

# 2022 Nevada Government Civil Attorneys' Conference

September 16, 2022

2.0 CLE hours



3100 W. Charleston Blvd., Ste. 100 Las Vegas, NV 89102

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# Biographies



**Justice Elissa F. Cadish-** Justice Cadish graduated magna cum laude from the University of Pennsylvania in 1986, receiving her Bachelor of Arts degree with honors in Political Science. She received her law degree from the University of Virginia School of Law in 1989, where she was a member of the Virginia Law Review and was honored to be awarded the Order of the Coif. After graduation, she moved to Las Vegas and clerked for two years for Hon. Philip M. Pro in the United States District Court for the District of Nevada. She then entered private practice where she focused on commercial litigation and employment law. She practiced at Hale Lane Peek Dennison and Howard, where she worked from 1995 until August of 2007, becoming a shareholder at Hale Lane in 2000. In July of 2007, she was appointed by Governor Jim Gibbons to fill the position of District Judge in Department 6 of the Eighth Judicial District Court. Justice Cadish was President of the Southern Nevada Association of Women

Attorneys from 2004 to 2006 and remains an active member in that organization. She is also a Master in the Howard D. McKibben Inn of Court, an active member of the local chapter of the Federal Bar Association, and a member of the American Bar Association and the Clark County Bar Association. In 2006, she was appointed as a Lawyer Representative to the United States District Court, acting as a liaison between the bench and bar, assisting in planning the District Court Conference, and attending the Ninth Circuit Judicial Conference on behalf of our district. In November 2017, Justice Cadish was appointed to the Nevada Rules of Civil Procedure (NRCP) Committee, which reviewed all civil rules and procedures for Nevada Courts resulting in rule revisions effective March 1, 2019. Over the years, Justice Cadish also has taught at numerous seminars regarding employment law topics and participated in presentations regarding various litigation topics for the Inn of Court.

# Biographies



**Laura M. Tucker-** Ms. Tucker, Senior Deputy Attorney General in the Nevada Attorney General's Office Bureau of Consumer Protection, focuses on general deceptive trade, multistate litigation, and privacy matters. She has presented at various outreach events across the state, focusing on cybersecurity for small business owners, senior citizens, and parents of school-aged children. In 2017, she was awarded the Make a Difference Award from the Attorney General for her work in consumer outreach. Tucker has been with the Office of the Attorney General since 2014. She also has legal experience in First Amendment, trademark, and copyright law. Prior to law school, Tucker worked as a journalist in Las Vegas.



**Lucas Tucker-** Lucas is a Senior Deputy in the Nevada Attorney General's Bureau of Consumer Protection. Since 2013, Lucas has been investigating, and seeking relief for, deceptive trade practices and potential antitrust violations on behalf of the State of Nevada. His work also includes cases concerning personal privacy, and in all areas he often works with Attorney General staff in several states, as well as staff at the Federal Trade Commission and U.S. Department of Justice.



NEVADA APPELLATE COURTS  
SUPREME COURT OF NEVADA

# SUPREME COURT UPDATE

NEVADA GOVERNMENT CIVIL ATTORNEYS  
ANNUAL CONFERENCE  
SEPTEMBER 14-16, 2022



# DISCUSSION TOPICS

- Status of the Caseload at the Nevada Supreme Court and Court of Appeals/ Personnel Changes
- Overview of Supreme Court Commissions and Committees
- Question and Answer Session



NEVADA APPELLATE COURTS  
SUPREME COURT OF NEVADA

# REPORT ON THE STATUS OF CASELOAD AND PERSONNEL AT THE NEVADA SUPREME COURT AND NEVADA COURT OF APPEALS

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- In January 2015 there were 1,819 cases pending in the Supreme Court. Pending cases includes those that are ready for disposition, in the settlement conference program, and in various stages of briefing
  - Since the Court of Appeals began in January 2015, there have been 17,323 cases filed with the Nevada Appellate Courts as of March 31, 2022
  - Collectively, the Nevada Supreme Court and the Court of Appeals have resolved 18,761 cases through March 31, 2022—6,752 of which were Court of Appeals dispositions

