SECTION I: PUBLIC INFORMATION (QUESTIONS 1 THROUGH 47)

Personal Information

1. Full Name: William Elmer Schaeffer

2. Have you ever used or been known by any other legal name? _No_ If so, state name and reason for the name change

3. Work Address: William E. Schaeffer, Attorney at Law, 160 W. 4th St., P.O. Box 936 Battle Mountain, NV 89820

4. How long have you been a continuous resident of Nevada? 22 years

5. Age: 56
   (NRS 3.060 states that a district judge must be at least 25 years old.)

Employment History

6. Using the format provided in Attachment "A" please start with your current employment or most recent employment, self-employment, and periods of unemployment for the twenty years immediately preceding the filing of this Application .

Educational Background

7. List names and addresses of high schools, colleges and graduate schools (other than law school) attended; dates of attendance; certificates or degrees awarded; reason for leaving.

   North Farmington High School, 32900 W. 13 Mile Road, Farmington Hills, MI 48334-1904; September 1971 to June 1974; diploma; graduated. University of Michigan, 1210 LS&A Bldg., 500 S. State St., Ann Arbor, MI 48109-1382; September 1974 to April 1979 B.A. in History degree; graduated. University of Michigan, 1210 LS&A Bldg., 500 S. State St., Ann Arbor, MI 48109-1382; September 1981 to April 1983; while in law school at the University of Toledo, I finished the additional courses needed to sit for CPA exam.

8. Describe significant high school and college activities including extracurricular activities, positions of leadership, special projects that contributed to the learning experience.

   Ran track and cross country in high school and track (briefly) in college. Had internships with Ann Arbor's Congressman, one of Michigan's U.S. Senators, and Michigan's Governor.

9. List names and addresses of law schools attended; degree and date awarded; your rank in your graduating class; if more than one law school attended, explain reason for change.

   University of Toledo, College of Law, 2801 W. Bancroft St., Toledo, OH 43606-3328; Juris Doctor awarded December 15, 1984; class rank 14th out of 30.

10. Indicate whether you were employed during law school, whether the employment was full-time or part-time, the nature of your employment, the name(s) of your employer(s), and dates of employment

    No employment during law school.

11. Describe significant law school activities including offices held, other leadership positions, clinics participated in, extracurricular activities.

    Spent one year as a member of the student council; had an internship in the Monroe County, Michigan, Prosecuting Attorney's Office as a part of my classes in my last year of law school.

Law Practice

12. State the year you were admitted to the Nevada Bar. 1986

13. Name states (other than Nevada) where you are or were admitted to practice law and your year of admission. Michigan 1985, Colorado 1986, Wyoming 1986.

14. Have you ever been suspended, disbarred, or voluntarily resigned from the practice of law in Nevada or any other state? If so, describe the circumstance, dates, and locations.

    No, I have not been suspended, disbarred, nor voluntarily resigned from the practice of law in Nevada or any other state.

15. Estimate what percentage of your work over the last five years has involved litigation matters, distinguishing between trial and appellate courts. For judges, answer questions 16-20 for the five years directly preceding your appointment or election to the bench.

    35% trial and 15% appellate work.

16. Estimate percentage of time spent on (1) domestic/family and juvenile law matters, (2) civil litigation, (3) criminal matters, and (4) administrative litigation.

    In the past five years, I estimate that I've spent about (1) 40% of my time on domestic/family and juvenile law matters, (2) 20% on other civil litigation, (3) 20% on criminal matters, and (4) 20 % on administrative litigation.

17. In the past five years, what percentage of your litigation matters involved cases set for jury trials vs. non-jury trials?

    Although I've handled more than twenty jury trials, none of them has occurred in the last five years; so, 100% of my cases lately have been for pleas, stipulated settlements, or bench trials.

18. Give the approximate number of jury cases tried to a conclusion during the past five years with you as lead counsel. Give the approximate number of non-jury cases tried to a decision in the same period.

As noted above, I've had plenty of jury trials; but none in the past five years. I've had only about a dozen cases tried to a judge in these last five years; though I've probably handled more than 75 bench trials in my career so far.

19. List courts and counties in any state where you have practiced in the past five years.

United States District Court for the District of Nevada, located in Washoe County

Fourth District Court in and for the County of Elko

Fifth District Court in and for the County of Esmeralda

Sixth District Court in and for the County of Humboldt

Sixth District Court in and for the County of Lander

Argenta Township Justice Court, in Northern Lander County

Austin Township Justice Court, in Southern Lander County

Esmeralda Township Justice Court, for all of Esmeralda County

20. List by case name and date the five cases of most significance to you (not including cases pending in which you have been involved), and list or describe:
    a. case name and date,
    b. court and presiding judge and all counsel,
    c. the importance of each case to you and the impact of each case on you,
    d. your role in the case.

I. a. Case name and date: State v. Kathy Malaperdas, 1991.

b. Court and presiding judge and all counsel:

Eureka Justice Court; Hon. Albert Hammond, Justice of the Peace; Defendant was in pro per, and I represented the State in my role as Eureka County District Attorney.

c. The importance of this case to me and the impact of the case on me:

First, the facts and context.

This was a simple plea hearing on a DUI wherein the Defendant was willing to plea in exchange for a recommendation of the minimum statutory sentence. The facts were strange, however, and they gave me an uneasy feeling. Ms. Malaperdas was in her husband's old pick up, drunk, but coasting downhill. The engine had not been turned on. She had no keys to it. It was on U.S. 50, the main street through the Town of Eureka and very close to several bars. She was caught red handed behind the wheel. I knew the Defendant fairly well because we were both volunteer EMTs with Eureka's ambulance service. At the arraignment, I pulled her aside and asked her what really happened and if she was sure she wanted to go through with the plea and maybe she

should ask for a lawyer. She assured me she was guilty and did not need a lawyer. Unfortunately, I did not pay attention to the fact that her husband stayed close by her side. She went ahead and pled.

And now, as Paul Harvey would say, the rest of the story.

My office had several reports of domestic violence and other violent incidents involving Mr. Malaperdas. It was a terrible mistake for me to not have insisted on interviewing Ms. Malaperdas alone, without her husband's presence. I ran into her a few years later, after she had divorced Mr. Malaperdas. She was working for a large Casino in Las Vegas as a security guard and EMT. I asked again about her lone DUI case, telling her how uneasy I still felt about it. It was then that she told me that she had been trying to escape from her husband who had become mad at her while they were at the bar. That's why she jumped into the pickup and took it out of gear, escaping down the hill. It worked. The Sheriff's Deputies picked her up and took her to safety for the night.

Importance and Impact:

In addition to learning to interview defendants and witnesses alone in appropriate situations, I also learned to trust my instincts more: if something feels wrong, it very well may be. Additionally, situations like that cause me to not mind, quite so much, when defendants who really did commit crimes nevertheless get acquitted. Well did our forefathers state: better to let ten guilty men go free than to convict one innocent person. As far as I know, this was the only innocent person I ever got convicted; and I will go to my grave regretting it. She's a nice person. I should have paid attention to my instincts and used my head.

