon the incorrect assertion that NRS Section 52.380 is procedural rather than substantive. As the Discovery Commissioner readily and unambiguously found, the differences between the statute and NRCP 35 are substantive, as the statute creates substantive rights for the examinee in an NRCP 35 examination. That is, under the statute, the examinees has substantive *rights* to have an observer present, to have that observer be the examinee's attorney, and to record the examination. Under NRCP 35, the examinee has no such rights, as each of these aspects is either completely unavailable or is conditioned upon a request to the court and/or a showing of good cause.

Defendants and Plaintiff argue precisely the same applicable law, as the Nevada Supreme Court has clearly spelled out the standards for finding a statute unconstitutional based upon a claimed violation of the separation of powers. The parties arrive at opposite conclusions solely because Defendants simply ignore the meanings of the words "substantive" and "procedural."

The Discovery Commissioner made no such mistake, instead applying the correct law, giving the words "substantive" and "procedural" their proper meanings, and therefore reaching the correct conclusion.

Whether this Court conducts de novo review or applies the "clearly erroneous" standard to the Discovery Commissioner's Report and Recommendations, no basis exists for granting Defendants' Objection, especially in light of the presumption of constitutionality that applies to the statute and the heavy burden Defendants bear in showing its purported unconstitutionality.

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In short, the Discovery Commissioner got the sole question presented to her exactly right, and Plaintiff therefore respectfully requests that this Court overrule Defendants' Objection and adopt the Report and Recommendations in full.[1]

II. STANDARD OF REVIEW

The standard of review to be applied by the District Court when a party objects to the Discovery Commissioner's Report and Recommendations has never been specifically identified by the Supreme Court or the Court of Appeals. *See, e.g.,* Michael P. Lowry, *The Unanswered Question: What is the Standard of Review When Objecting to a Discovery Commissioner's Report and Recommendations?*, COMMUNIQUÉ, May 2013, Vol. 34, No. 5 (concluding that standard of review has not been positively identified in Nevada law).

Former Eighth Judicial District Discovery Commissioner Bonnie A. Bulla (now a Judge of the Court of Appeals) and Second Judicial District Discovery Commissioner Wesley M. Ayres recently co-authored an article stating that "[t]he district court reviews a discovery commissioner's report and recommendation de novo." Bonnie A. Bulla and Wesley M. Ayres, *A Brief Overview of*

[1] The purported "Declaration" of Defense counsel Blake A. Doerr, Esq. in support of Defendants' Objection does not constitute a valid Declaration under Nevada law. Although the statement asserts "[n]o notary required pursuant to NRS § 53.045[,]" the document does not comply with the requirements of that statute, which provides as follows (emphases added):

> Any matter whose existence or truth may be established by an affidavit or other sworn declaration may be established with the same effect by an unsworn declaration of its existence or truth *signed by the declarant under penalty of perjury*, and dated, in substantially the following form:
>
> 1. If executed in this State: "I *declare under penalty of perjury* that the foregoing is true and correct."
>
> Executed on.....
> (date) (signature)
>
> 2. Except as otherwise provided in NRS 53.250 to 53.390, inclusive, if executed outside this State: "I *declare under penalty of perjury* under the law of the State of Nevada that the foregoing is true and correct."
>
> Executed on.....
> (date) (signature)

As the statute makes clear, a Declaration used in place of an Affidavit must be "signed by the declarant under penalty of perjury." *See* Nev. Rev. Stats. 53.045. Each of the two forms provided in the statute expressly states that the signatory "declare[s] under penalty of perjury[.]"

Mr. Doerr's purported "Declaration" is not "signed by the declarant under penalty of perjury" and therefore fails to satisfy the requirements of this statute.

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Selected Changes to Nevada's Discovery Rules, NEVADA LAWYER, June 2019, at 20. Unfortunately, Judge Bulla and Commissioner Ayres identified no legal authority in support of this proposition. *Id.* at 20-21.

However, the Nevada Supreme Court has noted that "the procedural interaction between a [federal] magistrate judge and a [federal] district court judge is similar to the interaction between the [Nevada] discovery commissioner and the [Nevada] district court[,]" specifically "in that a magistrate judge may be designated to conduct hearings and to submit to a district court judge for approval proposed findings of fact and recommendations." *Valley Health System, LLC v. Eighth Judicial District Court*, 127 Nev. 167, 173 (2011) (citing *U.S. v. Howell*, 231 F.3d 615, 621-22 (9th Cir. 2000)).

The federal District Court reviews the "proposed findings of fact and recommendations" of the Magistrate Judge under a "clearly erroneous or contrary to law" standard. *See* Fed. R. Civ. P. 72(a) (District Judge must "modify or set aside any part of the order that is clearly erroneous or is contrary to law").

Thus, it would be reasonable to conclude that the Discovery Commissioner's Report and Recommendations should be affirmed unless they are "clearly erroneous or contrary to law." "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Unionamerica Mortg. & Equity Tr. v. McDonald*, 97 Nev. 210, 211-12 (1981) (citing *United States v. Gypsum Co*., 333 U.S. 364, 395 (1948)).

However, irrespective of whether this Court conducts a de novo review or applies the "clearly erroneous or contrary to law" standard, the Discovery Commissioner's Report and Recommendations should be adopted in their entirety.

III. LEGAL ARGUMENT

The sole issue presented in Defendants' Objection is whether the Discovery Commissioner correctly found that certain portions of NRS Section 52.380 are *substantive* rather than *procedural* and therefore do not violate the constitutional separation of powers. *Exhibit 1*, ¶¶ 10-13; *see also* Declaration of Jared R. Richards, Esq., *supra*, ¶ 3 (authenticating Exhibit 1).

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As the Nevada Supreme Court has noted:

> The judiciary has the inherent power to govern its own procedures, and this power includes the right to promulgate rules of appellate procedure as provided by law. [ ] Although such rules may not conflict with the state constitution or "abridge, enlarge or modify any substantive right," NRS 2.120, the authority of the judiciary to promulgate procedural rules is independent of legislative power, and may not be diminished or compromised by the legislature. [ ] We have held that 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 that such a statute is of no effect. [ ] Furthermore, where, as here, a rule of procedure is promulgated in conflict with a pre-existing procedural statute, the rule supersedes the statute and controls. [ ]

State v. Connery, 99 Nev. 342, 345 (1983) (internal citations omitted).

Thus, the Discovery Commissioner was tasked <u>*solely*</u> with determining whether the two provisions of NRS Section 52.380 at issue (*i.e.*, the right of the examinee to have an observer present, which could be the examinee's attorney; the right of the examinee to record the examination via the observer) were substantive or procedural. If the former, the statute would supersede NRCP 35, and the examinee would have those rights without any request or showing of good cause; if the latter, NRCP 35 would supersede the statute, and the examinee would be required to show good cause in order to exercise each of those rights and would not be permitted to have his attorney (or an employee of his attorney) serve as the observer. *Id.*

The Discovery Commissioner correctly made the essentially self-evident finding that each of these provisions of the statute is <u>*substantive*</u> and that these provisions therefore supersede NRCP 35, such that the examinee may have an observer present and may record the examination without being required to show good cause for either.

A. AS THE DISCOVERY COMMISSIONER FOUND, NEVADA LAW <u>*PRESUMES THE CONSTITUTIONALITY*</u> OF THE STATUTE AND REQUIRES THAT "EVERY POSSIBLE PRESUMPTION" BE MADE IN ITS FAVOR, WHILE PLACING ON THE DEFENDANTS A HEAVY "BURDEN OF MAKING A <u>*CLEAR SHOWING*</u> THAT THE STATUTE IS UNCONSTITUTIONAL."

As the Discovery Commissioner found,

> begin[ning] with the <u>*presumption of constitutional validity*</u> which clothes statutes enacted by the Legislature. [ ] All acts passed by the Legislature are <u>*presumed to be valid*</u> until the contrary is <u>*clearly established*</u>. [ ] In case of doubt, <u>*every possible*</u>

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> *presumption will be made in favor of the constitutionality* of a statute, and courts will interfere only when the Constitution is *clearly violated*. [ ] Further, the presumption of constitutional validity *places upon those attacking a statute the burden of making a **clear showing** that the statute is unconstitutional*. [ ]

List v. Whisler, 99 Nev. 133, 137-38 (1983) (internal citations omitted) (emphases added); *cf. Exhibit 1*, ¶ 7 (citing *List*, 99 Nev. at 137-38).

To that end, to show respect for the province of the Judiciary, the Nevada Supreme Court has repeatedly recognized that a statute may be invalidated *only* if it "clearly violate[s]" the Constitution—in this case, by "clearly violat[ing]" the prerogative of the Judiciary to make its own rules governing its own procedure. *State v. Connery*, 99 Nev. 342, 345 (1983). Such a statute must be afforded "every possible presumption . . . in favor of . . . constitutionality[,]" and the burden of "mak[ing] a clear showing that the statute is unconstitutional[ ]" is properly placed on the party challenging the statute.

Whether this Court conducts a de novo review or applies the "clearly erroneous or contrary to law" standard, it is clear that the Discovery Commissioner invoked the correct standard in evaluating the constitutionality of the statute. *Exhibit 1*, ¶ 7.

B. THE DISCOVERY COMMISSIONER CORRECTLY FOUND THAT NRS SECTION 52.380 CREATES SUBSTANTIVE RIGHTS.

Defendants' Objection asserts that

> the belief that NRS 52.380 created a substantive right is a red herring established by Nevada legislators that supported changes to the Rule. In reality, it is clearly a procedural statute regarding the process in which Rule 35 examinations are to be conducted – which simply cannot be read in harmony with the process already established within NRCP 35. In other words, the new statute provides different procedures regarding the exact same examinations NRCP 35 already provides procedures for. NRS 52.380 therefore clearly violates the separation of powers doctrine and the procedure set forth in NRCP 35 regarding examinations should be followed by the Court here.

Objection, 5: 19-27.

As the Discovery Commissioner implicitly recognized in ruling to the contrary, Defendants' assertion here simply ignores the meanings of the terms "substance" and "procedure." Defendants' claim that the statute "provides different procedures regarding the exact same examinations NRCP 35 already provides procedures for[ ]" ignores that the *procedures* remain

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exactly the same from NRCP 35 to NRS Section 52.380. The only things that the statute changes are the examinee's *rights* concerning those procedures.

NRCP 35 already provides for an *observer* at an examination and for *recording* of an examination. However, NRCP 35 provides:

- On 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 *audio recorded*.

- The party against whom an examination is sought *may request as a condition of the examination to have an observer present at the examination*. When making the request, the party must identify the observer and state his or her relationship to the party being examined. *The observer may not be the party's attorney or anyone employed by the party or the party's attorney*.

- The party may have one observer present for the examination, unless [ ] the examination is a neuropsychological, psychological, or psychiatric examination; or [ ] the court orders otherwise for good cause shown. *The party may not have any observer present for a neuropsychological, psychological, or psychiatric examination, unless the court orders otherwise for good cause shown*.

See Nev. R. Civ. P. 35(a)(3), (4) (emphases added).

NRS Section 52.80, by contrast, provides that

- An observer *may attend an examination* but shall not participate in or disrupt the examination.

- The observer attending the examination pursuant to subsection 1 *may be [ ] [a]n attorney of an examinee or party producing the examinee; or [ ] [a] designated representative of the attorney* . . . [.] The observer attending the examination pursuant to subsection 1 *may make an audio or stenographic recording of the examination*.

See Nev. Rev. Stats. 52.380(1), (2), (3) (emphases added).

Thus, the *procedure* set forth in NRCP 35 permitted an observer at an examination and recording of an examination. However, these possibilities were *conditioned* upon a showing of good cause for recording, *limited* to exclude the examinee's attorney or the attorney's employee as the observer, *precluded* for neuropsychological, psychological, or psychiatric examinations absent a showing of good cause, and so on. *See* Nev. R. Civ. P. 35(a)(3), (4) (emphases added).

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The statute, by contrast, transformed these conditional elements of an examination into *substantive rights* of the examinee by *removing all conditions and limitations*. The examinee is no longer required to "request" an observer, to show good cause for recording the examination, to show good cause to have an observer at particular types of examinations, to choose someone other than his attorney as the observer, and so on. *See* Nev. Rev. Stats. 52.380(1), (2), (3).

It is simply incorrect to assert, as Defendants do, that "the new statute provides different procedures regarding the exact same examinations NRCP 35 already provides procedures for." *Objection*, 5: 20-25. Instead, the statute provides that the examinee may have an observer at *any* examination, may appoint his attorney to be the observer, and may have that observer record the examination *as a matter of right*. Under the statute, the examinee now has the *right* to record the examination, the *right* to have an observer present irrespective of the type of examination, and the *right* to have his attorney serve as the observer.

As the foregoing demonstrates, the procedures in the Rule and the statute are identical (*i.e.*, observer, recording). The only difference under the statute is that the examinee now has a *right* to these elements, rather than having to jump through the hoops defined in the Rule. To attempt to classify the statute as procedural is absurd — the statute on its face creates substantive rights not contained in the Rule.

As the Discovery Commissioner correctly found, "[a] substantive standard is one that 'creates duties, rights and obligations,' while a procedural standard specifies how those duties, rights, and obligations should be enforced. *Exhibit* 1, ¶ 9 (citing *Azar v. Allina Health Servs*., 139 S. Ct. 1804, 1811 (2019)). The Discovery Commissioner additionally found that

> [t]he Statute creates substantive rights, including the right of the examinee to have his or her attorney or that attorney's representative serve as the observer, the right to have the observer record the examination without making a showing of "good cause," and the right to have an observer present for a neuropsychological, psychological, or psychiatric examination without making a showing of "good cause." [ ]
>
> Because the Statute creates substantive rights, it is substantive rather than procedural. [ ] Because the Statute is substantive, it governs and supersedes [NRCP 35] where the two conflict.

Exhibit 1, ¶¶ 10-12.

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Thus, the Discovery Commissioner's Findings of Fact and Conclusions of Law follow directly from a comparison of the statute to the Rule and an accurate identification of the differences between them (as well as a correct understanding of the words "substantive" and "procedural").

Absolutely nothing in the Discovery Commissioner's Report and Recommendations is incorrect, such that de novo review by this Court would reach a different conclusion. In addition, nothing in the Report and Recommendations leaves "the definite and firm conviction that a mistake has been committed[,]" such that the decision would be "clearly erroneous." *Unionamerica Mortg. & Equity Tr.*, 97 Nev. at 211-12 (citing *Gypsum Co*., 333 U.S. at 395).

To the contrary, the factual findings and conclusions of law in the Report and Recommendations follow inexorably from controlling Nevada law and application of the proper definitions of "substantive" and "procedural," and they give rise to no inference whatsoever that a mistake has been committed. To put it bluntly, the Discovery Commissioner's conclusions are one hundred percent correct, and her Report and Recommendations should be adopted in full by this Court.

C. THE DISCOVERY COMMISSIONER CORRECTLY CONCLUDED THAT THE OPINIONS OF DEFENDANT'S EXPERTS AND THE POTENTIAL IMPACT OF THE STATUTE ON THE "POOL" OF AVAILABLE EXPERTS ARE IRRELEVANT TO THE CONSTITUTIONALITY OF THE STATUTE.

In both the briefing before the Discovery Commissioner and the Objection, Defendants inexplicably presented "objections" by its experts in this matter, Thomas Francis Kinsora and Aubrey Corwin, as well as opinions by others, regarding the *advisability* of the substantive rights created for an examinee by NRS Section 52.380. *Objection*, 11: 22-28; *Exhibit 2*, 13: 28 – 17: 4; *see also id.*, Exhibits D and E thereto; *see also* Declaration of Jared R. Richards, Esq., *supra*, ¶ 4 (authenticating Exhibit 2).

Obviously, such considerations can play no role in this Court's evaluation of the constitutionality of the statute, as the sole question presented here was whether the Legislature had the *prerogative* to enact this statute, not whether such enactment was *wise or virtuous or advisable*.

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It is hornbook Nevada law that the ***wisdom*** or a particular statute is the sole province of the Legislature and the Executive:

> But whether a statute represents sound or wise policy is for the political branches of government to decide, not the judiciary. *See In re Fontainebleau Las Vegas Holdings*, 128 Nev. [556] (2012) ("'When a statute is clear, unambiguous, not in conflict with other statutes and is constitutional, the judicial branch may not refuse to enforce the statute on public policy grounds. That decision is within the sole purview of the legislative branch.'" (quoting *Beazer Homes Nev., Inc. v. Eighth Judicial Dist. Court*, 120 Nev. 575, 578 n. 4[ ] (2004))). *See generally Griswold v. Connecticut*, 381 U.S. 479, 482 [ ] (1965) ("We do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions."). When the Legislature has acted and its intention is clear and unambiguous, we must enforce the statute as written even if we think that the statute operates in an unfair way or was just a bad idea. *See Pellegrini v. State*, 117 Nev. 860, 878[ ] (2001) ("[E]quitable principles will not justify a court's disregard of statutory requirements." (internal footnote omitted)).

Moultrie v. State, 131 Nev. 924, 938 (Nev. App. 2015) (as modified Dec. 29, 2015).

The Discovery Commissioner properly disregarded these considerations and did not even mention them in her Report and Recommendations. They were (and are) simply irrelevant to the question at issue here.

IV. CONCLUSION

Whether this Court conducts a de novo review of the Discovery Commissioner's Report and Recommendations or applies the "clearly erroneous and contrary to law" standard, the Report and Recommendations clearly should be adopted *in toto*. The Discovery Commissioner invoked and applied the correct law, and nothing about her findings of fact or conclusions of law is even marginally off, let alone "clearly erroneous."

Defendants' argument that NRS Section 52.380 is procedural rather than substantive is simply wrong as a matter of law. As the Discovery Commissioner found, "[t]he Statute creates substantive rights . . . [.] [ ] Because the Statute creates substantive rights, it is substantive rather than procedural. [ ] Because the Statute is substantive, it governs and supersedes the Rule where the two conflict."

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The Discovery Commissioner got the sole question presented to her exactly right, and Plaintiff therefore respectfully requests that this Court overrule Defendants' Objection and adopt her Report and Recommendations in full.

DATED this 8th day of September, 2020.

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CERTIFICATE OF SERVICE

I certify pursuant to NRCP 5(b)(4) that on the 8th day of September 2020, I caused a true and correct copy of the foregoing, **PLAINTIFF'S OPPOSITION TO DEFENDANTS LYFT, INC. AND THE HERTZ CORPORATION[']S OBJECTION TO REPORT AND RECOMMENDATION[S] OF DISCOVERY COMMISSIONER**, to be served as follows:

[ ] by placing a true and correct copy of the same to be deposited for mailing in the U.S. Mail at Henderson, Nevada, enclosed in a sealed envelope upon which first Class postage was fully prepaid to ; and/or

[ ] pursuant to EDCR 7.26, by sending it via facsimile; and/or

[ ] by hand delivery

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EXHIBIT 1

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DISTRICT COURT

CLARK COUNTY, NEVADA

KALENA DAVIS, an individual Plaintiff, vs. ADAM DERON BRIDEWELL, an individual; LYFT, INC., a foreign corporation; THE HERTZ CORPORATION, a foreign corporation; DOE OWNERS I through X; and ROE LEGAL ENTITIES I through X, inclusive, Defendants.	CASE NO.: A-18-777455-C DEPT. NO.: XIII

DISCOVERY COMMISSIONER'S REPORT AND RECOMMENDATIONS

Date of Hearing: April 9, 2020
Time of Hearing: 10:00 a.m.

APPEARANCES:

Attorney for Plaintiff Kalena Davis	Jared R. Richards, Esq. Clear Counsel Law Group
Attorney for Defendant Adam Deron Bridewell	Justin D. Gourley, Esq. Harper Selim
Attorney for Defendants Lyft, Inc. and The Hertz Corporation	Jason G. Revzin Esq. and Blake A. Doerr, Esq. Lewis Brisbois Bisgaard & Smith, LLP

I. FINDINGS

1. During the Discovery Commissioner's February 13, 2020, Hearing regarding Defendants' Motion to Compel Rule 35 Examinations, the Commissioner requested that the parties provide additional briefing regarding the interrelationship and conflicts between NRCP 35 and NRS Section 52.380.

2. The parties provided such additional briefing, which came before the Commissioner for Hearing on April 9, 2020. The Commissioner makes the following Report of its findings of fact and conclusions of law, and the subsequent Recommendation to the District Court:

3. Conflicts between Nevada Rules of Civil Procedure 35 (the "Rule") and NRS Section 52.380 (the "Statute") are as follows:

(a) whether a party's attorney, or a representative of that attorney, may serve as an observer during the examination (which is barred by the Rule but permitted by the Statute);

(b) whether a party may have an observer during a neuropsychological, psychological, or psychiatric examination without making a showing of "good cause" (which showing is also required by the Rule but not required by the Statute); and

(c) whether the observer may record the examination without making a showing of "good cause" (which showing is required by the Rule but not required by the Statute).

4. Each of these conflicts is irreconcilable, such that it is not possible to construe the Rule and the Statute in harmony. If the Rule is followed on any of these points, the Statute by definition is not followed. If the Statute is followed on any of these points, the Rule by definition is not followed.

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5. Under Nevada law, the judiciary has the exclusive prerogative to make rules governing its own *procedures*, while the Legislature has the exclusive prerogative to enact statutes governing the *substance* of the law. *State v. Connery*, 99 Nev. 342, 345 (1983)

6. This distinction is predicated upon the "separation of powers" doctrine, which is specifically recognized in the Nevada State Constitution. *Berkson v. LePome*, 126 Nev. 492, 498 (2010) (citing Nev. Const. art. 3, § 1(1)).

7. Under Nevada law, a statute is presumed constitutionally valid until its invalidity has been "clearly established." *List v. Whisler*, 99 Nev. 133, 137-38 (1983). "In case of doubt, every possible presumption will be made in favor of the constitutionality of a statute, and courts will interfere only when the Constitution is clearly violated." *Id.* This "presumption of constitutional validity places upon those attacking a statute the burden of making a *clear showing* that the statute is unconstitutional." *Id.* (emphasis added).

8. A single question is presented here: whether the Statute is procedural or substantive. If the Statute is substantive, the Statute governs where a conflict arises. If the Statute is procedural, it is unconstitutional (and therefore superseded by the Rule) to the extent that the Statute is both procedural *and* in conflict with the Rule.

9. A *substantive* standard is one that "creates duties, rights and obligations," while a *procedural* standard specifies how those duties, rights, and obligations should be enforced. *Azar v. Allina Health Servs.*, 139 S. Ct. 1804, 1811 (2019).

10. The Statute creates substantive rights, including the *right* of the examinee to have his or her attorney or that attorney's representative serve as the observer, the *right* to have the observer record the examination without making a showing of "good cause," and the *right* to have an observer present for a neuropsychological, psychological, or psychiatric examination without making a showing of "good cause."

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11. Because the Statute creates substantive rights, it is substantive rather than procedural.

12. Because the Statute is substantive, it governs and supersedes the Rule where the two conflict.

13. An individual submitting to an examination under NRCP 35 has the following substantive rights, pursuant to NRS Section 52.380: to have his or her attorney or that attorney's representative serve as the observer; have the observer record the examination without making a showing of "good cause"; and to have an observer present for a neuropsychological, psychological, or psychiatric examination without making a showing of "good cause."

II. RECOMMENDATIONS

IT IS HEREBY RECOMMENDED that, during any NRCP 35 examination of Plaintiff Kalena Davis ~~(or of any other individual in this matter)~~ in this matter ordered by the Discovery Commissioner or the District Judge, the individual submitting to the examination be permitted to have an observer present, without regard to the nature of the examination (*e.g.*, neuropsychological, psychological, or psychiatric, and without any requirement of a showing of "good cause" to the Court.

IT IS FURTHER RECOMMENDED that, during any NRCP 35 examination of Plaintiff Kalena Davis ~~(or of any other individual)~~ in this matter ordered by the Discovery Commissioner or the District Judge, the observer attending the examination may be any person of the examinee's choosing, including but not limited to the examinee's attorney or that attorney's representative.

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IT IS FURTHER RECOMMENDED that, during any NRCP 35 examination of Plaintiff Kalena Davis ~~(or of any other individual in this matter)~~ in this matter ordered by the Discovery Commissioner or the District Judge, the observer attending the examination may make an audio or stenographic recording of the examination without any requirement of a showing of "good cause" to the Court.

DATED this 14th day of August, 2020.

DISCOVERY COMMISSIONER

Respectfully submitted by:

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Davis v. Bridewell, et al.
A-18-777455-C
April 9, 2020, at 10:00 a.m.

NOTICE

Pursuant to NRCP 16.3(c)(2), you are hereby notified that within fourteen (14) calendar days after being served with a report, any party may file and serve written objections to the recommendations. Written authorities may be filed with objections but are not mandatory. If written authorities are filed, any other party may file and serve responding authorities within seven (7) days after being served with objections.

Objection time will expire on September 1**, 2020.**

A copy of the foregoing Discovery Commissioner's Report was:

_____ Mailed to Defendants at the following addresses on the ____ day of _____ 2020.

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✓ Electronically filed and served counsel on the 18 day of August 2020, pursuant to N.E.F.C.R. Rule 9.

DATED this ____ day of _____, 2020.

By: _____
COMMISSIONER DESIGNEE

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EXHIBIT 2

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EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

KALENA DAVIS,

Plaintiff,

vs.

ADAM DERON BRIDEWELL, an individual; LYFT, INC., a foreign corporation; THE HERTZ CORPORATION, a foreign corporation; DOE OWNERS I through X, and ROE LEGAL ENTITIES I through X, inclusive,

Defendants.

Case No.: A-18-777455-C
Dept. No.: XIII

BRIEF ON RULE 35 EXAMINATIONS AND NRS 52.380

I. INTRODUCTION AND PROCEDURAL POSTURE

As requested by the Discovery Commission, this briefing addresses whether Plaintiff is entitled to the accommodations of an observer (specifically Plaintiff's counsel or representative) and recording of Defendants' expert examinations of Plaintiff as provided by NRS 52.380 without the showing of good cause as required by NRCP 35 or bar the Plaintiff's attorney/representative from acting as the observer should good cause be established. As will be shown below, the provisions of NRS 52.380 violate the separation of powers doctrine and therefore should be denied in this matter.

As the Court is aware from previous briefing from the parties, this matter arises from

Plaintiff Kalena Davis running a red light on his motorcycle and collided with Defendant Adam Bridewell's vehicle, causing significant personal injuries to himself. During the impact, Plaintiff was ejected from his motorcycle. He was transported to Sunrise Hospital, where he was admitted for over two months and underwent multiple surgeries, including a below-the-knee amputation. Plaintiff has alleged future treatment and future damages, including claims of traumatic brain injury and lost earnings capacity.

On February 13, 2020, the parties appeared before the Discovery Commissioner for a hearing on the Defendants' Motion to Compel Rule 35 Examinations of the Plaintiff by Dr. Thomas Kinsora, Ms. Aubrey Corwin M.S., L.P.C., C.R.C., C.L.C.P, and Dr. David E. Fish. See Exhibit A. Prior to the hearing, the parameters as to the examination by Dr. Fish were agreed to by the parties.

In his opposition to the Motion to Compel, however, Plaintiff sought parameters surrounding the examination by Dr. Kinsora, including an observer at and recording of the examination pursuant to NRCP 35. Nowhere did Plaintiff seek to establish good cause as required under NRCP 35, nor did Plaintiff raise the accommodations provided under recently enacted NRS 52.380. Plaintiff fully opposed an examination by Ms. Corwin. At no time prior to the hearing on the Motion to Compel did Plaintiff even attempt to demonstrate good cause to support his request for the accommodations provided under NRS 52.308.

The Defendants included in their Motion that the Plaintiff was required by NRCP 16.1 to confer in good faith with the Defendants to attempt to reach an agreement on these examinations but Plaintiff had been completely unresponsive to both email and telephone communications. At the hearing on the Motion, the Defendants apprised the Discovery Commissioner of Plaintiff's counsel's failure to confer in good faith on the accommodations for Dr. Kinsora's examination and therefore, among other things, were too late and should be disregarded. Further, that Defendants

were entitled to Ms. Corwin's examination based upon the allegations and damages asserted by Plaintiff. Arguably, Plaintiff's failure to confer in good faith should have barred his ability to request any parameters to the examinations by Dr. Kinsora and Ms. Corwin.

At the time of the hearing on Defendant's Motion to Compel, the Discovery Commissioner unilaterally raised the accommodations of NRS 52.380 by actually reading in open court a copy of A.B. 285 (which became NRS 52.380). Despite acknowledging lacking any knowledge of the provisions of NRS 52.380 prior to the hearing, Plaintiff's counsel thereafter stated that his client wanted an observer and recording of the examinations by Defendants' proposed experts.

Given the concern that Dr. Kinsora and Ms. Corwin would not be agreeable to an observation or recording of their examinations of Plaintiff, certainly without a showing of good cause, Defendants' counsel discussed the interplay between NRS 52.380 and NRCP 35. As noted, NRCP 35 was promulgated by the Nevada Supreme Court and provides generally that when a Plaintiff puts his physical or mental condition into controversy, that an adverse party may have a plaintiff examined by an appropriate medical professional when good cause for the examination is demonstrated. NRCP 35 further allows the party being examined to make a recording of an examination ordered pursuant to the rule only upon good cause shown. Additionally, NRCP 35 also allows for observers at certain examinations but the observer may not be the party's attorney or anyone employed by the party or the party's attorney." NRCP 35(a)(3). Moreover, NRCP 35(a)(4)(B) provides "The party may not have any observer present for a neuropsychological, psychological, or psychiatric examination, unless the court orders otherwise for good cause shown."

Recently passed NRS 52.380, however, makes no mention of a requirement to show good cause for either observation or recording, and provides that the observer may record the

examination by various means without any distinction between a physical examination and a mental examination.

While the Discovery Commissioner granted the Defendant's Motion for the examinations, she included that the examinations were to be conducted pursuant to specific parameters. A Discovery Commissioner's Report and Recommendations granting the three examinations which included the parameters agreed to for the examination by Dr. Fish was submitted to the Court. The Discovery Commissioner then set a hearing on the status of an agreement on the parameters for the two remaining examinations. That status hearing was held on March 5, 2020. At the time of the hearing, the Discovery Commissioner asked for the instant briefing on the apparent conflict between newly enacted NRS 52.380 and NRCP 35.

As will be provided for in detail below, the Court will readily see that the statute attempts to circumvent the clear intent of the Nevada Supreme Court to prevent observation during psychological examination and testing, absent a showing of good cause, and that the statute was enacted in violation of the separation of powers doctrine and should be disregarded.

II. THE NEVADA SUPREME COURT ESTABLISHED RULES FOR WHEN AND HOW A MEDICAL EXAMINATION COULD BE CONDUCTED ON A PLAINTIFF

Rule 35(a) of the Nevada Rules of Civil Procedure (hereinafter "NRCP 35") authorizes the Court to enter an order requiring a party to submit to a physical examination by a suitably licensed or certified examiner:

> When the mental or physical condition ... of a party, or of a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit to a physical or mental examination by a physician or to produce for examination the person in his custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

NRCP 35(a).

a. The United States Supreme Court Evaluation of a Rule 35 Motion and the Motives for Ordering Such

The United States Supreme Court has held that evaluating a Rule 35 motion "requires discriminating application by the trial judge, who must decide, as an initial matter in every case, whether the party requesting a physical...examination...has adequately demonstrated the existence of the Rule's requirements of 'in controversy' and 'good cause.'" Schlagenhauf v. Holder, 379 U.S. 104, 118-119, 85 S. Ct. 234, 13 L.Ed.2d 152 (1964). The Supreme Court recognized, however, that the pleadings alone may establish both requirements, as in the case of a plaintiff who asserts a mental or physical injury. Id., at 119. In Schlagenhauf, the Court wrote:

> Of course, there are situations where the pleadings alone are sufficient to meet these requirements. A plaintiff in a negligence action who asserts mental or physical injury, places that mental or physical injury clearly in controversy and provides the defendant with good cause for an examination to determine the existence and extent of such asserted injury.

Schlagenhauf, 379 U.S. at 119; see also, Tangires v. The John Hopkins Hospital, 1999 U.S. Dist, LEXIS 15461 at p. 4-5 (D. Md. 1999); G.B. Goldman Paper Co. v. United Paper Workers Int'l Union, 1996 WL 432484 at p. 1 (E.D. Pa. 1996). These guidelines set forth by the United States Supreme Court have become the standard for when independent examinations are ordered under Rule 35.

NRCP 35(a) also requires good cause for an order for a medical examination. NRCP 35(a). In this matter, Plaintiff's mental condition, physical condition, and alleged future medical care have all been placed in controversy. Plaintiff Davis testified he has no memory of the day in question. Plaintiff testified he could not remember a single detail surrounding the accident: where he was going to at the time; where he was coming from; what time it was; what day it was; whether his light was red, yellow or green; whether he moved in-between lanes of stopped cars at the intersection; what intersection the accident occurred at; or what he told the investigating officers or first responders. Instead, Plaintiff testified at his deposition that what he knows about the accident is limited to what was told to him by others. These facts created a need for Defendants to draft their original Motion to Compel Rule 35 Examinations of the Plaintiff by Dr.

Thomas Kinsora, Ms. Aubrey Corwin M.S., L.P.C., C.R.C., C.L.C.P, and Dr. David E. Fish.

Largely based on the fact that Plaintiff has alleged significant damages for past and future treatment, the Discovery Commissioner agreed that the Defendants had demonstrated good cause and ordered all three examinations but ordered that they needed to be conducted pursuant to certain parameters.

As stated previously, Plaintiff and Defendants agreed to parameters as to the examination by Dr. Fish but did not agree to the parameters for the examinations of Dr. Kinsora and Aubrey Corwin. Plaintiff never requested any parameters until after the Defendants filed their motion. It was not until the hearing on the motions and only when prompted by the Discovery Commissioner did Plaintiff's counsel request 1) to be in the room during the examinations, and 2) to audio record the examinations. Under NRCP 35, the Plaintiff was required to demonstrate good cause to have an observer at any examination and was also required to demonstrate good cause to record the examination.

III. THE PROVISIONS OF NRS 52.380 CONFLICT WITH NRCP 35

NRS 52.380 states in pertinent part:

> 1. An observer may attend an examination but shall not participate in or disrupt the examination.
> 2. The observer attending the examination pursuant to subsection 1 may be:
> (a) An attorney of an examinee or party producing the examinee; or
> (b) A designated representative of the attorney, if:
> (1) The attorney of the examinee or party producing the examinee, in writing, authorizes the designated representative to act on behalf of the attorney during the examination; and
> (2) The designated representative presents the authorization to the examiner before the commencement of the examination.
> 3. The observer attending the examination pursuant to subsection 1 may make an audio or stenographic recording of the examination.

NV Rev Stat § 52.380 (2019)(hereinafter, NRS 52.380).

As will be discussed in further detail below, rules of statutory interpretation dictate that the above statute and rule are to be read in harmony. But NRS 52.380 and NRCP 35 conflict as to the way in which medical examinations are to take place, the accommodations received by the parties,

and the method in which the parties receive such accommodations. Pursuant to NRCP 35, parties being ordered to submit to medical examinations must show good cause as to whether an observer may be in the testing room and whether the examination may be audio recorded. NRCP 35 also states that the observer **may not** be the parties' attorney or a representative of that attorney. By contrast, NRS 52.380 automatically allows parties that are ordered to submit to a medical examination to bring an observer, and that observer may be an attorney or a representative of that attorney. NRS 52.380 also automatically allows said observer to record the examination by audio-recording or stenograph. Therefore, NRS 52.380 as enacted creates a true and plain conflict with NRCP 35.

a. When a Conflict Exists Between a Statute and a Rule, Courts are to Look Beyond the Plain Meaning and Review of the Legislative History is Warranted

"When an ambiguity exists, 'a court should consult other sources such as legislative history, legislative intent, and analogous statutory provisions.' Madera v. State Indus. Ins. Sys. 114 Nev. 253, 257 (1998)." W. Taylor St. v. Waste Mgmt. of Nev., 2014 Nev. Dist. LEXIS 1535, *21. Therefore, the legislative history of NRS 52.380 requires evaluation.

b. The Legislative History of NRS 52.380 Evidences That it is a Procedural Statute

NRS 52.380 was introduced in the 80th Nevada Legislature in 2019 as Assembly Bill No. 285 (hereinafter "A.B. 285"). The Bill's stated objective was to protect Plaintiffs or parties by allowing an observer to be present at a mental or physical examination ordered by Courts in Nevada. While A.B. 285 discussed the procedural parameters of an examination, including the observer, suspensions of the examinations, and the recording of such examinations; the proponents argued that A.B. 285 was addressing a substantive law and not merely a procedural statute.

When A.B. 285 was introduced on March 27, 2019, proponents discussed the motives for its potential enactment, which included the fact that in workers' compensation claims and litigation in Nevada, as well as in the surrounding western states of Washington, California and Arizona, observers are allowed to be present. The proponents testified that "this bill addresses substantive law, dealing with fundamental rights such as liberty and to control your own body. Assembly Bill 285 will allow the medical examination to be audio-recorded; however, the Nevada

Supreme Court rules forbid it." See Exhibit C: Minutes of the Meeting of the Senate Committee on Judiciary Hearing, Page 5.

The proponents also discussed a subcommittee which was formed in 2017 by the Supreme Court of Nevada to review and update the Nevada Rules of Civil Procedure. The provisions of A.B. 285 were proposed and voted 7-1 by that subcommittee as a substantial change to NRCP 35 but the Supreme Court of Nevada "rejected our changes for reasons we are still not clear on." See Exhibit B: Minutes of the Meeting of the Assembly Committee on Judiciary, Page 4. To reiterate, in 2017 when the Supreme Court considered incorporating the language which eventually became NRS 52.380 into NRCP 35, the Supreme Court rejected it.

By contrast, opponents of AB 285 argued that its provisions would constitute a violation of the Separation of Powers Doctrine as it was merely a procedural statute conflicting with previously enacted NRCP 35. The opponents further testified that the pool of doctors would be limited due to physicians and professionals not willing to conduct independent medical exams under the confines of A.B. 285. *Id*. at Page 14.

Despite these arguments and the Nevada Supreme Court's prior rejection, A.B. 285 was officially enacted by the Nevada Legislature on May 30, 2019 and became law on October 1, 2019.

IV. THE LEGISLATURE VIOLATES THE SEPARATION OF POWERS DOCTRINE WHEN IT ENACTS LAWS THAT CONTRADICT DULY PROMULGATED RULES

In order to determine the constitutionality of NRS 52.380 in relation to NRCP 35, legal authority must be evaluated.

a. The Constitutionality of a Nevada Statute is Presumed Valid Until the Contrary is Established

The Nevada Supreme Court has repeatedly explained that a party challenging the constitutionality of a statute bears a "heavy burden . . . to overcome the presumption of constitutional validity which every legislative enactment enjoys." Allen v. State, 100 Nev. 130, 133, 676 P.2d 792, 794 (1984). The analysis "begins with the presumption of constitutional validity which clothes statutes enacted by the Legislature. All acts passed by the Legislature are

presumed to be valid until the contrary is **clearly established**. In case of doubt, every possible presumption will be made in favor of the constitutionality of a statute, and courts will interfere only when the Constitution is **clearly** violated." *Id*. at 133-34 (emphasis added).

b. The Court Must Interpret Statutes Created by the Nevada Legislature to Determine their Meaning

When interpreting statutes created by the Nevada legislature, "[i]f the plain meaning of a statute is clear on its face, then [this court] will not go beyond the language of the statute to determine its meaning." Beazer Homes Nev., Inc. v. Eighth Judicial Dist. Court, 120 Nev. 575, 579-80, 97 P.3d 1132, 1135 (2004). When a rule and statute are to be interpreted together, Nevada Courts are to, "interpret a rule or statute in harmony with other rules and statutes . . . such that no part of the statute is rendered nugatory or turned to mere surplusage." Albios v. Horizon Communities, Inc., 122 Nev. 409, 418, 132 P.3d 1022, 1028 (2006); see also Orion Portfolio Servs. 2, LLC v. Cty. of Clark, 126 Nev. 397, 403, 245 P.3d 527, 531 (2010) ("This court has a duty to construe conflicting statutes as a whole, so that all provisions are considered together and, to the extent practicable, reconciled and harmonized." Hefetz v. Beavor, 397 P.3d 472, 475, 2017 Nev. LEXIS 61, *5-6, 133 Nev. Adv. Rep. 46, 2017 WL 2885639.

c. The Conflict Between NRCP 35 and NRS 52.380 Presents a Violation of the Separation of Powers Doctrine

When a rule and a statute diverge in meaning or interpretation, as here, one is forced to look to whether there has been a violation of the Separation of Powers Doctrine. "The separation of powers doctrine is the most important foundation for preserving and protecting liberty by preventing the accumulation of power in any one branch of government." Berkson v. Lepome, 245 P.3d 560, 564 (Nev. 2010). "[The Nevada Supreme Court has] been especially prudent to keep the powers of the judiciary separate from those of either the legislative or the executive branches." Id. at 564-65. Article 3, Section 1(1) of the Nevada Constitution addresses the separation of powers. Id. at 564. It states as follows:

> The powers of the Government of the State of Nevada shall be divided into three separate departments,—the Legislative,—the Executive and the Judicial; and no persons charged with the exercise

> of powers properly belonging to one of these departments shall exercise any functions, appertaining to either of the others, except in the cases expressly directed or permitted in this constitution.

Nev. Const. Art. 3, § 1.

Put simply, the Separation of Powers Doctrine prohibits one department from exercising the powers of the other departments. Galloway v. Truesdell, 83 Nev. 13, 19 (1967). "Legislative power is the power of law-making representative bodies to frame and enact laws, and to amend or repeal them." *Id.* at 19-20.

