**IN THE SUPREME COURT OF THE STATE OF NEVADA**

JIM MCGOWEN, Trustee of McGowen & Fowler, PLLC and/or DOES 1-10, inclusive; and DOES 11-20,

Petitioner,

vs.

THE SECOND JUDICIAL DISTRICT COURT, in and for the County of Washoe, State of Nevada, and THE HONORABLE DAVID A. HARDY, District Judge,

Respondent,

STEVEN B. CRYSTAL, individually and as Trustee of the Barbara L. Crystal Decedent Trust,

Real Party in Interest.

Case No. 73312

District Court Case No. CV17-00281

Dept. 15



# REPLY IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS

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The linchpin of Real Party in Interest Steven B. Crystal's ("Crystal") entire argument collapses in one untrue statement. That statement is: "*In 2004, the Nevada Supreme Court amended NRCP 4(c) to expressly require service by a non-party. See NRCP 4(c). This in effect superseded the common law previously discussed in Hankins and Sawyer* ***because it defined a disinterested party as any person who is not a party."*** Crystal's Brief, p. 8. The amendment did not define "disinterested person," as a non-party, and the official Committee notes accompanying the amended rule expressly "affirmed," as the continuing practice in Nevada, the common law rule "followed in Nevada" and most recently described in *Sawyer v. Sugarless Shops, Inc.*, 106 Nev. 265, 792 P.2d 14 (1990), that disinterested persons specifically exclude a party's counsel and his or her employees.

The 2004 amendment to Rule 4(c) did not "broaden" the scope of permissible service, it merely conformed the language of the rule to comply with existing common law, and longstanding historical practice and custom "*followed in Nevada." See* Advisory Comments to Rule 4. Crystal suggests that by narrowing the language of permissible mode of service under former Rule 4(c) from service "*by any citizen*" (over the age of 18), to "*any person over 18 who is not a party,"* the court intended to abrogate the common law requirement requiring service to be made by a "disinterested person," which the court itself defined as excluding the

attorney for a party and his or her employees. As set forth below, the Advisory Committee notes dispel this conclusion and affirm the exact opposite.

Crystal's argument is based on the non-sequitur that because service under the former rule by *"any citizen of the United States over 18,"* included the common law requirement that such service be made by a "disinterested person," the drafters of the amendment (and this court), intended to abrogate that common law "disinterested person" requirement by amending the rule to expressly prohibit service by parties to the action. Not only does such conclusion not follow from such amendment (which narrowed the scope of permissible service), the opposite is true. By narrowing the scope of permissible service, there is no indication at all that the drafters, or this court, intended to eliminate the requirement that service be made by "disinterested persons." Indeed, the drafters expressly stated that they intended to preserve and codify that requirement.

As noted in the Petition, service by counsel or his or her employees has been prohibited under Nevada law, and the common law of the United States and England for hundreds of years. This court took note of that historical principle of law in *Nevada Cornell S.M. v. Hankins*, 51 Nev. 420, 279 P. 27 (1929). That case voided a judgment procured by default on grounds that summons was served on the defendant by counsel for the plaintiff. *Silver Mines* was decided under the former broader formulation of the rule, which permitted service to be made by

"any citizen of the United States over the age of 21" (subsequently changed to any citizen over the age of 18). Although this limitation was not expressly set forth in the statute itself, this court held that by stating service could be effected by "any citizen" over the age of 21, neither the drafters nor this court intended to confer authority to serve on a party to the action, or his or her attorney. *Id.* at 433. In the words of the court "it would be unwise, unreasonable and unwholesome to permit service to be made by counsel for party." *Id.* at 433. It takes an enormous leap of logic to conclude that by amending the rule to expressly preclude service by a party, the drafters and this court intended to (1) eliminate the requirement that service be made by disinterested persons, (2) abrogate hundreds of years of jurisprudence and common law, (3) overrule several Supreme Court legal precedents, and (4) change longstanding historical practice, by now "permitting service" to be made by an attorney for a party, or his or her employees.