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- As of August 31, 2022, the pending cases in the Appellate Courts have been reduced to 1,021
  - Through June 30, 2022, 658 Petitions for Review of Court of Appeals' decisions were filed: 608 or 92.4% were denied and 50 or 7.6% were granted. Granted means the Court of Appeals' decision was replaced with a new disposition issued by the Supreme Court, not that the result was changed

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## PERSONNEL CHANGES

- Justice Silver retiring effective September 29, 2022, replacement to be appointed, up for election 2024
- Justice Hardesty retiring effective January, 2023, replacement Judge Bell - unopposed
- Judge Tao retiring effective January 2023, contested election between Deborah Westbrook and Judge Ronda Forsberg

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# CHIEF JUSTICE ROTATION

- 2022 Chief Justice Parraguirre
- 2023 Chief Justice Stiglich
- 2024 Chief Justice Cadish

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# NORTH/SOUTH SPLIT

- Chambers Location
- Panel Selection



NEVADA APPELLATE COURTS  
SUPREME COURT OF NEVADA

# OVERVIEW OF SUPREME COURT COMMISSIONS AND COMMITTEES



# COMMISSIONS & COMMITTEES

- Supreme Court Settlement Program—Chief Justice Parraguirre, Program Supervisor
- Supreme Court Senior Judge Program—Chief Justice Parraguirre, Program Supervisor
- Commission to Study Alternative Dispute Resolution and Short Trial Rules—Associate Chief Justice Hardesty, Chair
- Commission to Study the Adjudication of Water Law Cases—Associate Chief Justice Hardesty, Chair

# COMMISSIONS & COMMITTEES

- Commission to Study the Adoption of Statewide Rules for Virtual Advocacy—Associate Chief Justice Hardesty and Justice Herndon, Co-Chairs
- Nevada Sentencing Commission—Justice Stiglich, Chair
- Specialty Court Funding and Policy Committee—Justice Stiglich, Chair
- Nevada Children's Commission—Justice Cadish, Co-chair

# COMMISSIONS & COMMITTEES

- Court Improvement Program Select Committee—Justice Cadish, Chair
- Access to Justice Commission—Justice Hardesty and Justice Pickering, Co-chairs; Justice Cadish, Member
- Committee to Study Evidence Based Pretrial Release—Justice Herndon, Chair
- Appellate Courts Information Technology Steering Committee—Justice Herndon, Chair
- Commission on the Nevada Rules of Appellate Procedure—Justice Silver and Justice Pickering, Co-chairs

# COMMISSION TO STUDY ALTERNATIVE DISPUTE RESOLUTION & SHORT TRIAL RULES

The Commission was created to review and consider recommendations for comprehensive amendments to the Rules Governing Alternative Dispute Resolution and Nevada Short Trial Rules

# COMMISSION TO STUDY ADJUDICATION OF WATER LAW CASES

- The Commission will work to improve education, training, specialization, timeliness, and efficiency of Nevada's district courts in adjudicating water law cases
- Commission membership is comprised of experienced professionals, key stakeholders, and members of the Nevada judiciary
- Created under Administrative Docket 0576, the Commission will present its findings and recommendations to the Nevada Supreme Court

# COMMISSION TO STUDY BEST PRACTICES FOR VIRTUAL ADVOCACY IN NEVADA'S COURTS

- Created in 2021 to study the continued use of virtual/remote platforms to conduct business in Nevada's courts post-pandemic
- The Commission's purpose is to evaluate applicable rules to govern the unified use of remote technology in Nevada's courts and consider possible rule changes for handling criminal, civil, and family court matters effectively using remote technology
- Commission membership is comprised of experienced legal professionals and members of the Nevada judiciary from across the state

