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IN THE SUPREME COURT OF THE STATE OF NEVADA

Gabriel L. Martinez; Universal
Protection Services, LLC,

Petitioners,

vs.

The Eighth Judicial District Court of the
State of Nevada and the Honorable Joe
Hardy, Judge,

Respondents.

and

Douglas J. Kennedy,

Real Party in Interest.

Supreme Ct. No.:

Dist. Ct. Case No.: A-20-820254-C

**Gabriel L. Martinez & Universal
Protection Services, LLC's Petition for
Writ of Mandamus**

ORIGINAL PETITION

From the Eighth Judicial District Court, Clark County
The Honorable Joe Hardy, Judge

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1 **NRAP 26.1 Disclosure**

2 The undersigned counsel of record certifies that the following are persons
3 and entities, as described in NRAP 26.1(a), and must be disclosed. These
4 representations are made in order that the judges of this court may evaluate
5 possible disqualification or recusal.

6 1. Parent Corporation: Universal Protection Service LP d/b/a Allied Universal
7 Security Services

8 2. Publicly held company that owns 10% or more of the party's stock: None.

9 3. Law firms who have appeared or are expected to appear for Mr. Martinez &
10 Universal Protection Services, LLC: Wilson Elser

11 DATED this 22nd day of February, 2022.



13 /s/ Michael P. Lowry

14 MICHAEL P. LOWRY, ESQ.

15 CHRIS RICHARDSON, ESQ.

16 6689 Las Vegas Blvd. South, Suite 200

17 Las Vegas, Nevada 89119

18 Attorneys for Gabriel L. Martinez; Universal
19 Protection Services, LLC
20

Routing Statement

Typically NRAP 17(b)(13) governs pretrial writ proceedings challenging discovery orders. This petition challenges two discovery orders. However, this matter should be presumptively retained by the Supreme Court for decision per NRAP 17(a)(11) because it raises, as a principal issue of first impression, a question concerning NRCP 35(a)(3). Specifically, the petition addresses when good cause might exist to audio record a neuropsychological examination. As *Lyft v. Dist. Ct.* noted, Rule 35 examinations occur frequently in personal injury cases. But no appellate court has yet discussed what might demonstrate good cause to support recording a neuropsychological examination per NRCP 35(a)(3).

Alternatively, NRAP 17(a)(12) would also apply in this circumstance as another reason the Supreme Court should retain the case.

DATED this 22nd day of February, 2022.



/s/ Michael P. Lowry

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Attorneys for Gabriel L. Martinez; Universal
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Attorney's Certificate of Compliance

1. I certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14 point Times New Roman.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains 3,705 words.

3. Finally, I certify that I have read this petition, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this petition complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the petition regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying petition is not in conformity with the

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///

///

1 requirements of the Nevada Rules of Appellate Procedure.

2 DATED this 22nd day of February, 2022.



4 /s/ Michael P. Lowry

5 MICHAEL P. LOWRY, ESQ.

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7 Attorneys for Gabriel L. Martinez; Universal
8 Protection Services, LLC

9
10 **NRAP 21(a)(5) Verification**

11 I am the lead attorney for petitioners in A-20-820254-C and this petition.

12 On their behalf, I believe the facts stated in this motion are true to the best of the
13 information available to me. I declare under penalty of perjury that the foregoing
14 is true and correct, per NRS 53.045.

15 DATED this 22nd day of February, 2022.

16 /s/ Michael P. Lowry

17 Attorney for Petitioner
18
19
20

Certificate of Service

Per NRAP 21(a) and 25(c), I certify that on February 22, 2022, **Gabriel L. Martinez & Universal Protection Services, LLC's** Petition for Writ of **Mandamus** was served via electronic means by operation of the Court's electronic filing system to:

Joseph J. Troiano Cogburn Law 2580 St. Rose Parkway, Suite 330 Henderson, Nevada 89074 Attorneys for Real Parties in Interest	Judge Joe Hardy Eighth Judicial District Court Department 15 200 Lewis Ave. Las Vegas, NV 89155
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BY: /s/ Michael P. Lowry

Relief Sought

This petition seeks a writ of mandamus concerning a request for a neuropsychological examination per NRCP 35. Gabriel L. Martinez and Universal Protection Services, LLC (collectively “Martinez”) request a writ that 1) directs the district court to overrule ¶¶ 6 and 7 in the report and recommendations allowing an examination; and 2) directs the district court to grant Martinez’s motion to extend discovery, with an appropriate scheduling order to follow.

