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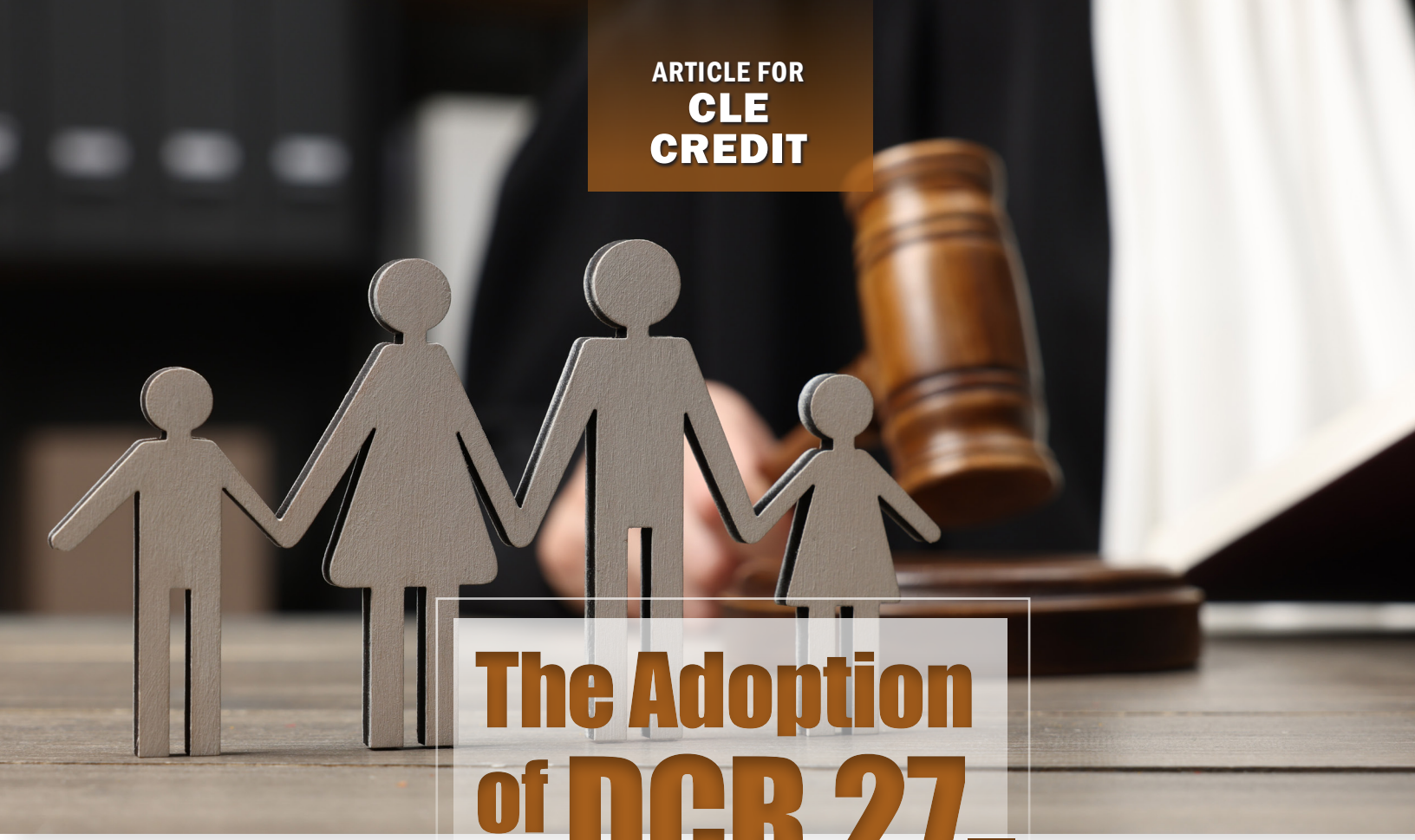

The Adoption of DCR 27– Improving Access to Justice in Family Court Through Informal Trials

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Family court is jammed with litigants demanding expedient solutions to real problems. For litigants who navigate the process on their own, court rules and procedures are complex, difficult to comprehend, and often stymie a litigant's sense that the judge decided the case fairly.[1] With the increasing number of self-represented litigants accessing our courtrooms, we must re-examine how to make the process more capable of doing what is promised: helping people resolve their problems through "swift, fair decisions they can understand and live by."[2]

Evolution of an Idea

At the end of last year, I wrote an article for *Nevada Lawyer* to spark discussion about the overwhelming number of self-represented litigants navigating the family court process on their own. More than 70 percent of contested family law cases in Clark County involve two unrepresented parties. Not only do self-represented litigants have difficulty understanding and complying with the rules, but the judges presiding over these cases face the significant challenge of how to maintain neutrality when needing to assist self-represented litigants in presenting their cases. But for a judge's assistance – which some judges worry may violate judicial ethics – too many self-represented litigants flounder, unsure where to start, or how to present their positions. The result clogs dockets and delays justice for all.

