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Benard Little

September 30, 2009

Honorable Justices of the Nevada Supreme Court  
C/O Tracie K. Lindeman, Clerk of the Supreme Court  
201 South Carson Street  
Carson City Nevada 89701

**FILED**

OCT 02 2009

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY *[Signature]*  
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Re: ADKT 424 and October 6, 2009 Hearing

Dear Honorable Justices of the Nevada Supreme Court:

On December 18, 2008, this Honorable Court adopted Part IX of the Supreme Court Rules: "Rules Governing Appearance By Communication Equipment." The term "communication equipment" is strictly limited therein to telephonic and audio, not audiovisual, equipment. Moreover, Rule 3 of Part IX specifically provides that the Part IX does not apply to criminal, juvenile and appellate proceedings. Therefore, Part IX did not potentially impact the practice of the Criminal Division of the City Attorney's Office. Prosecutors could still potentially utilize NRS 50.330 which allows experts to testify via "simultaneous audiovisual transmission" (if specified conditions are met) and utilize NRS 174.175-174.229 which allows the taking and introduction of the deposition of unavailable witnesses.

On June 17, 2009, the Court published ADKT 424 which incorrectly refers to Supreme Court Rule, Part IX as "governing telephonic and audiovisual participation in Nevada Courts." (Emphasis added). ADKT 424 informs the reader that this Honorable Court is contemplating amending Rule 3 of Part IX to make Part IX applicable to "criminal proceedings" where the parties stipulate "to utilize the procedures set forth in this rule." [If ADKT 424 is made applicable to criminal proceedings, the statement of purpose in Rule 2 should also be amended to reference not just "civil cases," but "civil cases and criminal proceedings"]. ADKT 424 also informs that a hearing has been set for October 6, 2009 at 4:00 p.m. at the Regional Justice Center (17<sup>th</sup> Floor).

As indicated, ADKT 424 incorrectly refers to Supreme Court Rule, Part IX as "governing telephonic and audiovisual participation in Nevada Courts," when in fact, Part IX is entitled "RULES GOVERNING APPEARANCE BY COMMUNICATION EQUIPMENT" and "communication equipment" is limited in Rule 1 to telephonic and audio electronic devices. Audiovisual devices are not included. If this is simply an oversight and prosecutors retain

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the use of NRS 50.330 (which allows experts to testify via "simultaneous audiovisual transmission") and NRS 174.175-174.229 (which allows the taking and introduction of the deposition of unavailable witnesses), then Part IX should specifically state that it is not intended to prohibit or limit appearance by simultaneous audiovisual transmission or the taking and introduction of depositions. [Part IX, Rule 4 separates those types of matters in which "parties" may appear by "communication equipment" from those in which "personal appearance" is otherwise required. Presumably witnesses are included in the latter provision. The use of depositions are not addressed and would arguably be prohibited under the personal appearance requirement.]

On the other hand, if the intent is to have Part IX generally apply to a more expansive definition of "communication equipment" which would include simultaneous audiovisual transmission, Part IX should respect current provisions enacted by the Nevada State Legislature and should not be more restrictive than the Constitution requires. In Maryland v. Hayes, 497 U.S. 836, 110 S.Ct. 3157, 111 L.Ed.2d 666 (1990), citing Coy v. Iowa, 487 U.S.1012, 108 S.Ct. 2798, 101 L.Ed.2d 857 (1988), the United States Supreme Court observed that the right to Confrontation is not absolute and "the right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation at trial only where denial of such confrontation is necessary to further an important public policy and only where the testimony's reliability is otherwise assured."

As applied to criminal proceedings, Part IX, Rule 4 should have a general exception, consistent with Maryland v. Hayes: where the court is satisfied that the simultaneous audiovisual transmission of an appearance furthers an important public interest and the reliability of any statements received is otherwise reasonably assured. Rule 4(3)(c) may be the appropriate provision to amend in this regard. If Part IX of the Supreme Court Rules is extended to criminal proceedings, the Nevada State Legislature's enactment of NRS 50.330 clearly falls within such a provision and should be specifically excluded in Rule 4. NRS 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.

NRS 50.330 was part of Senate Bill 35 which was adopted in the 2007 Legislative session. The Legislative history indicates that key representatives of the Nevada defense bar were at the February 14, 2007 Senate Judiciary Committee meeting which discussed SB 35 (amongst other bills). Howard Brooks from the Nevada Attorneys For Criminal Justice, Lee B. Rowland of the American Civil Liberties Union of Nevada, Jason M. Frierson from the Clark County Public Defender's Office and Cotter Conway from the Washoe County Public

Defender's Office were present. While they opposed the continued ability to use the affidavits of experts as authorized in NRS 50.315 and 50.320 (and Walsh v. City of Las Vegas), they did not oppose that part of SB 35 which would become NRS 50.330. Mr. Frierson even promoted such a provision: "Teleconferencing relieves people from traveling long distances to provide testimony" and " MR. FRIERSON: For the record, I don't believe that we oppose the audiovisual portion of the amendment in any way at all."

