IN THE SUPREME COURT OF THE STATE OF NEVADA

PRO PETROLEUM, LLC; RIP GRIFFIN TRUCK SERVICE CENTER, INC.; DAVID YAZZIE, JR.,

Petitioners,

v.

EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK, THE HONORABLE SUSAN H. JOHNSON, DISTRICT JUDGE,

Respondent,

and

DAKOTA JAMES LARSEN,

Real Party in Interest.

Electronically Filed
Sep 24 2021 02:32 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

Supreme Court Case No.: _____

District Court Case No.: A-20-826907-C

PETITION FOR WRIT OF MANDAMUS AND/OR PROHIBITION

(VOLUME I OF II)

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DATED: September 23, 2021

GRANT & ASSOCIATES

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David Yazzie, Jr.

IN THE SUPREME COURT OF THE STATE OF NEVADA

IN RE THE MATTER OF CREATING A COMMITTEE TO UDPATE 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.

Cherry, C.J.

Douglas, J.

Gibbons, J.

Pickering, J.

Hardesty, J.

Parraguirre, J.

Stiglich, J.

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

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
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.

18-31981

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

18-910939

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/. 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.

Douglas, C.J.

Cherry, J.

Gibbons, J.

Pickering, J.

Hardesty, J.

Parraguirre, J.

Stiglich, J.

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

STAFF MEMBERS PRESENT:

Diane C. Thornton, Committee Policy Analyst
Bradley A. Wilkinson, Committee Counsel
Lucas Glanzmann, Committee Secretary
Melissa Loomis, Committee Assistant

OTHERS PRESENT:

Alison Brasier, representing Nevada Justice Association
Graham Galloway, representing Nevada Justice Association
George T. Bochanis, representing Nevada Justice Association
David Sampson, Attorney, Law Offices of David Sampson, Las Vegas, Nevada
Dane A. Littlefield, President, Association of Defense Counsel of Nevada
Kevin Higgins, Chief Judge, Sparks Justice Court; and representing Nevada Judges of Limited Jurisdiction
John Tatro, Senior Judge; and representing Nevada Judges of Limited Jurisdiction
Richard Glasson, Judge, Tahoe Justice Court; and representing Nevada Judges of Limited Jurisdiction
Ann E. Zimmerman, Judge, Las Vegas Township Justice Court; and representing Nevada Judges of Limited Jurisdiction
Paul C. Deyhle, General Counsel and Executive Director, Commission on Judicial Discipline
Jerome M. Polaha, Judge, Second Judicial District Court
John J. Piro, Deputy Public Defender, Legislative Liaison, Clark County Public Defender's Office
Kendra G. Bertschy, Deputy Public Defender, Washoe County Public Defender's Office
John T. Jones, Jr., Chief Deputy District Attorney, Clark County District Attorney's Office; and representing Nevada District Attorneys Association

Chairman Yeager:
[Roll was taken. Committee protocol was explained.] Today, we have three bills on the agenda. I will now open the hearing on Assembly Bill 285.

Assembly Bill 285: Enacts provisions relating to a mental or physical examination of certain persons in a civil action. (BDR 4-1027)

Alison Brasier, representing Nevada Justice Association:
What I would like to do is explain what these examinations are in their current form. They are unique to personal injury litigation. I want to lay the foundation for what these examinations are and then turn it over to my colleagues in Carson City to explain more about the history of how we got here and what this bill proposes to do.

What we are talking about in this bill is commonly referred to as a "Rule 35" examination. They are very unique to personal injury cases because these examinations happen when someone is alleging injury. When a person alleges an injury, he or she can be forced to appear at an examination by an expert witness who is hired by the insurance company and to whom that claimant has no relationship. Under the current state of our rules, that claimant—the victim—has no right to have an observer present. They do not have a right to record what happens. What we have seen is, if there is a dispute in what happens in the examination, most of the time deference is given to the person who is being presented to the judge or jury as an expert witness rather than the victim or plaintiff who was forced to present at that examination. That is the current state of the law. The reason I used the word "unique" at the beginning of my testimony is because the way it currently stands in these forced examinations, the claimant has no rights as part of that examination.

When we look at it in different contexts, we would never expect people to submit to an examination under this current set of conditions. Outside of litigation, if you have an important medical examination, it would be commonplace for you to bring a friend or family member with you, maybe to ease anxiety and to make sure you are capturing all the important information. If you went to a doctor who said, "No, you do not have any right to have someone present with you during this examination," you would have the choice to pursue another doctor if you did not feel comfortable in that scenario. Under the current rules for these Rule 35 examinations, that is not the situation for personal injury victims.

Also, this is very unique to Nevada personal injury cases. Washington, California, and Arizona—all of our neighboring states—currently allow what this bill proposes. They allow an observer to be present during the examination and they also allow a recording to happen. Nevada is really an outlier with our western neighbors as far as not providing these protections for the injured party during the examination.

Additionally, in the workers' compensation context in Nevada, observers are allowed to be present during workers' compensation examinations. Again, this is really an outlier for Nevada personal injury cases where we do not already have these protections afforded to the claimants. I will turn it over to my colleagues to explain why that is important and how we got here.

Graham Galloway, representing Nevada Justice Association:
The origins of this bill flow from a committee formed by the Supreme Court of Nevada two years ago to review, revise, and update our *Nevada Rules of Civil Procedure* (NRCP)—the rules that govern all civil cases. The committee was made up of two Nevada Supreme Court justices, various district court judges from throughout the state, a number of attorneys who represent the various fields of practice in the civil side of litigation, and a member of the Legislative Counsel Bureau. The committee was broken down into subcommittees, and I chaired the subcommittee that handled this Rule 35 medical examination issue. Our subcommittee recommended substantial changes to the rule. Mr. Bochanis was a member of the committee. We voted 7-to-1 to make substantial changes, the changes that are set forth or embodied in the bill before you, Assembly Bill 285. Unfortunately, when our

recommendations went to the full Supreme Court of Nevada, they rejected our changes for reasons we are still not clear on. At that point, we reassessed our position.

Contrary to the opponents of this bill who want to say this is a procedural matter, this is not a procedural matter; it is a substantive right. It is the right to protect and control your own body. The scenario we often see in this situation is that our clients are going through a green light or sitting at a stop sign, and somebody blasts through the light and clocks them, injuring them. They are then required to go to an examination by an expert who is hired by the defense. These are experts that are trained, sophisticated, and weaponized. They put our clients through an examination and, in the process, the clients are interrogated. Our clients have to go through this without any representation.

This is not a criminal situation, but in the criminal field, you often hear the terms "right to counsel," "right of cross examination," and "due process." Those terms do not necessarily transfer over into the civil arena. In the civil arena, we have what is called "fundamental fairness." Is it fundamentally fair that an injured person is required to go to a hired expert—an expert whose sole goal is to further the defense side of the litigation—have their body inspected, have their body examined, and then be interrogated without there being a lawyer present to represent that individual? There is nothing in the law in any arena where that occurs except for the personal injury field. That is what A.B. 285 is designed to do: bring some fundamental fairness to the process and to level the playing field. It is not a procedural rule. That is how it is being characterized by the opponents of this bill. It is a fundamental right that you should have representation in such an important situation. I will turn it over to my colleague who will explain the nuts and bolts of the bill.

George T. Bochanis, representing Nevada Justice Association:
This bill is very important to individuals who are being subjected to these insurance company examinations. The reason we are before you today is because this bill protects substantive rights. This is not a procedural rule, which you would usually find within our NRCP. Our *Nevada Rules of Civil Procedure* involve things such as how many years someone has to file a lawsuit and how many days someone has to file a motion or an opposition to a motion. This bill does not involve those types of issues but, instead, involves a substantive right of a person during an examination by a doctor whom he did not choose, does not know, and has no relationship with whatsoever, a doctor who was chosen by an insurance defense attorney. This is a doctor who is going to handle this patient. It is not really a patient because there is no doctor-patient relationship. This examinee is going to be touched and handled by this doctor with whom he has zero relationship. It is being forced upon him as part of this examination. That is why this is a substantive right, and this is why we are before you here today.

What I would like to discuss with you are the two components of this bill. The first is that we are requesting that an observer be present during these types of insurance company evaluator examinations. That observer can be anyone; it can be a spouse, parent, friend, or it could be the person's attorney or a person from that attorney's staff. Really, when you look at the current rule, the attorney/observer portion of it is really the only difference between the

current rule and what we are asking for as part of this bill. I am surprised there is any opposition to the attorney/observer portion of this bill. As Ms. Brasier said, this is already allowed by every other state that surrounds Nevada. California, Utah, and Arizona already allow attorney observers.

I can tell you from representing clients in workers' compensation cases in Nevada for more than 30 years, we already attend doctor examinations in workers' compensation cases—"we" being attorneys or our staff. It happens on every permanent partial disability evaluation. An attorney is present. To me, the reason is very obvious; you want openness during this process. You already have an agent of the insurance company, the doctor, present. This bill levels the playing field by having an attorney or attorney staff member present. Is an attorney going to attend every one of these examination? No, probably not. How about an attorney's staff member? Probably. A family member? Yes. These are options that a person who is being subjected to this type of examination should have. All we are seeking is a level playing field where during these examinations you have an agent of the insurance company—the doctor—present, along with an observer who could be an attorney or someone from the attorney's office.

The language in the proposed bill is very clear: the observer is just an observer. They cannot participate. They cannot interrupt. If anything like that happens, the doctor can terminate the examination, and you can go to court to work out your problems or differences. I can tell you that in attending workers' compensation permanent partial disability evaluations, I have never had a doctor terminate an exam during the hundreds of exams I have attended over 30 years. Never once have we ever had a problem with the doctor. Do the doctor and I get along at all times in these evaluations? No, probably not. However, we are able to keep it civil. We are able to keep it professional, and there is no reason an attorney observer being at the exams in this context is going to be any different. That is the observer component of this bill.

I should also mention that having an observer prevents abuse during these examinations as well, because it keeps everything open and transparent. Think about it in a practical sense. We have had doctors who have had some issues during these exams, and we felt as though we should not need to have a hearing for every examination to show that a doctor is having problems with taking advantage of people during some of these examinations. Fortunately, it is a minority of doctors with whom we have had these issues. This observer keeps it open.

The second portion of the bill is audio recording. It is not video recording. This can be done as simply as using a cellphone, or it can be done as complicatedly as bringing in a court reporter. In practicality, how many times is a court reporter going to be brought in even though this language allows it? Probably 1 percent of the time, if at all. There are so many other means of communication whereby you are able to record. Again, this promotes openness and transparency during these examinations. The beauty of the language of this bill is that the doctor can also record it. You have a recorded version by the doctor, you have a recorded version by the patient or observer, and you know what happened. There is none of this "he said, she said." I cannot tell you how many cases I have had to litigate over an issue

where an examinee goes to one of these exams, we receive the report back, and there are things in it that are totally unfamiliar to me. I ask the client and she says to me, "I never told him that." Now we have this dispute over what was said during the exam. Now it is in the report by a doctor who will be testifying to that during trial. Again, audio recording by both the patient or observer and the doctor prevents this from happening. It keeps us out of court, and it keeps these cases moving.

In fact, before she was appointed to the Nevada Court of Appeals, the discovery commissioner in the Eighth Judicial District Court in Clark County already allowed audio recording on all cases. The problem with the current language in the current rule is that audio recording is only allowed for good cause. Now, what "for good cause" means is uncertain. Every time there is an examination where audio recording is requested, we are going to have litigation of these cases. It is going to cause delays. It is going to cause additional costs. It is going to cause clients' access to justice to be delayed on these types of cases. That is why this bill before you today does not provide or require this "for good cause" standard on audio recordings. As I stated before, the discovery commissioner had already allowed this type of audio recording without a showing of good cause. Again, we want to keep these examinations open and transparent, and we want these clients of ours to be able to move on with their cases without having to litigate every single issue because this examination is being requested by the insurance defense attorney.

These are the two elements, and these are the differences between what the existing rule says and what this bill says. Again, we are before you today because an examination by a doctor who is not of this person's choosing involves a substantive right. It is something that should be within a statute and not a procedural rule.

Chairman Yeager:
I want to make sure we have the record clear in terms of the process that got us here. The Supreme Court of Nevada was looking to make substantial changes to the NRCP, and those changes went into effect March 1, 2019. We are talking about Rule 35. It sounds as though there was a subcommittee that I believe Mr. Galloway chaired.

Graham Galloway:
That is correct.

Chairman Yeager:
So there were eight members of that subcommittee, and there was a 7-to-1 vote in favor of advancing what appears in A.B. 285. That was the recommendation, 7-to-1, out of the subcommittee to the entire Supreme Court of Nevada. Do I have that right?

George Bochanis:
There were some changes made such as the observer only being a person who was not the attorney and not associated with the attorney's staff. For the audio recording, there was nothing about the "for good cause" requirement being involved.

Chairman Yeager:
Essentially, the recommended language that came out 7-to-1 was not adopted by the Supreme Court. We do not know why, but it simply was not adopted.

Graham Galloway:
That is correct.

Chairman Yeager:
I just wanted to make sure we had that clear on the record.

Assemblywoman Backus:
I noticed you were both on the subcommittee, and I just read our new NRCP. When looking at the separate branches of government, the court can implement court rules consistent with Nevada law. I was trying to put these two together, and I am thinking about how the language is presented in section 1, subsection 1 of A.B. 285 where it says "An observer may attend," for example. The current Rule 35 is almost on par with that rule. I am not sure if that was your intent. It does not sound as though it was.

I also just want to clarify how an independent medical examination works. It is either by stipulation or by order. It looks as though this new rule keeps it by order. What will end up happening? When I was reading the very lengthy comments to the rule, it seemed as though the court and committee spent a lot of time working on that. Someone could raise the issue of having an observer being present, and likewise with the audio. That could be agreed to, or it could be put into the opposition if they are challenging a request for the examination. When I was looking at Rule 35 and A.B. 285 this morning, I could almost read them in sync. The only thing that was glaring to me was the issue of the attorney. I have to admit, I kept asking my friends who are attorneys if they really want to be present for this. That was the only thing I thought was agreed upon by all three amendments that were sent over to the Nevada Supreme Court with the petition. It seemed as though each of them excluded the attorney. That was the one thing I noticed. If you could clarify that for me, that would be great.

Graham Galloway:
You are correct that the language is similar, but it is distinct. From a practical standpoint, you are also correct that most of these examinations are done by stipulation. You work out the details ahead of time. With some attorneys, you can hash out the details. With other attorneys, you cannot. We have made changes that are not very dramatic, but they are substantial. Instead of having to show good cause, if you cannot agree with the other side as to the parameters of the examination, and you have to go the motion route, the rule provides that this can be done by motion or agreement. Most of the time it is by agreement. Under the existing rule, if you can agree, you have to show good cause for an observer. The big change we are proposing here is that you do not have to show that good cause; you automatically have the right to have an observer present, whether he or she be an attorney, an attorney's staff member, or a family member or friend.

The other point you raised about the differences between the current rule and our bill is that this would allow for an attorney observer. In reality, I do not foresee myself going to any of these examinations. I really have no interest in doing that. I think I could use my time better elsewhere. It would be a staff member or a family member. Currently, what I do—which, perhaps, is not necessarily authorized by the rule—is have all my clients take a family member. No one has ever objected to that. That, in practicality, is what is going to happen in most cases. There are certain experts who are marked for special treatment because they have been proven to be extremely biased. Those individuals may end up having a staff member from the law firm attending their examinations. Again, I think in the run-of-the-mill case, you are sending a family member or a friend.

George Bochanis:
As far as the mechanics of the examinations we have experienced in my office, we get a letter from the insurance defense attorney where the attorney says, "We want to examine your client on this date at this time. Bye." Of course, it does not work that way. We call them and say, "Sure, pursuant to these conditions." Or, under the rules, we can file a motion. My experience has been that we were able to agree less than half the time on these conditions. Since this rule has gone into effect on March 1, we have received three letters requesting clients to submit to examinations, and we have not been able to agree to the conditions once. That is because of the "for good cause" showing on the audio recording portion. We disagree as to what that means, and this was our concern when the current rule came out. When you allow that type of vagueness over this type of examination, there is just not agreement on it. This rule has been in effect for 27 days. We have received three letters in 27 days requesting these exams. We have not been able to agree to one of them. That is because of this audio recording "for good cause" requirement as well as the observer issue. I have told attorneys I should be able to send a staff member to one of these, and their objection is that it is not what the rule says. The rule says it has to be a family member. On some of these more complicated examination-type cases, we want a staff member there. This law we have proposed provides and allows for that. I think these are important distinctions.

Again, this is a substantive right. The procedural part of Rule 35 is, how do you get there? You agree to it or you file a motion. That stays with NRCP 35. The mechanics of the actual examination is a whole other issue. That is a person being handled and touched by a doctor who is not chosen by them but selected by an insurance defense attorney. That is why that is a substantive right. That is why we have proposed A.B. 285. This is something we thought about after the NRCP committee. We said to ourselves, You know, this really is not a procedural rule. I hope that helped.

Assemblywoman Backus:
It did. I was just trying to correlate what we have now as our rule and what the law is going to provide for. We all know as practitioners that we are going to continue experiencing the court reading of this law if it gets implemented along with Rule 35. I think we will have to deal with it through offers of judgment, as well as certain interpleader actions depending on what remains in our statutory provisions. Just so I am clear, it looked as though everyone had originally agreed that attorneys would not be present. The type of work I do sometimes

is more product liability. When an attorney shows up, I show up. It seems as though on a personal injury case, the goal is now to basically eliminate this from the rule and allow attorneys or someone from their office to be present. Another thing that looked as though it came out of nowhere was the whole examination of neuropsychological, psychological, or psychiatric examinations wherein an observer was going to be completely eliminated. I take it that through the proposal of A.B. 285, it would negate that provision as well.

George Bochanis:
The carve-out for psychological examinations completely took us by surprise. It was never discussed. No exceptions were ever allowed for psychologists under this bill. I have to be honest with you; I do not know who is more vulnerable and who more requires an observer with them during these examinations than a person with a traumatic brain injury. That came to us as a complete surprise. That was something that was never discussed during the NRCP committee and was never provided as being a carve-out for this type of specialty area.

As a result of that occurring, we have provided to the Committee as exhibits some documents we think support our view that there should not be some special exception for psychologists on these examinations [pages 51-76, (Exhibit C)]. A few psychologists appeared at the Supreme Court of Nevada hearing on this rule, and they testified that what they do is secret—the tests and the way they grade their tests are trademarked, secret items so they cannot be disclosed—and as a result of that, you cannot have an observer present. Well, that is not so. I have submitted to you 74 websites that contain copies of these exams and how they are graded and how they are evaluated [pages 51-59, (Exhibit C)]. So much for the proprietary or secret nature of these examinations.

These psychologists also testified that an observer being present during a psychological evaluation destroys the entire evaluation because if somebody is present, the examinee is not going to be as open. We have also submitted an affidavit from a psychologist with 20 years of experience who states that the mere fact this psychological exam is conducted by someone this person did not select, really puts the examinees in a position where they are not going to be entirely forthcoming [pages 60-76, (Exhibit C)]. They are going to hold things back because it is an examination that has been forced on them. Simply having somebody present is not going to change the nature of the examination at all. In fact, an observer being present during this examination is more required than any other type of examination because certain distractions—the inflection of the voice of this psychologist examiner and other things like that—could have a huge impact on the findings of the examination. Not having an observer present affects that. We have submitted these items, the affidavit and the 74 websites, as further evidence that there should not be a carve-out for psychologists.

Assemblywoman Nguyen:
You have mentioned workers' compensation. It is my understanding that those provisions that are similar to those which are contained here are also statutory as a part of *Nevada Revised Statutes* (NRS) 616C.490. In addition to the workers' compensation, are there any other provisions that are statutory as well? Obviously, there is some precedent here, so I was wondering if you are aware of anything else.

George Bochanis:
I am sure there are; I just cannot think of any right now. I can tell you that in our survey of looking at other states where an observer is allowed to be present, it is a mix between procedural rules and statutes. Other states have considered it to be a statutory right. It is a good point. There are a lot of other statutes and a lot of other things within our NRS that are partially statutory and are partially procedural, which are covered by NRCP. It does occur commonly.

Assemblywoman Nguyen:
As far as how workers' compensation works, do you not have the same concerns that you do under these current rules as they have been implemented in March?

George Bochanis:
We have found in workers' compensation cases that we have had zero problems with attorney observers being present. Although it is true that I certainly am not there at 100 percent of these permanent partial disability examinations, 99 percent of the time my staff is. It is not a family member. That is because there are certain mechanics of how these examinations on workers' compensation cases are supposed to be performed. If they are not performed in a certain way, it invalidates the exam. So we always have a staff member present at these. We have never had a doctor terminate an examination. I have never received a call from a doctor saying my staff member did something inappropriate, or from the insurance adjuster or defense attorney for the workers' compensation case objecting to something we did. An observer is an observer. That is our intention on this bill, and that is what occurs in workers' compensation cases now.

Assemblywoman Krasner:
In looking at some of the opposition cases, they say this is an attempt to narrow the pool of doctors willing to conduct these Rule 35 examinations. Can you please address that?

Graham Galloway:
Of all the other states that allow attorney observation and allow audio or video recording, there has never been an issue about the availability of defense experts. If you read the comments presented by the opposition, it is a fear, but there is no actual evidence. This, unfortunately, is a lucrative area of practice. There are going to be experts who will participate in this arena. There is no evidence—absolutely none—that this prevents the defense from hiring somebody. In the workers' compensation arena, there is never an issue. When I read that argument, I start seeing smoke. I see nothing else. From the experience of our neighboring sister states, there is absolutely no evidence that occurs.

Alison Brasier:
I think this idea that it is going to narrow the pool of doctors is kind of just a scare tactic—a red herring—to distract from the actual issues. In my view, I do not see why this would narrow the pool. It provides protection for the doctors so there is an objective record of what happened during the examination. If there is a dispute, everyone has a record of what happened. It is a protection for the claimant, but also for the doctor. I think this idea that it

will narrow the pool of doctors because we are going to create an objective record really has no basis in fact.

Chairman Yeager:
Can you give the Committee a sense of how much these examinations typically cost? I know they are paid by the defense, but is there a range in terms of what a physician would charge to do an examination such as this?

George Bochanis:
We have provided as an exhibit testimony from a doctor, Derek Duke, where the district court conducted 15 days of hearings on the appropriateness of this specific doctor conducting Rule 35 examinations [pages 9-43, (Exhibit C)]. This doctor testified that over the course of a year, he earned more than $1 million performing just these examinations. We have seen doctors charge anywhere from $1,000 to $10,000 for these examinations. That includes the review of medical records and the examination of the injured person.

Chairman Yeager:
The reason I ask that—I am not trying to drag anyone through the mud—is because I wanted to dovetail off Assemblywoman Krasner's question about the availability of doctors. It does sound as though it can be lucrative, so I do not know that it would come to pass if we were to enact this bill. We have heard some bills in this Committee in the criminal context about the importance of recording confessions. We have also had body camera bills. Some of the reasoning there is just what Ms. Brasier said: if you have to go into court later and have a dispute about what was said or what happened, it is obviously very helpful to have a video recording. I know in this circumstance we are not talking about video, because it is a medical examination. We are talking about audio. Is part of the reason you brought this bill forward to try to eliminate some of the litigation costs that happen after these examinations in front of the court?

Graham Galloway:
Exactly. That is the intent, or at least a major component of the intent of this bill: to eliminate the squabbling, the fighting, the extra unnecessary litigation, and the expense involved in that. That is part of the intent of the bill.

Chairman Yeager:
At this time, I will open it up for testimony in support.

David Sampson, Attorney, Law Offices of David Sampson, Las Vegas, Nevada:
I have seen some of the issues brought up in dispute of this particular bill. There is a clear understanding among the defense bar, the plaintiffs' bar, and in the insurance industry, of the importance of operating in the sunlight. When an insurance company learns of an incident—whether it is someone falling somewhere, a car crash, or whatever else goes on—one of the very first things they try to do is get a recorded statement. It is always important to them that they have a tape recording or some kind of digital record of what the individual has to say about what took place and what their injuries are. I have never once heard of an insurance

adjuster doing a statement of someone who has been injured and not making a record of that. So they understand and appreciate the importance of operating in the sunlight and making sure we have a record. Every time a deposition is taken, we have a record that is made. That is not just pursuant to the rules. It is important to understand and have a court reporter write down everything that goes on. More and more nowadays, we have a large percentage of depositions taking place with a video recording because it is important that we catch not only what is said, but inflections in voice, facial features, body language, et cetera. The defense bar, the plaintiffs' bar, and the insurance industry clearly understand it is important to have a clear, accurate record of what goes on. Whenever there are written questions submitted—they are called interrogatories in legal proceedings and discovery—they wisely always insist that those be signed under oath, verified, and notarized so we have a clear depiction of what the individual said and what took place when these different things happen.

Then, miraculously, when we turn to these Rule 35 examinations and when it comes time to take one of my clients and put him or her in a room with a highly paid expert from the defense and shut the door, all of a sudden, the insurance industry and the defense bar—and I would imagine any other opponents to this particular bill—do not want any record made. They want the conversation to have no witnesses, no transcript, no recording, and no idea as to what went on other than the proverbial "he said, she said." As Ms. Brasier mentioned, when you have a "he said, she said" situation come down to a layperson who did nothing wrong but was sitting at a stoplight when someone came through and hit him from behind with their car, and the person on the other side is a doctor who has been practicing in Nevada for 20 years, there is a tendency of jurors—no matter who is right, who is wrong, or what the truth is—to side with the defendant's expert and say whatever they are saying took place must actually be what happened. It is extremely unfair. I have seen, personally, on multiple occasions, the defense come back from the examining doctor with a report that contains information my client says is not true. If you review the order regarding Dr. Duke, there were multiple times when Dr. Duke said things took place in the examination that actually could not be true.

I would like to share two quick examples. When I was a very young attorney, in 1999 and 2000, I was involved in a case where my client was sitting in a lawn chair one evening in his driveway when a drunk driver drove across the road, up over the curb, across part of the lawn, and into the driveway, hit my client who was sitting in the lawn chair, and hit the house he was sitting in front of. My client was asked to attend an examination because his leg was shattered. He had $60,000 in medical bills as a result of his first night in the emergency room. They had the defense and the insurance company for the drunk driver hire a doctor to examine my client. When that report came out, I was astonished to read the doctor's report which said my client indicated he was walking in what the defense attorney later argued was the road when he was hit by this car. Of course, I went to my client as a young attorney not realizing what was going on—I even wanted to give deference to the doctor—and asked him why he told the doctor he was walking in the road when we had eyewitnesses and knew he was sitting in a chair in his driveway. Of course, my client was very insistent that was not what he said. We had to have this "he said, she said" dispute between the doctor saying, "Oh no, Mr. Johnson told me he was walking in the road," and my client saying, "No, I told the

doctor I was sitting in a chair." We had to get into this big mess with additional eyewitnesses who, thankfully, were there to say, "No, he was sitting in a chair and not trying to walk." In my opinion, they are trying to manufacture an issue that, first of all, has nothing to do with medical treatment. Why the doctor would even be talking about whether you were walking in the road or sitting in a chair is beyond me. It shines a light on the issues. It would have been nice, in that case, to have a record or an observer to say, "No, I was there. I heard exactly what Mr. Johnson said, and he said he was sitting in a chair as he said every other time he has talked about what happened in this horrific incident."

I had a situation recently in a case that I had where another doctor who had examined my client came out and said my client had misrepresented to me facts about a magnetic resonance imaging scan she had. My client said that was not what took place. I have seen it a number of times. I know Mr. Galloway had mentioned the experts are weaponized. I am not going to comment on whether that is the case or not, but I would like you to consider this: in 20 years of practice I have had hundreds of clients go and have an examination by a doctor who was hired and retained by the defense and the insurance company. Out of all of those cases, I can remember one time where the doctor examined my client and said these injuries that this individual sustained were due to this particular crash. In every other case I can recall, the doctors have invariably said the injuries were either not caused by this crash or they were not to the extent that the treating doctor had claimed.

The arguments related to the chilling effect simply do not hold. We see in our neighboring states that it is not the case. I would ask you to please consider this: I have had both male and female clients call me in tears from the doctor's office saying they were subject to being yelled at—what they considered to be abuse—and they did not know what to do. Please have these examinations take place in the sunlight and allow the citizens of Nevada to have the same rights as our sister states to be protected and to have an accurate depiction of what takes place in these examinations.

Chairman Yeager:
Is there additional testimony in support? [There was none.] Is there anyone opposed to A.B. 285?

Dane A. Littlefield, President, Association of Defense Counsel of Nevada:
I will stick mostly to my prepared statement (Exhibit D), but I do have additional comments that I will work into that. In support of my testimony today, I have provided the Committee with a copy of the current version of Rule 35 (Exhibit E), the former version of Rule 35 (Exhibit F), the Supreme Court of Nevada administrative order enacting the amendments to NRCP (Exhibit G), and various statements in opposition to the bill by members of the Association of Defense Counsel (Exhibit H). I have also provided a Supreme Court of Nevada case addressing the separation of powers issue that is implicated by this bill (Exhibit I).

One of the things we heard earlier was an attempt to characterize Rule 35 as affecting a substantive right and distinguish it from a procedural rule. That is simply not the case.

The *Nevada Rules of Civil Procedure* are made to address civil litigation through all phases, including the discovery phase, whether that is dealing with a Rule 35 examination or interrogatories as was addressed by the supporters of the bill.

The first issue is that A.B. 285 appears to be an attempt to reduce the pool of doctors willing to conduct Rule 35 examinations and create an unfair advantage, which has already been addressed by the Supreme Court of Nevada and the committee assigned to revise NRCP. This bill would allow the observer of a Rule 35 examination to be the plaintiff's attorney or a representative of the attorney, as you are aware. This could lead to unnecessary confrontations with doctors and unnecessary motion practice. Assembly Bill 285 only allows the plaintiff's attorney to attend a Rule 35 examination. There is no provision for the defendant's attorney or an observer representative of the attorney to be present. This creates a situation in which the plaintiff's attorney has an unfair, and perhaps unethical, opportunity to engage in direct communications with the doctor selected by defense counsel without defense counsel being present. The solution to that would be to simply not allow attorneys in the room. Under the current rule, there is a provision to allow recording by audio means for a showing of good cause. I would submit that good cause could be if a plaintiff's attorney has concerns about a doctor who has been retained by the defense who—I will remind the Committee—is already subject to the Hippocratic oath. A doctor is not an insurance company hitman.

The bill would allow the plaintiff's attorney to make a stenographic recording of the examination as an alternative to audio recording. This contemplates the presence of a court reporter. It is my understanding that many doctors would decline to participate in Rule 35 examinations where a lawyer and a court reporter would be present in the examination room. This would create an atmosphere in which many doctors would no longer be willing to participate in the examinations, and this would create an unfair advantage for the plaintiff's personal injury bar by substantially reducing or, perhaps, eliminating the defense bar's ability to retain them.

The bill allows audio or stenographic recording and limits the audio or stenographic recording to "any words spoken to or by the examinee during the examination." This suggestion is unworkable and would require the recorder or stenographer to stop recording anytime a word is spoken to anyone else in attendance at the examination. Additionally, A.B. 285 contemplates that the examination might need to be suspended for misconduct by the doctor or the attorney observer, with potential court review. However, because an audio or stenographic recording cannot include anything the lawyer said to the doctor or the other way around, there would be no record of the alleged misconduct and no way for a court to decide a "he said, she said" dispute. These concerns are already addressed by the current Rule 35.

Assembly Bill 285 allows the plaintiff's attorney to suspend the exam if the lawyer decides that the doctor was "abusive" or exceeded the scope of the exam. However, the plaintiffs' bar is concerned with eliminating motion practice caused by differences in opinion of what occurred at the examination. Something we would likely have differences of opinion on is

the definition of "abusive." To what extent do actions and/or words within the examination room become "abusive"? This is a highly subjective and highly prejudicial rule and provides no clear standard for the lawyer to make the highly disruptive decision on whether to suspend the examination. Moreover, the defendant is burdened with the cost of an examination that may abruptly be suspended for no real reason other than the plaintiff's attorney's subjective determination.

Further, section 1, subsection 6 of A.B. 285 states that if the exam is suspended by the lawyer or the doctor, only the plaintiff may move for a protective order. There is no reciprocal provision that allows the defendant to move for a protective order or a motion to compel to prevent abuse by the plaintiff's attorney during the exam or to seek sanctions against the offending attorney. Allowing one side in a lawsuit to seek relief while denying the availability of such relief to the other side would be grossly unfair and, most likely, a violation of due process.

In addition, A.B. 285 invites a clear and direct violation of constitutional separation of powers. This is why the plaintiffs' bar is trying to cast this proposed statute as affecting a substantive right rather than a procedural one; it is the only way they can try to get away from the Supreme Court's independent ability to draft and promulgate their own procedural rules. The Supreme Court of Nevada has enacted a comprehensive set of rules dealing with discovery, the NRCP, which includes Rule 35. The Court consistently holds that the Legislature violates separation of powers by enacting procedural statutes which conflict with preexisting procedural rules or which interfere with the judiciary's authority to manage litigation. If it were to become law, this new statute would directly and inappropriately contradict important parts of the newly amended NRCP and therefore violate the separation of powers doctrine.

Finally, the Supreme Court of Nevada's Nevada Rules of Civil Procedure Committee, in its drafters note to the new version of Rule 35, explicitly and directly rejected that an attorney or an attorney representative should be present at Rule 35 examinations in Nevada. That issue has already been considered duly and rejected in turn.

Assemblywoman Backus:
While you were speaking, I was trying to take a look at Rule 35 of the *Federal Rules of Civil Procedure*. It starts off looking similar to our new Rule 35 of NRCP. Are there any federal statutory provisions that address independent medical examinations to your knowledge?

Dane Littlefield:
Not to my knowledge, but I have not researched that topic.

Assemblyman Edwards:
I have a question about something you said about it being unfair to have one side represented in the room and not the other side. However, if you do have a representative of the plaintiff, the doctor is actually serving as a representative of the defendant. Is that correct?

Dane Littlefield:
That is correct. However, there would not be a defense attorney present in the room.

Assemblyman Edwards:
However, you do have representation, and you have trained representation that can actually take care of the defendant's side of the story.

Dane Littlefield:
Well, that assumes the expert witness who has been retained has a knowledge of what the scope of the procedural discovery rules are and what they can and cannot say. The fact that the bill as it stands does not allow for the recording of any statements that are not made directly to or from the plaintiff would mean there is no record for what is said in the room. It would become another "he said, she said" dispute.

Assemblyman Edwards:
How would an audio tape stop recording something that is being said in the room?

Dane Littlefield:
That seems to be the problem. That would be an issue where the audio recording would record everything, but to submit that to the court with a protective order or a motion, the plaintiffs' bar could make an argument that we would have to redact anything in a transcript that would be derived from that audio record and remove anything that could actually be back and forth between the doctor and the attorney.

Assemblyman Edwards:
If this goes through, that does not happen, right? If this bill is approved, the redaction does not take place. You have the full story there from both sides, correct?

Dane Littlefield:
Not the way the bill is written. The way the bill is written directly minimizes what can be recorded by stenographic or audio means to only the statements to or from the plaintiff. Under the current rule, audio recording can be done for good cause, and I do not believe it limits statements that are made. I would direct the Committee to the current Rule 35(a)(3) of the NRCP, which addresses audio recording of an examination.

Assemblyman Edwards:
I do not see where you are saying that anything is redacted or eliminated in the audio tape.

Dane Littlefield:
In the bill it would be section 1, subsection 3. It says, "Such a recording must be limited to any words spoken to or by the examinee during the examination."

Assemblyman Edwards:
So if that is between the examiner and the examinee, should that not give you the story of what is going on?

Dane Littlefield:
Not if there is a third party in the room. This would only be the examiner and the examinee. It would exclude any statements between the doctor and the observer, whether that is an attorney, an attorney representative, or a family member.

Chairman Yeager:
We can have the sponsors address that when they come back up. The way I read it was that it would not allow the attorney or representative to just start making arguments on the audio recording, but I believe the intent was to make sure whatever was said in the room is available for the judge. We can let the sponsors address the intent of that provision when they come back up.

I have a question. I understand where you are coming from. However, at the same time, to the extent there are disputes about what happened in the room and what was said, would it not be helpful to have at least an audio recording to be able to present to the discovery commissioner in helping to decide that? Do you just believe that would make it more difficult? The way I see it, it would be more helpful for the judge in making a decision to have a recording of what happened.

Dane Littlefield:
I do not necessarily disagree with that. A recording can be appropriate in certain circumstances, and the current rule actually provides for an audio recording for good cause. I think that is the intent of the Nevada Supreme Court and of its committee. I would submit that good cause would be if a plaintiff's attorney does have a concern that an expert witness who has been chosen by the defense may be problematic. Whether that is well-founded or not, that can be established via motion practice if the parties cannot stipulate to an audio recording. At that point, it would go before a judge who would be neutral and determine whether there is good cause to believe that an audio recording would be necessary to protect any party's rights.

Chairman Yeager:
I know we are just about three weeks into the new civil rules, but are you aware of any judges actually finding good cause in allowing an audio recording of an independent medical examination?

Dane Littlefield:
I have not been personally involved in any decisions of that nature.

Chairman Yeager:
I know it might be too early for this to work its way through the system, but I just wanted to ask that.

Assemblywoman Krasner:
Going back to the statement about this allowing for confrontations with only a plaintiff's attorney being in the room with the doctor and not the defense counsel being present,

obviously, the doctor is not an attorney. I have to agree with you there. Is it your position that if the defense were allowed to have an attorney or representative present as well, you would be okay with this bill?

Dane Littlefield:
Not necessarily. I think the issue with that is, I cannot imagine any plaintiff's attorney ever agreeing to have a defense attorney in the room during a medical examination that could become very private. That is why the most clear-cut solution is to not allow any attorneys or their representatives in the room. Of course, if a plaintiff and the plaintiff's attorney were amenable to something like that, it would be worth considering from a defense perspective.

Assemblywoman Torres:
I have some concerns about not allowing for another person to be in the room. I think back to my own father whose first language is not English. Sometimes, he has difficulty expressing himself. Although my mom would not get involved in the middle of a doctor's appointment, I think having her present allows him to feel more at ease because it is a setting where he does not feel comfortable and her being in the room would provide for an additional level of comfort. Additionally, my father is not the most reliable witness because he does not necessarily understand all the medical jargon that is being thrown around. I think it benefits both sides. It would benefit the plaintiffs and the defendants in that it allows for both of them to have a reliable story of what occurred if either another individual is present or if that encounter is recorded.

Dane Littlefield:
I agree with you. The rules currently do allow for an independent observer in the room; it just provides that the observer will not be an attorney or an attorney's representative. Family members are currently allowed in the room.

Assemblywoman Torres:
Are they allowed to record currently, or only with the judge's permission?

Dane Littlefield:
It would be with a showing of good cause. In a situation such as that where there is an issue with a language barrier, that could be grounds to assert good cause and have the judge rule on that or the parties stipulate to that.

Assemblywoman Torres:
In how many cases have they shown good cause for the mere fact of translation or additional assistance over the last year?

Dane Littlefield:
At this point, I do not have that information. However, I do not know if there is actually a data tracking capability for that. I would be happy to look into it to see if there is precedent for that. I just believe the language barrier issue would be a strong argument from the plaintiff's side.

Assemblywoman Cohen:
Continuing with Assemblywoman Torres' father as an example, say he is in the Eighth Judicial District Court. We have heard from the judges of the Eighth Judicial District Court and the other district courts throughout the state that their dockets are full, they need more judges, and there is too much going on. Can you tell us how long it would take if a plaintiff's attorney filed a motion saying they have good cause to have someone else in the room? How long would that process take in the Eighth Judicial District Court?

Dane Littlefield:
My practice area is pretty restricted to the Second Judicial District Court and some other northern Nevada courts. I cannot speak to the Eighth Judicial District Court particularly. I can offer that if there is good cause, at least up here in northern Nevada, we, as defense attorneys, are amenable to stipulating to reasonable requests. We may be portrayed as sticks in the mud who are not willing to compromise, but that is not the case. We are willing to work with people when there is a showing of good cause. If a motion to compel or a motion for a protective order requiring audio recording—a family observer is already allowed without a court order—is requested, I do not imagine it would be a very long process. It would go to a discovery commissioner, and the commissioner can work on that relatively expediently. My experience in the Second Judicial District Court is that we are fortunate to have a discovery commissioner who is extremely expeditious and very quick. Unfortunately, I cannot speak to the Eighth Judicial District Court.

Assemblywoman Cohen:
Once a motion would be filed in front of a discovery commissioner, how long would that take before it is heard?

Dane Littlefield:
As a former law clerk, I know internal rules of the court are, generally, they try to have a turnaround within 60 days. It is not guaranteed; it is just a general target goal. When matters get sent to the discovery commissioner, it can be anywhere between a week and 60 days. Generally, my experience is that it is much quicker than the 60-day rule of thumb.

Assemblywoman Cohen:
As attorneys, we are not supposed to file pleadings right away. We are supposed to work with each other. The discovery commissioner is going to want to know what the plaintiff's attorney did to try to work this out, so there would be phone calls, letters, and emails going back and forth beforehand for a few weeks on top of this. Is that correct?

Dane Littlefield:
That is correct. I would submit that the rules already provide a mechanism to remedy that. If an attorney is engaging in bad faith and if the discovery commissioner determines that any objections were not made from a good-faith basis, it opens that attorney up to discovery sanctions that can be levied against him. If it is found that the attorney is needlessly wasting the court or the other party's time, that would be a route the plaintiffs could go down.

Assemblywoman Cohen:
So we could go around 90 days before we have this resolved. Also, I think you can talk to any attorney who practices in this state, and that attorney would tell you that opposing counsel has acted inappropriately and that attorney could not get results from the court.

Chairman Yeager:
I will open it up for additional opposition testimony for A.B. 285. [There was none.] Is there anyone neutral? [There was no one.] I will invite our presenters to come forward to address Assemblyman Edwards' question and make any concluding remarks.

Alison Brasier:
Going to section 1, subsection 3, about allowing recording, I think we would be open to working on the language of that section. The intent was to capture exactly what happens in the room. That would include any dialogue with the observer. I think we would be open to dialogue about changing that section to alleviate any concerns. I was sitting and thinking about why this needs to be codified in NRS and we cannot just take care of it through the current rules. Something that has not been talked about before was that there are certain examinations that take place called "underinsured or uninsured motorist coverage" in which a person's own insurance company is, under contract, allowed to have them submit to one of these types of examinations prior to litigation being filed. Going along with the substantive rights we have been talking about and this right to control your body—even outside the litigation context—when you are dealing with an examination being compelled by an insurance company, I think it is important that we have those protections codified in our NRS.

George Bochanis:
It was our intention that the audio recording captures everything from the moment the person walks into the examination room to the second that person leaves the examination room. What you are hearing from the opposition is a very narrow interpretation. It certainly was not supposed to be so diced up. We want everything that is being said by everyone during these examinations to be part of the record. That, again, goes along with the whole concept of keeping this out in the open. It should not be some secret proceeding.

The other thing I wanted to comment on was Assemblywoman Cohen's remarks about the time element. An objection to this type of examination and having to litigate it is going to involve a meet and confer or a telephonic call first between both attorneys, which is going to take several weeks to arrange. It is going to require a motion before the discovery commissioner which adds 30 to 60 days. If one of the attorneys does not like the results of the discovery commissioner report recommendations—that report sometimes takes a month because there are objections to the language—it then goes to district court. Add another 30 to 60 days. If you are going to allow litigation on every examination request for good cause showing on audio recordings, you should give the Eighth Judicial District Court every new judge they want because you are going to need them. It is really going to cause an issue of access to justice for these types of cases.

Graham Galloway:
The argument that somehow this bill will lead to the suppression of the availability of experts for the defense side is still unsupported. I did not hear and I have not seen any evidence that will occur. What I did hear is one expert down south is making $1 million per year doing this kind of work. It is a lucrative business. There will be experts available.

Chairman Yeager:
I will now close the hearing on A.B. 285. [(Exhibit J) was submitted but not discussed and will become part of the record.]

I will now open the hearing on Assembly Bill 20.

Assembly Bill 20: Revises provisions governing judicial discipline. (BDR 1-494)

Kevin Higgins, Chief Judge, Sparks Justice Court; and representing Nevada Judges of Limited Jurisdiction:
We have offered an amended version of the bill (Exhibit K), and that is what I will be discussing this morning. The preamble to Assembly Bill 20 declares, "It is in the best interest of the citizens of the State of Nevada to have a competent, fair and impartial judiciary to administer justice in a manner necessary to provide basic due process, openness and transparency." Just as we work every day to ensure everyone who appears in our courts are treated fairly and given due process of law, the judiciary should enjoy the same treatment and guarantees of law if they are subject to review or discipline by the Nevada Commission on Judicial Discipline.

Section 1 of Assembly Bill 20 amends *Nevada Revised Statutes* (NRS) 1.440, which already provides for the appointment of two justices of the peace or two municipal court judges to sit on these judicial discipline proceedings once they go to hearing, and merely adds that the Supreme Court of Nevada will consider the advice of our association when making those appointments. We are only asking that the association offer who they think would be a good member to sit on that commission. Of course, the Supreme Court is free to appoint anybody it wants. We have no veto power or anything other than offering advice as to who we think would be an appropriate member.

Section 2 of the bill amends NRS 1.462, subsection 2 to provide that the *Nevada Rules of Civil Procedure* (NRCP) apply to all proceedings after the filing of formal charges. When the Commission receives a complaint from the public, it may choose to investigate, it may choose to ask the judge to respond, and it may file formal charges. Only after the filing of formal charges would this amendment apply. The *Nevada Rules of Civil Procedure* set forth pretrial procedures for discovery, interrogatories, requests for admission, and would also establish rules for pretrial motions. There are no such rules now. Many boards and commissions are subject to NRS Chapter 622A. Those are the NRS Title 54 boards. The Nevada Commission on Judicial Discipline is not a Title 54 board. For those boards it applies to, the rules for pretrial discovery, admission, and motions are set forth in statute.

1. Except as provided in NRS 52.365, the copy of a medical record delivered pursuant to NRS 52.325 shall be kept in the custody of the clerk of the court issuing the subpoena, in a sealed container supplied by the custodian of the medical record. This container shall be clearly marked to identify the contents, the name of the patient, the title and number of the court case, and shall not be opened except pursuant to the direction of the court during the trial of the case, for the purpose of discovery as provided in NRS 52.365, or upon special order of the court.

2. The contents of the record shall be preserved and maintained as a cohesive unit and shall not be separated except upon the order of the court. Forty days after any final order dismissing or otherwise terminating any case in which medical records have been subpoenaed, if no appeal is taken, the records shall be returned intact and in complete form to the submitting custodian. If an appeal is taken, the records shall be returned 40 days after any final order terminating the appeal. This return shall be accomplished through the use of a self-addressed, stamped envelope which shall be contained within the package prepared and sent to the court by the submitting custodian. The envelope or container in which the record is delivered to the court shall be clearly marked to identify its contents and to direct that it shall be returned to the submitting custodian if developments occur which eliminate the necessity of opening the envelope.

(Added to NRS by 1973, 360; A 1977, 1535)

NRS 52.345 Notice of delivery to clerk of court. The custodian of the medical record which has been subpoenaed shall promptly notify the attorney for the party who caused the subpoena to be issued that the documents involved have been delivered to the court. For purposes of this notice it is sufficient for the custodian to deliver to such attorney a copy of the certificate verifying the contents and authenticity of the medical record so supplied.

(Added to NRS by 1973, 360; A 1977, 1535)

NRS 52.355 Order for production of original documents; appearance by custodian.

1. If during a trial or discovery proceeding the authenticity of the record or a question of interpretation of handwriting is involved, the court may order the original documents produced.

2. If the personal attendance of a custodian of the medical records is required, the subpoena shall clearly state such demand.

3. If a custodian will personally appear, the original medical records shall be produced.

(Added to NRS by 1973, 360; A 1977, 1535)

NRS 52.365 Use of copies in discovery proceedings.

1. If the contents of a medical record which has been delivered pursuant to NRS 52.325 are the object of a discovery proceeding by any party to the action, counsel may stipulate for, or in the absence of stipulation the court may order:

(a) The delivery of the record to the officer before whom a deposition is to be taken; or

(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)

NRS 52.395 Controlled substances, dangerous drugs and immediate precursors: Procedure for destruction of unnecessary quantity seized as evidence; disposal of hazardous waste; exception.

1. When any substance alleged to be a controlled substance, dangerous drug or immediate precursor is seized from a defendant by a peace officer, the law enforcement agency of which the officer is a member may, with the prior approval of the prosecuting attorney, petition the district court in the county in which the defendant is charged to secure permission to destroy a part of the substance.

2. Upon receipt of a petition filed pursuant to subsection 1, the district court shall order the substance to be accurately weighed and the weight thereof accurately recorded. The prosecuting attorney or the prosecuting attorney's representative and the defendant or the defendant's representative must be allowed to inspect and weigh the substance.

3. If after completion of the weighing process the defendant does not knowingly and voluntarily stipulate to the weight of the substance, the district court shall hold a hearing to make a judicial determination of the weight of the substance. The defendant, the defendant's attorney and any other witness the defendant may designate may be present and testify at the hearing.

4. After a determination has been made as to the weight of the substance, the district court may order all of the substance destroyed except that amount which is reasonably necessary to enable each interested party to analyze the substance to determine the composition of the substance. The district court shall order the remaining sample to be sealed and maintained for analysis before trial.

5. If the substance is finally determined not to be a controlled substance, dangerous drug or immediate precursor, unless the substance was destroyed pursuant to subsection 7, the owner may file a claim against the county to recover the reasonable value of the property destroyed pursuant to this section.

6. The district court's finding as to the weight of a substance destroyed pursuant to this section is admissible in any subsequent proceeding arising out of the same transaction.

CASE NO: A-20-826907-C
Department 14

COMP

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DISTRICT COURT

CLARK COUNTY, NEVADA

DAKOTA JAMES LARSEN; Plaintiff, v. PRO PETROLEUM, LLC, a Texas Limited Liability Company; RIP GRIFFIN TRUCK SERVICE CENTER, INC., a Texas Corporation; DAVID YAZZIE, JR., an individual; DOES I-X; ROE BUSINESS ENTITIES XI-XX Defendants.	Case No. Dept. No. **COMPLAINT** **Jury Demand**

Plaintiff, DAKOTA LARSEN, by and through his attorneys of record, CLAGGETT & SYKES LAW FIRM, brings his causes of action against Defendants, PROPETROLEUM, LLC; RIP GRIFFIN TRUCK SERVICE CENTER, INC.; DAVID YAZZIE, JR.; DOES I-X; and ROE BUSINESS ENTITIES XI-XX, inclusive, and each of them, and alleges as follows:

JURISDICTION, VENUE, AND PARTIES

1. This Court has jurisdiction over this matter under NRS 14.065 and NRS 4.370(1), as the facts alleged occurred in Clark County, Nevada and involve an amount in controversy in excess of $15,000.00. Venue is proper pursuant to NRS 13.040, as Defendants, or any one of them, resided in Clark County, Nevada at the commencement of this action.

2. At all times relevant herein, Plaintiff Dakota James Larsen (hereinafter "Plaintiff" or "Dakota") was a resident of Clark County, Nevada at the time of the incident.

3. Plaintiff is informed and believes and thereon alleges that at all times relevant herein, Defendant Pro Petroleum, LLC (hereinafter "Defendant" or "Pro Petroleum"), was and is a limited liability company formed and existing under the laws of the State of Texas and doing business in Clark County, Nevada.

4. Plaintiff is informed and believes there on alleges that at all times relevant herein, Defendant Rip Griffin Truck Service Center, Inc. (hereinafter "Defendant" or "Rip Griffin"), was and is a corporation formed and existing under the laws of the State of Texas and doing business in Clark County, Nevada.

5. Upon information and belief, at all times relevant herein, Defendant David Yazzie, Jr. (hereinafter "Defendant" or "Yazzie"), was and is a resident of Clark County, Nevada.

6. Plaintiff does not know the true names of Defendants Does I through X and sues said Defendants by fictitious names. Upon information and belief, each of the Defendants designated herein as Doe is legally responsible in some manner for the events alleged in this Complaint and actually, proximately, and/or legally caused injury and damages to Plaintiff. Plaintiff will seek leave of the Court to amend this Complaint to substitute the true and correct names for these fictitious names upon learning that information.

