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8 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**
9 **IN AND FOR THE COUNTY OF MARICOPA**

10 KELLY MCCOY, PLC, an Arizona
11 professional limited liability company,

12 Plaintiff,

13 v.

14 DESERT PALM SURGICAL GROUP, PLC,
15 an Arizona professional limited liability
16 company; ALBERT E. CARLOTTI, MD and
17 MICHELE L. CABRET-CARLOTTI, MD,
18 husband and wife,

18 Defendants.

19 _____
20 AND RELATED COUNTERCLAIM.
21

Case Number: CV2018-003112

COUNTERDEFENDANTS' MOTION
IN LIMINE NO. 2 RE: CHARACTER
EVIDENCE

Assigned to the Hon. James D. Smith

22 Counterdefendants Kelly McCoy, PLC, Matthew J. Kelly and Kevin C. McCoy
23 (collectively, "KM") by and through counsel undersigned, respectfully moves this Court to
24 preclude Defendants/Counterclaimants Desert Palm Surgical Group, PLC, Albert Carlotti,
25 and Michele Cabret-Carlotti (collectively, "KM") from presenting the following at trial:
26 (1) evidence relating Matthew Kelly's DUI arrest and subsequent criminal proceedings;
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1 (2) the contents of <https://dui-kelly-mccoy.com/> in its entirety; (3) any and all evidence
2 concerning the allegation that Mr. Kelly was intoxicated in the Court of Appeals during
3 the oral argument in the appeal of the underlying litigation; and (4) any and all evidence
4 relating to Messrs. Kelly and McCoy’s existing ratings, or whether they are rated, with
5 attorney peer review services (hereinafter, the “Character Evidence”). This Motion is made
6 pursuant to Rule 7.2, *Ariz.R.Civ.P.* as well as Rules 401–04, *Ariz.R.Evid.*
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8 **MEMORANDUM OF POINTS AND AUTHORITIES**
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10 **I. RELEVANT FACTUAL BACKGROUND.**

11 Throughout this case, DPSG has made various assertions regarding Matthew Kelly
12 and Kevin McCoy’s character and reputation in the community. Specifically, DPSG’s
13 counsel has expressly indicated that they will support their professional negligence
14 counterclaim by using evidence relating to Mr. Kelly’s 2011 DUI arrest, will revisit the
15 allegation that Mr. Kelly was intoxicated in the Court of Appeals during the oral argument
16 in the appeal of the underlying litigation, and cite to the current ratings, or lack of ratings,
17 that Messrs. Kelly and McCoy have with attorney peer review services, including but not
18 limited to AV and Martindale-Hubbell.
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21 Additionally, a website with the URL link: <https://dui-kelly-mccoy.com> currently
22 exists, and includes content which relates to the above-referenced 2011 DUI arrest of Mr.
23 Kelly, as well as various allegations and materials regarding unrelated civil lawsuits to
24 which KM has been involved as counsel or as a party. Due to the nature of DPSG’s stated
25 intentions with respect to the Character Evidence, KM is wary of any further attempts to
26 utilize this website or any other related information within their case-in-chief.
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1 Allegations as to the existence of any previous litigation unrelated to the underlying
2 litigation in which KM represented DPSG, including any mention of previous lawsuits or
3 DUI-related investigation and/or collateral proceedings, is irrelevant and extremely
4 prejudicial. So too is the inclusion of any reference to “peer rating” website, including but
5 not limited to or the contents therein are likewise not relevant and prejudicial. For these
6 reasons, the Court should preclude the admission of the above-referenced allegations.
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8 **II. LAW AND ARGUMENT.**

