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Via First Class Mail and Email
Elizabeth A. Brown, Clerk of the Supreme Court
201 South Carson Street
Carson City, Nevada 89701
nvscclerk@nvcourts.nv.gov

RE: ADKT 0560 (Revisions to NRCP 41(e))

Dear Clerk Brown,

I am writing in favor of the changes proposed by Chief Justice Pickering and Justice Gibbons which would keep the discretionary standard for want of prosecution after two years but would retire the five-year mandatory dismissal rule. I apologize in advance for the length of this letter.

After the last hearing, I went back and took a look at the case history surrounding the five-year rule. **Thran v. First Judicial Dist. Court**, 79 Nev. 176, 380 P.2d 297 (1963) was the first case to discuss the mandatory nature of the Rule. Interestingly, the argument *against* the mandatory language was based upon the California law that was used to draft the Rule in the first place and **Christin v. Superior Court**, 9 Cal.2d 526, 71 P.2d 205, 112 A.L.R. 1153 which in effect provided a defense to the Rule based upon impossibility, impracticability and futility.[1] However, the Nevada Court refused to move away from the strict language of the Rule and denied the argument.

Over the years, our Court has maintained the mandatory nature of dismissals pursuant to the Rule. However, the Court has removed from the time calculation stipulations, appeals, and stays. See, e.g., **Boren v. City of North Las Vegas,** 98 Nev. 5, 638 P.2d 404 (1982); **Morgan v. Las Vegas Sands,** 118 Nev. 315, 43 P.3d 1036 (2002); **D.R. Horton, Inc. v. Eighth Judicial Dist. Court of Nev.,** 131 Nev. 865, 358 P.3d 925 (2015); **High Sierra Ranch Homes Owners Ass'n v. Richard Joseph & Co.**, 392 P.3d 165 (Nev. 2017). Notably, these are all Court-created exceptions basically centered on fairness and reality—yet, *the language of the Rule itself has not yet changed.* Despite 50 years of decisions on the Rule, and a wholesale revision of the NRCP, equities still do not balance the hardship of the Rule. This was recently demonstrated in **Rotes v. Suncrest Builders, Inc.,** 454 P.3d 1259 (Nev. 2019)(unpublished) where the trial Court refused

[1] At the last hearing, Chief Justice Pickering seemed to indicate a possibility of keeping the five-year rule but amending such to add some discretion based upon *impossibility, impracticability and futility.* I think this would be a good change if withdrawing the Rule would not be agreeable. But I would add "and/or good cause" to the list as the three words, if taken literally, may not cover each scenario.

20-25488

to set a trial until all third-parties were joined effectively staying the trial (not the case). The Court held that the time period was not a "stay" and thus affirmed the mandatory dismissal.

Curiously, in **Faye v. Hotel Riviera**, 81 Nev. 350, 403 P.2d 201 (1965), the Court "hinted" at a "wink wink" trial that could resolve a "good cause" issue. The Court inferred that all that was required was to "commence" trial. Although the Court has yet to specifically define this, it seems as though all that is required is the impaneling of a jury and the calling of a witness. See **Smith v. Timm**, 96 Nev. 197, 606 P.2d 530 (1980); **Ad-Art Inc. v. Denison**, 94 Nev. 73, 574 P.2d 1016 (1978). However, relying on this could be dangerous as "sham" proceedings do not work to vitiate the Rule. See **Lipitt v. State**, 103 Nev. 412, 743 P.2d 108 (1987).

Interestingly, in **Carstarphen v. Milsner**, 128 Nev. 55, 270 P.3d 1251 (2012), the Court held that a motion for preferential trial setting to avoid dismissal per NRCP 41(e) required an evaluation of how much time was remaining when the Motion was filed and the diligence of the moving party. Chief Justice Pickering dissented citing to California law which mandated a review of the "total picture" of the issues:

> "In *Salas v. Sears, Roebuck & Co.*, 42 Cal. 3d 342, 228 Cal. Rptr. 504, 721 P.2d 590, 594 (Cal. 1986), the California Supreme Court, after considerable debate, set out the factors that should guide a district court in assessing a motion for preferential trial setting to avoid a five-year deadline like that in NRCP 41(e):
>
> a trial court does not have a mandatory duty to set a preferential trial date, even when the five-year deadline approaches. Its discretion is not wholly unfettered: it must consider the 'total picture,' . . . including the condition of the court calendar, dilatory conduct by plaintiff, prejudice to defendant of an accelerated trial date, and the likelihood of eventual mandatory dismissal if the early trial date is denied."

Id. at 128 Nev. 55, 67, 270 P.3d 1251, 1259 (2012). Perhaps this is the "good cause" analysis which Chief Justice Pickering and Justice Gibbons have envisioned. And, if so, I would highly agree with same.

