



MICHAEL P. LOWRY, ESQ.

Nevada Bar No. 10666

E-mail: [Michael.Lowry@wilsonelser.com](mailto:Michael.Lowry@wilsonelser.com)

CHRIS RICHARDSON, ESQ.

Nevada Bar No. 9166

E-mail: [Chris.Richardson@wilsonelser.com](mailto:Chris.Richardson@wilsonelser.com)

6689 Las Vegas Blvd. South, Suite 200

Las Vegas, NV 89119

Tel: 702.727.1400/Fax: 702.727.1401

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

Electronically Filed  
Feb 22 2022 01:08 p.m.  
Elizabeth A. Brown  
Clerk of Supreme Court

**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

**Appendix Volume 1 to Gabriel L.  
Martinez & Universal Protection  
Services, LLC's Petition for Writ of  
Mandamus**

## Table of Contents

1	
2	Discovery Commissioner's Report & Recommendations ..... Vol. 1, 0172-0175
3	Joint Case Conference Report..... Vol. 1, 0001-0007
4	Motion for Rule 35 Examination ..... Vol. 1, 0021-0129
5	Motion to Extend Discovery (Third Request) ..... Vol. 1, 0164-0171
6	Notice of Hearing re Motion for Rule 35 Examination.....Vol. 1, 0130
7	Notice of Rule 35 Examinations..... Vol. 1, 0008-0009
8	Objection to Discovery Commissioner's Report & Recommendations ..... Vol. 2,
9	0264-0307
10	Opposition re Motion for Rule 35 Examination ..... Vol. 1, 0138-0152
11	Opposition re Motion to Extend Discovery (Third Request) ..... Vol. 2, 0176-0263
12	Order re Motion to Extend Discovery (Third Request)..... Vol. 2, 0342-0348
13	Order re Objection to Discovery Commissioner's Report & Recommendations .....
14	Vol. 2, 0335-0342
15	Reply re Motion for Rule 35 Examination ..... Vol. 1, 0153-0156
16	Reply re Motion to Extend Discovery (Third Request) ..... Vol. 2, 0308-0316
17	Stipulation to Extend Discovery (First Request)..... Vol. 1, 0010-0020
18	Stipulation to Extend Discovery (Second Request) ..... Vol. 1, 0131-0137
19	Transcript from Hearing re Motion for Rule 35 Examination ..... Vol. 1, 0157-0163
20	Transcript from Hearing re Motion to Extend..... Vol. 2, 0317-0334

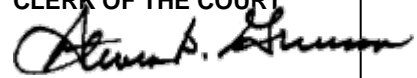
**Certificate of Service**

Per NRAP 21(a) and 25(c), I certify that I am an employee of Wilson Elser Moskowitz Edelman & Dicker LLP, and that on February 22, 2022, **Appendix Volume 1 to 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	
---	--

BY: /s/ Michael P. Lowry  
An Employee of





COGBURN LAW  
Jamie S. Cogburn, Esq.  
Nevada Bar No. 8409  
[jsc@cogburncares.com](mailto:jsc@cogburncares.com)  
Joseph J. Troiano, Esq.  
Nevada Bar No. 12505  
[jjt@cogburncares.com](mailto:jjt@cogburncares.com)  
2580 St. Rose Parkway, Suite 330  
Henderson, Nevada 89074  
Telephone: (702) 748-7777  
Facsimile: (702) 966-3880  
*Attorneys for Plaintiff*

**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

DOUGLAS J. KENNEDY, an individual; and  
LORI KENNEDY, an Individual,

Plaintiffs,

vs.

GABRIEL L. MARTINEZ, an Individual;  
UNIVERSAL PROTECTION SERVICES,  
LLC d/b/a ALLIED UNIVERSAL  
SECURITY SERVICES, a Foreign Limited  
Liability Company; DOE Family Members 1-  
10; DOE Individuals 11-20; and ROE  
Corporations 22-30, Inclusive,

Defendants.

Case No.: A-20-820254-C  
Dept. No.: 15

**JOINT CASE CONFERENCE REPORT**

DISPUTE RESOLUTION  
CONFERENCE REQUESTED:  
YES ☐ NO ☒

SETTLEMENT CONFERENCE  
REQUESTED:  
YES ☐ NO ☒

**I.**

**PROCEEDINGS PRIOR TO CASE CONFERENCE REPORT:**

**A. DATE OF FILING OF COMPLAINT:**

8/27/2020

Amended Complaint filed 10/13/2020



1 **B. DATE OF FILING OF ANSWER BY EACH DEFENDANT:**

2 10/16/2020

3 **C. DATE THE EARLY CASE CONFERENCE WAS HELD AND WHO**  
4 **ATTENDED:**

5 The case conference was held on November 13, 2020. Joseph J. Troiano, Esq. appeared on  
6 behalf of Plaintiff. Christopher J. Richardson, Esq., appeared on behalf of Defendant.

7 **II.**  
8 **A BRIEF DESCRIPTION OF THE NATURE OF THE ACTION AND EACH**  
9 **CLAIM FOR RELIEF OR DEFENSE: [16.1(C)(2)(A)]**

10 **A. DESCRIPTION OF THE ACTION:**

11 This is an action arising from a motor vehicle accident on November 05, 2018, resulting in  
12 alleged injuries and alleged damages to Plaintiff.

13 **B. CLAIMS FOR RELIEF:**

14 Negligence against all Defendants; Negligent Entrustment against Defendant Owner  
15 UNIVERSAL PROTECTION SERVICES, LLC D/B/A ALLIED UNIVERSAL SECURITY  
16 SERVICES and DOE Individuals 11-20 and ROE Corporations 22-30; Plaintiff Lori Kennedy -  
17 Loss of Consortium Claim Against all Defendants

18 **C. DEFENSES:**

- 19 1. Plaintiff was comparatively negligent.  
20 2. Plaintiff did not mitigate damages.

21 **III.**  
22 **A BRIEF STATEMENT OF WHETHER THE PARTIES DID OR DID NOT CONSIDER**  
23 **SETTLEMENT AND WHETHER SETTLEMENT OF THE CASE MAY BE POSSIBLE:**  
24 **[16.1(c)(2)(B)]**

25 Settlement has not been considered at this time.

IV.

**LIST OF ALL DOCUMENTS, DATA COMPILATIONS, DAMAGES COMPUTATIONS, INSURANCE AGREEMENTS, TANGIBLE THINGS AND OTHER REQUIRED INFORMATION IN THE POSSESSION, CUSTODY OR CONTROL OF EACH PARTY WHICH WERE IDENTIFIED OR PROVIDED AT THE EARLY CASE CONFERENCE OR AS A RESULT THEREOF: [16.1(c)(2)(E), (G), (H)]**

**A. PLAINTIFF:**

*See Plaintiff's Initial Disclosure of Witnesses and Documents (without attachments), attached hereto as Exhibit 1.*

**B. DEFENDANT:**

*See Defendant's Initial Disclosure of Witnesses and Documents (without attachments), attached hereto as Exhibit 2.*

V.

**LIST OF PERSONS IDENTIFIED BY EACH PARTY AS LIKELY TO HAVE INFORMATION DISCOVERABLE UNDER RULE 26(B), INCLUDING IMPEACHMENT OR REBUTTAL WITNESSES, MEDICAL PROVIDERS AND EXPERTS: [16.1(a)(1)(A) and 16.1(c)(2)(D), (F), (I)]**

**A. PLAINTIFF:**

*See Plaintiff's Initial Disclosure of Witnesses and Documents (without attachments), attached hereto as Exhibit 1.*

**B. DEFENDANT:**

*See Defendant's Initial Disclosure of Witnesses and Documents (without attachments), attached hereto as Exhibit 2.*

VI.

**DISCOVERY PLAN: [16.1(b)(4)(C) and 16.1 (c)(2)]**

**A. WHAT CHANGES, IF ANY, SHOULD BE MADE IN TIMING, FORM OR REQUIREMENTS FOR DISCLOSURES UNDER 16.1(a):**

**1. Plaintiff's view:**

The parties expressly agree to the following:

- Each and every document production—including documents disclosed in response to written discovery requests, produced as an exhibit to any

deposition, or attached as an exhibit to any court filing—shall be Bates-stamped with the Parties’ respective identifying Bates numbering system;

- The Parties agree that for each set of written discovery propounded upon the other, an accompanying “Word”, “Word Perfect”, or equivalent version of said discovery set shall be provided in order to reduce the time and effort in having to type out the requests or interrogatories. The failure to do so does not deem service of the written discovery ineffective; and
- Exhibit numbers in depositions will start with Exhibit 1 and continue throughout the case, regardless of which party conducts the deposition, rather than restarting back at Exhibit 1 for subsequent depositions. The Parties agree to maintain and share the deposition exhibit list.

**2. Defendant’s view:**

Defendant agrees and stipulates to Plaintiff’s view set forth above.

**B. WHEN DISCLOSURES UNDER 16.1(a)(1) WERE MADE OR WILL BE MADE:**

- |    |                          |  |
|----|--------------------------|--|
| 1. | Plaintiff’s disclosures: | <u>10/13/2020</u><br>enter calendar date |
| 2. | Defendant’s disclosures: | <u>11/09/2020</u><br>enter calendar date |

**C. SUBJECTS ON WHICH DISCOVERY MAY BE NEEDED:**

**1. Plaintiff’s view:**

Liability and damages pertaining to all claims and defenses.

**2. Defendant’s view:**

Liability, causation, and damages pertaining to all claims and defenses.

**D. A STATEMENT IDENTIFYING ANY ISSUES ABOUT PRESERVING DISCOVERABLE INFORMATION [16.1(c)(2)(J)]:**

**1. Plaintiff’s view:**

None.

**2. Defendant’s view:**

None.

1 E. SHOULD DISCOVERY BE CONDUCTED IN PHASES OR LIMITED TO OR  
2 FOCUSED UPON PARTICULAR ISSUES?

3 1. Plaintiff's view:

4 No.

5 2. Defendant's view:

6 No.

7 F. WHAT CHANGES, IF ANY, SHOULD BE MADE IN LIMITATIONS ON  
8 DISCOVERY IMPOSED UNDER THESE RULES AND WHAT, IF ANY, OTHER  
9 LIMITATIONS SHOULD BE IMPOSED?

10 1. Plaintiff's view:

11 None.

12 2. Defendant's view:

13 None.

14 G. A STATEMENT IDENTIFYING ANY ISSUES ABOUT TRADE SECRETS OR  
15 OTHER CONFIDENTIAL INFORMATION, AND WHETHER THE PARTIES  
16 HAVE AGREED UPON A CONFIDENTIALITY ORDER OR WHETHER A  
17 RULE 26(c) MOTION FOR PROTECTIVE ORDER WILL BE MADE  
18 [16.1(c)(2)(K)]:

19 1. Plaintiff's view:

20 None.

21 2. Defendant's view:

22 None.

23 H. WHAT, IF ANY, OTHER ORDERS SHOULD BE ENTERED BY COURT  
24 UNDER RULE 26(c) OR RULE 16(b) AND (c):

25 1. Plaintiff's view:

None.

2. Defendant's view:

None.

1 **I. ESTIMATED TIME FOR TRIAL:**

2 1. Plaintiff's view: 7-10 court days

3 2. Defendant's view: 7-10 court days

4  
5 **VII.**  
**DISCOVERY AND MOTION DATES: [16.1(c)(2)(L)–(O)]**

6 **A. DATES AGREED BY THE PARTIES:**

7 1. Close of discovery: 11/15/2021

8 2. Final date to file motions to amend  
9 pleadings or add parties (without a  
10 further court order): 8/17/2021

11 3. Final dates for expert disclosures:  
12 (i) Initial disclosure: 8/17/2021

13 (ii) Rebuttal disclosures: 9/16/2021

14 4. Final date to file dispositive motions: 12/15/2021

15  
16 Failure to agree on the calendar dates in this subdivision shall result in a discovery planning  
17 conference.

18 **VIII.**  
**JURY DEMAND: [16.1(c)(2)(Q)]**

19 A jury demand has been filed: Yes  
20 (Yes/No)

21 ...

22 ...

23 ...

24 ...

25 ...

IX.  
**INITIAL DISCLOSURES/OBJECTIONS: [16.1(a)(1)]**

If a party objects during the Early Case Conference that initial disclosures are not appropriate in the circumstances of this case, those objections must be stated herein. The Court shall determine what disclosures, if any, are to be made and shall set the time for such disclosure.

This report is signed in accordance with Rule 26(g)(1) of the Nevada Rules of Civil Procedure. Each signature constitutes a certification that to the best of the signer's knowledge, information and belief, formed after a reasonable inquiry, the disclosures made by the signer are complete and correct as of this time.

Dated this 17<sup>th</sup> day of December, 2020.

COGBURN LAW

By: /s/ Joseph J. Troiano  
Jamie S. Cogburn, Esq.  
Nevada Bar No. 8409  
Joseph J. Troiano, Esq.  
Nevada Bar No. 12505  
2580 St. Rose Parkway, Suite 330  
Henderson, Nevada 89074  
*Attorneys for Plaintiff*

Dated this 17<sup>th</sup> day of December, 2020.

WILSON ELSER MOSKOWITZ  
EDELMAN & DICKER, LLP

By: /s/ Christopher J. Richardson  
Michael P. Lowry, Esq.  
Nevada Bar No. 10666  
Christopher J. Richardson, Esq.  
Nevada Bar No. 9166  
6689 Las Vegas Blvd. South, Suite 200  
Las Vegas, Nevada 89119  
*Attorneys for Defendants*



MICHAEL P. LOWRY, ESQ.  
Nevada Bar No. 10666  
E-mail: [Michael.Lowry@wilsonelser.com](mailto:Michael.Lowry@wilsonelser.com)  
CHRISTOPHER J. RICHARDSON, ESQ.  
Nevada Bar No. 9166  
E-mail: [Chris.Richardson@wilsonelser.com](mailto:Chris.Richardson@wilsonelser.com)  
6689 Las Vegas Blvd. South, Suite 200  
Las Vegas, Nevada 89119  
Tel: 702.727.1400/Fax: 702.727.1401  
Attorneys for Gabriel L. Martinez;  
Universal Protection Services, LLC

**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

DOUGLAS J. KENNEDY, an individual; and  
LORI KENNEDY, an individual,

Plaintiffs,

vs.

GABRIEL L. MARTINEZ, an Individual;  
UNIVERSAL PROTECTION SERVICES,  
LLC d/b/a ALLIED UNIVERSAL SECURITY  
SERVICES, a Foreign Limited Liability  
Company; DOE Family Members 1-10; DOE  
Individuals 11-20; and ROE Corporations 21-  
30, Inclusive,

Defendants.

Case No. A-20-820254-C  
Dept. No. 15

**Notice of Rule 35 Independent Medical  
Examination of Plaintiff Douglas Kennedy**

**Date: July 20, 2021**  
**Time: 9:00 a.m. (8:45 a.m. arrival)**

PLEASE TAKE NOTICE that a Rule 35 Independent Medical Examination of Plaintiff Douglas Kennedy, will be conducted by Staci R. Ross, Ph.D., on July 20, 2021, at 9:00 a.m., at 716 South 6<sup>th</sup> Street, Las Vegas, NV 89101. Plaintiff is to arrive no later than 8:45 a.m. to check in and fill out paperwork.

PLEASE TAKE FURTHER NOTICE that Plaintiff is to bring with him any and all imaging films/disks.

PLEASE TAKE FURTHER NOTICE that in the event Plaintiff fails to appear for the examination, or does not provide timely notice of cancellation or objection to the Independent

Medical Examination, that Plaintiff shall be responsible for the fees and costs incurred of \$250.00, as a result of the failure of the examination to go forward as scheduled.

DATED this 18<sup>th</sup> day of June, 2021.



BY: /s/ Michael P. Lowry  
MICHAEL P. LOWRY, ESQ.  
Nevada Bar No. 10666  
CHRISTOHPER J. RICHARDSON, ESQ.  
Nevada Bar No. 9166  
6689 Las Vegas Blvd. South, Suite 200  
Las Vegas, Nevada 89119  
Attorneys for Gabriel L. Martinez;  
Universal Protection Services, LLC

#### CERTIFICATE OF SERVICE

Pursuant to NRCP 5, I certify that I am an employee of Wilson Elser Moskowitz Edelman & Dicker LLP, and that on June 18, 2021, I served **Notice of Rule 35 Independent Medical Examination of Plaintiff Douglas Kennedy** as follows:

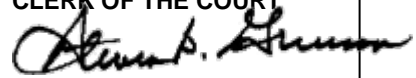
- ☐ by placing same to be deposited for mailing in the United States Mail, in a sealed envelope upon which first class postage was prepaid in Las Vegas, Nevada;
- ☒ via electronic means by operation of the Court's electronic filing system, upon each party in this case who is registered as an electronic case filing user with the Clerk;

Jamie S. Cogburn  
Joseph J. Troiano  
COGBURN LAW  
2580 St. Rose Parkway, Suite 330  
Henderson, Nevada 89074  
Attorneys for Plaintiffs

BY: /s/ Kaitlin Chavez  
An Employee of







COGBURN LAW  
Jamie S. Cogburn, Esq.  
Nevada Bar No. 8409  
jsc@cogburncares.com  
Joseph J. Troiano, Esq.  
Nevada Bar No. 12505  
jjt@cogburncares.com  
2580 St. Rose Parkway, Suite 330  
Henderson, Nevada 89074  
Telephone: (702) 748-7777  
Facsimile: (702) 966-3880  
*Attorneys for Plaintiff*

**DISTRICT COURT  
CLARK COUNTY, NEVADA**

DOUGLAS J. KENNEDY, an individual; and  
LORI KENNEDY, an individual,

Case No.: A-20-820254-C  
Dept. No.: 15

Plaintiff,

vs.

**NOTICE OF ENTRY OF STIPULATION  
AND ORDER TO EXTEND DISCOVERY  
DEADLINES AND CONTINUE TRIAL  
(FIRST REQUEST)**

GABRIEL L. MARTINEZ, an individual;  
UNIVERSAL PROTECTION SERVICES,  
LLC, d/b/a ALLIED UNIVERSAL  
SECURITY SERVICES, a Foreign Limited  
Liability Company, DOE Family Members 1-  
10; DOE Individuals 11-20; and ROE  
Corporations 21-30, Inclusive,

Defendant.

PLEASE TAKE NOTICE that a Stipulation and Order to Extend Discovery Deadlines and  
Continue Trial (First Request) was entered in the above-captioned matter on the 12th day of July,  
2021, a copy of which is attached hereto.

Dated this 13th day of July, 2021.

COGBURN LAW

By: /s/Joseph J. Troiano

Jamie S. Cogburn, Esq.  
Nevada Bar No. 8409  
Joseph J. Troiano, Esq.  
Nevada Bar No. 12505  
2580 St. Rose Parkway, Suite 330  
Henderson, Nevada 89074  
*Attorneys for Plaintiff*

**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing **NOTICE OF ENTRY OF STIPULATION AND ORDER TO EXTEND DISCOVERY DEADLINES AND CONTINUE TRIAL (FIRST REQUEST)** was submitted electronically for filing and/or service with the Eighth Judicial District Court on the 13th day of July, 2021.

I further certify that I served a true and correct copy of the foregoing document as follows:

☒ Pursuant to NEFCR 9 & EDCR 8.05(a), electronic service of the foregoing document shall be made in accordance with the CM/ECF E-Service List as follows:

Michael Lowry (michael.lowry@wilsonelser.com)

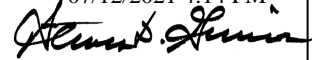
Efile Las Vegas (efilelasvegas@wilsonelser.com)

Kait Chavez (kait.chavez@wilsonelser.com)

Amanda Hill (amanda.hill@wilsonelser.com)

Chris Richardson (chris.richardson@wilsonelser.com)

/s/Sarah C. Wilder  
An employee of Cogburn Law

  
CLERK OF THE COURT

1 COGBURN LAW  
Jamie S. Cogburn, Esq.  
2 Nevada Bar No. 8409  
jsc@cogburncares.com  
3 Joseph J. Troiano, Esq.  
Nevada Bar No. 12505  
4 jjt@cogburncares.com  
2580 St. Rose Parkway, Suite 330  
5 Henderson, Nevada 89074  
Telephone: (702) 748-7777  
6 Facsimile: (702) 966-3880  
*Attorneys for Plaintiff*

8 **DISTRICT COURT**

9 **CLARK COUNTY, NEVADA**

10 DOUGLAS J. KENNEDY, an individual; and  
LORI KENNEDY, an individual,

Case No.: A-20-820254-C  
Dept. No.: 15

11 Plaintiff,

12 vs.

13 GABRIEL L. MARTINEZ, an individual;  
14 UNIVERSAL PROTECTION SERVICES,  
LLC, d/b/a ALLIED UNIVERSAL  
15 SECURITY SERVICES, a Foreign Limited  
Liability Company, DOE Family Members 1-  
16 10; DOE Individuals 11-20; and ROE  
Corporations 21-30, Inclusive,

17 Defendant.

18  
19 **STIPULATION AND ORDER TO EXTEND DISCOVERY DEADLINES AND**  
20 **CONTINUE TRIAL**

21 **(FIRST REQUEST)**

22 IT IS HEREBY STIPULATED by and between Plaintiff(s), Douglas and Lori Kennedy  
23 and Defendant(s), Gabriel L. Martinez and Universal Protection Services, LLC dba Allied  
24 Universal Security Services, through their respective attorneys of record, to continue all discovery  
25 deadlines and the current trial setting in the above-captioned matter.

1 **I. COMPLETED DISCOVERY**

2 The following discovery has been completed by the parties;

3 1. On October 13, 2020, Plaintiffs served their Initial Disclosures of Witnesses and  
4 Documents Pursuant to NRCP 16.1.

5 2. On October 20, 2020, Plaintiffs served their First Supplement to Initial Disclosures  
6 of Witnesses and Documents Pursuant to NRCP 16.1.

7 3. On November 9, 2020, Defendant served Initial (First) Disclosures of Witnesses  
8 and Documents Pursuant to NRCP 16.1.

9 4. On December 16, 2020, Defendants served First (Second) Supplement to Initial  
10 Disclosures of Witnesses and Documents Pursuant to NRCP 16.1.

11 5. On December 22, 2020. Defendants Universal Protection Services served their First  
12 Set of Interrogatories and Requests for Production of Documents to Plaintiff Douglas Kennedy.

13 6. On December 29, 2020. Defendants Universal Protection Services served their First  
14 Set of Interrogatories and Requests for Production of Documents to Plaintiff Lori Kennedy.

15 7. On December 29, 2020. Plaintiff Douglas Kennedy served their First Set of  
16 Interrogatories to Defendant Gabriel L. Martinez.

17 8. On December 29, 2020, Plaintiff Douglas Kennedy served their First Set of  
18 Interrogatories and Requests for Production of Documents to Defendant Universal Protection  
19 Services, LLC dba Allied Universal Security Services.

20 9. On December 31, 2020, Plaintiffs served their Second Supplement to Initial  
21 Disclosures of Witnesses and Documents Pursuant to NRCP 16.1.

22 10. On January 22, 2021, Plaintiff Douglas Kennedy served his responses to Defendant  
23 Universal Protection Services, LLC dba Allied Universal Security Services' First Set of  
24 Interrogatories.

1           11.     On January 22, 2021, Plaintiff Lori Kennedy served her responses to Defendant  
2 Universal Protection Services, LLC dba Allied Universal Security Services' First Set of  
3 Interrogatories and Request for Production of Documents.

4           12.     On January 28, 2021, Plaintiff Douglas Kennedy served his responses to Defendant  
5 Universal Protection Services, LLC dba Allied Universal Security Services' First Set of Request  
6 for Production of Documents.

7           13.     On January 28, 2021, Plaintiffs served their Third Supplement to Initial Disclosures  
8 of Witnesses and Documents Pursuant to NRCP 16.1.

9           14.     On February 11, 2021, Defendant Universal Protection Services, LLC dba Allied  
10 Universal Security Services Responses to Plaintiff Douglas Kennedy First Set of Requests for  
11 Production of Documents and Interrogatories.

12           15.     On February 11, 2021, Defendants served their Second (Third) Supplement to  
13 Initial Disclosures of Witnesses and Documents Pursuant to NRCP 16.1.

14           16.     On February 17, 2021, Plaintiff Douglas Kennedy Second Set of Interrogatories  
15 and Requests for Production of Documents to Defendant Universal Protection Services, LLC dba  
16 Allied Universal Security Services.

17           17.     On February 17, 2021, Plaintiff Douglas Kennedy First Set of Requests for  
18 Admissions to Defendant Universal Protection Services, LLC dba Allied Universal Security  
19 Services.

20           18.     On February 18, 2021, Plaintiffs served their Notice of Subpoena Duces Tecum,  
21 Pursuant to NRCP 45(a)(4)(A).

22           19.     On February 22, 2021, Plaintiff Douglas Kennedy Second Set of Requests for  
23 Admissions to Defendant Universal Protection Services, LLC dba Allied Universal Security  
24 Services.

25

1           20.    On February 22, 2021, Plaintiff Douglas Kennedy First Set of Requests for  
2 Admissions to Defendant Gabriel L. Martinez.

3           21.    On February 23, 2021, Plaintiffs served their Fourth Supplement to Initial  
4 Disclosures of Witnesses and Documents Pursuant to NRCP 16.1.

5           22.    On March 3, 2021, Plaintiffs served their Notice of Service of California Subpoena  
6 Duces Tecum.

7           23.    On March 3, 2021, Plaintiffs served their Fifth Supplement to Initial Disclosures of  
8 Witnesses and Documents Pursuant to NRCP 16.1.

9           24.    On March 5, 2021, Plaintiffs served their Notice of Taking Videotaped Deposition  
10 of Shomari Bracy and Kenya Crandell.

11          25.    On March 16, 2021, Plaintiffs served their Notice of Vacating the Deposition for  
12 Shomari Bracy.

13          26.    On March 22, 2021, Plaintiffs served their Sixth Supplement to Initial Disclosures  
14 of Witnesses and Documents Pursuant to NRCP 16.1.

15          27.    On March 23, 2021, Plaintiffs served their Notice of Service for Subpoena Duces  
16 Tecum for Bronson Risk Consultants – Change of Date.

17          28.    On March 29, 2021, Defendant Gabriel L. Martinez served his responses to  
18 Plaintiff's Douglas Kennedy's First Set of Interrogatories and Request for Admissions.

19          29.    On April 7, 2021, Plaintiffs served their Seventh Supplement to Initial Disclosures  
20 of Witnesses and Documents Pursuant to NRCP 16.1.

21          30.    On April 9, 2021, Plaintiff served their Second Notice of Subpoena Duces Tecum  
22 for Security Industry Specialists – Change of Date.

23          31.    On April 16, 2021, Defendant Universal Protection Services, LLC dba Allied  
24 Universal Security Services served their Supplemental Responses to Plaintiff Douglas Kennedy's  
25 First Set of Request for Production No. 2.

1           32.     On April 20, 2021, Defendant Universal Protection Services, LLC dba Allied  
2 Universal Security Services served their responses to Plaintiff Douglas Kennedy's Second Set of  
3 Interrogatories and Request for Production of Documents.

4           33.     On April 20, 2021, Defendant Universal Protection Services, LLC dba Allied  
5 Universal Security Services served their responses to Plaintiff Douglas Kennedy's First Set of  
6 Request for Admissions.

7           34.     April 27, 2021, Plaintiff Douglas Kennedy served his Third Set of Requests for  
8 Admission to Defendant Universal Protection Services, LLC dba Allied Universal Security  
9 Services.

10          35.     On April 29, 2021, Plaintiff served their Third Notice of Subpoena Duces Tecum  
11 for Security Industry Specialists – Change of Date.

12          36.     On May 13, 2021, Defendants served their Third (Fourth) Supplement to Initial  
13 Disclosures of Witnesses and Documents Pursuant to NRCP 16.1.

14          37.     On May 14, 2021, Defendant Universal Protection Services, LLC dba Allied  
15 Universal Security Services Request for Production No. 9 to Plaintiff Douglas Kennedy.

16          38.     On May 14, 2021, Defendants served their Fourth (Fifth) Supplement to Initial  
17 Disclosures of Witnesses and Documents Pursuant to NRCP 16.1.

18          39.     On May 20, 2021, Plaintiffs served their Eighth Supplement to Initial Disclosures  
19 of Witnesses and Documents Pursuant to NRCP 16.1.

20          40.     On May 21, 2021, Plaintiff served their Notice of Taking Videotaped Deposition  
21 for Gabriel L. Martinez.

22          41.     On May 25, 2021, Plaintiff Douglas Kennedy Responses to Defendant Universal  
23 Protection Services, LLC dba Allied Universal Security Services to Request for Production of No  
24 9.

42. On May 27, 2021, Defendant Universal Protection Services, LLC dba Allied Universal Security Services served their responses to Plaintiff Douglas Kennedy's Third Set of Request for Admission.

43. On June 3, 2021, Plaintiff Douglas Kennedy served his Third Set of Requests for Production and Interrogatories to Defendant Universal Protection Services, LLC dba Allied Universal Security Services.

44. On June 9, 2021, Plaintiffs served their Ninth Supplement to Initial Disclosures of Witnesses and Documents Pursuant to NRCP 16.1.

45. On June 11, 2021, Plaintiffs served their First Amended Notice of Taking Videotaped Deposition for Defendant Gabriel L. Martinez.

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

The parties anticipate the need to conduct the following discovery:

- Propounding and responding to additional written discovery;
- Deposition of Plaintiffs;
- Deposition of Defendants;
- Deposition of percipient witnesses;
- NRCP 35 exam scheduled for July 21, 2021;
- Initial and rebuttal expert disclosures;
- Depositions of the parties' experts; and
- Ongoing exchange of additional documents.

## **III. REASONS WHY DISCOVERY WAS NOT COMPLETED**

This is the Parties' first request for an extension. Good cause exists for an extension considering Plaintiff's type of injuries and the amount of his claimed damages. The parties believe that the case may be able to resolve following the disclosure of expert witnesses. The Parties agree



that an extension of the discovery deadlines and trial is appropriate. Further, the parties are submitting this request in good faith, and not for reasons of delay or for any other untoward purpose.

**IV. CURRENT AND PROPOSED DISCOVERY DEADLINES**

The current and proposed discovery deadlines are as follows:

Description	Current Deadline	Proposed Deadline
Discovery Cutoff	November 15, 2021	January 14, 2022
Deadline to Amend Pleadings/Add Parties	August 17, 2021	October 18, 2021
Initial Expert Deadline	August 17, 2021	October 18, 2021
Rebuttal Expert Deadline	September 16, 2021	November 15, 2021
Dispositive Motion Deadline	January 14, 2022	March 15, 2022

**V. CURRENT TRIAL DATE**

The trial is currently scheduled to begin on a five-week stack on March 14, 2022. The parties respectfully request the trial be rescheduled to begin on or around this Court's first trial stack following June 1 2022, or the next available trial stack otherwise deemed appropriate by the Court.

Dated this 12th day of July, 2021.

Dated this 12th day of July, 2021.

COGBURN LAW

WILSON ELSEER MOSKOWITZ  
EDELMAN DICKER, LLP

By: /s/ Joseph J. Troiano

By: /s/ Christopher J. Richardson

Jamie S. Cogburn, Esq.  
Nevada Bar No. 8409  
Joseph J. Troiano, Esq.  
Nevada Bar No. 12505  
2580 St. Rose Parkway, Suite 330  
Henderson, Nevada 89074  
*Attorneys for Plaintiffs*

Michael Lowry, Esq.  
Nevada Bar No. 10666  
Christopher J. Richardson, Esq.  
Nevada Bar No. 9166  
6689 S. Las Vegas Blvd., Suite 200  
Las Vegas, Nevada 89119  
*Attorneys for Defendants*

COGBURN LAW  
2580 St. Rose Parkway, Suite 330, Henderson, Nevada 89074  
Telephone: (702) 748-7777 | Facsimile: (702) 966-3880

Douglas Kennedy, et al. v. Gabriel L. Martinez, et al.  
Case No.: A-20-820254-C  
Stipulation and Order to Continue Discovery and Trial (First Request)

**ORDER**

The foregoing stipulation between the parties to continue discovery deadlines and trial is hereby GRANTED. An amended ~~discovery and~~ trial setting order will be issued.

IT IS SO ORDERED.

Dated: \_\_\_\_\_

Dated this 12th day of July, 2021

  
DISTRICT COURT JUDGE

Respectfully submitted by:

COGBURN LAW

**3A9 5BE 5758 2942**  
**Joe Hardy**  
**District Court Judge**

By: /s/Joseph J. Troiano  
Jamie S. Cogburn, Esq.  
Nevada Bar No. 8409  
Joseph J. Troiano, Esq.  
Nevada Bar No. 12505  
2580 St. Rose Parkway, Suite 330  
Henderson, Nevada 89074  
*Attorneys for Plaintiff*

1 **CSERV**

2  
3 DISTRICT COURT  
CLARK COUNTY, NEVADA

4  
5  
6 Douglas Kennedy, Plaintiff(s) CASE NO: A-20-820254-C  
7 vs. DEPT. NO. Department 15  
8 Gabriel Martinez, Defendant(s)  
9

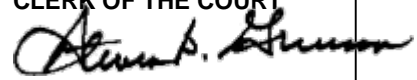
10 **AUTOMATED CERTIFICATE OF SERVICE**

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: 7/12/2021

15 Michael Lowry	michael.lowry@wilsonelser.com
16 Efile LasVegas	efilelasvegas@wilsonelser.com
17 Kait Chavez	kait.chavez@wilsonelser.com
18 Joseph Troiano	jjt@cogburncares.com
19 Amanda Hill	amanda.hill@wilsonelser.com
20 Chris Richardson	chris.richardson@wilsonelser.com
21 File Clerk	efile@cogburncares.com
22 Noel Raleigh	ncr@cogburncares.com
23 Sarah Wilder	scw@cogburncares.com

24  
25  
26  
27  
28



MICHAEL P. LOWRY, ESQ.

Nevada Bar No. 10666

E-mail: [Michael.Lowry@wilsonelser.com](mailto:Michael.Lowry@wilsonelser.com)

CHRISTOPHER J. RICHARDSON, ESQ.

Nevada Bar No. 9166

E-mail: [Chris.Richardson@wilsonelser.com](mailto:Chris.Richardson@wilsonelser.com)

6689 Las Vegas Blvd. South, Suite 200

Las Vegas, Nevada 89119

Tel: 702.727.1400/Fax: 702.727.1401

Attorneys for Gabriel L. Martinez;

Universal Protection Services, LLC

**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

DOUGLAS J. KENNEDY, an individual; and  
LORI KENNEDY, an individual,

Plaintiffs,

vs.

GABRIEL L. MARTINEZ, an Individual;  
UNIVERSAL PROTECTION SERVICES,  
LLC d/b/a ALLIED UNIVERSAL SECURITY  
SERVICES, a Foreign Limited Liability  
Company; DOE Family Members 1-10; DOE  
Individuals 11-20; and ROE Corporations 21-  
30, Inclusive,

Defendants.

Case No. A-20-820254-C

Dept. No. 15

**Defendants' Motion for Rule 35 Examination**

Hearing Requested with Discovery  
Commissioner

Mr. Kennedy alleges a brain injury from a motor vehicle accident. The parties agreed to a Rule 35 neuropsychological examination. While attending the exam, Kennedy misunderstood what the examiner was asking him to do, so the examination had to be terminated. When Defendants attempted to reschedule, Kennedy asserted new objections. He attempted to renege on his agreement to the examiner. He also demanded for the first time an observer and that the examination be recorded. Kennedy refuses to honor his original agreement, so this motion became necessary. A Rule 35 examination is merited and should be ordered per the parties' original agreement.

1 DATED this 7<sup>th</sup> day of October, 2021.



4 /s/ Michael P. Lowry  
5 MICHAEL P. LOWRY, ESQ.  
6 CHRISTOPHER J. RICHARDSON, ESQ.  
7 6689 Las Vegas Blvd. South, Suite 200  
8 Las Vegas, Nevada 89119  
9 Attorneys for Gabriel L. Martinez; Universal  
10 Protection Services, LLC

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

**Declaration of Chris Richardson**

1. The parties previously agreed to a Rule 35 neuropsychology examination to be conducted by Dr. Staci Ross.
2. Dr. Ross provided standard paperwork to Doug Kennedy's legal counsel in advance of the Rule 35 exam.
3. On information and belief, prior to submitting to the exam, Kennedy and/or his wife struck out portions of requested information contained in Dr. Ross's standard paperwork.<sup>1</sup>
4. On information and belief, Dr. Ross met with Kennedy on July 20, 2021 and conducted a portion of the exam before realizing he had yet to complete a necessary form, most notably the Limits of Confidentiality.
5. The Limits to Confidentiality allow divulging of information without permission when it "is necessary to protect against a clear and substantial risk of imminent serious harm by the patient or another person..." NAC 641.224. It is the standard in the neuropsychology industry to require any examinee to consent or assent to this limitation.

