

NONPARTY DISCOVERY UNDER RULE 45—SUBPOENAS

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I. SUBPOENA FOR DEPOSITION APPEARANCE OF A NONPARTY²

A. Subpoena to Individual Witness

NRCP 30(a)(1) allows a party to depose “any person” by oral examination. A subpoena is the proper method for a party to compel the attendance of a nonparty at a deposition.³ One must serve a deposition subpoena on a nonparty whether the witness is an individual, an entity’s officer/director/managing agent under Rule 30(b)(1), or a Rule 30(b)(6) designee.⁴ The subpoena must inform the deponent of the date, time, place, and method of recording the deposition testimony.⁵

The issuing party must serve a Notice of Taking of Deposition, together with a copy of the subpoena, on all parties.⁶ Further, if “a subpoena duces tecum is to be served on the deponent, the materials designated for production, as set out in the subpoena, must be listed in the [deposition] notice or in an attachment.”⁷

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² Also referred to by various courts and rules as a third party, third-party, or non-party. We have chosen to use “nonparty,” as that is the term used in the NRCP.

³ *Quinn v. Eighth Jud. Dist. Ct.*, 134 Nev. 25, 410 P.3d 984, 987 (Nev. 2018); *see also Nationstar Mortg., LLC v. Flamingo Trails No. 7 Landscape Maint. Ass’n*, 316 F.R.D. 327, 332–33 (D. Nev. 2016) (citing 8A Wright, Miller, & Marcus, *FEDERAL PRACTICE & PROCEDURE*, § 2107, at p. 507–08 (2010)). Nevada state courts may look to federal decisions interpreting similar federal rules as strong persuasive authority when construing NRCP. *See Moseley v. Eighth Jud. Dist. Ct.*, 124 Nev. 654, 662-63, 188 P.3d 1136, 1142 (2008). This recognition became even more important after the Supreme Court approved the “comprehensive” March 1, 2019 Amendments to the Nevada Rules of Civil Procedure. The 2019 Nevada Rules of Civil Procedure are modeled in large part “on the 2018 version of the Federal Rules of Civil Procedure”. Advisory Committee Note, 2019 Amendments Preface.

⁴ NRCP 45(a)(1)(B).

⁵ *Id.*

⁶ NRCP 30(b).

⁷ NRCP 30(b)(2). For further discussion of subpoenas *duces tecum*, *see* Section III, below.

B. Subpoena to Rule 30(b)(6) Designee⁸

NRCP Rule 30(b)(6) allows the deposition of any “public or private corporation, a partnership, an association, a governmental agency, or other entity.” Because an entity cannot speak for itself, the law requires that the entity designate a spokesperson or spokespersons whose testimony will “represent[] the knowledge of the corporation” and bind the entity by their answers.⁹ Like all other nonparty witnesses, the Rule 30(b)(6) designee’s attendance may be compelled by subpoena.¹⁰

1. Identifying the Topic(s) and the Designee(s)

Rule 30(b)(6) imposes burdens on both the discovering party and the designating party.¹¹ The notice of taking deposition (or subpoena for a nonparty) “must describe with reasonable particularity the matters for examination.”¹² Although there is no limit to either the number or breadth of the topics permitted under Rule 30(b)(6), noticing counsel must be guided by Rule 26(b)(1)’s proportionality factors and by Rule 26(g)’s certification requirement. “The reasonableness of the length and scope of a deposition notice turns on the circumstances of each case.”¹³ Protection is available under Rule 26(c)(1) for notices that are disproportionate to the needs of the case.

Parties who object to the number or description of topics for examination must confer in good faith promptly upon the service of the subpoena or notice to “facilitate[] collaborative efforts to achieve the proportionality goals [of the Rules].”¹⁴ Parties who designate a

⁸ This section is an excerpt from the Eighth Jud. Dist. Ct.’s Administrative Order 22-08, *Administrative Order Regarding Deposition Behavior* (Admin Order 22-08, issued May 9, 2022).

⁹ *Great Am. Ins. Co. of New York v. Vegas Const. Co.*, 251 F.R.D. 534, 538 (D. Nev. 2008) (cleaned up).

¹⁰ NRCP 45(a)(1)(B).

¹¹ *Id.*

¹² NRCP 30(b)(6).

¹³ *Reno v. W. Cab Co.*, Case No. 2:18-cv-00840-APG-NJK, 2020 WL 5902318, at *2 (D. Nev. Aug. 31, 2020).

¹⁴ FRCP 30 Advisory Committee Notes, 2020 Amendments.

disproportional number of topics—including for the purpose of burdening the responding party—may be subject to sanctions.¹⁵

The requesting party must designate the areas of inquiry with “painstaking specificity” such that they reasonably put the entity on notice of the subject matter of anticipated questions, as the entity must educate its designee(s) concerning the noticed topics.¹⁶ Where the responding party cannot identify the outer limits of areas of inquiry, compliant designation and preparation is not feasible; therefore, the notice is not sufficiently specific.¹⁷ Further, the noticed topic areas of inquiry are the “minimum” about which the designated representative must speak, not the “maximum”.¹⁸

2. *The Myth of the “PMK” Deposition*

Some practitioners inaccurately refer to a Rule 30(b)(6) entity deposition as a deposition of the “PMK” or “Person Most Knowledgeable”. There is no such type of deposition recognized under the NRCP *for the purpose of binding the nonparty entity*. Nor is a party entitled to force the entity to produce its “Person Most Knowledgeable” under Rule 30(b)(6).¹⁹ The entity chooses its own designee and is not forced to provide the person with the most personal or first-hand knowledge—the “named organization must then designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf”.²⁰ The entity must only prepare the designee and be willing to be bound by the designee’s testimony.

¹⁵ NRCP 26(g).

¹⁶ *Prokosch v. Catalina Lighting, Inc.*, 193 F.R.D. 633, 638 (D. Minn. 2000).

¹⁷ Wang, Joyce C., Lambrinos, Demetrius, and Murphy, Meredith L., *Speak for Yourself: The 30(b)(6) Deposition*, ABA (Sept. 19, 2019) (citing *McBride v. Medicalodges, Inc.*, 250 F.R.D. 581, 584 (D. Kan. 2008)).

¹⁸ *Crawford v. Franklin Credit Mgmt. Corp.*, 261 F.R.D. 34, 38 (S.D. N.Y. 2009).

¹⁹ If a party learns through interrogatories or another discovery device, for instance, that Ms. Smith is the person at an entity who has the most knowledge about a topic that is relevant and proportional to the needs of the case, the party may take Ms. Smith’s deposition, but her testimony will not bind the entity unless the entity voluntarily produces her as its Rule 30(b)(6) designee.

²⁰ NRCP 30(b)(6).

3. *The Entity's Obligation to Educate and Prepare a Witness*

The designee need not have *personal knowledge* on any topic presented, but the entity has an affirmative duty to “make a conscientious, good-faith effort to designate knowledgeable persons for Rule 30(b)(6) depositions and to prepare them to fully and unequivocally answer questions about the designated subject matter.”²¹ In other words, the entity may name its CEO or its janitor as its designee as long as it fully educates the individual it produces on the topics and is willing to be bound by testimony that “represents the knowledge of the corporation, not of the individual deponents.”²²

The entity is obligated to prepare any designee to testify: 1) beyond matters personally known to the witness or to matters in which the designated witness was personally involved; 2) on matters reasonably known by the responding party; 3) to the extent matters are reasonably available, whether from documents, past employees, past owners, or other sources; and 4) by having the designee review prior fact witness deposition testimony as well as documents and deposition exhibits.²³

Although adequately preparing a witness for a Rule 30(b)(6) deposition can be burdensome, “this is merely the result of the concomitant obligation from the privilege of being able to use the corporate form in order to conduct business.”²⁴ Further, if it becomes apparent during the deposition that the designee is unable to respond to relevant and properly-noticed areas of inquiry, the responding party has a duty to designate an additional knowledgeable deponent. Failure to produce a Rule 30(b)(6) designee who is adequately educated and prepared to testify

²¹ *Great Am. Ins. Co.*, 251 F.R.D. at 538 (internal citations omitted).

²² *Id.* (Rule 30(b)(6) designee binds company regardless of designee's personal knowledge on the subject).

²³ *Id.* (internal citations omitted).

²⁴ *Id.* (internal citations omitted).

on adequately-designated topics is tantamount to a nonappearance which could warrant the imposition of sanctions.²⁵

If an entity designates more than one spokesperson under Rule 30(b)(6), the designees collectively count as one deposition toward the presumptive maximum of ten depositions per side.²⁶ While an entity is at liberty to designate as many spokespersons as it deems necessary, “for purposes of this *durational limit*, the deposition of *each person* designated under Rule 30(b)(6) should be considered a separate deposition.”²⁷ In other words, the deposing party may depose *each* designee for up to 7 hours in 1 day, subject to a protective order where appropriate; however, if multiple persons are designated, it still only counts as one deposition toward the presumptive limit.

4. *Objecting to the Rule 30(b)(6) Notice*

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.²⁸ Moreover, the filing 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.²⁹ 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.

²⁵ *Id.*

²⁶ NRCP 30(a)(2)(A)(1); *see also* FRCP 30(a)(2)(A) Advisory Committee Notes, 1993 Amendments.

²⁷ FRCP 30(b)(6) Advisory Committee Notes, 2000 Amendments (emphasis added).

²⁸ *U.S. E.E.O.C. v. Caesars Entm’t, Inc.*, 237 F.R.D. 428, 436 (D. Nev. 2006) (discussing the circumstances under which a protective order to Rule 30(b)(6) topics may be appropriate); *Beach Mart, Inc. v. L & L Wings, Inc.*, 302 F.R.D. 396, 406 (E.D. N.C. 2014) (the “proper procedure to object to a Rule 30(b)(6) deposition notice is not to serve objections on the opposing party, but to move for a protective order.”).

