**IN THE SUPREME COURT OF NEVADA**

LYFT, INC.,
Petitioner,

vs.

EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, in and for the County of Clark, and THE HONORABLE MARK R. DENTON,
Respondents,

and

KALENA DAVIS,
Real Party in Interest.

District Court No. A-18-777455-C



# PETITIONER'S APPENDIX
# VOLUME 1 (Pages 1-250)

Jeffrey D. Olster
Nevada Bar No. 8864
Jeff.Olster@lewisbrisbois.com
Jason G. Revzin
Nevada Bar No. 8629
Jason.Revzin@lewisbrisbois.com
Blake A. Doerr
Nevada Bar No. 9001
Blake.Doerr@lewisbrisbois.com
Lewis Brisbois Bisgaard & Smith LLP
6385 S. Rainbow Boulevard, Suite 600
Las Vegas, Nevada 89118
(702) 893-3383
*Attorneys for Petitioner*

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## CERTIFICATE OF SERVICE

I certify that I am an employee of Lewis Brisbois Bisgaard & Smith LLP, and that on this 2nd day of December, 2020, I did cause a true copy of the foregoing **PETITIONER'S APPENDIX VOLUME 1 (Pages 1-250)** to be served via the Court's electronic filing and service system ("E-Flex") to all parties on the current service list:

Jared R. Richards
Dustin E. Birch
CLEAR COUNSEL LAW GROUP
1671 W. Horizon Ridge Pkwy., Ste. 200
Las Vegas, Nevada 89012
Tel: (702) 476-5900
Fax: (702) 924-0709
Email: jared@clearcounsel.com
dustin@clearcounsel.com
*Attorneys for Plaintiff/Real Party in Interest Kalena Davis*

James E. Harper
Justin Gourley
HARPER SELIM
1707 Village Center Circle, Suite 140
Las Vegas, Nevada 89134
Tel: (702) 948-9240
Fax: (702) 778-6600
Email: eservice@harperselim.com
*Attorneys for Defendant Adam Deron Bridewell*

Hon. Mark R. Denton
Eighth Judicial District Court
200 Lewis Avenue
Las Vegas, Nevada 89155
*Respondent Court*

By /s/ *Heidi Davis*
An Employee of Lewis Brisbois Bisgaard & Smith LLP

MOT
JASON G. REVZIN
Nevada Bar No. 8629
BLAKE A. DOERR
Nevada Bar No. 9001
LEWIS BRISBOIS BISGAARD & SMITH LLP
6385 S. Rainbow Boulevard, Suite 600
Las Vegas, Nevada 89118
Telephone: 702.893.3383
Fax: 702.893.3789
Email: jason.revzin@lewisbrisbois.com
Email: blake.doerr@lewisbrisbois.com
*Attorneys for Lyft, Inc. and The Hertz Corporation*

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

2/13/20
9:30 am

KALENA DAVIS,

Plaintiff,

vs.

ADAM DERON BRIDEWELL, an individual; LYFT, INC., a foreign corporation; THE HERTZ CORPORATION, a foreign corporation; DOE OWNERS I through X, and ROE LEGAL ENTITIES I through X, inclusive,

Defendants.

Case No.: A-18-777455-C
Dept. No.: XIII

**DEFENDANT LYFT AND DEFENDANT THE HERTZ CORPORATION'S MOTION TO COMPEL RULE 35 EXAMINATIONS ON ORDER SHORTENING TIME**

**(HEARING REQUESTED)**

Defendant, LYFT, INC., ("LYFT") and Defendant THE HERTZ CORPORATION ("HERTZ") by and through their counsel of record LEWIS BRISBOIS BISGAARD & SMITH LLP, hereby files this Motion to Compel Rule 35 Examinations against Plaintiff KALENA DAVIS.

This Motion is made and based on the attached memorandum of points and authorities, the papers, pleadings and records contained in this Honorable Court's file, and

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/ / /

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/ / /

any arguments of counsel to be presented at the hearing on this matter.

DATED this 28th day of January, 2020.

LEWIS BRISBOIS BISGAARD & SMITH LLP

By _____

JASON G. REVZIN
Nevada Bar No. 8629
BLAKE A. DOERR
Nevada Bar No. 9001
LEWIS BRISBOIS BISGAARD & SMITH LLP
6385 S. Rainbow Boulevard, Suite 600
Las Vegas, Nevada 89118
Telephone: 702.893.3383
Fax: 702.893.3789
jason.revzin@lewisbrisbois.com
blake.doerr@lewisbrisbois.com
*Attorneys for Lyft, Inc. and The Hertz Corporation*

## ORDER SHORTENING TIME

GOOD CAUSE APPEARING THEREFORE,

IT IS HEREBY ORDERED, that **DEFENDANTS' MOTION TO COMPEL RULE 35 EXAMINATIONS** be heard on February 13, 2020, at the hour of 9:30 a.m. before the Discovery Commissioner.

Dated this 29th day of January, 2020.

_____
DISCOVERY COMMISSIONER

Respectfully Submitted by:
LEWIS BRISBOIS BISGAARD & SMITH LLP

_____

JASON G. REVZIN
Nevada Bar No. 8629
BLAKE A. DOERR
Nevada Bar No. 9001
*Attorneys for Lyft, Inc. and The Hertz Corporation*

DECLARATION OF BLAKE A. DOERR, ESQ., IN SUPPORT OF DEFENDANT'S MOTION TO COMPEL RULE 35 EXAMINATIONS

I, Blake A. Doerr, declare as follows:

1. I am a partner at the law firm of LEWIS BRISBOIS BISGAARD & SMITH LLP, and am duly licensed to practice law in the State of Nevada. I am an attorney of record representing Defendant *Lyft, Inc.* and Defendant *The Hertz Corporation* in the subject lawsuit currently pending in Department 13 of the Eighth Judicial District Court for the State of Nevada, Case Number A-18-777455-C. I am competent to testify to the matters set forth in this Declaration, and will do so if called upon.

2. That I make this Declaration on behalf of Defendants and in support of their Motion to Compel Rule 35 Examinations against Plaintiff KALENA DAVIS and to demonstrate that the parties conferred in good faith to obtain the discovery prior to seeking this court's intervention.

3. On January 10, 2020, I participated in an E.D.C.R. 2.34 with Plaintiff's counsel, Jared Richards. In that conversation, we discussed the fact that Plaintiff's counsel had requested a stipulation as to certain terms prior to his agreement to allow his client to be examined; that Plaintiff's counsel had not provided any of the requested terms nor had Plaintiff's counsel ever provided dates even though he had agreed to work on that beginning in October of 2019.

4. This Motion on Order for Shortening Time is necessary as our experts need to be able to examine the Plaintiff and prepare their reports by March 6, 2020. The exams need to be scheduled forthwith.

5. This Declaration is made in good faith, and not for purposes of delay.

I declare under penalty of perjury under the laws of the State of Nevada that the foregoing is true and correct.

Blake A. Doerr, Esq.

No Notary Required per NRS 53.045

## MEMORANDUM OF POINTS AND AUTHORITIES

## I.

## FACTUAL INTRODUCTION

At the time of the accident, Co-Defendant Adam Bridewell ("Bridewell"), while utilizing the Lyft application, website, and technology platform ("Lyft platform") to transport two passengers, was driving a 2016 Toyota Camry (which he had leased from Hertz). One passenger, Ashley Caulk, was headed to her new job to collect her first paycheck; the other, Paulette Harris, was headed to the Galleria Mall. Plaintiff was headed to work (he was employed at RideNow Powersports on Boulder Highway near the Silver Bowl) traveling eastbound on Russell Road. Bridewell was traveling westbound on Russell Road and had entered the intersection at Stephanie Street to make a left-hand turn. Bridewell was yielding to oncoming traffic, with a solid green ball controlling his left turn. Meanwhile, Plaintiff split the lanes of travel on eastbound Russell Road, driving between the cars stopped for the red light at the intersection at Stephanie Street. As Bridewell followed through on his left-hand turn to clear the intersection, Plaintiff, once at the front of the line, revved his engine and blasted through the intersection on a solid red light. As Bridewell completed his turn, Plaintiff crashed into the right, passenger-side door of Bridewell's vehicle.

As a result of his colliding with Bridewell's vehicle, Plaintiff was ejected from his motorcycle. Plaintiff was transported to Sunrise Hospital, where he was admitted for over two months and underwent multiple surgeries, including a below-the-knee amputation. Plaintiff has alleged future treatment and future damages, including claims of traumatic brain injury.

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## II.

## LEGAL ANALYSIS

NRCP 35(a) provides in pertinent part as follows:

> When the mental or physical condition of a party . . . is in controversy, the court in which the action is pending may order the party to submit to a physical or mental examination by a suitably licensed or certified examiner . . . . The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner conditions, and scope of the examination and the persons . . . by whom it is to be made. (emphasis added).

NRCP 35 essentially mirrors its federal counterpart with the exception that the Federal Rule does not allow observers at the examination. Nevertheless, Nevada courts routinely look to the federal court's interpretation of the rules of civil procedure. *See, Greene v. Dist. Ct.*, 115 Nev. 391, 393, 990 P.2d 184 (1999). Thus, this Court should consider the federal case law regarding this issue set forth below.

The seminal case regarding Rule 35 is *Schlagenhauf v. Holder*, 379 U.S. 104 (1964). In *Schlagenhauf*, the United States Supreme Court set forth the showing that a party seeking a Rule 35 examination must make. *Id.* at 118-119. A party must show that the physical or mental condition of the party to be examined is in controversy and that there is good cause for the requested examination. *Id.* ("affirmative showing by the movant that each condition as to which the examination is sought is really and genuinely in controversy and that good cause exists for ordering each particular examination.").

In this case, Plaintiff's mental condition, physical condition, and alleged future medical care are in controversy. Plaintiff Kalena Davis testified he has no memory of the day in question. Plaintiff testified he could not remember any details of: where he was going to at the time, where he was coming from, what time it was, what day it was, whether his light was red, yellow or green, whether he moved in-between lanes of stopped cars at the intersection, what intersection the accident occurred at, what he told the investigating officers or first responders. Plaintiff testified at his deposition that what

he knows about the incident is limited to what was told to him by others.

According to the U.S. Supreme Court, "[a] plaintiff in a negligence action who asserts mental or physical injury . . . places that mental or physical injury clearly in controversy and provides the defendant with **good cause** for an examination to determine the existence and extent of such asserted injury." *Schlagenhauf*, 379 U.S. at 119 (emphasis added).

Here, Defendants retained Thomas Francis Kinsora, Ph.D. to perform a neuropsychological examination. Thomas Francis Kinsora, Ph.D., (Dr. Kinsora) is a trained clinical neuropsychologist. Dr. Kinsora received his undergraduate degree from Wayne State University in Detroit, Michigan. Moreover, Dr. Kinsora was admitted into the American Psychology, receiving a Ph.D. in Psychology with a certificate in neuropsychology and behavioral medicine. Dr. Kinsora's doctoral research focused on implicit stem-completion priming and memory processing in the differentiation of Alzheimer's type dementia from Parkinson's related dementia. It is expected that Dr. Kinsora will opine on the Plaintiff's condition within his area of expertise.

A Stipulation and Order was provided to Plaintiff's Counsel on January 24th for the Rule 35 Examination that is currently scheduled with Dr. Kinsora for two days beginning March 11, 2020 at 9:00 a.m. and March 12, 2020 at 9:00 a.m. A copy of the Stipulation and Order is attached hereto as Exhibit A.

Defendant retained Aubrey Corwin M.S., L.P.C., C.R.C., C.L.C.P to perform an earning capacity evaluation and make a vocational damages assessment and comment on any purported life care plan should one be disclosed. Ms. Corwin is the Director of Vocational Diagnostics Incorporated, a Licensed Professional Counselor for the Arizona Board of Behavioral Health Examiners, a Certified Rehabilitation Counselor, and a Certified Life Care Planner.

A Stipulation and Order was provided to Plaintiff's Counsel on January 24th for the Rule 35 Examination that is currently scheduled with Aubrey Corwin for February 7, 2020 at 9:30 a.m. and 1:00 p.m. A copy of the Stipulation and Order is attached hereto as

Exhibit B).

Defendant has further retained David E. Fish, M.D., a board certified physician in the areas of physical medicine and rehabilitation. Dr. Fish is expected to offer his expert opinions as to Plaintiff's alleged medical conditions allegedly resulting from the incident which is the subject of Plaintiff's Complaint. Dr. Fish will testify as to the reasonableness and necessity of Plaintiff's medical treatment following the subject incident, as well as future prognosis and treatment. Dr. Fish will also testify regarding the existence of any pre-accident and post-accident injuries, conditions, accidents/incidents, as well as medical treatment and billings, along with his rebuttal opinions, and any other areas within his expertise.

A Stipulation and Order was provided to Plaintiff's Counsel on January 24th for the Rule 35 Examination that is currently scheduled with Dr. Fish, for two days beginning March 20, 2020 at 2:00 p.m. A copy of the Stipulation and Order is attached hereto as Exhibit C.

## III.

## CONCLUSION

Based upon the foregoing, Defendants respectfully request an Order compelling Plaintiff to attend NRCP Rule 35 examinations as follows:

Dr. Kinsora: March 11, 2020 at 9:00 a.m. to 12:00 p.m. and;
March 12, 2020 at 9:00 a.m. to 5:00 p.m.

Ms. Corwin: February 7, 2020 at 9:30 a.m. to 12:30 p.m. and;
February 7, 2020 at 1:00 p.m. to 3:30 p.m.

Dr. Fish: March 20, 2020 at 2:00 p.m.

DATED this 28th day of January, 2020.

LEWIS BRISBOIS BISGAARD & SMITH LLP

By 

JASON G. REVZIN
Nevada Bar No. 8629
BLAKE A. DOERR
Nevada Bar No. 9001
LEWIS BRISBOIS BISGAARD & SMITH LLP
6385 S. Rainbow Boulevard, Suite 600
Las Vegas, Nevada 89118
Telephone: 702.893.3383
Fax: 702.893.3789
jason.revzin@lewisbrisbois.com
blake.doerr@lewisbrisbois.com
*Attorneys for Lyft, Inc. and The Hertz Corporation*

## CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b) and N.E.F.C.R. 4(b)(1), 5(k) and 10(b), I hereby certify that I am an employee of LEWIS BRISBOIS BISGAARD & SMITH LLP and that on this 30th day of January, 2020, I did cause a true and correct copy of **DEFENDANT LYFT AND DEFENDANT THE HERTZ CORPORATION'S MOTION TO COMPEL RULE 35 EXAMINATIONS ON ORDER SHORTENING TIME** to be served via the Court's electronic filing and service system to all parties on the current service list.

Jared R. Richards
CLEAR COUNSEL LAW GROUP
1671 W. Horizon Ridge Pkwy., Ste. 200
Las Vegas, NV 89012
*Attorneys for Plaintiff*

Justin S. Gourley
HARPER SELIM
1707 Village Center Circle, Suite 140
Las Vegas, Nevada 89134
*Attorneys for Defendant Adam Deron Bridewell*

By /s/Sherry Rainey
An Employee of LEWIS BRISBOIS BISGAARD & SMITH LLP

# Exhibit A

STP
MATTHEW A. CAVANAUGH
Nevada Bar No. 11077
BLAKE A. DOERR
Nevada Bar No. 9001
LEWIS BRISBOIS BISGAARD & SMITH LLP
6385 S. Rainbow Boulevard, Suite 600
Las Vegas, Nevada 89118
Telephone: 702.893.3383
Fax: 702.893.3789
Email: matthew.cavanaugh@lewisbrisbois.com
Email: blake.doerr@lewisbrisbois.com
*Attorneys for Lyft, Inc. and The Hertz Corporation*

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

KALENA DAVIS,

Plaintiff,

vs.

ADAM DERON BRIDEWELL, an individual; LYFT, INC., a foreign corporation; THE HERTZ CORPORATION, a foreign corporation; DOE OWNERS I through X, and ROE LEGAL ENTITIES I through X, inclusive,

Defendants.

Case No.: A-18-777455-C
Dept. No.: XIII

**STIPULATION AND ORDER FOR NRCP RULE 35 EXAMINATION**

**Date of Video Clinical Interview:**
**February 7, 2020**
**Time of Interview: 9:30 a.m.- 12:30 p.m.**

**Date of Video Vocational Testing:**
**February 7, 2020**
**Time of Testing: 1 p.m. - 3:30 p,m,**

On February 7, 2020 an Independent Video Clinical Interview and Video Vocational testing of the Plaintiff shall be Conducted by Aubrey Corwin, M.S., L.P.C., C.R.C., C.L.C.P., Director of Vocational Diagnostic Institute. Ms. Corwin is a qualified expert witness in Clark County District Court and will offer her opinions related to earning capacity evaluation, analysis of household services, and life care planning. Alleged injuries include orthopedic and neurological injuries and traumatic brain and spinal cord injuries.

1. The examination will consist of two sessions: an interview session and a testing

session. The interview session will be approximately 3 hours and the testing session will last approximately 3 hours and there will be a lunch break in between the two sessions.

2. The interview and testing will be done through videoconference means at Litigation Services located at 3770 Howard Hughes Pkwy #300, Las Vegas, Nevada 89169.

3. The Plaintiff shall complete the required intake documents requested by the examiner and bring them to the examination; and the examiner will go over the intake documents with the Plaintiff at the start of the interview.

4. The Plaintiff will not wait any longer than 30 minutes after the scheduled time for the commencement of the Rule 35 exam.

5. The examiner will not ask any questions to Plaintiff directly relating to the Plaintiff's opinions regarding liability; however, this shall not be construed to mean the examiner cannot inquire as to how the accident occurred to better understand the mechanism of the alleged injury; nor shall this be construed to mean the examiner cannot inquire about past medical treatment.

6. Should Plaintiff fail to appear and fully cooperate during the examination to completion, Plaintiff shall be all costs associated with any subsequent examination.

7. The examination shall not be recorded.

DATED this ____ day of January 2020.

CLEAR COUNSEL LAW GROUP

Jared R. Richards, Esq.
Nevada Bar No. 11254
1671 W. Horizon Ridge Pkwy, Suite 200
Henderson, NV 89012
*Attorneys for Plaintiff Kalena Davis*

DATED this ___ day of January 2020.

HARPER | SELIM

James E. Harper, Esq.
Nevada Bar No. 9822
Justin Gourley, Esq.
Nevada Bar No. 11976
1707 Village Center Circle, Suite 140
Las Vegas, NV 89134
*Attorneys for Defendant Adam Deron Bridewell*

DATED this ____ day of January 2020.

LEWIS BRISBOIS BISGAARD & SMITH, LLP

_____

Jason G. Revzin, Esq.
Nevada Bar No. 8629
Blake A. Doerr, Esq.
Nevada Bar No. 9001
6385 S. Rainbow Boulevard, Suite 600
Las Vegas, NV 89118
*Attorneys for Defendant Lyft, Inc. The Hertz Corporation*

ORDER

IT IS SO ORDERED.

_____

DISTRICT COURT JUDGE

Submitted by:

_____

MATTHEW A. CAVANAUGH
Nevada Bar No. 11077
BLAKE A. DOERR, Esq.
Nevada Bar No. 9001
6385 S. Rainbow Boulevard, Suite 600
Las Vegas, Nevada 89118
LEWIS BRISBOIS BISGAARD & SMITH LLP

# Exhibit B

STP
MATTHEW A. CAVANAUGH
Nevada Bar No. 11077
BLAKE A. DOERR
Nevada Bar No. 9001
LEWIS BRISBOIS BISGAARD & SMITH LLP
6385 S. Rainbow Boulevard, Suite 600
Las Vegas, Nevada 89118
Telephone: 702.893.3383
Fax: 702.893.3789
Email: matthew.cavanaugh@lewisbrisbois.com
Email: blake.doerr@lewisbrisbois.com
*Attorneys for Lyft, Inc. and The Hertz Corporation*

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

KALENA DAVIS,

Plaintiff,

vs.

ADAM DERON BRIDEWELL, an individual; LYFT, INC., a foreign corporation; THE HERTZ CORPORATION, a foreign corporation; DOE OWNERS I through X, and ROE LEGAL ENTITIES I through X, inclusive,

Defendants.

Case No.: A-18-777455-C
Dept. No.: XIII

**STIPULATION AND ORDER FOR NRCP RULE 35 EXAMINATION**

**Date of interview: March 11th 9 a.m. - noon**
**Date of Assessment: March 12th 9 a.m.-5 p.m**

A Clinical Interview of the Plaintiff shall be conducted on March 12, 2020 from 9:00 a.m. to noon. and an Independent Neuropsychological Assessment shall be conducted on March 12th, 2020 from 9:00 a.m. to 5:00 p.m. by Dr. Thomas F. Kinsora, Ph.D., at his office located at 716 South 6th Street, Las Vegas, NV 89101.

1. Plaintiff shall complete online intake at least 1 week prior to the assessment.
2. The examination shall not go beyond 5 p.m. except in circumstances where the Plaintiff may require extra breaks and lunch.
3. Plaintiff will not wait any longer than 30 minutes in the waiting room prior to the Commencement of the Rule 35 exam.

4. The examiner will not any questions to Plaintiff directly relating to Plaintiff's opinions regarding liability; however, this shall not be construed to mean the examiner cannot inquire as to how the accident occurred to better understand the mechanism of the alleged injury;
5. Should Plaintiff fail to timely appear and fully cooperate during the examination to completion, Plaintiff shall bear all costs associated with the examination and any second examination.
6. The examination shall not be recorded.
7. The Plaintiff shall not have an observer at the examination.

DATED this ____ day of January 2020.

CLEAR COUNSEL LAW GROUP

Jared R. Richards, Esq.
Nevada Bar No. 11254
1671 W. Horizon Ridge Pkwy, Suite 200
Henderson, NV 89012
*Attorneys for Plaintiff Kalena Davis*

DATED this ___ day of January 2020.

HARPER | SELIM

James E. Harper, Esq.
Nevada Bar No. 9822
Justin Gourley, Esq.
Nevada Bar No. 11976
1707 Village Center Circle, Suite 140
Las Vegas, NV 89134
*Attorneys for Defendant Adam Deron Bridewell*

DATED this ____ day of January 2020.

LEWIS BRISBOIS BISGAARD & SMITH, LLP

MATTHEW A. CAVANAUGH
Nevada Bar No. 11077
Blake A. Doerr, Esq.
Nevada Bar No. 9001
6385 S. Rainbow Boulevard, Suite 600
Las Vegas, NV 89118
*Attorneys for Defendant Lyft, Inc. The Hertz Corporation*

///

ORDER

IT IS SO ORDERED.

DISTRICT COURT JUDGE

Submitted by:

MATTHEW A. CAVANAUGH
Nevada Bar No. 11077
BLAKE A. DOERR, Esq.
Nevada Bar No. 9001
6385 S. Rainbow Boulevard, Suite 600
Las Vegas, Nevada 89118
LEWIS BRISBOIS BISGAARD & SMITH LLP

# Exhibit C

ORDR
MATTHEW A. CAVANAUGH
Nevada Bar No. 11077
BLAKE A. DOERR
Nevada Bar No. 9001
LEWIS BRISBOIS BISGAARD & SMITH LLP
6385 S. Rainbow Boulevard, Suite 600
Las Vegas, Nevada 89118
Telephone: 702.893.3383
Fax: 702.893.3789
Email: matthew.cavanaugh@lewisbrisbois.com
Email: blake.doerr@lewisbrisbois.com
*Attorneys for Lyft, Inc. and The Hertz Corporation*

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

KALENA DAVIS,

Plaintiff,

vs.

ADAM DERON BRIDEWELL, an individual; LYFT, INC., a foreign corporation; THE HERTZ CORPORATION, a foreign corporation; DOE OWNERS I through X, and ROE LEGAL ENTITIES I through X, inclusive,

Defendants.

Case No.: A-18-777455-C
Dept. No.: XIII

**STIPULATION AND ORDER FOR NRCP RULE 35 EXAMINATION**

**Date: March 20, 2020**
**Time: 2:00 p.m.**

IT IS HEREBY STIPULATED by and between all parties, through their respective attorneys of record, that Plaintiff undergo medical examination pursuant to NRCP 35. The parties have stipulated to the following conditions for the medical examination:

1. Any paperwork or forms that Defendants' medical expert, Dr. David E. Fish, requires for the examination shall be submitted to Plaintiff's counsel no later than five (5) days prior to the date of the examination and is subject to objection by Plaintiff's counsel.

2. Plaintiff will appear for a Rule 35 Exam with Dr. Fish on March 20, 2020 at 2:00 P.M. at Consultant Medical Group, located at 2500 West Sahara Avenue, Las Vegas, NV 89102.

3. No other physician, surgeon, or chiropractor shall be present during the

examination. If necessary, Dr. Fish may utilize members of his staff to assist during the examination.

4. The examination shall be completed within 90 minutes, and Plaintiff will not be required to wait in the waiting room longer than 30 minutes past the arrival time before the commencement of the examination.

5. The physical examination shall be limited to the physical conditions of the Plaintiff that are in controversy in the above-captioned case. Plaintiff will not be asked any liability questions surrounding the subject incident. However, the examining physician or staff member may ask about the mechanism of injury, body parts making contact with the ground, and may ask about relevant medical history, past and current symptoms.

6. No invasive procedures are allowed.

7. No medical treatment is allowed.

8. No x-rays, radiographs, MRIs, CT scans, PET scans or other medical imaging may be obtained as part of the examination.

9. Plaintiff shall not be required to disrobe from the waist down during the examination. Plaintiff shall wear loose fitting shorts or pants to the examination to prevent the need for disrobing.

10. No physically painful, intrusive or embarrassing procedures may be performed during the examination.

11. Defendants' medical expert, Dr. Fish, shall not engage in any ex parte communication with Plaintiff's treating health care providers.

12. Thirty (30) days following the examination, Defendants shall provide Plaintiff's counsel with a copy of the examination report.

13. Plaintiff shall not pay or incur any fee for the examination and shall use his best efforts to appear at the office of Dr. Fish 10 minutes prior to the scheduled examination date and time. In the event Plaintiff cannot attend his scheduled examination, his counsel shall contact Defendants' counsel to re-schedule the examination with 24 hours notice.

14. The examining physician shall be provided with a copy of this Stipulation prior to the examination.

///

DATED this ____ day of January 2020.

CLEAR COUNSEL LAW GROUP

Jared R. Richards, Esq.
Nevada Bar No. 11254
1671 W. Horizon Ridge Pkwy, Suite 200
Henderson, NV 89012
*Attorneys for Plaintiff Kalena Davis*

DATED this ____ day of January 2020.

LEWIS BRISBOIS BISGAARD & SMITH, LLP

Jason G. Revzin, Esq.
Nevada Bar No. 8629
Blake A. Doerr, Esq.
Nevada Bar No. 9001
6385 S. Rainbow Boulevard, Suite 600
Las Vegas, NV 89118
*Attorneys for Defendant Lyft, Inc. The Hertz Corporation*

DATED this ___ day of January 2020.

HARPER | SELIM

James E. Harper, Esq.
Nevada Bar No. 9822
Justin Gourley, Esq.
Nevada Bar No. 11976
1707 Village Center Circle, Suite 140
Las Vegas, NV 89134
*Attorneys for Defendant Adam Deron Bridewell*

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ORDER

IT IS SO ORDERED.

DISTRICT COURT JUDGE

Submitted by:

DARRELL D. DENNIS, Esq.
Nevada Bar No. 006618
Jason G. Revzin, Esq.
Nevada Bar No. 8629
BLAKE A. DOERR, Esq.
Nevada Bar No. 9001
6385 S. Rainbow Boulevard, Suite 600
Las Vegas, Nevada 89118
LEWIS BRISBOIS BISGAARD & SMITH LLP

**JOIN**
JAMES E. HARPER
Nevada Bar No. 9822
JUSTIN GOURLEY
Nevada Bar No. 11976
**HARPER | SELIM**
1707 Village Center Circle, Suite 140
Las Vegas, Nevada 89134
Phone: (702) 948-9240
Fax: (702) 778-6600
Email: eservice@harperselim.com
*Attorneys for Defendant Adam Deron Bridewell*

**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

KALENA DAVIS, an individual;

Plaintiff,

vs.

ADAM DERON BRIDEWELL, an individual; LYFT, INC., a foreign corporation; THE HERTZ CORPORATION, a foreign corporation; DOE OWNERS I through X; and ROE LEGAL ENTITIES I through X, inclusive,

Defendants.

CASE NO.: A-18-777455-C
DEPT. NO.: XIII

**DEFENDANT ADAM BRIDEWELL'S JOINDER TO DEFENDANTS' MOTION TO COMPEL RULE 35 EXAMINATIONS ON ORDER SHORTENING TIME**

COMES NOW Defendant Adam Bridewell and files his Joinder to Defendants Lyft, Inc. and The Hertz Corporation's Motion to Compel Rule 35 Examination on Order Shortening Time, which was filed on January 30, 2020.

DATED this 30th day of January 2020.

**HARPER | SELIM**

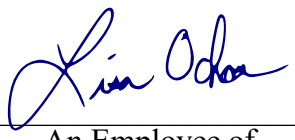
JUSTIN GOURLEY
Nevada Bar No. 11976
1707 Village Center Circle, Suite 140
Las Vegas, NV 89134
*Attorneys for Defendant Adam Deron Bridewell*

**CERTIFICATE OF SERVICE**

Pursuant to Rule 5(b) of the Nevada Rules of Civil Procedure, I hereby certify under penalty of perjury that I am an employee of HARPER | SELIM and that on the 30th day of January 2020, the foregoing **DEFENDANT ADAM BRIDEWELL'S JOINDER TO DEFENDANTS' MOTION TO COMPEL RULE 35 EXAMINATIONS ON ORDER SHORTENING TIME** was served upon those persons designated by the parties in the E-Service Master List for the above referenced matter in the Eighth Judicial District Court eFiling System in accordance with the mandatory electronic service requirements of Administrative Order 14-2 and the Nevada Electronic Filing and Conversion Rules:

Jared R. Richards, Esq.
Michael Stein, Esq.
CLEAR COUNSEL LAW GROUP
1671 W. Horizon Ridge Parkway, Suite 200
Henderson, NV 89012
*Attorneys for Plaintiff*

Jason Revzin, Esq.
Blake A. Doerr, Esq.
LEWIS BRISBOIS BISGAARD & SMITH LLP
6385 S. Rainbow Blvd., Suite 600
Las Vegas, NV 89118
*Attorneys for Defendants Lyft, Inc.* and
*The Hertz Corporation*



An Employee of
HARPER | SELIM

**OPPS**
Jared R. Richards, Esq.
Nevada Bar No. 11254
Dustin E. Birch, Esq.
Nevada Bar No. 10517
CLEAR COUNSEL LAW GROUP
1671 W. Horizon Ridge Pkwy, Suite 200
Henderson, NV 89012
Telephone: (702) 476-5900
Facsimile: (702) 924-0709
jared@clearcounsel.com
dustin@clearcounsel.com
*Attorneys for Plaintiff*
*Kalena Davis*

**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

| | |
|---|---|
| KALENA DAVIS, an individual<br><br>Plaintiff,<br><br>vs.<br><br>ADAM DERON BRIDEWELL, an individual; LYFT, INC., a foreign corporation; THE HERTZ CORPORATION, a foreign corporation; DOE OWNERS I through X; and ROE LEGAL ENTITIES I through X, inclusive,<br><br>Defendants. | CASE NO.: A-18-777455-C<br><br>DEPT. NO.: XIII<br><br>**OPPOSITION TO DEFENDANT LYFT AND DEFENDANT HERTZ CORPORATION'S MOTION TO COMPEL RULE 35 EXAMINATIONS ON ORDER SHORTENING TIME**<br><br>Hearing Date: February 13, 2020<br><br>Hearing Time: 9:30 a.m. |



Plaintiff, KALENA DAVIS by and through his counsel of record, Jared R. Richards, Esq. and Dustin E. Birch, Esq. of Clear Counsel Law Group, hereby submits his Opposition to Defendant Lyft and Defendant Hertz Corporation's Motion to Compel Rule 35 Examinations on Order Shortening Time.

## I. INTRODUCTION

Defendants' negligence has caused physical and mental injury to Plaintiff. Plaintiff does not object to examination by Dr. Fish but asks that the Court require the conditions set forth in Exhibit 1.

Plaintiff does not generally object to some level of examination by Dr. Kinsora but

Defendants have failed to lay a foundation for the specific tests and methodology to be used by Dr. Kinsora. It is Defendants' burden to show that the tests and methodology proposed by Dr. Kinsora meet the relevance and *Hallmark* standards required by Rule 35. As of yet, Defendants have failed in this burden. If Defendants lay a proper foundation and this Court accepts that foundation, Plaintiff asks that this Court implement the conditions proposed in Exhibit 2.

Plaintiff objects to the "earning capacity" examination of Ms. Corwin. This Court should limit Defendants to two Rule 35 examinations – one physical examination and one mental examination performed by Dr. Fish and Dr. Kinsora respectively. Defendants have further failed to lay a foundation for Ms. Corwin's specific examination. Defendants fail to explain why Ms. Corwin needs four times a long as Dr. Fish. Defendants fail to show how Ms. Corwin's proposed tests and methodology meet *Hallmark* standards. The proposed examination by Ms. Corwin should be denied.

## II. FACTS REGARDING THE INCIDENT

In this case, Co-Defendant Adam Bridewell was a Lyft driver and was acting as an agent for Lyft under Lyft's "Lyft Express" program in which Lyft provided bonuses, such as a car, to its agents to encourage exclusivity. Bridewell drove exclusively for Lyft and used the car provided to him by Lyft. In October 2017, Lyft sent Bridewell to pick up Lyft customers. The Lyft driver picked up the passengers and eventually traveled westbound on Russell. At the intersection of Russell and Stephanie the Lyft driver moved into the left turning lane where he was required to, but failed to, yield to oncoming traffic.

Plaintiff was riding a motorcycle to work. He worked in the service department of a motorcycle dealership. Plaintiff was early for work. Plaintiff was wearing motorcycle protective gear. Plaintiff was traveling eastbound on Russell in the No. 1 travel lane (the left through lane). There were no vehicles in Plaintiff's lane between Plaintiff and the intersection of Russell and Stephanie. Plaintiff entered the intersection on a yellow light. Plaintiff had the right-of-way. Plaintiff was fully visible to the Lyft driver. The Lyft driver should have identified Plaintiff as oncoming traffic. The Lyft driver violated Plaintiff's right-of-way by turning left in front of

CLEAR COUNSEL LAW GROUP
1671 W. HORIZON RIDGE PKWY, SUITE 200
HENDERSON, NEVADA 89012
(702) 476-5900

Plaintiff. As a result of the Lyft driver's violation of Plaintiff's right-of-way, Plaintiff's motorcycle collided with the Lyft vehicle.

Plaintiff suffered major trauma. Lyft's collision broke many of Plaintiff's bones and caused major internal damage. Plaintiff's leg was amputated. Plaintiff suffered a traumatic brain injury.

Plaintiff does not remember the wreck.

Immediately after the wreck, the Lyft driver reported to the police that the light had been yellow and Plaintiff had entered the intersection in order to beat the light before it turned red. After reporting to the police, the Lyft driver expressed fault for the wreck to a nearby witness.

Later, the Lyft driver's story evolved to avoid liability and became internally inconsistent. The Lyft driver has testified that he entered the intersection while he had a green light, which gave him the right to enter the intersection to yield to oncoming traffic. The Lyft driver has testified that he entered the intersection on a yellow light. The Lyft driver has testified that he entered the intersection on a flashing yellow light. The Lyft driver alleges he stopped in the intersection for oncoming traffic but is unsure whether he entered into the intersection a half a car's length or six cars' length and is unsure about how long he was in the intersection. The Lyft driver has stated he was turning on a yellow light. The Lyft driver has stated he was turning on a red light.

## III. LEGAL ANALSYIS

### A. Defendant Must Show Good Cause and Actual Controversy

Unlike other forms of discovery such as Rule 33 interrogatories or Rule 36 requests for admissions, Rule 35 physical and mental examinations can only be required if ordered by the court upon a motion showing good cause.[1] A Rule 35 physical and mental examination is only appropriate when (1) a party has put its mental or physical condition, including blood type, in controversy, and (2) the movant shows good cause for the need for a physical or mental examination.[2] As the United States Supreme Court held in *Schlagenhauf* regarding Rule 35's federal counterpart, the "good-cause requirement" and the "in controversy" requirement of Rule 35

[1] *Compare* Rule 35(a)(2) *to* Rule 34(a) *and* Rule 36(a).
[2] Rule 35(a)(1) and (2).

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1671 W. HORIZON RIDGE PKWY, SUITE 200
HENDERSON, NEVADA 89012
(702) 476-5900

are not mere formalities, but rather a "plainly expressed limitation" on Rule 35. [3] *Schlagenfhauf* further held that mere relevance is not sufficient to show good cause.[4] The movant must show that "each condition as to which the examination is sought is really and genuinely in controversy and that good cause exists for ordering each particular examination."[5] These requirements of the movant are not met "by mere relevance to the case."[6]

**B. "Good Cause" Requires the Defendant to Lay Foundation for The Proposed Tests and Show *Hallmark* Compliance and Relevance**

Before a court subjects a plaintiff to physical or mental examination, the defendant must lay a foundation for the proposed tests.[7] "[An evidentiary hearing] may be necessary in some cases, but in other cases the showing could be made by affidavits or other usual methods…"[8] "It does mean, though, that the movant must produce sufficient information, by whatever means, so that the district judge can fulfill his function mandated by the Rule."[9]

Additionally, "the opportunity to conduct a mental examination and the methodology to be employed in the course of that examination are two distinct issues."[10] The movant has the burden to show that the proposed tests meet *Hallmark* requirements[11] and that the proposed tests are actually relevant to the condition in controversy[12]. The moving party cannot do this without describing each test and methodology proposed in the examination.

**C. "Good Cause" Includes Consideration of Less Invasive Means**

As part of the "good cause" analysis, the court' should consider whether the movant might obtain the information through other discovery means.[13] The clear implication is that part of the

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[3] *Schlagenhauf v. Holder*, 379 U.S. 104, 118, 85 S. Ct. 234, 242–43, 13 L. Ed. 2d 152 (1964).
[4] *Id.*
[5] *Id.*
[6] *Id.*
[7] § 2235 Types of Examination Permitted, 8B Fed. Prac. & Proc. Civ. § 2235 (3d ed.).
[8] *Schlagenhauf v. Holder*, 379 U.S. 104, 119, 85 S. Ct. 234, 243, 13 L. Ed. 2d 152 (1964).
[9] *Id.*
[10] *Usher v. Lakewood Eng'g & Mfg. Co.*, 158 F.R.D. 411, 412–13 (N.D. Ill. 1994)
[11] *See* § 2235 Types of Examination Permitted, 8B Fed. Prac. & Proc. Civ. § 2235 (3d ed.) (stating that a court may consider *Daubert* factors under FRCP 35.)
[12] *See Schlagenhauf v. Holder*, 379 U.S. 104, 119, 85 S. Ct. 234, 243, 13 L. Ed. 2d 152 (1964) (emphasizing that the "good cause" requirement and the "in controversy" requirement "are necessarily related").
[13] *Id.*

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1671 W. HORIZON RIDGE PKWY, SUITE 200
HENDERSON, NEVADA 89012
(702) 476-5900

good cause analysis includes the court considering whether less intrusive means exist. As a necessary part, of this consideration, the Defendant must identify what discovery is sought and specify what the examiners plan to do to Plaintiff.

**D. The Defendant Must Specify the Manner and Scope**

Rule 35(a)(2)(B) places conditions on the examination, including that any order for an examination must specify the manner of the examination, the scope of the examination, the person performing the examination, and the time and place of the examination.

**E. The Nevada Rule Allows Recording and an Observer**

Nevada's Rule 35(a) differs from its federal counterpart. The federal rule does not provide for recordings or observers. The Nevada rule expressly provides for (1) audio recording the examination and (2) allowing the examined party to have an observer present.[14]

**F. The Court Should Allow Defendant Only One Physical Examination and One Mental Examination**

In this case, Defendants seek three Rule 35 examinations: a physical examination by David E. Fish, M.D.; a neuropsychological examination by Thomas Kinsora, Ph.D.; and an "earning capacity evaluation" by Aubrey Corwin. Plaintiff agrees in general terms to the examination by Dr. Fish and some examination by Dr. Kinsora if Defendants lay proper foundation, though Plaintiff disputes the specific conditions set forth by Defendants. Plaintiff does not consent to the vocational examination by Ms. Corwin. Defendants should be allowed only one physical examination and one mental examination. The examination by Ms. Corwin is unnecessary, duplicative and should not be granted.

**i. The Rule 35 Examination of Dr. Fish.**

Plaintiff does not oppose the Rule 35 examination by Dr. Fish in general but does oppose the terms proposed by Defendant. Plaintiff requests that this Court issue the terms and conditions set forth as **Exhibit 1** to this Opposition.

**ii. The Rule 35 Examination of Thomas Kinsora, Ph.D.**

[14] *Compare* NRCP 35 *to* FRCP 35.

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HENDERSON, NEVADA 89012
(702) 476-5900

Plaintiff does not oppose the Rule 35 examination by Thomas Kinsora, Ph.D. in general but does object to the length of time and lack of parameters proposed by Defendants. Plaintiff also objects to the terms proposed by Defendants.