And, one more thing: as far as I'm concerned, necessity is most emphatically a defense; so don't try to tell me that in reality I did the right thing. I ain't buyin' it. Sorry. She was just getting a head start so she could outrun her assailant; she did not mean to hurt anyone nor risk anyone's safety. She was only going about 25 and traffic was light, if not nonexistent. There was no substantial safety risk. A more interesting issue would be, if I had found out the truth before the statute of limitations had run, could I have prosecuted Mr. Malaperdas for the DUI since he caused it? That would have been a fun one to argue in the Supreme Court.

d. My role in the case:

I was the prosecutor who read the police report, made out the complaint, stood by for the plea, and failed to sufficiently investigate my own doubts.

II. a. Case name and date: State v. Parker, 2003.

b. Court and presiding judge and all counsel:

Fifth District Court in and for Esmeralda County; Hon. John Davis, District Judge; Andrew Fritz, Esq. for the Defense; myself, William E. Schaeffer, Esq., Esmeralda County D.A. for the State.

c. The importance of this case to me and the impact of the case on me:

Facts and Context:

This was my second, adult, sexual assault, jury trial. Mr. Parker was a black man who was a sort of prison guard for a private company in California. He also had a fiancee. He had a route on which he transported prisoners from one prison, jail, or detention facility to another - generally in California. One of his prisoners was a female white supremacist who was being extradited back to Esmeralda County for a parole violation on a non-violent crime. The company he worked for had recently been bought out by another company. The new company had a policy that guards were not to be left alone with the prisoners - especially not one guard and one prisoner of opposite sexes. The old company had no such policy and it had not yet been implemented for this particular trip. The last prisoner to be dropped off was the female, white supremacist. In a remote area, Mr. Parker pulled over his prisoner transport truck and had sexual intercourse with the white female, white supremacist. He admitted he used a condom and it was found at the site. She testified that it was un-consensual, he testified that she wanted it and literally asked him for it as well as teasing him by talking about it for miles and miles before they pulled over and consummated the act.

I put one of the investigating officers on the stand to establish the location, venue, and the fact that a used condom was found at the scene; as well as the fact that the Defendant admitted to the intercourse and condom. I then put the victim on the stand. She testified beautifully. She was unshakeable. She showed a tattoo on the back of her neck reading "solid white"; a reference, she said, to her racial purity and racial attitude. She also stated that her vagina was injured and that she asked to be taken to the hospital as soon as Parker had left after dropping her off. She was taken to the hospital in Tonopah, 26 miles away. There the doctor examined her and found tears in her vagina consistent with forced sex. I would have put the emergency room physician on the stand at that point; but at the start of the trial, Defense Counsel showed he had done his homework and I hadn't. He objected to any testimony by the physician on grounds that I had not given him the doctor's curriculum vitae (for the non-lawyers and the ones who didn't pay attention in class - like me, sometimes - a curriculum vitae is essentially a resume of the doctor's training in that particular area of medicine). Honestly, I had never even heard the phrase before and was totally unaware that I had to produce such a thing. I had open file discovery and thought that protected me from any discovery objections. Guess again. Fortunately for me and for justice, Mr Fritz had made his move too soon. Because it was at the start of trial and because I don't think the Judge was aware of the statute either, the matter was taken under advisement. I hastily read the statute and the annotations and then got my secretary going on trying to get a curriculum vitae together. Because the victim had done such a good job of testifying, I was sure that there would be a conviction if the Defense rested without calling the Defendant. Therefore, I thought it would be a good time to rest. I felt that my opponent had no choice but to call his client and that the client would try to deny that the sex was in any way rough or un-consensual. He would see that the roughness was a sign of non-consent.

I asked the Court for a minute. It was one of the longest minutes of my life as the seconds ticked by and I considered whether or not I had everything in place to force the Defense to put the Defendant on the stand. The Sheriff, his wife who was the Clerk, my secretary, the usual Public Defender (who represented the victim in her civil case against the Defendant's employer) were all watching intently as the tension built.

Strangely enough though, as the seconds ticked by and I went over my strategy in my mind, I became more comfortable - not less. I had covered everything. A woman in the audience broke the silence by saying out loud but in an attempted whisper: "What's he doing?" Without missing a beat, Judge Davis responded: "He's being sneaky." One of my disappointments is that the court reporter did not include this in the transcript since it was during a recess - however brief. Judge Davis was right. I rested. Defense Counsel asked for clarification in disbelief and the Judge told him, the State had rested.

Sure enough, Defense called the Defendant. He wove a tale of how the victim had been talking sexually to him much of the time on the transport truck - especially when they were the only two left. He mentioned how he had placed his fingers inside her vagina to lubricate her. That was a mistake. It allowed me to call the E.R. doctor, despite the lack of a curriculum vitae, as a rebuttal witness to show that she was not adequately lubricated, that her vagina tore, and that this was not consistent with consensual sex. Defense Counsel tried valiantly to recover by asking questions on cross about rough sex resulting in tearing; but rough sex is inconsistent with trying to lubricate a woman first. That's what lubrication is for, to prevent dryness and subsequent discomfort and tearing. Further, by cross examining the doctor on the rough sex issue, it gave the physician a chance to explain that no, this was not consistent with rough, consensual sex. That would have been better withheld as an argument to the jury without any testimony on it - after all, the burden is on the prosecution.

Mr. Parker was convicted of sexual assault and two other counts, but acquitted on three others. During the deliberation, I told my secretary that I would have defended it differently. I would have used the racism angle to suggest that Mr. Parker was the victim of the victim: she did it because she secretly wanted to make a black man guarding her miserable for the rest of his life and to make money in the bargain by suing his employer. My secretary suggested that was diabolical; but might work.

Importance and Impact:

I established that I could try and win even serious jury trials; something that had not happened in Esmeralda County for many years. As a result, I only had to try one more jury trial the rest of the time I was in office; the defense bar took my plea offers seriously and didn't argue nearly so much after this. I learned not to panic; that if I kept my cool, I could recover from a serious surprise (like finding out what a curriculum vitae is and discovering I had to get one to the defense). I also learned to hit the books so I wouldn't be so surprised again. Most importantly, I learned that I could see both sides of a controversy and understand them - not just in a human way, but also tactically. This allowed me to have less qualms than I once did about representing accused persons. It also helps me to not see my opponent in the courtroom as my enemy; s/he's a colleague who has a job to do, just as I do.

d. My role in the case:

Obviously, here too, I was the prosecutor. I made the case to the jury and they understood and largely agreed. By not losing my cool, I showed a woman that the same judicial system that punished her would also take her side and try to help her, when she was in the right. Now if only we could figure out a way to do something about her racial attitudes.