The Nevada Supreme Court maintains the judicial branch of our government. "'Judicial power' is the capability or potential capacity to exercise a judicial function. That is, 'judicial power' is the authority to hear and determine justiciable controversies." *Id*. at 20-21. The judiciary's power to draft and prescribe the Rules was given by the Nevada Legislature in 1951. The Preface of our Nevada Rules of Civil Procedure states in pertinent part, "The 1951 legislature authorized the Nevada Supreme Court to Prescribe (sic) rules to regulate civil practice and procedure. Existing statutes were deemed rules of court, to remain in effect until superseded. 1951 L., p. 44. See NRS 2.120." Further, the Enabling Act, NRS 2.120 grants the Supreme Court the following:

> The supreme court of Nevada, 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.

NRS 2.120

In State v. Connery, 99 Nev. 342, 661 P.2d 1298 (1983), the Nevada Supreme Court confirmed in pertinent part,

> Although such rules may not conflict with the state constitution or abridge, enlarge, or modify any substantive right, Nev. Rev. Stat. § 2.120, the authority of the judiciary to promulgate procedural rules is independent of legislative power, and may not be diminished or compromised by the legislature. **The legislature may not enact a procedural statute that conflicts with a pre-existing procedural**

> **rule**, without violating the doctrine of separation of powers. Such a statute is of no effect. Furthermore, where a rule of procedure is promulgated in conflict with a pre-existing procedural statute, the rule supersedes the statute and controls.

State v. Connery, 99 Nev. 342, 343, 661 P.2d 1298, 1299 (1983(Emphasis added). Therefore, the Nevada Legislature is under a duty not to breach the separation of powers doctrine by creating a statute that is in conflict with the Nevada Rules of Civil Procedure which are promulgated by the Supreme Court. If the Nevada Legislature does in fact breach the separation of powers doctrine by drafting a statute in conflict with a rule, the rule will control. Where the legislature breaches the separation of powers doctrine, the statute will be of no effect and the prior rule supersedes the statute.

Further, in the Nevada Supreme Court case of Watson Rounds, P.C. v. Eighth Judicial Dist. Court, 358 P.3d 228, 232 (Nev. 2015), the Court discussed Connery stating the rule and the statute in that matter were plainly in conflict as the issue was the amount of days from which to calculate a strict 30-day appeal window. The issue in Watson was whether NRCP 11 supersedes NRS 7.085 for the purposes of sanctioning attorney misconduct. The Court stated that the issue was distinguishable from Connery in that the statue and rule in question could be read in harmony because, analogous to FRCP 11 and 28 U.S.C. §1927, they apply to different types of misconduct and provide independent mechanisms for sanctioning attorney misconduct. *Id.* at 232.

In the case at hand, the legislature enacted NRS 52.380 after the Supreme Court promulgated NRCP 35. NRCP 35 does not allow for attorneys to be present in the examinations. NRCP 35 allows, only if good cause is shown, for an observer to be present and for the examination to be audio recorded. NRS 52.380, however, has no good cause requirement. The statute automatically allows observers to be present during an examination and that observer can be Plaintiff's own attorney or staff from their attorney's office. Further, NRS 52.380 also automatically allows for the examination to be audio recorded and, or, recorded by stenograph, meaning a court reporter would also be present during the examination. The rule and the statute clearly conflict as they did in Connery and cannot be read in harmony per Watson. To the

contrary, the statute nullifies the "good cause" requirement and prohibition of attorney observers of NRCP 35.

Therefore, unlike Watson where the statute and rule could be read in harmony because they applied to "different types of misconduct" and provided "independent mechanisms for sanctioning attorney misconduct," NRS 52.380 creates new conflicting procedures for the exact same thing covered by NRCP 35 – procedures for submitting a party to a physical or mental examination.

Therefore, under Connery, simply looking at the plain language of the statute with the plain language of the rule, the rule is to control and supersedes the promulgated legislative statute, meaning that in the matter at hand, Plaintiff's attorney should not be allowed to observe the examinations. Further, Plaintiff's attorney must be required to show good cause that an observer is necessary in order for his client to be examined, and must be required to show good cause that the examination be audio recorded. Plaintiff's attorney has yet to show good cause for either in this matter.

V. SUBSTANTIVE VERSUS PROCEDURAL RULES AND STATUTES

The Supreme Court of Nevada has consistently held that "The legislature may not enact a procedural statute that conflicts with a pre-existing procedural rule, without violating the doctrine of separation of powers." State v. Connery, 99 Nev. 342, 343, 661 P.2d 1298, 1299 (1983) (emphasis added). NRS 52.380 must be found to be a substantive law rather than a procedural law for NRCP 35 not to be in conflict with such. "Substantive law is defined as "the basic law of rights and duties . . . as opposed to procedural law (. . . law of jurisdiction, etc.)." Black's Law Dictionary 1281 (5th ed. 1979)." Meadows v. Dominican Republic, 817 F.2d 517, 524 (9th Cir. 1987). Further, the United States Supreme Court defined "a substantive standard is one that 'creates duties, rights and obligations,' while a procedural standard specifies how those duties, rights, and obligations should be enforced. Black's Law Dictionary 1281 (5th ed. 1979) (defining 'substantive law')". Azar v. Allina Health Servs., 139 S. Ct. 1804, 1811 (2019).

a. NRCP 35 as Promulgated by the Nevada Supreme Court is a Procedural Rule

NRCP 35 is a procedural rule. The rule as described creates the boundaries and ability for

Courts to order a party to submit to a physical or mental examination. NRCP 35 specifies the way in which notice must be given of the examination, what the order must include, the specifications regarding recording of an examination, the conditions as to whether an observer may be present during an examination, and finally the way in which the examiners report must be written and requested. This rule does not create duties and rights regarding mental and, or physical examinations. NRCP 35 does indeed postulate how to enforce the rights and duties of a physical and, or mental examination under Nevada law.

b. NRS 52.380 as Enacted by the Nevada Legislature is a Procedural Statute

At its core, NRS 52.380 is a procedural rule on top of the procedural rule of NRCP 35. NRS 52.380 also sets forth how to enforce the rights and duties of an individual ordered by the Court to undergo a physical and, or mental examination. The statute stipulates that an observer may attend the examination, whom the observer may be, the ability to audio record the examination or create a stenograph, and the way in which the observer or examiner may suspend the examination. The plain language of NRS 52.380 does not create rights, duties or obligations. This statute creates and extends ways in which to enforce rights and duties of a physical and, or mental examination.

Though the creators and drafters of NRS 52.380 tried to cloak the statute as being a substantive rule, as the opposition noted in the legislative history, what they actually created was a procedural rule regarding the right to order a party to attend a physical and, or mental examination. Both NRCP 35 and NRS 52.380 are clearly procedural by their impact in regards to the litigation between parties. Because NRS 52.380 is procedural, the statute as drafted and enacted today, violates the Separation of Powers Doctrine. Therefore, as NRCP 35 was promulgated prior to the enactment of the Legislature's NRS 52.380, the rule controls as held by the Nevada Supreme Court. *See* State v. Connery, 99 Nev. 342, 661 P.2d 1298 (1983); Berkson v. Lepome, 126 Nev. 492, 245 P.3d 560 (2010); Zamora v. Price, 125 Nev. 388, 213 P.3d 490 (2009). Consequently, Plaintiff in this matter is not automatically entitled to an observer, and, or an audio-recording of the examinations. Plaintiff must show good cause to have both or either, and has yet to do so.

VI. INDEPENDENT MEDICAL EXAMINATION OBJECTIONS BY DR. THOMAS

KINSORA AND MS. AUBREY CORWIN

a. Dr. Thomas F. Kinsora objects to the use of audio-recording in the testing room, as well as the presence of an observer during his neuropsychiatric evaluation of the Plaintiff

Defendants retained Thomas Francis Kinsora, Ph.D. to perform a neuropsychological examination. Thomas Francis Kinsora, Ph.D., (Dr. Kinsora) is a trained clinical neuropsychologist. Dr. Kinsora received his undergraduate degree from Wayne State University in Detroit, Michigan. Moreover, Dr. Kinsora was admitted into the California School of Professional Psychology which is accredited by the American Psychological Association. Dr. Kinsora received a Ph.D. in Psychology with a certificate in neuropsychology and behavioral medicine from California School of Professional Psychology. Dr. Kinsora's doctoral research focused on implicit stem-completion priming and memory processing in the differentiation of Alzheimer's type dementia from Parkinson's related dementia. It is expected that Dr. Kinsora will opine on the Plaintiff's condition within his area of expertise. Dr. Kinsora, when presented with NRS 52.380, condemned the use of audio recording as well as the concept of an observer being present in neuropsychological examinations. He concluded that

> Allowing a non-neuropsychologist, particularly an attorney, access to protected test material through third party observation, or direct access to raw test data, a)violates the neuropsychologist's ethical guidelines and the published positions of professional organizations, b) goes against the stated position of the Nevada Board of Psychological Examiners, c) violates NAC 641.234, d) presents a risk to public safety, e) diminishes the validity of test results, f) diminishes the usefulness of the neuropsychologist to the tier of fact, and f) (sic) diminishes the viability of the neuropsychologist by denying him/her the tools necessary to conduct valid neuropsychological assessments.

See Exhibit D: Why Neuropsychological Evidence is Compromised When Protected Test Material is Released and When the Examinee is Subject to Third Party Observation by Thomas F. Kinsora, Ph.D., Page 1.

Importantly, this is also not just Dr. Kinsora's conclusion. During the Amended NRCP Committee discussions, prior to promulgation, the examinations of neuropsychologists and neurological examinations were discussed. NRCP 35(a)(4)(A) and (B) as drafted, provides:

> (A) The party may have one observer present for the examination,

> unless: (i) the examination is a neuropsychological, psychological, or psychiatric examination; or (ii) the court orders otherwise for good cause shown. (B) The party may not have any observer present for a neuropsychological, psychological, or psychiatric examination, unless the court orders otherwise for good cause shown.

NRCP 35.

The Supreme Court obviously felt it prudent to highlight the work of neuropsychologists in regard to the independent medical examinations. During the Assembly Judiciary Meeting on March 27, 2019, Mr. George Bochanis testified that during the NRCP Committee discussions prior to the enactment of the Amended NRCP in 2019, psychologists testified in opposition to observers being permitted in the room where a party was being tested. See Exhibit B at Page 9. Mr. Bochanis discussed the secret nature of the examinations and the grading of the examinations. He tried to dissuade these physician's concerns by submitting "74 websites that contain copies of these exams and how they are graded and how they are evaluated [pages 51-59, (Exhibit C)]." *Id*. Further, Mr. Bochanis testified regarding the apprehension from physicians regarding examinees during these exams if they are allowed an observer, that

> [Examinees] are going to hold things back because it is an examination that has been forced on them. Simply having somebody present is not going to change the nature of the examination at all. In fact, an observer being present during this examination is more required than any other type of examination because certain distractions—the inflection of the voice of this psychologist examiner and other things like that—could have a huge impact on the findings of the examination. Not having an observer present affects that.

Id.

However, Mr. Bochanis is not a licensed psychologist, and misses the mark. Dr. Kinsora opined regarding this particular issue, that the recording of a neuropsychological examination or allowing an observer into the testing room that

> Some examinees get anxious when they know they are being recorded or observed, and their cognitive efficiency declines. Some examinees "play it up" for the recording in an effort to "prove their case", and some will simply get thrown off balance. **The presence**

> **of such third party observers have been shown repeatedly in research to reduce the validity of neuropsychological measures.**

See Exhibit D at Page 4.

Dr. Kinsora along with the other psychologists who testified during the NRCP Committee meeting, concluded that "any results obtained in the presence of a third party observer are, by definition, of unclear validity, and thus useless to the trier of fact." See Exhibit D at Page 5. As Dr. Kinsora has concluded that the presence of an observer and the use of audio-recording would tamper with the results of the examination, Defendants ask this Court to find that the Plaintiff has not and cannot show good cause for such accommodations.

b. Ms. Aubrey Corwin M.S., L.P.C., C.R.C., C.L.C.P objects to the presence of an observer while testing and evaluating the Plaintiff

Defendant retained Aubrey Corwin M.S., L.P.C., C.R.C., C.L.C.P to perform an earning capacity evaluation and make a vocational damages assessment and comment on any purported life care plan should one be disclosed. Ms. Corwin is the Director of Vocational Diagnostics Incorporated, a Licensed Professional Counselor for the Arizona Board of Behavioral Health Examiners, a Certified Rehabilitation Counselor, and a Certified Life Care Planner. Due to the very personal nature of the interview and evaluation Ms. Corwin needs to perform on the Plaintiff, she has objected to the presence of an observer in the testing room. Ms. Corwin opined:

> A very important component to the vocational evaluation process includes the administration of a vocational test battery. This is also a one-on-one meeting where standardized tests are administered to evaluate the subject's academic levels of achievement, aptitudes, interests and work values. In order to preserve the integrity of the tests and protocols, vocational testing can **only** be performed on a one-to-one basis with no other observers present.

Exhibit E: Letter from Ms. Aubrey Corwin to Mr. Blake Doerr, Page 3 (emphasis added).

Further, as Plaintiff has not shown good cause to have an observer in the testing room per NRCP 35, this Court should not allow recording or an observer to be present for Ms. Corwin's testing.

VII. CONCLUSION

Defendants ask this Court to deny Plaintiff's request to have the examinations by Dr. Kinsora and Ms. Corwin to be recorded and Plaintiff's request to have those examinations observed because pursuant to NRCP 35, Plaintiff has failed to demonstrate good cause for either recording or observation.

DATED this 20th day of March, 2020.

LEWIS BRISBOIS BISGAARD & SMITH LLP

By /s/ Blake A. Doerr

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b) and N.E.F.C.R. 4(b)(1), 5(k) and 10(b), I hereby certify that I am an employee of LEWIS BRISBOIS BISGAARD & SMITH LLP and that on this 20th day of March, 2020, I did cause a true and correct copy of **BRIEF ON RULE 35 EXAMINATIONS AND NRS 52.380** to be served via the Court's electronic filing and service system to all parties on the current service list.

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By */s/ Sherry Rainey*
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EXHIBIT A

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EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

2/13/20
9:30 am.

KALENA DAVIS,

Plaintiff,

vs.

ADAM DERON BRIDEWELL, an individual; LYFT, INC., a foreign corporation; THE HERTZ CORPORATION, a foreign corporation; DOE OWNERS I through X, and ROE LEGAL ENTITIES I through X, inclusive,

Defendants.

Case No.: A-18-777455-C
Dept. No.: XIII

DEFENDANT LYFT AND DEFENDANT THE HERTZ CORPORATION'S MOTION TO COMPEL RULE 35 EXAMINATIONS ON ORDER SHORTENING TIME

(HEARING REQUESTED)

Defendant, LYFT, INC., ("LYFT") and Defendant THE HERTZ CORPORATION ("HERTZ") by and through their counsel of record LEWIS BRISBOIS BISGAARD & SMITH LLP, hereby files this Motion to Compel Rule 35 Examinations against Plaintiff KALENA DAVIS.

This Motion is made and based on the attached memorandum of points and authorities, the papers, pleadings and records contained in this Honorable Court's file, and

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/ / /

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/ / /

any arguments of counsel to be presented at the hearing on this matter.

DATED this 28th day of January, 2020.

LEWIS BRISBOIS BISGAARD & SMITH LLP

By _____

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Attorneys for Lyft, Inc. and The Hertz Corporation

ORDER SHORTENING TIME

GOOD CAUSE APPEARING THEREFORE,

IT IS HEREBY ORDERED, that **DEFENDANTS' MOTION TO COMPEL RULE 35 EXAMINATIONS** be heard on February 13, 2020, at the hour of 9:30 a.m. before the Discovery Commissioner.

Dated this 29th day of January, 2020.

_____
DISCOVERY COMMISSIONER

Respectfully Submitted by:
LEWIS BRISBOIS BISGAARD & SMITH LLP

_____

JASON G. REVZIN
Nevada Bar No. 8629
BLAKE A. DOERR
Nevada Bar No. 9001
Attorneys for Lyft, Inc. and The Hertz Corporation

DECLARATION OF BLAKE A. DOERR, ESQ., IN SUPPORT OF DEFENDANT'S MOTION TO COMPEL RULE 35 EXAMINATIONS

I, Blake A. Doerr, declare as follows:

1. I am a partner at the law firm of LEWIS BRISBOIS BISGAARD & SMITH LLP, and am duly licensed to practice law in the State of Nevada. I am an attorney of record representing Defendant *Lyft, Inc.* and Defendant *The Hertz Corporation* in the subject lawsuit currently pending in Department 13 of the Eighth Judicial District Court for the State of Nevada, Case Number A-18-777455-C. I am competent to testify to the matters set forth in this Declaration, and will do so if called upon.

2. That I make this Declaration on behalf of Defendants and in support of their Motion to Compel Rule 35 Examinations against Plaintiff KALENA DAVIS and to demonstrate that the parties conferred in good faith to obtain the discovery prior to seeking this court's intervention.

3. On January 10, 2020, I participated in an E.D.C.R. 2.34 with Plaintiff's counsel, Jared Richards. In that conversation, we discussed the fact that Plaintiff's counsel had requested a stipulation as to certain terms prior to his agreement to allow his client to be examined; that Plaintiff's counsel had not provided any of the requested terms nor had Plaintiff's counsel ever provided dates even though he had agreed to work on that beginning in October of 2019.

4. This Motion on Order for Shortening Time is necessary as our experts need to be able to examine the Plaintiff and prepare their reports by March 6, 2020. The exams need to be scheduled forthwith.

5. This Declaration is made in good faith, and not for purposes of delay.

I declare under penalty of perjury under the laws of the State of Nevada that the foregoing is true and correct.

Blake A. Doerr, Esq.

No Notary Required per NRS 53.045

MEMORANDUM OF POINTS AND AUTHORITIES

I.

FACTUAL INTRODUCTION

At the time of the accident, Co-Defendant Adam Bridewell ("Bridewell"), while utilizing the Lyft application, website, and technology platform ("Lyft platform") to transport two passengers, was driving a 2016 Toyota Camry (which he had leased from Hertz). One passenger, Ashley Caulk, was headed to her new job to collect her first paycheck; the other, Paulette Harris, was headed to the Galleria Mall. Plaintiff was headed to work (he was employed at RideNow Powersports on Boulder Highway near the Silver Bowl) traveling eastbound on Russell Road. Bridewell was traveling westbound on Russell Road and had entered the intersection at Stephanie Street to make a left-hand turn. Bridewell was yielding to oncoming traffic, with a solid green ball controlling his left turn. Meanwhile, Plaintiff split the lanes of travel on eastbound Russell Road, driving between the cars stopped for the red light at the intersection at Stephanie Street. As Bridewell followed through on his left-hand turn to clear the intersection, Plaintiff, once at the front of the line, revved his engine and blasted through the intersection on a solid red light. As Bridewell completed his turn, Plaintiff crashed into the right, passenger-side door of Bridewell's vehicle.

As a result of his colliding with Bridewell's vehicle, Plaintiff was ejected from his motorcycle. Plaintiff was transported to Sunrise Hospital, where he was admitted for over two months and underwent multiple surgeries, including a below-the-knee amputation. Plaintiff has alleged future treatment and future damages, including claims of traumatic brain injury.

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II.

LEGAL ANALYSIS

NRCP 35(a) provides in pertinent part as follows:

> When the mental or physical condition of a party . . . is in controversy, the court in which the action is pending may order the party to submit to a physical or mental examination by a suitably licensed or certified examiner . . . . The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner conditions, and scope of the examination and the persons . . . by whom it is to be made. (emphasis added).

NRCP 35 essentially mirrors its federal counterpart with the exception that the Federal Rule does not allow observers at the examination. Nevertheless, Nevada courts routinely look to the federal court's interpretation of the rules of civil procedure. *See, Greene v. Dist. Ct.*, 115 Nev. 391, 393, 990 P.2d 184 (1999). Thus, this Court should consider the federal case law regarding this issue set forth below.

The seminal case regarding Rule 35 is *Schlagenhauf v. Holder*, 379 U.S. 104 (1964). In *Schlagenhauf*, the United States Supreme Court set forth the showing that a party seeking a Rule 35 examination must make. *Id.* at 118-119. A party must show that the physical or mental condition of the party to be examined is in controversy and that there is good cause for the requested examination. *Id.* ("affirmative showing by the movant that each condition as to which the examination is sought is really and genuinely in controversy and that good cause exists for ordering each particular examination.").

In this case, Plaintiff's mental condition, physical condition, and alleged future medical care are in controversy. Plaintiff Kalena Davis testified he has no memory of the day in question. Plaintiff testified he could not remember any details of: where he was going to at the time, where he was coming from, what time it was, what day it was, whether his light was red, yellow or green, whether he moved in-between lanes of stopped cars at the intersection, what intersection the accident occurred at, what he told the investigating officers or first responders. Plaintiff testified at his deposition that what

he knows about the incident is limited to what was told to him by others.

According to the U.S. Supreme Court, "[a] plaintiff in a negligence action who asserts mental or physical injury . . . places that mental or physical injury clearly in controversy and provides the defendant with good cause for an examination to determine the existence and extent of such asserted injury." *Schlagenhauf*, 379 U.S. at 119 (emphasis added).

Here, Defendants retained Thomas Francis Kinsora, Ph.D. to perform a neuropsychological examination. Thomas Francis Kinsora, Ph.D., (Dr. Kinsora) is a trained clinical neuropsychologist. Dr. Kinsora received his undergraduate degree from Wayne State University in Detroit, Michigan. Moreover, Dr. Kinsora was admitted into the American Psychology, receiving a Ph.D. in Psychology with a certificate in neuropsychology and behavioral medicine. Dr. Kinsora's doctoral research focused on implicit stem-completion priming and memory processing in the differentiation of Alzheimer's type dementia from Parkinson's related dementia. It is expected that Dr. Kinsora will opine on the Plaintiff's condition within his area of expertise.

A Stipulation and Order was provided to Plaintiff's Counsel on January 24th for the Rule 35 Examination that is currently scheduled with Dr. Kinsora for two days beginning March 11, 2020 at 9:00 a.m. and March 12, 2020 at 9:00 a.m. A copy of the Stipulation and Order is attached hereto as Exhibit A.

Defendant retained Aubrey Corwin M.S., L.P.C., C.R.C., C.L.C.P to perform an earning capacity evaluation and make a vocational damages assessment and comment on any purported life care plan should one be disclosed. Ms. Corwin is the Director of Vocational Diagnostics Incorporated, a Licensed Professional Counselor for the Arizona Board of Behavioral Health Examiners, a Certified Rehabilitation Counselor, and a Certified Life Care Planner.

A Stipulation and Order was provided to Plaintiff's Counsel on January 24th for the Rule 35 Examination that is currently scheduled with Aubrey Corwin for February 7, 2020 at 9:30 a.m. and 1:00 p.m. A copy of the Stipulation and Order is attached hereto as

Exhibit B).

Defendant has further retained David E. Fish, M.D., a board certified physician in the areas of physical medicine and rehabilitation. Dr. Fish is expected to offer his expert opinions as to Plaintiff's alleged medical conditions allegedly resulting from the incident which is the subject of Plaintiff's Complaint. Dr. Fish will testify as to the reasonableness and necessity of Plaintiff's medical treatment following the subject incident, as well as future prognosis and treatment. Dr. Fish will also testify regarding the existence of any pre-accident and post-accident injuries, conditions, accidents/incidents, as well as medical treatment and billings, along with his rebuttal opinions, and any other areas within his expertise.

A Stipulation and Order was provided to Plaintiff's Counsel on January 24th for the Rule 35 Examination that is currently scheduled with Dr. Fish, for two days beginning March 20, 2020 at 2:00 p.m. A copy of the Stipulation and Order is attached hereto as Exhibit C.

III.

CONCLUSION

Based upon the foregoing, Defendants respectfully request an Order compelling Plaintiff to attend NRCP Rule 35 examinations as follows:

Dr. Kinsora: March 11, 2020 at 9:00 a.m. to 12:00 p.m. and;
March 12, 2020 at 9:00 a.m. to 5:00 p.m.

Ms. Corwin: February 7, 2020 at 9:30 a.m. to 12:30 p.m. and;
February 7, 2020 at 1:00 p.m. to 3:30 p.m.

Dr. Fish: March 20, 2020 at 2:00 p.m.

DATED this 28th day of January, 2020.

LEWIS BRISBOIS BISGAARD & SMITH LLP

By 

JASON G. REVZIN
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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b) and N.E.F.C.R. 4(b)(1), 5(k) and 10(b), I hereby certify that I am an employee of LEWIS BRISBOIS BISGAARD & SMITH LLP and that on this 30th day of January, 2020, I did cause a true and correct copy of **DEFENDANT LYFT AND DEFENDANT THE HERTZ CORPORATION'S MOTION TO COMPEL RULE 35 EXAMINATIONS ON ORDER SHORTENING TIME** to be served via the Court's electronic filing and service system to all parties on the current service list.

Jared R. Richards
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Las Vegas, NV 89012
Attorneys for Plaintiff

Justin S. Gourley
HARPER SELIM
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Las Vegas, Nevada 89134
Attorneys for Defendant Adam Deron Bridewell

By /s/Sherry Rainey
An Employee of LEWIS BRISBOIS BISGAARD & SMITH LLP

Exhibit A

STP
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Email: blake.doerr@lewisbrisbois.com
Attorneys for Lyft, Inc. and The Hertz Corporation

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

KALENA DAVIS,

Plaintiff,

vs.

ADAM DERON BRIDEWELL, an individual; LYFT, INC., a foreign corporation; THE HERTZ CORPORATION, a foreign corporation; DOE OWNERS I through X, and ROE LEGAL ENTITIES I through X, inclusive,

Defendants.

Case No.: A-18-777455-C
Dept. No.: XIII

STIPULATION AND ORDER FOR NRCP RULE 35 EXAMINATION

Date of Video Clinical Interview: February 7, 2020
Time of Interview: 9:30 a.m.- 12:30 p.m.

Date of Video Vocational Testing: February 7, 2020
Time of Testing: 1 p.m. - 3:30 p,m,

On February 7, 2020 an Independent Video Clinical Interview and Video Vocational testing of the Plaintiff shall be Conducted by Aubrey Corwin, M.S., L.P.C., C.R.C., C.L.C.P., Director of Vocational Diagnostic Institute. Ms. Corwin is a qualified expert witness in Clark County District Court and will offer her opinions related to earning capacity evaluation, analysis of household services, and life care planning. Alleged injuries include orthopedic and neurological injuries and traumatic brain and spinal cord injuries.

1. The examination will consist of two sessions: an interview session and a testing

session. The interview session will be approximately 3 hours and the testing session will last approximately 3 hours and there will be a lunch break in between the two sessions.

2. The interview and testing will be done through videoconference means at Litigation Services located at 3770 Howard Hughes Pkwy #300, Las Vegas, Nevada 89169.

3. The Plaintiff shall complete the required intake documents requested by the examiner and bring them to the examination; and the examiner will go over the intake documents with the Plaintiff at the start of the interview.

4. The Plaintiff will not wait any longer than 30 minutes after the scheduled time for the commencement of the Rule 35 exam.

5. The examiner will not ask any questions to Plaintiff directly relating to the Plaintiff's opinions regarding liability; however, this shall not be construed to mean the examiner cannot inquire as to how the accident occurred to better understand the mechanism of the alleged injury; nor shall this be construed to mean the examiner cannot inquire about past medical treatment.

6. Should Plaintiff fail to appear and fully cooperate during the examination to completion, Plaintiff shall be all costs associated with any subsequent examination.

7. The examination shall not be recorded.

DATED this ____ day of January 2020.

CLEAR COUNSEL LAW GROUP

Jared R. Richards, Esq.
Nevada Bar No. 11254
1671 W. Horizon Ridge Pkwy, Suite 200
Henderson, NV 89012
Attorneys for Plaintiff Kalena Davis

DATED this ___ day of January 2020.

HARPER | SELIM

James E. Harper, Esq.
Nevada Bar No. 9822
Justin Gourley, Esq.
Nevada Bar No. 11976
1707 Village Center Circle, Suite 140
Las Vegas, NV 89134
Attorneys for Defendant Adam Deron Bridewell

DATED this ____ day of January 2020.

LEWIS BRISBOIS BISGAARD & SMITH, LLP

_____

Jason G. Revzin, Esq.
Nevada Bar No. 8629
Blake A. Doerr, Esq.
Nevada Bar No. 9001
6385 S. Rainbow Boulevard, Suite 600
Las Vegas, NV 89118
Attorneys for Defendant Lyft, Inc. The Hertz Corporation

ORDER

IT IS SO ORDERED.

_____

DISTRICT COURT JUDGE

Submitted by:

_____

MATTHEW A. CAVANAUGH
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BLAKE A. DOERR, Esq.
Nevada Bar No. 9001
6385 S. Rainbow Boulevard, Suite 600
Las Vegas, Nevada 89118
LEWIS BRISBOIS BISGAARD & SMITH LLP

Exhibit B

STP
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Attorneys for Lyft, Inc. and The Hertz Corporation

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

KALENA DAVIS,

Plaintiff,

vs.

ADAM DERON BRIDEWELL, an individual; LYFT, INC., a foreign corporation; THE HERTZ CORPORATION, a foreign corporation; DOE OWNERS I through X, and ROE LEGAL ENTITIES I through X, inclusive,

Defendants.

Case No.: A-18-777455-C
Dept. No.: XIII

STIPULATION AND ORDER FOR NRCP RULE 35 EXAMINATION

Date of interview: March 11th 9 a.m. - noon
Date of Assessment: March 12th 9 a.m.-5 p.m

A Clinical Interview of the Plaintiff shall be conducted on March 12, 2020 from 9:00 a.m. to noon. and an Independent Neuropsychological Assessment shall be conducted on March 12th, 2020 from 9:00 a.m. to 5:00 p.m. by Dr. Thomas F. Kinsora, Ph.D., at his office located at 716 South 6th Street, Las Vegas, NV 89101.

1. Plaintiff shall complete online intake at least 1 week prior to the assessment.
2. The examination shall not go beyond 5 p.m. except in circumstances where the Plaintiff may require extra breaks and lunch.
3. Plaintiff will not wait any longer than 30 minutes in the waiting room prior to the Commencement of the Rule 35 exam.

4. The examiner will not any questions to Plaintiff directly relating to Plaintiff's opinions regarding liability; however, this shall not be construed to mean the examiner cannot inquire as to how the accident occurred to better understand the mechanism of the alleged injury;
5. Should Plaintiff fail to timely appear and fully cooperate during the examination to completion, Plaintiff shall bear all costs associated with the examination and any second examination.
6. The examination shall not be recorded.
7. The Plaintiff shall not have an observer at the examination.

DATED this ____ day of January 2020.

CLEAR COUNSEL LAW GROUP

Jared R. Richards, Esq.
Nevada Bar No. 11254
1671 W. Horizon Ridge Pkwy, Suite 200
Henderson, NV 89012
Attorneys for Plaintiff Kalena Davis

DATED this ___ day of January 2020.

HARPER | SELIM

James E. Harper, Esq.
Nevada Bar No. 9822
Justin Gourley, Esq.
Nevada Bar No. 11976
1707 Village Center Circle, Suite 140
Las Vegas, NV 89134
Attorneys for Defendant Adam Deron Bridewell

DATED this ____ day of January 2020.

LEWIS BRISBOIS BISGAARD & SMITH, LLP

MATTHEW A. CAVANAUGH
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Blake A. Doerr, Esq.
Nevada Bar No. 9001
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Las Vegas, NV 89118
Attorneys for Defendant Lyft, Inc. The Hertz Corporation

///

ORDER

IT IS SO ORDERED.

DISTRICT COURT JUDGE

Submitted by:

MATTHEW A. CAVANAUGH
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Exhibit C

ORDR
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Attorneys for Lyft, Inc. and The Hertz Corporation

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

KALENA DAVIS,

Plaintiff,

vs.

ADAM DERON BRIDEWELL, an individual; LYFT, INC., a foreign corporation; THE HERTZ CORPORATION, a foreign corporation; DOE OWNERS I through X, and ROE LEGAL ENTITIES I through X, inclusive,

Defendants.

Case No.: A-18-777455-C
Dept. No.: XIII

STIPULATION AND ORDER FOR NRCP RULE 35 EXAMINATION

Date: March 20, 2020
Time: 2:00 p.m.

IT IS HEREBY STIPULATED by and between all parties, through their respective attorneys of record, that Plaintiff undergo medical examination pursuant to NRCP 35. The parties have stipulated to the following conditions for the medical examination:

1. Any paperwork or forms that Defendants' medical expert, Dr. David E. Fish, requires for the examination shall be submitted to Plaintiff's counsel no later than five (5) days prior to the date of the examination and is subject to objection by Plaintiff's counsel.

2. Plaintiff will appear for a Rule 35 Exam with Dr. Fish on March 20, 2020 at 2:00 P.M. at Consultant Medical Group, located at 2500 West Sahara Avenue, Las Vegas, NV 89102.

3. No other physician, surgeon, or chiropractor shall be present during the

examination. If necessary, Dr. Fish may utilize members of his staff to assist during the examination.

4. The examination shall be completed within 90 minutes, and Plaintiff will not be required to wait in the waiting room longer than 30 minutes past the arrival time before the commencement of the examination.

5. The physical examination shall be limited to the physical conditions of the Plaintiff that are in controversy in the above-captioned case. Plaintiff will not be asked any liability questions surrounding the subject incident. However, the examining physician or staff member may ask about the mechanism of injury, body parts making contact with the ground, and may ask about relevant medical history, past and current symptoms.

6. No invasive procedures are allowed.

7. No medical treatment is allowed.

8. No x-rays, radiographs, MRIs, CT scans, PET scans or other medical imaging may be obtained as part of the examination.

9. Plaintiff shall not be required to disrobe from the waist down during the examination. Plaintiff shall wear loose fitting shorts or pants to the examination to prevent the need for disrobing.

10. No physically painful, intrusive or embarrassing procedures may be performed during the examination.

11. Defendants' medical expert, Dr. Fish, shall not engage in any ex parte communication with Plaintiff's treating health care providers.

12. Thirty (30) days following the examination, Defendants shall provide Plaintiff's counsel with a copy of the examination report.

13. Plaintiff shall not pay or incur any fee for the examination and shall use his best efforts to appear at the office of Dr. Fish 10 minutes prior to the scheduled examination date and time. In the event Plaintiff cannot attend his scheduled examination, his counsel shall contact Defendants' counsel to re-schedule the examination with 24 hours notice.

14. The examining physician shall be provided with a copy of this Stipulation prior to the examination.

///

DATED this ____ day of January 2020.

CLEAR COUNSEL LAW GROUP

Jared R. Richards, Esq.
Nevada Bar No. 11254
1671 W. Horizon Ridge Pkwy, Suite 200
Henderson, NV 89012
Attorneys for Plaintiff Kalena Davis

DATED this ____ day of January 2020.

LEWIS BRISBOIS BISGAARD & SMITH, LLP

Jason G. Revzin, Esq.
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Blake A. Doerr, Esq.
Nevada Bar No. 9001
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Attorneys for Defendant Lyft, Inc. The Hertz Corporation

DATED this ___ day of January 2020.

HARPER | SELIM

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Justin Gourley, Esq.
Nevada Bar No. 11976
1707 Village Center Circle, Suite 140
Las Vegas, NV 89134
Attorneys for Defendant Adam Deron Bridewell

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ORDER

IT IS SO ORDERED.

DISTRICT COURT JUDGE

Submitted by:

DARRELL D. DENNIS, Esq.
Nevada Bar No. 006618
Jason G. Revzin, Esq.
Nevada Bar No. 8629
BLAKE A. DOERR, Esq.
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LEWIS BRISBOIS BISGAARD & SMITH LLP

EXHIBIT B

MINUTES OF THE MEETING
OF THE
ASSEMBLY COMMITTEE ON JUDICIARY

Eightieth Session
March 27, 2019

The Committee on Judiciary was called to order by Chairman Steve Yeager at 8:04 a.m. on Wednesday, March 27, 2019, in Room 3138 of the Legislative Building, 401 South Carson Street, Carson City, Nevada. The meeting was videoconferenced to Room 4406 of the Grant Sawyer State Office Building, 555 East Washington Avenue, Las Vegas, Nevada. Copies of the minutes, including the Agenda (Exhibit A), the Attendance Roster (Exhibit B), and other substantive exhibits, are available and on file in the Research Library of the Legislative Counsel Bureau and on the Nevada Legislature's website at www.leg.state.nv.us/App/NELIS/REL/80th2019.

COMMITTEE MEMBERS PRESENT:

Assemblyman Steve Yeager, Chairman
Assemblywoman Lesley E. Cohen, Vice Chairwoman
Assemblywoman Shea Backus
Assemblyman Skip Daly
Assemblyman Chris Edwards
Assemblyman Ozzie Fumo
Assemblywoman Alexis Hansen
Assemblywoman Lisa Krasner
Assemblywoman Brittney Miller
Assemblywoman Rochelle T. Nguyen
Assemblywoman Sarah Peters
Assemblyman Tom Roberts
Assemblywoman Jill Tolles
Assemblywoman Selena Torres
Assemblyman Howard Watts

COMMITTEE MEMBERS ABSENT:

None

GUEST LEGISLATORS PRESENT:

None

STAFF MEMBERS PRESENT:

Diane C. Thornton, Committee Policy Analyst
Bradley A. Wilkinson, Committee Counsel
Lucas Glanzmann, Committee Secretary
Melissa Loomis, Committee Assistant

OTHERS PRESENT:

Alison Brasier, representing Nevada Justice Association
Graham Galloway, representing Nevada Justice Association
George T. Bochanis, representing Nevada Justice Association
David Sampson, Attorney, Law Offices of David Sampson, Las Vegas, Nevada
Dane A. Littlefield, President, Association of Defense Counsel of Nevada
Kevin Higgins, Chief Judge, Sparks Justice Court; and representing Nevada Judges of Limited Jurisdiction
John Tatro, Senior Judge; and representing Nevada Judges of Limited Jurisdiction
Richard Glasson, Judge, Tahoe Justice Court; and representing Nevada Judges of Limited Jurisdiction
Ann E. Zimmerman, Judge, Las Vegas Township Justice Court; and representing Nevada Judges of Limited Jurisdiction
Paul C. Deyhle, General Counsel and Executive Director, Commission on Judicial Discipline
Jerome M. Polaha, Judge, Second Judicial District Court
John J. Piro, Deputy Public Defender, Legislative Liaison, Clark County Public Defender's Office
Kendra G. Bertschy, Deputy Public Defender, Washoe County Public Defender's Office
John T. Jones, Jr., Chief Deputy District Attorney, Clark County District Attorney's Office; and representing Nevada District Attorneys Association

Chairman Yeager:
[Roll was taken. Committee protocol was explained.] Today, we have three bills on the agenda. I will now open the hearing on Assembly Bill 285.

Assembly Bill 285: Enacts provisions relating to a mental or physical examination of certain persons in a civil action. (BDR 4-1027)

Alison Brasier, representing Nevada Justice Association:
What I would like to do is explain what these examinations are in their current form. They are unique to personal injury litigation. I want to lay the foundation for what these examinations are and then turn it over to my colleagues in Carson City to explain more about the history of how we got here and what this bill proposes to do.

What we are talking about in this bill is commonly referred to as a "Rule 35" examination. They are very unique to personal injury cases because these examinations happen when someone is alleging injury. When a person alleges an injury, he or she can be forced to appear at an examination by an expert witness who is hired by the insurance company and to whom that claimant has no relationship. Under the current state of our rules, that claimant—the victim—has no right to have an observer present. They do not have a right to record what happens. What we have seen is, if there is a dispute in what happens in the examination, most of the time deference is given to the person who is being presented to the judge or jury as an expert witness rather than the victim or plaintiff who was forced to present at that examination. That is the current state of the law. The reason I used the word "unique" at the beginning of my testimony is because the way it currently stands in these forced examinations, the claimant has no rights as part of that examination.

When we look at it in different contexts, we would never expect people to submit to an examination under this current set of conditions. Outside of litigation, if you have an important medical examination, it would be commonplace for you to bring a friend or family member with you, maybe to ease anxiety and to make sure you are capturing all the important information. If you went to a doctor who said, "No, you do not have any right to have someone present with you during this examination," you would have the choice to pursue another doctor if you did not feel comfortable in that scenario. Under the current rules for these Rule 35 examinations, that is not the situation for personal injury victims.

Also, this is very unique to Nevada personal injury cases. Washington, California, and Arizona—all of our neighboring states—currently allow what this bill proposes. They allow an observer to be present during the examination and they also allow a recording to happen. Nevada is really an outlier with our western neighbors as far as not providing these protections for the injured party during the examination.

Additionally, in the workers' compensation context in Nevada, observers are allowed to be present during workers' compensation examinations. Again, this is really an outlier for Nevada personal injury cases where we do not already have these protections afforded to the claimants. I will turn it over to my colleagues to explain why that is important and how we got here.

Graham Galloway, representing Nevada Justice Association:
The origins of this bill flow from a committee formed by the Supreme Court of Nevada two years ago to review, revise, and update our *Nevada Rules of Civil Procedure* (NRCP)—the rules that govern all civil cases. The committee was made up of two Nevada Supreme Court justices, various district court judges from throughout the state, a number of attorneys who represent the various fields of practice in the civil side of litigation, and a member of the Legislative Counsel Bureau. The committee was broken down into subcommittees, and I chaired the subcommittee that handled this Rule 35 medical examination issue. Our subcommittee recommended substantial changes to the rule. Mr. Bochanis was a member of the committee. We voted 7-to-1 to make substantial changes, the changes that are set forth or embodied in the bill before you, Assembly Bill 285. Unfortunately, when our

recommendations went to the full Supreme Court of Nevada, they rejected our changes for reasons we are still not clear on. At that point, we reassessed our position.

Contrary to the opponents of this bill who want to say this is a procedural matter, this is not a procedural matter; it is a substantive right. It is the right to protect and control your own body. The scenario we often see in this situation is that our clients are going through a green light or sitting at a stop sign, and somebody blasts through the light and clocks them, injuring them. They are then required to go to an examination by an expert who is hired by the defense. These are experts that are trained, sophisticated, and weaponized. They put our clients through an examination and, in the process, the clients are interrogated. Our clients have to go through this without any representation.

