October 12, 2018

Via Email NVSCCLERK@NVCOURTS.NV.GOV

Chief Justice Michael Douglas
Nevada Supreme Court
201 South Carson Street
Carson City, NV 89701-4702

Re: Proposed Amendments to Nevada Rules of Civil Procedure (ADKT 0522)

Dear Chief Justice Douglas:

Las Vegas Defense Lawyers (LVDL) submits the following comments and concerns regarding the proposed amendments to the Nevada Rules of Civil Procedure.

NRCP 6. Computing and Extending Time.

LVDL agrees with the Taskforce's suggestion to revise Rule 6(b)(1)(a) consistent with Rule 29(b), which allows for discovery stipulations without the need for court approval so long as the stipulation does not interfere with the time set for completing discovery, for hearing a motion, or for trial.

NRCP 16.1. Mandatory Pretrial Discovery Requirements.

LVDL has several concerns about the proposed changes to NRCP 16.1

Rule 16.1(a)(1)(A)(ii). The Advisory Committee's very broad interpretation of "report" seeks documents well beyond documents that are prepared or exist at or near the time of the subject incident. Requests for records, logs and summaries, maintenance records, prior repair and inspection, records and receipts, and sweep logs would be better requested pursuant to an NRCP Rule 34 request for production where the scope of the request could be identified and limited to be proportional to the needs of the case pursuant to NRCP 26.

Rule 16.1(a)(2)(D). LVDL finds the proposed amendments regarding the status and disclosure of treating physicians extremely problematic. Under the proposed language, treating physicians will be non-retained experts who will be able to testify at trial to medical opinions not expressed by experts, not in the treater's patient chart, not disclosed in deposition or in the case prior to trial. This amendment violates the language and the spirit of the ruling in FCH1 and the Rules of Civil Procedure. In addition, the defense will be in a position where it will not know all provider opinions until 21 days prior to the close of discovery under 16.1(a)(2)(F)(ii)(c). By that time, all discovery will be closed and the defense will be unable to address the provider's opinions. This amendment leaves open the distinct opportunity for obfuscation and misuse.

NRCP 26. General Provisions Governing Discovery

Rule 26(g) The signature requirement is duplicative of NRCP Rule 11 and lacks the safe harbor provisions found in that rule. The amendment is redundant because parties already have NRCP Rule 37 to seek discovery sanctions

Rule 30. Depositions by Oral Examination.

Rule 30(a)(2)(A)(i). LVDL opposes limitations on the number of depositions in matters that are already on a trial track. Particularly in person injury matters where the Plaintiff is treating with multiple providers in several disciplines, this amendment will require defense counsel to seek leave of the Court in a majority of cases (outside of the Mandatory Arbitration Program) in order to depose percipient witnesses, treating providers and expert witnesses.

Rule 30(b)(3)(A). LVDL notes that there is no language addressing competing transcriptions of same recording.

Rule 30(b)(3)(B). Avoiding distortion does not address all issues and concerns regarding audiovisual recording of a deposition. The amendment provides no remedy to the parties in the event of a malfunction or issues with recording.

NRCP 32. Using Depositions in Court Proceedings.

Rule 32(a)(5). LVDL shares the concern of the Taskforce related to proposed Rule 32(a)(5), which would allow a party to use a deposition of a retained or non-retained expert witness, even if available to testify, for any purpose, unless otherwise ordered by the Court. The rule does not explain in what circumstances it would be appropriate for the court to order the witness to appear to testify. Proposed Rule 32(a)(5) is not consistent with either Nevada's current rules, or with the Federal Rules of Civil Procedure. Although the proposed rule is intended to reduce costs and expenses, LVDL concurs with other commentators that the rule, as currently drafted, is problematic, and recommends either refining the rule or eliminating it entirely.

Rule 32(b) Objections to the Notice, Officer's Qualifications or Irregularity. Unless and until the Nevada Legislature creates a statutory body for licensing and a regulatory framework governing videographers and video depositions, LVDL maintains that objections should not be limited or waived after a deposition taken by a videographer. A party should not be held to a restrictive timeline when issues with the recordation or transcription of the testimony often do not arise or occur until long after the conclusion of the deposition.

As noted above regarding Rule 30, the amendments do not provide remedies for parties when issues regarding the recordation or transcription of the testimony arise.

Rule 35. Physical and Mental Examinations.

LVDL strongly maintains significant opposition to all of the alternative proposals to amend Rule 35 because all of them entertain recording a Rule 35 examination.

Rule 35(a)(1). Licensing requirement

At the outset, all alternatives require experts to be licensed in the state of Nevada. This requirement is unnecessary and unduly burdensome. Rule 35 examiners do not create a doctor-patient relationship with the party. Further, the examiners are not performing medical procedures upon the party. Thus, the licensing requirement is not warranted. Given the restricted number of medical providers in several disciplines that frequently arise in this jurisdiction, the licensing requirement unjustifiably limits the available pool of examiners.