III a. Case name and date: Martin v. Zerr, 2001; Two cases in one.

b. Court and presiding judge and all counsel:

Sixth District Court in and for Lander County, Hon. Jerry V. Sullivan, District Judge and Fourth District Court in and for Elko County, Hon. Jack Ames, District Judge; Kristin McQueary, Deputy D.A. for Elko County and Allen D. Gibson, Deputy D.A. for Lander County both representing Plaintiff Martin and William E. Schaeffer, Esq. representing Defendant Zerr.

c. The importance of this case to me and the impact of the case on me:

Facts and Context:

Ms. Martin and Mr. Zerr had been divorced for awhile and Ms. Martin was seeking additional child support. Without getting a court order first, the Lander County Child Support Coordinator increased the amount of support and began collecting it from Defendant Zerr. Additionally, Ms. Martin left Lander County and moved to Elko County. Once in Elko County, she opened a case with the Elko County Child Support Office, a part of the District Attorney's Office. Without taking any action to seek a change of venue from Lander County, the Elko D.A.'s Office opened a case in Elko. So, Mr. Zerr had two problems in a row: first, his child support had been increased without due process and second, his case had then been moved without notice or due process. On behalf of Mr. Zerr, I filed for a hearing in Lander County to get an accounting for the proper amount of child support actually ordered and then a motion to dismiss or change venue in Elko County. After receiving the motion to dismiss or change venue and upon receiving assurances that the matter would in fact be litigated in Lander County, the Elko D.A.'s office graciously stipulated to allow the venue to be changed back to Lander County. Meanwhile, Mr. Zerr moved to Kansas and got another job after being laid off in Lander County. His new job didn't pay as much. Eventually, we got the paperwork straightened out and it turned out that Mr. Zerr had over paid his support, just as we had claimed. The Court, without any objection from the Lander County D.A.'s office, was about to order that no support would be owing until the overpayment was eliminated. I realized what that would likely do to Ms. Martin and the Parties daughter and talked my client into a more gradual payment plan that gave Ms. Martin some continued support. The Court went along with that plan.

Importance and Impact:

We had a tough time communicating with both D.A.'s offices. At first, they did not want to acknowledge that they might have made a mistake and they did not want to talk about it; but a brief with an appendix of evidence will force a good lawyer to consider his or her case, if only to try to counter that brief. Once they realized the true facts, they became much more cooperative and we were able to reach a just result for everyone. I learned that persistence and an organized brief with an appendix of documents can do wonders to make an opponent look at his/her case with fresh eyes. I also learned not to be intimidated by court masters: it's the District Judge that has the last word. Finally, I was reassured that a little kindness goes a long way: after making sure that my client's opponent would not be destitute, he expressed his gratitude for my services and she was

friendly towards me too - once she understood what had happened. As far as I know, they have not had any further disputes over child support nor anything else.

d. My role in the case:

I started out as a bit of a bulldog advocate for my client, but ended up being something of a conciliator. I cannot take credit for the number crunching and organizing, however; my secretary did that.

IV a. Case name and date: Town of Eureka v. State Engineer, 1990

b. Court and presiding judge and all counsel:

Seventh Judicial District Court in and for the County of Eureka, Hon. Merlyn H. Hoyt, District Judge; Karen A. Peterson, Esq. and Dan Saxon, Esq. for the Town of Eureka, Margaret A. Twedt, Deputy A.G. for the State Engineer.

c. The importance of this case to me and the impact of the case on me:

Facts and Context:

Acting in their capacity as the Town Board for the Town of Eureka, the Eureka County Commissioners bought some long unused water rights in the farming areas close to the Town. At the time of purchase, it was known that the State Engineer was being fairly aggressive about forfeiting water rights, probably because nearby Diamond Valley (like some other parts of the state) seemed to be over-appropriated. Nevertheless, the Town of Eureka bought these agricultural rights knowing that they were probably walking into a lawsuit.

Importance and Impact:

This case turned on the meaning of the five year, non-use, forfeiture statute. Did it mean that immediately, upon the expiration of five years of non-use of a water right, that the water right was forfeited whether or not the State Engineer had filed or otherwise acted to forfeit the right? Or, did it mean that the right was merely liable to forfeiture and that the right could be re-established if the water were put to another beneficial use, or that one was at least applied for, before the State Engineer had taken any action against that dormant right? My late friend and Deputy D.A., Zane Miles, talked to me about the classic water cases (e.g. In re Manse Springs) and suggested I read some of them. I think he was also the one who recommended Ms. Peterson's firm. She listened to us and we listened to her and she came up with a line of reasoning. Zane and I approved and then let her run with it. She did very well in setting the foundations of the case; but lost the round in front of the State Engineer and again in front of Judge Hoyt; but she shined in front of the Supreme Court. It was a pleasure watching her poise and the knowledge she had at her fingertips. That was the first oral argument I had seen in front of an appellate court. We won the case - well Karen did - and it has meant a lot to not only Eureka, but to farmers all over the state. I learned a lot about administrative law generally and water law in particular. I also learned how oral argument was done before the Supreme Court and the necessity for laying a factual foundation before the administrative body (in that case the State Engineer), because you

don't get to raise new issues nor evidence before the District Judge nor the Supreme Court. If you don't present it to the administrative body, you waive it.

d. My role in the case:

My role in the case was fairly minor: I supervised Ms. Peterson - and I had replaced an outside lawyer before - but she did not need much supervision. She knew what she wanted to do and how she thought it should be done; but she both listened to and reassured us. She made the one or two changes that Zane and I thought appropriate in editing her brief. My reason for including it in this list is that it taught me a lot about administrative law (especially with reference to water law), an area which I previously knew almost nothing about - and the point of the question seems to be what did I learn; not how did I shine?

V. a. Case name and date: State v. Watson, 2000.

b. Court and presiding judge and all counsel:

Fifth District Court in and for the County of Nye, Hon. John Davis, District Judge; Peter Knight, Esq., Marla Zlotek, Esq., and Sharon Dockter, Esq., Deputy D.A.s for the State; myself, William E. Schaeffer, Esq., contract, conflicts public defender and Janalee M. Murray Esq. for the Defendant (I shared my contract pay with Ms. Murray).

c. The importance of this case to me and the impact of the case on me:

Facts and Context:

Mr. Watson was just over eighteen and had a girlfriend who was just under 16 who had stolen a video camera from her high school. A short while later, Mr. Watson's girlfriend suggested that they videotape each other having sex; so they did. Shortly thereafter, the girl's father found the camera and the videotape. The Defendant, Mr. Watson, ended up bound over at the preliminary exam on charges of (1) Statutory Sexual Seduction, (2) Use of Minor in Producing Pornography or of Sexual Portrayal in Performance, and (3) Preparing, Advertising or Distributing Materials Depicting Pornography Involving a Minor. At the preliminary hearing the only evidence of the victim's age as being under 16 was the date stamp at the bottom of the video and therefore, the Defense objected to the date stamp. The victim was known to be in the building and available to testify, but the State refused to call her. Further, a police report given to the Defense by the Prosecution stated that the officer was told by the victim that the date stamp was inaccurate. When pressed by the Defense on that point during an objection, the Prosecutor insisted that there was no evidence to indicate there was anything wrong with the date stamp. There was no other evidence presented to the court of the victim's age and the Justice Court immediately bound the Defendant over even though Ms. Murray had made an offer of proof to show that the police report did indeed indicate that the date stamp was wrong.