²⁹ *Nationstar Mortg., LLC v. Flamingo Trails No. 7 Landscape Maint. Ass’n*, 316 F.R.D. 327, 336–37 (D. Nev. 2016) (citing *Pioche Mines Consol., Inc. v. Dolman*, 333 F.2d 257, 269 (9th Cir. 1964) (“unless [the movant] has obtained a court order that postpones or dispenses with his duty to appear, that duty remains”); *see also In re Toys “R” Us—Delaware, Inc. Fair & Accurate Credit Transactions Act (FACTA) Litig.*, No. ML 08–1980 MMM (FMOx), 2010 WL 4942645, at *3 & n. 2 (C.D. Cal. July 29, 2010) (failure to attend deposition was unexcused despite the pendency of a motion for protective order)).

5. Questions Beyond the Scope of the Notice

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.³⁰ 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.³¹

II. Location of Deposition³²

Normally, a deposition will take place in person. Counsel may stipulate, and the court may order for good cause shown, that a deposition "be taken by telephone or other [including video] remote means."³³ Examining counsel may generally set the deposition for an appropriate location of their choosing subject to the court's power to grant a protective order.³⁴

A nonparty's Rule 30(b)(6) designee resides where the corporation has its principal place of business.³⁵ Nevertheless, a witness should not have to travel for a deposition absent good cause.³⁶ The Nevada Supreme Court in *Okada v. Eighth Jud. Dist. Ct.* held that courts must consider "cost, convenience[,] and litigation efficiency" as well as the following five factors when determining whether good cause exists to protect a deponent from having to testify in the location noticed by a party:

- (1) the location of counsel for the parties in the forum district;
- (2) the number of corporate representatives a party is seeking to depose;
- (3) the likelihood of significant discovery disputes arising, which would necessitate resolution by the forum court;
- (4) whether the persons sought to be deposed often engage in travel for business purposes;
- and (5) the equities with regard to the nature of the claim and the parties' relationship.³⁷

³⁰ NRCP 30(c)(2).

³¹ *U.S. E.E.O.C. v. Caesars Ent., Inc.*, 237 F.R.D. 428, 433 (D. Nev. 2006) (internal citations omitted).

³² Excerpted from Admin Order 22-08, at 3:8-23.

³³ NRCP 30(b)(4).

³⁴ *Okada v. Eighth Jud. Dist. Ct.*, 131 Nev. 834, 359 P.3d 1106 (2015) (citing 8A Charles Alan Wright, Arthur R. Miller & Richard L. Marcus, *Federal Practice and Procedure* § 2112 (3d ed. 2010)).

³⁵ *Id.*

³⁶ *Id.*, 359 P.3d at 1111 (citing *Cadent Ltd. v. 3M Unitek Corp.*, 232 F.R.D. 625, 629 (C.D. Cal. 2005)).

³⁷ *Id.*, 359 P.3d at 1112.

III. SUBPOENA *DUCES TECUM*

A. Subpoena *Duces Tecum* Generally

A subpoena requiring the turnover of documents is called a “subpoena *duces tecum*” (“SDT”), which is a Latin phrase meaning “under penalty you shall bring with you”.³⁸ A SDT is a “subpoena ordering the witness to appear . . . and to bring specified documents, records, or things.”³⁹

B. The Scope of Allowable Discovery by Subpoena *Duces Tecum*

Parties sometimes mistakenly issue a SDT to a *party* or attempt to issue interrogatories or requests for production of documents to *nonparties*. These practices are not authorized by the NRCP; the rules are clear that nonparty discovery requests must be made by subpoena, not requests pursuant to NRCP 33 or 34.⁴⁰ Likewise, NRCP 34 does not permit nonparty discovery;⁴¹ NRCP 34(c) expressly provides “(c) **Nonparties.** As provided in Rule 45, a nonparty may be compelled to produce documents, electronically stored information, and tangible things or to permit an inspection.”⁴²

SDTs are authorized by NRCP 45(a)(1)(C)-(D). These rules allow the issuing party to command the nonparty to “produce documents, electronically stored information, or tangible things [and] requires the responding person to permit inspection, copying, testing, or sampling of

³⁸ <https://www.merriam-webster.com/dictionary/subpoena%20duces%20tecum>.

³⁹ Black’s Law Dictionary (10th Ed. 2014).

⁴⁰ *Nevada Gen. Ins. Co. v. Eighth Jud. Dist. Ct.*, No. 73514-COA, 2019 WL 5680909, at *4 (Nev. App. Oct. 31, 2019) (“District court erred by ordering the company to answer interrogatories and requests for production of documents as this type of discovery is limited to parties.”); *see, e.g., Singleton v. Jupiter Communities, LLC*, 2:12-CV-02056-JAD, 2014 WL 251659 (D. Nev. Jan. 22, 2014) (citing *Slama v. City of Madera*, 2001 W.L. 6100511, *2 (E.D. Cal. 2011) (finding Rule 45 subpoena improper because discovery aimed at parties governed by other discovery rules)); 10 Federal Procedures, L. Ed. § 26:85 *Discovery From Nonparties and Representatives of Parties* (internal citations omitted).

⁴¹ *Wassner v. Eighth Jud. Dist. Ct.*, No. 78828-COA, 2019 WL 6247671, at *2 (Nev. App. Nov. 21, 2019).

⁴² *Id.*; *see also* NRCP 34(c) (emphasis in original).

the materials.”⁴³ “[T]he scope of discovery through subpoena is the same as that applicable to Rule 34 and other discovery rules.”⁴⁴ Rule 34(b)(1)(A) requires that a request for production “describe with reasonable particularity each item or category of items to be inspected.”

Rule 45 requires a “party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena.”⁴⁵ Rule 26’s relevance and proportionality factors are equally applicable to Rule 45 subpoenas.⁴⁶ The limits on discovery under Rule 26(b) (which should be narrowly construed when nonparties are the target of discovery)⁴⁷ are weighed against the potential prejudice⁴⁸ and undue burden associated with compliance with the subpoena to the nonparty.⁴⁹

⁴³ NRCP 45(a)(1)(D).

⁴⁴ See FRCP 45(d)(1) Advisory Committee Note, 1970 Amendment (the 1970 amendments “make it clear that the scope of discovery through a subpoena is the same as that applicable to Rule 34 and the other discovery rules.”). See also 9A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure*, § 2459 at p. 42 (2d ed.1995) (scope of discovery through a subpoena is “exceedingly broad” and incorporates the provisions of Rules 26(b) and 34); see also *Hampton v. Steen*, 2014 WL 2949302, at *3 (D. Or. June 27, 2014).

⁴⁵ NRCP 45(c)(1).

⁴⁶ *The Sedona Conference Commentary on Rule 45 Subpoenas to Non-Parties*, 22 SEDONA CONF. J. (2d. Ed. Oct. 2020), <https://thesedonaconference.org/pdf>; see also *Painters Joint Committee v. Employee Painters Trust Health & Welfare Fund*, Case No. 2:10-cv-1385-JCM-PAL, 2011 WL 4573349 at* 5 (D. Nev. Sept. 29, 2011) (“It is well established that the scope of discovery under a subpoena issued pursuant to Rule 45 is the same as the scope of discovery allowed under Rule 26(b)(1)”).

⁴⁷ *Dart Indus. Co., Inc. v. Westwood Chemical Co.*, 649 F.2d 46, 649 (9th Cir. 1980) (although there is a strong policy in favor of liberal discovery, there is potential for abuse in applying that policy to nonparties); *In re Subpoena to Apple, Inc.*, No. 5:14-cv-80139-LHK-PSG, 2014 WL 2798863, *2 (N.D. Cal., June 19, 2014) (“Discovery may be limited to ‘protect third parties from harassment, inconvenience, or disclosure of confidential documents.’” quoting *Dart, supra*); *Edwards v. California Dairies, Inc.*, Case No. 1:14-mc-00007-SAB, 2014 WL 2465934, at *2 (E.D. Cal. June 2, 2014) (“While discovery should not be unnecessarily restricted, discovery is more limited to protect third parties from harassment, inconvenience, or disclosure of confidential documents.” citing *Dart, supra*).

⁴⁸ See *Laxalt v. McClatchy*, 116 F.R.D. 455, 458 (D. Nev. 1986) (“The standards for non-party discovery ... require a stronger showing of relevance than for simple party discovery.”). The rules require courts display sensitivity to the costs imposed on nonparties, protecting them against significant cost. *Watts v. S.E.C.*, 482 F.3d 501, 509, 375 U.S.App.D.C. 409, 417 (D.C. Cir. 2007).

⁴⁹ *Lo v. Fed. Nat. Mortgage Ass’n*, 2:12-CV-01411-GMN, 2013 WL 2558614 (D. Nev. June 10, 2013).

Restrictions must be imposed on nonparty discovery to “protect third parties from harassment, inconvenience, or disclosure of confidential documents.”⁵⁰ Further, if the information sought in a nonparty SDT could be obtained from a party to the litigation, the nonparty should not be burdened with complying with the SDT.⁵¹ This policy of limiting discovery is clearly consistent with NRCP 26(c)(1)’s requirement to obtain discovery from a source that “is more convenient, less burdensome, or less expensive”.

A SDT’s requests must be narrowly tailored to the needs of the case.⁵² The SDT is facially overbroad if it: (1) fails to specify the documents or things sought with appropriate particularity;⁵³ (2) covers an unreasonable time period;⁵⁴ or (3) extends to documents or materials of limited or no relevance or proportionality to the action.⁵⁵

⁵⁰ *F.T.C. v. AMG Servs., Inc.*, 291 F.R.D. 544, 556 (D. Nev. 2013) (citing *Beinin v. Center for Study of Popular Culture*, No. 06–02298, 2007 WL 1795693 (N.D. Cal. June 20, 2007) citing *Dart Indus. Co.*, 649 F.2d at 649 (9th Cir. 1980)).

⁵¹ *G.K. Las Vegas Ltd. Partnership v. Simon Property Group, Inc.*, No. 2:04–cv-01199-DAE-GWF, 2007 WL 119148, at *4-5 (D. Nev. Jan. 9, 2007).

⁵² *Heard v. Costco Wholesale Corp.*, No. 2:19-CV-00673-RFB-DJA, 2020 WL 515841, at *2 (D. Nev. Jan. 31, 2020) (“parties must always carefully tailor a subpoena’s scope, both temporally and substantively, and echoes the current proportionality analysis that the Court is required to conduct.”).

