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Feb 08 2022 02:24 p.m.  
Elizabeth A. Brown  
Clerk of Supreme Court

IN THE SUPREME COURT OF THE STATE OF NEVADA

DAVID G. MARTINEZ and CHILLY  
WILLY'S HANDYMAN SERVICES,  
LLC

Petitioners,

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

and

TAYLOR MILES CAPE, and individual,

Respondents.

Supreme Ct. Case No:

Dist. Ct. Case No.:

A-20-818569-C

**Appendix to Chilly Willy's  
Handyman Services, LLC's Motion  
to Stay Proceedings**

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1 Order Granting Petition for Writ of Mandamus, *Yusi v. Eighth Judicial District Court*  
2 (*Felsner*).....228-230  
3

4 DATED this 8<sup>th</sup> day of February, 2022.  
5

6 **DENNETT WINSPEAR, LLP**  
7

8 By /s/ Brent D. Quist  
9 RYAN L. DENNETT, ESQ.  
10 Nevada Bar No. 005617  
11 BRENT D. QUIST, ESQ.  
12 Nevada Bar No. 009157  
13 3301 N. Buffalo Drive, Suite 195  
14 Las Vegas, Nevada 89129  
15 Telephone: (702) 839-1100  
16 Facsimile: (702) 839-1113  
17 *Attorneys for Defendant, Chilly Willy's*  
18 *Handyman Services, LLC*  
19  
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21  
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23  
24  
25  
26  
27  
28

DENNETT WINSPEAR

ATTORNEYS AT LAW

## 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 8<sup>th</sup> day of February, 2022, service of **Appendix to Chilly Willy's Handyman Services, LLC's Motion to Stay Proceedings** 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 <b>GGRM LAW FIRM</b> 2770 S. Maryland Parkway Suite 100 Las Vegas, Nevada 89109	Telephone: (702) 384-1616 Facsimile: (702) 384-2990 Email: rloosvelt@ggrmlawfirm.com	<b>Plaintiff Taylor Miles Cape</b>
John T. Keating, Esq. Nevada Bar No. 6373 <b>KEATING LAW GROUP</b> 9130 W. Russell Road Suite 200 Las Vegas, Nevada 89148	Telephone: (702) 228-6800 Facsimile: (702) 228-0443 Email: jkeating@keatinglg.com	<b>Defendant David G. Martinez</b>
Aaron D. Ford, Esq. Nevada Bar No. 7704 <b>NEVADA OFFICE OF ATTORNEY GENERAL</b> 555 E. Washington Avenue #3900 Las Vegas, Nevada 89101	Telephone: (702) 486-3768 Facsimile: (702) 486-3420	
Honorable Judge Ronald J. Israel Department 28 <b>REGIONAL JUSTICE CENTER</b> 200 Lewis Avenue Las Vegas, Nevada 89155	Telephone: (702) 366-1407	

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



**AFFIDAVIT OF BRENT D. QUIST, ESQ.**

STATE OF NEVADA }  
COUNTY OF CLARK }

BRENT D. QUIST, ESQ., being first duly sworn, deposes and states:

1. Affiant is an attorney of the law firm of DENNETT WINSPEAR, LLP, and is duly licensed to practice law before all the courts of the State of Nevada, and represents the interests of Defendant/Petitioner Chilly Willy's Handyman Services, LLC in *Martinez v. Cape*, Eighth Judicial District Court Case No. A-20-818569-C and Supreme Court Case No. 83911.

2. Affiant makes this Affidavit in support of Petitioners' Motion to Stay Proceedings (Motion) and for no improper purpose or delay. The facts set forth in this Affidavit are known to me personally, or are based upon my information and belief, and if called to do so, I would competently testify under oath regarding the same.

3. On 7/27/21, the parties submitted and the district court signed a Stipulation and Order to Extend Discovery (First Request) and Trial (First Request), which established an initial expert disclosure deadline of 1/7/22 and set trial for 6/27/22.

4. On 12/14/21, Petitioners filed their Writ of Mandamus as to the district court's order regarding Dr. Lewis Etcoff, Petitioners' expert.

5. On 12/14/21, Petitioners filed their Motion to Stay with the district court.

6. Respondent Taylor Miles Cape filed his Opposition on 12/21/21, and the Reply was filed on 12/23/21.

7. The Motion to Stay was set for chambers calendar. On 1/14/22, the district court denied the motion.

8. The district court found: (1) there were not sufficient grounds to stay

1 the entirety of the case pending the Petitioners' Writ; (2) Petitioners' Writ  
2 challenged the constitutionality of NRS 52.380, but Petitioners had waived their  
3 constitutional challenge by not serving the Secretary of State pursuant to NRS  
4 30.130; and (3) the *Mikohn* factors weigh in favor of denying the stay. The district  
5 court also indicated the proposed Order should "set forth a synopsis of the  
6 supporting reasons proffered to the Court in briefing." The parties are currently  
7 discussing the additional language to include in the proposed Order.

8 9. On 1/3/21, the district court signed a Stipulation and Order to Extend  
9 Discovery and Continue Trial (Second Request) that extended the initial expert  
10 disclosure deadline to 4/7/22 and reset trial to 11/14/22.

11 10. Petitioners are filing this Motion now so as not to require an  
12 emergency motion and burden Respondent Cape and/or this Court. NRAP 27(e).

13 11. The parties have already had over a year to conduct discovery.  
14 Respondent has had ample time to conduct any discovery he chose to do.

15  
16 FURTHER AFFIANT SAYETH NAUGHT.

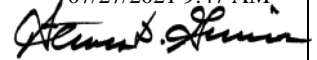
17 DATED this 8 day of February, 2022.

18  
19   
20 BRENT D. QUIST

21 SUBSCRIBED AND SWORN to before  
22 me this 8th day of February, 2022.

23   
24 NOTARY PUBLIC in and for said  
25 COUNTY AND STATE



  
CLERK OF THE COURT

RYAN L. DENNETT, ESQ.  
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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.

**STIPULATION AND ORDER TO EXTEND DISCOVERY (FIRST REQUEST)**

Plaintiff TAYLOR MILES CAPE, by and through its counsel of record GREENMAN  
GOLDBERG RABY & MARTINEZ, Defendant CHILLY WILLY'S HANDYMAN SERVICES, LLC,  
by and through its counsel of record, DENNETT WINSPEAR, LLP, and Defendant DAVID G.  
MARTINEZ, by and through their counsel of record, KEATING LAW GROUP, hereby request the  
Court continue discovery for a period of 90 days.

**I.**

**INTRODUCTION**

This case arises out of an automobile accident on November 11, 2018. Plaintiff TAYLOR  
CAPE was allegedly operating his vehicle southbound on Durango Drive attempting to make a  
left turn with a permissive green signal onto Oso Blanca Road. Defendant DAVID G. MARTINEZ,

APP000003

who was an alleged employee of CHILLY WILLY'S HANDYMAN SERVICES, LLC, allegedly went through the traffic light and struck Plaintiff CAPE.

Plaintiff alleges a traumatic brain injury, neck and back injuries, and ongoing pain complaints. In his NRCP 16.1(a)(1) disclosures, Plaintiff asserts past and future medical specials in the amount of \$5,696,934.47.

Plaintiff currently lives on the east coast. He has agreed to travel to Las Vegas for his deposition and for orthopedic and neuropsychological Rule 35 exams. However, given the examining doctor availability, these exams cannot occur until November 2021.

## II.

### **EDCR 2.35 REQUIREMENTS**

#### **A. DISCOVERY COMPLETED TO DATE**

The parties have served their initial and supplemental NRCP 16.1(a)(1) disclosures. Parties have also served and responded to written discovery.

#### **B. DISCOVERY THAT REMAINS TO BE COMPLETED**

Party depositions need to be completed, including the deposition of Plaintiff CAPE. Plaintiff intends to conduct further written discovery and take the deposition of Defendants, including Rule 30(b)(6) depositions.

The parties are also discussing parameters for Defendants' proposed IMEs of Plaintiff CAPE, which include proposals for one orthopedic Rule 35 exam and one separate neuropsychological Rule 35 exam in Las Vegas. These parameters will be determined by stipulation of the parties if they can agree or by order of the Court. The Parties have discussed dates for IMEs based on Defendants' experts' limited availability. In addition, other discovery including expert discovery needs to occur including medical expert depositions.

#### **C. REASONS WHY DISCOVERY HAS NOT BEEN COMPLETED**

The Complaint was filed on July 24, 2020. The Answer was filed October 13, 2020. The scheduling order was issued January 13, 2021.

///

On January 6, 2021, Defendant CHILLY WILLY'S HANDYMAN SERVICES, LLC served written discovery to Plaintiff CAPE. Defendant CHILLY WILLY'S HANDYMAN SERVICES, LLC provided Plaintiff CAPE additional time to respond to written discovery. Answers were served March 19, 2021. Thereafter, counsel for the parties conferred pursuant to EDCR 2.34 regarding what defense counsel believed could be insufficient discovery responses. However, after conferring, it was decided supplemental responses would not be provided.

However, based on Plaintiff CAPE's written discovery responses it was unclear to defense counsel whether and to what extent Rule 35 exams were necessary. Additional discussions occurred in or about April 2021 regarding the need, type and scope of Rule 35 exams. After numerous discussions it was ultimately determined both orthopedic and neuropsychological exams would be appropriate. The parties are still in the process of working out the scope of those exams.

Additionally, in June the parties discussed the timing of the exams and Plaintiff's deposition. Given that Plaintiff CAPE lives on the east coast, Defendant CHILLY WILLY HANDYMAN'S SERVICES LLC wanted to make it convenient for Plaintiff to undergo the Rule 35 exams and his depositions.

Given the schedules of the Rule 35 examiners chosen by the defense, one of Plaintiff CAPE'S Rule 35 exams is planned to go forward during the week of October 19, 2021 and Plaintiff's deposition, as well as the second Rule 35 exam, is planned to go forward during the week of November 15, 2021, once the parties agree on parameters of the IMEs or as otherwise ordered by the Court. This means Plaintiff will travel twice to Las Vegas for discovery purposes. However, given the delays occasioned by the timing of the Rule 35 exams due to the examiners' schedules, a discovery extension is needed.

In addition, the other discovery identified above necessitates a discovery extension as well. Trial will not be affected by the proposed extension.

**D. PROPOSED DISCOVERY SCHEDULE**

DEADLINE	CURRENT DATE	PROPOSED DATE
Discovery deadline	January 7, 2022	March 7, 2022

1	Initial expert disclosures	October 7, 2021	January 7, 2022
2	Rebuttal expert disclosures	November 8, 2021	February 7, 2022
3	Dispositive motions	February 7, 2022	April 7, 2022
4	Amend pleadings/add parties	October 7, 2021	October 7, 2021

**E. CURRENT TRIAL DATE**

Trial is currently set on a five-week stack to begin June 27, 2022. Trial does not need to be continued as a result of this requested continuance.

DATED: 07/27/21

**GREENMAN GOLDBERG RABY &  
MARTINEZ**

By: /s/ Ryan A. Loosvelt  
RYAN A. LOOSVELT, ESQ.  
Nevada Bar No. 8550  
2770 S. Maryland Parkway, Suite 100  
Las Vegas, Nevada 89109  
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Facsimile: (702) 384-2990  
***Attorneys for Plaintiff,  
Taylor Miles Cape***

DATED: 07/27/21

**DENNETT WINSPEAR, LLP**

By: /s/ Brent D. Quist  
RYAN L. DENNETT, ESQ.  
Nevada Bar No. 005617  
BRENT D. QUIST, ESQ.  
Nevada Bar No. 009157  
3301 N. Buffalo Drive, Suite 195  
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Facsimile: (702) 839-1113  
***Attorneys for Defendant,  
Chilly Willy's Handyman Service, LLC.***

DATED: 07/27/21

**KEATING LAW GROUP**

By: /s/ John T. Keating  
JOHN T. KEATING, ESQ.  
Nevada Bar No. 6373  
9130 W. Russell Road, Suite 200  
Las Vegas, Nevada 89148  
Telephone: (702) 228-6800  
Facsimile: (702) 228-0443  
***Attorneys for Defendant,  
David G. Martinez***

**ORDER**

UPON STIPULATION OF COUNSEL and good cause appearing,

IT IS SO ORDERED THIS \_\_\_\_\_ day of \_\_\_\_\_, 2021.

Dated this 27th day of July, 2021



DISTRICT COURT JUDGE  
A-20-818569-C

Submitted by:

**DENNETT WINSPEAR, LLP**

**E2B D56 6D2D 1605**  
**Ronald J. Israel** SJ  
**District Court Judge**

By \_\_\_\_\_ /s/ Brent D. Quist

RYAN L. DENNETT, ESQ.

Nevada Bar No. 005617

BRENT D. QUIST, ESQ.

Nevada Bar No. 009157

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Las Vegas, Nevada 89129

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***Attorneys for Defendant,***

***Chilly Willy's Handyman Services, LLC***

**From:** [Brent Quist](#)  
**To:** [Zaira Baldovinos](#)  
**Subject:** FW: Cape - SAO re extend discovery  
**Date:** Tuesday, July 27, 2021 8:55:13 AM

---

---

**From:** Brent Quist  
**Sent:** Monday, July 19, 2021 4:25 PM  
**To:** Zaira Baldovinos <[zaira@dennettwinspear.com](mailto:zaira@dennettwinspear.com)>  
**Subject:** FW: Cape - SAO re extend discovery

---

**From:** J. Keating <[jkeating@keatinglg.com](mailto:jkeating@keatinglg.com)>  
**Sent:** Monday, July 19, 2021 4:24 PM  
**To:** Brent Quist <[bquist@dennettwinspear.com](mailto:bquist@dennettwinspear.com)>; Ryan Loosvelt <[rloosvelt@ggrmlawfirm.com](mailto:rloosvelt@ggrmlawfirm.com)>  
**Cc:** Ashley Marchant <[amarchant@dennettwinspear.com](mailto:amarchant@dennettwinspear.com)>  
**Subject:** RE: Cape - SAO re extend discovery

You have my approval to attach my signature.

---

**From:** Brent Quist <[bquist@dennettwinspear.com](mailto:bquist@dennettwinspear.com)>  
**Sent:** Monday, July 19, 2021 10:42 AM  
**To:** Ryan Loosvelt <[rloosvelt@ggrmlawfirm.com](mailto:rloosvelt@ggrmlawfirm.com)>; J. Keating <[jkeating@keatinglg.com](mailto:jkeating@keatinglg.com)>  
**Cc:** Ashley Marchant <[amarchant@dennettwinspear.com](mailto:amarchant@dennettwinspear.com)>  
**Subject:** Cape - SAO re extend discovery  
**Importance:** High

Ryan:

I agree with your revisions to the SAO to extend discovery. I made a couple of additional grammatical changes. Please let me know if you agree, and if I can use your e-signature.

John, please let me know if you agree to the SAO to extend discovery to complete expert discovery and if I can use your e-signature.

Thanks,

Brent Quist  
Dennett Winspear, LLP  
3301 North Buffalo Drive, Suite 195  
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APP000008



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**From:** [Brent Quist](#)  
**To:** [Zaira Baldovinos](#)  
**Subject:** FW: Cape - SAO re extend discovery  
**Date:** Tuesday, July 27, 2021 8:54:58 AM  
**Attachments:** [image002.png](#)  
[image003.png](#)  
[image004.png](#)  
[image005.png](#)  
[image006.png](#)  
[21-07-19 Cape Redlined SAO Discovery Extension \(RL-PL revision\) - BDQ revision.doc](#)  
**Importance:** High

---

Zaira:

Please make red-line changes and file. Ryan Loosvelt's e-signature authorization is below. I will send you John Keating's e-signature authorization.

Brent

---

**From:** Brent Quist  
**Sent:** Monday, July 19, 2021 4:25 PM  
**To:** Zaira Baldovinos <[zaira@dennettwinspear.com](mailto:zaira@dennettwinspear.com)>  
**Subject:** FW: Cape - SAO re extend discovery  
**Importance:** High






---

**From:** Ryan Loosvelt <[rloosvelt@ggrmlawfirm.com](mailto:rloosvelt@ggrmlawfirm.com)>  
**Sent:** Monday, July 19, 2021 11:11 AM  
**To:** Brent Quist <[bquist@dennettwinspear.com](mailto:bquist@dennettwinspear.com)>; J. Keating <[jkeating@keatinglg.com](mailto:jkeating@keatinglg.com)>  
**Cc:** Ashley Marchant <[amarchant@dennettwinspear.com](mailto:amarchant@dennettwinspear.com)>; Rebeca Guardado <[rguardado@ggrmlawfirm.com](mailto:rguardado@ggrmlawfirm.com)>; Dillon Coil <[dcoil@ggrmlawfirm.com](mailto:dcoil@ggrmlawfirm.com)>  
**Subject:** FW: Cape - SAO re extend discovery  
**Importance:** High

Brent, this is fine with both parties' revisions, you can use my e-signature.



**Ryan Loosvelt**  
Personal Injury Attorney  
O: 702.384.1616 | F: 702.384.2990 | [www.ggrmlawfirm.com](http://www.ggrmlawfirm.com)  
2770 S. Maryland Pkwy., Ste. 100 Las Vegas, NV 89109

---

**From:** Brent Quist <[bquist@dennettwinspear.com](mailto:bquist@dennettwinspear.com)>  
**Sent:** Monday, July 19, 2021 10:42 AM  
**To:** Ryan Loosvelt <[rloosvelt@ggrmlawfirm.com](mailto:rloosvelt@ggrmlawfirm.com)>; [jkeating@keatinglg.com](mailto:jkeating@keatinglg.com)  
**Cc:** Ashley Marchant <[amarchant@dennettwinspear.com](mailto:amarchant@dennettwinspear.com)>  
**Subject:** Cape - SAO re extend discovery  
**Importance:** High

Ryan:

I agree with your revisions to the SAO to extend discovery. I made a couple of additional grammatical changes. Please let me know if you agree, and if I can use your e-signature.

APP000010

John, please let me know if you agree to the SAO to extend discovery to complete expert discovery and if I can use your e-signature.

Thanks,

Brent Quist  
Dennett Winspear, LLP  
3301 North Buffalo Drive, Suite 195  
Las Vegas, Nevada 89129  
702.839.1100 - Phone  
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APP000011

1 **CSERV**

2  
3 DISTRICT COURT  
4 CLARK COUNTY, NEVADA

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 Stipulation and Order to Extend Discovery Deadlines was served via  
13 the court's electronic eFile system to all recipients registered for e-Service on the above  
entitled case as listed below:

14 Service Date: 7/27/2021

15 Theresa Amendola tamendola@dennettwinspear.com

16 Susan Boschee sboschee@keatinglg.com

17 Dillon Coil dcoil@ggrmlawfirm.com

18 Ashley Marchant amarchant@dennettwinspear.com

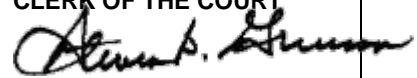
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20 Nicole Reyes nreyes@keatinglg.com

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22 Zaira Baldovinos zaira@dennettwinspear.com

23 Ryan Loosvelt rloosvelt@ggrmlawfirm.com



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**Attorneys for Defendant, Chilly  
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,

**HEARING REQUESTED**

Defendants.

**DEFENDANTS' MOTION TO STAY CASE PENDING WRIT OF MANDAMUS ON AN ORDER  
SHORTENING TIME**

Defendants CHILLY WILLY'S HANDYMAN SERVICES, LLC, by and through its counsel  
of record, DENNETT WINSPEAR, LLP, and DAVID G. MARTINEZ, by and through his counsel  
of record, KEATING LAW GROUP, hereby submit their Motion to Stay Case Pending Writ of  
Mandamus on an Order Shortening Time.

This Motion is made and based upon all papers, pleadings and records on file herein, the  
attached Points and Authorities, and such oral argument, testimony and evidence as the Court  
may entertain.

///

///

///

APP000013

**DECLARATION IN SUPPORT OF MOTION TO STAY CASE ON AN ORDER SHORTENING  
TIME**

I, BRENT D. QUIST, declare under penalty of perjury:

1. Defendants moved the Discovery Commissioner to compel Plaintiff's Rule 35 neuropsychological exam, over the course of two-days, without the presence of an observer and audio recording of the test-portions of the exam and without being required to disclose the raw-test data, test questions and other materials to a non-psychologist, such as Plaintiff's attorneys.

2. The Discovery Commissioner issued an order compelling the neuropsychological exam; however, the Commissioner's ruling bases the examination upon the foregoing conditions.

3. Defendants filed an Objection; that objection was overruled by the Court. The Court adopted the Discovery Commissioner's Report and Recommendations.

4. The deadline to disclose initial expert disclosures is January 7, 2021.

5. The Court's Order effectively precludes Dr. Etcoff, or any Nevada board-licensed neuropsychologist, from conducting a Rule 35 exam of Plaintiff. I am unaware of any Nevada board-licensed neuropsychologist that will conduct an examination under the conditions placed by the Court's Order. Dr. Etcoff has made clear in his Affidavit submitted in this matter he cannot conduct the Rule 35 exam of Plaintiff with those conditions in place.

6. Defendants have filed a Petition for Writ, pursuant to NRCP 8, with the Nevada Supreme Court.

7. Defendants herein request the Court stay this matter, in its entirety, pursuant to NRCP 8 until the Nevada Supreme Court considers the merits of the Petition for Writ.

8. Because the deadline to disclose initial experts is January 7, 2021, the Defendants request the Court consider this Motion on an Order Shortening Time. **Defendants request the Court consider this Motion on or before December 23, 2021.**

9. If the Motion is denied, or if the Motion is decided after the initial expert disclosure deadline, the Defendants will be placed in a position where they will not be able to conduct a neuropsychological Rule 35 exam of Plaintiff with Dr. Etcoff because if that examination ultimately occurs, but takes place after the initial expert disclosure deadline, Defendants will not

1 be able to disclose that report pursuant to Rule 16.1(a)(2).

2 10. Defendants again request the Court consider this Motion on an Order Shortening  
3 Time and for the reasons set forth in the Motion grant that Motion.

4 11. On Thursday, December 2<sup>nd</sup> I spoke with counsel for Plaintiff requesting his client  
5 stipulate to the stay. To the best of my memory, he indicated he was not inclined to stipulate to  
6 the stay. Per his request, I provided him with the names and case numbers of the other matters  
7 on Writ to the Supreme Court, identified herein. Plaintiff's counsel stated that he would attempt to  
8 get back to me on Friday, December 3<sup>rd</sup>, but that he was traveling out of town for his wedding.  
9 Plaintiff's counsel has not gotten back to me as to whether he now opposes the relief sought for  
10 in this Motion. Per another e-mail, it is my understanding just this week he returned from his  
11 wedding.

12 12. I certify this Motion is filed in good faith and not for an improper purpose.

13  
14 /s/Brent D. Quist  
BRENT D. QUIST, ESQ.

15  
16 **POINTS AND AUTHORITIES**

17 **I.**

18 **INTRODUCTION**

19 This Court should grant Defendants' Motion to stay the entire case because only the  
20 Nevada Supreme Court can resolve the NRCP 35 issues in this case, which apply to Plaintiff  
21 TAYLOR MILES CAPE's alleged claims and damages, and impact the entire case.

22 **II.**

23 **FACTUAL AND PROCEDURAL BACKGROUND**

24 **This Action**

25 This case arises out of an automobile accident. Plaintiff alleges various injuries, including  
26 a traumatic brain injury that will require him to undergo future counseling, cognitive remediation,  
27 and neuropsychological evaluation/psychometric testing. His past and future medical specials,  
28 which include treatment for his alleged brain injury, total nearly \$5.7 million. Thus, any further

1 discovery, including the Rule 35 neuropsychological examination, is relevant to all Plaintiff's  
2 claims and damages.

3 On September 13, 2021, Defendants filed a Motion to Compel Plaintiff's Rule 35  
4 neuropsychological examination with Dr. Lewis M. Etcoff, without an observer and audio  
5 recording of the full neuropsychological examination and without requiring Dr. Etcoff to share his  
6 raw test data and test questions with a non-psychologist. The Motion also sought to allow the  
7 exam to take two days.

8 The Discovery Commissioner granted in part and denied in part the Motion, holding that  
9 while Plaintiff would be compelled to attend a two-day examination with Dr. Etcoff, the Plaintiff  
10 could audio record the exam in full and have a third-party observer present, and that Dr. Etcoff  
11 was required to share the raw test data/test questions and other exam materials to Plaintiff's  
12 expert who would be permitted to share that material with Plaintiff's non-psychologist attorney.

13 **Exhibit A**, DCRR, at 3.

14 On October 27, 2021, Defendants filed an Objection to the DCRR. The Court adopted the  
15 Discovery Commissioner Report and Recommendations on November 22, 2021. **Exhibit B**,  
16 Order re: Discovery Commissioner's Report and Recommendations, at 1-2.

17 The deadline to serve initial Rule 16.1(a)(2) expert disclosures is January 7, 2022. The  
18 Defendants have filed a Petition for Writ with the Supreme Court. **Exhibit C**, Petition for Writ  
19 (pleading only). (The Petition for Writ is in the process of being filed with the Supreme Court.  
20 Defendants will supplement this Motion with a copy of the filed Petition after Defendants have  
21 received a file stamped copy back from the Supreme Court).

#### 22 **Nevada Supreme Court Pending Writs**

23 Effective January 1, 2019, the Nevada Supreme Court enacted NRCP 35 with its current  
24 provisions. In just under two years, the Nevada Supreme Court accepted four Writs regarding  
25 the Rule in the setting of a neuropsychological examination in *Moats v. Dist Ct. (Burgess)*, Case  
26 No. 81912, *Lyft, Inc. v. Dist. Ct (Davis)*, Case No. 82148, *Yusi v. Dist. Ct. (Felsur)*, Case No.  
27 82625, and *Ferrellgas, Inc. v. Dist Ct. (Green)*, Case No. 82670.

28 ///



1 In *Moats*, the plaintiff's counsel filed a "Motion to Stay Troy Moats' Rule 35 Examination  
2 Pending Writ of Mandamus" consisting solely of an Affidavit without any points and authorities.  
3 **Exhibit D**, Moats Motion to Stay and Order. Plaintiff's attorney signed the Moats motion to stay  
4 on October 1, 2020, filed the Moats Writ on October 9, 2020, and Judge Escobar granted the  
5 motion to stay without hearing on October 11, 2020—all before the Nevada Supreme Court  
6 accepted the Writ on December 16, 2020 by entering an Order Directing Answer. **Exhibit E**,  
7 *Moats* Petition for Writ, at 1 (pleading only); **Exhibit F**, Moats Order.