# NEVADA CHILDREN'S COMMISSION

The Children's Commission was originally formed by the Supreme Court with a focus on combining statewide efforts regarding child dependency cases. However, over time, the Children's Commission has expanded its reach and focuses on:

1. Providing a forum for state and local agencies and entities with an interest in serving children, including the sectors of juvenile justice, child welfare, social services, health care, legal aid, and education, to convene and discuss the needs of children in this State;
2. Developing collaborative approaches to address these needs;

# NEVADA CHILDREN'S COMMISSION

3. Fostering cooperation among child-serving entities to identify and address emerging and emergent issues facing Nevada's children; and
4. Enhancing public awareness of challenges facing children and families in this State.

# COURT IMPROVEMENT PROGRAM SELECT COMMITTEE

- Nevada's Court Improvement Program emphasizes and supports children's right to protection from abuse and neglect
- The CIP is committed to developing and implementing data-driven, evidence-based, and outcome-focused best practices that advance meaningful and ongoing collaboration among court, child welfare agencies, and other stakeholders to achieve safety, permanency, and well-being for children and families in the child welfare system in a fair and timely manner

# COURT IMPROVEMENT PROGRAM SELECT COMMITTEE

- The CIP enables courts and agencies involved in the child welfare system to develop systemic, statewide changes to significantly improve the handling of child welfare cases while ensuring compliance with state and federal laws regarding child dependency and child welfare matters, oversees the application for and distribution of federal grant funds, sets minimum standards for program and funding criteria, and establishes policies and procedures to plan and develop these statewide changes designed to improve the quality of the court process for children and families involved in abuse, neglect, and dependency proceedings

# COURT IMPROVEMENT PROGRAM SELECT COMMITTEE

- The CIP members worked hard to draft statewide forms adopted for use in child dependency cases to ensure compliance with all state and federal requirements – required to be implemented by January, 2023.

# COMMISSION ON THE NEVADA RULES OF APPELLATE PROCEDURE

- Through ADKT 0580, the Commission on Nevada Rules of Appellate Procedure was created to consider and make recommendations to amend and update the Nevada Rules of Appellate Procedure
- The Nevada Rules of Appellate Procedure were originally based upon an earlier version of the Federal Rules of Appellate Procedure, but they have not been comprehensively reviewed since their adoption



