Wanna Stay Out of Trouble in Discovery Version 2.0

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NOTE FROM THE AUTHORS

In October 2021, Discovery Commissioners Erin Lee Truman and Jay Young published *Wanna Stay Out of Trouble in Discovery?* The article began as a practical guide to recurring discovery issues appearing before the Eighth Judicial District Court's (EJDC) Discovery Department. In the years since, however, it has become something more. Lawyers appearing in the department have used it as a reference—sometimes even an encyclopedia of sorts—for understanding not only the discovery rules themselves, but what is expected of counsel before a discovery dispute ever reaches the courthouse.

Five years later, it is time for an update.

The Nevada Rules of Civil Procedure (NRCP) have continued to develop. New appellate decisions have clarified important areas of discovery law. Administrative Order 22-08 establishes detailed standards governing deposition practice. Local rules governing discovery disputes have changed. And perhaps most importantly, five additional years of discovery calendars have revealed recurring issues that deserve further discussion. *Wanna Stay Out of Trouble in Discovery? Version 2.0* is intended to address those developments while preserving the practical purpose of the original article.

This article is not intended to replace the NRCP, the Eighth Judicial District Court Rules (EDCR), Administrative Orders, or controlling Nevada appellate authority. Nor is it intended to create new discovery rules. Rather, our goal is much more practical: **to help lawyers understand what the existing rules require, what the Discovery Department expects, and how recurring discovery disputes can be avoided—or, when they cannot be avoided, presented efficiently and effectively for resolution.**

That goal is particularly important given the unique role of the EJDC Discovery Department. The EJDC has 32 General Jurisdiction Division (civil/criminal) departments and 24 Family Division departments, each responsible for managing and ultimately deciding the cases assigned to it. Both civil and family court discovery disputes – from across all those departments – generally funnel through a single Discovery Department. The discovery commissioners do not decide the merits of cases; our role is to help ensure litigants obtain the discovery to which they are entitled so district court judges can fairly and efficiently decide cases on their merits. That structure also provides an important opportunity to promote reasonable consistency and predictability in discovery practice across the EJDC.

There is also a broader objective. The best discovery dispute is often the one the court never has to decide. Discovery is intended, to the greatest extent possible, to be self-executing. Lawyers who understand their affirmative disclosure obligations, conduct the reasonable inquiry required by NRCP 26(g), tailor discovery to the claims and defenses actually at issue, meaningfully meet and confer, and narrow legitimate disagreements before seeking judicial intervention, save their clients time and money while allowing court officers to devote their resources to disputes that genuinely require a judicial decision.

The pages that follow therefore combine updated law with practical guidance drawn from the issues that repeatedly appear on the Discovery Department's calendar. Some topics are new. Others revisit principles discussed in the original article because experience has demonstrated that they remain recurring sources of disagreement. Throughout, the objective remains the same as it was in 2021: **provide the bar with reasonable expectations, promote consistency in discovery practice, reduce unnecessary disputes, and help counsel get their cases through discovery and ready for trial.**

So, five years, countless discovery motions, several rule changes, new appellate law, and more than a few lessons later, we return to the same basic question:

Wanna stay out of trouble in discovery?

Welcome to Version 2.0.

Discovery Commissioners Erin Lee Truman and Adam Ganz

PART 1:

NRCP 16.1(a)(1) Mandatory Initial Disclosure Requirements[1]

I. Introduction

Under Nevada Rule of Civil Procedure (NRCP) 16.1, most civil cases have mandatory initial disclosure obligations, often called "affirmative disclosures."[2] Parties must make these disclosures without waiting for a discovery request. *See*, NRCP 16.1(a)(1)(A). This important rule was implemented to do away with games like "hide the ball" and "keep away" that frustrate the discovery process, increase litigation costs and violate both discovery and ethical rules.

The mandatory initial disclosure requirement means that parties must proactively exchange witness information, documents and electronically stored information (ESI), damages computations, and insurance agreements at the beginning of the case, before written discovery requests are served. NRCP 16.1(a)(1)(A)(i)-(v). Parties are required to make their initial disclosures based on the information reasonably available to them at the time of disclosure. *See* NRCP 16.1(a)(1)(D)-(E); NRCP 26(g)(1)(A). Parties are not excused from making disclosures because they have not fully investigated the case or because they challenge the sufficiency of another party's disclosure. Similarly, a party cannot withhold disclosure because another party has not yet made its disclosures. NRCP 16.1(a)(1)(E).

Counsel has an important role in this process. Attorneys bear the responsibility to educate their clients on these rules, explain each of the items of information they must disclose, inquire as to the information in their client's possession, custody and control, and by signing the 16.1 production, verify under NRCP 26(g) that the information is true, correct, and complete as of the date of the production.

While NRCP 16.1(a)(1)(A)(i)-(v) provide a general outline of what must be affirmatively disclosed, there is no universal checklist of documents and information that must be produced in every case. Relevance and proportionality necessarily depend on the claims, defenses and circumstances presented in each action. So, this begs the

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[1] Although 16.1 is not applicable to cases in the Family Division, this section is still illustrative of the family law corollary provisions, 16.2 and 16.205, which are specifically addressed below in PART 4.
[2] NRCP 16.1 mandatory disclosures apply to all civil cases, except those exempted by NRCP 16.1(a)(1)(B) or as otherwise stipulated or ordered by the court. Pursuant to Rule 16.1(a)(1)(B)(i-x), cases generally exempt from mandatory disclosure include family court matters, juvenile court matters, appeals from limited jurisdiction court, administrative record review, actions for statutory forfeiture, actions to enforce or quash an administrative summons or subpoena, proceedings ancillary to a proceeding in another court, actions to enforce an arbitration award, and any other action that is not brought against a specific individual or entity.

question: “What should counsel be looking for – and more importantly asking their clients for – at the initial disclosure stage?”

The following discussion incorporates the specific information referenced in NRCP 16.1(a)(1)(A)(i)-(v), but also examines some of the more specific “hot topic” issues that have culminated in judicial review.

II. Witness Information

Parties are required to provide the name, address, and phone number of every individual likely to have discoverable information under Rule 26(b). This means that any person likely to have discoverable information that the party may use to support its claims or defenses must be identified, including individuals who may be used for impeachment or rebuttal. The disclosure must explicitly state the subjects of information each person holds, or their anticipated testimony. NRCP 16.1(a)(1)(A)(i).

III. Documents, Tangible Evidence and Electronically Stored Information (ESI)

A copy – or a comprehensive description by category and location – of all documents, ESI and tangible items in the party's possession, custody, or control must be produced without request. This includes relevant photographs, videos, audio recordings, reports, and witness statements, unless protected by privilege. NRCP 16.1(a)(1)(A)(ii).

There is no mandatory or exhaustive list for the documents and information that must be disclosed, but there are categories of information counsel should at least consider as part of their inquiry before signing an NRCP 16.1 disclosure, which automatically includes an NRCP 26(g) certification.

The examples below are merely illustrative, and the fact that a category appears below does not mean that it is relevant, proportional, non-privileged, or is required to be produced in every case. Merely, it means counsel should at least consider 1) whether the information exists; 2) whether it is within the client's possession, custody, or control;[3] and 3) whether the particular claims and defenses bring it within the party's affirmative disclosure obligations.

A. Video Recordings

Video recordings are too often the subject of discovery disputes. There seems to be a misunderstanding as to whether videos that capture the actual event at issue in litigation are *sub rosa* surveillance videos for the purposes of disclosure. They are not. Drive cam footage that captures an auto accident or security camera footage that captures a

[3] Possession, custody and control means a party has actual possession of the document or information, **or has the legal right to obtain it.** *Nevada Dep’t of Tax’n vs. Eighth Jud. Dist. Ct.*, 136 Nev. 366, 466 P.3d 1281 (2020)(emphasis added).

slip and fall in a casino or store is not surveillance video for discovery purposes. These videos fit squarely within the required initial disclosure requirement of NRCP 16.1, as they are a "record . . . concerning the incident that gives rise to the lawsuit."

Attorneys often argue that these video recordings constitute surveillance videos that should be withheld until a Plaintiff's deposition to presumably guarantee that the witness does not change his or her testimony based on what is shown on the video. This argument is misplaced. A video that is contemporaneously captured during an injury-producing event is required to be produced with initial disclosures.[4] It is a record of the event at issue, directly relevant to the claims and defenses at issue in the litigation and contains information that may be used for impeachment or rebuttal.

In contrast, production of actual *sub rosa* surveillance video may not be required at the time of initial disclosure. Whether the video must be disclosed with the initial 16.1 production, or may be withheld until after a Plaintiff's deposition, turns on when the surveillance was captured and at whose direction it was created.

The long-standing practice in this jurisdiction is to permit a party to delay disclosure of *sub rosa* surveillance video that was done at the direction of counsel and protected by the work product doctrine until after the surveilled party's deposition. Some have argued the 2019 amendment to NRCP 16.1 compels immediate production of all *sub rosa* surveillance video. The Nevada Supreme Court has not published an opinion on this issue, but a series of Nevada District Court cases – and a well-developed body of federal case law – support the position that the video is considered work product, but only if done at the direction of counsel, until after the surveilled party's deposition.

This issue was addressed in 2022 by the Nevada Court of Appeals in *Keolis Transit Servs, LLC vs. Eighth Jud. Dist. Ct.*, 138 Nev. Adv. Op. 8, 505 P.3d 1076 (2022). This case specifically addresses whether or not *sub rosa* video surveillance is protected by the work product doctrine and under what circumstances a claim of protection may stand.

In *Keolis*, there were three videos of the injured party at issue. The Nevada Court of Appeals concluded that the first two videos and related reports in the claims file were not protected work product because they were done at the direction of the insurance carrier, not Keolis's attorney. The Court of Appeals determined that the third video was work product created at the direction of counsel after litigation was filed, but did not ultimately determine whether it was discoverable; because the district court failed to analyze whether or not there was a substantial need or undue hardship that warranted production of the protected material. 138 Nev. Adv. Op. 8, at 14. The Court of Appeals upheld the district court's ruling regarding the order to produce the first two sub rosa surveillance videos, but reversed the district court's order to produce the third video created at the direction of counsel. The matter was referred back to the district court to

[4] *Practice tip:* When video of the injury-producing event exists, a reasonable amount of pre/post-incident footage should be maintained and preserved – not just a few seconds on either side of the event.

conduct the analysis of whether there was a substantial need or undue hardship that would support an order to produce the protected work product. 138 Nev. Adv. Op. 8, at 14.

Following *Keolis*, *sub rosa* surveillance videos done at the investigation stage, not created at the direction of counsel, should be disclosed pursuant to NRCP 16.1 with the initial mandatory disclosures. Surveillance *sub rosa* recordings done at the direction of counsel may be withheld from production until after the party's deposition, unless a substantial need or undue hardship is shown that would support production of the protected material.

B. Insurance Claims Files

Unless a specific privilege applies, contents of the insurance claims files are generally discoverable if they are relevant to a claim or defense and were prepared in the ordinary course of business, rather than in anticipation of litigation. Almost without exception, insurance claims files contain relevant information that is proportional to the claims and defenses at issue in a case, because they only exist as a result of the incident that gives rise to the litigation.

Trade secret information in a claims file is protected, but only if the insurer identifies what is being withheld in a privilege log and can demonstrate through competent evidence that the information withheld meets the standard of trade secret information. The mental impressions of the claims handler, such as reserves or liability determination, generally are protected, but the adjuster's recording or documentation of relevant facts, such as witness statements, are generally discoverable. Portions of a claims files may be protected as attorney work product, but only if the information was created at the direction of counsel and created in anticipation of litigation or trial pursuant NRCP 26(b)(3).

If looking at information generated **prior** to litigation to determine discoverability, the insurer must undertake the following inquiry:

1. "But for" test or "because of test": if the document would not exist but for the prospect of litigation, then it is protected.

2. However, the "but for" or "because of" test does not protect "documents that are prepared in the ordinary course of business or that would have been created in essentially similar form irrespective of the litigation." *Wynn Resorts, Ltd. v. Eighth Jud. Dist. Ct.,* 133 Nev. 369 (2017).

3. Investigative materials generated in the context of an insurance investigation are considered to have been created in the ordinary course of business of the insurance company, rather than in anticipation of litigation unless the investigation was performed at the request or under the

direction of an attorney. *Ballard v. Eighth Jud. Dist. Ct.,* 106 Nev. 83, 85, 787 P.2d 406, 407 (1990).