8 In *Lyft*, the defendant filed the Writ on December 2, 2020, and 29 days later, the Nevada  
9 Supreme Court accepted the Writ by Order Directing Answer. **Exhibit G**, *Lyft* Petition for Writ  
10 (pleading only); **Exhibit H**, *Lyft* Order Directing Answer. On January 7, 2020<sup>1</sup>, Judge Denton  
11 stayed Lyft in its entirety pursuant to the parties' stipulation. **Exhibit I**, Lyft Order to Stay.

12 In *Green*, the defendant moved Judge Kishner to stay the case in April 2021. On May 3,  
13 2021, she denied that motion on the Defendants had not complied with Eighth Judicial District  
14 Court Rules, did not contain analysis of what is necessary for a stay to be issued, and had bare  
15 reference to applicable rules and case law. **Exhibit J**, *Green* Order Denying Stay, at 4-6.  
16 Previously, Defendants had filed a Petition for Writ of Mandamus (see **Exhibit K**, *Green* Petition  
17 for Writ (pleading only)), which was accepted by the Nevada Supreme Court via an Order  
18 Directing Answer on May 20, 2021. **Exhibit L**, *Green* Order Directing Answer. On July 6, 2021,  
19 the *Green* defendants filed a Motion to Stay Proceedings, which was granted by the Nevada  
20 Supreme Court on July 30<sup>th</sup>. **Exhibit M**, *Green* Motion to Stay (pleading only); **Exhibit N**, *Green*  
21 Order Granting Stay.

22 The Nevada Supreme Court has taken up the same issues in the other four Writs  
23 pending before it, that were addressed by Defendants in their Objection; however, the Court has  
24 not yet ruled. The Court should stay this matter so that the constitutional and procedural issues  
25 surrounding Rule 35 exams in a neuropsychological context can be addressed before the initial  
26 expert disclosure deadline, and related discovery deadlines, expire.

27 ///

28 ///

## III.

ARGUMENT

## A. LEGAL STANDARD

NRCP 8 governs motions to stay pending a petition for an extraordinary writ. “A party must ordinarily move first in the district court for . . . a stay of the judgment or order of, or proceedings in, a district court pending appeal or resolution of a petition to the Supreme Court or Court of Appeals for an extraordinary writ[.] NRCP 8(a)(1)(A). “In deciding whether to issue a stay or injunction, the Supreme Court or Court of Appeals will generally consider the following factors: (1) whether the object of the appeal or writ petition will be defeated if the stay or injunction is denied; (2) whether appellant/petitioner will suffer irreparable or serious injury if the stay or injunction is denied; (3) whether respondent/real party in interest will suffer irreparable or serious injury if the stay or injunction is granted; and (4) whether appellant/petitioner is likely to prevail on the merits in the appeal or writ petition.” NRCP 8(c). See *Mikohn Gaming Corp. v. McCrea*, 89 P.3d 36, 38 (Nev. 2004)(recognizing four standards identified in NRCP 8(c) as governing whether to issue stay pending petition for writ to Supreme Court).

“The Nevada Supreme Court has not indicated that any one factor carries more weight than the others, although *Fritz Hansen A/S v. District Court* [6 P.3d 982, 987 (Nev. 2000)] recognizes that if one or two factors are especially strong, they may counterbalance other weak factors.” *Mikohn*, 89 P.3d at 38.

In analyzing the weight to be given the aforementioned factors, the *Mikohn* Court indicated the most significant factor is the first, i.e., whether the object of the writ will be defeated if the stay or injunction is denied. *Id.* at 38-40. “Although irreparable or serious harm remains part of the stay analysis, this factor will not generally play a significant role in the decision whether to issue a stay.” *Id.* at 39. “Normally, the only cognizant harm threatened to the parties is increased litigation cost and delay . . . [L]itigation costs, even if potentially substantial, are not irreparable harm.” *Id.* (citing *Fritz Hansen A/S*, 6 P.3d at 986-87). “Similarly, a mere delay in pursuing discovery and litigation normally does not constitute irreparable harm.” *Id.* (citing *Fritz Hansen A.S.*, 6 P.3d at 987). However, where a “party may face actual irreparable harm . . . the likelihood

of irreparable harm should be considered in the stay analysis.” *Id.* at 39.

The *Mikohn* Court explained that where an object of an appeal will be defeated if a stay is denied, and because irreparable harm “will seldom figure into the analysis,” a stay in such circumstances “is generally warranted.” A party opposing the stay may only defeat the motion “by making a strong showing that appellate relief is unattainable,” i.e., the appeal or writ is “frivolous[.]” *Id.* at 40.

**B. THE RULE 8(C) FACTORS WEIGH HEAVILY IN FAVOR OF THIS COURT GRANTING THE STAY.**

1. THE OBJECT OF DEFENDANTS’ PETITION FOR WRIT WILL BE DEFEATED IF THE COURT DENIES THE STAY.

Plaintiff alleges significant neuropsychological injuries, which he claims has resulted in a lifetime cognitive debilitation, as a result of the accident. He has undergone a neuropsychological exam with a neuropsychologist of his choosing, which did not involve a third-party observer or audio recording. The Life Care Plan that Plaintiff is relying on for his alleged future damages is based in large part upon this neuropsychological evaluation.

Defendants require Plaintiff to undergo a Rule 35 neuropsychological examination with Dr. Etcoff, who is a Nevada board-licensed neuropsychologist, to explore the validity of Plaintiff’s neuropsychological claims and defend against those allegations. Defendants seek a stay of the entire case because Dr. Etcoff, and to undersigned counsel’s knowledge all Nevada board licensed neuropsychologists, will not perform neuropsychological exams with an observer and audio recording of any (or at least the test portions) of that exam. That exam will determine how discovery proceeds, including whether Plaintiff provides a rebuttal expert to Dr. Etcoff and what additional experts, if any, Defendants disclose as part of their initial or rebuttal experts. Additionally, Dr. Etcoff’s opinions will determine which doctor depositions will need to be conducted and whether additional fact witness depositions are warranted.

Thus, discovery—in particular expert discovery—cannot proceed until Dr. Etcoff performs the Rule 35 exam. Again, he cannot perform this exam under the conditions ordered by the Court. Without this exam, Defendants will be placed at a significant disadvantage at trial. They will not be able to fairly evaluate or defend against the claims asserted by Plaintiff’s psychologist

1 and life care planner. Based on how long the other Writs have been before the Court, without the  
2 Court issuing rulings, it is highly unlikely the Court will rule on the Defendants' Writ before the  
3 January 7, 2022 initial expert disclosure deadline. Moreover, it is unlikely the Court will rule on it  
4 before trial, which is set for a five-week stack to begin June 22, 2021.

5 If the Court denies, the stay then the object of the Petition for Writ will be defeated, i.e.,  
6 Defendants will be unable to have a neuropsychological exam conducted before trial.  
7 Defendants will not be able to conduct expert discovery with the benefit of that  
8 neuropsychological exam and Defendants other expert(s) will not have the benefit of Dr. Etcoff's  
9 opinions in arriving at their initial and/or rebuttal expert opinions.

10 It is acknowledged that there are three cases on Writ to the Supreme Court pertaining to  
11 the constitutionality of NRS 52.380 (which addresses the scope of Rule 35 exams) and the  
12 application of NRCP 35(a)(4)(A)(ii) and NRCP 35(a)(3) in a neuropsychological Rule 35 exam.  
13 However, there is no way to know how long it will take the Nevada Supreme Court to make its  
14 ruling on these cases. It is highly likely that the Nevada Supreme Court will not issue its ruling in  
15 these cases prior to the January 7, 2022.

16 As the *Mikohn* case makes clear, this factor matters most to the Court's determination.  
17 As this factor weighs heavily in favor of granting the Motion, the Court should grant the Motion.

18 2. DEFENDANTS WILL BE HARMED AND/OR INJURED IF THE STAY IS DENIED.

19 The NRCP 35 neuropsychological examination pertains to Plaintiff's cognitive injuries,  
20 general damages, and Life Care Plan. While the past medical specials and Life Care Plan are  
21 alleged at approximately \$5.7 million, it is anticipated Plaintiff will seek significant general  
22 damages at trial. As noted above, Dr. Etcoff's examination of Plaintiff will frame discovery in this  
23 matter and Defendants' ability to have a fair opportunity to present a defense at trial. If the Court  
24 denies this Motion, Defendants will not have an opportunity to have a Nevada board-licensed  
25 neuropsychologist exam Plaintiff prior to trial. The case should therefore be stayed in its entirety,  
26 as has been done in three similar cases cited above, until the Nevada Supreme Court decides  
27 Defendants' Petition for Writ.

28 ////

1           3.     PLAINTIFF'S WILL NOT BE IRREPARABLY HARMED IF THE COURT STAYS  
2                 THE CASE.

3           "[A] mere delay in pursuing discovery and litigation normally does not constitute  
4     irreparable harm." *Mikohn*, supra. Therefore, any claimed delay in the case does not serve as a  
5     basis to find Plaintiff will be harmed by the stay. Additionally, the parties have already conducted  
6     significant discovery and have had months to conduct any necessary fact witness discovery. The  
7     Court issued its discovery scheduling order on January 13, 2021. Since then, the parties have  
8     served initial and supplemental Rule 16.1(a)(1) disclosures and served and responded to written  
9     discovery. In an effort to limit the number of times Plaintiff traveled to Nevada for discovery,  
10    Defendants waited to depose him in November, during the same week he had a Rule 35  
11    examination with Dr. Ginsburg. The stay will not prevent Plaintiff from conducting any additional  
12    discovery he deems necessary.

13           4.     DEFENDANTS WILL LIKELY PREVAIL ON THE PETITION FOR WRIT.

14           Effective January 1, 2019, the Nevada Supreme Court enacted the current NRCP 35.  
15    The Nevada Supreme Court accepted three petitions for writs—on December 16, 2020 as to  
16    *Moats*, and on December 31, 2020 as to *Lyft*—on issues related to NRCP 52.380 and NRCP 35,  
17    which entail a serious separation of powers issue. The petition for writ in *Yusi v. Dist. Ct*  
18    (*Felsner*), Case No. 82625, was submitted on March 15, 2021. Finally, the defendants' petition  
19    for writ in *Green* was accepted by the court on May 20, 2021. Both of these cases address the  
20    good cause standard for observers and audio recordings and whether there is ever good cause  
21    for those conditions in a Rule 35 neuropsychological examination. Defendants have filed their  
22    Petition for Writ. In the short lifespan of NRCP 35, at least **five writs** (that Defendants are aware  
23    of) have been filed. While there is no predicting what the Nevada Supreme Court will do as to  
24    Defendants' Petition for Writ, that is not a basis to deny the stay. Clearly, NRCP 35 requires  
25    clarification on many fronts and issues. Thus, at a minimum, the Nevada Supreme Court will  
26    likely accept the Defendants' Petition for Writ.

27           In addition, Defendants' Petition for Writ raises important issues of law that require  
28    clarification, and considerations of sound judicial economy and administration militate in favor of

1 accepting and granting the Writ regarding the good cause standards for the presence of an  
2 observer at and allowing an audio recording of NRCP 35 neuropsychological examinations,  
3 which is required by NRCP 35(a)(4)(A)(ii) and NRCP 35(a)(3).

4 Further, Defendants' Petition for Writ raises a valid constitutional challenge to NRS  
5 52.380. This Court ruled that the Defendants not mailing the Secretary of State a copy of their  
6 Objection constitutes a waiver of the constitutional issues raised in Defendants' Motion to  
7 Compel and Objection. Defendants respectfully disagree with the Court's position. NRS 31.130  
8 sets forth that the Attorney General, not Secretary of State, must be served "with a copy of the  
9 proceeding and be entitled to be heard." Further, NRS 31.130 does not state that failure to serve  
10 the Attorney General constitutes waiver of the right to challenge the constitutionality of a statute.  
11 Instead, based on the precedent established in *Crowly v. Duffrin*, 855 P.2d 536, 539-40 (Nev.  
12 1993), where the constitutionality of a statute is challenged and the Attorney General is not  
13 served, a district court should order the Attorney General be served, and provided an opportunity  
14 to be heard, and consider the merits of the constitutional challenge. In *Crowley*, the appellant  
15 sought declaratory relief; however, he did not add the district court- which was a party-to the  
16 action. Thus, the appellant did not comply with NRS 31.130. Summary judgment was entered  
17 against the appellant for not complying with NRS 31.130. The Nevada Supreme Court held  
18 failure to comply with NRS 31.130 did not justify summary judgment and that the district court  
19 should have "allowed Crowley to amend his complaint to join" the district court "or should have  
20 effectuated the amendment *sua sponte*." The court then decided the issue on its merits. Based  
21 on this precedent and the constitutional arguments raised in the Objection, Defendants believe  
22 they will prevail on the merits of their constitutional argument as well as their arguments  
23 pertaining to the good cause standard of Rule 35.

24 NRCP 35 examinations are a critical and regular aspect of civil litigation and the related  
25 good cause standards need to be defined for this Court, parties and public. Further, the  
26 constitutional issues must be addressed for this Court.

27 Finally, the NRCP 35 neuropsychological exam is Defendants' one and only opportunity  
28 to conduct a fair Rule 35 neuropsychological exam in defense of this case wherein Plaintiff seeks

1 nearly \$6 million in damages. Requiring that Defendants can only have a Rule 35  
2 neuropsychological exam if an observer is present, an audio recording is made, and if Dr. Etcoff  
3 is willing to expose himself to professional and ethical discipline and/or sanctions relating thereto  
4 is tantamount to denying Defendants the examination that all agree they are entitled to on the  
5 facts of this case.

6 Based on all the above, the Defendants will likely prevail on their Petition for Writ.

7 **IV.**

8 **CONCLUSION**

9 Defendants respectfully request this Court grant their Motion and stay the entire case  
10 pending the Nevada Supreme Court's determination on Defendants' Writ because the object of  
11 the Writ will be defeated if the stay is denied, Defendants will suffer irreparable or serious injury if  
12 the stay is denied, Plaintiff will not suffer irreparable or serious injury if the stay is granted  
13 because discovery will only be delayed, not denied, and Defendants are likely to prevail on the  
14 merits in the appeal.

15 DATED this 14<sup>th</sup> day of December, 2021.

16 **DENNETT WINSPEAR, LLP**

17  
18 By /s/ Brent D. Quist  
19 RYAN L. DENNETT, ESQ.  
20 Nevada Bar No. 005617  
21 BRENT D. QUIST, ESQ.  
22 Nevada Bar No. 009157  
23 3301 N. Buffalo Drive, Suite 195  
24 Las Vegas, Nevada 89129  
25 Telephone: (702) 839-1100  
26 Facsimile: (702) 839-1113  
27 ***Attorneys for Defendant,***  
28 ***Chilly Willy's Handyman Services, LLC***

DATED this 14<sup>th</sup> day of December, 2021.

**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***

**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' MOTION TO STAY CASE PENDING WRIT OF MANDAMUS ON**

**AN ORDER SHORTENING TIME** on all parties to this action by the following method:

\_\_\_\_\_ Facsimile  
\_\_\_\_\_ Mail  
  X   Electronic Service

RYAN A. LOOSVELT, ESQ.  
Nevada Bar No. 8550  
**GGRM LAW FIRM**  
2770 S. Maryland Parkway, Suite 100  
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Facsimile: (702) 384-2990  
***Attorneys for Plaintiff,  
Taylor Miles Cape***

JOHN T. KEATING, Esq.  
Nevada Bar No. 6373  
**KEATING LAW GROUP**  
9130 W. Russell Road, Suite 200  
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Telephone: (702) 228-6800  
Facsimile: (702) 228-0443  
***Attorneys for Defendant  
David G. Martinez***

DATED this   14<sup>th</sup>   day of December, 2021.

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



## Zaira Baldovinos

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**From:** Brent Quist  
**Sent:** Monday, December 13, 2021 5:17 PM  
**To:** Zaira Baldovinos  
**Subject:** Fwd: Cape - Motion to Stay and Petition for Writ

Sent from my iPhone

Begin forwarded message:

**From:** "J. Keating" <jkeating@keatinglg.com>  
**Date:** December 13, 2021 at 8:45:24 AM PST  
**To:** Brent Quist <bquist@dennettwinspear.com>  
**Subject:** RE: Cape - Motion to Stay and Petition for Writ

yes

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**From:** Brent Quist <bquist@dennettwinspear.com>  
**Sent:** Monday, December 13, 2021 8:25 AM  
**To:** J. Keating <jkeating@keatinglg.com>  
**Subject:** RE: Cape - Motion to Stay and Petition for Writ

Thank you.

I assume I can use your e-signatures?

---

**From:** J. Keating <jkeating@keatinglg.com>  
**Sent:** Monday, December 13, 2021 8:18 AM  
**To:** Brent Quist <bquist@dennettwinspear.com>  
**Subject:** RE: Cape - Motion to Stay and Petition for Writ

These look fine to me

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**From:** Brent Quist <bquist@dennettwinspear.com>  
**Sent:** Thursday, December 9, 2021 3:47 PM  
**To:** J. Keating <jkeating@keatinglg.com>  
**Cc:** Ryan Dennett <rdennett@dennettwinspear.com>; Theresa Amendola <tamendola@dennettwinspear.com>; Zaira Baldovinos <zaira@dennettwinspear.com>  
**Subject:** Cape - Motion to Stay and Petition for Writ

John:

Attached please find the draft Motion for Stay and Petition for Writ to the Supreme Court. Please let me know of any changes. We still need to finalize the formatting, but I believe otherwise the Petition is ready for filing.



1 **OPPM**  
2 **DILLON G. COIL, ESQ.**  
3 Nevada Bar No. 11541  
4 **RYAN A. LOOSVELT, ESQ.**  
5 Nevada Bar No. 8550  
6 **GGRM LAW FIRM**  
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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

**PLAINTIFF'S OPPOSITION TO  
DEFENDANTS' MOTION TO STAY  
CASE PENDING WRIT OF  
MANDAMUS ON AN ORDER  
SHORTENING TIME**

26 Plaintiff Taylor Cape ("Plaintiff"), by and through his attorneys of record, GGRM LAW  
27 FIRM, hereby submits Plaintiff's Opposition to Defendants' Motion to Stay Case Pending Writ  
28 of Mandamus on an Order Shortening Time.

This Opposition is made and based on the attached points and authorities, the declaration  
of counsel, the record on Defendants' Motion to Compel and Plaintiff's Opposition thereto, the  
record on Defendants' Objection to DCR&R and Plaintiff's opposition, the Exhibits submitted  
herewith, the pleadings, motions, and other papers on file herein, and upon any argument



1 permitted by the Court at a hearing on this matter.

2 DATED this 22<sup>nd</sup> day of December, 2021.

3 **GGRM LAW FIRM**

4 */s/ Ryan A. Loosvelt*

5 **RYAN A. LOOSVELT, ESQ.**

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7 2770 S. Maryland Pkwy Ste. 100

8 Las Vegas, NV 89109

9 Phone: 702. 384.1616

10 *Attorneys for Plaintiff*



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## MEMORANDUM POINTS AND AUTHORITIES

### **I. INTRODUCTION**

The factors for a stay all weigh against Defendants here and favor denial of the stay. Defendants have no likelihood of success because (i) they waived their constitutional challenge, (ii) the parameters in this case were ordered under Rule 35's highly discretionary "good cause" provision, (iii) the appellate court is not considering overturning Rule 35's good cause provision as Defendants advocate here, (iv) Defendants' expert refuses to do the DME even under Rule 35's good cause parameters, (v) Defendants' claim that no DMEs could ever take place with any parameters is unsupported and only attempted to be supported by Dr. Etcoff's untimely affidavit which the Court cannot consider, (vi) the contention is also belied by the numerous affidavits presented by Plaintiff in the prior briefing that the Court can consider as well as the American Psychological Association Guidelines, among other evidence of good cause on record.

Defendants will not suffer irreparable harm and the object of the writ will not be defeated if a stay is not granted. The parameters were ordered under Rule 35 and thus stand regardless of the constitutionality of NRS 52.380. Good cause under Rule 35 was independently shown through the legislative history, through the numerous physician affidavits, through the APA guidelines, and through the other evidence offered in the prior briefing, and is a highly discretionary ruling that will not be overturned. Further, Defendants knowingly and intentionally selected Dr. Etcoff with notice he refused to conduct legally permissible DMEs; thus any prejudice Defendants claim to suffer is as a result of their deliberate, calculated decisions. Finally, the harm and prejudice to the injured Plaintiff is severe and significant if a broad, unfettered, unnecessary stay of all proceedings is ordered here and his case held hostage due to one examiner's preference for secrecy.

Defendants extended the deadlines specifically to conduct the neuropsych DME. Defendants exhausted all challenges through a Motion to Compel and an Objection to the DCR&R in plenty of time to conduct it prior to the extended expert deadline, all the while never retaining a physician willing to comply with Nevada law if their attempt to get around the law failed. In essence, Defendants never intended to meet the deadline under the law.



1 As demonstrated by the Declarations/Affidavits submitted by Plaintiff in its Oppositions  
2 to Motion to Compel and Objection to the DCR&R, physicians can, and should have a  
3 neuropsych DME observed, recorded, or videotaped. Even the ethical guidelines submitted by  
4 Plaintiff in its Oppositions allow for these physicians to follow the laws of the local jurisdictions.  
5 The only evidence Defendants offered cannot even be considered by the Court or the appellate  
6 court—the belated affidavit of Dr. Etcoff—because it was not submitted during the discovery  
7 commissioner proceedings, but was instead created after the fact for the specific purpose of  
8 Defendants’ Objection to the DCR&R. It therefore cannot be considered or relied upon.

9 At issue here is a Motion for Stay of all proceedings which is not warranted. Defendants  
10 reason for a stay in this case is solely based on other lawsuits. No showing is made why this  
11 specific case warrants a stay or whether Defendants have a likelihood of success, and they do  
12 not. Unlike other cases, Defendants here have waived any constitutional challenge and therefore  
13 cannot succeed on that basis. In addition, Defendants sole evidence that it cannot perform the  
14 DME under the law is a self-serving declaration by a notorious defense hired gun that cannot be  
15 considered, leaving the relief Defendants seek—to undo the law—completely unsupported.

16 Furthermore, the Commissioner, and Court when adopting the ruling, ruled under Rule  
17 35 that there is good cause for observer and recording—and Rule 35 allows for such relief for  
18 good cause. Thus, regardless of the effect of the writs in other cases or this one in the appellate  
19 court on constitutional issues of NRS 52.380, the order in this case also independently stands up  
20 under Rule 35. Thus, once again, this case is uniquely situated and a stay is not warranted.

21 Defendants acknowledge the writs in other cases have been pending for more than a year,  
22 and there is no indication a decision is coming anytime soon. Defendants want to hold this entire  
23 case in limbo (not just the expert deadline) because they chose a physician as an expert that they  
24 knew would not actually conduct the DME under the current law. For this, Defendants have  
25 only themselves to blame. This Court should deny the stay in this case for all the reasons stated  
26 in this Opposition, including, but not limited to the fact that Defendants have not supported the  
27 relief they request with any actual basis related to this specific case either.

28 ///



1 **II. THE OTHER WRITS ARE UNAVAILING HERE.**

2 Defendants solely rely on the fact that other writs are pending as the sole reason to stay  
3 the *Cape* case without reference to the facts, circumstances, issues, or rulings that are at issue or  
4 being determined in the other writs and how that is the same or different in this case.  
5 Consequently, Defendants have not demonstrated a stay is warranted simply by the existence of  
6 the other cases alone. The cases and issues are not the same as those in this *Cape* case and do  
7 not necessitate a stay of the entire case here.

8 ***Troy Moats v. Burgess*, Case No. A-18-769459-C:**

9 In *Moats*, the Defendant sought to compel a DME with, which comes as no surprise, *Dr.*  
10 *Etcoff* without an observer or recording. See Case No. A-18-796459-C, 04/21/2020 Defendant  
11 Burgess' Motion to Compel. The Motion to Compel was brought after motions in limine and  
12 after the close of discovery and granted a DME with Dr. Etcoff upon the re-opening of discovery  
13 for such purpose, ordering the parties to confer over the parameters. *Id.* at 06/15/2020 Discovery  
14 Commissioner Report & Recommendation.

15 The defense submitted a memorandum to the Court seeking to prevent the use of an  
16 observer or recording of Dr. Etcoff's exam largely citing statements that discuss the  
17 confidentiality, proprietary, and test security of the materials so they do not become widely  
18 known or disseminated; (this is not an issue here as Mr. Cape agreed to a protective order which  
19 was ordered to keep all items protected for use in Cape case only). *Id.* at 07/22/2020 Defendant's  
20 Memorandum Regarding Rule 35 Psychological Examination Parameters.<sup>1</sup>

21 Discovery Commissioner Truman (in *Cape* we have Discovery Commissioner Young)  
22 found that NRS 52.380 was a substantive right (a finding not made in *Cape*) and recommended  
23 the examination go forward under NRS 52.380 with the allowance of an independent observer  
24

25 \_\_\_\_\_  
26 <sup>1</sup> Arguably, Dr. Etcoff's later challenges including in *Cape* are inappropriate second bites at the  
27 apple. Dr. Etcoff has been battling this law for years since its enactment so as to continue his  
28 secretive defense exams—a fact which is also important for purposes here of Defendants'  
knowing and intentional selection of a specific expert witness in Dr. Etcoff who refuses to follow  
the law, which will be discussed further below.



1 and recording for portions of the exam, and that the raw materials be shared with the experts and  
2 protected. *Id.* at 09/08/2020 DCR&R.