⁵³ FRCP 45(d)(1) Advisory Committee Note, 1970 Amendment (the 1970 amendments “make it clear that the scope of discovery through a subpoena is the same as that applicable to Rule 34 and the other discovery rules.”); NRCP 34(b)(1)(A) (a request for production must “describe with reasonable particularity each item or category or items to be inspected.”); *Cf. Ramsey v. P.F. Chang’s China Bistro, Inc.*, No. 220CV02207KJDJNK, 2021 WL 3604852, at *2 (D. Nev. June 22, 2021) (citing *Ford Motor Co. v. Versata Software, Inc.*, 316 F. Supp. 3d 925, 931-32 (N.D. Tex. 2017) (applying reasonable particularity requirement to third-party discovery); *see also Brown v. Dash*, No. 220CV10676DSFAFMX, 2021 WL 4434978, at *3 (C.D. Cal. July 27, 2021), reconsideration denied, No. 220CV10676DSFAFMX, 2021 WL 4899019 (C.D. Cal. Sept. 1, 2021) (citing *American Reliable Ins. Co. v. RoundPoint Mortgage Serv. Corp.*, 2016 WL 9108032, at *2 (D. Ariz. 2016) (quashing a subpoena for a failure to designate testimony topics with particularity); *Monge v. Maya Magazines, Inc.*, 2010 WL 2776328, at *4 (D. Nev. 2010) (quashing a subpoena for stating the topics of testimony but failing to meet the reasonable particularity standard of Rule 30(b)(6)); *Sec. & Exch. Comm’n v. Laura*, No. 18CIV5075NGGVMS, 2020 WL 5152873, at *2 (E.D.N.Y. Aug. 31, 2020) (citing *Hughes v. Twenty-First Century Fox, Inc.*, 327 F.R.D. 55, 57 (S.D. N.Y. 2018)).

⁵⁴ *Mattel, Inc. v. Walking Mountain Prods.*, 353 F.3d 792, 813 (9th Cir. 2003) (subpoena was properly quashed where it sought testimony and documents regarding topics that had “no bearing” on the claims at issue).

⁵⁵ NRCP 26(c)(1); *see also Sci. Games Corp. v. AGS LLC*, 2017 WL 3013251, at fn. 3 (D. Nev. July 13, 2017) (Koppe, M.J.) (“Because the scope of permissible discovery under Rule 45 parallels the scope of discovery permitted by Rule 26, these proportionality considerations apply to third-party discovery disputes.”); *Williams v. City of Dallas*, 178 F.R.D. 103, 109 (N.D. Tex. 1998) (holding subpoena was overbroad where it was “not limited in time or topic to any issue of consequence to this litigation or to any other litigation”).

C. 7 Day Notice of Intention to Serve Subpoena *Duces Tecum*

NRCP 45(a)(4)(A) requires the party issuing a SDT must provide all other parties with at least 7 days' notice of its intention to serve the SDT on a nonparty. The purpose of the advanced notice is "to permit a party to object to and seek issuance of a protective order against the subpoena during that time."⁵⁶ Until the expiration of the Notice, the nonparty will likely not know of the intention to serve the subpoena.

D. Automatic Stay

A party must serve written objections to the SDT within 7 days of the notice, or the objections are waived as untimely.⁵⁷ NRCP 45(a)(4)(B)(ii) requires that before a party may be protected from the subpoena, "the objecting party **must file and serve written objections** to the subpoena **and a motion** for a protective order under Rule 26(c) **within 7 days** after being served with notice and a copy of the subpoena under Rule 45(a)(4)(A)". Emphasis added. Thus, failure to **both** object within 7 days **and** file a motion within 7 days waives the objections and the right to a protective order. Waiver generally applies even if the objection is as to privilege.⁵⁸

A party's SDT is automatically stayed⁵⁹ *only* where: 1) the party files a timely objection "asserting that the subpoena calls for disclosure of privileged, confidential, or other protected matter";⁶⁰ and 2) the party files a timely motion for a protective order making the same assertion.⁶¹ The best practice is to file a timely objection *with the court*. Sending opposing counsel an email or merely discussing the objection without more does not satisfy the timely

⁵⁶ NRCP 45(a)(4)(A).

⁵⁷ See generally *Ina v. CV Scis., Inc.*, No. 218CV01602JADBNW, 2021 WL 3008994, at *2 (D. Nev. July 14, 2021) (citing *Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468, 1473 (9th Cir. 1992)).

⁵⁸ Cf. *Id.* (citing *Davis v. Fendler*, 650 F.2d 1154, 1160 (9th Cir. 1981) (holding in the context of Rule 33 that a "failure to object" "constitutes waiver of any objection" and "is true even of an objection that the information sought is privileged").

⁵⁹ NRCP 45(a)(4)(B)(iv).

⁶⁰ Rule 45(a)(4)(B)(1); see also NRCP Rule 45(a)(4) Advisory Committee Note, 2019 Amendment.

⁶¹ *Id.*

objection requirement, as the same is not “filed”. Next, the objecting party must file a timely motion for protective order. Wise counsel will file the objection separate from the motion.

The SDT may be served upon the expiration of the 7-day notice period *if*: 1) no party files an objection; 2) the objection filed is not one that entitles the objecting party to an automatic stay; and 3) no protective order is otherwise issued.⁶² If a party files an objection that entitles the party to an automatic stay, the party may nevertheless serve the SDT *only* if it revises the SDT “to eliminate the objected-to commands until the court that issued the subpoena has ruled on the objections and motion.”⁶³

E. Party Objections to Notice of Intention to Serve Subpoena *Duces Tecum*

If timely filed “objections and a motion for protective order not based on privilege, confidentiality or other recognized protection from disclosure such as the work product doctrine” do not automatically stay service of the subpoena; the objecting party in that instance must apply to the court for relief as with any other motion under Rule 26(c).⁶⁴ Absent a stay or protective order, the subpoena may be served on the nonparty.

To comply with NRCP 45(a)(4)(B)(iii), a party’s objection(s) must: 1) specifically state the party’s objection(s) *to each command* to produce documents, electronically stored information, or tangible things; 2) demonstrate (not merely state a conclusion) a basis for asserting that the command will require disclosure of privileged, confidential, or other protected matter; and 3) establish that no exception or waiver applies and that the objecting party is entitled to assert the claim of privilege or other protection against disclosure. If a party’s motion for protective order

⁶² NRCP 45(a)(4)(A) Advisory Committee Note, 2019 Amendment.

⁶³ NRCP 45(a)(4)(B)(i).

⁶⁴ NRCP Rule 45(a)(4)(A) Advisory Committee Note, 2019 Amendments.

fails to address the same matters, the party is not entitled to protection under NRC P 45(a)(4)(B)(iii).

Although there is a lack of Nevada authority on the subject, it is clear that a party lacks standing to object or challenge a subpoena *on behalf* of a nonparty *unless* the party claims a personal right or privilege regarding the documents sought in a subpoena.⁶⁵ For instance, a party may not object on the grounds that the subpoena imposes an improper burden on the nonparty.⁶⁶ A party may object “when it alleges a personal right or privilege with respect to, or has possession of, the materials subpoenaed.”⁶⁷ The party has standing to object where its challenge asserts that the information sought is privileged or protected to *the party* itself.⁶⁸

Although some federal authority suggests a party may not object on the basis of the relevance or proportionality of the information sought by the subpoena,⁶⁹ the 2019 amendments to NRC P urge a different result. Nevada’s 7-day notice provision allows a party to object prior to service of the subpoena. Coupled with Rule 45(a)(4)(B)(v)’s inclusion by reference that both the objections and motion practice are “subject to the provisions of Rules 26(c) and (g) and

⁶⁵ 9A Charles Allen Wright and Arthur R. Miller, *Fed. Prac. & Proc.* § 2459 (2d ed.1995); *Barcelon v. Landforce Corp.*, No. 218CV01493GMNDJA, 2020 WL 2926451, at *2 (D. Nev. June 3, 2020); *IST Tech., LLC v. Rational Enterprises Ltda*, No. 2:06CV-01110-RLH-GWF, 2007 WL 5596692, at *3 (D. Nev. Nov. 13, 2007).

⁶⁶ *G.K. Las Vegas Ltd. P’ship v. Simon Prop. Grp., Inc.*, No. 2:04-CV-01199-DAE, 2007 WL 119148, at *3 (D. Nev. Jan. 9, 2007).

⁶⁷ See *Platinum Air Charters, LLC v. Aviation Ventures, Inc.*, No. 205CV-01451-RCJ-LRL, 2007 WL 121674, at *2 (D. Nev. Jan. 10, 2007) (cleaned up); *First Am. Title Ins. Co. v. Commerce Assocs., LLC*, No. 2:15-CV-832-RFB-VCF, 2017 WL 53704, at *1 (D. Nev. Jan. 3, 2017).

⁶⁸ See *Acosta v. Wellfleet Commc’ns, LLC*, No. 216CV02353GMNGWF, 2017 WL 5180425, at *5 (D. Nev. Nov. 8, 2017) (cleaned up); *Proficio Mortg. Ventures, LLC v. Fed. Sav. Bank*, 2016 WL 1465333, at *3 (D. Nev. Apr. 14, 2016); *Diamond State Ins. Co. v. Rebel Oil Co.*, 157 F.R.D. 691, 695 (D. Nev. 1994) (cleaned up); 9A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2459 (2d ed. 2007).

⁶⁹ See generally *Proficio Mortg. Ventures, LLC v. Fed. Sav. Bank*, No. 2:15-CV-510-RFB-VCF, 2016 WL 1465333, at *2 (D. Nev. Apr. 14, 2016) (citing *G.K. Las Vegas Ltd. P’ship v. Simon Prop. Grp., Inc.*, No. 2:04-CV-01199-DAE, 2007 WL 119148, at *3 (D. Nev. Jan. 9, 2007)).

37(a)(5)”, it appears a party may also object on any grounds that would be appropriate to Rule 26(b)’s scope.