7. Plaintiff does not know the true names of Defendants Roe Business Entities XI through XX and sues said Defendants by fictitious names. Upon information and belief, each of the Defendants designated herein as Roe Business Entities XI through XX, are predecessors-in-interest, successors-in-interest, and/or agencies otherwise in a joint venture with, and/or serving as an alter ego of, any and/or all Defendants named herein; and/or are entities responsible for the supervision of the individually named Defendants at the time of the events and circumstances alleged herein; and/or are entities employed by and/or otherwise directing the individual Defendants in the scope and course of their responsibilities at the time of the events and circumstances alleged herein; and/or are entities otherwise contributing in any way to the acts complained of and the damages alleged to have been suffered by the Plaintiff herein. Upon information and belief, each of the Defendants designated as a Roe Business Entity is in some manner negligently, vicariously, and/or statutorily responsible for the events alleged in this Complaint and actually, proximately, and/or legally caused damages to Plaintiff. Plaintiff will seek leave of the Court to amend this Complaint to substitute the true and correct names for these fictitious names upon learning that information.

GENERAL ALLEGATIONS COMMON TO ALL CLAIMS

8. Plaintiff repeats and realleges the allegations as contained in the preceding paragraphs herein and incorporates the same herein by reference.

9. Defendant Yazzie was previously hired and/or contracted by Defendants Pro Petroleum and/or Rip Griffin as a truck driver.

10. On June 20, 2019, Defendant Yazzie was driving a Kenworth T680 west on Craig Road.

11. Defendant Pro Petroleum and/or Rip Griffin owned and/or leased the Kentworth T680 driven by Defendant Yazzie.

12. A 2001 Ford Ranger also traveling west on Craig Road was stopped at the intersection of Craig Road and Interstate 15.

13. Defendant Yazzie was either distracted, following too closely, and/or failed to pay attention to his surroundings.

14. Instead of stopping so as to not hit the Ford Ranger stopped at the intersection, Defendant Yazzie rear-ended the Ford Ranger.

15. The driver of the Ford Ranger rear-ended by Defendant Yazzie was Dakota James Larsen.

16. Upon information and belief, Defendant Yazzie was in the course and scope of his employment with Defendants Pro Petroleum and/or Rip Griffin at the time of the collision.

17. As a result of the collision, Dakota was injured.

18. As a result of the collision, Dakota's Ford Ranger was damaged.

FIRST CLAIM FOR RELIEF

(Negligence)

Against All Defendants

19. Plaintiff repeats and realleges the allegations as contained in the preceding paragraphs herein and incorporates the same herein by reference.

20. Defendant Yazzie owed a duty of care to Plaintiff, and everyone on the roadway, to follow the safety rules of the road. These rules include paying full attention while driving, not driving while distracted, not following too closely behind any vehicles ahead, stop at red lights, slow down and stop for stopped vehicles, and/or otherwise using due care while driving.

21. Defendant Yazzie violated the safety rules of the road, breached his duty, and acted unreasonably and dangerously when he did not pay full attention while driving, drove while distracted, followed too closely to vehicles ahead, did not stop at a red light, failed to slow down and stop for stopped vehicles, and/or otherwise did not use due care when driving.

22. Defendant Yazzie owed a duty under NRS Chapter 484B, entitled "Rules of the Road," and other codes, and/or ordinances to use due care in the operation of his vehicle to avoid injury to the class of persons who the statutes, codes, and/or ordinances were enacted and intended to protect. Plaintiff was a member of this class of persons. The injuries and damages suffered by Plaintiff were the type of injuries and damages that the statutes, codes, and ordinances were enacted and intended to prevent.

23. Defendant Yazzie's violation of statutory Rules of the Road, codes, and/or ordinances demonstrates a breach of the duty of care and constitutes negligence per se.

24. Additionally, upon information and belief, Defendant Yazzie had reason to know facts which could lead a reasonable person to realize that his

actions created an unreasonable risk of bodily harm to others and involved a high probability that substantial harm would result.

25. Defendant Yazzie's actions, despite knowledge that these actions created an unreasonable risk of bodily harm and involved a high probability that substantial harm would result, was an extreme departure from the ordinary duty of care owed and constitutes gross negligence.

26. By acting carelessly and recklessly and breaching the standard of care, Defendant caused his vehicle to collide with Plaintiff's vehicle.

27. Upon information and belief, Defendant Yazzie was employed by and/or was the servant, agent, or independent contractor of Defendants Pro Petroleum and/or Rip Griffin at the time of the aforementioned collision and was in the course and scope of his employment, agency, or contract with Defendants Pro Petroleum and/or Rip Griffin at the time of the collision.

28. Defendants Pro Petroleum and Rip Griffin are vicariously liable for Defendant Yazzie's negligence, gross negligence, and for any and all damages flowing therefrom.

29. Defendant Yazzie's negligence and/or gross negligence is an actual and proximate or legal cause of Plaintiff's injuries. Plaintiff thereby experienced great pain and anxiety to his body and mind, sustaining injuries and general damages in excess of Fifteen Thousand Dollars ($15,000.00). Defendants Pro Petroleum and/or Rip Griffin are vicariously liable for Defendant Yazzie's actions and these damages.

30. As a further actual and proximate or legal result of Defendant Yazzie's negligence and/or gross negligence, Plaintiff underwent medical treatment and incurred past medical and/or incidental expenses. Plaintiff may also require medical treatment in the future due to Defendants' negligence and/or gross negligence and may incur future medical and/or incidental expenses. The exact amount of such past and future damages is unknown at this present time, but Plaintiff alleges that he has suffered and/or will suffer special damages in excess of Fifteen Thousand Dollars ($15,000.00). Defendants Pro Petroleum and Rip Griffin are vicariously liable for Defendant Yazzie's actions and these damages.

31. Upon information and belief, as a further actual and proximate or legal result of Defendants' negligence and/or gross negligence, Plaintiff has suffered a loss of income and/or will suffer a loss of earning capacity. Defendants Pro Petroleum and Rip Griffin are vicariously liable for Defendant Yazzie's actions and these damages.

32. The actions of Defendant Yazzie in driving without knowing the basic safety rules of the road, were undertaken knowingly, wantonly, willfully, and/or maliciously.

33. Defendant Yazzie's conduct was despicable and so contemptible that it would be looked down upon and despised by ordinary decent people and was carried on by Defendant Yazzie with willful and conscious disregard for the safety of anyone on the roads, to include Plaintiff.

34. Defendant Yazzie's outrageous and unconscionable conduct warrants an award of exemplary and punitive damages pursuant to NRS 42.005, in an amount appropriate to punish and make an example of Defendant Yazzie, and to deter similar conduct in the future.

35. Pursuant to NRS 42.007, Defendant Pro Petroleum and/or Rip Griffin are vicariously liable for punitive damages arising from the outrageous and unconscionable conduct of its employees, agents, and/or servants, as set forth herein.

36. The actions of Defendants have forced Plaintiff to retain counsel to represent him in the prosecution of this action, and he is therefore entitled to an award of a reasonable amount as attorney's fees and costs of suit.

SECOND CLAIM FOR RELIEF

(Negligent Hiring, Supervision and Retention)

Against Defendants Pro Petroleum and Rip Griffin

37. Plaintiff repeats and realleges each and every allegation contained in the preceding paragraphs herein and incorporates the same herein by reference.

38. Upon information and belief, Defendants Pro Petroleum and/or Rip Griffin hired, trained, supervised, and/or retained Defendant Yazzie.

39. Defendants Pro Petroleum and/or Rip Griffin had a duty to hire qualified and competent employees, agents and/or independent contractors. Defendants Pro Petroleum and/or Rip Griffin also had a duty to properly train and/or properly supervise its employees, agents, and/or independent contractors

and to use due care in the retention of its employees, agents, and/or independent contractors.

40. Upon information and belief, Defendants Pro Petroleum and/or Rip Griffin breached its duty by hiring unqualified or incompetent employees, agents, and/or independent contractors; by improperly training its employees, agents, and/or independent contractors; by improperly supervising its employees, agents, and/or independent contractors; and/or by not being careful in the retention of its employees. Specifically, Defendants Pro Petroleum and/or Rip Griffin breached one or more of these duties in relation to Defendant Yazzie.

41. Specifically, Defendants Pro Petroleum and/or Rip Griffin breached their duty of care by having inadequate hiring policies and procedures that allowed Defendants Pro Petroleum and/or Rip Griffin to hire Defendant Yazzie, who upon information and belief was unfit and/or incompetent for his job duties; by having inadequate training policies and procedures and failing to train Defendant Yazzie not to drive company vehicles while distracted, not paying full attention while driving, not follow too closely to other vehicles ahead, not drive through stop signs or red lights, and/or fail to slow down and stop for stopped vehicles; by having inadequate supervision policies and procedures and by failing to supervise Defendant Yazzie, which allowed him to drive a company vehicle while distracted, not pay full attention while driving, follow too closely to the vehicle ahead, not stop at stop signs or red lights, not slow down and stop for a stopped vehicle; and/or by retaining Defendant Yazzie despite knowing he is not competent for his job duties.

42. Defendants Pro Petroleum's and/or Rip Griffin's negligent hiring, training, supervision, and/or retention is an actual and proximate or legal cause of Plaintiff's injuries. Plaintiff thereby experienced great pain, and anxiety to his body and mind, sustaining injuries and damages in excess of Fifteen Thousand Dollars ($15,000.00).

43. As a further actual and proximate or legal result of Defendants Pro Petroleum's and/or Rip Griffin's negligent hiring, training, supervision, and/or retention, Plaintiff underwent medical treatment and incurred past medical and/or incidental expenses. Plaintiff may also require medical treatment in the future due to Defendants' negligence and/or gross negligence and may incur future medical and/or incidental expenses. The exact amount of such past and future damages is unknown at this present time, but Plaintiff alleges that he has suffered and/or will suffer special damages in excess of Fifteen Thousand Dollars ($15,000.00).

44. Upon information and belief, as a further actual and proximate or legal result of Defendants' negligence, Plaintiff has suffered a loss of income and/or will suffer a loss of earning capacity.

45. The actions of Defendant Pro Petroleum and/or Rip Griffin in hiring an incompetent driver and/or failing to properly train or supervise that driver as to the basic safety rules of the road were undertaken knowingly, wantonly, willfully, and/or maliciously.

46. Defendant Yazzie's conduct was despicable and so contemptible that it would be looked down upon and despised by ordinary decent people and

was carried on by Defendant Yazzie with willful and conscious disregard for the safety of anyone on or near roadways, to include Plaintiff.

47. To the extend NRS 42.007 is applicable, Defendant Pro Petroleum and/or Rip Griffin are vicariously liable for punitive damages arising from the outrageous and unconscionable conduct of its employees, agents, and/or servants, as set forth herein.

48. The actions of Defendants have forced Plaintiff to retain counsel to represent him in the prosecution of this action, and he is therefore entitled to an award of a reasonable amount as attorney fees and costs of suit.

THIRD CLAIM FOR RELIEF

(Negligent Entrustment)

Against Defendants Pro Petroleum and Rip Griffin

49. Plaintiff repeats and realleges the allegations above as though fully set forth herein.

50. That Defendants Pro Petroleum and/or Rip Griffin willingly entrusted its vehicle to Defendant Yazzie.

51. That Defendants Pro Petroleum and/or Rip Griffin either knew or should have known that such entrustment to Defendant Yazzie was negligent.

52. By reason of the premises and as a direct and proximate result thereof, Plaintiff sustained injuries to his neck, back, bodily limbs, organs, and systems all or some of which conditions may be permanent and disabling in nature, all to his general damages in a sum in excess of $15,000.00.

53. By reasons of the premises and as a direct and proximate result of the aforementioned, Plaintiff was required and did receive medical and other treatment for his injuries received in an expense all to his damages in a sum in excess of $15,000.00. Said services, care, and treatment are continuing and shall continue in the future, at a presently unascertainable amount.

54. Prior to the injuries complained of herein, Plaintiff was able bodied readily and gainfully employed and physically capable of engaging in all other activities for which he was otherwise suited.

55. The actions of Defendant Pro Petroleum and/or Rip Griffin in entrusting an incompetent and/or negligent driver with its vehicle was undertaken knowingly, wantonly, willfully, and/or maliciously.

56. Defendant Pro Petroleum's and/or Rip Griffin's entrustment was despicable and contemptible that it would be looked down upon and despised by ordinary people and was carried on by Defendant Pro Petroleum and/or Rip Griffin with willful and conscious disregard for the safety of anyone on or near the roadways, to include Plaintiff.

57. Defendant Pro Petroleum's and/or Rip Griffin's outrageous and unconscionable conduct warrants an award of exemplary and punitive damages pursuant to NRS 42.005, in an amount appropriate to punish and make an example of Defendant Pro Petroleum and/or Rip Griffin, and to deter similar conduct in the future.

58. To the extent NRS 42.007 is applicable, Defendant Pro Petroleum and/or Rip Griffin are vicariously liable for punitive damages arising from the

outrageous and unconscionable conduct of its employees, agents, and/or servants as set forth herein.

59. Plaintiff has been compelled to retain the services of an attorney to prosecute this action and is, therefore, entitled to reasonable attorney's fees and costs incurred herein.

FOURTH CLAIM FOR RELIEF

(Respondeat Superior)

Against Defendants Pro Petroleum and Rip Griffin

60. Plaintiff repeats and realleges the allegations above, as though fully set forth herein.

61. At all times relevant herein, Defendant Yazzie was an employee and/or agent of Defendants Pro Petroleum and/or Rip Griffin and was acting within the course and scope of his employment.

62. Accordingly, Defendants Pro Petroleum and/or Rip Griffin are vicariously liable for the damages caused by Defendant Yazzie's actions and negligence, further encompassing the actions of Defendant Yazzie who was hired by Defendants Pro Petroleum and/or Rip Griffin.

63. By reason of the collision and as a direct and proximate result thereof, Plaintiff sustained injuries to his neck, back, bodily limbs, organs, and systems all or some of which conditions may be permanent and disabling in nature, all to his general damages, in a sum in excess of $15,000.00.

64. By reasons of the collision and as a direct and proximate result of the aforementioned, Plaintiff was required to and did receive medical and other

treatment for his injuries received in an expense all to his damages in a sum in excess of $15,000.00. Said services, care, and treatment are continuing and shall continue in the future, at a presently unascertainable amount.

65. Prior to the injuries complained of herein, Plaintiff was able bodied readily and gainfully employed and physically capable of engaging in all other activities for which he was otherwise suited.

66. The actions of Defendant Pro Petroleum and/or Rip Griffin in failing to properly train or supervise Defendant Yazzie as to the basic safety rules of the road were undertaken knowingly, wantonly, willfully, and/or maliciously.

67. Defendant Pro Petroleum's and/or Rip Griffin's conduct was despicable and so contemptible that it would be looked down upon and despised by ordinary decent people and was carried on by Defendant Pro Petroleum and/or Rip Griffin with willful and conscious disregard for the safety of anyone on or near the roadways, to include Plaintiff.

68. Defendant Pro Petroleum's and/or Rip Griffin's outrageous and unconscionable conduct warrants an award of exemplary and punitive damages pursuant to NRS 42.005, in an amount appropriate to punish and make an example of Defendant Pro Petroleum and/or Rip Griffin, and to deter similar conduct in the future.

69. To the extent NRS 42.007 is applicable, Defendant Pro Petroleum and/or Rip Griffin are vicariously liable for punitive damages arising from the

outrageous and unconscionable conduct of its employees, agents, and/or servants as set forth herein.

70. Plaintiff has been compelled to retain the services of an attorney to prosecute this action and is, therefore, entitled to reasonable attorney's fees and costs incurred herein.

WHEREFORE, Plaintiff, DAKOTA JAMES LARSEN, expressly reserving his right to amend this Complaint at the time of trial, to include all items of damage not yet ascertained, demands judgment against Defendants, PRO PETROLEUM, LLC; RIP GRIFFIN TRUCK SERVICE CENTER, INC.; DAVID YAZZIE, JR.; DOES I-X; and ROE BUSINESS ENTITIES XI-XX, inclusive, as follows:

1. For general damages in excess of Fifteen Thousand Dollars ($15,000.00), to be set forth and proven at the time of trial;

2. For special damages in excess of Fifteen Thousand Dollars ($15,000.00), to be set forth and proven at the time of trial;

3. For reasonable attorney's fees;

4. For costs of suit incurred;

5. For punitive damages;

6. For a jury trial on all issues so triable; and

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7. For such other relief as to the Court seems just and proper.

Dated this 23rd day of December 2020.

CLAGGETT & SYKES LAW FIRM

/s/ William Sykes

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DISTRICT COURT
CLARK COUNTY, NEVADA

DAKOTA JAMES LARSEN; Plaintiff, v. PRO PETROLEUM, LLC, a Texas Limited Liability Company; RIP GRIFFIN TRUCK SERVICE CENTER, INC., a Texas Corporation; DAVID YAZZIE, JR., an individual; DOES I-X; ROE BUSINESS ENTITIES XI-XX Defendants.	Case No. A-20-826907-C Dept. No. XIV **PLAINTIFF'S DEMAND FOR JURY TRIAL**

COMES NOW, Plaintiff, DAKOTA JAMES LARSEN, by and through his attorneys, WILLIAM SYKES, ESQ. of CLAGGETT & SYKES LAW FIRM and KEVIN SWENSON of SWENSON & SHELLY, PLLC, and demands a jury trial of all of the issues in the above captioned matter.

Dated this 5th day of January 2021.

CLAGGETT & SYKES LAW FIRM

/s/ William Sykes

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Attorneys for Defendants,
PRO PETROLEUM, LLC,
RIP GRIFFIN TRUCK SERVICE CENTER, INC., &
DAVID YAZZIE, JR.

DISTRICT COURT

CLARK COUNTY, NEVADA

DAKOTA JAMES LARSEN,

Plaintiff,

vs.

PRO PETROLEUM, LLC, a Texas Limited Liability Company; RIP GRIFFIN TRUCK SERVICE CENTER, INC., a Texas Corporation; DAVID YAZZIE, JR., an individual; DOES I-X; ROE BUSINESS ENTITIES XI-XX,

Defendants.

Case No.: A-20-826907-C
Dept. No.: 14

DEFENDANTS' ANSWER TO PLAINTIFF'S COMPLAINT

COME NOW Defendants, PRO PETROLEUM, LLC, RIP GRIFFIN TRUCK SERVICE CENTER, INC., and DAVID YAZZIE, JR. (hereinafter collectively "Defendants"), by and through their counsel of record, the law firm of GRANT & ASSOCIATES, and hereby answer the allegations of Plaintiff's Complaint as follows:

Jurisdiction and Venue

1. In answering Paragraph 1 of Plaintiff's Complaint, these Answering Defendants state that they do not have sufficient knowledge or information upon which to base a belief as to the truth or validity of the allegations contained therein, and upon such grounds, deny each and every allegation contained therein.

PROPETROL 0068

2. In answering Paragraph 2 of Plaintiff's Complaint, these Answering Defendants state that they do not have sufficient knowledge or information upon which to base a belief as to the truth or validity of the allegations contained therein, and upon such grounds, deny each and every allegation contained therein.

3. In answering Paragraph 3 of Plaintiff's Complaint, these Answering Defendants state that they do not have sufficient knowledge or information upon which to base a belief as to the truth or validity of the allegations contained therein, and upon such grounds, deny each and every allegation contained therein.

4. In answering Paragraph 4 of Plaintiff's Complaint, these Answering Defendants state that they do not have sufficient knowledge or information upon which to base a belief as to the truth or validity of the allegations contained therein, and upon such grounds, deny each and every allegation contained therein.

5. In answering Paragraph 5 of Plaintiff's Complaint, these Answering Defendants state that they do not have sufficient knowledge or information upon which to base a belief as to the truth or validity of the allegations contained therein, and upon such grounds, deny each and every allegation contained therein.

6. In answering Paragraph 6 of Plaintiff's Complaint, these Answering Defendants state that they do not have sufficient knowledge or information upon which to base a belief as to the truth or validity of the allegations contained therein, and upon such grounds, deny each and every allegation contained therein.

7. In answering Paragraph 7 of Plaintiff's Complaint, these Answering Defendants state that they do not have sufficient knowledge or information upon which to base a belief as to the truth or validity of the allegations contained therein, and upon such grounds, deny each and every allegation contained therein.

General Allegations Common to All Claims

8. In answering Paragraph 8 of Plaintiff's Complaint, these Answering Defendants repeat and re-allege their answers to Paragraphs 1-7, respectively, and incorporate the same as if fully set forth herein.

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9. In answering Paragraph 9 of Plaintiff's Complaint, these Answering Defendants state that they do not have sufficient knowledge or information upon which to base a belief as to the truth or validity of the allegations contained therein, and upon such grounds, deny each and every allegation contained therein.

10. In answering Paragraph 10 of Plaintiff's Complaint, these Answering Defendants state that they do not have sufficient knowledge or information upon which to base a belief as to the truth or validity of the allegations contained therein, and upon such grounds, deny each and every allegation contained therein.

11. In answering Paragraph 11 of Plaintiff's Complaint, these Answering Defendants state that they do not have sufficient knowledge or information upon which to base a belief as to the truth or validity of the allegations contained therein, and upon such grounds, deny each and every allegation contained therein.

12. In answering Paragraph 12 of Plaintiff's Complaint, these Answering Defendants state that they do not have sufficient knowledge or information upon which to base a belief as to the truth or validity of the allegations contained therein, and upon such grounds, deny each and every allegation contained therein.

13. In answering Paragraph 13 of Plaintiff's Complaint, these Answering Defendants state that they do not have sufficient knowledge or information upon which to base a belief as to the truth or validity of the allegations contained therein, and upon such grounds, deny each and every allegation contained therein.

14. In answering Paragraph 14 of Plaintiff's Complaint, these Answering Defendants state that they do not have sufficient knowledge or information upon which to base a belief as to the truth or validity of the allegations contained therein, and upon such grounds, deny each and every allegation contained therein.

15. In answering Paragraph 15 of Plaintiff's Complaint, these Answering Defendants state that they do not have sufficient knowledge or information upon which to base a belief as to the truth or validity of the allegations contained therein, and upon such grounds, deny each and every allegation contained therein.

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16. In answering Paragraph 16 of Plaintiff's Complaint, these Answering Defendants state that they do not have sufficient knowledge or information upon which to base a belief as to the truth or validity of the allegations contained therein, and upon such grounds, deny each and every allegation contained therein.

17. In answering Paragraph 17 of Plaintiff's Complaint, these Answering Defendants state that they do not have sufficient knowledge or information upon which to base a belief as to the truth or validity of the allegations contained therein, and upon such grounds, deny each and every allegation contained therein.

18. In answering Paragraph 18 of Plaintiff's Complaint, these Answering Defendants state that they do not have sufficient knowledge or information upon which to base a belief as to the truth or validity of the allegations contained therein, and upon such grounds, deny each and every allegation contained therein.

First Claim for Relief

(Negligence)

Against All Defendants

19. In answering Paragraph 19 of Plaintiff's Complaint, these Answering Defendants repeat and re-allege their answers to Paragraphs 1-18, respectively, and incorporate the same as if fully set forth herein.

20. In answering Paragraph 20 of Plaintiff's Complaint, these Answering Defendants state that this paragraph calls for a legal conclusion and, therefore, no response is required. To the extent this paragraph requires an answer, these Answering Defendants state that they do not have sufficient knowledge or information upon which to base a belief as to the truth or validity of the allegations contained therein, and upon such grounds, deny each and every allegation contained therein.

21. In answering Paragraph 21 of Plaintiff's Complaint, these Answering Defendants state that this paragraph calls for a legal conclusion and, therefore, no response is required. To the extent this paragraph requires an answer, these Answering Defendants state that they do not have sufficient knowledge or information upon which to base a belief as to the truth or validity

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of the allegations contained therein, and upon such grounds, deny each and every allegation contained therein.

22. In answering Paragraph 22 of Plaintiff's Complaint, these Answering Defendants state that this paragraph calls for a legal conclusion and, therefore, no response is required. To the extent this paragraph requires an answer, these Answering Defendants state that they do not have sufficient knowledge or information upon which to base a belief as to the truth or validity of the allegations contained therein, and upon such grounds, deny each and every allegation contained therein.

23. In answering Paragraph 23 of Plaintiff's Complaint, these Answering Defendants state that this paragraph calls for a legal conclusion and, therefore, no response is required. To the extent this paragraph requires an answer, these Answering Defendants state that they do not have sufficient knowledge or information upon which to base a belief as to the truth or validity of the allegations contained therein, and upon such grounds, deny each and every allegation contained therein.

24. In answering Paragraph 24 of Plaintiff's Complaint, these Answering Defendants state that they do not have sufficient knowledge or information upon which to base a belief as to the truth or validity of the allegations contained therein, and upon such grounds, deny each and every allegation contained therein.

25. In answering Paragraph 25 of Plaintiff's Complaint, these Answering Defendants state that this paragraph calls for a legal conclusion and, therefore, no response is required. To the extent this paragraph requires an answer, these Answering Defendants state that they do not have sufficient knowledge or information upon which to base a belief as to the truth or validity of the allegations contained therein, and upon such grounds, denies each and every allegation contained therein.

26. In answering Paragraph 26 of Plaintiff's Complaint, these Answering Defendants state that this paragraph calls for a legal conclusion and, therefore, no response is required. To the extent this paragraph requires an answer, these Answering Defendants state that they do not have sufficient knowledge or information upon which to base a belief as to the truth or validity

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of the allegations contained therein, and upon such grounds, deny each and every allegation contained therein.

27. In answering Paragraph 27 of Plaintiff's Complaint, these Answering Defendants state that this paragraph calls for a legal conclusion and, therefore, no response is required. To the extent this paragraph requires an answer, these Answering Defendants state that they do not have sufficient knowledge or information upon which to base a belief as to the truth or validity of the allegations contained therein, and upon such grounds, deny each and every allegation contained therein.

28. In answering Paragraph 28 of Plaintiff's Complaint, these Answering Defendants state that this paragraph calls for a legal conclusion and, therefore, no response is required. To the extent this paragraph requires an answer, these Answering Defendants state that they do not have sufficient knowledge or information upon which to base a belief as to the truth or validity of the allegations contained therein, and upon such grounds, deny each and every allegation contained therein.

29. In answering Paragraph 29 of Plaintiff's Complaint, these Answering Defendants state that this paragraph calls for a legal conclusion and, therefore, no response is required. To the extent this paragraph requires an answer, these Answering Defendants state that they do not have sufficient knowledge or information upon which to base a belief as to the truth or validity of the allegations contained therein, and upon such grounds, deny each and every allegation contained therein.

30. In answering Paragraph 30 of Plaintiff's Complaint, these Answering Defendants state that this paragraph calls for a legal conclusion and, therefore, no response is required. To the extent this paragraph requires an answer, these Answering Defendants state that they do not have sufficient knowledge or information upon which to base a belief as to the truth or validity of the allegations contained therein, and upon such grounds, deny each and every allegation contained therein.

31. In answering Paragraph 31 of Plaintiff's Complaint, these Answering Defendants state that this paragraph calls for a legal conclusion and, therefore, no response is required. To

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the extent this paragraph requires an answer, these Answering Defendants state that they do not have sufficient knowledge or information upon which to base a belief as to the truth or validity of the allegations contained therein, and upon such grounds, deny each and every allegation contained therein.

32. In answering Paragraph 32 of Plaintiff's Complaint, these Answering Defendants deny each and every allegation contained therein.

33. In answering Paragraph 33 of Plaintiff's Complaint, these Answering Defendants deny each and every allegation contained therein.

34. In answering Paragraph 34 of Plaintiff's Complaint, these Answering Defendants state that this paragraph calls for a legal conclusion and, therefore, no response is required. To the extent this paragraph requires an answer, these Answering Defendants state that they do not have sufficient knowledge or information upon which to base a belief as to the truth or validity of the allegations contained therein, and upon such grounds, deny each and every allegation contained therein.

35. In answering Paragraph 35 of Plaintiff's Complaint, these Answering Defendants state that this paragraph calls for a legal conclusion and, therefore, no response is required. To the extent this paragraph requires an answer, these Answering Defendants state that they do not have sufficient knowledge or information upon which to base a belief as to the truth or validity of the allegations contained therein, and upon such grounds, deny each and every allegation contained therein.

36. In answering Paragraph 36 of Plaintiff's Complaint, these Answering Defendants deny each and every allegation contained therein.

Second Claim for Relief

(Negligent Hiring, Supervision and Retention)

Against All Defendants Pro Petroleum and Rip Griffin

37. In answering Paragraph 37 of Plaintiff's Complaint, these Answering Defendants repeat and re-allege their answers to Paragraphs 1-36, respectively, and incorporate the same as if fully set forth herein.

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38. In answering Paragraph 38 of Plaintiff's Complaint, these Answering Defendants state that they do not have sufficient knowledge or information upon which to base a belief as to the truth or validity of the allegations contained therein, and upon such grounds, deny each and every allegation contained therein.

39. In answering Paragraph 39 of Plaintiff's Complaint, these Answering Defendants state that this paragraph calls for a legal conclusion and, therefore, no response is required. To the extent this paragraph requires an answer, these Answering Defendants state that they do not have sufficient knowledge or information upon which to base a belief as to the truth or validity of the allegations contained therein, and upon such grounds, deny each and every allegation contained therein.

40. In answering Paragraph 40 of Plaintiff's Complaint, these Answering Defendants state that this paragraph calls for a legal conclusion and, therefore, no response is required. To the extent this paragraph requires an answer, these Answering Defendants state that they do not have sufficient knowledge or information upon which to base a belief as to the truth or validity of the allegations contained therein, and upon such grounds, deny each and every allegation contained therein.

41. In answering Paragraph 41 of Plaintiff's Complaint, these Answering Defendants state that this paragraph calls for a legal conclusion and, therefore, no response is required. To the extent this paragraph requires an answer, these Answering Defendants state that they do not have sufficient knowledge or information upon which to base a belief as to the truth or validity of the allegations contained therein, and upon such grounds, deny each and every allegation contained therein.

42. In answering Paragraph 42 of Plaintiff's Complaint, these Answering Defendants state that this paragraph calls for a legal conclusion and, therefore, no response is required. To the extent this paragraph requires an answer, these Answering Defendants state that they do not have sufficient knowledge or information upon which to base a belief as to the truth or validity of the allegations contained therein, and upon such grounds, deny each and every allegation contained therein.

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43. In answering Paragraph 43 of Plaintiff's Complaint, these Answering Defendants state that this paragraph calls for a legal conclusion and, therefore, no response is required. To the extent this paragraph requires an answer, these Answering Defendants state that they do not have sufficient knowledge or information upon which to base a belief as to the truth or validity of the allegations contained therein, and upon such grounds, deny each and every allegation contained therein.

44. In answering Paragraph 44 of Plaintiff's Complaint, these Answering Defendants state that they do not have sufficient knowledge or information upon which to base a belief as to the truth or validity of the allegations contained therein, and upon such grounds, deny each and every allegation contained therein.

45. In answering Paragraph 45 of Plaintiff's Complaint, these Answering Defendants state that this paragraph calls for a legal conclusion and, therefore, no response is required. To the extent this paragraph requires an answer, these Answering Defendants state that they do not have sufficient knowledge or information upon which to base a belief as to the truth or validity of the allegations contained therein, and upon such grounds, deny each and every allegation contained therein.

46. In answering Paragraph 46 of Plaintiff's Complaint, these Answering Defendants state that this paragraph calls for a legal conclusion and, therefore, no response is required. To the extent this paragraph requires an answer, these Answering Defendants state that they do not have sufficient knowledge or information upon which to base a belief as to the truth or validity of the allegations contained therein, and upon such grounds, deny each and every allegation contained therein.

47. In answering Paragraph 47 of Plaintiff's Complaint, these Answering Defendants state that this paragraph calls for a legal conclusion and, therefore, no response is required. To the extent this paragraph requires an answer, these Answering Defendants state that they do not have sufficient knowledge or information upon which to base a belief as to the truth or validity of the allegations contained therein, and upon such grounds, deny each and every allegation contained therein.

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48. In answering Paragraph 48 of Plaintiff's Complaint, these Answering Defendants deny each and every allegation contained therein.

Third Claim for Relief

(Negligent Entrustment)

Against All Defendants Pro Petroleum and Rip Griffin

49. In answering Paragraph 49 of Plaintiff's Complaint, these Answering Defendants repeat and re-allege their answers to Paragraphs 1-48, respectively, and incorporate the same as if fully set forth herein.

50. In answering Paragraph 50 of Plaintiff's Complaint, these Answering Defendants state that they do not have sufficient knowledge or information upon which to base a belief as to the truth or validity of the allegations contained therein, and upon such grounds, deny each and every allegation contained therein.

51. In answering Paragraph 51 of Plaintiff's Complaint, these Answering Defendants state that they do not have sufficient knowledge or information upon which to base a belief as to the truth or validity of the allegations contained therein, and upon such grounds, deny each and every allegation contained therein.

52. In answering Paragraph 52 of Plaintiff's Complaint, these Answering Defendants state that this paragraph calls for a legal conclusion and, therefore, no response is required. To the extent this paragraph requires an answer, these Answering Defendants state that they do not have sufficient knowledge or information upon which to base a belief as to the truth or validity of the allegations contained therein, and upon such grounds, deny each and every allegation contained therein.

53. In answering Paragraph 53 of Plaintiff's Complaint, these Answering Defendants state that this paragraph calls for a legal conclusion and, therefore, no response is required. To the extent this paragraph requires an answer, these Answering Defendants state that they do not have sufficient knowledge or information upon which to base a belief as to the truth or validity of the allegations contained therein, and upon such grounds, deny each and every allegation contained therein.

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54. In answering Paragraph 54 of Plaintiff's Complaint, these Answering Defendants state that they do not have sufficient knowledge or information upon which to base a belief as to the truth or validity of the allegations contained therein, and upon such grounds, deny each and every allegation contained therein.

55. In answering Paragraph 55 of Plaintiff's Complaint, these Answering Defendants state that this paragraph calls for a legal conclusion and, therefore, no response is required. To the extent this paragraph requires an answer, these Answering Defendants state that they do not have sufficient knowledge or information upon which to base a belief as to the truth or validity of the allegations contained therein, and upon such grounds, deny each and every allegation contained therein.

56. In answering Paragraph 56 of Plaintiff's Complaint, these Answering Defendants state that this paragraph calls for a legal conclusion and, therefore, no response is required. To the extent this paragraph requires an answer, these Answering Defendants state that they do not have sufficient knowledge or information upon which to base a belief as to the truth or validity of the allegations contained therein, and upon such grounds, deny each and every allegation contained therein.

57. In answering Paragraph 57 of Plaintiff's Complaint, these Answering Defendants state that this paragraph calls for a legal conclusion and, therefore, no response is required. To the extent this paragraph requires an answer, these Answering Defendants state that they do not have sufficient knowledge or information upon which to base a belief as to the truth or validity of the allegations contained therein, and upon such grounds, deny each and every allegation contained therein.

58. In answering Paragraph 58 of Plaintiff's Complaint, these Answering Defendants state that this paragraph calls for a legal conclusion and, therefore, no response is required. To the extent this paragraph requires an answer, these Answering Defendants state that they do not have sufficient knowledge or information upon which to base a belief as to the truth or validity of the allegations contained therein, and upon such grounds, deny each and every allegation contained therein.

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59. In answering Paragraph 59 of Plaintiff's Complaint, these Answering Defendants deny each and every allegation contained therein.

Fourth Claim for Relief

(Respondeat Superior)

Against All Defendants Pro Petroleum and Rip Griffin

60. In answering Paragraph 60 of Plaintiff's Complaint, these Answering Defendants repeat and re-allege their answers to Paragraphs 1-59, respectively, and incorporate the same as if fully set forth herein.

61. In answering Paragraph 61 of Plaintiff's Complaint, these Answering Defendants state that they do not have sufficient knowledge or information upon which to base a belief as to the truth or validity of the allegations contained therein, and upon such grounds, deny each and every allegation contained therein.

62. In answering Paragraph 62 of Plaintiff's Complaint, these Answering Defendants state that this paragraph calls for a legal conclusion and, therefore, no response is required. To the extent this paragraph requires an answer, these Answering Defendants state that they do not have sufficient knowledge or information upon which to base a belief as to the truth or validity of the allegations contained therein, and upon such grounds, deny each and every allegation contained therein.

63. In answering Paragraph 63 of Plaintiff's Complaint, these Answering Defendants state that this paragraph calls for a legal conclusion and, therefore, no response is required. To the extent this paragraph requires an answer, these Answering Defendants state that they do not have sufficient knowledge or information upon which to base a belief as to the truth or validity of the allegations contained therein, and upon such grounds, deny each and every allegation contained therein.

64. In answering Paragraph 64 of Plaintiff's Complaint, these Answering Defendants state that this paragraph calls for a legal conclusion and, therefore, no response is required. To the extent this paragraph requires an answer, these Answering Defendants state that they do not have sufficient knowledge or information upon which to base a belief as to the truth or validity

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of the allegations contained therein, and upon such grounds, deny each and every allegation contained therein.

65. In answering Paragraph 65 of Plaintiff's Complaint, these Answering Defendants state that they do not have sufficient knowledge or information upon which to base a belief as to the truth or validity of the allegations contained therein, and upon such grounds, deny each and every allegation contained therein.

66. In answering Paragraph 66 of Plaintiff's Complaint, these Answering Defendants state that this paragraph calls for a legal conclusion and, therefore, no response is required. To the extent this paragraph requires an answer, these Answering Defendants state that they do not have sufficient knowledge or information upon which to base a belief as to the truth or validity of the allegations contained therein, and upon such grounds, deny each and every allegation contained therein.

67. In answering Paragraph 67 of Plaintiff's Complaint, these Answering Defendants state that this paragraph calls for a legal conclusion and, therefore, no response is required. To the extent this paragraph requires an answer, these Answering Defendants state that they do not have sufficient knowledge or information upon which to base a belief as to the truth or validity of the allegations contained therein, and upon such grounds, deny each and every allegation contained therein.

68. In answering Paragraph 68 of Plaintiff's Complaint, these Answering Defendants state that this paragraph calls for a legal conclusion and, therefore, no response is required. To the extent this paragraph requires an answer, these Answering Defendants state that they do not have sufficient knowledge or information upon which to base a belief as to the truth or validity of the allegations contained therein, and upon such grounds, deny each and every allegation contained therein.

69. In answering Paragraph 69 of Plaintiff's Complaint, these Answering Defendants state that this paragraph calls for a legal conclusion and, therefore, no response is required. To the extent this paragraph requires an answer, these Answering Defendants state that they do not have sufficient knowledge or information upon which to base a belief as to the truth or validity

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of the allegations contained therein, and upon such grounds, deny each and every allegation contained therein.

70. In answering Paragraph 70 of Plaintiff's Complaint, these Answering Defendants deny each and every allegation contained therein.

AFFIRMATIVE DEFENSES

FIRST AFFIRMATIVE DEFENSE

Plaintiff's Complaint fails to state a claim against these Answering Defendants upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

Plaintiff's Complaint fails to join a party necessary for just adjudication under NRCP

THIRD AFFIRMATIVE DEFENSE

Plaintiff had notice of all the facts and acts of Defendants set forth in the Complaint, and has thereby been guilty of laches and should in equity bar the Plaintiff from maintaining this action.

FOURTH AFFIRMATIVE DEFENSE

Plaintiff has failed to mitigate Plaintiff's alleged injuries and damages, if any.

FIFTH AFFIRMATIVE DEFENSE

That, at the time and place alleged in Plaintiff's Complaint, and for a period of time prior thereto, Plaintiff did not exercise ordinary care, caution or prudence for the protection of Plaintiff's own safety and the injuries and damages complained of by the Plaintiff in the Complaint, if any, were directly and proximately caused or contributed to by the fault, failure to act, carelessness and negligence of the Plaintiff himself and, as such, is responsible for comparative fault in excess of fifty percent (50%), thereby exonerating any liability as against these Defendants. Should Plaintiff's comparative fault be assessed at less than fifty percent (50%), these Defendants are entitled to reduce Plaintiff's recovery accordingly.

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SIXTH AFFIRMATIVE DEFENSE

These Answering Defendants are informed and believe and thereon allege that at the time and place of the incident alleged in Plaintiff's Complaint, Plaintiff knew of and fully understood the danger and risk incident to its undertaking, but despite such knowledge, Plaintiff freely and voluntarily assumed and exposed themselves to all risk of harm and the consequential injuries and damages, if any, resulting there from.

SEVENTH AFFIRMATIVE DEFENSE

Any injuries Plaintiff may have sustained, as alleged in the Complaint on file herein, were not caused by any negligence, want of care, act or omission of these Answering Defendants, but through the design, negligence or want of care of unknown third parties.

EIGHTH AFFIRMATIVE DEFENSE

These Answering Defendants are informed and believe and thereon allege that the damages complained of in Plaintiff's Complaint, if any, resulted from an unforeseeable Act of God, thereby barring either partially or totally Plaintiff's claimed damages herein.

NINTH AFFIRMATIVE DEFENSE

These Defendants alleges that the injuries, if any, suffered by the Plaintiff were caused in whole or in part by an independent intervening cause over which these Answering Defendants had no control and said independent intervening cause was not the result of negligence on the part of these Defendants.

TENTH AFFIRMATIVE DEFENSE

These Answering Defendants are informed and believe and thereon allege that Plaintiff was reimbursed for a portion of the claimed damages by a third party; these Answering Defendants are informed and believe and thereon allege that Plaintiff has subrogated that third party to a portion of the damages claimed herein; these Answering Defendants are informed and believe and thereon allege that by virtue of the aforementioned subrogation, Plaintiff has failed to name indispensable parties, and have violated the rule against splitting causes of action, thus barring Plaintiff's recovery herein.

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ELEVENTH AFFIRMATIVE DEFENSE

These Answering Defendants hereby incorporate by reference those affirmative defenses enumerated in Rule 8 of the Nevada Rules of Civil Procedure as though fully set forth herein.

LAST AFFIRMATIVE DEFENSE

Pursuant to N.R.C.P. 11, as amended, all possible affirmative defenses may not have been alleged herein insofar as sufficient facts were not available for responding party after reasonable inquiry upon the filing of these Answering Defendants Answer to Plaintiff's Complaint, and, therefore, these Answering Defendants reserve the right to amend their Answer to allege additional affirmative defenses, if subsequent investigation so warrants.

WHEREFORE, Defendants pray for judgment as follows:

1. That Plaintiff takes nothing by virtue of the Complaint on file herein;
2. For the costs of suit incurred herein;
3. That Defendants be awarded its attorneys' fees and costs of suit incurred to defend this action; and,
4. For any such other and further relief as this Court deems just and proper.

DATED this 1st day of February, 2021.

GRANT & ASSOCIATES

/s/ Annalisa N. Grant

ANNALISA N. GRANT, ESQ.
Nevada Bar No. 11807
SONYA C. WATSON, ESQ.
Nevada Bar No. 13195
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Attorneys for Defendants,
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CERTIFICATE OF SERVICE

I certify that I am an employee of GRANT & ASSOCIATES and that on this 1st day of February, 2021, I caused a true and correct copy of the foregoing **DEFENDANTS' ANSWER TO PLAINTIFF'S COMPLAINT** to be served as follows:

___ By placing the same to be deposited for mailing in the United States Mail, in a sealed envelope upon which first class postage was prepaid in Las Vegas, Nevada; and/or

___ Pursuant to EDCR 7.26, to be sent via facsimile; and/or

_X_ Pursuant to EDCR 7.26, by transmitting via the Court's electronic filing services by the document(s) listed above to the Counsel set forth on the service list.

Sean K. Clagget, Esq.
William T. Sykes, Esq.
Brian Blankenship, Esq.
CLAGGET & SYKES LAW FIRM
4101 Meadows Lane, Suite 100
Las Vegas, Nevada 89107
Attorneys for Plaintiff

Kevin Swenson, Esq.
Brian Shelley, Esq.
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107 South 1470 East, Suite 201
St. George, UT 84790
Attorneys for Plaintiff

/s/ Denisse A. Girard-Rubio

An Employee of GRANT & ASSOCIATES

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MCOM

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DISTRICT COURT

CLARK COUNTY, NEVADA

DAKOTA JAMES LARSEN,

Plaintiff,

vs.

PRO PETROLEUM, LLC, a Texas Limited Liability Company; RIP GRIFFIN TRUCK SERVICE CENTER, INC., a Texas Corporation; DAVID YAZZIE, JR., an individual; DOES I-X; ROE BUSINESS ENTITIES XI-XX,

Defendants.

Case No.: A-20-826907-C
Dept. No.: 22

HEARING REQUESTED DISCOVERY COMMISSIONER

DEFENDANTS' MOTION TO COMPEL PHYSICAL EXAMINATION OF PLAINTIFF PURSUANT TO NRCP 35 AND EXECUTION OF EMPLOYMENT RELEASES ON AN ORDER SHORTENING TIME

COME NOW Defendants, PRO PETROLEUM, LLC, RIP GRIFFIN TRUCK SERVICE CENTER, INC., and DAVID YAZZIE, JR., by and through their counsel of record, the law firm of **GRANT & ASSOCIATES**, and hereby submits its motion to compel Plaintiff's attendance at an NRCP 35 physical examination and to execute employment releases.

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This Motion is based upon NRCP 35, NRCP 26(b), the memorandum of points and authorities contained herein, the papers and pleadings on file, the exhibits attached hereto, and any oral argument that may be presented to the court.

DATED this 5th day of August, 2021.

GRANT & ASSOCIATES

/s/ Sonya C. Watson

SONYA C. WATSON, ESQ.
Nevada Bar No. 13195
7455 Arroyo Crossing Parkway, Suite 220
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Attorney for Intervenor,
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ORDER SHORTENING TIME

It appearing to the satisfaction of the Court, and good cause appearing therefor,

IT IS HEREBY ORDERED that the foregoing **DEFENDANTS' MOTION TO COMPEL PHYSICAL EXAMINATION OF PLAINTIFF PURSUANT TO NRCP 35 AND EXECUTION OF EMPLOYMENT RELEASES ON AN ORDER SHORTENING TIME** shall be heard before the Discovery Commissioner at the Regional Justice Center on the 13th day of August, 2021, at the hour of 9:30am.

DISCOVERY COMMISSIONER

Submitted by:

GRANT & ASSOCIATES

/s/ Sonya C. Watson

SONYA C. WATSON, ESQ.
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DECLARATION OF SONYA C. WATSON, ESQ. IN COMPLIANCE WITH EDCR 2.34

SONYA C. WATSON, declares under penalty of perjury as follows:

1. That I am an attorney duly licensed to practice in the State of Nevada and am an attorney at the law firm of **GRANT & ASSOCIATES**, counsel for Defendants in the instant lawsuit. I am over the age of 18 years and am in all respects competent to make this Declaration. This Declaration is based upon my personal knowledge unless stated upon information and belief and, if called to testify, I would testify as set forth in this Declaration.

2. That on April 16, 2021, I sent an email to Plaintiff's counsel indicating that I would like to schedule Plaintiff's Rule 35 exam for some time in September 2021. **EXHIBIT A**, Counsels' April 16, 2021 through April 20, 2021 Email Exchange.

3. That on April 20, 2021, Plaintiff's Counsel, Brian Blankenship of CLAGGET & SYKES LAW FIRM, responded to my April 16, 2021 email stating that he and his firm

> rarely stipulate to Rule 35 examinations and will never do so unless the party requesting the exam agrees to our written parameters, including an audio recording of the exam and an observer present. As it stands now, there is no agreement for a Rule 35 examination but we are happy to discuss this with you once the Parties enter into discovery,

to which I responded that same day, stating that I would be happy to have a phone call to discuss the Rule 35 exam. Plaintiff's counsel did not respond further. **Id.**

4. That on May 12, 2021, I sent an email to Plaintiff's Counsel, requesting that he please call me to discuss any parameters for Plaintiff's Rule 35 exam. Plaintiff's counsel did not respond. **EXHIBIT B**, Defendant's Counsel's May 12, 2021 Email to Plaintiff's Counsel.

5. That on July 29, 2021, Plaintiff's counsel and I had a telephone conference pursuant to EDCR 2.34 and were not able to reach an agreement as, pursuant to NRS 52.380, Plaintiff's counsel wanted a stipulation that would allow an audio recording of Plaintiff's Rule 35 exam as well as the presence of an observer hired by Plaintiff's counsel and, on behalf of Plaintiff, refused Defendants' request for Plaintiff's execution of employment releases.

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6. Good cause exists to hear this motion on an order shortening time. During the July 29, 2021 EDCR 2.34 call, Plaintiff's counsel advised that Plaintiff intends to undergo lumbar surgery within the next 60 days. However, due to the dispute regarding the parameters of any Rule 35 exam, the exam has not yet been scheduled as Plaintiff has not provided his availability for the exam. If this matter is heard in the ordinary course, it is highly unlikely that Defendants will be able to secure an appointment for the Rule 35 exam prior to the destruction of evidence that will result when Plaintiff undergoes surgery.

7. Pursuant to EDCR 2.34, I made a good faith effort to communicate with Plaintiff's counsel to resolve this issue as described above. Plaintiff's counsel and I disagree as to whether NRS 52.380 or NRCP 35 controls regarding recordings and observers at a Rule 35 exam and as to whether Plaintiff has produced sufficient information for Defendants to adequately evaluate and defend against Plaintiff's clam for future lost wages.

8. I believe I have complied with the requirements of EDCR 2.34 in making a good faith attempt to resolve these issues without court intervention. Accordingly, I believe this motion is properly before the court.

DATED this 5th day of August, 2021.

GRANT & ASSOCIATES

/s/ Sonya C. Watson

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POINTS & AUTHORITIES

I. INTRODUCTION

This case involves a motor vehicle accident in Las Vegas, Nevada, on or about June 20, 2019. Defendant David Yazzie was traveling behind Plaintiff. Plaintiff alleges that Defendant Yazzie collided with the rear of Plaintiff's vehicle. Plaintiff alleges injuries to his lumbar and cervical spine as a result of the alleged motor vehicle accident. He further alleges past medical specials totaling $24,000, future medical specials totaling $2,000,000+, past wage loss totaling $2,160 and future wage loss totaling $1,440,000+. **EXHIBIT C**, Plaintiff's First Supplement to Initial NRCP 16.1 Disclosures.

Plaintiff has placed the physical condition of his cervical and lumbar spine at issue. There is a dispute among the parties as to the causal nature, necessity, and reasonableness of Plaintiff's medical treatment and charges as they relate to these body parts. While Plaintiff has not outright refused to submit to a physical medical examination in this case, he has refused to submit to a medical examination absent the examination being recorded and Plaintiff being allowed to have an observer, hired by his attorneys, present. Defendants object to the recording of the Rule 35 exam and to an observer being present at the exam.

Plaintiff has also placed his future earning capacity at issue. Nevertheless, he refuses to sign employment releases that would allow Defendants to determine his earning potential based on his past work history and career trajectory. Defendants requires Plaintiff's executed employment releases to adequately defend against Plaintiff's claim for future wage loss.

II. LAW AND ARGUMENT

A. STANDARD OF REVIEW

NRCP 35 specifically provides that the court may order a physical examination of a party whose physical condition is in controversy. NRCP 35(a)(1). The order must be subject to a motion where good cause is shown for the physical examination and notice is provided to all parties and the person to be examined. NRCP 35(a)(2)(A). The order must also specify the time,

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place, manner, condition, and scope of the examination as well as the person who will perform it. NRCP 35(a)(2)(B).

Whether a physical examination must be recorded is left to the court's discretion and should be ordered only after good cause for such has been shown. NRCP 35(a)(3). Although NRCP 35 does generally allow a Plaintiff to request to have an observer present at the examination, the observer must not be an attorney or anyone hired by an attorney or the person being examined, and **the court may deny such a request for good cause shown**. NRCP 35(a)(4)(A)(ii).

NRS 52.380 provides that an observer at a Rule 35 examination may be an attorney of the examinee or a representative acting on behalf of an attorney, and that such an observer may audio record the exam. NRS 52.380(1)-(3).

NRCP 26(b) provides that

> [p]arties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claims or defenses and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefits.

Accordingly, a party's request for discovery should be honored when another party places a matter at issue, the information is requested is relevant, and the second party can claim no privilege or offer any reasonable excuse for failure to honor the first party's request.

B. A CONTROVERSY EXISTS REGARDING CAUSATION OF THE PHYSICAL CONDITION OF PLAINTIFF'S CERVICAL AND LUMBAR SPINE AND THEREFORE THERE IS GOOD CAUSE FOR PLAINTIFF TO SUBMIT TO A RULE 35 PHYSICAL EXAM

The "good cause" requirement of Rule 35 necessarily is related to the "in controversy" requirement. See *Schlagenhauf v. Holder,* 85 S.Ct. 234, 243. Defendant seeks a physical examination of Plaintiff's cervical and lumbar spine. Plaintiff admits to previous injury to, or

pre-existing conditions of, both his cervical and lumbar spine. Specifically, he admits to injuring his cervical spine in a motor vehicle accident prior to the alleged subject incident and admits to undergoing two surgeries for the lumbar spine prior to the June 20, 2019 alleged subject incident. **EXHIBIT D**, Plaintiff's Responses to Defendant Pro Petroleum, LLC's First Set of Interrogatories to Plaintiff Dakota James Larsen.

