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COMMUNIQUÉ

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Special feature

CLE Article #10:

Wanna Stay Out of Trouble in Discovery?

By ADR/Discovery Commissioners Jay Young and Erin Truman

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Wanna Stay Out of Trouble in Discovery?

By ADR/Discovery Commissioners Jay Young and Erin Truman

***About the CCBA's Article #10, "Wanna Stay Out of Trouble in Discovery? ":** The Clark County Bar Association (CCBA) offers 1.0 Continuing Legal Education (CLE) Credit to Nevada lawyers who complete the test and order form per the offer described in the October 2021 issue of Communiqué. See pp. 22-27. The CCBA is an Accredited Provider with the NV CLE Board.*

Discovery Commissioners Erin Lee Truman and Jay Young recently taught a series of CLE courses on ADR and Discovery to great acclaim (*Editor's Note:* Actually, they made us say that). Here at the CCBA, we want all attorneys, even those who were not able to attend the seminars, to benefit from the Commissioners' practical counsel to keep us all out of hot water when involved in a discovery dispute. You want to stay out of hot water, don't you? Then read on, friend.

The course materials from the Commissioners' recent seminars can be found at https://clarkcountybar.org/marketplace/cle-programs/. They will also be available on the court's website at http://www.clarkcountycourts.us/departments/discovery/. Keep these materials as a handy reference guide for when you and your staff prepare your next discovery matter. Learn what actually constitutes a meaningful, good faith meet and confer, pursuant to EDCR 2.34. Discover the new requirement by the Court of Appeals regarding court orders and the Rule 26 proportionality factors and why you should always include them in your motions. Decide if the Commissioner can hear your motion to continue trial. Avoid pitfalls and mistakes.

But wait! That isn't all. If you keep reading, you can also earn CLE credit. That's right. We know you know the drill by now. Read the materials. Take the Test. Complete the order form. Suddenly you will appear more attractive (satisfaction not guaranteed), obtain CLE credit, and may better advocate for your clients in discovery disputes (satisfaction not guaranteed).

Jay Young is an ADR/Discovery Commissioner for the Eighth Judicial District Court. He enjoys moonlit nights and Bluejeans hearings.

Erin Truman is an ADR/Discovery Commissioner for the Eighth Judicial District Court. Prior to her appointment, she was a litigator in Las Vegas for 25 years during which time she tried in earnest to avoid discovery disputes.

HOT TOPICS IN DISCOVERY

Presented by:

Discovery Commissioners
Erin Lee Truman
and Jay Young

Sept. 28, 2021
Oct. 12, 2021

I. HOT TOPICS IN DISCOVERY

A. Conducting a Meaningful Meet & Confer

The threshold inquiry for any motion involving a discovery dispute is whether the parties engaged in an adequate, meaningful, and good faith effort to meet, confer, and attempt to resolve the matter before seeking court intervention. *Cardoza v. Bloomin' Brands, Inc.*, 141 F. Supp. 3d 1137, 1145 (D. Nev. 2015). Whether counsel demonstrates attempts to engage in a meaningful meet and confer is the first thing Discovery staff review when the department receives a motion. If moving counsel fails to demonstrate the meet and confer was conducted according to the standard below, staff will reject the motion and take it off calendar until the movant demonstrates counsel engaged in a proper meet and confer. EDCR 2.34(d) ("Discovery motions may not be filed unless an affidavit of moving counsel is attached thereto setting forth that no agreement could be reached after a discovery dispute conference or a good faith effort to confer"); EDCR 5.602(e) ("A [Family Law] discovery motion must set forth that it is brought after a discovery dispute conference or a good faith effort to confer").

1. Discovery is Designed to Proceed Without Court Intervention

Discovery is intended to be self-executing, with little court intervention except in extraordinary circumstances. *Cardoza* 141 F. Supp. 3d. at 1145. While some counsel see the meet and confer obligation as a merely a technicality—it is actually a *prerequisite* to filing a discovery dispute in the Eighth Judicial District Court. *See* NRCP 16.1(e)(3)(A) (allowing sanctions under NRCP 37(b) or 37(f)); NRCP 26(c)(1) (protective orders); NRCP 30(h)(4)(A) (setting the amount of an expert witness' hourly fee for a deposition); NRCP 37(a)(1) (motion to compel disclosure or discovery); NRCP 37(a)(5)(A)(i)

(mandatory sanction for filing a motion under Rule 37 "before attempting in good faith to obtain the disclosure or discovery without court action."); NRCP 37(d)(1)(B) (failing to answer or respond to discovery); NRCP 45(a)(4)(B)(v) (incorporating "the provisions of Rules 26(c) and (g) and 37(a)(5)" when objecting to a subpoena or filing a motion for protection from the same); EDCR 2.34(d) (discovery motions must certify a meaningful meet and confer); EDCR 5.501 (all family division motions require an attempt to resolve the matter before court intervention); EDCR 5.511(c) (family division motions *in limine* require a meaningful meet and confer certification); and EDCR 5.602(d) (family division discovery motions must certify a meaningful meet and confer).

2. The Meet and Confer is a Prerequisite to Filing a Motion

The parties must treat the meet and confer negotiation as a substitute for judicial resolution of discovery disputes. *Nevada Power v. Monsanto*, 151 F.R.D. 118, 120 (D. Nev. 1993). "Instead of forcing judicial oversight of every dispute, attorneys are expected to approach discovery with an eye toward cooperation, practicality, and sensibility." *Big City Dynasty v. FP Holdings, L.P.*, 336 F.R.D. 507, 513 (D. Nev. 2020).

For a conference to be meaningful, the parties must discuss their disputed issues "with the same level of detail and legal support as they would during briefing a discovery motion." *Guerrero v. Wharton*, No. 16-cv-01667 (D. Nev. Jan. 22, 2018). Thus, a certification must contain a description of the positions taken by the parties at the meet and confer. EDCR 2.34(d) ("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."); EDCR 5.602(d) ("A discovery motion must set forth . . . what attempts to resolve the dispute were made, what was resolved and what

was not resolved, and why.") One may validly argue that a motion is premature for lack of a good faith meet and confer if the motion is based on a legal theory not discussed prior to the filing of the motion.

The meet and confer obligation is not new. First, it is plainly required by both the NRCP and the EDCR. Further, A*lboum v. Koe, M.D., et al.,* Discovery Commissioner Opinion #10 (November 2001) is almost 20 years old. That opinion contains a robust discussion of the meet and confer obligations of counsel under our rules. In important part, the Discovery Commissioner suggested:

> In order to satisfy the requirements of E.D.C.R. 2.34 the movant must detail in an affidavit the essential facts sufficiently to enable the Commissioner to pass preliminary judgment on the adequacy and sincerity of the good faith discussion between the parties. It must include the name of the parties who conferred or attempted to confer, [the conference should be between the attorneys/parties - not delegated to secretaries or paralegals] the manner in which they communicated, the dispute at issue, as well as the dates, times and results of the discussions, if any, and why negotiations proved fruitless. *Shuffle Master v. Progressive Gaming, supra*; *Hunter v. Moran, supra*; *Messier v. Southbury Training School*, 1998 U.S. Dist. Lexis 20315 (D. Conn. 1998). None of the required work was done prior to the filing of the instant motion.
>
> The above steps in the conferment process must not only be done, but also be done in good faith; *i.e.*, did the parties discuss the propriety of the asserted objections? Did they determine precisely what the requesting party was seeking and what information the responding party should reasonably supply? Did they converse, compare views and deliberate as to a solution? *Contracom Commodity Trading Co. v. Seaboard Corp.*, 189 F.R.D. 456 (D. Kan. 1999); *Deckon v. Chidebere*, 1994 U.S. Dist. Lexis 12778 (S.D.N.Y. 1994).
>
> Good faith is tested, not just by the quantity of contacts, but the quality as well; further, it is adjudged according to the nature of the dispute and the reasonableness of the positions held by the respective parties, as well as any suggested compromise of those positions. The keys are honesty in one's purpose to meaningfully discuss the discovery dispute, freedom from intention to defraud or abuse the discovery process and faithfulness to one's obligation to secure information without court action. *Contracom Commodity Trading Co. v. Seaboard Corp., supra*; *Prescient Partners, L.P. v. Fieldcrest Cannon, supra*. If counsel have any doubts as to the quantity and quality of the "meet-and-confer" requirements, I strongly suggest a reading of the *Shufflemaster v. Progressive*

> *Gaming* case, cited throughout this opinion, as to what counsel must do prior to filing a further discovery motion.

Id.

The Nevada Supreme Court has confirmed this prefiling conference requirement is not merely a formal prerequisite to seeking judicial intervention—it requires a fulsome discussion of the issues in dispute at the conference. *Nevada Power v. Monsanto*, 151 F.R.D. 118, 120 (D. Nev. 1993). The requirement is reciprocal and applies to all participants. EDCR 2.34(d) provides for sanctions if "responding counsel fails to participate in good faith".

A motion bereft of a certification sufficient to convince the court that counsel engaged in a meaningful meet and confer, as required by the rules and caselaw, is subject to denial without reaching the merits of the motion itself. *See* EDCR 2.34(d); EDCR 5.602(d); *see also* § 50:17 *Meet and Confer Requirements*, 5 Bus. & Com. Litig. Fed. Cts. § 50:17 (4th ed.) (internal citations omitted); *Elan Microelectronics Corp. v. Pixcir Microelectronics Co.*, 2013 U.S. Dist. LEXIS 114165 (D. Nev. 2013); *Alboum v. Koe* (citing *Schick v. Fragin*, 1997 Bankr. Lexis 1250 (Bankr. S.D. N.Y. 1997); *Tri-Star Pictures v. Unger*, 171 F.R.D. 94 (S.D. N.Y. 1997)). Further, a motion that fails to adequately certify that the parties met and conferred may subject the moving party to sanctions. NRCP 37(a)(5)(A)(i) contains a *mandatory sanction* for filing a motion under Rule 37 "before attempting in good faith to obtain the disclosure or discovery without court action."