Defendants have asked that Dr. Fish, the only medical doctor proposed by Defendants, have 90 minutes with Plaintiff. But Defendants allege that Dr. Kinsora needs two days to perform his examination. Defendants do not specify why Dr. Kinsora needs two days or what tests Plaintiff is expected to subject to. Defendants make no effort to lay a *Hallmark* foundation for the proposed tests or to show that the proposed tests will be relevant to the condition in controversy. This Court should not subject Plaintiff to two days of unsupervised testing without first requiring Defendants to specify what tests are to be done and allow Plaintiff an opportunity to approve of or object to the proposed testing. This Court should further consider whether the information alleged to be gained from the proposed testing can be obtained through less invasive means.

Once Defendant identifies what Dr. Kinsora intends to do and the parties or Court approve, Plaintiffs propose the general terms in **Exhibit 2**. Those terms will need to be amended to specify the time, manner and scope of the examination as ordered by the Court.

**iii. This Court should Deny the Motion for a Rule 35 Examination by Ms. Corwin.**

This Court should deny the motion for Ms. Corwin to perform a Rule 35 examination. Defendant's request to have Ms. Corwin "test" Plaintiff fails on various fronts.

First, Plaintiff has not put his present earning capacity at issue. Defendants propose Ms. Corwin on the general topic of "earning capacity evaluation" but Plaintiff has testified that he has a job. He is able to work and is currently working and doing the job he wants to do. Because Plaintiff is able to work and is currently working, Ms. Corwin's testing is meaningless. Plaintiff should not be subjected to meaningless tests.

Second, Ms. Corwin's testing is either not covered under Rule 35 or is duplicative of the examinations by Dr. Fish and Dr. Kinsora. Rule 35 is limited to physical and mental

CLEAR COUNSEL LAW GROUP
1671 W. HORIZON RIDGE PKWY, SUITE 200
HENDERSON, NEVADA 89012
(702) 476-5900

examinations.[15] Nowhere are "earning capacity evaluations" listed in Rule 35. Even if "earning capacity evaluations" were somehow within the scope of "physical and mental examinations," such tests are duplicative of Defendants' other Rule 35 exams. Defendants already seek a physical examination by Dr. Fish. Defendants already seek a mental examination by Dr. Kinsora. There is no need to subject Plaintiff to an "earnings capacity evaluation" by non-doctor Ms. Corwin.

Third, Defendants fail to explain why Ms. Corwin needs a day to perform her undisclosed testing. Defendants' proposed medical doctor, Dr. Fish, only needs 90 minutes. Defendants need to justify why Ms. Corwin, who is not a medical doctor, would need longer than Dr. Fish.

Fourth, as a less invasive means, Ms. Corwin can obtain her data from the tests and records of the other experts, retained and non-retained, in this case.

Fifth, Defendants have failed to lay a *Hallmark* foundation for the undisclosed tests and methodology proposed by Ms. Corwin. Defendants have further failed to show relevance between the proposed tests and the condition in controversy. Defendants have further failed to show how Ms. Corwin can perform her examination without being in the same room as Plaintiff.

This Court should deny Defendants' motion as to Ms. Corwin. If this Court decides to order the "earning capacity evaluation" over the objection of Plaintiff, then this Court should apply the terms set forth in **Exhibit 3**, subject to Defendant specifying exactly what Ms. Corwin proposes doing to Plaintiff.

[15] NRCP 35(a)(1).

CLEAR COUNSEL LAW GROUP
1671 W. HORIZON RIDGE PKWY, SUITE 200
HENDERSON, NEVADA 89012
(702) 476-5900

## IV. CONCLUSION

This Court should Deny the motion as to Ms. Corwin. This Court should require a greater showing by movants in relation to Dr. Kinsora. Plaintiff does not oppose the examination by Dr. Fish. Any exam ordered should include the conditions set forth in Exhibits 1 through 3.

DATED this 6 day of February 2020.

CLEAR COUNSEL LAW GROUP

Jared R. Richards, Esq.
Nevada State Bar No. 11254
Dustin E. Birch, Esq.
Nevada State Bar No. 10517
1671 W. Horizon Ridge Pkwy, Suite 200
Henderson, NV 89012
*Attorneys for Plaintiff Kalena Davis*

CLEAR COUNSEL LAW GROUP
1671 W. HORIZON RIDGE PKWY, SUITE 200
HENDERSON, NEVADA 89012
(702) 476-5900

**CERTIFICATE OF SERVICE**

I certify pursuant to NRCP 5(b)(4) that on the 6 day of February 2020, I caused a true and correct copy of the foregoing **OPPOSITION TO DEFENDANT LYFT AND DEFENDANT HERTZ CORPORATION'S MOTION TO COMPEL RULE 35 EXAMINATIONS ON ORDER SHORTENING TIME** to be served as follows:

[ ] by placing a true and correct copy of the same to be deposited for mailing in the U.S. Mail at Henderson, Nevada, enclosed in a sealed envelope upon which first Class postage was fully prepaid to ; and/or
[ ] pursuant to EDCR 7.26, by sending it via facsimile; and/or
[ ] by hand delivery
[X] E-service

| | |
|---|---|
| Karen M. Berk | kmb@thorndal.com |
| Master Calendar | calendar@thorndal.com |
| Meghan M. Goodwin | mmg@thorndal.com |
| Michael C. Hetey | mch@thorndal.com |
| Lorrie D. Johnson | ldj@thorndal.com |
| Stefanie Mitchell | sdm@thorndal.com |
| Patti L. Pinotti | plp@thorndal.com |
| Matthew Cavanaugh | Matthew.Cavanaugh@lewisbrisbois.com |
| Darrell Dennis | darrell.dennis@lewisbrisbois.com |
| Blake Doerr | blake.doerr@lewisbrisbois.com |
| Carrie Dunham | carrie.dunham@lewisbrisbois.com |
| Misty Humphrey | misty.humphrey@lewisbrisbois.com |
| Autumn Nouwels | autumn.prince@lewisbrisbois.com |
| Abigail Prince | abigail.prince@lewisbrisbois.com |
| Jason Revzin | jason.revzin@lewisbrisbois.com |
| Justin Gourley | eservice@harperselim.com |

An employee of Clear Counsel Law Group

CLEAR COUNSEL LAW GROUP
1671 W. HORIZON RIDGE PKWY, SUITE 200
HENDERSON, NEVADA 89012
(702) 476-5900

# Exhibit 1

**Proposed Conditions of the Rule 35 Examination**

**of Kalena Davis by David E. Fish, M.D.**

1. Any paperwork or forms that Defendants' medical expert, Dr. David E. Fish, requires for the examination shall be submitted to Plaintiff's counsel no later than seven (7) days prior to the date of the examination and is subject to objection by Plaintiff's counsel.
2. Plaintiff will appear for a Rule 35 Exam with Dr. Fish on March 20, 2020 at 2:00 P.M. at Consultant Medical Group, located at 2500 West Sahara Avenue, Las Vegas, NV 89102.
3. Plaintiff may bring an observer that is not the Plaintiff's attorney and is not employed by the Plaintiff or the Plaintiff's attorney. The observer may not in any way interfere, obstruct, or participate in the examination.
4. The examination may be audio recorded by the Plaintiff. If Plaintiff elects to audio record the examination, he shall notify all persons present and place the audio recording device in a location in the room reasonably approved of by the examiner. Plaintiff's counsel will provide a copy of the audio recording to Defendant's counsel.
5. The examination shall be completed by 3:30 p.m., and Plaintiff will not be required to wait in the waiting room longer than 30 minutes past the arrival time before the commencement of the examination.
6. The examiner shall not refer to the examination as "independent".
7. The physical examination shall be limited to the physical conditions of the Plaintiff that are in controversy in the above-captioned case. Plaintiff will not be asked any liability questions surrounding the subject incident. However, the examining physician or staff member may ask about the mechanism of injury, body parts making contact with the ground, and may ask about relevant medical history, past and current symptoms.
8. No invasive procedures are allowed.
9. No medical treatment is allowed.

10. No x-rays, radiographs, MRIs, CT scans, PET scans or other medical imaging may be obtained as part of the examination.
11. Plaintiff shall not be required to disrobe from the waist down during the examination. Plaintiff shall wear loose fitting shorts or pants to the examination to prevent the need for disrobing.
12. No physically painful, intrusive or embarrassing procedures may be performed during the examination.
13. Legal questions not normally a part of a medical examination may not be asked or discussed with Plaintiff by the examining physician, agent, or representative of the examining physician (e.g., liability, potential monetary recovery, professional criticisms, Plaintiff's motivation for or willingness to pursue the claim);
14. Defendants' medical expert, Dr. Fish, shall not engage in any ex parte communication with Plaintiff's treating health care providers.
15. Thirty (30) days following the examination, Defendants shall provide Plaintiff's counsel with a copy of the examination report.
16. Plaintiff shall not pay or incur any fee for the examination and shall use his best efforts to appear at the office of Dr. Fish 10 minutes prior to the scheduled examination date and time. In the event Plaintiff cannot attend his scheduled examination, his counsel shall contact Defendants' counsel to re-schedule the examination with 24 hours' notice.
17. The moving party shall provide the examining physician with a copy of these conditions prior to the examination.

# Exhibit 2

**Proposed Conditions of the Rule 35 Examination**

**of Kalena Davis by Thomas Kinsora Ph.D.**

1. The examiner shall provide Plaintiff with an online intake no later than two weeks prior to the examination. Plaintiff shall complete online intake at least one week prior to the examination.
2. The examination shall last from **[time and scope permitted by the court]**.
3. Plaintiff shall be given at least a 10-minute break every hour and shall be given a 30-minute lunch break.
4. Plaintiff will not wait any longer than 30 minutes in the waiting room prior to the Commencement of the Rule 35 exam.
5. The examiner shall not refer to the examination as "independent".
6. Legal questions not normally a part of a medical examination may not be asked or discussed with Plaintiff by the examining physician, agent, or representative of the examining physician (e.g., liability, potential monetary recovery, professional criticisms, Plaintiff's motivation for or willingness to pursue the claim);
7. Plaintiff will not be asked any liability questions surrounding the subject incident. However, the examining physician or staff member may ask about the mechanism of injury, body parts making contact with the ground, and may ask about relevant medical history, past and current symptoms.;
8. Both Plaintiff and examiner shall make a good faith effort to corporate with each other.
9. The examination may be audio recorded by the Plaintiff. If Plaintiff elects to audio record the examination, he shall notify all persons present and place the audio recording device in a location in the room reasonably approved of by the examiner. Plaintiff's counsel will provide a copy of the audio recording to Defendant's counsel.
10. The examiner shall not engage in any ex parte communication with Plaintiff's treating health care providers.

11. Thirty (30) days following the examination, Defendants shall provide Plaintiff's counsel with a copy of the examination report.
12. Plaintiff shall not pay or incur any fee for the examination and shall use his best efforts to appear at the office of Dr. Kinsora 10 minutes prior to the scheduled examination date and time. In the event Plaintiff cannot attend his scheduled examination, his counsel shall contact Defendants' counsel to re-schedule the examination with 24 hours' notice.
13. Thirty (30) days following the examination, Defendants shall provide Plaintiff's counsel with a copy of the examination report.
14. The moving party shall provide the examining physician with a copy of these conditions prior to the examination.

# Exhibit 3

**Proposed Conditions of the Rule 35 Examination**

**of Kalena Davis by Ms. Aubrey Corwin**

1. The examination will consist of **[Time and content as allowed by the court]**.
2. The interview and testing will be done through videoconference means at Litigation Services located at 3770 Howard Hughes Pkwy #300, Las Vegas, Nevada 89169.
3. No later than seven days prior to the examination, the requesting party shall provide the Plaintiff's counsel with all intake documents requested by the examiner. These documents are subject to Plaintiff's counsel's objection. Plaintiff shall fill out the intake documents and bring them to the examination. The examiner will go over the intake documents with the Plaintiff at the start of the interview.
4. The Plaintiff will not wait any longer than 30 minutes after the scheduled time for the commencement of the Rule 35 exam.
5. The examiner shall not refer to the examination as "independent".
6. The assessment will conclude by **[the time allowed by the court]**.
7. Plaintiff shall be permitted a 10-minute break every hour.
8. The examiner shall immediately stop any test if Plaintiff expresses physical discomfort resulting from performing the test.
9. Plaintiff may bring an observer that is not the Plaintiff's attorney and is not employed by the Plaintiff or the Plaintiff's attorney. The observer may not in any way interfere, obstruct, or participate in the examination.
10. Plaintiff will not be asked any questions surrounding the subject incident. Prior to the examination, Defense counsel will inform the examiner that Plaintiff was involved in a motorcycle wreck.
11. Both Plaintiff and examiner shall make a good faith effort to cooperate with each other.
12. The examination may be audio recorded by the Plaintiff. If Plaintiff elects to audio record the examination, he shall notify all persons present and place the audio recording device in

a location in the room reasonably approved of by the examiner. Plaintiff's counsel will provide a copy of the audio recording to Defendant's counsel.

13. Thirty (30) days following the examination, Defendants shall provide Plaintiff's counsel with a copy of the examination report.
14. The moving party shall provide the examining physician with a copy of these conditions prior to the examination.

RIS

JASON G. REVZIN
Nevada Bar No. 8629
BLAKE A. DOERR
Nevada Bar No. 9001
LEWIS BRISBOIS BISGAARD & SMITH LLP
6385 S. Rainbow Boulevard, Suite 600
Las Vegas, Nevada 89118
Telephone: 702.893.3383
Fax: 702.893.3789
Email: jason.revzin@lewisbrisbois.com
Email: blake.doerr@lewisbrisbois.com
*Attorneys for Lyft, Inc. and The Hertz Corporation*

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

| | |
|---|---|
| KALENA DAVIS,<br><br>Plaintiff,<br><br>vs.<br><br>ADAM DERON BRIDEWELL, an individual; LYFT, INC., a foreign corporation; THE HERTZ CORPORATION, a foreign corporation; DOE OWNERS I through X, and ROE LEGAL ENTITIES I through X, inclusive,<br><br>Defendants. | Case No.: A-18-777455-C<br>Dept. No.: XIII<br><br>**DEFENDANT LYFT AND DEFENDANT THE HERTZ REPLY IN SUPPORT OF THEIR MOTION TO COMPEL RULE 35 EXAMINATIONS**<br><br>**DATE: 2/13/2020**<br>**TIME: 9:30 a.m.** |

Defendant, LYFT, INC., ("LYFT") and Defendant THE HERTZ CORPORATION ("HERTZ") by and through their counsel of record LEWIS BRISBOIS BISGAARD & SMITH LLP, hereby files this Reply in support of their Motion to Compel Rule 35 Examinations against Plaintiff KALENA DAVIS.

DATED this 12th day of February, 2020.

LEWIS BRISBOIS BISGAARD & SMITH LLP

By */s/Blake A. Doerr*

JASON G. REVZIN
Nevada Bar No. 8629
BLAKE A. DOERR
Nevada Bar No. 9001
LEWIS BRISBOIS BISGAARD & SMITH LLP
6385 S. Rainbow Boulevard, Suite 600
Las Vegas, Nevada 89118
Telephone: 702.893.3383
Fax: 702.893.3789
jason.revzin@lewisbrisbois.com
blake.doerr@lewisbrisbois.com
*Attorneys for Lyft, Inc. and The Hertz Corporation*

DECLARATION OF BLAKE A. DOERR REGARDING COMPLIANCE WITH EDCR 2.34

Blake A. Doerr, declares as follows under penalty of perjury:

1. I am an attorney duly licensed to practice law in the State of Nevada.
2. I am a partner with the law firm Lewis Brisbois Bisgaard & Smith LLP which has been retained to represent the interests of LYFT, INC. and THE HERTZ CORPORATION in the above-entitled matter.
3. I have made a good faith effort to get the necessary NRCP 35 examinations scheduled in order to comply with the existing pre-trial deadlines.
4. Plaintiff's counsel advised he would provide stipulations and available dates for the examinations.
5. Examiners retained by the defense have provided multiple dates that have needed to be changed several times over now because of Plaintiff's counsel's failure to respond.
6. As of the last communication with defense experts, their next available dates do not allow the examinations to be conducted and reports prepared within the current discovery dates, which has necessitated a request to continue the discovery and trial dates—which was granted.
7. Efforts to schedule these examinations began in earnest after a failed mediation, attempted on October 11, 2019.
8. On October 17, 2019, I sent correspondence to Plaintiff's counsel requesting NRCP 35 examinations by Dr. Kinsora and Aubrey Corwin. *See* Exhibit A.
9. Defense counsel's paralegal Autumn Nouwels forwarded Exhibit A to Terri at Plaintiff's counsel's office by email requesting a response on October 22, 2019. *See* Exhibit B.
10. A follow up email was again sent on October 25, 2019. *See* Exhibit C.
11. As a result of the communications within Exhibit C, a telephone conference was scheduled for October 28, 2019 between myself and Plaintiff's counsel to

discuss the examinations sought. *See* Exhibit D.

12. During that phone call, Plaintiff's counsel advised that he would only agree to the Rule 35 examinations pursuant to a stipulation. I advised counsel to prepare the stipulation and I would forward it to the examiners and where they were agreeable to all of the provisions, the stipulations would be signed.

13. During the call, Plaintiff's counsel advised that his client would be working more than usual during the upcoming holidays and it was resolved that the examinations would be scheduled in the new year shortly after the holidays. Counsel for the parties also agreed to stipulate for an extension of the existing pre-trial discovery deadlines, given the delay.

14. The parties' Stipulation and Order to Extend Discovery (Second Request), which was filed on November 26, 2019 specifically memorialized this conversation which was the specific reason the parties were requesting the extension.

15. By email dated December 3, 2019, the undersigned requested that counsel provide dates the Plaintiff was available for the examinations. *See* Exhibit E.

16. By email dated December 4, 2019, Ms. Nouwels emailed Plaintiff's counsel with available dates for Dr. Kinsora and Dr. Fish and advised that we were still waiting for Ms. Corwin's availability. *See* Exhibit F.

17. By email dated December 11, 2019, Ms. Nouwels emailed Plaintiff's counsel with Corwin's availability. *See* Exhibit G.

18. On January 20, 2020, I participated in and EDCR 2.34 conference with Plaintiff's counsel regarding the status of the stipulations regarding the examinations wherein Plaintiff's counsel advised that he had not yet prepared the stipulations. As a result I advised counsel that I would proceed with filing a Motion to Compel those examinations and advised counsel that if he came up with stipulations and availability, that we would proceed and withdraw the Motion.

19. In yet another effort to work with counsel to keep the matter moving, I provided draft stipulations for the three examinations on January 24, 2020 and advised counsel to propose any draft changes. *See* **Exhibit H**.

20. I telephoned counsel on January 30, 2020 to advise that the dates the examiners are now available would not allow them to prepare reports prior to the initial expert disclosure deadline. Counsel was not available and I left a voicemail to contact me, followed by an email. *See* **Exhibit I**. I did the same thing again on January 31, 2020. *See* **Exhibit J**.

21. Plaintiff's counsel's complete lack of communication with defense counsel in this regard has necessitated the filing of the instant Motion.

DATED this 12th day of February, 2020.

/s/Blake A. Doerr
Blake A. Doerr

## MEMORANDUM OF POINTS AND AUTHORITIES

### I.

These examinations should be ordered as included in the proposed orders submitted by the Defendants because the Plaintiff had every opportunity to work with the Defendants on this, which, had he done, it would have obviated the entire need for the filing of the instant motion.

These examinations were contemplated and discussed by the undersigned and Plaintiff's counsel beginning in mid 2019. Dr. Kinsora and Aubrey Corwin were specifically discussed with Plaintiff's counsel on October 17, 2019. Defendant's retention of Ms. Corwin was specifically discussed at that time because just prior to the October 10, 2019 mediation, the Plaintiff included in his 7th Supplemental Disclosures that the Plaintiff was seeking $1,204,923.00 for loss of future earning capacity. The physical injury and claimed neurological injury had been evident since prior pleadings.

The Plaintiff included in his opposition that "Plaintiff has not put his present earning capacity at issue" as grounds for denying the examination of Aubrey Corwin. This is likely because Plaintiff testified in his deposition that he is working at a better job and making more money now than he did before the accident. Which begs the question, "What are your future earning capacity losses, if you're working a better job and making more money now?" Those facts alone should warrant the Defendants' request for the examination by Aubrey Corwin. But that is only secondary. The Plaintiff alleges damages of $1,204,923.00 for loss of future earning capacity. As of the filing of this Reply, this is the only clue the Defendants have as to why specifically the Plaintiff is alleging he will suffer a future loss; there is no expert report; there is no mention of what the Plaintiff claims he cannot do; and, this in the face of the Plaintiff having testified that

he has a better job and is making more money since the accident than he was prior. Therefore there is no basis for the Plaintiff to block the Defendants from examining the Plaintiff to determine what limitations he now has that support his claim for over a million dollars in future lost earning capacity.

The Defendants have tried to work with Plaintiff's counsel on these examinations since October. The Plaintiff could have simply returned the phone call to ask the substance or scope of the examinations, if he was confused, which seemed unlikely since he specifically advised that he was going to provided dates and a stipulation for the examinations.

Plaintiff asserts that Defendant must show good cause and actual controversy and cites to the exact same U.S. Supreme Court case which the Defendants cited to support their Motion. But Plaintiff ignored to cite the portion of the case where the Court announced that "[a] plaintiff in a negligence action who asserts mental or physical injury . . . places that mental or physical injury clearly in controversy and provides the defendant with **good cause** for an examination to determine the existence and extent of such asserted injury." *Schlagenhauf*, 379 U.S. at 119 (emphasis added).

Here the Plaintiff has asserted orthopedic injuries, neurological injuries and traumatic brain and spinal cord injuries. Plaintiff's most recent computation of damages is for past medical specials in the amount of $2,593,631.10; future medical specials in the amount of $5,000,000.00; future prosthetic hardware of $1,528,168.63; future earning capacity $1,204,923.00; Hedonic damages of $1,000,000.00; loss of household services of $473,833.00 plus additional amounts for past and future pain and suffering.

Included in each of the Defendant's proposed stipulations were the specific examinations contemplated by each of the examining individuals:

Dr. Kinsora: Clinical Interview of the Plaintiff shall be conducted on March 12, 2020

from 9:00 a.m. to noon. and an Independent Neuropsychological Assessment shall be conducted on March 12th, 2020 from 9:00 a.m. to 5:00 p.m. by Dr. Thomas F. Kinsora, Ph.D., at his office located at 716 South 6th Street, Las Vegas, NV 89101;

Dr. Fish: Dr. Fish will conduct a physical examination of the physical conditions of the Plaintiff that are in controversy on March 20, 2020 at 2:00 P.M. at Consultant Medical Group, located at 2500 West Sahara Avenue, Las Vegas, NV 89102.

Aubrey Corwin: On February 7, 2020 will conduct a Video Clinical Interview beginning at 9:30 and at 1p.m., Video Vocational testing of the Plaintiff shall be Conducted by Aubrey Corwin, M.S., L.P.C., C.R.C., C.L.C.P., to opine on the earning capacity evaluation, analysis of household services, and life care planning. Alleged injuries include orthopedic and neurological injuries and traumatic brain and spinal cord injuries.

Regarding recording the examinations, Plaintiff cites to the section of NRCP that allows audio recording of an examination as well as allowing the examined party to have an observer present. Regarding the recording of the examination, NRCP 35(a)(3) provides "On request of a party…, the court may, for good cause shown, require as a condition of the examination that the examination be audio recorded." Plaintiff has cited the rule but has made no request nor explained the "good cause" for the recording of any of the examinations and therefore no recording should be allowed.

Regarding Plaintiff's request for an order that the Plaintiff be allowed an observer at the examination(s) which he included as part of his opposition, that request should be denied.

NRCP 35(a)(4) allows a party to request an observer at the examination. However, the rule specifically provides that when a party makes such a request, he must "identify the observer and state his or her relationship to the party being examined."

Plaintiff's request should be denied for failure to include the identity of any purported observer. The rule simply does not allow for a blanket request.

Furthermore, specifically as to the neuropsychological examination by Dr. Kinsora, NRCP 35(a)(4)(B) provides that "The party may not have an observer present for a neuropsychological…examination, unless the court orders otherwise for good cause shown."

Here the rule specifically precludes an observer at the type of examination Dr. Kinsora is performing absent a showing of good cause by the Plaintiff. Plaintiff's request included in his opposition contains no explanation why an observer is being requested and has therefore given the court no basis to even consider an observer at this type of examination.

The Defendants are requesting an order that the examinations be conducted pursuant to the orders presented as exhibits to the motions. The Defendants worked with the Plaintiff's attorneys for over three months to try to attempt to come to an agreement on these examinations. The Plaintiff's attorneys repeatedly offered to not only provide availability for the examinations but also to provide the specific stipulations as to each specific examiner. In an effort to move this forward, the undersigned prepared proposed stipulations and advised counsel to make the edits and that those would be presented to the examiners. In response, the Plaintiff's counsel did ***absolutely nothing***. And in fact, Plaintiff's counsel refused to respond or phone the undersigned back. Plaintiff's counsel was at the undersigned's office for some other matter and never once attempted any communication regarding the examinations, the scheduling or the stipulations. This in turn forced the Defendants to file the instant motion. The Plaintiff's attorney was given all of this on a "silver platter" by the Defendants who bent over backwards over a period of three months trying to get this to happen. Counsel's response went from delayed

response to no response. This necessitated the filing of the instant motion. Plaintiff's counsel's dilatory conduct in failing at every step to try to work with the undersigned to get these examinations to happen should not be rewarded now by granting their completely unsubstantiated request which would likely have been agreed to had they done it in the three months when they said they were going to.

DATED this 12th day of February, 2020.

LEWIS BRISBOIS BISGAARD & SMITH LLP

By */s/Blake A. Doerr*

JASON G. REVZIN
Nevada Bar No. 8629
BLAKE A. DOERR
Nevada Bar No. 9001
LEWIS BRISBOIS BISGAARD & SMITH LLP
6385 S. Rainbow Boulevard, Suite 600
Las Vegas, Nevada 89118
Telephone: 702.893.3383
Fax: 702.893.3789
jason.revzin@lewisbrisbois.com
blake.doerr@lewisbrisbois.com
*Attorneys for Lyft, Inc. and The Hertz Corporation*

## CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b) and N.E.F.C.R. 4(b)(1), 5(k) and 10(b), I hereby certify that I am an employee of LEWIS BRISBOIS BISGAARD & SMITH LLP and that on this 30th day of January, 2020, I did cause a true and correct copy of **DEFENDANT LYFT AND DEFENDANT THE HERTZ REPLY IN SUPPORT OF THEIR MOTION TO COMPEL RULE 35 EXAMINATIONS** to be served via the Court's electronic filing and service system to all parties on the current service list.

Jared R. Richards
CLEAR COUNSEL LAW GROUP
1671 W. Horizon Ridge Pkwy., Ste. 200
Las Vegas, NV 89012
*Attorneys for Plaintiff*

Justin S. Gourley
HARPER SELIM
1707 Village Center Circle, Suite 140
Las Vegas, Nevada 89134
*Attorneys for Defendant Adam Deron Bridewell*

By /s/Sherry Rainey
An Employee of LEWIS BRISBOIS BISGAARD & SMITH LLP

# Exhibit A

LEWIS BRISBOIS

LEWIS BRISBOIS BISGAARD & SMITH LLP

Jason G. Revzin
6385 S. Rainbow Boulevard, Suite 600
Las Vegas, Nevada 89118
Jason.Revzin@lewisbrisbois.com
Direct: 702.693.4344

Blake A. Doerr
Blake.Doerr@lewisbrisbois.com
Direct: 702.693.4302

October 17, 2019

File No. 37586.577

VIA ELECTRONIC SERVICE

Jared R. Richards
Clear Counsel Law Group
1671 West Horizon Ridge Parkway, Suite 200
Henderson, Nevada 89012

Re: Davis, Kalena v. Bridewell, Adam, et al.
Clark County District Court, Case No. A-18-777455-C

| | | |
|---|---|---|
| Claim No. | : | LYFT54965B1 |
| Claimant | : | Kalena Davis |
| Insured | : | Lyft, Inc. |
| DOL | : | October 20, 2017 |

Dear Mr. Richards:

We are requesting that Plaintiff undergo NRCP 35 examinations with neuropsychologist, Thomas Francis Kinsora, Ph.D. and vocational rehabilitationist, Aubrey A Corwin, M.S., L.P.C., C.R.C., C.L.C.P. in advance of our impending initial expert disclosure deadline of December 18, 2019. Please confirm you are in agreement and we will provide each experts availability to conduct such examinations shortly.

Thank you for your professional courtesy in this matter.

Sincerely,

*/s/ Blake A. Doerr*

Jason G. Revzin of
Blake A. Doerr of
LEWIS BRISBOIS BISGAARD & SMITH LLP

JGR/BAD/an
Enclosures

# Exhibit B

## Doerr, Blake

**From:** Nouwels, Autumn
**Sent:** Tuesday, October 22, 2019 11:56 AM
**To:** 'terri@clearcounsel.com'
**Cc:** Doerr, Blake; Prince, Abigail
**Subject:** Davis v. Bridewell, et al. - NRCP 35 Examinations
**Attachments:** 20191018_LTR to OC re NRCP 35 examinations.pdf

Hi Terri,

See attached. Due to the time sensitive nature of this request, please provide a response as soon as possible.

Aubrey Corwin is available 11/14/2019, 9A a videoconference evaluation. I am still waiting on availability from Dr. Kinsora.

Thanks.

LEWIS BRISBOIS

**Autumn Nouwels**
**Paralegal**
Autumn.Nouwels @lewisbrisbois.com

**T: 702.693.1707 F: 702.893.3789**

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# Exhibit C

## Doerr, Blake

**From:** Nouwels, Autumn
**Sent:** Friday, October 25, 2019 11:29 AM
**To:** 'terri@clearcounsel.com'; Jared Richards
**Cc:** Doerr, Blake; Prince, Abigail
**Subject:** RE: Davis v. Bridewell, et al. - NRCP 35 Examinations
**Attachments:** 20191018_LTR to OC re NRCP 35 examinations.pdf

Terri,

Happy Friday. I just left you a voicemail. Please provide a response to my inquiry below at your earliest convenience.

LEWIS BRISBOIS

**Autumn Nouwels**
**Paralegal**
Autumn.Nouwels @lewisbrisbois.com

**T: 702.693.1707 F: 702.893.3789**

6385 South Rainbow Blvd., Suite 600, Las Vegas, NV 89118 | **LewisBrisbois.com**



---

**From:** Nouwels, Autumn
**Sent:** Wednesday, October 23, 2019 3:50 PM
**To:** 'terri@clearcounsel.com'
**Cc:** Doerr, Blake; Prince, Abigail
**Subject:** RE: Davis v. Bridewell, et al. - NRCP 35 Examinations

Hi Terri,

Please provide status at your earliest convenience.

Thank you.

LEWIS BRISBOIS

**Autumn Nouwels**
**Paralegal**
Autumn.Nouwels @lewisbrisbois.com

**T: 702.693.1707 F: 702.893.3789**

6385 South Rainbow Blvd., Suite 600, Las Vegas, NV 89118 | **LewisBrisbois.com**

---

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**Sent:** Tuesday, October 22, 2019 11:56 AM
**To:** 'terri@clearcounsel.com'
**Cc:** Doerr, Blake; Prince, Abigail
**Subject:** Davis v. Bridewell, et al. - NRCP 35 Examinations

Hi Terri,

See attached. Due to the time sensitive nature of this request, please provide a response as soon as possible.

Aubrey Corwin is available 11/14/2019, 9A a videoconference evaluation. I am still waiting on availability from Dr. Kinsora.

Thanks.

LEWIS BRISBOIS

**Autumn Nouwels**
**Paralegal**
Autumn.Nouwels @lewisbrisbois.com

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# Exhibit D

## Doerr, Blake

**From:** Nouwels, Autumn
**Sent:** Friday, October 25, 2019 12:16 PM
**To:** 'Terri Szostek'
**Cc:** Doerr, Blake; Prince, Abigail
**Subject:** RE: Davis v. Bridewell, et al. - NRCP 35 Examinations

702.693.4302 Direct.

Thank you.


LEWIS BRISBOIS

**Autumn Nouwels**
**Paralegal**
Autumn.Nouwels @lewisbrisbois.com

**T: 702.693.1707 F: 702.893.3789**

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---

**From:** Terri Szostek [mailto:terri@clearcounsel.com]
**Sent:** Friday, October 25, 2019 12:10 PM
**To:** Nouwels, Autumn
**Subject:** [EXT] RE: Davis v. Bridewell, et al. - NRCP 35 Examinations

Yes – we'll call Blake. Does he have a direct number?


Terri D. Szostek
Litigation Support Specialist
CLEARCOUNSEL LAW GROUP
1671 W. Horizon Ridge Pkwy., Suite 200
Henderson, NV 89012
702.476.5900 (office)
702.508.9242 (direct)
702.924.0709 (fax)

**From:** Nouwels, Autumn <Autumn.Nouwels@lewisbrisbois.com>
**Sent:** Friday, October 25, 2019 12:02 PM
**To:** Terri Szostek <terri@clearcounsel.com>
**Cc:** Doerr, Blake <Blake.Doerr@lewisbrisbois.com>; Prince, Abigail <Abigail.Prince@lewisbrisbois.com>
**Subject:** RE: Davis v. Bridewell, et al. - NRCP 35 Examinations

Sure thing. Does 10A, work?

---

**From:** Terri Szostek [mailto:terri@clearcounsel.com]
**Sent:** Friday, October 25, 2019 12:00 PM
**To:** Nouwels, Autumn
**Subject:** [EXT] RE: Davis v. Bridewell, et al. - NRCP 35 Examinations

External Email

Happy Friday to you!

Jared would like a phone conference with Blake about the Rule 35 exams. Can we set something for Monday?

Terri D. Szostek
Litigation Support Specialist
CLEARCOUNSEL LAW GROUP
1671 W. Horizon Ridge Pkwy., Suite 200
Henderson, NV 89012
702.476.5900 (office)
702.508.9242 (direct)
702.924.0709 (fax)



---

**From:** Nouwels, Autumn <Autumn.Nouwels@lewisbrisbois.com>
**Sent:** Friday, October 25, 2019 11:29 AM
**To:** Terri Szostek <terri@clearcounsel.com>; Jared Richards <jared@clearcounsel.com>
**Cc:** Doerr, Blake <Blake.Doerr@lewisbrisbois.com>; Prince, Abigail <Abigail.Prince@lewisbrisbois.com>
**Subject:** RE: Davis v. Bridewell, et al. - NRCP 35 Examinations

Terri,

Happy Friday. I just left you a voicemail. Please provide a response to my inquiry below at your earliest convenience.

LEWIS BRISBOIS
**Autumn Nouwels**
**Paralegal**
Autumn.Nouwels @lewisbrisbois.com

**T: 702.693.1707 F: 702.893.3789**

6385 South Rainbow Blvd., Suite 600, Las Vegas, NV 89118 | **LewisBrisbois.com**

---

**From:** Nouwels, Autumn
**Sent:** Wednesday, October 23, 2019 3:50 PM
**To:** 'terri@clearcounsel.com'
**Cc:** Doerr, Blake; Prince, Abigail
**Subject:** RE: Davis v. Bridewell, et al. - NRCP 35 Examinations

Hi Terri,

Please provide status at your earliest convenience.

Thank you.

LEWIS BRISBOIS

**Autumn Nouwels**
**Paralegal**
Autumn.Nouwels @lewisbrisbois.com

**T: 702.693.1707 F: 702.893.3789**

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---

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**To:** 'terri@clearcounsel.com'
**Cc:** Doerr, Blake; Prince, Abigail
**Subject:** Davis v. Bridewell, et al. - NRCP 35 Examinations

Hi Terri,

See attached. Due to the time sensitive nature of this request, please provide a response as soon as possible.

Aubrey Corwin is available 11/14/2019, 9A a videoconference evaluation. I am still waiting on availability from Dr. Kinsora.

Thanks.

LEWIS BRISBOIS

**Autumn Nouwels**
**Paralegal**
Autumn.Nouwels @lewisbrisbois.com

**T: 702.693.1707 F: 702.893.3789**

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# Exhibit E

## Doerr, Blake

**From:** Doerr, Blake
**Sent:** Tuesday, December 3, 2019 1:35 PM
**To:** 'Jared Richards'
**Cc:** Nouwels, Autumn; Revzin, Jason; Prince, Abigail
**Subject:** Davis v. Bridewell

Jared,
We need to get the IMEs scheduled in this case. Can you please make getting us dates a priority?
Blake

LEWIS BRISBOIS

**Blake A. Doerr**
**Partner**
Blake.Doerr@lewisbrisbois.com

**T: 702.693.4302 F: 702.893.3789**

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# Exhibit F

## Doerr, Blake

**From:** Nouwels, Autumn
**Sent:** Wednesday, December 4, 2019 3:48 PM
**To:** Doerr, Blake; 'Jared Richards'
**Cc:** Revzin, Jason; Prince, Abigail; 'Terri Szostek'
**Subject:** RE: Davis v. Bridewell

Jared,

Dr. Kinsora is available for the clinical interview and psychological testing on January 13th at 9A-12P, and neuropsychological testing on January 15.

Dr. Fish is available on January 3rd.

I am waiting on availability from Aubrey Corwin.

Please confirm at your earliest convenience.

LEWIS BRISBOIS

**Autumn Nouwels**
**Paralegal**
Autumn.Nouwels @lewisbrisbois.com

**T: 702.693.1707 F: 702.893.3789**

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---

**From:** Doerr, Blake
**Sent:** Tuesday, December 3, 2019 1:35 PM
**To:** 'Jared Richards'
**Cc:** Nouwels, Autumn; Revzin, Jason; Prince, Abigail
**Subject:** Davis v. Bridewell

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Blake

LEWIS BRISBOIS

**Blake A. Doerr**
**Partner**
Blake.Doerr@lewisbrisbois.com

**T: 702.693.4302 F: 702.893.3789**

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# Exhibit G

## Doerr, Blake

**From:** Nouwels, Autumn
**Sent:** Wednesday, December 11, 2019 3:45 PM
**To:** Doerr, Blake; 'Jared Richards'
**Cc:** Revzin, Jason; Prince, Abigail; 'Terri Szostek'
**Subject:** RE: Davis v. Bridewell

Jared:

In addition to the dates provided below. Aubrey Corwin can offer the following Jan 17 from 8:00 a.m. – 11:00 a.m. PST for video clinical interview and 11:30 a.m. – 2:00 p.m. PST for video vocational testing.

Please advise at your earliest convenience.

Thank you.

LEWIS BRISBOIS

**Autumn Nouwels**
**Paralegal**
Autumn.Nouwels @lewisbrisbois.com

**T: 702.693.1707 F: 702.893.3789**

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Autumn

---

**From:** Nouwels, Autumn
**Sent:** Wednesday, December 4, 2019 3:48 PM
**To:** Doerr, Blake; 'Jared Richards'
**Cc:** Revzin, Jason; Prince, Abigail; 'Terri Szostek'
**Subject:** RE: Davis v. Bridewell

Jared,

Dr. Kinsora is available for the clinical interview and psychological testing on January 13th at 9A-12P, and neuropsychological testing on January 15.

Dr. Fish is available on January 3rd.

I am waiting on availability from Aubrey Corwin.

Please confirm at your earliest convenience.

