Discovery Update

Commissioners Bonnie A. Bulla and Chris Beecroft, Jr.

NJA CLE
June 6, 2014
Union Plaza Hotel
12:00 p.m. to 1:30 p.m.

I. EXPERT ISSUES

A. Amendments to *NRCP 16.1*

1. *Initial Experts*: Necessary to prove elements in a party's case-in-chief:

   - Liability
   - Causation
   - Damages
   - Affirmative defenses (if a defendant).

If a party cannot prove or defend a case without an expert, the expert should be designated as an initial expert. *See e.g., In re Apex Oil Co.*, 958 F.2d 243, 245 (8th Cir. 1992), distinguishing initial from rebuttal disclosures. *See also, Sierra Club, Lone Star Chapter v. Cedar Point Oil Co., Inc.*, 73 F.3d 546, 571 (5th Cir. 1996), stating by inference that an initial disclosure (not a rebuttal disclosure) is where a party must identify the "lions share" of its expert information.

Under both federal and state court rules, parties must simultaneously disclose initial experts. The judge, magistrate or discovery commissioner may modify the timing of disclosures, requiring plaintiffs to disclose initial experts first with defendants disclosing second.

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2. *Retained Experts*:

Specifically retained or employed experts are required to include the following information in the disclosure:

- a written report signed by the witness;

- the report must include a complete statement of all the opinions to be expressed, and the basis or reasons therefor; the data or other information considered by the witness in formulating the opinions; any exhibits to be used as a summary of or in support for the opinions;

- the qualifications of the witness, including a list of all publications authored within the proceeding ten (10) years;

- compensation to be paid to the witness for the study and testimony;

- a list of any other cases in which the witness has testified as an expert at trial or by deposition within the proceeding four (4) years.

See NRCP 16.1 (a)(2)(B) and FRCP26(a)(2)(B).

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3. *Non-Retained Experts*:

Since 2010, the federal rules have required disclosure of certain information for those experts who are ***not*** required to prepare written reports, including:

- the subject matter on which the expert is expected to present evidence;

- a summary of the facts and opinions to which the witness is expected to testify.

See, FRCP 26(a)(2)(C).

On August 1, 2012, the Nevada Supreme Court adopted *ADKT 0472,* amending *NRCP 16.1(a)(2)* [effective on or about December 1, 2012]. These changes require non-retained experts, such as treating physicians, to disclose the following:

- the subject matter on which the witness is expected to testify;

- a summary of the facts and opinions to which the witness is expected to testify;

- the qualifications of the witness that may be satisfied by the production of a resume or curriculum vitae; and,

- the compensation of the witness for providing testimony at deposition and trial, which is satisfied by the production of a fee schedule.

See, NRCP 16.1(a)(2)(B).

****PRACTICE TIP****: *Attorneys should ensure that an adequate description of the non-retained expert's expected testimony is disclosed.* For example, the disclosure for a non-retained treating physician's testimony may be satisfied by stating that the physician will be testifying in accordance with his or her medical records. *See,* Drafter's Note to 2012 Rule.

But also see, federal court cases where mere identification of subject matter does *not* comply with the summary of facts and opinions requirement for non-retained experts. *E.g., Flonnes v. Prop. & Cas. Ins. Co.*, 2013 WL 2285224 (D. Nev.) (not reported); *Carrillo v. B&J Andrews Enterprises, L.L.C.*, 2013 WL 394207 (D. Nev.) (not reported).

There is no magic language or format required. The physician is not required to prepare a report, but the attorney is required to prepare the disclosure.

****PRACTICE TIP****: *Attorneys should disclose non-retained experts at the same time as their retained experts.* This disclosure may be set forth in a **written** *NRCP 16.1* disclosure and/or an expert disclosure.

Minimal qualifications also should be disclosed such as the medical school attended by the witness, date of graduation, applicable licenses and areas of specialization. At a minimum, the expert's fee for testifying at trial or deposition should also be disclosed.

The scope of the non-testifying expert's disclosure is explained in part by the Drafter's Note. The following points should be noted:

- A treating physician is not a retained expert because the attorney referred the patient to the physician for treatment.

- Testifying in accordance with the doctor's medical chart does not require every document contained therein to have been prepared by the physician.

- A treating physician may opine about diagnosis, prognosis or causation without preparing a report.

- A treating physician may review records outside his or her medical chart in the course of providing treatment, or defending his or her treatment, without being designated as a retained expert. However, the physician's opinions must be disclosed pursuant to *NRCP (a)(2)(B).*

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4. *Rebuttal Experts*: Present evidence intended solely to contradict or rebut evidence on the same subject matter identified by another party under paragraphs (2)(B) [and (2)(c) under the federal rules], within thirty (30) days after the disclosure is made by another party.

A rebuttal expert may only testify after the opposing party's initial expert witness testifies, and must address the "same subject matter" identified by the initial expert. *Lindner v. Meadow Gold Dairies, Inc.* 249 F.R.D. 625, 636 (D. Hawaii 2008).