<sup>1</sup> Declaration of Dr. Staci Ross, attached as Ex. A.

- 1 6. Dr. Ross asked Kennedy to verbally agree that he would consent to the Limits of  
2 Confidentiality. Unfortunately, Kennedy would not agree to the standard requirement,  
3 so Dr. Ross adjourned the exam until the issue could be rectified.
- 4 7. Dr. Ross has informed me that she can competently complete the Rule 35 exam, so long  
5 as Kennedy assents to the Limits of Confidentiality.
- 6 8. Following the adjournment, before we could reschedule the Rule 35 exam with  
7 Kennedy's counsel, Joe Troiano, Esq. sent an email stating his objection that Dr. Ross  
8 be allowed to reconvene the exam.<sup>2</sup>
- 9 9. On July 27, 2021, I proposed that we clarify what occurred at the first exam and agree  
10 on what forms needed to be signed beforehand.<sup>3</sup>
- 11 10. On September 23, 2021 I conducted an EDCR 2.34 meet and confer telephone  
12 conference with Mr. Troiano to discuss the parameters of the Rule 35 exam. Mr.  
13 Troiano stated that he would confer with co-counsel and respond with their position.
- 14 11. On September 24, 2021 Mr. Troiano sent an email stating that they would not agree to  
15 allowing Dr. Ross to conduct the exam and that they wanted it recorded.<sup>4</sup> Therefore,  
16 Defendants were required to file this motion.
- 17 12. To accommodate a ruling on this motion, the parties are submitting a stipulation to  
18 extend the expert deadlines, currently set for October 18, 2021, to allow the parties to  
19 bring this issue before the Court. The stipulation seeks to extend the expert disclosure  
20 deadline by 60 days and the close of discovery deadline by 30 days.
- 21 13. I declare under penalty of perjury that the foregoing is true and correct.

22  
23 /s/ Chris Richardson

24  
25  
26  
27 <sup>2</sup> July 23, 2021 email from Joe Troiano, attached as Exhibit B.

28 <sup>3</sup> *Id.* at July 27, 2021 email from Chris Richardson.

<sup>4</sup> September 24, 2021 email from Joe Troiano to Chris Richardson, attached as Exhibit C.

1 **Memorandum of Points & Authorities**

2 **I. Mr. Kennedy previously agreed to a Rule 35 examination.**

3 This personal injury case concerns a motor vehicle accident that occurred on  
4 November 5, 2018. The complaint was filed on August 27, 2020. Mr. Kennedy alleges he  
5 suffered a brain injury from it.

6 **a. The Rule 35 examination was not completed.**

7 Defendants previously requested a Rule 35 neuropsychological examination and  
8 proposed Staci Ross, Ph.D. to perform the examination. The parties agreed to the examination  
9 and it was scheduled for July 20, 2021. As part of the examination, Dr. Ross asked Kennedy  
10 to provide written or verbal consent to the Limits to Confidentiality, review foreseeable risks  
11 and benefits to the evaluation, and consent to the neuropsychological evaluation.<sup>5</sup> The Limits  
12 to Confidentiality allow divulging of information without permission when it “is necessary to  
13 protect against a clear and substantial risk of imminent serious harm by the patient or another  
14 person...”<sup>6</sup> It is the standard in the neuropsychology industry to require any examinee to  
15 consent or assent to this limitation.

16 When Dr. Ross asked Kennedy to agree, either verbally or in writing, to the limitation,  
17 Kennedy refused to provide his consent, citing his wife’s instruction.<sup>7</sup> Because Dr. Ross could  
18 not ethically continue the exam without Kennedy’s consent to the evaluation, knowledge of  
19 risks and benefits and to these Limits to Confidentiality, she adjourned the exam until the issue  
20 can be resolved.<sup>8</sup>

21 **b. Plaintiff tries to impose new conditions on the examination.**

22 Defendants then attempted to resolve this misunderstanding and reschedule the  
23 examination so it can be completed. At that point, Kennedy asserted new conditions. He  
24 refused to stipulate to Dr. Ross handling the examination and insisted that it be recorded.  
25

26 <sup>5</sup> Ex. A. at ¶ 8.

27 <sup>6</sup> *Id.* (citing NAC 641.224).

28 <sup>7</sup> *Id.* at ¶ 9.

<sup>8</sup> *Id.* at ¶ 10.

1     **II. Kennedy waived these objections by not asserting them earlier.**

2             When the Rule 35 exam was originally proposed and scheduled, Kennedy did not  
3     object to Dr. Ross' qualifications as an examiner. Nor did Kennedy request that an observer  
4     attend or record the examination. If Kennedy had objections to either issue, he was free to  
5     raise them at that time. But as he did not, those issues were waived.

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

11    **III. A Rule 35 examination is appropriate.**

12            If Kennedy's objections were not waived, Rule 35 is still satisfied. Rule 35(a)(1)  
13    permits the court to order "a party whose mental or physical condition ... is in controversy to  
14    submit to a physical or mental examination by a suitably licensed or certified examiner."  
15    Kennedy has put his mental and physical condition at issue in this case. Defendants proposed  
16    Dr. Ross as the examiner. Her CV indicates she is a licensed, practicing neuropsychologist in  
17    Nevada.<sup>9</sup>

18            Rule 35(a)(2)(A) notes a motion for examination requires good cause. This cause is  
19    present as Kennedy asserts he has ongoing deficits causally related to this motor vehicle  
20    accident.<sup>10</sup>

21            Kennedy's mental condition is at issue, Defendants have identified an appropriately  
22    qualified examiner, and good cause is present to support the examination. Rule 35 is satisfied  
23    here.

24            **a. Plaintiff does not satisfy Rule 35's requirements for an observer.**

25            Rule 35(a)(4)(A)(i) allows a plaintiff to request an observer unless "the examination is  
26    a neuropsychological, psychological, or psychiatric examination." Rule 35(a)(4)(B) expressly

27    

---

<sup>9</sup> Exhibit D.

28    <sup>10</sup> Exhibit E at interrogatory 9.



bars observers. “The party may not have any observer present for a neuropsychological, psychological, or psychiatric examination, unless the court orders otherwise for good cause shown.”

Rule 35(a)(4)(B)’s good cause exception is inapplicable here. Ethical rules prohibit observers from attending neuropsychological assessments. The American Board of Professional Neuropsychology has adopted a policy statement concerning what they term “third party observation” (TPO) of examinations.<sup>11</sup> The Board examined these requests and noted they are inconsistent with good practice. “Given the body of literature that exists regarding observer effects, it is incumbent on neuropsychologists who provide evaluations to make clear to patients, clients, families, and other professionals that they do not endorse TPO and to try to avoid this type of intrusion in the assessment.”<sup>12</sup> “Multiple studies have established and replicated the dubious validity of data obtained during recorded or observed evaluations.”<sup>13</sup> When confronted with a situation such as is at issue in this motion, “neuropsychologists should resist demands for TPO if requested by opposing counsel, retaining counsel, or the court. The neuropsychologist should educate the court or those involved as to the APA Ethics Code and the existing scientific research that supports the negative effects of this type of intrusion.”<sup>14</sup> The Board concluded:

Requests for TPO frequently create an ethical dilemma for neuropsychologists as any observation or recording of neuropsychological tests or their administration has the potential to influence and compromise the behavior of both the examinee and the administrator, threatens the validity of the data obtained under these conditions by, and consequently limits normative comparisons, clinical conclusions, opinions, interpretations, and recommendations. For these reasons, APA ethical standards support the position that TPO in neuropsychological testing should be avoided.<sup>15</sup>

---

<sup>11</sup> Exhibit F.

<sup>12</sup> *Id.* at 393.

<sup>13</sup> *Id.* at 395.

<sup>14</sup> *Id.* at 396.

<sup>15</sup> *Id.*

1                   **a. Plaintiff does not satisfy Rule 35’s requirements for recording.**

2                   As to recordings, “the court may, for good cause shown, require as a condition of the  
3 examination that the examination be audio recorded.”<sup>16</sup> The same ethical bars against  
4 allowing a third-party observer (“TPO”) during a neuropsychological assessment also apply to  
5 recordings. “Multiple studies have established and replicated the dubious validity of data  
6 obtained during recorded or observed evaluations.”<sup>17</sup> “Neuropsychologists should therefore  
7 not engage in, endorse, abet, or conduct assessments complicated by TPO or recording of any  
8 kind other than under the order of a court after all reasonable alternatives have been  
9 exhausted.”<sup>18</sup>

10                   **IV. If Rule 35 and NRS 52.380 conflict, then Rule 35 controls.**

11                   Rule 35 is clear that Kennedy may not have an observer or recording in this particular  
12 circumstance. Kennedy alternatively argues he may have an observer and recorder per NRS  
13 52.380.

14                   **a. How did we get here?**

15                   In 2017 the Supreme Court began a process to comprehensively update Nevada’s Rules  
16 of Civil Procedure. The Court appointed a committee, who formed sub-committees including  
17 one dedicated to the discovery rules. Rule 35 proved contentious from the start. The July 26,  
18 2017 meeting minutes from the full committee noted concern with the implications of early  
19 revisions. “As to NRCP 35, the Committee discussed the observer requirement and whether  
20 that person could be an interested party or an attorney.”<sup>19</sup> The rule was sent back to committee  
21 for further work.

22                   Rule 35 was discussed again at the September 27, 2017 full committee meeting. One  
23 subcommittee member stated “he did not support the rule as written. His concerns are, among  
24 other things, the presence of an observer and the recording of the medical exam. Consideration  
25 of the rule was passed to the next meeting, pending further public comment on the rule and the

26                   <sup>16</sup> Rule 35(a)(3).

27                   <sup>17</sup> Exhibit F at 395.

28                   <sup>18</sup> *Id.* at 397.

<sup>19</sup> Exhibit G at 2.

1 development of a proposed alternative....”<sup>20</sup> By the October 25, 2017 full committee meeting  
2 there were at least two competing drafts of Rule 35 under consideration.<sup>21</sup> No agreement was  
3 ever reached within the discovery sub-committee. The December 20, 2017 full committee  
4 meeting noted that, as to Rule 35, “three final proposals were complete and would be  
5 submitted to the Supreme Court. The co-chairs asked the proponents of the proposals to draft  
6 summary statements advocating for their proposal.”<sup>22</sup>

7 During the public comment process, Nevada’s Board of Psychological Examiners  
8 submitted comments against a draft proposal that would have allowed TPOs at psychological  
9 or neuropsychological examinations. It highlighted that allowing TPOs “poses a significant  
10 threat to public safety” and discussed the science concluding why observers and recordings  
11 invalidate the testing data.<sup>23</sup>

12 The Nevada Psychological Association also submitted comments against TPOs. It  
13 included a bibliography of literature discussing the problems TPOs create and how it  
14 invalidates testing data.<sup>24</sup> The Association also provided the Official Position Statement of the  
15 National Academy of Neuropsychology as to both test security and TPOs.

16 Seven individual psychologists and neuropsychologists also submitted comments  
17 against the proposal. Teri Belmont, Ph.D provided the American Academy of Clinical  
18 Neuropsychology’s policy statement against TPOs, among other materials.<sup>25</sup> All of the  
19 psychologists and neuropsychologists provided scientific references about why TPOs are  
20 scientifically impermissible.

21 The Supreme Court then adopted one of the proposals that became the Rule 35. It took  
22 effect March 1, 2019 and is applicable to this motion. The advocates for the losing proposal  
23 then went to the Legislature. On March 18, 2019, AB 285 was introduced. The former chair  
24

---

25 <sup>20</sup> Exhibit H at 4.

26 <sup>21</sup> Exhibit I at 1-2.

27 <sup>22</sup> Exhibit J at 2.

28 <sup>23</sup> Exhibit K.

<sup>24</sup> Exhibit L.

<sup>25</sup> Exhibit M

1 of the discovery sub-committee that drafted the competing proposals made clear that AB 285  
2 was the draft rule the Supreme Court rejected and he was asking the Legislature to intervene.

3 We voted 7-to-1 to make substantial changes, the changes that are set forth or  
4 embodied in the bill before you, Assembly Bill 285. Unfortunately, when our  
5 recommendations went to the full Supreme Court of Nevada, they rejected our  
6 changes for reasons we are still not clear on. At that point, we reassessed our  
7 position.<sup>26</sup>

8 The bill passed both chambers, the governor signed it on May 23, 2019, and it took effect on  
9 October 1, 2019, as NRS 52.380.

10 **b. Kennedy does not meet his burden per NRS 52.380.**

11 NRS 52.380(1) creates a conditional right for an observer to attend. “An observer may  
12 attend an examination but shall not participate in or disrupt the examination.” NRS  
13 52.380(2)(a) expressly permits the observer to be the “attorney of an examinee or party  
14 producing the examinee.” NRS 52.280(2)(b) permits the observer to be “[a] designated  
15 representative of the attorney....”

16 The potential conflict between Rule 35(a)(4) and NRS 52.380(1) and (2) is plain, but it  
17 is possible to harmonize them in this particular circumstance. “The court first looks to the  
18 plain language of the statute. If the statutory language fails to address the issue, this court  
19 construes the statute according to that which reason and public policy would indicate the  
20 legislature intended.”<sup>27</sup> Rule 35(a)(4) states the party against whom the examination “may  
21 request” an observer attend, NRS 52.380(1) states an observer “may attend.” “‘May’ is of  
22 course generally permissive.”<sup>28</sup> Rule 35 goes further and specifies that an observer may not  
23 attend a neuropsychological, psychological, or psychiatric examination. NRS 52.380 contains  
24 no equivalent language.

25 A similar analysis could apply to NRS 52.380(3), which states an “observer attending  
26 the examination pursuant to subsection 1 may make an audio or stenographic recording of the

27 <sup>26</sup> Exhibit N at 3-4.

28 <sup>27</sup> *Hardy Cos. v. SNMARK, LLC*, 126 Nev. Adv. Op. 49, 245 P.3d 1149, 1153 (2010) (citations  
and quotations omitted); *Marquis & Aurbach v. Dist. Ct.*, 122 Nev. 1147, 1157, 146 P.3d  
1130, 1137 (2006) (applying rules of statutory construction to the interpretation of a court  
rule).

<sup>28</sup> *Ewing v. Fahey*, 86 Nev. 604, 607, 472 P.2d 347, 349 (1970).

1 examination.” Again, may is permissive and the court has the discretion to state good cause to  
2 support a recording is not present here.

3 Neither Rule 35 nor NRS 52.380 provide guidance as to how a court should determine  
4 when an observer “may” attend. They both place the burden to request one on the plaintiff.  
5 Applied here, Kennedy has yet to state any specific reason why he wants an observer present  
6 and recording the examination. Conversely Kennedy was able to complete his own  
7 evaluations with his own physicians within their own ethical confines but without an observer  
8 or recording.

9 **c. NRS 52.380 is an unconstitutional, procedural statute.**

10 Defendants’ final argument against applying NRS 52.380 is constitutional. The  
11 constitutional problem arises due to the separation of powers built into Nevada’s  
12 constitution.<sup>29</sup> Each of government’s three branches is equal. “In keeping with this theory, the  
13 judiciary has the inherent power to govern its own procedures.”<sup>30</sup> NRS 2.120 expressly  
14 recognized that authority. “The judiciary is entrusted with rule-making and other incidental  
15 powers reasonable and necessary to carry out the duties required for the administration of  
16 justice and to economically and fairly manage litigation.”<sup>31</sup> This means “the legislature may  
17 not enact a procedural statute that conflicts with a pre-existing procedural rule, without  
18 violating the doctrine of separation of powers, and such a statute is of no effect.”<sup>32</sup>

19 In addition to the constitutionally mandated bases for keeping separate those  
20 inherent powers of the judiciary, leaving control of court rules and the  
21 administration of justice to the judiciary, and thereby placing the responsibility for  
22 the system’s continued effectiveness with those most familiar with the latest  
23 issues and the experience and flexibility to more quickly bring into effect  
24 workable solutions and amendments, makes good sense.<sup>33</sup>

25 The judiciary’s authority “to promulgate procedural rules is independent of legislative power,  
26 and may not be diminished or compromised by the legislature. ... Furthermore, where, as here,

27 <sup>29</sup> Nev. Const. Art. 3, § 1.

28 <sup>30</sup> *Berkson v. Lepome*, 126 Nev. 492, 499 (2010) (quotation omitted).

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

1 a rule of procedure is promulgated in conflict with a preexisting procedural statute, the rule  
2 supersedes the statute and controls.”<sup>34</sup>

3 **d. Nevada case law confirms NRS 52.380 is a procedural statute.**

4 The Supreme Court of Nevada has considered whether prior statutes are procedural or  
5 substantive and these prior cases help explain why NRS 52.380 is unconstitutional. For  
6 example, consider wrongful death cases. “Wrongful death is a cause of action created by  
7 statute, having no roots in the common law.”<sup>35</sup> NRS 41.085 created a substantive right that  
8 could be asserted subject to the judiciary’s procedural rules.

9 In another example, NRS 11.340 allowed “a plaintiff whose judgment is subsequently  
10 reversed on appeal with the right to file a new action within one year after the reversal.”<sup>36</sup>  
11 This statute arguably created a substantive right for a plaintiff whose statute of limitations has  
12 expired to file a new complaint after an unsuccessful appeal. But *Berkson v. Lepome*  
13 concluded NRS 11.340 was procedural in nature, violated separation of powers by interfering  
14 “with the judiciary’s authority to manage the litigation process” and was unconstitutional.

15 *Whitlock v. Salmon* addressed tension between NRCP 47(a), stating at the time “the  
16 court shall conduct the examination of prospective jurors and may permit such supplemental  
17 examination by counsel as it deems proper,” and NRS 16.030(b), which stated “the parties or  
18 their attorneys are entitled to conduct supplemental examinations which must not be  
19 unreasonably restricted.” *Whitlock* did not perceive the statute as a legislative encroachment  
20 on judicial prerogatives.

21 Although the statute does implicate trial procedure, it does not interfere with  
22 procedure to a point of disruption or attempted abrogation of an existing court  
23 rule. Rather, the statute confers a substantive right to reasonable participation in  
24 voir dire by counsel; and this court will not attempt to abridge or modify a  
25 substantive right.<sup>37</sup>

26 <sup>34</sup> *State v. Connery*, 99 Nev. 342, 345 (1983).

27 <sup>35</sup> *Alsenz v. Clark Cty. Sch. Dist.*, 109 Nev. 1062, 1064 (1993).

28 <sup>36</sup> *Berkson*, 126 Nev. at 494.

<sup>37</sup> 104 Nev. 24, 26 (1988).

1 Defendants have located no Nevada appellate authority yet considering NRS 52.380.<sup>38</sup>  
2 It has been interpreted at least once in the local federal court. The plaintiff in *Freteluco v.*  
3 *Smith's Food & Drug Ctrs.* argued NRS 52.380 is a substantive statute and thus applicable in  
4 federal actions rather than FRCP 35. Magistrate Judge Youchah disagreed, concluding “that  
5 whether an observer is present in the neuropsychological examination of Plaintiff is not  
6 substantive, but is procedural. That is, NRS 52.380 sets forth procedures applicable to  
7 observers who may attend independent medical examinations.”<sup>39</sup>

8 NRS 52.380 interferes “with procedure to a point of disruption” and attempts to  
9 abrogate an existing court rule as *Whitlock* feared. NRS 52.380 does not create or modify any  
10 substantive rights. Instead the legislative history indicates the statute’s express purpose was to  
11 enact a draft of Rule 35 the Supreme Court rejected.

12 **V. Kennedy should attend the exam he already agreed to.**

13 The parties reached an agreement on the Rule 35 examination. Kennedy is now trying  
14 to renege on his agreement and add new conditions. The simplest way to resolve this motion  
15 is to enforce the parties’ prior agreement and conclude that Kennedy’s new conditions were  
16 waived. Beyond that, Kennedy has not satisfied Rule 35’s requirements or NRS 52.380’s  
17 requirements for an observer or recorder. Finally, NRS 52.380 is unconstitutional.

18 DATED this 7<sup>th</sup> day of October, 2021.



21 /s/ Michael P. Lowry  
22 MICHAEL P. LOWRY, ESQ.  
23 CHRISTOPHER J. RICHARDSON, ESQ.  
24 6689 Las Vegas Blvd. South, Suite 200  
25 Las Vegas, Nevada 89119  
26 Attorneys for Gabriel L. Martinez; Universal  
27 Protection Services, LLC

28  
38 It is subject to at least 6 pending writ petitions though. Cases 81912, 82148, 82625, 82670, 82831, and 83536. Briefing was accepted in the first 5 and all have been assigned for en banc decision. Case 83536 was only filed last week.  
39 336 F.R.D. 198, 203 (D. Nev. 2020).

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**CERTIFICATE OF SERVICE**

Pursuant to NRCP 5, I certify that I am an employee of Wilson Elser Moskowitz Edelman & Dicker LLP, and that on October 7, 2021, I served **Defendants’ Motion for Rule 35**

**Examination** as follows:

- ☐ by placing same to be deposited for mailing in the United States Mail, in a sealed envelope upon which first class postage was prepaid in Las Vegas, Nevada;
- ☒ via electronic means by operation of the Court’s electronic filing system, upon each party in this case who is registered as an electronic case filing user with the Clerk;

Jamie S. Cogburn  
Joseph J. Troiano  
COGBURN LAW  
2580 St. Rose Parkway, Suite 330  
Henderson, Nevada 89074  
Attorneys for Plaintiffs

BY: /s/ Amanda Hill  
An Employee of





# Exhibit A

# Exhibit A

**DECLARATION OF STACI ROSS, Ph.D.**


I, Staci Ross, Ph.D. declare as follows:

1. I am a Psychologist who is board certified in neuropsychology and rehabilitation psychology and licensed to practice in the State of Nevada. I have personal knowledge of all of the following facts, and if called to testify in court, could and would testify competently to these facts.
2. I have been retained by the defendants in this matter to evaluate Plaintiff Douglas Kennedy in the lawsuit he filed against Gabriel Martinez and United Protection Services.
3. I am informed and believe that Mr. Kennedy alleges to be suffering from, among other conditions, symptoms associated with traumatic brain injury, related to a motor vehicle accident.
4. I am further informed and believe that the defendants were required to bring a motion to compel Mr. Kennedy to reconvene a neuropsychological evaluation which included discussing the events and effects of prior traumas, family relationships, relationship issues and other matters which are the subject matter of Mr. Kennedy's current psychological and neuropsychological care, including the allegations against Defendants.
5. I was initially scheduled to conduct Mr. Kennedy's Rule 35 examination on July 20, 2021.
6. In preparation for the scheduled exam, I reviewed Mr. Kennedy's medical records and provided certain forms for Mr. Kennedy to complete in preparation for the exam.
7. In this case, it is my understanding that Mr. Kennedy reviewed the forms with his wife and struck out portions to which they did not agree. In most instances, I did not object Mr. Kennedy's refusal.
8. However, after reviewing the forms, I asked that Mr. Kennedy consent to the Limits to Confidentiality, review foreseeable risks and benefits to the evaluation, and consent to the

neuropsychological evaluation. The Limits to Confidentiality allow divulging of information without permission when it “is necessary to protect against a clear and substantial risk of imminent serious harm by the patient or another person...” NAC 641.224. It is the standard in the neuropsychology industry to require any examinee to consent or assent to this limitation.

9. When I requested that Mr. Kennedy agree, either verbally or in writing, to the aforementioned limitation, Mr. Kennedy refused to provide his consent, citing his wife’s instruction.
10. Because I could not ethically continue the exam without Mr. Kennedy’s consent to the evaluation, knowledge of risks and benefits and to these Limits to Confidentiality, I adjourned the exam until the issue was resolved.
11. Despite the adjournment of the examination, Mr. Kennedy parted my office on amicable terms without any acrimony.
12. My prior interaction with Mr. Kennedy will not adversely impact my ability to conduct an impartial, independent medical examination and I welcome the opportunity reconvene Mr. Kennedy’s examination, so long as he agrees to the Limits of Confidentiality described above.
13. Therefore, based on the scope of the examination, my experience and expertise, I remain qualified to provide an objective, independent medical/neuropsychological examination of Mr. Kennedy.

I declare under penalty of perjury under the laws of the State of Nevada that the foregoing is true and correct and that this declaration was executed on September 30, 2021 at Las Vegas, Nevada.

By:  \_\_\_\_\_  
Staci Ross, Ph.D. ABPP

# Exhibit B

# Exhibit B

**From:** Richardson, Chris  
**Sent:** Tuesday, July 27, 2021 11:12 AM  
**To:** Joseph J. Troiano  
**Subject:** RE: Doug Kennedy - Martinez depo/Rog response/IME

Joe,

Sorry for the delay in responding to your email. I have been trying to obtain some information from the paralegal on the case and she was out last week. In any event, I am in the process of obtaining dates from Gabriel Martinez regarding his deposition. I have asked him for availability in the month of August. As I mentioned in our call, he experienced a medical event that precluded him from contacting me about his previously scheduled deposition.

I will also take a look at the interrogatory that you requested be supplemented.

With regard to the IME, we disagree that anything that transpired at the original IME somehow impacts our ability to conduct a future IME. From my understanding, there was some discussion about the forms that were presented by Dr. Ross. I have been informed that Mr. Kennedy became argumentative with Dr. Ross. I propose that we agree on the forms that Mr. Kennedy must sign before the IME can go forward. We can then schedule a mutually agreeable date and move forward accordingly.

If you would still prefer to schedule a 2.34 conference on Thursday, I am available all afternoon. I believe it can be avoided for the time being, but I will leave it up to you.

Chris Richardson  
Attorney at Law  
Wilson Elser Moskowitz Edelman & Dicker LLP  
6689 Las Vegas Blvd. South, Suite 200  
Las Vegas, NV 89119  
702.727.1269 (Direct)  
702.727.1400 (Main)  
702.727.1401 (Fax)  
[chris.richardson@wilsonelser.com](mailto:chris.richardson@wilsonelser.com)

---

**From:** Joseph J. Troiano [<mailto:JJT@cogburncares.com>]  
**Sent:** Tuesday, July 27, 2021 7:51 AM  
**To:** Richardson, Chris <[Chris.Richardson@wilsonelser.com](mailto:Chris.Richardson@wilsonelser.com)>  
**Subject:** RE: Doug Kennedy - Martinez depo/Rog response/IME

**[EXTERNAL EMAIL]**

Chris,

I'm just following-up on the email below. Are you available Thursday for a 2.34 call?

**Joseph J. Troiano**

Attorney

2580 St. Rose Parkway, Suite 330

Henderson, NV 89074

Ph. (702) 748-7777

Fax (702) 966-3880

[www.CogburnCares.com](http://www.CogburnCares.com)



---

**From:** Joseph J. Troiano <[JJT@cogburncares.com](mailto:JJT@cogburncares.com)>

**Sent:** Friday, July 23, 2021 11:38 AM

**To:** Richardson, Chris <[Chris.Richardson@wilsonelser.com](mailto:Chris.Richardson@wilsonelser.com)>

**Subject:** Doug Kennedy - Martinez depo/Rog response/IME

Chris,

I am writing this email to address a few things. Last week, I sent an email about the company's response to Interrogatory No. 18. Instead of referring me to a bunch of docs, I'm asking that your client identify in the rog responses what qualifications needed to be met for someone to drive a company owned vehicle.

Next, I'm following-up on Mr. Martinez's depo. If you haven't received dates from him, my inclination is to file a MTC and have an order requiring him to show up.

Lastly, attached are the records that Mr. Kennedy brought with him to the IME with Dr. Ross. The forms weren't provided to my office beforehand and I actually received them because Lori called Dr. Ross' office the day before the IME and requested them. We didn't sign certain forms for obvious reasons.

It's my understanding that Mr. Kennedy showed up to the IME and Dr. Ross started asking him questions about his family history. After she started asking questions, she apparently realized that the forms were not all signed and asked Mr. Kennedy why they weren't signed. He explained that they weren't signed based upon advice from myself. She then requested that he sign all forms, which he declined. She apparently made comment where she claimed that she needed the forms all signed because if he represented to her that he was going to kill someone, she would have to report that. Based upon what I know, I'm not agreeing that he undergoes an IME with Dr. Ross or any neuropsych.

**Joseph J. Troiano**

Attorney

2580 St. Rose Parkway, Suite 330

Henderson, NV 89074

Ph. (702) 748-7777

Fax (702) 966-3880

[www.CogburnCares.com](http://www.CogburnCares.com)





# Exhibit C

# Exhibit C

**From:** Joseph J. Troiano <JJT@cogburncares.com>  
**Sent:** Friday, September 24, 2021 10:40 AM  
**To:** Richardson, Chris  
**Subject:** Kennedy - neuropsych exam

**[EXTERNAL EMAIL]**

Chris,

You'll have to file a motion. We won't agree that Stacy Ross can do it and we want it recorded.

**Joseph J. Troiano**

Attorney

2580 St. Rose Parkway, Suite 330  
Henderson, NV 89074

Ph. (702) 748-7777

Fax (702) 966-3880

[www.CogburnCares.com](http://www.CogburnCares.com)



# Exhibit D

# Exhibit D

**CURRICULUM VITAE**  
**Staci R. Ross, Ph.D., ABPP**  
**04/2020**

716 South 6<sup>th</sup> Street  
Las Vegas, NV 89101  
Phone: (702) 382-3670  
Fax : (702) 382-3998

**ABPP (CN) American Board of Professional Psychology,**  
Board Certified in Clinical Neuropsychology

**ABPP (RP), American Board of Professional Psychology,**  
Board Certified in Rehabilitation Psychology

**State of Nevada Board of Psychological Examiners,**  
Nevada License # PY0406

**State of Utah Department of Commerce**  
8390870-2501 Psychologist

**Education**

**Doctoral Degree/Educational Experience**

07/98 Ph.D in Clinical Psychology , West Virginia University

**Post-doctoral Fellowship in Neuropsychology and Rehabilitation**

Department of PM&R, University of Missouri-Columbia

Supervisors: Brick Johnstone, Ph.D. Laura Schopp, Ph.D.; Renee Stucky, Ph.D.

**Pre-doctoral Internship Neuropsychology Specialty Track**

Department of Psychiatry

Allegheny University of the Health Sciences, Allegheny Campus,

Allegheny General Hospital, Pittsburgh, PA. APA accredited Internship

Supervisors: Michael Franzen, Ph.D., Robert Fields, Ph.D., Sharon Arffa, Ph.D.

Stanley Smith, Ph.D., and Laura Smith-Seemiller, Ph.D.

**Neuropsychology and Rehabilitation Extern**

Re-Med of Pittsburgh and Department of Psychiatry, Allegheny University of  
Health Sciences, Pittsburgh, PA. Supervisor: James Petrick, Ph.D.

**Neuropsychology Practicum Student**

Department of Behavioral Medicine and Psychiatry

School of Medicine, West Virginia University, Morgantown, WV

Supervisors: Marc W. Haut, Ph.D, Jennifer S. Haut, Ph.D. and

Christina S. Wilson Ph.D.

**Clinical Psychology Practicum Student**

Valley Community Mental Health, Fairmont, WV; Quinn Curtis Center, Department of  
Psychology, West Virginia University, Morgantown, W.V.

Supervisor: Tracy Morris, Ph.D.

Department of Behavioral Medicine and Psychiatry, School of Medicine, West  
Virginia University, William R. Sharpe Psychiatric Hospital, Weston, WV

Supervisors: Jeannie Sperry-Clark, Ph.D, Martin L. Boone, Ph.D.

**Forensic Evaluations Assistant**

Department of Psychology, West Virginia University, Morgantown, WV.

Supervisor: William J. Fremouw, Ph.D., ABPP

## **Professional Activities**

03/01-Present: **Independent Practice in Clinical Neuropsychology and Rehabilitation**

### **Psychology**

Las Vegas, NV

Independent practice consisting of providing Neuropsychological, Forensic, Medical-psychological, Medical-legal evaluations, Psychoeducational evaluations and Treatment for individuals with neurological, genetic, developmental, spinal cord, orthopedic and other medical injuries/disorders for individuals ranging from adolescents to older adults. Assist with treatment planning, crisis intervention, return to work, return to sport, and community integration.

### **Sports Concussion Specialists of Nevada**

Participate in concussion management, from a neuropsychological standpoint and assist with return to play decisions locally and regionally, at the intramural, high school, college, semiprofessional, and professional level.

03/15-Present: **Neuropsychology Consultant**

R3 Continuum LLC

Consulting Neuropsychologist providing file review services, independent neuropsychological evaluations and fitness for duty examinations

07/05-06/07; 01/11-08/14

### **Independent Medical Reviewer in Clinical Psychology, Clinical Neuropsychology, and Rehabilitation**

#### **Psychology:**

Medical Review Institute of America/ NMR

Provide independent reviews to assist with resolution of disagreements between providers and payors.

06/07-06/11: **Clinical Neuropsychologist/Rehabilitation Psychologist:**

Southwest cares

Providing neuropsychological and psychological services with individuals with neurological and medical illnesses in local skilled nursing facilities.

03/02-06/07 **Clinical Neuropsychologist/Rehabilitation Psychologist**

Rehab without walls. Las Vegas, NV

Provide neuropsychological and psychological services to individuals with neurological and spinal cord disorders/injuries, in home, as a part of an interdisciplinary team.

03/01-10/02: **Indian Health Services Psychologist:**

Psychologist for the Las Vegas Colony and Moapa Reservation providing general psychological services primarily to members of the Paiute Tribe.

09/99-3/01: **Clinical Director of Neurological Rehabilitation Team**

### **Clinical Neuropsychologist/Rehabilitation Psychologist**

JHC Health Center, Las Vegas, Nevada

Clinical director of services for a comprehensive outpatient rehabilitation for individuals with neurological and spinal cord injuries as a part of an interdisciplinary team. Provide Neuropsychological and psychological services for individuals with neurological and spinal cord injuries. Conduct psychological evaluations and treatment for individuals with orthopedic injuries and/or a variety of psychological disorders (such as mood disorders and crisis intervention) Provide family/marital therapy for families and spouses of individuals with brain

injury. Provide groups for individuals with brain and spinal cord injuries.  
Marketing activities

### **Editorial Activities**

Reviewer ABRP, Practice Samples  
Reviewer Sexuality and Disability, 1/2013-present  
Ad hoc Reviewer, Brain Injury, 2011- present  
Ad hoc Editorial Consultant, Archives of Clinical Neuropsychology, 1997.  
Ad hoc Editorial Consultant, The Journal of Neuropsychiatry and Clinical Neurosciences, 1997.  
Ad hoc Editorial Consultant, Health Psychology, 1995.

### **Leadership Activities**

**Nevada State Psychological Association,**  
President- 2009-2010  
Treasurer 1999-2001, 2004-2008  
Southern Division Vice President 2001-2002,  
Legislative Affairs committee co-chair, member 2004-2009

### **Membership in Professional Organizations**

American Psychological Association (Divisions 22, 40, 47)  
American Academy of Clinical Neuropsychology  
International Neuropsychological Society  
National Academy of Neuropsychology  
American Academy of Neurology  
Nevada State Psychological Association

### **Teaching Experiences**

08/19- Present **University of Nevada, Las Vegas**  
Adjunct Professor, Department of Psychology  
2001- present **Workshop Presenter**  
Provided workshops, facilitated support groups to local chapters of  
Parkinson's Disease Association, Senior Center, American Brain Tumor Association, National  
Rehabilitation Association, National Multiple Sclerosis Society, Epilepsy Foundation,  
Nevada Interscholastic Activities Association , Network Medical Review, Nevada DIR Worker's  
Compensation,  
2002-2011 **Practicum Supervisor in Clinical Neuropsychology**  
University of Nevada Las Vegas, Clinical Psychology graduate program  
Supervising advanced graduate students in administration and interpretation of  
Neuropsychological evaluations. Providing didactic learning experiences.  
01/96-5/96 Instructor/Health Psychology  
Supervisor: Kevin T. Larkin, Ph. D.  
08/95-12/95 Instructor/Forensic Psychology  
Supervisor: William J. Fremouw, Ph. D., ABPP.

## Research Experiences

- 02/95-06/97 **Neuropsychological Research Assistant**  
Department of Behavioral Medicine and Psychiatry, School of Medicine,  
West Virginia University, Morgantown, WV  
Supervisors: Marc W. Haut, Ph.D., ABPP, Jennifer S. Haut, Ph.D.
- 10/93-7/96 **Psychophysiological Research Assistant**  
Department of Psychology, West Virginia University, Morgantown, WV.  
Supervisor: Kevin T. Larkin, Ph.D.
- 10/93-7/94 **Forensic Psychology Research Assistant**  
Department of Psychology, West Virginia University, Morgantown, WV  
Supervisor: William J. Fremouw, Ph.D., ABPP.
- .08/91-05/93 **Research Assistant**  
Department of Psychology, Binghamton University, Binghamton, NY  
Supervisor: Stephen A. Lisman, Ph.D.
- 08/92-05/93 **Research Assistant**  
Department of Psychology, Binghamton University, Binghamton, NY.  
National Science Foundation Grant application.  
Supervisor: A. F. Smith, Ph.D.

