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June 13, 2021

Elizabeth A. Brown, Clerk of the Court
SUPREME COURT OF NEVADA
201 S. Carson Street
Carson City, NV 89701

Re: ADKT No. 581
To nvscclerk@nvcourts.nv.gov only

Dear Ms. Brown:

This letter is being sent pursuant to the invitation for comments by members of the Bar contained in the order filed May 20, 2021, in ADKT 0581.

I served as Reporter to the 2016 and 2020 EDCR 5 Revisions Committees and at the direction of the latter Committee drafted proposed EDCR 5.609 and its ancillary procedural provisions. The rule set has been approved by the family court, is in mid-review by the entire Eighth Judicial District, and should be submitted to the Nevada Supreme Court in the near future.

The proposed rule, drafted after lengthy discussion, significant public input, and inquiries to all known stake-holders, is:

> Rule 5.609. In-person and virtual hearings.
>
> (a) Unless otherwise directed by the court, all hearings except for evidentiary hearings, trials, and proceedings to show cause why sanctions should not be imposed shall be conducted utilizing simultaneous audiovisual or telephonic transmission equipment.

21-17061

(b) A party filing a motion, opposition, or reply requesting an in-person hearing shall set forth the reasons for the request.

(c) Upon a minimum of seven days notice, the court may schedule or reschedule any hearing as an in-person hearing for good cause.

For the reasons discussed below, the creation of a Commission to study best practices is a good idea, and I would happy to assist that Commission in any way that I can.

I. BASIC ECONOMICS OF VIRTUAL AND PHYSICAL APPEARANCES

The pandemic forced circumstances allowing a reconsideration of the economics of every court participant in the "normal" operations of family court. Typically, on motion days, each department would have some 5-8 hearings, each hour, on the law and motion calendar, usually for four to six settings per day.

Each case would have at minimum two parties, and at least half the time, two attorneys. Settings were in one-hour increments. That means that at least 20 departments would have between two and four people sitting in the hallway waiting for at *least* most of an hour for each hearing, all day; normal hearing dockets were in one-hour increments. It is extremely common for things to run long, so the realistic wait times in the hallway were 2-4 hours (with or without travel time), from arrival to departure, for every litigant and attorney, for each case.

As to attorney fees, that means some 20 x 4 x 6 (480) hours of "waiting" time" were incurred – every hearing day, and on top of the time spent actually attending to cases. Attorneys typically bill from $200-$750 per hour. Assuming half of the cases had counsel on at least one side, that means that some $114,000 to $228,000 ***per day*** of billable time was consumed each and every day just in waiting for ten to fifteen minute hearings by requiring people to attend in-person hearings at family court.

And even for the cases *without* counsel, every in-person hearing for each litigant normally required taking a day off of work, at the loss of an entire day's wages, the effects of which were most severe at the lower part of the economic spectrum. This reality is critical to any access to justice analysis.

Virtual appearances typically permit litigants to take breaks to attend them while at work as opposed to taking a day off, and permit counsel to be at their desks attending to other matters until called; if they only bill when the matter in question is being called (as they should), that is a reduction in

incurred fees per case of some 75% to 80% as opposed to attending an in-person hearing. The total savings to litigants is in the many millions per year.[1]

That is why the EDCR 5 Committee Summary (attached) recites:

> Having noted the enormous savings in time and money for litigants and counsel alike, the default was altered so that motion practice would continue to default to "virtual" even after the pandemic restrictions are lifted, with a provision to have an in-person hearing if desired; the court is sensitive to the public-access issue (for non-sealed, non-closed hearings) and working to provide a mechanism to provide it virtually as if it was in person.

As part of the discussion leading up to adoption of the proposed rule, members of the Committee ran an informal survey for several months (both in private communications and through the Nevada Bar family law list serv), collecting all comments, suggestions, complaints, and criticisms, and examining each at length. The responses were overwhelmingly positive, despite the fact that, because the proposal was to change to virtual hearings as a default, the motivation to comment at all would be greatest for those objecting to the proposal.

The primary objections received were of the "I want my day 'in court'" variety. Closer examination indicated that most of these comments were really about the same economics described above – there are lawyers whose business model ***depends*** on the inefficiencies and waste of travel time and waiting time to make their practices more profitable. The Committee did not see this as a legitimate basis for objection.

