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JAN 25 2022

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

December 8, 2021

Chief Justice James W. Hardesty
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Justice Ron D. Parraguirre
Justice Kristina Pickering
Justice Abbi Silver
Justice Lidia S. Stiglich
201 South Carson Street, Suite 201
Carson City, Nevada 89701-4702

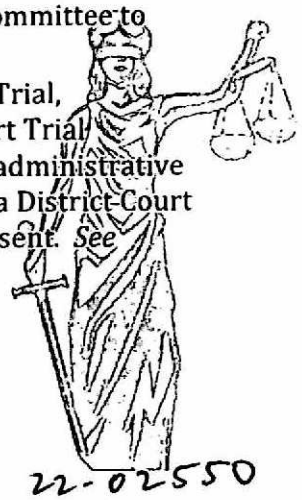
ADKT 575

Re: Proposed Changes to the Nevada Short Trial Rules

Dear Members of the Court:

The Nevada Justice Association (NJA) is an association of approximately 900 Nevada lawyers who devote a significant portion of their practice to representing individuals injured through the fault of others. Many practice in this area exclusively. Most members of NJA have first-hand experience with the Nevada Short Trial Program (Short Trial Program) and many have extensive experience in trying multiple cases to verdict in that program.[1] While there has always been some controversy regarding the Nevada Short Trial Program (Short Trial Program), dissatisfaction with the Short Trial Program among NJA's membership has steadily grown over time. By the summer of 2020, that dissatisfaction became so intense that NJA's Board of Governors voted unanimously to establish a committee to

[1] The experience of the District Court Judges and Short Trial, Discovery and Arbitration Commissioners with the Short Trial Program in their current capacity is almost exclusively administrative by design, except in the relatively rare situations when a District Court Judge presides over a Short Trial by stipulation and consent. *See* NSTR 2 and 3(a)(1) and (d).



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study the Nevada Short Trial Rules (NSTR) and propose changes to this Court.

A committee was constituted (Committee) with NJA lawyers who had considerable experience in trying cases to verdict through the Short Trial Program. The Committee sought input from NJA's members to identify areas of concern. The primary areas of concern were determined to be: 1) the wide disparity in the competence of Pro Tempore Judges leading to unjust and inconsistent rulings; 2) an arbitrary and practically inflexible limitation on the time allotted for trying all Short Trials regardless of the issues or the number of parties or witnesses involved; 3) the inability to conduct meaningful voir dire under such a severe time constraint; 4) the inability to make plaintiff's whole or feasibly try these cases from an economic standpoint by limiting the amount of attorney's fees that can be awarded; 5) and the lack of a record of the proceedings, rendering appellate review difficult if not impossible.[2]

The Committee then undertook a comprehensive study of the NSTR with the goal of proposing changes to rectify several long-standing problems, bring the Rules current with existing practice conditions, and improve the Short Trial Program going forward.

By January 2021 the Committee's review and recommendations were largely complete. Coincidently, the State Bar of Nevada (State Bar) had also been working on proposed changes to the NSTR, as well as the Nevada Arbitration Rules (NAR), and had lodged with the Court ADKT 0575 on January 22, 2021 to modify the NSTR, Nevada Mediation Rules and the NAR.[3] ADKT 0575 dealt exclusively with: 1) increasing the cap on awardable attorney's fees

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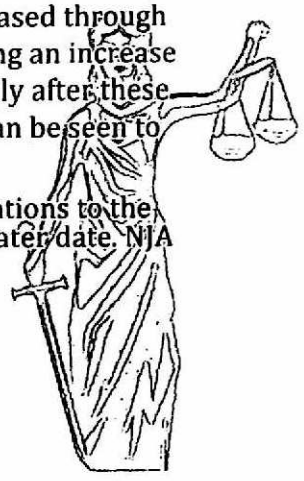
[2] The Committee carefully considered and rejected the idea of expanding the jurisdictional limit of the Short Trial Program beyond $50,000 at this point in time. It is NJA's firm belief the Short Trial Program has serious deficiencies which have only increased through the passage of time. NJA would be in favor of considering an increase in the jurisdictional limits of the Short Trial Program only after these deficiencies are rectified and the Short Trial Program can be seen to function more justly.

[3] While the Committee recognized the need for modifications to the NAR, NJA initially decided to leave that evaluation to a later date. NJA does propose one change to NAR 16(E) at this time.



under NAR 16(E), 2) increasing the cap on compensation for arbitrators, mediators and Judges Pro Tempore; 3) and fully incorporating Rule 68 into the Arbitration Program.