This is not a criminal situation, but in the criminal field, you often hear the terms "right to counsel," "right of cross examination," and "due process." Those terms do not necessarily transfer over into the civil arena. In the civil arena, we have what is called "fundamental fairness." Is it fundamentally fair that an injured person is required to go to a hired expert—an expert whose sole goal is to further the defense side of the litigation—have their body inspected, have their body examined, and then be interrogated without there being a lawyer present to represent that individual? There is nothing in the law in any arena where that occurs except for the personal injury field. That is what A.B. 285 is designed to do: bring some fundamental fairness to the process and to level the playing field. It is not a procedural rule. That is how it is being characterized by the opponents of this bill. It is a fundamental right that you should have representation in such an important situation. I will turn it over to my colleague who will explain the nuts and bolts of the bill.

George T. Bochanis, representing Nevada Justice Association:
This bill is very important to individuals who are being subjected to these insurance company examinations. The reason we are before you today is because this bill protects substantive rights. This is not a procedural rule, which you would usually find within our NRCP. Our *Nevada Rules of Civil Procedure* involve things such as how many years someone has to file a lawsuit and how many days someone has to file a motion or an opposition to a motion. This bill does not involve those types of issues but, instead, involves a substantive right of a person during an examination by a doctor whom he did not choose, does not know, and has no relationship with whatsoever, a doctor who was chosen by an insurance defense attorney. This is a doctor who is going to handle this patient. It is not really a patient because there is no doctor-patient relationship. This examinee is going to be touched and handled by this doctor with whom he has zero relationship. It is being forced upon him as part of this examination. That is why this is a substantive right, and this is why we are before you here today.

What I would like to discuss with you are the two components of this bill. The first is that we are requesting that an observer be present during these types of insurance company evaluator examinations. That observer can be anyone; it can be a spouse, parent, friend, or it could be the person's attorney or a person from that attorney's staff. Really, when you look at the current rule, the attorney/observer portion of it is really the only difference between the

current rule and what we are asking for as part of this bill. I am surprised there is any opposition to the attorney/observer portion of this bill. As Ms. Brasier said, this is already allowed by every other state that surrounds Nevada. California, Utah, and Arizona already allow attorney observers.

I can tell you from representing clients in workers' compensation cases in Nevada for more than 30 years, we already attend doctor examinations in workers' compensation cases—"we" being attorneys or our staff. It happens on every permanent partial disability evaluation. An attorney is present. To me, the reason is very obvious; you want openness during this process. You already have an agent of the insurance company, the doctor, present. This bill levels the playing field by having an attorney or attorney staff member present. Is an attorney going to attend every one of these examination? No, probably not. How about an attorney's staff member? Probably. A family member? Yes. These are options that a person who is being subjected to this type of examination should have. All we are seeking is a level playing field where during these examinations you have an agent of the insurance company—the doctor—present, along with an observer who could be an attorney or someone from the attorney's office.

The language in the proposed bill is very clear: the observer is just an observer. They cannot participate. They cannot interrupt. If anything like that happens, the doctor can terminate the examination, and you can go to court to work out your problems or differences. I can tell you that in attending workers' compensation permanent partial disability evaluations, I have never had a doctor terminate an exam during the hundreds of exams I have attended over 30 years. Never once have we ever had a problem with the doctor. Do the doctor and I get along at all times in these evaluations? No, probably not. However, we are able to keep it civil. We are able to keep it professional, and there is no reason an attorney observer being at the exams in this context is going to be any different. That is the observer component of this bill.

I should also mention that having an observer prevents abuse during these examinations as well, because it keeps everything open and transparent. Think about it in a practical sense. We have had doctors who have had some issues during these exams, and we felt as though we should not need to have a hearing for every examination to show that a doctor is having problems with taking advantage of people during some of these examinations. Fortunately, it is a minority of doctors with whom we have had these issues. This observer keeps it open.

The second portion of the bill is audio recording. It is not video recording. This can be done as simply as using a cellphone, or it can be done as complicatedly as bringing in a court reporter. In practicality, how many times is a court reporter going to be brought in even though this language allows it? Probably 1 percent of the time, if at all. There are so many other means of communication whereby you are able to record. Again, this promotes openness and transparency during these examinations. The beauty of the language of this bill is that the doctor can also record it. You have a recorded version by the doctor, you have a recorded version by the patient or observer, and you know what happened. There is none of this "he said, she said." I cannot tell you how many cases I have had to litigate over an issue

where an examinee goes to one of these exams, we receive the report back, and there are things in it that are totally unfamiliar to me. I ask the client and she says to me, "I never told him that." Now we have this dispute over what was said during the exam. Now it is in the report by a doctor who will be testifying to that during trial. Again, audio recording by both the patient or observer and the doctor prevents this from happening. It keeps us out of court, and it keeps these cases moving.

In fact, before she was appointed to the Nevada Court of Appeals, the discovery commissioner in the Eighth Judicial District Court in Clark County already allowed audio recording on all cases. The problem with the current language in the current rule is that audio recording is only allowed for good cause. Now, what "for good cause" means is uncertain. Every time there is an examination where audio recording is requested, we are going to have litigation of these cases. It is going to cause delays. It is going to cause additional costs. It is going to cause clients' access to justice to be delayed on these types of cases. That is why this bill before you today does not provide or require this "for good cause" standard on audio recordings. As I stated before, the discovery commissioner had already allowed this type of audio recording without a showing of good cause. Again, we want to keep these examinations open and transparent, and we want these clients of ours to be able to move on with their cases without having to litigate every single issue because this examination is being requested by the insurance defense attorney.

These are the two elements, and these are the differences between what the existing rule says and what this bill says. Again, we are before you today because an examination by a doctor who is not of this person's choosing involves a substantive right. It is something that should be within a statute and not a procedural rule.

Chairman Yeager:
I want to make sure we have the record clear in terms of the process that got us here. The Supreme Court of Nevada was looking to make substantial changes to the NRCP, and those changes went into effect March 1, 2019. We are talking about Rule 35. It sounds as though there was a subcommittee that I believe Mr. Galloway chaired.

Graham Galloway:
That is correct.

Chairman Yeager:
So there were eight members of that subcommittee, and there was a 7-to-1 vote in favor of advancing what appears in A.B. 285. That was the recommendation, 7-to-1, out of the subcommittee to the entire Supreme Court of Nevada. Do I have that right?

George Bochanis:
There were some changes made such as the observer only being a person who was not the attorney and not associated with the attorney's staff. For the audio recording, there was nothing about the "for good cause" requirement being involved.

Chairman Yeager:
Essentially, the recommended language that came out 7-to-1 was not adopted by the Supreme Court. We do not know why, but it simply was not adopted.

Graham Galloway:
That is correct.

Chairman Yeager:
I just wanted to make sure we had that clear on the record.

Assemblywoman Backus:
I noticed you were both on the subcommittee, and I just read our new NRCP. When looking at the separate branches of government, the court can implement court rules consistent with Nevada law. I was trying to put these two together, and I am thinking about how the language is presented in section 1, subsection 1 of A.B. 285 where it says "An observer may attend," for example. The current Rule 35 is almost on par with that rule. I am not sure if that was your intent. It does not sound as though it was.

I also just want to clarify how an independent medical examination works. It is either by stipulation or by order. It looks as though this new rule keeps it by order. What will end up happening? When I was reading the very lengthy comments to the rule, it seemed as though the court and committee spent a lot of time working on that. Someone could raise the issue of having an observer being present, and likewise with the audio. That could be agreed to, or it could be put into the opposition if they are challenging a request for the examination. When I was looking at Rule 35 and A.B. 285 this morning, I could almost read them in sync. The only thing that was glaring to me was the issue of the attorney. I have to admit, I kept asking my friends who are attorneys if they really want to be present for this. That was the only thing I thought was agreed upon by all three amendments that were sent over to the Nevada Supreme Court with the petition. It seemed as though each of them excluded the attorney. That was the one thing I noticed. If you could clarify that for me, that would be great.

Graham Galloway:
You are correct that the language is similar, but it is distinct. From a practical standpoint, you are also correct that most of these examinations are done by stipulation. You work out the details ahead of time. With some attorneys, you can hash out the details. With other attorneys, you cannot. We have made changes that are not very dramatic, but they are substantial. Instead of having to show good cause, if you cannot agree with the other side as to the parameters of the examination, and you have to go the motion route, the rule provides that this can be done by motion or agreement. Most of the time it is by agreement. Under the existing rule, if you can agree, you have to show good cause for an observer. The big change we are proposing here is that you do not have to show that good cause; you automatically have the right to have an observer present, whether he or she be an attorney, an attorney's staff member, or a family member or friend.

The other point you raised about the differences between the current rule and our bill is that this would allow for an attorney observer. In reality, I do not foresee myself going to any of these examinations. I really have no interest in doing that. I think I could use my time better elsewhere. It would be a staff member or a family member. Currently, what I do—which, perhaps, is not necessarily authorized by the rule—is have all my clients take a family member. No one has ever objected to that. That, in practicality, is what is going to happen in most cases. There are certain experts who are marked for special treatment because they have been proven to be extremely biased. Those individuals may end up having a staff member from the law firm attending their examinations. Again, I think in the run-of-the-mill case, you are sending a family member or a friend.

George Bochanis:
As far as the mechanics of the examinations we have experienced in my office, we get a letter from the insurance defense attorney where the attorney says, "We want to examine your client on this date at this time. Bye." Of course, it does not work that way. We call them and say, "Sure, pursuant to these conditions." Or, under the rules, we can file a motion. My experience has been that we were able to agree less than half the time on these conditions. Since this rule has gone into effect on March 1, we have received three letters requesting clients to submit to examinations, and we have not been able to agree to the conditions once. That is because of the "for good cause" showing on the audio recording portion. We disagree as to what that means, and this was our concern when the current rule came out. When you allow that type of vagueness over this type of examination, there is just not agreement on it. This rule has been in effect for 27 days. We have received three letters in 27 days requesting these exams. We have not been able to agree to one of them. That is because of this audio recording "for good cause" requirement as well as the observer issue. I have told attorneys I should be able to send a staff member to one of these, and their objection is that it is not what the rule says. The rule says it has to be a family member. On some of these more complicated examination-type cases, we want a staff member there. This law we have proposed provides and allows for that. I think these are important distinctions.

Again, this is a substantive right. The procedural part of Rule 35 is, how do you get there? You agree to it or you file a motion. That stays with NRCP 35. The mechanics of the actual examination is a whole other issue. That is a person being handled and touched by a doctor who is not chosen by them but selected by an insurance defense attorney. That is why that is a substantive right. That is why we have proposed A.B. 285. This is something we thought about after the NRCP committee. We said to ourselves, You know, this really is not a procedural rule. I hope that helped.

Assemblywoman Backus:
It did. I was just trying to correlate what we have now as our rule and what the law is going to provide for. We all know as practitioners that we are going to continue experiencing the court reading of this law if it gets implemented along with Rule 35. I think we will have to deal with it through offers of judgment, as well as certain interpleader actions depending on what remains in our statutory provisions. Just so I am clear, it looked as though everyone had originally agreed that attorneys would not be present. The type of work I do sometimes

is more product liability. When an attorney shows up, I show up. It seems as though on a personal injury case, the goal is now to basically eliminate this from the rule and allow attorneys or someone from their office to be present. Another thing that looked as though it came out of nowhere was the whole examination of neuropsychological, psychological, or psychiatric examinations wherein an observer was going to be completely eliminated. I take it that through the proposal of A.B. 285, it would negate that provision as well.

George Bochanis:
The carve-out for psychological examinations completely took us by surprise. It was never discussed. No exceptions were ever allowed for psychologists under this bill. I have to be honest with you; I do not know who is more vulnerable and who more requires an observer with them during these examinations than a person with a traumatic brain injury. That came to us as a complete surprise. That was something that was never discussed during the NRCP committee and was never provided as being a carve-out for this type of specialty area.

As a result of that occurring, we have provided to the Committee as exhibits some documents we think support our view that there should not be some special exception for psychologists on these examinations [pages 51-76, (Exhibit C)]. A few psychologists appeared at the Supreme Court of Nevada hearing on this rule, and they testified that what they do is secret—the tests and the way they grade their tests are trademarked, secret items so they cannot be disclosed—and as a result of that, you cannot have an observer present. Well, that is not so. I have submitted to you 74 websites that contain copies of these exams and how they are graded and how they are evaluated [pages 51-59, (Exhibit C)]. So much for the proprietary or secret nature of these examinations.

These psychologists also testified that an observer being present during a psychological evaluation destroys the entire evaluation because if somebody is present, the examinee is not going to be as open. We have also submitted an affidavit from a psychologist with 20 years of experience who states that the mere fact this psychological exam is conducted by someone this person did not select, really puts the examinees in a position where they are not going to be entirely forthcoming [pages 60-76, (Exhibit C)]. They are going to hold things back because it is an examination that has been forced on them. Simply having somebody present is not going to change the nature of the examination at all. In fact, an observer being present during this examination is more required than any other type of examination because certain distractions—the inflection of the voice of this psychologist examiner and other things like that—could have a huge impact on the findings of the examination. Not having an observer present affects that. We have submitted these items, the affidavit and the 74 websites, as further evidence that there should not be a carve-out for psychologists.

Assemblywoman Nguyen:
You have mentioned workers' compensation. It is my understanding that those provisions that are similar to those which are contained here are also statutory as a part of *Nevada Revised Statutes* (NRS) 616C.490. In addition to the workers' compensation, are there any other provisions that are statutory as well? Obviously, there is some precedent here, so I was wondering if you are aware of anything else.

George Bochanis:
I am sure there are; I just cannot think of any right now. I can tell you that in our survey of looking at other states where an observer is allowed to be present, it is a mix between procedural rules and statutes. Other states have considered it to be a statutory right. It is a good point. There are a lot of other statutes and a lot of other things within our NRS that are partially statutory and are partially procedural, which are covered by NRCP. It does occur commonly.

Assemblywoman Nguyen:
As far as how workers' compensation works, do you not have the same concerns that you do under these current rules as they have been implemented in March?

George Bochanis:
We have found in workers' compensation cases that we have had zero problems with attorney observers being present. Although it is true that I certainly am not there at 100 percent of these permanent partial disability examinations, 99 percent of the time my staff is. It is not a family member. That is because there are certain mechanics of how these examinations on workers' compensation cases are supposed to be performed. If they are not performed in a certain way, it invalidates the exam. So we always have a staff member present at these. We have never had a doctor terminate an examination. I have never received a call from a doctor saying my staff member did something inappropriate, or from the insurance adjuster or defense attorney for the workers' compensation case objecting to something we did. An observer is an observer. That is our intention on this bill, and that is what occurs in workers' compensation cases now.

Assemblywoman Krasner:
In looking at some of the opposition cases, they say this is an attempt to narrow the pool of doctors willing to conduct these Rule 35 examinations. Can you please address that?

Graham Galloway:
Of all the other states that allow attorney observation and allow audio or video recording, there has never been an issue about the availability of defense experts. If you read the comments presented by the opposition, it is a fear, but there is no actual evidence. This, unfortunately, is a lucrative area of practice. There are going to be experts who will participate in this arena. There is no evidence—absolutely none—that this prevents the defense from hiring somebody. In the workers' compensation arena, there is never an issue. When I read that argument, I start seeing smoke. I see nothing else. From the experience of our neighboring sister states, there is absolutely no evidence that occurs.

Alison Brasier:
I think this idea that it is going to narrow the pool of doctors is kind of just a scare tactic—a red herring—to distract from the actual issues. In my view, I do not see why this would narrow the pool. It provides protection for the doctors so there is an objective record of what happened during the examination. If there is a dispute, everyone has a record of what happened. It is a protection for the claimant, but also for the doctor. I think this idea that it

will narrow the pool of doctors because we are going to create an objective record really has no basis in fact.

Chairman Yeager:
Can you give the Committee a sense of how much these examinations typically cost? I know they are paid by the defense, but is there a range in terms of what a physician would charge to do an examination such as this?

George Bochanis:
We have provided as an exhibit testimony from a doctor, Derek Duke, where the district court conducted 15 days of hearings on the appropriateness of this specific doctor conducting Rule 35 examinations [pages 9-43, (Exhibit C)]. This doctor testified that over the course of a year, he earned more than $1 million performing just these examinations. We have seen doctors charge anywhere from $1,000 to $10,000 for these examinations. That includes the review of medical records and the examination of the injured person.

Chairman Yeager:
The reason I ask that—I am not trying to drag anyone through the mud—is because I wanted to dovetail off Assemblywoman Krasner's question about the availability of doctors. It does sound as though it can be lucrative, so I do not know that it would come to pass if we were to enact this bill. We have heard some bills in this Committee in the criminal context about the importance of recording confessions. We have also had body camera bills. Some of the reasoning there is just what Ms. Brasier said: if you have to go into court later and have a dispute about what was said or what happened, it is obviously very helpful to have a video recording. I know in this circumstance we are not talking about video, because it is a medical examination. We are talking about audio. Is part of the reason you brought this bill forward to try to eliminate some of the litigation costs that happen after these examinations in front of the court?

Graham Galloway:
Exactly. That is the intent, or at least a major component of the intent of this bill: to eliminate the squabbling, the fighting, the extra unnecessary litigation, and the expense involved in that. That is part of the intent of the bill.

Chairman Yeager:
At this time, I will open it up for testimony in support.

David Sampson, Attorney, Law Offices of David Sampson, Las Vegas, Nevada:
I have seen some of the issues brought up in dispute of this particular bill. There is a clear understanding among the defense bar, the plaintiffs' bar, and in the insurance industry, of the importance of operating in the sunlight. When an insurance company learns of an incident—whether it is someone falling somewhere, a car crash, or whatever else goes on—one of the very first things they try to do is get a recorded statement. It is always important to them that they have a tape recording or some kind of digital record of what the individual has to say about what took place and what their injuries are. I have never once heard of an insurance

adjuster doing a statement of someone who has been injured and not making a record of that. So they understand and appreciate the importance of operating in the sunlight and making sure we have a record. Every time a deposition is taken, we have a record that is made. That is not just pursuant to the rules. It is important to understand and have a court reporter write down everything that goes on. More and more nowadays, we have a large percentage of depositions taking place with a video recording because it is important that we catch not only what is said, but inflections in voice, facial features, body language, et cetera. The defense bar, the plaintiffs' bar, and the insurance industry clearly understand it is important to have a clear, accurate record of what goes on. Whenever there are written questions submitted—they are called interrogatories in legal proceedings and discovery—they wisely always insist that those be signed under oath, verified, and notarized so we have a clear depiction of what the individual said and what took place when these different things happen.

Then, miraculously, when we turn to these Rule 35 examinations and when it comes time to take one of my clients and put him or her in a room with a highly paid expert from the defense and shut the door, all of a sudden, the insurance industry and the defense bar—and I would imagine any other opponents to this particular bill—do not want any record made. They want the conversation to have no witnesses, no transcript, no recording, and no idea as to what went on other than the proverbial "he said, she said." As Ms. Brasier mentioned, when you have a "he said, she said" situation come down to a layperson who did nothing wrong but was sitting at a stoplight when someone came through and hit him from behind with their car, and the person on the other side is a doctor who has been practicing in Nevada for 20 years, there is a tendency of jurors—no matter who is right, who is wrong, or what the truth is—to side with the defendant's expert and say whatever they are saying took place must actually be what happened. It is extremely unfair. I have seen, personally, on multiple occasions, the defense come back from the examining doctor with a report that contains information my client says is not true. If you review the order regarding Dr. Duke, there were multiple times when Dr. Duke said things took place in the examination that actually could not be true.

I would like to share two quick examples. When I was a very young attorney, in 1999 and 2000, I was involved in a case where my client was sitting in a lawn chair one evening in his driveway when a drunk driver drove across the road, up over the curb, across part of the lawn, and into the driveway, hit my client who was sitting in the lawn chair, and hit the house he was sitting in front of. My client was asked to attend an examination because his leg was shattered. He had $60,000 in medical bills as a result of his first night in the emergency room. They had the defense and the insurance company for the drunk driver hire a doctor to examine my client. When that report came out, I was astonished to read the doctor's report which said my client indicated he was walking in what the defense attorney later argued was the road when he was hit by this car. Of course, I went to my client as a young attorney not realizing what was going on—I even wanted to give deference to the doctor—and asked him why he told the doctor he was walking in the road when we had eyewitnesses and knew he was sitting in a chair in his driveway. Of course, my client was very insistent that was not what he said. We had to have this "he said, she said" dispute between the doctor saying, "Oh no, Mr. Johnson told me he was walking in the road," and my client saying, "No, I told the

doctor I was sitting in a chair." We had to get into this big mess with additional eyewitnesses who, thankfully, were there to say, "No, he was sitting in a chair and not trying to walk." In my opinion, they are trying to manufacture an issue that, first of all, has nothing to do with medical treatment. Why the doctor would even be talking about whether you were walking in the road or sitting in a chair is beyond me. It shines a light on the issues. It would have been nice, in that case, to have a record or an observer to say, "No, I was there. I heard exactly what Mr. Johnson said, and he said he was sitting in a chair as he said every other time he has talked about what happened in this horrific incident."

I had a situation recently in a case that I had where another doctor who had examined my client came out and said my client had misrepresented to me facts about a magnetic resonance imaging scan she had. My client said that was not what took place. I have seen it a number of times. I know Mr. Galloway had mentioned the experts are weaponized. I am not going to comment on whether that is the case or not, but I would like you to consider this: in 20 years of practice I have had hundreds of clients go and have an examination by a doctor who was hired and retained by the defense and the insurance company. Out of all of those cases, I can remember one time where the doctor examined my client and said these injuries that this individual sustained were due to this particular crash. In every other case I can recall, the doctors have invariably said the injuries were either not caused by this crash or they were not to the extent that the treating doctor had claimed.

The arguments related to the chilling effect simply do not hold. We see in our neighboring states that it is not the case. I would ask you to please consider this: I have had both male and female clients call me in tears from the doctor's office saying they were subject to being yelled at—what they considered to be abuse—and they did not know what to do. Please have these examinations take place in the sunlight and allow the citizens of Nevada to have the same rights as our sister states to be protected and to have an accurate depiction of what takes place in these examinations.

Chairman Yeager:
Is there additional testimony in support? [There was none.] Is there anyone opposed to A.B. 285?

Dane A. Littlefield, President, Association of Defense Counsel of Nevada:
I will stick mostly to my prepared statement (Exhibit D), but I do have additional comments that I will work into that. In support of my testimony today, I have provided the Committee with a copy of the current version of Rule 35 (Exhibit E), the former version of Rule 35 (Exhibit F), the Supreme Court of Nevada administrative order enacting the amendments to NRCP (Exhibit G), and various statements in opposition to the bill by members of the Association of Defense Counsel (Exhibit H). I have also provided a Supreme Court of Nevada case addressing the separation of powers issue that is implicated by this bill (Exhibit I).

One of the things we heard earlier was an attempt to characterize Rule 35 as affecting a substantive right and distinguish it from a procedural rule. That is simply not the case.

The *Nevada Rules of Civil Procedure* are made to address civil litigation through all phases, including the discovery phase, whether that is dealing with a Rule 35 examination or interrogatories as was addressed by the supporters of the bill.

The first issue is that A.B. 285 appears to be an attempt to reduce the pool of doctors willing to conduct Rule 35 examinations and create an unfair advantage, which has already been addressed by the Supreme Court of Nevada and the committee assigned to revise NRCP. This bill would allow the observer of a Rule 35 examination to be the plaintiff's attorney or a representative of the attorney, as you are aware. This could lead to unnecessary confrontations with doctors and unnecessary motion practice. Assembly Bill 285 only allows the plaintiff's attorney to attend a Rule 35 examination. There is no provision for the defendant's attorney or an observer representative of the attorney to be present. This creates a situation in which the plaintiff's attorney has an unfair, and perhaps unethical, opportunity to engage in direct communications with the doctor selected by defense counsel without defense counsel being present. The solution to that would be to simply not allow attorneys in the room. Under the current rule, there is a provision to allow recording by audio means for a showing of good cause. I would submit that good cause could be if a plaintiff's attorney has concerns about a doctor who has been retained by the defense who—I will remind the Committee—is already subject to the Hippocratic oath. A doctor is not an insurance company hitman.

The bill would allow the plaintiff's attorney to make a stenographic recording of the examination as an alternative to audio recording. This contemplates the presence of a court reporter. It is my understanding that many doctors would decline to participate in Rule 35 examinations where a lawyer and a court reporter would be present in the examination room. This would create an atmosphere in which many doctors would no longer be willing to participate in the examinations, and this would create an unfair advantage for the plaintiff's personal injury bar by substantially reducing or, perhaps, eliminating the defense bar's ability to retain them.

The bill allows audio or stenographic recording and limits the audio or stenographic recording to "any words spoken to or by the examinee during the examination." This suggestion is unworkable and would require the recorder or stenographer to stop recording anytime a word is spoken to anyone else in attendance at the examination. Additionally, A.B. 285 contemplates that the examination might need to be suspended for misconduct by the doctor or the attorney observer, with potential court review. However, because an audio or stenographic recording cannot include anything the lawyer said to the doctor or the other way around, there would be no record of the alleged misconduct and no way for a court to decide a "he said, she said" dispute. These concerns are already addressed by the current Rule 35.

Assembly Bill 285 allows the plaintiff's attorney to suspend the exam if the lawyer decides that the doctor was "abusive" or exceeded the scope of the exam. However, the plaintiffs' bar is concerned with eliminating motion practice caused by differences in opinion of what occurred at the examination. Something we would likely have differences of opinion on is

the definition of "abusive." To what extent do actions and/or words within the examination room become "abusive"? This is a highly subjective and highly prejudicial rule and provides no clear standard for the lawyer to make the highly disruptive decision on whether to suspend the examination. Moreover, the defendant is burdened with the cost of an examination that may abruptly be suspended for no real reason other than the plaintiff's attorney's subjective determination.

Further, section 1, subsection 6 of A.B. 285 states that if the exam is suspended by the lawyer or the doctor, only the plaintiff may move for a protective order. There is no reciprocal provision that allows the defendant to move for a protective order or a motion to compel to prevent abuse by the plaintiff's attorney during the exam or to seek sanctions against the offending attorney. Allowing one side in a lawsuit to seek relief while denying the availability of such relief to the other side would be grossly unfair and, most likely, a violation of due process.

In addition, A.B. 285 invites a clear and direct violation of constitutional separation of powers. This is why the plaintiffs' 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. The Court consistently holds that the Legislature violates separation of powers by enacting procedural statutes which conflict with preexisting procedural rules or which interfere with the judiciary's authority to manage litigation. If it were to become law, this new statute would directly and inappropriately contradict important parts of the newly amended NRCP and therefore violate the separation of powers doctrine.

Finally, the Supreme Court of Nevada's Nevada Rules of Civil Procedure Committee, in its drafters note to the new version of Rule 35, explicitly and directly rejected that an attorney or an attorney representative should be present at Rule 35 examinations in Nevada. That issue has already been considered duly and rejected in turn.

Assemblywoman Backus:
While you were speaking, I was trying to take a look at Rule 35 of the *Federal Rules of Civil Procedure*. It starts off looking similar to our new Rule 35 of NRCP. Are there any federal statutory provisions that address independent medical examinations to your knowledge?

Dane Littlefield:
Not to my knowledge, but I have not researched that topic.

Assemblyman Edwards:
I have a question about something you said about it being unfair to have one side represented in the room and not the other side. However, if you do have a representative of the plaintiff, the doctor is actually serving as a representative of the defendant. Is that correct?

Dane Littlefield:
That is correct. However, there would not be a defense attorney present in the room.

Assemblyman Edwards:
However, you do have representation, and you have trained representation that can actually take care of the defendant's side of the story.

Dane Littlefield:
Well, that assumes the expert witness who has been retained has a knowledge of what the scope of the procedural discovery rules are and what they can and cannot say. The fact that the bill as it stands does not allow for the recording of any statements that are not made directly to or from the plaintiff would mean there is no record for what is said in the room. It would become another "he said, she said" dispute.

Assemblyman Edwards:
How would an audio tape stop recording something that is being said in the room?

Dane Littlefield:
That seems to be the problem. That would be an issue where the audio recording would record everything, but to submit that to the court with a protective order or a motion, the plaintiffs' bar could make an argument that we would have to redact anything in a transcript that would be derived from that audio record and remove anything that could actually be back and forth between the doctor and the attorney.

Assemblyman Edwards:
If this goes through, that does not happen, right? If this bill is approved, the redaction does not take place. You have the full story there from both sides, correct?

Dane Littlefield:
Not the way the bill is written. The way the bill is written directly minimizes what can be recorded by stenographic or audio means to only the statements to or from the plaintiff. Under the current rule, audio recording can be done for good cause, and I do not believe it limits statements that are made. I would direct the Committee to the current Rule 35(a)(3) of the NRCP, which addresses audio recording of an examination.

Assemblyman Edwards:
I do not see where you are saying that anything is redacted or eliminated in the audio tape.

Dane Littlefield:
In the bill it would be section 1, subsection 3. It says, "Such a recording must be limited to any words spoken to or by the examinee during the examination."

Assemblyman Edwards:
So if that is between the examiner and the examinee, should that not give you the story of what is going on?

Dane Littlefield:
Not if there is a third party in the room. This would only be the examiner and the examinee. It would exclude any statements between the doctor and the observer, whether that is an attorney, an attorney representative, or a family member.

Chairman Yeager:
We can have the sponsors address that when they come back up. The way I read it was that it would not allow the attorney or representative to just start making arguments on the audio recording, but I believe the intent was to make sure whatever was said in the room is available for the judge. We can let the sponsors address the intent of that provision when they come back up.

I have a question. I understand where you are coming from. However, at the same time, to the extent there are disputes about what happened in the room and what was said, would it not be helpful to have at least an audio recording to be able to present to the discovery commissioner in helping to decide that? Do you just believe that would make it more difficult? The way I see it, it would be more helpful for the judge in making a decision to have a recording of what happened.

Dane Littlefield:
I do not necessarily disagree with that. A recording can be appropriate in certain circumstances, and the current rule actually provides for an audio recording for good cause. I think that is the intent of the Nevada Supreme Court and of its committee. I would submit that good cause would be if a plaintiff's attorney does have a concern that an expert witness who has been chosen by the defense may be problematic. Whether that is well-founded or not, that can be established via motion practice if the parties cannot stipulate to an audio recording. At that point, it would go before a judge who would be neutral and determine whether there is good cause to believe that an audio recording would be necessary to protect any party's rights.

Chairman Yeager:
I know we are just about three weeks into the new civil rules, but are you aware of any judges actually finding good cause in allowing an audio recording of an independent medical examination?

Dane Littlefield:
I have not been personally involved in any decisions of that nature.

Chairman Yeager:
I know it might be too early for this to work its way through the system, but I just wanted to ask that.

Assemblywoman Krasner:
Going back to the statement about this allowing for confrontations with only a plaintiff's attorney being in the room with the doctor and not the defense counsel being present,

obviously, the doctor is not an attorney. I have to agree with you there. Is it your position that if the defense were allowed to have an attorney or representative present as well, you would be okay with this bill?

Dane Littlefield:
Not necessarily. I think the issue with that is, I cannot imagine any plaintiff's attorney ever agreeing to have a defense attorney in the room during a medical examination that could become very private. That is why the most clear-cut solution is to not allow any attorneys or their representatives in the room. Of course, if a plaintiff and the plaintiff's attorney were amenable to something like that, it would be worth considering from a defense perspective.

Assemblywoman Torres:
I have some concerns about not allowing for another person to be in the room. I think back to my own father whose first language is not English. Sometimes, he has difficulty expressing himself. Although my mom would not get involved in the middle of a doctor's appointment, I think having her present allows him to feel more at ease because it is a setting where he does not feel comfortable and her being in the room would provide for an additional level of comfort. Additionally, my father is not the most reliable witness because he does not necessarily understand all the medical jargon that is being thrown around. I think it benefits both sides. It would benefit the plaintiffs and the defendants in that it allows for both of them to have a reliable story of what occurred if either another individual is present or if that encounter is recorded.

Dane Littlefield:
I agree with you. The rules currently do allow for an independent observer in the room; it just provides that the observer will not be an attorney or an attorney's representative. Family members are currently allowed in the room.

Assemblywoman Torres:
Are they allowed to record currently, or only with the judge's permission?

Dane Littlefield:
It would be with a showing of good cause. In a situation such as that where there is an issue with a language barrier, that could be grounds to assert good cause and have the judge rule on that or the parties stipulate to that.

Assemblywoman Torres:
In how many cases have they shown good cause for the mere fact of translation or additional assistance over the last year?

Dane Littlefield:
At this point, I do not have that information. However, I do not know if there is actually a data tracking capability for that. I would be happy to look into it to see if there is precedent for that. I just believe the language barrier issue would be a strong argument from the plaintiff's side.

Assemblywoman Cohen:
Continuing with Assemblywoman Torres' father as an example, say he is in the Eighth Judicial District Court. We have heard from the judges of the Eighth Judicial District Court and the other district courts throughout the state that their dockets are full, they need more judges, and there is too much going on. Can you tell us how long it would take if a plaintiff's attorney filed a motion saying they have good cause to have someone else in the room? How long would that process take in the Eighth Judicial District Court?

Dane Littlefield:
My practice area is pretty restricted to the Second Judicial District Court and some other northern Nevada courts. I cannot speak to the Eighth Judicial District Court particularly. I can offer that if there is good cause, at least up here in northern Nevada, we, as defense attorneys, are amenable to stipulating to reasonable requests. We may be portrayed as sticks in the mud who are not willing to compromise, but that is not the case. We are willing to work with people when there is a showing of good cause. If a motion to compel or a motion for a protective order requiring audio recording—a family observer is already allowed without a court order—is requested, I do not imagine it would be a very long process. It would go to a discovery commissioner, and the commissioner can work on that relatively expediently. My experience in the Second Judicial District Court is that we are fortunate to have a discovery commissioner who is extremely expeditious and very quick. Unfortunately, I cannot speak to the Eighth Judicial District Court.

Assemblywoman Cohen:
Once a motion would be filed in front of a discovery commissioner, how long would that take before it is heard?

Dane Littlefield:
As a former law clerk, I know internal rules of the court are, generally, they try to have a turnaround within 60 days. It is not guaranteed; it is just a general target goal. When matters get sent to the discovery commissioner, it can be anywhere between a week and 60 days. Generally, my experience is that it is much quicker than the 60-day rule of thumb.

Assemblywoman Cohen:
As attorneys, we are not supposed to file pleadings right away. We are supposed to work with each other. The discovery commissioner is going to want to know what the plaintiff's attorney did to try to work this out, so there would be phone calls, letters, and emails going back and forth beforehand for a few weeks on top of this. Is that correct?

Dane Littlefield:
That is correct. I would submit that the rules already provide a mechanism to remedy that. If an attorney is engaging in bad faith and if the discovery commissioner determines that any objections were not made from a good-faith basis, it opens that attorney up to discovery sanctions that can be levied against him. If it is found that the attorney is needlessly wasting the court or the other party's time, that would be a route the plaintiffs could go down.

Assemblywoman Cohen:
So we could go around 90 days before we have this resolved. Also, I think you can talk to any attorney who practices in this state, and that attorney would tell you that opposing counsel has acted inappropriately and that attorney could not get results from the court.

Chairman Yeager:
I will open it up for additional opposition testimony for A.B. 285. [There was none.] Is there anyone neutral? [There was no one.] I will invite our presenters to come forward to address Assemblyman Edwards' question and make any concluding remarks.

Alison Brasier:
Going to section 1, subsection 3, about allowing recording, I think we would be open to working on the language of that section. The intent was to capture exactly what happens in the room. That would include any dialogue with the observer. I think we would be open to dialogue about changing that section to alleviate any concerns. I was sitting and thinking about why this needs to be codified in NRS and we cannot just take care of it through the current rules. Something that has not been talked about before was that there are certain examinations that take place called "underinsured or uninsured motorist coverage" in which a person's own insurance company is, under contract, allowed to have them submit to one of these types of examinations prior to litigation being filed. Going along with the substantive rights we have been talking about and this right to control your body—even outside the litigation context—when you are dealing with an examination being compelled by an insurance company, I think it is important that we have those protections codified in our NRS.

George Bochanis:
It was our intention that the audio recording captures everything from the moment the person walks into the examination room to the second that person leaves the examination room. What you are hearing from the opposition is a very narrow interpretation. It certainly was not supposed to be so diced up. We want everything that is being said by everyone during these examinations to be part of the record. That, again, goes along with the whole concept of keeping this out in the open. It should not be some secret proceeding.

The other thing I wanted to comment on was Assemblywoman Cohen's remarks about the time element. An objection to this type of examination and having to litigate it is going to involve a meet and confer or a telephonic call first between both attorneys, which is going to take several weeks to arrange. It is going to require a motion before the discovery commissioner which adds 30 to 60 days. If one of the attorneys does not like the results of the discovery commissioner report recommendations—that report sometimes takes a month because there are objections to the language—it then goes to district court. Add another 30 to 60 days. If you are going to allow litigation on every examination request for good cause showing on audio recordings, you should give the Eighth Judicial District Court every new judge they want because you are going to need them. It is really going to cause an issue of access to justice for these types of cases.

Graham Galloway:
The argument that somehow this bill will lead to the suppression of the availability of experts for the defense side is still unsupported. I did not hear and I have not seen any evidence that will occur. What I did hear is one expert down south is making $1 million per year doing this kind of work. It is a lucrative business. There will be experts available.

Chairman Yeager:
I will now close the hearing on A.B. 285. [(Exhibit J) was submitted but not discussed and will become part of the record.]

I will now open the hearing on Assembly Bill 20.

Assembly Bill 20: Revises provisions governing judicial discipline. (BDR 1-494)

Kevin Higgins, Chief Judge, Sparks Justice Court; and representing Nevada Judges of Limited Jurisdiction:
We have offered an amended version of the bill (Exhibit K), and that is what I will be discussing this morning. The preamble to Assembly Bill 20 declares, "It is in the best interest of the citizens of the State of Nevada to have a competent, fair and impartial judiciary to administer justice in a manner necessary to provide basic due process, openness and transparency." Just as we work every day to ensure everyone who appears in our courts are treated fairly and given due process of law, the judiciary should enjoy the same treatment and guarantees of law if they are subject to review or discipline by the Nevada Commission on Judicial Discipline.

Section 1 of Assembly Bill 20 amends *Nevada Revised Statutes* (NRS) 1.440, which already provides for the appointment of two justices of the peace or two municipal court judges to sit on these judicial discipline proceedings once they go to hearing, and merely adds that the Supreme Court of Nevada will consider the advice of our association when making those appointments. We are only asking that the association offer who they think would be a good member to sit on that commission. Of course, the Supreme Court is free to appoint anybody it wants. We have no veto power or anything other than offering advice as to who we think would be an appropriate member.

Section 2 of the bill amends NRS 1.462, subsection 2 to provide that the *Nevada Rules of Civil Procedure* (NRCP) apply to all proceedings after the filing of formal charges. When the Commission receives a complaint from the public, it may choose to investigate, it may choose to ask the judge to respond, and it may file formal charges. Only after the filing of formal charges would this amendment apply. The *Nevada Rules of Civil Procedure* set forth pretrial procedures for discovery, interrogatories, requests for admission, and would also establish rules for pretrial motions. There are no such rules now. Many boards and commissions are subject to NRS Chapter 622A. Those are the NRS Title 54 boards. The Nevada Commission on Judicial Discipline is not a Title 54 board. For those boards it applies to, the rules for pretrial discovery, admission, and motions are set forth in statute.

Section 1, subsection 3 would adopt a procedure followed by many professional regulatory boards in Nevada that the investigative and prosecutorial functions are separated so the board members who decide whether to investigate and file a formal complaint are not the same members who decide whether a judge has violated the judicial canons of the *Revised Nevada Code of Judicial Conduct* and should be disciplined. This is important because, oftentimes, the evidence that is considered in the investigative phase is not the evidence that is introduced in the adjudicative phase, but the board members are aware of it and it is unclear how they disregard it when making a judicial decision. Simply put, the police and prosecutors should not be serving as the judge and jury. Due process requires that discipline decisions be made only on evidence introduced at the hearing, not evidence considered in closed, secret sessions before the public hearing. This is the procedure followed by many boards and commissions. I will draw the Committee's attention to the procedure followed by the Board of Medical Examiners in NRS 630.352: any member who sits on the investigative committee that makes a decision on whether or not a formal complaint should be filed cannot sit on the hearing panel to decide whether the physician should be disciplined.

Section 2 of the bill sets forth some specific due process protections. Section 2, subsection 4, paragraph (a) provides that the venue for a hearing will be in the county where the judge resides. Right now, frequently, northern judges' hearings are held in southern Nevada, and southern judge's hearings are held in northern Nevada. The judges, their attorneys, and their witnesses have to travel to the far end of the state to have their cases heard. This would just provide that the venue resides where the judge is.

Section 2(4)(b) provides that there would not be any interrogatories until after the formal statement of the charges. Just like a regular civil case, interrogatories and requests for admission are not appropriate until a complaint is filed and the person understands what the actual complaint is. Right now, the practice is to ask judges to respond to interrogatories and requests for admissions before the filing of formal charges, before the judge knows what they are actually going to be charged with, and judges are required to testify against themselves before they know what they are being charged with. This would just require them to wait until the formal filing of charges. There are pending cases, even a Nevada Supreme Court case, where judges object to these interrogatories. With a failure to answer them, they are deemed admitted, and you are also subject to additional discipline for failing to cooperate with the investigative process.

Section 2(4)(c) would provide that the Commission would provide all parties with the reports and investigative materials appropriate to the case once a complaint is filed, and no later than ten days before the hearing, including any exculpatory materials. There is no such requirement now that the Commission provide exculpatory materials. Discovery to requests, which are subject to ongoing litigation, have been denied by the Commission in the past. I think it is simply fair that any evidence that is going to be used or relied on by the Commission at the time of the hearing be presented to the judge and their attorney before the hearing. There is ongoing litigation about prehearing motions. Section 2(4)(d) provides that those motions be heard in an open preceding in the county where the hearing is set unless the parties agree to submit it.

