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IN THE SUPREME COURT OF THE STATE OF NEVADA

Edgardo P. Yusi; Keolis Transit Services, LLC,
Supreme Ct. No.:

Dist. Ct. Case No.: A-18-781000-C

Petitioner,

vs.

**Edgardo Yusi & Keolis Transit
Services, LLC's Petition for Writ of
Mandamus or Prohibition**

The Eighth Judicial District Court of the
State of Nevada and the Honorable
Nancy Allf, Judge,

Respondents.

and

Heather Felsner,

Real Party in Interest.

ORIGINAL PETITION

From the Eighth Judicial District Court, Clark County
The Honorable Nancy Allf, Judge

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1 **NRAP 26.1 Disclosure**

2 The undersigned counsel of record certifies that the following are persons
3 and entities, as described in NRAP 26.1(a), and must be disclosed. These
4 representations are made in order that the judges of this court may evaluate
5 possible disqualification or recusal.

- 6 1. Parent Corporation: Keolis America, Inc.
7 2. Publicly held company that owns 10% or more of the party's stock: None.
8 3. Law firms who have appeared or are expected to appear for Mr. Yusi &
9 Keolis Transit Services, LLC: Wilson Elser

10 DATED this 15th day of March, 2021.



12 /s/ Michael P. Lowry
13 MICHAEL P. LOWRY, ESQ.
14 6689 Las Vegas Blvd. South, Suite 200
15 Las Vegas, Nevada 89119
16 Attorneys for Edgardo P. Yusi; Keolis
17 Transit Services, LLC
18
19
20

Routing Statement

Typically NRAP 17(b)(13) governs pretrial writ proceedings challenging discovery orders. This petition challenges a discovery order. However, this matter presumptively should be retained by the Supreme Court for decision per NRAP 17(a)(11) because it raises as a principal issue a question of first impression involving Nevada's constitution. Specifically, petitioners assert NRS 52.380 is an unconstitutional abrogation of NRCP 35 because the statute violates the separation of powers.

This issue appears to be similar to the issues raised in two other pending writ petitions, docket numbers 81912 and 82618. As these other matters and this petition demonstrate, the conflict between NRS 52.380 and NRCP 35 is a real problem affecting multiple cases in the state. NRAP 17(a)(12) would also apply in this circumstance as another reason the Supreme Court should retain the case.

DATED this 15th day of March, 2021.



/s/ Michael P. Lowry

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Attorneys for Edgardo P. Yusi; Keolis

Transit Services, LLC

Attorney's Certificate of Compliance

1. I certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14 point Times New Roman.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains 4,329 words.

3. Finally, I certify that I have read this petition, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this petition complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the petition regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying petition is not in conformity with the

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///

///

1 requirements of the Nevada Rules of Appellate Procedure.

2 DATED this 15th day of March, 2021.



4
5 /s/ Michael P. Lowry
6 MICHAEL P. LOWRY, ESQ.
7 6689 Las Vegas Blvd. South, Suite 200
8 Las Vegas, Nevada 89119
9 Attorneys for Edgardo P. Yusi; Keolis
10 Transit Services, LLC

11
12 **NRAP 21(a)(5) Verification**

13 I am the lead attorney for petitioners in A-18-781000-C and this petition.
14 On their behalf, I believe the facts stated in this motion are true to the best of the
15 information available to me. I declare under penalty of perjury that the foregoing
16 is true and correct, per NRS 53.045.

17 DATED this 15th day of March, 2021.

18
19 /s/ Michael P. Lowry
20 Attorney for Petitioner

1 **Certificate of Service**

2 Per NRAP 21(a) and 25(c), I certify that I am an employee of Wilson Elser
3 Moskowitz Edelman & Dicker LLP, and that on March 15, 2021, **Edgardo Yusi**
4 **& Keolis Transit Services, LLC's Petition for Writ of Mandamus or**
5 **Prohibition** was served via electronic means by operation of the Court's
6 electronic filing system to:

7

8 John B. Shook, Esq. Shook & Stone, Esq. 710 South Fourth Street Las Vegas, NV 89101 9 Attorneys for Heather Felsner	Judge Nancy Allf Eighth Judicial District Court Department 27 200 Lewis Ave. Las Vegas, NV 89155
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10 BY: /s/ Michael P. Lowry
11 An Employee of



Relief Sought

This petition seeks a writ of mandamus concerning NRCP 35 request for a neuropsychological examination. Mr. Yusi and Keolis (collectively “Mr. Yusi”) request the writ overrule the district court’s order after § II(b).

