

IN THE SUPREME COURT OF THE STATE OF NEVADA

YEONHEE LEE,

Petitioner,

v.

**EIGHTH JUDICIAL DISTRICT
COURT OF THE STATE OF NEVADA,
IN AND FOR THE COUNTY OF
CLARK, THE HONORABLE DAVID
M. JONES, DISTRICT JUDGE,**

Respondent,

and

ALBERTO EDUARDO CARIO,

Real Party in Interest.

Electronically Filed
Apr 30 2021 11:19 a.m.
Elizabeth A. Brown
Clerk of Supreme Court

Supreme Court Case No.: _____

District Court Case No.: A-19-803446-C

**PETITIONER YEONHEE LEE'S APPENDIX TO PETITION FOR
WRIT OF MANDAMUS AND/OR PROHIBITION – VOLUME I of III**

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Reply in Support of Defendant's Motion to Compel Rule 35 Exam	09/16/2020	II	LEE 0171-0181
Summons and Complaint	10/10/2019	I	LEE 0092-0097

DATED: April 30, 2021

DUANE MORRIS LLP

By: /s/ Tyson E. Hafen
DOMINICA C. ANDERSON
Nevada Bar No.: 2988
TYSON E. HAFEN
Nevada Bar No.: 13139

Attorneys for Petitioner
Yeonhee Lee

CERTIFICATE OF SERVICE

I hereby certify that on April 30, 2021, a true and correct copy of **PETITIONER ALANA ALLEN’S APPENDIX TO PETITION FOR WRIT OF MANDAMUS AND/OR PROHIBITION – VOLUME I of III** was submitted for filing via the Court’s eFlex electronic filing system, and electronic notification will be sent to the following:

Jason R. Maier
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8816 Spanish Ridge Avenue
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With a copy delivered by U.S. Mail to:

Honorable David M. Jones
Eighth Judicial District Court, Dept. 29
Regional Justice Center
200 Lewis Avenue
Las Vegas, NV 89155

Office of the Attorney General
100 N. Carson Street
Carson City, NV 89701

/s/ Jana Dailey
Jana Dailey, an employee of
Duane Morris LLP

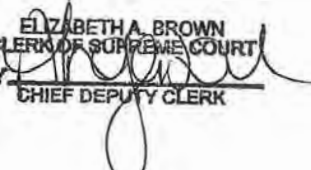
IN THE SUPREME COURT OF THE STATE OF NEVADA

IN RE THE MATTER OF CREATING A
COMMITTEE TO UPDATE AND
REVISE THE NEVADA RULES OF
CIVIL PROCEDURE

ADKT 0522

FILED

FEB 10 2017

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY 
CHIEF DEPUTY CLERK

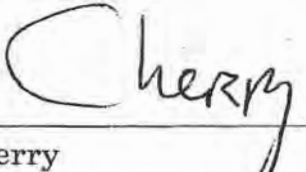
ORDER ESTABLISHING COMMITTEE

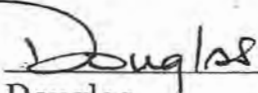
The Supreme Court has determined that the Nevada Rules of Civil Procedure and the associated district court and specialized rules should be reviewed and updated as appropriate. To that end, this court concludes that a committee should be appointed to consider these matters and to make such recommendations to this court as the committee deems appropriate.

Accordingly, the Supreme Court hereby appoints a committee consisting of the Honorable Mark Gibbons, Supreme Court Justice, and the Honorable Kristina Pickering, Supreme Court Justice, as co-chairpersons of the committee and the following members, Wesley M. Ayres, Discovery Commissioner, George T. Bochanis, Attorney, Bonnie A. Bulla, Discovery Commissioner, the Honorable Elissa F. Cadish, District Judge, Robert L. Eisenberg, Attorney, Graham A. Galloway, Attorney, Thomas Main, Professor, Boyd School of Law School, Steve Morris,

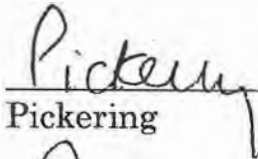
Attorney, Daniel F. Polsenberg, Attorney, Don Springmeyer, Attorney, and the Honorable Kimberly A. Wanker, District Judge.

It is so ORDERED.

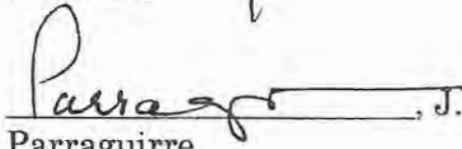
 C.J.
Cherry


 J.
Douglas

 J.
Gibbons

 J.
Pickering

 J.
Hardesty

 J.
Parraguirre

 J.
Stiglich

cc: Hon. Elissa F. Cadish, District Judge
Hon. Kimberly A. Wanker, District Judge
Wesley M. Ayres, Discovery Commissioner
Bonnie A. Bulla, Discovery Commissioner
Thomas Main, Professor, Boyd School of Law
George T. Bochanis
Robert L. Eisenberg
Graham A. Galloway
Steve Morris
Daniel F. Polsenberg
Don Springmeyer
Administrative Office of the Courts

Nevada Rules of Civil Procedure Revision Committee Summary

May 24, 2017 Meeting

The third meeting of the Nevada Rules of Civil Procedure Revision Committee (Committee) was held on May 24, 2017 at 3:00 p.m. The meeting was video conferenced among the State Bar of Nevada Office in Reno, the Supreme Court conference room in Carson City and the Supreme Court conference room in Las Vegas. Present from Reno were Discovery Commissioner Wesley Ayres and Robert Eisenberg. Present in Carson City were Graham Galloway, Todd Reese, Kevin Powers and Justice Mark Gibbons. Present in Las Vegas were Justice Kristina Pickering, Discovery Commissioner Bonnie Bulla, Professor Thomas Main, Racheal Mastel, Daniel Polsenberg, Don Springmeyer, Steve Morris and George Bochanis.

Justices Pickering and Gibbons welcomed the two new members to the Committee, Kevin Powers and Todd Reese.

The Committee then discussed the proposed draft amendments to the NRCP submitted by the “no brainer” subcommittee consisting of Justice Kristina Pickering, Justice Mark Gibbons and Todd Reese. Racheal Mastel discussed the current language of NRCP 16.2, 16.205 and 16.21. Ms. Mastel further recommended that NRCP 16.21 be amended to make references to the recently adopted versions of NRCP 16.2 and 16.205. Ms. Mastel stated that NRCP 16.3 should cross-reference to NRCP 16.21.

Discussion then turned to NRCP 55 and NRCP 4 and whether the time period for default notice under NRCP 55 should be changed from three (3) days to seven (7) days to conform to the time period in the FRCP; the consensus was that it should. Professor Main suggested that the proposed draft of NRCP 55(b)(2) delete the reference to the term “federal statutory”; Todd Reese and Justice Pickering committed to reevaluate whether FRCP 55 pared the prior rule’s language too lean as far as damage and accounting hearings.

Robert Eisenberg had a question regarding certain terminology in proposed NRCP 61 and whether it signaled a substantive change in the rule. Justice Kristina Pickering referenced the prefatory comment stating that the rules listed in the comment have text changes that are stylistic, not substantive. Robert Eisenberg stated this addressed his concern. The committee also discussed NRCP 44, NRCP 80, and NRCP 85. Kevin Powers stated that the

proposed language of NRCP 85 should say the rules should be cited without periods. Steve Morris and George Bochanis commented that NRCP 85 should be deleted completely.

Dan Polsenberg moved to table the no brainer rules to the Committee's next meeting, which is scheduled for June 21, 2017. It was agreed that all Committee members would re-review the materials circulated by the subcommittee. At that meeting, particular attention will be paid to NRCP 1, 16.2, 16.205, 16.21, 16.215, 16.3, 44, 55, 78, 80 and 85. The other NRCPs addressed in the no-brainer subcommittee report were non-controversial.

There was a discussion to confirm membership of each subcommittee and a chairperson of the subcommittee. The members of the subcommittees and the chairpersons for the various committees were established as follows:

- 1) Judgment and Post-Judgment Rules Subcommittee (NRCP 50, 52, 54(b), 58, 59, 60, and writs)

Chair: Dan Polsenberg

Members: Robert Eisenberg, Kevin Powers, Don Springmeyer

- 2) Discovery Subcommittee (NRCP 16.1, 26-37, 45)

Chair: Graham Galloway

Members: Steve Morris, Commissioner Wes Ayres, Commissioner Bonnie Bulla, Dan Polsenberg, George Bochanis, Don Springmeyer

- 3) Class and Derivative Actions Subcommittee (NRCP 23, 23.1, 23.2)

Chair: Prof. Thomas Main

Members: Dan Polsenberg, Don Springmeyer

- 4) Time and Service of Process Subcommittee (NRCP 4, 5, 6) (includes all e-service rules, calculation of time, and time to perform acts throughout the NRCP)

Chair: Judge Elissa Cadish

Members: Justice Kristina Pickering, Don Springmeyer, Dan Polsenberg, Todd Reese, Kevin Powers

- 5) Huneycutt Subcommittee (NRCP 62.1, NRAP 12.1, *Huneycutt v. Huneycutt*, 94 Nev. 79, 575 P.2d 585 (1978) and progeny)

Chair: Racheal Mastel

Members: Justice Kristina Pickering, Justice Mark Gibbons, Todd Reese, Dan Polsenberg

6) Special Masters and Receivers Subcommittee (NRCP 53 and 66)

No subcommittee established at this time

7) Approved Forms Subcommittee (NRCP 84 and forms)

Chair: Todd Reese

Members: Steve Morris, Kevin Powers

8) NRCP 16.2, 16.205, 16.21, 16.215, and 16.3 Subcommittee

Chair: Racheal Mastel

Members: Todd Reese

9) No Brainer Subcommittee (All NRCP Rules not otherwise accounted for)

Chair: Justice Kristina Pickering

Members: Justice Mark Gibbons, Todd Reese

10) Style Subcommittee (NRCP 1 and other rules as applicable)

Chair: Todd Reese

Members: Kevin Powers, Steve Morris, Prof. Thomas Main

11) NRCP 68 Subcommittee

Chair: Dan Polsenberg

Members: Don Springmeyer

12) NRCP 12 and 56 Subcommittee

Chair: Judge Elissa Cadish

Members: Justice Kristina Pickering, Judge Wanker, Prof. Thomas Main

The Committee then agreed to defer establishing a date for submission of subcommittee majority/minority reports until the Committee's next scheduled meeting on June 21, 2017.

Racheal Mastel addressed additional issues of concern in Family Court. Ms. Mastel said there is a question as to whether allegations of torts committed by one spouse against another should be litigated in Family Court in conjunction with divorce litigation. Ms. Mastel was concerned whether there would be a right to jury in family court since family court proceedings are generally equitable in nature. Justice Gibbons stated that a possible solution would be to file a separate law suit in civil court involving torts committed during marriage and this may resolve the jury entitlement issue.

Justices Pickering and Gibbons provided a brief status regarding possible revisions to NRCP 68 regarding offers of judgment. Because of the uncertainty regarding legal issues based upon the repeal of NRS 17.115, Justices Pickering and Gibbons stated that the Nevada Supreme Court would make any final decision as to whether NRCP 68 is to be revised at this time.

A discussion was then held of issues of general concern to the Committee members. Justice Gibbons advised the Committee that based upon the background noise software utilized for video conferencing by the Nevada Supreme Court, members of the Committee would not be able to participate by telephone in the event they are unable to attend from one of the location for video conferencing.

There being no further business to come before the Committee, the meeting was adjourned at 4:45 p.m.

Respectfully submitted,
Kristina Pickering and Mark Gibbons
Co-Chairs

Nevada Rules of Civil Procedure Revision Committee Summary

June 21, 2017 Meeting

The fourth meeting of the Nevada Rules of Civil Procedure Revision Committee (Committee) was held on June 21, 2017 at 3:00 p.m. The meeting was video conferenced between the State Bar of Nevada Office in Reno and the Supreme Court conference room in Las Vegas. Present in Reno were Discovery Commissioner Wesley Ayres, Graham Galloway, Bill Peterson, Todd Reese, Kevin Powers, Justice Mark Gibbons, and Kristen Martini from the Washoe County Bar Association. Present in Las Vegas were Justice Kristina Pickering, Discovery Commissioner Bonnie Bulla, Racheal Mastel, Don Springmeyer, George Bochanis, Judge Elissa Cadish, and Judge Kimberly Wanker.

The Committee first approved the May 24, 2017 meeting minutes, as amended.

The Committee then discussed that the subcommittees would be the driver of the rule proposals and would present rules for the Committee to consider at each Committee meeting.

It was noted that the AOC has created a link on its website and the Supreme Court's website identifying the Committee and its members that also posts the minutes once approved and gives the location and dates of the Committee meetings. An email address will be established by which comments can be submitted and routed to the Committee and its subcommittees under direction of Todd Reese.

The Committee addressed the proposed draft amendments to the NRCP submitted by the "no brainer" subcommittee consisting of Justice Kristina Pickering, Justice Mark Gibbons and Todd Reese. After discussion of whether the proposed NRCP 43(a) should reference a statute, the NRCP rules, or simply refer to "applicable law," NRCP 43 was pulled from consideration for further work by the "no brainer" subcommittee. The proposed NRCP 64 was amended to number the bullet points included in NRCP 64(b), and was then approved by general consent. The proposed NRCP 69(b) was amended to fix the article usage, and was then approved by general consent. The proposed NRCP 71 was amended to conform to the federal rule, eliminating the word "lawfully" and deleting the proposed comment. As amended, NRCP 71 was

approved by general consent. The proposed NRCP 86(b)(12) was amended to provide a blank for an effective date to be filled in, and was then approved by general consent. The proposed NRCP 2, 3, 18, 21, 42, 44.1, 46, 57, 63, 65.1, and 82 were approved by general consent. The proposed NRCP 7.1 and 84 were pulled from the Committee's consideration by the "no brainer" subcommittee prior to the meeting for further work.

Discussion then turned to the subcommittees and subcommittee reports. Bill Peterson was added to the Judgment and Post-Judgment Rules Subcommittee and the Discovery Subcommittee. Judge Kimberly Wanker was added to the NRCP 16.2, 16.205, 16.21, 16.215, and 16.3 Subcommittee.

1) Judgment and Post-Judgment Rules Subcommittee (NRCP 50, 52, 54(b), 58, 59, 60, and writs)

Chair: Dan Polsenberg

Members: Robert Eisenberg, Kevin Powers, Don Springmeyer, Bill Peterson.

Don Springmeyer reported that the Judgment and Post-Judgment Rules Subcommittee would have proposed rules for the Committee to consider at the September meeting.

2) Discovery Subcommittee (NRCP 16.1, 26-37, 45)

Chair: Graham Galloway

Members: Steve Morris, Commissioner Wes Ayres, Commissioner Bonnie Bulla, Dan Polsenberg, George Bochanis, Don Springmeyer, Bill Peterson

Graham Galloway reported that the Discovery Subcommittee has a working draft of NRCP 35, and would present NRCP 35 to the Committee at the July meeting. The subcommittee will split presenting the remaining rules to the Committee at the August and September meetings.

3) Class and Derivative Actions Subcommittee (NRCP 23, 23.1, 23.2)

Chair: Prof. Thomas Main

Members: Dan Polsenberg, Don Springmeyer

Don Springmeyer reported that the Class and Derivative Actions Subcommittee would have a further oral report for the Committee at the July meeting.

- 4) Time and Service of Process Subcommittee (NRCP 4, 5, 6) (includes all e-service rules, calculation of time, and time to perform acts throughout the NRCP)

Chair: Judge Elissa Cadish

Members: Justice Kristina Pickering, Don Springmeyer, Dan Polsenberg, Todd Reese, Kevin Powers

Judge Cadish reported that the Time and Service of Process Subcommittee would propose rules for the Committee to consider at the September meeting.

- 5) Huneycutt Subcommittee (NRCP 62.1, NRAP 12.1, *Huneycutt v. Huneycutt*, 94 Nev. 79, 575 P.2d 585 (1978) and progeny)

Chair: Racheal Mastel

Members: Justice Kristina Pickering, Justice Mark Gibbons, Todd Reese, Dan Polsenberg

Racheal Mastel reported that the Huneycutt Subcommittee would propose rules for the Committee to consider at the August meeting.

- 6) Special Masters and Receivers Subcommittee (NRCP 53 and 66)

No subcommittee has been established at this time

- 7) Approved Forms Subcommittee (NRCP 84 and forms)

Chair: Todd Reese

Members: Steve Morris, Kevin Powers

Todd Reese reported that the work of the Approved Forms Subcommittee often depended on the rules proposed by the other subcommittees, and the subcommittee would propose NRCP 84 and the forms to the Committee to consider at the September meeting.

- 8) NRCP 16.2, 16.205, 16.21, 16.215, and 16.3 Subcommittee

Chair: Racheal Mastel
Members: Todd Reese, Judge Kimberly Wanker

Racheal Mastel reported that the NRCP 16.2, 16.205, 16.21, 16.215, and 16.3 Subcommittee had met and would propose rules for the Committee to consider at the July meeting.

9) No Brainer Subcommittee (All NRCP Rules not otherwise accounted for)

Chair: Justice Kristina Pickering
Members: Justice Mark Gibbons, Todd Reese

Justice Pickering reported that the “No Brainer” Subcommittee would continue to present rules at each Committee meeting with the goal of having all rules not in another subcommittee presented to the Committee by September.

10) Style Subcommittee (NRCP 1 and other rules as applicable)

Chair: Todd Reese
Members: Kevin Powers, Steve Morris, Prof. Thomas Main

Todd Reese reported that the Style Subcommittee would give its feedback regarding the proposed and adopted rules at each meeting, and would present any final rule proposals to the Committee at the September meeting.

11) NRCP 68 Subcommittee

Chair: Dan Polsenberg
Members: Don Springmeyer

Don Springmeyer reported that the NRCP 68 Subcommittee would propose a rule for the Committee to consider at the July meeting.

12) NRCP 12 and 56 Subcommittee

Chair: Judge Elissa Cadish
Members: Justice Kristina Pickering, Judge Wanker, Prof. Thomas Main

Judge Cadish reported that the NRCP 12 and 56 Subcommittee would propose rules for the Committee to consider at the August meeting.

A discussion was then held of issues of general concern to the Committee members. Justice Gibbons advised the Committee that Committee meetings were scheduled for July 26, 2017 at 3:00 pm, August 16, 2017 at 3:00 pm, and September 27, 2017 at 3:00 pm.

There being no further business to come before the Committee, the meeting was adjourned at 4:15 p.m.

Respectfully submitted,
Kristina Pickering and Mark Gibbons
Co-Chairs

Nevada Rules of Civil Procedure Revision Committee Summary

July 26, 2017 Meeting

The fifth meeting of the Nevada Rules of Civil Procedure Committee (Committee) was held on July 26, 2017 at 3:00 p.m. The meeting was video conferenced among the State Bar of Nevada Office in Reno, the Supreme Court conference room in Las Vegas, and the Supreme Court conference room in Carson City. Present in Reno were Discovery Commissioner Wesley Ayres, Graham Galloway, Bill Peterson, Todd Reese, and Don Springmeyer. Present in Carson City were Kevin Powers and Justice Mark Gibbons. Present in Las Vegas were Justice Kristina Pickering, Discovery Commissioner Bonnie Bulla, George Bochanis, Judge Elissa Cadish, Steve Morris and Dan Polsenberg.

The Committee first approved the June 21, 2017 meeting minutes.

The Committee then discussed publicity for NRCP revision process. Justice Pickering advised the Committee that the Supreme Court's website for the Committee would soon be populated and that the State Bar would be contacted to run a notice of the Committee's work in the Nevada Lawyer and to send an email to members of the State Bar. An article written by Kristen Martini would also be running in the Writ, a Washoe County Bar publication, and in the Communiqué, a Clark County Bar publication.

The Committee then discussed the impact of the NRCP revisions on the Nevada Justice Court Rules of Civil Procedure. Many of the NRCP are adopted wholesale in the NJCRCP. Justice Gibbons will notify the Chief Justice of the concerns, with a view toward possibly appointing a committee to examine the NJCRCP in light of any changes to the NRCP.

Discussion then turned to the subcommittees and subcommittee reports and rule recommendations.

1) Discovery Subcommittee (NRCP 16, 16.1, 26-37, 45)

Chair: Graham Galloway

Members: Steve Morris, Commissioner Wes Ayres, Commissioner Bonnie Bulla, Dan Polsenberg, George Bochanis, Don Springmeyer, Bill Peterson

The Committee first confirmed that NRCP 16 has been assigned to the Discovery Subcommittee. The Committee then discussed the proposed draft amendments to NRCP 16.1 and 35 submitted by the Discovery Subcommittee.

As to NRCP 16.1, the subcommittee recommended that “data compilations” be changed to “electronically stored information” to be consistent with other jurisdictions. Discussion then turned to the standard appropriate for a party’s initial disclosure obligation. The subcommittee recommended changing the current broad initial disclosure requirement to a narrower requirement that the party disclose any information that the party “may use to support its claims or defenses, including for impeachment or rebuttal.” Some present offered that this was a significant change, in that a party would have no obligation to disclose information that hurts his claims or defenses, only information the party intends to use to support his litigation position or to impeach his opponent. Supporters of the change noted that affirmative discovery requests can flesh out information; the change just concerns initial disclosures. The Committee discussed that, if the change is made, the advisory committee notes should make clear what the limitations are.

The Committee also noted that initial disclosure obligations do not apply when cases are before the probate commissioner but should apply when a probate case reaches district court and discussed whether NRCP 16.1 and the NRCP need revision to make this clear. The Committee noted that NRCP 3 and 81 come into play because probate is a statutory proceeding commenced by petition.

The Committee decided that further discussion was needed and that drafter’s notes in rule 16.1 and or 81 may be warranted along with a change to NRCP 3 to include “petitions” and “applications” in NRCP3’s language. The Committee passed on this rule pending further examination by the Discovery Subcommittee and the Everything Else Subcommittee on NRCP 3 and 81.

As to NRCP 35, the Committee discussed the observer requirement and whether that person could be an interested party or an attorney. The subcommittee reported that the Audio Recording provision was new. The Committee also expressed concern about the language in NRCP 35(b)(1) and (3), which was taken directly from the FRCP counterpart, noting that the language was confusing regarding who would be requesting what from whom, and what exams must be produced. The Committee also discussed how this

rule would apply to minors and interact with other rules applicable to minors, and the Committee recommended adding to the drafter's note to address this concern. The Committee also noted that NRCP 35(a)(2)(B) allowed the court to impose conditions on the examination to protect minors. The subcommittee will reconsider the rule, make alterations, and present the rule at the August meeting.

- 2) Time and Service of Process Subcommittee (NRCP 4, 4.1, 5, 6) (includes all e-service rules, calculation of time, and time to perform acts throughout the NRCP)

Chair: Judge Elissa Cadish

Members: Justice Kristina Pickering, Don Springmeyer, Dan Polsenberg, Todd Reese, Kevin Powers

Judge Cadish reported that FRCP 4.1 has been assigned to the Time and Service of Process Subcommittee for consideration.

- 3) Huneycutt Subcommittee (NRCP 62.1, NRAP 12.1, *Huneycutt v. Huneycutt*, 94 Nev. 79, 575 P.2d 585 (1978) and progeny)

Chair: Racheal Mastel

Members: Justice Kristina Pickering, Justice Mark Gibbons, Todd Reese, Dan Polsenberg

The Committee then discussed the proposed draft addition of NRCP 62.1 and NRAP 12.1 and accompanying draft committee notes submitted by the Huneycutt Subcommittee. The Committee generally approved of the rules and comment, but discussed altering language in the drafter's note regarding whether *Huneycutt* and its progeny would be overruled by the adoption of these rules, and discussed needed changes to the language of the rule reference federal courts. The subcommittee will make the alterations requested and present the rules at the August meeting.

- 4) Everything Else Subcommittee (renamed from the "No Brainer" Subcommittee) (All NRCP Rules not otherwise accounted for)

Chair: Justice Kristina Pickering

Members: Justice Mark Gibbons, Todd Reese

The Committee discussed the proposed draft amendments to NRCP 5.1, 5.2, 7, 7.1, 8, 9, and 11 submitted by the Everything Else Subcommittee. The Committee approved the recommendation to reject FRCP 5.1. The Committee considered FRCP 5.2, and advised against incorporating the Rules on Sealing and Reacting Court Records (SRCR) into Rule 5.2 because the SRCR apply more broadly than the NRCP do. The Committee approved rejecting the text of FRCP 5.2, but advised adding Rule 5.2 to the NRCP with language directing practitioners to the SRCR for rules regarding sealing and redaction. The Subcommittee will redraft NRCP 5.2 and submit it to the Committee for its consideration at the August meeting. The Committee approved NRCP 7, 7.1, and 11 as proposed. The Committee agreed with changes proposed by Racheal Mastel to Rules 7 and 8, leaving in the federal language regarding pleading the jurisdiction of the court. With that change, the Committee approved NRCP 7 and 8.

A discussion was then held of issues of general concern to the Committee members. Concern was voiced with the ambitious pace of this Committee and the scheduling conflicts occurring with the subcommittees. This issue will be revisited in August. Justice Gibbons advised the Committee that Committee meetings are scheduled for August 16, 2017 at 3:00 pm, and September 27, 2017 at 3:00 pm.