Rule 26(c), of course, outlines that protective orders are available to, among other things, “forbid[] the disclosure or discovery” and to forbid “inquiry into certain matters, or limiting the scope of disclosure or discovery to certain matters”.⁷⁰ Because the scope of permissible discovery by SDT “parallels the scope of discovery permitted by Rule 26, these [relevance and] proportionality considerations apply to third-party discovery disputes”,⁷¹ a party must be allowed to seek a protection under Rule 26(c) from discovery that is not “relevant to any party’s claims or defenses and proportional to the needs of the case”.⁷²

One court suggested a party may “move for a protective order in regard to a subpoena issued to a non-party if it believes its own interest is jeopardized by discovery sought from a third party and has standing under Rule 26(c) to seek a protective order regarding subpoenas issued to non-parties which seek irrelevant information.”⁷³ Since “the scope of discovery through subpoena is the same as that applicable to Rule 34 and other discovery rules,”⁷⁴ every party has an interest in ensuring that discovery outside Rule 26(b)(1)’s approved scope is not allowed.⁷⁵

F. Boilerplate Objections are Inappropriate and Subject an Objecting Party to Sanctions

⁷⁰ NRCPC 26(c)(1)(A) and (D).

⁷¹ *Sci. Games Corp. v. AGS LLC*, 2017 WL 3013251, at fn. 3 (D. Nev. July 13, 2017) (Koppe, M.J.); *Painters Joint Committee v. Employee Painters Trust Health & Welfare Fund*, Case No. 2:10-cv-1385-JCM-PAL, 2011 WL 4573349 at* 5 (D. Nev. Sept. 29, 2011); see also *The Sedona Conference Commentary on Rule 45 Subpoenas to Non-Parties*, 22 SEDONA CONF. J. 13 (2d. Ed. Oct. 2020).

⁷² NRCPC 26(b)(1).

⁷³ *Heyman v. Nevada ex rel. Bd. of Regents of Nevada Sys. of Higher Educ.*, No. 2:15-CV-1228-RFB-GWF, 2018 WL 10323384, at *2 (D. Nev. Apr. 20, 2018) (quoting *G.K. Las Vegas Ltd. P'ship v. Simon Prop. Grp., Inc.*, No. 2:04-CV-01199-DAE, 2007 WL 119148, at *3 (D. Nev. Jan. 9, 2007)); see also *First Am. Title Ins. Co. v. Commerce Assocs., LLC*, 2017 WL 53704, at *1 (D. Nev. Jan. 3, 2017); *Barcelon v. Landforce Corp.*, No. 218CV01493GMNDJA, 2020 WL 2926451, at *1 (D. Nev. June 3, 2020).

⁷⁴ See FRCP 45(d)(1) Advisory Committee Note, 1970 Amendments.

⁷⁵ NRCPC 26(c).

The specificity requirement of objections under NRCP 45(a)(4)(B)(iii) echoes the 2019 NRCP’s prohibition against boilerplate objections found in NRCP 34(b)(2)(B).⁷⁶ Although normally stated in terms of the objections made by the responding party, the requirement to object with particularity applies with equal force to a response to Rule 45 subpoenas.⁷⁷ Objections not stated with specificity are boilerplate.⁷⁸

The word “boilerplate” refers to “trite, hackneyed writing”—an appropriate definition in light of how boilerplate objections are used. An objection to a discovery Request is boilerplate when it merely states the legal grounds for the objection without (1) specifying how the discovery Request is deficient and (2) specifying how the objecting party would be harmed if it were forced to respond to the Request.⁷⁹

Further, the practice of interjecting a boilerplate objection was inappropriate even before it was explicitly prohibited by the most recent amendments to the NRCP. *Olivarez v. Rebel Oil Company, et al.*, Discovery Commissioner Opinion #11 (April, 2003) (“Meeting the burden of asserting a proper discovery objection entails more than the ritual recital of boilerplate verbiage to each discovery Request”);⁸⁰ “Boilerplate and generalized objections are inadequate and tantamount to no objection at all).⁸¹ Because a boilerplate objection fails to meet the specificity

⁷⁶ “For each item or category, the response must . . . state the ground for objecting to the request, with specificity, including the reasons.” See also NRCP 33(b)(4) (“The grounds for objecting to an interrogatory must be stated with specificity.”)

⁷⁷ *The Sedona Conference Commentary on Rule 45 Subpoenas to Non-Parties*, 22 SEDONA CONF. J. 14-15 (2d. Ed. Oct. 2020); *F.T.C. v. AMG Servs., Inc.*, 291 F.R.D. 544, 553 (D. Nev. 2013) (The objecting party must specifically detail the reasons why each request is irrelevant” and may not rely on boilerplate, generalized, conclusory, or speculative arguments.)

⁷⁸ See, e.g., *Fischer v. Forrest*, No. 14 Civ. 01304, 2017 WL 773694 (S.D. N.Y. Feb. 28, 2017) (Any discovery response that does not comply with Rule 34’s requirement to state objections with specificity (and to clearly indicate whether responsive material is being withheld on the basis of objection) will be deemed a waiver of all objections (except as to privilege)).

⁷⁹ Matthew L. Jarvey, *Boilerplate Discovery Objections: How They are Used, Why They are Wrong, and What We Can Do About Them*, 61 Drake L. Rev. 913, 914 (2013) (internal citations omitted).

⁸⁰ See also *Albourn v. Koe, M.D., et al.*, Discovery Commissioner Opinion #10 (November 2001).

⁸¹ *Partner Weekly, LLC v. Viable Mktg. Corp.*, No. 2:09-CV-2120-PMP-VCF, 2014 WL 1577486, at *2 (D. Nev. Apr. 17, 2014) (citing *Walker v. Lakewood Condo. Owners Ass’n*, 186 F.R.D. 584, 587 (C.D. Cal.1999)).

requirement in NRCP 45(a)(4)(B)(iii), like its NRCP 33(b)(4) and 34(b)(2)(B) counterparts, the objection is not a valid objection and is therefore a waiver of the objection.

G. Resisting a Subpoena is Subject to Rules 26(c), 26(g), and 37(a)(5)

NRCP 45(a)(4)(B)(v) subjects both the “objections and motion practice . . . to the provisions of Rules 26(c) and (g) and 37(a)(5).” By subjecting the process to Rule 26(c), it is clear the good faith conference must take place before filing either the objection or the motion. Rule 26(c), of course, concerns motions for protective order. It requires “a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action.”⁸² Because both the objection and the motion must be filed within 7 days in order to invoke the automatic stay, efforts to meet and confer regarding any objection should be made immediately upon notice of the intention to serve the subpoena. The filing of either the objection or the motion without the other will not act to stay service of the SDT.

NRCP 37(a)(5) requires an award of attorney fees for the prevailing party on a motion for protective order as is more fully discussed in Section V(D) *infra* . NRCP 26(g) requires that all counsel certify to the court that their discovery responses, objections, and pleadings are consistent with the rules (including their prohibition against overbroad requests and boilerplate objections) and warranted by law. This certification functions the same as the more-familiar Rule 11 certification—it is automatically made by signing a discovery request, response, or pleading. Further, the rule makes a sanction mandatory when counsel “violates this rule without substantial justification.”⁸³

IV. NONPARTY OBLIGATIONS

⁸² NRCP 26(c)(1).

⁸³ NRCP 26(g)(3).

A nonparty served with a subpoena or SDT has three options: it may “(1) comply with the subpoena, (2) serve an objection on the requesting party in accordance with Rule 45(c)(2)(B), or (3) move to quash or modify the subpoena in accordance with Rule 45(c)(3).”⁸⁴ If a nonparty chooses to comply with the subpoena, the nonparty must either appear at the deposition or, if responding to a SDT, comply with its command to produce documents, ESI, or tangible things.⁸⁵

A. Nonparty Objections

Under NRCP 45(c)(2)(B), a nonparty has 14 days after service within which to object to a subpoena. Failure to timely object generally acts as a waiver of the objections,⁸⁶ even as to objections that the subpoena seeks privileged information.⁸⁷ Upon service of a timely objection, “the party serving the subpoena is not entitled to inspect, copy, test, or sample the materials or tangible things or to inspect the premises except by order of the court that issued the subpoena.”⁸⁸ From that point, the nonparty is not required to produce documents, or even search for them, until the subpoenaing party obtains an order compelling the same.⁸⁹

⁸⁴ *Genx Processors Mauritius Ltd. v. Jackson*, No. 214CV01938APGPAL, 2018 WL 5777485, at *9 (D. Nev. Nov. 2, 2018) (citing *In re Plise*, 506 B.R. 870, 878 (9th Cir. BAP 2014)).

⁸⁵ NRCP 45(a)(1)(D).

⁸⁶ *Forsythe v. Brown*, 281 F.R.D. 577, 587 (D. Nev. 2012), *report and recommendation adopted*, No. 3:10-CV-00716-RCJ, 2012 WL 1833393 (D. Nev. May 18, 2012); *On Demand Direct Response, LLC v. McCart-Pollak*, No. 215CV01576MMDGWF, 2019 WL 1867427, at *1 (D. Nev. Apr. 25, 2019) (citing *Moon v. SCP Pool Corp.*, 232 F.R.D. 633, 636 (C.D. Cal. 2005)); *In re Ex Parte Application of Grupo Mexico SAB de CV*, 2015 WL 12916415, at *3 (citing *Isenberg v. Chase Bank USA*, 661 F. Supp. 2d 627, 629 (N.D. Tex. 2009)) (“The failure to serve written objections to a subpoena within the time specified by [Rule 45(d)(2)(B)] typically constitutes a waiver of such objections.” (quoting *Concord Boat Corp. v. Brunswick Corp.*, 169 F.R.D. 44, 48 (S.D. N.Y. 1996))).

⁸⁷ *Ina v. CV Scis., Inc.*, No. 218CV01602JADBNW, 2021 WL 3008994, at *2 (D. Nev. July 14, 2021) (citing *Davis v. Fendler*, 650 F.2d 1154, 1160 (9th Cir. 1981) (holding in the context of Rule 33 that a “failure to object” “constitutes waiver of any objection” and “is true even of an objection that the information sought is privileged”).