3 The Defendant filed an Objection and Judge Escobar reversed the recommendations of  
4 Commissioner Truman ruling that Rule 35 and NRS 52.380 are both procedural, that NRCP 35  
5 controls, finding a non-controlling unique federal district court decision persuasive that relies  
6 on FRCP 35 (a rule which does not allow for an observer or recording for good cause unlike the  
7 Nevada rule), and ruled there was no showing of good cause (as, unlike here, the plaintiff in  
8 *Moats* had relied essentially only on NRS 52.380). *Id.* at 10/07/2020 Order on Defendant's  
9 Objection to the DCR&R. Notably, the Court still did not rule that Rule 35 exams can *never*  
10 have an observer or recording but which is what Defendants in *Cape*, especially in their writ  
11 (exhibit C to their motion for Stay) are now contending.

12 The plaintiff in *Moats* then filed a motion to stay the Rule 35 exam *only*, not any and all  
13 discovery, which was granted by Judge Escobar. *Id.* at 10/11/2020 Motion to Stay Rule 35  
14 Examination. Interestingly, the defendant, representing Dr. Etcoff, opposed the stay and wanted  
15 the exam to proceed as ordered by the district court (which he refuses to do in *Cape*). *Id.* at  
16 10/11/2020 Defendant's Objection and Opposition to Motion for Stay.

17 ***Kalena Davis v. Bridewell, Case No. A-18-777455-C:***

18 At issue in this writ is the constitutionality of NRS 52.380. *See* Defs.' Exhibit G, p.3.  
19 In *Davis*, Discovery Commissioner Truman ruled NRS 52.380 created substantive rights for  
20 Rule 35 examinations and allowed the exam with an observer and recording under the statute,  
21 acknowledging that issue may ultimately be determined by the Supreme Court. *Id.* at p.9; *see*  
22 *also* 08/18/2020 DCR&R in the *Davis v. Bridewell* district court case. The writ issue in *Davis*  
23 is focused on whether the statute is procedural or substantive and thus constitutional. *Id.* at p.11-  
24 12. The DCR&R was adopted by Judge Denton. In *Davis*, the parties then stipulated to a stay  
25 so the constitutionality of the statute is determined. *See* Defs.' Exhibit I.

26 ***Green v. Ferrellgas, Inc., Case no. A-19-795381:***

27 In *Green*, the defendants included Ferrellgas, Inc., Mario S. Gonzales, Carl J. Kleisner.  
28 *See* Defs.' Exhibit J. Defendant Kleisner was and is represented by Chilly Willy's same counsel,





1 Brent Quist, Esq. of Dennett Winspear, LLP. *Id.* at p.2. Judge Kishner adopted in part and  
2 modified in part Commissioner Truman’s recommendations, allowing the Rule 35 exam with  
3 parameters under Rule 35 for good cause. *See* 03/02/21 Order in the district court.

4 While the issue in the *Green* writ concerns whether or not good cause was established  
5 under Rule 35 for an observer and recording under the facts and evidence of that specific case  
6 (*see* Defs.’ Exhibit K, p.5), that issue is case and factually specific with a very highly  
7 discretionary standard difficult to overturn. Not surprisingly, Chilly Willy’s counsel in *Green*  
8 also elected to retain of course **Dr. Etkoff**. *See id.* at p.13.

9 *Green* is important for several reasons. First, Defendants misrepresent that Dr. Etkoff’s  
10 belated affidavit provided during its Objection but not during the discovery proceedings was  
11 purportedly unavailable at the time (which it does in its writ and motion to stay). This is an  
12 intentionally misleading and false statement made to the Court, sanctionable under EDCR 7.60,  
13 Rule 11, and ethical rules violating a duty of candor, among other things, both against the  
14 defendants and their signed attorneys who counseled such misconduct. In fact, Defendants were  
15 procuring extensions in *Cape*—under the guise that Dr. Etkoff was not available for 5 or so  
16 months—while at the same time filing motions to stay in the *Green* writ case in the Supreme  
17 Court. *See* Defs.’ Exhibit M, 07/02/21 *Green* case Motion to Stay. Defendants have lost all  
18 credibility.

19 Second, *Green* also proves Defendants, through their counsel, specifically and  
20 intentionally retained an expert (and provided no evidence of speaking to any others) that they  
21 specifically knew would not proceed with or conduct the DME under Rule 35’s good cause  
22 parameters under any circumstances, and now Defendants are stuck with this strategic misstep  
23 and cannot be heard to claim harm or prejudice now.

24 Third, the *Cape* case is also different than these others. For example, while petitioners  
25 argue the plaintiff in *Green* only provided one affidavit to support good cause showing that the  
26 parameters can ethically be imposed, Mr. Cape provided *numerous* affidavits, ethical guidelines  
27 allowing compliance with local laws and parameters, detailed legislative history and testimony,  
28 and other evidence, all establishing good cause in *Cape*. Because the court could find on the



1 record in *Cape* that good cause was shown, it will not be overturned. *Cape* is thus uniquely  
2 situated from these other cases on both the issues and the facts.

3 ***Felsner v. Yusi*, Care No. A-18-781000-C:**

4 There is also a fourth writ case referenced in Defendants' Motion, *Yusi v. District Court*,  
5 Supreme Court Case No. 82625, which Defendants do not provide as an exhibit to their motion  
6 to stay. A stay of all discovery was denied in the district court by Judge Allf, allowing an  
7 extension of only the expert and discovery deadlines (Defendants here do not seek an extension  
8 or alternative relief to a full stay). *See* 03/30/2021 Order in district court. To Plaintiff's  
9 knowledge a full stay has not been ordered in the appellate court to date either according to the  
10 docket though a motion appears to have been filed in October 2021.

11 Here in *Cape*, Defendants also seek a stay of all discovery which should also be denied,  
12 and do not alternatively seek an extension of any deadlines in their Motion, and thus no partial  
13 or alternative relief should be afforded to Defendants either. The *Yusi* writ case largely concerns  
14 whether *Valley Health* precludes parties from raising new issues in their Objection—another  
15 reason Defendants leave it out of their exhibits—and whether NRS 52.380 is procedural and  
16 unconstitutional.

17 **III. THE FACTORS ALL WEIGH IN FAVOR OF DENYING A STAY OF ALL**  
18 **PROCEEDINGS IN *CAPE*.**

19 In considering whether to grant a stay pending resolution of a writ petition, the Court is  
20 guided by the following factors: (1) whether the object of the petition will be defeated if the stay  
21 is denied; (2) whether the petitioner will suffer irreparable or serious injury if the stay is denied;  
22 (3) whether the real party in interest will suffer irreparable or serious injury if the stay is granted;  
23 and (4) whether the petitioner is likely to prevail on the merits of the writ petition. NRAP 8(c).  
24 A strong showing on some factors may counterbalance weak factors. *Mikohn Gaming Corp. v.*  
25 *McCrea*, 120 Nev. 248, 251, 89 P.3d 36, 38 (2004). Here, all factors strongly weigh against a  
26 stay.

27 Defendants seek a stay so that the constitutional issue surrounding NRS 52.380 can be  
28 addressed before *any* more discovery occurs, which is an overbroad request as to all discovery,



1 holding this case hostage and causing severe prejudice to Plaintiff. Here, however, Defendants  
2 waived any constitutional challenge for failure to properly serve the State, which is notable  
3 because Defendants in this case thus have no chance for a likelihood of success on the  
4 constitutionality of the rulings at issue making a stay particularly inappropriate in this case. (*See*  
5 Defs.’ Exhibit B p.2: “IT IS FURTHER ORDERED that Defendant’s constitutionality argument  
6 is waived due to his failure to serve the Secretary of State pursuant to NRS 30.130.”); (*see also*  
7 Plaintiff’s Opposition to Motion to Compel, failure to confer on constitution). Having waived  
8 that issue, NRS 52.380 stands and allows for an observer and recording in this case.

9 Plaintiff incorporates his arguments from his Oppositions and exhibits concerning the  
10 constitutionality of NRS 52.380 by this reference for brevity. Among other things, the statute  
11 provides for substantive rights, Rule 35 does not foreclose DME parameters under any  
12 circumstances though it’s federal counterpart does, statutes are presumed constitutional, and the  
13 statute is rationally related to a legitimate interest as detailed in Plaintiff’s Oppositions, among  
14 other reasons. But, even had Defendants not waived constitutionality arguments, this case is  
15 uniquely situated from the others and stands on its own for other reasons too.

16 Here, the Order granting the DME parameters also did so under Rule 35 for “good  
17 cause,” not solely ordering the parameters under NRS 52.380 as automatic. Rule 35 expressly  
18 allows such parameters for mental DMEs for good cause, which the record supports here, and  
19 which is a highly discretionary ruling allowed to a district court and very unlikely to be  
20 overturned.

21 Once again, Defendants therefore have little to no likelihood of success regardless of the  
22 impact of the other writs, or their own writ, on NRS 52.380. Defendants reliance on an outlier  
23 non-controlling federal district court case is not persuasive here, particularly given its based on  
24 FRCP 35 which contains no good cause allowance for an observer and recording, unlike NRCF  
25 35 which does. In any event, the federal district court case Defendants rely on ruled with respect  
26 to NRS 52.380 not applying in federal court (but which it does in state court) and even  
27 specifically noted Dr. Etcoff has recorded his exams in past and thus belies their arguments  
28 anyways.



1 Uniquely here, Defendants' writ has the audacity to try and *undo Rule 35's good cause*  
2 *provision*, not just NRS 52.380—an issue the Supreme Court is *not* taking up. Defendants' writ  
3 argues through an untimely affidavit of Dr. Etcoff and defense counsel that no parameters can  
4 ever be ordered as, purportedly, no neuropsych DME could ever take place with them, a notion  
5 unsupported by Defendants here and completely refuted by the numerous affidavits presented  
6 by Plaintiff in the prior briefing in Opposition to the Motion to Compel and Opposition to  
7 Objection to DCR&R, incorporated by this reference.

8 Defendants did not present the Etcoff affidavit during the discovery proceedings but had  
9 it prepared for their Objection to DCR&R once they lost on the parameters, and therefore, it  
10 cannot be considered by the district court or the appellate court. *Valley Health Sys., LLC v. Dist.*  
11 *Court*, 127 Nev. 167, 173, 252 P.3d 676, 680 (2011). Any suggestion by Defendants that the  
12 statements in Dr. Etcoff's belated affidavit were purportedly unavailable at the time is  
13 disingenuous and frankly sanctionable, given he has been involved in the writs on other cases  
14 refusing to conduct DMEs outside secret proceedings for years. Thus, Defendants have no  
15 actual support for such an argument.

16 Defendants have also not otherwise shown that DMEs will come to a standstill if the  
17 Supreme Court upholds NRS 52.380 or Rule 35's good cause condition. Dr. Etcoff, a notorious  
18 defense hired gun, appears to be the basis for most of the challenges to the law, and one or two  
19 defense oriented persons should not be able to hold up all these cases due to their preference to  
20 conduct the exams in secret. In this case, Dr. Etcoff is the sole basis for the writ as Defendants  
21 have offered no other evidence of purportedly 'all other examiners' refusing to do any under the  
22 law, and his affidavit cannot even be considered anyways. Again, the numerous affidavits  
23 offered by Plaintiff in the various briefing that not only permit for such parameters but opine the  
24 parameters should be imposed to prevent the documented abuses belie Dr. Etcoff's contention.<sup>2</sup>

---

25  
26 <sup>2</sup> See, incorporated in full by this reference, Plaintiff's Opposition to Motion to Compel: Exhibit  
27 1, Affidavit of Dr. Richard I. Frederick, PH.D.; Exhibit 2, American Academy of Psychiatry  
28 Law article "Videotaping of Forensic Psychiatric Evaluations."; Exhibit 3, Affidavit of DR.  
Howard V. Zonana; Exhibit 4, Affidavit of Dr. Harry D. Krop, PH.D.; Exhibit 5, Affidavit of  
Dr. Jacqueline C. Valdes, PH.D.; Exhibit 6, Affidavit of Dr., Fred J. Petrilla Jr., PH.D.



Defendants’ attempt to frame the issue as to Nevada licensed physicians only is also unavailing because the laws apply to all physicians who conduct DMEs here, and the ethics guidelines specifically allow for physicians to follow the laws and parameters ordered in the various jurisdictions. The American Psychological Association (“APA”) has issued specific Guidelines for forensic psychology that provide for and allow fairness, transparency, and compliance with the law:

**Guideline 7.01: Conflicts With Legal Authority**

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**

... 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.

See Opposition to Motion to Compel, Exhibit 9, incorporated by this reference. Dr. Etcoff’s (unsupported) preference/position that DMEs cannot be done with observer and recording parameters is false and totally without merit. Plaintiff incorporates his Oppositions and exhibits showing how it is not unethical to conduct exams with the parameters and how the exams



1 actually can benefit thereby. Defendants have no likelihood of success on their writ as they seek  
2 to undo the parameters under any and all circumstances.

3 Defendants have made no showing the object of their writ will be defeated if a stay of  
4 all discovery is not entered. The case should be allowed to proceed and not held hostage by Dr.  
5 Etcoff's preferences. Defendants made the calculated choice to retain Dr. Etcoff who they knew  
6 refused to do the DMEs within the parameters allowed by law. They then procured an extension  
7 of deadlines to push the expert deadline out in the hopes the law would be changed by then, and  
8 when it was not, they now seek to stay the case in its entirety. The harm to Defendants is minimal  
9 if there is any, and it is of their own doing.

10 NRS 52.380 and Rule 35 with its good cause condition was and is the state of the law  
11 when Defendants' chosen expert, Dr. Etcoff, was selected and hired, and at minimum, Rule 35's  
12 good cause condition will still remain the state of the law no matter what happens in the appellate  
13 court as to NR 52.380. Dr. Etcoff is the defense expert at issue in many of the writs Defendants  
14 reference that have been pending for over a year and Defendants deliberately selected him with  
15 eyes wide open, knowing he refuses to follow the law *under any circumstances*.

16 Any prejudice to Defendants is a direct result of their own calculated choices, and the  
17 writ will not be defeated absent a stay because Rule 35's good cause condition, under which the  
18 parameters were ordered here, will remain anyways, and Dr. Etcoff will still be unable to do the  
19 DME under his own reasoning and statements he made under penalty of perjury. In essence,  
20 Dr. Etcoff has backed himself into a corner and is effectively out of the defense expert  
21 neuropsych business in Nevada which allows for the parameters under Rule 35 for good cause,  
22 and will remain doing so after the appellate court rules on the writs.

23 Defendants have also conducted a DME already with neurologist Dr. Ginsburg, a  
24 diplomat member of the American Board of Psychiatry and Neurology. *See* Exhibit 1 Notice of  
25 Rule 35 Exam. Dr. Ginsburg and plaintiff allowed this DME to be recorded. The prejudice to  
26 Defendants is minimal, if any, and again, of their own doing.

27 If NRS 52.380 is held unconstitutional, the DME *with parameters* here will still be in  
28 effect because it was ordered under Rule 35's good cause requirement too. The appellate court



1 is not considering whether Rule 35's good cause requirement is unconstitutional or permissible;  
2 that issue is fact and case specific. Even Defendants acknowledge the Supreme Court wrote  
3 Rule 35 which allow the parameters under certain circumstances, which Defendants also argue  
4 should control over NRS 52.380. Thus, Dr. Etcoff is unable to serve as the expert examiner in  
5 this or any other Rule 35 good cause case regardless of the outcome of the constitutionality of  
6 NRS 52.380, and Defendants will not suffer irreparable harm if the stay is not granted. Dr.  
7 Etcoff has made it clear he will not conduct any DME with such parameters, and thus, knowing  
8 this all along, Defendants should have retained an expert that would.

9 However, in contrast, the prejudice to Plaintiff is severe. Plaintiff is severely injured,  
10 his case has been pending for a long time, the case has been extended at Defendants'  
11 disingenuous requests already, Plaintiff has sat for another DME already and his deposition, and  
12 Plaintiff is entitled to his day in court and to proceed with his case. A full stay as Defendants  
13 request has no end in sight and has been pending for years in other cases.

14 This case has been delayed by Defendants calculated tactics already. Defendants  
15 procured an extension about 6 months in advance of deadlines to push the deadline out further  
16 on the notion that Dr. Etcoff was only available 6 months later in November, all the while he  
17 never intended to proceed with it with under any of the legal parameters. Indeed, Plaintiff  
18 traveled to town for a week in November and sat for one DME and his deposition, and was back  
19 in December and could have sat for Dr. Etcoff's DME in these months. However, Defendants  
20 elected not to proceed. When conferring with Defendants, Defense counsel and their chosen  
21 expert refused to do the DME within the deadline because they refused to do it all with any  
22 parameters. *See Loosvelt Declaration.*

23 Consequently, Defendants have put themselves into this situation themselves be  
24 deliberate and calculated conduct and choices. The factors all favor denial of a stay because  
25 Defendants do not have a likelihood of success, there is great harm to Plaintiff if a full stay of  
26 all proceedings is imposed, the object of the writ will not be defeated if a stay is denied, and  
27 Defendants will not suffer any harm, but which is of their own doing anyways.

28 ///





1 **IV. CONCLUSION**

2 For the foregoing reasons and arguments, this Court should deny Defendants' motion for  
3 a stay.

4 DATED this 22<sup>nd</sup> day of December, 2021

6 **GGRM LAW FIRM**

7 */s/ Ryan A. Loosvelt*

8 **DILLON G. COIL, ESQ.**

9 Nevada Bar No. 11541

10 **RYAN A. LOOSVELT, ESQ.**

11 Nevada Bar No. 8550

12 2770 S. Maryland Pkwy, Ste. 100

13 Las Vegas, NV 89109

14 *Attorneys for Plaintiff*





1 **CERTIFICATE OF SERVICE**

2 Pursuant to NRCP 5(b), I certify that I am an employee of GGRM LAW FIRM, and that  
3 on this 22<sup>nd</sup> day of December, 2021, I caused the foregoing document entitled **PLAINTIFF'S**  
4 **OPPOSITION TO DEFENDANTS' MOTION TO STAY CASE PENDING WRIT OF**  
5 **MANDAMUS ON AN ORDER SHORTENING TIME** to be served upon those persons  
6 designated by the parties in the E-service Master List for the above-referenced matter in the  
7 Federal Court E-filing System in accordance with the mandatory electronic service requirements  
8 of Administrative Order 14-2 and the Nevada Electronic Filing and Conversion Rules.

9  
10 */s/ Danielle Glave*

11 \_\_\_\_\_  
12 An Employee of GGRM LAW FIRM

EXHIBIT “1”

EXHIBIT “1”

RYAN L. DENNETT, ESQ.  
Nevada Bar No. 005617  
[rdennett@dennettwinspear.com](mailto:rdennett@dennettwinspear.com)  
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Telephone: (702) 839-1100  
Facsimile: (702) 839-1113  
**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.

**NOTICE OF RULE 35 EXAMINATION OF PLAINTIFF TAYLOR MILES CAPE TO BE  
CONDUCTED BY DAVID L. GINSBURG, M.D.**

TO: Plaintiff TAYLOR MILES CAPE and his attorneys

PLEASE TAKE NOTICE that on the **November 16, 2021 at the hour of 4:00 p.m.** a Rule  
35 examination of Plaintiff TAYLOR MILES CAPE will be conducted by Dr. David L. Ginsburg,  
M.D. at his office located at 851 S. Rampart Blvd. Suite 115, Las Vegas, NV 89145.

If Plaintiff fails to appear for the examination and/or timely cancel the examination, Plaintiff  
will be subject to Dr. Ginsburg's cancellation fees per his attached fee schedule.

Paperwork to be completed and sent to Dr. Ginsburg at least one (1) week prior to the  
scheduled exam is attached hereto.

///

///

APP000043

1 If you require the services of an interpreter at the examination, please notify counsel at  
2 least five (5) business days prior to the scheduled exam.

3 DATED this 16<sup>th</sup> day of August, 2021.

4  
5 **DENNETT WINSPEAR, LLP**

6  
7 By /s/ Brent D. Quist  
8 RYAN L. DENNETT, ESQ.  
9 Nevada Bar No. 005617  
10 BRENT D. QUIST, ESQ.  
11 Nevada Bar No. 009157  
12 3301 N. Buffalo Drive, Suite 195  
13 Las Vegas, Nevada 89129  
14 Telephone: (702) 839-1100  
15 Facsimile: (702) 839-1113  
16 ***Attorneys for Defendant, Chilly Willy's***  
17 ***Handyman Services, LLC***  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**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 **NOTICE OF RULE 35 EXAMINATION OF PLAINTIFF TAYLOR MILES CAPE TO BE CONDUCTED BY DAVID L. GINSBURG, M.D.** on all parties to this action by the following method:

\_\_\_\_\_ Facsimile  
\_\_\_\_\_ Mail  
  X   Electronic Service

Ryan A. Loosvelt, Esq.  
Nevada Bar No. 8550  
**GREENMAN GOLDBERG RABY & MARTINEZ**  
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***Attorneys for Plaintiff,  
Taylor Miles Cape***

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Telephone: 702.228.6800  
Facsimile: 702.228.0443  
***Attorneys for Defendant  
David G. Martinez***

DATED this   17<sup>th</sup>   day of August, 2021.

          /s/ Ashley Marchant            
an Employee of DENNETT WINSPEAR, LLP

**DAVID L. GINSBURG, M.D.**

**BUSINESS ADDRESS**  
**851 S. RAMPART BLVD.**  
**SUITE 115**  
**LAS VEGAS, NV 89145**

**REMIT ADDRESS**  
**8550 W. CHARLESTON BLVD.**  
**SUITE 102-213**  
**LAS VEGAS, NV 89117**

**FEE SCHEDULE**

Records Review; paid. Deposition and Trial Preparation; Meetings and Phone Conferences	\$800.00/ Hr. The report will be sent after all charges have been
IME	\$3,500.00 An IME appointment will include the interview and examination by the physician, and an Independent Medical Evaluation Report. Additional time spent reviewing records will be billed at \$800.00 per hour or part thereof. The IME fee must be received one week in advance of the appointment. If not received, the appointment will be canceled. If the examinee does not show for the appointment, a fee of \$1,500.00 will be required to reschedule the IME.
Deposition	\$3,000.00 for two hour deposition, payable one week in advance. \$1,500.00 for each additional hour. If the deposition is canceled less than 7 days prior, a fee of \$1,500.00 will be required to reschedule the deposition.
Video Deposition	\$4,000.00 for two hour video deposition, payable one week in advance. \$2,000.00 for each additional hour. If the deposition is canceled less than 7 days prior, a fee of \$2,000 will be required to reschedule the deposition
Expert Witness or Arbitration Testimony	\$6,000.00 per 4 hour timeblock (local). Pre-payment of the retainer is required one week in advance.
Out of Town Services	\$14,000.00 per day plus travel related expenses, payable one week in advance. Travel/lodging/transfers to be arranged and paid by requesting party.
Cancellation Policy	7 days or less - no refund. Over 7 days - 50% refund.

**PLEASE NOTE: PRE-PAYMENT MINIMUM ONE WEEK IN ADVANCE IS REQUIRED. WORK WILL COMMENCE ONCE SIGNED AUTHORIZATION HAS BEEN RECEIVED.**

**ALL CHECKS PAYABLE TO GINSBURG NEUROLOGY PLLC**  
**8550 W. CHARLESTON BLVD.**  
**SUITE 102-213**  
**LAS VEGAS, NV 89117**

**TAX ID: 82-2274803**

Fees subject to change.

Reviewed 10/18

APP000046

**DAVID L. GINSBURG, M.D.**

DIPLOMATE, AMERICAN BOARD OF PSYCHIATRY AND NEUROLOGY  
AND AMERICAN BOARD OF ELECTRODIAGNOSTIC MEDICINE

**APPOINTMENT**

**ADDRESS:**

851 S. RAMPART BLVD. STE. 115  
LAS VEGAS, NV 89145

**CROSS STREETS:**

RAMPART/CHARLESTON

**BUILDING**

**INFORMATION:**

SIR. WILLIAMS COURT  
WHITE 2-STORY BUILDING WITH PILARS

Please fax IME paperwork 1 week prior to your scheduled appointment to (fax) 702-778-9301.

**DO NOT GO TO:**

1707 West Charleston Ste. 220  
Las Vegas, NV 89102

DAVID L. GINSBURG, M.D.  
ADULT NEUROLOGY  
DIPLOMATE, AMERICAN BOARD OF PSYCHIATRY AND NEUROLOGY  
AND AMERICAN BOARD OF ELECTRODIAGNOSTIC MEDICINE

**Independent Medical Evaluation – Patient Information**

(Please Print)

Patient \_\_\_\_\_  
Last Name First Name Middle Name

Street Address: \_\_\_\_\_

City: \_\_\_\_\_ State: \_\_\_\_\_ Zip Code: \_\_\_\_\_

Home Phone: \_\_\_\_\_ S.S. # \_\_\_\_\_ Age: \_\_\_\_\_ D.O.B. \_\_\_\_\_

Sex ☐ M ☐ F

Single ☐ Married ☐ Widowed ☐ Separated ☐ Divorced ☐

Employed by: \_\_\_\_\_ Address: \_\_\_\_\_

Occupation: \_\_\_\_\_ Business Phone: \_\_\_\_\_

Spouse's Name: \_\_\_\_\_

Occupation: \_\_\_\_\_ Business Phone: \_\_\_\_\_

Who referred you to us for this examination? \_\_\_\_\_

AUTHORIZATION: I hereby authorize physical examination/treatment of the person name above.

I further authorize Nevada Neurological Consultants, Ltd. To release all medical information obtained as the result of this Independent Medical Examination to the party or parties who ordered this examination and who will be making payment for the physician's services.

\_\_\_\_\_  
Date

\_\_\_\_\_  
Signature of Patient or Responsible Party

\_\_\_\_\_  
Relationship if other than Patient



Patient Questionnaire

Patient Name: \_\_\_\_\_ D.O.B. \_\_\_\_\_

Type of Injury: Describe how you were injured and how the injury happened.

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History of Injury: Did you see a doctor immediately, or go to a hospital, etc. What was the treatment at the first doctor's visit?

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Related History: Describe the later treatment, by whom and its results.

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Job Description: Give your official occupation title, at the time of your injury. How long had you been working this position?

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Daily Work Activities: Describe what you did in your occupation on an average day. What percentage of time did you sit, stand, walk, climb, drive, etc... Did you do any lifting if so, how heavy and how often? Did you do pushing or pulling objects?

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Current Subjective Complaints: Describe in your own words the problems that you are having now, i.e., pain, discomfort, etc. List all locations on your body where you are having problems that were caused by the accident.