Section 2(4)(e) would require that the prehearing motions be decided ten days before the hearing. These motions are commonly motions to dismiss or motions to limit the charges or discovery motions. Currently, it is the practice of the Commission to not hear those until the full Commission hearing. The defense of the judge may be contingent upon how some of those pretrial motions are heard—whether some of those charges are dismissed or not considered or are not violations of the canons of judicial discipline. Having to wait until an actual hearing to have the pretrial motions considered means the attorney providing the judge their defense really does not know what defense they will be able to provide until the time of the hearing.

Section 2(4)(f) would require that every party be entitled to provide all evidence necessary and relevant to support the case and be given time to do so, and that time limits not be placed upon the presentation of the defense. It has been the practice of the Commission to ask the prosecutor how long he needs to present, and then the defense is given the same amount of time and told they cannot exceed that. It is practice in court that defense has all the time it needs to present its defense; it is not limited by artificial rules. It would have to be necessary and relevant evidence, of course. Section 2(4)(g) provides that if any commission rule conflicts with the NRCP, the NRCP will take precedence.

The additional sections clarify some of the evidentiary standards that are used in making these decisions. Section 3 would reword NRS 1.4655(3)(e) to provide that a decision to authorize the filing of a formal statement of the charges would be made when there is a reasonable probability, based upon clear and convincing evidence, to establish grounds, so there is an evidentiary standard now provided in the statute. Section 4 removes the phrase that investigations would only be conducted pursuant to the Commission's own procedural rules. Section 5 rewords NRS 1.4667(1) so the decision to file a formal complaint is based on "whether there is a reasonable probability, supported by clear and convincing evidence, to establish grounds for disciplinary action," which just rewords the current language of the statute.

Section 6 amends NRS 1.467 so that a judge has an opportunity to respond to the initial complaint made to the Commission, but is not required to do so. Now, when the complaint from the public comes in, the judge is asked to respond to that. However, that could be premature based upon the filing of a later formal complaint. If a judge wants to respond, he can, but he is not required to make statements or admissions until he knows what the actual charges against him are, after which the Commission can decide, based on clear and convincing evidence, whether to file a formal complaint.

Section 7 amends NRS 1.468(2) to clarify that the evidentiary standard to determine whether to enter into an agreement to defer discipline is based on whether there is clear and convincing evidence to establish grounds. Section 8 sets forth the provisions on how the amendments apply prospectively into existing cases, and section 9 makes the act effective on passage and approval.

The judges in the state are expected to apply due process rights and give everybody a fair and open hearing. I think it is reasonable to expect that if we are subject to discipline, we enjoy the same due process rights as anybody who appears in front of us. There is a legal maxim that is a question in Roman law about "Who watches the watchers?" Who decides whether the police are doing a good job? Who keeps track of that? The Commission on Judicial Discipline is an independent commission. They report to no one. They are not supervised in any way, and the only way to resolve a dispute is to appeal a matter directly to the Supreme Court of Nevada. I am sure we are more than willing to hear from the Commission and have a discussion with them about possible amendments to this bill, but I do not think it is unfair to expect that due process rights apply when judges are brought before the Commission.

John Tatro, Senior Judge; and representing Nevada Judges of Limited Jurisdiction:
I do not want to understate the issue and the importance of it. I have an understanding of how the judges feel and of issues that have come up over the years. I was president of the Nevada Judges of Limited Jurisdiction (NJLJ) twice. None of us want bad judges. It reflects on all of us because when you read about a bad judge, it is as though they group us together, and we certainly do not want that. We want a remedy for finding out bad judges and people who violate ethics rules or other rules. I think the Commission is a very important thing, and I think the work they do is admirable and good. However, this discussion has been at the top of the NJLJ's agenda for over 24 years. I am not talking about war stories about the Commission; it is just this unknown. Why can we not have the same due process rights that litigants have in court on the civil side? We think it is extremely important.

You all received a letter from former Justice of the Supreme Court of Nevada Nancy Saitta (Exhibit L). In the second paragraph, she says we "must not ignore the most basic notion of fair and equal treatment under the law." We are judges, but we should be afforded that same treatment. When something is brought before us, we should have the same rights as everyone else does. I think Justice Saitta's statement sums it up.

Richard Glasson, Judge, Tahoe Justice Court; and representing Nevada Judges of Limited Jurisdiction:
I have been involved with NJLJ for the last 19 years. I am a former president and member of the board. Our mission with NJLJ is education, especially ethics education. We know and can assist the Supreme Court of Nevada in nominating these judges who will sit in judgement of other judges rather than getting that telephone call saying, "I do not know what I am doing. How do I respond to the Supreme Court? How do I sit?" We know who is capable, we know who is able, and we would like to be able to make those nominations to the Supreme Court rather than the same names over and over again being pulled out of a hat.

Ann E. Zimmerman, Judge, Las Vegas Township Justice Court; and representing Nevada Judges of Limited Jurisdiction:
I want to point out to the Committee that in *Mosley v. Nevada Com'n on Judicial Discipline* 117 Nev. 371 (2001), the Supreme Court of Nevada recognized that judges in Nevada have a protected liberty and property interest in the continued expectation of judicial office, especially where they are elected and serve designated terms. We believe that under the

current system we are being denied the basic rights of due process enjoyed by all civil litigants. It is kind of ironic that when you take your judicial oath of office, you swear to uphold the *Constitution of the State of Nevada* and the *Constitution of the United States*, but we do not enjoy those same rights before the Commission on Judicial Discipline.

Assemblywoman Backus:
With the new proposed bill, when would a complaint of charges become public? My understanding right now is that the pre-investigation is not a public proceeding. Is that correct?

Judge Higgins:
That is correct. Our bill does not change that at all. The pre-formal complaint process stays the same. Sometimes, it is confusing because the complaint comes in from the public, saying "Judge Higgins did XYZ." Then, after the process—the Commission makes a decision about whether to investigate, then a decision about whether I should respond, and then eventually presents a decision to file their formal complaint—the formal public complaint is filed by a Commission prosecutor. There are two complaints, but we do not change anything from how the Commission considers that complaint from the public now. Once the formal written complaint is there, NRCP would apply after that point.

Assemblywoman Backus:
That was my understanding. I am a licensed attorney, and I know that if someone sends a letter to the State Bar of Nevada they may not do any pre-investigation work. I get a letter shipped off to me saying, "You are in violation," but if someone took a look at the order, my name is not even in it. So it behooves me to easily just respond, and no formal complaint is filed. I was concerned that now imposing NRCP clear and convincing evidence standards may not just easily dispose of this, and there will end up being more backlog and maybe even more publicity for judges who run for office and who may not want this known. I was just trying to rectify this in my head.

Judge Higgins:
I do not think it changes that part. A judge can make a decision whether to respond. I think if somebody said, "Judge Higgins called me a jerk on the stand," I could say, "No, I did not. Here is the videotape. I asked him to sit down because he was making a scene." That would be quickly resolved, I would hope, by my responding to that public complaint. If the public complaint is that someone violated the canons and violated the criminal law and is subject to criminal prosecution—for some judges, that has been the case—I think, until the filing of the formal charges, judges have to make a decision about whether to give up those rights before they respond or are forced to respond. If you do not know what the formal charges are, it is hard to respond in those more complicated cases.

Assemblywoman Peters:
Would this pertain only to judicial duty disciplines, or does it extend to a situation in which a judge is taken into court for other issues?

Judge Higgins:
It would pertain to the workings of the Commission. It would not pertain to judges going into court for other issues.

Assemblywoman Peters:
Is a judge taken to the Commission only for actions done under the judicial office, or for any action that has consequences under the judicial system?

Judge Glasson:
A judge is a judge 24/7. What we do off the bench is subject to discipline, just as what we do on the bench. Judges must be patient, dignified, and courteous and must follow the "Boy Scout code" throughout their life. Oftentimes, a judge is brought up on a complaint and then perhaps a formal statement of charges on things that were totally unrelated to his or her duties on the bench. The old idiom is "sober as a judge." Well, if they are not, they should not be a judge anymore.

Assemblywoman Hansen:
I am a layperson. I know the law can get complicated, so this makes sense to me. You mentioned getting this fixed has been at the top of the list for several years. I was just curious about the history. Has this come before this body before? I am curious how we got here.

Judge Tatro:
No, we have not brought this bill forward. It has been talked about and talked about. This was the time when we decided to bring it forward. It has not come forward in the past.

Judge Zimmerman:
I think the reason why the bill has been proposed at this time is because judges have started to have lengthy conversations amongst themselves about the lack of due process before the Commission. Experiences have been compared, and many people are concerned about this. That is why we decided the time was right to bring this bill forward.

Assemblywoman Tolles:
It seems to me that what has been in place is an administrative process. When we start to move into language such as "clear and convincing evidence" and "due process," if there is criminal activity, it would go into court and that would have all of those applied. If it is an administrative process, it seems appropriate that it would stay at the current level to be dealt with as an administrative personnel issue. Can you speak to that?

Judge Higgins:
Both activities can come before the Commission. There was a judge in Las Vegas who was removed from the bench and was accused of mortgage fraud and was prosecuted for that. I think he went to prison. He still could be disciplined. If you are appearing in front of the Commission and have potential criminal liability for your conduct, I would assume the person would want some of it to be done before the other so you would not have to make

admissions. Both kinds of activities can come before the Commission. Judges have been disciplined for having a DUI, and that comes before the Commission. They have been dealt with and served their DUI sentence, but they still are disciplined following the criminal case.

Assemblywoman Tolles:
By asking that question, I meant putting clear and convincing evidence standards for administrative types of disciplinary action. I think that is more where my question is coming from.

Judge Higgins:
Several sections currently refer to "clearly convincing evidence." It has just been reworded to "clear and convincing" to make it clear that is the evidentiary standard. It currently refers to that. In some of the other sections it is added. That is true. I am sure there will be opposition to that, but we were trying to make it clear what the evidentiary standard is at each point of the proceeding.

Judge Zimmerman:
I think when you are talking about possibly disciplining judges or removing judges from office, their due process rights should be in place and not kick in at the level where you are appealing to the Supreme Court of Nevada. Due process should apply from the moment the formal statement of charges is filed. I want to caution or instruct that a complaint comes from an individual; it can be a citizen, it can be a lawyer, and it can be anybody that can file a complaint before the Commission. Once the Commission votes to proceed with a matter with the judge, they file what is called a "formal statement of charges." The formal statement of charges is when the matter becomes public and when the judge is formally charged. I wanted to make that important distinction.

Assemblyman Watts:
I see the current language speaks of a "reasonable probability . . . could clearly and convincingly," and this is changing it to "supported by clear and convincing evidence." Again, I am still learning about the variety of evidentiary standards in the law. It seems to me a little bit contradictory to have a reasonable probability supported by clear and convincing evidence. I have seen some things that indicate those are two separate standards. I am wondering why, in your proposal, you did not just eliminate "reasonable probability" and say "based on a finding that there is clear and convincing evidence."

Judge Higgins:
Well, there is a story about the elephant designed by a committee, right? A committee worked on this bill together, so it does not satisfy everybody's drafting needs. I think the intent was not that they use the same level of evidence at the investigative phase that they would at the conviction stage. That is where reasonable probability comes in, but whatever evidence they rely on is clear and convincing. If you are using a scale, "preponderance of the evidence" is just slightly tipped. "Beyond a reasonable doubt" would be tipped all the way; I cannot have any doubt in my mind. "Clear and convincing" is between that; it is more than just slight evidence, but it does not have to be beyond a reasonable doubt. There is case law

that explains what "clear and convincing" is. If there was a question, a judge could go to a Supreme Court of Nevada decision that explains what clear and convincing is if they were going to appeal it. I think that was the intent, to have an evidentiary standard but not force them to have the same decision level at the investigative phase and the conviction phase.

Assemblywoman Torres:
I have a two-part question. To clarify for my own understanding, if a judge were to commit a criminal act, he or she would go through the normal court process and also go through the Commission, correct?

Judge Higgins:
Correct.

Assemblywoman Torres:
I am wondering how this piece of legislation would compare with how other employees of the state have to go through their own employer. For example, as an educator, if I have a DUI, I get reprimanded through my occupation as well. I am wondering how this piece of legislation compares to our expectations of other employees of the state.

Judge Higgins:
I think it would bring it more in line with how it is applied. *Nevada Revised Statutes* Chapter 622A applies to all Title 54 boards. That includes almost everybody except a few commissions. That sets forth these procedures. It would be more parallel and similar to what happens to everybody else. If you are convicted of a crime by proof beyond a reasonable doubt, it is pretty much a given that you are going to be disciplined because boards' and commissions' standards are not as high. They can use the evidence of your conviction. Essentially, you do not have much defense to the discipline at that point because you have already been proven guilty. My experience is that most judges who have had a DUI, for example, just admit they had a DUI and throw themselves at the mercy of the Commission and hopefully have mended their ways. I think it brings it closer to how everybody else is treated.

Assemblywoman Torres:
I am not sure I see how that is different than what we do at my profession because if I were to have a DUI and there is a conviction, the district is going to see that. They have access to that. I do not understand what the difference would be.

Judge Higgins:
As a judge, you can be removed from office for habitual intemperance. You would lose your elected position. I would assume, as a teacher, while your employer might discipline you, I am not sure the State Board of Education would. Maybe that is the distinction. Here, the Commission has the authority to order us to go to treatment, suspend us, and even remove us from office. Apparently, habitual intemperance was a problem years ago, and it is written right into all of the proceedings that you can be removed from office. You would lose that

position. I do not believe the State Board of Education would revoke your license for a DUI, but I am not familiar enough with that.

Judge Glasson:
Oftentimes, it proceeds at the same time. I was called once to sit in a case in Clark County with regard to a judge who was accused of battery that constitutes domestic violence. At the very same time, the judge was up on those same charges before the Commission of Judicial Discipline. It is not always the "chicken and the egg." Sometimes it is happening at the same time.

Chairman Yeager:
Going to the amendment in section 2, subsection 4, some of the language says that "Any procedural rules adopted by the Commission . . . must provide due process," and then it says, "including, but not limited to," and provides a few different areas where the due process is specified. I wondered, with the language "including, but not limited to," are there some topic areas you have not enumerated in here where you feel as though there is not due process in the rules that have been promulgated by the Commission? I know sometimes they say "including, but not limited to," because they do not want to miss something in an exhaustive list. Does this list lay out what the current concerns are, or are there others that are not included in the list?

Judge Zimmerman:
These are the most pressing issues of due process the judges feel need to be addressed to make the process fairer. I just want to emphasize that as a judiciary association, we are not asking for more than average citizens receives when they litigate a matter in any court in the state of Nevada; we are asking for the same due process protections. It is problematic that under the current procedural rules of the Commission, they have the sole authority to determine where the venue lies. They decide venue based upon their own convenience and for no other reason. In any other case, venue would be decided based on where the conduct occurred or where the party resided. We believe venue should be the jurisdiction where the judge sits.

Judge Higgins previously went over the issue of never having prehearing motions determined until the minute before the hearing starts. These motions could include excluding witnesses, excluding evidence, adding witnesses, or adding evidence. How do you prepare for trial if you do not know what evidence you will be allowed to present? It would be no burden upon the Commission to hear those motions and issue a decision ten judicial days before the hearing. That would make the process fairer to the judges. I know we like to say "including, but not limited to" in case we forget something, but these are the big issues we think would make the process fairer.

Chairman Yeager:
With respect to venue, is that typically always in Carson City for these proceedings? My understanding is that is where the Commission on Judicial Discipline is housed. I wonder if any of you are aware of a venue being located outside of Carson City for the hearings?

Judge Zimmerman:
Most of the time, the southern judges' hearings are scheduled for Carson City. Most recently, maybe based upon numerous complaints, they have scheduled a couple of hearings in Las Vegas. It is still their decision where to schedule a hearing. It would be important to us to have venue determined by where the judge resides. The short answer is yes, sometimes the hearings occur in Las Vegas and sometimes they occur up north. I do not believe there is any rhyme or reason to how that is determined.

Assemblywoman Hansen:
Just to clarify, for several sections we were talking about the "clearly and convincingly" language, and then "supported by clear and convincing evidence" is the new language. Is it the same evidentiary standard?

Judge Higgins:
Clear and convincing evidence is an evidentiary standard. I think that was intended by the way it was worded. It is not necessarily the same. I think this would give us a reason, if there were a dispute, we could tell the Supreme Court based upon your history of litigating what clear and convincing means, we would have case law one way or another. I think it is the same standard, although I am not sure the opponents of the bill will agree to that. It is just a clearer standard.

Chairman Yeager:
I will open it up for additional testimony in support of A.B. 20. [There was none.] I will now take opposition testimony.

Paul C. Deyhle, General Counsel and Executive Director, Commission on Judicial Discipline:
I have with me today the full Commission, which comprises district court judges appointed by the Supreme Court of Nevada, attorneys appointed by the State Bar of Nevada Board of Governors, and lay members appointed by the Governor of this state. They are all in opposition to this bill. Gary Vause is our chairman. He very much wanted to come today, but his wife had a medical procedure, so he did prepare a letter that was submitted and uploaded to Nevada Electronic Legislative Information System (Exhibit M). In addition to that, I have also submitted the letter I sent to each of the Committee members in January (Exhibit N), as well as two cases and Commission orders that were filed in public cases that discuss the constitutionality of some of the issues that were discussed today.

A picture has been painted today that a certain group of judges in this state do not receive due process. That is simply inaccurate. I am going to do my best to scratch the surface, because underneath the surface of those allegations are the facts.

The current statutes and procedural rules reflect a number of competing interests: the interests of the public, the interests of judges, and many other interests. That is where we are today. Just ten years ago, this Legislature enacted sweeping changes to the Commission's statutes and rules at the recommendation of the Article 6 Commission. The Article 6

Commission was formed by the Supreme Court of Nevada in 2006. The goals of that commission were to increase transparency of the Commission on Judicial Discipline, to improve its effectiveness, the fair treatment of judges—which certainly would include due process issues—and the timeliness of issuing decisions. The participants of this Article 6 Commission were experts from all over the country: law professors, judges, attorneys, and representatives from the Nevada Press Association and the American Civil Liberties Union of Nevada. The Commission on Judicial Discipline at that time fully participated in this effort. This took two years, where our rules and our statutes were under a microscope. As a result of that work, there was a report written. That report formed the basis in the 2009 Session for sweeping changes to both the statutes and the rules. Those were enacted just ten years ago.

I have heard testimony today that none of these issues were addressed. That is not true. All of these issues were addressed just ten years ago. I would respectfully request that if this Committee is seriously considering entertaining any of these requests, they do it the right way like they did ten years ago and convene an Article 6 Commission—which is named Article 6 after the section of the *Nevada Constitution* that deals with the judiciary—and get the input from all of these interests: the public, the judges, the lawyers, et cetera.

This is extremely important because you have only heard one side of the story here today from the proponents of A.B. 20. You have heard there is this rampant violation of their due process rights. That is, as I said, simply not the case. These changes from the 2009 Session reflect the national standards for judicial conduct and are in conformity with the judicial discipline commissions throughout the United States. This is nothing new here in this state. The structures may be different, but the rules and the laws that govern this Commission are followed around the country.

I will briefly go into the analysis of the bill. I know they filed an amendment to the bill. I can tell you, with all due respect, the commissioners unequivocally viewed that amendment as just as unreasonable as the original bill. I will tell you why: it has no regard for the process that has developed over 40 to 50 years, not just in this state, but across the country. It has no regard for the public or the taxpayer. Section 1 of the bill grants advice authority to limited jurisdiction judges only for judicial appointments for the Commission. I believe this is highly questionable on constitutional grounds. The Commission does not really have a dog in that fight. It does not directly affect the Commission, but I would think the Supreme Court of Nevada would have a problem with that because it is the appointing authority under the *Nevada Constitution*. The *Nevada Constitution* makes no mention of anyone having advice authority over their decisions, no more than the Governor or the State Bar of Nevada. I believe the Governor and the Board of Governors of the State Bar of Nevada are more than capable of appointing qualified individuals to these commissions.

This is just one group of judges within this judiciary, which is made up of over 600 judges, and I do not see any representation from the Nevada District Judges Association, the Supreme Court of Nevada, or the Nevada Court of Appeals. It is just one group of judges within Nevada that want to provide advice to the Supreme Court. I do not want to speak on

behalf of the Nevada Supreme Court, but I think they would have a big problem with this. It also sets a bad precedent as other groups will petition the Legislature for advice authority to influence appointing authorities to select members as well—not just this commission, but boards and commissions at every level.

Section 2 of this bill deletes the application of NRS and the procedural rules of the Commission. Now, I know the amendment to this bill took away the deletion of the application of the NRS, but it still deletes the procedural rules of the Commission. What a lot of people, even judges, do not know is that the procedural rules of the Commission were drafted and adopted by the Supreme Court of Nevada. They formed part of the Supreme Court's rules for decades. The Commission did not draft these rules; they are our rules now based upon constitutional amendments over the last two decades. We did not draft the actual rules that are being challenged by the proponents of this bill. The rules that they are attacking were adopted by the Supreme Court. I think we can all agree that the Supreme Court knows a thing or two about constitutionality.

The *Nevada Constitution* specifically and expressly empowers the Commission to adopt its own procedural rules. This is extremely important. We are not a district court. The proponents of this bill try to equate the Commission with any other court in this state. It is not true. We are a court of judicial performance. It is completely unique. It is not a district court. The same rules do not apply. That is why the *Nevada Constitution* itself empowers the Commission to draft its own procedural rules. We adopted those rules after a constitutional amendment in 2003. The same rules exist now, for the most part, in the statute as they existed ten years ago after this two-year effort to review all of these commissions and rules. These issues have been vetted by experts all over the country—by lawyers, judges, the public, and all these organizations. It is not true that these issues are the first time this Committee is hearing them.

The other part of section 2 is that the application of the NRCP applies to all stages. They did change that in the amendment, but as I said, they are requiring the procedural rules be simply negated, which I find constitutionally questionable. Section 2 also requires that the Commission's procedural rules provide due process to judges. This is not necessary. The *Nevada Constitution*, NRS Chapter 1, the procedural rules of the Commission, and Nevada case law already give all judges in this state due process rights. This is not necessary.

Section 3 revises the standard of proof required in judicial discipline proceedings. The current standard of proof is consistent with the standards of proof found in all jurisdictions in this country. Their change to this is a radical departure to what is customary and normal in all jurisdictions in this country. As I indicated in my letter to each of you in January, it does not make sense. To everybody that I speak to about this issue, it is contradictory. It requires the Commission to prove its case before a trial, before examining witnesses, and before conducting a trial on the merits. It just does not make any sense.

It also eliminates the Commission's ability to consider all evidence available for introduction at a formal hearing. They deleted this portion of the statute. All the Commission will be able

to do in this case is focus on the investigation report—nothing else, no other evidence. The investigation report is drafted by one individual. It is an independent contractor hired by the Commission to do an investigation of the facts. We would not be able to look at the transcript. We could not look at other evidence that may come in after the investigation but before the decision is made to file a formal statement of charges. We just have to focus on the investigation report, which could have some issues; for example, if the factual evidence does not support the conclusions in the report or if there is new evidence that comes to the attention of the Commission after the investigation. The Commission has a right to follow up with the judge and ask the judge to respond to that evidence. It really handcuffs the Commission in doing its job, which is to get to the facts. A thorough investigation is what is needed. That actually provides more due process to the judges because we are trying to get it right. We have judges' reputations and livelihoods on the line. We have to get it right. This is an investigation. They are trying to impede and obstruct our investigation. I do not know a lot of judges, other than the proponents of this bill, who are okay with it.

Section 5 of the bill refers to not compelling a judge to respond to a complaint during the investigative phase of a judicial discipline proceeding. Again, I will be standing tall next week in Las Vegas before the en banc Supreme Court on an issue of whether or not the Commission can ask judges written questions during its investigative phase. This change in section 5 does not have anything to do with that particular question. The current statute requires a judge to respond to a complaint. They are looking to change that. They do not want to respond to the complaint; they want an option to respond to the complaint. Again, I have to stress that this is an investigation.

There are only two phases of the Commission process: the investigative phase and the adjudicative stage. The investigative stage starts with the filing of a complaint by a member of the public, and it ends upon the filing of the formal statement of charges. Everything before the formal statement of charges is an investigation. The adjudicative phase of judicial discipline proceedings starts at the filing of the formal statement of charges. This is the complaint the judges are talking about. This is where their adjudicative and due process rights start. This is in accordance with not only the Nevada Supreme Court, but the United States Supreme Court. This is clear and settled law.

This change, again, is a radical departure from what other jurisdictions have done and do across this country. The sole issue on Tuesday is whether we can ask written questions during an investigation. I am not going to belabor that point here, but I am going to say, again, this is an investigation. If investigative bodies cannot ask questions during an investigation, I think we should just pack it all up and go home. I do not know what the purpose of an investigation is if these investigating bodies—not just the Commission, but any investigating body—cannot get to the truth and the facts. That is what I will be arguing on behalf of the Commission next week before the Supreme Court of Nevada. As I indicated before, the Commission's statutes and the procedural rules being challenged by the proponents here are the same that existed in 2009 following the implementation of the Article 6 Commission report.

We have heard a lot of testimony today that the current judicial discipline process does not afford due process for judges. As I indicate in my opposition outline (Exhibit O), judges have more due process rights than any litigant in any court in this country. Eighteen to twenty-four months prior to the filing of a public complaint, there is a review of the complaint and there is an investigation that commences. The Commission holds three meetings. They review the complaint and there is an investigation. They come together again and review the investigation report and all other evidence. Then they vote again for the judge to respond. They have to respond, by law, to the complaint. They have the opportunity to clarify anything they want. They already know what the complaint is. Please do not get confused by the definition of complaint. Complaint is defined by statute as is the formal statement of charges. A complaint is one filed by the public, and the complaint by the Commission is one filed by the Commission. They are more than knowledgeable of the allegations against them early on in the process. If the Commission decides to investigate, they send an investigator out, the judge sees the complaint, participates in an interview, and can provide any documents or arguments to that investigator that the Commission will review and consider. The Commission also goes out and speaks with all other witnesses that are relevant to this allegation—not just the complainant, but everyone else—and considers all of that evidence, not just in the investigation report, but everything else, including videos, court documents, etc. The Commission meets again after they receive the judge's response and answers to questions and they vote again. In the response process, judges can provide legal arguments. They can correct mistakes. They may have misstated something in the interview because they are nervous or they forgot something. They can address new evidence the Commission has received. It is a perfect opportunity for judges to correct the record and reconcile any inconsistencies or ambiguities in witness testimony or even their own testimony. They can even submit legal arguments to the Commission. The Commission will consider all of that, every bit of it, before they decide to file a formal complaint against the judge.

When I hear they do not get any due process rights, it is simply not true. Look at the typical litigant in any court. They do not get advance notice of a complaint being filed almost a year and a half to two years beforehand. They do not have an opportunity to come in and talk to an investigator, have an interview, and submit legal arguments. They do not have an opportunity to petition the Supreme Court of Nevada on perceived due process violations. They do not have any of those rights. Yet a year and a half to two years prior to the decision of the Commission to file a formal complaint, all of this is taking place. The commissioners behind me and I cannot imagine how anybody can argue there is no due process rights for judges. It is simply not true.

With respect to the argument that the Commission blatantly violates due process rights, two years ago, I testified before this Committee on Assembly Bill 28 of the 2017 Session, which specifically expanded due process rights for this particular group of judges: limited jurisdiction judges. I drafted the bill. I testified before the Judicial Council. I worked with the Administrative Office of the Courts prior to the bill being introduced, and I testified before the Assembly and Senate Judiciary Committees. This bill was for their benefit.

It expanded their rights. The Commission is not out to get these judges. That is simply not the case.

As you know, discipline is imposed against all judges. We have 600 judges in this state or more—district court judges, hearing masters, Nevada Court of Appeals judges, and Supreme Court justices. Our decisions are all unanimous decisions. There are seven members on our Commission. There are two judges, two attorneys, and three lay members. Two of their own colleagues have decided, based upon the facts, they have committed misconduct. As far as the discipline that was imposed, these two judges agreed the discipline was appropriate under the circumstances. This is not a case of lay members and attorneys ganging up on the judges. That is not happening. These are unanimous decisions. I think that is very telling. Their own colleagues are finding them to be in violation of the code and the law and disciplining them accordingly. There is simply no consensus regarding the lack of due process protections among the Nevada judiciary.

I attached, as part of one of my documents, a public order for the Commission [pages 24-34, (Exhibit O)]. I am not going to discuss that order, I just want you to know who signed that order. That was Judge Thomas Armstrong. He was appointed by the Nevada Supreme Court. He is an alternate commissioner, and he was the past president of NJLJ, just four months ago. That order debunks all of the constitutional arguments you heard here today. This is from a municipal judge and justice of the peace to his own colleagues. The other order [pages 13-22, (Exhibit O)] addresses the arguments you have heard today that we need more than one keeper of judicial discipline because it is unfair. If you look at the highlighted portions, that is the law. This is settled law by the United States Supreme Court and the Nevada Supreme Court. They have already ruled on these issues. There is absolutely no evidence that a one-tier or a two-tier system is any more or less fair. In fact, the overwhelming majority of jurisdictions in this country have a one-tier system as we have here today. There is no evidence that our system is less fair or doles out less due process protections. There is simply no evidence of it. This was born out by a Stanford study not too long ago that said the same thing. They did a study. It is the only study of its kind. This hypothesis was not proven, but one thing in that study that was proven is that if there is a two-tier system, it is going to cost a lot more money, and you are going to get the same results—more money and more time.

I wanted to counter what was testified toward the end about venue. We do not have a policy of bringing judges up here from Las Vegas or vice versa. Nine times out of ten if it is a southern judge, we go down to Las Vegas. The only time we have brought a judge up here was for a one-day hearing when we could not have the trial within a few months. We have seven commissioners. It is literally like herding cats to try to get them together. It is very difficult. They are all professionals, judges, and attorneys. If it is a one-day trial and we have to wait another three months just to have the trial, I think having these done quickly based upon the public's need for these cases to go forward in a timely and efficient matter overweighs those concerns. There is no law they can point to that says it is a violation of due process because they may have to get on a plane for one day and go back home the next day. There is case law on this by the Supreme Court of Nevada and other jurisdictions.

In conclusion, I would like to stress that if a jurisdiction is to have a judicial system that has the confidence of its citizens, it must have a judicial system that is effective. From myself and all of these commissioners here today, we have utmost respect for judges. They do a noble job for the citizens of this state, and our mission is to protect judges.

Chairman Yeager:
You mentioned a Nevada Supreme Court argument next Tuesday. Is that going to be here in Carson City and do you know what time that will be?

Paul Deyhle:
That is in Las Vegas at 10 a.m.

Chairman Yeager:
Just one thing I wanted to put on the record so we are clear: all the bills from the Judicial Branch come through the Supreme Court of Nevada for submission to the Legislative Counsel Bureau. That is in the rules of the Legislative Counsel Bureau. If you look at A.B. 20, it does say "On behalf of the Nevada Supreme Court." That is the process that is set up in statute. In case anyone was wondering, as we have heard, there is at least one and maybe more cases pending in front of the Supreme Court of Nevada on some of these issues. Because of that, the Supreme Court of Nevada is not able to be here to express opinions on this matter due to ongoing litigation. I just wanted to make that clear for the record; under their rules, they are not going to be able to weigh in on this bill given the pending litigation. I will now open it up to questions from Committee members for Mr. Deyhle.

Assemblywoman Cohen:
Is there anything in the amendment that is acceptable to you?

Paul Deyhle:
No.

Chairman Yeager:
Do we have any additional testimony in opposition to A.B. 20?

Jerome M. Polaha, Judge, Second Judicial District Court:
I have been on the Commission since 2002. I have had a lot of hearings and a lot of experience with the Commission. The question was asked: Is there anything the Commission agrees to in this proposed bill? It is unnecessary. As far as the due process that has been argued here, it is afforded. Think about this: there are seven people on the Commission. We have an investigator. As far as the request for a two-tier system, to be able to make that work, we are going to have to split the panel. However, the law says four constitute a quorum for all reasons except for handing out discipline, for which I need five. Right there we have a problem that has to be addressed. The obvious way to address it is to expand the Commission, spend more money. Consequentially, there will be more delay.

The other aspect of the law which is a big selling point for them is that the investigation be founded on clear and convincing evidence rather than a reasonable possibility that there could be clear and convincing evidence after a complete hearing. Think about that. You have an investigator. That would be like police officers finding proof beyond a reasonable doubt before they took their case to the justice court. The court could say, "Well, there is obviously, by law, a requirement that proof beyond a reasonable doubt has to be established by the investigator. I got an investigation report; there had been proof beyond a reasonable doubt. What am I going to do? Pass it on to district court." Then district court gets it and says, "Why do we need a jury? We already have proof beyond a reasonable doubt, so my job is to punish you." That is the effect of what they are proposing, and it will not work. It is not due process.

Chairman Yeager:
Is there anyone else in opposition? [There was no one.] Is there anyone in neutral? [There was no one.] I will invite our presenters back to the table for any concluding remarks.

Judge Higgins:
Sitting here, I was starting to think I had drawn the short straw by agreeing to come testify today, but I did because I was available and I think this is an important bill. I think I need to disagree with my friend Judge Polaha. I think it is necessary to have some of these due process rights written into the statute because each of these touches a point where, in the past, the Commission has denied these issues. Prehearing motions are not being decided before the hearing. They are not being ruled on soon enough in advance for somebody to craft his or her defense. I think it is only fundamentally fair that the judges get all the evidence that is going to be relied upon by the Commission when they make their decisions and that everybody has a chance to present their side of the case. I have been told of cases in Las Vegas where the prosecution says they only need two hours, so the Commission says the defense only gets two hours even though they have a lot more than that. They are limited, then, by what the prosecution puts on. Each of those is in response to something that has been pending and that we think needs to be resolved.

I was trying to figure out how there are 600 judges in the state. I guess there are a lot of hearing masters and commissioners, but our association represents 95 judges. There are approximately 100 other elected district court judges and court of appeals judges, so I think we represent about one half of the elected judges in this state. Frankly, we do not agree on everything. Getting 95 judges to agree to go to lunch is difficult enough. Some people are big proponents of this bill. To some people, it does not bother them so much. I do not think I am a member of a minority radical group of judges that is seeking to change the rules. Many states have two-tiered systems. It only seems fair to me that whatever body decides what you are going to be disciplined for has not already been in charge of the investigation and decided what questions to ask and where the investigation goes. Those ought to be changed. I do not think we ever said there is rampant violation of every due process right. I think our testimony was that there are some things we think could be improved.

I might have to disagree that having to respond to an investigator's questions or be sanctioned for failure to cooperate with the Commission, I am not quite sure how that is a due process right afforded to the judges. We have to answer those questions or we are disciplined and sanctioned for failure to do so. I had hoped to be able to work on this bill and come to a conclusion. I was actually on the Article 6 Commission and spent hours and hours in hearings on the subcommittee I was on. I am aware there were a lot of things that did not get addressed. I do not think just because something is written one way it means we cannot change it ten years later. I think there is room for improvement. I do not think we are being radical; we are just asking for some basic fundamental fairness. I think we are still willing to sit down and meet with the Commission if they would like to. It does not sound as though there is a comma or a semicolon in this bill they agree with. We are still willing to sit down with them and discuss it if possible.

Judge Tatro:
When I started my testimony, I pointed out that we think the Commission does great work. They need to be there. They are very important. I have never once questioned if they made a right decision. It is just these issues that are our concern. Ten years ago, the Article 6 Commission happened, but things have changed. It is just like the NRCP recently being changed. Everything gets changed because things change. Time goes on, and they have to change.

There was one thing Mr. Deyhle said that I need to respond to. He indicated that Judge Armstrong, when he served on the Commission, signed that order. I am not saying whether he opposes or supports this bill, but when he was president, the way it works is we have a committee and then the whole body of judges decides what bills we are going to take forward to the council, and ultimately to this body. He was the president. It was a unanimous vote to bring this bill forward.

Judge Zimmerman:
I want to clarify and disagree with Mr. Deyhle on some of his remarks. None of the judges are saying that if there is a complaint made against them it should not be investigated and we should not be questioned. Our objection is to answering interrogatories that we have to swear under oath that could be used against us in the future if the Commission chooses to proceed with the formal statement of charges. If you do not answer the interrogatories, they are deemed admitted and you are slapped with an additional charge of failure to cooperate. The purpose of this is not that judges do not want to cooperate in investigations—they certainly should—it is the way the interrogatories are presented before formal statement of charges are filed that we object to.

I thought it was interesting that Mr. Deyhle testified that we have more due process rights than anybody else. However, he failed to address any of our specific concerns about pretrial motions being ruled upon, how much time is allocated to the defense to present their case, interference with the witnesses the defense wants to present, and standing on venue. He glossed over all of those and did not answer anything about those.

I also want to point out that I think it is very important that the investigative and prosecutorial functions are separate. When they are not separate, the outcome has always been predetermined. I am sure, if you reviewed the decisions of the Commission, they are always unanimous because they have been involved in the investigative part and heard that evidence and then hear the trial part. I also thought it was interesting to note that Mr. Deyhle said there are no district court judges here in favor of the bill. Well, there are no district court judges here in opposition either, but I can tell you from my own personal experience working in the Regional Justice Center, I am stopped constantly and encouraged. I have been encouraged by Supreme Court justices. I have been encouraged by district court judges. I have been told repeatedly that this is crazy to bring this bill before the Legislature because now I have made myself a target by the Commission. I do not believe that is true, but I have had that said to me repeatedly. For him to say this is a small minority of judges that want this, I have received encouragement from judges from all over the state in proceeding with this bill, so it is just not true.

Chairman Yeager:
I will now close the hearing on A.B. 20. I will hand this meeting over to Vice Chairwoman Cohen as I am going to present the next bill on the agenda.

[Assemblywoman Cohen assumed the Chair.]

Vice Chairwoman Cohen:
I will open the hearing on Assembly Bill 423.

Assembly Bill 423: Revises provisions relating to certain attempt crimes. (BDR 15-1117)

Assemblyman Steve Yeager, Assembly District No. 9:
It is my honor to present Assembly Bill 423 to you this morning. This bill allows certain people to petition the court for a reduction of charge once they finish their sentence. This bill only applies to crimes known as "wobblers," which is kind of a funny name. A wobbler means that when the person is sentenced for a crime, the judge can either adjudicate the person for a felony or a gross misdemeanor. Essentially, the crime wobbles between a felony and a gross misdemeanor. I think that is where the name came from, but I am not sure. Those are the limited circumstances where this bill would apply. The only crimes that we are talking about where A.B. 423 would apply would be an attempted crime of a category C, D, or E felony. If you plead guilty to or are found guilty of attempting to commit one of those categories, those are the wobbler offenses we are talking about where the judge makes the determination.

The language of the bill itself is pretty straightforward. What it says is that if a judge decides to give the offender a felony at the time of sentencing, the offender would be able to come back to the court after the completion of the sentence and petition the court to modify that felony down to a gross misdemeanor. This would only apply in circumstances where: (1) the

offender has a wobbler offense, and (2) the judge actually gives the offender the felony rather than the gross misdemeanor.

The procedure in the bill is that notice must be given to the prosecuting attorney, and then the prosecuting attorney has 30 days to respond. If the prosecuting attorney either agrees with the request or does not oppose it, a judge would be allowed to simply grant that motion and reduce the charge without a hearing. If the prosecuting attorney opposes the motion, the court must hold a hearing. The court would have total discretion in terms of what evidence to consider at such a hearing. I anticipate that a court would look at how the offender did on probation or in prison, how the offender is doing in life currently when they file the motion—including whether they are employed, whether they are going to school—the offender's complete criminal history, and obviously any input from the victim of the crime and the district attorney about the crime itself, and then make a decision about what to do. If the judge denies the motion, the petitioner cannot appeal, so that would be the last stop.

Even if a judge denies the motion to reduce the charge, the offender would still be eligible to seal his or her records after the waiting period that is in statute. Right now, that is five years for a category D felony and two years for a category E felony. Keep in mind that the record-sealing process, as we have heard, is burdensome and can be expensive. This would be a better procedure where a judge could, on his or her own, reduce it down from a felony to a gross misdemeanor.

In the real world, I anticipate these would only be granted when the petitioner has shown extraordinary success on probation. Honestly, I do not think a judge would reduce a charge after someone was given a prison sentence because that would be a reflection of the seriousness of the crime in the first place. I think we are talking about situations where the offender did really, really well on probation. I trust our judges to use their discretion appropriately when deciding these petitions. We are not talking about a lot of cases, so I do not think this is going to clog the court system.

Finally, under the terms of the bill, this is not retroactive. If we were to enact this legislation, it would only apply to offenses committed on or after October 1, 2019. People who now have felonies on their records as a result of wobblers would not be able to go back now under this bill. That should limit the amount of petitions that would be filed because it would only be on a future basis. With that being said, I am open to any questions.

Assemblywoman Peters:
In this language, we talk about the petition having to go to the original prosecuting attorney. What if that attorney is retired or otherwise unavailable? Who would be a default?

Assemblyman Yeager:
There are a couple components here. In section 1, subsection 3, it talks about petitioning the court of original jurisdiction. Essentially, that means it would have to go back to the same court. Now, judges shuffle around all the time. What would happen is that it stays in the department it started in. If there is a new judge in that department, it would stay there. With

respect to the prosecuting attorney, there may very well be a different prosecuting attorney. That prosecuting attorney may have retired or moved on. I would just expect somebody from the district attorney's office to comment, so it would not necessarily preclude someone from asking if there was a shuffling of the case. The reason we have that language about the original jurisdiction is that we do not want someone to go in front of one judge and get the felony and then try to petition another judge and sort of "forum shop" to get a reduction. It would have to be the same judge who would make the determination unless there was some kind of switch in the departments.

