

Nevada Rules of Civil Procedure Revision Committee Summary

August 1, 2018 Meeting

The eighteenth meeting of the Nevada Rules of Civil Procedure Committee (Committee) was held on August 1 at 2:00 p.m. The meeting was video conferenced between the Washoe County Bar Center in Reno, and the Supreme Court court room in Las Vegas. Present in Reno were Commissioner Wes Ayres, Graham Galloway, Bob Eisenberg, and Todd Reese. Present in Las Vegas were Justice Mark Gibbons, Justice Kristina Pickering, Judge Elissa Cadish, Discovery Commissioner Bonnie Bulla, Don Springmeyer, Dan Polsenberg, George Bochanis, and Loren Young.

The Committee first approved the July 26, 2018 meeting minutes.

The Committee considered Rules 10, 15, 45, 62, and 80. As to Rule 80, the Committee further amended Rule 80 to apply to transcripts of the proceedings made by stenographic reporting and to audio and video recording. The Committee elected to leave transcripts of video recordings in the hands of the district court judges to be admitted in accordance with the Nevada law of evidence. The Committee requested that a comment on that issue be added and a comment on those court employees that may certify an audio or video recording. As amended, Justice Pickering moved to recommend the rule, the motion was seconded by Bob Eisenberg and Commissioner Bulla, and the Committee voted to recommend the rule.

The Committee next considered Rules 10 and 15. The everything else subcommittee explained that Rule 10 and 15 were intertwined with regard to substituting or adding parties to pleadings. The subcommittee recommended adopting FRCP 10, with changes to preserve Nevada practice in Rule 10(a), and to rephrase fictitious parties in existing NRCP 10(a) and relocate it to 10(d). The subcommittee was split regarding whether to also add the factors for substituting fictitious parties into the rule. After discussion the Committee elected not to place the substitution factors into Rule 10, preferring to leave the factors to be judicially developed if change is warranted. The current statement of the rule 10 substitution factors is in *Nurenberger Hercules-Werke GMBH v. Virostek*, 107 Nev. 873, 881, 822 P.2d 1100, 1106 (1991). As to Rule 10, Justice Gibbons moved to recommend the rule as presented, the motion was seconded by Judge Cadish, and the Committee voted to recommend the rule.

As to Rule 15, the subcommittee recommended adopting FRCP 15, except for FRCP 15(c). As to Rule 15(c), the subcommittee noted that Nevada has departed from the federal rule since 1966. The federal rule expressly states the test for relation back as to parties, whereas the existing NRCP rule text references relation back of claims. Nevertheless, the existing Nevada Supreme Court case law interprets the existing NRCP 15(c) to permit relation back as to parties. *Costello v. Casler*, 127 Nev. 436, 440 n.4, 254 P.3d 631, 634 n.4 (2011). The subcommittee was hesitant to adopt FRCP 15(c) without an understanding of federal case law interpreting it. There is some concern that the federal court's application of "mistake" in FRCP 15(c)(2)(C)(ii) was undesirable, but some committee members preferred the other federal language to the existing Nevada test. The Committee members requested that they be provided with a handful of cases that exemplify the federal courts' application of FRCP 15(c)(1)(C) prior to making their decision to adopt that rule or retain Nevada's existing Rule 15(c). Commissioner Bulla moved to recommend Rule 15(a), (b), and (d), and to pass on Rule 15(c) pending review of federal case law, the motion was seconded by Justice Pickering, and the Committee voted to recommend Rule 15(a), (b), and (d). Todd Reese and Professor Main will provide the Committee with exemplars of the federal courts' application of FRCP 15(c)(1)(C). The Committee Members' vote as to which Rule 15(c) to adopt will be due by August 13, 2018, at 5:00 p.m.

The Committee next considered Rule 62. The subcommittee reworked Rule 62, generally conforming it to the April 2018 amendments to the federal rule. The Committee discussed whether Rule 62(b) was needed in light of the new federal amendments to Rule 62(d), and ultimately elected to retain Rule 62(b). The Committee discussed whether stays should take effect when the bond is approved, as stated in the FRCP, or when the supersedeas bond was filed, as stated in the existing NRCP. Some committee members advocated for retaining the existing Nevada rule, while other felt that it was not needed given the 30 day automatic stay in Rule 62(a). The Committee ultimately decided to recommend changing the existing Nevada rule to adopt the federal approach. The Committee also modified Rule 62(a) to make clear that the automatic stay ran from the date of entry of the judgment to 30 days after service of written notice of entry of judgment. The Committee also discussed Rule 62(e), declining to expand the rule to "employees" and retaining the existing rule consistent with NRS 20.040. Dan Polsenberg moved to recommend the rule as amended, the motion was seconded by Don Springmeyer, and the Committee voted to recommend the rule. The draft comments circulated with the rule were not approved and will be revised.

The Committee next considered Rule 45. The subcommittee revised the rule, generally adapting it to the federal rule except for Rules 45(a)(4), 45(b), 45(c)(2)A(ii), and 45(e). The Committee discussed 45(b), 45(c)(2)A(ii), and 45(e), generally approved of those modifications and revisions, and did not make any amendments to those sections. In Rule 45(a)(4), the Committee approved of the modification to provide notice to parties prior to service of subpoenas, but set the time at one 7-day period to for the party to object and file a motion, rather than a 7-day period to object and 3 day period to file a motion, a concurrently running 7- and 10-day period, or one 10-day period. The Committee also modified the rule to state that the opposing party's motion would be for a protective order under NRC 26(c). Question was raised as to whether it was necessary or appropriate to adopt provisions respecting service of Nevada subpoenas out of state, given the Uniform Interstate Depositions and Discovery Act that Nevada and other states have adopted. The new provisions are intended to make clear that the process to be followed is that of the foreign state and so the new sections were recommended. Commissioner Bulla moved to recommend the rule as amended, the motion was seconded by Graham Galloway, and the Committee voted to recommend the rule.

A discussion was then held of issues of general concern to the Committee members. Justices Gibbons and Pickering thanked the Committee Members for their service on the Committee. They also reported that attorney David Frederick has agreed to help read the final preliminary draft. No further Committee meetings were set. Justices Gibbons, Justice Pickering, and Todd Reese will finalize the rules for filing in ADKT 0522. A Committee Report will be prepared and will be filed in the ADKT when finished. Todd Reese will circulate the August 1 minutes and the Rule 15(c) materials to the Committee as soon as possible. The Committee Members' vote as to which Rule 15(c) to adopt will be due by August 13, 2018, at 5:00 p.m. Once complete, the final rules and report will also be circulated to the Committee Members and posted on the website. The Supreme Court will make an effort to circulate all written comments filed in ADKT 0522 to the Committee Members.

There being no further business to come before the Committee, the meeting was adjourned at 4:43 p.m.

Respectfully submitted,
Kristina Pickering and Mark Gibbons
Co-Chairs