Plainly stated, the simple involvement of an attorney does not automatically insulate all materials from discovery as work product. *See, Columbia/HCA Healthcare Corp. v. Eighth Jud. Dist. Ct.*, 113 Nev. 521 (1997), (where hospital's occurrence reports were found to be prepared in the ordinary course of business).

C. Documents to be considered in premise liability cases/falls

Negligence cases arising from slips or trips and falls on premises may require the defending counsel to consider whether sweep/inspection logs are proportional to the needs of the case and should be disclosed with mandatory initial disclosures. This may include reports and checklists for the incident; employee schedules for the relevant area and time; applicable maintenance/cleaning policies and schedules; incident/investigation materials; safety-meeting materials regarding the incident; and relevant prior similar incidents.

D. Documents to be considered in auto/commercial vehicle negligence cases

When preparing mandatory initial disclosures in auto/commercial vehicle negligence cases, counsel should consider whether production of property damage photographs and estimates (including body-shop photographs) related to the incident are mandated. In addition, recorded statements, dash camera and “black-box” information should be reviewed and considered for mandatory initial disclosure. Finally, other information that counsel should consider when implicated by the claims, is driver history, driver logs, cell phone information, employment/training materials, drug testing, vehicle-maintenance records, pre-trip inspections, and accident-reporting policies. Again, this is not to say that these materials are discoverable and require disclosure at the mandatory initial disclosure phase, only that they might be.

E. Documents to be considered in insurance - bad faith claims

In bad faith claims, prior to mandatory initial disclosures, counsel should review and consider the discoverable portions of the claims file, including underwriting materials, payment history, communications to the insured, certified policy and coverage materials, and applicable claims-handling manuals.

F. Documents to be considered in contract cases

In contract disputes, counsel should review and consider disclosure of the entire operative contract – including amendments, addenda, and exhibits; performance documents; breach, cure and default communications; and damages documents – including invoices, payments, and mitigation efforts.

G. Medical information (when personal injury is at issue)

When a personal injury is at issue, the identity of each relevant medical provider must be identified so that the opposing party may prepare an appropriate medical authorization for signature to obtain medical records from each provider. NRCP 16.1(a)(1)(A)(iii).

H. Damages

A party must produce a computation of each category of damages claimed in the mandatory initial disclosure. The disclosing party must also make available for inspection and copying (as under Rule 34) the documents or other evidentiary material upon which each computation is based, unless it is privileged or otherwise protected from disclosure. This includes materials bearing on the nature and extent of injuries suffered. NRCP 16.1(a)(1)(A)(iv).

I. Insurance agreements

NRCP 16.1(a)(1)(A)(v) specifically requires:

> a party must, without awaiting a discovery request, provide to the other parties:
> . . .
> (v) or inspection and copying as under Rule 34, any insurance agreement under which an insurance business may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment and any disclaimer or limitation of coverage or reservation of rights under any such insurance agreement.

Therefore, any insurance policy or agreement under which an insurer may be liable to satisfy all or part of a judgment or reimburse payments made to satisfy the judgment, must be provided with mandatory NRCP 16.1 initial disclosures. Any disclaimer or limitation of coverage or reservation of rights under any such insurance agreement must also be affirmatively disclosed under 16.1 with initial disclosures. NRCP 16.1(a)(1)(A)(v). This includes **all** layers, towers, and policies available, not just the ones that the defendant or counsel think might be triggered or applicable. Moreover, "[i]f a party fails to make a disclosure required by Rule 16.1(a) […], any other party may move to compel disclosure and for appropriate sanctions." NRCP 37(a)(3)(A).

In *Vanguard Piping Systems, Inc. v. Eighth Jud. Dist. Ct.*, the Nevada Supreme Court held that this rule requires disclosure of "any and all" insurance agreements that may be liable to pay a portion of a judgment, and that a party may not unilaterally decide which policies are relevant, even where it has already disclosed policies with limits it contends are sufficient, because "it is impossible to foresee all the circumstances in which the primary policies will be subject to liability and potentially exhausted by other judgments." *Vanguard Piping v. Eighth Jud. Dist. Ct.*, 129 Nev. 602, 609, 309 P.3d 1017, 1021 (2013).

The Court noted that Nevada's rule is broader than its federal counterpart because it compels disclosure of disclaimers, limitations of coverage, and reservations of rights.

IV. Timing

Initial disclosures are generally due within 14 days after the parties' Rule 16.1(b) early case conference, unless the court orders otherwise or the parties stipulate to a different schedule.

Parties who are served or join the case after the early case conference must make their initial disclosure within 30 days of filing an answer or Rule 12 motion to make their disclosures, unless a stipulation or court order sets a different deadline. NRCP 16.1(a)(1)(C).

V. Continuing Duty to Supplement

NRCP 16.1 also imposes a continuing duty to supplement or correct disclosures if a party later learns that its disclosures were incomplete or inaccurate in a material way. *See also,* NRCP 26(e)(1).

VI. Consequences of Noncompliance

It is the responsibility of each attorney to timely disclose all information required by NRCP 16.1 in mandatory initial disclosures. This is not aspirational, and a party should not have to repeatedly request the disclosure of information the opposing party is already required to provide without a discovery request. When a party fails to make the disclosures required by Rule 16.1(a), counsel should consider bringing that failure to the court's attention even if there is no traditional discovery request to compel. Rule 16.1(e)(3) expressly authorizes sanctions for an attorney's failure to reasonably comply with any provision of Rule 16.1, including the sanctions available under NRCP 37(b) and, significantly, an order prohibiting the use of any witness, document, or tangible thing that should have been affirmatively disclosed. The message is straightforward: affirmative disclosure means affirmative disclosure—the burden is not shifted to the opposing party to discover what Rule 16.1 already requires a party to disclose.

VII. Conclusion

NRCP 16.1's disclosure requirements are intended to make discovery affirmative and self-executing, not a process in which parties wait for the "right" request before producing information they already know is relevant. The practical takeaway is simple: investigate early, disclose completely, supplement promptly, and remember that NRCP 26(g) requires a reasonable inquiry before counsel certifies those disclosures. Doing so not only satisfies the Rules—it prevents many of the discovery disputes that otherwise end up before the court.

PART 2:

The Myth of the Automatic Protective Order: Why NRCP 26(c) Requires the Party Seeking Confidentiality to Promptly Establish Good Cause Before Withholding Discovery

I. Introduction

It begins with an email that many Nevada litigators have either written or received:

> *"Responsive documents exist and will be produced upon execution of the enclosed Stipulated Protective Order."*

No motion for protective order has been filed. No specific documents requiring protection have been identified. No explanation of good cause accompanies the proposed agreement. Discovery simply pauses while the parties negotiate confidentiality provisions. A motion to compel is filed.

At the discovery hearing, the court asks a simple question:

> ***"Why haven't the documents been produced?"***

Counsel responds:

> *"Your Honor, we have no objection to producing the documents. We just haven't been able to agree on the stipulated protective order."*

The court then asks the question that prompted this article:

> ***"Where in NRCP 26(c) does it authorize a party to withhold otherwise discoverable documents until a stipulated protective order has been signed?"***

The answer is rarely discussed.

Although this issue arises with increasing frequency in Nevada civil litigation, neither the text of NRCP 26(c) nor the Nevada appellate decisions interpreting that rule appear to contemplate this now common procedural sequence.

A protective order is a shield. Rule 26(c) exists so that a party required to disclose genuinely sensitive information—a trade secret, a patient's medical file, a customer's personal data—can produce it without surrendering the very confidentiality the law protects. Used that way, the protective order advances the search for truth; it lets discovery proceed on the merits while safeguarding legitimate interests that otherwise counsel would silence. However, difficulties arise when a proposed protective order evolves from a voluntary agreement concerning confidentiality into a unilateral condition precedent to producing otherwise discoverable information.

This article does not question the legitimacy of protecting truly confidential information. The issue is not whether confidentiality should exist, but how confidentiality should be obtained under the Nevada Rules of Civil Procedure.

NRCP 26(c) places the burden on the party seeking protection to establish good cause before otherwise discoverable information may be withheld. Read together with NRCP 26(g), the Rule contemplates a straightforward procedural sequence: the responding party must first conduct a reasonable inquiry, identify the responsive documents, determine whether protection is warranted, and, if necessary, promptly seek judicial relief.

We examine here that procedural framework and the extent to which current discovery practice has, in some instances, drifted from it. It concludes that confidentiality and cooperation remain important objectives of modern discovery, but that they should be achieved through the procedures contemplated by the NRCP rather than by shifting the burden of seeking protection from the responding party to the requesting party having to file a motion to compel.

II. The Protective Order Is an Exception to Broad Discovery, Not a Prerequisite to It

A. Discoverability versus confidentiality

Properly understood, Rule 26(c) does not diminish Nevada's broad policy favoring discovery. Instead, it recognizes that certain categories of information may warrant protection notwithstanding their discoverability. Trade secrets, proprietary business information, confidential commercial information, medical records, personally identifying information, juvenile records, and information implicating significant privacy or public safety concerns are familiar examples of materials for which protective relief may be appropriate. In such circumstances, the issue ordinarily is not whether the information should be produced, but under what conditions it should be produced.

This distinction is critical. Discoverability and confidentiality are related concepts, but they are not synonymous. A document may be fully discoverable under NRCP 26(b)(1) while simultaneously warranting protection from unnecessary dissemination under NRCP 26(c). Likewise, a document may be confidential without being privileged. Privilege generally precludes discovery altogether. Confidentiality, by contrast, ordinarily regulates the manner in which otherwise discoverable information may be disclosed, used, or disseminated. Confusing these distinct concepts often leads to unnecessary discovery disputes and, at times, to the mistaken assumption that an assertion of confidentiality alone justifies withholding production.

The purpose of a protective order, therefore, is not to create a new category of nondiscoverable information. Nor is it intended to serve as a procedural prerequisite to production. Rather, Rule 26(c) provides a mechanism through which a court may tailor appropriate protections for information that is otherwise discoverable but deserving of limited confidentiality. Properly employed, protective orders promote efficient discovery while safeguarding legitimate privacy and commercial interests. They reduce unnecessary motion practice, encourage cooperation between counsel, and permit the exchange of sensitive information without sacrificing the discovery principles embodied in the Nevada Rules of Civil Procedure.

B. What Good Cause Actually Requires

The most common misuse of protective orders is the entry of an order with no genuine good-cause analysis at all. Meanwhile, the framework the Nevada Court of Appeals adopted in *Venetian Casino Resort, LLC v. Eighth Jud. Dist. Ct.,* 136 Nev. 221, 467 P.3d 1 (Ct. App. 2020), remains the landmark Nevada authority on the question. Borrowing from the Ninth Circuit's decision in *In re Roman Catholic Archbishop of Portland*, 661 F.3d 417 (9th Cir. 2011), *Venetian* holds that a court confronted with a Rule 26(c) request must proceed in three steps.

First, the court must determine whether particularized harm will result from disclosure. Broad allegations of harm, unsubstantiated by specific examples or articulated reasoning, do not satisfy Rule 26(c). Second, if particularized harm is shown, the court must balance the public and private interests to decide whether protection is warranted. For that balancing, Nevada courts apply the seven *Glenmede* factors: whether disclosure will violate privacy interests; whether the information is sought for a legitimate or an improper purpose; whether disclosure will cause embarrassment; whether the information bears on public health and safety; whether sharing the information among litigants will promote fairness and efficiency; whether the party benefiting from the order is a public entity or official; and whether the case involves issues important to the public. Third, even if the balance favors protection, the court must consider whether a less restrictive alternative—redaction, limited disclosure, a narrower designation—would address the concern. *Glenmede Trust Co. v. Thompson*, 56 F.3d 476, 483 (3d Cir. 1995).

III. Nevada Appellate Authority Consistently Places the Burden on the Party Seeking Protection

Although the factual settings vary considerably, Nevada's appellate decisions interpreting the discovery rules consistently adhere to a common procedural principle: the party seeking to limit otherwise discoverable information bears the burden of timely invoking the applicable protection and establishing the factual and legal basis for doing so. Whether the issue involves privilege, work product, confidentiality, statutory protections, or a protective order under NRCP 26(c), the procedural obligation remains the same. Protection from discovery is not automatic. It must be affirmatively asserted, supported, and, when disputed, judicially determined.