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1. Is your complaint present every day? At night? Only with certain movements? Is it initiated with any particular movement?

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2. Does anything make any improvement in your condition? (rest, avoiding certain activities, medications)

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3. Please answer every section below. In each section underline only one sentence that best applies to you.

#### Section 1 – Pain Intensity

I have no pain.

I have pain, but I do not take medication.

The pain is reduced (some, all, or not helped) by medicine.

Pain medication has no effect, so I do not take any.

#### Section 2 – Personal Care (washing, dressing, etc.)

I can look after myself without help.

I can look after myself but have some pain.

I can look after myself but am very slow and careful.

I can look after myself but need help occasionally.

I need help daily in most aspects of self care.

#### Section 3 – Lifting

I can lift everything without pain.

I can lift everything but have pain.

I cannot lift everything, but this is not a nuisance.

I cannot lift everything, and this is a nuisance.

I can lift only very light objects (with or without difficulty)

I cannot lift anything at all.

#### Section 4 – Walking

Pain does not prevent me from walking as far as I want.

I have to walk slowly and not as far because of pain.

I walk slowly and have to take frequent rests.

I always use a cane or crutches.

I am in bed or lying down most of the day.

#### Section 5 – Activities

I can stand \_\_\_\_\_ minutes without pain before having to sit.

I can stand \_\_\_\_\_ hours without pain before having to sit.

I can walk \_\_\_\_\_ minutes without pain before having to stop.

I can walk \_\_\_\_\_ hours without pain before having to stop.

I can sit \_\_\_\_\_ minutes without pain before having to move.

I can sit \_\_\_\_\_ hours without pain before having to move.

#### Section 6 – Sitting

I can sit only when I have to.  
I avoid sitting as much as possible.  
I never sit, even for meals.

#### Section 7 – Sleeping

I am able to sleep well.  
I have some pain at night, but I sleep well.  
I have to take sleeping medication in order to sleep.  
Even when I take sleeping tablets, I do not sleep well.  
Even when I take sleeping tablets, I sleep less than three hours.  
Even when I take sleeping tablets, I do not sleep at all.

#### Section 8 – Traveling

I have no pain and no restrictions for traveling.  
I have pain during and after a trip, but traveling is not restricted.  
I am restricted to short journeys.  
I only travel occasionally.  
The only time that I travel is to a doctor or medical clinic.

#### Section 9 – Social Life

I have no pain and lead an active social life.  
I have some pain, but I lead a satisfactory social life.  
Pain has reduced my social life. I do not go out as often.  
Pain has stopped my social life. I never go out.

#### Section 10 – Sports

I played the following sports before the accident/injury: \_\_\_\_\_

I played them on a regular basis, \_\_\_\_\_ times a week or month prior to the injury. My pain prevents me from playing the following sports: \_\_\_\_\_

My pain only allows me to play \_\_\_\_\_ at a frequency of \_\_\_\_\_ times per week.

I am unable to play any sports because of my pain.

## Section 11 – Sexual Life

My sex life is normal.

My sex life is normal but increases my pain.

My sex life is restricted by pain.

My sex life is severely restricted by pain.

My sex life is absent because of my pain.

4. Describe our routine daily activity. (bed rest, light activity at home, sedentary)

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5. In your opinion, are your complaints getting better, worse or staying the same?

How are they getting worse?

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6. Were you ever hospitalized for this condition? Did you have surgery? How many times in the hospital and where?

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7. Do you use any assistive devices (cane, brace)? How often do you use these?  
How does it help you?

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Have you had any previous work related injuries? If so, please list type, extent of injury and date. Was there any legal settlement?

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Have you been involved in any accident (i.e., traffic, not work related)? Please list.  
Was there any litigation and what was the outcome of the accident?

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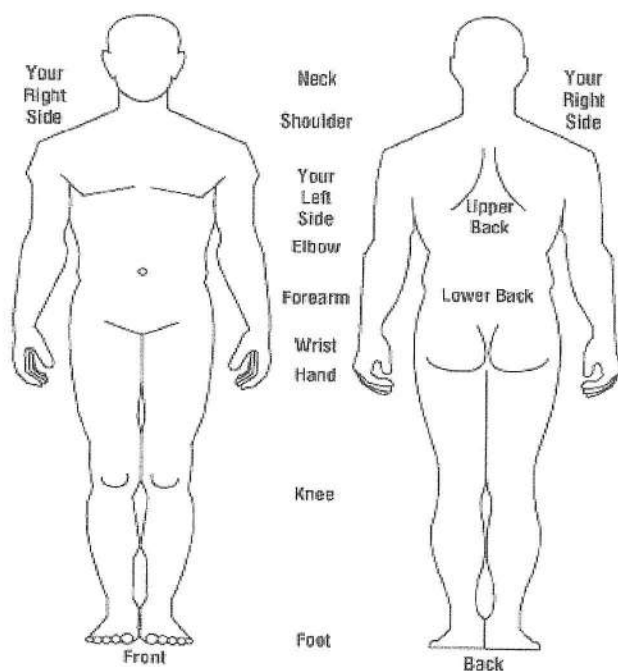
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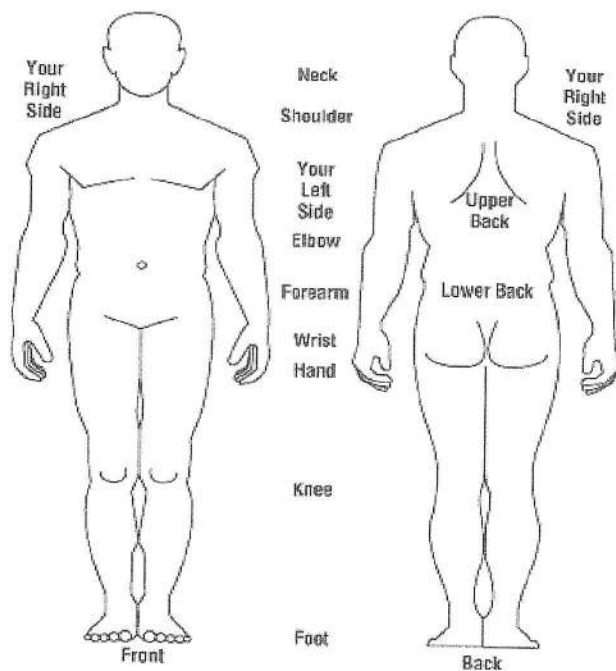
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Please indicate all areas where you feel pain.



Please indicate all areas where you are numb.



Social History:

Please Circle Answer:

Marital Status:      Single      Married      Separated      Divorced      Widowed

Are you living with your husband or wife?..... Yes    No

Do you have dependents at home?..... Yes    No

Are you employed?..... Yes    No

Full time \_\_\_\_\_ Part Time \_\_\_\_\_

What is your job? \_\_\_\_\_

Are you exposed to fumes, dust or solvents? \_\_\_\_\_

How much time have you lost from work because of your health during the past?

Six months \_\_\_\_\_ One year \_\_\_\_\_ Five years \_\_\_\_\_

Alcoholic beverages:

Never \_\_\_\_\_  
Rarely \_\_\_\_\_  
Moderately \_\_\_\_\_  
Daily \_\_\_\_\_  
Ever (?) \_\_\_\_\_

Tobacco:

Cigarettes \_\_\_\_\_ Packs a day  
Don't Smoke \_\_\_\_\_  
Ever smoked (?) \_\_\_\_\_

Education:

Years  
Grade School \_\_\_\_\_  
High School \_\_\_\_\_  
College \_\_\_\_\_  
Postgraduate \_\_\_\_\_



Family History:

	<u>Living:</u> Age and Health	<u>Deceased:</u> Age and Cause
Father	_____	_____
Mother	_____	_____
Brother/Sister	_____	_____
	_____	_____
	_____	_____
Husband/Wife	_____	_____
Son/Daughter	_____	_____
	_____	_____
	_____	_____
	_____	_____

Has any blood relative ever had?

	<u>Please Circle Answer</u>	
	Yes	No
Cancer.....		
Tuberculosis.....		
Diabetes.....		
Heart Trouble.....		
High Blood Pressure.....		
Stroke.....		
Convulsions.....		
Suicide.....		
Psychiatric Treatment.....		
Bleeding Tendency.....		
Gout or other Arthritis.....		
Headaches/Migraines.....		

Health History:

Childhood:

	<u>Please Circle Answer</u>	
Measles.....	Yes	No
Mumps.....	Yes	No
Chicken Pox.....	Yes	No
Rheumatic fever or heart disease.....	Yes	No
Congenital abnormalities.....	Yes	No
Other serious diseases.....	Yes	No

\_\_\_\_\_

\_\_\_\_\_

Adult:

	<u>Please Circle Answer</u>	
Diabetes.....	Yes	No
Strokes.....	Yes	No
Tuberculosis.....	Yes	No
Venereal.....	Yes	No
Hypertension.....	Yes	No
Have you had any serious illness?.....	Yes	No
Have you ever been hospitalized or been under medical care very long?.....	Yes	No
If Yes, for what reason?	Yes	No

\_\_\_\_\_

\_\_\_\_\_

Operations:

Have you had any surgery?..... Yes No

List: \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

Injuries:

Have you had any broken bones?..... Yes No

Have you had any head concussions or injuries? ..... Yes No

Have you ever been knocked unconscious?..... Yes No

\_\_\_\_\_

\_\_\_\_\_

Medications:

List your current medications, amount take and frequency.

Medication: _____	Amount: _____	Frequency _____
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____

Systemic Review: Do you have any of the following?

General:

Recent weight change?.....  
 Have you been good general health most of your life?.....  
 Height \_\_\_\_\_ Weight \_\_\_\_\_

Please Circle Answer

Yes No  
 Yes No

Skin:

Skin Disease.....  
 Jaundice.....  
 Hives, eczema or rash.....  
 Frequent infection or boils.....  
 Abnormal pigmentation.....

Yes No  
 Yes No  
 Yes No  
 Yes No  
 Yes No

Head - Eyes - Ears - Nose - Throat:

Eye disease or injury.....  
 Do you wear glasses?.....  
 Double vision.....  
 Headaches.....  
 Glaucoma.....  
 Itching eyes or nose.....  
 Sneezing or runny nose.....  
 Nosebleeds.....  
 Chronic sinus trouble.....  
 Ear disease.....  
 Impaired hearing.....  
 Dizziness or transient episodes of unconsciousness.....

Yes No  
 Yes No  
 Yes No  
 Yes No  
 Yes No  
 Yes No  
 Yes No  
 Yes No  
 Yes No  
 Yes No  
 Yes No

Neck:

Stiffness.....  
 Thyroid trouble.....  
 Enlarged glands.....

Yes No  
 Yes No  
 Yes No

Respiratory:

URI (cold) now.....  
 Spitting up blood.....  
 Chronic or frequent cough.....  
 Asthma or wheezing.....  
 Difficulty breathing.....  
 Pleurisy or pneumonia.....  
 Bronchitis.....  
 Any other trouble with lungs.....

Yes No  
 Yes No  
 Yes No  
 Yes No  
 Yes No  
 Yes No  
 Yes No  
 Yes No

Cardiovascular:

Chest pain or angina pectoris.....  
 Shortness of breath with walking or lying down.....  
 Difficulty walking two blocks.....

Yes No  
 Yes No  
 Yes No

Heart trouble or heart attacks.....	Yes	No
High Blood Pressure.....	Yes	No
Swelling of hands, feet or ankles.....	Yes	No
<u>Systemic Review:</u> (continued)      Do you have any of the following?		

Awakening in the night smothering.....	Yes	No
Heart murmur.....	Yes	No

Gastrointestinal:

Peptic ulcer (stomach or duodenal).....	Yes	No
Vomiting blood or food.....	Yes	No
Gallbladder disease.....	Yes	No
Liver trouble.....	Yes	No
Hepatitis.....	Yes	No
Painful bowel movements.....	Yes	No
Black stools.....	Yes	No
Hemorrhoids or piles.....	Yes	No
Recent change in bowel habits.....	Yes	No
Frequent diarrhea.....	Yes	No
Heartburn or indigestion.....	Yes	No
Cramping or pain in the abdomen.....	Yes	No
Does food stick in throat?.....	Yes	No

Genitourinary:

Loss of urine.....	Yes	No
Frequent urination.....	Yes	No
Night time urinating.....	Yes	No
Burning or painful urination.....	Yes	No
Blood in urine.....	Yes	No
Kidney trouble.....	Yes	No
Kidney stones.....	Yes	No
Bright's disease.....	Yes	No

Gynecological:

Age period started _____		
How long so periods last? _____ days		
Number of pregnancies _____		
Number of miscarriages _____		
Date of last cancer smear and results _____		
Frequency of periods, every _____ days		
Date of first day of last period _____		
Number of children _____ Ages _____		
Any pain with your periods?.....	Yes	No

Locomotor-Musculoskeletal:

Varicose veins.....	Yes	No
Weakness of muscles or joints.....	Yes	No
Any difficulty in walking.....	Yes	No



Any pain in calves or buttocks from walking, relieved by rest?      Yes      No

Systemic Review: (continued)      Do you have any of the following?

Neuropsychiatric:

Have you ever had psychiatric care?.....	Yes	No
Have you been advised to see a psychiatrist?.....	Yes	No
Do you ever have, or have had, fainting spells?.....	Yes	No
Convulsions.....	Yes	No
Paralysis.....	Yes	No

Hematologic:

Are you slow to heal after cuts?.....	Yes	No
Blood disease.....	Yes	No
Anemia.....	Yes	No
Phlebitis.....	Yes	No
Have you had abnormal bruising or bleeding?.....	Yes	No
Have you had difficulty with bleeding excessively after a tooth extraction or surgery?.....	Yes	No

Endocrine:

Thyroid disease.....	Yes	No
Hormone therapy.....	Yes	No
Any change in hat or glove size?.....	Yes	No
Any change in hair growth?.....	Yes	No
Have you become colder than before or skin becomes drier?.....	Yes	No

Allergic:

Any allergies, including medication.....	Yes	No
List all allergies, including medications, and type of reaction.		

Allergy: _____	Type of reaction: _____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____

Allergies and Sensitivities:

1. Is there a history of skin reaction or other unfavorable reaction or sickness following injection or oral administration of:

Please Circle Answer

Penicillin or antibiotics.....	Yes	No	Don't Know
Morphine, Codeine, Demerol or other narcotics.....	Yes	No	Don't Know
Novocain or other anesthetics.....	Yes	No	Don't Know
Aspirin, empirin or other pain remedies.....	Yes	No	Don't Know
Tetanus antitoxin or other serums.....	Yes	No	Don't Know
Adhesive tape.....	Yes	No	Don't Know
Iodine or Merthiolate.....	Yes	No	Don't Know
Any other drug or medication.....	Yes	No	Don't Know
Any foods, such as egg, milk or chocolate.....	Yes	No	Don't Know

2. (Drugs Recently Taken)

Within the past six months has patient taken:

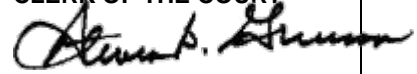
Cortisone.....	Yes	No	Don't Know
ACTH.....	Yes	No	Don't Know
Anticoagulants.....	Yes	No	Don't Know
Tranquilizers.....	Yes	No	Don't Know
Hypotensive (high blood pressure medications)....	Yes	No	Don't Know
Aspirin.....	Yes	No	Don't Know
Has the patient ever received treatment for;			
Asthma, rheumatism or rheumatic fever?.....	Yes	No	Don't Know

Source of information, if other than patient: \_\_\_\_\_

Signature of person acquiring this information: \_\_\_\_\_

Signature of Patient: \_\_\_\_\_ Date: \_\_\_\_\_

Signature of Doctor: \_\_\_\_\_ Date: \_\_\_\_\_



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Facsimile: (702) 839-1113  
**Attorneys for Defendant, Chilly  
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,

**HEARING REQUESTED**

Defendants.

**REPLY IN SUPPORT OF DEFENDANTS' MOTION TO STAY CASE PENDING WRIT OF  
MANDAMUS ON AN ORDER SHORTENING TIME**

Defendants CHILLY WILLY'S HANDYMAN SERVICES, LLC, by and through its counsel  
of record, DENNETT WINSPEAR, LLP, and DAVID G. MARTINEZ, by and through his counsel  
of record, KEATING LAW GROUP, hereby submit their Reply in Support of their Motion to Stay  
Case Pending Writ of Mandamus on an Order Shortening Time.

**DECLARATION OF BRENT D. QUIST, ESQ.**

I, BRENT D. QUIST, declare under penalty of perjury as follows:

1. On December 2, 2021, I spoke with Plaintiff's attorney Ryan Loosvelt, Esq.
2. Upon information and belief, and to the best of my memory, in Mr. Loosvelt's  
Declaration he states he asked me whether Dr. Etcoff "refused to comply" with this Court's Order  
re the Rule 35 neuropsychological exam, and that I indicated Dr. Etcoff could not ethically or

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professionally perform them under conditions imposed by this Court. I never indicated to Mr. Loosvelt that Dr. Etcoff would not comply with any Order of this Court.

3. Upon information and belief, and to the best of my memory, I recall explaining to Mr. Loosvelt that it is my understanding neither Dr. Etcoff or any other Nevada board-licensed neuropsychologist would be able to proceed with a Rule 35 neuropsychological exam of the Plaintiff. This understanding is supported by Dr. Etcoff's Affidavit.

4. In no way was I suggesting Dr. Etcoff would not comply with any Order of this Court.

5. Upon information and belief, and to the best of my memory, during this phone call I explained to Mr. Loosvelt that the initial expert deadline is January 7, 2021, and that as I was unaware how long it would take for the Nevada Supreme Court to address the issues raised in the Defendants Petition for Writ, I was asking for a stay.

6. Upon information and belief, and to the best of my memory, at no time during our call did he suggest the parties stipulate to extend the case deadlines instead of a stay of the case.

Dated this 23<sup>rd</sup> day of December, 2021.

/s/ Brent D. Quist

**MEMORANDUM OF POINTS AND AUTHORITIES**

**I.**

**PLAINTIFF'S OPPOSITION MISTATES REPRESENTATION OF DEFENSE COUNSEL**

Plaintiff's Opposition does not accurately represent statements of defense counsel. As set forth above, defense counsel never represented Dr. Etcoff would not comply with this Court's Order regarding Rule 35 neuropsychological exams. Instead, defense counsel explained due to the professional and ethical obligations that are imposed on Dr. Etcoff, he (as well as other Nevada board certified neurologists) **cannot** conduct Rule 35 neuropsychological exams under the conditions placed by this Court. It is defense counsel's understanding if this Court's Order stands, no Rule 35 neuropsychological exam of Plaintiff will happen.



## II.

ARGUMENT**A. COURTS CONSIDERING THE ISSUES RAISED BY DEFENDANTS IN THEIR PETITION FOR WRIT, INCLUDING THE NEVADA SUPREME COURT, HAVE ENTERED STAYS PENDING THE NEVADA SUPREME COURT'S CONSIDERATION OF THE ISSUES.**

Two district courts and the Nevada Supreme Court have stayed cases involving the same or similar issues raised in Defendants' Motion to Compel, Objection to the DCRR, and Petition for Writ. See, for instance, Opposition, at pp. 6-9 (recognizing that Judge Escobar, Judge Denton, and the Nevada Supreme Court have issued stays; also recognizing in the *Felsner v. Yusi* case, Supreme Court Case No. 82625, the defendants moved the Nevada Supreme Court for a stay, which motion is currently pending before the court). The chief reason these courts have granted the stay appears to be because the object of the petitions for writ filed in those cases, i.e., the Rule 35 neuropsychological exam of the plaintiffs, would be defeated if the stay were not granted. The parties in those cases faced initial expert disclosure deadlines. Either plaintiffs did not wish for the Rule 35 exams to go forward without observers or recordings, or defendants were unable to proceed with those exams with observers and recording due to the ethical and professional obligations imposed on neuropsychologists in Nevada.

In *Green v. Ferrellgas*, the Nevada Supreme Court itself granted a motion for stay filed by the defendants. See Opposition, at 8.

**B. STANDARD FOR GRANTING A MOTION FOR STAY PURSUANT TO NRCP 8.**

Most if not all of the Opposition is focused on the fourth factor set forth in NRCP(a)(1)(A) for whether to issue a stay pending a petition for writ, i., whether the petitioner is likely to prevail on the merits in the writ petition. See Opposition, at 8-14. However, as set forth in NRCP 8, and as recognized by *Mikohn Gaming Corp v. McCrea*, 89 P.3d 36, 38 (Nev. 2004), there are four factors a district court should consider. First, whether the object of the writ petition will be defeated if the stay is denied. Second, whether the petitioner will suffer serious injury if the stay is denied. Third, whether the respondent/real party if interest will suffer irreparable or serious injury if the stay or injection is granted. Fourth, whether the petitioner is likely to prevail on the

merits of the writ petition. See Motion, at 6. Plaintiff only touches minimally, if at all, on the initial three factors, instead choosing to focus almost entirely on the fourth factor.

The *Mikohn* Court provides helpful guidance as to application of these factors and the weight to give them. The court explained that even if only one or two of the factors weighs in favor of granting the stay, the stay may be granted. *Mikohn*, 39 P.3d at 38 (citing *Fritz Hansen A/S v. District Court*, 6 P.3d 982, 987 (Nev. 2000)).

The court further explained the third factor, i.e., harm to the respondent, typically does not exist in a case and does not weigh against the district court granting the stay. See Motion, at 6. “Although irreparable or serious harm remains part of the stay analysis, this factor will not generally play a significant role in the decisions whether to issue a stay.” *Id.* at 39. This is because the only “cognizant harm threatened to the parties is increased litigation cost and delay.” *Id.* [L]itigation costs, even if potentially substantial, are not irreparable harm.” *Id.* (citing *Fritz Hansen A/S*, 6 P.3d at 986-87). “Similarly, a mere delay in pursuing discovery and litigation normally does not constitute irreparable harm.” *Id.* (citing *Fritz Hansen A/S*, 6 P.3d at 987). The court further noted that where the object of an appeal will be defeated if a stay is denied, a stay “is generally warranted.” *Id.* at 40.

**C. THE FACTORS WEIGH IN FAVOR OF THE DISTRICT COURT GRANTING THE DEFENDANTS’ MOTION AND STAYING THE CASE.**

The NRCP 8(a)(1)(A) factors weigh in favor of the Court issuing the stay.

**1. THE OBJECT OF DEFENDANTS’ PETITION FOR WRIT, I.E., THE RULE 35 NEUROPSYCHOLOGICAL EXAM AND RELATED DISCOVERY, WILL BE DEFEATED IF THE COURT DENIES THE STAY.**

Dr. Etcoff’s position has remained consistent in this case, as it has in the other cases referenced by the parties in the Motion and Opposition. He is ethically and professionally prohibited by the State of Nevada Board of Psychological Examiners and Nevada law from conducting a Rule 35 neuropsychological exam with an observer and recording and sharing that information with non-psychologists. The Defendants’ Petition for Writ centers on whether the Legislature and Governor have constitutional authority to mandate, by statute, that neuropsychologists violate these ethical duties in conducting Rule 35 neuropsychological exams.

1 The Petition for Writ also addresses whether there can ever be good cause under Rule 35 for a  
2 district court to order a neuropsychological expert to conduct an exam under conditions that  
3 would force them to violate their ethical and professional responsibilities. Ultimately, the Petition  
4 for Writ addresses under what conditions a neuropsychologist is required to conduct a Rule 35  
5 exam.

6 The initial expert disclosure deadline in this case is January 7, 2022. If the Court denies  
7 the Defendants' Motion and does not grant the stay, then the objection of the Petition for Writ will  
8 be defeated. Defendants will not be able to have Dr. Etcoff, or any other Nevada board-certified  
9 neuropsychologist, perform a Rule 35 neuropsychological exam or conduct additional discovery  
10 with the benefit of that exam. Defendants will be placed at a severe disadvantage at trial as  
11 Plaintiff's treating neuropsychologist was able to proceed with an exam without any recording or  
12 observer and was thus able to conduct an exam of the Plaintiff. Moreover, Defendants will not  
13 have an opportunity to have a neuropsychologist independently examine the Plaintiff to verify the  
14 validity of his neuropsychological claims.

15 2. DEFENDANTS WILL SUFFER SERIOUS INJURY IF THE STAY IS NOT  
16 ISSUED.

17 As noted in the Motion, the Rule 35 neuropsychological exam pertains to Plaintiff's  
18 alleged cognitive injuries, general damages, and Life Care Plan. His alleged past and future  
19 medical specials total approximately \$5.7 million, and it is anticipated he will allege significant  
20 general damages. Plaintiff has had an opportunity to be examined by his own neuropsychologist.  
21 Defendants will be seriously disadvantaged during discovery and at trial if they are unable to  
22 have their own neuropsychologist examine Plaintiff to independently assess his cognitive abilities  
23 and need for future treatment, and to rebut the opinions of Plaintiff's neuropsychologist and  
24 ultimately the Life Care Plan.

25 Plaintiff appears to suggest that Defendants will not suffer harm because Dr. Etcoff really  
26 is not ethically or professionally prohibited from conducting Rule 35 exams with observers and  
27 recordings of that exam. See Opposition, at 11. However, as Dr. Etcoff's Affidavit demonstrates,  
28 he is ethically and professionally prohibited from conducting an examination under those

1 conditions. Moreover, he is ethically and professionally prohibited from sharing raw test data and  
2 materials if there is a risk they could be shared with a non-psychologist, even an attorney. See  
3 **Exhibits A**, and **A(1)-A(8)**, Dr. Etcoff's Affidavit and supporting materials. Plaintiff argues he  
4 included "numerous affidavits" in his Opposition to the Objection that refute Dr. Etcoff's position.  
5 However, those "numerous affidavits" were written by individuals who are not licensed in  
6 Nevada. They do not know what Nevada law requires of neuropsychologists or what  
7 ethical/professional obligations govern neuropsychologists in Nevada. Their opinions are  
8 meaningless.

9 Plaintiff argues that Dr. Ginsburg allowed for his Rule 35 exam with Plaintiff to be  
10 recorded. See Opposition, at 13. However, Dr. Ginsburg is a neurologist not a  
11 neuropsychologist. He has a medical license not a psychological license. The law, ethical  
12 obligations and professional obligations that govern him are different than those that govern Dr.  
13 Etcoff or any other Nevada psychologist/neuropsychologist.

