

# STATE BAR OF NEVADA

October 2, 2018

Chief Justice Michael Douglas  
Nevada Supreme Court  
201 South Carson Street  
Carson City, NV 89701-4702

**FILED**

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**RE: Proposed Amendments to Nevada Rules of Civil Procedure (ADKT 0522)**

Dear Chief Justice Douglas:

On behalf of the State Bar of Nevada, I would like to thank the Court for the opportunity to provide comment on the proposed amendments to the Nevada Rules of Civil Procedure. The state bar's Board of Governors appointed a taskforce, comprised of plaintiff and defense attorneys in northern and southern Nevada, to conduct a review of the proposed rules. We extend the Board's appreciation to the following taskforce members who have dedicated their time and service to this endeavor:

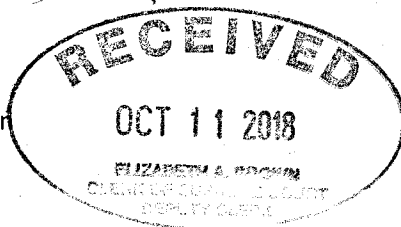
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Holly Parker; Laxalt & Nomura; Reno  
Dennis Prince; Eglet Prince; Las Vegas  
Jorge Ramirez; Wilson Elser Moskowitz Edelman & Dicker; Las Vegas

The recommendations proposed by the taskforce are outlined on the pages that follow. Members of the taskforce will also attend the October 19, 2018 public hearing scheduled for this matter and will be available to address any concerns from the Court at that time. Please do not hesitate to contact me should the Court require further information.

Respectfully,

*[Signature]*  
Kimberly K. Farmer  
Executive Director

cc: Elizabeth Brown



18-4005

**NRCP 4.1. Waiving Service.** *The taskforce does not propose an amendment to this Rule, but notes the following concern to the Court:*

The proposed rule raises a concern applicable to insurance cases. Failure to waive service could result in sanctions to the client. While Rule 4.2 was adopted from the Federal Rules of Civil Procedure (FRCP) and the Arizona Rules of Civil Procedure, similar language does not exist in the Arizona Rules and may have unintended consequences. For example, if a defendant is represented by an insurance carrier and is sanctioned for failure to waive service, to what extent would the Court pursue action? Would the carrier also be sanctioned?

**NRCP 5. Service and Filing Pleadings and Other Papers.** *The taskforce recommends that rule 5(c) be removed or modified to state that it is not applicable if e-filing.*

The taskforce suggests that the option for electronic filing and the ease through which it may be used to serve numerous defendants mitigates the need for a separate rule regarding this process. The taskforce considered the possible effect eliminating this rule might have on those districts without electronic filing and it found the rule to be unnecessary.

**NRCP 6. Computing and Extending Time; Time for Motion Papers.** *The taskforce suggests that Rule 6(b)(1)(A) be amended for consistency with Rule 29, allowing parties to stipulate to an extension of time. Language for the suggested amendment is as follows:*

(A) The parties may stipulate to an extension of time without court approval so long as the extension will not interfere with the time set for completing discovery, completing briefing of a motion before a hearing, hearing a motion, trial, or any other court-ordered deadline. Otherwise, the parties may obtain an extension of time by stipulation if approved by the court, provided the stipulation is submitted to the court before the original time or its extension expires;

...

**NRCP 8. General Rules of Pleading.** *The taskforce suggests Rule 8(a)(1) be removed and the Advisory Comment be amended to state that Rule 8(c)(1) applies to specific affirmative defenses.*

**Rule 8(a)(1).** The taskforce noted that while the federal court has limited jurisdiction, Nevada courts have general jurisdiction. This language, taken from the Federal Rules, is not necessary as Nevada's legislative framework presumptively implies jurisdiction. Therefore, the taskforce suggests that Rule 8(a)(1) be removed.

**Rule 8(c)(1).** The taskforce noted that in some specified instances, it is recommended to state an explanation when claiming an affirmative defense, particularly in cases of fraud and laches. The taskforce suggests that for Rule 8(c)(1), the Advisory Comment be amended to make clear that Rule 9(b) applies to affirmative defenses including fraud, mistake or conditions of mind.