In asking this court to take this giant leap of logic, Crystal flails at every legal and logical reason standing in the way. Crystal argues:

(1) had the drafters intended to preclude a party's counsel or his or her employees from being able to serve, they would have stated so expressly (Brief, p. 9), (overlooking the more logical conclusion that because this limitation was already a part of the existing rule, common law and long standing historical

practice, any intent to abrogate that existing limitation would have been expressed, not ignored or omitted);

(2) the amendment came after the rule in *Sawyer* was decided (which reaffirmed the rule precluding service by counsel or his or her employees), and if the drafters and this court intended to continue that rule, the drafters would have so stated (Brief, p. 9) (overlooking the more logical inference that had the drafters intended to abandon or overrule existing law as set forth in *Sawyer,* they would have so stated, and, in fact, they did state that the former rule continued);

(3) the facts and issues in *Sawyer* can be distinguished (Brief, p. 10) (overlooking that the principle of law enunciated in *Sawyer* is a rule of general application based on public policy (as the court expressly stated in *Sawyer*), and did not limit it to the particular facts of that case);

(4) the opinion in *Sawyer* was "dicta" and not binding (Brief, p. 13), (overlooking again that what is at issue is the meaning, and application of the rule, as intended by the court and drafters, who stated that the prohibition was based on public policy, and was a matter of general application);

(5) most federal courts construe the federal analogue to permit service by counsel or his or her office (overlooking multiple fundamental differences between FRCP 4, and NRCP 4 including NRCP 4(d), which refers to "state law" for the

manner of making service on individuals, and also overlooking that our Nevada rules look to the federal rules for guidance, but not binding precedent).[1]

Crystal cannot overcome the unambiguous intent of the drafters in revising NRCP 4(c) to continue and preserve the common law requirement, and historical practice precluding attorneys for parties and their employees from effecting service of a summons and complaint. This intent is manifested by the words they employed in amending the rule. That they intended to continue the rule set forth in *Sawyer* is beyond reasonable cavil: "The amendment clarifies that service may be made by any person who is over 18 years of age **so long as he or she is also a disinterested person…."** *See* Advisory Committee comments NRCP 4(c). The Committee went on to state in their Advisory comments that the revised provision was intended ***to be consistent with the common law rule, followed in Nevada, requiring that service be made by a disinterested person,*** *see Sawyer v. Sugarless Shops, Inc.*, 106 Nev. 265, 269-70, 792 P.2d 14, 17 (1990). The specific portion of the *Sawyer* opinion cited in the Committee notes (pp. 69-70) leaves no doubt that

[1] Petitioner does not dispute that service by counsel is permitted under FRCP 4(c), although one of the cases cited by Crystal does not so hold (*Madden v. Cleland*, 105 F.R.D. 520, 522 (N.D.Ga. 1985) and another held that service in such manner is to be discouraged. As noted, *infra*, FRCP 4 is different from NRCP 4 in numerous respects, and federal authority has never been applied to overturn or repudiate longstanding Nevada practice based on public policy. Federal authority is not controlling, and the commentary to NRCP 4(c) indicates an intended departure.

the rule was intended to preserve the prohibition against service by counsel, or his or her employees:

> Nevada has long had rules prohibiting service by a party. Nevada Cornell Silver Mines v. Hankins, 51 Nev. 420, 429-432, 279 P. 27, 29-30 (1929). This was a common law requirement and has not been changed by statute. *Id.* There are obvious and sound policy reasons for this prohibition. The primary justification, as illustrated by the facts of this case, is that service many times becomes a battle of credibility and testimony. ***Something as fundamental and decisive as service is best taken away from the parties or their counsel or counsel's employees.*** Applying this prohibition to the facts of this case, Sugarless cannot establish that proper service took place by a disinterested party; the default judgment is therefore void.

That the Advisory Committee's citation to the "specific passage" recited above completely dispels Crystal's argument, noted in the introductory paragraph of Crystal's Brief (and recited at the beginning of this reply), that the amendment to the rule *"defined an interested party as any person who is not a party."* Brief, p. 8. Neither this court nor the Committee defined a "disinterested person" as any person who is not a party, but rather defined it to expressly preclude "parties and their counsel, and counsel's employees," from that definition. *Id.* at p. 270.

While Committee notes are not conclusive they are given considerable weight in ascertaining the meaning and intent of the rules, and the manner on which they are applied:

> *In interpreting the federal rules, the Advisory Committee Notes are a very important source of information and direction and should be given considerable weight. Although not conclusive, they provide something akin to a legislative history of the rules and carry, in*

> *addition, the great prestige that the individual members of the successive Advisory Committees, and the Committees themselves, have enjoyed as authorities on procedure.*

*See* Wright & Miller, *Federal Practice and Procedure* § 1029.

A situation remarkably similar to the one sub judice occurred shortly after Nevada adopted the Nevada Rules of Civil Procedure. The issue presented in *Deboer v. Fattor*, 72 Nev. 316, 304 P.2d 958 (1956) was whether the Nevada common law requirement that summons be actually "delivered to a process server" for service to qualify as "issuance of summons," survived the enactment of NRCP 3 (as opposed to merely being issued by the clerk and handed to counsel). NRCP 3 defined commencement of an action as filing of complaint *"and issuance of summons."*[2] The issue was critical to disposition of the case because while summons was issued by the clerk and handed to plaintiff's counsel prior to expiration of the statute of limitations, it was not actually delivered to the sheriff for service until after the statute had run. The precise question presented was whether the common law requirement that summons not only be issued by the clerk, but actually delivered to a process server in order to qualify as "issuance of summons," carried forward to the newly enacted NRCP, and in particular NRCP 3, which defined commencement of an action as "filing of the complaint and issuance of summons."

