

## Nevada Rules of Civil Procedure Revision Committee Summary

March 14, 2018 Meeting

The thirteenth meeting of the Nevada Rules of Civil Procedure Committee (Committee) was held on March 14 at 3:00 p.m. The meeting was video conferenced between the Washoe County Court conference room in Reno and the Supreme Court conference rooms in Las Vegas and Carson City. Present in Reno was Discovery Commissioner Wes Ayres. Present in Carson City were Judge Jim Wilson, Kevin Powers, and Todd Reese. Present in Las Vegas were Justice Kristina Pickering, Justice Mark Gibbons, Judge Elissa Cadish, Discovery Commissioner Bonnie Bulla, Don Springmeyer, Racheal Mastel, Dan Polsenberg, George Bochanis, and Steve Morris.

The Committee first approved the February 21, 2018 meeting minutes.

The Committee discussed the following subcommittee rule recommendations.

1) Discovery Subcommittee (NRCP 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 NRCP 32 submitted by the discovery subcommittee. The Committee requested that the prior NRCP 32(a) provision permitting a deposition to be used in interlocutory proceedings be added back into the rule. The Committee also requested that the phrase “Nevada Rules of Evidence” be changed to “Nevada law on evidence.” The Committee also identified a problem concerning pro se litigants in Rule 32(a)(6)(B). The rule prohibits a deposition taken from an unavailable deponent from being used against a party that shows that “it could not, despite diligent efforts, obtain an attorney to represent it at the deposition.” The Committee is concerned that this would, in many cases, prohibit the use of the deposition against parties that were proceeding entirely or primarily pro se. The rule was passed to the next meeting for edits to Rule 32(a)(1) and (2), and for Racheal Mastel, Todd Reese, and Commissioners Bulla and Ayres to propose language regarding pro se litigants in Rule 32(a)(6)(B).

2) Judgment and Post-Judgment Rules Subcommittee (NRCP 50, 52, 54(b), 58, 59, 60)

Chair Dan Polsenberg

Members: Robert Eisenberg, Kevin Powers, Don Springmeyer, Bill Peterson.

The committee discussed NRCP 58 submitted by the judgment and post-judgment rules subcommittee. Todd Reese reported that the Nevada Supreme Court Clerk's Office generally viewed the separate document requirement from FRCP 58(a) as an extra, unnecessary requirement for a judgment that would have jurisdictional implications for appeals, but that the requirement could be implemented. The Committee then discussed the benefits of the separate document requirement, that a distinct separate document would be entered into the record as the judgment. The Committee also discussed the time frame in which judges and attorneys would adapt to the separate document requirement and the difficulty in applying the separate document requirement in divorce and family matters. The Committee voted and remained split on the separate document requirement, with the majority of the Judgment and Post-Judgment Rules Subcommittee members supporting the separate document requirement. Accordingly, two versions of the rule will be forwarded to the supreme court. The Committee also removed the phrases "in family law cases" and "in addition" from Rule 58(g).

3) Class and Derivative Actions Subcommittee (NRCP 23, 23.1, 23.2)

Chair: Dan Polsenberg

Members: Don Springmeyer and Professor Thomas Main

The Committee next discussed NRCP 23 submitted by the class and derivative actions subcommittee. The Committee discussed the proposal to add language into the rule mandating that class actions be brought in district court and to delete NJCRCP 23. The Committee agreed that Justice Courts are generally not equipped to handle class actions and that class actions should be brought in district court. Kevin Powers raised concerns whether this could be done by rule or whether NRS 4.370, governing the Justice Court's jurisdiction, must be amended to expressly exclude class actions. Given the possibility that the Justice Court's jurisdiction might be interpreted to include class actions, in which case a subset of class actions involving amounts under \$15,000 would not be provided for if NJCRCP 23 were deleted, the Committee rejected the

proposed language mandating that class actions be brought in district court and deleting NJCRCP 23 absent an amendment to NRS 4.370. The Committee also expressed concern regarding the substitution of class members in Rule 23(d)(2) being adopted from the federal rule. The Committee passed on the rule to permit the subcommittee to redraft Rule 23, including considering further comments by Kevin Powers and aggregating claims to get over the \$15,000 justice court threshold jurisdiction and allow an action to be filed in district court.