Issues Presented

1. EDCR 2.34(d) requires parties to meet and confer before filing a discovery motion. That occurred here, but Plaintiff’s opposition asserted multiple new objections that were not raised during the meet and confer process. *Valley Health* concluded “neither this court nor the district court will consider new arguments raised in objection to a discovery commissioner’s report and recommendation that could have been raised before the discovery commissioner but were not.”¹ Does *Valley Health*’s logic also apply to new arguments that were not raised during the meet and confer process?
2. NRS 52.380(1)-(3) state a plaintiff “may” request an observer for an examination and “may” record it. “‘May’ is of course generally permissive.”² NRS 52.380 does not indicate how a court should determine when an observer “may” attend or record. Mrs. Felsner requested an observer, so she had the

¹ *Valley Health Systems, LLC. v. Dist. Ct.*, 127 Nev. 167, 173, 252 P.3d 676, 680 (2011).

² *Ewing v. Fahey*, 86 Nev. 604, 607, 472 P.2d 347, 349 (1970).

burden to demonstrate why it was appropriate but stated no specific reason to support her request. Did she meet her burden under NRS 52.380?

3. NRCP 35 is a procedural rule. NRS 52.380 was expressly drafted to conflict with NRCP 35, if not abrogate it. The Supreme Court previously ruled “where, as here, a rule of procedure is promulgated in conflict with a preexisting procedural statute, the rule supersedes the statute and controls.”³ *Whitlock v. Salmon* noted a statute is unconstitutional if it interferes “with procedure to a point of disruption or attempted abrogation of an existing court rule.”⁴ Does NRS 52.380 unconstitutionally disrupt or abrogate NRCP 35?

Facts Necessary to Consider the Petition

A. Mr. Yusi requests a NRCP 35 examination & conducts a meet and confer.

Mrs. Felsner fell while on a bus that Mr. Yusi was driving. She allegedly suffered a brain injury from that fall that still affects her in material ways.⁵ On September 28, 2020, Mr. Yusi requested a Rule 35 neuropsychological examination.⁶ By October 12, 2020, the parties conducted a meet and confer per EDCR 2.34(d), as described in a supporting declaration.⁷ Mr. Yusi’s motion requesting a NRCP 35 examination was filed on October 16, 2020. The motion

³ *State v. Connery*, 99 Nev. 342, 345, 661 P.2d 1298, 1300 (1983).

⁴ 104 Nev. 24, 26, 752 P.2d 210, 211 (1988).

⁵ App. Vol. 1 at 64-65.

⁶ *Id.* at 9.

⁷ *Id.* at 2.

1 addressed the two objections Mrs. Felsner raised during the EDCR 2.34(d) meet
2 and confer: 1) requiring Mrs. Felsner to drive from her home to Dr. Axelrod's
3 office; and 2) that some unidentified testing was duplicative of prior work.⁸

4 Mrs. Felsner opposed on November 2, 2020. She did not dispute that 1) she
5 alleges ongoing deficits related to her brain injury; or 2) Mr. Yusi's proposed
6 examiner was appropriately qualified. She did not dispute the substance of the
7 parties' EDCR 2.34(d) conference and argued the two objections that she had
8 raised. But then she argued for the first time that the requested neuropsychological
9 examination was governed by NRS 52.380, not NRCP 35.

10 Mr. Yusi's reply on November 13, 2020 objected to Mrs. Felsner's new
11 arguments.⁹ Mr. Yusi then alternatively argued that Mrs. Felsner did not satisfy
12 her burden to obtain an observer or a recording under either NRS 52.380 or NRCP
13 35.¹⁰ He also alternatively argued that NRS 52.380 is unconstitutional.¹¹

14 **B. The Discovery Commissioner's ruling.**

15 The Discovery Commissioner's report and recommendations was entered on
16 February 4, 2021. It first concluded "a Rule 35 neuropsychological examination is
17 appropriate in this case based upon the allegations Mrs. Felsner has presented."¹²

18 ⁸ *Id.* at 3-4.

19 ⁹ *Id.* at 115.

¹⁰ *Id.* at 120-123.

20 ¹¹ *Id.* at 117-120.

¹² *Id.* at 227.