The federal courts have specifically expressed that "[a] rebuttal expert report is not the proper place for presenting new arguments." *Trowbridge v. United States*, 2009 WL 1813767, at 11 (D. Idaho, June 25, 2009) (quoting *Ebbert v. Nassau County*, 2008 WL 4443238, at 13 (E.D.N.Y. Sept. 26, 2008) (*internal quotation marks omitted*).

The recently adopted amendments to *NRCP 16.1* specifically provide that a rebuttal expert does not include the following:

- a witness whose purpose is to contradict a portion of another party's case in chief that should have been expected and anticipated by the disclosing party;

- a witness who is presenting opinions outside the scope of another party's disclosure.

See NRCP 16.1(a)(2)(C).

Non-retained rebuttal experts must also comply with the disclosure requirements pursuant to newly adopted *NRCP 16.1 (a)(2)(B)* and *FRCP 26(a)(2)(C)*.

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B. Failure to Timely Disclose.

The remedies for failure to timely disclose experts are governed by *NRCP 37.* Not surprisingly, where experts are disclosed just before trial or after close of discovery, the sanction of excluding an untimely-designated expert is more likely. *See e.g., Patton v. Wal-Mart Stores, Inc.,* 2013 WL 2394853 (D. Nev.) (not reported).

Missed deadlines do not automatically warrant exclusion of untimely disclosed experts if exclusion would adversely affect the ability to have the case heard on the merits. *See, Singleton v. Jupiter Communities, LLC.*, 2013 WL 5492669 (D. Nev.). In *Singleton*, the health of the attorney who failed to timely disclose, as well as the agreement by the parties to continue conducting discovery beyond the deadlines, mitigated against exclusion of the untimely designated experts.

Non-retained experts, such as treating physicians, may be limited to testifying in accordance with their treatment and care, and specifically about the opinions that they formed during their treatment of the Plaintiff. *See Carrillo.*

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C. Trial Testimony.

Whether or not expert witnesses are subject to the exclusionary rule depends on the circumstances. *See e.g., McConnell v. Wal-Mart Stores, Inc.*, __ F.Supp. 2d ____, 2014 WL 464799 (D. Nev. 2014).

****PRACTICE TIP**:** *Be able to articulate why the expert should not be excluded.* For example, the expert must be present so as to be able to base their opinions on proffered testimony from other witnesses. *Id.*

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II. AMENDMENTS TO *NRCP 30(d)* and *NRCP 34*.

A. New Deposition Time Limits.

Amended *NRCP 30(d)(1)* states that "unless otherwise stipulated or ordered by the court, a deposition is limited to 1 day of 7 hours." Additional time may be obtained by stipulation or court order. The court or discovery commissioner may allow additional time if there is a "need to fairly examine the deponent", or if there has been an impediment to or delay in the examination.

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B. Improper Objections During Depositions.

Setting forth appropriate objections during the deposition process continues to be problematic for counsel. As a preliminary matter, *NRCP 30(d)(1)* states that "**An objection must be stated concisely, and in a non-argumentative and non-suggestive manner**. A party may instruct a deponent not to answer and only when necessary to preserve a privilege, to enforce a limitation directed by the court, or to present a motion under paragraph (3)." (Emphasis added.)

****PRACTICE TIP****: Attorneys improperly instructing deponents not to answer questions based on relevancy is an on-going concern. *Know which privileges can be properly raised.* (For example, the Fifth Amendment right against self-incrimination may be asserted in the civil setting. *See e.g., Meyer v. Second Judicial District Court*, 95 Nev. 176, 591 P.2d 259 (1979).) The privileges are set forth in *NRS Chapter 49*. The general rule is that privileges must be narrowly construed. *See e.g., McNair v. Eighth Judicial District Court*, 110 Nev. 1285, 855 P.2d 576 (1994). *Understand the exceptions to the privileges to be asserted.* Many times such exceptions render the privileges waived!

A problem arises when an objection is made to a question that does not provide sufficient information so that the attorney asking the question may correct it. By way of illustration, the blanket statement "object to the form of the question" is not very helpful. The U.S. District Court of Nevada has explained, in *In Re Stratosphere Corp. Securities Litigation*, 182 F.R.D. 614 (D. Nev. 1998):

> It is only necessary to object at a deposition where the "form" of the question (not the nature of the question) is objectionable and a "seasonable" objection would provide an opportunity to correct the form.

Likewise, lengthy speaking objections are not favored.

Improperly instructing a witness not to answer a question is sanctionable conduct. A party may bring a motion for sanctions for improper deposition conduct, pursuant to *NRCP 37,* after the deposition is completed, or otherwise terminated.

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C. Claw-back Provision.