My friend Mr. Hejmanowski argues that the Rule should remain as is because it provides finality. Similarly, some of the Justices agree with this position. This is clearly understandable especially in a matter where the Plaintiff is not pushing the case forward. Yet, finality can remain without resorting to the hardship of the Rule. We can create a situation, similar to other Rules which require "good cause" to allow for the Court to examine why a case hasn't come to trial in a time period. There may be good reason—there may be bad. But, taking away the examination of the reasons has unintended consequences. And, it robs the trial judge of the right to manage her/his

own cases. (In a sense, this is similar to the Mandatory Minimum sentences used in Federal criminal matters. They take away the independence of the Judge to do what he or she thinks is right[2]). The Judge should have the ability to speak with counsel and make a determination that good cause exists because of X or Y. Sometimes there is a good reason for a case to take 5 years. Sometimes not. But, the Judge should be able to make this decision using reason, not a calendar.

The Fifty State Survey (attached as Exhibit A to the original Petition) makes it quite clear that Nevada seems to be the only State that mandates dismissal after five years. Though a few of the States have discretionary dismissals after a time period, Nevada is the lone State where the dismissal does not take into account good cause or similar reasons. Though certainly not binding, it does raise the question of why we are the only State to do this. And, the survey also demonstrates that some States had the rule and then amended it to allow for good cause. Though Nevada has a spirit of going its own way, in this case, it seems as though the balance of the 50 States have moved in the right direction allowing for good cause or similar rationales as opposed to a mandatory dismissal.

I tried to look at statistics to see how many cases are currently pending (or were pending at the end of 2019) that were at least four years in the system. Unfortunately, I could not find a table demonstrating this. Yet, simply based upon the "cases filed" and "cases disposed of" numbers, my guess would be that not too many exist. However, I looked at a few of my own cases over the years that have been pending for some time or had a stipulation to a five-year rule waiver. There were no cases that had just been "sitting around" gathering dust. On each one, there were issues that simply precluded the case from moving forward to trial including appeals, or the significant illness of a child/spouse of a lawyer or party. Two involved significant discovery and criminal issues which required the criminal case to proceed first—but due to issues within the criminal case, the matter was delayed (and stayed).

It is the rare case that requires going past five years. Justice Hardesty made clear at the hearing that while the onus is primarily on plaintiff's counsel to move the case forward, defense counsel also plays a role. That is true--but for the defense, delays do not come with the hardship of the five-year rule. In fact, at least in my cases, delays are sort of built-in for the defense. For example, I am routinely asked for continuances on filing an answer and answering discovery. I would say that it is the rare case where I am not asked for *multiple* continuances again and again. I believe in civility and so, I always grant the request. If a lawyer calls me and says she needs some time because her husband is ill or her child is ill, I give a continuance with no questions asked. Generally, I do not even ask for a reason. Now, as time moves on and the five-year rule is shortly

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[2] See, e.g., "One Judge Makes The Case For Judgment", Van Meter, The Atlantic, 2/25/16 (https://www.theatlantic.com/politics/archive/2016/02/one-judge-makes-the-case-for-judgment/463380/) (arguing that Judges should be allowed to employ context and discretion to sentences).

coming down the pike, I always make the continuance subject to a stipulation regarding the five-year rule. Of course, this comes from years of experience (and sweating over the five-year date). I could certainly envision a young lawyer not thinking about the five-year rule and granting continuances without getting the stipulation back. In a situation like that, fairness dictates a waiver of the Rule. Because of the drastic nature of the Rule, I believe Courts should err on the side of good cause—but the Rule does not allow for this type of discretion (or any discretion).

Some other issues delaying matters involve physician depositions. Years ago, I could call a doctor and set the deposition within a couple of weeks. Now, it takes literally months to get these set up. (For example, in Court today, Judge David Jones stated that certain surgeons are now setting depositions well into 2021). Imagine a case with 7-10 doctors. Getting the depositions taken takes a long time. And that is neither the fault of Plaintiff's counsel nor the defense—it's just a fact of life these days.

And, finally, an unintended consequence of the new discovery rules relating to proportionality have provided fodder for exhaustive LR 2.34 conferences and threats (for now) of motions. Proportionality—especially after **Venetian Casino Resort, LLC v. Eighth Judicial Dist. Court**, 2020 Nev. App. LEXIS 2, 136 Nev. Adv. Rep. 26—will become the new **Iqbal** and **Twombly** where more and more motions will be filed, and cases delayed. And, the five-year rule just sits there while we have all of these new delays.

