

Nevada Rules of Civil Procedure Revision Committee Summary

October 25, 2017 Meeting

The eighth meeting of the Nevada Rules of Civil Procedure Committee (Committee) was held on October 25, 2017 at 3:00 p.m. The meeting was video conferenced between the State Bar of Nevada Office in Reno and the Supreme Court conference rooms in Las Vegas and Carson City. Present in Reno were Discovery Commissioner Wesley Ayres, Graham Galloway, Bob Eisenberg, and Bill Peterson. Present in Carson City were Justice Mark Gibbons, Judge Jim Wilson, Kevin Powers, and Todd Reese. Present in Las Vegas were Justice Kristina Pickering, Judge Elissa Cadish, Judge Kim Wanker, Discovery Commissioner Bonnie Bulla, George Bochanis, Steve Morris, Rachael Mastel, Dan Polsenberg, Don Springmeyer, and Professor Thom Main.

The Committee first approved the September 27, 2017 meeting minutes.

This meeting focused on discovery. The Committee discussed the following subcommittee rule recommendations.

1) Discovery Subcommittee (NRCP 16, 16.1, 26-37, 45)

Chair: Graham Galloway

Members: Steve Morris, Commissioner Wes Ayres, Commissioner Bonnie Bulla, Dan Polsenberg, George Bochanis, Don Springmeyer, Bill Peterson

The Committee discussed the proposed draft amendments to NRCP 16.1, 26, 30, 34, and 35 submitted by the Discovery Subcommittee. As to Rule 35, Bob Eisenberg presented an opposing proposed amendment. The Committee also considered the opposing views submitted by plaintiff and insurance defense counsel regarding Rule 35. Graham Galloway discussed the language in the committee note regarding the location of the exam, indicating that he agreed that the language should be changed so that the location will be in Nevada, unless otherwise stipulated or ordered. The Committee also discussed that this provision was substantive and should be in the text of the rule. The committee then discussed audio and video recordings and observers. The issue is, generally, how to address issues that arise during an examination and whether a person subject to an exam should have a right to a recording or an observer, or whether a court should be required to order a recording or

observer, and if so whether that should be for just cause. Commissioner Bulla emphasized that the committee draft was a compromise position. Several members of the subcommittee felt that exams should be video recorded, but Commissioner Bulla noted her opposition to video recording and her concerns that such videos might end up on the internet, compromising the examinee's privacy. The committee and the subcommittee agreed with the language in Bob Eisenberg's draft that observers should not obstruct the exam and that minors and incompetent persons should be entitled to a parent or guardian as an observer. Judge Cadish commented that a person subject to an exam might have a right to an audio recording but that the court might be required to order an observer. The Committee also acknowledged its lack of understanding whether doctors would refuse to perform exams if recorded or if an observer was present, or if performing an exam with a recording or observer might violate doctors' ethical rules. The committee noted that some attorneys were contacting doctors to get their input on this question. The Committee also discussed the lack of an insurance defense lawyer on the subcommittee and on the committee as a whole. Dan Polsenberg also noted that the draft from Bob Eisenberg was inconsistent on who would be requesting what, and Bob agreed that revisions were appropriate. The Committee passed on Rule 35 to allow Bob Eisenberg to work with the subcommittee to edit their respective drafts as needed, and to attempt to work out a compromise version or to present competing version to the committee at the next meeting.

The Committee next discussed NRCP 26, noting some discrepancy with the cross-citations to Rules 16.2 and 16.205. Subject to correcting those citations, Justice Pickering moved to recommend the rule, the motion was seconded by Justice Gibbons, and the Committee voted to recommend the rule.

The Committee next discussed Rule 30. The subcommittee noted that the rule tracked FRCP 30 including the limitation of 10 depositions absent stipulation or leave of court. The subcommittee noted that Rule 30(h) was kept from the existing rule, and that the rule was not intended to change "7 hours of testimony" referring to 7 hours on the record or the holding in *Coyote Springs Inv., LLC v. Eighth Judicial Dist. Court*, 131 Nev., Adv. Op. 18, 347 P.3d 267 (2015), concerning privileges during breaks in the deposition. Subject to minor edits to the committee note, Don Springmeyer moved to recommend the rule, Judge Cadish seconded, and the Committee voted to recommend the rule.

The Committee next discussed Rule 34, specifically the edited language in Rule 34(b)(2)(E)(i) pertaining to production of documents as they are kept in the usual course of business, unless that form of production is unreasonably burdensome for the discovering party. The Committee recognized that while the producing party should not be permitted to simply dump documents on the discovering party, neither should the discovering party be permitted to require the producing party to organize the documents in a form preferred by the discovering party when the documents are produced in an organized form. Commissioner Bulla stressed that some form of cost shifting or further request for organization was required to address discovery abuses. The Committee passed on Rule 34 so that the discovery subcommittee could address the language in Rule 34(b)(2)(E)(i).

The Committee passed on Rule 16.1 so that the subcommittee could make further edits to the rule.

A discussion was then held of issues of general concern to the Committee members. The Committee Members noted that the link on the Supreme Court's website to the Committee information was difficult to find, and the Committee asked if it could be made easier to find. The Supreme Court staff and Justices will investigate this. Bob Eisenberg asked what materials he could print for presentations concerning the Committee. Any materials that are posted on the website are publicly disseminated, and may certainly be used. These include the minutes, agendas, and recommended rules. Similar to disclosure of other materials, drafts in subcommittee should not be disclosed to allow the subcommittees to perform their work, but any drafts circulated to the committee as a whole may be used. The Justices cautioned the committee not to disclose information about pending cases when discussing hypotheticals. George Bochanis and Graham Galloway agreed to work on redrafting Rule 25 with the Everything Else subcommittee.

Justice Gibbons advised the Committee that the next Committee meeting is scheduled for November 29, 2017 at 3:00 pm at the usual locations, and that the Justices would set a December meeting.

There being no further business to come before the Committee, the meeting was adjourned at 5:00 p.m.

Respectfully submitted,
Kristina Pickering and Mark Gibbons
Co-Chairs