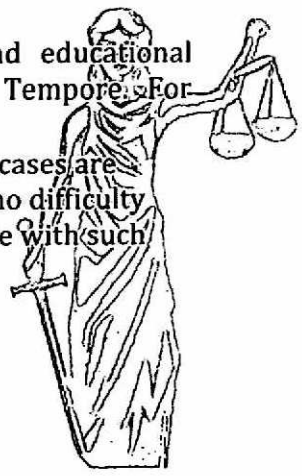
NJA reviewed the State Bar's proposed ADKT and agreed with the State Bar's suggested changes. NJA then contacted the State Bar and offered NJA's proposed changes to the NSTR. The State Bar then withdrew its proposed ADKT. After several consultations between the two organizations' committees, NJA's proposed changes to the NSTR's were incorporated into a revised joint submission by the State Bar and NJA.

The State Bar proceeded to open up the revised proposed ADKT for comment. That ultimately resulted in multiple Bench Bar Hearings in the Eighth Judicial District with no definitive outcome as of this date. It is our understanding this proposed ADKT was also an agenda item discussed by the State Bar Board of Governors at the most recent State Bar Convention, but we are unaware if any further action was taken with respect to the joint ADKT proposal by the State Bar and NJA. Accordingly, NJA offers its proposed changes to the NSTR as explained below.

NSTR 3. As noted above, NJA's members have become increasingly concerned about the uniform competence of Judges Pro Tempore. This stems from a variety of reasons, such as a lack of familiarity with the cases over which Judges Pro Tempore are charged to preside, inadequate experience in trying cases and an inadequate knowledge of trial practice and procedure. Additionally, because Judges Pro Tempore are paid by the litigants, the litigants' access to justice is impacted.[4]

For these reasons NJA proposes that Short Trials be handled by District Court Judges unless the litigants stipulate to the use of a Judge Pro Tempore. Litigants could opt out by stipulating to a particular Judge Pro Tempore within 120 days (or some other appropriate time period) of entering the Short Trial Program.

NJA also proposes additional experiential and educational requirements for lawyers to become a Judge Pro Tempore. For



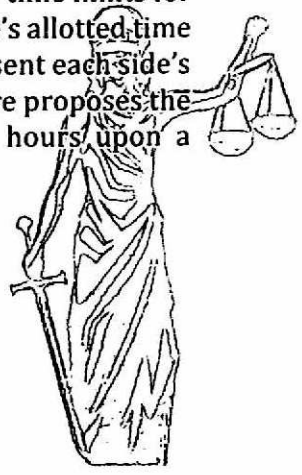
[4] From a practical standpoint, defendants in negligence cases are almost always defended by liability insurers who have no difficulty paying the costs of trial. Plaintiffs almost always struggle with such costs and must rely on counsel for assistance.

instance, Judges Pro Tempore should have a minimum of 10 hours of mandatory judicial training when they are appointed. They should also only be authorized to preside over the kind of cases with which they have some experience. They should certify their practice is comprised of at least 25% of the area in which they are authorized to preside. Judges Pro tempore should have participated in at least two jury trials as first or second chair trial counsel. Additional CLE requirements regarding current jurisprudence and the Civil Justice System should be mandated.

NSTR 20. NJA also proposes that all Short Trials be reported through an audio recording system to create an official record of the proceedings that will be provided to the litigants free of charge. The Eighth Judicial District Courts already have audio recording capability. While it does not yet exist in the Second Judicial District and other districts where the Short Trial Program is in use, funds from COVID relief programs could be used to cover the modest cost of providing such important and basic technology in courtrooms designated for Short Trials. Should funding from those sources not occur, NJA would be willing to donate that technology to courtrooms designated for Short Trials.

NSTR 21. Limiting each side to three hours to present their case regardless of the number of issues, evidence, and witnesses, is unreasonable in certain situations. This "one size fits all" approach should be modified. While many cases can be appropriately tried under the existing time constraints, some cannot. The goal of the Civil Justice System is to provide a just result in accordance with the law and evidence. That goal should not be subordinated to an administrative desire to process all cases in an arbitrary time period regardless of the circumstances or the results obtained. NJA believes the concern that attorneys will use up more time than necessary just because more time is available is exaggerated. The presiding judge is vested with the authority to keep presentations moving along efficiently when warranted.

