

**Before the  
Federal Communications Commission  
Washington, DC 20554**

**FCC 15M-26  
10369**

|   |   |                              |
|---|---|------------------------------|
| In the Matter of                            | ) | EB Docket No. 14-82          |
|   | ) |                              |
| <b>PATRICK SULLIVAN</b>                     | ) | FRN: 0003749041, 0006119796, |
| (Assignor)                                  | ) | 0006149843, 0017196064       |
|   | ) |                              |
| and   | ) | Facility ID No. 146162       |
|   | ) |                              |
| <b>LAKE BROADCASTING, INC.</b>              | ) | File No. BALFT-20120523ABY   |
| (Assignee)                                  | ) |                              |
|   | ) |                              |
| For Commission Consent to the Assignment of | ) |                              |
| License of FM Translator Station W238CE,    | ) |                              |
| Montgomery, Alabama                         | ) |                              |

**ORDER**

**Issued: August 4, 2015**

**Released: August 4, 2015**

**Preliminary Statement**

On July 9, 2015, the Enforcement Bureau (“Bureau”) filed a Motion to Permit Examination by Expert Psychologist (“Motion”). Although parties have tentatively agreed to allow the Bureau’s psychological expert, Dr. Kimberly Weitzl, to interview Michael Rice, the parties disagree as to several aspects of the examination. Lake wishes to impose three conditions upon the interview: (1) that Dr. Weitzl be restricted from asking Mr. Rice any questions regarding the actions for which he was incarcerated or concerning the time period before he was released from prison; (2) that Lake’s expert be in attendance at Dr. Weitzl’s examination of Mr. Rice; and (3) that the interview be transcribed and the resultant transcription be made available to Lake no more than two weeks after the interview.<sup>1</sup> For the reasons provided below, the Bureau’s Motion is granted unconditionally.

**Discussion**

Section 1.311(b) of the Commission’s Rules provides that “[p]ersons and parties may be examined regarding any matter, not privileged, which is relevant to the hearing issues.”<sup>2</sup> For guidance as to whether to permit the examination, the Presiding Judge looks to Rule 35 of the Federal Rules of Civil Procedure, which states that a court “may order a party whose mental or

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<sup>1</sup> Lake Broadcasting Inc.’s Partial Opposition to Enforcement Bureau’s Motion to Permit Examination by Expert Psychologist at 2 (filed July 9, 2015) (“Partial Opposition”).

<sup>2</sup> 47 C.F.R. § 1.311(b).

physical condition . . . is in controversy to submit to a physical or mental examination by a suitably licensed or certified examiner. The court has the same authority to order a party to produce for examination a person who is in its custody or under its legal control.”<sup>3</sup> Rule 35 also safeguards a party against whom an examination is ordered.<sup>4</sup> The Presiding Judge may limit a Rule 35 examination if good cause is shown to justify the request.<sup>5</sup>

The Bureau’s Motion is granted. Lake has placed Mr. Rice’s psychological condition into controversy by arguing that the acts for which Mr. Rice was convicted were the result of severe, undiagnosed, and untreated mental illness and substance abuse from which he is now “fully recovered and rehabilitated,” and that there is no evidence that he will relapse.<sup>6</sup> The Bureau must be able to test these assertions by having the opportunity to allow its qualified expert perform a psychological examination. As Lake does not object to an examination and does not challenge Dr. Weitzl’s qualifications, she is permitted to examine Mr. Rice. The conditions that Lake seeks to place on that examination shall now be considered.

#### *Scope of Examination*

Lake argues that there is no legal basis for Dr. Weitzl to examine Mr. Rice on matters that occurred prior to his incarceration.<sup>7</sup> Lake justifies this restriction by insisting that Mr. Rice’s mental state is not at issue in this case, as the Hearing Designation Order does not mention Mr. Rice’s mental state but only the issue of whether Mr. Rice has been rehabilitated.<sup>8</sup> Evidently, Lake believes that Mr. Rice’s actions prior to incarceration, any acceptance of responsibility for those actions, any history of substance abuse, and any maintenance behavior are irrelevant, and that Dr. Weitzl should only examine how Mr. Rice has conducted himself since his release from prison.<sup>9</sup> Lake seeks that the Presiding Judge restrict the scope of examination to either the time period following Mr. Rice’s release from prison on December 29, 1999, with the potential to look back to his participation in the Missouri Sexual Offender’s Program, or the time period following Mr. Rice’s incarceration on September 30, 1994.<sup>10</sup>

The Presiding Judge rejects Lake’s argument. As stated above, Lake opened the door to the examination of Mr. Rice’s mental state when it asserted that Mr. Rice’s untreated mental illnesses and substance abuse were responsible for the conduct that led to his incarceration and that he is now fit to be a Commission licensee because he has fully recovered from those illnesses. Despite Lake’s pleas to the contrary, Mr. Rice’s reflections on his prior criminal conduct and the steps he takes to avoid engaging in that conduct again are all clearly relevant to

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<sup>3</sup> Fed. R. Civ. P. 35(a)(1).

<sup>4</sup> “Courts have often . . . found that Rule 35 and the adversary process provide other safeguards for plaintiffs who submit to Rule 35 examinations. Plaintiffs receive a Rule 35 examination report and then have the opportunity to depose the physician, cross-examine him or her, and introduce contrary expert evidence.” *Lerer v. Ferno-Washington, Inc.*, 2007 WL 3513189, at \*1 (S.D.Fla. Nov. 14, 2007).

<sup>5</sup> See Fed.R.Civ.P. 26(c); see also *Stoner v. New York City Ballet Co.*, 2002 WL 31875404, at \*3 (S.D.N.Y. Dec. 24, 2002).

