A Brief Overview of Selected Changes to Nevada's Discovery Rules

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> "Even when laws have been written down, they ought not always to remain unaltered."[1]

On December 31, 2018, the Nevada Supreme Court adopted amendments to the Nevada Rules of Civil Procedure, which became effective on March 1, 2019. This is the first comprehensive review of our civil procedure rules since 2005. Every rule was modified in some way, although many amendments were not intended to make substantive changes. Most of our discovery rules were substantially revised during this process, and the purpose of this article is to briefly summarize some of the most significant changes to those rules.[2]

NRCP 16

Scheduling orders may now be issued and modified only by the district judge after a scheduling conference, case conference, telephone conference or other consultation. Accordingly, discovery commissioners will no longer be issuing scheduling orders or signing stipulations and orders to extend discovery deadlines. Discovery continuances will be determined by the district judge.

NRCP 16.1

Early Case Conference

Certain cases are explicitly exempted from the case conference requirement (e.g., when a request for exemption from the Court Annexed Arbitration Program is pending). When a new party serves its initial pleading after the first case conference, a supplemental case conference must be held within 30 days if any party serves a written request for one. An early case conference may be conducted by audiovisual means. In addition to the other subjects that have long been addressed at an early case conference, parties must also discuss issues about preserving and producing discoverable information (e.g., electronically stored information (ESI)), and about the need to protect confidential information from disclosure. Similarly, the parties' discovery plan must address issues relating to ESI and to any privilege or work-product claims. In personal injury cases, injured parties must identify relevant medical providers and provide an appropriate signed medical authorization to obtain their medical records.

Initial Disclosures

A party must disclose documents, ESI and tangible things that it may use to support its claims or defenses, including for impeachment or rebuttal. In addition, parties must disclose any record, report or witness statement, in any form, concerning the incident that gives rise to the lawsuit, unless the disclosing party claims that such an item is privileged or protected from disclosure. This new requirement includes but is not limited to "incident reports, records, logs and summaries, maintenance records, former repair and inspection records and receipts, sweep logs, and any written summaries of such documents … that are prepared or exist at or near the time of the subject incident."[3] Injured parties must identify each relevant medical provider. The previous initial disclosure requirements concerning percipient witnesses, computation of damages and insurance documents have not substantively changed.[4]

Expert Disclosures

While the requirements governing the disclosure of testifying expert witnesses have been retained, treating physicians are now addressed in a separate provision. Unless also identified as a retained expert, a treating physician is not required to provide a report; however, the party's disclosure must still satisfy the requirements for non-retained experts, to the extent practicable. A treating physician's status as a non-retained expert can change if the party who calls that witness asks the physician to provide opinions outside the course and scope of the treatment provided to the patient.[5] But a treating physician is not required to provide a written report solely because the physician's testimony may discuss ancillary treatment, or the diagnosis, prognosis or causation of the patient's injuries, that is not contained within the physician's medical chart, as long as the content of such testimony is otherwise properly disclosed. A party generally must move to reopen discovery deadlines or otherwise seek leave of court in order to supplementally disclose a non-retained expert, unless the disclosure:

- Provides the information required by the rule;
- Is made reasonably promptly after the new expert's opinions become known to the disclosing party; ***and***
- Is made not later than 21 days before the close of discovery.

NRCP 16.3

Some of the provisions concerning discovery commissioners previously found in NRCP 16.1(d) have been transferred here, including the provisions governing objections. Objections must now be filed within 14 days after service of the recommendation,[6] and other parties may file a response within seven days after service of the objection. An objecting party may not raise new arguments in support of an objection that could have been raised before the discovery commissioner but were not.[7] The district court reviews a discovery commissioner's report and recommendation de novo.

NRCP 26

Scope of Discovery

Parties generally may obtain discovery regarding any nonprivileged matter that is relevant to any party's claims or defenses and proportional to the needs of the case. Although narrower than the previous standard, discovery may still be permitted of certain information beyond those facts specifically set forth in the pleadings (e.g., as to impeachment, organizational arrangements, filing systems, other incidents of the same type or involving the same product, etc.). In assessing proportionality, courts will consider the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues and whether the burden or expense of the proposed discovery outweighs its likely benefit.

ESI

A party need not provide discovery of ESI from sources that the party identifies as not reasonably accessible because of undue burden or cost (e.g., backup tapes). If that showing is made, the court may nonetheless order discovery from such sources for good cause, and it may specify conditions for the discovery. Prior to involving the court, parties should discuss the attendant burdens and costs, the needs that might support an order for production, and any conditions that may be appropriate.

Expert Reports and Communications

Work product protection has been extended to drafts of any required expert report or disclosure. Communications between a party's counsel and its retained testifying experts are likewise protected, with three exceptions. Protection will not extend to communications that:

- Relate to compensation for the expert's study or testimony;
- Identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or
- Identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed.

Inadvertent Disclosures

If protected information is inadvertently produced, the producing party may provide notice of its claim and the basis for that claim to any party that received the information. The party who receives such a notification must promptly return, sequester or destroy the specified information and any copies it has. If the information was already provided to others, it must take reasonable steps to retrieve the information. If the information is sequestered, the receiving party may promptly present the information to the court under seal for a determination of the claim. In any event, until the protection claim is resolved, the receiving party is precluded from using or disclosing the information, and the producing party must preserve the information.