In that article, I suggested one possible plan would be offering litigants the option of a simplified or informal trial format in divorce and child custody cases. The idea aimed to make our family courts more user-friendly and client-focused by lessening the complexity of a trial process that self-represented litigants cannot reasonably expect to comprehend. Less than one year later, the Nevada Supreme Court adopted District Court Rule (DCR) 27, which went into effect on November 19, 2024, as a one-year pilot program.

What is an Informal Family Law Trial?

The concept is simple. The parties speak under oath directly to the judge without objection or interruption. There is no direct or cross-examination. The judge asks

all the questions to assist in developing the evidence required by any statute or rule. The other party (or lawyer, if present) may ask the court to inquire into other areas. The process is then repeated for the opposing side. Unless permitted by the judge, nonparty witnesses are limited to experts. All rules of evidence are relaxed. Any exhibits the parties offer are admitted, and the court decides what evidentiary weight they receive. The trial judge retains discretion to modify these procedures on a case-by-case basis as necessary to assure fairness.

Before the trial begins, the judge is required to review the process with the parties and confirm their agreement. The judge applies the same substantive law as with a traditional trial. NRCP 16.2, 16.205, or 16.21 and all discovery rules still apply. Each party retains the same appeal rights as if using a traditional trial.

Informal Trials Do Not Shortchange Litigants

There is an erroneous perception that litigants who participate in an informal trial are receiving something less than or inferior to the type of justice that a traditional trial provides. That is incorrect.

For example, one may think that eliminating cross-examination lessens a party's ability to challenge opposing testimony and will impact the judge's decision-making negatively. However, most self-represented litigants come to court unprepared to conduct cross-examination, and when they try, they are unable to craft helpful questions. Poorly designed cross-examination offers minimal evidentiary value to one's case while often stirring emotions and undermining the ultimate goal of resolving conflict.

Likewise, relaxing evidentiary standards will not appreciably impact the judge's decision-making in these cases. Yes, that is what I said. Keep in mind, and what cannot be emphasized enough, is that most if not all evidence is already being routinely admitted in traditional trials involving self-represented litigants, as litigants are unfamiliar with the rules of evidence, such as the hearsay rules, and fail almost always to make timely objections during the trial, which ultimately leads to the waiver of the objection. Simply stated, the evidence is already being admitted nearly all the time under the traditional trial model, as self-represented litigants do not know when or how to object to evidence. The bottom line: The fairness baked into a traditional trial is illusory when the parties are unfamiliar with and do not comprehend the rules by which that process is governed.

When Can an Informal Trial Be Used?

Any pre- or post-judgment evidentiary proceeding involving claims filed under NRS Chapter 125, 125C, or 126 is eligible for an informal family law trial. The process is never mandatory. It is an opt-in program, and both parties must make an informed choice to select the informal process. Parties will now be required before any trial begins to select the type of trial they choose – whether traditional or informal. This choice is not unlike other case proceedings where parties choose whether to use a bench or jury trial.

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The informal trial process is ideally suited for self-represented litigants but available to represented litigants as well. In those cases, attorneys may summarize the issues and may advise their clients during the trial, but they do not question witnesses or participate in offering exhibits or making objections.

The informal trial program functions well in conjunction with unbundled or limited-scope legal services. Litigants can consult with lawyers, utilize an unbundled attorney to help prepare pleadings or conduct discovery, and then if not able to retain the attorney for trial, which is often the case, conduct the informal trial without the attorney present in the courtroom.

Because there is no cross-examination, and each party speaks without interruption or objection, the process tends to diffuse animosity and bring down the temperature of often acrimonious proceedings.

The informal trial model can also be effective in cases involving allegations of domestic violence. The rules permit the victim to introduce police or medical reports without having to subpoena witnesses. Additionally, the victim is not subject to cross-examination by the perpetrator, while the judge controls the nature of questioning and maintains focus on the issues.

Informal Trials are Already Used with Great Success

Oregon has been using informal trials since 2012 with great success. Five other jurisdictions, including Alaska, Arizona, Idaho, Utah, and Washington, have also implemented the program. Nevada has just as much of a vested interest as these other states in improving case outcomes by making court processes more accessible to those who need our services the most. With the implementation of informal trials, litigants can now understand the rules (less than three pages long), and participate in a trial, feeling confident and secure the process is being conducted fairly.

With a simpler, less-formal process, where litigants tell their story directly to the judge, all evidence is considered, and neither party is hindered by rules they do not understand, the ultimate achievement is a greater sense of trust and belief in the legal process as a whole. The result is courts treating litigants fairly, hearing their disputes, and sorting out their everyday troubles in a way that is comprehensible to all.

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ENDNOTES:

1. When evidence a party believes important is excluded, for example, they are likely to believe the process was unfair and the outcome wrong because the judge did not consider all of the information.
2. See Thomas G. Moukawsher, The Common Flaw. Needless Complexity in the Courts and 50 Ways to Reduce It. Brandeis University Press, 2023.