

IN THE SUPREME COURT OF THE STATE OF NEVADA

IN THE MATTER OF THE ADOPTION
OF A UNIFORM RULE GOVERNING
TELEPHONIC AND AUDIOVISUAL
PARTICIPATION IN CIVIL, CRIMINAL
AND FAMILY LAW CASES IN ALL
COURTS IN THE STATE OF NEVADA.

ADKT No. 424

FILED

JUN 07 2011

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *[Signature]*
CHIEF DEPUTY CLERK

PETITION

COMES NOW, Mark Gibbons, Justice of the Nevada Supreme Court, who petitions the Nevada Supreme Court on its Administrative Docket to amend Rule 4 of Part IX, Rules Governing Appearance By Communication Equipment, originally adopted on December 18, 2008, as follows:

1. Whereas this Court entered an order amending the rules governing telephonic and audiovisual transmission on December 4, 2009;
2. Subsequent to the amendment of the rules, it has been brought to the undersigned's attention that the rules may be interpreted to preclude witnesses in certain proceedings from testifying in court proceedings, as shown by Exhibit "A;"
3. That further input from the legal community and public may be appropriate as to additional amendments which may be necessary to the audiovisual transmission rules.

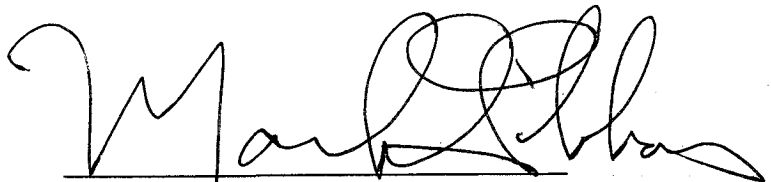
Wherefore, the undersigned requests that the Court

11-16736

adopt the attached revisions to Rule 4(3)(a), (3)(b), (3)(c) and (4) as shown by Exhibit "B."

Dated this 7 day of June, 2011.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Mark Gibbons", written over a horizontal line.

MARK GIBBONS, Justice

Exhibit "A"

Memorandum

By: John Reese Petty

Re: ADKT 424 (In the Matter of the Adoption of a Uniform Rule Governing Telephonic and Audiovisual Participation in Civil, Criminal and Family Law Cases in All Courts in the State of Nevada)

Dated: January 26, 2010

On December 4, 2009, the Nevada Supreme Court amended the uniform rules governing telephonic and audiovisual participation in Nevada Courts it had adopted on December 18, 2008. These amendments take effect on February 2, 2010 and are now Part IX of the Supreme Court Rules. (A copy is attached.)

These amendments express a policy favoring *appearances by parties* via audiovisual transmission in appropriate conferences, hearings and proceedings in civil cases, but they are also applicable to criminal cases. As will be concluded below however, the use of audiovisual transmission equipment in criminal proceedings under these rules will be extremely rare since under the amendments such appearances cannot be mandated at trials, motion hearings where testimony is expected to be given (think suppression hearings or hearings on the admissibility of prior bad act evidence, for example), or in hearings on motions in limine.

Rule 3 provides that these rules apply "to all cases except juvenile and appellate proceedings." Rule 3 adds that "in criminal cases, the court may follow the procedures set forth in these rules or NRS 50.330." (Emphasis added.)¹

¹NRS 50.330 provides:

Any testimony given pursuant to NRS 50.315 or 50.320 may be given by means of simultaneous audiovisual transmission accomplished through the use of:

1. One or more cameras at a location other than the courtroom that depict the witness in real time so that the defendant, the defendant's counsel, the prosecutor, the court and the jury, if any, can see the witness in his entirety; and
2. One or more cameras in the courtroom that depict the defendant, the defendant's counsel, the prosecutor, the court and the jury, if any, in real time on a screen visible to the witness who is at another location.