A. *Kerley* Establishes That the Responding Party Must Seek Protection Rather Than Simply Refuse Discovery.

The Nevada Supreme Court first articulated this procedural framework nearly fifty years ago in *Kerley v. Aetna Casualty & Surety Co.,* 94 Nev. 710, 585 P.2d 1339 (1978). There, the responding party neither produced the requested documents nor sought judicial protection from producing them. Instead, the party simply failed to comply with the discovery request and the district court's subsequent order compelling production. Affirming dismissal of the action as a discovery sanction, the Nevada Supreme Court stated unequivocally that "[t]he method for raising an objection to such discovery is by motion for a protective order under NRCP 26(c)."

The *Kerley* opinion identifies the proper procedural mechanism for resisting discovery. When a responding party believes requested discovery should not be produced—or should be produced only under specified conditions—the NRCP require that party to affirmatively seek relief under NRCP 26(c). This rule does not contemplate unilateral noncompliance while awaiting action by the requesting party.

B. *Ballard* and *Columbia/HCA* Reinforce That Protection Must Be Affirmatively Established.

The Nevada Supreme Court's later decisions addressing work-product protection likewise reinforce the principle that discovery limitations are exceptions requiring affirmative justification.

In *Ballard v. Eighth Jud. Dist. Ct.,* 106 Nev. 83, 787 P.2d 406 (1990), the court held that an insurer's routine claim investigation was not protected work product merely because litigation was anticipated. Instead, the court adopted the rule that materials generated during an insurer's ordinary investigation are discoverable unless the investigation was conducted at the request or direction of counsel.

Seven years later, in *Columbia/HCA Healthcare Corp. v. Eighth Jud. Dist. Ct.,* 113 Nev. 521, 936 P.2d 844 (1997), the court further clarified that attorney involvement alone does not transform ordinary business records into protected work product. The court rejected an attempt to cloak routine occurrence reports with privilege simply because counsel had become involved, emphasizing that documents created in the ordinary course of business remain discoverable notwithstanding subsequent litigation.

Although these decisions principally address work-product doctrine, they reflect the same procedural premise underlying Rule 26(c); assertions of confidentiality, privilege, or work product are not self-proving. The party asserting protection bears the burden of demonstrating that the requested information falls within the applicable protection. Mere conclusory assertions—or generalized references to litigation—are insufficient and most importantly, coupled with *Kerley*, the party seeking protection from discovery bears the burden of requesting that protection without a motion to compel being filed.

C. *Okada* Clarifies That Discovery Obligations Are Triggered by the Discovery Request—Not by the Motion to Compel.

Perhaps the clearest discussion of timing appears in *Okada v. Eighth Jud. Dist. Ct.,* 134 Nev. 6, 408 P.3d 566 (2018).

There, our Supreme Court considered whether a newly enacted statutory gaming privilege applied to information that had been requested in discovery before the statute became effective but became the subject of a motion to compel after the effective date.

Rejecting the argument that the filing of a motion to compel constituted a new discovery request, the court explained that:

> A motion to compel discovery is not a separate, independent request for information but rather is an enforcement mechanism used when someone fails to comply with a discovery request.

Okada confirms that the parties' respective obligations arise when discovery is served. A motion to compel merely asks the court to enforce those preexisting obligations. Consequently, a responding party cannot postpone its Rule 26(c) obligations until enforcement proceedings begin. If protection is believed necessary, it should be sought when the discovery request is received—not after the requesting party has been forced to seek judicial intervention.

D. *Venetian* Reaffirms That Protection Requires Both Judicial Findings and a Particularized Showing of Good Cause.

The procedural principles underlying *Kerley, Ballard, Columbia/HCA, and Okada* culminate in the Court of Appeals' decision in *Venetian Casino Resort, LLC v. Eighth Jud. Dist. Ct.,* 136 Nev. 221, 467 P.3d 1 (2020). There, as discussed above in Part 1, the Court of Appeals emphasized that Rule 26(c) requires an actual judicial determination of good cause supported by a particularized analysis. A district court may not simply assume confidentiality or rely solely upon generalized assertions that information is sensitive. Instead, the court **must** determine whether disclosure would result in a particularized harm, balance the competing interests, and consider whether narrower alternatives—such as redaction or limited disclosure—would adequately protect the interests identified.

Equally important, *Venetian* recognizes that Rule 26(c) operates only after the party seeking protection has affirmatively invoked the Rule and established the factual basis for doing so. Nothing in *Venetian* suggests that the requesting party bears any obligation to justify production of otherwise discoverable information or to negotiate confidentiality agreements before discovery proceeds.

E. *Keolis* Confirms That Even Established Discovery Protections Must Be Demonstrated Rather Than Presumed.

Finally, in *Keolis Transit Services, LLC v. Eighth Jud. Dist. Ct.,,* 138 Nev. 71, 506 P.3d 1076 (Ct. App. 2022), again, as discussed above, the Court of Appeals synthesized *Ballard, Columbia/HCA,* and *Wynn Resorts* in addressing work-product protection for surveillance materials.

The opinion rejected categorical assumptions regarding protection. Rather than treating all surveillance as protected or discoverable, the court required a document-specific analysis addressing the purpose for which the materials were created, whether they were prepared in anticipation of litigation, and whether any qualified protection had been overcome through a showing of substantial need and undue hardship.

Like the preceding decisions, *Keolis* illustrates that Nevada discovery law does not presume confidentiality or protection merely because a party asserts it. Protection must be affirmatively established under the governing legal standard before otherwise discoverable information may be withheld.

F. The Common Thread

Viewed collectively, these decisions reveal a remarkably consistent procedural framework. *Kerley* requires the responding party to affirmatively seek protection rather than simply refusing production. *Ballard* and *Columbia/HCA* require the party asserting protection to establish the factual basis for doing so. *Okada* confirms that these obligations arise when discovery is requested—not when a motion to compel is filed. *Venetian* requires judicial findings supported by a particularized showing of good cause before protective relief may be granted. *Keolis* reiterates that discovery protections are established through evidence and legal analysis, not assumption.

None of these decisions suggests that a responding party may suspend otherwise applicable discovery obligations while awaiting execution of a proposed confidentiality agreement. To the contrary, each reinforces the same underlying procedural principle: the burden of seeking protection rests with the party requesting protection.

IV. Trade Secrets: The Shield at Its Strongest

A trade secret is a species of property that, unlike most property, can be destroyed in an instant by disclosure. Once a secret is public, it is gone; no injunction and no damages award can restore its confidentiality. That reality is why the law does not treat trade-secret protection as an ordinary inconvenience of litigation. The Uniform Trade Secrets Act—adopted in Nevada as NRS Chapter 600A—directs that a court "shall preserve the secrecy of an alleged trade secret by reasonable means," including protective orders, in-camera hearings, and sealing. *NRS 600A.070.*

Perhaps nowhere is the importance of Rule 26(c)'s procedural framework more evident than in requests to protect alleged trade secrets. NRCP 26(c)(1)(G) expressly authorizes a court, upon a showing of good cause, to protect "a trade secret or other confidential research, development, or commercial information." The rule, however, does not presume that information constitutes a trade secret simply because a party labels it as such. Rather, the burden remains on the party seeking protection to demonstrate both that the information qualifies for protection and that the requested limitations are justified.

Nevada law reflects this same principle. In *Frantz v. Johnson*, the Nevada Supreme Court recognized that the party asserting trade-secret protection must first establish that a protectable trade secret exists. *Frantz v. Johnson*, 116 Nev. 455, 999 P.2d 351 (2000). Likewise, NRS 600A.030 defines a trade secret by reference to two essential elements: the information must derive independent economic value from not being generally known, and the owner must undertake reasonable efforts to maintain its secrecy. These are factual determinations requiring competent evidence—not conclusory assertions.

Consequently, generalized representations that documents are "confidential," "proprietary," or contain "trade secrets" do not suffice. Before the court can determine whether good cause exists under NRCP 26(c), it must first understand precisely what information is claimed to constitute the trade secret and why. Without that foundation, the court cannot meaningfully evaluate whether the information qualifies for protection, whether the requested restrictions are narrowly tailored, or whether less restrictive alternatives—such as redaction or limited disclosure—would adequately protect the asserted interests.

Accordingly, when a party seeks protection based upon an alleged trade secret, the court should ordinarily expect evidence addressing, at a minimum:

1. The specific information claimed to constitute the trade secret, rather than broad or categorical references to entire document productions.
2. The economic value of the information, including how it derives independent economic value from not being generally known or readily ascertainable.
3. The measures undertaken to maintain secrecy, including internal confidentiality practices, contractual restrictions, access limitations, and other reasonable efforts to preserve confidentiality.
4. The extent to which the information is known outside the business, including whether it has previously been disclosed in litigation, regulatory proceedings, publications, or other public settings.
5. The availability of narrower alternatives, including whether redaction, limited disclosure, or an attorneys'-eyes-only designation would adequately protect the asserted interests.

Such evidence need not ultimately persuade the court that protection is warranted. It must, however, provide a sufficient factual record to permit the individualized analysis required by NRCP 26(c), *Venetian*, and *Frantz*. Absent that showing, a court is left with little more than a conclusory assertion that information should remain confidential—a determination the Rules do not permit.

V. The Procedural Disconnect: When the Burden Shifts from the Party Seeking Protection to the Party Seeking Discovery

As alluded to earlier, a familiar sequence frequently unfolds shortly after written discovery is served.

A. Hypothetical No. 1

A plaintiff alleges severe emotional distress arising from a catastrophic injury. The defendant requests ten years of psychiatric and psychological treatment records. The plaintiff acknowledges that responsive records exist and that at least some are discoverable, but the records also contain highly sensitive information concerning unrelated treatment, family matters, prior trauma, and other deeply personal issues.

Rather than producing the records immediately, the plaintiff seeks a protective order requesting an in camera review, limited redactions of unrelated treatment, and an attorneys'-eyes-only designation until the court determines the appropriate scope of disclosure.

B. Hypothetical No. 2

A patron slips on a liquid substance in a grocery store aisle and files a premises liability action alleging negligent inspection and maintenance of the premises. During discovery, the plaintiff requests the surveillance footage, incident report, employee training materials, inspection policies, prior versions of the store's safety manual, and written procedures governing spill response. Some of those materials may ultimately warrant limited confidential treatment. Many likely do not.

Rather than produce the plainly discoverable materials and seek protection for any documents genuinely requiring confidentiality, the defendant responds that no documents will be produced until the plaintiff signs a proposed Stipulated Protective Order. No specific documents are identified. No showing of good cause accompanies the request. No motion under NRCP 26(c) is filed. Discovery simply stops.

C. Hypothetical No. 3

A dispute arises between the owners of a closely held corporation concerning the alleged misuse of company assets. During discovery, one owner requests the corporation's financial statements, accounting records, tax returns, bank records, operating agreements, and communications concerning the challenged transactions.

The opposing party acknowledges that responsive documents exist but states that no production will occur until a proposed stipulated protective order has been executed.

No motion seeking protection has been filed. No specific documents are identified as requiring confidential treatment. No factual showing of good cause accompanies the request. Nevertheless, production of all responsive documents is suspended while the parties negotiate a blanket confidentiality agreement.

Some of the requested information may ultimately justify limited protection. Other records may not. The NRCP provide a mechanism for addressing that distinction. The question is whether the Rules contemplate withholding all otherwise discoverable information before that determination has been made.

D. Has the burden imposed by the Rule shifted?

The requesting party seeks production of documents that are plainly relevant and proportional to the claims and defenses at issue. In the best case, the responding party acknowledges that responsive documents exist but advises that production will not occur until the requesting party executes a proposed stipulated protective order. In the worst case, the responding party does not even look for the responding documents and focuses on the stipulated protective order. Frequently, the proposed order identifies no particular documents, no specific categories of information, and no factual basis demonstrating why any responsive material requires protection. Instead, production of all responsive documents is suspended pending execution of a blanket confidentiality agreement.

When agreement is promptly reached, little attention is given to the procedural implications because discovery proceeds without judicial involvement.[5] When agreement cannot be reached, however, the practical effect is often that otherwise discoverable information remains withheld until the requesting party files a motion to compel. Only then does the issue of confidentiality become the subject of judicial review.