We also heard rumors that there were judicial officers who did not feel sufficiently "respected" without the trappings of having people physically rise when they entered the room, etc. The Committee did not see this as a legitimate basis for a different rule, either.

II. DEFAULTS AND JUDICIAL DISCRETION

The reason the default is for virtual hearings is economic. The reality of the adversarial process is that some wealthier litigants will wish to schedule in-person hearings just to increase the cost and inconvenience to the other party. The experienced judges and lawyers on the EDCR 5 Committee, knowing this, made the default virtual, but permitted any party at any time to request an in-person hearing; the ultimate decision on the matter belongs to the judge, who presumably can weigh the

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[1] Even if any of the specifics above were quibbled over, the numbers involved are so massive that a variance of 50% would not change the recommendations reached.

proffered rationale for requesting an in-person hearing against the indisputable increase in expense and inconvenience to everyone resulting from granting such a request.

Any mechanical process ***other*** than making virtual appearances the default would unnecessarily require additional expense, delay, and inefficiency to almost every party in almost every case. For example, requiring people to file notices of A/V appearances would mandate such requests by both sides and both counsel for almost every hearing. There is no known legitimate justification for requiring that level of wasteful bureaucracy and paperwork, given that the overwhelming majority of litigants and attorneys prefer all motion hearings to be virtual.

The ultimate decision remains vested in the trial court judge, who might know of some legitimate reason to have people incur the additional expenditure of time and money for an in-person hearing. This is true whether anyone requests an in-person hearing or not. As a practical matter during the last year, most judges have required personal appearances only by people who have demonstrated an inability to control themselves outside of the formal court setting.

Part of the charge of the proposed Commission should include how to address those judges who state that they simply "want" everyone to appear in person, regardless of the economic and other effects on those litigants and counsel.

III. COURTROOMS AND INFRASTRUCTURE

The 2019 Report of the National Center for Juvenile Justice (NCJJ) on Nevada's family courts identified infrastructure as the single largest challenge facing those courts. One of the positive results of the pandemic pivot to virtual hearings has been to illustrate how an embrace of technology can enormously extend the usable lifespan of the existing physical plant.

It has been made clear that the existing family courtrooms in Clark County should be adequate not just for the current family court, extended to 26 departments, but potentially for twice that number. Courtroom are simply unnecessary for the great majority of hearings and decisions. Between submission on the papers (slightly expanded in the 2016 rule revisions, and set to be further expanded in the 2021 proposed revisions) and virtual motion hearings, which simply require electronic connections between a judge (in chambers or at any other location), a court clerk, and the litigants, actual courtroom use is enormously reduced.

There are more mixed and nuanced reactions and evaluations of *trial* proceedings by virtual means. Virtual trials certainly are possible, and have been routinely and successfully done for many months, but some lawyers and judges prefer the immediate availability of moving physical paper around a

courtroom, and some people have suggested that credibility determinations are easier in person (others dispute this).

The Commission should explicitly investigate and report on the impact of a transition to virtual motion hearings on the need for courtrooms, chambers, and other traditional structures used for court operations; it is anticipated that budgets can be enormously lowered, the usable lifespan of physical plants can be greatly extended, and otherwise-necessary dispersal of judicial officers to multiple locations can be reduced, avoided, or even reversed.

IV. ACCESS TO JUSTICE; REFLECTION OF PHYSICAL COURTROOMS

One legitimate concern about virtual proceedings during the pandemic has been how to ensure equal access to those individuals who lack the means or ability to utilize video for virtual appearances. This was raised as an equal protection concern by the Self-help Center, and from other quarters.

To some degree the concern is overblown. Preliminary reports from the most recent census statistics, still being compiled and published, indicate that 85 percent of adults owned a smartphone, as of February 2021. As far back as 2016, 89% of households had some kind of computer with video capability, including 81% of the population with smartphones,[2] which indicates that the 2021 percentage of the population with access to some kind of video-capable computer should now be well over 90%. That is all that is needed for full virtual participation in a court proceeding.

In any event, once pandemic restrictions on access to the courthouse and other public buildings is lifted, access to justice issues should be not only as good as it was before virtual hearings, but should be easily made to be greatly ***superior***.