## Publications

- Maietta, J., Kuwabara, H. C., Flood, S. M., Kinsora, T. F., Ross, S. R., & Allen, D. N. (2021). Influence of autism and other neurodevelopmental disorders on cognitive and symptom profiles: Considerations for baseline sport concussion assessment. *Archives of Clinical Neuropsychology*.
- Maietta, J., Barchard, K, Kuwabara, H. C., Donahue, Ross, S. R., Kinsora, T. F., & Allen, D. N. (2020). Influence of Special Education, ADHD, Autism, and Learning Disorders on ImPACT Validity Scores in High School Athletes *Journal Of International Neuropsychological Society* 1-11
- Flood, S., Maietta, J. E., Kuwabara, H. C., Kinsora, T. F., Ross, S. R., & Allen, D. N. (2020, April). *Symptom reporting in neurodevelopmental athletes with and without concussion history*. Poster session presented at the Annual Convention of the American Academy of Pediatric Neuropsychology, Las Vegas, NV.
- Flood, S., Kuwabara, H., Hussey, J., Fraga, B., Kinsora, T. F., Ross, S. R., & Allen, D. N. (2019, November). Frequency of Sports-Related Concussion in Athletes with Neurodevelopment Conditions. Poster session presented at the 39<sup>th</sup> Annual Conference of the National Academy of Neuropsychology, San Diego, CA.
- Flood, S., Hussey, J., Kinsora, T. F., Ross, S. R., & Allen, D. N. (2019, April). Does neurodevelopmental diagnosis effect baseline testing for sport concussion? Poster session presented at the Annual Convention of the American Academy of Pediatric Neuropsychology, Las Vegas, NV.
- Flood, S., Hussey, J., Kinsora, T. F., Ross, S. R., & Allen, D. N. (2019, April). The effect of neurodevelopmental diagnosis on baseline testing and concussion rates in student athletes. Poster session presented at the Annual Convention of the American Academy of Pediatric Neuropsychology, Las Vegas, NV.
- Goodwin, G.J., Moore, S, Hopkins, N.A., Maietta, J.E., Kuwabara, H.C., Kinsora, T.F., Ross, S.R., Allen, D.N. (2021, February). Post-Concussion Symptom Scores Among Athletes

with Neurodevelopmental History. Poster to be Presented Virtually at the International Neuropsychological Society.

Hopkins, N. A., Maietta, J. E., Maietta, L. N., Kuwabara, H. C., Goodwin, G. J., Kinsora, T. F., Ross, S. R., & Allen, D. N. (2021, February 2-5). *Differences in baseline symptom reporting in athletes with psychiatric history* [Poster presentation]. International Neuropsychological Society 49th Annual Meeting, San Diego, CA, United States. (Conference held virtually).

Hussey, J., Kuwabara, H. C., Ng, W. W. Y., Kinsora, T. F., Ross, S. R., & Allen, D. N. (2019, November). Performance of ImPACT validity indices for athletes with neurodevelopmental disorders. Poster session presented at the 39<sup>th</sup> Annual Conference of the National Academy of Neuropsychology, San Diego, CA.

Hussey, J., Barchard, K. A., Kuwabara, H., Kinsora, T. F., Ross, S. R., Flood, S. Allen, D. N. (2019, August). Confirmatory factor analysis of the ImPACT in high school athletes. Poster session presented at the 127<sup>th</sup> Annual Meeting of the American Psychological Association, Chicago, IL.

Hussey, J., Ng, W. W. Y., Witoslawski, D. E., Kinsora, T. F., Ross, S. R., & Allen, D. N. (2018, October). Concussion rate differences across football positions. Poster session presented at the 38th Annual Conference of the National Academy of Neuropsychology, New Orleans, LA.

Hussey, J., Ng, W. W. Y., Flood, S. M., Kinsora, T. F., Ross, S. R., & Allen, D. N. (2018, October). Rates of sport concussion in contact and non-contact sports. Poster session presented at the 38th Annual Conference of the National Academy of Neuropsychology, New Orleans, LA.

Hussey, J., Witoslawski, D. E., Sheikh, R. M., Kinsora, T. F., Ross, S. R., & Allen, D. N. (2018, October). Demographic factors and likelihood of sport concussion. Poster session presented at the 38th Annual Conference of the National Academy of Neuropsychology, New Orleans, LA.

Skeel R. & Ross, S.R. (2009) Assessment and Rehabilitation memory impairments in Rehabilitation of Neuropsychological Disorders , Second Edition, 47-75

Skeel R. & Edwards S.R. (2001) Assessment and Rehabilitation memory impairments in Rehabilitation of Neuropsychological Disorders , 53-87

Johnstone, B., Hogg, J.R., Schopp, L.H., Kapita, C., Edwards, S.R. (2000). Neuropsychological deficit profiles in probable senile dementia of the Alzheimer's type. Arch Clin Neuropsychol. 2002 Apr;17(3):273-81.

Kuwabara, H. C., Moore, S., Grant, K., Maietta, J. E., Kinsora, T. F., Ross, S. R., & Allen, D. N. (2020, October 14-16). Changes in frequency of ImPACT assessments over time. [Poster presentation]. National Academy of Neuropsychology 40<sup>th</sup> Annual Conference, Chicago, IL, United States. (Conference held virtually).

Kuwabara, H. C., Grant, K., Moore, S., Maietta, J. E., Kinsora, T. F., Ross, S. R., & Allen, D. N. (2020, October 14-16). The effect of language on invalid baselines in ImPACT. [Poster presentation]. National Academy of Neuropsychology 40<sup>th</sup> Annual Conference, Chicago, IL, United States. (Conference held virtually).

Maietta, L. N., Maietta, J. E., Goodwin, G., Kuwabara, H. C., Kinsora, T. F., Ross, S. R., & Allen, D. N. (2021, February 2-5). Effects of helmet use on concussion rates across sport categories [Symposium presentation]. International Neuropsychological Society 49th Annual Meeting, San Diego, CA, United States. (Conference held virtually).



Maietta, J., Hopkins, N. A., Maietta, L. N., Flood, S. F., Johnson, L. T., Kuwabara, H. C., Kinsora, T. F., Ross, S. R., & Allen, D. N. (2020, October 14-16). Are invalid baselines more frequent in those with concussion history? [Poster presentation]. National Academy of Neuropsychology 40<sup>th</sup> Annual Conference, Chicago, IL, United States. (Conference held virtually).

Maietta, J., Flood, S. M., Johnson, L. T., Hopkins, N. A., Maietta, L. N., Kuwabara, H. C., Kinsora, T. F., Ross, S. R., & Allen, D. N. (2020, October 14-16). Cognitive profiles in athletes with neurodevelopmental disorders on baseline testing [Poster presentation]. National Academy of Neuropsychology 40<sup>th</sup> Annual Conference, Chicago, IL, United States. (Conference held virtually).

Rogers, E. A., Kuwabara, H. C., Goodwin, G. J., Maietta, J., Kinsora, T. F., Ross, S. R., & Allen, D. N. (2021). Sleep duration not related to baseline cognitive performance in high school athletes [Poster presentation]. American Psychological Association 129<sup>th</sup> Annual Convention, Virtual Conference.

Goodwin, G.J., Maietta, J.E., Maietta, L.N., Hopkins, N.A., Kuwabara, H.C., Kinsora, T.F., Ross, S.R., Allen, D.N. (2021, August). Post-concussion symptom recovery in high school athletes with neurodevelopmental disorders [Poster presentation]. American Psychological Association 129<sup>th</sup> Annual Convention, Virtual Conference.

Robyn, S (1999). Traumatic Brain Injury Rehabilitation- book review. Brain Injury, 13, 217-218.

Robyn, S. & Fremouw, W. J. (1996). Cognitive and affective styles of parents who physically abuse their children. American Journal of Forensic Psychology 14, 63-79.

Robyn, S. & Fremouw, W. J.(1996). An introduction to court testimony and mental health. Journal of Contemporary Psychology, 41, 172.

Robyn, S., Haut, M., Keefover, R., Rankin, E. (1999, February). Cognitive abilities and functional status in Alzheimer's Disease. Paper presented at the International Neuropsychological Society, Boston, MA, February, 1999.

Robyn, S. and Haut, M. Working Memory and Aging. Paper presented at the International Neuropsychological Society, Boston, MA, February, 1999.

Robyn, S., Franzen, M. D., Smith-Seemiller, L., & Bowers, D. (1998, August). Performance on an Index of Malingering in a Clinical Sample. Paper to be presented at the American Psychological Association, San Francisco, CA, August 1998.

Robyn, S., Haut, M., Keefover, R. W., Wilson, C. S. & Rankin, E.D. (1998, February). The Nature of Semantic Memory Deficits in Alzheimer's Disease. Paper presented at the 26th Annual Meeting of the International Neuropsychological Society, Honolulu, Hawaii.

Haut, J. S., Robyn, S., Haut, M. W., & Kirk, K. S. (1997, February). Memory and executive functioning in adolescents with schizophrenia and ADHD. Paper presented at the 25th Annual Meeting of the International Neuropsychological Society, Orlando, FL.

Frazer, N., Larkin, K., Robyn, S., Brown, S., Null, J., Spaulding, S., & Westrup, D. (1996, March). Relation between family environment and cognitive and physiological response to stress. Paper presented at the Society of Behavioral Medicine, Washington, D.C.

Larkin, K.T, Schauss, S., Elnicki, M., Allard, H., & Robyn, S. (1996, March). Is there such a thing as a "White Coat Normotension?". Paper presented at the 54th Annual Meeting American Psychosomatic Society, Williamsburg, Va.

Robyn, S., Haut, M. W., Stevenson, J., Makela, E. H. (1996, February). Working memory functions in schizophrenia. Paper presented at the 24th Annual Meeting of the International

Neuropsychological Society, Chicago, Illinois.

Robyn, S. & Fremouw, W. J. (1995, November). Cognitive and affective styles of parent who physically abuse their children. Paper presented at the 29th Annual Meeting of the Association for the Advancement of Behavior Therapy.

Robyn, S., Lisman, S. A., & Schulman, D. A. (1995, November). Validation of a self-statement procedure for the induction of anger. Paper presented at the 29th Annual Meeting of the Association for the Advancement of Behavior Therapy.

Larkin, Schauss, Elnicki, Robyn, Stock, (1995, March). Establishing baseline cardiovascular functioning in clinic: Fact or fiction. Paper presented at Society of Behavioral Medicine, San Diego, Ca.

### **Awards and Honors**

Endowed Doctoral Teaching Supplementary Fellowship, West Virginia University, 1994, 1995, 1996.

Arlene G. and Louise Stone Swiger Doctoral Fellowship, West Virginia University, 1993, 1994, 1995.

Alumni Fund Award for research, West Virginia University, 1995.

Distinguished Honors in Psychology, Binghamton University, 1993.

Faculty-Student Scholarship Award, Binghamton University, 1992-1993.

Golden Key National Honor Society, Binghamton University, 1992.

Psi Chi National Honor Society, Binghamton University, 1991.

Phi Eta Sigma National Freshman Honor Society, University of Vermont, 1990.

# Exhibit E

# Exhibit E

COGBURN LAW  
2580 St. Rose Parkway, Suite 330, Henderson, Nevada 89074  
Telephone: (702) 748-7777 | Facsimile: (702) 966-3880

COGBURN LAW  
Jamie S. Cogburn, Esq.  
Nevada Bar No. 8409  
[jsc@cogburncares.com](mailto:jsc@cogburncares.com)  
Joseph J. Troiano, Esq.  
Nevada Bar No. 12505  
[jjt@cogburncares.com](mailto:jjt@cogburncares.com)  
2580 St. Rose Parkway, Suite 330  
Henderson, Nevada 89074  
Telephone: (702) 748-7777  
Facsimile: (702) 966-3880  
*Attorneys for Plaintiffs*

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

DOUGLAS J. KENNEDY, an individual; and  
LORI KENNEDY, an individual,

Case No.: A-20-820254-C  
Dept. No.: 15

Plaintiffs,

vs.

**PLAINTIFF DOUGLAS J. KENNEDY'S  
ANSWERS TO DEFENDANT  
UNIVERSAL PROTECTION SERVICES,  
LLC'S FIRST SET OF  
INTERROGATORIES**

GABRIEL L. MARTINEZ, an individual;  
UNIVERSAL PROTECTION SERVICES,  
LLC, d/b/a ALLIED UNIVERSAL  
SECURITY SERVICES, a Foreign Limited  
Liability Company, DOE Family Members 1-  
10; DOE Individuals 11-20; and ROE  
Corporations 21-30, Inclusive,

Defendants.

In accordance with NRCP 33, Plaintiff, Douglas J. Kennedy, by and through counsel, Jamie S. Cogburn, Esq. and Joseph J. Troiano, Esq. of Cogburn Law, hereby answers Defendant, Universal Protection Services, LLC's First Set of Interrogatories as follows:

**INTERROGATORY NO. 1:**

State your full name, date of birth, address and the name, address, and occupation of each individual who assisted in the answering of these interrogatories.

**ANSWER TO INTERROGATORY NO. 1:**

Douglas Joseph Kennedy  
3/1/1954  
86 Desert Sunflower Circle  
Henderson, NV 89002  
Assisted by my attorney and his paralegal.

1 **INTERROGATORY NO. 2:**

2 If you have ever been convicted of a felony or crime involved in moral turpitude, state:

- 3 a. the nature of the felony or felonies;
- 4 b. the date or dates on which you were convicted; and
- 5 c. the courts where you were convicted.

6 **ANSWER TO INTERROGATORY NO. 2:**

7 Plaintiff objects to this Interrogatory on the ground that it seeks information beyond the

8 scope of permissible discovery under NRCP Rule 26, in that the information sought is not relevant

9 to the subject matter involved in the pending action. The information sought will not be admissible

10 at the trial of this action and the disclosure of the information sought will not lead to the discovery

11 of admissible evidence. Notwithstanding Plaintiff's objections, Plaintiff states: He has never been

12 convicted of a felony or crime involved in moral turpitude.

13 **INTERROGATORY NO. 3:**

14 Please describe the material facts of how and where the accident described in your

15 complaint occurred. Please state in your answer all events leading up to the accident in their

16 sequential order.

17 **ANSWER TO INTERROGATORY NO. 3:**

18 I was driving on the 95. I was rear ended by the Defendant, driving the Allied truck. When

19 Defendant struck my car, it pushed me into the other lane. I was then hit by another truck which

20 caused me to spin and hit the median.

21 **INTERROGATORY NO. 4:**

22 Did you observe the vehicle that struck you prior to impact? If so, state:

- 23 a. how long it was before impact that you first observed this vehicle;
- 24 b. what it was that you observed about this vehicle; and
- 25 c. what you did in reaction to seeing this vehicle.

1 **ANSWER TO INTERROGATORY NO. 4:**

2 I was hit by two vehicles. I did not see either prior to impact.

3 **INTERROGATORY NO. 5:**

4 If any photographs or video were taken of damage to your vehicle, identify the person, by  
5 name and address, who presently has custody of each said photograph or video.

6 **ANSWER TO INTERROGATORY NO. 5:**

7 The only photographs and videos that I am aware of were taken by Nevada Highway Patrol  
8 and have been produced. Please see Plaintiff's Initial Disclosure of Witnesses and Documents and  
9 any and all supplements thereto. Specifically, please refer to Bates stamped documents P-PHOTO  
10 0001-0043 and P-BWC 0001-0002. All information responsive to this discovery request currently  
11 known to Plaintiff has been disclosed. Discovery is continuing, however, and Plaintiff reserves the  
12 right to supplement this response if additional information becomes available.

13 **INTERROGATORY NO. 6:**

14 State the full name, address and telephone number of each person of which you are aware  
15 who has knowledge, information or evidence of the incident that is the subject of your complaint.

16 **ANSWER TO INTERROGATORY NO. 6:**

17 Please see Plaintiff's Initial Disclosure of Witnesses and Documents and any and all  
18 supplements thereto. Specifically, the List of Witnesses. All information responsive to this  
19 discovery request currently known to Plaintiff has been disclosed. Discovery is continuing,  
20 however, and Plaintiff reserves the right to supplement this response if additional information  
21 becomes available.

22 **INTERROGATORY NO. 7:**

23 If any persons made statements, written or otherwise, while being interviewed or  
24 questioned by you or some person acting on your behalf, in connection with the accident, set forth  
25 for each statement:

- a. the name, address, and relationship to you of the person making the statement;
- b. when the statement was made.
- c. where the statement was made;
- d. the names and addresses of all persons present when the statement was made; and
- e. the name and address of the person who presently has custody of each statement

**ANSWER TO INTERROGATORY NO. 7:**

Objection, to the extent that this discovery request can be construed to seek attorney-client privileged information and/or information regarding specially retained non-testifying consultant(s), or their possible work on this, such information is protected under both the attorney-client privilege and attorney work product doctrine and is protected pursuant to NRCP Rule 26(b)(4)(B). Subject to and without waiving these objections, Plaintiff responds: Aside from statements made which can be seen on the Body Worn Camera Footage and the Nevada Highway Patrol Traffic Report disclosed as P-BWC 0001-0002 and P-TCR 0009-0014, I only know that my attorney contacted the witnesses involved in the third vehicle to obtain their contact information and their account of the events.

**INTERROGATORY NO. 8:**

State the name, address, place of employment, job title and capacity of each medical practitioner who treated, examined, or otherwise cared for you with respect to any and all injuries that you claimed were received in the accident referred to in your complaint.

**ANSWER TO INTERROGATORY NO. 8:**

1. Samuel B. Wright, DO and/or NRCP 30(b)(6) Representative(s) and/or Custodian(s) of Records for  
HENDERSON HOSPITAL  
1050 West Galleria Drive  
Henderson, NV 89011  
(702) 963-7000

///

- 1 2. NRCP 30(b)(6) Representative(s) and/or Custodian(s) of Records for  
2 SHADOW EMERGENCY PHYSICIANS  
3 P.O. Box 13917  
4 Philadelphia, PA 19101  
5 800-355-2470
- 6 3. Michael Trainor MD and/or NRCP 30(b)(6) Representative(s) and/or Custodian(s)  
7 of Records for  
8 ADVANCED ORTHOPEDICS & SPORTS MEDICINE  
9 8420 West Warm Springs Road, Suite 100  
10 Las Vegas, NV 89113  
11 (702) 740-5327
- 12 4. Jeffrey Markham, MD and/or NRCP 30(b)(6) Representative(s) and/or  
13 Custodian(s) of Records for  
14 LAS VEGAS RADIOLOGY (MARYLAND)  
15 3201 S. Maryland Pkwy 102  
16 Las Vegas, NV 89109  
17 (702) 254-5004
- 18 5. Gobinder S. Chopra MD and/or NRCP 30(b)(6) Representative(s) and/or  
19 Custodian(s) of Records for  
20 NEUROCARE OF NEVADA  
21 6410 Medical Center St Ste A-100  
22 Las Vegas, NV 89148  
23 (702) 796-8500
- 24 6. Joseph E. Indrieri, MSPT, DPT and/or NRCP 30(b)(6) Representative(s) and/or  
25 Custodian(s) of Records for  
DYNAMIC SPINE & SPORTS  
2567 E. Windmill Parkway, Suite B  
Henderson, NV 89074  
(702) 565-1243
7. Eric Biesbroeck MD and/or NRCP 30(b)(6) Representative(s) and/or Custodian(s)  
of Records for  
PUEBLO MEDICAL IMAGING  
5495 S. Rainbow Boulevard, Suite 101  
Las Vegas, NV 89118  
(702) 228-0031
8. Janet E. Baumann, Ph.D. and/or NRCP 30(b)(6) Representative(s) and/or  
Custodian(s) of Records for  
JANET E. BAUMANN, PH.D.  
501 S. Rancho Drive, Suite F37  
Las Vegas, NV 89106  
(702) 388-9403
9. Travis Snyder, DO and/or NRCP 30(b)(6) Representative(s) and/or Custodian(s) of  
Records for  
SIMONMED IMAGING - HENDERSON  
6301 Mountain Vista St  
Henderson, NV 89014  
(702) 433-7216



10. Evan C. Allen MD and/or Erum Malik PA-C and/or NRCP 30(b)(6) Representative(s) and/or Custodian(s) of Records for  
TOTAL CARE FAMILY PRACTICE  
1701 North Green Valley Parkway, Suite 5C  
Henderson, NV 89074
11. Austin Hill DPT and/or NRCP 30(b)(6) Representative(s) and/or Custodian(s) of Records for  
KELLY HAWKINS PHYSICAL THERAPY - PECOS  
8975 S. Pecos Road, Ste. 7A  
Henderson, NV 89074  
(702) 4563-2024
12. Richard P. Newman, MD and/or Scott Auerbach, PT and/or NRCP 30(b)(6) Representative(s) and/or Custodian(s) of Records for  
MEDTRAK DIAGNOSTICS, INC.  
400 N. Stephanie Street, Ste. 225  
Henderson, NV 89014  
(347) 742-4100
13. Firooz Mashhood, MD and/or NRCP 30(b)(6) Representative(s) and/or Custodian(s) of Records for  
MEDICAL REHABILITATION ASSOCIATES OF LAS VEGAS  
5440 W. Sahara Ave., #104  
Las Vegas, NV 89146
14. Kevel Johnson, MFT and/or NRCP 30(b)(6) Representative(s) and/or Custodian(s) of Records for  
GRACE COUNSELING CENTER  
2637 W. Horizon Ridge Pkwy.  
Henderson, NV 89052  
(702) 716-0908

**INTERROGATORY NO. 9:**

If you claim to presently suffer from any effects of the accident, describe the symptoms, complaints or disabilities that you claim are a result of the accident.

**ANSWER TO INTERROGATORY NO. 9:**

Headaches, lightheadedness, varying degrees of head pain which is daily-from manageable to debilitating wherein I need to lay down in the dark for 1-1.5 hours until it alleviates. Balance issues which also create a fear of falling and therefore I now use a cane and a scooter to move around. I also have memory/concentration issues.

1 **INTERROGATORY NO. 10:**

2 Describe your physical and medical condition at present as compared with your condition  
3 immediately preceding the accident.

4 **ANSWER TO INTERROGATORY NO. 10:**

5 I was symptom free at the time of the accident. I did not have any of the issues outlined in  
6 Answer to Interrogatory No. 9 prior to the accident. I also had no neck or back pain prior, although  
7 this has since resolved.

8 **INTERROGATORY NO. 11:**

9 If you have an appointment, or intend to make an appointment, for injuries you believe are  
10 caused by the accident, state:

- 11 a. the name and address of each person or practice you plan to see; and  
12 b. the date or dates of each future appointment.

13 **ANSWER TO INTERROGATORY NO. 11:**

14 Objection, to the extent this discovery request is overbroad, vague, and unduly  
15 burdensome. Plaintiff cannot possibly know all of his future appointment. Subject to and without  
16 waiving said objections, as to currently known upcoming appointments, Plaintiff states:

17 Grace Counseling with Dr. Kevel Johnson on January 25, 2021.

18 Ear Nose and Throat Consultants of Nevada on January 26, 2021

19 Medical Rehabilitation Associates with Firooz Mashood, MD- I don't have a current  
20 upcoming appointment at this time but I am still treating with Dr. Mashood.

21 **INTERROGATORY NO. 12:**

22 If, in the five years preceding the date of the incident alleged in your complaint, you  
23 sustained any physical injury to the areas of your body you allege were injured in the event  
24 described in your complaint, state as to each injury:

- 25 a. the nature of the injury;

- 1           b.       the date on which the injury was sustained;
- 2           c.       circumstances surrounding the injury;
- 3           d.       whether you suffered from any ongoing conditions or pain in any form associated
- 4 with this injury as of the time of the accident;
- 5           e.       the name and address of each medical provider who provided treatment for the
- 6 injury.

7 **ANSWER TO INTERROGATORY NO. 12:**

8           No such injuries were sustained.

9 **INTERROGATORY NO. 13:**

10           In the five years before the incident described in your complaint, if you received any care

11 to the areas of your body you allege were injured in the event described in your complaint, state

12 with regard to each such treatment:

- 13           a.       the name and address of the people providing the care;
- 14           b.       the dates it was provided; and
- 15           c.       the reason it was provided.

16 **ANSWER TO INTERROGATORY NO. 13:**

17           No such care was received.

18 **INTERROGATORY NO. 14:**

19           If any preexisting condition or injury was aggravated as a result of the event described in

20 your complaint, state:

- 21           a.       the nature of the preexisting condition;
- 22           b.       how long the condition existed prior to the event described in your complaint;
- 23           c.       the names and addresses of those treating you for the condition prior to the event
- 24 described in your complaint; and
- 25           d.       how the event described in your complaint has aggravated the condition.

1 **ANSWER TO INTERROGATORY NO. 14:**

2 There were no preexisting conditions.

3 **INTERROGATORY NO. 15:**

4 If you have been in any other accident since the date of the accident alleged in your  
5 complaint, state for each such accident:

- 6 a. the date when the accident occurred;  
7 b. where the accident occurred;  
8 c. the circumstances surrounding the accident; and  
9 d. the names and addresses of the people involved in the accident.

10 **ANSWER TO INTERROGATORY NO. 15:**

11 I have not been involved in any subsequent accidents.

12 **INTERROGATORY NO. 16:**

13 Please list all educational institutions you attended, beginning with high school. Please  
14 indicate the dates you attended each institution, your course of study, and whether you received a  
15 diploma.

16 **ANSWER TO INTERROGATORY NO. 16:**

17 Objection. This discovery request seeks information not relevant to the subject matter of  
18 this lawsuit and not calculated to lead to the discovery of admissible evidence. Subject to and  
19 without waiving said objections, Plaintiff states:

20 Milford High School in Milford, CT – graduated in 1972.

21 **INTERROGATORY NO. 17:**

22 Regardless of whether you are asserting an income claim, if you were employed at any  
23 time during the five years preceding the event alleged in your complaint through the present, state  
24 as to each employer:

- 25 a. name and address;

- b. the date of which you were employed;
- c. your job title and the nature of your duties you performed; and
- d. the reason you left or changed your employment.

**ANSWER TO INTERROGATORY NO. 17:**

I retired from the postal service in 2009 after 31 years- employment I held in the five years preceding the accident until present are as follows:

Catapult Fundraising – telemarketer Left due to this accident.	September 2018-November 2018.
Fiesta Station - Custodian Left due to not having enough consistent hours.	Do not recall dates
Henderson Christian Academy- assistant teacher Left due to decided to take a break from working with young children.	April 2015-September 2016
Sunset Station – Casino Promotions Left to work at Henderson Christian Academy	2013-April 2015

**INTERROGATORY NO. 18:**

Regardless of whether you are asserting an income claim, if you were employed when the event alleged in your complaint occurred, and have continued in that employment, state:

- a. your present work title or job capacity;
- b. any change in title or capacity since the event alleged in your complaint;
- c. any change in your duties since the event alleged in your complaint; and
- d. the reason for each change.

**ANSWER TO INTERROGATORY NO. 18:**

I was employed with Catapult Fundraising as a telemarketer. I recall working one shift after the accident, but I have not returned since. Although I do not believe I can maintain employment due to all my issues outlined in Answer to Interrogatory No. 9, I did try to reach out and make an effort at working but my attempts to contact Catapult were unanswered.

1 **INTERROGATORY NO. 19:**

2 If the injuries you allege were caused by the event alleged in your complaint affect your  
3 ability to work, describe the manner how these injuries affect your ability to work.

4 **ANSWER TO INTERROGATORY NO. 19:**

5 Too much activity increases the intensity of my head pain. I have balance issues which has  
6 created a constant fear of falling. I have a fear of driving which is increased by night driving. I  
7 have memory issues. All of these make it very difficult to obtain and maintain employment.

8 **INTERROGATORY NO. 20:**

9 If you were employed when the event alleged in your complaint occurred, and you have  
10 lost time from your employment as a result, state:

- 11 a. the name and address of each employer;  
12 b. the period or periods of time when you were absent;  
13 c. the total number of working days that you were absent; and  
14 d. the amount of any income you allege was lost.

15 **ANSWER TO INTERROGATORY NO. 20:**

16 I had to stop working at Catapult Fundraising due to this accident, however, I am not  
17 currently making a wage loss claim.

18 **INTERROGATORY NO. 21:**

19 If you were employed at the time of the event alleged in your complaint, and you have been  
20 unable to return to work as a result of it, state:

- 21 a. the nature of your employment prior to the accident; and  
22 b. the reasons you were unable to continue or return to this employment.

23 **ANSWER TO INTERROGATORY NO. 21:**

24 Please see answer to Interrogatory No. 20.  
25

1 **INTERROGATORY NO. 22:**

2 If you have not returned to the job you held immediately prior to the event alleged in your  
3 complaint, and you have not attained employment elsewhere, state:

- 4 a. the name and address of each potential employer to whom who submitted an  
5 application;  
6 b. when you submitted each application; and  
7 c. what happened to each application.

8 **ANSWER TO INTERROGATORY NO. 22:**

9 Due to the complications outlined in my Answers to Interrogatory No. 9 and Interrogatory  
10 No. 19, I have not been able to attain employment. I did try contacting my last employer to try and  
11 return to work but after three unanswered phone calls it became apparent that I no longer had a  
12 position with their company.

13 **INTERROGATORY NO. 23:**

14 Regardless of whether you are asserting an income claim, if you have been employed since  
15 the date of the event alleged in your complaint, for each employer state:

- 16 a. The employer's name and address;  
17 b. what you do or did for each employer;  
18 c. the dates you were employed;  
19 d. how much you were paid; and  
20 e. the reason you left or changed your employment.

21 **ANSWER TO INTERROGATORY NO. 23:**

22 Objection. This discovery request seeks information not relevant to the subject matter of  
23 this lawsuit and not calculated to lead to the discovery of admissible evidence, subject to and  
24 without waiving said objections, Plaintiff states: I have not been employed since the date of the  
25 accident.

1 **INTERROGATORY NO. 24:**

2 If any of your activities, other than those involving gainful employment, have been  
3 restricted as a result of the event alleged in your complaint, describe the activities that have been  
4 restricted and the manner in which they have been restricted.

5 **ANSWER TO INTERROGATORY NO. 24:**

6 Many activities have been affected. These are including, but not limited to, the following:  
7 I cannot go to movies which I used to do every weekend with my wife and occasionally with my  
8 grandchildren. I require a cane just to ambulate and a scooter if I need to walk for extended periods  
9 of time. I sleep separate from my wife now due to my inability to fall asleep. I have difficulty  
10 doing household chores due to constant head pain and fear of falling. I have also been advised by  
11 my neurologist that I should not take any long flights and if I have to fly anywhere that I need to  
12 have a layover.

13 **INTERROGATORY NO. 25:**

14 Have you taken any trips away from your primary residence since the event alleged in your  
15 complaint? If so, state:

- 16 a. the date when you took the trip;  
17 b. where you went;  
18 c. how you got there; and  
19 d. who you went with.

20 **ANSWER TO INTERROGATORY NO. 25:**

21 Yes. I flew to Connecticut with my wife on or around January/February 2019 for her  
22 father's funeral.

23 **INTERROGATORY NO. 26:**

24 Do the injuries you allege affect your ability to perform household activities? If so, please  
25 describe the nature and extent they have been affected.



1 **ANSWER TO INTERROGATORY NO. 26:**

2 Please see answer to Interrogatory No. 24.

3 **INTERROGATORY NO. 27:**

4 As a result of your claimed injuries or disabilities, did you apply for, or obtain any Social  
5 Security, Medicare, Medicaid, or other insurance related benefits? If your answer is anything other  
6 than an unqualified no, please state:

- 7 a. the type of benefit for which you applied; and  
8 b. the date that you first applied.

9 **ANSWER TO INTERROGATORY NO. 27:**

10 I have Medicare and Social Security but not as a result of my claimed injuries.

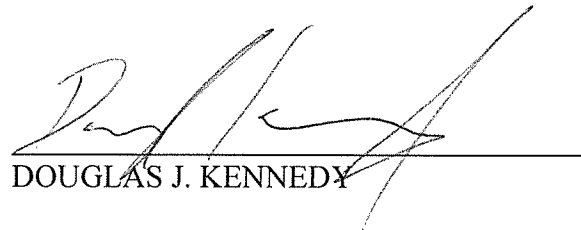
11 Dated this 22<sup>nd</sup> day of January, 2021.

12 COGBURN LAW

13 By: /s/Joseph J. Troiano  
14 Jamie S. Cogburn, Esq.  
15 Nevada Bar No. 8409  
16 Joseph J. Troiano, Esq.  
17 Nevada Bar No. 12505  
18 2580 St. Rose Parkway, Suite 330  
19 Henderson, Nevada 89074  
20 *Attorneys for Plaintiffs*  
21  
22  
23  
24  
25

**VERIFICATION**

Pursuant to NRS § 53.045, I, DOUGLAS J. KENNEDY, hereby declare, under penalty of perjury under the laws of the State of Nevada, that I have read the foregoing Answers to Interrogatories and know the contents thereof, and the same are true of my knowledge, information and belief.

  
DOUGLAS J. KENNEDY

**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing **PLAINTIFF DOUGLAS J. KENNEDY'S ANSWERS TO DEFENDANT UNIVERSAL PROTECTION SERVICES, LLC's FIRST SET OF INTERROGATORIES** was submitted electronically for *service only* with the Eighth Judicial District Court on the 22<sup>nd</sup> day of January, 2021.

I further certify that I served a true and correct copy of the foregoing document as follows:

☒ Pursuant to NEFCR 9 & EDCR 8.05(a), electronic service of the foregoing document shall be made in accordance with the CM/ECF E-Service List as follows:

[Michael.Lowry@wilsonelser.com](mailto:Michael.Lowry@wilsonelser.com)

[Chris.Richardson@wilsonelser.com](mailto:Chris.Richardson@wilsonelser.com)

Wilson Elser Moskowitz Edelman & Dicker LLP

6689 Las Vegas Blvd. South, Suite 200

Las Vegas, NV 89119

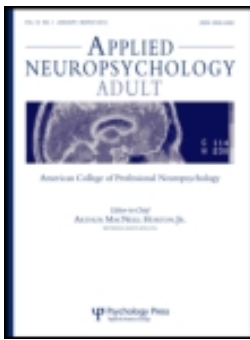
*Attorneys for Defendants*

/s/Noel Raleigh

An employee of Cogburn Law

# Exhibit F

# Exhibit F



## Policy Statement of the American Board of Professional Neuropsychology regarding Third Party Observation and the recording of psychological test administration in neuropsychological evaluations

Alan Lewandowski, W. John Baker, Brad Sewick, John Knippa, Bradley Axelrod & Robert J. McCaffrey

To cite this article: Alan Lewandowski, W. John Baker, Brad Sewick, John Knippa, Bradley Axelrod & Robert J. McCaffrey (2016) Policy Statement of the American Board of Professional Neuropsychology regarding Third Party Observation and the recording of psychological test administration in neuropsychological evaluations, *Applied Neuropsychology: Adult*, 23:6, 391-398, DOI: [10.1080/23279095.2016.1176366](https://doi.org/10.1080/23279095.2016.1176366)

To link to this article: <http://dx.doi.org/10.1080/23279095.2016.1176366>



Published online: 30 Aug 2016.



Submit your article to this journal [↗](#)



Article views: 253



View related articles [↗](#)



View Crossmark data [↗](#)

GUEST EDITORIAL

## Policy Statement of the American Board of Professional Neuropsychology regarding Third Party Observation and the recording of psychological test administration in neuropsychological evaluations

Alan Lewandowski<sup>a</sup>, W. John Baker<sup>b</sup>, Brad Sewick<sup>c</sup>, John Knippa<sup>d</sup>, Bradley Axelrod<sup>e</sup>, and Robert J. McCaffrey<sup>f</sup>

<sup>a</sup>Neuropsychology Associates and Western Michigan University, School of Medicine, Kalamazoo, MI, USA; <sup>b</sup>Psychological Systems, Royal Oak, MI, USA; <sup>c</sup>Spectrum Rehabilitation, Southfield, MI, USA; <sup>d</sup>Coast Psychiatric Associates, Long Beach, CA, USA; <sup>e</sup>John D. Dingell Department of Veterans Affairs Medical Center, Detroit, MI, USA; <sup>f</sup>Department of Psychology, University at Albany, SUNY, Albany, NY, USA

### General

Neuropsychologists are frequently presented with requests from parents, attorneys, nurse case managers, insurance representatives, school personnel, allied health professionals, family members, or other interested parties who have some type of relationship with a patient or client examinee to directly observe or record the administration of psychological and neuropsychological tests. Consequently, a number of practice concerns have been raised that include, but are not limited to, the effects on the examinee's performance and the neuropsychologist administering the assessment, violations of testing guidelines, the impact on standardization procedures, the appropriateness of applying test findings to normative samples established under standardized circumstances, and test security. These requests can become even more problematic and complicated when the request occurs within the adversarial process associated with the legal system, such as competency hearings, custody evaluations, divorce proceedings, civil litigation, and criminal investigations (Bush, Pimental, Ruff, Iverson, Barth & Broshek, 2009; Duff & Fisher, 2005; Howe & McCaffrey, 2010; Lynch, 2005; McCaffrey, Fisher, Gold, & Lynch, 1996; McCaffrey, Lynch, & Yantz, 2005; McSweeney et al., 1998; Sweet, Grote, & Van Gorp, 2002).