Nothing in this article should be read to discourage parties from resolving confidentiality issues through stipulation whenever appropriate. Cooperative discovery remains a central objective of the NRCP. However, any negotiated protective order should remain faithful to the requirements of NRCP 26(c). A stipulation should identify, with reasonable specificity, the categories of information for which protection is sought and should reflect a good-faith determination that good cause exists for the protections requested. Stipulation may resolve the need for judicial intervention, but it should not dispense with the principles that would otherwise govern the court's analysis under Rule 26(c). The

[5] This article does not take a position about the on-going debate as to whether stipulated protective orders require the court to find good cause under NRCP 26(c) before issuing the order. *See*, Nora Freeman Engstrom, David Freeman Engstrom, Jonah B. Gelbach, Austin Peters & Aaron Schaffer-Neitz, *Secrecy by Stipulation*, 74 Duke Law Journal 99 (2024).

procedural concern arises only when cooperation evolves into a condition precedent to compliance with otherwise existing discovery obligations.

NRCP 26(c) does not provide that discoverable information may be withheld while the parties negotiate the terms of a proposed protective order. Nor does the rule provide that the requesting party bears the obligation to obtain an agreement before production becomes due. Rather, the rule provides a mechanism through which the responding party may seek judicial protection upon a showing of good cause if the parties cannot resolve the issue informally.

This distinction is more than academic. It affects the timing of discovery, the allocation of litigation costs, and the efficient administration of civil cases.

The structure of NRCP 26 suggests a responding party must produce all non-confidential responsive information in the ordinary course while specifically identifying those limited documents or categories of information believed to require protection. If agreement concerning those materials cannot be reached after meaningful meet-and-confer efforts, the responding party may promptly seek relief under NRCP 26(c), thereby allowing the court to determine whether good cause exists and, if so, fashion protection tailored to the particular information at issue.

Such an approach preserves the balance struck by the discovery rules. It allows discovery to proceed without unnecessary interruption while simultaneously preserving the responding party's ability to obtain judicial protection for information genuinely deserving of confidentiality. Most importantly, it preserves the procedural allocation of burdens established by NRCP 26(c): **the party seeking protection remains responsible for requesting it and demonstrating why it is warranted before otherwise discoverable information is withheld.**

VI. Returning to the Procedural Framework Contemplated by the Nevada Rules of Civil Procedure - combined

When NRCP 26 is read as a cohesive whole, it establishes a logical procedural sequence for addressing confidentiality concerns during discovery. Rules 26(b), 26(c), and 26(g) are not independent provisions operating in isolation; rather, they function together as part of a unified discovery process. Read collectively, the Rules first require the responding party to conduct a reasonable inquiry into the requested discovery, then determine what information is discoverable, next identify the specific information believed to warrant protection, and finally, if necessary, seek judicial intervention upon a showing of good cause.

The process begins—not with a proposed protective order—but with the responding party's obligation under NRCP 26(g). Before signing a discovery response, counsel certifies that, "*to the best of the person's knowledge, information, and belief formed after a reasonable inquiry,*" the response is complete, consistent with the Nevada Rules of

Civil Procedure, warranted by existing law or a good-faith argument for its extension, and not interposed for any improper purpose. NRCP 26(g)(1).

The certification required by Rule 26(g) necessarily contemplates more than a cursory review of the discovery requests. It requires counsel to conduct a reasonable inquiry into what responsive information actually exists. Responsive documents must be located, reviewed, and evaluated before counsel can meaningfully certify the response that says they are entitled to protection. Stated differently, counsel cannot determine whether responsive information warrants confidential treatment without first identifying the responsive information itself.

This sequence is significant because the determination that protection may be warranted necessarily follows—not precedes—the reasonable inquiry required by Rule 26(g). A party cannot meaningfully assert that responsive documents require confidential treatment without first knowing what documents are responsive, what information those documents contain, and whether any portion of that information actually presents a legitimate confidentiality concern. Compliance with Rule 26(g), therefore, is more than a certification requirement; it provides the procedural foundation upon which any request for protection under Rule 26(c) necessarily rests.

Once the responding party has identified the responsive documents, the next inquiry is governed by NRCP 26(b)(1). At this stage, counsel determines whether the identified materials are discoverable—that is, whether they are relevant to a party's claims or defenses, proportional to the needs of the case, and not otherwise protected by privilege or another recognized limitation upon discovery. Importantly, this inquiry addresses whether information must be produced; it does not yet determine how that production should occur.

Only after discoverability has been determined does the analysis shift to NRCP 26(c). At this point, the responding party should identify the specific documents—or reasonably defined categories of documents—for which protection is sought. This determination should be document-specific whenever practicable and category-specific when individual review would be unduly burdensome. Generalized assertions that an entire production is "confidential" or "proprietary" rarely assist either opposing counsel or the court in evaluating whether good cause exists. By contrast, identifying the particular documents or categories of information believed to require protection allows both parties to focus upon the actual confidentiality issues presented.

Equally important, the responding party should articulate the factual basis supporting the requested protection. Good cause is not established simply because information may be sensitive or because a party would prefer that it remain confidential. Rather, the responding party should identify the particular interest requiring protection and explain why the requested limitation is necessary under the circumstances. In many cases, the appropriate protection may consist of nothing more than limited redactions of personally identifying information, restrictions upon dissemination, or attorney-eyes-only provisions. In others, broader protection may be justified. Regardless of the remedy ultimately sought, however, the analysis should begin with the information actually requiring protection rather than with the assumption that an entire production should be withheld or designated confidential.

Conducting this analysis before judicial intervention serves another important purpose. It facilitates meaningful meet-and-confer efforts. Once the responding party has identified the documents believed to require protection and articulated the basis for that request, opposing counsel is in a far better position to evaluate the legitimacy of the asserted confidentiality interests and to determine whether agreement can be reached. Frequently, the dispute concerns not whether protection is appropriate, but rather the scope of that protection. By identifying the documents at issue and the reasons protection is sought, the parties substantially increase the likelihood that any disagreement can be resolved without judicial involvement.

If agreement cannot be reached, NRCP 26(c) provides the procedural mechanism through which the responding party may seek judicial protection. At that stage, the court is presented with a concrete dispute involving identified documents, articulated confidentiality interests, and a factual record demonstrating why protection is believed necessary. The court may then perform the individualized analysis contemplated by *Venetian*, determine whether good cause has been established, and fashion protection tailored to the particular information requiring confidentiality.

Viewed collectively, the Nevada Rules of Civil Procedure establish the following procedural sequence:

1. **Conduct the reasonable inquiry required by NRCP 26(g).** Identify, locate, and review the responsive documents before certifying the discovery response.
2. **Determine discoverability under NRCP 26(b)(1).** Evaluate whether the identified materials are relevant, proportional, and otherwise discoverable.
3. **Identify the information for which protection is sought.** Specify the particular documents or reasonably defined categories of documents believed to warrant protection.
4. **Articulate the factual basis constituting good cause.** Explain why the identified information requires protection and why the requested protection is appropriately tailored to that information.
5. **Engage in meaningful meet-and-confer efforts.** Attempt to resolve the identified confidentiality issues through informed discussion directed toward the specific documents at issue.
6. **Promptly seek relief under NRCP 26(c) if agreement cannot be reached.** Present the identified documents and the factual basis supporting protection to the court for determination.

This procedural framework accomplishes several important objectives. It preserves the responding party's ability to protect legitimately confidential information while allowing discovery to proceed as to materials presenting no genuine confidentiality concerns. It provides opposing counsel with sufficient information to evaluate the requested protection intelligently and promotes meaningful meet-and-confer efforts directed toward identifiable disputes rather than generalized assertions of confidentiality. Most importantly, it preserves the allocation of burdens established by the Nevada Rules of Civil Procedure. The party seeking protection remains responsible for identifying the information requiring protection, establishing the factual basis constituting good cause, and, when necessary, requesting judicial relief before otherwise discoverable information is withheld.

VII. Conclusion

Protective orders will undoubtedly continue to play an important role in Nevada civil litigation. Nothing in this article questions the legitimacy of protecting trade secrets, proprietary business information, medical records, or other genuinely confidential materials, nor does it discourage parties from resolving confidentiality issues through cooperation whenever possible. Rather, the question is one of procedure: how is that protection properly obtained under the Nevada Rules of Civil Procedure?

When NRCP 26(b), 26(c), and 26(g) are read together, the answer is straightforward. The responding party must first conduct a reasonable inquiry, identify the responsive information, determine what legitimately requires protection, and, if necessary, promptly seek relief under NRCP 26(c). The Nevada Rules and the appellate decisions interpreting them consistently place the burden of seeking protection on the party requesting it—not on the party seeking discovery. Stipulated protective orders remain a valuable tool for resolving confidentiality disputes by agreement, but they should complement—not replace—the procedural framework established by the Nevada Rules of Civil Procedure.

The bench and bar share a common interest in the just, speedy, and inexpensive determination of every action. Faithful adherence to procedural framework for protective orders will better protect legitimate confidentiality interests, reduce unnecessary discovery disputes, and promote the efficient administration of justice.

PART 3:

NEW DISCOVERY RELATED LAW SINCE 2021

I. Administrative Order 22-08: Deposition Behavior

The Eighth Judicial District Court's Administrative Order 22-08 (AO 22-08 or Order) Regarding Deposition Behavior was entered on May 9, 2022. This Order establishes mandatory standards governing the conduct of attorneys, parties, and witnesses during depositions in both civil and family division cases. The Order emphasizes that depositions are judicial proceedings that should be conducted in accordance with the Nevada Rules of Civil Procedure, with the same level of professionalism and decorum expected in a courtroom. It emphasized that depositions are truth-seeking proceedings – not tactical contests. AO 22-08 is intended to promote the just, speedy, and inexpensive resolution of cases by encouraging professionalism, cooperation, and compliance with the Nevada Rules of Civil Procedure, while minimizing unnecessary court intervention. AO 22-08, at 1:12-13.

A. Professionalism and Civility

Counsel are required to conduct themselves with professionalism, courtesy, and respect toward opposing counsel, parties, witnesses, court reporters, interpreters, videographers, and all participants. *Id.,* at 1:14-15. The court expressly discourages adversarial tactics that increase costs, delay proceedings, or interfere with the truth-seeking purpose of discovery. Counsel are responsible for self-regulating their conduct and resolving disputes cooperatively whenever possible. Gamesmanship and obstruction are inconsistent with the Nevada Rules of Civil Procedure and violate AO 22-08.

B. Scheduling Depositions

Attorneys have an ethical obligation to cooperate when scheduling depositions. Before serving a deposition notice, counsel should make reasonable efforts to determine the availability of all attorneys and witnesses. *Id.*, at 1:21-22.

A deposition should only be set unilaterally if the opposing party, counsel, or witness fail to respond to a request for a mutually agreeable date. *Id.*, at 1:21-27. When a deposition is unilaterally noticed and a scheduling conflict exists, the affected party must promptly communicate the conflict and provide several reasonable alternative dates. Failure to timely communicate availability or propose alternatives may waive objections to the noticed date. Likewise, attorneys are expected to accommodate reasonable requests to reschedule when doing so does not prejudice a party's rights. When an agreement cannot be reached regarding a new date, the party with a conflict must file a motion for protection – and receive an order of protection – before the date of the deposition. *Id.*, at 2:1-5.

C. Conduct of Depositions

Depositions must proceed as they would at trial. Counsel should conduct examinations as though a judge were present, exercising professionalism, civility, and good-faith cooperation throughout the process. *Id.,* at 2:9-16.

Unless otherwise agreed or ordered:

- Depositions should occur during normal business hours.
- Absent agreement or court order, depositions are generally limited to seven hours of on-the-record testimony.[6]
- Counsel should cooperate regarding allocation of questioning time, particularly in multi-party litigation.
- Additional time should be allowed when fairness, complexity, or the number of parties requires. *Id.,* at 2:18-23 and 3:1-2.

Although in-person depositions remain the default, parties may stipulate—or the court may order—that depositions proceed remotely by telephone or video. *Okada v. Eighth Jud. Dist. Ct.,* 131 Nev. 834, 359 P.3d 1106 (2015). *Id.,* at 3:4-6.

D. Appropriate Examination of Witnesses

Counsel may inquire into any nonprivileged relevant matter that is proportional to the needs of the case. Counsel may not conduct examinations in bad faith or in a manner that harasses, intimidates, embarrasses, or oppresses a witness. Similarly, conduct that impedes, delays, or frustrates the examination must be avoided. *Id.,* at 3:25-28.

