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7 *Willy's Handyman, LLC*

Electronically Filed
Dec 14 2021 11:35 a.m.
Elizabeth A. Brown
Clerk of Supreme Court

8 IN THE SUPREME COURT OF THE STATE OF NEVADA

9
10 DAVID G. MARTINEZ and CHILLY
11 WILLY'S HANDYMAN SERVICES,
12 LLC

13 Petitioners,

14 EIGHTH JUDICIAL DISTRICT COURT
OF THE STATE OF NEVADA IN AND
15 FOR THE COUNTY OF CLARK; THE
HONORABLE RONALD J. ISRAEL,
16 DISTRICT JUDGE,

17 and

18 TAYLOR MILES CAPE, and individual,

19 Respondents.

Supreme Ct. Case No:

Dist. Ct. Case No.:

A-20-818569-C

**Appendix Volume III to Chilly
Willy's Handyman, LLC's Petition
for Writ of Mandamus or
Prohibition**

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DATED this 13th day of December, 2021.

DENNETT WINSPEAR, LLP

By /s/ Brent D. Quist
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*Attorneys for Defendant, Chilly Willy's
Handyman Services, LLC*

CERTIFICATE OF SERVICE

Per NRAP 21(a) and 25 (c), I certify that I am an employee of Dennett Winspear, LLP, and that on the 13th day of December, 2021, service of **Appendix to Volume III to Chilly Willy's Handyman, LLC's Petition for Writ of Mandamus or Prohibition** was served via electronic means by operation of the Court's electronic filing system to:

NAME	TEL., FAX & EMAILS	PARTY REPRESENTING
Ryan A. Loosvelt, Esq. Nevada Bar No. 8550 GGRM LAW FIRM 2770 S. Maryland Parkway Suite 100 Las Vegas, Nevada 89109	Telephone: (702) 384-1616 Facsimile: (702) 384-2990 Email: rloosvelt@ggrmlawfirm.com	Plaintiff Taylor Miles Cape
John T. Keating, Esq. Nevada Bar No. 6373 KEATING LAW GROUP 9130 W. Russell Road Suite 200 Las Vegas, Nevada 89148	Telephone: (702) 228-6800 Facsimile: (702) 228-0443 Email: jkeating@keatinglg.com	Defendant David G. Martinez
Aaron D. Ford, Esq. Nevada Bar No. 7704 NEVADA OFFICE OF ATTORNEY GENERAL 555 E. Washington Avenue #3900 Las Vegas, Nevada 89101	Telephone: (702) 486-3768 Facsimile: (702) 486-3420	
Honorable Judge Ronald J. Israel Department 28 REGIONAL JUSTICE CENTER 200 Lewis Avenue Las Vegas, Nevada 89155	Telephone: (702) 366-1407	

/s/ Zaira Baldovinos
An Employee of DENNETT WINSPEAR, LLP

1 o'clock.

2 MR. QUIST: And, Your Honor, I want to make sure,
3 I tried to take notes as fast as I could. With the
4 observer, the observer can be listening remotely or outside
5 the door listening. Is that right?

6 THE DISCOVERY COMMISSIONER: Correct.

7 MR. QUIST: Okay.

8 THE DISCOVERY COMMISSIONER: They cannot be in the
9 examination room, but they can be there for the purpose of
10 protecting the plaintiff from embarrassment, harassment,
11 etcetera.

12 MR. QUIST: Okay. Understood. Thank you.

13 THE DISCOVERY COMMISSIONER: Any other questions
14 or concerns?

15 MR. MARTIN: Your Honor, that applies to the
16 testing, too?

17 THE DISCOVERY COMMISSIONER: Correct.

18 MR. MARTIN: Okay.

19 THE DISCOVERY COMMISSIONER: And then, to be
20 clear, and I did not say this, I'm not allowing the video
21 recording.

22 MR. MARTIN: Okay.

23 THE DISCOVERY COMMISSIONER: I apologize for that.

24 MR. QUIST: I'm sorry. Was that -- you cut out,
25 Your Honor. Was that not allowing the video?

1 THE DISCOVERY COMMISSIONER: Correct. I am not
2 allowing the video recordation.

3 MR. MARTIN: That's even for the interview portion
4 that he's allowed that in the past?

5 THE DISCOVERY COMMISSIONER: Correct.

6 MR. MARTIN: Okay.

7 MR. QUIST: Is -- Your Honor, is audio recording
8 allowed for any of it?

9 THE DISCOVERY COMMISSIONER: Yes. It is. For all
10 of it --

11 MR. QUIST: Throughout the whole -- Your Honor,
12 all of it? Okay.

13 THE DISCOVERY COMMISSIONER: Have a good day,
14 gentlemen. Have a safe weekend.

15 MR. QUIST: Thank you, Your Honor.

16

17 PROCEEDING CONCLUDED AT 10:47 A.M.

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CERTIFICATION

I certify that the foregoing is a correct transcript from the audio-visual recording of the proceedings in the above-entitled matter.

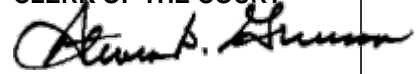
AFFIRMATION

I affirm that this transcript does not contain the social security or tax identification number of any person or entity.



KRISTEN LUNKWITZ
INDEPENDENT TRANSCRIBER

EXHIBIT “F”



DCRR

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**Attorneys for Defendant, CHILLY
WILLY'S HANDYMAN SERVICES, LLC**

DISTRICT COURT

CLARK COUNTY, NEVADA

TAYLOR MILES CAPE,

Plaintiff,

Case No: A-20-818569-C

Dept. No: 28

vs.

DAVID G. MARTINEZ, individually; CHILLY
WILLY'S HANDYMAN SERVICES, LLC, a
domestic limited-liability company; DOES I
through X; and ROE BUSINESS ENTITIES I
through X, inclusive,

Defendants.

**DISCOVERY COMMISSIONER'S
REPORT AND RECOMMENDATIONS**

Hearing Date: October 1, 2021

Hearing Time: 9:30 a.m.

Appearances: William T. Martin, Esq., GGRM Law Firm, for Plaintiff Taylor Miles Cape.

Brent D. Quist, Esq., Dennett Winspear, LLP, for Defendant Chilly Willy's

Handyman Services, LLC.

John T. Keating, Esq., Keating Law Group, for Defendant David G. Martinez.

I.

FINDINGS

On October 1, 2021, the Discovery Commissioner, Honorable Jay Young, heard Defendants, Chilly Willy's Handyman Services, LLC and David G. Martinez's Motion to Compel NRCP 35 Neuropsychological Exam with Dr. Lewis M. Etcoff, Noticed for October 19-20, 2021,

1 on an Order Shortening Time; and Plaintiff's Opposition, Counter-Motion for Fees, and to Stay
2 Enforcement. The Commissioner having reviewed the papers and pleadings on file, having
3 heard the oral argument of counsel, and being informed on the premises, finds as follows with
4 respect to Defendants' Motion:

5 Defendants seek a two-day Rule 35 mental examination of Plaintiff. Plaintiff does not
6 oppose the examination take place; rather, he opposes certain parameters of the examination.
7 Plaintiff requested the exam be recorded with an observer and that his expert and counsel be
8 provided the defense expert's raw test data/ test materials under protections. Plaintiff also
9 counter-moved for a stay pending objection to the district court if the protections were not
10 ordered and counter-moved for fees.

11 The COMMISSIONER HEREBY FINDS, under Rule 35, there is good cause to allow a
12 third-party observer of the Rule 35 neuropsychological exam and an audio recording of that full
13 examination.

14 THE COMMISSIONER FURTHER FINDS the good cause to allow a third-party observer
15 and audio recording of the Rule 35 neuropsychological exam is the Legislature passed NRS
16 52.380 and the governor signed it into law. The observer can be present outside the examination
17 room and can listen to the examination either by remote means or directly, with the door open.
18 The observer may not interrupt the examination, except to suspend the examination if any
19 irregularities occur as allowed under NRS 52.380(4).

20 THE COMMISSIONER FURTHER FINDS Plaintiff cannot videotape the examination.

21 THE COMMISSIONER FURTHER FINDS the exam can take place over a two-day
22 period.

23 THE COMMISSIONER FURTHER FINDS the raw test data/test questions and other
24 exam materials must be provided to plaintiff's expert, who may share that information with
25 plaintiff's attorney, in an attorney's eyes-only capacity for preparation of the case. The
26 information is otherwise protected in this matter. It cannot be filed in a public setting. It can be
27 shared between counsel.

28 ///

THE COMMISSIONER FURTHER FINDS, as to Plaintiff's counter-motion for fees, the Motion was substantially justified by the conflict between the NRCP 35 and NRS 52.380 and, therefore, the Commissioner is not granting Plaintiff's request for fees.

THE COMMISSIONER FURTHER FINDS, as to Plaintiff's request for a stay to allow an Objection, that good cause exists to grant that stay.

II.

RECOMMENDATIONS

The Discovery Commissioner, having considered the papers and pleadings on file, having entertained oral argument of counsel, and being informed in the present premises, hereby makes the following recommendations:

IT IS THEREFORE RECOMMENDED that Defendants' Motion be **GRANTED IN PART** and **DENIED IN PART**.

IT IS FURTHER RECOMMENDED the Court compel the NRCP 35 neuropsychological exam of Plaintiff.

IT IS FURTHER RECOMMENDED the exam may take place over a two-day period;

IT IS FURTHER RECOMMENDED that Plaintiff may audio record the exam in full and have a third-party observer present;

IT IS FURTHER RECOMMENDED the third-party observer can be present outside the examination room and can listen to the examination either by remote means or directly, with the door open, but the observer cannot interrupt the examination, except to suspend the examination if any irregularities occur, as allowed by NRS 52.380(4);

IT IS FURTHER RECOMMENDED Plaintiff cannot videotape the examination;

IT IS FURTHER RECOMMENDED the raw test data/test questions and other exam materials must be provided to plaintiff's expert, who may share that information with plaintiff's attorney, in an attorney's eyes-only capacity for preparation of the case. The information is otherwise protected in this matter. It cannot be filed in a public setting. It can be shared between counsel.

///

IT IS FURTHER RECOMMENDED that Plaintiff's counter-motion for fees be **DENIED**;
and

IT IS FURTHER RECOMMENDED that Plaintiff's request for a stay to allow an Objection
be **GRANTED**.

DATED this 15th day of October, 2021.


DISCOVERY COMMISSIONER

Approved as to form and content by:

Respectfully submitted by:

GGRM LAW FIRM

DENNETT WINSPEAR, LLP

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Attorneys for Defendant,
Chilly Willy's Handyman Services, LLC

Respectfully submitted by:

KEATING LAW GROUP

By /s/ John T. Keating
JOHN T. KEATING, Esq.
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9130 W. Russell Road, Suite 200
Las Vegas, Nevada 89148
Telephone: (702) 228-6800
Facsimile: (702) 228-0443
Attorneys for Defendant
David G. Martinez

NOTICE

Pursuant to NRCP 16.3(c)(2), you are hereby notified that within fourteen (14) 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 November 1, **2021.**

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

 Mailed to Plaintiff/Defendant at the following address on the day of , 2021.

☒ Electronically filed and served counsel on October 18, 2021, pursuant to N.E.F.C.R. Rule 9.

By: Natilie Simonetti
COMMISSIONER DESIGNEE

EXHIBIT “G”

DECLARATION OF LEWIS M. ETCOFF, PHD

I, LEWIS M. ETCOFF, hereby declare in accordance with NRS 53.045:

1. I am a Nevada board-certified neuropsychologist with nearly 40-years of clinical experience. **Attachment 1**, Lewis M. Etcoff, PhD, Curriculum Vitae.

2. The statements made herein are based upon my personal knowledge unless expressly stated herein upon information and belief.

3. I have been retained by Defendants in the matter of *Taylor Miles Cape v. Martinez, et al*, Case No. A-20-818569-C, to perform a NRCP 35 neuropsychological examination of Mr. Cape.

4. Upon information and belief, it is my understanding the Discovery Commissioner has recommended the Court compel Mr. Cape to attend a Rule 35 neuropsychological examination with me, which examination will be conditioned upon (a) the presence of a third-party observer outside the examination room but with the door open so that the third-party observer will be privy to the whole of the examination, (b) that the full examination may be audio recorded, and (c) that I produce by test data and test materials to Dr. Sunshine Collins, Mr. Cape's neuropsychologist, who may then produce the test data/materials to Mr. Cape and his attorneys.

5. I am professionally and ethically not permitted to conduct the Rule 35 neuropsychological examination under the foregoing conditions.

6. Upon information and belief, the Nevada Supreme Court is currently considering the issue of whether to allow third-party observers and audio recording in the setting of a Rule 35 neuropsychological exam in *Moats v. Eighth Judicial District Court (Burgess)*, Supreme Court No. 347683.

7. On December 11, 2020 the Executive Board of the Nevada Psychological association submitted to the Nevada Supreme Court a 2017 Amici Curiae brief previously submitted to the Michigan Court of Appeals regarding the professional and ethical problems caused by third-party observers and audio recording in Rule 35 neuropsychological exams. **Attachment 2**, Nevada Psychological Association letter to Nevada Supreme Court, dated

December 11, 2020.

8. As shown in that Amici Curiae brief, multiple professional neuropsychological associations argue against allowing third-party observers and audio recording of Rule 35 neuropsychological exams due to "(1) the implications for test performance and the validity of test results, (2) ethical considerations, and (3) test security." **Attachment 3**, Amici Curiae Brief submitted by The American Academy of Clinical Neuropsychology, the National Academy of Neuropsychology, The Society for Clinical Neuropsychology of the American Psychological Association, The American Board of Professional Neuropsychology, and The Michigan Psychological Association, at 5.

THIRD-PARTY OBSERVER/AUDIO RECORDING EFFECT ON TEST VALIDITY

9. These organizations recognize that, to be valid, neuropsychological tests must be administered under conditions that closely replicate the standardized conditions under which they were developed. Standardized conditions do not include the presence of a third-party observer or audio recording. **Attachment 3**, at 8-9. Third-party observers and audio recording distract and disrupt the examinee, may influence how the examinee responds, and have overall significant negative effects on neuropsychological test performance. *Id.* at 9-10.

10. A recent, 2021, article published in the Archives of Clinical Neuropsychology similarly notes the presence of third-party observers and audio recording in a Rule 35 neuropsychological setting creates test reliability and validity concerns due to "observer effects", such as distraction of attention of an examinee, which departs from standardized administration procedures. **Attachment 4**, Update on Third Party Observers in Neuropsychological Evaluation: An Interorganizational Position Paper, Archives of Clinical Neuropsychology (2021), at 1-3.

11. The Nevada State Board of Psychological Examiners also opposes third-party observers/audio recording in neuropsychological Rule 35 exams because "[o]bservation, 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." The presence of a third-party observer or audio recording may also prevent the examinee from disclosing crucial information essential to

1 diagnosis. **Attachment 5**, State of Nevada Board of Psychological Examiners letter to Clerk of
2 the Nevada Supreme Court, dated October 1, 2018.

3 12. In my experience, there is a risk that if a third-party observer is present in or near
4 the examinee/examination, coaching of the examinee may occur. Such coaching would interfere
5 with the test result validity.

6 **ETHICAL RULES PROHIBIT THIRD-PARTY OBSERVERS/AUDIO RECORDING**

7 13. As a Nevada licensed neuropsychologist, I am professionally bound by the *Ethical*
8 *Principals of Psychologists and Code of Conduct* adopted by the American Psychological
9 Association ("APA"). See NAC 641.250(1) (adopting by reference the "most recent edition of the
10 *Ethical Principles of Psychologists and Code of Conduct* adopted by the American Psychological
11 Association." **Attachment 6**, NAC 641.250.

12 14. According to APA ethical principles, psychologists should adhere to standardized
13 procedures and utilize test materials in an appropriate manner based upon current research.
14 **Attachment 7**, APA Ethical Principles of Psychologists and Conde of Conduct, effective January
15 1, 2017, at Standard 9.2; **Attachment 3**, at 13.

16 15. Test administration should carefully follow standard procedures determined by the
17 test publishers. The environment should minimize distractions as much as possible. **Attachment**
18 **3**, at 13-14.

19 16. Psychologists must make reasonable efforts to maintain the integrity and security
20 of test materials and other assessment techniques. **Attachment 7**, at Standard 9.11;
21 **Attachment 3**, at 14.

22 17. Psychologists must not promote the use of psychological assessment techniques
23 by unqualified persons. Third-party observers in a litigation setting are unqualified persons and
24 thus should not be involved in the assessment. **Attachment 7**, at Standard 9.07; **Attachment 3**,
25 at 14.

26 18. A psychologist must protect against misuse and misrepresentation of their work.
27 **Attachment 7**, at Standard 1.01. A third-party observer is not trained as a neuropsychologist
28 and may misrepresent the examinee's performance. Attorneys have neither the education,

training or experience to be a neuropsychological assessment expert. **Attachment 3**, at 14-15.

19. Psychologists must take reasonable steps to avoid harming examinees. **Attachment 7**, at Standard 3.04. The examinee, and the field of psychology more generally, is harmed when third-party observers are permitted during neuropsychological exams because their presence diminishes the quality of the evaluation. **Attachment 3**, at 15.

THIRD-PARTY OBSERVERS/AUDIO RECORDINGS HARM TEST SECURITY

20. "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 an examination. Psychologist must not release test data to "protect . . . misrepresentation of the data or the test[.]" **Attachment 7**, at Standard 9.04. **Attachment 3**, at 17.

21. "Test materials" refers to manuals, instruments, protocols, and test questions and stimuli. Psychologists must make reasonable efforts to maintain the integrity and security of test materials and other assessment techniques. **Attachment 7**, at Standard 9.11. **Attachment 3**, at 17.

22. Third-party observation directly provides to unlicensed third-parties confidential test questions and information about test stimuli and procedures that substantially compromise test security. **Attachment 3**, at 17. Public or lay person knowledge of the test materials runs the risk for coaching of individuals in the future, that may result in inflated test scores so individuals appear to have intact cognitive abilities when they do not. *Id.* at 17-18.

23. For these reasons, the test data and materials may not be divulged to non-psychologists, such as a personal injury plaintiff or their counsel. However, I am amenable to sharing any test data/materials directly with Mr. Cape's neuropsychologist, Dr. Sunshine Collins. However, ethically it may not be shared with Mr. Cape or his counsel.

CONSEQUENCES OF VIOLATING ETHICAL DUTIES

24. In my nearly forty-years of professional practice I have not violated my ethical duties. I hold myself up to a high ethical standard.

25. If I were to violate my professional and ethical responsibilities there is a risk that I

1 could place my psychology license in jeopardy.

2 26. If I were to violate my professional and ethical responsibilities, there is also a
3 likelihood counsel for Mr. Cape would attempt to impeach my credibility at trial.

4 **A REASONABLE COMPROMISE SHOULD BE ADOPTED BY THE COURT**

5 27. I believe the same reasonable compromise adopted by Discovery Commissioner
6 Erin Truman, in *Paul v. Vegas MF Acquisition Partners, LLC*, Case No. A-20-819012-C, should
7 be adopted by the Court, regarding these issues.

8 28. Commissioner Truman recently ordered that the plaintiff was to submit to me for a
9 Rule 35 neuropsychological exam, with condition that the interview portion of the exam could be
10 audio recorded by a licensed nurse; however, "due to ethical, legal, and professional obligations
11 and rules, the testing itself cannot be recorded." **Attachment 8**, Stipulation and Order, at 2, ¶8.
12 Additionally, Commissioner Truman held that instead of requiring me to produce testing data and
13 materials directly to the plaintiff and his attorneys, the plaintiff can serve on me a subpoena or
14 can serve on defense counsel a request for production of documents, which procedures will
15 allow me an opportunity (or the defendant) to object to the same. **Attachment 8**, at 3, ¶18.

16 29. Here, I am willing to share the raw test data/test materials with Mr. Cape's
17 psychologist, Dr. Sunshine Collins; however, that test data/materials should not be shared
18 directly with Mr. Cape or his attorneys. Or, Mr. Cape should be required to subpoena the test
19 data/materials or serve a request for production so I can protect my rights as afforded by the
20 Nevada Rules of Civil Procedure.

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

22
23 Dated: October 14, 2021

24 
25 DR. LEWIS M. ETCOFF, PHD
26
27
28

EXHIBIT “G.1”

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

*Nevada Licensed Psychologist No. 129
Diplomate, American Board of Professional Neuropsychology #257
Fellow, National Academy of Neuropsychology
Fellow, The American College of professional Neuropsychology*

CURRICULUM VITAE 2021

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Las Vegas, Nevada 89123
PHONE: (702) 876-1977
FACSIMILE: (702) 876-0238
DATE OF BIRTH: October 17, 1951

EDUCATION

1978 - 1983 Doctor of Philosophy in Clinical Psychology
University of Toledo, Toledo, Ohio (APA-approved)

1982 - 1983 Doctoral Internship in Clinical Psychology
Wright-Patterson Air Force Base Medical Center, Ohio (APA-approved)

1977 - 1978 Undergraduate Psychology Courses
University of Toledo, Toledo, Ohio

1973 - 1975 Master of Arts in Contemporary Jewish Studies
Lown School of Jewish Communal Service and
Florence Heller School for the Advanced Studies of Social Welfare
Brandeis University, Waltham, Massachusetts

1969 - 1973 Bachelor of Arts in Political Science, *cum laude*
Brandeis University, Waltham, Massachusetts

PROFESSIONAL EXPERIENCE

2008 – 2020 Lay Member, Las Vegas Panel C, Fee Dispute Arbitration Committee, State Bar of Nevada

2008 – 2017 Adjunct Professor of Neuropsychology, Touro University Nevada, College of Osteopathic
Medicine, Henderson, Nevada

2008 – 2011 Supervising Neuropsychologist and Part-Time Professor of Neuropsychology, Center for
Autism and Developmental Disabilities, Touro University Nevada, College of Osteopathic
Medicine, Henderson, Nevada

2004 – 2008 Reviewer, *Journal of Applied Neuropsychology*

2002 – 2014 Adjunct Assistant Professor of Clinical Psychology, University of Nevada, Las Vegas

2001 - 2014 Doctoral Psychology Practicum Site Supervisor, University of Nevada, Las Vegas

1999 - 2008 Professional Advisory Council, American Board of Disability Analysts

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2021 CURRICULUM VITAE
PAGE 2

1995 - 1999 Reviewer, *Archives of Clinical Neuropsychology*

1995 - 2008 Committee Member, Advisor to Expert Panel, Admissions Department, State Bar of Nevada

1993 - 2008 Clinical Assistant Professor, Department of Family and Community Medicine, University of Nevada School of Medicine

1992 - 1998 State of Nevada Oral Licensing Test Examiner and Oral Licensing Test Developer for the Nevada State Board of Psychological Examiners

1992 - 2019 Examiner of Diplomate Applicant Work Product, American Board of Professional Neuropsychology

1992 - 1995 Consulting Neuropsychologist, Nevada Appellate and Postconviction Project

1988 - 1997 Consulting Clinical Psychologist, Eighth Judicial District Family Court and Child Custody Division

1985 – present Private Practice, Lewis M. Etkoff, Ph.D. & Associates

1983 - 1985 Clinical Psychologist, United States Air Force Hospital, Nellis Air Force Base, Nevada

1983 - 1985 Chief of Neuropsychodiagnostics, USAF Hospital Nellis (TAC), Nellis AFB, Las Vegas, Nevada

PROFESSIONAL CREDENTIALS

2006 Fellow, National Academy of Neuropsychology

2002 Added Credentials in Forensic Neuropsychology, American Board of Professional Neuropsychology

1995 Fellow, American College of Professional Neuropsychology

1992 Diplomate, American Board of Professional Neuropsychology

PROFESSIONAL MEMBERSHIPS

American Psychological Association

- Division 40 (Neuropsychology)
- Division 41 (American Psychology-Law Society)

National Academy of Neuropsychology

American Academy of Clinical Neuropsychology

National Register of Health Service Providers in Psychology #33910

Nevada State Psychological Association

Associate Member, Clark County Bar Association

PROFESSIONAL LEADERSHIP POSITIONS

2011-2012	Member, Continuing Education Committee, Nevada Psychological Association
2011-2012	Membership Committee Chair, Nevada Psychological Association
2004 - 2005	Secretary, Board of Directors, Nevada State Psychological Association
2000 - 2004	Co-Chair, Membership / Continuing Education Committee, Nevada State Psychological Association
1996 - 1997	President, Nevada State Psychological Association
1995 - 1996	President-Elect, Nevada State Psychological Association
1995 - 1997	Board of Directors, Nevada State Psychological Association
10/21/95	Chairperson, Nevada State Psychological Association Strategic Planning Session
1994	Co-Chair, Nevada State Psychological Association Federal Advocacy
1993 - 1994	Chairman, Nevada State Psychological Association 1994 Annual State Conference
1992 - 1993	Chairman, Public Education Committee, Nevada State Psychological Association

PUBLIC SERVICE RECOGNITION

2020	2020 James Mikawa Award On behalf of the Regional and State Boards of NPA, and in recognition of your outstanding Contribution to psychology. We specifically want to recognize your efforts with children and their families; educating, training and providing opportunities to legions of predoctoral, postdoctoral, and early career psychologists; and your work educating attorneys and judges in order to bring clinical wisdom and compassion to our system of justice. James Mikawa gave the art and science of psychology away to as many individuals, families, organizations, and institution as possible. We feel that you not only embrace Dr. Mikawa's values and legacy, you have also embodied them over the course of a long and successful career.
1996	Outstanding Contributor to the Nevada State Psychological Association
1993 - 1994	American Academy of Family Physicians
1991	National Association of School Psychologists

PUBLICATIONS

Parke EM, Thaler NS, **Etcoff LM**, Allen DN 2020. Intellectual profiles in children with attention deficit hyperactivity disorder and comorbid learning and motor disorders. *Journal of Attention Disorders*, 24(9), doi: 10.1177/1087054715576343.

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Nunez A, San Miguel LE, Barchard KA, **Etcoff L**, Allen DN (Submitted 10/1/18). Wechsler Intelligence Scale for Children-Fourth Edition (WISC-IV) Short Form Accuracy in Children with Attention-Deficit/Hyperactivity Disorder (ADHD): Does Primary Language Matter? *Psychological Assessment*.

Graves SJ, Freeman AJ, Paul MG, **Etcoff L**, Allen DN, (Submitted 7/13/18). Improving accuracy of ADHD-inattentive diagnoses with symptom rating scales. *Psychological Assessment*.

Mayfield A, Parke EM, Barchard KA, Thaler NS, **Etcoff, L**, Allen DN (2018). Equivalence of Mother and Father Ratings of ADHD in Children. *Child Neuropsychology*, 24(2), 166-183. doi: 10.1080/09297049.2016 .[1236186](https://doi.org/10.1080/09297049.2016.1236186).

Parke EM, Mayfield A, Barchard KA, Thaler NS, **Etcoff LM**, Allen DN (2015). Factor structure of symptom dimensions in ADHD. *Psychological Assessment*, 27(4), 1427-1437. doi: 10.1037/pas0000121

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- Neuropsychology*, 31(6), 598. Presented at the 36th Annual Conference of the National Academy of Neuropsychology, October 19-22, Seattle, WA.
- 2015 Mayfield AR, Ciobanu C, **Etcoff L**, Allen DN (2015). *Utility of WISC-IV Short Forms in Attention-Deficit/Hyperactivity Disorder (ADHD)*. *Archives of Clinical Neuropsychology*, 30(6), 533. Presented at the 35th annual meeting of the National Academy of Neuropsychology Conference, Austin, TX., USA.
- 2013 Parke EM, Hart JS, Baldock D, Barchard KA, **Etcoff LM**, Allen DN (2013). *Intelligence and achievement predictors of Attention Deficit Hyperactivity Disorder and Learning Disorders*. *Archives of Clinical Neuropsychology*, 28(6), 518. Presented at the 33rd Annual Conference National Academy of Neuropsychology, November 7-10, San Diego, CA.
- 2012 Parke E, Thaler NS, **Etcoff LM**, Allen DN (2012). *Neurocognitive differences among learning disabilities*. *Archives of Clinical Neuropsychology*, 27(6), 590. Presented at the 32nd National Academy of Neuropsychology, Memphis, TN.
- 2012 Hart JS, Cox JL, Woolery H, Safko E, Thaler NS, **Etcoff LM**, Allen DN (2012). *WISC-IV profiles in children with learning disabilities*. Western Psychological Association 91st Annual Convention, April 26-29, San Francisco, CA.
- 2012 Farcello, C. A., Boucher, J., Wood, N., Thaler, N S., **Etcoff, L. M.**, & Allen, D. N. (April 2012). *The relationship between processing and symptomatology in ADHD*. Poster presented at the 92nd Annual Convention of the Western Psychological Association, San Francisco, CA.
- 2012 Umuhuza, D., Baldock, D. Hart, J. L., Thaler, N. S., & **Etcoff, L. M.** (April 2012). *Parental differences in symptom rating scales in children with ADHD*. Poster presented at the 92nd Annual Convention of the Western Psychological Association, San Francisco, CA.
- 2012 Hart, J. S., Cox, J. L., Woolery, H., Safko, E., Thaler, N. S., **Etcoff, L. M.** & Allen, D. N. (April 26, 2012). *WISC-IV profiles in children with learning disabilities*. Poster presented at the Western Psychological Association Convention, San Francisco, CA.
- 2011 Farcello, C., Boucher, J., Wood, N., Thaler, N. S., **Etcoff, L. M.** & Allen, D. N. *The relationship between processing speed and ADHD*.
- 2011 Thaler, N. S., Bello, D. T., Woolery, H., & **Etcoff, L. M.** (November 2011). *WISC-IV cluster subtypes predict diagnoses, symptom ratings, and outcome in children with ADHD*. Poster presented at the 31st National Academy of Neuropsychology, Marco Island, FL.
- 2011 Thaler, N. S., Allen, D. N., Bello, D. T., & **Etcoff, L. M.** (November 2011). *Confirmatory factor analysis of the WISC-IV in children with ADHD*. Poster presented at the 31st National Academy of Neuropsychology, Marco Island, FL.
- 2011 Umuhuza, D., Baldock, D., Hart, J. S., Cox, J. L., Thaler, N. S., & **Etcoff, L. M.** (November 2011). *Confirmatory factor analysis of the WISC-IV in children with ADHD*. Poster presented at the 31st National Academy of Neuropsychology, Marco Island, FL.

PROFESSIONAL PRESENTATIONS SINCE 2010

- 01/26/21 **How Retaining a Forensic Neuropsychologist can Assist Attorneys Defending Mild Traumatic Brain Injury Cases**
Presentation to Winner, Sherrod Law (approved by Nevada State Bar, 1CLE).

2021 CURRICULUM VITAE
PAGE 6

- 09/19/16 **Neuropsychological Test used in Forensic Neuropsychology**
Presentation to Federal Public Defender's (approved by Nevada State Bar)
Las Vegas, Nevada
- 03/10/16 **Destigmatizing Learning Disabilities**
Presentation to the Alexander Dawson School, Las Vegas, Nevada
- 02/14/16 **How to Assist Teachers to Help Students with Anxiety**
Presentation to the Las Vegas Day School, Las Vegas, Nevada
- 08/23/13 **Understanding Children with Special Needs**
Presentation to the Solomon Schechter Day School of Las Vegas, Las Vegas, Nevada
- 10/01/12 **Psychology Careers**
Presentation to University of Nevada Las Vegas Psi Chi Honor Society, Las Vegas, Nevada
- 07/31/12 **How to Match Your Child to a School**
Presentation to the Solomon Schechter Day School of Las Vegas, Las Vegas, Nevada
- 07/08/11 **Forensic Neuropsychology: A Case Study:**
Presentation to Physicians Assistants at Touro University Nevada, College of Osteopathic
Medicine, Henderson, Nevada
- 06/18/11 **Working as a Team in Torts of Emotional Distress or Brain Injury: Attorney, Paralegal and
Forensic Psychologist:**
Presentation to the Nevada Paralegal Association in conjunction with the Legal Assistant Division
of the State Bar of Nevada, Las Vegas, Nevada
- 01/21/11 **Attention-Deficit/Hyperactivity, Learning Disorders & Psychological Tests:**
Presentation to 2nd Year Medical Students at Touro University School of Osteopathic Medicine,
Henderson, Nevada
- 10/01/10 **Attention Deficit Hyperactivity Disorder: Signs and Symptoms, Classroom Tips, Suggestions
for Working with Parents from Preschool – 8th Grade:**
Presentation to Las Vegas Day School, Las Vegas, Nevada
- 08/25/10 **Forensic Neuropsychology: A Case Study:**
Presentation to Physicians Assistants at Touro University Nevada, College of Osteopathic
Medicine, Henderson, Nevada
- 08/18/10 **Course Director, Typical vs. Atypical Development: When to Seek Out an Evaluation for
Your Child:**
Presentation to The Meadows School, Las Vegas, Nevada
- 05/07/10 **Clinical Vignettes:**
Presentation to 2nd Year Medical Students in Behavioral Medicine / Psychiatry Course at
Touro University Nevada, College of Osteopathic Medicine, Henderson, Nevada
- 04/16/10 **Brain-Behavior Relationships:**
Presentation to 2nd Year Medical Students in Behavioral Medicine / Psychiatry Course at
Touro University Nevada, College of Osteopathic Medicine, Henderson, Nevada

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- 03/18/10 **Somatoform and Factitious Disorders:**
Presentation to 2nd Year Medical Students in Behavioral Medicine / Psychiatry Course at
Touro University Nevada, College of Osteopathic Medicine, Henderson, Nevada
- 02/09/10 **Neuropsychological Assessments in Disability Cases:**
Presentation to State Farm Health Insurance Case Managers, Bally's Hotel, Las Vegas, Nevada
- 01/28/10 **Attention Deficit Hyperactivity Disorder:**
Presentation as a Panelist to the general community, sponsored by Lexis Preparatory School,
Las Vegas, Nevada

CONTINUING EDUCATION WORKSHOPS AND CONFERENCES SINCE 2009

- 11/16/20 **NPA Legislative Retreat (2 hours CE)**
Presented by Bryan Gresh, Nevada Psychological Association
- 11/13/20 **Ethics and Risk Management in Complex Clinical Conundrums (6 hours CE)**
Presented by Daniel Taube, J.D., Ph.D. American Psychological Association
- 05/29/20 **Clinical Approaches to Suicidality: Collaborating with Patients to Make Life Liveable (6 hours CE)**
Presented by Noelle Lefforge, Ph.D, and Amelia Black, Ph.D. Nevada Psychological Association
- 05/23/20 **Effective Leadership Training (3.0 hours CE)**
Presented by Sara Hunt, Ph.D., Nevada Psychological Association
- 11/13-16/19 National Academy of Neuropsychology (4.5 hours CE). Including:
 - **Supervision and Ethics during Neuropsychological Training and Beyond: A Competency Based Approach** (Daniel Gizzo, Ph.D.)
 - **Serving as a Neuropsychological Expert: Some Things to Know** (Daniel Marson, Ph.D., JD)
 - **The Teen Brain** (Jay N. Giedd, MD)
 - **Unilateral Neglect** (Kenneth M. Heilman, MD)
 - **Hot Topics in Traumatic Brain Injury** (Kristen Dams-O'Connor, Ph.D.)
 - **How your Microbiome Speaks to your Brain, and What it is Saying** (Rob Knight, Ph.D.)
 - **Contemporary Ethical Considerations in Forensic Neuropsychology: Practical Perspectives from a Neuropsychologist and a Lawyer** (Scott D. Bender, Ph.D.)
 - **Paper Session TBI:** (Wsley Cole, Ph.D.)
- 08/17/19 **Nevada Laws 2019: Opioids, Pain and Beyond (3 hours CE)**
Touro University College of Osteopathic Medicine
- 07/17/19 **Remaining Current in Your Forensic Practice: MMPI-2-RF (1.5 hours CE)**
Presented by Martin Sellbom, Ph.D., Live Webinar, Pearson Clinical Assessments
- 07/16/19 **Use of the MMPI-2-RF in the Evaluation of Spine Surgery and Spinal Cord Stimulator Candidates (1 hour CE)**
Live Webinar, Pearson Clinical Assessments

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- 01/25/19 **Personal Injury Evaluations: Law and Psychological Practice (7 hours CE)**
Presented by Craig R. Lareau, Ph.D., ABFP, American Academy of Forensic Psychology, Las Vegas, Nevada
- 09/29/18 **Evidence-Based Suicide Intervention (2.0 hours CE)**
Presented by Noelle L. Lefforge, Ph.D., MHA, CGP, University Nevada Las Vegas, The Practice
- 05/04/18 **Ethics and Risk Management in the Digital World 2.0 (6.0 Ethics CE)**
Presented by Daniel O. Taube, J.D., Ph.D. Nevada Psychological Association
- 04/04/18 **(On Demand) Subpoenas and Deposition Testimony: An Overview for Practitioners (1.5 hours CE)**
Presented by Daniel O. Taube, J.D., Ph.D., The Trust
- 11/04/17 **Assessing Reports of Trauma in Forensic Contexts (7.0 hours CE)**
Presented by Christina A. Pietz, Ph.D., ABPP, American Academy of Forensic Psychology, Las Vegas, Nevada
- 10/25-28/17 National Academy of Neuropsychology (16 hours CE) Including:
- **Mild Traumatic Brain Injury: Outcome, Postconcussion Syndrome, and Forensic Assessment** (Glenn J. Larrabee, Ph.D.)
 - **Forensic Methods: Causation Analysis, Work Ability Evaluation, and Impairment Rating (for Cognitive Impairment, Mental Disorders, and Chronic Pain) as Published in the American Medical Association's Guides Library** (Robert Barth, Ph.D.)
 - **Diverse Brains** (Morton Ann Gernsbacher, Ph.D.)
 - **Neuropsychology of Cognitive Aging and Dementia: Advances in Clinical Diagnosis and Treatment** (Kathleen A. Welsh-Bohmer, Ph.D., Joseph and Kathleen Bryan Alzheimer's Disease Research Center/Duke University)
 - **Practical Update on Ethics in Clinical and Forensic Neuropsychology** (Christopher Grote, Ph.D.)
 - **Integrating into the Future Role of Neuropsychology: What will Practice Be Like in 5 + Years?** (John E. Meyers, Psy.D.)
 - **Challenges Associated with TBI Research and Clinical Practice in the DoD and VA: Diagnostics, Pathology, and Ethics** (Patrick Armistead-Jehle, Ph.D., Wesley R. Cole, Ph.D., Robert D. Shura, Psy.D.)
 - **Clearing the Smoke : Assessing the Impace of Marijuana Use on Cognition and Related Variables** (Staci A. Gruber, Ph.D.)
- 07/20/17 **Sluggish Cognitive Tempo: A Dinemsional Approach to Attention in Children (1.5 hours CE)**
Presented by Lisa A. Jacobson, Ph.D., NCSP, National Academy of Neuropsychology
- 10/21/16 **Why People Die by Suicide (6.0 hours CE)**
Presented by Thomas Joiner, Ph.D., Nevada Psychological Association, Las Vegas, Nevada
- 09/17/16 **APA Saga of Torture Interrogation- Lessons for Psychological Ethics in Institutional Settings (6.0 hours CE)**
Presented by Jean Maria Arrigo, Ph.D. and David Debatto, M.A, SSG
- 09/16/16 **Spine IME, Clark County Bar Association (2.0 hours CLE)**
Presented by David Oliveri, M.D., Thomas E. Winner, Esq., Lawrence J. Smith, Esq.

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- 04/22/16 **Advanced Legal Practice Issues: Depositions and Testimony for Experts (1.5 hours CE)**
Presented by Bonny J. Forrest, J.D., Ph.D., Webinar, National Academy of Neuropsychology
- 04/15-17/16 **Annual Conference of the American Academy of Pediatric Neuropsychology:
Advances in the Clinical Practice of Pediatric Neuropsychology: Assessment,
Management & Intervention (3 APA-CE hours)**
Division of Continuing Studies Training Outreach, Indiana University - Purdue University
Fort Wayne, Las Vegas, Nevada
- 04/15/16 **Clinical and Forensic Assessment of Medically Unexplained Symptoms (1.5 hours CE)**
Presented by Laurence M. Binder, Ph.D., Webinar, National Academy of Neuropsychology
- 02/19/16 **Nevada Legal and Ethical Issues for Mental Health Clinicians (6.25 hours CE)**
Presented by Susan Lewis, Ph.D., J.D., Live Webcast, PESI, Inc.
- 01/21/16 **Understanding Autism Spectrum Disorder and the Neurodevelopmental Disorders in
the DSM-5 (3.0 hours CE)**
Presented by Greg Neimeyer, Ph.D., Live Webcast, American Psychological Association
- 08/18/15 **Overview of the Millon Clinical Multiaxial Inventory – IV (MCMI-IV) (1 hour webinar)**
Presented by Amy Dilworth Gabel, Ph.D., NCSP, Pearson Education Inc.
- 05/08/15 **The Current Procedural Terminology (CPT) System as a Model for
Professional Psychological Services (6.0 hours CE)**
Presented by Antonio E. Puente, Ph.D., Nevada Psychological Association (NPA) –
Las Vegas, Nevada.
- 12/16/14 **Unleashing the Power of the WISC-V (1 hour online webinar)**
Presented by Amy Dilworth Gabel, Ph.D., Pearson Education Inc.
- 11/22/14 **Hot Topics in Ethics & Risk Management in Psychological Practice (6.0 hours CE)**
Presented by Eric Harris, Ed.D., J.D., Nevada Psychological Association (NPA) –
Henderson, Nevada.
- 08/15/14 **Developing an Effective Outpatient Treatment Plan for Eating Disorder Patients
(3.0 hours CE)**
Presented by Anthony Paulson, Ph.D. and Valerie Piacitelli, MSW, Nevada Psychological
Association (NPA) – Las Vegas, Nevada.
- 10/23/13 **Legally Blunt: Tackling Legal Questions Psychologists Encounter (1.0 hour CE)**
Presented by Gary Lenkeit, Ph.D., Shera Bradley, Ph.D., and Margaret Pickard, Esq.,
Nevada Psychological Association (NPA) – Las Vegas, Nevada.
- 10/05/13 **NPA 2013 Legislative Retreat (4.0 hours CE)**
Nevada Psychological Association (NPA) – Las Vegas, Nevada.
- 10/04/13 **Diagnosing Autism and Related PDDs, Pediatric Bipolar Disorder, ADHD and Applications
of the BASC-2 in Behavioral RTI: An Advanced Training on the BASC-2 (6.0 hours CE)**
Nevada Psychological Association (NPA) – Presented by Cecil R. Reynolds, Ph.D. Las Vegas,
Nevada.