As discussed below, NJA proposes to remove the time limits for conducting voir dire and include that time into each side's allotted time to present their cases. Therefore, additional time to present each side's case may be needed for this change as well. NJA therefore proposes the time for conducting a Short Trial be expanded to 6 hours upon a requisite showing of the need for additional time.



NSTR 23. The necessity of adequate time to conduct voir dire is essential to enable counsel to attempt to impanel a truly impartial jury. Voir dire is designed to identify prospective jurors that are unqualified, biased or unwilling to follow the facts and the law, and remove them for cause. It is also to enable counsel to intelligently exercise their peremptory challenges.[5]

The right of counsel to conduct voir dire is deemed by this Court to be a substantive right that cannot be unreasonably restricted.[6] In Nevada a challenge for cause to further the goal of obtaining an impartial and disinterested jury is deemed so sacrosanct that this Court has held that not even the Legislature can abrogate such a right.[7] That is not a problem, however, as the Nevada Legislature is in complete agreement and has codified this right in NRS 16.030(6) (The judge shall conduct the initial examination of prospective jurors and the parties or their attorneys are entitled to conduct supplemental examinations which must not be unreasonably restricted.)

Prospective juror incompetence, bias, and an unwillingness to follow the facts and law, infects Short Trial cases just as much as other cases and with just as deleterious effects. No attorney can even come close to adequately questioning a panel of prospective jurors for a Short Trial in the current time allotted.[8] Every attorney the Committee has spoken with on this point agrees. The time limits in NSTR 23 abridge the substantive right of trial counsel to conduct adequate voir dire.[9]

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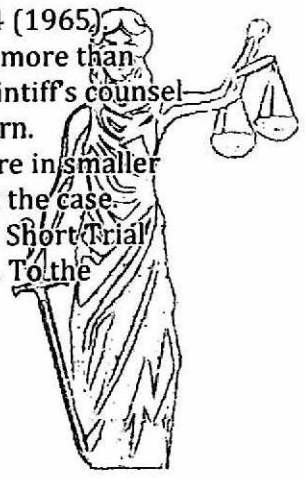
[5] *See also* Mu'Min *v. Virginia*, 500 U.S. 415, 431 (U.S. 1991).
[6] *Whitlock v. Salmon*, 104 Nev. 24, 26, 742 P.2d. 210 (1988)("The importance of a truly impartial jury... is so basic to our notion of jurisprudence that its necessity has never really been questioned in this country."). Citing *United States v. Bear Runner*, 502 F.2d 908 (8th Cir. 1974).
[7] *Frame v. Griswold*, 81 Nev. 114, 122, 399 P.2d 450, 454 (1965).
[8] Time limits on voir dire generally impact plaintiffs far more than defendants who have the benefit of first listening to plaintiff's counsel question prospective jurors on common issues of concern.
[9] One might be tempted to think that conducting voir dire in smaller cases is less complicated or time consuming. That is not the case. Some may also think voir dire is not as important in the Short Trial Program because the amounts at issue are insignificant. To the



Therefore, NJA proposes removing the time limits for conducting voir dire and incorporating the time a party uses on voir dire into the time allotted to present their case.

NSTR 27(b)(4) and NAR 16(E). The $3,000 cap on attorney's fees in NSTR 27(b)(4) deviates from existing Nevada law, is outdated and out of step with current insurance industry practices. The Nevada Legislature recognized that Nevada citizens could not be made whole in smaller cases without an adequate award of attorney's fees and enacted NRS 18.010(2)(a) to provide a means for them to be made whole. The current iteration of NRS 18.010(2)(a) designates those smaller cases as having a value of not more than $20,000. This Court expressly recognized Nevada's strong public policy in having plaintiff's made whole in smaller cases, first in its 1995 decision in *Smith v. Crown Financial Services of America*, 111 Nev. 277, 281-282, 890 P.2d 769, 772 (1995)[10] and again in its 2004 decision in *Trustees v. Developers Surety*, 120 Nev. 56, 62-63, 84 P.3d 59, 63 (2004).[11] The $3,000 limit on

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majority of our clients, however, these amounts are oftentimes a matter of economic survival.

[10] This Court observed in *Smith*: ...Plaintiffs who sought relatively small recoveries were not being made whole because they were required to pay attorney fees out of their judgments.... *Smith* at p. 281-82.

