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USA – Nevada: Trends & Developments

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USA – NEVADA



Trends and Developments

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Mead Law Group is a boutique law firm located in Las Vegas, Nevada, with attorneys licensed in Nevada, California, Colorado and Texas, who specialise in construction law. Mead Law Group has extensive experience in complex construction disputes resolved via litigation, arbitration and mediation, including contract disputes, mechanic's liens and payment disputes, project delays and deficiencies, and other issues. The firm also works in the field of administrative law, including licensing and regulatory compliance, as well as preparing and negotiating contracts

for public and private construction projects. Mead Law Group was born from experience in the construction industry and the changing needs of legal clients. Leon F Mead II, Esquire founded Mead Law Group in 2016 in response to what he believes is a changing legal environment. Mead Law Group is tailor-made to service clients in need of excellent and experienced legal performance by attorneys with specific expertise, without paying the cost of the high overhead of a large firm.

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Leon F Mead of Mead Law Group has been handling construction law almost exclusively for over 30 years. He is the only practising lawyer to be elected to the Board of

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The Need for Local Counsel

Nevada is a large geographic state with a relatively small population. It has one large population centre in the south (Las Vegas), one medium-sized one in the north (Reno), and many smaller rural communities throughout the remainder of the state. It is also relatively close to the major metropolitan areas of surrounding states; a few hours' drive in most cases. These factors often lead to an unstated expectation by legal practitioners, and occasionally litigants, that the laws of Nevada are the same or sufficiently similar to those of neighbouring states, such that non-resident counsel licensed in Nevada do not prioritise obtaining local counsel. In almost all cases, that thinking is a strategic mistake.

Nevada procedure and evidence rules largely follow the Federal Rules of Civil Procedure (FRCP) and the Federal Rules of Evidence. However, there are some unique differences that are important to understand. For instance, unlike many other larger jurisdictions, Nevada has a “general exception” to the typical hearsay exclusion rules. Nevada Revised Statutes (NRS) 51.075 provides:

“A statement is not excluded by the hearsay rule if its nature and the special circumstances under

which it was made offer assurances of accuracy not likely to be enhanced by calling the declarant as a witness, even though the declarant is available.”

Since this “general exception” to the hearsay exclusionary rules is not widely accepted in other jurisdictions (or the Federal Rules of Evidence), it represents an unexpected trap for the unwary litigant or seasoned out-of-state trial lawyer. It is not something that an out-of-state law firm might think to specifically research, but it could critically lead to unexpectedly admitted evidence that the lawyer might otherwise have been expected to be excluded. This again illustrates the importance of retaining experienced local Nevada counsel, as advised in the previous section, to avoid such unique issues.

It is also crucial to understand that the Nevada Rules of Professional Conduct and Nevada case law strongly mandate not only the retention of local counsel, but the active participation and control of litigation by that local counsel. Nearly 30 years ago, the Nevada Standing Committee on Ethics and Professional Responsibility, succinctly outlined the concerns of the State Bar regarding out-of-state counsel in Formal Opinion No 20 (24 February 1995):

“[T]he Nevada Supreme Court has exclusive jurisdiction to discipline attorneys admitted to practice law in Nevada, specially admitted for a particular proceeding, or ‘practicing law here, whether specially admitted or not’. Nevada, like many jurisdictions, does not define ‘the practice of law’, and each incident is considered on a case-by-case basis. Generally speaking, when another relies upon your judgment or opinion as to his legal rights, you are practicing law.

The Bar has received complaints of out-of-state counsel participating in the pre-litigation mediation procedures. Writing notification letters, engaging in discovery, and appearing at pre-litigation mediations in a representative capacity is generally the practice of law. In Nevada, there is no mechanism to obtain authority from the Supreme Court to appear in pre-litigation cases. Therefore, engaging in legal activities involving Nevada disputes and Nevada parties normally requires a licensed Nevada attorney.