Assemblywoman Peters:
I also wonder about whether there is any victim input in this. My question comes about as a result of Marsy's Law.

Assemblyman Yeager:
It is not specifically listed in here. I would certainly be willing to include that. We left the proceeding pretty open-ended in terms of what evidence a judge would want to hear, but I would think, under Marsy's Law, a victim would have to be noticed and, at least, have an opportunity to come and weigh in. To the extent that is not the case or it is unclear, I would be happy to add that to the language.

Vice Chairwoman Cohen:
I will open it up for testimony in support.

John J. Piro, Deputy Public Defender, Legislative Liaison, Clark County Public Defender's Office:
There are often times when we take a person to sentencing on a wobbler. Other states do not necessarily have this mechanism, so when we describe to attorneys in other jurisdictions that a person will not necessarily know whether they are getting a felony or a gross misdemeanor prior to sentencing, they think we are kind of crazy in doing that. Cases can certainly be negotiated to allow us the opportunity to argue for a gross misdemeanor. Sometimes we lose that. Then you have a client who goes on to successfully complete probation, do all of these things, and really wants to get a good hold on their life, but there is that felony on their record. This would be a carrot at the end to allow them to apply for a gross misdemeanor at that time.

Kendra G. Bertschy, Deputy Public Defender, Washoe County Public Defender's Office:
I believe this really helps clarify the wobbler provisions. More importantly, it provides that carrot to ensure our clients are really working toward being successful. It allows them the opportunity to have that felony removed from their record so they are able to become better members of our society.

Vice Chairwoman Cohen:
Is there any more support? [There was none.] We will move on to opposition.

John T. Jones, Jr., Chief Deputy District Attorney, Clark County District Attorney's Office; and representing Nevada District Attorneys Association:

We are in opposition to A.B 423 as it is currently written. I do not have an amendment yet, but I did have an opportunity to speak with Chairman Yeager yesterday about our opposition. I appreciate his taking the time to meet with me on such short notice. Generally, a judge loses jurisdiction to modify a sentence once a judgment of conviction is filed unless the defendant can show a material misrepresentation of fact or some sort of clerical error. District attorneys, in general, do not want to set the precedent of opening up judgments of conviction once the sentence has been rendered.

That being said, I think we are open to some changes in this bill that would achieve the same result but do it in a slightly different way. For example, our position is that this would be better done at sentencing. In fact, in Clark County, what often happens on wobbler cases is that the judge will ask the state if we have an objection to allowing for a drop-down to a gross misdemeanor. When I say "drop-down," I mean the judge would adjudicate the defendant of a felony, and if they complete probation, the judge would then vacate the felony conviction and enter a gross misdemeanor at the end. The reason why the district attorney stipulation is important is because that is how we get around the fact that the judge loses jurisdiction to modify the judgment of conviction after the sentence is rendered.

I think it is better done at sentencing for several reasons. First, the victim will have finality at sentence. In cases where it is a wobbler, the victim will know the judge has, at least, given the defendant an opportunity to earn a reduction to a gross misdemeanor and has given the defendant a road map of how to get there. The judge can say, "If you stay out of trouble," or, "If you comply with terms X, Y, and Z, and if you pay restitution, I will allow you to earn a reduction to a gross misdemeanor." The victim will know at sentencing what is going to happen ultimately with the case instead of waiting for a period of time to potentially receive a notice of this new hearing set out in the current version of the bill in which we would have to basically relitigate sentencing and instances where the victim has a problem with the reduction.

Further, this bill should not apply in situations where the parties have stipulated to a particular sentence. In other words, I, as a deputy district attorney, have often offered a negotiation of a wobbler offense to a defendant, but as part of that negotiation, the defendant is required to stipulate to felony treatment. This bill does not speak to those instances. I think the way it is currently read, they could apply or make a motion to ask for a reduction despite the agreement to the contrary.

Finally, this should not apply to people who have prior felony or gross misdemeanor convictions or who have already received the benefit of this bill in the past. I think there is an avenue for us to get to the ultimate goal of allowing judges to do this, but we think it should be at the front end where the victim has had input at sentencing and the judge specifically spells out a road map in the judgment of conviction to how a defendant could earn that gross misdemeanor reduction.

Vice Chairwoman Cohen:
Is there anyone here in neutral? [There was no one.] I will invite Chairman Yeager back for concluding remarks.

Assemblyman Yeager:
I agree with Mr. Jones that the parties would be able to agree in a guilty plea agreement, which is essentially a contractual relationship, about someone getting a felony. I think, if that is important enough, they could put that in there to not have this bill apply. Other than that, I heard there is a willingness to continue working on this. I am committed to continuing to work with Mr. Jones to see if we can find a way to enact this provision which, I think, would apply in a very small number of cases but would be a huge benefit to an offender getting his or her life back on track.

Vice Chairwoman Cohen:
Thank you. [(Exhibit P) was submitted but not mentioned and will become part of the record.] I will close the hearing on A.B. 423.

Is there anyone here for public comment? [There was no one.] This meeting is adjourned [at 10:54 a.m.].

RESPECTFULLY SUBMITTED:

_____
Lucas Glanzmann
Committee Secretary

APPROVED BY:

_____
Assemblyman Steve Yeager, Chairman

DATE: _____

EXHIBITS

Exhibit A is the Agenda.

Exhibit B is the Attendance Roster.

Exhibit C is a set of documents in support of Assembly Bill 285, submitted by Kaylyn Kardavani, representing Nevada Justice Association, and presented by George T. Bochanis, representing Nevada Justice Association.

Exhibit D is a written testimony dated March 25, 2019, written and presented by Dane A. Littlefield, President, Association of Defense Counsel of Nevada, in opposition to Assembly Bill 285.

Exhibit E is the current *Nevada Rules of Civil Procedure* Rule 35, submitted by Dane A. Littlefield, President, Association of Defense Counsel of Nevada.

Exhibit F is the former *Nevada Rules of Civil Procedure* Rule 35, submitted by Dane A. Littlefield, President, Association of Defense Counsel of Nevada.

Exhibit G is a Supreme Court of Nevada order, submitted by Dane A. Littlefield, President, Association of Defense Counsel of Nevada.

Exhibit H is a packet of written statements in opposition to Assembly Bill 285, from various members of the Association of Defense Counsel and submitted by Dane A. Littlefield.

Exhibit I is a copy of a Supreme Court of Nevada case, *Berkson v. LePome*, 126 Nev. 492 (2010), submitted by Dane A. Littlefield, President, Association of Defense Counsel of Nevada.

Exhibit J is a packet of letters in support of Assembly Bill 285.

Exhibit K is a proposed amendment to Assembly Bill 20, submitted by Nevada Judges of Limited Jurisdiction.

Exhibit L is a statement submitted by Justice Nancy M. Saitta, retired, in support of Assembly Bill 20.

Exhibit M is a letter dated March 25, 2019, to Chairman Yeager and members of the Assembly Committee on Judiciary, submitted by Gary Vause, Chairman, Nevada Commission on Judicial Discipline, in opposition to Assembly Bill 20.

Exhibit N is a letter dated January 3, 2019, to Chairman Yeager, submitted by Paul C. Deyhle, General Counsel and Executive Director, Nevada Commission on Judicial Discipline, in opposition to Assembly Bill 20.

Exhibit O is a set of documents in opposition to Assembly Bill 20, submitted by Paul C. Deyhle, General Counsel and Executive Director, Nevada Commission on Judicial Discipline.

Exhibit P is a letter dated March 26, 2019, to members of the Assembly Committee on Judiciary, submitted by Jim Hoffman, Legislative Committee, Nevada Attorneys for Criminal Justice, in support of Assembly Bill 423.

EXHIBIT C

MINUTES OF THE
SENATE COMMITTEE ON JUDICIARY

Eightieth Session
May 6, 2019

The Senate Committee on Judiciary was called to order by Chair Nicole J. Cannizzaro at 8:21 a.m. on Monday, May 6, 2019, in Room 2135 of the Legislative Building, Carson City, Nevada. The meeting was videoconferenced to Room 4412E of the Grant Sawyer State Office Building, 555 East Washington Avenue, Las Vegas, Nevada. Exhibit A is the Agenda. Exhibit B is the Attendance Roster. All exhibits are available and on file in the Research Library of the Legislative Counsel Bureau.

COMMITTEE MEMBERS PRESENT:

Senator Nicole J. Cannizzaro, Chair
Senator Dallas Harris, Vice Chair
Senator James Ohrenschall
Senator Marilyn Dondero Loop
Senator Melanie Scheible
Senator Scott Hammond
Senator Ira Hansen
Senator Keith F. Pickard

GUEST LEGISLATORS PRESENT:

Assemblyman Jason Frierson, Assembly District No. 8
Assemblywoman Daniele Monroe-Moreno, Assembly District No. 1

STAFF MEMBERS PRESENT:

Patrick Guinan, Committee Policy Analyst
Nicolas Anthony, Committee Counsel
Jeanne Mortimer, Committee Secretary

OTHERS PRESENT:

Sandy Anderson, Nevada State Board of Massage Therapy
Bailey Bortolin, Washoe Legal Services
Graham Galloway, Nevada Justice Association
Alison Brasier, Nevada Justice Association

Christian Morris, Nevada Justice Association
Brad Johnson, Las Vegas Defense Lawyers
Marla McDade Williams, Reno-Sparks Indian Colony
Connor Cain, Nevada Association of Realtors; Nevada Bankers Association
Hawah Ahmad, Pyramid Lake Paiute Tribe
Chris Ferrari, Nevada Credit Union League
Robert Teuten
Edward Coleman
Christine Saunders, Progressive Leadership Alliance of Nevada
John J. Piro, Office of the Public Defender, Clark County; Office of the Public Defender, Washoe County

CHAIR CANNIZZARO:
The meeting is called to order and will begin with a presentation of Assembly Bill (A.B.) 248.

ASSEMBLY BILL 248 (1st Reprint): Prohibits a settlement agreement from containing provisions that prohibit or restrict a party from disclosing certain information under certain circumstances. (BDR 2-1004)

ASSEMBLYMAN JASON FRIERSON (Assembly District No. 8):
I am here to present A.B. 248. This bill provides that under certain circumstances, settlement agreements are voidable. Settlement agreements are useful in civil litigation and help with timely settlement. Confidentiality provisions are often referred to as nondisclosure agreements (NDAs) within a NDAs settlement agreement.

Settlement agreements were created for reasonable business purposes; more recently, the NDA provision has been used by high-profile individuals accused of sexual assault to prevent the alleged victim from testifying in a criminal proceeding. The NDA provision protects serial abusers by preventing the details of a case from becoming public. This enables further abuse.

Most NDA provisions include a financial settlement between the accused and the accuser, barring the alleged victim from receiving a financial settlement and then talking about the allegations or revealing the amount of the settlement. The penalties for breaking the silence may be costly to an alleged victim, who may be forced to pay back monies he or she has received in a settlement agreement as well as legal fees for the adverse party.

Some advocates may be concerned that A.B. 248 would make it difficult for alleged victims to obtain settlements from their abusers and increase difficulty in criminally prosecuting sexual assault cases. In some instances, civil litigation may be the only recourse. This bill would create strong public policy to prohibit certain types of NDA provisions in settlement agreements; claims that involve vulnerable victims, felony behavior and other egregious conduct create an unfair justice system.

Assembly Bill 248 aims to create balance in the justice system. There needs to be balance for public disclosure and victim confidentiality. Settlement agreements that prohibit disclosure of sexual assault would be prohibited under this bill. Sex discrimination by an employer or landlord would be prohibited, as would retaliation by an employer or landlord concerning a person reporting sex discrimination. Under this bill, a court would be prohibited from entering an order that prohibits or restricts the disclosure of such factual information.

This bill prohibits the accused from shielding his or her identity. Settlement agreements would not prohibit the parties from disclosing the settlement amount. The Nevada Equal Rights Commission has the jurisdiction to investigate complaints of harassment against Nevada employers—these provisions do not apply to settlement agreements executed by the Commission. It is important to have options available to ensure that rights are protected and that sound public policy is adhered to. This bill provides that any settlement agreement entered into on or after July 1 that contains a provision prohibited by this bill would be void and unenforceable. It would be appropriate to send the message that this initiative is moving forward.

SENATOR SCHEIBLE:
Do other states have similar laws?

ASSEMBLYMAN FRIERSON:
Yes, California does.

SENATOR HANSEN:
Will this bill restrict a victim from receiving restitution or financial compensation?

ASSEMBLYMAN FRIERSON:
No. This bill will not impact the ability of a victim receiving restitution or financial compensation. This bill presents many benefits. A serial perpetrator would be prohibited from entering into numerous illegal settlement agreements. This bill does not prohibit civil actions.

SENATOR SCHEIBLE:
Does this bill provide for protections for discrimination against a person based on sexual orientation?

ASSEMBLYMAN FRIERSON:
Protection for sexual orientation is not the intent of the bill; however, this bill will cover discrimination against a person's sexual orientation.

SENATOR SCHEIBLE:
I agree. There are factual instances where it is difficult because of different factors based on discrimination. This bill is good public policy.

ASSEMBLYMAN FRIERSON:
This bill does cover protections for discrimination based on sexual orientation, as does existing Nevada law.

SANDY ANDERSON (Board of Massage Therapy):
We support A.B. 248. There are repeat offenders who negotiate settlement agreements with alleged victims. Subsequently, victims are prohibited from testifying before the Board of Massage Therapy that sexual assault occurred at the hands of a licensed massage therapist.

BAILEY BORTOLIN (Washoe Legal Services):
We support A.B. 248. This bill is an important step to balance inequities. More employers conduct sexual harassment training as a result of similar legislation in other states. There will be positive outcomes if this bill is passed.

CHAIR CANNIZZARO:
The hearing on A.B. 248 is closed. The hearing on A.B. 285 is open.

ASSEMBLY BILL 285 (1st Reprint): Enacts provisions relating to a mental or physical examination of certain persons in a civil action. (BDR 4-1027)

ASSEMBLYMAN JASON FRIERSON (Assembly District No. 8):
I am here to present A.B. 285 with the Nevada Justice Association.

GRAHAM GALLOWAY (Nevada Justice Association):
We have provided Article 35 Examinations Caselaw (Exhibit C contains copyrighted material. Original is available upon request of the Research Library). In a personal injury lawsuit, the defendant is entitled to file a motion requesting or requiring that the alleged victim attend a medical examination arranged by the defense. This is called an independent medical evaluation or a *Nevada Rules of Civil Procedure* (NRCP) Rule 35 examination. The NRCP Rule 35 allows this process to move forward. I have practiced law for 33 years, and this area of law has been controversial.

The issue under NRCP Rule 35 is that the alleged victim is required to go to a medical examination and get questioned without any legal representation. This bill would provide and allow for alleged victims to have legal representation present during this medical examination. This bill would allow for an alleged victim to bring a friend or family member to the NRCP Rule 35 examination. This bill allows for the examination to be audio-recorded.

The Nevada Supreme Court rules allow an observer to be present but will not allow a recording of the examination unless certain elements of good cause have been met. We do not believe this bill addresses procedural rules; this bill addresses substantive law, dealing with fundamental rights such as liberty and to control your own body. Assembly Bill 285 will allow the medical examination to be audio-recorded; however, the Nevada Supreme Court rules prohibit it.

ALISON BRASIER (Nevada Justice Association):
Assembly Bill 285 protects injured victims. The NRCP Rule 35 examination governs some of the practices in place but not enough to protect an alleged victim's rights and intrusion. This bill protects persons from being forced to attend and participate in the NRCP Rule 35 examination. This bill allows the audio recordings and a witness present to have an objective record available. The current rule provides that an audio recording is only permissible upon a showing of good cause to the court. This bill addresses more than a procedural law, it is a substantive law. Some states permit video recordings of the medical examination; however, most states allow audio recording.

CHRISTIAN MORRIS (Nevada Justice Association):
Assembly Bill 285 allows for the alleged victim to have an observer present in the medical examination room. Doctors may not act in good faith. Perhaps the doctor may ask inappropriate questions that are outside the scope of the examination. Doctors may expose the alleged victim to intrusive questions.

SENATOR SCHIEBLE:
There is a presumption that the doctor is not biased. Does A.B. 285 undermine the goal that the doctor is unbiased?

MR. GALLOWAY:
Insurance companies want to win the lawsuit at all costs. Doctors will say what the insurance companies want them to say. Independence is no longer present.

MS. MORRIS:
The medical examination needs to be audio-recorded so that no one has to be a witness. The doctor knows that he or she will be creating a report and will be deposed about the medical examination. The attorneys agree on the parameters of the medical exam.

SENATOR SCHEIBLE:
In your testimony, you referenced how doctors may act inappropriately during a medical examination. There may be disputes on how a medical examination was conducted, so having a witness observe may alleviate disputed claims. Are you anticipating that plaintiff's counsel will be a witness in his or her own case?

MS. MORRIS:
No. That is why the medical examination must be recorded. Nobody needs to be a witness. An audio recording of the medical examination clarifies any disputes.

MR. GALLOWAY:
It is highly unlikely that the plaintiff's counsel would attend the medical examination, even if A.B. 285 allows the counsel to attend. If a lawyer attends the medical examination, this potentially could render the lawyer as a witness.

SENATOR SCHEIBLE:
What is the purpose of allowing attorneys in the medical examination room?

MS. MORRIS:
Most clients prefer that their attorney accompany them to the medical examination. This bill allows the attorney to attend and is an option. The reality is that most attorneys would not attend the medical examination. This bill allows the client to have a friend or family member present. This medical examination would be audio-recorded.

SENTOR OHRENSCHALL:
There are legal practitioners who have medical backgrounds. Is there an issue with the difference in sophistication regarding attending medical examinations?

MR. GALLOWAY:
The issue derives from alleged victims who have never been through the process before. The alleged victim may not be a sophisticated individual and may not understand what is going on. Medical examiners are highly educated, and have completed many medical examinations. There is not a level playing field with this regard.

SENATOR OHRENSCHALL:
The portion of the bill that deals with audio recording of the medical examination—is the medical examiner permitted to have such a recording?

MR. GALLOWAY:
It would go both ways. This bill allows either side to audio-record the medical examination.

SENATOR HANSEN:
If the plaintiff's attorney is present for the medical examination, is the attorney allowed to ask questions of the medical examiner during the exam?

MR. GALLOWAY:
The attorney is not permitted to ask questions or to interfere with the medical examination. The bill provides that if the observer interferes improperly, the medical examination can be stopped and sanctions can be leveled. If an attorney improperly conducted him or herself during the medical examination, the defense would bring a motion to impose sanctions on that attorney.

SENATOR HANSEN:
The idea clarifies a gray area of the law. This is why we want the audio recording of the medical examination. Would this provision apply when an injured party has been to his or her own medical examiner? Would the injured party then have to provide this audio recording to the defense?

MR. GALLOWAY:
No. This only happens during the litigation process. When an injured party goes to the doctor, there is no litigation at that point. There is no defense counsel at that point. These medical examinations are done for treatment purposes. The bill covers medical examinations during litigation for personal injury claims.

SENATOR HANSEN:
What if an injured party decides to go to dispute resolution? Can there be other doctors?

MR. GALLOWAY:
This occurs frequently.

SENATOR HANSEN:
This is standard operating procedure for the injured party to see both the plaintiff's doctor and the defense's doctor?

MR. GALLOWAY:
Yes; however, it is not common in smaller personal injury cases because it is not economically feasible. Any time there is a large case, the NRCP Rule 35 examination will occur.

SENATOR PICKARD:
Initially, the injured party is harmed, and he or she goes to see a doctor. Subsequently, the personal injury lawyer attempts to get compensation for the client's injuries. The insurance company then hires the doctor who is an expert witness to complete a medical examination under NRCP Rule 35?

MS. MORRIS:
Yes, that is correct. Most doctors are consistent. The doctors hired by the insurance company evaluate the injured victim for purposes of litigation. These medical examinations are typically outside the scope of most doctors' practices.

SENATOR PICKARD:
The insurance company hires the more experienced doctor for purposes of rebutting a claim. No provision disallows an injured party from bringing someone in; however, this bill allows the plaintiff's attorney to be in the room during the medical examination. The plaintiff's attorney can call an end to the exam, correct?

MS. MORRIS:
This bill helps injured victims. This is litigation-based deposition. The doctor anticipates that he or she will be called to the stand. Currently, there is no audio recording allowed, absent good cause. The doctors understand the process.

MS. BRASIER:
This bill does not have a chilling effect on the injured party's claim. The audio recording provides an objective record of what has occurred.

SENATOR SCHEIBLE:
I have concerns that A.B. 285 permits the observer to stop the medical examination. This is a legal inquiry—this raises the issue of whether the exam has exceeded the scope of the agreement made by the two attorneys? If the defense attorney exceeds the scope, this objection will lead the doctor to be the legal representative of the defense. This is what your testimony says that happens currently. Should both attorneys be present in the room during the examination?

MS. MORRIS:
These medical examinations are costly. Stopping a medical examination is unlikely. Either side of the litigation would have to deal with that. This bill will provide for accurate audio recordings from an objective standpoint. The boundaries of the medical examination have already been established by the attorneys and the court.

SENATOR SCHEIBLE:
My reading of the bill differs from the statements made during testimony.

MR. GALLOWAY:
If the doctor conducts an appropriate medical examination, this bill will prevent inappropriate behavior. The goal is to terminate an examination where a doctor is acting inappropriately.

SENATOR PICKARD:
Is this already the law regarding workers compensation lawsuits?

MS. MORRIS:
Yes, the provision allowing an audio recording for purposes of a workers compensation claim is provided for in statute.

SENATOR PICKARD:
Have there been dilatory outcomes in those cases?

MR. GALLOWAY:
We have never experienced an issue attending a medical examination where the examination had to be terminated.

SENATOR OHRENSCHALL:
Under the law, if the injured party feels that the examination is going wrong, is there any power for the injured party to stop the examination?

MR. GALLOWAY:
No. The law does not provide for the injured party to terminate the medical examination as it is occurring.

SENATOR OHRENSCHALL:
Can the examination stop in the workers compensation claims if requested by the injured party?

MR. GALLOWAY:
Yes, that is correct.

BRAD JOHNSON (Las Vegas Defense Lawyers):
I have provided written testimony (Exhibit D). We oppose A.B. 285. The revised NRCP Rule 35 addresses the concerns that this bill brings forth. The current law permits that someone is allowed to attend the NRCP Rule 35 examination and that the exam can be audio-recorded, and the law is not one-sided with regard to the plaintiff.

It is not the Legislative Body that makes a procedural rule; however, this bill does not address a substantive law. This bill violates the separation of powers. The state of litigation is not a matter that should be before the Legislative Body.

Doctors do not conduct examinations of people for free, and the doctor must be hired. The workers compensation process is a different system. As provided on page 4 of Exhibit D, doctors have one-stop-shops for patients where it can be determined if a patient has a claim.

SENATOR PICKARD:
With respect to the workers compensation, is there a panel of doctors paid independently by other people?

MR. JOHNSON:
No, there is not.

MR. GALLOWAY:
We want to emphasize that alleged victims are forced to undergo medical examinations to become whole again. The victims did not ask to be in this situation. This bill protects fundamental rights. This bill is a substantive law, not just procedural law.

CHAIR CANNIZZARO:
The hearing on A.B. 285 is closed. The hearing on A.B. 393 is open.

ASSEMBLY BILL 393 (1st Reprint): Providing protections to certain governmental and tribal employees and certain other persons during a government shutdown. (BDR 3-1015)

ASSEMBLYMAN JASON FRIERSON (Assembly District No. 8):
This bill protects employees who are impacted by federal government shutdowns. Our Nation recently had a federal government shutdown and did not resume operations for many weeks. During that period, many federal employees did not receive paychecks. Federal law establishes an orderly process for a budget to be enacted by Congress and the U.S. President with outlined deadlines. If deadlines are not met, the budget will not be completed in time. Congress can pass a resolution to allow federal agencies to continue to spend money at current levels for a specified period of time. Sometimes, there is no resolution, resulting in a federal shutdown.

In Nevada, there are approximately 11,500 federal civilian employees. During the most recent shutdown, about 3,500 of these employees did not receive paychecks. Many other Nevadans were negatively impacted, some who had

contracts with federal agencies. When contractors are not paid, the contractors lay off employees. The federal shutdown impacts State employees who work in programs funded by the federal government. These families have ongoing financial obligations. Assembly Bill 393 provides a measure of relief for those who are directly affected during a federal government shutdown. This bill addresses mortgage holders, common-interest communities, landlords and holders of liens on motor vehicles. This bill prohibits evictions against persons who have been impacted by the federal government shutdown or repossessing vehicles. These families could be eligible for government assistance.

At the State level, we must take action to protect our citizens. This bill provides commonsense transition, and it is not indefinite. As a community, we need to help our members. This bill will provide protections for those impacted by federal government shutdowns.

SENATOR PICKARD:
There are many repercussions during a federal government shutdown. There is a domino effect. Can you explain limitations of A.B. 393?

ASSEMBLYMAN FRIERSON:
This bill includes household members, and there is a proposed amendment to define who is a household member (Exhibit E). The bill requires that there be proof of financial hardship and proof of being subjected to a federal government shutdown. The parameters provide sufficient notice to lienholders and ability for adjustment for those who are subjected to the shutdown. There are federal employees who still need to work during a shutdown. This bill protects them.

SENATOR PICKARD:
As we discuss independent contractors, many in Nevada had no guarantee of getting paid during the federal shutdown.

ASSEMBLYMAN FRIERSON:
This bill includes persons who are contracted with the federal government. This bill does not relieve any debts accrued.

SENATOR HARRIS:
Can you explain the rationale including the term "landlord" in the bill?

ASSEMBLYMAN FRIERSON:
With regard to evictions, this language is critical. This bill would prohibit evictions against tenants who are impacted by a federal government shutdown. This bill does not relieve a person of his or her debt.

MARLA MCDADE WILLIAMS (Reno-Sparks Indian Colony):
We support A.B. 393. The last federal government shutdown imposed hardships on the tribal communities.

CONNER CAIN (Nevada Association of Realtors; Nevada Bankers Association):
We support A.B. 393.

HAWAH AHMAD (Pyramid Lake Paiute Tribe):
We support A.B. 393. However, we do not support section 2 of the amendment in Exhibit E.

CHRIS FERRARI (Nevada Credit Union League):
We are neutral on A.B. 393 and submitted the proposed amendment, Exhibit E. Credit unions are member-owned; credit unions do their best to assist their employees during the federal government shutdowns as well as recessions. The term "materially affected" is not enumerated. We want to include the definition of a "household member" in the bill.

ASSEMBLYMAN FRIERSON:
There needs to be proof that a person was materially impacted by the federal government shutdown. The person would need to provide proof that he or she was subject to a federal government shutdown.

CHAIR CANNIZZARO:
The hearing on A.B. 393 is closed. The hearing on A.B. 432 is open.

ASSEMBLY BILL 432 (1st Reprint): Establishes provisions governing worker cooperative corporations. (BDR 7-1026)

ASSEMBLYMAN JASON FRIERSON (Assembly District No. 8):
Assembly Bill 432 aims to create quality jobs in Nevada. This bill will help the economy in Nevada. Jobs are vital to the economic health in Nevada. This bill sets up worker cooperatives as a type of cooperation in Nevada. This bill furthers making Nevada a welcoming environment for a variety of businesses.

Worker cooperatives are present in other states and are business entities. Worker cooperatives do not have a chief executive officer, and employees collectively own the business. Employees collectively decide important business decisions.

ROBERT TEUTEN:
This bill is important for setting up worker cooperatives in Nevada. This bill defines worker cooperatives and is a result of stakeholders input. Worker cooperatives are important to unite people during a crisis such as a recession. This bill is important for Nevada. There are many states that offer worker cooperatives as a form of business structure.

SENATOR OHRENSCHALL:
If this bill were to pass, do you think the existing worker cooperatives would move to Nevada based on favorable tax structure?

MR. TEUTEN:
Yes, we believe worker cooperatives would come to Nevada if the State had favorable tax structure.

SENATOR HARRIS:
Are there entities that would be prohibited from being organized under the structure proposed in A.B. 432?

ASSEMBLYMAN FRIERSON:
A worker cooperative is an attractive structure for certain types of businesses. This bill creates a new form of cooperation structure in Nevada.

MR. TEUTEN:
This bill does not prohibit any entity from forming under this bill. Small businesses favor worker cooperatives. There are more benefits to structuring as a worker cooperative.

CHAIR CANNIZZARO:
The hearing on A.B. 432 is closed. The hearing on A.B. 183 is open.

ASSEMBLY BILL 183 (1st Reprint): Prohibits certain correctional services from being provided by private entities. (BDR 16-290)

ASSEMBLYWOMAN DANIELE MONROE-MORENO (Assembly District No. 1):
This bill requires that State and local governments prohibit privately run prisons. Nevada does not currently have any private-operated prisons. We have provided a visual presentation (Exhibit F) of A.B. 183. Prisons will be provided by State and local governments. This bill will stop the movement of Nevada's prisoners to out-of-state facilities by 2022. Nevada has one federal facility. This bill will not impact the federal facility.

This bill was initially introduced as A.B. No. 303 of the 79th Session and passed in both Houses but was ultimately vetoed by the Governor. During that time, Nevada had a growing prison population; however, the prison population is decreasing in our State. During the last Session, there was testimony that situations in prisons were unsafe and amendments were proposed. We expect to return nearly 100 inmates back to Nevada by the end of the year. We are working to improve our prisons and to get our correction employees paid at competitive rates.

It costs Nevada more to send inmates out of state. Instead, we can use these funds to better fund our correction facility. We need to help our former inmates become the best people they can be. We have to be fiscally responsible with taxpayer dollars. It does not make sense to pay money to an out-of-state business when we can use that money to fund our own correctional facilities. This bill will send the message that this Legislature recognizes the needs of our taxpayers and that Legislators believe it is our duty to ensure anyone in our State is taken care of properly.

SENATOR DONDERO LOOP:
Most of our prisoners do not spend their whole lives in prison. In Nevada, we have shorter prison sentences. We have a responsibility to help defendants reenter society.

SENATOR OHRENSCHALL:
I am hopeful A.B. 183 becomes law this Session.

EDWARD COLEMAN:
I support A.B. 183. The for-profit industry has been subject to many different lawsuits across the Country. Any changes to the law would reduce the demand for privately run correctional facilities. For-profit prisons appear to be focused on their bottom line. Medical care at for-profit correctional facilities may jeopardize

inmates' health. In one instance, a lawsuit was brought against a for-profit prison for failure to contain a widespread scabies outbreak. In other instances, for-profit correctional facilities have engaged in fraudulent activities and questionable lobbying.

CHRISTINE SAUNDERS (Progressive Leadership Alliance of Nevada):
We support A.B. 183. Private prisons lead to mass incarceration and contribute to the billion-dollar industry. It is important that our taxpayer dollars never go to fund a highly paid chief executive officer of a privately run prison. Profit does not belong in Nevada's criminal justice system.

JOHN J. PIRO (Office of the Public Defender, Clark County; Office of the Public Defender, Washoe County):
We support A.B. 183.

ASSEMBLYWOMAN MONROE-MORENO:
As a retired corrections officer, I can speak first-hand of reforms needed in our system. This bill will also provide protections for our corrections officers. It is fiscally responsible to spend our taxpayer dollars in Nevada. By outlawing for-profit prisons, our criminal justice system will be based on equity, integrity and fairness. Our prisoners are not profit margins. The service our corrections officers provide is valued. Our prisoners have complex needs. By outlawing for-profit systems, we are sending the message that prisoners are people. I urge the Committee to support passage of A.B. 183.

Remainder of page intentionally left blank; signature page to follow.

CHAIR CANNIZZARO:
The hearing on A.B. 183 is closed. The meeting is adjourned at 11:51 a.m.

RESPECTFULLY SUBMITTED:

Jeanne Mortimer,
Committee Secretary

APPROVED BY:

Senator Nicole J. Cannizzaro, Chair

DATE:

EXHIBIT SUMMARY				
Bill	**Exhibit / # of pages**		**Witness / Entity**	**Description**
	A	1		Agenda
	B	6		Attendance Roster
A.B. 285	C	1	Nevada Justice Association	Article 35 Examinations Caselaw
A.B. 285	D	64	Brad Johnson / Las Vegas Defense Lawyers	Testimony and Letters of Opposition
A.B. 393	E	1	Nevada Credit Union League	Proposed Amendment
A.B. 183	F	20	Assemblywoman Daniele Monroe-Moreno	Presentation

EXHIBIT D

Center for Applied Neuroscience
"Putting neuroscience research into practice"

Specializing in the assessment of neurocognition

Thomas F. Kinsora, Ph.D.
Clinical Neuropsychologist

Why Neuropsychological Evidence is Compromised when Protected Test Material is Released and when the Examinee is Subject to Third Party Observation

In the matter of: Kalena Davis and the Rule 35 Examination
Date: March 4, 2020

On the face of it, it seems logical to conclude that an attorney's ability to develop a good cross-examination is partially contingent on having the data that formulated the neuropsychologist's opinion. However, for several very excellent and well established reasons, data and test materials from neurocognitive assessments exist in a very special and separate category that courts around the country, with some unfortunate exceptions, have honored and preserved. Attorneys have, for years, prepared strong cross examinations without ever seeing the raw test data, test materials, and test manuals, and without needing a recording of the exam itself; namely through an analysis of the raw test data by a qualified neuropsychologist. By making these requests, a law that was designed to protect the consumer has, in this special circumstance, crossed over into actually causing public harm. The rule effectively forces neuropsychologists to withdraw from these cases on legal and ethical grounds, and the end result of compliance would not only cause public harm, but would deny the neuropsychologist the tools of her/his trade. This surely was not the intent of the rule when it was approved.

Most courts around the country have understood that the protection of psychological and neuropsychological test material is in the interest of the State and her citizens for reasons including public safety and patient care. It has been understood that psychologists should only disseminate protected test material to a designated expert who is also licensed as a psychologist, with the

same ethical and legal obligations to protect test materials. Allowing an external third party to observe the examination, to video/audio record the administration of protected test material, or to be forced to turn over material that contains protected test stimuli, puts a licensed psychologist in conflict with ethics, legal restrictions, public safety, and ultimately threatens the viability of the measures that we use.

For the sake of ease, the term "third party observation" includes direct observation, monitored (one way mirror) observation, as well as video, auditory, and monitoring by concealed listening equipment.

It will be shown that:

Allowing a non-neuropsychologist, particularly an attorney, access to protected test material through third party observation, or direct access to raw test data,

a) violates the neuropsychologist's ethical guidelines and the published positions of professional organizations,
b) goes against the stated position of the Nevada Board of Psychological Examiners,
c) violates NAC 641.234,
d) presents a risk to public safety,
e) diminishes the validity of test results,
f) diminishes the usefulness of the neuropsychologist to the tier of fact, and
f) diminishes the viability of the neuropsychologist by denying him/her the tools necessary to conduct valid neuropsychological assessments.

The argument:

1. Rebuttal of neuropsychological test interpretation can be accomplished by a retained expert who reviews the protected raw test data provided by the original examiner. There is little to be gained, and much to be lost by allowing non-psychologists direct access to protected test material and evaluation techniques, whether through third party observation, or through possession of the actual raw test data (raw test data often contains protected test material on the forms themselves).
2. The Nevada Board of Psychological Examiners clearly indicates that the results of neuropsychological assessment conducted under third party observation can invalidate the test results and the practice "poses a significant threat to public safety" (see **Appendix A**).
3. The practice of third party observation runs counter to the guidelines and positions of all professional organizations that oversee psychological and neuropsychological practice (see **Appendix B**).

4. Psychologists and neuropsychologists are required by law to protect test material from any type of disclosure that might invalidate the test or procedures (NAC 641.234). **Allowing non-psychologists to witness, record, or otherwise see protected test materials violates NAC 641.234**, particularly in the case of disclosure to attorneys. See the letter written by the Nevada Board of Psychological Examiners that supports this interpretation.
5. Test development takes years between conceptualization, standardization, and publication. It is costly and involves teams of examiners. Standardization often includes thousands of test subjects, stratified demographically across the United States. **Neurocognitive measures are years in the making**. Scientific research on each measure continues for many years after the measure is published. Neuropsychologists depend on each measure to be useful for decades. **Exposure of protected test material to non-psychologists effectively renders the test invalid once it is widely released to attorneys**. The many years of research and work that goes into test development and standardization are then wasted.
6. Research clearly indicates that examinee behavior changes when being observed, recorded, or otherwise monitored by a third-party. A sampling of research on the effects of third party observation can be found in **Appendix C**. Some examinee's get anxious when they know they are being recorded or observed, and their cognitive efficiency declines. Some examinees "play it up" for the recording in an effort to "prove their case", and some will simply get thrown off balance. **The presence of such third party observers have been shown repeatedly in research to reduce the validity of neuropsychological measures**. Memory, attention, and processing speed seem to be particularly vulnerable to the third party observation effect. Observation skews the findings in a way that is unique to each examinee; and because it is an unknown quantity, cannot be factored in or out of the equation when interpreting the test results. For example, how would a

neuropsychologist know how a reaction time, memory, or processing speed test was affected by ongoing knowledge that an agent of his attorney was observing or recording everything the examinee does? Neuropsychologists have no way of knowing how each examinee might be affected, but can only state that the examinee was placed in a condition that was not present during the standardization of the measure. Ethically, the neuropsychologist must indicate that the test performance was almost certainly affected and may be entirely invalid, due to non-standardized test conditions that have been shown to alter performance. **Any results obtained in the presence of a third party observer are, by definition, of unclear validity, and thus useless to the trier of fact**. This very issue could be raised by the very attorney who demanded the third party observation. It would be a clever argument if the results did not favor her/his client.

7. Neuropsychological measures are standardized, and are administered in the same fashion to every examinee (thus the term "standardized"). Psychologists are ethically bound to adhere to standardized test administration with few exceptions, and when standardization is broken, neuropsychologists are obligated to discuss the breach in the body of the final report. While minor breaches may be inconsequential, major changes in standardized administration can invalidate a measure. There are sometimes good reasons to do so, for example reading a test question to a blind patient on a test that was standardized with the standardization research subjects reading the question. Such a break from standardized administration would be detailed in the report. Neuropsychologists who examine the raw data of another neuropsychologist can take any nonstandardized approach to a given measure into account in any rebuttal.
8. The argument will be made that the attorney should be able to go over a video or audio recording of an evaluation with their retained expert. However, we all know net result; The provision of a recording or third-party observation will

result in a sharp increase in many picayune criticisms by an overzealous rebuttal expert. However, the litany of criticisms will do little in the way of providing the trier of fact additional information, and will only serve to confuse the trier of fact with meaningless smoke.

9. Psychologists and neuropsychologists are bound by strict ethical standards and are regulated by the Nevada Board of Psychological Examiners. **They are ethically obliged to protect test security to protect public safety**. This places the offending psychologist at risk of losing his license and of being disciplined by his or her professional associations.
10. **Public safety is compromised when non-psychologists have access to the measures, test items, and evaluation techniques that neuropsychologists use**. Neuropsychologists are very frequently asked to assess high risk professionals, including airline and fighter pilots, surgeons, police officers, and high clearance government officials who have been ordered to undergo neurocognitive or personality assessment, often because some concerns were raised regarding their fitness for duty. Knowledge of the test items, for example on a memory test, or a measure of frontal lobe functioning, could result in test results that might release this individual to return to duty prematurely or in cases where they might pose a risk to others. For this reason, test protection is a matter of public safety, a responsibility that is taken seriously by neuropsychologists. Similarly, IQ measures are critical in death penalty cases. Learning about the test items (even by reviewing the answer sheet) could skew a test in a favorable direction for a defendant who is trying to fake mental retardation or mental illness.
11. **Allowing third party observation or access to raw data will give attorneys and others access to protected measures that are used to detect exaggeration and malingering**. As of 2020, only five or six of the dozen or so neuropsychologists in Nevada are formally trained in measures used to detect exaggeration and malingering. The measures are well researched and are securely

protected by researchers and neuropsychologists. As with all protected test materials we are required to withhold them from the general public and non-psychologists. They are locked on premises. These measures used to detect malingering and exaggeration need protection. The measures involve tricks and cognitive processes that are known to remain preserved, even in severe brain injury. The names of the tests are often not even placed on final reports but are transferred directly to the rebuttal expert, primarily because neuropsychologists do not want unscrupulous attorneys and others to research them and inform their clients on what to look for when being evaluated. We know from multiple research studies that between 30% and 40% of litigating examinees exaggerate or outright feign symptoms. There is well documented evidence of attorney coaching in litigation, and recently, with large NFL brain injury settlement (see **Appendix D**). Neuropsychologists are the designated holders of these protected measures. No other medical discipline has conducted the same level of research on the detection of deception, nor has any other medical discipline developed and researched measures to detect deception. For this reason, other medical professionals have come to rely on neuropsychologists to help them identify cases of exaggeration, malingering, and psychosomatic illness. It is a standard of care for neuropsychologists to administer several in general clinical settings. National surveys on best practices, indicate that forensic neuropsychologists administer an average of six or more of these measures during a full neuropsychological evaluation. Retained neuropsychologist-experts who are asked to review the raw data of another neuropsychologist should be familiar with these measures and the research supporting their use. They are, however obligated to protect the identity of these measures and do not discuss them in detail with retained attorneys. This is considered ethical practice.

