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OCT 12 2018

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

October 12, 2018

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

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

Dear Chief Justice Douglas:

The law firm of Wilson, Elser, Moskowitz, Edelman & Dicker, LLP, is pleased to provide the Supreme Court with comments on the proposed amendments to the Nevada Rules of Civil Procedure. We appreciate the opportunity to be a part of this process and will have Chad Butterfield and Ellen Bowman of our firm at the public hearing on October 19, 2018, to provide further comment, if desired.

Please do not hesitate to contact the undersigned at (702) 727-1400, if you have any questions.

Very truly yours,

Wilson Elser Moskowitz Edelman & Dicker LLP

Jorge A. Ramirez, Esq.

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NRCP 4.1. Waiving Service.

The proposed rule raises a concern with respect to the proposed sanction in cases where an insurance carrier may be providing a defense. We can perceive a situation where a defendant fails to execute a waiver of service, unbeknownst to an insurer. If the court then "must" impose expenses incurred in making service and reasonable expenses and attorney fees of any motion to collect those expenses, who would be responsible to pay the expenses? This also raises concerns with insurance policy cooperation provisions. Any sanction awarded against an insured will probably not be paid by an insurer if they did not have an opportunity to direct the insured to accept the waiver. Any additional penalty imposed by the court may then implicate their coverage issues up to and including declining coverage. Rather than impose a penalty for not executing a waiver, we believe the incentive of additional time to respond by executing the waiver is a better approach.

In addition, **subsection (c), Time to Answer After a Waiver**, and **subsection (d), Results of Filing a Waiver**, appear to be conflicting as to when an answer would be due. Sub. (c) provides that the answer is due "60 days after the request [for waiver] was sent." Sub. (d) provides that "these rules apply as if a summons and complaint had been served at the time of filing the waiver."

NRCP 16.1. Mandatory Pretrial Discovery Requirements.

Rule 16.1(a)(1)(A)(iii). While incorporating the obligation to provide medical authorizations in personal injury matters, the proposed amendment uses the word "relevant" when referring to which medical provider names must be provided to the opposing party. The opposing parties may have differing viewpoints as to which medical treatment is "relevant." We suggest that the term "relevant medical providers" be defined in the Advisory Committee notes.

Rule 16.1(a)(1)(D). The time to submit its Rule 16.1 disclosures for a party later joined to a lawsuit is listed as within 30 days after being served or joined, unless a different time is set by stipulation or court order. If a party has 21 days to file an answer, that party's disclosure would be due 9 days later. If that party were the first to file an answer, it would have up to 44 days to submit its disclosure (30 days to hold ECC plus 14 to submit its 16.1 disclosure). The time for a new party to submit its disclosure should be longer than 9 days. We propose the time to be within 30 days of filing the answer.

Rule 16.1(a)(2)(D)(i). This provision allows a treating physician to discuss "ancillary treatment that is not contained within his or her medical chart." "Ancillary treatment" is not

defined and will lead to confusion and disagreement as to what "ancillary treatment" was contemplated by the Rules. This could be defined in an Advisory Comment.

Also, allowing a treating physician to testify as to "ancillary treatment" may circumvent the stated purpose for amending the Civil Procedure Rules in 2011, which was to take the surprise out of trials. Not knowing what the treating physicians' opinions are about the ancillary treatment will leave defendants to guess at trial what the testimony may be.

Rule 16.1(a)(2)(D)(ii). This provision indicates when a treating physician becomes a retained expert. However, a treating physician will not be deemed a retained expert merely because ... (3) the witness reviews documents outside his or her medical chart in the course of providing treatment or defending that treatment. The "defending that treatment" language opens the door for treating physicians to review medical records of other providers and render opinions without providing a written report so long as they claim they are defending their own treatment. This creates an opportunity for the parties to sandbag their opponents, not provide a written report, then have a treating physician testify as to treatment rendered by other providers. This is likely an unintended consequence of the Rule as written, but in application, it causes concern. The consequence is also contrary to the premise that the civil procedure rules are supposed to take the surprise out of trials.

Rule 16.1(b)(4)(C). As part of the discovery plan discussion, it would be helpful if the parties were instructed to discuss concerns of trade secrets or confidential materials and include in the joint case conference report whether a protective order would be appropriate in the case. To the extent the issues are limited, the provisions of the protective order could be set forth in the joint case conference report. In more complicated cases, such as product liability cases, a separate protective order would still likely be required.

NRCP 23. Class Actions. The proposed rule is contrary to recent Nevada case precedent. The Supreme Court was clear that Nevada is unique in that it allows its Justice Court to also hear class action matters. Had the existing rules been enforced in the Higher Ground HOA lien dispute litigation, most of those cases would not have been in district court as they did not reach the jurisdictional limit at the time that they were filed. Having the class action cases, such as the Higher Ground lien cases, proceed in Justice Court would have allowed the parties to significantly reduce litigation costs and have a more expedient resolution of the cases overall. There seems to be no purpose to allow class litigants to aggregate their damages to reach the jurisdictional limit of the District Court when they have a viable option in the lower court with a more expedient time frame for resolution.

NRCP 26. General Provisions Governing Discovery.

While proportionality has been the trend in discovery parameters, we are concerned that the proportionality language is 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 30. Depositions by Oral Examination.

Rule 30(a)(2)(A)(i). We agree that limiting the number of depositions to 10 per side is positive. However, custodian of records depositions are often required to obtain records only from non-parties. These are not substantive depositions and should not count toward the 10. We recommend that the rule language include a provision that excludes custodian of records depositions from counting toward the limitation.

NRCP 32. Using Depositions in Court Proceedings.

Rule 32(a)(5). While we appreciate the effort to reduce costs at trial, we believe that permitting the use of treating physician depositions for any purpose at trial would likely increase deposition costs. Parties would have to assume that every deposition of a treating physician would be used in lieu of live testimony at trial. This means, in addition to taking a discovery deposition, the deposing party would have to take the deposition as if it were a trial deposition. This would increase the length of the deposition, increasing the cost of witness fees, deposition transcripts, and preparation time. As approximately 97% of all cases settle prior to trial, this would be an unnecessary increase in discovery costs with little to no added benefit. It also conflicts with the rules of evidence.

NRCP 34. Producing Documents, Electronically Stored Information, and Tangible Things, or Entering into Land, For Inspection and Other Purposes.

Rule 34(b)(2)(E)(i). Concerns with how documents should be identified and produced could be ameliorated by suggesting or requiring bates numbering on documents. Such a recommendation could be made in the Advisory Notes.

NRCP 35. Physical and Mental Examinations. Of the three competing versions provided, we recommend adoption of Alternate 3 of this Rule.

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

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

NRCP 60. Relief from a Judgment or Order.

Rule 60(c)(1). We recommend adoption of the Rule as proposed by the Advisory Committee.