1 It also noted “Mrs. Felsner does not dispute that the proposed examiner, Dr.
2 Axelrod, is appropriately qualified.”¹³ Next the report and recommendations
3 resolved the two objections Mrs. Felsner raised during the meet and confer
4 process.¹⁴

5 The report and recommendations then addressed the issues presented in this
6 petition. It overruled Mr. Yusi’s objection to Mrs. Felsner’s arguments that were
7 not raised during the EDCR 2.34(d) meet and confer process.¹⁵ Mr. Yusi’s
8 objection as to whether Mrs. Felsner had met her burdens under NRCP 35 or NRS
9 52.380 was also overruled. “Mr. Yusi contends ethical prohibitions bar
10 neuropsychologists from conducting an examination with a third-party observer
11 like NRS 52.380 allows. ... If Dr. Axelrod is unable or unwilling to perform the
12 examination, Mr. Yusi may locate another appropriately qualified examiner.”¹⁶
13 Finally, as to Mr. Yusi’s constitutional arguments, the report and recommendations
14 concluded “NRS 52.380 involves and affects a substantive right and shall be
15 applied in this instance.”¹⁷

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19 ¹³ *Id.* at 228.

¹⁴ *Id.*

¹⁵ *Id.*

20 ¹⁶ *Id.* at 229.

¹⁷ *Id.* at 228.

1 **C. The district court’s ruling.**

2 Mr. Yusi timely objected to the Discovery Commissioner’s report and
3 recommendation on February 5, 2021. Mr. Yusi did not object to the Discovery
4 Commissioner’s resolution of the two objections raised during the EDCR 2.34(d)
5 meet and confer process. He did object to the rulings as to 1) the meet and confer;
6 2) whether Mrs. Felsner had met her burden to trigger NRS 52.380 or NRCP 35;
7 and 3) NRS 52.380’s constitutionality.

8 Mrs. Felsner did not independently object to the Discovery Commissioner’s
9 report and recommendation, but she responded to Mr. Yusi’s objection on
10 February 12, 2021. She argued for the first time in her objection that requests for
11 Rule 35 examinations are not subject to EDCR 2.34(d)’s meet and confer
12 requirements.¹⁸ She then reasserted her prior arguments. Mr. Yusi replied on
13 February 16, 2021. The district court entered an order affirming the Discovery
14 Commissioner’s report and recommendations on February 19, 2021.

15 **D. How this petition differs from 81912 and 82618.**

16 Mr. Yusi’s petition is now one of three about the relationship between
17 NRCP 35 and NRS 52.380. Docket 81912 (“*Moats*”) also concerns a
18 neuropsychological examination. In *Moats* the parties disputed whether the
19 plaintiff could 1) audio record the examination; and 2) have an observer present.

20 _____
¹⁸ App. Vol. 2 at 249-250.

1 The Discovery Commissioner ruled NRS 52.380 controlled. However, in *Moats*
2 the district court sustained the defendant's objection and concluded NRCP 35
3 controlled. The district court then applied NRCP 35 and concluded the plaintiff
4 did not demonstrate good cause for a third-party observer or audio recording. The
5 plaintiff then filed a writ petition arguing only that NRS 52.380 is a substantive
6 right and overrides NRCP 35. The real party in interest also argued only
7 constitutional concerns.

8 Docket 82618 does not concern a neuropsychological examination. Instead,
9 the examination at issue concerns a back injury. The Discovery Commissioner and
10 district court both concluded NRS 52.380 overrides NRCP 35. The defendant then
11 filed a writ petition arguing only constitutional concerns.

12 Mr. Yusi's petition varies slightly from these two petitions because he
13 presents arguments that could resolve his petition without reaching the
14 constitutional conflict between NRCP 35 and NRS 52.380. His petition also varies
15 from *Moats* because there the district court applied NRCP 35 to a
16 neuropsychological examination, but here the district court applied NRS 52.380.