There being no further business to come before the Committee, the meeting was adjourned at 5:00 p.m.

Respectfully submitted,
Kristina Pickering and Mark Gibbons
Co-Chairs

Nevada Rules of Civil Procedure Revision Committee Summary

August 16, 2017 Meeting

The sixth meeting of the Nevada Rules of Civil Procedure Committee (Committee) was held on August 16, 2017 at 3:00 p.m. The meeting was video conferenced between the State Bar of Nevada Office in Reno and the Supreme Court conference room in Las Vegas, until the videoconferencing failed, then proceeded by teleconference. Present in Reno were Discovery Commissioner Wesley Ayres, Bob Eisenberg, Todd Reese, and Kevin Powers. Present in Las Vegas were Justice Mark Gibbons, Justice Kristina Pickering, Judge Elissa Cadish, Discovery Commissioner Bonnie Bulla, Professor Tom Main, George Bochanis, Steve Morris, Dan Polsenberg, Don Springmeyer and Rachael Mastel.

The Committee first approved the July 26, 2017 meeting minutes.

The Committee then discussed the subcommittee rule recommendations.

- 1) Everything Else Subcommittee (renamed from the “No Brainer” Subcommittee) (All NRCP Rules not otherwise accounted for)

Chair: Justice Kristina Pickering

Members: Justice Mark Gibbons, Todd Reese

The Committee then discussed the proposed draft amendments to NRCP 13, 14, 17, 19, 20, 22, and 25 submitted by the Everything Else Subcommittee. The Committee discussed proposed language changes to NRCP 13(d), regarding counterclaims against the state, suggested by Kevin Powers to specify additional persons or government entities, or whether such language should be more general with an explanatory Drafter’s Note, and noted that similar issues are pending as to other rules, including NRCP 12. The Committee passed on NRCP 13 so that the subcommittee could consider the issue as it pertains to other rules as well and redraft the text or comment if appropriate. The Committee also discussed whether the “serve a summons and complaint” language in NRCP 14(a)(1) was limiting, considering the waiver procedures proposed for adoption in NRCP 4. The Committee passed on NRCP 14 so that the subcommittee could consider the issue and offer revisions to the rule. The Committee approved NRCP 17, with edits to make “State law” lowercase. The Committee approved NRCP 19, with the adding the subcommittee’s notes to the committee, regarding the origin of certain subsections, in a Drafter’s Note.

NRCP 20 was approved, with discussion of whether a definition of “person” was needed or a Drafter’s Note should be added. The subcommittee will consider this issue. The Committee passed on NRCP 22 so that the subcommittee could consider whether reference to statutory interpleader should be retained and to redraft the rule. The Committee passed on NRCP 25, expressing concerns of when the 90 day period to substitute a person after a party’s death or dismiss the case would be triggered and whether the district court had discretion to note the death on the record if a notice of death was not filed. Bob Eisenberg recommended that the word “action” be changed to “claims” so that the entire action would not have to be dismissed upon one party’s death. The subcommittee will consider whether to redraft the rule or to further explain how the rule would work.

2) Huneycutt Subcommittee (NRCP 62.1, NRAP 12.1, *Huneycutt v. Huneycutt*, 94 Nev. 79, 575 P.2d 585 (1978) and progeny)

Chair: Racheal Mastel

Members: Justice Kristina Pickering, Justice Mark Gibbons, Todd Reese, Dan Polsenberg

The Committee then discussed the proposed draft addition of NRCP 62.1 and NRAP 12.1 submitted by the Huneycutt Subcommittee. The Committee approved the rules, but with specified edits to change court of appeals to appellate court in the comment to Rule 62.1, and to fix the grammar in a sentence in the comment to NRAP 12.1. With the approval of these two rules and the comments to them, this subcommittee’s work has finished.

3) NRCP 68 Subcommittee

Chair: Dan Polsenberg

Members: Don Springmeyer, Prof. Thomas Main

The Committee then discussed the proposed draft submitted by the NRCP 68 Subcommittee. The consensus was that the draft represents a major improvement to existing Rule 68. The Committee noted that several substantive changes were being proposed and recommended that a Drafter’s Note be added to the rule to explain the changes. The Committee also discussed how “before trial” was defined, how far in advance of trial the offer of judgment mechanism should end (10, 14, 28 or 30 days), and which offers were to be considered in the penalty phase when multiple offers were given.

The Committee passed the rule to the next meeting, and the subcommittee will consider language changes to the rule.

4) Discovery Subcommittee (NRCP 16, 16.1, 26-37, 45)

Chair: Graham Galloway

Members: Steve Morris, Commissioner Wes Ayres, Commissioner Bonnie Bulla, Dan Polsenberg, George Bochanis, Don Springmeyer, Bill Peterson

The Committee then discussed the proposed draft amendments to NRCP 16.1, 26, and 35 submitted by the Discovery Subcommittee. As to Rule 35, Rachael Mastel requested time to get feedback on the rule from family law practitioners and to consider whether the Committee should develop a family law specific version of Rule 35. Bob Eisenberg also asked for time to distribute the proposed rule to various practitioners and to get feedback on the rule. Consideration of the rule was passed to the next meeting.

Because time remaining was short, the co-chairs advised the Committee to review Rules 16.1 and 26 and to be prepared to discuss them at the next meeting. Commissioner Ayres circulated an email before the meeting setting out the policy issues that have divided the subcommittee, a copy of which is attached to these minutes, which Committee members are encouraged to review in preparing to discuss these rules.

A discussion was then held of issues of general concern to the Committee members. The Committee discussed whether cut-off time/procedures should be developed for agendas for the Committee meetings so that the Committee members had time to consider the rules being proposed prior to the meeting. Committee members were also asked to come to the September meeting prepared to discuss a weekend session to discuss all recommended rule changes before forwarding them to the supreme court for its consideration.

Last, the Committee discussed and agreed to use a date protocol in naming word documents being circulated before the meeting to make it easier to track the versions being discussed. A subcommittee should submit a proposed rule or comment to the Committee via word document. The word document should be named with the rule or rules being proposed, then a date. For example, the name of a circulated NRCP 68 draft should be "NRCP 68 (8-9-17)". If someone offers revisions or comments to a draft, the person should add his or her initials

to the draft and circulate that draft to the committee. For example, if Justice Pickering made edits to the proposed NRCP 68 draft, she would circulate a document titled "NRCP 68 (8-9-17) [KP]". If Don Springmeyer then made edits to the draft that Justice Pickering edited, he would circulate a document titled "NRCP 68 (8-9-17) [KP][DS]". If the Committee passes a rule to the next session and a subcommittee reconsiders the rule and submits a new draft to the Committee for the following meeting, then the new draft should be titled with the new date. For example, the NRCP 68 subcommittee would submit a new draft entitled "NRCP 68 (9-10-17)".

Justice Gibbons advised the Committee that a Committee meeting is scheduled for September 27, 2017 at 3:00 pm, and that the co-chairs will be scheduling further meetings.

There being no further business to come before the Committee, the meeting was adjourned at 5:03 p.m.

Respectfully submitted,
Kristina Pickering and Mark Gibbons
Co-Chairs

Reese, Todd

From: Ayres, Wes
Sent: Tuesday, August 15, 2017 4:31 PM
To:

Cc:
Subject: NRCP 16.1
Attachments: Proposed NRCP 16.1 with Edits (8-15-17).docx

Committee Members:

The NRCP Subcommittee on Discovery Rules is unable to make a specific recommendation regarding the scope of the parties' initial disclosure requirements. Essentially, the subcommittee believes that two points need to be resolved by the full committee before specific language can be included: (1) whether disclosure should extend to material that will be used solely for impeachment or rebuttal; and (2) whether disclosure should extend to material that the disclosing party may use in the case or, more broadly, material that any party may use.

The language currently used in NRCP 16.1(a)(1) requires the initial disclosure of witnesses and documents/ESI/things that are "discoverable under Rule 26(b), including for impeachment or rebuttal." The subcommittee has discussed five other options that would limit disclosure to:

- (1) Material that the disclosing party may use, including for impeachment or rebuttal;
- (2) Material that the disclosing party may use, unless the use would be solely for impeachment or rebuttal;
- (3) Material that any party may use, including for impeachment or rebuttal;
- (4) Material that any party may use, unless the use would be solely for impeachment or rebuttal; and
- (5) Material that any party may use, unless the use would be solely for impeachment or rebuttal, in which case disclosure would be limited to material the disclosing party may use.

The subcommittee requests that these points be discussed at the full committee's August meeting. Once the full committee provides guidance on these "philosophical" questions, specific language addressing initial disclosure obligations can be drafted. The subcommittee's most recent edited draft is attached.

Wes

Nevada Rules of Civil Procedure Revision Committee Summary

September 27, 2017 Meeting

The seventh meeting of the Nevada Rules of Civil Procedure Committee (Committee) was held on September 27, 2017 at 3:00 p.m. The meeting was video conferenced between the State Bar of Nevada Office in Reno and the Supreme Court conference rooms in Las Vegas and Carson City. Present in Reno were Discovery Commissioner Wesley Ayres, Graham Galloway, Bob Eisenberg, Dan Polsenberg, and Don Springmeyer. Present in Carson City were Judge Jim Wilson, Kevin Powers, and Todd Reese. Present in Las Vegas were Justice Mark Gibbons, Justice Kristina Pickering, Judge Elissa Cadish, Discovery Commissioner Bonnie Bulla, Judge Kim Wanker, Professor Tom Main, George Bochanis, Steve Morris, and Rachael Mastel.

The Committee first approved the August 16, 2017 meeting minutes.

The Committee then welcomed Judge James E. Wilson, who was recently appointed to the Committee. Judge Wilson will join the discovery; NRCP 4, 5, 6; and style subcommittees.

The Committee then discussed publicizing its work and seeking comment from practitioners. It was agreed that, unless otherwise approved by the subcommittee chair, comments on a rule being developed by a subcommittee should not be sought from the bar until the subcommittee has finished their work with the rule. This will allow the subcommittee to completely vet and develop their work and to prevent an incomplete rule from being scrutinized by the bar. After a subcommittee has presented a proposed rule to the committee, however, then the committee members are encouraged to seek comment on the rule from any desired sources. This will enable the committee to have as much input as possible when considering the Rules.

The Committee then discussed the subcommittee rule recommendations.

1) NRCP 68 Subcommittee

Chair: Dan Polsenberg

Members: Don Springmeyer, Prof. Thomas Main

The subcommittee reported that it left “before trial” as is because a better alternative could not be found and that they fixed the time before trial at 21 days. The subcommittee also reported that they added a section to NRCP 68(d) to clarify that a party may pay the amount of the offer within 21 days without an adverse judgment. Todd Reese suggested adding, and will draft, language to NRCP 68(f) to clarify how to calculate the penalty when multiple offers have been given. The Committee also discussed the conflict in NRCP 68(d) between obtaining a judgment after 14 days but having 21 days to pay without entry of a judgment. The subcommittee will redraft that subsection of the rule. The Committee passed the rule to the November meeting, and the subcommittee will consider language changes to the rule.

2) Everything Else Subcommittee (All NRCP Rules not otherwise accounted for)

Chair: Justice Kristina Pickering

Members: Justice Mark Gibbons, Todd Reese

The Committee then discussed the revised proposed draft amendments to NRCP 5.2, 22, and 25 submitted by the Everything Else Subcommittee. The Committee approved the drafts of NRCP 5.2 and 22. When discussing NRCP 25, the Committee expressed concerns regarding who may file a notice of death, what the purpose of the district court noting the death on the record is, and whether the notice of death trigger a trap for the unwary with the 90 day period to substitute a person after the notice is filed. The Committee discussed whether the dismissal after 90 days should be mandatory or discretionary. The subcommittee will reconsider and redraft the rule, taking into consideration the Committee’s concerns.

3) Class and Derivative Actions Subcommittee (NRCP 23, 23.1, 23.2)

Chair: Prof. Thomas Main

Members: Dan Polsenberg, Don Springmeyer

The Class and Derivative Actions Subcommittee reported that it would present proposed rules at the next Committee meeting. (In November as the October meeting will focus on discovery.)

4) Time and Service of Process Subcommittee (NRCP 4, 4.1, 5, 6)

Chair: Judge Elissa Cadish

Members: Justice Kristina Pickering, Judge Jim Wilson; Don Springmeyer, Dan Polsenberg, Racheal Mastel, Todd Reese, Kevin Powers

The Committee then discussed the proposed draft of NRCP 5 submitted by the Time and Service of Process Subcommittee. The Committee approved NRCP 5 as proposed.

5) NRCP 12 and 56 Subcommittee (NRCP 8, 12, and 56)

Chair: Judge Elissa Cadish

Members: Justice Kristina Pickering, Judge Wanker, Prof. Thomas Main

The Committee then discussed the proposed draft of NRCP 8, 12, and 56 submitted by the NRCP 12 and 56 Subcommittee. The Advisory Committee Note added to NRCP 8 was approved. The Committee discussed the addition to NRCP 12 of the provisions for public entities, officers, and political subdivisions to answer or respond and whether they should have 45 or 60 days to or answer respond. The Committee approved the rules with a 45 day time period subject to syncing the public entities, officers, and political subdivisions provisions with NRCP 4. The Committee also discussed subsections (d) and (e) of NRCP 56, indicating that they did not alter and were consistent with existing law. The Committee approved NRCP 12 and 56 and the Advisory Committee Note proposed for NRCP 12.

6) Discovery Subcommittee (NRCP 16, 16.1, 26-37, 45)

Chair: Graham Galloway

Members: Steve Morris, Commissioner Wes Ayres, Commissioner Bonnie Bulla, Dan Polsenberg, George Bochanis, Don Springmeyer, Bill Peterson

The Committee then discussed the proposed draft amendments to NRCP 16.1, 26, 30, 34, and 35 submitted by the Discovery Subcommittee. As to Rule 35, Rachael Mastel reported that the family law bar suggested developing their own rule to address the unique problems regarding medical exams in family law. Bob Eisenberg sent the committee feedback from other practitioners on

the rule. Bob also stated that he did appreciate the work of the discovery subcommittee, but that he did not support the rule as written. His concerns are, among other things, the presence of an observer and the recording of the medical exam. Consideration of the rule was passed to the next meeting, pending further public comment on the rule and the development of a proposed alternative by Bob Eisenberg. The Committee briefly discussed NRCP 16.1, its approach to initial disclosures, and its approach to the testimony of treating physicians. The Committee also discussed whether Rule 26 should refer to NRCP 16.2 and 16.205. The Committee also briefly discussed NRCP 30 and 34, not mentioning any serious concerns. Because time remaining was short, the co-chairs advised the Committee to review the discovery rules and to be prepared to discuss them at the next meeting. This set of rules will be first on the next meeting agenda to afford sufficient time for their discussion.

A discussion was then held of issues of general concern to the Committee members.

Justice Gibbons advised the Committee that the next Committee meetings are scheduled for October 25, 2017 at 3:00 pm, and November 29, 2017 at 3:00 pm at the usual times and locations. The next Committee meeting in October will focus exclusively on discovery.

There being no further business to come before the Committee, the meeting was adjourned at 5:03 p.m.

Respectfully submitted,
Kristina Pickering and Mark Gibbons
Co-Chairs

Nevada Rules of Civil Procedure Revision Committee Summary

October 25, 2017 Meeting

The eighth meeting of the Nevada Rules of Civil Procedure Committee (Committee) was held on October 25, 2017 at 3:00 p.m. The meeting was video conferenced between the State Bar of Nevada Office in Reno and the Supreme Court conference rooms in Las Vegas and Carson City. Present in Reno were Discovery Commissioner Wesley Ayres, Graham Galloway, Bob Eisenberg, and Bill Peterson. Present in Carson City were Justice Mark Gibbons, Judge Jim Wilson, Kevin Powers, and Todd Reese. Present in Las Vegas were Justice Kristina Pickering, Judge Elissa Cadish, Judge Kim Wanker, Discovery Commissioner Bonnie Bulla, George Bochanis, Steve Morris, Rachael Mastel, Dan Polsenberg, Don Springmeyer, and Professor Thom Main.

The Committee first approved the September 27, 2017 meeting minutes.

This meeting focused on discovery. The Committee discussed the following subcommittee rule recommendations.

1) Discovery Subcommittee (NRCP 16, 16.1, 26-37, 45)

Chair: Graham Galloway

Members: Steve Morris, Commissioner Wes Ayres, Commissioner Bonnie Bulla, Dan Polsenberg, George Bochanis, Don Springmeyer, Bill Peterson

The Committee discussed the proposed draft amendments to NRCP 16.1, 26, 30, 34, and 35 submitted by the Discovery Subcommittee. As to Rule 35, Bob Eisenberg presented an opposing proposed amendment. The Committee also considered the opposing views submitted by plaintiff and insurance defense counsel regarding Rule 35. Graham Galloway discussed the language in the committee note regarding the location of the exam, indicating that he agreed that the language should be changed so that the location will be in Nevada, unless otherwise stipulated or ordered. The Committee also discussed that this provision was substantive and should be in the text of the rule. The committee then discussed audio and video recordings and observers. The issue is, generally, how to address issues that arise during an examination and whether a person subject to an exam should have a right to a recording or an observer, or whether a court should be required to order a recording or

observer, and if so whether that should be for just cause. Commissioner Bulla emphasized that the committee draft was a compromise position. Several members of the subcommittee felt that exams should be video recorded, but Commissioner Bulla noted her opposition to video recording and her concerns that such videos might end up on the internet, compromising the examinee's privacy. The committee and the subcommittee agreed with the language in Bob Eisenberg's draft that observers should not obstruct the exam and that minors and incompetent persons should be entitled to a parent or guardian as an observer. Judge Cadish commented that a person subject to an exam might have a right to an audio recording but that the court might be required to order an observer. The Committee also acknowledged its lack of understanding whether doctors would refuse to perform exams if recorded or if an observer was present, or if performing an exam with a recording or observer might violate doctors' ethical rules. The committee noted that some attorneys were contacting doctors to get their input on this question. The Committee also discussed the lack of an insurance defense lawyer on the subcommittee and on the committee as a whole. Dan Polsenberg also noted that the draft from Bob Eisenberg was inconsistent on who would be requesting what, and Bob agreed that revisions were appropriate. The Committee passed on Rule 35 to allow Bob Eisenberg to work with the subcommittee to edit their respective drafts as needed, and to attempt to work out a compromise version or to present competing version to the committee at the next meeting.

The Committee next discussed NRCP 26, noting some discrepancy with the cross-citations to Rules 16.2 and 16.205. Subject to correcting those citations, Justice Pickering moved to recommend the rule, the motion was seconded by Justice Gibbons, and the Committee voted to recommend the rule.

The Committee next discussed Rule 30. The subcommittee noted that the rule tracked FRCP 30 including the limitation of 10 depositions absent stipulation or leave of court. The subcommittee noted that Rule 30(h) was kept from the existing rule, and that the rule was not intended to change "7 hours of testimony" referring to 7 hours on the record or the holding in *Coyote Springs Inv., LLC v. Eighth Judicial Dist. Court*, 131 Nev., Adv. Op. 18, 347 P.3d 267 (2015), concerning privileges during breaks in the deposition. Subject to minor edits to the committee note, Don Springmeyer moved to recommend the rule, Judge Cadish seconded, and the Committee voted to recommend the rule.

The Committee next discussed Rule 34, specifically the edited language in Rule 34(b)(2)(E)(i) pertaining to production of documents as they are kept in the usual course of business, unless that form of production is unreasonably burdensome for the discovering party. The Committee recognized that while the producing party should not be permitted to simply dump documents on the discovering party, neither should the discovering party be permitted to require the producing party to organize the documents in a form preferred by the discovering party when the documents are produced in an organized form. Commissioner Bulla stressed that some form of cost shifting or further request for organization was required to address discovery abuses. The Committee passed on Rule 34 so that the discovery subcommittee could address the language in Rule 34(b)(2)(E)(i).

The Committee passed on Rule 16.1 so that the subcommittee could make further edits to the rule.

A discussion was then held of issues of general concern to the Committee members. The Committee Members noted that the link on the Supreme Court's website to the Committee information was difficult to find, and the Committee asked if it could be made easier to find. The Supreme Court staff and Justices will investigate this. Bob Eisenberg asked what materials he could print for presentations concerning the Committee. Any materials that are posted on the website are publicly disseminated, and may certainly be used. These include the minutes, agendas, and recommended rules. Similar to disclosure of other materials, drafts in subcommittee should not be disclosed to allow the subcommittees to perform their work, but any drafts circulated to the committee as a whole may be used. The Justices cautioned the committee not to disclose information about pending cases when discussing hypotheticals. George Bochanis and Graham Galloway agreed to work on redrafting Rule 25 with the Everything Else subcommittee.

Justice Gibbons advised the Committee that the next Committee meeting is scheduled for November 29, 2017 at 3:00 pm at the usual locations, and that the Justices would set a December meeting.

There being no further business to come before the Committee, the meeting was adjourned at 5:00 p.m.

Respectfully submitted,
Kristina Pickering and Mark Gibbons
Co-Chairs

Nevada Rules of Civil Procedure Revision Committee Summary

November 29, 2017 Meeting

The ninth meeting of the Nevada Rules of Civil Procedure Committee (Committee) was held on November 29, 2017 at 3:00 p.m. The meeting was video conferenced between the State Bar of Nevada Office in Reno and the Supreme Court conference rooms in Las Vegas and Carson City. Present in Reno were Discovery Commissioner Wes Ayres, Graham Galloway, Bob Eisenberg, and Bill Peterson. Present in Carson City were Judge Jim Wilson, Kevin Powers, and Todd Reese. Present in Las Vegas were Justice Mark Gibbons, Justice Kristina Pickering, Judge Elissa Cadish, Judge Kim Wanker, Discovery Commissioner Bonnie Bulla, Steve Morris, Don Springmeyer, Professor Thom Main, and Loren Young.

The Committee first approved the October 25, 2017 meeting minutes.

Justice Gibbons then introduced Loren Young as a new committee member.

The various subcommittees reported that they would attempt to have Rules 4, 23, 23.1, 25, and the rest of the discovery rules for the committee's consideration at the December committee meeting.

The Committee discussed the following subcommittee rule recommendations.

1) Discovery Subcommittee (NRCP 16, 16.1, 26-37, 45)

Chair: Graham Galloway

Members: Judge Jim Wilson, Steve Morris, Commissioner Wes Ayres, Commissioner Bonnie Bulla, Dan Polsenberg, George Bochanis, Don Springmeyer, Bill Peterson, and Loren Young

The Committee discussed the proposed draft amendments to NRCP 16.1, 34, and 35 submitted by the Discovery Subcommittee. As to Rule 16.1, the subcommittee indicated that the proposed rule contained broader initial disclosure requirements than the federal rule, retaining the requirement of disclosing rebuttal and impeachment evidence, and requiring the disclosure of audio or video records, reports, or witness statements regarding the incident. Commissioner Bulla stated that the subcommittee felt that this type of information should be disclosed as soon as possible. Justice Pickering and

others were concerned about the breadth of the language and whether it would require the disclosure of internal emails or recorded phone calls regarding the incident. Bob Eisenberg commented that the last committee to review the rules favored as complete a disclosure as possible to encourage settlement. The committee passed on the rule, pending preparation of a redline of the rule.

The committee briefly discussed Rule 34, noting the new language in Rule 34(b)(2)(E)(i) requiring that the production of electronic documents be in a form not unreasonably burdensome for the discovering party to correlate, and Rule 34(d) regarding the reasonable cost of copying documents and storage media devices. Don Springmeyer moved to recommend the rule as written, the motion was seconded by Judge Cadish, and the Committee voted to recommend the rule.

As to Rule 35, competing proposals were put forth by the discovery subcommittee and by Bob Eisenberg. Graham Galloway summarized the disputed points, whether audio recording and an observer should be a matter of right or only by court order. Commissioner Bulla commented that the discovery subcommittee could accept the language in Bob Eisenberg's draft concerning the location of the exam and the conduct of observers. She also indicated that the language regarding conduct of the observers was in the advisory note of their draft, but that they could allow for it being moved into the text. Judge Cadish supported a draft giving a person subject to an exam a right to an audio recording but requiring that they seek a court order for an observer. Kevin Powers and Judge Wilson agreed with this approach. Loren Young reported back on his conversations with doctors regarding the rule. The doctors said that this version of the rule would not prohibit them from performing medical exams, but that it appeared to insinuate that they were not trustworthy, that it might intimidate new doctors from performing exams, and that it may shift the focus of the medical exam from the findings to the procedure used. The Committee passed on Rule 35 to allow the different sides to incorporate changes and present three final drafts to be forwarded to the Supreme Court.

2) NRCP 68 Subcommittee

Chair: Dan Polsenberg

Members: Don Springmeyer, Prof. Thom Main

The Committee next discussed NRCP 68. Subject to minor language and punctuation changes, Don Springmeyer moved to recommend the rule, Judge Wilson seconded the motion, and the committee voted to recommend the rule.