⁸⁸ NRCP 45(c)(2)(B)(i).

⁸⁹ *Forsythe v. Brown*, 281 F.R.D. 577, 587 (D. Nev. 2012) *report and recommendation adopted*, 3:10-CV-00716-RCJ, 2012 WL 1833393 (D. Nev. May 18, 2012); *Pennwalt Corp. v. Durand-Wayland, Inc.*, 708 F.2d 492, at 494 & n. 5 (9th Cir. 1983).

Of course, the nonparty's objection must be stated with specificity. The objecting party must specifically detail the reasons why each request is improper and may not rely on boilerplate, generalized, conclusory, or speculative arguments.⁹⁰ A nonparty who objects that a SDT is unduly burdensome or onerous has the burden of establishing "the manner and extent of the burden and the injurious consequences of insisting upon compliance with the subpoena."⁹¹

Under Rule 45, a nonparty may object that:

1. the subpoena was improperly served;⁹²
2. the issuing party failed to pay a witness appearance fee;⁹³
3. the witness has been required to travel more than 100 miles;⁹⁴
4. the subpoena does not provide a reasonable amount of time within which to respond;⁹⁵
5. the subpoena imposes an undue burden or expense upon the witness without providing for cost-shifting arrangements;⁹⁶
6. the subpoena requires the disclosure of a trade secret, confidential, privileged, or otherwise protected materials.⁹⁷ A nonparty claiming protection under a legal privilege must include a privilege log providing "the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim;"⁹⁸

⁹⁰ *F.T.C. v. AMG Servs., Inc.*, 291 F.R.D. 544, 553 (D. Nev. 2013).

⁹¹ *Lo v. Fed. Nat. Mortgage Ass'n*, 2:12-CV-01411-GMN, 2013 WL 2558614 (D. Nev. June 10, 2013) (citing *Goodman v. United States*, 369 F.2d 166, 169 (9th Cir. 1966); 9A Charles Alan Wright et al., *Federal Practice and Procedure* § 2463.1 (3d ed. 2013)).

⁹² NRCP45(b).

⁹³ NRCP 45(b)(1).

⁹⁴ NRCP 45(c)(3)(A)(ii).

⁹⁵ NRCP 45(c)(3)(A)(i).

⁹⁶ NRCP 26(b)(4)(c) and 45(c)(3)(A)(iv). A nonparty who objects that a SDT is unduly burdensome or onerous has the burden of establishing that "the manner and extent of the burden and the injurious consequences of insisting upon compliance with the subpoena." *Lo v. Fed. Nat. Mortgage Ass'n*, 2:12-CV-01411-GMN, 2013 WL 2558614 (D. Nev. June 10, 2013) (citing *Goodman v. United States*, 369 F.2d 166, 169 (9th Cir.1966); 9A Charles Alan Wright et al., *Federal Practice and Procedure* § 2463.1 (3d ed. 2013)).

⁹⁷ NRCP 45(c)(3) and 45(d)(2); see also *United States v. Fed'n of Physicians & Dentists, Inc.*, 63 F. Supp. 2d 475, 479 (D. Del. 1999).

⁹⁸ NRCP 45(d)(2)(A)(ii).

7. The subpoena is overly broad,⁹⁹ seeks irrelevant information, and is not narrowly tailored to the needs of the case;¹⁰⁰
8. The subpoena places an undue burden on the nonparty by requiring disclosure of information that could be obtained from a party to the litigation or from a party more closely related to the party to the litigation;¹⁰¹
9. The subpoena requires the disclosure of confidential documents,¹⁰² including regarding financial affairs;¹⁰³ and
10. The subpoena is designed to annoy, embarrass, or oppress the nonparty.¹⁰⁴

B. Privilege Log

“A party claiming the attorney-client privilege must prove its applicability... [and] must bear the burden as to specific questions or documents, not by making a blanket claim” (citation

⁹⁹ *Diamond State Ins. Co. v. Rebel Oil Co.*, 157 F.R.D. 691, 695 (D. Nev. 1994) (cleaned up); *Barcelon v. Landforce Corp.*, No. 218CV01493GMNDJA, 2020 WL 2926451, at *2 (D. Nev. June 3, 2020) (quoting *McCall v. State Farm Mut. Auto. Ins. Co.*, 2017 WL 3174914, at *6 (D. Nev. July 26, 2017) (“When a request is overly broad on its face or when relevancy is not readily apparent ... the party seeking discovery has the burden to show the relevancy of the request”).

¹⁰⁰ NRCP 26(b)(1); *Painters Joint Committee v. Employee Painters Trust Health & Welfare Fund*, Case No. 2:10-cv-1385-JCM-PAL, 2011 WL 4573349 at* 5 (D. Nev. Sept. 29, 2011). (“It is well established that the scope of discovery under a subpoena issued pursuant to Rule 45 is the same as the scope of discovery allowed under Rule 26(b)(1)”).

¹⁰¹ The court has an inherent right to limit discovery where it may “be obtained from some other source that is more convenient, less burdensome, or less expensive.” NRCP 26(b)(2)(C)(i); *see also G.K. Las Vegas Ltd. Partnership v. Simon Property Group, Inc.*, No. 2:04-cv-01199-DAE-GWF, 2007 WL 119148, at *4-5 (D. Nev. Jan. 9, 2007). Rule 45 is not the proper procedure to seek discovery more appropriately subject to a request to a party to the litigation pursuant to Rule 34. *See, e.g., Slama v. City of Madera*, 2001 W.L. 6100511, *2 (E.D. Cal. 2011) (finding Rule 45 subpoena improper because discovery aimed at parties governed by other discovery rules) (as cited by *Singleton v. Jupiter Communities, LLC*, 2:12-CV-02056-JAD, 2014 WL 251659 (D. Nev. Jan. 22, 2014)).

¹⁰² *F.T.C. v. AMG Servs., Inc.*, 291 F.R.D. 544, 556 (D. Nev. 2013) (citing *Beinin v. Center for Study of Popular Culture*, No. 06-02298, 2007 WL 1795693 (N.D. Cal. June 20, 2007) *citing Dart Indus. Co.*, 649 F.2d at 649 (9th Cir. 1980)).

¹⁰³ *Rock Bay, LLC v. Dist. Ct.*, 129 Nev. 205, 298 Nev. 441 (2013) (“a nonparty's financial assets are generally protected where “the information sought was critical to the financial health of the non-party's business and was being requested by a direct competitor.”); Due to privacy concerns and the potential for “abuse and harassment,” a defendant's personal financial information can “not be had for the mere asking.” *Cain v. Price*, 134 Nev. 193, 198, 415 P.3d 25, 30 (2018) (quoting *Hetter v. Eighth Jud. Dist. Ct.*, 110 Nev. 513, 520, 874 P.2d 762, 766 (1994) (Subjecting federal income tax returns of our citizens to discovery is sustainable only because the pursuit of justice between litigants outweighs protection of their privacy. But sacrifice of the latter should be kept to the minimum, and this requires scrupulous limitation of discovery to information furthering justice between the parties which, in turn, can only be information of relevancy and materiality to the matters in controversy)).

¹⁰⁴ NRCP 45(a)(2)(B)(v) subjects subpoenas to the protections of NRCP 26(c)(1); *see also Schwartz v. Eighth Jud. Dist. Ct.*, No. 73066, 2017 WL 2951434 at *1 (Nev. App. June 26, 2017) (noting Nevada courts' discretion under NRCP 26 to limit and manage discovery through protective orders).

omitted)).¹⁰⁵ A failure to “identif[y] specific information or documents that [it] believe[s] are protected” precludes protection.¹⁰⁶ Refusal to provide a privilege log may serve as a waiver of any claimed privilege.¹⁰⁷ A proper privilege log provides:

1. the author(s) and their capacities;
2. the recipients (including all parties copied on the communication) and their capacities;
3. other individuals with access to the document and their capacities;
4. the type of document;
5. the subject matter of the document;
6. the purpose(s) for the production of the document;
7. the date on the document;
8. a detailed, specific explanation as to why the document is privileged or otherwise immune from discovery, including a presentation of all factual grounds and legal analyses in a non-conclusory fashion;¹⁰⁸ and
9. Such explanation may require affidavits or other evidence as a supplement to the log.¹⁰⁹

V. MOTION PRACTICE

A. Motion to Quash or Modify

A nonparty may file a motion to quash rather than lodging an objection to a subpoena. Nevada Rules of Civil Procedure require the court “must quash or modify the subpoena” found to subject a nonparty to an “undue burden.”¹¹⁰ Once a nonparty objects or files a motion to quash or modify the SDT, they have no obligation to produce the documents absent court order.¹¹¹ While the NRCP contains no pre-filing requirement that the parties attempt to resolve their discovery

¹⁰⁵ *Superpumper, Inc. v. Leonard, Tr. for Bankr. Est. of Morabito*, 137 Nev. Adv. Op. 43, 495 P.3d 101, 107 (2021) (citing *In re Foster*, 188 F.3d 1259, 1264 (10th Cir. 1999)).

¹⁰⁶ *Id.*

¹⁰⁷ *Bullion Monarch Mining, Inc. v. Newmont USA Ltd.*, 271 F.R.D. 643, 649 (D. Nev. 2010).

¹⁰⁸ *Alboun v. Koe, M.D., et al.*, Discovery Commissioner Opinion #10 (November 2001).

¹⁰⁹ *Id.* (citing *Allendale Mut. Ins. Co. v. Bull Data Systems, Inc.*, 145 F.R.D. 84 (N.D. Ill. 1992)).

¹¹⁰ NRCP 45(c)(3)(A)(iv).

¹¹¹ *Pennwalt Corp. v. Durand-Wayland, Inc.*, 708 F.2d 492, at 494 & n. 5 (9th Cir. 1983)); *see also Forsythe v. Brown*, 281 F.R.D. 577, 587 (D. Nev. 2012) *report and recommendation adopted*, 3:10–CV–00716–RCJ, 2012 WL 1833393 (D. Nev. May 18, 2012).

dispute in good faith before filing a motion to quash, both the Second and Eighth Judicial District Courts do require a certification regarding such efforts. WDCR 12(6); EDCR 2.34.