I prepared a habeas corpus petition pointing out that there was no evidence that the victim was under 16 at the time apart from the date stamp on the video and pointing out the problems with the authentication of that date stamp. Further, I noted that a date stamp, like a computer printout or most other evidence is hearsay and must be authenticated to be admissible. Additionally, there was no evidence that there was any intent to publish (that is to distribute to or show others) the videotape which seemed to be a necessary element of the pornography charge. We also had information that the victim was going to testify that indeed she was over 16 at the time of the videotaping and that the date stamp was inaccurate. Judge Davis took all of this under advisement and went forward with preparations for a jury trial. Just before he ruled and within days of the scheduled trials, the case was settled with much lesser pleas to statutory sexual seduction and an offense involving stolen property. The video tape pornography charge carried a possible life sentence. In some ways, I think this case presaged the recent fad of "sexting" (teenagers sending naked pictures of themselves to each other using cell phones).

Importance and Impact:

Given how strong the Defense evidence was that the victim was not under 16 and the fact that the Defendant had no prior criminal history, I was surprised at the ferocity with which the case was fought by the Prosecution. This taught me that not everyone is as sensitive to convicting people of things they did not do as one could hope. Some Prosecutors seem to think that what we do in court is a sporting event. It's not. At least one Justice of the U.S. Supreme Court has said so; and in so many words. Giles v. Maryland, 386 U.S. 66, 102, 87 S.Ct. 793, 811, 17 L.Ed.2d 737, 761 (1966 Justice Fortas, concurring). After this case, I became more skeptical of prosecutors I did not know. I also honed my skills as a defense attorney inasmuch as this was my first habeas corpus attempt.

d. My role in the case:

I merely prepared the habeas corpus petition and related paperwork as well as got ready for a jury trial. Had Jan and I not researched the statutes and case law so thoroughly, young Mr. Watson might still be behind bars for merely acquiescing in his girlfriend's fantasies. True, he should not have done what he did; but he paid for that. The idea is to make the punishment actually fit the crime and not just mouth the words.

21. Do you now serve or have you previously served as a mediator, an arbitrator, a part-time or full-time judicial officer, or a quasi-judicial officer? To the extent possible, explain each experience.

In, I think 1987, I served as a mediator in Michigan on one case. It was an appointment from a District Court Judge to see if a case could be settled. Frankly, I don't remember much about it. It was shortly before I got my first job as a prosecutor, so I did not have occasion to do another one.

22. Describe any pro bono or public interest work as an attorney.

I frequently handle divorce and custody cases for single moms. They are pretty much the same as the paying divorces. I've probably averaged more than one a year since I went back into private practice in 1999. Several religions hold that we should try to aid widows and many have argued that single moms are effectively widows and therefore deserving of special consideration. I agree; so I help when I can.

23. List all bar associations and professional societies of which you are or have been a member. Give titles and dates of offices held. List chairs or committees in such groups you believe to be of significance. Exclude information regarding your political affiliation.

I was a founding member of an organization called the Institute for Constitutional Rights out of San Diego which grew out of the U.S. v. Nye County litigation in the mid nineties. However, except for an amicus brief here and there in the late nineties, the organization did not develop and is now practically defunct.

24. List all courses, seminars, or institutes you have attended relating to continuing legal education during the past five years. Are you in compliance with the continuing legal education requirements applicable to you as a lawyer or judge?

Focus on Kids 2011, Criminal Law Defending the Accused, Government Civil Attorneys Conference, Prosecutors Conference, Jury Selection, How To Make Money And Stay Out Of Trouble, Cybersleuths, Super Search Strategies, and Litigation Strategies.

I am currently in compliance with all continuing legal education requirements.

25. Do you have Professional Liability Insurance or do you work for a governmental agency?

I have had professional liability insurance since about 2000 and I also worked for a government agency until January of this year.

Business and Occupational Experience

26. Have you ever been engaged in any occupation, business, or profession other than judicial officer or the practice of law?

Just internship, summer laborer and bank teller positions during breaks from attending college.

27. List experience as an executor, trustee, or in any other fiduciary capacity. Give name address, position title, nature of your duties, terms of service and, if any, the percentage of your ownership.

None; I do handle estates for clients, however.

28. Do you currently serve or have you in the past served as a manager, officer, or director of any business enterprise, including a law practice? If so, please provide details as to:

a. the nature of the business,
b. the nature of your duties,
c. the extent of your involvement in the administration or management of the business,
d. the terms of your service,
e. the percentage of your ownership.

I have operated either full or part time as a solo practitioner of law in my private practice since March of 1999 and previously did so in Pontiac, Michigan from late in 1986 to the beginning of 1988 when I became an Assistant Prosecuting Attorney for Montcalm County, Michigan. I have handled murder cases, drug possession cases, domestic relations cases, DUIs, domestic violence, driver's license suspension hearings, water law rights cases, body of water quality matters, bankruptcies, incorporations, wills, estates, and personal injury. Basically, if you walk in my door or call me, I will either handle it or refer you to someone I know who does that sort of thing. That is the nature of my private practice.

As to my duties, I do everything from answering phones, drafting briefs, motions and stipulations, to trying cases in court, negotiating pleas and settlements, attending arraignments, arranging for repairs to equipment or purchase of new equipment, whatever it takes.

I am completely involved in all aspects of my private practice including its administration and management.

There are no terms of my service. I am the entire enterprise apart from my equipment, files and location. However, I have had secretaries in the past and may again in the future.

I own my business 100 percent – and sometimes it seems as if the reverse is also true.

Apart from my private practices (now and in Michigan in the late 80s), I have not owned, operated nor managed any business enterprise or company.

Civic, Professional and Community Involvement

29. Have you ever held an elective or appointive public office in this or any other state? Have you been a candidate for such an office? If so, give details, including the offices involved, whether initially appointed or elected, and the length of service. Exclude political affiliation.

I was first appointed as District Attorney of Eureka County in August of 1989 and then retained in opposed elections three times: 1990, 1992, and 1994 (the one in 1992 was a recall election against former Assemblywoman and State Treasurer Patty Cafferata; it was the fourth recall attempt against law enforcement officials in Eureka County in the previous 15 years and was the first such attempt that failed – there have been no successful recalls there since). I voluntarily left office in January of 1999 when I chose to start my current private practice. Thereafter, I was elected as the Esmeralda County District Attorney in 2002 replacing Patty Cafferata (Nevada statutes allow the Esmeralda County D.A. to have a private practice in addition to his/her office; so I continued my practice throughout my tenure in that office). No one has been re-elected as Esmeralda County D.A. in at least thirty years, but I tried and failed in 2006; so I served from January 2003 to January 2007. I also ran unsuccessfully for District Judge in the Sixth Judicial District in 2008.