3. Conclusory Statements do no Satisfy the Requirement

Too often, a movant's certification makes conclusory statements such as "an EDCR 2.34 telephonic conference was held on or about [DATE]. Counsel were not able

to resolve the matter. The movant has engaged in a good faith meet and confer." If the certification says nothing more, it fails to meet the standard required by local rules and caselaw. Remember that the purpose of the certification is to *demonstrate* to the court that you attempted to resolve the dispute without coming to court. Without the specificity outlined above, the court cannot tell whether counsel actually engaged in good faith attempts to resolve the matter on their own, or just attempted to check a box so they could file a motion. The prerequisite to filing the instant motion—certifying that counsel engaged in a meaningful, good faith meet and confer and attempted to resolve the matter by compromise—has not been met. The motion must be denied.

The movant "must adequately set forth in the motion essential facts sufficient to enable the court to pass a preliminary judgment on the adequacy and sincerity of the good faith conferment between the parties." *Shufflemaster, Inc. v. Progressive Games, Inc.*, 170 F.R.D. 166, 170 (D. Nev. 1996). In other words, a moving party must not simply *tell* the Court, but must actually *demonstrate* it engaged in meaningful, good faith negotiations. *Cf. Cadle v. Woods Erickson, LLP*, 131 Nev. 114, 345 P.3d 1049 (2015) (Counsel's affidavit of costs must move beyond telling the court that costs were necessary. It must demonstrate the costs were necessary to and incurred in the action).

4. What you Should Include in your Certification

If you desire to remove all doubt that you actually engaged in a proper meet and confer, provide a proper certification. Demonstrate, *through sworn testimony*, each of the following:

a. *Counsel Held a Personal (Face-to-Face) Meeting or Held a Telephone (or Video) Conference*

This seems like a simple requirement—pick up the phone and speak with opposing counsel. As simple as it is, attorneys routinely submit declarations attaching email after email wherein counsel engage in positional warfare without offering to find a middle ground or a way past their impasse. Counsel then submit a declaration suggesting they held a meet and confer. *They emphatically did not hold a meaningful meet and confer, and the court must reject a motion based on emails alone.* Alternatively, counsel might call and leave a message at 3:43 PM and file the motion at 5:00 PM. Neither exhibits an *actual attempt to resolve the matters* without court intervention.

Please, send your emails that set forth your legal and factual positions. It is a good practice and helps to define the issues. But follow up the emails by picking up the phone and suggesting a way past the dispute. Discuss each other's positions and work cooperatively to find a way past the loggerhead without court intervention. Note the date, time, and method of each communication (face-to-face, telephone, video conference, etc.) in your sworn testimony. A*lboum v. Koe, M.D., et al.* Detail with whom you communicated and for how long you spoke.

b. *If a Personal or Telephone Conference was not Possible, the Motion Shall set Forth the Reasons*

If opposing counsel fails to cooperate by refusing to meet and confer, you may *cautiously* file a motion without a meet and confer. EDCR 2.34(d) ("If a personal or telephone conference was not possible, the affidavit shall set forth the reasons."); EDCR 5.602(d) ("if a personal or telephone conference was not possible, the motion shall set forth the reasons. Such a motion must be supported by affidavit"). When doing so, you should demonstrate that you were an extremely reasonable person who gave the other

side every opportunity to participate. We recommend the following efforts before filing a motion without actually speaking with opposing counsel:

- Send an email advising counsel of the dispute and setting forth your position, then request a phone call (providing your availability for the same in the email);
- After waiting a reasonable amount of time for opposing counsel to respond to your email (24 hours), call counsel's office, attempting to meet and confer;
- Leave a voicemail message that you are calling to meet and confer;
- Send a follow-up email detailing when you called and what message you left. Give counsel a time frame (at least another 24 hours) within which to return your call, explaining that if you do not hear from counsel, you will be forced to file the motion;
- After the reasonable period has passed, again call counsel and leave another message; and
- Send a final email that you note counsel has not responded to your emails or your phone message. Note that when you attempted another call and the substance of the message you left. Inform counsel that you are now going to file your motion.[1]

Counsel who refuse to respond to emails and phone calls regarding a discovery dispute do so at their own peril. EDCR 2.34(d) provides 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's fees, caused by the failure." EDCR 5.602(e) similarly provides if, "after request, the responding party fails to participate in good faith in the conference or to answer the discovery, the court may require such party to pay to any other party the reasonable expenses, including attorney fees, caused by the failure." Likewise, counsel who leave a voicemail at 3:43 PM and file their motion at 5:00 PM may be subject to their motion being denied for failure to meet and confer, or possibly sanctions under NRCP 26(g) or NRCP 37(a)(5)(A)(i).

[1] If, at this point in time or even after the motion is filed, opposing counsel returns your call, take the call and attempt to work things out. If you refuse, you may win the motion but will not be as sympathetic if the Court believes you could have avoided a hearing. You may still be entitled to fees under Rule 37(a)(5)(A), but you can jointly inform the court that the need to compel is mooted by compliance.

c. *Detail What was Resolved and What was not Resolved*

A conclusory statement that you spoke with opposing counsel and were unable to come to an agreement does not convince the court that you actually tried to resolve your dispute. Thus, local rules and caselaw require that you detail what you were able to resolve. Telling the court you were owed supplements to 10 RPDs, detailing the positions argued by each counsel, explaining how counsel resolved 3 of the matters demonstrates your good faith negotiations.

d. *Detail what was not Resolved, and why*

Equally important, the court needs to understand what remains to be resolved and why the parties were unable to agree. Detail the positions taken by counsel regarding the unresolved matters. Detail the offers made to find a resolution. Detail the responses to those offers. Give the court a picture of what happened in the meet and confer. Demonstrate to the court that you discussed the disputed issues at the meet and confer "with the same level of detail and legal support" as you eventually do in your briefing. *Guerrero v. Wharton*, No. 16-cv-01667 (D. Nev. Jan. 22, 2018). Make it easy for the court to agree with you—put all of these details in your sworn testimony rather than asking the court to wade through page after page of email traffic to find your argument.

Attached as Exhibit 1 is a Model Meet & Confer Declaration. This declaration is provided for demonstrative purposes, illustrating language that *could* be used. It does not adequately address all possible situations, and counsel should narrowly tailor each declaration to the meet and confer engaged in prior to filing a motion. Regurgitating a form without tailoring it to your actual meet and confer does not meet the requirements of the rules and caselaw.

B. Rule 2.40 Requirement

Before a motion to compel—or for protection from—written discovery requests will be heard by a discovery commissioner, the motion must follow EDCR 2.40. This local rule provides:

> **Rule 2.40. Responding to discovery requests.** Answers to interrogatories must set forth each question in full before each answer. Each objection to an interrogatory, a request for admission, or a demand for production of documents and each application for a protective order must include a verbatim statement of the interrogatory, question, request or demand, together with the basis for the objection. A demand to compel further answer to any written discovery must set forth in full the interrogatory or request and the answer or answers thereto.

The rule requires that each discovery request is fully stated in the *body* of the motion, followed immediately thereafter by the response that was given, if any. Although it is important that the entire written discovery is attached as an exhibit, it is insufficient to merely refer to the exhibit instead of setting forth the request and the response in the papers (unless the other side provided no response to the request at all).

When the motion deals with numerous requests, the maximum page limit of the motion may become an issue. EDCR 2.20(a) ("Unless otherwise ordered by the court, papers submitted in support of pretrial and post-trial briefs shall be limited to 30 pages, excluding exhibits"). Where the inclusion of all disputed discovery requests would lead to the page limit being exceeded, the motion must be severed or split. The result is that the discovery requests at issue will be addressed by the court through hearing multiple motions, instead of one motion that exceed the page limit allowed by rule. When this occurs, the titles of the motion should indicate that multiple motions are being filed regarding the written discovery. For example, the motions could be titled as follows:

Plaintiff's Motion to Compel (1 of 3) Response to Interrogatories 1-19.

Plaintiff's Motion to Compel (2 of 3) Responses to Interrogatories 20-32.

Plaintiff's Motion to Compel (3 of 3) Responses to Interrogatories 33-40.

C. Proportionality Requirements

The 2019 Amendment to NRCP 26(b)(1) requires the district court to consider the proportionality of discovery **in addition to** potential relevancy. This should result in counsel asking themselves two very key questions regarding discovery that is sought.

First, ask yourself: *"Is the discovery sought relevant to any party's claim or defense?"* If the answer to the first question is yes, then next ask yourself: *"Is the discovery sought proportional to the needs of the case?"* For discovery to be allowed, it must be both relevant to a party's claim or defense **and** proportional to the needs of the case.

The Nevada Court of Appeals addresses this standard in *Venetian Casino Resort, LLC v. Eighth Judicial Dist. Ct.*, 136 Nev. 221, 467 P.3d 1 (2020). The plaintiff in the case, Joyce Sekera, slipped and fell on the Venetian Casino Resort's marble flooring. Sekera requested, through discovery requests, that the Venetian produce incident reports relating to slip and falls on the marble flooring for the three years preceding her injury to the date of the request. In response, the Venetian provided 64 incident reports that disclosed the date, time, and circumstance of the various incidents. Venetian redacted the personal information of injured parties from these reports, including names, addresses, phone numbers, medical information, and social security numbers. Sekera insisted on receiving the unredacted reports so she could contact potential witnesses to gather information to show that she was not comparatively negligent, as was asserted by the Venetian.

The Venetian moved for a protective order in order to avoid providing the redacted personal information contained in the incident reports. The discovery commissioner found that

there was a legitimate privacy issue and recommended the court grant the protective order, such that the reports remain redacted, and further prevented Sekera from sharing the reports outside of the litigation at issue. *Venetian,* 136 Nev. at 222, 467 P.3d at 3.

Plaintiff objected to the discovery commissioner's recommendation. The district court agreed with the objection and rejected the discovery commissioner's recommendation in its entirety, thereby denying the motion for protective order.