Issues Presented

1. The parties agreed to a neuropsychological examination without an audio recording. The examination started but was not completed. Kennedy then insisted that any continued examination be audio recorded. Did Kennedy waive his ability to request a recording by not raising it when he originally agreed to the examination?
2. Unable to reach agreement as to the continued examination, Martinez filed a motion to set one. Kennedy requested that the examination be audio recorded per NRCP 35(a)(3) because he was uncomfortable with the examination. Does that reason satisfy NRCP 35(a)(3)’s good cause requirement? Does it satisfy the good cause requirement if neuropsychological science has conclusively determined such recordings invalidate the data gathered in the examination?

1 3. Martinez’s defense plan was to first evaluate Kennedy via a neuropsychological
2 evaluation, then decide what further expert witnesses were necessary, if any.
3 Despite repeated consultations with Kennedy, no agreement could be reached
4 on the continued examination. That in turn delayed Martinez’s ability to
5 execute on his plan. Did the district court abuse its discretion by concluding
6 Martinez’s efforts to defend himself were not reasonably diligent and then
7 denying a motion to generally extend discovery?

8 **Facts Necessary to Consider the Petition**

9 **A. Martinez seeks a neuropsychological examination per NRCP 35.**

10 This petition arises from a motor vehicle accident involving Martinez and
11 Kennedy on November 5, 2018. Kennedy alleges he suffered a brain injury from
12 that accident that still affects him in material ways.

13 Discovery opened in this case when the joint case conference report was
14 filed on December 17, 2020.¹ Martinez requested a neuropsychological
15 examination per NRCP 35 and the parties reached an agreement as to the
16 examination. On June 18, 2021 the examination was noticed for July 20, 2021.²
17 The parties then accommodated that by stipulating to extend discovery for the first
18 time, making initial expert disclosures due October 18, 2021.³

19 ¹ App. Vol. 1 at App0001-0007.

20 ² *Id.* at App0008-0009.

³ *Id.* at App0010-0020.

1 As part of the examination on July 20, 2021, the examiner, Staci Ross,
2 Ph.D., asked Kennedy to provide written or verbal consent to the Limits to
3 Confidentiality, review foreseeable risks and benefits to the evaluation, and
4 consent to the neuropsychological evaluation.⁴ The Limits to Confidentiality allow
5 divulging of information without permission when it “is necessary to protect
6 against a clear and substantial risk of imminent serious harm by the patient or
7 another person...”⁵ It is the standard in neuropsychology to require any examinee
8 to consent or assent to this limitation.

9 When Dr. Ross asked Kennedy to agree, either verbally or in writing, to the
10 limitation, Kennedy refused to provide his consent, citing his wife’s instruction.⁶
11 Because Dr. Ross could not ethically continue the exam without Kennedy’s
12 consent to the evaluation, knowledge of risks and benefits, and to these Limits to
13 Confidentiality, she adjourned the exam until the issue could be resolved.⁷

14 During the rest of July, August, and September, Defendants communicated
15 with Kennedy to resolve this misunderstanding and reschedule the examination so
16 it can be completed. During those communications, Kennedy asserted new
17 conditions. He refused to stipulate to Dr. Ross handling the examination *and*
18 insisted that it be recorded. By early October, it was clear no agreement could be

19 ⁴ *Id.* at App000035-0036, ¶ 8.

20 ⁵ *Id.* (citing NAC 641.224).

⁶ *Id.* at App000036, ¶ 9.

⁷ *Id.* at ¶ 10.

1 reached, so on October 7, 2021 Martinez moved for an examination.⁸ The district
2 court scheduled the motion for hearing on December 3, 2021.⁹ Recognizing that
3 the October 18, 2021 initial expert disclosure deadline was no longer workable, the
4 parties stipulated to extend discovery.¹⁰ Initial expert disclosures were then due
5 December 18, 2021.