Why the Writ Should Issue

A. An important issue of law needs clarification.

Writ relief is available when there is no “plain, speedy and adequate remedy in the ordinary course of law.”¹⁹ “Because an appeal from a final judgment or order is ordinarily an adequate remedy, in most cases, we decline to exercise our discretion to consider writ petitions challenging interlocutory district court orders.”²⁰ Nevada’s appellate courts “generally will not exercise our discretion to review discovery orders through” writ petitions.²¹ “Nevertheless, in certain cases, consideration of a writ petition raising a discovery issue may be appropriate if an important issue of law needs clarification and public policy is served by this court’s invocation of its original jurisdiction.”²²

This petition presents an important issue of law. In this case, the district court’s order permitting a neuropsychological examination per NRS 52.380, as opposed to NRCP 35, put conditions on that examination that make it impossible for Mr. Yusi to obtain the examination. The ethical guidance for neuropsychologists, discussed below, bars an examination from occurring under the conditions the order imposed. In effect, NRS 52.380 voids NRCP 35 and

¹⁹ NRS 34.170.

²⁰ *Oxbow Constr., LLC v. Dist. Ct.*, 130 Nev. 867, 872, 335 P.3d 1234, 1238 (2014).

²¹ *Club Vista Fin. Servs. v. Dist. Ct.*, 128 Nev. 224, 228, 276 P.3d 246, 249 (2012).

²² *Las Vegas Sands Corp. v. Dist. Ct.*, 130 Nev. 578, 581, 331 P.3d 876, 878 (2014).

1 blocks Mr. Yusi or any other defendant from obtaining an ethically compliant
2 neuropsychological examination.

3 There are also now at least three pending writ petitions on this issue of law,
4 with conflicting rulings from the district courts. Resolving the conflict between
5 NRS 52.380 and NRCP 35 via an appeal would, if successful, then require not only
6 retrying each case, but also re-opening discovery. Judicial economy favors
7 resolving the conflict between NRS 52.380 and NRCP 35 now so that litigants and
8 the district courts may predictably and uniformly manage their cases.

9 **B. The standard of review is de novo and then abuse of discretion.**

10 “Conclusions of law, including the meaning and scope of statutes, are
11 reviewed de novo.”²³ Once the conclusions of law are decided, an abuse of
12 discretion standard applies. “Discovery matters are within the district court’s
13 sound discretion, and we will not disturb a district court’s ruling regarding
14 discovery unless the court has clearly abused its discretion.”²⁴

15 **C. The district court’s interpretation of EDCR 2.34(d) was erroneous.**

16 The district court erred as a matter of law by interpreting EDCR 2.34(d) in a
17 way that allowed Mrs. Felsner to assert objections she admittedly did not raise
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20 ²³ *Canarelli v. Dist. Ct.*, 136 Nev. Adv. Op. 29, 464 P.3d 114, 119 (2020).

²⁴ *Id.*

1 during the EDCR 2.34(d) conference. The district court’s interpretation of EDCR
2 2.34(d) is subject to de novo review.²⁵

3 EDCR 2.34(d) creates requirements parties must meet before they file a
4 discovery motion.²⁶ The rule’s purpose is to promote informal resolution of
5 discovery disputes without court intervention. The rule also may help the parties
6 narrow the list of disputed issues that require the court’s consideration. Here, the
7 parties agree a meet and confer conference occurred. They also agree what was
8 discussed and what was not. The dispute is whether a litigant waives objections
9 that were not raised during a meet and confer process.

10 Objections not raised during the meet and confer process are waived for the
11 same reasons outlined in *Valley Health* about why a party may not raise new
12 arguments in an objection to a Discovery Commissioner’s report and
13 recommendations. *Valley Health* concluded “neither this court nor the district
14 court will consider new arguments raised in objection to a discovery
15 commissioner’s report and recommendation that could have been raised before the
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18 ²⁵ *Marquis & Aurbach v. Dist. Ct.*, 122 Nev. 1147, 1157, 146 P.3d 1130, 1137
(2006) (applying rules of statutory construction to the interpretation of a court
rule).

19 ²⁶ Mrs. Felsner argued for the first time to the district court that EDCR 2.34(d)’s
20 meet and confer requirement did not apply to a motion for an examination per
NRCP 35. As she did not raise this argument before a Discovery Commissioner,
that argument was waived per *Valley Health*.

1 discovery commissioner but were not.”²⁷ Allowing new arguments in the objection
2 “would lead to the inefficient use of judicial resources and allow parties to make an
3 end run around the discovery commissioner by making one set of arguments before
4 the commissioner, waiting until the outcome is determined, then adding or
5 switching to alternative arguments before the district court.”²⁸

6 This logic also applies to EDCR 2.34(d)’s meet and confer requirement. If
7 the rule’s purpose is to reduce the number and scope of discovery motions, then
8 parties should be required to present their objections for discussion during the meet
9 and confer process. If they do not, then the objection is waived just like resulted in
10 *Valley Health*. Allowing parties to present objections that were not raised at the
11 meet and confer process causes the judicial process to break down for the same
12 reasons as *Valley Health*.