12. Neuropsychologists routinely conduct independent medical (neuropsychological) examinations for both workers compensation companies, and disability companies. Again, the rate of exaggeration and outright malingering is well over 30%. Many injured workers have their own attorneys. Regular distribution of the neuropsychological and validity measures to attorneys would increase the probability of coaching by the attorney, or self-teaching by the plaintiff, thus destroying the usefulness of the tests.
13. Neuropsychologists, as holders of the measures have been successful in keeping protected test material protected from the general public. It is patently unreasonable for neuropsychologists to share this material with a law firm in the hopes that they and their office staff will feel bound by the same ethical principles, and who are not bound by NAC 641.234, and may have no appreciation for the importance of test security. Over time the once-protected test materials will slip from the draws of attorneys to the pages of websites. This is an undeniable fact. Once in possession of the test items, attorneys will feel compelled to use the material to win their case. These attorneys, nor the court have requisite knowledge of what they can or cannot use from a recording, or a test form that constitutes protected test material. This opens the risk for the material to be presented in a public forum, in a courtroom hearing, and between attorneys over dinner. Thus, by giving the protected test material to a non-psychologist, events that follow <u>will</u> result in loss of test security. In this sense, the moment that the material is turned over by the neuropsychologist, she/he has violated ethical guidelines and the law. This is unacceptable, and is unreasonable to ask of the neuropsychologist.
14. Weakening test security, or otherwise causing invalidity of a neuropsychologist's battery of measures will, in effect, **deny the neuropsychologist the tools of his or her trade**. Neuropsychologists earn their living through these neurocognitive measures and tools. Allowing non-psychologists access to these protected materials and techniques will essentially destroy the usefulness of

neuropsychologists in our public safety evaluations, in criminal hearings and civil litigation cases, and in their care for patients. How can they practice if they do not know whether their examinee has studies the test prior to coming in. How can they be expected to opine on matters related to deception, when all of the techniques and measures are given to attorneys and make their way into public domain?

15. Neuropsychological test measures have copyright protection and the test publishers have a vested interest in the tests remaining secure. Neuropsychologists typically sign licenses to use test material and thus the test material is owned by the test publisher. Allowing proprietary test material to non-psychologists will, in some cases, break copy-write protection and will violate the contract between the neuropsychologist and the test publisher. This can result in the neuropsychologist losing rights to a given tool of his/her trade. Attached is a letter from a test publisher (Green Publishing) that clearly illustrates this threat. see **Appendix E**).
16. Disclosure of protected test material by witness, recording, or otherwise, will allow for these protected materials to slowly accumulate in law offices across the state. Attorneys and law office employees are not obliged in any way to follow the ethical and legal obligations that licensed psychologist must follow as it relates to protecting this protected test material. Despite the honor of most professionals in the legal profession, there is little doubt that these materials will end up being shared, used in seminars on how to beat expert witnesses, and on the internet for public consumption. Office help in law offices will have easy access to material that is held under lock and key by neuropsychologists. It is thus understandable how this issue presents a problem within the community of professionals who have been entrusted by law and ethics to hold these protected measures secure.

17. Allowing for third-party observation is also concerning because it will allow for eight hours or more of one-on-one interaction to be scrutinized in a manner that will only confuse jurors and will not assist them as triers of fact. Every cough, hiccup, and observed behavior will be taken out of context, and made to appear to be an important error. Jurors have no training in how to put any alleged errors into context when reviewing an entire day of test administration. Attorneys will feel compelled to use portions of recording during court hearings to prove their case, thereby exposing the public to protected test material.
18. In most cases, when a third party observer (which refers to witnessing, recording, or monitoring) is requested, the request is lopsided in that the examiner on the opposing side was not forced to do the same. This obviously presents problems and issues of fairness. The monitored examiner will essentially be turning over an extraordinary amount of information that will not be provided by the examiner on the opposing side.
19. Case law does support the protection of test material (see **Appendix F**).

Respectfully,

Thomas F. Kinsora, Ph.D.
Clinical Neuropsychologist
Adjunct Professor, University of Nevada, Las Vegas, Dept. of Psychology

Appendix A: Nevada Board of Psychological Examiners Position

STATE OF NEVADA
BOARD OF PSYCHOLOGICAL EXAMINERS
4600 Kietzke Lane, Building B-116
Reno, Nevada 89502
Telephone 775 / 688-1268 • Fax 775 / 688-1060
nbop@govmail.state.nv.us
Psyexam.nv.gov

Brian Sandoval
Governor

October 1, 2018

Elizabeth Brown
Clerk of the Supreme Court
201 South Carson Street
Carson City, NV, 89701.

Dear Ms. Brown:

Please see below the Licensing Board's 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.

Sincerely
for the Board of Psychological Examiners

Morgan Gleich
Executive Director

Michelle Paul, Ph.D.
Board President

Whitney Owens, Psy.D.
Board Secretary/Treasurer

Pam Becker, MA
Public Member

Stephanie Holland, Psy.D.
Board Member

John Krogh, Ph.D.
Board Member

Appendix B: Position Papers by Professional Organizations

Assemblyman Jason Frierson
7925 W. Russell Road, No. 400187
Las Vegas, NV 89140-8009

SENT VIA EMAIL

Dear Assemblyman Frierson,

The Inter Organizational Practice Committee (IOPC) is a coalition of representatives of the major neuropsychology organizations in the US[1]. The IOPC is tasked with coordinating and advancing national neuropsychology advocacy efforts that relate to the practice of clinical neuropsychology in the United States and represents approximately 8,000 neuropsychologists from all regions of the country.

We write to share our concerns about A.B. 285 in the Nevada Assembly, which would mandate that Third Party Observers (TPOs) can attend medical and psychological examinations. We oppose the application of the bill to neuropsychological testing because:

- TPO's can greatly affect the results of tests
- Most neuropsychological tests have been designed and validated for situations where a TPO is not present
- The bill would generally override the neuropsychologist's or the court's judgment that a TPO is not appropriate.

The presence of TPOs can greatly influence the outcome of neuropsychological testing in certain situations, which can invalidate results. Unlike most medical examinations, psychological examinations, which include neuropsychological examinations, are complex processes that require concentration and an environment free from distraction. The presence of a TPO is inconsistent with the requirements for standard test administration for this reason. Extensive social psychological research on the social

[1] The IOPC includes the American Academy of Clinical Neuropsychology (AACN), The Society for Clinical Neuropsychology (SCN; Division 40 of the American Psychological Association), the National Academy of Neuropsychology (NAN), the American Board of Professional Neuropsychology (ABN), as well as APA Services, the companion professional organization to the American Psychological Association.

facilitation effect indicates that the mere presence of a TPO may influence cognitive performance in a variety of settings.

Additionally, neuropsychological testing is a complex process based on sound scientific research and evidence. Test measures have not been standardized in the presence of TPOs. In other words, the presence of a TPO adds a variable to the set of highly controlled environmental factors that were used when validating these examinations to make sure that they accurately test or measure certain things, like a person's level of cognitive functioning after a stroke. Thus, adding a TPO to the test environment potentially compromises the legitimacy of the results. Furthermore, research studies show that TPOs affect test results in a way that may alter the outcome of testing.[2]

The IOPC is also concerned that the bill allows the examiner to suspend the examination only if the TPO disrupts the examination or attempts to participate; however, TPOs may interfere in other ways. For example, the examiner may observe that the TPO is distracting the test subject or making him/her uncomfortable, affecting their test performance. TPOs also affect performance in less obvious ways, by leading to alterations in a person's performance and may potentially cause test scores to be lower than an individual's true ability level. Psychologists who conduct these examinations must be able to use their clinical judgment when deciding whether the examination will be compromised, or is being compromised, by the presence of a TPO.

The bill also appears to remove a court's discretion to determine that a TPO should not be present for neuropsychological testing that it has ordered. The only remedy would be pursuant to a protective order, which could only be filed *after* an examiner suspends the exam for one of the limited reasons.

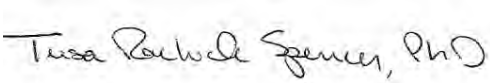
For the reasons outlined above, IOPC opposes A.B. 285 as written.

Sincerely,

[2] The American Academy of Clinical Neuropsychology and the National Academy of Neuropsychology have published positions that TPOs should not be allowed when their presence is clinically inappropriate.
https://www.tandfonline.com/doi/abs/10.1076/clin.15.4.433.1888
https://www.nanonline.org/docs/PAIC/PDFs/NANPositionThirdParty.pdf

Chris Morrison, Ph.D., ABPP
President, American Academy of Clinical Neuropsychology

Jared Skillings, Ph.D.
Chief of Professional Practice, American Psychological Association Services Inc.



Tresa Roebuck Spencer, Ph.D., ABPP
President, National Academy of Neuropsychology

Michael McCrea, Ph.D.
President, Society for Clinical Neuropsychology (APA Division 40)

Renee Low, Ph.D., ABN
President, American Board of Professional Neuropsychology

Pergamon

Archives of Clinical Neuropsychology, Vol. 15, No. 5, pp. 383–386, 2000

0887-6177/00 $–see front matter

PII S0887-6177(00)00055-X

Axelrod, B., Heilbronner, R., Barth, J., Larrabee, G., Faust, D., Pliskin, N., & ... Silver, C. (2000). Test security: Official position statement of the National Academy of Neuropsychology. Archives Of Clinical Neuropsychology, 15(5), 383-386.

Test Security

Official Position Statement of the National Academy of Neuropsychology

Approved 10/5/99

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 upon 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 Ethical Principles of Psychologists and Code of Conduct (American Psychological Association, 1992; Principle 2.1, Maintaining Test Security), which specify that these procedures are to be used only by psychologists trained in the use and interpretation of test instruments (APA Principles 2.01, 2.06, Unqualified Persons).

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 audiotaping a psychological or neuropsychological evaluation for release to a non-psychologist violates the Ethical Principles of Psychologists and Code of Conduct (APA, 1992), by placing confidential test procedures in the public domain (APA Principle 2.10), and by making tests available to persons unqualified to interpret them (APA Principles 2.02, 2.06). Recording an examination can additionally affect the validity of test performance (see NAN position paper on Third Party Observers). Such requests can also place the psychologist in potential conflict with state laws regulating the practice of psychology. Maintaining test security is critical, because of the harm that can result from public dissemination of novel test procedures. Audio- or video-recording a neuropsychological examination results in a product that can be disseminated without regard to the need to maintain test security. The potential disclosure of test instructions, questions, and items by replaying recorded examinations can enable individuals to determine or alter their responses in advance of actual examination. Thus, a likely and foreseeable consequence of uncontrolled test release is widespread circulation, leading to the opportunity to determine answers in advance, and to manipulation of test performance. This is analogous to the situation in which a student gains access to test items and the answer key for a final examination prior to taking the test.

Threats to test security by release of test data to non-psychologists are significant. Formal research (Coleman, Rapport, Millis, Ricker, & Farchione, 1998; Wetter & Corri-

The Policy and Planning committee wishes to acknowledge the important contribution of Mr. John Craver for his careful analysis and helpful comments on this project.

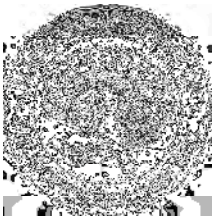
gan, 1995; Youngjohn, 1995; Youngjohn, Lees-Haley, & Binder, 1999) confirms what is seemingly already evident: individuals who gain access to test content can and do manipulate tests and coach others to manipulate results, and they are also more likely to circumvent methods for detecting test manipulation. Consequently, uncontrolled release of test procedures to non-psychologists, via stenographic, audio or visual recording potentially jeopardizes the validity of these procedures for future use. This is critical in a number of respects. First, there is potential for great public harm (e.g., a genuinely impaired airline pilot, required to undergo examination, obtains a videotape of a neuropsychological evaluation, and produces spuriously normal scores; a genuinely non-impaired criminal defendant obtains a recorded examination, and convincingly alters performance to appear motivated on tests of malingering, and impaired on measures of memory and executive function). Second, should a test become invalidated through exposure to the public domain, redevelopment of a replacement is a costly and time consuming endeavor (note: restandardization of the most widely-used measures of intelligence and memory, the WAIS-III and WMS-III, cost several million dollars, took over five years to complete, and required testing of over 5000 cases). This can harm copyright and intellectual property interests of test authors and publishers, and deprive the public of effective test instruments. Invalidation of tests through public exposure, and the prospect that efforts to develop replacements may fail or, even if successful, might themselves have to be replaced before too long, could serve as a major disincentive to prospective test developers and publishers, and greatly inhibit new scientific and clinical advances.

If a request to release test data or a recorded examination places the psychologist or neuropsychologist in possible conflict with ethical principles and directives, the professional should take reasonable steps to maintain test security and thereby fulfill his or her professional obligations. Different solutions for problematic requests for the release of test material are possible. For example, the neuropsychologist may respond by offering to send the material to another qualified neuropsychologist, once assurances are obtained that the material will be properly protected by that professional as well. The individual making the original request for test data (e.g., the attorney) will often be satisfied by this proposed solution, although others will not and will seek to obtain the data for themselves. Other potential resolutions involve protective arrangements or protective orders from the court. (See the attached addendum for general guidelines for responding to requests).

In summary, the National Academy of Neuropsychology fully endorses the need to maintain test security, views the duty to do so as a basic professional and ethical obligation, strongly discourages the release of materials when requests do not contain appropriate safeguards, and, when indicated, urges the neuropsychologist to take appropriate and reasonable steps to arrange conditions for release that ensure adequate safeguards.

The NAN Policy and Planning Committee
Bradley Axelrod, Ph.D.
Robert Heilbronner, Ph.D.
Jeffrey Barth, Ph.D., Chair
Glenn Larrabee, Ph.D.
David Faust, Ph.D.
Neil Pliskin, Ph.D., Vice Chair
Jerid Fisher, Ph.D.
Cheryl Silver, Ph.D.

Test Security: An Update. (2003). Official Statement of the National Academy of Neuropsychology Approved by the NAN Board of Directors On October 13, 2003.



Test Security: An Update

Official Statement of the National Academy of Neuropsychology
Approved by the NAN Board of Directors 10/13/2003

Introduction

The National Academy of Neuropsychology's first official position statement on *Test Security* was approved on October 5, 1999 and published in the Archives of Clinical Neuropsychology in 2000 (Volume 15, Number 5, pp. 383-386). Although this position statement has apparently served its intended purposes, questions have arisen regarding the potential impact of the 2002 revision of the APA Ethics Code (APA Ethical Principles of Psychologists and Code of Conduct, 2002) on the original position statement, which was based upon the 1992 APA Ethical Principles of Psychologists and Code of Conduct. The 2002 revised APA Ethics Code seems to necessitate no basic changes in the principles and procedures contained in the original *Test Security* paper, and requires only some alterations and clarification in wording. Specifically, the 2002 revised APA Ethics Code distinguishes between test data and test materials. According to Code 9.04:

> Test data "refers to raw and scaled scores, client/patient responses to test questions or stimuli, and psychologists' notes and recordings concerning client/patient statements and behavior during the examination. Those portions of test materials that include client/patient responses are included in the definition of test data."

According to Code 9.11:

> Test materials "refers to manuals, instruments, protocols, and test questions or stimuli and does not include test data" (as defined above).

Psychologists are instructed to release test data pursuant to a client/patient release unless harm, misuse, or misrepresentation of the materials may result, while being mindful of laws regulating release of confidential materials. Absent client/patient release, test data are to be provided only as required by law or court order. In contrast, psychologists are instructed to make reasonable efforts to maintain the integrity and security of test materials and other assessment techniques consistent with such factors as law and contractual obligations.

The distinction between test data and test materials increases conceptual clarity, and thus this language has been incorporated into the updated *Test Security* position statement that follows. Beyond this change, we do not believe that the 2002 revision of the APA Ethics Code calls for additional changes in the guidelines contained in the original *Test Security*

paper. That is, if a request is made for test materials, the guidelines in the original position paper remain fully applicable. Further, despite the intended distinction between test materials and test data and the differing obligations attached to each, a request for test data still appears to necessitate the safeguards described in the original position statement in most circumstances in which neuropsychologists practice. The release pursuant to client/patient consent alone is still likely to conflict not only with the NAN original Test Security position statement, but also with one or both of 2002 revised APA Ethics Codes 9.04 and 9.11. This is because release of test responses without the associated test materials often has the potential to mislead (and is also often impractical given the manner in which test responses are often embedded in test materials). Further, in many cases, test data and test materials overlap, given the current state of many neuropsychological test forms, and thus to release the test data is to release the test materials. In other cases, test materials might easily be inferred from test data, and although release of the data might not technically violate the 2002 revised APA Ethics Code 9.11, it may well violate the intent of the guideline. Thus, even if requirements are met under 9.04, such test release may well still conflict with the procedures or principles articulated in 9.11.

Thus, requests not only for release of test materials (manuals, protocols, and test questions, etc.), but also for certain test data (test scores or responses where test questions are embedded or can be easily inferred) will typically fall under the guides and cautions contained in the original and restated Test Security position papers. True raw test scores or calculated test scores that do not reveal test questions, do not require such test security protection. It is unfortunate that the new 2002 revised APA Ethics Code, while clearly attempting, and for the most part achieving, clarity in endorsing the release of raw and scaled test scores, test answers, and patient responses, does not address the very practical problem of releasing data which imply or reveal test questions. This is not a trivial concern when state licensure board ethics committees may be forced to investigate charges that relate to such ambiguities. Until such clarifications are offered by APA, we suggest a conservative approach that protects these imbedded and inferred questions, and treating them as one would test materials as proffered by the NAN Revised Test Security Paper below. Further revisions of the NAN Test Security guidelines will follow any clarifications by APA of the Ethics Code.

Revised Test Security Paper

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), which specify that these procedures are to be used only by psychologists trained in the use and interpretation of test instruments (APA, 1992; Codes 2.01, 2.06; Unqualified Persons; and APA, 2002; Code 9.04; Release of Test Data).

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). Recording an examination can additionally affect the validity of test performance (see NAN position paper on Third Party Observers). Such requests can also place the psychologist in potential conflict with state laws regulating the practice of psychology. Maintaining test security is critical, because of the harm that can result from public dissemination of novel test procedures. Audio- or video recording a neuropsychological examination results in a product that can be disseminated without regard to the need to maintain test security. The potential disclosure of test instructions, questions, and items by replaying recorded examinations can enable individuals to determine or alter their responses in advance of actual examination. Thus, a likely and foreseeable consequence of uncontrolled test release is widespread circulation, leading to the opportunity to determine answers in advance, and to manipulate test performances. This is analogous to the situation in which a student gains access to test items and the answer key for a final examination prior to taking the test.

Threats to test security by release of test data to non-psychologists are significant. Research confirms what is seemingly already evident: individuals who gain access to 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 (Coleman, Rapport, Millis, Ricker and Farchione, 1998; Wetter and Corrigan, 1995; Youngjohn, 1995; Youngjohn, Lees-Haley & Binder, 1999). Consequently, uncontrolled release of test procedures to non-psychologists, via stenographic, audio or visual recording potentially jeopardizes the validity of these procedures for future use. This is critical in a number of respects. First, there is potential for great public harm (For example, a genuinely impaired airline pilot, required to undergo examination, obtains a videotape of a neuropsychological evaluation, and produces spuriously normal scores; a genuinely non-impaired criminal defendant obtains a recorded examination, and convincingly alters performance to appear motivated on tests of malingering, and impaired on measures of memory and executive function). Second, should a test become invalidated through exposure to the public domain, redevelopment of a replacement is a costly and time consuming endeavor (note: restandardization of the many measures of intelligence and memory, the WAIS-III and WMS-III, cost several million dollars, took over five years to complete, and required testing of over 5000 individuals). This can harm copyright and intellectual property interests of test authors and publishers, and deprive the public of effective test instruments. Invalidation of tests through public exposure, and the prospect that efforts to develop replacements may fail or, even if successful, might themselves have to be replaced before too long, could serve as a major disincentive to prospective test developers and publishers, and greatly inhibit scientific and clinical advances.

If a request to release test data or a recorded examination places the psychologist or neuropsychologist in possible conflict with ethical principles and directives, the professional should take reasonable steps to maintain test security and thereby fulfill his or her professional obligations. Different solutions for problematic requests for the release of test material are possible. For example, the neuropsychologist may respond by offering to send the material to another qualified neuropsychologist, once assurances are obtained that the material will be properly protected by that professional as well. The individual making the original request for test data (e.g., the attorney) will often be satisfied by this proposed solution, although others will not. Other potential resolutions involve protective arrangements or protective orders from the court. (See the attached addendum for general guidelines for responding to requests).

In summary, the National Academy of Neuropsychology fully endorses the need to maintain test security, views the duty to do so as a basic professional and ethical obligation, strongly discourages the release of materials when requests do not contain appropriate safeguards, and, when indicated, urges the neuropsychologist to take appropriate and reasonable steps to arrange conditions for release that ensure adequate safeguards.

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September 25, 2018

RE: THE MATTER OF CREATING A COMMITTEE TO UPDATE AND REVISE THE NEVADA RULES OF CIVIL PROCEDURE

The Executive Board of the Nevada Psychological Association **opposes** third party observation of the administration of standardized measures during psychological and/or neuropsychological independent medical evaluations (IMEs). Our organization opposes this proposed revision to the Nevada Rules of Civil Procedure for the following reasons. Additionally, no licensed psychologist in the State of Nevada would be able to conduct psychological and/or neuropsychological IMEs under the conditions of observation and recording proposed for these same reasons:

1. **Decreased Patient Disclosure**: Observation, monitoring, and recording can directly impact the behavior of the patient during psychological clinical interview such that the patient may avoid disclosing crucial information essential to diagnosis and clinical recommendations. The patient may also avoid disclosing critical information related to their safety or the safety of another person (e.g., child abuse or abuse of a vulnerable adult).
2. **Test Standardization & Compromised Validity**: The clear and well-established standard of practice is that standardized psychological and neuropsychological tests must be administered under standardized conditions (i.e., conditions that closely replicate the conditions under which the tests were standardized during the test development process). The standardization process does not include third party observation, monitoring, or recording. Deviations from standardized administration procedures compromise the validity of the data collected. When the validity of testing data are compromised, the accuracy of the diagnosis is compromised.
3. **Social Facilitation and Observer Effects & Compromised Validity**: Research consistently demonstrates that patient performance can be impacted (negatively or positively) by the presence of an observer (including live observation, remote observation, or recorded observation). Observation, monitoring, and recording can artificially strengthen or weaken the patient's performance on psychological and neuropsychological test, thus compromising the validity of the data and the accuracy of diagnostic conclusions.
4. **Test Security & Social Harm**: Psychologists have a legal and ethical requirement to maintain the "integrity and security" of tests and other assessment techniques. Permitting individuals who are not licensed psychologists to observe a psychological examination, either live or via recording, compromises test security. Dissemination of psychological and neuropsychological test materials when test security is breeched carries a risk for significant social harm. Future

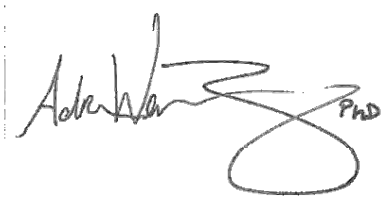
patients can be coached or (inappropriately) prepared for IMEs. Additionally, the tests used in psychological and neuropsychological IMEs are the same tests used across a wide range of evaluations. These include, but are not limited to, determinations of fitness or competency to: (a) parent; (b) pilot an airplane; (c) practice medicine or surgery; (d) stand trial; (e) work in law enforcement or at a nuclear power facility, etc. The Court might also be interested to know that these same tests are used to determine if an applicant is eligible to receive special accommodations when taking the Bar Exam.

As stated by the National Academy of Neuropsychology in 2003, "Maintaining test security is critical, because of the harm that can result from public dissemination of novel test procedures. Audio- or video recording a neuropsychological examination results in a product that can be disseminated without regard to the need to maintain test security. The potential disclosure of test instructions, questions, and items by replaying recorded examinations can enable individuals to determine or alter their responses in advance of actual examination. Thus, a likely and foreseeable consequence of uncontrolled test release is widespread circulation, leading to the opportunity to determine answers in advance, and to manipulate test performances. This is analogous to the situation in which a student gains access to test items and the answer key for a final examination prior to taking the test."

In summary, the 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.

We have enclosed a list of references, as well as complete copies of the most relevant position and consensus statements. Please do not hesitate to reach out with any questions.

Respectfully,



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2018 Policy Statement
On The Presence Of Third Party Observers
In Forensic Neuropsychological Assessments
Performed In The Commonwealth Of Virginia

Clinical neuropsychologists rely in part on administration of tests to assist the trier of fact in reaching a well-informed decision on medical diagnoses and causation in instances of presumptive neurobehavioral dysfunction. Neuropsychological tests have been shown to be reliable and valid measures when administered in a standardized fashion. The undersigned chose to issue this position statement in order to emphasize the importance that the administration of the neuropsychological measures remain consistent with this standardization procedure. We are aware that there have been instances when attorneys have requested that a third party observer be present in the examination room when neuropsychological tests are administered to a litigant and we wish to be on record as opposing such practices as harmful to standardized neuropsychological assessment procedures and interpretation.

We are in support of the position taken by the American Academy of Clinical Neuropsychology (2001) and the National Academy of Neuropsychology (1999), on the presence of observers during neuropsychological testing. Neuropsychological test measures have not been standardized in the presence of an observer. Rather, neuropsychological test administration has been standardized using a rigorous set of controlled conditions, which did not include the presence of a third party. In addition, the presence of a third party observer and/or the videotaping the administration of formal test procedures is inconsistent with positions set forth in American Psychological Association (APA). Manuals for a number of common standardized neuropsychological tests (for example, the WAIS III, WMS-III, and others) specifically state that third party observers should be excluded from the examination room to keep it free from distraction.

The primary rule governing the admissibility of expert testimony in Virginia is Federal Rule of Evidence (FRE) 702 which states:

If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise.

We believe that the presence of a third party observer (which includes but is not limited to attorney's, their representatives, the use of one-way mirrors or other electronic means such as video/audio taping), during the formal testing significantly jeopardizes the validity of the generated data, and opinions which are subsequently generated. This violation in test administration standardization will significantly jeopardize the neuropsychologist's ability to provide admissible testimony as well as testimony which assists the trier of fact.
Our professional opinion is that the use of a third party observer during a forensic psychological and/or neuropsychological evaluation does not meet an acceptable standard of practice in the Commonwealth of Virginia and is not permissible under current professional and ethical standards.

In 2006, the following individuals agree to the above Policy Statement

(Alphabetical Order)

Jeffrey T. Barth, PhD, ABPP-CN

Robert P. Hart, PhD, ABPP-CN

Jeffrey S. Kreutzer, PhD, ABPP-RP

Bernice A. Marcopoulis, PhD, ABPP-CN

Edward A. Peck III, PhD, ABPP-CN

Thomas V. Ryan, PhD, ABPP-CN

Scott W. Sautter, PhD, ABPN

James B. Wade, PhD, ABPP-CN

Thus far in 2018, the following Licensed Clinical Psychologists have agreed to be added
to the above Policy Statement – which is unchanged from the original 2006 wording.

Vivian Begali, PsyD, ABN
Ronald Federici, PhD, ABN
David Hess, PhD, ABPP-RP
Bethany Gilstrap, PhD, ABN
Melissa, Hunter, PsyD, ABN
John Mason, PsyD

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GUEST EDITORIAL

Policy Statement of the American Board of Professional Neuropsychology regarding Third Party Observation and the recording of psychological test administration in neuropsychological evaluations

Alan Lewandowski[a], W. John Baker[b], Brad Sewick[c], John Knippa[d], Bradley Axelrod[e], and Robert J. McCaffrey[f]

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General

Neuropsychologists are frequently presented with requests from parents, attorneys, nurse case managers, insurance representatives, school personnel, allied health professionals, family members, or other interested parties who have some type of relationship with a patient or client examinee to directly observe or record the administration of psychological and neuropsychological tests. Consequently, a number of practice concerns have been raised that include, but are not limited to, the effects on the examinee's performance and the neuropsychologist administering the assessment, violations of testing guidelines, the impact on standardization procedures, the appropriateness of applying test findings to normative samples established under standardized circumstances, and test security. These requests can become even more problematic and complicated when the request occurs within the adversarial process associated with the legal system, such as competency hearings, custody evaluations, divorce proceedings, civil litigation, and criminal investigations (Bush, Pimental, Ruff, Iverson, Barth & Broshek, 2009; Duff & Fisher, 2005; Howe & McCaffrey, 2010; Lynch, 2005; McCaffrey, Fisher, Gold, & Lynch, 1996; McCaffrey, Lynch, & Yantz, 2005; McSweeny et al., 1998; Sweet, Grote, & Van Gorp, 2002).

Definition of Third Party Observation

Third Party Observation (TPO) is defined in this practice guideline as the direct or indirect presence of an individual other than the patient or client and the psychologist or their technician administering a published psychological test in order to obtain objective data under standardized conditions for clinical, counseling, or forensic purposes in order to render clinical conclusions, opinions, interpretations, or recommendations based on the data collected. Direct presence means a person(s) physically present in the room other than the psychologist or his/her technician and the examinee. Indirect presence means viewing through a window, two-way mirror, use of any camera, or audio or video recording device, or any electronic or communication device. The act of recording includes the on-site transcription by a court recorder or reporter during an examination by either direct or indirect involvement (Barth, 2007; Constantinou, Ashendorf, & McCaffrey, 2002; Constantinou, Ashendorf, & McCaffrey, 2005; Eastvold, Belanger, & Vanderploeg, 2012; McCaffrey, Fisher, Gold, & Lynch, 1996).

Ethical considerations

The Ethical Principles of Psychologists and Code of Conduct of the American Psychological Association (hereafter called the Ethics Code) helps guide the thinking and behavior of psychologists, and provides direction with regard to clinical practice standards. Relevant to TPO and the Ethics Code are both the General Principles and a number of the Ethical Standards.

Within the Ethics Code a series of General Principles are outlined with the intent of guiding psychologists to practice at the highest professional level. Relevant to TPO are General Principle: A (Beneficence and Nonmaleficence), B: (Fidelity and Responsibility), C (Integrity), and D (Justice).

In contrast to the General Principles, the Ethics Code offers specific standards that represent obligations to which psychologists are bound, and consequently form the basis for ethical violations and consequently the basis for sanctions. Most relevant to TPO are Ethical Standards 2 (Competence) and 9 (Assessment). (American Psychological Association, 2010).

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Principle A: Beneficence and nonmaleficence

Principle A is applicable and is described as follows:

> Psychologists strive to benefit those with whom they work and take care to do no harm. In their professional actions, psychologists seek to safeguard the welfare and rights of those with whom they interact professionally and other affected persons, and the welfare of animal subjects of research. When conflicts occur among psychologists' obligations or concerns, they attempt to resolve these conflicts in a responsible fashion that avoids or minimizes harm. Because psychologists' scientific and professional judgments and actions may affect the lives of others, they are alert to and guard against personal, financial, social, organizational, or political factors that might lead to misuse of their influence. Psychologists strive to be aware of the possible effect of their own physical and mental health on their ability to help those with whom they work (American Psychological Association, 2010, p. 3).

It is incumbent on neuropsychologists to be vigilant regarding the impact of their professional opinion on others, particularly with regard to diagnostic testing. Scientific and professional judgments and conclusions should be based on data from neuropsychological assessments gathered in a standardized manner and, therefore, without the influence of extraneous factors that might influence the collection of behavior samples. Neuropsychologists must always be mindful that their verbal and written opinions affect the medical, social, and legal lives of others and, therefore, must safeguard those with whom they interact professionally to do no harm.

Principle B: Fidelity and responsibility

Principle B is applicable and is described as follows.

> Psychologists establish relationships of trust with those with whom they work. They are aware of their professional and scientific responsibilities to society and to the specific communities in which they work. Psychologists uphold professional standards of conduct, clarify their professional roles and obligations, accept appropriate responsibility for their behavior, and seek to manage conflicts of interest that could lead to exploitation or harm.
>
> Psychologists consult with, refer to, or cooperate with other professionals and institutions to the extent needed to serve the best interests of those with whom they work. They are concerned about the ethical compliance of their colleagues' scientific and professional conduct. Psychologists strive to contribute a portion of their professional time for little or no compensation or personal advantage (American Psychological Association, 2010, p. 3).

It is the responsibility of all psychologists who elect to perform diagnostic testing, to do so within the established parameters of the instrument(s) they employ and therefore in a standardized manner. Whether or not a neuropsychologist is engaged in a patient-doctor relationship, acting as an independent clinician, a clinician for an institution, state or federal agency, or an independent examiner for an insurance carrier or legal counsel, a professional obligation exists to uphold standards for the delivery of scientific work commensurate with the responsibilities to the profession, community, and society in general.

Principle C: Integrity

Principle C is applicable and is described as follows.

> Psychologists seek to promote accuracy, honesty, and truthfulness in the science, teaching, and practice of psychology. In these activities psychologists do not steal, cheat, or engage in fraud, subterfuge, or intentional misrepresentation of fact. Psychologists strive to keep their promises and to avoid unwise or unclear commitments. In situations in which deception may be ethically justifiable to maximize benefits and minimize harm, psychologists have a serious obligation to consider the need for, the possible consequences of, and their responsibility to correct any resulting mistrust or other harmful effects that arise from the use of such techniques (American Psychological Association, 2010, p. 3).

The practice and promotion of clinical assessment requires that neuropsychologists present themselves and their work to others in an accurate and honest manner and avoid any misrepresentation of their findings. A considerable body of research supports that TPO can affect the accuracy of test findings, and to purposefully disregard its potential impact can be construed as a misrepresentation of the data

Principle D: Justice

Principle D is applicable and is described as follows.

> Psychologists recognize that fairness and justice entitle all persons to access to and benefit from the contributions of psychology and to equal quality in the processes, procedures, and services being conducted by psychologists. Psychologists exercise reasonable judgment and take precautions to ensure that their potential biases, the boundaries of their competence, and the limitations of their expertise do not lead to or condone unjust practices (American Psychological Association, 2010, p. 3–4).

In an attempt to provide fair and just treatment to all patients and clients, neuropsychologists do not modify assessment procedures or alter their work on the basis

of personal opinion or professional bias, nor do they neglect to maintain an awareness of their competency level and the limitations of their expertise. To this end, the American Psychological Association (APA), psychological state organizations, and neuropsychological specialty organizations, provide multiple continuing education opportunities for neuropsychologists to learn, maintain, and improve their professional expertise, and avoid practices that are irregular or not commensurate with accepted clinical practice. Given the body of literature that exists regarding observer effects, it is incumbent on neuropsychologists who provide evaluations to make clear to patients, clients, families, and other professionals that they do not endorse TPO and to try to avoid this type of intrusion in the assessment.

Ethical standard 2: Competence

Ethical Standard 2 is applicable to TPO and the recording of test administration. Section 2.04, Bases for Scientific and Professional Judgments states the following:

> Psychologists' work is based upon established scientific and professional knowledge of the discipline. (American Psychological Association, 2010, p. 5; see also Standards 2.01e, Boundaries of Competence).

Ethical standard 2.04

Ethical Standard 2.04 requires neuropsychologists to conduct their practice within the boundaries of scientific knowledge. Texts on psychological testing have long cited the need to conduct testing in a distraction-free environment (Anastasi & Urbina, 1997). For example, the Wechsler Adult Intelligence Scale-Third Revision (WAIS-III) requires that, "As a rule, no one other than you and the examinee should be in the room during the testing" (1997, p. 29). The manual further directs, "Attorneys who represent plaintiffs sometimes ask to observe, but typically withdraw this request when informed of the potential effect of the presence of a third person" (Wechsler, 1997, p. 29). The requirement to avoid interference from others is noted in the Wechsler Intelligence Scale for Children-Fourth Edition (WISC-IV), which advises that no one other than the examiner and the examinee should be in the room during test administration (Wechsler, 2003, p. 23).

The concept of being free from distractibility is also emphasized in the Wechsler Adult Intelligence Scale-Fourth Revision (WAIS-IV) that instructs the examiner to provide a physical environment "free from distractions and interruptions" and stresses that "External distractions must be minimized to focus the examinee's attention on the tasks presented and not on outside sounds or sights, physical discomfort, or testing materials not in use" (Wechsler, 2008, p. 24). This is also emphasized in the administration manual for the Rey Complex Figure Test (Meyers, 1995, p. 6). Similarly, the scoring manual for the California Verbal Learning Test-Second Edition (CVLT-II) instructs that only the examiner and examinee be present in the room during testing (Delis et al., 2000, p. 8). By eliminating the presence of third parties, the examiner eliminates potential interference and the possibility of their distracting from or influencing the testing process, hence variables that are inconsistent with test standardization.

Most test manuals specify that the examiner is responsible for ensuring that the testing environment is quiet and free from distractions (Meyers, 1995; Williams, 1991; Urbina, 2014) and are often very specific about the testing room being limited to "A table or desk and two chairs" (Meyers, 1995). Similarly, the manual for the California Verbal Learning Test- Second Edition (CVLT-II) states "as a rule, no one other than you and the examinee should be in the room during testing" (Delis, Dramer, Kaplan & Ober, 2000, p. 8). As described above, these instructions serve to emphasize the importance of controlling distraction as an important factor in assessment.

Ethical standard 9: Assessment

Ethical Standard 9 is applicable to TPO and recording. In Section 9.01, Bases for Assessments, the code notes "(a) Psychologists base the opinions contained in their recommendations, reports, and diagnostic or evaluative statements, including forensic testimony, on information and techniques sufficient to substantiate their findings" (American Psychological Association, 2010, p. 12; see also Standard 2.04, Bases for Scientific and Professional Judgments).

Test results generated by nonstandard methods that negatively impact the validity of the findings are insufficient. In forensic settings, neuropsychologists are often required to use their findings in comparison with other evaluations. The ability to compare separate data sets, when one evaluation was conducted following proper testing procedures and the other evaluation had inherent threats to validity such as a third party observer is dubious.

Under 9.01:

> (a) the psychologist cannot provide opinions or evaluative statements because TPO presence yields the evaluation of questionable validity. (b) Except as noted in 9.01c, psychologists provide opinions of the psychological characteristics of individuals only after they have conducted an examination of the individuals adequate to

support their statements or conclusions. When, despite reasonable efforts, such an examination is not practical, psychologists document the efforts they made and the result of those efforts, clarify the probable impact of their limited information on the reliability and validity of their opinions, and appropriately limit the nature and extent of their conclusions or recommendations. (American Psychological Association, 2010, p. 12; see also Standards 2.01, Boundaries of Competence, and 9.06, Interpreting Assessment Results). (c) When psychologists conduct a record review or provide consultation or supervision and an individual examination is not warranted or necessary for the opinion, psychologists explain this and the sources of information on which they based their conclusions and recommendations.

Section 9.02: Use of assessments

Section 9.02 describes the following:

> (a) Psychologists administer, adapt, score, interpret, or use assessment techniques, interviews, tests, or instruments in a manner and for purposes that are appropriate in light of the research on or evidence of the usefulness and proper application of the techniques. (b) Psychologists use assessment instruments whose validity and reliability have been established for use with members of the population tested. When such validity or reliability has not been established, psychologists describe the strengths and limitations of test results and interpretation. (c) Psychologists use assessment methods that are appropriate to an individual's language preference and competence, unless the use of an alternative language is relevant to the assessment issues (American Psychological Association, 2010, p. 12).

Section 9.02 (a) suggests that tests administered by a neuropsychologist in a manner that is inconsistent with the standardization of the instrument and contrary to the test manual, may be in violation of this standard. When an exception exits, it is incumbent on the neuropsychologist to provide a rationale or need that supports altering standardization in the report. Otherwise, TPO is contrary to this standard.

Section 9.06: Interpreting assessment results

Section 9.06 describes the following:

> When interpreting assessment results, including automated interpretations, psychologists take into account the purpose of the assessment as well as the various test factors, test-taking abilities, and other characteristics of the person being assessed, such as situational, personal, linguistic, and cultural differences, that might affect psychologists' judgments or reduce the accuracy of their interpretations. They indicate any significant limitations of their interpretations (American Psychological Association, 2010, p. 13; see also Standards 2.01b and c, Boundaries of Competence).

Many authors and organizations (Anastasi & Urbina, 1997; National Academy of Neuropsychology, 2000a; Oregon Psychological Association, 2012; Michigan Psychological Association, 2014) emphasize that, during test development, procedures are standardized without the presence of an observer. Subsequently the data obtained outside of those parameters lacks corresponding assurance of validity and interpretive significance.

Section 9.11: Maintaining test security

Section 9.11 raises the importance of maintaining test security. "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" (American Psychological Association, 2010, p. 13). Test security is a critical issue, as it addresses the prevention of unnecessary exposure of psychometric materials that can result in diminishing a test's ability to accurately distinguish between normal and abnormal performance.

Several professional organizations have emphasized the importance of maintaining test security. The APA, the National Academy of Neuropsychology (NAN), and several state associations (among others) emphasize test security as essential to the practice of psychology, and that it is incumbent on neuropsychologists to protect the integrity of psychological test materials (American Psychological Association, 1999; National Academy of Neuropsychology, 2003; Michigan Psychological Association, 2014).

Other state and national psychological organizations as well as a number of authors have raised concerns about the potential for testing material to be used inappropriately by attorneys or become part of the public domain (American Academy of Clinical Neuropsychology, 2001; American Psychological Association, 1999; Bush et al., 2009; Canadian Psychological Association, 2009; Essig, Mittenberg, Petersen, Strauman, & Cooper, 2001; Kaufman, 2005, 2009; McCaffrey et al., 1996; Michigan Psychological Association, 2014; Morel, 2009; National Academy of Neuropsychology, 1999; Oregon Psychological Association, 2012; Victor & Abeles, 2004; Wetter & Corrigan, 1995). Public accessibility allows individuals involved in litigation to self-educate or be coached as to how to perform on certain measures or how to selectively pass or fail key components of the neuropsychological evaluation and thus invalidate the results of the assessment. As a result, several psychological organizations have taken a formal position against the presence of TPO during assessment.

The National Academy of Neuropsychology (Axelrod et al., 2000) advises that TPO is inconsistent with psychological guidelines and practices, as it threatens the validity, reliability, and interpretation of test scores. The position of the academy is that TPO should be avoided whenever possible outside of necessary situations involving a nonforensic setting where the observer is both neutral and noninvolved (e.g., student training or an interpreter). This view is also held by the Canadian Psychological Association (CPA) that advises "It is not permissible for involved third parties to be physically or electronically present during the course of neuropsychological or similar psychological evaluations of a patient or plaintiff" (CPA, 2009).