3) Time and Service of Process Subcommittee (NRCP 4, 4.1, 5, 6, and NRAP 4, 25, and 26)

Chair: Judge Elissa Cadish

Members: Justice Kristina Pickering, Judge Jim Wilson, Don Springmeyer, Dan Polsenberg, Racheal Mastel, Todd Reese, Kevin Powers

The Committee discussed the proposed draft amendments to NRCP 4.1 and 6, and NRAP 26 submitted by the Time and Service of Process Subcommittee. The Committee first discussed FRCP 4.1, and agreed that it was not necessary for Nevada. Judge Cadish moved to recommend rejecting the rule, Don Springmeyer seconded the motion, and the committee approved rejecting the rule.

The Committee next considered NRCP 6. Todd Reese and Judge Cadish explained that the proposed rule adopted the federal method of counting days, counting all days and not excluding weekends and holidays, which enabled “day of the week” counting. The ability of the parties to stipulate to extensions of time subject to court approval was retained from the existing NRCP, and the minimal approach to NRCP 6(c) was proposed, instead of incorporating DCR 13 into the rule. The Committee elected to have a motion filed 21 days before a hearing, to reference the district court rules in NRCP 6(c)(1)(B), and to require the opposing affidavits to be due 7 days before any hearing. This 14 day window tracks the time line in DCR 13. The committee also discussed eliminating the 3 extra day allowance after electronic service, and agreed with the change, but Justice Pickering noted that the local rules need to be changed as well for consistency across all Nevada rules to prevent traps for the unwary who might think that they get an extra three days to act. Judge Cadish noted that the advisory committee notes addressed the concern about inconsistent time counting and rules and statutes that may not be updated quickly, noting

that the note suggested allowing additional time when warranted to prevent any prejudice as a result of the rule change. Subject to a notation in the advisory committee note regarding the need to alter the local rules, Judge Cadish moved to recommend the rule, Judge Wilson seconded the motion, and the committee voted to recommend the rule.

The Committee next considered NRAP 26. NRAP 26 is the appellate time calculation rule. In order to have one system of counting time, it should be changed as well. The Committee agree with the need to change the rule for consistency. Kevin powers noted an inconsistency with the language of NRAP 26(c) and the NEFCR, and the rule was referred back to subcommittee to address the inconsistency.

4) Everything Else Subcommittee

Chair: Justice Kristina Pickering

Members: Justice Mark Gibbons, Todd Reese

The Committee discussed the proposed draft amendments to NRCP 13, 14, 24, and 47 submitted by the Everything Else Subcommittee. The Committee agree with the changes incorporated into Rule 47 that were suggested by Judge Wilson. Judge Cadish agree with the changes to Rules 13 and 14 to permit third-party defendants and defendants to file crossclaims against each other. Todd Reese noted that Rule 13 was proposed subject to the language in 13(d) being synced with the language in Rules 4 and 12 concerning the state and public entities. Subject to syncing the language, Justice Gibbons moved to recommend the rules, Todd Reese seconded the motion, and the committee voted to recommend the rules.

5) Discovery Subcommittee (NRCP 16, 16.1, 26-37, 45)

Chair: Graham Galloway

Members: Judge Jim Wilson, Steve Morris, Commissioner Wes Ayres, Commissioner Bonnie Bulla, Dan Polsenberg, George Bochanis, Don Springmeyer, Bill Peterson, and Loren Young

The Committee discussed the proposed draft amendments to NRCP 37 and 45 submitted by the Discovery Subcommittee. Kevin Powers expressed reservations about the short timeframe in Rule 45(a)(4) to notify other parties about a third-party subpoena, and the short timeframe to object and

file a motion. The committee agreed to change the 5 day time frame to 7 days to be consistent with the federal method of counting days. The committee elected to leave the 3 day time frame for filing a motion as is. The 15 day time frame in Rule 45(b)(1) was also change to 14 days for consistency. Justice Gibbons Justice Gibbons moved to recommend the rule, Don Springmeyer seconded the motion, and the committee voted to recommend the rule. Kevin Powers voted not to recommend the rule, citing the minimal 3 day time frame to file a motion in Rule 45(a)(4).

Rule 37 was not acted upon and was passed to the December meeting.

A discussion was then held of issues of general concern to the Committee members. Justice Gibbons advised the Committee that the next Committee meetings are scheduled for December 20, 2017, January 17, 2018, and February 21, 2018, at 3:00 pm, at the usual locations.

There being no further business to come before the Committee, the meeting was adjourned at 5:05 p.m.

Respectfully submitted,
Kristina Pickering and Mark Gibbons
Co-Chairs

Nevada Rules of Civil Procedure Revision Committee Summary

December 20, 2017 Meeting

The tenth meeting of the Nevada Rules of Civil Procedure Committee (Committee) was held on December 20 at 3:00 p.m. The meeting was video conferenced between the State Bar of Nevada Office in Reno and the Supreme Court conference rooms in Las Vegas and Carson City. Present in Reno were Discovery Commissioner Wes Ayres, Graham Galloway, Bob Eisenberg, and Bill Peterson. Present in Carson City were Justice Mark Gibbons, Justice Kristina Pickering, Judge Jim Wilson, Kevin Powers, and Todd Reese. Present in Las Vegas were Judge Elissa Cadish, Judge Kim Wanker, Discovery Commissioner Bonnie Bulla, Don Springmeyer, Racheal Mastel, and Don Polsenberg.

The Committee first approved the November 29, 2017 meeting minutes with minor edits.

The various subcommittees reported that they would attempt to have Rules 4, 6, 23.1, 23.2, the rest of the discovery rules, the judgment and post-judgment rules, NRAP 26, and NEFCR 9 for the committee's consideration at the January committee meeting. Regarding NEFCR 9, the subcommittee reported that the clerk's offices shed light on the procedure determining when electronic service is given and that the rules would need to be adjusted to reflect the procedure.

The Committee discussed the following subcommittee rule recommendations.

1) Discovery Subcommittee (NRCP 16, 16.1, 26-37, 45)

Chair: Graham Galloway

Members: Judge Jim Wilson, Steve Morris, Commissioner Wes Ayres, Commissioner Bonnie Bulla, Dan Polsenberg, George Bochanis, Don Springmeyer, Bill Peterson, and Loren Young

The Committee discussed the proposed draft amendments to NRCP 16.1, 27, 28, 29, 35, and 37 submitted by the Discovery Subcommittee. As to Rule 16.1, the subcommittee indicated that there was a majority and minority position regarding broader or more restrictive initial disclosure requirements. The committee passed this rule to the January meeting so that additional committee members could be present for the discussion.

The committee briefly discussed Rule 35, noting that three final proposals were complete and would be submitted to the Supreme Court. The co-chairs asked the proponents of the proposals to draft summary statements advocating for their proposal.

The committee also discussed Rule 37, noting the change in language in NRCP 37(a)(4) to account for documents not in compliance with Rule 34(b)(2)(E)(i). The rule was approved as written.

The committee next discussed Rules 27, 28, and 29. The discovery committee proposed to adopt the federal rules without change for use in Nevada. The committee expressed concern about whether Rule 29(b)'s language concerning "any form of discovery" would permit stipulations regarding depositions and whether that language conflicted with the existing rule or the Eighth Judicial District Court Rules. After discussion, the committee believed that there was no conflict, or that any conflict could be resolved. Justice Gibbons moved to recommend the rules as written, the motion was seconded by Justice Pickering, and the Committee voted to recommend the rules.

2) Class and Derivative Actions Subcommittee (NRCP 23, 23.1, 23.2)

Chair: Dan Polsenberg

Members: Don Springmeyer and Professor Thomas Main

The Committee next discussed competing proposals regarding Rule 23. Dan Polsenberg proposed adopting FRCP 23, Don Springmeyer proposed retaining the existing NRCP 23 with edits, and Professor Main is agnostic on the proposals. The Committee discussed sending both proposals to the Supreme Court, but noted the new appellate procedure in FRCP 23(f). Nevada does not currently have an "appeal by permission" type of appeal and this would necessitate adopting new appellate rules. Dan Polsenberg agreed to draft two alternative proposals, one retaining the new type of permissive appeal and one with an appeal as of right. Pending the edited rules, the rule was passed to the next meeting.

3) NRCP 25 Subcommittee (NRCP 25 and NRAP 43)

Chair: Todd Reese

Members: Justice Kristina Pickering, Graham Galloway, George Bochanis, and Loren Young

The Committee next discussed NRCP 25 and NRAP 43. Todd Reese explained that the rule was adapted from the FRCP and the existing NRCP to give more flexibility to the district courts in dealing with a party's death and to avoid the mandatory dismissal penalty. The rule's provisions are also garnered from the NRAP and other states rules. The rule is not intended to violate due process or change probate law. Justice Pickering noted that the Rule is set for review by probate attorneys to make sure that its provisions do not conflict with probate law. Concerns were also raised regarding whether provisions of the rule permitting an action to proceed despite the party's death would conflict with Rule 17(a). The Committee passed on the rule pending review.

4) Everything Else Subcommittee

Chair: Justice Kristina Pickering

Members: Justice Mark Gibbons, Todd Reese

The Committee discussed the proposed draft amendments to NRCP 38, 39, 40, 43, 44, 48, and 49 submitted by the Everything Else Subcommittee. The committee discussed edits to Rule 38, 40, and 43. The committee also discussed the passive wording of Rule 48, discussing where a jury of 8 persons was authorized. Rule 48 was passed for redrafting and research. Justice Gibbons moved to recommend the remaining rules, Judge Wilson seconded the motion, and the committee voted to recommend the rules.

A discussion was then held of issues of general concern to the Committee members. Justice Gibbons advised the Committee that the next Committee meetings are scheduled for January 17, 2018, and February 21, 2018, at 3:00 pm. The Reno location of the January meeting will be at a Washoe County District Court Room. The other locations will be at the usual locations.

There being no further business to come before the Committee, the meeting was adjourned at 4:35 p.m.

Respectfully submitted,
Kristina Pickering and Mark Gibbons
Co-Chairs

IN THE SUPREME COURT OF THE STATE OF NEVADA

IN THE MATTER OF CREATING A
COMMITTEE TO UPDATE AND
REVISE THE NEVADA RULES OF
CIVIL PROCEDURE.

No. ADKT 0522

FILED

AUG 17 2018

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY *[Signature]*
CHIEF DEPUTY CLERK

PETITION

Justices Mark Gibbons and Kristina Pickering of the Nevada Supreme Court petition this Court to amend the Nevada Rules of Civil Procedure, the Nevada Rules of Appellate Procedure, and the Nevada Electronic Filing and Conversion Rules. In support of the petition, Justices Gibbons and Pickering allege that:

1. On February 20, 2017, the Supreme Court of Nevada appointed a committee to consider whether the Nevada Rules of Civil Procedure and associated rules should be updated and, if so, to recommend appropriate revisions.

2. The Committee consists of Justice Mark Gibbons, Justice Kristina Pickering, Judge Elissa F. Cadish, Judge Kimberly A. Wanker, Judge James E. Wilson, Discovery Commissioner Wesley M. Ayres, Discovery Commissioner Bonnie A. Bulla, Professor Thom Main, and Attorneys George T. Bochanis, Robert L. Eisenberg, Graham A. Galloway, Racheal Mastel, Steve Morris, William E. Peterson, Daniel F. Polsenberg, Kevin C. Powers, Don Springmeyer, Todd E. Reese, and Loren S. Young.

3. The Committee held regularly scheduled meetings over the course of the past year, the agendas and minutes from which, along with proposed recommended revisions, are publicly available at https://nvcourts.gov/AOC/Committees_and_Commissions/NRCP/Overview/

4. After considering the comments of its members and those of bench, bar, and the public who offered comments, the Committee submits the following preliminary rule drafts for the Supreme Court of Nevada's consideration:

- Exhibit A: Nevada Rules of Civil Procedure (clean copy with Advisory Committee Notes).
- Exhibit B: Nevada Rules of Civil Procedure (redline against the existing Nevada Rules of Civil Procedure, without Advisory Committee Notes).
- Exhibit C: Nevada Rules of Civil Procedure (redline against the existing Federal Rules of Civil Procedure, without Advisory Committee Notes).
- Exhibit D: Nevada Rules of Appellate Procedure
- Exhibit E: Nevada Electronic Filing and Conversion Rules

5. The Committee did not reach unanimous agreement on all rules that it considered. For those rules on which the Committee was not unanimous, the Committee has presented alternative drafts of the rule.

Accordingly, petitioners request that the Nevada Supreme Court hold such public hearings and receive such additional input from judges, attorneys, and other interested parties regarding the proposed

amendments as the Court deems appropriate, and that the Court consider and adopt the proposed rule amendments.

Dated this 17th day of August 2018.

Respectfully submitted,

Mark Gibbons

MARK GIBBONS, Justice

Kristina Pickering

KRISTINA PICKERING, Justice

EXHIBIT A

Preface

The proposed amendments to the Nevada Rules of Civil Procedure represent a comprehensive revision of NRCP. These proposed revisions were prompted in part by the extensive substantive and stylistic updates to the Federal Rules of Civil Procedure since the last review of the NRCP. At the outset, the Advisory Committee recognized that the NRCP are, in general, based upon the FRCP. Thus, where the NRCP had previously adopted the FRCP language, the Committee recommended amending the NRCP to adopt the modernized language of the current FRCP. Where the NRCP depart from the FRCP, the Committee reviewed the FRCP to determine whether any updates to the FRCP should be adopted or whether the language in the existing NRCP should be retained or modernized. The Committee also reviewed the NRCP to identify and address any deficiencies that have arisen over time.

The Committee did not unanimously approve all of the preliminary rule drafts that follow. In certain instances, alternatives are presented for the Supreme Court's consideration. In those instances, the Committee will, in a supplemental filing, offer commentary on the distinctions between the alternatives. Certain advisory committee notes are also incomplete, and those, too, will be updated by supplemental filing. Due to the comprehensive nature of the revisions, the NRCP is presented as a complete revision of the entire NRCP. However, redlines of the proposed NRCP against the current NRCP and FRCP are attached to this petition to facilitate review.

In general, the following rules were adopted from the FRCP without change, or with minor changes adapting the rule for use in Nevada, and are stylistic changes from the prior NRCP rules.

NRCP 1, 2, 3, 7, 9, 11, 13, 18, 20, 21, 22, 28, 29, 31, 42, 43, 44, 44.1, 46, 55, 57, 61, 63, 64, 65.1, 69(a), 70, 71, 78, 82, and 86(a).

The following rules were adopted from the FRCP, but have substantive changes—either consistent with the existing Nevada rules or newly added substantive changes.

NRCP 5, 6, 7.1, 8, 10, 12, 14, 15, 16, 17, 19, 24, 27, 30, 32, 33, 34, 36, 38, 39, 40, 41, 45, 49, 50, 52, 54, 56, 59, 60, 62, 62.1, 65, 66, 77, and 80.

(d) Expenses of Copying Documents and/or Producing Electronically Stored Information. Unless the court orders otherwise, the party requesting production under this rule must pay the responding party the reasonable cost of copying documents. If the responding party produces electronically stored information by a media storage device, the requesting party must pay the reasonable cost of the device.

Advisory Committee Note—2018 Amendment

Rule 34 is conformed to FRCP 34 with Nevada specific alterations in Rule 34(b)(2)(E)(i). Rule 34(d) is retained from the prior Nevada rule.

Rule 35. Physical and Mental Examinations (ALTERNATE 1)

(a) Order for Examination.

(1) **In General.** The court where the action is pending may order a party whose mental or physical condition—including blood group—is in controversy to submit to a physical or mental examination by a suitably licensed or certified examiner. The court has the same authority to order a party to produce for examination a person who is in the party's custody or under the party's legal control.

(2) Motion and Notice; Contents of the Order.

(A) The order may be made only on motion for good cause and on notice to all parties and the person to be examined; and

(B) The order must specify the time, place, manner, conditions, and scope of the examination, as well as the person or persons who will perform it. The examination must take place in an appropriate professional setting and in the judicial district in which the case is pending, unless a different location is agreed to by the parties or ordered by the court.

(3) **Recording the Examination.** The party against whom the order was issued may, at that party's expense, have the examination audio recorded. The

examiner may also have the examination audio recorded at his or her expense. If the party against whom the order is issued elects to audio record the examination, the party must advise the examiner of the recording prior to commencement of the examination. If the examiner elects to audio record the examination, the examiner must advise of the recording prior to the examination. Any party may obtain a copy of any audio recording by making a written request for the recording.

(4) Observing the Examination. Unless otherwise ordered by the court or discovery commissioner for good cause, the party against whom the order was issued may have one observer present for the examination, except that the observer may not be the party's attorney, or anyone employed by the party or the party's attorney. An observer must not in any way interfere, obstruct, or participate in the examination.

(b) Examiner's Report.

(1) Request by the Party or Person Examined. Unless otherwise ordered by the court or discovery commissioner for good cause, the party who moved for the examination must provide, upon a request by the party against whom the examination order was issued or by the person examined, a copy of the examiner's report within 30 days of the examination or by the date of the applicable expert disclosure deadline, whichever occurs first.

(2) Contents. The examiner's report must be in writing and must set out in detail the examiner's findings, including diagnoses, conclusions, and the results of any tests.

(3) Request by the Moving Party. After delivering the reports, the party who moved for the examination may request—and is entitled to receive—from the party against whom the examination order was issued like reports of all earlier or later examinations of the same condition. But those reports need not be delivered by the party with custody or control of the person examined if the party shows that it could not obtain them.

(4) **Waiver of Privilege.** By requesting and obtaining the examiner's report, or by deposing the examiner, the party examined waives any privilege it may have—in that action or any other action involving the same controversy,—concerning testimony about all examinations of the same condition.

(5) **Failure to Deliver a Report.** The court on motion may order—on just terms—that a party deliver the report of an examination. If the report(s) is not provided, the court may exclude the examiner's testimony at trial.

(6) **Scope.** Rule 35(b) applies also to an examinations made by the parties' agreement, unless the agreement states otherwise. Rule 35 does not preclude obtaining an examiner's report or deposing an examiner under other rules.

Advisory Committee Note—2018 Amendment

Rule 35(a)(1) permits an examination. Rule 35(a)(2)(B) directs that the examination must take place in the judicial district where the case is pending unless otherwise stipulated by the parties or ordered by the Court. The examination must be performed by a person licensed or provisionally licensed or certified in Nevada and take place in a professional medical office or setting. A hotel room or attorney's office will not suffice. Rule 35(a)(3) permits the audio recording of an examination without leave of court. As permitted by the rule, either party may transcribe the audio recording of the examination. It is envisioned that the primary purpose of such transcription would be to address by motion any irregularity that occurred during the examination. At trial, a party may use any portion of the transcription as permitted by Nevada law of evidence. Rule 35(a)(4) allows the person being examined to have an observer present during the examination unless otherwise ordered upon a showing of good cause. In cases involving minors, conservators and or guardians, the notice requirements and who may obtain a copy of the report is governed by the law applicable to minors, conservators and guardians. If a report is confidential, then obtaining a copy may require an order from the court. If an examination is required

as part of a child custody evaluation, a parent as an observer may not be appropriate. The examiner may have a member of the examiner's staff present during the examination if it is necessary in order for the examiner to comply with accepted standards of care or reasonable office procedures.

The report required by Rule 35(b) may only contain opinions concerning the physical or mental condition in controversy for which the examiner is qualified to render an opinion.

The disclosure deadline for the report in Rule 35(b)(1) contemplates that, for the vast majority of cases, the examiner's report will be required to be disclosed at the time of the initial expert disclosure deadline, if that deadline is within 30 days of the examination. There may be rare circumstances that would justify a rebuttal Rule 35 examination. Any report prepared of from a rebuttal examination must be timely disclosed by the rebuttal expert disclosure deadline or within 30 days of the examination, whichever occurs first. If the expert disclosure deadlines have passed, a party seeking a Rule 35 examination must move to reopen the applicable expert disclosure deadlines unless otherwise stipulated in writing by the parties. In order to reopen an expert disclosure deadline, the moving party must demonstrate excusable neglect or changed circumstances, such as where there has been an unanticipated change in a party's physical or mental condition.

Rule 35. Physical and Mental Examinations (ALTERNATE 2)

(a) Order for Examination.

(1) **In General.** The court where the action is pending may order a party whose mental or physical condition—including blood group—is in controversy to submit to a physical or mental examination by a suitably licensed or certified examiner. The court has the same authority to order a party to produce for examination a person who is in the party's custody or under the party's legal control.

(2) Motion and Notice; Contents of the Order.

(A) The order may be made only on motion for good cause and on notice to all parties and the person to be examined; and

(B) The order must specify the time, place, manner, conditions, and scope of the examination, as well as the person or persons who will perform it. The examination must take place in an appropriate professional setting in the judicial district in which the case is pending, unless otherwise agreed by the parties or ordered by the court.

(3) Recording the Examination. The party against whom the order is being requested may seek a condition in the order, upon a showing of good cause, allowing that party to audio record the examination at that party's expense. The examiner may also have the examination audio recorded at his or her expense. If the party against whom the order is issued is allowed to audio record the examination, the party must advise the examiner of the recording prior to commencement of the examination. If the examiner elects to audio record the examination, the examiner must advise of the recording prior to the examination. Any party may obtain a copy of any audio recording by making a written request for the recording.

(4) Observing the Examination. The party against whom the order is being requested may seek a condition in the order, upon a showing of good cause, allowing that party to have one observer present for the examination, except that the observer may not be the party's attorney, or anyone employed by the party or the party's attorney. Such an observer must not in any way interfere, obstruct, or participate in the examination, and may only observe the examination, except as otherwise specified in the order. In the event the party against whom the order was issued is a minor, the minor is permitted to have a parent or legal guardian observe the examination without leave of court.

(b) Examiner's Report.

(1) Request by the Party or Person Examined. Unless otherwise ordered by the court or discovery commissioner for good cause, the party who moved

for the examination must provide, upon a request by the party against whom the examination order was issued or by the person examined, a copy of the examiner's report within 30 days of the examination or by the date of the applicable expert disclosure deadline, whichever occurs first.

(2) **Contents.** The examiner's report must be in writing and must set out in detail the examiner's findings, including diagnoses, conclusions, and the results of any tests.

(3) **Request by the Moving Party.** After delivering the reports, the party who moved for the examination may request—and is entitled to receive—from the party against whom the examination order was issued like reports of all earlier or later examinations of the same condition. But those reports need not be delivered by the party with custody or control of the person examined if the party shows that it could not obtain them.

(4) **Waiver of Privilege.** By requesting and obtaining the examiner's report, or by deposing the examiner, the party examined waives any privilege it may have—in that action or any other action involving the same controversy—concerning testimony about all examinations of the same condition.

(5) **Failure to Deliver a Report.** The court on motion may order—on just terms—that a party deliver the report of an examination. If the report(s) is not provided, the court may exclude the examiner's testimony at trial.

(6) **Scope.** Rule 35(b) applies also to an examination made by the parties' agreement, unless the agreement states otherwise. Rule 35 does not preclude obtaining an examiner's report or deposing an examiner under other rules.

Advisory Committee Note—2018 Amendment

TBD.

Rule 35. Physical and Mental Examinations (ALTERNATE 3)

(a) Order for Examination.

(1) **In General.** The court where the action is pending may order a party whose mental or physical condition—including blood group—is in controversy to submit to a physical or mental examination by a suitably licensed or certified examiner. The court has the same authority to order a party to produce for examination a person who is in the party's custody or under the party's legal control.

(2) Motion and Notice; Contents of the Order.

(A) The order may be made only on motion for good cause and on notice to all parties and the person to be examined; and

(B) The order must specify the time, place, manner, conditions, and scope of the examination, as well as the person or persons who will perform it. The examination must take place in an appropriate professional setting in the judicial district in which the case is pending, unless otherwise agreed by the parties or ordered by the court.

(3) **Recording the Examination.** The party against whom the order was issued may, at that party's expense, have the examination audio recorded. The examiner may also have the examination audio recorded at his or her expense. If the party against whom the order is issued is allowed to audio record the examination, the party must advise the examiner of the recording prior to commencement of the examination. If the examiner elects to audio record the examination, the examiner must advise of the recording prior to the examination. Any party may obtain a copy of any audio recording by making a written request for the recording.

(4) **Observing the Examination.** The party against whom the order is being requested may seek a condition in the order, upon a showing of good cause, allowing that party to have one observer present for the examination, except that the observer may not be the party's attorney, or anyone employed by the party or the party's attorney. Such an observer must not in any way interfere, obstruct, or participate in the examination, and may only observe the examination, except as

otherwise specified in the order. In the event the party against whom the order was issued is a minor, the minor is permitted to have a parent or legal guardian observe the examination without leave of court.

(b) Examiner's Report.

(1) **Request by the Party or Person Examined.** Unless otherwise ordered by the court or discovery commissioner for good cause, the party who moved for the examination must provide, upon a request by the party against whom the examination order was issued or by the person examined, a copy of the examiner's report within 30 days of the examination or by the date of the applicable expert disclosure deadline, whichever occurs first.

(2) **Contents.** The examiner's report must be in writing and must set out in detail the examiner's findings, including diagnoses, conclusions, and the results of any tests.