While Plaintiff alleges that the current painful condition of his cervical and lumbar spine are due to the alleged subject incident, Defendants' position is that, more likely than not, Plaintiff's current pain is entirely or partially attributable to his prior injuries to, and pre-existing conditions of, these body parts. Therefore, a controversy exists regarding the causation of the current condition of Plaintiff's cervical and lumbar spine.

A physical examination of Plaintiff's lumbar and cervical spine will lead to relevant information as to the causal nature, necessity, and reasonableness of Plaintiff's medical treatment and charges as they relate to these body parts. Defendants cannot adequately defend against Plaintiff's claim for damages without the expert medical opinion of a suitably certified or licensed examiner.

C. PLAINTIFF HAS NOT SHOWN GOOD CAUSE FOR RECORDING HIS EXAMINATION AS REQUIRED BY NCRCP 35 AND, LIKEWISE, THERE IS GOOD CAUSE TO DENY HIM AN OBSERVER AT THE EXAMINATON

Plaintiff has conditioned his submission to a physical examination upon Defendants agreeing to allow the examination to be recorded but has offered no reason as to why he believes recording the exam is necessary. Plaintiff's omission is likely because there is no valid reason for the examination to be recorded. Plaintiff is 31 years of age, far past the age of majority, and can therefore protect his own interests at the examination as well as speak for himself if he becomes uncomfortable with any portion of the noninvasive examination. Plaintiff has alleged no infirmity, incapacitation, or incompetency that would necessitate recording the examination. There is no good cause for Plaintiff to record the examination.

Plaintiff has further conditioned his submission to a physical examination upon

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Defendants agreeing to allow Plaintiff to have an observer, hired by his attorney, present at the examination. For the reasons stated above regarding Plaintiff's lack of infirmity, incapacitation, or incompetency, there is no valid reason for Plaintiff to have an observer present at his examination. Again, Plaintiff is 31 years of age, far past the age of majority, and can therefore protect his own interests at the noninvasive examination. There is nothing an observer can observe that Plaintiff cannot observe for himself. Further, NRCP 35 explicitly forbids attorney and attorney representative observers. There is good cause to deny any request Plaintiff makes to have an observer present at the examination.

D. THE NRCP 35 PROVISIONS RELATING TO RECORDINGS AND OBSERVERS ARE CONTROLLING AND ARE NOT SUPERCEDED BY THOSE OF NRS 52.380

Plaintiff relies on NRS 52.380 to support his position that he is entitled to have an observer, hired by his attorney, present at his Rule 35 exam and that he is permitted to record the exam. However, NRS 52.380 is an inappropriate infringement by the Nevada Legislature upon the power of the Nevada Judiciary, and as NRS 52.380 violates the separation of powers clause of Nevada's Constitution, NRS 52.380 has no effect on Rule 35 exams.

The Nevada Supreme Court has stated that "[t]he separation of powers doctrine is the most important foundation for preserving and protecting liberty by preventing the accumulation of power in any one branch of government." *Berkson v. LePome*, 126 Nev. 492, 498, 245 P.3d 560, 564 (2010). To this end and pursuant to Article 3, Section 1(1) of the Nevada Constitution, governmental power of the State of Nevada is divided into three separate, coequal branches: legislative, executive, and judicial. The powers specific to each branch are set forth within Articles 4, 5, and 6. Each branch has "inherent power to administer its own affairs and perform its duties, so as not to become a subordinate branch of government." *Id*. at 499 (internal quotations omitted); See also, *Halverson v. Hardcastle*, 123 Nev. 245, 261, 163 P.3d 428, 439 (2007) and *Blackjack Bonding v. Las Vegas Mun. Ct.*, 116 Nev. 1213, 1218, 14 P.3d 1275, 1279 (2000).

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The Nevada Supreme Court has "been especially prudent to keep the powers of the judiciary separate from those of either the legislative or the executive branches." *Berkson*, at 498, 245 P.3d at 565 (citing, *e.g. Galloway v. Truesdell*, 83 Nev. 13, 19, 422 P.2d 237, 242 (1967)). "'This separation is fundamentally necessary because '[w]ere the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for the judge would be the legislator: Were it joined to the executive power the judge might behave with all the violence of an oppressor.'" *Id*. at 498-99, 245 P.3d at 565.

In *Berkson*, the Nevada Supreme Court held that a statute enacted by the Legislature which attempted to supersede a procedural rule regarding the course of litigation violated the separation of powers doctrine of the Nevada Constitution. *Id*. at 501, 245 P.3d at 566. To arrive at its holding, the *Berkson* Court stated:

> Regarding such discord between the legislative and judicial branches of government, it is well settled that the judiciary retains the authority to "'hear and determine justiciable controversies'" as a coequal power to the Legislature's broad authority to enact, amend, and repeal legislation. *Halverson*, 123 Nev. at 260, 163 P.3d at 439 (quoting *Galloway*, 83 Nev. at 20, 422 P.2d at 242). And as one commentator aptly explained this distinction, "[t]o declare what the law *is or has been* is judicial power; to declare what the law *shall be* is legislative." 1 Thomas M. Cooley, *Constitutional Limitations* 191 (8th ed. 1927).
>
> In keeping with this theory, "'[t]he judiciary … has the inherent power to govern its own procedures.'" *State v. Dist. Ct. [Marshall]*, 116 Nev. 953, 959, 11 P.3d 1209, 1212 (2000) (quoting *Whitlock v. Salmon*, 104 Nev. 24, 26, 742 P.2d 210, 211 (1988)); See also NRS 2.120(2) (legislative recognition that that this court regulates civil practice in order to promote "the speedy determination of litigation upon its merits"). The judiciary is entrusted with "'rule-making and other incidental powers reasonable and necessary to carry out the duties required for the administration of justice'" and "'to economically and fairly manage litigation.'" *Borger v. Dist. Ct.*, 120 Nev. 1021, 1029, 102 P.3d 600, 606 (2204) (quoting *Goldberg v. Dist. Ct.*, 93 Nev. 614, 616 572 P.2d 521, 522 (1977)); See also *Marshall*, 116 Nev. at 959, 11 P.3d at 1213 (stating that "'[t]here are regulating … powers of the Judicial Department that are within the province of the judicial function, i.e., … promulgating and prescribing any and all rules necessary or desirable to handle the business of the courts or their judicial functions'" (second and third alterations in original) (quoting *Galloway*, 83 Nev. at 23, 422 P.2d at 244)). **Thus, "'the legislature may not enact a procedural statute that conflicts with a preexisting procedural rule, without violating the doctrine of**

> **separation of powers, and … such a statute is of no effect.'"** *Marshall*, 116 Nev. at 959, 11 P.3d at 1213 (quoting *State v. Connery*, 99 Nev. 342, 345, 661 P.2d 1298, 1300 (1983)); See also *Secretary of State*, 120 Nev. at 465, 93 P.3d at 752 (explaining that the Legislature cannot restrict, substantially impair, or defeat the exercise of this court's constitutional powers); *Whitlock*, 104 Nev. at 26, 752 P.2d at 211 (concluding that a particular statute did not encroach on judicial authority because it did not abrogate a court rule); but see *Connery*, 99 Nev. at 345, 661 P.2d at 1300 (noting that any court-created procedural rules "may not conflict with the state constitution or abridge, enlarge or modify any substantive right." (internal quotations omitted)). In addition to the constitutionality mandated basis for keeping separate those inherent powers of the judiciary, leaving control of court rules and the administration of justice to the judiciary, and thereby placing the responsibility for the system's continued effectiveness with those most familiar with the latest issues and the experience and flexibility to more quickly bring into effect workable solutions and amendments, makes good sense. *Goldberg*, 93 Nev. at 617-18, 572 P.2d at 523.
> *Berkson*, at 499-500, 245 P.3d at 565 (emphasis added).

The *Berkson* Court's holding extended the long-standing rule that the Legislature cannot enact a procedural statute that conflicts with a pre-existing procedural rule. *Id*. at 500, 245 P.3d 566.

On December 31, 2018, the Nevada Supreme Court adopted revisions to NRCP 35 which specifically addressed audio recording and the presence of observers during Rule 35 exams. The changes were made effective on March 1, 2019. The current Rule 35 permits, for "good cause" shown, audio recording of an independent examination under the Rule. See, NRCP 35(a)(3). Further, any observer to such examination may not be the party's attorney or anyone employed by the party or the party's attorney. See, NRCP 35(a)(4).

The 2019 Advisory Committee Notes Subsection (a) provides that the rational for the changes to the observer and recording language as follows:

> "ADVISORY COMMITTEE NOTES 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 <u>is not sufficient to establish good cause</u> 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

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> confidential and proprietary testing materials that make it appropriate to condition the attendance of any observer on court permission, to be granted for good cause shown. **In either event, the observer <u>should not be the attorney or employed by the attorney</u> 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.

On or about May 29, 2019, after the recent Nevada Supreme Court rule changes to NRCP 35, the Nevada Legislature passed NRS 52.380. This statutory language allows attorney and attorney employee observers at a Rule 35 exam. In addition, the language does not expressly contain any good cause requirements for recording.

NRCP 35 is a procedural rule over which the Nevada Judiciary has exclusive power to regulate and control. The United States Supreme Court has long held that **"rules authorizing court order[s] for physical and mental examination of a party are rules of 'procedure[.]'"** *Sibbach v. Wilson & Co.*, 312 U.S. 1, 13-14 (1941). In contrast, "[s]ubstantive rules 'are directed at individuals and government and tell them to do or abstain from certain conduct on pain of some sanction. Substantive rules are based on legislative and judicial assessments of the society's wants and needs and they help to shape the world of primary activity outside the courtroom." *Sims v. Great American Life Insurance Company*, 469 F.3d 870, 882 (10th Cir. 2006) (quoting *Barron v. Ford Motor Co.*, 965 F.2d 195 (7th Cir. 1992)). The court in *Sims* went on to set forth a litmus test to distinguish between procedural and substantive rules, stating:

> In short, although the distinction between substance and procedures is not always clear, we can distinguish a substantive rule from a procedural rule by examining the language and the policy of the rule in question. **If these inquiries point to achieving fair, accurate and efficient resolution of disputes, the rule is procedural.** If however, the primary objective is directed to influencing conduct through legal incentives, the rule is substantive."
> *Sims,* at 883 (emphasis added).

NRCP 35 is not directed at influencing conduct through legal incentives but, instead, is a rule aimed at achieving fair, accurate, and efficient resolution of disputes through the discovery process and to allow a defendant the opportunity to have its own chosen medical professional

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evaluate a plaintiff. NRCP 35, is nothing more than the procedure required to be followed when a defendant requests that a plaintiff, who has put his physical condition at issue by wage of litigation, to present for a Rule 35 exam to allow that defendant the opportunity to have an examination performed by someone other than that plaintiff's treatment provider(s). Specifically, NRCP 35 is simply a procedural roadmap as to how the Rule 35 exam will be conducted.

While it is true the Nevada Legislature has the power and authority to create and modify substantive rights, NRS 52.380 did not create or modify any substantive rights, meaning causes of action that can be alleged or damages that may be sought. The statute instead expressly attempts to modify the process by which the Nevada Judiciary governs a specific part of personal injury litigation. It is expressly procedural and nothing within NRCP 35 conflicts with the Nevada Constitution, no does it abridge, enlarge, or modify any substantive right. See, *Connery*, 99 Nev. at 345, 661 P.2d at 1300 (noting that any court created procedural rules "may not conflict with the state constitution or abridge, enlarge or modify any substantive right" (internal quotations omitted)).

To the extent NRS 52.380 intends to create or reinforce a substantive right, it interferes "with procedure to a point of disruption" and attempts to abrogate the existing court rule concerning physical examinations of personal injury plaintiffs. See contra, *Whitlock v. Salmon*, 104 Nev. 24, 26 (1988) ("[a]lthough the statute does implicate trial procedure, it does not interfere with procedure to a point of disruption or attempted abrogation of an existing court rule …").

In fact, the legislative history of NRS 52.380 indicates the statute's express purpose was to enact a draft of Rule 35 the Nevada Supreme Court rejected. On March 18, 2019, AB 285 was introduced. The legislative minutes make clear AB 285 was expressly intended to implement changes to Rule 35. Supporters of NRS 52.380 noted what became 285 was rejected during the process that led to Nevada's amended rules of civil procedure:

> We voted 7 to 1 to make substantial changes, the changes that are set for or embodied in the bill before you, Assembly Bill 285. Unfortunately, when our

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> recommendation 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.
> See, Minutes of Assembly Committee on Judiciary, March 27, 2019, Page 4 statement of Graham Galloway.

The Nevada Supreme Court, which has promulgated the Nevada Rules of Civil Procedure, and the Nevada Legislature, which issues the Nevada Revised Statutes, serve separate and distinct purposes. NRCP 35 and NRS 52.380 cannot both govern the issue as they conflict. This issue of audio recording and the presence of observers during an independent medical examination are procedural in nature. Therefore, NRCP 35 governs.

E. PLAINTIFF MUST EXECUTE EMPLOYMENT RELEASES PURSUANT TO NRCP 26

Information relevant to a matter placed at issue in a civil action is discoverable unless privileged. NRCP 26(b)(1); *Schlatter v. Eighth Judicial Dist. Court In and For Clark County*, 1977, 561 P.2d 1342, 93 Nev. 189. The court will also examine whether the discovery requested is proportional to the needs of the case, the amount in controversy, the parties' relevant access to the information, and whether the burden or expense of the discovery requested outweighs its likely benefit. NRCP 26(b)(1). Further, a party must produce relevant documents that he has the legal right to obtain. *See Dep't of Taxation v. Eighth Judicial Dist. Court in & for County of Clark*, 136 Nev. Adv. Op. 42, 466 P.3d 1281 (2020).

Plaintiff has placed his future earning capacity at issue in this matter. Plaintiff alleges over $140 million in loss of future earning capacity as a result of alleged injuries from the subject incident. In support of his claim, he has produced his federal income tax returns, but has not produced any employment records. While past earnings may be indicative of future earning potential, they are not dispositive. Many factors bear on a person's future earning potential, including a person's past job performance.

Defendants seeks Plaintiff's entire employee file for each of his past employers from 2014 to present, including records relating to disciplinary history and performance reviews,

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because these records are relevant to Plaintiff's career trajectory, and thus, his future earning capacity. Defendants' request is not overly broad or unreasonable given Plaintiff's claim for over $140 million in lost future earnings.

Further, Defendants' request is not unduly burdensome. Because Plaintiff has placed his earning capacity at issue, legally he should be compelled to produce his employment records himself. *See Dep't of Taxation v. Eighth Judicial Dist. Court in & for County of Clark*, 136 Nev. Adv. Op. 42, 466 P.3d 1281 (2020) (a party must produce relevant evidence that he has the legal right to obtain). Nevertheless, Defendants seek only executed employment releases, taking on the expense and burden of this discovery themselves. Plaintiff need only sign a few documents, which is hardly any inconvenience at all. Therefore, Plaintiff should be required to sign employment releases as requested as Plaintiff claims no privilege for denying the request.

III. CONCLUSION

Plaintiff has placed the condition of his cervical and lumbar spine and his future earning capacity at issue, which has caused a controversy among the parties as to the causal nature, necessity, and reasonableness of Plaintiff's medical treatment and charges as they relate to these body parts as well as the causal nature of any future loss of income. Defendants therefore require a Rule 35 examination of Plaintiff to adequately evaluate and defend against Plaintiff's claim for damages. Defendants likewise require executed employment releases from Plaintiff to evaluate and defend against his claim for lost earning capacity. Accordingly, Plaintiff should be ordered to submit to a Rule 35 examination, be denied the opportunity to record the examination, denied the opportunity to have an observer present at the examination, and required to execute employment releases as requested.

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DATED this 5th day of August, 2021.

GRANT & ASSOCIATES

/s/ Sonya C. Watson

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CERTIFICATE OF SERVICE

I certify that I am an employee of **GRANT & ASSOCIATES** and that on this 5th day of August, 2021, I caused a true and correct copy of the foregoing **DEFENDANTS' MOTION TO COMPEL PHYSICAL EXAMINATION OF PLAINTIFF PURSUANT TO NRCP 35 AND EXECUTION OF EMPLOYMENT RELEASES ON AN ORDER SHORTENING TIME** to be served as follows:

___ By placing the same to be deposited for mailing in the United States Mail, in a sealed envelope upon which first class postage was prepaid in Las Vegas, Nevada; and/or

___ Pursuant to EDCR 7.26, to be sent via facsimile; and/or

_X_ Pursuant to EDCR 7.26, by transmitting via the Court's electronic filing services by the document(s) listed above to the Counsel set forth on the service list.

Sean K. Claggett, Esq.
William T. Sykes, Esq.
Brian Blankenship, Esq.
CLAGGETT & SYKES LAW FIRM
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Attorneys for Plaintiff

/s/ Denisse A. Girard-Rubio

An Employee of GRANT & ASSOCIATES

EXHIBIT “A”

Watson, Sonya C

From: Watson, Sonya C
Sent: Tuesday, April 20, 2021 5:10 PM
To: Brian Blankenship
Cc: Moises Garcia; Jory, Shannon; Girard-Rubio, Denisse A.; Smith, Diana; Grant, Annalisa N; Will Sykes
Subject: RE: Larsen v. Pro Petroleum

Hi Brian,

I am happy to discuss these issues with you. When are you available for a call?

Sincerely,

Sonya C. Watson

Sonya C. Watson
Associate Attorney, Grant & Associates
Staff Counsel
American International Group, Inc. (AIG)

7455 Arroyo Crossing Pkwy, Suite 220, Las Vegas, NV 89113
T (+1) 702.940.3534 | C (+1) 725.502.0269
sonya.watson@aig.com | www.aig.com

From: Brian Blankenship <brian@claggettlaw.com>
Sent: Tuesday, April 20, 2021 3:56 PM
To: Watson, Sonya C <Sonya.Watson@aig.com>
Cc: Moises Garcia <MGarcia@claggettlaw.com>; Jory, Shannon <Shannon.Jory@aig.com>; Girard-Rubio, Denisse A. <Denisse.GirardRubio@aig.com>; Smith, Diana <Diana.Smith@aig.com>; Grant, Annalisa N <Annalisa.Grant@aig.com>; Will Sykes <WSykes@claggettlaw.com>
Subject: [EXTERNAL] RE: Larsen v. Pro Petroleum

Good Afternoon Sonya:

Thank you for your email. Please allow this email correspondence to serve as a response to the issues addressed below and the Rule 34 Requests we recent served on your client(s). We can reserve the Rule 34 Requests until after the JCCR is entered. That's not a problem.

Employment Authorizations

As you are aware, we provided you with medical authorizations regarding our client, as required by Rule 16.1. As to the employment releases, we cannot agree to execute the employment authorizations you requested at this time. Before we agree to any releases, we must first discuss the scope and the justification for providing releases for all former employers to determine whether a protective order is necessary. We are claiming injuries that are obviously traumatic and, therefore, we do not yet see the relevance or proportionality of producing all prior employment records. Furthermore, as you discussed in a previous email, the JCCR is not yet entered in this matter. As such, we will not be releasing employment authorizations until discovery begins and we receive a formal request for the same thru a Rule 34 Request so that we can appropriately review the request and object, if necessary.

Rule 35 Exam and Deposition

As to the Rule 35 examination, these examinations are not a matter of right and court order is necessary before an examination can take place. Furthermore, we rarely stipulate to Rule 35 examinations and will never do so unless the party requesting the exam agrees to our written parameters, including an audio recording of the exam and an observer present. As it stands now, there is no agreement for a Rule 35 examination but we are happy to discuss this with you once the Parties enter into discovery. Regarding the deposition, we will discuss the client's availability in September and get back to you.

Thank you,

Brian

Brian Blankenship, Esq.
Trial Attorney
Claggett & Sykes Law Firm
4101 Meadows Lane, Suite 100
Las Vegas, NV 89107
Direct: 702-902-4014
Tel. 702-655-2346 / Fax 702-655-3763
brian@claggettlaw.com

From: Watson, Sonya C <Sonya.Watson@aig.com>
Sent: Friday, April 16, 2021 3:55 PM
To: Brian Blankenship <brian@claggettlaw.com>
Cc: Moises Garcia <MGarcia@claggettlaw.com>; Jory, Shannon <Shannon.Jory@aig.com>; Girard-Rubio, Denisse A. <Denisse.GirardRubio@aig.com>; Smith, Diana <Diana.Smith@aig.com>; Grant, Annalisa N <Annalisa.Grant@aig.com>
Subject: Larsen v. Pro Petroleum
Importance: High

Hi Brian,

We anticipate taking Plaintiffs deposition in September and would like to schedule the depo to coincide with the Rule 35 exam. Please provide your availability for September for Plaintiff's deposition.

Please advise regarding the status of the employment release per our discussion at the ECC. Please also be advised that we are going to need releases for each of the employers included in Plaintiff's 2015-2019 tax returns. The following is a list of Plaintiff's past employers as reported in his tax returns:

Diamond Ranch Academy, Inc.
Legend Venture, LLC
Resource Management, Inc.
Three Points Center, LLC
Summit Security
Disney Financial Services, LLC
Allegiant Air
WFS Express, Inc.
Airbus Americas, Inc.

Sincerely,

Sonya C. Watson

Sonya C. Watson
Associate Attorney, Grant & Associates
Staff Counsel
American International Group, Inc. (AIG)

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sonya.watson@aig.com | www.aig.com

EXHIBIT “B”

Watson, Sonya C

From: Watson, Sonya C
Sent: Wednesday, May 12, 2021 1:45 PM
To: Brian Blankenship; Girard-Rubio, Denisse A.; Moises Garcia; Sean Claggett; Will Sykes; kevin@swensonshelley.com; brian@swensonshelley.com; jake@swensonshelley.com
Cc: Smith, Diana; Jory, Shannon; Grant, Annalisa N
Subject: Larsen v. Pro Petroleum - Rule 35 Exam

Importance: High

Hi Brian,

If we can reach an agreement regarding the rule 35 exam, that would be preferable.

Please call me at 725-502-0269 or respond to this email to discuss any parameters you would propose.

Sincerely,

Sonya C. Watson

Sonya C. Watson
Associate Attorney, Grant & Associates
Staff Counsel
American International Group, Inc. (AIG)

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sonya.watson@aig.com | www.aig.com

EXHIBIT “C”

Sean K. Claggett, Esq.
Nevada Bar No. 008407
William T. Sykes, Esq.
Nevada Bar No. 009916
Brian Blankenship, Esq.
Nevada Bar No. 011522
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Kevin Swenson, Esq.
Utah Bar No. 5803
Brian Shelley, Esq.
Utah Bar No. 14084
Jake R. Spencer, Esq.
Utah Bar No. 15744
SWENSON & SHELLEY, PLLC
107 South 1470 East, Suite 201
St. George, UT 84790
Attorneys for Plaintiff

DISTRICT COURT

CLARK COUNTY, NEVADA

DAKOTA JAMES LARSEN, PLAINTIFF, v. PRO PETROLEUM, LLC, a Texas Limited Liability Company; RIP GRIFFIN TRUCK SERVICE CENTER, INC., a Texas Corporation; DAVID YAZZIE, JR., an individual; DOES I-X; ROE BUSINESS ENTITIES XI-XX DEFENDANTS.	Case No. A-20-826907-C Dept. No. XXII **PLAINTIFF'S FIRST SUPPLEMENT TO INITIAL NRCP 16.1 DISCLOSURES**

Plaintiff, DAKOTA JAMES LARSEN, by and through his attorneys of record, CLAGGETT & SYKES LAW FIRM, hereby submits Plaintiff's Supplement to Initial NRCP 16.1 Disclosures, as follows:

I.

Production of Documents

EX.	DESCRIPTION	BATES NO.
1.	Medical Records from Desert Radiology	LARSEN000001-000005
2.	Medical and Billing from Henderson Hospital	LARSEN000001-000093
3.	COR and Diagnostics from Henderson Hospital	LARSEN000094
4.	Medical and Billing Records from Las Vegas Neurosurgical Institute	LARSEN000095-LARSEN000154
5.	Medical and Billing from Max Health Center	LARSEN000155-000183
6.	Diagnostics from Max Health Center	LARSEN000184
7.	Medical and Billing from Nevada Neurosciences Institute at Sunrise Hospital and Medical Center	LARSEN000185-000215
8.	Billing from Shadow Emergency Physicians	LARSEN000216-000217
9.	Medical and Billing from Steinberg Diagnostics	LARSEN000218-000235
10.	Diagnostics from Steinberg Diagnostics Imaging	LARSEN000236
11.	NHP Report	LARSEN000237-000242
12.	Photographs of Vehicles	LARSEN000243-000269
13.	Garber – Report	LARSEN000270-000275
14.	Garber – Life Care Plan	LARSEN000276-000290
15.	Earnings Statement March 2020	LARSEN000291-000292
16.	Tax Returns 2015-2019	LARSEN000293-000444
17.	**Tax Return 2020**	**LARSEN000445-000481**
18.	**Driver's License – Larsen**	**LARSEN000482-000483**
19.	**Anthem Insurance Card - Larsen**	**LARSEN000484**
20.	**PRIOR – Dixie Regional Medical Center DOS 10/2/15 – 10/1/16**	**LARSEN000485-000551**
21.	**PRIOR – Coral Canyon Chiropractic DOS 11/4/16 - 4/19/17**	**LARSEN000552-000566**

Any and all documents provided by the Defendants and/or any other party to this litigation.

Plaintiff reserves the right to supplement his production of documents as discovery is ongoing.

IV.

LIST OF WITNESSES

DAKOTA JAMES LARSEN *is the Plaintiff in this matter and will testify to the allegations contained in the Complaint and any information relevant thereto; his recollection of the facts and circumstances surrounding the subject incident; his pre-and post-incident status, including medical conditions, injuries, treatments, outcomes, diagnoses, and prognoses; his employment and income history; the medical special damages he claims to have incurred as a result of the incident and any observations of the parties and witnesses.*

1.	DAKOTA JAMES LARSEN, Plaintiff c/o Claggett & Sykes Law Firm 4101 Meadows Lane, Suite 100 Las Vegas, Nevada 89107

The following witnesses are Defendants in this action, and it is anticipated that they will testify as to their knowledge of the allegations contained in the Complaint, the Answer and Affirmative Defenses; any and all observations, meetings, communications and interactions with the parties, officers, and witnesses; any notes, photos or memoranda created about the incident or matters alleged in the Complaint, Answer and Affirmative Defenses:

///

1.	PRO PETROLEUM, LLC, Defendant c/o GRANT & ASSOCIATES 7455 Arroyo Crossing Parkway, Suite 220 Las Vegas, Nevada 89113
2.	RIP GRIFFIN TRUCK SERVICE CENTER, INC, Defendant c/o GRANT & ASSOCIATES 7455 Arroyo Crossing Parkway, Suite 220 Las Vegas, Nevada 89113
3.	DAVID YAZZIE, JR., Defendant c/o GRANT & ASSOCIATES 7455 Arroyo Crossing Parkway, Suite 220 Las Vegas, Nevada 89113

The following witnesses are expected to testify regarding the facts and circumstances surrounding the subject incident, the allegations contained in the Complaint and any information relevant thereto and/or Plaintiff's condition, lifestyle and activities before and after the incident:

1.	Chandler P. Larsen, Wife 440 South 110 East 3204 Saint George UT 84790
2.	Jayson Johns - Friend 801-600-5796
3.	Pat Glennon - Father 702-250-0836

Officer Greg Luna will testify as to his education, professional training, professional experience, the facts and circumstances regarding the investigation of the incident, conversations with the parties and witnesses, observations of the parties, the securing or taking of evidence, the contemporaneous or subsequent creation of notes, written statements, memorandum, photographs, diagrams, measurements, calculations of speed estimates of involved vehicles, creation of and review of the traffic accident report, or other investigative reports, fact basis and legal basis for issuance of citations, declarations of arrest, or affidavits, and

any court appearances related to the incident, done in the ordinary course of the company's business. The Custodian of Records will testify to the records retention policies and practices of the department and to the authenticity of records created and kept by the department.

1.	Officer Luna Badge No. H6366 NRCP 30(b)(6) Witness(es) for c/o Nevada Highway Patrol 4615 W. Sunset Road Las Vegas, Nevada 89118

The following treating physicians are expected to testify and may give expert opinions as non-retained treating physicians, regarding their treatment of Plaintiff. Their testimony and opinions will consist of the necessity of the medical treatment rendered, diagnosis of the Plaintiff's injuries, prognosis, the reasonableness and necessity of future treatment to be rendered, the causation of the necessity for past and future medical treatment, their opinion as to past and future restrictions of activities, including work activities, caused by the incident. Their opinions shall include the authenticity of medical records, the cost of past medical care, future medical care, and whether those medical costs fall within ordinary and customary charges in the community, for similar medical care and treatment. Their testimony may include opinions as to whether the Plaintiff has a diminished work life expectancy as a result of the incident. They will testify in accordance with their medical chart, including records contained therein that were prepared by other healthcare providers, and any documents reviewed by the treating physician outside of his or his medical chart in the course of providing treatment or to defend that treatment. Such documents may include,

but are not limited to, records from other healthcare providers, expert opinions, reports and testimony from experts retained by any party, and any other documents that may be relevant to the treating physician's treatment or defense of his or her treatment of the Plaintiff:

1.	Morris Schaner, DO NRCP 30(b)(6) witness and/or Custodian of Records for Desert Radiology 7200 W. Cathedral Rock #230 Las Vegas, Nevada 89128 702-759-8600
2.	Eric Moldestad, MD NRCP 30(b)(6) witness and/or Custodian of Records for Desert Radiology 7200 W. Cathedral Rock #230 Las Vegas, Nevada 89128 702-759-8600
3.	Jessica L. Leduc, DO NRCP 30(b)(6) witness and/or Custodian of Records for Henderson Hospital 1050 W. Galleria Drive Las Vegas, Nevada 89011
4.	Jason Garber, M.D. FACS NRCP 30(b)(6) witness and/or Custodian of Records for Las Vegas Neurosurgical Institute 3012 S. Durango Dr. Las Vegas, Nevada 89117 702-835-0088
5.	Jordan Baker, DC NRCP 30(b)(6) witness and/or Custodian of Records for Max Health Center 8475 S. Eastern Ave, Suite 101 Las Vegas, Nevada 89123 702-898-3311
6.	Adam Murie, DC NRCP 30(b)(6) witness and/or Custodian of Records for Max Health Center 8475 S. Eastern Ave, Suite 101 Las Vegas, Nevada 89123 702-898-3311
7.	Kelly E. Murie DC NRCP 30(b)(6) witness and/or Custodian of Records for Max Health Center

	8475 S. Eastern Ave, Suite 101 Las Vegas, Nevada 89123 702-898-3311
8.	Kevin Xie, MD NRCP 30(b)(6) witness and/or Custodian of Records for Nevada Neurosciences Center 3006 S. Maryland Pkwy Las Vegas, Nevada 89109 702-961-7310
9.	NRCP 30(b)(6) witness and/or Custodian of Records for Shadow Emergency Physicians P.O. Box 13917 Philadelphia, PA 19101
10.	Michael Stevenson MD NRCP 30(b)(6) witness and/or Custodian of Records for Steinberg Diagnostic Medical Imaging Centers 3012 S. Durango Drive Las Vegas, NV 89117 702-732-6000
11.	Sarah Kym, MD NRCP 30(b)(6) witness and/or Custodian of Records for Steinberg Diagnostic Medical Imaging Centers 3012 S. Durango Drive Las Vegas, NV 89117 702-732-6000
12.	Henry Chang, MD NRCP 30(b)(6) witness and/or Custodian of Records for Steinberg Diagnostic Medical Imaging Centers 3012 S. Durango Drive Las Vegas, NV 89117 702-732-6000
13.	**Joshua A. Carr, DC and/or** **NRCP 30(b)(6) witness and/or** **Custodian of Records for** **Coral Canyon Chiropractic (PRIOR)** **83 S. 2600 W. Ste 102** **Hurricane, UT 84737**
14.	**Benjamin Fox, MD and/or** **NRCP 30(b)(6) witness and/or** **Custodian of Records for** **Dixie Regional Medical Center** **1380 East Medical Center Drive (PRIOR)** **St. GeorgeUT 84790**
15.	**Danica Christensen, NP and/or** **NRCP 30(b)(6) witness and/or** **Custodian of Records for**

	Dixie Regional Medical Center (PRIOR) **1380 East Medical Center Drive** **St. GeorgeUT 84790**
16.	**Kristina Winters NP and/or** **NRCP 30(b)(6) witness and/or** **Custodian of Records for** **Dixie Regional Medical Center (PRIOR)** **1380 East Medical Center Drive** **St. GeorgeUT 84790**
17.	**Joseph Ferguson, PA-C and/or** **NRCP 30(b)(6) witness and/or** **Custodian of Records for** **Dixie Regional Medical Center (PRIOR)** **1380 East Medical Center Drive** **St. GeorgeUT 84790**
18.	**John Wheiler, NP and/or** **NRCP 30(b)(6) witness and/or** **Custodian of Records for** **Dixie Regional Medical Center (PRIOR)** **1380 East Medical Center Drive** **St. GeorgeUT 84790**
19.	**Micharl R. Wolfenbarger, RN** **NRCP 30(b)(6) witness and/or** **Custodian of Records for Henderson Hospital** **1050 W. Galleria Drive** **Las Vegas, Nevada 89011**
20.	**Jillian Nelson RN** **NRCP 30(b)(6) witness and/or** **Custodian of Records for Henderson Hospital** **1050 W. Galleria Drive** **Las Vegas, Nevada 89011**

Any and all witnesses listed by Defendants and/or any other party to this litigation.

Plaintiff reserves the right to supplement his list of witnesses as discovery is ongoing.

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III.

DAMAGES

	Item of Damages		**Amount**
1.	Desert Radiology Solutions	6/21/19	$197.00
2.	Henderson Hospital	6/21/19	$14,620.00
3.	Las Vegas Neurosurgical Institute	7/16/19-8/20/19	$1,100.00
4.	Max Health	6/25/19-7/31/19	$3,957.00
5.	Shadow Emergency Physicians LLC	6/21/19	$1,888.00
6.	Steinberg Diagnostic Medical Imaging	8/23/19-8/28/19	$1,821.00
7.	Nevada Neuroscience Institute	7/3/20-7/28/20	$572.00
	Total Past Medical Specials to Date:		**$24,155.00**
	Future Medical Expenses		$2,000,000.00+
	Past Wage Loss		$2,160.00
	Loss of Earning Capacity		$1,440,000.00+
	Past Pain, Suffering, Mental Anguish, Loss of Enjoyment of Life		To Be Determined
	Future Pain, Suffering, Mental Anguish, Loss of Enjoyment of Life		To Be Determined
	Punitive Damages		To Be Determined
	Special Damages		To Be Determined

Dated this 1st day of June 2021.

CLAGGETT & SYKES LAW FIRM

/s/ Brian Blankenship

Brian Blankenship, Esq.
Nevada Bar No. 011522
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of June 2021, I caused to be served a true and correct copy of the foregoing **PLAINTIFF'S FIRST SUPPLEMENT TO INITIAL NRCP 16.1 DISCLOSURES** on the following person(s) by the following method(s) pursuant to NRCP 5(b) and NEFCR 9:

VIA E-SERVICE ONLY:
ANNALISA N. GRANT, ESQ.
Nevada Bar No. 11807
SONYA C. WATSON, ESQ.
Nevada Bar No. 13195
GRANT & ASSOCIATES
7455 Arroyo Crossing Parkway, Suite 220
Las Vegas, Nevada 89113
Tel.: (702) 940-3529
Fax: (855) 429-3413
Attorneys for Defendants

/s/ Moises Garcia

An Employee of CLAGGETT & SYKES LAW FIRM

CLAGGETT & SYKES LAW FIRM

EXHIBIT “D”

ANS

Sean K. Claggett, Esq.
Nevada Bar No. 008407
William T. Sykes, Esq.
Nevada Bar No. 009916
Brian Blankenship, Esq.
Nevada Bar No. 011522
CLAGGETT & SYKES LAW FIRM
4101 Meadows Lane, Suite 100
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(702) 655-2346 – Telephone
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sclaggett@claggettlaw.com
wsykes@claggettlaw.com
brian@claggettlaw.com

Kevin Swenson, Esq.
Utah Bar No. 5803
Brian Shelley, Esq.
Utah Bar No. 14084
Jake R. Spencer, Esq.
Utah Bar No. 15744
SWENSON & SHELLEY, PLLC
107 South 1470 East, Suite 201
St. George, UT 84790
(435) 220-3392 – Telephone
(855) 450-8435 – Facsimile
kevin@swensonshelley.com
brian@swensonshelley.com
jake@SwensonShelley.com
Attorneys for Plaintiff

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DISTRICT COURT

CLARK COUNTY, NEVADA

DAKOTA JAMES LARSEN; Plaintiff, v. PRO PETROLEUM, LLC, a Texas Limited Liability Company; RIP GRIFFIN TRUCK SERVICE CENTER, INC., a Texas Corporation; DAVID YAZZIE, JR., an individual; DOES I-X; ROE BUSINESS ENTITIES XI-XX, Defendants.	Case No. A-20-826907-C Dept. No. XXII **PLAINTIFF'S RESPONSES TO DEFENDANT PRO PETROLEUM, LLC'S FIRST SET OF INTERROGATORIES TO PLAINTIFF DAKOTA JAMES LARSEN**

CLAGGETT & SYKES LAW FIRM

COMES NOW, Plaintiff, DAKOTA LARSEN, by and through his counsel of record, CLAGGETT & SYKES LAW FIRM, and provides Plaintiff's Answers to Defendant Pro Petroleum First Set of Interrogatories to Plaintiff Dakota James Larsen as follows:

INTERROGATORY NO. 1:

State your full name and all names by which you have ever been known, your date of birth, birthplace, telephone number, social security number, your present address, and each of your addresses within the past five (5) years, as well the corresponding dates of such residences.

ANSWER TO INTERROGATORY NO. 1:

Objection, this Interrogatory is vague, ambiguous, overly broad, and unduly burdensome. This Interrogatory seeks information that is not relevant and proportional to the needs of the case. This Interrogatory is not properly

limited in time or scope. It seeks confidential and private information. Subject to and without waiving the preceding objections, Plaintiff responds as follows:

Dakota James Larsen

Date of Birth: 12/07/1989

Telephone Number: (435) 229-8884

Address: 10663 Ridgeview Drive, Mobile AL 36608

Last four of SSN: 2412

INTERROGATORY NO. 2:

Please describe, in Plaintiff's own words, how you allege the June 20, 2019 accident occurred, as described in your Complaint ("Subject Incident"), including details about from where you were coming and to where you were going at the time of the Subject Incident; and describe in detail the exact route that you followed up to the point of injury.

ANSWER TO INTERROGATORY NO. 2:

Objection, this Interrogatory is compound, vague, ambiguous, overly broad, and unduly burdensome. This Interrogatory seeks information that is not relevant and proportional to the needs of the case. Subject to and without waiving the preceding objections, Plaintiff responds as follows:

I was leaving work, which was located at Nellis Air Force base, late in the evening. I was traveling west on E Craig Road towards the I-15. I was headed to my home in Henderson, NV. I came to a stop at a red light at the intersection of E Craig Road and Pecos Road. While I was stopped at the light, I was rear ended by the tanker truck.

INTERROGATORY NO. 3:

Please describe your activities immediately following the Subject Incident, up to and including the time at which you sought medical treatment.

ANSWER TO INTERROGATORY NO. 3:

Objection, this Interrogatory is vague, ambiguous, overly broad, and unduly burdensome. Specifically, it is unclear what "activities" this Interrogatory is referring to. This Interrogatory seeks information that is not relevant and proportional to the needs of the case. This Interrogatory is not properly limited in time or scope. Subject to and without waiving the preceding objections, Plaintiff responds as follows:

After being hit by the tanker truck, I pulled over to the right side of the road and remained in my vehicle. After a minute or so, the driver of the tanker truck approached my vehicle and asked if I was ok. He asked me to pull my vehicle forward so he could get his tanker truck out of the road. I moved my vehicle forward to make more room for his tanker truck. After moving my vehicle, I got out of my truck and called 911 to report the collision. After speaking with dispatch, I waited outside my vehicle until the police arrived. Once the officer finished his report, I proceeded to drive home.

The next morning, I woke up and immediately went to the Henderson Hospital emergency room where I was examined for injuries.

INTERROGATORY NO. 4:

Please describe in detail your communications or other contacts with anyone at the scene after the Subject Incident occurred.

ANSWER TO INTERROGATORY NO. 4:

Objection, this Interrogatory is vague, ambiguous, overly broad, and unduly burdensome. This Interrogatory seeks information that is not relevant and proportional to the needs of the case. This Interrogatory is not properly limited in time or scope. Subject to and without waiving the preceding objections, Plaintiff responds as follows:

Immediately following the accident, the only people I spoke with were the driver of the tanker truck and the police officer who responded to the scene of the wreck.

INTERROGATORY NO. 5:

If any party or witness known to you or to any of your representatives claims to have heard any statement made by the Defendant(s) herein and/or the Plaintiff herein, or any agent of Defendant(s) and/or Plaintiff herein, regarding the Subject Incident, please describe the substance of said statement and give the name, address, and telephone number of the party or witness making such statement.

ANSWER TO INTERROGATORY NO. 5:

Objection, this Interrogatory is vague, ambiguous, overly broad, and unduly burdensome. Specifically, it is unclear what information this Interrogatory seeks when it asks about "any statement…regarding the Subject Incident…." This Interrogatory seeks information that is not relevant and proportional to the needs of the case. Subject to and without waiving the preceding objections, Plaintiff responds as follows:

Please see Plaintiff's NRCP 16.1 disclosures, and all supplements thereto, which contains a list of witnesses with potentially pertinent information.

DAKOTA JAMES LARSEN is the Plaintiff in this matter and will testify to the allegations contained in the Complaint and any information relevant thereto; his recollection of the facts and circumstances surrounding the subject incident; his pre-and post-incident status, including medical conditions, injuries, treatments, outcomes, diagnoses, and prognoses; his employment and income history; the medical special damages he claims to have incurred as a result of the incident and any observations of the parties and witnesses.

1.	DAKOTA JAMES LARSEN, Plaintiff c/o Claggett & Sykes Law Firm 4101 Meadows Lane, Suite 100 Las Vegas, Nevada 89107

The following witnesses are Defendants in this action, and it is anticipated that they will testify as to their knowledge of the allegations contained in the Complaint, the Answer and Affirmative Defenses; any and all observations, meetings, communications and interactions with the parties, officers, and witnesses; any notes, photos or memoranda created about the incident or matters alleged in the Complaint, Answer and Affirmative Defenses:

1.	PRO PETROLEUM, LLC, Defendant c/o GRANT & ASSOCIATES 7455 Arroyo Crossing Parkway, Suite 220

	Las Vegas, Nevada 89113
2.	RIP GRIFFIN TRUCK SERVICE CENTER, INC, Defendant c/o GRANT & ASSOCIATES 7455 Arroyo Crossing Parkway, Suite 220 Las Vegas, Nevada 89113
3.	DAVID YAZZIE, JR., Defendant c/o GRANT & ASSOCIATES 7455 Arroyo Crossing Parkway, Suite 220 Las Vegas, Nevada 89113

The following witnesses are expected to testify regarding the facts and circumstances surrounding the subject incident, the allegations contained in the Complaint and any information relevant thereto and/or Plaintiff's condition, lifestyle and activities before and after the incident:

1.	Chandler P. Larsen, Wife 440 South 110 East 3204 Saint George UT 84790
2.	Jayson Johns - Friend 801-600-5796
3.	Pat Glennon - Father 702-250-0836

Officer Greg Luna will testify as to his education, professional training,

professional experience, the facts and circumstances regarding the investigation of the incident, conversations with the parties and witnesses, observations of the parties, the securing or taking of evidence, the contemporaneous or subsequent creation of notes, written statements, memorandum, photographs, diagrams, measurements, calculations of speed estimates of involved vehicles, creation of and review of the traffic accident report, or other investigative reports, fact basis and legal basis for issuance of citations, declarations of arrest, or affidavits, and any court appearances related to the incident, done in the ordinary course of the company's business. The Custodian of Records will testify to the records retention policies and practices of the department and to the authenticity of records created and kept by the department.

1.	Officer Luna Badge No. H6366 NRCP 30(b)(6) Witness(es) for c/o Nevada Highway Patrol 4615 W. Sunset Road Las Vegas, Nevada 89118

The following treating physicians are expected to testify and may give expert opinions as non-retained treating physicians, regarding their treatment of Plaintiff. Their testimony and opinions will consist of the necessity of the medical treatment rendered, diagnosis of the Plaintiff's injuries, prognosis, the reasonableness and necessity of future treatment to be rendered, the causation of the necessity for past and future medical treatment, their opinion as to past and

future restrictions of activities, including work activities, caused by the incident. Their opinions shall include the authenticity of medical records, the cost of past medical care, future medical care, and whether those medical costs fall within ordinary and customary charges in the community, for similar medical care and treatment. Their testimony may include opinions as to whether the Plaintiff has a diminished work life expectancy as a result of the incident. They will testify in accordance with their medical chart, including records contained therein that were prepared by other healthcare providers, and any documents reviewed by the treating physician outside of his or his medical chart in the course of providing treatment or to defend that treatment. Such documents may include, but are not limited to, records from other healthcare providers, expert opinions, reports and testimony from experts retained by any party, and any other documents that may be relevant to the treating physician's treatment or defense of his or her treatment of the Plaintiff:

1.	Morris Schaner, DO NRCP 30(b)(6) witness and/or Custodian of Records for Desert Radiology 7200 W. Cathedral Rock #230 Las Vegas, Nevada 89128 702-759-8600
2.	Eric Moldestad, MD NRCP 30(b)(6) witness and/or Custodian of Records for Desert Radiology

	7200 W. Cathedral Rock #230 Las Vegas, Nevada 89128 702-759-8600
3.	Jessica L. Leduc, DO NRCP 30(b)(6) witness and/or Custodian of Records for Henderson Hospital 1050 W. Galleria Drive Las Vegas, Nevada 89011
4.	Jason Garber, M.D. FACS NRCP 30(b)(6) witness and/or Custodian of Records for Las Vegas Neurosurgical Institute 3012 S. Durango Dr. Las Vegas, Nevada 89117 702-835-0088
5.	Jordan Baker, DC NRCP 30(b)(6) witness and/or Custodian of Records for Max Health Center 8475 S. Eastern Ave, Suite 101 Las Vegas, Nevada 89123 702-898-3311
6.	Adam Murie, DC NRCP 30(b)(6) witness and/or Custodian of Records for Max Health Center

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	8475 S. Eastern Ave, Suite 101 Las Vegas, Nevada 89123 702-898-3311
7.	Kelly E. Murie DC NRCP 30(b)(6) witness and/or Custodian of Records for Max Health Center 8475 S. Eastern Ave, Suite 101 Las Vegas, Nevada 89123 702-898-3311
8.	Kevin Xie, MD NRCP 30(b)(6) witness and/or Custodian of Records for Nevada Neurosciences Center 3006 S. Maryland Pkwy Las Vegas, Nevada 89109 702-961-7310
9.	NRCP 30(b)(6) witness and/or Custodian of Records for Shadow Emergency Physicians P.O. Box 13917 Philadelphia, PA 19101
10.	Michael Stevenson MD NRCP 30(b)(6) witness and/or Custodian of Records for Steinberg Diagnostic Medical Imaging Centers 3012 S. Durango Drive

	Las Vegas, NV 89117 702-732-6000
11.	Sarah Kym, MD NRCP 30(b)(6) witness and/or Custodian of Records for Steinberg Diagnostic Medical Imaging Centers 3012 S. Durango Drive Las Vegas, NV 89117 702-732-6000
12.	Henry Chang, MD NRCP 30(b)(6) witness and/or Custodian of Records for Steinberg Diagnostic Medical Imaging Centers 3012 S. Durango Drive Las Vegas, NV 89117 702-732-6000

Discovery is ongoing and Plaintiff reserves the right to supplement this response as additional information becomes known.

INTERROGATORY NO. 6:

If you claim to have suffered personal injuries resulting from the Subject Incident, please list all such injuries, ailments, and/or symptoms experienced by you.

ANSWER TO INTERROGATORY NO. 6:

Objection, this Interrogatory is vague, ambiguous, overly broad, and

unduly burdensome. This Interrogatory seeks information that is not relevant and proportional to the needs of the case. This Interrogatory calls for medical or expert opinions. Subject to and without waiving the preceding objections, Plaintiff responds as follows:

As a result of the Subject Incident, I suffered the following injuries: (1) headaches; (2) ringing in left ear; (3) neck spasms/pain; (4) back spasms/pain; (5) pain and numbness in left leg.

Please see medical records previously produced as LARSEN000001 – LARSEN000236; LARSEN000270 – LARSEN000290.

Discovery is ongoing and Plaintiff reserves the right to supplement this response as additional information becomes known.

INTERROGATORY NO. 7:

Please list and explain all injuries, ailments, and/or symptoms similar to those enumerated in your Answer to Interrogatory No. 6 that you suffered, sustained, and/or experienced at any time prior to the Subject Incident and identify any medical providers seen for such injuries.

ANSWER TO INTERROGATORY NO. 7:

Objection, this Interrogatory is compound, vague, ambiguous, overly broad, and unduly burdensome. Specifically, it is unclear what this Interrogatory means by "injuries, ailments, and/or symptoms similar to those enumerated in your Answer to Interrogatory No. 6…." This Interrogatory seeks information that is not relevant and proportional to the needs of the case. This Interrogatory is not properly limited in time or scope. This Interrogatory calls for medical or expert

opinions. Subject to and without waiving the preceding objections, Plaintiff responds as follows:

I had an L5-S1 microdiscectomy on May 12, 2016, which was re-done on October 1, 2016. The surgeries were performed by Dr. Benjamin D. Fox at Dixie Regional Medical Center. I then received chiropractic care at Coral Canyon Chiropractic from approximately November 2016 to April 2017. Prior to my surgeries, I received injections.

Please see prior medical records produced as LARSEN000485 – LARSEN000566.

Discovery is ongoing and Plaintiff reserves the right to supplement this response as additional information becomes known.

INTERROGATORY NO. 8:

Please identify by name, address, telephone number, dates of treatment, and treatment procedure each health care provider and health care facility from which you received treatment or consultation for personal injuries you allege to have sustained in the Subject Incident.

ANSWER TO INTERROGATORY NO. 8:

Objection, this Interrogatory is vague, ambiguous, overly broad, and unduly burdensome. This Interrogatory seeks information that is not relevant and proportional to the needs of the case. Subject to and without waiving the preceding objections, Plaintiff responds as follows:

Please see Plaintiff's NRCP 16.1 disclosures, and all supplements thereto, which contains a list of Plaintiff's medical providers and medical records.

Please see medical records previously produced as LARSEN000001 – LARSEN000236; LARSEN000270 – LARSEN000290.

1.	Morris Schaner, DO NRCP 30(b)(6) witness and/or Custodian of Records for Desert Radiology 7200 W. Cathedral Rock #230 Las Vegas, Nevada 89128 702-759-8600
2.	Eric Moldestad, MD NRCP 30(b)(6) witness and/or Custodian of Records for Desert Radiology 7200 W. Cathedral Rock #230 Las Vegas, Nevada 89128 702-759-8600
3.	Jessica L. Leduc, DO NRCP 30(b)(6) witness and/or Custodian of Records for Henderson Hospital 1050 W. Galleria Drive Las Vegas, Nevada 89011
4.	Jason Garber, M.D. FACS NRCP 30(b)(6) witness and/or Custodian of Records for Las Vegas Neurosurgical Institute 3012 S. Durango Dr. Las Vegas, Nevada 89117 702-835-0088
5.	Jordan Baker, DC NRCP 30(b)(6) witness and/or Custodian of Records for Max Health Center

	8475 S. Eastern Ave, Suite 101 Las Vegas, Nevada 89123 702-898-3311
6.	Adam Murie, DC NRCP 30(b)(6) witness and/or Custodian of Records for Max Health Center 8475 S. Eastern Ave, Suite 101 Las Vegas, Nevada 89123 702-898-3311
7.	Kelly E. Murie DC NRCP 30(b)(6) witness and/or Custodian of Records for Max Health Center 8475 S. Eastern Ave, Suite 101 Las Vegas, Nevada 89123 702-898-3311
8.	Kevin Xie, MD NRCP 30(b)(6) witness and/or Custodian of Records for Nevada Neurosciences Center 3006 S. Maryland Pkwy Las Vegas, Nevada 89109 702-961-7310
9.	NRCP 30(b)(6) witness and/or Custodian of Records for Shadow Emergency Physicians P.O. Box 13917 Philadelphia, PA 19101
10.	Michael Stevenson MD NRCP 30(b)(6) witness and/or Custodian of Records for Steinberg Diagnostic Medical Imaging Centers 3012 S. Durango Drive

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	Las Vegas, NV 89117 702-732-6000
11.	Sarah Kym, MD NRCP 30(b)(6) witness and/or Custodian of Records for Steinberg Diagnostic Medical Imaging Centers 3012 S. Durango Drive Las Vegas, NV 89117 702-732-6000
12.	Henry Chang, MD NRCP 30(b)(6) witness and/or Custodian of Records for Steinberg Diagnostic Medical Imaging Centers 3012 S. Durango Drive Las Vegas, NV 89117 702-732-6000

Discovery is ongoing and Plaintiff reserves the right to supplement this response as additional information becomes known.