The American Academy of Clinical Neuropsychology (AACN; 2001) has taken the position that "it is not permissible for involved third parties to be physically or electronically present during the course of an evaluation assessment of a plaintiff patient with the exception of those situations specified below" (p. 434). Exceptions are described that include as an example, the assessment of young children who require the presence of a family member.

The executive committee of the Oregon Psychological Association (2012) adopted a clear and unequivocal policy that the observation by a third party compromises test validity and security and therefore advises against the presence of TPO during assessment. Similarly, the Michigan Psychological Association Ethics Committee has advised against TPO for the same reasons (Michigan Psychological Association, 2014).

Research evidence

In support of professional ethics, there is a significant body of research indicating that TPO cannot be assumed as inconsequential to test findings. A review of the pertinent literature overwhelmingly supports the negative consequences of either direct or indirect TPO or recording on the behavior of both the examiner and the examinee, and the validity of findings obtained in a neuropsychological assessment.

It is self-evident that neuropsychological evaluations be conducted in a standardized fashion consistent with the publisher's directives to ensure valid and reliable results. Consistent with other major neuropsychological organizations, it is the position of the American Board of Professional Neuropsychology that altering test procedures to accommodate observation or recording compromises test standardization and affects the subsequent data set obtained. As there is no basis for accepting as valid an assessment under nonstandard (observed or recorded) conditions, it is questionable if findings reflect a reasonable degree of certainty or fall within an accepted range of probability. Test results therefore lack the normal and accepted parameters of validity and, more importantly, do not reflect the expected standards of psychological care. Given current research it is not surprising that most publishers of psychological tests have cautioned against TPO in their instruction manuals and national organizations have advised against TPO (National Academy of Neuropsychology, 2000a; Committee on Psychological Tests and Assessment, 2007).

The issue of TPO has been investigated by numerous researchers, including an early case study by Binder and Johnson-Greene (1995). Multiple studies have established and replicated the dubious validity of data obtained during recorded or observed evaluations. A considerable amount of research now exists demonstrating the deleterious effect on data obtained during nonstandard evaluations involving executive functioning (Horowitz & McCaffrey, 2008), attention and processing speed (Binder & Johnson-Greene, 1995; Kehrer, Sanchez, Habif, Rosenbaum, & Townes, 2000), and memory/recall of information (Eastvold et al., 2012; Gavett, Lynch, & McCaffrey, 2005; Lynch, 2005; Yantz & McCaffrey, 2005). Eastvold et al. (2012) meta-analysis found negative effects on multiple cognitive measures and that attention, learning, and memory (delayed recall) were most adversely impacted by the presence of an observer.

Exceptions to TPO

Third party assistant (TPA)

In selected circumstances, the presence of an unbiased, impartial, and neutral third party observer may be necessary to proceed with or complete a neuropsychological assessment. In these cases, rather than an involved third party observing or monitoring the behavior of the test administrator or examinee, the third party holds a neutral position and acts in an indirect manner to assist or expedite the completion of the assessment. Given this significant difference of purpose, we suggest that the presence of an uninvolved and neutral observer during an evaluation is more accurately identified as a third party assistant (TPA).

A TPA may be deemed appropriate in clinical examinations in which the examiner is acting as a clinical treater with an established patient-doctor relationship, as opposed to an independent psychological examination for an insurance company or a forensic assessment in civil or criminal proceedings. A TPA may be appropriate in a testing situation in which the presence

of a parent, family member, guardian, family friend, or interpreter is necessary, and without whose presence the examination could not proceed because of a mental disability or clinical limitation that requires an accommodation. Examples might include a child with suspected or diagnosed autism, developmental disorders affecting intelligence, confirmed brain injury that precludes independent living, children who are either too young or severely anxious that they cannot be left alone, elderly adults with compromised cognition who are unwilling to participate without the presence of a trusted family member or friend, or patients who have a thought disorder impacting reality testing, among others.

Alternatively, there are cases in which a language barrier precludes valid test administration. While the preference is for the examination to be conducted in the examinee's native language, in some these cases an interpreter may be necessary because a native speaking psychological examiner is not available or within a practical distance. In these situations, to avoid potential conflicts of interest, if it is at all possible the interpreter should have no relationship (i.e., such as family member, close friend or social affiliation) to the person being examined.

Similarly, if an examinee is deaf or hearing impaired, an individual versed in American Sign Language (ASL) or a member of the deaf community would be necessary to complete an examination. Absent a qualified examiner fluent in sign language, a certified specialist or ASL interpreter may be needed.

Training presents another situation in which a TPA is considered appropriate. Not unlike medical students, psychology students and technicians learning the administration of psychology test procedures require direct observation, practice, and supervision to ensure accuracy and competence.

In the aforementioned cases, the examiner is ethically required to document in the neuropsychological report the use of a TPA and any deviations of standardization or modifications in test administration. The limitations of normative data with subsequent impact on the generalization of findings should be clearly noted.

Forensic examinations, independent medical examinations, and acting as an expert witness

Neuropsychologists who choose to perform forensic assessments are ethically required to be aware of the specialty guidelines pertinent to this area of expertise. In order to avoid potential conflict, neuropsychologists who regularly provide forensic consultations should inform referral sources that if TPO or recording develops as an issue or is required by legal proceedings, they may elect to remove themselves from the assessment.

When retained as an expert witness in forensic situations, neuropsychologists should resist demands for TPO if requested by opposing counsel, retaining counsel, or the court. The neuropsychologist should educate the court or those involved as to the APA Ethics Code and the existing scientific research that supports the negative effects of this type of intrusion. However, it is recognized that often in forensic situations professional ethics and the adversarial nature of the legal system may not agree. If attempts to educate those involved fail and counsel insists, or the court directs to proceed with TPO, the neuropsychologist can consider removing himself/herself from the assessment.

In those exceptions in which a neuropsychologist is *compelled* by the court to evaluate with a TPO because of existing state statutes or if the neuropsychologist is placed in a situation whereby withdrawing will bring clear and substantial harm to the examinee, the manner in which test validity and clinical findings are affected and may be compromised should explicitly documented. The neuropsychologist should then follow existing recommendations and guidelines for protecting test security including requesting that test material and intellectual property be provided only to another licensed psychologist who would be bound by the same duty to protect.

If this is not possible, the neuropsychologist should request a protective order specifically prohibiting either party from copying test material or intellectual property, using them for any other purpose than the matter at hand, and directing that they be returned uncopied directly to the psychologist or destroyed in a manner verifiable by the psychologist.

Conclusion

Requests for TPO frequently create an ethical dilemma for neuropsychologists as any observation or recording of neuropsychological tests or their administration has the potential to influence and compromise the behavior of both the examinee and the administrator, threatens the validity of the data obtained under these conditions by, and consequently limits normative comparisons, clinical conclusions, opinions, interpretations, and recommendations. For these reasons, APA ethical standards support the position that TPO in neuropsychological testing should be avoided.

Ethical standards of practice compel neuropsychologists to avoid or resist requests for conducting assessments complicated by TPO, except for those situations

as described. Neuropsychologists should therefore not engage in, endorse, abet, or conduct assessments complicated by TPO or recording of any kind other than under the order of a court after all reasonable alternatives have been exhausted. It would be entirely appropriate for a neuropsychologist to decline to perform an examination under these conditions.

As an exception, TPA is acceptable under infrequent clinical circumstances that necessitate the involvement of an assistant or in a rare forensic case that might require a neutral or uninvolved party such as a language interpreter. A neuropsychologist is obligated to clarify in the report the rationale for the use of TPA, identify what procedures and standards have been modified, and how or to what degree the findings, results, and conclusions may be impacted. This should include limitations in the generalization of the diagnostic data and the impact on assessment's findings.

In summary, it is the position of the American Board of Professional Neuropsychology that it is incumbent on neuropsychologists to minimize variables that might influence or distort the accuracy and validity of neuropsychological assessment. Therefore, it is the recommendation of the American Board of Professional Neuropsychology that neuropsychologists should resist requests for TPO and educate the referral sources as to the ethical and clinical implications.

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Policy Statement
On The Presence Of Third Party Observers
In Forensic Neuropsychological Assessments
Performed In The Commonwealth Of Virginia

Clinical neuropsychologists rely in part on administration of tests to assist the trier of fact in reaching a well-informed decision on medical diagnoses and causation in instances of presumptive neurobehavioral dysfunction. Neuropsychological tests have been shown to be reliable and valid measures when administered in a standardized fashion. The undersigned chose to issue this position statement in order to emphasize the importance that the administration of the neuropsychological measures remain consistent with this standardization procedure. We are aware that there have been instances when attorneys have requested that a third party observer be present in the examination room when neuropsychological tests are administered to a litigant and we wish to be on record as opposing such practices as harmful to standardized neuropsychological assessment procedures and interpretation.

We are in support of the position taken by the American Academy of Clinical Neuropsychology (2001) and the National Academy of Neuropsychology (1999), on the presence of observers during neuropsychological testing. Neuropsychological test measures have not been standardized in the presence of an observer. Rather, neuropsychological test administration has been standardized using a rigorous set of controlled conditions, which did not include the presence of a third party. In addition, the presence of a third party observer and/or the videotaping the administration of formal test procedures is inconsistent with positions set forth in American Psychological Association (APA). Manuals for a number of common standardized neuropsychological tests (for example, the WAIS III, WMS-III, and others) specifically state that third party observers should be excluded from the examination room to keep it free from distraction.

The primary rule governing the admissibility of expert testimony in Virginia is Federal Rule of Evidence (FRE) 702 which states:

If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise.

We believe that the presence of a third party observer (which includes but is not limited to attorneys, their representatives, the use of one-way mirrors or other electronic means such as video/audio taping), during the formal testing significantly jeopardizes the validity of the generated data, and opinions which are subsequently generated. This violation in test administration standardization will significantly jeopardize the neuropsychologist's ability to provide admissible testimony as well as testimony which assists the trier of fact.

Our professional opinion is that the use of a third party observer during a forensic psychological and/or neuropsychological evaluation does not meet an acceptable standard of practice in the Commonwealth of Virginia and is not permissible under current professional and ethical standards.

The following individuals endorse the above Policy Statement

(Alphabetical Order)

Jeffrey T. Barth, PhD, ABPP-CN

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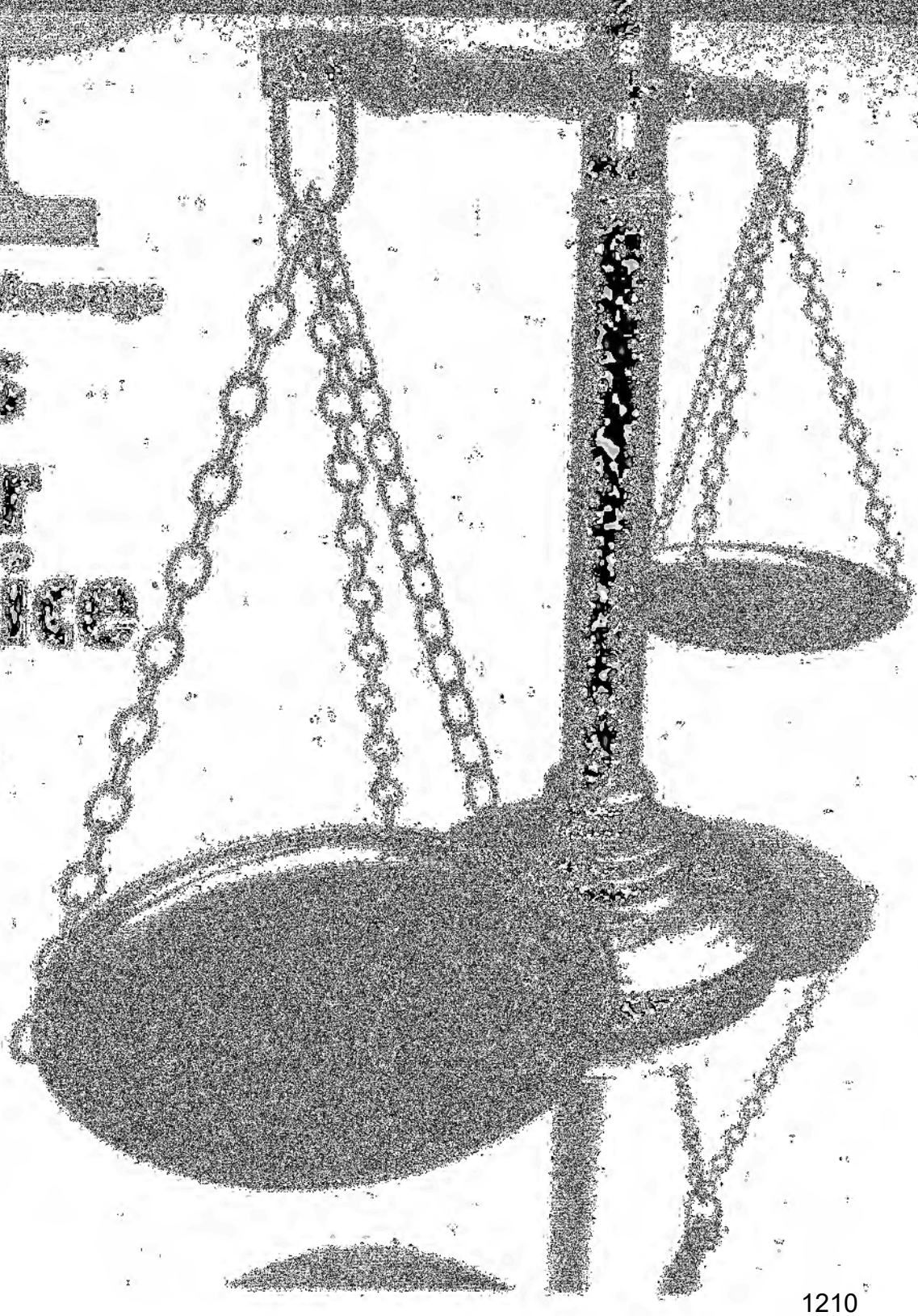
Thomas V. Ryan, PhD, ABPP-CN

James B. Wade, PhD, ABPP-CN

Florida PSYCHOLOGIST

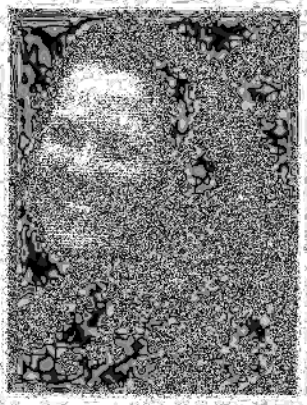
President's Message

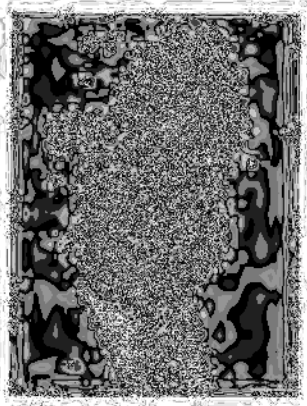
Ethics in our Practices

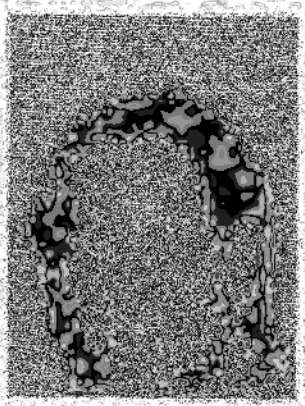


Psychological Ethics and Third Party Observers (TPO): We've Observed Their Effect And Now Need To Act

Laura Howe, J.D., Ph.D., Warren J. Rice, Ph.D., and Valerie Hoese, Ph.D.







The Baker Act prohibited admission of individuals to state institutions without just cause.

A *third party observer* (TPO) is any person or observational process that is present during a psychological evaluation aside from the psychologist and the client. Frequently attorneys, most often plaintiff attorneys, demand to be present during their client's psychological evaluation. These demands range from having another psychologist, the attorney themselves, a paralegal, a court stenographer, and a videographer present or having the interaction monitored by electronic devices such as a tape recorder or video recorder, or observation via a one-way mirror.

Two types of TPOs have been distinguished in the literature. An involved third party observer is one who, in civil litigation, has an interest in the outcome of a specific plaintiff's evaluation, usually an attorney or someone working for them. An uninvolved third party observer is one who, in civil litigation, has no specific interest in the outcome of the case such as a student in training, or an interpreter.

Research on the Effects of TPOs

Neuropsychological examinations are very vulnerable to the presence of a TPO. The research literature documents that TPOs adversely impact the validity of neuropsychological examinations.

The fundamental concern with permitting TPOs is their impact on the validity of standardized psychological measures. Psychological tests are developed under standardized conditions with the assumption that only the examinee and the examiner are present during the evaluation. Every departure from standardized conditions may result in unknown effects on the validity of test measures and possibly render the normative data no longer applicable. In the instance of TPOs, change is attributed to social facilitation, which is the effect of the presence of others on test performance. Research studies in the area of social facilitation demonstrate the effect TPOs have on an individual's performance on psychological tests. The social facilitation effect causes individuals to perform better on tasks requiring over-learned or simple skills while performing more poorly on novel or more difficult tasks (McCaffrey, Fisher, Gold, & Lynch, 1996). Several studies have demonstrated that the mere presence of TPOs, even if they are not disruptive (e.g., observers exiting quietly in the room and out of sight) impact neuropsychological measures. The effect has been demonstrated when the TPO is an electronic recorder such as an audio recorder (Constantinou, Ashendorf, & McCaffrey, 2002) or a video recorder (Constantinou, Ashendorf, & McCaffrey, 2005). These disruptive effects extend to when the observer is a significant other (Kehrer, Sanchez, Habif, Rosenbaum, & Townes, 2008) and someone posing as the examiner's supervisor (Finch & McCaffrey, 2005).

The areas of functioning most influenced by the presence of a TPO in neuropsychological assessments are attention, sustained concentration, verbal fluency, learning and memory. The average effects size on memory tasks has been shown to be approximately one standard deviation but may be as large as one and a half standard deviations (Garrett, Lynch, & McCaffrey, 2005). This may diminish an average memory score of 100 to a borderline memory score of 78 making the data difficult to interpret. When a client scores outside of the normal and expected range, there is a question of whether the results are due to true brain pathology or stem from the presence of the TPO. The client is thereby denied the opportunity for an accurate measurement of their cognitive functioning and the legal system is left to make decisions on the basis of data that is of questionable validity. Due to the importance of this issue within the field of neuropsychology the American Academy of Clinical Neuropsychology and the National Academy of Neuropsychology have each published official statements on the topic of TPOs (American Academy of Clinical Neuropsychology, 2001; Axelrod et al., 2000a).

TPOs result in a failure of test security and expose tests for potential misuse and public access. Many tests used for psychological examination depend on an examinee's unfamiliarity with the items, which necessitates protecting the test items from general circulation to preserve their uniqueness and usefulness (Axelrod et al., 2000b). Although psychologists are bound by their ethics to protect psychological materials, no such restraint is placed on others who are not

psychologists, which puts the test materials in a vulnerable position. When new tests must be developed and standardized the process requires an incredible amount of time and financial investment. Replacement of the WAIS-III and WMS-III took over five years and cost several million dollars (Zeidner et al., 2006b). Furthermore, psychologists often have to sign purchasing agreements when obtaining materials stating they will uphold test security and protect copyrights.

Breaches in test security may result in coaching where examinees are given information about psychological tests that may lead to their being able to alter their presentation to appear a certain way. Wetzel & Conelyea (1992) surveyed 70 practicing attorneys and 150 law students and found that 22 percent of students and 42 percent of attorneys believe that an attorney should provide as much specific information as possible about psychological assessment to their clients. Youngjohn (1995) reported a case in which an attorney admitted that he deliberately coached his client before testing. This is of concern since coaching may impact assessment procedures. For example, providing detailed information on the validity scales was shown to enable one-third of examinees to successfully change their responses on the MMPI-2 clinical scales yet not raise the validity scales (Rogers, Bagby, & Chakraborty, 1993).

The presence of TPOs conflicts with psychologists' ethical obligations and competencies. The Ethical Principles of Psychologists and Code of Conduct (APA, 2002) outline the governing principles that guide psychologists in the US. Psychologists are encouraged to adhere to standardized procedures and utilize test materials in a manner appropriately based upon the current research (APA, at ES 9.02, Use of Assessments). Similar obligations are cited in the Standards for Educational and Psychological Testing (AERA) (1999) and "test users have the responsibility of protecting the security of test materials at all times (AERA at Ss. 5.9)." This includes making "reasonable efforts to maintain the integrity and security of test materials and other assessment techniques consistent with law and contractual obligations (APA at ES 9.11 Maintaining Test Security)." Additionally, "Psychologists do not promote the use of psychological assessment techniques by unqualified persons (APA at ES 9.07 Assessment by Unqualified Persons)." They must protect against misuse and misrepresentation of their work (APA at ES 1.03 Misuse of Psychologists' Work) that may occur when unqualified individuals observe psychological examinations. Neuropsychologists obtain extensive training in brain-behavior relationships, which is necessary to understand, integrate, and correctly interpret behaviors that occurs during an evaluation. Someone without such expertise may misinterpret the examinee's performance, not placing it in the context of clinical theory, which may lead to incorrect attributions for test results. Finally, "... psychologists take reasonable steps to avoid harming their clients/patients ... and others with whom they work, and to minimize harm where it is foreseeable and unavoidable (APA at ES 3.04 Avoiding Harm)."

TPOs and Current Florida Law

In Florida, no distinction is made between psychological and medical examinations when someone wishes to exclude a TPO in civil forensic examinations. Florida courts currently apply a two-part test to determine if an involved TPO should be excluded during a medical/legal examination. The party seeking to prevent the TPO's presence must demonstrate with case specific facts why a TPO will be disruptive to the examination and also that no other qualified provider in the area would be willing to conduct the examination with a TPO (Broyles v. Reilly, 1997). As shown, there are fundamental reasons applicable to all examinations regarding why TPOs should not be present during neuropsychological examinations. That the current standard requires case specific reasons demonstrates a fundamental misunderstanding between the fields. The burden of proof should be on the party requesting to have a TPO present. They should be required to show case specific justifications showing why TPOs sufficient to override the damaging effects involved TPOs have on neuropsychological examinations.

Currently, the TPO problem is dealt with unfairly and on a case-by-case basis. Some practitioners may allow an involved TPO if not familiar with the adverse effects. Other practitioners object and present their rationale and ethical concerns to the circuit court judge via their attorneys. Many accept the final order of the judge and either withdraw from the case or conduct the examination and then add caveats to their report regarding the questionable validity of the test results due to the TPO.

In Florida, a small number of cases regarding TPOs during psychological examinations have been appealed to the District Courts of Appeals (DCA). As stated, Florida courts do not currently make a consistent distinction between medical and psychological examinations. The two-part test is often applied and exceptions are made on a case-by-case basis and there has been some variability shown at the district court level, though no court has made a global exception or altered the rule for psychological examinations. The Florida Supreme Court has not considered the issue of a TPO during a neuropsychological examination.

In August 2006, FPA signed onto an Amicus Curiae Brief written by The Group Protecting the Integrity of Psychological Examinations (GPIPE) in *Bennett v. Moore*. In the Bennett case, the circuit court denied the presence of a TPO. The plaintiff's attorney appealed this decision to the 5th DCA. G-PIPE and the Florida Defense Lawyers Association (FDLA) each submitted Amicus Curiae Briefs asking the Court to not allow the presence of third party observers to civil psychological examinations. The DCA upheld the decision of the circuit court denying a TPO, but did so via a court order and not a written decision so the ruling cannot be used as precedence in other cases and the court order neither expanded the two-part test nor distinguished between psychological and medical examinations.

Future Approaches on the TPO Issue

Presenting research articles and organizational position papers in opposition to TPOs allows the individual practitioner to rely on a case-by-case basis yet these actions are time consuming and costly. Additionally, every time a case is appealed to the DCA there is a risk its ruling may have a detrimental impact on the practice of psychology due to the misunderstandings between psychology and the law.

Due to the ethical concerns in having psychologists deal with the issue on a case-by-case basis, proposing legislation to effectively deal

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Psychological Ethics and Third Party Observers
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with this issue is the best defensive recommendation for psychologists. The proposed legislation would espouse a policy that would exclude TPOs during civil psychological examinations except in rare circumstances to be determined by the retained psychologist and based on their clinical judgment and expertise. This would shift the burden of proof to the party requesting the presence of a TPO. They would have to show case specific reasons why a TPO should be present in the particular examination.

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Appendix C: Research

McCaffrey RJ, Lynch, JK, Yantz, CL. (2005). Third Party Observers: Why All the Fuss, Journal of Forensic Neuropsychology, Vol. 4(2) 2005

Third Party Observers: Why All the Fuss?

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ABSTRACT. Following a brief discussion of the emergence of third party observation as an issue in neuropsychology, this article reviews the social psychological theory of social facilitation. Social facilitation refers to the impact of another person, whether as an observer or a performer of the same activity, on an individual's performance. Both performance enhancements and impairments can be caused by this phenomenon. The article concludes with a review of the empirical studies that have demonstrated that a third party observer significantly impacts an individual's performance on some neuropsychological tests. *[Article copies available for a fee from The Haworth Document Delivery Service: 1-800-HAWORTH. E-mail address: <docdelivery@haworthpress.com> Website: <http://www.HaworthPress.com>*

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KEYWORDS. Social facilitation, third party observer, forensic, standardized test administration

The issues raised about the presence of a third party observer during neuropsychological testing were first formally addressed a decade ago at the annual meeting of the National Academy of Neuropsychology (NAN) where a special topics workshop entitled "Presence of Third Party Observers During Neuropsychological Evaluations: Who Is Evaluating Whom?" was presented by two clinical neuropsychologists and an attorney (McCaffrey, Fisher, & Gold, 1994). The workshop focused on the existing professional guidelines and factors to be considered by the clinical neuropsychologist faced with the request for a third party observer to be present during neuropsychological testing. This involved a discussion of the pertinent Ethical Principles of Psychologists and Code of Conduct (American Psychological Association, 1992), the relevant sections from the *Standards for Educational and Psychological Testing* (AERA, APA, & NCME, 1999) and the Specialty Guidelines for Forensic Psychologists (1991). The social psychological literature dealing with the phenomena of "social facilitation" was reviewed as it applied to studies of recognition memory and free recall. The seminal clinical case report by Binder and Johnson-Greene (1995) was still in press in *The Clinical Neuropsychologist*; however, it was widely available as a preprint and was used to highlight the link between the social psychological studies on social facilitation and clinical neuropsychological practice. Lastly, legal issues pertaining to requests for a third party observer to be present were examined, including the Federal Rules of Civil Procedure (2001) and the New York Civil Practice Law and Regulations (CPLR, 2003) since the presenters practiced in New York State.

When Mr. Gold had completed his comments on the legal issues and third party observers, the panel opened the floor to questions from the audience for the remaining 45 minutes. The room size was typical for a special topic workshop at NAN, but there was standing room only. Among those in attendance were Antonio E. Puente, PhD, and Jeffrey T. Barth, PhD, both of whom commented that the profession needed to address this issue formally. The questions, comments and discussions among all of those in attendance served as catalysts that initiated practice suggestions in the clinical neuropsychological literature, as well as the impetus for additional research and, ultimately, the development of official policy statements by the National Academy of Neuropsychology

(Axelrod et al., 2000; *http://nanonline.org/paoi/thirdparty.shtm*) and, later, by the American Academy of Clinical Neuropsychology (Hamsher, Lee, & Baron, 2001; *http://www.the AACN.org/position_papers/tc154433.pdf*).

While much has transpired over the past 10 years, clinical neuropsychological practitioners continue to confront many of these same matters in their daily practice. This special issue of the *Journal of Forensic Neuropsychology* is intended to provide an overview of the salient issues practitioners must consider when faced with requests for third party observers, as well as an update and review of the research in this area since that initial NAN meeting in 1994. In addition, we will present original research findings that bear directly on the issue of third party observers. Finally, we hope that this special issue will provide clinical neuropsychological practitioners with an important resource that will assist them in their daily practice. Also, this issue can aid in the education of the legal community on the myriad of issues concerning the presence of a third party observer during neuropsychological testing, such as the caveats that must be included when interpreting neuropsychological test data from evaluations contaminated by the presence of a third party observer.

AN OVERVIEW OF SOCIAL FACILITATION

In the 1990s, requests for the physical presence of third party observers during neuropsychological testing and professional concerns regarding whether such observers would impact the examinee's performance on testing led us to examine the social psychology literature and, specifically, social facilitation theory. The impact of the presence of others on an individual's performance has been an area of scientific study in social psychology for more than a century. Beginning in the late 1800s, psychologists began to recognize that an individual's task performance could be altered just by the inclusion of other individuals simultaneously performing the same task. This was first reported by Triplett in 1898 who found that cyclists rode faster when racing in groups than when racing alone (Triplett, 1898). Subsequent research found that, in addition to the presence of others engaged in the same activity, referred to as "co-actors" in the social psychology literature, the presence of an *observing audience* could alter an individual's performance. An early documentation of the influence of an observing audience was provided by Meumann [1904, as cited in Cottrell (1972)].

Using a finger ergograph, he found individuals pulled a finger-weight a greater distance in the presence of an observer than when alone. Additional studies followed providing converging evidence that the presence of others was a salient social force. This form of social influence eventually became known as *social facilitation*. This term was adopted because the earliest studies had shown that the presence of an audience was associated with performance increments (Aiello & Douthitt, 2001). A more precise term, however, would be *social facilitation and inhibition*, as later work showed that the presence of an audience can inhibit performance on some tasks.

Social facilitation is the influence that the presence of another person has on an individual's performance. Zajonc (1965) described social facilitation as a "fundamental" form of social influence, as it occurs in the absence of any direct effort or intention of the observer or co-actor to alter the individual's performance. An individual's performance can either be facilitated or impaired by the presence of others. A general framework that has been offered within the social facilitation literature is that simple or well-learned tasks will be performed better in the presence of another person while difficult or novel tasks will be performed worse in the presence of another person. This general framework, however, may oversimplify the social facilitation phenomenon. There are a number of factors, in addition to task complexity or novelty, which have been considered to be important in the social facilitation and inhibition of task performance. Many social psychologists place particular importance upon the characteristics of the observer. Whether the observer is an expert or non-expert, evaluator or non-evaluator, a friend or stranger, or attentive or non-attentive to the performer may have a differential impact on the individual's performance. Characteristics of the individual may also be important, such as personality characteristics, prior experience with the task, or prior experience with being observed or evaluated (Aiello & Douthitt, 2001; Butler & Baumeister, 1998; Geen, 1989; Geen & Gange, 1977; Guerin, 1983). Some researchers of the social facilitation phenomenon consider these factors as non-essential. According to Zajonc (1965), the principal proponent of this view, the "sheer" or "mere" presence of another person is all that is required for social facilitation to occur. This group does recognize, however, that characteristics of the observer, performer, or situation can influence the magnitude of the social facilitation effect.

Another potentially important factor in social facilitation is audience size. A number of studies have demonstrated a relationship between audience size and the magnitude of social facilitation effects. Many social

theorists contend that social facilitation and inhibition effects increase as the audience size increases, and there have been empirical studies in support of this view (Jackson & Latané, 1981; Knowles, 1983; Latané, 1981; Latané & Harkins,1976; Mullen, 1983; 1985). Another group of social theorists do not consider an increase in audience size to necessarily result in a larger impact on task performance (Seta, Crisson, Seta, & Wang, 1989; Seta, Wang, Crisson & Seta, 1989). According to these theorists, the impact of an additional observer is a function of the evaluative status of that observer. If the new observer poses little threat of evaluation to the performer, the addition of this observer to the audience may actually serve to decrease the overall social influence associated with the audience and, consequently, a reduction in the social facilitation effect. If, however, the additional observer is perceived as highly evaluative, then social facilitation and inhibition effects would be expected to increase.

An interesting finding that has emerged from the research is that the *physical presence* of another person in the same room as the performer is not essential for the social facilitation effect. The social psychological literature contains several empirical studies demonstrating that observation from behind a one-way mirror, on closed-circuit television, or by video-recording the performer can impact an individual's task performance. It appears that the individual's belief that his/her performance is observed is the essential factor here. This is sometimes referred to as the "implied presence" of another person. As examples of this literature, Putz (1975) found that individuals' accuracy on a visual vigilance/signal detection task was significantly better when they believed that performance was observed through a one-way mirror, monitored on a closed-circuit television by a video camera in the room, or observed by an expert in the testing room. Geen (1973) found that presence of an another person, either in the room or observing from another room by closed circuit video during learning of letter-number pairs, significantly impacted later recall. On the recall trials, the letters were presented, and the individuals were required to supply the number that had been paired with these letters. Individuals who were observed during learning, even with observation by videocamera, recalled significantly fewer numbers on the immediate recall trial compared to individuals who had been alone during learning. On the 45 minute delayed recall, individuals observed during learning recalled significantly more numbers than those not observed during learning. As a final example of this research, Seta, Seta, Donaldson, and Wang (1988) found that an individual's recall of a word list was less organized when the performer believed that he/she

was observed by an audience behind a one-way mirror than when performed alone; however, the number of words recalled was not significantly different between the two experimental conditions.

THEORETICAL EXPLANATIONS OF SOCIAL FACILITATION

Several theoretical models have been offered to account for the social facilitation phenomenon. Guerin and Innes (1984) have organized these frameworks into three categories: drive/arousal theories, social valuation theories, and attention theories. The drive theory, proposed by Zajonc (1965), is based on the Hull-Spence drive theory. According to the Hull-Spence equation (Spence, 1956), the tendency to make a response is a function of drive level and the habit strength of that response. Drive energizes and, therefore, increases the probability of a well-learned or dominant (i.e., habit) response. If the dominant response is incorrect, performance will be inhibited by increased drive. If the dominant response is correct, performance will be enhanced by increased drive. This theory predicts, then, that difficult tasks will be impaired by social presence since the tendency to fail at such a task is greater than the tendency to succeed.

While many social psychology theorists have accepted the drive theory of social facilitation, there is disagreement as to the reason for an increase in drive when in the presence of others. Zajonc (1965) considered this increase in drive to be an innate or instinctual response that enhances the individual's preparedness to interact with social stimuli. Unlike physical stimuli, social stimuli are unpredictable, and, consequently, the individual needs to be alert and prepared to produce any number of responses. Others have suggested that the threat of evaluation, often referred to as evaluation apprehension, associated with the presence of others results in increased drive. Further, this group of social psychologists considers the increased drive to be a learned, rather than instinctual, response to social stimuli that is acquired from experience with positive and negative evaluations throughout their social development (Cottrell, Wack, Sekerak, & Rittle, 1968; Weiss & Miller, 1971). Still others have proposed that an increase in drive is in reaction to the distracting influence of an observer's presence during task performance. Essentially, this theory suggests that the performer experiences an increase in arousal as he/she is confronted with conflicting demands for attention (Sanders & Baron, 1975; Sanders, Baron, & Moore, 1978).

The social valuation theories refer to three separate but related explanations for social facilitation: objective self-awareness theory (Wicklund & Duval, 1971), control systems theory (Carver & Scheier, 1981a, 1981b), and self-presentational theory (Bond, 1982). These theories de-emphasize generalized drive and emphasize the individual's active efforts to manage his/her public self-image when performing in the presence of others. The presence of others increases the individual's awareness of any discrepancies between his/her actual behavior and an idealized behavioral standard. The facilitating effect of the presence of others on easy or well-learned tasks occurs as the individual performs at a higher level to reduce the discrepancy between the actual and idealized performance. Performance on novel or complex tasks will be worse for a variety of reasons. It may be that the individual attempts to prematurely perform at a higher level than his/her current ability allows which results in errors, or the individual may withdraw effort from the task due to his/her low expectations of meeting the idealized performance standard. An additional explanation is that the individual may become embarrassed by the discrepancy between his/her actual performance and the ideal standard, and it is the disruptive impact that this sense of embarrassment has on task performance that results in a poor performance.

Finally, the attentional theories of social facilitation focus on the observer's impact on the performer's cognitive functioning. In a re-conceptualization of his drive theory of social facilitation, Baron (1986) proposed that the attentional conflict caused by the presence of another person during task performance leads to information overload. As a result, the individual allocates attention to information that is central to the task at hand at the expense of peripheral information. Presumably, simple or well-learned tasks require attention to relatively few peripheral cues, whereas difficult or novel tasks require attention to many cues. According to this theory, the narrowing of attention facilitates performance on simple tasks by eliminating irrelevant information. On novel or complex tasks, the narrowing of attention eliminates task-relevant cues, impairing performance. Manstead and Semin (1980) offer another attention-based theory of social facilitation. According to their theory, the presence of another person during task performance invokes controlled processing of information. Simple or well-learned tasks, typically completed using automatic processing, will be completed better when the performer uses controlled processing. However, complex or novel tasks already require controlled information processing. The presence of another person serves to increase the attentional demands

and divert limited attentional resources away from the task, resulting in task performance impairment.

Presently, there remains disagreement in the field of social psychology regarding these explanations of social facilitation. It seems, however, that there is growing recognition that no single explanation can account for this phenomenon. Social facilitation is probably mediated by a number of factors including increased arousal, evaluation apprehension, increased information processing demands, or increased concern with one's self-image and public image introduced by the observer's presence. There have been some attempts to develop a model of social facilitation that integrates the various theories. For example, Paulus (1983) proposed that the presence of others during task performance evokes three states in the performer: (1) arousal, (2) effort, and (3) task-irrelevant processing. An increase in arousal (i.e., drive) influences task performance by energizing the dominant response. An increase in effort stems from the performer's desire to maintain a favorable self-image. Task irrelevant processing arises in response to the attentional demands that another person places on the performer's cognitive processes. The weight of these three states in any social situation determines whether social facilitation or inhibition of task performance will occur. Sanders (1981) offered another integrative model of social facilitation, called the Attentional Processes model. According to this model, the social facilitation effect is due to an increase in drive that results from the attentional conflict caused by the presence of another person during performance of a task. The other models of social facilitation provide explanations as to the reason that the presence of others is a source of distraction that ultimately results in the attentional conflict. A shift in attention from the task, whether to monitor the social presence, self-evaluate performance, or manage one's public image, sets the stage for attentional conflict and an increase in drive.

Despite the lack of consensus regarding the mechanism(s) underlying social facilitation and inhibition effects, the social psychological research has repeatedly demonstrated that the presence of a passive observer alters the behavior of children and adults.

SOCIAL FACILITATION AND THE NEUROPSYCHOLOGICAL EVALUATION

Social facilitation has received considerable scientific attention since initial documentation of this phenomenon in the 19th century, and there

is extensive empirical evidence that the social facilitation effect does occur across different situations. The social facilitation literature spans a wide variety of activities, including tasks primarily of athletic or physical skill as well as cognitively-based tasks. Social facilitation effects have been found on word generation tasks (Gates, 1924); paired associates learning (Baron, Moore, & Sanders, 1978; Geen, 1983; Guerin, 1983; Houston, 1970); concept attainment (Laughlin & Jaccard, 1975; Laughlin & Wong-McCarthy, 1975); maze learning (Rajecki, Ickes, Corcoran, & Lenerz, 1977; Shaver & Liebling, 1976); running speed (Strube, Miles, & Finch, 1981; Worringham & Messick, 1983); and gymnastic routines (Paulus, Shannon, Wilson, & Boone, 1972). Social facilitation effects have also been found with samples of young children. The presence of a passive audience has been found to influence the intensity of lever pulling (Clark & Fouts, 1973) and balance beam performance (MacCracken & Stadulis, 1985) in preschoolers. In grade school children, the presence of a passive audience has been shown to impact ladder climbing (Landers & Landers, 1973), letter cancellation speed and accuracy (Baldwin & Levin, 1958), reaction time (Fouts, 1980), and digit recall forward and backward (Quarter & Marcus, 1971). While this literature provides a basis to suspect that social facilitation effects may extend to neuropsychological tests conducted in the presence of third party observers, it is, of course, important to examine this hypothesis empirically.

Although third party observation is of great importance for the clinical neuropsychologist, especially the forensic neuropsychologist, only a handful of studies have examined the effect of third party observation on neuropsychological test performance. The first documented investigation of the observer effect in the context of a neuropsychological evaluation appeared in 1995. In their paper, Binder and Johnson-Greene (1995) presented a case study of a 26-year old woman with intractable seizures who was seen for neuropsychological evaluation as part of a medical work-up for the seizure disorder. As part of the neuropsychological evaluation, the woman was administered the Portland Digit Recognition Test (PDRT) following discontinuation rules for accurate performances on the PDRT. The examiner later returned to the patient's room to administer the PDRT in full, since a complete administration was in keeping with the epilepsy protocol. The patient's mother was visiting and requested to remain in the room while the test was administered. The examiner allowed the mother to remain but then requested that she leave the room after noticing a decline in the patient's accuracy compared to her earlier performance on this measure. After mother's

departure, the patient's accuracy increased. Apparently curious to see if this pattern would repeat, the examiner administered the remaining items first with mother present and then absent. The pattern of worsening performance in the presence of her mother and improving performance in her absence continued. In total, the patient's accuracy significantly declined from 65.4% under standard testing conditions to 38.5% when her mother remained in the room.

Binder and Johnson-Greene's single case study provided initial evidence that the social facilitation phenomenon might extend to neuropsychological testing. The findings from that study were in concert with the predictions of the social facilitation literature. The patient's accuracy on difficult items of the PDRT declined in the presence of a significant-other observer. Subsequent research has provided further evidence that an observer during neuropsychological testing significantly impacts the individual's test performance. Huguet, Galvaing, Monteil, and Dumas (1999) examined social facilitation effects on a computerized version of the Stroop test with a sample of 48 undergraduate females. The students completed the test alone or in the presence of an observer. The observer was identified as another student waiting to participate in a separate study. There were three different observer conditions: an attentive observer who sat opposite to the performer and watched her complete the task for 60% of the time; an inattentive observer who sat opposite the performer but never looked at her (e.g., read a book); and an "invisible" observer who sat behind the performer and was therefore out of view. The presence of an attentive observer and an invisible observer was associated with a significantly faster completion of the Interference trial. The presence of an inattentive observer who did not watch the test taker at any time did not significantly impact performance.

