

STATEMENT IN OPPOSITION TO A.B. 285

I, Dane A. Littlefield, hereby provide the following statement in opposition to A.B. 285 to the Nevada Assembly Judiciary Committee.

1. I am an attorney licensed to practice law in the State of Nevada, and a member and current President of the Association of Defense Counsel of Nevada.

2. I am opposed to A.B. 285 for multiple reasons, including the following:

A. A.B. 285 appears to be an attempt to reduce the pool of doctors willing to conduct Nevada Rule of Civil Procedure (“NRCP”) 35 examinations, and thereby create the unfair advantage already addressed by the Nevada Supreme Court and the committee assigned to revise the Nevada Rules of Civil Procedure.

B. A.B. 285 would allow the observer of a Rule 35 examination to be the plaintiff’s attorney or a representative of the attorney. This would lead to unnecessary confrontations with doctors and unnecessary motion practice.

C. A.B. 285 only allows the plaintiff’s attorney or representative to attend a Rule 35 examination. There is no provision for the defendant’s attorney to be present. This creates a situation in which the plaintiff’s attorney has an unfair and perhaps unethical opportunity to engage in direct communications with the doctor selected by defense counsel without defense counsel being present.

D. A.B. 285 would allow the plaintiff’s attorney to make a stenographic recording of the examination, which contemplates the presence of a court reporter. Many doctors would decline to participate in Rule 35

examinations where a lawyer and a court reporter would be present in the examination room. This would create an atmosphere in which many doctors will no longer be willing to participate in Rule 35 examinations, and create an unfair advantage for the plaintiffs' personal injury bar by substantially reducing or perhaps eliminating the defense bar's ability to obtain examinations for the defense.

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

F. A.B. 285 allows the plaintiff's attorney to suspend the exam if the lawyer decides that the doctor was "abusive" or exceeded the scope of the exam. To what extent do actions and/or words within the examination room become "abusive"? This is highly subjective, highly prejudicial, and provides no clear standard for the lawyer to make the highly disruptive decision on whether to suspend the exam. Further, the defendant is burdened with the cost of an examination that may abruptly be suspended for no real reason, other than the plaintiff's attorney's subjective determination.


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

H. A.B. 285 invites a clear and direct violation of constitutional separation of powers. The Nevada Supreme Court has enacted a comprehensive set of rules dealing with discovery, the Nevada Rules of Civil Procedure, which include Rule 35. The Court consistently holds that the Legislature violates separation of powers by enacting procedural statutes which conflict with pre-existing procedural rules or which interfere with the judiciary's authority to manage litigation. If it were to become law, this new statute would directly and inappropriately contradict important parts of the newly amended NRCP 35 and therefore violate the separation of powers doctrine.

3. I respectfully request that this statement be entered into the record.

4. Further, I respectfully request that the Nevada Assembly Judiciary Committee reject the proposed statute.

Executed on this 25th day of March, 2019.


Dane A. Littlefield
President
*Association of Defense Counsel of
Nevada*
Reno, Nevada