In addition, the Bar has received inquiries and complaints of out-of-counsel participating in private arbitration hearings in Nevada. Acting as a mediator or arbitrator is permissible. Parties to private arbitration can choose anyone as the Trier of fact. However, representing a Nevada client here or representing a client in a Nevada based dispute is practicing law, and requires a Nevada-licensed attorney.

Finally, merely holding yourself out as an attorney can constitute the practice of law. This issue most often arises in correspondence from an attorney licensed in another state but not in Nevada. A licensed attorney who is not admitted to practice in Nevada must clearly designate that fact on letterhead. Further, an attorney licensed only in a foreign jurisdiction must indicate any

jurisdictional limitations following his signature on firm stationery.

Ultimately, the test is whether or not under the circumstances the public would believe that the person is a licensed attorney. This can differ from state to state. For example, in Nevada, attorneys almost always use ‘esquire’ following their name and the community and the local bar deem it interchangeable with ‘attorney.’ As a general proposition, persons not admitted in any jurisdiction (ie, law clerks or law school graduates) may not use ‘esquire’ because it can be misleading to the public.”

While the Rules of Professional Responsibility have largely been re-written in the three decades since this guidance was written, the concerns of the Nevada bar over outside counsel have not diminished. Individual judges can also become frustrated by the lack of involvement of local counsel, which could impact client strategy. It is therefore critical that local counsel is involved in a client’s overall strategy.

Additionally, Nevada’s state courts are divided into 11 “districts”, broken up by region and county. Each district has its own unique local rules and manner of applying the civil procedure rules. In addition, judges within a single district may also have a variety of preferences and practices that are crucial to understand. Because of this, obtaining local counsel is important at the county level, as well as at the state level. In the rural counties of Nevada, even bringing in Nevada-licensed counsel from larger cities such as Las Vegas or Reno may not be sufficient. In many cases, it makes more sense to select local counsel from the rural county or surrounding counties instead. Indeed, practitioners from the larger Nevada cities will employ local counsel in more rural courts to address this very issue.

Selection of local counsel, therefore, should be undertaken in every case a client has in Nevada.

Federal Procedure Rules and Evidence Rules Generally Followed, but With Some Quirks

As noted above, Nevada's procedure and evidence rules mirror the federal rules of evidence and the federal rules of civil procedure with limited exception. Despite this equivalency, the decisions issued by federal courts regarding the applicability of the FRCP are only advisory and do not constitute binding authority upon Nevada courts. While this is a commonly understood principle of jurisdiction throughout the United States, Nevada courts, in practice, do not shy away from disregarding a federal court's interpretation of a federal procedure or evidence rule that mirrors Nevada's rules. Nevada courts will review and complete their own interpretation of the Nevada Rules of Civil Procedure (NRCP) and the Nevada Rules of Evidence and only rely upon federal court decisions regarding the FRCP when the Nevada Supreme Court has not interpreted a specific rule and there is nothing else to rely upon.

As such, there are many important distinctions that must be considered when practising before Nevada courts (and which demonstrate the value of obtaining local counsel).

Initial disclosure and early case conference reports

Rule 16.1 of the NRCP is a critical rule for litigation counsel practising in Nevada to understand. This rule mandates a number of pretrial discovery requirements that all counsel in a case must adhere to throughout the litigation process. Initially, counsel must hold a pretrial early case conference within 30 days of the initial answer being filed in an action. At that early case conference, the parties must prepare a discovery plan

and proposed case management schedule for review and approval by the court.

After the conference is held, each party must provide a disclosure document within 14 days of the date of the early case conference, which will include the names and addresses of all known individuals who are likely to have information that may be discoverable under the NRCP Rule 26 provisions, including impeachment or rebuttal information, and the subjects of that information. This disclosure must also include a copy, or a description by category and location, of all documents, electronically stored information and tangible things that the disclosing party has in its possession, custody or control and that may be used to support its claims or defences, including impeachment and rebuttal. The disclosure must also include a computation of damages – a copy of any insurance policy that may provide coverage for the matter giving rise to the lawsuit. In a personal injury action, the plaintiff must also provide the identity of any medical service provider.