LEWIS BRISBOIS

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**Paralegal**
Autumn.Nouwels @lewisbrisbois.com

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---

**From:** Doerr, Blake
**Sent:** Tuesday, December 3, 2019 1:35 PM
**To:** 'Jared Richards'
**Cc:** Nouwels, Autumn; Revzin, Jason; Prince, Abigail
**Subject:** Davis v. Bridewell

Jared,
We need to get the IMEs scheduled in this case. Can you please make getting us dates a priority?
Blake

LEWIS BRISBOIS

**Blake A. Doerr**
**Partner**
Blake.Doerr@lewisbrisbois.com

**T: 702.693.4302 F: 702.893.3789**

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# Exhibit H

## Doerr, Blake

**From:** Doerr, Blake
**Sent:** Friday, January 24, 2020 4:28 PM
**To:** 'Jared Richards'
**Subject:** Davis v. Bridewell
**Attachments:** Stip re IPE- Dr. Kinsora 4828-7153-8098 v.1.docx; Stip re IME- Dr. Fish 4831-4744-4658 v.1.docx; Stip re Clinical Interview- Corwin 4810-9629-8930 v.1.docx

Jared,
Here are some draft stips with the dates we can get. I think it is easier for all of us if we can agree to this. If you want changes, just let me know.
Blake

LEWIS BRISBOIS

**Blake A. Doerr**
**Partner**
Blake.Doerr@lewisbrisbois.com

**T: 702.693.4302 F: 702.893.3789**

6385 South Rainbow Blvd., Suite 600, Las Vegas, NV 89118 | **LewisBrisbois.com**

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# Exhibit I

## Doerr, Blake

**From:** Doerr, Blake
**Sent:** Thursday, January 30, 2020 8:49 AM
**To:** 'Jared Richards'
**Subject:** FW: Davis v. Bridewell
**Attachments:** Stip re IPE- Dr. Kinsora 4828-7153-8098 v.1.docx; Stip re IME- Dr. Fish 4831-4744-4658 v.1.docx; Stip re Clinical Interview- Corwin 4810-9629-8930 v.1.docx

Jared,
I called and left a voicemail. Please call me if you have a moment.
Blake

---

**From:** Doerr, Blake
**Sent:** Friday, January 24, 2020 4:28 PM
**To:** 'Jared Richards'
**Subject:** Davis v. Bridewell

Jared,
Here are some draft stips with the dates we can get. I think it is easier for all of us if we can agree to this. If you want changes, just let me know.
Blake

LEWIS BRISBOIS

**Blake A. Doerr**
**Partner**
Blake.Doerr@lewisbrisbois.com

**T: 702.693.4302 F: 702.893.3789**

6385 South Rainbow Blvd., Suite 600, Las Vegas, NV 89118 | **LewisBrisbois.com**

# Exhibit J

## Doerr, Blake

**From:** Doerr, Blake
**Sent:** Friday, January 31, 2020 9:07 AM
**To:** 'Jared Richards'
**Subject:** FW: Davis v. Bridewell
**Attachments:** Stip re IPE- Dr. Kinsora 4828-7153-8098 v.1.docx; Stip re IME- Dr. Fish 4831-4744-4658 v.1.docx; Stip re Clinical Interview- Corwin 4810-9629-8930 v.1.docx

I just left a message again. Please call when you have a moment.
Blake

---

**From:** Doerr, Blake
**Sent:** Thursday, January 30, 2020 8:49 AM
**To:** 'Jared Richards'
**Subject:** FW: Davis v. Bridewell

Jared,
I called and left a voicemail. Please call me if you have a moment.
Blake

---

**From:** Doerr, Blake
**Sent:** Friday, January 24, 2020 4:28 PM
**To:** 'Jared Richards'
**Subject:** Davis v. Bridewell

Jared,
Here are some draft stips with the dates we can get. I think it is easier for all of us if we can agree to this. If you want changes, just let me know.
Blake

LEWIS BRISBOIS

**Blake A. Doerr**
**Partner**
Blake.Doerr@lewisbrisbois.com

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# REGISTER OF ACTIONS

## CASE NO. A-18-777455-C

**Kalena Davis, Plaintiff(s) vs. Adam Bridewell, Defendant(s)**

| | |
|---|---|
| Case Type: | **Negligence - Auto** |
| Date Filed: | **07/10/2018** |
| Location: | **Department 13** |
| Cross-Reference Case Number: | **A777455** |

### PARTY INFORMATION

| | | Lead Attorneys |
|---|---|---|
| **Defendant** | **Bridewell, Adam Deron** | **James E. Harper**<br>*Retained*<br>702-948-9240(W) |
| **Defendant** | **Hertz Corporation** | **Michael C Hetey**<br>*Retained*<br>702-366-0622(W) |
| **Defendant** | **Lyft Inc** | **Matthew A. Cavanaugh**<br>*Retained* |
| **Plaintiff** | **Davis, Kalena** | **Jared R. Richards**<br>*Retained*<br>702-476-5900(W) |

### EVENTS & ORDERS OF THE COURT

02/13/2020 **All Pending Motions** (9:30 AM) (Judicial Officer Truman, Erin)

**Minutes**

02/13/2020 9:30 AM

- DEFENDANT LYFT AND DEFENDANT THE HERTZ CORPORATION'S MOTION TO COMPEL RULE 35 EXAMINATIONS ON OST...DEFENDANT ADAM BRIDEWELL'S JOINDER TO DEFENDANTS' MOTION TO COMPEL RULE 35 EXAMINATIONS ON OST COMMISSIONER NOTED, there was good cause for the examinations to go forward. Colloquy regarding the parameters of the examinations. COMMISSIONER FURTHER NOTED the time for the neuro-psych examination and the orthopedic examination requested was appropriate. COMMISSIONER FURTHER RECOMMENDED, motions GRANTED. Additional colloquy regarding the parameters Dr. Fish examination. Mr. Doerr suggested to work off Mr. Richard's stipulation as to the parameters. COMMISSIONER FURTHER RECOMMENDED, Status Check SET as to the parameters for Ms. Corwin's examination and Dr. Kinsora's examination. COMMISSIONER COMPELLED counsel to obtain from Ms. Corwin what she intended to do as to testing. Counsel to discuss and come to an agreement. If an agreement could not be reached then it would be addressed at the status check. Mr. Doerr to prepare the Report and Recommendations, and Mr. Richards to approve as to form and content. A proper report must be timely submitted within 14 days of the hearing. Otherwise, counsel will pay a contribution. Mr. Richards requested that the issue regarding that Hallmark should be addressed at Motions in Limine and not prior to the exam be included in the report and recommendation. COMMISSIONER SO RECOMMENDED. 03/06/20 10:00 AM STATUS CHECK: PARAMETERS FOR CORWIN AND DR. KINSORA EXAMINATION

Parties Present
Return to Register of Actions

**RTRAN**

DISTRICT COURT

CLARK COUNTY, NEVADA

| | |
|---|---|
| KALENA DAVIS,<br>Plaintiff,<br>vs.<br>ADAM BRIDEWELL, ET AL.,<br>Defendants. | CASE#: A-18-777455-C<br>DEPT. XIII |

BEFORE THE HONORABLE ERIN TRUMAN,
DISCOVERY COMMISSIONER

THURSDAY, FEBRUARY 13, 2020

***RECORDER'S TRANSCRIPT OF PROCEEDINGS***

**DEFENDANT LYFT AND DEFENDANT THE HERTZ CORPORATION'S MOTION TO COMPEL RULE 35 EXAMINATIONS ON OST**

**DEFENDANT ADAM BRIDEWELL'S JOINDER TO DEFENDANTS' MOTION TO COMPEL RULE 35 EXAMINATIONS ON OST**

APPEARANCES:

| | |
|---|---|
| For the Plaintiff: | JARED R. RICHARDS, ESQ. |
| For the Defendants: | BLAKE A. DOERR, ESQ.<br>TODD L. SWIFT, ESQ. |

RECORDED BY: FRANCESCA HAAK, COURT RECORDER

Las Vegas, Nevada, Thursday, February 13, 2020

[Case called at 11:10 a.m.]

THE COURT: All right, Davis versus Bridewell.

MR. RICHARDS: Good morning, Your Honor.

THE COURT: Good morning.

MR. RICHARDS: Jared Richards on behalf of the plaintiff.

THE COURT: Good morning, Mr. Richards.

MR. DOERR: Good morning. Blake Doerr on behalf of Lyft and Hertz.

MR. SWIFT: Todd Swift, Bar number 13595, on behalf of Defendant Bridewell.

THE COURT: And is it pronounced Dougher (ph) or Dyer (ph)?

MR. DOERR: I say Door (ph).

THE COURT: Door (ph). Okay.

MR. DOERR: Doer (ph), Derr (ph).

THE COURT: So Door (ph).

MR. DOERR: I -- I say Door (ph).

THE COURT: I want to pronounce it the way you want me to pronounce it. Okay, Door (ph). Got it. Just thought I would ask because I didn't hear it correctly. Okay. This is Defendant Lyft and Hertz's motion to compel Rule 35 exam.

MR. DOERR: Correct.

THE COURT: Do -- have we reached any stipulations on this

at this point?

MR. DOERR: Well Judge, I don't know if you got my reply yesterday. I admit I filed it, you know, after lunch yesterday. We had been --

THE COURT: Well this was on an OST so we'll give you a little leeway.

MR. DOERR: We had been trying to work with plaintiff's counsel on this. I -- I'm actually surprised that he's opposed it at all. We've been talking about it since October of last year. He in -- in late November, I was going out of town December 6th, I said -- we entered into a stipulation to move the dates so because his client was out of town working through December 11th and when I came back on December 23rd, I -- I fully expected to have dates, convenient dates for his client and stipulations so I've been willing to agree to stipulations.

In fact, after I had my 2.34, I then sent him draft stipulations for all three. One I used for my doctor because I got a stipulation in another case weeks before. I just used that one. I sent it to him and I got no response whatsoever. I called back. I said hey I sent those to you. I left a message. He never returned my call. I called him again. He never returned my call and that's why I filed so I -- I -- I've tried to work out a stipulation from him but --

THE COURT: Just second. Mr. Croteau?

MR. CROTEAU: Yes, Your Honor.

THE COURT: We can call your matter -- recall your matter if you'd like in a moment.

MR. CROTEAU: That's fine, thank you.

THE COURT: Okay. Go ahead, sorry.

MR. DOERR: I'm -- I'm just saying that I've never received another call back from him until I got the opposition to the motion where then he includes his -- his litany of stipulations. I tried to work out with him in advance of -- of this whole thing. I think -- I'm not sure why it was even necessary. I've been trying to do it since October.

I'll let Your Honor know that, you know, this necessitated filing an additional motion with the Court regarding the discovery dates which we had that hearing on Monday that was granted so we've got time to do it. I -- I gave you the amended date. One of my experts could not do it in the date that I included in the original motion because this hearing was set after that date so I got her next available date and put the discovery date out so that she has time to prepare the report after that.

I'll just tell you that the reason that I need all of these examinations is because of the allege damages that plaintiff has presented. I'll point out to you that the real number I have are the past medical bills. What I have going forward for the futures are just allegations. I don't have a report, I don't have a surgical recommendation letter, I don't have -- I don't have any of that.

THE COURT: What's the past damages at this point?

MR. RICHARDS: I believe --

MR. DOERR: Two point five million approximately.

MR. RICHARDS: In past specials.

MR. DOERR: In past specials. I -- I've given you the -- in his

opposition the -- the biggest objection is to the -- the vocational analysis by Ms. Corwin. At this point what I have is an allegation that he's seeking one -- you know, in excess of a million dollars, $1,204,923, and -- and that's --

THE COURT: In lost wage?

MR. DOERR: In -- in future lost earnings. And that's the information I have about it. So when -- you know, he -- he says that I needed to explain more fully what -- what examination I need. It's kind of hard for me to do that when all I have is a number, $1,204,923 to -- to -- to go after.

As we saw in the last case, when I have notice that that's what they're alleging, I got to do something then. This is what I'm doing now.

THE COURT: I don't disagree.

MR. DOERR: So there's a -- a TBI claim alleged. That's why I need the neuropsych evaluation --

THE COURT: So what are the nature of the injuries alleged because the --

MR. DOERR: Judge, he was --

THE COURT: -- as I understand it, Dr. Fische is an orthopedic --

MR. DOERR: Right, so this was a -- a motorcycle --

THE COURT: Motorcycle, right.

MR. DOERR: -- versus car.

THE COURT: So there's a TBI which is why you're requesting the neuropsych.

MR. DOERR: He had a -- a leg amputated.

THE COURT: Okay.

MR. DOERR: He was in the hospital over two months.

THE COURT: Okay.

MR. DOERR: He went from the scene in an ambulance there. There's certainly orthopedic -- I mean he had his leg removed, he had a crush injury to his arm.

THE COURT: I just wanted --

MR. DOERR: Horrific injuries.

THE COURT: Right. No I -- I just wanted to make sure that I understood the nature of the physical injuries correctly.

MR. DOERR: Sure. And -- and then Ms. Corwin, she's -- I -- I've got a --

THE COURT: She's a voc rehabilitation expert?

MR. DOERR: Yes.

THE COURT: Okay.

MR. DOERR: So she does the testing that she does I -- in the stipulations that I prepared, I named them what she named them. I -- I gave that to him and I -- then I got no response.

THE COURT: Okay. All right. So first we need -- excuse me, first we need to deal with the whether they can go forward, secondly we need to deal with the parameters of them. Have you guys reached -- if they do go forward, are you able to reach an agreement as to what the parameters are or is that still in dispute as well?

MR. DOERR: I think it's still in dispute. I mean --

THE COURT: Okay. What are the areas of the dispute with regard to if they go forward?

MR. DOERR: In -- in my opinion, the two areas of dispute are the recording of the examinations and the observers at the examinations. In my reply I -- I set forth the section of NRCP 35 that says if -- well, for a neuropsych it's not allowed unless they show good cause for an observer --

THE COURT: AB285 is really come -- I mean now that AB285 is law --

MR. DOERR: Sure.

THE COURT: -- that really address- -- I mean that really --

MR. DOERR: I -- I think though that the rule still is in place and the rule has always modified what the statute said.

I -- here -- here's the other thing, Your Honor. In October when we were talking about this, why wasn't he discussing this with me at that time? How about October, how about November, how about December, how about at any point in January? He doesn't discuss it with me at all.

THE COURT: Okay. Well we're here now.

MR. DOERR: He -- he comes in here and then he -- he gives a laundry list then. And I told him and I put the email in the reply where I said to him here -- I've told him more than once, send me your stipulations. What I do with that is I send it to the doctor and I ask the doctor is there anything you object to? If my doctor doesn't object to that or my expert doesn't object to that, I -- I sign it and I send it back

and we go forward.

I just -- I never got a response. Then I prepared one and I didn't get a response to that and then -- then I have to file my motion then in his opposition he includes a nice pretty packet of -- of stipulations.

THE COURT: Okay. All right. So is the only --

MR. DOERR: I'm not being -- we could work it out.

THE COURT: Okay.

MR. DOERR: I just don't know why --

THE COURT: All right.

MR. DOERR: -- I never got a call back in the prior three months.

THE COURT: Well --

MR. DOERR: I don't think that's fair.

THE COURT: All right. I'm going to just keep encouraging counsel to talk with each other because I'll say that most of these matters can be resolved -- a lot of the matters I see could have been resolved without me involved, but --

MR. DOERR: I just don't know how many more times I was supposed to call when he's never --

THE COURT: I under- --

MR. DOERR: -- called me back.

THE COURT: Okay. All right.

MR. DOERR: And I -- I like Jared. We've worked very collegially throughout this. I don't know why he never called. I -- I --

THE COURT: Well maybe he'll tell us.

Mr. Richards.

MR. RICHARDS: Good morning, Your Honor.

THE COURT: Good morning.

MR. RICHARDS: So -- and I do respect Mr. -- Mr. Doerr and I have enjoyed actually working with him in this case.

THE COURT: Why didn't you call him back?

MR. RICHARDS: Well, we did up through December -- January I think we had a phone call, but late December when he -- late January when he sent those stips, I actually didn't notice when he -- when he filed this -- the initial motion and he said that he had sent the stipulations, I actually had to search back through my emails, I didn't see that email --

THE COURT: Okay.

MR. RICHARDS: -- until this order had been filed and -- or this motion been filed --

THE COURT: All right.

MR. RICHARDS: -- and here we are, but regardless --

THE COURT: Yeah.

MR. RICHARDS: -- when parties can't reach a stipulation --

THE COURT: That's why I have a job.

MR. RICHARDS: -- we are here --

THE COURT: Yes.

MR. RICHARDS: -- and well, we're in the proper forum and we're speaking with the proper person.

THE COURT: Yes. And we're going to decide it.

MR. RICHARDS: And let's decide it. Okay, so --

THE COURT: All right, so what's your opposition to -- your client is claiming a traumatic brain injury, correct?

MR. RICHARDS: Yes.

THE COURT: Your client has had serious and significant orthopedic issues, correct?

MR. RICHARDS: Yes.

THE COURT: And your client has a significant, excuse me, lost -- future lost earnings claim, correct?

MR. RICHARDS: Yes.

THE COURT: All right.

MR. RICHARDS: All correct. So what is your position as to why there's not good cause for me to recommend that these three examinations go forward?

MR. RICHARDS: Okay. So first, if I may, there's the --

THE COURT: Take them whatever order you want.

MR. RICHARDS: Okay. Thank you. So as a bit of ground foundation, Rule 35 requires a good cause showing and that is because what the Court is doing is essentially forcing an individual to submit themselves physically, mentally to the examination of a third party that he has no control over. He gets poked and prodded and in this case they're asking for four days of examinations. And so for that the Court needs to balance good cause, but there are two levels of good cause.

The first level is, is there general need based on the damages

claimed and -- and --

THE COURT: There's extensive damages claimed in this case.

MR. RICHARDS: Yeah, there are extensive damages claimed in this case.

THE COURT: So I would say general need has been established.

MR. RICHARDS: Yes, I agree.

THE COURT: Okay.

MR. RICHARDS: And we'll talk about Ms. Kinsora in a second, but specifically as to Fische and -- or Ms. Corwin in a second, the voc rehab in a second, but as far as -- we're not opposing the -- the basic concept that he should be examined by their orthopedic and that he should be examined by their neuropsych. That's --

THE COURT: So you're fine with those two --

MR. RICHARDS: Yeah.

THE COURT: -- as long as the parameters can be worked out?

MR. RICHARDS: Yes.

THE COURT: Okay.

MR. RICHARDS: Okay, but we're going to get into the second level of good cause.

THE COURT: Okay.

MR. RICHARDS: And the second level of good cause is -- now they want two days for their neuropsych and they want a full day --

THE COURT: That's pretty typical.

MR. RICHARDS: -- and they want a full day for their voc rehab.

THE COURT: And that's pretty typical.

MR. RICHARDS: But the issue is that before they do that they need to establish three things to present good cause. They need to establish that the testing that's being done is being relevant -- is relevant, and just because it is a neuropsych and he declares I'm going to do neuropsych testing doesn't mean the actual testing he does is going to be relevant to the case.

THE COURT: But he -- hasn't he identified the testing --

MR. RICHARDS: The testing parameters, no.

THE COURT: No, hasn't he -- has he provided the list of testing --

MR. RICHARDS: No.

THE COURT: -- that's going to be conducted?

MR. RICHARDS: No. He said that there's going to be an interview and there's going to be neuropsych testing, but -- but we don't know in detail what that even means.

THE COURT: Okay.

MR. RICHARDS: They need to prove that there's *Hallmark* -- that it passes *Hallmark*.

THE COURT: Well that's a motion in limine that you can address if your expert believes that the testing that they did was -- does not meet (ph) that level.

MR. RICHARDS: So I -- I appreciate that normally in a -- when an expert is doing normal testing and analysis and it's on that expert's time that that's a pretrial motion that we deal in motions limine, but what we're -- what -- what we're doing here is they're trying to show good cause for this Court to tell my client to be poked and prodded for a specific period of time and --

THE COURT: I don't think the neuropsych's going to poke or prod.

MR. RICHARDS: Well, mentally poked and prodded then.

THE COURT: Okay.

MR. RICHARDS: But it's still two days of discomfort and two days of heightened stress and two days of restricted freedom that my client has to -- to go through. And if that's going to happen, then we should address the *Hallmark* issues prior to the testing, not after the testing.

And that's part of the good cause analysis and I would say that Miller and Wright in their treatise when they're dealing with the federal version -- I do cite this in my opposition -- they do put a note in there they mention that the court should consider *Daubert* principles and of course we're dealing with *Hallmark*. But that's part of the good cause analysis is showing that the testing -- it's part of laying the foundation that the testing that's going to be done is actually going to be relevant and is actually going to pass muster before we make this poor plaintiff who's already gone through so much go through even more.

THE COURT: I understand your position, but we're talking -- I

mean would -- obviously, you know, based on just what I've heard today this is a case where just with the million in future and the two and a half past -- two and a half million in past specials, this is a very high dollar potential value case.

MR. RICHARDS: I agree.

THE COURT: You're alleging a permanent traumatic brain injury, correct?

MR. RICHARDS: Yes.

THE COURT: And significant permanent orthopedic injuries.

MR. RICHARDS: Yes.

THE COURT: And so I -- based on that, I -- I find good cause for the -- the neuropsych and the orthopedic exam to go forward. I think it's appropriate given -- I think it's proportional to the needs of this case. This is not a small dollar value case. I think it's proportional to the needs of this case. With the severity of the injuries involved, I don't think that the two days is disproportional. I don't think at this stage for discovery purposes we need to undergo an evidentiary hearing on the *Hallmark* issues. I think that would need to be done before the judge. I think it is sufficient that -- I believe there's good cause for those two exams to go forward.

Now, I am willing to address the parameters and let's -- let's go to Aubrey Corwin.

MR. RICHARDS: Okay. Aubrey Corwin. So -- so my client --

THE COURT: What's the past -- what's the past earnings at this point?

MR. RICHARDS: I don't have it --

THE COURT: There's a million future --

MR. RICHARDS: I don't have it top my head.

THE COURT: -- and I anticipate that there's going to be a life care plan.

MR. RICHARDS: Yes, there is.

THE COURT: So --

MR. RICHARDS: Aubrey Corwin at the top my head I'm not quite sure what the past -- what his past wage loss was and I just wasn't ready -- maybe you --

MR. DOERR: In the computa- -- there is no number in the computation of --

THE COURT: Okay.

MR. DOERR: -- damages for past wage loss. Not that he can't amend, but there --

THE COURT: Okay.

MR. DOERR: -- there's no number in the computation of damages.

THE COURT: But there's a million future?

MR. RICHARDS: Sure, he's currently working.

MR. DOERR: One point two million --

THE COURT: One point two --

MR. DOERR: -- in futures.

THE COURT: -- future.

MR. RICHARDS: So my client is currently working and he's

currently working in the job that he wants to have. The concern is, is that with the injuries that he has he's not going to forever be able to do that.

THE COURT: Okay.

MR. RICHARDS: And that raises the concern though of what exactly is it and this also goes down to foundation to part -- part of a *Hallmark* analysis of what is it that Ms. Corwin can do or what is she planning to do that testing is going to show, and before we submit my client who's already gone through so much to additional testing, they should show good cause as to why this is actually going to actually give her the information that she can use.

Plus, he's already going through a physical exam which -- and you'll see in our opposition we don't oppose and already going through a neuropsych which we don't oppose and we never did oppose the neuropsych, just the parameters, the -- their lack of foundation as to what the testing actually specifically is going to be which Your Honor has just addressed.

But they already have a physical exam, they already have a mental exam. They shouldn't have a third full-day exam by Ms. Corwin, especially when he is currently working.

THE COURT: Okay. Counsel.

MR. DOERR: Ms. Corwin does something different and she's there to opine about something different. I -- I completely I -- I really take a Rule 35 exam very seriously and I see them overused a lot. I ask for them a lot.

In this case, one of the problems in identifying the testing and exactly what Ms. Corwin needs to do is all I have about this is a number, $1,240,000 (sic). I don't -- I don't know what he's saying he can't do. That's why I have her.

I have been given information that says this is the approximate value. I called her. She says this is -- I'm going to figure out what he's claiming he can't do. That's the purpose of the examination.

If there's a specific test it's called, I don't know the answer because I don't really know what he's saying he can't do. In his deposition he said I got the job that I wanted and I'm making more money now. I -- so it -- it is curious to me how there's 1.2 million future lost wages if you've got a better job now and you're making more money --

THE COURT: Well he just indicated that he doesn't think he'll be able to do it for as long a period of time.

MR. DOERR: Well --

THE COURT: At least that's what I thought I understood you to say.

MR. RICHARDS: Yeah, I mean he's a young guy.

MR. DOERR: And now that I know that --

THE COURT: He's what?

MR. RICHARDS: He's a young guy.

THE COURT: Okay.

MR. RICHARDS: He's around 30 I believe.

MR. DOERR: Now that I know that today right this moment, it gives me some information to take to her to figure out what the testing is, but walking in here today I had $1.2 million. That's the information I had.

THE COURT: Okay.

MR. DOERR: I -- and I'm not opposed to a stipulation and the parameters of this. I've been willing to do that the whole time.

THE COURT: All right. This is what my recommendation is going to be. I'm going to recommend that all three examinations go forward. With that said, I -- I think the time for the neuropsych examination as well as the orthopedic Rule 35 examination those two I think that the time that's been requested is appropriate and I'm going to allow that.

With regard to the -- let's talk about the parameters now that -- that -- what are the parameters whose -- whose stipulation should I work off of? Who has -- whose has the most --

MR. DOERR: Your Honor --

THE COURT: --- that you agree to?

MR. DOERR: -- let's work off his.

THE COURT: Okay, let's work off yours.

MR. RICHARDS: Fantastic.

MR. DOERR: If he'd given this to me before, we probably wouldn't be here today.

THE COURT: Okay.

MR. DOERR: Let's work off his.

THE COURT: And so off Exhibit 1 this is for the one by David Fische, let's just go through it. What are the objections to anything on page -- let me just read through it then quickly. I'm fine with one. Does anybody have problem with one or --

MR. DOERR: No.

THE COURT: I'm fine with two.

I'm fine with three particularly since AB285 allows the attorney to be present and they've agreed not to be present.

MR. RICHARDS: Oh --

MR. DOERR: I was included in my original stipulation for Dr. Fische anyway.

THE COURT: Okay.

MR. RICHARDS: And actually, Your Honor, and I'll -- I will admit to some ignorance. I am unaware of what we're talking about so the -- my understanding is the attorney cannot be present. So the attorney can now be present?

THE COURT: Under AB Bill 285 that was past last year the attorney can be present.

MR. RICHARDS: Okay. Well, then Your Honor, I would ask that I be present.

THE COURT: Okay. Counsel?

MR. DOERR: I don't believe he's demonstrated good cause for an observer which I think the rule requires. He hasn't said -- he says that he needs it, he's asking for the blanket request and I think the rule says he has to come forward with good cause. And the rule says he has

to name the observer.

MR. RICHARDS: Well, Your Honor, I'm naming me. And this is a high-value case and it is likely to be a hotly-contested case. It makes sense that there is an observer and I think I'm qualified to do that.

THE COURT: I'm reading from AB285 this is Chapter 52, the NRS will be amended by adding a subsection to read as follows: 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 an attorney of an examinee as -- or party producing the examinee or a designated representative of the attorney if the attorney of the examinee or party producing the examinee in writing authorizes the designated representative on -- to act on behalf of the attorney during the examination and the designated representative presents the authorization to the examiner before the commencement of the examination.

So under the law, they may designate who will be present in writing prior to the time of the examination.

MR. RICHARDS: Okay. So under that provision, Your Honor, and thank you for reading that I -- I -- I really do appreciate that. Then just in case there are any evidentiary witness issues, then I would like to be able to designate somebody to come in and just pursuant to that rule --

THE COURT: Okay. So under -- under that that I --

MR. DOERR: Pursuant to the rule --

THE COURT: Pursuant to the rule --

MR. DOERR: -- I -- I don't disagree.

MR. RICHARDS: Pursuant to that statute then --

THE COURT: Okay, so they need to designate --

MR. RICHARDS: -- I will designate.

THE COURT: So designate who you would like to needs to be part of the -- the examination.

Number 4, the examination may be audio recorded by the plaintiff. If plaintiff elects to audio record the examination, he shall notify all persons present. I'm fine with that. Under AB285 I'm fine with that. AB85 (sic) allows for audio recording.

The examination -- is there a problem with five? Are there problems with anything else? And the examiner shall refer to the examination as a Rule 35 examination, an NRCP Rule 35 examination.

[Pause]

THE COURT: I don't have any problem with the rest of it. Do you counsel?

MR. DOERR: I -- I -- I don't have a problem with disrobing, but know that, you know, he's had a leg amputated below the knee.

THE COURT: He -- he needs to be able to --

MR. DOERR: I -- I think he --

THE COURT: He needs to be able to have clothing so that he can move the clothing such that the doctor can see the scaring, can see -- can test mobility and can see the surgical area. So to the extent that is required I -- I don't know the nature of his scaring, but to the extent the

-- he doesn't have to completely disrobe, but he does need to be able to move the clothing such that the examining physician can identify and observe any physical injury and/or permanent scarring. Okay?

All right, any -- is -- are there any issues then with regard to the remainer (sic), Kinsora or -- what I'm going to -- I'm going to set this for a status check on Corwin because what I would like you to do is I would like you to obtain from Ms. Corwin what she intends to -- what type of testing generally speaking and if she has specifics she intends to do. I'd like the two of you to discuss it, see if you can come to an agreement. If you can't, we'll resolve that through a status check and I'd like to do that within -- when's her scheduled? Is there not one scheduled?

MR. RICHARDS: Wasn't she April?

MR. DOERR: I put it in the amendment, if you give me a moment.

THE COURT: And this is to be done by video conference; is that correct?

MR. DOERR: Correct.

THE COURT: And that was fine with Ms. Corwin?

MR. DOERR: She's requested that in fact.

THE COURT: Video conference? And I don't think that that's too intrusive. So video conference -- it'll be done by video conference.

MR. RICHARDS: And --

MR. DOERR: It's April 10th.

MR. RICHARDS: And again, Your Honor, for the record, I

simply just object to Ms. Corwin up and down including the video conference.

THE COURT: Okay. Well I'm going to recommend that that one go forward.

Are there any parameters we need discuss with regard to the proposed conditions of the Rule 35 exam by Kalena Davis?

MR. RICHARDS: By -- I'm sorry?

MR. DOERR: For -- for who?

THE COURT: I'm looking at plaintiff's parameters.

MR. DOERR: For Dr. Kinsora?

THE COURT: The proposed conditions.

MR. DOERR: I -- I guess --

THE COURT: Did I say -- oh I'm sorry, of Kalena Davis by Dr. Kinsora, I'm sorry.

MR. DOERR: So I just want to -- I -- I know that in the past I haven't addressed this with Dr. Kinsora specifically. I have -- I have discussed the issue of recording the examination and having an observer at an examination specifically with Dr. Etcoff in the past. Before I -- I -- you may recommend it, but I would before -- I would hand this to him and see if he agrees with it before I --

THE COURT: Well, I think that you need to also give him a copy of the -- the -- the law that applies in the state of Nevada.

MR. DOERR: Sure. I believe there's -- the Nevada Rules of Civil Procedure are still applicable. I don't think they conflict with it, I think they -- they modify it, I think they did before. I think it says a

neuropsychological --

THE COURT: I -- I think the -- but --

MR. DOERR: -- examination they're not allowed unless they show good cause.

MR. RICHARDS: But -- but the new statute says that I get to designate.

THE COURT: The --

MR. DOERR: The new statute that he didn't know about.

THE COURT: Well --

MR. RICHARDS: Well, doesn't change the existence of the statute.

MR. DOERR: Well it doesn't change the existing rule either.

THE COURT: The Court knows about it. This specifically deals with any physical -- examination means a mental or physical examination ordered by the court. And so this statute -- this statute does apply to neuropsychological and so I believe that it can be audio recorded.

MR. RICHARDS: And also I can designate an observer?

THE COURT: Yes.

MR. RICHARDS: Okay.

THE COURT: I mean I didn't pass the law but that's the law.

MR. DOERR: What's your understanding of how the rule modifies the law?

THE COURT: I think the --

MR. DOERR: And -- and I'm not being trite, I -- I don't really

know the answer either.

THE COURT: I think that the --

MR. DOERR: I think it's still there.

THE COURT: I think that the statute --

MR. DOERR: We have a statute --

THE COURT: I think that the statute governs.

All right. So any other issues?

THE CLERK: We need set the status check?

THE COURT: We'll set a status check in two weeks for -- and that will be on the parameters for Aubrey Corwin's examination. So all three may go forward, but I want you to provide at least a general statement as to what --

MR. DOERR: Sure.

THE COURT: -- she intends to conduct so that he can respond and --

MR. DOERR: Sure. Regarding Dr. Kinsora, number 3, Dr. Kinsora sets it up where he does the examination -- what he's requested here is that plaintiff shall be given a 10-minute break. I haven't discussed that with him. I don't think he normally does that. They do a -- they do something different.

THE COURT: All right, then -- then I'd like the two of you to discuss the timing and bring -- find out how Dr. Kinsora does that. We'll -- we'll address the parameters in two weeks at that examina- or at the status check as well. So the status check is going to be two weeks from Friday.

THE CLERK: Dark in two weeks so do three weeks?

THE COURT: Three weeks from Friday.

THE CLERK: March 6th, 9:30.

THE COURT: And so we'll address the parameters for Dr. Kinsora and if you want -- if you want to submit prior to that status check any authority that you think would say that the rule versus the statute governs, I'll consider it at that time. Just have it submitted to me beforehand.

MR. DOERR: I don't know the -- I don't know the answer.

THE COURT: Okay.

MR. DOERR: I -- I've been trying to figure the answer out. I -- I don't know. I don't think the rule's gone. I -- I know what a statute is, I know who does it, I know what role it plays but -- if they're going to overturn it, they may have included language in there I didn't see that, I didn't -- haven't extensively looked at the legislative history, although I have looked at the legislative history. I don't know the answer.

THE COURT: So -- well it was -- it was passed and it is -- it is in effect so -- all right. So we will be back on March 6th at 9:30. Why don't we say -- let's do March 6th at 10.

THE CLERK: Okay.

THE COURT: Because I think we have a --

THE CLERK: March 6th 10.

THE COURT: We have a lot on that day so -- I don't want you to wait long.

All right, I would like, Mr. Doerr, for you to prepare the report

and recommendation from today's hearing --

MR. DOERR: Yes.

THE COURT: -- and have that submitted to Mr. Richards for his approval as to form and content and submit that to me within 14 days to avoid a contribution.

MR. DOERR: Just -- that's just really a report and recommendation that the examinations have been granted --

THE COURT: Yes.

MR. DOERR: -- with the parameters to be decided --

THE COURT: Well we did the parameters already for --

MR. DOERR: For Dr. --

THE COURT: -- Dr. Fische but --

MR. DOERR: -- Dr. Fische.

THE COURT: -- and then the parameters --

MR. DOERR: Understood.

THE COURT: -- for Dr. Kinsora and Cortin (sic) --

MR. DOERR: Ms. Corwin.

THE COURT: -- Ms. Corwin will be addressed further at the status check.

MR. RICHARDS: And if I may ask that the issue regarding that *Hallmark* should be addressed in motions limine time and not prior to the exam be put into the report and recommendation?

MR. DOERR: Please include that.

THE COURT: Yes.

MR. DOERR: I don't have any problem with that.

MR. RICHARDS: Okay.

MR. DOERR: I think probably we can work it out. Should we -- if we can work it out --

THE COURT: If you work it out -- if you work it out, you don't need to come back for the status check.

MR. DOERR: Thank you.

THE COURT: But you still need to do the report and recommendation.

MR. DOERR: Will do.

MR. RICHARDS: Thank you.

MR. DOERR: Thank you.

THE COURT: Thank you.

[Hearing concluded at 11:40 a.m.]

* * * * * *

ATTEST: I hereby certify that I have truly and correctly transcribed the audio/visual proceedings in the above-entitled case to the best of my ability.

Tracy A. Gegenheimer, CER-282, CET-282
Court Recorder/Transcriber

JASON G. REVZIN
Nevada Bar No. 8629
BLAKE A. DOERR
Nevada Bar No. 9001
LEWIS BRISBOIS BISGAARD & SMITH LLP
6385 S. Rainbow Boulevard, Suite 600
Las Vegas, Nevada 89118
Telephone: 702.893.3383
Fax: 702.893.3789
Email: jason.revzin@lewisbrisbois.com
Email: blake.doerr@lewisbrisbois.com
*Attorneys for Lyft, Inc. and The Hertz Corporation*

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

KALENA DAVIS,

Plaintiff,

vs.

ADAM DERON BRIDEWELL, an individual; LYFT, INC., a foreign corporation; THE HERTZ CORPORATION, a foreign corporation; DOE OWNERS I through X, and ROE LEGAL ENTITIES I through X, inclusive,

Defendants.

Case No.: A-18-777455-C
Dept. No.: XIII

**DISCOVERY COMMISSIONER'S REPORT AND RECOMMENDATIONS**

| | |
|---|---|
| Hearing Date: | February 13, 2020 |
| Hearing Time: | 9:30 a.m. |
| Attorney for Plaintiff: | Jared Richards, Clear Counsel |
| Attorney for Defendants Lyft, Inc. and Hertz: | Blake A. Doerr, Lewis Brisbois |
| Attorney for Defendant Adam Bridewell: | Todd Swift, Harper Selim |

I.

FINDINGS

The matter pertains to allegations of injury which occurred in a motor vehicle accident where it has been alleged that the Plaintiff's motorcycle collided with the vehicle driven by Defendant Adam Bridewell ("Bridewell") while Bridewell was logged onto the

LYFT Platform. Plaintiff claims he was severely injured in the accident. In his most recent supplement to NRCP 16.1 production of documents, the Plaintiff alleges $2,593,631.10 in past medical specials, $5,000,000 in future medical specials, $1,528,168.63 in future prosthetic hardware, $1,204,923 in loss of future earning capacity, $1,000,000 in hedonic damages and $473,833.00 in loss of household services in addition to an amount for past and future pain and suffering in an amount to be determined.

The hearing on LYFT, INC.'S, and Defendant THE HERTZ CORPORATION'S (collectively "Defendant" or "LYFT") MOTION TO COMPEL NRCP RULE 35 EXAMINATIONS on ORDER SHORTENING TIME took place on February 13, 2020 at 9:30 a.m.

Defendant's Request for a NRCP Rule 35 examination by Dr. Fish is reasonable and warranted given the Plaintiff's claim of orthopedic injuries and future treatment.

Defendant's Request for NRCP Rule 35 examination by Dr. Kinsora is reasonable and warranted given the Plaintiff's claim of traumatic brain injuries and future treatment.

Defendant's Request for NRCP Rule 35 examination by Ms. Corwin is reasonable and warranted given the Plaintiff's claim of future lost wages in excess of one million dollars.

The Discovery Commissioner, having reviewed the filed papers and having met with counsel for the parties and having discussed the issues, hereby submits the subsequent recommendations.

II.

RECOMMENDATIONS

IT IS HEREBY RECOMMENDED that Defendant's MOTION TO COMPEL NRCP RULE 35 EXAMINATIONS be GRANTED.

Plaintiff shall appear for the examination with Dr. Fish on March 20, 2020 at 2 p.m. and pursuant to the stipulations regarding the examination as attached hereto as Exhibit A. Plaintiff shall appear for the examination with Dr. Kinsora on March 11, 2020

beginning at 9 a.m.; and again on March 12, 2020 beginning at 9 a.m. Plaintiff shall appear for the examination with Ms. Corwin on April 10 beginning at 9:30 a.m. The examinations by Dr. Kinsora and Ms. Corwin are to be conducted pursuant to conditions to be determined by the parties. This examinations by Dr. Kinsora and Ms. Corwin are to be conducted pursuant to conditions to be determined by the parties. If the parties and their experts cannot reach consensus on the conditions, the parties will address such issues with the Discovery Commissioner at the status check on March 6, 2020.

The Discovery Commissioner, met with the counsel for the parties, having discussed the issues noted above and having reviewed any materials proposed in support thereof, here by submits the above recommendations.

Dated this 2nd day of March, 2020

DISCOVERY COMMISSIONER

Respectfully Submitted by:
LEWIS BRISBOIS BISGAARD & SMITH LLP

JASON G. REVZIN
Nevada Bar No. 8629
BLAKE A. DOERR
Nevada Bar No. 9001
*Attorneys for Lyft, Inc. and The Hertz Corporation*

Approved as to form and content:

Jared R. Richards
CLEAR COUNSEL LAW GROUP
1671 W. Horizon Ridge Pkwy., Ste. 200
Las Vegas, NV 89012

///

LEWIS BRISBOIS

*Attorneys for Plaintiff*

# 13595

Justin S. Gourley
HARPER SELIM
1707 Village Center Circle. Suite 140
Las Vegas, Nevada 89134
*Attorneys for Defendant Adam Deron Bridewell*

NOTICE

Pursuant to NRCP 16.3(c)(2), you are hereby notified that within fourteen (14) days after being served with a report any party may file and serve written objections to the recommendations. Written authorities may be filed with objections but are not mandatory. If written authorities are filed, any other party may field and serve responding authorities within seven (7) days after being served with objections.

Objection time will expire on March 17, 2020.

A copy of the foregoing Discovery Commissioner's report was:

____ Mailed to Plaintiff/Defendant at the following address on _____, 2020.

__✓__ Electronically filed and served on counsel on March 3, 2020, pursuant to N.E.F.C.R. Rule 19.

By: Natalie Teh
COMMISSIONER DESIGNEE

LEWIS BRISBOIS

# Exhibit A

**Conditions of the Rule 35 Examination of Kalena Davis by David E. Fish, M.D.**

1. Any paperwork or forms that Defendants' medical expert, Dr. David E. Fish, requires for the examination shall be submitted to Plaintiff's counsel no later than seven (7) days prior to the date of the examination and is subject to objection by Plaintiff's counsel.

2. Plaintiff will appear for a Rule 35 Exam with Dr. Fish on March 20, 2020 at 2:00 P.M. at Consultant Medical Group, located at 2500 West Sahara Avenue, Las Vegas, NV 89102.

3. Plaintiff may bring an observer pursuant to SB 285 (2019). The observer may not in any way interfere, obstruct, or participate in the examination.

4. The examination may be audio recorded by the Plaintiff. If Plaintiff elects to audio record the examination, he shall notify all persons present and place the audio recording device in a location in the room reasonably approved of by the examiner. Plaintiff's counsel will provide a copy of the audio recording to Defendant's counsel.

5. The examination shall be completed by 3:30 p.m., and Plaintiff will not be required to wait in the waiting room longer than 30 minutes past the arrival time before the commencement of the examination.

6. The examiner shall not refer to the examination as "independent".

7. The physical examination shall be limited to the physical conditions of the Plaintiff that are in controversy in the above-captioned case. Plaintiff will not be asked any liability questions surrounding the subject incident. However, the examining physician or staff member may ask about the mechanism of injury, body parts making contact with the ground, and may ask about relevant medical history, past and current symptoms.

8. No invasive procedures are allowed.

9. No medical treatment is allowed.

10. No x-rays, radiographs, MR1s, CT scans, PET scans or other medical imaging may be obtained as part of the examination.