INTERROGATORY NO. 9:

Please identify by name, address, telephone number, dates of treatment, and treatment procedure of any and all health care providers and health care facilities with whom you have treated and/or consulted from June 20, 2014 *(5 years prior to the Subject Incident)* to present.

ANSWER TO INTERROGATORY NO. 9:

Objection, this Interrogatory is vague, ambiguous, overly broad, and unduly burdensome. This Interrogatory seeks information that is not relevant and proportional to the needs of the case. Further, this Interrogatory is not

properly limited in time or scope. Subject to and without waiving the preceding objections, Plaintiff responds as follows:

Please see Plaintiff's responses to Interrogatory No. 7 and Interrogatory No. 8.

Please see prior medical records produced as LARSEN000485 – LARSEN000566.

Dr. Kevin Xie; 5115 S. Durango Dr. Unit 100, Las Vegas, NV 89148.

Discovery is ongoing and Plaintiff reserves the right to supplement this response as additional information becomes known.

INTERROGATORY NO. 10:

Please identify by name, address, telephone number, dates of treatment, and treatment procedure any and all health care providers and/or health care facilities with whom you have treated and/or consulted from the date of the Subject Incident to the present time, other than those listed in your Answer to Interrogatory No. 9, set forth above.

ANSWER TO INTERROGATORY NO. 10:

Objection, this Interrogatory is compound, vague, ambiguous, overly broad, and unduly burdensome. This Interrogatory seeks information that is not relevant and proportional to the needs of the case. This Interrogatory is not properly limited in time or scope. Subject to and without waiving the preceding objections, Plaintiff responds as follows:

Please see Plaintiff's NRCP 16.1 disclosures, and all supplements thereto, which contains a list of Plaintiff's medical providers and medical records.

Please see medical records previously produced as LARSEN000001 – LARSEN000236; LARSEN000270 – LARSEN000290.

Please see Plaintiff's responses to Interrogatory No. 8 and Interrogatory No. 9.

Discovery is ongoing and Plaintiff reserves the right to supplement this response as additional information becomes known.

INTERROGATORY NO. 11:

Please state whether, as of the present date, you continue to experience any physical pains/discomforts which you attribute to your involvement in the Subject Incident.

ANSWER TO INTERROGATORY NO. 11:

Objection, this Interrogatory is compound, vague, ambiguous, overly broad, and unduly burdensome. Specifically, it is unclear what is meant by "physical pains/discomforts" as that phrase is open to multiple interpretations. This Interrogatory seeks information that is not relevant and proportional to the needs of the case. This Interrogatory is not properly limited in time or scope. This Interrogatory calls for medical or expert opinions. Subject to and without waiving the preceding objections, Plaintiff responds as follows:

Since the collision, I continue to have pain in my left leg and lower back.

INTERROGATORY NO. 12:

If you are claiming any permanent injuries, ailments, pains or disabilities as a result of the Subject Incident, please describe them fully, stating their nature and extent, and identify the person(s) who told you that injury was permanent.

ANSWER TO INTERROGATORY NO. 12:

Objection, this Interrogatory is compound, vague, ambiguous, overly broad, and unduly burdensome. Specifically, it is unclear what is meant by "permanent injuries, ailments, pains or disabilities…." This Interrogatory seeks information that is not relevant and proportional to the needs of the case. This Interrogatory is not properly limited in time or scope. This Interrogatory calls for medical or expert opinions. Subject to and without waiving the preceding objections, Plaintiff responds as follows:

Please see Dr. Jason E. Garber Report previously produced as LARSEN000270 – LARSEN000275.

Please see Dr. Jason E. Garber Life Care Plan previously produced as LARSEN000270 – LARSEN000290.

Please see medical records previously produced as LARSEN000001 – LARSEN000236.

Discovery is ongoing and Plaintiff reserves the right to supplement this response as additional information becomes known.

INTERROGATORY NO. 13:

Please state the name and address of any health care provider or other person who has advised you that you will require future treatment as a result of the Subject Incident and state the purpose of such future treatment.

ANSWER TO INTERROGATORY NO. 13:

Objection, this Interrogatory is compound, vague, ambiguous, overly broad, and unduly burdensome. This Interrogatory seeks information that is not

relevant and proportional to the needs of the case. This Interrogatory is not properly limited in time or scope. This Interrogatory calls for medical or expert opinions. Subject to and without waiving the preceding objections, Plaintiff responds as follows:

Jason Garber, MD

LVNI Center for Brain & Spine Institute

3012 S. Durango Dr.

Las Vegas, NV 89117

Please see Dr. Jason E. Garber Report previously produced as LARSEN000270 – LARSEN000275.

Please see Dr. Jason E. Garber Life Care Plan previously produced as LARSEN000270 – LARSEN000290.

Please see medical records previously produced as LARSEN000001 – LARSEN000236.

Discovery is ongoing and Plaintiff reserves the right to supplement this response as additional information becomes known.

INTERROGATORY NO. 14:

If you have ever made a claim(s), whether or not a lawsuit was filed, against any person or organization for damages or injuries to your person or personal property, please state with specificity the circumstances which gave rise to such claim(s), including, where applicable, the case number and court where the proceeding took place.

///

ANSWER TO INTERROGATORY NO. 14:

Objection, this Interrogatory is compound, vague, ambiguous, overly broad, and unduly burdensome. Specifically, it is unclear what is meant by "claim(s)" as that phrase is open to multiple interpretations. This Interrogatory seeks information that is not relevant and proportional to the needs of the case. This Interrogatory is not properly limited in time or scope. Subject to and without waiving the preceding objections, Plaintiff responds as follows:

Aside from this present case, I was previously involved in an automobile collision on or about November 2, 2016. My claim against the at-fault driver was resolved pre-litigation.

INTERROGATORY NO. 15:

If you have ever made application or claim for benefits under any medical pay coverage of a policy of insurance or under any public or private benefits plan (including Social Security or worker's compensation benefits), please state the particulars of your claim, including policy and application numbers, name of company, dates of claims, and payments, if any.

ANSWER TO INTERROGATORY NO. 15:

Objection, this Interrogatory is compound, vague, ambiguous, overly broad, and unduly burdensome. Specifically, it is unclear what is meant by "claim" as that phrase is open to multiple interpretations. This Interrogatory seeks information that is not relevant and proportional to the needs of the case. This Interrogatory is not properly limited in time or scope. Subject to and without waiving the preceding objections, Plaintiff responds as follows:

None at this time.

INTERROGATORY NO. 16:

Please describe with specificity the nature and subject matter of any lawsuits, regardless of jurisdiction, filed on your behalf or filed against you, including case title and number, current status, and disposition, if any.

ANSWER TO INTERROGATORY NO. 16:

Objection, this Interrogatory is compound, vague, ambiguous, overly broad, and unduly burdensome. This Interrogatory seeks information that is not relevant and proportional to the needs of the case. This Interrogatory is not properly limited in time or scope. Subject to and without waiving the preceding objections, Plaintiff responds as follows:

Aside from this present case, I have not been involved in any other lawsuit.

INTERROGATORY NO. 17:

If you have ever been convicted, released from prison, and/or released from parole, for any felony and/or crime of moral turpitude within the last ten (10) years, state the date(s) of the conviction(s), the offense(s) involved, and the date(s) you were released from prison and/or the date(s) you were released from parole.

ANSWER TO INTERROGATORY NO. 17:

Objection, this Interrogatory is compound, vague, ambiguous, overly broad, and unduly burdensome. Specifically, it is unclear what is meant by "crime of moral turpitude" as that phrase is open to multiple interpretations. This Interrogatory seeks information that is not relevant and proportional to the needs of the case. This Interrogatory is not properly limited in time or scope. Subject to

and without waiving the preceding objections, Plaintiff responds as follows:

None.

INTERROGATORY NO. 18:

Please identify by name, address, telephone number, subject matter and expected testimony any and all percipient witnesses, other than experts, relative to the Subject Incident known to you, your attorney, agent, representative, or investigator employed by you or your attorney, or anyone acting on your behalf.

ANSWER TO INTERROGATORY NO. 18:

Objection, this Interrogatory is compound, vague, ambiguous, overly broad, and unduly burdensome. This Interrogatory seeks information that is not relevant and proportional to the needs of the case. This Interrogatory is not properly limited in time or scope. Subject to and without waiving the preceding objections, Plaintiff responds as follows:

Please see Plaintiff's NRCP 16.1 disclosures, and all supplements thereto, which contains a list of witnesses with potentially pertinent information.

Please see Plaintiff's response to Interrogatory No. 5.

Discovery is ongoing and Plaintiff reserves the right to supplement this response as additional information becomes known.

INTERROGATORY NO. 19:

Please identify by name, address and telephone number all persons and/or entities having any knowledge of injuries or disabilities allegedly sustained by you in the Subject Incident, exclusive of physicians or hospital personnel. As to such person(s), if any:

a. State the general facts of which each said person has knowledge;

b. Identify every document you know of which contains any of these facts or confirms the identified person's knowledge of these facts.

ANSWER TO INTERROGATORY NO. 19:

Objection, this Interrogatory is compound, vague, ambiguous, overly broad, and unduly burdensome. It contains several discrete subparts. Specifically, it is unclear what is meant by "persons and/or entities having any knowledge of injuries or disabilities allegedly sustained by you…." This Interrogatory seeks information that is not relevant and proportional to the needs of the case. This Interrogatory is not properly limited in time or scope. Subject to and without waiving the preceding objections, Plaintiff responds as follows:

Please see Plaintiff's NRCP 16.1 disclosures, and all supplements thereto, which contains a list of witnesses with potentially pertinent information.

Please see Plaintiff's response to Interrogatory No. 5.

The following witnesses are expected to testify regarding the facts and circumstances surrounding the subject incident, the allegations contained in the Complaint and any information relevant thereto and/or Plaintiff's condition, lifestyle, and activities before and after the incident:

1. Chandler Larsen (spouse)
   10663 Ridgeview Drive
   Mobile, AL 36608
   (435) 229-0809
2. Patrick Glennon (Father)

1034 Blue Lantern Drive

Henderson, NV 89015

(702) 250-0836

3. Jayson Johns (Friend)

4554 M MT Ellen Street

Eagle Mountain, UT 84005

(801) 600-5796

INTERROGATORY NO. 20:

If you are in the possession or control of, or know of the existence of, any maps, pictures, photographs, plats, drawings, diagrams, measurements, or other written description of the accident and the scene or area of the Subject Incident, or photographs of your alleged personal injuries, please state the nature and subject matter of each such item and in whose custody it presently reposes with specificity sufficient that the named items might be identified in a request for production

ANSWER TO INTERROGATORY NO. 20:

Objection, this Interrogatory is compound, vague, ambiguous, overly broad, and unduly burdensome. This Interrogatory seeks information that is not relevant and proportional to the needs of the case. This Interrogatory is not properly limited in time or scope. Subject to and without waiving the preceding objections, Plaintiff responds as follows:

Please see Plaintiff's NRCP 16.1 disclosures, and all supplements thereto, which contains a list of responsive materials.

Please see medical records previously produced as LARSEN000001 – LARSEN000236; LARSEN000270 – LARSEN000290.

Please see NHP Report previously produced as LARSEN237 – LARSEN242.

Please see photographs previously produced as LARSEN000243 – LARSEN269.

Discovery is ongoing and Plaintiff reserves the right to supplement this response as additional information becomes known.

INTERROGATORY NO. 21:

If you are claiming a loss of income or wages from your business or occupation as a result of the Subject Incident, please describe with specificity any such loss, including the cause, the dates, the amount of income lost, and the method which was utilized in computing the claimed wage loss.

ANSWER TO INTERROGATORY NO. 21:

Objection, this Interrogatory is compound, vague, ambiguous, overly broad, and unduly burdensome. This Interrogatory seeks information that is not relevant and proportional to the needs of the case. This Interrogatory is not properly limited in time or scope. This Interrogatory calls for expert opinions. Subject to and without waiving the preceding objections, Plaintiff responds as follows:

Please see Plaintiff's NRCP 16.1 disclosures, and all supplements thereto, which contains Plaintiff's computation of damages and a list of responsive materials.

Please see Tax Returns previously produced as LARSEN000293 – LARSEN000444; LARSEN000445 – LARSEN000481.

Please see Earnings Statement previously produced as LARSEN000291 – LARSEN000292.

Plaintiff will further update this response on or before the expert disclosure date and close of discovery.

Discovery is ongoing and Plaintiff reserves the right to supplement this response as additional information becomes known.

INTERROGATORY NO. 22:

For the five (5) year period leading up to and including the date of the Subject Incident, please identify each of your employers, including the employers' names, addresses, and telephone numbers, your dates of employment, a description of the work performed, number of hours worked per week, average weekly wages, as well as the name and contact information of your immediate supervisor.

ANSWER TO INTERROGATORY NO. 22:

Objection, this Interrogatory is compound, vague, ambiguous, overly broad, and unduly burdensome. This Interrogatory seeks information that is not relevant and proportional to the needs of the case. This Interrogatory is not properly limited in time or scope. Subject to and without waiving the preceding objections, Plaintiff responds as follows:

Draken International: Located at Nellis Airforce Base. I was working there at the time of the subject incident in a paid internship position. I was working approximately 30 hours per week and making about $18 an hour.

Legend Solar: They are currently out of business. I worked there from 2015 to 2017. I was a Solar Analyst whose job consisted of designing solar systems for residential properties. I worked 40 hours a week at a rate of $17 an hour as a salary employee. I no longer have the supervisor's information since the company went out of business.

Fort Berthold Services: 4th Street SW, Killdeer ND 58640. (701)927-0119. I worked there from 2014 to 2015 as a water transfer technician whose daily activities consisted of pumping, filtering, and providing water for semi-trucks to be taken to various locations for fracking. I worked 84 hours a week at a rate of $18 an hour. I no longer have the supervisor's information.

Diamond Ranch Academy: 433 S. Diamond Ranch Pkwy, Hurricane UT 84737. (435)635-4297. I worked there from 2012 to 2014 as a youth development counselor. My job was to supervise and hold students accountable as they attended their daily activities. I worked 40 hours a week at a rate of $15 an hour. I no longer have the supervisor's information.

INTERROGATORY NO. 23:

If employed since the Subject Incident, please identify each of your employers, including the employers' names, addresses, and telephone numbers, your dates of employment, a description of the work performed, number of hours

worked per week, average weekly wages, as well as the name and contact information of your immediate supervisor.

ANSWER TO INTERROGATORY NO. 23:

Objection, this Interrogatory is compound, vague, ambiguous, overly broad, and unduly burdensome. This Interrogatory seeks information that is not relevant and proportional to the needs of the case. This Interrogatory is not properly limited in time or scope. Subject to and without waiving the preceding objections, Plaintiff responds as follows:

Airbus: 320 Airbus Way, Mobile AL 36615. (251)439-4000. I have worked there from September 2019 to present. I am an aircraft assembler/mechanic. My day involves following work orders to assemble and troubleshoot the airplane. I work 40 hours a week at a rate of $25 an hour. My supervisor is Gerald Brandon (251)278-4496.

INTERROGATORY NO. 24:

If you have been unable to work at full capacity since the Subject Incident, please describe the capacity in which you have worked, how your employer has accommodated your injuries, and the physician who recommended you for light duty work, and the date of said recommendation.

ANSWER TO INTERROGATORY NO. 24:

Objection, this Interrogatory is compound, vague, ambiguous, overly broad, and unduly burdensome. Specifically, it is unclear what is meant by "work at full capacity" as that phrase is open to multiple interpretations. This Interrogatory seeks information that is not relevant and proportional to the needs

of the case. This Interrogatory is not properly limited in time or scope. This Interrogatory calls for expert opinions. Subject to and without waiving the preceding objections, Plaintiff responds as follows:

I have not been placed on light duty at this time.

INTERROGATORY NO. 25:

Please enumerate in detail all out-of-pocket expenses (*other than medical bills*) which you contend to have incurred solely by reason of the Subject Incident

ANSWER TO INTERROGATORY NO. 25:

Objection, this Interrogatory is compound, vague, ambiguous, overly broad, and unduly burdensome. This Interrogatory seeks information that is not relevant and proportional to the needs of the case. This Interrogatory is not properly limited in time or scope. Subject to and without waiving the preceding objections, Plaintiff responds as follows:

Please see Plaintiff's NRCP 16.1 disclosures, and all supplements thereto, which includes Plaintiff's computation of damages.

Discovery is ongoing and Plaintiff reserves the right to supplement this response as additional information becomes known.

INTERROGATORY NO. 26:

Please identify the date(s) and location(s) of any accident, incident, or occurrence, either prior or subsequent to the Subject Incident, wherein you sustained any injuries whatsoever which required or resulted in any medical care, consultation, examination, or treatment and further state:

a. The nature of the injuries and their symptom;

b. The names and addresses of each doctor and each hospital from which you received such consultation, examination, or treatment;

c. Whether any such injuries left residual symptoms which had not disappeared at the time of the Subject Incident; and,

d. The nature of such residual symptoms, if any.

ANSWER TO INTERROGATORY NO. 26:

Objection, this Interrogatory is compound, vague, ambiguous, overly broad, and unduly burdensome. It includes several discrete subparts. Specifically, it is unclear what is meant by "accident, incident, or occurrence…wherein you sustained any injuries whatsoever…" as this phrase is open to multiple interpretations. This Interrogatory seeks information that is not relevant and proportional to the needs of the case. This Interrogatory is not properly limited in time or scope. This Interrogatory calls for expert opinions. Subject to and without waiving the preceding objections, Plaintiff responds as follows:

I was in a car crash in or about November 2016 on Buena Vista Blvd in Washington, UT 84780.

a. I suffered from a sore and stiff neck.

b. Dr. Carr; 83 S. 2600 W. #103, Hurricane UT 84737

c. I had no residual injuries or symptoms which had not disappeared by the time of subject incident.

INTERROGATORY NO. 27:

Please identify with specificity any and all medications, pills, alcoholic and/or intoxicating beverages which you ingested within twenty-four (24) hours

prior to the Subject Incident, and state the type and quantity of each such medication and/or alcoholic beverage consumed, and whether the medication was prescribed by a physician and, if so, provide the name and address of the prescribing physician.

ANSWER TO INTERROGATORY NO. 27

Objection, this Interrogatory is compound, vague, ambiguous, overly broad, and unduly burdensome. This Interrogatory seeks information that is not relevant and proportional to the needs of the case. This Interrogatory is not properly limited in time or scope. This Interrogatory calls for expert opinions. Subject to and without waiving the preceding objections, Plaintiff responds as follows:

Within 24 hours preceding the Subject Incident, I had taken 1500 mg of Keppra and 200 mg of Lamotrigine. Both of these medications were prescribed by my doctor: Dr. Kevin Xie; 5115 S. Durango Dr. Unit 100, Las Vegas, NV 89148.

INTERROGATORY NO. 28:

Were there any hobbies, sports, games, cultural, familial, vocational, or other interests that you were prevented or restricted from participating in because of your alleged injuries from the Subject Incident? If so, please identify the activity or interest and describe how often you participated in this activity before the accident, as well as how your participation was limited because of your alleged injuries.

///

ANSWER TO INTERROGATORY NO. 28:

Objection, this Interrogatory is compound, vague, ambiguous, overly broad, and unduly burdensome. This Interrogatory seeks information that is not relevant and proportional to the needs of the case. This Interrogatory is not properly limited in time or scope. This Interrogatory calls for expert opinions. Subject to and without waiving the preceding objections, Plaintiff responds as follows:

Gym – several times a week, Running – occasionally, hunting – couple weeks out of the years, back packing – couple weeks out of the year, sports – couple weeks out of the year, playing with kids – daily, intercourse – weekly.

I am in pain throughout the day and physical activities cause me discomfort, even sitting and standing. So, due to this incident, I have been greatly impacted when it comes to physical activities.

Discovery is ongoing and Plaintiff reserves the right to supplement this response as additional information becomes known.

INTERROGATORY NO. 29:

Please provide the name of any and all cellular service provider(s) as well as the telephone numbers (including area code) that you had access to use at the time of the Subject Incident.

ANSWER TO INTERROGATORY NO. 29:

Objection, this Interrogatory is compound, vague, ambiguous, overly broad, and unduly burdensome. This Interrogatory seeks information that is not relevant and proportional to the needs of the case. This Interrogatory is not

properly limited in time or scope. Subject to and without waiving the preceding objections, Plaintiff responds as follows:

Sprint; (435) 229-8884.

INTERROGATORY NO. 30:

If you are a member of or belong to any social networking website(s) (i.e., Facebook, Twitter, Google+, Instagram, YouTube, Tumblr, LinkedIn, Pinterest, Snapchat, WhatsApp, Flickr, TikTok, Reddit, Vine, 4chan, Imgur, Whisper, Blogspot, Vimeo, Classmates.com, MySpace, etc.) or have ever maintained or utilized a blog or website related to your individual activities, please provide all such website information, including but not limited to the name of the networking website, URL, all screen names registered and/or utilized, the date you became a member of or established each website, the last time you logged on to each website, and the last time you updated each website.

ANSWER TO INTERROGATORY NO. 30:

Objection, this Interrogatory is compound, vague, ambiguous, overly broad, and unduly burdensome. This Interrogatory seeks information that is not relevant and proportional to the needs of the case. This Interrogatory is not properly limited in time or scope.

INTERROGATORY NO. 31:

If you are a member of, belong to, maintain, or utilize any social networking or blog website(s), please provide a list of all information deleted within the 30 days immediately preceding the date of service of these Interrogatories. Such deleted information includes, but is not limited to any

screen names; screen profiles; news feeds; profile pictures and/or information; contacts or suggested contacts, i.e. friends or followers; messages sent and/or received via the website or related messaging application/platform; contents of any inbox; status/mood updates; activity streams; tweets; blurbs; comments; notifications; notes; personal information, i.e., information including but not limited to activities, hobbies, interests, entertainment, education, or work; your medical, mental, or emotional condition both before and after the time of the subject incident; photographs; videos; music; groups; networks; memberships; and/or advertising.

ANSWER TO INTERROGATORY NO. 31:

Objection, this Interrogatory is compound, vague, ambiguous, overly broad, and unduly burdensome. This Interrogatory seeks information that is not relevant and proportional to the needs of the case. This Interrogatory is not properly limited in time or scope. Subject to and without waiving the preceding objections, Plaintiff responds as follows:

None.

INTERROGATORY NO. 32:

In a manner sufficient to serve a subpoena, please provide the name, address and phone number for the company that employed you to work in the oil fields for 8 months.

ANSWER TO INTERROGATORY NO. 32:

Objection, this Interrogatory is compound, vague, ambiguous, overly broad, and unduly burdensome. This Interrogatory seeks information that is not

relevant and proportional to the needs of the case. This Interrogatory is not properly limited in time or scope. Subject to and without waiving the preceding objections, Plaintiff responds as follows:

Fort Berthold Services

4th Street SW

Killdeer, ND 58640

(701) 927-0119

INTERROGATORY NO. 33:

In response to Interrogatory No. 32, set forth above, please identify your supervisor's name and the reason for leaving that job.

ANSWER TO INTERROGATORY NO. 33:

Objection, this Interrogatory is compound, vague, ambiguous, overly broad, and unduly burdensome. This Interrogatory contains multiple lines of inquiry and thus constitutes two (2) separate Interrogatories within NRCP 33's limit on the number of Interrogatories available to a party. This Interrogatory seeks information that is not relevant and proportional to the needs of the case. This Interrogatory is not properly limited in time or scope. Subject to and without waiving the preceding objections, Plaintiff responds as follows:

My supervisor's name was Aaron, I do not recall his last name. I quit working at Fort Berthold Services because I found a new job in my hometown.

INTERROGATORY NO. 34:

In the five (5) years preceding the alleged incident, if you sustained an injury as a result of a seizure, please identify:

a. The date of each injury sustained;

b. The body part(s) injured;

c. Whether you sought treatment for each injury;

d. Each medical professional's name, address and telephone number who treated you for the injured body part(s);

e. The date each injured body part was medically resolved; and

f. If not resolved, the symptoms you currently experience in relation to each injured body part.

ANSWER TO INTERROGATORY NO. 34:

Objection, this Interrogatory is compound, vague, ambiguous, overly broad, and unduly burdensome. It contains several discrete subparts. This Interrogatory seeks information that is not relevant and proportional to the needs of the case. This Interrogatory is not properly limited in time or scope. This Interrogatory calls for expert opinions. Subject to and without waiving the preceding objections, Plaintiff responds as follows:

I did not sustain any injuries due to a seizure within 5 years prior to the Subject Incident.

INTERROGATORY NO. 35:

Please describe in detail the circumstances surrounding your pre-existing back complaints which resulted in microdiscectomies in May 2016 and October 2016, including but not limited to the date your prior back issue first arose and what, in your opinion, caused it.

///

ANSWER TO INTERROGATORY NO. 35:

Objection, this Interrogatory is compound, vague, ambiguous, overly broad, and unduly burdensome. Specifically, it is unclear what is meant by "the circumstances surrounding your pre-existing back complaints…." This Interrogatory seeks information that is not relevant and proportional to the needs of the case. This Interrogatory is not properly limited in time or scope. This Interrogatory calls for expert opinions. Subject to and without waiving the preceding objections, Plaintiff responds as follows:

I began experiencing back pain in mid-2015. I do not know what caused it.

INTERROGATORY NO. 36:

If any of the injuries which you claim were caused by the Subject Incident are an aggravation of a pre-existing condition, please state the nature of the aggravation claimed. If the injuries complained are not an aggravation of a pre-existing condition, please state, "None of the injuries which I claim were caused by the Subject Incident are an aggravation of a pre-existing condition."

ANSWER TO INTERROGATORY NO. 36:

Objection, this Interrogatory is compound, vague, ambiguous, overly broad, and unduly burdensome. This Interrogatory seeks information that is not relevant and proportional to the needs of the case. This Interrogatory is not properly limited in time or scope. This Interrogatory calls for expert opinions. Subject to and without waiving the preceding objections, Plaintiff responds as follows:

Please see Dr. Jason E. Garber Report previously produced as LARSEN000270 – LARSEN000275.

Please see Dr. Jason E. Garber Life Care Plan previously produced as LARSEN000270 – LARSEN000290.

Please see medical records previously produced as LARSEN000001 – LARSEN000236.

Please see prior medical records produced as LARSEN000485 – LARSEN000566.

Discovery is ongoing and Plaintiff reserves the right to supplement this response as additional information becomes known.

INTERROGATORY NO. 37:

Were there any hobbies, sports, games, cultural, familial, vocational, or other interests that you were prevented or restricted from participating in because of your alleged injuries from the Subject Incident? If so, please identify the activity or interest and describe how often you participated in this activity before the accident, as well as how your participation was limited because of your alleged injuries.

ANSWER TO INTERROGATORY NO. 37:

Objection, this Interrogatory is compound, vague, ambiguous, overly broad, and unduly burdensome. This Interrogatory seeks information that is not relevant and proportional to the needs of the case. This Interrogatory is not properly limited in time or scope. This Interrogatory calls for expert opinions.

Subject to and without waiving the preceding objections, Plaintiff responds as follows:

Please see Plaintiff's response to Interrogatory No. 28.

DATED this 2nd day of June 2021.

CLAGGETT & SYKES LAW FIRM

/s/ *William T. Sykes*
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 2nd day of June 2021 I caused to be served a true and correct copy of the **PLAINTIFF'S RESPONSES TO DEFENDANT PRO PETROLEUM, LLC'S FIRST SET OF INTERROGATORIES TO PLAINTIFF DAKOTA JAMES LARSEN** on the following person(s) by the following method(s) pursuant to NRCP 5(b) and NEFCR 9:

Via E-Service
Annalisa N. Grant, Esq.
Nevada Bar No. 11807
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GRANT & ASSOCIATES
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Attorneys for Defendants

/s/ Gabrielle Carvalho
An Employee of CLAGGETT & SYKES LAW FIRM

CLAGGETT & SYKES LAW FIRM

VERIFICATION

(Per NRS 53.045)

I am a named Plaintiff in the subject litigation. I have read the foregoing **PLAINTIFF'S RESPONSES TO DEFENDANT PRO PETROLEUM, LLC'S FIRST SET OF INTERROGATORIES TO PLAINTIFF DAKOTA JAMES LARSEN** and know the contents thereof; that the same is true of my knowledge, except as to those matters stated on information and belief, and as to such matters I believe them to be true.

DATE this 2 day of June 2021.

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

Dakota James Larsen

CLAGGETT & SYKES LAW FIRM

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DISTRICT COURT
CLARK COUNTY, NEVADA

DAKOTA JAMES LARSEN; Plaintiff, v. PRO PETROLEUM, LLC, a Texas Limited Liability Company; RIP GRIFFIN TRUCK SERVICE CENTER, INC., a Texas Corporation; DAVID YAZZIE, JR., an individual; DOES I-X; ROE BUSINESS ENTITIES XI-XX Defendants.	Case No. A-20-826907-C Dept. No. XXII **PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION TO COMPEL PHYSICAL EXAMINATION OF PLAINTIFF PURSUANT TO NRCP 35 AND EXECUTION OF EMPLOYMENT RELEASES ON AN ORDER SHORTENING TIME**

DECLARATION OF BRIAN BLANKENSHIP, ESQ. IN SUPPORT OF ORDER SHORTENING TIME

I, Brian Blankenship, Esq., declare under penalty of perjury as follows:

1. I am an attorney at Claggett & Sykes Law Firm, counsel for Plaintiffs in the above-named action. I have personal knowledge of, and am competent to testify to, the facts contained in this declaration, except on those matters stated upon information and belief, and as to those matters, I believe them to be true.

2. I make this declaration in support of Plaintiff's Opposition to Defendant's Motion to Compel Physical Examination of Plaintiff Pursuant to NRCP 35 and Execution of Employment Releases on an Order Shortening Time.

3. On June 4, 2021, Defendant filed a Motion to Compel a Rule 35 Examination. Defendants filed the Motion before engaging in a Rule 2.34 conference as is required before filing any discovery motion.

4. On June 9, 2021, Plaintiff sent Defendants a letter informing them of their obligation to hold a 2.34 conference before filing a Motion. *See* June 9, 2021, Correspondence to Defendant's Counsel attached hereto as **Ex. 1.**

5. In the same correspondence, Plaintiff's counsel requested that Defendants withdraw the Motion so the Parties could meet and confer pursuant to Rule 2.34 in an attempt to come to a resolution.

6. On June 10, 2021, in response, Defendants' counsel telephoned Plaintiff's counsel. During the telephone conference, Defendants' counsel refused to schedule a Rule 2.34 conference or withdraw the Motion.

7. For the next several days, Plaintiff's counsel spent time drafting an opposition in response to Defendants' improper Motion and timely filed the same.

8. Before the hearing, as expected, the Court removed Defendants' Motion for failure to hold a Rule 2.34. conference.

9. Following the removal, Defendants' counsel reached out to Plaintiff's counsel to schedule a Rule 2.34 conference to actually discuss pending issues.

10. On July 29, 2021, the Parties participated in a Rule 2.34 conference to discuss a Rule 35 examination, employment authorizations, and Defendants' refusal to respond to other discovery requests.[1]

11. During the telephone conference, the Parties agreed to all of Plaintiff's parameters for a Rule 35 examination except for the recording and observation of the examination.

12. Moreover, Plaintiff's counsel informed Defendants' counsel that Plaintiff, Dakota Larsen ("Dakota"), intended to schedule surgery within the next 60 days given the pain he has in his lower back due to the vehicle crash at issue.

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[1] Given this Motion was filed on order shortening time, Plaintiff does not have the opportunity to fully brief Defendants' deficient discovery responses and will do so in a subsequent motion. Plaintiff apologizes to the Court for the inability to resolve all issues in one Motion.

13. Given the time constraints, Plaintiff's counsel informed Defendants they would make every opportunity to allow for Defendants to hold a Rule 35 examination before Dakota's surgery should they agree to compromise on the issues pending in this Motion.

14. When the telephone conference ended, Defendants' counsel agreed to discuss the recording and observation of the Rule 35 examination with her "manager" and the physician who will be giving the examination and report back to Plaintiff.

15. Rather than further discuss the issue, Defendants filed the instant Motion.

16. On August 10, 2021, Plaintiff sent Defendants' counsel a letter providing formal notice that Dakota has surgery scheduled for September 13, 2021. *See* Corres. to Defendants, dated August 10, 2021, attached hereto as **Ex. 2.**

17. In the letter, Plaintiff informed Defendants' counsel that it would remove one of its parameters in order to facilitate a Rule 35 examination before Dakota's surgery. *Id.*

18. Specifically, Plaintiff offered to either record or observe the Rule 35 examination, but not demand that both occur at the examination. *Id.*

19. Furthermore, Plaintiff provided Defendant with dates to hold an examination (September 6th thru September 10th) in Las Vegas. *Id.*

20. To allow for even more flexibility, Plaintiff proposed holding a Rule 35 examination at or near Dakota's home in Mobile, Alabama any time during the remaining month of August or first week of September. *Id.*

21. Defendants ultimately refused to accept Plaintiff's proposal.

22. As to employment authorizations, Plaintiff offered to provide all employment information related to Dakota's wage loss, future earning capacity, and loss of earning capacity.

23. Plaintiff refused to provide Dakota's entire file citing privacy concerns. Plaintiff further contended that employee file information unrelated to wage loss or future earning capacity is neither relevant nor proportional to the needs of this case, a vehicle case where Plaintiff suffered injuries as a result of Defendants' negligent conduct.

24. In response, Defendants refused to limit the scope of the employment authorizations in any way.

25. This declaration in support of Plaintiff's opposition is made in good faith and not for the purpose of delay.

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

DATED this 11th day of August, 2021.

/s/ Brian Blankenship

BRIAN BLANKENSHIP, ESQ.

INTRODUCTION

On June 20, 2019, Defendant David Yazzie, Jr., driving a Kenworth T680 tractor trailer within the course and scope of his employment with Defendants Pro Petroleum, LLC, and/or Rip Griffin Truck Service Center, Inc., failed to come to a stop and instead crashed into the rear of Plaintiff Dakota James' 2001 Ford Ranger. As a result of the collision, Dakota was injured.

As recycled from the last Motion to Compel that the Court ultimately withdrew for Defendants' failure to hold a Rule 2.34 examination or include a Rule 2.34 affidavit in support of the Motion, Defendants again move to compel a Rule 35 examination without allowing Plaintiff to record or observe the examination. Defendants still maintain that Rule 35 of the Nevada Rules of Civil Procedure is controlling and there is no good cause for Plaintiff to record the examination or have an observer present during the same. Moreover, Defendants refused to limit the scope of employment authorizations to the information relevant to this case and, therefore, Defendants want *carte blanche* access to Plaintiff's employment files going back 5 years before the Incident. The Court should deny the Motion for the following reasons:

1. NRS 52.380 was introduced after NRCP 35 in an attempt to add transparency and protection during a NRCP 35 examination. It is not controversial for an examination conducted by an examiner hired exclusively by Defendant to be observed and audio recorded for transparency purposes and to help prevent gamesmanship or falsehoods. Plaintiff disagrees that NRS 52.380 is a mere "procedural statute." These

types of invasive, intensive, probing examinations implicate a plaintiff's substantive rights to protection of their private, innermost thoughts, from exploitation, gamesmanship, distortion, or abuse. A Rule 35 examination is the only proceeding that counsel is aware of where a plaintiff must appear at a location demanded by the defendant, answer detailed questions about private information by an examiner hired by the defendant, all without the presence of counsel or presence of a friendly witness or independent witness. To claim that NRS 52.380 is merely "procedural" distorts the purpose of the statute and the substantive rights that the statute seeks to protect.

2. NRS 52.380 controls here, not NRCP 35, and the statute is clear on its face that an observer may attend an examination and shall not participate or disrupt the examination in any way, but may audio record the entire examination. The legislative history of NRS 52.380 confirms that the Nevada Legislature explicitly enacted the statute to create substantive rights for litigants faced with compulsory NRCP 35 examinations. Minutes of Assembly Committee on Judiciary, March 27, 2019, attached hereto as **Exhibit 3** at 3-8. Accordingly, because NRS 52.380 provides substantive rights, it supersedes NRCP 35.

3. Alternatively, even if NRCP 35 applied, Plaintiff has good cause to have an observer present and to record the examination. First, within NRCP 35(a)(4)(A), a party is entitled to have an observer present during a physical examination, such as the one proposed by Defendants.

Defendants have not demonstrated that good cause exists for Plaintiff to not have an observer present. Further, given Plaintiff's injuries, unfamiliarity with the examination and examiner means it is in his best interest to have an audio recording to ensure Plaintiff's interests are not abused.

4. In Nevada, Rule 26(b)(1) permits parties to obtain discovery regarding any nonprivileged matter that is relevant to any party's claims or defenses and proportional to the needs of the case. *See* Nev. R. Civ. P. 26(c); *Venetian Casino Resort, LLC v. Eighth Judicial Dist. Ct.*, 136 Nev. Adv. Op. 26, 467 P.3d 1 (Nev. App., May 14, 2020). Should the information not be both relevant ***and*** proportional, the Court has the authority to "make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense. […]." Nev. R. Civ. P. 26(c). Thus, the Court has discretion to issue a protective order or prevent the disclosure of information where the information is neither relevant to a claim or defense in the case or the discovery is intended to harass or oppress the subject of the discovery.

5. Here, the Court should deny Defendants' request to compel execution of nine (9) authorizations for employee files dating back to 2014 because the information sought is neither relevant nor proportional to the needs of this case. Defendants seek Plaintiff's employee files to rebut claims of loss of future earning capacity. First, Plaintiff does not seek $140 Million in loss of future earning capacity. The number is actually $1,440,000.00.

Second, Defendants seek one authorization from an employer dating back 14 years ago and another authorization for one of Dakota's wife's employers. Third, Plaintiff already produced Dakota's tax returns from 2015 thru 2020 and, therefore, Defendants already possess the wage information necessary to rebut Plaintiff's loss of future earnings claim. Finally, Defendants failed to analyze proportionality or the *Venetian Casino Resort, LLC* factors to determine whether the information sought is proportional to a claim or defense in this case. This failure alone justified denial of Defendants' Motion. Based on the above and the arguments below, the Court should deny Defendants' Motion in its entirety.

STATEMENT OF FACTS

Defendants Pro Petroleum and/or Rip Griffin hired and/or contracted Defendant as a truck driver. On June 20, 2019, Defendant drove his Kenworth T680 tractor trailer west on Craig Road. Upon information and belief, Defendant drove his tractor trailer while hauling petroleum, a potentially hazardous material. A 2001 Ford Ranger also traveling west on Craig Road was stopped at the intersection of Craig Road and Interstate 15. Defendant, while distracted, following too closely, and driving approximately 35 mph, rear-ended the 2001 Ford Ranger. The driver of the Ford Ranger rear-ended by Defendant was Dakota. As a result of the collision, Dakota suffered injuries to his cervical and lumbar spine.

LEGAL ARGUMENT

I. NRS 52.380 ALLOWS BOTH AN OBSERVER AND AUDIO RECORDINGS.

NRS 52.380 provides, in pertinent part:

> 1. An observer may attend an examination but shall not participate or disrupt 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.

NRS 52. 380.

The statute is clear on its face that an observer may attend an examination and shall not participate or disrupt the examination in any way, but may audio record the entire examination. Essentially, the observer is allowed to sit in the examination room and record the exam with no bearing on how the exam shall proceed. It is clear that an observer is allowed in order to protect the patient from any type of abuse or prejudice that could develop during an examination conducted by an examiner hired by an adverse party.

A. NRS 52.380 CONTROLS, NOT NRCP 35.

In their original Motion, Defendants completely ignore the existence of NRS 52.380. *See* Defs.' Mot., 2-4. However, in their third Motion, Defendants add an entirely new section arguing that NRS 52.380 is unconstitutional procedural statute that conflicts with NRCP 35. Defs.' Mot., 9-14. Although

Defendants assert that NRS 52.380 is procedural is nature, the plain language of the statute reveals that it, in fact, creates a substantive right to have an observer at one's Rule 35 examination who can record the proceedings.

B. THE PLAIN LANGUAGE OF NRS 52.380 CREATES SUBSTANTIVE RIGHTS.

A substantive statute is one that "creates duties, rights and obligations," while a procedural rule simply "specifies how those duties, rights, and obligations should be enforced." *Azar v. Allina Health Services*, 139 S. Ct. 1804, 1811, 204 L. Ed. 2d 139, 147 (2019); *see also* 1 James W. Moore, *Moore's Federal Practice* § 1.05[2][b], at 1-29 (3d ed. 2016) ("Substantive rights are rights established by law. The term 'substantive' does not mean rights that are 'important' or 'substantial,' but rather those that have been conferred by the Constitution, by statute, or by the common law."). A substantive statute supersedes a conflicting procedural statute or court rule. *State v. Connery*, 99 Nev. 342, 345, 661 P.2d 1298, 1300 (1983).

The plain language of NRS 52.380 creates substantive rights. Specifically, the statute creates the right to: (1) have an observer present at one's independent medical examination; (2) have an observer record one's exam; and (3) allows the observer to suspend the exam for certain abuses. NRS 52.380. Therefore, NRS 52.380, as a substantive statute, preempts NRCP 35's conflicting provisions.

C. THE LEGISLATIVE HISTORY OF NRS 52.380 CONFIRMS THAT IT CREATES SUBSTANTIVE RIGHTS.

The legislative history of NRS 52.380 confirms that the Nevada Legislature explicitly enacted the statute to create substantive rights for litigants faced with compulsory NRCP 35 examinations. Proponents for the law outlined the need for parties undergoing NRCP 35 examinations to have observers present and for those observers to have the right to record the exam:

> 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.

See Minutes of Assembly Committee on Judiciary, March 27, 2019, Statement of Allison Brasier, Representing Nevada Justice Association ("NJA"), **Ex. 3,** at 3.

> 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.

See Minutes, Statement of Graham Galloway, Representing NJA, **Ex. 3** at 3-4.

> 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.

See, Minutes, Statement of George Bochanis, Representing NJA, **Ex. 3** at 8.

As the legislative history of NRS 52.380 makes clear, the law was enacted to provide substantive rights to those who are forced to undergo an NRCP 35 examination. Proponents of the law explained that the law provided substantive rights, and the Nevada Legislature clearly agreed, as Assembly Bill 285 was passed and signed into law, becoming NRS 52.380. Accordingly, NRS 52.380 provides substantive rights and, thus, supersedes NRCP 35.

D. PURSUANT TO NRCP 35, GOOD CAUSE EXISTS FOR THE PROPOSED RULE 35 EXAMINATION TO BE RECORDED BY AN OBSERVER

Although NRCP 35 does not control under the circumstances, there is good cause to have Plaintiff's examination audio recorded and observed pursuant to NRCP 35(a)(3) and (4).

First, NRCP 35(a)(4) does not require Plaintiff to have good cause for an observer during a physical examination. *See* NRCP 35(a)(4). Instead, the rule

explicitly permits observers for physical exams, while only requiring a party to demonstrate good cause for observers of neuropsychological, psychological, or psychiatric examinations. *Id*. In their Motion, Defendants fail to apply the correct standard and instead argue that Plaintiff has failed to meet his burden of demonstrating good cause. *See* Defs.' Mot., 8:18-26; 9:1-8. The burden, however, lies with the Defendants: Defendants must show that good cause exists for there ***not*** to be an observer at the examination. *See* NRCP 35(a)(4). In the Motion, Defendants contend there is no good cause for an observer because Dakota can essentially observe himself because he is not incapacitated. *Id.* This argument sets a standard that simply does not exist. If the standard for good cause required Plaintiff to demonstrate incapacity, then there would be little need for the requirement, as the large majority of cases would never satisfy good cause. Moreover, good cause for an observer as it relates to a physical examination does not implicate the capacity of a plaintiff in any fashion. The requirement is necessary because a Rule 35 examination is an adversary proceeding and the plaintiff should not be expected to undergo an examination with an adverse party's expert who carries an inherent bias without proper protection or representation. Because Defendants only cite to Dakota's "capacity" as a basis to deny protection under NRS 52.380 and nothing more, Defendants fail to satisfy their burden of showing why good cause exists for Plaintiff to not have an observer at his NRCP 35 examination. Therefore, Plaintiff requests that this Court order he be allowed to have an observer at his examination.

Moreover, there is good cause for Plaintiff's examination to be audio recorded within to NRCP 35(a)(3). Plaintiff suffered serious injuries to his spine due to Defendants' negligent acts. Now, Defendants demand he be compelled to appear at a physician's office for an unknown period of time for testing in the midst of a pandemic. If that were not bad enough, Plaintiff is unfamiliar with the physician hired by Defendants, and does not know what methods will be used to evaluate him. Due to Defendants' expected defense that Plaintiff's injuries were, at least partially, pre-existing, Plaintiff should not be evaluated by a physician or expert hired by Defendants without an audio recording to protect the interests of all parties. It is in Plaintiff's best interest to have an audio recording to ensure Plaintiff's interests are not abused and, if necessary, to present the audio recording to the Court.

II. PERSONNEL FILES ARE DISCOVERABLE WHEN THE FILES ARE RELEVANT AND THERE IS NO LESS INTRUSIVE MEANS TO OBTAIN THE INFORMATION SOUGHT.

Personnel files can be discoverable but only where the requesting party can demonstrate the relevance and proportionality of the discovery it is requesting. Information contained in personnel files is subject to privacy protections and may be discoverable only in certain circumstances. *Smith v. Clark Cty. Sch. Dist.*, 2006 WL 2583290, *1 (D. Nev. 2006) (citing *Knoll v. American Tel. & Tel. Co.*, 176 F.3d 359, 365 (6th Cir. 1999) (**"noting that personnel files may contain 'highly personal information' and other work-related problems unrelated to plaintiff's claim"**) (Emphasis

Added); *Atkinson v. Denton Publ'g Co.*, 84 F.3d 144, 148 (5th Cir. 1996)). In response to a request for personnel files in *Smith*, the Nevada District Court held the following:

> Discovery is permitted "regarding any matter, not privileged, that is relevant to the claim or defense of any party." Fed. R. Civ. P. 26(b)(1). Information contained in personnel files is subject to privacy protections and may be discoverable only in certain circumstances. *See Knoll v. American Tel. & Tel. Co.,* 176 F.3d 359, 365 (6th Cir.1999) (noting that personnel files might contain "highly personal information" and other work-related problems unrelated to plaintiff's claim); *Atkinson v. Denton Publ'g Co.,* 84 F.3d 144 (5th Cir.) (holding that where there was a lack of any nexus between plaintiff's complaint and the employees whose personnel files were requested the District Court did not abuse its discretion in denying plaintiff's motion to compel). Here, plaintiff has not shown that the information she seeks from Mrs. Harmon's personnel file is relevant to her claim. Thus, the court will not compel CCSD to produce documents contained in Mrs. Harmon's personnel file.

Smith, 2006 WL 2583290 at *1. Taken together, a party must show that the information sought is relevant to her claim or the court will not compel production of documents contained in personnel files. *Id.*

The Ninth Circuit also addressed the discovery of personnel files in *Boar v. County of Nye*, 2012 WL 6012467, *3 (9th Cir. 2012). In *Boar*, the Court addressed an attempt to obtain discovery of personnel files--and upheld the Court's decision to deny production. *Id*. As noted by the Ninth Circuit, the parties seeking discovery did "not present evidence indicating that the information in the files is relevant and that it cannot be produced through less intrusive means, but rather appear to be merely trying 'to find a basis for discrediting' these two county employees." *Id*. In short, the Ninth Circuit held that to obtain production of personnel files a party must establish (1) relevance

and (2) that there is no less intrusive means of obtaining the information sought. *Id.*

Rule 26(b)(1) outlines several factors for district courts to consider regarding proportionality:

> [(1)] the importance of the issues at stake in the action; [(2)] the amount in controversy; [(3)] the parties' relative access to relevant information; [(4)] the parties' resources; [(5)] the importance of the discovery in resolving the issues; and [(6)] whether the burden or expense of the proposed discovery outweighs its likely benefit.

Venetian Casino Resort, LLC, 136 Nev. at 225, 467 P.3d at 5. A court can and must limit proposed discovery that it determines is not proportional to the needs of the case. *Id.* at 226, 5. A district court abuses its discretion when it fails to analyze proportionality in light of the revisions to NRCP 26(b)(1) and makes findings related to proportionality. *Id.* at 226, 5-6.

A. There Is No Basis For Intrusion Into Dakota's Personnel Files for Information Unrelated to Wage Loss or Future Earning Capacity Claims As Defendants Fail To Demonstrate The Relevance Or Proportionality Of The Requested Discovery.

Here, Defendants seek all of Dakota's personnel files for 9 different employers from 2014 thru the present. *See* Employment Authorizations, attached hereto as **Ex.4.** The Defendants requested all employee documents and files, not just wage information or payroll records. Plaintiff offered to request and produce all employee information related to Plaintiff's payroll records or any information relevant to wage loss or future earnings. Notwithstanding, Defendants refused to limit the authorizations in any way.

At the outset, Plaintiff never worked at "Disney Financial Services" from 2014 thru the present, as he worked at this company approximately 14 years ago. As to "Allegiant Air", Plaintiff never worked for this company; Plaintiff's wife worked for the company. As such, the Court should deny these authorizations and/or grant 26(c) relief as to these proposed authorizations. Finally, Defendants contend that the authorizations are appropriate given Plaintiff seeks "$140 million in lost future earnings." *See* Defs.' Mot.,14:19-15:3. Plaintiff is not seeking $140 million in future earnings; the number is $1,440,000.00. *See* Plaintiff's Computation of Damages, dated June 1, 2021, attached hereto as **Ex.5.**

1. Defendants Never Analyzed Proportionality.

As to the remaining 7 authorizations, Defendants fail to establish the relevance and proportionality of these authorizations. Dakota's personnel records going back to 2014, 5 years prior to the Incident, have absolutely no bearing on Plaintiff's claims or Defendants' defenses in this matter. Plaintiff already provided Defendants with tax returns from 2015 thru 2020. As such, Defendants already have all of Plaintiff's earnings for the past 5 years. *Id.* To the extent Defendants require information to rebut past and future earning capacity, the tax returns provide more than enough information in this regard.

Rather than explain why the remaining employment information sought is relevant and proportional to the needs of this case, the Defendants make no effort in their motion to tailor the authorizations to the information they contend is relevant. Instead, Defendants imply that all employee files are

relevant to a "person's future earning potential." *See* Defs.' Mot., 14:11-15:11. Defendants, however, fail to examine any of the proportionality factors espoused in *Venetian Casino Resort, LLC*. On this basis alone, the Court should deny Defendants' Motion as to the employment authorizations. Instead, the Defendants make conclusory statements contending that all of the information sought is relevant and proportional. Assuming *arguendo* that the information sought is relevant, a closer look at the *Venetian* factors demonstrates how this information is not, however, proportional to the needs of the case. In fact, multiple *Venetian* factors weigh in favor of denying this discovery.

As to the "importance" of the information requested, the Defendants contend that the employment files are necessary to rebut Dakota's future earning capacity. *Venetian Casino Resort, LLC*, 136 Nev. at 225, 467 P.3d at 5. As stated above, Plaintiff already produced all of Plaintiff's tax returns dating back to 2015. This information demonstrates Plaintiff's earning capacity before and after the wreck. The remaining information contained in Plaintiff's job files aside from his wage information bears no relevance to Plaintiff's earnings, past or future. Defendants only seek this information with the hope of finding some type of information damaging to Plaintiff's credibility and this type of fishing expedition bears no relationship to earning capacity. Moreover, the Defendants failed to provide any information or declaration from an expert or economist demonstrating why other employment information is necessary to rebut past or future wage loss or earning capacity. Defendants provide no justification other than to make conclusory statements that this information is "relevant to

Plaintiff's career trajectory" to justify execution of the authorizations. *See* Defs' Mot., 14:25-15:2. Such broad statements fail to demonstrate the "importance" of all of the information sought to justify invading Dakota's privacy rights.