The district court concluded:

> 1. There was no legal basis to preclude Sekera from knowing the identity of the persons involved in the prior incidents, as this information was relevant discovery material; and
> 2. There was no legal basis to prevent the disclosure of the unredacted reports to third parties not involved in the Sekera litigation.

Venetian, 136 Nev. at 222-23, 467 P.3d at 3-4.

On appeal, the Nevada Court of Appeals reviewed whether it was an abuse of discretion for the district court to overrule the discovery commissioner's recommendation by solely considering whether the unredacted reports were relevant to the claims/defenses.

The appellate court found that in denying the Venetian's motion for a protective order, the district court abused its discretion in two ways:

1. The district court focused on relevancy and did not consider proportionality as required under the amendments to NRCP 26(b)(1); and
2. **The district court abused its discretion when it failed to analyze proportionality in light of the revisions to NRCP 26(b)(1).**

Venetian, 136 Nev. at 229, 467 P.3d at 7-8. NRCP 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.

A proportionality analysis requires a weighing of these factors in each unique case.

The scope of discovery was previously addressed by the Nevada Supreme Court in *Schlatter v. Eighth Judicial Dist. Court In & For Clark Cty.*, 93 Nev. 189 (1977). Plaintiff, Mary Schlatter, suffered personal injury on Defendant's property and brought suit. The lower court ordered Schlatter to execute an authorization permitting Paradise to inspect and copy all medical records relating to the injuries complained of and, if a pre-existing condition was discovered, an authorization allowing Paradise access to all records in her medical history without limitation. Further, she was ordered to execute an authorization permitting Paradise to obtain complete copies of her income tax returns for a three-year period. Petitioner Schlatter sought a writ of mandamus directing the respondent court to vacate its improper discovery order. *Id.*

The *Schlatter* Court ruled that respondent, Eighth Judicial District Court, exceeded its jurisdiction by granting discovery of irrelevant matter, and a "traditional use of the writ (of mandamus) has been to confine an inferior court to a lawful exercise of its prescribed jurisdiction", stating:

> Since the disclosure of irrelevant matter is irretrievable once made, Schlatter would effectively be deprived of any remedy from respondent's erroneous ruling if she was required to disclose the information and then contest the validity of the order on direct appeal.

Id., at 189.

Under *Schlatter,* and the NRCP 26 (b)(1) factors regarding proportionality, only information that is proportional and probative on the actual claims and defenses in the case should be allowed. Discovery "fishing expeditions" should be prohibited.

D. <u>Moving for Fees and Costs</u>

The Supreme Court has made it clear that an award of attorney fees and costs will not

be disturbed absent an abuse of discretion. Most reported cases that reverse such an award do so because the district court lacked an evidentiary basis for making a finding that the fees or costs were justified. This result is completely avoidable if the movant presents competent evidence introduced by sworn testimony. If the movant attempts to introduce evidence in some other way, the order is subject to reversal. The goal for the moving party should be to allow the court to grant a durable, enforceable order. Failing to adhere to the requirements below removes the court's ability to issue an order granting requested fees and costs.

1. The Standard for Granting a Request for Fees

A court may not award attorney fees or costs unless authorized to do so by a statute, rule, or contract. *U.S. Design & Const. Corp. v. Int'l Bhd. of Elec. Workers*, 118 Nev. 458, 462, 50 P.3d 170, 173 (2002). Once a court has determined that the movant is entitled to an award of fees, the court next turns its attention to the amount of the award. The court has great discretion regarding its decision to award fees and regarding the amount of fees granted. The court's discretion is "tempered only by reason and fairness." *Albios v. Horizon Communities, Inc.*, 122 Nev. 409, 427, 132 P.3d 1022, 1034 (2006) (quoting *University of Nevada v. Tarkanian*, 110 Nev. 581, 591, 879 P.2d 1180, 1186 (1994)).

"In determining the amount of fees to award, the [district] court is not limited to one specific approach; its analysis may begin with any method rationally designed to calculate a reasonable amount, so long as the requested amount is reviewed in light of the" *Brunzell* factors. *Logan v. Abe*, 131 Nev. 260, 266, 350 P.3d 1139, 1143 (2015) (citing *Haley v. Eighth Judicial Dist. court*, 128 Nev. 171, 273 P.3d 855, 860 (2012)

(internal quotations omitted)).

The Supreme court in *Brunzell v. Golden Gate National Bank*, 85 Nev. 345, 349–50, 455 P.2d 31, 33 (1969) gave guidance on how a court is to determine the reasonable value of the work performed by a movant's counsel.[2] *Brunzell* and its progeny direct courts to consider the following when determining a reasonable amount of attorney fees to award:

> (1) the qualities of the advocate: his ability, his training, education, experience, professional standing and skill; (2) the character of the work to be done: its difficulty, its intricacy, its importance, time and skill required, the responsibility imposed and the prominence and character of the parties where they affect the importance of the litigation; (3) the work actually performed by the lawyer: the skill, time and attention given to the work; (4) the result: whether the attorney was successful and what benefits were derived.

Id. (internal quotation marks omitted).

The court can follow any rational method so long as it applies the *Brunzell* factors; it is not confined to authorizing an award of attorney fees exclusively from billing records or hourly statements. *Logan v. Abe*, 131 Nev. 260, 266, 350 P.3d 1139, 1143 (2015); *Shuette v. Beazer Homes Holdings Corp.*, 121 Nev. 837, 864, 124 P.3d 530, 549 (2005) (approving awards based on a "lodestar" amount, as well as a contingency fee arrangement). Although the court must "expressly analyze each factor", no single factor should be given undue weight. *Logan v. Abe*, 131 Nev. 260, 266, 350 P.3d 1139, 1143 (2015); *Brunzell*, 85 Nev. at 349-50, 455 P.2d at 33.

After determining the reasonable value of an attorney's services by analyzing the factors established in *Brunzell*, the court must then provide sufficient reasoning and

[2] The court must determine the reasonable rates for all persons for whose time a party seeks reimbursement, including partners, associates, paralegals, and law clerks, etc. *See LVMPD v. Yeghiazarian*, 129 Nev. 760, 770, 312 P.3d 503, 510 (2013).

findings concerning those factors in its order. *Shuette v. Beazer Homes Holdings Corp.*, 121 Nev. 837, 865, 124 P.3d 530, 549 (2005). The court's decision must be supported by "substantial evidence". *Logan v. Abe*, 131 Nev. 260, 266, 350 P.3d 1139, 1143 (2015).

Substantial evidence supporting a request for fees *must be presented* to the court by "affidavits, unsworn declarations under penalty of perjury, depositions, answers to interrogatories, [or] admissions on file". EDCR 2.21(a). Sworn statements submitted pursuant to EDCR 2.21(a) must be sufficient to satisfy NRCP 56(e). EDCR 2.21(c). Unsworn statements of counsel and conclusory statements in pleadings not otherwise presented in compliance with EDCR 2.21(a) may not be considered by the court. Some practitioners are confused as to the standard against which their "substantial evidence" will be measured. "Affidavits/declarations must contain only factual, evidentiary matter, conform to the requirements of NRCP 56(e), and avoid mere general conclusions or argument." EDCR 2.21(c). NRCP 56(e) requires "[s]upporting and opposing affidavits shall be made on *personal knowledge*, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." Emphasis added.

FAMILY PRACTITIONERS PLEASE NOTE EDCR 5.506 allows you to submit a 2-sentence affidavit simply stating that you have read the motion and all factual statements are true. This risk with type of affidavit is that the motion may contain only conclusory statements, which are insufficient to satisfy the Supreme Court's requirements and demand denial of the motion. If you want your motion granted, place all factual information in a separate affidavit that complies with EDCR 2.21.

The first requirement of Rule 56(e) is that the sworn testimony must be made

upon personal knowledge. *See generally Saka v. Sahara–Nevada Corp.*, 92 Nev. 703, 705, 558 P.2d 535, 536 (1976) (recognizing that affidavits must be based on "the affiant's personal knowledge, and there must be an affirmative showing of his competency to testify to them" (as cited by *Las Vegas Convention & Visitors Auth. v. Miller*, 124 Nev. 669, 687, 191 P.3d 1138, 1150 (2008)). A witness is only competent to testify to a fact if there is evidence that she has ***personal knowledge*** of the matter. NRS 50.025(l)(a); *see also Bennett v. State*, 281 P.3d 1154 (Nev. 2009). A person only has personal knowledge of a fact that she has "personally observed." *Bennett v. State*, 281 P.3d 1154 (Nev. 2009) (quoting *State v. Vaughn*, 101 Wash.2d 604, 682 P.2d 878, 882 (Wash.1984); *cf. Lane v. District Court*, 104 Nev. 427, 446, 760 P.2d 1245, 1257 (1988) (noting that the witness was incompetent to testify because she was not present at the time in question)).

By incorporating the Rule 56(e) standard, the Rule's authors and the courts distinguish circumstances where facts are presented in motions before the court only by personal knowledge with other circumstances where one may testify based on belief. *Williams v. Clark Cnty. Dist. Attorney*, 118 Nev. 473, 480, 50 P.3d 536, 540 n.9 (2002) (*City of Santa Cruz v. Municipal Court*, 49 Cal.3d 74, 260 Cal.Rptr. 520, 776 P.2d 222, 230 (1989) (acknowledging that the legislature may expressly authorize the use of affidavits based on information and belief or may require affidavits based on personal knowledge).

Testimony or argument about one's belief, without personal knowledge, is insufficient under the Rule 56(e) standard and is therefore insufficient to qualify under the Nevada meet and confer reporting standard. *See Coblentz v. Hotel Employees & Rest. Employees Union Welfare Fund*, 112 Nev. 1161, 1172, 925 P.2d 496, 502 (1996). In

fact, "a district court's reliance upon an affidavit which does not comply with [Rule 56(e)] may constitute reversible error." *See Havas v. Hughes Estate*, 98 Nev. 172, 173, 643 P.2d 1220, 1221 (1982) (quoting *Daugherty v. Wabash Life Ins. Co.*, 87 Nev. 32, 482 P.2d 814 (1971); *cf. State of Washington v. Maricopa County*, 143 F.2d 871 (9th Cir. 1944)).