The point of all of the above is that not all delays are created equal. I am sure there are lawyers who do nothing with their cases after filing. After reading each Bar action in this Court, I am more sure of this than ever. The draconian answer to this is the five-year rule. However, perhaps a better way is to have the Court become involved way earlier than five years out. The Early Case Management Conference is certainly a good start. However, what if the parties were required to file status reports indicating what has been done in terms of motions, discovery and what is left to do. The Federal Courts have done this for years. Obviously, the time period depends upon the case—but, there should be a Report due at least every 6-9 months. This can be ordered at the time of the first conference. In that report, counsel can indicate if there are issues that are causing delays. And, if it looks like there are going to be significant delays, the Court would be made aware of same well before the five-year rule—or whatever period is used. No doubt that this would aid in the good cause analysis.

Covid-19 brings a whole distinct issue to this problem. With the backlog of criminal cases, civil cases are going to be delayed for at least a year. I can't force a case to trial regardless of what I am doing to finalize discovery and move the case forward. Yet, the five-year rule does loom. If the Court is not going to make a wholesale change to NRCP 41(e), *at the very least*, it needs to add language allowing the District Court to waive the five-year rule due to impossibility and impracticability. This would just merely accept the problems associated with Covid-19 and

potentially other issues that Nevada might face in the future. The Pandemic has shown that our Rules need to have flexibility for matters that may come up. For example, I have several cases where many witnesses are outside of the State, and curiously, many in the New York area. As the Court well knows, 9/11 effectively shut down New York City not just for days, but for months. If that were to happen now, that could cause a significant delay in my cases in Nevada. So, while the impossibility prong would not be indicated, impracticability would be. Accordingly, at the very least, I would urge this Court to amend the Rule to allow for impossibility and impracticability based upon a showing of good cause. However, I would also urge the Court to use a sort of **Scrimer v. Eighth Judicial Dist. Court,** 116 Nev. 507, 998 P.2d 1190 (2000) good cause analysis.

Please allow me to end with a word or two about unintended consequences. As I said previously, I grant continuances left and right and as time moves on, I always get a stipulation to waive the five-year rule as it gets closer and a continuance is requested. But, let's assume that a particular law firm will not give me that. I will have learned a lesson with that particular firm so that when a lawyer calls me and asks for a continuance in another case, I won't give it. And regardless of a child's illness or anything else, I will move forward with discovery and depositions. Now, the *only* reason that will happen is because of the finality of the five-year rule. So, if we really want to increase civility, harsh rules need to be amended to allow for good cause rationales. That way, I can give continuances without resorting to these types of actions. And, lawyers can get along. The amount of "back and forth" I have seen over the years since we have moved to scheduling orders, time limited depositions, limited numbers of interrogatories and the like, have increased substantially over the years. And, virtually all of them are because of the new limitations we have put in. Obviously, this is an unintended consequence. Yet, gamesmanship over the Rules is now more important than the facts of the case. If I send 40 interrogatories, I can be sure that there will be a motion because there might have been a subpart or two that I didn't count. Or, if I am one day late on an expert report, there will be a motion to strike the report. Now, on each of these examples, the Court will look at my argument as to why I sent this discovery or why I was one day late. And, the Court will use a form of good cause analysis. So, why wouldn't that same analysis be used regarding the five-year rule? If I can show good cause as to why the case isn't ready for trial within five years, shouldn't the District Court be allowed to examine reasons why? Should an ill wife or an ill child be the reason for a potential malpractice case? A Judge who is involved in the case in terms of its management should be allowed to look at the arguments of counsel and make a determination as to whether something is good cause or not. Now, if I am not pushing the case forward, then the fault is mine. But, if I am sending discovery, taking depositions, filing motions etc., then I should be allowed to explain why the case is taking so long.

If the pandemic has shown us anything it is that sometimes, things happen that are out of our control and the Rules of Civil Procedure need to reflect that reality. The Rules should provide counsel and the Court some flexibility to address these problems without a new Administrative Order every few days. If the proposed Rule was in effect last March, there would be no issues

about impossible delays. And, if by some chance a client gets ill with Covid-19 and can't give a deposition for a long time, the five-year rule shouldn't be out there waiting to dismiss her case. Flexibility should be the rule. For sure, there are going to be times when litigants and lawyers will take advantage of this. However, again, with the District Court's involvement (and my idea regarding status reports), those cases will be few, and the Court can still find no good cause.

Therefore, I would urge this Court to remove the five-year rule as the Proposed Rule does. But, so as not to open the floodgates for delay, I would also urge the Court to mandate status reports at least every 6-9 months from the date of the Early Management Conference.

Respectfully submitted,

MURDOCK & ASSOCIATES, CHTD.

Robert E. Murdock, Esq.

REM/vam