11. Plaintiff shall not be required to disrobe from the waist down during the examination. Plaintiff shall wear loose fitting shorts or pants to the examination to prevent the need for disrobing.

12. No physically painful, intrusive or embarrassing procedures may be performed during the examination.

13. Legal questions not normally a part of a medical examination may not be asked or discussed with Plaintiff by the examining physician, agent, or representative of the examining physician (e.g., liability, potential monetary recovery, professional criticisms, Plaintiff's motivation for or willingness to pursue the claim);

14. Defendants' medical expert, Dr. Fish, shall not engage in any ex parte communication with Plaintiffs treating health care providers.

15. Thirty (30) days following the examination, Defendants shall provide Plaintiffs counsel with a copy of the examination report.

16. Plaintiff shall not pay or incur any fee for the examination and shall use his best efforts to appear at the office of Dr. Fish 10 minutes prior to the scheduled examination date and time. In the event Plaintiff cannot attend his scheduled examination, his counsel shall contact Defendants' counsel to re-schedule the examination with 24 hours' notice.

17. The moving party shall provide the examining physician with a copy of these conditions prior to the examination.

JUSTIN GOURLEY
Nevada Bar No. 11976
TODD L. SWIFT
Nevada Bar No. 13595
**HARPER | SELIM**
1707 Village Center Circle, Suite 140
Las Vegas, Nevada 89134
Phone: (702) 948-9240
Fax: (702) 778-6600
Email: eservice@harperselim.com
*Attorneys for Defendant Adam Deron Bridewell*

**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

| | |
|---|---|
| KALENA DAVIS, an individual;<br><br>Plaintiff,<br><br>vs.<br><br>ADAM DERON BRIDEWELL, an individual; LYFT, INC., a foreign corporation; THE HERTZ CORPORATION, a foreign corporation; DOE OWNERS I through X; and ROE LEGAL ENTITIES I through X, inclusive,<br><br>Defendants. | CASE NO.: A-18-777455-C<br>DEPT. NO.: XIII<br><br>HEARING DATE: March 5, 2020<br><br>HEARING TIME: 9:00 a.m. |

**ORDER**

The Court, having reviewed the above report and recommendations prepared by the Discovery Commissioner and,

X No timely objection having been filed,

_____ After reviewing the objections to the Report and Recommendations and good cause appearing,

CASE NAME: Davis v. Bridewell, et al.

CASE NO: A-18-777455-C

AND

__X__ IT IS HEREBY ORDERED the Discovery Commissioner's Report and Recommendations are affirmed and adopted.

_____ IT IS HEREBY ORDERED the Discovery Commissioner's Report and Recommendations are affirmed and adopted as modified in the following manner. (attached hereto)

_____ IT IS HEREBY ORDERED this matter is remanded to the Discovery Commissioner for reconsideration or further action.

_____ IT IS HEREBY ORDERED that a hearing on the Discovery Commissioner's Report is set for _____, 2020, at _____:_____ a.m.

DATED this 26th day of May, 2020.

DISTRICT COURT JUDGE

HARPER|SELIM
CIVIL AND COMMERCIAL LITIGATION

JUSTIN GOURLEY
Nevada Bar No. 11976
TODD L. SWIFT
Nevada Bar No. 13595
**HARPER | SELIM**
1707 Village Center Circle, Suite 140
Las Vegas, Nevada 89134
Phone: (702) 948-9240
Fax: (702) 778-6600
Email: eservice@harperselim.com
*Attorneys for Defendant Adam Deron Bridewell*

HARPER | SELIM
CIVIL AND COMMERCIAL LITIGATION

**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

| | |
|---|---|
| KALENA DAVIS, an individual;<br><br>Plaintiff,<br><br>vs.<br><br>ADAM DERON BRIDEWELL, an individual; LYFT, INC., a foreign corporation; THE HERTZ CORPORATION, a foreign corporation; DOE OWNERS I through X; and ROE LEGAL ENTITIES I through X, inclusive,<br><br>Defendants. | CASE NO.: A-18-777455-C<br>DEPT. NO.: XIII<br><br>**DISCOVERY COMMISSIONER'S REPORT AND RECOMMENDATIONS ON DEFENDANT BRIDEWELL'S MOTION TO DEEM AS ADMITTED CERTAIN OF PLAINTIFF KALENA DAVIS' RESPONSES TO DEFENDANT'S SECOND SET OF REQUESTS FOR ADMISSION, AND DEFENDANT BRIDEWELL'S MOTION TO COMPEL PLAINTIFF TO PROVIDE DOCUMENTS IN RESPONSE TO DEFENDANT'S SECOND SET OF REQUESTS FOR PRODUCTION** |

Date of Hearing: March 5, 2020

Time of Hearing: 9:00 a.m.

Attorney for Plaintiff: Dustin Birch, Esq., of CLEAR COUNSEL LAW GROUP

Attorney for Defendant Lyft, Inc.: Blake A. Doerr, Esq. of LEWIS BRISBOIS BISGAARD & SMITH LLP

Attorney for Defendant Bridewell: Todd L. Swift, Esq. of HARPER | SELIM.

On March 5, 2020, the parties appeared on Defendant Adam Deron Bridewell's Motion to Motion to Deem as Admitted Certain of Plaintiff Kalena Davis' Responses to Defendant's Second

Set of Requests for Admission, and Defendant Bridewell's Motion to Compel Plaintiff to Provide Documents in Response to Defendant's Second Set of Requests for Production.

Upon the Court's review of Defendants' Motions, and all other pleadings and papers on file with this Court, and oral arguments made by counsel, and for good cause appearing, the Discovery Commissioner hereby makes the following Findings and Recommendations:

I.

**FINDINGS**

1. The Discovery Commissioner finds that Plaintiff Kalena Davis amended his response to Request for Admission No. 16, admitting the same.
2. The Discovery Commissioner finds that Plaintiff Kalena Davis did not respond or appropriately object to Defendant Bridewell's Requests for Admission Nos. 15 and 17.
3. The Discovery Commissioner finds that Plaintiff Kalena Davis did not show why Requests No. 15 ad 17 should not be answered.
4. The Discovery Commissioner finds that Plaintiff Kalena Davis' "relevancy" objection is insufficient to resist the discovery requests.
5. The Discovery Commissioner finds that Defendant Adam Deron Bridewell's possible uses of the information sought are ~~commensurate with~~ proportional to the needs of the case.
6. The Discovery Commissioner therefore finds that Plaintiff Kalena Davis is compelled to either admit or deny that he was operating a motorcycle with expired registration at the time of the subject incident.
7. The Discovery Commissioner further finds that Plaintiff Kalena Davis is compelled to either admit or deny that the license plate on the motorcycle he was operating at the time of the subject incident, bearing Nevada license plate number AF791, was a Nevada veterans and military specialty plate.
8. The Discovery Commissioner finds that Plaintiff Kalena Davis amended his responses to Requests for Production Nos. 37, 39, 40 and 41 to Defendant's satisfaction, though Defendant reserves the right to conduct further discovery on the issues in those requests.

9. The Discovery Commissioner finds that Plaintiff Kalena Davis did not sufficiently amend his response to Request for Production No. 38, but based on representations by counsel made at the hearing, it is understood that Plaintiff Davis' complete response is that he has no further documents in his possession, custody, or control which are responsive to this request.

10. The Discovery Commissioner finds that Plaintiff Kalena Davis did not adequately respond to Request for Production No. 35.

**II.**

**RECOMMENDATIONS**

IT IS THEREFORE RECOMMENDED that Defendant Adam Deron Bridewell's Motion to Motion to Deem as Admitted Certain of Plaintiff Kalena Davis' Responses to Defendant's Second Set of Requests for Admission or, in the Alternative, Motion to Compel is GRANTED, and Plaintiff is COMPELLED to either admit or deny Requests for Admission Nos. 15 and 17 and serve his responses within 30 days from the date of this Order.

IT IS FURTHER RECOMMENDED that Defendant Bridewell's Motion to Compel Plaintiff to Provide Documents in Response to Defendant's Second Set of Requests for Production is GRANTED. Plaintiff has 30 days from the date of his Order to amend or supplement his responses to Requests for Production Nos. 35 and 38.

///

///

A-18-777455-C
DAVIS V BRIDEWELL

The Discovery Commissioner, having met with counsel for the parties, having discussed the issues noted above and having reviewed any materials proposed in support thereof, hereby submits the above recommendations.

Dated this 21st day of ~~March~~ April 2020.

DISCOVERY COMMISSIONER

Respectfully submitted by:

Dated this 16th day of April 2020.

**HARPER | SELIM**

/s/ Todd L. Swift

JAMES E. HARPER
Nevada Bar No. 9822
JUSTIN GOURLEY
Nevada Bar No. 11976
TODD L. SWIFT
Nevada Bar No. 13595
1707 Village Center Circle, Suite 140
Las Vegas, NV 89134
*Attorneys for Defendant Bridewell*

Approved as to form and content:

Dated this 16th day of April 2020.

**CLEAR COUNSEL LAW GROUP**

/s/ Dustin Birch

JARED R. RICHARDS
Nevada Bar No. 11254
DUSTIN BIRCH
Nevada Bar No. 10517
1671 W. Horizon Ridge Pkwy, Suite 200
Henderson, NV 89012
*Attorneys for Plaintiff*

HARPER|SELIM
CIVIL AND COMMERCIAL LITIGATION

**NOTICE**

Pursuant to NRCP 16.3(c)(2), you are hereby notified that within fourteen (14) days after being served with a report any party may file and serve written objections to the recommendations. Written authorities may be filed with objections, but are not mandatory. If written authorities are filed, any other party may file and serve responding authorities within seven (7) days after being served with objections.

**Objection time will expire on** May 11th **2020.**

A copy of the foregoing Discovery Commissioner's Report was:

_____ Mailed to Plaintiff/Defendant at the following address on the ____ day of _____ 2020:

✓ Electronically filed and served counsel on April 27th, 2020. Pursuant to N.E.F.C.R. Rule 9.

By: Natalie Simonett
COMMISSIONER DESIGNEE

# REGISTER OF ACTIONS

## CASE NO. A-18-777455-C

**Kalena Davis, Plaintiff(s) vs. Adam Bridewell, Defendant(s)**

| | |
|---|---|
| Case Type: | **Negligence - Auto** |
| Date Filed: | **07/10/2018** |
| Location: | **Department 13** |
| Cross-Reference Case Number: | **A777455** |

### PARTY INFORMATION

| | | Lead Attorneys |
|---|---|---|
| **Defendant** | **Bridewell, Adam Deron** | **James E. Harper** *Retained* 702-948-9240(W) |
| **Defendant** | **Hertz Corporation** | **Michael C Hetey** *Retained* 702-366-0622(W) |
| **Defendant** | **Lyft Inc** | **Matthew A. Cavanaugh** *Retained* |
| **Plaintiff** | **Davis, Kalena** | **Jared R. Richards** *Retained* 702-476-5900(W) |

### EVENTS & ORDERS OF THE COURT

03/05/2020 **All Pending Motions** (9:00 AM) (Judicial Officer Truman, Erin)

**Minutes**

03/05/2020 9:00 AM

- STATUS CHECK: PARAMETERS FOR CORWIN AND DR. KINSORA EXAMINATION Defendant Bridewell's Motion to Deem as Admitted Certain of Plaintiff Kalena Davis' Responses to Defendant's Second Set of Requests For Admission or, in the Alternative, Motion to Compel Defendant Bridewell's Motion to Compel Plaintiff to Provide Documents in Response to Defendant's Second Set of Requests for Production Mr. Swift stated an amended response was provided on 16, and 15 and 17 remain at issue. Mr. Swift moved for responses, or counsel moved to deem Admissions admitted. Arguments by counsel. COMMISSIONER RECOMMENDED, Defendant Bridewell's Motion to Deem as Admitted Certain of Plaintiff Kalena Davis' Responses to Defendant's Second Set of Requests For Admission or, in the Alternative, Motion to Compel is GRANTED, and responses to 15 and 17 are COMPELLED. On the second Motion, Mr. Swift stated amended responses were provided to Plaintiff. However, Mr. Swift requested RFP 38 for pre-crash repairs and upgrades to determine the capabilities of the bike. No objection by Mr. Birch. COMMISSIONER RECOMMENDED, documents in Plaintiff's possession, custody, or control will be provided responsive to the request; RFP 35 same ruling as 38; produce documents within 30 days; all other RFP are off calendar based on agreement by counsel. Mr. Swift to prepare the Report and Recommendations, and counsel to approve as to form and content. A proper report must be timely submitted within 14 days of the hearing. Otherwise, counsel will pay a contribution. Commissioner has not reviewed the late submission. Under AB 285, Commissioner will enforce the law. Mr. Doerr requested further briefing. Colloquy. Deadlines discussed. COMMISSIONER RECOMMENDED, Mr. Doerr's brief due 3-20-2020; Opposition due 4-3-2020; Status Check CONTINUED, and Further

Proceedings SET. 4-9-2020 10:00 a.m. STATUS CHECK: PARAMETERS FOR CORWIN AND DR. KINSORA EXAMINATION 4-9-2020 10:00 a.m. Further Proceedings: Additional briefing

Parties Present
Return to Register of Actions

**RTRAN**

DISTRICT COURT

CLARK COUNTY, NEVADA

| | | |
|---|---|---|
| KALENA DAVIS, Plaintiff, vs. ADAM BRIDEWELL, ET AL., Defendants. | ) | CASE#: A-18-777455-C<br>DEPT. XIII |

BEFORE THE HONORABLE ERIN TRUMAN,
DISCOVERY COMMISSIONER

THURSDAY, MARCH 5, 2020

***RECORDER'S TRANSCRIPT OF PROCEEDINGS***

**STATUS CHECK: PARAMETERS FOR CORWIN AND DR. KINSORA EXAMINATION**

**DEFENDANT BRIDEWELL'S MOTION TO DEEM AS ADMITTED CERTAIN OF PLAINTIFF KALENA DAVIS' RESPONSES TO DEFENDANT'S SECOND SET OF REQUESTS FOR ADMISSION OR, IN THE ALTERNATIVE, MOTION TO COMPEL**

**DEFENDANT BRIDEWELL'S MOTION TO COMPEL PLAINTIFF TO PROVIDE DOCUMENTS IN RESPONSE TO DEFENDANT'S SECOND SET OF REQUESTS FOR PRODUCTION**

APPEARANCES:

For the Plaintiff: DUSTIN BIRCH, ESQ.

For the Defendants: BLAKE A. DOERR, ESQ.
TODD L. SWIFT, ESQ.

RECORDED BY: FRANCESCA HAAK, COURT RECORDER

Las Vegas, Nevada, Thursday, March 5, 2020

[Case called at 9:57 a.m.]

THE COURT: -- versus Bridewell. We have two motions on this matter.

MR. SWIFT: Good morning. Todd Swift on behalf of Defendant Bridewell.

THE COURT: I'm sorry, I didn't catch that.

MR. SWIFT: Todd Swift on behalf of Bridewell.

THE COURT: Good morning, Mr. Swift.

MR. DOERR: Blake Doerr on behalf of Lyft and The Hertz Corporation.

THE COURT: Good morning, Mr. Doerr.

MR. DOERR: Morning.

MR. BIRCH: Morning, Your Honor. Dustin Birch --

THE COURT: And Mr. Birch.

MR. BIRCH: -- on behalf of plaintiff.

THE COURT: Okay, thanks Mr. Birch.

I over spoke you so did you guys catch -- okay.

THE CLERK: I caught it. Yeah.

THE COURT: Yeah. Okay, good.

This is on for Defendant Bridewell's motion to deem as admitted the responses -- well certain of the second set of request for admissions, or motion to compel. Let's take that one first.

MR. SWIFT: Okay. So the basic opposition here is to the

relevancy of these requests and it's been narrowed down the plaintiff did provide a -- an amended response to one of them. It was number --

THE COURT: Oh which one?

MR. SWIFT: Number 16. And that was admitted. And so the only ones that are at issue now are 15 and 17.

THE COURT: Okay. And the -- so you're moving to compel responses to 15 and 17 or to have them deemed admitted?

MR. SWIFT: Correct.

THE COURT: And there were objections lodged timely, correct?

MR. SWIFT: The -- yeah, the objection was relevancy --

THE COURT: Right.

MR. SWIFT: -- and our argument is that the burden is on the resisting party to show why they shouldn't provide responses. There has been no showing why they don't have to provide these responses. We have, however, shown why they are relevant because if the --

THE COURT: Number 17 you're saying is -- has impeachment value?

MR. SWIFT: That and other things.

THE COURT: Okay.

MR. SWIFT: So as far as number 15, the registration of the vehicle that goes to -- it's foundational, it's to identify the vehicle itself, the ownership, whether is legally allowed to be even on the roadways at the time, the credibility of the -- and the character of the plaintiff in abiding by the rules of the road, including having his vehicle registration

maintained.

There are issues in this case as far as whether or not plaintiff was abiding by the rules at the time of the accident, whether he was running a red light, whether he was lane splitting, and so this is just further evidence of that. So there's a number of different uses for that registration here.

And then as far as the veteran plate, similar thing, it's foundational, it's to identify the vehicle. There are some photographs that show the license plate, but it's -- they're not the clearest photographs either and so we just need plaintiff to confirm the -- the -- the identity of the vehicle itself.

And so there's that reason, there's plaintiff's background because in order to get that license plate he'd have to fill out a form, he'd have to certify that either he is a veteran or someone in his immediate family is a veteran. Basic background information on the plaintiff himself.

And then there's also the credibility possible impeachment factor.

THE COURT: Okay. Well obviously I'm not determining admissibility, I'm only determining discoverability and just because --

MR. SWIFT: Right.

THE COURT: -- I say it's discoverable by no means does it mean that it's going to ultimately be admissible. Okay. Anything further?

MR. SWIFT: On that motion, no.

THE COURT: Okay. Mr. Birch.

MR. BIRCH: Yes, Your Honor, I mean on -- on those issues, the defendants haven't offered anything that even comes close to a possible use of this information. The -- the expiration --

THE COURT: I think he just did.

MR. BIRCH: Well, those are -- those are maybe arguments, but none of those the -- he -- his explanation as to why the expired registration might be relevant, that's never been allowed in -- in court. You can't say well, he didn't -- he didn't register his bike, no -- no judge in -- in either this court or in district court would -- would you allow to say well he didn't register his bike so he doesn't follow the rules of the road.

THE COURT: I didn't say that -- I just gave that whole little colloquy --

MR. BIRCH: I know, Your Honor.

THE COURT: -- about the fact that just because I say something is discoverable doesn't mean --

MR. BIRCH: I -- I understand.

THE COURT: -- it's ultimately admissible.

MR. BIRCH: Right. We're not -- we're not arguing -- we're not arguing motions in limine in front of Your Honor --

THE COURT: Right.

MR. BIRCH: -- but the -- the requiring of a -- of a request for admission to admit something that has absolutely no relevance to the case, this has nothing to do with the case --

THE COURT: Well I think he -- okay.

MR. BIRCH: The issue as to we need to make sure that this is the right bike is request for admission 16, not 17. Seventeen is admit that this is a veteran's plate, which again has nothing to do with the case.

THE COURT: Well --

MR. BIRCH: Sixteen is admit that this is the plate that was on the bike, and that's been admitted. Seventeen is admit that this is a veteran's plate. What possible relevance could that have? So --

THE COURT: I -- I guess I'm just not clear why admitting whether or not the motorcycle was registered is a fight we really need to have. I mean I think it's proportional to the needs of the case. I don't think it's embarrassing, harassing or oppressing -- oppressive for you to respond to it. It may ultimately not be admissible. It's just like admit you were cited for the accident would not be admissible unless there was a conviction. It doesn't mean it's not discoverable.

MR. BIRCH: Sure.

THE COURT: And so -- and I think that there was a reason articulated with regard to potential impeachment or character evidence that I'm not sure would be admissible, but I think they're entitled to discover it. And so based on that I'm going to compel a response to 15 and 17.

Certainly the concerns that you've articulated, Mr. Birch, which may -- which likely are extremely valid can be raised through motion in limine, but I am going to allow the discovery to go forward on 15 and 17.

MR. BIRCH: Understood, Your Honor.

THE COURT: Okay?

MR. SWIFT: All right.

THE COURT: And I'm going to ask that the -- on that motion that Mr. -- Mr. Swift?

MR. SWIFT: Yes.

THE COURT: Okay, I just didn't want to -- okay. Mr. Swift, if you please prepare the report and recommendation on that.

Okay, now moving on to -- and actually you can prepare them as one report and recommendation for both -- for both when we're done I think.

MR. SWIFT: Okay.

THE COURT: All right. The next is Defendant Bridewell's motion to compel plaintiff to provide documents in response to the second request for production.

MR. SWIFT: All right, and with this one as well plaintiff has provided amended responses --

THE COURT: So there's only -- number 35 is the only one that remains at issue; is that correct?

MR. SWIFT: Well number 38 I addressed it just briefly at the beginning. He provided an amended response with some of the post-crash repair documents, but the request was specifically for pre-crash repair and maintenance records.

THE COURT: Okay, and why would that go to the claims or defense in this -- how would that go to the claims or defenses in this case and how would it be proportional to the needs of this case?

MR. SWIFT: Well for one, plaintiff has an expert who's going to testify on the capabilities of the bike and so we're trying to find out what type of condition this bike was in whether it was maintained properly. Some of the other requests one -- some that he's subsequently responded to he said he has no documents. We're going to have to do a little bit more discovery along those lines, but we're trying to find out what type of upgrades he did to the bike, what type of modifications.

He used to work at a -- a motorsports store and it's understood that he probably got parts from there or had repairs or upgrades done there where he was working so we're trying to find out what type of changes have been done to this bike to see what his capabilities were in response to this possible expert testimony saying what the capabilities of the bike are.

THE COURT: Okay. And so 35 -- 38 remains at issue and then 35 again is still at issue.

MR. SWIFT: And that's about the veteran --

THE COURT: Number 17.

MR. SWIFT: -- plate application --

THE COURT: And is that -- and those are the only two that remain at issue; is that correct?

MR. SWIFT: Correct.

THE COURT: Okay. All right, Mr. Birch.

MR. BIRCH: Yes, Your Honor, on 38, I don't -- we don't have any objection, we've produced what our client has --

THE COURT: Okay. So -- so -- so with regard to 38, plaintiff just needs to state that all documents in his possession, custody and control have been provided that are responsive to that request and -- and I just want to be clear that control means anything which he has access or can obtain. And so anything in his possession, custody and control or that he -- which means or that he can obtain.

Okay. So that will be the recommendation for 38, we kind of took it in reverse order. And 35 I think that similarly he needs to provide any documents that are in his possession, custody and control or that he can -- you know, and control meaning or that he can obtain.

MR. BIRCH: Sure. As consistent with Your Honor's earlier ruling on the request for admission.

THE COURT: Yes. So with regard to 38 and 30- -- I'm sorry, 35 and 38, the motion is granted. All others are off calendar as they've been resolved by the parties so those two request for production, the motion for -- to compel is granted and the recommendation will be that they be produced. So I'm going to say within -- where's your discovery cutoff? I'm going to say within 30 days those documents need to be produced.

I am going to ask that that be included in one report and recommendation, noting that there were two motions addressed --

MR. SWIFT: Okay.

THE COURT: -- and that will be prepared by Mr. Swift. Please circulate that to all counsel for their review as to form and content and have that submitted to me within 14 days to avoid a

contribution.

Anything further, Mr. Birch?

MR. BIRCH: Your Honor, we also have a status check on --

THE COURT: Oh yes, nothing --

MR. BIRCH: -- the condition of the --

THE COURT: Nothing had been --

MR. BIRCH: -- findings.

MR. BIRCH: -- submitted and it's my understanding that something was submitted. I don't have a copy of it.

THE CLERK: It's in there.

THE COURT: It is in here?

THE CLERK: There's two files.

THE COURT: I'm sorry?

THE CLERK: There's two files, two maintenance files.

THE COURT: Oh. Sorry. I did not see this -- when did it -- I'm not sure when it came in but --

MR. DOERR: About 4:30 yesterday afternoon.

THE COURT: Okay. And I --

MR. DOERR: Judge, I started my --

THE COURT: It wasn't e-filed so I didn't see it.

MR. DOERR: Sure. Remember we had a status check set for Friday and I tried to --

THE COURT: Move it to today which --

MR. DOERR: -- move it to today.

THE COURT: -- we were happy to accommodate.

MR. DOERR: And -- and I appreciate that. I had my discussion with Dr. Kinsora about this yesterday afternoon at 2:00 and so I -- I gave him the materials. I started off my letter to you apologizing for the late -- the late submission on it. I -- I don't -- and in fact, Dr. Kinsora gave me a hundred pages in exhibits that go to what he --

THE COURT: Remind me again what Dr. Kinsora's specialty is.

MR. DOERR: He's a neuropsychologist.

THE COURT: Okay.

MR. DOERR: You know under AB285, the law is the law and -- and I'm going to enforce the law.

MR. DOERR: As we discussed last time, you know, we were discussing the rule versus the -- the statute and I -- I -- I did some research on that. I -- I -- I have some -- you know, some talking points about it. I just want --

THE COURT: Okay, so it sounds like we need to -- that needs to be further briefed then and we need to continue this status check if you intend to argue something that I haven't been presented with.

MR. DOERR: Excellent.

THE COURT: Okay. So let's continue this for two -- this status check for two weeks. I'm going to require that this whatever you're asking me to consider that was emailed -- was it emailed to everyone?

MR. DOERR: It was.

THE COURT: Okay, if you could please e-file --

MR. DOERR: Absolutely.

THE COURT: -- a supplement in response to the status check and with -- with anything that you want me to consider. Because as I indicated previously, AB285 is what it is. And I understand the differences between the rule and --

MR. DOERR: Well --

THE COURT: -- the statute but --

MR. DOERR: Well let me -- let me tell you so -- and -- and what's included in what I've given you is -- is my doctors saying that they're prohibited from doing that. In fact, I had a long discussion with Dr. Kinsora who was involved when they actually made Rule 35, he was asked to come to the supreme court and discuss it. He -- he received correspondence from the discovery commissioner after that saying thank you for his input and what they would do going forward.

THE COURT: And then AB285 was passed.

MR. DOERR: It was. And -- and in fact, you know, that's a -- a -- an evidentiary statute and the rule is an evidentiary statute and rules and statutes are supposed to be read together. But Your Honor, I --

THE COURT: And this is -- this is likely an issue that's ultimately going to have to be decided by the supreme court because there is a discrepancy or a disparity between the language of the two.

MR. DOERR: Well, and in fact, Judge, so if -- you know, I have a great analogy if you -- if you'll indulge me for one minute.

THE COURT: I will.

MR. DOERR: If -- if the legislature says you can bring a gun to a medical examination and you walk in to get an MRI, the MRI tech says you cannot bring that in here, I can't run -- I can't run this machine if you have a gun in your pocket, it's going to damage my machine and I'm not going to even have a test. So then the patient --

THE COURT: Well that's an impossibility argument. I don't think there's any impossibility that -- argument perhaps that a person be present during Aubrey Corwin's examination.

MR. DOERR: Actually, they say that the board of psychological examiners says you can't have an observer. Aubrey Corwin says the testing that she performs can only be done in a one-on-one scenario and if it's not done that way, it's invalid so I mean I --

THE COURT: All right, well I'll have to read all of that because I did -- again I did not see this prior to today.

MR. DOERR: No, no, I -- I totally understand. I mean -- and I think you're right, I -- I think it's really an -- an as-applied challenge to the statute. They're telling me it's really not allowed by their profession and -- and I -- I -- I've read the statute too, I see what it says. I -- I -- I totally get it, I -- I don't know how I go forward with my client if I don't have this and so I think -- I think you're right, I think it's an issue that probably will be dealt with.

THE COURT: I --

MR. DOERR: Unless they agree to what we've said and we've told them what they'll agree to which is Dr. Kinsora says that the --

the interview portion could be recorded but he -- he can't allow an observer and Corwin says that the interview -- interview portion could have an observer but she can't allow the recording or an observer for the testing piece. And so I --

THE COURT: Well I'll take a look at it.

MR. DOERR: Yeah.

THE COURT: Ultimately this may be an issue that either needs to be addressed -- you know, that ultimately -- not needs to be, ultimately will be addressed by the appellate court or the supreme court, but --

MR. DOERR: I'll tell --

THE COURT: -- I'll review what you submit --

MR. DOERR: Sure.

THE COURT: -- and I'll read this that you submitted last night and --

MR. DOERR: It will be re-submitted and I'll -- I'll brief the issue so I --

THE COURT: Okay.

MR. DOERR: -- I think you can dispense with that.

THE COURT: So why don't we give you two weeks to brief the issue. I'm going to give other counsel two -- a week after that. Is that sufficient to brief the issue?

MR. BIRCH: It -- it should be, Your Honor.

THE COURT: Where are we -- where are we at on your --

MR. BIRCH: We have a -- we have a trial starting but not until

May.

THE COURT: Where are we at on your -- okay, so your trial in this case is August 11th; is that correct?

MR. BIRCH: Correct, Your Honor.

THE COURT: Your discovery cutoff is July 3rd. Is that trial date still standing with the change in the -- because it's my understanding that the motion to extend discovery was granted on February 10th, but there's no order yet. I -- and I didn't -- I don't think there was --

MR. DOERR: I think it has been --

THE COURT: So the trial's going to move, the August trial?

MR. DOERR: Yes, and -- and --

THE COURT: Okay, because discovery is closing now December 3rd. Must be because dispositive motions are due July 31st I believe.

MR. BIRCH: Right.

MR. DOERR: I'll just the -- the examination with Kinsora is scheduled for next week so --

THE COURT: Oh.

MR. DOERR: -- I'll be coming back to and -- perhaps we could reschedule it. You know, I think there's still time.

MR. BIRCH: Yeah, I think that -- I think that's the only appropriate -- we won't agree to go forward with it as it -- you know, without following the law and I -- I think our client -- our client is pretty insistent on making sure that it's both recorded --

THE COURT: Okay. So what I need --

MR. BIRCH: -- so --

THE COURT: -- what I need to do is have it briefed.

MR. BIRCH: -- so I think we'll have to reschedule.

THE COURT: I'm going to give you -- I'm going to give you two weeks to have that to me. I mean the issue was already decided that -- that it go forward as it does, but I haven't read -- I -- no actually I -- we didn't agree on the parameters, I apologize. That was what the status check was for, for today.

MR. DOERR: For Dr. Fische we -- we've agreed.

THE COURT: We did, but for these two --

MR. DOERR: For Dr. Kinsora and Ms. Corwin --

THE COURT: -- and Aubrey Corwin we have not.

MR. DOERR: Yeah.

THE COURT: So -- so I'm going to continue this motion -- it's not really a status check, it's a continuance of the motion on these two parameters or on -- on the parameters for these two examinations. I'm going to give -- I'm going to give you, counsel, two weeks to brief it and then I think it's appropriate to give Mr. Birch two weeks after that so let's set this for like 45 days?

THE CLERK: Okay, the opening brief is March 20th and the opposition is April 3rd.

And then do you want it one week after --

THE COURT: The following Friday, yeah.

THE CLERK: Okay. And the hearing will be April 10th at 10

a.m.

THE COURT: Is that a Thursday?

THE CLERK: It's a Friday. Do you want --

THE COURT: Yeah, let's do it on 9th.

THE CLERK: Okay, April 9th at 10.

THE COURT: Okay. And then we'll -- I'll hear argument at that time. All right?

MR. DOERR: Thank you.

MR. BIRCH: Thank you, Your Honor.

THE COURT: Thank you.

[Hearing concluded at 10:15 a.m.]

* * * * * *

ATTEST: I hereby certify that I have truly and correctly transcribed the audio/visual proceedings in the above-entitled case to the best of my ability.

Tracy A. Gegenheimer, CER-282, CET-282
Court Recorder/Transcriber

JASON G. REVZIN
Nevada Bar No. 8629
BLAKE A. DOERR
Nevada Bar No. 9001
LEWIS BRISBOIS BISGAARD & SMITH LLP
6385 S. Rainbow Boulevard, Suite 600
Las Vegas, Nevada 89118
Telephone: 702.893.3383
Fax: 702.893.3789
Email: jason.revzin@lewisbrisbois.com
Email: blake.doerr@lewisbrisbois.com
*Attorneys for Lyft, Inc. and The Hertz Corporation*

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

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| KALENA DAVIS,<br><br>Plaintiff,<br><br>vs.<br><br>ADAM DERON BRIDEWELL, an individual; LYFT, INC., a foreign corporation; THE HERTZ CORPORATION, a foreign corporation; DOE OWNERS I through X, and ROE LEGAL ENTITIES I through X, inclusive,<br><br>Defendants. | Case No.: A-18-777455-C<br>Dept. No.: XIII<br><br>**BRIEF ON RULE 35 EXAMINATIONS AND NRS 52.380** |

## I. INTRODUCTION AND PROCEDURAL POSTURE

As requested by the Discovery Commission, this briefing addresses whether Plaintiff is entitled to the accommodations of an observer (specifically Plaintiff's counsel or representative) and recording of Defendants' expert examinations of Plaintiff as provided by NRS 52.380 without the showing of good cause as required by NRCP 35 or bar the Plaintiff's attorney/representative from acting as the observer should good cause be established. As will be shown below, the provisions of NRS 52.380 violate the separation of powers doctrine and therefore should be denied in this matter.

As the Court is aware from previous briefing from the parties, this matter arises from

Plaintiff Kalena Davis running a red light on his motorcycle and collided with Defendant Adam Bridewell's vehicle, causing significant personal injuries to himself. During the impact, Plaintiff was ejected from his motorcycle. He was transported to Sunrise Hospital, where he was admitted for over two months and underwent multiple surgeries, including a below-the-knee amputation. Plaintiff has alleged future treatment and future damages, including claims of traumatic brain injury and lost earnings capacity.

On February 13, 2020, the parties appeared before the Discovery Commissioner for a hearing on the Defendants' Motion to Compel Rule 35 Examinations of the Plaintiff by Dr. Thomas Kinsora, Ms. Aubrey Corwin M.S., L.P.C., C.R.C., C.L.C.P, and Dr. David E. Fish. See Exhibit A. Prior to the hearing, the parameters as to the examination by Dr. Fish were agreed to by the parties.

In his opposition to the Motion to Compel, however, Plaintiff sought parameters surrounding the examination by Dr. Kinsora, including an observer at and recording of the examination pursuant to NRCP 35. Nowhere did Plaintiff seek to establish good cause as required under NRCP 35, nor did Plaintiff raise the accommodations provided under recently enacted NRS 52.380. Plaintiff fully opposed an examination by Ms. Corwin. At no time prior to the hearing on the Motion to Compel did Plaintiff even attempt to demonstrate good cause to support his request for the accommodations provided under NRS 52.308.

The Defendants included in their Motion that the Plaintiff was required by NRCP 16.1 to confer in good faith with the Defendants to attempt to reach an agreement on these examinations but Plaintiff had been completely unresponsive to both email and telephone communications. At the hearing on the Motion, the Defendants apprised the Discovery Commissioner of Plaintiff's counsel's failure to confer in good faith on the accommodations for Dr. Kinsora's examination and therefore, among other things, were too late and should be disregarded. Further, that Defendants

were entitled to Ms. Corwin's examination based upon the allegations and damages asserted by Plaintiff. Arguably, Plaintiff's failure to confer in good faith should have barred his ability to request any parameters to the examinations by Dr. Kinsora and Ms. Corwin.

At the time of the hearing on Defendant's Motion to Compel, the Discovery Commissioner unilaterally raised the accommodations of NRS 52.380 by actually reading in open court a copy of A.B. 285 (which became NRS 52.380). Despite acknowledging lacking any knowledge of the provisions of NRS 52.380 prior to the hearing, Plaintiff's counsel thereafter stated that his client wanted an observer and recording of the examinations by Defendants' proposed experts.

Given the concern that Dr. Kinsora and Ms. Corwin would not be agreeable to an observation or recording of their examinations of Plaintiff, certainly without a showing of good cause, Defendants' counsel discussed the interplay between NRS 52.380 and NRCP 35. As noted, NRCP 35 was promulgated by the Nevada Supreme Court and provides generally that when a Plaintiff puts his physical or mental condition into controversy, that an adverse party may have a plaintiff examined by an appropriate medical professional when good cause for the examination is demonstrated. NRCP 35 further allows the party being examined to make a recording of an examination ordered pursuant to the rule only upon good cause shown. Additionally, NRCP 35 also allows for observers at certain examinations but the observer may not be the party's attorney or anyone employed by the party or the party's attorney." NRCP 35(a)(3). Moreover, NRCP 35(a)(4)(B) provides "The party may not have any observer present for a neuropsychological, psychological, or psychiatric examination, unless the court orders otherwise for good cause shown."

Recently passed NRS 52.380, however, makes no mention of a requirement to show good cause for either observation or recording, and provides that the observer may record the

examination by various means without any distinction between a physical examination and a mental examination.

While the Discovery Commissioner granted the Defendant's Motion for the examinations, she included that the examinations were to be conducted pursuant to specific parameters. A Discovery Commissioner's Report and Recommendations granting the three examinations which included the parameters agreed to for the examination by Dr. Fish was submitted to the Court. The Discovery Commissioner then set a hearing on the status of an agreement on the parameters for the two remaining examinations. That status hearing was held on March 5, 2020. At the time of the hearing, the Discovery Commissioner asked for the instant briefing on the apparent conflict between newly enacted NRS 52.380 and NRCP 35.

As will be provided for in detail below, the Court will readily see that the statute attempts to circumvent the clear intent of the Nevada Supreme Court to prevent observation during psychological examination and testing, absent a showing of good cause, and that the statute was enacted in violation of the separation of powers doctrine and should be disregarded.

## II. THE NEVADA SUPREME COURT ESTABLISHED RULES FOR WHEN AND HOW A MEDICAL EXAMINATION COULD BE CONDUCTED ON A PLAINTIFF

Rule 35(a) of the Nevada Rules of Civil Procedure (hereinafter "NRCP 35") authorizes the Court to enter an order requiring a party to submit to a physical examination by a suitably licensed or certified examiner:

> When the mental or physical condition ... of a party, or of a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit to a physical or mental examination by a physician or to produce for examination the person in his custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

NRCP 35(a).

**a. The United States Supreme Court Evaluation of a Rule 35 Motion and the Motives for Ordering Such**

The United States Supreme Court has held that evaluating a Rule 35 motion "requires discriminating application by the trial judge, who must decide, as an initial matter in every case, whether the party requesting a physical...examination...has adequately demonstrated the existence of the Rule's requirements of 'in controversy' and 'good cause.'" Schlagenhauf v. Holder, 379 U.S. 104, 118-119, 85 S. Ct. 234, 13 L.Ed.2d 152 (1964). The Supreme Court recognized, however, that the pleadings alone may establish both requirements, as in the case of a plaintiff who asserts a mental or physical injury. Id., at 119. In Schlagenhauf, the Court wrote:

> Of course, there are situations where the pleadings alone are sufficient to meet these requirements. A plaintiff in a negligence action who asserts mental or physical injury, places that mental or physical injury clearly in controversy and provides the defendant with good cause for an examination to determine the existence and extent of such asserted injury.

Schlagenhauf, 379 U.S. at 119; see also, Tangires v. The John Hopkins Hospital, 1999 U.S. Dist, LEXIS 15461 at p. 4-5 (D. Md. 1999); G.B. Goldman Paper Co. v. United Paper Workers Int'l Union, 1996 WL 432484 at p. 1 (E.D. Pa. 1996). These guidelines set forth by the United States Supreme Court have become the standard for when independent examinations are ordered under Rule 35.

NRCP 35(a) also requires good cause for an order for a medical examination. NRCP 35(a). In this matter, Plaintiff's mental condition, physical condition, and alleged future medical care have all been placed in controversy. Plaintiff Davis testified he has no memory of the day in question. Plaintiff testified he could not remember a single detail surrounding the accident: where he was going to at the time; where he was coming from; what time it was; what day it was; whether his light was red, yellow or green; whether he moved in-between lanes of stopped cars at the intersection; what intersection the accident occurred at; or what he told the investigating officers or first responders. Instead, Plaintiff testified at his deposition that what he knows about the accident is limited to what was told to him by others. These facts created a need for Defendants to draft their original Motion to Compel Rule 35 Examinations of the Plaintiff by Dr.

Thomas Kinsora, Ms. Aubrey Corwin M.S., L.P.C., C.R.C., C.L.C.P, and Dr. David E. Fish.

Largely based on the fact that Plaintiff has alleged significant damages for past and future treatment, the Discovery Commissioner agreed that the Defendants had demonstrated good cause and ordered all three examinations but ordered that they needed to be conducted pursuant to certain parameters.

As stated previously, Plaintiff and Defendants agreed to parameters as to the examination by Dr. Fish but did not agree to the parameters for the examinations of Dr. Kinsora and Aubrey Corwin. Plaintiff never requested any parameters until after the Defendants filed their motion. It was not until the hearing on the motions and only when prompted by the Discovery Commissioner did Plaintiff's counsel request 1) to be in the room during the examinations, and 2) to audio record the examinations. Under NRCP 35, the Plaintiff was required to demonstrate good cause to have an observer at any examination and was also required to demonstrate good cause to record the examination.