6 **1. The district court rules on the examination request.**

7 Martinez’s motion to set the examination noted Mr. Kennedy’s confusion at
8 what he was being asked to do during the examination, that Dr. Ross was an
9 appropriate examiner, that Mr. Kennedy had waived his right to request an
10 recording by not raising it originally, and that, if he hadn’t, there was no good
11 cause for a recording because it would invalidate the data gathered. Mr. Kennedy
12 opposed and the motion was heard as scheduled. The discovery commissioner
13 ruled that Dr. Ross could complete the examination.¹¹ The discovery
14 commissioner also ruled “Plaintiff did not waive his right to recording the
15 continued Rule 35 examination under the circumstances presented.”¹² Finally, the
16 discovery commissioner ordered that the examination be audio-recorded. “Under
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19 ⁸ *Id.* at App0021-0033.

20 ⁹ *Id.* at App0130.

¹⁰ *Id.* at App0131-0137.

¹¹ *Id.* at App0173, ¶¶ 2 & 3.

¹² *Id.* at ¶ 6.

1 the circumstances presented, there is good cause for the continued Rule 35
2 examination to be recorded.”¹³

3 Martinez timely objected to the discovery commissioner’s report and
4 recommendations.¹⁴ The district court overruled the objection without
5 discussion.¹⁵

6 **B. The delayed examination leads Martinez to move to extend discovery.**

7 When the motion to reset the examination was heard on December 3, 2021,
8 the initial expert disclosure deadline was still December 18, 2021. Given this 17
9 day period, for practical reasons Martinez believed that Kennedy would agree to
10 extend discovery no matter the ruling on that motion. If Kennedy won, Martinez
11 might object or begin the process of locating a new examiner to schedule the
12 examination. If Martinez won, Kennedy might object, which would then delay
13 scheduling the examination. Even if Martinez’s motion for a Rule 35 examination
14 was simply granted in full without objection, it would still have taken more than 17
15 days between the ruling and the disclosure deadline to mutually coordinate a date
16 and time with Kennedy and Dr. Ross. Recognizing this, Martinez decided it would
17 be more practical to wait for a ruling on the examination to then assess what
18 needed to occur, how long that might take, and what discovery deadlines might be

19 ¹³ *Id.* at ¶ 7.

20 ¹⁴ App. Vol. 2 at App0264-0270.

¹⁵ *Id.* at App0335-0336.

1 appropriate. Proposing deadlines without that guidance would generate
2 speculative, unrealistic timeframes. Despite that, Kennedy refused to stipulate to
3 extend discovery.

4 Martinez moved to extend discovery, discussing this reasoning.¹⁶ He
5 proposed a 9 month extension of discovery because he anticipated 1) his objection
6 would not be heard for a month; 2) it could take another 60-90 days beyond that to
7 schedule and conduct the examination; and 3) he recognized that this writ petition
8 could result. Martinez wrote “a protracted delay seems inevitable because, again,
9 the conditions put on the Rule 35 examination effectively prevent Defendants from
10 obtaining one. They prefer to be transparent about that and propose a schedule
11 based upon it.”¹⁷

12 Kennedy argued Martinez had not been diligent because the brain injury has
13 been an issue in the case since it was filed and Martinez should have prosecuted his
14 defense differently. Kennedy cited no authority that indicates one party may
15 dictate another’s litigation strategy, nor does Rule 35 impose such a requirement.
16 Each party is free to select their own litigation strategies and have the ability to
17 independently gather evidence relevant to those strategies. Martinez took
18 reasonable steps to prosecute his defense that Kennedy impeded by insisting on
19 new conditions for a continued examination.

20 ¹⁶App. Vol. 1 at App0164-0171.

¹⁷ *Id.* at App0169:23-26.

1 During oral argument, Martinez specified that his expert witness strategy
2 started with obtaining the neuropsychological assessment of Kennedy.¹⁸ Based
3 upon the findings of that assessment, Martinez then planned to determine what
4 other damages experts might be necessary.