(3) **Request by the Moving Party.** After delivering the reports, the party who moved for the examination may request—and is entitled to receive—from the party against whom the examination order was issued like reports of all earlier or later examinations of the same condition. But those reports need not be delivered by the party with custody or control of the person examined if the party shows that it could not obtain them.

(4) **Waiver of Privilege.** By requesting and obtaining the examiner's report, or by deposing the examiner, the party examined waives any privilege it may have—in that action or any other action involving the same controversy—concerning testimony about all examinations of the same condition.

(5) **Failure to Deliver a Report.** The court on motion may order—on just terms—that a party deliver the report of an examination. If the report(s) is not provided, the court may exclude the examiner's testimony at trial.

(6) **Scope.** Rule 35(b) applies also to an examination made by the parties' agreement, unless the agreement states otherwise. Rule 35 does not preclude obtaining an examiner's report or deposing an examiner under other rules.

Advisory Committee Note—2018 Amendment

TBD.

Rule 36. Requests for Admission

(a) Scope and Procedure.

(1) **Scope.** A party may serve on any other party a written request to admit, for purposes of the pending action only, the truth of any matters within the scope of Rule 26(b)(1) relating to:

(A) facts, the application of law to fact, or opinions about either;
and

(B) the genuineness of any described documents.

(2) **Form; Copy of a Document.** Each matter must be separately stated. A request to admit the genuineness of a document must be accompanied by a copy of the document unless it is, or has been, otherwise furnished or made available for inspection and copying.

(3) **Time to Respond; Effect of Not Responding.** A matter is admitted unless, within 30 days after being served, the party to whom the request is directed serves on the requesting party a written answer or objection addressed to the matter and signed by the party or its attorney. A shorter or longer time for responding may be stipulated to under Rule 29 or be ordered by the court.

(4) **Answer.** If a matter is not admitted, the answer must specifically deny it or state in detail why the answering party cannot truthfully admit or deny it. A denial must fairly respond to the substance of the matter; and when good faith requires that a party qualify an answer or deny only a part of a matter, the answer

IN THE SUPREME COURT OF THE STATE OF NEVADA

IN THE MATTER OF CREATING A
COMMITTEE TO UPDATE AND
REVISE THE NEVADA RULES OF
CIVIL PROCEDURE.

No. ADKT 0522

FILED

DEC 31 2018

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY  DEPUTY CLERK

*ORDER AMENDING THE RULES OF CIVIL PROCEDURE, THE
RULES OF APPELLATE PROCEDURE, AND THE NEVADA
ELECTRONIC FILING AND CONVERSION RULES*

On February 2, 2017, this court established a committee to review and recommend updates to the Nevada Rules of Civil Procedure and the associated district court and specialized rules. The committee consisted of co-chairs Justice Mark Gibbons and Justice Kristina Pickering, Judge Elissa F. Cadish, Judge Kimberly A. Wanker, Judge James E. Wilson, Discovery Commissioner Wesley M. Ayres, Discovery Commissioner Bonnie A. Bulla, Professor Thom Main, and attorneys George T. Bochanis, Robert L. Eisenberg, Graham A. Galloway, Racheal Mastel, Steve Morris, William E. Peterson, Daniel F. Polsenberg, Kevin C. Powers, Don Springmeyer, Todd E. Reese, and Loren S. Young. The Nevada Supreme Court acknowledges and thanks the NRCP committee members for their dedication, time, and effort to comprehensively review and revise the NRCP and recommend the associated amendments to the NRAP and NEFCR.

On August 17, 2018, the committee co-chairs, Justices Mark Gibbons and Kristina Pickering of the Nevada Supreme Court, filed a petition to amend the Nevada Rules of Civil Procedure, the Nevada Rules of Appellate Procedure, and the Nevada Electronic Filing and Conversion Rules. This court solicited public comment on the petition, received written public comment, and held a public hearing on October 19, 2018, in this

matter. This court reviewed the committee's recommendations, considered the public comment, and edited the rules. In particular, as to the proposed NRCP 32(a)(5), regarding the use of expert and treating physician deposition transcripts, the court agrees that the use of deposition transcripts would lower the cost of litigation and assist access to justice. The court, however, is reluctant to create by rule an additional exception to the hearsay rule, beyond those established in NRS Chapter 51. Establishing such a hearsay exception is the province of the Legislature.

The revised Nevada Rules of Civil Procedure, Nevada Rules of Appellate Procedure, and Nevada Electronic Filing and Conversion Rules contain significant changes. These changes will necessitate the review and probable revision of other associated rules and forms, including, among others, the family court financial disclosure forms, the Nevada Justice Court Rules of Civil Procedure, and a more thorough review of the Nevada Rules of Appellate Procedure. The Nevada Supreme Court will address the need for review of these rules in 2019.

For the benefit of the bench and the bar and to facilitate the transition from the existing rules to the new rules, the Nevada Supreme Court will create redlines of the new NRCP against the former NRCP and against the current FRCP. These redlines will be posted in ADKT 0522 and will be available on the Nevada Appellate Courts' website located at: [https://nvcourts.gov/AOC/Committees and Commissions/NRCP/Adopted Rules and Redlines/](https://nvcourts.gov/AOC/Committees%20and%20Commissions/NRCP/Adopted%20Rules%20and%20Redlines/). If any discrepancies exist between the redlines and the attached exhibits, the attached exhibits control as they are the officially adopted rules. The committee's agendas and minutes are available on the committee's website and will also be posted to ADKT 0522.

Accordingly,

WHEREAS, this court has solicited public comment on the petition, received written public comment, and held a public hearing on October 19, 2018; and

WHEREAS, this court has determined that rule changes are warranted;

IT IS HEREBY ORDERED that the Nevada Rules of Civil Procedure shall be amended and shall read as set forth in Exhibit A; and

IT IS HEREBY ORDERED that the Nevada Rules of Appellate Procedure shall be amended and shall read as set forth in Exhibit B; and

IT IS HEREBY ORDERED that the Nevada Electronic Filing and Conversion Rules shall be amended and shall read as set forth in Exhibit C.

IT IS FURTHER ORDERED that this amendment to the Nevada Rules of Civil Procedure, the Nevada rules of Appellate Procedure, and the Nevada Electronic Filing and Conversion Rules shall be effective prospectively on March 1, 2019, as to all pending cases and cases initiated after that date. The clerk of this court shall cause a notice of entry of this order to be published in the official publication of the State Bar of Nevada. Publication of this order shall be accomplished by the clerk disseminating copies of this order to all subscribers of the advance sheets of the Nevada Reports and all persons and agencies listed in NRS 2.345, and to the executive director of the State Bar of Nevada. The certificate of the clerk of this court as to the accomplishment of the above-described publication of notice of entry and dissemination of this order shall be conclusive evidence of the adoption and publication of the foregoing rule amendments.

IT IS FURTHER ORDERED that on and after the effective date, these amended rules shall control when conflicts arise between these amended rules and the local rules or the district court rules. Time frames accruing before the effective date of these amended rules shall be calculated using the existing, unamended rules. Time frames accruing on or after the effective date of these amended rules shall be calculated under these amended rules. If a reduction in the time to respond or other adverse consequence results from the change in and application of these amended rules, an extension of time or other relief may be warranted to prevent prejudice.

Dated this 31 day of December 2018.


, C.J.
Douglas

, J.
Cherry

, J.
Gibbons

, J.
Pickering

, J.
Hardesty

, J.
Parraguirre

, J.
Stiglich

cc: Richard Pocker, President, State Bar of Nevada
Kimberly Farmer, Executive Director, State Bar of Nevada
All District Court Judges
All Court of Appeal Judges
Clark County Bar Association
Washoe County Bar Association
First Judicial District Bar Association
Administrative Office of the Courts

EXHIBIT A
AMENDMENT TO THE NEVADA RULES OF
CIVIL PROCEDURE

Advisory Committee Note—2019 Amendments
Preface

The 2019 amendments to the Nevada Rules of Civil Procedure are comprehensive. Modeled in part on the 2018 version of the Federal Rules of Civil Procedure, the 2019 amendments restyle the rules and modernize their text to make them more easily understood. Although modeled on the FRCP, the amendments retain and add certain Nevada-specific provisions. The stylistic changes are not intended to affect the substance of the former rules.

The 2019 amendments to the NRCP affect and will require review and revision of other court rules. Because the amendments respecting filing, service, and time calculation directly impact the Nevada Electronic Filing and Conversion Rules and certain of the Nevada Rules of Appellate Procedure, amendments to those rules have been adopted to harmonize them with the NRCP. The job of reviewing and amending the District Court Rules and individual local rules, such as the Second and Eighth Judicial District Court Rules, to bring them into conformity with the 2019 amendments to the NRCP, NEFCR, and NRAP remains.

I. SCOPE OF RULES; FORM OF ACTION

Rule 1. Scope and Purpose

These rules govern the procedure in all civil actions and proceedings in the district courts, except as stated in Rule 81. They should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding.

form kept in the usual course of business, often electronically, that is wholly unrelated to the document requests. If it would be unreasonably burdensome for the requesting party to correlate the documents, the requesting party can request that the responding party specify the correlation. The identification of responsive documents may be assisted by the use of Bates numbering. Rule 34(d) retains the former Nevada rule with provisions added to address electronically stored information.

Rule 35. Physical and Mental Examinations

(a) Order for Examination.

(1) **In General.** The court where the action is pending may order a party whose mental or physical condition—including blood group—is in controversy to submit to a physical or mental examination by a suitably licensed or certified examiner. The court has the same authority to order a party to produce for examination a person who is in the party's custody or under the party's legal control.

(2) Motion and Notice; Contents of the Order.

(A) The order may be made only on motion for good cause and on notice to all parties and the person to be examined.

(B) The order must specify the time, place, manner, conditions, and scope of the examination, as well as the person or persons who will perform it. The examination must take place in an appropriate professional setting in the judicial district in which the action is pending, unless otherwise agreed by the parties or ordered by the court.

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

who requests the audio recording must arrange and pay for the recording and provide a copy of the recording on written request. The examiner and all persons present must be notified before the examination begins that it is being recorded.

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

(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.

(C) An observer must not in any way interfere, obstruct, or participate in the examination.

(b) **Examiner's Report.**

(1) **Request by the Party or Person Examined.** Unless otherwise ordered by the court or discovery commissioner for good cause, the party who moved for the examination must, upon a request by the party against whom the examination order was issued, provide a copy of the examiner's report within 30 days of the examination or by the date of the applicable expert disclosure deadline, whichever occurs first.

(2) **Contents.** The examiner's report must be in writing and must set out in detail the examiner's findings, including diagnoses, conclusions, and the results of any tests.

(3) **Request by the Moving Party.** After delivering the reports, the party who moved for the examination may request—and is entitled to receive—from the party against whom the examination order was issued like reports of all earlier or later examinations of the same condition. But those reports need not be delivered by the party with custody or control of the person examined if the party shows that it could not obtain them.

(4) **Waiver of Privilege.** By requesting and obtaining the examiner's report, or by deposing the examiner, the party examined waives any privilege it may have—in that action or any other action involving the same controversy—concerning testimony about all examinations of the same condition.

(5) **Failure to Deliver a Report.** The court on motion may order—on just terms—that a party deliver the report of an examination. If the report(s) is not provided, the court may exclude the examiner's testimony at trial.

(6) **Scope.** Rule 35(b) also applies to an examination made by the parties' agreement, unless the agreement states otherwise. Rule 35(b) does not preclude obtaining an examiner's report or deposing an examiner under other rules.

Advisory Committee Note—2019 Amendment

Subsection (a). Rule 35(a) expressly addresses audio recording and attendance by an observer at court-ordered physical and mental examinations. A court may for good cause shown direct that an examination

be audio recorded. A generalized fear that the examiner might distort or inaccurately report what occurs at the examination is not sufficient to establish good cause to audio record the examination. In addition, a party whose examination is ordered may have an observer present, typically a family member or trusted companion, provided the party identifies the observer and his or her relationship to the party in time for that information to be included in the order for the examination. Psychological and neuropsychological examinations raise subtler questions of influence and confidential and proprietary testing materials that make it appropriate to condition the attendance of an observer on court permission, to be granted for good cause shown. In either event, the observer should not be the attorney or employed by the attorney for the party against whom the request for examination is made, and the observer may not disrupt or participate in the examination. A party requesting an audio recording or an observer should request such a condition when making or opposing a motion for an examination or at a hearing on the motion.

Subsection (b). A Rule 35(b) report should contain opinions concerning the physical or mental condition in controversy for which the examiner is qualified to render an opinion. The disclosure deadlines contemplate that the report will be provided by the initial expert disclosure deadline, assuming that deadline is within 30 days of the examination. There may be rare circumstances that would justify a rebuttal Rule 35 examination. Any report prepared from a rebuttal examination must be timely disclosed by the rebuttal expert disclosure deadline or within 30 days of the examination, whichever occurs first. If the expert disclosure deadlines have passed, a party seeking a Rule 35 examination must move to reopen the applicable expert disclosure deadlines unless otherwise stipulated in writing by the parties. To

reopen an expert disclosure deadline, the moving party must demonstrate excusable neglect or changed circumstances, such as where there has been an unanticipated change in a party's physical or mental condition.

Rule 36. Requests for Admission

(a) Scope and Procedure.

(1) **Scope.** A party may serve on any other party a written request to admit, for purposes of the pending action only, the truth of any matters within the scope of Rule 26(b)(1) relating to:

(A) facts, the application of law to fact, or opinions about either; and

(B) the genuineness of any described documents.

(2) **Form; Copy of a Document.** Each matter must be separately stated. A request to admit the genuineness of a document must be accompanied by a copy of the document unless it is, or has been, otherwise furnished or made available for inspection and copying.

(3) **Time to Respond; Effect of Not Responding.** A matter is admitted unless, within 30 days after being served, the party to whom the request is directed serves on the requesting party a written answer or objection addressed to the matter and signed by the party or its attorney. A shorter or longer time for responding may be stipulated to under Rule 29 or be ordered by the court.

(4) **Answer.** If a matter is not admitted, the answer must specifically deny it or state in detail why the answering party cannot truthfully admit or deny it. A denial must fairly respond to the substance of the matter; and when good faith requires that a party qualify an answer or deny only a part of a matter, the answer must specify the part admitted and

**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

Minutes ID: 638



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 NRC, 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 expeditiously. 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.

**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

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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.

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.

SENATOR 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.

Senate Committee on Judiciary
May 6, 2019
Page 10

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

(b) The copying of all or part of the record and the delivery of the copies so made to the party or parties requesting them.

2. If the record is delivered for the purpose of a deposition it shall be returned to the clerk immediately upon completion of the deposition, and in either case mentioned in subsection 1 it shall upon completion of the discovery proceeding be resealed by the clerk.

(Added to NRS by [1973, 360](#))

NRS 52.375 Fees for subpoenas; admissibility of medical records. [NRS 52.320](#) to [52.365](#), inclusive, do not affect:

1. Subpoena fee requirements provided by statute or rule of court.
2. The admissibility of the contents of a medical record.

(Added to NRS by [1973, 361](#))

MENTAL OR PHYSICAL EXAMINATION

NRS 52.380 Attendance by observer.

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.
4. The observer attending the examination pursuant to subsection 1 may suspend the examination if an examiner:
 - (a) Becomes abusive towards an examinee; or
 - (b) Exceeds the scope of the examination, including, without limitation, engaging in unauthorized diagnostics, tests or procedures.
5. An examiner may suspend the examination if the observer attending the examination pursuant to subsection 1 disrupts or attempts to participate in the examination.
6. If the examination is suspended pursuant to subsection 4 or 5, the party ordered to produce the examinee may move for a protective order pursuant to the Nevada Rules of Civil Procedure.
7. As used in this section:
 - (a) "Examination" means a mental or physical examination ordered by a court for the purpose of discovery in a civil action.
 - (b) "Examinee" means a person who is ordered by a court to submit to an examination.
 - (c) "Examiner" means a person who is ordered by a court to conduct an examination.

(Added to NRS by [2019, 966](#))

DISPOSAL OF PHYSICAL EVIDENCE BEFORE CRIMINAL TRIAL

NRS 52.385 Property evidencing crime: Return to person entitled to possession; admissibility of photographs in lieu of property; disposal of property not returned.

1. At any time after property of any person other than the one accused of the crime of which the property is evidence comes into the custody of a peace officer or law enforcement agency, the rightful owner of the property or a person entitled to possession of the property may request the prosecuting attorney to return the property to him or her. Upon receipt of such a request, the prosecuting attorney may, before the property is released, require the peace officer or law enforcement agency to take photographs of the property. Except as otherwise provided in subsection 3, the peace officer or law enforcement agency shall return the property to the person submitting the request within a reasonable time after the receipt of the request, but in no event later than 180 days after the receipt of the request.
2. In the absence of such a request, the prosecuting attorney may authorize the peace officer or law enforcement agency that has custody of the property to return the property to its owner or a person who is entitled to possession of the property.
3. If the prosecuting attorney to whom a request for the release of property is made determines that the property is required for use as evidence in a criminal proceeding, the prosecuting attorney may deny the request for the release of the property.
4. Photographs of property returned pursuant to the provisions of this section are admissible in evidence in lieu of the property in any criminal or civil proceeding if they are identified and authenticated in the proceeding by:
 - (a) The rightful owner of the property or person entitled to possession of the property to whom the property was released;
 - (b) The peace officer or representative of the law enforcement agency who released the property; or
 - (c) A credible witness who has personal knowledge of the property,

↪ in accordance with the provisions of [NRS 52.185](#) to [52.295](#), inclusive.
5. Any property subject to the provisions of this section which is not returned under the provisions of this section must be disposed of as provided in [NRS 179.125](#) to [179.165](#), inclusive.

(Added to NRS by [1975, 1183](#); [A 1979, 694](#); [1985, 796](#); [1993, 279](#); [1999, 754](#))

SUMM

JASON R. MAIER, ESQ.

Nevada Bar No. 8557

JULIA M. CHUMBLER, ESQ.

Nevada Bar No. 15025

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Attorneys for Plaintiff Alberto Eduardo Cario

DISTRICT COURT

CLARK COUNTY, NEVADA

CASE NO: A-19-803446-C

ALBERTO EDUARDO CARIO, an individual,

Plaintiff,

vs.

YEONHEE LEE; an individual; DOES I through
X; and ROE CORPORATIONS I through X,
inclusive,

Defendants.

Case No.:

Dept. No.:

Department 29

SUMMONS - CIVIL

**NOTICE! YOU HAVE BEEN SUED. THE COURT MAY DECIDE AGAINST YOU
WITHOUT YOUR BEING HEARD UNLESS YOU RESPOND WITHIN 20 DAYS. READ
THE INFORMATION BELOW.**

YEONHEE LEE

A civil complaint has been filed by the Plaintiff against you for the relief set forth in the
complaint.

1. If you intend to defend this lawsuit, within 20 days after this Summons is served on
you, exclusive of the day of service, you must do the following:

- (a) File with the Clerk of the Court, whose address is shown below, a formal
written response to the Complaint in accordance with the rules of the Court,

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with the appropriate filing fee.


(b) Serve a copy of your response upon the attorney whose name and address is shown below.

2. Unless you respond, your default will be entered upon application of the Plaintiffs and failure to so respond will result in a judgment of default against you for the relief demanded in the complaint, which could result in the taking of money or property or other relief requested in the complaint.

3. If you intend to seek the advice of an attorney in this matter, you should do so promptly so that your response may be filed on time.

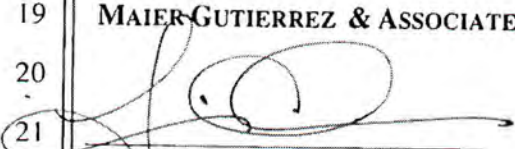
4. The State of Nevada, its political subdivisions, agencies, officers, employees, board members, commission members and legislators each have 45 days after service of this Summons within which to file and Answer or other responsive pleading to the complaint.

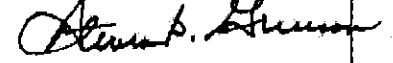
STEVEN D. GRIERSON
CLERK OF THE COURT

	10/11/2019
Deputy Clerk	Date
Regional Justice Court	
200 Lewis Avenue	
Las Vegas, Nevada 89155	
Marie Kramer	

Respectfully submitted,

MAIER-GUTIERREZ & ASSOCIATES


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CASE NO: A-19-803446-C
Department 29

13 *Attorneys for Plaintiff Alberto Eduardo Cario*

14 **DISTRICT COURT**
15 **CLARK COUNTY, NEVADA**

16 ALBERTO EDUARDO CARIO, an individual,
17 Plaintiff,

18 vs.

19 YEONHEE LEE; an individual; DOES I through
20 X; and ROE CORPORATIONS I through X,
21 inclusive,

22 Defendants.

Case No.:
Dept. No.:

23 **COMPLAINT**

24 **DEMAND FOR JURY TRIAL**

25 **Arbitration Exemption:**

- 26 1. Damages in Excess of \$50,000

27 Plaintiff ALBERTO EDUARDO CARIO, by and through his attorneys of record, the law firm
28 MAIER GUTIERREZ & ASSOCIATES, hereby demands a trial by jury and complains and alleges against
defendants as follows:

GENERAL ALLEGATIONS

1. Plaintiff ALBERTO EDUARDO CARIO is, and at all times pertinent hereto was, a
resident of Clark County, Nevada.

2. Upon information and belief, defendant YEONHEE LEE is, and at all times pertinent
hereto was, a resident of Clark County, Nevada.

3. The true names and capacities, whether individual, corporate, associate, partnership or
otherwise, of the defendants herein designated as DOES I through X and ROE CORPORATIONS I

1 through X, inclusive, are unknown to plaintiff, who therefore sues said defendants by such fictitious
2 names. Plaintiff will seek leave of the Court to insert the true names and capacities of such defendants
3 when the same have been ascertained and will further seek leave to join said defendants in these
4 proceedings.

5 4. Plaintiff ALBERTO EDUARDO CARIO was, at all times mentioned herein, the
6 operator of a 2018 Dodge Challenger.

7 5. Defendant YEONHEE LEE was, at all times mentioned herein, the operator of a 2017
8 Audi A4.

9 6. On or about November 24, 2018 around 4:00am, in Clark County, Nevada, defendant
10 YEONHEE LEE ran a red light at Sahara Avenue and Buffalo Drive and caused a serious automobile
11 collision that injured plaintiff ALBERTO EDUARDO CARIO.

12 7. As a direct and proximate result of the negligence of defendants, and each of them,
13 plaintiff sustained personal injuries, all or some of which conditions may be permanent and disabling,
14 and all to plaintiff's damage in a sum in excess of \$15,000.00.

15 8. As a direct and proximate result of the negligence of defendants, and each of them,
16 plaintiff received medical and other treatment for the aforementioned injuries, and that said services,
17 care, and treatment is continuing and shall continue in the future, all to the damage of plaintiff.

18 9. As a direct and proximate result of the negligence of defendants, and each of them,
19 plaintiff has been required to, and has limited occupational and recreational activities, which have
20 caused and shall continue to cause plaintiff loss of earning capacity, lost wages, physical impairment,
21 mental anguish, and loss of enjoyment of life, in a presently unascertainable amount.

22 10. As a direct and proximate result of the aforementioned negligence of defendants, and
23 each of them, plaintiff has been required to engage the services of an attorney, incurring attorney's
24 fees and costs to bring this action.

25 **FIRST CLAIM FOR RELIEF**

26 **(NEGLIGENCE)**

27 11. Plaintiff repeats and re-alleges the allegations of the preceding paragraphs of the
28 complaint as though fully set forth herein, and incorporate the same herein by reference.

1 12. Defendants, and each of them, owed a duty of care to plaintiff to operate a vehicle in a
2 reasonable and safe manner.

3 13. Defendants, and each of them, breached that duty of care by striking plaintiff's vehicle
4 on the roadway.

5 14. The acts of defendants, and each of them, as described herein, violated the traffic laws
6 of Clark County and the state of Nevada, which also constitutes negligence per se, and plaintiff has
7 been damaged as a direct and proximate result thereof in an amount in excess of \$15,000.00.

8 15. As a direct and proximate result of the negligence of defendants, and each of them,
9 plaintiff sustained personal injuries, all or some of which conditions may be permanent and disabling,
10 and all to plaintiff's damage in a sum in excess of \$15,000.00.

11 16. As a direct and proximate result of the negligence of defendants, and each of them,
12 plaintiff received medical and other treatment for the aforementioned injuries, and that said services,
13 care, and treatment is continuing and shall continue in the future, all to the damage of plaintiff.

14 17. As a direct and proximate result of the negligence of defendants, and each of them,
15 plaintiff has been required to, and has limited occupational and recreational activities, which have
16 caused and shall continue to cause plaintiff loss of earning capacity, lost wages, physical impairment,
17 mental anguish, and loss of enjoyment of life, in a presently unascertainable amount.

18 18. As a direct and proximate result of the aforementioned negligence of defendants, and
19 each of them, plaintiff has been required to engage the services of an attorney, incurring attorney's
20 fees and costs to bring this action.