**NRCP 12. Defenses and Objections; When and How Presented; Motion for Judgment on the Pleadings; Consolidating Motions; Waiving Defenses; Pretrial Hearing.** *The taskforce recommended the Advisory Comment be amended.*

**Advisory Comment.** The taskforce found the statement “...and leaves to judicial development whether Nevada should adopt the plausibility analysis in *Ashcroft v. Iqbal*, 556 U.S. 662, 677-78 (2009), and *Bell Atlantic Co. v. Twombly*, 550 U.S. 544, 565-66 (2007)” to suggest that adoption be warranted, which may not be the intent. A suggested amendment to the Advisory Comment is as follows:

Rule 12(b)(5) tracks FRCP 12(b)(6). As noted in the Advisory Committee Note to Rule 8, by adopting the text of the federal rule the Committee does not intend any change to existing Nevada case law regarding pleading standards. [~~and leaves to judicial development whether Nevada should adopt the plausibility analysis in *Ashcroft v. Iqbal*, 556 U.S. 662, 677-78 (2009), and *Bell Atlantic Co. v. Twombly*, 550 U.S. 544, 565-66 (2007).~~]

**NRCP 14. Third-Party Practice.** *The taskforce recommends the Court retain FRCP 14(c).*

The taskforce noted that the proposed rule conformed to FRCP 14, except for FRCP 14(c), Admiralty or Maritime Claim. Maritime law is applicable in Nevada with cases involving navigable waterways, such as Lake Tahoe and Lake Mead.

**NRCP 15. Amended and Supplemental Pleadings.** *The taskforce recommends the Court retain the language from Rule 10(a).*

The taskforce noted that the proposed amendments to NRCP 15(c), relating to pleading amendments for fictitious parties who later become known, would refer back to the date of the original pleading. The taskforce recommends the Court retain the language from Rule 10(a).

**NRCP 16.1. Mandatory Pretrial Discovery Requirements.** *The taskforce recommends amendments to Rules 16.1(a)(1)(A)(iii) relating to relevant medical providers; Rule 16.1(a)(2)(D)(ii)(c) regarding expert witnesses; and Rule 16.1(c) regarding orders shortening time.*

**Rule 16.1(a)(1)(A)(iii).** The taskforce noted that while NRCP 16.1(a)(1)(A) will generally streamline the process of obtaining authorizations in personal injury matters, the amendment uses the word “relevant” pertaining to which medical provider names must be provided to the opposing party. The taskforce agreed that opposing parties may have differing viewpoints as to a relevancy standard. The taskforce recommends NRCP 16.1(a)(1)(A)(iii) be amended to state:

(iii) when personal injury is in issue, the identity of the [~~relevant~~] medical provider(s) who have treated the plaintiff or defendant’s injury, so that the opposing party may prepare an appropriate

medical authorization(s) for signature to obtain medical records.

Alternatively, the taskforce suggested that the term “relevant medical providers” be defined in the Advisory Committee notes.

**Rule 16.1(c).** The taskforce noted that it may be more efficient for attorneys to obtain court orders shortening time from the local discovery commissioner and suggested that, in addition to the authority granted by court order, authority also be granted to the discovery commissioner. The taskforce suggests Rule 16.1(c) be amended to add subsection (4) as follows:

**16.1(c)(4). Orders Shortening or Lengthening Discovery.** The Discovery Commissioner has the authority to issue orders shortening time to respond or lengthening time to respond with respect to matters heard by the Discovery Commissioner.

**NRCP 16.21. Postjudgment Discovery in Domestic Relations Matters;**

**NRCP 16.22. Custody Evaluations; NRCP 16.23. Examination of Minors.**

The taskforce solicited comments from family law practitioners, including the state bar’s Family Law Section; no consensus was reached, and the taskforce has no formal recommendation regarding these proposed rules.