Rule 35(a)(3) Recording the Examination
Rule 35(a)(4) Observing the Examination

Statement in favor of Alternate 2 to Rule 35 proposal

Alternate 1 contains two provisions that go far beyond the federal rule dealing with independent medical examinations. We believe these provisions will heavily favor personal injury plaintiffs generally, to the disadvantage of defendants. These provisions deal with audio recordings and observers. Alternate 1 allows a plaintiff to record and have an observer at an IME as a matter of right. We believe the better approach is for the court to determine whether recording or an observer is appropriate.

It is common practice in federal jurisdictions that neither defense counsel nor plaintiff's counsel, nor anyone from counsel's office, may attend the examination. *See Hertenstein v. Kimberly Home Health Care, Inc.*, 189 F.R.D. 620, 632 (D. Kan. 1999) (plaintiff did not establish good cause to overcome general rule); *Douponce v. Drake*, 183 F.R.D. 565, 567 (D. Colo. 1998) (neither a third-party's presence nor a tape recording are permitted); *Looney v. Lott*, CIV-11-410, 2012 U.S. Dist. LEXIS 116690, 2012 WL 3583019 (E.D. Okla. Aug. 20, 2012). Generally, the only people that attend a Rule 35 examination are the plaintiff and the examiner. If the plaintiff and examiner are different genders, a member of the examiner's office staff who is the same gender as the examinee may attend. The current versions of NRCP and FRCP 35 allow a court to impose conditions allowing observers or recording, based upon a showing of good cause. The proposal in Alternate 1 turns the unusual exception into the rule, which appears to be a disproportionate reaction to some situations that are not the norm.

Changing the rule to include these provisions, as a matter of right instead of the exception without a showing of good cause, expresses an inherent indictment of the medical community and defense community as untruthful and biased. Changing the rule in this manner would create a chilling effect on doctors, drastically limiting the ability of the defense bar to find and retain doctors to perform the exams. We have spoken with different doctors who expressed the opinion that such changes to the rules would cause many doctors to be hesitant and unwilling to perform the exams. The proposed changes would make it nearly impossible to add new doctors to the pool of doctors who are willing to perform IMEs. Of course, limiting the doctors willing to perform IMEs would greatly help plaintiffs and the plaintiffs' bar generally, all to the huge detriment of defendants and defense attorneys.

Rule 35 exams are intended to level the playing field between plaintiffs and defendants. A plaintiff already has all the information regarding the injuries and damages in the case, both before and after an accident, including access to any doctor the plaintiff chooses. Recordings and observers by defendants never occur during examinations by a plaintiff's doctors. Alternate 1 would give a plaintiff the absolute right to make an audio recording or to use an observer—without seeking permission from the court—although the defendant has no similar right during examinations by the plaintiff's doctors.

Options for defense IMEs are already very limited. The proposed changes in Alternate 1 would dis-incentivize a defendant from having the exam, tilting the playing field to the plaintiff. An IME is usually the only opportunity for a defendant to have doctor examine a plaintiff. Alternate 1 will be seen by potential IME doctors as a form of intimidation. Doctors should be able to perform IMEs without such intimidation.

Recordings and observers should be the exception rather than the rule. Although there may have been isolated instances of problems at IMEs in the past, there is no evidence of such widespread abuse that would justify major game-changing revisions in Rule 35. The proposed changes in Alternate 1 will make litigation more expensive and burdensome. It could create a new cottage industry for "expert observers" and evidentiary issues for recordings. The proposed Rule change does not address authenticity issues of the recording, whether the recording is certified, or a professional is required to provide authenticity and foundation of the recording.

The rule change proposed in Alternate 2 is a reasonable change that does not favor plaintiffs or defendants, unlike Alternate 1. Alternate 2 is neutral. It recognizes that there may be individual cases in which a recording or an observer at an IME should be allowed. In such a case, the plaintiff's counsel would merely be required to seek advance permission from the court. Such a burden on the plaintiff's counsel would not be great, and there is no evidence that this would create an unreasonable burden on the courts.

Rule 35(b)(1) Examiner's Report

The proposed amendment to disclose reports within 30 days of the examination unnecessarily creates a second initial disclose deadline for the defense where one is not warranted.

Rule 37. Failure to Make Disclosures or to Cooperate in Discovery; Sanctions

Rule 37(e). This proposed amendment regarding the failure to preserve electronically stored information is disproportionately harsh. Incidents occur on a regular basis but not all result in litigation. The amendment does not take into account the lack of notice upon a party regarding an incident. Further, given the passage of time between an event and whether litigation is pursued, individuals and companies will be tasked with identifying and storing an inordinate amount of information to be deemed to have taken reasonable steps to preserve electronically stored information.

Rule 38. Right to a Jury Trial.

LVDL agrees with the Taskforce's suggestion to add clarification to NRCP 38(d)(1) that a jury demand filed by a party inures to the benefit of all parties, and that a demand for a jury trial may only be withdrawn if all parties consent or the court for good cause orders the demand withdrawn.

NRCP 45. Subpoena.

Rule 45(a)(4)(i). LVDL believes that the proposed seven days' notice requirement creates an unnecessary procedural hoop that will lead to delays in the discovery process.

NRCP 60(c)(1).

LVDL concurs with the proposed amendment to Rule 60(b) which would lengthen the time to file a Rule 60(b) motion from 6 months to one year. The proposed amendment is consistent with longstanding Nevada authorities and public policy to have matters adjudicated on the merits.