## III. THE PROVISIONS OF NRS 52.380 CONFLICT WITH NRCP 35

NRS 52.380 states in pertinent part:

> 1. An observer may attend an examination but shall not participate in or disrupt the examination.
> 2. The observer attending the examination pursuant to subsection 1 may be:
> (a) An attorney of an examinee or party producing the examinee; or
> (b) A designated representative of the attorney, if:
> (1) The attorney of the examinee or party producing the examinee, in writing, authorizes the designated representative to act on behalf of the attorney during the examination; and
> (2) The designated representative presents the authorization to the examiner before the commencement of the examination.
> 3. The observer attending the examination pursuant to subsection 1 may make an audio or stenographic recording of the examination.

NV Rev Stat § 52.380 (2019)(hereinafter, NRS 52.380).

As will be discussed in further detail below, rules of statutory interpretation dictate that the above statute and rule are to be read in harmony. But NRS 52.380 and NRCP 35 conflict as to the way in which medical examinations are to take place, the accommodations received by the parties,

and the method in which the parties receive such accommodations. Pursuant to NRCP 35, parties being ordered to submit to medical examinations must show good cause as to whether an observer may be in the testing room and whether the examination may be audio recorded. NRCP 35 also states that the observer **may not** be the parties' attorney or a representative of that attorney. By contrast, NRS 52.380 automatically allows parties that are ordered to submit to a medical examination to bring an observer, and that observer may be an attorney or a representative of that attorney. NRS 52.380 also automatically allows said observer to record the examination by audio-recording or stenograph. Therefore, NRS 52.380 as enacted creates a true and plain conflict with NRCP 35.

**a. When a Conflict Exists Between a Statute and a Rule, Courts are to Look Beyond the Plain Meaning and Review of the Legislative History is Warranted**

"When an ambiguity exists, 'a court should consult other sources such as legislative history, legislative intent, and analogous statutory provisions.' Madera v. State Indus. Ins. Sys. 114 Nev. 253, 257 (1998)." W. Taylor St. v. Waste Mgmt. of Nev., 2014 Nev. Dist. LEXIS 1535, *21. Therefore, the legislative history of NRS 52.380 requires evaluation.

**b. The Legislative History of NRS 52.380 Evidences That it is a Procedural Statute**

NRS 52.380 was introduced in the 80th Nevada Legislature in 2019 as Assembly Bill No. 285 (hereinafter "A.B. 285"). The Bill's stated objective was to protect Plaintiffs or parties by allowing an observer to be present at a mental or physical examination ordered by Courts in Nevada. While A.B. 285 discussed the procedural parameters of an examination, including the observer, suspensions of the examinations, and the recording of such examinations; the proponents argued that A.B. 285 was addressing a substantive law and not merely a procedural statute.

When A.B. 285 was introduced on March 27, 2019, proponents discussed the motives for its potential enactment, which included the fact that in workers' compensation claims and litigation in Nevada, as well as in the surrounding western states of Washington, California and Arizona, observers are allowed to be present. The proponents testified that "this bill addresses substantive law, dealing with fundamental rights such as liberty and to control your own body. Assembly Bill 285 will allow the medical examination to be audio-recorded; however, the Nevada

Supreme Court rules forbid it." See Exhibit C: Minutes of the Meeting of the Senate Committee on Judiciary Hearing, Page 5.

The proponents also discussed a subcommittee which was formed in 2017 by the Supreme Court of Nevada to review and update the Nevada Rules of Civil Procedure. The provisions of A.B. 285 were proposed and voted 7-1 by that subcommittee as a substantial change to NRCP 35 but the Supreme Court of Nevada "rejected our changes for reasons we are still not clear on." See Exhibit B: Minutes of the Meeting of the Assembly Committee on Judiciary, Page 4. To reiterate, in 2017 when the Supreme Court considered incorporating the language which eventually became NRS 52.380 into NRCP 35, the Supreme Court rejected it.

By contrast, opponents of AB 285 argued that its provisions would constitute a violation of the Separation of Powers Doctrine as it was merely a procedural statute conflicting with previously enacted NRCP 35. The opponents further testified that the pool of doctors would be limited due to physicians and professionals not willing to conduct independent medical exams under the confines of A.B. 285. *Id*. at Page 14.

Despite these arguments and the Nevada Supreme Court's prior rejection, A.B. 285 was officially enacted by the Nevada Legislature on May 30, 2019 and became law on October 1, 2019.

## IV. THE LEGISLATURE VIOLATES THE SEPARATION OF POWERS DOCTRINE WHEN IT ENACTS LAWS THAT CONTRADICT DULY PROMULGATED RULES

In order to determine the constitutionality of NRS 52.380 in relation to NRCP 35, legal authority must be evaluated.

### a. The Constitutionality of a Nevada Statute is Presumed Valid Until the Contrary is Established

The Nevada Supreme Court has repeatedly explained that a party challenging the constitutionality of a statute bears a "heavy burden . . . to overcome the presumption of constitutional validity which every legislative enactment enjoys." Allen v. State, 100 Nev. 130, 133, 676 P.2d 792, 794 (1984). The analysis "begins with the presumption of constitutional validity which clothes statutes enacted by the Legislature. All acts passed by the Legislature are

presumed to be valid until the contrary is **clearly established**. In case of doubt, every possible presumption will be made in favor of the constitutionality of a statute, and courts will interfere only when the Constitution is **clearly** violated." *Id*. at 133-34 (emphasis added).

**b. The Court Must Interpret Statutes Created by the Nevada Legislature to Determine their Meaning**

When interpreting statutes created by the Nevada legislature, "[i]f the plain meaning of a statute is clear on its face, then [this court] will not go beyond the language of the statute to determine its meaning." Beazer Homes Nev., Inc. v. Eighth Judicial Dist. Court, 120 Nev. 575, 579-80, 97 P.3d 1132, 1135 (2004). When a rule and statute are to be interpreted together, Nevada Courts are to, "interpret a rule or statute in harmony with other rules and statutes . . . such that no part of the statute is rendered nugatory or turned to mere surplusage." Albios v. Horizon Communities, Inc., 122 Nev. 409, 418, 132 P.3d 1022, 1028 (2006); see also Orion Portfolio Servs. 2, LLC v. Cty. of Clark, 126 Nev. 397, 403, 245 P.3d 527, 531 (2010) ("This court has a duty to construe conflicting statutes as a whole, so that all provisions are considered together and, to the extent practicable, reconciled and harmonized." Hefetz v. Beavor, 397 P.3d 472, 475, 2017 Nev. LEXIS 61, *5-6, 133 Nev. Adv. Rep. 46, 2017 WL 2885639.

**c. The Conflict Between NRCP 35 and NRS 52.380 Presents a Violation of the Separation of Powers Doctrine**

When a rule and a statute diverge in meaning or interpretation, as here, one is forced to look to whether there has been a violation of the Separation of Powers Doctrine. "The separation of powers doctrine is the most important foundation for preserving and protecting liberty by preventing the accumulation of power in any one branch of government." Berkson v. Lepome, 245 P.3d 560, 564 (Nev. 2010). "[The Nevada Supreme Court has] been especially prudent to keep the powers of the judiciary separate from those of either the legislative or the executive branches." Id. at 564-65. Article 3, Section 1(1) of the Nevada Constitution addresses the separation of powers. Id. at 564. It states as follows:

> The powers of the Government of the State of Nevada shall be divided into three separate departments,—the Legislative,—the Executive and the Judicial; and no persons charged with the exercise

> of powers properly belonging to one of these departments shall exercise any functions, appertaining to either of the others, except in the cases expressly directed or permitted in this constitution.

Nev. Const. Art. 3, § 1.

Put simply, the Separation of Powers Doctrine prohibits one department from exercising the powers of the other departments. Galloway v. Truesdell, 83 Nev. 13, 19 (1967). "Legislative power is the power of law-making representative bodies to frame and enact laws, and to amend or repeal them." *Id.* at 19-20.

The Nevada Supreme Court maintains the judicial branch of our government. "'Judicial power' is the capability or potential capacity to exercise a judicial function. That is, 'judicial power' is the authority to hear and determine justiciable controversies." *Id.* at 20-21. The judiciary's power to draft and prescribe the Rules was given by the Nevada Legislature in 1951. The Preface of our Nevada Rules of Civil Procedure states in pertinent part, "The 1951 legislature authorized the Nevada Supreme Court to Prescribe (sic) rules to regulate civil practice and procedure. Existing statutes were deemed rules of court, to remain in effect until superseded. 1951 L., p. 44. See NRS 2.120." Further, the Enabling Act, NRS 2.120 grants the Supreme Court the following:

> The supreme court of Nevada, by rules adopted and published from time to time, shall regulate original and appellate civil practice and procedure, including, without limitation, pleadings, motions, writs, notices and forms of process, in judicial proceedings in all courts of the state, for the purpose of simplifying the same and of promoting the speedy determination of litigation upon its merits. Such rules shall not abridge, enlarge or modify any substantive right and shall not be inconsistent with the constitution of the State of Nevada.

NRS 2.120

In State v. Connery, 99 Nev. 342, 661 P.2d 1298 (1983), the Nevada Supreme Court confirmed in pertinent part,

> Although such rules may not conflict with the state constitution or abridge, enlarge, or modify any substantive right, Nev. Rev. Stat. § 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. **The legislature may not enact a procedural statute that conflicts with a pre-existing procedural**

> **rule**, without violating the doctrine of separation of powers. Such a statute is of no effect. Furthermore, where a rule of procedure is promulgated in conflict with a pre-existing procedural statute, the rule supersedes the statute and controls.

State v. Connery, 99 Nev. 342, 343, 661 P.2d 1298, 1299 (1983(Emphasis added). Therefore, the Nevada Legislature is under a duty not to breach the separation of powers doctrine by creating a statute that is in conflict with the Nevada Rules of Civil Procedure which are promulgated by the Supreme Court. If the Nevada Legislature does in fact breach the separation of powers doctrine by drafting a statute in conflict with a rule, the rule will control. Where the legislature breaches the separation of powers doctrine, the statute will be of no effect and the prior rule supersedes the statute.

Further, in the Nevada Supreme Court case of Watson Rounds, P.C. v. Eighth Judicial Dist. Court, 358 P.3d 228, 232 (Nev. 2015), the Court discussed Connery stating the rule and the statute in that matter were plainly in conflict as the issue was the amount of days from which to calculate a strict 30-day appeal window. The issue in Watson was whether NRCP 11 supersedes NRS 7.085 for the purposes of sanctioning attorney misconduct. The Court stated that the issue was distinguishable from Connery in that the statue and rule in question could be read in harmony because, analogous to FRCP 11 and 28 U.S.C. §1927, they apply to different types of misconduct and provide independent mechanisms for sanctioning attorney misconduct. *Id.* at 232.

In the case at hand, the legislature enacted NRS 52.380 after the Supreme Court promulgated NRCP 35. NRCP 35 does not allow for attorneys to be present in the examinations. NRCP 35 allows, only if good cause is shown, for an observer to be present and for the examination to be audio recorded. NRS 52.380, however, has no good cause requirement. The statute automatically allows observers to be present during an examination and that observer can be Plaintiff's own attorney or staff from their attorney's office. Further, NRS 52.380 also automatically allows for the examination to be audio recorded and, or, recorded by stenograph, meaning a court reporter would also be present during the examination. The rule and the statute clearly conflict as they did in Connery and cannot be read in harmony per Watson. To the

contrary, the statute nullifies the "good cause" requirement and prohibition of attorney observers of NRCP 35.

Therefore, unlike Watson where the statute and rule could be read in harmony because they applied to "different types of misconduct" and provided "independent mechanisms for sanctioning attorney misconduct," NRS 52.380 creates new conflicting procedures for the exact same thing covered by NRCP 35 – procedures for submitting a party to a physical or mental examination.

Therefore, under Connery, simply looking at the plain language of the statute with the plain language of the rule, the rule is to control and supersedes the promulgated legislative statute, meaning that in the matter at hand, Plaintiff's attorney should not be allowed to observe the examinations. Further, Plaintiff's attorney must be required to show good cause that an observer is necessary in order for his client to be examined, and must be required to show good cause that the examination be audio recorded. Plaintiff's attorney has yet to show good cause for either in this matter.

## V. SUBSTANTIVE VERSUS PROCEDURAL RULES AND STATUTES

The Supreme Court of Nevada has consistently 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." State v. Connery, 99 Nev. 342, 343, 661 P.2d 1298, 1299 (1983) (emphasis added). NRS 52.380 must be found to be a substantive law rather than a procedural law for NRCP 35 not to be in conflict with such. "Substantive law is defined as "the basic law of rights and duties . . . as opposed to procedural law (. . . law of jurisdiction, etc.)." Black's Law Dictionary 1281 (5th ed. 1979)." Meadows v. Dominican Republic, 817 F.2d 517, 524 (9th Cir. 1987). Further, the United States Supreme Court defined "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. Black's Law Dictionary 1281 (5th ed. 1979) (defining 'substantive law')". Azar v. Allina Health Servs., 139 S. Ct. 1804, 1811 (2019).

### a. NRCP 35 as Promulgated by the Nevada Supreme Court is a Procedural Rule

NRCP 35 is a procedural rule. The rule as described creates the boundaries and ability for

Courts to order a party to submit to a physical or mental examination. NRCP 35 specifies the way in which notice must be given of the examination, what the order must include, the specifications regarding recording of an examination, the conditions as to whether an observer may be present during an examination, and finally the way in which the examiners report must be written and requested. This rule does not create duties and rights regarding mental and, or physical examinations. NRCP 35 does indeed postulate how to enforce the rights and duties of a physical and, or mental examination under Nevada law.

**b. NRS 52.380 as Enacted by the Nevada Legislature is a Procedural Statute**

At its core, NRS 52.380 is a procedural rule on top of the procedural rule of NRCP 35. NRS 52.380 also sets forth how to enforce the rights and duties of an individual ordered by the Court to undergo a physical and, or mental examination. The statute stipulates that an observer may attend the examination, whom the observer may be, the ability to audio record the examination or create a stenograph, and the way in which the observer or examiner may suspend the examination. The plain language of NRS 52.380 does not create rights, duties or obligations. This statute creates and extends ways in which to enforce rights and duties of a physical and, or mental examination.

Though the creators and drafters of NRS 52.380 tried to cloak the statute as being a substantive rule, as the opposition noted in the legislative history, what they actually created was a procedural rule regarding the right to order a party to attend a physical and, or mental examination. Both NRCP 35 and NRS 52.380 are clearly procedural by their impact in regards to the litigation between parties. Because NRS 52.380 is procedural, the statute as drafted and enacted today, violates the Separation of Powers Doctrine. Therefore, as NRCP 35 was promulgated prior to the enactment of the Legislature's NRS 52.380, the rule controls as held by the Nevada Supreme Court. *See* State v. Connery, 99 Nev. 342, 661 P.2d 1298 (1983); Berkson v. Lepome, 126 Nev. 492, 245 P.3d 560 (2010); Zamora v. Price, 125 Nev. 388, 213 P.3d 490 (2009). Consequently, Plaintiff in this matter is not automatically entitled to an observer, and, or an audio-recording of the examinations. Plaintiff must show good cause to have both or either, and has yet to do so.

**VI. INDEPENDENT MEDICAL EXAMINATION OBJECTIONS BY DR. THOMAS**

**KINSORA AND MS. AUBREY CORWIN**

**a. Dr. Thomas F. Kinsora objects to the use of audio-recording in the testing room, as well as the presence of an observer during his neuropsychiatric evaluation of the Plaintiff**

Defendants retained Thomas Francis Kinsora, Ph.D. to perform a neuropsychological examination. Thomas Francis Kinsora, Ph.D., (Dr. Kinsora) is a trained clinical neuropsychologist. Dr. Kinsora received his undergraduate degree from Wayne State University in Detroit, Michigan. Moreover, Dr. Kinsora was admitted into the California School of Professional Psychology which is accredited by the American Psychological Association. Dr. Kinsora received a Ph.D. in Psychology with a certificate in neuropsychology and behavioral medicine from California School of Professional Psychology. Dr. Kinsora's doctoral research focused on implicit stem-completion priming and memory processing in the differentiation of Alzheimer's type dementia from Parkinson's related dementia. It is expected that Dr. Kinsora will opine on the Plaintiff's condition within his area of expertise. Dr. Kinsora, when presented with NRS 52.380, condemned the use of audio recording as well as the concept of an observer being present in neuropsychological examinations. He concluded that

> Allowing a non-neuropsychologist, particularly an attorney, access to protected test material through third party observation, or direct access to raw test data, a)violates the neuropsychologist's ethical guidelines and the published positions of professional organizations, b) goes against the stated position of the Nevada Board of Psychological Examiners, c) violates NAC 641.234, d) presents a risk to public safety, e) diminishes the validity of test results, f) diminishes the usefulness of the neuropsychologist to the tier of fact, and f) (sic) diminishes the viability of the neuropsychologist by denying him/her the tools necessary to conduct valid neuropsychological assessments.

See Exhibit D: Why Neuropsychological Evidence is Compromised When Protected Test Material is Released and When the Examinee is Subject to Third Party Observation by Thomas F. Kinsora, Ph.D., Page 1.

Importantly, this is also not just Dr. Kinsora's conclusion. During the Amended NRCP Committee discussions, prior to promulgation, the examinations of neuropsychologists and neurological examinations were discussed. NRCP 35(a)(4)(A) and (B) as drafted, provides:

> (A) The party may have one observer present for the examination,

> unless: (i) the examination is a neuropsychological, psychological, or psychiatric examination; or (ii) the court orders otherwise for good cause shown. (B) The party may not have any observer present for a neuropsychological, psychological, or psychiatric examination, unless the court orders otherwise for good cause shown.

NRCP 35.

The Supreme Court obviously felt it prudent to highlight the work of neuropsychologists in regard to the independent medical examinations. During the Assembly Judiciary Meeting on March 27, 2019, Mr. George Bochanis testified that during the NRCP Committee discussions prior to the enactment of the Amended NRCP in 2019, psychologists testified in opposition to observers being permitted in the room where a party was being tested. See Exhibit B at Page 9. Mr. Bochanis discussed the secret nature of the examinations and the grading of the examinations. He tried to dissuade these physician's concerns by submitting "74 websites that contain copies of these exams and how they are graded and how they are evaluated [pages 51-59, (Exhibit C)]." *Id*. Further, Mr. Bochanis testified regarding the apprehension from physicians regarding examinees during these exams if they are allowed an observer, that

> [Examinees] are going to hold things back because it is an examination that has been forced on them. Simply having somebody present is not going to change the nature of the examination at all. In fact, an observer being present during this examination is more required than any other type of examination because certain distractions—the inflection of the voice of this psychologist examiner and other things like that—could have a huge impact on the findings of the examination. Not having an observer present affects that.

Id.

However, Mr. Bochanis is not a licensed psychologist, and misses the mark. Dr. Kinsora opined regarding this particular issue, that the recording of a neuropsychological examination or allowing an observer into the testing room that

> Some examinees get anxious when they know they are being recorded or observed, and their cognitive efficiency declines. Some examinees "play it up" for the recording in an effort to "prove their case", and some will simply get thrown off balance. **The presence**

> **of such third party observers have been shown repeatedly in research to reduce the validity of neuropsychological measures.**

See Exhibit D at Page 4.

Dr. Kinsora along with the other psychologists who testified during the NRCP Committee meeting, concluded that "any results obtained in the presence of a third party observer are, by definition, of unclear validity, and thus useless to the trier of fact." See Exhibit D at Page 5. As Dr. Kinsora has concluded that the presence of an observer and the use of audio-recording would tamper with the results of the examination, Defendants ask this Court to find that the Plaintiff has not and cannot show good cause for such accommodations.

**b. Ms. Aubrey Corwin M.S., L.P.C., C.R.C., C.L.C.P objects to the presence of an observer while testing and evaluating the Plaintiff**

Defendant retained Aubrey Corwin M.S., L.P.C., C.R.C., C.L.C.P to perform an earning capacity evaluation and make a vocational damages assessment and comment on any purported life care plan should one be disclosed. Ms. Corwin is the Director of Vocational Diagnostics Incorporated, a Licensed Professional Counselor for the Arizona Board of Behavioral Health Examiners, a Certified Rehabilitation Counselor, and a Certified Life Care Planner. Due to the very personal nature of the interview and evaluation Ms. Corwin needs to perform on the Plaintiff, she has objected to the presence of an observer in the testing room. Ms. Corwin opined:

> A very important component to the vocational evaluation process includes the administration of a vocational test battery. This is also a one-on-one meeting where standardized tests are administered to evaluate the subject's academic levels of achievement, aptitudes, interests and work values. In order to preserve the integrity of the tests and protocols, vocational testing can **only** be performed on a one-to-one basis with no other observers present.

Exhibit E: Letter from Ms. Aubrey Corwin to Mr. Blake Doerr, Page 3 (emphasis added).

Further, as Plaintiff has not shown good cause to have an observer in the testing room per NRCP 35, this Court should not allow recording or an observer to be present for Ms. Corwin's testing.

## VII. CONCLUSION

Defendants ask this Court to deny Plaintiff's request to have the examinations by Dr. Kinsora and Ms. Corwin to be recorded and Plaintiff's request to have those examinations observed because pursuant to NRCP 35, Plaintiff has failed to demonstrate good cause for either recording or observation.

DATED this 20th day of March, 2020.

LEWIS BRISBOIS BISGAARD & SMITH LLP

By /s/ Blake A. Doerr

JASON G. REVZIN
Nevada Bar No. 8629
BLAKE A. DOERR
Nevada Bar No. 9001
LEWIS BRISBOIS BISGAARD & SMITH LLP
6385 S. Rainbow Boulevard, Suite 600
Las Vegas, Nevada 89118
Telephone: 702.893.3383
Fax: 702.893.3789
jason.revzin@lewisbrisbois.com
blake.doerr@lewisbrisbois.com
*Attorneys for Lyft, Inc. and The Hertz Corporation*

## CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b) and N.E.F.C.R. 4(b)(1), 5(k) and 10(b), I hereby certify that I am an employee of LEWIS BRISBOIS BISGAARD & SMITH LLP and that on this 20th day of March, 2020, I did cause a true and correct copy of **BRIEF ON RULE 35 EXAMINATIONS AND NRS 52.380** to be served via the Court's electronic filing and service system to all parties on the current service list.

Jared R. Richards
CLEAR COUNSEL LAW GROUP
1671 W. Horizon Ridge Pkwy., Ste. 200
Las Vegas, NV 89012
*Attorneys for Plaintiff*

Justin S. Gourley, Esq.
HARPER SELIM
1707 Village Center Circle, Suite 140
Las Vegas, Nevada 89134
*Attorneys for Defendant Adam Deron Bridewell*

By */s/ Sherry Rainey*
An Employee of LEWIS BRISBOIS BISGAARD & SMITH LLP

# EXHIBIT A

MOT
JASON G. REVZIN
Nevada Bar No. 8629
BLAKE A. DOERR
Nevada Bar No. 9001
LEWIS BRISBOIS BISGAARD & SMITH LLP
6385 S. Rainbow Boulevard, Suite 600
Las Vegas, Nevada 89118
Telephone: 702.893.3383
Fax: 702.893.3789
Email: jason.revzin@lewisbrisbois.com
Email: blake.doerr@lewisbrisbois.com
*Attorneys for Lyft, Inc. and The Hertz Corporation*

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

2/13/20
9:30 am.

KALENA DAVIS,

Plaintiff,

vs.

ADAM DERON BRIDEWELL, an individual; LYFT, INC., a foreign corporation; THE HERTZ CORPORATION, a foreign corporation; DOE OWNERS I through X, and ROE LEGAL ENTITIES I through X, inclusive,

Defendants.

Case No.: A-18-777455-C
Dept. No.: XIII

**DEFENDANT LYFT AND DEFENDANT THE HERTZ CORPORATION'S MOTION TO COMPEL RULE 35 EXAMINATIONS ON ORDER SHORTENING TIME**

**(HEARING REQUESTED)**

Defendant, LYFT, INC., ("LYFT") and Defendant THE HERTZ CORPORATION ("HERTZ") by and through their counsel of record LEWIS BRISBOIS BISGAARD & SMITH LLP, hereby files this Motion to Compel Rule 35 Examinations against Plaintiff KALENA DAVIS.

This Motion is made and based on the attached memorandum of points and authorities, the papers, pleadings and records contained in this Honorable Court's file, and

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any arguments of counsel to be presented at the hearing on this matter.

DATED this 28th day of January, 2020.

LEWIS BRISBOIS BISGAARD & SMITH LLP

By _____

JASON G. REVZIN
Nevada Bar No. 8629
BLAKE A. DOERR
Nevada Bar No. 9001
LEWIS BRISBOIS BISGAARD & SMITH LLP
6385 S. Rainbow Boulevard, Suite 600
Las Vegas, Nevada 89118
Telephone: 702.893.3383
Fax: 702.893.3789
jason.revzin@lewisbrisbois.com
blake.doerr@lewisbrisbois.com
*Attorneys for Lyft, Inc. and The Hertz Corporation*

## ORDER SHORTENING TIME

GOOD CAUSE APPEARING THEREFORE,

IT IS HEREBY ORDERED, that **DEFENDANTS' MOTION TO COMPEL RULE 35 EXAMINATIONS** be heard on February 13, 2020, at the hour of 9:30 a.m. before the Discovery Commissioner.

Dated this 29th day of January, 2020.

_____
DISCOVERY COMMISSIONER

Respectfully Submitted by:
LEWIS BRISBOIS BISGAARD & SMITH LLP

_____

JASON G. REVZIN
Nevada Bar No. 8629
BLAKE A. DOERR
Nevada Bar No. 9001
*Attorneys for Lyft, Inc. and The Hertz Corporation*

DECLARATION OF BLAKE A. DOERR, ESQ., IN SUPPORT OF DEFENDANT'S MOTION TO COMPEL RULE 35 EXAMINATIONS

I, Blake A. Doerr, declare as follows:

1. I am a partner at the law firm of LEWIS BRISBOIS BISGAARD & SMITH LLP, and am duly licensed to practice law in the State of Nevada. I am an attorney of record representing Defendant *Lyft, Inc.* and Defendant *The Hertz Corporation* in the subject lawsuit currently pending in Department 13 of the Eighth Judicial District Court for the State of Nevada, Case Number A-18-777455-C. I am competent to testify to the matters set forth in this Declaration, and will do so if called upon.

2. That I make this Declaration on behalf of Defendants and in support of their Motion to Compel Rule 35 Examinations against Plaintiff KALENA DAVIS and to demonstrate that the parties conferred in good faith to obtain the discovery prior to seeking this court's intervention.

3. On January 10, 2020, I participated in an E.D.C.R. 2.34 with Plaintiff's counsel, Jared Richards. In that conversation, we discussed the fact that Plaintiff's counsel had requested a stipulation as to certain terms prior to his agreement to allow his client to be examined; that Plaintiff's counsel had not provided any of the requested terms nor had Plaintiff's counsel ever provided dates even though he had agreed to work on that beginning in October of 2019.

4. This Motion on Order for Shortening Time is necessary as our experts need to be able to examine the Plaintiff and prepare their reports by March 6, 2020. The exams need to be scheduled forthwith.

5. This Declaration is made in good faith, and not for purposes of delay.

I declare under penalty of perjury under the laws of the State of Nevada that the foregoing is true and correct.

Blake A. Doerr, Esq.

No Notary Required per NRS 53.045

## MEMORANDUM OF POINTS AND AUTHORITIES

## I.

## FACTUAL INTRODUCTION

At the time of the accident, Co-Defendant Adam Bridewell ("Bridewell"), while utilizing the Lyft application, website, and technology platform ("Lyft platform") to transport two passengers, was driving a 2016 Toyota Camry (which he had leased from Hertz). One passenger, Ashley Caulk, was headed to her new job to collect her first paycheck; the other, Paulette Harris, was headed to the Galleria Mall. Plaintiff was headed to work (he was employed at RideNow Powersports on Boulder Highway near the Silver Bowl) traveling eastbound on Russell Road. Bridewell was traveling westbound on Russell Road and had entered the intersection at Stephanie Street to make a left-hand turn. Bridewell was yielding to oncoming traffic, with a solid green ball controlling his left turn. Meanwhile, Plaintiff split the lanes of travel on eastbound Russell Road, driving between the cars stopped for the red light at the intersection at Stephanie Street. As Bridewell followed through on his left-hand turn to clear the intersection, Plaintiff, once at the front of the line, revved his engine and blasted through the intersection on a solid red light. As Bridewell completed his turn, Plaintiff crashed into the right, passenger-side door of Bridewell's vehicle.

As a result of his colliding with Bridewell's vehicle, Plaintiff was ejected from his motorcycle. Plaintiff was transported to Sunrise Hospital, where he was admitted for over two months and underwent multiple surgeries, including a below-the-knee amputation. Plaintiff has alleged future treatment and future damages, including claims of traumatic brain injury.

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## II.

## LEGAL ANALYSIS

NRCP 35(a) provides in pertinent part as follows:

> When the mental or physical condition of a party . . . is in controversy, the court in which the action is pending may order the party to submit to a physical or mental examination by a suitably licensed or certified examiner . . . . The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner conditions, and scope of the examination and the persons . . . by whom it is to be made. (emphasis added).

NRCP 35 essentially mirrors its federal counterpart with the exception that the Federal Rule does not allow observers at the examination. Nevertheless, Nevada courts routinely look to the federal court's interpretation of the rules of civil procedure. *See, Greene v. Dist. Ct.*, 115 Nev. 391, 393, 990 P.2d 184 (1999). Thus, this Court should consider the federal case law regarding this issue set forth below.

The seminal case regarding Rule 35 is *Schlagenhauf v. Holder*, 379 U.S. 104 (1964). In *Schlagenhauf*, the United States Supreme Court set forth the showing that a party seeking a Rule 35 examination must make. *Id.* at 118-119. A party must show that the physical or mental condition of the party to be examined is in controversy and that there is good cause for the requested examination. *Id.* ("affirmative showing by the movant that each condition as to which the examination is sought is really and genuinely in controversy and that good cause exists for ordering each particular examination.").

In this case, Plaintiff's mental condition, physical condition, and alleged future medical care are in controversy. Plaintiff Kalena Davis testified he has no memory of the day in question. Plaintiff testified he could not remember any details of: where he was going to at the time, where he was coming from, what time it was, what day it was, whether his light was red, yellow or green, whether he moved in-between lanes of stopped cars at the intersection, what intersection the accident occurred at, what he told the investigating officers or first responders. Plaintiff testified at his deposition that what

he knows about the incident is limited to what was told to him by others.

According to the U.S. Supreme Court, "[a] plaintiff in a negligence action who asserts mental or physical injury . . . places that mental or physical injury clearly in controversy and provides the defendant with **good cause** for an examination to determine the existence and extent of such asserted injury." *Schlagenhauf*, 379 U.S. at 119 (emphasis added).

Here, Defendants retained Thomas Francis Kinsora, Ph.D. to perform a neuropsychological examination. Thomas Francis Kinsora, Ph.D., (Dr. Kinsora) is a trained clinical neuropsychologist. Dr. Kinsora received his undergraduate degree from Wayne State University in Detroit, Michigan. Moreover, Dr. Kinsora was admitted into the American Psychology, receiving a Ph.D. in Psychology with a certificate in neuropsychology and behavioral medicine. Dr. Kinsora's doctoral research focused on implicit stem-completion priming and memory processing in the differentiation of Alzheimer's type dementia from Parkinson's related dementia. It is expected that Dr. Kinsora will opine on the Plaintiff's condition within his area of expertise.

A Stipulation and Order was provided to Plaintiff's Counsel on January 24th for the Rule 35 Examination that is currently scheduled with Dr. Kinsora for two days beginning March 11, 2020 at 9:00 a.m. and March 12, 2020 at 9:00 a.m. A copy of the Stipulation and Order is attached hereto as Exhibit A.

Defendant retained Aubrey Corwin M.S., L.P.C., C.R.C., C.L.C.P to perform an earning capacity evaluation and make a vocational damages assessment and comment on any purported life care plan should one be disclosed. Ms. Corwin is the Director of Vocational Diagnostics Incorporated, a Licensed Professional Counselor for the Arizona Board of Behavioral Health Examiners, a Certified Rehabilitation Counselor, and a Certified Life Care Planner.

A Stipulation and Order was provided to Plaintiff's Counsel on January 24th for the Rule 35 Examination that is currently scheduled with Aubrey Corwin for February 7, 2020 at 9:30 a.m. and 1:00 p.m. A copy of the Stipulation and Order is attached hereto as

Exhibit B).

Defendant has further retained David E. Fish, M.D., a board certified physician in the areas of physical medicine and rehabilitation. Dr. Fish is expected to offer his expert opinions as to Plaintiff's alleged medical conditions allegedly resulting from the incident which is the subject of Plaintiff's Complaint. Dr. Fish will testify as to the reasonableness and necessity of Plaintiff's medical treatment following the subject incident, as well as future prognosis and treatment. Dr. Fish will also testify regarding the existence of any pre-accident and post-accident injuries, conditions, accidents/incidents, as well as medical treatment and billings, along with his rebuttal opinions, and any other areas within his expertise.

A Stipulation and Order was provided to Plaintiff's Counsel on January 24th for the Rule 35 Examination that is currently scheduled with Dr. Fish, for two days beginning March 20, 2020 at 2:00 p.m. A copy of the Stipulation and Order is attached hereto as Exhibit C.

## III.

## CONCLUSION

Based upon the foregoing, Defendants respectfully request an Order compelling Plaintiff to attend NRCP Rule 35 examinations as follows:

Dr. Kinsora: March 11, 2020 at 9:00 a.m. to 12:00 p.m. and;
March 12, 2020 at 9:00 a.m. to 5:00 p.m.

Ms. Corwin: February 7, 2020 at 9:30 a.m. to 12:30 p.m. and;
February 7, 2020 at 1:00 p.m. to 3:30 p.m.

Dr. Fish: March 20, 2020 at 2:00 p.m.

DATED this 28th day of January, 2020.

LEWIS BRISBOIS BISGAARD & SMITH LLP

By 

JASON G. REVZIN
Nevada Bar No. 8629
BLAKE A. DOERR
Nevada Bar No. 9001
LEWIS BRISBOIS BISGAARD & SMITH LLP
6385 S. Rainbow Boulevard, Suite 600
Las Vegas, Nevada 89118
Telephone: 702.893.3383
Fax: 702.893.3789
jason.revzin@lewisbrisbois.com
blake.doerr@lewisbrisbois.com
*Attorneys for Lyft, Inc. and The Hertz Corporation*

## CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b) and N.E.F.C.R. 4(b)(1), 5(k) and 10(b), I hereby certify that I am an employee of LEWIS BRISBOIS BISGAARD & SMITH LLP and that on this 30th day of January, 2020, I did cause a true and correct copy of **DEFENDANT LYFT AND DEFENDANT THE HERTZ CORPORATION'S MOTION TO COMPEL RULE 35 EXAMINATIONS ON ORDER SHORTENING TIME** to be served via the Court's electronic filing and service system to all parties on the current service list.

Jared R. Richards
CLEAR COUNSEL LAW GROUP
1671 W. Horizon Ridge Pkwy., Ste. 200
Las Vegas, NV 89012
*Attorneys for Plaintiff*

Justin S. Gourley
HARPER SELIM
1707 Village Center Circle, Suite 140
Las Vegas, Nevada 89134
*Attorneys for Defendant Adam Deron Bridewell*

By /s/Sherry Rainey
An Employee of LEWIS BRISBOIS BISGAARD & SMITH LLP

# Exhibit A

STP
MATTHEW A. CAVANAUGH
Nevada Bar No. 11077
BLAKE A. DOERR
Nevada Bar No. 9001
LEWIS BRISBOIS BISGAARD & SMITH LLP
6385 S. Rainbow Boulevard, Suite 600
Las Vegas, Nevada 89118
Telephone: 702.893.3383
Fax: 702.893.3789
Email: matthew.cavanaugh@lewisbrisbois.com
Email: blake.doerr@lewisbrisbois.com
*Attorneys for Lyft, Inc. and The Hertz Corporation*

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

KALENA DAVIS,

Plaintiff,

vs.

ADAM DERON BRIDEWELL, an individual; LYFT, INC., a foreign corporation; THE HERTZ CORPORATION, a foreign corporation; DOE OWNERS I through X, and ROE LEGAL ENTITIES I through X, inclusive,

Defendants.

Case No.: A-18-777455-C
Dept. No.: XIII

**STIPULATION AND ORDER FOR NRCP RULE 35 EXAMINATION**

Date of Video Clinical Interview:
February 7, 2020
Time of Interview: 9:30 a.m.- 12:30 p.m.

Date of Video Vocational Testing:
February 7, 2020
Time of Testing: 1 p.m. - 3:30 p,m,

On February 7, 2020 an Independent Video Clinical Interview and Video Vocational testing of the Plaintiff shall be Conducted by Aubrey Corwin, M.S., L.P.C., C.R.C., C.L.C.P., Director of Vocational Diagnostic Institute. Ms. Corwin is a qualified expert witness in Clark County District Court and will offer her opinions related to earning capacity evaluation, analysis of household services, and life care planning. Alleged injuries include orthopedic and neurological injuries and traumatic brain and spinal cord injuries.

1. The examination will consist of two sessions: an interview session and a testing

session. The interview session will be approximately 3 hours and the testing session will last approximately 3 hours and there will be a lunch break in between the two sessions.

2. The interview and testing will be done through videoconference means at Litigation Services located at 3770 Howard Hughes Pkwy #300, Las Vegas, Nevada 89169.

3. The Plaintiff shall complete the required intake documents requested by the examiner and bring them to the examination; and the examiner will go over the intake documents with the Plaintiff at the start of the interview.

4. The Plaintiff will not wait any longer than 30 minutes after the scheduled time for the commencement of the Rule 35 exam.

5. The examiner will not ask any questions to Plaintiff directly relating to the Plaintiff's opinions regarding liability; however, this shall not be construed to mean the examiner cannot inquire as to how the accident occurred to better understand the mechanism of the alleged injury; nor shall this be construed to mean the examiner cannot inquire about past medical treatment.

6. Should Plaintiff fail to appear and fully cooperate during the examination to completion, Plaintiff shall be all costs associated with any subsequent examination.

7. The examination shall not be recorded.

DATED this ____ day of January 2020.

CLEAR COUNSEL LAW GROUP

Jared R. Richards, Esq.
Nevada Bar No. 11254
1671 W. Horizon Ridge Pkwy, Suite 200
Henderson, NV 89012
*Attorneys for Plaintiff Kalena Davis*

DATED this ___ day of January 2020.

HARPER | SELIM

James E. Harper, Esq.
Nevada Bar No. 9822
Justin Gourley, Esq.
Nevada Bar No. 11976
1707 Village Center Circle, Suite 140
Las Vegas, NV 89134
*Attorneys for Defendant Adam Deron Bridewell*

DATED this ____ day of January 2020.

LEWIS BRISBOIS BISGAARD & SMITH, LLP

_____

Jason G. Revzin, Esq.
Nevada Bar No. 8629
Blake A. Doerr, Esq.
Nevada Bar No. 9001
6385 S. Rainbow Boulevard, Suite 600
Las Vegas, NV 89118
*Attorneys for Defendant Lyft, Inc. The Hertz Corporation*

ORDER

IT IS SO ORDERED.

_____

DISTRICT COURT JUDGE

Submitted by:

_____

MATTHEW A. CAVANAUGH
Nevada Bar No. 11077
BLAKE A. DOERR, Esq.
Nevada Bar No. 9001
6385 S. Rainbow Boulevard, Suite 600
Las Vegas, Nevada 89118
LEWIS BRISBOIS BISGAARD & SMITH LLP

# Exhibit B

STP
MATTHEW A. CAVANAUGH
Nevada Bar No. 11077
BLAKE A. DOERR
Nevada Bar No. 9001
LEWIS BRISBOIS BISGAARD & SMITH LLP
6385 S. Rainbow Boulevard, Suite 600
Las Vegas, Nevada 89118
Telephone: 702.893.3383
Fax: 702.893.3789
Email: matthew.cavanaugh@lewisbrisbois.com
Email: blake.doerr@lewisbrisbois.com
*Attorneys for Lyft, Inc. and The Hertz Corporation*

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

KALENA DAVIS,

Plaintiff,

vs.

ADAM DERON BRIDEWELL, an individual; LYFT, INC., a foreign corporation; THE HERTZ CORPORATION, a foreign corporation; DOE OWNERS I through X, and ROE LEGAL ENTITIES I through X, inclusive,

Defendants.

Case No.: A-18-777455-C
Dept. No.: XIII

**STIPULATION AND ORDER FOR NRCP RULE 35 EXAMINATION**

**Date of interview: March 11th 9 a.m. - noon**
**Date of Assessment: March 12th 9 a.m.-5 p.m**

A Clinical Interview of the Plaintiff shall be conducted on March 12, 2020 from 9:00 a.m. to noon. and an Independent Neuropsychological Assessment shall be conducted on March 12th, 2020 from 9:00 a.m. to 5:00 p.m. by Dr. Thomas F. Kinsora, Ph.D., at his office located at 716 South 6th Street, Las Vegas, NV 89101.

1. Plaintiff shall complete online intake at least 1 week prior to the assessment.
2. The examination shall not go beyond 5 p.m. except in circumstances where the Plaintiff may require extra breaks and lunch.
3. Plaintiff will not wait any longer than 30 minutes in the waiting room prior to the Commencement of the Rule 35 exam.