### Definition of Third Party Observation

Third Party Observation (TPO) is defined in this practice guideline as the direct or indirect presence of an individual other than the patient or client and the psychologist or their technician administering a published psychological test in order to obtain objective data under standardized conditions for clinical, counseling, or forensic purposes in order to render

clinical conclusions, opinions, interpretations, or recommendations based on the data collected. Direct presence means a person(s) physically present in the room other than the psychologist or his/her technician and the examinee. Indirect presence means viewing through a window, two-way mirror, use of any camera, or audio or video recording device, or any electronic or communication device. The act of recording includes the on-site transcription by a court recorder or reporter during an examination by either direct or indirect involvement (Barth, 2007; Constantinou, Ashendorf, & McCaffrey, 2002; Constantinou, Ashendorf, & McCaffrey, 2005; Eastvold, Belanger, & Vanderploeg, 2012; McCaffrey, Fisher, Gold, & Lynch, 1996).

### Ethical considerations

The Ethical Principles of Psychologists and Code of Conduct of the American Psychological Association (hereafter called the Ethics Code) helps guide the thinking and behavior of psychologists, and provides direction with regard to clinical practice standards. Relevant to TPO and the Ethics Code are both the General Principles and a number of the Ethical Standards.

Within the Ethics Code a series of General Principles are outlined with the intent of guiding psychologists to practice at the highest professional level. Relevant to TPO are General Principle: A (Beneficence and Non-maleficence), B: (Fidelity and Responsibility), C (Integrity), and D (Justice).

In contrast to the General Principles, the Ethics Code offers specific standards that represent obligations to which psychologists are bound, and consequently form the basis for ethical violations and consequently the basis for sanctions. Most relevant to TPO are Ethical Standards 2 (Competence) and 9 (Assessment). (American Psychological Association, 2010).

**Principle A: Beneficence and nonmaleficence**

Principle A is applicable and is described as follows:

Psychologists strive to benefit those with whom they work and take care to do no harm. In their professional actions, psychologists seek to safeguard the welfare and rights of those with whom they interact professionally and other affected persons, and the welfare of animal subjects of research. When conflicts occur among psychologists' obligations or concerns, they attempt to resolve these conflicts in a responsible fashion that avoids or minimizes harm. Because psychologists' scientific and professional judgments and actions may affect the lives of others, they are alert to and guard against personal, financial, social, organizational, or political factors that might lead to misuse of their influence. Psychologists strive to be aware of the possible effect of their own physical and mental health on their ability to help those with whom they work (American Psychological Association, 2010, p. 3).

It is incumbent on neuropsychologists to be vigilant regarding the impact of their professional opinion on others, particularly with regard to diagnostic testing. Scientific and professional judgments and conclusions should be based on data from neuropsychological assessments gathered in a standardized manner and, therefore, without the influence of extraneous factors that might influence the collection of behavior samples. Neuropsychologists must always be mindful that their verbal and written opinions affect the medical, social, and legal lives of others and, therefore, must safeguard those with whom they interact professionally to do no harm.

**Principle B: Fidelity and responsibility**

Principle B is applicable and is described as follows.

Psychologists establish relationships of trust with those with whom they work. They are aware of their professional and scientific responsibilities to society and to the specific communities in which they work. Psychologists uphold professional standards of conduct, clarify their professional roles and obligations, accept appropriate responsibility for their behavior, and seek to manage conflicts of interest that could lead to exploitation or harm.

Psychologists consult with, refer to, or cooperate with other professionals and institutions to the extent needed to serve the best interests of those with whom they work. They are concerned about the ethical compliance of their colleagues' scientific and professional conduct. Psychologists strive to contribute a portion of their professional time for little or no compensation or personal advantage (American Psychological Association, 2010, p. 3).

It is the responsibility of all psychologists who elect to perform diagnostic testing, to do so within the established parameters of the instrument(s) they employ and therefore in a standardized manner. Whether or not a neuropsychologist is engaged in a patient-doctor relationship, acting as an independent clinician, a clinician for an institution, state or federal agency, or an independent examiner for an insurance carrier or legal counsel, a professional obligation exists to uphold standards for the delivery of scientific work commensurate with the responsibilities to the profession, community, and society in general.

**Principle C: Integrity**

Principle C is applicable and is described as follows.

Psychologists seek to promote accuracy, honesty, and truthfulness in the science, teaching, and practice of psychology. In these activities psychologists do not steal, cheat, or engage in fraud, subterfuge, or intentional misrepresentation of fact. Psychologists strive to keep their promises and to avoid unwise or unclear commitments. In situations in which deception may be ethically justifiable to maximize benefits and minimize harm, psychologists have a serious obligation to consider the need for, the possible consequences of, and their responsibility to correct any resulting mistrust or other harmful effects that arise from the use of such techniques (American Psychological Association, 2010, p. 3).

The practice and promotion of clinical assessment requires that neuropsychologists present themselves and their work to others in an accurate and honest manner and avoid any misrepresentation of their findings. A considerable body of research supports that TPO can affect the accuracy of test findings, and to purposefully disregard its potential impact can be construed as a misrepresentation of the data

**Principle D: Justice**

Principle D is applicable and is described as follows.

Psychologists recognize that fairness and justice entitle all persons to access to and benefit from the contributions of psychology and to equal quality in the processes, procedures, and services being conducted by psychologists. Psychologists exercise reasonable judgment and take precautions to ensure that their potential biases, the boundaries of their competence, and the limitations of their expertise do not lead to or condone unjust practices (American Psychological Association, 2010, p. 3–4).

In an attempt to provide fair and just treatment to all patients and clients, neuropsychologists do not modify assessment procedures or alter their work on the basis

of personal opinion or professional bias, nor do they neglect to maintain an awareness of their competency level and the limitations of their expertise. To this end, the American Psychological Association (APA), psychological state organizations, and neuropsychological specialty organizations, provide multiple continuing education opportunities for neuropsychologists to learn, maintain, and improve their professional expertise, and avoid practices that are irregular or not commensurate with accepted clinical practice. **Given the body of literature that exists regarding observer effects, it is incumbent on neuropsychologists who provide evaluations to make clear to patients, clients, families, and other professionals that they do not endorse TPO and to try to avoid this type of intrusion in the assessment.**

### **Ethical standard 2: Competence**

Ethical Standard 2 is applicable to TPO and the recording of test administration. Section 2.04, Bases for Scientific and Professional Judgments states the following:

Psychologists' work is based upon established scientific and professional knowledge of the discipline. (American Psychological Association, 2010, p. 5; see also Standards 2.01e, Boundaries of Competence).

### **Ethical standard 2.04**

Ethical Standard 2.04 requires neuropsychologists to conduct their practice within the boundaries of scientific knowledge. Texts on psychological testing have long cited the need to conduct testing in a distraction-free environment (Anastasi & Urbina, 1997). For example, the Wechsler Adult Intelligence Scale-Third Revision (WAIS-III) requires that, "As a rule, no one other than you and the examinee should be in the room during the testing" (1997, p. 29). The manual further directs, "Attorneys who represent plaintiffs sometimes ask to observe, but typically withdraw this request when informed of the potential effect of the presence of a third person" (Wechsler, 1997, p. 29). The requirement to avoid interference from others is noted in the Wechsler Intelligence Scale for Children-Fourth Edition (WISC-IV), which advises that no one other than the examiner and the examinee should be in the room during test administration (Wechsler, 2003, p. 23).

The concept of being free from distractibility is also emphasized in the Wechsler Adult Intelligence Scale-Fourth Revision (WAIS-IV) that instructs the examiner to provide a physical environment "free from distractions and interruptions" and stresses that "External distractions must be minimized to focus the examinee's attention on the tasks presented and not on outside

sounds or sights, physical discomfort, or testing materials not in use" (Wechsler, 2008, p. 24). This is also emphasized in the administration manual for the Rey Complex Figure Test (Meyers, 1995, p. 6). Similarly, the scoring manual for the California Verbal Learning Test-Second Edition (CVLT-II) instructs that only the examiner and examinee be present in the room during testing (Delis et al., 2000, p. 8). By eliminating the presence of third parties, the examiner eliminates potential interference and the possibility of their distracting from or influencing the testing process, hence variables that are inconsistent with test standardization.

Most test manuals specify that the examiner is responsible for ensuring that the testing environment is quiet and free from distractions (Meyers, 1995; Williams, 1991; Urbina, 2014) and are often very specific about the testing room being limited to "A table or desk and two chairs" (Meyers, 1995). Similarly, the manual for the California Verbal Learning Test- Second Edition (CVLT-II) states "as a rule, no one other than you and the examinee should be in the room during testing" (Delis, Dramer, Kaplan & Ober, 2000, p. 8). As described above, these instructions serve to emphasize the importance of controlling distraction as an important factor in assessment.

### **Ethical standard 9: Assessment**

Ethical Standard 9 is applicable to TPO and recording. In Section 9.01, Bases for Assessments, the code notes "(a) Psychologists base the opinions contained in their recommendations, reports, and diagnostic or evaluative statements, including forensic testimony, on information and techniques sufficient to substantiate their findings" (American Psychological Association, 2010, p. 12; see also Standard 2.04, Bases for Scientific and Professional Judgments).

Test results generated by nonstandard methods that negatively impact the validity of the findings are insufficient. In forensic settings, neuropsychologists are often required to use their findings in comparison with other evaluations. The ability to compare separate data sets, when one evaluation was conducted following proper testing procedures and the other evaluation had inherent threats to validity such as a third party observer is dubious.

Under 9.01:

(a) the psychologist cannot provide opinions or evaluative statements because TPO presence yields the evaluation of questionable validity. (b) Except as noted in 9.01c, psychologists provide opinions of the psychological characteristics of individuals only after they have conducted an examination of the individuals adequate to



support their statements or conclusions. When, despite reasonable efforts, such an examination is not practical, psychologists document the efforts they made and the result of those efforts, clarify the probable impact of their limited information on the reliability and validity of their opinions, and appropriately limit the nature and extent of their conclusions or recommendations. (American Psychological Association, 2010, p. 12; see also Standards 2.01, Boundaries of Competence, and 9.06, Interpreting Assessment Results). (c) When psychologists conduct a record review or provide consultation or supervision and an individual examination is not warranted or necessary for the opinion, psychologists explain this and the sources of information on which they based their conclusions and recommendations.

### **Section 9.02: Use of assessments**

Section 9.02 describes the following:

(a) Psychologists administer, adapt, score, interpret, or use assessment techniques, interviews, tests, or instruments in a manner and for purposes that are appropriate in light of the research on or evidence of the usefulness and proper application of the techniques. (b) Psychologists use assessment instruments whose validity and reliability have been established for use with members of the population tested. When such validity or reliability has not been established, psychologists describe the strengths and limitations of test results and interpretation. (c) Psychologists use assessment methods that are appropriate to an individual's language preference and competence, unless the use of an alternative language is relevant to the assessment issues (American Psychological Association, 2010, p. 12).

Section 9.02 (a) suggests that tests administered by a neuropsychologist in a manner that is inconsistent with the standardization of the instrument and contrary to the test manual, may be in violation of this standard. When an exception exists, it is incumbent on the neuropsychologist to provide a rationale or need that supports altering standardization in the report. Otherwise, TPO is contrary to this standard.

### **Section 9.06: Interpreting assessment results**

Section 9.06 describes the following:

When interpreting assessment results, including automated interpretations, psychologists take into account the purpose of the assessment as well as the various test factors, test-taking abilities, and other characteristics of the person being assessed, such as situational, personal, linguistic, and cultural differences, that might affect psychologists' judgments or reduce the accuracy of their interpretations. They indicate any significant limitations of their interpretations (American Psychological Association, 2010, p. 13; see also Standards 2.01b and c, Boundaries of Competence).

Many authors and organizations (Anastasi & Urbina, 1997; National Academy of Neuropsychology, 2000a; Oregon Psychological Association, 2012; Michigan Psychological Association, 2014) emphasize that, during test development, procedures are standardized without the presence of an observer. Subsequently the data obtained outside of those parameters lacks corresponding assurance of validity and interpretive significance.

### **Section 9.11: Maintaining test security**

Section 9.11 raises the importance of maintaining test security. "Psychologists make reasonable efforts to maintain the integrity and security of test materials and other assessment techniques consistent with law and contractual obligations, and in a manner that permits adherence to this Ethics Code" (American Psychological Association, 2010, p. 13). Test security is a critical issue, as it addresses the prevention of unnecessary exposure of psychometric materials that can result in diminishing a test's ability to accurately distinguish between normal and abnormal performance.

Several professional organizations have emphasized the importance of maintaining test security. The APA, the National Academy of Neuropsychology (NAN), and several state associations (among others) emphasize test security as essential to the practice of psychology, and that it is incumbent on neuropsychologists to protect the integrity of psychological test materials (American Psychological Association, 1999; National Academy of Neuropsychology, 2003; Michigan Psychological Association, 2014).

Other state and national psychological organizations as well as a number of authors have raised concerns about the potential for testing material to be used inappropriately by attorneys or become part of the public domain (American Academy of Clinical Neuropsychology, 2001; American Psychological Association, 1999; Bush et al., 2009; Canadian Psychological Association, 2009; Essig, Mittenberg, Petersen, Strauman, & Cooper, 2001; Kaufman, 2005, 2009; McCaffrey et al., 1996; Michigan Psychological Association, 2014; Morel, 2009; National Academy of Neuropsychology, 1999; Oregon Psychological Association, 2012; Victor & Abeles, 2004; Wetter & Corrigan, 1995). Public accessibility allows individuals involved in litigation to self-educate or be coached as to how to perform on certain measures or how to selectively pass or fail key components of the neuropsychological evaluation and thus invalidate the results of the assessment. As a result, several psychological organizations have taken a formal position against the presence of TPO during assessment.

The National Academy of Neuropsychology (Axelrod et al., 2000) advises that TPO is inconsistent with psychological guidelines and practices, as it threatens the validity, reliability, and interpretation of test scores. The position of the academy is that TPO should be avoided whenever possible outside of necessary situations involving a nonforensic setting where the observer is both neutral and noninvolved (e.g., student training or an interpreter). This view is also held by the Canadian Psychological Association (CPA) that advises “It is not permissible for involved third parties to be physically or electronically present during the course of neuropsychological or similar psychological evaluations of a patient or plaintiff” (CPA, 2009).

The American Academy of Clinical Neuropsychology (AACN; 2001) has taken the position that “it is not permissible for involved third parties to be physically or electronically present during the course of an evaluation assessment of a plaintiff patient with the exception of those situations specified below” (p. 434). Exceptions are described that include as an example, the assessment of young children who require the presence of a family member.

The executive committee of the Oregon Psychological Association (2012) adopted a clear and unequivocal policy that the observation by a third party compromises test validity and security and therefore advises against the presence of TPO during assessment. Similarly, the Michigan Psychological Association Ethics Committee has advised against TPO for the same reasons (Michigan Psychological Association, 2014).

## Research evidence

In support of professional ethics, there is a significant body of research indicating that TPO cannot be assumed as inconsequential to test findings. A review of the pertinent literature overwhelmingly supports the negative consequences of either direct or indirect TPO or recording on the behavior of both the examiner and the examinee, and the validity of findings obtained in a neuropsychological assessment.

It is self-evident that neuropsychological evaluations be conducted in a standardized fashion consistent with the publisher's directives to ensure valid and reliable results. Consistent with other major neuropsychological organizations, it is the position of the American Board of Professional Neuropsychology that altering test procedures to accommodate observation or recording compromises test standardization and affects the subsequent data set obtained. As there is no basis for accepting as valid an assessment under nonstandard (observed or recorded) conditions, it is questionable if findings

reflect a reasonable degree of certainty or fall within an accepted range of probability. Test results therefore lack the normal and accepted parameters of validity and, more importantly, do not reflect the expected standards of psychological care. Given current research it is not surprising that most publishers of psychological tests have cautioned against TPO in their instruction manuals and national organizations have advised against TPO (National Academy of Neuropsychology, 2000a; Committee on Psychological Tests and Assessment, 2007).

The issue of TPO has been investigated by numerous researchers, including an early case study by Binder and Johnson-Greene (1995). Multiple studies have established and replicated the dubious validity of data obtained during recorded or observed evaluations. A considerable amount of research now exists demonstrating the deleterious effect on data obtained during nonstandard evaluations involving executive functioning (Horowitz & McCaffrey, 2008), attention and processing speed (Binder & Johnson-Greene, 1995; Kehrner, Sanchez, Habif, Rosenbaum, & Townes, 2000), and memory/recall of information (Eastvold et al., 2012; Gavett, Lynch, & McCaffrey, 2005; Lynch, 2005; Yantz & McCaffrey, 2005). Eastvold et al. (2012) meta-analysis found negative effects on multiple cognitive measures and that attention, learning, and memory (delayed recall) were most adversely impacted by the presence of an observer.

## Exceptions to TPO

### Third party assistant (TPA)

In selected circumstances, the presence of an unbiased, impartial, and neutral third party observer may be necessary to proceed with or complete a neuropsychological assessment. In these cases, rather than an involved third party observing or monitoring the behavior of the test administrator or examinee, the third party holds a neutral position and acts in an indirect manner to assist or expedite the completion of the assessment. Given this significant difference of purpose, we suggest that the presence of an uninvolved and neutral observer during an evaluation is more accurately identified as a third party assistant (TPA).

A TPA may be deemed appropriate in clinical examinations in which the examiner is acting as a clinical treater with an established patient-doctor relationship, as opposed to an independent psychological examination for an insurance company or a forensic assessment in civil or criminal proceedings. A TPA may be appropriate in a testing situation in which the presence

of a parent, family member, guardian, family friend, or interpreter is necessary, and without whose presence the examination could not proceed because of a mental disability or clinical limitation that requires an accommodation. Examples might include a child with suspected or diagnosed autism, developmental disorders affecting intelligence, confirmed brain injury that precludes independent living, children who are either too young or severely anxious that they cannot be left alone, elderly adults with compromised cognition who are unwilling to participate without the presence of a trusted family member or friend, or patients who have a thought disorder impacting reality testing, among others.

Alternatively, there are cases in which a language barrier precludes valid test administration. While the preference is for the examination to be conducted in the examinee's native language, in some these cases an interpreter may be necessary because a native speaking psychological examiner is not available or within a practical distance. In these situations, to avoid potential conflicts of interest, if it is at all possible the interpreter should have no relationship (i.e., such as family member, close friend or social affiliation) to the person being examined.

Similarly, if an examinee is deaf or hearing impaired, an individual versed in American Sign Language (ASL) or a member of the deaf community would be necessary to complete an examination. Absent a qualified examiner fluent in sign language, a certified specialist or ASL interpreter may be needed.

Training presents another situation in which a TPA is considered appropriate. Not unlike medical students, psychology students and technicians learning the administration of psychology test procedures require direct observation, practice, and supervision to ensure accuracy and competence.

In the aforementioned cases, the examiner is ethically required to document in the neuropsychological report the use of a TPA and any deviations of standardization or modifications in test administration. The limitations of normative data with subsequent impact on the generalization of findings should be clearly noted.

### **Forensic examinations, independent medical examinations, and acting as an expert witness**

Neuropsychologists who choose to perform forensic assessments are ethically required to be aware of the specialty guidelines pertinent to this area of expertise. In order to avoid potential conflict, neuropsychologists who regularly provide forensic consultations should inform referral sources that if TPO or recording

develops as an issue or is required by legal proceedings, they may elect to remove themselves from the assessment.

When retained as an expert witness in forensic situations, neuropsychologists should resist demands for TPO if requested by opposing counsel, retaining counsel, or the court. The neuropsychologist should educate the court or those involved as to the APA Ethics Code and the existing scientific research that supports the negative effects of this type of intrusion. However, it is recognized that often in forensic situations professional ethics and the adversarial nature of the legal system may not agree. If attempts to educate those involved fail and counsel insists, or the court directs to proceed with TPO, the neuropsychologist can consider removing himself/herself from the assessment.

In those exceptions in which a neuropsychologist is *compelled* by the court to evaluate with a TPO because of existing state statutes or if the neuropsychologist is placed in a situation whereby withdrawing will bring clear and substantial harm to the examinee, the manner in which test validity and clinical findings are affected and may be compromised should explicitly documented. The neuropsychologist should then follow existing recommendations and guidelines for protecting test security including requesting that test material and intellectual property be provided only to another licensed psychologist who would be bound by the same duty to protect.

If this is not possible, the neuropsychologist should request a protective order specifically prohibiting either party from copying test material or intellectual property, using them for any other purpose than the matter at hand, and directing that they be returned uncopied directly to the psychologist or destroyed in a manner verifiable by the psychologist.

### **Conclusion**

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

Ethical standards of practice compel neuropsychologists to avoid or resist requests for conducting assessments complicated by TPO, except for those situations

as described. Neuropsychologists should therefore not engage in, endorse, abet, or conduct assessments complicated by TPO or recording of any kind other than under the order of a court after all reasonable alternatives have been exhausted. It would be entirely appropriate for a neuropsychologist to decline to perform an examination under these conditions.

As an exception, TPA is acceptable under infrequent clinical circumstances that necessitate the involvement of an assistant or in a rare forensic case that might require a neutral or uninvolved party such as a language interpreter. A neuropsychologist is obligated to clarify in the report the rationale for the use of TPA, identify what procedures and standards have been modified, and how or to what degree the findings, results, and conclusions may be impacted. This should include limitations in the generalization of the diagnostic data and the impact on assessment's findings.

In summary, it is the position of the American Board of Professional Neuropsychology that it is incumbent on neuropsychologists to minimize variables that might influence or distort the accuracy and validity of neuropsychological assessment. Therefore, it is the recommendation of the American Board of Professional Neuropsychology that neuropsychologists should resist requests for TPO and educate the referral sources as to the ethical and clinical implications.

## References

- American Academy of Clinical Neuropsychology. (2001). Policy statement on the presence of third party observers in neuropsychological assessments. *The Clinical Neuropsychologist (Neuropsychology, Development and Cognition: Section D)*, 15, 433–439. doi:10.1076/clin.15.4.433.1888
- American Psychological Association. (1999). Test security: Protecting the integrity of tests. *American Psychologist*, 54, 1078. doi:10.1037/0003-066x.54.12.1078
- American Psychological Association. (2010). Ethical principles of psychologists and code of conduct: 2002. *American Psychologist*, 2002, 16. doi:10.1037/e305322003-001. Retrieved from <http://apa.org/ethics/code/index.aspx>
- Anastasi, A., & Urbina, S. (1997). *Psychological testing* (7th ed.). Upper Saddle River, NJ: Prentice Hall.
- Axelrod, B., Barth, J., Faust, D., Fisher, J., Heilbronner, R., Larrabee, G., ... Silver, C. (2000). Presence of third party observers during neuropsychological testing: Official statement of the National Academy of Neuropsychology. *Archives of Clinical Neuropsychology*, 15, 379–380. doi:10.1016/s0887-6177(00)00053-6
- Barth, R. J. (2007). Observation compromises the credibility of an evaluation. *The Guides Newsletter*, (July/August) 1–9.
- Binder, L. M., & Johnson-Greene, D. (1995). Observer effects on neuropsychological performance: A case report. *The Clinical Neuropsychologist*, 9, 74–78. doi:10.1080/13854049508402061
- Bush, S., Pimental, P., Ruff, R., Iverson, G., Barth, J., & Broshek, D. (2009). Secretive recording of neuropsychological testing and interviewing: Official position of the National Academy of Neuropsychology. *Archives of Clinical Neuropsychology*, 24, 1–2.
- Canadian Psychological Association. (2009). The presence of involved third party observer in neuropsychological assessments. Retrieved from <http://www.cpa.ca/aboutcpa/policystatements/#Thirdparty>
- Committee on Psychological Tests, & Assessment. (2007). Statement on third party observers in psychological testing and assessment: A framework for decision-making. *American Psychological Association*. Retrieved from <http://www.apa.org/science/programs/testing/third-party-observers.pdf>
- Constantinou, M., Ashendorf, L., & McCaffrey, R. J. (2002). When the third party observer of a neuropsychological evaluation is an audio-recorder. *The Clinical Neuropsychologist (Neuropsychology, Development and Cognition: Section D)*, 16, 407–412. doi:10.1076/clin.16.3.407.13853
- Constantinou, M., Ashendorf, L., & McCaffrey, R. J. (2005). Effects of a third party observer during neuropsychological assessment: When the observer is a video camera. *Journal of Forensic Neuropsychology*, 4, 39–48. doi:10.1300/j151v04n02\_04
- Delis, D., Kramer, J., Kaplan, E., & Ober, B. (2000). *California Verbal Learning Test-Second Edition: Adult version*. San Antonio, TX: The Psychological Corporation.
- Duff, K., & Fisher, J. M. (2005). Ethical dilemmas with third party observers. *Journal of Forensic Neuropsychology*, 4, 65–82. doi:10.1300/j151v04n02\_06
- Eastvold, A. D., Belanger, H. G., & Vanderploeg, R. D. (2012). Does a third party observer affect neuropsychological test performance? It depends. *The Clinical Neuropsychologist*, 26, 520–541. doi:10.1080/13854046.2012.663000
- Essig, S., Mittenberg, W., Petersen, R., Strauman, S., & Cooper, J. (2001). Practices in forensic neuropsychology: Perspectives of neuropsychologists and trial attorneys. *Archives of Clinical Neuropsychology*, 16, 271–291. doi:10.1016/s0887-6177(99)00065-7
- Gavett, B. E., Lynch, J. K., & McCaffrey, R. J. (2005). Third party observers: The effect size is greater than you might think. *Journal of Forensic Neuropsychology*, 4, 49–64. doi:10.1300/j151v04n02\_05
- Horowitz, J., & McCaffrey, R. J. (2008). Effects of a third party observer and anxiety on tests of executive function. *Archives of Clinical Neuropsychology*, 23, 409–417. doi:10.1016/j.acn.2008.02.002
- Howe, L. L. S., & McCaffrey, R. J. (2010). Third party observation during neuropsychological evaluation: An update on the literature, practical advice for practitioners, and future directions. *The Clinical Neuropsychologist*, 24, 518–537. doi:10.1080/13854041003775347
- Kaufman, P. M. (2005). Protecting the objectivity, fairness, and integrity of neuropsychological evaluations in litigation: A privilege second to none? *Journal of Legal Medicine*, 26, 95–131. doi:10.1080/01947640590918007
- Kaufman, P. M. (2009). Protecting raw data and psychological tests from wrongful disclosure: A primer on the law and other persuasive strategies. *The Clinical Neuropsychologist*, 23, 1130–1159. doi:10.1080/13854040903107809



- Kehrer, C. A., Sanchez, P. N., Habif, U., Rosenbaum, G. J., & Townes, B. (2000). Effects of a significant-other observer on neuropsychological test performance. *The Clinical Neuropsychologist (Neuropsychology, Development and Cognition: Section D)*, 14, 67–71. doi:10.1076/1385-4046(200002)14:1;1-8;ft067
- Lynch, J. K. (2005). Effects of a third party observer on neuropsychological test performance following closed head injury. *Journal of Forensic Neuropsychology*, 4, 17–25. doi:10.1300/j151v04n02\_02
- McCaffrey, R. J., Fisher, J. M., Gold, B. A., & Lynch, J. K. (1996). Presence of third parties during neuropsychological evaluations: Who is evaluating whom? *The Clinical Neuropsychologist*, 10, 435–449. doi:10.1080/13854049608406704
- McCaffrey, R. J., Lynch, J. K., & Yantz, C. L. (2005) Third party observers: Why all the fuss? *Journal of Forensic Neuropsychology*, 4, 1–15. doi:10.1300/j151v04n02\_01
- McSweeney, A. J., Becker, B. C., Naugle, R. I., Snow, W. G., Binder, L. M., & Thompson, L. L. (1998). Ethical issues related to the presence of third party observers in clinical neuropsychological evaluations. *The Clinical Psychologist*, 12, 552–559. doi:10.1076/clin.12.4.552.7245
- Meyers, J., & Meyers, K. (1995). *Rey Complex Figure Test and Recognition Trial*. Lutz, FL: Psychological Assessment Resources.
- Michigan Psychological Association. (2014). *Ethical considerations regarding third party observation (TPO) and recording of psychological test administration for licensed psychologists practicing in the State of Michigan*. Retrieved from <http://www.michiganpsychologicalassociation.org/>
- Morel, K. R. (2009). Test security in medicolegal cases: Proposed guidelines for attorneys utilizing neuropsychology practice. *Archives of Clinical Neuropsychology*, 24, 635–646. doi:10.1093/arclin/acp062
- National Academy of Neuropsychology. (1999). Test security. Official position statement of the National Academy of Neuropsychology. *Archives of Clinical Neuropsychology*, 15, 383–386. Retrieved from <http://nanonline.org/paio/security.shtm>
- National Academy of Neuropsychology. (2000a). Presence of third party observers during neuropsychological testing: Official statement of the National Academy of Neuropsychology. *Archives of Clinical Neuropsychology*, 15, 379–380. doi:10.1016/s0887-6177(00)00053-6. Retrieved from <http://nanonline.org/paio/thirdparty.shtm>
- National Academy of Neuropsychology. (2000b). Test security. Official position statement of the National Academy of Neuropsychology. *Archives of Clinical Neuropsychology*, 15, 383–386. doi:10.1016/s0887-6177(00)00055-x
- National Academy of Neuropsychology. (2003). *Test security: An update*. Retrieved from <http://nanonline.org/docs/PAIC/PDFs/NANTestSecurityUpdate.pdf>
- Oregon Psychological Association. (2012). *Statement opposing the presence of third party observers and recording neuropsychological and psychological assessments performed in the state of Oregon*. Retrieved from <http://www.opa.org/associations/2508/files/Statement%20Opposing%20the%20Presence%20of%20Third%20Party%20Observers%202-12.pdf>
- Sweet, J. J., Grote, C., & Van Gorp, W. (2002). Ethical issues in forensic neuropsychology. In S. S. Bush & M. L. Drexler (Eds.), *Ethical issues in clinical neuropsychology* (pp. 103–133). Lisse, The Netherlands: Swets & Zeitlinger.
- Urbina, S. (2014). Essentials of ethical test use. *Psychological Testing-Second Edition* (pp. 298–299). Hoboken, NJ: Wiley.
- Victor, T. L., & Abeles, N. (2004). Coaching clients to take psychological and neuropsychological tests: A clash of ethical obligations. *Professional Psychology: Research and Practice*, 35, 373–379. doi:10.1037/0735-7028.35.4.373
- Wechsler, D. (1997). *Wechsler Adult Intelligence Scale-Third Edition: Administration and Scoring Manual*. San Antonio, TX: The Psychological Corporation.
- Wechsler, D. (2003). *Wechsler Intelligence Scale for Children-Fourth Edition (WISC-IV): Administration and Scoring Manual*. San Antonio, TX: The Psychological Corporation.
- Wechsler, D. (2008). *Wechsler Adult Intelligence Scale-Fourth Edition: Administration and Scoring Manual*. San Antonio, TX: The Psychological Corporation.
- Wetter, M. W., & Corrigan, S. K. (1995). Providing information to clients about psychological tests: A survey of attorneys' and law students' attitudes. *Professional Psychology: Research and Practice*, 26, 474–477. doi:10.1037/0735-7028.26.5.474
- Williams, J. (1991). *Memory Assessment Scale*. Odessa, FL: Psychological Assessment Resources.
- Yantz, C. L., & McCaffrey, R. J. (2005). Effects of a supervisor's observation on a memory test performance of the examinee: Third party observer effect confirmed. *Journal of Forensic Neuropsychology*, 4, 27–38. doi:10.1300/j151v04n02\_03

# Exhibit G

# Exhibit G

## Nevada Rules of Civil Procedure Revision Committee Summary

July 26, 2017 Meeting

The fifth meeting of the Nevada Rules of Civil Procedure Committee (Committee) was held on July 26, 2017 at 3:00 p.m. The meeting was video conferenced among the State Bar of Nevada Office in Reno, the Supreme Court conference room in Las Vegas, and the Supreme Court conference room in Carson City. Present in Reno were Discovery Commissioner Wesley Ayres, Graham Galloway, Bill Peterson, Todd Reese, and Don Springmeyer. Present in Carson City were Kevin Powers and Justice Mark Gibbons. Present in Las Vegas were Justice Kristina Pickering, Discovery Commissioner Bonnie Bulla, George Bochanis, Judge Elissa Cadish, Steve Morris and Dan Polsenberg.

The Committee first approved the June 21, 2017 meeting minutes.

The Committee then discussed publicity for NRCP revision process. Justice Pickering advised the Committee that the Supreme Court's website for the Committee would soon be populated and that the State Bar would be contacted to run a notice of the Committee's work in the Nevada Lawyer and to send an email to members of the State Bar. An article written by Kristen Martini would also be running in the Writ, a Washoe County Bar publication, and in the Communiqué, a Clark County Bar publication.

The Committee then discussed the impact of the NRCP revisions on the Nevada Justice Court Rules of Civil Procedure. Many of the NRCP are adopted wholesale in the NJCRCP. Justice Gibbons will notify the Chief Justice of the concerns, with a view toward possibly appointing a committee to examine the NJCRCP in light of any changes to the NRCP.

Discussion then turned to the subcommittees and subcommittee reports and rule recommendations.

### 1) Discovery Subcommittee (NRCP 16, 16.1, 26-37, 45)

Chair: Graham Galloway

Members: Steve Morris, Commissioner Wes Ayres, Commissioner Bonnie Bulla, Dan Polsenberg, George Bochanis, Don Springmeyer, Bill Peterson

The Committee first confirmed that NRCP 16 has been assigned to the Discovery Subcommittee. The Committee then discussed the proposed draft amendments to NRCP 16.1 and 35 submitted by the Discovery Subcommittee.

As to NRCP 16.1, the subcommittee recommended that “data compilations” be changed to “electronically stored information” to be consistent with other jurisdictions. Discussion then turned to the standard appropriate for a party’s initial disclosure obligation. The subcommittee recommended changing the current broad initial disclosure requirement to a narrower requirement that the party disclose any information that the party “may use to support its claims or defenses, including for impeachment or rebuttal.” Some present offered that this was a significant change, in that a party would have no obligation to disclose information that hurts his claims or defenses, only information the party intends to use to support his litigation position or to impeach his opponent. Supporters of the change noted that affirmative discovery requests can flesh out information; the change just concerns initial disclosures. The Committee discussed that, if the change is made, the advisory committee notes should make clear what the limitations are.

The Committee also noted that initial disclosure obligations do not apply when cases are before the probate commissioner but should apply when a probate case reaches district court and discussed whether NRCP 16.1 and the NRCP need revision to make this clear. The Committee noted that NRCP 3 and 81 come into play because probate is a statutory proceeding commenced by petition.

The Committee decided that further discussion was needed and that drafter’s notes in rule 16.1 and or 81 may be warranted along with a change to NRCP 3 to include “petitions” and “applications” in NRCP3’s language. The Committee passed on this rule pending further examination by the Discovery Subcommittee and the Everything Else Subcommittee on NRCP 3 and 81.

As to NRCP 35, the Committee discussed the observer requirement and whether that person could be an interested party or an attorney. The subcommittee reported that the Audio Recording provision was new. The Committee also expressed concern about the language in NRCP 35(b)(1) and (3), which was taken directly from the FRCP counterpart, noting that the language was confusing regarding who would be requesting what from whom, and what exams must be produced. The Committee also discussed how this



rule would apply to minors and interact with other rules applicable to minors, and the Committee recommended adding to the drafter's note to address this concern. The Committee also noted that NRCP 35(a)(2)(B) allowed the court to impose conditions on the examination to protect minors. The subcommittee will reconsider the rule, make alterations, and present the rule at the August meeting.

- 2) Time and Service of Process Subcommittee (NRCP 4, 4.1, 5, 6) (includes all e-service rules, calculation of time, and time to perform acts throughout the NRCP)

Chair: Judge Elissa Cadish

Members: Justice Kristina Pickering, Don Springmeyer, Dan Polsenberg, Todd Reese, Kevin Powers

Judge Cadish reported that FRCP 4.1 has been assigned to the Time and Service of Process Subcommittee for consideration.