13 Applied here, the district court’s interpretation of EDCR 2.34(d) is
14 erroneous as a matter of law. A party may not argue objections that were not
15 raised during the meet and confer process. Consequently, the district court abused
16 its discretion by considering Mrs. Felsner’s objections other than the two the
17 parties agree she raised. If so, then the district court’s order after § II(b) should be
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20 ²⁷ *Valley Health*, 127 Nev. at 173, 252 P.3d at 680.

²⁸ *Id.* at 172-73, 252 P.3d at 679-80.

1 voided.²⁹ This would resolve Mr. Yusi’s petition without reaching the
2 constitutional conflict between NRS 52.380 and NRCP 35.

3 **D. Mrs. Felsner did not meet her burden to invoke NRS 52.380.**

4 If Mrs. Felsner’s other objections were not waived, Mr. Yusi’s petition could
5 still be decided without reaching constitutional grounds. “Under the constitutional-
6 avoidance canon, when statutory language is susceptible of multiple
7 interpretations, a court may shun an interpretation that raises serious constitutional
8 doubts and instead may adopt an alternative that avoids those problems.”³⁰

9 **1. NRS 52.380(1) gives discretion to allow an examiner.**

10 Mr. Yusi requested a neuropsychological examination per NRCP 35. Mrs.
11 Felsner wants an observer to attend with her and to record it. NRCP 35(a)(4)
12 allows a party to request an observer, subject to court approval. But NRCP
13 35(a)(4)(A) explicitly bars an observer during a neuropsychological examination.
14 “The party may have one observer present for the examination, unless: (i) the
15 examination is a neuropsychological, psychological, or psychiatric examination.”
16 NRCP 35(a)(4)(B) expressly reiterates this limitation. “The party may not have
17 any observer present for a neuropsychological, psychological, or psychiatric
18 examination, unless the court orders otherwise for good cause shown.”

20 ²⁹ App. Vol. 1 at 228.

³⁰ *Degraw v. Dist. Ct.*, 134 Nev. Adv. Op. 43, 419 P.3d 136, 139 (2018).

1 As NRCP 35 does not permit an observer for a neuropsychological
2 examination, Mrs. Felsner relies upon NRS 52.380(1), which creates a conditional
3 right and states “[a]n observer may attend an examination but shall not participate
4 in or disrupt the examination.” NRS 52.380(1) contains no limitation pertaining to
5 neuropsychological examinations. NRS 52.380(2) also expressly permits the
6 observer to be the plaintiff’s lawyer, whereas NRCP 35(a)(4) states “[t]he observer
7 may not be the party’s attorney or anyone employed by the party or the party’s
8 attorney.”

9 The potential conflict between NRCP 35(a)(4) and NRS 52.380(1)-(2) is
10 plain. NRCP 35(a)(4) bars an observer at a neuropsychological examination
11 whereas NRS 52.380(1) might allow one. But it is possible to harmonize them in
12 this particular circumstance. NRS 52.380(1) states an observer “may attend,” but
13 provides no guidance as to how a district court should determine when an observer
14 “may” attend. “‘May’ is of course generally permissive.”³¹ “May” gives the
15 district court discretion to allow an observer and places the burden to justify one on
16 the requesting party, here Mrs. Felsner.

17 Applied here, Mrs. Felsner gave no specific reason why she wants an
18 observer present. Her briefing and medical records make plain she attended
19 neuropsychological assessments with her own doctors without an observer present.

20 _____
³¹ *Ewing*, 86 Nev. at 607, 472 P.2d at 349.

1 She provided no reason why she is unable to attend a psychological assessment
2 with Dr. Axelrod without an observer. Mrs. Felsner presented no reason to apply
3 NRS 52.380(1) other than that it exists.

4 To the extent the district court interpreted NRS 52.380(1) as creating an
5 absolute right to have an observer attend, that interpretation erred as a matter of
6 law because NRS 52.380(1) gives the district court discretion to deny the request.
7 Applying that standard here, the district court then abused its discretion by
8 allowing an observer because Mrs. Felsner presented no substantive reason to
9 merit one. This conclusion then avoids the constitutional questions in this petition.