NEVADA APPELLATE COURTS  
SUPREME COURT OF NEVADA

# QUESTION AND ANSWER SESSION

# OFFICE OF THE NEVADA ATTORNEY GENERAL

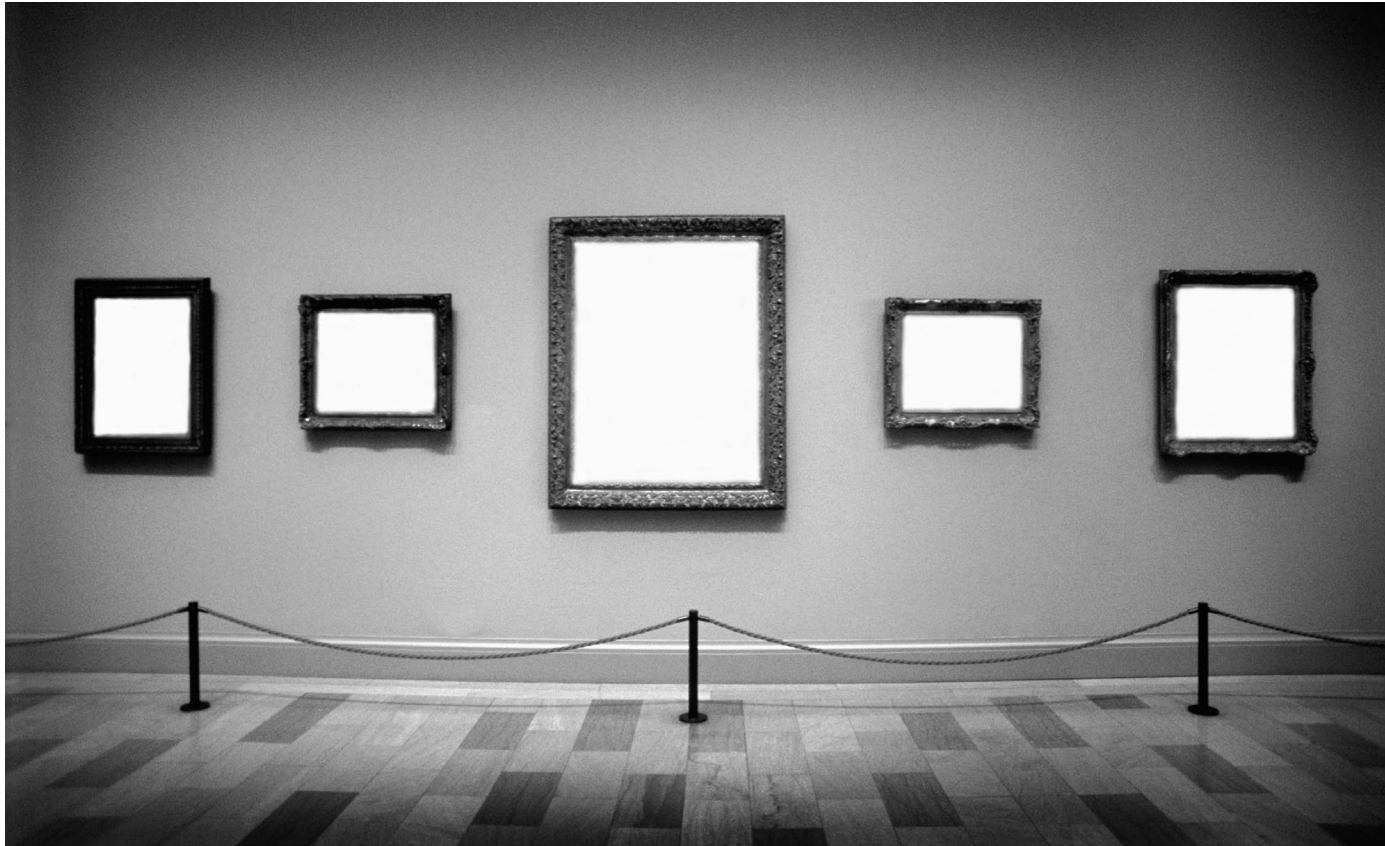
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## Bureau of Consumer Protection Discovery Issues in Complex Litigation for Public Agencies



# Framing the Discussion: Defensive Discovery

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# Overview

- Determining Relevant Agencies or Municipalities
- Cooperation/Who is the Party to Discovery
- Preserving Potential Evidence
- Responding to Discovery Requests
- Producing Documents
- When Agencies are Deposed





# Determining Relevant Agencies or Municipalities

Slightly less challenging than finding the Ark of the Covenant

# Ask and Survey

## FIRST, ASK:

- Who has suffered damages or other economic harm?
- Who regulates the relevant industry(ies) in Nevada?
- Who else might have potentially relevant information?

## THEN, SURVEY

Prepare and distribute surveys to confirm the relevant agencies or municipalities.





# Cooperation: Who is the Party Subject to Discovery?

## § Statutes and Regulations

### § Example: Bureau of Consumer Protection

§ NRS 598.0963(3) - If the Attorney General has reason to believe that a person has engaged or is engaging in a deceptive trade practice, the Attorney General may bring an action in the name of the State of Nevada against that person to obtain a temporary restraining order, a preliminary or permanent injunction, or other appropriate relief.