The rules contemplate both mandatory and permissive motions to quash or modify. A court *must* quash or modify a subpoena on a timely motion if the subpoena: 1) fails to allow reasonable time for compliance; 2) requires a person to travel to a place more than 100 miles from the place where that person resides, is employed, or regularly transacts business in person, unless the person is commanded to attend trial within Nevada; 3) requires disclosure of privileged or other protected matter and no exception or waiver applies; or 4) subjects a person to an undue burden.¹¹²

A court *may* quash or modify a subpoena on a timely motion if the subpoena requires disclosing: 1) a trade secret or other confidential research, development, or commercial information; or 2) an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party.¹¹³

A nonparty who objects that a SDT is unduly burdensome or onerous has the burden of establishing "the manner and extent of the burden and the injurious consequences of insisting upon compliance with the subpoena."¹¹⁴ The party resisting discovery carries the heavy burden of showing why discovery should be denied.¹¹⁵ Once the objecting party makes its showing of the undue burden, the court must weigh the burden placed on the subpoenaed party against the prejudice that would be endured by the requesting party.¹¹⁶

¹¹² NRC 45(A)(3)(A).

¹¹³ NRC 45(A)(3)(B).

¹¹⁴ *Lo v. Fed. Nat. Mortgage Ass'n*, 2:12-CV-01411-GMN, 2013 WL 2558614 (D. Nev. June 10, 2013) (citing *Goodman v. United States*, 369 F.2d 166, 169 (9th Cir. 1966); 9A Charles Alan Wright et al., *Federal Practice and Procedure* § 2463.1 (3d ed. 2013)).

¹¹⁵ *NML Capital Ltd. v. Republic of Argentina*, No. 2:14-CV-492-RFB-VCF, 2014 WL 3898021, at *6 (D. Nev. Aug. 11, 2014).

¹¹⁶ *Id.* (citing *Moon v. SCP Pool Corp.*, 232 F.R.D. 633, 637 (C.D. Cal. 2005)).

Should the court require disclosure despite an undue burden, it must cause the party issuing the subpoena to bear the burden of the cost of the disclosure. Cases interpreting the federal rules suggest the language of NRCP 45(c)(1) makes cost shifting mandatory.¹¹⁷ Courts have utilized a six-factor test when determining if an undue burden exists: “(1) relevance of the information requested;¹¹⁸ (2) the need of the party for the documents; (3) the breadth of the discovery request; (4) the time period covered by the request; (5) the particularity with which the party describes the requested documents; and (6) the burden imposed.”¹¹⁹ If the documents requested are not relevant, “then *any burden whatsoever* imposed... [is] by definition ‘undue.’”¹²⁰

Once the court makes a finding the request is burdensome, it must cause the requesting party to bear the cost until the same is “non-significant.” In fact, the court should focus its inquiry not on how burdensome the compliance is, but only on how costly it is. To do otherwise would be to err.¹²¹ Many federal authorities suggest that although a party has no standing to object to relevance on a motion to quash, it nevertheless has standing to make that argument on a motion for protective order.¹²²

B. Motion to Compel

¹¹⁷ See *Legal Voice v. Stormans Inc.*, 738 F.3d 1178, 1184 (9th Cir. 2013) (citing *Linder v. Calero–Portocarrero*, 251 F.3d 178 (D.C. Cir. 2001) (“the [1991] amendment made cost shifting mandatory in all instances in which a non-party incurs significant expense from compliance with a subpoena.”)).

¹¹⁸ *Playstudios, Inc. v. Centerboard Advisors, Inc.*, No. 218CV01423JCMNJK, 2019 WL 8128168, at *2 (D. Nev. July 18, 2019), *adhered to on denial of reconsideration*, No. 218CV1423JCMNJK, 2019 WL 6493926 (D. Nev. Dec. 3, 2019) (“courts have incorporated relevance as a factor when determining motions to quash a subpoena, particularly when considering whether there is an undue burden.” *Bird v. PSC Holdings I, LLC*, 2013 WL 12108107, at *1 (S. D. Cal. Nov. 20, 2013)).

¹¹⁹ *Precourt v. Fairbank Reconstruction Corp.*, 280 F.R.D. 462, 467 (D. S.D. 2011) (citation omitted).

¹²⁰ *Compaq Computer Corp. v. Packard Bell Elecs.*, 163 F.R.D. 329, 335-36 (N.D. Cal. 1995).

¹²¹ *Id.*

¹²² See generally *Heyman v. Nevada ex rel. Bd. of Regents of Nevada Sys. of Higher Educ.*, No. 2:15-CV-1228-RFB-GWF, 2018 WL 10323384, at *2 (D. Nev. Apr. 20, 2018) (citing *G.K. Las Vegas Ltd. Partnership v. Simon Property Group, Inc.*, 2007 WL 119148 at* 4 (D. Nev. Jan. 9, 2007)).

A motion to compel pursuant to Rule 37 is the proper vehicle to enforce compliance when a nonparty fails to provide discovery and produce documents in response to a Rule 45 subpoena.¹²³ Rule 37(a)(3)(C) addresses motions to compel related to various discovery matters, including specific motions related to a party's failure to produce documents. Therefore, an essential prerequisite of a motion to compel is a "preexisting" request for production – in the case of a nonparty – a subpoena.¹²⁴

A motion for an order compelling discovery from a nonparty must be made in the court where the discovery is or will be taken.¹²⁵ The motion to compel "must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without court action."¹²⁶ The "party resisting discovery bears the burden" of showing why the discovery should be denied¹²⁷

C. Motion for Protective Order

As discussed in Section III(G), *supra*, Rule 45(a)(4)(B)(v) incorporates "the provisions of Rules 26(c) and (g) and 37(a)(5)" when objecting to a subpoena or filing a motion for protection from the same. As with other discovery disputes, Rule 26(c) requires that *prior* to filing a motion for protective order, a good faith conference – attempting to resolve the discovery dispute – must be held.¹²⁸ When the parties cannot agree to a voluntary limitation, a motion for protective order may be sought. Just like a motion to compel, a motion for protective order under NRC 26(c)

¹²³ See *Okada v. Eighth Jud. Dist. Ct.*, 408 P.3d 566, 571 (Nev. 2018); see also *Jamison v. State Farm Gen. Ins. Co.*, 2020 WL 6151082, at *2 (C.D. Cal. Sept. 3, 2020).

¹²⁴ *Okada v. Dist. Ct.*, 408 P.3d 566, 571 (Nev. 2018).

¹²⁵ NRC 37(a)(2); see also *La Fosse v. WinCo Foods, LLC*, 2021 WL 4557207, at *2 (D. Idaho Oct. 4, 2021), at *1 (recognizing that "the authority to decide a motion to compel arising out of [a Rule 45 subpoena] is vested with the court where compliance is required").

¹²⁶ NRC 37(a)(1).

¹²⁷ *Painters Joint Comm. v. Emp. Painters Trust Health & Welfare Fund*, 2011 WL 4573349, at * 5 (D. Nev. 2011), modified on other grounds, 2011 WL 5854714 (D. Nev. 2011).

¹²⁸ NRC Rule 26(c).

must be sought from the court where the action is pending – “or as an alternative on matters relating to an out-of-state deposition, in the court for the judicial district where the deposition will be taken.”¹²⁹

The motion must contain “a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action.”¹³⁰ When this condition precedent has been satisfied, the court is authorized under NRCP 26(b)(2)(C) to enter an order controlling a party’s attempt to seek discovery.

Pursuant to NRCP 26(c)(1), the court may for good cause shown, protect any “party or person from annoyance, embarrassment, oppression, or undue burden or expense.”¹³¹ The court’s order may protect by any or all of the following:

1. forbidding the disclosure or discovery;
2. specifying terms, including time and place or the allocation of expenses, for the disclosure or discovery;
3. prescribing a discovery method other than the one selected by the party seeking discovery;
4. forbidding inquiry into certain matters, or limiting the scope of disclosure or discovery to certain matters;
5. designating the persons who may be present while the discovery is conducted;
6. requiring that a deposition be sealed and opened only on court order;
7. requiring that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way; and
8. requiring that the parties simultaneously file specified documents or information in sealed envelopes, to be opened as the court directs.¹³²

It is a well-settled principle of law that the party resisting discovery carries the heavy burden of showing why discovery should be denied.¹³³ Rule 26(b)(1)’s proportionality limitations also

¹²⁹ NRCP 26(c)(1).

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² NRCP 26(c)(1)(A)-(H).

¹³³ *NML Capital Ltd. v. Rep. of Argentina*, No. 2:14-CV-492-RFB-VCF, 2014 WL 3898021, at *6 (D. Nev. Aug. 11, 2014) (citing *Blankenship v. Hearst Corp.*, 519 F.2d 418, 429 (9th Cir. 1975)). “It is ... well established that the party [objecting to a subpoena] bears the burden of showing why a discovery request should be denied.” *Paws Up Ranch, LLC v. Green*, No. 2:12-CV-01547-GMN, 2013 WL 6184940, at *2

apply equally to subpoenas to nonparties. A nonparty must specifically articulate the basis for its objection to the discovery sought and “may not rely on boilerplate, generalized, conclusory, or speculative arguments.”¹³⁴ Concern for the unwanted burden thrust upon a nonparty is a factor entitled to special weight in evaluating the balance of competing needs.¹³⁵

Rule 45(c)(1) also requires parties issuing a subpoena to “take reasonable steps to avoid imposing an undue burden or expense on a person subject to the subpoena.”¹³⁶ Additionally, Rule 45(c)(2)(B)(iii) requires an order protecting a person “from significant expense resulting from compliance.”¹³⁷ Courts evaluating an undue burden challenge require an evidentiary basis to limit the subpoena. This requires that the responding nonparty must state specific facts which demonstrate how and why the discovery sought is burdensome or otherwise objectionable; this showing typically requires an affidavit or other competent evidence.¹³⁸ When the resisting nonparty fails to meet this burden, protection should be denied and the discovery allowed.¹³⁹

The nonparty seeking to avoid the discovery must further demonstrate good cause for the protection sought.¹⁴⁰ In *Venetian Casino Resort, LLC v. Eighth Jud. Dist. Ct.*,¹⁴¹ the Nevada Court of Appeals outlined the analysis required for a court to determine whether **good cause** for a protective order under NRCP 26(c)(1) exists. In *Venetian*, the Nevada Court of Appeals held

(D. Nev. Nov. 22, 2013) (quoting *Painters Joint Comm. v. Emp. Painters Trust Health & Welfare Fund*, 2011 WL 4573349, at *5 (D. Nev. Sept. 29, 2011) (citing *Blankenship v. Hearst Corp.*, 519 F.2d 418, 429 (9th Cir. 1975)).