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- 07/20/13 **DSM-5: What You Need to Know (4.0 hours CE)**
 Nevada Psychological Association (NPA) – Presented by Dodge Slagle, D.O., FAPA and Barry Cole, M.S. DFAPA, Las Vegas, Nevada.
- 06/01/13 **Dementia 2013 (6.25 hours CE)**
 Nevada Psychological Association (NPA) - Las Vegas, Nevada.
- 06/22/12 **Psychological Approaches to Chronic Pain and Addiction (6.0 hours CE)**
 Nevada Psychological Association (NPA) – Presented by Mel Pohl, Ph.D. and Leanne Earnest, Ph.D., Henderson, Nevada.
- 03/10/12 **Update on Third Party Observers: Practice Strategies and Ethical Considerations (1.5 hours CE)**
 American College of Professional Neuropsychology – Presented by Robert J. McCaffrey, Ph.D., Las Vegas, Nevada.
- 03/10/12 **AAPN Working Group on Empirically-Defined Disorders of Attention (EDDA): A Neuropsychological Taxonomy of Attention Disorders – A Workshop Sponsored by Pearson (3 hours CE)**
 American College of Professional Neuropsychology – Presented by James Hale (Chair): Peter Entwistle, Emilie Crevier-Quintin, Sally Frutiger, Teresa Baily, Ted Wasserman, Cynthia Riccio, Hilary Gomes, Hanna Kubas, Maggie Topiak, & Margaret Semrud-Clikeman (Discussant), Las Vegas, Nevada.
- 03/09/12 **Dancing with your Attorney: Steps to be Followed for Effective Courtroom Testimony (3 hours CE)**
 American College of Professional Neuropsychology – Presented by Bill Anzalone, J.D., Las Vegas, Nevada.
- 01/21/12 **Adventures on the Electronic Frontier: Ethics and Risk Management in the Digital Era (6 hours CE)**
 Nevada Psychological Association (NPA) – Presented by Jeffrey Younggren, Ph.D., ABPP, Reno, Nevada.
- 04/29/11 **Psychopharmacology Update: Integration of Medication and Psychological Treatments (6 hours CE)**
 Nevada Psychological Association (NPA) Annual Conference – Presented by Morgan Sammons, Ph.D., APBB & Steven Tulkin, Ph.D., M.S.
- 04/05/11 **Minnesota Multiphasic Personality Inventory – 2 (MMPI-2) Webinar**
 03/25/11 **Practicum Training: Models of Supervision (3 hours CE)**
 The University of Nevada, Las Vegas Clinical Psychology Program – Presented by Michelle G. Carro, Ph.D., Las Vegas, Nevada
- 03/12/11 **Reframing Nonverbal Learning Disorder: Identifying Clinical Subgroups (3 hours CE)**
 American College of Professional Neuropsychology – Presented by Gail M. Grodzinsky, Ph.D., ABPdN, Las Vegas, Nevada
- 03/12/11 **Biopsychosocial Outcome from Mild Traumatic Brain Injury (3 hours CE)**
 American College of Professional Neuropsychology – Presented by Grant L. Iverson, Ph.D., Las Vegas, Nevada

2021 CURRICULUM VITAE

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- 03/11/11 **The Personality Assessment Inventory (PAI): A Significant Improvement in Personality Assessment (3 hours CE)**
American College of Professional Neuropsychology – Presented by Steven M. Schwartz, Ph.D., Las Vegas, Nevada
- 03/11/11 **The Neurobiology of Exceptional Ability (3 hours CE)**
American College of Professional Neuropsychology – Presented by Nadia Webb, Psy.D., Las Vegas, Nevada
- 11/13/10 **Ethics and Ethical Decision Making for Nevada Psychologists (6 hours CE)**
Nevada Psychological Association – Presented by Stephen Behnke, Ph.D., Reno, Nevada
- 11/11/10 **Listening to the Body: Understanding the Language of Stress-Related Symptoms (6 hours CE)**
IBP – Presented by William Sieber, Ph.D., Las Vegas, Nevada
- 03/19/10 **Update in Practicum Training: Consideration of Behavioral Benchmarks in Competency Evaluation (2 hours CE)**
The University of Nevada, Las Vegas Clinical Psychology Program – Presented by Michelle G. Carro, Ph.D., Las Vegas, Nevada
- 02/27/10 **Pediatric Psychopharmacology Updates 2009 (3 hours CE)**
The American College of Professional Neuropsychology – Presented by John Courtney, Psy.D., MP, ABN, ABPdN, Las Vegas, Nevada

Updated: 1/27/2021

EXHIBIT “G.2”



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
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October 4, 2018
Governor

Elizabeth Brown
Clerk of the Supreme Court
201 South Carson Street
Carson City, NV, 89701.

Michelle G. Paul, Ph.D.
President, Las Vegas

Whitney E. Kach-Owens, Psy.D.
Secretary/Treasurer, Las Vegas

John H. Krogh, Ph.D.
Board Member, Reno

Stephanie Holland, Psy.D.
Board Member, Las Vegas

Anthony Page, Ph.D.
Board Member, Reno

Pamela L. Becker, M.A.
Public Board Member, Reno

Patrick M. Chuzai, Ph.D., BCBA-D, LBA
Board Member, Reno

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

Lewis Etcoff Ph.D.

EXHIBIT “G.3”

**STATE OF MICHIGAN
IN THE COURT OF APPEALS**

ALIAMA X. SCHAUMANN-BELTRAN,

Plaintiff-Appellee,

v

JOSEPH GEMMETE, M.D.,

Defendant-Appellant

Consolidated With

ALIAMA X. SCHAUMANN-BELTRAN,

Plaintiff-Appellee

v

THE BOARD OF REGENTS OF THE UNIVERSITY
OF MICHIGAN, d/b/a UNIVERSITY OF MICHIGAN
HEALTH SYSTEM (now Michigan Medicine),
UNIVERSITY OF MICHIGAN MEDICAL CENTER
and C.S. MOTT CHILDREN'S HOSPITAL,

Defendants-Appellants.

Court of Appeals Case No. 347683

Washtenaw County Circuit
Court Case No. 17-132-NH
Hon. Timothy P. Connors

Court of Claims Case No. 17-38-MH
Hon. Cynthia Stephens

BRIEF OF AMICI CURIAE

**THE AMERICAN ACADEMY OF CLINICAL NEUROPSYCHOLOGY
THE NATIONAL ACADEMY OF NEUROPSYCHOLOGY
THE SOCIETY FOR CLINICAL NEUROPSYCHOLOGY OF THE
AMERICAN PSYCHOLOGICAL ASSOCIATION
THE AMERICAN BOARD OF PROFESSIONAL NEUROPSYCHOLOGY
THE MICHIGAN PSYCHOLOGICAL ASSOCIATION**

**IN SUPPORT OF DEFENDANT-APPELLANTS' APPEAL FROM THE
JANUARY 25, 2019 ORDER PERMITTING
VIDEOTAPING OF NEUROPSYCHOLOGICAL EXAM**

KERR, RUSSELL AND WEBER, PLC
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Rules

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STATEMENT OF QUESTION PRESENTED

Whether this Court should reverse the Trial Court's order permitting a third party to videotape the neuropsychological examination of Plaintiff as a condition for permitting the examination to go forward?

Plaintiff-Appellee answers "no."

Defendants-Appellants answer "yes."

Amici Curiae answer "yes."

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STATEMENT OF INTEREST OF AMICI CURIAE¹

This friend of the court brief is being filed by five organizations whose members have a significant interest in the important issue raised in this appeal. The Trial Court's decision to allow third-party observation through videotaping of the testing portion of a neuropsychological evaluation contravenes professional ethical standards and testing protocol, and will seriously undermine the accuracy, integrity, and usefulness of the evaluation. Thus, this Court's decision will broadly impact the practice of neuropsychology in Michigan, as well as the goals of amici in seeking to advance and promote the highest standards of practice in the conduct of neuropsychological evaluations throughout the country.

The mission of Amicus Curiae *American Academy of Clinical Neuropsychology* (AACN), the organization of professionals certified through the American Board of Clinical Neuropsychology (ABCN), is to advance the profession of clinical neuropsychology through the advocacy of outstanding educational and public policy initiatives and dedication to the following purposes:

- To promote board certification by the American Board of Clinical Neuropsychology (ABCN) as the standard for competence in the practice of clinical neuropsychology.
- To support principles, policies and practices that seek to attain the best in clinical neuropsychological patient care.
- The pursuit of excellence in psychological education, especially as it concerns the clinical neuropsychological sciences.
- To pursue high standards in the practice of clinical neuropsychology and support the credentialing activities of ABCN.

¹ Pursuant to MCR 7.212(H)(3), the Amici Curiae identified above state that neither party's counsel authored this brief in whole or in part, nor contributed money that was intended to fund the preparation or submission of the brief. Further, no person other than the amici curiae have contributed money intended to fund the preparation and submission of this brief.

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- To support the quest of scientific knowledge through research in neuropsychology and related fields.
- To communicate scientific and scholarly information through continuing education, scientific meetings, and publications.

Amicus Curiae *The National Academy of Neuropsychology* (NAN) was founded in 1975 and has witnessed steady growth in its membership since its inception. The mission of the National Academy of Neuropsychology is to advance neuropsychology as a science and health profession, to promote human welfare, and to generate and disseminate knowledge of brain-behavior relationships. In order to fulfill its mission, the National Academy of Neuropsychology has established the following objectives:

- To provide information and support to the membership and the profession to enhance neuropsychological assessment, treatment, and consultation services;
- To disseminate neuropsychological knowledge through meetings, professional contacts, publications, reports, the Internet, and other forms of media;
- To promote research to improve knowledge of brain-behavior relationships;
- To improve the efficacy of outcomes in neuropsychological evaluations and interventions;
- To promote understanding of cultural and individual diversity as it applies to the study and practice of neuropsychology;
- To promote the field of neuropsychology as a career choice among students, thus supporting student participation in the Academy's activities;
- To provide education to the public that fosters healthy behavior and the prevention of neurological illness and injury; and
- To advocate in various forums on behalf of the profession, health consumers, and the promotion of neuropsychological health.

The mission of Amicus Curiae *The Society for Clinical Neuropsychology* (SCN) of the *American Psychological Association* (APA) is to advance the specialty of clinical neuropsychology as a science and profession and as a means of enhancing human welfare. The

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Society furthers this mission by promoting excellence in clinical practice, scientific research, and professional education in the public interest. The goals advanced by this mission are to be achieved in cooperation with the American Psychological Association, other professional organizations, and the general public.

The mission of Amicus Curiae *The American Board of Professional Neuropsychology* (ABN) is to establish and maintain professional standards for competence in the practice of clinical neuropsychology. ABN's objectives include validating the skills of clinical practitioners, signifying the practitioner has demonstrated competence through rigorous peer review, offering means for maintaining professional practice competence through continuing education, and providing professionals and consumers with a referral directory of ABN Diplomates.

Through its stated mission, Amicus Curiae, *The Michigan Psychological Association* (MPA) seeks to improve the mental health of the people of Michigan and the discipline of psychology by advancing the science, education and practice of psychology at all levels of training.

Amici and their members are alarmed at the increasing number of requests in the litigation context to allow third-party observers at neuropsychological examinations. This much-studied issue has generated several position statements and many academic papers which outline the various ways in which third-party observers detrimentally affect the validity of such examinations and conflict with a neuropsychologist's ethical responsibilities. Some of these papers are addressed below. The rule which amici curiae urge this Court to adopt, and which has been applied by other courts and tribunals, is to protect the effectiveness and integrity of neuropsychological examinations by prohibiting the presence of third-party observers at neuropsychological examinations, directly or indirectly, whether in person, through electronic, digital or video means, via recordings of any kind, through one-way mirrors, or by any other means.

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ARGUMENT

I. Third-Party Observers Should Not be Permitted at Neuropsychological Examinations Because Their Presence, Whether in Person or by Electronic or Indirect Means, Detrimentally Affects the Validity and Integrity of the Examination, Violates Ethical Obligations, and Undermines Test Security.

Clinical neuropsychology is a specialty within the field of clinical psychology dedicated to understanding the relationship between brain and behavior, particularly as applied to the diagnosis of brain disorder, assessment of cognitive and behavioral functioning, and the design of effective treatment.² A clinical neuropsychologist is an independent, professional, doctoral level psychologist who provides assessment and intervention services to people of all ages. A clinical neuropsychologist has a broad background in clinical psychology, as well as specialized training and experience in clinical neuropsychology.³ The work of a clinical neuropsychologist is accomplished, in large part, by conducting a neuropsychological evaluation.

There are several components to a neuropsychological evaluation. The neuropsychologist will gather relevant historical information by interviewing the examinee, possibly conducting a structured clinical interview, reviewing medical/other records and, with the examinee's permission, talking to family members or other knowledgeable persons about the examinee's history and symptoms. The neuropsychologist will also conduct an examination, which typically consists of the administration of standardized tests using oral questions, paper and pencil,

² The above description of clinical neuropsychology, the role of a neuropsychologist, and the neuropsychological examination comes from the website of the American Academy of Clinical Neuropsychology and can be found at <https://theaacn.org/adult-neuropsychology/> (accessed December 5, 2019).

³ A neuropsychologist's training includes: (1) completion of a doctoral degree in psychology from an accredited university training program, (2) a year-long internship in a clinically relevant area of professional psychology, (3) the equivalent of two years of additional specialized training in clinical neuropsychology, and (4) state or provincial licensure to practice psychology and/or clinical neuropsychology independently.

computers, the manipulation of materials such as blocks and puzzles, and other procedures. Depending upon the scope and intent of the evaluation, testing may focus on a wide range of cognitive functions including attention, memory, language, academic skills, reasoning and problem solving, visuospatial ability, and sensory-motor skills. The neuropsychologist may also administer tests and questionnaires concerning psychological aspects of mood, emotional style, behavior, and personality. The goal of testing is to obtain an accurate measure of the examinee's cognitive, emotional, personality, and/or adaptive functioning.⁴

After the evaluation, the clinical neuropsychologist will prepare a comprehensive report based on an analysis of the testing data and other clinical information. Depending upon the referral issue and the scope of the evaluation, the report will provide a description of the examinee's neuropsychological strengths and weaknesses, diagnostic considerations, functional capacities, and recommendations for further evaluation and/or treatment.

A. The Impact of Third-Party Observers Has Been Extensively Addressed in the Relevant Literature and in the Position Statements of Professional Organizations.

The impact of third-party observers has been discussed in great detail within the field of neuropsychology. The profession's opposition to third-party observation reflects three primary concerns: (1) the implications for test performance and the validity of test results, (2) ethical considerations, and (3) test security. These concerns are addressed in several position statements from professional organizations, credentialing boards, respected representatives in the field, and

⁴ Some or all of the testing may be administered by a neuropsychology technician, under the supervision of the clinical neuropsychologist. The amount of direct contact time required for the patient will depend on the scope of the specific evaluation; the evaluation might be a brief screening requiring as little as an hour or a comprehensive assessment requiring 12 hours or more, spread out over multiple appointments.

B. The Presence of a Third-Party Observer During a Neuropsychological Examination Detrimentally Affects Test Performance and the Validity of Test Results.

As one should gather from the above description, neuropsychological testing is an essential component of a neuropsychological evaluation. It is used by neuropsychologists to assist clinicians, administrative boards, and the courts in reaching well-informed decisions on diagnoses, treatment, and opinions relating to presumptive psychological, intellectual, academic, and neurobehavioral dysfunction.

Neuropsychological tests are developed and standardized at great expense over long periods of time, under a rigorous set of controlled conditions. To be valid, neuropsychological tests must be administered under conditions that closely replicate the conditions under which the tests were developed ("standardized conditions"). This is critically important because to properly interpret the data collected during testing, it must be compared to normative databases, (i.e., data accumulated under standardized conditions). Standardized conditions allow the neuropsychologist to maintain control over the testing environment to ensure extraneous factors do not affect performance. Importantly, standardized conditions do not include the presence of a third-party observer. Maintaining standardized conditions is essential to avoid the invalidation of normative test results, prevent undue influence of extraneous factors on performance and evaluation procedures, and avoid breaches of test security.

Unlike a medical examination, neuropsychological testing requires a quiet, controlled, distraction-free environment that allows the examiner and examinee to maintain a comfortable working relationship over a lengthy period of time. The reason for this is illuminated when one considers the nature of testing.

A neuropsychologist assesses cognitive abilities by looking at performance. Performance can be affected by many factors, such as attention. For example, if an examinee is distracted and

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cannot focus his or her attention on the information being tested, the examinee cannot learn the information. An examinee who does not learn the information because the examinee's attention is impaired by distraction cannot use his or her memory to recall the information (because the information was not learned and placed in the examinee's memory for later recall). This will undoubtedly affect the validity of test results. Thus, because the testing environment can influence the examinee's ability to pay attention, distractions must be minimized. The focus of the examiner and the examinee must be on the assessment procedures.

The presence of a third-party observer - whether in person, electronically, or through a recording device - is a distraction, disrupts the necessary focus of the examinee, and may influence how an examinee may respond.⁵ It could also distract the examiner. A considerable body of scientific literature addresses the deleterious effects of an observer's presence on an individual's task performance, despite best efforts to remain unobtrusive. In fact, Gavett, Lynch, and McCaffrey (2005) conclude, on the basis of meta-analytic analysis of 42 combined research studies on the deleterious effects of third party observation on neuropsychological test findings, that "the inclusion of a third party observer in a neuropsychological evaluation results in clinically meaningful changes in test performance" (p. 61), with memory measures being particularly vulnerable [*Third Party Observers: The Effect Size Is Greater Than You Might Think*, Exhibit A-10]. Whether in person, through the use of a one-way mirror, or via other electronic means such as video or audio taping, the presence of a third-party observer during formal testing significantly jeopardizes the validity of the generated data and the opinions that are based on that data because

⁵ References to "observer" or "third-party observer" throughout this brief include observation in person, electronically, or through a recording device.

the exact effects of the third-party's presence on an individual's test performance cannot be reliably determined.

In fact, controlled research published in peer-reviewed journals has demonstrated that both recording and observation have significant negative effects on neuropsychological test performance. [For a review, see the Meta-Analysis of the available literature consolidating the effects of third-party observers on neuropsychological testing *Does a Third Party Observer Affect Neuropsychological Test Performance? It Depends*, Exhibit A-11]. Phenomena referred to as “social facilitation” and “observer effects” have been consistently demonstrated [*Third party observation during neuropsychological evaluation: an update on the literature, practical advice for practitioners, and future directions*, Exhibit A-12]. These phenomena pertain to the various ways in which the experience of being observed and/or recorded can artificially alter an individual’s task performance. Research indicates that social facilitation may cause examinees to perform better than usual on tests of simple or overlearned skills and poorer than expected on more difficult tasks. In other words, social facilitation can have the effect of causing an individual’s deficits to appear worse than they actually are and their strengths to appear stronger than what is typical for the individual (because they expend extra effort), resulting in inaccurate test data. [*Presence of Third Parties During Neuropsychological Evaluations: Who is Evaluating Whom?* Exhibit A-13].

Also, recent studies examining the effect of third-party observers during neuropsychological assessment have consistently found the presence of observers to be associated with poorer performance across multiple cognitive domains, including measures of verbal learning, memory, verbal fluency, attention, and executive function, and faster performance on simple motor measures. This association is present regardless of the method of observation (i.e.,

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physically present, audio or video taping, or through a one-way mirror). [See *Does a Third Party Observer Affect Neuropsychological Test Performance? It Depends*, Exhibit A-11]. Specifically, Constantinou, Ashendorf & McCaffrey (2002) [When the Third Party Observer of a Neuropsychological Evaluation is an Audio-Recorder, Exhibit A-14] noted that the presence of third-parties during neuropsychological evaluations is an issue of concern for contemporary neuropsychologists. They note that previous studies reported that the presence of an observer during neuropsychological testing alters the performance of individuals under evaluation. Their study specifically investigated 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, further highlighting that the effects of observers on performance are not intuitive or consistent across tests. As highlighted in the position statement of AACN, the presence of observers inherently leads to internal distractions related to social expectations and heightened self-monitoring on the part of the examinee, which cannot be known or directly observed and, thus, cannot be accounted for in test interpretation. The cognitive processes involved in self-monitoring can interfere with performance on tests of attention and processing speed in particular, and potentially results in scores that magnify the appearance of impairment [See AACN *Policy Statement on the Presence of Third Party Observers in Neuropsychological Assessments*, Exhibit A-5].

The literature is clear that the effects of third-party observation are almost universally prone to attenuate test scores leading to conclusions of neurocognitive decrement on which many legal cases hinge. Complicating matters is that this apparent decrement presents itself in an

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unpredictable manner across tests and procedures which makes it impossible to quantify and understand its relevance to the test data. The results can be spurious conclusions of neurocognitive dysfunction based on inaccurate test data.

It is important to note that prohibiting the presence of a third-party observer should not be construed as the intention to withhold information from the opposing party. Instead, test data (including examinee's responses) and other clinical information gathered during an evaluation can be released to the opposing party's retained neuropsychology expert. Additionally, it is standard practice that a detailed formal report is generated, describing the evaluation process as well as the results. Importantly, the attorney has the opportunity to ask detailed questions about all parts of the evaluation and evaluation results as part of the discovery process. Thus, a third-party observer is not necessary to ensure that the opposing party can discover the details of the evaluation. Further complicating matters is that given that most requests for third-party observation are for subsequent evaluations, the third-party observation problem provides a systematic legal bias in favor of plaintiffs in civil litigation and in favor of defendants in criminal proceedings (assuming that civil plaintiffs and criminal defendants generally have their own expert evaluations conducted first and subsequent proceedings prompt an expert examination for the other party).

To summarize, neuropsychological tests are valid measures of neurocognitive capacities (brain-behavior relationships) when administered pursuant to the rigorous, controlled conditions under which they were created. This means that to achieve reliable results, these standardized testing procedures must be replicated during testing. Because the procedures were not standardized in the presence of a third-party observer, the presence of a third-party observer will lead to inaccurate and unreliable results. Consequently, testing conducted in the presence of a third-party observer does not meet the accepted standard of neuropsychological practice, is impermissible

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under current professional guidelines and ethical standards, and contravenes the protocol advanced by board certification and professional organizations.⁶

C. The Presence of a Third-Party Observer During Neuropsychological Testing Violates Ethical Guidelines Related to the Practice of Neuropsychology.

Psychologists in the United States are bound by the Ethical Principles of Psychologists and Code of Conduct of the American Psychological Association (2002) either directly through membership in the Association or indirectly through application of the principles to non-APA members by state psychology boards, the courts, and other public entities [See *APA Ethical Principles of Psychologists and Code of Conduct*, Exhibit A-6]. Permitting the presence of a third-party observer during a psychological examination conflicts with a psychologist's professional guidelines and ethical obligations as articulated by numerous professional organizations. They include the American Psychological Association, American Academy of Clinical Neuropsychology, American Board of Professional Neuropsychology, National Academy of Neuropsychology, and a joint committee to establish standards for educational and psychological testing organized by the American Educational Research Association, the American Psychological Association, and the National Council on Measurement in Education [See Exhibits A-1 through A-7]. The following examples are illustrative.

First, according to the APA ethical principles, psychologists are encouraged to adhere to standardized procedures and utilize test materials in an appropriate manner based upon current research. See Standard 9.02: *Use of Assessments* [Exhibit A-6]. Likewise, according to the Standards for Educational and Psychological Testing (2014), test administration should carefully

⁶ Under certain circumstances, the presence of an attorney or other third-party observer may be acceptable during the interview portion of a neuropsychological evaluation if the observer understands he or she cannot interfere with the interview process. But there is no allowable exception during testing.

follow standard procedures determined by the test publishers and the environment should minimize distractions as much as possible [See *Standards for Educational and Psychological Testing*, Exhibit A-7].

Second, psychologists and “test users have the responsibility of protecting the security of tests” [See Standard 9.21 of the *Standards for Educational and Psychological Testing*, Exhibit A-7]. Psychologists are ethically bound to “make reasonable efforts to maintain the integrity and security of test materials and other assessment techniques consistent with law and contractual obligations” [See Standard 9.11 *Maintaining Test Security* of the *APA Ethical Principles of Psychologists and Code of Conduct*, Exhibit A-6].

Third, “psychologists do not promote the use of psychological assessment techniques by unqualified persons, except when such use is conducted for training purposes with appropriate supervision” [See Standard 9.07 *Assessment by Unqualified Persons* of the *APA Ethical Principles of Psychologists and Code of Conduct*, Exhibit A-6]. Third-party observers in a litigation setting are unqualified persons and should not be involved in the assessment. As explained above, attorneys can have their own expert neuropsychologist review the test data upon completion of the evaluation.

Fourth, a psychologist must protect against misuse and misrepresentation of their work [See Standard 1.01 *Misuse of Psychologists' Work* of the *APA Ethical Principles of Psychologists and Code of Conduct*, Exhibit A-6]. Neuropsychologists obtain extensive training in brain-behavior relationships necessary to understand and interpret the multiplicity of behavior that occurs during an evaluation. Someone without such expertise and training may likely misinterpret the examinee’s performance and not take the whole clinical history and surrounding circumstances into account. Attorneys have neither the education, training, or experience to be expert in

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neuropsychological assessment and would need to have expert input from a trained neuropsychologist to properly advocate for their client, obviating their need to review test products and/or recording. Otherwise, this may lead to incorrect attributions of test results. Coaching is another way in which a psychologist's work may be misused.

Finally, "psychologists take reasonable steps to avoid harming their clients/patients, students, supervisees, research participants, organizational clients, and others with whom they work, and to minimize harm where it is foreseeable and unavoidable" [See Standard 3.04 *Avoiding Harm* of the APA *Ethical Principles of Psychologists and Code of Conduct*, Exhibit A-6]. The field of psychology, individual practitioners, the claimant, and the legal system itself are harmed when involved third-party observers are permitted during neuropsychological examinations because their presence diminishes the quality of the evaluation and impacts the neuropsychologist's ability to validly answer the referral question, leading to potential misuse and misinterpretation of test measures. Further, a third-party observer has no compelling reason to protect the test content and if careless with the information, there is no mechanism by which to hold him or her accountable.

Many of the test manuals specifically instruct that third-party observers should be excluded from the examination room. Testing materials provided by the two largest psychological test publishers, Pearson Assessments and Psychological Assessment Resources, along with other testing companies maintain substantially similar protections as reflected in Exhibits A-8 [*PAR Position Regarding the Release and/or Photocopying of Test Materials*] and A-9 [Pearson Assessments Legal Policies]. As set forth in those exhibits, dissemination of testing materials (including through the observations of a third party), violates restrictions on the health care provider's use of testing materials, renders test instruments invalid, and ultimately renders them

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useless to the professional community and the general public. Additionally, attorneys generally do not meet evidentiary qualifications to be considered expert in test administration, scoring, and interpretation; having their neuropsychologist expert review the test data (as mentioned previously) makes more sense than allowing attorneys to review a recording or test protocol.

As a final area of consideration, the National Academy of Neuropsychology issued a position statement in 2009 clarifying that secretive recording reflects deceptive practice, which is inconsistent with ethical behavior [*Secretive Recording of Neuropsychological Testing and Interviewing: Official Position of the National Academy of Neuropsychology*, Exhibit A-15]. In addition, such recording may affect the behavior of the examiner. For these reasons, the statement emphasized that “neuropsychologists do not, and should not, encourage, condone, or engage in secret recording of neuropsychological interviews or testing.” [*Id.* at 2]. The detriment of third-party observation, in person or electronically, prompted the Canadian Psychological Association to promulgate the following official Policy in 2009 (quoted in full):

“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. Exceptions to this policy are only permissible when in the sole professional opinion of the assessing psychologist, based on their clinical judgment and expertise, that a third party would allow more useful assessment data to be obtained. Typical examples may include the inclusion of a parent or caregiver until a full rapport is gained. The presence of these observers should be cited as a limitation to the validity of the assessment.” [See *The Presence of Involved Third Party Observer in Neuropsychological Assessments*, Exhibit A-18]

To summarize, governing ethical obligations and standards of practice prohibit conducting a neuropsychological examination in the presence of a third-party observer. These practices and standards exist to maintain and assure neuropsychologists’ ability to obtain valid performance from examinees, upon which their interpretations and conclusions are based. When the presence

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of a third-party observer is compelled by the court, the neuropsychologist cannot participate, which has the potential to limit court access to the most appropriate medical experts.

D. The Presence of a Third-Party Observer During a Neuropsychological Examination Undermines Public Safety and Test Security.

As already noted, the primary purposes for not allowing third-party observation during neuropsychological testing is to protect the public from misuse/misinterpretation and potential invalid/inaccurate test results. Also, as explained above, the Ethical Principles of Psychologists of the American Psychological Association (2010) require psychologists to maintain the “integrity and security” of tests and other assessment techniques and to avoid promoting the use of psychological assessment techniques by “unqualified persons” (i.e., individuals who are not licensed to practice psychology [See Ethical Standard 9.11 *Maintaining Test Security*, and Ethical Standard 9.07 *Assessment by Unqualified Persons*, Exhibit A-6]). These standards implicate the compromise of test security through third-party observation and the release of the raw data to unqualified individuals once the evaluation is complete.

Third-party observation directly provides to unlicensed (in psychology) third parties confidential test questions and information about test stimuli and procedures that substantially compromise test security. Test security is essential to preserving the practical utility of testing measures in both forensic and clinical situations. The failure to secure test materials will compromise the ability of the tests to assist clinicians, administrative boards, and the courts in subsequent clinical and/or forensic proceedings. Indeed, preserving test security protects the public in that many of the tests and procedures used during neuropsychological testing are identical to those used in fitness-for-duty evaluations administered to physicians, airline pilots, lawyers, law enforcement, and other public servants. Public or lay-person knowledge of test stimuli and

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procedures would allow for coaching and preparation for such individuals that may inflate their actual test scores so that they appear to have intact cognitive abilities when they do not.

Through coaching, examinees are given information about psychological tests that may enable them to alter their presentation on those measures to appear a certain way. Wetter and Corrigan surveyed 70 practicing attorneys and 150 law students and found that 22 percent of students and 42 percent of attorneys believed an attorney should provide as much specific information as possible about psychological assessment [See *Providing Information to Clients About Psychological Tests: A Survey of Attorneys' and Law Students' Attitudes*, Exhibit A-16]. Additionally, 36 percent of students and nearly 50 percent of attorneys responded that an attorney should always or usually inform a client of validity scales on psychological tests. This is very concerning because studies have found that even minimal coaching can impact assessment procedures. Giving clients a general idea of what the day will entail and a brief explanation of the purpose of assessment will possibly help lessen a plaintiff's anxiety regarding the assessment. However, giving clients specific and in-depth information regarding psychological and neuropsychological tests can invalidate the assessment and undermine the reason for the referral.

There are no specific ethical guidelines requiring attorneys to maintain test security when they have access to the tests. Once notes or a recording exist, nothing prevents an attorney from coaching other clients on how to obtain a certain desired test result by purposefully altering their behavior to appear in a certain way. Access to advanced and specific information will increase the examinee's ability to alter the test results, akin to knowing the LSAT questions in advance. Examples of this are documented in the literature [See *Confirmed Attorney Coaching Prior to Neuropsychological Evaluation*, Exhibit A-17], which reported a case where an attorney admitted that he deliberately coached his client before testing. One legal remedy to this that we find lacking

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is the Protective Order. First is the client coaching concern just discussed. Despite abiding by the letter of a Protective Order, attorneys are granted the opportunity to misuse their access to the measures to learn about the tests and subsequently use this information in other cases. Also, with electronic conveyance and storage of information, it is easy to inadvertently misplace psychological tests, having them appear later and then misused (e.g., on a thumb drive, on a cell phone, on a hard drive, in an internet server). The strength of a Protective Order is typically limited after the end of a trial.

The need for test security is important to other professions as well: "...the increasing sophistication and miniaturization of technology has increased the risk of test security breaches exponentially. The importance of maintaining test security cannot be overemphasized, because cheating, regardless of which form it takes, erodes the validity of the interpretations of test scores and then undermines the legitimacy of decisions based on those scores. Without remediation, the impacts will be significant." [The Bar Examiner, pp. 30-34, *Test Security: A Meeting of Minds*, Exhibit A-19]. While directed to professional examinations such as admissions (e.g., LSAT) or licensing (e.g., Bar) examinations, the lesson applies to neuropsychological tests as well. For example, once an IQ test is available to the public it can no longer be used to determine IQ. We will not know what it is measuring (e.g., ability to manipulate performance convincingly either for a higher or a lower IQ score).

The Michigan Department of Education also recognized the importance of test security with respect to standardized writing tests. As reported in Howe & McCaffrey (2010) [*Third Party Observation During Neuropsychological Evaluation: An Update on the Literature, Practical Advice for Practitioners, and Future Directions*, Exhibit A-12]:

Michigan's Department of Education in 2007 made thousands of fifth and sixth graders retake part of the state's standardized writing test due to a breach in test

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security - caused by a newspaper publishing a brief article about the test that revealed the topics for two of the questions and could have resulted in an unfair advantage for some students (Bunkley, 2007). Knowing questions contained on neuropsychological assessment measures ahead of time likewise creates an unfair advantage that can impact scores and interpretation. Recording of NP testing increases the likelihood that test security will be violated by attorneys whose ethics call for advocacy at most any price.

To avoid this potential skewing of the results, accepted professional standards and some state laws dictate that the appropriate manner in which to share or allow discovery of test stimuli and/or responses derived from neuropsychological evaluations is to release all of the information gathered during the course of the evaluation directly to the opposing counsel's neuropsychology or other appropriately qualified expert.

Further, actual test materials – including test record forms, test items, and administration procedures – are copyrighted, trade secret materials and are not subject to HIPAA. See the statements from the largest psychological test publishers Psychological Assessment Resources and Pearson Assessment, which require that test purchasers carefully protect test materials from disclosure to non-psychologists [See Exhibits A-8 and A-9]. In this sense, test security also refers to the rights of the publishers of test materials to not have their work rendered useless by the potential public release of questions and answers to third-party observers. For this reason as well, test publishers require proof of appropriate credentials before tests can be purchased.

To summarize, test security is necessary to maintain the integrity of testing procedures in forensic, clinical, and fitness-for-duty evaluations. Public knowledge of test stimuli and procedures would allow for coaching and preparation, with the consequent skewing of test results. Thus, governing ethical principles require psychologists to maintain the security of testing materials and to avoid testing in the presence of a third-party observer.

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II. Many Courts Have Prohibited the Presence of Third-Party Observers at Neuropsychological Examinations.

Courts and tribunals throughout the country have recognized the validity of the above-described concerns as a basis for prohibiting a third-party observer during a neuropsychological examination. While Amici have not undertaken exhaustive research on this subject, we offer helpful decisions that recognize the concerns described above. For example, in *Long v Chippewa Hills School Dist*, unpublished opinion of the Mecosta Circuit Court, issued December 6, 2012 (Docket No. 12-20846-NI), the court initially ordered the plaintiff to submit to a neuropsychological examination but allowed certain conditions, including observation by the plaintiff's counsel. The neuropsychologist retained by the defendant refused to perform the examination under the conditions set forth in the court's order. *Id.* at 2. Defense counsel stated that she could find no professional willing to perform the testing and examination in the presence of plaintiff's counsel. Plaintiff's counsel said he knew at least two professionals in the State of Michigan who would allow plaintiff's counsel to observe. Accepting the "well-founded" opinions of defendant's neuropsychologist that observation would undermine the validity of testing and violate ethical standards, the court opined that "[a] proper balance is not struck by forcing Defense Counsel to use a professional not of her choice, or by forcing her to have the examination conducted in a manner that she is told will result in unethical behavior and/or invalid results." *Id.* at 2. The court concluded that defendant's counsel "is entitled to some latitude in carrying out what it is allowed to do pursuant to MCR 2.311(A)." *Id.* at 2.⁷

⁷ This unpublished opinion and other unreported decisions are cited because they address some of the considerations raised in this amicus brief. The issue typically arises on an interlocutory basis at the trial court or tribunal level, and thus does not always result in a published opinion. Copies of unpublished opinions are attached as Exhibit B.

Other courts have held similarly. For example, in its discussion of matters related to whether a capital criminal defendant can be compelled by the state to submit to a psychiatric evaluation for the sole purpose of sentencing, the US Supreme Court in *Estelle v Smith*, 451 US 454, 470 n 14; 101 SCt 1866; 68 LEd2d 359 (1981), quoted and relied on the conclusion of the Fifth Circuit Court of Appeals in the case that “an attorney present during the psychiatric interview could contribute little and might seriously disrupt the examination.” (602 F2d at 708). Also, in *In re Air Crash at Taipei, Taiwan on October 31, 2000*, No. 01-ML-1394-GAF(RCx) (CD Cal, August 12, 2003), the defendant airline sought to compel mental examinations of the plaintiffs pursuant to FRCP 35(a), which provides for such examinations if the mental condition of the party is in controversy and if the defendant can establish good cause for the examination. The various plaintiffs sought certain protections, including video or audio recording of the examinations and/or the presence of different types of third-party observers. *Id.* at 4. The court found that the presence of a recording device could invalidate the results of the examinations, and the concerns advanced by plaintiffs were speculative and unfounded. *Id.* at 5-7. The court further found that the plaintiffs’ counsel could obtain insight into the examinations and prepare for cross-examination of the examiners by requesting detailed written reports of the results. *Id.* at 6. The court ordered mental examinations of the plaintiffs without recording devices or third parties. *Id.* at 7.⁸

Similarly, in *Rando v Gov’t Employees Ins Co*, No. 5:06-cv-336-Oc-10GRJ, 2008 WL 11434556 (MD Fla, January 2, 2008), the plaintiff sought to have a videographer or court reporter present at his neuropsychological examination, claiming that his cognitive problems would preclude him from acting as historian with his attorney after the examination. The court found

⁸ The court did allow the presence of a Cambodian interpreter for the one plaintiff who did not speak English but expressed doubt that the examination would go smoothly or be productive. *Id.* at 6.

that there was no good cause for the presence of a court reporter, the plaintiff's attorney, the plaintiff's spouse, or any recording equipment. *Id.* at 3. The court held that the plaintiff was adequately safeguarded because his counsel would be provided a written report setting forth the findings and the tests administered, and his counsel could depose the examiner. *Id.*

In *Kuber v Garcia*, RJI No. 45-1-2013-1929 (NY Sup Ct, April 20, 2015), the court granted the defendant's request to prohibit the plaintiff's representative from being present during the cognitive portion of the testing. The court found that such presence would impair the validity and effectiveness of the testing. *Id.* at 2.

In *Fusco v Levine*, No. 5:16-cv-01454-SMH-KLH (WD La, January 30, 2018), the plaintiff claimed to have suffered traumatic brain injuries, traumatic neurosis, psychological damage, and depression as a result of a car accident caused by the defendant. When defendant requested an independent neuropsychological examination, plaintiff argued, among other objections, that the examiner should be required to preserve recordings of the examination and that she should be allowed to have a non-attorney support person present. *Id.* at 14. In rejecting that request, the court accepted the neuropsychologist's explanation that third-party observation, whether directly or through electronic recording devices, "compromises the validity of normative comparisons, changes examinee behavior, compromises test security, and interferes with the establishment of clinical rapport." *Id.* The court permitted the plaintiff to have a support person in the waiting room. *Id.*

In *Heraldo v Suffolk Constr Co*, No. 2017-02475-H (Mass Sup Ct, June 24, 2019), the court denied the plaintiff's motion to have his neuropsychological examination videotaped where the defendant's expert raised concerns that it would impair the integrity of the examination, the evidence that the plaintiff's accent would lead to confusion was not compelling, the plaintiff's

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expert examined him successfully and without a witness or recording, and the parties agreed to provide each other the underlying raw data.

The pros and cons of this issue, as well as the professional literature addressing it, was extensively considered in a workers' compensation proceeding in *Goodrich v Fletcher Allen Health Care*, Vermont Dep't of Labor Opinion No. 07-17WC, State File No. DD-60132 (April 14, 2017), where the claimant sought permanent total disability benefits for an employment-related back injury on the ground that the injury, combined with her preexisting learning disability, precluded her from obtaining alternative employment. *Id.* at 3. Vermont law guaranteed an employer's right to require an injured worker to submit to an examination but also provided that the employee "may make a video or audio recording" of the examination "or have a licensed health care provider designated and paid by the employee present at the examination." *Id.* at 4. The claimant notified the defendant that she would exercise her right to have her neuropsychological examination video recorded. *Id.* The defendant's neuropsychologist refused to allow the testing portion to be recorded under ethical standards to which she was bound but indicated that the interview portion could be recorded. *Id.* As the *Goodrich* opinion recites:

The statute guarantees both the employer's right to obtain an independent medical examination and the employee's right to videotape it. The question presented by Defendant's motion is what happens when the two rights collide, as is the case here? [*Id.* at 5].

At an evidentiary hearing, the Administrative Law Judge considered testimony and exhibits from both sides, including policy statements from a number of professional associations, including three of the present amici (AACN, NAN, ABN), setting forth many of the same positions advocated here. *Id.* at 5-12. While noting that case law from other jurisdictions reflects varying approaches, the ALJ ultimately concluded that the claimant could record the interview portion but not the testing portion of her examination, stating:

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35. Although I cannot offer a perfect solution, I am convinced that there are ways to substantially protect Claimant's interest in ensuring that Dr. Hebben's evaluation proceeds appropriately and yields valid results. For one, I will hold Dr. Hebben to her agreement to allow Claimant to videotape the interview portion of her exam. Beyond that, Claimant's attorney is free to educate his client beforehand regarding proper test administration conditions, and debrief her immediately afterwards regarding the extent, if any, to which Dr. Hebben deviates from standardized procedures. And certainly Dr. Hebben can be compelled to submit to close questioning under oath on the issue.