Rule 4 identifies and contrasts the types of proceedings where appearance by audiovisual equipment is appropriate and where personal appearance is required. Rule 4(1)(a-g) lists circumstances where the use of audiovisual transmission equipment may be allowed in the place of personal appearances: case management conferences, trial setting conferences, law and motion hearings (except motions in limine), discovery motions before the discovery commissioner, status conferences, a hearing to review the dismissal of an action, and hearings scheduled for 15 minutes or less. In contrast, Rule 4(2)(a-b) lists circumstances where personal appearance is required: trials and hearings where witnesses are expected to testify, hearings on temporary restraining orders, settlement conferences, trial management conferences, hearings on motions in limine, hearings on petitions to confirm the sale of property under NRS Title 12, hearings before the discovery commissioner where the discovery commissioner has determined that the presence of the parties is necessary, applicants seeking certain ex parte orders, hearings on orders to show cause, and persons ordered to appear under NRS Title 12.

Rule 4(3)(b) allows the court, upon its motion or upon the motion of a party that establishes good cause, to require the personal appearance of a party at a hearing where appearance by audiovisual equipment is otherwise authorized, *i.e.* as identified in Rule 4(1). Similarly, under Rule 4(3)(c) the court, if it determines that an audiovisual appearance is appropriate, may allow a party to appear by audiovisual transmission in any of the hearings listed in Rule 4(2). Here the Rule provides that “[t]he court may permit a party to appear.” This suggests that a request to appear by audiovisual transmission must be made by the party in the first instance. Keep in mind that the term “party” covers the party and the party’s attorney, Rule 1(3), it does not include witnesses. Thus, Rule 4(3)(c) does not provide for the examination of witnesses by audiovisual transmission.

Rule 4(4) allows the court to continue any audiovisual conference or hearing if, at any time during the conference or hearing, the court determines that a party’s personal appearance is necessary.

Rule 4(5) sets forth the procedure to be followed by a party choosing to appear by audiovisual transmission in those proceedings where such appearance is allowed, *i.e.* Rule 4(1). A party who has given notice of his intent to appear by audiovisual transmission may elect to appear in person, but must “notify the court and all other parties that have appeared in the action ... at least two court days before the appearance.” Rule 4(5)(c).

Rule 4(6) sets forth the procedure to be followed by the court when it has determined that the personal appearance of the party is required notwithstanding the party’s request to appear by audiovisual transmission.

Finally, Rule 4(7), (8), (9), (10), (11), and (12) covers such things as vendor services, audibility and procedure, and reporting. Rule 4(9) provides that “[a]ll proceedings involving audiovisual transmission equipment appearances must be reported to the same extent and in

the same manner as if the participants had appeared in person.” Rule 4(12) provides for the right of public access to court proceedings.

Under these amendments the use of audiovisual transmission equipment in criminal cases to any large degree not agreed upon by the parties seems, at present, unlikely. More likely is the use audiovisual transmission equipment under the provisions of NRS 50.330. But even NRS 50.330 is not an open-ended grant of authority for the use of audiovisual transmission equipment in criminal cases. Rather, it is limited to “testimony” given pursuant to NRS 50.315 and 50.320. Both NRS 50.315 and 50.320 concern the use of certain types of affidavits in the place of live testimony. Moreover, under NRS 50.315(6), a defendant may object, either at or before trial, to the use of the affidavit if “the defendant establishes that ... [t]here is a substantial and bona fide dispute regarding the facts in the affidavit or declaration; and ... [i]t is in the best interests of justice that the witness who signed the affidavit or declaration be cross-examined[.]”² And NRS 50.315(7) provides that if, in a felony trial, the