14 3. PLAINTIFF WILL NOT SUFFER ANY HARM IF THE STAY IS ISSUED.

15 Plaintiff argues he will be harmed if the stay is issued because the stay will result in a  
16 case delay. See Opposition, at 14. However, as the *Mikohn* Court recognized, "[a] mere delay in  
17 pursuing discovery and litigation normally does not constitute irreparable harm." *Mikohn*, supra.  
18 Thus, this factor weighs in favor of this Court granting the Motion.

19 4. DEFENDANT'S PETITION FOR WRIT HAS MERIT AND WILL LIKELY BE  
20 GRANTED BY THE NEVADA SUPREME COURT.

21 For the reasons set forth in the Motion, and below, Defendants believe their position as to  
22 Rule 35 neuropsychological exams is strong. Even if this Court disagrees, the Court must weigh  
23 this fourth factor in favor of the Defendants unless the Plaintiff makes a "strong showing" the  
24 Petition for Writ is frivolous. *Mikohn*, 89 P.3d at 40. An appeal or petition for writ is frivolous only  
25 if it is "wholly without merit." *In re George*, 322 F.3d 586, 591 (9<sup>th</sup> Cir. 2003); *United States v.*  
26 *Kitsap Physicians Serv.*, 314 F.3d 995, 1003 n. 3 (9<sup>th</sup> Cir. 2002).

27 Defendants respectfully assert their Petition for Writ is not "wholly without merit." Indeed,  
28 there are currently pending before the Supreme Court multiple writs addressing the same or

similar issues involved in Defendants' Petition for Writ. Indeed, the Supreme Court of Nevada granted the stay in *Green*, which indicates the Supreme Court does not believe that writ was frivolous.

There are legitimate issues pertaining to the constitutionality of NRS 52.380 and the application of Rule 35 in the context of neuropsychological exams being considered by the Nevada Supreme Court. They are not frivolous—neither is Defendants' Petition for Writ.

The following is the Defendants response to the apparent arguments made by Plaintiff at pages 11-14 of his Opposition.

i. *THE NEVADA SUPREME COURT MAY CONSIDER DEFENDANT'S CONSTITUTIONALITY ARGUMENTS AS THEY WERE NOT WAIVED BY THE DEFENDANTS.*

Defendants' position is they did not waive their constitutional arguments by not serving the Secretary of State with a copy of their Objection. NRS 30.130 states the Attorney General must be given an opportunity to be heard on any constitutionality argument. Further, NRS 31.130 does not provide failure of service on the Attorney General constitutes "waiver" of the constitutional argument. Indeed, case law provides that where NRS 30.130 is not complied with, the proper recourse is for a court to hold off consideration of the issue until the necessary party (in this case the Attorney General) is served with notice. The court should then consider that party's position and make a ruling on the merits. *See Crowley v. Duffrin*, 855 P.2d 536, 339-40 (Nev. 1993); *see also*, Motion, at 10.

ii. *NRS 52.380 IS UNCONSTITUTIONAL PURSUANT TO THE SEPARATION OF POWERS DOCTRINE.*

The most recent amendments to NRCP 35 were adopted by the Nevada Supreme Court six months before NRS 52.380 was passed; further, NRS 52.380 governs Rule 35 examination. Therefore, under Nevada's Separation of Powers Doctrine contained in Nevada's Constitution, NRS 52.380 is unconstitutional. The "legislature may not enact a procedural statute that conflicts with a pre-existing procedural rule, without violating the doctrine of separation of powers, and such a statute is of no effect." *Berkson v. Lepome*, 245 P.3d 560, 565 (Nev. 2010) (quoting *State v. Dist. Ct. [Marshall]*, 11 P.3d 1209, 1213 (Nev. 2000)). Defendants' position here is the

same as the other defendants who are now challenging the constitutionality of NRS 52.380—  
pursuant to the Separation of Powers Doctrine only the Nevada Supreme Court can govern the  
procedures pertaining to Rule 35 examinations.

iii. *THE PASSAGE OF NRS 52.380 INTO LAW DOES NOT CONSTITUTE  
GOOD CAUSE FOR THE DISTRICT COURT'S ORDER.*

By adopting the Discovery Commissioner's Report and Recommendations, the District  
Court held "the good cause to allow a third-party observer and audio recording of the Rule 35  
neuropsychological exam is the Legislature passed NRS 52.380 and the governor signed it into  
law." **Exhibit B**, Order Re: Discovery Commissioner's Report and Recommendations, at DCRR  
2:14-16.

Defendants' position, among others, is there is not good cause to condition the Rule 35  
neuropsychological exam on allowance of an observer and audio recording because (1) NRS  
52.380 is unconstitutional and, therefore, the Legislature and Governor passing the law cannot  
constitute good cause for those conditions; and, (2) there can never be good cause to place  
those conditions on a Rule 35 exam, or require a Nevada licensed neuropsychologist to produce  
raw test materials and data if that information may be viewed by a non-psychologist, because  
that would require the psychologist/neuropsychologist to violate their professional and ethical  
standards and place their license in jeopardy. The result would be no Rule 35  
neuropsychological exams will take place. These arguments have strong merit.

iv. *PLAINTIFF DID NOT RAISE THE ISSUES ADDRESSED BY DR. ETCOFF'S  
AFFIDAVIT UNTIL THE DISCOVERY HEARING ITSELF AND THEREFORE  
DEFENDANTS WERE PERMITTED TO SUBMIT THE AFFIDAVIT AS PART OF  
THEIR OBJECTION.*

In support of the foregoing position, Defendants submitted an Affidavit of Dr. Etcoff.  
Plaintiff asserts this Affidavit should have been submitted prior to the discovery hearing.  
However, as explained in Defendant's Reply to the Objection, in their Motion to Compel the  
Defendants relied upon the State of Nevada Board of Psychological Examiner's October 1, 2018  
letter to establish that Dr. Etcoff was professionally and ethically prohibited from conducting Rule  
35 neuropsychological exams under the conditions imposed by the Plaintiff. See Reply, at 3.  
Plaintiff nowhere challenged Defendants' interpretation of this letter or argued that Dr. Etcoff's

1 license would not be placed in jeopardy until the actual discovery hearing. Therefore, Defendants  
2 could not have addressed this argument of Plaintiff via an Affidavit of Dr. Etcoff in either its  
3 Motion to Compel or Reply.

4 *Valley Health System, LLC v. Eighth Judicial District Court*, 252 P.3d 676 (Nev. 2011),  
5 allowed the Defendants to submit Etcoff's Affidavit in support of their Objection. In *Valley Health*,  
6 the court stated that new arguments could not be raised for the first time to the district court **if** the  
7 party had an opportunity to raise them to the Discovery Commissioner.

8 Plaintiffs never challenged the meaning, import or effect of the October 1, 2018 letter in  
9 any of its pleadings and, therefore, Defendants were not placed on notice prior to the hearing  
10 itself that they would need an Affidavit from Dr. Etcoff affirming he is ethically and professionally  
11 prohibited from conducting a Rule 35 exam under the conditions ultimately placed on that exam  
12 by this Court.

13 Based on the *Valley Health System* case, Dr. Etcoff's Affidavit is proper and supports the  
14 merits of the Defendants' Petition for Writ.

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## IV.

**CONCLUSION**

Defendants respectfully request this Court grant their Motion and stay the entire case pending the Nevada Supreme Court's determination on Defendants' Writ because the object of the Writ will be defeated if the stay is denied, Defendants will suffer irreparable or serious injury if the stay is denied, Plaintiff will not suffer irreparable or serious injury if the stay is granted because discovery will only be delayed, not denied, and Defendants are likely to prevail on the merits in the appeal.

DATED this 23<sup>rd</sup> day of December, 2021.

**DENNETT WINSPEAR, LLP**

By /s/ Brent D. Quist  
RYAN L. DENNETT, ESQ.  
Nevada Bar No. 005617  
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Telephone: (702) 839-1100  
Facsimile: (702) 839-1113  
***Attorneys for Defendant,  
Chilly Willy's Handyman Services, LLC***

DATED this 23<sup>rd</sup> day of December, 2021.

**KEATING LAW GROUP**

By /s/ John T. Keating  
JOHN T. KEATING, Esq.  
Nevada Bar No. 6373  
9130 W. Russell Road, Suite 200  
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 **REPLY IN SUPPORT OF DEFENDANTS' MOTION TO STAY CASE PENDING WRIT OF MANDAMUS ON AN ORDER SHORTENING TIME** on all parties to this action by the following method:

\_\_\_\_\_ Facsimile  
 \_\_\_\_\_ Mail  
    X     Electronic Service

RYAN A. LOOSVELT, ESQ.  
 Nevada Bar No. 8550  
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***Attorneys for Plaintiff,  
 Taylor Miles Cape***

JOHN T. KEATING, Esq.  
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 Telephone: (702) 228-6800  
 Facsimile: (702) 228-0443  
***Attorneys for Defendant  
 David G. Martinez***

DATED this 23<sup>rd</sup> day of December, 2021.

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

## Zaira Baldovinos

---

**From:** J. Keating <jkeating@keatinglg.com>  
**Sent:** Thursday, December 23, 2021 11:09 AM  
**To:** Brent Quist  
**Cc:** Zaira Baldovinos; Theresa Amendola  
**Subject:** RE: Cape v. Chilly Willy's (Reply in Support of Motion for Stay)

This is fine

---

**From:** Brent Quist <bquist@dennettwinspear.com>  
**Sent:** Thursday, December 23, 2021 7:46 AM  
**To:** J. Keating <jkeating@keatinglg.com>  
**Cc:** Zaira Baldovinos <zaira@dennettwinspear.com>; Theresa Amendola <tamendola@dennettwinspear.com>  
**Subject:** Cape v. Chilly Willy's (Reply in Support of Motion for Stay)  
**Importance:** High

John,

The court has placed the Defendants' motion for stay on its chambers calendar for today at 3:00 a.m., which I take means the court may rule on it any time today. As it is the start of a holiday weekend, I suspect the court may consider the motion this motion. I've attached a draft Reply (the Opposition came in later yesterday afternoon). Please let me know if I may use your e-signature on the Reply.

If you could get back to me in the next two hours I would appreciate it. I'd like to file the Reply this morning.

Thanks,

Brent Quist  
Dennett Winspear, LLP  
3301 North Buffalo Drive, Suite 195  
Las Vegas, Nevada 89129  
702.839.1100 - Phone  
702.839.1113 - Fax

CONFIDENTIALITY NOTICE: INFORMATION IN THIS MESSAGE IS INTENDED ONLY FOR THE PERSONAL AND CONFIDENTIAL USE OF THE RECIPIENT(S) NAMED ABOVE. This message may be an Attorney-Client communication, or may be an Attorney Work Product, and is therefore privileged and confidential. If the reader of this message is not the intended recipient or an agent responsible for delivering it to an intended recipient, you are hereby notified that you have received this message in error, and that any review, dissemination, distribution, or copying of this message is strictly prohibited. If you received this message in error, please notify the sender immediately by return email, delete the message and return any hard copy printouts to the address above. Thank you.

# **EXHIBIT “A”**

**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,

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

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

6 **THIRD-PARTY OBSERVERS/AUDIO RECORDINGS HARM TEST SECURITY**

7 20. "Test data" refers to raw and scaled scores, client/patient responses to test  
8 questions or stimuli, and psychologists' notes and recordings concerning client/patient  
9 statements and behavior during an examination. Psychologist must not release test data to  
10 "protect . . . misrepresentation of the data or the test[.]" **Attachment 7**, at Standard 9.04.  
11 **Attachment 3**, at 17.

12 21. "Test materials" refers to manuals, instruments, protocols, and test questions and  
13 stimuli. Psychologists must make reasonable efforts to maintain the integrity and security of test  
14 materials and other assessment techniques. **Attachment 7**, at Standard 9.11. **Attachment 3**, at  
15 17.

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

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

25 **CONSEQUENCES OF VIOLATING ETHICAL DUTIES**

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

28 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, ¶18.  
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 Lewis M. Etkoff Ph.D.  
25 DR. LEWIS M. ETCOFF, PHD  
26  
27  
28



# **EXHIBIT “A.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**

**NAME:** LEWIS M. ETKOFF, Ph.D.  
**ADDRESS:** 8475 S. Eastern Avenue, Suite 205  
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	<b>2020 James Mikawa Award</b> 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.

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.

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Thaler NS, Barchard KA, Parke E, Etcoff L, Jones P, Allen DN (2015). Factor structure of the Wechsler Intelligence Scale for Children – Fourth Edition in children with ADHD. *Journal of Attention Disorders*, 19(12), 1013-1021. doi: 10.1177/1087054712459952

Parke, E. M., Thaler, N. S., Etcoff, L. M., & Allen, D. N. (2015). Intellectual profiles in children with ADHD and comorbid learning and motor disorders. *Journal of Attention Disorders*, Advanced Online Publication. doi: 10.1177/1087054715576343

Parke, E. M., Mayfield, M., Barchard, K. A., Thaler, N. S., Etcoff, L. M., & Allen, D. N. (2015). Factor structure of symptom dimensions in Attention-Deficit/Hyperactivity Disorder (ADHD). *Psychological Assessment*, Advanced Online Publication. doi: 10.1037/37/pas0000121

Thaler, N. S., Bello, D. T., & Etcoff, L. M. (2013). WISC-IV profiles are associated with differences in symptomatology and outcome in children with attention-deficit/hyperactivity disorder. *Journal of Attention Disorders*, 17, 291-301.

Thaler, N. S., Barchard, K. A., Parke, E., Jones, W. Paul, Etcoff, L. M., & Allen, D. N. (2012). Factor structure of the Wechsler Intelligence Scale for Children: Fourth Edition in children with ADHD. *Journal of Attention Disorders*, 1087054712459952, first published on October 16, 2012.

Etcoff, L.M., Sims, K.E., Abbott, S.M., & Carro, M.G. (2002 - 2003). A psycholegal perspective: The lack of neuropsychological examination following significant brain trauma can be costly. *Advances in Medical Psychotherapy*, 11, 9-18.

Etcoff, L.M., & Kampfer, K. (1996). Practical guidelines in the use of symptom validity and other psychological tests to measure malingering and symptom exaggeration in traumatic brain injury cases. *Neuropsychology Review*, 6, 171-202.

Etcoff, L.M. & Kampfer, K. (1996). Nonverbal learning disability. In K. Anchor (Ed.), *Disability analysis handbook: Tools for independent practice* (pp. 219-234). Iowa: Kendall/Hunt Publishing Company.

Etcoff, L.M. (1993). Sexual abuse allegations: Separating fact from fiction. *Nevada Family Law Report*, 8, 1-3.

#### PROFESSIONAL POSTER PRESENTATIONS

2016 Graves S, Parke EM, Etcoff L, San Miguel L, Allen DN (2016). *The Relationship between the Woodcock-Johnson-III and the Batteria-III in Children with ADHD and Learning Disorders*. *Archives of Clinical*

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- Neuropsychology*, 31(6), 598. Presented at the 36<sup>th</sup> 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 35<sup>th</sup> 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 33<sup>rd</sup> 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 32<sup>nd</sup> 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 91<sup>st</sup> 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 92<sup>nd</sup> Annual Convention of the Western Psychological Association, San Francisco, CA.
- 2012 Umuhzoza, 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 92<sup>nd</sup> 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 31<sup>st</sup> 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 31<sup>st</sup> National Academy of Neuropsychology, Marco Island, FL.
- 2011 Umuhzoza, 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 31<sup>st</sup> 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).

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- 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 – 8<sup>th</sup> 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 2<sup>nd</sup> 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 2<sup>nd</sup> Year Medical Students in Behavioral Medicine / Psychiatry Course at  
Touro University Nevada, College of Osteopathic Medicine, Henderson, Nevada

**2021 CURRICULUM VITAE**  
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- 03/18/10      **Somatoform and Factitious Disorders:**  
Presentation to 2<sup>nd</sup> 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 Impact 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.

**2021 CURRICULUM VITAE**  
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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

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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 “A.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  
nhop@govmail.state.nv.us  
Psyexam.nv.gov

October 1, 2018  
Governor

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

Dear Ms. Brown:

Please see below the Licensing Board's position on third-party observers in psychological evaluations. This statement has been provided to the Nevada State Supreme Court as public comment regarding the proposed changes to Rule 35 of Nevada Civil Procedure.

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

Sincerely  
for the Board of Psychological Examiners

Morgan Gleich  
Executive Director

Michelle Paul, Ph.D.  
Board President

Whitney Owens, Psy.D.  
Board Secretary/Treasurer

Pam Becker, MA  
Public Member

Stephanie Holland, Psy.D.  
Board Member

John Krogh, Ph.D.  
Board Member

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

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

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

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

Anthony Pagan, Ph.D.  
Board Member, Reno

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

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

Lewis Etcoff Ph.D.

APP0000134

# **EXHIBIT “A.3”**

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

ALIAMA X. SCHAUAMANN-BELTRAN,

Plaintiff-Appellee,

v

JOSEPH GEMMETE, M.D.,

Defendant-Appellant

**Consolidated With**

ALIAMA X. SCHAUAMANN-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

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**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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**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 CURIAE<sup>1</sup>

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.

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<sup>1</sup> 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.<sup>2</sup> 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.<sup>3</sup> 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,

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<sup>2</sup> 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).

<sup>3</sup> 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.<sup>4</sup>

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

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<sup>4</sup> 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.<sup>5</sup> 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

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<sup>5</sup> 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.<sup>6</sup>

**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

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<sup>6</sup> 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.<sup>7</sup>

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<sup>7</sup> 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.<sup>8</sup>

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

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<sup>8</sup> 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,

**KERR, RUSSELL AND WEBER, PLC**

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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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# **EXHIBIT “A.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

**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 Appeals Case No. 347684

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

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**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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APP0009137

# **EXHIBIT “A.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](http://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)<sup>1</sup>. 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](mailto:drsarahunt@gmail.com)

Noelle Lefforge, PhD  
Past-President  
Nevada Psychological Association  
[nlefforge@gmail.com](mailto:nlefforge@gmail.com)

<sup>1</sup>APA (2017). Ethical principles of psychologists and code of conduct.

# **EXHIBIT “A.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

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End of Document

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# **EXHIBIT “A.7”**



AMERICAN PSYCHOLOGICAL ASSOCIATION

# **ETHICAL PRINCIPLES OF PSYCHOLOGISTS AND CODE OF CONDUCT**

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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.

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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.
  - American Psychological Association. (1968). Ethical standards of psychologists. *American Psychologist*, 23, 357-361.
  - American Psychological Association. (1977, March). Ethical standards of psychologists. *APA Monitor*, 22-23.
  - American Psychological Association. (1979). *Ethical standards of psychologists*. Washington, DC: Author.
  - American Psychological Association. (1981). Ethical principles of psychologists. *American Psychologist*, 36, 633-638.
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  - American Psychological Association. (1992). Ethical principles of psychologists and code of conduct. *American Psychologist*, 47, 1597-1611.
  - American Psychological Association. (2002). Ethical principles of psychologists and code of conduct. *American Psychologist*, 57, 1060-1073.
  - American Psychological Association. (2010). 2010 amendments to the 2002 "Ethical Principles of Psychologists and Code of Conduct." *American Psychologist*, 65, 493.
  - 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.







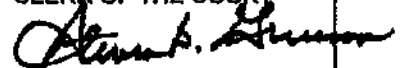
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# **EXHIBIT “A.8”**



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12 *Attorneys for Plaintiff Vanessa Paul*

13 **DISTRICT COURT**

14 **CLARK COUNTY, NEVADA**

15 VANESSA PAUL, an individual,

16 Plaintiff,

17 vs.

18 VEGAS MF ACQUISITION PARTNERS,  
19 LLC, a foreign limited liability corporation;  
20 APARTMENT MANAGEMENT  
21 CONSULTANTS, LLC, a foreign limited  
22 liability company; DOES I through X; and ROE  
23 CORPORATIONS I through X, inclusive,

24 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.)**

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

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

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

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

4. The date, time and location of the Rule 35 examination are as follows: September 29, 2021 at 9:00 a.m. and September 30, 2021 at 9:00 a.m., located at 8475 South Eastern Avenue, Suite 205 Las Vegas, Nevada 89123.
5. The Rule 35 examination shall be held in an office in compliance with HIPAA, to the extent applicable.
6. Other than the required neuropsychological and clinical psychological testing, the Examiner will not require Ms. Vanessa Paul to sign any paperwork at the time of the Rule 35 examination other than a "sign-in" sheet or authorization to perform the examination. The Examiner has not requested that Ms. Vanessa Paul complete any other paperwork or intake forms during or in advance of the Rule 35 examination.
7. Ms. Vanessa Paul shall not be required to wait in the waiting room for longer than 30 minutes before the commencement of the Rule 35 examination.
8. Any interview of Ms. Paul required in the Rule 35 evaluation may be audio ~~and~~ <sup>EJ</sup> recorded by Lynn Belcher LNC Associates by placing a recorder or an ~~unattended video camera in the interview room~~ <sup>EJ</sup>, and Ms. Vanessa Paul's counsel will arrange and pay for the recording. However, due to ethical, legal, and professional obligations and rules, the testing itself cannot be recorded. Ms. Paul's counsel shall disclose a copy of the recording within 30 days of receipt of the same. All persons present must be notified that the examination will be recorded before the interview begins.
9. Defense counsel, or any other representatives of defendant(s) other than the Examiner and his/her staff, are not permitted to attend the Rule 35 examination.
10. Liability questions may not be asked by the Examiner or any of his/her agents or representatives during the Rule 35 examination.
11. No x-rays or radiographs may be obtained during the Rule 35 examination. The Examiner will rely upon the same film studies relied upon by the treating physicians 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  
11 materials and/or raw data related to the Rule 35 examination. Following the disclosure  
12 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.

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

15 DATED this 16<sup>th</sup> day of September, 2021.

DATED this 16<sup>th</sup> day of September, 2021.

16 MAIER GUTIERREZ & ASSOCIATES

OLSON CANNON GORMLEY & STOBERSKI

17 /s/ Stephen G. Clough

/s/ Max E. Mcorrick

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Attorneys for Defendants Vegas MF  
Acquisition Partners, LLC and Apartment  
Management Consultants, LLC.

21 **ORDER**

22 IT IS SO ORDERED.

23 DATED this 22<sup>nd</sup> day of September, 2021.

24 

25 **DISCOVERY COMMISSIONER**

# **EXHIBIT “B”**

1 ORDR

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

APP000167

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.

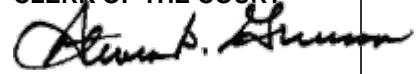
14 Dated this 22nd day of November, 2021

15   
\_\_\_\_\_

16 9CB 433 A993 22F7  
17 Ronald J. Israel  
18 District Court Judge

19 JT





DCRR

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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,

APP000169

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**

By /s/ Ryan A. Loosvelt  
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  
**Attorneys for Plaintiff,**  
**Taylor Miles Cape**

By /s/ Brent D. Quist  
RYAN L. DENNETT, ESQ.  
Nevada Bar No. 005617  
BRENT D. QUIST, ESQ.  
Nevada Bar No. 009157  
3301 N. Buffalo Drive, Suite 195  
Las Vegas, Nevada 89129  
Telephone: (702) 839-1100  
Facsimile: (702) 839-1113  
**Attorneys for Defendant,**  
**Chilly Willy's Handyman Services, LLC**

Respectfully submitted by:

**KEATING LAW GROUP**

By /s/ John T. Keating  
JOHN T. KEATING, Esq.  
Nevada Bar No. 6373  
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

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

15 Theresa Amendola tamendola@dennettwinspear.com

16 Susan Boschee sboschee@keatinglg.com

17 Dillon Coil dcoil@ggrmlawfirm.com

18 Ashley Marchant amarchant@dennettwinspear.com

19 Rebecca Guardado rguardado@ggrmlawfirm.com

20 Nicole Reyes nreyes@keatinglg.com

21 Zaira Baldovinos zaira@dennettwinspear.com

22 Ryan Loosvelt rloosvelt@ggrmlawfirm.com

23 Danielle Glave dglave@ggrmlawfirm.com

A-20-818569-C

**DISTRICT COURT  
CLARK COUNTY, NEVADA**

**Negligence - Auto**

**COURT MINUTES**

**December 23, 2021**

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A-20-818569-C      Taylor Cape, Plaintiff(s)  
vs.  
David Martinez, Defendant(s)

---

**December 23, 2021      3:00 AM      Motion to Stay**

**HEARD BY:** Israel, Ronald J.      **COURTROOM:** RJC Courtroom 15C

**COURT CLERK:** Patia Cunningham

**RECORDER:**

**REPORTER:**

**PARTIES  
PRESENT:**

**JOURNAL ENTRIES**

- Defendants filed this Motion to Stay Case Pending Writ of Mandamus on an Order Shortening Time on December 14, 2021. Plaintiff filed its Opposition on December 22, 2021, in which Defendants replied on December 23, 2021.

This Motion follows after this Court overruled Defendants' Objection to the Discovery Commissioner's Report and Recommendations to compel Plaintiff's Rule 35 Examination upon certain conditions. With Rule 35 examinations being governed by NRS 52.380, Defendants' primary bases for their Objection were that NRS 52.380 is unconstitutional and that good cause does not exist to enforce certain Rule 35 examination conditions. As such, Defendants filed a Petition for Writ of Mandamus with the Nevada Supreme Court to address these issues and now move for this Court to stay this case until the Supreme Court issues a ruling.

However, this Court finds that there are no sufficient grounds to stay the entirety of this case pending Defendants' Writ. Defendants' sole claim rests on the constitutionality of NRS 52.380, yet, Defendants waived any constitutional challenge when they failed to serve the Secretary of State pursuant to NRS 30.130. Additionally, the Mikohn factors weigh in favor of denying the stay. Mikohn Gaming Corp. v. McCrea, 120 Nev. 248, 251, 89 P.3d 36, 38 (2004). Accordingly, Defendants Motion is

PRINT DATE: 01/14/2022

Page 1 of 2

Minutes Date: December 23, 2021

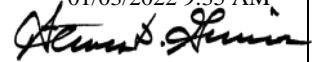
APP000175

DENIED.