30. State significant activities in which you have taken part, giving dates and offices or leadership positions.

It would take too much space and time here to detail all of my offices within Lions Clubs International, so I will just touch on the highlights. I was Zone Chairman (at least 3 clubs in a zone) twice and Region Chairman (at least 6 clubs and 2 zones in a region) twice in the 1990s, President of the Battle Mountain Lions 2000-2001 and current Secretary thereof. I capped off my Lions Clubs involvement as the District Governor from 2002 – 2003. The District included all 44 clubs in Nevada plus Truckee, California. I originally joined the Eureka Lions when I was District Attorney there in 1990.

I also am the current vice-chairman and past chairman of the Battle Mountain Family Resource Center with which I have been involved since 2000. The Center provides a variety of charitable services including WIC (Women, Infants and Children) coordination, a pre-school, and some food hand-outs for low income families in our area.

31. Describe any courses taught at law schools or continuing education programs. Describe any lectures delivered at bar association conferences. None.

32. List educational, military service, service to your country, charitable, fraternal and church activities you deem significant. Indicate leadership positions.

I listed my Lions Clubs activities in relation to question 30 above. I was active in the Diamond Valley Baptist Church in Eureka throughout the nineties but, for a variety of reasons, have not been active since.

33. List honors, prizes, awards, or other forms of recognition.

Nothing I haven't already mentioned.

34. Have you at anytime in the last 12 months belonged to or do you currently belong to any club or organization that in practice or policy restricts (or restricted during the time of your membership) its membership on the basis or race, religion, creed, national origin or sex? If so, detail the name and nature of the club(s) or organization(s), relevant policies and practices, and whether you intend to continue as a member if you are selected for this vacancy.

While Lions Clubs International has not discriminated on the basis of sex for many years, after I joined, I discovered that the Eureka Lions did. I opposed this and, when the first woman District Governor for our District (Sharlene Trinko) ran in 1998-99, I switched to the Austin Lions Club so that I would not have to agree to vote for her male opponent. When I got to Battle Mountain, I found that they too had a tradition against allowing women. Fortunately, I got to be involved in bringing in our first female member at just about the time I became District Governor. I was bothered by this more than most because my mother and aunt are believed to be the first sister judges in American history since my mother was elected as District Judge the same year I graduated from high school in 1974 and her sister had been previously appointed to the U.S. District Court by President Nixon and later was appointed to the Sixth Circuit Court of Appeals. I would note, and believe I have demonstrated, that it is easier to change an organization from the inside than it is from the outside.

Note: none of this took place within the last twelve months, but the way the question is phrased, it seems to ask if I am currently a member of an organization that once upon a time discriminated; and, of course, Lions has discriminated on the basis of sex in the past although it

has not done so in many years and in fact has at least one mostly gay and lesbian club in San Francisco (one of my fellow District Governors was a proud lesbian from such a club).

35. List books, articles, speeches and public statements published, or examples of opinions rendered, with citations and dates.

Nothing worth mentioning or that I've kept.

36. During the past ten years, have you been registered to vote? Have you voted in the general elections held in those years?

I think I've missed voting in only one primary and one special election (due to last minute emergencies that took me out of town) and no general elections. I think it would be hypocritical for a person who has held public office not to vote.

37. List avocational interests and hobbies.

Apart from my involvement in Lions, I enjoy bicycling, skiing, jogging, dancing and other physical activities. I also try to remain active in political and community development activities.

Conduc
t

38. Have you ever been convicted of or formally found to be in violation of federal, state or local law, ordinance or regulation? Provide details of circumstances, charges and dispositions.

I've had a few speeding tickets over the years but just one, in Eureka County in I think 2001, since I've lived in Nevada (21 years now). I was late for a Lions Club cabinet meeting. I sent in the payment. I can't recall anything else that resulted in formal action since I've lived in Nevada (I've also been pulled over for having tail or license plate lights out – which I quickly fixed each time - and for speeding, a few times, without getting a ticket). As to the speeding tickets from more than twenty years ago, I cannot recall much in the way of details. There was one in Lovelock for wasting a valuable resource wherein I was going around 65 mph in a 55 mph zone on Interstate 80 in the late 80s. I think I probably had 4 or 5 others prior to that in the 70s and 80s; but those were in Michigan and were civil infractions, not misdemeanors and I can't remember any details.

39. Have you ever been sanctioned, disciplined, reprimanded, found to have breached an ethics rule or to have acted unprofessionally by any judicial or bar association discipline Commission, other professional organization or administrative body or military tribunal? If yes, explain.

I got one private letter from the Bar Counsel's Office. It was years ago, over a disagreement as to how best to preserve the right of counsel for single moms in divorce situations.

40. Have your ever been dropped, suspended, disqualified, expelled, dismissed from, or

placed on probation at any college, university, professional school or law school for any reason including scholastic, criminal, or moral? If yes, explain.

No.

41. Have you ever been refused admission to or been released from any of the armed services for reasons other than honorable discharge? If yes, explain.

No, I've never applied to be in any of the armed services.

42. Has a lien ever been asserted against you or any property of yours that was not discharged within 30 days? If yes, explain.

No.

43. Has any Bankruptcy Court in a case where you are or were the debtor, entered an order providing a creditor automatic relief from the bankruptcy stay (providing in rem relief) in any present or future bankruptcy case, related to property in which you have an interest?

No.

Other

44. If you have previously submitted a questionnaire or Application to this or any other judicial nominating commission, please provide the name of the commission, the approximate date(s) of submission, and the result.

I applied for the appointment to the Seventh Judicial District Court through this Commission when Judge Hoyt retired in 2001. Steve Dobrescu got the appointment from Governor Guinn. Earlier this year, I applied for the vacancy created by the death of Judge Davis in the Fifth Judicial District. While this Commission approved me along with two others, the Governor chose Ms. Wanker to be the new District Judge there.

45. In no more than three pages (double spaced) attached to this Application, provide a statement describing what you believe sets you apart from your peers, and explains what particular education, experience, personality or character traits you possess or have acquired that you feel qualify you as a good district court judge. In so doing, address both the civil (including family law matters) and criminal processes (including criminal sentencing.)

46. Detail any further information relative to your judicial candidacy that you desire to call to the attention of the members of the Commission on Judicial Selection.

47. Attach a sample of no more than ten pages of your original writing in the form of a decision, "points and authorities," or appellate brief generated within the past five years, which demonstrates your ability to write in a logical, cohesive, concise, organized, and persuasive fashion.

- - INSERT PAGE BREAK HERE TO START SECTION II

WILLIAM E. SCHAEFFER, ATTORNEY AT LAW

RESPONSE TO QUESTION 45 FOR JUDICIAL APPLICATION

In no more than three pages (double spaced) attached to this Application, provide a statement describing what you believe sets you apart from your peers, and explains what particular education, experience, personality or character traits you possess or have acquired that you feel qualify you as a good district court judge. In so doing, address both the civil (including family law matters) and criminal processes (including criminal sentencing.)

Initially, let me say that I am not applying for this position so much because it will help me; I'm applying for it because I believe that through it, I can help the people of the State I love.