Specifically, counsel shall avoid:

- Argumentative or repetitive questioning.
- Mischaracterizing testimony or evidence.
- Interrupting witnesses while an answer is being given. In addition, witnesses should be permitted to answer questions fully before another question is asked.
- Attempting to trick or mislead a witness.
- Any conduct designed to impede the process or obstruct discovery. *Id.,* at 4:2-10.

E. Document Disclosure and Use at Depositions

The Administrative Order strongly reinforces the disclosure requirements of NRCP 16.1 by requiring advance disclosure of documents intended for use during depositions. Document disclosure prior to a deposition must occur to allow opposing counsel adequate time to review and prepare. *Id.*, at 4:12-17.

The Order expressly condemns discovery "gamesmanship," including withholding documents until the deposition to obtain a tactical advantage. Such conduct violates both the discovery rules and ethical obligations and may result in sanctions. In addition,

[6] Breaks for meals, convenience, or recesses do not count toward the seven-hour limit.

all participants are to be provided copies of exhibits that will be referenced during the deposition before examination begins. During remote depositions, exhibits should be electronically distributed in advance, as well as contemporaneously displayed on screen during questioning. Early disclosure is intended to eliminate surprise and promote the fair evaluation of claims and defenses. *Id.*, at 5:18 – 6:12.

The Order also clarifies that NRCP 45 subpoenas may not be used to circumvent the 30-day response period applicable to document requests under the NRCP 34 procedures for obtaining documents from parties. Subpoenas directed to nonparties must comply with Rule 45, including advance notice requirements and procedures governing objections and protective orders. *Id.*, at 6:14-21.

F. Witness Preparation and Conferences

Counsel may prepare a witness before a deposition but may not coach the witness during questioning. A witness generally may not confer privately with his counsel while a question is pending unless necessary to determine whether to assert a privilege. If such a conference occurs, after the break for the conference, counsel must immediately disclose on the record:

- that a conference occurred,
- the subject of the conference, and
- whether a privilege will be asserted.

Discussions beyond privilege may waive the attorney-client privilege concerning those communications. Improper coaching may also result in waiver of privilege and sanctions. *Id.*, at 7:19 – 8:4.

G. Witness Responsibilities

Witnesses are expected to answer questions directly and honestly, avoid evasive or nonresponsive testimony, avoid filibustering or refusing to give reasonable estimates and participate in discovery in good faith. *Id.*, at 8:6-9.

The Order identifies several examples of improper witness conduct, including:

- repeated evasive answers,
- nonresponsive narratives intended to delay questioning,
- feigning lack of knowledge, and
- making argumentative or impertinent comments. *Id.*, at 8:20 – 9:18.

These witness behaviors may be treated as a failure to testify. Expert witnesses and Rule 30(b)(6) corporate representatives are held to the same standards and may face exclusion or other sanctions for noncompliance.

H. NRCP 30(b)(6) Corporate Representative Depositions

The Administrative Order provides detailed guidance regarding NRCP 30(b)(6) entity depositions. The noticing party must identify deposition topics with reasonable particularity. Failure to do so will generally result in an unprepared witness or unnecessary motion practice. *Id.*, at 14 – 17.

The entity receiving a Rule 30(b)(6) notice may object to topics outlined in a Rule 30(b)(6) notice, but the entity must also seek and obtain a protective order from the court before going forward with the deposition. Moreover, the filing *alone* of a motion does not relieve an entity from appearing and testifying at a deposition—that obligation is only relieved by obtaining a protective order. Cooperative, civil counsel will postpone a deposition pending the decision on a motion for protective order unless doing so would adversely affect their client's rights. *Id.*, at 17:12-21.

In response to a NRCP 30(b)((6) deposition, the responding entity must comply as follows:

- designate one or more representatives,
- prepare the witness beyond their personal knowledge,
- gather reasonably available information from documents, employees, former employees, and other available sources, and
- thoroughly educate those representatives to testify on the noticed topics with all information reasonably available to the organization, and
- present witness testimony that is binding upon the entity. *Id.*, at 16:4 – 17:11.

AO 22-08 rejects the concept of producing the "person most knowledgeable" as a legal requirement. Instead, the entity may select any representative so long as that individual is adequately prepared to testify on behalf of the organization. *Id.*, at 15:19 – 16:2.

If a designee cannot answer properly noticed questions, the entity has a continuing obligation to designate an additional prepared representative. Failure to adequately prepare a Rule 30(b)(6) witness may be treated as a failure to appear and may result in exclusion of testimony, additional depositions, monetary sanctions, or other discovery sanctions. *Id.*, at 16:20 – 17:11.

When a designee is asked questions within the witness' knowledge but beyond the scope of the noticed topics, counsel may not instruct the deponent not to answer. However, counsel may then object and note on the record that because the question goes beyond the scope of the notice, the answers will not bind the entity. *Id.*, at 17:22-25.

I. Objections

Objections during depositions should be rare and limited. Most evidentiary objections are preserved for trial and need not be asserted during the deposition. *Id.,* at 9:22 - 27. AO-22-08 significantly limits permissible objections during depositions; they generally include:

- objections to the form of a question,
- assertions of privilege,
- enforcement of court-ordered limitations,
- motions under Rule 30(d)(3), and
- limited objections necessary to preserve issues that would otherwise be waived. *Id.,* at 10:1 - 7.

Form objections must be concise, nonargumentative, and nonsuggestive. They must identify only the specific defect, such as:

- ambiguous,
- vague,
- compound,
- argumentative,
- leading,
- calls for speculation,
- calls for a narrative,
- mischaracterizes prior testimony, or
- mischaracterizes the evidence. *Id.*, at 10:9 – 11:9.

The Order expressly prohibits the following improper objections:

- speaking objections,
- lengthy explanations,
- coaching through objections,
- repeated "string objections,"
- unnecessary commentary,
- suggesting answers,
- interpreting questions for witnesses. *Id.,* at 10:9 – 11:9

Comments such as "if you remember," "don't guess," "you've answered the question," or "he means…" are identified as improper witness coaching. Such statements improperly influence testimony and may warrant sanctions. Counsel should preserve the issue on the record and continue with remaining areas of examination whenever practical. *Id.*, at 11 – 13.

J. Instructing a Witness Not to Answer and Court Intervention

An attorney may instruct a witness not to answer only when necessary to:

1. Preserve a privilege;
2. Enforce a court-ordered limitation; or
3. Present a motion under NRCP 30(d)(3). *Id.*, at 14:1-10.

Even when such an instruction is appropriate, counsel should preserve the objection on the record and continue the deposition on all remaining topics whenever possible before seeking judicial intervention. *Id.,* at 14:1-10.

Court intervention should be rare and occur only after counsel have exhausted reasonable efforts to resolve disputes themselves. Before seeking relief, counsel are expected to:

1. Attempt to resolve disputes professionally.
2. Reference the Administrative Order during the deposition if necessary.
3. Make concise objections on the record.
4. Complete the deposition on undisputed topics before seeking judicial relief whenever possible. *Id.*, at 18:1-24.

Only after meaningful efforts to resolve the issue should counsel contact the discovery commissioner, and only if all parties consent. Any motion alleging improper deposition conduct must provide evidence of a good-faith meet-and-confer effort, including supporting transcripts or other evidence. *Id.*, at 18:25 – 19:19.

K. Sanctions

Violations of the Administrative Order may result in substantial sanctions under NRCP 37, including:

- payment of attorney's fees and costs,
- orders compelling testimony,
- deeming facts established,
- exclusion of evidence,
- striking pleadings,
- staying proceedings,
- dismissal of claims,
- default judgment,
- contempt sanctions, and
- exclusion of expert testimony.

Sanctions may be imposed against the offending attorney, the party, the witness, or any combination thereof. *See*, NRCP 37.

L. Guiding Principle

The Administrative Order reflects the EJDC's expectation that depositions be conducted with professionalism, civility, and cooperation. Attorneys must avoid gamesmanship, witness coaching, obstructionist conduct, and unnecessary objections. The bottom line is that discovery should facilitate the fair exchange of information rather than create tactical advantages. Abusive conduct undermines the judicial process and will not be tolerated. Meaningful compliance with the Nevada Rules of Civil Procedure, combined with good-faith cooperation among counsel, remains the cornerstone of proper deposition practice and will reduce the need for judicial intervention while promoting the efficient resolution of litigation.

II. Case Law Regarding NRCP 35 Physical and Mental Examinations

Rule 35 has been in a state of flux for more than 7 years. In March 2019, the current version of NRCP 35 was enacted. The rule sets forth what is required to obtain an order for a physical and/or mental examination and the procedure for the exam itself.

NRCP 35(a)(1) requires that the Rule 35 exam be governed by an order of the court. This order can be obtained either by stipulation of the parties or by a motion to the court. An order may be granted only upon a showing of "good cause"[7] and must specify who will perform the examination and the "time, place, manner, conditions, and scope of the examination."[8] The examination must be performed by a professional in the judicial district where the case in pending, unless otherwise ordered by the court or agreed by the parties. NRCP 35(b) governs the attendant requirements for the production and contents of the examiner's report.

At its core, the foregoing elements of NRCP 35 are widely understood and seldom disputed. However, two aspects of the rule – recording of the examination and observers at the examination – have created a seesaw of legislation, litigation and caselaw.

NRCP 35(a)(3) provides that upon the request of the party, and for "good cause shown," the court may require that the examination be audio recorded. It further details the procedures for the recording to be obtained. Similarly, NRCP 35(a)(4) addresses observers at the examination and establishes that the examinee may request as a condition of the examination that an observer be present. The rule clarifies that if allowed, the observer may not be the party's attorney or anyone employed by the attorney. It further provides that a party is not allowed to have an observer present for a neuropsychological, psychological, or psychiatric examination, "unless the court orders otherwise for good cause shown." NRCP 35(a)(4)

These provisions in the rule regarding recordings of and observers at the examination led to the Nevada Legislature's enactment of NRS 52.380 in 2019. NRS 52.380 allowed a party's attorney to attend and record all physical and mental medical examinations as a matter of course. Litigation ensued regarding the constitutionality of NRS 52.380. The arguments for and against the validity of the statute centered on whether the rule violated the separation of powers clause and whether the court rule was substantive or procedural. In *Lyft, Inc. v. Eighth Jud. Dist. Ct.,* 137 Nev. Adv. Op. 86, 501 P.3d 994 (2021), the Nevada Supreme Court ruled that court procedure belongs exclusively to the judiciary, meaning the Legislature cannot pass a statute to abrogate an existing court rule, as NRS 52.380 did not "confer any legally recognized

[7] NRCP 35 (a)(2)(A).
[8] NRCP 35 (a)(2)(B).

claim that it creates a substantive right." *Lyft* found NRS 52.380 unconstitutional and NRCP 35 was thereafter the exclusive rule regarding examinations – for a time.

After *Lyft*, the Nevada Legislature took another stab at enacting legislation that would allow recording of and an observer present at all physical and mental examinations. In 2023, the Nevada Legislature enacted NRS 629.620 which purported to create the substantive right of a person examined to have both an observer present and a recording of **any** examination, including neuropsychological, psychological, or psychiatric examinations.

Litigation ensued – again – regarding the constitutionality of NRS 629.630. Again, in *Powers v. Eighth Jud. Dist. Ct.,* 142 Nev. Adv. Op. No. 35 (May 14, 2026), the Nevada Supreme Court ruled that NRCP 35 exclusively controls the procedures for physical and mental examinations. The *Powers* court held NRS 629.620 is unconstitutional to the extent it governs discovery in civil litigation and conflicts with NRCP 35. The *Powers* court reiterated NRCP 35 is a procedural rule and therefore it is exclusively within the judicial branch's purview. The legislature's passage of a law to alter the procedure followed in Rule 35 physical and mental examinations was again found to be unconstitutional. As in *Lyft*, the Nevada Supreme Court struck down the statute – NRS 629.620 – as it violates the separation of powers clause of the Nevada Constitution.