Further, hearsay statements are, of course, inadmissible under Rule 56(e) or any other evidentiary standard. NRS 51.065; *see also Moore v. United States*, 429 U.S. 20, 21-22, 97 S.Ct. 29, 50 L.Ed.2d 25 (1976) (per curiam); *Donnelly v. United States*, 228 U.S. 243, 273, 33 S.Ct. 449, 57 L.Ed. 820 (1913). Further, mere conclusions rather than factual statements are inadmissible. *See* EDCR 2.21(c); *see also Gunlord Corp. v. Bozzano*, 95 Nev. 243, 245, 591 P.2d 1149, 1150 (1979).

The Supreme Court has confirmed that the *Brunzell* factors must be presented by affidavit or other competent evidence. *Miller v. Wilfong*, 121 Nev. 619, 624, 119 P.3d 727, 730 (2005); *Katz v. Incline Vill. Gen. Improvement Dist.*, 452 P.3d 411 (Nev. 2019), *cert. denied*, 141 S. Ct. 253, 208 L. Ed. 2d 26 (2020) (citing *Herbst v. Humana Health Ins. of Nev., Inc.*, 105 Nev. 586, 591, 781 P.2d 762, 765 (1989) (holding that an affidavit documenting the hours of work performed, the length of litigation, and the number of volumes of appendices on appeal was sufficient evidence to enable the court to make a reasonable determination of attorney fees, even in the absence of a detailed billing statement); *Cooke v. Gove*, 61 Nev. 55, 57, 114 P.2d 87, 88 (1941) (upholding an award of attorney fees based on, among other evidence, two depositions from attorneys testifying about the value of the services rendered)). An award that is not based on such substantial evidence is subject to reversal, as the court will have no factual basis

on which to base its decision. *Beattie v. Thomas*, 99 Nev. 579, 668 P.2d 268 (1983).

FAMILY PRACTITIONERS PLEASE NOTE that in addition to the *Brunzell* factors, the court must evaluate the disparity of income between parties to family division matters. *Wright v. Osburn*, 114 Nev. 1367, 1370, 970 P.2d 1071, 1073 (1998). A failure of the movant to present competent evidence (by attaching FDF or other sworn testimony by one competent to testify under the Rule 56 standard—statements by counsel do not suffice) regarding the disparity in income *must result in a motion being denied*. *Id.*

2. The Standard for Granting a Request for Costs

Courts have broad discretion to award costs. *Cadle Co. v. Woods & Erickson, LLP*, 131 Nev. 114, 120, 345 P.3d 1049, 1054 (2015). A memorandum of costs must be supported by an affidavit. *See* NRS 18.110. Further, any documentary evidence required to prove that the costs were actually incurred, necessary, and related to the action, must be presented by affidavit or other competent evidence. EDCR 2.21(a). Parties may not simply estimate a reasonable amount of costs; they must provide the court with proof that the costs were *actually incurred*. *Cadle*, 131 Nev. at 120, 345 P.3d at 1054 (citing *Gibellini v. Klindt*, 110 Nev. 1201, 1205–06, 885 P.2d 540, 543 (1994) (holding that a party may not estimate costs based on hours billed)). Without competent evidence to "determine whether a cost was reasonable and necessary, a district court may not award costs." *Cadle*, 131 Nev. at 121, 345 P.3d at 1054 (citing *Bobby Berosini, Ltd.*, 114 Nev. at 1353, 971 P.2d at 386).

"'[R]easonable costs' must be actual and reasonable, 'rather than a reasonable estimate or calculation of such costs.'" *Bobby Berosini, Ltd. v. PETA*, 114 Nev. 1348, 1352, 971 P.2d 383, 385 (1998). Movant must "demonstrate how such [claimed costs]

were necessary to and incurred in the present action." *Id.*, 114 Nev. at 1352-53, 971 P.2d at 386. Conclusory arguments, or even statements in sworn testimony, that the costs were "reasonable and necessary" do not suffice. An award of costs based on such a conclusory statement is subject to reversal, as the court will lack "evidence on which to judge the reasonableness or necessity of each [cost]". *Cadle*, 131 Nev. at 121, 345 P.3d at 1054-55. Rather than merely *telling* the court the costs were reasonable and necessary, counsel's affidavit must attach "justifying documentation" verifying the costs were incurred and must *demonstrate* how those costs were both reasonable and necessary to the matter at issue. *Id.* (citing *Bobby Berosini, Ltd.*, 114 Nev. at 1352-53, 971 P.2d at 386). Without "justifying documentation" ***and*** counsel's explanation, there is "no way [for the court to] determine whether the cost was reasonable or necessary." *Id.*, 131 Nev. at 121-22, 345 P.3d at 1055.

In summary, to avoid having your motion for fees and costs denied, put all of your allegations, including all information used in any argument regarding the *Brunzell* factors, in a separate affidavit that complies with EDCR 2.21 (see explanation, *supra*). Similarly, to avoid having your application for costs denied, put all of your allegations in a complying affidavit *demonstrating, not just telling,* the court that the costs were actually incurred (attaching actual receipts to an affidavit testifying that the cost was incurred), were reasonable and necessary. Attached as Exhibit 2 is the court's official Discovery Commissioner's Report And Recommendations Granting Application for Fees and Costs. It is also available on the court's website, http://www.clarkcountycourts.us/departments/discovery/. The form contains the legal standard stated above. This standard should serve as a reminder to counsel to submit any

application with competent evidence. The form then prompts the movant (in yellow) to include in the order the proof the movant supplied to the court in support of the application.

E. The Powers and Authority of Discovery Commissioner

Discovery commissioners have specific authority, granted by NRCP 16.3, to facilitate the efficient and proper administration of the pre-trial discovery in civil actions. It is important to note what specific powers discovery commissioners are granted by Rule 16.3. They are given the authority to administer oaths and affirmation. NRCP 16.3(b)(1). In addition, a discovery commissioner may preside at discovery resolution conferences, over discovery motions and at "any other proceeding or conference in furtherance of the discovery commissioner's duties." NRCP 16.3(b)(2)(A) (B) and (C).

Discovery commissioners are given authority to "regulate all proceedings before the discovery commissioner" and to take any other action necessary to efficiently and properly perform the discovery commissioner's duties. NRCP 16.3(b)(2)(D) and 16.3(b)(2)(E). Finally, discovery commissioners may conduct settlement conferences, if agreed by the parties or ordered by the court. NRCP 16.3(b)(3).

Generally, all discovery disputes (except disputes regarding any extension of deadlines set by the discovery scheduling order) must first be heard by the discovery commissioner. The motions that should be heard before the discovery commissioner include, but are not limited to the following motions:

1. **Motion to compel** (deposition; responses to subpoenas; requests for production of documents; and interrogatories);

2. **Motion for protective order** (deposition; subpoenas; requests for production of documents; requests for admission; interrogatories; Rule 35 physical or mental examination; Rule 34 site inspection; etc.);

3. **Motion to quash subpoena;**

4. **Motion to set reasonable fee for expert witness;**

5. **Motion for Rule 34 site inspection;**

6. **Motion for Rule 35 physical or mental exam;**

7. **Motion to strike** (For example, motion to strike untimely production or untimely or improper expert report. However, if the motion to strike is based on admissibility under *Hallmark v. Eldridge*, 124 Nev. 492 (2008), it should be heard by the district court judge);

8. **Motion for spoliation of evidence** (If seeking sanctions including adverse inference. However, if seeking case disposition sanction, the motion should be heard by the district court judge);

9. **Motion for sanctions** (If seeking case dispositive sanctions, the motion should be heard by district court judge); and

10. **Motion to withdraw admissions.**

F. Limits to Authority of Discovery Commissioner

While NRCP 16.3 grants discovery commissioners with specific powers and authority to facilitate the exchange of information and case discovery, there are many powers that are reserved exclusively for the district court judge. For example, discovery commissioners *do not* have the power to:

1. **Issue orders of contempt.** Discovery commissioners are not given contempt powers; this power is reserved in the EJDC for the district court judges.

2. **Extend discovery deadlines.** Under the 2019 revision of Rule 16 of the Nevada Rules of Civil Procedure, only a district court judge has authority to issue or modify a scheduling order. NRCP 16(b)(1) addresses a judge's responsibility for issuing a scheduling order and NRCP 16(b)(3)(A) requires that the discovery deadlines be contained in the order. Pursuant to EDCR 2.35(a), any stipulation or motion to extend any date in the scheduling order must be filed no later than 21 days before the discovery cut-off date. EDCR 2.35(a)(1) requires that any stipulation to extend any discovery scheduling order deadline must

be submitted to the assigned judge. It follows that any motion to extend must be set in accordance with EDCR 2.20, before the assigned district court judge. *While a discovery commissioner does not have authority to extend deadlines in the discovery scheduling order, a discovery commissioner does have the authority to extend the time to* ***respond*** *to and complete timely served and noticed, discovery.*

3. **Continue trial dates.** Pursuant to NRCP 16, case management and scheduling of all pre-trial and trial dates is reserved to the assigned district court judge. Trial dates may only be modified by stipulation or motion to the assigned district court judge.

4. **Issue case-ending sanctions (striking answer, declaring default, etc.)**

5. **Strike expert based on admissibility (versus timeliness of disclosure of opinions).** Discovery commissioners make discovery rulings, not evidentiary rulings. Therefore, a discovery commissioner may only hear a motion to strike an expert based on an untimely disclosure or production of report. If the motion to strike is based on its admissibility under *Hallmark v. Eldridge*, 124 Nev. 492 (2008), then it must be decided by the district court judge).