- 3) Huneycutt Subcommittee (NRCP 62.1, NRAP 12.1, *Huneycutt v. Huneycutt*, 94 Nev. 79, 575 P.2d 585 (1978) and progeny)

Chair: Racheal Mastel

Members: Justice Kristina Pickering, Justice Mark Gibbons, Todd Reese, Dan Polsenberg

The Committee then discussed the proposed draft addition of NRCP 62.1 and NRAP 12.1 and accompanying draft committee notes submitted by the Huneycutt Subcommittee. The Committee generally approved of the rules and comment, but discussed altering language in the drafter's note regarding whether *Huneycutt* and its progeny would be overruled by the adoption of these rules, and discussed needed changes to the language of the rule reference federal courts. The subcommittee will make the alterations requested and present the rules at the August meeting.

- 4) Everything Else Subcommittee (renamed from the "No Brainer" Subcommittee) (All NRCP Rules not otherwise accounted for)

Chair: Justice Kristina Pickering

Members: Justice Mark Gibbons, Todd Reese

The Committee discussed the proposed draft amendments to NRCP 5.1, 5.2, 7, 7.1, 8, 9, and 11 submitted by the Everything Else Subcommittee. The Committee approved the recommendation to reject FRCP 5.1. The Committee considered FRCP 5.2, and advised against incorporating the Rules on Sealing and Reacting Court Records (SRCR) into Rule 5.2 because the SRCR apply more broadly than the NRCP do. The Committee approved rejecting the text of FRCP 5.2, but advised adding Rule 5.2 to the NRCP with language directing practitioners to the SRCR for rules regarding sealing and redaction. The Subcommittee will redraft NRCP 5.2 and submit it to the Committee for its consideration at the August meeting. The Committee approved NRCP 7, 7.1, and 11 as proposed. The Committee agreed with changes proposed by Racheal Mastel to Rules 7 and 8, leaving in the federal language regarding pleading the jurisdiction of the court. With that change, the Committee approved NRCP 7 and 8.

A discussion was then held of issues of general concern to the Committee members. Concern was voiced with the ambitious pace of this Committee and the scheduling conflicts occurring with the subcommittees. This issue will be revisited in August. Justice Gibbons advised the Committee that Committee meetings are scheduled for August 16, 2017 at 3:00 pm, and September 27, 2017 at 3:00 pm.

There being no further business to come before the Committee, the meeting was adjourned at 5:00 p.m.

Respectfully submitted,  
Kristina Pickering and Mark Gibbons  
Co-Chairs

# Exhibit H

# Exhibit H

## Nevada Rules of Civil Procedure Revision Committee Summary

### September 27, 2017 Meeting

The seventh meeting of the Nevada Rules of Civil Procedure Committee (Committee) was held on September 27, 2017 at 3:00 p.m. The meeting was video conferenced between the State Bar of Nevada Office in Reno and the Supreme Court conference rooms in Las Vegas and Carson City. Present in Reno were Discovery Commissioner Wesley Ayres, Graham Galloway, Bob Eisenberg, Dan Polsenberg, and Don Springmeyer. Present in Carson City were Judge Jim Wilson, Kevin Powers, and Todd Reese. Present in Las Vegas were Justice Mark Gibbons, Justice Kristina Pickering, Judge Elissa Cadish, Discovery Commissioner Bonnie Bulla, Judge Kim Wanker, Professor Tom Main, George Bochanis, Steve Morris, and Rachael Mastel.

The Committee first approved the August 16, 2017 meeting minutes.

The Committee then welcomed Judge James E. Wilson, who was recently appointed to the Committee. Judge Wilson will join the discovery; NRCP 4, 5, 6; and style subcommittees.

The Committee then discussed publicizing its work and seeking comment from practitioners. It was agreed that, unless otherwise approved by the subcommittee chair, comments on a rule being developed by a subcommittee should not be sought from the bar until the subcommittee has finished their work with the rule. This will allow the subcommittee to completely vet and develop their work and to prevent an incomplete rule from being scrutinized by the bar. After a subcommittee has presented a proposed rule to the committee, however, then the committee members are encouraged to seek comment on the rule from any desired sources. This will enable the committee to have as much input as possible when considering the Rules.

The Committee then discussed the subcommittee rule recommendations.

#### 1) NRCP 68 Subcommittee

Chair: Dan Polsenberg

Members: Don Springmeyer, Prof. Thomas Main

The subcommittee reported that it left “before trial” as is because a better alternative could not be found and that they fixed the time before trial at 21 days. The subcommittee also reported that they added a section to NRCP 68(d) to clarify that a party may pay the amount of the offer within 21 days without an adverse judgment. Todd Reese suggested adding, and will draft, language to NRCP 68(f) to clarify how to calculate the penalty when multiple offers have been given. The Committee also discussed the conflict in NRCP 68 (d) between obtaining a judgment after 14 days but having 21 days to pay without entry of a judgment. The subcommittee will redraft that subsection of the rule. The Committee passed the rule to the November meeting, and the subcommittee will consider language changes to the rule.

2) Everything Else Subcommittee (All NRCP Rules not otherwise accounted for)

Chair: Justice Kristina Pickering

Members: Justice Mark Gibbons, Todd Reese

The Committee then discussed the revised proposed draft amendments to NRCP 5.2, 22, and 25 submitted by the Everything Else Subcommittee. The Committee approved the drafts of NRCP 5.2 and 22. When discussing NRCP 25, the Committee expressed concerns regarding who may file a notice of death, what the purpose of the district court noting the death on the record is, and whether the notice of death trigger a trap for the unwary with the 90 day period to substitute a person after the notice is filed. The Committee discussed whether the dismissal after 90 days should be mandatory or discretionary. The subcommittee will reconsider and redraft the rule, taking into consideration the Committee’s concerns.

3) Class and Derivative Actions Subcommittee (NRCP 23, 23.1, 23.2)

Chair: Prof. Thomas Main

Members: Dan Polsenberg, Don Springmeyer

The Class and Derivative Actions Subcommittee reported that it would present proposed rules at the next Committee meeting. (In November as the October meeting will focus on discovery.)

4) Time and Service of Process Subcommittee (NRCP 4, 4.1, 5, 6)

Chair: Judge Elissa Cadish

Members: Justice Kristina Pickering, Judge Jim Wilson; Don Springmeyer, Dan Polsenberg, Racheal Mastel, Todd Reese, Kevin Powers

The Committee then discussed the proposed draft of NRCP 5 submitted by the Time and Service of Process Subcommittee. The Committee approved NRCP 5 as proposed.

5) NRCP 12 and 56 Subcommittee (NRCP 8, 12, and 56)

Chair: Judge Elissa Cadish

Members: Justice Kristina Pickering, Judge Wanker, Prof. Thomas Main

The Committee then discussed the proposed draft of NRCP 8, 12, and 56 submitted by the NRCP 12 and 56 Subcommittee. The Advisory Committee Note added to NRCP 8 was approved. The Committee discussed the addition to NRCP 12 of the provisions for public entities, officers, and political subdivisions to answer or respond and whether they should have 45 or 60 days to or answer respond. The Committee approved the rules with a 45 day time period subject to syncing the public entities, officers, and political subdivisions provisions with NRCP 4. The Committee also discussed subsections (d) and (e) of NRCP 56, indicating that they did not alter and were consistent with existing law. The Committee approved NRCP 12 and 56 and the Advisory Committee Note proposed for NRCP 12.

6) Discovery Subcommittee (NRCP 16, 16.1, 26-37, 45)

Chair: Graham Galloway

Members: Steve Morris, Commissioner Wes Ayres, Commissioner Bonnie Bulla, Dan Polsenberg, George Bochanis, Don Springmeyer, Bill Peterson

The Committee then discussed the proposed draft amendments to NRCP 16.1, 26, 30, 34, and 35 submitted by the Discovery Subcommittee. As to Rule 35, Rachael Mastel reported that the family law bar suggested developing their own rule to address the unique problems regarding medical exams in family law. Bob Eisenberg sent the committee feedback from other practitioners on

the rule. Bob also stated that he did appreciate the work of the discovery subcommittee, but that he did not support the rule as written. His concerns are, among other things, the presence of an observer and the recording of the medical exam. Consideration of the rule was passed to the next meeting, pending further public comment on the rule and the development of a proposed alternative by Bob Eisenberg. The Committee briefly discussed NRCP 16.1, its approach to initial disclosures, and its approach to the testimony of treating physicians. The Committee also discussed whether Rule 26 should refer to NRCP 16.2 and 16.205. The Committee also briefly discussed NRCP 30 and 34, not mentioning any serious concerns. Because time remaining was short, the co-chairs advised the Committee to review the discovery rules and to be prepared to discuss them at the next meeting. This set of rules will be first on the next meeting agenda to afford sufficient time for their discussion.

A discussion was then held of issues of general concern to the Committee members.

Justice Gibbons advised the Committee that the next Committee meetings are scheduled for October 25, 2017 at 3:00 pm, and November 29, 2017 at 3:00 pm at the usual times and locations. The next Committee meeting in October will focus exclusively on discovery.

There being no further business to come before the Committee, the meeting was adjourned at 5:03 p.m.

Respectfully submitted,  
Kristina Pickering and Mark Gibbons  
Co-Chairs

# Exhibit I

# Exhibit I



## Nevada Rules of Civil Procedure Revision Committee Summary

October 25, 2017 Meeting

The eighth meeting of the Nevada Rules of Civil Procedure Committee (Committee) was held on October 25, 2017 at 3:00 p.m. The meeting was video conferenced between the State Bar of Nevada Office in Reno and the Supreme Court conference rooms in Las Vegas and Carson City. Present in Reno were Discovery Commissioner Wesley Ayres, Graham Galloway, Bob Eisenberg, and Bill Peterson. Present in Carson City were Justice Mark Gibbons, Judge Jim Wilson, Kevin Powers, and Todd Reese. Present in Las Vegas were Justice Kristina Pickering, Judge Elissa Cadish, Judge Kim Wanker, Discovery Commissioner Bonnie Bulla, George Bochanis, Steve Morris, Rachael Mastel. Dan Polsenberg, Don Springmeyer, and Professor Thom Main.

The Committee first approved the September 27, 2017 meeting minutes.

This meeting focused on discovery. The Committee discussed the following subcommittee rule recommendations.

### 1) Discovery Subcommittee (NRCP 16, 16.1, 26-37, 45)

Chair: Graham Galloway

Members: Steve Morris, Commissioner Wes Ayres, Commissioner Bonnie Bulla, Dan Polsenberg, George Bochanis, Don Springmeyer, Bill Peterson

The Committee discussed the proposed draft amendments to NRCP 16.1, 26, 30, 34, and 35 submitted by the Discovery Subcommittee. As to Rule 35, Bob Eisenberg presented an opposing proposed amendment. The Committee also considered the opposing views submitted by plaintiff and insurance defense counsel regarding Rule 35. Graham Galloway discussed the language in the committee note regarding the location of the exam, indicating that he agreed that the language should be changed so that the location will be in Nevada, unless otherwise stipulated or ordered. The Committee also discussed that this provision was substantive and should be in the text of the rule. The committee then discussed audio and video recordings and observers. The issue is, generally, how to address issues that arise during an examination and whether a person subject to an exam should have a right to a recording or an observer, or whether a court should be required to order a recording or

observer, and if so whether that should be for just cause. Commissioner Bulla emphasized that the committee draft was a compromise position. Several members of the subcommittee felt that exams should be video recorded, but Commissioner Bulla noted her opposition to video recording and her concerns that such videos might end up on the internet, compromising the examinee's privacy. The committee and the subcommittee agreed with the language in Bob Eisenberg's draft that observers should not obstruct the exam and that minors and incompetent persons should be entitled to a parent or guardian as an observer. Judge Cadish commented that a person subject to an exam might have a right to an audio recording but that the court might be required to order an observer. The Committee also acknowledged its lack of understanding whether doctors would refuse to perform exams if recorded or if an observer was present, or if performing an exam with a recording or observer might violate doctors' ethical rules. The committee noted that some attorneys were contacting doctors to get their input on this question. The Committee also discussed the lack of an insurance defense lawyer on the subcommittee and on the committee as a whole. Dan Polsenberg also noted that the draft from Bob Eisenberg was inconsistent on who would be requesting what, and Bob agreed that revisions were appropriate. The Committee passed on Rule 35 to allow Bob Eisenberg to work with the subcommittee to edit their respective drafts as needed, and to attempt to work out a compromise version or to present competing version to the committee at the next meeting.

The Committee next discussed NRCP 26, noting some discrepancy with the cross-citations to Rules 16.2 and 16.205. Subject to correcting those citations, Justice Pickering moved to recommend the rule, the motion was seconded by Justice Gibbons, and the Committee voted to recommend the rule.

The Committee next discussed Rule 30. The subcommittee noted that the rule tracked FRCP 30 including the limitation of 10 depositions absent stipulation or leave of court. The subcommittee noted that Rule 30(h) was kept from the existing rule, and that the rule was not intended to change "7 hours of testimony" referring to 7 hours on the record or the holding in *Coyote Springs Inv., LLC v. Eighth Judicial Dist. Court*, 131 Nev., Adv. Op. 18, 347 P.3d 267 (2015), concerning privileges during breaks in the deposition. Subject to minor edits to the committee note, Don Springmeyer moved to recommend the rule, Judge Cadish seconded, and the Committee voted to recommend the rule.

The Committee next discussed Rule 34, specifically the edited language in Rule 34(b)(2)(E)(i) pertaining to production of documents as they are kept in the usual course of business, unless that form of production is unreasonably burdensome for the discovering party. The Committee recognized that while the producing party should not be permitted to simply dump documents on the discovering party, neither should the discovering party be permitted to require the producing party to organize the documents in a form preferred by the discovering party when the documents are produced in an organized form. Commissioner Bulla stressed that some form of cost shifting or further request for organization was required to address discovery abuses. The Committee passed on Rule 34 so that the discovery subcommittee could address the language in Rule 34(b)(2)(E)(i).

The Committee passed on Rule 16.1 so that the subcommittee could make further edits to the rule.

A discussion was then held of issues of general concern to the Committee members. The Committee Members noted that the link on the Supreme Court's website to the Committee information was difficult to find, and the Committee asked if it could be made easier to find. The Supreme Court staff and Justices will investigate this. Bob Eisenberg asked what materials he could print for presentations concerning the Committee. Any materials that are posted on the website are publicly disseminated, and may certainly be used. These include the minutes, agendas, and recommended rules. Similar to disclosure of other materials, drafts in subcommittee should not be disclosed to allow the subcommittees to perform their work, but any drafts circulated to the committee as a whole may be used. The Justices cautioned the committee not to disclose information about pending cases when discussing hypotheticals. George Bochanis and Graham Galloway agreed to work on redrafting Rule 25 with the Everything Else subcommittee.

Justice Gibbons advised the Committee that the next Committee meeting is scheduled for November 29, 2017 at 3:00 pm at the usual locations, and that the Justices would set a December meeting.

There being no further business to come before the Committee, the meeting was adjourned at 5:00 p.m.

Respectfully submitted,  
Kristina Pickering and Mark Gibbons  
Co-Chairs

# Exhibit J

# Exhibit J

## Nevada Rules of Civil Procedure Revision Committee Summary

### December 20, 2017 Meeting

The tenth meeting of the Nevada Rules of Civil Procedure Committee (Committee) was held on December 20 at 3:00 p.m. The meeting was video conferenced between the State Bar of Nevada Office in Reno and the Supreme Court conference rooms in Las Vegas and Carson City. Present in Reno were Discovery Commissioner Wes Ayres, Graham Galloway, Bob Eisenberg, and Bill Peterson. Present in Carson City were Justice Mark Gibbons, Justice Kristina Pickering, Judge Jim Wilson, Kevin Powers, and Todd Reese. Present in Las Vegas were Judge Elissa Cadish, Judge Kim Wanker, Discovery Commissioner Bonnie Bulla, Don Springmeyer, Racheal Mastel, and Don Polsenberg.

The Committee first approved the November 29, 2017 meeting minutes with minor edits.

The various subcommittees reported that they would attempt to have Rules 4, 6, 23.1, 23.2, the rest of the discovery rules, the judgment and post-judgment rules, NRAP 26, and NEFCR 9 for the committee's consideration at the January committee meeting. Regarding NEFCR 9, the subcommittee reported that the clerk's offices shed light on the procedure determining when electronic service is given and that the rules would need to be adjusted to reflect the procedure.

The Committee discussed the following subcommittee rule recommendations.

#### 1) Discovery Subcommittee (NRCP 16, 16.1, 26-37, 45)

Chair: Graham Galloway

Members: Judge Jim Wilson, Steve Morris, Commissioner Wes Ayres, Commissioner Bonnie Bulla, Dan Polsenberg, George Bochanis, Don Springmeyer, Bill Peterson, and Loren Young

The Committee discussed the proposed draft amendments to NRCP 16.1, 27, 28, 29, 35, and 37 submitted by the Discovery Subcommittee. As to Rule 16.1, the subcommittee indicated that there was a majority and minority position regarding broader or more restrictive initial disclosure requirements. The committee passed this rule to the January meeting so that additional committee members could be present for the discussion.

The committee briefly discussed Rule 35, noting that three final proposals were complete and would be submitted to the Supreme Court. The co-chairs asked the proponents of the proposals to draft summary statements advocating for their proposal.

The committee also discussed Rule 37, noting the change in language in NRCP 37(a)(4) to account for documents not in compliance with Rule 34(b)(2)(E)(i). The rule was approved as written.

The committee next discussed Rules 27, 28, and 29. The discovery committee proposed to adopt the federal rules without change for use in Nevada. The committee expressed concern about whether Rule 29(b)'s language concerning "any form of discovery" would permit stipulations regarding depositions and whether that language conflicted with the existing rule or the Eighth Judicial District Court Rules. After discussion, the committee believed that there was no conflict, or that any conflict could be resolved. Justice Gibbons moved to recommend the rules as written, the motion was seconded by Justice Pickering, and the Committee voted to recommend the rules.

## 2) Class and Derivative Actions Subcommittee (NRCP 23, 23.1, 23.2)

Chair: Dan Polsenberg

Members: Don Springmeyer and Professor Thomas Main

The Committee next discussed competing proposals regarding Rule 23. Dan Polsenberg proposed adopting FRCP 23, Don Springmeyer proposed retaining the existing NRCP 23 with edits, and Professor Main is agnostic on the proposals. The Committee discussed sending both proposals to the Supreme Court, but noted the new appellate procedure in FRCP 23(f). Nevada does not currently have an "appeal by permission" type of appeal and this would necessitate adopting new appellate rules. Dan Polsenberg agreed to draft two alternative proposals, one retaining the new type of permissive appeal and one with an appeal as of right. Pending the edited rules, the rule was passed to the next meeting.

## 3) NRCP 25 Subcommittee (NRCP 25 and NRAP 43)

Chair: Todd Reese

Members: Justice Kristina Pickering, Graham Galloway, George Bochanis, and Loren Young

The Committee next discussed NRCP 25 and NRAP 43. Todd Reese explained that the rule was adapted from the FRCP and the existing NRCP to give more flexibility to the district courts in dealing with a party's death and to avoid the mandatory dismissal penalty. The rule's provisions are also garnered from the NRAP and other states rules. The rule is not intended to violate due process or change probate law. Justice Pickering noted that the Rule is set for review by probate attorneys to make sure that its provisions to not conflict with probate law. Concerns were also raised regarding whether provisions of the rule permitting an action to proceed despite the party's death would conflict with Rule 17(a). The Committee passed on the rule pending review.

#### 4) Everything Else Subcommittee

Chair: Justice Kristina Pickering

Members: Justice Mark Gibbons, Todd Reese

The Committee discussed the proposed draft amendments to NRCP 38, 39, 40, 43, 44, 48, and 49 submitted by the Everything Else Subcommittee. The committee discussed edits to Rule 38, 40, and 43. The committee also discussed the passive wording of Rule 48, discussing where a jury of 8 persons was authorized. Rule 48 was passed for redrafting and research. Justice Gibbons moved to recommend the remaining rules, Judge Wilson seconded the motion, and the committee voted to recommend the rules.

A discussion was then held of issues of general concern to the Committee members. Justice Gibbons advised the Committee that the next Committee meetings are scheduled for January 17, 2018, and February 21, 2018, at 3:00 pm. The Reno location of the January meeting will be at a Washoe County District Court Room. The other locations will be at the usual locations.

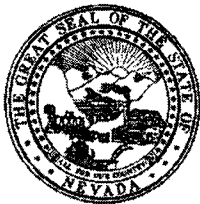
There being no further business to come before the Committee, the meeting was adjourned at 4:35 p.m.

Respectfully submitted,  
Kristina Pickering and Mark Gibbons  
Co-Chairs



# Exhibit K

# Exhibit K



STATE OF NEVADA  
BOARD OF PSYCHOLOGICAL EXAMINERS

4600 Kietzke Lane, Building B-116  
Reno, Nevada 89502  
Telephone 775 / 688-1268 • Fax 775 / 688-1060  
nbop@govmail.state.nv.us  
Psyexam.nv.gov

October 1, 2018  
Governor

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

Dear Ms. Brown:

ADKT 0522

FILED

OCT 02 2018

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY   
CHIEF DEPUTY CLERK

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

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

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

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

Anthony Papa, Ph.D.,  
Board Member, Reno

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

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

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

# Exhibit L

# Exhibit L



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

Supreme Court Clerk's Office  
201 South Carson Street  
Carson City, Nevada 89701

ADLT 0522

FILED

OCT 11 2018

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY *[Signature]*  
CHIEF DEPUTY CLERK

September 25, 2018

**RE: THE MATTER OF CREATING A COMMITTEE TO UPDATE AND REVISE THE NEVADA  
RULES OF CIVIL PROCEDURE**

The Nevada Psychological Association opposes the revision to the Nevada Rules of Civil Procedures allowing third-party observation, monitoring, or reporting of the administration of standardized measures psychological and neuropsychological evaluations. Any evaluations conducted under such conditions would be invalid for the following reasons:

1. **Decreased Patient Disclosure:** Observation, monitoring, and recording can directly impact the behavior of the patient during clinical interviews, such that the patient may avoid disclosing crucial information essential to diagnosis and clinical recommendations. The patient may avoid disclosing critical information related to their safety or the safety of another person (e.g., child abuse or abuse of a vulnerable adult).
2. **Test Standardization & Compromised Validity:** The well-established standard of practice is that standardized psychological and neuropsychological tests must be administered under standardized conditions (i.e., conditions that closely replicate the conditions under which the tests were standardized during the test development process). The standardization process does not include third-party observation, monitoring, or recording. Deviations which allow such observation likely compromise the validity of the data collected. When the validity of testing data is compromised, the accuracy of the results is compromised.
3. **Social Facilitation, Observer Effects, and Compromised Validity:** Research consistently demonstrates that patient performance can be impacted (negatively or positively) by the presence of an observer, including live observation, remote observation, or recorded observation. These factors can artificially strengthen or weaken the patient's performance on psychological and neuropsychological testing, thus compromising the validity of the data and the accuracy of the conclusions.
4. **Test Security and Social Harm:** Psychologists have an ethical responsibility to maintain the integrity and security of tests and other assessment procedures. Permitting individuals who are not licensed psychologists to observe a psychological examination, either through live or recorded methods, compromises test security. These materials could be disseminated, thus carrying a risk for significant social harm. Future patients can be coached or inappropriately prepared for evaluations. Additionally, since the tests used for independent medical evaluations are also used for a wide variety of other psychological evaluations, the validity of

RECEIVED

OCT 11 2018

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
DEPUTY CLERK

App0101

18-40001

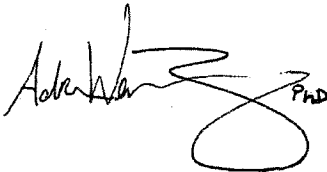
these evaluations would also be compromised by dissemination of test materials. Compromising the test materials would have wide spread effect as the same tests used across a wide range of evaluations. These include, but are not limited to, determinations of fitness or competency to: (a) parent; (b) pilot an airplane; (c) practice medicine or surgery; (d) stand trial; (e) work in law enforcement or at a nuclear power facility, etc. The Court might also be interested to know that these same tests are used to determine if an applicant is eligible to receive special accommodations when taking the Bar Exam.

As stated by the National Academy of Neuropsychology in 2003, "Maintaining test security is critical, because of the harm that can result from public dissemination of novel test procedures. Audio or video recording a neuropsychological examination results in a product that can be disseminated without regard to the need to maintain test security. The potential disclosure of test instructions, questions, and items by replaying recorded examinations can enable individuals to determine or alter their responses in advance of actual examination. Thus, a likely and foreseeable consequence of uncontrolled test release is widespread circulation, leading to the opportunity to determine answers in advance, and to manipulate test performances. This is analogous to the situation in which a student gains access to test items and the answer key for a final examination prior to taking the test."

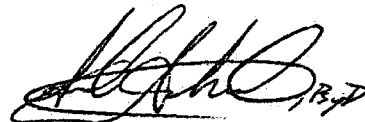
In summary, the proposed changes which would allow third-party observation, monitoring, or recording of psychological or neuropsychological examinations would have a profound deleterious impact on the ability of licensed psychologists to appropriately conduct valid psychological and neuropsychological IMEs. It is unlikely that psychologists would be able to conduct these evaluations while maintaining adherence to ethical guidelines for the reasons listed above.

We have enclosed a list of references, as well as complete copies of the most relevant position and consensus statements. Please do not hesitate to contact us with any concerns or questions.

Respectfully,



Adrianna Wechsler Zimring, PhD  
Past President 2018/2019  
Nevada Psychological Association



Sarah Ahmad, PsyD  
President 2018/2019  
Nevada Psychological Association



Noelle Lefforge, PhD  
President-Elect 2018/2019  
Nevada Psychological Association



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

## References

- American Psychological Association. (2017). Ethical principles of psychologists and code of conduct (2002, Amended June 1, 2010 and January 1, 2017). Retrieved from <http://www.apa.org/ethics/code/index.aspx>
- American Psychological Association (2014). Standards for Educational and Psychological Testing. Washington, DC: The Joint Committee on the Standards for Educational and Psychological Testing of the American Educational Research Association, the American Psychological Association, and the National Council on Measurement in Education
- Anastasi, A. (1988). Psychological Testing (6th ed.), New York: Macmillan Publishing Company.
- Binder, L. M., & Johnson-Greene, D. (1995). Observer effects on neuropsychological performance: A case report. *The Clinical Neuropsychologist*, 9, 74–78.
- Fatemeh Rezaei, Nasrin Alsadat Hosseini Ramaghani & Rachel L. Fazio (2016): The effect of a third party observer and trait anxiety on neuropsychological performance: the Attentional Control Theory (ACT) perspective, *The Clinical Neuropsychologist*, DOI: 10.1080/13854046.2016.1266031
- Kehrer, C. A., Sanchez, P. N., Habif, U., Rosenbaum, J. G., & Townes, B. D. (2000). Effects of a significant-other observer on neuropsychological test performance. *The Clinical Neuropsychologist*, 14(1), 67-71.
- Lynch, J. K. (2005). Effect of a Third Party Observer on Neuropsychological Test Performance Following Closed Head Injury. *Journal Of Forensic Neuropsychology*, 4(2), 17.
- McCaffrey, R. J., Fisher, J. M., Gold, B. A., & Lynch, J. K. (1996). Presence of third parties during neuropsychological evaluations: Who is evaluating whom? *The Clinical Neuropsychologist*, 10, 435–449.
- McSweeney, A. J., Becker, B. C., Naugle, R. I., Snow, W. G., Binder, L. M. & Thompson, L. L. (1998). Ethical issues related to third party observers in clinical neuropsychological evaluations. *The Clinical Neuropsychologist*, 12(4), 552–559
- Presence of Third Party Observers During Neuropsychological Testing: Official Statement of the National Academy of Neuropsychology, *Archives of Clinical Neuropsychology*, Vol. 15, No. 5, pp. 379–380, 2000
- Test Security: Official Position Statement of the National Academy of Neuropsychology, *Archives of Clinical Neuropsychology*, Vol. 15, No. 5, pp. 383–386, 2000
- Test Security: An Update. (2003). Official Statement of the National Academy of Neuropsychology Approved by the NAN Board of Directors On October 13, 2003.



## Test Security

# Official Position Statement of the National Academy of Neuropsychology

Approved 10/5/99

A major practice activity of neuropsychologists is the evaluation of behavior with neuropsychological test procedures. Many tests, for example, those of memory or ability to solve novel problems, depend to varying degrees upon a lack of familiarity with the test items. Hence, there is a need to maintain test security to protect the uniqueness of these instruments. This is recognized in the Ethical Principles of Psychologists and Code of Conduct (American Psychological Association, 1992; Principle 2.1, Maintaining Test Security), which specify that these procedures are to be used only by psychologists trained in the use and interpretation of test instruments (APA Principles 2.01, 2.06, Unqualified Persons).

In the course of the practice of psychological and neuropsychological assessment, neuropsychologists may receive requests from attorneys for copies of test protocols, and/or requests to audio or videotape testing sessions. Copying test protocols, video and/or audiotaping a psychological or neuropsychological evaluation for release to a non-psychologist violates the Ethical Principles of Psychologists and Code of Conduct (APA, 1992), by placing confidential test procedures in the public domain (APA Principle 2.10), and by making tests available to persons unqualified to interpret them (APA Principles 2.02, 2.06). Recording an examination can additionally affect the validity of test performance (see NAN position paper on Third Party Observers). Such requests can also place the psychologist in potential conflict with state laws regulating the practice of psychology. Maintaining test security is critical, because of the harm that can result from public dissemination of novel test procedures. Audio- or video-recording a neuropsychological examination results in a product that can be disseminated without regard to the need to maintain test security. The potential disclosure of test instructions, questions, and items by replaying recorded examinations can enable individuals to determine or alter their responses in advance of actual examination. Thus, a likely and foreseeable consequence of uncontrolled test release is widespread circulation, leading to the opportunity to determine answers in advance, and to manipulation of test performance. This is analogous to the situation in which a student gains access to test items and the answer key for a final examination prior to taking the test.

Threats to test security by release of test data to non-psychologists are significant. Formal research (Coleman, Rapport, Millis, Ricker, & Farchione, 1998; Wetter & Corri-

gan, 1995; Youngjohn, 1995; Youngjohn, Lees-Haley, & Binder, 1999) confirms what is seemingly already evident: individuals who gain access to test content can and do manipulate tests and coach others to manipulate results, and they are also more likely to circumvent methods for detecting test manipulation. Consequently, uncontrolled release of test procedures to non-psychologists, via stenographic, audio or visual recording potentially jeopardizes the validity of these procedures for future use. This is critical in a number of respects. First, there is potential for great public harm (e.g., a genuinely impaired airline pilot, required to undergo examination, obtains a videotape of a neuropsychological evaluation, and produces spuriously normal scores; a genuinely non-impaired criminal defendant obtains a recorded examination, and convincingly alters performance to appear motivated on tests of malingering, and impaired on measures of memory and executive function). Second, should a test become invalidated through exposure to the public domain, redevelopment of a replacement is a costly and time consuming endeavor (note: restandardization of the most widely-used measures of intelligence and memory, the WAIS-III and WMS-III, cost several million dollars, took over five years to complete, and required testing of over 5000 cases). This can harm copyright and intellectual property interests of test authors and publishers, and deprive the public of effective test instruments. Invalidation of tests through public exposure, and the prospect that efforts to develop replacements may fail or, even if successful, might themselves have to be replaced before too long, could serve as a major disincentive to prospective test developers and publishers, and greatly inhibit new scientific and clinical advances.

If a request to release test data or a recorded examination places the psychologist or neuropsychologist in possible conflict with ethical principles and directives, the professional should take reasonable steps to maintain test security and thereby fulfill his or her professional obligations. Different solutions for problematic requests for the release of test material are possible. For example, the neuropsychologist may respond by offering to send the material to another qualified neuropsychologist, once assurances are obtained that the material will be properly protected by that professional as well. The individual making the original request for test data (e.g., the attorney) will often be satisfied by this proposed solution, although others will not and will seek to obtain the data for themselves. Other potential resolutions involve protective arrangements or protective orders from the court. (See the attached addendum for general guidelines for responding to requests).

In summary, the National Academy of Neuropsychology fully endorses the need to maintain test security, views the duty to do so as a basic professional and ethical obligation, strongly discourages the release of materials when requests do not contain appropriate safeguards, and, when indicated, urges the neuropsychologist to take appropriate and reasonable steps to arrange conditions for release that ensure adequate safeguards.

*The NAN Policy and Planning Committee*

*Bradley Axelrod, Ph.D.*

*Robert Heilbronner, Ph.D.*

*Jeffrey Barth, Ph.D., Chair*

*Glenn Larrabee, Ph.D.*

*David Faust, Ph.D.*

*Neil Pliskin, Ph.D., Vice Chair*

*Jerid Fisher, Ph.D.*

*Cheryl Silver, Ph.D.*



## REFERENCES

- American Psychological Association (1992). Ethical Principles of Psychologists and Code of Conduct. *The American Psychologist*, *47*, 1597–1611.
- Coleman, R. D., Rapport, L. J., Millis, S. R., Ricker, J. H., & Farchione, T. J. (1998). Effects of coaching on detection of malingering on the California Verbal Learning Test. *Journal of Clinical and Experimental Neuropsychology*, *20*(2), 201–210.
- Wetter, M. W., & Corrigan, S. K. (1995). Providing information clients about psychological tests: a survey of attorneys' and law students' attitudes. *Professional Psychology: Research and Practice*, *26*(5), 474–477.
- Youngjohn, J. R. (1995). Confirmed attorney coaching prior to neuropsychological examination. *Psychological Assessment*, *2*, 279–283.
- Youngjohn, J. R., Lees-Haley, P. R., & Binder, L. M. (1999). Comment: Warning malingerers produces more sophisticated malingering. *Archives of Clinical Neuropsychology*, *14*(6), 511–515.

## APPENDIX: HANDLING REQUESTS TO RELEASE TEST DATA, RECORDING AND/OR REPRODUCTIONS OF TEST DATA

*Please note that these are general guidelines that may not apply to your specific jurisdiction. It is recommended that all psychologists seek advice from personal counsel to determine if these guidelines are appropriate for their specific jurisdiction.*

1. Is the request in written form?  
If **yes**, go on to 2.  
If **no**, ask that the request be placed in written format.
2. Do you have a signed release from a competent patient?  
If **yes**, go on to 3.  
If **no**, obtain a signed release from the patient or, if the patient is not competent, from his or her legal guardian. (If competency is uncertain, e.g., the patient has deteriorated or competency has not been determined, an alternate course of action will be necessitated, e.g., contact the person who made the request and indicate you are not certain if the patient meets requirements to sign a release.)
3. Is the material to be released to a professional qualified to interpret the test data?  
If **yes**, go to 4.  
If **no**, go to 5.
4. Has the request included an assurance that test security will be maintained?  
If **yes**, release the material.  
If **no**, especially in certain circumstances (e.g., the psychologist is not known to you, litigation is ongoing), it may be prudent to ask for written assurance that test security will be maintained. The statement might indicate something like the following, "I agree to protect the test materials in accordance with the principles set forth in the APA Ethical Principles."
5. Is the request in the form of a subpoena (*not* a court order)?  
If **yes**, respond in a timely fashion by indicating that complying with the request to release test data under these circumstances places the psychologist in conflict with professional practice guides and ethical principles and places him/her at risk for serious professional sanctions due to the need to maintain test security. Sections of the "APA Ethical Principles" and/or of the NAN Test Security Position Statement can be provided. The need to protect test security can be explained, and proposed solutions can be presented such as release to a qualified professional who agrees to maintain test security. If this is not satisfactory, alternative arrangements can be proposed; for example, all parties given access to test data

can assent to enter into a written agreement that contains the elements for protection of test materials. Alternatively, the suggestion can be made that a court order be issued containing these elements, at which time the data will be released. If **no**, go on to 6.

6. Is the request in the form of a *court order* (i.e., signed by a judge)?

If **yes**, go to 7.

If **no**, the request should fall under one of the previously listed categories (e.g., an informal request, a subpoena), and the reader should consult that section.

7. Does the court order contain adequate provisions for maintaining test security?

If **yes**, release the material

If **no**, go to 8.

8. Does the court order require release to an unqualified individual?

If **yes**, go to 9.

If **no**, go to 10.

9. Court orders are expected to be obeyed in a timely fashion and failure to do so can place the professional in direct conflict with the law and at risk for serious penalties (e.g., award of attorney fees, contempt orders). If the court order does not appear to maintain adequate test security because it instructs release to a non-psychologist, possible options include:

- a. Respond to the court by immediately releasing the data, but at the same time request that appropriate safeguards be put in place to maintain test security. For example, the need to maintain test security might be, briefly described, the NAN Statement and/or sections of the APA Ethical Principles might be provided, and the following arrangements requested:

"I would ask that the test materials not be circulated beyond those directly involved in the case, that no unauthorized copies or reproductions be made, that the presentation of the test materials in the courtroom be minimized to the extent possible, that exhibits and courtroom records containing test materials be protected or sealed, and that all test materials be destroyed or returned upon the completion of the case".

