

# PRACTICING IN NEVADA'S STATE AND FEDERAL CIVIL COURTS:

## What Are the Differences?

BY JAY YOUNG, ESQ.

With the 2019 amendments to the Nevada Rules of Civil Procedure (NRCP), Nevada's rules are more closely aligned with the Federal Rules of Civil Procedure (FRCP) than they have been in a generation. Still, there are differences both between the rules themselves, as well as in their application. Anecdotal evidence suggests federal courts are more formal, more strictly adhere to the rules and more often hold parties to the timelines of trial orders compared to state courts. Of course, this generalization is not always true but is widely accepted as accurate. This article highlights other differences between practicing in Nevada's state and federal courts.

### Jurisdiction

Generally, a U.S. district court has subject matter jurisdiction over actions presenting a federal question—that is, the matter arises under U.S. Constitution, enabling laws or treaties. 28 U.S.C. § 1331. U.S. district courts also generally have jurisdiction over a controversy between citizens of different states where the amount in controversy exceeds \$75,000.<sup>1</sup> Nevada district courts have original jurisdiction over matters involving title to real property or where the amount in controversy exceeds \$15,000 (NRS 4.370(1)) and the matter is not otherwise assigned to the justice courts.<sup>2</sup>



The Lloyd D. George Federal Courthouse on Las Vegas Boulevard in downtown Las Vegas.



The Bruce R. Thompson Courthouse and Federal Building on South Virginia Street in Reno, Nevada.

### Magistrate Judges

The role of magistrate judges in the adjudication of matters in the federal courts cannot be overestimated. While the breadth of their authority is addressed elsewhere in this issue, their role highlights a key distinction from our state courts' administration of justice. Magistrate judges may preside over dispositive motions and other pretrial matters.<sup>3</sup> They may also preside over jury trials and bench trials.<sup>4</sup> Of course, magistrate judges hear discovery disputes, filling a role comparable to that of a discovery commissioner operating under NRCP 16.3.



## Fictitious Parties

NRCP 10(d) allows a plaintiff to name a defendant by “any name” if that person’s name is not known at the time of the filing of the complaint. Under FRCP 15, fictitious name pleadings are “not favored in the Ninth Circuit” but are permissible where the defendant’s identity is not known as of the filing of the complaint.<sup>5</sup>

The rules allow for substitution of the actual name of the defendant once identified. Further, Nevada’s state courts allow an amendment to relate back to the initial filing.<sup>6</sup> If the defendant’s identity is not discovered within the statute of limitations, a federal court *may* declare the pleading does not relate back to the filing of the complaint since the defendant may not have had adequate notice of action within the Rule 4(m) period of service. However, FRCP “Rule 15(c)(1) incorporates the relation back rules of the law of a state when that state’s law provides the applicable statute of limitations and is more lenient.”<sup>7</sup> Following this ruling, Nevada federal judges have applied the NRCP 10 standard in unpublished opinions, allowing amendments to relate back.

## Discovery

There are major differences regarding discovery between the state and federal systems. NRCP 16.1’s mandatory disclosure provision diverges from FRCP 26’s requirements “in key respects.”<sup>8</sup> NRCP 16.1 requires:

- (1) the identity of impeachment and rebuttal witnesses, which is broader than the federal requirement;
- (2) “any record, report, or witness statement in any form, including audio or audiovisual form, concerning the incident that gives rise to the lawsuit”, which is broader than the federal requirement;
- (3) the identity of each relevant treating medical provider in a personal injury case; and
- (4) the identity of all witnesses who have been subpoenaed for trial.

## NRCP 30 differs from FRCP 30 in several respects. Under NRCP 30:

- (1) a custodian of records deposition authenticating documents subpoenaed from a non-part does not count against a party’s limit of 10 depositions;
- (2) a party must give at least 14 days’ notice of a deposition, as opposed to the federal requirement of “reasonable” notice;
- (3) The Advisory Committee Notes reveal “7

hours of testimony... means 7 hours on the record”; and

- (4) the Advisory Notes specifically incorporate the *Coyote Springs Inv., LLC v. Eighth Judicial Dist. Court*, 131 Nev. 140, 149, 347 P.3d 267, 273 (2015) ruling (discussions between deponent and counsel during a convenience break are not privileged unless counsel called the break to preserve a privilege, enforce an order or to seek a protective order).

NRCP 33 allows 40 interrogatories, while FRCP 33 allows 25. NRCP 36 allows 40 requests for admission, while FRCP 36 allows an unlimited number (assuming the same are proportional to the needs of the case).

NRCP 35 allows the court to order an audio recording of physical and/or mental examinations for good cause shown. An examinee may bring an observer (if the observer is not the attorney or anyone employed by the attorney representing the examinee) to the examination. Changes to NRS Chapter 52 required by AB 285 ostensibly overrule portions of NRCP 35.<sup>9</sup> AB 285 allows the examinee’s attorney to observe the examination. Further, the observer may make a stenographic record of the examination and may suspend the examination to obtain a protective order against abuse or if the exam attempts to exceed the scope of the court’s order.