NRCP 30

Each side — not each ***party*** — is now presumptively entitled to take up to 10 depositions in a given case, excluding custodian-of-records depositions. The court may permit additional depositions. The seven hours permitted for a given deposition means seven hours on the record, and excludes the time taken for convenience breaks, recess for a meal or while a party moves to terminate or limit the examination.[8] Further, discussion between the deponent and counsel during a convenience break is not privileged unless counsel called the break to preserve a privilege, to enforce a limitation ordered by the court or to present a motion to terminate or limit the examination.[9]

continued on page 23

continued from page 21

A Brief Overview of Selected Changes to Nevada's Discovery Rules

NRCP 35

Court-ordered physical or mental examinations generally must take place in an appropriate professional setting where the action is pending. For good cause, the court may permit an examination to be audio-recorded.[10] Unless the court orders otherwise for good cause, the examined party generally may be accompanied by one observer. The party being examined must timely identify that person and state his or her relationship to that party; however, the observer may not be the party's attorney, or anyone employed by the party or the party's attorney. In addition, an observer may ***not*** be present for a neuropsychological, psychological or psychiatric examination unless the court permits attendance for good cause. An observer must not in any way interfere, obstruct or participate in the examination. The examiner's report is due within 30 days after the examination, or by the date of the applicable expert disclosure deadline, whichever occurs first.

NRCP 37

A court may take appropriate steps to address a party's loss of relevant ESI if:

a. The ESI should have been preserved in anticipation or conduct of litigation;
b. The party failed to take reasonable steps to preserve that ESI;
c. The ESI cannot be restored or replaced through additional discovery; and
d. Another party is prejudiced by the loss of that ESI.

In that event, the court ordinarily may order measures no greater than necessary to cure the prejudice. However, if it finds that the offending party acted with the intent to deprive another party of the information's use in the litigation, the court may:

a. Presume that the lost information was unfavorable to the party;
b. Instruct the jury that it may or must presume the information was unfavorable to the party; or
c. Dismiss the action or enter a default judgment.

NRCP 45

Form and Service

A deposition subpoena must state the method for recording the testimony, and a subpoena duces tecum may specify the form or forms in which ESI is to be produced. Personal delivery is no longer required for effective service. Rather, any appropriate method permitted for service of a summons may be used to serve a subpoena.

Subpoena Duces Tecum

All parties are entitled to receive notice and a copy of a proposed subpoena duces tecum at least seven days before that subpoena is served. If a party believes that the subpoena will require the disclosure of privileged, confidential or other protected matter, to which no exception or waiver applies, that party may object to the subpoena by filing and serving written objections and a motion for a protective order within seven days. If the objections and motion are timely, the subpoena may not be served until the dispute is resolved. When documents are produced in response to a subpoena duces tecum, the party who receives them generally must promptly copy, electronically reproduce or photograph the materials produced, and serve these items on every other party. The production may be accompanied by a statement of the reasonable cost of copying, reproducing or photographing the materials.

Rights and Obligations of Nonparties

Within 14 days after a subpoena duces tecum is served, objections may be asserted by the person served with a subpoena duces tecum or any person claiming a proprietary interest in the subpoenaed documents, ESI, tangible things or premises to be inspected. A nonparty may be relieved from having to produce ESI that it claims is not reasonably accessible, in the same manner as a party. Likewise, a nonparty can address the inadvertent disclosure of protected information to the same extent as a litigant. In connection with a motion to compel a nonparty to produce documents, the court may award to the prevailing party or person the reasonable expenses incurred in making or opposing the motion. NL

1. Aristotle, Politics bk. 2, ch. 8 (Benjamin Jowett trans., Dover Publ'ns 2000) (350 B.C.).
2. To review the court's order adopting these amendments, see In the Matter of Creating a Committee to Update and Revise the Nevada Rules of Civil Procedure, ADKT 0522 (Nev. Sup. Ct. Dec. 31, 2018), https://nvcourts.gov/AOC/Committees_and_Commissions/NRCP/Adopted_Rules_and_Redlines.
3. See NRCP 16.1(a)(1)(A)(ii) advisory committee's note to 2019 amendment.
4. Practitioners should note that requirements governing case conference reports have been modified to reflect the information disclosed and topics discussed in connection with the early case conference.
5. See FCH1, *LLC v. Rodriguez*, 130 Nev. 425, 433-35 (2014) (finding that trial court abused its discretion by allowing treating physician disclosed as non-retained expert to provide expert opinions formed outside the course of treatment without an expert report).
6. In the Eighth Judicial District Court, the Discovery Commissioner will e-file and e-serve every Report and Recommendation, which will become part of the record. On the notice page, the due date of the objection will be calculated and made known to the parties. A proposed order will be attached and delivered by the Discovery Commissioner to the appropriate district judge.
7. See *Valley Health Sys., LLC v. Dist. Court*, 127 Nev. 167, 173 (2011).
8. See NRCP 30(d)(1) advisory committee's note to 2019 amendment.
9. See *Coyote Springs Inv., LLC v. Dist. Court*, 131 Nev. 140, 149 (2015). After a privilege-assessment break, counsel for the deponent must promptly place on the record: (1) that a conference took place; (2) the subject of the conference; and (3) the result of the conference (i.e., whether to assert privilege or not). See id.
10. A generalized fear that the examiner might distort or inaccurately report what occurs at the examination is not sufficient to establish good cause for audio recording. See NRCP 35(a)(3) advisory committee's note to 2019 amendment.

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