

## Nevada Rules of Civil Procedure Revision Committee Summary

November 29, 2017 Meeting

The ninth meeting of the Nevada Rules of Civil Procedure Committee (Committee) was held on November 29, 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 Wes Ayres, Graham Galloway, Bob Eisenberg, and Bill Peterson. Present in Carson City were Judge Jim Wilson, Kevin Powers, and Todd Reese. Present in Las Vegas were Justice Mark Gibbons, Justice Kristina Pickering, Judge Elissa Cadish, Judge Kim Wanker, Discovery Commissioner Bonnie Bulla, Steve Morris, Don Springmeyer, Professor Thom Main, and Loren Young.

The Committee first approved the October 25, 2017 meeting minutes.

Justice Gibbons then introduced Loren Young as a new committee member.

The various subcommittees reported that they would attempt to have Rules 4, 23, 23.1, 23.1, 25, and the rest of the discovery rules for the committee's consideration at the December committee meeting.

The Committee discussed the following subcommittee rule recommendations.

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

Chair: Graham Galloway

Members: Judge Jim Wilson, Steve Morris, Commissioner Wes Ayres, Commissioner Bonnie Bulla, Dan Polsenberg, George Bochanis, Don Springmeyer, Bill Peterson, and Loren Young

The Committee discussed the proposed draft amendments to NRCP 16.1, 34, and 35 submitted by the Discovery Subcommittee. As to Rule 16.1, the subcommittee indicated that the proposed rule contained broader initial disclosure requirements than the federal rule, retaining the requirement of disclosing rebuttal and impeachment evidence, and requiring the disclosure of audio or video records, reports, or witness statements regarding the incident. Commissioner Bulla stated that the subcommittee felt that this type of information should be disclosed as soon as possible. Justice Pickering and

others were concerned about the breadth of the language and whether it would require the disclosure of internal emails or recorded phone calls regarding the incident. Bob Eisenberg commented that the last committee to review the rules favored as complete a disclosure as possible to encourage settlement. The committee passed on the rule, pending preparation of a redline of the rule.

The committee briefly discussed Rule 34, noting the new language in Rule 34(b)(2)(E)(i) requiring that the production of electronic documents be in a form not unreasonably burdensome for the discovering party to correlate, and Rule 34(d) regarding the reasonable cost of copying documents and storage media devices. Don Springmeyer moved to recommend the rule as written, the motion was seconded by Judge Cadish, and the Committee voted to recommend the rule.

As to Rule 35, competing proposals were put forth by the discovery subcommittee and by Bob Eisenberg. Graham Galloway summarized the disputed points, whether audio recording and an observer should be a matter of right or only by court order. Commissioner Bulla commented that the discovery subcommittee could accept the language in Bob Eisenberg's draft concerning the location of the exam and the conduct of observers. She also indicated that the language regarding conduct of the observers was in the advisory note of their draft, but that they could allow for it being moved into the text. Judge Cadish supported a draft giving a person subject to an exam a right to an audio recording but requiring that they seek a court order for an observer. Kevin Powers and Judge Wilson agreed with this approach. Loren Young reported back on his conversations with doctors regarding the rule. The doctors said that this version of the rule would not prohibit them from performing medical exams, but that it appeared to insinuate that they were not trustworthy, that it might intimidate new doctors from performing exams, and that it may shift the focus of the medical exam from the findings to the procedure used. The Committee passed on Rule 35 to allow the different sides to incorporate changes and present three final drafts to be forwarded to the Supreme Court.

## 2) NRCP 68 Subcommittee

Chair: Dan Polsenberg

Members: Don Springmeyer, Prof. Thom Main

The Committee next discussed NRCP 68. Subject to minor language and punctuation changes, Don Springmeyer moved to recommend the rule, Judge Wilson seconded the motion, and the committee voted to recommend the rule.

## 3) Time and Service of Process Subcommittee (NRCP 4, 4.1, 5, 6, and NRAP 4, 25, and 26)

Chair: Judge Elissa Cadish

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

The Committee discussed the proposed draft amendments to NRCP 4.1 and 6, and NRAP 26 submitted by the Time and Service of Process Subcommittee. The Committee first discussed FRCP 4.1, and agreed that it was not necessary for Nevada. Judge Cadish moved to recommend rejecting the rule, Don Springmeyer seconded the motion, and the committee approved rejecting the rule.