5 The district court ultimately granted only a 60 day extension to complete the
6 neuropsychological examination. Its written order, filed February 15, 2022,
7 concluded in relevant part:

8 This Court finds as follows: (1) the Discovery Commissioner's Report
9 and Recommendations was filed on December 30, 2021, with an
10 Objection filed on January 3, 2022; however, a hearing date had not
11 yet been set to address the Objection; (2) under the facts and
12 circumstances, there was no basis at all to grant the general nine to ten
13 months extension of discovery, as requested by the Defendants; (3)
14 the issue of the alleged TBI had been in the case from its inception;
15 (4) the Court must weigh the preference for a trial on the merits vs.
16 the deadlines to which the parties had stipulated; (5) there was a lack
17 of due diligence on the part of the Defendants, particularly regarding
18 the fact that the exam was supposed to go forward in July of 2021,
19 and when it did not go forward, defense counsel waited three months
20 to raise the issue with the Discovery Commissioner, and then another
two months to raise the instant Motion with the Court; (6) in making
its decision, the Court considered the totality of the circumstances, the
Plaintiffs' pending Motion to Amend Complaint, and the Discovery
Commissioner's Report and Recommendations, wherein the
Discovery Commissioner found that the Rule 35 exam should be
reconvened and completed; (7) finding good cause for the late filing
of the instant Motion, the instant Motion was hereby GRANTED IN
PART to allow the partial reopening of discovery for a period of
THIRTY (30) DAYS, for the limited purpose of identifying an expert
in neuropsychology, and conducting the remainder of the Rule 35
exam, subject to what the Discovery Commissioner may decide on the

¹⁸ App. Vol. 2 at 325:9-24.

1 Objection to the Report and Recommendations; (8) no good cause had
2 been shown to extend discovery for any other purpose; (9) the
3 deadline for the initial expert disclosure of the neuropsychologist by
the Defendants, as well as the taking of the Rule 35 examination, is
March 14, 2022;¹⁹

4 Why the Writ Should Issue

5 A. An important issue of law needs clarification.

6 Writ relief is available when there is no “plain, speedy and adequate remedy
7 in the ordinary course of law.”²⁰ “Because an appeal from a final judgment or
8 order is ordinarily an adequate remedy, in most cases, we decline to exercise our
9 discretion to consider writ petitions challenging interlocutory district court
10 orders.”²¹ Nevada’s appellate courts “generally will not exercise our discretion to
11 review discovery orders through” writ petitions.²² “Nevertheless, in certain cases,
12 consideration of a writ petition raising a discovery issue may be appropriate if an
13 important issue of law needs clarification and public policy is served by this
14 court’s invocation of its original jurisdiction.”²³

15 This petition presents an important issue of law for many of the same
16 reasons that were considered in *Lyft, Inc. v. Dist. Ct.* *Lyft* noted “physical and

17 ¹⁹ App. Vol. 2 at 0346-0347.

18 ²⁰ NRS 34.170.

19 ²¹ *Oxbow Constr., LLC v. Dist. Ct.*, 130 Nev. 867, 872, 335 P.3d 1234, 1238
(2014).

20 ²² *Club Vista Fin. Servs. v. Dist. Ct.*, 128 Nev. 224, 228, 276 P.3d 246, 249 (2012).

²³ *Las Vegas Sands Corp. v. Dist. Ct.*, 130 Nev. 578, 581, 331 P.3d 876, 878
(2014).

1 mental examinations are frequently conducted during discovery” so resolving the
2 conflict between NRCP 35 and NRS 52.380 was important.²⁴ It also concluded
3 “this is a substantial issue of public policy due to the conflicting interests of
4 plaintiffs and defendants with respect to the procedures for the examinations.”

5 These two points apply equally here. Mental examinations are frequently
6 conducted during discovery and there are conflicting interests between parties as to
7 the examinations. This petition concerns a requested mental examination. This
8 petition also involves the conflicting interests between a plaintiff and a defendant.
9 Kennedy wants to audio record the examination, but Martinez has provided
10 scientific literature indicating that if the examination is audio recorded then the
11 data gathered in the examination are invalid. If the district court’s ruling stands,
12 then Martinez is effectively deprived of his ability to obtain the very examination
13 that the district court concluded was appropriate.

