

Supreme Court of Nevada

ADMINISTRATIVE OFFICE OF THE COURTS

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Commission on Statewide Rules of Criminal Procedure

April 22, 2019

Noon

Summary prepared by: Jamie Gradick

Members Present

Justice James Hardesty, Chair
Justice Abbi Silver, Co-Chair
Justice Lidia Stiglich, Co-Chair
John Arrascada
Chief Judge Scott Freeman
Judge Douglas Herndon
Christopher Hicks
Darin Imlay
Lisa Rasmussen
JoNell Thomas
Steve Wolfson

Guests Present

Sharon Dickinson
Chris Lalli
Robert O'Brien
Steve Owens
John Petty
Luke Prengaman

AOC Staff Present

Vicki Elefante
John McCormick

- I. Call to Order
 - A. Justice Hardesty called the meeting to order at 12:05 pm.
 - B. Ms. Elefante called roll; a quorum was present.
- II. There was no public comment.
- III. Review and Approval of March 21, 2019 Meeting Summary
 - The March 21, 2019 meeting summary was approved.
- IV. Work Group Updates
 - Jury Instructions Work Group
 - Chief Judge Freeman provided attendees with a brief update on the work group's most recent efforts and referred attendees to the work group's meeting summary for additional details.
- V. Statewide Rules Discussion

A. Local Rules of Practice

- Attendees discussed the differences in discovery rules between the Second Judicial District (2nd JD) and the Eighth Judicial District (8th JD): Rule 6
 - Mr. O'Brien commented that the 2nd JD's rule 6(A) appears to remove the statutory burden on the defense to move for discovery.
 - Attendees discussed whether the rule is at odds with the statute; Mr. Prengaman commented that the statute requires both parties to make a request of the other in some form in order to trigger the statutory duty.
 - In the 2nd JD, the practice is either both parties signing a reciprocal discovery agreement, or both parties make their formal request in of the other in some form.
 - Attendees discussed the ease of discovery sharing through Justware and how that system has changed discovery request practices.
 - Mr. Lalli explained that, in Clark County, a discovery packet is provided to defense counsel at a first appearance in justice court; there is a receipt that should be signed for. The homicide team handles discovery differently.
 - Mr. Lalli clarified that the district attorney's office does not currently require the public defender to submit a discovery request within 30 days of the arraignment.
 - Ms. Thomas commented that there is an ongoing discovery issue with Metro records; additionally, the standard of review changes under *Roberts* if there is a specific request for discovery.
 - Mr. O'Brien commented that there are instances where the district court judge will not apply any sanctions for discovery issues if there is no request on the record.
 - Attendees discussed whether the 8th judicial district courts "take charge" of timing and manner of discovery.
 - The 2nd JD's rule 6(B) allows for this, but this is not a common practice in the eighth judicial district beyond occasional "readiness" check set by the court.
 - Chief Judge Freeman commented that it is a "different world" in Washoe; the early, discovery sharing practices in Washoe usually prevent the need for court intervention.
 - Justice Silver commented that the practice in the 8th JD is usually done "piecemeal".
 - Mr. Lalli explained that the Clark County District Attorney's office uses a discovery checklist and adheres to best practices in terms or discovery.
 - Justice Silver commented that, at one time, there was an ongoing issue with late discovery handed over at calendar call.
 - Mr. Imlay commented that certain types of discovery are difficult to get; if the defense does not specifically request them, then they lose the opportunity.
 - Justice Hardesty asked for input on whether the 8th JD could adopt an approach similar to that of the 2nd JD.
 - Attendees discussed the feasibility of this approach; Mr. Imlay commented that it would be helpful if there was some sort of record from Metro or the detective confirming that all discovery has been turned over to the district attorney.

- Mr. Hicks informed attendees that his office sometimes incurs delays in receipt of certain discovery but his office continuously collaborates with the various law enforcement agencies it works with to address issues and delays.
- Justice Hardesty asked for input on whether there should be any changes made to the 2nd JD's Rule 6?
 - Chief Judge Freeman commented that the rule is rarely invoked and the system works well; Mr. Arrascada agreed with this assessment.
- Justice Hardesty commented that the Commission does not have the ability to address the issues causing discovery delays at the law enforcement level so its focus will be on the development and adoption of a statewide discovery rule that comports with the 2nd JD's Rule 6.
 - Justice Hardesty asked Judge Herndon to review this and provide feedback.
 - Mr. O'Brien commented that the rule would not really alleviate the Clark County concerns.
 - Attendees discussed process challenges; the district court does not see the case until calendar call.
 - Mr. Imlay commented that the defense files the discovery motion on everything just in case something comes in during the middle of trial.
 - Justice Hardesty asked Ms. Dickinson and Mr. O'Brien for input on how to amend the 2nd JD's Rule 6 to address the Clark County concerns.
 - Attendees discussed the possibility of requiring a 30-day status check for certain types of cases.
 - Mr. Lalli explained that there is not one file where law enforcement keeps all evidence for a case; this creates a challenge.
 - A suggestion was made that the status checks be set 10-15 days out in order to allow additional time to locate evidence.
 - Attendees from the 2nd JD were supportive of a status check at the discretion of the parties but the timing would need to be in advance of the statutory 30-day deadline.
 - Justice Hardesty informed attendees that Rule 6 will be modified to include "at the request of either party, an earlier hearing before the district court on the status of discovery or other matters in the case will be required where requested in advance of the statutory time periods for production of discovery" language.
 - This will be reviewed at the next meeting.
- Ms. Rasmussen commented that Clark County is the only jurisdiction charging private counsel for discovery; perhaps this would be the place to address this.
 - Mr. Lalli informed attendees that he has requested that Clark County cease this practice; maintaining this practice requires a significant amount of time and resources.
 - Attendees discussed possible legal consideration associated with this.
 - This will be added to the agenda for the next meeting; there are possible constitutional issues with this.
- Attendees briefly discussed Rule 4: Initial Appearance and Arraignment and discovery beyond NRS Chapter 174.
 - Mr. Prengaman commented that, typically, this does not happen in Washoe County.
 - Attendees discussed a separate, "evolving" set of rules for the homicide practice in the 8th JD.