No one opposed that part of SB 35 which would become NRS 50.330 at the February 27, 2007 meeting of the Senate Judiciary Committee. At the April 25, 2007 meeting of the Assembly Judiciary Committee, Lee B. Rowland of the American Civil Liberties Union of Nevada spoke again only in opposition to the continued ability to use the affidavits of experts as authorized in NRS 50.315 and 50.320 (and Walsh v. City of Las Vegas) and Mr. Frierson was present, but did not testify. On May 4, 2007, SB 35 was taken off of the agenda. On May 11, 2007 the Assembly Judiciary Committee passed SB35 without additional opposition.

The interest in minimizing the amount of time health care givers, such as registered nurses and licensed practical nurses are called away from patient care to travel to court, wait to be called as a witness and ultimately testify in court is not just an "important" interest but a compelling one. The Las Vegas City Attorney's Office had one memorable occasion where a registered nurse called one hour before trial to report that she was the only RN on duty at a local Trauma Center. Unfortunately, the Court had advised that no further continuances would be granted and the defendant had a history of driving while intoxicated. The choice for the prosecutor was to let a repeat DUI offender have his (latest) DUI case dismissed or deprive the local Trauma Center of its only on-duty Registered Nurse. The following excerpt from the above-mentioned April 25, 2007 meeting of the Assembly Judiciary Committee (concerning SB 35) is similarly informative:

**Robin Keith, President, Nevada Rural Hospital Partners:**

Nevada Rural Hospital Partners is a consortium of 15 of Nevada's small rural hospitals across the State. We are here in support of the bill. Staffing is a particular issue in rural hospitals. We often have maybe only two registered nurses (RN) in a small hospital during a shift and to pull one of them out leaves either the emergency room (ER) or the acute care part of the hospital virtually uncovered. We would appreciate your support of the bill.

There is also an "important" interest in minimizing the amount of time forensic criminalists are called away from their job sites to travel to court, wait to be called as a witness and ultimately testify in court. Excessive time away from the crime lab, necessarily delays important tests by such experts which, in turn delays case prosecutions and backs up court calendars. A defendant's right to speedy trial may even be impacted. Earlier this year due to one forensic criminalist dying and others retiring, the Las Vegas Metropolitan Police Department was over 2,000 analysis behind in conducting tests and well behind its goal of testing within 30 days of receipt of the substance to be tested.

NRS 50.330 assures the trustworthiness of the expert's testimony. That is undoubtedly why this part of SB 35 was unopposed before the 2007 Nevada Legislature. Under NRS 50.330, remote audiovisual testimony may only occur if it is "in real time" and if it allows the judge, prosecutor, defendant, any jury and any defense counsel to see all of the witness and allows the witnesses to see the others. Such a system is certainly as

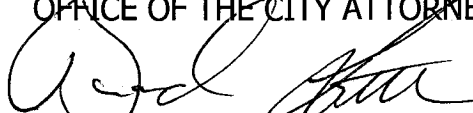
reliable as the process involved in Maryland v. Hayes which apparently did not involve the witness being able to view the defendant, judge and jury. It is as reliable as the process of procuring the videotaped deposition of an unavailable (expert) witness (under NRS 174.175- 174.229) and playing the deposition for the trier of fact. Additionally, the vast majority of times an expert appears to testify, the case is either continued or negotiated or the defense stipulates to the expert's testimony (approximately 85%-90% of the time). This is not only our experience, but the experience of others. See, the 2007 legislative history to SB35.

Prior to receipt of ADKT 424, the Las Vegas Metropolitan Police Department Crime Lab and the City of Las Vegas Detention and Enforcement Department were each working with the Las Vegas Municipal Court to purchase and set up appropriate audiovisual equipment so as to possibly allow testimony as authorized by NRS 50.330. This project is on hold pending possible amendment of Part IX of the Supreme Court Rules.

In addressing the expansion of Part IX to criminal proceedings, we request this Honorable Court resolve the issue of whether simultaneous audiovisual transmissions are intended to be within the scope of Part IX and whether depositions are impacted by Part IX. If Part IX is made applicable to criminal proceedings, we request this Honorable Court to exclude "appearances by communication equipment where the court is satisfied that the simultaneous audiovisual transmission of an appearance furthers an important public interest and the reliability of any statements received is otherwise reasonably assured including, but not limited to, those authorized by NRS 50.330 and 174.175-174.229."

As always, we are extremely grateful for the notice and opportunity to be heard prior to final decision on matters which impact our office.

Cordially,  
OFFICE OF THE CITY ATTORNEY



Bernard Little, Assistant City Attorney