¹³⁴ *Big City Dynasty v. FP Holdings, L.P.*, 336 F.R.D. 507, 510 (D. Nev. 2020) (citing *F.T.C. v. AMG Servs., Inc.*, 291 F.R.D. 544, 553 (D. Nev. 2013). “The party resisting discovery must specifically detail the reasons why each request is irrelevant or otherwise objectionable, and “may not rely on boilerplate, generalized, conclusory, or speculative arguments.”

¹³⁵ *Cusumano v. Microsoft Corp.*, 162 F.3d 708, 717 (1st Cir. 1998).

¹³⁶ NRCP 45(d)(1).

¹³⁷ NRCP 45(c)(2)(B)(iii).

¹³⁸ *Collins v. Landry's Inc.*, 2014 WL 2770702, at *3 (D. Nev. June 17, 2014) (citing *Jackson v. Montgomery Ward & Co., Inc.*, 173 F.R.D. 524 (D. Nev. 1997) (citations omitted); *Cory v. Aztec Steel Bldg., Inc.*, 225 F.R.D. 667, 672 (D. Kan. 2005)).

¹³⁹ *Id.*

¹⁴⁰ *Venetian Casino Resort, LLC v. Eighth Jud. Dist. Ct.*, 136 Nev. Adv. Op. 26 (2020).

¹⁴¹ *Id.*

the district court abused its discretion when it determined that it had no legal basis to protect the Venetian’s guests’ information without first considering whether the Venetian demonstrated good cause for a protective order based on the individual circumstances presented.¹⁴²

The Nevada Court of Appeals adopted the Ninth Circuit’s three-part test for conducting a good-cause analysis under FRCP 26(c).¹⁴³ This test is as follows:

1. First, the district court must determine if particularized harm would occur due to public disclosure of the information sought.
2. Second, if the district court concludes that particularized harm would result, then it must balance the public and private interests to decide whether a protective order is necessary.
3. Third, even if the factors balance in favor of protecting the discovery material, “a court must still consider whether redacting portions of the discovery material will nevertheless allow disclosure.”¹⁴⁴

The Ninth Circuit has directed federal district courts to utilize the factors set forth in *Glenmede Trust Co. v. Thompson*¹⁴⁵ to help them balance the private and public interests. *Glenmede* sets forth the following non-mandatory and non-exhaustive list of factors for courts to consider when determining if good cause exists:

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

¹⁴² *Venetian Casino Resort, LLC v. Eighth Jud. Dist. Ct.*, 136 Nev. Adv. Op. 26 (2020).

¹⁴³ *In re Roman Catholic Archbishop of Portland in Or.*, 661 F.3d 417, 424 (9th Cir. 2011).

¹⁴⁴ *In re Roman Catholic Archbishop of Portland in Or.*, 661 F.3d at 425 (9th Cir. 2011).

¹⁴⁵ *Glenmede Trust Co. v. Thompson*, 56 F.3d 476, 483 (3d Cir. 1995).

6. whether a party benefitting from the order of confidentiality is a public entity or official; and
7. whether the case involves issues important to the public.

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

D. Motion for Attorneys' Fees

NRCP 37(a)(5) governs the granting of awards of expenses – including attorneys' fees – following discovery disputes. Following a successful motion for a protective order brought under Rule 26(c), a motion to compel brought under Rule 45(c)(2)(B), or a motion to quash or modify the subpoena brought under Rule 45(c)(3), the prevailing party may seek reasonable attorneys' fees incurred in making or opposing the motion.¹⁴⁶ Rule 37(a)(5)(A) specifically states that following a successful motion, “the court must, after giving an opportunity to be heard, require the party or deponent whose conduct necessitated the motion, . . . to pay the movant's reasonable expenses incurred in making the motion, including attorney's fees.”¹⁴⁷

An award of expenses is inappropriate if: (1) the movant filed the motion before attempting in good faith to obtain the disclosure or discovery without court action; (2) the opposing party's non-disclosure, response, or objection was substantially justified; or (3) other circumstances

¹⁴⁶ NRCP 45(e).

¹⁴⁷ NRCP 37(a)(5)(A).

make an award of expenses unjust.¹⁴⁸ The burden is on the losing party to affirmatively demonstrate that its discovery conduct was substantially justified.¹⁴⁹ Discovery conduct is ‘substantially justified if it is a response to a ‘genuine dispute or if reasonable people could differ as to the appropriateness of the contested action.’”¹⁵⁰

The Supreme Court has made it clear that NRCP 37(a)(5)(A) *requires* the court award expenses to a party who succeeds on its motion to compel discovery unless an exception applies.¹⁵¹ Discovery conduct is “substantially justified” if it is a response to a genuine dispute or if reasonable people could differ as to the appropriateness of the contested action.¹⁵²

An award of attorney fees and costs will not be disturbed absent an abuse of discretion.¹⁵³ Most reported cases that reverse such an award do so because the district court lacked an evidentiary basis for making a finding that the fees or costs were justified. This result is completely avoidable if the movant presents competent evidence introduced by sworn testimony. If the movant attempts to introduce evidence in some other way, the order is subject to reversal. The goal for the moving party should be to allow the court to grant a durable, enforceable order. Failing to adhere to the requirements below removes the court’s ability to issue an order granting requested fees and costs.

1. The Standard for Granting a Request for Fees

¹⁴⁸ NRCP 37(a)(5).

¹⁴⁹ NRCP 37(a)(5)(ii).

¹⁵⁰ *Pierce v. Underwood*, 487 U.S. 552, 565 (1988).

¹⁵¹ *Hines v. Nat’l Default Servicing Corp.*, 131 Nev. 1291 (2015).

¹⁵² *Barren v. Robinson*, 2014 U.S. Dist. LEXIS 196333, at *2-3 (D. Nev. July 16, 2014) (citing *Garity v Donahoe*, 2014 U.S. Dist. LEXIS 37465, *3 (D. Nev.)).

¹⁵³ *MEI-GSR Holdings, LLC v. Peppermill Casinos, Inc.*, 134 Nev. 235, 416 P.3d 249, 255 (2018) (quoting *Okada v. Eighth Jud. Dist. Ct.*, 131 Nev. 834, 359 P.3d 1106, 1110 (2015)); *Prestige of Beverly Hills, Inc. v. Weber*, 128 Nev. 927, 381 P.3d 652 (2012) (absent clear abuse of discretion, the supreme court will not disturb a district court’s management of discovery); *Harrison v. Harrison*, 385 P.3d 52 (Nev. 2016); *Chipman v. Burton*, 127 Nev. 1125, 373 P.3d 903 (2011); *Foster v. Dingwall*, 126 Nev. 56, 65, 227 P.3d 1042, 1048 (2010); *Banks v. Sunrise Hosp.*, 120 Nev. 822, 830, 102 P.3d 52, 58 (2004).

A court may not award attorney fees or costs unless authorized to do so by a statute, rule, or contract.¹⁵⁴ In the context of discovery disputes, fees may be awarded following a successful motion protective order, motion to compel or motion to quash, pursuant to Rule 37(a)(5), Rule 26(c)(3), Rule(c)(2)(B) and Rule 45(c)(3). Once a court has determined that the movant is entitled to an award of fees, the court next turns its attention to the amount of the award. The court has great discretion regarding its decision to award fees and regarding the amount of fees granted. The court's discretion is "tempered only by reason and fairness."¹⁵⁵

The Nevada Supreme Court in *Brunzell v. Golden Gate National Bank*,¹⁵⁶ gave guidance on how a court is to determine the reasonable value of the work performed by a movant's counsel.¹⁵⁷ *Brunzell* and its progeny direct courts to consider the following when determining a reasonable amount of attorney fees to award:

(1) the qualities of the advocate: his ability, his training, education, experience, professional standing and skill; (2) the character of the work to be done: its difficulty, its intricacy, its importance, time and skill required, the responsibility imposed and the prominence and character of the parties where they affect the importance of the litigation; (3) the work actually performed by the lawyer: the skill, time and attention given to the work; (4) the result: whether the attorney was successful and what benefits were derived.¹⁵⁸

The court can follow any rational method so long as it applies the *Brunzell* factors; it is not confined to authorizing an award of attorney fees exclusively from billing records or hourly

¹⁵⁴ *U.S. Design & Const. Corp. v. Int'l Bhd. of Elec. Workers*, 118 Nev. 458, 462, 50 P.3d 170, 173 (2002). In this context, attorney's fees may be awarded pursuant Rule 26(c)(3), 37(a)(5) and/or 45(e).

¹⁵⁵ *Albios v. Horizon Communities, Inc.*, 122 Nev. 409, 427, 132 P.3d 1022, 1034 (2006) (quoting *Univ. of Nevada v. Tarkanian*, 110 Nev. 581, 591, 879 P.2d 1180, 1186 (1994)).

¹⁵⁶ 85 Nev. 345, 349–50, 455 P.2d 31, 33 (1969).

¹⁵⁷ The court must determine the reasonable rates for all persons for whose time a party seeks reimbursement, including partners, associates, paralegals, and law clerks, etc. See *LVMPD v. Yeghiazarian*, 129 Nev. 760, 770, 312 P.3d 503, 510 (2013).