Defendants also fail to demonstrate how this information must be produced because the Defendants do not have "relative access" to the wage information. *Venetian Casino Resort, LLC*, 136 Nev. at 225, 467 P.3d at 5. As belabored above, the Defendants already possess Plaintiff's tax returns. This information is dispositive on Dakota's earnings before and after the wreck. As such, Defendants have the information necessary to rebut any claim for loss of future earning capacity based on the tax return information. In the Motion, the Defendants do not argue "access" or even address this factor. Moreover, "access" is not at issue because Defendants have access to all of the potential wage information available. As such, this factor also cuts against Defendants' conclusory argument that the information sought is proportional.

Finally, Defendants had the burden to analyze whether the "burden or expense of the proposed discovery outweighs its likely benefit." Here, the Defendants seek to invade Plaintiff's private employment files. Defendants already have the benefit of Plaintiff's wage information. As such, the Court's inquiry is to determine whether the disclosure of the remaining files or information in the employee files *aside from the wage information*, outweighs the invasion of Plaintiff's privacy. As stated, Defendants failed to articulate any reasoning as to how the remaining information in the employee files relates to any claim or defense. The employee files will include private information

irrelevant to Plaintiff's wage information or a claim or defense in this case. As such, Plaintiff should not be exposed to the potential embarrassment or harassment of having their entire personnel files released to satisfy Defendants' curiosity or fishing expedition. Given Defendants have the requisite wage information they require to rebut Plaintiff's wage loss claims or claims of future earning capacity, the burden of harassing Plaintiff does not outweigh the alleged benefit of information collateral to Defendants' need to rebut wage loss or future earning capacity. Defendants never analyzed the burden of releasing Plaintiff's private information other than to state that Defendants will be "taking on the expense and burden of the discovery themselves." Defendants never discussed, however, the burden imposed on Plaintiff resulting from the release of his private information. As such, this factor also weighs in favor of denying the authorizations.

Indeed, Defendants never articulated why production of Plaintiff's entire employee files for 7 different employers dating back to 2014 for a vehicle wreck case is necessary to rebut a claim or prove a defense in this case. Defendants never actually addressed proportionality or the *Venetian* factors. The simple truth is that the discovery sought is grossly disproportionate to what Defendants need to know in order to rebut Plaintiff's claims for wage loss or loss of future earning capacity. Thus, the Court should deny Defendants' Motion and/or grant Rule 26(c) relief as to the employment authorizations.

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CONCLUSION

Based on the foregoing, Plaintiff respectfully requests that the Court deny Defendants' Motion to Compel Physical Examination of Plaintiff and Execution of Employment Releases on an Order Shortening Time.

DATED this 11th day of August, 2021.

CLAGGETT & SYKES LAW FIRM

/s/ Brian Blankenship

Sean K. Claggett, Esq.
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Attorneys for Plaintiff

CLAGGETT & SYKES LAW FIRM

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 11th day of August, 2021, I caused to be served a true and correct copy of the foregoing **PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION TO COMPEL PHYSICAL EXAMINATION OF PLAINTIFF PURSUANT TO NRCP 35 AND EXECUTION OF EMPLOYMENT RELEASES ON AN ORDER SHORTENING TIME** on the following person(s) by the following method(s) pursuant to NRCP 5(b) and NEFCR 9:

VIA E-SERVICE ONLY:
ANNALISA N. GRANT, ESQ.
Nevada Bar No. 11807
SONYA C. WATSON, ESQ.
Nevada Bar No. 13195
GRANT & ASSOCIATES
7455 Arroyo Crossing Parkway, Suite 220
Las Vegas, Nevada 89113
Tel.: (702) 940-3529
Fax: (855) 429-3413
Attorneys for Defendants

/s/ Moises Garcia
_____
Employee of Claggett & Sykes Law Firm

CLAGGETT & SYKES LAW FIRM

EXHIBIT 1

CLAGGETT & SYKES LAW FIRM

4101 Meadows Lane #100 | Las Vegas, NV 89107 Tel.
702.655.2346 | Fax 702.655.3763 | claggettlaw.com

June 9, 2021

VIA E-MAIL

Annalisa N. Grant, Esq.
Sonya C. Watson, Esq.
7455 Arroyo Crossing Parkway, Suite 220
Las Vegas, Nevada 89113

RE: Larsen v. Pro Petroleum, LLC

Dear Grant and Watson,

Our office received service of Pro Petroleum, LLC's ("Pro Petroleum") Motion to Compel a Rule 35 Examination ("Motion") of our client, Dakota Larsen ("Plaintiff"). As you know, the Parties discussed, via email correspondence, Pro Petroleum's request for a Rule 35 examination. The Parties, however, never held an EDCR 2.34 conference to discuss a proposed Rule 35 examination by telephone conference before Pro Petroleum filed its Motion.

The Eighth District Court Rule ("EDCR" or "Rule") 2.34 governs all discovery disputes, conferences, motions, and stays within the Eighth Judicial District Court of Nevada. Rule 2.34 states the following:

> **Rule 2.34. Discovery disputes; conferences; motions; stays.**
> (a) Unless otherwise ordered, all discovery disputes (except disputes regarding any extension of deadlines set by the discovery scheduling order, or presented at a pretrial conference or at trial) must first be heard by the discovery commissioner.
> **[…]**
> (d) Discovery motions may not be filed unless an affidavit of moving counsel is attached thereto setting forth that after a discovery dispute

> conference or a good faith effort to confer, counsel have been unable to resolve the matter satisfactorily. A conference requires either a personal or telephone conference between or among counsel. Moving counsel must set forth in the affidavit what attempts to resolve the discovery dispute were made, what was resolved and what was not resolved, and the reasons therefor. If a personal or telephone conference was not possible, the affidavit shall set forth the reasons. If the responding counsel fails to answer the discovery, the affidavit shall set forth what good faith attempts were made to obtain compliance. If, after request, responding counsel fails to participate in good faith in the conference or to answer the discovery, the court may require such counsel to pay to any other party the reasonable expenses, including attorney fees, caused by the failure. When a party is not represented by counsel, the party shall comply with this rule.
> **[…]**

EDCR 2.34.

Per EDCR 2.34(d), the moving counsel must confer with opposing counsel by conference in an effort to resolve any discovery disputes before filing a discovery motion. Specifically, Rule 2.34 expressly "requires either a personal or telephone conference between or among counsel," and, therefore, email correspondence between the Parties will not satisfy Pro Petroleum's obligations under the rule. Moreover, Pro Petroleum failed to attach to the Motion the required affidavit detailing the 2.34 conference and good faith efforts to resolve any issues. Thus, Pro Petroleum's Motion violates Rule 2.34(d).

Proposed Resolution:

To resolve this issue, we respectfully request that Pro Petroleum promptly and voluntarily withdraw its Motion. Following withdrawal, the Parties can set a Rule 2.34 conference to discuss the proposed Rule 35 examination and Plaintiff's position on whether the Parties can stipulate to the same. Plaintiff cannot promise that the Parties will reach an agreement on a stipulation for a Rule 35 examination, but Plaintiff will

certainly make a good faith effort to reach a compromise. We are available on Monday, June 14, 2021 at 1:30 pm PST to hold the telephone conference. If you cannot agree to the proposed time, please provide your availability between June 14, 2021, and June 30, 2021, and we will do our best to find availability during the proposed dates.

We hope you will consider Plaintiff's proposal to voluntarily withdraw the Motion. Should Pro Petroleum refuse to voluntarily withdraw the Motion, however, and you force Plaintiff to file an Opposition, we will have no choice but to seek sanctions, including attorney's fees and costs for having to review, draft, and file a response to the Motion. We hope to avoid this course of action. Plaintiff's response to the Motion is currently due on or about June 18, 2021. As such, please notify Plaintiff regarding your intentions and/or voluntarily withdraw the Motion on or before June 16, 2021.

As always, we hope to resolve any issues with you in good faith and without the need for court intervention. Should you have any questions or concerns regarding the contents of this correspondence, please feel free to contact us.

Sincerely,
CLAGGETT & SYKES LAW FIRM

/s/ Brandon Cromer

BRANDON CROMER, ESQ.
BRIAN BLANKENSHIP, ESQ.

EXHIBIT 2

ELECTRONICALLY SERVED
8/10/2021 11:49 AM

CLAGGETT & SYKES LAW FIRM

4101 Meadows Lane #100 | Las Vegas, NV 89107 Tel.
702.655.2346 | Fax 702.655.3763 | claggettlaw.com

August 10, 2021

VIA E-SERVICE

Annalisa N. Grant, Esq.
Sonya C. Watson, Esq.
7455 Arroyo Crossing Parkway, Suite 220
Las Vegas, Nevada 89113

RE: Larsen v. Pro Petroleum, LLC et al., Case Number A-20-826907-C

Dear Ms. Grant and Watson:

Please allow this correspondence to memorialize our telephonic EDCR 2.34 conference which occurred on July 29, 2021, at 10:30am. Moreover, please be advised that this correspondence also serves as formal notice that our client, Dakota Larsen ("Dakota") is scheduled to have artificial disc replacement surgery at L4-L5 on September 13, 2021.

A. Proposed Rule 35 Physical Examination.

Prior to our telephone conference, your office requested a Rule 35 examination. As such, on July 29, 2021, we sent our proposed parameters in an attempt to stipulate to an examination. We also informed your office that Dakota needs surgery, and he intended to schedule it within the next 60 days from our meet and confer.

During the Rule 2.34 conference, we discussed Plaintiff's proposed parameters for a Rule 35 examination. The Parties tentatively agreed to all parameters except Defendants refuse to allow for either an observer to be present or the recording of the

examination. Given NRS 52.380 allows Plaintiff to observe and record Rule 35 examinations, and Defendants expressed a desire to challenge the issues before the Commissioner, District Court, and even before the Nevada Supreme Court, it is safe to say we are an impasse and we are in receipt of Defendants' Motion to Compel regarding this issue.

As stated above, on Friday, August 6, 2021, we learned that Dakota is now scheduled to undergo surgery on his lower back on September 13, 2021. As a result, Defendants have approximately 35 days to come to an agreement on a Rule 35 examination and schedule the same or lose the ability to do so. In the spirit of cooperation, and to allow Defendants the ability to examine Dakota before he undergoes surgery, Plaintiff is willing to drop the demand of having both an observer and recordation of the Rule 35 examination. Please note, Rule 35 and NRS 52.380 allow for observers, and there is no conflict regarding the same. Dakota will be flying out to Las Vegas to undergo the surgical procedure with Dr. Garber. He is willing to fly to Las Vegas earlier in the week before his surgery to accommodate for a Rule 35 examination should Defendants agree to resolve the issue as proposed by Plaintiff. As such, Dakota is willing to fly to Las Vegas the week of **September 6th thru September 10th** to accommodate for a Rule 35 examination in Las Vegas. As another option, Dakota lives in Mobile, Alabama. Should it be easier for Defendant's examiner to fly to Alabama and make arrangements there to hold the examination, then we can accommodate the examiner for almost the remaining month of August leading up to his surgery in September.

Should your office decide to accept the aforementioned proposal from Plaintiff, please immediately let us know so we can inform Dakota and update the Court at the

hearing on Friday that this issue is now moot.

B. Executed Employment Releases.

Your office requested employment authorizations for Dakota's former employment records. We offered to execute authorizations if Defendants would agree to limit the scope of the authorizations to wage information relevant to Plaintiff's wage loss and future earning claims. You responded that the entire file is necessary because it is relevant to our client's employability in the future. Because Defendants refused to limit the scope of employment authorizations, we cannot agree to execute the proposed authorizations because Dakota's entire employment files are neither relevant nor proportional to the claims and defenses at issue in this case. Thus, all parties are at an impasse and this issue will be resolved at Friday's hearing.

C. Plaintiff's Rule 34 Requests.

The Parties also discussed your responses to Plaintiff's Rule 34 Requests. Below is a summary of our discussion:

Request No. 10

Regarding Request 10, you agreed to review and confirm if your clients have copies of any and all estimates and/or appraisals for property damages related to the vehicles involved in the subject collision.

Requests 13-14, 16-21, and 23-25

As to Requests 13-14, 16-21, and 23-25, Defendants will not produce documents responsive to the aforementioned requests without Plaintiff first agreeing to execute a protective order. Our position is these documents are not subject to a protective order. As such, we will move to compel responses to these documents.

Requests 5, 29, 38, and 39

In response to Requests 5, 29, 38, and 39, you stated that your clients produced all the requested documents in their possession and/or control. To resolve future issues, we requested that your clients execute a declaration stating they do not have any additional information to provide related to those requests. You agreed to review the documents and discuss the proposal with your clients.

D. Spoliation.

On July 1, 2019, we sent formal notice to your clients to preserve any and all daily driver logbooks, physical and electronic, and all records pertaining to the routine course of business for dispatching, trip monitoring, dispatch progress reports, communications, pay records, and bills of lading of David Yazzie, Jr. In response to Requests 26 and 27, your clients concede, in Requests 26 and 27, to discarding and/or destroying Mr. Yazzie's driver logbooks and written accounts of the number of hours Mr. Yazzie operated the subject vehicle, including all breaks, relief periods, off-duty periods, and/or non-operational time for 8 days prior to the subject incident. During our telephone conference, we requested that you verify if the documents still exist and, if not, confirm if the documents were destroyed before or after July 1, 2019. You agreed to investigate the matter.

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Thank you for discussing the above issues with us. For the requests you agreed to supplement, please provide responses within 14 days of this correspondence. As to the other requests, we will seek court intervention. Moreover, as we discussed above, please confirm whether you are willing to forego one of your objections to either the recording or observation of the Rule 35 examination. If so, we can work with you to schedule Mr. Larsen's Rule 35 examination before September 13, 2021.

Sincerely,
CLAGGETT & SYKES LAW FIRM

/s/ Brian Blankenship

BRANDON CROMER, ESQ.
BRIAN BLANKENSHIP, ESQ.

EXHIBIT 3

MINUTES OF THE MEETING
OF THE
ASSEMBLY COMMITTEE ON JUDICIARY

Eightieth Session
March 27, 2019

The Committee on Judiciary was called to order by Chairman Steve Yeager at 8:04 a.m. on Wednesday, March 27, 2019, in Room 3138 of the Legislative Building, 401 South Carson Street, Carson City, Nevada. The meeting was videoconferenced to Room 4406 of the Grant Sawyer State Office Building, 555 East Washington Avenue, Las Vegas, Nevada. Copies of the minutes, including the Agenda (Exhibit A), the Attendance Roster (Exhibit B), and other substantive exhibits, are available and on file in the Research Library of the Legislative Counsel Bureau and on the Nevada Legislature's website at www.leg.state.nv.us/App/NELIS/REL/80th2019.

COMMITTEE MEMBERS PRESENT:

Assemblyman Steve Yeager, Chairman
Assemblywoman Lesley E. Cohen, Vice Chairwoman
Assemblywoman Shea Backus
Assemblyman Skip Daly
Assemblyman Chris Edwards
Assemblyman Ozzie Fumo
Assemblywoman Alexis Hansen
Assemblywoman Lisa Krasner
Assemblywoman Brittney Miller
Assemblywoman Rochelle T. Nguyen
Assemblywoman Sarah Peters
Assemblyman Tom Roberts
Assemblywoman Jill Tolles
Assemblywoman Selena Torres
Assemblyman Howard Watts

COMMITTEE MEMBERS ABSENT:

None

GUEST LEGISLATORS PRESENT:

None

STAFF MEMBERS PRESENT:

Diane C. Thornton, Committee Policy Analyst
Bradley A. Wilkinson, Committee Counsel
Lucas Glanzmann, Committee Secretary
Melissa Loomis, Committee Assistant

OTHERS PRESENT:

Alison Brasier, representing Nevada Justice Association
Graham Galloway, representing Nevada Justice Association
George T. Bochanis, representing Nevada Justice Association
David Sampson, Attorney, Law Offices of David Sampson, Las Vegas, Nevada
Dane A. Littlefield, President, Association of Defense Counsel of Nevada
Kevin Higgins, Chief Judge, Sparks Justice Court; and representing Nevada Judges of Limited Jurisdiction
John Tatro, Senior Judge; and representing Nevada Judges of Limited Jurisdiction
Richard Glasson, Judge, Tahoe Justice Court; and representing Nevada Judges of Limited Jurisdiction
Ann E. Zimmerman, Judge, Las Vegas Township Justice Court; and representing Nevada Judges of Limited Jurisdiction
Paul C. Deyhle, General Counsel and Executive Director, Commission on Judicial Discipline
Jerome M. Polaha, Judge, Second Judicial District Court
John J. Piro, Deputy Public Defender, Legislative Liaison, Clark County Public Defender's Office
Kendra G. Bertschy, Deputy Public Defender, Washoe County Public Defender's Office
John T. Jones, Jr., Chief Deputy District Attorney, Clark County District Attorney's Office; and representing Nevada District Attorneys Association

Chairman Yeager:
[Roll was taken. Committee protocol was explained.] Today, we have three bills on the agenda. I will now open the hearing on Assembly Bill 285.

Assembly Bill 285: Enacts provisions relating to a mental or physical examination of certain persons in a civil action. (BDR 4-1027)

Alison Brasier, representing Nevada Justice Association:
What I would like to do is explain what these examinations are in their current form. They are unique to personal injury litigation. I want to lay the foundation for what these examinations are and then turn it over to my colleagues in Carson City to explain more about the history of how we got here and what this bill proposes to do.

What we are talking about in this bill is commonly referred to as a "Rule 35" examination. They are very unique to personal injury cases because these examinations happen when someone is alleging injury. When a person alleges an injury, he or she can be forced to appear at an examination by an expert witness who is hired by the insurance company and to whom that claimant has no relationship. Under the current state of our rules, that claimant—the victim—has no right to have an observer present. They do not have a right to record what happens. What we have seen is, if there is a dispute in what happens in the examination, most of the time deference is given to the person who is being presented to the judge or jury as an expert witness rather than the victim or plaintiff who was forced to present at that examination. That is the current state of the law. The reason I used the word "unique" at the beginning of my testimony is because the way it currently stands in these forced examinations, the claimant has no rights as part of that examination.

When we look at it in different contexts, we would never expect people to submit to an examination under this current set of conditions. Outside of litigation, if you have an important medical examination, it would be commonplace for you to bring a friend or family member with you, maybe to ease anxiety and to make sure you are capturing all the important information. If you went to a doctor who said, "No, you do not have any right to have someone present with you during this examination," you would have the choice to pursue another doctor if you did not feel comfortable in that scenario. Under the current rules for these Rule 35 examinations, that is not the situation for personal injury victims.

Also, this is very unique to Nevada personal injury cases. Washington, California, and Arizona—all of our neighboring states—currently allow what this bill proposes. They allow an observer to be present during the examination and they also allow a recording to happen. Nevada is really an outlier with our western neighbors as far as not providing these protections for the injured party during the examination.

Additionally, in the workers' compensation context in Nevada, observers are allowed to be present during workers' compensation examinations. Again, this is really an outlier for Nevada personal injury cases where we do not already have these protections afforded to the claimants. I will turn it over to my colleagues to explain why that is important and how we got here.

Graham Galloway, representing Nevada Justice Association:
The origins of this bill flow from a committee formed by the Supreme Court of Nevada two years ago to review, revise, and update our *Nevada Rules of Civil Procedure* (NRCP)—the rules that govern all civil cases. The committee was made up of two Nevada Supreme Court justices, various district court judges from throughout the state, a number of attorneys who represent the various fields of practice in the civil side of litigation, and a member of the Legislative Counsel Bureau. The committee was broken down into subcommittees, and I chaired the subcommittee that handled this Rule 35 medical examination issue. Our subcommittee recommended substantial changes to the rule. Mr. Bochanis was a member of the committee. We voted 7-to-1 to make substantial changes, the changes that are set forth or embodied in the bill before you, Assembly Bill 285. Unfortunately, when our

recommendations went to the full Supreme Court of Nevada, they rejected our changes for reasons we are still not clear on. At that point, we reassessed our position.

Contrary to the opponents of this bill who want to say this is a procedural matter, this is not a procedural matter; it is a substantive right. It is the right to protect and control your own body. The scenario we often see in this situation is that our clients are going through a green light or sitting at a stop sign, and somebody blasts through the light and clocks them, injuring them. They are then required to go to an examination by an expert who is hired by the defense. These are experts that are trained, sophisticated, and weaponized. They put our clients through an examination and, in the process, the clients are interrogated. Our clients have to go through this without any representation.

This is not a criminal situation, but in the criminal field, you often hear the terms "right to counsel," "right of cross examination," and "due process." Those terms do not necessarily transfer over into the civil arena. In the civil arena, we have what is called "fundamental fairness." Is it fundamentally fair that an injured person is required to go to a hired expert—an expert whose sole goal is to further the defense side of the litigation—have their body inspected, have their body examined, and then be interrogated without there being a lawyer present to represent that individual? There is nothing in the law in any arena where that occurs except for the personal injury field. That is what A.B. 285 is designed to do: bring some fundamental fairness to the process and to level the playing field. It is not a procedural rule. That is how it is being characterized by the opponents of this bill. It is a fundamental right that you should have representation in such an important situation. I will turn it over to my colleague who will explain the nuts and bolts of the bill.

George T. Bochanis, representing Nevada Justice Association:
This bill is very important to individuals who are being subjected to these insurance company examinations. The reason we are before you today is because this bill protects substantive rights. This is not a procedural rule, which you would usually find within our NRCP. Our *Nevada Rules of Civil Procedure* involve things such as how many years someone has to file a lawsuit and how many days someone has to file a motion or an opposition to a motion. This bill does not involve those types of issues but, instead, involves a substantive right of a person during an examination by a doctor whom he did not choose, does not know, and has no relationship with whatsoever, a doctor who was chosen by an insurance defense attorney. This is a doctor who is going to handle this patient. It is not really a patient because there is no doctor-patient relationship. This examinee is going to be touched and handled by this doctor with whom he has zero relationship. It is being forced upon him as part of this examination. That is why this is a substantive right, and this is why we are before you here today.

What I would like to discuss with you are the two components of this bill. The first is that we are requesting that an observer be present during these types of insurance company evaluator examinations. That observer can be anyone; it can be a spouse, parent, friend, or it could be the person's attorney or a person from that attorney's staff. Really, when you look at the current rule, the attorney/observer portion of it is really the only difference between the

current rule and what we are asking for as part of this bill. I am surprised there is any opposition to the attorney/observer portion of this bill. As Ms. Brasier said, this is already allowed by every other state that surrounds Nevada. California, Utah, and Arizona already allow attorney observers.

I can tell you from representing clients in workers' compensation cases in Nevada for more than 30 years, we already attend doctor examinations in workers' compensation cases—"we" being attorneys or our staff. It happens on every permanent partial disability evaluation. An attorney is present. To me, the reason is very obvious; you want openness during this process. You already have an agent of the insurance company, the doctor, present. This bill levels the playing field by having an attorney or attorney staff member present. Is an attorney going to attend every one of these examination? No, probably not. How about an attorney's staff member? Probably. A family member? Yes. These are options that a person who is being subjected to this type of examination should have. All we are seeking is a level playing field where during these examinations you have an agent of the insurance company—the doctor—present, along with an observer who could be an attorney or someone from the attorney's office.

The language in the proposed bill is very clear: the observer is just an observer. They cannot participate. They cannot interrupt. If anything like that happens, the doctor can terminate the examination, and you can go to court to work out your problems or differences. I can tell you that in attending workers' compensation permanent partial disability evaluations, I have never had a doctor terminate an exam during the hundreds of exams I have attended over 30 years. Never once have we ever had a problem with the doctor. Do the doctor and I get along at all times in these evaluations? No, probably not. However, we are able to keep it civil. We are able to keep it professional, and there is no reason an attorney observer being at the exams in this context is going to be any different. That is the observer component of this bill.

I should also mention that having an observer prevents abuse during these examinations as well, because it keeps everything open and transparent. Think about it in a practical sense. We have had doctors who have had some issues during these exams, and we felt as though we should not need to have a hearing for every examination to show that a doctor is having problems with taking advantage of people during some of these examinations. Fortunately, it is a minority of doctors with whom we have had these issues. This observer keeps it open.

The second portion of the bill is audio recording. It is not video recording. This can be done as simply as using a cellphone, or it can be done as complicatedly as bringing in a court reporter. In practicality, how many times is a court reporter going to be brought in even though this language allows it? Probably 1 percent of the time, if at all. There are so many other means of communication whereby you are able to record. Again, this promotes openness and transparency during these examinations. The beauty of the language of this bill is that the doctor can also record it. You have a recorded version by the doctor, you have a recorded version by the patient or observer, and you know what happened. There is none of this "he said, she said." I cannot tell you how many cases I have had to litigate over an issue

where an examinee goes to one of these exams, we receive the report back, and there are things in it that are totally unfamiliar to me. I ask the client and she says to me, "I never told him that." Now we have this dispute over what was said during the exam. Now it is in the report by a doctor who will be testifying to that during trial. Again, audio recording by both the patient or observer and the doctor prevents this from happening. It keeps us out of court, and it keeps these cases moving.

In fact, before she was appointed to the Nevada Court of Appeals, the discovery commissioner in the Eighth Judicial District Court in Clark County already allowed audio recording on all cases. The problem with the current language in the current rule is that audio recording is only allowed for good cause. Now, what "for good cause" means is uncertain. Every time there is an examination where audio recording is requested, we are going to have litigation of these cases. It is going to cause delays. It is going to cause additional costs. It is going to cause clients' access to justice to be delayed on these types of cases. That is why this bill before you today does not provide or require this "for good cause" standard on audio recordings. As I stated before, the discovery commissioner had already allowed this type of audio recording without a showing of good cause. Again, we want to keep these examinations open and transparent, and we want these clients of ours to be able to move on with their cases without having to litigate every single issue because this examination is being requested by the insurance defense attorney.

These are the two elements, and these are the differences between what the existing rule says and what this bill says. Again, we are before you today because an examination by a doctor who is not of this person's choosing involves a substantive right. It is something that should be within a statute and not a procedural rule.

Chairman Yeager:
I want to make sure we have the record clear in terms of the process that got us here. The Supreme Court of Nevada was looking to make substantial changes to the NRCP, and those changes went into effect March 1, 2019. We are talking about Rule 35. It sounds as though there was a subcommittee that I believe Mr. Galloway chaired.

Graham Galloway:
That is correct.

Chairman Yeager:
So there were eight members of that subcommittee, and there was a 7-to-1 vote in favor of advancing what appears in A.B. 285. That was the recommendation, 7-to-1, out of the subcommittee to the entire Supreme Court of Nevada. Do I have that right?

George Bochanis:
There were some changes made such as the observer only being a person who was not the attorney and not associated with the attorney's staff. For the audio recording, there was nothing about the "for good cause" requirement being involved.

Chairman Yeager:
Essentially, the recommended language that came out 7-to-1 was not adopted by the Supreme Court. We do not know why, but it simply was not adopted.

Graham Galloway:
That is correct.

Chairman Yeager:
I just wanted to make sure we had that clear on the record.

Assemblywoman Backus:
I noticed you were both on the subcommittee, and I just read our new NRCP. When looking at the separate branches of government, the court can implement court rules consistent with Nevada law. I was trying to put these two together, and I am thinking about how the language is presented in section 1, subsection 1 of A.B. 285 where it says "An observer may attend," for example. The current Rule 35 is almost on par with that rule. I am not sure if that was your intent. It does not sound as though it was.

I also just want to clarify how an independent medical examination works. It is either by stipulation or by order. It looks as though this new rule keeps it by order. What will end up happening? When I was reading the very lengthy comments to the rule, it seemed as though the court and committee spent a lot of time working on that. Someone could raise the issue of having an observer being present, and likewise with the audio. That could be agreed to, or it could be put into the opposition if they are challenging a request for the examination. When I was looking at Rule 35 and A.B. 285 this morning, I could almost read them in sync. The only thing that was glaring to me was the issue of the attorney. I have to admit, I kept asking my friends who are attorneys if they really want to be present for this. That was the only thing I thought was agreed upon by all three amendments that were sent over to the Nevada Supreme Court with the petition. It seemed as though each of them excluded the attorney. That was the one thing I noticed. If you could clarify that for me, that would be great.

Graham Galloway:
You are correct that the language is similar, but it is distinct. From a practical standpoint, you are also correct that most of these examinations are done by stipulation. You work out the details ahead of time. With some attorneys, you can hash out the details. With other attorneys, you cannot. We have made changes that are not very dramatic, but they are substantial. Instead of having to show good cause, if you cannot agree with the other side as to the parameters of the examination, and you have to go the motion route, the rule provides that this can be done by motion or agreement. Most of the time it is by agreement. Under the existing rule, if you can agree, you have to show good cause for an observer. The big change we are proposing here is that you do not have to show that good cause; you automatically have the right to have an observer present, whether he or she be an attorney, an attorney's staff member, or a family member or friend.

The other point you raised about the differences between the current rule and our bill is that this would allow for an attorney observer. In reality, I do not foresee myself going to any of these examinations. I really have no interest in doing that. I think I could use my time better elsewhere. It would be a staff member or a family member. Currently, what I do which, perhaps, is not necessarily authorized by the rule—is have all my clients take a family member. No one has ever objected to that. That, in practicality, is what is going to happen in most cases. There are certain experts who are marked for special treatment because they have been proven to be extremely biased. Those individuals may end up having a staff member from the law firm attending their examinations. Again, I think in the run-of-the-mill case, you are sending a family member or a friend.

George Bochanis:
As far as the mechanics of the examinations we have experienced in my office, we get a letter from the insurance defense attorney where the attorney says, "We want to examine your client on this date at this time. Bye." Of course, it does not work that way. We call them and say, "Sure, pursuant to these conditions." Or, under the rules, we can file a motion. My experience has been that we were able to agree less than half the time on these conditions. Since this rule has gone into effect on March 1, we have received three letters requesting clients to submit to examinations, and we have not been able to agree to the conditions once. That is because of the "for good cause" showing on the audio recording portion. We disagree as to what that means, and this was our concern when the current rule came out. When you allow that type of vagueness over this type of examination, there is just not agreement on it. This rule has been in effect for 27 days. We have received three letters in 27 days requesting these exams. We have not been able to agree to one of them. That is because of this audio recording "for good cause" requirement as well as the observer issue. I have told attorneys I should be able to send a staff member to one of these, and their objection is that it is not what the rule says. The rule says it has to be a family member. On some of these more complicated examination-type cases, we want a staff member there. This law we have proposed provides and allows for that. I think these are important distinctions.

Again, this is a substantive right. The procedural part of Rule 35 is, how do you get there? You agree to it or you file a motion. That stays with NRCP 35. The mechanics of the actual examination is a whole other issue. That is a person being handled and touched by a doctor who is not chosen by them but selected by an insurance defense attorney. That is why that is a substantive right. That is why we have proposed A.B. 285. This is something we thought about after the NRCP committee. We said to ourselves, You know, this really is not a procedural rule. I hope that helped.

Assemblywoman Backus:
It did. I was just trying to correlate what we have now as our rule and what the law is going to provide for. We all know as practitioners that we are going to continue experiencing the court reading of this law if it gets implemented along with Rule 35. I think we will have to deal with it through offers of judgment, as well as certain interpleader actions depending on what remains in our statutory provisions. Just so I am clear, it looked as though everyone had originally agreed that attorneys would not be present. The type of work I do sometimes

is more product liability. When an attorney shows up, I show up. It seems as though on a personal injury case, the goal is now to basically eliminate this from the rule and allow attorneys or someone from their office to be present. Another thing that looked as though it came out of nowhere was the whole examination of neuropsychological, psychological, or psychiatric examinations wherein an observer was going to be completely eliminated. I take it that through the proposal of A.B. 285, it would negate that provision as well.

George Bochanis:
The carve-out for psychological examinations completely took us by surprise. It was never discussed. No exceptions were ever allowed for psychologists under this bill. I have to be honest with you; I do not know who is more vulnerable and who more requires an observer with them during these examinations than a person with a traumatic brain injury. That came to us as a complete surprise. That was something that was never discussed during the NRCP committee and was never provided as being a carve-out for this type of specialty area.

As a result of that occurring, we have provided to the Committee as exhibits some documents we think support our view that there should not be some special exception for psychologists on these examinations [pages 51-76, (Exhibit C)]. A few psychologists appeared at the Supreme Court of Nevada hearing on this rule, and they testified that what they do is secret—the tests and the way they grade their tests are trademarked, secret items so they cannot be disclosed—and as a result of that, you cannot have an observer present. Well, that is not so. I have submitted to you 74 websites that contain copies of these exams and how they are graded and how they are evaluated [pages 51-59, (Exhibit C)]. So much for the proprietary or secret nature of these examinations.

These psychologists also testified that an observer being present during a psychological evaluation destroys the entire evaluation because if somebody is present, the examinee is not going to be as open. We have also submitted an affidavit from a psychologist with 20 years of experience who states that the mere fact this psychological exam is conducted by someone this person did not select, really puts the examinees in a position where they are not going to be entirely forthcoming [pages 60-76, (Exhibit C)]. They are going to hold things back because it is an examination that has been forced on them. Simply having somebody present is not going to change the nature of the examination at all. In fact, an observer being present during this examination is more required than any other type of examination because certain distractions—the inflection of the voice of this psychologist examiner and other things like that—could have a huge impact on the findings of the examination. Not having an observer present affects that. We have submitted these items, the affidavit and the 74 websites, as further evidence that there should not be a carve-out for psychologists.

Assemblywoman Nguyen:
You have mentioned workers' compensation. It is my understanding that those provisions that are similar to those which are contained here are also statutory as a part of *Nevada Revised Statutes* (NRS) 616C.490. In addition to the workers' compensation, are there any other provisions that are statutory as well? Obviously, there is some precedent here, so I was wondering if you are aware of anything else.

George Bochanis:
I am sure there are; I just cannot think of any right now. I can tell you that in our survey of looking at other states where an observer is allowed to be present, it is a mix between procedural rules and statutes. Other states have considered it to be a statutory right. It is a good point. There are a lot of other statutes and a lot of other things within our NRS that are partially statutory and are partially procedural, which are covered by NRCP. It does occur commonly.

Assemblywoman Nguyen:
As far as how workers' compensation works, do you not have the same concerns that you do under these current rules as they have been implemented in March?

George Bochanis:
We have found in workers' compensation cases that we have had zero problems with attorney observers being present. Although it is true that I certainly am not there at 100 percent of these permanent partial disability examinations, 99 percent of the time my staff is. It is not a family member. That is because there are certain mechanics of how these examinations on workers' compensation cases are supposed to be performed. If they are not performed in a certain way, it invalidates the exam. So we always have a staff member present at these. We have never had a doctor terminate an examination. I have never received a call from a doctor saying my staff member did something inappropriate, or from the insurance adjuster or defense attorney for the workers' compensation case objecting to something we did. An observer is an observer. That is our intention on this bill, and that is what occurs in workers' compensation cases now.

Assemblywoman Krasner:
In looking at some of the opposition cases, they say this is an attempt to narrow the pool of doctors willing to conduct these Rule 35 examinations. Can you please address that?

Graham Galloway:
Of all the other states that allow attorney observation and allow audio or video recording, there has never been an issue about the availability of defense experts. If you read the comments presented by the opposition, it is a fear, but there is no actual evidence. This, unfortunately, is a lucrative area of practice. There are going to be experts who will participate in this arena. There is no evidence—absolutely none—that this prevents the defense from hiring somebody. In the workers' compensation arena, there is never an issue. When I read that argument, I start seeing smoke. I see nothing else. From the experience of our neighboring sister states, there is absolutely no evidence that occurs.

Alison Brasier:
I think this idea that it is going to narrow the pool of doctors is kind of just a scare tactic—a red herring—to distract from the actual issues. In my view, I do not see why this would narrow the pool. It provides protection for the doctors so there is an objective record of what happened during the examination. If there is a dispute, everyone has a record of what happened. It is a protection for the claimant, but also for the doctor. I think this idea that it

will narrow the pool of doctors because we are going to create an objective record really has no basis in fact.

Chairman Yeager:
Can you give the Committee a sense of how much these examinations typically cost? I know they are paid by the defense, but is there a range in terms of what a physician would charge to do an examination such as this?

George Bochanis:
We have provided as an exhibit testimony from a doctor, Derek Duke, where the district court conducted 15 days of hearings on the appropriateness of this specific doctor conducting Rule 35 examinations [pages 9-43, (Exhibit C)]. This doctor testified that over the course of a year, he earned more than $1 million performing just these examinations. We have seen doctors charge anywhere from $1,000 to $10,000 for these examinations. That includes the review of medical records and the examination of the injured person.

Chairman Yeager:
The reason I ask that—I am not trying to drag anyone through the mud—is because I wanted to dovetail off Assemblywoman Krasner's question about the availability of doctors. It does sound as though it can be lucrative, so I do not know that it would come to pass if we were to enact this bill. We have heard some bills in this Committee in the criminal context about the importance of recording confessions. We have also had body camera bills. Some of the reasoning there is just what Ms. Brasier said: if you have to go into court later and have a dispute about what was said or what happened, it is obviously very helpful to have a video recording. I know in this circumstance we are not talking about video, because it is a medical examination. We are talking about audio. Is part of the reason you brought this bill forward to try to eliminate some of the litigation costs that happen after these examinations in front of the court?

Graham Galloway:
Exactly. That is the intent, or at least a major component of the intent of this bill: to eliminate the squabbling, the fighting, the extra unnecessary litigation, and the expense involved in that. That is part of the intent of the bill.

Chairman Yeager:
At this time, I will open it up for testimony in support.

David Sampson, Attorney, Law Offices of David Sampson, Las Vegas, Nevada:
I have seen some of the issues brought up in dispute of this particular bill. There is a clear understanding among the defense bar, the plaintiffs' bar, and in the insurance industry, of the importance of operating in the sunlight. When an insurance company learns of an incident—whether it is someone falling somewhere, a car crash, or whatever else goes on—one of the very first things they try to do is get a recorded statement. It is always important to them that they have a tape recording or some kind of digital record of what the individual has to say about what took place and what their injuries are. I have never once heard of an insurance

adjuster doing a statement of someone who has been injured and not making a record of that. So they understand and appreciate the importance of operating in the sunlight and making sure we have a record. Every time a deposition is taken, we have a record that is made. That is not just pursuant to the rules. It is important to understand and have a court reporter write down everything that goes on. More and more nowadays, we have a large percentage of depositions taking place with a video recording because it is important that we catch not only what is said, but inflections in voice, facial features, body language, et cetera. The defense bar, the plaintiffs' bar, and the insurance industry clearly understand it is important to have a clear, accurate record of what goes on. Whenever there are written questions submitted—they are called interrogatories in legal proceedings and discovery—they wisely always insist that those be signed under oath, verified, and notarized so we have a clear depiction of what the individual said and what took place when these different things happen.

Then, miraculously, when we turn to these Rule 35 examinations and when it comes time to take one of my clients and put him or her in a room with a highly paid expert from the defense and shut the door, all of a sudden, the insurance industry and the defense bar—and I would imagine any other opponents to this particular bill—do not want any record made. They want the conversation to have no witnesses, no transcript, no recording, and no idea as to what went on other than the proverbial "he said, she said." As Ms. Brasier mentioned, when you have a "he said, she said" situation come down to a layperson who did nothing wrong but was sitting at a stoplight when someone came through and hit him from behind with their car, and the person on the other side is a doctor who has been practicing in Nevada for 20 years, there is a tendency of jurors—no matter who is right, who is wrong, or what the truth is—to side with the defendant's expert and say whatever they are saying took place must actually be what happened. It is extremely unfair. I have seen, personally, on multiple occasions, the defense come back from the examining doctor with a report that contains information my client says is not true. If you review the order regarding Dr. Duke, there were multiple times when Dr. Duke said things took place in the examination that actually could not be true.

I would like to share two quick examples. When I was a very young attorney, in 1999 and 2000, I was involved in a case where my client was sitting in a lawn chair one evening in his driveway when a drunk driver drove across the road, up over the curb, across part of the lawn, and into the driveway, hit my client who was sitting in the lawn chair, and hit the house he was sitting in front of. My client was asked to attend an examination because his leg was shattered. He had $60,000 in medical bills as a result of his first night in the emergency room. They had the defense and the insurance company for the drunk driver hire a doctor to examine my client. When that report came out, I was astonished to read the doctor's report which said my client indicated he was walking in what the defense attorney later argued was the road when he was hit by this car. Of course, I went to my client as a young attorney not realizing what was going on—I even wanted to give deference to the doctor—and asked him why he told the doctor he was walking in the road when we had eyewitnesses and knew he was sitting in a chair in his driveway. Of course, my client was very insistent that was not what he said. We had to have this "he said, she said" dispute between the doctor saying, "Oh no, Mr. Johnson told me he was walking in the road," and my client saying, "No, I told the

doctor I was sitting in a chair." We had to get into this big mess with additional eyewitnesses who, thankfully, were there to say, "No, he was sitting in a chair and not trying to walk." In my opinion, they are trying to manufacture an issue that, first of all, has nothing to do with medical treatment. Why the doctor would even be talking about whether you were walking in the road or sitting in a chair is beyond me. It shines a light on the issues. It would have been nice, in that case, to have a record or an observer to say, "No, I was there. I heard exactly what Mr. Johnson said, and he said he was sitting in a chair as he said every other time he has talked about what happened in this horrific incident."

I had a situation recently in a case that I had where another doctor who had examined my client came out and said my client had misrepresented to me facts about a magnetic resonance imaging scan she had. My client said that was not what took place. I have seen it a number of times. I know Mr. Galloway had mentioned the experts are weaponized. I am not going to comment on whether that is the case or not, but I would like you to consider this: in 20 years of practice I have had hundreds of clients go and have an examination by a doctor who was hired and retained by the defense and the insurance company. Out of all of those cases, I can remember one time where the doctor examined my client and said these injuries that this individual sustained were due to this particular crash. In every other case I can recall, the doctors have invariably said the injuries were either not caused by this crash or they were not to the extent that the treating doctor had claimed.

The arguments related to the chilling effect simply do not hold. We see in our neighboring states that it is not the case. I would ask you to please consider this: I have had both male and female clients call me in tears from the doctor's office saying they were subject to being yelled at—what they considered to be abuse—and they did not know what to do. Please have these examinations take place in the sunlight and allow the citizens of Nevada to have the same rights as our sister states to be protected and to have an accurate depiction of what takes place in these examinations.

Chairman Yeager:
Is there additional testimony in support? [There was none.] Is there anyone opposed to A.B. 285?

Dane A. Littlefield, President, Association of Defense Counsel of Nevada:
I will stick mostly to my prepared statement (Exhibit D), but I do have additional comments that I will work into that. In support of my testimony today, I have provided the Committee with a copy of the current version of Rule 35 (Exhibit E), the former version of Rule 35 (Exhibit F), the Supreme Court of Nevada administrative order enacting the amendments to NRCP (Exhibit G), and various statements in opposition to the bill by members of the Association of Defense Counsel (Exhibit H). I have also provided a Supreme Court of Nevada case addressing the separation of powers issue that is implicated by this bill (Exhibit I).

One of the things we heard earlier was an attempt to characterize Rule 35 as affecting a substantive right and distinguish it from a procedural rule. That is simply not the case.

The *Nevada Rules of Civil Procedure* are made to address civil litigation through all phases, including the discovery phase, whether that is dealing with a Rule 35 examination or interrogatories as was addressed by the supporters of the bill.

The first issue is that A.B. 285 appears to be an attempt to reduce the pool of doctors willing to conduct Rule 35 examinations and create an unfair advantage, which has already been addressed by the Supreme Court of Nevada and the committee assigned to revise NRCP. This bill would allow the observer of a Rule 35 examination to be the plaintiff's attorney or a representative of the attorney, as you are aware. This could lead to unnecessary confrontations with doctors and unnecessary motion practice. Assembly Bill 285 only allows the plaintiff's attorney to attend a Rule 35 examination. There is no provision for the defendant's attorney or an observer representative of the attorney to be present. This creates a situation in which the plaintiff's attorney has an unfair, and perhaps unethical, opportunity to engage in direct communications with the doctor selected by defense counsel without defense counsel being present. The solution to that would be to simply not allow attorneys in the room. Under the current rule, there is a provision to allow recording by audio means for a showing of good cause. I would submit that good cause could be if a plaintiff's attorney has concerns about a doctor who has been retained by the defense who—I will remind the Committee—is already subject to the Hippocratic oath. A doctor is not an insurance company hitman.

The bill would allow the plaintiff's attorney to make a stenographic recording of the examination as an alternative to audio recording. This contemplates the presence of a court reporter. It is my understanding that many doctors would decline to participate in Rule 35 examinations where a lawyer and a court reporter would be present in the examination room. This would create an atmosphere in which many doctors would no longer be willing to participate in the examinations, and this would create an unfair advantage for the plaintiff's personal injury bar by substantially reducing or, perhaps, eliminating the defense bar's ability to retain them.

The bill allows audio or stenographic recording and limits the audio or stenographic recording to "any words spoken to or by the examinee during the examination." This suggestion is unworkable and would require the recorder or stenographer to stop recording anytime a word is spoken to anyone else in attendance at the examination. Additionally, A.B. 285 contemplates that the examination might need to be suspended for misconduct by the doctor or the attorney observer, with potential court review. However, because an audio or stenographic recording cannot include anything the lawyer said to the doctor or the other way around, there would be no record of the alleged misconduct and no way for a court to decide a "he said, she said" dispute. These concerns are already addressed by the current Rule 35.

Assembly Bill 285 allows the plaintiff's attorney to suspend the exam if the lawyer decides that the doctor was "abusive" or exceeded the scope of the exam. However, the plaintiffs' bar is concerned with eliminating motion practice caused by differences in opinion of what occurred at the examination. Something we would likely have differences of opinion on is

the definition of "abusive." To what extent do actions and/or words within the examination room become "abusive"? This is a highly subjective and highly prejudicial rule and provides no clear standard for the lawyer to make the highly disruptive decision on whether to suspend the examination. Moreover, the defendant is burdened with the cost of an examination that may abruptly be suspended for no real reason other than the plaintiff's attorney's subjective determination.

Further, section 1, subsection 6 of A.B. 285 states that if the exam is suspended by the lawyer or the doctor, only the plaintiff may move for a protective order. There is no reciprocal provision that allows the defendant to move for a protective order or a motion to compel to prevent abuse by the plaintiff's attorney during the exam or to seek sanctions against the offending attorney. Allowing one side in a lawsuit to seek relief while denying the availability of such relief to the other side would be grossly unfair and, most likely, a violation of due process.

In addition, A.B. 285 invites a clear and direct violation of constitutional separation of powers. This is why the plaintiffs' bar is trying to cast this proposed statute as affecting a substantive right rather than a procedural one; it is the only way they can try to get away from the Supreme Court's independent ability to draft and promulgate their own procedural rules. The Supreme Court of Nevada has enacted a comprehensive set of rules dealing with discovery, the NRCP, which includes Rule 35. The Court consistently holds that the Legislature violates separation of powers by enacting procedural statutes which conflict with preexisting procedural rules or which interfere with the judiciary's authority to manage litigation. If it were to become law, this new statute would directly and inappropriately contradict important parts of the newly amended NRCP and therefore violate the separation of powers doctrine.

Finally, the Supreme Court of Nevada's Nevada Rules of Civil Procedure Committee, in its drafters note to the new version of Rule 35, explicitly and directly rejected that an attorney or an attorney representative should be present at Rule 35 examinations in Nevada. That issue has already been considered duly and rejected in turn.

Assemblywoman Backus:
While you were speaking, I was trying to take a look at Rule 35 of the *Federal Rules of Civil Procedure*. It starts off looking similar to our new Rule 35 of NRCP. Are there any federal statutory provisions that address independent medical examinations to your knowledge?

Dane Littlefield:
Not to my knowledge, but I have not researched that topic.

Assemblyman Edwards:
I have a question about something you said about it being unfair to have one side represented in the room and not the other side. However, if you do have a representative of the plaintiff, the doctor is actually serving as a representative of the defendant. Is that correct?

Dane Littlefield:
That is correct. However, there would not be a defense attorney present in the room.

Assemblyman Edwards:
However, you do have representation, and you have trained representation that can actually take care of the defendant's side of the story.

Dane Littlefield:
Well, that assumes the expert witness who has been retained has a knowledge of what the scope of the procedural discovery rules are and what they can and cannot say. The fact that the bill as it stands does not allow for the recording of any statements that are not made directly to or from the plaintiff would mean there is no record for what is said in the room. It would become another "he said, she said" dispute.

Assemblyman Edwards:
How would an audio tape stop recording something that is being said in the room?

Dane Littlefield:
That seems to be the problem. That would be an issue where the audio recording would record everything, but to submit that to the court with a protective order or a motion, the plaintiffs' bar could make an argument that we would have to redact anything in a transcript that would be derived from that audio record and remove anything that could actually be back and forth between the doctor and the attorney.

Assemblyman Edwards:
If this goes through, that does not happen, right? If this bill is approved, the redaction does not take place. You have the full story there from both sides, correct?

Dane Littlefield:
Not the way the bill is written. The way the bill is written directly minimizes what can be recorded by stenographic or audio means to only the statements to or from the plaintiff. Under the current rule, audio recording can be done for good cause, and I do not believe it limits statements that are made. I would direct the Committee to the current Rule 35(a)(3) of the NRCP, which addresses audio recording of an examination.

Assemblyman Edwards:
I do not see where you are saying that anything is redacted or eliminated in the audio tape.

Dane Littlefield:
In the bill it would be section 1, subsection 3. It says, "Such a recording must be limited to any words spoken to or by the examinee during the examination."

Assemblyman Edwards:
So if that is between the examiner and the examinee, should that not give you the story of what is going on?

Dane Littlefield:
Not if there is a third party in the room. This would only be the examiner and the examinee. It would exclude any statements between the doctor and the observer, whether that is an attorney, an attorney representative, or a family member.

Chairman Yeager:
We can have the sponsors address that when they come back up. The way I read it was that it would not allow the attorney or representative to just start making arguments on the audio recording, but I believe the intent was to make sure whatever was said in the room is available for the judge. We can let the sponsors address the intent of that provision when they come back up.

I have a question. I understand where you are coming from. However, at the same time, to the extent there are disputes about what happened in the room and what was said, would it not be helpful to have at least an audio recording to be able to present to the discovery commissioner in helping to decide that? Do you just believe that would make it more difficult? The way I see it, it would be more helpful for the judge in making a decision to have a recording of what happened.

Dane Littlefield:
I do not necessarily disagree with that. A recording can be appropriate in certain circumstances, and the current rule actually provides for an audio recording for good cause. I think that is the intent of the Nevada Supreme Court and of its committee. I would submit that good cause would be if a plaintiff's attorney does have a concern that an expert witness who has been chosen by the defense may be problematic. Whether that is well-founded or not, that can be established via motion practice if the parties cannot stipulate to an audio recording. At that point, it would go before a judge who would be neutral and determine whether there is good cause to believe that an audio recording would be necessary to protect any party's rights.

Chairman Yeager:
I know we are just about three weeks into the new civil rules, but are you aware of any judges actually finding good cause in allowing an audio recording of an independent medical examination?

Dane Littlefield:
I have not been personally involved in any decisions of that nature.

Chairman Yeager:
I know it might be too early for this to work its way through the system, but I just wanted to ask that.

Assemblywoman Krasner:
Going back to the statement about this allowing for confrontations with only a plaintiff's attorney being in the room with the doctor and not the defense counsel being present,

obviously, the doctor is not an attorney. I have to agree with you there. Is it your position that if the defense were allowed to have an attorney or representative present as well, you would be okay with this bill?

Dane Littlefield:
Not necessarily. I think the issue with that is, I cannot imagine any plaintiff's attorney ever agreeing to have a defense attorney in the room during a medical examination that could become very private. That is why the most clear-cut solution is to not allow any attorneys or their representatives in the room. Of course, if a plaintiff and the plaintiff's attorney were amenable to something like that, it would be worth considering from a defense perspective.

Assemblywoman Torres:
I have some concerns about not allowing for another person to be in the room. I think back to my own father whose first language is not English. Sometimes, he has difficulty expressing himself. Although my mom would not get involved in the middle of a doctor's appointment, I think having her present allows him to feel more at ease because it is a setting where he does not feel comfortable and her being in the room would provide for an additional level of comfort. Additionally, my father is not the most reliable witness because he does not necessarily understand all the medical jargon that is being thrown around. I think it benefits both sides. It would benefit the plaintiffs and the defendants in that it allows for both of them to have a reliable story of what occurred if either another individual is present or if that encounter is recorded.

Dane Littlefield:
I agree with you. The rules currently do allow for an independent observer in the room; it just provides that the observer will not be an attorney or an attorney's representative. Family members are currently allowed in the room.

