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USA – Nevada: Trends and 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 and Texas, who specialise in construction law. Mead Law Group has extensive experience in complex construction disputes resolved via litigation, arbitration and mediation - for example, contract disputes, mechanic's liens and payment disputes, and project delays and deficiencies. 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 of the construction industry and the changing needs of legal clients and was founded by Leon F Mead 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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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 as 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.

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 also the active participation in 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), as follows.

"[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 [their] 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 [into] 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 [t]rier of fact. However, representing a Nevada client here or representing a client in a Nevada based dispute is practi[s]ing 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 [their] 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 rewritten 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 eleven "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 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 (With Some Quirks)

As noted earlier, 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 Federal Rules of Civil Procedure (FRCP) are only advisory and do not constitute binding authority upon Nevada courts. Although this is a commonly understood principle of jurisdiction throughout the USA, 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 to understand for litigation counsel practising in Nevada. This rule mandates a number of pre-trial discovery requirements that all counsel in a case must adhere to throughout the litigation process. Initially, counsel must hold a pre-trial 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. This document must include the names and addresses of all known individuals who are likely to have information that may be discoverable under the provisions of Rule 26 of the NRCP, including impeachment or rebuttal information (and the subjects of that information). This disclosure must include a copy - or a description by catego-

ry and location - of all documents, electronically stored information (ESI) 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 ESI or other particulars.

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

Electronic filing

Effective as of 26 July 2024, the Nevada Supreme Court issued Administrative Order ADKT No 615, which repealed and replaced the rules for electronic filing of pleadings and other documents with the various courts in the State of Nevada. The rules apply to any court that adopts a local "electronic filing system". The larger courts of the Eighth Judicial District (Clark County), the First Judicial District (Washoe County) and others have adopted these electronic filing systems and thus the new rules will apply. Other courts covering smaller populated counties may not have adopted an electronic filing system and so the new rules may not apply.

Critically for out-of-state counsel, any counsel admitted pro hac vice will need to register for use of the electronic filing system, which covers filing and service of all documents in a matter.

Supplemental disclosures

Rule 26 of the NRCP 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 - as well as 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 the disclosure of expert witnesses' designation and the production of reports by those designated. Pursuant to Rule 16.1(a)(2) of the NRCP, expert witness' identities and reports must be disclosed pursuant to any scheduling order issued by the court or – if the court does not specify a date in the issued scheduling order – 90 days before the discovery cut-off date (at the very latest).

Rule 26 of the NRCP requires supplementation of expert disclosures, as needed, both with regard to 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 refer to 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 Rule 16.1 of the NRCP 16.1 or after 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 in some other jurisdictions. As a matter of practice, responding to written discovery must be useful - although this is not specifically provided in the NRCP. 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 (eg, California).

In written discovery responses, documents must be identified by Bates number or another reasonable method of identification. Alternatively, documents must be well organised and categorised, so as 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 discovery commissioner in certain districts

The NRCP generally outlines how to handle discovery disputes - although the way in which those disputes will actually be handled is driven by local rules. Pursuant to Rules 16.1(d) and 16.3 of the NRCP, 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 earlier, there are eleven 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.

By way of example, in the Eighth Judicial District - located in both Clark County and Las Vegas, Nevada - discovery disputes are not routinely handled by the judge presiding over the matter, with limited exceptions for cases assigned to specialty courts (eg, 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. The local rules regarding practising before the courts therein are segregated by type of practice, as follows:

- 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.

However, other Nevada judicial districts have no discovery commissioner and have a single set of local rules that apply to all cases, regardless of case type. By way of example, the Third Judicial District - governing Lyon County and located in Yerington, Nevada - has a total of 13 local rules, collectively known as the Rules of Practice for the Third Judicial District Court of the State of Nevada (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 pre-trial discovery procedures shall result in the court making such orders as deemed appropriate, including the imposition of appropriate sanctions."

Rule 2.34 of the NRCP 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. However, Nevada judges 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, although 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).

Deposition Behaviour of Counsel

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. Even though judges and discovery commissioners in the Eighth Judicial District previously and consistently made it clear that attorneys must be civil and 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. It also 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 pre-trial activities, counsel should always consult the local rules of the specific trial court in order to ascertain the specific judge's particular requirements. By way of 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. Although 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 so as to avoid sustaining the objection.

General Hearsay Exception

As previously mentioned, Nevada procedure and evidence rules largely follow the FRCP and the Federal Rules of Evidence. However, there are some unique differences that are important to understand. By way of example, 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."

Given that 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 of specifically researching, but it could critically lead to unexpectedly admitted evidence that the lawyer might otherwise have expected to be excluded. This again illustrates the importance of retaining experienced local Nevada counsel - as advised in the opening section - in order to avoid such unique issues.

Impact of COVID-19 Administrative Orders

Nevada Governor issued administrative orders from the COVID-19 era that impacted Nevada litigation cases. The Nevada Supreme Court issued a decision that any case governed by statutes and regulations was tolled for 122 days (see Dignity Heath v Eighth Judicial Dist Ct, 140 Nev Adv Op 40, 550 P.3d 341 (2024)).

However, this limitation does not apply to any deadlines issued by court rule. Such periods are not used for determination of the five-year period in which cases must be brought to trial (see Boren v City of North Las Vegas, 98 Nev 5, 6, 638 P.2d 404, 405 (1982)).

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