

Nevada Rules of Civil Procedure Revision Committee Summary

May 23, 2018 Meeting

The fifteenth meeting of the Nevada Rules of Civil Procedure Committee (Committee) was held on May 23 at 3:00 p.m. The meeting was video conferenced between the Washoe County Bar Center in Reno, and the Supreme Court conference rooms in Las Vegas and Carson City. Present in Reno were Bill Peterson and Graham Galloway. Present in Carson City were Kevin Powers and Todd Reese. Present in Las Vegas were Justice Kristina Pickering, Justice Mark Gibbons, Judge Elissa Cadish, Judge Kimberly Wanker, Discovery Commissioner Bonnie Bulla, Professor Thom Main, Bob Eisenberg, Don Springmeyer, Racheal Mastel, Dan Polsenberg, George Bochanis, and Loren Young.

The Committee first approved the April 25, 2018 meeting minutes.

Justice Gibbons provided a brief legislative update, indicating that the Supreme Court would, where possible, include in its bill draft requests provisions to address some of the conflicts between the NRS and NRCP identified by the Committee.

The Committee then discussed revisions to Rules 23, 25, 51, and 59, which have been previously considered. As to Rule 23, the committee accepted the modifications proposed by Kevin Powers to the aggregation provision to state: "The representative parties may aggregate the value of the individual claims of all potential members of the class to establish district court jurisdiction over a class action." Don Springmeyer moved to recommend the rule as amended, the motion was seconded by Dan Polsenberg, and the Committee voted to recommend the rule.

The Committee next considered Rule 25. In light of NRS 7.075, minor modifications were made to Rule 25 to permit the former attorneys of a deceased person to file a notice of death and a motion for substitution. The Committee also requested that the modifications be stated in the singular form. George Bochanis moved to recommend the rule as amended, the motion was seconded by Judge Cadish, and the Committee voted to recommend the rule.

The Committee next considered Rule 51. The Committee agreed with the location of the reference to preliminary jury instructions, but discussed

whether to remove “before trial” from the second sentence of NRCP 51(e)(1) to permit the court and the parties more flexibility as to when a preliminary instruction might be given; without that phrase, the court could give a “preliminary instruction” after the presentation of evidence had begun. The Committee was split regarding whether to remove this phrase. Justice Gibbons moved to recommend the rule as amended, without “before trial,” the motion was seconded by Todd Reese, and a majority of the Committee voted to recommend the rule. Justice Pickering and Judge Wanker voted no, and Racheal Mastel abstained.

The Committee next considered Rule 59, and after a short discussion, Don Springmeyer moved to recommend the rule as amended, the motion was seconded by Dan Polsenberg, and the Committee voted to recommend the rule.

The Committee discussed the following subcommittee rule recommendations.

1) Discovery Commissioner Subcommittee (NRCP 16.3 and NRCP 16.1(d))

Chair: Todd Reese

Members: Commissioner Bonnie Bulla, Commissioner Wes Ayres

The Committee next discussed NRCP 16.3 and modifications to NRCP 16.1(d), 16.2(k), and 16.205(k), presented by the Discovery Commissioner Subcommittee. The subcommittee reported that it altered Rule 16.3 to include commissioners hearing discovery motions and moved the report and recommendation sections into Rule 16.3(c) from Rules 16.1(d), 16.2(k), and 16.205(k). The subcommittee reported that it would prefer to pattern the powers of a discovery commissioner after a federal magistrate judge and provide a standard of review, but because the Legislature has not authorized referees in district courts, it was felt that retaining the report and recommendation format was the best course at this time. The committee requested that the 7 days in Rule 16.3(d)(2) be changed to 14 days. Commissioner Bulla moved to recommend the rule as amended, the motion was seconded by Don Springmeyer, and the Committee voted to recommend the rule.

2) NRCP 16.2, 16.205, 16.21, and 16.215 Subcommittee

Chair: Racheal Mastel

Members: Todd Reese, Judge Kim Wanker, Justice Mark Gibbons

The Committee next discussed a proposed NRCP 35.1, medical and psychiatric evaluations for use in family court. Racheal Mastel explained that custody evaluations and other examinations in family court are currently performed under NRCP 35, but that does not fit well with family court. Justice Pickering expressed concerns about the location of the rule as 35.1 and whether portions of the rule would be better left to the Legislature. The Committee suggested that the rule may be better located with the other family court rules, such as 16.21, and that the issues may be better addressed by developing rules addressing specific examinations, rather than having one rule covering all of them. The Committee passed on this rule for reconsideration by the subcommittee.