21 **PRAYER FOR RELIEF**

22 WHEREFORE, plaintiff prays for judgment against defendants, and each of them, as follows:

23 1. For a judgment in favor of plaintiff and against defendants, and each of them, on the
24 complaint and all claims for relief asserted therein;

25 2. For an award of general and special damages in an amount in excess of \$15,000.00, to
26 be proven at trial;

27 ///

28 ///

1 3. For an award of reasonable attorney's fees and costs incurred in this action; and

2 4. For such other and further relief as the Court may deem proper.

3 DATED this 10th of October, 2019.

4 Respectfully submitted,

5 **MAIER GUTIERREZ & ASSOCIATES**

6 /s/ Julia M. Chumbler

7 JASON R. MAIER, ESQ.

8 Nevada Bar No. 8557

9 JULIA M. CHUMBLER, ESQ.

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11 8816 Spanish Ridge Avenue

12 Las Vegas, Nevada 89148

13 Attorneys for Plaintiff Alberto Eduardo Cario



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9 Attorney for Defendant,
10 YEONHEE LEE

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DISTRICT COURT
CLARK COUNTY, NEVADA

ALBERTO EDUARDO CARIO,

Plaintiff,

vs.

YEONHEE LEE, an individual; DOES I through
X and ROE CORPORATIONS I through X,
inclusive,

Defendants.

Case No.: A-19-803446-C
Dept. No.: 29

DEFENDANT YEONHEE LEE'S
ANSWER TO COMPLAINT

COMES NOW, Defendant, YEONHEE LEE ("Defendant"), by and through her attorney of record, Rhonda Long, Esq. of the Law Office of Lee J. Grant, II, hereby files this answer to Plaintiff ALBERTO EDUARDO CARIO's Complaint ("Complaint") and admits, denies, and alleges as follows:

GENERAL ALLEGATIONS

1. Answering Paragraph 1 of the Complaint, Defendant is without sufficient knowledge to form a belief as to the truth or falsity of the allegations contained therein and, therefore, denies the same.

2. Answering Paragraph 2 of the Complaint, Defendant admits.

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1 3. Answering Paragraph 3 of the Complaint, Defendant is without sufficient
2 knowledge to form a belief as to the truth or falsity of the allegations contained therein and,
3 therefore, denies the same.

4 4. Answering Paragraph 4 of the Complaint, Defendant is without sufficient
5 knowledge to form a belief as to the truth or falsity of the allegations contained therein and,
6 therefore, denies the same.

7 5. Answering Paragraph 5 of the Complaint, Defendant admits.

8 6. Answering Paragraph 6 of the Complaint, Defendant admits to the limited extent
9 that an automobile collision occurred involving a vehicle being operated by Defendant and a
10 vehicle being operated by Plaintiff on the early morning hours of November 24, 2018; and
11 denies all other remaining allegations contained in said paragraph.
12

13 7. Answering Paragraph 7 of the Complaint, Defendant denies the allegations
14 contained therein which reference conclusions of law and negligence causation; and Defendant
15 is without sufficient knowledge to form a belief as to the truth or falsity of the remaining
16 allegations, including but not limited to Plaintiff's allegations of damages, and therefore, denies
17 the same.
18

19 8. Answering Paragraph 8 of the Complaint, Defendant denies the allegations
20 contained therein which reference conclusions of law and negligence causation; and Defendant
21 is without sufficient knowledge to form a belief as to the truth or falsity of the remaining
22 allegations, including but not limited to Plaintiff's allegations of damages, and therefore, denies
23 the same.
24

25 9. Answering Paragraph 9 of the Complaint, Defendant denies the allegations
26 contained therein which reference conclusions of law and negligence causation; and Defendant
27 is without sufficient knowledge to form a belief as to the truth or falsity of the remaining
28

allegations, including but not limited to Plaintiff's allegations of damages, and therefore, denies the same.

10. Answering Paragraph 10 of the Complaint, Defendant denies the allegations contained therein which reference conclusions of law and negligence causation; and Defendant is without sufficient knowledge to form a belief as to the truth or falsity of the remaining allegations, including but not limited to Plaintiff's allegations of damages, and therefore, denies the same.

FIRST CLAIM FOR RELIEF

(Negligence)

11. Answering Paragraph 11 of the Complaint, Defendant is without sufficient knowledge to form a belief as to the truth or falsity of the allegations contained therein and, therefore, denies the same.

12. Answering Paragraph 12 of the Complaint, Defendant states that the allegations contained therein constitute conclusions of law and thus require no answer; however, to the extent that they contain allegations of fact, Defendant denies the same.

13. Answering Paragraph 13 of the Complaint, Defendant states that the allegations contained therein constitute conclusions of law and thus require no answer; however, to the extent that they contain allegations of fact, Defendant denies the same.

14. Answering Paragraph 14 of the Complaint, Defendant states that the allegations contained therein constitute conclusions of law and thus require no answer; however, to the extent that they contain allegations of fact, Defendant denies the same.

15. Answering Paragraph 15 of the Complaint, Defendant denies the allegations contained therein which reference conclusions of law and negligence causation; and Defendant is without sufficient knowledge to form a belief as to the truth or falsity of the remaining

1 allegations, including but not limited to Plaintiff's allegations of damages, and therefore, denies
2 the same.

3 16. Answering Paragraph 16 of the Complaint, Defendant denies the allegations
4 contained therein which reference conclusions of law and negligence causation; and Defendant
5 is without sufficient knowledge to form a belief as to the truth or falsity of the remaining
6 allegations, including but not limited to Plaintiff's allegations of damages, and therefore, denies
7 the same.
8

9 17. Answering Paragraph 17 of the Complaint, Defendant denies the allegations
10 contained therein which reference conclusions of law and negligence causation; and Defendant
11 is without sufficient knowledge to form a belief as to the truth or falsity of the remaining
12 allegations, including but not limited to Plaintiff's allegations of damages, and therefore, denies
13 the same.
14

15 18. Answering Paragraph 18 of the Complaint, Defendant denies the allegations
16 contained therein which reference conclusions of law and negligence causation; and Defendant
17 is without sufficient knowledge to form a belief as to the truth or falsity of the remaining
18 allegations, including but not limited to Plaintiff's allegations of damages, and therefore, denies
19 the same.
20

21 19. Defendant denies each and every allegation of the Complaint not specifically
22 admitted or otherwise answered.

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1 **AFFIRMATIVE DEFENSES**

2 **FIRST AFFIRMATIVE DEFENSE**

3 The Complaint fails to state a claim upon which relief can be granted against
4 Defendant.

5 **SECOND AFFIRMATIVE DEFENSE**

6 The incidents referred to in the Complaint, and any and all damages resulting therefrom,
7 were proximately caused in whole or in part, or were contributed to by the negligence or other
8 conduct of the Plaintiff, which negligence or other conduct causally contributed to the incidents
9 referred to in the Complaint and any damages resulting therefrom, in greater degree than any
10 conduct or negligence, which is specifically denied, of answering Defendant.

11 **THIRD AFFIRMATIVE DEFENSE**

12 Plaintiff failed to mitigate damages, if any, and to the extent of such failure of such
13 mitigation, is precluded from recovery herein.

14 **FOURTH AFFIRMATIVE DEFENSE**

15 The injuries and damages, if any, were caused in whole or in part by the negligence or
16 otherwise actionable conduct of a third party or third parties over which Defendant had no
17 control.

18 **FIFTH AFFIRMATIVE DEFENSE**

19 The damages, if any, suffered by Plaintiff were caused by new, independent,
20 intervening and superseding causes, and not by Defendant's alleged negligence or other
21 actionable conduct, the existence of which is specifically denied.

22 **SIXTH AFFIRMATIVE DEFENSE**

23 In the event the answering Defendant is found to be liable in any way for the injuries
24 claimed by Plaintiffs, the answering Defendant is only severally liable as Plaintiff was in whole
25

1 or in part responsible for their own injuries and Plaintiff's alleged injuries were caused in
2 whole or part by the actions of third parties outside of the answering Defendant's control.

3
4 SEVENTH AFFIRMATIVE DEFENSE

5 All or part of the damages being claimed in this matter are barred by the doctrine of
6 accord and satisfaction.

7 EIGHTH AFFIRMATIVE DEFENSE

8 The liability, if any, of the answering Defendant must be reduced by the percentage of
9 fault of others, including the Plaintiff.

10 NINTH AFFIRMATIVE DEFENSE

11 Plaintiff is barred from recovering any special damages herein for Plaintiff's failure to
12 specifically allege the kind of special damages claimed, pursuant to NRCP 9(g).

13 TENTH AFFIRMATIVE DEFENSE

14 The damages which are alleged to have been incurred by Plaintiff, if any, were the
15 direct result in whole or in part, of Plaintiff's own intentional and willful acts and/or omissions.

16 ELEVENTH AFFIRMATIVE DEFENSE

17 Pursuant to NRCP 11, as amended, all possible affirmative defenses may not have been
18 alleged herein insofar as sufficient facts were not available after reasonable inquiry upon the
19 filing of Defendant's Answer, and therefore Defendant reserve the right to amend this Answer
20 to allege additional affirmative defenses if subsequent investigation warrants.
21

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1 WHEREFORE, Defendant, YEONHEE LEE, prays as follows:

- 2 1. That Plaintiff takes nothing by way of the Complaint on file herein;
- 3 2. For reasonable attorney's fees and costs incurred herein; and
- 4 3. For such other and further relief as this Court deems just and proper in the premises.

5 DATED this 10th day of November, 2019.

6
7 **LAW OFFICES OF LEE J. GRANT, II**

8
9 By: 

10 Rhonda Long, Esq.
11 Nevada Bar No. 10921
12 8345 West Sunset Road, Suite 250
13 Las Vegas, Nevada 89113
14 *Attorney for Defendant,*
15 *Yeonhee Lee*

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 X VIA ECF: by electronic filing and/or service with the Court delivering the document(s) listed above via the Court's e-filing and service system, upon each party in this case who is registered as an electronic case filing user with the Clerk.

_____ VIA ELECTRONIC MAIL: by causing a true and correct copy thereof to be mailed electronically to the email addressee(s) at the attached email addresses set forth in the service list.

/s/ Jackie De La Paz
EMPLOYEE OF LAW OFFICE OF LEE J.
GRANT, II

8



1 MTN
2 RHONDA LONG, ESQ.
3 Nevada Bar No.: 10921
4 LAW OFFICE OF LEE J. GRANT, II
5 8345 West Sunset Road, Suite 250
6 Las Vegas, Nevada 89113
7 Telephone: 702-233-9303
8 E-mail: rhlong@geico.com
9 Attorney for Defendant
10 YEONHEE LEE

9/17/20
9:30 a.m.

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DISTRICT COURT
CLARK COUNTY, NEVADA

ALBERTO EDUARDO CARIO, an individual,
Plaintiff,
vs.
YEONHEE LEE, an individual; DOES I
through X and ROE CORPORATIONS I
through X, inclusive,
Defendants.

Case No.: A-19-803446-C

Dept. No.: 29

**MOTION TO COMPEL RULE 35
EXAM – ORDER SHORTENING
TIME REQUESTED**

**HEARING REQUESTED - BEFORE
THE DISCOVERY COMMISSIONER**

COME NOW Defendant YEONHEE LEE, by and through her attorney of record,
Rhonda Long, Esq., of the LAW OFFICE OF LEE J. GRANT, II, and hereby submits
Defendant's Motion to Compel a Rule 35 Exam of Plaintiff Alberto Carlo.

///


///

///

1 Defendant's Motion is made and based upon the papers and pleadings on file herein, the
2 exhibits attached hereto, and the following points and authorities submitted in support hereof.

3 Dated this 27th day of August, 2020.

4
5 LAW OFFICE OF LEE J. GRANT, II

6 By: 
7 RHONDA LONG, ESQ.
8 Nevada Bar #10921
8 8345 West Sunset Road, Suite 250
9 Las Vegas, Nevada 89113
9 Attorney for Defendant
10 YEONHEE LEE
11

12
13 **ORDER SHORTENING TIME**


14 GOOD CAUSE APPEARING THEREFORE, it is hereby ORDERED, that the time for
15 the hearing of the foregoing Defendant's MOTION TO COMPEL RULE 35 EXAM be
16 shortened the 17th day of September, 2020, at 9:30 a.m.

17 Dated this 2nd Day of September, 2020.

18
19 Submitted by:


20 DISCOVERY COMMISSIONER

21 LAW OFFICE OF LEE J. GRANT, II

22 By: 
23 RHONDA LONG, ESQ.
24 Nevada Bar #10921
24 8345 West Sunset Road, Suite 250
25 Las Vegas, Nevada 89113
25 Attorney for Defendant
26 YEONHEE LEE
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1 **DECLARATION OF RHONDA LONG, ESQ. IN SUPPORT OF THE**
2 **MOTION TO COMPEL RULE 35 EXAM AND ORDER SHORTENING TIME**

3 RHONDA LONG, declares under penalty of perjury as follows:

4 1. That Declarant is an attorney duly licensed to practice in the State of Nevada and
5 is an attorney at the law firm of LAW OFFICE OF LEE J. GRANT, II, counsel for Defendant in
6 the within action. Declarant is over the age of 18 years and is in all respects competent to make
7 this Declaration. This Declaration is based upon my personal knowledge unless stated upon
8 information and belief and, if called to testify, Declarant would testify as set forth in this
9 declaration.
10

11 2. That on August 7, 2020, paralegal for Declarant, Candice Harris, reached out to
12 Plaintiff's counsel, the law firm of MAIER GUTIERREZ & ASSOCIATES with proposed dates
13 for an independent medical exam of Plaintiff. See, August 2020 Rule 35 E-Mail Chain attached
14 as **Exhibit A**.
15

16 3. That on or about August 20, 2020, paralegal for Plaintiff's firm provided a
17 proposed stipulation and order setting forth parameters and restrictions on the independent
18 medical exam.
19

20 4. That on August 21, 2020, Declarant replied that she would not agree the
21 stipulation and order as written. Declarant provided a redlined version which struck the
22 parameters allowing a nurse consultant as an observer and the provision providing that the expert
23 must retain his drafts and notes and that such is subject to be subpoenaed by Plaintiff. See,
24 **Exhibit B**.
25

26 6. That in reply to this objection, Plaintiff's counsel, Jason Maeier, Esq. said he
27 would not agree to the redline revisions. See, **Exhibit A**.
28

1 7. On August 25, 2020, an EDCR 2.34 conference was held regarding the IME
2 dispute and parties were not able to come to an agreement.

3 9. That good cause exists to hear this motion on order shortening time as the initial
4 expert disclosure deadline is October 9, 2020 and as this motion concerns actions required of
5 Plaintiff for an expert disclosure.

6 10. Pursuant to EDCR 2.34, Declarant attempted to resolve this matter as described
7 above. As such, Defendant now seek an order from the Discovery Commissioner compelling an
8 exam pursuant to NRCP 35.

9 11. This motion is made in good faith and is not made for purposes of delay. An Order
10 Shortening Time and a setting before September 1, 2020 is respectfully requested.

11 12. FURTHER DECLARANT SAYETH NAUGHT.

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RHONDA LONG, ESQ

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I.**

3 **INTRODUCTION**

4
5 Defendant Yeonhee Lee (“Defendant LEE”) respectfully requests an order compelling
6 Plaintiff Alberto Cario (“Plaintiff CARIO”) to submit to a Nevada Rule of Civil Procedure
7 Rule 35 medical examination to be conducted by Dr. Mark Rosen. See, Curriculum Vitae of
8 Dr. Rosen attached as **Exhibit C**. The examination will concern the current status and future
9 prognosis of Plaintiff’s alleged back injury which is the basis for Plaintiff’s claim for damages
10 against Defendant.
11

12 In this lawsuit, Plaintiff seeks recovery of damages, resulting from an automobile
13 accident including actual medical specials, unspecified past and continuing suffering, and
14 physical limitations and restrictions according to Plaintiff’s written answers to discovery. See,
15 Plaintiff’s responses to Interrogatories and Requests for Admissions attached as **Exhibit D**.
16 Plaintiff’s attorney has agreed to a Rule 35 exam of their client; however, Plaintiff’s attorney
17 wishes to impose restrictions on the exam which are not required by Rule 35. As such,
18 Defendant brings this Motion to obtain an order compelling an exam per the terms of Rule 35.
19
20

21 **II.**

22 **STATEMENT OF FACTS**

23 This matter arises from a two-car accident which occurred in the early morning hours
24 around 4:30 am on November 24, 2018 at the intersection of Sahara Avenue and Buffalo Drive.
25 Defendant LEE was driving a 2017 Audi A4 and the Plaintiff CARIO, was operating a 2018
26 Dodge Challenger. The two vehicles collided at the intersection. Plaintiff has alleged that he
27
28

1 was injured in the automobile accident and has made this lawsuit seeking damages. See,
2 **Exhibit D.**

3 **III.**

4 **LEGAL ARGUMENT**

5 **A.**

6 **LEGAL STANDARD**

7 Nevada Rule of Civil Procedure 35 provides in pertinent part as follows:

8 “Rule 35. Physical and Mental Examinations

9 (a) Order for Examination.

10 (1) In General. The court where the action is pending may order a party
11 whose mental or physical condition — including blood group — is in
12 controversy to submit to a physical or mental examination by a suitably
13 licensed or certified examiner. The court has the same authority to order a
14 party to produce for examination a person who is in the party’s custody or
15 under the party’s legal control.

16 (2) Motion and Notice; Contents of the Order.

17 (A) The order may be made only on motion for good cause and on
18 notice to all parties and the person to be examined.

19 (B) The order must specify the time, place, manner, conditions, and
20 scope of the examination, as well as the person or persons who
21 will perform it. The examination must take place in an
22 appropriate professional setting in the judicial district in which
the action is pending, unless otherwise agreed by the parties or
ordered by the court.

23 (3) Recording the Examination. On request of a party or the examiner, the court
24 may, for good cause shown, require as a condition of the examination that the
25 examination be audio recorded. The party or examiner who requests the audio
26 recording must arrange and pay for the recording and provide a copy of the
recording on written request. The examiner and all persons present must be
notified before the examination begins that it is being recorded.

27 (4) Observers at the Examination. The party against whom an examination is
28 sought may request as a condition of the examination to have an observer present

1 at the examination. When making the request, the party must identify the observer
2 and state his or her relationship to the party being examined. The observer may
3 not be the party's attorney or anyone employed by the party or the party's
4 attorney.

5 (A) The party may have one observer present for the examination,
6 unless:

7 (i) the examination is a neuropsychological, psychological, or
8 psychiatric examination; or

9 (ii) the court orders otherwise for good cause shown.

10 (B) The party may not have any observer present for a
11 neuropsychological, psychological, or psychiatric examination,
12 unless the court orders otherwise for good cause shown.

13 (C) An observer must not in any way interfere, obstruct, or
14 participate in the examination.

15 Thus, a party seeking to compel a plaintiff's physical examination must show that the
16 plaintiff's physical condition is in controversy and there is good cause for the examination.
17 Requests under Rule 35 are liberally constructed in favor of granting discovery, but due to their
18 intrusive nature remain a matter of discretion. See Schlagenhauf v. Holder, (1964) 379 U.S.
19 104, 114-15 (interpreting the analogous federal rule concerning independent medical
20 examinations). As so stated in the rule, it is proper to order a plaintiff in a personal injury
21 lawsuit to submit to an independent medical examination by the defendant when good cause
22 has been shown, and the time, place, manner, conditions, and scope of the examination and the
23 person by whom it is to be made have been specified.

24 As will be demonstrated below, good cause exists and all requirements of NRCP 35(a)
25 have been satisfied for ordering Plaintiff to submit to a defense Independent Medical
26 Examination ("IME") and Plaintiff should be compelled to attend the IME by Dr. Rosen sought
27 by Defendant in this matter.
28

1 B.

2 PLAINTIFF'S PHYSICAL CONDITION IS IN CONTROVERSY AND GOOD CAUSE
3 EXISTS FOR AN EXAMINATION

4
5 "A plaintiff in a negligence action who asserts mental or physical injury . . . places that
6 mental or physical injury clearly in controversy and provides the defendant with good cause for
7 an examination to determine the existence and extent of such asserted injury." Schlagenhauf,
8 379 U.S. at 119. There is no doubt Plaintiff's physical condition is "in controversy" – Plaintiff
9 placed his physical condition in controversy by filing this action to recover monetary damages
10 for her claimed physical injuries and purported on going pain and suffering and physical
11 limitations and restrictions. Thus, by filing suit seeking recovery for his physical and
12 emotional injuries, Plaintiff placed his condition in controversy.
13

14
15 Moreover, Plaintiff has asserted that he has continued and ongoing pain complaints since
16 the accident. See, **Exhibit D**. In fact, in Plaintiff's deposition, which took place on August 21,
17 2020, he stated that he had an upcoming appointment with a chiropractor at ChiroYoga.
18 Accordingly, there is good cause for the examination requested.
19

20 C.

21 THE ONLY LIMITATIONS TO THE RULE 35 EXAM SHOULD BE THOSE
22 PARAMETERS SET FORTH IN RULE 35

23 The judiciary has the inherent power to govern its own procedures. See, Nev. Const. Art.
24 3 and Berkson v. Lepome, 126 Nev. 492 (2010). "The judiciary is entrusted with rule-making
25 and other incidental powers reasonable and necessary to carry out the duties required for the
26 administration of justice and to economically and fairly manage litigation." Berkson, 126 Nev.
27 at 499 (citing in part Borger v. Dist. Ct., 120 Nev. 1021, 1029, 102 P.3d 600, 606 (2004); State
28

1 v. Dist Ct. [Marshall], 116 Nev. 953, 959, 11 P.3d 1209, 1212 (2000); Goldberg v. District
2 Court, 93 Nev. 614, 616, 572 P.2d 521, 522 (1977)). This means “the legislature may not enact
3 a procedural statute that conflicts with a pre-existing procedural rule, without violating the
4 doctrine of separation of powers, and such a statute is of no effect.” Id. The judiciary’s
5 authority “to promulgate procedural rules is independent of legislative power, and may not be
6 diminished or compromised by the legislature...[f]urthermore, where, as here, a rule of
7 procedure is promulgated in conflict with a preexisting procedural statute, the rule supersedes
8 the statute and controls.” State v. Connery, 99 Nev. 342, 345 (1983).

10 Accordingly, Defendant requests that any order for a Rule 35 exam be limited to the
11 provisions which are in Rule 35 and not any other rule, statute, or unilateral parameters set
12 forth by Plaintiff’s counsel. To the extent any statute conflicts with Rule 35, the provisions of
13 Rule 35 control. Specifically, Defendant asks that no parameters be included in the order which
14 limit the opinions of the doctor or which asks that observers or recording be permitted unless
15 there is good cause as established by the Discovery Commissioner.

17 Further, Plaintiff’s request that the independent medical exam doctor retain all of his
18 draft reports and that such drafts may be subpoenaed by Plaintiff is also in dispute. NRCP
19 16.1(a)(2), which governs expert disclosures, does not have such a requirement. Moreover, the
20 March 2019 changes to the Nevada Rules of Civil Procedure specifically wrote this rule to
21 avoid any request made by a party to compel drafts from an expert¹.

23
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25
26 ¹ See, Advisory Committee Note—2019 Amendment: “Rule 16.1(a)(2) incorporates the federal rule requirement
27 that the report of a retained expert witness disclose “the facts or data considered by the witness” in forming his or
28 her opinions. The former language—“the data or other information considered by the witness”—has been construed
broadly by most federal courts to include drafts of expert reports and virtually any communications between counsel
and the expert. The new language avoids that result. The 2019 amendments do not abrogate the 2012 drafter’s notes
to Rule 16.1.”).

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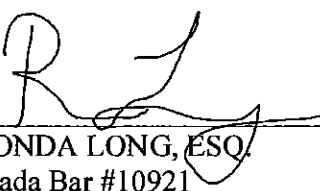
IV.

CONCLUSION

Based on the foregoing, Defendant respectfully requests relief from the Discovery Commissioner an order compelling that a Rule 35 Exam will be conducted by Dr. Mark Rosen at his office on a date and time agreed upon by the parties; and that no other parameters except for those allowed under NRCP 35 be imposed.

Dated this 27th day of August 2020.

LAW OFFICE OF LEE J. GRANT, II

By: 
RHONDA LONG, ESQ.
Nevada Bar #10921
8345 West Sunset Road, Suite 250
Las Vegas, Nevada 89113
Attorney for Defendant
YEONHEE LEE

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I HEREBY CERTIFY that I am an employee of LAW OFFICES OF LEE J. GRANT II,
 on this 27th day of August 2020, I caused a true and correct copy of the foregoing
 ent **MOTION TO COMPEL RULE 35 EXAM – ORDER SHORTENING TIME**
TESTED to be served as follows:

X VIA ECF: by electronic filing with the Court delivering the document(s) listed above via the Court's e-filing and service system, upon each party in this case who is registered as an electronic case filing user with the Clerk.

_____ VIA U.S. POSTAL MAIL: by placing a true and correct copy thereof enclosed in a sealed envelope with the postage thereon fully prepaid, addresses as indicated on the attached service list in the United States Mail.

____ VIA ELECTRONIC MAIL: by causing a true and correct copy thereof to be mailed electronically to the email addressee(s) at the attached email addresses set forth in the service list.