[2] Rule 3 no longer requires issuance of summons. The rule now states that a civil action is commenced by filing a complaint with the court.

Although these were "hard facts," the court was compelled to conclude that the common law requirement survived, and that the action was barred by the statute of limitations because summons had not been "issued" in compliance with longstanding Nevada law by delivering it to the sheriff or other person for service. In reaching this conclusion, the court relied very heavily on the Committee notes, which stated that NRCP 3 was intended to *"preserve the present Nevada Rule."* The Nevada rule at that time was set forth in *Woodstock v. Whitaker*, 62 Nev. 224, 146 P.2d 779 (1944), which defined "issuance of summons" as not only signing the summons and placing the court's seal thereon, *"but also delivery to the sheriff or other person qualified to serve the same, with the intent that said summons be served in due course." Deboer, supra*, at p. 317.

The court observed that the parties had agreed that the Advisory Committee Notes accompanying the revised rule constituted *"an expression by this court and that the Committee's reference to preserving the Nevada rule meant the rule as applied in Woodstock v. Whitaker." Id.* at 318.

The court conceded that the case presented hard facts, but that the court's prior common law construction of "issuance of summons," coupled with the "clear intention of the NRCP to preserve that rule, left the court with no other alternative than to hold that a summons is not issued, and an action, accordingly, not commenced, until the summons is placed in the hands of the sheriff, or other

person authorized to serve it." *Id.* at 319. The court stated its conclusion was compelled by a combination of factors: First, the intention of the NRCP as specifically stated by the Advisory Committee's notes to "preserve the present Nevada rule," second, that such rule was the rule enunciated in *Woodstock v. Whitaker* …; third, that delivery of summons for service is expressly required by Rule 4(a), and, fourth, that the former amendments to the rule were intended to preserve the common law requirement. *Id.* at 318.

Most of the factors identified in *Woodstock* are present in this case. The Advisory Committee notes plainly expressed the Committee's intent to "follow" existing law and it was conceded that in adopting the rule, the Supreme Court intended to accept and adopt the Committee's recommendation as an expression of its own interest. Existing law requires service by a disinterested person, which excludes counsel and his or her employees. As in *Woodstock*, the comments state the amendment is intended to preserve the common law. Moreover, the appellant in that case also argued, as Crystal does here, that issuance of summons was accomplished by delivery of summons from the clerk to counsel "who could then serve it." The Supreme Court rejected that argument, simply noting, that in Nevada ***"service may not be made by plaintiff's attorney."*** *Id.* at p. 319, n. 2.

The logic and analysis laid out in *Deboer, supra,* is directly applicable here, and the facts are even more compelling than those presented in *Deboer*. This is

because the Committee notes here did not merely state that the rule was "intended to preserve the present Nevada rule" as they did in *Deboer,* (and by implication the *Woodstock* rule), instead, they expressly stated that the revised rule is consistent with "*the common law rule followed in Nevada, requiring that service be made by a disinterested person, see Sawyer v. Sugarless Shops, 106 Nev. 265, 269-270, 792 P.2d 14,17 (1990). Nevada has long had rules prohibiting service by a party. This was a common law requirement and has not been changed by statute.*" [cites omitted]. Committee Notes.

As noted above, the common law rule that the Advisory Committee expressly indicated was preserved, and should be followed, included the requirement that service be made by a disinterested person, specifically citing to *Sawyer* and the specific pages in *Sawyer* that defined "disinterested party" to exclude counsel for a party, and his or her employees.

This court has previously noted various instances when the NRCP has departed from the federal rule. *See, e.g., Horton v. D.J. Operating Company*, 84 Nev. 694, 448 P.2d 36 (1968) (Rule 60(b) allows for new trial on newly discovered evidence to "preserve the practice theretofore established under the Civil Practice Act."). Nevada rules have been interpreted to conform with and implement the intent expressed in the Committee notes. *See, e.g., Doyle v. Jorgensen*, 82 Nev. 196, 414 P.2d 707 (1966) (Rule 4(d) interpreted to comport with expressed intent

of the Advisory Committee Notes); *Hill v. Summa Corporation*, 90 Nev. 79, 518 P.2d 1094 (1974) (Cases inconsistent with Rule 10 are inapplicable, as we adopted NRCP 10(a) upon recommendation of the Advisory Committee.).