- b. Seek personal counsel immediately from an attorney licensed within your jurisdiction, and, if counsel deems it appropriate, inform the court that the request to release test data creates a potential problem. A solution to the problem can be proposed as in 9.a. above.

10. Court orders are expected to be obeyed in a timely fashion and failure to do so can place the professional in direct conflict with the law and at risk for serious penalties (e.g., award of attorney fees, contempt orders). If the court order commands release to a qualified professional and contains adequate provisions for maintaining test security, release the material. If adequate provisions are not contained the same type of suggestions described under 9.a. or 9.b. can be presented. It is not recommended that you disobey a court order without seeking advice of personal counsel licensed within your jurisdiction.



# Presence of Third Party Observers During Neuropsychological Testing

## Official Statement of the National Academy of Neuropsychology

Approved 5/15/99

Forensic neuropsychological evaluations are often constrained by the demand that a third party observer be present during the course of interview and formal testing. This demand may originate from counsel's desire to ensure that the neuropsychologist does not interrogate or unfairly question the plaintiff with respect to issues of liability and to ascertain if test procedures are accurately administered. In general, neuropsychologists should have the right to carry out their examination in a manner that will not in any way jeopardize, influence or unduly pressure their normal practice.

The presence of a third party observer during the administration of formal test procedures is inconsistent with recommendations promulgated in The Standards for Educational and Psychological Testing (APA, 1985) and Anastasi (1988), that the psychological testing environment be distraction free. More recently, standardized test manuals (for example, The WAIS-III, WMS-III Technical Manual; The Psychological Corporation, 1997) have specifically stated that third party observers should be excluded from the examination room to keep it free from distraction. The presence of a third party observer in the testing room is also inconsistent with the requirements for standardized test administration as set forth in the APA's Ethical Principles Of Psychologists and Code Of Conduct (APA, 1992) in that it creates the potential for distraction and/or interruption of the examination (McSweeney et al., 1998).

A second issue that relates to the potential influence of the presence of a third party observer is the reliance upon normative data. Neuropsychological test measures have not been standardized in the presence of an observer. In fact, neuropsychological test measures have been standardized under a specific set of highly controlled circumstances that did not include the presence of a third party observer. The presence of a third party observer introduces an unknown variable into the testing environment which may prevent the examinee's performance from being compared to established norms and potentially precludes valid interpretation of the test results (McCaffrey, Fisher, Gold, & Lynch, 1996). Observer effects can be such that performance on more complex tasks declines, in contrast to enhanced performance on overlearned tasks, leading to a spuriously magnified picture of neuropsychological deficit (McCaffrey et al., 1996). Likewise, observation of an examination being conducted for a second opinion may fundamentally alter the test session, in comparison to the initial examination that the patient has already undergone, potentially creating an adversarial atmosphere, and increasing the risk of motivational effects related to secondary gain. Observer effects can be magnified by the presence of involved parties who have a significant relationship with the patient (e.g.

legal representatives who have a stake in the outcome of the examination; cf. Binder and Johnson-Greene, 1995). Thus, the presence of a third party observer during formal testing may represent a threat to the validity and reliability of the data generated by an examination conducted under these circumstances, and may compromise the valid use of normative data in interpreting test scores. Observer effects also extend to situations such as court reporters, attorneys, attorney representatives, viewing from behind one-way mirrors and to electronic means of observation, such as the presence of a camera which can be a significant distraction (McCaffrey et al., 1996). Electronic recording and other observation also raises test security considerations that are detailed in the National Academy of Neuropsychology's position statement on Test Security.

It should be noted that there are circumstances that support the presence of a neutral, non-involved party in nonforensic settings. One situation might be when students or other professionals in psychology observe testing as part of their formal education. These trainees have sufficient instruction and supervision in standardized measurement and clinical procedures, such that their presence would not interfere with the assessment process. Other situations might include a parent's calming presence during an evaluation of a child.

The weight of accumulated scientific and clinical literature with respect to the issue of third party observers in the forensic examination provides clear support for the official position of the National Academy of Neuropsychology that neuropsychologists should strive to minimize all influences that may compromise accuracy of assessment and should make every effort to exclude observers from the evaluation.

*The NAN Policy and Planning Committee*

*Bradley Axelrod, Ph.D.*

*Jeffrey Barth, Ph.D., Chair*

*David Faust, Ph.D.*

*Jerid Fisher, Ph.D.*

*Robert Heilbrunner, Ph.D.*

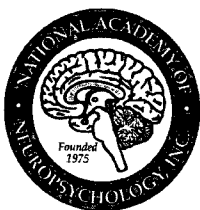
*Glenn Larrabee, Ph.D.*

*Neil Pliskin, Ph.D., Vice Chair*

*Cheryl Silver, Ph.D.*

## REFERENCES

- American Psychological Association (1985). *Standards for Educational and Psychological Testing*. Washington, DC: Author.
- American Psychological Association (1992). Ethical Principles of Psychologists and Code of Conduct. *The American Psychologist*, *47*, 1597-1611.
- Anastasi, A. (1988). *Psychological Testing* (6th ed.). New York: Macmillan Publishing Company.
- Binder, L. M., & Johnson-Greene, D. (1995). Observer effects on neuropsychological performance: A case report. *The Clinical Neuropsychologist*, *9*, 74-78.
- McCaffrey, R. J., Fisher, J. M., Gold, B. A., & Lynch, J. K. (1996). Presence of third parties during neuropsychological evaluations: Who is evaluating whom? *The Clinical Neuropsychologist*, *10*, 435-449.
- McSweeney, A. J., Becker, B. C., Naugle, R. I., Snow, W. G., Binder, L. M. & Thompson, L. L. (1998). Ethical issues related to third party observers in clinical neuropsychological evaluations. *The Clinical Neuropsychologist*, *12*(4), 552-559.
- The Psychological Corporation (1997). *The WAIS-III, WMS-III Technical Manual*. San Antonio: Author.



## Test Security: An Update

*Official Statement of the National Academy of Neuropsychology  
Approved by the NAN Board of Directors 10/13/2003*

### Introduction

The National Academy of Neuropsychology's first official position statement on *Test Security* was approved on October 5, 1999 and published in the Archives of Clinical Neuropsychology in 2000 (Volume 15, Number 5, pp. 383-386). Although this position statement has apparently served its intended purposes, questions have arisen regarding the potential impact of the 2002 revision of the APA Ethics Code (APA Ethical Principles of Psychologists and Code of Conduct, 2002) on the original position statement, which was based upon the 1992 APA Ethical Principles of Psychologists and Code of Conduct. The 2002 revised APA Ethics Code seems to necessitate no basic changes in the principles and procedures contained in the original *Test Security* paper, and requires only some alterations and clarification in wording. Specifically, the 2002 revised APA Ethics Code distinguishes between test data and test materials. According to Code 9.04:

Test data "refers to raw and scaled scores, client/patient responses to test questions or stimuli, and psychologists' notes and recordings concerning client/patient statements and behavior during the examination. Those portions of test materials that include client/patient responses are included in the definition of test data."

According to Code 9.11:

Test materials "refers to manuals, instruments, protocols, and test questions or stimuli and does not include test data" (as defined above).

Psychologists are instructed to release test data pursuant to a client/patient release unless harm, misuse, or misrepresentation of the materials may result, while being mindful of laws regulating release of confidential materials. Absent client/patient release, test data are to be provided only as required by law or court order. In contrast, psychologists are instructed to make reasonable efforts to maintain the integrity and security of test materials and other assessment techniques consistent with such factors as law and contractual obligations.

The distinction between test data and test materials increases conceptual clarity, and thus this language has been incorporated into the updated *Test Security* position statement that follows. Beyond this change, we do not believe that the 2002 revision of the APA Ethics Code calls for additional changes in the guidelines contained in the original *Test Security*

paper. That is, if a request is made for test materials, the guidelines in the original position paper remain fully applicable. Further, despite the intended distinction between test materials and test data and the differing obligations attached to each, a request for test data still appears to necessitate the safeguards described in the original position statement in most circumstances in which neuropsychologists practice. The release pursuant to client/patient consent alone is still likely to conflict not only with the NAN original Test Security position statement, but also with one or both of 2002 revised APA Ethics Codes 9.04 and 9.11. This is because release of test responses without the associated test materials often has the potential to mislead (and is also often impractical given the manner in which test responses are often embedded in test materials). Further, in many cases, test data and test materials overlap, given the current state of many neuropsychological test forms, and thus to release the test data is to release the test materials. In other cases, test materials might easily be inferred from test data, and although release of the data might not technically violate the 2002 revised APA Ethics Code 9.11, it may well violate the intent of the guideline. Thus, even if requirements are met under 9.04, such test release may well still conflict with the procedures or principles articulated in 9.11.

Thus, requests not only for release of test materials (manuals, protocols, and test questions, etc.), but also for certain test data (test scores or responses where test questions are embedded or can be easily inferred) will typically fall under the guides and cautions contained in the original and restated Test Security position papers. True raw test scores or calculated test scores that do not reveal test questions, do not require such test security protection. It is unfortunate that the new 2002 revised APA Ethics Code, while clearly attempting, and for the most part achieving, clarity in endorsing the release of raw and scaled test scores, test answers, and patient responses, does not address the very practical problem of releasing data which imply or reveal test questions. This is not a trivial concern when state licensure board ethics committees may be forced to investigate charges that relate to such ambiguities. Until such clarifications are offered by APA, we suggest a conservative approach that protects these imbedded and inferred questions, and treating them as one would test materials as proffered by the NAN Revised Test Security Paper below. Further revisions of the NAN Test Security guidelines will follow any clarifications by APA of the Ethics Code.

#### Revised Test Security Paper

A major practice activity of neuropsychologists is the evaluation of behavior with neuropsychological test procedures. Many tests, for example, those of memory or ability to solve novel problems, depend to varying degrees on a lack of familiarity with the test items. Hence, there is a need to maintain test security to protect the uniqueness of these instruments. This is recognized in the 1992 and 2002 Ethical Principles of Psychologists and Code of Conduct (APA, 1992; Code 2.1, and APA, 2002; Code 9.11, Maintaining Test Security), which specify that these procedures are to be used only by psychologists trained in the use and interpretation of test instruments (APA, 1992; Codes 2.01, 2.06; Unqualified Persons; and APA, 2002; Code 9.04; Release of Test Data).

In the course of the practice of psychological and neuropsychological assessment, neuropsychologists may receive requests from attorneys for copies of test protocols, and/or requests to audio or videotape testing sessions. Copying test protocols, video and/or audio taping a psychological or neuropsychological evaluation for release to a non-psychologist potentially violates the Ethical Principles of Psychologists and Code of Conduct (APA, 1992; APA, 2002), by placing confidential test procedures in the public domain (2.10), and by making tests available to persons unqualified to interpret them (APA, 1992; Codes 2.02, 2.06 and 2.10; APA, 2002; Codes 9.04 and 9.11). Recording an examination can additionally affect the validity of test performance (see NAN position paper on Third Party Observers). Such requests can also place the psychologist in potential conflict with state laws regulating the practice of psychology. Maintaining test security is critical, because of the harm that can result from public dissemination of novel test procedures. Audio- or video recording a neuropsychological examination results in a product that can be disseminated without regard to the need to maintain test security. The potential disclosure of test instructions, questions, and items by replaying recorded examinations can enable individuals to determine or alter their responses in advance of actual examination. Thus, a likely and foreseeable consequence of uncontrolled test release is widespread circulation, leading to the opportunity to determine answers in advance, and to manipulate test performances. This is analogous to the situation in which a student gains access to test items and the answer key for a final examination prior to taking the test.

Threats to test security by release of test data to non-psychologists are significant. Research confirms what is seemingly already evident: individuals who gain access to test content can and do manipulate tests and coach others to manipulate results, and they are also more likely to circumvent methods for detecting test manipulation (Coleman, Rapport, Millis, Ricker and Farchione, 1998; Wetter and Corrigan, 1995; Youngjohn, 1995; Youngjohn, Lees-Haley & Binder, 1999). Consequently, uncontrolled release of test procedures to non-psychologists, via stenographic, audio or visual recording potentially jeopardizes the validity of these procedures for future use. This is critical in a number of respects. First, there is potential for great public harm (For example, a genuinely impaired airline pilot, required to undergo examination, obtains a videotape of a neuropsychological evaluation, and produces spuriously normal scores; a genuinely non-impaired criminal defendant obtains a recorded examination, and convincingly alters performance to appear motivated on tests of malingering, and impaired on measures of memory and executive function). Second, should a test become invalidated through exposure to the public domain, redevelopment of a replacement is a costly and time consuming endeavor (note: restandardization of the many measures of intelligence and memory, the WAIS-III and WMS-III, cost several million dollars, took over five years to complete, and required testing of over 5000 individuals). This can harm copyright and intellectual property interests of test authors and publishers, and deprive the public of effective test instruments. Invalidation of tests through public exposure, and the prospect that efforts to develop replacements may fail or, even if successful, might themselves have to be replaced before too long, could serve as a major disincentive to prospective test developers and publishers, and greatly inhibit scientific and clinical advances.

If a request to release test data or a recorded examination places the psychologist or neuropsychologist in possible conflict with ethical principles and directives, the professional should take reasonable steps to maintain test security and thereby fulfill his or her professional obligations. Different solutions for problematic requests for the release of test material are possible. For example, the neuropsychologist may respond by offering to send the material to another qualified neuropsychologist, once assurances are obtained that the material will be properly protected by that professional as well. The individual making the original request for test data (e.g., the attorney) will often be satisfied by this proposed solution, although others will not. Other potential resolutions involve protective arrangements or protective orders from the court. (See the attached addendum for general guidelines for responding to requests).

In summary, the National Academy of Neuropsychology fully endorses the need to maintain test security, views the duty to do so as a basic professional and ethical obligation, strongly discourages the release of materials when requests do not contain appropriate safeguards, and, when indicated, urges the neuropsychologist to take appropriate and reasonable steps to arrange conditions for release that ensure adequate safeguards.

NAN Policy and Planning Committee

Jeffrey Barth, Ph.D., Chair

Neil Pliskin, Ph.D., Vice-Chair

Sharon Arffa, PhD

Bradley Axelrod, Ph.D.

Lynn Blackburn, PhD

David Faust, Ph.D.

Jerid Fisher, Ph.D.

J. Preston Harley, PhD

Robert Heilbronner, Ph.D.

Glenn Larrabee, Ph.D.

Antonio Puente, PhD

William Perry, Ph.D.

Joseph Ricker, PhD

Cheryl Silver, Ph.D.



# Exhibit M

# Exhibit M

**Teri F. Belmont, Ph.D.**  
Licensed Psychologist, Nevada  
PY0551

1489 West Warm Springs Road, Suite 110  
Henderson, Nevada 89014  
p 702.595.2731  
[drteribeltmont@live.com](mailto:drteribeltmont@live.com)  
[www.drteribeltmont.com](http://www.drteribeltmont.com)

October 5, 2018

Supreme Court Clerk's Office  
201 South Carson Street  
Carson City, Nevada 89701

ADLT 0522

**FILED**

OCT 09 2018

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY *[Signature]*  
CHIEF DEPUTY CLERK

**RE: Proposed Amendment to Nevada Civil Procedure Rule 35 (Physical and Mental Examinations)**

I am a licensed psychologist in the state of Nevada. As part of my practice I administer psychological and neuropsychological measures to individuals. I am well versed in the standards and practices for the administration of such examinations.

I have additionally studied and trained in the administration of psychological and neuropsychological measures in civil forensic contexts for nearly 20 years, and my doctoral dissertation (Forrest, 2006) focused specifically on the influence of instruction set and test format on the detection of malingering.

I have offered independent psychological and neuropsychological services since 2010 in cases in venues including the Clark County District Court, United States District Court for Nevada, and the Superior Court of the State of California, County of Riverside.

I stand in strong opposition to the proposed amendment to Nevada Civil Procedure Rule 35, which would permit third-party observation and/or recording of psychological and neuropsychological evaluations, and in solidarity with my psychologist colleagues and state psychological organizations, including the Nevada Psychological Association (NPA) and the Nevada State Board of Psychological Examiners (NBOP), who also oppose the proposed amendment.

NPA and NBOP have already submitted position statements that provide excellent overviews of the many possible deleterious effects of the proposed amendment, if adopted, which include decreased patient disclosure, compromises to test validity, aberrations in and invalidity of test performance as a result of social facilitation and observer effects, and long-term risks to test security and the public.

Additionally, the National Academy of Neuropsychology has published Official Statements regarding the presence of third party observers during neuropsychological testing (NAN, 2000) and test security (NAN, 2000; updated in 2003 to address the 2002 revision of the 1992 APA Ethical Principles of Psychologists and Code of Conduct). The American Academy of Clinical Neuropsychology has also published a policy statement on the presence of third party observers in neuropsychological assessments (AACN, 2001). All of these papers discuss the myriad threats posed to the utility of our measures by third party observation and reflect the consensus in our profession that "neuropsychologists should strive to minimize all influences that may compromise accuracy of assessment and should make every effort to exclude observers from the evaluation" (NAN, 2000).

I would like to speak in more depth to one specific possible deleterious effect of this proposed amendment – the risks of exposing confidential testing and assessment procedures to non-psychologists who are not trained in or experienced with administration of neuropsychological and psychological tests. Such exposure will ultimately harm the public, not just in Nevada but throughout the United States, by undermining the future validity and utility of these tests.

RECEIVED  
OCT 09 2018  
ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
DEPUTY CLERK

App0115

18-39129

As an example, the increasing frequency in which individuals engage in civil litigation, and in that context undergo neuropsychological evaluation, also increases the possibility that plaintiffs may receive trade-secret test information from their attorneys prior to evaluation in order to maximize their ability to appear injured. My own doctoral research (Forrest, 2006) examined the performance of individuals with brain damage (via archival data), normal control participants, and individuals sorted into three groups on two common neuropsychological measures. These three groups differed as to the extent of prior coaching they were given specifically regarding the nature, content, and requirements of one of those measures.

My results suggested that individuals given the most explicit coaching about that measure were able to produce more believable performances indicative of brain injury than individuals in the other groups and that a priori knowledge about neuropsychological measures may be able to bolster an individual's ability to produce such believable performance indicative of brain injury. I also found that explicitness of coaching generalized from one test to the other, such that individuals given explicit instruction on one test performed better than other groups on the second test, although they were given no explicit instruction regarding the second test.

I noted that my findings suggested that "with the aid of a neuropsychologically sophisticated attorney, litigants may be coached on... potentially any... neuropsychological or psychological measure... to the extent that they are able to perform more like truly brain-damaged individuals for the purpose of receiving the remuneration they seek. These findings suggest that neuropsychologists should be aware that examinees presenting to them in the context of civil litigation may not be truly impaired but may have been thoroughly coached on symptoms and tests ahead of time. These findings also suggest that psychologists should renew or enhance efforts to protect trade-secret psychological testing information not only from attorneys, but from laypersons in general." This research represents only a single demonstration of how readily the validity and utility of our tests and measures may be significantly compromised by an individuals' prior exposure to them.

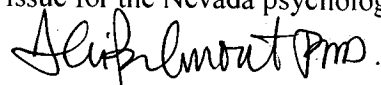
The sum of the canon of ethics for our profession obligates me to refuse to perform an examination that would be observed or recorded. Recording under the proposed amendment would violate these standards, and I am ethically bound to protect the security of testing materials and methods.

If asked or ordered to conduct a psychological or neuropsychological examination that would be observed and/or recorded by a third party, I will be obligated to decline to perform the examination at all or else perform an examination that does not include administration of standardized psychological or neuropsychological tests. It is my understanding that other reputable Nevada psychologists would act similarly. In this sense, requiring that a psychological or neuropsychological examination be observed and/or recorded by a third party would eliminate all psychologists from participating in judicial matters due to these ethical and test security concerns. This would have a deleterious effect on the courts' ability to adequately adjudicate cases involving claims of cognitive and emotional damages.

In sum, the proposed amendment to Rule 35, if adopted, would serve to decimate our profession, likely across the entire United States, by compromising the validity and utility of the psychological and neuropsychological measures we share with all of our colleagues and rely upon to make valid, informed assessments of our clients and patients.

Please find attached a list of relevant references, as well as complete copies of the most relevant position and consensus statements.

I thank you for your time spent in reviewing this letter and your careful consideration in this extremely significant issue for the Nevada psychological community.



Teri F. Belmont, Ph.D.  
Licensed Psychologist

## References

- American Academy of Clinical Neuropsychology (2001). *Policy Statement on the Presence of Third Party Observers in Neuropsychological Assessments*. Retrieved from <https://www.tandfonline.com/doi/abs/10.1076/clin.15.4.433.1888>.
- American Psychological Association (2017). *Ethical Principles of Psychologists and Code of Conduct*. Retrieved from <https://www.apa.org/ethics/code/index.aspx>.
- National Academy of Neuropsychology (2000). *Test Security: Official Position Statement of the National Academy of Neuropsychology*. Retrieved from <https://www.nanonline.org/docs/PAIC/PDFs/NANPositionSecurity.pdf>.
- National Academy of Neuropsychology (2000). *Presence of Third Party Observers During Neuropsychological Testing: Official Statement of the National Academy of Neuropsychology*. Retrieved from <https://www.nanonline.org/docs/PAIC/PDFs/NANPositionThirdParty.pdf>.
- National Academy of Neuropsychology (2003). *Test Security: An Update*. Retrieved from <https://www.nanonline.org/docs/PAIC/PDFs/NANTestSecurityUpdate.pdf>.
- Forrest, T.J. (2006). The influence of instruction set and test format on the detection of malingering. *Dissertation Abstracts International*, 67 (05). (UMI No. AAT 3215874)



## SPECIAL PRESENTATION

# Policy Statement on the Presence of Third Party Observers in Neuropsychological Assessments\*

American Academy of Clinical Neuropsychology

### Purpose

The purpose of this policy is to clarify what is the appropriate response of a clinical neuropsychologist when a request is received for the presence of a third party during a medicolegal consultation and patient examination.

### Definitions

For the purposes of this policy, two classes of third party observers are recognized, viz., involved and uninvolved parties.

Involved third parties are those who, directly or indirectly, have some stake in the outcome of an examination of a particular plaintiff in civil litigation. This stake may derive from a legal, financial, family, social, or other relationship or benefit. Involved parties may or may not be known or familiar to the plaintiff patient. For example, an unfamiliar agent of the plaintiff's attorney would be deemed an involved party for the purposes of this policy.

Uninvolved third parties have no stake in the outcome of a plaintiff patient's examination, directly or indirectly. Instead, uninvolved third parties do have an interest in the behavior of the examiner or in the examination process or in the behavior of the patient during the assessment as an exemplar of such relevant entities as a disease (e.g., cerebrovascular disease, closed-head injury), a condition (e.g., dementia, aphasia), or a phenomenon (e.g., visual neglect, right hemi-

paresis), or others (e.g., malingering, manifestations of personality disorders). An uninvolved third party does not have an interest in the particular individual who serves as the exemplar. The purpose of the presence of uninvolved parties generally is to learn about or practice the administration of neuropsychological tests, procedures, interviews, and so forth, and to observe how patients respond to the administration of such tests or to receive critical feedback concerning their performance in the role of an examiner. Uninvolved parties include health-care professionals and student professionals, for example, student neuropsychologists, other student psychologists, student psychometrists, and cognate professionals or technical personnel.

### Medicolegal Consultations

#### *Scope of Application*

The context for this policy pertains to medicolegal consultations in which the consulting clinical neuropsychologist is being asked to formulate professional opinions about a patient's condition within their area of expertise in the specialty of clinical neuropsychology in relation to tort litigation, or related insurance benefits involving third parties. This policy is not intended for application to clinical (medical) consultations in which the clinical neuropsychologist has direct responsibility for the assessment, diagnosis, or treatment of

---

\*Members of the Task Force were: Kerry Hamsher, Ph.D. (Chair), Gregory P. Lee, Ph.D., and Ida Sue Baron, Ph.D. Address correspondence to: American Academy of Clinical Neuropsychology, Department of Psychiatry (B2954, CFOB), University of Michigan Health Systems, 1500 East Medical Center Drive, Ann Arbor, MI 48109-0704, USA. Accepted for publication: August 2, 2001.

the patient. Likewise, this policy is not intended for application to criminal forensic consultations that involve issues of criminal liability or culpability because the right to legal representation and a third party observer is absolute in criminal matters.

### *Policy*

It is not permissible for involved third parties to be physically or electronically present during the course of an evaluation assessment of a plaintiff patient with the exception of those situations specified below.

### *Exceptions*

In the case of toddlers and young children, when their physical separation from the parental or caretaker figure results in, or is known to result in, a behavioral reaction (e.g., disruptive behavior, dysphoric state, social withdrawal) such as to invalidate the outcome of a neuropsychological or neurobehavioral assessment, it may be permissible to allow the caretaker (e.g., parent) to be physically present, at least initially until rapport is established, if this exception results in the cessation or mollification of the behavioral reaction or otherwise allows more useful assessment data to be obtained. For example, it might be facilitative to allow a family member, who may otherwise have a distorting influence, to be present in the testing room when a child simply will not stay in the examination room without that family member.

Likewise, so long as the latter principle obtains, viz., it would allow more useful assessment data to be obtained in the professional opinion of the clinical neuropsychologist, this exception may be extended to certain cases involving older children and adult patients with extreme behavioral disturbances, for example, severe mental illness, delirium.

When the circumstances are such that the presence of an involved third party may have both a potentially distorting and a potentially facilitating influence on the collection of assessment data, it shall be the sole responsibility of the clinical neuropsychologist employing their best clinical judgment to determine whether or not to proceed with the assessment of the plain-

tiff patient on the particular occasion. As always, it remains incumbent upon the clinical neuropsychologist to make known any limitation regarding the reliability and validity of their conclusions and other professional opinions.

### **Fundamental Issue**

The fundamental issue with which this policy is concerned is the validity of the results obtained from a clinical neuropsychological assessment process. As a general principle, it is important that the clinical neuropsychologist not deviate from their ordinary clinical practices when called upon to do the same in the execution of an evaluation or in their treatment of a plaintiff patient. The greatest degree of validity is understood to be obtained when the patient is motivated to cooperate with the examiner by performing in an optimal fashion in compliance with instructions, and in a candid or unbiased fashion, and that this occurs in the context of a controlled environment simulating or comporting with psychological laboratory conditions.

The presence of an involved third party observer potentially introduces a distortion of the patient's motivation, behavioral self-selection, and rapport with the examiner(s). For example, the patient's rapport may be more attached to, and their behavior at least somewhat directed toward, the involved third party. This introduces threats to the validity of the neuropsychological evaluation in ways potentially unknown to, and perhaps not perceptible by, the examiner.

Because the surreptitious eavesdropping on a patient during an examination or treatment is ethically proscribed, the mere displacement of the involved third party from the examination room to a remote site does neither necessarily eliminate nor lessen the above described threats to the validity of the obtained psychometric or other evaluation data upon which the clinical neuropsychologist will rely in formulating their professional opinions. That is, a stealthy presence via such mechanisms as a one-way mirror, audio monitoring, video monitoring, or audiovisual monitoring, does not constitute a tolerable exception to the above-stated policy.

## DOCUMENTARY SUPPORT

**Observer Adverse Effects**

The presence of an involved third party observer during the neuropsychological examination may distract the examinee or distort patient motivation which could adversely affect test performance.

The distraction effect can come in different forms, that is, as an external distraction or an internal distraction, or some combination thereof. External distractions refer to stimuli that arise external to the patient and are potentially observable. These include, for example, sights and sounds. Under sights, the distracting stimuli could be simple physical movements, such as the involved third party observer turning their head in anticipation of a cough or sneeze. Also, the distracting visual stimuli could be more complex, such as postures ('body language') or facial expressions. Although it would be a wholly unsatisfactory solution, as discussed below, removal of the involved third party from the examination room may greatly reduce the source of external distractions. Internal distractions, on the other hand, generally are not directly observable as they arise from within the patient. These involve such stimuli as perceptions, attitudes, and social expectations on the part of the patient. For example, given that it appears that the financial rewards of a lawsuit may increase in some proportion to the severity of subjective complaints or claimed disabilities on the part of the patient, and knowing they are being observed by a representative of their own attorney, a patient may behave during the period of involved third party observation (by whatever means, including remotely) in such a way as they perceive would please this involved observer. Or the patient may suffer internal distraction from simply wondering how the involved third party observer is evaluating their behavior and test performance rather than being fully focused on the task at hand, (e.g., if an involved third party observer were to insist on access to such observation, it would be reasonable for the patient to assume that how they behaved during observation was particularly important to the involved third party). In regard to internal distractions, the use of remote observation by

audio or visual monitoring or videotaping does not greatly reduce the source of this type of distraction.

Psychologists are obligated to create a testing environment relatively free of distractions. Standard 15.2 of the *Standards for Educational and Psychological Testing* (American Educational Research Association, 1985) states, "The testing environment should be one of reasonable comfort and with minimal distractions" (p. 83).

The *Standards for Educational and Psychological Testing* also direct psychologists to follow the procedures for administration specified by the publisher in the test manual: "In typical situations, test administrators should follow carefully the standardized procedures for administration and scoring specified by the test publisher" (Standard 15.1, p. 83). The *Wechsler Adult Intelligence Scale - III, Administration and Scoring Manual* (Wechsler, 1997) specifically states that involved third parties should be excluded from the testing area:

As a rule, no one other than you and the examinee should be in the room during the testing. Attorneys who represent plaintiffs sometimes ask to observe but typically withdraw this request when informed of the potential effect of the presence of a third person. (p. 29)

An almost identical statement against the presence of an involved third person is presented on page 30 of the *Wechsler Memory Scale - III, Administration and Scoring Manual* (Wechsler, 1997).

In her authoritative work, *Neuropsychological Assessment, Third Edition*, (1995) Lezak notes that distractions in the testing environment adversely affect performance, and thus, jeopardize the validity of a neuropsychological assessment. She states:

It is not difficult to get a patient to do poorly on a psychological examination. This is especially true of brain damaged patients, for the quality of their performance can be exceedingly vulnerable to external influences or changes in their internal states. All an examiner need do is make these patients

tired or anxious, or subject them to any one of a number of distractions most people ordinarily do not even notice, and their test scores will plummet. . .

Eliciting the patient's maximum output is necessary for a valid behavioral assessment. Interpretation of test scores and of test behavior is predicated on the assumption that the demonstrated behavior is a representative sample of the patient's true capacity in that area. (pp. 139–140)

Binder and Johnson-Greene (1995) demonstrated the negative effect that an involved observer had on test performance in a single case study. McSweeney, Becker, Naugle, Snow, Binder, and Thompson (in press) have detailed many of the ethical implications of the use of third party observers. Some of the adverse effects of observers on test performance have been systematically investigated in a body of literature that has come to be known as social facilitation research. McCaffrey, Fisher, Gold, and Lynch (1996) summarized the recent literature on social facilitation in their article on the presence of third party observers during neuropsychological evaluations. The social facilitation literature provides empirical evidence that the presence of a third party observer can alter cognitive and motor test performance whether or not the patient has a brain injury or disease.

The social facilitation effect causes examinees to perform better than usual on tests of simple or overlearned skills and poorer on tasks that are more difficult for them (McCaffrey et al., 1996). These adverse effects have been shown to occur even when the observer is behind a one-way mirror. Although there are no studies at present that demonstrate a social facilitation effect during video or audio taping, these alternatives to the physical presence of an observer in the room raise other important ethical and professional concerns (such as, problems involving test security, allowing testing materials to become part of the public domain, or potential misuse of assessment results by third parties for purposes unrelated to the current case).

### Test Administration and Interpretation

Psychological and neuropsychological tests have not been standardized in the presence of involved third party observers, and thus, it is inappropriate to compare the examinee's results to the normative results from the standardization sample. Departure from a standardized testing procedures may diminish the utility of the normative data. Thus, any factor that compromises the standard administration of a neuropsychological test may jeopardize the validity and reliability of the test's findings.

In a highly regarded book on the nature and use of psychological and neuropsychological tests, Anastasi (1988) stresses the importance of test standardization, "Standardization implies uniformity of procedure in administering and scoring the test. If the scores obtained by different persons are to be comparable, testing conditions must obviously be the same for all. Such a requirement is only a special application of the need for controlled conditions in all scientific observations. In a test situation, the single independent variable is often the individual being tested." (p. X).

The *Standards for Educational and Psychological Testing* (American Educational Research Association, 1985) stress the importance of following standardized procedures in Standard 15.1,

In typical applications, test administrators should follow carefully the standardized procedures for administration and scoring specified by the test publisher. Specifications regarding instructions to test takers, time limits, the form of item presentation or response, and test materials or equipment should be strictly observed. Exceptions should be made only on the basis of carefully considered professional judgment, primarily in clinical applications. (p. 83)

In the American Psychological Association's ethical principles of psychologists (American Psychological Association, 1992), ethical standard 2.04(c) *Use of Assessment in General with Special Populations* states in part, "Psychologists attempt to identify situations in which particular interpretations or assessment techniques or norms may not be applicable or may require adjustment



in administration or interpretation because of factors such as..." Because no norms exist for testing in the presence of involved third parties, misinterpretation of test results may be common, and psychologists should be aware of the potential ethical difficulties involved in interpretation of test results under these circumstances.

If an involved third party were present during a neuropsychological examination, neuropsychologists should include in their report any concerns regarding limitations that this places on interpretation. This is made clear in ethical standard 2.05, *Interpreting Assessment Results*:

When interpreting assessment results, including automated interpretations, psychologists take into account the various test factors and characteristics of the person being assessed that might affect psychologists' judgements or reduce the accuracy of their interpretations. They indicate any significant reservations they have about the accuracy or limitations of their interpretations.

Ethical principle 2.02 (a), *Competence and Appropriate Use of Assessments and Interventions*, states, "Psychologists who develop, administer, score, interpret, or use psychological assessment techniques, interviews, tests, or instruments do so 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." Thus, psychologists should be aware that the presence of an involved third party may alter the validity of test results and either refuse to administer tests under these circumstances or alter their interpretations if an observer has been present. The presence of an involved third party may especially impact on determinations made about the integrity of brain function, change over time intervals, and effects of treatment in individuals prone to easy disruption of function such as those with neurological conditions.

### Test Security

Involved third party observers may undermine the neuropsychologist's ethical responsibility to

maintain test security. This ethical principle is most clearly presented in Ethical Standard 2.10, *Maintaining Test Security* (American Psychological Association, 1992):

Psychologists make reasonable efforts to maintain the integrity and security of tests and other assessment techniques consistent with law, contractual obligations, and in a manner that permits compliance with the requirements of this code.

The same principle is also delineated in the *Standards for Educational and Psychological Testing* (1985). Standard 15.7 states that, "Test users should protect the security of test materials." These standards would be applicable whether the observation occurred in the testing room, behind a one-way mirror, or through audio or video monitoring or recording.

### Test Misuse

The neuropsychologist has little or no control over how an involved third party observer will use the content of testing in the present or future cases. This lack of control over the data generated during a neuropsychological assessment may be incompatible with our ethical responsibilities. The American Psychological Association's (1992), Ethical Standard, 1.16, *Misuse of Psychologists' Work* states, "Psychologists do not participate in activities in which it appears likely that their skills or data will be misused by others, unless corrective mechanisms are available."

Involved third party observers could take notes and record specific test questions and answers to be used in preparing or coaching future litigants with neuropsychological claims. Moreover, poor performances could be misinterpreted by the third party resulting in incorrect conclusions. All these difficulties which could arise from the presence of an involved observer could result in a potential conflict with Ethical Standard, 2.02 (b), *Competence and Appropriate Use of Assessments and Interventions*:

Psychologists refrain from misuse of assessment techniques, interventions, results, and interpretations and take reasonable steps to

prevent others from misusing the information these techniques provide. This includes refraining from releasing raw test results or raw data to persons, other than to patients or clients as appropriate, who are not qualified to use such information.

As with the problem of test security, potential test misuse may occur regardless of the method of observation (i.e., actual presence in the same room, behind a one-way mirror, or audio or video monitoring/recording).

### Responsibility in Forensic Situations

Because the presence of an involved third party observer is most commonly requested within a medicolegal context, several ethical principles may help to guide neuropsychologist's decisions regarding this issue. Ethical standard, 7.06, *Compliance with Law and Rules*, appears to indicate that it is the responsibility of the neuropsychologist to inform lawyers, judges, and others that the presence of an involved third party observer represents a potential ethical conflict. Ethical standard, 7.06, *Compliance with Law and Rules*, states:

In performing forensic roles, psychologists are reasonably familiar with the rules governing their roles. Psychologists are aware of the occasionally competing demands placed upon them by these principles and the requirements of the court system, and attempt to resolve these conflicts by making known their commitment to this Ethics Code and taking steps to resolve the conflict in a responsible manner.