10 **2. NRS 52.380(3) gives discretion as to a recording.**

11 Mrs. Felsner also plans to audio record the neuropsychological examination.
12 NRCP 35(a)(3) states “the court may, for good cause shown, require as a condition
13 of the examination that the examination be audio recorded.” NRCP 35(a)(3)
14 contains no limitation on neuropsychological examinations. By contrast, NRS
15 52.380(3) states the “observer attending the examination pursuant to subsection 1
16 may make an audio or stenographic recording of the examination.”

17 The district court made no finding of good cause to permit an audio
18 recording of the examination per NRCP 35(a)(3), nor did Mrs. Felsner argue one.
19 If the district court relied upon NRCP 35(a)(3) to allow the audio recording, that
20 was an abuse of discretion because no cause was shown.

1 Instead, the district court relied solely upon NRS 52.380(3). First, the
2 statute does not apply because it only permits the observer allowed per NRS
3 52.380(1) to make the recording. As described in the previous section, Mrs.
4 Felsner did not qualify for an observer per NRS 52.380(1), so no recording is
5 permitted under NRS 52.380(3). Second, NRS 52.380(3) it uses permissive “may”
6 language just like NRS 52.380(1). Mrs. Felsner presented no substantive reason
7 why an observer or an audio recording is necessary. Consequently she did not
8 meet her burden to justify the recording.

9 **3. Mr. Yusi’s evidence weighs against an observer or recording.**

10 Even if Mrs. Felsner presented some substantive reason for wanting an
11 observer and recording per NRS 52.380, Mr. Yusi’s evidence against it is stronger.
12 Mrs. Felsner submitted an affidavit from Dr. Axelrod stating various ethical rules
13 prohibit observers from attending neuropsychological assessments.³² This is true.
14 The American Board of Professional Neuropsychology has adopted a policy
15 statement concerning what they term “third party observation” (TPO) of
16 examinations.³³ The Board examined these requests and noted they are
17 inconsistent with good practice. “Given the body of literature that exists regarding
18 observer effects, it is incumbent on neuropsychologists who provide evaluations to
19 make clear to patients, clients, families, and other professionals that they do not

20 ³² App. Vol. 1 at 98-99.

³³ *Id.* at 180-188.

endorse TPO and to try to avoid this type of intrusion in the assessment.”³⁴

“Multiple studies have established and replicated the dubious validity of data obtained during recorded or observed evaluations.”³⁵ “Neuropsychologists should therefore not engage in, endorse, abet, or conduct assessments complicated by TPO or recording of any kind other than under the order of a court after all reasonable alternatives have been exhausted.”³⁶ When confronted with a situation such as is at issue in this motion, “neuropsychologists should resist demands for TPO if requested by opposing counsel, retaining counsel, or the court. The neuropsychologist should educate the court or those involved as to the APA Ethics Code and the existing scientific research that supports the negative effects of this type of intrusion.”³⁷ The Board concluded:

Requests for TPO frequently create an ethical dilemma for neuropsychologists as any observation or recording of neuropsychological tests or their administration has the potential to influence and compromise the behavior of both the examinee and the administrator, threatens the validity of the data obtained under these conditions by, and consequently limits normative comparisons, clinical conclusions, opinions, interpretations, and recommendations. For these reasons, APA ethical standards support the position that TPO in neuropsychological testing should be avoided.³⁸

³⁴ *Id.* at 183.

³⁵ *Id.* at 184.

³⁶ *Id.* at 187.

³⁷ *Id.* at 186.

³⁸ *Id.*

1 The Michigan Psychological Association where Dr. Axelrod practices also
2 issued guidance for these requests that mirrors the Board’s recommendations. “In
3 forensic situations when retained as an expert witness and in which TPO is
4 requested by opposing counsel or directed by the court, the psychologist should
5 educate the court as to the [relevant ethical standards], and the scientific basis for
6 the negative effects (invalid data) of these intrusions.”³⁹ “If directed by the court
7 to proceed with TPO, the psychologist should remove himself/herself from the
8 assessment.”⁴⁰

9 Applied here, the district court’s order permitting an observer and audio
10 recording directly conflict with this ethical guidance. To the extent Mrs. Felsner
11 presented a substantive reason for an observer and recording, this ethical guidance
12 is stronger, scientific evidence why an observer and recording should not be
13 permitted for a neuropsychological examination. Further, Mrs. Felsner was able to
14 complete her own evaluations with her own psychologists within their own ethical
15 confines but without an observer or recording. Mrs. Felsner’s request for an
16 observer, and citation to neuropsychological ethical guidelines, were intended
17 solely to defeat Mr. Yusi’s right under NRCP 35 to obtain his own examination.