- Attendees discussed Rule 2: Case Assignments
 - Attendees discussed whether the 8th JD could adopt the 2nd JD's rule.
 - Ms. Dickinson informed attendees that the 8th JD has rules requiring random assignment.
 - Ms. Thomas suggested that Judge Herndon, and possibly others, should be present for this discussion since this could mean a significant disruption to the current system.
 - Justice Hardesty informed attendees that he has reached out to Chief Judge Bell and Judge Herndon about this issue and the Commission will hold off on this discussion until the judges can respond.
 - Attendees discussed case assignment processes in the 2nd JD.
 - Cases follow the department.
 - Justice Hardesty explained that the underlying policy of the process is to prevent forum shopping; Mr. Imlay commented that forum shopping is not a significant issue in the 8th JD.
 - Mr. Lalli commented on the inefficiencies in the 8th JD and explained that a rule similar to the 2nd JD rule could increase efficiency.
 - A suggestion was made to amend SCR 48.1 to allow for preemptory challenge of the judge in criminal cases.
 - Mr. Lalli expressed concern with "judge shopping".
 - Mr. Arrascada commented that the 2nd judicial district court would, likely, be opposed to this.
 - Justice Stiglich suggested that this issue be tabled until the judges on the Commission could be present to participate in the discussion.
 - Justice Silver commented that this would be problematic with overflow judges.
 - Justice Hardesty commented that this would be a challenge in the rural judicial districts with only one or two sitting judges.
 - Ms. Dickinson commented that there is a law review article that addresses this; Justice Hardesty asked her to forward the article citation to Ms. Gradick.

B. Court's Authority to Adopt Rules

- Attendees discussed the ADKT 0491 first interim report and recommendations recently filed with the Nevada Supreme Court. Justice Hardesty informed attendees that he has requested the Nevada Supreme Court schedule a public hearing for, most likely, June 3.
- Attendees discussed the Boyd School of Law's white paper.
 - During the previous meeting, attendees were asked to review pages 44-53 and footnotes in order to facilitate a discussion on Nevada jurisprudence regarding rules that might be adopted by the Nevada Supreme Court that may conflict with statutes.
 - Attendees discussed the paper's implication that legislative involvement and/or approval may be needed. Justice Hardesty commented that the recommendations presented in the paper are at odds with Nevada jurisprudence that allows rules to be established by the Nevada Supreme Court.
 - The legal authority referenced in the footnotes recognizes the inherent power of the Court to enact procedural rules, regardless of grants from the legislature.

- Attendees discussed the need for a “precise exploration” of where the authority constitutionally lies; Article IV, sections 20-21 contain the provisions in question. Concern was expressed regarding the constitutional authority granted to the legislature to make rules versus the Court’s “derived” or “inferred” power.
- Statutory rules do not provide complete guidance or coverage of all areas (like discovery, for example).
- Attendees discussed the Nevada Supreme Court’s power to adopt local rules of practice.
 - There needs to be an “enabling statute” that gives the Court authority to adopt rules of practice; there is a difference between rules of practice and rules of procedure. Inherent authority is primarily on issues of practice; the “dividing line” usually falls between substantive rules and rules of practice.
 - Justice Hardesty expressed concern regarding the development of rules that could, ultimately, be challenged because the Court may not have authority to adopt them.
- Attendees discussed the creation of discovery rules; Ms. Rasmussen commented that, in other states, the supreme courts have developed discovery rules because the courts have authority to govern lawyers.
- Justice Hardesty asked Mr. Prengaman, Mr. Imlay, Mr. Arrascada, and Mr. Wolfson to work together to research these issues and assess the extent of the Court’s authority to adopt rules that may conflict with statute, under Nevada’s existing jurisprudence. Mr. Prengaman will coordinate the effort.

VI. Other Items/Discussion

VII. Next Meeting

- Justice Hardesty requested that Ms. Gradick survey the Commission membership for availability and then schedule the next meeting.
- Justice Hardesty informed attendees that the next meeting will cover the following rules:
 - Rule 3: Appearance and Withdrawal of Attorneys
 - Rule 4: Initial Appearance and Arraignment
 - Rule 4.1: Setting of Cases (if time allows)

VIII. Adjournment

- The meeting was adjourned at 1:50 p.m.