In a similar vein, Ethical Standard, 1.02, *Relationship of Ethics and Law*, explicitly explains that, "If psychologists' ethical responsibilities conflict with law, psychologists make known their commitment to the Ethics Code and take steps to resolve the conflict in a responsible manner."

Confidentiality may also encompass the issue of involved third party observers. Ethical standard, 5.02, *Maintaining Confidentiality*, states that "psychologists have a primary obligation and take reasonable precautions to respect the con-

fidentiality rights of those with whom they work or consult..." Neuropsychologists need to communicate the potential limitations to confidentiality with all parties involved but especially with the patient.

Ethical standard, 7.01, *Professionalism*, informs the psychologist that the APA Ethics Code applies to the atypical professional activities that take place within the forensic context. Standard 7.01 states in part, "Psychologists who perform forensic functions, such as assessments, interviews, consultations, reports, or expert testimony, must comply with all other provisions of this Ethics Code to the extent that they apply to such work activities." This ethical standard makes clear that all ethical issues raised by the presence of an involved third party are applicable whether or not the neuropsychological assessment occurs in a forensic setting.

Ethical standard, 7.04, *Truthfulness and Candor*, emphasizes the need to communicate the bases for conclusions as well as any threats to the validity of an examination when an involved third party has been an observer.

7.04 (a) "In forensic testimony and reports, psychologists testify truthfully, honestly, and candidly and, consistent with applicable legal procedures, describe fairly the bases for their testimony and conclusions."

7.04 (b) "Whenever necessary to avoid misleading, psychologists acknowledge the limits of their data or conclusions."

### REFERENCES

- American Educational Research Association, American Psychological Association, and National Council on Measurement in Education. (1985). *Standards for educational and psychological testing*. Washington, DC: American Psychological Association.
- American Psychological Association. (1992). Ethical principles of psychologists and code of conduct. *American Psychologist*, 47, 1597-1611.
- Anastasi, A. (1988). *Psychological testing*, (6th ed.). New York: MacMillan.
- Binder, L., & Johnson-Greene, D. (1995). Observer effects on neuropsychological performance: A case report. *The Clinical Neuropsychologist*, 9, 74-78.

- Lezak, M.D. (1995). *Neuropsychological assessment* (3rd ed.). New York: Oxford University Press.
- McCaffrey, R.J., Fisher, J.M., Gold, B.A., & Lynch, J.K. (1996). Presence of third parties during neuropsychological evaluations: Who is evaluating whom? *The Clinical Neuropsychologist*, 10, 435-449.
- McSweeney, A.J., Becker, B.C., Naugle, R.I., Snow, W.G., Binder, L. M., & Thompson, L.L. (in press). Ethical issues related to the presence of third-party observers in clinical neuropsychological evaluations. *The Clinical Neuropsychologist*.
- Wechsler, D. (1997). *Wechsler Memory Scale – third edition, administration and scoring manual*. San Antonio, TX: The Psychological Corporation, Harcourt Brace & Company.

# Exhibit N

# Exhibit N

**MINUTES OF THE MEETING  
OF THE  
ASSEMBLY COMMITTEE ON JUDICIARY**

**Eightieth Session  
March 27, 2019**

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

**COMMITTEE MEMBERS PRESENT:**

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

**COMMITTEE MEMBERS ABSENT:**

None

**GUEST LEGISLATORS PRESENT:**

None



**STAFF MEMBERS PRESENT:**

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

**OTHERS PRESENT:**

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

**Chairman Yeager:**

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

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

**Alison Brasier, representing Nevada Justice Association:**

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

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

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

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

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

**Graham Galloway, representing Nevada Justice Association:**

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

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

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

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

**George T. Bochanis, representing Nevada Justice Association:**

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

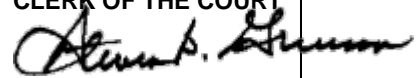
What I would like to discuss with you are the two components of this bill. The first is that we are requesting that an observer be present during these types of insurance company evaluator examinations. That observer can be anyone; it can be a spouse, parent, friend, or it could be the person's attorney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



DISTRICT COURT  
CLARK COUNTY, NEVADA

\*\*\*\*

Electronically Filed  
10/8/2021 8:49 AM  
Steven D. Grierson  
CLERK OF THE COURT



Douglas Kennedy, Plaintiff(s)  
vs.  
Gabriel Martinez, Defendant(s)

Case No.: A-20-820254-C  
Department 15

**NOTICE OF HEARING**

Please be advised that the Defendants' Motion for Rule 35 Examination in the above-entitled matter is set for hearing as follows:

**Date:** December 03, 2021  
**Time:** 9:30 AM  
**Location:** RJC Level 5 Hearing Room  
Regional Justice Center  
200 Lewis Ave.  
Las Vegas, NV 89101

**NOTE: Under NEFCR 9(d), if a party is not receiving electronic service through the Eighth Judicial District Court Electronic Filing System, the movant requesting a hearing must serve this notice on the party by traditional means.**

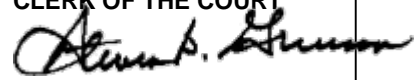
STEVEN D. GRIERSON, CEO/Clerk of the Court

By: /s/ Chaunte Pleasant  
Deputy Clerk of the Court

**CERTIFICATE OF SERVICE**

I hereby certify that pursuant to Rule 9(b) of the Nevada Electronic Filing and Conversion Rules a copy of this Notice of Hearing was electronically served to all registered users on this case in the Eighth Judicial District Court Electronic Filing System.

By: /s/ Chaunte Pleasant  
Deputy Clerk of the Court



MICHAEL P. LOWRY, ESQ.

Nevada Bar No. 10666

E-mail: [Michael.Lowry@wilsonelser.com](mailto:Michael.Lowry@wilsonelser.com)

CHRISTOHPER J. RICHARDSON, ESQ.

Nevada Bar No. 9166

E-mail: [Chris.Richardson@wilsonelser.com](mailto:Chris.Richardson@wilsonelser.com)

6689 Las Vegas Blvd. South, Suite 200

Las Vegas, Nevada 89119

Tel: 702.727.1400/Fax: 702.727.1401

Attorneys for Gabriel L. Martinez;

Universal Protection Services, LLC

**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

DOUGLAS J. KENNEDY, an individual; and  
LORI KENNEDY, an individual,

Plaintiffs,

vs.

GABRIEL L. MARTINEZ, an Individual;  
UNIVERSAL PROTECTION SERVICES,  
LLC d/b/a ALLIED UNIVERSAL SECURITY  
SERVICES, a Foreign Limited Liability  
Company; DOE Family Members 1-10; DOE  
Individuals 11-20; and ROE Corporations 21-  
30, Inclusive,

Defendants.

Case No. A-20-820254-C

Dept. No. 15

**Notice of Entry**

Please be advised the court entered the attached order.

DATED this 12<sup>th</sup> day of October, 2021.



/s/ Michael P. Lowry

MICHAEL P. LOWRY, ESQ.

CHRISTOHPER J. RICHARDSON, ESQ.

6689 Las Vegas Blvd. South, Suite 200

Las Vegas, Nevada 89119

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

1 **CERTIFICATE OF SERVICE**

2 Pursuant to NRCP 5, I certify that I am an employee of Wilson Elser Moskowitz Edelman &  
3 Dicker LLP, and that on October 12, 2021, I served **Notice of Entry** as follows:

- 4 ☐ by placing same to be deposited for mailing in the United States Mail, in a sealed  
5 envelope upon which first class postage was prepaid in Las Vegas, Nevada;
- 6 ☒ via electronic means by operation of the Court's electronic filing system, upon  
7 each party in this case who is registered as an electronic case filing user with the  
8 Clerk;

8 Jamie S. Cogburn  
9 Joseph J. Troiano  
10 COGBURN LAW  
11 2580 St. Rose Parkway, Suite 330  
12 Henderson, Nevada 89074  
13 Attorneys for Plaintiffs

14 BY: /s/ Amanda Hill  
15 An Employee of



*Heather S. Hume*  
CLERK OF THE COURT



MICHAEL P. LOWRY, ESQ.  
Nevada Bar No. 10666  
E-mail: [Michael.Lowry@wilsonelser.com](mailto:Michael.Lowry@wilsonelser.com)  
CHRIS RICHARDSON, ESQ.  
Nevada Bar No. 9166  
E-mail: [Chris.Richardson@wilsonelser.com](mailto:Chris.Richardson@wilsonelser.com)  
6689 Las Vegas Blvd. South, Suite 200  
Las Vegas, Nevada 89119  
Tel: 702.727.1400/Fax: 702.727.1401  
Attorneys for Gabriel L. Martinez;  
Universal Protection Services, LLC

**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

DOUGLAS J. KENNEDY, an individual; and  
LORI KENNEDY, an individual,

Case No. A-20-820254-C  
Dept. No. 15

Plaintiffs,

vs.

**Stipulation and Order Extending Discovery  
Deadlines ~~and Continuing Trial Date~~**

**(Second Request)**

GABRIEL L. MARTINEZ, an Individual;  
UNIVERSAL PROTECTION SERVICES,  
LLC d/b/a ALLIED UNIVERSAL SECURITY  
SERVICES, a Foreign Limited Liability  
Company; DOE Family Members 1-10; DOE  
Individuals 11-20; and ROE Corporations 21-  
30, Inclusive,

Defendants.

IT IS HEREBY STIPULATED AND AGREED by and between the parties, through their undersigned counsel of record, that certain current discovery deadlines in this matter be extended so that the parties may complete remaining necessary discovery as set forth herein.

Pursuant to EDCR 2.35(b) the parties provide the following in support of this Stipulation and Order.

**(a) Discovery Completed to Date.**

The parties have exchanged their respective NRCP 16.1 disclosures of witnesses and documents and provided supplements thereto. Each party has supplemented disclosures throughout discovery.

1 The parties have subpoenaed third party records from Nevada Highway Patrol, Henderson  
2 Fire Department, Metlife Auto and Home, Metropolitan Group Insurance, Security Industry  
3 Specialists, SOS Security and Bronson Risk.

4 Defendants served Plaintiff with Interrogatories and Requests for Production to which  
5 Plaintiff has responded.

6 Plaintiff has served Defendants with Interrogatories, Requests for Admission and Requests  
7 for Production, to which Defendant has responded.

8 Plaintiff deposed Defendant Gabriel Martinez on September 10, 2021.

9 The parties deposed third party witnesses, Cheryl and Louis Countermash on September  
10 23, 2021.

11 Defendant commenced, but did not finish the NRCP 35 exam of Plaintiff on July 20, 2021.

12 **(b) Discovery That Remains To Be Completed.**

13 Depositions of plaintiffs.

14 Depositions of employee defendants.

15 Defendants' expert will need to perform a Rule 35 examination of Plaintiff.

16 The parties have yet to make initial and rebuttal expert disclosures.

17 The parties have to depose initial and rebuttal experts or conduct expert discovery.

18 Exchange of additional documents.

19 The parties reserve the right to engage in other discovery as permitted by applicable rules  
20 and within the discovery window.

21 **(c) Reasons to Extend the Discovery Deadlines.**

22 Good cause exists to extend all discovery deadlines. The current initial expert disclosure  
23 deadline is October 18, 2021 which will not allow enough time to complete, or otherwise  
24 reschedule the Rule 35 neuropsychology exam. The parties agree that the Rule 35 exam will  
25 proceed, but disagree on the parameters under which it will be conducted. Based on the foregoing  
26 the parties propose that the initial expert disclosures be continued Sixty (60) days to allow time for  
27  
28

the parties to conduct the Rule 35 exam. This issue is the subject of a motion that will be decided by the discovery commissioner. The parties have agreed that the close of discovery deadline may be continued 30 days. The parties have been diligent in moving this case forward.

**(d) Proposed Schedule for Completing All Remaining Discovery.**

The following table sets forth the current discovery deadlines and the proposed extended discovery deadlines that are the subject of this stipulated request:

	<u>Current Date</u>	<u>Proposed Date</u>
Last day to add parties/amend pleadings	10/18/2021	10/18/2021
Initial expert disclosures	10/18/2021	12/18/2021
Rebuttal expert disclosures	11/15/2021	01/15/2022
Close of discovery	01/14/2022	02/14/2022
Deadline to file dispositive motions	03/15/2022	03/15/2022
TRIAL	05/23/2022	05/23/2022

This request for an extension of time is not sought for an improper purpose including delay. Based on the foregoing, the parties respectfully request the court to enter an order on the above stipulation, extending the discovery deadlines where applicable.

///

///

///

///

///

1 COGBURN LAW

2 WILSON ELSE MOSKOWITZ  
3 EDELMAN & DICKER LLP

4 /s/ Joseph J. Troiano

5 JOSEPH J. TROIANO, ESQ.  
6 Nevada Bar No. 12505  
2580 St. Rose Parkway, Suite 330  
Henderson, Nevada 89074  
Attorneys for Plaintiff

7 /s/ Michael P. Lowry

8 MICHAEL P. LOWRY, ESQ.  
Nevada Bar No. 10666  
CHRISTOHPER J. RICHARDSON, ESQ.  
Nevada Bar No. 9166  
6689 Las Vegas Boulevard South, Suite 200  
Las Vegas, NV 89119  
Attorneys for Defendants

9 The stipulation between the parties to continue discovery deadlines is hereby Granted.  
10 Amended discovery and trial order will be issued.

11 IT IS SO ORDERED this \_\_\_\_\_ day of \_\_\_\_\_, 2021.  
Dated this 11th day of October, 2021

12   
13 \_\_\_\_\_  
DISTRICT JUDGE

14 **DFB 9DB 2556 BBE9**  
15 **Joe Hardy**  
16 **District Court Judge**

1 **CSERV**

2  
3 DISTRICT COURT  
CLARK COUNTY, NEVADA

4  
5  
6 Douglas Kennedy, Plaintiff(s) CASE NO: A-20-820254-C  
7 vs. DEPT. NO. Department 15  
8 Gabriel Martinez, Defendant(s)  
9

10 **AUTOMATED CERTIFICATE OF SERVICE**

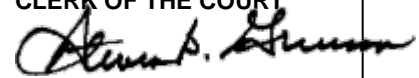
11 This automated certificate of service was generated by the Eighth Judicial District  
12 Court. The foregoing Stipulation and Order to Extend Discovery Deadlines was served via  
13 the court's electronic eFile system to all recipients registered for e-Service on the above  
entitled case as listed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

14 Service Date: 10/11/2021

15 Michael Lowry	michael.lowry@wilsonelser.com
16 Efile LasVegas	efilelasvegas@wilsonelser.com
17 Joseph Troiano	jjt@cogburncares.com
18 Amanda Hill	amanda.hill@wilsonelser.com
19 Chris Richardson	chris.richardson@wilsonelser.com
20 File Clerk	efile@cogburncares.com
21 Noel Raleigh	ncr@cogburncares.com
22 Sarah Wilder	scw@cogburncares.com
23 Joyce Radden	Joyce.Radden@wilsonelser.com
24 Kait Natarajan	kait.natarajan@wilsonelser.com

25  
26  
27  
28





1 COGBURN LAW  
2 Jamie S. Cogburn, Esq.  
3 Nevada Bar No. 8409  
4 [jsc@cogburncares.com](mailto:jsc@cogburncares.com)  
5 Joseph J. Troiano, Esq.  
6 Nevada Bar No. 12505  
7 [jit@cogburncares.com](mailto:jit@cogburncares.com)  
8 2580 St. Rose Parkway, Suite 330  
9 Henderson, Nevada 89074  
10 Telephone: (702) 748-7777  
11 Facsimile: (702) 966-3880  
12 *Attorneys for Plaintiff*

7 **DISTRICT COURT**

8 **CLARK COUNTY, NEVADA**

9 DOUGLAS J. KENNEDY, an individual; and  
10 LORI KENNEDY, an individual,

11 Plaintiff,

12 vs.

13 GABRIEL L. MARTINEZ, an individual;  
14 UNIVERSAL PROTECTION SERVICES,  
15 LLC, d/b/a ALLIED UNIVERSAL  
16 SECURITY SERVICES, a Foreign Limited  
17 Liability Company, DOE Family Members 1-  
18 10; DOE Individuals 11-20; and ROE  
19 Corporations 21-30, Inclusive,

20 Defendant.

Case No.: A-20-820254-C  
Dept. No.: 15

Hearing Date: December 3, 2021  
Hearing Time: 9:30 A.M.

18 **OPPOSITION TO DEFENDANT'S MOTION FOR RULE 35 EXAMINATION**

19 Plaintiff, Douglas J. Kennedy, by and through counsel, Cogburn Law, hereby files this  
20 Opposition to Defendant's Motion for Rule 35 Examination. This Opposition is made and based  
21 upon the papers and pleadings on file herein, the following Memorandum of Points and  
22 Authorities, any exhibits attached hereto, and any oral argument this Court may choose to  
23 entertain.

**MEMORANDUM OF POINTS AND AUTHORITIES**

**I. STATEMENT OF FACTS**

**A. Plaintiff Was Diagnosed with Posttraumatic Stress Disorder and Currently Treats with a Therapist Because of a Crash that Totaled Three Vehicles**

While driving on the freeway, Plaintiff Doug Kennedy was rear-ended by Defendant Gabriel Martinez who was within the course and scope of his employment with Defendant Universal Protection Services at the time of crash. Defendant Gabriel Martinez testified that he was driving “probably 65” mph at impact. Mr. Martinez also blamed his lack of sleep as a cause of the crash. Mr. Martinez’s lack of sleep was caused by Defendant Universal Protection Services’ decision to have Mr. Martinez work up to six days per week, 12-14 hours per day. The force of the initial impact caused Doug’s vehicle to spin into a different lane where he was then t-boned by a driver of a pick-up truck. All three vehicles involved in the crash were totaled.

In addition to numerous other medical professionals, Doug Kennedy was diagnosed with a traumatic brain injury by Dr. Norton Rietman, a psychiatrist. Dr. Rietman specifically diagnosed Doug Kennedy with Posttraumatic Stress Disorder that he related to the crash. Currently, to deal with the stress and anxiety caused by the crash, both Doug Kennedy and his wife, Plaintiff Lori Kennedy, are treating with therapists. This is important to note because absent from Dr. Ross’s declaration is any mention of the comments she made to Mr. Kennedy when, without the assistance of his counsel, she attempted to have sign forms he was directed not to sign by his counsel.

For instance, when attempting to have Mr. Kennedy sign a form that would permit her to divulge information she learned during the examination, Dr. Ross represented that if Mr. Kennedy threatens to kill himself, she would need to report that.

**B. Dr. Ross Admits that She Attempted to Have Mr. Kennedy Sign Forms He Was Directed By His Counsel Not to Sign**

*The day before* Plaintiff Doug Kennedy’s neuropsychological examination, Dr. Ross provided paperwork she claims she needed to be filled out by Plaintiff Douglas Kennedy. Plaintiff

1 completed the paperwork and took it with him to the examination. *See* paperwork, attached as  
2 **Exhibit “1.”** *After Dr. Ross began the examination*, she decided for the first time to review the  
3 paperwork and decided that it wasn’t completed to her liking. Instead of stopping the examination,  
4 and contacting Defendants’ counsel, who would have then contacted Plaintiff’s counsel to resolve  
5 any dispute, Dr. Ross decided to take matters into her own hands. Dr. Ross remarkably questioned  
6 Mr. Kennedy about he did not sign certain forms and even explained why he should, against the  
7 advice of his counsel, sign certain forms. Dr. Ross’ declaration states as follows:

8         6. In preparation for the scheduled exam, I reviewed Mr. Kennedy’s medical  
9 records and provided certain forms for Mr. Kennedy to complete in preparation for  
the exam.

10        7. In this case, it is my understanding that Mr. Kennedy reviewed the forms  
11 with his wife and struck out portions to which they did not agree. In most cases, I  
did not object [to] Mr. Kennedy’s refusal.

12        8. However, after reviewing the forms, I asked Mr. Kennedy [to] consent to  
13 the Limits to Confidentiality, review foreseeable risks and benefits to the  
evaluation, and consent to the neuropsychological examination. The Limits of  
14 Confidentiality allow divulging of information without permission when it “is  
15 necessary to protect against a clear and substantial risk of imminent serious harm  
by the patient or another person. . . .” NAC 641.224. It is standard in the  
16 neuropsychology industry to require any examinee to consent or assent to this  
limitation.

17        9. When I requested that Mr. Kennedy agree, either verbally or in writing, to  
18 the aforementioned limitation, Mr. Kennedy refused to provide his consent, citing  
to his wife’s instruction.

19        Even assuming that Dr. Ross is correct regarding this obligation, the problem with her  
20 forms is that this confidentiality language is within a page that would permit her to use the results  
21 for “SCIENTIFIC RESEARCH.” *See* Exhibit “1.” Had Dr. Ross reviewed the forms *before*  
22 starting her examination, contacted Defendants’ counsel to resolve any issues, and not offered  
23 legal advice contrary to the advice of Mr. Kennedy’s counsel, this issue would have been resolved.

24 ///

25 ///

1           **C.     Plaintiff’s Counsel Was Told that Defendants’ Counsel Would Agree to a New**  
2           **Examiner So Long as Plaintiff Did Not Want the New Examination Recorded**

3           Before filing the motion, Defendants took the position that if Plaintiff agreed that the  
4           examination would not be reported, Defendants would find a new examiner. What’s remarkable  
5           about Defendants’ request is that despite the bad interaction between Plaintiff and Dr. Ross, caused  
6           by Dr. Ross’ failure to ensure forms she wanted completed where in fact filled out to her liking  
7           *before* she started the examination, Defendants still want Dr. Ross to perform the examination.  
8           And while Dr. Ross claims that she can be fair in a second examination, the problem is that Doug  
9           Kennedy, a person who currently treats with a therapist for issues caused by the crash, does not  
10          feel comfortable with her because of how she handled their first interaction. Without question, the  
11          results of the examination (good or bad for either party) are clouded by the issues raised during  
12          the first examination.

13           **II.     LEGAL ARGUMENT**

14           **A.     Defendants Have Not Established Good Cause to Show Why Plaintiff Should**  
15           **Undergo a Second Examination with Dr. Ross**

16          The issue here isn’t whether Plaintiff should undergo a neuropsych examination or whether  
17          an observer should be present. Here, Plaintiff agreed to attend a neuropsych examination with a  
18          new doctor if it is recorded. Plaintiff *never* asked for an observer to be present. *See* Troiano email,  
19          attached as Exhibit “C” to Defendants’ motion (stating “You’ll have to file a motion. We won’t  
20          agree that Stacy Ross can do it and we want it recorded.”). Despite the issues created by Dr. Ross,  
21          and how the bad first interaction would lead one to question the results and opinions of a second  
22          examination, Defendants are requesting an order from the Court compelling Plaintiff to attend a  
23          second examination with Dr. Ross. Simply put, Doug Kennedy is not comfortable with Dr. Ross  
24          and this is not surprising since she attempted to have sign forms he was directed by his counsel  
25          not to sign.

1 For this Court to compel Mr. Kennedy to attend a second examination with Dr. Ross, this  
2 Court would need to find that “good cause” exists. NRCP 35(a)(2)(a). Despite Defendants  
3 knowing Plaintiff’s objection to Dr. Ross caused by, among other things, her decision to provide  
4 legal advice to Mr. Kennedy in contradiction to the advice of his own counsel, Defendants failed  
5 to address this key issue. Thus, this Court should summarily deny Defendants’ motion because  
6 they do not even contend that “good cause” exists to compel Plaintiff to attend a second  
7 examination with Dr. Ross.

8 **B. Dr. Ross’ Interaction with Dr. Ross Establishes Good Cause to Have the**  
9 **Examination Recorded**

10 According to Rule 35, “good cause” must be shown to have an examination audio recorded.  
11 NRCP 35(a)(3). Here, Dr. Ross’s declaration establishes that she attempted to have Plaintiff sign  
12 forms that his counsel advised him not to sign. Accordingly, Dr. Ross’s decision to provide legal  
13 advice in contradiction to the legal advice of Plaintiff’s counsel establishes “good cause” as to why  
14 an examination should be recorded.

15 **III. CONCLUSION**

16 This Court should DENY Defendants’ motion because Defendants failed to even contend  
17 that there is “good cause” that would compel Plaintiff to attend a second examination with Dr.  
18 Ross.

19 Dated this 22<sup>nd</sup> day of October, 2021.

20 COGBURN LAW

21 By: /s/Joseph J. Troiano  
22 Jamie S. Cogburn, Esq.  
23 Nevada Bar No. 8409  
24 Joseph J. Troiano, Esq.  
25 Nevada Bar No. 12505  
2580 St. Rose Parkway, Suite 330  
Henderson, Nevada 89074  
*Attorneys for Plaintiff*

**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing **OPPOSITION TO DEFENDANT'S MOTION TO RULE 35 EXAMINATION** was submitted electronically for filing and/or service with the Eighth Judicial District Court on the 22<sup>nd</sup> day of October 2021.

I further certify that I served a true and correct copy of the foregoing document as follows:

☒ Pursuant to NEFCR 9 & EDCR 8.05(a), electronic service of the foregoing document shall be made in accordance with the CM/ECF E-Service List as follows:

Efile LasVegas ([efilelasvegas@wilsonelser.com](mailto:efilelasvegas@wilsonelser.com))  
Michael Lowry ([michael.lowry@wilsonelser.com](mailto:michael.lowry@wilsonelser.com))  
Amanda Hill ([amanda.hill@wilsonelser.com](mailto:amanda.hill@wilsonelser.com))  
Chris Richardson ([chris.richardson@wilsonelser.com](mailto:chris.richardson@wilsonelser.com))  
Joyce Radden ([Joyce.Radden@wilsonelser.com](mailto:Joyce.Radden@wilsonelser.com))  
Kait Natarajan ([kait.natarajan@wilsonelser.com](mailto:kait.natarajan@wilsonelser.com))

/s/Noel Raleigh  
An employee of Cogburn Law

## **EXHIBIT 1**

## **EXHIBIT 1**

716 South 6<sup>th</sup> Street  
Las Vegas, NV 89101  
Downtown

**Staci R. Ross, PhD., ABPP**  
Clinical Neuropsychologist

TEL: 702-382-3670  
FAX: 702-382-3998

PATIENT:			
CONSULT APPOINTMENT:	DATE: _____	TIME: _____	APPROX. _____
EVALUATION APPOINTMENT:	DATE: 01/20/21	TIME: 8:45am	ALL DAY

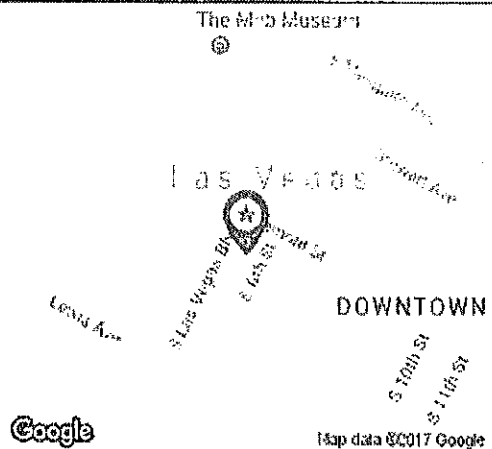
If you are unable to attend or prefer not to attend, please contact our office as early as possible, as the entire day has been blocked out for you. If you are going to be late, please let us know, as the evaluation will be canceled if you have not called or arrived by 15 mins after the scheduled time.

**INSTRUCTIONS: For a Neuropsychological Evaluation/ Assessment**

An evaluation/assessment involves paper and pencil testing that is sensitive to brain functioning, like memory, attention, problem-solving, academic, and emotional functions and depends on questions you and the referring source have. Evaluations are lengthy and may require completion over the course of 2 days. If necessary, we can schedule the completion appointment before you leave.

- **Medical Records:** Please bring ~~any~~ records, reports, test results i.e., MRI/CAT scan/EEG but no films with you to your consult appointment.
- **Medications:** Bring a list of medications you are currently taking, dosage, for what, how often, and the medications you are on today.
- **No nurse or child care provided:** If you require supervision or assistance a caregiver must accompany you throughout the appointment. Children unattended in the waiting area will not be allowed.
- **Eye Glasses/ Hearing aids:** If you use either of these items, please bring with you.
- **Lunch:** You will need to bring a lunch or bring money and order out for about \$15.00 for a sandwich, burger, or salad. We have a microwave and refrigerator to use. We also have free bottled water to drink. We do not have a cafeteria.

**Directions to our office**

<b>From the I-95:</b> <ul style="list-style-type: none"><li>➤ Go to Las Vegas Blvd Exit</li><li>➤ Go South on LV Blvd</li><li>➤ Get in Left Lane</li><li>➤ Turn Left on 6th Street</li><li>➤ Second building on Left</li></ul> <b>From Charleston Blvd:</b> <ul style="list-style-type: none"><li>➤ Go North on LV Blvd</li><li>➤ Turn Right on Gass Street</li><li>➤ Turn Left on 6th Street</li><li>➤ Located between Gass &amp; Garces</li><li>➤ Second building on Left</li></ul>		<b>CAT Bus:</b> <ul style="list-style-type: none"><li>➤ Bus Route 206 heading East will stop near the Walgreens</li><li>➤ Bus Route 206 heading West will stop past the intersection of LV Blvd on Charleston</li></ul> <b>DEUCE Bus:</b> <ul style="list-style-type: none"><li>➤ The Deuce Bus stops on LV Blvd South near Gass</li></ul>
---	--	--

716 South 6<sup>th</sup> Street  
Las Vegas, Nevada 89101-6922

Tel: 702-382-3670 Fax: 702-382-3998



## Information Sheet

☒ Patient ☐ Examinee ☐ Claimant Gender: ☒ M ☐ F  
Date: 7/20/21 Name: Douglas J. Kennedy Date of Birth: [REDACTED] Age: [REDACTED]  
Address: [REDACTED] Apt #: [REDACTED] City, State, Zip: Henderson NV  
Tel: [REDACTED] Cell: [REDACTED] Social Security #: (Last Four) [REDACTED]  
Employer: Retired Work#: [REDACTED] Ext: [REDACTED] Ethnic Background: [REDACTED]  
Date of Injury/First Symptoms: 11/5/2018 Is injury worked related? Y or ☒ N  
If injury, how were you injured? Auto Accident  
Is there an Attorney involved? ☒ Y or N Attorney's Name: Joe Troiano, Esq. Tel: 702-748-7777 Fax: [REDACTED]  
Patient (Adult) EMAIL: Cogburn Law Parent's (if a minor)

### REFERRAL INFORMATION:

PHYSICIAN: [REDACTED] PCP PhD Specialist Tel: [REDACTED] Fax: [REDACTED]  
Claims Adjuster/Case Worker: [REDACTED] Nurse Case Mgr: [REDACTED]  
Tel: [REDACTED] Ext: [REDACTED] Fax: [REDACTED] Tel: [REDACTED] Ext: [REDACTED] Fax: [REDACTED]

### INSURANCE INFORMATION:

Primary Company: [REDACTED] Address: [REDACTED]  
Tel: Benefits [REDACTED] Prior Auth [REDACTED] Mental Health Benefits [REDACTED]  
Insured: [REDACTED] Date of Birth: [REDACTED] Relationship to Patient: [REDACTED]  
Place of Employment: [REDACTED] Soc Sec #: [REDACTED] ID#: [REDACTED]  
Secondary Company: [REDACTED] Address: [REDACTED]  
Tel: Benefits [REDACTED] Prior Auth [REDACTED] Mental Health Benefits [REDACTED]  
Insured: [REDACTED] Date of Birth: [REDACTED] Relationship to Patient: [REDACTED]  
Place of Employment: [REDACTED] Soc Sec #: [REDACTED] ID#: [REDACTED]

DEDUCTIBLE/COINSURANCE/COPAY: You will be billed for the Ded/Coins/Copay amounts! If Private Pay we will collect today Cash/Check/MO  
Amounts may differ and the appointment today may not be covered under new insurance other than when scheduled if we aren't notified in advance!

### IN CASE WE NEED TO CONTACT

### Emergency Contact/ Medical Surrogate

Name: [REDACTED] Relationship: [REDACTED] Tel: [REDACTED]  
If Parent/Guardian/Other needs to pick up Patient Examinee Claimant or you need a ride (we will call approximately: 1/2 - 3/4 hr before finished) Name: [REDACTED] Relationship: [REDACTED]  
Tel: [REDACTED] Ext: [REDACTED] Cell: [REDACTED]

Our office will attempt to reduce the burden of payment by contacting the insurance company and advocating on behalf of each patient. If payment is initially rejected, this clinic will resubmit the bill with an explanation of why the services were necessary. Wherever possible, we will work with the insurance company to keep the cost to our patients at a minimum.

**RECORDING AND TAKING NOTES ARE FORBIDDEN** We are required, by law to protect the security of the tests that we administer (Nevada Administrative Code 641.234). In an effort to keep our legal and ethical obligations, and preserve the validity of the measures, we strictly forbid any type of recording (audio, video, photography, live feed, across cellular or other transmission device, and others), and any type of note-taking in this building from this moment forward. Such recording is forbidden on these premises in any form, whether during the assessment, interview, or during any interactions with staff. Further, we forbid any type of note-taking or recording, as specified above, of, by, or for any individual seen for an assessment or interview in this office. We also ask that you agree to never discuss the contents and to never make notes on specific test items after leaving the assessment. This is the only way to preserve their validity with patients who have neurological problems. By signing this agreement you agree to abide by these rules.

Cellular phones are required to be shut completely off once you leave the waiting room and enter the exam room. If you are expecting an important call, please inform your doctor, or an assistant, and we will make arrangements to assist you.

**AUTHORIZATION FOR DIRECT REIMBURSEMENT** I authorize this clinic to furnish my health insurance company with full information regarding my history, physical, or neuropsychological condition, as well as treatment or psychotherapy rendered including a copy of notes and reports. I also authorized payment directly to this clinic of any medical/neuropsychological benefits, if any, otherwise payable to me for the services provided.

**PROMISSORY TO FULFILL PAYMENT OBLIGATION** I agree to pay any co-pay, coinsurance and deductible due for the services provided. I understand that I am ultimately responsible for the full costs of services provided should my insurance company reject payment.

**PERMISSION TO USE SCORES FOR SCIENTIFIC RESEARCH** I understand that this clinic routinely collects data for scientific research by analyzing the performance of large groups of patients with similar problems and by investigating new, promising tests. Some of my test scores may be used in research to help understand how the brain works. I understand that the scores from many patients will be used and that my name or any identifying information will never be associated with the scientific finding and my scores on these tests will remain confidential.

**LIMITS TO CONFIDENTIALITY** I understand that this clinic will keep all information related to my care completely confidential unless given expressed permission to reveal such information by me or my legal guardian. However, under the following conditions, confidential information can be divulged without any permission:

1. When disclosing the information "is necessary to protect against a clear and substantial risk of imminent serious harm by the patient to the patient or another person..." NAC 641.224
2. When ordered to disclose information by a legal authority such as a judge or court administrator.
3. When required by law, such as when there is reasonable suspicion of abuse to a child or vulnerable adult

**Medicare/Medicaid** In the case of Medicare/Medicaid, I am aware that they may deny payment if too many services were provided within a specific time period or if similar services have been provided during the same time period. As a Medicare or Medicaid recipient, I understand that I will be responsible only for the cost of services at the rate set by the Medicare and Medicaid programs.

**RECORDS WILL BE KEPT IN DIGITAL FORM FOR 5 YEARS FOR ADULTS 18 AND OVER, AND UNTIL AGE 23 FOR CHILDREN. AFTERWARDS, ALL RECORDS MAY BE DESTROYED.**

This office does not discriminate based on race, color, national origin, religion, sex, gender identity (including gender expression), sexual orientation, disability, age, or marital status.

I have read, understand and agree to fully abide by all of the conditions and rules outlined above, and will immediately discuss any concerns that I have directly with Tracy, the Office Manager, or directly with the doctor prior to signing this form.

Signature: \_\_\_\_\_

Date: \_\_\_\_\_

Parent, if patient is a minor: \_\_\_\_\_

Print name: \_\_\_\_\_

N/A



**FYI**  
**For Your Information**

IF YOU NEED A NOTE TO BE EXCUSED FROM WORK or SCHOOL for your visit today,  
Please notify Terri before you see the Doctor and she will give you a note!