This Decision sets forth the Court's intended disposition on the subject but anticipates further Order of the Court to make such disposition effective as an Order. Such Order should set forth a synopsis of the supporting reasons proffered to the Court in briefing. Plaintiff s counsel is to prepare the Order and submit to Chambers for consideration in accordance with EDCR 7.21.

CLERK'S NOTE: This Minute Order was electronically served to all registered parties for Odyssey File & Serve. 01/14/22 pc



  
CLERK OF THE COURT

**SAO**  
RYAN L. DENNETT, ESQ.  
Nevada Bar No. 005617  
[rdennett@dennettwinspear.com](mailto:rdennett@dennettwinspear.com)  
BRENT D. QUIST, ESQ.  
Nevada Bar No. 009157  
[bquist@dennettwinspear.com](mailto:bquist@dennettwinspear.com)  
**DENNETT WINSPEAR, LLP**  
3301 N. Buffalo Drive, Suite 195  
Las Vegas, Nevada 89129  
Telephone: (702) 839-1100  
Facsimile: (702) 839-1113  
**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.

JURY TRIAL: 11/14/2022  
PTC/CC: 11/01/2022, 9:30 am

Entered in Odyssey./sj

**STIPULATION AND ORDER TO EXTEND DISCOVERY (SECOND REQUEST) AND TO  
EXTEND TRIAL (FIRST REQUEST)**

Plaintiff TAYLOR MILES CAPE, by and through its counsel of record GREENMAN  
GOLDBERG RABY & MARTINEZ, Defendant CHILLY WILLY'S HANDYMAN SERVICES, LLC,  
by and through its counsel of record, DENNETT WINSPEAR, LLP, and Defendant DAVID G.  
MARTINEZ, by and through their counsel of record, KEATING LAW GROUP, hereby request the  
Court continue discovery for a period of 90 days and continue trial.

**I.**

**INTRODUCTION**

This case arises out of an automobile accident on November 11, 2018. Plaintiff TAYLOR  
CAPE was allegedly operating his vehicle southbound on Durango Drive attempting to make a

APP000177

left turn with a permissive green signal onto Oso Blanca Road. Defendant DAVID G. MARTINEZ, who was an alleged employee of CHILLY WILLY'S HANDYMAN SERVICES, LLC, allegedly went through the traffic light and struck Plaintiff CAPE.

Plaintiff alleges a traumatic brain injury, neck and back injuries, and ongoing pain complaints. Defendants have sought a Rule 35 neuropsychological exam with Dr. Etcoff without an observer or audio recording. Plaintiff disagrees with these conditions. The Discovery Commissioner and this Court have ordered the Rule 35 neuropsychological exam may move forward with an observer and audio recording. Defendants have recently filed a Petition for Writ with the Nevada Supreme Court as to this issue.

The initial expert disclosure deadline is January 7, 2022. Defendants seek an extension of the discovery deadlines, including the initial expert disclosure deadline, to allow for more time for the Nevada Supreme Court to rule on the issue. Plaintiff reserves all rights but has agreed to a one-time extension of deadlines in the event the appellate court rules on the issues soon that allows other discovery to proceed in the meantime.

## II.

### **EDCR 2.35 REQUIREMENTS**

#### **A. DISCOVERY COMPLETED TO DATE**

The parties have served their initial and supplemental NRCP 16.1(a)(1) disclosures. Parties have also served and responded to written discovery. Defendants have deposed the Plaintiff. Also, Plaintiff has undergone a Rule 35 examination with Dr. David Ginsburg, a neurologist.

#### **B. DISCOVERY THAT REMAINS TO BE COMPLETED**

Plaintiff seeks to depose Defendant Martinez and to conduct a Rule 30(b)(6) deposition of Defendant Chilly Willy's Handyman Service. Defendants continue to seek a Rule 35 neuropsychological exam with the Plaintiff. Parties need to serve their initial Rule 16.1(a)(2) expert disclosures and, based on these disclosures, the parties will likely need to conduct expert depositions.

Defendants recently responded to Plaintiff's written discovery requests. Plaintiff will be

conferring with Defendants and, if necessary, seeking to compel further responses. Document and individual depositions of the police also need to be conducted. Supplementation of medical records is also on-going.

**C. REASONS WHY DISCOVERY HAS NOT BEEN COMPLETED**

Plaintiff resides on the east coast. His deposition occurred earlier this Fall, during the same week as his Rule 35 exam with Dr. Ginsburg.

Much of the discovery Defendants seek to conduct will be based on the Rule 35 neuropsychological exam and Dr. Etcoff's findings. It is Defendants position that Dr. Etcoff's is ethically and professionally prohibited from conducting the exam under the conditions placed by the Court, which Plaintiff opposes. Thus, Defendants have filed a Petition for Writ with the Nevada Supreme Court concerning the permissible scope of Rule 35 neuropsychological exams, and Defendants contend they will not be in a position to proceed with either a Rule 35 neuropsychological exam or conduct discovery based on that exam.

The initial expert disclosure deadline is January 7, 2022. Defendants contend they will not be in a position to serve their initial expert disclosures by that date, and contend they will therefore be prejudiced unless the Court grants the requested discovery continuance.

**D. PROPOSED DISCOVERY SCHEDULE**

DEADLINE	CURRENT DATE	PROPOSED DATE
Discovery deadline	March 7, 2022	June 7, 2022 <sup>1</sup>
Initial expert disclosures	January 7, 2022	April 7, 2022
Rebuttal expert disclosures	February 7, 2022	May 9, 2022 <sup>2</sup>
Dispositive motions	April 7, 2022	July 6, 2022
Amend pleadings/add parties	January 7, 2022	April 7, 2022

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<sup>1</sup> June 6<sup>th</sup> is a Sunday, and so the next court date is June 7, 2022.

<sup>2</sup> May 8<sup>th</sup> is a Sunday, and so the next court date is May 9, 2022.

**E. CURRENT TRIAL DATE**

Trial is currently set on a five-week stack to begin June 27, 2022. Trial will need to be continued.

DATED: 12/30/21

**GREENMAN GOLDBERG RABY &  
MARTINEZ**

By: /s/ Ryan A. Loosvelt  
DILLON G. COIL, ESQ.  
Nevada Bar No. 11541  
RYAN A. LOOSVELT, ESQ.  
Nevada Bar No. 8550  
2770 S. Maryland Parkway, Suite 100  
Las Vegas, Nevada 89109  
Telephone: (702) 384-1616  
Facsimile: (702) 384-2990  
***Attorneys for Plaintiff,  
Taylor Miles Cape***

DATED: 12/30/21

**KEATING LAW GROUP**

By: /s/ John T. Keating  
JOHN T. KEATING, ESQ.  
Nevada Bar No. 6373  
9130 W. Russell Road, Suite 200  
Las Vegas, Nevada 89148  
Telephone: (702) 228-6800  
Facsimile: (702) 228-0443  
***Attorneys for Defendant,  
David G. Martinez***

DATED: 12/30/21

**DENNETT WINSPEAR, LLP**

By: /s/ Brent D. Quist  
RYAN L. DENNETT, ESQ.  
Nevada Bar No. 005617  
BRENT D. QUIST, ESQ.  
Nevada Bar No. 009157  
3301 N. Buffalo Drive, Suite 195  
Las Vegas, Nevada 89129  
Telephone: (702) 839-1100  
Facsimile: (702) 839-1113  
***Attorneys for Defendant,  
Chilly Willy's Handyman Service, LLC.***

**ORDER**

UPON STIPULATION OF COUNSEL and good cause appearing,

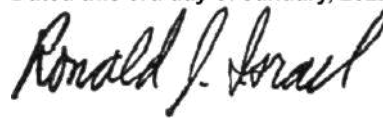
~~THIS COURT ORDERED THIS XXXXX day of XXXXXXXXXXXXXXXXXXXX, 20XX~~

COURT ORDERED, the June 27, 2022, trial date is VACATED and reset on the November 14, 2022, five-week stack with Pretrial Conference/Calendar Call on November 1, 2022, at 9:30 a.m. An Amended Trial Order will NOT be prepared.

Submitted by:

**DENNETT WINSPEAR, LLP**

Dated this 3rd day of January, 2022



By /s/ Brent D. Quist  
RYAN L. DENNETT, ESQ.  
Nevada Bar No. 005617  
BRENT D. QUIST, ESQ.  
Nevada Bar No. 009157  
3301 N. Buffalo Drive, Suite 195  
Las Vegas, Nevada 89129  
Telephone: (702) 839-1100  
Facsimile: (702) 839-1113  
**Attorneys for Defendant,**  
**Chilly Willy's Handyman Services, LLC**

819 364 6397 5FFC  
Ronald J. Israel  
District Court Judge

sj

A-20-818569-C

## Zaira Baldovinos

---

**From:** Ryan Loosvelt <rloosvelt@ggrmlawfirm.com>  
**Sent:** Wednesday, December 29, 2021 3:59 PM  
**To:** Brent Quist  
**Cc:** Zaira Baldovinos; J. Keating; Danielle Glave  
**Subject:** RE: Cape - SAO discovery continuance

You can use me e-signature on this latest draft. Thanks,



### Ryan Loosvelt

Attorney

O: 702.384.1616 | F: 702.384.2990 | [www.ggrmlawfirm.com](http://www.ggrmlawfirm.com)  
2770 S. Maryland Parkway, Suite 100, Las Vegas, NV 89109



---

**From:** Brent Quist <bquist@dennettwinspear.com>  
**Sent:** Wednesday, December 29, 2021 3:48 PM  
**To:** Ryan Loosvelt <rloosvelt@ggrmlawfirm.com>  
**Cc:** Zaira Baldovinos <zaira@dennettwinspear.com>; J. Keating <jkeating@keatinglg.com>; Danielle Glave <dglave@ggrmlawfirm.com>  
**Subject:** RE: Cape - SAO discovery continuance

Ryan,

I have corrected a few typos. Otherwise, I am in agreement with your language. My draft, with the typo revisions is attached. If you agree with it please authorize the use of your e-signature.

Likewise John, please let me know if I can use your e-signature.

I would like to file this in the morning.

Brent

---

**From:** Ryan Loosvelt <[rloosvelt@ggrmlawfirm.com](mailto:rloosvelt@ggrmlawfirm.com)>  
**Sent:** Wednesday, December 29, 2021 3:43 PM  
**To:** Brent Quist <[bquist@dennettwinspear.com](mailto:bquist@dennettwinspear.com)>  
**Cc:** Zaira Baldovinos <[zaira@dennettwinspear.com](mailto:zaira@dennettwinspear.com)>; J. Keating <[jkeating@keatinglg.com](mailto:jkeating@keatinglg.com)>; Danielle Glave <[dglave@ggrmlawfirm.com](mailto:dglave@ggrmlawfirm.com)>  
**Subject:** RE: Cape - SAO discovery continuance

Here are my revisions. I added my name to the signatory line on the clean version as well. Ok to submit as revised here.

## Zaira Baldovinos

---

**From:** J. Keating <jkeating@keatinglg.com>  
**Sent:** Wednesday, December 29, 2021 5:57 PM  
**To:** Brent Quist; Ryan Loosvelt  
**Cc:** Zaira Baldovinos; Danielle Glave  
**Subject:** RE: Cape - SAO discovery continuance

Yes you may.

---

**From:** Brent Quist <bquist@dennettwinspear.com>  
**Sent:** Wednesday, December 29, 2021 3:48 PM  
**To:** Ryan Loosvelt <rloosvelt@ggrmlawfirm.com>  
**Cc:** Zaira Baldovinos <zaira@dennettwinspear.com>; J. Keating <jkeating@keatinglg.com>; Danielle Glave <dglave@ggrmlawfirm.com>  
**Subject:** RE: Cape - SAO discovery continuance

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Brent

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**To:** Brent Quist <[bquist@dennettwinspear.com](mailto:bquist@dennettwinspear.com)>  
**Cc:** Zaira Baldovinos <[zaira@dennettwinspear.com](mailto:zaira@dennettwinspear.com)>; J. Keating <[jkeating@keatinglg.com](mailto:jkeating@keatinglg.com)>; Danielle Glave <[dglave@ggrmlawfirm.com](mailto:dglave@ggrmlawfirm.com)>  
**Subject:** RE: Cape - SAO discovery continuance

Here are my revisions. I added my name to the signatory line on the clean version as well. Ok to submit as revised here.



### Ryan Loosvelt

Attorney

O: 702.384.1616 | F: 702.384.2990 | [www.ggrmlawfirm.com](http://www.ggrmlawfirm.com)  
2770 S. Maryland Parkway, Suite 100, Las Vegas, NV 89109



---

**From:** Brent Quist <[bquist@dennettwinspear.com](mailto:bquist@dennettwinspear.com)>  
**Sent:** Wednesday, December 29, 2021 3:28 PM  
**To:** Ryan Loosvelt <[rloosvelt@ggrmlawfirm.com](mailto:rloosvelt@ggrmlawfirm.com)>

1 **CSERV**

2  
3 DISTRICT COURT  
4 CLARK COUNTY, NEVADA

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 Stipulation and Order to Extend Discovery Deadlines was served via  
13 the court's electronic eFile system to all recipients registered for e-Service on the above  
entitled case as listed below:

14 Service Date: 1/3/2022

15 Theresa Amendola tamendola@dennettwinspear.com

16 Susan Boschee sboschee@keatinglg.com

17 Dillon Coil dcoil@ggrmlawfirm.com

18 Ashley Marchant amarchant@dennettwinspear.com

19 Rebecca Guardado rguardado@ggrmlawfirm.com

20 Zaira Baldovinos zaira@dennettwinspear.com

21 Ryan Loosvelt rloosvelt@ggrmlawfirm.com

22 Nicole Reyes nreyes@keatinglg.com

23 Danielle Glave dglave@ggrmlawfirm.com





**ECC**  
**GABRIEL A. MARTINEZ, ESQ.**  
Nevada Bar No. 326  
**DILLON G. COIL, ESQ.**  
Nevada Bar No. 11541  
**BRIAN P. NESTOR, ESQ.**  
Nevada Bar No. 13551  
**GREENMAN GOLDBERG RABY & MARTINEZ**  
2770 S. Maryland Pkwy., Ste. 100  
Las Vegas, NV 89109  
Phone: 702.384.1616 ~ Fax: 702.384.2990  
Email: gmartinez@ggrmlawfirm.com  
dcoil@ggrmlawfirm.com  
bnestor@ggrmlawfirm.com

*Attorneys for Plaintiff*

**DISTRICT COURT**  
**CLARK COUNTY, NEVADA**

TAYLOR MILES CAPE,  
Plaintiff,

vs.

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

Defendants.

CASE NO.: A-20-818569-C  
DEPT. NO.: 28

**PLAINTIFF'S INITIAL EARLY CASE CONFERENCE**  
**WITNESS AND EXHIBIT LIST AND PRE-TRIAL DISCLOSURES**

Plaintiff, TAYLOR MILES CAPE, by and through his attorneys, Gabriel Martinez, Esq.,  
Dillon G. Coil, Esq., and Brian P. Nestor, Esq., of the law firm GREENMAN GOLDBERG RABY &  
MARTINEZ, hereby submits his list of witnesses, exhibits and pre-trial disclosures, as follows:

///



**I.**  
**WITNESSES**

- 1  
2  
3 1. Taylor Cape  
4 c/o Brian P. Nestor, Esq.  
5 GREENMAN, GOLDBERG, RABY & MARTINEZ  
6 2770 S. Maryland Pkwy., Ste 100  
7 Las Vegas, Nevada 89109

8 Taylor Cape is expected to testify regarding his knowledge of the facts and circumstances  
9 surrounding this collision, which is the subject of this litigation as well as damages and injuries  
10 she sustained.

- 11 2. David G. Martinez-Holdridge  
12 c/o John T. Keating, Esq.  
13 KEATING LAW GROUP  
14 9130 W. Russell Road, Ste. 200  
15 Las Vegas, NV 89148

16 David G. Martinez is expected to testify regarding his knowledge of the facts and  
17 circumstances surrounding this collision, which is the subject of this litigation as well as  
18 damages and injuries Plaintiff sustained.

- 19 3. Chilly Willy's Handyman Services, LLC  
20 c/o Ryan L. Dennett, Esq.  
21 DENNETT WINSPEAR, LLP  
22 3301 N. Buffalo Drive, Ste. 195  
23 Las Vegas, NV 89129

24 Chilly Willy's Handyman Services, LLP is expected to testify regarding its knowledge  
25 of the facts and circumstances surrounding this collision, which is the subject of this litigation  
26 as well as damages and injuries Plaintiff sustained.

- 27 4. Angela Olguin  
28 346 Ocean View Blvd.  
Lompoc, CA 98437

Angela Olguin is expected to testify regarding her knowledge surrounding this collision,  
which is the subject of this litigation.

5. Ashley Warren  
6835 Rolling Boulder St.  
Las Vegas, NV 89149



1 Ashley Olguin is expected to testify regarding her knowledge surrounding this collision,  
2 which is the subject of this litigation.

3 6. Chris Osorio  
4 8704 Willow Cabin St.  
5 Las Vegas, NV 89131

6 Chris Osorio is expected to testify regarding his knowledge surrounding this collision,  
7 which is the subject of this litigation.

8 7. Silina Indalecio  
9 9354 Writing Ave.  
10 Las Vegas, NV 89149

11 Silina Indalecio is expected to testify regarding her knowledge surrounding this collision,  
12 which is the subject of this litigation.

13 8. Jose Gonzalez Martinez  
14 1209 Pyramid Dr.  
15 Las Vegas, NV 89108

16 Jose Gonzalez Martinez is expected to testify regarding his knowledge surrounding this  
17 collision, which is the subject of this litigation.

18 9. Officer Matthew Ware  
19 LVMPD ID No. 9684  
20 400 S. Martin Luther King, Jr Blvd.  
21 Las Vegas, NV 89106

22 Officer Matthew Ware is expected to testify regarding his knowledge surrounding this  
23 collision, which is the subject of this litigation.

24 10. Jan Roughan, BSN, RN, PHN, CRRN/ABSNC  
25 465 N. Halstead Street, Ste. 120  
26 Pasadena, CA 91107

27 Ms. Jan Roughan is expected to testify regarding the injuries sustained by Plaintiff and  
28 future treatment required as a result of these injuries.

### **PLAINTIFF'S HEALTHCARE PROVIDERS**

29 The following treating physicians are expected, but not limited to testify to the opinions  
30 (including causation) outlined in their records and/or otherwise disclosed and based upon the  
31 records contained in their file, to any additional opinions that result from Plaintiff's continued  
32 treatment and will testify and give opinions regarding the care and treatment of Plaintiff.,



1 Plaintiff's ancillary treatment and Plaintiff's diagnosis and prognosis. It is expected that the  
2 following individual medical providers, their custodians of records and persons with knowledge  
3 will testify regarding the injuries, treatment, expense, costs for future treatment, and all other  
4 relevant information pertaining to Plaintiff. Additionally, each and every one of the following  
5 medical providers is designated and deemed an expert and may be called at the time of trial to  
6 provide expert testimony regarding Plaintiff's injuries, the causation of said injuries and all the  
7 medical treatment and damages incurred by Plaintiff. Their testimony and opinions will consist  
8 of the nature of the Plaintiff's injuries, Plaintiff's diagnosis and prognosis, causation of  
9 Plaintiff's injuries and the necessity of the medical treatment rendered, the necessity of future  
10 treatment to be rendered, the causation of the necessity for past and future medical treatment,  
11 and/or their opinions as to past and future restrictions of activities, including work activities,  
12 causally related to the subject incident. Their testimony will also include authenticity of medical  
13 records, the cost of past and future medical care, the reasonableness of such costs, and whether  
14 those medical costs are reasonable and customary for this community. Their testimony will also  
15 address any referrals made to other providers and the billing and treatment of same, including  
16 any surgical recommendations. Their testimony will also include opinions as to whether  
17 Plaintiff has a diminished work life expectancy as a result of the subject incident. They will  
18 testify in accordance with their file and regarding documents reviewed outside their file in the  
19 course of providing treatment and/or defending their treatment and opinions against the  
20 criticisms of experts retained by the Defendant.

- 21 1. Attending Physician and/or  
22 N.R.C.P. 30(b)(6) Witness(es) and/or  
23 Custodian of Records  
24 UMC Medical Center  
25 1800 W. Charleston Blvd.,  
26 Las Vegas, Nevada 89106
- 27 2. Attending Provider and/or  
28 N.R.C.P. 30(b)(6) Witness(es) and/or  
Custodian of Records  
Pueblo Medical Imaging  
5495 S. Rainbow Blvd. Ste. 203  
Las Vegas, NV 89118



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3. Sunshine Collins, PsyD and/or  
N.R.C.P. 30(b)(6) Witness(es) and/or  
Custodian of Records  
9163 W. Flamingo Rd., Ste. 120  
Las Vegas, NV 89147
4. Attending Physician and/or  
N.R.C.P. 30(b)(6) Witness(es) and/or  
Custodian of Records  
Spring Mountain Treatment Center  
7000 Spring Mountain Rd.  
Las Vegas, NV 89117
5. Attending Physician and/or  
N.R.C.P. 30(b)(6) Witness(es) and/or  
Custodian of Records  
Seven Hills Behavioral Health Hospital  
3021 W. Horizon Ridge Pkwy.  
Henderson, NV 89052
6. Leesha Bitto and/or  
N.R.C.P. 30(b)(6) Witness(es) and/or  
Custodian of Records  
Leesha Bitto  
3201 S. Maryland Pkwy., Ste. 318  
Las Vegas, NV 89109
7. Attending Physician and/or  
N.R.C.P. 30(b)(6) Witness(es) and/or  
Custodian of Records  
Las Vegas Radiology  
3201 S. Maryland Pkwy., Ste. 102  
Las Vegas, NV 89109
8. Attending Physician and/or  
N.R.C.P. 30(b)(6) Witness(es) and/or  
Custodian of Records  
Greenwalt Chiropractic  
7500 W. Sahara Ave.  
Las Vegas, NV 89117
9. Enrico Fazzini, M.D. and/or  
N.R.C.P. 30(b)(6) Witness(es) and/or  
Custodian of Records  
826 E. Charleston Blvd.  
Las Vegas, NV 89074



10. Attending Physician and/or  
N.R.C.P. 30(b)(6) Witness(es) and/or  
Custodian of Records  
Emp of Clark UMC PPL  
P.O. Box 18925  
Belfast, ME 04915
11. Attending Physician and/or  
N.R.C.P. 30(b)(6) Witness(es) and/or  
Custodian of Records  
Desert Radiologist  
11460 N. Meridian St.  
Carmel, IN 46032
12. Attending Physician and/or  
N.R.C.P. 30(b)(6) Witness(es) and/or  
Custodian of Records  
American Medical Response  
50 S. Main St., Ste. 401  
Akron, OH 44308
13. Akindale Kolade, MD and/or  
N.R.C.P. 30(b)(6) Witness(es) and/or  
Custodian of Records  
3201 S. Maryland Pkwy., #318  
Las Vegas, NV 89109

Further, these medical providers are expected to testify regarding Plaintiff's injuries resulting from the collision, their treatment, prognosis and the cost of the services rendered. Plaintiff anticipates that she may require testimony from any and all custodians of records, which are necessary to authenticate documents, which are not stipulated to regarding admissibility by the parties herein.

Plaintiff reserves the right to call any and all expert witnesses which Plaintiff may hereafter select as the need arises during the course of this litigation; and Plaintiff further reserves the right to supplement this witness list if any other witnesses becomes known to Plaintiff as this litigation progresses and as other witnesses are discovered or located.

Plaintiff reserves the right to call rebuttal and/or impeachment witnesses; to call the records custodian for any person(s) or institutions(s) to which there is an objection concerning authenticity; and call any and all witnesses of any other party in this matter.



## II.

### DOCUMENTS

1. LVMPD State of Nevada – Traffic Crash Report (Bate Nos. 0001- 0008);
2. UMC Medical Center medical records and billing (Bate Nos. 0009- 0083);
3. Pueblo Medical Imaging medical records and billing (Bate Nos. 0084- 0088);
4. Sunshine Collins, LLC medical records and billing (Bate Nos. 0089- 0116);
5. Spring Mountain Treatment Center medical records and billing (Bate No. 0117- 0344);
6. Las Vegas Radiology medical records and billing (Bate No. 0345-0352);
7. Greenwalt Chiropractic medical records and billing (Bate Nos. 0353- 0406);
8. Enrico Fazzini, MD medical records and billing (Bate Nos. 0407- 0418);
9. Emp of Clark UMC PLLC billing statement (Bate Nos. 0419- 0422);
10. Desert Radiologist billing statement (Bate No. 0423);
11. American Medical Response medical records and billing (Bate Nos. 0424- 0433);
12. Jan Roughan, BSN, RN, PHN Life Care Plan report (Bate Nos. 0434- 0441);
13. Color photographs of Plaintiff's property damage (Bate Nos. 0442- 0451).

Plaintiff reserves the right to submit as an exhibit any document or tangible item identified by any other party in this action or obtained from any third party. Plaintiff further reserves the right to amend and/or supplement this list of documents or tangible items as discovery proceeds.

In addition, neither inclusion of any documents or tangible items within this disclosure nor acceptance of documents provided by any other party hereto in a disclosure shall be deemed as a waiver by Plaintiff of any evidentiary rights Plaintiff may have with respect to those documents and/or tangible items, including, but not limited to, objections related to authenticity, materiality, relevance, foundation, hearsay, or any other rights as may be permitted pursuant to the Nevada Rules of Evidence.

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III.