36. Short of barring Claimant from videotaping the test portion of the exam, there is no way to safeguard the interests underlying Defendant's right. Certainly there is no legal basis for me to order an examiner to conduct an evaluation he or she is unwilling to conduct, particularly if doing so might violate professional ethics and thereby jeopardize his or her career. Thus, if I side with Claimant on the issue, Defendant will effectively be denied the right to test a central theory underlying her case in chief – that her claimed learning disability has so narrowed her prospects for re-employment as to render her permanently and totally disabled. I cannot imagine that the legislature intended this result. [*Id.* at 14-15.]

In *Schlunt v Verizon Directories Sales-W, Inc.*, No. 3:05-CV-666-J-25, 2006 WL 1643727 (MD Fla, June 12, 2006), at *4, the court observed that “[t]he majority of federal courts ... have held that attorneys, court reporters, and recording devices are distractions that may compromise the accuracy of the examination and turn a neutral examination into an adversarial event,” citing as examples, *Shirsat Mutual Pharmaceutical Co Inc*, 169 FRD 68, 71 (ED Pa, 1996) (“the presence of an observer interjects an adversarial, partisan atmosphere into what should be otherwise a wholly objective inquiry ... it is recognized that psychological examinations necessitate an unimpeded, one-on-one exchange between the doctor and the patient”) and *Bethel v Dixie Homecrafters, Inc*, 192 FRD 320, 324 (ND Ga, 2000) (following the reasoning in *Shirsat* in denying the plaintiff's request to have her attorney present and stating that the attorney's presence “would only increase the likelihood of creating an adversarial atmosphere”). Plaintiff's request to have her attorney and a court reporter attend the examination was denied.

Other courts have followed the federal majority. In *Tomlin v Holecek*, 150 FRD 628, 631 (D Minn, 1993), the court noted the split in authority among state cases but gave less weight to

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decisions “driven by perceived local customs or the provisions of a State statute.” The court found that the greater weight of federal authority favored the exclusion of the presence of the plaintiff’s attorney during the Rule 35 examination. *Id.* The court also held that a tape recorder would be inconsistent with the underlying principles of the rule because it would invalidate the evaluatory technique and be inconsistent with professional standards. *Id.* at 631-632. The court compelled the plaintiff to undergo an independent psychological examination without the requested presence of a third party or recording. *Id.* at 634. See also *Duncan v Upjohn Co*, 155 FRD 23, 26-27 (D Conn, 1994) (following holding in *Tomlin* to preclude the presence of the plaintiff’s own physicians or mental health professionals during the examination).

In *Shirsat v Mutual*, *supra*, the Court explained the basis for denying plaintiff’s request for a third-party observer, stating:

This Court denies the plaintiff’s request for an observer during the defense’s examination of the plaintiff. This Court finds that an observer, court reporter, or recording device, would constitute a distraction during the examination and work to diminish the accuracy of the process.

* * *

Instead, this Court adopts the decisions promulgated in *Duncan v. Upjohn Company*, 155 F.R.D. 23, 27 (D.Conn.1994) and *Galieti v. State Farm Mutual Automobile Insurance Company*, 154 F.R.D. 262, 265 (D.Colo.1994), where the courts denied the plaintiff’s request to have an observer present. In *Duncan*, the court noted that because the defendant’s doctor “does not propose to use unorthodox or potentially harmful techniques in his examination of Mr. Duncan, ... there is no need for any of plaintiff’s physicians or other mental health professionals to be present during the examination....” 155 F.R.D. at 27. In *Galieti*, the court denied the plaintiff’s request for an observer during an examination of the plaintiff by the defendant’s doctor finding that the “[p]laintiff has presented nothing that indicates that [Defendants’ Doctors] will be less than impartial, other than that they have been hired by Defendants.” 154 F.R.D. at 265. [169 FRD at 70-71]

And in *Newman v Gaetz*, 2010 WL 4928868 (ND Ill, 2010), the Court explained:

First and foremost, Dr. Stafford Henry, Respondent’s expert, swears in an affidavit filed with Respondent’s brief that the presence of a video recorder would interfere with the dynamics of the examination and adversely affect the information that he

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receives from Petitioner. Dr. Henry attests that in eighteen years of performing forensic evaluations for courts, he has never had an examination videotaped. Courts have recognized that the presence of recording equipment can disrupt the examination and have disallowed videotaping on those grounds. See, e.g. *Pizzuto v. Hardison*, 2010 WL 672754, *2 (D.Idaho Feb. 20, 2010) (in habeas case where mentally retarded prisoner requested examination by defendant's expert to be videotaped, court disallowed videotaping of examination based on expert's objections); *Abdulwali v. Washington Area Metro. Transit*, 193 F.R.D. 10, 14 (D.D.C.2000) (denying request that examination be recorded and collecting cases that recognize the disruptive effect of recording equipment on Rule 35 examinations); *Tomlin v. Holecek*, 150 F.R.D. 628, 631–33 (D.Minn.1993) (plaintiff who alleged severe and permanent psychological injury ordered to undergo an independent psychological examination, but without attorney present or recording of the examination, given the intrusive nature of both factors, which the examining psychologist asserted would be inimical to a valid psychiatric examination).”

To summarize, while Amici do not provide exhaustive research on this issue, we offer abundant examples of decisions in which courts have heeded the concerns expressed by the neuropsychologists and denied all forms of third-party observation for the reasons expressed above. It is respectfully requested that this Court do the same.

RELIEF REQUESTED

For these reasons, the American Academy of Clinical Neuropsychology, the National Academy of Neuropsychology, the Society for Clinical Neuropsychology of the American Psychological Association, the American Board of Professional Neuropsychology, and the Michigan Psychological Association respectfully request that this Court reverse the January 25, 2019 Order permitting videotaping of the neuropsychological examination of Plaintiff and adopt a rule which prohibits the presence of third-party observers at neuropsychological examinations, directly or indirectly, whether in person, through electronic, digital or video means, via recordings of any kind, through one-way mirrors, or by any other means.

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Respectfully submitted,

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Dated: February 14, 2020

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CERTIFICATE OF SERVICE

Cynthia J. Villeneuve, being first duly sworn deposes and says that she is employed with the law firm of Kerr, Russell and Weber, PLC, and on February 14, 2020, she filed the foregoing document with the Clerk of the Court using the Court's electronic filing system which will electronically serve all parties of record.

/s/Cynthia J. Villeneuve
Cynthia J. Villeneuve

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STATE OF MICHIGAN
MI Court of Appeals

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Filing Type	Document Title
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EXHIBIT “G.4”

Update on Third Party Observers in Neuropsychological Evaluation: An Interorganizational Position Paper

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Abstract

Objective: The National Academy of Neuropsychology (NAN), the American Academy of Clinical Neuropsychology (AACN), and the American College of Professional Neuropsychology (ACPN) collaborated to publish an update to their original position statements, confirming the organizations' opposition to third party observer (TPO).

Method: A review of literature addressing TPO effects, ethical standards, professional organization position statements, test publisher policies and new telemedicine developments was completed to obtain consensus on relevant issues in TPO and recording of neuropsychological evaluations.

Results: TPO has been shown to impact the cognitive functions most often assessed in forensic or medicolegal settings. Third party observation, whether in person, recorded or electronic, remains a potential threat to the validity and reliability of evaluation results, and violates test security guidelines, ethical principles and standards of conduct in the field. Demands for TPO in the context of medicolegal or forensic settings have become a tactic designed to limit the ability of the consulting neuropsychologist to perform assessment and provide information to the trier of fact.

Conclusion: The field of neuropsychology opposes the presence of TPO in the setting of medicolegal or forensic neuropsychological evaluations.

Keywords: Assessment; Forensic neuropsychology; Professional issues

Introduction

The National Academy of Neuropsychology (NAN), the American Academy of Clinical Neuropsychology (AACN), and the American College of Professional Neuropsychology (ACPN) are united in their opposition to third party observer (TPO) in clinical neuropsychological evaluations. The presence of third-party observation is opposed because, most fundamentally, it introduces concerns about reliability and validity of test procedures and results (i.e., the presence of a TPO will negatively affect the accuracy and utility of the neuropsychological assessment). TPO introduces extraneous factors that deviate from the assessment procedures' intended use. Specifically, TPO departs from standardized administration procedures because it creates observer effects which are known to affect human performance and test validity. Observer effects, such as distraction of attention of an examinee, are not taken into account in collection of normative data, which may result in inaccurate conclusions pertaining to the extent and severity of abnormal findings. Replacing in-person observation with camera recording or remote observation does not eliminate these issues (Constantinou, Ashendorf, & McCaffrey, 2005). TPO and recording of evaluations conflict with

requirements for test security, published ethical principles, and standards of conduct in the field that are designed to protect the public, examinees, and the profession as a whole.

The potential deleterious effects of TPO are particularly problematic in the medicolegal or forensic context, because of the unique consultant role of the neuropsychologist. These evaluations are adversarial, often entail adherence to a Court Order, and typically involve an opportunity to complete a medicolegal or forensic examination and formulate opinions based on data obtained during that assessment. Therefore, it is especially critical to minimize the effects of TPO. Follow-up contacts and repeat examinations do not occur as they might for clinical assessments, in which there is an opportunity to further evaluate unclear or invalid results. In non-medicolegal or non-forensic assessment there is an iterative process between clients and clinicians, allowing for ongoing communication such that findings can be updated, reconsidered, or amended. In forensic settings there is no similar reciprocal communication between the forensic evaluator and the fact finder, and typically, the evaluator has one opportunity for diagnosis or description of deficits. Expert opinion based on collected data is often critical in deliberations concerning, for instance, a defendant's life or liberty, or a plaintiff's economic justice. Any variable, however small, that may adversely affect the neuropsychological evaluation should be guarded against.

Further, attorneys have recognized that neuropsychologists have reservations about assessments involving TPO. It has become a legal tactic for attorneys attempting to limit or even preclude neuropsychological assessment to demand TPO, which potentially limits the availability of impactful evidence to the trier of fact. Neuropsychologists frequently fend off requests for videotaping or remote monitoring of examination, or allowing an involved third party such as attorney, legal assistant, spouse, or even a psychologist to attend the interview and examination to monitor and take notes. These requests may compromise the ability of neuropsychologists to gather valid data and render empirically-based opinions (Zasler, 2019) and may ultimately affect information experts can provide to the court.

Consistent with our prior position statements, neuropsychologists recognize that there are circumstances in which TPO is permitted. Those circumstances are limited to specific evaluation *context* (clinical, as opposed to medicolegal or forensic) and the *type of observer*. For example, TPO may be necessary in the assessment of an anxious child who is unable to participate in testing unless a parent is present. Similarly, an interpreter may be required when assessment cannot be completed in the patient's preferred language. In these instances, TPO facilitates data collection when assessment could not otherwise proceed. Trainees such as residents and interns are also examples of TPO with no stake in the outcome of an evaluation, and who appear only in the clinical context. These examples are in contrast to TPO whose presence may interfere with data collection without adding advantage, such as those with a stake in the outcome of the evaluation, for example, an attorney or a party retained by the attorney.

Prior Statements on TPO

In 2000, NAN published an official statement opposing the presence of TPO during neuropsychological testing (Axelrod, Barth, Faust, Fisher, Heilbronner...Silver, 2000). In close succession, AACN published its own policy statement on TPO (American Academy of Clinical Neuropsychology, 2001).

The two publications were the first formal statements from major professional organizations on the issue of TPO in neuropsychological assessment. They were closely followed by other organizations (e.g., American Psychological Association, 2007) that also opposed TPO. Additional position statements on related issues, such as recording of evaluations and test security (e.g., National Academy of Neuropsychology, 2000; Inter Organizational Practice Committee, 2014; American Board of Professional Neuropsychology, 2016) have been subsequently released.

In the two decades since their publication, the NAN and AACN statements have been valuable resources in neuropsychologists' efforts to minimize external factors that could compromise data collection and interpretation, standardization, and test security. Importantly, the 2016 policy statement from the American Board of Professional Neuropsychology (ABN) extended the argument against TPO to recording of neuropsychological evaluations. The purpose of the current paper is to present a collaborative position statement, updated to reflect new research, test publisher policies, and technological developments, such as advances in telehealth.

TPO Affects Test Performance and Validity

The impact of TPO on examinee performance has long been one of the foundations upon which neuropsychologists base objections to the presence of an involved observer in their evaluations. Test performance can be affected by many factors, such as distraction by repetitive loud noises, frequent interruptions by persons entering the room, or the mere fact of being observed, leading to difficulty maintaining focus, encoding and remembering new information, or increased anxiety. The presence of TPO—whether in person, electronically, or through a recording device—may influence an examinee or examiner response.

A considerable body of scientific literature addresses the deleterious effects of an observer's presence on an individual's task performance, despite the best efforts to remain unobtrusive. Observer effects have been noted in precisely the cognitive domains often in question in the context of medicolegal or forensic evaluation including memory, attention, processing speed, and executive functions (Kehrer, Sanchez, Habif, Rosenbaum & Townes, 2000; Horwitz & McCaffrey, 2008; Eastvold, Belanger & Vanderploeg, 2012). These modifications in performance unnecessarily raise the risk for misinterpretation of results obtained under observation or monitoring conditions, and make direct comparison of other data difficult, such as with prior evaluations not performed under TPO conditions (Lewandowski et al., 2016). Neuropsychological tests are reliable and valid measures of neurocognitive capacities (brain–behavior relationships) when administered pursuant to the rigorous, controlled conditions under which they were created. Varying testing procedures and conditions across two examinations, one with an observer and one without, may compromise comparison of results.

Observer effects have been reported whether the observer was present for the purpose of considering the examinee (Eastvold, Belanger, & Vanderploeg, 2012) the examiner (McCaffrey, Lynch & Yantz, 2005), or when the purpose of examination was not explained (Horwitz & McCaffrey, 2008). Similar findings were observed when TPO was performed via video recording device (Constantinou, Ashendorf, & McCaffrey, 2005) or audio recording device (Constantinou, Ashendorf, & McCaffrey, 2002). Because observer effects are significant when the context is medicolegal or forensic, and when the observer has a stake in the outcome, TPO is opposed even if the third party is a neuropsychologist retained to observe the examination.

In addition to observer effects on neuropsychological test performance, the presence of a TPO may affect validity of test administration and interpretation of results (Constantinou, Ashendorf, & McCaffrey, 2005; Eastvold, Belanger, & Vanderploeg, 2012). Tests are developed and standardized in the absence of TPO, and evaluation procedures rely on uniform testing conditions and administration. Introduction of a factor not accounted for in test administration and standardization may jeopardize reliability, validity, and interpretation of assessment results.

To summarize, TPO can affect the cognitive functions most often assessed in forensic or medicolegal settings and may impact interpretation and comparison of test results. Consequently, testing conducted in the presence of TPO is not consistent with best practices in clinical neuropsychology, may interfere with obtaining accurate data in a neuropsychological examination, and therefore jeopardizes the accuracy of decisions and judgments made by the trier of fact when based on these data.

TPO Conflicts with Ethical Guidelines and Code of Conduct

The presence of third-party observers during neuropsychological test administration potentially conflicts with the American Psychological Association's Ethical Principles of Psychologists and Code of Conduct (APA, 2017), which sets forth general principles and ethical standards. The ABPN policy statement on TPO (Lewandowski, Baker, Sewick, Knippa, Axelrod, & McCaffrey, 2016) describes these areas of conflict in detail. In short, the General Principles of Beneficence and Nonmaleficence, Fidelity and Responsibility, Integrity, and Justice encourage optimal standards of practice (which preclude presence of TPO); when these are eroded, the outcome may compromise the data interpretation, diagnostic opinion, and recommendations, which has direct impact on public welfare.

APA Ethical standards of Competence and Assessment (2017) are likewise in conflict with the presence of TPO. These include standards 9.01 and 9.02 (Basis and Use of Assessments), 9.06 (Interpreting Assessment Results), and 9.11 (Test Security), which advise adherence to standardization procedures, reporting limitations to interpretation validity, and maintaining test security. Similarly, the Standards for Educational and Psychological Testing (American Educational Research Association, 2014) advise that clinicians must create a test setting with minimal distractions (Standard 15.2). Thus, in addition to the practical matter of test validity, allowing the presence of TPO may place the clinician in violation of ethical and practice standards.

Furthermore, TPO and/or recording/monitoring of evaluations present a dilemma for neuropsychologists in that non-qualified individuals could influence test selection by proxy: in order to minimize test content disclosure or observer distraction effects, neuropsychologists may alter the test selection. The influence of TPO on test selection conflicts with a NAN statement on test selection that explicitly warns against influence of test selection by unqualified third parties (Fazio, Roebuck-Spencer, Denney, Glen, Bianchini...Scott, 2018).

Finally, it is clear that professional ethical principles and standards require test administration, transcription, and interpretation of responses in a manner consistent with standardization procedures and in a manner that ensures valid assessment of underlying abilities without undue influence of extraneous factors on performance. Thus, a priori suggestions that clinicians will behave unethically without observation or recording are inconsistent with professional standards and principles. On occasion, an attorney for an examinee, or their proxy, may demand TPO for their client, citing the potential for malfeasance on the part of the neuropsychologist. It is our position that such a claim is inappropriate given that it is contrary to best practices in the field of neuropsychology, and rather than safeguarding the testing process, may actually introduce error in the test data gathered.

TPO Impacts Test Security and Public Safety

TPO is objectionable in addition, because the practice may violate professional and ethical standards to protect the confidentiality of test materials. The 2017 APA Ethical Code Standard 9.11 (Maintain Test Security) asserts that psychologists “maintain the integrity and security of test materials and other assessment techniques,” and Standard 9.04 specifically notes the importance of protection of test materials, including “manuals, instruments, protocols and test questions, or stimuli,” all of which risk disclosure when direct observation or recording is allowed.

Indeed, APA has long asserted that psychologists must protect materials from third parties (APA, 1999). The American Educational Research Association, the National Council on Measurement in Education, and APA Standards for Educational and Psychological Testing (2014) state that “test users have the responsibility to protect the security of tests, including that of previous editions” (Standard 9.21).

Test security is of paramount importance for public safety. Valid and reliable neuropsychological assessment rests on the assumption that a test taker has not been exposed to test content or structure. The United States Supreme Court, in *Detroit Edison Co v NLRB*, 440 US 301 (1979), reinforced this notion when it moved to protect future test integrity by prohibiting disclosure of test content to non-psychologist petitioners. Prior exposure to test materials may alter client responses to the stimuli and interfere with valid test score interpretation, and accurate conclusions cannot be drawn from the assessment. When test materials are not adequately secured, the public may have exposure to manuals, test instructions and answers, and testing procedures. Subsequently, the utility of the tests is diminished, neuropsychological evaluations are less effective, public safety is at risk, and persons are deprived of access to a valid evaluation.

Neuropsychological tests are used for high-stakes decisions, such as to determine suitability for surgery, the ability to safely work as a pilot or police officer, access to academic accommodations, fitness to parent, the ability to stand trial, the need for medication and other treatment, and return to play decision following a sports concussion, to name a few. Neuropsychologists must be able to use tests and interpret scores according to standardized administration, comparison to normative data, and assurance that the test takers have not been previously exposed to the materials and procedures. Unfortunately, published studies have shown that preparation for psychological testing is supported by a majority of attorneys (Spengler, Walters, Bryan, & Millsbaugh, 2020), which highlights the importance of test security as it relates to the need to protect test content and procedures. Inability to perform neuropsychological evaluations that adhere to ethical and test administration and interpretation guidelines places the general public at risk.

Consensus of Other Organizations on TPO

National psychology and neuropsychology organizations, state psychological associations, international partners, consensus standards for psychological assessment, and test publishers (Psychological Assessment Resources, Pearson Assessments, MHS Assessments, Green's Test Publishing) are unified in opposition to TPO during neuropsychological test administration. Organizations with published statements pertaining to the opposition to TPO include the American Psychological Association (APA Committee on Psychological Tests and Assessment, 2007), several U.S. state psychological or neuropsychological associations (e.g., Colorado, New York, and Virginia), the Canadian Psychological Association (CPA), the Standards for Educational and Psychological Testing, the National Academy of Neuropsychology (NAN), the American Academy of Clinical Neuropsychology (AACN), and the American Board of Professional Neuropsychology (ABN).

The Standards for Educational and Psychological Testing (2014), published by a joint committee of American Educational Research Association, the American Psychological Association, and the National Council on Measurement in Education, assert that test administration should follow standard procedures and minimize distractions, both of which are inconsistent with TPO.

Many Courts Have Agreed That TPO Should Be Prohibited

Many courts have agreed that TPO should not be allowed in forensic or medicolegal evaluations; however, court decisions have varied by case, region, and jurisdiction. Neuropsychologists who encounter TPO demands in medicolegal/forensic cases are encouraged to work with the retaining party to craft a formal response to any such motion, often in the form of an affidavit, detailing the arguments against and potential negative consequences of allowing TPO, including those outlined in this position statement, accompanied by supportive documents. Should there be an adverse ruling or motion to compel TPO, neuropsychologists should weigh their options carefully and consult legal and ethical guidance as appropriate.

TPO Presence Conflicts with Test Publisher Policies and User Contracts

The majority of psychological and neuropsychological tests are copyrighted and users of psychological and neuropsychological tests are subject to strict credential review by test publishers. As users of copyrighted materials, neuropsychologists are required to maintain test security and to ensure that the materials are not shared with persons unqualified in their use and interpretation. TPO with a stake in the outcome of the evaluation have a potential incentive to distribute test content which would violate copyright protections and other mandates designed to protect test materials from unnecessary exposure to unqualified persons.

Test publishers require specific user qualifications and security of test content. Three major test vendors (MHS Assessments, Pearson Assessment, and Psychological Assessment Resources, Inc.) publish statements indicating release of test content is subject to the trade secret exemption, "Protection of Trade Secrets," cited in Section 1172(e) of Health Insurance Portability and Accountability Act (HIPPA, 1996). The test vendor statements note the potential for public harm if test integrity is compromised and note there are limited alternative measurements, should copyrighted and confidential content be released. Another test publisher, Green's Publishing, has a user contract specifying that misuse or unauthorized distribution of test materials will result in revocation of the clinician's license to use the test (P. Green, personal communication, July 26, 2019).

Therefore, TPO and recording potentially violate trade secrets and jeopardize the integrity and security of test content in a manner that places the clinician at risk of losing test user contracts, and thus access to tools of the trade.

Telehealth Developments

Following the outbreak of coronavirus disease in 2020, hospitals and clinics nationwide were temporarily closed to mitigate against rapid spread of the virus. Thus followed a dramatic increase in the use and reimbursement for "remote" or telehealth appointments by mental health professionals and neuropsychologists. Given the nature of remote testing, there is potential for observer effects, test content disclosure, and examination recording, which are significant threats to the validity of test results and test security. As Miller and Barr (2017) write, "There would be nothing in place to prevent someone from recording the assessment via external device or simply writing items down for future reference . . . even video feeds of the assessment would not be able to entirely safeguard against this."

Despite the increasing use of teleneuropsychology, TPO standards still apply and are recognized by clinicians and researchers. Marra, Hamlet, Bauer, and Bowers (2020) note that at least one test publisher, Pearson Assessments, requires documentation of examinee agreement not to record testing or reproduce materials. The authors recommend examiner attention to test security and validity, and amending consent forms to prohibit recording and to reflect the possible unknown effects of video-based assessment. The InterOrganizational Practice Committee (IOPC) issued recommendations for teleneuropsychology (Bilder et al., 2020), noting there are insufficient data to establish guidelines for modification of routine testing for telehealth. Furthermore, cognitive assessments performed in teleneuropsychology studies tend to be very brief and targeted, appropriate for limited conditions and contexts without the presence of a potentially adversarial or even invested observer. In contrast, independent neuropsychological examinations done in a litigation context are much more extensive and subject to observer effects given the examination's potential impact on the outcome of a case. Thus, the research supporting basic cognitive teleneuropsychology screening in specific targeted populations cannot be generalized to medicolegal/forensic evaluations. Therefore, the TPO policy in the current paper is unchanged by recent developments in teleneuropsychology, consistent with literature differentiating between presence of a paraprofessional technical administrator or video monitoring in a brief clinical screening, and the TPO and monitoring associated with medicolegal or forensic examinations.

Conclusion and Looking Ahead

Neuropsychological evaluation is an integral part of diagnosis and treatment for a wide range of medical and psychiatric conditions, with demonstrated clinical (Watt & Crowe, 2017) and economic value (Glen, Hostetter, Roebuck-Spencer, Garmoe, Scott...Espe-Pfeifer, 2020). Third party observation presents a threat to the validity and reliability of data collection and interpretation, potentially conflicts with ethical standards, and poses risks to the public by eroding utility of vital clinical measures that cannot be replaced in a timely or cost-effective manner. The longstanding NAN, AACN, and ABN policies, which are in opposition to TPO in neuropsychological evaluations, are maintained.

Conflict of Interest

The authors have no disclosures.

Acknowledgements

This position paper is a summary of current issues and positions regarding the policy of third party observers in neuropsychological testing. This paper has been approved by the National Academy of Neuropsychology (NAN) Board of Directors, the American Academy of Clinical Neuropsychology (AACN) Board of Directors, and the American College of Professional Neuropsychology (ACPN) of the American Board of Professional Neuropsychology (ABN). The authors thank NAN Policy and Planning committee members Robin Hilsabeck, Shawn Acheson, Scott Sperling, Patricia Espe-Pfeifer, Tahlia Bragg, Jason Bailie, and Mollie Colvin for their review and suggestions regarding this article.

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**STATE OF MICHIGAN
IN THE COURT OF APPEALS**

ALIAMA X. SCHAUMANN-BELTRAN,

Plaintiff-Appellee,

v

JOSEPH GEMMETE, M.D.,

Defendant-Appellant

Court of Appeals Case No. 347683

Washtenaw County Circuit

Court Case No. 17-132-NH

Hon. Timothy P. Connors

Consolidated With

ALIAMA X. SCHAUMANN-BELTRAN,

Plaintiff-Appellee

v

THE BOARD OF REGENTS OF THE UNIVERSITY
OF MICHIGAN, d/b/a UNIVERSITY OF MICHIGAN
HEALTH SYSTEM (now Michigan Medicine),
UNIVERSITY OF MICHIGAN MEDICAL CENTER
and C.S. MOTT CHILDREN'S HOSPITAL,

Defendants-Appellants.

Court of Appeals Case No. 347684

Court of Claims Case No. 17-38-MH

Hon. Cynthia Stephens

BRIEF OF AMICI CURIAE

**THE AMERICAN ACADEMY OF CLINICAL NEUROPSYCHOLOGY
THE NATIONAL ACADEMY OF NEUROPSYCHOLOGY
THE SOCIETY FOR CLINICAL NEUROPSYCHOLOGY OF THE
AMERICAN PSYCHOLOGICAL ASSOCIATION
THE AMERICAN BOARD OF PROFESSIONAL NEUROPSYCHOLOGY
THE MICHIGAN PSYCHOLOGICAL ASSOCIATION**

**IN SUPPORT OF DEFENDANT-APPELLANTS' APPEAL FROM THE
JANUARY 25, 2019 ORDER PERMITTING
VIDEOTAPING OF NEUROPSYCHOLOGICAL EXAM**

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EXHIBIT “G.5”



Nevada
Psychological
Association

Advocating for Psychologists in Nevada

Nevada Psychological Association

P.O. Box 400671

Las Vegas, NV 89140

888.654.0050 ph/fax

www.NVpsychology.org

December 11, 2020

Supreme Court of Nevada
201 South Carson Street, Suite 201
Carson City, NV 89701-4702

On behalf of: Executive Board, Nevada Psychological Association

Dear Honorable Supreme Court Justices of the Nevada Supreme Court:

It has come to the attention of the Executive Board of the Nevada Psychological Association (NPA) that MOATS VS. BURGESS will be heard in the Nevada Supreme Court. This case relates to third-party observation and audio recording of the administration of standardized measures during psychological and neuropsychological independent medical examinations.

As the state professional association of psychologists, NPA's mission is to advance and represent psychology as a science and a profession, as well as to serve the professional needs of its membership and the community. In accordance with our mission, we respectfully submit to the Court two documents for consideration in this case:

1. Brief of Amici Curiae submitted to the State of Michigan Court of Appeals (Case No. 347683)
2. Letter submitted to the Eighth Judicial District Court from NPA (dated June 17, 2018)

The amicus brief was submitted on behalf of multiple professional psychological organizations in opposition to third-party observers based on empirical research, our professional ethics, and best practices of test administration and security. The letter submitted by NPA to Judge Togliotti was in support of one of our psychologist member's adherence to our professional ethics to protect the confidentiality and security of testing materials and results.

Additionally, we specifically highlight the American Psychological Association's (APA) ethical code which requires psychologists to "administer...or use assessment techniques" in accordance with research on the "proper application" of techniques (9.02, Use of Assessments), as well as maintain the "integrity and security" of psychological tests and other assessment techniques (9.11, Maintaining Test Security)¹. We are concerned that third-party observation compromises the integrity of these tests and techniques which threatens the profession of psychology. We believe this stance is supported by many well-cited journal articles and is the general consensus of our peers.

Respectfully,

Sara Hunt, PhD
President
Nevada Psychological Association
drsarahunt@gmail.com

Noelle Lefforge, PhD
Past-President
Nevada Psychological Association
nlefforge@gmail.com

¹APA (2017). Ethical principles of psychologists and code of conduct.

EXHIBIT “G.6”

KeyCite Yellow Flag - Negative Treatment
Proposed Regulation

Nevada Administrative Code
Chapter 641. Psychologists, Licensed Behavior Analysts, Licensed Assistant Behavior Analysts and Certified
Autism Behavior Interventionists
Standards of Conduct

NAC 641.250

**641.250. Ethical Principles of Psychologists and Code of
Conduct: Adoption by reference; controlling provisions; revision.**

Currentness

1. The provisions set forth in the most recent edition of the *Ethical Principles of Psychologists and Code of Conduct* adopted by the American Psychological Association are hereby adopted by reference and incorporated herein, unless the Board gives notice that the most recent edition is not suitable for this State pursuant to subsection 2 and except to the extent that those provisions conflict with the provisions of NAC 641.200 to 641.255, inclusive, in which case the provisions of NAC 641.200 to 641.255, inclusive, are controlling. A copy of the publication may be obtained free of charge from the American Psychological Association at 750 First Street, N.E. Washington, D.C., 20002-4242, Attention: Service Center, at the Internet address <http://www.apa.org/ethics/code.html> or by telephone at (202) 336-5500.

2. If the publication adopted by reference pursuant to subsection 1 is revised, the Board will review the revision to ensure its suitability for this State. If the Board determines that the revision is not suitable for this State, the Board will hold a public hearing to review its determination within 6 months after the date of publication of the revision and give notice of that hearing. If, after the hearing, the Board does not revise its determination, the Board will give notice within 30 days after the hearing that the revision is not suitable for this State. If the Board does not give such notice, the revision becomes part of the publication adopted by reference pursuant to subsection 1.

Credits

(Added to NAC by Bd. of Psychological Exam'rs, eff. 8-24-90; A 12-28-95; R089-03, 1-18-2005)

Current with amendments included in the State of Nevada Register of Administrative Regulations, Volume 281, dated July 31, 2021 and Supplement 2020-08, dated August 31, 2020.

Nev. Admin. Code 641.250, NV ADC 641.250

End of Document

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EXHIBIT “G.7”



AMERICAN PSYCHOLOGICAL ASSOCIATION

ETHICAL PRINCIPLES OF PSYCHOLOGISTS AND CODE OF CONDUCT

Adopted August 21, 2002

Effective June 1, 2003

(With the 2010 Amendments
to Introduction and Applicability
and Standards 1.02 and 1.03,
Effective June 1, 2010)

With the 2016 Amendment
to Standard 3.04

Adopted August 3, 2016

Effective January 1, 2017



ETHICAL PRINCIPLES OF PSYCHOLOGISTS AND CODE OF CONDUCT

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AMENDMENTS TO THE 2002 "ETHICAL PRINCIPLES OF PSYCHOLOGISTS AND CODE OF CONDUCT" IN 2010 AND 2016

INTRODUCTION AND APPLICABILITY

The American Psychological Association's (APA's) Ethical Principles of Psychologists and Code of Conduct (hereinafter referred to as the Ethics Code) consists of an Introduction, a Preamble, five General Principles (A-E), and specific Ethical Standards. The Introduction discusses the intent, organization, procedural considerations, and scope of application of the Ethics Code. The Preamble and General Principles are aspirational goals to guide psychologists toward the highest ideals of psychology. Although the Preamble and General Principles are not themselves enforceable rules, they should be considered by psychologists in arriving at an ethical course of action. The Ethical Standards set forth enforceable rules for conduct as psychologists. Most of the Ethical Standards are written broadly, in order to apply to psychologists in varied roles, although the application of an Ethical Standard may vary depending on the context. The Ethical Standards are not exhaustive. The fact that a given conduct is not specifically addressed by an Ethical Standard does not mean that it is necessarily either ethical or unethical.

This Ethics Code applies only to psychologists' activities that are part of their scientific, educational, or professional roles as psychologists. Areas covered include but are not limited to the clinical, counseling, and school practice of psychology; research; teaching; supervision of trainees; public service; policy development; social intervention; development of assessment instruments; conducting assessments; educational counseling; organizational consulting; forensic activities; program design and evaluation; and administration. This Ethics Code applies to these activities across a variety of contexts, such as in person, postal, telephone, Internet, and other electronic transmissions. These activities shall be distinguished from the purely private conduct of psychologists, which is not within the purview of the Ethics Code.

Membership in the APA commits members and student affiliates to comply with the standards of the APA Ethics Code and to the rules and procedures used to enforce them. Lack of awareness or misunderstanding of an Ethical Standard is not itself a defense to a charge of unethical conduct.

The procedures for filing, investigating, and resolving complaints of unethical conduct are described in the current Rules and Procedures of the APA Ethics Committee. APA may impose sanctions on its members for violations of the standards of the Ethics Code, including termination of APA membership, and may notify other bodies and individuals of its actions. Actions that violate the standards of the Ethics Code may also lead to the imposition of sanctions on psychologists or students whether or not they are APA members by bodies other than APA, including state psychological associations, other professional groups, psychology boards, other state or federal agencies, and payors for health services.

In addition, APA may take action against a member after his or her conviction of a felony, expulsion or suspension from an affiliated state psychological association, or suspension or loss of licensure. When the sanction to be imposed by APA is less than expulsion, the 2001 Rules and Procedures do not guarantee an opportunity for an in-person hearing, but generally provide that complaints will be resolved only on the basis of a submitted record.

The Ethics Code is intended to provide guidance for psychologists and standards of professional conduct that can be applied by the APA and by other bodies that choose to adopt them. The Ethics Code is not intended to be a basis of civil liability. Whether a psychologist has violated the Ethics Code standards does not by itself determine whether the psychologist is legally liable in a court action, whether a contract is enforceable, or whether other legal consequences occur.

The American Psychological Association's Council of Representatives adopted this version of the APA Ethics Code during its meeting on August 21, 2002. The Code became effective on June 1, 2003. The Council of Representatives amended this version of the Ethics Code on February 20, 2010, effective June 1, 2010, and on August 3, 2016, effective January 1, 2017. (see p. 16 of this pamphlet). Inquiries concerning the substance or interpretation of the APA Ethics Code should be addressed to the Office of Ethics, American Psychological Association, 750 First St. NE, Washington, DC 20002-4242. This Ethics Code and information regarding the Code can be found on the APA website, <http://www.apa.org/ethics>. The standards in this Ethics Code will be used to adjudicate complaints brought concerning alleged conduct occurring on or after the effective date. Complaints will be adjudicated on the basis of the version of the Ethics Code that was in effect at the time the conduct occurred.

The APA has previously published its Ethics Code, or amendments thereto, as follows:

- American Psychological Association. (1953). *Ethical standards of psychologists*. Washington, DC: Author.
 - American Psychological Association. (1959). Ethical standards of psychologists. *American Psychologist*, 14, 279-282.
 - American Psychological Association. (1963). Ethical standards of psychologists. *American Psychologist*, 18, 56-60.
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 - American Psychological Association. (2016). Revision of ethical standard 3.04 of the "Ethical Principles of Psychologists and Code of Conduct" (2002, as amended 2010). *American Psychologist*, 71, 900.
- Request copies of the APA's Ethical Principles of Psychologists and Code of Conduct from the APA Order Department, 750 First St. NE, Washington, DC 20002-4242, or phone (202) 336-5510.

The modifiers used in some of the standards of this Ethics Code (e.g., *reasonably*, *appropriate*, *potentially*) are included in the standards when they would (1) allow professional judgment on the part of psychologists, (2) eliminate injustice or inequality that would occur without the modifier, (3) ensure applicability across the broad range of activities conducted by psychologists, or (4) guard against a set of rigid rules that might be quickly outdated. As used in this Ethics Code, the term *reasonable* means the prevailing professional judgment of psychologists engaged in similar activities in similar circumstances, given the knowledge the psychologist had or should have had at the time.

In the process of making decisions regarding their professional behavior, psychologists must consider this Ethics Code in addition to applicable laws and psychology board regulations. In applying the Ethics Code to their professional work, psychologists may consider other materials and guidelines that have been adopted or endorsed by scientific and professional psychological organizations and the dictates of their own conscience, as well as consult with others within the field. If this Ethics Code establishes a higher standard of conduct than is required by law, psychologists must meet the higher ethical standard. If psychologists' ethical responsibilities conflict with law, regulations, or other governing legal authority, psychologists make known their commitment to this Ethics Code and take steps to resolve the conflict in a responsible manner in keeping with basic principles of human rights.

PREAMBLE

Psychologists are committed to increasing scientific and professional knowledge of behavior and people's understanding of themselves and others and to the use of such knowledge to improve the condition of individuals, organizations, and society. Psychologists respect and protect civil and human rights and the central importance of freedom of inquiry and expression in research, teaching, and publication. They strive to help the public in developing informed judgments and choices concerning human behavior. In doing so, they perform many roles, such as researcher, educator, diagnostician, therapist, supervisor, consultant, administrator, social interventionist, and expert witness. This Ethics Code provides a common set of principles and standards upon which psychologists build their professional and scientific work.

This Ethics Code is intended to provide specific standards to cover most situations encountered by psychologists. It has as its goals the welfare and protection of the individuals and groups with whom psychologists work and the education of members, students, and the public regarding ethical standards of the discipline.

The development of a dynamic set of ethical standards for psychologists' work-related conduct requires a

personal commitment and lifelong effort to act ethically; to encourage ethical behavior by students, supervisees, employees, and colleagues; and to consult with others concerning ethical problems.

GENERAL PRINCIPLES

This section consists of General Principles. General Principles, as opposed to Ethical Standards, are aspirational in nature. Their intent is to guide and inspire psychologists toward the very highest ethical ideals of the profession. General Principles, in contrast to Ethical Standards, do not represent obligations and should not form the basis for imposing sanctions. Relying upon General Principles for either of these reasons distorts both their meaning and purpose.

Principle A: Beneficence and Nonmaleficence

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.

Principle B: Fidelity and Responsibility

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.

Principle C: Integrity

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.

Principle D: Justice

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.

Principle E: Respect for People's Rights and Dignity

Psychologists respect the dignity and worth of all people, and the rights of individuals to privacy, confidentiality, and self-determination. Psychologists are aware that special safeguards may be necessary to protect the rights and welfare of persons or communities whose vulnerabilities impair autonomous decision making. Psychologists are aware of and respect cultural, individual, and role differences, including those based on age, gender, gender identity, race, ethnicity, culture, national origin, religion, sexual orientation, disability, language, and socioeconomic status, and consider these factors when working with members of such groups. Psychologists try to eliminate the effect on their work of biases based on those factors, and they do not knowingly participate in or condone activities of others based upon such prejudices.

ETHICAL STANDARDS

1. Resolving Ethical Issues

1.01 Misuse of Psychologists' Work

If psychologists learn of misuse or misrepresentation of their work, they take reasonable steps to correct or minimize the misuse or misrepresentation.

1.02 Conflicts Between Ethics and Law, Regulations, or Other Governing Legal Authority

If psychologists' ethical responsibilities conflict with law, regulations, or other governing legal authority, psychologists clarify the nature of the conflict, make known their commitment to the Ethics Code, and take reasonable

steps to resolve the conflict consistent with the General Principles and Ethical Standards of the Ethics Code. Under no circumstances may this standard be used to justify or defend violating human rights.

1.03 Conflicts Between Ethics and Organizational Demands

If the demands of an organization with which psychologists are affiliated or for whom they are working are in conflict with this Ethics Code, psychologists clarify the nature of the conflict, make known their commitment to the Ethics Code, and take reasonable steps to resolve the conflict consistent with the General Principles and Ethical Standards of the Ethics Code. Under no circumstances may this standard be used to justify or defend violating human rights.

1.04 Informal Resolution of Ethical Violations

When psychologists believe that there may have been an ethical violation by another psychologist, they attempt to resolve the issue by bringing it to the attention of that individual, if an informal resolution appears appropriate and the intervention does not violate any confidentiality rights that may be involved. (See also Standards 1.02, Conflicts Between Ethics and Law, Regulations, or Other Governing Legal Authority, and 1.03, Conflicts Between Ethics and Organizational Demands.)

1.05 Reporting Ethical Violations

If an apparent ethical violation has substantially harmed or is likely to substantially harm a person or organization and is not appropriate for informal resolution under Standard 1.04, Informal Resolution of Ethical Violations, or is not resolved properly in that fashion, psychologists take further action appropriate to the situation. Such action might include referral to state or national committees on professional ethics, to state licensing boards, or to the appropriate institutional authorities. This standard does not apply when an intervention would violate confidentiality rights or when psychologists have been retained to review the work of another psychologist whose professional conduct is in question. (See also Standard 1.02, Conflicts Between Ethics and Law, Regulations, or Other Governing Legal Authority.)

1.06 Cooperating with Ethics Committees

Psychologists cooperate in ethics investigations, proceedings, and resulting requirements of the APA or any affiliated state psychological association to which they belong. In doing so, they address any confidentiality issues. Failure to cooperate is itself an ethics violation. However, making a request for deferment of adjudication of an ethics complaint pending the outcome of litigation does not alone constitute noncooperation.