The actual items for disclosure must be produced within 30 days of the disclosure being served. In some cases where records may be voluminous, the parties may stipulate extended timeframes or a specific protocol for electronically stored information (ESI) or other particulars.

A case conference report is prepared for submission to the court, which includes listing of the various items shown in NRCP Rule 16.1(c) (2). Notably, some judicial districts in Nevada have varied, additional requirements for complying with NRCP 16.1. For example, in the Eighth Judicial District Court for Clark County, Nevada, cases can be docketed to "business court" judicial departments or other speciality dockets based on complexity and other factors.

In such situations, litigation counsel is required to comply with additional or varied procedures, such as appearing at a second early case conference before the judge, prior to a scheduling order being issued.

Supplemental disclosures

NRCP 26 discusses a party's obligation to supplement disclosures of initial documents and witnesses as well as expert designations or reports. The initial disclosure completed 14 days after the early case conference is a fluid document that must be periodically updated with additional and new information once it is discovered, and/or once damages have a good faith basis to be revised. Failure to properly disclose damage calculation revisions, supplemental information, identification of witnesses, and/or documents in good time can be cause for exclusion of evidence and even the limitation of damages.

A large part of this requirement relates to disclosure of expert witnesses – designation and production of reports by those designated. Pursuant to NRCP 16.1(a)(2), expert witness identities and reports must be disclosed pursuant to any scheduling order issued by the court or at the very latest, 90 days before the discovery cut-off date, if the court does not specify a date in the issued scheduling order.

NRCP 26 requires supplementation of expert disclosures, as needed, as to both information contained in any previously produced report and to information provided during the deposition of a disclosed expert. Therein, the deadline for completing such expert supplements is required to be “by the time the party's disclosures under Rule 16.1(a)(3), 16.2(f), or 16.205(f) are due.” These rules reference pretrial disclosures, which are due 30 days prior to the scheduled trial date. There is disagreement among Nevada judges

and other third-party neutrals about whether such supplements are appropriately made after the expert deadlines agreed upon pursuant to NRCP 16.1 or the overall close of discovery. As such, supplemental reports prepared by an expert after the initial disclosure deadline, whether 90 days prior to the close of discovery or otherwise, should be provided with a motion for leave to supplement the same, as a matter of good practice.

Document discovery responses

Document discovery request responses are also handled in a different manner in Nevada than some other jurisdictions. As a matter of practice, although not specifically provided in the NRCP, responding to written discovery must be useful. In responding to Requests for Production, for example, it is not sufficient for a party to state “responsive documents will be provided within a reasonable time”, as is customary in other jurisdictions, such as California. Documents must be identified by bates number or other reasonable method of identification, in written discovery responses. Alternatively, documents must be well organised and categorised, to avoid confusion on the part of the opposing party – whether intentional or accidental. Nevada judges, discovery commissioners, and other neutrals will require this, if not done as a matter of course.

Discovery disputes – automatic referral to a discovery commissioner in certain districts

The NRCP generally outlines how to handle discovery disputes, but the way in which those disputes will actually be handled is local-rule driven. Pursuant to NRCP 16.1(d) and 16.3, all discovery disputes are automatically referred to the discovery commissioners for resolution, if the judicial district where the case is pending has discovery commissioners. As noted above, there are 11 districts of Nevada courts which all have

distinct resources and local rules of procedure. Thus, the NRCP must be followed in conjunction with the local rules of a particular district.

In the Eighth Judicial District, located in both Clark County and Las Vegas, Nevada, for example, discovery disputes are not routinely handled by the presiding judge over the matter, with limited exception for cases assigned to speciality courts, such as the “business court”. Rather, each district also has its own meet and confer requirements which must be followed as dictated by local court rules. In the Eighth District, exhaustive meet and confer attempts must be made before submitting a discovery dispute to the discovery commissioner for resolution, and a failure to make acceptable attempts to resolve discovery issues with counsel will likely result in denial of discovery motions and potentially, sanctions being issued.