Assemblywoman Torres:
Are they allowed to record currently, or only with the judge's permission?

Dane Littlefield:
It would be with a showing of good cause. In a situation such as that where there is an issue with a language barrier, that could be grounds to assert good cause and have the judge rule on that or the parties stipulate to that.

Assemblywoman Torres:
In how many cases have they shown good cause for the mere fact of translation or additional assistance over the last year?

Dane Littlefield:
At this point, I do not have that information. However, I do not know if there is actually a data tracking capability for that. I would be happy to look into it to see if there is precedent for that. I just believe the language barrier issue would be a strong argument from the plaintiff's side.

Assemblywoman Cohen:
Continuing with Assemblywoman Torres' father as an example, say he is in the Eighth Judicial District Court. We have heard from the judges of the Eighth Judicial District Court and the other district courts throughout the state that their dockets are full, they need more judges, and there is too much going on. Can you tell us how long it would take if a plaintiff's attorney filed a motion saying they have good cause to have someone else in the room? How long would that process take in the Eighth Judicial District Court?

Dane Littlefield:
My practice area is pretty restricted to the Second Judicial District Court and some other northern Nevada courts. I cannot speak to the Eighth Judicial District Court particularly. I can offer that if there is good cause, at least up here in northern Nevada, we, as defense attorneys, are amenable to stipulating to reasonable requests. We may be portrayed as sticks in the mud who are not willing to compromise, but that is not the case. We are willing to work with people when there is a showing of good cause. If a motion to compel or a motion for a protective order requiring audio recording—a family observer is already allowed without a court order—is requested, I do not imagine it would be a very long process. It would go to a discovery commissioner, and the commissioner can work on that relatively expediently. My experience in the Second Judicial District Court is that we are fortunate to have a discovery commissioner who is extremely expeditious and very quick. Unfortunately, I cannot speak to the Eighth Judicial District Court.

Assemblywoman Cohen:
Once a motion would be filed in front of a discovery commissioner, how long would that take before it is heard?

Dane Littlefield:
As a former law clerk, I know internal rules of the court are, generally, they try to have a turnaround within 60 days. It is not guaranteed; it is just a general target goal. When matters get sent to the discovery commissioner, it can be anywhere between a week and 60 days. Generally, my experience is that it is much quicker than the 60-day rule of thumb.

Assemblywoman Cohen:
As attorneys, we are not supposed to file pleadings right away. We are supposed to work with each other. The discovery commissioner is going to want to know what the plaintiff's attorney did to try to work this out, so there would be phone calls, letters, and emails going back and forth beforehand for a few weeks on top of this. Is that correct?

Dane Littlefield:
That is correct. I would submit that the rules already provide a mechanism to remedy that. If an attorney is engaging in bad faith and if the discovery commissioner determines that any objections were not made from a good-faith basis, it opens that attorney up to discovery sanctions that can be levied against him. If it is found that the attorney is needlessly wasting the court or the other party's time, that would be a route the plaintiffs could go down.

Assemblywoman Cohen:
So we could go around 90 days before we have this resolved. Also, I think you can talk to any attorney who practices in this state, and that attorney would tell you that opposing counsel has acted inappropriately and that attorney could not get results from the court.

Chairman Yeager:
I will open it up for additional opposition testimony for A.B. 285. [There was none.] Is there anyone neutral? [There was no one.] I will invite our presenters to come forward to address Assemblyman Edwards' question and make any concluding remarks.

Alison Brasier:
Going to section 1, subsection 3, about allowing recording, I think we would be open to working on the language of that section. The intent was to capture exactly what happens in the room. That would include any dialogue with the observer. I think we would be open to dialogue about changing that section to alleviate any concerns. I was sitting and thinking about why this needs to be codified in NRS and we cannot just take care of it through the current rules. Something that has not been talked about before was that there are certain examinations that take place called "underinsured or uninsured motorist coverage" in which a person's own insurance company is, under contract, allowed to have them submit to one of these types of examinations prior to litigation being filed. Going along with the substantive rights we have been talking about and this right to control your body—even outside the litigation context—when you are dealing with an examination being compelled by an insurance company, I think it is important that we have those protections codified in our NRS.

George Bochanis:
It was our intention that the audio recording captures everything from the moment the person walks into the examination room to the second that person leaves the examination room. What you are hearing from the opposition is a very narrow interpretation. It certainly was not supposed to be so diced up. We want everything that is being said by everyone during these examinations to be part of the record. That, again, goes along with the whole concept of keeping this out in the open. It should not be some secret proceeding.

The other thing I wanted to comment on was Assemblywoman Cohen's remarks about the time element. An objection to this type of examination and having to litigate it is going to involve a meet and confer or a telephonic call first between both attorneys, which is going to take several weeks to arrange. It is going to require a motion before the discovery commissioner which adds 30 to 60 days. If one of the attorneys does not like the results of the discovery commissioner report recommendations—that report sometimes takes a month because there are objections to the language—it then goes to district court. Add another 30 to 60 days. If you are going to allow litigation on every examination request for good cause showing on audio recordings, you should give the Eighth Judicial District Court every new judge they want because you are going to need them. It is really going to cause an issue of access to justice for these types of cases.

Graham Galloway:
The argument that somehow this bill will lead to the suppression of the availability of experts for the defense side is still unsupported. I did not hear and I have not seen any evidence that will occur. What I did hear is one expert down south is making $1 million per year doing this kind of work. It is a lucrative business. There will be experts available.

Chairman Yeager:
I will now close the hearing on A.B. 285. [(Exhibit J) was submitted but not discussed and will become part of the record.]

I will now open the hearing on Assembly Bill 20.

Assembly Bill 20: Revises provisions governing judicial discipline. (BDR 1-494)

Kevin Higgins, Chief Judge, Sparks Justice Court; and representing Nevada Judges of Limited Jurisdiction:
We have offered an amended version of the bill (Exhibit K), and that is what I will be discussing this morning. The preamble to Assembly Bill 20 declares, "It is in the best interest of the citizens of the State of Nevada to have a competent, fair and impartial judiciary to administer justice in a manner necessary to provide basic due process, openness and transparency." Just as we work every day to ensure everyone who appears in our courts are treated fairly and given due process of law, the judiciary should enjoy the same treatment and guarantees of law if they are subject to review or discipline by the Nevada Commission on Judicial Discipline.

Section 1 of Assembly Bill 20 amends *Nevada Revised Statutes* (NRS) 1.440, which already provides for the appointment of two justices of the peace or two municipal court judges to sit on these judicial discipline proceedings once they go to hearing, and merely adds that the Supreme Court of Nevada will consider the advice of our association when making those appointments. We are only asking that the association offer who they think would be a good member to sit on that commission. Of course, the Supreme Court is free to appoint anybody it wants. We have no veto power or anything other than offering advice as to who we think would be an appropriate member.

Section 2 of the bill amends NRS 1.462, subsection 2 to provide that the *Nevada Rules of Civil Procedure* (NRCP) apply to all proceedings after the filing of formal charges. When the Commission receives a complaint from the public, it may choose to investigate, it may choose to ask the judge to respond, and it may file formal charges. Only after the filing of formal charges would this amendment apply. The *Nevada Rules of Civil Procedure* set forth pretrial procedures for discovery, interrogatories, requests for admission, and would also establish rules for pretrial motions. There are no such rules now. Many boards and commissions are subject to NRS Chapter 622A. Those are the NRS Title 54 boards. The Nevada Commission on Judicial Discipline is not a Title 54 board. For those boards it applies to, the rules for pretrial discovery, admission, and motions are set forth in statute.

Section 1, subsection 3 would adopt a procedure followed by many professional regulatory boards in Nevada that the investigative and prosecutorial functions are separated so the board members who decide whether to investigate and file a formal complaint are not the same members who decide whether a judge has violated the judicial canons of the *Revised Nevada Code of Judicial Conduct* and should be disciplined. This is important because, oftentimes, the evidence that is considered in the investigative phase is not the evidence that is introduced in the adjudicative phase, but the board members are aware of it and it is unclear how they disregard it when making a judicial decision. Simply put, the police and prosecutors should not be serving as the judge and jury. Due process requires that discipline decisions be made only on evidence introduced at the hearing, not evidence considered in closed, secret sessions before the public hearing. This is the procedure followed by many boards and commissions. I will draw the Committee's attention to the procedure followed by the Board of Medical Examiners in NRS 630.352: any member who sits on the investigative committee that makes a decision on whether or not a formal complaint should be filed cannot sit on the hearing panel to decide whether the physician should be disciplined.

Section 2 of the bill sets forth some specific due process protections. Section 2, subsection 4, paragraph (a) provides that the venue for a hearing will be in the county where the judge resides. Right now, frequently, northern judges' hearings are held in southern Nevada, and southern judge's hearings are held in northern Nevada. The judges, their attorneys, and their witnesses have to travel to the far end of the state to have their cases heard. This would just provide that the venue resides where the judge is.

Section 2(4)(b) provides that there would not be any interrogatories until after the formal statement of the charges. Just like a regular civil case, interrogatories and requests for admission are not appropriate until a complaint is filed and the person understands what the actual complaint is. Right now, the practice is to ask judges to respond to interrogatories and requests for admissions before the filing of formal charges, before the judge knows what they are actually going to be charged with, and judges are required to testify against themselves before they know what they are being charged with. This would just require them to wait until the formal filing of charges. There are pending cases, even a Nevada Supreme Court case, where judges object to these interrogatories. With a failure to answer them, they are deemed admitted, and you are also subject to additional discipline for failing to cooperate with the investigative process.

Section 2(4)(c) would provide that the Commission would provide all parties with the reports and investigative materials appropriate to the case once a complaint is filed, and no later than ten days before the hearing, including any exculpatory materials. There is no such requirement now that the Commission provide exculpatory materials. Discovery to requests, which are subject to ongoing litigation, have been denied by the Commission in the past. I think it is simply fair that any evidence that is going to be used or relied on by the Commission at the time of the hearing be presented to the judge and their attorney before the hearing. There is ongoing litigation about prehearing motions. Section 2(4)(d) provides that those motions be heard in an open preceding in the county where the hearing is set unless the parties agree to submit it.

Section 2(4)(e) would require that the prehearing motions be decided ten days before the hearing. These motions are commonly motions to dismiss or motions to limit the charges or discovery motions. Currently, it is the practice of the Commission to not hear those until the full Commission hearing. The defense of the judge may be contingent upon how some of those pretrial motions are heard—whether some of those charges are dismissed or not considered or are not violations of the canons of judicial discipline. Having to wait until an actual hearing to have the pretrial motions considered means the attorney providing the judge their defense really does not know what defense they will be able to provide until the time of the hearing.

Section 2(4)(f) would require that every party be entitled to provide all evidence necessary and relevant to support the case and be given time to do so, and that time limits not be placed upon the presentation of the defense. It has been the practice of the Commission to ask the prosecutor how long he needs to present, and then the defense is given the same amount of time and told they cannot exceed that. It is practice in court that defense has all the time it needs to present its defense; it is not limited by artificial rules. It would have to be necessary and relevant evidence, of course. Section 2(4)(g) provides that if any commission rule conflicts with the NRCP, the NRCP will take precedence.

The additional sections clarify some of the evidentiary standards that are used in making these decisions. Section 3 would reword NRS 1.4655(3)(e) to provide that a decision to authorize the filing of a formal statement of the charges would be made when there is a reasonable probability, based upon clear and convincing evidence, to establish grounds, so there is an evidentiary standard now provided in the statute. Section 4 removes the phrase that investigations would only be conducted pursuant to the Commission's own procedural rules. Section 5 rewords NRS 1.4667(1) so the decision to file a formal complaint is based on "whether there is a reasonable probability, supported by clear and convincing evidence, to establish grounds for disciplinary action," which just rewords the current language of the statute.

Section 6 amends NRS 1.467 so that a judge has an opportunity to respond to the initial complaint made to the Commission, but is not required to do so. Now, when the complaint from the public comes in, the judge is asked to respond to that. However, that could be premature based upon the filing of a later formal complaint. If a judge wants to respond, he can, but he is not required to make statements or admissions until he knows what the actual charges against him are, after which the Commission can decide, based on clear and convincing evidence, whether to file a formal complaint.

Section 7 amends NRS 1.468(2) to clarify that the evidentiary standard to determine whether to enter into an agreement to defer discipline is based on whether there is clear and convincing evidence to establish grounds. Section 8 sets forth the provisions on how the amendments apply prospectively into existing cases, and section 9 makes the act effective on passage and approval.

The judges in the state are expected to apply due process rights and give everybody a fair and open hearing. I think it is reasonable to expect that if we are subject to discipline, we enjoy the same due process rights as anybody who appears in front of us. There is a legal maxim that is a question in Roman law about "Who watches the watchers?" Who decides whether the police are doing a good job? Who keeps track of that? The Commission on Judicial Discipline is an independent commission. They report to no one. They are not supervised in any way, and the only way to resolve a dispute is to appeal a matter directly to the Supreme Court of Nevada. I am sure we are more than willing to hear from the Commission and have a discussion with them about possible amendments to this bill, but I do not think it is unfair to expect that due process rights apply when judges are brought before the Commission.

John Tatro, Senior Judge; and representing Nevada Judges of Limited Jurisdiction:
I do not want to understate the issue and the importance of it. I have an understanding of how the judges feel and of issues that have come up over the years. I was president of the Nevada Judges of Limited Jurisdiction (NJLJ) twice. None of us want bad judges. It reflects on all of us because when you read about a bad judge, it is as though they group us together, and we certainly do not want that. We want a remedy for finding out bad judges and people who violate ethics rules or other rules. I think the Commission is a very important thing, and I think the work they do is admirable and good. However, this discussion has been at the top of the NJLJ's agenda for over 24 years. I am not talking about war stories about the Commission; it is just this unknown. Why can we not have the same due process rights that litigants have in court on the civil side? We think it is extremely important.

You all received a letter from former Justice of the Supreme Court of Nevada Nancy Saitta (Exhibit L). In the second paragraph, she says we "must not ignore the most basic notion of fair and equal treatment under the law." We are judges, but we should be afforded that same treatment. When something is brought before us, we should have the same rights as everyone else does. I think Justice Saitta's statement sums it up.

Richard Glasson, Judge, Tahoe Justice Court; and representing Nevada Judges of Limited Jurisdiction:
I have been involved with NJLJ for the last 19 years. I am a former president and member of the board. Our mission with NJLJ is education, especially ethics education. We know and can assist the Supreme Court of Nevada in nominating these judges who will sit in judgement of other judges rather than getting that telephone call saying, "I do not know what I am doing. How do I respond to the Supreme Court? How do I sit?" We know who is capable, we know who is able, and we would like to be able to make those nominations to the Supreme Court rather than the same names over and over again being pulled out of a hat.

Ann E. Zimmerman, Judge, Las Vegas Township Justice Court; and representing Nevada Judges of Limited Jurisdiction:
I want to point out to the Committee that in *Mosley v. Nevada Com'n on Judicial Discipline* 117 Nev. 371 (2001), the Supreme Court of Nevada recognized that judges in Nevada have a protected liberty and property interest in the continued expectation of judicial office, especially where they are elected and serve designated terms. We believe that under the

current system we are being denied the basic rights of due process enjoyed by all civil litigants. It is kind of ironic that when you take your judicial oath of office, you swear to uphold the *Constitution of the State of Nevada* and the *Constitution of the United States*, but we do not enjoy those same rights before the Commission on Judicial Discipline.

Assemblywoman Backus:
With the new proposed bill, when would a complaint of charges become public? My understanding right now is that the pre-investigation is not a public proceeding. Is that correct?

Judge Higgins:
That is correct. Our bill does not change that at all. The pre-formal complaint process stays the same. Sometimes, it is confusing because the complaint comes in from the public, saying "Judge Higgins did XYZ." Then, after the process—the Commission makes a decision about whether to investigate, then a decision about whether I should respond, and then eventually presents a decision to file their formal complaint—the formal public complaint is filed by a Commission prosecutor. There are two complaints, but we do not change anything from how the Commission considers that complaint from the public now. Once the formal written complaint is there, NRCP would apply after that point.

Assemblywoman Backus:
That was my understanding. I am a licensed attorney, and I know that if someone sends a letter to the State Bar of Nevada they may not do any pre-investigation work. I get a letter shipped off to me saying, "You are in violation," but if someone took a look at the order, my name is not even in it. So it behooves me to easily just respond, and no formal complaint is filed. I was concerned that now imposing NRCP clear and convincing evidence standards may not just easily dispose of this, and there will end up being more backlog and maybe even more publicity for judges who run for office and who may not want this known. I was just trying to rectify this in my head.

Judge Higgins:
I do not think it changes that part. A judge can make a decision whether to respond. I think if somebody said, "Judge Higgins called me a jerk on the stand," I could say, "No, I did not. Here is the videotape. I asked him to sit down because he was making a scene." That would be quickly resolved, I would hope, by my responding to that public complaint. If the public complaint is that someone violated the canons and violated the criminal law and is subject to criminal prosecution—for some judges, that has been the case—I think, until the filing of the formal charges, judges have to make a decision about whether to give up those rights before they respond or are forced to respond. If you do not know what the formal charges are, it is hard to respond in those more complicated cases.

Assemblywoman Peters:
Would this pertain only to judicial duty disciplines, or does it extend to a situation in which a judge is taken into court for other issues?

Judge Higgins:
It would pertain to the workings of the Commission. It would not pertain to judges going into court for other issues.

Assemblywoman Peters:
Is a judge taken to the Commission only for actions done under the judicial office, or for any action that has consequences under the judicial system?

Judge Glasson:
A judge is a judge 24/7. What we do off the bench is subject to discipline, just as what we do on the bench. Judges must be patient, dignified, and courteous and must follow the "Boy Scout code" throughout their life. Oftentimes, a judge is brought up on a complaint and then perhaps a formal statement of charges on things that were totally unrelated to his or her duties on the bench. The old idiom is "sober as a judge." Well, if they are not, they should not be a judge anymore.

Assemblywoman Hansen:
I am a layperson. I know the law can get complicated, so this makes sense to me. You mentioned getting this fixed has been at the top of the list for several years. I was just curious about the history. Has this come before this body before? I am curious how we got here.

Judge Tatro:
No, we have not brought this bill forward. It has been talked about and talked about. This was the time when we decided to bring it forward. It has not come forward in the past.

Judge Zimmerman:
I think the reason why the bill has been proposed at this time is because judges have started to have lengthy conversations amongst themselves about the lack of due process before the Commission. Experiences have been compared, and many people are concerned about this. That is why we decided the time was right to bring this bill forward.

Assemblywoman Tolles:
It seems to me that what has been in place is an administrative process. When we start to move into language such as "clear and convincing evidence" and "due process," if there is criminal activity, it would go into court and that would have all of those applied. If it is an administrative process, it seems appropriate that it would stay at the current level to be dealt with as an administrative personnel issue. Can you speak to that?

Judge Higgins:
Both activities can come before the Commission. There was a judge in Las Vegas who was removed from the bench and was accused of mortgage fraud and was prosecuted for that. I think he went to prison. He still could be disciplined. If you are appearing in front of the Commission and have potential criminal liability for your conduct, I would assume the person would want some of it to be done before the other so you would not have to make

admissions. Both kinds of activities can come before the Commission. Judges have been disciplined for having a DUI, and that comes before the Commission. They have been dealt with and served their DUI sentence, but they still are disciplined following the criminal case.

Assemblywoman Tolles:
By asking that question, I meant putting clear and convincing evidence standards for administrative types of disciplinary action. I think that is more where my question is coming from.

Judge Higgins:
Several sections currently refer to "clearly convincing evidence." It has just been reworded to "clear and convincing" to make it clear that is the evidentiary standard. It currently refers to that. In some of the other sections it is added. That is true. I am sure there will be opposition to that, but we were trying to make it clear what the evidentiary standard is at each point of the proceeding.

Judge Zimmerman:
I think when you are talking about possibly disciplining judges or removing judges from office, their due process rights should be in place and not kick in at the level where you are appealing to the Supreme Court of Nevada. Due process should apply from the moment the formal statement of charges is filed. I want to caution or instruct that a complaint comes from an individual; it can be a citizen, it can be a lawyer, and it can be anybody that can file a complaint before the Commission. Once the Commission votes to proceed with a matter with the judge, they file what is called a "formal statement of charges." The formal statement of charges is when the matter becomes public and when the judge is formally charged. I wanted to make that important distinction.

Assemblyman Watts:
I see the current language speaks of a "reasonable probability . . . could clearly and convincingly," and this is changing it to "supported by clear and convincing evidence." Again, I am still learning about the variety of evidentiary standards in the law. It seems to me a little bit contradictory to have a reasonable probability supported by clear and convincing evidence. I have seen some things that indicate those are two separate standards. I am wondering why, in your proposal, you did not just eliminate "reasonable probability" and say "based on a finding that there is clear and convincing evidence."

Judge Higgins:
Well, there is a story about the elephant designed by a committee, right? A committee worked on this bill together, so it does not satisfy everybody's drafting needs. I think the intent was not that they use the same level of evidence at the investigative phase that they would at the conviction stage. That is where reasonable probability comes in, but whatever evidence they rely on is clear and convincing. If you are using a scale, "preponderance of the evidence" is just slightly tipped. "Beyond a reasonable doubt" would be tipped all the way; I cannot have any doubt in my mind. "Clear and convincing" is between that; it is more than just slight evidence, but it does not have to be beyond a reasonable doubt. There is case law

that explains what "clear and convincing" is. If there was a question, a judge could go to a Supreme Court of Nevada decision that explains what clear and convincing is if they were going to appeal it. I think that was the intent, to have an evidentiary standard but not force them to have the same decision level at the investigative phase and the conviction phase.

Assemblywoman Torres:
I have a two-part question. To clarify for my own understanding, if a judge were to commit a criminal act, he or she would go through the normal court process and also go through the Commission, correct?

Judge Higgins:
Correct.

Assemblywoman Torres:
I am wondering how this piece of legislation would compare with how other employees of the state have to go through their own employer. For example, as an educator, if I have a DUI, I get reprimanded through my occupation as well. I am wondering how this piece of legislation compares to our expectations of other employees of the state.

Judge Higgins:
I think it would bring it more in line with how it is applied. *Nevada Revised Statutes* Chapter 622A applies to all Title 54 boards. That includes almost everybody except a few commissions. That sets forth these procedures. It would be more parallel and similar to what happens to everybody else. If you are convicted of a crime by proof beyond a reasonable doubt, it is pretty much a given that you are going to be disciplined because boards' and commissions' standards are not as high. They can use the evidence of your conviction. Essentially, you do not have much defense to the discipline at that point because you have already been proven guilty. My experience is that most judges who have had a DUI, for example, just admit they had a DUI and throw themselves at the mercy of the Commission and hopefully have mended their ways. I think it brings it closer to how everybody else is treated.

Assemblywoman Torres:
I am not sure I see how that is different than what we do at my profession because if I were to have a DUI and there is a conviction, the district is going to see that. They have access to that. I do not understand what the difference would be.

Judge Higgins:
As a judge, you can be removed from office for habitual intemperance. You would lose your elected position. I would assume, as a teacher, while your employer might discipline you, I am not sure the State Board of Education would. Maybe that is the distinction. Here, the Commission has the authority to order us to go to treatment, suspend us, and even remove us from office. Apparently, habitual intemperance was a problem years ago, and it is written right into all of the proceedings that you can be removed from office. You would lose that

position. I do not believe the State Board of Education would revoke your license for a DUI, but I am not familiar enough with that.

Judge Glasson:
Oftentimes, it proceeds at the same time. I was called once to sit in a case in Clark County with regard to a judge who was accused of battery that constitutes domestic violence. At the very same time, the judge was up on those same charges before the Commission of Judicial Discipline. It is not always the "chicken and the egg." Sometimes it is happening at the same time.

Chairman Yeager:
Going to the amendment in section 2, subsection 4, some of the language says that "Any procedural rules adopted by the Commission . . . must provide due process," and then it says, "including, but not limited to," and provides a few different areas where the due process is specified. I wondered, with the language "including, but not limited to," are there some topic areas you have not enumerated in here where you feel as though there is not due process in the rules that have been promulgated by the Commission? I know sometimes they say "including, but not limited to," because they do not want to miss something in an exhaustive list. Does this list lay out what the current concerns are, or are there others that are not included in the list?

Judge Zimmerman:
These are the most pressing issues of due process the judges feel need to be addressed to make the process fairer. I just want to emphasize that as a judiciary association, we are not asking for more than average citizens receives when they litigate a matter in any court in the state of Nevada; we are asking for the same due process protections. It is problematic that under the current procedural rules of the Commission, they have the sole authority to determine where the venue lies. They decide venue based upon their own convenience and for no other reason. In any other case, venue would be decided based on where the conduct occurred or where the party resided. We believe venue should be the jurisdiction where the judge sits.

Judge Higgins previously went over the issue of never having prehearing motions determined until the minute before the hearing starts. These motions could include excluding witnesses, excluding evidence, adding witnesses, or adding evidence. How do you prepare for trial if you do not know what evidence you will be allowed to present? It would be no burden upon the Commission to hear those motions and issue a decision ten judicial days before the hearing. That would make the process fairer to the judges. I know we like to say "including, but not limited to" in case we forget something, but these are the big issues we think would make the process fairer.

Chairman Yeager:
With respect to venue, is that typically always in Carson City for these proceedings? My understanding is that is where the Commission on Judicial Discipline is housed. I wonder if any of you are aware of a venue being located outside of Carson City for the hearings?

Judge Zimmerman:
Most of the time, the southern judges' hearings are scheduled for Carson City. Most recently, maybe based upon numerous complaints, they have scheduled a couple of hearings in Las Vegas. It is still their decision where to schedule a hearing. It would be important to us to have venue determined by where the judge resides. The short answer is yes, sometimes the hearings occur in Las Vegas and sometimes they occur up north. I do not believe there is any rhyme or reason to how that is determined.

Assemblywoman Hansen:
Just to clarify, for several sections we were talking about the "clearly and convincingly" language, and then "supported by clear and convincing evidence" is the new language. Is it the same evidentiary standard?

Judge Higgins:
Clear and convincing evidence is an evidentiary standard. I think that was intended by the way it was worded. It is not necessarily the same. I think this would give us a reason, if there were a dispute, we could tell the Supreme Court based upon your history of litigating what clear and convincing means, we would have case law one way or another. I think it is the same standard, although I am not sure the opponents of the bill will agree to that. It is just a clearer standard.

Chairman Yeager:
I will open it up for additional testimony in support of A.B. 20. [There was none.] I will now take opposition testimony.

Paul C. Deyhle, General Counsel and Executive Director, Commission on Judicial Discipline:
I have with me today the full Commission, which comprises district court judges appointed by the Supreme Court of Nevada, attorneys appointed by the State Bar of Nevada Board of Governors, and lay members appointed by the Governor of this state. They are all in opposition to this bill. Gary Vause is our chairman. He very much wanted to come today, but his wife had a medical procedure, so he did prepare a letter that was submitted and uploaded to Nevada Electronic Legislative Information System (Exhibit M). In addition to that, I have also submitted the letter I sent to each of the Committee members in January (Exhibit N), as well as two cases and Commission orders that were filed in public cases that discuss the constitutionality of some of the issues that were discussed today.

A picture has been painted today that a certain group of judges in this state do not receive due process. That is simply inaccurate. I am going to do my best to scratch the surface, because underneath the surface of those allegations are the facts.

The current statutes and procedural rules reflect a number of competing interests: the interests of the public, the interests of judges, and many other interests. That is where we are today. Just ten years ago, this Legislature enacted sweeping changes to the Commission's statutes and rules at the recommendation of the Article 6 Commission. The Article 6

Commission was formed by the Supreme Court of Nevada in 2006. The goals of that commission were to increase transparency of the Commission on Judicial Discipline, to improve its effectiveness, the fair treatment of judges—which certainly would include due process issues and the timeliness of issuing decisions. The participants of this Article 6 Commission were experts from all over the country: law professors, judges, attorneys, and representatives from the Nevada Press Association and the American Civil Liberties Union of Nevada. The Commission on Judicial Discipline at that time fully participated in this effort. This took two years, where our rules and our statutes were under a microscope. As a result of that work, there was a report written. That report formed the basis in the 2009 Session for sweeping changes to both the statutes and the rules. Those were enacted just ten years ago.

I have heard testimony today that none of these issues were addressed. That is not true. All of these issues were addressed just ten years ago. I would respectfully request that if this Committee is seriously considering entertaining any of these requests, they do it the right way like they did ten years ago and convene an Article 6 Commission—which is named Article 6 after the section of the *Nevada Constitution* that deals with the judiciary—and get the input from all of these interests: the public, the judges, the lawyers, et cetera.

This is extremely important because you have only heard one side of the story here today from the proponents of A.B. 20. You have heard there is this rampant violation of their due process rights. That is, as I said, simply not the case. These changes from the 2009 Session reflect the national standards for judicial conduct and are in conformity with the judicial discipline commissions throughout the United States. This is nothing new here in this state. The structures may be different, but the rules and the laws that govern this Commission are followed around the country.

I will briefly go into the analysis of the bill. I know they filed an amendment to the bill. I can tell you, with all due respect, the commissioners unequivocally viewed that amendment as just as unreasonable as the original bill. I will tell you why: it has no regard for the process that has developed over 40 to 50 years, not just in this state, but across the country. It has no regard for the public or the taxpayer. Section 1 of the bill grants advice authority to limited jurisdiction judges only for judicial appointments for the Commission. I believe this is highly questionable on constitutional grounds. The Commission does not really have a dog in that fight. It does not directly affect the Commission, but I would think the Supreme Court of Nevada would have a problem with that because it is the appointing authority under the *Nevada Constitution*. The *Nevada Constitution* makes no mention of anyone having advice authority over their decisions, no more than the Governor or the State Bar of Nevada. I believe the Governor and the Board of Governors of the State Bar of Nevada are more than capable of appointing qualified individuals to these commissions.

This is just one group of judges within this judiciary, which is made up of over 600 judges, and I do not see any representation from the Nevada District Judges Association, the Supreme Court of Nevada, or the Nevada Court of Appeals. It is just one group of judges within Nevada that want to provide advice to the Supreme Court. I do not want to speak on

behalf of the Nevada Supreme Court, but I think they would have a big problem with this. It also sets a bad precedent as other groups will petition the Legislature for advice authority to influence appointing authorities to select members as well—not just this commission, but boards and commissions at every level.

Section 2 of this bill deletes the application of NRS and the procedural rules of the Commission. Now, I know the amendment to this bill took away the deletion of the application of the NRS, but it still deletes the procedural rules of the Commission. What a lot of people, even judges, do not know is that the procedural rules of the Commission were drafted and adopted by the Supreme Court of Nevada. They formed part of the Supreme Court's rules for decades. The Commission did not draft these rules; they are our rules now based upon constitutional amendments over the last two decades. We did not draft the actual rules that are being challenged by the proponents of this bill. The rules that they are attacking were adopted by the Supreme Court. I think we can all agree that the Supreme Court knows a thing or two about constitutionality.

The *Nevada Constitution* specifically and expressly empowers the Commission to adopt its own procedural rules. This is extremely important. We are not a district court. The proponents of this bill try to equate the Commission with any other court in this state. It is not true. We are a court of judicial performance. It is completely unique. It is not a district court. The same rules do not apply. That is why the *Nevada Constitution* itself empowers the Commission to draft its own procedural rules. We adopted those rules after a constitutional amendment in 2003. The same rules exist now, for the most part, in the statute as they existed ten years ago after this two-year effort to review all of these commissions and rules. These issues have been vetted by experts all over the country—by lawyers, judges, the public, and all these organizations. It is not true that these issues are the first time this Committee is hearing them.

The other part of section 2 is that the application of the NRCP applies to all stages. They did change that in the amendment, but as I said, they are requiring the procedural rules be simply negated, which I find constitutionally questionable. Section 2 also requires that the Commission's procedural rules provide due process to judges. This is not necessary. The *Nevada Constitution*, NRS Chapter 1, the procedural rules of the Commission, and Nevada case law already give all judges in this state due process rights. This is not necessary.

Section 3 revises the standard of proof required in judicial discipline proceedings. The current standard of proof is consistent with the standards of proof found in all jurisdictions in this country. Their change to this is a radical departure to what is customary and normal in all jurisdictions in this country. As I indicated in my letter to each of you in January, it does not make sense. To everybody that I speak to about this issue, it is contradictory. It requires the Commission to prove its case before a trial, before examining witnesses, and before conducting a trial on the merits. It just does not make any sense.

It also eliminates the Commission's ability to consider all evidence available for introduction at a formal hearing. They deleted this portion of the statute. All the Commission will be able

to do in this case is focus on the investigation report—nothing else, no other evidence. The investigation report is drafted by one individual. It is an independent contractor hired by the Commission to do an investigation of the facts. We would not be able to look at the transcript. We could not look at other evidence that may come in after the investigation but before the decision is made to file a formal statement of charges. We just have to focus on the investigation report, which could have some issues; for example, if the factual evidence does not support the conclusions in the report or if there is new evidence that comes to the attention of the Commission after the investigation. The Commission has a right to follow up with the judge and ask the judge to respond to that evidence. It really handcuffs the Commission in doing its job, which is to get to the facts. A thorough investigation is what is needed. That actually provides more due process to the judges because we are trying to get it right. We have judges' reputations and livelihoods on the line. We have to get it right. This is an investigation. They are trying to impede and obstruct our investigation. I do not know a lot of judges, other than the proponents of this bill, who are okay with it.

Section 5 of the bill refers to not compelling a judge to respond to a complaint during the investigative phase of a judicial discipline proceeding. Again, I will be standing tall next week in Las Vegas before the en banc Supreme Court on an issue of whether or not the Commission can ask judges written questions during its investigative phase. This change in section 5 does not have anything to do with that particular question. The current statute requires a judge to respond to a complaint. They are looking to change that. They do not want to respond to the complaint; they want an option to respond to the complaint. Again, I have to stress that this is an investigation.

There are only two phases of the Commission process: the investigative phase and the adjudicative stage. The investigative stage starts with the filing of a complaint by a member of the public, and it ends upon the filing of the formal statement of charges. Everything before the formal statement of charges is an investigation. The adjudicative phase of judicial discipline proceedings starts at the filing of the formal statement of charges. This is the complaint the judges are talking about. This is where their adjudicative and due process rights start. This is in accordance with not only the Nevada Supreme Court, but the United States Supreme Court. This is clear and settled law.

This change, again, is a radical departure from what other jurisdictions have done and do across this country. The sole issue on Tuesday is whether we can ask written questions during an investigation. I am not going to belabor that point here, but I am going to say, again, this is an investigation. If investigative bodies cannot ask questions during an investigation, I think we should just pack it all up and go home. I do not know what the purpose of an investigation is if these investigating bodies—not just the Commission, but any investigating body—cannot get to the truth and the facts. That is what I will be arguing on behalf of the Commission next week before the Supreme Court of Nevada. As I indicated before, the Commission's statutes and the procedural rules being challenged by the proponents here are the same that existed in 2009 following the implementation of the Article 6 Commission report.

We have heard a lot of testimony today that the current judicial discipline process does not afford due process for judges. As I indicate in my opposition outline (Exhibit O), judges have more due process rights than any litigant in any court in this country. Eighteen to twenty-four months prior to the filing of a public complaint, there is a review of the complaint and there is an investigation that commences. The Commission holds three meetings. They review the complaint and there is an investigation. They come together again and review the investigation report and all other evidence. Then they vote again for the judge to respond. They have to respond, by law, to the complaint. They have the opportunity to clarify anything they want. They already know what the complaint is. Please do not get confused by the definition of complaint. Complaint is defined by statute as is the formal statement of charges. A complaint is one filed by the public, and the complaint by the Commission is one filed by the Commission. They are more than knowledgeable of the allegations against them early on in the process. If the Commission decides to investigate, they send an investigator out, the judge sees the complaint, participates in an interview, and can provide any documents or arguments to that investigator that the Commission will review and consider. The Commission also goes out and speaks with all other witnesses that are relevant to this allegation—not just the complainant, but everyone else—and considers all of that evidence, not just in the investigation report, but everything else, including videos, court documents, etc. The Commission meets again after they receive the judge's response and answers to questions and they vote again. In the response process, judges can provide legal arguments. They can correct mistakes. They may have misstated something in the interview because they are nervous or they forgot something. They can address new evidence the Commission has received. It is a perfect opportunity for judges to correct the record and reconcile any inconsistencies or ambiguities in witness testimony or even their own testimony. They can even submit legal arguments to the Commission. The Commission will consider all of that, every bit of it, before they decide to file a formal complaint against the judge.

When I hear they do not get any due process rights, it is simply not true. Look at the typical litigant in any court. They do not get advance notice of a complaint being filed almost a year and a half to two years beforehand. They do not have an opportunity to come in and talk to an investigator, have an interview, and submit legal arguments. They do not have an opportunity to petition the Supreme Court of Nevada on perceived due process violations. They do not have any of those rights. Yet a year and a half to two years prior to the decision of the Commission to file a formal complaint, all of this is taking place. The commissioners behind me and I cannot imagine how anybody can argue there is no due process rights for judges. It is simply not true.

With respect to the argument that the Commission blatantly violates due process rights, two years ago, I testified before this Committee on Assembly Bill 28 of the 2017 Session, which specifically expanded due process rights for this particular group of judges: limited jurisdiction judges. I drafted the bill. I testified before the Judicial Council. I worked with the Administrative Office of the Courts prior to the bill being introduced, and I testified before the Assembly and Senate Judiciary Committees. This bill was for their benefit.

It expanded their rights. The Commission is not out to get these judges. That is simply not the case.

As you know, discipline is imposed against all judges. We have 600 judges in this state or more—district court judges, hearing masters, Nevada Court of Appeals judges, and Supreme Court justices. Our decisions are all unanimous decisions. There are seven members on our Commission. There are two judges, two attorneys, and three lay members. Two of their own colleagues have decided, based upon the facts, they have committed misconduct. As far as the discipline that was imposed, these two judges agreed the discipline was appropriate under the circumstances. This is not a case of lay members and attorneys ganging up on the judges. That is not happening. These are unanimous decisions. I think that is very telling. Their own colleagues are finding them to be in violation of the code and the law and disciplining them accordingly. There is simply no consensus regarding the lack of due process protections among the Nevada judiciary.

I attached, as part of one of my documents, a public order for the Commission [pages 24-34, (Exhibit O)]. I am not going to discuss that order, I just want you to know who signed that order. That was Judge Thomas Armstrong. He was appointed by the Nevada Supreme Court. He is an alternate commissioner, and he was the past president of NJLJ, just four months ago. That order debunks all of the constitutional arguments you heard here today. This is from a municipal judge and justice of the peace to his own colleagues. The other order [pages 13-22, (Exhibit O)] addresses the arguments you have heard today that we need more than one keeper of judicial discipline because it is unfair. If you look at the highlighted portions, that is the law. This is settled law by the United States Supreme Court and the Nevada Supreme Court. They have already ruled on these issues. There is absolutely no evidence that a one-tier or a two-tier system is any more or less fair. In fact, the overwhelming majority of jurisdictions in this country have a one-tier system as we have here today. There is no evidence that our system is less fair or doles out less due process protections. There is simply no evidence of it. This was born out by a Stanford study not too long ago that said the same thing. They did a study. It is the only study of its kind. This hypothesis was not proven, but one thing in that study that was proven is that if there is a two-tier system, it is going to cost a lot more money, and you are going to get the same results—more money and more time.

I wanted to counter what was testified toward the end about venue. We do not have a policy of bringing judges up here from Las Vegas or vice versa. Nine times out of ten if it is a southern judge, we go down to Las Vegas. The only time we have brought a judge up here was for a one-day hearing when we could not have the trial within a few months. We have seven commissioners. It is literally like herding cats to try to get them together. It is very difficult. They are all professionals, judges, and attorneys. If it is a one-day trial and we have to wait another three months just to have the trial, I think having these done quickly based upon the public's need for these cases to go forward in a timely and efficient matter overweighs those concerns. There is no law they can point to that says it is a violation of due process because they may have to get on a plane for one day and go back home the next day. There is case law on this by the Supreme Court of Nevada and other jurisdictions.

In conclusion, I would like to stress that if a jurisdiction is to have a judicial system that has the confidence of its citizens, it must have a judicial system that is effective. From myself and all of these commissioners here today, we have utmost respect for judges. They do a noble job for the citizens of this state, and our mission is to protect judges.

Chairman Yeager:
You mentioned a Nevada Supreme Court argument next Tuesday. Is that going to be here in Carson City and do you know what time that will be?

Paul Deyhle:
That is in Las Vegas at 10 a.m.

Chairman Yeager:
Just one thing I wanted to put on the record so we are clear: all the bills from the Judicial Branch come through the Supreme Court of Nevada for submission to the Legislative Counsel Bureau. That is in the rules of the Legislative Counsel Bureau. If you look at A.B. 20, it does say "On behalf of the Nevada Supreme Court." That is the process that is set up in statute. In case anyone was wondering, as we have heard, there is at least one and maybe more cases pending in front of the Supreme Court of Nevada on some of these issues. Because of that, the Supreme Court of Nevada is not able to be here to express opinions on this matter due to ongoing litigation. I just wanted to make that clear for the record; under their rules, they are not going to be able to weigh in on this bill given the pending litigation. I will now open it up to questions from Committee members for Mr. Deyhle.

Assemblywoman Cohen:
Is there anything in the amendment that is acceptable to you?

Paul Deyhle:
No.

Chairman Yeager:
Do we have any additional testimony in opposition to A.B. 20?

Jerome M. Polaha, Judge, Second Judicial District Court:
I have been on the Commission since 2002. I have had a lot of hearings and a lot of experience with the Commission. The question was asked: Is there anything the Commission agrees to in this proposed bill? It is unnecessary. As far as the due process that has been argued here, it is afforded. Think about this: there are seven people on the Commission. We have an investigator. As far as the request for a two-tier system, to be able to make that work, we are going to have to split the panel. However, the law says four constitute a quorum for all reasons except for handing out discipline, for which I need five. Right there we have a problem that has to be addressed. The obvious way to address it is to expand the Commission, spend more money. Consequentially, there will be more delay.

The other aspect of the law which is a big selling point for them is that the investigation be founded on clear and convincing evidence rather than a reasonable possibility that there could be clear and convincing evidence after a complete hearing. Think about that. You have an investigator. That would be like police officers finding proof beyond a reasonable doubt before they took their case to the justice court. The court could say, "Well, there is obviously, by law, a requirement that proof beyond a reasonable doubt has to be established by the investigator. I got an investigation report; there had been proof beyond a reasonable doubt. What am I going to do? Pass it on to district court." Then district court gets it and says, "Why do we need a jury? We already have proof beyond a reasonable doubt, so my job is to punish you." That is the effect of what they are proposing, and it will not work. It is not due process.

Chairman Yeager:
Is there anyone else in opposition? [There was no one.] Is there anyone in neutral? [There was no one.] I will invite our presenters back to the table for any concluding remarks.

Judge Higgins:
Sitting here, I was starting to think I had drawn the short straw by agreeing to come testify today, but I did because I was available and I think this is an important bill. I think I need to disagree with my friend Judge Polaha. I think it is necessary to have some of these due process rights written into the statute because each of these touches a point where, in the past, the Commission has denied these issues. Prehearing motions are not being decided before the hearing. They are not being ruled on soon enough in advance for somebody to craft his or her defense. I think it is only fundamentally fair that the judges get all the evidence that is going to be relied upon by the Commission when they make their decisions and that everybody has a chance to present their side of the case. I have been told of cases in Las Vegas where the prosecution says they only need two hours, so the Commission says the defense only gets two hours even though they have a lot more than that. They are limited, then, by what the prosecution puts on. Each of those is in response to something that has been pending and that we think needs to be resolved.

I was trying to figure out how there are 600 judges in the state. I guess there are a lot of hearing masters and commissioners, but our association represents 95 judges. There are approximately 100 other elected district court judges and court of appeals judges, so I think we represent about one half of the elected judges in this state. Frankly, we do not agree on everything. Getting 95 judges to agree to go to lunch is difficult enough. Some people are big proponents of this bill. To some people, it does not bother them so much. I do not think I am a member of a minority radical group of judges that is seeking to change the rules. Many states have two-tiered systems. It only seems fair to me that whatever body decides what you are going to be disciplined for has not already been in charge of the investigation and decided what questions to ask and where the investigation goes. Those ought to be changed. I do not think we ever said there is rampant violation of every due process right. I think our testimony was that there are some things we think could be improved.

I might have to disagree that having to respond to an investigator's questions or be sanctioned for failure to cooperate with the Commission, I am not quite sure how that is a due process right afforded to the judges. We have to answer those questions or we are disciplined and sanctioned for failure to do so. I had hoped to be able to work on this bill and come to a conclusion. I was actually on the Article 6 Commission and spent hours and hours in hearings on the subcommittee I was on. I am aware there were a lot of things that did not get addressed. I do not think just because something is written one way it means we cannot change it ten years later. I think there is room for improvement. I do not think we are being radical; we are just asking for some basic fundamental fairness. I think we are still willing to sit down and meet with the Commission if they would like to. It does not sound as though there is a comma or a semicolon in this bill they agree with. We are still willing to sit down with them and discuss it if possible.

Judge Tatro:
When I started my testimony, I pointed out that we think the Commission does great work. They need to be there. They are very important. I have never once questioned if they made a right decision. It is just these issues that are our concern. Ten years ago, the Article 6 Commission happened, but things have changed. It is just like the NRCP recently being changed. Everything gets changed because things change. Time goes on, and they have to change.

There was one thing Mr. Deyhle said that I need to respond to. He indicated that Judge Armstrong, when he served on the Commission, signed that order. I am not saying whether he opposes or supports this bill, but when he was president, the way it works is we have a committee and then the whole body of judges decides what bills we are going to take forward to the council, and ultimately to this body. He was the president. It was a unanimous vote to bring this bill forward.

Judge Zimmerman:
I want to clarify and disagree with Mr. Deyhle on some of his remarks. None of the judges are saying that if there is a complaint made against them it should not be investigated and we should not be questioned. Our objection is to answering interrogatories that we have to swear under oath that could be used against us in the future if the Commission chooses to proceed with the formal statement of charges. If you do not answer the interrogatories, they are deemed admitted and you are slapped with an additional charge of failure to cooperate. The purpose of this is not that judges do not want to cooperate in investigations—they certainly should—it is the way the interrogatories are presented before formal statement of charges are filed that we object to.

I thought it was interesting that Mr. Deyhle testified that we have more due process rights than anybody else. However, he failed to address any of our specific concerns about pretrial motions being ruled upon, how much time is allocated to the defense to present their case, interference with the witnesses the defense wants to present, and standing on venue. He glossed over all of those and did not answer anything about those.

I also want to point out that I think it is very important that the investigative and prosecutorial functions are separate. When they are not separate, the outcome has always been predetermined. I am sure, if you reviewed the decisions of the Commission, they are always unanimous because they have been involved in the investigative part and heard that evidence and then hear the trial part. I also thought it was interesting to note that Mr. Deyhle said there are no district court judges here in favor of the bill. Well, there are no district court judges here in opposition either, but I can tell you from my own personal experience working in the Regional Justice Center, I am stopped constantly and encouraged. I have been encouraged by Supreme Court justices. I have been encouraged by district court judges. I have been told repeatedly that this is crazy to bring this bill before the Legislature because now I have made myself a target by the Commission. I do not believe that is true, but I have had that said to me repeatedly. For him to say this is a small minority of judges that want this, I have received encouragement from judges from all over the state in proceeding with this bill, so it is just not true.

Chairman Yeager:
I will now close the hearing on A.B. 20. I will hand this meeting over to Vice Chairwoman Cohen as I am going to present the next bill on the agenda.

[Assemblywoman Cohen assumed the Chair.]

Vice Chairwoman Cohen:
I will open the hearing on Assembly Bill 423.

Assembly Bill 423: Revises provisions relating to certain attempt crimes. (BDR 15-1117)

Assemblyman Steve Yeager, Assembly District No. 9:
It is my honor to present Assembly Bill 423 to you this morning. This bill allows certain people to petition the court for a reduction of charge once they finish their sentence. This bill only applies to crimes known as "wobblers," which is kind of a funny name. A wobbler means that when the person is sentenced for a crime, the judge can either adjudicate the person for a felony or a gross misdemeanor. Essentially, the crime wobbles between a felony and a gross misdemeanor. I think that is where the name came from, but I am not sure. Those are the limited circumstances where this bill would apply. The only crimes that we are talking about where A.B. 423 would apply would be an attempted crime of a category C, D, or E felony. If you plead guilty to or are found guilty of attempting to commit one of those categories, those are the wobbler offenses we are talking about where the judge makes the determination.

The language of the bill itself is pretty straightforward. What it says is that if a judge decides to give the offender a felony at the time of sentencing, the offender would be able to come back to the court after the completion of the sentence and petition the court to modify that felony down to a gross misdemeanor. This would only apply in circumstances where: (1) the

offender has a wobbler offense, and (2) the judge actually gives the offender the felony rather than the gross misdemeanor.

The procedure in the bill is that notice must be given to the prosecuting attorney, and then the prosecuting attorney has 30 days to respond. If the prosecuting attorney either agrees with the request or does not oppose it, a judge would be allowed to simply grant that motion and reduce the charge without a hearing. If the prosecuting attorney opposes the motion, the court must hold a hearing. The court would have total discretion in terms of what evidence to consider at such a hearing. I anticipate that a court would look at how the offender did on probation or in prison, how the offender is doing in life currently when they file the motion—including whether they are employed, whether they are going to school—the offender's complete criminal history, and obviously any input from the victim of the crime and the district attorney about the crime itself, and then make a decision about what to do. If the judge denies the motion, the petitioner cannot appeal, so that would be the last stop.

Even if a judge denies the motion to reduce the charge, the offender would still be eligible to seal his or her records after the waiting period that is in statute. Right now, that is five years for a category D felony and two years for a category E felony. Keep in mind that the record-sealing process, as we have heard, is burdensome and can be expensive. This would be a better procedure where a judge could, on his or her own, reduce it down from a felony to a gross misdemeanor.

In the real world, I anticipate these would only be granted when the petitioner has shown extraordinary success on probation. Honestly, I do not think a judge would reduce a charge after someone was given a prison sentence because that would be a reflection of the seriousness of the crime in the first place. I think we are talking about situations where the offender did really, really well on probation. I trust our judges to use their discretion appropriately when deciding these petitions. We are not talking about a lot of cases, so I do not think this is going to clog the court system.

Finally, under the terms of the bill, this is not retroactive. If we were to enact this legislation, it would only apply to offenses committed on or after October 1, 2019. People who now have felonies on their records as a result of wobblers would not be able to go back now under this bill. That should limit the amount of petitions that would be filed because it would only be on a future basis. With that being said, I am open to any questions.

Assemblywoman Peters:
In this language, we talk about the petition having to go to the original prosecuting attorney. What if that attorney is retired or otherwise unavailable? Who would be a default?

Assemblyman Yeager:
There are a couple components here. In section 1, subsection 3, it talks about petitioning the court of original jurisdiction. Essentially, that means it would have to go back to the same court. Now, judges shuffle around all the time. What would happen is that it stays in the department it started in. If there is a new judge in that department, it would stay there. With

respect to the prosecuting attorney, there may very well be a different prosecuting attorney. That prosecuting attorney may have retired or moved on. I would just expect somebody from the district attorney's office to comment, so it would not necessarily preclude someone from asking if there was a shuffling of the case. The reason we have that language about the original jurisdiction is that we do not want someone to go in front of one judge and get the felony and then try to petition another judge and sort of "forum shop" to get a reduction. It would have to be the same judge who would make the determination unless there was some kind of switch in the departments.

Assemblywoman Peters:
I also wonder about whether there is any victim input in this. My question comes about as a result of Marsy's Law.

Assemblyman Yeager:
It is not specifically listed in here. I would certainly be willing to include that. We left the proceeding pretty open-ended in terms of what evidence a judge would want to hear, but I would think, under Marsy's Law, a victim would have to be noticed and, at least, have an opportunity to come and weigh in. To the extent that is not the case or it is unclear, I would be happy to add that to the language.

Vice Chairwoman Cohen:
I will open it up for testimony in support.

John J. Piro, Deputy Public Defender, Legislative Liaison, Clark County Public Defender's Office:
There are often times when we take a person to sentencing on a wobbler. Other states do not necessarily have this mechanism, so when we describe to attorneys in other jurisdictions that a person will not necessarily know whether they are getting a felony or a gross misdemeanor prior to sentencing, they think we are kind of crazy in doing that. Cases can certainly be negotiated to allow us the opportunity to argue for a gross misdemeanor. Sometimes we lose that. Then you have a client who goes on to successfully complete probation, do all of these things, and really wants to get a good hold on their life, but there is that felony on their record. This would be a carrot at the end to allow them to apply for a gross misdemeanor at that time.