4. The examiner will not any questions to Plaintiff directly relating to Plaintiff's opinions regarding liability; however, this shall not be construed to mean the examiner cannot inquire as to how the accident occurred to better understand the mechanism of the alleged injury;
5. Should Plaintiff fail to timely appear and fully cooperate during the examination to completion, Plaintiff shall bear all costs associated with the examination and any second examination.
6. The examination shall not be recorded.
7. The Plaintiff shall not have an observer at the examination.

DATED this ____ day of January 2020.

CLEAR COUNSEL LAW GROUP

Jared R. Richards, Esq.
Nevada Bar No. 11254
1671 W. Horizon Ridge Pkwy, Suite 200
Henderson, NV 89012
*Attorneys for Plaintiff Kalena Davis*

DATED this ___ day of January 2020.

HARPER | SELIM

James E. Harper, Esq.
Nevada Bar No. 9822
Justin Gourley, Esq.
Nevada Bar No. 11976
1707 Village Center Circle, Suite 140
Las Vegas, NV 89134
*Attorneys for Defendant Adam Deron Bridewell*

DATED this ____ day of January 2020.

LEWIS BRISBOIS BISGAARD & SMITH, LLP

MATTHEW A. CAVANAUGH
Nevada Bar No. 11077
Blake A. Doerr, Esq.
Nevada Bar No. 9001
6385 S. Rainbow Boulevard, Suite 600
Las Vegas, NV 89118
*Attorneys for Defendant Lyft, Inc. The Hertz Corporation*

///

ORDER

IT IS SO ORDERED.

DISTRICT COURT JUDGE

Submitted by:

MATTHEW A. CAVANAUGH
Nevada Bar No. 11077
BLAKE A. DOERR, Esq.
Nevada Bar No. 9001
6385 S. Rainbow Boulevard, Suite 600
Las Vegas, Nevada 89118
LEWIS BRISBOIS BISGAARD & SMITH LLP

# Exhibit C

ORDR
MATTHEW A. CAVANAUGH
Nevada Bar No. 11077
BLAKE A. DOERR
Nevada Bar No. 9001
LEWIS BRISBOIS BISGAARD & SMITH LLP
6385 S. Rainbow Boulevard, Suite 600
Las Vegas, Nevada 89118
Telephone: 702.893.3383
Fax: 702.893.3789
Email: matthew.cavanaugh@lewisbrisbois.com
Email: blake.doerr@lewisbrisbois.com
*Attorneys for Lyft, Inc. and The Hertz Corporation*

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

KALENA DAVIS,

Plaintiff,

vs.

ADAM DERON BRIDEWELL, an individual; LYFT, INC., a foreign corporation; THE HERTZ CORPORATION, a foreign corporation; DOE OWNERS I through X, and ROE LEGAL ENTITIES I through X, inclusive,

Defendants.

Case No.: A-18-777455-C
Dept. No.: XIII

**STIPULATION AND ORDER FOR NRCP RULE 35 EXAMINATION**

**Date: March 20, 2020**
**Time: 2:00 p.m.**

IT IS HEREBY STIPULATED by and between all parties, through their respective attorneys of record, that Plaintiff undergo medical examination pursuant to NRCP 35. The parties have stipulated to the following conditions for the medical examination:

1. Any paperwork or forms that Defendants' medical expert, Dr. David E. Fish, requires for the examination shall be submitted to Plaintiff's counsel no later than five (5) days prior to the date of the examination and is subject to objection by Plaintiff's counsel.

2. Plaintiff will appear for a Rule 35 Exam with Dr. Fish on March 20, 2020 at 2:00 P.M. at Consultant Medical Group, located at 2500 West Sahara Avenue, Las Vegas, NV 89102.

3. No other physician, surgeon, or chiropractor shall be present during the

examination. If necessary, Dr. Fish may utilize members of his staff to assist during the examination.

4. The examination shall be completed within 90 minutes, and Plaintiff will not be required to wait in the waiting room longer than 30 minutes past the arrival time before the commencement of the examination.

5. The physical examination shall be limited to the physical conditions of the Plaintiff that are in controversy in the above-captioned case. Plaintiff will not be asked any liability questions surrounding the subject incident. However, the examining physician or staff member may ask about the mechanism of injury, body parts making contact with the ground, and may ask about relevant medical history, past and current symptoms.

6. No invasive procedures are allowed.

7. No medical treatment is allowed.

8. No x-rays, radiographs, MRIs, CT scans, PET scans or other medical imaging may be obtained as part of the examination.

9. Plaintiff shall not be required to disrobe from the waist down during the examination. Plaintiff shall wear loose fitting shorts or pants to the examination to prevent the need for disrobing.

10. No physically painful, intrusive or embarrassing procedures may be performed during the examination.

11. Defendants' medical expert, Dr. Fish, shall not engage in any ex parte communication with Plaintiff's treating health care providers.

12. Thirty (30) days following the examination, Defendants shall provide Plaintiff's counsel with a copy of the examination report.

13. Plaintiff shall not pay or incur any fee for the examination and shall use his best efforts to appear at the office of Dr. Fish 10 minutes prior to the scheduled examination date and time. In the event Plaintiff cannot attend his scheduled examination, his counsel shall contact Defendants' counsel to re-schedule the examination with 24 hours notice.

14. The examining physician shall be provided with a copy of this Stipulation prior to the examination.

///

DATED this ____ day of January 2020.

CLEAR COUNSEL LAW GROUP

Jared R. Richards, Esq.
Nevada Bar No. 11254
1671 W. Horizon Ridge Pkwy, Suite 200
Henderson, NV 89012
*Attorneys for Plaintiff Kalena Davis*

DATED this ____ day of January 2020.

LEWIS BRISBOIS BISGAARD & SMITH, LLP

Jason G. Revzin, Esq.
Nevada Bar No. 8629
Blake A. Doerr, Esq.
Nevada Bar No. 9001
6385 S. Rainbow Boulevard, Suite 600
Las Vegas, NV 89118
*Attorneys for Defendant Lyft, Inc. The Hertz Corporation*

DATED this ___ day of January 2020.

HARPER | SELIM

James E. Harper, Esq.
Nevada Bar No. 9822
Justin Gourley, Esq.
Nevada Bar No. 11976
1707 Village Center Circle, Suite 140
Las Vegas, NV 89134
*Attorneys for Defendant Adam Deron Bridewell*

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ORDER

IT IS SO ORDERED.

DISTRICT COURT JUDGE

Submitted by:

DARRELL D. DENNIS, Esq.
Nevada Bar No. 006618
Jason G. Revzin, Esq.
Nevada Bar No. 8629
BLAKE A. DOERR, Esq.
Nevada Bar No. 9001
6385 S. Rainbow Boulevard, Suite 600
Las Vegas, Nevada 89118
LEWIS BRISBOIS BISGAARD & SMITH LLP

# EXHIBIT B

# 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.

**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

current rule and what we are asking for as part of this bill. I am surprised there is any opposition to the attorney/observer portion of this bill. As Ms. Brasier said, this is already allowed by every other state that surrounds Nevada. California, Utah, and Arizona already allow attorney observers.

I can tell you from representing clients in workers' compensation cases in Nevada for more than 30 years, we already attend doctor examinations in workers' compensation cases—"we" being attorneys or our staff. It happens on every permanent partial disability evaluation. An attorney is present. To me, the reason is very obvious; you want openness during this process. You already have an agent of the insurance company, the doctor, present. This bill levels the playing field by having an attorney or attorney staff member present. Is an attorney going to attend every one of these examination? No, probably not. How about an attorney's staff member? Probably. A family member? Yes. These are options that a person who is being subjected to this type of examination should have. All we are seeking is a level playing field where during these examinations you have an agent of the insurance company—the doctor—present, along with an observer who could be an attorney or someone from the attorney's office.

The language in the proposed bill is very clear: the observer is just an observer. They cannot participate. They cannot interrupt. If anything like that happens, the doctor can terminate the examination, and you can go to court to work out your problems or differences. I can tell you that in attending workers' compensation permanent partial disability evaluations, I have never had a doctor terminate an exam during the hundreds of exams I have attended over 30 years. Never once have we ever had a problem with the doctor. Do the doctor and I get along at all times in these evaluations? No, probably not. However, we are able to keep it civil. We are able to keep it professional, and there is no reason an attorney observer being at the exams in this context is going to be any different. That is the observer component of this bill.

I should also mention that having an observer prevents abuse during these examinations as well, because it keeps everything open and transparent. Think about it in a practical sense. We have had doctors who have had some issues during these exams, and we felt as though we should not need to have a hearing for every examination to show that a doctor is having problems with taking advantage of people during some of these examinations. Fortunately, it is a minority of doctors with whom we have had these issues. This observer keeps it open.

The second portion of the bill is audio recording. It is not video recording. This can be done as simply as using a cellphone, or it can be done as complicatedly as bringing in a court reporter. In practicality, how many times is a court reporter going to be brought in even though this language allows it? Probably 1 percent of the time, if at all. There are so many other means of communication whereby you are able to record. Again, this promotes openness and transparency during these examinations. The beauty of the language of this bill is that the doctor can also record it. You have a recorded version by the doctor, you have a recorded version by the patient or observer, and you know what happened. There is none of this "he said, she said." I cannot tell you how many cases I have had to litigate over an issue

where an examinee goes to one of these exams, we receive the report back, and there are things in it that are totally unfamiliar to me. I ask the client and she says to me, "I never told him that." Now we have this dispute over what was said during the exam. Now it is in the report by a doctor who will be testifying to that during trial. Again, audio recording by both the patient or observer and the doctor prevents this from happening. It keeps us out of court, and it keeps these cases moving.

In fact, before she was appointed to the Nevada Court of Appeals, the discovery commissioner in the Eighth Judicial District Court in Clark County already allowed audio recording on all cases. The problem with the current language in the current rule is that audio recording is only allowed for good cause. Now, what "for good cause" means is uncertain. Every time there is an examination where audio recording is requested, we are going to have litigation of these cases. It is going to cause delays. It is going to cause additional costs. It is going to cause clients' access to justice to be delayed on these types of cases. That is why this bill before you today does not provide or require this "for good cause" standard on audio recordings. As I stated before, the discovery commissioner had already allowed this type of audio recording without a showing of good cause. Again, we want to keep these examinations open and transparent, and we want these clients of ours to be able to move on with their cases without having to litigate every single issue because this examination is being requested by the insurance defense attorney.

These are the two elements, and these are the differences between what the existing rule says and what this bill says. Again, we are before you today because an examination by a doctor who is not of this person's choosing involves a substantive right. It is something that should be within a statute and not a procedural rule.

**Chairman Yeager:**
I want to make sure we have the record clear in terms of the process that got us here. The Supreme Court of Nevada was looking to make substantial changes to the NRCP, and those changes went into effect March 1, 2019. We are talking about Rule 35. It sounds as though there was a subcommittee that I believe Mr. Galloway chaired.

**Graham Galloway:**
That is correct.

**Chairman Yeager:**
So there were eight members of that subcommittee, and there was a 7-to-1 vote in favor of advancing what appears in A.B. 285. That was the recommendation, 7-to-1, out of the subcommittee to the entire Supreme Court of Nevada. Do I have that right?

**George Bochanis:**
There were some changes made such as the observer only being a person who was not the attorney and not associated with the attorney's staff. For the audio recording, there was nothing about the "for good cause" requirement being involved.

**Chairman Yeager:**
Essentially, the recommended language that came out 7-to-1 was not adopted by the Supreme Court. We do not know why, but it simply was not adopted.

**Graham Galloway:**
That is correct.

**Chairman Yeager:**
I just wanted to make sure we had that clear on the record.

**Assemblywoman Backus:**
I noticed you were both on the subcommittee, and I just read our new NRCP. When looking at the separate branches of government, the court can implement court rules consistent with Nevada law. I was trying to put these two together, and I am thinking about how the language is presented in section 1, subsection 1 of A.B. 285 where it says "An observer may attend," for example. The current Rule 35 is almost on par with that rule. I am not sure if that was your intent. It does not sound as though it was.

I also just want to clarify how an independent medical examination works. It is either by stipulation or by order. It looks as though this new rule keeps it by order. What will end up happening? When I was reading the very lengthy comments to the rule, it seemed as though the court and committee spent a lot of time working on that. Someone could raise the issue of having an observer being present, and likewise with the audio. That could be agreed to, or it could be put into the opposition if they are challenging a request for the examination. When I was looking at Rule 35 and A.B. 285 this morning, I could almost read them in sync. The only thing that was glaring to me was the issue of the attorney. I have to admit, I kept asking my friends who are attorneys if they really want to be present for this. That was the only thing I thought was agreed upon by all three amendments that were sent over to the Nevada Supreme Court with the petition. It seemed as though each of them excluded the attorney. That was the one thing I noticed. If you could clarify that for me, that would be great.

**Graham Galloway:**
You are correct that the language is similar, but it is distinct. From a practical standpoint, you are also correct that most of these examinations are done by stipulation. You work out the details ahead of time. With some attorneys, you can hash out the details. With other attorneys, you cannot. We have made changes that are not very dramatic, but they are substantial. Instead of having to show good cause, if you cannot agree with the other side as to the parameters of the examination, and you have to go the motion route, the rule provides that this can be done by motion or agreement. Most of the time it is by agreement. Under the existing rule, if you can agree, you have to show good cause for an observer. The big change we are proposing here is that you do not have to show that good cause; you automatically have the right to have an observer present, whether he or she be an attorney, an attorney's staff member, or a family member or friend.

The other point you raised about the differences between the current rule and our bill is that this would allow for an attorney observer. In reality, I do not foresee myself going to any of these examinations. I really have no interest in doing that. I think I could use my time better elsewhere. It would be a staff member or a family member. Currently, what I do—which, perhaps, is not necessarily authorized by the rule—is have all my clients take a family member. No one has ever objected to that. That, in practicality, is what is going to happen in most cases. There are certain experts who are marked for special treatment because they have been proven to be extremely biased. Those individuals may end up having a staff member from the law firm attending their examinations. Again, I think in the run-of-the-mill case, you are sending a family member or a friend.

**George Bochanis:**
As far as the mechanics of the examinations we have experienced in my office, we get a letter from the insurance defense attorney where the attorney says, "We want to examine your client on this date at this time. Bye." Of course, it does not work that way. We call them and say, "Sure, pursuant to these conditions." Or, under the rules, we can file a motion. My experience has been that we were able to agree less than half the time on these conditions. Since this rule has gone into effect on March 1, we have received three letters requesting clients to submit to examinations, and we have not been able to agree to the conditions once. That is because of the "for good cause" showing on the audio recording portion. We disagree as to what that means, and this was our concern when the current rule came out. When you allow that type of vagueness over this type of examination, there is just not agreement on it. This rule has been in effect for 27 days. We have received three letters in 27 days requesting these exams. We have not been able to agree to one of them. That is because of this audio recording "for good cause" requirement as well as the observer issue. I have told attorneys I should be able to send a staff member to one of these, and their objection is that it is not what the rule says. The rule says it has to be a family member. On some of these more complicated examination-type cases, we want a staff member there. This law we have proposed provides and allows for that. I think these are important distinctions.

Again, this is a substantive right. The procedural part of Rule 35 is, how do you get there? You agree to it or you file a motion. That stays with NRCP 35. The mechanics of the actual examination is a whole other issue. That is a person being handled and touched by a doctor who is not chosen by them but selected by an insurance defense attorney. That is why that is a substantive right. That is why we have proposed A.B. 285. This is something we thought about after the NRCP committee. We said to ourselves, You know, this really is not a procedural rule. I hope that helped.

**Assemblywoman Backus:**
It did. I was just trying to correlate what we have now as our rule and what the law is going to provide for. We all know as practitioners that we are going to continue experiencing the court reading of this law if it gets implemented along with Rule 35. I think we will have to deal with it through offers of judgment, as well as certain interpleader actions depending on what remains in our statutory provisions. Just so I am clear, it looked as though everyone had originally agreed that attorneys would not be present. The type of work I do sometimes

is more product liability. When an attorney shows up, I show up. It seems as though on a personal injury case, the goal is now to basically eliminate this from the rule and allow attorneys or someone from their office to be present. Another thing that looked as though it came out of nowhere was the whole examination of neuropsychological, psychological, or psychiatric examinations wherein an observer was going to be completely eliminated. I take it that through the proposal of A.B. 285, it would negate that provision as well.

**George Bochanis:**
The carve-out for psychological examinations completely took us by surprise. It was never discussed. No exceptions were ever allowed for psychologists under this bill. I have to be honest with you; I do not know who is more vulnerable and who more requires an observer with them during these examinations than a person with a traumatic brain injury. That came to us as a complete surprise. That was something that was never discussed during the NRCP committee and was never provided as being a carve-out for this type of specialty area.

As a result of that occurring, we have provided to the Committee as exhibits some documents we think support our view that there should not be some special exception for psychologists on these examinations [pages 51-76, (Exhibit C)]. A few psychologists appeared at the Supreme Court of Nevada hearing on this rule, and they testified that what they do is secret—the tests and the way they grade their tests are trademarked, secret items so they cannot be disclosed—and as a result of that, you cannot have an observer present. Well, that is not so. I have submitted to you 74 websites that contain copies of these exams and how they are graded and how they are evaluated [pages 51-59, (Exhibit C)]. So much for the proprietary or secret nature of these examinations.

These psychologists also testified that an observer being present during a psychological evaluation destroys the entire evaluation because if somebody is present, the examinee is not going to be as open. We have also submitted an affidavit from a psychologist with 20 years of experience who states that the mere fact this psychological exam is conducted by someone this person did not select, really puts the examinees in a position where they are not going to be entirely forthcoming [pages 60-76, (Exhibit C)]. They are going to hold things back because it is an examination that has been forced on them. Simply having somebody present is not going to change the nature of the examination at all. In fact, an observer being present during this examination is more required than any other type of examination because certain distractions—the inflection of the voice of this psychologist examiner and other things like that—could have a huge impact on the findings of the examination. Not having an observer present affects that. We have submitted these items, the affidavit and the 74 websites, as further evidence that there should not be a carve-out for psychologists.

**Assemblywoman Nguyen:**
You have mentioned workers' compensation. It is my understanding that those provisions that are similar to those which are contained here are also statutory as a part of *Nevada Revised Statutes* (NRS) 616C.490. In addition to the workers' compensation, are there any other provisions that are statutory as well? Obviously, there is some precedent here, so I was wondering if you are aware of anything else.

**George Bochanis:**
I am sure there are; I just cannot think of any right now. I can tell you that in our survey of looking at other states where an observer is allowed to be present, it is a mix between procedural rules and statutes. Other states have considered it to be a statutory right. It is a good point. There are a lot of other statutes and a lot of other things within our NRS that are partially statutory and are partially procedural, which are covered by NRCP. It does occur commonly.

**Assemblywoman Nguyen:**
As far as how workers' compensation works, do you not have the same concerns that you do under these current rules as they have been implemented in March?

**George Bochanis:**
We have found in workers' compensation cases that we have had zero problems with attorney observers being present. Although it is true that I certainly am not there at 100 percent of these permanent partial disability examinations, 99 percent of the time my staff is. It is not a family member. That is because there are certain mechanics of how these examinations on workers' compensation cases are supposed to be performed. If they are not performed in a certain way, it invalidates the exam. So we always have a staff member present at these. We have never had a doctor terminate an examination. I have never received a call from a doctor saying my staff member did something inappropriate, or from the insurance adjuster or defense attorney for the workers' compensation case objecting to something we did. An observer is an observer. That is our intention on this bill, and that is what occurs in workers' compensation cases now.

**Assemblywoman Krasner:**
In looking at some of the opposition cases, they say this is an attempt to narrow the pool of doctors willing to conduct these Rule 35 examinations. Can you please address that?

**Graham Galloway:**
Of all the other states that allow attorney observation and allow audio or video recording, there has never been an issue about the availability of defense experts. If you read the comments presented by the opposition, it is a fear, but there is no actual evidence. This, unfortunately, is a lucrative area of practice. There are going to be experts who will participate in this arena. There is no evidence—absolutely none—that this prevents the defense from hiring somebody. In the workers' compensation arena, there is never an issue. When I read that argument, I start seeing smoke. I see nothing else. From the experience of our neighboring sister states, there is absolutely no evidence that occurs.

**Alison Brasier:**
I think this idea that it is going to narrow the pool of doctors is kind of just a scare tactic—a red herring—to distract from the actual issues. In my view, I do not see why this would narrow the pool. It provides protection for the doctors so there is an objective record of what happened during the examination. If there is a dispute, everyone has a record of what happened. It is a protection for the claimant, but also for the doctor. I think this idea that it

will narrow the pool of doctors because we are going to create an objective record really has no basis in fact.

**Chairman Yeager:**
Can you give the Committee a sense of how much these examinations typically cost? I know they are paid by the defense, but is there a range in terms of what a physician would charge to do an examination such as this?

**George Bochanis:**
We have provided as an exhibit testimony from a doctor, Derek Duke, where the district court conducted 15 days of hearings on the appropriateness of this specific doctor conducting Rule 35 examinations [pages 9-43, (Exhibit C)]. This doctor testified that over the course of a year, he earned more than $1 million performing just these examinations. We have seen doctors charge anywhere from $1,000 to $10,000 for these examinations. That includes the review of medical records and the examination of the injured person.

**Chairman Yeager:**
The reason I ask that—I am not trying to drag anyone through the mud—is because I wanted to dovetail off Assemblywoman Krasner's question about the availability of doctors. It does sound as though it can be lucrative, so I do not know that it would come to pass if we were to enact this bill. We have heard some bills in this Committee in the criminal context about the importance of recording confessions. We have also had body camera bills. Some of the reasoning there is just what Ms. Brasier said: if you have to go into court later and have a dispute about what was said or what happened, it is obviously very helpful to have a video recording. I know in this circumstance we are not talking about video, because it is a medical examination. We are talking about audio. Is part of the reason you brought this bill forward to try to eliminate some of the litigation costs that happen after these examinations in front of the court?

**Graham Galloway:**
Exactly. That is the intent, or at least a major component of the intent of this bill: to eliminate the squabbling, the fighting, the extra unnecessary litigation, and the expense involved in that. That is part of the intent of the bill.

**Chairman Yeager:**
At this time, I will open it up for testimony in support.

**David Sampson, Attorney, Law Offices of David Sampson, Las Vegas, Nevada:**
I have seen some of the issues brought up in dispute of this particular bill. There is a clear understanding among the defense bar, the plaintiffs' bar, and in the insurance industry, of the importance of operating in the sunlight. When an insurance company learns of an incident—whether it is someone falling somewhere, a car crash, or whatever else goes on—one of the very first things they try to do is get a recorded statement. It is always important to them that they have a tape recording or some kind of digital record of what the individual has to say about what took place and what their injuries are. I have never once heard of an insurance

adjuster doing a statement of someone who has been injured and not making a record of that. So they understand and appreciate the importance of operating in the sunlight and making sure we have a record. Every time a deposition is taken, we have a record that is made. That is not just pursuant to the rules. It is important to understand and have a court reporter write down everything that goes on. More and more nowadays, we have a large percentage of depositions taking place with a video recording because it is important that we catch not only what is said, but inflections in voice, facial features, body language, et cetera. The defense bar, the plaintiffs' bar, and the insurance industry clearly understand it is important to have a clear, accurate record of what goes on. Whenever there are written questions submitted—they are called interrogatories in legal proceedings and discovery—they wisely always insist that those be signed under oath, verified, and notarized so we have a clear depiction of what the individual said and what took place when these different things happen.

Then, miraculously, when we turn to these Rule 35 examinations and when it comes time to take one of my clients and put him or her in a room with a highly paid expert from the defense and shut the door, all of a sudden, the insurance industry and the defense bar—and I would imagine any other opponents to this particular bill—do not want any record made. They want the conversation to have no witnesses, no transcript, no recording, and no idea as to what went on other than the proverbial "he said, she said." As Ms. Brasier mentioned, when you have a "he said, she said" situation come down to a layperson who did nothing wrong but was sitting at a stoplight when someone came through and hit him from behind with their car, and the person on the other side is a doctor who has been practicing in Nevada for 20 years, there is a tendency of jurors—no matter who is right, who is wrong, or what the truth is—to side with the defendant's expert and say whatever they are saying took place must actually be what happened. It is extremely unfair. I have seen, personally, on multiple occasions, the defense come back from the examining doctor with a report that contains information my client says is not true. If you review the order regarding Dr. Duke, there were multiple times when Dr. Duke said things took place in the examination that actually could not be true.

I would like to share two quick examples. When I was a very young attorney, in 1999 and 2000, I was involved in a case where my client was sitting in a lawn chair one evening in his driveway when a drunk driver drove across the road, up over the curb, across part of the lawn, and into the driveway, hit my client who was sitting in the lawn chair, and hit the house he was sitting in front of. My client was asked to attend an examination because his leg was shattered. He had $60,000 in medical bills as a result of his first night in the emergency room. They had the defense and the insurance company for the drunk driver hire a doctor to examine my client. When that report came out, I was astonished to read the doctor's report which said my client indicated he was walking in what the defense attorney later argued was the road when he was hit by this car. Of course, I went to my client as a young attorney not realizing what was going on—I even wanted to give deference to the doctor—and asked him why he told the doctor he was walking in the road when we had eyewitnesses and knew he was sitting in a chair in his driveway. Of course, my client was very insistent that was not what he said. We had to have this "he said, she said" dispute between the doctor saying, "Oh no, Mr. Johnson told me he was walking in the road," and my client saying, "No, I told the

doctor I was sitting in a chair." We had to get into this big mess with additional eyewitnesses who, thankfully, were there to say, "No, he was sitting in a chair and not trying to walk." In my opinion, they are trying to manufacture an issue that, first of all, has nothing to do with medical treatment. Why the doctor would even be talking about whether you were walking in the road or sitting in a chair is beyond me. It shines a light on the issues. It would have been nice, in that case, to have a record or an observer to say, "No, I was there. I heard exactly what Mr. Johnson said, and he said he was sitting in a chair as he said every other time he has talked about what happened in this horrific incident."

I had a situation recently in a case that I had where another doctor who had examined my client came out and said my client had misrepresented to me facts about a magnetic resonance imaging scan she had. My client said that was not what took place. I have seen it a number of times. I know Mr. Galloway had mentioned the experts are weaponized. I am not going to comment on whether that is the case or not, but I would like you to consider this: in 20 years of practice I have had hundreds of clients go and have an examination by a doctor who was hired and retained by the defense and the insurance company. Out of all of those cases, I can remember one time where the doctor examined my client and said these injuries that this individual sustained were due to this particular crash. In every other case I can recall, the doctors have invariably said the injuries were either not caused by this crash or they were not to the extent that the treating doctor had claimed.

The arguments related to the chilling effect simply do not hold. We see in our neighboring states that it is not the case. I would ask you to please consider this: I have had both male and female clients call me in tears from the doctor's office saying they were subject to being yelled at—what they considered to be abuse—and they did not know what to do. Please have these examinations take place in the sunlight and allow the citizens of Nevada to have the same rights as our sister states to be protected and to have an accurate depiction of what takes place in these examinations.

**Chairman Yeager:**
Is there additional testimony in support? [There was none.] Is there anyone opposed to A.B. 285?

**Dane A. Littlefield, President, Association of Defense Counsel of Nevada:**
I will stick mostly to my prepared statement (Exhibit D), but I do have additional comments that I will work into that. In support of my testimony today, I have provided the Committee with a copy of the current version of Rule 35 (Exhibit E), the former version of Rule 35 (Exhibit F), the Supreme Court of Nevada administrative order enacting the amendments to NRCP (Exhibit G), and various statements in opposition to the bill by members of the Association of Defense Counsel (Exhibit H). I have also provided a Supreme Court of Nevada case addressing the separation of powers issue that is implicated by this bill (Exhibit I).

One of the things we heard earlier was an attempt to characterize Rule 35 as affecting a substantive right and distinguish it from a procedural rule. That is simply not the case.

The *Nevada Rules of Civil Procedure* are made to address civil litigation through all phases, including the discovery phase, whether that is dealing with a Rule 35 examination or interrogatories as was addressed by the supporters of the bill.

The first issue is that A.B. 285 appears to be an attempt to reduce the pool of doctors willing to conduct Rule 35 examinations and create an unfair advantage, which has already been addressed by the Supreme Court of Nevada and the committee assigned to revise NRCP. This bill would allow the observer of a Rule 35 examination to be the plaintiff's attorney or a representative of the attorney, as you are aware. This could lead to unnecessary confrontations with doctors and unnecessary motion practice. Assembly Bill 285 only allows the plaintiff's attorney to attend a Rule 35 examination. There is no provision for the defendant's attorney or an observer representative of the attorney to be present. This creates a situation in which the plaintiff's attorney has an unfair, and perhaps unethical, opportunity to engage in direct communications with the doctor selected by defense counsel without defense counsel being present. The solution to that would be to simply not allow attorneys in the room. Under the current rule, there is a provision to allow recording by audio means for a showing of good cause. I would submit that good cause could be if a plaintiff's attorney has concerns about a doctor who has been retained by the defense who—I will remind the Committee—is already subject to the Hippocratic oath. A doctor is not an insurance company hitman.

The bill would allow the plaintiff's attorney to make a stenographic recording of the examination as an alternative to audio recording. This contemplates the presence of a court reporter. It is my understanding that many doctors would decline to participate in Rule 35 examinations where a lawyer and a court reporter would be present in the examination room. This would create an atmosphere in which many doctors would no longer be willing to participate in the examinations, and this would create an unfair advantage for the plaintiff's personal injury bar by substantially reducing or, perhaps, eliminating the defense bar's ability to retain them.

The bill allows audio or stenographic recording and limits the audio or stenographic recording to "any words spoken to or by the examinee during the examination." This suggestion is unworkable and would require the recorder or stenographer to stop recording anytime a word is spoken to anyone else in attendance at the examination. Additionally, A.B. 285 contemplates that the examination might need to be suspended for misconduct by the doctor or the attorney observer, with potential court review. However, because an audio or stenographic recording cannot include anything the lawyer said to the doctor or the other way around, there would be no record of the alleged misconduct and no way for a court to decide a "he said, she said" dispute. These concerns are already addressed by the current Rule 35.

Assembly Bill 285 allows the plaintiff's attorney to suspend the exam if the lawyer decides that the doctor was "abusive" or exceeded the scope of the exam. However, the plaintiffs' bar is concerned with eliminating motion practice caused by differences in opinion of what occurred at the examination. Something we would likely have differences of opinion on is

the definition of "abusive." To what extent do actions and/or words within the examination room become "abusive"? This is a highly subjective and highly prejudicial rule and provides no clear standard for the lawyer to make the highly disruptive decision on whether to suspend the examination. Moreover, the defendant is burdened with the cost of an examination that may abruptly be suspended for no real reason other than the plaintiff's attorney's subjective determination.

Further, section 1, subsection 6 of A.B. 285 states that if the exam is suspended by the lawyer or the doctor, only the plaintiff may move for a protective order. There is no reciprocal provision that allows the defendant to move for a protective order or a motion to compel to prevent abuse by the plaintiff's attorney during the exam or to seek sanctions against the offending attorney. Allowing one side in a lawsuit to seek relief while denying the availability of such relief to the other side would be grossly unfair and, most likely, a violation of due process.

In addition, A.B. 285 invites a clear and direct violation of constitutional separation of powers. This is why the plaintiffs' bar is trying to cast this proposed statute as affecting a substantive right rather than a procedural one; it is the only way they can try to get away from the Supreme Court's independent ability to draft and promulgate their own procedural rules. The Supreme Court of Nevada has enacted a comprehensive set of rules dealing with discovery, the NRCP, which includes Rule 35. The Court consistently holds that the Legislature violates separation of powers by enacting procedural statutes which conflict with preexisting procedural rules or which interfere with the judiciary's authority to manage litigation. If it were to become law, this new statute would directly and inappropriately contradict important parts of the newly amended NRCP and therefore violate the separation of powers doctrine.

Finally, the Supreme Court of Nevada's Nevada Rules of Civil Procedure Committee, in its drafters note to the new version of Rule 35, explicitly and directly rejected that an attorney or an attorney representative should be present at Rule 35 examinations in Nevada. That issue has already been considered duly and rejected in turn.

**Assemblywoman Backus:**
While you were speaking, I was trying to take a look at Rule 35 of the *Federal Rules of Civil Procedure*. It starts off looking similar to our new Rule 35 of NRCP. Are there any federal statutory provisions that address independent medical examinations to your knowledge?

**Dane Littlefield:**
Not to my knowledge, but I have not researched that topic.

**Assemblyman Edwards:**
I have a question about something you said about it being unfair to have one side represented in the room and not the other side. However, if you do have a representative of the plaintiff, the doctor is actually serving as a representative of the defendant. Is that correct?

**Dane Littlefield:**
That is correct. However, there would not be a defense attorney present in the room.

**Assemblyman Edwards:**
However, you do have representation, and you have trained representation that can actually take care of the defendant's side of the story.

**Dane Littlefield:**
Well, that assumes the expert witness who has been retained has a knowledge of what the scope of the procedural discovery rules are and what they can and cannot say. The fact that the bill as it stands does not allow for the recording of any statements that are not made directly to or from the plaintiff would mean there is no record for what is said in the room. It would become another "he said, she said" dispute.

**Assemblyman Edwards:**
How would an audio tape stop recording something that is being said in the room?

**Dane Littlefield:**
That seems to be the problem. That would be an issue where the audio recording would record everything, but to submit that to the court with a protective order or a motion, the plaintiffs' bar could make an argument that we would have to redact anything in a transcript that would be derived from that audio record and remove anything that could actually be back and forth between the doctor and the attorney.

**Assemblyman Edwards:**
If this goes through, that does not happen, right? If this bill is approved, the redaction does not take place. You have the full story there from both sides, correct?

**Dane Littlefield:**
Not the way the bill is written. The way the bill is written directly minimizes what can be recorded by stenographic or audio means to only the statements to or from the plaintiff. Under the current rule, audio recording can be done for good cause, and I do not believe it limits statements that are made. I would direct the Committee to the current Rule 35(a)(3) of the NRCP, which addresses audio recording of an examination.

**Assemblyman Edwards:**
I do not see where you are saying that anything is redacted or eliminated in the audio tape.

**Dane Littlefield:**
In the bill it would be section 1, subsection 3. It says, "Such a recording must be limited to any words spoken to or by the examinee during the examination."

**Assemblyman Edwards:**
So if that is between the examiner and the examinee, should that not give you the story of what is going on?

**Dane Littlefield:**
Not if there is a third party in the room. This would only be the examiner and the examinee. It would exclude any statements between the doctor and the observer, whether that is an attorney, an attorney representative, or a family member.

**Chairman Yeager:**
We can have the sponsors address that when they come back up. The way I read it was that it would not allow the attorney or representative to just start making arguments on the audio recording, but I believe the intent was to make sure whatever was said in the room is available for the judge. We can let the sponsors address the intent of that provision when they come back up.

I have a question. I understand where you are coming from. However, at the same time, to the extent there are disputes about what happened in the room and what was said, would it not be helpful to have at least an audio recording to be able to present to the discovery commissioner in helping to decide that? Do you just believe that would make it more difficult? The way I see it, it would be more helpful for the judge in making a decision to have a recording of what happened.

**Dane Littlefield:**
I do not necessarily disagree with that. A recording can be appropriate in certain circumstances, and the current rule actually provides for an audio recording for good cause. I think that is the intent of the Nevada Supreme Court and of its committee. I would submit that good cause would be if a plaintiff's attorney does have a concern that an expert witness who has been chosen by the defense may be problematic. Whether that is well-founded or not, that can be established via motion practice if the parties cannot stipulate to an audio recording. At that point, it would go before a judge who would be neutral and determine whether there is good cause to believe that an audio recording would be necessary to protect any party's rights.

**Chairman Yeager:**
I know we are just about three weeks into the new civil rules, but are you aware of any judges actually finding good cause in allowing an audio recording of an independent medical examination?

**Dane Littlefield:**
I have not been personally involved in any decisions of that nature.

**Chairman Yeager:**
I know it might be too early for this to work its way through the system, but I just wanted to ask that.

**Assemblywoman Krasner:**
Going back to the statement about this allowing for confrontations with only a plaintiff's attorney being in the room with the doctor and not the defense counsel being present,

obviously, the doctor is not an attorney. I have to agree with you there. Is it your position that if the defense were allowed to have an attorney or representative present as well, you would be okay with this bill?

**Dane Littlefield:**
Not necessarily. I think the issue with that is, I cannot imagine any plaintiff's attorney ever agreeing to have a defense attorney in the room during a medical examination that could become very private. That is why the most clear-cut solution is to not allow any attorneys or their representatives in the room. Of course, if a plaintiff and the plaintiff's attorney were amenable to something like that, it would be worth considering from a defense perspective.

**Assemblywoman Torres:**
I have some concerns about not allowing for another person to be in the room. I think back to my own father whose first language is not English. Sometimes, he has difficulty expressing himself. Although my mom would not get involved in the middle of a doctor's appointment, I think having her present allows him to feel more at ease because it is a setting where he does not feel comfortable and her being in the room would provide for an additional level of comfort. Additionally, my father is not the most reliable witness because he does not necessarily understand all the medical jargon that is being thrown around. I think it benefits both sides. It would benefit the plaintiffs and the defendants in that it allows for both of them to have a reliable story of what occurred if either another individual is present or if that encounter is recorded.

**Dane Littlefield:**
I agree with you. The rules currently do allow for an independent observer in the room; it just provides that the observer will not be an attorney or an attorney's representative. Family members are currently allowed in the room.

**Assemblywoman Torres:**
Are they allowed to record currently, or only with the judge's permission?

**Dane Littlefield:**
It would be with a showing of good cause. In a situation such as that where there is an issue with a language barrier, that could be grounds to assert good cause and have the judge rule on that or the parties stipulate to that.

**Assemblywoman Torres:**
In how many cases have they shown good cause for the mere fact of translation or additional assistance over the last year?

**Dane Littlefield:**
At this point, I do not have that information. However, I do not know if there is actually a data tracking capability for that. I would be happy to look into it to see if there is precedent for that. I just believe the language barrier issue would be a strong argument from the plaintiff's side.

**Assemblywoman Cohen:**
Continuing with Assemblywoman Torres' father as an example, say he is in the Eighth Judicial District Court. We have heard from the judges of the Eighth Judicial District Court and the other district courts throughout the state that their dockets are full, they need more judges, and there is too much going on. Can you tell us how long it would take if a plaintiff's attorney filed a motion saying they have good cause to have someone else in the room? How long would that process take in the Eighth Judicial District Court?

**Dane Littlefield:**
My practice area is pretty restricted to the Second Judicial District Court and some other northern Nevada courts. I cannot speak to the Eighth Judicial District Court particularly. I can offer that if there is good cause, at least up here in northern Nevada, we, as defense attorneys, are amenable to stipulating to reasonable requests. We may be portrayed as sticks in the mud who are not willing to compromise, but that is not the case. We are willing to work with people when there is a showing of good cause. If a motion to compel or a motion for a protective order requiring audio recording—a family observer is already allowed without a court order—is requested, I do not imagine it would be a very long process. It would go to a discovery commissioner, and the commissioner can work on that relatively expediently. My experience in the Second Judicial District Court is that we are fortunate to have a discovery commissioner who is extremely expeditious and very quick. Unfortunately, I cannot speak to the Eighth Judicial District Court.

**Assemblywoman Cohen:**
Once a motion would be filed in front of a discovery commissioner, how long would that take before it is heard?

**Dane Littlefield:**
As a former law clerk, I know internal rules of the court are, generally, they try to have a turnaround within 60 days. It is not guaranteed; it is just a general target goal. When matters get sent to the discovery commissioner, it can be anywhere between a week and 60 days. Generally, my experience is that it is much quicker than the 60-day rule of thumb.

**Assemblywoman Cohen:**
As attorneys, we are not supposed to file pleadings right away. We are supposed to work with each other. The discovery commissioner is going to want to know what the plaintiff's attorney did to try to work this out, so there would be phone calls, letters, and emails going back and forth beforehand for a few weeks on top of this. Is that correct?

**Dane Littlefield:**
That is correct. I would submit that the rules already provide a mechanism to remedy that. If an attorney is engaging in bad faith and if the discovery commissioner determines that any objections were not made from a good-faith basis, it opens that attorney up to discovery sanctions that can be levied against him. If it is found that the attorney is needlessly wasting the court or the other party's time, that would be a route the plaintiffs could go down.

**Assemblywoman Cohen:**
So we could go around 90 days before we have this resolved. Also, I think you can talk to any attorney who practices in this state, and that attorney would tell you that opposing counsel has acted inappropriately and that attorney could not get results from the court.

**Chairman Yeager:**
I will open it up for additional opposition testimony for A.B. 285. [There was none.] Is there anyone neutral? [There was no one.] I will invite our presenters to come forward to address Assemblyman Edwards' question and make any concluding remarks.

**Alison Brasier:**
Going to section 1, subsection 3, about allowing recording, I think we would be open to working on the language of that section. The intent was to capture exactly what happens in the room. That would include any dialogue with the observer. I think we would be open to dialogue about changing that section to alleviate any concerns. I was sitting and thinking about why this needs to be codified in NRS and we cannot just take care of it through the current rules. Something that has not been talked about before was that there are certain examinations that take place called "underinsured or uninsured motorist coverage" in which a person's own insurance company is, under contract, allowed to have them submit to one of these types of examinations prior to litigation being filed. Going along with the substantive rights we have been talking about and this right to control your body—even outside the litigation context—when you are dealing with an examination being compelled by an insurance company, I think it is important that we have those protections codified in our NRS.