The Committee next considered NRCP 6. Todd Reese and Judge Cadish explained that the proposed rule adopted the federal method of counting days, counting all days and not excluding weekends and holidays, which enabled “day of the week” counting. The ability of the parties to stipulate to extensions of time subject to court approval was retained from the existing NRCP, and the minimal approach to NRCP 6(c) was proposed, instead of incorporating DCR 13 into the rule. The Committee elected to have a motion filed 21 days before a hearing, to reference the district court rules in NRCP 6(c)(1)(B), and to require the opposing affidavits to be due 7 days before any hearing. This 14 day window tracks the time line in DCR 13. The committee also discussed eliminating the 3 extra day allowance after electronic service, and agreed with the change, but Justice Pickering noted that the local rules need to be changed as well for consistency across all Nevada rules to prevent traps for the unwary who might think that they get an extra three days to act. Judge Cadish noted that the advisory committee notes addressed the concern about inconsistent time counting and rules and statutes that may not be updated quickly, noting

that the note suggested allowing additional time when warranted to prevent any prejudice as a result of the rule change. Subject to a notation in the advisory committee note regarding the need to alter the local rules, Judge Cadish moved to recommend the rule, Judge Wilson seconded the motion, and the committee voted to recommend the rule.

The Committee next considered NRAP 26. NRAP 26 is the appellate time calculation rule. In order to have one system of counting time, it should be changed as well. The Committee agree with the need to change the rule for consistency. Kevin powers noted an inconsistency with the language of NRAP 26(c) and the NEFCR, and the rule was referred back to subcommittee to address the inconsistency.

#### 4) Everything Else Subcommittee

Chair: Justice Kristina Pickering

Members: Justice Mark Gibbons, Todd Reese

The Committee discussed the proposed draft amendments to NRCP 13, 14, 24, and 47 submitted by the Everything Else Subcommittee. The Committee agree with the changes incorporated into Rule 47 that were suggested by Judge Wilson. Judge Cadish agree with the changes to Rules 13 and 14 to permit third-party defendants and defendants to file crossclaims against each other. Todd Reese noted that Rule 13 was proposed subject to the language in 13(d) being synced with the language in Rules 4 and 12 concerning the state and public entities. Subject to syncing the language, Justice Gibbons moved to recommend the rules, Todd Reese seconded the motion, and the committee voted to recommend the rules.

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

Chair: Graham Galloway

Members: Judge Jim Wilson, Steve Morris, Commissioner Wes Ayres, Commissioner Bonnie Bulla, Dan Polsenberg, George Bochanis, Don Springmeyer, Bill Peterson, and Loren Young

The Committee discussed the proposed draft amendments to NRCP 37 and 45 submitted by the Discovery Subcommittee. Kevin Powers expressed reservations about the short timeframe in Rule 45(a)(4) to notify other parties about a third-party subpoena, and the short timeframe to object and

file a motion. The committee agreed to change the 5 day time frame to 7 days to be consistent with the federal method of counting days. The committee elected to leave the 3 day time frame for filing a motion as is. The 15 day time frame in Rule 45(b)(1) was also change to 14 days for consistency. Justice Gibbons Justice Gibbons moved to recommend the rule, Don Springmeyer seconded the motion, and the committee voted to recommend the rule. Kevin Powers voted not to recommend the rule, citing the minimal 3 day time frame to file a motion in Rule 45(a)(4).

Rule 37 was not acted upon and was passed to the December meeting.

A discussion was then held of issues of general concern to the Committee members. Justice Gibbons advised the Committee that the next Committee meetings are scheduled for December 20, 2017, January 17, 2018, and February 21, 2018, at 3:00 pm, at the usual locations.

There being no further business to come before the Committee, the meeting was adjourned at 5:05 p.m.

Respectfully submitted,  
Kristina Pickering and Mark Gibbons  
Co-Chairs