Post *Powers*, the Rule 35 good cause analysis is as follows:

> Special circumstances amounting to good cause are rare and typically include extreme situations, such as:
>
> 1) Where the plaintiff has a long history of serious mental health troubles and demonstrates significant memory loss, such that the court has doubts "as to whether plaintiff [would] be capable of providing any assistance to his attorney in understanding what took place during the examination;"
>
> 2) When the evidence suggests that the physician is abusive and has a predilection for ignoring court-ordered conditions; or
>
> 3) Where serious doubts about the plaintiff's ability to communicate with his counsel about what occurred during the examination exist due to the plaintiff's education level, English language difficulties, and impaired memory and cognitive ability. *Powers*, at 17-18.

The Nevada Supreme Court has now repeatedly struck down legislative attempts to change NRCP 35, declaring the statutes unconstitutional because they violate the separation of powers clause. NRCP 35 prevails and now exclusively controls the procedures for physical and mental examinations in civil cases.

III. Recent “discovery cases” since 2021 version of article:

In addition to some of the cases addressed herein, counsel should be aware of the following Nevada cases addressing discovery that have been authored since the 2021 article:

A. Work Product

In *Sunrise Hosp. v. Eighth Jud. Dist. Ct.,* 140 Nev. Adv. Op. 12, 544 P.3d 241 (2024), the Nevada Supreme Court ruled that under the Patient Safety and Quality Improvement Act of 2005 (PSQIA), 42 USC §§ 299b-21-299b-26, identifiable patient safety work product is privileged from discovery in civil proceedings and the privilege cannot be waived.

B. Informant Privilege – NRS 49.335

The Nevada Supreme Court held in *Las Vegas Review-Journal, Inc. v. Vegas Metro. Police Dep’t*, 139 Nev. Adv. Op. 8, 526 P.3d 724 (2023), the district court abused its discretion by allowing LVMPD to withhold and heavily redact investigative records, emphasizing that informant privilege under NRS 49.335 does not justify blanket nondisclosure. The court affirmed that public records exemptions must be narrowly construed, and a balancing test is required that favors government transparency and accountability over broad confidentiality claims.

C. Crime Fraud Exception – How NRS 49.115(1) applies to NRS 49.095

In, *Seibel v. Eighth Jud. Dist. Ct.*, 138 Nev. Adv. Op. 73 (Nov. 23, 2022), the Nevada Supreme Court ruled that the district court must apply a two-part test to determine whether NRS 49.115(1) applies to NRS 49.095. The party seeking to invoke the crime-fraud exception must satisfy a two-part test by demonstrating by a preponderance of the evidence that: (1) “the client was engaged in or planning a criminal or fraudulent scheme when it sought the advice of counsel to further the scheme” and (2) the attorney-client communications for which production is sought are “sufficiently related to and were made in furtherance of the intended, or present, continuing illegality.”

In *Seibel*, the Nevada Supreme Court found that the district court was proper in ordering that an in-camera review of the privileged document was necessary before it decided whether the crime-fraud exception applied. Additionally, it found that the district court properly granted disclosure of the privileged document in finding that the crime-fraud exception applied and therefore, the *Seibel* court denied the petitioner’s petition for extraordinary relief.

D. Disclosure of psychological test data to counsel

The Nevada Supreme Court addressed a writ of mandamus challenging a district court judge’s order requiring disclosure of raw psychological test data relied upon by an expert witness while conducting a medical examination, in *Davis vs. Eighth Jud. Dist. Ct.,* 142 Nev. Adv. Op. 58 (Aug. 27, 2026). In *Davis*, the plaintiff underwent a neuropsychological evaluation, pursuant to NRCP 35, to address claims of psychological and cognitive harm.

As part of the examination, the examiner conducted neuropsychological testing and prepared a report. Counsel for the plaintiff sought to obtain a copy of the raw data from the examination, including the testing and questions administered to and answers provided by the plaintiff. The examiner objected and asserted that NAC 641.234(3) precluded his disclosure of the raw testing data to the plaintiff's counsel. Counsel for the plaintiff argued without the raw data, his ability to prepare an effective cross-examination of the examining physician would be prejudiced. The district court determined NAC 641.234(3) did not prohibit the disclosure of raw psychological test data and ordered petitioners in *Davis* to produce the data to counsel. The petitioner refused to comply and a writ of mandamus followed.

The *Davis* court rejected the argument that an NRCP medical examiner "was not bound by the requirements of NRCP 16.1 that apply to testifying expert witnesses." *Davis*, 142 Nev. Adv. Op 58, at 10. The Nevada Supreme Court held that the Nevada Administrative Code provision promulgated by the Nevada Board of Psychological Examiners (Board) – that precluded production of the raw testing data – "does not supersede a court's ability to direct discovery." The *Davis* court further concluded that NRS 641.100(2) permitted the Board "to regulate the practice of psychology, but not civil discovery in courts." 142 Nev. Adv. Op 58, at 11.

IV. Conclusion

Discovery continues to evolve, but its underlying principles remain familiar: be prepared, be professional, be proportional, and know the rules before the dispute arises. The developments discussed in this section provide clearer guidance on recurring discovery issues and, when followed, should make discovery more efficient, predictable, and less dependent on court intervention.

PART 4:

Wanna Stay Out of Trouble in Discovery v2.0: *Family Law Edition*

I. Introduction

Five years ago, Discovery Commissioners Erin Lee Truman and Jay Young published *Wanna Stay Out of Trouble in Discovery?*, a practical guide addressing recurring discovery problems in the Eighth Judicial District Court. The article covered a wide range of issues—from meaningful meet-and-confers and proportionality to boilerplate objections, protective orders, attorney's fees, and the authority of the discovery commissioners. It also identified several rules and considerations unique to family-law practice.

There was, however, a practical problem: family-law discovery was only one part of a much broader article. Many family-law practitioners understandably did not view a general civil-discovery article as essential reading, even though many of the principles discussed applied equally in Family Division and several portions were directed specifically to family practitioners.

Five years of Family Division discovery calendars have reinforced the need for a separate discussion.

Family law discovery presents issues that do not always fit neatly within the traditional civil discovery model. Mandatory disclosures under NRCP 16.2 and 16.205 interact with party-initiated discovery. Financial discovery may involve businesses, new spouses, employers, banks, and other nonparties. Custody disputes may implicate children, child safety issues, therapists, medical providers, schools, and intensely private information. Also, the Family Division's meet-and-confer requirements impose specific procedural obligations that must be satisfied before a discovery dispute is presented to the discovery commissioner even when the parties may not get along with each other. Lastly, the timing in Family Court is significantly abbreviated compared to civil cases.

The fundamental principles, however, remain similar.[9] Discovery should proceed without unnecessary court intervention. Discovery must be relevant and proportional. Objections must be specific. Parties must conduct a reasonable inquiry before responding. Counsel must meaningfully meet and confer before filing a discovery motion and when judicial intervention becomes necessary, the court should be

[9] Although NRCP 16.1 does not apply in family law cases, the principles and analysis discussed in Part I remain relevant and instructive in the family law context. For that reason, we chose to include this discussion here rather than repeat it in a separate family law article.

presented with the actual dispute—not asked to reconstruct it from dozens or hundreds of pages of exhibits.

This Family Law Edition therefore returns to the basic premise of the original article, but through a specific family-law lens: most discovery trouble is easier to avoid than to fix. What follows addresses several recurring issues appearing on the Family Discovery calendar and offers practical guidance for keeping those disputes out of trouble—and, when possible, out of court.

II. Start With The Right Rule: Mandatory Disclosures Are Not The Same As Discovery

Family-law practitioners should distinguish between information that must be produced through affirmative mandatory disclosure and information that a party may obtain through traditional party-initiated discovery. The distinction matters because the responding party's obligation may arise from the NRCP themselves, rather than from an interrogatory, request for production, or motion to compel.

NRCP 16.2 (Divorce/Annulment matters) establishes mandatory disclosure obligations in applicable family-law matters. Those obligations are intended to place certain fundamental information into the hands of the parties without requiring them to first engage in formal discovery. NRCP 16.205 (Paternity or Custody matters) establishes additional procedures applicable to matters within its scope. These disclosure obligations operate alongside—not as a substitute for—the broader discovery provisions of the NRCP. Most importantly, it also presupposes that the items listed in 16.2 and 16.205 presumptively meet the scope of permissible discovery pursuant to NRCP 26(b)(1).

These distinctions are important in practice. A party should not ordinarily be forced to serve formal discovery merely to obtain information the opposing party already has an affirmative obligation to disclose. Nor should the failure to make a mandatory disclosure be transformed into a debate over whether a later request for production was perfectly drafted. The first inquiry is whether the information should already have been disclosed.

A. Disclosure Obligations Are Affirmative

As noted in the original article in 2021 and again above in Part 1 above: discovery is designed, to the extent possible, to proceed without court intervention. The 2021 materials described discovery as intended to be “self-executing” and emphasized that judicial intervention should not substitute for counsel performing their obligations under the rules.

That principle has particular force with mandatory family-law disclosures.

The obligation is not:

Produce the information if opposing party/counsel asks the right question.

It is:

Identify and disclose the information the Rule requires you to disclose, affirmatively!

B. Disclosure Is a Continuing Process

Initial disclosure also should not be treated as a one-time event followed by silence. Financial circumstances change. Accounts are opened or closed. Employment changes. New documents become available. Information previously provided may become incomplete or inaccurate. The NRCP contemplate supplementation where required. The parties should therefore think of disclosure as a continuing obligation, not a document-production event that ends when the initial disclosure packet is served.

This becomes especially important in family cases because Family Division matters are often a moving target and the information frequently goes directly to issues the ourt ultimately must decide—income, assets, liabilities, support, property characterization and valuation, and, depending upon the case, issues affecting custody and the best interests of children.

C. Before Filing a Motion, Identify Which Obligation Was Violated

A recurring problem is a motion that generally alleges “discovery violations” without identifying the source of the obligation supposedly violated.

Before filing, ask:

Was this information required by NRCP 16.2? Was it required by NRCP 16.205? Was it requested through formal discovery? Was supplementation required? Or is the moving party actually seeking new information beyond the mandatory disclosure requirements and/or something that has not been requested in formal discovery?

The answer determines both the applicable legal standard and the appropriate remedy.

And it makes the discovery commissioner's job considerably easier.

III. Before You File The Motion: EDCR 5.402 And The Required Discovery Dispute Conference

Perhaps the most significant change for family law discovery practice since the 2021 *Wanna Stay Out of Trouble in Discovery* article is the 2024 amendment to EDCR 5.402.

Specifically, in April 2024, the Nevada Supreme Court adopted substantial amendments to the Eighth Judicial District Court Rules in ADKT 0612, effective June 25, 2024. Among those amendments was a significant revision to the procedure governing family-law discovery disputes. The amended rule was intended to address recurring problems seen on the discovery calendar.

The message to family-law practitioners is straightforward: *the discovery dispute conference is not a procedural speed bump on the way to filing a motion. It is supposed to be the principal mechanism for avoiding the motion.*

A. An Email Exchange Is No Longer a Discovery Dispute Conference

The amended rule therefore provides that the required conference must be conducted by personal, telephonic, or videoconference. EDCR 5.402(d).

Emails remain useful. Parties can—and often should—use them before the conference to identify the disputed requests, exchange proposed compromises, provide authority, or memorialize what occurred. But an exchange of emails, standing alone, does not satisfy EDCR 5.402(d).

That distinction is deliberate.

A discovery dispute conference is intended to involve an actual conversation. Parties should be able to explain why information is needed, why an objection was asserted, whether the request can be narrowed, whether a date range can be shortened, whether a privacy concern can be addressed by redaction or some lesser restriction, and whether some portion of the requested information can be produced even if another portion remains disputed.

In other words: *Email can prepare for the conference. Email can memorialize the conference. Email is not the conference.*

B. "We Met and Conferred" Is Not Enough

The amendment also addresses the quality of the conference.

EDCR 5.402(d) now expressly requires the affidavit accompanying a discovery motion to demonstrate that counsel discussed the disputed issues "with the same level of detail and legal support as is contained in their briefing before the court."

That language matters.

One recurring problem occurs when a party has a brief telephone call before filing the motion, generally identifies the subject of the dispute, declares an impasse, and then—in the motion or opposition—presents detailed factual arguments, proportionality arguments, case authority, privacy objections, privilege claims, or proposed compromises that were never actually discussed during the conference.

That does not accomplish the purpose of the rule.

If an argument is important enough to put in the motion, it ordinarily should have been important enough to discuss during the discovery dispute conference.

The objective is not to preview every sentence that may eventually appear in a brief. The objective is to ensure that the parties have meaningfully discussed the substance of the dispute before asking the court to resolve it.