**NRCP 23. Class Actions.** *There is no proposed amendment to this rule; however, the taskforce notes that the rule may be contrary to recent case law regarding aggregation, specifically in the matter of Castillo v. United Federal Credit Union. 134 Nev. Adv. Rep. 3.*

**NRCP 26. General Provisions Governing Discovery.** *The taskforce suggests that Rule 26(b)(1) is overly broad and suggests that it be amended to account for proportionality.*

The taskforce considered the amended language in NRCP 26(b)(1) regarding the scope of discovery, specifically, language the proportionality to the needs of the case. The taskforce considered the proportionality language to be overly broad and subjective, without accounting for individual matters. Disputes over proportionality may also lead to additional expenses incurred by the client. Furthermore, NRCP 26 (b)(2)(c) and (c)(1) fulfill the presumable purpose of this rule. Suggested amendments to Rule 26(b)(1) are as follows:

(1) **Scope.** Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claims or defenses. ~~[and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties’ relative access to relative information, the parties’ resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.]~~ Information within this scope of discovery need not be admissible in evidence to be discoverable.

**NRCP 29. Stipulations About Discovery Procedure.** *The Taskforce notes a small typographical error in Rule 29(b).*

(b) other procedures governing or limiting discovery may be modified—but a stipulation extending the time for any form of discovery must have court approval if it would interfere with the time set for completing discovery, for hearing a motion, or for trial.

**NRCP 30. Depositions by Oral Examination.** *Concerning out-of-state depositions, the taskforce seeks guidance for where relief should be sought and which laws apply.*

**Rule 30(d)(3)(A).** The taskforce evaluated this this proposed rule and expressed concerns about how it would function and questioned whether the local discovery commissioner should be the first arbiter of a dispute. The proposed rule language states, “The motion *may be [emphasis added]* filed in the court where the action is pending,” which leaves uncertainty about discovery issues disputed in another state.

**NRCP 32. Using Depositions in Court Proceedings.** *The taskforce suggests that Rule 32(a)(5) be removed.*

**Rule 32(a)(5).** The taskforce evaluated this proposed rule and noted the intention to save on trial costs, especially with treating and local physicians, but found the rule may be problematic with more complex cases involving out-of-state experts. Another unforeseen consequence may be increased deposition expenses as attorneys attempt to capture maximum witness testimony on the deposition transcript. The taskforce questioned the language that states a party may use the deposition of a party, “unless otherwise ordered by the court” and asked if this means an expert must appear if subpoenaed.

The taskforce considered several rule amendment permutations that would address its concerns, such as limiting the scope of those experts to those subject to the subpoena power of the court, but ultimately found the rule to be unworkable as written. Therefore, the taskforce recommends NRCP 32(a)(5) should not be adopted.

**NRCP 34. Producing Documents, Electronically Stored Information, and Tangible Things, or Entering into Land, For Inspection and Other Purposes.** *The taskforce recommends that the Advisory Comments be amended to reflect the recommended use of Bates numbering.*

**Rule 34(b)(2)(E)(i).** The taskforce had concern with the language that states “a party must produce documents as they are kept in the usual course of business...” which may result in receipt of documents that are difficult to identify or decipher. Although the taskforce does not suggest amendments to the proposed rule, it does recommend the Advisory Notes include Bates numbering as a preferred method for identifying documents.

**NRCP 35. Physical and Mental Examinations.** *Of the three competing versions provided, the taskforce*

*recommends adoption of Alternate 1 of this Rule, as it is most fair to both parties.*

**NRCP 38. Right to a Jury Trial.** *The taskforce suggests that NRCP 38(d) be amended to eliminate the need for multiple filings if the parties agree.*

Suggested amendments are as follows:

**(d) Waiver; Withdrawal.**

(1) A party's failure to properly file and serve a demand constitutes the party's waiver of a jury trial. A jury demand filed by a party inures to the benefit of all parties.

(2) A proper demand for a jury trial may be withdrawn only if all the parties consent, or by court order for good cause upon such terms and conditions as the court may fix.

**NRCP 39. Trial by Jury or by the Court.** *The taskforce recommends NRCP 39(a)(1) be amended to conform with the proposed amendments to NRCP 38(d). The suggested amendment is as follows:*

**NRCP 39(a)(1)**

(a) By Jury. When a jury trial has been demanded under Rule 38, the action must be designated as a jury action. The trial on all issues so demanded must be by jury unless:

(1) all the parties or their attorneys file a stipulation to a non-jury trial or so stipulate on the record; or...