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10 The scope of relevant evidence is determined by whether the facts proved by the
11 evidence have a tendency to make a fact more or less probable than without the evidence
12 and whether the facts are of consequence in determining the action at issue. *Ariz. R. Evid.*
13 401; *Yauch v. S. Pac. Transp. Co.*, 198 Ariz. 394, 401-402, ¶ 19, 10 P.3d 1181, 1188–89
14 (App. 2000); *see also Newell v. Town of Oro Valley*, 163 Ariz. 527, 530, 789 P.2d 394, 397
15 (App.1990). “In other words, evidence is relevant if it relates to a consequential fact that
16 is placed in issue by the pleadings and the substantive law and if it alter[s] the probability,
17 not prove[s] or disprove[s] the existence, of a consequential fact.” *Yauch*, 198 Ariz. at 401-
18 402 ¶ 19, 10 P.3d at 1188–89 *quoting Hawkins v. Allstate Ins. Co.*, 152 Ariz. 490, 496, 733
19 P.2d 1073, 1079 (1987)(internal quotations omitted). Evidence Rule 402 generally
20 provides that relevant evidence is admissible and irrelevant evidence is not.
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23 Presuming that this character evidence meets some minimal relevance threshold
24 under Evidence Rule 402, the evidence may nevertheless be excluded by the Court if “its
25 probative value is substantially outweighed by a danger of [. . .] unfair prejudice, confusing
26 the issues, misleading the jury, undue delay, wasting time, or needlessly presenting
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1 cumulative evidence.” *Ariz. R. Evid.* 403; *see also Yauch*, 198 Ariz. at 403 ¶ 25, 10 P.3d
2 at 1190; *Salt River Project Agricultural Improvement and Power Dist. v. Miller Park,*
3 *L.L.C.*, 218 Ariz. 246, 250 ¶¶ 18-19, 183 P.3d 497, 501 (2008). Under Rule 403, the Court
4 balances the probative value of the evidence against the enumerated risks. *Id.*

6 Moreover, evidence of a “person’s character or a trait of character is not admissible
7 for the purpose of proving action in conformity therewith on a particular occasion.” Rule
8 404(a), *Ariz. R. Evid.* Rule 404(b) provides that evidence of “other crimes, wrongs, or acts
9 is not admissible to prove the character of a person in order to show action in conformity,”
10 but may only be admitted for other purposes, such as “proof of motive, opportunity, intent,
11 preparation, plan, knowledge, identity, or absence of mistake or accident.”

13 Arizona courts approve of the preclusion of character evidence regarding
14 allegations of substance abuse. *See Ritchie v. Krasner*, 221 Ariz. 288, 301, 211 P.3d 1272,
15 1286 (App. 2009). In *Ritchie*, the plaintiff sued a physician for medical malpractice for his
16 failure to diagnose and properly treat a significant spinal cord injury. *Id.* at 295, 211 P.3d
17 at 1279. During the course of litigation, the plaintiff died due to an accidental overdose
18 from the various medications that the physician had prescribed, and a wrongful death
19 action was then initiated. *Id.* at 294-95, 211 P.3d at 1278-79. Prior to trial, the trial court
20 excluded evidence regarding Mr. Ritchie’s “history of alcoholism and felony convictions”
21 pursuant to Rule 404(a) and further ruled that the introduction of Mr. Ritchie’s alleged
22 alcoholism “would have been highly prejudicial.” *Id.* at 295, 302, ¶¶ 9, 44, 211 P.3d at
23 1279, 1286. On appeal, the appellate court found that the trial court properly excluded the
24 evidence. *Id.* at ¶ 44, 211 P.3d at 1286.

1 The allegations of substance abuse in *Ritchie* were far more closely intertwined
2 with the issues of liability, causation and damages in the plaintiffs’ wrongful death and
3 medical negligence claims, yet such evidence was still excluded as inadmissible character
4 evidence and for its “highly prejudicial” nature. Here, the Character Evidence is of no
5 consequence to determining any issue in the present action, and does not make the facts
6 supporting DPSG’s legal malpractice counterclaim any more or less probable. DPSG also
7 has never disclosed any portion of the Character Evidence as being necessary to prove the
8 elements of their legal malpractice counterclaim. Furthermore, DPSG previously alleged
9 that Mr. Kelly arrived to the Court of Appeals for oral argument while intoxicated as
10 support for their claim for intentional infliction of emotional distress. This Court
11 dismissed that claim over two and a half years ago and it cannot be revisited now.
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15 Even if this Court were to consider the Character Evidence to be relevant, it should
16 still be precluded. It is exceedingly inflammatory and does not address whether KM fell
17 below the standard of care in its representation of DPSG. Any potential probative value
18 it may offer will be substantially outweighed by unfair prejudice, cause undue delay, will
19 confuse the issues in this case, mislead the jury, and could result in a mistrial if it is
20 introduced at trial.
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22 **III. CONCLUSION.**

23 For the foregoing reasons, KM respectfully requests that the Court preclude the
24 Character Evidence in its entirety.
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1 RESPECTFULLY SUBMITTED this 3rd day of March, 2021.

2 THOMPSON•KRONE, P.L.C.

3 By: /s/ Maxwell T. Riddiough

4 Russell E. Krone

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6 Samantha O. Sanchez

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7 Original of the foregoing filed
8 this 3rd day of March, 2021 with:

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