§ NRS 598A – The Attorney General may bring an action through its parens patriae authority



# Duty of Cooperation

- NRS 598A.150: Defines the duty of public officers and employees to furnish assistance in unfair trade practice investigations
- NRS 598.0964: Allows the Attorney General to coordinate with state and local agencies, as well as federal and other state governments, to enforce the NDTPA
- NRS 228.330(3): The Consumer's Advocate may have access to all records in the possession of any agency, board or commission of this State that he or she determines are necessary for the exercise of the powers set forth in subsection 1.



# Encouraging Cooperation

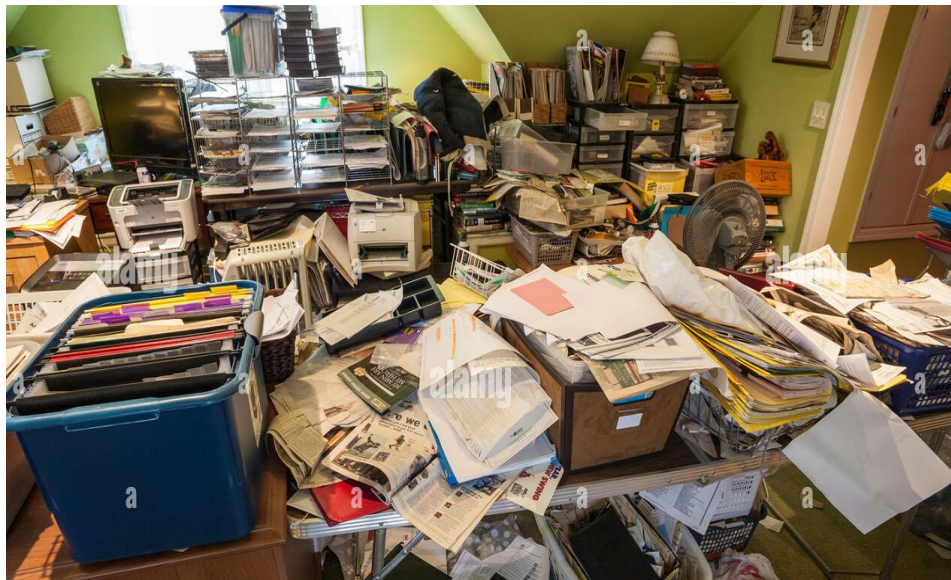
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- Explore ways to encourage cooperation among your boards, commissions, agencies, etc.
- Discovery leads to recovery



# Preserving Potential Evidence

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Don't Throw it Out Yet.

# Why is Preservation Important?

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## AFFIRMATIVE DUTY TO PRESERVE

- NRCP and FRCP 37 (a) – (e)
- *Fire Ins. Exchange v. Zenith Radio Corp.*, 103 Nev. 648 (1987)
  - Even when there is only potential for litigation, there is a duty to preserve evidence that the litigant knows or reasonably should know is relevant to the action.

## RISK OF SANCTIONS

- Termination sanctions
  - Default judgment or dismissal
  - *Young v. Johnny Ribeiro Bldg., Inc.*, 106 Nev. 88 (1990)
- Adverse inferences
  - *Bass-Davis v. Davis*, 122 Nev. 442 (2006)
  - NRS 47.250(3)
- Exclusion of testimony, attorneys' fees and costs, and jury instructions
  - *MDB Trucking, LLC v. Versa Products Company, Inc.*, 136 Nev. 626 (2020)



# What Needs to be Preserved?

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- ❑ Documents and information, including electronically stored information
  - ❑ word processing documents, emails, metadata, audio recordings, telephone logs, instant messages, calendars, spreadsheets, internet usage files, voicemails
- ❑ Wherever such information is stored
  - ❑ servers, workstations, laptops, personal computers, word processing, calendars, PDAs, removable media such as CDs and DVDs, and all other instruments
- ❑ All files to be preserved in their native / original format