#### 4) 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 NRCP 16.21 submitted by the NRCP 16.2, 16.205, 16.21, and 16.215 subcommittee class and derivative actions subcommittee. The Committee approved of the intent of the rule, but objected to the wording of the rule, which could be interpreted to exclude certain actions from postjudgment discovery in family law actions. The Committee passed on the rule and the subcommittee will revise the rule.

#### 5) Everything Else Subcommittee

Chair: Justice Kristina Pickering

Members: Justice Mark Gibbons, Todd Reese

The Committee discussed the proposed draft amendments to NRCP 16, 41, 51, 54, 62, 65, 66, 67, 70, 77, 79, 81, and 83 circulated by the everything else subcommittee.

The Committee first discussed Rule 81. The Committee discussed the deletion of the second and their sentence in the existing NRCP 81(a), including the proposed Rule 81(a)(2). The Committee agreed to delete both sentences as superfluous and no longer needed and edit the rule and the comment accordingly. Justice Gibbons moved to recommend the rules as amended, the motion was seconded by Don Polsenberg, and the Committee voted to recommend the rule.

The Committee next discussed Rule 83. The subcommittee presented several questions to the Committee. The subcommittee first included a new proposed

Rule 83(a)(2) governing the District Court Rules. The DCRs are orphaned and the subcommittee sought the committee's recommendation regarding including a new rule governing making and amendment of the DCRs. The Committee rejected the proposed rule, recommending that the Committee suggest to the Nevada Supreme Court that it consider appointing a separate committee to consider repealing the DCRs, adopting them as the local rules of those district courts that do not have local rules, and permitting the other district courts time to incorporate any relevant DCRs into their local rules. The subcommittee also considered Rules 83(a)(4) and the second sentence of Rule 83(b). The Committee approved of adding proposed Rule 83(a)(4), preserving the rights of the parties because of a nonwillful failure to comply with a local rule imposing a requirement of form, with Commissioner Bulla abstaining. The Committee rejected the second sentence of proposed Rule 83(b), expressing concerns regarding whether it could be used to object to a sanction for bad behavior where the actor was not expressly notified that he or she could not act in that manner. The Committee also voted to retain the first sentence of Rule 83(b) as it currently exists, without adding the word "reasonable." Justice Gibbons moved to recommend the rules as amended and with appropriate changes to the comments, the motion was seconded by Justice Pickering and Judge Wilson, and the Committee voted to recommend the rule.

The Committee next briefly discussed Rule 41. Justice Gibbons advised the committee that the rule as approved would be sent to the Supreme Court with the recommendation that the court consider whether to eliminate NRCP 41(e). If eliminated the court would adopt the failure to prosecute provisions of the federal rule. The Committee approved the rule draft as written if the court prefers to keep Rule 41(e).

The Committee next discussed the redraft of Rule 51. The Committee approved of the redraft but raised concerns regarding the location of Rule 51(b)(4) and (5) in the rule and the ability of a judge to give preliminary jury instructions prior to or after opening argument. The Committee passed on this rule so that the subcommittee could redraft the rule to incorporate or address preliminary jury instructions.

The Committee next discussed the redraft of Rule 54 and approved the edits made to specify that Rule 54(d)(2)(B)(iv) permits disclosing the non-privileged financial terms of the agreement. Justice Gibbons moved to

recommend the rule, the motion was seconded by Don Springmeyer, and the Committee voted to recommend the rule.

The Committee considered and voted to recommend Rule 79, rejecting the federal rule in favor of the existing Nevada statutes and rules regarding record keeping.

Due to time concerns, rules 16 and 62 through 77 were not considered and were passed to the next 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 April 25, 2018, and May 9, 2018, at 3:00 pm, but that the Las Vegas location for the April meeting would be announced at a later date; it will either be at the court room at the Las Vegas Supreme Court building or at the Las Vegas State Bar Offices.

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