1.07 Improper Complaints

Psychologists do not file or encourage the filing of ethics complaints that are made with reckless disregard for or willful ignorance of facts that would disprove the allegation.

1.08 Unfair Discrimination Against Complainants and Respondents

Psychologists do not deny persons employment, advancement, admissions to academic or other programs, tenure, or promotion, based solely upon their having made or their being the subject of an ethics complaint. This does not preclude taking action based upon the outcome of such proceedings or considering other appropriate information.

2. Competence

2.01 Boundaries of Competence

(a) Psychologists provide services, teach, and conduct research with populations and in areas only within the boundaries of their competence, based on their education, training, supervised experience, consultation, study, or professional experience.

(b) Where scientific or professional knowledge in the discipline of psychology establishes that an understanding of factors associated with age, gender, gender identity, race, ethnicity, culture, national origin, religion, sexual orientation, disability, language, or socioeconomic status is essential for effective implementation of their services or research, psychologists have or obtain the training, experience, consultation, or supervision necessary to ensure the competence of their services, or they make appropriate referrals, except as provided in Standard 2.02, Providing Services in Emergencies.

(c) Psychologists planning to provide services, teach, or conduct research involving populations, areas, techniques, or technologies new to them undertake relevant education, training, supervised experience, consultation, or study.

(d) When psychologists are asked to provide services to individuals for whom appropriate mental health services are not available and for which psychologists have not obtained the competence necessary, psychologists with closely related prior training or experience may provide such services in order to ensure that services are not denied if they make a reasonable effort to obtain the competence required by using relevant research, training, consultation, or study.

(e) In those emerging areas in which generally recognized standards for preparatory training do not yet exist, psychologists nevertheless take reasonable steps to ensure the competence of their work and to protect clients/patients, students, supervisees, research participants, organizational clients, and others from harm.

(f) When assuming forensic roles, psychologists are

or become reasonably familiar with the judicial or administrative rules governing their roles.

2.02 Providing Services in Emergencies

In emergencies, when psychologists provide services to individuals for whom other mental health services are not available and for which psychologists have not obtained the necessary training, psychologists may provide such services in order to ensure that services are not denied. The services are discontinued as soon as the emergency has ended or appropriate services are available.

2.03 Maintaining Competence

Psychologists undertake ongoing efforts to develop and maintain their competence.

2.04 Bases for Scientific and Professional Judgments

Psychologists' work is based upon established scientific and professional knowledge of the discipline. (See also Standards 2.01e, Boundaries of Competence, and 10.01b, Informed Consent to Therapy.)

2.05 Delegation of Work to Others

Psychologists who delegate work to employees, supervisees, or research or teaching assistants or who use the services of others, such as interpreters, take reasonable steps to (1) avoid delegating such work to persons who have a multiple relationship with those being served that would likely lead to exploitation or loss of objectivity; (2) authorize only those responsibilities that such persons can be expected to perform competently on the basis of their education, training, or experience, either independently or with the level of supervision being provided; and (3) see that such persons perform these services competently. (See also Standards 2.02, Providing Services in Emergencies; 3.05, Multiple Relationships; 4.01, Maintaining Confidentiality; 9.01, Bases for Assessments; 9.02, Use of Assessments; 9.03, Informed Consent in Assessments; and 9.07, Assessment by Unqualified Persons.)

2.06 Personal Problems and Conflicts

(a) Psychologists refrain from initiating an activity when they know or should know that there is a substantial likelihood that their personal problems will prevent them from performing their work-related activities in a competent manner.

(b) When psychologists become aware of personal problems that may interfere with their performing work-related duties adequately, they take appropriate measures, such as obtaining professional consultation or assistance, and determine whether they should limit, suspend, or terminate their work-related duties. (See also Standard 10.10, Terminating Therapy.)

3. Human Relations

3.01 Unfair Discrimination

In their work-related activities, psychologists do not engage in unfair discrimination based on age, gender, gender identity, race, ethnicity, culture, national origin, religion, sexual orientation, disability, socioeconomic status, or any basis proscribed by law.

3.02 Sexual Harassment

Psychologists do not engage in sexual harassment. Sexual harassment is sexual solicitation, physical advances, or verbal or nonverbal conduct that is sexual in nature, that occurs in connection with the psychologist's activities or roles as a psychologist, and that either (1) is unwelcome, is offensive, or creates a hostile workplace or educational environment, and the psychologist knows or is told this or (2) is sufficiently severe or intense to be abusive to a reasonable person in the context. Sexual harassment can consist of a single intense or severe act or of multiple persistent or pervasive acts. (See also Standard 1.08, Unfair Discrimination Against Complainants and Respondents.)

3.03 Other Harassment

Psychologists do not knowingly engage in behavior that is harassing or demeaning to persons with whom they interact in their work based on factors such as those persons' age, gender, gender identity, race, ethnicity, culture, national origin, religion, sexual orientation, disability, language, or socioeconomic status.

3.04 Avoiding Harm

(a) Psychologists take reasonable steps to avoid harming their clients/patients, students, supervisees, research participants, organizational clients, and others with whom they work, and to minimize harm where it is foreseeable and unavoidable.

(b) Psychologists do not participate in, facilitate, assist, or otherwise engage in torture, defined as any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person, or in any other cruel, inhuman, or degrading behavior that violates 3.04a.

3.05 Multiple Relationships

(a) A multiple relationship occurs when a psychologist is in a professional role with a person and (1) at the same time is in another role with the same person, (2) at the same time is in a relationship with a person closely associated with or related to the person with whom the psychologist has the professional relationship, or (3) promises to enter into another relationship in the future with the person or a person closely associated with or related to the person.

A psychologist refrains from entering into a multiple relationship if the multiple relationship could reasonably be expected to impair the psychologist's objectivity, competence, or effectiveness in performing his or her functions as a psychologist, or otherwise risks exploitation or harm to the person with whom the professional relationship exists.

Multiple relationships that would not reasonably be expected to cause impairment or risk exploitation or harm are not unethical.

(b) If a psychologist finds that, due to unforeseen factors, a potentially harmful multiple relationship has arisen, the psychologist takes reasonable steps to resolve it with due regard for the best interests of the affected person and maximal compliance with the Ethics Code.

(c) When psychologists are required by law, institutional policy, or extraordinary circumstances to serve in more than one role in judicial or administrative proceedings, at the outset they clarify role expectations and the extent of confidentiality and thereafter as changes occur. (See also Standards 3.04, Avoiding Harm, and 3.07, Third-Party Requests for Services.)

3.06 Conflict of Interest

Psychologists refrain from taking on a professional role when personal, scientific, professional, legal, financial, or other interests or relationships could reasonably be expected to (1) impair their objectivity, competence, or effectiveness in performing their functions as psychologists or (2) expose the person or organization with whom the professional relationship exists to harm or exploitation.

3.07 Third-Party Requests for Services

When psychologists agree to provide services to a person or entity at the request of a third party, psychologists attempt to clarify at the outset of the service the nature of the relationship with all individuals or organizations involved. This clarification includes the role of the psychologist (e.g., therapist, consultant, diagnostician, or expert witness), an identification of who is the client, the probable uses of the services provided or the information obtained, and the fact that there may be limits to confidentiality. (See also Standards 3.05, Multiple Relationships, and 4.02, Discussing the Limits of Confidentiality.)

3.08 Exploitative Relationships

Psychologists do not exploit persons over whom they have supervisory, evaluative or other authority such as clients/patients, students, supervisees, research participants, and employees. (See also Standards 3.05, Multiple Relationships; 6.04, Fees and Financial Arrangements; 6.05, Barter with Clients/Patients; 7.07, Sexual Relationships with Students and Supervisees; 10.05, Sexual Intima-

cies with Current Therapy Clients/Patients; 10.06, Sexual Intimacies with Relatives or Significant Others of Current Therapy Clients/Patients; 10.07, Therapy with Former Sexual Partners; and 10.08, Sexual Intimacies with Former Therapy Clients/Patients.)

3.09 Cooperation with Other Professionals

When indicated and professionally appropriate, psychologists cooperate with other professionals in order to serve their clients/patients effectively and appropriately. (See also Standard 4.05, Disclosures.)

3.10 Informed Consent

(a) When psychologists conduct research or provide assessment, therapy, counseling, or consulting services in person or via electronic transmission or other forms of communication, they obtain the informed consent of the individual or individuals using language that is reasonably understandable to that person or persons except when conducting such activities without consent is mandated by law or governmental regulation or as otherwise provided in this Ethics Code. (See also Standards 8.02, Informed Consent to Research; 9.03, Informed Consent in Assessments; and 10.01, Informed Consent to Therapy.)

(b) For persons who are legally incapable of giving informed consent, psychologists nevertheless (1) provide an appropriate explanation, (2) seek the individual's assent, (3) consider such persons' preferences and best interests, and (4) obtain appropriate permission from a legally authorized person, if such substitute consent is permitted or required by law. When consent by a legally authorized person is not permitted or required by law, psychologists take reasonable steps to protect the individual's rights and welfare.

(c) When psychological services are court ordered or otherwise mandated, psychologists inform the individual of the nature of the anticipated services, including whether the services are court ordered or mandated and any limits of confidentiality, before proceeding.

(d) Psychologists appropriately document written or oral consent, permission, and assent. (See also Standards 8.02, Informed Consent to Research; 9.03, Informed Consent in Assessments; and 10.01, Informed Consent to Therapy.)

3.11 Psychological Services Delivered to or Through Organizations

(a) Psychologists delivering services to or through organizations provide information beforehand to clients and when appropriate those directly affected by the services about (1) the nature and objectives of the services, (2) the intended recipients, (3) which of the individuals are clients, (4) the relationship the psychologist will have with each person and the organization, (5) the probable uses of services

provided and information obtained, (6) who will have access to the information, and (7) limits of confidentiality. As soon as feasible, they provide information about the results and conclusions of such services to appropriate persons.

(b) If psychologists will be precluded by law or by organizational roles from providing such information to particular individuals or groups, they so inform those individuals or groups at the outset of the service.

3.12 Interruption of Psychological Services

Unless otherwise covered by contract, psychologists make reasonable efforts to plan for facilitating services in the event that psychological services are interrupted by factors such as the psychologist's illness, death, unavailability, relocation, or retirement or by the client's/patient's relocation or financial limitations. (See also Standard 6.02c, Maintenance, Dissemination, and Disposal of Confidential Records of Professional and Scientific Work.)

4. Privacy and Confidentiality

4.01 Maintaining Confidentiality

Psychologists have a primary obligation and take reasonable precautions to protect confidential information obtained through or stored in any medium, recognizing that the extent and limits of confidentiality may be regulated by law or established by institutional rules or professional or scientific relationship. (See also Standard 2.05, Delegation of Work to Others.)

4.02 Discussing the Limits of Confidentiality

(a) Psychologists discuss with persons (including, to the extent feasible, persons who are legally incapable of giving informed consent and their legal representatives) and organizations with whom they establish a scientific or professional relationship (1) the relevant limits of confidentiality and (2) the foreseeable uses of the information generated through their psychological activities. (See also Standard 3.10, Informed Consent.)

(b) Unless it is not feasible or is contraindicated, the discussion of confidentiality occurs at the outset of the relationship and thereafter as new circumstances may warrant.

(c) Psychologists who offer services, products, or information via electronic transmission inform clients/patients of the risks to privacy and limits of confidentiality.

4.03 Recording

Before recording the voices or images of individuals to whom they provide services, psychologists obtain permission from all such persons or their legal representatives. (See also Standards 8.03, Informed Consent for Recording Voices and Images in Research; 8.05, Dispensing with Informed Consent for Research; and 8.07, Deception in Research.)

4.04 Minimizing Intrusions on Privacy

(a) Psychologists include in written and oral reports and consultations, only information germane to the purpose for which the communication is made.

(b) Psychologists discuss confidential information obtained in their work only for appropriate scientific or professional purposes and only with persons clearly concerned with such matters.

4.05 Disclosures

(a) Psychologists may disclose confidential information with the appropriate consent of the organizational client, the individual client/patient, or another legally authorized person on behalf of the client/patient unless prohibited by law.

(b) Psychologists disclose confidential information without the consent of the individual only as mandated by law, or where permitted by law for a valid purpose such as to (1) provide needed professional services; (2) obtain appropriate professional consultations; (3) protect the client/patient, psychologist, or others from harm; or (4) obtain payment for services from a client/patient, in which instance disclosure is limited to the minimum that is necessary to achieve the purpose. (See also Standard 6.04e, Fees and Financial Arrangements.)

4.06 Consultations

When consulting with colleagues, (1) psychologists do not disclose confidential information that reasonably could lead to the identification of a client/patient, research participant, or other person or organization with whom they have a confidential relationship unless they have obtained the prior consent of the person or organization or the disclosure cannot be avoided, and (2) they disclose information only to the extent necessary to achieve the purposes of the consultation. (See also Standard 4.01, Maintaining Confidentiality.)

4.07 Use of Confidential Information for Didactic or Other Purposes

Psychologists do not disclose in their writings, lectures, or other public media, confidential, personally identifiable information concerning their clients/patients, students, research participants, organizational clients, or other recipients of their services that they obtained during the course of their work, unless (1) they take reasonable steps to disguise the person or organization, (2) the person or organization has consented in writing, or (3) there is legal authorization for doing so.

5. Advertising and Other Public Statements

5.01 Avoidance of False or Deceptive Statements

(a) Public statements include but are not limited to paid or unpaid advertising, product endorsements, grant applications, licensing applications, other credentialing applications, brochures, printed matter, directory listings, personal resumes or curricula vitae, or comments for use in media such as print or electronic transmission, statements in legal proceedings, lectures and public oral presentations, and published materials. Psychologists do not knowingly make public statements that are false, deceptive, or fraudulent concerning their research, practice, or other work activities or those of persons or organizations with which they are affiliated.

(b) Psychologists do not make false, deceptive, or fraudulent statements concerning (1) their training, experience, or competence; (2) their academic degrees; (3) their credentials; (4) their institutional or association affiliations; (5) their services; (6) the scientific or clinical basis for, or results or degree of success of, their services; (7) their fees; or (8) their publications or research findings.

(c) Psychologists claim degrees as credentials for their health services only if those degrees (1) were earned from a regionally accredited educational institution or (2) were the basis for psychology licensure by the state in which they practice.

5.02 Statements by Others

(a) Psychologists who engage others to create or place public statements that promote their professional practice, products, or activities retain professional responsibility for such statements.

(b) Psychologists do not compensate employees of press, radio, television, or other communication media in return for publicity in a news item. (See also Standard 1.01, Misuse of Psychologists' Work.)

(c) A paid advertisement relating to psychologists' activities must be identified or clearly recognizable as such.

5.03 Descriptions of Workshops and Non-Degree-Granting Educational Programs

To the degree to which they exercise control, psychologists responsible for announcements, catalogs, brochures, or advertisements describing workshops, seminars, or other non-degree-granting educational programs ensure that they accurately describe the audience for which the program is intended, the educational objectives, the presenters, and the fees involved.

5.04 Media Presentations

When psychologists provide public advice or comment via print, Internet, or other electronic transmission,

they take precautions to ensure that statements (1) are based on their professional knowledge, training, or experience in accord with appropriate psychological literature and practice; (2) are otherwise consistent with this Ethics Code; and (3) do not indicate that a professional relationship has been established with the recipient. (See also Standard 2.04, Bases for Scientific and Professional Judgments.)

5.05 Testimonials

Psychologists do not solicit testimonials from current therapy clients/patients or other persons who because of their particular circumstances are vulnerable to undue influence.

5.06 In-Person Solicitation

Psychologists do not engage, directly or through agents, in uninvited in-person solicitation of business from actual or potential therapy clients/patients or other persons who because of their particular circumstances are vulnerable to undue influence. However, this prohibition does not preclude (1) attempting to implement appropriate collateral contacts for the purpose of benefiting an already engaged therapy client/patient or (2) providing disaster or community outreach services.

6. Record Keeping and Fees

6.01 Documentation of Professional and Scientific Work and Maintenance of Records

Psychologists create, and to the extent the records are under their control, maintain, disseminate, store, retain, and dispose of records and data relating to their professional and scientific work in order to (1) facilitate provision of services later by them or by other professionals, (2) allow for replication of research design and analyses, (3) meet institutional requirements, (4) ensure accuracy of billing and payments, and (5) ensure compliance with law. (See also Standard 4.01, Maintaining Confidentiality.)

6.02 Maintenance, Dissemination, and Disposal of Confidential Records of Professional and Scientific Work

(a) Psychologists maintain confidentiality in creating, storing, accessing, transferring, and disposing of records under their control, whether these are written, automated, or in any other medium. (See also Standards 4.01, Maintaining Confidentiality, and 6.01, Documentation of Professional and Scientific Work and Maintenance of Records.)

(b) If confidential information concerning recipients of psychological services is entered into databases or systems of records available to persons whose access has not been consented to by the recipient, psychologists use coding or other techniques to avoid the inclusion of personal identifiers.

(c) Psychologists make plans in advance to facilitate the appropriate transfer and to protect the confidentiality of records and data in the event of psychologists' withdrawal from positions or practice. (See also Standards 3.12, Interruption of Psychological Services, and 10.09, Interruption of Therapy.)

6.03 Withholding Records for Nonpayment

Psychologists may not withhold records under their control that are requested and needed for a client's/patient's emergency treatment solely because payment has not been received.

6.04 Fees and Financial Arrangements

(a) As early as is feasible in a professional or scientific relationship, psychologists and recipients of psychological services reach an agreement specifying compensation and billing arrangements.

(b) Psychologists' fee practices are consistent with law.

(c) Psychologists do not misrepresent their fees.

(d) If limitations to services can be anticipated because of limitations in financing, this is discussed with the recipient of services as early as is feasible. (See also Standards 10.09, Interruption of Therapy, and 10.10, Terminating Therapy.)

(e) If the recipient of services does not pay for services as agreed, and if psychologists intend to use collection agencies or legal measures to collect the fees, psychologists first inform the person that such measures will be taken and provide that person an opportunity to make prompt payment. (See also Standards 4.05, Disclosures; 6.03, Withholding Records for Nonpayment; and 10.01, Informed Consent to Therapy.)

6.05 Barter with Clients/Patients

Barter is the acceptance of goods, services, or other nonmonetary remuneration from clients/patients in return for psychological services. Psychologists may barter only if (1) it is not clinically contraindicated, and (2) the resulting arrangement is not exploitative. (See also Standards 3.05, Multiple Relationships, and 6.04, Fees and Financial Arrangements.)

6.06 Accuracy in Reports to Payors and Funding Sources

In their reports to payors for services or sources of research funding, psychologists take reasonable steps to ensure the accurate reporting of the nature of the service provided or research conducted, the fees, charges, or payments, and where applicable, the identity of the provider, the findings, and the diagnosis. (See also Standards 4.01, Maintaining Confidentiality; 4.04, Minimizing Intrusions on Privacy; and 4.05, Disclosures.)

6.07 Referrals and Fees

When psychologists pay, receive payment from, or divide fees with another professional, other than in an employer-employee relationship, the payment to each is based on the services provided (clinical, consultative, administrative, or other) and is not based on the referral itself. (See also Standard 3.09, Cooperation with Other Professionals.)

7. Education and Training

7.01 Design of Education and Training Programs

Psychologists responsible for education and training programs take reasonable steps to ensure that the programs are designed to provide the appropriate knowledge and proper experiences, and to meet the requirements for licensure, certification, or other goals for which claims are made by the program. (See also Standard 5.03, Descriptions of Workshops and Non-Degree-Granting Educational Programs.)

7.02 Descriptions of Education and Training Programs

Psychologists responsible for education and training programs take reasonable steps to ensure that there is a current and accurate description of the program content (including participation in required course- or program-related counseling, psychotherapy, experiential groups, consulting projects, or community service), training goals and objectives, stipends and benefits, and requirements that must be met for satisfactory completion of the program. This information must be made readily available to all interested parties.

7.03 Accuracy in Teaching

(a) Psychologists take reasonable steps to ensure that course syllabi are accurate regarding the subject matter to be covered, bases for evaluating progress, and the nature of course experiences. This standard does not preclude an instructor from modifying course content or requirements when the instructor considers it pedagogically necessary or desirable, so long as students are made aware of these modifications in a manner that enables them to fulfill course requirements. (See also Standard 5.01, Avoidance of False or Deceptive Statements.)

(b) When engaged in teaching or training, psychologists present psychological information accurately. (See also Standard 2.03, Maintaining Competence.)

7.04 Student Disclosure of Personal Information

Psychologists do not require students or supervisees to disclose personal information in course- or program-related activities, either orally or in writing, regarding

sexual history, history of abuse and neglect, psychological treatment, and relationships with parents, peers, and spouses or significant others except if (1) the program or training facility has clearly identified this requirement in its admissions and program materials or (2) the information is necessary to evaluate or obtain assistance for students whose personal problems could reasonably be judged to be preventing them from performing their training- or professionally related activities in a competent manner or posing a threat to the students or others.

7.05 Mandatory Individual or Group Therapy

(a) When individual or group therapy is a program or course requirement, psychologists responsible for that program allow students in undergraduate and graduate programs the option of selecting such therapy from practitioners unaffiliated with the program. (See also Standard 7.02, Descriptions of Education and Training Programs.)

(b) Faculty who are or are likely to be responsible for evaluating students' academic performance do not themselves provide that therapy. (See also Standard 3.05, Multiple Relationships.)

7.06 Assessing Student and Supervisee Performance

(a) In academic and supervisory relationships, psychologists establish a timely and specific process for providing feedback to students and supervisees. Information regarding the process is provided to the student at the beginning of supervision.

(b) Psychologists evaluate students and supervisees on the basis of their actual performance on relevant and established program requirements.

7.07 Sexual Relationships with Students and Supervisees

Psychologists do not engage in sexual relationships with students or supervisees who are in their department, agency, or training center or over whom psychologists have or are likely to have evaluative authority. (See also Standard 3.05, Multiple Relationships.)

8. Research and Publication

8.01 Institutional Approval

When institutional approval is required, psychologists provide accurate information about their research proposals and obtain approval prior to conducting the research. They conduct the research in accordance with the approved research protocol.

8.02 Informed Consent to Research

(a) When obtaining informed consent as required in Standard 3.10, Informed Consent, psychologists inform participants about (1) the purpose of the research, expect-

ed duration, and procedures; (2) their right to decline to participate and to withdraw from the research once participation has begun; (3) the foreseeable consequences of declining or withdrawing; (4) reasonably foreseeable factors that may be expected to influence their willingness to participate such as potential risks, discomfort, or adverse effects; (5) any prospective research benefits; (6) limits of confidentiality; (7) incentives for participation; and (8) whom to contact for questions about the research and research participants' rights. They provide opportunity for the prospective participants to ask questions and receive answers. (See also Standards 8.03, Informed Consent for Recording Voices and Images in Research; 8.05, Dispensing with Informed Consent for Research; and 8.07, Deception in Research.)

(b) Psychologists conducting intervention research involving the use of experimental treatments clarify to participants at the outset of the research (1) the experimental nature of the treatment; (2) the services that will or will not be available to the control group(s) if appropriate; (3) the means by which assignment to treatment and control groups will be made; (4) available treatment alternatives if an individual does not wish to participate in the research or wishes to withdraw once a study has begun; and (5) compensation for or monetary costs of participating including, if appropriate, whether reimbursement from the participant or a third-party payor will be sought. (See also Standard 8.02a, Informed Consent to Research.)

8.03 Informed Consent for Recording Voices and Images in Research

Psychologists obtain informed consent from research participants prior to recording their voices or images for data collection unless (1) the research consists solely of naturalistic observations in public places, and it is not anticipated that the recording will be used in a manner that could cause personal identification or harm, or (2) the research design includes deception, and consent for the use of the recording is obtained during debriefing. (See also Standard 8.07, Deception in Research.)

8.04 Client/Patient, Student, and Subordinate Research Participants

(a) When psychologists conduct research with clients/patients, students, or subordinates as participants, psychologists take steps to protect the prospective participants from adverse consequences of declining or withdrawing from participation.

(b) When research participation is a course requirement or an opportunity for extra credit, the prospective participant is given the choice of equitable alternative activities.

8.05 Dispensing with Informed Consent for Research

Psychologists may dispense with informed consent only (1) where research would not reasonably be assumed to create distress or harm and involves (a) the study of normal educational practices, curricula, or classroom management methods conducted in educational settings; (b) only anonymous questionnaires, naturalistic observations, or archival research for which disclosure of responses would not place participants at risk of criminal or civil liability or damage their financial standing, employability, or reputation, and confidentiality is protected; or (c) the study of factors related to job or organization effectiveness conducted in organizational settings for which there is no risk to participants' employability, and confidentiality is protected or (2) where otherwise permitted by law or federal or institutional regulations.

8.06 Offering Inducements for Research Participation

(a) Psychologists make reasonable efforts to avoid offering excessive or inappropriate financial or other inducements for research participation when such inducements are likely to coerce participation.

(b) When offering professional services as an inducement for research participation, psychologists clarify the nature of the services, as well as the risks, obligations, and limitations. (See also Standard 6.05, Barter with Clients/Patients.)

8.07 Deception in Research

(a) Psychologists do not conduct a study involving deception unless they have determined that the use of deceptive techniques is justified by the study's significant prospective scientific, educational, or applied value and that effective nondeceptive alternative procedures are not feasible.

(b) Psychologists do not deceive prospective participants about research that is reasonably expected to cause physical pain or severe emotional distress.

(c) Psychologists explain any deception that is an integral feature of the design and conduct of an experiment to participants as early as is feasible, preferably at the conclusion of their participation, but no later than at the conclusion of the data collection, and permit participants to withdraw their data. (See also Standard 8.08, Debriefing.)

8.08 Debriefing

(a) Psychologists provide a prompt opportunity for participants to obtain appropriate information about the nature, results, and conclusions of the research, and they take reasonable steps to correct any misconceptions that participants may have of which the psychologists are aware.

(b) If scientific or humane values justify delaying or withholding this information, psychologists take reasonable measures to reduce the risk of harm.

(c) When psychologists become aware that research procedures have harmed a participant, they take reasonable steps to minimize the harm.

8.09 Humane Care and Use of Animals in Research

(a) Psychologists acquire, care for, use, and dispose of animals in compliance with current federal, state, and local laws and regulations, and with professional standards.

(b) Psychologists trained in research methods and experienced in the care of laboratory animals supervise all procedures involving animals and are responsible for ensuring appropriate consideration of their comfort, health, and humane treatment.

(c) Psychologists ensure that all individuals under their supervision who are using animals have received instruction in research methods and in the care, maintenance, and handling of the species being used, to the extent appropriate to their role. (See also Standard 2.05, Delegation of Work to Others.)

(d) Psychologists make reasonable efforts to minimize the discomfort, infection, illness, and pain of animal subjects.

(e) Psychologists use a procedure subjecting animals to pain, stress, or privation only when an alternative procedure is unavailable and the goal is justified by its prospective scientific, educational, or applied value.

(f) Psychologists perform surgical procedures under appropriate anesthesia and follow techniques to avoid infection and minimize pain during and after surgery.

(g) When it is appropriate that an animal's life be terminated, psychologists proceed rapidly, with an effort to minimize pain and in accordance with accepted procedures.

8.10 Reporting Research Results

(a) Psychologists do not fabricate data. (See also Standard 5.01a, Avoidance of False or Deceptive Statements.)

(b) If psychologists discover significant errors in their published data, they take reasonable steps to correct such errors in a correction, retraction, erratum, or other appropriate publication means.

8.11 Plagiarism

Psychologists do not present portions of another's work or data as their own, even if the other work or data source is cited occasionally.

8.12 Publication Credit

(a) Psychologists take responsibility and credit, in-

cluding authorship credit, only for work they have actually performed or to which they have substantially contributed. (See also Standard 8.12b, Publication Credit.)

(b) Principal authorship and other publication credits accurately reflect the relative scientific or professional contributions of the individuals involved, regardless of their relative status. Mere possession of an institutional position, such as department chair, does not justify authorship credit. Minor contributions to the research or to the writing for publications are acknowledged appropriately, such as in footnotes or in an introductory statement.

(c) Except under exceptional circumstances, a student is listed as principal author on any multiple-authored article that is substantially based on the student's doctoral dissertation. Faculty advisors discuss publication credit with students as early as feasible and throughout the research and publication process as appropriate. (See also Standard 8.12b, Publication Credit.)

8.13 Duplicate Publication of Data

Psychologists do not publish, as original data, data that have been previously published. This does not preclude republishing data when they are accompanied by proper acknowledgment.

8.14 Sharing Research Data for Verification

(a) After research results are published, psychologists do not withhold the data on which their conclusions are based from other competent professionals who seek to verify the substantive claims through reanalysis and who intend to use such data only for that purpose, provided that the confidentiality of the participants can be protected and unless legal rights concerning proprietary data preclude their release. This does not preclude psychologists from requiring that such individuals or groups be responsible for costs associated with the provision of such information.

(b) Psychologists who request data from other psychologists to verify the substantive claims through reanalysis may use shared data only for the declared purpose. Requesting psychologists obtain prior written agreement for all other uses of the data.

8.15 Reviewers

Psychologists who review material submitted for presentation, publication, grant, or research proposal review respect the confidentiality of and the proprietary rights in such information of those who submitted it.

9. Assessment

9.01 Bases for Assessments

(a) Psychologists base the opinions contained in their recommendations, reports, and diagnostic or evaluative statements, including forensic testimony, on informa-

tion and techniques sufficient to substantiate their findings. (See also Standard 2.04, Bases for Scientific and Professional Judgments.)

(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. (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.

9.02 Use of Assessments

(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.

9.03 Informed Consent in Assessments

(a) Psychologists obtain informed consent for assessments, evaluations, or diagnostic services, as described in Standard 3.10, Informed Consent, except when (1) testing is mandated by law or governmental regulations; (2) informed consent is implied because testing is conducted as a routine educational, institutional, or organizational activity (e.g., when participants voluntarily agree to assessment when applying for a job); or (3) one purpose of the testing is to evaluate decisional capacity. Informed consent includes an explanation of the nature and purpose of the assessment, fees, involvement of third parties, and limits of confidentiality and sufficient opportunity for the client/patient to ask questions and receive answers.

(b) Psychologists inform persons with questionable

capacity to consent or for whom testing is mandated by law or governmental regulations about the nature and purpose of the proposed assessment services, using language that is reasonably understandable to the person being assessed.

(c) Psychologists using the services of an interpreter obtain informed consent from the client/patient to use that interpreter, ensure that confidentiality of test results and test security are maintained, and include in their recommendations, reports, and diagnostic or evaluative statements, including forensic testimony, discussion of any limitations on the data obtained. (See also Standards 2.05, Delegation of Work to Others; 4.01, Maintaining Confidentiality; 9.01, Bases for Assessments; 9.06, Interpreting Assessment Results; and 9.07, Assessment by Unqualified Persons.)

9.04 Release of Test Data

(a) The term *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 an examination. Those portions of test materials that include client/patient responses are included in the definition of *test data*. Pursuant to a client/patient release, psychologists provide test data to the client/patient or other persons identified in the release. Psychologists may refrain from releasing test data to protect a client/patient or others from substantial harm or misuse or misrepresentation of the data or the test, recognizing that in many instances release of confidential information under these circumstances is regulated by law. (See also Standard 9.11, Maintaining Test Security.)

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

9.05 Test Construction

Psychologists who develop tests and other assessment techniques use appropriate psychometric procedures and current scientific or professional knowledge for test design, standardization, validation, reduction or elimination of bias, and recommendations for use.

9.06 Interpreting Assessment Results

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. (See also Standards 2.01b and c, Boundaries of Competence, and 3.01, Unfair Discrimination.)

9.07 Assessment by Unqualified Persons

Psychologists do not promote the use of psychological assessment techniques by unqualified persons, except when such use is conducted for training purposes with appropriate supervision. (See also Standard 2.05, Delegation of Work to Others.)

9.08 Obsolete Tests and Outdated Test Results

(a) Psychologists do not base their assessment or intervention decisions or recommendations on data or test results that are outdated for the current purpose.

(b) Psychologists do not base such decisions or recommendations on tests and measures that are obsolete and not useful for the current purpose.

9.09 Test Scoring and Interpretation Services

(a) Psychologists who offer assessment or scoring services to other professionals accurately describe the purpose, norms, validity, reliability, and applications of the procedures and any special qualifications applicable to their use.

(b) Psychologists select scoring and interpretation services (including automated services) on the basis of evidence of the validity of the program and procedures as well as on other appropriate considerations. (See also Standard 2.01b and c, Boundaries of Competence.)

(c) Psychologists retain responsibility for the appropriate application, interpretation, and use of assessment instruments, whether they score and interpret such tests themselves or use automated or other services.

9.10 Explaining Assessment Results

Regardless of whether the scoring and interpretation are done by psychologists, by employees or assistants, or by automated or other outside services, psychologists take reasonable steps to ensure that explanations of results are given to the individual or designated representative unless the nature of the relationship precludes provision of an explanation of results (such as in some organizational consulting, preemployment or security screenings, and forensic evaluations), and this fact has been clearly explained to the person being assessed in advance.

9.11 Maintaining Test Security

The term *test materials* refers to manuals, instruments, protocols, and test questions or stimuli and does not include *test data* as defined in Standard 9.04, Release of Test Data. 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.

10. Therapy

10.01 Informed Consent to Therapy

(a) When obtaining informed consent to therapy as required in Standard 3.10, Informed Consent, psychologists inform clients/patients as early as is feasible in the therapeutic relationship about the nature and anticipated course of therapy, fees, involvement of third parties, and limits of confidentiality and provide sufficient opportunity for the client/patient to ask questions and receive answers. (See also Standards 4.02, Discussing the Limits of Confidentiality, and 6.04, Fees and Financial Arrangements.)

(b) When obtaining informed consent for treatment for which generally recognized techniques and procedures have not been established, psychologists inform their clients/patients of the developing nature of the treatment, the potential risks involved, alternative treatments that may be available, and the voluntary nature of their participation. (See also Standards 2.01e, Boundaries of Competence, and 3.10, Informed Consent.)

(c) When the therapist is a trainee and the legal responsibility for the treatment provided resides with the supervisor, the client/patient, as part of the informed consent procedure, is informed that the therapist is in training and is being supervised and is given the name of the supervisor.

10.02 Therapy Involving Couples or Families

(a) When psychologists agree to provide services to several persons who have a relationship (such as spouses, significant others, or parents and children), they take reasonable steps to clarify at the outset (1) which of the individuals are clients/patients and (2) the relationship the psychologist will have with each person. This clarification includes the psychologist's role and the probable uses of the services provided or the information obtained. (See also Standard 4.02, Discussing the Limits of Confidentiality.)

(b) If it becomes apparent that psychologists may be called on to perform potentially conflicting roles (such as family therapist and then witness for one party in divorce proceedings), psychologists take reasonable steps to clarify and modify, or withdraw from, roles appropriately. (See also Standard 3.05c, Multiple Relationships.)

10.03 Group Therapy

When psychologists provide services to several persons in a group setting, they describe at the outset the roles and responsibilities of all parties and the limits of confidentiality.

10.04 Providing Therapy to Those Served by Others

In deciding whether to offer or provide services to those already receiving mental health services elsewhere, psychologists carefully consider the treatment issues and the potential client's/patient's welfare. Psychologists discuss these issues with the client/patient or another legally authorized person on behalf of the client/patient in order to minimize the risk of confusion and conflict, consult with the other service providers when appropriate, and proceed with caution and sensitivity to the therapeutic issues.

10.05 Sexual Intimacies with Current Therapy Clients/Patients

Psychologists do not engage in sexual intimacies with current therapy clients/patients.

10.06 Sexual Intimacies with Relatives or Significant Others of Current Therapy Clients/Patients

Psychologists do not engage in sexual intimacies with individuals they know to be close relatives, guardians, or significant others of current clients/patients. Psychologists do not terminate therapy to circumvent this standard.

10.07 Therapy with Former Sexual Partners

Psychologists do not accept as therapy clients/patients persons with whom they have engaged in sexual intimacies.

10.08 Sexual Intimacies with Former Therapy Clients/Patients

(a) Psychologists do not engage in sexual intimacies with former clients/patients for at least two years after cessation or termination of therapy.

(b) Psychologists do not engage in sexual intimacies with former clients/patients even after a two-year interval except in the most unusual circumstances. Psychologists who engage in such activity after the two years following cessation or termination of therapy and of having no sexual contact with the former client/patient bear the burden of demonstrating that there has been no exploitation, in light of all relevant factors, including (1) the amount of time that has passed since therapy terminated; (2) the nature, duration, and intensity of the therapy; (3) the circumstances of termination; (4) the client's/patient's personal history; (5) the client's/patient's current mental status; (6) the likelihood of adverse impact on the client/patient; and (7) any statements or actions made by the therapist during the course of therapy suggesting or inviting the possibility of a posttermination sexual or romantic relationship with the client/patient. (See also Standard 3.05, Multiple Relationships.)

10.09 Interruption of Therapy

When entering into employment or contractual relationships, psychologists make reasonable efforts to provide for orderly and appropriate resolution of responsibility for client/patient care in the event that the employment or contractual relationship ends, with paramount consideration given to the welfare of the client/patient. (See also Standard 3.12, Interruption of Psychological Services.)

10.10 Terminating Therapy

(a) Psychologists terminate therapy when it becomes reasonably clear that the client/patient no longer needs the service, is not likely to benefit, or is being harmed by continued service.

(b) Psychologists may terminate therapy when threatened or otherwise endangered by the client/patient or another person with whom the client/patient has a relationship.

(c) Except where precluded by the actions of clients/patients or third-party payors, prior to termination psychologists provide pretermination counseling and suggest alternative service providers as appropriate.

AMENDMENTS TO THE 2002 "ETHICAL PRINCIPLES OF PSYCHOLOGISTS AND CODE OF CONDUCT" IN 2010 AND 2016

2010 Amendments

Introduction and Applicability

If psychologists' ethical responsibilities conflict with law, regulations, or other governing legal authority, psychologists make known their commitment to this Ethics Code and take steps to resolve the conflict in a responsible manner. ~~If the conflict is unresolvable via such means, psychologists may adhere to the requirements of the law, regulations, or other governing authority in keeping with basic principles of human rights.~~

1.02 Conflicts Between Ethics and Law, Regulations, or Other Governing Legal Authority

If psychologists' ethical responsibilities conflict with law, regulations, or other governing legal authority, psychologists clarify the nature of the conflict, make known their commitment to the Ethics Code, and take reasonable steps to resolve the conflict consistent with the General Principles and Ethical Standards of the Ethics Code. ~~If the conflict is unresolvable via such means, psychologists may adhere to the requirements of the law, regulations, or other governing legal authority, Under no circumstances may this standard be used to justify or defend violating human rights.~~

1.03 Conflicts Between Ethics and Organizational Demands

If the demands of an organization with which psychologists are affiliated or for whom they are working are in conflict with this Ethics Code, psychologists clarify the nature of the conflict, make known their commitment to the Ethics Code, and to the extent feasible, resolve the conflict in a way that permits adherence to the Ethics Code. take reasonable steps to resolve the conflict consistent with the General Principles and Ethical Standards of the Ethics Code. Under no circumstances may this standard be used to justify or defend violating human rights.

2016 Amendment

3.04 Avoiding Harm

(a) Psychologists take reasonable steps to avoid harming their clients/patients, students, supervisees, research participants, organizational clients, and others with whom they work, and to minimize harm where it is foreseeable and unavoidable.

(b) Psychologists do not participate in, facilitate, assist, or otherwise engage in torture, defined as any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person, or in any other cruel, inhuman, or degrading behavior that violates 3.04a.



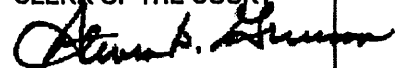
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EXHIBIT “G.8”



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13 *Attorneys for Plaintiff Vanessa Paul*

14 **DISTRICT COURT**
15 **CLARK COUNTY, NEVADA**

16 VANESSA PAUL, an individual,
17
18 Plaintiff,

19 vs.

20 VEGAS MF ACQUISITION PARTNERS,
21 LLC, a foreign limited liability corporation;
22 APARTMENT MANAGEMENT
23 CONSULTANTS, LLC, a foreign limited
24 liability company; DOES I through X; and ROE
25 CORPORATIONS I through X, inclusive,
26
27 Defendants.

Case No.: A-20-819012-C
Dept. No.: XXVII

**STIPULATION AND ORDER FOR
RULE 35 EXAMINATION OF PLAINTIFF
VANESSA PAUL (LEWIS M. ETCOFF
Ph.D.)**

28 **IT IS HEREBY STIPULATED AND AGREED:**

Defendant(s) have requested that plaintiff Vanessa Paul submit to a Rule 35 neuropsychological examination, and Ms. Vanessa Paul has agreed to the request subject to the following rules and conditions:

1. The Rule 35 examination shall be conducted pursuant to Nevada Rule of Civil Procedure 35 and Nevada Revised Statute 52.380.
2. Defendant(s) selected Dr. Lewis M. Etcoff (the "Examiner") to conduct the Rule 35 examination of Ms. Vanessa Paul.
3. The scope of the Rule 35 examination is as follows: neuropsychological evaluation

1 necessary for the Examiner to evaluate Ms. Vanessa Paul's injuries and treatment.