Most attorneys tend to concentrate on one or two areas of the law. I have been exposed to all aspects of our profession. I've practiced as both an elected, public prosecutor and a public defender; both as a government attorney and in private practice. I've been involved in over 20 jury trials running the gamut from a motorist passing a school bus, when it was stopped to pick up children (when I was still in Michigan where there is a right to jury trials for misdemeanor cases), all of the way up to murder and sexual assault cases. I've appeared and presented cases before various administrative commissions, justices of the peace, state and federal district courts, and the Nevada Supreme Court. I am admitted in multiple states and have actually practiced in three. I've practiced in most Nevada counties: Clark, Nye, Esmeralda, Lyon, Washoe, Pershing, Humboldt, Lander, Elko and Eureka. Since district judges have to deal with all of these things, a lawyer taking the bench should ideally have experience in them as well.

I've represented indigent, single moms in divorce, custody and support cases as well as fathers. I had a multimillionaire client for several years in a drawn out case in federal court. I've had judges make snap decisions and cut off argument while at other times they let decisions languish for months or even years. I've had to deal with rude attorneys and clients and gracious ones. All these experiences have impressed upon me the importance of civility and common sense fairness: making sure that all arguments are heard – even the ones the judge doesn't want to hear. Lawyers have a duty of zealous representation for their clients. That includes setting a

case up for appeal. A fair judge understands that and welcomes it. S/he is not overly concerned with imposing his/her will on the case, but rather with achieving justice within the constraints of the law; and so accepts evidence and argument that is designed to overturn that judge on appeal. For example: the radio personality Dr. Laura has often pointed to studies and anecdotes showing that it is important for children of divorced couples to have a relationship with both parents and that therefore, it is usually inimical to that goal to allow the custodial parent to move out of state. I agree with this, but it is not Nevada law. In Nevada, a custodial parent must be allowed to move out of state with the children if s/he can better his/her economic prospects by doing so; the effect upon the relationship of the children to the non-custodial parent is secondary. Thus, a judge may think it a tragedy to allow a move out of state; but s/he must either allow it or make a finding of good reasons why the case law is in error and should be changed or why this is a special case. It is improper for the judge in such circumstances to discourage the custodial parent's lawyer from putting in evidence of the economic advantage involved therein. It may be laudable to send a case up to the Supreme Court or to try to do the right thing for the children in such circumstances, but the judge should have the courage of his/her convictions and should not try to be the law. Likewise, once reversed, a judge should not petulantly refuse to follow the law by ignoring the reversal in similar cases; yet, I've seen this done. A Nevada district judge is constrained by our laws; s/he is not an Old Testament judge whose word IS law. As John Locke put it, we hold Lex Rex not Rex Lex (literally, the law is king not the king is law).

An additional advantage I have to some others is my network of mentors. My mother is a retired district court judge in Michigan while her sister is a retired federal circuit judge who still handles cases for the U.S. Sixth Circuit. I have friends who are now judges and I have not

hesitated to ask them, my mother and my aunt questions I have concerning law and procedure and I have often followed their good advice. I don't believe a good judge or lawyer can be an island unto him or herself. Even the Bible says that there is wisdom in a multitude of counselors. Proverbs 11:15 & 15:22. Although there is also something to be said for Lincoln's comment to his cabinet regarding the Emancipation Proclamation: seven nays and one aye, the ayes have it. One needs to do what s/he feels certain is right despite the opinions of others; but one should definitely listen to and carefully consider those opinions before making that decision.

I have often shared a drink and pleasant conversation with my opponents after our work is done. Gary Woodbury, the recently retired Elko D.A. was a highly regarded criminal defense attorney when I hired him as my deputy while I was the Eureka D.A. After a couple of years with me, he became the Elko D.A for 16 years. My previous boss, Hy Forgeron and I have opposed each other in court as well on both sides – prosecution and defense; yet we have been good friends for years. A good lawyer should be able and willing to argue either side of a dispute and to take on unpopular and politically incorrect causes. I abhor the recent trend to demonize all criminal defense lawyers by prosecutors or all prosecutors by criminal defense lawyers and the same between insurance defense and tort lawyers. We are men and women doing important work. We need to somehow redevelop the sense of respect and camaraderie that once characterized our profession. I think a judge can help this along by patiently giving respect to the lawyers in front of him/her and by not putting up with their disrespect for each other. I would appreciate the chance to help make that happen inasmuch as my patience, experience and attitude of civility are what is needed to encourage these traits in others; traits that are important to the process of implementing our ideal of liberty and justice for all.

Thank you.

WRITING SAMPLE FOR JUDICIAL APPLICATION OF WILLIAM E. SCHAEFFER

47. Attach a sample of no more than ten pages of your original writing in the form of a decision, "points and authorities", or appellate brief generated within the past five years, which demonstrates your ability to write in a logical, cohesive, concise, organized, and persuasive fashion.

The first part is an excerpt from a much longer appellate brief on a Post Conviction Relief case. The second part is a short brief from a divorce case.

* * * * * * * * *

RESPONSE TO GROUND ONE

APPELLATE COUNSEL PRESENTED CONSTITUTIONAL ISSUES TO THE SUPREME COURT IN THE GUISE OF STATE LAW VIOLATIONS AND SUCH ISSUES WERE CONSIDERED AND FOUND TO BE MERITLESS.

The State of Nevada is a State of the United States. Admission Proclamation of President Lincoln, October 31, 1864. As such a state, Nevada is subject to the Supremacy Clause in the U.S. Constitution. Art. VI, ¶ 2; Constitution of the State of Nevada, Preliminary Action Section. Said Art. VI, ¶ 2 of the U.S. Constitution provides in pertinent part as follows: "This Constitution ... shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the contrary notwithstanding." When Nevada's laws are found to be unconstitutional, they are struck down and/or not enforced. Further, the Judge of this Honorable Court, the Justices of the Nevada Supreme Court, and the legislators of Nevada, all took an oath of office to uphold said Constitution of the United States. It is not surprising then, that the statutes under which the Petitioner's Appellate Counsel presented many of the same issues that Petitioner is raising herein, parallel and rely on said U.S. Constitution. As such, said statutes and said courts of this state provide the same due process as do the Federal Courts inasmuch as all courts and judges - State and Federal - are bound by the same U.S. Constitution and owe their full faith and allegiance thereto. Accordingly, unless a specific violation of the U.S. Constitution is alleged that is not covered by state law, how can

there be a violation of due process as guaranteed by the 6th and 14th Amendments to the U.S. Constitution? All of the Petitioner's issues are in fact cognizable in state law and are argued using such law - at least in part. e.g. his citation to *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984) and *Kirksey v. State*, 107 Nev. 499, 814 P.2d 1008 *cert. denied*, 502 U.S. 989 (1991) on page 8 of his Memorandum and his citation to *Passana v. State*, 103 Nev. 212, 213, 735 P.2d 321, 322 (1989), and *Auson v. McKaskie*, 724 F.2d 1153 (9th Cir. 1984) on page 22. Therefore, the failure of Appellate Counsel to simultaneously raise the issues as both State and Federal in his brief manifestly did not prejudice the Petitioner nor does he detail facts as to how he was prejudiced thereby. Numbered Paragraph 6 of the instructions for the Petitioner's Post Conviction Petition requires such facts be specified and warns: "Failure to allege specific facts rather than just conclusions may cause your petition to be dismissed." Again, Petitioner merely asserts such prejudice. He doesn't say what that prejudice is. Further, the possibility that he cannot get an additional review of his case in the Federal Court system (even were that true) in no way implies that he was denied due process. The U.S. Constitution guarantees "due process" not perfect process and fair trials not perfect ones.