**PLAINTIFF'S COMPUTATION OF DAMAGES**

The following medical specials were incurred as a direct result of the subject collision:

MEDICAL PROVIDER	DATES OF SERVICE	TOTAL CHARGES
UMC Medical Center	11/22/18	\$9,037.77
Pueblo Medical Imaging	1/10/19	\$5,700.00
Sunshine Collins, LLC	6/3/19- 9/30/19	\$3,181.19
Spring Mountain Treatment Center	8/24/17- 8/29/17	\$12,000.00
Seven Hills Behavioral Health Hospital		Pending
Leesha Bitto		Pending
Las Vegas Radiology	6/20/19	\$1,650.00
Greenwalt Chiropractic	11/28/18- 2/11/19	\$1,940.00
Enrico Fazzini, DO.	12/15/18- 7/24/19	\$3,900.00
Emp of Clark UMC PLLC	11/22/18	\$1,051.20
Desert Radiologist	11/22/18	\$425.00
American Medical Response	11/21/18	\$1,286.31
Akindele Kolade, MD		Pending
<b>PAST MEDICAL EXPENSES</b>		<b>\$40,171.47</b>

**Past Medical and Related Expenses                      \$40,171.47**

Past Wage Loss                      To be determined

Future Loss of Wages and Earning Capacity                      To be determined

**Future Medical Expenses                      \$5,656,763.00**

Total Special Damages                      To be determined

Further, at trial, the Jury will decide upon a sum of money sufficient to reasonably and fairly compensate Plaintiff for the following items:

1. The reasonable medical expenses Plaintiff has necessarily incurred as a result of the collision and the medical expenses which the Jury believes the Plaintiff is reasonably certain to incur in the future as a result of the collision, discounted to present value.

2. Plaintiff's loss of earnings or earning capacity from the date of the collision to the present.

3. Plaintiff's loss of earnings or earning capacity which the Jury believes the Plaintiff is reasonably certain to experience in the future as a result of the collision, discounted





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1 to present value. Also, the Jury will include the reasonable value of services performed by  
2 another in doing things for the Plaintiff, which except for the injuries, Plaintiff would ordinarily  
3 have performed.

4 4. The physical and mental pain, suffering, anguish and disability endured by the  
5 Plaintiff from the date of the collision to the present; and

6 5. The physical and mental pain, suffering, anguish and disability which the jury  
7 believes Plaintiff is reasonably certain to experience in the future as a result of the collision,  
8 discounted to present value.

9 Plaintiff reserves all rights to seek other damages including, but not limited to, general  
10 and exemplary damages in an amount to be proven at trial.

11 **PRE-TRIAL DISCLOSURES**

12 **Pursuant to N.R.C.P. 16.1.(a)(3)**

13 **I.**

14 **PLAINTIFF'S WITNESSES PURSUANT TO N.R.C.P. 16.1 (a)(3)(A)**

	NAME	EXPECTED TO PRESENT	SUBPOENAED	MAY CALL	BY DEPO
15 1.	Taylor Cape c/o Brian P. Nestor, Esq. GREENMAN, GOLDBERG, RABY & MARTINEZ 2770 S. Maryland Pkwy. Ste. 100 Las Vegas, Nevada 89109	X			
22 2.	David G. Martinez-Holdridge c/o John T. Keating, Esq. KEATING LAW GROUP 9130 W. Russell Road, Ste. 200 Las Vegas, NV 89148	X			



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	NAME	EXPECTED TO PRESENT	SUBPOENAED	MAY CALL	BY DEPO
3.	Chilly Willy's Handyman Services, LLC c/o Ryan L. Dennett, Esq. DENNETT WINSPEAR, LLP 3301 N. Buffalo Drive, Ste. 195 Las Vegas, NV 89129	X			
4.	Angela Olguin 346 Ocean View Blvd. Lompoc, CA 98437			X	
5.	Ashley Warren 6835 Rolling Boulder St. Las Vegas, NV 89149			X	
6.	Chris Osorio 8704 Willow Cabin St. Las Vegas, NV 89131			X	
7.	Silina Indalecio 9354 Writing Ave. Las Vegas, NV 89149			X	
8.	Jose Gonzalez Martinez 1209 Pyramid Dr. Las Vegas, NV 89108			X	
9.	Officer Matthew Ware LVMPD ID No. 9684 400 S. Martin Luther King, Jr. Blvd. Las Vegas, NV 89106			X	
10.	Jan Roughan, BSN, RN, PHN, CRRN/ABSNC 465 N. Halstead Street, Ste. 120 Pasadena, CA 91107			X	



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	NAME	EXPECTED TO PRESENT	SUBPOENAED	MAY CALL	BY DEPO
11.	Attending Physician and/or N.R.C.P. 30(b)(6) Witness(es) and/or Custodian of Records UMC Medical Center 1800 W. Charleston Blvd., Las Vegas, Nevada 89106			X	
12.	Attending Provider and/or N.R.C.P. 30(b)(6) Witness(es) and/or Custodian of Records Pueblo Medical Imaging 5495 S. Rainbow Blvd. Ste. 203 Las Vegas, NV 89118			X	
13.	Sunshine Collins, PsyD and/or N.R.C.P. 30(b)(6) Witness(es) and/or Custodian of Records 9163 W. Flamingo Rd., Ste. 120 Las Vegas, NV 89147			X	
14.	Attending Physician and/or N.R.C.P. 30(b)(6) Witness(es) and/or Custodian of Records Spring Mountain Treatment Center 7000 Spring Mountain Rd. Las Vegas, NV 89117			X	
15.	Attending Physician and/or N.R.C.P. 30(b)(6) Witness(es) and/or Custodian of Records Seven Hills Behavioral Health Hospital 3021 W. Horizon Ridge Pkwy. Henderson, NV 89052			X	
16.	Leesha Bitto and/or N.R.C.P. 30(b)(6) Witness(es) and/or Custodian of Records Leesha Bitto 3201 S. Maryland Pkwy., Ste. 318 Las Vegas, NV 89109			X	



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	NAME	EXPECTED TO PRESENT	SUBPOENAED	MAY CALL	BY DEPO
17.	Attending Physician and/or N.R.C.P. 30(b)(6) Witness(es) and/or Custodian of Records Las Vegas Radiology 3201 S, Maryland Pkwy., Ste. 102 Las Vegas, NV 89109			X	
18.	Attending Physician and/or N.R.C.P. 30(b)(6) Witness(es) and/or Custodian of Records Greenwalt Chiropractic 7500 W. Sahara Ave. Las Vegas, NV 89117			X	
19.	Enrico Fazzini, M.D. and/or N.R.C.P. 30(b)(6) Witness(es) and/or Custodian of Records 826 E. Charleston Blvd. Las Vegas, NV 89074			X	
20.	Attending Physician and/or N.R.C.P. 30(b)(6) Witness(es) and/or Custodian of Records Emp of Clark UMC PPL P.O. Box 18925 Belfast, ME 04915			X	
21.	Attending Physician and/or N.R.C.P. 30(b)(6) Witness(es) and/or Custodian of Records Desert Radiologist 11460 N. Meridian St. Carmel, IN 46032			X	
22.	Attending Physician and/or N.R.C.P. 30(b)(6) Witness(es) and/or Custodian of Records American Medical Response 50 S. Main St., Ste. 401 Akron, OH 44308			X	



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	NAME	EXPECTED TO PRESENT	SUBPOENAED	MAY CALL	BY DEPO
23.	Akindale Kolade, MD and/or N.R.C.P. 30(b)(6) Witness(es) and/or Custodian of Records 3201 S. Maryland Pkwy., #318 Las Vegas, NV 89109			X	

Plaintiff may call the Custodian of Records of all treating physicians to testify as to the completeness and accuracy of records, medical records and bills generated in the normal course of business.

Plaintiff reserves the right to call any witness named by Defendants. Plaintiff reserves the right to call any witness as may be necessary for the purpose of impeachment. Plaintiff may call any and all witnesses in rebuttal to testimony given by Defendants' witnesses. Plaintiff reserves the right to object to any of Defendants' witnesses at the time of trial.

#### I.

#### **PLAINTIFF'S EXHIBITS PURSUANT TO N.R.C.P. 16.1 (a)(3)(B)**

	EXHIBIT	EXPECT TO USE	MAY USE
1.	LVMPD State of Nevada – Traffic Crash Report (Bate Nos. 0001- 0008);	X	
2.	UMC Medical Center medical records and billing (Bate Nos. 0009- 0083);	X	
3.	Pueblo Medical Imaging medical records and billing (Bate Nos. 0084- 0088);	X	
4.	Sunshine Collins, LLC medical records and billing (Bate Nos. 0089- 0116);	X	
5.	Spring Mountain Treatment Center medical records and billing (Bate No. 0117- 0344);	X	
6.	Las Vegas Radiology medical records and billing (Bate No. 0345-0352);	X	
7.	Greenwalt Chiropractic medical records and billing (Bate Nos. 0353- 0406);	X	
8.	Enrico Fazzini, MD medical records and billing (Bate Nos. 0407- 0418);	X	
9.	Emp of Clark UMC PLLC billing statement (Bate Nos. 0419- 0422);	X	
10.	Desert Radiologist billing statement (Bate No. 0423);	X	



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	EXHIBIT	EXPECT TO USE	MAY USE
11.	American Medical Response medical records and billing (Bate Nos. 0424- 0433);	X	
12.	Jan Roughan, BSN, RN, PHN Life Care Plan report (Bate Nos. 0434- 0441);	X	
13.	Color photographs of Plaintiff's property damage (Bate Nos. 0442- 0451).	X	

Plaintiff may use any and all writings, published works, journals, treatises, medical texts, affidavits, films, drawings, graphs, charts, photographs, reports, computer tapes, computer discs, and other data compilations, and other medical reference materials which Plaintiff and/or Plaintiff's expert use in support of Plaintiff's allegations.

Deposition transcripts will be used as needed for rebuttal or impeachment. Deposition transcripts may also be used for direct examination if the witness is unable to appear at the time of trial.

Plaintiff may also use the parties' responses to discovery as necessary.

Plaintiff reserves the right to object to the admission of Defendants' exhibits at the time of trial.

Plaintiff reserves the right to use any and all other exhibits needed for rebuttal or impeachment.

Plaintiff may offer documents produced by Plaintiff and Defendants which experts have reviewed or used in forming their opinions, including but not limited to reports, pleadings, correspondence, notes, as well as medical records and billings.

Plaintiff further reserves the right to utilize any and all documents produced by Defendants.

### III.

#### **PLAINTIFF'S OBJECTION TO DEFENDANT'S EXHIBITS**

#### **PURSUANT TO N.R.C.P. 16.1 (a)(3)(c)**

None at this time. Plaintiff reserves the right to object to any exhibit listed by Defendants in Pre-Trial Disclosures and after such time as the Court has ruled on pre-trial motions and motions in limine and/or at the time of trial.



1 IV.

2 **PLAINTIFF WILL PRESENT THE FOLLOWING DEPOSITIONS AT TRIAL**  
3 **PURSUANT TO N.R.C.P. 16.1 (a)(3)(B)**

4 Plaintiff does not anticipate presenting testimony by deposition at this time.

5 V.

6 **PLAINTIFF'S DEMONSTRATIVE EXHIBITS**

7 Plaintiff may offer at trial, certain Exhibits for demonstrative purposes including, but not  
8 limited to, the following:

- 9 a. Actual surgical hardware, plates, screws, surgical tools, and surgical equipment  
10 as used in Plaintiff's medical treatment and anticipated to be used in future  
11 treatment;
- 12 b. Demonstrative and actual photographs and videos of surgical procedures and  
13 other diagnostic tests Plaintiff has undergone and will undergo in the future;
- 14 c. Actual diagnostic studies and computer digitized diagnostic studies;
- 15 d. Samples of tools used in surgical procedures;
- 16 e. Diagrams, drawings, pictures, photos, film, video, DVD and CD ROM of  
17 various parts of the human body, diagnostic tests and surgical procedures;
- 18 f. Computer simulation, finite element analysis, mabymo and similar forms of  
19 computer visualization;
- 20 g. Power point images/drawings/diagrams/animations/story boards depicting the  
21 facts and circumstances of the subject incident, the parties involved, the  
22 location of the subject collision and what occurred in the subject collision;
- 23 h. Pictures of Plaintiff prior and subsequent to the subject collision;
- 24 i. Surgical Timeline;
- 25 j. Medical treatment timeline;
- 26 k. Future Medical Timeline;
- 27 l. Charts depicting Plaintiff's Loss of Earning Capacity;
- 28 m. Charts depicting Plaintiff's Life Care Plans;



- n. Charts depicting Plaintiff's Loss of Hedonic Damages;
- o. Charts depicting Plaintiff's Loss of Household Services;
- p. Photographs of Plaintiff's Witnesses;
- q. Charts depicting Plaintiff's Life Expectancy;
- r. Story boards and computer digitized power point images;
- s. Blow-ups/transparencies/digitized images of medical records, medical bills, photographs and other exhibits;
- t. Diagrams/story boards/computer re-enactment of the subject incident;
- u. Diagrams of various parts of the human body related to Plaintiff's injuries;
- v. Photographs of various parts of the human body related to Plaintiff's injuries;
- w. Models of the human body related to Plaintiff's injuries;
- x. Samples of a spinal cord stimulator and leads;
- y. Sample of an intrathecal drug delivery system and leads;
- z. Samples of the needles and surgical tools used in Plaintiff's various diagnostic and therapeutic pain management procedures.

DATED this 11<sup>th</sup> day of November, 2020.

**GREENMAN GOLDBERG RABY & MARTINEZ**

*/s/ Dillon G. Coil*

---

**GABRIEL A. MARTINEZ, ESQ.**

Nevada Bar No. 326

**DILLON G. COIL, ESQ.**

Nevada Bar No. 11541

**BRIAN P. NESTOR, ESQ.**

Nevada Bar No. 13551

2770 S. Maryland Pkwy, Ste. 100

Las Vegas, NV 89109

Phone: 702.384.1616 ~ Fax: 702.384.2990

*Attorneys for Plaintiff*





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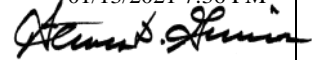
## CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of GREENMAN, GOLDBERG, RABY & MARTINEZ, and that on the 11<sup>th</sup> day of November, 2020, I caused the foregoing document entitled **PLAINTIFF'S INITIAL EARLY CASE CONFERENCE WITNESS AND EXHIBIT LIST AND PRE-TRIAL DISCLOSURES** to be served upon those persons designated by the parties in the E-service Master List for the above-referenced matter in the Eighth Judicial 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/ Michael Madden*

---

An Employee of GREENMAN, GOLDBERG,  
RABY & MARTINEZ

  
CLERK OF THE COURT

**SCHTO**

DISTRICT COURT  
CLARK COUNTY, NEVADA

TAYLOR MILES CAPE,

Plaintiff(s),

vs.

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

Defendant(s).

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

TRIAL DATE: June 27, 2022  
TRIAL TIME: 1:30 p.m.

***ENTERED INTO ODYSSEY/sj***

**SCHEDULING ORDER AND ORDER SETTING CIVIL JURY TRIAL**

NATURE OF ACTION: **Negligence - Auto**

TIME REQUIRED FOR TRIAL: **7 - 10 DAYS (JURY DEMAND)**

DATES FOR SETTLEMENT CONFERENCE: NONE

Counsel representing all parties and after consideration by the Honorable Ronald J.  
Israel,

**IT IS HEREBY ORDERED:**

1. All parties shall complete discovery on or before **January 7, 2022**.
2. All parties shall file motions to amend pleadings or add parties on or before  
**October 7, 2021**.
3. All parties shall make initial expert disclosures pursuant to N.R.C.P. 16.1(a)(2)  
on or before **October 7, 2021**.
4. All parties shall make rebuttal expert disclosures pursuant to N.R.C.P. 16.1(a)(2)

on or before **November 8, 2021**.

5. All parties shall file dispositive motions on or before **February 7, 2022**.

Certain dates from your case conference report(s) may have been changed to bring them into compliance with N.R.C.P. 16.1.

Within 60 days from the date of this Scheduling Order, the Court shall notify counsel for the parties as to the date of trial, as well as any further pretrial requirements in addition to those set forth above.

Unless otherwise directed by the court, all pretrial disclosures pursuant to N.R.C.P. 16.1(a)(3) must be made at least 30 days before trial.

Motions for extensions of discovery shall be made directly to this Court. Discovery is completed on the day responses are due or the day a deposition begins.

Unless otherwise ordered, all discovery disputes (except disputes presented at a pre-trial conference or at trial) must first be heard by the Discovery Commissioner.

**IT IS HEREBY ORDERED THAT:**

- A. The above-entitled case is set to be tried before a jury on a **five-week stack** to begin on the **27th of June, 2022, at 1:30 p.m.**
- B. A Pre-Trial Conference // Calendar Call with the designated attorney and/or parties in proper person will be held on the **21st of June, 2022, at 9:30 a.m.** You will leave Calendar Call with a FIRM trial date.
- C. The Pre-Trial Memorandum must be filed not less than 15 days before the date set for trial, with a courtesy copy delivered to Department XXVIII Chambers. All parties, (attorneys and parties in Proper Person) MUST comply with ALL REQUIREMENTS of E.D.C.R. 2.67, 2.68 and 2.69.
- D. All discovery deadlines, deadlines for filing dispositive motions and motions to amend the pleadings or add parties are controlled by the previously issued

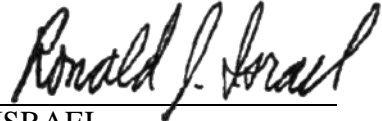
1 Scheduling Order and/or any Stipulation And Order To Extend Discovery  
2 Deadlines.

- 3 E. All pre-trial motions MUST be filed at least 45 days before, and heard at least  
4 fourteen days prior to the trial date. ORDERS SHORTENING TIME WILL NOT  
5 SIGNED EXCEPT IN EXTREME EMERGENCIES. An upcoming trial date is not  
6 an EXTREME EMERGENCY.

7 Failure of the designated trial attorney or any party appearing in proper  
8 person for any court appearances for any court appearances or to comply with this  
9 Order shall result in any of the following: (1) dismissal of the action; (2) default  
judgment; (3) monetary sanctions; (4) vacation of the trial date; and/or any other  
appropriate remedy or sanction.

10 Counsel are required to advise the Court immediately when the case settles  
11 or is otherwise resolved prior to trial. A Stipulation which terminates a case by  
12 dismissal shall also indicate whether a Scheduling Order has been filed and if a trial  
13 date has been set, and the date of that trial. A copy should be provided to  
14 Chambers.

Dated this 13th day of January, 2021



17 RONALD J. ISRAEL

18 A-20-818569-C

2AB 796 CC3D 7A77

Ronald J. Israel

District Court Judge

1 **CSERV**

2  
3 DISTRICT COURT  
4 CLARK COUNTY, NEVADA

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 Scheduling and Trial Order was served via the court's electronic eFile  
13 system to all recipients registered for e-Service on the above entitled case as listed below:

14 Service Date: 1/13/2021

15 Theresa Amendola tamendola@dennettwinspear.com

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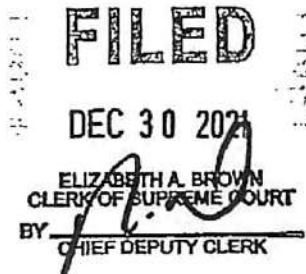
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137 Nev., Advance Opinion *86*  
IN THE SUPREME COURT OF THE STATE OF NEVADA

LYFT, INC.,  
Petitioner,  
vs.  
THE EIGHTH JUDICIAL DISTRICT  
COURT OF THE STATE OF NEVADA,  
IN AND FOR THE COUNTY OF  
CLARK; AND THE HONORABLE  
MARK R. DENTON, DISTRICT JUDGE,  
Respondents,  
and  
KALENA DAVIS,  
Real Party in Interest.

No. 82148



Original petition for a writ of mandamus challenging a district court order overruling an objection to the discovery commissioner's recommendation that examinations of the real party in interest's mental and physical condition proceed under NRS 52.380.

*Petition granted.*

Lewis Brisbois Bisgaard & Smith LLP and Jeffrey D. Olster, Jason G. Revzin, and Blake A. Doerr, Las Vegas,  
for Petitioner.

Clear Counsel Law Group and Jared R. Richards and Dustin Birch,  
Henderson,  
for Real Party in Interest.

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BEFORE THE SUPREME COURT, EN BANC.

## OPINION

By the Court, PARRAGUIRRE, J.:

In 2019, this court amended Nevada Rule of Civil Procedure (NRCP) 35, which governs mental and physical examinations of a party ordered during discovery in civil litigation.<sup>1</sup> The Legislature subsequently enacted NRS 52.380,<sup>2</sup> which also governs conditions for such examinations. The conditions imposed by NRS 52.380 differ from those imposed under NRCP 35, however. Specifically, the statute allows the examinee's attorney to attend and make audio recordings of all physical and mental examinations, while NRCP 35 disallows observers at certain mental examinations, prohibits the examinee's attorney from attending any examination, and allows audio recordings only upon a showing of good cause.

In the underlying dispute, the discovery commissioner concluded that NRS 52.380 supersedes NRCP 35, such that real party in interest's examinations must follow the procedures set forth in the statute. The district court summarily affirmed and adopted the discovery commissioner's report and recommendations. Petitioner, the party that sought the examinations, asserts that NRS 52.380 violates the separation of powers doctrine, which prevents one branch of government from encroaching on the powers of another branch, by attempting to abrogate NRCP 35. Petitioner seeks a writ of mandamus precluding the district court

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<sup>1</sup>See *In re Creating a Comm. to Update & Revise the Nev. Rules of Civil Procedure*, ADKT 522 (Order Amending the Rules of Civil Procedure, the Rules of Appellate Procedure, and the Nevada Electronic Filing and Conversion Rules, Dec. 31, 2018 (effective March 1, 2019)).

<sup>2</sup>See 2019 Nev. Stat., ch. 180, § 1, at 966-67.



from requiring adherence to the assertedly unconstitutional statute during the examinations.

The judiciary has the power to regulate court procedure, and the Legislature may not enact a procedural statute that would abrogate a preexisting court rule. We conclude that NRS 52.380 attempts to abrogate NRCP 35 and that, by enacting it, the Legislature encroached on the inherent power of the judiciary. Thus, we hold that NRS 52.380 violates the separation of powers doctrine. The district court's decision to allow the examinations to proceed under NRS 52.380 was therefore a manifest abuse of discretion, and mandamus relief is warranted.

### *FACTS AND PROCEDURAL HISTORY*

Petitioner Lyft, Inc., operates a ridesharing network. A vehicle providing services for Lyft's network collided with real party in interest, Kalena Davis, who was riding a motorcycle. Davis was seriously injured and sued Lyft for negligence, claiming \$11.8 million in damages. Lyft disputed liability and retained three experts to contest the amount of Davis's damages. Lyft filed a motion to compel Davis to attend physical and mental examinations with its experts under NRCP 35. Davis opposed Lyft's motion on the ground that good cause did not exist for the examinations under NRCP 35.

After a hearing on Lyft's motion to compel, the discovery commissioner issued a report and recommendations concluding that Lyft showed good cause for its experts to examine Davis because he placed his mental and physical condition in controversy. The discovery commissioner *sua sponte* asked the parties to submit supplemental briefing regarding the differing examination conditions imposed by NRCP 35 and NRS 52.380. Thereafter, Davis argued that NRS 52.380 governed and requested the presence of his attorney at the examinations.

Following submission of supplemental briefing by the parties, the discovery commissioner concluded that NRS 52.380 irreconcilably conflicts with NRCP 35. Without citation to legal authority, the discovery commissioner concluded that NRS 52.380 provides substantive rights and thus supersedes NRCP 35. Consistent with NRS 52.380, the discovery commissioner recommended that Davis be allowed to have his attorney present to observe and make an audio recording of each exam. Lyft filed an objection to the discovery commissioner's recommendations. The district court overruled Lyft's objection without a hearing and entered an order summarily affirming and adopting the recommendations, and Lyft filed this writ petition.

### DISCUSSION

*We exercise our discretion to entertain Lyft's writ petition*

The decision to entertain a writ petition is discretionary. *Davis v. Eighth Judicial Dist. Court*, 129 Nev. 116, 118, 294 P.3d 415, 417 (2013). Although “[a] writ of mandamus is not a substitute for an appeal,” *Archon Corp. v. Eighth Judicial Dist. Court*, 133 Nev. 816, 819, 407 P.3d 702, 706 (2017) (citing *Schlagenhauf v. Holder*, 379 U.S. 104, 110 (1964)), entertaining a petition for advisory mandamus is “appropriate when an important issue of law needs clarification and considerations of sound judicial economy and administration militate in favor of granting the petition,” *id.* at 820, 407 P.3d at 706 (internal quotation marks omitted). However, we will entertain an advisory mandamus petition only “to address the rare question that is likely of significant repetition prior to effective review, so that our opinion would assist other jurists, parties, or lawyers.” *Id.* at 822-23, 407 P.3d at 708 (internal quotation marks omitted). Finally, advisory mandamus is appropriate when our intervention will “clarify a substantial issue of public policy or precedential value.” *Walker v. Second*

*Judicial Dist. Court*, 136 Nev., Adv. Op. 80, 476 P.3d 1194, 1199 (2020) (internal quotation marks omitted).

Whether NRS 52.380 supersedes NRCP 35 is an issue of statewide importance that presents a novel question of law requiring clarification. Because physical and mental examinations are frequently conducted during discovery, our clarification of this issue will assist the district courts and parties alike by resolving the uncertainty that exists over whether NRS 52.380 or NRCP 35 governs mental and physical examinations performed during discovery. Our intervention is further warranted because district courts are reaching different conclusions on this very issue. Moreover, this is a substantial issue of public policy due to the conflicting interests of plaintiffs and defendants with respect to the procedures for the examinations. Thus, we choose to entertain Lyft's petition.

*NRS 52.380 plainly conflicts with NRCP 35*

The parties dispute whether NRS 52.380 violates the separation of powers between the branches of government. The separation of powers “prevent[s] one branch of government from encroaching on the powers of another branch.” *Comm’n on Ethics v. Hardy*, 125 Nev. 285, 292, 212 P.3d 1098, 1103 (2009); *see also* Nev. Const. art. 3, § 1. We review the constitutionality of a statute de novo, even in the context of a writ petition. *Tam v. Eighth Judicial Dist. Court*, 131 Nev. 792, 796, 358 P.3d 234, 237 (2015). “Statutes are presumed to be valid, and the challenger bears the burden of showing that a statute is unconstitutional.” *Id.* at 796, 358 P.3d at 237-38.