Kendra G. Bertschy, Deputy Public Defender, Washoe County Public Defender's Office:
I believe this really helps clarify the wobbler provisions. More importantly, it provides that carrot to ensure our clients are really working toward being successful. It allows them the opportunity to have that felony removed from their record so they are able to become better members of our society.

Vice Chairwoman Cohen:
Is there any more support? [There was none.] We will move on to opposition.

John T. Jones, Jr., Chief Deputy District Attorney, Clark County District Attorney's Office; and representing Nevada District Attorneys Association:

We are in opposition to A.B 423 as it is currently written. I do not have an amendment yet, but I did have an opportunity to speak with Chairman Yeager yesterday about our opposition. I appreciate his taking the time to meet with me on such short notice. Generally, a judge loses jurisdiction to modify a sentence once a judgment of conviction is filed unless the defendant can show a material misrepresentation of fact or some sort of clerical error. District attorneys, in general, do not want to set the precedent of opening up judgments of conviction once the sentence has been rendered.

That being said, I think we are open to some changes in this bill that would achieve the same result but do it in a slightly different way. For example, our position is that this would be better done at sentencing. In fact, in Clark County, what often happens on wobbler cases is that the judge will ask the state if we have an objection to allowing for a drop-down to a gross misdemeanor. When I say "drop-down," I mean the judge would adjudicate the defendant of a felony, and if they complete probation, the judge would then vacate the felony conviction and enter a gross misdemeanor at the end. The reason why the district attorney stipulation is important is because that is how we get around the fact that the judge loses jurisdiction to modify the judgment of conviction after the sentence is rendered.

I think it is better done at sentencing for several reasons. First, the victim will have finality at sentence. In cases where it is a wobbler, the victim will know the judge has, at least, given the defendant an opportunity to earn a reduction to a gross misdemeanor and has given the defendant a road map of how to get there. The judge can say, "If you stay out of trouble," or, "If you comply with terms X, Y, and Z, and if you pay restitution, I will allow you to earn a reduction to a gross misdemeanor." The victim will know at sentencing what is going to happen ultimately with the case instead of waiting for a period of time to potentially receive a notice of this new hearing set out in the current version of the bill in which we would have to basically relitigate sentencing and instances where the victim has a problem with the reduction.

Further, this bill should not apply in situations where the parties have stipulated to a particular sentence. In other words, I, as a deputy district attorney, have often offered a negotiation of a wobbler offense to a defendant, but as part of that negotiation, the defendant is required to stipulate to felony treatment. This bill does not speak to those instances. I think the way it is currently read, they could apply or make a motion to ask for a reduction despite the agreement to the contrary.

Finally, this should not apply to people who have prior felony or gross misdemeanor convictions or who have already received the benefit of this bill in the past. I think there is an avenue for us to get to the ultimate goal of allowing judges to do this, but we think it should be at the front end where the victim has had input at sentencing and the judge specifically spells out a road map in the judgment of conviction to how a defendant could earn that gross misdemeanor reduction.

Vice Chairwoman Cohen:
Is there anyone here in neutral? [There was no one.] I will invite Chairman Yeager back for concluding remarks.

Assemblyman Yeager:
I agree with Mr. Jones that the parties would be able to agree in a guilty plea agreement, which is essentially a contractual relationship, about someone getting a felony. I think, if that is important enough, they could put that in there to not have this bill apply. Other than that, I heard there is a willingness to continue working on this. I am committed to continuing to work with Mr. Jones to see if we can find a way to enact this provision which, I think, would apply in a very small number of cases but would be a huge benefit to an offender getting his or her life back on track.

Vice Chairwoman Cohen:
Thank you. [(Exhibit P) was submitted but not mentioned and will become part of the record.] I will close the hearing on A.B. 423.

Is there anyone here for public comment? [There was no one.] This meeting is adjourned [at 10:54 a.m.].

RESPECTFULLY SUBMITTED:

_____
Lucas Glanzmann
Committee Secretary

APPROVED BY:

_____
Assemblyman Steve Yeager, Chairman

DATE: _____

EXHIBITS

Exhibit A is the Agenda.

Exhibit B is the Attendance Roster.

Exhibit C is a set of documents in support of Assembly Bill 285, submitted by Kaylyn Kardavani, representing Nevada Justice Association, and presented by George T. Bochanis, representing Nevada Justice Association.

Exhibit D is a written testimony dated March 25, 2019, written and presented by Dane A. Littlefield, President, Association of Defense Counsel of Nevada, in opposition to Assembly Bill 285.

Exhibit E is the current *Nevada Rules of Civil Procedure* Rule 35, submitted by Dane A. Littlefield, President, Association of Defense Counsel of Nevada.

Exhibit F is the former *Nevada Rules of Civil Procedure* Rule 35, submitted by Dane A. Littlefield, President, Association of Defense Counsel of Nevada.

Exhibit G is a Supreme Court of Nevada order, submitted by Dane A. Littlefield, President, Association of Defense Counsel of Nevada.

Exhibit H is a packet of written statements in opposition to Assembly Bill 285, from various members of the Association of Defense Counsel and submitted by Dane A. Littlefield.

Exhibit I is a copy of a Supreme Court of Nevada case, *Berkson v. LePome*, 126 Nev. 492 (2010), submitted by Dane A. Littlefield, President, Association of Defense Counsel of Nevada.

Exhibit J is a packet of letters in support of Assembly Bill 285.

Exhibit K is a proposed amendment to Assembly Bill 20, submitted by Nevada Judges of Limited Jurisdiction.

Exhibit L is a statement submitted by Justice Nancy M. Saitta, retired, in support of Assembly Bill 20.

Exhibit M is a letter dated March 25, 2019, to Chairman Yeager and members of the Assembly Committee on Judiciary, submitted by Gary Vause, Chairman, Nevada Commission on Judicial Discipline, in opposition to Assembly Bill 20.

Exhibit N is a letter dated January 3, 2019, to Chairman Yeager, submitted by Paul C. Deyhle, General Counsel and Executive Director, Nevada Commission on Judicial Discipline, in opposition to Assembly Bill 20.

Exhibit O is a set of documents in opposition to Assembly Bill 20, submitted by Paul C. Deyhle, General Counsel and Executive Director, Nevada Commission on Judicial Discipline.

Exhibit P is a letter dated March 26, 2019, to members of the Assembly Committee on Judiciary, submitted by Jim Hoffman, Legislative Committee, Nevada Attorneys for Criminal Justice, in support of Assembly Bill 423.

EXHIBIT 4

EMPLOYMENT RECORDS RELEASE

EMPLOYER: **WFS EXPRESS, INC. AND/OR WORLDWIDE FLIGHT SERVICES**
ADDRESS: **3095 E. Russell Rd., Suite G, Las Vegas, NV 89120**

RE: Claimant : DAKOTA JAMES LARSEN

YOU ARE HEREBY AUTHORIZED AND INSTRUCTED to release to Sonya C. Watson, Esq., of the law firm of GRANT & ASSOCIATES, copies of my employment records from **2014 through Present**, including payroll records.

This authorization is given upon the express condition that any costs incurred will be borne by the law firm of GRANT & ASSOCIATES, a copy of all records obtained will be provided to Plaintiff's attorneys, CLAGGET & SYKES LAW FIRM and/or SWENSON & SHELLEY, PLLC.

A photocopy of this Authorization shall have the same force and effect as the original.

DATED this _____ day of _____, 2021.

_____
DAKOTA JAMES LARSEN

EMPLOYMENT RECORDS RELEASE

EMPLOYER: **THREE POINTS CENTER, LLC**

ADDRESS: **1500 E. 2700 S., Hurricane, UT 84737**

RE: Claimant : DAKOTA JAMES LARSEN
DOB: :

YOU ARE HEREBY AUTHORIZED AND INSTRUCTED to release to Sonya C. Watson, Esq., of the law firm of GRANT & ASSOCIATES, copies of my employment records from **2014 through Present**, including payroll records.

This authorization is given upon the express condition that any costs incurred will be borne by the law firm of GRANT & ASSOCIATES, a copy of all records obtained will be provided to Plaintiff's attorneys, CLAGGET & SYKES LAW FIRM and/or SWENSON & SHELLEY, PLLC.

A photocopy of this Authorization shall have the same force and effect as the original.

DATED this _____ day of _____, 2021.

_____
DAKOTA JAMES LARSEN

EMPLOYMENT RECORDS RELEASE

EMPLOYER: **SUMMIT SECURITY SOLUTIONS, LLC**

ADDRESS: **4012 S. River Rd., Suite 1F, Saint George, UT 84790**

RE: Claimant : DAKOTA JAMES LARSEN

YOU ARE HEREBY AUTHORIZED AND INSTRUCTED to release to Sonya C. Watson, Esq., of the law firm of GRANT & ASSOCIATES, copies of my employment records from **2014 through Present**, including payroll records.

This authorization is given upon the express condition that any costs incurred will be borne by the law firm of GRANT & ASSOCIATES, a copy of all records obtained will be provided to Plaintiff's attorneys, CLAGGET & SYKES LAW FIRM and/or SWENSON & SHELLEY, PLLC.

A photocopy of this Authorization shall have the same force and effect as the original.

DATED this _____ day of _____, 2021.

_____

DAKOTA JAMES LARSEN

EMPLOYMENT RECORDS RELEASE

EMPLOYER: **RESOURCE MANAGEMENT, INC.**

ADDRESS: **510 S. 200 W., Suite 100, Salt Lake City, UT 84101**

RE: Claimant : DAKOTA JAMES LARSEN

YOU ARE HEREBY AUTHORIZED AND INSTRUCTED to release to Sonya C. Watson, Esq., of the law firm of GRANT & ASSOCIATES, copies of my employment records from **2014 through Present**, including payroll records.

This authorization is given upon the express condition that any costs incurred will be borne by the law firm of GRANT & ASSOCIATES, a copy of all records obtained will be provided to Plaintiff's attorneys, CLAGGET & SYKES LAW FIRM and/or SWENSON & SHELLEY, PLLC.

A photocopy of this Authorization shall have the same force and effect as the original.

DATED this _____ day of _____, 2021.

_____

DAKOTA JAMES LARSEN

EMPLOYMENT RECORDS RELEASE

EMPLOYER: **LEGEND VENTURES, LLC**

ADDRESS: **3292 E. Deseret Dr. S. Suite, A101, Saint George, UT 84790**

RE: Claimant : DAKOTA JAMES LARSEN

YOU ARE HEREBY AUTHORIZED AND INSTRUCTED to release to Sonya C. Watson, Esq., of the law firm of GRANT & ASSOCIATES, copies of my employment records from **2014 through Present**, including payroll records.

This authorization is given upon the express condition that any costs incurred will be borne by the law firm of GRANT & ASSOCIATES, a copy of all records obtained will be provided to Plaintiff's attorneys, CLAGGET & SYKES LAW FIRM and/or SWENSON & SHELLEY, PLLC.

A photocopy of this Authorization shall have the same force and effect as the original.

DATED this _____ day of _____, 2021.

_____

DAKOTA JAMES LARSEN

EMPLOYMENT RECORDS RELEASE

EMPLOYER: **DISNEY FINANCIAL SERVICES, LLC**

ADDRESS: **500 S. Buena Vista St., Burbank, CA 91521**

RE: Claimant : DAKOTA JAMES LARSEN

YOU ARE HEREBY AUTHORIZED AND INSTRUCTED to release to Sonya C. Watson, Esq., of the law firm of GRANT & ASSOCIATES, copies of my employment records from **2014 through Present**, including payroll records.

This authorization is given upon the express condition that any costs incurred will be borne by the law firm of GRANT & ASSOCIATES, a copy of all records obtained will be provided to Plaintiff's attorneys, CLAGGET & SYKES LAW FIRM and/or SWENSON & SHELLEY, PLLC.

A photocopy of this Authorization shall have the same force and effect as the original.

DATED this _____ day of _____, 2021.

_____

DAKOTA JAMES LARSEN

EMPLOYMENT RECORDS RELEASE

EMPLOYER: **DIAMOND RANCH ACADEMNY, INC.**

ADDRESS: **433 S. Diamond Ranch Parkway W., Hurricane, UT 84737**

RE: Claimant : DAKOTA JAMES LARSEN

YOU ARE HEREBY AUTHORIZED AND INSTRUCTED to release to Sonya C. Watson, Esq., of the law firm of GRANT & ASSOCIATES, copies of my employment records from **2014 through Present**, including payroll records.

This authorization is given upon the express condition that any costs incurred will be borne by the law firm of GRANT & ASSOCIATES, a copy of all records obtained will be provided to Plaintiff's attorneys, CLAGGET & SYKES LAW FIRM and/or SWENSON & SHELLEY, PLLC.

A photocopy of this Authorization shall have the same force and effect as the original.

DATED this _____ day of _____, 2021.

_____

DAKOTA JAMES LARSEN

EMPLOYMENT RECORDS RELEASE

EMPLOYER: **ALLEGIENT AIR, LLC**
ADDRESS: **1201 N. Town Center Dr., Las Vegas, Nevada 89144**

RE: Claimant : DAKOTA JAMES LARSEN

YOU ARE HEREBY AUTHORIZED AND INSTRUCTED to release to Sonya C. Watson, Esq., of the law firm of GRANT & ASSOCIATES, copies of my employment records from **2014 through Present**, including payroll records.

This authorization is given upon the express condition that any costs incurred will be borne by the law firm of GRANT & ASSOCIATES, a copy of all records obtained will be provided to Plaintiff's attorneys, CLAGGET & SYKES LAW FIRM and/or SWENSON & SHELLEY, PLLC.

A photocopy of this Authorization shall have the same force and effect as the original.

DATED this _____ day of _____, 2021.

_____
DAKOTA JAMES LARSEN

EMPLOYMENT RECORDS RELEASE

EMPLOYER: **AIRBUS AMERICAS, INC.**
ADDRESS: **2550 Wasser Terrace, Suite 9000, Herndon, VA 20171**

RE: Claimant : DAKOTA JAMES LARSEN

YOU ARE HEREBY AUTHORIZED AND INSTRUCTED to release to Sonya C. Watson, Esq., of the law firm of GRANT & ASSOCIATES, copies of my employment records from **2014 through Present**, including payroll records.

This authorization is given upon the express condition that any costs incurred will be borne by the law firm of GRANT & ASSOCIATES, a copy of all records obtained will be provided to Plaintiff's attorneys, CLAGGET & SYKES LAW FIRM and/or SWENSON & SHELLEY, PLLC.

A photocopy of this Authorization shall have the same force and effect as the original.

DATED this _____ day of _____, 2021.

_____
DAKOTA JAMES LARSEN

EXHIBIT 5

Sean K. Claggett, Esq.
Nevada Bar No. 008407
William T. Sykes, Esq.
Nevada Bar No. 009916
Brian Blankenship, Esq.
Nevada Bar No. 011522
CLAGGETT & SYKES LAW FIRM
4101 Meadows Lane, Suite 100
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(702) 655-2346 – Telephone
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brian@claggettlaw.com

Kevin Swenson, Esq.
Utah Bar No. 5803
Brian Shelley, Esq.
Utah Bar No. 14084
Jake R. Spencer, Esq.
Utah Bar No. 15744
SWENSON & SHELLEY, PLLC
107 South 1470 East, Suite 201
St. George, UT 84790
Attorneys for Plaintiff

DISTRICT COURT

CLARK COUNTY, NEVADA

DAKOTA JAMES LARSEN, PLAINTIFF, v. PRO PETROLEUM, LLC, a Texas Limited Liability Company; RIP GRIFFIN TRUCK SERVICE CENTER, INC., a Texas Corporation; DAVID YAZZIE, JR., an individual; DOES I-X; ROE BUSINESS ENTITIES XI-XX DEFENDANTS.	Case No. A-20-826907-C Dept. No. XXII **PLAINTIFF'S FIRST SUPPLEMENT TO INITIAL NRCP 16.1 DISCLOSURES**

III.

DAMAGES

	Item of Damages		**Amount**
1.	Desert Radiology Solutions	6/21/19	$197.00
2.	Henderson Hospital	6/21/19	$14,620.00
3.	Las Vegas Neurosurgical Institute	7/16/19-8/20/19	$1,100.00
4.	Max Health	6/25/19-7/31/19	$3,957.00
5.	Shadow Emergency Physicians LLC	6/21/19	$1,888.00
6.	Steinberg Diagnostic Medical Imaging	8/23/19-8/28/19	$1,821.00
7.	Nevada Neuroscience Institute	7/3/20-7/28/20	$572.00
	Total Past Medical Specials to Date:		**$24,155.00**
	Future Medical Expenses		$2,000,000.00+
	Past Wage Loss		$2,160.00
	Loss of Earning Capacity		$1,440,000.00+
	Past Pain, Suffering, Mental Anguish, Loss of Enjoyment of Life		To Be Determined
	Future Pain, Suffering, Mental Anguish, Loss of Enjoyment of Life		To Be Determined
	Punitive Damages		To Be Determined
	Special Damages		To Be Determined

Dated this 1st day of June 2021.

CLAGGETT & SYKES LAW FIRM

/s/ Brian Blankenship

Brian Blankenship, Esq.
Nevada Bar No. 011522
Attorneys for Plaintiff

RPLY

ANNALISA N. GRANT, ESQ.
Nevada Bar No. 11807
SONYA C. WATSON, ESQ.
Nevada Bar No. 13195
GRANT & ASSOCIATES
7455 Arroyo Crossing Parkway, Suite 220
Las Vegas, Nevada 89113
Tel.: (702) 940-3529
Fax: (855) 429-3413
Annalisa.Grant@aig.com
Sonya.Watson@aig.com

Attorneys for Defendants,
PRO PETROLEUM, LLC,
RIP GRIFFIN TRUCK SERVICE CENTER, INC., &
DAVID YAZZIE, JR.

GRANT & ASSOCIATES
7455 Arroyo Crossing Parkway, Suite 220
Las Vegas, Nevada 89113
Telephone No. (702) 940-3529
Facsimile No. (855) 429-3413

DISTRICT COURT

CLARK COUNTY, NEVADA

DAKOTA JAMES LARSEN,

Plaintiff,

vs.

PRO PETROLEUM, LLC, a Texas Limited Liability Company; RIP GRIFFIN TRUCK SERVICE CENTER, INC., a Texas Corporation; DAVID YAZZIE, JR., an individual; DOES I-X; ROE BUSINESS ENTITIES XI-XX,

Defendants.

Case No.: A-20-826907-C
Dept. No.: 22

DEFENDANTS' REPLY TO PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO COMPEL PHYSICAL EXAMINATION OF PLAINTIFF PURSUANT TO NRCP 35 AND EXECUTION OF EMPLOYMENT RELEASES ON AN ORDER SHORTENING TIME

DATE: August 13, 2021
TIME: 9:30 a.m.
BEFORE THE DISCOVERY COMMISSIONER

COME NOW Defendants, PRO PETROLEUM, LLC, RIP GRIFFIN TRUCK SERVICE CENTER, INC., and DAVID YAZZIE, JR., by and through their counsel of record, the law firm of **GRANT & ASSOCIATES**, and hereby replies to Plaintiff's opposition to Defendants' motion to compel Plaintiff's attendance at an NRCP 35 physical examination and execution of employment releases.

This Reply is based upon NRCP 35, the memorandum of points and authorities contained herein, the papers and pleadings on file, the exhibits attached hereto, and any oral argument that may be presented to the court.

DATED this 12th day of August, 2021.

GRANT & ASSOCIATES

/s/ Sonya C. Watson

SONYA C. WATSON, ESQ.
Nevada Bar No. 13195
7455 Arroyo Crossing Parkway, Suite 220
Las Vegas, Nevada 89113
Attorney for Intervenor,
THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA

GRANT & ASSOCIATES
7455 Arroyo Crossing Parkway, Suite 220
Las Vegas, Nevada 89113
Telephone No. (702) 940-3529
Facsimile No. (855) 429-3413

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7455 Arroyo Crossing Parkway, Suite 220
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Telephone No. (702) 940-3529
Facsimile No. (855) 429-3413

POINTS & AUTHORITIES

I. ARGUMENT

A. NRS 52.380 is a Procedural Rule and Does Not Create a Substantive Right

Plaintiff argues that NRS 52.380 creates or reinforces a substantive right to physical integrity. However, to the extent this was the intention of NRS 52.380, it clearly interferes with "procedure to a point of disruption" and attempt to abrogate an existing court rule, which is impermissible. *Whitlock v. Salmon*, 104 Nev. 24, 26 (1988). The judiciary's authority "to promulgate procedural rules is independent of legislative power and may not be diminished or compromised by the legislature…" State v. Connery, 99 Nev. 342, 345, 661 P.2d 1298, 1300 (1983). As NRS 52.380 is expressly procedural, enactment of the same has violated the separation of powers as it has diminished the judiciary's authority.

That NRS 52.380 is expressly procedural is supported by the finding of Nevada Federal Court Judge's Erie analysis between NRS 52.380 and FRCP 35 (which NRCP substantially mimics). The judge, in reasoning consistent with Erie and its progeny, found the provision of NRS 52.380 were clearly procedural as the statutory provision of NRS 52.380 are not "outcome" or case determinative, but rather reflect a "procedural preference." *Freteluco v. Smith's Food & Drug Ctrs*, 2020 U.S. Dist. LEXIS 113217, *11 (D. Nev., June 29, 2020) (citing *Flack v. Nutribullet*, LLC, 333 F.R.D. 508, 517 (C.D. Cal. 2019) citing Smolke v. Unimark Lowboy Trans., 327 F.R.D. 59, 63 (M.D. Penn. 2018), and *Stefan v. Trinity Trucking, L.L.C.*, 275 F.R.D. 248, 250 (N.D. Ohio 2011)). The court found that whether an observer is present for a plaintiff's examination is not substantive but procedural as "… NRS 52.380 sets forth procedures applicable to observers who may attend independent medical examinations." *Id*. at *10-*11.

B. Whether NRCP 35 or NRS 52.380 Controls in this Matter is Yet Unsettled

Currently before the Nevada Supreme Court are three petitions for writs of mandamus addressing whether NRCP 35 or NRS 52.380 controls with regard to observers and recordings at

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Facsimile No. (855) 429-3413

Rule 35 exams. *See Moats v. The Eighth Judicial District Court of the State of Nevada*, 2020 WL 7865828 (Nev.); *Lyft, Inc. v. Eighth Judicial District Court of the State of Nevada*, 2020 WL 8920628 (Nev.); and *Yusi v. The Eighth Judicial District Court of the State of Nevada and the Honorable Nancy Allf*, 2021 WL 2354557 (Nev.). Although Plaintiff argues that it is clear from the plain language of NRS 52.380, and the statute's legislative history, that the statute is substantive and therefore controls, the Nevada Supreme Court has not yet concluded so; the issue is far from settled. There is not yet any established law on the issue.

C. There is No Good Cause for Plaintiff to Record the Examination and there is Good Cause to Deny the Attendance of an Observer at the Examination

Although Plaintiff's counsel's Declaration mischaracterizes the sequence of events regarding the matters at hand, and at times entirely misrepresents the contents of past conversations, it is true that **Defendants have agreed to "all of Plaintiff's parameters for a Rule 35 examination except for the recording and observation of the examination.**" (Pl's. Opp. to Defs.' Mot., 3:12-14; **EXHIBIT E**, August 11, 2021 Email Exchange Between Counsel) Particularly relevant to this discussion are Plaintiff's following parameters, numbered in accord with Plaintiff's July 29, 2021 email:

7. You and/or the Rule 35 examiner must provide a detailed list of the examination(s) and protocols that will be administered or performed during the examination.

11. The Rule 35 examination shall be conducted in a manner that is respectful to the Plaintiff.

13. There will be no x-rays, MRI's, or other forms of imaging performed on Plaintiff.

14. There will be no intrusive tests.

15. There will be no questions regarding liability or fault in the underlying case.

16. If the examiner subjects the Plaintiff to any disruptive, upsetting, harassing, or embarrassing examinations, Plaintiff reserves the right to immediately terminate the examination and to file the appropriate motion with the Discovery Commissioner.

17. The Rule 35 examiner will accurately report his or her test results and findings.

. . .

20. The Rule 35 examiner will provide a complete copy of their report and the underlying data within 30 days of the examination.

(**EXHIBIT F**, July 29, 2021 Email from Plaintiff's Counsel)

Defendants confirmed with their medical expert, Dr. Forage, agreement to adhere to the foregoing parameters. In light of such agreement, Plaintiff's argument that good cause exists to record the Rule 35 exam because "Plaintiff is unfamiliar with the physician hired by Defendants, and does not know what methods will be used to evaluate him" is disingenuous at best—Dr. Forage agrees to treat Plaintiff respectfully and provide advance details regarding the scope of the examination. Further, Plaintiff's argument that there is good cause for a recording "[d]ue to Defendant's expected defense that Plaintiff's injuries were, at least partially, pre-existing" is nonsensical. Defendants' potential defenses have no bearing on how the examiner will conduct the Rule 35 exam. Plaintiff's argument that a recording is necessary to "ensure Plaintiff's interests are not abused" lacks any merit whatsoever given that Defendants and their expert agree to Plaintiff's above-referenced parameters.

Defendants' and their expert's agreement to Plaintiff's above-referenced Rule 35 exam parameters also negates the need to have an observer present at the exam, and there is therefore good cause to deny Plaintiff the opportunity to have an observer present at the exam. Defendants maintain that NRS 52.380 does not apply in this matter. Nevertheless, an examination of NRS 52.380(4)(a)-(b) is useful for demonstrating that there is good cause to deny Plaintiff the opportunity to have an observer present at the exam.

NRS 52.380(4)(a)-(b) provides that an observer may end the exam if the examiner is abusive toward the examinee or exceeds the scope of the exam. Here, because Defendants' examiner agrees to be respectful toward Plaintiff, agrees to provide advance details of the scope of the exam, agrees not to conduct imaging studies or intrusive testing, and agrees that Plaintiff himself may terminate the exam if subjected to anything untoward, there is no ostensive need for . . .

GRANT & ASSOCIATES
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Las Vegas, Nevada 89113
Telephone No. (702) 940-3529
Facsimile No. (855) 429-3413

the presence of an observer. The examiner's agreement to abide by Plaintiff's parameters makes having an observer present superfluous.

D. Defendants Seek Plaintiff's Employment Information Only as it Relates to Plaintiff's Alleged Wage Loss and Loss of Future Earning Capacity

Plaintiff has offered to sign limited employment releases to include authorization of the release of information *only as it relates to his past income*. He, through his counsel, has refused to sign a release that would include any information as it relates to his past job performance or disciplinary history. This information is relevant and proportional to his over $1.4 million claim for loss of future earning capacity.

While past earnings may be indicative of future earning potential, they are not dispositive. Many factors bear on a person's future earning potential, including a person's past job performance and disciplinary history. Without executed employment releases, Defendants have no way of discovering what, in addition to past earning potential, may affect Plaintiff's future earning potential. While Plaintiff seemingly alleges that any loss of future earning capacity would be due solely to physical restrictions as a result of his alleged injuries from the subject incident, Defendants are not required to accept this allegation as true. Instead, Defendants are entitled to discovery regarding this issue so that it may *discover* whether there is any basis for the allegation.

II. CONCLUSION

NRCP 35 controls with regard to whether Plaintiff may record his Rule 35 exam and have an observer present at the exam. Pursuant to Rule 35, Plaintiff should be compelled to submit to a physical exam absent a recording because he has not shown good cause for such a recording, and should be denied the opportunity to have an observer present as the presence of an observer is unnecessary given Defendants' agreement to Plaintiff's Rule 35 exam parameters. Further, Plaintiff should be compelled to execute employment releases authorizing the release of

. . .

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7455 Arroyo Crossing Parkway, Suite 220
Las Vegas, Nevada 89113
Telephone No. (702) 940-3529
Facsimile No. (855) 429-3413

Plaintiff's employment information as it relates to his earnings, job performance, and disciplinary history as this information bears on his future earning capacity.

DATED this 12th day of August, 2021.

GRANT & ASSOCIATES

/s/ Sonya C. Watson

SONYA C. WATSON, ESQ.
Nevada Bar No. 13195
7455 Arroyo Crossing Parkway, Suite 220
Las Vegas, Nevada 89113
Attorneys for Defendants,
PRO PETROLEUM, LLC,
RIP GRIFFIN TRUCK SERVICE CENTER, INC.,
& DAVID YAZZIE, JR.

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Las Vegas, Nevada 89113
Telephone No. (702) 940-3529
Facsimile No. (855) 429-3413

CERTIFICATE OF SERVICE

I certify that I am an employee of **GRANT & ASSOCIATES** and that on this 12th day of August, 2021, I caused a true and correct copy of the foregoing **DEFENDANTS' REPLY TO PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO COMPEL PHYSICAL EXAMINATION OF PLAINTIFF PURSUANT TO NRCP 35 AND EXECUTION OF EMPLOYMENT RELEASES ON AN ORDER SHORTENING TIME** to be served as follows:

___ By placing the same to be deposited for mailing in the United States Mail, in a sealed envelope upon which first class postage was prepaid in Las Vegas, Nevada; and/or

___ Pursuant to EDCR 7.26, to be sent via facsimile; and/or

_X_ Pursuant to EDCR 7.26, by transmitting via the Court's electronic filing services by the document(s) listed above to the Counsel set forth on the service list.

Sean K. Claggett, Esq.
William T. Sykes, Esq.
Brian Blankenship, Esq.
CLAGGETT & SYKES LAW FIRM
4101 Meadows Lane, Suite 100
Las Vegas, Nevada 89107
Attorneys for Plaintiff

Kevin Swenson, Esq.
Brian Shelley, Esq.
Jake R. Spencer, Esq.
SWENSON & SHELLEY, PLLC
107 South 1470 East, Suite 201
St. George, UT 84790
Attorneys for Plaintiff

/s/ Denisse A. Girard-Rubio

An Employee of GRANT & ASSOCIATES

EXHIBIT “E”

Watson, Sonya C

From: Brian Blankenship <brian@claggettlaw.com>
Sent: Wednesday, August 11, 2021 1:12 PM
To: Watson, Sonya C; Will Sykes; Sean Claggett
Cc: Jory, Shannon; Girard-Rubio, Denisse A.; Smith, Diana; Brandon Cromer; Grant, Annalisa N
Subject: [EXTERNAL] RE: Larsen v. Pro Petroleum

Thanks, Sonya. It appears nothing has changed since our last conversation. At this point, we will simply let the Court decide.

Thank you,

Brian

Brian Blankenship, Esq.
Trial Attorney
Claggett & Sykes Law Firm
4101 Meadows Lane, Suite 100
Las Vegas, NV 89107
Direct: 702-902-4014
Tel. 702-655-2346 / Fax 702-655-3763
brian@claggettlaw.com

From: Watson, Sonya C <Sonya.Watson@aig.com>
Sent: Wednesday, August 11, 2021 11:58 AM
To: Brian Blankenship <brian@claggettlaw.com>; Will Sykes <WSykes@claggettlaw.com>; Sean Claggett <SClaggett@claggettlaw.com>
Cc: Jory, Shannon <Shannon.Jory@aig.com>; Girard-Rubio, Denisse A. <Denisse.GirardRubio@aig.com>; Smith, Diana <Diana.Smith@aig.com>; Grant, Annalisa N <Annalisa.Grant@aig.com>
Subject: RE: Larsen v. Pro Petroleum
Importance: High

Hi Brian,

This email is a follow up to our phone call this morning.

We can't agree to have the exam observed by someone hired by your office or, in the alternative, to have the exam recorded. However, as I advised, we will agree to have a family member/friend observer present for the exam.

I understand your concern that an observer who is a family member/friend won't necessarily be able to discern whether the examiner is impermissibly exceeding the scope of the exam and therefore end the exam, if necessary, pursuant to NRS 52.380(4)(b). However, we did send your list of proposed parameters to Dr. Forage and he does agree to adhere to all of them (exclusive of parameters 4 and 5, the "recording" and "observer" parameters, due to our dispute regarding these two parameters).

As you recall, parameter 7 provides that "the examiner must provide a detailed list of the examination(s) and protocols that will be administered or performed during the examination." Additionally, parameters 13 and 14, respectively, provide that "[t]here will be no x-rays, MRI's, or other forms of imaging performed on Plaintiff" and "[t]here will be no intrusive tests." I think Dr. Forage's agreement to these parameters negates the need for an observer as there will be no need to end the exam pursuant to NRS 52.380(4)(a)-(b) (i.e. for abuse towards Plaintiff or for exceeding the scope of the exam). Nevertheless, we would still agree to have a family member/friend observer present at the exam.

Please let me know if, given Dr. Forage's agreement to all parameters (exclusive of parameters 4 and 5), Plaintiff will submit to the exam without a recording and with the presence of a family member/friend observer.

Sincerely,

Sonya C. Watson

Sonya C. Watson
Associate Attorney, Grant & Associates
Staff Counsel
American International Group, Inc. (AIG)

7455 Arroyo Crossing Pkwy, Suite 220, Las Vegas, NV 89113
T (+1) 702.940.3534 | C (+1) 725.502.0269
sonya.watson@aig.com | www.aig.com

From: Watson, Sonya C
Sent: Monday, July 12, 2021 2:40 PM
To: Brian Blankenship <brian@claggettlaw.com>; Will Sykes <WSykes@claggettlaw.com>; Sean Claggett <SClaggett@claggettlaw.com>
Cc: Jory, Shannon <Shannon.Jory@aig.com>; Girard-Rubio, Denisse A. <Denisse.GirardRubio@aig.com>; Smith, Diana <Diana.Smith@aig.com>; Grant, Annalisa N <Annalisa.Grant@aig.com>
Subject: RE: Larsen v. Pro Petroleum
Importance: High

Hi Brian,

Please find attached the letter we served last week requesting a 2.34 conference. Please advise of your availability on July 28, 2021 in the morning or on July 29, 2021 in the morning or afternoon. Thank you.

Sincerely,

EXHIBIT “F”

Watson, Sonya C

From: Brian Blankenship <brian@claggettlaw.com>
Sent: Thursday, July 29, 2021 10:20 AM
To: Watson, Sonya C
Cc: Brandon Cromer; Scott Lundy; Girard-Rubio, Denisse A.; Jory, Shannon; Grant, Annalisa N
Subject: [EXTERNAL] Rule 2.34 Conference / Parameters

Follow Up Flag: Follow up
Flag Status: Completed

Good Morning Sonya:

My apologies for not sending earlier. Below is the list of parameters we will have up for discussion during our call. If you need more time to review, let me know.

1. The full name and specialty or specialties of the examiner performing the Rule 35 examination.
2. Plaintiff reserves the right to object to any Rule 35 examiner proposed by the Defendants.
3. An observer of Plaintiff's choice may attend the entire Rule 35 examination pursuant to NRS 52.380.
4. The Rule 35 examination shall be conducted at a date and time that is convenient for the Plaintiff and Plaintiff's observer, and that date and time shall be arranged through my office.
5. The entire examination will be audio recorded by an observer of the Plaintiff's choice, pursuant to NRS 52.380.
6. You or the Rule 35 examiner will provide me with any forms that Plaintiff is required to fill out at least seven (7) judicial days prior to the examination, and the Plaintiff will not be asked to fill out or sign any additional documents at the examination.
7. You and/or the Rule 35 examiner must provide a detailed list of the examination(s) and protocols that will be administered or performed during the examination.
8. We must be provided with the estimated length of the Rule 35 examination fourteen (14) judicial days prior to the examination.
9. The examination cannot take longer than 2 hours, including waiting time, breaks and lunch breaks, over the course of one (1) day.
10. The Plaintiff shall not be required nor asked to wait more than thirty (30) minutes in any room, lobby, reception or other area prior to the commencement of the examination or during the examination.
11. The Rule 35 examination shall be conducted in a manner that is respectful to the Plaintiff.
12. Defendants' counsel, representatives from defense counsel's office, or representatives or observers by or on behalf of defense counsel or the Defendants shall be expressly prohibited from attending, participating in, or observing any portion of the examination.
13. There will be no x-rays, MRI's, or other forms of imaging performed on Plaintiff.
14. There will be no intrusive tests.
15. There will be no questions regarding liability or fault in the underlying case.
16. If the examiner subjects the Plaintiff to any disruptive, upsetting, harassing, or embarrassing examinations, Plaintiff reserves the right to immediately terminate the examination and to file the appropriate motion with the Discovery Commissioner.
17. The Rule 35 examiner will accurately report his or her test results and findings.
18. Plaintiff will not be asked to disrobe or wear any inappropriate clothing, such as a hospital gown.
19. If there will be anyone besides the Plaintiff, Plaintiff's observer and the examiner in the examination room, such as a nurse, medical assistant, or other examiner's assistant, you will provide me with the names and

titles of any such persons seven (7) judicial days prior to the examination and we reserve the right to object to their presence during the examination.

20. The Rule 35 examiner will provide a complete copy of their report and the underlying data within thirty (30) days of the examination.

Brian

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Attorneys for Defendants,
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RIP GRIFFIN TRUCK SERVICE CENTER, INC., &
DAVID YAZZIE, JR.

DISTRICT COURT

CLARK COUNTY, NEVADA

DAKOTA JAMES LARSEN,

Plaintiff,

vs.

PRO PETROLEUM, LLC, a Texas Limited Liability Company; RIP GRIFFIN TRUCK SERVICE CENTER, INC., a Texas Corporation; DAVID YAZZIE, JR., an individual; DOES I-X; ROE BUSINESS ENTITIES XI-XX,

Defendants.

Case No.: A-20-826907-C
Dept. No.: 22

DISCOVERY COMMISSIONER'S REPORT AND RECOMMENDATIONS

Date of Hearing: August 13, 2021
Time of Hearing: 9:30 a.m.

Attorney for Plaintiff: Brian Blankenship, Esq.

Attorney for Defendants: Sonya C. Watson, Esq.

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I.

FINDINGS

On August 13, 2021, counsel for Plaintiff and Defendants in the above-captioned matter appeared telephonically before the Honorable Discovery Commissioner Jay Young on Defendants' Motion to Compel Physical Examination of Plaintiff Pursuant to NRCP 35 and Execution of Employment Releases on an Order Shortening Time. Defendants seek Plaintiff's submission to a physical examination prior to his lumbar surgery scheduled for September 13, 2021. Defendants request that Plaintiff be required to submit to the examination absent a recording of the examination and absent the presence of an observer. Defendants further seek execution of employment releases for each of Plaintiff's employers for the five years preceding the subject incident.

Upon the Court's review of the Motion and all other pleadings and papers on file with this court, and oral arguments made by counsel, and for good cause appearing, the Discovery Commissioner hereby recommends that Plaintiff is compelled to submit to a physical examination pursuant to NRCP 35 but is permitted to record the examination and have an observer present pursuant to NRS 52.380. The Commissioner further recommends that Plaintiff is required to produce his employee file for each of his employers for the five years preceding the subject incident, subject to a confidentiality log limiting the records produced to those that relate to Plaintiff's wages, job performance, and disciplinary history.

II.

RECOMMENDATIONS

IT IS THEREFORE RECOMMENDED Defendants' Motion to Compel Physical Examination of Plaintiff Pursuant to NRCP 35 and Execution of Employment Releases on an Order Shortening Time is GRANTED IN PART and DENIED IN PART,

IT IS FURTHER RECOMMENDED THAT that Plaintiff submit to a Rule 35

examination. Plaintiff may record the examination and have an observer of his choosing present at the examination.

IT IS FURTHER RECOMMENDED that Defendants are entitled to employment records, but only for wage information, and performance and disciplinary history as they are relevant going back 5 years.

IT IS FURTHER RECOMMENDED THAT Plaintiff will obtain the entirety of the employment files requested and produce employee files for each of his employers for the five years preceding the subject incident, subject to a confidentiality and redaction log limiting the records produced to those that relate to Plaintiff's wages, job performance, and disciplinary history.

IT IS FURTHER RECOMMENDED THAT the Discovery Commissioner will conduct an in camera review if necessary.

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

DATED this 25th day of August, 2021.

Jay Young

DISCOVERY COMMISSIONER

Submitted by:
GRANT & ASSOCIATES

/s/ Sonya C. Watson

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Approved as to form and content by:

/s/ Brian Blankenship

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Attorneys for Plaintiff,
DAKOTA LARSEN

N O T I C E

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

Objection time will expire on September 9 **2021.**

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

_____ Mailed to Plaintiff at the following address on the ____ day of August 2021.

__XX__ Electronically filed and served to counsel on the 26th day of August 2021, Pursuant to N.E.F.C.R. Rule 9.

By: /s/ Sandy Gerety
COMMISSIONER DESIGNEE

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ELECTRONICALLY SERVED
8/27/2021 9:59 AM

Electronically Filed
08/27/2021 9:58 AM
CLERK OF THE COURT

OST
~~ODCR~~

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DISTRICT COURT

CLARK COUNTY, NEVADA

DAKOTA JAMES LARSEN,

Plaintiff,

vs.

PRO PETROLEUM, LLC, a Texas Limited Liability Company; RIP GRIFFIN TRUCK SERVICE CENTER, INC., a Texas Corporation; DAVID YAZZIE, JR., an individual; DOES I-X; ROE BUSINESS ENTITIES XI-XX,

Defendants.

Case No.: A-20-826907-C
Dept. No.: 22

HEARING REQUESTED

DEFENDANTS' OBJECTIONS TO DISCOVERY COMMISSIONER'S REPORT AND RECOMMENDATION AND MOTION TO STAY THE CASE ON AN ORDER SHORTENING TIME

COME NOW Defendants, PRO PETROLEUM, LLC, RIP GRIFFIN TRUCK SERVICE CENTER, INC., and DAVID YAZZIE, JR., by and through their counsel of record, the law firm of **GRANT & ASSOCIATES**, and hereby submits the following Objection to the Discovery Commissioner's Report and Recommendation and Motion to Stay the Case on an Order Shortening Time. This Objection is based upon the attached Memorandum of Points and

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PROPETROL 0272

Authorities, the pleadings and papers on file herein, and any oral argument permitted at the hearing of this matter.

DATED this 26th day of August, 2021.

GRANT & ASSOCIATES

/s/ Sonya C. Watson

SONYA C. WATSON, ESQ.
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ORDER SHORTENING TIME

It appearing to the satisfaction of the Court, and good cause appearing therefor,

IT IS HEREBY ORDERED that the foregoing **DEFENDANTS' OBJECTIONS TO DISCOVERY COMMISSIONER'S REPORT AND RECOMMENDATIONS AND MOTION TO STAY THE CASE ON AN ORDER SHORTENING TIME** shall be heard on the 9 day of September, 2021, at the hour of 9:00 am, in Department XXII.

Dated this 27th day of August, 2021

The Honorable Susan H. Johnson
1B8 76F 00C6 6CB3
Susan Johnson
District Court Judge

Submitted by:

GRANT & ASSOCIATES

/s/ Sonya C. Watson

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DECLARATION OF SONYA C. WATSON, ESQ. IN SUPPORT OF OBJECTION TO DISCOVERY COMMISSIONER'S REPORT AND RECOMMENDATION OR, IN THE ALTERNATIVE, MOTION TO STAY THE CASE ON AN ORDER SHORTENING TIME

SONYA C. WATSON, declares under penalty of perjury that:

1. I am an attorney duly licensed to practice in the State of Nevada and am an attorney at the law firm of **GRANT & ASSOCIATES**, counsel for Defendants in the instant lawsuit. I am over the age of 18 years and am in all respects competent to make this Declaration. This Declaration is based upon my personal knowledge unless stated upon information and belief and, if called to testify, I would testify as set forth in this Declaration.

2. Between April and June of 2021, the undersigned made several attempts to contact Plaintiff's counsel to schedule a Rule 35 exam of Plaintiff with no response regarding Plaintiff's availability.

3. When Plaintiff's counsel spoke with the undersigned on June 10, 2021, the parties were unable to agree to the parameters for a Rule 35 exam of Plaintiff. Specifically, Defendants do not agree to allow the recording of the examination, and do not agree to allow an observer who is an attorney, employee of a law firm, or a medical professional hired by Plaintiff. Following additional discussions and efforts to compromise, on August 6, 2021, a Motion to Compel Physical Examination of Plaintiff Pursuant to NRCP 35 and Execution of Employment Releases on an Order Shortening Time was filed with the Discovery Commissioner and set for hearing on August 13, 2021.

4. On August 13, 2021 counsel for both parties appeared before the Discovery Commissioner for the hearing on Defendants' Motion to Compel. The Motion to Compel was granted as to the Rule 35 exam, but allows the attendance of an observer at the exam, as well as the recording of the exam.

5. The Discovery Commissioner's Report and Recommendation was signed on August 25, 2021 and served on the undersigned electronically on August 26, 2021.

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6. Despite the undersigned's early requests for Plaintiff's availability for the Rule 35 exam, Plaintiff's counsel never provided the same, and now demands that Defendants' expert make himself available prior to Plaintiff's imminent surgery.

7. Plaintiff has scheduled a lumbar spine surgery for September 13, 2021 but has not yet submitted to the Rule 35 exam ordered by the Discovery Commissioner. Plaintiff will not agree to reschedule his surgery to allow for a Rule 35 exam to be conducted in October, and Defendants' have been unable to schedule an exam with another expert on such short notice.

8. This order shortening time is necessary so this matter may be heard and resolved by the court prior to Plaintiff's scheduled surgery and is not intended for delay. Given the quickly approaching surgery date, time is of the essence.

I declare under penalty of perjury that the contents of this declaration are true and correct.

DATED this 26th day of August, 2021.

GRANT & ASSOCIATES

/s/ Sonya C. Watson

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

On August 13, 2021, counsel for Plaintiff and Defendants in the above-captioned matter appeared telephonically before the Honorable Discovery Commissioner Jay Young on Defendants' Motion to Compel Physical Examination of Plaintiff Pursuant to NRCP 35 and Execution of Employment Releases on an Order Shortening Time. The Discovery Commissioner has recommended that Plaintiff be compelled to submit to a physical exam pursuant to Rule 35, but that Plaintiff may record the exam and have an observer present at the exam. Defendants object to the recommendation in so far as it allows Plaintiff to record his Rule 35 exam and have an observer present at the exam. Defendants request that the Court reject and reverse the Discovery Commissioner's recommendation allowing Plaintiff to record his Rule 35 exam and have an observer present at the exam who is an attorney, attorney representative, or a hired expert/consultant. Defendants also request that the Court stay the case pursuant to NRCP 37(b)(1)(D) to allow the Rule 35 exam to be conducted prior to the surgery currently scheduled for September 13, 2021.

II. STATEMENT OF FACTS

This case involves a motor vehicle accident in Las Vegas, Nevada, on or about June 20, 2019. Defendant David Yazzie was traveling behind Plaintiff and Plaintiff alleges that Defendant Yazzie collided with the rear of Plaintiff's vehicle. Plaintiff alleges injuries to his lumbar and cervical spine as a result of the motor vehicle accident. He further alleges past medical specials totaling $24,000, future medical specials totaling $2,000,000+, past wage loss totaling $2,160 and future wage loss totaling $1,440,000+. Again, Plaintiff is scheduled to undergo surgery for his lumbar spine on September 13, 2021.

III. LAW AND ARGUMENT

A. NRCP 35 CONTROLS PARAMETERS OF INDEPENDENT MEDICAL EXAMS IN NEVADA COURTS, NOT NRS 52.380, BECAUSE NRS 52.380 VIOLATES THE SEPARATION OF POWERS CLAUSE OF THE NEVADA CONSTITUTION

Plaintiff relies on NRS 52.380 to support his position that he is entitled to have an observer,

hired by his attorney, present at his Rule 35 exam and that he is permitted to record the exam. The Discovery Commissioner's report and recommendation agrees with Plaintiff's position. However, currently before the Nevada Supreme Court are several cases under review to determine whether NRS 52.380, as Defendants contend, is an inappropriate infringement by the Nevada Legislature upon the power of the Nevada Judiciary that violates the separation of powers clause of Nevada's Constitution. As explained below, current case law leans in favor of NRCP being the controlling authority regarding recordings and observers at Rule 35 exams. Thus, NRCP 35 is not superseded by NRS 52.380.

The Nevada Supreme Court has stated that "[t]he separation of powers doctrine is the most important foundation for preserving and protecting liberty by preventing the accumulation of power in any one branch of government." *Berkson v. LePome*, 126 Nev. 492, 498, 245 P.3d 560, 564 (2010). To this end and pursuant to Article 3, Section 1(1) of the Nevada Constitution, governmental power of the State of Nevada is divided into three separate, coequal branches: legislative, executive, and judicial. The powers specific to each branch are set forth within Articles 4, 5, and 6. Each branch has "inherent power to administer its own affairs and perform its duties, so as not to become a subordinate branch of government." *Id*. at 499 (internal quotations omitted); See also, *Halverson v. Hardcastle*, 123 Nev. 245, 261, 163 P.3d 428, 439 (2007) and *Blackjack Bonding v. Las Vegas Mun. Ct.*, 116 Nev. 1213, 1218, 14 P.3d 1275, 1279 (2000).

The Nevada Supreme Court has "been especially prudent to keep the powers of the judiciary separate from those of either the legislative or the executive branches." *Berkson*, at 498, 245 P.3d at 565 (citing, *e.g. Galloway v. Truesdell*, 83 Nev. 13, 19, 422 P.2d 237, 242 (1967)). "'This separation is fundamentally necessary because '[w]ere the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for the judge would be the legislator: Were it joined to the executive power the judge might behave with all the violence of an oppressor.'" *Id*. at 498-99, 245 P.3d at 565.

In *Berkson*, the Nevada Supreme Court held that a statute enacted by the Legislature which attempted to supersede a procedural rule regarding the course of litigation violated the separation of powers doctrine of the Nevada Constitution. *Id*. at 501, 245 P.3d at 566. To arrive at its holding,

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the *Berkson* Court stated:

> Regarding such discord between the legislative and judicial branches of government, it is well settled that the judiciary retains the authority to "'hear and determine justiciable controversies'" as a coequal power to the Legislature's broad authority to enact, amend, and repeal legislation. *Halverson*, 123 Nev. at 260, 163 P.3d at 439 (quoting *Galloway*, 83 Nev. at 20, 422 P.2d at 242). And as one commentator aptly explained this distinction, "[t]o declare what the law *is or has been* is judicial power; to declare what the law *shall be* is legislative." 1 Thomas M. Cooley, *Constitutional Limitations* 191 (8th ed. 1927).
>
> In keeping with this theory, "'[t]he judiciary … has the inherent power to govern its own procedures.'" *State v. Dist. Ct. [Marshall]*, 116 Nev. 953, 959, 11 P.3d 1209, 1212 (2000) (quoting *Whitlock v. Salmon*, 104 Nev. 24, 26, 742 P.2d 210, 211 (1988)); See also NRS 2.120(2) (legislative recognition that that this court regulates civil practice in order to promote "the speedy determination of litigation upon its merits"). The judiciary is entrusted with "'rule-making and other incidental powers reasonable and necessary to carry out the duties required for the administration of justice'" and "'to economically and fairly manage litigation.'" *Borger v. Dist. Ct.*, 120 Nev. 1021, 1029, 102 P.3d 600, 606 (2204) (quoting *Goldberg v. Dist. Ct.*, 93 Nev. 614, 616 572 P.2d 521, 522 (1977)); See also *Marshall*, 116 Nev. at 959, 11 P.3d at 1213 (stating that "'[t]here are regulating … powers of the Judicial Department that are within the province of the judicial function, i.e., … promulgating and prescribing any and all rules necessary or desirable to handle the business of the courts or their judicial functions'" (second and third alterations in original) (quoting *Galloway*, 83 Nev. at 23, 422 P.2d at 244)). **Thus, "'the legislature may not enact a procedural statute that conflicts with a preexisting procedural rule, without violating the doctrine of separation of powers, and … such a statute is of no effect.'"** *Marshall*, 116 Nev. at 959, 11 P.3d at 1213 (quoting *State v. Connery*, 99 Nev. 342, 345, 661 P.2d 1298, 1300 (1983)); See also *Secretary of State*, 120 Nev. at 465, 93 P.3d at 752 (explaining that the Legislature cannot restrict, substantially impair, or defeat the exercise of this court's constitutional powers); *Whitlock*, 104 Nev. at 26, 752 P.2d at 211 (concluding that a particular statute did not encroach on judicial authority because it did not abrogate a court rule); but see *Connery*, 99 Nev. at 345, 661 P.2d at 1300 (noting that any court-created procedural rules "may not conflict with the state constitution or abridge, enlarge or modify any substantive right." (internal quotations omitted)). In addition to the constitutionality mandated basis for keeping separate those inherent powers of the judiciary, leaving control of court rules and the administration of justice to the judiciary, and thereby placing the responsibility for the system's continued effectiveness with those most familiar with the latest issues and the experience and flexibility to more quickly bring into effect workable solutions and amendments, makes good sense. *Goldberg*, 93 Nev. at 617-18, 572 P.2d at 523.
>
> *Berkson*, at 499-500, 245 P.3d at 565 (emphasis added).