Based on the foregoing, the following motions, that may appear to deal with discovery, are property heard by the district court judge – not the discovery commissioner:

1. **Motions to extend discovery deadlines** (Whether or not trial date is affected);

2. **Motions for orders to show cause why a party should not be held in contempt for discovery abuses; and,**

3. **Motion to strike expert based on admissibility.** Any motion to strike an expert for reasons set forth in *Hallmark v. Eldridge*, 124 Nev. 492 (2008), must be decided by the district court judge.

4. **Motion for case ending sanctions.**

G. <u>Boilerplate Objections</u>

When responding to discovery requests, one must provide information that is fairly sought under the Rule 26(b)(1) standard. Objections not stated with specificity are boilerplate.[3]

> The word "boilerplate" refers to "trite, hackneyed writing"—an appropriate definition in light of how boilerplate objections are used. An objection to a discovery Request is boilerplate when it merely states the legal grounds for the objection without (1) specifying how the discovery Request is deficient and (2) specifying how the objecting party would be harmed if it were forced to respond to the Request.

Matthew L. Jarvey, *Boilerplate Discovery Objections: How They are Used, Why They are Wrong, and What We Can Do About Them*, 61 Drake L. Rev. 913, 914 (2013) (internal citations omitted).

By rule, Nevada has declared boilerplate objections are inappropriate. NRCP 33(b)(4) ("The grounds for objecting to an interrogatory must be stated with specificity"); NRCP 34(b)(2)(B) (One must "state the ground for objecting to the Request, with specificity, including the reasons").

Further, the practice of interjecting a boilerplate objection was inappropriate even before it was explicitly prohibited by the most recent amendments to the NRCP. *Olivarez v. Rebel Oil Company, et al.*, Discovery Commissioner Opinion #11 (April, 2003) ("Meeting the burden of asserting a proper discovery objection entails more than

[3] *See, e.g., Fischer v. Forrest*, No. 14 Civ. 01304, 2017 WL 773694 (S.D.N.Y. Feb. 28, 2017) (Any discovery response that does not comply with Rule 34's requirement to state objections with specificity (and to clearly indicate whether responsive material is being withheld on the basis of objection) will be deemed a waiver of all objections (except as to privilege)). The Nevada Supreme Court recognizes federal decisions involving the Federal Rules of Civil Procedure provide strong persuasive authority. *Exec. Mgmt. Ltd. v. Ticor Title Ins. Co.*, 118 Nev. 46, 38 P.3d 872 (2002). This recognition became even more important after the Supreme Court approved the "comprehensive" March 1, 2019 Amendments to the Nevada Rules of Civil Procedure. The 2019 Nevada Rules of Civil Procedure are modeled in large part "on the 2018 version of the Federal Rules of Civil Procedure". Advisory Committee Note—2019 Amendments Preface.

the ritual recital of boilerplate verbiage to each discovery Request");[4] *Partner Weekly, LLC v. Viable Mktg. Corp.*, No. 2:09-CV-2120-PMP-VCF, 2014 WL 1577486, at *2 (D. Nev. Apr. 17, 2014) (citing *Walker v. Lakewood Condo. Owners Ass'n*, 186 F.R.D. 584, 587 (C.D. Cal.1999)) ("Boilerplate and generalized objections are inadequate and tantamount to no objection at all"). Yet, the outdated practice persists.

One federal court suggested that tread worn objections – that the request is over burdensome or overbroad – are boilerplate unless they also answer "Why is it burdensome? How is it overly broad?" *Fischer v. Forrest*, No. 14 Civ. 1304 (PAE) (AJP), 2017 WL 773694, (S.D.N.Y. Feb. 28, 2017). The court then warned future litigants that "[f]rom now on in cases before this Court, any discovery response that does not comply with Rule 34's requirement…will be deemed a waiver of all objections (except as to privilege)." *Id.* Similarly, the court in *Liguria Foods, Inc. v. Griffith Labs., Inc.*, 320 F.R.D. 168, 170 n.1 (N.D. Iowa 2017) suggested that failure to "show specifically how" the requests were "not relevant" or "overly broad, burdensome or oppressive," violates the rules' specificity requirement and renders the objection boilerplate.

One article recommends the following as best practice:

> Objecting parties should strive to limit "general objections" to those applicable to all or most requests. Litigants should also indicate why they are making specific objections. For example, if objecting to a request as vague or undefined, the litigant should identify the specific phrase at issue and either request to meet and confer or state its own reasonable construction and respond accordingly. As

[4] *See also Alboum v. Koe, M.D., et al.,* Discovery Commissioner Opinion #10 (November 2001) (citing *Pleasants v. Allbaugh*, 2002 U.S.Dist. Lexis 8941 (D. D.C. 2002); *G-69 v. Degnan*, 130 F.R.D. 326 (D. N.J. 1990); *Josephs v. Harris Corp.*, 677 F.2d 985 (3d Cir. 1982)). ("Repeating the familiar phrase that each request is 'vague, ambiguous, overly broad, unduly burdensome and oppressive, not relevant nor calculated to lead to the discovery of admissible evidence and, further, seeks material protected by the attorney/client or other privilege and the work product doctrine' is insufficient. . . . The burden is on the party resisting discovery to clarify and explain precisely why its objections are proper given the broad and liberal discovery rules.").

> another example, a litigant may object to a request as overbroad but propose a more narrow scope, such as a shorter time period. A response indicating that the party will only produce documents related to X dates or Y matter is sufficient to indicate that the party is withholding documents. If unable to identify a date certain for production, litigants should make a principled suggestion such as production will occur on a rolling basis beginning on Z date, or within a reasonable time.

Jessica L. Falk and Rachel Kaplowitz, *Lessons for Litigants Five Years After Rule 34 Discovery Amendments*, New York Law Journal, July 2, 2020.

H. Rule 26(g)

All counsel have an affirmative obligation pursuant to NRCP 26(g) to make a certification to the Court that their discovery responses are consistent with the rules (including their prohibition against boilerplate objections) and warranted by law. This certification functions the same as the more-familiar Rule 11 certification—it is automatically made by signing a discovery request, response, or pleading.

Rule 26(g)(1) reads:

> By signing, an attorney or party certifies that to the best of the person's knowledge, information, and belief formed after a reasonable inquiry:
> ….
> (B) ***with respect to a discovery Request, response, or objection***, it is:
> (i) consistent with these rules and warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law, or for establishing new law;
> (ii) not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; and
> (iii) neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action.

Emphasis added.

Further, the rule makes a sanction mandatory when counsel "violates this rule without substantial justification." Rule 26(g)(3). Therefore, when coupled with counsel's automatic certification under NRCP 26(g), one who makes a non-tailored,

overbroad or overly burdensome discovery request, makes a boilerplate objection, or files a pleading in support of the same, is subject to *mandatory* sanctions. NRCP 26(g)(3).

I. Good Cause for Issuance of a Protective Order

When a party seeks to preclude the disclosure of information or documents in discovery, or contends that the discovery be had, but only if protected as confidential – for use only in the instant litigation – the moving party must first attempt to enter into a stipulated protective order. If no agreement can be reached and the requirements of EDCR 2.34 have been exhausted, the party requesting protection may file a motion for a protective order and must demonstrate good cause for the protection sought.

In *Venetian Casino Resort, LLC v. Eighth Judicial Dist. Ct.*, 136 Nev. Adv. Op. 26 (2020), the Nevada Court of Appeals found the district court must determine whether ***good cause*** for a protective order under NRCP 26(c)(1) exists. In *Venetian*, the Nevada Court of Appeals held the district court abused its discretion when it determined that it had no legal basis to protect the Venetian's guests' information without first considering whether the Venetian demonstrated good cause for a protective order based on the individual circumstances presented.

The Nevada Court of Appeals adopted the Ninth Circuit's three-part test for conducting a good-cause analysis under FRCP 26(c). *In re Roman Catholic Archbishop of Portland in Or.*, 661 F.3d 417, 424 (9th Cir. 2011). This test is as follows:

1. First, the district court must determine if particularized harm would occur due to public disclosure of the information sought.

2. Second, if the district court concludes that particularized harm would result, then it must balance the public and private interests to decide whether a protective order is necessary.

3. Third, even if the factors balance in favor of protecting the discovery material, "a court must still consider whether redacting portions of the discovery material will nevertheless allow disclosure." *In re Roman Catholic Archbishop of Portland in Or.*, 661 F.3d at 425 (9th Cir. 2011).

The Ninth Circuit has directed federal district courts to utilize the factors set forth in *Glenmede Trust Co. v. Thompson*, 56 F.3d 476, 483 (3d Cir. 1995), to help them balance the private and public interests. *Glenmede* sets forth the following non-mandatory and non-exhaustive list of factors for courts to consider when determining if good cause exists:

1. whether disclosure will violate any privacy interests;
2. whether the information is being sought for a legitimate purpose or for an improper purpose;
3. whether disclosure of the information will cause a party embarrassment;
4. whether confidentiality is being sought over information important to public health and safety;
5. whether the sharing of information among litigants will promote fairness and efficiency;
6. whether a party benefitting from the order of confidentiality is a public entity or official; and
7. whether the case involves issues important to the public.

In deciding each motion for protective order, the discovery commissioner must conduct this good cause analysis to determine whether the discovery should be had, and if so whether it should be had only under an order that protects confidentiality. Parties seeking an order of protection, and those opposing protection, must set forth their arguments and address the factors articulated in *Glenmede*, as adopted by the Nevada Court of Appeals in the *Venetian* case. The prevailing party must include the discovery commissioner's findings of good cause – or lack thereof – in the DCRR.

Exhibit 1

Model Meet & Confer Declaration

DECLARATION OF [WITNESS**]**[5] **IN SUPPORT OF [**DISCOVERY MOTION**]**

[WITNESS], under the penalty of perjury, declares as follows:

1. I am over the age of 18 years and have personal knowledge of the facts stated herein, except for those stated upon information and belief, and as to those, I believe those to be true. I am competent to testify as to the facts stated herein in a court of law and will so testify if called upon.