- 2 4. The date, time and location of the Rule 35 examination are as follows: September 29,
3 2021 at 9:00 a.m. and September 30, 2021 at 9:00 a.m., located at 8475 South Eastern
4 Avenue, Suite 205 Las Vegas, Nevada 89123.
- 5 5. The Rule 35 examination shall be held in an office in compliance with HIPAA, to the
6 extent applicable.
- 7 6. Other than the required neuropsychological and clinical psychological testing, the
8 Examiner will not require Ms. Vanessa Paul to sign any paperwork at the time of the
9 Rule 35 examination other than a "sign-in" sheet or authorization to perform the
10 examination. The Examiner has not requested that Ms. Vanessa Paul complete any
11 other paperwork or intake forms during or in advance of the Rule 35 examination.
- 12 7. Ms. Vanessa Paul shall not be required to wait in the waiting room for longer than 30
13 minutes before the commencement of the Rule 35 examination.
- 14 8. Any interview of Ms. Paul required in the Rule 35 evaluation may be audio ~~and~~ ^{ET}
15 ~~and~~ recorded by Lynn Belcher LNC Associates by placing a recorder or an
16 ~~unattended video camera in the interview room~~, and Ms. Vanessa Paul's counsel will
17 arrange and pay for the recording. However, due to ethical, legal, and professional
18 obligations and rules, the testing itself cannot be recorded. Ms. Paul's counsel shall
19 disclose a copy of the recording within 30 days of receipt of the same. All persons
20 present must be notified that the examination will be recorded before the interview
21 begins.
- 22 9. Defense counsel, or any other representatives of defendant(s) other than the Examiner
23 and his/her staff, are not permitted to attend the Rule 35 examination.
- 24 10. Liability questions may not be asked by the Examiner or any of his/her agents or
25 representatives during the Rule 35 examination.
- 26 11. No x-rays or radiographs may be obtained during the Rule 35 examination. The
27 Examiner will rely upon the same film studies relied upon by the treating physicians
28 in this case. If additional film studies are necessary for the Rule 35 examination, this
must be detailed in writing by the Examiner at least 30 days prior to the examination
and this issue may be revisited.
12. No invasive procedures shall be allowed during the Rule 35 examination.
13. Ms. Vanessa Paul shall not be required to disrobe during the Rule 35 examination.
14. If the Examiner subjects Ms. Vanessa Paul to physically painful or invasive
procedures, Ms. Vanessa Paul reserves the right to immediately terminate the
examination in her sole discretion. The nurse observer also has the right to suspend
the examination if the Examiner becomes abusive or otherwise exceeds the scope of
the examination.
15. The Examiner shall not engage in *ex parte* contact with Ms. Vanessa Paul treating
health care providers.
16. The Examiner must prepare and disclose a written report within 30 days of the Rule
35 examination that accurately sets out in detail his/her findings, including diagnosis,
conclusions, and the results of any tests, as required by Rule 35(b)(2). The Examiner's

1 written report must include a complete statement of all opinions he or she will express,
2 and the basis and reasons for them, as well as all of the facts or data he or she
considered in forming said opinions, as required by Rule 16.1(a)(2)(B).

3 17. Defense counsel shall disclose a copy of the Examiner's written report within 30 days
4 of the Rule 35 examination or by the Rule 16.1(a)(2) initial expert disclosure deadline,
whichever occurs first.

5 18. The Examiner shall retain and preserve a complete copy of the entire file pertaining to
6 the Rule 35 examination and shall not destroy any documents, including but not limited
7 to draft reports, handwritten notes, e-mails or other communications sent and received,
8 and all documents generated or received, including draft reports shared with defense
9 counsel, defendant(s) or an agent of defendant(s), communications regarding draft
10 reports with defense counsel, defendant(s) or an agent of defendant(s), redlines of draft
reports shared with defense counsel, defendant(s) or an agent of defendant(s), and test
materials and/or raw data related to the Rule 35 examination. Following the disclosure
of the Rule 35 examination report, counsel for plaintiff may serve the Examiner with
a subpoena and/or serve defendant(s) with a request for production of documents;
however, any party has the right to file an objection to the scope of such subpoena.

11 19. Defense counsel shall be responsible for providing the Examiner with a copy of this
12 stipulation and order prior to the Rule 35 examination.

13 DATED this 16th day of September, 2021.

DATED this 16th day of September, 2021.

14 MAIER GUTIERREZ & ASSOCIATES

OLSON CANNON GORMLEY & STOBERSKI

15 /s/ Stephen G. Clough

/s/ Max E. Mcorrick

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21 **ORDER**

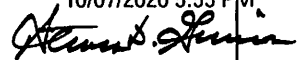
22 IT IS SO ORDERED.

23 DATED this 22nd day of September, 2021.

24 

25 **DISCOVERY COMMISSIONER**

EXHIBIT “H”


CLERK OF THE COURT

1 **ORDR**

2 **EIGHTH JUDICIAL DISTRICT COURT**

3 **CLARK COUNTY, NEVADA**

4
5 TROY MOATS, an individual,

6 Plaintiff(s),

7 vs.

8 TROY BURGESS, an individual; DOES I
9 through X, inclusive and ROE Business
Entities I through X, inclusive,

10 Defendant(s).

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

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

11
12 Defendant objected to the Discovery Commissioner's Report and
13 Recommendations regarding the scheduled NRCP 35 psychological examination of
14 Plaintiff. Plaintiff timely replied.

15 This matter was heard before the Honorable Adriana Escobar on September
16 29, 2020, with Thomas E. Winner, Esq. and Caitlin J. Lorelli, Esq. present for
17 Defendant Burgess and Adam Ganz, Esq. present for Plaintiff. In accordance with
18 the pleadings on file and all parties having been heard during oral argument, this
19 Court sustains Defendant's objection, and enters the following findings and order:

20 **BACKGROUND**

21 Plaintiff alleges a traumatic brain injury in the underlying personal injury action.
22 This court compelled an NRCP 35 psychological examination with Lewis M. Etcoff,
23 Ph.D., A.B.N. (hereinafter Dr. Etcoff), for October 12, 2020 and October 13, 2020.
24 The parties stipulated to 29 parameters for the examination, but disagreed on two: (1)
25 whether Plaintiff should be allowed to bring a third-party observer into the
26 examination, and (2) whether Plaintiff can require the examination be audio recorded.
27

1 A hearing on the two outstanding issues was held before the Discovery
2 Commissioner on July 31, 2020. The Discovery Commissioner found that NRS
3 52.380 controls over NRCP 35 regarding the psychological examination. For that
4 reason, the Discovery Commissioner recommended permitting a third-party observer
5 and audio recording of the oral examination portion of the NRCP 35 psychological
6 examination. In the Discovery Commissioner's Report and Recommendations, "[t]he
7 Discovery Commissioner acknowledged there is a clear conflict between NRS 52.380
8 and NRCP 35, and this conflict need be addressed by a higher court, giving
9 deference to NRS 52.380 as it affects the substantive right inherent in a physical
10 examination."

11 Defendant timely objected, contending NRCP 35, as adopted by the Nevada
12 Supreme Court, is in conflict with NRS 52.380, and that under the Nevada
13 Constitution and separation of powers doctrine, NRCP 35 should govern. Defendant
14 argued that in applying NRCP 35, Plaintiff has failed to show good cause permitting
15 the Court, in its discretion, to allow a third-party observer or an audio recording of the
16 NRCP 35 psychological examination. Plaintiff contends NRS 52.380 is applicable,
17 and under this statute, he is permitted to have a third-party observer and an audio
18 recording of the oral portion of the NRCP 35 psychological examination.

19 **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

20 The Court makes the following findings of fact and conclusions of law:

21 Under NRCP 35, once the court has ordered an NRCP 35 examination, "[o]n
22 request of a party or the examiner, the court may, for good cause shown, require as
23 a condition of the examination that the examination be audio recorded." NRCP
24 35(a)(3) (emphasis added). Additionally, "[t]he party against whom an examination is
25 sought may request as a condition of the examination to have an observer present at
26 the examination." NRCP 35(a)(4). However, "[t]he party may not have any observer
27 present for a neuropsychological, psychological, or psychiatric examination, **unless**

1 the court orders otherwise for good cause shown.” NRCp 35(a)(4)(B) (emphasis
2 added).

3 In contrast, NRS 52.380(1) provides that “[a]n observer may attend an
4 examination but shall not participate in or disrupt the examination.” There are no
5 requirements that good cause exist before an observer is permitted under NRS
6 52.380.

7 NRS 2.120 recognizes that the Nevada Supreme Court is responsible for
8 adopting rules for civil practice. Specifically, the Nevada Supreme Court “shall
9 regulate original and appellate civil practice and procedure, including, without
10 limitation, pleadings, motions, writs, notices and forms of process, in judicial
11 proceedings in all courts of the State, for the purpose of simplifying the same and of
12 promoting the speedy determination of litigation upon its merit.” NRS 2.120(2).

13 Additionally, “[t]he judiciary is entrusted with ‘rule-making and other incidental
14 powers reasonable and necessary to carry out the duties required for the
15 administration of justice’ and ‘to economically and fairly manage litigation.’” Berkson
16 v. LePome, 126 Nev. 492, 499 (2010) (citations omitted). The legislature may not
17 enact a procedural statute that conflicts with a pre-existing procedural rule, without
18 violating the doctrine of separation of powers, and such a statute is of no effect. Id.;
19 State v. Connery, 99 Nev. 342, 345 (1983).

20 Here, the Court notes that NRCp 35 is a procedural rule. And although the
21 Legislature may not enact a procedural statute that conflicts with a preexisting
22 procedural rule, NRS 52.380 is procedural in nature. As set forth above, the Nevada
23 Supreme Court has the independent ability to draft and promulgate its own
24 procedural rules and has enacted a comprehensive set of rules dealing with
25 discovery, as set forth in the Nevada Rules of Civil Procedure, which includes NRCp
26 35. Thus, in accordance with the Nevada Constitution and separation of powers
27 doctrine, the Court finds that NRCp 35 is controlling on the issue of whether a third-

1 party observer and/or an audio recording is permissible during an NRCP 35
2 psychological examination. The Court further finds that NRS 52.380 is procedural and
3 does not affect a substantive right as the Discovery Commissioner contends.

4 Persuasive authority also supports this Court's ruling that NRS 52.380 does
5 not apply over NRCP 35 in governing an NRCP 35 psychological examination.
6 Freteluco v. Smith's Food and Drug Centers, Inc., Case No. 2: 19-cv-00759-JCM-
7 EJY, 2020 WL 3504456 (D. Nev. June 29, 2020), presented a similar issue. In
8 Freteluco, the district court ordered a neuropsychological examination of the plaintiff
9 pursuant to FRCP 35.¹ Id. at *1. Pursuant to NRS 52.380, the plaintiff sought to
10 record the examination and also have an observer present. Id. The issue was
11 whether NRS 52.380 controlled over FRCP 35 to govern the examination. Id. at *2.
12 While NRS 52.380 permits the attendance of an observer, under FRCP 35, the
13 method of the examination is within the district court's discretion. The district court
14 acknowledged that federal courts have adopted the majority rule that excludes third
15 parties from observing medical and psychiatric examinations unless good cause
16 exists. Id. at *4. Because federal courts sitting in diversity must apply the substantive
17 law of the forum state and federal procedural law, the district court applied the Erie
18 Doctrine to determine whether NRS 52.380 was substantive such that it controlled
19 the issue of permitting an observer and audio recording. Id. at *3. The Freteluco
20 Court determined that NRS 52.380 was procedural in nature, and thus, FRCP 35
21 governed. Id. at *3-4.

22 In finding that NRCP 35 controls, this Court further finds that Plaintiff has failed
23 to establish good cause to permit the presence of a third-party observer or an audio
24 recording of the upcoming NRCP 35 examination. Plaintiff's fear of altered test results
25 in this case, based on his belief that other examiners in separate cases may have
26

27 ¹The Court acknowledges that NRCP 35 does not mirror FRCP 35, but notes that these
differences have no impact on the persuasive value of Freteluco.

1 altered examination results, is not sufficient cause to permit a third-party observer or
2 an audio recording of the examination under the facts in this case. Specifically, there
3 is no indication that Plaintiff's fear is justified as to Dr. Etcoff. This Court further finds
4 that Plaintiff's claims of social anxiety and nervousness, as presented to this Court, is
5 not sufficient cause. Plaintiff has provided no legal authority or persuasive support for
6 his contention that anxiety and nervousness constitutes good cause. Regardless, the
7 Court does not find, based on the argument and pleadings before it, that anxiety and
8 nervousness establishes good cause for the presence of an observer or audio
9 recording.

10 It is important to note that there are concerns at this time for abiding by social
11 distancing requirements amidst the Covid-19 pandemic and the limited space
12 available to Dr. Etcoff in his office to perform his psychological/neuropsychological
13 examinations.

14 ORDER

15 The Court, having reviewed the Discovery Commissioner's Report and
16 Recommendations entered on September 8, 2020, and, after reviewing Defendant's
17 objections thereto, as well as the Plaintiff's reply, in accordance with the pleadings
18 and the arguments of counsel, and good cause appearing, **IT IS HEREBY**
19 **ORDERED** the objection is **SUSTAINED** and the Court orders as follows:

20 **IT IS FURTHER ORDERED** that NRCP 35, and not NRS 52.380, governs
21 whether a third-party observer and/or an audio recording of an NRCP 35
22 psychological and/or neuropsychological examination is permitted.

23 **IT IS FURTHER ORDERED** that Plaintiff is compelled to appear for the NRCP
24 35 psychological and/or neuropsychological examination with Dr. Etcoff on October
25 12, 2020 and October 13, 2020 as previously scheduled, and as the court previously
26 compelled.

1 **IT IS FURTHER ORDERED** that Plaintiff may not have a third-party observer
2 present at the NRCP 35 psychological and/or neuropsychological examination with
3 Dr. Etcoff on October 12, 2020 and October 13, 2020.

4 **IT IS FURTHER ORDERED** that Plaintiff may not audio record the NRCP 35
5 psychological and/or neuropsychological examination with Dr. Etcoff on October 12,
6 2020 and October 13, 2020.

7 **IT IS SO ORDERED.**

A-18-789459-C

Dated this 7th day of October, 2020



ADRIANA ESCOBAR
DISTRICT COURT JUDGE

10B 08D 4DBE 8EDC
Adriana Escobar
District Court Judge

1 **CSERV**

2
3 DISTRICT COURT
4 CLARK COUNTY, NEVADA

5
6 Troy Moats, Plaintiff(s)

CASE NO: A-18-769459-C

7 vs.

DEPT. NO. Department 14

8 Troy Burgess, Defendant(s)

9
10 **AUTOMATED CERTIFICATE OF SERVICE**

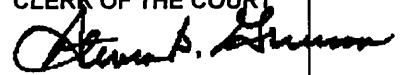
11 This automated certificate of service was generated by the Eighth Judicial District
12 Court. The foregoing Order was served via the court's electronic eFile system to all
13 recipients registered for e-Service on the above entitled case as listed below:

14 Service Date: 10/7/2020

15 Matt Pfau	matt@mattpfaulaw.com
16 Ronald Pehr	rpehr@geico.com
17 James Smith	jamesmith@aol.com
18 Stella Taylor	stella@mattpfaulaw.com
19 AWS E-Services	eservices@winnerfirm.com
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21 Christine Miller	cmiller@winnerfirm.com
22 Colette Thorne	cthorne@winnerfirm.com
23 Thomas Winner	twinner@winnerfirm.com
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ORDR

Jared R. Richards, Esq.

Nevada Bar No. 11254

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Attorneys for Plaintiff

Kalena Davis

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

ORDER

**RE: DISCOVERY COMMISSIONER'S
REPORT AND RECOMMENDATIONS**

Date of Hearing: April 9, 2020

Time of Hearing: 10:00 a.m.

The Court, having reviewed the above Report and Recommendations prepared by the
Discovery Commissioner and,

_____ No timely objection having been filed,

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

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After reviewing the objections to the Report and Recommendations and good cause appearing,

✓

IT IS HEREBY ORDERED the Discovery Commissioner's Report and Recommendations are affirmed and adopted.

IT IS HEREBY ORDERED the Discovery Commissioner's Report and Recommendations are affirmed and adopted as modified in the following manner:

(attached hereto).

IT IS HEREBY ORDERED this matter is remanded to the Discovery Commissioner for reconsideration or further action.

IT IS HEREBY ORDERED that a hearing on the Discovery Commissioner's Report is set for _____, 2020, at _____ a.m./p.m.

DATED this 18 day of September, 2020.



DISTRICT JUDGE



DCRR

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Kalena Davis

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

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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.
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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)~~ ^{ED} 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)~~ ^{ED} 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:

Approved as to Form and Content:

CLEAR COUNSEL LAW GROUP

HARPER | SELIM

/s/ Jared R. Richards

/s/ Justin Gourley

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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.

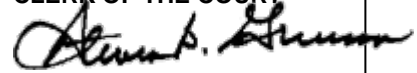
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And The Hertz Corporation

✓ 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: Nathalie Simonetti
COMMISSIONER DESIGNEE



1 **OPPC**
2 **DILLON G. COIL, ESQ.**
3 Nevada Bar No. 11541
4 **RYAN A. LOOSVELT, ESQ.**
5 Nevada Bar No. 8550
6 **GGRM LAW FIRM**
7 2770 S. Maryland Pkwy., Suite 100
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9 Phone: 702.384.1616 ~ Fax: 702.384.2990
10 Email: dcoil@ggrmlawfirm.com
11 rloosvelt@ggrmlawfirm.com

12 *Attorneys for Plaintiff*

13 **DISTRICT COURT**
14 **CLARK COUNTY, NEVADA**

15 TAYLOR MILES CAPE,
16
17 Plaintiff,

18 vs.

19 DAVID G. MARTINEZ, individually;
20 CHILLY WILLY'S HANDYMAN
21 SERVICES, LLC, a domestic limited-
22 liability company; DOES I through X and
23 ROE Business Entities III through X,
24 inclusive.
25 Defendants.

CASE NO.: A-20-818569-C
DEPT. NO.: XXVIII

**(1) PLAINTIFF'S OPPOSITION TO
DEFENDANTS' OBJECTION TO
DISCOVERY COMMISSIONER
REPORT AND RECOMMENDATION
REGARDING DEFENDANTS' MOTION
TO COMPEL NRCP 35
NEUROPSYCHOLOGICAL EXAM
WITH DR. LEWIS M. ETCOFF, AND,
(2) COUNTERMOTION FOR FEE
SANCTIONS**

26 Plaintiff Taylor Cape ("Plaintiff"), by and through his attorneys of record, GGRM LAW
27 FIRM, hereby submits Plaintiff's Opposition to Defendants' Objection to Discovery
28 Commissioner Report and Recommendation regarding Defendants' Motion to Compel NRCP
35 Neuropsychological Exam with Dr. Lewis M. Etcoff, and Countermotion for Fee Sanctions.



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INJURY ATTORNEYS



1 This Opposition is made and based on the attached points and authorities, the declaration
2 of counsel, the record on Defendants' Motion to Compel and Plaintiff's Opposition thereto, the
3 Exhibits submitted with those and this paper(s), and any argument permitted by the Court at a
4 hearing on this matter.

5 DATED this 10th day of November, 2021.

6 **GGRM LAW FIRM**

7 */s/ Ryan A. Loosvelt*

8 **RYAN A. LOOSVELT, ESQ.**

9 Nevada Bar No. 8550

10 2770 S. Maryland Pkwy Ste. 100

11 Las Vegas, NV 89109

12 Phone: 702. 384.1616

Attorneys for Plaintiff

13 **DECLARATION OF RYAN A. LOOSVELT, ESQ.**

14 I, Ryan A. Loosvelt, do hereby declare as follows:

15 1. I am over the age of eighteen, an attorney with GGRM Law Firm duly licensed to
16 practice in the State of Nevada, attorneys of record for Plaintiff. I have personal knowledge of
17 the matters stated herein and can competently testify thereto if called to do so. I file this
18 Declaration in support of Plaintiff's Opposition to Defendants' Objection to Discovery
19 Commissioner Report and Recommendation and Countermotion for Fee Sanctions.

20 2. Attached as **Exhibit 1** is a true and correct copy of the Discovery Commissioner's Report
21 and Recommendation. Attached as **Exhibit 2** is a true and correct copy of the Discovery Hearing
22 Transcript. Outside these two exhibits, the Court may only otherwise consider the parties'
23 original evidence and arguments submitted on the Motion to Compel and Opposition briefing
24 under *Valley Health Sys., LLC v. Dist. Court*, 127 Nev. 167, 173, 252 P.3d 676, 680 (2011).

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

27 DATED this 10th day of November, 2021.

28 */s/ Ryan A. Loosvelt*

RYAN A. LOOSVELT



MEMORANDUM POINTS AND AUTHORITIES

I. INTRODUCTION

In this case, the Plaintiff was and still is willing to appear for a neuropsychological defense medical examination provided he can have an observer present and audio record the exam (or alternatively video record it), and where the defense expert shares the materials with Plaintiff's expert and counsel (under protections limited to non-public, for use in this case only, and for expert and attorney's eyes only to address any confidentiality or copyright concerns). This is also precisely what the Discovery Commissioner specifically allowed and recommended in this case here, and what Defendants currently object to.

NRS 52.380 expressly allow for an observer and audio recording of mental IMEs, rights deliberately and specifically legislated and passed more recently than NRCP 35 to grant litigants these particular substantive rights and protections. In addition, while the procedural rule, Nevada Rule of Procedure 35, does not expressly allow for observers and audio recording in every mental IME circumstance, it does not foreclose these protections either. Instead, NRCP 35 also allows for observers and audio recording for good cause. The federal procedural rule (which does not apply in state court anyways), FRCP 35, does not build in the "good cause" protections of an observer and recording that Nevada laws and rules do provide. And, even if Rule 35 did not allow for the protections under any circumstances, statutes prevail over conflicting rules.

Defendants' Objection almost solely relies on an inapposite federal case that has no applicability here to argue procedural rules versus substantive rights. That federal case applying federal procedural law is inapplicable here, and interestingly involved the same defense expert as here, Dr. Etcoff, and expressly noted that Dr. Etcoff has allowed observers and recordings previously and complied with discovery orders—all things Defendants disingenuously argues neither he, nor anyone, can do here. Indeed, Plaintiff's Opposition to Motion to Compel set forth numerous affidavits, ethical rules, and evidence showing, through the great weight of evidence the Court can consider, that observers, recordings, and video recording are permissible, ethical, and beneficial.



1 Defendants further argue that, while Rule 35 allows for these protections, there is not
2 good cause here because the statute is purportedly unconstitutional. However, there has been
3 no such showing, the statute is a substantive rule that prevails over any conflicting procedural
4 rule (here the procedural also allows for the protections for good cause), is presumptively
5 constitutional under the law, there is clearly rational and legitimate reasons for the enactment of
6 the statute, and the law must be upheld. Defendants attempt to interject a constitutionality ruling
7 by the Discovery Commissioner where none was made by him in any event. Defendants have
8 not shown the statute is unconstitutional, and notably even Rule 35 allows the protections for
9 cause, which is what the Commissioner's recommendations were in part based on.

10 Importantly, Defendants' Objection is a blatant and unlawful attempt to re-litigate the
11 issues on impermissible new arguments and evidence that they failed to rely on or submit
12 previously in the Motion to Compel discovery proceeding before the Discovery Commissioner.
13 Nevada law is crystal clear that parties must bring all their evidence and arguments before the
14 discovery commissioner, or it is waived; it is not permissible to submit new evidence and
15 arguments to the district court that was not submitted during the discovery proceedings. *Valley*
16 *Health Sys., LLC v. Dist. Court*, 127 Nev. 167, 173, 252 P.3d 676, 680 (2011).

17 However, 50%, 8 of Defendants' 16 Exhibits to its Objection, are completely newly
18 submitted here in these proceedings and cannot be considered. Defendants' Objection likewise
19 impermissibly contains new arguments based on this evidence that cannot be considered here
20 either.

21 Consequently, this Court should review and rely on Defendants' September 13, 2021
22 Motion to Compel IME and Exhibits, and Plaintiff's September 27, 2021 Opposition and
23 Exhibits, incorporated herein by this reference in full, to decide the Objection to the DCR&R,
24 and disregard Defendants' Objection Exhibits and arguments based thereon. Defendants'
25 attempt to re-litigate the matter with 50% brand new issues and evidence not raised in the
26 discovery court proceedings should not be condoned or tolerated and may not be considered on
27 this Objection. Plaintiff has thus counter-moved for sanctions as a result.

28 ///



II. ARGUMENT

A. Defendants Improperly Submitted New Evidence Here That They Failed To Present During The Discovery Commissioner Proceedings That This Court Cannot Consider Because The Law Is Clear It Was Thus Waived.

In an attempt to improperly take a second bite at the apple, Defendants have submitted entirely new evidence in support of their Objection that they never presented to the Discovery Commissioner during the prior proceedings in violation of Nevada law. In fact, egregiously 50% (8 of Defendants' 16) exhibits to its Objection are completely newly offered. This is abusively improper and a sanctionable offense.

The Supreme Court of Nevada has been very clear that **“failure to raise an issue presentable to the discovery commissioner constitutes waiver of the issue.”** *Valley Health Sys., LLC v. Eighth Judicial Dist. Court of State ex rel. Cty. of Clark*, 127 Nev. 167, 173, 252 P.3d 676, 680 (2011). The Court explained that **“[a]ll arguments, issues, and evidence should be presented at the first opportunity and not held in reserve to be raised after the commissioner issues his or her recommendation.”** As such, all arguments and evidence not raised before the discovery commissioner are waived and cannot be raised afterwards on objection or appeal. *Valley Health Sys., LLC*, 127 Nev. at 172-173, 252 P.3d 676 (2011). As the Nevada Supreme Court reasoned:

This court has held that ‘[a] point not urged in the trial court, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal.’ One purpose of this rule is to allow the lower tribunal the first opportunity to decide the issue. We conclude that this principle is equally applicable where, as here, an issue is first heard by the discovery commissioner and then submitted to the district court for approval.

Additionally, consideration of such untimely raised contentions ‘would unduly undermine the authority of the Magistrate Judge by allowing litigants the option of waiting until a Report is issued to advance additional arguments.’ A contrary holding would lead to the inefficient use of judicial resources and allow parties to make an end run around the discovery commissioner by making one set of arguments before the commissioner, waiting until the outcome is determined, then adding or switching to alternative arguments before the district court. All



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arguments, issues, and evidence should be presented at the first opportunity and not held in reserve to be raised after the commissioner issues his or her recommendation. All objections are to be presented to the commissioner so that he or she may consider all the issues before making a recommendation, so as not to ‘frustrate the purpose’ of having discovery commissioners. (citations omitted).

Valley Health Sys., LLC, 127 Nev. at 172-173.

Therefore, the Court held: “neither this [appellate] court nor the district court will consider new arguments raised in objection to a discovery commissioner’s report and recommendation that could have been raised before the discovery commissioner but were not.” *Id.* The issue is instead deemed waived. *Id.* Consequently, Defendants are limited on their Objection to the arguments and evidence submitted in their Motion to Compel to the Discovery Commissioner.

Not including the hearing transcript and subject DCR&R which the Court may consider, Defendants’ have newly offered in their Objection **the following Defense exhibits that cannot be considered** by the District Court on this Objection:

Defendants’ Exhibit G:	Dr. Etcoff’s October 14, 2021
Defendants’ Exhibit G.1	Defendants’ Exhibit
Defendants’ Exhibit G.2	Nevada Psych. Assoc. 11/11/2020 Letter
Defendants’ Exhibit G.3	Amicus Curiae Brief
Defendants’ Exhibit G.6	NAC 641.250
Defendants’ Exhibit G.7	APA Ethical Principled article
Defendants’ Exhibit G.8	Rule 35 Stipulation in Unrelated Case (<i>Paul</i>)
Defendants’ Exhibit H	Non-Controlling Order in Unrelated Case (<i>Moats</i>)

Under *Valley Health*, these exhibits cannot be considered and any arguments an evidence based thereon is waived as a matter of law.

B. Defendant’s Reliance On *Fretuluco* Is Misplaced And Belies Its Arguments That Etcoff Will Not Do Exams Utilizing Nevada’s Permissible Legal Parameters; Both NRS 52.380 and NRCP 35 Allow For Observer And Recordings.

Defendant relies almost exclusively on *Freteluco v. Smith’s Food & Drug Ctrs.*, 336 F.R.D. 198 (D. Nev. 2020) in its Objection, but to no avail. Outside of being a non-controlling federal district court case, *Freteluco* was a federal case that held federal procedure applied, then



1 applied federal rules, not Nevada’s rules. The Federal law and rules do *not* expressly provide
2 for an observer or audio recording of a mental IME. However, unlike the Federal rules, **Nevada**
3 **state law and rules do expressly provide for an observer and audio recording** of a mental
4 IME under both NRS 52.380 and NRCP 35.

5 First, NRS 52.380, more recently enacted after NRCP 35, expressly allows for an
6 observer and recording at a mental IME. NRS 52.380(1), (2) (“An observer may attend an
7 examination ... The observer attending the examination pursuant to subsection 1 may make an
8 audio or stenographic recording of the examination.”).

9 Secondly, FRCP 35 and NRCP 35 are different with respect to observers and recording.
10 NRCP 35(a)(3) expressly allows an audio recording for good cause, whereas FRCP 35 does not
11 expressly so allow it. NRCP 35(a)(3) provides: “On request of a party or the examiner, the court
12 may, for good cause shown, require as a condition of the examination that the examination be
13 audio recorded.” Similarly, NRCP 35(a)(4) also expressly allows an observer “for good cause
14 shown” too, while FRCP 35 does not expressly state. Thus, the Federal court’s ruling not
15 applying either Nevada’s statute nor its rule, but applying FRCP 35, is inapposite, non-
16 controlling, and unavailing here.

17 Interestingly, however, *Freteluco* involved the same defense hired gun, Dr. Etcoff. That
18 case specifically noted that while Dr. Etcoff had submitted a letter that was in evidence lobbying
19 to prevent audio recording and observers from the Rule, the letter conceded he allowed observers
20 and recordings:

21 “Dr. Etcoff’s letter further states, that he ‘allow[s] a noninvolved third
22 party observer audiotaping and videotaping of my examinee
23 interviews.’ Dr. Etcoff goes on to state that he allows audio and video
24 recordings ‘so as to accommodate the attorney and the discovery
25 commissioner ...’ Finally, Dr. Etcoff states on occasion, I have
allowed an employee from the examiner’s attorney’s office to sit in on
the interview.”

26 *Freteluco*, 336 F.R.D. at 201, n.1.

27 This is a significant admission and concession because here, in Defendants’ Objection,
28 they state the exact opposite. Defendants purport to argue that these measures that provide



1 reliability and transparency in the oft-abused, and secret process of mental exams cannot be
2 implemented or that no physician will do them—which is obviously and patently false, and
3 belief by Dr. Etcoff’s own admissions. There has been no stand-still with mental IMEs allowing
4 an observer and recording—over even videotape—as even Defendants’ own expert has allowed,
5 and certainly no evidence of any such stand-still. Given the blatant discrepancies here, Dr. Etcoff
6 lacks credibility for purposes of this Objection.

7 In any event, Nevada law is different than Federal law. Nevada law allows for the
8 observer and audio recording. The statute provides for it, and the rule also allows it for good
9 cause. The Discovery Commissioner, among other things, also found good cause under Rule 35
10 to allow it. Rule 35 does not expressly preclude it under any circumstances but allows for it
11 upon a showing of good cause. Both discovery commissioners are allowing mental IMEs with
12 observers and recording. The one non-controlling state district court decision Defendants
13 attached to their Objection is, non-controlling, contrary to Nevada law and rules, did not concern
14 this case, and cannot be considered by the Court in any event because it was not offered during
15 the discovery commissioner proceedings. The same is true of Dr. Etcoff’s created declaration
16 for the Objection and the other materials referenced above in Argument Section A.

17 C. **The History and Purpose of NRS 52.380, Which Constitutes The Current**
18 **State of Nevada Law: NRS 52.380 Provides For An Observer As A Matter**
19 **Of Right, And Rule 35 Allow Them For Good Cause.**

20 Rule 35 states that a court “may order a party whose mental or physical condition . . . is
21 in controversy to submit to a physical or mental examination by a suitably licensed or certified
22 examiner.” NRCP 35(a)(1). Although Rule 35 exams are commonly referred to as “independent
23 medical exams,” that phrase is misleading because “[t]hese examinations are generally
24 performed by a defense-selected, defense-paid doctor, not a court-ordered independent expert.”
25 *Davanzo v. Carnival Cruise Lines*, 2014 WL 1385729, at *1-2 (S.D. Fla. Apr. 9, 2014). “[I]t is
26 somewhat artificial and unrealistic to describe such an exam as an [independent medical exam].”

27 *Id.*

28 ///



1 Instead, a more accurate view is as a compulsory examination that is “more akin to a
2 litigant attending a deposition than a medical patient seeing his doctor.” *Id.* As a result, many
3 courts recognize that the examination is not independent but, rather, is “inextricably intertwined
4 with the adversarial process.” *Goggins v. State Farm Mut. Auto. Ins. Co.*, 2011 WL 1660609,
5 at *3 (M.D. Fla. May 3, 2011); *see also Zabkowicz v. West Bend Co.*, 585 F. Supp. 635, 636
6 (E.D. Wis. 1984) (“[T]he defendants’ expert is being engaged to advance the interests of the
7 defendants; clearly, the doctor cannot be considered a neutral in the case.”).

8 The inherently adversarial nature of a Rule 35 exam provided the backdrop for the need
9 for and eventual enactment of statutory safeguards for litigants during the exam, in particular,
10 the right to have an observer (including her or his attorney) and the right to record the exam.

11 These substantive safeguards were first recommended to be included in the 2019
12 revisions to Nevada’s Rules of Civil Procedure. *See* Hearing on A.B. 285 Before the Assembly
13 Judiciary Comm., 80th Leg. (Nev., Mar. 27, 2019), (statement of Graham Galloway, representing
14 NJA) (testifying that the subcommittee tasked with providing recommendations on the updated
15 NRCP 35 “voted 7-to-1 to make substantial changes, the changes that are [now] set forth or
16 embodied in [NRS 52.380].”).

17 However, despite the recommendations, the adoption of NRCP 35 modified those
18 safeguards in two crucial ways. First, **the rule allowed recording at the court’s discretion**
19 **“for good cause shown,”** rather than as a matter of right. Second, the rule prohibited a “party’s
20 attorney or anyone employed by the party or the party’s attorney” from serving as an observer
21 of the examination, and prohibited observers at a “neuropsychological, psychological, or
22 psychiatric examination, **[unless] the court orders otherwise for good cause shown.**”

23 Because of the recommendations, yet omission of those crucial safeguards from NRCP
24 35, the 2019 Legislature sought to enshrine those substantive rights in statutory form to make
25 sure they were allowed to litigants. *See, e.g.,* Hearing on A.B. 285 Before the Assembly Jud.
26 Comm., 80th Leg. (Nev., Mar. 27, 2019) (statement of Graham Galloway) (“The origins of this
27 bill flow from a committee formed by the Supreme Court of Nevada two years ago to review,
28 revise, and update our Nevada Rules of Civil Procedure—the rules that govern all civil cases.”).



1 The result was **NRS 52.380**, entitled “**Attendance by observer**,” under the section
2 entitled “**MENTAL OR PHYSICAL EXAMINATION**,” more recently adopted after Rule
3 35’s latest prior adoption. The statute mandates that, *as a matter of right*, a party may have an
4 observer, including a party’s attorney, present at his or her examination. NRS 52.380(1)-(2).
5 Further, the statute provides that the observer may, as a matter of right, make a recording of the
6 examination. NRS 52.380(3). In addition to those substantive safeguards, the statute includes
7 several additional procedural rights, including the right for an observer or the examiner to
8 suspend the examination and the ability to file a protective order. NRS 52.380(4)-(6).

9 NRS 52.380 provides, in relevant part, that:

10 **MENTAL OR PHYSICAL EXAMINATION**

11 **NRS 52.380 Attendance by observer.**

12 1. An observer may attend an examination but shall not participate in or
13 disrupt the examination.

14 2. The observer attending the examination pursuant to subsection 1 may be:

15 (a) An attorney of an examinee or party producing the examinee; or

16 (b) A designated representative of the attorney, if:

17 (1) The attorney of the examinee or party producing the examinee, in
18 writing, authorizes the designated representative to act on behalf of the attorney
19 during the examination; and

20 (2) The designated representative presents the authorization to the
21 examiner before the commencement of the examination.

22 3. The observer attending the examination pursuant to subsection 1 may
23 make an audio or stenographic recording of the examination.

24 4. The observer attending the examination pursuant to subsection 1 may
25 suspend the examination if an examiner:

26 (a) Becomes abusive towards an examinee; or

27 (b) Exceeds the scope of the examination, including, without limitation,
28 engaging in *unauthorized diagnostics, tests or procedures*.

23 As the Nevada State Legislature intended, the enactment of NRS 52.380 provided
24 litigants with a right to have an observer present and a recording made of a Rule 35 examination,
25 including a neuropsychological examination. In addition, as shown by the “unauthorized” tests
26 and procedures, a physician must identify the authorized tests he or she might seek to utilize.
27 NRS 52.380 is the current state of the law in Nevada, and Defendants in essence are refusing to
28 comply with the law.



1 Here, the Discovery Commissioner allowed an observer and recording for good cause
2 under Rule 35 and due to NRS 52.380, and this Court should uphold the ruling. NRS 52.380 is
3 the current state of law in Nevada and allows for these protections, and Rule 35 also allows for
4 it for good cause. Certainly, there was good cause to enact NRS 52.380, and for all those reasons
5 and others, including the reasons and evidence Plaintiff submitted in its Opposition to Moton to
6 Compel, there is and was good cause to allow for an observer and audio recording here too.

7 **D. NRS 52.380 Creates a Substantive Right to Record and have Observed**
8 **One's Own Rule 35 Medical or Psychological Examination.**

9 Defendants' Motion to Compel did not address procedural vs. substantive rights as it
10 does in its Objection, and thus has waived the matters to that extent here under *Valley Health*.
11 Nevertheless, Defendants get it wrong once again.

12 A substantive rule or statute is one that “creates duties, rights and obligations,” while a
13 procedural rule or statute merely “specifies how those duties, rights, and obligations should be
14 enforced.” *Azar v. Allina Health Services*, 587 U.S. —, —, 139 S. Ct. 1804, 1811 (2019); *see*
15 also 1 James W. Moore, Moore's Federal Practice § 1.05[2][b], at 1-29 (3d ed. 2016)
16 (“Substantive rights are rights established by law. The term ‘substantive’ does not mean rights
17 that are ‘important’ or ‘substantial,’ but rather those that have been conferred by the
18 Constitution, by statute, or by the common law.”). **A substantive statute supersedes a**
19 **conflicting procedural statute or court rule.** *Connery*, 99 Nev. at 345, 661 P.2d at 1300.

20 Here, the statute, NRS 52.380, is substantive, creating rights to litigants to protect them
21 from the history of manipulated defense medical exams conducted in secret. Under the law, the
22 statute prevails to the extent the rule—the *procedural* rule—Nevada Rule of Procedure 35
23 conflicts, though here, the procedural rule still allows for the parameters for good cause.

24 The statute's plain language and legislative history confirm that NRS 52.380 creates a
25 right to record and have observers, including an attorney, present at one's own NRCP 35 exam.
26 Thus, NRS 52.380's substantive provisions preempt NRCP 35's conflicting provisions as was
27 intended by the Legislature of the State of Nevada.

28 **1. The plain language of NRS 52.380 shows it creates substantive rights.**



1 This Court reviews questions of statutory construction de novo. *APCO Constr., Inc. v.*
2 *Zitting Bros. Constr., Inc.*, 136 Nev., Adv. Op. 64, 473 P.3d 1021, 1027 (2020). When
3 “construing a statute, [this Court’s] analysis begins with its text.” *Shue v. State*, 133 Nev. 798,
4 805, 407 P.3d 332, 338 (2017). “When the language of a statute is plain and unambiguous, a
5 court should give that language its ordinary meaning and not go beyond it.” *City Council of*
6 *Reno v. Reno Newspapers, Inc.*, 105 Nev. 886, 891, 784 P.2d 974, 977 (1989).

7 The plain language of NRS 52.380, contains rights that can be protected or enforced by
8 law as well as the means with which those rights should be enforced. Indeed, the statute both
9 creates the substantive right to right to have an observer present at one’s own independent
10 medical exam, including a psychological, neuropsychological, or psychiatric exam, see NRS
11 52.380(1)-(2), to have an observer record one’s own exam, see NRS 52.380(3), and provides the
12 procedural rules to enforce those rights. See NRS 52.380(4) (allowing observer to suspend the
13 exam); NRS 52.380(5) (allowing examiner to suspend the exam); NRS 52.380(6) (allowing the
14 examinee to move for a protective order if the exam is suspended).

15 Thus, the Court need not go beyond the statute’s plain text to determine that those plainly
16 substantive portions of the statute—NRS 52.380(1)-(3)—create the right to record and have
17 observed one’s own psychological, neuropsychological, or psychiatric independent medical
18 exam that supersede the conflicting portions of NRCP 35.

19 **2. The legislative history of NRS 52.380 proves it is a substantive right.**

20 Although the Court need not go beyond the plain text of NRS 52.380 to resolve this
21 issue, the statute’s legislative history further confirms that the right to record and to have
22 observers present are, and were intended to be, substantive rights that supersede NRCP 35.

23 Indeed, “[t]here is . . . no more persuasive evidence of the purpose of a statute than the
24 words by which the legislature undertook to give expression to its wishes. Often these words are
25 sufficient in and of themselves to determine the purpose of the legislation.” *United States v.*
26 *Am. Trucking Ass’ns*, 310 U.S. 534, 543 (1940). The legislative intent of a statute can be
27 determined by examining the statements of a bill’s major proponents. See, e.g., *Valenti v. State,*
28 *Dep’t of Motor Vehicles*, 131 Nev. 875, 881, 362 P.3d 83, 87 (2015) (“The most informative



1 statement as to the Legislature’s intent in defining [a statutory term] came from a lead proponent
2 of [the bill].”).

3 Here, **the legislative history explicitly provides that NRS 52.380 was enacted to**
4 **provide a substantive right to record and to have observers in one’s own exam:**

5 The reason we are before you today is because [A.B. 285] protects
6 substantive rights. This is not a procedural rule, which you would usually
7 find within our [Nevada Rules of Civil Procedure]. Our Nevada Rules of
8 Civil Procedure involve things such as how many years someone has to
9 file a lawsuit and how many days someone has to file a motion or an
10 opposition to a motion. This bill does not involve those types of issues
11 but, instead, involves a substantive right of a person during an
12 examination by a doctor whom he did not choose, does not know, and has
13 no relationship with whatsoever, a doctor who was chosen by an
14 insurance defense attorney.