NRCP 45(a)(4) requires all parties be given seven days’ notice before serving a subpoena duces tecum (SDT); the notice gives parties an opportunity to obtain a protective order before the subpoena is served. The rule also requires prompt disclosure of all documents produced by a third-party pursuant to a SDT. FRCP 45(a)(4) only requires that notice be given to a party before the SDT is served and doesn’t require prompt disclosure (although it is still the best practice).

## Trial

The following illustrates differing treatment of matters relating to trial:

- Discharge in bankruptcy is an affirmative defense under NCRP 8, but not under the FRCP;
- NRS 13.050 declares improper venue is not a basis for dismissal in state court. Persons joined to an action under NRCP 19 retain the right to move to change venue. Under FRCP 19(a)(3), dismissal of the action against a joined party is required where the venue is improper;
- NRCP 41(e) allows dismissal of an action for want of prosecution. LR 41-1 allows dismissal of actions pending for more than 270 days without prosecution;

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- NRCP 25 allows substitution 180 days after notice of the death of a party; FRCP 25 allows up to 90 days;
- Under NRCP 38, a party's right to a jury trial is waived by the failure to make a timely jury demand; and
- Under NRCP 48, a jury must number at least eight unless otherwise stipulated between the parties but may consist of no fewer than four persons. Under FRCP 48(a), a jury must number at least six and no more than 12 persons.

## Offers of Judgment

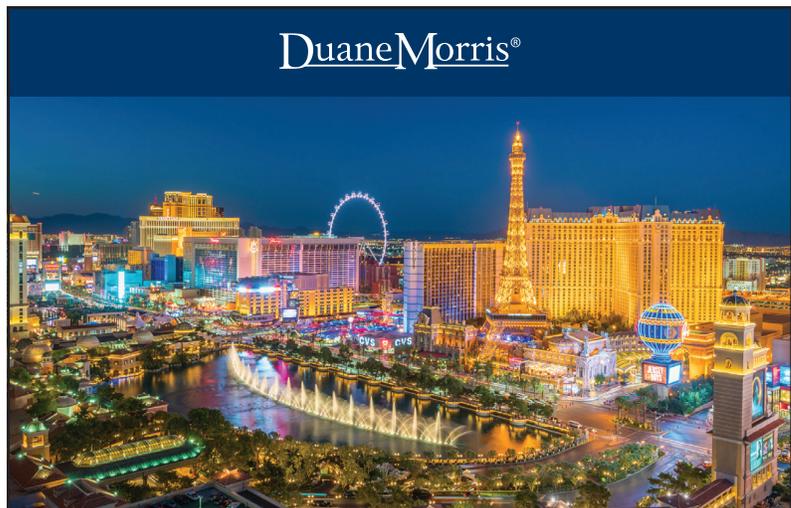
The penalty under FRCP 68(d) for failing to accept an offer of judgment where the offeror obtains a more favorable result thereafter is ostensibly limited to payment of the costs (but not attorney fees) incurred by the offeror after the offer was made. NRCP 68 allows an award of both fees and costs as a penalty for rejecting such an offer. *MRO Communications v. AT&T*, 197 F.3d 1276, 1280 (9<sup>th</sup> Cir. 1999) seems to suggest that NRCP 68 treatment is available even if the offer is made pursuant to FRCP 68. Finally, where a "court is exercising its subject matter jurisdiction over a state law claim," an offeror may recover attorney fees where a state law provides for an award of attorney fees if the law "reflects a substantial policy of the state" and "does not run counter to a valid federal statute or rule of court."<sup>10</sup> Fees may also be awarded where a substantive state law provides for an award of attorney fees.<sup>11</sup> Under NRCP 68(a), one may make an offer whether prosecuting or defending a claim.

Best practice requires a careful practitioner to review the rules of procedure as well as local rules before practicing in an unfamiliar jurisdiction. That best practice extends to uninitiated practitioners venturing into Nevada's state and federal courts. Careful review of the applicable rules and consultation with others knowledgeable about local practices are a must.

1. 28 U.S.C. § 1332(a).
2. Nev. Const. art. VI, § 6. Justice courts have jurisdiction over all civil actions where the amount in controversy is \$15,000 or less, and as otherwise listed in NRS 4.370.
3. 28 U.S.C. § 636(b)(1)(A).
4. 28 U.S.C. § 636(c)(1); LR IB 2-1, 2-2.
5. *Swartz v. Gold Dust Casino*, 91 F.R.D. 543, 546 (D. Nev. 1981) (citing *Gillespie v. Civiletti*, 629 F.2d 637, 642 (9<sup>th</sup> Cir. 1980)).
6. See Advisory Committee Notes to NRCP 15.
7. *Butler v. Nat'l Cmty. Renaissance of Cal.*, 766 F.3d 1191, 1201 (9<sup>th</sup> Cir. 2014).
8. Nevada Advisory Committee Notes to Rule 16.1.

9. One could argue AB 285 violates constitutional separation of powers, but that will be for the court to determine if the legislation is challenged.
10. *Beach v. Wal-Mart Stores, Inc.*, 958 F. Supp. 2d 1165, 1170 (D. Nev. 2013) (quoting *MRO Commc'ns*, 197 F.3d at 1281 (quoting *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 259 n. 31, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975))).
11. *Walsh v. Kelly*, 203 F.R.D. 597 (D. Nev. 2001).

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