[11] This Court in *Trustees* noted:

> In 1985, the Legislature amended NRS 18.010 to authorize attorney fees awards when the prevailing party had recovered no more than $20,000. (Footnote omitted.) While the Legislature may have been partially concerned with inflation, (Footnote omitted.) the statute's 2003 amendment unambiguously reflects the Legislature's intent to liberalize attorney fee awards. In 2003, Senate Bill 250 added the following language to NRS 18.010: "The court shall liberally construe the provisions of this paragraph in favor of awarding attorney's fees in all appropriate situations." (Footnote omitted.) *The statutory language is clear; it encourages the district court to award attorney fees* and it makes no exemptions for sureties. The district court should have considered awarding attorney fees under NRS 18.010(2)(a). (Emphasis supplied.)

attorney's fees in NSTR 27(b)(4) conflicts with the public policy underlying NRS 18.010(2)(a) and the *Smith* and *Trustees* decisions. It does so by expressly limiting awards of attorney's fees in smaller cases.

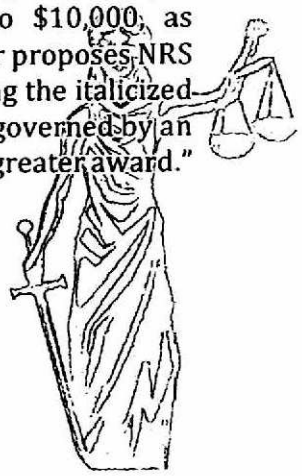
Exclusive of the time involved in arbitrating a case, estimates of the time to litigate and try a Short Trial case to verdict range between $20,000 and $40,000. Understandably, Nevada attorneys are reluctant to take on these smaller cases if there is no hope their clients can be made whole, and it is economically unfeasible to do so. The $3,000 cap on awardable attorney's fees thus also creates an access to justice problem which will only get worse as time goes on.

The $3,000 attorney's fees limit in NSTR 27(b)(4) is also at odds with the legal framework for awarding fees under NRCP 68, *Beattie v. Thomas*, 99 Nev. 579, 588, 668 P.2d 268, 274 and *Yamaha Motor Co., U.S.A. v. Arnoult*, 114 Nev. 233, 252, 955 P.2d 661, 673 (1998). This Court mandates under Rule 68 that a determination be made that the fees sought are reasonable and justified in amount. The maximum awardable fee of $3,000 under NTSR 27(B)(4) is now unreasonably low in every case in which full fees should be awarded under Rule 68.

The $3,000 limit under NSTR 27(b)(4) also creates an incentive for liability insurers to reject arbitration decisions, "wait out" Nevada citizens trying to receive justice and litigate cases through a Short Trial at little risk. Liability insurers in Nevada defend the vast majority of these cases. Most do so with in-house counsel and view the potential maximum $3,000 award of fees as a minor cost of doing business. This incentivizes the rejection of arbitration decisions and undermines the laudable goal of the Arbitration Program in providing "... a procedure for obtaining a prompt and equitable of certain civil matters." NAR 1(A).

NJA therefore proposes the limit on attorney's fees in NSTR 27(b)(4) be removed. In doing so, the policy of NRS 18.010(2)(a) will be upheld, litigants can be made whole in these smaller cases, and the stated purpose of the Arbitration Program will be promoted.

Correspondingly, NJA also recommends modifying NAR 16(E) to increase the limits on awardable attorney's fees to $10,000, as proposed by the State Bar in ADKT No. 0575. NJA further proposes NRS 18.010(2)(a) be brought back into full effect by inserting the italicized language: "...unless the compensation of an attorney is governed by an agreement between the parties *or by statute* allowing a greater award."



Trustees at p. at 62-63.

NSTR 28. This rule has not been amended for nearly a decade. NJA proposes the maximum allowable fees for Arbitrators, Mediators and Judges Pro Tempore be increased to $3,000.

NSTR 34. NJA proposes the presiding judge be authorized to designate one of their staff or other suitable person to record the proceedings and sequester the jury.

NJA hopes the forgoing is useful to the Court in its reassessment of the Short Trial Program. Members of NJA are willing to answer any questions members of the Court may have or explain our position further in any forum the Court deems appropriate.

Further, if the Court decides to place the previously submitted ADKT for public comment before it makes any changes to the Short Trail Program, we will have representatives present to answer any questions.

We have copied the District Court Judges below and ask that they please share this with all other interested Judges in their district.

Sincerely,

David D. Boehrer, Esq.
President

cc: Hon. James T. Russell
Chief Judge Scott Freeman
Chief Judge Linda M. Bell
Hon. Nathan Todd Young
Hon. Thomas W. Gregory