# Who is Tasked with Preservation?

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- ❖ For agencies, the Executive Director
- ❖ For municipalities, the County Manager, Mayor or Commission / Council members
- ❖ Counsel for the agency / municipality should also be informed
- ❖ Any Information Technology Chiefs should also be informed



# Notice to Preserve / Litigation Hold

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## Common Elements of Litigation Hold Letter:

- Identify nature of the potential litigation
- Identify known defendants and specific products or services
- Identify relevant time period for which evidence may exist
- Provide examples of potential evidence
- Distribute copies to necessary staff
- Preserve emails, files and devices of employees that leave
- Follow up to confirm preservation efforts





# Preserving Evidence

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- Relevant time period is generally the timeframe of the complaint
  - Retention policy
- IT Issues
  - Server space



# Confidentiality and Protective Orders

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- Questions to ask
  - What sort of data needs to be protected?
    - Sometimes must meet with agency employees to discuss
  - Redaction
  - Protective Order
    - Decide in Court
    - Provides clarity and comfort



# Responding to Discovery Requests

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- Voluntary Cooperation vs. Subpoena
- Common Objections
  - Overly Burdensome
  - Relevance
  - Privileged/Confidential



# Meet and Confer with Opposing Counsel

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- Clarify important definitions
- Clarify scope of requests
- Negotiate search terms
- Identify / negotiate custodians



# PRODUCING DOCUMENTS

The Devil is in the Details

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# Producing Documents: Logistics and Search Terms

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## Logistics of Gathering and Transferring Files

- Individual Discussions with Custodians During Collection
- Secure Transfer of Files
  - Use a Secure File Transfer Protocol
  - Use Encrypted External Hard Drive

## Who Applies the Search Terms

- Agency Counsel or IT staff
- Use of Third-Party Vendor
- Application Procedure Should be Documented



# Reviewing Documents: Focus on Relevance or Privilege?

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- ❖ Relevance Review May be Appropriate if:
  - ❖ The number of documents is reasonable
  - ❖ There is general consensus with opposing counsel following meet and confers
  - ❖ Reasons for exclusion should be documented (e.g., relevance, outside of relevant time period, etc...)
- ❖ Privilege Review May be Preferable when:
  - ❖ There is a large volume of documents
  - ❖ There are disputes as to the meaning or scope of particular document requests
  - ❖ You have a clear understanding of what privileges apply
  - ❖ Excluding privileged documents that are irrelevant or non-responsive
- ❖ DOBs, SSNs and other Personal Information



# PRIVILEGE LOGS

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## Timing

- Discuss timing of privilege logs with opposing counsel
- If no specific agreement, produce logs within reasonable time, e.g. 45 days
- If no privileges claimed, expressly state that at time of production

## Content

- Log must sufficiently enable opposing parties and court to verify the asserted privilege is valid
  - Type of document and date of its creation
  - Author and recipients (including counsel)
  - Description and reason for privilege
- Redaction or Withholding



# Depositions

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- Who can be deposed?
  - Employees with relevant information
  - 16.1 witnesses
  - Former employees
    - Representation must be requested - NRS 41.0339(1)(a)





# Deposition – PMKs

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## ✓ NRCP 30(b)(6) Depositions

- ✓ Duty to present person most knowledgeable for organization
  - ✓ Can be anyone in the agency, including the janitor
  - ✓ Can also hire someone to act as witness and prep them
  - ✓ Can be more than one person, if necessary
- ✓ Not a memory test- Can be prepped from documents
- ✓ Still subject to the seven hours per person, but it's tricky (NRCP 30(d)(1))



# Depositions

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## Preparation

- Protect privilege
- Showing of Documents, taking notes
- Can ask things like how long met, with whom

## During the Deposition

- Topics discussed during breaks are not subject to privilege - *Coyote Springs Investment LLC v. Eighth Judicial District Court*, 131 Nev. Adv. Op. 18 (2015)
- 8th JD – Administrative Order 22-08 – Civility during depositions



# QUESTIONS

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*Thank you*

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