14 Finally, this is not a hypothetical point limited to one case. Of the writ
15 petitions that were filed contesting NRS 52.380’s constitutionality, many of them
16 arose from mental examinations. While *Lyft* concluded NRS 52.380 could not be
17 used to justify an observer or audio recording, *Lyft* did not analyze if, or how, an
18 observer or audio recording could be justified under NRCP 35. The petitions
19
20

²⁴ *Lyft, Inc. v. Dist. Ct.*, 137 Nev. Adv. Op. 86 (December 30, 2021).

1 raising that point were returned to the district courts for further factual
2 development, and perhaps inevitably to return later as new writ petitions.

3 Deciding this petition on its merits will provide guidance to litigants and
4 district courts trying to address these frequently arising issues. This in turn
5 promotes judicial economy and provides litigants further ability to resolve their
6 potential disputes about neuropsychological examinations per NRCP 35 without
7 court intervention.

8 **B. The standard of review is de novo and then abuse of discretion.**

9 “Conclusions of law, including the meaning and scope of statutes, are
10 reviewed de novo.”²⁵ Once the conclusions of law are decided, an abuse of
11 discretion standard applies. “Discovery matters are within the district court’s
12 sound discretion, and we will not disturb a district court’s ruling regarding
13 discovery unless the court has clearly abused its discretion.”²⁶

14 **C. The district court erred by allowing Kennedy to assert a new condition.**

15 When the NRCP 35 exam was originally proposed and scheduled, Kennedy
16 did not ask to record the examination. He could have raised that issue, but did not.
17 Because he did not raise this topic at the appropriate time, the issue about whether
18 to record the examination was waived just like any other objection that is not
19 timely asserted.

20 ²⁵ *Canarelli v. Dist. Ct.*, 136 Nev. Adv. Op. 29, 464 P.3d 114, 119 (2020).

²⁶ *Id.*

1 Allowing a party to assert new conditions to a Rule 35 examination after
2 agreeing to the exam would only promote gamesmanship. The parties here worked
3 amicably to reach an agreement for the exam. Kennedy's misunderstanding of
4 what Dr. Ross was asking him is the only reason the examination did not go
5 forward. He should not benefit from that by adding a new condition to the exam.

6 **D. Allowing an audio recording makes an examination impossible.**

7 If Kennedy did not waive this issue, then he has not met his burden to
8 demonstrate good cause to support it. Martinez seeks a mental examination per
9 NRCP 35. When an examination is allowed, NRCP 35(a)(3) allows permits audio
10 recording under certain circumstances. "On request of a party or the examiner, the
11 court may, for good cause shown, require as a condition of the examination that the
12 examination be audio recorded."

13 The report and recommendations did not state what factual finding
14 supported the good cause requirement. The hearing transcript provides some
15 insight as to what good cause the discovery commissioner found.

16 I'm going to grant the motion in part and deny it in part. The Plaintiff
17 is compelled to attend a second examination. I think because of the
18 circumstances here there is good cause to require recordation, if
19 nothing else, to calm the Plaintiff's nerves about it. But because of the
20 interaction before with Dr. Ross, [plaintiff's counsel], I understand
your argument about your client not being terribly comfortable. I'm
never comfortable going to a doctor. I'll tell you that much, but the
Defendant gets to choose their examiner, and your client is stuck with
that.

1 The district court did not elaborate further in overruling Martinez’s objection.

2 **1. “Calming nerves” is not good cause.**

3 “I think because of the circumstances here there is good cause to require
4 recordation, if nothing else, to calm the Plaintiff’s nerves about it.”²⁷ The district
5 court cited no legal authority indicating that the examinee’s subjective unease
6 about the examination establishes good cause for an audio recording. Instead, it
7 appears the district court read a requirement into Rule 35 that the rule’s plain
8 language does not support. This is similar to the conclusion in *Ferrellgas, Inc. v.*
9 *Dist. Ct.* where the district court manifestly abused its discretion by concluding
10 good cause supported an audio recording because there was no doctor-patient
11 relationship between the examiner and examinee.²⁸ In both circumstances, the
12 district courts read language into the rule that the rule’s plain language does not
13 support.