As set forth above, the intent of NRCP 4(c) as manifested by the Committee Notes, and which either "express the intent of this court" (*Deboer*, *supra*), or which intent was adopted by this court on recommendation of the Advisory Committee as manifested in those notes, (*Doyle v. Jorgensen, supra*), is unequivocally clear that (1) NRCP 4(c) requires service to be made by a "disinterested person," and (2) counsel for a party, and his or her employees are "not disinterested persons" under the rule. Under the logic of *Deboer, supra*, service by counsel for Crystal must be quashed because the Committee Notes and this court expressly indicated that the rule was intended to preserve and continue the existing common law as enunciated in *Sawyer*, *supra,* and *Sawyer* expressly held that service by counsel for a party, or counsel's employee is invalid under NRCP 4(c).

## CONCLUSION

This is neither the time nor place to debate the prudence or wisdom of NRCP 4(c). The purpose of this Petition is to compel the district court to apply existing law. There may be sound arguments on both sides of this issue, but that debate should be left to future committees, and this court's right to alter or amend

existing rules after notice and participation by practitioners (as is currently underway). Crystal argues that the prohibition against service by counsel, or his or her employees, makes sense in the context of *Sawyer*, where there was legitimate question on the "fact of service." But this court does not enact special rules to apply to parties in one case, and different rules in another. Indeed, such practice is anathema to the rule of law, and principles of stare decisis. Moreover, *Sawyer* merely followed longstanding historical practice and the earlier seminal case of *Nevada Cornell S.M. v. Hankins, supra* (which voided service by counsel), where there was no factual dispute at all that counsel had, in fact, served the summons and complaint.

The rule of law applies in all cases, and to all parties. This court expressly observed that the rule in *Sawyer* was based not on its peculiar facts (although the facts in that case justified application of the rule), but rather as a matter of sound judicial and public policy relating to the administration of justice in Nevada: "There are obvious and sound policy reasons for this prohibition … something as fundamental and decisive as service is best taken away from the parties or their counsel or counsel's employees." *Sawyer* at p. 270.

That the facts in *Sawyer* may provide a stronger example supporting those policy reasons is not a justification for abolishing the longstanding rule of law, and applying a different rule in this case. It is often said that hard cases make bad law,

meaning that a less extreme case arousing sympathy should not provide a basis for applying a different rule of law and courts should avoid the termination to do so. As this court said in *Sawyer*, "something as fundamental and decisive as service is best taken away from the parties or their counsel and their employees." This is the rule of law that applies whether a case presents easy facts, or hard facts, and it is the rule of law that applies here.

Moreover, the facts are not so tempting as they might seem. The defendant (McGowen) was seduced by a misrepresentation (albeit not of counsel's making) to voluntarily appear in this jurisdiction for an unrelated judicial proceeding, and is admittedly not subject to the "due process minimum contacts" jurisdiction under *International Shoe v. Washington*, 326 U.S. 310 (1948) or NRS 14.065, but rather, hauled into court on the serendipity of *Pennoyer v. Neff* (95 U.S. 714 (1818)) (temporary physical "presence" procured by trickery). There are no "equitable" factors weighing in favor of Crystal here. There is no statute of limitations that has run, and there is no inability on the part of Crystal to bring its action. He can do so, but he should do so in Texas, where his case belongs.

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Dated: December 22, 2017

SNELL & WILMER L.L.P.

By: /s/ William E. Peterson
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## CERTIFICATE OF COMPLIANCE

1. I hereby certify that this petition for rehearing complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman 14 font.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the petition exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains 3,173 words.

3. Finally, I hereby certify that I have read this petition, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated: December 22, 2017

SNELL & WILMER L.L.P.

By: /s/ William E. Peterson

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## CERTIFICATE OF SERVICE

I, the undersigned, declare under penalty of perjury, that I am over the age of eighteen (18) years, and I am not a party to, nor interested in, this action. On December 22, 2017, I caused to be served a true and correct copy of the foregoing **REPLY IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS** upon the following by the method indicated:

☐ **BY E-MAIL:** by transmitting via e-mail the document(s) listed above to the e-mail addresses set forth below and/or included on the Court's Service List for the above-referenced case.

☒ **BY U.S. MAIL:** by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Reno, Nevada addressed as set forth below.

☐ **BY ELECTRONIC SUBMISSION:** submitted to the above-entitled Court for electronic filing and service upon the Court's Service List for the above-referenced case.

The Honorable David A. Hardy
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