2. I am an attorney duly licensed to practice law in the State of Nevada. In this matter, I represent the interests of [PLAINTIFF/DEFENDANT] [NAME OF CLIENT]. I provide this declaration in support of [PLEADING NAME].

Add if the Motion is for Written Discovery or for Failure to Make Rule 16.1, 16.2, 16.205 Disclosures

3. On [DATE], I served [NAME OF WRITTEN DISCOVERY] on [PARTY]. Responses to [NAME OF WRITTEN DISCOVERY] were due on [DATE].

4. On [DATE], [PARTY] [served inadequate responses OR failed to timely respond to] [NAME OF WRITTEN DISCOVERY] [OR failed to make mandatory disclosures required by [RULE]].

Add if the Motion is for a Deposition Dispute

5. On [DATE], [PARTY] served a Notice of Deposition for taking the deposition of [WITNESS]. A true, authentic, and accurate copy the Notice of Deposition is attached to the [DISCOVERY MOTION] as Exhibit [NUMBER].

6. The Notice of Deposition is problematic because [REASONS].

Add if the Motion is for a Dispute Arising During a Deposition

[5] Bracketed text refers to information needed from the declarant or the need to make a choice between two or more alternatives. Replace the bracket with the required information with as much detail as necessary.

7. During the deposition of [WITNESS], a dispute arose regarding [NATURE OF DISPUTE, INCLUDING PORTIONS OF TRANSCRIPT IF NECESSARY].

8. I spoke with [COUNSEL] on the record in an attempt to resolve the dispute. [INCLUDE FROM TRANSCRIPT IF NECESSARY].

Add if the Motion is for a Subpoena Dispute

9. On [DATE], [PARTY] served [a Notice of Intent to Serve Subpoena on [RECIPEINT] with a Subpoena]. A true, authentic, and accurate copy the [Notice of Intent to Serve Subpoena OR Subpoena] is attached to the [DISCOVERY MOTION] as Exhibit [NUMBER].

10. The [Notice of Intent to Serve Subpoena on [RECIPEINT] with a Subpoena] is problematic because [REASONS].

Add if the Motion is for a Dispute Regarding Expert Witness Report or Designation

11. On [DATE], [PARTY] served [NAME OF EXPERT DISCLOSURE AT ISSUE]. A true, authentic, and accurate copy the [NAME OF EXPERT DISCLOSURE AT ISSUE] as attached to the [DISCOVERY MOTION] as Exhibit [NUMBER]. [NAME OF EXPERT DISCLOSURE AT ISSUE] is problematic because [REASONS].

Add if Movant's Counsel Sent and Email

12. On [DATE], I sent [OPPOSING COUNSEL NAME] an email detailing the discovery dispute, as well as [PARTY]'s position regarding the discovery dispute (the "First Email"). A true, authentic, and accurate copy the First Email is attached to the [DISCOVERY MOTION] as Exhibit [NUMBER]. I suggested that we hold a [face-to-face OR telephonic conference OR video conference] on [DATE(S) PROPOSED] to meet and confer regarding [PARTY]'s deficiencies.

Add if Counsel Failed to Respond to Email[6]

13. [COUNSEL] failed to respond to my First Email. On [DATE] at [TIME], I called [COUNSEL]'s office number [PHONE NUMBER] (the "First Call"). [COUNSEL] was not available. I left a message that I was calling to engage in a meeting to confer about the discovery dispute referenced in my [DATE] email.

14. I sent a second email at [DATE], again inviting [COUNSEL] to meet and confer regarding the discovery dispute (the "Second Email"). I asked counsel to call me on or before [DATE AND TIME][7] to avoid the filing of the instant matter. A true, authentic, and accurate copy the email is attached to the [DISCOVERY MOTION] as Exhibit [NUMBER].

15. When [COUNSEL] failed to call by the appointed time, I again called [COUNSEL]'s office number [PHONE NUMBER] (the "Second Call"). [COUNSEL] was not available. I left another message explaining that I was attempting to meet with [COUNSEL] to resolve the discovery dispute referenced in my First Email, Second Email, and First Call. I informed [COUNSEL] that I would now begin preparing the [DISCOVERY MOTION] and would report to the Court that [COUNSEL] failed to participate in good faith in the conference and that I would ask the Court to require such [PARTY] to pay [PARTY]'s reasonable expenses, including attorney's fees, as allowed by [EDCR 2.34(d) OR EDCR 5.602(e)].

16. I confirmed the content of my voicemail on the same date by email, a true, authentic, and accurate copy of which is attached to the [DISCOVERY MOTION] as Exhibit [NUMBER] (the "Third Email').

Add if Counsel Held a Meet and Confer

[6] If counsel refuses to meet and confer, you must demonstrate reasonable efforts to engage with counsel. Send at least one email detailing your positions. Call counsel at least twice, leaving a message each time. The calls should be at least 24 hours apart.
[7] Give at least an additional 24 hours if possible.

17. On [DATE] at [TIME], I held a meeting with [COUNSEL] via [face-to-face meeting at [LOCATION] OR telephone conference OR video conference]. The meeting lasted approximately [AMOUNT OF TIME].

18. During our meet and confer efforts on [DATE], I informed [COUNSEL] of my position regarding the dispute. I informed [COUNSEL] that [INSERT ALL POSITIONS SHARED]. [COUNSEL] informed me of his position that [INSERT ALL POSITIONS SHARED].

19. Seeing we were at an impasse, I offered to compromise my position regarding [FINITE ISSUE(S)], including [DESCRIBE OFFER]. [COUNSEL] agreed with my offer and we resolved [FINITE ISSUE(S)].

20. Regarding [FINITE ISSUE(S)], I offered a compromise to which [COUNSEL] would not agree. I offered [COMPROMISE]. [COUNSEL] responded by [RESPONSE].

21. Regarding [FINITE ISSUE(S)], [COUNSEL] offered a compromise to which I could not agree. [COUNSEL] offered [COMPROMISE]. I responded by [RESPONSE].

Pursuant to NRS 53.045, I declare under penalty of perjury under the laws of the State of Nevada that the foregoing is true and correct.

Dated this ___ day of [MONTH], [YEAR].

_____
[WITNESS]

Exhibit 2

Official Form Report and Recommendation on Motion for Attorney Fees and Costs

DCRR
Attorney's Name
Attorney's Bar Number
Attorney's Firm Name
Attorney's Address
Attorney's Phone Number
Attorney's E-mail Address
Party Attorney Represents

DISTRICT COURT
CLARK COUNTY, NEVADA

*, Plaintiff(s), v. *, et al., Defendant(s).	CASE NO. A---C DEPT NO. Date of Hearing: *, 202_ Time of Hearing: _____ a.m.

DISCOVERY COMMISSIONER'S REPORT AND RECOMMENDATIONS

INSTRUCTIONS: SUBMITTING COUNSEL TO FILL OUT THE INFORMATION REQUESTED IN YELLOW BELOW. ALL OTHER MATTERS BELOW MUST BE LEFT FOR THE COURT TO FILL OUT.

Party/Attorney appearing for Plaintiff(s): [LIST]

Party/Attorney appearing Defendant(s): [LIST]

On [HEARING DATE], the parties to the above-captioned matter appeared before the Honorable Discovery Commissioner

_____ Erin Lee Truman

_____ Jay Young

by and through their counsel listed above, on Movant's [INSERT FULL TITLE OF MOTION] (the "Motion"). The Court reviewed the Motion and [LIST ALL OTHER PLEADINGS], and entertained oral argument made by the parties. For good cause

appearing, the Discovery Commissioner hereby makes the following findings and recommendations:

I. FINDINGS

A court may not award attorney fees or costs unless authorized to do so by a statute, rule, or contract. *U.S. Design & Const. Corp. v. Int'l Bhd. of Elec. Workers*, 118 Nev. 458, 462, 50 P.3d 170, 173 (2002). Movant seeks an award of reasonable attorney fees [AND COSTS].

A. MOVANT SEEKS AN AWARD OF ATTORNEY FEES

The Motion seeks an award of attorney fees pursuant to [INSERT STATUTE, RULE, OR CONTRACT]. [INSERT STATUTE, RULE, OR CONTRACT] allows for an award of fees where [LIST CIRCUMSTANCES APPLICABLE TO THE REQUEST].

The court here has determined that an award of attorney fees is appropriate under [INSERT STATUTE, RULE, OR CONTRACT] because [INSERT REASONS]. Having determined that the Movant is entitled to an award of fees, the court next turns its attention to the amount of the award.

The court has great discretion regarding its decision to award fees and regarding the amount of fees granted. The court's discretion is "tempered only by reason and fairness." *Albios v. Horizon Communities, Inc.*, 122 Nev. 409, 427, 132 P.3d 1022, 1034 (2006) (quoting *University of Nevada v. Tarkanian*, 110 Nev. 581, 591, 879 P.2d 1180, 1186 (1994)).

"In determining the amount of fees to award, the [district] court is not limited to one specific approach; its analysis may begin with any method rationally designed to

calculate a reasonable amount, so long as the requested amount is reviewed in light of the" *Brunzell* factors. *Logan v. Abe*, 131 Nev. 260, 266, 350 P.3d 1139, 1143 (2015) (citing *Haley v. Eighth Judicial Dist. court*, 128 Nev. 171, 273 P.3d 855, 860 (2012) (internal quotations omitted)).

The Supreme court in *Brunzell v. Golden Gate National Bank*, 85 Nev. 345, 349–50, 455 P.2d 31, 33 (1969) gave guidance on how a court is to determine the reasonable value of the work performed by a movant's counsel.[8] *Brunzell* directs courts to consider the following when determining a reasonable amount of attorney fees to award:

> (1) the qualities of the advocate: his ability, his training, education, experience, professional standing and skill; (2) the character of the work to be done: its difficulty, its intricacy, its importance, time and skill required, the responsibility imposed and the prominence and character of the parties where they affect the importance of the litigation; (3) the work actually performed by the lawyer: the skill, time and attention given to the work; (4) the result: whether the attorney was successful and what benefits were derived.