Specifically, the judges of the Eighth Judicial District are working on attempting to create uniform procedures whereby virtual hearings mirror, as closely as possible, the functionality of physical courtrooms. That means ensuring public access to all non-sealed, non-closed proceedings by way of publicly-available links. This actually *increases* public access to court proceedings, as an individual at home could "observe" proceedings in a dozen courtrooms, located in different buildings, in the same hour. Any study of "Best Practices" should create a template for all courts on how to provide such access as simply and openly as possibly.

As for hearing participation for those people without the necessary equipment or the ability to operate it, it would be both inexpensive and simple to arrange for laptop kiosks at the family court

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[2] *See* Ryan, Camille, "Computer and Internet Use in the United States: 2016," American Community Survey Reports, ACS-39, U.S. Census Bureau, Washington, DC, 2017.

building, making participation in a virtual hearing no more difficult for those persons than a personal appearance would have been. And by extending those kiosks to public facilities at remote locations – Laughlin, Mesquite, elsewhere – equal access to justice can be ***enormously*** improved for everyone, including the small percentage of the population who do not have or cannot operate their own devices.

This not to say there have not been some complaints and hiccups. The most common complaint in surveying family court attorneys in Clark County was about the small number of judges who have taken advantage of the remote appearances to not appear visually at all during such hearings. Criticized by lawyers as the "Wizard of Oz" problem, it should be directly addressed by a Best Practices Commission, again with an eye to duplicating as nearly as possible what litigants and lawyers have in a physical courtroom – including the ability to see the judicial officer's mannerisms and expressions.

V. RURAL COURTS

The reluctance, or outright refusal, of rural courts to permit audio-video appearances, electronic filing, and other 21st century practices have been noted as an access to justice impediment for the citizens of those locations for years.[3] Several such courts continue practices such as demanding not just in-person appearances at hearings, but original "wet" signatures on all documents and the personal delivery of ***all*** papers to their court clerks irrespective of any rational concern for authenticity.

While equipment and forms permitting remote access have been made available to several of those courts for a decade, some of them refuse to allow use of any of it, effectively denying equal access to justice to citizens of those locations who are then economically prohibited from employing counsel of their choice in any of the population centers where lawyers best suited to their cases are located.[4]

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[3] *See, e.g.*, Marshal Willick Legal Note Vol. 23 — What's up with Hooterville? (Aug. 18, 2010), posted at https://www.willicklawgroup.com/vol-23-whats-up-with-hooterville/.

[4] This problem was repeatedly brought up in the Rural Sub-Committee of the Access to Justice Committee, where I was asked to participate and assist by Justices Douglas and Gibbons; no substantive action to improve the situation was ever taken.

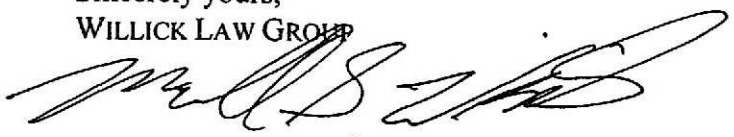
Such courts have ignored the Nevada Supreme Court initiatives where A/V equipment was distributed around the state, as well as both the Supreme Court Rules regarding audio-video appearances that the holdings in cases such as *Campfield*.[5]

Certainly part of the work of a Best Practices Commission should be how to ensure equal access to justice by Nevada citizens in rural counties, including getting the courts of those counties, no matter how reluctant, to begin employing both virtual hearings and electronic filing as part of their standard operations.

VI. CONCLUSIONS

There is an opportunity here to make the entire court bureaucracy more accessible, affordable, and efficient, and therefore inherently more "equal" than it has been. That opportunity should be embraced by appointment of an appropriate Best Practices Commission staffed by persons knowledgeable in both technological and court operations matters, and the recommendations of that Commission should be promptly evaluated and implemented state-wide as expeditiously as possible.

Sincerely yours,
WILLICK LAW GROUP



Marshal S. Willick, Esq.

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[5] *See Campfield v. Campfield*, No. 69373, Order of Reversal and Remand (Unpublished Disposition) Dec. 21, 2016). The Court's A/V rules should also be revised at the conclusion of the work of this Commission to see if the distinction of the kinds of hearings at which virtual appearances may be made continues to make sense.