RESPONSE TO GROUND TWO

THE PROSECUTION WAS NOT REQUIRED TO ADHERE TO NRS 174.234(2) CONCERNING THE TESTIMONY OF DR. SCOCCIA AS DR. SCOCCIA WAS A REBUTTAL WITNESS AND AS SUCH, THE TESTIMONY OF DR. SCOCCIA DID NOT DEPRIVE THE PETITIONER OF HIS RIGHTS TO DUE PROCESS AND A FAIR TRIAL.

The Petitioner asserts that "[d]uring Petitioner's trial, the State called as its expert witness Vincent Scoccia., D.O. However, the State failed to notice Petitioner that Dr. Scoccia would be testifying as an expert pursuant to NRS 174.234(2), in that they "failed to provide a statement concerning the subject matter of Dr. Scoccia's testimony, and failed to provide a copy of his curriculum vitae." Petition, page 9.

NRS 174.234(2) states:

> If the defendant shall be tried . . . and a witness that a party intends to call ***during the case in chief of the State*** is expected to offer expert testimony..., the party . . shall file and serve upon the opposing party... NRS 174.234(2)(emphasis added).

Immediately prior to trial on December 18, 2003, the Defendant made oral motion to have the "expert witness" testimony of Vincent Scoccia, DO, excluded. The Court denied the motion but required the prosecution to submit the CV of the Doctor to the Defense. Appellate, Rough Draft Transcript, page 11, lines 1-16. The State had endorsed Dr. Scoccia on its list of witnesses, but did not identify him as an expert pursuant to NRS 174.234. The State had provided the emergency room medical records of the victim in discovery. The State stated during argument of the motion that Dr. Scoccia would be testifying not only as a lay or opinion witness, but as an expert as well. The trial commenced.

It is clear from the transcript of the trial that Dr. Scoccia was called as a rebuttal witness, not in the State's case in chief. The State rested its case on page 58 of the transcript. The State had called two witnesses by that time: the victim who testified to the rape, and Deputy Marino who testified as to collection of corroborating evidence. The Defense called a single witness, the Defendant, and rested on page 98 of the transcript. The Court then authorized the calling of the State's rebuttal witnesses. Transcript, page 98, line 11.

During the course of the Defendant's testimony, it was openly admitted that the sexual conduct did occur, but that such contact was consensual and invited by the victim.

In rebuttal, the State provided witnesses regarding the victim's actions and demeanor after the report of the assault as well as Dr. Scoccia's medical testimony regarding his observations and examination of injuries he opined to be a consistent result of non-consensual sexual activity, to wit: a ½ to 1 cm. vaginal tear that he found inconsistent with the Defendant's stated account of consensual sexual activity and foreplay.

In *Floyd v. State*, the Nevada Supreme Court defined the scope of NRS 174.234. In holding that the prosecution was able to utilize expert witness testimony at the penalty phase of a capitol case without notice pursuant to NRS 174.234, the Court reasoned:

> Black's Law Dictionary defines "case in chief" as "that part of a trial in which the party with the initial burden of proof presents his evidence after which he rests." Black's Law Dictionary 216 (6th ed. 1990). The statutes in question refer to "the case in chief of the defendant" as well as "of the state," even though a criminal defendant normally has no burden of proof. It is clear that the statutes use the term "case in chief" to refer to either party's initial presentation of evidence, in contrast to either's presentation of rebuttal evidence. This meaning is consistent with the context of discovery: before trial a party should know and be able to disclose evidence it expects to present in its case in chief, whereas the need for and nature of rebuttal evidence is uncertain before trial. This meaning is also consistent with the use of the term in this court's case law. *See e.g Batson v. State*, 113 Nev. 669, 677, 941 P.2d 478, 493(1977)(citations added). *Floyd v. State*, 118 Nev. 156, 42 P,3d 249 (2002).

At the time of trial, Mr. Fritz made objection to certain evidence being adduced during the rebuttal phase and was overruled by the Court. Transcript, page 112, lines 21 (overruled); page 113, lines 20-22(prosecution told to go ahead). The transcript makes clear that this was done in the rebuttal phase. On page 98, line 12, the Court states: "You may call your rebuttal witness." On the next page, line 14, after a short recess, the State called "Captain Kim Wilson." Defense counsel then made sure that this was a "rebuttal witness" and stated: "I wanted to be clear on that." TR 99, lines 16-19. Accordingly, there can be no doubt that Dr. Scoccia, testifying at TR 152 et seq. was a ***rebuttal*** witness.

This issue was also set forth erroneously by the Petitioner in the fast track appeal alleging that the State called Dr. Scoccia to testify in the State's **case in chief** and stated that the State failed to notify appellant's counsel of the expert witness as required pursuant to NRS 174.234. On that basis, the Supreme Court stated that even were the State negligent in failing to properly notice the expert, the State took adequate measures to ensure that the Defendant was not prejudiced in allowing him additional time to prepare his cross-examination of Dr. Scoccia and held that the District Court did not abuse its discretion in allowing the doctor's testimony.

In fact, the Dr. Scoccia was not called during the State's case in chief, and because of

that, the provisions of NRS 174.234 were not triggered requiring the State to provide the information. There was no constitutional level violation.

Further, Mr. Fritz' representation did not fall below a reasonable standard in regards to the evidence. Prior to trial, Mr. Fritz received a copy of the relevant ER reports. Though he was not notified that Dr. Scoccia would be testifying as an expert witness, Dr. Scoccia's name did appear as a potential witness, but was not called in the case in chief. Mr. Fritz made objection to Dr. Scoccia's testimony and was given time to prepare for the testimony including being provided a copy of the Curriculum Vitae (CV). The defense knew that Dr. Scoccia would be testifying as the treating physician of the victim.

The prosecution adjusted its case around its failure to provide an expert notification, even despite the ruling by the trial court that the testimony could be heard in the State's case in chief. As a rebuttal witness, the State was not required to notice the testimony, produce a summary of subject matter of the testimony, or to produce the Doctor's CV. Because there was no duty on the State to produce these things, Defense counsel representation is not deficient and he cannot be held to a standard of objecting or requiring production of that which the law does not support.

RESPONSE TO GROUND THREE

DR. SCOCCIA'S TESTIMONY REGARDING THE VICTIM'S PHYSICAL SYMPTOMOLOGY WAS NOT IMPROPER TESTIMONY AND FURTHER THE PROVISIONS OF NRS 50.345 WOULD ALLOW FOR SUCH TESTIMONY.