C. The Affidavit Must Tell The Court What Actually Happened

The affidavit required by EDCR 5.402(d) is likewise not intended to be boilerplate.

The amended rule requires the movant to identify who participated, how they communicated, what efforts were made to resolve the dispute, what was resolved, what remains unresolved, and why. The affidavit must contain enough information for the discovery commissioner to make a preliminary assessment of the “adequacy and sincerity” of the parties' good-faith discussion.

Thus, an affidavit stating only:

“The parties met and conferred in good faith but were unable to resolve the discovery dispute.”

does not tell the discovery commissioner what the rule requires.

Nor does attaching a chain of emails cure the problem if the required personal, telephone, or video conference never occurred.

D. If the Other Side Will Not Confer, Document It

The rule does not permit one party to prevent another from obtaining discovery relief simply by refusing to participate.

Where a conference cannot occur, EDCR 5.402(d) requires the moving party to explain why. And where a responding party has failed to answer discovery, EDCR 5.402(e) requires the motion to identify the good-faith attempts made to obtain compliance. A party's failure, after request, to participate in good faith or to answer discovery may result in an award of reasonable expenses, including attorney's fees, caused by that failure.

E. EDCR 5.402(g): Put the Actual Discovery Dispute in the Motion

The 2024 amendments also corrected another recurring Family Division problem.

The rule now requires that disputes regarding interrogatories, requests for admission, document requests, and applications for protective orders include the verbatim discovery request and the basis for the objection. A motion seeking a further response must likewise set forth the discovery request and the response in full.

This requirement is particularly important in family cases.

A motion should not simply tell the discovery commissioner that *“Respondent has failed to provide discovery concerning marital waste,”* cite to an exhibit containing twenty pages of requests and responses, and leave the discovery commissioner to determine which requests remain disputed.

Likewise:

“Petitioner has refused to provide requested financial information. See Exhibit 4.”

This is not an adequate presentation of a request-by-request discovery dispute.

Put the disputed request in the motion. Put the response in the motion. Identify the objection. Then explain why the response is or is not sufficient.

The discovery commissioner should not have to reconstruct the discovery dispute from exhibits.

Here is an example of how it should look:

REQUEST FOR PRODUCTION NO. 9:

Please produce and identify by bates stamp number copies of any and all your income tax returns for each of the Businesses, including all schedules and worksheets, for tax years 2019 through the present including either form 1120-S or form 1120.

RESPONSE: Please refer to Exhibits A batestamp PLTF 0001-0034 [2021-2022 Tax Returns] from Defendant’s Initial 16.2 Disclosure.

DEFICIENCY: Need tax years 2019 through 2021 and 2021 through 2024.

RELIEF SOUGHT: Order directing Defendant to provide copies of the income tax returns for each of the Businesses, including all schedules and worksheets, for tax years 2019 through the present including either form 1120-S or form 1120.

F. The Motion Should Reflect the Dispute That Remains After the EDCR 5.402 Conference

There is an additional practical consequence of Rule 5.402 that deserves emphasis. *The discovery dispute presented to the discovery commissioner should be the dispute remaining <u>after</u> the meet and confer—not the dispute that existed before it.*

Suppose a motion initially concerns fifteen request for productions. During the conference, the responding party agrees to supplement five; the requesting party withdraws three; the parties agree to narrow four; and only three remain genuinely disputed. The motion should principally concern those three unresolved requests. The parties should make that narrowing apparent in their papers.

G. The Duty to Meet and Confer Continues After the Motion Is Filed

A discovery dispute does not necessarily remain static after a motion to compel is filed. In family law cases, it is common for the responding party to serve supplemental responses, amended objections, additional documents, or entirely new responses after the motion is on file but before the hearing.

When that occurs, the dispute presented to the court has changed.

The original Rule 5.402 conference addressed one set of responses—or, in some instances, the complete absence of responses. If new responses are later served, the parties are now dealing with a materially different discovery dispute. Counsel should therefore conduct a new Rule 5.402 meet and confer directed to the new responses and determine what, if anything, actually remains unresolved or is deficient.

This is not merely a technical requirement. Without an updated conference, the discovery commissioner may arrive at the hearing with a motion describing discovery deficiencies that no longer exist, an opposition addressing responses that were later supplemented, and exhibits that do not reveal which requests remain genuinely disputed. The court is then left to reconstruct the current dispute during oral argument—precisely what EDCR 5.402 is designed to avoid.

The continuing obligation to confer serves an important practical purpose. Suppose a motion to compel alleges that no responses were served to twenty requests for production. Two weeks later, the responding party serves responses to all twenty requests. The original dispute—failure to respond—has effectively been replaced by a new dispute concerning the adequacy of the responses actually served. Perhaps twelve responses are now satisfactory, five can be resolved through clarification or supplementation, and only three remain disputed. The parties should confer again before asking the discovery commissioner to decide those three requests.

Importantly, a subsequent response or production does not necessarily eliminate the issue of attorney's fees. NRCP 37(a)(5) separately addresses expenses incurred in bringing a motion to compel and expressly contemplates circumstances in which the requested discovery is provided only after the motion is filed. Thus, a later production may moot the substantive request for an order compelling production while leaving open the question whether reasonable expenses incurred in bringing the motion should nevertheless be awarded.

The renewed meet-and-confer obligation therefore should not be viewed as giving the responding party a procedural escape from sanctions or expenses potentially available under NRCP 37. Its purpose is different. It ensures that the discovery commissioner knows what remains to be decided on the merits, while preserving any separate question concerning fees arising from the conduct that necessitated the motion in the first place.

Practically, when supplemental responses are served after filing, parties should:

1. promptly review the new responses;
2. identify which issues are now resolved;
3. identify which issues remain disputed;
4. conduct a new Rule 5.402 conference regarding those remaining disputes; and
5. advise the court before the hearing of what portions of the motion are moot and what issues still require decision.

This is a good example of why the meet-and-confer obligation should be understood as a continuing duty throughout the discovery dispute, rather than a one-time prerequisite satisfied on the date the motion is filed.

H. The Rule Applies to Both Sides of the Dispute

Although the moving party bears the obligation to file the Rule 5.402(d) affidavit, the obligation to participate meaningfully in the discovery dispute process is not unilateral.

The responding party should come to the conference prepared to explain the factual and legal basis for its objections and to consider reasonable alternatives. A party should not simply repeat “overbroad,” “burdensome,” “irrelevant,” “private,” or “not proportional” without explaining why.

Likewise, the requesting party should be prepared to explain why the discovery is needed, how it relates to the issues actually in dispute, and why its scope is proportional to the needs of the case.

I. The Practical Rule: No Surprises at the Hearing

If the first time opposing counsel hears the real argument is when reading the motion, the meet and confer probably did not accomplish what Rule 5.402 requires.

If the first time the discovery commissioner can determine which discovery requests are actually disputed is during oral argument, the papers probably do not comply with Rule 5.402(g).

And if the parties have not meaningfully explored whether the dispute can be narrowed before asking the court to decide it, they have missed the principal purpose of the rule.

The goal of EDCR 5.402 is not to create another procedural hurdle before filing a discovery motion. The goal is to make the motion unnecessary whenever reasonably possible—and, when a motion truly is necessary, to ensure that the dispute presented to the discovery commissioner is defined, narrowed, and ready to be decided.

IV. Relevance Is Not Enough: Proportionality in Family-Law Discovery

One of the most persistent misconceptions in discovery practice is that a request should be permitted simply because the information sought is “relevant” or “likely to lead to the discovery of admissible evidence.” That has not been the Nevada standard since the 2019 amendments to NRCP 26(b)(1).

The current NRCP permits discovery regarding nonprivileged matter that is both **relevant to a party's claims or defenses and proportional to the needs of the case.** Those are separate requirements. A discovery request may seek information that has some conceivable relevance and nevertheless exceed the permissible scope of discovery because the request is disproportionate to the actual issues presented.

The distinction is particularly important in family law cases.

Family litigation frequently involves information that is intensely personal, financially sensitive, or expansive in scope. Bank records, credit card statements, tax returns, business records, medical information, therapy records, communications, social media content, and records belonging to third parties may all have some relationship to an issue in the case. But the fact that information bears some relationship to the parties does not answer the Rule 26(b)(1) inquiry.

A. NRCP 26(b)(1)’s Six Factors Matter in Family Court Too

NRCP 26(b)(1) requires consideration of:

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.

The Nevada Court of Appeals emphasized in *Venetian Casino Resort, LLC v. Eighth Jud. Dist. Ct., 136 Nev. 221, (2020)* that a court abuses its discretion when it considers relevance without also addressing proportionality. The original *Wanna Stay Out of Trouble in Discovery?* article discussed *Venetian* in the civil context and cautioned practitioners that discovery must satisfy both inquiries. That same analysis applies in Family cases, but the factors frequently operate differently because of the nature of the claims and information involved.

Factor #1. Importance of the Issues at Stake

Family cases often involve issues of extraordinary importance even when the amount of money in controversy is relatively modest. Custody, relocation, support, characterization of property, tracing of community assets, and allegations concerning dissipation or concealment of property may have consequences far beyond a traditional damages calculation.

This factor like the next one, therefore, should not be reduced to dollars necessarily.

A request for information bearing directly upon the best interests of a child, for example, may carry substantial importance even though no monetary claim is associated with it. Conversely, the emotional importance of a dispute to the parties does not mean that every piece of information relating to the opposing party becomes discoverable.

Factor #2. Amount in Controversy

In financial cases, the amount at issue remains important.

If the dispute concerns whether several million dollars of business interests constitute community property, substantial financial discovery may be proportional. The same scope of discovery may be difficult to justify where the only remaining financial disagreement concerns a relatively small reimbursement claim.

The scope of discovery must bear some reasonable relationship to the economic issue the discovery is intended to resolve.

Factor #3. Relative Access to the Information

This factor is especially significant in family cases.

One spouse may have managed the finances throughout the marriage. One party may control the family business. An account may exist solely in one spouse's name. A party may possess employment, compensation, retirement, or business information unavailable to the other.

But “the other party has it” does not end the analysis. The requesting party must still identify why the information matters and why the requested scope is reasonable.

Factor #4. The Parties' Resources

Family litigation frequently presents significant disparities in resources.

A request that may impose little practical burden on a sophisticated business with established accounting systems may impose a substantial burden on an individual attempting to reconstruct years of personal records. Courts should consider those realities when assessing proportionality, but understand that the rules do not prohibit discovery merely because compliance requires effort.

Factor #5. Importance of the Discovery in Resolving the Issues

This is often the most useful proportionality question:

What will this discovery actually help decide?

Consider a support dispute in which one spouse claims the other is underreporting income from a closely held business. Bank records, general ledgers, distributions, personal expenses paid by the business, and tax information may be central to determining actual income.

Contrast that with a custody dispute in which neither party's finances affect any contested issue. The same extensive business discovery may have little or no importance to resolving what the court must ultimately decide.

The requested discovery must be tied to the issues to be decided by the trier of fact.

Factor #6. Burden or Expense Compared With Likely Benefit

Finally, counsel should consider whether the burden imposed by the request is justified by what the information is likely to add to the issues presented.

A request for every bank statement from every account maintained during a twenty-year marriage may technically encompass relevant information. But if the disputed transaction occurred during a discrete two-year period, requiring production for the entire marriage may add little value while dramatically increasing burden, expense, and collateral privacy concerns.

In deciding what is proportional, one should look to limit:

- the relevant time period;
- discovery to specific identified accounts;
- requests to particular transactions;
- identifying specific entities or businesses; or
- redacting unrelated personal information.

That narrowing should ordinarily occur during the Rule 5.402 conference.

B. Family Discovery Should Follow the Issues, Not the Relationship

Family law cases present a unique danger of overbroad discovery because the parties may have shared years—or decades—of financial, personal, and family history.

That history does not itself define the permissible scope of discovery.

A divorce proceeding is not an automatic license to investigate every aspect of a spouse's financial or personal life. A custody dispute does not make every medical record, text message, social-media post, romantic relationship, or employment record discoverable merely because it concerns one of the parents.

Discovery must remain tied to the **claims and defenses actually to be heard by the district court judge**.

For example, where marital waste is alleged, financial records reasonably calculated to trace the disputed expenditures may be highly significant. But the existence of a waste allegation does not necessarily justify production of every financial transaction made during the marriage.