Jason R. Maier, Esq.
Julia M. Chumbler, Esq.
MAIER GUTIERREZ & ASSOCIATES
8816 Spanish Ridge Avenue
Las Vegas, Nevada 89148
Attorneys for Plaintiff

/s/ Jackie De La Paz
EMPLOYEE OF LAW OFFICE OF LEE J.
GRANT, II

DATED: 8/27/2020

EXHIBIT A

**AUGUST 2020 E-MAIL CHAIN
RE: IME ISSUES**

EXHIBIT A

Long, Rhonda

From: Jason Maier <jrm@mgalaw.com>
Sent: Friday, August 21, 2020 2:47 PM
To: Long, Rhonda; Harris, Candice
Cc: Natalie Vazquez; Julia Chumbler
Subject: RE: [SECURE] RE: [SAO for Rule 35 examination] LEE adv. Cario

CAUTION EXTERNAL EMAIL. This email originated outside of GEICO.

Hi Rhonda. Based on your proposed edits, it appears we will not be able to stipulate to a Rule 35 exam. Feel free to file a motion with the discovery commissioner. Thanks.

Jason R. Maier
MAIER GUTIERREZ & ASSOCIATES
8816 Spanish Ridge Avenue
Las Vegas, Nevada 89148
Tel: 702.629.7900 | Fax: 702.629.7925
jrm@mgalaw.com | www.mgalaw.com

From: Long, Rhonda <RhLong@geico.com>
Sent: Friday, August 21, 2020 1:00 PM
To: Natalie Vazquez <ndv@mgalaw.com>; Julia Chumbler <jmc@mgalaw.com>
Cc: Harris, Candice <CandHarris@geico.com>
Subject: [SECURE] RE: [SAO for Rule 35 examination] LEE adv. Cario

Attached is my version with red line revisions.

Sincerely,

Rhonda Long, Esq.
LAW OFFICE OF LEE J. GRANT II
*Attorneys and Support Staff are Employees of
Government Employees Insurance Company*

8345 W. Sunset Road, Ste. 250
Las Vegas, Nevada 89113
(702) 233-9303 Ext. 5507
rhlmg@geico.com

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Sensitivity: Confidential

From: Natalie Vazquez <ndv@mgalaw.com>
Sent: Thursday, August 20, 2020 11:03 AM
To: Harris, Candice <CandHarris@geico.com>; Julia Chumbler <jmc@mgalaw.com>
Cc: Long, Rhonda <RhLong@geico.com>
Subject: RE: [SAO for Rule 35 examination] LEE adv. Cario

CAUTION EXTERNAL EMAIL. This email originated outside of GEICO.
Ms. Long,

Mr. Cario is available on 9/17, please see the attached for the proposed stipulation and order for Mr. Cario's Rule 35 examination. Please redline any edits and/or advise if you are agreeable so we may submit to the Discovery Commissioner.

Thank you,

Natalie D. Vazquez | Paralegal
MAIER GUTIERREZ & ASSOCIATES
8816 Spanish Ridge Avenue
Las Vegas, Nevada 89148
Tel: 702.629.7900 | Fax: 702.629.7925
ndv@mgalaw.com | www.mgalaw.com

From: Harris, Candice <CandHarris@geico.com>
Sent: Monday, August 17, 2020 9:34 AM
To: Julia Chumbler <jmc@mgalaw.com>
Cc: Natalie Vazquez <ndv@mgalaw.com>; Long, Rhonda <RhLong@geico.com>
Subject: RE: LEE adv. Cario

Hello Julia,

Dr. Rosen's availability has changed. Dr. Rosen's updated availability is:

Sept 15th

Sept 17th

Sept 29th all for a start time of 1:15pm, check-in of 12:45pm. The dates and times fill up fast so please let me know ASAP when your client will be available. I appreciate your assistance in this matter.

Kind Regards,

Candice Harris

Paralegal

LAW OFFICE OF LEE J. GRANT II

Attorneys and support staff are employees of

Government Employees Insurance Company

8345 West Sunset, Suite 250

Las Vegas, NV 89113

702-233-9303x5498 - telephone

702-780-8119 – fax

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Sensitivity: Confidential

From: Julia Chumbler [<mailto:jmc@mgalaw.com>]

Sent: Thursday, August 13, 2020 9:12 AM

To: Harris, Candice <CandHarris@geico.com>

Cc: Natalie Vazquez <ndv@mgalaw.com>; Long, Rhonda <RhLong@geico.com>
Subject: Re: LEE adv. Cario

CAUTION EXTERNAL EMAIL. This email originated outside of GEICO.
I'm sorry confused with the depo dates . Stand by

Sent from my iPhone

On Aug 13, 2020, at 9:11 AM, Julia Chumbler <jmc@mgalaw.com> wrote:

Your original email gave the 21st at 10a as an option . Is that date no longer available ?

Sent from my iPhone

On Aug 13, 2020, at 9:03 AM, Harris, Candice <CandHarris@geico.com> wrote:

Hi Julia,
Thank you for responding. Do you mean the August 20th date?

Kind Regards,
Candice Harris
Paralegal
LAW OFFICE OF LEE J. GRANT II
Attorneys and support staff are employees of
Government Employees Insurance Company
8345 West Sunset, Suite 250
Las Vegas, NV 89113
702-233-9303x5498 - telephone
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Sensitivity: Confidential

From: Julia Chumbler [mailto:jmc@mgalaw.com]
Sent: Thursday, August 13, 2020 8:42 AM
To: Harris, Candice <CandHarris@geico.com>
Cc: Natalie Vazquez <ndv@mgalaw.com>; Long, Rhonda <RhLong@geico.com>
Subject: Re: LEE adv. Cario

CAUTION EXTERNAL EMAIL. This email originated outside of GEICO.
Candice I apologize I thought I responded last week that he can make the 21st. Is that not available anymore ?

Sent from my iPhone

On Aug 13, 2020, at 8:20 AM, Harris, Candice <CandHarris@geico.com> wrote:

Hello Ladies,
I am following up on the previous email sent last week regarding scheduling your client's Rule 35 Exam. I haven't received a response and dates with doctors fill up fast. Please respond at your earliest convenience. I appreciate your assistance in this matter.

Kind Regards,
Candice Harris
Paralegal
LAW OFFICE OF LEE J. GRANT II
Attorneys and support staff are employees of
Government Employees Insurance Company
8345 West Sunset, Suite 250
Las Vegas, NV 89113
702-233-9303x5498 - telephone
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Sensitivity: Confidential

From: Harris, Candice

Sent: Friday, August 7, 2020 2:42 PM

To: Natalie Vazquez <ndv@mgalaw.com>; Julia Chumbler <jmc@mgalaw.com>

Cc: Long, Rhonda <RhLong@geico.com>

Subject: LEE adv. Cario

Hello,

We are in the process of setting up a Rule 35 Exam for Albert Cario. The doctor we are planning to retain for the exam is Mark Rosen, MD. Dr. Rosen is available the following dates:

- Aug 20 at 2:30pm
- Sept 8 at 1:15pm
- Sept 10 at 1:15pm

There is a 30min check-in required prior to the scheduled time. Please let me know if one of the dates works for Mr. Cario. I appreciate your assistance in this matter.

Kind Regards,

Candice Harris

Paralegal

LAW OFFICE OF LEE J. GRANT II

Attorneys and support staff are employees of

Government Employees Insurance Company

8345 West Sunset, Suite 250

Las Vegas, NV 89113

702-233-9303x5498 - telephone

702-780-8119 – fax

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EXHIBIT B

**DRAFT STIPULATION AND ORDER
W/REDLINE REVISIONS
RE: RULE 35 EXAM**

EXHIBIT B

1 **SAO**

JASON R. MAIER, ESQ.

2 Nevada Bar No. 8557

JULIA M. CHUMBLER, ESQ.

3 Nevada Bar No. 15025

MAIER GUTIERREZ & ASSOCIATES

4 8816 Spanish Ridge Avenue

Las Vegas, Nevada 89148

5 Telephone: 702.629.7900

Facsimile: 702.629.7925

6 E-mail: jrm@mgalaw.com

jmc@mgalaw.com

7 *Attorneys for Plaintiff Alberto Eduardo Cario*

8
9
10 **DISTRICT COURT**

11 **CLARK COUNTY, NEVADA**

12 ALBERTO EDUARDO CARIO, an individual,

13 Plaintiff,

14 vs.

15 YEONHEE LEE; an individual; DOES I through
16 X; and ROE CORPORATIONS I through X,
17 inclusive,

18 Defendants.

Case No.: A-19-803446-C

Dept. No.: XXIX

**STIPULATION AND ORDER FOR
RULE 35 EXAMINATION OF PLAINTIFF**

19
20 **IT IS HEREBY STIPULATED AND AGREED:**

21 Defendant has requested that plaintiff Alberto Eduardo Cario submit to a Rule 35 medical
22 examination, and Mr. Cario has agreed to the request subject to the following rules and conditions:

- 23 1. The Rule 35 examination shall be conducted pursuant to Nevada Rule of Civil
24 Procedure 35, as amended.
- 25 2. Defendants have selected Mark J. Rosen, M.D. to conduct the Rule 35 examination of
26 Mr. Cario
- 27 3. The scope of the Rule 35 examination is as follows: the Dr. Rosen's evaluation of Mr.
28 Cario's injuries and treatment.
4. The date, time and location of the Rule 35 examination are as follows: September 17,
2020 at 1:15pm with an arrival time of 12:45pm.

5. The Rule 35 examination shall be held in a medical office in compliance with HIPAA.
6. Dr. Rosen will not require Mr. Cario to sign any paperwork at the time of the Rule 35 examination other than a "sign-in" sheet limited to his name, date and time of arrival.
7. The intake forms to be completed by Mr. Cario shall be provided to plaintiff's counsel at least ten business days prior to the Rule 35 examination and will be returned to defense counsel prior to the examination.
8. Mr. Cario shall not be required to wait in the waiting room for longer than 30 minutes before the commencement of the Rule 35 examination.
- ~~9. The Rule 35 examination will be audio recorded by LYNN BELCHER LNC ASSOCIATES, in which Mr. Cario's counsel will arrange and pay for the recording. Mr. Cario's counsel shall disclose a copy of the recording within 30 days of receipt of the same. The doctor and all persons present must be notified that the examination will be recorded before the examination begins.~~
- ~~10. Mr. Cario will have a nurse observer present at the Rule 35 examination from LYNN BELCHER LNC ASSOCIATES. The nurse observer must not in any way interfere, obstruct, or participate in the examination.~~
- ~~11.9.~~ 9. Defense counsel, or any other representatives of defendants, will not attend the Rule 35 examination.
- ~~12.10.~~ 10. Liability questions may not be asked by Dr. Rosen or any of his agents or representatives during the Rule 35 examination.
- ~~13.11.~~ 11. No x-rays or radiographs may be obtained during the Rule 35 examination. Dr. Rosen can rely upon the same film studies relied upon by the treating physicians in this case. If additional film studies are necessary for the Rule 35 examination, this must be detailed in writing by Dr. Rosen at least 30 days prior to the examination and this issue may be revisited.
- ~~14.12.~~ 12. No invasive procedures shall be allowed during the Rule 35 examination.
- ~~15.13.~~ 13. Mr. Cario shall not be required to disrobe during the Rule 35 examination.
- ~~16.14.~~ 14. If Dr. Rosen subjects Mr. Cario to physically painful or invasive procedures, Mr. Cario reserves the right to immediately terminate the examination in his sole discretion.
- ~~17.15.~~ 15. Dr. Rosen shall not engage in *ex parte* contact with Mr. Cario's treating health care providers.
- ~~18.16.~~ 16. Dr. Rosen must prepare and disclose a written report ~~within 30 days of the Rule 35 examination~~ that accurately sets out in detail his findings, including diagnosis, conclusions, and the results of any tests, as required by Rule 35(b)(2). Dr. Rosen's written report must include a complete statement of all opinions he will express, and

the basis and reasons for them, as well as all of the facts or data he considered in forming said opinions, as required by Rule 16.1(a)(2)(B).

~~19.~~17. Defense counsel shall disclose a copy of Dr. Rosen's written report within 30 days of the Rule 35 examination or by the Rule 16.1(a)(2) initial expert disclosure deadline, whichever occurs first.

~~20. Dr. Rosen shall retain a complete copy of the entire file pertaining to the Rule 35 examination, including but not limited to draft reports, handwritten notes, e-mails or other communications sent and received, and all documents generated or received, including draft reports shared with defense counsel, defendants or an agent of defendants, communications regarding draft reports with defense counsel, defendants or an agent of defendants, redlines of draft reports shared with defense counsel, defendants or an agent of defendants, and test materials and/or raw data related to the Rule 35 examination. Following the disclosure of the Rule 35 examination report, counsel for plaintiff may serve Dr. Rosen with a subpoena and/or serve defendants with a request for production to produce these materials.~~

~~21.~~18. Defense counsel shall be responsible for providing Dr. Rosen with a copy of this stipulation and order prior to the Rule 35 examination.

DATED this ____ day of August, 2020.

DATED this ____ day of August, 2020.

MAIER GUTIERREZ & ASSOCIATES

LAW OFFICE OF LEE J. GRANT, II

JASON R. MAIER, ESQ.
Nevada Bar No. 8557
JULIA M. CHUMBLER, ESQ.
Nevada Bar No. 15025
8816 Spanish Ridge Avenue
Las Vegas, Nevada 89148
Attorneys for Plaintiff Alberto Cario

RHONDA LONG, ESQ.
Nevada Bar No. 10921
8345 West Sunset Road, Suite 250
Las Vegas, Nevada 89113
Attorneys for Defendant Yeonhee Lee

ORDER

IT IS SO ORDERED.

DATED this ____ day of _____, 2020.

DISCOVERY COMMISSIONER

EXHIBIT C

CURRICULUM VITAE OF DR. ROSEN

EXHIBIT C

MARK J. ROSEN M.D.
Orthopaedic Surgery
www.OrthoDoc.AAOS.org/MarkRosen

2020 Palomino Lane, Ste 220
Las Vegas Nevada 89106
702-474-7200 Ph#
702-474-0009 Fax#

2680 Crimson Canyon Drive
Las Vegas Nevada 89128
702-228-7355 Ph#
702-228-4499 Fax#

UNDERGRADUATE:

Massachusetts Institute of Technology
Cambridge, Massachusetts
B.S. In Management
B.S. In Chemical Engineering
07/80 to 05/84

MEDICAL EDUCATION:

Baylor College of Medicine
Houston, Texas
M.D.
08/84 to 06/88

POST GRADUATE TRAINING:

Orthopaedic Surgery Residency
University of Texas Health and Science Center
San Antonio, Texas
07/88 to 06/93

PRACTICAL EXPERIENCE:

Bone & Joint Specialist
2020 Palomino Lane Suite 220
Las Vegas Nevada 89106
1994 to present

Founding Member
Trauma Orthopaedics Surgical Services
701 South Tonopah Drive
Las Vegas Nevada 89106
2000 to present

Member Orthopaedic Trauma Services
University Medical Center
1800 West Charleston Blvd
Las Vegas Nevada 89102

Orthopaedic Associates of Nevada
700 Shadow Lane Suite 165
Las Vegas Nevada 89106
1993 to 1994

LICENSURE:

State of Nevada NV6850

CERTIFICATION:

Board Certified, American Board of Orthopaedic Surgery

Re-Board Certified, American Board of Orthopaedic Surgery
March 2005

Re-Board Certified, American Board of Orthopaedic Surgery
January 2017

**PROFESSIONAL AND
ACADEMIC APPOINTMENTS:**

Vice Chief of Orthopaedic Surgery
University Medical Center
Las Vegas Nevada
2001 to 2010

Acting Chief of Orthopaedic Surgery
University Medical Center
Las Vegas Nevada
2002

Chief of Orthopaedic Surgery
Mountain View Hospital
Las Vegas Nevada
2000 to 2002

Chairman Utilization Review Committee
Member Medical Executive Committee
Mountain View Hospital
Las Vegas Nevada
2003 to 2005

Chief of Orthopaedic Surgery
Summerlin Hospital
Las Vegas Nevada
2007 to 2008

Vice Chief of Staff
Centennial Hills Hospital
Las Vegas Nevada
2008 to 2010

HOSPITAL AFFILIATIONS:

University Medical Center
Valley Hospital
Mountain View Hospital
Summerlin Hospital
Centennial Hills Hospital

CME/COURSES:

Available by request

TRIAL TESTIMONY'S DONE BY DR. ROSEN
Updated 10/31/2013

03/22/01	Frances Clappetta
05/03/01	Derrick Leblanc
07/12/01	Debra Magee
09/13/01	Anna Wilson
08/01/04	Wynanda Hoffman
08/19/05	Terry Barcus
09/13/05	Michelle Gillum
06/09/06	Guy Zewadski
12/13/06	Lucy Morelli
03/06/07	Darren Carney
03/15/07	Katrina Duncan
10/11/07	Randy Hipple
03/27/08	Eva Buff
04/04/08	Audrey Quinlan
03/24/09	Kevin Bibbins
09/30/10	Livia Farina
01/18/11	Gerardo Lopez-Celelos
04/08/11	Katrina Duncan
11/30/11	Cano, Angela
04/18/12	Desalvo, Nancy
06/19/12	Axtell, Catherine
08/30/12	Garabedian, Tom
10/17/13	John Phillips (Arbitration)

TRIALS FROM 2014 TO PRESENT FOR DR MARK ROSEN

Updated 6/25/18

10/2/2014

Gerald Gelger (treating) v Joshua Galloway and dominos Pizza Case N# A-12_663 12-663843-C
Deposed by Jolley Urg Wirth Plaintiff

Oct 13,16

Blanca Jimenez (plaintiff) vs Blue Martini Las Vegas Case # A-15-716334-C
Deposed by Lewis Brisbois Bisgaard & Smith

2/1/2018

Joshua Nieto (Plaintiff) Vs Chandler , et al. Case# A-13-686092-C
Deposed by Kirst & Associates

3/8/2018

George Paz (plaintiff) Vs Rent a Center, Case # se # A-15-7154448-C
Deposed by Wilson Elser

5/31/2018

Robert Novak (plaintiff) vs Nexcom
Deposed by Aleccia & Mitani

DEPOSITIONS BY DR. MARK ROSEN

Updated 12/13/13

02/01/02 Douglas Edwards
05/21/02 Brenda Vulcano
07/15/02 Andrew Thompson
07/18/02 Audrey Gelashvill-Presley
08/20/02 Jocelyn Juliano
10/24/02 Sylvia Atencio
11/12/02 Dale Alumbaugh
09/09/03 Velma Lee Armstrong
09/23/03 Shaun Johnson
10/22/03 Kenneth Morris
02/25/04 Karen Lindblom
08/27/04 David Beatty
09/07/04 David Cozart

02/08/05 Robert Arechiga
06/06/05 Lance Otterstein
06/07/05 Terry Barcus
07/11/05 Michelle Gillum
07/25/05 Donna Preedan
08/16/05 James Williams
09/20/05 Ronald Calhoun
02/13/06 Sandra Terreberry
04/12/06 Guy Zewadski
05/15/06 Andrea Ackers
06/16/06 Katrina Duncan
09/15/06 Harry Glasser
10/24/06 Darren Carney
02/22/07 Susan Gargiulo
04/23/07 Joe Zaczek
05/07/07 Gregory Peters
06/19/07 Rose Garcia
07/19/07 Patricia Bonesteele
07/31/07 Sandy Meier
04/15/08 Alan Jensen
05/01/08 Maricela Arenas De Castillo
05/16/08 Gloria Loyd
07/21/08 Hilda Moss
10/28/08 Lola Anastasia
12/04/08 Christina Ashenfelter-Tisdal
01/20/09 Shirley Whitney
02/12/09 Livia Farina
04/15/09 Alexandria Striegel
05/11/09 Jose Cabrera
06/19/09 Candace Nason
06/23/09 Sara Conley
07/20/09 Nellie Macdalmid
07/30/09 Carmelita Musni
08/11/09 Lina Khachekian
11/25/09 Roberta Tillinger

05/04/10 Raymond Lanplear
05/06/10 Sam Mofford
05/06/10 Clayton Mofford
05/09/11 Ann Johnson
06/22/11 Jaqueline Van Wagner
07/15/11 William Stout
08/17/11 Joseph Allison
09/12/11 Barbara Dvorak
01/16/12 Debra Partridge
01/31/12 Joan Galptman
02/23/12 Digiovanna, Debby
05/17/12 Wendy Blettchart
08/09/12 Cho, Jae

03/28/13 Diane Vogelzang
05/06/13 Maryann Medina
07/25/13 Benjamin Martin
08/27/13 Wendy Wood
10/08/13 John Phillips
12/10/13 James Pedersen

DEPOSITIONS GOING FORWARD FROM 2014

DR MARK ROSEN

Updated 10/17/2018

Page 1

1/14/2014

Gerald Gelger v Dominoes No.8006-11

Deposed by Jolley Urga Wirth Woodbury & Standish (treating)

1/23/2014

William Candow Plaintiff v David Dust defendant Case No. 2:11-CV-00343-LRH-GWF.

Deposed by Barron & Pruitt (expert)

2/25/2014

Tina Thomas Plaintiff v MGM Case#: A-12-661785-C

Deposed by Kunin & Carman (expert)

4/15/2014

Karen Milmesister Plaintiff v Coast Hotels & Casinos Inc d/b/a The Orli Orleans Hotel Case# A-12-672331

Deposed by t Thorndal

8/27/2014

Sheila Galper Plaintiff v Merck, Sharp and Dohme, Corp Case# JCCP 4644/30-2012-00547764

Deposed by Mark P. Rob (treating)

9/12/2014

Mohammad Sultan Plaintiff v Mission essential Personnel, LLC

File#228-1378

Deposed by Flicker, Garelick & Associates (expert)

2/12/2015

Norma Cantero Plaintiff v Kuslna NI Loraine Case No: A-13-691384-C

Deposed by Hall Jaffe & Clayton Tre: (treating)

4/16/2015

Sheree Hufstetler v Dependable Highway Express Inc. File# a-14-698141-C

Deposed by Christopher Gellner (expert)

4/30/2015

Stefani Caneva Plaintiff v Jeffy Holland and Russel Sigler Inc File # YKZ AL 98038

Deposted by Robert Amick (expert)

5/16/2016

Michael Kling Plaintiff vs IDS Property Casualty Ins (Ameriprise) File# A-13-6892244-C

Deposed by Brown, Bonn & Friedmann (expert)

6/20/2016

William Lacombe Plaintiff vs Dewqne White: Lifetrans Inc (Roe Corp) Case No# A-15-720164-C

Deposed by Bremer Whyte Brown & O'Meara (expert)

6/14/2016

Doris Yahraus Plaintiff vs Paragon Tavern Dba (off the Strip) Case#A-12-667376-C
Deposed by Kenneth Go Goates (expert)

8/29/2016

Dale Maxwell Plaintiff vs Arizona charlies Case# A-15-720740-C
Deposed by Morris, Sullivan, Lemkul & Pltegooff (treating)

9/7/2016

Robert Kilroy Plaintiff vs Steven Taylor & Mary Taylor Case# A580860
Deposed by Atkin Winner & Sherrod (expert)

10/11/2016

Manuel Cruz Plaintiff vs Ashley Cockrell Individual goes through Roe Corp I
Case# CV15-01441 Dept#D8
Deposed by Gollightly & Vannah PLLC (expert)

3/7/2017

Donna Apostolec Plaintiff vs Target Corp Case # CV 2:16 CV-01184-JCM-VCF
Deposed by Trevor Atkin, Atkin winner & Sherrod (expert)

3/9/2017

Charles Bertrand Plaintiff vs Goodwill Industries of S. NV NV
Case# A-15-715208-C
Deposed by Richard Harris Law Firm (expert)

3/27/2017

Jeanne Wondra Plaintiff vs Old Fenrm Case# P949-259168-01
Deposed by Attorney John Shannon (expert)

10/10/2017

Carlos Diaz Plaintiff vs MGM Grand Hotel Case#A-12-658149-C
Deposed by Harris & Harris Law Firm (expert)

11/16/2017

Nicolas Scott Plaintiff vs Ethan Hoopes Corp. of Church Latter Day Saints
Case No. 2:16-CV-02646-APG-PAL
Deposed by Clear Counsel Law Group (expert)

2/19/2018

Shan Terada Plaintiff vs Ma Lynn Aguilar Individual Case #A-17-757912-C
Deposed by Steven Burris (expert)

3/13/2018

Shaun Phillips vs Tre Builders LLC, Great Salt Lake Electrical

Case# A-16-743080-C

Deposed by Cisneros & Marias (expert)

6/18/2018

Enrique Garcia-Lopez Plaintiff vs Checker Cab Corp Case # A-16-739239-C

Deposed by Ladah Law Firm (expert)

6/26/2018

Tracy Sunahara vs Yichang Fu Individual Case# A-16-743707-C

Deposed by Maler Gutierrez & Assoc (expert)

7/24/2018

Rebecca Todorovich Plaintiff vs Smiths Food & Drug Case# A-16-742940-C

Deposed by Glen Lerner (expert)

9/27/2018

Trixa Bellosso-Rivas Plaintiff vs Covenant Care Ca LLC, Johnathan Geocanny Amaya Individual

Case# A-16-74-2390-C

Deposed by Eric Blank (expert)

**BONE & JOINT SPECIALIST
FEE SCHEDULES & POLICIES**

TAX ID #88-0293830

EFFECTIVE JUNE 1, 2019 PRICE CHANGE

Deposits are due with the case work

INDEPENDENT MEDICAL EXAMINATION:

Minimum Charge	\$ 1000.00	1 st Hour
Additional Hr.	\$ 800.00	Hour
Cancellation Fee	\$ 1600.00	Non refundable if cancellation less than 5 Business days prior to the scheduled appt.
Deposit	\$ 1900.00	Due prior to the appointment.