²As an aside, in *City of Las Vegas v. Walsh*, 121 Nev. 899, 124 P.3d 203 (2005), the Nevada Supreme Court concluded that “[i]f defense counsel has no bona fide dispute regarding the facts in an affidavit and credibility of an NRS 50.315 declarant, then cross-examination is meaningless. It serves no purpose to have a witness appear if no questions will be asked on cross-examination.” The court said that defense counsel had the authority to waive a defendant’s right to confrontation and that failure to “properly raise a dispute of fact with regard to affidavits submitted under NRS 50.315 constitutes a waiver of the defendant’s opportunity to confront the witness against him.” 121 Nev. at 907. Last year, in *Melendez-Diaz v. Massachusetts*, 557 U.S. ____, 129 S.Ct. 2527 (2009), the United States Supreme Court noted that “notice and demand” statutes in their “simplest form” require the prosecution “to give notice to the defendant of its intent to use an analyst’s report as evidence at trial, after which the defendant is given a period of time in which he may object to the admission of the evidence absent the analyst’s appearance live at trial.” 129 S.Ct. at 2541 (citations omitted). The Court said that the simplest form of notice and demand was permissible because the defendant “*always* has the burden of raising his Confrontation Clause objection; notice-and-demand statutes simply govern the *time* within which he must do so. State’s are free to adopt procedural rules governing objections.” *Id.* (italics in the original, citations omitted). In his dissenting opinion, Justice Kennedy noted that some notice and demand statutes impose more requirements than simple demand – for example some statutes require “defense counsel to subpoena the analyst’s presence, to show good cause for demanding the analyst’s presence, or even to affirm under oath an intent to cross examine the analyst”, and opined that in a future case “the Court may find that some of these more onerous burden-shifting statutes violate the Confrontation Clause because they ‘impos[e] a burden ... on the defendant to bring ... adverse witnesses into court.’” *Id.* at 2557 (alterations in the original, citations omitted). Is NRS 50.315(6) such a burden-shifting statute since in order to preclude the use of 50.315 affidavits the defendant must establish “a substantial and bona fide dispute regarding the facts in the affidavit or declaration” and that it is “in the best interests of justice that the witness who signed the affidavit or declaration be crossed examined”? This appears to be an issue only in misdemeanor cases, since the objection-in-writing command in 50.315(7) applies to felony

defendant files a written objection to the use of the affidavit, "the court shall not admit the affidavit or declaration into evidence[.]" Similarly, NRS 50.320(3) precludes the use of the affidavit at trial if the defendant has objected in writing. Conceivably, a court, faced with an objection to the admission of an affidavit in the place of live testimony could, under NRS 50.330, allow the affiant or declarant to testify "by means of simultaneous audiovisual transmission" if such transmission meets the criteria in 50.330(1) and (2).

In conclusion, ADKT 424 should not have an impact on criminal trial practice by this office. It allows only for the appearance of parties in certain types of proceedings by audiovisual transmission; it does not allow for the presentation of witness testimony via audiovisual transmission. Moreover, by its terms the use of audiovisual appearances by a party cannot be mandated at either trials, motion hearings where testimony is expected to be given, or in hearings on motions in limine.

cases and likewise appears to only require the objection in writing and not an objection that establishes or meets the criteria in 50.315(6). *Cf. City of Las Vegas v. Walsh*, 121 Nev. at 907 ("[t]he defendant has a greater ability to challenge and exclude an affidavit or declaration offered in a felony DUI case. NRS 50.315(7) indicates that when a defendant in a felony case objects in writing, the court 'shall not admit the affidavit or declaration into evidence'").

Exhibit "B"

PART IX. RULES GOVERNING APPEARANCE BY AUDIOVISUAL TRANSMISSION EQUIPMENT

Rule 4. Appearance by audiovisual transmission equipment.

3. Court discretion to modify rule.

(a) **Applicable cases.** In exercising its discretion under this provision, the court should consider the general policy favoring audiovisual transmission equipment appearances in civil and criminal cases.

(b) **Court may require personal appearances.** Upon a showing of good cause either by motion of a party or upon its own motion, the court may require a party or witness to appear in person at a hearing, conference, or proceeding listed in subsection 1 if the court determines on a hearing-by-hearing basis that a personal appearance would materially assist in the determination of the proceedings or in the effective management or resolution of the particular case.

(c) **Court may permit appearances by audiovisual transmission equipment.** The court may permit a party or witness to appear by audiovisual transmission equipment at a hearing, conference, or proceeding listed in subsection 2 if the court determines that an audiovisual transmission equipment appearance is appropriate.

4. **Need for personal appearance.** If, at any time during a hearing, conference, or proceeding conducted by audiovisual transmission equipment, the court determines that a personal appearance is necessary, the court may continue the matter and require a personal appearance by a party or witness.