

IN THE SUPREME COURT OF THE STATE OF NEVADA

Troy Moats,

Petitioner,

vs.

**The Eighth Judicial District Court
of the State of Nevada ex rel the
County of Clark and the
Honorable Judge Adriana
Escobar,**

Respondents.

Troy Burgess,

Real Party in Interest.

Supreme Court No.:

Electronically Filed
Oct 09 2020 01:26 p.m.

District Court No. 18-164590

Elizabeth A. Brown
Clerk of Supreme Court

**PETITION UNDER FOR A
WRIT OF MANDAMUS OR OTHER EXTRAORDINARY RELIEF
H&P LAW**

Matthew G. Pfau, Esq.

Nevada Bar No. 11439

Marjorie L. Hauf, Esq.

Nevada Bar No. 8111

8950 W. Tropicana Ave., #1

Las Vegas, Nevada 89147

702 598 4529 TEL

Attorneys for Troy Moats, Petitioner

ROUTING STATEMENT

This Petition raises a principal issue and question of statewide public importance in compliance with NRAP 17(a)(12). As such, jurisdiction over this matter is retained by the Nevada Supreme Court. There is no existing authority vested in the Nevada Court of Appeals which would permit the Court of Appeals to address this issue.

This Petition concerns the clear conflict between NRCP 35 and NRS 52.380 regarding whether an observer and audio recording are permitted during a court ordered psychological and neuro-psychological evaluations. The Respondent District Court erroneously ordered that NRCP 35 is the controlling authority on these issues and that Plaintiff may not have a third-party observer present and may not audio record the NRCP 35 neuropsychological examination on October 12, 2020, and October 13, 2020.

The District Court's order is conflicting with the parameters set forth in NRS 52.380 regarding attendance by an observer. And different judges within the Eighth Judicial District have made conflicting rulings on the

same subject making this issue ripe of the Supreme Court's determination.¹

Since this case involves a conflict of law – the application of NRCP 35 and NRS 52.380 – which also implies a separation of powers determination, this petition should be heard and decided by the Supreme Court pursuant to the Nevada Rule of Appellate Procedure.

DATED this 9th day of October 2020. H & P LAW



Marjorie Hauf, Esq.
Nevada Bar No.: 8111
Matthew G. Pfau, Esq.
Nevada Bar No.: 11439

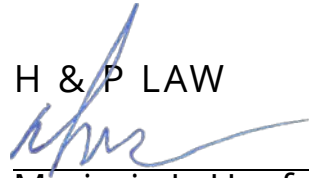
Attorneys for Petitioner,
Troy Moats

NRAP 26.1 DISCLOSURE

TROY MOATS, is an individual, and represented by Matthew G. Pfau, Esq., and Marjorie L. Hauf, Esq. of the law firm of H&P LAW in the District Court and in this Court.

¹ See Conflicting Orders from Judge Mark Denton and Judge Adriana Escobar in Appendix, Volume I.

DATED this 9th day of October 2020. H & P LAW



Marjorie L. Hauf, Esq.
Nevada Bar No.: 8111
Matthew G. Pfau, Esq.
Nevada Bar No.: 11439

Attorney for Petitioner,
Troy Moats

**DECLARATION OF MATTHEW G. PFAU, ESQ. IN SUPPORT OF
PETITION**

Matthew G. Pfau, Esq., declares and submits the following facts in support of the Petition for Writ of Mandamus:

1. I am licensed to practice law in this Court and am a partner at H&P Law, counsel for Petitioner.
2. I certify that I have read this Petition and to the best of my knowledge, this Petition complies with the form requirements of NRAP 21(d), and that it is not frivolous or interposed for any improper purpose such as to harass or cause unnecessary delay or needless increase in the cost of litigation.
3. I further certify that this Petition complies with all applicable Nevada Rules of Appellate Procedure, including the requirement of NRAP 28(e) that references to matters in the record be supported by a reference to the appendix where the matter relied upon is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in

conformity with the requirements of the Nevada Rules of Appellate Procedure.