The *Berkson* Court's holding extended the long-standing rule that the Legislature cannot enact a

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procedural statute that conflicts with a pre-existing procedural rule. *Id*. at 500, 245 P.3d 566.

On December 31, 2018, the Nevada Supreme Court adopted revisions to NRCP 35 which specifically addressed audio recording and the presence of observers during Rule 35 exams. The changes were made effective on March 1, 2019. The current Rule 35 permits, for "good cause" shown, audio recording of an independent examination under the Rule. See, NRCP 35(a)(3). Further, any observer to such examination may not be the party's attorney or anyone employed by the party or the party's attorney. See, NRCP 35(a)(4).

The 2019 Advisory Committee Notes Subsection (a) provides that the rationale for the changes to the observer and recording language as follows:

> "ADVISORY COMMITTEE NOTES 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 any 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.

On or about May 29, 2019, after the recent Nevada Supreme Court rule changes to NRCP 35, the Nevada Legislature passed NRS 52.380. This statutory language allows attorney and attorney employee observers at a Rule 35 exam. In addition, the language does not expressly contain any good cause requirements for recording.

NRCP 35 is a procedural rule over which the Nevada Judiciary has exclusive power to regulate and control. The United States Supreme Court has long held that **"rules authorizing court order[s] for physical and mental examination of a party are rules of 'procedure[.]'"** *Sibbach v. Wilson & Co.*, 312 U.S. 1, 13-14 (1941). In contrast, "[s]ubstantive rules 'are directed

at individuals and government and tell them to do or abstain from certain conduct on pain of some sanction. Substantive rules are based on legislative and judicial assessments of the society's wants and needs and they help to shape the world of primary activity outside the courtroom." *Sims v. Great American Life Insurance Company*, 469 F.3d 870, 882 (10th Cir. 2006) (quoting *Barron v. Ford Motor Co.*, 965 F.2d 195 (7th Cir. 1992)). The court in *Sims* went on to set forth a litmus test to distinguish between procedural and substantive rules, stating:

> In short, although the distinction between substance and procedures is not always clear, we can distinguish a substantive rule from a procedural rule by examining the language and the policy of the rule in question. **If these inquiries point to achieving fair, accurate and efficient resolution of disputes, the rule is procedural.** If however, the primary objective is directed to influencing conduct through legal incentives, the rule is substantive."
> *Sims,* at 883 (emphasis added).

NRCP 35 is not directed at influencing conduct through legal incentives but, instead, is a rule aimed at achieving fair, accurate, and efficient resolution of disputes through the discovery process and to allow a defendant the opportunity to have its own chosen medical professional evaluate a plaintiff. NRCP 35, is nothing more than the procedure required to be followed when a defendant requests that a plaintiff, who has put his physical condition at issue by wage of litigation, to present for a Rule 35 exam to allow that defendant the opportunity to have an examination performed by someone other than that plaintiff's treatment provider(s). Specifically, NRCP 35 is simply a procedural roadmap as to how the Rule 35 exam will be conducted.

That NRS 52.380 is expressly procedural is supported by the finding of Nevada Federal Court Judge's Erie analysis between NRS 52.380 and FRCP 35 (which NRCP substantially mimics). The judge, in reasoning consistent with Erie and its progeny, found the provision of NRS 52.380 were clearly procedural as the statutory provision of NRS 52.380 are not "outcome" or case determinative, but rather reflect a "procedural preference." *Freteluco v. Smith's Food & Drug Ctrs*, 2020 U.S. Dist. LEXIS 113217, *11 (D. Nev., June 29, 2020) (citing *Flack v. Nutribullet*, LLC, 333 F.R.D. 508, 517 (C.D. Cal. 2019) citing Smolke v. Unimark Lowboy Trans., 327 F.R.D. 59, 63 (M.D. Penn. 2018), and *Stefan v. Trinity Trucking, L.L.C.*, 275 F.R.D. 248, 250 (N.D. Ohio 2011)). The court found that whether an observer is present for a plaintiff's examination is not

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substantive but procedural as "… NRS 52.380 sets forth procedures applicable to observers who may attend independent medical examinations." *Id*. at *10-*11.

While it is true the Nevada Legislature has the power and authority to create and modify substantive rights, NRS 52.380 did not create or modify any substantive rights, meaning causes of action that can be alleged or damages that may be sought. The statute instead expressly attempts to modify the process by which the Nevada Judiciary governs a specific part of personal injury litigation. It is expressly procedural and nothing within NRCP 35 conflicts with the Nevada Constitution, no does it abridge, enlarge, or modify any substantive right. See, *Connery*, 99 Nev. at 345, 661 P.2d at 1300 (noting that any court created procedural rules "may not conflict with the state constitution or abridge, enlarge or modify any substantive right" (internal quotations omitted)).

To the extent NRS 52.380 intends to create or reinforce a substantive right, it interferes "with procedure to a point of disruption" and attempts to abrogate the existing court rule concerning physical examinations of personal injury plaintiffs. See contra, *Whitlock v. Salmon*, 104 Nev. 24, 26 (1988) ("[a]lthough the statute does implicate trial procedure, it does not interfere with procedure to a point of disruption or attempted abrogation of an existing court rule …").

In fact, the legislative history of NRS 52.380 indicates the statute's express purpose was to enact a draft of Rule 35 the Nevada Supreme Court rejected. On March 18, 2019, AB 285 was introduced. The legislative minutes make clear AB 285 was expressly intended to implement changes to Rule 35. Supporters of NRS 52.380 noted what became 285 was rejected during the process that led to Nevada's amended rules of civil procedure:

> "We voted 7 to 1 to make substantial changes, the changes that are set for or embodied in the bill before you, Assembly Bill 285. Unfortunately, when our recommendation 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." See, Minutes of Assembly Committee on Judiciary, March 27, 2019, Page 4 statement of Graham Galloway.

The Nevada Supreme Court, which has promulgated the Nevada Rules of Civil Procedure, and the Nevada Legislature, which issues the Nevada Revised Statutes, serve separate and distinct purposes. NRCP 35 and NRS 52.380 cannot both govern the issue as they conflict. This issue of

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audio recording and the presence of observers during an independent medical examination are procedural in nature. Therefore, NRCP 35 likely governs.

B. NRCP 35 CONTROLS AND PLAINTIFF HAS NOT SHOWN GOOD CAUSE FOR RECORDING THE EXAM AND THERE IS GOOD CAUSE TO DENY HIM AN OBSERVER AT THE EXAM

Plaintiff has not shown good cause as to why recording the exam is necessary, and there is no valid reason for the examination to be recorded. Defendants have agreed to all of Plaintiff's parameters for a Rule 35 examination except for the recording and observation of the examination by a party hired by Plaintiff's attorney. Particularly relevant to this discussion are Plaintiff's following parameters, numbered in accord with Plaintiff's July 29, 2021 email:

7. You and/or the Rule 35 examiner must provide a detailed list of the examination(s) and protocols that will be administered or performed during the examination.
11. The Rule 35 examination shall be conducted in a manner that is respectful to the Plaintiff.
13. There will be no x-rays, MRI's, or other forms of imaging performed on Plaintiff.
14. There will be no intrusive tests.
15. There will be no questions regarding liability or fault in the underlying case.
16. If the examiner subjects the Plaintiff to any disruptive, upsetting, harassing, or embarrassing examinations, Plaintiff reserves the right to immediately terminate the examination and to file the appropriate motion with the Discovery Commissioner.
17. The Rule 35 examiner will accurately report his or her test results and findings.
20. The Rule 35 examiner will provide a complete copy of their report and the underlying data within 30 days of the examination.

(**EXHIBIT A**, July 29, 2021 Email from Plaintiff's Counsel)

Again, Defendants confirmed with their medical expert, Dr. Forage, agreement to adhere to the foregoing parameters. In light of such agreement, any of Plaintiff's arguments set forth in his Opposition to Defendants' motion to compel a Rule 35 exam that good cause exists to record the Rule 35 exam because Plaintiff is unfamiliar with the examiner and does not know what to expect at the examination is disingenuous. As provided in the above 2019 Advisory Committee

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Notes, a Plaintiff has not established good cause simply because they state a general fear of the integrity of the exam process. Plaintiff has not provided any specific reason necessitating the recording of this exam.

Further, Plaintiff's argument that there is good cause for recording the exam because Defendants may allege that Plaintiff's injury were pre-existing is nonsensical. Defendants' potential defenses have no bearing on how the examiner will conduct the Rule 35 exam. Plaintiff's argument that a recording is necessary to avoid abuse of Plaintiff's interests lacks any merit whatsoever given that Defendants and their expert agree to Plaintiff's above-referenced parameters. More significantly, Plaintiff's physical condition prior to the subject incident is documented in his medical records and imaging studies dating from before the 2019 accident.

Defendants' and their expert's agreement to Plaintiff's above-referenced Rule 35 exam parameters also negates the need to have an observer present at the exam, and there is therefore good cause to deny having an observer present at the exam. Defendants maintain that NRS 52.380 does not apply in this matter. Nevertheless, an examination of NRS 52.380(4)(a)-(b) is useful for demonstrating that there is, in fact, good cause to deny Plaintiff the opportunity to have an observer present at the exam.

NRS 52.380(4)(a)-(b) provides that an observer may end the exam if the examiner is abusive toward the examinee or exceeds the scope of the exam. Here, because Defendants' examiner agrees to be respectful toward Plaintiff, agrees to provide advance details of the scope of the exam, agrees not to conduct imaging studies or intrusive testing, and agrees that Plaintiff himself may terminate the exam if subjected to anything untoward, there is no ostensive need for the presence of an observer. The examiner's agreement to abide by Plaintiff's parameters makes having an observer present superfluous.

Further, Plaintiff is 31 years of age, far past the age of majority, and can therefore protect his own interests at the examination as well as speak for himself if he becomes uncomfortable with any portion of the noninvasive examination. Plaintiff has alleged no infirmity, incapacitation, or incompetency that would necessitate recording the exam or having an observer present at the

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exam. Again, there is no good cause for Plaintiff to record the exam, and there is good cause to deny Plaintiff the opportunity to have an observer present at the exam. As such, Defendants ask that the Discovery Commissioner's recommendation which allows an observer and recording be overturned.

C. DEFENDANTS ARE UNABLE TO SECURE A DATE FOR PLAINTIFF'S RULE 35 EXAM PRIOR TO PLAINTIFF'S SEPTEMBER 13, 2021 SURGERY, AND THE CASE SHOULD BE STATYED UNTIL AFTER PLAINTIFF SUBMITS TO THE RULE 35 EXAM THE DISCOVERY COMISSIONER HAS RECOMMENDED

Defendants request that the Court stay Plaintiff's case until he submits to a Rule 35 exam as recommended by the Discovery Commissioner. NRCP 37 provides that "[i]f a party … fails to obey an order to provide or permit discovery, including an order under Rule 35 or 37(a), the court may issue further just order that may include … staying the proceedings until the order is obeyed." (NRCP 37(b)(1)(D)) Here, pursuant to the Discovery Commissioner's Report and Recommendation, Plaintiff must submit to a Rule 35 exam. However, as noted in defense counsel's Declaration, Plaintiff has scheduled lumbar surgery for September 13, 2021, refuses to reschedule the surgery to permit a Rule 35 exam to go forward in early October, and has filed a motion compelling Defendants to schedule Plaintiff's Rule 35 exam prior to his September 13, 2021 surgery. Defendants are unable to schedule a Rule 35 exam prior to September 13, 2021, but did make every effort to do so early on in the case.[1] Defendants should not be deprived of the

[1] Plaintiff has had a recommendation for surgery since April 10, 2020, several months prior to even filing his Complaint on December 23, 2020. (**EXHIBIT B**, Dr. Garber Report) As such, it was no surprise to anyone, least of all Plaintiffs' counsel, that a Rule 35 exam would need to be scheduled in this matter. Approximately three months after service of the Complaint on January 11, 2021, Defendants' counsel contacted Plaintiff's counsel on April 16, 2021 asking to schedule the Rule 35 exam and Plaintiff's counsel replied that he did not wish to discuss the matter until after the opening of discovery. (**EXHIBIT C**, Counsels' April 16, 2021 through April 2021 Email Exchange) On May 12, 2021 Defendants' counsel again attempted to discuss the Rule 35 exam with Plaintiff's counsel but received no response. (**EXHIBIT D**, Defendants' Counsel' May 12, 2021 Email to Plaintiff's counsel) Plaintiffs' counsel did not contact Defendants' counsel regarding the Rule 35 exam until after Defendants' counsel filed a June 4, 2021 motion to compel the Rule 35 exam, at which time Plaintiff's counsel served a June 9, 2021 letter upon Defendants' counsel asking that Defendants withdraw their motion to compel for failure to meet and confer even though Defendants' counsel had previously attempted to discuss the issue with Plaintiff's counsel. (**EXHIBIT E**, Plaintiff's Counsel's June 9, 2021 Letter) Defendants subsequently filed an amended motion to compel the Rule 35 exam, which the Discovery Commissioner dismissed without prejudice pursuant to Plaintiff's Opposition, directing the parties to meet and confer pursuant to EDRC 2.34. The parties had an EDCR 2.34 conference on July 29, 2021, and the motion that is the subject of this Objection followed. During the pendency of these proceedings, Defendants' counsel continually asked Defendants' expert, Dr. Forage, for his availability. After the opening of discovery on May 19, 2021, Dr. Forage could have seen Plaintiff as early as June 1, 2021 if only Plaintiff's counsel had, as requested,

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opportunity to have their expert conduct a Rule 35 examination of Plaintiff prior to his surgery. Thus, Defendants ask that this matter be stayed, thereby postponing Plaintiff's surgery, until the Rule 35 examination be conducted in October, should that date still be available for Dr. Forage

IV. CONCLUSION

NRCP 35 controls with regard to whether Plaintiff may record his Rule 35 exam, and have an attorney or hired observer present at the exam. Pursuant to Rule 35, Plaintiff should be compelled to submit to a physical exam absent a recording because he has not shown good cause, and should be denied having an observer present as an observer is unnecessary given Defendants' agreement to the remainder of Plaintiff's Rule 35 exam parameters. Further, Defendants request that this matter be stayed until such time as he submits to a Rule 35 exam.

DATED this 26th day of August, 2021.

GRANT & ASSOCIATES

/s/ Sonya C. Watson

SONYA C. WATSON, ESQ.
Nevada Bar No. 13195
7455 Arroyo Crossing Parkway, Suite 220
Las Vegas, Nevada 89113
Attorney for Defendants

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provided Plaintiff's availability for the exam. (*Id.*) Dr. Forage is now unavailable until October 5, 2021 at the earliest. (*Id.*) Defendants' counsel also attempted to schedule Plaintiff for a Rule 35 exam with two other experts, Dr. Bassewitz and Dr. Lee, to no avail. Defendants' counsel was therefore extremely diligent in attempting to schedule a Rule 35 exam for Plaintiff in advance of Plaintiff's anticipated surgery.

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CERTIFICATE OF SERVICE

I certify that I am an employee of **GRANT & ASSOCIATES** and that on this 26th day of August, 2021, I caused a true and correct copy of the foregoing **DEFENDANTS' OBJECTIONS TO DISCOVERY COMMISSIONER'S REPORT AND RECOMMENDATION AND MOTION TO STAY THE CASE ON AN ORDER SHORTENING TIME** to be served as follows:

___ By placing the same to be deposited for mailing in the United States Mail, in a sealed envelope upon which first class postage was prepaid in Las Vegas, Nevada; and/or

___ Pursuant to EDCR 7.26, to be sent via facsimile; and/or

_X_ Pursuant to EDCR 7.26, by transmitting via the Court's electronic filing services by the document(s) listed above to the Counsel set forth on the service list.

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Brian Blankenship, Esq.
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Attorneys for Plaintiff

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Attorneys for Plaintiff

/s/ Denisse A. Girard-Rubio

An Employee of GRANT & ASSOCIATES

EXHIBIT “A”

Watson, Sonya C

From: Brian Blankenship <brian@claggettlaw.com>
Sent: Thursday, July 29, 2021 10:20 AM
To: Watson, Sonya C
Cc: Brandon Cromer; Scott Lundy; Girard-Rubio, Denisse A.; Jory, Shannon; Grant, Annalisa N
Subject: [EXTERNAL] Rule 2.34 Conference / Parameters

Follow Up Flag: Follow up
Flag Status: Completed

Good Morning Sonya:

My apologies for not sending earlier. Below is the list of parameters we will have up for discussion during our call. If you need more time to review, let me know.

1. The full name and specialty or specialties of the examiner performing the Rule 35 examination.
2. Plaintiff reserves the right to object to any Rule 35 examiner proposed by the Defendants.
3. An observer of Plaintiff's choice may attend the entire Rule 35 examination pursuant to NRS 52.380.
4. The Rule 35 examination shall be conducted at a date and time that is convenient for the Plaintiff and Plaintiff's observer, and that date and time shall be arranged through my office.
5. The entire examination will be audio recorded by an observer of the Plaintiff's choice, pursuant to NRS 52.380.
6. You or the Rule 35 examiner will provide me with any forms that Plaintiff is required to fill out at least seven (7) judicial days prior to the examination, and the Plaintiff will not be asked to fill out or sign any additional documents at the examination.
7. You and/or the Rule 35 examiner must provide a detailed list of the examination(s) and protocols that will be administered or performed during the examination.
8. We must be provided with the estimated length of the Rule 35 examination fourteen (14) judicial days prior to the examination.
9. The examination cannot take longer than 2 hours, including waiting time, breaks and lunch breaks, over the course of one (1) day.
10. The Plaintiff shall not be required nor asked to wait more than thirty (30) minutes in any room, lobby, reception or other area prior to the commencement of the examination or during the examination.
11. The Rule 35 examination shall be conducted in a manner that is respectful to the Plaintiff.
12. Defendants' counsel, representatives from defense counsel's office, or representatives or observers by or on behalf of defense counsel or the Defendants shall be expressly prohibited from attending, participating in, or observing any portion of the examination.
13. There will be no x-rays, MRI's, or other forms of imaging performed on Plaintiff.
14. There will be no intrusive tests.
15. There will be no questions regarding liability or fault in the underlying case.
16. If the examiner subjects the Plaintiff to any disruptive, upsetting, harassing, or embarrassing examinations, Plaintiff reserves the right to immediately terminate the examination and to file the appropriate motion with the Discovery Commissioner.
17. The Rule 35 examiner will accurately report his or her test results and findings.
18. Plaintiff will not be asked to disrobe or wear any inappropriate clothing, such as a hospital gown.
19. If there will be anyone besides the Plaintiff, Plaintiff's observer and the examiner in the examination room, such as a nurse, medical assistant, or other examiner's assistant, you will provide me with the names and

titles of any such persons seven (7) judicial days prior to the examination and we reserve the right to object to their presence during the examination.

20. The Rule 35 examiner will provide a complete copy of their report and the underlying data within thirty (30) days of the examination.

Brian

Brian Blankenship, Esq.
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EXHIBIT “B”

LVNI
LAS VEGAS NEUROSURGICAL INSTITUTE
CENTER FOR SPINE AND BRAIN SURGERY™

Jason E. Garber, MD, FAANS, FACS
Stuart S. Kaplan, MD, FAANS, FACS
Gregory Logan Douds, MD, FAANS, FACS
Scott Glickman, DO, FACOS
Aury Nagy, MD, FAANS, FACS
Patrick McNulty, MD, FABOS, FABBS

Supplement #1

April 10, 2020

Swenson & Shelley Injury Attorneys
Kevin Swenson, Esq.
520 East Tabernacle
St. George, UT. 84770
(435) 265-3500

Regarding: Dakota Larsen

Date of Loss: 06/20/2019
Date of Birth: [redacted]

Dear Mr. Swensen,

Enclosed is a complete review of all medical records in regards to Mr. Dakota Larsen. After reviewing the records provided to me, enclosed is my expert opinion.

Below is a list of the items that I have reviewed in preparation for this expert opinion:

1. Las Vegas Neurosurgical Institute
2. Steinberg Diagnostic Medical Imaging Centers
3. Southern Utah of Neurosciences Institute
4. Dixie Regional Medical Center

TABLE OF CONTENTS:

I. PHYSICIAN CONSULTATIONS / OFFICE VISITS:

Mr. Larsen was seen by Dr. Jason Garber at Las Vegas Neurosurgical Institute on the following dates:

07/16/2019 The patient presents today after having two microlumbar discectomies in 2016 as a result of an accident. Specifically his first microdiscectomy was made in June of 2016 and the second one was October of 2016. This performed by Dr. Benjamin Fox in St. George Utah. He was living there at the time. Since that time he has had progressive onset of lower back pain with left lower extremity radiculopathy, numbness and tingling. On examination the patient has a positive straight leg raising test on the left with absence of his patella reflex. CAT scan of the lumbar spine without sagittal imaging reveals a laminotomy defect left L4-5. I have ordered a new CAT scan of the lumbar spine including sagittal bone windows. I have ordered an MRI of the lumbar spine and x-rays and the patient will follow up with me thereafter.

08/20/2019 Patient presents today with axial mechanical back pain with more importantly left lower extremity radiculopathy. The patient had two prior microdiscectomy left L5-S1. The patient was doing relatively well by his own account until he was involved in an accident. Since that time he has had recurrence of symptomatology. MRI of the lumbar spine reveals what appears to be a recurrence of disc protrusion left L5-S1. Patient has failed conservative management. I recommended one last left L5-S1 microdiscectomy. If this is unsuccessful in alleviating his of symptomatology he may be a candidate for anterior posterior lumbar fusion versus anterior lumbar artificial disc replacement L5-S1.

II. DIAGNOSTIC AND TESTING REVIEW:

Below is a summary of the imaging study reports generated by the testing that was performed on the patient 08/16/2019. It does not necessarily represent my individual interpretation of the imaging studies.

08/16/2019 Mr. Larsen underwent an x-ray of the lumbar spine performed at Steinberg Diagnostic Medical Imaging Centers. X-ray revealed degenerative changes most notably at L5-S1 with mild to moderate disc space narrowing.

08/16/2019 Mr. Larsen underwent an MRI of the lumbar spine performed at Steinberg Diagnostic Medical Imaging Centers. MRI revealed postsurgical changes in the left had the laminar defect from prior surgery. Minimal retrolisthesis and small disc bulge was seen. Abuts the descending S1 nerve root. There was moderate bony foraminal stenosis bilaterally. Disc space, disc bulge, and small central annular tear at L4-L5 was noted. The disc narrows the right lateral recess. Mild to moderate right, mild left foraminal narrowing was noted.

08/16/2019 Mr. Larsen underwent a CAT scan of the lumbar spine performed at Steinberg Diagnostic Medical Imaging Centers. CAT scan revealed mild multilevel degenerative changes most notably at L5-S1 with mild to moderate bilateral neural foraminal stenosis as well as narrowing at the lateral recesses bilaterally.

III. PAST MEDICAL HISTORY:

a. PAST PHYSICIAN CONSULTATIONS / OFFICE VISITS:

Mr. Larsen was seen by Dr. Benjamin Fox at Southern Utah of Neurosciences Institute on the following dates:

10/02/2015 Patient was a 25-year-old male who presented with low back pain. He reported every year for the past 3-4 years he would develop weeks and low back, a couple times a year. In May of 2016 the patient developed his low back pain but coupled with left lower extremity pain. He was seen by Dr. Callahan who prescribed oxycodone. Patient tried chiropractic treatment but made his symptoms worse. He currently worked as a youth counselor. Prior to that he worked in the oil fields for eight months. Plain film x-rays of the lumbar spine demonstrated mild straightening of the normal lordosis. MRI of the lumbar spine showed five lumbar type vertebral bodies. Disc height appeared to be well preserved. There was disc desiccation at L4-L5 and L5-S1 without significant collapse. A broad bulge at L4-L5 with mild foraminal narrowing and a broad bulging L5-S1, worse on the left with subarticular zone stenosis was noted. There was some facet hypertrophy at L4-5 and L5-S1 with some edema within the joint space. He was recommended conservative treatment before any surgical options. Physical therapy and try a course strengthening and possible epidural steroid injections were recommended. Patient was to return for a follow up visit.

04/26/2016 Dr. Benjamin Fox: Patient is a 26-year-old male who presented with low back and left lower extremity pain. The onset was last year old and had not improved. Patient was initially seen on 10/02/2015 when conservative measures were recommended. He completed three months of physical therapy and had three injections with very little relief to his pain. Patient was taking oxycodone, ibuprofen, and Tylenol which helped minimally. He noted numbness and tingling became more constant and his left leg will give out at times. MRI of the lumbar spine dated 08/27/2016 showed moderate disc and facet disease at L4-5 and L5-S1 with mild to moderate bilateral foraminal and subarticular recess stenosis. X-ray the lumbar spine dated 10/02/2015 showed an unstable configuration. It was reduced range of motion. Mild spondylosis was noted. Patient was recommended a left L5-S1 microdiscectomy.

05/26/2016 Patient returned for a postoperative visit. He was status post L5-S1 microdiscectomy on 05/12/2016. Patient was doing well. He noted his leg pain resolved and occasionally would have some twinge in his ankle. He was to continue with restrictions for a total eight weeks. Patient was to follow up in six weeks.

09/30/2016 Patient returned for a follow up visit. He reported his left lower extremity radiculopathy returned. Patient denied motor weakness. MRI the lumbar spine dated 09/28/2016 demonstrated post-surgical changes at L5-S1 status post left-sided laminotomy. Previously seen left posterior paracentral disc protrusion at L5-S1 was smaller in size. Residual disc protrusion and adjacent scar tissue about it and translating left S1 nerve root. Patient was recommended a possible redo L5-S1 left microdiscectomy.

Mr. Larsen was seen at Dixie Regional Medical Center on the following dates:

11/02/2016 Emergency Department - Dr. Penny Louise Walker: Patient was a 26-year-old male who presented with complaints of neck pain. He was involved in a motor vehicle accident. Patient was the restrained passenger at a complete stop when he was rear-ended by a truck driver. No airbags deployed. X-ray of the cervical spine was stable and intact. Compared to CT scan dated 10/10/2016. He was recommended over-the-counter medicine and ice. Patient was stable and discharged home.

b. <u>PAST SUMMARY OF TREATMENT & PROCEDURES:</u>

Surgical:	05/12/2016 - Left microdiscectomy at L5-S1
Performed by:	Benjamin Fox, M.D.
Facility:	Dixie Regional Medical Center

Surgical:	10/01/2016 – Redo left microdiscectomy at L5-S1
Performed by:	Benjamin Fox, M.D.
Facility:	Dixie Regional Medical Center

Treatment:	11/04/2016 to 04/12/2017 - Chiropractic treatment for approximately 25 visits including, therapeutic exercise, manipulation, and massage as well as hot and cold packs for neck, mid-back, and low back
Performed by:	Coral Canyon Chiropractic
Results:	Patient continued to have intermittent neck pain.

---

c. PAST DIAGNOSTIC AND TESTING REVIEW:

10/02/2015 Mr. Larsen underwent an x-ray of the lumbosacral spine performed at Dixie Regional Medical Center. X-ray revealed nonspecific configuration. There was reduced range of motion. Mild spondylosis was noted. Compared to lumbar MRI dated 08/27/2015

07/13/2016 Mr. Larsen underwent an x-ray of the lumbosacral spine performed at Dixie Regional Medical Center. X-ray revealed mild dextro convex scoliosis of the lumbar spine. There was mild spondylosis manifest as posterior disc space narrowing and endplate sclerosis. Compared to prior x-ray dated 10/02/2015

09/21/2016 Mr. Larsen underwent an x-ray of the lumbar spine performed at Dixie Regional Medical Center. X-ray revealed no subluxation on flexion or extension.

09/21/2016 Mr. Larsen underwent an x-ray of the lumbosacral spine performed at Dixie Regional Medical Center. X-ray revealed no fractures or wedge compression deformities. There was stable degenerative changes in the lower lumbar spine manifested by disc space narrowing and posterior hypertrophic facet disease.

11/02/2016 Mr. Larsen underwent an x-ray of the cervical spine performed at Dixie Regional Medical Center. X-ray revealed stable intact cervical spine. Compared to CT scan dated 10/10/2016.

IV. CONCLUSION:

I have been presented additional medical records regarding patient Dakota Larsen, regarding the injuries sustained as a result of the motor vehicle collision that occurred on 06/20/2019. On my prior report, dated 10/24/2019, I opined that the patient sustained cervical and lumbar sprains and/or strains as a result of the accident on 06/20/2019.

Regarding this supplemental report, my initial medical records from Las Vegas Neurosurgical Institute are present. It was noted the patient had microdiscectomies in 2016 as a result of an accident. Specifically the first microdiscectomy was in June of 2016, and the second one was in October of 2016. These were performed by Dr. Benjamin Fox in St. George, Utah. Since the time of his accident, he has had progressive onset of lower back pain with left lower extremity radiculopathy, numbness and tingling. The imaging studies I reviewed showed a laminotomy defect at L4-L5 on the left. I ordered CAT scans of the lumbar spine as well as recent MRIs and x-rays.

The patient followed up with me and had recurrence of symptomatology following a motor vehicle accident that occurred 06/20/2019. I reviewed the MRI of the lumbar spine revealed what appeared to be recurrence of the disc protrusion at L5-S1. Because the patient now has his second disc reherniation, I recommended one final left L5-S1 microdiscectomy. I noted that if this last microdiscectomy is unsuccessful in alleviating his symptomatology because of his disc space height loss, he would be an excellent candidate for artificial disc replacement L5-S1 vs. anterior posterior decompression and fusion at L5-S1.

I have also been provided the past medical history on Dakota Larsen. Mr. Larsen was seen by Dr. Benjamin Fox on 10/02/2015 for 3-4 year history of lower back pain with intermittent left lower extremity radiculopathy. The patient was found to have foraminal narrowing with a broad-based disc bulge at L5-S1. The patient was ultimately recommended by Dr. Fox on 04/26/2016 a left L5-S1 microlumbar discectomy.

Dakota Larsen did in fact undergo a left L5-S1 microlumbar discectomy by Dr. Benjamin Fox 05/12/2016 at Dixie Regional Medical Center. The patient postoperatively did very well and was told to follow up in six weeks. Patient was last seen by Dr. Fox on 09/30/2016 for recurrence of radiculopathy. An MRI of the lumbar spine dated 09/28/2016 revealed postoperative changes left L5-S1 with a recurrent disc protrusion. Dakota Larsen was recommended a redo left L5-S1 microdiscectomy. This occurred on 10/01/2016.

Datoka Larsen was then seen at Dixie Regional Medical Center on 11/02/2016 after being involved in a motor vehicle accident. The patient was the restrained passenger of an automobile that was at a complete stop, when struck by a truck driver. The patient presented to the emergency department Dixie Regional Medical Center on 11/02/2016 with complaints of neck pain. Apparently airbags did not deploy, and plain film x-ray of the cervical spine were unremarkable. The patient was prescribed pain medication and discharged thereafter. The patient did undergo from 11/04/2016 until 04/12/2017 25 visits of chiropractic treatment for which the patient did have some intermittent neck pain. The last medical records that I have reviewed include Coral Canyon Chiropractic treatment visits, the last of which was 04/12/2017.

Based upon the additional information that was provided to me, it is clear and without question the patient had an aggravation of his pre-existing lumbar spine condition as a result of 06/20/2019 accident. The motor vehicle accident of 06/20/2019 alters in my expert opinion with a reasonable degree of medical probability of recurrent disc protrusion at L5-S1, requiring treatment. The patient failed conservative management, for which she was recommended one final left L5-S1 microdiscectomy.

It remains my expert opinion with a reasonable degree of medical probability and certainty the patient requires one final left L5-S1 microdiscectomy. If this is unsuccessful in alleviating his symptomatology, then he would be a candidate for an artificial disc replacement vs. anterior posterior decompression and fusion at L5-S1. The need for this surgery is also directly and causally related to the motor vehicle accident of 06/20/2019.

V. LIFE CARE PLAN:

Life expectancy is based on the records of mortality. This was provided through the National Vital Statistics Reports and updated through the Centers of Disease Control and Prevention (CDC) website. These reports project life expectancy based on demographic status which includes current age, gender, and race. After reviewing the life expectancy table, Mr. Dakota Larsen is a 30 year old male. According to the National Vital Statistics Report[1], Mr. Dakota Larsen's life expectancy is an additional 47.9 years.

It is important to note that the patient has the risk of developing adjacent segment disease in the lumbar spine following the surgery. In my experience, patients have a risk of developing adjacent segment disease at roughly 1-4% per year. If we assumed that the patient has at least another 47 years of life expectancy, and we assume a 2% per year risk of developing adjacent segment disease, then it would be my expert opinion with a reasonable degree of medical probability and certainty that the patient would in fact have a greater than 90% chance of developing adjacent segment disease of the lumbar spine that would necessitate surgery in the future.

The goal of this life care plan is to establish the costs to care for Mr. Dakota Larsen, related to his medical needs, as a result of the trauma on June 20, 2019. It will be edited or modified if new information or findings are presented. The dollar amounts provided in this life care plan are based on current dollars (2020), which are obtained through suppliers, facilities, vendors, and healthcare providers. Local prices are used unless local vendors are unable to supply the data.

[1] National Vital Statistics Reports, Vol. 68, No. 7, June 24, 2019, obtained March 17, 2020

I. SURIGICAL INTERVENTION MICROLUMBAR DISCECTOMY (MLD) [2]						
Item	**Start**	**Stop**	**Cost per Unit**	**Frequency**	**Annual Cost**	**Life Expectancy Cost**
Left microlumbar discectomy (see below)	2020	2068	263,360.00	1 time	5,498.12	263,360.00
Lumbar Bracing	2020	2068	1,800.00	1 time	37.58	1,800.00
Lumbar x-ray 4-view pre-op	2020	2068	81.00	1 time	1.69	81.00
Lumbar x-rays 2-view post-op	2020	2068	46.00	2 times	1.92	92.00
Physical Therapy post-operative	2020	2068	100.00	3x/week for 4 weeks	25.05	1,200.00
					5,564.36	**266,533.00**

Patient is a candidate for a left microlumbar discectomy at L5-S1 - CPT code: 63030
The cost for this procedure includes Valley Hospital $239,000.00, Surgical Anesthesia Services $9,000.00, as well as Surgeon and PA-C fees $15,360.00 = $263,360

LSO brace following lumbar surgery is required. The lumbar brace provides protection, support, and stabilization

Plain film x-rays of the lumbar spine are required for pre-operative as well as post-operative surgery, 3-months, 6-months, 9-months, and 12-months

One month of post-operative physical therapy and rehabilitation care following lumbar surgery.

[2] Universal Health Services, per Cicely Wells-Blue on January 24, 2020
Surgical Anesthesia Services, per Sondra on January 30, 2020
Optum 360. (2018). 2019 National Fee Analyzer, obtained March 16, 2020
OrthoAssist, per Adam Busto, CEO on February 28, 2020
Desert Radiology cash list price, obtained on March 16, 2020

II. SURIGICAL INTERVENTION ANTERIOR POSTER DECOMPRESSION & FUSION (A/P FUSION) [3]						
Item	**Start**	**Stop**	**Cost per Unit**	**Frequency**	**Annual Cost**	**Life Expectancy Cost**
Anterior/Posterior Decompression & Fusion (see below)	2020	2068	433,970.00	1 time	9,059.92	433,970.00
Lumbar Bracing and Bone Growth Stimulator	2020	2068	7,800.00	1 time	162.84	7,800.00
Lumbar x-ray 4-view pre-op	2020	2068	81.00	1 time	1.69	81.00
Lumbar x-rays 2-view post-op	2020	2068	46.00	2 times	1.92	92.00
Physical Therapy post-operative	2020	2068	100.00	3x/week for 4 weeks	25.05	1,200.00
					9,251.42	**443,143.00**

Patient may be a candidate for an anterior posterior lumbar fusion at L5-S1 - CPT codes: 95926, 95940, 77002, 22612, 63047, 22840, 22558, 22845, and 22853

The cost for this procedure includes Valley Hospital $335,000.00, Surgical Anesthesia Services $16,200.00, as well as Surgeon and PA-C fees $82,770.00 = $433,970

A bone growth stimulator and LSO brace following lumbar fusion is required.
The lumbar brace provides protection, support, and stabilization and bone growth stimulator helps enhance the body's bone healing process for the patient.

Plain film x-rays of the lumbar spine are required for pre-operative as well as post-operative fusion, 3-months, 6-months, 9-months, and 12-months

One month of post-operative physical therapy and rehabilitation care following lumbar fusion.

[3] Universal Health Services, per Cicely Wells-Blue on February 14, 2020
Surgical Anesthesia Services, per Sondra on February 14, 2020
Optum 360. (2018). 2019 National Fee Analyzer, obtained March 16, 2020
OrthoAssist, per Adam Busto, CEO on February 28, 2020
Desert Radiology cash list price, obtained on March 16, 2020

III. ADJACENT SEGMENT DISEASE (ASD) ANTERIOR POSTERIOR DECOMPRESSION & FUSION (A/P FUSION) [4]						
Item	**Start**	**Stop**	**Cost per Unit**	**Frequency**	**Annual Cost**	**Life Expectancy Cost**
Anterior Posterior Decompression & Fusion (see below)	2021	2068	433,970.00	1 time	9,253.09	433,970.00
Lumbar Bracing and Bone Growth Stimulator	2021	2068	7,800.00	1 time	166.31	7,800.00
Lumbar x-ray 4-view pre-op	2021	2068	81.00	1 time	1.73	81.00
Lumbar x-rays 2-view post-op	2021	2068	46.00	2 times	1.96	92.00
Physical Therapy post-operative	2021	2068	100.00	3x/week for 4 weeks	25.59	1,200.00
					9,448.68	**443,143.00**

Patient has the risk of developing adjacent segment disease or transitional level syndrome in the lumbar spine following his recommended anterior posterior decompression & fusion at L5-S1
Future 1-level A/P fusion - CPT codes: 95926, 95940, 77002, 22612, 63047, 22840, 22558, 22845, and 22853
The cost for this procedure includes Valley Hospital $335,000.00, Surgical Anesthesia Services $16,200.00, as well as Surgeon and PA-C fees $82,770.00 = $433,970

A bone growth stimulator and LSO brace following lumbar fusion is required.
The lumbar brace provides protection, support, and stabilization and bone growth stimulator helps enhance the body's bone healing process for the patient.

Plain film x-rays of the lumbar spine are required for pre-operative as well as post-operative fusion, 3-months, 6-months, 9-months, and 12-months

One month of post-operative physical therapy and rehabilitation care following lumbar fusion.

[4] Universal Health Services, per Cicely Wells-Blue on February 14, 2020
Surgical Anesthesia Services, per Sondra on February 14, 2020
Optum 360. (2018). 2019 National Fee Analyzer, obtained March 16, 2020
OrthoAssist, per Adam Busto, CEO on February 28, 2020
Desert Radiology cash list price, obtained on March 16, 2020

IV. PHYSICIAN APPOINTMENTS						
Item	**Start**	**Stop**	**Cost per Unit**	**Frequency**	**Annual Cost**	**Life Expectancy Cost**
Neurosurgeon [5] Cervical & Lumbar Pre-operative visit	2020	2068	350.00	4-5 times	34.34	1,645.00
Neurosurgeon [5] Cervical & Lumbar Post-operative visit	2020	2068	350.00	4-5 times	34.34	1,645.00
Pain Management [6] office visits	2020	2068	125.00	3 visits annually	375.00	17,962.50
					443.68	**21,252.50**

Neurosurgeon office visits are required for pre-operative vists prior to surgery.

Following surgery, Neurosurgeon office visits are required post-operatively as well as follow up visits to evaluate the lumbar spine.

Pain management office visits for the lumbar spine
Actual treatment cost to be determined by pain specialist

[5] Based on average costs from Las Vegas Neurosurgical Institute

[6] Southwest Spine and Pain Center, per Jess, obtained April 2, 2020

V. MEDICATIONS [7]						
Item	**Start**	**Stop**	**Cost per Unit**	**Months**	**Annual Cost**	**Life Expectancy Cost**
Over-the-counter pain medication	2020	2068	22.50	12	270.00	12,933.00
					270.00	**12,933.00**

Unit cost of $22.50 is for a bottle of 90 tablets (one month supply). Frequency: every 8 hours or as needed. Cost was given for Ibuprofen 800mg.

Patient is required to stay off NSAIDs including ibuprofen pre-surgically, during the surgical period, and following surgery. Other pain medication to be utilized during this time; this is not reflected in this portion of the plan. This plan represents a lower end of medication only.

[7] Based on average costs, online pharmacy https://www.healthwarehouse.com/ibuprofen-800mg-tablets-20872.htm, obtained on March 5, 2020

VI. THERAPY [8]						
Item	**Start**	**Stop**	**Cost per Unit**	**Frequency**	**Annual Cost**	**Life Expectancy Cost**
Lumbar physical therapy flare-ups	2021	2068	100.00	3x/week for 4 weeks - Once a year	1,200.00	56,280.00
					1,200.00	**56,280.00**
Future, physical therapy for flare-ups are recommended once a year with a frequency of three times a week for four weeks. This is for motion and function optimization of the cervical and lumbar spine.						

[8] First Physical Therapy, per Martha on February 28, 2020

COST SUMMARY			
Table	**Category**	**Life Expectancy Cost**	
I	Surgical Intervention - MLD	$	266,533.00
II	Surgical Intervention - Lumbar	$	443,143.00
III	Adjacent Segment Disease - Lumbar	$	443,143.00
IV	Physician Appointments	$	21,252.50
V	Medication	$	12,933.00
VI	Therapy	$	56,280.00
	Total:	**$**	**1,243,284.50**

It is my expert opinion with a reasonable degree of medical probability that the patient sustained both lumbar spine injuries necessitating treatment as a result of the 06/20/2019 accident.

All my opinions are with a reasonable degree of medical probability, and I reserve the right to alter or modify my opinions based upon any additional information that may be presented to me.

Should you have any additional questions or concerns, please do not hesitate to contact me. Thank you very much for your time and consideration.

Sincerely,

JASON E. GARBER, M.D., F.A.A.N.S., F.A.C.S.
Diplomat, American Board of Neurological Surgeons
Spine Fellowship Trained Neurosurgeon
JEG:crh
Dictated but not edited

EXHIBIT “C”

Watson, Sonya C

From: Watson, Sonya C
Sent: Tuesday, April 20, 2021 5:10 PM
To: Brian Blankenship
Cc: Moises Garcia; Jory, Shannon; Girard-Rubio, Denisse A.; Smith, Diana; Grant, Annalisa N; Will Sykes
Subject: RE: Larsen v. Pro Petroleum

Hi Brian,

I am happy to discuss these issues with you. When are you available for a call?

Sincerely,

Sonya C. Watson

Sonya C. Watson
Associate Attorney, Grant & Associates
Staff Counsel
American International Group, Inc. (AIG)

7455 Arroyo Crossing Pkwy, Suite 220, Las Vegas, NV 89113
T (+1) 702.940.3534 | C (+1) 725.502.0269
sonya.watson@aig.com | www.aig.com

From: Brian Blankenship <brian@claggettlaw.com>
Sent: Tuesday, April 20, 2021 3:56 PM
To: Watson, Sonya C <Sonya.Watson@aig.com>
Cc: Moises Garcia <MGarcia@claggettlaw.com>; Jory, Shannon <Shannon.Jory@aig.com>; Girard-Rubio, Denisse A. <Denisse.GirardRubio@aig.com>; Smith, Diana <Diana.Smith@aig.com>; Grant, Annalisa N <Annalisa.Grant@aig.com>; Will Sykes <WSykes@claggettlaw.com>
Subject: [EXTERNAL] RE: Larsen v. Pro Petroleum

Good Afternoon Sonya:

Thank you for your email. Please allow this email correspondence to serve as a response to the issues addressed below and the Rule 34 Requests we recent served on your client(s). We can reserve the Rule 34 Requests until after the JCCR is entered. That's not a problem.

Employment Authorizations

As you are aware, we provided you with medical authorizations regarding our client, as required by Rule 16.1. As to the employment releases, we cannot agree to execute the employment authorizations you requested at this time. Before we agree to any releases, we must first discuss the scope and the justification for providing releases for all former employers to determine whether a protective order is necessary. We are claiming injuries that are obviously traumatic and, therefore, we do not yet see the relevance or proportionality of producing all prior employment records. Furthermore, as you discussed in a previous email, the JCCR is not yet entered in this matter. As such, we will not be releasing employment authorizations until discovery begins and we receive a formal request for the same thru a Rule 34 Request so that we can appropriately review the request and object, if necessary.

Rule 35 Exam and Deposition

As to the Rule 35 examination, these examinations are not a matter of right and court order is necessary before an examination can take place. Furthermore, we rarely stipulate to Rule 35 examinations and will never do so unless the party requesting the exam agrees to our written parameters, including an audio recording of the exam and an observer present. As it stands now, there is no agreement for a Rule 35 examination but we are happy to discuss this with you once the Parties enter into discovery. Regarding the deposition, we will discuss the client's availability in September and get back to you.

Thank you,

Brian

Brian Blankenship, Esq.
Trial Attorney
Claggett & Sykes Law Firm
4101 Meadows Lane, Suite 100
Las Vegas, NV 89107
Direct: 702-902-4014
Tel. 702-655-2346 / Fax 702-655-3763
brian@claggettlaw.com

From: Watson, Sonya C <Sonya.Watson@aig.com>
Sent: Friday, April 16, 2021 3:55 PM
To: Brian Blankenship <brian@claggettlaw.com>
Cc: Moises Garcia <MGarcia@claggettlaw.com>; Jory, Shannon <Shannon.Jory@aig.com>; Girard-Rubio, Denisse A. <Denisse.GirardRubio@aig.com>; Smith, Diana <Diana.Smith@aig.com>; Grant, Annalisa N <Annalisa.Grant@aig.com>
Subject: Larsen v. Pro Petroleum
Importance: High

Hi Brian,

We anticipate taking Plaintiffs deposition in September and would like to schedule the depo to coincide with the Rule 35 exam. Please provide your availability for September for Plaintiff's deposition.

Please advise regarding the status of the employment release per our discussion at the ECC. Please also be advised that we are going to need releases for each of the employers included in Plaintiff's 2015-2019 tax returns. The following is a list of Plaintiff's past employers as reported in his tax returns:

Diamond Ranch Academy, Inc.
Legend Venture, LLC
Resource Management, Inc.
Three Points Center, LLC
Summit Security
Disney Financial Services, LLC
Allegiant Air
WFS Express, Inc.
Airbus Americas, Inc.

Sincerely,

Sonya C. Watson

Sonya C. Watson
Associate Attorney, Grant & Associates
Staff Counsel
American International Group, Inc. (AIG)

7455 Arroyo Crossing Pkwy, Suite 220, Las Vegas, NV 89113
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sonya.watson@aig.com | www.aig.com

EXHIBIT “D”

Watson, Sonya C

From: Watson, Sonya C
Sent: Wednesday, May 12, 2021 1:45 PM
To: Brian Blankenship; Girard-Rubio, Denisse A.; Moises Garcia; Sean Claggett; Will Sykes; kevin@swensonshelley.com; brian@swensonshelley.com; jake@swensonshelley.com
Cc: Smith, Diana; Jory, Shannon; Grant, Annalisa N
Subject: Larsen v. Pro Petroleum - Rule 35 Exam

Importance: High

Hi Brian,

If we can reach an agreement regarding the rule 35 exam, that would be preferable.

Please call me at 725-502-0269 or respond to this email to discuss any parameters you would propose.

Sincerely,

Sonya C. Watson

Sonya C. Watson
Associate Attorney, Grant & Associates
Staff Counsel
American International Group, Inc. (AIG)

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EXHIBIT “E”

CLAGGETT & SYKES LAW FIRM

4101 Meadows Lane #100 | Las Vegas, NV 89107 Tel.
702.655.2346 | Fax 702.655.3763 | claggettlaw.com

June 9, 2021

VIA E-MAIL

Annalisa N. Grant, Esq.
Sonya C. Watson, Esq.
7455 Arroyo Crossing Parkway, Suite 220
Las Vegas, Nevada 89113

RE: Larsen v. Pro Petroleum, LLC

Dear Grant and Watson,

Our office received service of Pro Petroleum, LLC's ("Pro Petroleum") Motion to Compel a Rule 35 Examination ("Motion") of our client, Dakota Larsen ("Plaintiff"). As you know, the Parties discussed, via email correspondence, Pro Petroleum's request for a Rule 35 examination. The Parties, however, never held an EDCR 2.34 conference to discuss a proposed Rule 35 examination by telephone conference before Pro Petroleum filed its Motion.

The Eighth District Court Rule ("EDCR" or "Rule") 2.34 governs all discovery disputes, conferences, motions, and stays within the Eighth Judicial District Court of Nevada. Rule 2.34 states the following:

> **Rule 2.34. Discovery disputes; conferences; motions; stays.**
> (a) Unless otherwise ordered, all discovery disputes (except disputes regarding any extension of deadlines set by the discovery scheduling order, or presented at a pretrial conference or at trial) must first be heard by the discovery commissioner.
> **[…]**
> (d) Discovery motions may not be filed unless an affidavit of moving counsel is attached thereto setting forth that after a discovery dispute

> conference or a good faith effort to confer, counsel have been unable to resolve the matter satisfactorily. A conference requires either a personal or telephone conference between or among counsel. Moving counsel must set forth in the affidavit what attempts to resolve the discovery dispute were made, what was resolved and what was not resolved, and the reasons therefor. If a personal or telephone conference was not possible, the affidavit shall set forth the reasons. If the responding counsel fails to answer the discovery, the affidavit shall set forth what good faith attempts were made to obtain compliance. If, after request, responding counsel fails to participate in good faith in the conference or to answer the discovery, the court may require such counsel to pay to any other party the reasonable expenses, including attorney fees, caused by the failure. When a party is not represented by counsel, the party shall comply with this rule.
> **[…]**

EDCR 2.34.

Per EDCR 2.34(d), the moving counsel must confer with opposing counsel by conference in an effort to resolve any discovery disputes before filing a discovery motion. Specifically, Rule 2.34 expressly "requires either a personal or telephone conference between or among counsel," and, therefore, email correspondence between the Parties will not satisfy Pro Petroleum's obligations under the rule. Moreover, Pro Petroleum failed to attach to the Motion the required affidavit detailing the 2.34 conference and good faith efforts to resolve any issues. Thus, Pro Petroleum's Motion violates Rule 2.34(d).

Proposed Resolution:

To resolve this issue, we respectfully request that Pro Petroleum promptly and voluntarily withdraw its Motion. Following withdrawal, the Parties can set a Rule 2.34 conference to discuss the proposed Rule 35 examination and Plaintiff's position on whether the Parties can stipulate to the same. Plaintiff cannot promise that the Parties will reach an agreement on a stipulation for a Rule 35 examination, but Plaintiff will

certainly make a good faith effort to reach a compromise. We are available on Monday, June 14, 2021 at 1:30 pm PST to hold the telephone conference. If you cannot agree to the proposed time, please provide your availability between June 14, 2021, and June 30, 2021, and we will do our best to find availability during the proposed dates.

We hope you will consider Plaintiff's proposal to voluntarily withdraw the Motion. Should Pro Petroleum refuse to voluntarily withdraw the Motion, however, and you force Plaintiff to file an Opposition, we will have no choice but to seek sanctions, including attorney's fees and costs for having to review, draft, and file a response to the Motion. We hope to avoid this course of action. Plaintiff's response to the Motion is currently due on or about June 18, 2021. As such, please notify Plaintiff regarding your intentions and/or voluntarily withdraw the Motion on or before June 16, 2021.

As always, we hope to resolve any issues with you in good faith and without the need for court intervention. Should you have any questions or concerns regarding the contents of this correspondence, please feel free to contact us.

Sincerely,
CLAGGETT & SYKES LAW FIRM

/s/ Brandon Cromer

BRANDON CROMER, ESQ.
BRIAN BLANKENSHIP, ESQ.

CSERV

DISTRICT COURT
CLARK COUNTY, NEVADA

Dakota Larsen, Plaintiff(s) vs. Pro Petroleum LLC, Defendant(s)	CASE NO: A-20-826907-C DEPT. NO. Department 22

AUTOMATED CERTIFICATE OF SERVICE

This automated certificate of service was generated by the Eighth Judicial District Court. The foregoing Order Shortening Time was served via the court's electronic eFile system to all recipients registered for e-Service on the above entitled case as listed below:

Service Date: 8/27/2021

Jackie Abrego	jabrego@claggettlaw.com
Maria Alvarez	malvarez@claggettlaw.com
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Diana Smith	diana.Smith@aig.com
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