“[T]his court indisputably possesses inherent power to prescribe rules necessary or desirable to handle the judicial functioning of the courts . . . .” *State v. Second Judicial Dist. Court (Marshall)*, 116 Nev. 953,

963, 11 P.3d 1209, 1215 (2000); *see also* NRS 2.120(2) (explaining that this court “shall regulate original and appellate civil practice and procedure”). Thus, in the context of a conflicting statute and court rule, our separation of powers analysis examines “whether the challenged statutory provision is substantive or procedural.” *See Hefetz*, 133 Nev. at 330 n.5, 397 P.3d at 478 n.5 (quoting *Seisinger v. Siebel*, 203 P.3d 483, 489 (Ariz. 2009)). As we have explained, “the [L]egislature may not enact a procedural statute that conflicts with a pre-existing procedural rule, without violating the doctrine of separation of powers, and . . . such a statute is of no effect.” *State v. Connery*, 99 Nev. 342, 345, 661 P.2d 1298, 1300 (1983). However, a “legislative encroachment on judicial prerogatives” is implicated only where the statute “interfere[s] with procedure to a point of disruption or attempted abrogation of an existing court rule.” *Whitlock v. Salmon*, 104 Nev. 24, 26, 752 P.2d 210, 211 (1988). The parties ostensibly agree that before analyzing whether NRS 52.380 violates the separation of powers doctrine, we must first analyze whether NRS 52.380 irreconcilably conflicts with NRCP 35 or whether the provisions can be harmonized.

Lyft argues that NRS 52.380 and NRCP 35 irreconcilably conflict. Davis argues that these provisions can be read in harmony. Specifically, Davis asserts that NRCP 35 sets forth general procedures for the examinations, whereas NRS 52.380 provides examinees the substantive right to have an attorney present at all examinations.

NRCP 35 applies in civil actions where a party’s “mental or physical condition . . . is in controversy” and the opposing party seeks to have an “examination [of that party’s condition] by a suitably licensed or certified examiner.” NRCP 35(a)(1). However, a party can seek the examination only “on motion for good cause.” NRCP 35(a)(2)(A). In interpreting the federal counterpart to NRCP 35, the United States

Supreme Court held that good cause under FRCP 35 is “not met by mere conclusory allegations of the pleadings—nor by mere relevance to the case—but require[s] an affirmative showing by the movant that each condition as to which the examination is sought is really and genuinely in controversy.” *Schlagenhauf*, 379 U.S. at 118. NRCP 35 also prescribes the conditions under which the examination may take place. Relevant to this case, subsection (a)(3) governs recordings, providing that “[o]n request of a party or the examiner, the court may, for good cause shown, require as a condition of the examination that the examination be audio recorded.” And subsection (a)(4) governs when, and by whom, observation of the examination will be allowed, giving considerable discretion to the district court in determining when good cause is shown to depart from the general rule:

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

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

(i) the examination is a neuropsychological, psychological, or psychiatric examination; or

(ii) the court orders otherwise for good cause shown.

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



(C) An observer must not in any way interfere, obstruct, or participate in the examination.

NRCP 35(a)(4).

Like the court rule, NRS 52.380 regulates the conditions of “a mental or physical examination ordered by a court for the purpose of discovery in a civil action.” NRS 52.380(7)(a). Under the relevant subsections of NRS 52.380, an observer, including an attorney, is automatically allowed to attend and record any examination:

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

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

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

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

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

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

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

Here, the main arguments center on the provisions governing observers and recordings.

*An observer’s presence at the physical or mental examination*

With respect to an observer’s presence at the examination, NRCP 35(a)(4) generally allows a party being examined to request “to have

an observer present at the examination,” but “[t]he observer *may not be the party’s attorney* or anyone employed by the party or the party’s attorney.” *Id.* (emphasis added). The party making the request is required to “identify the observer and state his or her relationship to the party being examined.” *Id.* Further, this general rule does not apply to “neuropsychological, psychological, or psychiatric examination[s]” unless “the court orders otherwise for good cause shown.” NRCP 35(a)(4)(A)(i)-(ii); NRCP 35(a)(4)(B).

NRS 52.380(1), on the other hand, unconditionally provides that “[a]n observer may attend an examination.” In addition, NRS 52.380 omits any language that requires the party being examined to identify the observer or state the observer’s relationship to the examinee before the exam. Thus, NRS 52.380 eliminates the district court’s discretion to control the presence of observers at mental and physical examinations. *Compare* NRS 52.380(1)-(2), *with* NRCP 35(a)(4). Further, and crucially, under the statute, the observer may be an attorney or the attorney’s representative. NRS 52.380(2)(a)-(b). In these ways, NRS 52.380 attempts to abrogate NRCP 35: allowing an observer—who can be the examinee’s *attorney*—to attend all examinations regardless of whether good cause exists to allow or preclude an observer in deviation of the general rule.

*An audio recording of the mental or physical examination*

With respect to the audio recording of an exam, NRCP 35(a)(3) provides that, “[o]n request of a party or the examiner, the court may, *for good cause shown*, require as a condition of the examination that the examination be audio recorded.” (Emphasis added.) NRS 52.380(3) removes the good cause requirement and provides that “[t]he observer attending the examination . . . may make an audio or stenographic recording of the examination.” Thus, NRS 52.380 also removes the district

court's discretion to control audio recordings at the examinations. Plainly, NRS 52.380(3) attempts to abrogate NRCP 35(a)(3).

Davis argues that NRS 52.380 and NRCP 35 can be harmonized because the statute allows what Davis refers to as a "victim's advocate" to attend the exam. NRS 52.380, however, omits the term "victim's advocate." Instead, like NRCP 35, the statute uses the term "observer." Thus, we conclude that Davis's argument is unsupported by the plain meaning of NRS 52.380. *See Vanguard Piping Sys., Inc. v. Eighth Judicial Dist. Court*, 129 Nev. 602, 607, 309 P.3d 1017, 1020 (2013) (stating that we effectuate the plain meaning of statutes).

Therefore, we conclude that NRS 52.380 conflicts with NRCP 35 and that these provisions cannot be harmonized. Thus, we next analyze whether NRS 52.380 violates the separation of powers doctrine.

*NRS 52.380 violates the separation of powers doctrine*

Lyft argues that NRS 52.380 violates the separation of powers doctrine because the statute is procedural and attempts to abrogate NRCP 35, a preexisting court rule. Lyft contends that NRS 52.380 is procedural because it does not provide substantive rights but rather sets forth processes applicable to an examination conducted, for discovery purposes, as incidental to a substantive claim. Davis cites caselaw, legislative history, and the statutory text to argue that NRS 52.380 is a substantive statute and therefore trumps. He specifically argues that NRS 52.380 provides examinees the substantive right to have an attorney present and make an audio recording at all examinations.

The United States Supreme Court has generally explained that "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.*, \_\_\_ U.S. \_\_\_,



\_\_\_\_\_, 139 S. Ct. 1804, 1811 (2019) (internal quotation marks omitted). More specifically, the Supreme Court has held that FRCP 35, which governs mental and physical examinations, is procedural because it is “the judicial process for enforcing rights and duties recognized by substantive law.” *Sibbach v. Wilson & Co.*, 312 U.S. 1, 14 (1941); *see also Schlagenhauf*, 379 U.S. at 113 (noting the same). Further, the United States District Court for the District of Nevada has also concluded—for the purposes of the *Erie*<sup>3</sup> doctrine’s diversity analysis—that NRS 52.380 is procedural because it “sets forth [the] process allowed . . . [for] an examination under [NRC] 35,” and therefore “is not a substantive law.” *Freteluco v. Smith’s Food & Drug Ctrs., Inc.*, 336 F.R.D. 198, 203 (D. Nev. 2020) (applying FRCP 35 instead of NRS 52.380 after concluding that the statute is procedural).<sup>4</sup>

These federal authorities persuasively conclude that NRS 52.380 is a rule of procedure because it sets forth the process allowed for a mental or physical examination conducted during discovery. Like FRCP 35, this statute only provides a process for enforcing an underlying civil claim. NRS 52.380 applies to “discovery in a civil action,” NRS 52.380(7)(a), so it can be invoked only after a party has asserted an underlying civil claim. Outside of civil discovery, NRS 52.380 has no application. Moreover, NRS 52.380 does not give litigants any substantive right because it does not create a cognizable claim for relief from a violation of its provisions. *See Legal Right, Black’s Law Dictionary* (11th ed. 2019) (defining a right as

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<sup>3</sup>*See Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938) (holding that a federal court sitting in diversity applies the substantive law of the state).

<sup>4</sup>To the extent Davis argues that *Freteluco*’s analysis of NRS 52.380 and FRCP 35 under the *Erie* doctrine is irrelevant to this separation of powers analysis, we are unpersuaded because both analyses determine whether a law is substantive or procedural.

"[t]he capacity of asserting a legally recognized claim against one with a correlative duty to act"). Indeed, the only relief a party can obtain under the statute is "a protective order pursuant to the Nevada Rules of Civil Procedure," if the exam has been suspended. NRS 52.380(6). Thus, the remedy for a violation of NRS 52.380 is the invocation of NRCP 26(c), which again can only be obtained if the party seeking the protective order is litigating an underlying civil claim. Therefore, the statute is procedural.

Insofar as Davis relies on *Whitlock v. Salmon*, 104 Nev. 24, 26, 752 P.2d 210, 211 (1988), to argue that NRS 52.380 is substantive, we are unpersuaded. In *Whitlock*, we examined whether NRS 16.030(6), which sets forth how voir dire is conducted, violated the separation of powers doctrine because it conflicted with the then-existing version of NRCP 47(a). 104 Nev. at 25-26, 752 P.2d at 211. We explained that the statute allows parties to conduct supplemental voir dire that the district court "must not . . . unreasonably restrict[]," *id.* at 25, 752 P.2d at 211 (emphasis omitted) (quoting NRS 16.030(6)), whereas the court rule allowed the district court to permit supplemental voir dire "as it deem[ed] proper," *id.* at 26, 752 P.2d at 211 (internal quotation marks omitted). Although the provisions seemingly conflicted, we explained that NRS 16.030(6) did not "interfere with procedure to a point of disruption or *attempted abrogation* of an existing court rule." *Id.* at 26, 752 P.2d at 211 (emphasis added). We further reasoned that the trial judge still had discretion to "reasonably control and limit an attorney's participation in voir dire." *Id.* at 28, 752 P.2d at 213. Thus, in recognizing a substantive right to counsel's reasonable participation in voir dire, the statute reflected the principles of the rule and did not violate the separation of powers doctrine. *Id.* at 26, 752 P.2d at 211-12. Here, unlike the situation in *Whitlock*, NRS 52.380 attempts to abrogate

NRCP 35 by removing the district court's discretion to control the examinations and in the other above-mentioned ways.<sup>5</sup>

In sum, NRS 52.380 does not confer any legally recognized claim such that it creates a substantive right.<sup>6</sup> Instead, NRS 52.380 is procedural because it specifies the process allowed for a mental or physical examination that is conducted only after a party has filed an underlying civil claim.<sup>7</sup> Accordingly, we hold that NRS 52.380 is unconstitutional because it attempts to abrogate an existing rule of procedure that this court prescribed under its inherent authority to regulate the judicial process.

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<sup>5</sup>Davis also cites to *Seisinger v. Siebel*, 203 P.3d 483, 484 (Ariz. 2009), which held that a statute was substantive because it "increase[ed] the plaintiff's burden of production in medical malpractice actions." There, the Arizona Supreme Court held that the statute at issue did not violate the separation of powers doctrine because it was substantive and "specifie[d] the kind of expert testimony necessary to *establish* medical malpractice." *Id.* (emphasis added). Davis, however, does not explain how NRS 52.380 changes the burden of proof such that it would affect any underlying claim. Thus, we conclude that Davis's reliance on *Seisinger* is misplaced.

<sup>6</sup>Insofar as Davis argues that NRS 52.380 is substantive because it allows a "victim's advocate" to attend the exam, we are unpersuaded because, as we noted above, the statutory text is devoid of any language indicating that a "victim's advocate" may attend the exam. See NRS 52.380.

<sup>7</sup>Davis also argues that, in the event we determine that NRS 52.380 is procedural, we should nonetheless hold that NRS 52.380 is "directory." He therefore suggests that we should order district courts to consider NRS 52.380 when conducting an NRCP 35 analysis. He cites to *Mendoza-Lobos v. State*, 125 Nev. 634, 641-42, 218 P.3d 501, 506 (2009), which concluded that a statute violating the separation of powers was directory because it created a "laudable goal." However, the sentencing statute in *Mendoza-Lobos*, unlike here, did not attempt to abrogate a preexisting court rule. Moreover, the Legislature expressly gave this court the power to regulate the Nevada Rules of Civil Procedure. See NRS 2.120(2). Thus, we conclude that Davis's argument is meritless.

*Writ relief is appropriate because the district court manifestly abused its discretion*

Lyft asks this court to issue a writ of mandamus that directs the district court to vacate its order overruling Lyft's objection to the discovery commissioner's report and recommendation. Lyft further asks this court to direct the district court to order that the NRCP 35 examinations proceed without an audio recording or the presence of Davis's attorney. Other than arguing that NRS 52.380 does not violate the separation of powers doctrine, Davis's brief does not address whether, and to what extent, writ relief is warranted.

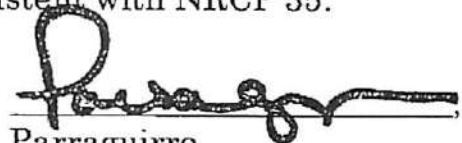
In adopting and affirming the discovery commissioner's report and recommendations applying NRS 52.380 over NRCP 35, the district court manifestly abused its discretion by proceeding under an invalid law. Thus, we conclude that it is appropriate to issue a writ of mandamus directing the district court to vacate its order overruling Lyft's objection to the discovery commissioner's report and recommendation. *Scarbo v. Eighth Judicial Dist. Court*, 125 Nev. 118, 121, 206 P.3d 975, 977 (2009) (explaining that we will issue a writ of mandamus when the district court has manifestly abused its discretion); *State v. Eighth Judicial Dist. Court (Armstrong)*, 127 Nev. 927, 932, 267 P.3d 777, 780 (2011) (defining abuse of discretion as "[a] clearly erroneous interpretation of the law or a clearly erroneous application of a law or rule" (alteration in original) (quoting *Steward v. McDonald*, 958 S.W.2d 297, 300 (Ark. 1997))).

However, we decline to direct the district court to order that the examinations proceed without an observer or an audio recording because it is unclear from the record whether Davis failed to show good cause for those conditions. See *Ryan's Express Transp. Servs., Inc. v. Amador Stage Lines, Inc.*, 128 Nev. 289, 299, 279 P.3d 166, 172 (2012) ("An appellate court is not

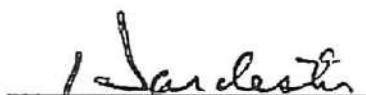
particularly well-suited to make factual determinations in the first instance.”). Thus, we direct the district court to consider the parties’ motions consistent with NRCP 35.

### CONCLUSION


NRS 52.380 violates the separation of powers doctrine because it is a procedural statute that conflicts with NRCP 35. Thus, we hold NRS 52.380 is unconstitutional. Accordingly, we grant Lyft’s petition and direct the clerk of this court to issue a writ of mandamus instructing the district court to vacate its order overruling Lyft’s objection and affirming and adopting the discovery commissioner’s report and recommendation, and to consider the parties’ motions consistent with NRCP 35.

  
Parraguirre, J.

We concur:

  
Hardesty, C.J.

  
Stiglich, J.

  
Cadish, J.

  
Silver, J.

  
Pickering, J.

  
Herndon, J.



IN THE SUPREME COURT OF THE STATE OF NEVADA

FERRELLGAS, INC., A FOREIGN  
CORPORATION; MARIO GONZALEZ;  
AND CARL KLEISNER,

Petitioners,

vs.

THE EIGHTH JUDICIAL DISTRICT  
COURT OF THE STATE OF NEVADA,  
IN AND FOR THE COUNTY OF  
CLARK; AND THE HONORABLE  
JOANNA KISHNER, DISTRICT  
JUDGE,

Respondents,

and

JOSHUA GREEN, AN INDIVIDUAL,  
Real Party in Interest.

No. 82670

**FILED**

**JAN 27 2022**

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY S. Young  
DEPUTY CLERK

*ORDER GRANTING PETITION*

This is an original petition for a writ of mandamus challenging a district court order upholding the discovery commissioner's recommendation that an examination of real party in interest's psychological condition proceed with an observer present and an audio recording.

Petitioner Ferrellgas, Inc. (Ferrellgas), argues that the district court manifestly abused its discretion by finding that Joshua Green, real party in interest, showed good cause for an observer's presence and an audio recording at his NRCP 35 psychological examination. *See* NRCP 35(a)(3), (4)(B). Ferrellgas contends that the district court erroneously concluded that good cause existed for permitting both an observer and audio recording

on the ground that Green did not have a doctor-patient relationship with the examining doctor.

The decision to entertain a writ petition is discretionary. *Davis v. Eighth Judicial Dist. Court*, 129 Nev. 116, 118, 294 P.3d 415, 417 (2013). We “may issue a writ of mandamus . . . where discretion has been manifestly abused or exercised arbitrarily or capriciously.” *Scarbo v. Eighth Judicial Dist. Court*, 125 Nev. 118, 121, 206 P.3d 975, 977 (2009) (internal quotation marks omitted). “A manifest abuse of discretion is a clearly erroneous interpretation of the law or a clearly erroneous application of a law or rule.” *State v. Eighth Judicial Dist. Court (Armstrong)*, 127 Nev. 927, 932, 267 P.3d 777, 780 (2011) (internal quotation marks omitted).

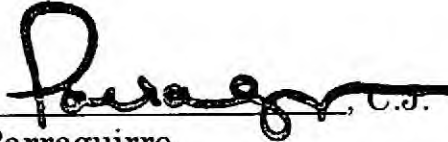
Here, the district court erroneously concluded that Green showed good cause under NRCP 35 based on a lack of a “medical provider-patient relationship” between Green and the examining doctor. The district court cited no legal authority to support its conclusion that the lack of a doctor-patient relationship between the NRCP 35 examiner and examinee establishes good cause for an observer or audio recording, and the plain language of NRCP 35 imposes no such requirement. By misapplying NRCP 35, the district court manifestly abused its discretion.<sup>1</sup> Accordingly, we

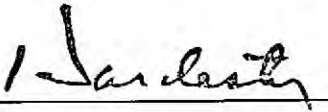
ORDER the petition GRANTED AND DIRECT THE CLERK OF THIS COURT TO ISSUE A WRIT OF MANDAMUS instructing the

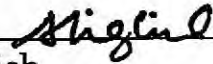
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<sup>1</sup>Likewise, mandamus relief is warranted because Green failed to identify his observer, *see* NRCP 35(a)(4), and the district court failed to acknowledge at the hearing that an observer is not allowed at a psychological exam absent a showing of good cause, *see* NRCP 35(a)(4)(A)-(B), by inquiring into whether Green demonstrated “good faith,” rather than good cause, for the observer and audio recording.

district court to vacate its order overruling Ferrellgas's objection to the discovery commissioner's report and recommendation, and to analyze the parties' motions in light of *Lyft, Inc. v. Eighth Judicial District Court*, 137 Nev., Adv. Op. 86, \_\_ P.3d \_\_, \_\_ (2021).<sup>2</sup>

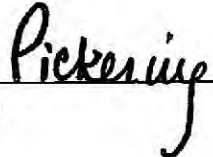
  
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Pickering

  
Herndon

<sup>2</sup>Ferrellgas also argues that Green waived any good cause argument under NRCP 35 because he did not raise that argument before the discovery commissioner. See *Valley Health Sys., LLC v. Eighth Judicial Dist. Court*, 127 Nev. 167, 173, 252 P.3d 676, 680 (2011) (“[N]either this 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.”). We disagree. *Valley Health’s* bar applies to new arguments raised *in objection* to a discovery commissioner’s report and recommendation. Green prevailed before the discovery commissioner, and therefore he did not object to the discovery commissioner’s report and recommendation.



cc: Hon. Joanna Kishner, District Judge  
Hon. Linda M. Bell, Chief Judge  
Olson, Cannon, Gormley, & Stoberski  
Dennett Winspear, LLP  
Baker Sterchi Cowden & Rice LLC/Kansas City  
Pyatt Silvestri  
H&P Law, PLLC  
Eighth District Court Clerk

IN THE SUPREME COURT OF THE STATE OF NEVADA

TROY MOATS,  
Petitioner,

vs.

THE EIGHTH JUDICIAL DISTRICT  
COURT OF THE STATE OF NEVADA,  
IN AND FOR THE COUNTY OF  
CLARK; AND THE HONORABLE  
ADRIANA ESCOBAR, DISTRICT  
JUDGE,

Respondents,

and

TROY BURGESS,  
Real Party in Interest.

No. 81912

**FILED**

**JAN 27 2022**

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY S. Young  
DEPUTY CLERK

**ORDER DENYING PETITION**

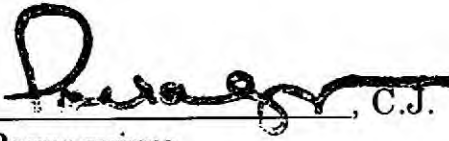
This is an original petition for a writ of mandamus challenging a district court order sustaining an objection to the discovery commissioner's recommendation that the examination of real party in interest's mental condition proceed under NRS 52.380.

Petitioner Troy Moats argues that the district court manifestly abused its discretion by sustaining real party in interest Troy Burgess's objection to the discovery commissioner's report and recommendation concluding that NRS 52.380 supersedes NRCP 35.

The decision to entertain a writ petition is discretionary. *Davis v. Eighth Judicial Dist. Court*, 129 Nev. 116, 118, 294 P.3d 415, 417 (2013). We recently held that NRS 52.380 violates the separation of powers

doctrine. *See Lyft, Inc. v. Eighth Judicial Dist. Court*, 137 Nev., Adv. Op. 86, \_\_ P.3d \_\_, \_\_ (2021). Because the district court concluded that NRCP 35 supersedes NRS 52.380, which was consistent with our holding in *Lyft*, we decline to entertain Moats's petition. Accordingly, we

ORDER the petition DENIED.

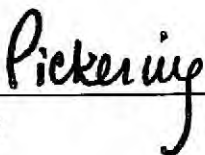
  
Parraguirre, C.J.


  
Hardesty, J.

  
Stiglich, J.

  
Cadish, J.

  
Silver, J.

  
Pickering, J.

  
Herndon, J.

cc: Hon. Adriana Escobar, District Judge  
Hon. Linda M. Bell, Chief Judge  
H&P Law, PLLC  
Winner Booze & Zarccone  
Lincoln, Gustafson & Cercos  
Claggett & Sykes Law Firm  
The Powell Law Firm  
Eighth District Court Clerk

IN THE SUPREME COURT OF THE STATE OF NEVADA

EDGARDO P. YUSI; AND KEOLIS  
TRANSIT SERVICES, LLC,  
Petitioners,

vs.

THE EIGHTH JUDICIAL DISTRICT  
COURT OF THE STATE OF NEVADA,  
IN AND FOR THE COUNTY OF  
CLARK; AND THE HONORABLE  
NANCY L. ALLF, DISTRICT JUDGE,  
Respondents,  
and  
HEATHER FELSNER,  
Real Party in Interest.

No. 82625

**FILED**

**JAN 28 2022**

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY S. Yarnes  
DEPUTY CLERK

*ORDER GRANTING PETITION FOR WRIT OF MANDAMUS*

This is an original petition for a writ of mandamus challenging a district court order adopting a discovery commissioner's recommendation that examination of the real party in interest's medical and physical condition proceed under NRS 52.380.

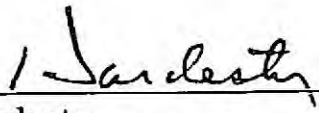
Petitioner, Edgardo Yusi, alleges the district court manifestly abused its discretion by adopting a discovery commissioner's recommendation that NRS 52.380 supersedes NRCP 35. We elect to entertain this petition because "judicial economy and sound judicial administration militate in favor of writ review." *Scarbo v. Eighth Judicial Dist. Court*, 125 Nev. 118, 121, 206 P.3d 975, 977 (2009).


In *Lyft, Inc. v. Eighth Judicial District Court*, we held NRS 52.380 unconstitutional because it violated the separation of powers doctrine. 137 Nev., Adv. Op. 86, \_\_ P.3d \_\_ (2021). Specifically, NRS 52.380 violated separation of powers because it is a procedural statute that conflicts with NRCP 35—a preexisting court rule. See *State v. Connery*, 99 Nev. 342, 345, 661 P.2d 1298, 1300 (1983) (“[T]he [L]egislature may not enact a procedural statute that conflicts with a pre-existing procedural rule, without violating the doctrine of separation of powers, and . . . such a statute is of no effect.”). Given our holding in *Lyft*, writ relief is appropriate in this case because the district court’s adoption of the discovery commissioner’s recommendation that NRS 52.380 supersedes NRCP 35 and, its resulting denial of Yusi’s motion, constituted a manifest abuse of discretion. Cf. *Round Hill Gen. Improvement Dist. v. Newman*, 97 Nev. 601, 603-04, 637 P.2d 534, 536 (1981). Further, issuance of the writ is appropriate because the parties are still in the early stages of litigation and issuing the writ serves the interests of judicial administration. *Int’l Game Tech., Inc. v. Second Judicial Dist. Court*, 124 Nev. 193, 198, 179 P.3d 556, 559 (2008). Accordingly, we vacate our January 20, 2022, temporary stay and

ORDER the petition GRANTED AND DIRECT THE CLERK OF THIS COURT TO ISSUE A WRIT OF MANDAMUS instructing the district court to vacate its order adopting the discovery commissioner’s

report and instruct the district court to analyze the parties' positions consistent with NRCP 35.<sup>1</sup>

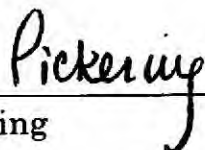
 C.J.  
Parraguirre

 J.  
Hardesty

 J.  
Stiglich

 J.  
Cadish

 J.  
Silver

 J.  
Pickering

 J.  
Herndon

cc: Hon. Nancy L. Allf, District Judge  
Hon. Linda M. Bell, Chief Judge  
Wilson, Elser, Moskowitz, Edelman & Dicker, LLP/Las Vegas  
Shook & Stone, Chtd.  
The Powell Law Firm  
Schwab Law Firm PLLC  
Eighth District Court Clerk

<sup>1</sup>In light of our decision, we do not address the parties' remaining arguments.