**George Bochanis:**
It was our intention that the audio recording captures everything from the moment the person walks into the examination room to the second that person leaves the examination room. What you are hearing from the opposition is a very narrow interpretation. It certainly was not supposed to be so diced up. We want everything that is being said by everyone during these examinations to be part of the record. That, again, goes along with the whole concept of keeping this out in the open. It should not be some secret proceeding.

The other thing I wanted to comment on was Assemblywoman Cohen's remarks about the time element. An objection to this type of examination and having to litigate it is going to involve a meet and confer or a telephonic call first between both attorneys, which is going to take several weeks to arrange. It is going to require a motion before the discovery commissioner which adds 30 to 60 days. If one of the attorneys does not like the results of the discovery commissioner report recommendations—that report sometimes takes a month because there are objections to the language—it then goes to district court. Add another 30 to 60 days. If you are going to allow litigation on every examination request for good cause showing on audio recordings, you should give the Eighth Judicial District Court every new judge they want because you are going to need them. It is really going to cause an issue of access to justice for these types of cases.

**Graham Galloway:**
The argument that somehow this bill will lead to the suppression of the availability of experts for the defense side is still unsupported. I did not hear and I have not seen any evidence that will occur. What I did hear is one expert down south is making $1 million per year doing this kind of work. It is a lucrative business. There will be experts available.

**Chairman Yeager:**
I will now close the hearing on A.B. 285. [(Exhibit J) was submitted but not discussed and will become part of the record.]

I will now open the hearing on Assembly Bill 20.

**Assembly Bill 20: Revises provisions governing judicial discipline. (BDR 1-494)**

**Kevin Higgins, Chief Judge, Sparks Justice Court; and representing Nevada Judges of Limited Jurisdiction:**
We have offered an amended version of the bill (Exhibit K), and that is what I will be discussing this morning. The preamble to Assembly Bill 20 declares, "It is in the best interest of the citizens of the State of Nevada to have a competent, fair and impartial judiciary to administer justice in a manner necessary to provide basic due process, openness and transparency." Just as we work every day to ensure everyone who appears in our courts are treated fairly and given due process of law, the judiciary should enjoy the same treatment and guarantees of law if they are subject to review or discipline by the Nevada Commission on Judicial Discipline.

Section 1 of Assembly Bill 20 amends *Nevada Revised Statutes* (NRS) 1.440, which already provides for the appointment of two justices of the peace or two municipal court judges to sit on these judicial discipline proceedings once they go to hearing, and merely adds that the Supreme Court of Nevada will consider the advice of our association when making those appointments. We are only asking that the association offer who they think would be a good member to sit on that commission. Of course, the Supreme Court is free to appoint anybody it wants. We have no veto power or anything other than offering advice as to who we think would be an appropriate member.

Section 2 of the bill amends NRS 1.462, subsection 2 to provide that the *Nevada Rules of Civil Procedure* (NRCP) apply to all proceedings after the filing of formal charges. When the Commission receives a complaint from the public, it may choose to investigate, it may choose to ask the judge to respond, and it may file formal charges. Only after the filing of formal charges would this amendment apply. The *Nevada Rules of Civil Procedure* set forth pretrial procedures for discovery, interrogatories, requests for admission, and would also establish rules for pretrial motions. There are no such rules now. Many boards and commissions are subject to NRS Chapter 622A. Those are the NRS Title 54 boards. The Nevada Commission on Judicial Discipline is not a Title 54 board. For those boards it applies to, the rules for pretrial discovery, admission, and motions are set forth in statute.

Section 1, subsection 3 would adopt a procedure followed by many professional regulatory boards in Nevada that the investigative and prosecutorial functions are separated so the board members who decide whether to investigate and file a formal complaint are not the same members who decide whether a judge has violated the judicial canons of the *Revised Nevada Code of Judicial Conduct* and should be disciplined. This is important because, oftentimes, the evidence that is considered in the investigative phase is not the evidence that is introduced in the adjudicative phase, but the board members are aware of it and it is unclear how they disregard it when making a judicial decision. Simply put, the police and prosecutors should not be serving as the judge and jury. Due process requires that discipline decisions be made only on evidence introduced at the hearing, not evidence considered in closed, secret sessions before the public hearing. This is the procedure followed by many boards and commissions. I will draw the Committee's attention to the procedure followed by the Board of Medical Examiners in NRS 630.352: any member who sits on the investigative committee that makes a decision on whether or not a formal complaint should be filed cannot sit on the hearing panel to decide whether the physician should be disciplined.

Section 2 of the bill sets forth some specific due process protections. Section 2, subsection 4, paragraph (a) provides that the venue for a hearing will be in the county where the judge resides. Right now, frequently, northern judges' hearings are held in southern Nevada, and southern judge's hearings are held in northern Nevada. The judges, their attorneys, and their witnesses have to travel to the far end of the state to have their cases heard. This would just provide that the venue resides where the judge is.

Section 2(4)(b) provides that there would not be any interrogatories until after the formal statement of the charges. Just like a regular civil case, interrogatories and requests for admission are not appropriate until a complaint is filed and the person understands what the actual complaint is. Right now, the practice is to ask judges to respond to interrogatories and requests for admissions before the filing of formal charges, before the judge knows what they are actually going to be charged with, and judges are required to testify against themselves before they know what they are being charged with. This would just require them to wait until the formal filing of charges. There are pending cases, even a Nevada Supreme Court case, where judges object to these interrogatories. With a failure to answer them, they are deemed admitted, and you are also subject to additional discipline for failing to cooperate with the investigative process.

Section 2(4)(c) would provide that the Commission would provide all parties with the reports and investigative materials appropriate to the case once a complaint is filed, and no later than ten days before the hearing, including any exculpatory materials. There is no such requirement now that the Commission provide exculpatory materials. Discovery to requests, which are subject to ongoing litigation, have been denied by the Commission in the past. I think it is simply fair that any evidence that is going to be used or relied on by the Commission at the time of the hearing be presented to the judge and their attorney before the hearing. There is ongoing litigation about prehearing motions. Section 2(4)(d) provides that those motions be heard in an open preceding in the county where the hearing is set unless the parties agree to submit it.

Section 2(4)(e) would require that the prehearing motions be decided ten days before the hearing. These motions are commonly motions to dismiss or motions to limit the charges or discovery motions. Currently, it is the practice of the Commission to not hear those until the full Commission hearing. The defense of the judge may be contingent upon how some of those pretrial motions are heard—whether some of those charges are dismissed or not considered or are not violations of the canons of judicial discipline. Having to wait until an actual hearing to have the pretrial motions considered means the attorney providing the judge their defense really does not know what defense they will be able to provide until the time of the hearing.

Section 2(4)(f) would require that every party be entitled to provide all evidence necessary and relevant to support the case and be given time to do so, and that time limits not be placed upon the presentation of the defense. It has been the practice of the Commission to ask the prosecutor how long he needs to present, and then the defense is given the same amount of time and told they cannot exceed that. It is practice in court that defense has all the time it needs to present its defense; it is not limited by artificial rules. It would have to be necessary and relevant evidence, of course. Section 2(4)(g) provides that if any commission rule conflicts with the NRCP, the NRCP will take precedence.

The additional sections clarify some of the evidentiary standards that are used in making these decisions. Section 3 would reword NRS 1.4655(3)(e) to provide that a decision to authorize the filing of a formal statement of the charges would be made when there is a reasonable probability, based upon clear and convincing evidence, to establish grounds, so there is an evidentiary standard now provided in the statute. Section 4 removes the phrase that investigations would only be conducted pursuant to the Commission's own procedural rules. Section 5 rewords NRS 1.4667(1) so the decision to file a formal complaint is based on "whether there is a reasonable probability, supported by clear and convincing evidence, to establish grounds for disciplinary action," which just rewords the current language of the statute.

Section 6 amends NRS 1.467 so that a judge has an opportunity to respond to the initial complaint made to the Commission, but is not required to do so. Now, when the complaint from the public comes in, the judge is asked to respond to that. However, that could be premature based upon the filing of a later formal complaint. If a judge wants to respond, he can, but he is not required to make statements or admissions until he knows what the actual charges against him are, after which the Commission can decide, based on clear and convincing evidence, whether to file a formal complaint.

Section 7 amends NRS 1.468(2) to clarify that the evidentiary standard to determine whether to enter into an agreement to defer discipline is based on whether there is clear and convincing evidence to establish grounds. Section 8 sets forth the provisions on how the amendments apply prospectively into existing cases, and section 9 makes the act effective on passage and approval.

The judges in the state are expected to apply due process rights and give everybody a fair and open hearing. I think it is reasonable to expect that if we are subject to discipline, we enjoy the same due process rights as anybody who appears in front of us. There is a legal maxim that is a question in Roman law about "Who watches the watchers?" Who decides whether the police are doing a good job? Who keeps track of that? The Commission on Judicial Discipline is an independent commission. They report to no one. They are not supervised in any way, and the only way to resolve a dispute is to appeal a matter directly to the Supreme Court of Nevada. I am sure we are more than willing to hear from the Commission and have a discussion with them about possible amendments to this bill, but I do not think it is unfair to expect that due process rights apply when judges are brought before the Commission.

**John Tatro, Senior Judge; and representing Nevada Judges of Limited Jurisdiction:**
I do not want to understate the issue and the importance of it. I have an understanding of how the judges feel and of issues that have come up over the years. I was president of the Nevada Judges of Limited Jurisdiction (NJLJ) twice. None of us want bad judges. It reflects on all of us because when you read about a bad judge, it is as though they group us together, and we certainly do not want that. We want a remedy for finding out bad judges and people who violate ethics rules or other rules. I think the Commission is a very important thing, and I think the work they do is admirable and good. However, this discussion has been at the top of the NJLJ's agenda for over 24 years. I am not talking about war stories about the Commission; it is just this unknown. Why can we not have the same due process rights that litigants have in court on the civil side? We think it is extremely important.

You all received a letter from former Justice of the Supreme Court of Nevada Nancy Saitta (Exhibit L). In the second paragraph, she says we "must not ignore the most basic notion of fair and equal treatment under the law." We are judges, but we should be afforded that same treatment. When something is brought before us, we should have the same rights as everyone else does. I think Justice Saitta's statement sums it up.

**Richard Glasson, Judge, Tahoe Justice Court; and representing Nevada Judges of Limited Jurisdiction:**
I have been involved with NJLJ for the last 19 years. I am a former president and member of the board. Our mission with NJLJ is education, especially ethics education. We know and can assist the Supreme Court of Nevada in nominating these judges who will sit in judgement of other judges rather than getting that telephone call saying, "I do not know what I am doing. How do I respond to the Supreme Court? How do I sit?" We know who is capable, we know who is able, and we would like to be able to make those nominations to the Supreme Court rather than the same names over and over again being pulled out of a hat.

**Ann E. Zimmerman, Judge, Las Vegas Township Justice Court; and representing Nevada Judges of Limited Jurisdiction:**
I want to point out to the Committee that in *Mosley v. Nevada Com'n on Judicial Discipline* 117 Nev. 371 (2001), the Supreme Court of Nevada recognized that judges in Nevada have a protected liberty and property interest in the continued expectation of judicial office, especially where they are elected and serve designated terms. We believe that under the

current system we are being denied the basic rights of due process enjoyed by all civil litigants. It is kind of ironic that when you take your judicial oath of office, you swear to uphold the *Constitution of the State of Nevada* and the *Constitution of the United States*, but we do not enjoy those same rights before the Commission on Judicial Discipline.

**Assemblywoman Backus:**
With the new proposed bill, when would a complaint of charges become public? My understanding right now is that the pre-investigation is not a public proceeding. Is that correct?

**Judge Higgins:**
That is correct. Our bill does not change that at all. The pre-formal complaint process stays the same. Sometimes, it is confusing because the complaint comes in from the public, saying "Judge Higgins did XYZ." Then, after the process—the Commission makes a decision about whether to investigate, then a decision about whether I should respond, and then eventually presents a decision to file their formal complaint—the formal public complaint is filed by a Commission prosecutor. There are two complaints, but we do not change anything from how the Commission considers that complaint from the public now. Once the formal written complaint is there, NRCP would apply after that point.

**Assemblywoman Backus:**
That was my understanding. I am a licensed attorney, and I know that if someone sends a letter to the State Bar of Nevada they may not do any pre-investigation work. I get a letter shipped off to me saying, "You are in violation," but if someone took a look at the order, my name is not even in it. So it behooves me to easily just respond, and no formal complaint is filed. I was concerned that now imposing NRCP clear and convincing evidence standards may not just easily dispose of this, and there will end up being more backlog and maybe even more publicity for judges who run for office and who may not want this known. I was just trying to rectify this in my head.

**Judge Higgins:**
I do not think it changes that part. A judge can make a decision whether to respond. I think if somebody said, "Judge Higgins called me a jerk on the stand," I could say, "No, I did not. Here is the videotape. I asked him to sit down because he was making a scene." That would be quickly resolved, I would hope, by my responding to that public complaint. If the public complaint is that someone violated the canons and violated the criminal law and is subject to criminal prosecution—for some judges, that has been the case—I think, until the filing of the formal charges, judges have to make a decision about whether to give up those rights before they respond or are forced to respond. If you do not know what the formal charges are, it is hard to respond in those more complicated cases.

**Assemblywoman Peters:**
Would this pertain only to judicial duty disciplines, or does it extend to a situation in which a judge is taken into court for other issues?

**Judge Higgins:**
It would pertain to the workings of the Commission. It would not pertain to judges going into court for other issues.

**Assemblywoman Peters:**
Is a judge taken to the Commission only for actions done under the judicial office, or for any action that has consequences under the judicial system?

**Judge Glasson:**
A judge is a judge 24/7. What we do off the bench is subject to discipline, just as what we do on the bench. Judges must be patient, dignified, and courteous and must follow the "Boy Scout code" throughout their life. Oftentimes, a judge is brought up on a complaint and then perhaps a formal statement of charges on things that were totally unrelated to his or her duties on the bench. The old idiom is "sober as a judge." Well, if they are not, they should not be a judge anymore.

**Assemblywoman Hansen:**
I am a layperson. I know the law can get complicated, so this makes sense to me. You mentioned getting this fixed has been at the top of the list for several years. I was just curious about the history. Has this come before this body before? I am curious how we got here.

**Judge Tatro:**
No, we have not brought this bill forward. It has been talked about and talked about. This was the time when we decided to bring it forward. It has not come forward in the past.

**Judge Zimmerman:**
I think the reason why the bill has been proposed at this time is because judges have started to have lengthy conversations amongst themselves about the lack of due process before the Commission. Experiences have been compared, and many people are concerned about this. That is why we decided the time was right to bring this bill forward.

**Assemblywoman Tolles:**
It seems to me that what has been in place is an administrative process. When we start to move into language such as "clear and convincing evidence" and "due process," if there is criminal activity, it would go into court and that would have all of those applied. If it is an administrative process, it seems appropriate that it would stay at the current level to be dealt with as an administrative personnel issue. Can you speak to that?

**Judge Higgins:**
Both activities can come before the Commission. There was a judge in Las Vegas who was removed from the bench and was accused of mortgage fraud and was prosecuted for that. I think he went to prison. He still could be disciplined. If you are appearing in front of the Commission and have potential criminal liability for your conduct, I would assume the person would want some of it to be done before the other so you would not have to make

admissions. Both kinds of activities can come before the Commission. Judges have been disciplined for having a DUI, and that comes before the Commission. They have been dealt with and served their DUI sentence, but they still are disciplined following the criminal case.

**Assemblywoman Tolles:**
By asking that question, I meant putting clear and convincing evidence standards for administrative types of disciplinary action. I think that is more where my question is coming from.

**Judge Higgins:**
Several sections currently refer to "clearly convincing evidence." It has just been reworded to "clear and convincing" to make it clear that is the evidentiary standard. It currently refers to that. In some of the other sections it is added. That is true. I am sure there will be opposition to that, but we were trying to make it clear what the evidentiary standard is at each point of the proceeding.

**Judge Zimmerman:**
I think when you are talking about possibly disciplining judges or removing judges from office, their due process rights should be in place and not kick in at the level where you are appealing to the Supreme Court of Nevada. Due process should apply from the moment the formal statement of charges is filed. I want to caution or instruct that a complaint comes from an individual; it can be a citizen, it can be a lawyer, and it can be anybody that can file a complaint before the Commission. Once the Commission votes to proceed with a matter with the judge, they file what is called a "formal statement of charges." The formal statement of charges is when the matter becomes public and when the judge is formally charged. I wanted to make that important distinction.

**Assemblyman Watts:**
I see the current language speaks of a "reasonable probability . . . could clearly and convincingly," and this is changing it to "supported by clear and convincing evidence." Again, I am still learning about the variety of evidentiary standards in the law. It seems to me a little bit contradictory to have a reasonable probability supported by clear and convincing evidence. I have seen some things that indicate those are two separate standards. I am wondering why, in your proposal, you did not just eliminate "reasonable probability" and say "based on a finding that there is clear and convincing evidence."

**Judge Higgins:**
Well, there is a story about the elephant designed by a committee, right? A committee worked on this bill together, so it does not satisfy everybody's drafting needs. I think the intent was not that they use the same level of evidence at the investigative phase that they would at the conviction stage. That is where reasonable probability comes in, but whatever evidence they rely on is clear and convincing. If you are using a scale, "preponderance of the evidence" is just slightly tipped. "Beyond a reasonable doubt" would be tipped all the way; I cannot have any doubt in my mind. "Clear and convincing" is between that; it is more than just slight evidence, but it does not have to be beyond a reasonable doubt. There is case law

that explains what "clear and convincing" is. If there was a question, a judge could go to a Supreme Court of Nevada decision that explains what clear and convincing is if they were going to appeal it. I think that was the intent, to have an evidentiary standard but not force them to have the same decision level at the investigative phase and the conviction phase.

**Assemblywoman Torres:**
I have a two-part question. To clarify for my own understanding, if a judge were to commit a criminal act, he or she would go through the normal court process and also go through the Commission, correct?

**Judge Higgins:**
Correct.

**Assemblywoman Torres:**
I am wondering how this piece of legislation would compare with how other employees of the state have to go through their own employer. For example, as an educator, if I have a DUI, I get reprimanded through my occupation as well. I am wondering how this piece of legislation compares to our expectations of other employees of the state.

**Judge Higgins:**
I think it would bring it more in line with how it is applied. *Nevada Revised Statutes* Chapter 622A applies to all Title 54 boards. That includes almost everybody except a few commissions. That sets forth these procedures. It would be more parallel and similar to what happens to everybody else. If you are convicted of a crime by proof beyond a reasonable doubt, it is pretty much a given that you are going to be disciplined because boards' and commissions' standards are not as high. They can use the evidence of your conviction. Essentially, you do not have much defense to the discipline at that point because you have already been proven guilty. My experience is that most judges who have had a DUI, for example, just admit they had a DUI and throw themselves at the mercy of the Commission and hopefully have mended their ways. I think it brings it closer to how everybody else is treated.

**Assemblywoman Torres:**
I am not sure I see how that is different than what we do at my profession because if I were to have a DUI and there is a conviction, the district is going to see that. They have access to that. I do not understand what the difference would be.

**Judge Higgins:**
As a judge, you can be removed from office for habitual intemperance. You would lose your elected position. I would assume, as a teacher, while your employer might discipline you, I am not sure the State Board of Education would. Maybe that is the distinction. Here, the Commission has the authority to order us to go to treatment, suspend us, and even remove us from office. Apparently, habitual intemperance was a problem years ago, and it is written right into all of the proceedings that you can be removed from office. You would lose that

position. I do not believe the State Board of Education would revoke your license for a DUI, but I am not familiar enough with that.

**Judge Glasson:**
Oftentimes, it proceeds at the same time. I was called once to sit in a case in Clark County with regard to a judge who was accused of battery that constitutes domestic violence. At the very same time, the judge was up on those same charges before the Commission of Judicial Discipline. It is not always the "chicken and the egg." Sometimes it is happening at the same time.

**Chairman Yeager:**
Going to the amendment in section 2, subsection 4, some of the language says that "Any procedural rules adopted by the Commission . . . must provide due process," and then it says, "including, but not limited to," and provides a few different areas where the due process is specified. I wondered, with the language "including, but not limited to," are there some topic areas you have not enumerated in here where you feel as though there is not due process in the rules that have been promulgated by the Commission? I know sometimes they say "including, but not limited to," because they do not want to miss something in an exhaustive list. Does this list lay out what the current concerns are, or are there others that are not included in the list?

**Judge Zimmerman:**
These are the most pressing issues of due process the judges feel need to be addressed to make the process fairer. I just want to emphasize that as a judiciary association, we are not asking for more than average citizens receives when they litigate a matter in any court in the state of Nevada; we are asking for the same due process protections. It is problematic that under the current procedural rules of the Commission, they have the sole authority to determine where the venue lies. They decide venue based upon their own convenience and for no other reason. In any other case, venue would be decided based on where the conduct occurred or where the party resided. We believe venue should be the jurisdiction where the judge sits.

Judge Higgins previously went over the issue of never having prehearing motions determined until the minute before the hearing starts. These motions could include excluding witnesses, excluding evidence, adding witnesses, or adding evidence. How do you prepare for trial if you do not know what evidence you will be allowed to present? It would be no burden upon the Commission to hear those motions and issue a decision ten judicial days before the hearing. That would make the process fairer to the judges. I know we like to say "including, but not limited to" in case we forget something, but these are the big issues we think would make the process fairer.

**Chairman Yeager:**
With respect to venue, is that typically always in Carson City for these proceedings? My understanding is that is where the Commission on Judicial Discipline is housed. I wonder if any of you are aware of a venue being located outside of Carson City for the hearings?

**Judge Zimmerman:**
Most of the time, the southern judges' hearings are scheduled for Carson City. Most recently, maybe based upon numerous complaints, they have scheduled a couple of hearings in Las Vegas. It is still their decision where to schedule a hearing. It would be important to us to have venue determined by where the judge resides. The short answer is yes, sometimes the hearings occur in Las Vegas and sometimes they occur up north. I do not believe there is any rhyme or reason to how that is determined.

**Assemblywoman Hansen:**
Just to clarify, for several sections we were talking about the "clearly and convincingly" language, and then "supported by clear and convincing evidence" is the new language. Is it the same evidentiary standard?

**Judge Higgins:**
Clear and convincing evidence is an evidentiary standard. I think that was intended by the way it was worded. It is not necessarily the same. I think this would give us a reason, if there were a dispute, we could tell the Supreme Court based upon your history of litigating what clear and convincing means, we would have case law one way or another. I think it is the same standard, although I am not sure the opponents of the bill will agree to that. It is just a clearer standard.

**Chairman Yeager:**
I will open it up for additional testimony in support of A.B. 20. [There was none.] I will now take opposition testimony.

**Paul C. Deyhle, General Counsel and Executive Director, Commission on Judicial Discipline:**
I have with me today the full Commission, which comprises district court judges appointed by the Supreme Court of Nevada, attorneys appointed by the State Bar of Nevada Board of Governors, and lay members appointed by the Governor of this state. They are all in opposition to this bill. Gary Vause is our chairman. He very much wanted to come today, but his wife had a medical procedure, so he did prepare a letter that was submitted and uploaded to Nevada Electronic Legislative Information System (Exhibit M). In addition to that, I have also submitted the letter I sent to each of the Committee members in January (Exhibit N), as well as two cases and Commission orders that were filed in public cases that discuss the constitutionality of some of the issues that were discussed today.

A picture has been painted today that a certain group of judges in this state do not receive due process. That is simply inaccurate. I am going to do my best to scratch the surface, because underneath the surface of those allegations are the facts.

The current statutes and procedural rules reflect a number of competing interests: the interests of the public, the interests of judges, and many other interests. That is where we are today. Just ten years ago, this Legislature enacted sweeping changes to the Commission's statutes and rules at the recommendation of the Article 6 Commission. The Article 6

Commission was formed by the Supreme Court of Nevada in 2006. The goals of that commission were to increase transparency of the Commission on Judicial Discipline, to improve its effectiveness, the fair treatment of judges—which certainly would include due process issues—and the timeliness of issuing decisions. The participants of this Article 6 Commission were experts from all over the country: law professors, judges, attorneys, and representatives from the Nevada Press Association and the American Civil Liberties Union of Nevada. The Commission on Judicial Discipline at that time fully participated in this effort. This took two years, where our rules and our statutes were under a microscope. As a result of that work, there was a report written. That report formed the basis in the 2009 Session for sweeping changes to both the statutes and the rules. Those were enacted just ten years ago.

I have heard testimony today that none of these issues were addressed. That is not true. All of these issues were addressed just ten years ago. I would respectfully request that if this Committee is seriously considering entertaining any of these requests, they do it the right way like they did ten years ago and convene an Article 6 Commission—which is named Article 6 after the section of the *Nevada Constitution* that deals with the judiciary—and get the input from all of these interests: the public, the judges, the lawyers, et cetera.

This is extremely important because you have only heard one side of the story here today from the proponents of A.B. 20. You have heard there is this rampant violation of their due process rights. That is, as I said, simply not the case. These changes from the 2009 Session reflect the national standards for judicial conduct and are in conformity with the judicial discipline commissions throughout the United States. This is nothing new here in this state. The structures may be different, but the rules and the laws that govern this Commission are followed around the country.

I will briefly go into the analysis of the bill. I know they filed an amendment to the bill. I can tell you, with all due respect, the commissioners unequivocally viewed that amendment as just as unreasonable as the original bill. I will tell you why: it has no regard for the process that has developed over 40 to 50 years, not just in this state, but across the country. It has no regard for the public or the taxpayer. Section 1 of the bill grants advice authority to limited jurisdiction judges only for judicial appointments for the Commission. I believe this is highly questionable on constitutional grounds. The Commission does not really have a dog in that fight. It does not directly affect the Commission, but I would think the Supreme Court of Nevada would have a problem with that because it is the appointing authority under the *Nevada Constitution*. The *Nevada Constitution* makes no mention of anyone having advice authority over their decisions, no more than the Governor or the State Bar of Nevada. I believe the Governor and the Board of Governors of the State Bar of Nevada are more than capable of appointing qualified individuals to these commissions.

This is just one group of judges within this judiciary, which is made up of over 600 judges, and I do not see any representation from the Nevada District Judges Association, the Supreme Court of Nevada, or the Nevada Court of Appeals. It is just one group of judges within Nevada that want to provide advice to the Supreme Court. I do not want to speak on

behalf of the Nevada Supreme Court, but I think they would have a big problem with this. It also sets a bad precedent as other groups will petition the Legislature for advice authority to influence appointing authorities to select members as well—not just this commission, but boards and commissions at every level.

Section 2 of this bill deletes the application of NRS and the procedural rules of the Commission. Now, I know the amendment to this bill took away the deletion of the application of the NRS, but it still deletes the procedural rules of the Commission. What a lot of people, even judges, do not know is that the procedural rules of the Commission were drafted and adopted by the Supreme Court of Nevada. They formed part of the Supreme Court's rules for decades. The Commission did not draft these rules; they are our rules now based upon constitutional amendments over the last two decades. We did not draft the actual rules that are being challenged by the proponents of this bill. The rules that they are attacking were adopted by the Supreme Court. I think we can all agree that the Supreme Court knows a thing or two about constitutionality.

The *Nevada Constitution* specifically and expressly empowers the Commission to adopt its own procedural rules. This is extremely important. We are not a district court. The proponents of this bill try to equate the Commission with any other court in this state. It is not true. We are a court of judicial performance. It is completely unique. It is not a district court. The same rules do not apply. That is why the *Nevada Constitution* itself empowers the Commission to draft its own procedural rules. We adopted those rules after a constitutional amendment in 2003. The same rules exist now, for the most part, in the statute as they existed ten years ago after this two-year effort to review all of these commissions and rules. These issues have been vetted by experts all over the country—by lawyers, judges, the public, and all these organizations. It is not true that these issues are the first time this Committee is hearing them.

The other part of section 2 is that the application of the NRCP applies to all stages. They did change that in the amendment, but as I said, they are requiring the procedural rules be simply negated, which I find constitutionally questionable. Section 2 also requires that the Commission's procedural rules provide due process to judges. This is not necessary. The *Nevada Constitution*, NRS Chapter 1, the procedural rules of the Commission, and Nevada case law already give all judges in this state due process rights. This is not necessary.

Section 3 revises the standard of proof required in judicial discipline proceedings. The current standard of proof is consistent with the standards of proof found in all jurisdictions in this country. Their change to this is a radical departure to what is customary and normal in all jurisdictions in this country. As I indicated in my letter to each of you in January, it does not make sense. To everybody that I speak to about this issue, it is contradictory. It requires the Commission to prove its case before a trial, before examining witnesses, and before conducting a trial on the merits. It just does not make any sense.

It also eliminates the Commission's ability to consider all evidence available for introduction at a formal hearing. They deleted this portion of the statute. All the Commission will be able

to do in this case is focus on the investigation report—nothing else, no other evidence. The investigation report is drafted by one individual. It is an independent contractor hired by the Commission to do an investigation of the facts. We would not be able to look at the transcript. We could not look at other evidence that may come in after the investigation but before the decision is made to file a formal statement of charges. We just have to focus on the investigation report, which could have some issues; for example, if the factual evidence does not support the conclusions in the report or if there is new evidence that comes to the attention of the Commission after the investigation. The Commission has a right to follow up with the judge and ask the judge to respond to that evidence. It really handcuffs the Commission in doing its job, which is to get to the facts. A thorough investigation is what is needed. That actually provides more due process to the judges because we are trying to get it right. We have judges' reputations and livelihoods on the line. We have to get it right. This is an investigation. They are trying to impede and obstruct our investigation. I do not know a lot of judges, other than the proponents of this bill, who are okay with it.

Section 5 of the bill refers to not compelling a judge to respond to a complaint during the investigative phase of a judicial discipline proceeding. Again, I will be standing tall next week in Las Vegas before the en banc Supreme Court on an issue of whether or not the Commission can ask judges written questions during its investigative phase. This change in section 5 does not have anything to do with that particular question. The current statute requires a judge to respond to a complaint. They are looking to change that. They do not want to respond to the complaint; they want an option to respond to the complaint. Again, I have to stress that this is an investigation.

There are only two phases of the Commission process: the investigative phase and the adjudicative stage. The investigative stage starts with the filing of a complaint by a member of the public, and it ends upon the filing of the formal statement of charges. Everything before the formal statement of charges is an investigation. The adjudicative phase of judicial discipline proceedings starts at the filing of the formal statement of charges. This is the complaint the judges are talking about. This is where their adjudicative and due process rights start. This is in accordance with not only the Nevada Supreme Court, but the United States Supreme Court. This is clear and settled law.

This change, again, is a radical departure from what other jurisdictions have done and do across this country. The sole issue on Tuesday is whether we can ask written questions during an investigation. I am not going to belabor that point here, but I am going to say, again, this is an investigation. If investigative bodies cannot ask questions during an investigation, I think we should just pack it all up and go home. I do not know what the purpose of an investigation is if these investigating bodies—not just the Commission, but any investigating body—cannot get to the truth and the facts. That is what I will be arguing on behalf of the Commission next week before the Supreme Court of Nevada. As I indicated before, the Commission's statutes and the procedural rules being challenged by the proponents here are the same that existed in 2009 following the implementation of the Article 6 Commission report.

We have heard a lot of testimony today that the current judicial discipline process does not afford due process for judges. As I indicate in my opposition outline (Exhibit O), judges have more due process rights than any litigant in any court in this country. Eighteen to twenty-four months prior to the filing of a public complaint, there is a review of the complaint and there is an investigation that commences. The Commission holds three meetings. They review the complaint and there is an investigation. They come together again and review the investigation report and all other evidence. Then they vote again for the judge to respond. They have to respond, by law, to the complaint. They have the opportunity to clarify anything they want. They already know what the complaint is. Please do not get confused by the definition of complaint. Complaint is defined by statute as is the formal statement of charges. A complaint is one filed by the public, and the complaint by the Commission is one filed by the Commission. They are more than knowledgeable of the allegations against them early on in the process. If the Commission decides to investigate, they send an investigator out, the judge sees the complaint, participates in an interview, and can provide any documents or arguments to that investigator that the Commission will review and consider. The Commission also goes out and speaks with all other witnesses that are relevant to this allegation—not just the complainant, but everyone else—and considers all of that evidence, not just in the investigation report, but everything else, including videos, court documents, etc. The Commission meets again after they receive the judge's response and answers to questions and they vote again. In the response process, judges can provide legal arguments. They can correct mistakes. They may have misstated something in the interview because they are nervous or they forgot something. They can address new evidence the Commission has received. It is a perfect opportunity for judges to correct the record and reconcile any inconsistencies or ambiguities in witness testimony or even their own testimony. They can even submit legal arguments to the Commission. The Commission will consider all of that, every bit of it, before they decide to file a formal complaint against the judge.

When I hear they do not get any due process rights, it is simply not true. Look at the typical litigant in any court. They do not get advance notice of a complaint being filed almost a year and a half to two years beforehand. They do not have an opportunity to come in and talk to an investigator, have an interview, and submit legal arguments. They do not have an opportunity to petition the Supreme Court of Nevada on perceived due process violations. They do not have any of those rights. Yet a year and a half to two years prior to the decision of the Commission to file a formal complaint, all of this is taking place. The commissioners behind me and I cannot imagine how anybody can argue there is no due process rights for judges. It is simply not true.

With respect to the argument that the Commission blatantly violates due process rights, two years ago, I testified before this Committee on Assembly Bill 28 of the 2017 Session, which specifically expanded due process rights for this particular group of judges: limited jurisdiction judges. I drafted the bill. I testified before the Judicial Council. I worked with the Administrative Office of the Courts prior to the bill being introduced, and I testified before the Assembly and Senate Judiciary Committees. This bill was for their benefit.

It expanded their rights. The Commission is not out to get these judges. That is simply not the case.

As you know, discipline is imposed against all judges. We have 600 judges in this state or more—district court judges, hearing masters, Nevada Court of Appeals judges, and Supreme Court justices. Our decisions are all unanimous decisions. There are seven members on our Commission. There are two judges, two attorneys, and three lay members. Two of their own colleagues have decided, based upon the facts, they have committed misconduct. As far as the discipline that was imposed, these two judges agreed the discipline was appropriate under the circumstances. This is not a case of lay members and attorneys ganging up on the judges. That is not happening. These are unanimous decisions. I think that is very telling. Their own colleagues are finding them to be in violation of the code and the law and disciplining them accordingly. There is simply no consensus regarding the lack of due process protections among the Nevada judiciary.

I attached, as part of one of my documents, a public order for the Commission [pages 24-34, (Exhibit O)]. I am not going to discuss that order, I just want you to know who signed that order. That was Judge Thomas Armstrong. He was appointed by the Nevada Supreme Court. He is an alternate commissioner, and he was the past president of NJLJ, just four months ago. That order debunks all of the constitutional arguments you heard here today. This is from a municipal judge and justice of the peace to his own colleagues. The other order [pages 13-22, (Exhibit O)] addresses the arguments you have heard today that we need more than one keeper of judicial discipline because it is unfair. If you look at the highlighted portions, that is the law. This is settled law by the United States Supreme Court and the Nevada Supreme Court. They have already ruled on these issues. There is absolutely no evidence that a one-tier or a two-tier system is any more or less fair. In fact, the overwhelming majority of jurisdictions in this country have a one-tier system as we have here today. There is no evidence that our system is less fair or doles out less due process protections. There is simply no evidence of it. This was born out by a Stanford study not too long ago that said the same thing. They did a study. It is the only study of its kind. This hypothesis was not proven, but one thing in that study that was proven is that if there is a two-tier system, it is going to cost a lot more money, and you are going to get the same results—more money and more time.

I wanted to counter what was testified toward the end about venue. We do not have a policy of bringing judges up here from Las Vegas or vice versa. Nine times out of ten if it is a southern judge, we go down to Las Vegas. The only time we have brought a judge up here was for a one-day hearing when we could not have the trial within a few months. We have seven commissioners. It is literally like herding cats to try to get them together. It is very difficult. They are all professionals, judges, and attorneys. If it is a one-day trial and we have to wait another three months just to have the trial, I think having these done quickly based upon the public's need for these cases to go forward in a timely and efficient matter overweighs those concerns. There is no law they can point to that says it is a violation of due process because they may have to get on a plane for one day and go back home the next day. There is case law on this by the Supreme Court of Nevada and other jurisdictions.

In conclusion, I would like to stress that if a jurisdiction is to have a judicial system that has the confidence of its citizens, it must have a judicial system that is effective. From myself and all of these commissioners here today, we have utmost respect for judges. They do a noble job for the citizens of this state, and our mission is to protect judges.

**Chairman Yeager:**
You mentioned a Nevada Supreme Court argument next Tuesday. Is that going to be here in Carson City and do you know what time that will be?

**Paul Deyhle:**
That is in Las Vegas at 10 a.m.

**Chairman Yeager:**
Just one thing I wanted to put on the record so we are clear: all the bills from the Judicial Branch come through the Supreme Court of Nevada for submission to the Legislative Counsel Bureau. That is in the rules of the Legislative Counsel Bureau. If you look at A.B. 20, it does say "On behalf of the Nevada Supreme Court." That is the process that is set up in statute. In case anyone was wondering, as we have heard, there is at least one and maybe more cases pending in front of the Supreme Court of Nevada on some of these issues. Because of that, the Supreme Court of Nevada is not able to be here to express opinions on this matter due to ongoing litigation. I just wanted to make that clear for the record; under their rules, they are not going to be able to weigh in on this bill given the pending litigation. I will now open it up to questions from Committee members for Mr. Deyhle.

**Assemblywoman Cohen:**
Is there anything in the amendment that is acceptable to you?

**Paul Deyhle:**
No.

**Chairman Yeager:**
Do we have any additional testimony in opposition to A.B. 20?

**Jerome M. Polaha, Judge, Second Judicial District Court:**
I have been on the Commission since 2002. I have had a lot of hearings and a lot of experience with the Commission. The question was asked: Is there anything the Commission agrees to in this proposed bill? It is unnecessary. As far as the due process that has been argued here, it is afforded. Think about this: there are seven people on the Commission. We have an investigator. As far as the request for a two-tier system, to be able to make that work, we are going to have to split the panel. However, the law says four constitute a quorum for all reasons except for handing out discipline, for which I need five. Right there we have a problem that has to be addressed. The obvious way to address it is to expand the Commission, spend more money. Consequentially, there will be more delay.

The other aspect of the law which is a big selling point for them is that the investigation be founded on clear and convincing evidence rather than a reasonable possibility that there could be clear and convincing evidence after a complete hearing. Think about that. You have an investigator. That would be like police officers finding proof beyond a reasonable doubt before they took their case to the justice court. The court could say, "Well, there is obviously, by law, a requirement that proof beyond a reasonable doubt has to be established by the investigator. I got an investigation report; there had been proof beyond a reasonable doubt. What am I going to do? Pass it on to district court." Then district court gets it and says, "Why do we need a jury? We already have proof beyond a reasonable doubt, so my job is to punish you." That is the effect of what they are proposing, and it will not work. It is not due process.

**Chairman Yeager:**
Is there anyone else in opposition? [There was no one.] Is there anyone in neutral? [There was no one.] I will invite our presenters back to the table for any concluding remarks.

**Judge Higgins:**
Sitting here, I was starting to think I had drawn the short straw by agreeing to come testify today, but I did because I was available and I think this is an important bill. I think I need to disagree with my friend Judge Polaha. I think it is necessary to have some of these due process rights written into the statute because each of these touches a point where, in the past, the Commission has denied these issues. Prehearing motions are not being decided before the hearing. They are not being ruled on soon enough in advance for somebody to craft his or her defense. I think it is only fundamentally fair that the judges get all the evidence that is going to be relied upon by the Commission when they make their decisions and that everybody has a chance to present their side of the case. I have been told of cases in Las Vegas where the prosecution says they only need two hours, so the Commission says the defense only gets two hours even though they have a lot more than that. They are limited, then, by what the prosecution puts on. Each of those is in response to something that has been pending and that we think needs to be resolved.

I was trying to figure out how there are 600 judges in the state. I guess there are a lot of hearing masters and commissioners, but our association represents 95 judges. There are approximately 100 other elected district court judges and court of appeals judges, so I think we represent about one half of the elected judges in this state. Frankly, we do not agree on everything. Getting 95 judges to agree to go to lunch is difficult enough. Some people are big proponents of this bill. To some people, it does not bother them so much. I do not think I am a member of a minority radical group of judges that is seeking to change the rules. Many states have two-tiered systems. It only seems fair to me that whatever body decides what you are going to be disciplined for has not already been in charge of the investigation and decided what questions to ask and where the investigation goes. Those ought to be changed. I do not think we ever said there is rampant violation of every due process right. I think our testimony was that there are some things we think could be improved.

I might have to disagree that having to respond to an investigator's questions or be sanctioned for failure to cooperate with the Commission, I am not quite sure how that is a due process right afforded to the judges. We have to answer those questions or we are disciplined and sanctioned for failure to do so. I had hoped to be able to work on this bill and come to a conclusion. I was actually on the Article 6 Commission and spent hours and hours in hearings on the subcommittee I was on. I am aware there were a lot of things that did not get addressed. I do not think just because something is written one way it means we cannot change it ten years later. I think there is room for improvement. I do not think we are being radical; we are just asking for some basic fundamental fairness. I think we are still willing to sit down and meet with the Commission if they would like to. It does not sound as though there is a comma or a semicolon in this bill they agree with. We are still willing to sit down with them and discuss it if possible.