4. I have discussed the Petition with the appropriate persons and have obtained authorization to file this Petition.

5. I declare under penalty of perjury that the foregoing is true and correct.

DATED this 9th day of October 2020. H & P LAW



Matthew G. Pfau, Esq.
Nevada Bar No.: 11439

Attorney for Petitioner,
Troy Moats

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I. INTRODUCTION

NRS 52.280 creates substantive rights, including the right of the examinee to have his or her attorney or that attorney's representative serve as the observer, the right to have the observer record the examination without making a showing of "good cause," and the right to have an observer present for a neuropsychological, psychological, or psychiatric examination without making a showing of "good cause."

Since NRS 52.380 creates substantive rights, it is substantive rather than procedural. And, since NRS 52.380 is substantive, it governs and supersedes NRCP 35 where the two conflict under the constitutional separation of powers. Therefore, NRS 52.280 applies when determining whether an individual has the substantive right to an observer present or to audio record a neuropsychological, psychological, or psychiatric examination in Nevada.

II. STATEMENT OF ISSUES PRESENTED

Whether the District Court committed error in finding that NRCP 35 is controlling on the issue of whether a third-party observer and/or an

audio recording is permissible during an NRCP 35 psychological examination.

III. PROCEDURAL BACKGROUND

On February 13, 2018, Plaintiff, Troy Moats filed his Complaint against Defendant, Troy Burgess, claiming Negligence and Negligence Per Se. This case was deemed exempt from Nevada's Mandatory Arbitration program on December 11, 2018 and discovery thereafter commenced.

On April 21, 2020, Defendant filed a Motion to Compel Rule 35 Examination of Plaintiff, to which Plaintiff opposed on May 6, 2020. Defendant then filed their Reply in Support of Motion to Compel Rule 35 Psychological Examination on May 20, 2020.

The matter came before the Honorable Discovery Commissioner on May 28, 2020. The Discovery Commissioner recommended Plaintiff undergo a Rule 35 Psychological Examination and requested the parties confer regarding parameters prior to a Status Check on July 31, 2020. The parties ultimately stipulated to 29 of 31 topics, but remained

contested on two parameters:

1. Troy Moats will be permitted to audio record the examination.
2. Troy Moats will be accompanied by a silent observer during the examination.

During the Status Check on July 31, 2020, the Discovery Commissioner recommended per NRS 52.380, Troy Moats was permitted to audio record the examination and could be accompanied by an independent observer. The Discovery Commissioner made this ruling in deference to NRS 52.380, as “affects the substantive right inherent in a physical examination.”

Defendant then filed an Objection to the Discovery Commissioner’s recommendation, claiming the instant matter was procedural not substantive. The matter was heard before the Honorable Adriana Escobar on September 29, 2020. Judge Escobar sustained Defendant’s objection and determined NRCP 35 governs whether a third-party observer and audio recording is permitted.

Judge Escobar entered an Order on October 7, 2020 compelling Troy

Moats to appear for a Rule 35 Psychological Examination on October 12-13, 2020 and barring Troy Moats being accompanied by an observer or audio recording.² A Motion to Stay that Rule 35 Examination is pending.

IV. LEGAL ARGUMENT

A. Operative Law Regarding Writ

This Court noted that “writ relief is available only when there is no plain, speedy and adequate remedy in the ordinary course of law.”³ However, the Court will consider writ petitions “when an important issue of law needs clarification and considerations of sound judicial economy and administration militate in favor of granting the petition.”⁴ Such is the case here.

² Conflicting Orders from Judge Mark Denton and Judge Adriana Escobar in Appendix, Volume I.

³ *Oxbow Constr., LLC v. Eighth Judicial Dist. Court*, 130 Nev. Adv. Op. 86, 335 P.3d 1234, 1238 (2014).

⁴ *Id.*

B. The right to the presence of an observer afforded under NRS

52.280 establishes a substantive right created by the judiciary.

The differences between the NRS 52.280 and NRCP 35 are substantive, as the statute creates substantive rights for the examinee in a NRCP35 examination. These substantive rights are the rights to have an observer present, to have that observer be the examinee's attorney, and to record the examination. Under NRCP 35, the examinee has no such rights, as each of these aspects is either completely unavailable or is conditioned upon a request to the court and/or a showing of good cause.