<sup>6</sup> *Patrick Sullivan and Lake Broadcasting, Inc.*, Hearing Designation Order, MB Docket No. 14-82 at 29 FCC Rcd 5421, 5422 ¶ 7 (MB 2014).

<sup>7</sup> Partial Opposition at 3.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

determining whether Mr. Rice is now sufficiently rehabilitated to be a Commission licensee. Further, the Presiding Judge will not interfere with Dr. Weitzl's examination methodology. If the Presiding Judge were to micromanage Dr. Weitzl's examination, its results would likely be tainted.

Moreover, Lake has not provided any compelling reason for why Dr. Weitzl should not be able to examine Mr. Rice unfettered on these matters. If Lake has concerns about the relevance of the facts or opinions discussed in Dr. Weitzl's report, Lake may object to their offering for admission into the record at the appropriate time. Lake also will be authorized to take Dr. Weitzl's deposition and challenge her written report in advance of trial.

#### *Expert Attendance at Examination*

Lake seeks to have its own psychological expert present as an observer during Dr. Weitzl's examination of Mr. Rice.<sup>11</sup> In support of this request, Lake cites two federal district court cases from 1960 and 1983 in which experts were permitted to be present at a client's examination.<sup>12</sup>

In more recent years, many courts have held that the party seeking the presence of a third party at a Rule 35 examination sustains the burden of convincing the court that good cause exists for a protective order and that such a third-party presence is necessary.<sup>13</sup> Further, precedent informs that having an opposing expert present at a psychological examination is likely to be disruptive, intimidating, and potentially prejudicial.<sup>14</sup> Lake has failed to provide any reason why its expert should be permitted to observe Dr. Weitzl's examination of Mr. Rice. Accordingly, for Lake's failure to show good cause, Lake's expert will not be permitted to attend and observe the examination.

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<sup>11</sup> *Id.*

<sup>12</sup> *Id.* (citing *Dziwanoski v. Ocean Carriers Corp.*, 26 F.R.D. 595 (D. Md. 1960); *Lowe v. Philadelphia Newspapers, Inc.*, 101 F.R.D. 296 (E.D. Pa. 1983)).

<sup>13</sup> *Ornelas v. S. Tire Mart, LLC*, 292 F.R.D. 388, 395 (S.D. Tex. 2013) (citing *Calderon v. Reederei Claus-Peter Offen GmbH & Co.*, 258 F.R.D. 523, 526 (S.D. Fla. 2009)). See also *Galiati v. State Farm Mut. Auto. Ins. Co.*, 154 F.R.D. 262, 265 (D. Colo. 1994) ("The Court agrees . . . that each case must be reviewed on its own facts. . . . The Court further agrees . . . that the party seeking the presence of a third party or recording device must carry the burden of convincing the court.").

<sup>14</sup> See *Stoner v. New York City Ballet Co.*, 2002 WL 31875404, at 5 (S.D.N.Y. Dec. 24, 2002); *Shirsat v. Mut. Pharm. Co.*, 169 F.R.D. 68, 70 (E.D. Pa. 1996) ("This Court declines to follow *Lowe* [*v. Philadelphia Newspapers, Inc.*] . . . . This Court finds that the need for effective psychiatric examinations militates against allowing an observer who could potentially distract the examining psychiatrist and examinee thereby compromising the results of the examination. Moreover, the presence of the observer interjects an adversarial, partisan atmosphere into what should be otherwise a wholly objective inquiry. . . . Additionally, it is recognized that psychological examinations necessitate an unimpeded, one-on-one exchange between the doctor and the patient. . . . The Court finds that the presence of an observer would lend a degree of artificiality to the examination that would be inconsistent with the applicable professional standard." (citations omitted)); *Hertenstein v. Kimberly Home Health Care, Inc.*, 189 F.R.D. 620, 633 (D. Kan. 1999) ("The court also declines to follow *Lowe v. Philadelphia Newspapers, Inc.* . . . . The case is not followed in its own district. See *Shirsat v. Mutual Pharmaceutical Co.* . . . . For the reasons stated in *Shirsat*, this court likewise declines to follow *Lowe*." (citations omitted)).

*Examination Transcript*

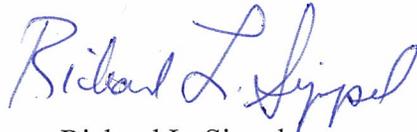
Lake seeks to have the Presiding Judge require that Dr. Weitzl's examination of Mr. Rice be transcribed and that a copy of the transcript be made available to Lake within two weeks of the examination.<sup>15</sup> Courts generally review requests for the recording or transcription of a mental examination in the same way that they analyze requests that a third party be present for an examination.<sup>16</sup>

Again, Lake has failed to provide any reason, let alone demonstrate good cause, why its request should be granted. Lake has not expressed any concern that Dr. Weitzl will misrepresent Mr. Rice's responses in her written report. Nor has Lake suggested that there are any special circumstances that justify the creation of a transcript.<sup>17</sup> Therefore, Lake's request for a transcript of the examination is denied.

**Rulings**

For the foregoing reasons, **IT IS ORDERED** that the Enforcement Bureau's Motion to Permit Examination by Expert Psychologist **IS GRANTED** without conditions or limitations.

FEDERAL COMMUNICATIONS COMMISSION<sup>18</sup>



Richard L. Sippel  
Chief Administrative Law Judge

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<sup>15</sup> Partial Opposition at 4.

<sup>16</sup> See *Ornelas*, 292 F.R.D. at 396-97.

<sup>17</sup> See *Newman v. San Joaquin Delta Community College Dist.*, 272 F.R.D. 505, 514 (E.D. Cal. 2011).

<sup>18</sup> Courtesy copies of this *Order* were sent by e-mail on date of issuance to each counsel.