**Judge Tatro:**
When I started my testimony, I pointed out that we think the Commission does great work. They need to be there. They are very important. I have never once questioned if they made a right decision. It is just these issues that are our concern. Ten years ago, the Article 6 Commission happened, but things have changed. It is just like the NRCP recently being changed. Everything gets changed because things change. Time goes on, and they have to change.

There was one thing Mr. Deyhle said that I need to respond to. He indicated that Judge Armstrong, when he served on the Commission, signed that order. I am not saying whether he opposes or supports this bill, but when he was president, the way it works is we have a committee and then the whole body of judges decides what bills we are going to take forward to the council, and ultimately to this body. He was the president. It was a unanimous vote to bring this bill forward.

**Judge Zimmerman:**
I want to clarify and disagree with Mr. Deyhle on some of his remarks. None of the judges are saying that if there is a complaint made against them it should not be investigated and we should not be questioned. Our objection is to answering interrogatories that we have to swear under oath that could be used against us in the future if the Commission chooses to proceed with the formal statement of charges. If you do not answer the interrogatories, they are deemed admitted and you are slapped with an additional charge of failure to cooperate. The purpose of this is not that judges do not want to cooperate in investigations—they certainly should—it is the way the interrogatories are presented before formal statement of charges are filed that we object to.

I thought it was interesting that Mr. Deyhle testified that we have more due process rights than anybody else. However, he failed to address any of our specific concerns about pretrial motions being ruled upon, how much time is allocated to the defense to present their case, interference with the witnesses the defense wants to present, and standing on venue. He glossed over all of those and did not answer anything about those.

I also want to point out that I think it is very important that the investigative and prosecutorial functions are separate. When they are not separate, the outcome has always been predetermined. I am sure, if you reviewed the decisions of the Commission, they are always unanimous because they have been involved in the investigative part and heard that evidence and then hear the trial part. I also thought it was interesting to note that Mr. Deyhle said there are no district court judges here in favor of the bill. Well, there are no district court judges here in opposition either, but I can tell you from my own personal experience working in the Regional Justice Center, I am stopped constantly and encouraged. I have been encouraged by Supreme Court justices. I have been encouraged by district court judges. I have been told repeatedly that this is crazy to bring this bill before the Legislature because now I have made myself a target by the Commission. I do not believe that is true, but I have had that said to me repeatedly. For him to say this is a small minority of judges that want this, I have received encouragement from judges from all over the state in proceeding with this bill, so it is just not true.

**Chairman Yeager:**
I will now close the hearing on A.B. 20. I will hand this meeting over to Vice Chairwoman Cohen as I am going to present the next bill on the agenda.

[Assemblywoman Cohen assumed the Chair.]

**Vice Chairwoman Cohen:**
I will open the hearing on Assembly Bill 423.

**Assembly Bill 423: Revises provisions relating to certain attempt crimes. (BDR 15-1117)**

**Assemblyman Steve Yeager, Assembly District No. 9:**
It is my honor to present Assembly Bill 423 to you this morning. This bill allows certain people to petition the court for a reduction of charge once they finish their sentence. This bill only applies to crimes known as "wobblers," which is kind of a funny name. A wobbler means that when the person is sentenced for a crime, the judge can either adjudicate the person for a felony or a gross misdemeanor. Essentially, the crime wobbles between a felony and a gross misdemeanor. I think that is where the name came from, but I am not sure. Those are the limited circumstances where this bill would apply. The only crimes that we are talking about where A.B. 423 would apply would be an attempted crime of a category C, D, or E felony. If you plead guilty to or are found guilty of attempting to commit one of those categories, those are the wobbler offenses we are talking about where the judge makes the determination.

The language of the bill itself is pretty straightforward. What it says is that if a judge decides to give the offender a felony at the time of sentencing, the offender would be able to come back to the court after the completion of the sentence and petition the court to modify that felony down to a gross misdemeanor. This would only apply in circumstances where: (1) the

offender has a wobbler offense, and (2) the judge actually gives the offender the felony rather than the gross misdemeanor.

The procedure in the bill is that notice must be given to the prosecuting attorney, and then the prosecuting attorney has 30 days to respond. If the prosecuting attorney either agrees with the request or does not oppose it, a judge would be allowed to simply grant that motion and reduce the charge without a hearing. If the prosecuting attorney opposes the motion, the court must hold a hearing. The court would have total discretion in terms of what evidence to consider at such a hearing. I anticipate that a court would look at how the offender did on probation or in prison, how the offender is doing in life currently when they file the motion—including whether they are employed, whether they are going to school—the offender's complete criminal history, and obviously any input from the victim of the crime and the district attorney about the crime itself, and then make a decision about what to do. If the judge denies the motion, the petitioner cannot appeal, so that would be the last stop.

Even if a judge denies the motion to reduce the charge, the offender would still be eligible to seal his or her records after the waiting period that is in statute. Right now, that is five years for a category D felony and two years for a category E felony. Keep in mind that the record-sealing process, as we have heard, is burdensome and can be expensive. This would be a better procedure where a judge could, on his or her own, reduce it down from a felony to a gross misdemeanor.

In the real world, I anticipate these would only be granted when the petitioner has shown extraordinary success on probation. Honestly, I do not think a judge would reduce a charge after someone was given a prison sentence because that would be a reflection of the seriousness of the crime in the first place. I think we are talking about situations where the offender did really, really well on probation. I trust our judges to use their discretion appropriately when deciding these petitions. We are not talking about a lot of cases, so I do not think this is going to clog the court system.

Finally, under the terms of the bill, this is not retroactive. If we were to enact this legislation, it would only apply to offenses committed on or after October 1, 2019. People who now have felonies on their records as a result of wobblers would not be able to go back now under this bill. That should limit the amount of petitions that would be filed because it would only be on a future basis. With that being said, I am open to any questions.

**Assemblywoman Peters:**
In this language, we talk about the petition having to go to the original prosecuting attorney. What if that attorney is retired or otherwise unavailable? Who would be a default?

**Assemblyman Yeager:**
There are a couple components here. In section 1, subsection 3, it talks about petitioning the court of original jurisdiction. Essentially, that means it would have to go back to the same court. Now, judges shuffle around all the time. What would happen is that it stays in the department it started in. If there is a new judge in that department, it would stay there. With

respect to the prosecuting attorney, there may very well be a different prosecuting attorney. That prosecuting attorney may have retired or moved on. I would just expect somebody from the district attorney's office to comment, so it would not necessarily preclude someone from asking if there was a shuffling of the case. The reason we have that language about the original jurisdiction is that we do not want someone to go in front of one judge and get the felony and then try to petition another judge and sort of "forum shop" to get a reduction. It would have to be the same judge who would make the determination unless there was some kind of switch in the departments.

**Assemblywoman Peters:**
I also wonder about whether there is any victim input in this. My question comes about as a result of Marsy's Law.

**Assemblyman Yeager:**
It is not specifically listed in here. I would certainly be willing to include that. We left the proceeding pretty open-ended in terms of what evidence a judge would want to hear, but I would think, under Marsy's Law, a victim would have to be noticed and, at least, have an opportunity to come and weigh in. To the extent that is not the case or it is unclear, I would be happy to add that to the language.

**Vice Chairwoman Cohen:**
I will open it up for testimony in support.

**John J. Piro, Deputy Public Defender, Legislative Liaison, Clark County Public Defender's Office:**
There are often times when we take a person to sentencing on a wobbler. Other states do not necessarily have this mechanism, so when we describe to attorneys in other jurisdictions that a person will not necessarily know whether they are getting a felony or a gross misdemeanor prior to sentencing, they think we are kind of crazy in doing that. Cases can certainly be negotiated to allow us the opportunity to argue for a gross misdemeanor. Sometimes we lose that. Then you have a client who goes on to successfully complete probation, do all of these things, and really wants to get a good hold on their life, but there is that felony on their record. This would be a carrot at the end to allow them to apply for a gross misdemeanor at that time.

**Kendra G. Bertschy, Deputy Public Defender, Washoe County Public Defender's Office:**
I believe this really helps clarify the wobbler provisions. More importantly, it provides that carrot to ensure our clients are really working toward being successful. It allows them the opportunity to have that felony removed from their record so they are able to become better members of our society.

**Vice Chairwoman Cohen:**
Is there any more support? [There was none.] We will move on to opposition.

**John T. Jones, Jr., Chief Deputy District Attorney, Clark County District Attorney's Office; and representing Nevada District Attorneys Association:**

We are in opposition to A.B 423 as it is currently written. I do not have an amendment yet, but I did have an opportunity to speak with Chairman Yeager yesterday about our opposition. I appreciate his taking the time to meet with me on such short notice. Generally, a judge loses jurisdiction to modify a sentence once a judgment of conviction is filed unless the defendant can show a material misrepresentation of fact or some sort of clerical error. District attorneys, in general, do not want to set the precedent of opening up judgments of conviction once the sentence has been rendered.

That being said, I think we are open to some changes in this bill that would achieve the same result but do it in a slightly different way. For example, our position is that this would be better done at sentencing. In fact, in Clark County, what often happens on wobbler cases is that the judge will ask the state if we have an objection to allowing for a drop-down to a gross misdemeanor. When I say "drop-down," I mean the judge would adjudicate the defendant of a felony, and if they complete probation, the judge would then vacate the felony conviction and enter a gross misdemeanor at the end. The reason why the district attorney stipulation is important is because that is how we get around the fact that the judge loses jurisdiction to modify the judgment of conviction after the sentence is rendered.

I think it is better done at sentencing for several reasons. First, the victim will have finality at sentence. In cases where it is a wobbler, the victim will know the judge has, at least, given the defendant an opportunity to earn a reduction to a gross misdemeanor and has given the defendant a road map of how to get there. The judge can say, "If you stay out of trouble," or, "If you comply with terms X, Y, and Z, and if you pay restitution, I will allow you to earn a reduction to a gross misdemeanor." The victim will know at sentencing what is going to happen ultimately with the case instead of waiting for a period of time to potentially receive a notice of this new hearing set out in the current version of the bill in which we would have to basically relitigate sentencing and instances where the victim has a problem with the reduction.

Further, this bill should not apply in situations where the parties have stipulated to a particular sentence. In other words, I, as a deputy district attorney, have often offered a negotiation of a wobbler offense to a defendant, but as part of that negotiation, the defendant is required to stipulate to felony treatment. This bill does not speak to those instances. I think the way it is currently read, they could apply or make a motion to ask for a reduction despite the agreement to the contrary.

Finally, this should not apply to people who have prior felony or gross misdemeanor convictions or who have already received the benefit of this bill in the past. I think there is an avenue for us to get to the ultimate goal of allowing judges to do this, but we think it should be at the front end where the victim has had input at sentencing and the judge specifically spells out a road map in the judgment of conviction to how a defendant could earn that gross misdemeanor reduction.

**Vice Chairwoman Cohen:**
Is there anyone here in neutral? [There was no one.] I will invite Chairman Yeager back for concluding remarks.

**Assemblyman Yeager:**
I agree with Mr. Jones that the parties would be able to agree in a guilty plea agreement, which is essentially a contractual relationship, about someone getting a felony. I think, if that is important enough, they could put that in there to not have this bill apply. Other than that, I heard there is a willingness to continue working on this. I am committed to continuing to work with Mr. Jones to see if we can find a way to enact this provision which, I think, would apply in a very small number of cases but would be a huge benefit to an offender getting his or her life back on track.

**Vice Chairwoman Cohen:**
Thank you. [(Exhibit P) was submitted but not mentioned and will become part of the record.] I will close the hearing on A.B. 423.

Is there anyone here for public comment? [There was no one.] This meeting is adjourned [at 10:54 a.m.].

RESPECTFULLY SUBMITTED:

_____
Lucas Glanzmann
Committee Secretary

APPROVED BY:

_____
Assemblyman Steve Yeager, Chairman

DATE: _____

## EXHIBITS

Exhibit A is the Agenda.

Exhibit B is the Attendance Roster.

Exhibit C is a set of documents in support of Assembly Bill 285, submitted by Kaylyn Kardavani, representing Nevada Justice Association, and presented by George T. Bochanis, representing Nevada Justice Association.

Exhibit D is a written testimony dated March 25, 2019, written and presented by Dane A. Littlefield, President, Association of Defense Counsel of Nevada, in opposition to Assembly Bill 285.

Exhibit E is the current *Nevada Rules of Civil Procedure* Rule 35, submitted by Dane A. Littlefield, President, Association of Defense Counsel of Nevada.

Exhibit F is the former *Nevada Rules of Civil Procedure* Rule 35, submitted by Dane A. Littlefield, President, Association of Defense Counsel of Nevada.

Exhibit G is a Supreme Court of Nevada order, submitted by Dane A. Littlefield, President, Association of Defense Counsel of Nevada.

Exhibit H is a packet of written statements in opposition to Assembly Bill 285, from various members of the Association of Defense Counsel and submitted by Dane A. Littlefield.

Exhibit I is a copy of a Supreme Court of Nevada case, *Berkson v. LePome*, 126 Nev. 492 (2010), submitted by Dane A. Littlefield, President, Association of Defense Counsel of Nevada.

Exhibit J is a packet of letters in support of Assembly Bill 285.

Exhibit K is a proposed amendment to Assembly Bill 20, submitted by Nevada Judges of Limited Jurisdiction.

Exhibit L is a statement submitted by Justice Nancy M. Saitta, retired, in support of Assembly Bill 20.

Exhibit M is a letter dated March 25, 2019, to Chairman Yeager and members of the Assembly Committee on Judiciary, submitted by Gary Vause, Chairman, Nevada Commission on Judicial Discipline, in opposition to Assembly Bill 20.

Exhibit N is a letter dated January 3, 2019, to Chairman Yeager, submitted by Paul C. Deyhle, General Counsel and Executive Director, Nevada Commission on Judicial Discipline, in opposition to Assembly Bill 20.

Exhibit O is a set of documents in opposition to Assembly Bill 20, submitted by Paul C. Deyhle, General Counsel and Executive Director, Nevada Commission on Judicial Discipline.

Exhibit P is a letter dated March 26, 2019, to members of the Assembly Committee on Judiciary, submitted by Jim Hoffman, Legislative Committee, Nevada Attorneys for Criminal Justice, in support of Assembly Bill 423.

# EXHIBIT C

# MINUTES OF THE
# SENATE COMMITTEE ON JUDICIARY

## Eightieth Session
## May 6, 2019

The Senate Committee on Judiciary was called to order by Chair Nicole J. Cannizzaro at 8:21 a.m. on Monday, May 6, 2019, in Room 2135 of the Legislative Building, Carson City, Nevada. The meeting was videoconferenced to Room 4412E of the Grant Sawyer State Office Building, 555 East Washington Avenue, Las Vegas, Nevada. Exhibit A is the Agenda. Exhibit B is the Attendance Roster. All exhibits are available and on file in the Research Library of the Legislative Counsel Bureau.

**COMMITTEE MEMBERS PRESENT:**

Senator Nicole J. Cannizzaro, Chair
Senator Dallas Harris, Vice Chair
Senator James Ohrenschall
Senator Marilyn Dondero Loop
Senator Melanie Scheible
Senator Scott Hammond
Senator Ira Hansen
Senator Keith F. Pickard

**GUEST LEGISLATORS PRESENT:**

Assemblyman Jason Frierson, Assembly District No. 8
Assemblywoman Daniele Monroe-Moreno, Assembly District No. 1

**STAFF MEMBERS PRESENT:**

Patrick Guinan, Committee Policy Analyst
Nicolas Anthony, Committee Counsel
Jeanne Mortimer, Committee Secretary

**OTHERS PRESENT:**

Sandy Anderson, Nevada State Board of Massage Therapy
Bailey Bortolin, Washoe Legal Services
Graham Galloway, Nevada Justice Association
Alison Brasier, Nevada Justice Association

Christian Morris, Nevada Justice Association
Brad Johnson, Las Vegas Defense Lawyers
Marla McDade Williams, Reno-Sparks Indian Colony
Connor Cain, Nevada Association of Realtors; Nevada Bankers Association
Hawah Ahmad, Pyramid Lake Paiute Tribe
Chris Ferrari, Nevada Credit Union League
Robert Teuten
Edward Coleman
Christine Saunders, Progressive Leadership Alliance of Nevada
John J. Piro, Office of the Public Defender, Clark County; Office of the Public Defender, Washoe County

CHAIR CANNIZZARO:
The meeting is called to order and will begin with a presentation of Assembly Bill (A.B.) 248.

**ASSEMBLY BILL 248 (1st Reprint)**: Prohibits a settlement agreement from containing provisions that prohibit or restrict a party from disclosing certain information under certain circumstances. (BDR 2-1004)

ASSEMBLYMAN JASON FRIERSON (Assembly District No. 8):
I am here to present A.B. 248. This bill provides that under certain circumstances, settlement agreements are voidable. Settlement agreements are useful in civil litigation and help with timely settlement. Confidentiality provisions are often referred to as nondisclosure agreements (NDAs) within a NDAs settlement agreement.

Settlement agreements were created for reasonable business purposes; more recently, the NDA provision has been used by high-profile individuals accused of sexual assault to prevent the alleged victim from testifying in a criminal proceeding. The NDA provision protects serial abusers by preventing the details of a case from becoming public. This enables further abuse.

Most NDA provisions include a financial settlement between the accused and the accuser, barring the alleged victim from receiving a financial settlement and then talking about the allegations or revealing the amount of the settlement. The penalties for breaking the silence may be costly to an alleged victim, who may be forced to pay back monies he or she has received in a settlement agreement as well as legal fees for the adverse party.

Some advocates may be concerned that A.B. 248 would make it difficult for alleged victims to obtain settlements from their abusers and increase difficulty in criminally prosecuting sexual assault cases. In some instances, civil litigation may be the only recourse. This bill would create strong public policy to prohibit certain types of NDA provisions in settlement agreements; claims that involve vulnerable victims, felony behavior and other egregious conduct create an unfair justice system.

Assembly Bill 248 aims to create balance in the justice system. There needs to be balance for public disclosure and victim confidentiality. Settlement agreements that prohibit disclosure of sexual assault would be prohibited under this bill. Sex discrimination by an employer or landlord would be prohibited, as would retaliation by an employer or landlord concerning a person reporting sex discrimination. Under this bill, a court would be prohibited from entering an order that prohibits or restricts the disclosure of such factual information.

This bill prohibits the accused from shielding his or her identity. Settlement agreements would not prohibit the parties from disclosing the settlement amount. The Nevada Equal Rights Commission has the jurisdiction to investigate complaints of harassment against Nevada employers—these provisions do not apply to settlement agreements executed by the Commission. It is important to have options available to ensure that rights are protected and that sound public policy is adhered to. This bill provides that any settlement agreement entered into on or after July 1 that contains a provision prohibited by this bill would be void and unenforceable. It would be appropriate to send the message that this initiative is moving forward.

SENATOR SCHEIBLE:
Do other states have similar laws?

ASSEMBLYMAN FRIERSON:
Yes, California does.

SENATOR HANSEN:
Will this bill restrict a victim from receiving restitution or financial compensation?

ASSEMBLYMAN FRIERSON:
No. This bill will not impact the ability of a victim receiving restitution or financial compensation. This bill presents many benefits. A serial perpetrator would be prohibited from entering into numerous illegal settlement agreements. This bill does not prohibit civil actions.

SENATOR SCHEIBLE:
Does this bill provide for protections for discrimination against a person based on sexual orientation?

ASSEMBLYMAN FRIERSON:
Protection for sexual orientation is not the intent of the bill; however, this bill will cover discrimination against a person's sexual orientation.

SENATOR SCHEIBLE:
I agree. There are factual instances where it is difficult because of different factors based on discrimination. This bill is good public policy.

ASSEMBLYMAN FRIERSON:
This bill does cover protections for discrimination based on sexual orientation, as does existing Nevada law.

SANDY ANDERSON (Board of Massage Therapy):
We support A.B. 248. There are repeat offenders who negotiate settlement agreements with alleged victims. Subsequently, victims are prohibited from testifying before the Board of Massage Therapy that sexual assault occurred at the hands of a licensed massage therapist.

BAILEY BORTOLIN (Washoe Legal Services):
We support A.B. 248. This bill is an important step to balance inequities. More employers conduct sexual harassment training as a result of similar legislation in other states. There will be positive outcomes if this bill is passed.

CHAIR CANNIZZARO:
The hearing on A.B. 248 is closed. The hearing on A.B. 285 is open.

**ASSEMBLY BILL 285 (1st Reprint)**: Enacts provisions relating to a mental or physical examination of certain persons in a civil action. (BDR 4-1027)

ASSEMBLYMAN JASON FRIERSON (Assembly District No. 8):
I am here to present A.B. 285 with the Nevada Justice Association.

GRAHAM GALLOWAY (Nevada Justice Association):
We have provided Article 35 Examinations Caselaw (Exhibit C contains copyrighted material. Original is available upon request of the Research Library). In a personal injury lawsuit, the defendant is entitled to file a motion requesting or requiring that the alleged victim attend a medical examination arranged by the defense. This is called an independent medical evaluation or a *Nevada Rules of Civil Procedure* (NRCP) Rule 35 examination. The NRCP Rule 35 allows this process to move forward. I have practiced law for 33 years, and this area of law has been controversial.

The issue under NRCP Rule 35 is that the alleged victim is required to go to a medical examination and get questioned without any legal representation. This bill would provide and allow for alleged victims to have legal representation present during this medical examination. This bill would allow for an alleged victim to bring a friend or family member to the NRCP Rule 35 examination. This bill allows for the examination to be audio-recorded.

The Nevada Supreme Court rules allow an observer to be present but will not allow a recording of the examination unless certain elements of good cause have been met. We do not believe this bill addresses procedural rules; this bill addresses substantive law, dealing with fundamental rights such as liberty and to control your own body. Assembly Bill 285 will allow the medical examination to be audio-recorded; however, the Nevada Supreme Court rules prohibit it.

ALISON BRASIER (Nevada Justice Association):
Assembly Bill 285 protects injured victims. The NRCP Rule 35 examination governs some of the practices in place but not enough to protect an alleged victim's rights and intrusion. This bill protects persons from being forced to attend and participate in the NRCP Rule 35 examination. This bill allows the audio recordings and a witness present to have an objective record available. The current rule provides that an audio recording is only permissible upon a showing of good cause to the court. This bill addresses more than a procedural law, it is a substantive law. Some states permit video recordings of the medical examination; however, most states allow audio recording.

CHRISTIAN MORRIS (Nevada Justice Association):
Assembly Bill 285 allows for the alleged victim to have an observer present in the medical examination room. Doctors may not act in good faith. Perhaps the doctor may ask inappropriate questions that are outside the scope of the examination. Doctors may expose the alleged victim to intrusive questions.

SENATOR SCHIEBLE:
There is a presumption that the doctor is not biased. Does A.B. 285 undermine the goal that the doctor is unbiased?

MR. GALLOWAY:
Insurance companies want to win the lawsuit at all costs. Doctors will say what the insurance companies want them to say. Independence is no longer present.

MS. MORRIS:
The medical examination needs to be audio-recorded so that no one has to be a witness. The doctor knows that he or she will be creating a report and will be deposed about the medical examination. The attorneys agree on the parameters of the medical exam.

SENATOR SCHEIBLE:
In your testimony, you referenced how doctors may act inappropriately during a medical examination. There may be disputes on how a medical examination was conducted, so having a witness observe may alleviate disputed claims. Are you anticipating that plaintiff's counsel will be a witness in his or her own case?

MS. MORRIS:
No. That is why the medical examination must be recorded. Nobody needs to be a witness. An audio recording of the medical examination clarifies any disputes.

MR. GALLOWAY:
It is highly unlikely that the plaintiff's counsel would attend the medical examination, even if A.B. 285 allows the counsel to attend. If a lawyer attends the medical examination, this potentially could render the lawyer as a witness.

SENATOR SCHEIBLE:
What is the purpose of allowing attorneys in the medical examination room?

MS. MORRIS:
Most clients prefer that their attorney accompany them to the medical examination. This bill allows the attorney to attend and is an option. The reality is that most attorneys would not attend the medical examination. This bill allows the client to have a friend or family member present. This medical examination would be audio-recorded.

SENTOR OHRENSCHALL:
There are legal practitioners who have medical backgrounds. Is there an issue with the difference in sophistication regarding attending medical examinations?

MR. GALLOWAY:
The issue derives from alleged victims who have never been through the process before. The alleged victim may not be a sophisticated individual and may not understand what is going on. Medical examiners are highly educated, and have completed many medical examinations. There is not a level playing field with this regard.

SENATOR OHRENSCHALL:
The portion of the bill that deals with audio recording of the medical examination—is the medical examiner permitted to have such a recording?

MR. GALLOWAY:
It would go both ways. This bill allows either side to audio-record the medical examination.

SENATOR HANSEN:
If the plaintiff's attorney is present for the medical examination, is the attorney allowed to ask questions of the medical examiner during the exam?

MR. GALLOWAY:
The attorney is not permitted to ask questions or to interfere with the medical examination. The bill provides that if the observer interferes improperly, the medical examination can be stopped and sanctions can be leveled. If an attorney improperly conducted him or herself during the medical examination, the defense would bring a motion to impose sanctions on that attorney.

SENATOR HANSEN:
The idea clarifies a gray area of the law. This is why we want the audio recording of the medical examination. Would this provision apply when an injured party has been to his or her own medical examiner? Would the injured party then have to provide this audio recording to the defense?

MR. GALLOWAY:
No. This only happens during the litigation process. When an injured party goes to the doctor, there is no litigation at that point. There is no defense counsel at that point. These medical examinations are done for treatment purposes. The bill covers medical examinations during litigation for personal injury claims.

SENATOR HANSEN:
What if an injured party decides to go to dispute resolution? Can there be other doctors?

MR. GALLOWAY:
This occurs frequently.

SENATOR HANSEN:
This is standard operating procedure for the injured party to see both the plaintiff's doctor and the defense's doctor?

MR. GALLOWAY:
Yes; however, it is not common in smaller personal injury cases because it is not economically feasible. Any time there is a large case, the NRCP Rule 35 examination will occur.

SENATOR PICKARD:
Initially, the injured party is harmed, and he or she goes to see a doctor. Subsequently, the personal injury lawyer attempts to get compensation for the client's injuries. The insurance company then hires the doctor who is an expert witness to complete a medical examination under NRCP Rule 35?

MS. MORRIS:
Yes, that is correct. Most doctors are consistent. The doctors hired by the insurance company evaluate the injured victim for purposes of litigation. These medical examinations are typically outside the scope of most doctors' practices.

SENATOR PICKARD:
The insurance company hires the more experienced doctor for purposes of rebutting a claim. No provision disallows an injured party from bringing someone in; however, this bill allows the plaintiff's attorney to be in the room during the medical examination. The plaintiff's attorney can call an end to the exam, correct?

MS. MORRIS:
This bill helps injured victims. This is litigation-based deposition. The doctor anticipates that he or she will be called to the stand. Currently, there is no audio recording allowed, absent good cause. The doctors understand the process.

MS. BRASIER:
This bill does not have a chilling effect on the injured party's claim. The audio recording provides an objective record of what has occurred.

SENATOR SCHEIBLE:
I have concerns that A.B. 285 permits the observer to stop the medical examination. This is a legal inquiry—this raises the issue of whether the exam has exceeded the scope of the agreement made by the two attorneys? If the defense attorney exceeds the scope, this objection will lead the doctor to be the legal representative of the defense. This is what your testimony says that happens currently. Should both attorneys be present in the room during the examination?

MS. MORRIS:
These medical examinations are costly. Stopping a medical examination is unlikely. Either side of the litigation would have to deal with that. This bill will provide for accurate audio recordings from an objective standpoint. The boundaries of the medical examination have already been established by the attorneys and the court.

SENATOR SCHEIBLE:
My reading of the bill differs from the statements made during testimony.

MR. GALLOWAY:
If the doctor conducts an appropriate medical examination, this bill will prevent inappropriate behavior. The goal is to terminate an examination where a doctor is acting inappropriately.

SENATOR PICKARD:
Is this already the law regarding workers compensation lawsuits?

MS. MORRIS:
Yes, the provision allowing an audio recording for purposes of a workers compensation claim is provided for in statute.

SENATOR PICKARD:
Have there been dilatory outcomes in those cases?

MR. GALLOWAY:
We have never experienced an issue attending a medical examination where the examination had to be terminated.

SENATOR OHRENSCHALL:
Under the law, if the injured party feels that the examination is going wrong, is there any power for the injured party to stop the examination?

MR. GALLOWAY:
No. The law does not provide for the injured party to terminate the medical examination as it is occurring.

SENATOR OHRENSCHALL:
Can the examination stop in the workers compensation claims if requested by the injured party?

MR. GALLOWAY:
Yes, that is correct.

BRAD JOHNSON (Las Vegas Defense Lawyers):
I have provided written testimony (Exhibit D). We oppose A.B. 285. The revised NRCP Rule 35 addresses the concerns that this bill brings forth. The current law permits that someone is allowed to attend the NRCP Rule 35 examination and that the exam can be audio-recorded, and the law is not one-sided with regard to the plaintiff.

It is not the Legislative Body that makes a procedural rule; however, this bill does not address a substantive law. This bill violates the separation of powers. The state of litigation is not a matter that should be before the Legislative Body.

Doctors do not conduct examinations of people for free, and the doctor must be hired. The workers compensation process is a different system. As provided on page 4 of Exhibit D, doctors have one-stop-shops for patients where it can be determined if a patient has a claim.

SENATOR PICKARD:
With respect to the workers compensation, is there a panel of doctors paid independently by other people?

MR. JOHNSON:
No, there is not.

MR. GALLOWAY:
We want to emphasize that alleged victims are forced to undergo medical examinations to become whole again. The victims did not ask to be in this situation. This bill protects fundamental rights. This bill is a substantive law, not just procedural law.

CHAIR CANNIZZARO:
The hearing on A.B. 285 is closed. The hearing on A.B. 393 is open.

**ASSEMBLY BILL 393 (1st Reprint)**: Providing protections to certain governmental and tribal employees and certain other persons during a government shutdown. (BDR 3-1015)

ASSEMBLYMAN JASON FRIERSON (Assembly District No. 8):
This bill protects employees who are impacted by federal government shutdowns. Our Nation recently had a federal government shutdown and did not resume operations for many weeks. During that period, many federal employees did not receive paychecks. Federal law establishes an orderly process for a budget to be enacted by Congress and the U.S. President with outlined deadlines. If deadlines are not met, the budget will not be completed in time. Congress can pass a resolution to allow federal agencies to continue to spend money at current levels for a specified period of time. Sometimes, there is no resolution, resulting in a federal shutdown.

In Nevada, there are approximately 11,500 federal civilian employees. During the most recent shutdown, about 3,500 of these employees did not receive paychecks. Many other Nevadans were negatively impacted, some who had

contracts with federal agencies. When contractors are not paid, the contractors lay off employees. The federal shutdown impacts State employees who work in programs funded by the federal government. These families have ongoing financial obligations. Assembly Bill 393 provides a measure of relief for those who are directly affected during a federal government shutdown. This bill addresses mortgage holders, common-interest communities, landlords and holders of liens on motor vehicles. This bill prohibits evictions against persons who have been impacted by the federal government shutdown or repossessing vehicles. These families could be eligible for government assistance.

At the State level, we must take action to protect our citizens. This bill provides commonsense transition, and it is not indefinite. As a community, we need to help our members. This bill will provide protections for those impacted by federal government shutdowns.

SENATOR PICKARD:
There are many repercussions during a federal government shutdown. There is a domino effect. Can you explain limitations of A.B. 393?

ASSEMBLYMAN FRIERSON:
This bill includes household members, and there is a proposed amendment to define who is a household member (Exhibit E). The bill requires that there be proof of financial hardship and proof of being subjected to a federal government shutdown. The parameters provide sufficient notice to lienholders and ability for adjustment for those who are subjected to the shutdown. There are federal employees who still need to work during a shutdown. This bill protects them.

SENATOR PICKARD:
As we discuss independent contractors, many in Nevada had no guarantee of getting paid during the federal shutdown.

ASSEMBLYMAN FRIERSON:
This bill includes persons who are contracted with the federal government. This bill does not relieve any debts accrued.

SENATOR HARRIS:
Can you explain the rationale including the term "landlord" in the bill?

ASSEMBLYMAN FRIERSON:
With regard to evictions, this language is critical. This bill would prohibit evictions against tenants who are impacted by a federal government shutdown. This bill does not relieve a person of his or her debt.

MARLA MCDADE WILLIAMS (Reno-Sparks Indian Colony):
We support A.B. 393. The last federal government shutdown imposed hardships on the tribal communities.

CONNER CAIN (Nevada Association of Realtors; Nevada Bankers Association):
We support A.B. 393.

HAWAH AHMAD (Pyramid Lake Paiute Tribe):
We support A.B. 393. However, we do not support section 2 of the amendment in Exhibit E.

CHRIS FERRARI (Nevada Credit Union League):
We are neutral on A.B. 393 and submitted the proposed amendment, Exhibit E. Credit unions are member-owned; credit unions do their best to assist their employees during the federal government shutdowns as well as recessions. The term "materially affected" is not enumerated. We want to include the definition of a "household member" in the bill.

ASSEMBLYMAN FRIERSON:
There needs to be proof that a person was materially impacted by the federal government shutdown. The person would need to provide proof that he or she was subject to a federal government shutdown.

CHAIR CANNIZZARO:
The hearing on A.B. 393 is closed. The hearing on A.B. 432 is open.

**ASSEMBLY BILL 432 (1st Reprint)**: Establishes provisions governing worker cooperative corporations. (BDR 7-1026)

ASSEMBLYMAN JASON FRIERSON (Assembly District No. 8):
Assembly Bill 432 aims to create quality jobs in Nevada. This bill will help the economy in Nevada. Jobs are vital to the economic health in Nevada. This bill sets up worker cooperatives as a type of cooperation in Nevada. This bill furthers making Nevada a welcoming environment for a variety of businesses.

Worker cooperatives are present in other states and are business entities. Worker cooperatives do not have a chief executive officer, and employees collectively own the business. Employees collectively decide important business decisions.

ROBERT TEUTEN:
This bill is important for setting up worker cooperatives in Nevada. This bill defines worker cooperatives and is a result of stakeholders input. Worker cooperatives are important to unite people during a crisis such as a recession. This bill is important for Nevada. There are many states that offer worker cooperatives as a form of business structure.

SENATOR OHRENSCHALL:
If this bill were to pass, do you think the existing worker cooperatives would move to Nevada based on favorable tax structure?

MR. TEUTEN:
Yes, we believe worker cooperatives would come to Nevada if the State had favorable tax structure.

SENATOR HARRIS:
Are there entities that would be prohibited from being organized under the structure proposed in A.B. 432?

ASSEMBLYMAN FRIERSON:
A worker cooperative is an attractive structure for certain types of businesses. This bill creates a new form of cooperation structure in Nevada.

MR. TEUTEN:
This bill does not prohibit any entity from forming under this bill. Small businesses favor worker cooperatives. There are more benefits to structuring as a worker cooperative.

CHAIR CANNIZZARO:
The hearing on A.B. 432 is closed. The hearing on A.B. 183 is open.

**ASSEMBLY BILL 183 (1st Reprint)**: Prohibits certain correctional services from being provided by private entities. (BDR 16-290)

ASSEMBLYWOMAN DANIELE MONROE-MORENO (Assembly District No. 1):
This bill requires that State and local governments prohibit privately run prisons. Nevada does not currently have any private-operated prisons. We have provided a visual presentation (Exhibit F) of A.B. 183. Prisons will be provided by State and local governments. This bill will stop the movement of Nevada's prisoners to out-of-state facilities by 2022. Nevada has one federal facility. This bill will not impact the federal facility.

This bill was initially introduced as A.B. No. 303 of the 79th Session and passed in both Houses but was ultimately vetoed by the Governor. During that time, Nevada had a growing prison population; however, the prison population is decreasing in our State. During the last Session, there was testimony that situations in prisons were unsafe and amendments were proposed. We expect to return nearly 100 inmates back to Nevada by the end of the year. We are working to improve our prisons and to get our correction employees paid at competitive rates.

It costs Nevada more to send inmates out of state. Instead, we can use these funds to better fund our correction facility. We need to help our former inmates become the best people they can be. We have to be fiscally responsible with taxpayer dollars. It does not make sense to pay money to an out-of-state business when we can use that money to fund our own correctional facilities. This bill will send the message that this Legislature recognizes the needs of our taxpayers and that Legislators believe it is our duty to ensure anyone in our State is taken care of properly.

SENATOR DONDERO LOOP:
Most of our prisoners do not spend their whole lives in prison. In Nevada, we have shorter prison sentences. We have a responsibility to help defendants reenter society.

SENATOR OHRENSCHALL:
I am hopeful A.B. 183 becomes law this Session.

EDWARD COLEMAN:
I support A.B. 183. The for-profit industry has been subject to many different lawsuits across the Country. Any changes to the law would reduce the demand for privately run correctional facilities. For-profit prisons appear to be focused on their bottom line. Medical care at for-profit correctional facilities may jeopardize

inmates' health. In one instance, a lawsuit was brought against a for-profit prison for failure to contain a widespread scabies outbreak. In other instances, for-profit correctional facilities have engaged in fraudulent activities and questionable lobbying.

CHRISTINE SAUNDERS (Progressive Leadership Alliance of Nevada):
We support A.B. 183. Private prisons lead to mass incarceration and contribute to the billion-dollar industry. It is important that our taxpayer dollars never go to fund a highly paid chief executive officer of a privately run prison. Profit does not belong in Nevada's criminal justice system.

JOHN J. PIRO (Office of the Public Defender, Clark County; Office of the Public Defender, Washoe County):
We support A.B. 183.

ASSEMBLYWOMAN MONROE-MORENO:
As a retired corrections officer, I can speak first-hand of reforms needed in our system. This bill will also provide protections for our corrections officers. It is fiscally responsible to spend our taxpayer dollars in Nevada. By outlawing for-profit prisons, our criminal justice system will be based on equity, integrity and fairness. Our prisoners are not profit margins. The service our corrections officers provide is valued. Our prisoners have complex needs. By outlawing for-profit systems, we are sending the message that prisoners are people. I urge the Committee to support passage of A.B. 183.

Remainder of page intentionally left blank; signature page to follow.

CHAIR CANNIZZARO:
The hearing on A.B. 183 is closed. The meeting is adjourned at 11:51 a.m.

RESPECTFULLY SUBMITTED:

Jeanne Mortimer,
Committee Secretary

APPROVED BY:

Senator Nicole J. Cannizzaro, Chair

DATE:

| EXHIBIT SUMMARY | | | | |
|---|---|---|---|---|
| **Bill** | **Exhibit / # of pages** | | **Witness / Entity** | **Description** |
| | A | 1 | | Agenda |
| | B | 6 | | Attendance Roster |
| A.B. 285 | C | 1 | Nevada Justice Association | Article 35 Examinations Caselaw |
| A.B. 285 | D | 64 | Brad Johnson / Las Vegas Defense Lawyers | Testimony and Letters of Opposition |
| A.B. 393 | E | 1 | Nevada Credit Union League | Proposed Amendment |
| A.B. 183 | F | 20 | Assemblywoman Daniele Monroe-Moreno | Presentation |

# EXHIBIT D

**Center for Applied Neuroscience**
*"Putting neuroscience research into practice"*

*Specializing in the assessment of neurocognition*

Thomas F. Kinsora, Ph.D.
Clinical Neuropsychologist

# Why Neuropsychological Evidence is Compromised when Protected Test Material is Released and when the Examinee is Subject to Third Party Observation

**In the matter of**: Kalena Davis and the Rule 35 Examination
**Date**: March 4, 2020

On the face of it, it seems logical to conclude that an attorney's ability to develop a good cross-examination is partially contingent on having the data that formulated the neuropsychologist's opinion. However, for several very excellent and well established reasons, data and test materials from neurocognitive assessments exist in a very special and separate category that courts around the country, with some unfortunate exceptions, have honored and preserved. Attorneys have, for years, prepared strong cross examinations without ever seeing the raw test data, test materials, and test manuals, and without needing a recording of the exam itself; namely through an analysis of the raw test data by a qualified neuropsychologist. By making these requests, a law that was designed to protect the consumer has, in this special circumstance, crossed over into actually causing public harm. The rule effectively forces neuropsychologists to withdraw from these cases on legal and ethical grounds, and the end result of compliance would not only cause public harm, but would deny the neuropsychologist the tools of her/his trade. This surely was not the intent of the rule when it was approved.

Most courts around the country have understood that the protection of psychological and neuropsychological test material is in the interest of the State and her citizens for reasons including public safety and patient care. It has been understood that psychologists should only disseminate protected test material to a designated expert who is also licensed as a psychologist, with the

same ethical and legal obligations to protect test materials. Allowing an external third party to observe the examination, to video/audio record the administration of protected test material, or to be forced to turn over material that contains protected test stimuli, puts a licensed psychologist in conflict with ethics, legal restrictions, public safety, and ultimately threatens the viability of the measures that we use.

For the sake of ease, the term "third party observation" includes direct observation, monitored (one way mirror) observation, as well as video, auditory, and monitoring by concealed listening equipment.