**NRCP 41. Dismissal of Actions.** *Of the two competing proposals, the taskforce recommends adoption of the more-detailed Alternate 1, as it addresses timeframe issues and offers a clearer explanation of the process.*

**NRCP 45. Subpoena.** *The taskforce notes the discrepancies between Rule 34 and Rule 45(a)(1)(C). The taskforce also notes its support for Rule 45(a)(4)(i) and suggests proposed language to clarify payment for reproduction in Rule 45(c)(2)(A)(ii).*

**Rule 45(a)(1)(C).** The taskforce noted that this Rule contains conflicting language from the proposed language in NRCP 34. The taskforce prefers the language in Rule 45; however, whichever is decided, the language in both rules should be consistent.

**Rule 45(a)(4)(i).** The taskforce considered this rule's seven-day timeframe and whether or not that timeframe provides sufficient time for response. The taskforce agreed that this timeframe conforms with the "notice to consumer" requirement in other jurisdictions, which mandate serving the consumer first, and the taskforce specifically notes its agreement with this amendment.

**Rule 45(c)(2)(A)(ii).** The taskforce considered the language in this Rule concerning payment for

reproduction to be vague. The taskforce suggests the following amendment, which would make clear that payment is not required prior to production.

(ii) If documents, electronically stored information, or tangible things are produced to the party that issued the subpoena without an appearance at the place of production, the party receiving such materials must promptly copy or electronically reproduce the documents or information, photograph any tangible items not subject to copying, and serve these items on every other party. The party issuing the subpoena may also serve a statement of the reasonable cost of copying, reproducing, and/or photographing, which the recipient must promptly pay. Payment is not required prior to production.

**NRCP 47. Selecting Jurors.** *The taskforce suggests Rule 47(c)(2) be amended for syntax and clarity. A proposed amendment is as follows:*

(2) For every two alternate jurors that are to be impaneled, each [Each] side is entitled to one additional peremptory challenge. ~~[for every two alternate jurors that are to be impaneled. The additional peremptory challenges may be used against an alternate juror only, and the regular peremptory challenges allowed by law must not be used against an alternate juror.]~~

**NRCP 54. Judgments; Attorney Fees.** *Of the two competing versions, the taskforce recommends Alternate 1 be adopted, as it includes Nevada-specific Rule language.*

**NRCP 58. Entering Judgment.** *Of the two competing versions, the taskforce recommends Alternate 1 be adopted, as it makes clear the need for a separate document for judgments and amended judgments in sections (a) and (e).*

**NRCP 60. Relief from Judgment or Order.** *The taskforce proposes amendments to Rule 60(b) regarding grounds for relief and Rule 60(c)(1) regarding the timeframe to file a Rule 60(b) motion.*

**Rule 60(b)(6).** The taskforce expressed concerns with the language “any other reason” currently presented in proposed NRCP 60(b)(6). The taskforce anticipates that this catch-all language, which likely has a higher standard when applied to Federal case law, will increase litigation under Rule 60 more than the time-change extension proposed in NRCP 60(c)(1). The taskforce recommends the Court amend NRCP 60(b) as follows:

**(b) Grounds for Relief from a Final Judgment, Order, or Proceeding.** On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order or proceeding for the following reasons:

...

(5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable. ~~;~~ ~~or~~

~~(6) any other reason that justifies relief.]~~

**Rule 60(c)(1).** The taskforce considered the potential ramifications of the proposed change in the timeframe to file a Rule 60(b) motion. The taskforce agreed that an extension to one year is unnecessary, as most cases will not require a full year if they continue to meet the standards of proposed rule NRCP 60(b). The taskforce recommends the Court retain the timeframe in the current Rule and amend NRCP 60(c)(1) as follows:

**(c) Timing and Effect of the Motion.**

- (1) **Timing.** A motion under Rule 60(b) must be made within a reasonable time – and for reasons (1), (2), and (3) no more than ~~[a year]~~ six months after the date of the proceeding or the date of service of written notice of entry of the judgment or order, whichever date is later. The time for filing the motion cannot be extended under Rule 6(b).