Id. (internal quotation marks omitted). [IN FAMILY LAW CASES ADD THE FOLLOWING LANGUAGE: In addition to the *Brunzell* factors, the court must evaluate the disparity of income between parties to family law matters. *Wright v. Osburn*, 114 Nev. 1367, 1370, 970 P.2d 1071, 1073 (1998).]

The court can follow any rational method so long as it applies the *Brunzell* factors; it is not confined to authorizing an award of attorney fees exclusively from billing records or hourly statements. *Logan v. Abe*, 131 Nev. 260, 266, 350 P.3d 1139, 1143 (2015); *Shuette v. Beazer Homes Holdings Corp.*, 121 Nev. 837, 864, 124 P.3d 530, 549 (2005) (approving awards based on a "lodestar" amount, as well as a contingency fee

[8] The court must determine the reasonable rates for all persons for whose time a party seeks reimbursement, including partners, associates, paralegals, and law clerks, etc. *See LVMPD v. Yeghiazarian*, 129 Nev. 760, 770, 312 P.3d 503, 510 (2013).

arrangement). Although the court must "expressly analyze each factor", no single factor should be given undue weight. *Logan v. Abe*, 131 Nev. 260, 266, 350 P.3d 1139, 1143 (2015); *Brunzell*, 85 Nev. at 349-50, 455 P.2d at 33.

After determining the reasonable value of an attorney's services analyzing the factors established in *Brunzell,* the court must then provide sufficient reasoning and findings concerning those factors in its order. *Shuette v. Beazer Homes Holdings Corp.,* 121 Nev. 837, 865, 124 P.3d 530, 549 (2005). The court's decision must be supported by "substantial evidence". *Logan v. Abe*, 131 Nev. 260, 266, 350 P.3d 1139, 1143 (2015).

Substantial evidence supporting a request for fees must be presented to the court by "affidavits, unsworn declarations under penalty of perjury, depositions, answers to interrogatories, [or] admissions on file". EDCR 2.21(a). Sworn statements submitted pursuant to EDCR 2.21(a) must be sufficient to satisfy NRCP 56(e). EDCR 2.21(c). Unsworn statements of counsel and conclusory statements in pleadings not otherwise presented in compliance with EDCR 2.21(a) may not be considered by the court. The Supreme Court has confirmed that the *Brunzell* factors must be presented by affidavit or other competent evidence. *Miller v. Wilfong*, 121 Nev. 619, 624, 119 P.3d 727, 730 (2005); *Katz v. Incline Vill. Gen. Improvement Dist.*, 452 P.3d 411 (Nev. 2019), *cert. denied*, 141 S. Ct. 253, 208 L. Ed. 2d 26 (2020) (citing *Herbst v. Humana Health Ins. of Nev., Inc.*, 105 Nev. 586, 591, 781 P.2d 762, 765 (1989) (holding that
an affidavit documenting the hours of work performed, the length of litigation, and the number of volumes of appendices on appeal was sufficient evidence to enable the court to make a reasonable determination of attorney fees, even in the absence of a detailed billing statement); *Cooke v. Gove,* 61 Nev. 55, 57, 114 P.2d 87, 88 (1941) (upholding

an award of attorney fees based on, among other evidence, two depositions from attorneys testifying about the value of the services rendered)). An award that is not based on such substantial evidence is subject to reversal, as the court will have no factual basis on which to base its decision. *Beattie v. Thomas*, 99 Nev. 579, 668 P.2d 268 (1983).

In the instant matter, Movant provided the court with the following sworn testimony and other evidence: [LIST SWORN STATEMENT(S) AND ALL OTHER EVIDENCE RELIED UPON]. Movant argues each *Brunzell* factor as follows:

1. **The Qualities of the Advocate**

2. **The Character of the Work**

3. **The Work Performed**

4. **The Result**

5. **Disparity in Income** (Only in family law matters)

6. **Total Award Sought**

Movant provided evidence suggesting [NAME OF ADVOCATE] spent [NUMBER OF HOURS] at the rate of $____ per hour on matters related to the activities for which the court ordered an award of fees. [REPEAT FOR EACH ADVOCATE]. Movant asks the court for an award of $_____ of attorney fees. [ALTERNATIVELY, USE LODESTAR, CONTINGENCY FEE ANALYSIS, ETC.]

The court finds [NAME OF ADVOCATE]'s reasonable hourly rate based on

experience, skill, and community standard, is $___ per hour. The court finds [NAME OF ADVOCATE] performed _____ hours of work that was reasonably and necessarily related to the motion at issue. [REPEAT FOR EACH ADVOCATE]

B. MOVANT SEEKS AN AWARD OF COSTS [OMIT IF COSTS ARE NOT SOUGHT]

Movant seeks an award of costs pursuant to [INSERT STATUTE, RULE, OR CONTRACT]. [INSERT STATUTE, RULE, OR CONTRACT] allows for an award of fees in the following circumstances [LIST].

Courts have broad discretion to award costs. *Cadle Co. v. Woods & Erickson, LLP*, 131 Nev. 114, 120, 345 P.3d 1049, 1054 (2015). A memorandum of costs must be supported by an affidavit. *See* NRS 18.110. Further, any documentary evidence required to prove that the costs were actually incurred, necessary, and related to the action, must be presented by affidavit or other competent evidence. EDCR 2.21(a). Parties may not simply estimate a reasonable amount of costs, but must provide the court with proof that the costs were actually incurred. *Cadle*, 131 Nev. at 120, 345 P.3d at 1054 (citing *Gibellini v. Klindt*, 110 Nev. 1201, 1205–06, 885 P.2d 540, 543 (1994) (holding that a party may not estimate costs based on hours billed)). Without competent evidence to "determine whether a cost was reasonable and necessary, a district court may not award costs." *Cadle*, 131 Nev. at 121, 345 P.3d at 1054 (citing *Bobby Berosini, Ltd.*, 114 Nev. at 1353, 971 P.2d at 386).

"'[R]easonable costs' must be actual and reasonable, 'rather than a reasonable estimate or calculation of such costs.'" *Bobby Berosini, Ltd. v. PETA*, 114 Nev. 1348, 1352, 971 P.2d 383, 385 (1998). Movant must "demonstrate how such [claimed costs]

were necessary to and incurred in the present action." *Id.*, 114 Nev. at 1352-53, 971 P.2d at 386. Conclusory arguments, or even statements in sworn testimony, that the costs were "reasonable and necessary" do not suffice. An award of costs based on such a conclusory statement is subject to reversal, as the court will lack "evidence on which to judge the reasonableness or necessity of each [cost]". *Cadle*, 131 Nev. at 121, 345 P.3d at 1054-55. Rather than merely *telling* the court the costs were reasonable and necessary, counsel's affidavit must attach "justifying documentation" verifying the costs were incurred and must *demonstrate* how those costs were both reasonable and necessary to the matter at issue. *Id.* (citing *Bobby Berosini, Ltd.*, 114 Nev. at 1352-53, 971 P.2d at 386). Without "justifying documentation" ***and*** counsel's explanation, there is "no way [for the court to] determined whether the cost was reasonable or necessary." *Id.*, 131 Nev. at 121-22, 345 P.3d at 1055.

In the instant matter, Movant provided the court with the following sworn testimony and other substantial "justifying documentation": [LIST SWORN STATEMENT(S) AND ALL OTHER EVIDENCE RELIED UPON].

II. RECOMMENDATIONS

The court has reviewed [LIST SWORN STATEMENT(S) AND ALL OTHER EVIDENCE RELIED UPON IN SUPPORT OF REQUEST FOR FEES] and finds

_____ Movant has adequately addressed the factors required by *Brunzell* and its progeny. Movant has detailed the qualities of the advocate, the character of the work performed, the actual work performed by the attorney, including skilled time and attention given to the work, and the result. Movant has provided competent evidence in support of Movant's request for fees.

_____ Movant has not adequately addressed the factors required by *Brunzell* and its progeny. Movant has not detailed the qualities of the advocate, the character of the work performed, the actual work performed by the attorney, including skilled time and attention given to the work, and the result sufficiently. Movant has not provided sufficient competent evidence in support of Movant's request for fees.

IT IS THEREFORE RECOMMENDED the analysis required under [INCLUDE ALL THAT APPLY] *Brunzell v. Golden Gate Nat. Bank*, 85 Nev. 345, 455 P.2d 31 (1969); *Beattie v. Thomas*, 99 Nev. 579, 668 P.2d 268 (1983); *Wright v. Osburn*, 114 Nev. 1367, 1370, 970 P.2d 1071, 1073 (1998)

_____ was satisfied.

_____ was not satisfied.

The factors addressed by [THAT/THOSE] case(s), prerequisite to an award of attorney fees, were set forth in the Motion with specificity as addressed above.

IT IS FURTHER RECOMMENDED the court finds the fees charged by Movant's counsel in this matter

_____ were necessary to the matter and are reasonable in the marketplace given the experience and qualities of the advocates. Accordingly, an award of attorney fees is GRANTED against _____ the amount of $_____.

_____ were not proven necessary and reasonable. Accordingly, an award of attorney fees is DENIED.

[ONLY INCLUDE THE FOLLOWING LANGUAGE IF COSTS ARE BEING SOUGHT]

IT IS FURTHER RECOMMENDED the court has reviewed [LIST SWORN

STATEMENT(S) AND ALL OTHER EVIDENCE RELIED UPON IN SUPPORT OF REQUEST FOR COSTS] and finds

_____ Movant has adequately demonstrated through sworn testimony and "justifying documents" how the claimed costs were actually incurred, and were "reasonable and necessary" to the action. Accordingly, an award of costs is the amount of $_____ is GRANTED.