3) NRCP 80 Subcommittee

Chair: George Bochanis

The Committee next discussed NRCP 80. The subcommittee reported that it had received research in this area from Professor Main, and that it was reviewing the report. The subcommittee will prepare a draft of NRCP 80 for next month's meeting.

4) Time and Service of Process Subcommittee (NRCP 4, 4.1, 5, 6, NRAP 4, 25, 26, 27, and the NECFR)

Chair: Judge Elissa Cadish

Members: Justice Kristina Pickering, Judge Jim Wilson, Dan Polsenberg, Don Springmeyer, Racheal Mastel, Kevin Powers, and Todd Reese

The Committee next discussed NRCP 4 and the NEFCR. As to NRCP 4, Commissioner Bulla commented that the rule was long and suggested that the rule be broken up into different sections as Arizona has done with their similar rule. The Committee agreed. The Committee also expressed concern at the new rule concerning additional notice via email or text message, commenting that it was too specific and did not anticipate future technologies. Judge Cadish commented that the rule should be retained to allow a judge to order, in appropriate situations, that notice be sent by means other than to the last-known address when email or other contact information is known. The subcommittee will modify the rule as requested for consideration at the next meeting.

The Committee next discussed the NEFCR. Todd Reese reported that the major changes to the NEFCR were in the definitions section and in rules 8 and 9. The revisions more clearly specify the relationship between submission and filing. Service is required to be sent upon submission of a document to an e-filing system, and the clerk's office at the court may later review the document prior to filing. Notice of either filing or rejection must then be sent to all users receiving service through the e-filing system. Should a court desire to implement a submission and filing system with clerk review after filing, as the federal system uses, these rules will not prohibit that because a clerk's review prior to filing is optional. After discussion, Judge Cadish moved to recommend the rules, the motion was seconded by Don Springmeyer, and the Committee voted to recommend the rules.

5) Everything Else Subcommittee

Chair: Justice Kristina Pickering

Members: Justice Mark Gibbons, Todd Reese

The Committee next discussed NRCP 16, 62, 65, 66, 67, 70, 71.1 and 77. As to NRCP 16, the Committee requested that the term "commissioner" state "discovery commissioner" whenever it was used in the rule. The Committee also requested that the term "judge" be changed to "court" for consistency with the other rules. After discussion, Justice Gibbons moved to recommend the rule, the motion was seconded by George Bochanis, and the Committee voted to recommend the rule.

As to NRCP 71.1, the Committee agreed that the federal rule should be rejected because eminent domain proceedings are governed by NRS Chapter 37. However, the Committee also agreed that reference should be made to Chapter 35 in the NRCP to direct practitioners looking for eminent domain procedure to the NRS. The Committee agreed to use the notation "(Reserved)" and include an explanatory comment. The subcommittee will circulate a recommendation that states Rule 71.1 is reserved with a comment noting that NRS Chapter 37 addresses eminent domain for consideration at the next meeting.

Because not all Committee Members received a draft of NRCP 62, 65, 66, 67, 70 and 77, they were passed to the next meeting.

A discussion was then held of issues of general concern to the Committee members. Justices Pickering and Gibbons commented that, as the Committee's work winds down, they are appreciative of the amount of time that the committee members have given to the Committee and are concerned about the continuing draw on the resources of the committee members who are private practitioners. The Justices are also concerned with meeting deadlines to enable the rules to become effective on January 1, 2019. Given those concerns, unless the Committee desires to hold a July meeting, the last scheduled meeting is for June 20, 2018, at 2:00 pm. Please note that this meeting starts an hour early to enable the Committee to consider as much as possible. All remaining rules must be ready for the Committee's consideration at that time. Unless the Committee schedules another meeting, all rules not approved at the July meeting will be reviewed by Justice Gibbons, Justice Pickering, and Todd Reese. Once complete, a final report will be circulated via email to all committee members for comment. After the comment period, the final report will be posted on the website and filed in ADKT 0522 for the Nevada Supreme Court's consideration.

There being no further business to come before the Committee, the meeting was adjourned at 4:35 p.m.

Respectfully submitted,
Kristina Pickering and Mark Gibbons
Co-Chairs