15 See Hearing on A.B. 285 Before the Assembly Judiciary Comm., 80th Leg. (Nev., Mar. 27,
16 2019).

17 Additionally, proponents of the bill noted that having an observer present at an
18 examination and or having the ability to record the exam are substantive rights litigants have in
19 Alaska, Arizona, California, Connecticut, Delaware, Florida, Illinois, Indiana, Kentucky,
20 Massachusetts, Michigan, New Jersey, New York, Pennsylvania, Oklahoma, Washington, West
21 Virginia, and Utah, as well as in the Fifth Circuit and indeed in Nevada in the workers-
22 compensation context.⁴ See Hearing on A.B. 285 Before the Assembly Judiciary Comm., 80th
23 Leg. (Nev., Mar. 27, 2019) (Exhibit C).

24 As outlined in Exhibit C to the Assembly Judiciary Committee, Arizona, California,
25 Illinois, Michigan, Pennsylvania, Oklahoma, Washington, and Utah authorize either the
26 presence of an observer or audio recording of the exam by statute or court rule. See Ariz. R.
27 Civ. P. 35(c); Cal. Code Civ. P. § 2032(q)(2); 735 Ill. Comp. Stat. § 5/2 - 1003(d) (2008); Mich.
28 R. Civ. P. R. 2, 311 (1985); Pa. R. Civ. P. 4010 (2002); 12 Okla. Stat. § 3235(D); Wa. Super.
Ct. R. Civ. Cr. 35 (2001); Utah R. Civ. Proc. R. 35 (1993).

Additionally, Alaska, Connecticut, Delaware, Florida, Indiana, Kentucky,
Massachusetts, New Jersey, New York, West Virginia, and the Fifth Circuit have all recognized



one or both of the substantive rights in their caselaw. *See Lagfeldt–Haaland v. Saupe Enterprise, Inc.*, 768 P.2d 1144, 1147 (Alaska 1989); *Polcaro v. Daniels*, 2007 WL 1299159 (Conn. Sup. Ct. 2007); *Rocken v. Huang*, 558 A.2d 1108, 1111 (Del. Sup. Ct. 1988); *Lunceford v. Florida Central Railroad Co., Inc.*, 728 So.2d 1239, 1241 (Fla. App. 5. Dist. 1999); *Jacob v. Chaplain*, 639 N.E. 2d 1010, 1013 (Ind. 1994); *Metropolitan Property & Cas. Ins. Co. v. Overstreet*, 103 S.W. 3d 31, 38-40 (Ky. 2003); *Hepburn v. Barr & Barr*, 2006 WL 1711849 (Mass. Sup. Ct. 2006); *B.D. v. Carley*, 704 A.2d 979, 981 (N.J. 1998); *Flow v. Cty. of Oneida*, 34 A.D. 3d 1236 (N.Y. 2006); *State ex rel. Hess v. Henry*, 393 S.E. 2d 666 (W. Va. 1990); *Acosta v. Tenneco Oil Co.*, 913 F.2d 205 (5th Cir. 1990).

Finally, the legislative history reveals that, although members of the committee tasked with recommending revisions to NRCP 35 for the 2019 overhaul of Nevada’s Rules of Civil Procedure voted 7-to-1 to provide the substantive rights now embodied in NRS 52.380, the changes were not adopted in the 2019 update to the rules. *See* Hearing on A.B. 285 Before the Assembly Judiciary Comm., 80th Leg. (Nev., Mar. 27, 2019) (statement of George T. Bochanis, representing NJA). The failure to include the substantive protections within NRCP 35 necessitated the proposal, and eventual enactment, of what is now NRS 52.380.

This legislative history thus confirms what the statute’s plain text demonstrates: that NRS 52.380 was explicitly enacted to create substantive right for litigants when they are most vulnerable during discovery—during one’s own examination by “a defense-selected, defense-paid doctor” in a process “inextricably intertwined” with the inherently adversarial litigation process. The Legislature considered the effect an observer could have during an NRCP 35 examination, and ultimately allowed a litigant to have an observer, including his or her attorney, present during any type of NRCP 35 exam and to have their observer record the exam. Granting this right was well within the Legislature’s power, meaning the substantive provisions of NRS 52.380 preempt the competing provisions of NRCP 35.

3. NRS 52.380 is Constitutional.

Although legislation that violates the separation of powers may be unconstitutional, *see Comm’n on Ethics v. Hardy*, 125 Nev. 285, 299, 212 P.3d 1098, 1108 (2009), all statutes are



1 **presumed to be constitutional** and “every possible presumption will be made in favor of the
2 **constitutionality of a statute.**” *List v. Whisler*, 99 Nev. 133, 137-38 (1983). In other words,
3 **“unless it be demonstrated that there is clearly no rational and legitimate reason for the**
4 **[enactment of the statute], [this Court] must uphold the law.**” *Mengelkamp v. List*, 88 Nev.
5 542, 545, 501 P.2d 1032, 1034 (1972); *see also* Michael L. Stokes, Judicial Restraint and the
6 Presumption of Constitutionality, 35 U. Tol. L. Rev. 347, 372-73 (2003) (“While the
7 fundamental principle of judicial review dictates that the judiciary must have the last word in
8 constitutional matters, the other branches consider the matter first, and their conclusions deserve
9 deference.”). Defendants have not made *any* such showing, and the advocacy articles by defense
10 attorneys they provided with their Motion to Compel are likewise unavailing.

11 Here, ample evidence of the rational and legitimate reasons for NRS 52.380’s enactment
12 further support the statute’s presumptive constitutionality. The Legislature heard testimony
13 detailing the need for substantive safeguards for litigants undergoing NRCP 35 exams and the
14 specific safeguards that were necessary to protect the litigants during those exams. The
15 safeguards discussed in that testimony are now embodied as the substantive provisions of NRS
16 52.380.

17 As a result, this Court should conclude that NRS 52.380’s substantive provisions
18 regarding the right to record and the right to have an observer at an NRCP 35 exam are
19 constitutional, and/or not reach that issue. While Defendants falsely try to mischaracterize the
20 Discovery Commissioner’s recommendations as “impliedly” reaching the constitutionality issue
21 so it can try and inappropriately submit dozens of pages of new argument on constitutionality,
22 the Commissioner made no such ruling as demonstrated by the DCR&R and the Transcript of
23 the hearing. Rather, the Commissioner enforced the law of Nevada, allowing an observer and
24 recording under NRS 52.380 and for good cause under NRCP 35. Defendants primary argument
25 for purported lack of good cause is its Hail-Mary constitutional argument which the Court should
26 deny or disregard.

27 ///

28 ///



1 **E. Rule 35 Neuropsychological Examinations May be Ethically and Accurately**
2 **Performed with an Observer and a Recording, And the Providing of All**
3 **Data to Plaintiff and his Attorneys Under Protections.**

4 In support of its request that the Court disregard the provisions of NRS 52.380,
5 Defendants purport to argue there are ethical concerns about sensitive neuropsychological test
6 materials being disseminated to the public and concerns that the presence of observers and/or
7 the recording of the examination may alter or change the results of the testing. Dr. Etcoff's
8 purported objections to having observers and/or recording of his Rule 35 examination are based
9 upon his own personal idiosyncrasies—fabricated for purposes of this case as shown by his prior
10 admissions that e has allowed observers and recording previously, and complied with court orders
11 therefor. It is not, however, based on established standards or some broad consensus in the
12 psychological community, and have previously been rejected by this court. *See e.g.* Exhibit 7
13 to Plaintiff's Opposition to Motion to Compel: Order allowing observer and recording at Dr.
14 Etcoff's examination in another case. Dr. Etcoff's positions are not shared by the majority of
15 the members of the psychological community, his objections are not well founded, and are belied
16 by the very caselaw Defendants rely upon.

17 **1. There is no Ethical Prohibition on Observers or Recording And**
18 **Safeguards like Protective Orders may be issued.**

19 It is completely ethical for an examiner such as Dr. Etcoff to allow an observer to be
20 present and to allow the recording of a Rule 35 examination. Psychologist Richard I. Frederik,
21 Ph.D. authored an affidavit on October 30, 2018 in which he explained that there is no
22 prohibition on psychologists allowing their examinations to be recorded. As he explained:

23 The Ethical Principles of Psychologists and Code of Conduct ... does not in any
24 way restrict evaluating psychologists from recording evaluations to be used in legal
25 proceedings. The requirement (Section 9.11) is that "Psychologists make reasonable
26 efforts to maintain the integrity and security of test materials and other assessment
27 techniques consistent with the law and contractual obligations, and in a manner that
28 permits adherence to the Ethics Code."

 "Reasonable efforts" to maintain security of test materials do not require that
evaluating psychologists work to prevent the recording of their assessments.
Consulting psychologists must have free and unfettered access to recordings of



assessments to provide a full and useful analysis of the reliability and validity of assessments offered as evidence in a disputed manner. Attorneys must be able to examine specific instances of variations, errors, omissions, or misbehavior to allow for cross-examination of opinions offered by evaluating psychologists.

Exhibit 1 to Plaintiff’s Opposition to Motion to Compel: Affidavit of Richard I. Frederik, Ph.D. Paragraph 16-17. Dr. Frederik explains that the ethical guidelines for psychologists anticipate and allow for the need to comply with court proceedings by producing even sensitive and confidential materials:

The 2014 edition of the Standards for Educational and Psychological Testing anticipates the need to produce documents and secure test information in the resolution of disputed matters. Standard 6.7 of the Standards states “Test users must balance test security with the rights of all test takers and test users. When sensitive test documents are at issue in court or in administrative agency challenges, it is important to identify security and privacy concerns and needed protections at the outset. Parties should ensure that the release and exposure of such documents (including specific sections of those documents that may warrant redaction) to third parties, experts, and the courts/agencies themselves are consistent with the conditions (often reflected in protective orders) that do not result in inappropriate disclosure and that do not risk unwarranted release beyond the particular setting in which the challenge has occurred.” Psychologists who are unwilling to record their examinations are unwilling to balance the rights of the plaintiff against the need for test security.

Id. at ¶18. He explains that exams can be recorded provided that reasonable safeguards are followed:

There is no part of Standard 6.7 that can be read to mean that an evaluation cannot be recorded or that the recording cannot be reviewed by those who are obligated to protect test security. There is no part of Standard 6.7 that can be read to mean that an evaluation cannot be recorded to identify which parts should be reviewed by “third parties” or “courts/agencies” to determine if opinions or conclusions have valid and reliable bases. Instead, current standards of testing require that psychologists anticipate how to “release and expose” such documents to third parties that protect the security issues.

Id. at ¶19.

Here, Plaintiff proposed agreeing to protective order limitations (which the Discovery Commissioner agreed with and also recommended in the DCR&R to obviate any copyright arguments, among other things), yet Defendants continue to argue the materials cannot be shared for copyright issues—arguments for which neither Defendants nor Dr. Etcoff even have standing



1 to assert. However, Dr. Frederik explains that **any ethical concerns can be resolved through**
2 **the issuance of a protective order regarding the manner in which confidential materials**
3 **are handled:**

4 A protective order ensures that all test security concerns are addressed so that the
5 evaluating psychologist can fulfill his or her ethical responsibilities to protect tests
6 and test information.

7 *Id.* at ¶11.

8 **2. There is no Ethical Prohibition on Videotaping Either.**

9 Defendants argue that an observe and recording is obstructive to their examinations. As
10 an alternative to the observer and recording, Plaintiff's specifically offered to instead have the
11 entire exam videotaped as an arguably less intrusive alternative, given defense arguments. Not
12 surprisingly, however, Defendants and their hired doctors do not want to be observed an
13 accountable in any manner. Since the Discovery Commissioner recommended an observer and
14 audio recording would be allowed, he declined to allow videotape on top of the that. However,
15 the Court may order here that videotape may be used as an alternative for good cause under Rule
16 26(c), particularly given Defendants arguments about an in person observer. Videotaping would
17 provide the most transparency, remove the observer from the presence, an provide the most
18 accountability while reducing defense doctor manipulation that occurs in their unmonitored,
19 secret exams.

20 Dr. Frederik explained that a protective order also addresses any test security concerns
21 while giving all parties access to the test data and recordings:

22 Video recording and production of raw test data preserve evidence of all variations,
23 errors, omissions, and misbehavior on the part of the psychologist, should they
24 occur. Although there are legitimate and important reasons for any psychologist to
25 maintain the protection of test items, test questions, and stimulus materials from
26 public access, the need for security must not prevent preservation of evidence of
27 potential errors and misconstructions that form the basis for the evaluation
28 psychologist's conclusions. A protective order will address all test security concerns
while giving all parties access to the test data and recordings.

Id. at ¶15.



1 The American Academy of Psychiatry and the Law published a study titled “Videotaping
2 of Forensic Psychiatric Evaluations,” attached as Exhibit 2 to Plaintiff’s Opposition to Motion
3 to Compel, in which the task force evaluated the benefits and drawbacks of videotaping
4 psychological examinations. Following an exhaustive review of the subject, the findings were
5 as follows:

6 “The Task Force finds the option of videotaping to be an ethically
7 acceptable medical practice.”

8 Exhibit 2 to Plaintiff’s Opposition to Motion to Compel: “Videotaping of Forensic Psychiatric
9 Evaluations.”

10 The Chairman of the American Psychiatric Association’s Task Force on Videotaping
11 Forensic Psychiatric Examinations, Yale’s Dr. Howard Zonana authored an affidavit in which
12 he explained that allowing a video recording is a commonly accepted practice which does not
13 compromise ethics. Exhibit 3 to Plaintiff’s Opposition to Motion to Compel: Affidavit of
14 Howard V. Zonana, M.D.

15 There is no ethical prohibition on allowing video recording and/or an observer during
16 the Rule 35 examination. The manner in which the test materials and/or recording of the testing
17 are to be handled can be maintained subject to appropriate confidentiality agreements and can
18 be disposed of at the conclusion of the case. This Court should therefore order that Plaintiff may
19 videotape the exam in full.

20 3. **The Rule 35 examination will not be Adversely Affected by the**
21 **Presence of an Observer and the Recording of the Examination.**

22 An observer during the examination and recording the examination does not adversely
23 affect the outcome of the testing. The recent consensus among the majority of psychologists is
24 that having observers present and/or recording neuropsychological examination and testing does
25 not impact the test results to any appreciable degree.

26 The Chairman of the American Psychiatric Association’s Task Force on Videotaping
27 Forensic Psychiatric Examinations, Yale’s Dr. Howard Zonana, testified that he has video
28 recorded examinations for over twenty-five years with advantageous effects. Dr. Zonana



1 explains that video recording provides the following benefits and protections, which far
2 outweigh any perceived disadvantage:

- 3 1. videotape does not compromise ethics;
- 4 2. videotape is more comprehensive than handwritten notes;
- 5 3. videotape accurately records the entire interaction;
- 6 4. videotape enables objective evaluation of facial expressions, verbal tone,
7 body language and behavior;
- 8 5. videotape ensures that all raw data is preserved;
- 9 6. videotape eliminates subsequent disputes;
- 10 7. videotape provides the examinee with greater sense that the process will
11 be fair;
- 12 8. videotape provides accessibility;
- 13 9. no reliable research suggest that videotape substantively alters
14 examination or test results;
- 15 10. most examinees ignore the video camera;
- 16 11. the logistics of videotaping are simple, once instituted;
- 17 12. the cost of videotaping is relatively minor;
- 18 13. videotaping may be easily accomplished with a simple camera or one-
19 way mirror;
- 20 14. the examiner's best practice is to videotape forensic examinations;
- 21 15. videotape is beneficial to the examiner by ensuring accuracy (i.e. proof
22 examiner did not abuse the process or examinee);
- 23 16. videotape provides the examinee with the only basis for verifying
24 events reported by the adversary's expert witness.

25 Exhibit 3 to Plaintiff's Opposition to Motion to Compel: Affidavit of Howard V. Zonana,
26 M.D.

27 Similarly, Psychologist Richard I. Frederik, Ph.D explains that it is a common practice
28 in the psychological field to record psychological examinations:

Recordings are commonly used in psychological examinations to create a record of exactly what happened in the examination session. Recording is a common practice that does not need to create any sort of disruption to the psychological testing process, when modern equipment is used. I have reviewed many hours of recorded evaluations conducted by licensed, board-certified psychologists and neuropsychologists.



Exhibit 1 to Plaintiff's Opposition to Motion to Compel at ¶14).

Many psychologists have explained that it is common practice to record psychological examinations:

- Psychologist Harry D. Krop, Ph.D., Exhibit 4 to Plaintiff's Opposition to Motion to Compel, explains that video recording psychological examinations is a common practice in the field of psychology.
- Psychologist Jacqueline C. Valdes, Ph.D., Exhibit 5 to Plaintiff's Opposition to Motion to Compel, explains that she regularly performs examinations while being video recorded subject to a protective order.
- Psychologist Fred J. Petrilla, Ph.D., Exhibit 6 to Plaintiff's Opposition to Motion to Compel, explains he regularly performs examinations while being video recorded subject to a protective order.

Dr. Frederik, Ph.D. further explained that recording does not adversely affect the results of a neuropsychological examination. He explained:

Some psychologists claim that knowledge that one is being record (and the examiner's knowledge that the examination is being recorded) negatively affects test performance. A 2002 report showed that knowledge that an examination was being recorded produced very small differences in test performance on memory tasks. A 2013 report revealed that no such differences actually existed, and, in fact, differences in testing were better accounted for by gender and handedness—random variables that cannot possibly be controlled. There is no reason to believe that knowledge that one is being recorded systematically affects psychological assessment in any meaningful way.

Eastvold, Belanger, and Vanderploeg (2012) published a review of all known articles dealing with the effects of being observed or recorded during cognitive task performance. They found 210 such articles, and they included 62 that were satisfactory for comparisons in their review. Most of the studies of the effect of having an observer or knowledge that one is being recorded during neuropsychological examination show no effect or have the effect of improving performance. Some studies show a negative effect of being observed or recorded, decreasing performance. As can be seen in Figure 1 from Eastvold et al. (2012), the overall effect across all studies included for review is near zero. When all known studies are included and evaluated and not selectively chosen for their negative findings, it is immediately seen that there is no systematic phenomena from being observed or recorded.

Exhibit 1 to Plaintiff's Opposition to Motion to Compel at ¶¶23, 25).



1 4. **Public Policy Reasons Support NRS 52.380 Because of the**
2 **Manipulation that occurs in secret in litigation by hired experts.**
3

4 Dr. Frederik also examined and explained some of the potential problems with
5 unobserved and unrecorded Rule 35 neuropsychological examinations which demonstrate the
6 importance of having an accurate record of what actually transpired during the examination:

7 The reason for reviewing the videos is to ensure that tests were administered in ways
8 that they must be administered in order for the tests to have any reliability or validity
9 for understanding client conditions, attitudes, behavior, and cognition. Variations to
10 standard test administration are important. Most tests have exact procedures in
11 instructions, wording, practice, feedback, time of exposure, documentation, and
12 scoring of responses. These exact procedures must be followed, and the exact
13 procedures are easily followed by trained test administrators who adhere to ethical
14 practice of psychometrics.

15 ***

16 I have reviewed about 40-50 video recorded assessments in litigated matters. Some
17 of these reviews have included reviews of video recordings of Dr. Sally Kolitz
18 Russell and her staff. Reviews of these videos have revealed numerous, pervasive,
19 and important changes to standardized procedures, and the reports accompanying
20 those evaluations did not report her failures to strictly observe the same procedures
21 used when obtaining for generating test scores. She nevertheless generated the test
22 scores as if she had followed test procedures and interpreted test scores as if she
23 had done what was necessary to afford the interpretation. I have generated lengthy
24 reports identifying in detail the numerous, pervasive, and important changes to
25 standardized procedure that would not have been discovered had not the
26 examinations been video recorded.

27 ***

28 I have rarely observed an examination by neuropsychologists or clinical
psychologists that did not include important deviations from standard procedure
that did not include striking, important departures from standard procedure.
Following standard procedure is what makes test interpretation possible. When
standard procedure is not followed, the psychologist is obligated to report it and to
explain the potential implications to reliability and validity of test results—the test
results should be considered invalid for interpretation unless the psychologist can
explain why the departure is unimportant. Again, I have rarely seen an entire video
recorded examination without a serious violation to standard procedure, and I can
think of only one or two occasions in which the psychologist reported a deviation
to standard procedure and discussed it. Without the video recordings, the serious
problems in examinations would be unknown.

Exhibit 1 to Plaintiff's Opposition to Motion to Compel, at ¶¶ 7, 9, 10.



1 Dr. Frederik also discusses the problems with testing that has been done *that he has*
2 *been able to identify through use of video recordings*, making it beneficial for the fair cross-
3 examination of hired gun experts:

4
5 Following are some of the many problems that I have observed upon review of the
6 data and recordings of psychological examinations:

7 a. A test is reported to have been administered. A review of the video shows
8 that the test was never given.

9 b. Tests are given, but they are given incorrectly:

10 i. The examiner fails to give instructions in the way required by the
11 publisher. The examiner makes up instructions or uses non-standard
12 instructions.

13 ii. The examiner fails to limit the time in which certain tasks can be
14 accomplished. Some tasks require strict time limits.

15 iii. The examiner times the tasks as required but records an
16 inaccurate time.

17 iv. The examiner fails to follow rules for when certain follow-up
18 tasks are to be administered.

19 v. The examiner fails to follow an established pattern for how tests
20 are to be administered and does not record or identify failure to follow the
21 established pattern of test administration.

22 vi. The examiner fails to read instructions in a verbatim manner as
23 prescribed by the test publisher. Instead, the examiner makes up the
24 instructions as the test progresses.

25 vii. The examiner does not query certain responses in a prescribed
26 manner. viii. The examiners queries responses that were not to be queried.

27 ix. The examiner prompts for a response when prompts are
28 explicitly prohibited.

x. The examiner is given an incorrect response. Instead of scoring it
as wrong, the examiner tells the plaintiff that the answer is wrong and then
prompts for a correct response with hints. The resulting response is then
given full credit.

xi. The examiner teaches the plaintiff how to solve certain problems
when this is explicitly prohibited by the publisher, and then gives the
plaintiff credit for responses following the teaching of the task.

xii. The plaintiff gives one answer. The examiner writes down a
different answer never uttered by the plaintiff.



xiii. The test requires that the examiner be positioned in a certain way or that materials be positioned in a certain way, and these requirements are ignored and not documented in the report.

c. The examiner uses a demeaning tone when giving instructions, speaks angrily to the plaintiff, or mocks the plaintiff.

d. There are undocumented interruptions to the testing procedure by actions or noise. None of the following distractions, interruptions, impediments to valid testing (all discovered only by recording), or consideration of their potential impact were reported by the examiner:

- A plaintiff attempts to memorize material for testing while a landscaper used a Weed-Eater directly outside the window.

- An assistant comes into the room and refills coffee for the examiner and plaintiff while the plaintiff is being given lists of words for memorization.

- An examiner noisily re-loads his copier machine while the plaintiff is completing a paper-and-pencil test.

- An examiner responds to e-mail by clacking on his keyboard while the plaintiff is completing a paper-and-pencil test.

- The plaintiff appears to be sedated or falling asleep during the examination, but this is not noted by the examiner.

- A plaintiff is presented with a series of pictures to memorize. Bright sunshine is unshaded by the examiner. The pictures for memorization are presented with a sharp glare on them.

- A plaintiff is presented with series of pictures to memorize. The examiner has his head on the examining table and does not notice that the plaintiff is massaging his neck during the presentation with his head pointed at the ceiling. The plaintiff never saw most of the pictures presented.

- An examiner presents a test for the memorization of words by computer. The examiner is required to leave the room during the several-minute interval for memorization. Instead, he stays in the room and makes a great deal of noise during the attempt to memorize by the plaintiff.

e. Scoring rules for recorded items are followed incorrectly. Responses by the plaintiff are assigned incorrect values.

f. The examiner mis-scores the test. The examiner erroneously assigns a score to items because of calculation errors or by misidentifying incorrect responses as correct or correct responses as incorrect. Some mis-scorings cannot possibly be identified without a recording. For example, some scores depend on writing down and scoring exactly what is said or by recording the absolutely correct time to complete a task. I have seen examiners write down a different response or a different time and thereby mis-score the item.



1 g. The examiner mis-enters responses into a computer-based scoring
2 program.

3 h. The examiner uses bootleg and illegal scoring programs that generate
4 incorrect values for test scores used for interpretation.

5 i. The examiner derives certain scores when scoring the responses and then
6 reported different values in the written report.

7 All of these instances represent threats to the accuracy, reliability, validity, and
8 appropriateness of the opinions and conclusions of the evaluating psychologist who
9 performed the testing. Most of the threats to the accuracy, reliability, validity, and
10 appropriateness of the opinions and conclusions of the evaluating psychologist
11 would not have been discovered had not evidence been secured from the evaluation.
12 Clearly, merely providing copies of test forms is not satisfactory for allowing an
13 evaluation of the opinions and conclusions of the evaluating psychologist.
14 Recording the examination is the best way to ensure a proper record of the
15 examination exists. Video recording and audio recording provide these safeguards—
16 video recording offers the best protection.

17 Exhibit 1 to Plaintiff’s Opposition to Motion to Compel, ¶¶12-13.

18 The problems that Dr. Frederik has observed and identified illustrate the danger of
19 allowing psychological examinations to be performed unsupervised, unrecorded, and in secret
20 as Dr. Etcoff seeks to do here—but as he has allowed to be done in the past. Nevada law
21 expressly provides an examinee with the right to have an observer and recording.

22 **5. The APA has also recognized the need for transparency and compliance**
23 **with the legal process in its Guidelines.**

24 The American Psychological Association (“APA”) has issued specific Guidelines for
25 forensic psychology that provide for openness, fairness, transparency, and compliance with the
26 court rules, law, and process:

27 **Guideline 7.01: Conflicts With Legal Authority**

28 When their responsibilities conflict with law, regulations, or other governing
legal authority, forensic practitioners make known their commitment to the
EPPCC, and take steps to resolve the conflict. ... When the conflict cannot
be resolved by such means, forensic practitioners may adhere to the
requirements of the law, regulations, or other governing legal authority ...

Guideline 8.02: Access to Information

... Access to records by anyone other than the retaining party is governed
by legal process, usually subpoena or court order, or by explicit consent of
the retaining party ...



Guideline 10.06: Documentation and Compilation of Data Considered

Forensic practitioners are encouraged to recognize the importance of documenting all data they consider with enough detail and quality to allow for reasonable judicial scrutiny and adequate discovery by all parties. This documentation includes, but is not limited to, letters and consultations; notes, recordings, and transcriptions; assessment and test data, scoring reports and interpretations; and all other records in any form or medium that were created or exchanged in connection with a matter. When contemplating third party observation or audio/ video-recording of examinations, forensic practitioners strive to consider any law that may control such matters, the need for transparency and documentation, and the potential impact of observation or recording on the validity of the examination and test security.

Guideline 10.07: Provision of Documentation

Pursuant to proper subpoenas or court orders, or other legally proper consent from authorized persons, forensic practitioners seek to make available all documentation described in Guideline 10.05, all financial records related to the matter, and any other records including reports (and draft reports if they have been provided to a party, attorney, or other entity for review), that might reasonably be related to the opinions to be expressed.

Exhibit 9 to Plaintiff's Opposition to Motion to Compel.

F. The Affidavits This Court Can Consider Overwhelmingly Show There Is No Ethical Bar To Observers, Audio, or Video of Mental IMEs, or to Allow Fair Sharing of Materials With Protections.

The American Psychological Association makes clear that fairness, transparency, and compliance with the legal process is permissible and should be adhered to. Defense physicians can and must comply with Nevada law and court orders, and it is not unethical to do so. Mental examinations can and should allow for an observer and audio recording, and even videotaping, and it is not unethical to do so. The testing, materials, data, and results, can and should be shared the opposing party's expert and counsel, or counsel cannot fairly cross-examine the opposing expert. This is not unethical either. Any considerations about improper sharing outside the experts and counsel can easily be handled with a protective order limiting the use to experts and "attorneys' eyes only" restrictions as is routinely done in litigation—and as the Discovery Commissioner recommended here. This is not unethical either.



1 But, instead, Defendants, and Dr. Etcoff in particular, a notorious defense hired gun,
2 desire the exams to be done in secret, where there is no transparency, no accountability, limited
3 ability for cross-examination yet vast ability for manipulation. Defendants Objection solely
4 relies on a Affidavit from Dr. Etcoff belatedly manufactured for the Objection that was not
5 submitted to the Discovery Commissioner, that cannot be considered here under *Valley Health*,
6 and that belies Dr. Etcoff's own concessions as discussed above where he has allowed observers
7 and recordings and followed discovery orders.

8 However, the many Affidavits submitted with Plaintiff's Opposition to the Motion to
9 Compel that the Court *can* consider, more than establish grounds for compliance with NRS
10 52.380 and good cause under Rule 35 to allow an observer and recording, or even a videotaping,
11 an to allow for sharing of the materials with experts an counsel, under the protections
12 recommended by the Discovery Commissioner. This is permissible by legal, ethical, and
13 psychological standards. Just not Dr. Etcoff or Defendants preference in this case.

14 **III. COUNTERMOTION FOR SANCTIONS**

15 **A. Defendants And Their Counsel Should Be Sanctioned Under EDCR 7.60.**

16 Because Defendants' Objection is clearly an improper attempt to re-litigate the order on
17 completely new evidence and argument contrary to law, Defendants and their attorneys who
18 counseled such conduct may and should be sanctioned.

19 "The court may, after notice and an opportunity to be heard, impose upon *an attorney* or
20 a party any and all sanctions which may, under the facts of the case, be reasonable, including
21 the imposition of fines, costs or attorney's fees." EDCR 7.60(b). The sanctionable offenses
22 include "when an attorney or a party without just cause":

- 23 (1) Presents to the court a motion or an opposition to a motion which is
- 24 obviously frivolous, unnecessary or unwarranted ...
- 25 (3) So multiplies the proceedings in a case as to increase costs
- 26 unreasonably and vexatiously.
- 27 (4) Fails or refuses to comply with these rules.
- 28 (5) Fails or refuses to comply with any order of a judge of the court.



EDCR 7.60(b).

Here, Defendants' entire Objection is unlawfully based on waived evidence and argument it failed to submit during the discovery commissioner in an improper attempt to re-litigate the issue anew. That is clearly inappropriate and contrary to Nevada law. Worse, it is not an inadvertent event of one exhibit for example either, but rather an overt, intentional act, of more than half their evidence. For example, Defendants willfully had their expert Dr. Etkoff draft a new October 14, 2021 declaration after the discovery proceedings for the *purpose* of their Objection, despite him obviously being available to them during the discovery proceedings (see, e.g., Defendants' Motion to Compel IME, Exhibit P, "Etkoff letter to Quist dated August 23, 2021").

Defendants' Objection is in violation of the rules and law, is therefore unwarranted, vexatious, and frivolous, and unnecessarily increases the expenses of this case and wastes judicial and parties time and resources. Plaintiff thus countermoves for fee sanctions against Defendants and their counsel jointly under EDCR 7.60(b). This is not a case where evidence was not considered or law misapplied, but rather, Defendants' Objection is almost entirely based on new evidence and argument crated for the purpose of the Objection. This is a clear and willful violation of the rules and law.

"An opposition to a motion which contains a motion related to the same subject matter will be considered as a counter-motion." EDCR 2.20(f). "A counter-motion will be heard and decided at the same time set for the hearing of the original motion and no separate notice of motion is required." Thus, countermotions like this one related to the subject matter of the original motion "will be" heard at the same time as the Motion without a separate notice.

To the extent the Court awards fees to Plaintiff as sanctions against Defendants, Plaintiff will submit a fee application and appropriate *Brunzell* analysis.

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1 **IV. CONCLUSION**

2 For the foregoing reasons and arguments, this Court should:

3 (1) overrule and deny Defendants Objection;

4 (2) adopt the DCR&R

5 (3) allow for an Observer and Audio-recording;

6 (4) allow for a Videotaping alternative, and,

7 (4) Grant the Countermotion for fee sanctions under EDCR 7.60 and allow
8 Plaintiff to submit a *Brunzell* application.

9 DATED this 10th day of November, 2021

10
11 **GGRM LAW FIRM**

12 */s/ Ryan A. Loosvelt*

13 **DILLON G. COIL, ESQ.**

14 Nevada Bar No. 11541

15 **RYAN A. LOOSVELT, ESQ.**

16 Nevada Bar No. 8550

17 2770 S. Maryland Pkwy, Ste. 100

18 Las Vegas, NV 89109

19 *Attorneys for Plaintiff*



LAW FIRM
INJURY ATTORNEYS

CERTIFICATE OF SERVICE

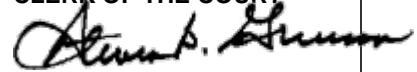
Pursuant to NRCP 5(b), I certify that I am an employee of GGRM LAW FIRM, and that on this 10th day of November, 2021, I caused the foregoing document entitled **PLAINTIFF'S OPPOSITION TO DEFENDANTS' OBJECTION TO DISCOVERY COMMISSIONER REPORT AND RECOMMENDATION REGARDING DEFENDANTS' MOTION TO COMPEL NRCP 35 NEUROPSYCHOLOGICAL EXAM WITH DR. LEWIS M. ETCOFF AND COUNTERMOTION** to be served upon those persons designated by the parties in the E-service Master List for the above-referenced matter in the Federal Court E-filing System in accordance with the mandatory electronic service requirements of Administrative Order 14-2 and the Nevada Electronic Filing and Conversion Rules.

/s/ Danielle Glave

An Employee of GGRM LAW FIRM

EXHIBIT “1”

EXHIBIT “1”



DCRR

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DISTRICT COURT

CLARK COUNTY, NEVADA

TAYLOR MILES CAPE,

Plaintiff,

Case No: A-20-818569-C

Dept. No: 28

vs.

DAVID G. MARTINEZ, individually; CHILLY
WILLY'S HANDYMAN SERVICES, LLC, a
domestic limited-liability company; DOES I
through X; and ROE BUSINESS ENTITIES I
through X, inclusive,

Defendants.

**DISCOVERY COMMISSIONER'S
REPORT AND RECOMMENDATIONS**

Hearing Date: October 1, 2021

Hearing Time: 9:30 a.m.

Appearances: William T. Martin, Esq., GGRM Law Firm, for Plaintiff Taylor Miles Cape.

Brent D. Quist, Esq., Dennett Winspear, LLP, for Defendant Chilly Willy's

Handyman Services, LLC.

John T. Keating, Esq., Keating Law Group, for Defendant David G. Martinez.

I.

FINDINGS

On October 1, 2021, the Discovery Commissioner, Honorable Jay Young, heard Defendants, Chilly Willy's Handyman Services, LLC and David G. Martinez's Motion to Compel NRCP 35 Neuropsychological Exam with Dr. Lewis M. Etcoff, Noticed for October 19-20, 2021,

1 on an Order Shortening Time; and Plaintiff's Opposition, Counter-Motion for Fees, and to Stay
2 Enforcement. The Commissioner having reviewed the papers and pleadings on file, having
3 heard the oral argument of counsel, and being informed on the premises, finds as follows with
4 respect to Defendants' Motion:

5 Defendants seek a two-day Rule 35 mental examination of Plaintiff. Plaintiff does not
6 oppose the examination take place; rather, he opposes certain parameters of the examination.
7 Plaintiff requested the exam be recorded with an observer and that his expert and counsel be
8 provided the defense expert's raw test data/ test materials under protections. Plaintiff also
9 counter-moved for a stay pending objection to the district court if the protections were not
10 ordered and counter-moved for fees.

11 The COMMISSIONER HEREBY FINDS, under Rule 35, there is good cause to allow a
12 third-party observer of the Rule 35 neuropsychological exam and an audio recording of that full
13 examination.

14 THE COMMISSIONER FURTHER FINDS the good cause to allow a third-party observer
15 and audio recording of the Rule 35 neuropsychological exam is the Legislature passed NRS
16 52.380 and the governor signed it into law. The observer can be present outside the examination
17 room and can listen to the examination either by remote means or directly, with the door open.
18 The observer may not interrupt the examination, except to suspend the examination if any
19 irregularities occur as allowed under NRS 52.380(4).

20 THE COMMISSIONER FURTHER FINDS Plaintiff cannot videotape the examination.

21 THE COMMISSIONER FURTHER FINDS the exam can take place over a two-day
22 period.

23 THE COMMISSIONER FURTHER FINDS the raw test data/test questions and other
24 exam materials must be provided to plaintiff's expert, who may share that information with
25 plaintiff's attorney, in an attorney's eyes-only capacity for preparation of the case. The
26 information is otherwise protected in this matter. It cannot be filed in a public setting. It can be
27 shared between counsel.

28 ///

1 THE COMMISSIONER FURTHER FINDS, as to Plaintiff's counter-motion for fees, the
2 Motion was substantially justified by the conflict between the NRCP 35 and NRS 52.380 and,
3 therefore, the Commissioner is not granting Plaintiff's request for fees.

4 THE COMMISSIONER FURTHER FINDS, as to Plaintiff's request for a stay to allow an
5 Objection, that good cause exists to grant that stay.

6 II.

7 **RECOMMENDATIONS**

8 The Discovery Commissioner, having considered the papers and pleadings on file,
9 having entertained oral argument of counsel, and being informed in the present premises,
10 hereby makes the following recommendations:

11 IT IS THEREFORE RECOMMENDED that Defendants' Motion be **GRANTED IN PART**
12 and **DENIED IN PART**.

13 IT IS FURTHER RECOMMENDED the Court compel the NRCP 35 neuropsychological
14 exam of Plaintiff.

15 IT IS FURTHER RECOMMENDED the exam may take place over a two-day period;

16 IT IS FURTHER RECOMMENDED that Plaintiff may audio record the exam in full and
17 have a third-party observer present;

18 IT IS FURTHER RECOMMENDED the third-party observer can be present outside the
19 examination room and can listen to the examination either by remote means or directly, with the
20 door open, but the observer cannot interrupt the examination, except to suspend the examination
21 if any irregularities occur, as allowed by NRS 52.380(4);

22 IT IS FURTHER RECOMMENDED Plaintiff cannot videotape the examination;

23 IT IS FURTHER RECOMMENDED the raw test data/test questions and other exam
24 materials must be provided to plaintiff's expert, who may share that information with plaintiff's
25 attorney, in an attorney's eyes-only capacity for preparation of the case. The information is
26 otherwise protected in this matter. It cannot be filed in a public setting. It can be shared between
27 counsel.

28 ///

IT IS FURTHER RECOMMENDED that Plaintiff's counter-motion for fees be **DENIED**;
and

IT IS FURTHER RECOMMENDED that Plaintiff's request for a stay to allow an Objection
be **GRANTED**.

DATED this 15th day of October, 2021.


DISCOVERY COMMISSIONER

Approved as to form and content by:

Respectfully submitted by:

GGRM LAW FIRM

DENNETT WINSPEAR, LLP

By /s/ Ryan A. Loosvelt
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Chilly Willy's Handyman Services, LLC

Respectfully submitted by:

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David G. Martinez

NOTICE

Pursuant to NRCP 16.3(c)(2), you are hereby notified that within fourteen (14) 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 November 1, **2021.**

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

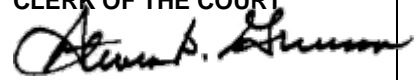
 Mailed to Plaintiff/Defendant at the following address on the day of , 2021.

☒ Electronically filed and served counsel on October 18, 2021, pursuant to N.E.F.C.R. Rule 9.

By: Natilie Simonetti
COMMISSIONER DESIGNEE

EXHIBIT “2”

EXHIBIT “2”



RTRAN

DISTRICT COURT

CLARK COUNTY, NEVADA

* * * * *

TAYLOR MILES CAPE,)	
)	CASE NO. A-20-818569-C
Plaintiff,)	
)	
vs.)	DEPT. NO. XXVIII
)	
DAVID MARTINEZ, CHILLY WILLY'S))	
HANDYMAN SERVICES, LLC,)	Transcript of Proceedings
)	
Defendants.)	
)	

BEFORE THE HONORABLE JAY YOUNG, DISCOVERY COMMISSIONER

**DEFENDANTS' MOTION TO COMPEL NRCP 35 NEUROPSYCHOLOGICAL
EXAM WITH DR. ETCOFF, NOTICED FOR OCTOBER 19-20, 2021 ON
ORDER SHORTENING TIME**

FRIDAY, OCTOBER 1, 2021

APPEARANCES:

For the Plaintiff: WILLIAM T. MARTIN, ESQ.
[Via Video Conference]

For the Defendants: BRENT QUIST, ESQ.
[Via Video Conference]
JOHN T. KEATING, ESQ.
[Via Telephone Conference]

RECORDED BY: FRANCESCA HAAK, DISTRICT COURT
TRANSCRIBED BY: KRISTEN LUNKWITZ

Proceedings recorded by audio-visual recording; transcript
produced by transcription service.

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FRIDAY, OCTOBER 1, 2021 AT 10:06 A.M.

THE DISCOVERY COMMISSIONER: Calling *Cape versus Martinez*, case number A-20-818569-C. Counsel, state your appearance for the record, please, starting with plaintiff's counsel.

MR. MARTIN: This is Will Martin, bar number 2534, on behalf of plaintiff.

MR. QUIST: Your Honor, Brent Quist on behalf of defendant, Chilly Willy's.

MR. KEATING: And, good morning. John Keating on behalf of Martinez.

THE DISCOVERY COMMISSIONER: All right. Good morning, gentlemen. This is Defendants' Motion to Compel a Neuropsychological Exam with Dr. Etcoff on Order Shortening Time and I see that an Opposition was filed. I don't see if a Reply was filed. I forgot to check that this morning. I apologize.

MR. QUIST: Yeah, Your Honor. This is Brent Quist. We filed our Reply, I believe, Tuesday and, I believe, either Wednesday or Thursday my assistant, I believe, e-mailed the discovery inbox.

THE DISCOVERY COMMISSIONER: I apologize, counsel. I typically -- when there's an order shortening time, the morning of, I'll try and see if I can pull up any kind of

1 last minute filings and I failed to do that. So, I will
2 allow you a little bit of extra time to argue in that case
3 and, again, my apologies. You were owed better respect
4 than that.