_____ Movant has not adequately demonstrated through sworn testimony and "justifying documents" how the claimed costs were actually incurred, and/or were "reasonable and necessary" to the action. Accordingly, an award of costs is DENIED.

IT IS FURTHER RECOMMENDED the award must be paid within ___ days of entry of an order on these Recommendations.

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

DATED this _____ day of _____, 2021.

_____
DISCOVERY COMMISSIONER

[CASE NAME AND CASE NUMBER]

Submitted by:

_____
Attorney's Name
Attorney's Firm Name
Attorney's Address
Attorney's E-mail Address
Counsel for _____

Approved as to form and content by:

_____
Attorney's Name
Attorney's Firm Name
Attorney's Address
Attorney's E-mail Address
Counsel for _____

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_____2021.

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

_____ Mailed to Plaintiff/Defendant at the following address on the ____ day of _____ 2021:

_____ Electronically filed and served counsel on _____, 2021, Pursuant to NEFCR, Rule 9.

By:_____
COMMISSIONER DESIGNEE

ORDR
Attorney's Name
Attorney's Bar Number
Attorney's Firm Name
Attorney's Address
Attorney's Phone Number
Attorney's E-mail Address
Party Attorney Represents

DISTRICT COURT

CLARK COUNTY, NEVADA

*, Plaintiff(s), v. *, et al., Defendant(s).	CASE NO. A DEPT NO. HEARING DATE: HEARING TIME: 9:00 a.m.

ORDER
RE: DISCOVERY COMMISSIONER'S REPORT AND RECOMMENDATIONS

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

_____ No timely objection having been filed,

_____ After reviewing the objections to the Report and Recommendations and good

cause
appearing,

* * *

CASE NAME:
CASE NO:

AND

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

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

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

_____ IT IS HEREBY ORDERED that a hearing on the Discovery Commissioner's Report is

set for _____, 2021, at _____:_____ a.m.

_____
DISTRICT COURT JUDGE

CCBA CLE Article #10 Quiz

Wanna Stay Out of Trouble in Discovery?

Complete the quiz. Each question has only one correct answer.

1. T / F If all counsel shared their opinions regarding a discovery dispute in a series of emails stating their positions, they have met the EDCR 2.34 requirement to meet and confer before filing a motion on the dispute.

2. T / F An affidavit that states as follows:

> "I held telephonic conference with opposing counsel on or about September 12, 2021. Counsel were not able to resolve the matter. The Movant has engaged in a good faith meet and confer."

meets the certification requirements in EDCR 2.34 or EDCR 5.602:

3. T / F My discovery motion will be denied and I may be sanctioned if I file the motion without a certification that the parties engaged in an adequate, meaningful, and good faith effort to meet, confer, and attempt to resolve the matter before seeking court intervention.

4. The Supreme Court requires the denial of a motion for attorney fees unless it contains (mark all that apply):
   a. Proof that the award is authorized by statute, rule, or contract
   b. Analysis of the *Brunzell* factors, presented through competent evidence (affidavit)
   c. Billing records or other justification for the amount of fees is presented through competent evidence (affidavit and invoice with privileged information redacted)
   d. The "qualities" (or qualifications) of each time biller, presented through competent evidence (affidavit)
   e. Discussion of the reasonableness of the fees requested compared to the marketplace and given the skills and training of each advocate
   f. All of the above

CLE *Quiz continued on page 24*

Instructions for CCBA's CLE Article #10

How Nevada lawyers may earn 1.0 General CLE credit in three easy steps:

1. Read the article, "Wanna Stay Out of Trouble in Discovery?" (CCBA CLE Article #10). See page 22 and materials online referenced by the authors;
2. Complete the quiz. See pages 23-26; and
3. Complete the order form. See page 27.

Questions: Contact Donna Wiessner at the Clark County Bar Association, (702) 387-6011.

CLE *Article continued from page 23*

5. The Supreme Court requires the denial of a request for an award of costs unless it contains (mark all that apply):
    a. Evidence all costs were incurred, proved by attaching receipts or other proof (not just inclusion in billing records), introduced through a Rule 56(e) compliant affidavit
    b. An affidavit that demonstrates how each cost was actually incurred
    c. An affidavit that demonstrates how each cost was necessary (a conclusory statement that the "cost was necessary" is not enough)
    d. An affidavit that demonstrates how each cost was reasonable in the community
    e. All of the above

6. T / F Drafting an overbroad discovery request that is not proportional or narrowly tailored to the needs of the case is sanctionable conduct.

7. T / F Lodging boilerplate objections to discovery requests is sanctionable conduct.

8. T / F Discovery Commissioners require the use of an official form when submitting a DCRR on an application for fees and/or costs.

9. What local rule requires that you include each discovery request and the responses thereto *verbatim* in your motion?

10. T / F You must include the proportionality factors from NRCP 26(b)(1) and *Venetian Casino Resort, LLC v. Eighth Judicial Dist. Ct.* in your proposed Discovery Commissioner's Report and Recommendation.

11. The proper standard for the scope of discovery is:
    a. Parties 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.
    b. Parties may obtain discovery that appears reasonably calculated to lead to the discovery of admissible evidence.
    c. Discovery must consider 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 the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.
    d. a and b only
    e. a and c only
    f. b and c only
    g. a, b, and c

12. A Discovery Commissioner has the power to (mark all that apply):
    a. Administer oaths
    b. Find counsel or a party in contempt
    c. Conduct settlement conferences
    d. Extend discovery deadlines
    e. Grant trial continuances
    f. Strike pleadings

13. T / F For discovery to be allowed, it must be both relevant to a party's claim or defense and proportional to the needs of the case.

14. In *Venetian Casino Resort, LLC v. Eighth Judicial Dist. Ct.*, 136 Nev. 221, 467 P.3d 1 (Ct. App 2020), the Nevada Court of Appeals outlines factors the district court must consider in analyzing which of the following discovery disputes:
    a. the proportionality of discovery under NRCP 26(b)(1)
    b. whether good cause for a protective order under NRCP 26(c)(1) exists

c. the proper venue for a NRCP 30(b)(6) deposition to proceed

d. a and b only

e. All of the above

15. T / F The following are factors the district court should weigh in considering the proportionality of discovery under NRCP 26(b)(1):

a. the importance of the issues at stake in the action;

b. the amount in controversy;

c. the parties' relative access to relevant information;

d. the parties' resources;

e. the importance of the discovery in resolving the issues; and

f. whether the burden or expense of the proposed discovery outweighs its likely benefit.

16. In *Venetian Casino Resort, LLC v. Eighth Judicial Dist. Ct.*, 136 Nev. 221, 467 P.3d 1 (Ct. App. 2020), the Nevada Court of Appeals adopted the Ninth Circuit's three-part test for conducting a good-cause analysis under the FRCP 26(c), and applied it to NRCP 26(c).

The 3 factors are:

a. _____

_____

b. _____

_____

c. _____

_____

17. T / F The following is a non-mandatory and non-exhaustive list of factors for courts to consider when determining if good cause exists for a protective order under NRCP 26(c).

CLE *Quiz continued on page 26*

CLE *Quiz continued from page 25*

a. whether disclosure will violate any privacy interests;

b. whether the information is being sought for a legitimate purpose or for an improper purpose;

c. whether disclosure of the information will cause a party embarrassment;

d. whether confidentiality is being sought over information important to public health and safety;

e. whether the sharing of information among litigants will promote fairness and efficiency;

f. whether a party benefitting from the order of confidentiality is a public entity or official; and

g. whether the case involves issues important to the public.

18. T/F A motion to extend discovery deadlines should be always be heard and decided by a discovery commissioner.

19. Which of the following must be first heard before a discovery commissioner (unless all discovery in the case is being heard by the assigned district court judge, i.e. business court cases): (Mark all that apply).

a. Motion to compel (deposition; responses to subpoenas; requests for production of documents; and interrogatories)

b. Motion for protective order (deposition; subpoenas; requests for production of documents; requests for admission; interrogatories; Rule 35 physical or mental examination; Rule 34 site inspection; etc.)

c. Motion to quash subpoena

d. Motion to set reasonable fee for expert witness

e. Motion for Rule 34 site inspection

f. Motion for Rule 35 physical or mental exam

g. Motion to strike untimely production or untimely or improperly designated expert report

h. Motion for spoliation of evidence (If seeking sanctions up to and including adverse inference)

i. Motion to withdraw admissions

j. Motion for case ending sanctions

k. Motions to extend discovery deadlines

l. Motions for orders to show cause why a party should not be held in contempt for discovery abuses;

m. Motion to strike expert based on admissibility.

n. All of the above.

o. None of the above.

p. a - i only.

CCBA CLE Article #10
Order Form

Wanna Stay Out of Trouble in Discovery?

Offers 1 General CLE Credit (NV)

Complete the order form and submit the completed quiz pages to receive CLE Credit from the CCBA.

Participant information: Date CLE Completed: _____

Name: _____ Bar#: _____

Firm/Co.: _____

E-mail address for CCBA to send verification of transmission of attorney's participation to NV CLE Board:

_____

Fee:

❑ $45/CCBA member
❑ $75/Non-member

Total amount enclosed:

$ _____

Type of payment:

❑ Check or money order is enclosed
❑ I will call CCBA with my credit card information
❑ I authorize CCBA to charge my credit card* (MC • VISA • AMEX)

**Do not send credit card details via e-mail.*

Name of card holder: _____

Credit Card #: _____

Expiration date: _____ Phone #: _____

Authorized Signature: _____

Email address for payment receipt: _____

Submit order form with the completed quiz pages and payment to:

Clark County Bar Association
717 S. 8th Street
Las Vegas, Nevada, 89101
Phone: 702-387-6011
Fax: 702-387-7867
Email: Donnaw@clarkcountybar.org – Do NOT email credit card info. Call it in to 702-387-6011.

Upon receipt of the completed order, the CCBA's staff will record the attorney's participation directly with the Nevada Board of Continuing Legal Education and provide verification of that transmission to the e-mail address provided in the completed order form.