A substantive standard is "one that 'creates duties, rights and obligations,' while a procedural standard specifies how those duties, rights, and obligations should be enforced."⁵ This definition of a "substantive standard" is important since NRCP 35 already provides for the procedural right to have an observer at an examination and for

Conflicting Orders from Judge Mark Denton and Judge Adriana Escobar in Appendix, Volume I. (citing Azar v. Allina Health Servs., 139 S. Ct. 1804, 1811 (2019)).

recording of an examination. However, NRCP 35 provides:

On request of a party or the examiner, the court may, *for good cause shown*, require as a condition of the examination that the examination be *audio recorded*.

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

The party may have one observer present for the examination, unless [] the examination is a neuropsychological, psychological, or psychiatric examination; or [] the court orders otherwise for good cause shown. *The party may not have any observer present for a neuropsychological, psychological, or psychiatric examination,*

*unless the court orders otherwise for good cause shown.*⁶

NRS Section 52.80, by contrast, provides that

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

The observer attending the examination pursuant to subsection 1 *may be [] [a]n attorney of an examinee or party producing the examinee; or [] [a] designated representative of the attorney . . . [.]*

The observer attending the examination pursuant to subsection 1 *may make an audio or stenographic recording of the examination.*⁷

Thus, the *procedure* set forth in NRCP 35 permitted an observer at an examination and recording of an examination. However, these possibilities were *conditioned* upon a showing of good cause for recording, *limited* to exclude the examinee's attorney or the attorney's employee as the observer, *precluded* for neuropsychological,

⁶ See Nev. R. Civ. P. 35(a)(3), (4) (emphases added).

⁷ See Nev. Rev. Stats. 52.380(1), (2), (3) (emphases added).

psychological, or psychiatric examinations absent a showing of good cause, and so on.⁸

The statute, by contrast, transformed these conditional elements of an examination into *substantive rights* of the examinee *by removing all conditions and limitations*. The examinee is no longer required to “request” an observer, to show good cause for recording the examination, to show good cause to have an observer at particular types of examinations, to choose someone other than his attorney as the observer, and so on.⁹

Under the statute, the examinee now has the right to record the examination, the right to have an observer present irrespective of the type of examination, and the right to have his attorney serve as the observer.

As the foregoing demonstrates, the procedures in the Rule and the statute are identical (i.e., observer, recording). The only difference

⁸ See Nev. R. Civ. P. 35(a)(3), (4) (emphases added).

⁹ See Nev. Rev. Stats. 52.380(1),(2),(3).

under the statute is that the examinee now has a right to these elements, rather than having to jump through the hoops defined in the Rule. The statute on its face creates substantive rights not contained in the Rule.

C. NRS 52.380 controls the presence of observers in the examination room—superseding NRCP 35—due to the separation of powers afforded to the judiciary.

Nevada law is extraordinarily clear regarding the interrelation of court rules and legislative statutes. As this Court has noted:

The judiciary has the inherent power to govern its own procedures, and this power includes the right to promulgate rules of appellate procedure as provided by law. [] Although such rules may not conflict with the state constitution or “abridge, enlarge or modify any substantive right,” NRS 2.120, the authority of the judiciary to promulgate procedural rules

is independent of legislative power, and may not be diminished or compromised by the legislature. [] We have held that the legislature may not enact a procedural statute that conflicts with a pre-existing procedural rule, without violating the doctrine of separation of powers, and that such a statute is of no effect. [] Furthermore, where, as here, a rule of procedure is promulgated in conflict with a pre-existing procedural statute, the rule supersedes the statute and controls. []¹⁰

The executive prerogative is given to the judiciary to make its own rules governing its own procedures. The Legislature has the exclusive prerogative to enact status governing the substance of the law. This distinction is predicated upon the “separation of powers” doctrine, which is specifically recognized in the Nevada State Constitution.¹¹

¹⁰ *State v. Connery*, 99 Nev. 342, 345 (1983) (internal citations omitted).

¹¹ *Berkson v. LePome*, 126 Nev. 492, 498 (2010) (citing Nev. Const. art. 3, § 1(1)).