Likewise, where income is disputed for purposes of support, discovery concerning compensation, distributions, business benefits, and financial accounts may be central. But that does not automatically make every business document or every historical financial record proportional.

The inquiry must remain case-specific.

C. A Practical Example: Relevance Does Not End the Inquiry

An early matter on the Family Discovery calendar illustrates the distinction between relevance and proportionality particularly well. In a divorce proceeding involving children, a subpoena was served on the security desk of the high-rise condominium where the wife resided. The subpoena sought the building's records identifying **every visitor to the wife's residence for the three years preceding the filing of the divorce complaint through the present.**

The request presented an immediate relevance problem. Nevada is a no-fault divorce state, and discovery ordinarily cannot be justified merely by a desire to determine who visited a spouse's residence or whether the spouse may have been involved in another relationship. The existence of a divorce action does not make the details of a spouse's personal life independently discoverable.

Because children were involved, however, the above analysis did not necessarily end the question of relevance. Depending upon the circumstances, the identity or conduct of particular individuals regularly present around a child could conceivably bear upon one or more of the best-interest considerations identified in **NRS 125C.0035**. That potential connection illustrates an important point: a court should be cautious about resolving a discovery dispute merely by declaring information categorically "relevant" or "irrelevant" without considering the actual issues presented.

But even assuming some relevance, the subpoena still had to satisfy **NRCP 26(b)(1)'s proportionality requirement**. A demand identifying every person who visited a parent's residence over a period exceeding three years sweeps far beyond any legitimate need to investigate circumstances bearing upon the children's current best interests. It potentially captures family members, friends, coworkers, service providers, delivery personnel, attorneys, medical providers, romantic partners, and countless other individuals having no connection whatsoever to any issue before the court. It also imposes burdens on a nonparty and intrudes substantially into private activity while offering comparatively little information likely to assist in resolving the custody issues actually presented.

The proportionality inquiry therefore changes the question. It is not simply whether **some visitor information might conceivably relate to the children's best interests**. The question is whether obtaining **the identity of every visitor over more than three years** is proportional to that legitimate discovery need. Those are very different inquiries.

If a party has a good-faith basis to believe that a particular individual residing in or regularly visiting the home presents an issue relevant to the best interests of the children, appropriately tailored discovery may be warranted. The discovery might be limited to an identified person, a particular time period, overnight visitors, or another category reasonably connected to the asserted concern. What proportionality does not permit is using a potentially legitimate, narrow area of inquiry to justify substantially broader discovery into a party's private life.

This example also illustrates why proportionality should be addressed **before** the subpoena is issued. NRCP 26(g)'s reasonable-inquiry requirement applies to the requesting party as well. Counsel should ask before serving discovery: *What issue am I attempting to prove? What information do I actually need to prove it? And can I obtain that information through a materially narrower request?* If those questions are considered at the outset, many disputes that otherwise reach the discovery commissioner can be avoided altogether.

D. What We Want to See

When proportionality is disputed, the briefing should do more than recite the six factors.

The requesting party should explain **why the discovery matters, what issue it will help resolve, and why the requested scope is reasonable.**

The responding party should explain **what burden, expense, privacy concern, or overbreadth actually exists and why a narrower request would adequately serve the legitimate discovery need.**

Where reasonable narrowing is possible, counsel should address it during the EDCR 5.402 conference before presenting the dispute to the discovery commissioner.

The goal is not to produce a mechanical six-factor checklist.

V. Depositions and Other Sensitive Discovery: The *Manner* Matters

A. Rule 30(b)(6) Depositions: Do Not Forget Administrative Order 22-08

Family cases involving closely held businesses, trusts, property-management companies, employers, or other entities may also require an organizational deposition under NRCP 30(b)(6). When they do, practitioners should remember **Administrative Order 22-08**, which establishes procedures governing NRCP 30(b)(6) depositions in the Eighth Judicial District Court.[10]

The central concept is cooperation before the deposition occurs. The noticing party should identify the proposed topics with reasonable particularity, and the parties should meaningfully confer regarding the scope of those topics and any objections before presenting the dispute to the discovery commissioner. A Rule 30(b)(6) notice should not become an invitation to conduct an unlimited examination of an entity simply because the entity is connected to one of the spouses.

B. Protective Orders Should Address the Problem, Not Eliminate Discovery

Where legitimate concerns exist regarding the manner of a deposition, NRCP 26(c) provides substantial flexibility. Depending upon the circumstances, the court may limit subject matter, duration, persons present, or other conditions of the examination. In appropriate cases, the court may consider whether another discovery method would adequately provide the necessary information.

The important distinction is the same one discussed throughout this article: **a legitimate concern about the manner of discovery does not necessarily establish that the discovery should not occur at all.** Counsel should first identify the particular harm, determine whether the information is genuinely needed, and explore whether reasonable conditions can address the concern.

The EDCR 5.402 conference is again critical. Before asking the discovery commissioner to prohibit a deposition entirely, counsel should have meaningfully discussed whether narrowing the topics, limiting the duration, using another source, or imposing

[10] See Part 3 above for a detailed discussion regarding parties specific obligations.

reasonable conditions can accomplish the legitimate discovery objective while minimizing unnecessary burden.

VI. Attorney's Fees Are Not a Required Part of Every Discovery Motion

One recurring feature of the Family Discovery calendar deserves particular attention: **nearly every discovery motion includes a request for attorney's fees and costs, and nearly every opposition responds with a competing request for fees and costs.** Fee requests have become so routine that they sometimes appear to be included as a matter of course rather than as the product of an analysis of whether the circumstances actually warrant an award under the discovery rules.

NRCP 37(a)(5) does not provide that every discovery dispute produces a prevailing party entitled to fees. If a motion to compel is granted—or the requested discovery is provided after the motion is filed—NRCP 37(a)(5)(A) generally requires an award of reasonable expenses, including attorney's fees, **unless** one of the Rule's exceptions applies. Among them, expenses should not be awarded where the movant filed the motion before attempting in good faith to obtain the discovery without court action, where the opposing party's position was substantially justified, or where other circumstances make an award unjust. Where a motion is denied, NRCP 37(a)(5)(B) contains a corresponding provision, and where relief is granted in part and denied in part, NRCP 37(a)(5)(C) permits the court to apportion reasonable expenses.

Those distinctions matter in Family Division cases. A party who prevails on some requests and loses on others has not necessarily established entitlement to all fees incurred in bringing or opposing the motion. Likewise, a party who ultimately produces discovery after a motion is filed does not necessarily avoid fees simply because the substantive dispute has become moot. The question remains **why court intervention became necessary and whether the standards of NRCP 37(a)(5) are satisfied.**

A. Before Asking for Fees, Consider NRCP 26(g)

Fee requests themselves should not become boilerplate. NRCP 26(g) requires an attorney or party signing a discovery motion, objection, or response to certify, after a reasonable inquiry, that the position is consistent with the court rules and existing law or a non-frivolous argument for changing it; is not interposed for an improper purpose; and is neither unreasonable nor unduly burdensome or expensive under the circumstances.

Often the answer will be clear. A party may have ignored discovery, refused to supplement plainly deficient responses, failed to participate in the required discovery conference, maintained an objection without substantial justification, or produced the requested discovery only after the opposing party incurred the expense of filing a motion. In those circumstances, a properly supported fee request may be entirely appropriate.

But the mere existence of a good-faith discovery disagreement does not necessarily justify sanctions. Neither does the fact that one side ultimately persuaded the discovery commissioner. Reasonable lawyers can disagree about relevance, proportionality, privilege, scope, or the application of the discovery rules without every disagreement becoming sanctionable conduct.

Sometimes, however, it’s the cost of litigation and therefore, not sanctionable discovery misconduct.

B. Ask for Fees When the Circumstances Warrant Them

None of this is intended to discourage appropriate requests for attorney's fees. The expense provisions of NRCP 37 serve an important function in enforcing discovery obligations and compensating parties who were unnecessarily required to seek judicial intervention. **When the rule supports an award, counsel should request one. Nothing in this article should be construed to believe that the Discovery Department does not believe that there should be teeth to the court rules when they are not followed – there must!**

However, the point is narrower: **a request for attorney's fees should be a considered request for relief, not a standard closing paragraph**[11] **included in every discovery motion and opposition.** Before requesting fees, counsel should identify the conduct supporting the request, the provision authorizing the award, and why the circumstances satisfy that provision. And before requesting sanctions against opposing counsel or a party, the certification obligations of NRCP 26(g) should be taken seriously.

The discovery commissioner should not begin every hearing with two competing assumptions that somebody must be sanctioned. The better starting point is the one provided by the court rules themselves: **Was the motion necessary? Were the parties' positions substantially justified? Did counsel meaningfully attempt to resolve the dispute? And do the circumstances actually warrant shifting the expense of the dispute from one party to the other?**

That is the analysis NRCP 37(a)(5) requires.

VII. The DCRR: Findings Matter—Protect the Record

The discovery hearing is not necessarily the end of the dispute. In the Family Division, the discovery commissioner issues a Discovery Commissioner’s Report and Recommendation (“DCRR”), which may later be reviewed by the district court judge and, depending upon the posture of the case, become part of the record considered on

[11] Often it is not just a paragraph; as a matter of fact many motions spend more time with pages and pages of boilerplate argument for fees that is substantially longer than the necessary arguments for what discovery is needed and why.

appeal. For that reason, the DCRR should do more than announce who won. It should provide a sufficient record of what was decided and why.

One recurring problem is a proposed DCRR containing detailed procedural history followed by little more than: *"Motion GRANTED," "Motion DENIED,"* or a recitation of what must be produced. That tells the reviewing court the result, but not the findings supporting it. Was the discovery relevant? Was it proportional under NRCP 26(b)(1)? Was an objection unsupported? Was good cause established under NRCP 26(c)? Did a party fail to comply with EDCR 5.402? Was a request narrowed because its original scope was disproportionate? If those determinations formed the basis of the recommendation, the DCRR should say so.

A. To the Winner Go the Spoils—But Accurately

Here is one practical way to think about preparing a proposed DCRR: **to the winner go the spoils.**

If you prevailed because the discovery commissioner accepted your argument that five years of financial records were relevant and proportional to a tracing claim, include that finding. If the discovery commissioner agreed that a request was overbroad because the information sought extended far beyond the period relevant to the disputed transaction, include that reasoning. If good cause for a protective order was established because particular records contained identified confidential information and a specific harm was demonstrated, the proposed DCRR should reflect those findings.

In most cases, the prevailing party has already done much of the work. The argument was developed in the briefing, refined during the Rule 5.402 conference, and presented at the hearing. **When the discovery commissioner adopts that argument, counsel should translate the adopted reasoning into appropriate findings rather than reducing the ruling to a single sentence announcing the result.**

But "to the winner go the spoils" does **not** mean the prevailing party gets to write whatever it wants. A proposed DCRR is not a re-writing of the argument. Do not add findings the discovery commissioner did not make, embellish the ruling, resolve issues that were not decided, or transform comments made during discussion into rulings. The objective is to accurately memorialize the discovery commissioner 's reasoning—not improve upon it after the hearing.

B. Findings Protect the Record

The importance of findings extend beyond drafting preference. **Findings protect the record.**

If a party objects to the DCRR, the district court judge should be able to determine from the recommendation and the hearing record what issue was presented, what standard was applied, what material facts were found, and why the discovery commissioner recommended the particular result. A bare statement that a motion was “granted” or “denied” provides little assistance in reviewing the exercise of discretion.

The same concern may become even more significant later in the case. Discovery rulings frequently involve discretionary determinations concerning relevance, proportionality, burden, good cause, sanctions, privilege, or the appropriate scope of relief. If the record does not disclose the reasoning supporting the determination, meaningful review becomes more difficult.

A useful DCRR therefore should identify, where applicable, the **material findings supporting the recommendation**. It need not become a lengthy judicial opinion. Indeed, brevity is generally preferable. Brevity and an absence of findings are not the same thing.

VIII. Conclusion

We do not expect every discovery dispute to disappear—reasonable people will disagree, and some issues require a ruling. But when parties investigate before taking positions, tailor discovery to the issues, meaningfully confer, narrow disputes whenever possible, and clearly present those that genuinely require judicial resolution, the discovery process works better for the parties, counsel, and the court. That, ultimately, is how we all stay out of trouble in family discovery.