

May the Nevada Legislature Constitutionally Revise the Rules of Civil Procedure?

BY MICHAEL LOWRY, ESQ. AND NATHANIEL SAXE

On March 1, 2019, Nevada's revised rules of civil procedure took effect after a lengthy editing process. Some of the changes were generally supported, while others were enacted over dissent. In at least one instance, the dissenters took their proposed changes to the subsequent Legislature and successfully lobbied for those changes to be enacted into law. But is that statute a constitutionally permissible exercise of the Legislature's power?

Rule 35 vs. NRS 52.380

The revised rules significantly changed Rule 35. When the draft changes were published for public comment, there were three proposed drafts for Rule 35. Eventually one of the drafts was adopted and took effect on March 1, 2019.

On March 18, 2019, AB 285 was introduced. The legislative minutes make clear AB 285 was expressly intended to implement changes to Rule 35. Supporters noted what became AB 285 was rejected during the process that led to Nevada's amended rules of civil procedure.

We voted 7-to-1 to make substantial changes, the changes that are set forth or embodied in the bill before you, Assembly Bill 285. Unfortunately, when our recommendations went to the full Supreme Court of Nevada, they rejected our changes for reasons we are still not clear on. At that point, we reassessed our position.¹

The bill passed both chambers, the governor signed it on May 23, 2019, and it took effect on October 1, 2019, as NRS 52.380. Rule 35 is compared with NRS 52.380 below.

Rule 35	NRS 52.380
<p>(4) Observers at the Examination. The party against whom an examination is sought may request as a condition of the examination to have an observer present at the examination. When making the request, the party must identify the observer and state his or her relationship to the party being examined. The observer may not be the party's attorney or anyone employed by the party or the party's attorney.</p> <p>(A) The party may have one observer present for the examination, unless:</p> <p>(i) the examination is a neuropsychological, psychological, or psychiatric examination; or</p> <p>(ii) the court orders otherwise for good cause shown.</p> <p>(B) The party may not have any observer present for a neuropsychological, psychological, or psychiatric examination, unless the court orders otherwise for good cause shown.</p> <p>(C) An observer must not in any way interfere, obstruct, or participate in the examination.</p>	<p>1. An observer may attend an examination but shall not participate in or disrupt the examination.</p> <p>2. The observer attending the examination pursuant to subsection 1 may be:</p> <p>(a) An attorney of an examinee or party producing the examinee; or</p> <p>(b) A designated representative of the attorney, if:</p> <p>(1) The attorney of the examinee or party producing the examinee, in writing, authorizes the designated representative to act on behalf of the attorney during the examination; and</p> <p>(2) The designated representative presents the authorization to the examiner before the commencement of the examination.</p>
	<p>3. The observer attending the examination pursuant to subsection 1 may make an audio or stenographic recording of the examination.</p>
<p>(3) Recording the Examination. On request of a party or the examiner, the court may, for good cause shown, require as a condition of the examination that the examination be audio recorded. The party or examiner who requests the audio recording must arrange and pay for the recording and provide a copy of the recording on written request. The examiner and all persons present must be notified before the examination begins that it is being recorded.</p>	<p>4. The observer attending the examination pursuant to subsection 1 may suspend the examination if an examiner:</p> <p>(a) Becomes abusive towards an examinee; or</p> <p>(b) Exceeds the scope of the examination, including, without limitation, engaging in unauthorized diagnostics, tests or procedures.</p> <p>5. An examiner may suspend the examination if the observer attending the examination pursuant to subsection 1 disrupts or attempts to participate in the examination.</p> <p>6. If the examination is suspended pursuant to subsection 4 or 5, the party ordered to produce the examinee may move for a protective order pursuant to the Nevada Rules of Civil Procedure.</p>
No equivalent.	

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Rules of Civil Procedure vs. Legislative Enactments

The constitutional problem arises due to the separation of powers built into Nevada's constitution.² Each of government's three branches is equal. "In keeping with this theory, the judiciary has the inherent power to govern its own procedures."³ NRS 2.120 expressly recognized that authority. "The judiciary is entrusted with rule-making and other incidental powers reasonable and necessary to carry out the duties required for the administration of justice and to economically and fairly manage litigation."⁴ This means "the legislature may not enact a procedural statute that conflicts with a pre-existing procedural rule, without violating the doctrine of separation of powers, and such a statute is of no effect."⁵

In addition to the constitutionally mandated bases for keeping separate those inherent powers of the judiciary, leaving control of court rules and the administration of justice to the judiciary, and thereby placing the responsibility for the system's continued effectiveness with those most familiar with the latest issues and the experience and flexibility to more quickly bring into effect workable solutions and amendments, makes good sense.⁶

The judiciary's authority "to promulgate procedural rules is independent of legislative power, and may not be diminished or compromised by the legislature. ... Furthermore, where, as here, a rule of procedure is promulgated in conflict with a pre-existing procedural statute, the rule supersedes the statute and controls."⁷

Is NRS 52.380 Constitutional?

NRS 52.380's constitutionality may rest on whether it is a substantive

or procedural statute. Discussing other statutes may help contextualize the difference between substantive and procedural statutes. For example, consider wrongful death cases. "Wrongful death is a cause of action created by statute, having no roots in the common law."⁸ NRS 41.085 created a substantive right that could be asserted subject to the judiciary's procedural rules.

In another example, NRS 11.340 allowed "a plaintiff whose judgment is subsequently reversed on appeal with the right to file a new action within one year after the reversal."⁹ This statute arguably creates a substantive right for a plaintiff whose statute of limitations has expired to file a new complaint after an unsuccessful appeal. But *Berkson v. Lepome* concluded NRS 11.340 was procedural in nature, violated separation of powers by interfering "with the judiciary's authority to manage the litigation process" and was unconstitutional.

Whitlock v. Salmon addressed tension between NRCP 47(a), stating at the time "the court shall conduct the examination of prospective jurors and may permit such supplemental examination by counsel as it deems proper," and NRS 16.030(b), which stated "the parties or their attorneys are entitled to conduct supplemental examinations which must not be unreasonably restricted."

Whitlock did not perceive the statute as a legislative encroachment on judicial prerogatives. Although the statute does implicate trial procedure, it does not interfere with procedure to a point of disruption or attempted abrogation of an existing court rule. Rather, the statute confers a substantive right to reasonable participation in voir dire by counsel; and this court will not attempt to abridge or modify a substantive right.¹⁰

Turning to NRS 52.380, supporters asserted it created or reinforced a

substantive right to physical integrity. However, to the extent this was NRS 52.280's intention, it interferes "with procedure to a point of disruption" and attempts to abrogate an existing court rule as *Whitlock* feared. NRS 52.380 does not create or modify any substantive rights. Instead the legislative history indicates the statute's express purpose was to enact a draft of Rule 35 the Supreme Court rejected. In this circumstance, NRS 52.380 appears unconstitutional.

1. Minutes of Assembly Committee on Judiciary, March 27, 2019, Page 4, statement of Graham Galloway.
2. Nev. Const. Art. 3, § 1.
3. *Berkson v. Lepome*, 126 Nev. 492, 499 (2010) (quotation omitted).
4. *Id.*
5. *Id.*
6. *Id.*
7. *State v. Connery*, 99 Nev. 342, 345 (1983).
8. *Alsensz v. Clark Cty. Sch. Dist.*, 109 Nev. 1062, 1064 (1993).
9. *Berkson*, 126 Nev. at 494.
10. 104 Nev. 24, 26 (1988).

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