The Eighth Judicial District has a designated discovery commissioner and an ADR commissioner, and the local rules regarding practising before the courts therein are segregated by type of practice (ie, rules that apply to all cases; rules that apply to civil cases; rules that apply to criminal cases; rules that apply to family court cases, such as guardianship, custody and divorce; and rules that apply to probate and estate administration cases).

Other Nevada judicial districts, however, have no discovery commissioner and have a single set of local rules that apply to all cases, regardless of case type. For example, the Third Judicial District, governing Lyon County and located in Yerington, Nevada, has a total of 13 local rules (Rules of Practice for the Third Judicial District Court of the State of Nevada or “TDCR”). Only one of those 13 rules – TDCR 4 – includes the term “discovery” at all, and it simply provides:

“Failure of any counsel... to have complied in good faith with the rules governing pretrial discovery procedures shall result in the court making such orders as deemed appropriate, including the imposition of appropriate sanctions.”

Rule 2.34 outlines very detailed meet and confer requirements regarding discovery disputes in civil cases. The specific requirements therein do not apply to criminal cases, probate cases, or other types of cases pending before the Eighth Judicial District, unless there is a separate rule applying those requirements to such cases. Indeed, the Eighth Judicial District’s local rules have extensive application to discovery generally – the word “discovery” appears 102 times.

Sanctions Not Routinely Issued

In some jurisdictions, counsel will routinely ask the court to issue sanctions against the other side in many instances. Nevada judges, however, are reluctant to issue monetary sanctions against attorneys in prosecuting or defending cases, regardless of the severity of the action conducted by the attorney. As such, while the threat of sanctions is still a tool in the litigation arsenal, it is often not as effective as it is in other jurisdictions, or even as it is in Nevada’s federal courts.

Civility is a major issue

In Nevada, unlike some other states, the judiciary strongly enforces the obligation of counsel to engage civilly with each other. The Eighth Judicial District recently issued an “Administrative Order Regarding Deposition Behavior No. 22-08”, which was put together by the discovery commissioners and affirmed by the chief judge. While judges and discovery commissioners in the Eighth Judicial District previously and consistently made it clear that attorneys must be civil and reasonably co-operate with each other

during discovery in particular matters, the recent issuance of an administrative order on the subject demonstrates the seriousness of the issue.

Administrative Order No 22-08 contains specific direction on the types of objections that are and are not appropriate to be made in depositions, and contains general edicts, such as, “Counsel must behave professionally at all times during depositions; they must treat parties, other counsel, court reporters, videographers, interpreters, and others involved in any aspect of a deposition with civility and respect.”

Trials

When preparing a case for trial in Nevada, as when conducting pretrial activities, counsel should always consult the local rules of the specific trial court to ascertain the specific judge’s particular requirements. For example, exhibit requirements can vary. Some judges will want evidentiary notebooks prepared that hold all the exhibits. Other judges will only want electronic exhibits to be reviewed and used in the courtroom.

Motions in limine

Motions in limine in cases handled without a jury should not be used. While this could depend on the particular judge, many judges deny motions in limine outright when no jury is involved. Some judges will entertain motions in limine for certain issues, such as exclusion of experts or limitation in the scope of expert testimony. However, others will not even consider a motion in limine if filed, and will deny it as a matter of course. In bench trials, the court is likely to want to consider the weight of the evidence rather than exclude the evidence entirely. This avoids appeals on exclusion when no jury decision is made.

Evidentiary rules in bench trials

Similarly, with limited exception, judges in bench trials often do not sustain objections to live testimony, such as those made upon the basis of hearsay, lack of foundation, speculation, or similar objections. These objections will either be overruled outright or, in some cases, judges may provide the examining attorney with instructions to fix the line of questioning to avoid sustaining the objection.

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