20 ³⁹ *Id.* at 199.

⁴⁰ *Id.*

1 **E. NRCP 35 controls because NRS 52.380 is unconstitutional.**

2 If Mrs. Felsner preserved her arguments as to NRS 52.380 and otherwise
3 qualified for its provisions, the Court must then reach the constitutional conflict
4 between NRCP 35 and NRS 52.380.

5 **1. How did we get here?**

6 In 2017 the Supreme Court began a process to comprehensively update
7 Nevada’s Rules of Civil Procedure. The Court appointed a committee, who
8 formed sub-committees including one dedicated to the discovery rules. NRCP 35
9 proved contentious from the start. The July 26, 2017 meeting minutes from the
10 full committee noted concern with the implications of early revisions. “As to
11 NRCP 35, the Committee discussed the observer requirement and whether that
12 person could be an interested party or an attorney.”⁴¹ The rule was sent back to
13 committee for further work.

14 NRCP 35 was discussed again at the September 27, 2017 full committee
15 meeting. One subcommittee member stated “he did not support the rule as written.
16 His concerns are, among other things, the presence of an observer and the
17 recording of the medical exam. Consideration of the rule was passed to the next
18 meeting, pending further public comment on the rule and the development of a
19
20

⁴¹ *Id.* at 157.

1 proposed alternative....”⁴² By the October 25, 2017 full committee meeting there
2 were at least two competing drafts of NRCP 35 under consideration.⁴³ No
3 agreement was ever reached within the discovery sub-committee. The December
4 20, 2017 full committee meeting noted that, as to NRCP 35, “three final proposals
5 were complete and would be submitted to the Supreme Court. The co-chairs asked
6 the proponents of the proposals to draft summary statements advocating for their
7 proposal.”⁴⁴ The Supreme Court then adopted one of the proposals and it became
8 NRCP 35. It took effect March 1, 2019 and is applicable to this case.

9 The advocates for the losing proposal then went to the Legislature. On
10 March 18, 2019, AB 285 was introduced. The former chair of the discovery sub-
11 committee that drafted the competing proposals made clear what became AB 285
12 was rejected during the NRCP revision process and he was asking the Legislature
13 to intervene.

14 We voted 7-to-1 to make substantial changes, the changes that are set
15 forth or embodied in the bill before you, Assembly Bill 285.
16 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.⁴⁵

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

19 ⁴² *Id.* at 164.

⁴³ *Id.* at 165-166.

20 ⁴⁴ *Id.* at 172.

⁴⁵ *Id.* at 177-178.

1 **2. The legislature may not interfere with the judiciary’s rules.**

2 The constitutional problem arises due to the separation of powers built into
3 Nevada’s constitution.⁴⁶ Each of government’s three branches is equal. “In
4 keeping with this theory, the judiciary has the inherent power to govern its own
5 procedures.”⁴⁷ NRS 2.120 expressly recognized that authority. “The judiciary is
6 entrusted with rule-making and other incidental powers reasonable and necessary
7 to carry out the duties required for the administration of justice and to
8 economically and fairly manage litigation.”⁴⁸ This means “the legislature may not
9 enact a procedural statute that conflicts with a pre-existing procedural rule, without
10 violating the doctrine of separation of powers, and such a statute is of no effect.”⁴⁹

11 In addition to the constitutionally mandated bases for keeping separate
12 those inherent powers of the judiciary, leaving control of court rules
13 and the administration of justice to the judiciary, and thereby placing
14 the responsibility for the system’s continued effectiveness with those
most familiar with the latest issues and the experience and flexibility
to more quickly bring into effect workable solutions and amendments,
makes good sense.⁵⁰

15 The judiciary’s authority “to promulgate procedural rules is independent of
16 legislative power, and may not be diminished or compromised by the legislature. ...
17

18 ⁴⁶ Nev. Const. Art. 3, § 1.

19 ⁴⁷ *Berkson v. Lepome*, 126 Nev. 492, 499, 245 P.3d 560, 565 (2010) (quotation
omitted).