***Dr. Ross patients:***

Notes, Recommendations or Report Writing for the Neuropsychologist may take approximately 2-3 weeks to produce, due to scoring, dictating, transcribing, review of medical records or holidays. *Sometimes may be a little longer due to any emergencies or holidays.*

***Dr. Kinsora patients:***

Notes, Recommendations or Report Writing for the Neuropsychologist may take approximately 4-5 weeks to produce, due to scoring, dictating, transcribing, review of medical records or holidays. *Sometimes may be a little longer due to any emergencies or holidays.*

**RECORDS WILL BE KEPT FOR 5 YEARS FOR ADULTS 18 and over AND  
UNTIL AGE 23 FOR CHILDREN. Afterwards, ALL records may be destroyed.**

**HIPAA**

(Health Insurance Portability and Accountability Act ) of 1996  
YOUR SIGNATURE BELOW SERVES AS AN ACKNOWLEDGMENT  
THAT YOU HAVE RECEIVED THE HIPAA NOTICE FORM DESCRIBED  
and/or HAVE READ THE HIPAA NOTICE POSTED ON THE WALL.

Print Name \_\_\_\_\_ Signature \_\_\_\_\_ Date \_\_\_\_\_

(Circle One): Thomas F. Kinsora, Ph.D. Staci R. Ross, Ph.D., ABPP

**Nature and Purpose of Assessment:** The goal of neuropsychological assessment is to determine if any changes have occurred in your attention, memory, language, problem solving, or other cognitive functions. A neuropsychological assessment may point to changes in brain function and suggest possible methods and treatments for rehabilitation. In addition to an interview where we will be asking you questions about your background and current medical symptoms we may be using different techniques and standardized tests including but not limited to asking questions about your knowledge of certain topics, reading, drawing figures and shapes, listening to recorded tapes, viewing printed material, and manipulating objects.

Assessments may take several hours or more of face-to-face testing and several additional hours for scoring, interpretation, and report preparation.

**Foreseeable Risks, Discomforts, and Benefits:** For some individuals assessments can cause fatigue, frustration, and anxiousness.

I have read and agree with the nature and purpose of this assessment and to each of the points listed above. I have had an opportunity to clarify any questions and discuss any points of concern before signing.

Patient Signature \_\_\_\_\_ Date \_\_\_\_\_  
Parent/Guardian or Authorized Surrogate (if applicable) \_\_\_\_\_  
Witness Signature \_\_\_\_\_ Date \_\_\_\_\_

N/A

Staci R. Ross, Ph.D., ABPP  
Board Certified Neuropsychologist  
Board Certified Rehabilitation Psychologist

Thomas F. Kinsora, Ph.D.  
Clinical Neuropsychologist  
Neuroscience Specialist

REQUEST to RELEASE and/or OBTAIN MEDICAL RECORDS  
including PERSONAL INFORMATION

PATIENT:

Full Name

Date of Birth

Last four of Social Security #

FACILITY:

1.

2.

3.

4.

INFORMATION REQUESTED:

1. Obtain or Release Medical Records, Hx, Physical, MRI/Cat Scan Reports, Notes,  
List of Medications, Progress Notes, Psychiatric/Npsy/Psychological Notes/Reports  
Other: \_\_\_\_\_
2. Obtain or Release Medical Records, Hx, Physical, MRI/Cat Scan Reports, Notes,  
List of Medications, Progress Notes, Psychiatric/Npsy/Psychological Notes/Reports  
Other: \_\_\_\_\_
3. Obtain or Release Medical Records, Hx, Physical, MRI/Cat Scan Reports, Notes,  
List of Medications, Progress Notes, Psychiatric/Npsy/Psychological Notes/Reports  
Other: \_\_\_\_\_
4. Obtain or Release Medical Records, Hx, Physical, MRI/Cat Scan Reports, Notes,  
List of Medications, Progress Notes, Psychiatric/Npsy/Psychological Notes/Reports  
Other: \_\_\_\_\_

AUTHORIZATION to Release and/or OBTAIN MEDICAL and/or PERSONAL INFORMATION

I hereby authorize Thomas F. Kinsora, Ph.D., and/or Staci R. Ross, Ph.D., ABPP to release and/or obtain Medical/Psychiatric/Psychological and/or personal information from my medical records, which may include psychological information to the above individual or facility. I also give the above individual or facility full permission to discuss my case, convey personal information and to release to Thomas F. Kinsora, Ph.D., and/or Staci R. Ross, Ph.D., ABPP copies of any records they may have regarding myself. I authorize the use of a facsimile transmittal (FAX) or copy in place of this original.

Patient Signature (If minor, Parent or Legal Guardian)  
Relationship to Patient: \_\_\_\_\_

Date: \_\_\_\_\_

Witness Signature

Date: \_\_\_\_\_





RE: Douglas J. Kennedy ✓  
Your Doctor \_\_\_\_\_

# **INFORMED CONSENT FOR RETURNING TO IN-PERSON NEUROPSYCHOLOGICAL SERVICES**

This Consent for Returning to In-Person Neuropsychological Services is a supplement to the general informed consent completed in your initial consultation. Please read this document carefully, and let me know if you have any questions.

The threat of COVID-19 is ongoing throughout the United States. As a way to mitigate the risk of exposure to COVID-19, our practice was initially suspended pending re-opening guidance from the Nevada Department of Health and Human Services and our Governor's Office. As we plan to reopen, we will continue to follow all recommendations of the CDC, the Nevada Department of Health and Human Services, and the Governor's Office, and will again suspend services immediately if this is recommended at any point. Even with re-opening, we will continue to take all necessary precautions to limit COVID-19 exposure, including use of teleneuropsychology services when possible, and limiting in-person services. Use of telecommunications technology reduces the need for face-to-face contact, but limits the testing that can be performed, as well as limit the validity of tests administered in this non-traditional format. However, in some situations, teleneuropsychology services may not be adequate, and in-person services may be more appropriate.

The decision about whether to engage in in-person services is based on current local conditions and guidelines, which may change at any time. It is possible that a return to remote services or service suspension will be necessary at some point based on consideration of health and safety issues. Such a decision will be made in consultation with you, but I will make the final determination based on a careful weighing of the risks and applicable regulations.

It is also important to consider that, although insurance reimbursement for teleneuropsychology services may be mandated during the COVID-19 pandemic, it is important for you to check with your insurance company to ensure that these services will be covered.

In order for me to provide you with in-person services, the following safety protocols must be followed by all patients/clients and providers:

Social distancing requirements should be maintained whenever possible, meaning that you should maintain a six-foot distance from others while in offices, waiting rooms, and other areas.

Patients/clients and providers will be required to wear masks or face coverings while in the office. Both staff and patients will be required to sanitize and/or wash their hands at regular intervals throughout your testing appointment.

Physical contact with others in the office is discouraged. Specifically, please do not shake hands, hug, or in any other way initiate or accept physical contact.

It is possible, but unlikely, that you will be asked to wait in your vehicle or outside the office until you receive a text, email, or phone call from office staff indicating that you can enter the office. This is to maintain proper distancing. It is our hope to have no more than one or two people in the waiting room at one time.

You agree not to present for in-person services if you have a fever, shortness of breath, coughing, or any other symptoms associated with COVID-19 or if you have been exposed to another person who is showing signs of infection or has confirmed COVID-19 within the past two weeks.

You agree to ensure that both you and your child/dependent follow all of these protocols.

Failure or refusal to follow the above protocols may result in immediate cancellation of your appointment.

We are committed to following state and federal guidelines and to adhering to prevailing professional healthcare standards to limit the transmission of COVID-19 in our offices. We are not able to treat or allow individuals with COVID-19 or symptoms consistent with COVID-19 in our office. Despite our careful attention to sanitization, social distancing, and other protocols, there is still a chance that you will be

exposed to COVID-19 in our office. If, at any point, you prefer to stop in-person services or to consider transitioning to remote services, if available, please let me know.

By signing below, you acknowledge that you understand that there is still a potential risk of exposure and that you agree to follow the safety protocols outlined above in order to engage in in-person services.

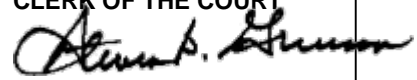
  
Patient/Client

Date

7/20/21

Douglas J. Kennedy

Appt today was for an IME



MICHAEL P. LOWRY, ESQ.

Nevada Bar No. 10666

E-mail: [Michael.Lowry@wilsonelser.com](mailto:Michael.Lowry@wilsonelser.com)

CHRISTOPHER J. RICHARDSON, ESQ.

Nevada Bar No. 9166

E-mail: [Chris.Richardson@wilsonelser.com](mailto:Chris.Richardson@wilsonelser.com)

6689 Las Vegas Blvd. South, Suite 200

Las Vegas, Nevada 89119

Tel: 702.727.1400/Fax: 702.727.1401

Attorneys for Gabriel L. Martinez;

Universal Protection Services, LLC

**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

DOUGLAS J. KENNEDY, an individual; and  
LORI KENNEDY, an individual,

Plaintiffs,

vs.

GABRIEL L. MARTINEZ, an Individual;  
UNIVERSAL PROTECTION SERVICES,  
LLC d/b/a ALLIED UNIVERSAL SECURITY  
SERVICES, a Foreign Limited Liability  
Company; DOE Family Members 1-10; DOE  
Individuals 11-20; and ROE Corporations 21-  
30, Inclusive,

Defendants.

Case No. A-20-820254-C

Dept. No. 15

**Defendants' Reply re Motion for Rule 35  
Examination**

Mr. Kennedy is asking the court to create a new requirement that he subjectively “feel comfortable” with an examiner as a condition of a Rule 35 examination. No such requirement exists and the rule that does apply is satisfied. The motion should be granted.

///

///

///



1 DATED this 27<sup>th</sup> day of October, 2021.



4 /s/ Michael P. Lowry  
5 MICHAEL P. LOWRY, ESQ.  
6 CHRISTOHPER J. RICHARDSON, ESQ.  
7 6689 Las Vegas Blvd. South, Suite 200  
8 Las Vegas, Nevada 89119  
9 Attorneys for Gabriel L. Martinez; Universal  
10 Protection Services, LLC

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

**Memorandum of Points & Authorities**

**I. Rule 35 is satisfied here.**

Kennedy does not dispute that Rule 35(a)(1) is satisfied. Kennedy has put his mental and physical condition at issue in this case and Defendants proposed a suitably qualified examiner. Kennedy instead argues only that Rule 35(a)(2) is not satisfied. However, Rule 35(a)(2) addresses only the form requirements for an order granting a motion per Rule 35(a)(1). The “good cause” requirement of Rule 35(a)(2) is satisfied by meeting the threshold conditions of Rule 35(a)(1). Applied here, Kennedy agrees Rule 35(a)(1) is satisfied, so the “good cause” requirement of Rule 35(a)(2) is satisfied.

Instead, Kennedy is asking the court to read new language into Rule 35. He wants the court to require that he “feel comfortable” with an examiner as a condition to having an examination. Rule 35 has no such language, nor does Kennedy cite authority supporting his novel proposal. By reading this language into the rule, the court would effectively give Kennedy a veto over *any* examination because he could simply assert he doesn’t “feel comfortable.”

**a. Kennedy does not dispute he waived his other new conditions.**

Defendants’ motion outlined the remaining conditions Kennedy asks to impose upon the continued Rule 35 examination and how Kennedy waived those conditions by agreeing to participate in and appearing for the original Rule 35 examination. Kennedy does not respond

1 to those points. He does not explain how he is now able to renege on his prior agreements  
2 because he misunderstood what Dr. Ross was asking him to do and the reason for it.

3 **II. Kennedy should attend the exam he already agreed to.**

4 Kennedy agreed to attend the exam and Defendants are just asking the court to enforce  
5 the terms of the parties' agreement. Defendants will provide the paperwork to Kennedy, just  
6 as they did before. The motion should be granted.

7 DATED this 27<sup>th</sup> day of October, 2021.



10 /s/ Michael P. Lowry

11 MICHAEL P. LOWRY, ESQ.

12 CHRISTOHPER J. RICHARDSON, ESQ.

13 6689 Las Vegas Blvd. South, Suite 200

14 Las Vegas, Nevada 89119

15 Attorneys for Gabriel L. Martinez; Universal  
16 Protection Services, LLC  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

1 **CERTIFICATE OF SERVICE**

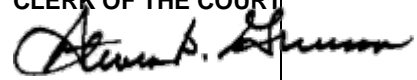
2 Pursuant to NRCp 5, I certify that I am an employee of Wilson Elser Moskowitz Edelman &  
3 Dicker LLP, and that on October 27, 2021, I served **Defendants' Reply re Motion for Rule**  
4 **35 Examination** as follows:

- 5 ☐ by placing same to be deposited for mailing in the United States Mail, in a sealed  
6 envelope upon which first class postage was prepaid in Las Vegas, Nevada;
- 7 ☒ via electronic means by operation of the Court's electronic filing system, upon  
8 each party in this case who is registered as an electronic case filing user with the  
9 Clerk;

9 Jamie S. Cogburn  
10 Joseph J. Troiano  
11 COGBURN LAW  
12 2580 St. Rose Parkway, Suite 330  
Henderson, Nevada 89074  
Attorneys for Plaintiffs

13  
14 BY: /s/ Amanda Hill  
15 An Employee of





RTRAN

DISTRICT COURT  
CLARK COUNTY, NEVADA

DOUGLAS KENNEDY, ET AL.,

Plaintiffs,

vs.

GABRIEL MARTINEZ, ET AL.,

Defendants.

CASE NO: A-20-820254-C

DEPT. XV

BEFORE THE HONORABLE JAY YOUNG, DISCOVERY COMMISSIONER  
FRIDAY, DECEMBER 3, 2021

**RECORDER'S TRANSCRIPT OF HEARING RE:**  
**DEFENDANTS' MOTION FOR RULE 35 EXAMINATION**

APPEARANCES:

For the Plaintiffs:

JOSEPH TROIANO, ESQ.

[Via Bluejeans Videoconference]

For the Defendants:

CHRISTOPHER RICHARDSON, ESQ.

[Via Bluejeans Videoconference]

RECORDED BY: FRANCESCA HAAK, COURT RECORDER

1 Las Vegas, Nevada; Friday, December 3, 2021

2 \* \* \*

3 [Proceeding commenced at 10:31 a.m.]

4 DISCOVERY COMMISSIONER: Calling Kennedy versus  
5 Martinez, case number A-20-820254-C. Counsel, state your  
6 appearance, please, for the record, starting with Plaintiffs' counsel.

7 MR. TROIANO: Good morning, Your Honor. Joseph Troiano,  
8 for the Plaintiff, Bar number 1 -- or Plaintiffs -- Bar number 12505.

9 DISCOVERY COMMISSIONER: Good morning, sir.

10 MR. TROIANO: Good morning.

11 MR. RICHARDSON: Good morning, Your Honor. Chris  
12 Richardson, on behalf of the Defendants.

13 DISCOVERY COMMISSIONER: Good morning, sir.

14 All right. This is Defendants' motion for a Rule 35  
15 examination. I understand that there was a prior examination, and  
16 during the middle of the examination the -- Dr. Ross learned that Mr.  
17 Kennedy had not filled out some paperwork that Dr. Ross believes is  
18 standard and proceeded to then ask Mr. Kennedy to verbally agree to  
19 the information that was in the form. He wasn't comfortable doing that,  
20 and so the examination was terminated, and now this is a motion to  
21 have the examination resumed.

22 Plaintiffs are insisting that they're happy to do that, but without  
23 Dr. Ross's examiner, and want to have recordation, and the Defendants  
24 are saying that they get to choose their own examiner, and there is no  
25 good cause for the recordation, and it's not appropriate under Rule 35.

1                   So that's my understanding. If I've missed something, please  
2 illustrate that in your arguments, but understand that I have read the  
3 pleadings and I'm ready to rule.

4                   Defendants, this is your motion.

5                   MR. RICHARDSON: Thank you, Your Honor. You did cover  
6 everything basically that is at issue in this case. There was an  
7 agreement amongst the parties that Dr. Ross could conduct the  
8 examination, there would not be recordation.

9                   Since that time, we've now been presented with this demand  
10 that it now be recorded, even though there was a prior agreement in  
11 place. We have a declaration from Dr. Ross, who is a professional, who  
12 does conduct these examinations. She has affirmed that she can  
13 ethically and professionally go forward and resume the exam, a portion  
14 of it. She's not going to cover anything that she's already covered, and I  
15 think there was, you know, background information, so it would actually  
16 subject Mr. Kennedy to a less burdened, as far as a time frame goes  
17 'cause he won't have to start over from scratch with a new  
18 neuropsychologist.

19                   So we set forth our arguments of the juxtabition [sic] of --  
20 between NRCP 35 and NRS 52. I know that issue has been probably  
21 argued in front of you ad nauseam in other cases, so I'm not going to  
22 belabor you with -- I'm not going to belabor that any further.

23                   We would just submit that, with regard to the fact that good  
24 cause doesn't exist and hasn't been shown in this case, that the issue  
25 has been waived by the prior agreement, that we should be able to go

1 forward with Dr. Ross under the original terms of the agreement.

2 I know that -- I know Mr. Troiano wasn't doing anything  
3 untoward. We're more concerned about Plaintiffs in the future trying to  
4 dictate terms and using various tactics and setting a precedent for  
5 different conduct. Again, I don't -- I'm not levying that in this case, but  
6 that is a concern of a principle perspective going forward, and with that, I  
7 know that you've reviewed the pleadings, so I'll submit it.

8 DISCOVERY COMMISSIONER: Thank you, Mr. Richardson.  
9 Mr. Troiano.

10 MR. TROIANO: Thank you, Your Honor. I think you outlined  
11 the issues. This whole issue would have never have occurred had Dr.  
12 Ross simply had been diligent instead of waiting till the day before the  
13 examination to provide us the forms, and even under the circumstances  
14 in which it happened, all she had to do was stop the examination and  
15 contact counsel, and we could have resolved it.

16 If you just read her own affidavit, she essentially is providing  
17 legal advice to a Plaintiff who has suffered a traumatic brain injury and is  
18 currently undergoing therapy during the examination. And so all we're  
19 asking, all we ask defense counsel, was simply select another examiner  
20 because he's not comfortable with her, and whether it's good or bad for  
21 either party going forward, it clouds -- what happened at the first  
22 examination clouds Dr. Ross's -- whatever examination she does do and  
23 her result of that. And so we're just kind of asking for a clean slate, pick  
24 somebody new, go forward with the examination.

25 And in light of what happened during the first examination, and

1 her explaining to a claimant that he needs to fill out forms, there  
2 absolutely is good cause to have that recorded, and so for that reason  
3 we're -- we ask for that.

4 And I would also say there's also good cause that the Court  
5 finds that Dr. Ross is to do it. There's also good cause, in light of what  
6 happened, to have an observer there. Again, the, you know, the amount  
7 in controversy is high. We agree that a examination is warranted. We  
8 just don't agree that an examination should go forward with this  
9 particular expert.

10 DISCOVERY COMMISSIONER: I don't recall -- and correct  
11 me if I'm wrong, but I don't recall there being a request for an observer.  
12 Was that --

13 MR. TROIANO: There was not.

14 DISCOVERY COMMISSIONER: Okay.

15 MR. TROIANO: There was not.

16 DISCOVERY COMMISSIONER: All right. All right. Last  
17 word, Mr. Richardson.

18 MR. RICHARDSON: Yeah, just briefly. I would submit that,  
19 you know, what we have here is a declaration from a professional who  
20 conducts the examinations routinely. We don't have a declaration from  
21 Mr. Kennedy stating that he would be uncomfortable. All we have is  
22 argument in a pleading, and to the extent that it is a high dollar case, I  
23 don't know that that should impact whether an observer would be  
24 warranted under the circumstances because we don't believe that good  
25 cause exists under any circumstance as it relates to the circumstances



1 in this case, so with that, we'll submit it.

2 DISCOVERY COMMISSIONER: All right. Thank you,  
3 counsel. I appreciate your good briefing and your respectful treatment of  
4 one another.

5 I'm going to grant the motion in part and deny it in part. The  
6 Plaintiff is compelled to attend a second examination. I think because of  
7 the circumstances here there is good cause to require recordation, if  
8 nothing else, to calm the Plaintiff's nerves about it. But because of the  
9 interaction before with Dr. Ross, Mr. Troiano, I understand your  
10 argument about your client not being terribly comfortable. I'm never  
11 comfortable going to a doctor. I'll tell you that much, but the Defendant  
12 gets to choose their examiner, and your client is stuck with that. And I  
13 also understand your argument, you know, that Dr. Ross may not be  
14 able to get past whatever biased opinions she may have because of the  
15 first examination, and you'll have ample opportunity to explore that at the  
16 time of trial. But the Defendant does get to choose their examiner.

17 I'm going to order the recordation. I'm not going to order the  
18 examiner because it wasn't included in the motion as a countermotion.  
19 I'm going to ask Mr. Richardson to prepare the Report and  
20 Recommendation; run that past Mr. Troiano for approval as to form and  
21 content; let's get that to chambers within fourteen days.

22 We'll set a status hearing on January 7<sup>th</sup> at 10:00 to determine  
23 if that's been accomplished. If it has, there will be no need to appear.

24 Questions, concerns?

25 MR. TROIANO: No.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

MR. RICHARDSON: No, Your Honor.

MR. TROIANO: Thank you. Thank you, Your Honor.

MR. RICHARDSON: Thank you, Your Honor.

DISCOVERY COMMISSIONER: Have a good day, good weekend.

MR. RICHARDSON: You too.

[Proceeding concluded at 10:40 a.m.]

\* \* \* \* \*

ATTEST: I do hereby certify that I have truly and correctly transcribed the audio-video recording of this proceeding in the above-entitled case.



FRANCESCA HAAK  
Court Recorder/Transcriber

*Heather S. Smith*  
CLERK OF THE COURT



MICHAEL P. LOWRY, ESQ.  
Nevada Bar No. 10666  
E-mail: [Michael.Lowry@wilsonelser.com](mailto:Michael.Lowry@wilsonelser.com)  
CHRIS RICHARDSON, ESQ.  
Nevada Bar No. 9166  
E-mail: [Chris.Richardson@wilsonelser.com](mailto:Chris.Richardson@wilsonelser.com)  
6689 Las Vegas Blvd. South, Suite 200  
Las Vegas, Nevada 89119  
Tel: 702.727.1400/Fax: 702.727.1401  
Attorneys for Gabriel L. Martinez;  
Universal Protection Services, LLC

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

DOUGLAS J. KENNEDY, an individual; and LORI  
KENNEDY, an individual,

Plaintiffs,

vs.

GABRIEL L. MARTINEZ, an Individual;  
UNIVERSAL PROTECTION SERVICES, LLC  
d/b/a ALLIED UNIVERSAL SECURITY  
SERVICES, a Foreign Limited Liability Company;  
DOE Family Members 1-10; DOE Individuals 11-20;  
and ROE Corporations 21-30, Inclusive,

Defendants.

Case No. A-20-820254-C  
Dept. No. 15

**Defendants Motion to Extend  
Discovery (3<sup>rd</sup> Request) on Order  
Shortening Time**

Mr. Kennedy claims an ongoing brain injury as a result of the motor vehicle accident at issue in this case. Defendants requested a Rule 35 examination. The Discovery Commissioner agreed, but put conditions on it that make an examination impossible to obtain. Defendants plan to object to this ruling, but the objection will not be decided before the initial expert disclosure deadline on December 20, 2021. Consequently, Defendants request that discovery be extended.

///

///

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



3  
4  
5 BY: /s/Michael Lowry

6 MICHAEL P. LOWRY, ESQ.

7 Nevada Bar No. 10666

8 CHRIS RICHARDSON, ESQ.

9 Nevada Bar No. 9166

10 6689 Las Vegas Blvd. South, Suite 200

11 Las Vegas, Nevada 89119

12 Attorneys for Gabriel L. Martinez;

13 Universal Protection Services, LLC

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25
- 26
- 27
- 28

- 
- /s/ *Chris Richardson*

The request for an order shortening time in A-20-820254-C is granted. This motion is scheduled for hearing on January 10, 2022 at 9:00 am. Oppositions will be due on \_\_\_\_\_, and replies on \_\_\_\_\_.

**Dated this 16th day of December, 2021**

DISTRICT JUDGE

**9DB 53A B217 BEBD**  
**Joe Hardy**  
**District Court Judge**

1 **Memorandum of Points & Authorities**

2 **I. The case concerns an alleged TBI.**

3 This personal injury case concerns a motor vehicle accident that occurred on November 5,  
4 2018. The complaint was filed on August 27, 2020. Mr. Kennedy alleges he suffered a brain  
5 injury from the motor vehicle accident.

6 Defendants believe a neuropsychological examination is necessary to assess the  
7 allegations. Recognizing that, they worked with Kennedy to schedule a Rule 35  
8 neuropsychological examination for July 20, 2021. The examination started, but was not  
9 substantively completed due to a dispute or misunderstanding over a form. Defendants then  
10 attempted to resolve this misunderstanding and reschedule the examination so it can be completed.  
11 At that point, Kennedy asserted new conditions, refusing to stipulate to Dr. Ross handling the  
12 examination and insisting that the examination be recorded.

13 The parties could not reach an agreement, so Defendants' filed a motion on October 7,  
14 2021 to set a Rule 35 examination.<sup>1</sup> The court scheduled the hearing for December 3, 2021.<sup>2</sup>  
15 Based on email exchanges, Defendants believe Kennedy tried to advance the hearing date and  
16 Defendants supported that request. However the efforts were apparently unsuccessful. Kennedy  
17 filed his opposition to the Rule 35 motion and the hearing occurred on December 3. The  
18 Discovery Commissioner orally ruled that Defendants could proceed with Dr. Ross as an  
19 examiner, but the examination would be recorded. The written report and recommendations is  
20 being circulated, but has not yet been entered. After the December 3 hearing, Defendants  
21 considered the Discovery Commissioner's ruling and concluded an objection is necessary.

22 **II. A discovery extension is merited under these particular circumstances.**

23 Discovery opened in this case when the joint case conference report was filed on  
24 December 17, 2020.<sup>3</sup> The parties stipulated to extend discovery twice.<sup>4</sup> Initial experts are  
25 presently due on December 20, 2021.

26  
27 <sup>1</sup> Doc ID# 44.

<sup>2</sup> Doc ID# 45.

28 <sup>3</sup> Doc ID# 18.

<sup>4</sup> Doc ID# 41 & 46.

1                   **a. Good cause supports the motion's timing.**

2                   EDCR 2.35(a) admittedly states a motion to extend should be filed more than 21 days  
3 before the deadline it seeks to extend and this motion is filed within 21 days of the deadline it  
4 seeks to extend. There is good cause to support the motion as the hearing on the Rule 35 motion  
5 did not occur until December 3, despite efforts to advance it. Defendants also thought that  
6 Kennedy would agree to extend discovery no matter how the Discovery Commissioner's ruled  
7 because it would take time to mutually schedule the examination, whether with Dr. Ross or  
8 someone else. Scheduling would vary depending on if Defendants had to locate a new examiner  
9 too. Rather than proposing new deadlines that would be completely speculative, Defendants  
10 decided it would be more practical to wait for a ruling to then assess what needed to occur and  
11 how long that might take. Upon learning Kennedy would not stipulate to extend, Defendants  
12 immediately filed this motion.

13                   **b. Discovery completed thus far.**

14                   All parties have disclosed witnesses and documents per NRCP 16.1(a)(1). Plaintiffs both  
15 responded to written discovery. Defendants have responded to written discovery, additional  
16 discovery to defendant Gabriel Martinez is pending. Mr. Martinez has been deposed. Third-party  
17 witnesses Louis and Cheryl Countermash were deposed. The parties attempted to depose another  
18 third-party witness that failed to appear.

19                   **c. Discovery remaining.**

20                   Party depositions remain, other than Mr. Martinez. Expert disclosures are also necessary,  
21 such as are discussed in this motion. Initial expert disclosures are due December 20, 2021.

22                   **d. Why remaining discovery cannot be completed within the current schedule.**

23                   As a practical matter, the Rule 35 motion was not decided until December 3, 2021. Even  
24 had the Discovery Commissioner granted Defendants' motion in full, they would still have needed  
25 more than 17 days between the ruling and the disclosure deadline to mutually coordinate a date  
26 and time with both an examiner and Kennedy.

27                   The second, seemingly larger, issue is that as a consequence of the Discovery  
28 Commissioner's oral ruling, Defendants cannot proceed with a Rule 35 neuropsychological

1 examination. The audio recording condition that was imposed would require the examiner to  
2 violate neuropsychological ethical guidelines. Scientific studies also indicate that audio  
3 recordings may invalidate the data gathered from the examination. Defendants plan to object to  
4 the report and recommendations, once it is entered. However, the objection will not be decided  
5 until after the December 20, 2021 disclosure deadline.

6 Although rebuttal expert disclosures are not due until January 15, it is Defendants'  
7 understanding that a Rule 35 examiner is an initial expert. Further, the same concerns about the  
8 objection and scheduling would also apply.

9 **e. Proposed schedule and trial date.**

	<b>Current Schedule</b>	<b>Proposed Schedule</b>
<b>Amend Pleadings</b>	October 18, 2021	Closed
<b>Initial Experts</b>	December 20, 2021	September 2, 2022
<b>Rebuttal Experts</b>	January 15, 2022	October 3, 2022
<b>Discovery Deadline</b>	February 14, 2022	December 2, 2022
<b>Dispositive Motions</b>	March 15, 2022	December 30, 2022

16  
17 These are not arbitrary dates. Defendants anticipate that their objection will not be heard  
18 until at least January, 2022. If the objection is sustained, the first available examination date may  
19 not be until March or April, 2022. Further, the reality of this issue is that it seems highly probable  
20 one side or the other may attempt a writ petition no matter how the district court rules on the  
21 objection. This in turn leads to further delay.

22 Defendants do not want this delay, they just want a Rule 35 examination. But when  
23 considering the implications of the Discovery Commissioner's oral ruling, a protracted delay seems  
24 inevitable because, again, the conditions put on the Rule 35 examination effectively prevent  
25 Defendants from obtaining one. They prefer to be transparent about that and propose a schedule  
26 based upon it.

27 If a discovery extension is granted, the case will need to be reassigned from the current May  
28 23, 2022 trial group.



1 **III. An extension is appropriate to allow trial on the merits.**

2 Defendants are not asking the court to rule on the objection via this motion. That would be  
3 procedurally improper. Defendants are only asking that the court extend discovery so that they  
4 have the opportunity to present their objection and have it decided before then having to decide  
5 how to proceed with initial expert disclosures.

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



8  
9  
10 BY: /s/ Michael Lowry

MICHAEL P. LOWRY, ESQ.

Nevada Bar No. 10666

CHRIS RICHARDSON, ESQ.

Nevada Bar No. 9166

6689 Las Vegas Blvd. South, Suite 200

Las Vegas, Nevada 89119

Attorneys for Gabriel L. Martinez;

Universal Protection Services, LLC

11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

1 **CSERV**

2  
3 DISTRICT COURT  
4 CLARK COUNTY, NEVADA

5  
6 Douglas Kennedy, Plaintiff(s) CASE NO: A-20-820254-C  
7 vs. DEPT. NO. Department 15  
8 Gabriel Martinez, Defendant(s)  
9

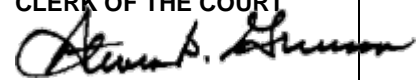
10 **AUTOMATED CERTIFICATE OF SERVICE**

11 This automated certificate of service was generated by the Eighth Judicial District  
12 Court. The foregoing Order Shortening Time 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: 12/16/2021

15 Michael Lowry	michael.lowry@wilsonelser.com
16 Efile LasVegas	efilelasvegas@wilsonelser.com
17 Joseph Troiano	jjt@cogburncares.com
18 Amanda Hill	amanda.hill@wilsonelser.com
19 Chris Richardson	chris.richardson@wilsonelser.com
20 File Clerk	efile@cogburncares.com
21 Noel Raleigh	ncr@cogburncares.com
22 Kaitlyn Brooks	Kaitlyn.Brooks@wilsonelser.com
23 Sarah Wilder	scw@cogburncares.com
24 Kait Natarajan	kait.natarajan@wilsonelser.com

25  
26  
27  
28



DCRR



MICHAEL P. LOWRY, ESQ.

Nevada Bar No. 10666

E-mail: [Michael.Lowry@wilsonelser.com](mailto:Michael.Lowry@wilsonelser.com)

CHRISTOPHER J. RICHARDSON, ESQ.

Nevada Bar No. 9166

E-mail: [Chris.Richardson@wilsonelser.com](mailto:Chris.Richardson@wilsonelser.com)

6689 Las Vegas Blvd. South, Suite 200

Las Vegas, Nevada 89119

Tel: 702.727.1400/Fax: 702.727.1401

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

**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

DOUGLAS J. KENNEDY, an individual; and LORI  
KENNEDY, an individual,

Plaintiffs,

vs.

GABRIEL L. MARTINEZ, an Individual;  
UNIVERSAL PROTECTION SERVICES, LLC  
d/b/a ALLIED UNIVERSAL SECURITY  
SERVICES, a Foreign Limited Liability Company;  
DOE Family Members 1-10; DOE Individuals 11-20;  
and ROE Corporations 21-30, Inclusive,

Defendants.

Case No. A-20-820254-C

Dept. No. 15

**Discovery Commissioner's Report &  
Recommendations re Defendants'  
Motion for Rule 35 Examination**

**Date of Hearing:** December 3, 2021

**Time of Hearing:** 9:30AM

**Attorney for Plaintiff:** Joseph J. Troiano of Cogburn Law

**Attorney for Defendants:** Chris Richardson of Wilson Elser Moskowitz Edelman & Dicker

**I. Findings**

This matter came before the Discovery Commissioner for a hearing on December 3, 2021, on Defendants Gabriel Martinez and Universal Protection Services, LLC ("Defendants") Motion for Rule 35 Examination.

**THE DISCOVERY COMMISSIONER FINDS AS FOLLOWS:**

1. Plaintiff originally agreed to submit to an NRCP Rule 35 neuropsychology examination with Dr. Staci Ross without the presence of a third party observer or audio recording device.

- 1 2. Defendants have the right to select the neuropsychologist to conduct the Rule 35 examination.
- 2 3. There is good cause for Dr. Staci Ross to reconvene and finish Plaintiff's Rule 35 examination.
- 3 4. Neither NRCP 35 nor NRS 52.380 preclude Plaintiff from requesting that the examination be
- 4 audio recorded.
- 5 ~~5. NRS 52.380 is not unconstitutional.~~
- 6 6. Although Plaintiff originally agreed to submit to the Rule 35 examination without audio
- 7 recording, Plaintiff did not waive his right to recording the continued Rule 35 examination
- 8 under the circumstances presented.
- 9 7. Under the circumstances presented, there is good cause for the continued Rule 35 examination
- 10 to be recorded.
- 11 8. Plaintiff made no request for a third-party to observe the examination.

## 12 II. Recommendations

- 13 1. IT IS HEREBY RECOMMENDED that Defendants Gabriel Martinez and Universal
- 14 Protection Services, LLC ("Defendants") Motion for Rule 35 Examination is GRANTED IN
- 15 PART AND DENIED IN PART within the following parameters:
- 16 2. IT IS FURTHER RECOMMENDED that Plaintiff's Rule 35 neuropsychology examination
- 17 be reconvened with <sup>an examiner of Defendants' choosing.</sup> ~~Dr. Staci Ross.~~
- 18 3. IT IS FURTHER RECOMMENDED Plaintiff be allowed to audio record the examination
- 19 without the presence of any third-party.

20 ...

21 ...

22 ...

23 ...

24 ...


25 ...

1 The Discovery Commissioner, having met with counsel for the parties, having discussed the  
2 issues noted above and having reviewed any materials proposed in support thereof, hereby submits  
3 the above recommendations.

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

5 It is so recommended.

6   
7  
8 DISCOVERY COMMISSIONER

<p>9  <b>WILSON ELSE</b> 10 <small>WILSON ELSER MOSKOWITZ EDLMAN &amp; DICKER LLP</small></p> <p>11 <u>/s/Christopher J. Richardson</u> 12 MICHAEL P. LOWRY, ESQ. 13 CHRISTOPHER J. RICHARDSON, ESQ. 14 6689 Las Vegas Blvd. South, Suite 200 Las Vegas, Nevada 89119 Attorneys for Gabriel L. Martinez; Universal Protection Services, LLC</p>	<p>COGBURN LAW</p> <p>11 <u>/s/ Joseph J. Troiano</u> 12 JAMIE S. COGBURN 13 JOSEPH J. TROIANO 14 2580 St. Rose Parkway, Suite 330 Henderson, Nevada 89074 Attorneys for Plaintiffs</p>
--	---

1 **NOTICE**

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

7 **Objection time will expire on January 13, 2022.**

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

9  
10 \_\_\_\_\_ Mailed to Plaintiff/Defendant at the following address on the \_\_\_\_\_ day of \_\_\_\_\_,  
11 2021:

12 ☒ Electronically filed and served counsel on December 30, 2021, Pursuant to  
13 NEFCR Rule 9.

14  
15  
16 By: Natilie Simonette  
17 COMMISSIONER DESIGNEE  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28