This division of powers between three separate departments (Legislative, Executive, and Judicial) is fiercely guarded under Nevada law—in fact, this Court has noted that, while the United States Constitution implicitly divides power through its creation of three branches, “Nevada’s Constitution goes one step further; it contains an express provision prohibiting any one branch of government from impinging on the functions of another.”¹²

As noted in *Connery*, the prohibition on the Legislature’s enactment of a statute that conflicts with a pre-existing procedural rule, without violating the doctrine of separation of powers,” is limited to any “procedural statute.”¹³ A “procedural statute” that conflicts with a “procedural rule” is “of no effect, irrespective of which was enacted first.”¹⁴

¹² *Comm’n on Ethics v. Hardy*, 125 Nev. 285 (2009) (citing *Secretary of State v. Nevada State Legislature*, 120 Nev. 456, 466 (2004)) (emphasis added).

¹³ *Connery*, 99 Nev. at 345.

¹⁴ *Id.*

Consistent with this separation of powers among co-equal branches of government, the district courts likewise may not promulgate a rule that would “abridge, enlarge or modify any substantive right[.]”¹⁵

Since NRS Section 52.380 establishes a substantive right, the rule properly governs the presence of an observer (or the conducting of a recording) in Defendant’s examinations of Plaintiff in this matter. And, as a result, the doctrine of separation of powers mandates that the statute supersedes NRCP 35.¹⁶

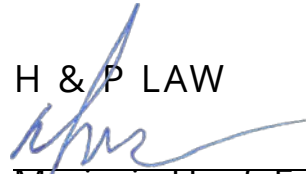
V. CONCLUSION

Petitioner respectfully requests this Court issue a Writ of Mandamus. Respondent unreasonably abused its discretion and committed clear error by ordering that Plaintiff is not permitted to audio record or have a third-party observer present at the NRCP 35 psychological examination with Dr. Etcoff on October 12, 2020, and October 13, 2020.

¹⁵ *Id.*

¹⁶ *Connery*, 99 Nev. at 345 (court rules cannot “abridge, enlarge or modify any substantive right”).

DATED this 9th day of October 2020. H & P LAW



Marjorie Haut, Esq.
Nevada Bar No.: 8111
Matthew G. Pfau, Esq.
Nevada Bar No.: 11439

Attorneys for Petitioner,
Troy Moats

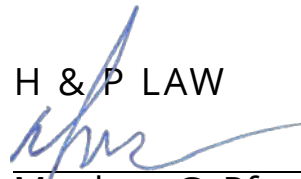
CERTIFICATE OF COMPLIANCE

I, Matthew G. Pfau, the undersigned, hereby certify as follows:

1. I have prepared and read this Petition.
2. To the best of my knowledge, information, and belief, the Petition is not frivolous or interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.
3. This Petition complies with all applicable Nevada Rules of Appellate Procedure, including Rule 28(e), that every assertion in the brief regarding matters in the record be supported by a reference to the page and volume number, if any, of the appendix where the matter relied on is to be found.
4. The Petition complies with the formatting requirements of Rule 32(a)(4)-(6) and 32(a)(7).
5. The Petition is written using 14-point proportional-spaced font called "Open Sans."
6. Although this Petition exceeds 15 pages at a total of 25 pages, it

contains fewer than 7,000 words at 2,955 words.

DATED this 9th day of October 2020. H & P LAW



Matthew G. Pfau, Esq.
Nevada Bar No.: 11439

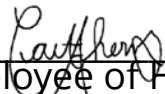
Attorneys for Petitioner,
Troy Moats

CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of October 2020, service of the foregoing Petition for a Writ of Mandamus or Other Extraordinary Relief was made by required electronic service and U.S. Mail to the following individuals:

Thomas E. Winner, Esq.
Nevada Bar No. 5168
Caitlin J. Lorelli, Esq.
Nevada Bar No. 15471
WINNER & SHERROD
1117 South Rancho Drive
Las Vegas, Nevada 89102
702 243 7000 TEL
Attorneys for Troy Burgess, Defendant/Real Party in Interest

The Eighth Judicial District Court
of the State of Nevada ex rel The
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Department 14
Regional Justice Center
200 Lewis Avenue
Las Vegas, Nevada 89101
Respondent



An employee of H&P LAW