20 ⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

1 Furthermore, where, as here, a rule of procedure is promulgated in conflict with a
2 preexisting procedural statute, the rule supersedes the statute and controls.”⁵¹

3 **3. NRS 52.380 is an unconstitutional, procedural statute.**

4 Prior cases have considered whether statutes are procedural or substantive
5 and those cases help explain why NRS 52.380 is unconstitutional. For example,
6 consider wrongful death cases. “Wrongful death is a cause of action created by
7 statute, having no roots in the common law.”⁵² NRS 41.085 created a substantive
8 right that could be asserted subject to the judiciary’s procedural rules.

9 In another example, NRS 11.340 allowed “a plaintiff whose judgment is
10 subsequently reversed on appeal with the right to file a new action within one year
11 after the reversal.”⁵³ This statute arguably created a substantive right for a plaintiff
12 whose statute of limitations has expired to file a new complaint after an
13 unsuccessful appeal. But *Berkson v. Lepome* concluded NRS 11.340 was
14 procedural in nature, violated separation of powers by interfering “with the
15 judiciary’s authority to manage the litigation process,” and was unconstitutional.⁵⁴

16 *Whitlock v. Salmon* addressed tension between NRCP 47(a), stating at the
17 time “the court shall conduct the examination of prospective jurors and may permit
18 such supplemental examination by counsel as it deems proper,” and NRS

19 ⁵¹ *Connery*, 99 Nev. at 345, 661 P.2d at 1300.

20 ⁵² *Alsenz v. Clark Cty. Sch. Dist.*, 109 Nev. 1062, 1064, 864 P.2d 285, 286 (1993).

⁵³ *Berkson*, 126 Nev. at 494, 245 P.3d at 562.

⁵⁴ *Id.* at 501, 245 P.3d at 566.

1 16.030(b), which stated “the parties or their attorneys are entitled to conduct
2 supplemental examinations which must not be unreasonably restricted.” *Whitlock*
3 did not perceive the statute as a legislative encroachment on judicial prerogatives.

4 Although the statute does implicate trial procedure, it does not
5 interfere with procedure to a point of disruption or attempted
6 abrogation of an existing court rule. Rather, the statute confers a
7 substantive right to reasonable participation in voir dire by counsel;
8 and this court will not attempt to abridge or modify a substantive
9 right.⁵⁵

10 None of the parties to the three writ petitions on this topic have located
11 Nevada appellate authority considering NRS 52.380. They did find one federal
12 decision interpreting it though. The plaintiff in *Freteluco v. Smith’s Food & Drug*
13 *Ctrs.* argued NRS 52.380 is a substantive statute and thus applicable in federal
14 actions rather than FRCP 35. Magistrate Judge Youchah disagreed, concluding
15 “that whether an observer is present in the neuropsychological examination of
16 Plaintiff is not substantive, but is procedural. That is, NRS 52.380 sets forth
17 procedures applicable to observers who may attend independent medical
18 examinations.”⁵⁶

19 NRS 52.380 interferes “with procedure to a point of disruption” and
20 expressly attempts to abrogate an existing court rule as *Whitlock* feared. NRS

⁵⁵ 104 Nev. at 26, 752 P.2d at 211.

⁵⁶ *Freteluco v. Smith’s Food & Drug Ctrs.*, No. 2:19-cv-759, 2020 U.S. Dist.
LEXIS 113217, 2020 WL 3504456 (D. Nev. June 29, 2020).

52.380 does not create or modify any substantive rights. Instead the statute's express purpose was to enact a draft of NRCP 35 the Supreme Court rejected. NRS 52.380 is an unconstitutional, procedural statute.

Conclusion

Mr. Yusi's writ petition should be decided on its merits. It is at least the 3rd petition concerning the direct conflict between NRS 52.380 and NRCP 35. More petitions seem likely as other cases work their way through the district courts, generating conflicts just like are at issue here. But Mr. Yusi's petition appears to be the only one thus far to offer ways to resolve the conflict without reaching the constitutional question.

Mr. Yusi requests an order overruling the district court's order after § II(b). If so, then the neuropsychological examination with Dr. Axelrod would go forward per NRCP 35 because either 1) Mrs. Felsner's objections based upon NRS 52.380 were waived because she did not raise them during the EDCR 2.34(d) process; 2) Mrs. Felsner did not meet her burden to justify an observer under NRS 52.380's permissive language; or 3) NRS 52.380 is unconstitutional.

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1 DATED this 15th day of March, 2021.



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