14 **2. The harm of recording outweighs the perceived benefit.**

15 If Kennedy presented good cause sufficient to justify audio recording the
16 examination, Martinez presented good cause to overcome it. Scientific studies
17 uniformly conclude that recording a neuropsychological evaluation invalidates the
18 data gathered from it. Martinez presented these studies to support his motion,
19 Kennedy presented no studies reaching the opposite conclusion.

20 ²⁷ App. Vol. 1 at 162:6-8.

²⁸ No. 82670, 2022 Nev. Unpub. LEXIS 81, at *2 (Jan. 27, 2022).

1 In fact, ethical rules bar recording. The American Board of Professional
2 Neuropsychology has adopted a policy statement concerning what they term “third
3 party observation” (TPO) of examinations.²⁹ The Board examined these requests
4 and noted they are inconsistent with good practice. “Given the body of literature
5 that exists regarding observer effects, it is incumbent on neuropsychologists who
6 provide evaluations to make clear to patients, clients, families, and other
7 professionals that they do not endorse TPO and to try to avoid this type of intrusion
8 in the assessment.”³⁰ “Multiple studies have established and replicated the dubious
9 validity of data obtained during recorded or observed evaluations.”³¹ When
10 confronted with a situation such as is at issue here, “neuropsychologists should
11 resist demands for TPO if requested by opposing counsel, retaining counsel, or the
12 court. The neuropsychologist should educate the court or those involved as to the
13 APA Ethics Code and the existing scientific research that supports the negative
14 effects of this type of intrusion.”³² “Neuropsychologists should therefore not
15 engage in, endorse, abet, or conduct assessments complicated by TPO or recording
16 of any kind other than under the order of a court after all reasonable alternatives
17 have been exhausted.”³³ The Board concluded:

18
19 ²⁹ App. Vol. 1 at App0070.

³⁰ *Id.* at App0073.

³¹ *Id.* at App0075.

³² *Id.* at App0076.

³³ *Id.* at App0077.

1 Requests for TPO frequently create an ethical dilemma for
2 neuropsychologists as any observation or recording of
3 neuropsychological tests or their administration has the potential to
4 influence and compromise the behavior of both the examinee and the
5 administrator, threatens the validity of the data obtained under these
6 conditions by, and consequently limits normative comparisons,
7 clinical conclusions, opinions, interpretations, and recommendations.
8 For these reasons, APA ethical standards support the position that
9 TPO in neuropsychological testing should be avoided.³⁴

10 These comments were echoed during the public comment process that led to
11 Rule 35's current language. Nevada's Board of Psychological Examiners
12 submitted comments against a draft proposal that would have allowed TPO at
13 psychological or neuropsychological examinations. It highlighted that allowing
14 TPO "poses a significant threat to public safety" and discussed the science
15 concluding why observers and recordings invalidate the testing data.³⁵

16 The Nevada Psychological Association also submitted comments against
17 TPO.³⁶ It included a bibliography of literature discussing the problems TPO create
18 and how it invalidates testing data.³⁷ The Association also provided the Official
19 Position Statement of the National Academy of Neuropsychology as to both test
20 security and TPO.³⁸ Seven individual psychologists and neuropsychologists also
submitted comments against the proposal. Teri Belmont, Ph.D provided the

³⁴ *Id.* at App0076.

³⁵ App. Vol. 1 at App0099.

³⁶ *Id.* at App0101-0102.

³⁷ *Id.* at App0103.

³⁸ *Id.* at App0104-0113.

1 American Academy of Clinical Neuropsychology’s policy statement against TPO,
2 among other materials.³⁹ All of the psychologists and neuropsychologists provided
3 scientific references about why TPO is scientifically impermissible.