The petitioner argues that Dr. Scoccia's rebuttal testimony should not have been allowed as it was improper expert testimony. As a rebuttal witness, Dr. Scoccia had information regarding the condition of the victim relevant to refute the Defendant's testimony

that the sexual contact between the victim and defendant was consentual. The threshold question is whether or not Dr. Scoccia was testifying as a medical provider or as an expert witness, or both.

A careful reading of Dr. Scoccia's testimony shows that his CV was admitted, over objection, into evidence. TR, page 153, lines 1-25. Dr. Scoccia testified regarding his qualifications and training and his current employment as the Nye Regional Medical Center Emergency Room physician. TR, page 154, line 3-21. Dr. Scoccia testified that he had been previously qualified and accepted as an expert in the 6th Judicial District Court in Nye County. TR, page 154, lines 25. *Sua sponte*, the Court stated that, "All right. I think he's qualified to ask the questions you want to ask. Go ahead." TR, page 155, lines 1-10. There was no specific qualification of Dr. Scoccia as an expert.

Dr. Scoccia's testimony belies the Petitoner's assertion. A careful reading of the transcript shows that Dr. Scoccia testified on direct rebuttal as the treating medical physician and that his qualifications, training and experience as an emergency room physician allowed him to make a diagnosis to treat the victim. TR, page 258, lines 24-25. Dr. Scoccia testified as to the victim's statements to him. TR, page 156, lines 1-25 through page 158, lines 1-13. Dr. Scoccia testified that he observed the victim's demeanor when she presented as "very distraught and shell-shocked and she was in a great deal of emotional turmoil." TR, page 158, lines 10-12.

Dr. Scoccia further qualified this observation of her "distraught and shell-shocked demeanor and emotional turmoil" by stating his objective observations of the behaviors and symptomology he personally observed, to wit: tremors, shaking, sweaty, diaphoretic, crying and emotionally frail as evidenced by crying, emotional crying, and anxiety. TR, page 158, lines 15-23.

Dr. Scoccia testified to his physical examination of the victim. TR, page 159, lines 23-25. The only significant finding was a fresh vaginal tear as well as redness and swelling in the vaginal area. TR, page 159, lines 4-13, 17-19. Dr. Scoccia testified that the victim had "grip marks" on the flank of her back and some irritation on her "backside." TR, page 159, lines 14-16. Dr. Scoccia testified that such tears are made by trauma and that he has not seen such tears are not found in the cases of consensual sex. TR, page 159, line 22, page 160, lines 1-7. He did not offer any "expert testimony" outside his training and experience and/or as the treating physician during the State's direct examination.

Dr. Scoccia testified that he administered drugs to the victim to calm her, and prescribed some pain medications. TR page 161, lines 4-8.

The defense asked the opinion testimony question on cross-examination:

Q. When you testify there is no way this could occur during consensual intercourse –

A. I believe there is no way, yes. TR, page 163, lines 11-13.

Q. In your experience, have you ever seen tearing during consensual intercourse?

A. I've never seen that, sir, no.

. . .

Q. What is the extent of your experience in dealing with things like this?

A. For since 19 – since 1994 in working in the Emergency Room, on the job training. . .

Q. The reason why you believe there was some tearing was because the vagina wasn't lubricated properly, is that why there would be tearing?

A. I can't make an assumption, all I can make is the objective finding that I found. But I can – I can agree with you that if the vagina is lubricated, there is less

likelihood of tearing to occur. If it is not lubricated, tearing is more likely. TR, page 164-165.

The result of the cross-examination testimony is that the physician was asked for his first "expert opinion" by the Defense in the case, not the prosecution. However, this was not necessarily a mistake (as Petitioner is likely to argue); rather, it appears to be an attempt - a tactical risk - to try to elicit reasonable doubt as to the issue of consent by getting an admission that rough sex could cause vaginal tearing. It backfired, but that doesn't mean it wasn't worth the risk. With the consistent testimony detailing the victim's pale, disheveled appearance and upset demeanor, Mr. Fritz had to try to find something to grasp at to bolster his client's lone, not credible testimony regarding supposed consent. He therefore took a calculated risk - and it failed. Had he not taken that risk, no doubt Petitioner would now be complaining that his lawyer didn't challenge the doctor on this point.

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POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S EX PARTE MOTION FOR IMMEDIATE TEMPORARY CUSTODY

I. This Honorable Court Should Award, The Plaintiff, CONNIE LUANN SCHEPKER, Custody Of The Parties' Minor Children And Award Plaintiff Child Support Therefor.

This Honorable Court is empowered to grant orders regarding custody of the Parties' minor child pursuant to NRS 125.510, which states, in pertinent part, as follows:

"1. In determining custody of a minor child in an action brought under this chapter, the court may:

"(a) During the pendency of the action, at the final hearing or at any time thereafter during the minority of any of the children of the marriage, make such an order for the custody, care, education, maintenance and support of the minor children as appears in their best interests."

Case law naturally follows the statutory command for the Court to exclusively consider the "best interests" of the child. "An essential part of the case at bar is the child custody arrangements, the focus is on the best interests of the minor child. Sims v. Sims, 109 Nev. 1146, 1148, 865 P.2d 328, 330 (1993); *see also* NRS 125.480" Lesley v. Lesley, 113 Nev. 727, 734-735, 941 P.2d 451, 455 (1997). Other cases echo and firmly establish this emphasis on the "best interests of the child." Culbertson v. Culbertson, 91 Nev. 230, 233, 533 P.2d 768, 770 (1975); and Fenkell v. Fenkell, 86 Nev. 397, 400-401, 469 P.2d 701, 703 (1970). Accordingly, this Court has a duty to make the placement of the minor child in this case - and in every case - with the parent, parents or other person(s) whose past history and apparent prospects indicate(s) that he/she/they will be best for the welfare and development of the child(ren) involved. NRS 125.480 indicates several factors that a court is to consider when determining which possible placement is in the best interest of the child.

One of the factors that is of the highest priority and that is specifically listed in that statute is "(w)hich parent is more likely to allow the child to have frequent associations and a continuing relationship with the noncustodial parent." NRS 125.480(4)(c); *see*, Lesley v. Lesley, 113 Nev. 727, 734-735, 941 P.2d 451, 455 (1997); In Re Marriage of Wang, 271 Mont. 291, 896 P.2d 450, 452 (1995); and Strosnider v. Strosnider, 101 N.M. 639, 686 P.2d 981, 988 (1984). In the present case, the Verified Complaint of the Plaintiff indicates that the minor children are not allowed free access to even talk with their mother on the phone and that they were initially taken out of state and away from their mother and long time home without any warning to them or their mother. ¶s 5-7.

Moral considerations such as adultery and homosexuality in the child's home are also factors to consider in deciding custody of a child. Martinez v. Martinez,652 P.2d 934, 936 (Utah 1982); and Kallas v. Kallas, 614 P2d 641, 644-645 (Utah 1980). Consequently, since