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October 12, 2018

FILED

OCT 12 2018

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

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

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

Dear Chief Justice Douglas:

I have reviewed the proposed amendments to the Nevada Rules of Civil Procedure and one of the proposed amendments is exceptionally troubling to me. Before addressing my concern, I would note that I have been practicing law in Nevada for more than three decades and for the past 15 or so years I have worked almost equally for plaintiffs and defendants. Thus, I do not believe that I have any predisposition to favor one side or the other. I hope my comments are perceived as being as objective as possible.

As I sure you are aware, the proposed amendment to Rule 45 permits a party to unilaterally stop the discovery process merely by the filing of a motion for a protective order. My understanding is that the purpose for this amendment is to prevent one party from obtaining records from a third party by way of subpoena duces tecum without the other parties' knowledge. Most certainly this practice is of justifiable concern. However, I believe the proposed solution to this perceived problem has exceeded what is necessary to prevent the perceived evil. I further believe that it led to an unwanted delay in the discovery process, and worst of all, it may be subject to great abuse.

Under the new Rule 45(a)(4), a party who intends to serve a subpoena duces tecum upon a third party must provide all other parties with 7 days' notice before the subpoena is served. I fully agree that a party should be required to provide all others with notice of the subpoena. However, from there I disagree with several additional provisions. First, I disagree with the provision which requires the serving party to wait seven (7) days before serving the subpoena. More significantly, in subsection (ii) the newly proposed rule allows a party who objects to the subpoena to file a motion for a protective order within that seven (7) day period, in which case the subpoena cannot be served until the motion is heard and resolved. I believe these provisions will result in substantial delay in the discovery process.

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As I am sure you are all too aware, getting matters such as this before a court are often difficult and time consuming. Given normal briefing periods (and the difficulty with getting a hearing before the court), allowing an objecting party to completely stay this aspect of the discovery process merely by the filing of a motion for protective order is unwarranted. It is my belief that the objectives sought to be achieved through this rule can be accomplished in other far less burdensome ways which are not as susceptible to abuse.

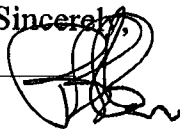
In this regard I would fully support a rule that would require a party to give notice of their intent to serve a subpoena duces tecum upon a third party. To that I would add a provision that the subpoena could not require the production of the records in a period less than the normal notice requirement for any other subpoena. I would further add a provision that the requesting party must instruct the recipient of the subpoena to await passage of that time period *before* producing the requested records. This would allow a party opposing the subpoena the opportunity to seek protection from a court without also granting the opposing party the right to unilaterally impose a protective order against the requested discovery.

In practice, what I often see happen is that the party serving the subpoena will instruct the recipient that he/she/it may avoid appearance on the requested date if the records are produced before the date set in the subpoena. In response, the subpoenaed party immediately produces the requested records, oftentimes even before the other parties are aware that the subpoena has been served. In my opinion, requiring notice to the opposing parties in such a manner which will allow that party an opportunity to seek a protective order is more than sufficient protection against the improper collection of records. I do not believe it is necessary, nor warranted, to grant objecting parties the enormous power to unilaterally stop the discovery process merely by the filing of motion for a protective order.

I seem to recall that there were some prior discovery rules which allowed a party to effectively stay the discovery process merely by the filing of a motion for protective order. My recollection is that those rules were later changed when it became apparent that litigants were abusing the unilateral power afforded by such rules. I see this being subject to the same abuse. I believe is appropriate to place the burden upon the party seeking the protective order to obtain a stay of discovery rather than allowing an opposing party the immediate right to such relief. Through the suggested alternative set forth above, I believe a rule could be fashioned to protect the interests of all of the involved parties.

I appreciate the opportunity to offer these comments.

Sincerely,



THOMAS P. BEKO, ESQ.

TPB:dm

C O V E R

S H E E T

FAX

To: Elizabeth Brown, Clerk of the Court
Nevada Supreme Court

Fax No.: 775-684-1601

Subject: *Comment to proposed amendments to NRCP*

Date: October 12, 2018

Pages: 3, including this cover sheet.

From: Thomas P. Beko, Esq.

Letter follows.

From the desk of...

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