OFFICE POLICY DOES NOT ALLOW ANY THIRD PARTIES AFFILIATED WITH DEFENSE OR APPLICANT TO BE PRESENT DURING THE EXAM.

MEDICAL RECORDS REVIEW:

Hourly Rate	\$ 900.00	1 Hour Minimum
Deposit	\$ 1800.00	Due with records under 3 inches
Deposit	\$ 2700.00	Due with records up to 5 inches
Deposit	\$ 3600.00	Due with records over 5 inches
Chart Prep	\$ 35.00	Per Hr. Sorting, removing dups, prepping in date order
<u>Stat Report Fee:</u>	\$ 1200.00	Requesting any report in 5 days or less

DEPOSITION:

First Hour	\$ 1300.00	1 Hour Minimum
Additional Hr.	\$ 850.00	
Pre-Depo/Trial Meeting	\$ 700.00	Per Hour 1 Hour Minimum
Video Deposition	\$ 2500.00	Per Hour
Deposit	\$ 1300.00	Due 1 week prior to Deposition
Cancellation		Payment is Non- Refundable if less than 1 week

TELEPHONE CONFERENCE:

1 Hour	\$600.00	1 Hour Minimum
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COURT APPEARANCE:

Half Day	\$ 5,000.00	
Full Day	\$10,000.00	
Out of City Court	\$15,000.00	Plus travel expenses
Deposit	\$ 5,000.00	Due 2 weeks prior to Court appearance
Cancellation Fee	\$ 5,000.00	Non-refundable 10 days prior to appearance

DELIVERY OF REPORTS REQUIRES PAYMENT IN FULL

I UNDERSTAND THE POLICIES & THE FEES SCHEDULE FOR BONE & JOINT SPECIALIST.

Attorney's /Insurance Representative's Signature

Date

Please Sign & fax back to me at 702-228-4499

All records need to be sent to our office in paper form. Only X-rays are accepted on a disk.

Send Records to :

Bone & Joint Specialist
Attn: Debra Cosgrove
2680 Crimson Canyon Drive
Las Vegas NV 89128

Thank you

Debra Cosgrove
Legal Assist to Dr. Rosen

EXHIBIT D

**PLAINTIFF'S ANSWERS TO DEFENDANT'S
INTERROGATORIES AND
REQUESTS FOR ADMISSIONS**

EXHIBIT D

1 **RESP**
JASON R. MAIER, ESQ.
2 Nevada Bar No. 8557
JULIA M. CHUMBLER, ESQ.
3 Nevada Bar No. 15025
MAIER GUTIERREZ & ASSOCIATES
4 8816 Spanish Ridge Avenue
Las Vegas, Nevada 89148
5 Telephone: 702.629.7900
Facsimile: 702.629.7925
6 E-mail: jrm@mgalaw.com
jmc@mgalaw.com

7 *Attorneys for Plaintiff Alberto Eduardo Cario*
8
9

10 **DISTRICT COURT**
11 **CLARK COUNTY, NEVADA**
12

13 ALBERTO EDUARDO CARIO, an individual,

14 Plaintiff,

15 vs.

16 YEONHEE LEE; an individual; DOES I through
17 X; and ROE CORPORATIONS I through X,
inclusive,

18 Defendants.
19

Case No.: A-19-803446-C
Dept. No.: XXIX

**PLAINTIFF'S RESPONSES TO
DEFENDANT'S INTERROGATORIES**

20 Pursuant to Rule 33 of the Nevada Rules of Civil Procedure, plaintiff ALBERTO EDUARDO
21 CARIO ("Plaintiff"), by and through his attorneys of record, the law firm MAIER GUTIERREZ &
22 ASSOCIATES hereby responds to defendant YEONHEE LEE's interrogatories.

23 These responses are made solely for the purpose of, and in relation to, this action. Each
24 response is given subject to all appropriate objections (including, but not limited to, objections
25 concerning competency, relevancy, materiality, propriety and admissibility) which would require the
26 exclusion of any statement contained herein if the interrogatory were asked of, or any statements
27 contained herein were made by, a witness present and testifying in court. All such objections and
28 grounds therefore are reserved and may be interposed at the time of trial.

1 The party on whose behalf the responses are given has not yet completed their investigation
2 of the facts relating to this action, has not yet completed their discovery in this action, and has not yet
3 completed their preparation for trial. Consequently, the following responses are given without
4 prejudice to the responding party's right to produce, at the time of trial, subsequently-discovered
5 material.

6 Except for the facts explicitly admitted herein, no admission of any nature whatsoever is to be
7 implied or inferred. The fact that any interrogatory herein has been answered should not be taken as
8 an admission, or a concession, of the existence of any facts set forth or assumed by such interrogatory,
9 or that such answer constitutes evidence of any facts set forth or assumed. All responses must be
10 construed as given on the basis of present recollection.

11 **RESPONSES TO INTERROGATORIES**

12 **INTERROGATORY NO. 1:**

13 Please state your full name, any aliases, current residence address, date of birth, marital status,
14 and social security number.

15 **RESPONSE TO INTERROGATORY NO. 1:**

16 Objection. The request for Plaintiff's social security number as an improper request for
17 confidential information, an invasion of privacy, not reasonably calculated to lead to the discovery of
18 admissible information and precluded by NRS 239B.030. Furthermore, this interrogatory is overbroad
19 and compound, and appears to constitute at least six distinct interrogatories. Subject to and without
20 waiver of the foregoing objection, plaintiff responds as follows:

21 Full legal name: Alberto Eduardo Cario;

22 Aliases: None;

23 Date of birth: [REDACTED]

24 Marital Status: [REDACTED]

25 Address: [REDACTED]

26 SSN: [REDACTED]

27 As discovery is ongoing, plaintiff reserves the right to amend or supplement this response as
28 necessary.

1 **INTERROGATORY NO. 2:**

2 If you have ever been convicted of a felony and/or convicted of any crime involving deceit or
3 lying, state the original charge made against you, the court and the case number and the disposition
4 of the charges.

5 **RESPONSE TO INTERROGATORY NO. 2:**

6 Objection. NRCP 26(b) allows parties to "obtain discovery regarding any nonprivileged
7 matter that is relevant to any party's claims or defenses and proportional to the needs of the case."
8 This information requested is not relevant to any claim or defense of any of the parties hereto. Subject
9 to and without waiver of the foregoing objections, plaintiff responds as follows:

10 No, I have never been convicted of a felony and/or convicted of any crime involving deceit or
11 lying.

12 **INTERROGATORY NO. 3:**

13 If you have ever served in the Armed Forces, please set forth the details of your military
14 history, such as the branch of service, the date and place of induction, the highest rank obtained, the
15 type, date and place of discharge, etc.

16 **RESPONSE TO INTERROGATORY NO. 3:**

17 I have never served in the Armed Forces.

18 **INTERROGATORY NO. 4:**

19 List your complete educational history including in your response the highest level of
20 education you have obtained.

21 **RESPONSE TO INTERROGATORY NO. 4:**

22 Objection. NRCP 26(b) allows parties to "obtain discovery regarding any nonprivileged
23 matter that is relevant to any party's claims or defenses and proportional to the needs of the case."
24 This information requested is not relevant to any claim or defense of any of the parties hereto. Subject
25 to and without waiver of the foregoing objections, plaintiff responds as follows:

26 I am currently working on my associates degree at College of Southern Nevada for business
27 management, my highest level completed is a high school diploma at this time.

28 ///

1 **INTERROGATORY NO. 5:**

2 If you have ever had your driver's license suspended or revoked, please state all details
3 regarding such suspension or revocation including the agency taking such action and the date and
4 reason for such action.

5 **RESPONSE TO INTERROGATORY NO. 5:**

6 Objection. This request is overly broad as to its timing and scope. Subject to and without
7 waiver of the foregoing objection, plaintiff responds as follows:

8 I had my driver's license suspended when I was 18 years-old in California due to an unpaid
9 speeding ticket, I paid it and got my license reinstated before I received my Nevada driver's License
10 around 2012.

11 **INTERROGATORY NO. 6:**

12 Please provide your employment history for the period of five (5) years before the Subject
13 Incident date until present including in your response: (a) name of employer; (b) city and state where
14 employed; (c) your stated title or position and accompanying duties and responsibilities; and (d) the
15 length of your employment.

16 **RESPONSE TO INTERROGATORY NO. 6:**

- 17 a. Lowe's Home Improvement
18 b. Las Vegas, Nevada
19 c. Store Manager (recent promotion);
20 a. Assistant Store Manager (previous position past 4 years) – over sees daily
21 operations; employment; manage existing employees; opening closing store;
22 shipping receiving; day to day retail operations.
23 d. 11 years

24 **INTERROGATORY NO. 7:**

25 With respect to the Subject Accident, describe the details of the accident or incident in your
26 own words, describing factually (without legal conclusion) what caused it to happen.

27 **RESPONSE TO INTERROGATORY NO. 7:**

28 I was driving north on Buffalo Drive, I came to a red light on Buffalo Drive and Sahara

1 Avenue, when my light turned green I drove through the intersection, when I was a 3/4 through the
2 intersection I was struck by a vehicle traveling west on Sahara Avenue. I saw the white Audi coming
3 towards me and I slammed on my brakes and tried to turn left away from the vehicle but it was too
4 late, the vehicle hit me and everything in the car exploded around me.

5 **INTERROGATORY NO. 8:**

6 Describe in detail any conversations you had with anyone at the scene of the accident during
7 the ten (10)-minute period immediately before and the ten (10)-minute period immediately after the
8 accident in question.

9 **RESPONSE TO INTERROGATORY NO. 8:**

10 I had no conversations in the ten (10) minutes prior to the accident. In the ten (10) minutes
11 after the accident, I spoke to a few witnesses and borrowed one of their phones to call my fiancé, I
12 also spoke to the driver of the white Audi to see if she was okay. The people at the accident had
13 already called the police.

14 As discovery is ongoing, Plaintiff reserves the right to amend or supplement this response as
15 necessary.

16 **INTERROGATORY NO. 9:**

17 Describe in detail the physical layout of the area of the Subject Accident, including in your
18 answer the locations and types of any traffic control devices, the number of travel lanes for the
19 direction in which you were traveling, and the locations and types of any traffic barriers (including
20 but not limited to concrete barriers, traffic cones, traffic barrels, etc.).

21 **RESPONSE TO INTERROGATORY NO. 9:**

22 Objection. This request is vague and ambiguous in regards to the use and meaning of the terms:
23 “physical layout”, “locations”, “types”, and “traffic barriers”. The interrogatory is also overly broad
24 in its request to “describe in detail” as such a threshold is subjective. Subject to and without waiving
25 said objection, Plaintiff responds as follows:

26 Sahara and Buffalo is a four-way intersection, there were two lanes of travel in the direction I
27 was going, there are four (4) traffic lights. There was no traffic at the time of the accident.

28 ///

1 **INTERROGATORY NO. 10:**

2 What was your place of departure and intended destination immediately prior to the Subject
3 Accident?

4 **RESPONSE TO INTERROGATORY NO. 10:**

5 I left home from [REDACTED] and was traveling to
6 work at Lowe's located at 7550 W. Washington, Las Vegas, Nevada 89128.

7 **INTERROGATORY NO. 11:**

8 Describe in detail the manner in which your body moved as a result of Subject Accident.
9 Include in your answer a description of any parts of your body which struck any part of your vehicle
10 or any other foreign object during the accident and the object(s) which was (were) struck.

11 **RESPONSE TO INTERROGATORY NO. 11:**

12 Objection. This request is vague and ambiguous in regards to the use and meaning of the terms:
13 "manner", "body", "moved", "parts", "struck", and "foreign object". The interrogatory is also overly
14 broad in its request to "describe in detail" as such a threshold is subjective. Subject to and without
15 waiving said objection, Plaintiff responds as follows:

16 To the best of my recollection, I remember my body jerked forward, my wrist hit the door
17 when the air bag went off, my face struck the airbag and my body slammed back into my seat where
18 my head hit the seat. I do not remember how every part of my body moved and in what ways what
19 parts struck what parts of the inside of the vehicle. The accident was loud, fast and violent with enough
20 force to cause every part of my body to move, only inhibited to the extent of my seatbelt, and the
21 impact caused parts of my body to hit the inside of the car and the airbags that were simultaneously
22 deploying. I do not remember if items in my car that were thrown about.

23 **INTERROGATORY NO. 12:**

24 If you have ever been involved in any claim or any lawsuit with any person, group, or
25 organization, corporation, or industrial commission, or any other entity, either as a plaintiff or a
26 defendant, in the five years prior to the Subject Incident, or at any time subsequent to the Subject
27 Incident, please describe in detail the nature of the claim or lawsuit, when it was made and how it was
28 resolved.

1 **RESPONSE TO INTERROGATORY NO. 12:**

2 Objection. NRC 26(b) allows parties to "obtain discovery regarding any nonprivileged
3 matter that is relevant to any party's claims or defenses and proportional to the needs of the case."
4 This information requested is not relevant to any claim or defense of any of the parties hereto. Further,
5 this request is improperly overbroad as to its timing and scope and will be limited to five years before
6 the November 24, 2018, collision. Subject to and without waiver of the foregoing objection, plaintiff
7 responds as follows:

8 I have not made any claims or lawsuits other than this case.

9 **INTERROGATORY NO. 13:**

10 How fast were you traveling immediately prior to the collision?

11 **RESPONSE TO INTERROGATORY NO. 13:**

12 I do not recall my speed, I had just left from a full stop.

13 **INTERROGATORY NO. 14:**

14 If, during the three-minute period immediately before impact, you were engaged in any
15 activity which required the use of one or both hands, such as smoking, drinking, talking on a cellular
16 phone, eating, adjusting equipment, or touching some person or object, please describe such conduct
17 or activity in detail, setting forth a complete description of each activity, the duration of each activity,
18 and how long in seconds before the occurrence such activity ended.

19 **RESPONSE TO INTERROGATORY NO. 14:**

20 None. I also forgot my phone at home, which is why I used the cell phone of one of the
21 witnesses to call my fiancé.

22 **INTERROGATORY NO. 15:**

23 Were you suffering from physical infirmity, disability, or sickness at the time of the Subject
24 Incident? If so, what was the nature of the infirmity, disability, or sickness?

25 **RESPONSE TO INTERROGATORY NO. 15:**

26 No, I was not suffering from physical infirmity, disability, or sickness at the time of the
27 accident.

28 ///

1 **INTERROGATORY NO. 16:**

2 Did you consume any alcoholic beverages or take any drugs or medications within 12 hours
3 before the Subject Incident? If so, state the type and amount of alcoholic beverages, drugs, or
4 medication which were consumed, and when and where you consumed them.

5 **RESPONSE TO INTERROGATORY NO. 16:**

6 I did not consume alcohol, medications and/or drugs 12 hours prior to the collision.

7 **INTERROGATORY NO. 17:**

8 Did any mechanical defects in the motor vehicle in which you were operating/riding at the
9 time of the Subject Accident contribute to the accident? If so, describe the nature of the defect and
10 how it contributed to the accident.

11 **RESPONSE TO INTERROGATORY NO. 17:**

12 No, my vehicle did not have any mechanical defects that contributed to the accident.

13 **INTERROGATORY NO. 18:**

14 Did you do anything to cause or to contribute to cause Subject Accident? If so, please describe
15 fully, and not by way of conclusions, how you caused or contributed to the said accident.

16 **RESPONSE TO INTERROGATORY NO. 18:**

17 No, I did not cause or contribute to the accident.

18 **INTERROGATORY NO. 19:**

19 Please state if the vehicle you were operating or riding in at the time of the Subject Accident
20 was equipped with a dash cam, a "Nexar" system, an "On Star" system, or another in-vehicle
21 camera/video, security, communications, and detection system. If so, please state: (a) the company
22 providing such service; and (b) whether you were contacted by the company following the accident.

23 **RESPONSE TO INTERROGATORY NO. 19:**

24 No, my vehicle did not have any of the above.

25 **INTERROGATORY NO. 20:**

26 If you received any injuries of any kind whatsoever (whether objective or subjective) as a
27 result of this accident or incident of which you, your attorney, or your health care providers are aware
28 of or suspect, please list and describe each in specific detail, giving the exact location within or upon

1 your body of all your injuries, and the nature of your complaint, whether physical, dental, emotional,
2 nervous, mental, or psychological.

3 **RESPONSE TO INTERROGATORY NO. 20:**

4 Objection. This request is cumulative, duplicative and in violation of NRCP 26(g)(1)(B)(ii).
5 Furthermore this request requires an expert medical opinion for which Plaintiff is not qualified to give.
6 Subject to and without waiving stated objections, Plaintiff responds as follows:

7 I injured my wrist, I had pain in my neck and the middle of my back, and I hurt my lower
8 back significantly. I also was very nervous for a few weeks after the accident when going through an
9 intersection.

10 **INTERROGATORY NO. 21:**

11 If any of the injuries which you claim were caused by the Defendant are an aggravation of a
12 pre-existing condition, please state the nature of the pre-existing conditions and the nature of the
13 aggravation claimed.

14 **RESPONSE TO INTERROGATORY NO. 21:**

15 Objection. This interrogatory requires an expert medical opinion. Subject to and without
16 waiver of the foregoing objection, plaintiff responds as follows:

17 I did not have any prior existing conditions prior to the subject collision.

18 **INTERROGATORY NO. 22:**

19 If you claim that any of your injuries are permanent, state which of your injuries you claim to
20 be permanent and what, if any, disabilities you contend such injuries will cause.

21 **RESPONSE TO INTERROGATORY NO. 22:**

22 Objection. This interrogatory is compound and comprised of at least two distinct interrogatory
23 requests. Further, the interrogatory is vague and ambiguous regarding the meaning and scope of the
24 terms "permanent" and "disabilities". The interrogatory is also overbroad in regards to the term "any".
25 Most importantly, the interrogatory calls for expert medical opinions, which Plaintiff is not qualified
26 to provide. Subject to and without waiver of the foregoing objections, plaintiff responds as follows:

27 I am unsure if my injuries are permanent.

28 As discovery is ongoing, Plaintiff reserves the right to amend or supplement this response as

1 necessary.

2 **INTERROGATORY NO. 23:**

3 If, in the five (5) years *prior* to the Subject Accident, you suffered any injuries, caused
4 accidentally, intentionally, or otherwise, that required medical care, please state the nature of the
5 injuries sustained, the date and place it was sustained and the name and address of the medical provider
6 giving such medical care.

7 **RESPONSE TO INTERROGATORY NO. 23:**

8 Objection. This request is vague and ambiguous in regards to the term "injuries". Subject to
9 and without waiving the foregoing objection, Plaintiff responds as follows:

10 None, five (5) years prior to the accident, I did not suffer from any injuries or accidents.

11 **INTERROGATORY NO. 24:**

12 List the name, address, and specialty of each health care provider who has examined or treated
13 you for any of the injuries *resulting from* the Subject Accident and list the date of each examination
14 or treatment.

15 **RESPONSE TO INTERROGATORY NO. 24:**

16 Objection. This interrogatory is cumulative, duplicative and in direct violation of NRC
17 26(g)(1)(B)(ii). Plaintiff previously disclosed complete names of medical providers, addresses, and
18 phone numbers and produced supporting medical/billing records with dates of treatment in Plaintiff's
19 NRC 16.1 disclosures and supplements thereto.

20 **INTERROGATORY NO. 25:**

21 List the name and address of each pharmacy and/or pharmaceutical provider, where you have
22 obtained prescription pain medication for the *period of five (5) years prior to the Subject Accident*
23 *until present*.

24 **RESPONSE TO INTERROGATORY NO. 25:**

25 Prescriptions from Interventional Pain & Spine Institute have been filled at CVS Pharmacy:
26 CVS Pharmacy
27 9405 West Russell Road
28 Las Vegas, Nevada 89148
(702) 262-7854

1 **INTERROGATORY NO. 26:**

2 If, in the time period *subsequent* to the Subject Accident, you suffered any injuries, caused
3 accidentally, intentionally, or otherwise, that required medical care, please state the nature of the
4 injuries sustained, the date and place it was sustained and the name and address of the health care
5 provider giving such medical care.

6 **RESPONSE TO INTERROGATORY NO. 26:**

7 None, subsequently to the accident, I did not suffer from any injuries or accidents.

8 **INTERROGATORY NO. 27:**

9 State the name and location of any hospital in which you have been admitted since the time of
10 the Subject Accident, the inclusive dates of admission and the purpose for such admission.

11 **RESPONSE TO INTERROGATORY NO. 27:**

12 None.

13 **INTERROGATORY NO. 28:**

14 If you claim that any medical treatment or expense will be necessary in the future as a result
15 of the incident in question, please state the nature of the treatment and/or expense and the name of the
16 person advising of such necessity.

17 **RESPONSE TO INTERROGATORY NO. 28:**

18 Objection. This interrogatory is overbroad as the term "any" and the interrogatory calls for
19 expert medical opinions. Subject to and without waiver of the foregoing objections, Plaintiff responds
20 as follows:

21 I was advised by Dr. Rosler I would need injections in the future. Injections were scheduled
22 for March 19, 2020, but my procedure did not move forward as the surgery center was delayed.

23 As discovery is ongoing, Plaintiff reserves the right to amend or supplement this response as
24 necessary.

25 **INTERROGATORY NO. 29:**

26 If any of your health care providers has recommended you undergo any specific course of
27 medical treatment (including but not limited to injection treatments, physical therapy or surgical
28 intervention) to treat any of the injuries you claim to have received in the Subject Accident, *which*

1 *treatment you have not undergone*, describe in detail the nature of the treatment in question, the
2 medical provider recommending such treatment, the date such treatment was first recommended, and
3 the reason(s) why you have not undergone such treatment.

4 **RESPONSE TO INTERROGATORY NO. 29:**

5 Objection. This interrogatory is compound, vague and ambiguous, overbroad, and calls for
6 expert medical opinions. Subject to and without waiver of the foregoing objections, plaintiff responds
7 as follows:

8 See plaintiff's response to Interrogatory No. 28.

9 **INTERROGATORY NO. 30:**

10 If you claim that any of your injuries has resulted in restrictions on your ability to work or
11 perform activities of daily living, state which of your body parts you claim to suffer such restrictions,
12 the specific nature of such restrictions and the medical provider(s) who imposed such restrictions on
13 your activities.

14 **RESPONSE TO INTERROGATORY NO. 30:**

15 I cannot carry heavy objects or stand or sit for long periods of time. The doctors at
16 Interventional Pain & Spine Institute advised against these activities.

17 **INTERROGATORY NO. 31:**

18 If you are making a claim for lost wages as a result of the Subject Incident, please set forth the
19 specific injury, symptom or disability which you claim caused the loss of time, the amount of time
20 and wages lost, the name and address of your employer, and your current rate of wages or salary with
21 said employer has testified as an expert at trial or by deposition within the preceding four years.

22 **RESPONSE TO INTERROGATORY NO. 31:**

23 Plaintiff is not making a wage loss claim at this time. Plaintiff reserves the right to amend or
24 supplement this interrogatory response.

25 **INTERROGATORY NO. 32:**

26 If you are making a claim for property damage as a result of the Subject Incident, please set
27 describe the property damaged, the amount to repair, and any individuals or companies who estimated
28 the repair cost.

1 **RESPONSE TO INTERROGATORY NO. 32:**

2 Plaintiff is not making a property damage claim.

3 **INTERROGATORY NO. 33:**

4 Identify all person(s) who you to your knowledge have or may have any relevant information
5 regarding the Subject Incident.

6 **RESPONSE TO INTERROGATORY NO. 33:**

7 A witness by the name of Frank, I do not know his last name and responding Las Vegas
8 Metropolitan officers.

9 **INTERROGATORY NO. 34:**

10 If you provided a written or recorded statement to anyone regarding the subject accident,
11 please state:(a)whether the statement was written or recorded,(b)the name and address of the person
12 or company who requested the statement.

13 **RESPONSE TO INTERROGATORY NO. 34:**

14 My written statement to Las Vegas Metropolitan Police Department. I gave a verbal statement
15 I gave to GEICO, but it was not recorded.

16 **INTERROGATORY NO. 35:**

17 Were you a Medicare or Medicaid insured, or otherwise eligible for or entitled to benefits of
18 Medicare or Medicaid? If so, please identify by which entity you were insured/entitled and state the
19 nature and amount of any existing or anticipated lien(s) on any past, present or future payments from
20 any source for any and all claims, medical expenses/damages as they may relate to the facts and
21 allegations of this suit. Include in your answer to this interrogatory whether this lawsuit and/or claim
22 has been self-reported to the Centers for Medicare and Medicaid Services, and whether you, or anyone
23 on your behalf, intends to self-report to the Centers for Medicare and Medicaid Services.