¹⁵⁸ *Id.* (internal quotation marks omitted).

statements.¹⁵⁹ Although the court must “expressly analyze each factor”, no single factor should be given undue weight.¹⁶⁰

After determining the reasonable value of an attorney’s services by analyzing the factors established in *Brunzell*, the court must then provide sufficient reasoning and findings concerning those factors in its order.¹⁶¹ The court’s decision must be supported by “substantial evidence.”¹⁶² Substantial evidence supporting a request for fees *must be presented* to the court by “affidavits, unsworn declarations under penalty of perjury, depositions, answers to interrogatories, [or] admissions on file”.¹⁶³ Sworn statements submitted pursuant to EDCR 2.21(a) must be sufficient to satisfy NRCPC 56(e).¹⁶⁴ Unsworn statements of counsel and conclusory statements in pleadings not otherwise presented in compliance with EDCR 2.21(a) may not be considered by the court.

Some practitioners are confused as to the standard against which their “substantial evidence” will be measured. “Affidavits/declarations must contain only factual, evidentiary matter, conform to the requirements of NRCPC 56(e), and avoid mere general conclusions or argument.”¹⁶⁵ Rule 56(e) requires “[s]upporting and opposing affidavits shall be made on *personal knowledge*, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.”¹⁶⁶

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

¹⁵⁹*Logan v. Abe*, 131 Nev. 260, 266, 350 P.3d 1139, 1143 (2015); *Shuette v. Beazer Homes Holdings Corp.*, 121 Nev. 837, 864, 124 P.3d 530, 549 (2005) (approving awards based on a “lodestar” amount, as well as a contingency fee arrangement).

¹⁶⁰*Logan v. Abe*, 131 Nev. 260, 266, 350 P.3d 1139, 1143 (2015); *Brunzell*, 85 Nev. at 349-50, 455 P.2d at 33.

¹⁶¹*Shuette v. Beazer Homes Holdings Corp.*, 121 Nev. 837, 865, 124 P.3d 530, 549 (2005).

¹⁶²*Logan v. Abe*, 131 Nev. 260, 266, 350 P.3d 1139, 1143 (2015).

¹⁶³ EDCR 2.21(a).

¹⁶⁴ EDCR 2.21(c).

¹⁶⁵*Id.*

¹⁶⁶NRCPC 56(e) (emphasis added).

knowledge.¹⁶⁷ A witness is only competent to testify to a fact if there is evidence that she has *personal knowledge* of the matter.¹⁶⁸ A person only has personal knowledge of a fact that she has “personally observed.”¹⁶⁹

By incorporating the Rule 56(e) standard, the Rule’s authors and the courts distinguish circumstances where facts are presented in motions before the court only by personal knowledge with other circumstances where one may testify based on belief.¹⁷⁰ Testimony or argument about one’s belief, without personal knowledge, is insufficient under the Rule 56(e) standard and is therefore insufficient to qualify under the Nevada meet and confer reporting standard.¹⁷¹ In fact, “a district court’s reliance upon an affidavit which does not comply with [Rule 56(e)] may constitute reversible error.”¹⁷² Further, hearsay statements are, of course, inadmissible under Rule 56(e) or any other evidentiary standard.¹⁷³ Mere conclusions, rather than factual statements, are similarly inadmissible.¹⁷⁴

The Supreme Court has confirmed that the *Brunzell* factors must be presented by affidavit or

¹⁶⁷See generally *Saka v. Sahara–Nevada Corp.*, 92 Nev. 703, 705, 558 P.2d 535, 536 (1976) (recognizing that affidavits must be based on “the affiant’s personal knowledge, and there must be an affirmative showing of his competency to testify to them” (as cited by *Las Vegas Convention & Visitors Auth. v. Miller*, 124 Nev. 669, 687, 191 P.3d 1138, 1150 (2008)).

¹⁶⁸NRS 50.025(l)(a); see also *Bennett v. State*, 281 P.3d 1154 (Nev. 2009).

¹⁶⁹*Bennett v. State*, 281 P.3d 1154 (Nev. 2009) (quoting *State v. Vaughn*, 101 Wash.2d 604, 682 P.2d 878, 882 (Wash.1984); cf. *Lane v. Dist. Ct.*, 104 Nev. 427, 446, 760 P.2d 1245, 1257 (1988) (noting that the witness was incompetent to testify because she was not present at the time in question)).

¹⁷⁰*Williams v. Clark Cnty. Dist. Attorney*, 118 Nev. 473, 480, 50 P.3d 536, 540 n.9 (2002) (*City of Santa Cruz v. Municipal Ct.*, 49 Cal.3d 74, 260 Cal. Rptr. 520, 776 P.2d 222, 230 (1989) (acknowledging that the legislature may expressly authorize the use of affidavits based on information and belief or may require affidavits based on personal knowledge).

¹⁷¹ See *Coblentz v. Hotel Employees & Rest. Employees Union Welfare Fund*, 112 Nev. 1161, 1172, 925 P.2d 496, 502 (1996).

¹⁷²See *Havas v. Hughes Estate*, 98 Nev. 172, 173, 643 P.2d 1220, 1221 (1982) (quoting *Daugherty v. Wabash Life Ins. Co.*, 87 Nev. 32, 482 P.2d 814 (1971); cf. *State of Washington v. Maricopa Cnty.*, 143 F.2d 871 (9th Cir. 1944)).

¹⁷³ NRS 51.065; see also *Moore v. United States*, 429 U.S. 20, 21-22, 97 S.Ct. 29, 50 L.Ed.2d 25 (1976) (per curiam); *Donnelly v. United States*, 228 U.S. 243, 273, 33 S.Ct. 449, 57 L.Ed. 820 (1913).

¹⁷⁴ See EDCR 2.21(c); see also *Gunlord Corp. v. Bozzano*, 95 Nev. 243, 245, 591 P.2d 1149, 1150 (1979).

other competent evidence.¹⁷⁵ An award that is not based on such substantial evidence is subject to reversal, as the court will have no factual basis on which to base its decision.¹⁷⁶

2. The Standard for Granting a Request for Costs

Courts have broad discretion to award costs.¹⁷⁷ A memorandum of costs must be supported by an affidavit.¹⁷⁸ Further, any documentary evidence required to prove that the costs were actually incurred, necessary, and related to the action, must be presented by affidavit or other competent evidence.¹⁷⁹ Parties may not simply estimate a reasonable amount of costs; they must provide the court with proof that the costs were *actually incurred*.¹⁸⁰ Without competent evidence to “determine whether a cost was reasonable and necessary, a district court may not award costs.”¹⁸¹

“‘[R]easonable costs’ must be actual and reasonable, ‘rather than a reasonable estimate or calculation of such costs.’”¹⁸² Movant must “demonstrate how such [claimed costs] were necessary to and incurred in the present action.”¹⁸³ Conclusory arguments, or even statements in sworn testimony, that the costs were “reasonable and necessary” do not suffice. An award of costs based on such a conclusory statement is subject to reversal, as the court will lack “evidence

¹⁷⁵ *Miller v. Wilfong*, 121 Nev. 619, 624, 119 P.3d 727, 730 (2005); *Katz v. Incline Vill. Gen. Improvement Dist.*, 452 P.3d 411 (Nev. 2019), *cert. denied*, 141 S. Ct. 253, 208 L. Ed. 2d 26 (2020) (citing *Herbst v. Humana Health Ins. of Nev., Inc.*, 105 Nev. 586, 591, 781 P.2d 762, 765 (1989) (holding that an affidavit documenting the hours of work performed, the length of litigation, and the number of volumes of appendices on appeal was sufficient evidence to enable the court to make a reasonable determination of attorney fees, even in the absence of a detailed billing statement); *Cooke v. Gove*, 61 Nev. 55, 57, 114 P.2d 87, 88 (1941) (upholding an award of attorney fees based on, among other evidence, two depositions from attorneys testifying about the value of the services rendered)).

¹⁷⁶ *Beattie v. Thomas*, 99 Nev. 579, 668 P.2d 268 (1983).

¹⁷⁷ *Cadle Co. v. Woods & Erickson, LLP*, 131 Nev. 114, 120, 345 P.3d 1049, 1054 (2015).

¹⁷⁸ See NRS 18.110.

¹⁷⁹ EDCR 2.21(a).

¹⁸⁰ *Cadle*, 131 Nev. at 120, 345 P.3d at 1054 (citing *Gibellini v. Klindt*, 110 Nev. 1201, 1205–06, 885 P.2d 540, 543 (1994) (holding that a party may not estimate costs based on hours billed)).

¹⁸¹ *Cadle*, 131 Nev. at 121, 345 P.3d at 1054 (citing *Bobby Berosini, Ltd.*, 114 Nev. at 1353, 971 P.2d at 386).

¹⁸² *Bobby Berosini, Ltd. v. PETA*, 114 Nev. 1348, 1352, 971 P.2d 383, 385 (1998).

¹⁸³ *Id.*, 114 Nev. at 1352-53, 971 P.2d at 386.

on which to judge the reasonableness or necessity of each [cost]”.¹⁸⁴ Rather than merely *telling* the court the costs were reasonable and necessary, counsel’s affidavit must attach “justifying documentation” verifying the costs were incurred and must *demonstrate* how those costs were both reasonable and necessary to the matter at issue.¹⁸⁵ Without “justifying documentation” *and* counsel’s explanation, there is “no way [for the court to] determine whether the cost was reasonable or necessary.”¹⁸⁶

In summary, to avoid having your motion for fees and costs denied, put all of your allegations, including all information used in any argument regarding the *Brunzell* factors, in a separate affidavit. Similarly, to avoid having your application for costs denied, put all of your allegations in a complying affidavit *demonstrating, not just telling*, the court that the costs were actually incurred (attaching actual receipts to an affidavit testifying that the cost was incurred), were reasonable and necessary.

¹⁸⁴ *Cadle*, 131 Nev. at 121, 345 P.3d at 1054-55.

¹⁸⁵ *Id.* (citing *Bobby Berosini, Ltd.*, 114 Nev. at 1352-53, 971 P.2d at 386).

¹⁸⁶ *Id.* at 121-22, 345 P.3d at 1055.