Kehrer, Sanchez, Habif, Rosenbaum, and Townes (2000) examined the effects of a significant-other observer's presence on performance on a repeatable neuropsychological battery. The study sample was 30 undergraduate students referred for neuropsychological testing to determine eligibility for special education accommodations. The students enrolled in the study were informed that the purpose of the research was to examine "the effects of an observer on examiner-examinee interaction" (p. 68). The observer was a parent, spouse, friend or sibling of the student. During test administration, the observer sat out of the direct view of the student, watched the testing attentively, and did not interact with the student. Each participant was administered a subset of the neuropsychological battery twice (using alternative forms for some tests), once under standard conditions and once with the significant-

other present. Test administration followed an A-B-A-B design of observer absence and presence. Difference scores between the unobserved and observed conditions were calculated for each measure. Findings showed that, in the presence of a significant-other observer, students produced significantly more perseverative responses on the Rey Auditory Verbal Learning Test and performed significantly lower on Digit Span; Stroop word reading, color naming, and color/word trial; the Paced Auditory Serial Addition Test; and the Controlled Oral Word Association Test. There was no observer effect found on the Trail Making Test, Finger Tapping Test, or on total words recalled and number of intrusions on the Rey Auditory Verbal Learning Test.

Constantinou, Ashendorf, and McCaffrey (2002) examined the impact of audio-recording on neuropsychological test performance of 40 undergraduate university students. In this study, each student's neuropsychological testing session was audio-taped, but only half of the students were aware that the testing session was recorded. In the "Aware" group, the audio-recorder was placed on the testing table in close proximity to the student. In the "Non-Aware" group, the audio-recorder was hidden under the testing table. The findings showed that students who were aware of the audio-recording performed significantly lower on several subtests from the Memory Assessment Scales. Specifically, the Aware group performed significantly lower on List Acquisition, Immediate Cued Recall, Delayed List Recall, and Delayed Cued Recall. There were no significant group differences on the Finger Tapping Test, Lafayette Grooved Pegboard, Grip Strength, or the List Recall or Verbal Span subtests from the Memory Assessment Scales. These findings extend third party observer effects on neuropsychological testing to include electronic observation.

This literature has demonstrated that presence of an observer during administration of neuropsychological testing significantly reduces the examinee's test performance. The next three articles in this special issue will report on additional empirical studies of the impact of an observer on neuropsychological test performance. The first paper demonstrates the impact of a third party observer on neuropsychological tests among closed head injury survivors. The next article deals with the effect of a video-recorder as the third party observer on neuropsychological testing. The last empirical article focuses on the situation in which an examinee is told that a supervisory third party observer (e.g., clinical supervisor or "trained observer") is present specifically to observe the examiner's administration of the neuropsychological testing and not the examinee's performance. Each of these studies provides evidence that

neuropsychological testing in the presence of an observer, whether physically present or present through electronic means, results in a decrement in performance on some neuropsychological measures.

The importance of maintaining standardized testing procedures has always been recognized by clinical neuropsychological practitioners. Less appreciated has been the clinical significance of breaking standardized procedures. It is hoped that the research presented in this issue will serve to highlight the importance of following a standardized test protocol. There have been several empirical studies that have shown that changes in seemingly minor aspects of the standardization procedures results in a significant change in test performance. For example, changing the mode of presentation (reading, computerized vs. audiotape), deviation from prescribed test instructions, or changing the rate of stimulus presentation have been found to significantly impact performance (see Lee, Reynolds, & Willson, 2003, for review). The research on third party observers of neuropsychological evaluation provides additional confirmation that adherence to standardized test procedures is essential.

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Some Final Thoughts and Comments Regarding the Issues of Third Party Observers

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ABSTRACT. Clinical neuropsychologists need to be aware of the issues associated with requests for third party observers to be present during an evaluation and be prepared to address these issues before they arise. While the literature to date has focused upon the impact of the third party observer on the examinee's test performance, the issue of examiner reactivity to the presence of an observer remains largely unstudied. The data from an evaluation conducted with a third party observer present cannot be deemed to be either a reliable or valid indication of the examinee's current neuropsychological status. As such, any data obtained in the presence of a third party observer may be considered as unreliable and any opinion testimony based upon those data inadmissible.

KEYWORDS. Third party observer, forensic neuropsychology, examiner reactivity, clinical training

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Clinical neuropsychologists are called upon to assist physicians, attorneys, school districts, parents, and the courts in a number of very important ways–for example, in differential diagnosis for appropriate early interventions, providing input to Committees on Special Education and parents regarding the best program of instruction for a student with a disability, determination of the presence and extent of a brain-related disability for either a governmental agency or private insurance carrier, assisting in sorting out secondary gain-related issues from brain dysfunction in personal injury litigation referrals, and in the mitigation phases of death penalty cases, to name but a few. The work that we do is very important and serves as a significant factor in the overall decision making processes by our referents. The quality of our work should benefit the referent in the decision making process; however, data from an evaluation with a third party observer present can lead to an unintended result. The empirical studies contained in this special issue of the *Journal of Forensic Neuropsychology* focus on different types of third party observers and their influence upon examinees' performance on neuropsychological tests. The presence of a quiet, unobtrusive third party observer present in the testing room was shown to have a negative impact on test results in a sample of CHI survivors. A second study showed that the third party observer effect occurs when the examinees were tested in the presence of a video recording device. Finally, the third party observer effect was found in a simulated clinical training situation where the supervisor was present in the room to observe the examiner's test administration. Regardless of the format of third party observation, each of these studies demonstrated that the examinees' performance on memory testing was negatively impacted. This issue also contained an article that demonstrates that the third party observer effect has both a statistically significant and clinically meaningful influence on the examinees' performance. These findings add to the previous work in this area and argue against the presence of third party observers in any format during neuropsychological testing.

There is also a small but growing body of literature that demonstrates that the presence of a third party observer actually has a negative impact on the results of at least two symptom validity measures: the Portland Digit Recognition Test (Binder & Johnson-Greene, 1995) and the Test of Malingering Memory (Constantinou & McCaffrey, 2003). The impact of third party observers on other symptom validity measures remains to be examined; however, for any individual, performance on symptom validity measures may be skewed in the direction of suspect effort. This could result in an opinion of suspect effort or dissimulation when in reality the data may represent a false positive finding due to the

presence of the third party observer. The implications of this scenario in any neuropsychological evaluation are obvious, especially in neuropsychological evaluations involving capital murder cases.

In addition to the negative impact on neuropsychological test performance, third party observers challenge test security. Preventing the dissemination of neuropsychological and psychological testing materials to the general public is essential to maintaining the integrity and utility of all tests. Test developers strive to maintain the integrity of their copyrighted and intellectually protected property by having clinical neuropsychological practitioners sign copyright, licensing and maintenance of test security agreements as a pre-condition to the sale and purchase of their products. The litigation policy of Harcourt Assessment, Inc., reads as follows:

> Harcourt does not wish to impede the progress of legal proceedings; however, we are equally unwilling to jeopardize the security and integrity of our test instruments by consenting to the release of copyrighted and confidential material to those not professionally qualified to obtain them. Should litigation in which a psychologist is involved reach the stage where a court considers ordering the release of proprietary test materials to non-professionals such as counsel, we request that the court issue a protective order prohibiting parties from making copies of the materials; requiring that the materials be returned to the professional at the conclusion of the proceedings; and requiring that the materials not be publicly available as part of the record of the case, whether this is done by sealing part of the record or by not including the materials in the record at all.
>
> In addition, testimony regarding the items, particularly that which makes clear the content of items, should be sealed and again not be included in the record. Pleadings and other documents filed by the parties should not, unless absolutely necessary, make specific reference to the content of or responses to any item, and any portion of any document that does so should be sealed. Finally, we ask that the judge's opinion, including both findings of fact and conclusions of law, not include descriptions or quotations of the items or responses. We think this is the minimum requirement to protect our copyright and other proprietary rights in the test, as well as the security and integrity of the test.[1]

While this litigation policy from Harcourt Assessment does not specifically mention third party observers, the concerns addressed within

the policy regarding release of test content are relevant to third party observation.

CLINICAL VS. FORENSIC SETTINGS

The issues associated with a third party observer are applicable to neuropsychological evaluation in both the forensic and clinical settings. In the clinical setting, the practitioner, using his/her best clinical judgment, makes the decision to allow another person to be present for part or all of the formal testing. This is particularly likely to occur in the evaluation of children where having a parent present for the early portions of the examination may facilitate the cooperation of the child. Nonetheless, the literature on third party observers and the potential impact on the outcome of an evaluation of a child must be factored into the clinical decision making process. It is common for practitioners to permit a parent to be present during the initial testing in order to engage the child and then to proceed to conduct the remainder of the examination with the parent absent. The policy statements from both the NAN and AACN indicate that there may be circumstances where the presence of a third party may be permissible in order to conduct evaluations of children. AACN further indicates that a third party may be present to assist with adults who have extreme behavioral difficulties. The role of the third party in these situations is to assist with managing the behavior of the examinee and not to observe the test procedures *per se*. Nonetheless, the clinical literature on third party observers indicates that the presence of a third party in such clinical situations does impact test performance. Binder and Johnson-Greene (1995) found that inclusion of a patient's mother during administration of the Portland Digit Recognition Test resulted in a significant decline in the patient's accuracy. Kehrer, Sanchez, Habif, Rosenbaum, and Townes (2000) found that the presence of a significant other during testing resulted in a significant decline in performance on several neuropsychological measures. There is an additional study from the social psychology literature that demonstrated that the presence of a supportive person during performance of difficult tasks (i.e., backward counting by 13s and a videogame) was associated with a worse performance in the presence of a supportive observer than in the presence of a stranger or adversarial observer (Butler & Baumeister, 1998). These researchers described the individuals within the supportive-observer condition as more cautious in their approach to the tasks in that they decreased speed; however, the cautious approach did not result

in a higher accuracy rate. Subjectively, the individuals observed by supportive persons described a sense of decreased stress and a generally positive feeling about the presence of a supportive individual. They did not recognize the detrimental impact that the supportive presence had on their performance. In light of the research, the clinician who makes the decision to permit a family member to be present during some or all of the testing must factor into the final interpretation of the test findings the impact that the family member had on test performance.

Unlike a clinical setting where clinical necessity dictates the presence of a third party observer, the neuropsychologist conducting an evaluation in a forensic setting may not be making the decision as to whether or not a third party will be permitted during testing. There are likely to be competing and conflicting legal issues as to the presence or absence of third party observers that have nothing to do with clinical necessity.

IMPLICATIONS FOR CLINICAL TRAINING

The findings from the Yantz and McCaffrey study (2005) highlight the concern that the mode of training our students and postdoctoral fellows in assessment techniques and methods needs to be reconsidered, as their presence may not be as benign as we have thought it to be for the past 60 years. While additional research is warranted, it would be prudent nonetheless for clinical neuropsychological practitioners not to utilize for clinical training purposes cases that involve serious matters such as personal injury litigation, competency evaluations, and death penalty-related matters. It would also seem that the recommendation by McSweeny et al. (1998) that audio recording and/or video recording of a clinical neuropsychological evaluation as a compromise to the physical presence of a third party observer not be adopted in light of current literature. Moreover, these "compromises" also involve the unknown impact of reactivity in the examining clinical neuropsychologist's efforts to perform a standardized administration.

EXAMINER REACTIVITY: UNCHARTED TERRITORY

To date, the research associated with the presence of a third party observer has focused on the *examinee*. An issue that has been overlooked is the cognitive, physiological and emotional reactivity of the *examiner*

while conducting an examination in the presence of a third party observer. Specifically, there is no guarantee that either the reliability or the validity of the assessment process is not impacted by the examiner's obvious knowledge that his/her actions, comments, questions and so forth are being scrutinized by a third party observer or memorialized in living color. Imagine how you might react if Ralph M. Reitan, PhD, were sitting in the room taking notes about your administration of the Halstead-Reitan Neuropsychological Test Battery for Adults. What impact would the presence of a video recorder have on your ability to conduct an evaluation?

AN OUNCE OF PREVENTION IS WORTH A TON OF CURE

Practitioners are not likely to know which forensic evaluations will involve requests for a third party observer. As such, it would be prudent to be prepared to address this issue for every forensic neuropsychological evaluation, particularly given the complexity of professional, ethical and legal issues that accompany requests for third party observers. Waiting until the examinee and his/her attorney are in your waiting room is probably too late. The practitioner should be up-to-date on the current research and policy statements from national organizations regarding third party observers, applicable ethical standards, and the applicable statutes in the state(s) where he/she practices. All of these relevant materials should be maintained in a readily accessible file that can be shared with counsel should the issue arise. Many times, the request may be withdrawn once both sides understand fully the implications of having a third party observer present during testing and the impact on the validity and reliable of the data.

If this initial attempt to dissuade the request for a third party observer is unsuccessful, then you need to be prepared to assist counsel in the preparation of an affidavit to be submitted to the court. The intent of an affidavit is to educate the court. Towards this end, counsel should be educated about and provided copies of all relevant literature and documents pertaining to third party observers. You should be aware, however, that the courts will look to the law regarding this issue as well as expert affidavits. Other potentially useful materials to provide counsel in preparing the affidavit are the formal policy statements from the legal departments of test publishers regarding the release of copyrighted and confidential material that deal with the measures to be utilized during

your evaluation. Affidavits from other clinical neuropsychologists, especially those who have developed neuropsychological tests, may also assist the trier of fact in understanding the salient issues.

If the court rules that a third party observer may be present during your evaluation, you must decide whether or not to conduct the evaluation. If you decide to conduct the evaluation, then the major issue becomes one of maintaining the security and integrity of the assessment instrument. At this point, counsel should petition the court for a protective order to safeguard the confidentiality of the test publisher's intellectual and copyrighted property. The potential need for a protective order to safeguard the test materials is an issue that counsel should be made aware of at the time that your services are retained. A statement regarding the circumstance under which counsel agrees to seek a protective order could be included in your standard letter of agreement, such as:

> Counsel understands that neuropsychological testing and/or psychological testing services involve raw test data, test manuals, and testing apparatus, and other copyrighted materials. These materials are made available to the neuropsychologist pursuant to "Copyrights, Permissions, Licensing and Maintenance of Test Security" agreements. Counsel agrees to promptly apply for a protective order to safeguard the confidentiality of test materials. The cost of applying for such protective order shall not be the responsibility of the neuropsychologist.

Counsel requesting the presence of a third party observer should be informed that the written report will contain a section outlining the myriad of problems in the interpretation of their client's test performance caused by the presence of the third party observer. Furthermore, the written report should contain a behavioral observation section that focuses exclusively on the behavior of the third party observers and/or any disruptions/distraction of the examinee or the examiner caused by the third party observer. For example, did the examinee turn around to look at the observer during testing, did the examinee or the third party observer initiate conversation between them, or did the observer leave and then re-enter the room without permission during the testing?

The neuropsychologist always has the option to refuse to conduct a forensic evaluation with a third party observer present. It is important to be cognizant of the possibility that opposing counsel's underlying agenda may have been to not have you conduct the evaluation. If a sub-

set of the legal community can control who does and who does not perform forensic neuropsychological evaluations, then the entire legal process may not be well-served.

ONE FINAL POINT

Clinical neuropsychologists undergo years of rigorous training in the appropriate administration of assessment instruments in order to ensure that the test results are a reliable and valid indication of the examinee's cognitive, neuropsychological, academic achievement, and behavioral/emotional functioning. In order to assure that the testing findings are reliable and valid, the clinical neuropsychologist must adhere to each assessment instrument's standardized test administration guidelines. This is essential, since the normative data for each battery or individual test was produced by following the standardized administration guidelines. Failure to follow a test's standardized administration guidelines negates the clinical neuropsychologist's ability to utilize the norms for the tests, since they were developed under the standardized administration guidelines. Any deviation from a standardized administration may render the testing findings unreliable and invalid, since the norms may no longer be applicable, and the error rates and terms may also be affected. Deviation from the standardized administration outlined in a test manual has been found to have profound effects on examinees' performance on cognitive/neuropsychological testing, achievement/educational testing, and personality/emotion testing. Included among the deviations from standardized administration are the test setting, presentation of test stimuli, examinee's response mode, and alteration in test instructions (Lee, Reynolds, & Willson, 2003). The presence of a third party observer is also a deviation from standardized administration.

Deviation from standardized administration in forensic neuropsychological evaluations may have profound negative consequences for everyone involved. As Lee et al. (2003) point out, three United States Supreme Court cases have addressed the issue of error rates and reliability of data upon which an expert's opinion is formulated. The conclusions reached by the Court are that, if the data used by an expert to form an opinion are unreliable, then any opinion derived from those data, even in part, is considered unreliable and not admissible as testimony. Given that the presence of a third party observer during testing is both a deviation from a standardized test administration and has been demonstrated to skew the results of the testing, it would appear that the data ob-

tained from an evaluation with a third party observer present would be deemed to be unreliable, and any opinion based upon those data inadmissible. Perhaps, this would be the ultimate unintended consequence of a third party observer.

NOTE

1. (*http://harcourtassessment.com/hai/Templates/GeneralPurposeTemplate.aspx?NRMODE=Published&NRORIGINALURL=%2fhaiweb%2fCultures%2fen-US%2fFooter%2fLegal%2bPolicies%2ehtm&NRNODEGUID=%7bB506C9EF-0DA3-42C3-A3AF-12CEAC9B0792%7d&NRCACHEHINT=NoModifyGuest#release* Harcourt Legal Affairs may be reached at 800-228-0752).

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When the Third Party Observer of a Neuropsychological Evaluation is an Audio-Recorder

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ABSTRACT

The presence of third parties during neuropsychological evaluations is an issue of concern for contemporary neuropsychologists. Previous studies have reported that the presence of an observer during neuropsychological testing alters the performance of individuals under evaluation. The present study sought to investigate whether audio-recording affects the neuropsychological test performance of individuals in the same way that third party observation does. In the presence of an audio-recorder the performance of the participants on memory tests declined. Performance on motor tests, on the other hand, was not affected by the presence of an audio-recorder. The implications of these findings in forensic neuropsychological evaluations are discussed.

The presence of an observer during neuropsychological evaluations is not unusual; this is especially true for evaluations that are conducted for litigious reasons (McSweeny et al., 1998). A large number of social psychology studies exhibited that the presence of an observer(s) tends to affect positively or negatively the task performance of individuals (Guerin, 1986). These findings are tightly related to the phenomenon of *social facilitation*, which is generally defined as the tendency of an individual to exhibit enhanced performance on simple tasks and inhibited performance on complex tasks in the presence of observers. This phenomenon is also called *reactivity*, which is defined in similar lines as "the tendency of the behavior to change when and because it is under observation" (Russell, Russell, & Midwinter, 1992). Clearly then, the presence of an observer(s) during neuropsychological evaluations could be a cause of unwanted headaches, many of which will be discussed in more depth shortly, for neuropsychologists who are concerned with the validity of obtained test scores and the violation of standardized test administration. For these reasons, the National Academy of Neuropsychology (NAN) recommends that the presence of third party observers during neuropsychological testing should be avoided when possible (Axelrod et al., 2000). In addition, in 1999 the American Psychological Association (APA), along with the American Educational Research Association (AERA) and the National Council on Measurement in Education (NCME), dictated in the *Standards for Educational and Psychological Tests* that the administrations of tests should adhere to standard procedures set by test publishers and that testing should be carried out with no distraction. As a whole, today's neuropsychologists aim to obtain test results that are not influenced by extraneous factors so that they can draw the most immaculate conclusions possible about evaluated individuals. The

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influence of third party observation during neuropsychological testing can be determined by examining the findings of past neuropsychological studies.

Binder and Johnson-Greene (1995) demonstrated, in a single case study, that the performance of an epileptic woman under neuropsychological evaluation deteriorated significantly when her mother was present in the examination room. Of course the limitations of a single case study are obvious. Nevertheless, similar outcomes were reported by group studies. Kehrer, Sanchez, Habif, Rosenbaum, and Townes (2000) found that participants' performance was significantly poorer when a "significant-other" observer was present during the administration of neuropsychological measures. Specifically, this study demonstrated that the performance of participants on attention, processing speed, and verbal fluency measures was negatively impacted by the presence of a "significant-other" observer; no such influence was observed on motor and cognitive flexibility tests. Lynch (1997) found that a third party observer negatively affected the performance of participants on a subscale of the Wechsler Memory Scale (WMS) that involved delayed recall. As in the previous study, Lynch (1997) did not find any third party observer effects for motor tests (i.e., Finger Tapping Test, Grip Strength, and Grooved Pegboard Test). In short, all of the above studies reported that the presence of a third party observer(s) appears to exert some negative influence on the neuropsychological test performance of individuals.

McSweeny et al. (1998) proposed that the need for the presence of a third party observer (e.g., a lawyer or their representative) in the examination room during neuropsychological evaluation may be eliminated if the potential third party observer(s) could have access to a video- or audio-recording of the neuropsychological evaluation. Then again, there is no evidence on how such recordings would affect the examinees' neuropsychological test performance. Outside of the neuropsychological area, contrasting results were reported with respect to the effects of audiovisual recording on task performance. For example, Cohen (1979) and Cohen and Davis (1973) reported that audiovisual recording had an autonomic arousing effect, measured by psychophysiological instruments, that, in turn, had a negative impact on the performance of participants who were asked to solve a series of word problems. On the other hand, Lichton and Waehler (1999) demonstrated that audiovisual recording did not affect participants' scores on assessment measures of anxiety.

The present study was conducted in an effort to investigate whether audio-recording affects individuals' neuropsychological test performance. Forty undergraduates were assigned to one of two groups, either the Tape-Recording Aware group or the Non-Aware group, who were not aware that responses were tape-recorded. The participants were administered selected subtests of the Memory Assessment Scales (MAS; Williams, 1991) and a series of motor tests.

It was hypothesized that indirect observation (i.e., through the audio-recording) would produce results that resemble those reported by Lynch (1997) and Kehrer et al. (2000), in which a third party was observing the performance of participants. Specifically, it was hypothesized that in the Tape-Recording Aware group the participants' performance on the memory subtests of the MAS would be poorer than that of the participants in the Non-Aware group, while it was hypothesized that no group differences would be found on the motor tests.

METHOD

Participants

After obtaining approval from the Human Subjects Institutional Review Board, 42 undergraduate students were recruited from introductory psychology classes. Participants were randomly assigned to one of two groups, either the Tape-Recording Aware group or the Non-Aware group. Participants' ages ranged from 18 to 45 years of age, $M = 20.03$, $SD = 4.58$. In addition, participants' class standing ranged from freshman to senior year, while their mean college education was 1.65 years, $SD = .98$. Two of the participants requested that their data not be used for the study; therefore, the total number of participants was 40 (22 men and 18 women) with 20 participants in each group. Independent sample t tests and chi-square tests did not reveal any demographic differences between the two groups with respect to age, gender, or class standing.

Material

Each participant was administered a brief battery of measures in the following order:

1. *List Learning* (LL; from the Memory Assessment Scales – MAS, Williams, 1991). Involves the verbal presentation of 12 common words, each belonging to one of the four categories: countries, birds, colors, or cities. The list is verbally presented to participants up to six times or until all 12 words are successfully recalled on a test trial. Each list presentation is followed by a test trial, or recall trial, during which participants attempt to recall as many list words as possible. The total score (List Acquisition Score, LAS) of the participants consists of the total number of words that were recalled successfully. LL represents an immediate memory measure and a measure of the ability to learn over consecutive presentations of the same material.
2. *List Recall* (LR; MAS, Williams, 1991). During the administration of this subtest the participants are required to recall the words that were presented in the LL subtest. In addition, the participants are asked to recall the words that belong to each category (countries, birds, colors, or cities), when the examiner prompts them to do so; this subsection is called Cued Recall (CR). The participants receive a List Recall Score (LRS) and a Cued Recall Score (CRS) on this subtest of the MAS. In a typical MAS administration, LL and LR are separated by the administration of another MAS subtest, which lasts about 5 min. In this study, the administration of LL and LR were also separated by an interval of 5 min. Hence, LR can be considered as a short-term memory measure. CR is a measure of the ability to cluster similar information into meaningful categories.
3. *Finger Tapping*. The Finger Tapping test from the Halstead–Reitan Neuropsychological Battery for Adults (HRNB-A) was administered and scored following the protocol outlined in Reitan and Wolfson (1993, p. 63).
4. *Grooved Pegboard* (as described in Lezak, 1995, p. 683). In this motor test the participants are asked to match the groove of pegs with the grooves of a pegboard and place the pegs into the holes of the pegboard as fast as possible. The pegboard consists of five rows and five columns of holes (for a total of 25 holes). The total time spent in placing the pegs into the pegboard and the total number of pegs dropped are the measures of performance on this test. For this study the Grooved Pegboard score consisted of a combination of the right and left hands' time to complete the task. The total number of pegs dropped was not used in the analyses of the data since only 4 of the participants dropped any pegs (each of them dropped only one or two pegs).
5. *Grip Strength*. This motor test from the HRNB-A was administered and scored following the protocol outlined in Reitan and Wolfson (1993, p. 56).
6. *Verbal Span* (VS; MAS, Williams, 1991). This test consists of two sections. In the first subsection, the participants are verbally presented with a series of single-digit integers that they subsequently attempt to recall in the correct order. In the second subsection, the participants are again verbally presented with series of single-digit integers that they have to recall in reverse order. The longest series recalled on both sections are added together for a composite score (Verbal Span Score, VSS). This is a measure of immediate recall, given that the recall of the digits comes immediately after their presentation.
7. *Delayed List Recall* (DLR; MAS, Williams, 1991). DLR administration is identical to the administration of the LR subtest, which includes the recall of the 12-word list and a cued recall. During a typical administration of the MAS, LR and DLR are separated by an interval of 15–20 min, during which other MAS subtests are administered. In this study, DLR and LR were separated by the administration of three motor tests and VS, whose administration also lasted about 15–20 min. Hence, DLR can be considered a long-term memory measure. A Delayed List Recall Score (DLRS) and a Delayed Cued Recall Score (DCRS) are obtained in DLR in the same fashion as LRS and CRS, respectively, in the LR subtest.

Procedure

All of the participants' answers were audio-taped in order to increase the reliability of the scoring of the memory tests. The experimenter placed an audio-recorder (audio-recording device's measures: 10 cm × 5 cm) in close proximity (about 45 cm away) to the participants of the Tape-Recording Aware group. In the Non-Aware group the audio-recorder was hidden under the assessment table. In both conditions, the audio-recording commenced after the participants signed a consent form. The Tape-Recording Aware participants were informed that the session was going to be audio-recorded, while the Non-Aware participants were not informed that their responses were being recorded.

Each participant was administered a total of seven tests and received a total of nine scores (LAS, LRS, CRS, Finger Tapping, Grooved Pegboard, Grip Strength, VSS, DLRS, and DCRS), which constituted the dependent variables of the study. The total testing was approximately 40–45 min.

At the end of the experiment, the participants in both groups were debriefed and asked whether they would allow the experimenter to use their audio-taped data. As mentioned above, only two participants, from the Non-Aware condition, requested that their data not be used in the study.

RESULTS

A one-way Multivariate Analysis of Variance (MANOVA) was conducted in order to determine the effects of the presence of an audio-recorder on the participants' neuropsychological test performance. The one-way MANOVA was significant, Wilks' $\Lambda = .588$, $F(9,30) = 2.34$, $p < .05$, $\eta^2 = .41$; the multivariate observed power was .82. Subsequently, a series of one-way Analyses of Variance (ANOVA) were conducted on the nine dependent variables. After applying the Bonferroni correction for control of Type I error for multiple pair-wise comparisons, each one-way ANOVA was tested at the .006 level (.05/9). These follow-up tests revealed that the Non-Aware group's scores were significantly higher than the Tape-Recording Aware group's scores on four of the six MAS scores earned: (a) List Acquisition Score (*LAS; MS* = 225.63, $F(1,38) = 9.66$, $p < .006$), (b) Cued Recall Score (*CRS; MS* = 15.62, $F(1,38) = 12.59$, $p < .006$), (c) Delayed List Recall Score (*DLRS; MS* = 9.03, $F(1,38) = 9.09$, $p < .006$), and (d) Delayed Cued Recall Score (*DCRS; MS* = 15.62, $F(1,38) = 12.03$, $p < .006$). The means and standard deviations of the two groups' performance on the MAS and motor measures are displayed in Table 1. No significant effects were observed for two MAS scores: Learning Recall Scores (LRS), and Verbal Span Score (VSS). As hypothesized the two groups did not significantly differ with respect to the three motor measures (i.e., Finger Tapping, Grooved Pegboard, and Grip Strength).

In order to assess which dependent variables were affected more noticeably by the presence of an audio-recorder an effect size was calculated for each dependent variable: η^2s of .01, .06, and .14 are generally regarded as small, medium, and large effect sizes, respectively. The effect sizes and corresponding observed powers for the dependent variables that were significantly affected by the presence of an audio-recorder are presented in Table 2. In summary, it appeared that both cued recall scores (i.e., CRS, DCRS) were the most affected by the participants' awareness of their responses being audio-recorded.

Table 1. Means and Standard Deviations of the Two Groups on the Nine Dependent Variables (in the Order they were Administered to the Participants).

Dependent variable	Non-Aware group		Tape-Recording Aware group	
	M	*SD*	*M*	*SD*
LAS	65.15	4.09	60.40	5.47
LRS	11.25	.97	10.70	.92
CRS	11.30	.98	10.05	1.23
Finger Tapping	93.52	12.22	91.09	13.50
Grooved Pegboard	137.98	15.90	146.19	20.69
Grip Strength	79.28	25.12	75.73	18.25
VSS	12.85	2.30	11.80	1.77
DLRS	11.55	.51	10.60	1.31
DCRS	11.60*	.75	10.35	1.42

Note. LAS = List Acquisition Score; LRS = List Recall Score; CRS = Cued Recall Score; VSS = Verbal Span Score; DLRS = Delayed List Recall Score; DCRS = Delayed Cued Recall Score.
*Denotes that the Non-Aware group's mean performance is significantly better than the Tape-Recording Aware group's mean performance at the .006 level.

Table 2. Effect Sizes and Observed Power for the Dependent Variables that were Significantly Affected by the presence of an Audio-Recorder.

Dependent variable	Effect size	Observed power
LAS	.20	.86
CRS	.25	.93
DLRS	.19	.84
DCRS	.24	.92

Note. LAS = Learning Acquisition Score; CRS = Cued Recall Score; DLRS = Delayed List Recall Score; DCRS = Delayed Cued Recall Score.

DISCUSSION

The present study investigated whether or not audio-recording in and of itself can influence examinees' performance during neuropsychological testing. The present study supported the aforementioned hypothesis demonstrating that audio-recording of an examinee's performance during neuropsychological testing is not a benign procedure. In fact, the current findings are in line

with those of previous reports on the presence of third party observers during neuropsychological testing (e.g., Binder & Johnson-Greene, 1995; Lynch, 1997). Specifically, having the knowledge that their performance was being tape-recorded adversely affected the test performance of examinees on four MAS subtests. As predicted from previous studies, there was no effect on the motor measures in either condition. Probably due to the fact that our sample was comprised of university students, the performance of all participants, of both groups, on the brief neuropsychological battery fell within the average range – the deviations from average were not significant. However, the significant differences between the two groups, that survived the stringent Bonferroni correction for control of Type 1 error, are almost certainly not spurious and the detrimental impact of audio-recording is clear. Of course in order to extend further the clinical significance and generalizability of the present findings, future studies of this sort should aim at sampling clinical populations with identified neuropsychological impairments.

Most neuropsychologists are likely to be faced with requests to permit and/or demands to allow the presence of a third party observer (e.g., an attorney, another clinical neuropsychologist, a paralegal, etc.) during formal neuropsychological testing. Authoritative figures in the area of clinical neuropsychology openly suggest that such requests ought to be handled with caution and refused, when possible, as an observer could be a threat to the validity of the obtained scores, test standardization, and ethical standards of test administration (McCaffrey, Fisher, Gold, & Lynch, 1996; McSweeny et al., 1998). In fact, as mentioned previously, the National Academy of Neuropsychology has issued a formal position statement that recommends against the presence of third parties during neuropsychological testing (Axelrod et al., 2000). According to the statement, third party observation during neuropsychological assessment may pose a threat to the validity and reliability of the data obtained from such sessions and "may compromise the valid use of normative data in interpreting test scores" (Axelrod et al., 2000). The NAN statement also points out that observer effects may materialize due to the physical presence of other individuals (e.g., an attorney, another neuropsychologist, lab technicians, etc.) or even the mere presence of electronic recording devices.

This study indicated that the *indirect presence* of an observer, through tape-recording, influenced the neuropsychological test performance of examinees. These findings are in accordance with the social facilitation theory, which suggests that the presence of observers (in the present study the *indirect presence*) affects performance (Guerin, 1986; McCaffrey et al., 1996). While McSweeny et al. (1998) recommended that an alternative to third party observation could be audio or audio-visual recording that could be reviewed later by a professional, the present findings indicate that such an alternative does not control for the confounding effects of tape-recording.

Attorneys sometimes argue that in order to gain both unobtrusiveness and access to assessment sessions clinical neuropsychologists should tape-record their assessment sessions without the examinee being aware of the recording. As mentioned above, in the present study, two participants from the Non-Aware group requested that their responses not be used in the study after they were debriefed at the end of the assessment. Although these two participants represent only about 5% of the total sample, clinicians should note that the negative feelings of some examinees about being audio taped without their approval are rather strong and may even be stronger in clinical settings.

The present study investigated only the impact of audio-recording; thus, the quantitative and qualitative impact of audiovisual recording on neuropsychological performance remains untested. The findings from the social facilitation literature regarding the effects of audiovisual recording have been inconsistent (e.g., Cohen, 1979; Lichton & Waehler, 1999). Clearly then, additional studies using neuropsychological tests are warranted; future investigations about the impact of electronic recording devices may want to expand to include a larger variety of memory and motor instruments and measures of other areas of functioning (e.g., attention, executive functioning, visuoperceptual functioning, etc.). Such expansion may also reveal measures, such as the motor measures in the present study, that

are not influenced by the presence of electronic devices, therefore potentially suggesting that (a) such measures are "resistant" to the adverse effects of electronic recording and (b) portions of neuropsychological testing can be recorded without problems. Furthermore, future expansions of the present study should sample clinical populations, such as individuals who sustained traumatic head injuries, strokes, or other neurological damage, so that the generalizability of the present findings gain more clinical significance.

In summary, neuropsychologists should be aware of the issues raised in the present study and strive to assist the legal community in understanding the impact that the myriad types of third party observers may have on the validity of an individual's neuropsychological test performance.

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Effects of a Third Party Observer During Neuropsychological Assessment: When the Observer Is a Video Camera

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ABSTRACT. Several studies have reported that the presence of a third party observer during neuropsychological assessment negatively affects the test performance of the examinee. A previous study (Constantinou, Ashendorf, & McCaffrey, 2002) demonstrated that the presence of an audio recorder as the third party observer during neuropsychological assessment also has a negative effect on the performance. The present study was designed to investigate whether or not a video recorder as the third party observer affects neuropsychological test performance. Results showed that the presence of a video recorder had a negative impact on memory test scores. This study confirms findings from the social facilitation literature that the presence of a video camera impacts task per-

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formance, and also replicates our earlier work with an audio recorder as third party observer.

KEYWORDS. Third party observer, video recorder, audio recorder, neuropsychological evaluation, standardized test administration

The physical presence of an observer in the testing room during neuropsychological assessments is an issue that should concern contemporary neuropsychologists. Neuropsychological evaluations that are conducted for legal purposes are often conducted in the presence of a third party. However, past literature revealed that an audience tends to have a negative or positive effect on the performance of motor and cognitive tasks (Guerin, 1986). Such audience effects have been attributed to the social psychology phenomenon of *social facilitation*, defined as "the tendency of an individual to exhibit enhanced performance on simple tasks and inhibited performance on complex tasks in the presence of passive or evaluative observers" (Constantinou, Ashendorf, & McCaffrey, 2002).

In an effort to provide an alternative to the physical presence of a third party observer in the examination room during the actual neuropsychological testing, McSweeny et al. (1998) proposed that the examination be recorded either by audio or video recordings. This compromise raises ethical concerns that are discussed by Duff and Fisher in this issue. In addition to any ethical concerns, there is some evidence in the social psychology literature that social facilitation effects occur when the individual believes that his/her performance is being videotaped for observation. The presence of a videocamera has been found to significantly improve performance on a visual vigilance task (Putz, 1975) and immediate paired associates recall (Geen, 1973) but impair performance on delayed paired associates recall (Geen, 1973). Landers, Bauer, and Feltz (1978) found the presence of a videocamera to have a detrimental impact on visuomotor task performance. Two other studies (Cohen, 1979; Henchy & Glass, 1968) have shown that individuals performing a task in the presence of a videocamera more frequently provided domi-

nant responses during the task than did those individuals performing alone.

In addition to the social facilitation literature, Constantinou, Ashendorf, and McCaffrey (2002) examined the effect of an audio recorder on examinees' performances during neuropsychological testing. While the test performance of all participants was audiotaped, they found that the participants who were aware that the testing was audiotaped performed significantly worse on memory testing than those who were not aware of the audiotaping. The present study sought to investigate whether or not McSweeney et al.'s other suggestion, that the neuropsychological examination be video recorded, would be a more viable method of addressing the effects of a third party observer.

METHOD

Participants

Sixty-five students were recruited from undergraduate psychology courses, after obtaining approval from the human subjects institutional review board. Participants were randomly assigned to one of two groups, either the visual recording group (VR) where testing took place in the presence of a video-recording device, or the no visual recording group (NVR) where testing occurred in the absence of this device.

Participants were administered the Beck Depression Inventory-II (BDI-II; Beck, Steer, & Brown, 1996) and the State Trait Anxiety Inventory (STAI; Spielberger, 1983) to screen for clinically significant anxiety or depressive symptomatology. Only one person was excluded from the statistical analyses due to a BDI-II score in the severe range. This reduced the total number of participants to 64 with the VR group having 31 members (14 men and 17 women) and the NVR group having 33 members (18 men and 15 women). Medical background information was also obtained by self-report from each participant. Five individuals reported a medical/surgical history (e.g., traumatic brain injury, brain cancer, brain surgery, or Lyme disease) or mental health problems (e.g., depression, mania, or anxiety). These participants were not excluded from the study.

The 64 participants' chronological ages ranged from 17 to 31 (M = 19.63, SD = 2.55); educational level ranged from 1 to 4 years of college (M = 1.64 years, SD = .90). The two groups did not differ statistically on

any of the demographic variables, level of depression, level of state/trait anxiety, or the proportion of those with a significant medical, surgical, or psychological history.

Material

Each participant was administered the following tests in the order presented:

1. *List Learning* (from the MAS; Williams, 1991) involves the oral presentation of 12 common words belonging to one of four categories. Each list presentation is followed by a trial during which the participant attempts to recall as many list words as possible. The word list is presented a maximum of six times, or until all 12 words are successfully recalled on a trial. The total List Acquisition score is the total number of words that were recalled successfully across all the learning trials. The total number of errors, such as related words, unrelated words, or repetitions, over all the administered acquisition trials were counted. In addition, for the purposes of this study, the *number of learning trials* (minimum = 1; maximum = 6) to reach a recall of all 12 words from the list was noted as a measure of learning speed/rate. Because the task has six possible learning trials, the maximum number of learning trials (6) was entered for the participants who had not recalled all 12 words on any trial.
2. *Prose Memory* (from the MAS; Williams, 1991). In this subtest, the participant is orally presented a short story and asked to recall as much of the story as possible after the presentation. In addition, the participants are asked to answer nine "yes-no" questions about the story. The total Prose Memory score consists of the number of correct answers to each of the questions.
3. *List Recall* (from the MAS; Williams, 1991). This is the recall of the 12-item word list immediately following presentation of the short story. A cued recall trial is also administered where the participant is asked to recall word list items belonging to specific categories. The participant receives a List Recall Score and a Cued Recall Score. In addition, the number of errors on both the List Recall and Cued Recall are counted.
4. *Finger Tapping*. The Finger Tapping test from the Halstead-Reitan Neuropsychological Battery for Adults (HRNB-A) was administered and scored following the protocol outlined by Reitan and Wolfson (1993). Since there were no statistical dif-

ferences between the performances with the left and right hands for any subject, the average performance for each hand was combined into a single composite score.

5. *Grooved Pegboard* (see Lezak, 1995). The total time to place all the pegs into the pegboard is the measure of performance on this motor test. The average performance for each hand was combined into a single composite score since there were no statistical differences between performances with the left and right hand for any subject.
6. *Grip Strength*. This motor test from the HRNB-A was administered and scored following the protocol outlined in Reitan and Wolfson (1993). As was the case for the other motor measures, there were no statistical differences between the right and left hands, and therefore, the average score for each hand was combined into a composite score.
7. *Verbal Span* (MAS, Williams, 1991). This test consists of digit span backward and forward. The longest series recalled on each section are added together for a composite Verbal Span score.
8. *Delayed List Recall* (MAS, Williams, 1991). Delayed List Recall administration is identical to that of the List Recall subtest, and follows it by an interval of about 20 minutes. A Delayed List Recall score and a Delayed Cued Recall score are obtained from this subtest. The total number of errors is noted in both Delayed List Recall and Delayed Cued Recall.
9. *Delayed Prose Memory* (MAS, Williams, 1991). This subtest of the MAS is administered about 20 minutes after the presentation of the Prose Memory short story. It is scored in the same manner as Prose Memory.
10. *Forced Recognition* (MAS, Williams, 1991). In this last subtest of the battery, each of the 12 words from List Learning is matched with a distractor word for a total of 12 word pairs. The participant is asked to recognize and circle the familiar word in each of the 12 pairs.

Procedure

Each testing session required approximately one hour. During the administration of the test measures to the VR group, who were informed that their performance was being recorded, the experimenter placed the video camera (measuring 30 cm $\times$ 15 cm $\times$ 5 cm) on a tripod approximately 1.0 meter away from and in the plain view of the participant.