24 **RESPONSE TO INTERROGATORY NO. 35:**

25 Plaintiff does not have Medicare and/or Medicaid.

26 **INTERROGATORY NO. 36:**

27 Other than your attorneys or your attorneys' staff, identify all persons who assisted you in
28 responding to the Interrogatories, Request for Production of Documents, and Requests for

1 Admissions.

2 **RESPONSE TO INTERROGATORY NO. 36:**

3 None.

4 DATED this 2nd day of April, 2020.

5 Respectfully submitted,

6 **MAIER GUTIERREZ & ASSOCIATES**

7 /s/ Julia M. Chumbler

8 JASON R. MAIER, ESQ.

9 Nevada Bar No. 8557

JULIA M. CHUMBLER, ESQ.

10 Nevada Bar No. 15025

8816 Spanish Ridge Avenue

11 Las Vegas, Nevada 89148


Attorneys for Plaintiff Alberto Eduardo Cario

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VERIFICATION

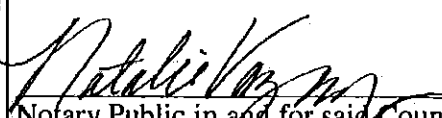
STATE OF NEVADA)
)ss:
COUNTY OF CLARK)

I, ALBERTO EDUARDO CARIO, declare, under penalty of perjury, that the following statement is true: I am the plaintiff in the above-entitled action. The entitled document **PLAINTIFF'S RESPONSES TO DEFENDANT'S INTERROGATORIES** and know the contents therein. The same is true of my knowledge, except as to those matter therein stated on information and belief, and as to those matters, I believe them to be true.

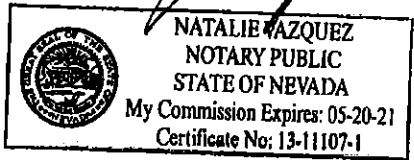


ALBERTO EDUARDO CARIO

SUBSCRIBED and SWORN to before
me this 27th day of March, 2020.



Notary Public in and for said County and State



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/s/ Natalie Vazquez

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7 *Attorneys for Plaintiff Alberto Eduardo Cario*

8
9
10 **DISTRICT COURT**

11 **CLARK COUNTY, NEVADA**

12
13 ALBERTO EDUARDO CARIO, an individual,

14 Plaintiff,

15 vs.

16 YEONHEE LEE; an individual; DOES I through
17 X; and ROE CORPORATIONS I through X,
inclusive,

18 Defendants.

Case No.: A-19-803446-C

Dept. No.: XXIX

**PLAINTIFF'S RESPONSES TO
DEFENDANT'S REQUEST FOR
ADMISSIONS**

19 Pursuant to Rule 33 of the Nevada Rules of Civil Procedure, plaintiff ALBERTO EDUARDO
20 CARIO ("Plaintiff"), by and through his attorneys of record, the law firm MAIER GUTIERREZ &
21 ASSOCIATES, hereby responds to defendant YEONHEE LEE's requests for admissions.

22 These responses are made solely for the purpose of, and in relation to, this action. Each
23 response is given subject to all appropriate objections (including, but not limited to, objections
24 concerning competency, relevancy, materiality, propriety and admissibility) which would require the
25 exclusion of any statement contained herein if the interrogatory were asked of, or any statement
26 contained herein were made by, a witness present and testifying in court. All such objections and
27 grounds therefore are reserved and may be interposed at the time of trial.
28

1 The party on whose behalf the responses are given has not yet completed their investigation
2 of the facts relating to this action, has not yet completed their discovery in this action, and has not yet
3 completed their preparation for trial. Consequently, the following responses are given without
4 prejudice to the responding party's right to produce, at the time of trial, subsequently-discovered
5 material.

6 Except for the facts explicitly admitted herein, no admission of any nature whatsoever is to be
7 implied or inferred. The fact that any interrogatory herein has been answered should not be taken as
8 an admission, or a concession, of the existence of any facts set forth or assumed by such interrogatory,
9 or that such answer constitutes evidence of any facts set forth or assumed. All responses must be
10 construed as given on the basis of present recollection.

11 **RESPONSES TO REQUEST FOR ADMISSIONS**

12 **REQUEST FOR ADMISSION NO. 1:**

13 Admit that you are not claiming property damages in this lawsuit.

14 **RESPONSE TO REQUEST FOR ADMISSION NO. 1:**

15 Admit.

16 **REQUEST FOR ADMISSION NO. 2:**

17 Admit that you are not claiming damages for lost wages or income in this lawsuit.

18 **RESPONSE TO REQUEST FOR ADMISSION NO. 2:**

19 Deny.

20 **REQUEST FOR ADMISSION NO. 3:**

21 Admit that you are not claiming damages for lost earning capacity in this lawsuit.

22 **RESPONSE TO REQUEST FOR ADMISSION NO. 3:**

23 Deny.

24 **REQUEST FOR ADMISSION NO. 4:**

25 Admit that you are not claiming damages for travel expenses in this lawsuit.

26 **RESPONSE TO REQUEST FOR ADMISSION NO. 4:**

27 Admit.

28 ///

1 **REQUEST FOR ADMISSION NO. 5:**

2 Admit that you did not break any bones as a result of the Subject Accident.

3 **RESPONSE TO REQUEST FOR ADMISSION NO. 5:**

4 Objection. This request calls for a medical expert opinion. Subject to and without waiver of
5 the foregoing objection, Plaintiff responds as follows:

6 Admit.

7 **REQUEST FOR ADMISSION NO. 6:**

8 Admit that the back injuries that you are claiming resulted from the Subject Accident are soft
9 tissue injuries.

10 **RESPONSE TO REQUEST FOR ADMISSION NO. 6:**

11 Objection. This request calls for a medical expert opinion. Further, this request is vague and
12 ambiguous in regards to the term "soft tissue injuries". Moreover, this request does not comply with
13 the purpose of NRCP 36, which is to obtain admission of facts that are in no real dispute and that the
14 adverse party can admit cleanly, without qualifications. *See Morgan v. Demille*, 106 Nev. 671, 799
15 P.2d 561 (1990). Subject to and without waiver of the foregoing objection, Plaintiff responds as
16 follows:

17 Deny.

18 **REQUEST FOR ADMISSION NO. 7:**

19 Admit that you were not transported from the Subject Accident scene by ambulance.

20 **RESPONSE TO REQUEST FOR ADMISSION NO. 7:**

21 Admit.

22 **REQUEST FOR ADMISSION NO. 8:**

23 Admit that you were able to get out of your car, unassisted, at the scene of the accident.

24 **RESPONSE TO REQUEST FOR ADMISSION NO. 8:**

25 Admit.

26 **REQUEST FOR ADMISSION NO. 9:**

27 Admit that you were able to walk into the emergency room at the ER at the Lakes (Southern
28 Hills Hospital).

1 **RESPONSE TO REQUEST FOR ADMISSION NO. 9:**

2 Admit.

3 **REQUEST FOR ADMISSION NO. 10:**

4 Admit that you were able to walk out of the emergency room at the ER at the Lakes (Southern
5 Hills Hospital) with no apparent pain or distress.

6 **RESPONSE TO REQUEST FOR ADMISSION NO. 10:**

7 Objection. This request does not comply with the purpose of NRCP 36, which is to obtain
8 admission of facts that are in no real dispute and that the adverse party can admit cleanly, without
9 qualifications. *See Morgan v. Demille*, 106 Nev. 671, 799 P.2d 561 (1990). Subject to and without
10 waiver of the foregoing objection, Plaintiff responds as follows:

11 Deny.

12 **REQUEST FOR ADMISSION NO. 11:**

13 Admit that no health care provider has told you that any injury or damages alleged from the
14 Subject Accident are permanent.

15 **RESPONSE TO REQUEST FOR ADMISSION NO. 11:**

16 Objection. This request is not reasonably calculated to lead to the discovery of relevant or
17 admissible evidence. Moreover, this request does not comply with the purpose of NRCP 36, which
18 is to obtain admission of facts that are in no real dispute and that the adverse party can admit cleanly,
19 without qualifications. *See Morgan v. Demille*, 106 Nev. 671, 799 P.2d 561 (1990). Subject to and
20 without waiver of the foregoing objections, Plaintiff responds as follows:

21 Deny.

22 **REQUEST FOR ADMISSION NO. 12:**

23 Admit that your body did not strike anything inside the cab of your vehicle at the time of the
24 Subject Accident.

25 **RESPONSE TO REQUEST FOR ADMISSION NO. 12:**

26 Deny.

27 **REQUEST FOR ADMISSION NO. 13:**

28 Admit that you have provided a written or recorded statement to an insurance company

1 providing your account of what occurred during the Subject Accident.

2 **RESPONSE TO REQUEST FOR ADMISSION NO. 13:**

3 Deny.

4 **REQUEST FOR ADMISSION NO. 14:**

5 Admit that, to date, no health care provider has recommended future surgery related to
6 injuries you alleged to have sustained in the Subject Accident.

7 **RESPONSE TO REQUEST FOR ADMISSION NO. 14:**

8 Deny.

9 **REQUEST FOR ADMISSION NO. 15:**

10 Admit that, to date, no health care provider has recommended future injections related
11 to injuries you alleged to have sustained in the Subject Accident.

12 **RESPONSE TO REQUEST FOR ADMISSION NO. 15:**

13 Deny

14 **REQUEST FOR ADMISSION NO. 16:**

15 Admit that your home life activities have not been limited as a result of the Subject Accident.

16 **RESPONSE TO REQUEST FOR ADMISSION NO. 16:**

17 Deny.

18 **REQUEST FOR ADMISSION NO. 17:**

19 Admit that you have no personal knowledge of any persons who witnessed the Subject
20 Accident except for those persons occupying the vehicles involved in the Subject Accident.

21 **RESPONSE TO REQUEST FOR ADMISSION NO. 17:**

22 Deny.

23 **REQUEST FOR ADMISSION NO. 18:**

24 Admit that the medical expenses you incurred in this incident were unnecessary.

25 **RESPONSE TO REQUEST FOR ADMISSION NO. 18:**

26 Deny.

27 **REQUEST FOR ADMISSION NO. 19:**

28 Admit that the medical expenses you incurred in this incident were unreasonable.

1 **RESPONSE TO REQUEST FOR ADMISSION NO. 19:**

2 Deny.

3 **REQUEST FOR ADMISSION NO. 20:**

4 Admit that the medical treatment you sought for injuries you relate to this Subject Accident
5 was excessive.

6 **RESPONSE TO REQUEST FOR ADMISSION NO. 20:**

7 Deny.

8 **REQUEST FOR ADMISSION NO. 21:**

9 Admit that you have delayed treatment recommended by health care providers which would
10 have promoted recovery for injuries you claim arise from the Subject Accident.

11 **RESPONSE TO REQUEST FOR ADMISSION NO. 21:**

12 Deny.

13 **REQUEST FOR ADMISSION NO. 22:**

14 Admit that you failed to keep proper lookout of the road ahead of you which resulted in the
15 collision that caused the Subject Accident.

16 **RESPONSE TO REQUEST FOR ADMISSION NO. 22:**

17 Deny.

18 **REQUEST FOR ADMISSION NO. 23:**

19 Admit that you could have taken evasive action to avoid the collision which resulted in the
20 Subject Accident.

21 **RESPONSE TO REQUEST FOR ADMISSION NO. 23:**

22 Deny.

23 **REQUEST FOR ADMISSION NO. 24:**

24 Admit that were going above the posted speed limit at the time of the Subject Accident.

25 **RESPONSE TO REQUEST FOR ADMISSION NO. 24:**

26 Deny.

27 **REQUEST FOR ADMISSION NO. 25:**

28 Admit that there was nothing that Defendant could have done to avoid or minimize the

1 collision between the vehicles which resulted in the Subject Accident.

2 **RESPONSE TO REQUEST FOR ADMISSION NO. 25:**

3 Deny.

4 **REQUEST FOR ADMISSION NO. 26:**

5 Admit that Defendant did not cause the Subject Accident.

6 **RESPONSE TO REQUEST FOR ADMISSION NO. 26:**

7 Deny.

8 **REQUEST FOR ADMISSION NO. 27:**

9 Admit that your operation of the vehicle you were driving was the actual cause of the Subject
10 Accident.

11 **RESPONSE TO REQUEST FOR ADMISSION NO. 27:**

12 Deny.

13 **REQUEST FOR ADMISSION NO. 28:**

14 Admit that your operation of the vehicle you were driving was the proximate cause of the
15 Subject Accident.

16 **RESPONSE TO REQUEST FOR ADMISSION NO. 28:**

17 Deny.

18 DATED this 18th day of March, 2020.

19 Respectfully submitted,

20 **MAIER GUTIERREZ & ASSOCIATES**

21 /s/ Julia M. Chumbler

22 JASON R. MAIER, ESQ.

23 Nevada Bar No. 8557

24 JULIA M. CHUMBLER, ESQ.

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DISTRICT COURT

CLARK COUNTY, NEVADA

ALBERTO EDUARDO CARIO, an individual,

Plaintiff,

vs.

YEONHEE LEE; an individual; DOES I through
X; and ROE CORPORATIONS I through X,
inclusive,

Defendants.

Case No.: A-19-803446-C
Dept. No.: XXIX

**PLAINTIFF'S OPPOSITION TO
DEFENDANT'S MOTION TO COMPEL
RULE 35 EXAM - ORDER SHORTENING
TIME**

[DISCOVERY COMMISSIONER]

Plaintiff Alberto Eduardo Cario, by and through his attorneys, the law firm MAIER GUTIERREZ & ASSOCIATES, hereby submits this opposition to defendant Yeonhee Lee's motion to compel Rule 35 examination on order shortening time. This opposition is made and based on the following memorandum of points and authorities, the pleadings and papers on file in this matter, and any oral argument the Discovery Commissioner may allow at the hearing on this matter.

MEMORANDUM OF POINTS AND AUTHORITIES

Plaintiff does not oppose defendant's request to perform a Rule 35 examination. In fact, it was plaintiff's counsel who actually took the time to prepare and provide defendant with the draft stipulation and order for Rule 35 examination that is now at issue, which is based on the same template that has been used and approved in numerous other cases. *See Ex. B. to defendant's motion.*

1 In response, defendant insisted on striking the entirety of item nos. 9 (audio recording), 10
2 (observer) and 20 (preservation of files) without providing any basis in law or fact for such strikes.
3 **See Ex. B. to defendant's motion.** Defendant also insisted on striking the 30-day report deadlines
4 within item nos. 18-19.

5 During the EDCR 2.34 conference, it was explained to defendant that plaintiff's draft
6 stipulation and order is consistent with both NRCP 35 and NRS 52.380, as well as consistent with
7 prior discovery dispute conferences and rulings by the Discovery Commissioner in numerous other
8 cases.¹

9 Despite these representations by plaintiff's counsel during the EDCR 2.34 conference,
10 defendant could not reference any authority whatsoever to substantiate defendant's requested strikes,
11 preferring instead to skip straight to the instant motion to compel.

12 As outlined below, each of defendant's proposed strikes are contrary to Nevada law and
13 inconsistent with the Discovery Commissioner's prior rulings.

14 **Item Nos. 9 (audio recording) and 10 (observer) are as follows:**

15 9. The Rule 35 examination will be audio recorded by LYNN BELCHER LNC ASSOCIATES,
16 in which Mr. Cario's counsel will arrange and pay for the recording. Mr. Cario's
17 counsel shall disclose a copy of the recording within 30 days of receipt of the same.
The doctor and all persons present must be notified that the examination will be
recorded before the examination begins.

18 10. Mr. Cario will have a nurse observer present at the Rule 35 examination from LYNN
19 BELCHER LNC ASSOCIATES. The nurse observer must not in any way interfere,
obstruct, or participate in the examination.

20 Defendant requests that the Discovery Commissioner disregard NRS 52.380, which provides
21 Mr. Cario with the substantive right to have an observer attend and make an audio or stenographic
22 recording of an examination.

23 The Nevada Legislature enacted NRS 52.380 in 2019 to provide individuals, such as Mr.
24 Cario, with the substantive right to record examinations and have observers present:

25 Contrary to opponents of this bill who want to say this is a

26
27 ¹ Plaintiff's counsel acknowledges that on September 9, 2020, the Discovery Commissioner
28 recently modified item no. 12 in another case. In the other case, the Discovery Commissioner added
that the doctor "may ask how the incident occurred and how Plaintiff was injured" to the end of item
no. 12.

1 procedural matter, this is not a procedural matter; it is a substantive
2 right. It is the right to protect and control your own body.

3 ...
4 The reason we are before you today is because this bill protects
5 substantive rights. This is not a procedural rule, which you would
6 usually find within our NRCP. Our *Nevada Rules of Civil Procedure*
7 involve things such as how many years someone has to file a lawsuit
8 and how many days someone has to file a motion or an opposition
9 to a motion. This bill does not involve those types of issues but,
10 instead, involves a substantive right of a person during an
11 examination by a doctor whom he did not chose, does not know, and
12 has no relationship with whatsoever, a doctor who was chosen by an
13 insurance defense attorney. This is a doctor who is going to handle
14 this patient. It is not really a patient because there is no doctor-
15 patient relationship. This examinee is going to be touched and
16 handled by this doctor with whom he has zero relationship. It is
17 before forced upon him as part of this examination. That is why this
18 is a substantive right, and this is why we are before you here today.

19 ...
20 The procedural part of Rule 35 is, how do you get there? You agree
21 to it or you file a motion. That stays with NRCP 35. The mechanics
22 of the actual examination is a whole other issue. That is a person
23 being handled and touched by a doctor who is not chosen by them
24 but selected by an insurance defense attorney. That is why that is a
25 substantive right.

26 Assembly Committee on Judiciary Hearing on AB 285, March 27, 2019.

27 Also considered during the Judiciary Hearing on AB 285 was that having someone present at
28 an examination and audio recording the examination were already substantive rights individuals have
in California, Utah and Arizona, as well as in Nevada worker compensation cases. *See id.*
Additionally, recording of the examination promotes openness and transparency during the
examinations. *See id.*

Mr. Cario has the substantive rights² to an audio recording and observer, which will serve to
minimize future disputes over what occurred during the examination, eliminate disputes over what
was said at the examination, and ensure the report is consistent with the examination. In other words,
an audio recording and observer will ensure the integrity of the process, which one would think both

² To the extent defendant argues these are not substantive rights, such argument is contrary to
the above Legislative History as well as the law on substantive rights. A statute is substantive when
it concerns matters that are based upon subjects other than court administration. *See Muci v. State*
Farm Mut. Auto Ins., 732 N.W.2d 88, 96 (Mich. 2007). And the enactment of substantive rules is
well within the powers conferred upon the Legislature by the Nevada Constitution and courts must
defer to the Legislature regarding the statute's validity. *See Zamora v. Price*, 125 Nev. 388, 392
(2009).

1 plaintiff *and defendant* would want.

2 Accordingly, defendant's motion to compel Mr. Cario to submit to a Rule 35 examination
3 without the protections afforded by item nos. 9 (audio recording) and 10 (observer) should be denied.

4 **Item Nos. 18-19 (report deadline) are as follows:**

5 18. Dr. Rosen must prepare and disclose a written report **within 30 days** of the Rule 35
6 examination that accurately sets out in detail his findings, including diagnosis,
7 conclusions, and the results of any tests, as required by Rule 35(b)(2). Dr. Rosen's
8 written report must include a complete statement of all opinions he will express, and
9 the basis and reasons for them, as well as all of the facts or data he considered in
10 forming said opinions, as required by Rule 16.1(a)(2)(B).

11 19. Defense counsel shall disclose a copy of Dr. Rosen's written report **within 30 days** of
12 the Rule 35 examination or by the Rule 16.1(a)(2) initial expert disclosure deadline,
13 whichever occurs first.

14 For some unknown reason, defendant is asking the Discovery Commissioner to ignore and
15 strike the 30-day report requirement contained in NRCP 35.

16 Specifically, NRCP 35(b)(1) provides:

17 Unless otherwise ordered by the court or discovery commissioner
18 for good cause, the party who moved for the examination must, upon
19 a request by the party against whom the examination order was
20 issued, provide a copy of the examiner's report within 30 days of
21 the examination or by the date of the applicable expert disclosure
22 deadline, whichever occurs first.

23 Despite the express procedural requirements of NRCP 35, which were incorporated directly
24 into item nos. 18-19, defendant did not bother to explain during the EDCR 2.34 conference any reason,
25 never mind good cause, to deviate from the 30-day report requirement. Nor has defendant put forth
26 any reason or good cause in the motion presently before the Discovery Commissioner to deviate from
27 the 30-day report requirement.

28 Accordingly, defendant's motion to compel Mr. Cario to submit to a Rule 35 examination
without the protections afforded by item nos. 18-19 (report deadline) should be denied.

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1 **Item No. 20 (preservation of files) is as follows:**

2 20. Dr. Rosen shall retain a complete copy of the entire file pertaining to the Rule 35
3 examination, including but not limited to draft reports, handwritten notes, e-mails or
4 other communications sent and received, and all documents generated or received,
5 including draft reports shared with defense counsel, defendants or an agent of
6 defendants, communications regarding draft reports with defense counsel, defendants
7 or an agent of defendants, redlines of draft reports shared with defense counsel,
8 defendants or an agent of defendants, and test materials and/or raw data related to the
9 Rule 35 examination. Following the disclosure of the Rule 35 examination report,
10 counsel for plaintiff may serve Dr. Rosen with a subpoena and/or serve defendants
11 with a request for production to produce these materials.

12 Although not discussed during the EDCR 2.34 conference, defendant argues item no. 20
13 (preservation of files) is inappropriate because plaintiff is not permitted to compel draft reports of an
14 expert. Had a meaningful EDCR 2.34 conference actually taken place, plaintiff's counsel would have
15 explained to defendant that item no. 20 does not automatically mean plaintiff *will or shall* serve a
16 subpoena or request for production, but rather that plaintiff *may* do so if preservation issues arise.

17 Additionally, the purpose of item no. 20 is to place the doctor on notice *before* the Rule 35
18 examination that he or she is not to destroy any documents that may be subject to production or
19 subpoena *after* the Rule 35 examination. This is because plaintiff's counsel has had problems in the
20 past with examiners not retaining a complete copy of their files *after* Rule 35 examinations, so
21 including item no. 20 has been an attempt to head off any potential problems in advance, and plaintiff's
22 counsel has not encountered any such problems since including this type of language in Rule 35
23 examination stipulations and orders in other cases.

24 Further, to the extent defendant has objections about a future subpoena or request for
25 production that has not yet been drafted or served, such objections are premature at this time. Nothing
26 in item no. 20 waives any substantive objections regarding a future subpoena or request for
27 production.

28 Next, plaintiff's counsel also would have explained that the "draft reports" language of item
no. 20 is only triggered if such draft reports are actually *shared with defense counsel*, and that the
Discovery Commissioner has previously reviewed item no. 20 on multiple occasions and it was the
Discovery Commissioner who added the limiting language used in plaintiff counsel's templates
regarding communications or sharing such documents with defense counsel: "draft reports *shared*

1 *with defense counsel, defendants or an agent of defendants, communications regarding draft reports*
2 *with defense counsel, defendants or an agent of defendants, redlines of draft reports shared with*
3 *defense counsel, defendants or an agent of defendants.”*

4 Finally, it is unclear from the motion why defendant objects to an expert witness preserving
5 test materials and/or raw data related to a Rule 35 examination. The disclosure of such items are
6 specifically contemplated and required by NRCP 16.1(a)(2)(B), and such items should not be destroyed
7 by an expert witness.

8 **CONCLUSION**

9 Based upon the foregoing, Mr. Cario respectfully requests that the Discovery Commissioner
10 deny defendant’s motion to compel Mr. Cario to submit to a Rule 35 examination without the
11 protections afforded by item nos. 9 (audio recording), 10 (observer), 18-19 (report deadline) and 20
12 (preservation of files).

13 DATED this 15th day of September, 2020.

14 **MAIER GUTIERREZ & ASSOCIATES**

15
16 /s/ Jason R. Maier

17 JASON R. MAIER, ESQ.

Nevada Bar No. 8557

18 JULIA M. CHUMBLER, ESQ.

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19 Las Vegas, Nevada 89148

20 *Attorneys for Plaintiff Alberto Eduardo Cario*

1 **CERTIFICATE OF SERVICE**

2 Pursuant to Administrative Order 14-2, a copy of the **PLAINTIFF'S OPPOSITION TO**
3 **DEFENDANT'S MOTION TO COMPEL RULE 35 EXAM – ORDER SHORTENING TIME**
4 was electronically filed on the 15th day of September, 2020, and served through the Notice of
5 Electronic Filing automatically generated by the Court's facilities to those parties listed on the
6 Court's Master Service List as follows:

7 Rhonda Long, Esq.
8 LAW OFFICE OF LEE J. GRANT II
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9 Las Vegas, Nevada 89113
Attorneys for Defendant Yeonhee Lee

10 /s/ Natalie Vazquez

11 An Employee of MAIER GUTIERREZ & ASSOCIATES
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