5 MR. QUIST: Understood, Your Honor. That's fine.

6 THE DISCOVERY COMMISSIONER: Thank you.

7 MR. QUIST: Okay. Well, Your Honor, I'm gonna try
8 to highlight -- I -- the points that I think are most
9 relevant. This is a car accident matter. Mr. Cape, he
10 claims a brain injury. He had a [indiscernible]
11 neuropsychological exam with his own doctor, Sunshine
12 Collins. There was no observer present for that exam and
13 that's going to be a big theme of this argument, Your
14 Honor, is here in Nevada, the Board that governs
15 neuropsychological exams here in Nevada won't allow for
16 observers -- third party observers for the actual testing
17 part of the exam.

18 THE DISCOVERY COMMISSIONER: I'm familiar with
19 that.

20 MR. QUIST: Yeah. So, that's why Dr. Collins was
21 able to proceed with Mr. Cape's exam because there was just
22 her and him. Based on that exam, at least part of it,
23 plaintiff has produced a Life Care Plan where he alleges
24 his future [indiscernible] for the rest of his life was
25 going to be valued at \$5.7 million. For the last three

1 months or so, I've been working with Mr. Keating and with
2 Mr. Loosvelt, plaintiff's attorney, to come to like an
3 agreement as to the scope. And we really -- I think we did
4 a good job. We -- there's three issues that we can't agree
5 to.

6 THE DISCOVERY COMMISSIONER: I'm familiar with
7 them.

8 MR. QUIST: Yeah. So, and that's what we're --
9 the defendants are going to ask the Court to order is for
10 Mr. Cape to come here to meet with Mr. -- or Dr. Etcoff.
11 Dr. Etcoff [indiscernible] have an observer present
12 [inaudible] non -- I guess non-technical interview portion
13 of the exam. That's not the neuropsych actual, you know,
14 tests. And he's -- says, ethically, he's allowed to have
15 an audio recording of just kind of that interview. He's
16 willing to share the raw test data -- the test questions --
17 the actual data with Sunshine Collins. Ethically, he says
18 that the rules that govern what he can and can't do only
19 allow him to show that with another psychologist.

20 And the third thing we're asking the Court is to
21 allow this exam to be a standard two-day exam. And Dr.
22 Collins took two days. For Dr. Etcoff, that's typical for
23 him.

24 MR. MARTIN: I don't mean to interrupt, but we're
25 not opposing that, Your Honor. So, --

1 THE DISCOVERY COMMISSIONER: Okay.

2 MR. MARTIN: Two days.

3 MR. QUIST: So, you've read our brief, Your Honor,
4 and I know -- well, I learned for the first time during the
5 Opposition, I didn't know this before, that six months ago,
6 you had considered this issue -- well, at least the issue
7 of the interplay between NRS 552.380 and NRCP 35 in the
8 case of *Lehnardt*. So, I know it sounds like you're aware
9 of the issue.

10 So, the defendants' position is the problem with
11 NRS 52.380 is it's procedural in nature, that the current
12 NRCP 35 predated it, that the -- that both the statute and
13 the rule of procedural nature would govern the procedure
14 for conducting Rule 35 exams here in Nevada. And that,
15 because of that, it's really within the purview of the
16 Nevada Supreme Court to govern how those procedures take
17 place.

18 Nevada's Constitution adopted the separation of
19 powers doctrine and the purpose of that doctrine is to
20 prevent one branch of government from encroaching upon the
21 powers of another branch. And, really, it's within the
22 sole purview of the Nevada Supreme Court to govern how
23 procedural -- procedures in a civil court matter take
24 place, including gathering of evidence. And you see that
25 throughout the Nevada Rules of Civil Procedure. There's

1 Rule 16.1, Rule 33, Rule 34, Rule 35, and Rule 36, all
2 dealing with: How does evidence get gathered?

3 Now, in the Opposition, it seems that the position
4 that the plaintiff was taking in the Opposition brief,
5 specifically at page 13, is that the Legislature can pass
6 any statute it wants, even a procedural statute, as long as
7 it thinks, the Legislature thinks it's got a good reason
8 for it. And that doesn't comply with the *Whitloff versus*
9 *Salmon* [phonetic] case, right, that the Supreme Court says
10 that the Legislature may not pass laws that interfere with
11 procedure to the point of disruption or that abrogates an
12 existing court rule, and that's exactly what NRS 52.380
13 does.

14 Now, much of the Opposition deals with discussing
15 legislative history. The problem with that is that flies
16 in the face of the rules of construction adopted by the
17 Nevada Supreme Court. The Nevada Supreme Court says:
18 Look, if a statute and a rule or procedure are plain on
19 their face, clear on their face, you don't go and look at
20 the legislative history. And there's caselaw I cite --
21 well, I cited in my Reply. I can -- let me find it. In
22 *Garcia versus Vanguard Car Rental USA*, that's 540 F.3d
23 1242. It's an Eleventh Circuit opinion from 2008. The
24 Court there --

25 THE DISCOVERY COMMISSIONER: [Indiscernible] in

1 your briefs?

2 MR. QUIST: I'm sorry. What's that?

3 THE DISCOVERY COMMISSIONER: What page are you
4 referring to in your brief?

5 MR. QUIST: Oh, I'm sorry. Page 1247.

6 THE DISCOVERY COMMISSIONER: What page of your
7 brief?

8 MR. QUIST: Oh, let me find that, Your Honor.

9 [Pause in proceedings]

10 MR. QUIST: It's page 10. Page 10 of the Reply
11 brief.

12 THE DISCOVERY COMMISSIONER: Can you give me the
13 case citation, again, please?

14 MR. QUIST: Sure. *Garcia versus* --

15 THE DISCOVERY COMMISSIONER: I see it.

16 MR. QUIST: Yeah. And, there, the Court notes
17 that -- you can't really do what plaintiff's trying to do
18 which is to cite or quote legislative history to read
19 ambiguity into a statute or a rule that's clear on its
20 face. And it -- if you read the statute and you read the
21 rule or procedure, they're both really clear and plain.
22 They're just -- they're taking different approaches for how
23 independent medical examination should occur here in Nevada
24 and they contradict each other.

25 Now, another, I guess, rule -- construction rule

1 that the Court here adopts in Nevada is that statutes and
2 rules really should be construed in a manner that
3 effectuates its purpose and doesn't nullify or -- yeah,
4 nullify the purpose. And that's a big problem here because
5 that's exactly what 52.380 does. It nullifies the purpose
6 underlying Rule 35 exams.

7 And, in the -- if I can pronounce the case right,
8 the *Frederico versus Smith's Food and Drug Centers* case,
9 that's -- these are both in my Motion and Reply. That's
10 the Federal Magistrate rulings from last year where the
11 Judge dealt with [inaudible] and the Judge there noted one
12 of the -- and she cites other federal caselaw. But one of
13 the real purposes of Rule 35 is to level the playing field,
14 that the plaintiff has had a chance to have his own expert
15 look at him, unobstructed, unimpeded, and the defense
16 should be able to have an independent doctor come in and
17 have the same type of opportunity to examine him and say:
18 Hey, is this -- did he really, you know, suffer a brain
19 injury? How has that affected his life?

20 The bigger problem with the impact that NRS 52.380
21 has on a Rule 35, for purposes of neuropsychological exams,
22 that basically make it so that they'll never take place
23 because Exhibit N and O to my Motion discuss that. The
24 Exhibit N is the letter from October of 2018 from the State
25 Board of Psychological Examiners to the Clerk of the

1 Supreme Court. Exhibit O is this 2021 article from the
2 Archives of Clinical Neuropsychology addressing third party
3 observers in neuropsychological evaluations. And the
4 *Frederico* case picks up on some of the arguments made in
5 these documents.

6 And they note that the reason why a
7 neuropsychological exam, the actual test part, can't have
8 either a recording device or an observer is because -- even
9 if the observer doesn't say anything, just their presence
10 in the room is going to affect or impact or alter the
11 tests. And those tests are designed and standardized
12 without an observer present. Right? So, if you have an
13 observer present, you're not going to get right results.
14 The test is going to be meaningless. And, so, the position
15 of [inaudible] neuropsychologists here in [inaudible] Dr.
16 Etcoff, and I presume Dr. Collins, is -- just ethically and
17 professionally, they can't do these tests with an observer
18 present.

19 And, so, if the Court rules like it did six months
20 ago in this *Lehnardt* case, hey, you've got to have an
21 observer present or a recording device, what's going to
22 happen is exactly what happened in this *Lenhardt* case. Is
23 that -- again, I wasn't aware of this decision by Your
24 Honor and, so, I reached -- my staff reached out to Dr.
25 Etcoff's staff and said: What did you end up doing? Did

1 you go through with the Rule 35 exam with an observer and
2 the recording device? And the response we got back from
3 the staff and Dr. Etcoff's staff was they had to cancel the
4 exam and he just did a records review. And that's very
5 problematic. What's the purpose of Rule 35? So, that's
6 another reason why --

7 THE DISCOVERY COMMISSIONER: But that's a choice
8 of the industry in response to the statute. Isn't it?

9 MR. QUIST: Well, I think that was the standard
10 even before the statute was passed. Right? The letter
11 written to the Nevada Supreme Court was issued even before.
12 And, I mean, -- and, I think, Rule 35, the current version,
13 takes account of that because the Rule says we're not going
14 to have an observer present, unless. Right? It's an
15 exception. Unless the plaintiff can only show good cause.
16 But I'm not sure that there could ever be good cause
17 because it's going to nullify -- or it's going to make it
18 impossible. Right? They -- those exams will never take
19 place here --

20 THE DISCOVERY COMMISSIONER: So, your suggestion
21 is even under Rule 35 the doctor would have to refuse, if
22 there was an examiner -- or a guest allowed?

23 MR. QUIST: Well, yeah, I think the Court, in that
24 place, would have to go challenge the plaintiff and the
25 plaintiff would have to -- because really, I guess, the way

1 you'd have to read the statute and even -- well, the
2 statute, is it's kind of being used as a protective order
3 by plaintiffs that, well, we never want to be subject to
4 IME for a neuropsych exam here in Nevada. Because that's,
5 effectively, what it does.

6 I think, you know, Judge -- and I'll probably
7 mispronounce her last name, Youchah, in the *Frederico* case,
8 where she -- well, what's the purpose of the statute?
9 Well, the -- and she kind of did an Erie Doctrine kind of
10 analysis and she says: Look, it's -- they're dealing with
11 the same matter, which is how you go about gathering this
12 evidence and the statute doesn't create a substantive
13 right. It doesn't affect the result of the litigation.
14 It's not outcome determinative or case determinative. And,
15 so, she said: Considering that, plus kind of the policy
16 for not allowing observers in the setting of a
17 neuropsychological exam, at least at the test portions, she
18 says: Hey, it's -- the statute is procedural and, so, the
19 Rule 35 -- Federal Rule 35 is going to supersede it. And I
20 think the Court should take that same approach here.

21 THE DISCOVERY COMMISSIONER: All right. Anything
22 else?

23 MR. QUIST: The only other thing is just -- I
24 mean, I can do the rebuttal. I'll do it now.

25 In the Opposition, the plaintiff cites to --

1 includes various affidavits. Okay? Of professionals that
2 the plaintiff says: Hey, these guys say you can have
3 observers present. If you look at those affidavits
4 closely, one, they're old. Like, some of them are 20 years
5 old. They're all out of state. None of them are from
6 Nevada psychologists or neuropsychologists.

7 And I think the most helpful document attached to
8 the Opposition is from the American Psychology Association.
9 That's Exhibit 9 to the Opposition, where it says that:
10 When you're thinking about having observers present for
11 neuropsychological exams, you've got to keep in mind the
12 law governing that in your state and the effect you were to
13 have on the validity of the exam. And, here, Dr. Etcoff,
14 the law governing him and what he does is set by the Board.
15 Right? They don't allow it. And, second, having an
16 observer present for the exam is going to ruin the results.

17 I think that's my argument and then my position is
18 that the test questions, the raw data, should be shared
19 directly with Dr. Collins. I think plaintiff is protected
20 -- if that happens. The *Frederico* Court did the same
21 thing.

22 And, as far as the Countermotion for Sanctions, I
23 think that's frivolous just because this is an ongoing -- I
24 mean, there's two cases I know of right now that are on
25 appeal with the Supreme Court addressing this issue. So, I

1 think this is -- this is not a settled area of the law.
2 So, I'll leave it with that.

3 THE DISCOVERY COMMISSIONER: All right. Mr.
4 Martin, recognizing that I am familiar with the interplay
5 between NRS 52.380 and Rule 35, do you have anything in
6 response?

7 MR. MARTIN: Yeah. I mean, this appears to be a
8 coordinated, you know, an aggressive effort to frustrate
9 transparency in psychological evaluations. I mean, they're
10 taking the position that there would be good cause under
11 Rule -- NRCP 35 to order an examination -- they're saying -
12 - they're reading this October 1st, 2018 letter, which they
13 attach as Exhibit M, as somehow saying it's unethical and
14 your license will be revoked. I think they say that in
15 their pleadings. There's nothing about that in this
16 October 1st, 2018 letter.

17 They really are relying on this October 1st, 2018
18 letter from the Board and the decision by Magistrate
19 Youchah in the case that she considered, and that's a
20 totally different context. There, it's the interplay
21 between a state substantive law -- she doesn't really
22 address, you know, that because the Erie Doctrine says if
23 you're comparing a state law versus a federal statute, and
24 the state law is not outcome determinative, you go to the
25 federal rule. She's not considering -- there's no federal

1 statute that's like the Nevada statute. So, she's not
2 making that analysis as if there was a federal statute
3 addressing it where there was a conflict between the
4 federal statute and the federal law.

5 She doesn't address constitutionality, separation
6 of powers, anything like that. It's really not applicable.
7 Yet, in passing, she says a couple of things about, you
8 know, she believes that people might be distracted by an
9 examiner, but she doesn't go into, you know, the validity
10 of the testing and all of that -- the point defendant tries
11 to go to and saying that an observer should not be allowed
12 a recording.

13 And, if you look carefully at the October 1st, 2018
14 letter, you know, it starts off by talking about third
15 party observers, which is similar to Exhibit O that they
16 cite as some kind of neuropsychological study. But it's
17 just a position paper. It's not -- it's a position paper
18 on third party observers.

19 So, the introductory sentence is about third party
20 observers and, then, the next paragraph makes that broader
21 by talking about observers, monitors, and electronic
22 recording. And, then, if you dig deeply into what they're
23 talking about, when they're talking about research
24 indicating the presence of those observers, monitors, and
25 recorders, they're talking about during the clinical

1 interview portion. So, they're saying the research
2 indicates during the interview portion, you know, somebody
3 being there may stop somebody from disclosing crucial
4 information. Well, Dr. Etcoff has already agreed to the
5 clinical interview portion that, you know, he's had
6 observers -- he's had an audience -- it's not accurate that
7 he's only allowed audiotapes because the footnote in the
8 Youchah opinion says that he's allowed those videotaped.
9 So, he's allowed audio and videotapes of the interview
10 portion.

11 The next sentence --

12 THE DISCOVERY COMMISSIONER: And my memory is he
13 did that prior to the statute as well.

14 MR. MARTIN: What's that?

15 THE DISCOVERY COMMISSIONER: My memory is he did
16 that prior to the statute --

17 MR. MARTIN: [Indiscernible] under good cause.

18 And the next sentence that talks about the testing
19 itself, the concern there that the Board expresses is that
20 it may cause the patient on their performance to -- their
21 weaknesses and strengths are exaggerating. Okay? So that
22 seemed to be the Board's concern about having observation,
23 monitoring, recording during the tests.

24 Now, we cite to the affidavit from -- it's -- let
25 me see. It's Dr. Frederik from 2018 saying, you know,

1 there's lots of reasons why you want videotaping of the
2 testing because he points out all the various inaccurate
3 things that happen during the testing, that if you don't
4 have a videotape -- you know, our preference would be a
5 videotape. You know, that not giving the instructions the
6 publisher requires, exceeding time limits, or shortening
7 time limits, inaccurate recording, or misconstruing results
8 and answers, not performing required follow-up that the
9 test says you're supposed to, not following established
10 patterns for testing and administration, not recording the
11 responses properly, prompting responses, coaching, teaching
12 the examinee how to solve during interactions, improperly
13 positioning his examiner's materials, the examiner's
14 attitude.

15 That was about the only thing that really -- I
16 think that the Magistrate Youchah -- there was a mention
17 that they were concerned about Dr. Etcoff's attitude. And
18 that seemed to be -- you know, in theory, what the
19 plaintiff was complaining about in the case that she was
20 looking at, but, then again, the statutory analysis is not
21 the same as here.

22 You know, then, about interruptions and
23 distractions that are on document -- you know, that's --
24 the recording is the best way to ensure a proper record of
25 the testing that's been done.

1 And in a -- you know, if you closely read the --
2 there's nothing in here about, you know, they're going to
3 lose their license, or it's unethical from the -- you know,
4 from the Board.

5 The -- you know, to go quickly point by point in
6 the argument that was made supporting, you know, Mr. Cape
7 lost consciousness. He was unconscious from the time the
8 car was hit until he came to and he was being -- trying --
9 being extracted from the vehicle.

10 They talk about Dr. Collins was not a treating --
11 I mean, a retained expert. She was a treating provider
12 before litigation. You know, the -- a compelled Rule 35
13 mental or medical evaluation is a highly intrusive and
14 extraordinary measure. You know, it's not about leveling
15 the playing field. It's not a game. It's driven by
16 litigation doing these and it's often adversarial. You
17 know, that retained experts have to provide testimony of
18 this. You know, you rarely find somebody who does 50/50
19 work.

20 You know, Sunshine Collins, like we said, was a
21 treating provider. And that's a very different context
22 than a Rule 35 exam.

23 The Nevada Board won't allow testing. That --
24 that doesn't say that. You know, they express some
25 concerns. They say the research, which is studies,

1 supports clinical interviews might cause somebody to not
2 disclose information and testing, it's more speculative to
3 the effect. We cite to experts who say there are studies
4 showing that there's little effect by having observers.
5 But that isn't what the Board says. If their industry, you
6 know, has a coordinated effort to not allow these to go
7 forward, then they're not going to do them in Nevada, I
8 mean, that's a different issue on them.

9 Ethically, audio -- you know, I think -- you know,
10 footnote 1 in Magistrate Youchah's opinion talks about Dr.
11 Etcoff actually letting videotape take place.

12 Your Honor, I believe, took a very reasonable
13 approach in the opinion that you -- in the prior case that
14 you considered this issue. NRC 35 allows recording for
15 good cause. It allows an observer for these type of
16 examinations for good cause.

17 You know, and a lot of this stuff is substantive
18 to policy choices. So, it seems like the type of thing --
19 because there's various opinions on accuracy and what
20 effect it has, you know, that really sounds like something
21 the Legislature should be dealing with for policy choices.
22 It's not -- you know, they shouldn't be citing to
23 Magistrate Youchah's opinion that is saying: Oh, well that
24 determined it's procedural in nature. It's a different
25 context.

1 The constitutionality was never something the
2 parties conferred about.

3 Exhibit N and O, I've already talked to you about
4 the letter from the Board and the position paper from some
5 organizations that don't want to have third party
6 observers.

7 Not get the right results, well, that's up in the
8 air. There's no real hard -- you know, it appears
9 different people have different opinions on that.

10 Ethically and professionally cannot have an
11 observer present, there's nothing saying that. If that's
12 the choice of Dr. Etcoff, then, you know, that's his
13 choice. There's other -- we cite to other, you know,
14 psychiatrists and psychologists who say it is allowed and
15 it's reasonable and it helps establish a clear record of
16 what happens and it's transparent. All right. I think the
17 Court, you know, expressed some concern with regard to the
18 position they were taking on that.

19 So, we believe that we should be able to videotape
20 it or have an observer, and audio record it, or, you know,
21 we believe the data should be given to plaintiff's counsel
22 so that they can adequately prepare for cross-examination
23 and not just to a psychologist. They draw arguments about
24 copyright, but they don't give any real sense to it. I'm
25 not an intellectual property lawyer, but property rights

1 are, you know, this is a -- tests are considered literary
2 works. You file an application, you pay a fee, and you
3 provide your work, and that -- you can have a copyright.
4 You know, you can go online and see all kinds of -- I
5 assume the personality tests -- Dr. Etcoff says in the
6 letter that was attached to their Reply, a little bit about
7 what he's going to do. It doesn't give, you know, a list
8 of whether he's going to do the Wechsler IQ test or the
9 MMPI for personality. You know, very common tests that
10 have been around for decades.

11 He said -- you know, he's going to do some motor
12 testing, which sounds more like the -- you know, what
13 doctors do to test your muscles during physical
14 examination. Then there's sensory perception exams which
15 are measures of touch, vision, and sound function. You
16 know, those are important things to see how the doctor does
17 them, and what happens to them, whether they accurately
18 record it. You know, I've had medical IMEs where they say
19 the testing of the range of motion, the doctor's eyeballing
20 it, or they only spend -- they don't perform tests that
21 they say they performed. There's just a lot of controversy
22 with regard to IMEs, which are really Rule 35 examinations
23 and --

24 THE DISCOVERY COMMISSIONER: I was just going to -
25 -

1 MR. MARTIN: -- they're adverse --

2 THE DISCOVERY COMMISSIONER: -- say we don't have
3 IMEs anymore.

4 MR. MARTIN: Yeah. Yeah. The Court doesn't but
5 who does it?

6 So, he says it's about five hours of testing,
7 about three hours for personality testing, two to three
8 hours of the interview. We're assuming he's not going to
9 object to videotaping that or having an observer with audio
10 because that's what he's allowed in the past. So, it's
11 about the personality test and the neuropsychological
12 tests.

13 And, you know, these tests have validity and, you
14 know, he didn't mention that. It's -- there are
15 [indiscernible] symptom validity checks that are done
16 during the process to see whether they're valid. So, you
17 know, a lot of these involve subjective judgments. You
18 know, having a videotape would be our preferred method.

19 We also think that we, as plaintiff's counsel,
20 should be able to get the data and, you know, subject to
21 whatever protective orders there are. If we need to look
22 at some copy -- you know, with the copyright seems like
23 just something that they're throwing out there to, you
24 know, try and make it more difficult to do these. That
25 wasn't even anything the Board addressed in their October

1 1st letter. They just said that the neuropsychological
2 tests and measures are developed and standardized under
3 highly controlled conditions and they're saying one of the
4 conditions is, you know, third party observers aren't
5 allowed, so, therefore, you can infer from that that's not
6 -- that is different than the highly controlled conditions.
7 You know, they say observation, monitoring, recording of
8 these tests is not part of the standardization and it may
9 distort. You know, it's very equivocal.

10 So, you know, Your Honor, we believe that we
11 should be able to videotape it or have an observer and
12 audio recorded, as the rules allow, because there's good
13 cause based on subjective judgments and everything that
14 happens. And we believe plaintiff's counsel is entitled to
15 the data because, you know, we're the ones doing cross-
16 examination, not the psychologist we might retain to rebut
17 Dr. Etcoff.

18 And, you know, if Your Honor's inclined to grant
19 their Motion, we would request a stay so that we can, you
20 know, file an Objection. And we think that sanctions are
21 something that should be considered the -- because it
22 appears to be such a coordinated effort to frustrate the
23 transparency in these evaluations. And they're
24 exaggerating the ethical and licensing issues and what
25 chilling effect it might theoretically have on

1 practitioners and then thrown in copyright.

2 The accuracy, again, I told you, there's different
3 opinions on that and that seems like policy choices that
4 the Legislature should make.

5 So, that's why we oppose.

6 THE DISCOVERY COMMISSIONER: All right. Very
7 well. Mr. Quist, you said you were addressing things
8 rather than in rebuttal in your main argument. Is there
9 anything that you need to cover?

10 MR. QUIST: I think the only thing to cover, two
11 quick points on the --

12 THE DISCOVERY COMMISSIONER: Very quickly, please.

13 MR. QUIST: Yeah. The first is that -- I -- does
14 -- the Court [indiscernible] address the -- showing the
15 test data. Right? She recognizes, under American
16 Psychological Association, that a subpoenaed doctor is only
17 allowed to release test data to qualified professionals
18 such as other psychologists. So, I'm not making that up.
19 I mean, that's just what's required.

20 And if you look at that case, it really does
21 squarely line up with what we have here in this case. So,
22 I do think it has strong persuasive authority. I'll end
23 with that, Your Honor.

24 THE DISCOVERY COMMISSIONER: All right. Very
25 well. I'm granting the Motion in part and denying it in

1 part. I am granting Mr. Martin's request for a stay to
2 allow an Objection in this matter. The Rule 35 exam is
3 compelled.

4 With regard to the observer, there is a question,
5 obviously, whether the statute, NRS 52.380, creates a
6 substantive right and whether that substantive right trumps
7 procedural rules. That's a question that I'm not going to
8 answer to anybody's satisfaction today. It's a question
9 that's in front of the Supreme Court and I assume that they
10 will provide us guidance. But, in the meantime, if I have
11 to err on one, I'm erring on the side of protecting the
12 individual and, that being said, I have to err on the side
13 of the statute.

14 I do find, under Rule 35, that there's good cause
15 to allow an observer and a recording. That good cause
16 exists in the mere fact that the Legislature formed good
17 reason to pass the statute 52.380. And the governor found
18 good cause to sign it into law. I think that, in and of
19 itself, constitutes good cause for allowing the
20 recordation.

21 So, I'm allowing an observer. The observer can be
22 present outside the examination room, but can be listening
23 to the examination either by remote means or directly, with
24 the door open. The exam -- the observer cannot interrupt
25 the examination, except to suspend the examination if any

1 irregularities occur. That's allowed under NRS 52.380
2 subsection 4. The exam can take place over a two-day
3 period. The raw data must be provided to plaintiff's
4 expert, Dr. Collins, who may share that information with
5 plaintiff's attorney, in an attorney's eyes only capacity
6 for preparation of the case. The information is otherwise
7 protected in this matter. It cannot be filed in a public
8 setting. It can be shared between counsel.

9 As to the Countermotion for Fees, counsel, I think
10 that the Motion was substantially justified by the conflict
11 between the rule and the statute and, therefore, I'm not
12 granting either party request for fees.

13 I'm going to ask Mr. Quist to prepare the Report
14 and Recommendation and run that past all counsel for
15 approval as to form and content. Let's get that on file
16 within 14 days. We'll set a status 21 days out to
17 determine if that's been accomplished. If it has, there
18 will be no need to appear. If it hasn't, then you'll need
19 to appear and, pursuant to EDCR 7.60, you'll be given an
20 opportunity to be heard as to why sanctions shouldn't issue
21 for failure to comply with the Court Order.

22 Questions?

23 THE CLERK: [Inaudible] 22nd at 10.

24 MR. MARTIN: I didn't hear that.

25 THE DISCOVERY COMMISSIONER: October 22 at 10

1 o'clock.

2 MR. QUIST: And, Your Honor, I want to make sure,
3 I tried to take notes as fast as I could. With the
4 observer, the observer can be listening remotely or outside
5 the door listening. Is that right?

6 THE DISCOVERY COMMISSIONER: Correct.

7 MR. QUIST: Okay.

8 THE DISCOVERY COMMISSIONER: They cannot be in the
9 examination room, but they can be there for the purpose of
10 protecting the plaintiff from embarrassment, harassment,
11 etcetera.

12 MR. QUIST: Okay. Understood. Thank you.

13 THE DISCOVERY COMMISSIONER: Any other questions
14 or concerns?

15 MR. MARTIN: Your Honor, that applies to the
16 testing, too?

17 THE DISCOVERY COMMISSIONER: Correct.

18 MR. MARTIN: Okay.

19 THE DISCOVERY COMMISSIONER: And then, to be
20 clear, and I did not say this, I'm not allowing the video
21 recording.

22 MR. MARTIN: Okay.

23 THE DISCOVERY COMMISSIONER: I apologize for that.

24 MR. QUIST: I'm sorry. Was that -- you cut out,
25 Your Honor. Was that not allowing the video?

1 THE DISCOVERY COMMISSIONER: Correct. I am not
2 allowing the video recordation.

3 MR. MARTIN: That's even for the interview portion
4 that he's allowed that in the past?

5 THE DISCOVERY COMMISSIONER: Correct.

6 MR. MARTIN: Okay.

7 MR. QUIST: Is -- Your Honor, is audio recording
8 allowed for any of it?

9 THE DISCOVERY COMMISSIONER: Yes. It is. For all
10 of it --

11 MR. QUIST: Throughout the whole -- Your Honor,
12 all of it? Okay.

13 THE DISCOVERY COMMISSIONER: Have a good day,
14 gentlemen. Have a safe weekend.

15 MR. QUIST: Thank you, Your Honor.

16

17 PROCEEDING CONCLUDED AT 10:47 A.M.

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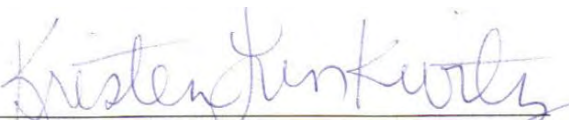
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CERTIFICATION

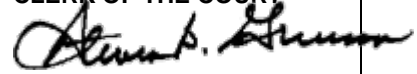
I certify that the foregoing is a correct transcript from the audio-visual recording of the proceedings in the above-entitled matter.

AFFIRMATION

I affirm that this transcript does not contain the social security or tax identification number of any person or entity.



KRISTEN LUNKWITZ
INDEPENDENT TRANSCRIBER



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Willy's Handyman, LLC**

DISTRICT COURT
CLARK COUNTY, NEVADA

TAYLOR MILES CAPE,

Plaintiff,

Case No: A-20-818569-C
Dept. No: 28

vs.

DAVID G. MARTINEZ, individually; CHILLY
WILLY'S HANDYMAN SERVICES, LLC, a
domestic limited-liability company; DOES I
through X; and ROE BUSINESS ENTITIES I
through X, inclusive,

Defendants.

**DEFENDANTS' REPLY IN SUPPORT OF THEIR OBJECTION TO DISCOVERY
COMMISSIONER REPORT AND RECOMMENDATION REGARDING DEFENDANTS'
MOTION TO COMPEL NRCP 35 NEUROPSYCHOLOGICAL EXAM WITH DR. LEWIS M.
ETCOFF AND OPPOSITION TO COUNTER-MOTION FOR SANCTIONS**

Defendants CHILLY WILLY'S HANDYMAN SERVICES, LLC, by and through their
counsel of record, DENNETT WINSPEAR, LLP, and DAVID G. MARTINEZ, by and through his
counsel of record, KEATING LAW GROUP, submit the following Reply in Support of their
Objection to Discovery Commissioner Report and Recommendation Regarding Defendants'
Motion to Compel NRCP 35 Neuropsychological Exam with Dr. Lewis M. Etcoff and Opposition
to Counter-Motion for Sanctions.

///

///

DECLARATION OF BRENT D. QUIST, ESQ.

I, BRENT D. QUIST, ESQ., declare under penalty of perjury the following.

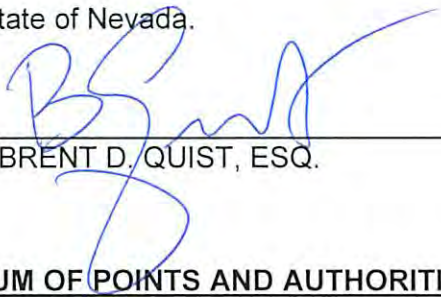
1. I am an attorney licensed in the State of Nevada.

2. I am one of the attorneys representing Defendant CHILLY WILLY'S HANDYMAN SERVICE in this action.

3. On November 12, 2021, I researched the State of Nevada Board of Psychological Examiners "Directory of Psychologists."

4. I entered the following names, to see whether the individuals are licensed psychologists in the State of Nevada: Howard V. Zonana, MD, John M. Bradford, MB, Debora L. Biorgi-Guarnieri, MD, JD, Park E. Dietz, MD, Steven K. Hoge, MD, Daniel J. Sprehe, MD and Stephen S. Teich, MD.

5. None of these individuals appears in the directory, which indicates none of them are licensed psychologists with the State of Nevada.


BRENT D. QUIST, ESQ.

MEMORANDUM OF POINTS AND AUTHORITIES

I.

ARGUMENT IN SUPPORT OF OBJECTION

A. DEFENDANTS' OBJECTION AND EVIDENCE SUBMITTED IN SUPPORT OF THE OBJECTION IS NOT BARRED BY THE VALLEY HEALTH CASE.

The Nevada Supreme Court's holding in *Valley Health System, LLC v. Eighth Judicial District Court*, 252 P.3d 676 (Nev. 2011) supports the inclusion of Dr. Etcoff's Affidavit, the need for which was not known and did not arise until Plaintiff's counsel raised new arguments for the first time during the hearing before Commissioner Young.

The plaintiff in *Valley Health* alleged she was assaulted by hospital staff; she sought to have the hospital produce records of other incidents or complaints of improper conduct by staff. *Id.* at 678. The plaintiff ultimately filed a motion to compel. The hospital resisted the motion by

1 arguing the discovery was irrelevant and not reasonably calculated to lead to discovery of
2 admissible evidence. *Id.* The Discovery Commissioner granted the motion. *Id.* In its objection,
3 the hospital raised a **new** argument, i.e., the requested information was privileged. The district
4 court affirmed the Discovery Commissioner's ruling. *Id.*

5 The Nevada Supreme Court noted the hospital "did not raise its privilege argument until
6 the Discovery Commissioner's report and recommendation was before the district court" which
7 was improper because the Discovery Commissioner should have the first opportunity to have
8 decided the privilege issue. *Id.* at 679 (citing *Oliver v. Barrick v. Goldstrike Mines*, 905 P.2d 168,
9 173 (Nev. 1995)). The court ultimately held:

10 Therefore, we hold that neither this court nor the district court will
11 consider new arguments raised in objection to a Discovery
12 Commissioner's Report and Recommendation **that could have
been raised before the Discovery Commissioner** but were not.

13 *Id.* at 680 (emphasis added).

14 Here, Defendants argued that the State of Nevada Board of Psychological Examiner's
15 ("Board") letter to the Clerk of the Nevada Supreme Court, dated October 1, 2018 ("Board
16 letter"), established that Dr. Etcoff was professionally and ethically prohibited from conducting
17 Rule 35 neuropsychological exams with the conditions required by Plaintiff. See Exhibit N to
18 Motion to Compel. Plaintiff nowhere challenged Defendants' interpretation of this letter or argued
19 that Dr. Etcoff's license would not be placed in jeopardy until the actual discovery hearing.
20 Therefore, Defendants could not have addressed this argument of Plaintiff in either its Motion to
21 Compel or Reply.

22 Finally, Judge Escobar's and Commissioner Truman's Orders on this issue are not
23 evidence but, instead, is persuasive legal authority the Court may consider.

24 1. DEFENDANTS' OBJECTION DOES NOT RAISE NEW ARGUMENTS.

25 Defendants' Motion to Compel sought an Order compelling the Rule 35
26 neuropsychological exam of Plaintiff Cape without the presence of a third-party observer and
27 audio recording of the exam, and without requiring Dr. Etcoff to share the raw testing materials
28 with non-psychologists. See Motion, at 20 and Reply, at 15. However, in their briefing the

Defendants acknowledge Dr. Etcoff is permitted to allow the interview portion of the exam to be audio recorded, and for the presence of a third-party observer for the interview only.

Defendants further argued in their Motion and Reply that good cause did not exist under Rule 35 for a third-party observer and audio recording of the test portions of the exam because ethically and professionally Dr. Etcoff cannot conduct the neuropsychological tests under those conditions (see Motion to Compel, at 16-18; Reply, at 12-14). Further, the reason for Rule 35 exams is to level the playing field and that cannot happen where Cape's neuropsychologist was allowed to examine him without conditions placed on that exam and Defendants will ultimately not be allowed to have a neuropsychologist examine Cape if those conditions are placed on the exam (see Motion, at 16-19; Reply, at 11-14), and the presence of third-party observers and recording will result in unreliable test results (see Motion, at 16-19; Reply, at 12-14).

Another issue raised by Defendants was that Plaintiff does not have an absolute right to a third-party observer and recording of the test portions of the exam under NRS 52.380 because that statute is unconstitutional pursuant to the separation of powers doctrine. NRS 52.380 conflicts with NRCP 35 to the point of disruption and since both the statute and rule are procedural in nature and the rule predated the statute, the statute is constitutionally void. See Motion to Compel, at 9-15; Reply, at 7-10.

Defendants Objection thus addresses the exact issues raised by Defendants in their Motion to Compel and Reply.

2. DEFENDANTS DID NOT HAVE AN OPPORTUNITY TO PRODUCE DR. ETCOFF'S AFFIDAVIT AND SUPPORTING MEDICAL AUTHORITY IN SUPPORT OF THEIR REPLY BECAUSE PLAINTIFF DID NOT CONTEND IN HIS OPPOSITION THAT THE STATE OF NEVADA BOARD OF PSYCHOLOGICAL EXAMINERSS OCTOBER 1, 2018 DOES NOT PROVIDE SUPPORT FOR DR. ETCOFF'S POSITION THAT HE IS ETHICALLY PROHIBITED FROM ALLOWING A THIRD-PARTY OBSERVER AND RECORDING OF THE TEST PORTIONS OF HIS EXAM, OR THAT HIS LICENSE COULD BE PLACED IN JEOPARDY IF HE WERE TO ALLOW THAT TO OCCUR.

As noted above, in their Motion to Compel, Defendants referenced the Board letter in support of their position that Dr. Etcoff is professionally and ethically prohibited from allowing third party observers and recordings of the test portions of the exam and sharing raw test materials and data with non-psychologists. See Motion to Compel, at 16-17.

1 In his Opposition, Plaintiff does not challenge Defendants' position as to the meaning and
2 import of the Board letter. Nor did Plaintiff suggest that Dr. Etcoff's professional license would not
3 be placed at risk if he conducted the neuropsychological tests of Plaintiff, with third-party
4 observers and audio recording, in contravention of the Board letter. Instead, Plaintiff spent ten
5 pages of his Opposition citing to non-Nevada psychologists and the American Academy of
6 Psychiatry in arguing that, in reality, there is no ethical or professional problem with Dr. Etcoff
7 performing neuropsychological exam tests with third-party observers and recording devices. See
8 Opposition to Motion to Compel, at 14-23.

9 Therefore, as Plaintiff was not challenging the Board letter and did not suggest Dr.
10 Etcoff's professional license would not be placed in jeopardy if he conducted a
11 neuropsychological exam under Plaintiff's conditions, the Defendants' Reply was focused on
12 addressing the medical "authorities" relied on by Plaintiff. See Reply, at 12-14.

13 For the very first time, at the hearing with Commissioner Young, counsel for Plaintiff
14 challenged Defendants' position as to the Board letter. He contended in the letter the Board was
15 merely objecting to the presence of third-party observers and recording of the interview portion of
16 the exam. See Exhibit E to Objection, at 14:13-15:4. Cape's attorney then argued for the first
17 time that Dr. Etcoff will not place his professional license in jeopardy if he violates the Board's
18 prohibitions on neuropsychological testing. See Exhibit E to Objection, at 17:1-4. He went so far
19 to say that Dr. Etcoff is "exaggerating" his licensing concerns. *Id.* at 22:23-25.

20 It was only after Plaintiffs raised these new arguments and position that Defendants were
21 in a position to require Dr. Etcoff to prepare his Affidavit. Again, Plaintiff never argued in his
22 Opposition that a Nevada-licensed neuropsychologist will not place his license in jeopardy by
23 violating the professional and ethical standards set forth in the foregoing letter. As is clear by Dr.
24 Etcoff's Affidavit and medical authority attached thereto, he will place his professional license in
25 jeopardy if he conducts neuropsychological tests of the plaintiff with third-party observers and
26 audio recording present.

27 The *Valley Health* holding is clear. Only **new** arguments are prohibited from being
28 presented to a district court for the first time. Defendants do not raise new arguments in their

1 Objection. Moreover, new evidence may be brought before the district court if the party did not
2 have an opportunity to present that evidence to the Discovery Commissioner. Here, Defendants
3 did not know of the need to have Dr. Etcoff prepare his Affidavit because Plaintiff's Opposition
4 does not contend Dr. Etcoff will not be violating his Nevada-licensing ethics and will not subject
5 his license to jeopardy if he proceeded to conduct the exam in accordance with the conditions
6 requested by Plaintiff. Plaintiff's Opposition does not address Nevada professional responsibility
7 requirements for psychologists—it focuses on the standards set by other states and 8-year-old
8 "guidelines" published by the American Psychological Association. See Opposition, at 14-23.

9 The Court should therefore consider Dr. Etcoff's Affidavit and the documents referenced
10 therein, which are attached to the Objection as Exhibit G, and Exhibits G (1)-(8).

11 3. THE COURT MAY CONSIDER JUDGE ESCOBAR'S AND COMMISSIONER
12 TRUMAN'S ORDERS.

13 The Orders of Judge Escobar and Commissioner Truman with respect to the issues
14 raised in the Objection, which support the Defendants' position, are not **evidence**. Instead, they
15 constitute persuasive legal authority which this Court is free to consider.

16 4. DEFENDANTS WERE NOT ALLOWED TO FILE A MOTION FOR
17 RECONSIDERATION WITH THE DISCOVERY COMMISSIONER BASED ON
18 THE NEW ARGUMENT RAISED FOR THE FIRST TIME BY PLAINTIFF'S
19 COUNSEL DURING THE DISCOVERY HEARING.

20 Pursuant to EDCR 2.34, the proper procedure a party must follow if it disagrees with the
21 Discovery Commissioner's ruling is to file an Objection. See EDCR 2.34(f)(1). The local rule
22 does not allow for a motion for reconsideration. Moreover, a motion for reconsideration is meant
23 to address situations where there is new evidence or a change in the law, not situations as here
24 where a party makes a brand-new argument for the first time during a discovery hearing which
25 the opposing party is unable to brief prior to that hearing. See *Masonry and Tile Contractors*
26 *Ass'n of Southern Nevada v. Jolley, Urga & Wirth, Ltd*, 941 P.2d 486, 489 (Nev. 1997) (quoting
27 *Moore v. City of Las Vegas*, 551 P.2d 244, 246 (Nev. 1976) ("Only in very rare instances in
28 which *new issues of fact or law* are raised supporting a ruling contrary to the ruling already
reached should a motion for rehearing be granted.") (Emphasis in the original).