4 Applying all of this here, audio recording the neuropsychological
5 examination invalidates the data that the examination would gather. If the data
6 cannot be used, then the examination is pointless. This in effect deprives Martinez
7 of his opportunity to obtain the examination the district court concluded is
8 permitted here. To the extent Kennedy demonstrated good cause for a recording,
9 the scientific evidence and ethical guidelines that the neuropsychological
10 community itself have created are stronger cause to deny an audio recording in this
11 instance. Ruling otherwise would turn the neuropsychological examination into an
12 exercise in futility, defeating the very reason Rule 35 exists.

13 **E. The district court abused its discretion by not extending discovery.**

14 Martinez’s motion to extend discovery was governed by EDCR 2.35(a). It
15 requires that “motions to extend any date set by the discovery scheduling order
16 must be in writing and supported by a showing of good cause for the extension and
17 be filed no later than 21 days before the discovery cut-off date or any extension
18 thereof.” Martinez’s motion was filed within 21 days of the deadline it sought to
19 extend. “A request made beyond the period specified above shall not be granted

20 ³⁹ *Id.* at App0115-0124.

1 unless the moving party, attorney or other person demonstrates that the failure to
2 act was the result of excusable neglect.” Although not expressly stated in its order,
3 the district court did consider the motion on its merits and implicitly concluded
4 good cause for the motion’s timing was present. The district court then concluded
5 there was no good cause to extend discovery as Martinez proposed.

6 Nevada appellate courts have not expressly evaluated what “good cause”
7 requires. The federal courts have a similar “good cause” requirement. Their “good
8 cause” analysis “primarily considers the diligence of the party seeking the
9 amendment. The district court may modify the pretrial schedule if it cannot
10 reasonably be met despite the diligence of the party seeking the extension.”⁴⁰ But
11 “carelessness is not compatible with a finding of diligence and offers no reason for
12 a grant of relief.”⁴¹ Further, while “the existence or degree of prejudice to the
13 party opposing the modification might supply additional reasons to deny a motion,
14 the focus of the inquiry is upon the moving party’s reasons for seeking
15 modification.”⁴² A party is not required to be perfectly diligent, just reasonably
16 diligent.

17 Applied here, Martinez demonstrated reasonable diligence to support an
18 extension. Martinez adopted a reasonable defense plan that attempted to assess

19 ⁴⁰ *Johnson v. Mammoth Recreations*, 975 F.2d 604, 609 (9th Cir. 1992).

20 ⁴¹ *Id.*

⁴² *Id.*

1 Kennedy's condition with a neuropsychologist before then assessing whether to
2 spend tens of thousands more on other expert witnesses who might ultimately not
3 be necessary. Martinez took concrete steps to execute this plan by arranging for
4 the examination, working with Kennedy to extend discovery twice as their disputes
5 arose, and by bringing appropriate motions to the district court when the parties
6 were unable to reach an agreement. While Kennedy might believe Martinez could
7 or should have implemented a different defense plan, that does not factor into
8 whether Martinez was reasonably diligent in pursuing the defense plan that he
9 selected.

10 Martinez was reasonably diligent in pursuing the discovery he needs to
11 evaluate the claims and defenses in this case. Denying the motion except as to the
12 neuropsychological examination was an abuse of discretion in this particular
13 circumstance.

14 Conclusion

15 Martinez's writ petition should be decided on its merits. It presents the next
16 question started by the various writ petitions that led to *Lyft*: What circumstances
17 might demonstrate good cause per NRCP 35(a)(3) sufficient to merit recording a
18 neuropsychological examination? There might not be a bright-line, one size fits all
19 answer to that question. But if the answer requires case-by-case assessment, then
20 providing examples of what is or is not good cause will help litigants resolve these

1 questions on their own or, if court intervention is necessary, will help guide district
2 courts to appropriate conclusions.

3 Martinez requests a writ that directs the district court to 1) overrule ¶¶ 6 and
4 7 to the findings section of the report and recommendations; and 2) withdraw its
5 order partially granting Martinez's motion to extend discovery and instead grant
6 that motion, with an appropriate scheduling order to follow.

7 DATED this 22nd day of February, 2022.



9 /s/ Michael P. Lowry

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