///

1 In light of the fact that Plaintiff argued, for the first time at the discovery hearing itself, that
2 **Nevada law** does not preclude Dr. Etcoff from allowing a third-party observer and recording in
3 the test portions of his exam and Dr. Etcoff will not lose his license if he violates his professional
4 and ethical obligations, the Defendants were permitted to present evidence to this Court that
5 demonstrates Nevada law (i.e., NAC 641.250) prohibits third-party observers and recording
6 during neuropsychological tests and Dr. Etcoff will place his license in jeopardy if he violates
7 these professional and ethical obligations.

8 **B. PLAINTIFF IS REQUIRED TO SHOW GOOD CAUSE UNDER RULE 35 FOR A THIRD-**
9 **PARTY OBSERVER AND RECORDING.**

10 Under Rule 35(a)(3) and Rule 35(a)(4)(B) it is the plaintiff who carries the burden of
11 showing “good cause” for an observer and audio recording of any portion of a
12 neuropsychological exam. Plaintiff contends the “good cause” for requiring these conditions to
13 his neuropsychological exam with Dr. Etcoff is the “good cause” found by the Discovery
14 Commissioner, i.e., that “there was good cause to enact NRS 52.380.” Opposition to Objection,
15 at 11; see *also*, Exhibit F to Objection, at 2:14-16. As discussed further below, whether NRS
16 52.380 constitutes “good cause” for requiring a third-party observer and recording of a full
17 neuropsychological exam comes down to whether the statute is constitutional. If it is
18 unconstitutional, if the legislature and Governor had no authority to enact the law, it cannot
19 constitute “good cause” for the examination conditions.

20 **C. THE *FRETELUCO* DECISION IS STRONG PERSUASIVE AUTHORITY WITH**
21 **RESPECT TO WHETHER NRS 52.380 IS PROCEDURAL OR SUBSTANTIVE IN**
22 **NATURE.**

23 Plaintiff seeks to mislead the Court as to the persuasive value of *Freteluco v. Smith’s*
24 *Food & Drug Ctrs*, 336 F.R.D. 198 (D.Nev. 2020). Plaintiff does not even address whether the
25 case is persuasive authority. Plaintiff merely states it is a “non-controlling federal district court
26 case.” Opposition, at 6. While the case may not be controlling, it is still “strong persuasive
27 authority” because NRCP 35 was patterned after FRCP 35. See *Executive Management, Ltd. v.*
28 *Ticor Title Ins. Co.*, 38 P.3d 872 (Nev. 2002) (internal citation omitted). This Court would commit
reversible error if it did not give the *Freteluco* due consideration because this Court would be

1 disregarding the Nevada Supreme Court's recognition that federal case law addressing a rule of
2 civil procedure is "strong persuasive authority.") See *MB America, Inc. v. Alaska Pac. Leasing*,
3 367 P.3d 1286, 1292 (Nev. 2016) (a district court commits reversible error if it disregards
4 controlling case law).

5 The *Freteluco* Court did not only consider whether there was good cause under FRCP 35
6 to require a third-party observer and audio recording of the test portions of Dr. Etcoff's exam. It
7 went a step further and addressed whether it was required under the *Erie* Doctrine to apply NRS
8 52.380 to its Rule 35 exam consideration. 336 F.R.D. at 202-203. At the heart of the court's *Erie*
9 Doctrine analysis was whether NRS 52.380 is procedural in nature or, instead, establishes a
10 substantive right. Under *Erie*, a federal court sitting in diversity must follow the state's
11 substantive law; however, if a statute is procedural in nature, then the court applies the federal
12 procedural rule. *Id.*

13 The *Freteluco* case is important, first of all, because the court recognized that NRS
14 52.380 does not establish a substantive right to a third-party observer and recording. The statute
15 governs the same discovery procedure as Rule 35 and is therefore procedural in nature. *Id.* at
16 203. Based on this, the *Freteluco* Court held that under *Erie* it was required to adhere to FRCP
17 35. *Id.* Had the court determined NRS 52.380 establishes a substantive right, the court would
18 have had to follow the requirements of the statute.

19 *Freteluco* is "strong persuasive authority" as to whether NRS 52.380 is substantive or
20 procedural in nature and, therefore, whether it controls over Rule 35—whether Rule 35 of the
21 Federal Rules of Civil Procedure or Rule 35 of the Nevada Rules of Civil Procedure.

22 This Court should similarly hold that NRS 52.380 is procedural in nature, not substantive
23 in nature, and that Rule 35 therefore controls the Court's decision in this case. Further, as will be
24 discussed further below, pursuant to Rule 35 there is not good cause to allow a third-party
25 observer and audio recording of the neuropsychological test portions of Dr. Etcoff's exam of
26 Plaintiff. There may be good cause to audio record and have an observer present for the
27 interview portions of the exam.

28 ///

D. THE *FRETELUCO* CASE CONSTITUTES STRONG PERSUASIVE AUTHORITY WITH RESPECT TO WHETHER GOOD CAUSE EXISTS TO EVER ALLOW A THIRD-PARTY OBSERVER OR RECORDING OF THE TESTING PORTION OF A RULE 35 NEUROPSYCHOLOGICAL EXAM.

The *Freteluco* case is “strong persuasive authority” as to whether courts find good cause to require a third-party observer and audio recording of the test-portions of a Rule 35 neuropsychological exam. Plaintiff contends *Freteluco* is not “strong persuasive authority” as to this issue because FRCP 35 does not expressly require a finding of good cause to mandate the presence of a third-party observer and audio recording, while NRCP 35 expressly contains a good cause requirement. This argument fails because the judge in *Freteluco* performed a good-cause analysis.

The court noted, first off, that the majority rule adopted by federal courts is that third-party observation and recording of psychiatric exams is not allowed. *Id.* at 203. The court then explained the reason why there is never good cause for an observer and recording of a neuropsychological exam:

Courts are often reluctant to permit a third party or recording device out of concern that the intrusion would (1) potentially invalidate the examination results; (2) fail to provide a level playing field[] as plaintiff was not required to tape record his examination with his own health care providers; and (3) inject a greater degree of the adversary process into an evaluation that is to be neutral.

Id. at 204 (quoting *Flack v. Nutribullet, LLC*, 333 F.R.D. 508, 518 (C.D. Cal. 2019)).

Further, the court noted the plaintiff had not presented evidence that “Dr. Etkoff has ever been or, in this case, will be abusive to someone he is examining.” Further, there was “nothing to support the conclusion that Dr. Etkoff will go beyond the agreed upon testing he has disclosed.” *Id.*

Here, there is not good cause to require the third-party observer and audio recording of the test portions of Dr. Etkoff’s exam. As noted by the *Freteluco* Court, these conditions can invalidate exam results. As evidenced in the Motion to Compel and Reply, and Dr. Etkoff’s Affidavit, that is a very real concern. Further, even if Dr. Etkoff were willing to violate his ethical and professional obligations and place his license in jeopardy (which he will not do), it would be fundamentally unfair to require a third-party observer and recording of the neuropsychological

1 tests as Plaintiff's psychologist, Dr. Sunshine Collins, was not required to perform her
2 examination of Plaintiff under those conditions. In reality, there can never be a level playing field
3 for the Defendants if this Court orders a third-party observer and recording of the test portions of
4 the neuropsychological exam, because Dr. Etkoff cannot perform the exam under those
5 conditions. Moreover, no other Nevada licensed neuropsychologist will ever perform a Rule 35
6 exam of Plaintiff under those conditions. Thus, Defendants will not be able to have any
7 neuropsychological exam of the Plaintiff performed.

8 Plaintiff argues that Dr. Etkoff perjured himself in his Affidavit by asserting he is not
9 ethically and professionally allowed to conduct neuropsychological tests in the presence of third-
10 party observers or to allow those tests to be recorded. Plaintiff relies on the *Freteluco* decision,
11 as Dr. Etkoff was the neuropsychologist hired by the defense in that case. See Opposition to
12 Objection, at p. 7. Plaintiff either did not read Defendants' Reply and Objection, and the
13 *Freteluco* decision, or is intentionally attempting to mislead the Court. In *Freteluco*, the court
14 noted that Dr. Etkoff allows recording of the examinee interviews to accommodate the Discovery
15 Commissioner and "on occasion" has allowed an employee from the examiner's attorney's office
16 to sit in on the interview. See *Freteluco*, supra, at fn 1. This is the position that Defendants have
17 taken in this case. See, for instance, Motion to Compel, at 3-4 and Exhibit C, thereto; see also,
18 Reply, at p. 15.

19 **To clarify Defendants' position, there is not good cause for a third-party observer**
20 **and recording of the test portions of the exam. Ethically, that part of the exam cannot be**
21 **conducted with a third-party observer and recording. There may be good cause for a**
22 **recording of and third-party presence at the interview portion of the exam. Dr. Etkoff is**
23 **not ethically and professionally prohibited from conducting the interview under those**
24 **conditions.**

25 **E. DR. ETKOFF CANNOT PERFORM NEUROPSYCHOLOGICAL TESTS WITH THIRD-**
26 **PARTY OBSERVERS AND AUDIO RECORDING BECAUSE HE IS, IN FACT,**
27 **ETHICALLY AND PROFESSIONALLY PROHIBITED FROM DOING SO AND, IF HE**
28 **WERE TO VIOLATE HIS PROFESSIONAL ETHICS, HIS PROFESSIONAL LICENSE**
WOULD BE PLACED IN JEOPARDY.

///

1 Plaintiff completely ignores the ethical and professional prohibitions placed on Dr. Etcoff
2 by NAC 641.250 and the Board. Once again, Plaintiff merely cites to old, non-Nevada
3 psychologist opinions and primarily the affidavits of a Dr. Richard I Frederick and Howard V.
4 Zonana, to argue Dr. Etcoff has no foundation for his concerns. These documents will be
5 addressed below in Section I(F).

6 Cape fails to address that Nevada psychologists and neuropsychologists are bound by
7 NAC 641.250(1), which adopts by reference the “most recent edition of the *Ethical Principles of*
8 *Psychologists and Code of Conduct* [‘Ethical Principles’] adopted by the American Psychological
9 Association.” See Exhibit G to Objection, at ¶13, and Exhibit G(6). Subjective beliefs of non-
10 Nevada licensed psychologists as to how the Ethical Principles are applied in Nevada are
11 irrelevant and immaterial to this Court’s determination. Whether the Ethical Principles truly
12 prohibit Dr. Etcoff from conducting neuropsychological tests in the presence of third-party
13 observers and recordings, in Nevada, and whether he may share his raw testing material with
14 non-psychologists, in Nevada, depends on whether the Board believes that is permissible. The
15 Board’s letter makes clear its position that the foregoing is NOT permissible. Thus, as Dr. Etcoff
16 notes in his Affidavit, if he were to violate his professional and ethical responsibilities there is a
17 risk he could place his psychology license in jeopardy. See Exhibit G to Objection, at ¶25.

18 There are other practical reasons why the Board—as well as The American Academy of
19 Clinical Neuropsychology, the National Academy of Neuropsychology, The Society of Clinical
20 Neuropsychology of the American Psychological Association, and The American Board of
21 Professional Neuropsychology—construes the Ethical Principles as prohibiting third-party
22 observations and recording of neuropsychological tests. Third-party observers and audio
23 recording creates test reliability and validity concerns because those tests are not standardized
24 to include the presence of a third-party observer or recording. Exhibit G to Objection, at ¶¶8-12.
25 Additionally, third-party observers and recording of these tests harm test security. *Id.* at ¶¶20-23.

26 Plaintiff Cape does not desire Defendants to level the playing field with respect to his
27 alleged brain injury and neuropsychological claims. He does not want to undergo any Rule 35
28 exam with Dr. Etcoff, and that is why he is placing unreasonable conditions on that examination.

1 Dr. Etcoff is ethically and professionally prohibited from conducting neuropsychological tests if
2 third-party observers are present and the tests are recorded. Cape understands this fact. His
3 position is not based on any concern that Dr. Etcoff will abuse or mistreat him during the
4 examination. His position is not based on any concern that Dr. Etcoff will violate his ethical duties
5 and misconstrue the test findings. If Plaintiff had these concerns, he would have lodged them in
6 his Opposition to the Objection. He did not.

7 **F. THE MEDICAL AUTHORITY RELIED UPON BY PLAINTIFF IS UNPERSUASIVE AS**
8 **THE DOCTORS ARE NOT LICENSED IN NEVADA AND DO NOT ADDRESS THE**
9 **PSYCHOLOGICAL ETHICAL PRINCIPLES CODIFIED IN NAC 641.250.**

10 The purported medical authority relied upon by Plaintiff in claiming Dr. Etcoff is not
11 professionally and ethically prohibited from allowing third-party observers and recording of the
12 test portions of his neuropsychological exams carry no weight because they were prepared by
13 non-Nevada psychologists. The first is that of Dr. Richard I. Frederick, Phd (see Opposition to
14 Objection, at pp. 16-25). This affidavit is three years old, and was prepared for a lawsuit filed in
15 Florida. Dr. Frederick states that he is engaged in “the private practice of psychology in the state
16 of Missouri.” Exhibit 1 to Plaintiff’s Opposition to Motion to Compel, at ¶1. He further states he is
17 licensed in Arkansas, Kansas, Texas, Florida, Iowa, Oklahoma, Wisconsin and Louisiana. *Id.* at
18 ¶2. **Nowhere does he state he is licensed in Nevada!** His opinions as to Dr. Etcoff’s ethical
19 and professional obligations and what conduct he could place his psychology license in jeopardy
20 do not matter because he does not have any understanding as to a psychologists ethical and
21 professional obligations in Nevada. He has no understanding as to what obligations and
22 responsibilities NAC 641.250 and the Board place on Nevada practitioners.

23 Exhibit 2 to Plaintiff’s Opposition to the Motion to Compel is entitled “Videotaping of
24 Forensic Psychiatric Evaluations,” and was prepared by Howard V. Zonana, MD, John M.
25 Bradford, MB, Debora L. Biorgi-Guarnieri, MD, JD, Park E. Dietz, MD, Steven K. Hoge, MD,
26 Daniel J. Sprehe, MD and Stephen S. Teich, MD. *Id.* at 345. This article is 20 years old. None of
27 these purported psychologists are licensed in the State of Nevada. (See above, Declaration of
28 Brent D. Quist, Esq.). This article carries no weight as to the current ethical and professional
obligations of Nevada-licensed psychologists as to third-party observers and recording of tests.

The Board has construed the Ethical Principles, which are codified at NAC 641.250(1), as prohibiting Dr. Etcoff from allowing third-party observers and recording of the test-portions of his exam. Plaintiff has not produced any affidavit or legal authority from a Nevada-licensed psychologist to show otherwise. In considering whether good cause exists under Rule 35 to order Dr. Etcoff to allow third-party observers and recording of the tests themselves, the Court should take this into consideration. The Court should also consider if it affirms the Discovery Commissioner's Report and Recommendation, that ruling will preclude any Nevada-licensed neuropsychologist from conducting an examination of Plaintiff Cape—not just Dr. Etcoff. Defendants will be placed in an insurmountable disadvantage in their attempt to prepare a defense in this case if that were to occur.

G. THE COURT IS NOT PERMITTED TO CONSIDER THE LEGISLATIVE HISTORY OF NRS 52.380 BECAUSE THE STATUTE IS NOT AMBIGUOUS.

NRS 52.380 is not ambiguously written and, therefore, this Court will commit reversible error if it considers the legislative history. As noted in the Objection, because the plain language of NRS 52.380 is not ambiguous and susceptible to more than one interpretation, this Court may not look at the legislative history in determining the meaning of the statute or whether the statute is constitutional. See Objection, at pp. 12-13; *see also, Nevada Department of Corrections v. York Claims Services, Inc.*, 348 P.3d 1010, 1013 (Nev. 2015) (noting a statute that is subject to more than one reasonable interpretation is ambiguous) (quoting *Savage v. Pierson*, 157 P.3d 697, 699 (Nev. 2007)); *Valenti v. State, Dep't of Motor Vehicles*, 362 P.2d 83, 85 (Nev. 2015) ("In interpreting a statute, this court looks to the plain language of the statute and, if that language is clear, this court does not go beyond it.") To do otherwise would be to disregard controlling law and constitute reversible error. See *MB America, Inc. v. Alaska Pac. Leasing*, 367 P.3d 1286, 1292 (Nev. 2016) (A court abuses its discretion if it disregards controlling law).

H. NRS 52.380 IS A PROCEDURAL STATUTE AND DOES NOT ESTABLISH A SUBSTANTIVE RIGHT TO THE PRESENCE OF THIRD-PARTY OBSERVERS AND RECORDING DEVICES IN RULE 35 NEUROPSYCHOLOGICAL EXAMS.

NRS 52.380 simply lays out procedures for conducting Rule 35 exams and does not create a substantive right. As noted by Plaintiff, a substantive statute creates duties, rights and

obligations, while a procedural statute specifies how those duties, rights, and obligations should be enforced. See Opposition to Objection, at 11 (quoting *Azar v. Allina Health Services*, 139 S.Ct. 1804, 1811 (2019)). However, contrary to what Cape suggests, not every statute creates a substantive right. On more than one occasion the Nevada Supreme Court has addressed procedural statutes. See, for instance, *Berkson v. LePome*, 245 P.3d 560, 562 (Nev. 2010) (considering NRS 11.340, which provides time a plaintiff has to file a new action if judgment is reversed on appeal); *State v. Second Judicial District Court*, 11 P.3d 1209, 1212 (Nev. 2000) (addressing NRS 175.552(3), which sets forth conditions under which statute may introduce evidence of additional aggravating circumstances for consideration at penalty hearing); and *State v. Connery*, 661 P.2d 1298, 1299 (Nev. 1983) (considering NRS 177.066, which sets forth the time in which an appeal must be taken).

On its face, NRS 52.380 does not create a substantive right. It establishes a procedure for Rule 35 exams that differs from the procedure provided by Rule 35. Whereas Rule 35 provides that a plaintiff must show good cause before a district court may order a third-party observer and recording of a neuropsychological exam, NRS 52.380 does not require a showing of good cause by a plaintiff. However, the statute does not affect a substantive right. For instance, it does not impact a personal injury plaintiff's right to pursue a negligence claim. The statute does not set forth a new standard for establishing negligence in Nevada. As recognized by the *Freteluco* Court, NRS 52.380 reflects a "procedural preference" that differs from Rule 35. As the court explained:

... whether an observer is present in the neuropsychological examination of Plaintiff is not substantive, but is procedural. That is, NRS 52.380 sets forth procedures applicable to observers who may attend independent medical examinations . . . These statutory provisions are not 'outcome' or case determinative, but instead reflect a 'procedural preference.'"

Freteluco, 338 F.R.D. at 203 (citing *Flack*, 33 F.R.D. at 517; *Smolko v. Unimark Lowboy Trans*, 327 F.R.D. 59, 63 (M.D. Penn. 2018) and *Stefan v. Trinity Trucking, LLC*, 275 F.R.D. 248, 250 (N.D. Ohio 2011)).

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1 **I. IN ARGUING THAT NRS 52.380 IS CONSTITUTIONAL, PLAINTIFF GLARINGLY**
2 **FAILS TO ACKNOWLEDGE THE NEVADA SUPREME COURT’S HOLDING THAT A**
3 **PROCEDURAL STATUTE WHICH CONFLICTS WITH A PRE-EXISTING**
4 **PROCEDURAL RULE IS UNCONSTITUTIONAL UNDER THE SEPARATION OF**
5 **POWERS DOCTRINE.**

6 Plaintiff misleads the Court in his constitutional analysis of NRS 52.380. Based on the
7 wording of the Discovery Commissioner’s Report and Recommendations, this Court must
8 analyze the constitutionality of NRS 52.380. While the Discovery Commissioner stated he was
9 compelling Plaintiff’s Rule 35 neuropsychological exam pursuant to Rule 35, and had found good
10 cause for imposing the observer and recording conditions on that exam, the “good cause” for the
11 exam and the exam conditions was the enactment of NRS 52.380. In order words, the Discovery
12 Commissioner relies on the judgment of the legislature and Governor in holding there is “good
13 cause” to require the exam to move forward with a third-party observer and recording.

14 However, if the legislature and Governor have no constitutional authority to enact NRS
15 52.380, then their judgment as to whether third-party observation and recording of a
16 neuropsychological exam setting should be allowed does not matter. All that matters is whether
17 the Nevada Supreme Court believes those conditions should be imposed on a
18 neuropsychological exam and, if so, when those conditions should be imposed. Thus, this Court
19 must reach a decision as to whether NRS 52.380 is constitutional under the separation of
20 powers doctrine.

21 Plaintiff argues NRS 52.380 is constitutional because there are “rational and legitimate
22 reasons for NRS 52.380’s enactment[.]” Opposition to Objection, at 15. However, Cape
23 completely ignores the separation of powers doctrine. Even if the legislature and Governor
24 believe there are good reasons to enact a procedural statute, they may not do so where the
25 statute “conflicts with a pre-existing procedural rule.” *Berkson*, 245 P.3d at 499 (quoting *State v.*
26 *Distr. Ct [Marshall]*, 11 P.3d 1209, 1213 (Nev. 2000) (quoting *State v. Connery*, 661 P.2d 1298,
27 1300 (Nev. 1983)). A procedural statute that conflicts with a pre-existing rule of procedure is of
28 “no effect.” *Berkson*, 245 P.3d at 499. This is because under the separation of powers doctrine,
the judiciary has “inherent power” to govern its own procedures. *Berkson*, 245 P.3d at 499.
Additionally, NRS 2.120 recognizes the Nevada Supreme Court is responsible for adopting rules

1 for civil practice.

2 Thus, the analysis of whether NRS 52.380 is constitutional is not, as Plaintiff suggests,
3 restricted to whether the legislature and Governor believe there are good reasons to enact it.
4 Even if, hypothetically, there are good reasons for NRS 52.380, which is denied, the fact the
5 statute was adopted AFTER the most recent amendments to NRCP 35—which amendments
6 similarly address third-party observers and recordings of neuropsychological exams, means
7 NRS 52.380 cannot stand if it interferes or conflicts with NRCP 35.

8 Here, the procedures set forth in NRS 52.380 for third-party observers and recordings in
9 a neuropsychological exam setting cannot be reconciled or read in harmony with the procedures
10 set forth in Rule 35. Under Rule 35, a plaintiff must show good cause before a district court may
11 require the presence of a third-party observer and recording of a Rule 35 neuropsychological
12 exam. However, for the reasons set forth by Defendants in their Objection—including but not
13 limited to the reasons set forth in Dr. Etcoff's Affidavit and supporting documents—there is
14 NEVER good cause to require a third-party observer and recording of the test portion of a
15 neuropsychological exam. Rule 35 thus allows a district court to compel a neuropsychological
16 exam without requiring the third-party observer and recording conditions that make it impossible
17 for a neuropsychologist to perform a Rule 35 exam.

18 NRS 52.380 removes a district court's ability to compel an examine without the presence
19 of a third-party observer and recording for the test portions of the exam. As a result, no Rule 35
20 neuropsychological exams will ever take place in Nevada. The statute thus irreconcilably
21 conflicts and interferes with Rule 35. Under the separation of powers doctrine, NRS 52.380 is
22 therefore unconstitutional.

23 **J. PLAINTIFF HAS FAILED TO SHOW GOOD CAUSE FOR REQUIRING A THIRD-**
24 **PARTY OBSERVER AND RECORDING OF THE TEST-PORTION OF THE EXAM**
25 **BECAUSE THE SOLE "GOOD CAUSE" FOR THOSE EXAM CONDITIONS, PER**
26 **PLAINTIFF, IS THE UNCONSTITUTIONAL ADOPTION OF 52.380 INTO LAW.**

27 The sole "good cause" basis relied upon by the Plaintiff and the Discovery Commissioner
28 for requiring a third-party observer and recording of the test portions of the exam is that NRS
52.380 was enacted. However, as noted above, because that statute is unconstitutional, its

1 enactment cannot provide “good cause” to require a third-party observer and recording of the
2 test portions of the exam.

3 **K. PLAINTIFF’S RELIANCE ON THE AMERICAN PSYCHOLOGICAL ASSOCIATION**
4 **“GUIDELINES” WERE NOT INCORPORATED INTO NAC 641.250, DO NOT GOVERN**
5 **DR. ETCOFF’S ETHICAL AND PROFESSIONAL OBLIGATIONS, AND ARE OUT OF**
6 **DATE; FURTHER, PLAINTIFF MISCONSTRUES THEM.**

7 Plaintiff Cape argues that Dr. Etcoff should be compelled to share his raw test materials
8 and data with Plaintiff’s attorneys, in violation of his ethical and professional obligations, based
9 solely on 8-year-old “guidelines” published by the American Psychological Association.
10 Opposition to Objection, at pp. 25-26. The Ethical Principles that govern Dr. Etcoff’s ethical and
11 professional responsibilities (see NAC 641.250) contradict the APA Guidelines. See Objection, at
12 22-24. The APA Guidelines are thus irrelevant. Moreover, they are out of date and do not set
13 forth the current ethical and professional obligations of a neuropsychologist.

14 Additionally, Cape misrepresents what the APA Guidelines actually allow. Cape states
15 that APA Guideline 7.01 provides a neuropsychologist may “adhere to the requirements of the
16 law” in violation of the APA Guidelines; however, he fails to note this same guideline only permits
17 this violation where it does not in any way violate a person’s rights. Exhibit 9 to Opposition, at 78-
18 79 (Guideline 7.01). As explained by Dr. Etcoff, disclosure of the test materials, test questions,
19 and test scores to non-psychologists harms the public by creating a risk for coaching of
20 individuals in the future, that may result in inflated test scores so individuals appear to have
21 intact cognitive abilities when they do no. Exhibit G to Objection, at ¶22. A person’s right to have
22 a validly administered test, and to have test scores that correctly reflect their cognitive abilities
23 can be harmed if the test materials are shared with non-psychologists.

24 Cape argues that APA Guideline 8.02 requires psychologists to produce testing materials
25 in response to a subpoena and court order. Opposition to Objection, at p. 25. However, this
26 guideline further provides a psychologist need not comply with a subpoena or court order, if
27 there “is a legally valid reason to offer an objection.” Exhibit 9 to Plaintiff’s Opposition, at p. 79,
28 Guideline 8.01. Thus, as here, where disclosure of testing materials to non-psychologists would
violate his ethical and professional obligations, Dr. Etcoff is well within his rights to object.

1 Lastly, Plaintiff relies on Guidelines 10.06 and 10.07 to argue his counsel should have
2 access to the raw testing data and testing materials. Plaintiff's Opposition to Objection, at p. 26.
3 However, these APA Guidelines recognize when deciding whether to allow third-party
4 observations and recording of examinations, psychologists must consider the "potential impact of
5 observation or recording on the validity of the examination and test security." Exhibit 9 to
6 Opposition, at p. 81 (Guideline 10.06). Those are the exact issues raised by Dr. Etcoff in his
7 Affidavit! Additionally, Guideline 10.07 states that psychologists may disclose reports describing
8 the tests performed, test results, and test data (i.e., an expert report). However, this APA
9 Guideline does not require a psychologist to disclose the raw testing data and testing material to
10 a non-psychologist. Exhibit 9 to Opposition, at p. 81 (Guideline 10.07).

11 **L. THE COURT SHOULD CONSTRUE NRCP 35 IN HARMONY WITH NAC 641.250 AND**
12 **BY DOING SO, FIND GOOD CAUSE DOES NOT EXIST TO REQUIRE THIRD-PARTY**
13 **OBSERVERS AND RECORDINGS FOR THE TEST-PORTION OF THE EXAM.**

14 In determining whether good cause exists to require a third-party observer and audio
15 recording of the full exam, and to condition that exam on Dr. Etcoff disclosing the raw test data
16 and testing materials, the Court is required to construe Rule 35 in light of NAC 641.250. Courts
17 must construe a rule or statute in harmony with other rules and statutes, including the Nevada
18 Administrative Code. See *Figueroa-Beltran v. United States*, 467 P.3d 615, 621 (Nev. 2020)
19 (quoting *Clay v. Eighth Judicial Dist. Court*, 305 P.3d 898, 902 (Nev. 2013) ("this court will
20 interpret a rule or statute in harmony with other rules and statutes."); *City of North Las Vegas v.*
21 *Warburton*, 262 P.3d 715, 718 (Nev. 2011) (Rules of statutory construction "apply to
22 administrative regulations.") (citing *Silver State Elec. V. State, Dep't of Tax.*, 157 P.3d 710,
713(Nev. 2007)).

23 Whether there is ever good cause under Rule 35 for a third-party observer and recording
24 in a Rule 35 neuropsychological exam, and whether that exam can be conditioned on the
25 neuropsychologist sharing raw test materials and data with non-psychologists, must be
26 considered in light of the Ethical Principles incorporated into the Nevada Administrative Code.
27 NAC 641.250(1) adopts by reference those Ethical Principles. According to the Ethical
28 Principles, psychologists may not allow third-party observers to attend the test portion, as

1 compared to the interview portion, of an exam. The same prohibition applies to recording of the
2 tests. Exhibit G to Objection, at ¶¶13-22. Sharing of raw test data and materials is similarly
3 prohibited. Exhibit G to Objection, at ¶¶20-23.

4 Here, the Court cannot simply ignore NAC 641.250. It must construe Rule 35 in harmony
5 with that administrative code provision. Given the ethical and professional requirements
6 established by the Ethical Principles, which are codified by reference at NAC 641.250, there can
7 never be good cause to compel a plaintiff's Rule 35 neuropsychology exam with the conditions
8 recommended by the Discovery Commissioner.

9 **II.**

10 **ARGUMENT IN OPPOSITION TO COUNTER-MOTION FOR SANCTIONS**

11 Plaintiff's argument that Defendants should be sanctioned because they included Dr.
12 Etcoff's Affidavit and accompanying documents in their Objection is without merit. As explained
13 above, Dr. Etcoff's Affidavit shows he is prohibited by the Ethical Principles, adopted by
14 reference in NAC 641.250, from conducting the testing portion of his exam with a third-party
15 observer and recording and that he likewise is not permitted to disclose raw testing data and
16 materials to non-psychologists.

17 This Affidavit and accompanying documents are necessary to address the position raised
18 and argued by Plaintiff's counsel for the first time during the discovery hearing itself that the
19 Board letter does not actually preclude Dr. Etcoff from performing a Rule 35 exam with the
20 conditions required by Plaintiff and his license will not be placed in jeopardy if he does so.
21 Because Plaintiff raised these issues for the very first time during the discovery hearing,
22 Defendants were unable to have Dr. Etcoff prepare an Affidavit to address those issues before
23 the hearing.

24 The Etcoff Affidavit is not improper. It certainly is not sanctionable under EDCR 7.60(b).
25 The Affidavit is not "obviously frivolous, unnecessary or unwarranted."

26 ///

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III.

CONCLUSION

For the foregoing reasons, Defendants request the Court sustain the Objection, hold that NRS 52.380 is unconstitutional and therefore the enactment of that law does not constitute “good cause” to compel Plaintiff’s Rule 35 neuropsychological exam on condition that (1) an observer be allowed at the testing portion of the exam, (2) the testing portion of the exam be recorded in any manner, and (3) Dr. Etcoff share his raw test materials and testing data with a non-psychologist.

The Court should compel the Rule 35 neuropsychological exam of Plaintiff Cape with the following conditions:

1. That no third-party observer and recording of the testing portion of the exam is allowed.

2. That a third-party observer and recording of the interview portion of the exam may be allowed. As noted in the Freteluco case, Dr. Etcoff allows recording of the examinee interviews to accommodate the Discovery Commissioner and “on occasion” has allowed an employee from the examiner’s attorney’s office to sit in on the interview.

3. That Dr. Etcoff share the raw test data and testing materials with Plaintiff’s psychologist, whether that is Dr. Sunshine Collins or another licensed psychologist retained by Plaintiff. However, Dr. Collins may not share that raw test data and testing materials with a non-psychologist. In the alternative, that the Rule 35 neuropsychology exam not be conditioned on Dr. Etcoff producing this information as Plaintiff may serve a subpoena, which would allow Dr. Etcoff to object to the same.

4. That the exam may last two days.

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5. That Plaintiff's Counter-Motion for Sanctions be denied.

DATED this 17th day of November, 2021.

DENNETT WINSPEAR, LLP

By /s/ Brent D. Quist
RYAN L. DENNETT, ESQ.
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BRENT D. QUIST, ESQ.
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Facsimile: (702) 839-1113
***Attorneys for Defendant,
Chilly Willy's Handyman, LLC***

DATED this 17th day of November, 2021.

KEATING LAW GROUP

By /s/ John T. Keating
JOHN T. KEATING, Esq.
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Las Vegas, Nevada 89148
Telephone: (702) 228-6800
Facsimile: (702) 228-0443
***Attorneys for Defendant
David G. Martinez***

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), EDCR 7.26 and N.E.F.C.R. 9, I certify that on this date, I served the foregoing **DEFENDANTS' REPLY IN SUPPORT OF THEIR OBJECTION TO DISCOVERY COMMISSIONER REPORT AND RECOMMENDATION REGARDING DEFENDANTS' MOTION TO COMPEL NRCP 35 NEUROPSYCHOLOGICAL EXAM WITH DR. LEWIS M. ETCOFF AND OPPOSITION TO COUNTER-MOTION FOR SANCTIONS** on all parties to this action by the following method:

_____ Facsimile
_____ Mail
 X Electronic Service

RYAN A. LOOSVELT, ESQ.
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***Attorneys for Defendant
David G. Martinez***

DATED this 17th day of November, 2021.

 /s/ Zaira Baldovinos
An Employee of DENNETT WINSPEAR, LLP

From: [Brent Quist](#)
To: [Zaira Baldovinos](#)
Subject: FW: Cape - authorization to use e-signature
Date: Tuesday, November 16, 2021 4:18:55 PM

From: J. Keating <jkeating@keatinglg.com>
Sent: Tuesday, November 16, 2021 3:54 PM
To: Brent Quist <bquist@dennettwinspear.com>
Subject: Re: Cape - authorization to use e-signature

Yes

Sent from my iPhone

On Nov 16, 2021, at 3:53 PM, Brent Quist <bquist@dennettwinspear.com> wrote:

John,

Can we use your e-signature to file the Reply in Support of the Objection?

Brent Quist
Dennett Winspear, LLP
3301 North Buffalo Drive, Suite 195
Las Vegas, Nevada 89129
702.839.1100 - Phone
702.839.1113 - Fax

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1 ORDER

2
3 DISTRICT COURT
4 CLARK COUNTY, NEVADA
5

6 TAYLOR CAPE,

7
8 Plaintiff(s),

9 v.

CASE NO. A-20-818569-C
DEPT NO. 28

10
11 DAVID MARTINEZ, et al.,

12 Defendant(s).
13

HEARING DATE: October 1, 2021
HEARING TIME: 9:30 AM
14

15 ORDER

16 RE: DISCOVERY COMMISSIONER'S
17 REPORT AND RECOMMENDATIONS
18

19 The Court, having reviewed the above report and recommendations prepared by the
20 Discovery Commissioner and,

21 _____ No timely objection having been filed,

22
23 X After reviewing the objections to the Report and Recommendations and good cause
24 appearing,

25 * * *
26
27
28

1 AND

2 X IT IS HEREBY ORDERED the Discovery Commissioner's Report and
3 Recommendations are affirmed and adopted.

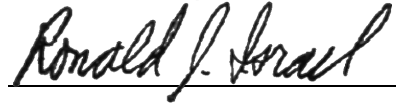
4
5 _____ IT IS HEREBY ORDERED the Discovery Commissioner's Report and
6 Recommendations are affirmed and adopted as modified in the following manner.
(attached hereto)

7
8 _____ IT IS HEREBY ORDERED this matter is remanded to the Discovery Commissioner for
reconsideration or further action.

9
10 _____ IT IS HEREBY ORDERED that a hearing on the Discovery Commissioner's Report is
11 set for _____, 2021, at _____:_____ a.m.

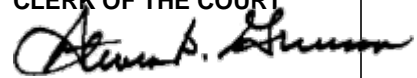
12 IT IS FURTHER ORDERED that Defendant's constitutionality argument is waived
13 due to his failure to serve the Secretary of State pursuant to NRS 30.130.

14 Dated this 22nd day of November, 2021

15 

16 9CB 433 A993 22F7
17 Ronald J. Israel
18 District Court Judge

19 JT



DCRR

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**Attorneys for Defendant, CHILLY
WILLY'S HANDYMAN SERVICES, LLC**

DISTRICT COURT

CLARK COUNTY, NEVADA

TAYLOR MILES CAPE,

Plaintiff,

Case No: A-20-818569-C

Dept. No: 28

vs.

DAVID G. MARTINEZ, individually; CHILLY
WILLY'S HANDYMAN SERVICES, LLC, a
domestic limited-liability company; DOES I
through X; and ROE BUSINESS ENTITIES I
through X, inclusive,

Defendants.

**DISCOVERY COMMISSIONER'S
REPORT AND RECOMMENDATIONS**

Hearing Date: October 1, 2021

Hearing Time: 9:30 a.m.

Appearances: William T. Martin, Esq., GGRM Law Firm, for Plaintiff Taylor Miles Cape.

Brent D. Quist, Esq., Dennett Winspear, LLP, for Defendant Chilly Willy's

Handyman Services, LLC.

John T. Keating, Esq., Keating Law Group, for Defendant David G. Martinez.

I.

FINDINGS

On October 1, 2021, the Discovery Commissioner, Honorable Jay Young, heard Defendants, Chilly Willy's Handyman Services, LLC and David G. Martinez's Motion to Compel NRCP 35 Neuropsychological Exam with Dr. Lewis M. Etcoff, Noticed for October 19-20, 2021,

1 on an Order Shortening Time; and Plaintiff's Opposition, Counter-Motion for Fees, and to Stay
2 Enforcement. The Commissioner having reviewed the papers and pleadings on file, having
3 heard the oral argument of counsel, and being informed on the premises, finds as follows with
4 respect to Defendants' Motion:

5 Defendants seek a two-day Rule 35 mental examination of Plaintiff. Plaintiff does not
6 oppose the examination take place; rather, he opposes certain parameters of the examination.
7 Plaintiff requested the exam be recorded with an observer and that his expert and counsel be
8 provided the defense expert's raw test data/ test materials under protections. Plaintiff also
9 counter-moved for a stay pending objection to the district court if the protections were not
10 ordered and counter-moved for fees.

11 The COMMISSIONER HEREBY FINDS, under Rule 35, there is good cause to allow a
12 third-party observer of the Rule 35 neuropsychological exam and an audio recording of that full
13 examination.

14 THE COMMISSIONER FURTHER FINDS the good cause to allow a third-party observer
15 and audio recording of the Rule 35 neuropsychological exam is the Legislature passed NRS
16 52.380 and the governor signed it into law. The observer can be present outside the examination
17 room and can listen to the examination either by remote means or directly, with the door open.
18 The observer may not interrupt the examination, except to suspend the examination if any
19 irregularities occur as allowed under NRS 52.380(4).

20 THE COMMISSIONER FURTHER FINDS Plaintiff cannot videotape the examination.

21 THE COMMISSIONER FURTHER FINDS the exam can take place over a two-day
22 period.

23 THE COMMISSIONER FURTHER FINDS the raw test data/test questions and other
24 exam materials must be provided to plaintiff's expert, who may share that information with
25 plaintiff's attorney, in an attorney's eyes-only capacity for preparation of the case. The
26 information is otherwise protected in this matter. It cannot be filed in a public setting. It can be
27 shared between counsel.

28 ///

THE COMMISSIONER FURTHER FINDS, as to Plaintiff's counter-motion for fees, the Motion was substantially justified by the conflict between the NRCP 35 and NRS 52.380 and, therefore, the Commissioner is not granting Plaintiff's request for fees.

THE COMMISSIONER FURTHER FINDS, as to Plaintiff's request for a stay to allow an Objection, that good cause exists to grant that stay.

II.

RECOMMENDATIONS

The Discovery Commissioner, having considered the papers and pleadings on file, having entertained oral argument of counsel, and being informed in the present premises, hereby makes the following recommendations:

IT IS THEREFORE RECOMMENDED that Defendants' Motion be **GRANTED IN PART** and **DENIED IN PART**.

IT IS FURTHER RECOMMENDED the Court compel the NRCP 35 neuropsychological exam of Plaintiff.

IT IS FURTHER RECOMMENDED the exam may take place over a two-day period;

IT IS FURTHER RECOMMENDED that Plaintiff may audio record the exam in full and have a third-party observer present;

IT IS FURTHER RECOMMENDED the third-party observer can be present outside the examination room and can listen to the examination either by remote means or directly, with the door open, but the observer cannot interrupt the examination, except to suspend the examination if any irregularities occur, as allowed by NRS 52.380(4);

IT IS FURTHER RECOMMENDED Plaintiff cannot videotape the examination;

IT IS FURTHER RECOMMENDED the raw test data/test questions and other exam materials must be provided to plaintiff's expert, who may share that information with plaintiff's attorney, in an attorney's eyes-only capacity for preparation of the case. The information is otherwise protected in this matter. It cannot be filed in a public setting. It can be shared between counsel.

///

IT IS FURTHER RECOMMENDED that Plaintiff's counter-motion for fees be **DENIED**;
and

IT IS FURTHER RECOMMENDED that Plaintiff's request for a stay to allow an Objection
be **GRANTED**.

DATED this 15th day of October, 2021.


DISCOVERY COMMISSIONER

Approved as to form and content by:

Respectfully submitted by:

GGRM LAW FIRM

DENNETT WINSPEAR, LLP

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Respectfully submitted by:

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NOTICE

Pursuant to NRCP 16.3(c)(2), you are hereby notified that within fourteen (14) 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 November 1, **2021.**

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

 Mailed to Plaintiff/Defendant at the following address on the day of , 2021.

☒ Electronically filed and served counsel on October 18, 2021, pursuant to N.E.F.C.R. Rule 9.

By: Natilie Simonetti
COMMISSIONER DESIGNEE

1 **CSERV**

2
3 DISTRICT COURT
CLARK COUNTY, NEVADA

4
5
6 Taylor Cape, Plaintiff(s)

CASE NO: A-20-818569-C

7 vs.

DEPT. NO. Department 28

8 David Martinez, Defendant(s)

9
10 **AUTOMATED CERTIFICATE OF SERVICE**

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

14 Service Date: 11/22/2021

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