Nevada has not yet adopted a claw-back provision for inadvertent disclosure of attorney-client or work-product information. The attorney's only ethical duty is to advise opposing counsel that such a document has been received. *See*, the Nevada Rules of Professional Conduct, *Rule 4.4(b)*.

****PRACTICE TIP**:** *Consider agreeing to a claw-back provision and including it in a Case Management Order or Case Conference Report.*

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III. *RULE 35* EXAMINATIONS.

A. Examination must be Conducted Pursuant to Stipulation or Court Order.

NRCP 35 examinations are permissive and not a matter of right. *See, Storlie v. State Farm Mutual Automobile Insurance Company*, 2010 WL 5490777 (D. Nev.) (Not reported).

****PRACTICE TIP **:** *Failure to timely request a Rule 35 examination will result in the denial of the request. Id. See also, Adele v. Dunn*, 2012 WL 5944705 (D. Nev.). This includes the failure to comply with the notice requirements of the rule. *See, Adele.*

However, if the delay in requesting a *Rule 35* examination was due to the plaintiff's own failure to properly disclose damages, then, in lieu of granting a late examination, plaintiff's future damages may be excluded. *See Shakespeare v. Wal-Mart Stores*, 2013 WL 3491172 (D. Nev.).

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B. Reasonable Parameters.

Parameters that are deemed reasonable when conducting a *Rule 35* examination include, but are not limited to the following:

1. Plaintiff's counsel should be provided with forms for completion, 5-7 business days before the examination;

2. No liability questions;

3. No intrusive tests or painful examinations;

4. No video or audio recording of examination. *See, Newman v. San Joaquin Delta Community College District*, 272 F.R.D. 505 (E.D. Cal. 2011);

5. Unless special circumstances warrant otherwise, no one accompanies the Plaintiff to the examination; and,

6. Appropriate attire should be worn during the examination (*e.g.*, no hospital gowns).

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C. Depositions and Reports.

The party who submits to the examination has the right to demand a report, pursuant to the rule. However, if the *Rule 35* examiner is not identified as a trial witness by the party paying for the examination, the party submitting to it may *not* be entitled to take the examiner's deposition, absent "exceptional circumstances." *See e.g., Downs v. River City Group*, 296 F.R.D. 507 (D. Nev. 2013).

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IV. CASE LAW UPDATES.

A. Refreshing Recollection at a Deposition.

If a deponent reviews materials in preparation for his or her deposition, and those materials do in fact "refresh" the deponent's recollection, the materials must be turned over to opposing counsel upon demand. *See, Las Vegas Development Associates, LLC v. Eighth Judicial District Court*, 130 Nev. Adv. Op. 37 (May 29, 2014). Further, the Nevada Supreme Court determined that *NRS 50.125* (the refreshing recollection statute) applies to both "depositions as well as to in-court hearing by operation of *NRCP 30(c)*." *Id.* There is ***no*** discretionary language in *NRS 50.125* that permits the District Court to "halt the disclosure of privileged documents when a witness uses the privileged documents to refresh his or her recollection prior to testifying." *See, Las Vegas Sands Corp. v. Eighth Judicial District Court*, 319 P.3d 618, 622 (2014).

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B. Timely filing of Case Conference Reports.

Recently, the Nevada Supreme Court held that *NRCP 16.1(e)* is triggered by a "first appearance." *See, Dornbach v. Tenth Judicial District Court*, 130 Nev. Adv. Op. 33 (May 15, 2014). Such "first appearance" is not limited to the filing of an answer. *Id.* However, the court also emphasized the discretionary nature of a dismissal under *Rule 16.1(e)*, and clarified that this is a permissive dismissal. *Id.* Further, a district court when exercising its discretion under *Rule 16.1(e)* may consider its own internal delays when deciding whether or not to dismiss a case under this provision. *Id.*

V. SURVEILLANCE VIDEOS.

Generally, surveillance videos must be produced in initial disclosures where they depict relevant events. Whether or not a protective order is warranted for disclosure requires a balancing of interests of the parties. *See e.g., Foltz v. State Farm*, 331 F.3d 1122, 1120 (9th Cir. 2003). Failure to preserve a reasonable length of videotape may result in sanctions. *See e.g., Maxim v. FP Holdings, LP.*, 2014 WL 200545 (D. Nev.). Further, the request to preserve video surveillance must be sufficiently specific to place a party on notice to preserve the video. *See e.g., Glover v. Smith's Food & Drug Centers, Inc.*, 2013 WL 5437062 (D. Nev.). *Note,* Pursuant to Nevada Gaming Regulations, casinos have independent obligations to maintain video surveillance. *See e.g., FGA, Inc, v. Giglio*, 278 P.3d 490, 128 Nev. Adv. Op. 26.

Surveillance videos are in contrast to *sub rosa* recordings prepared at the request of an attorney.

PRACTICE TIP: *If asked, the party must disclose whether sub rosa surveillance exists, and then timely produce it when required.* Under *Rule 16.1*, initial disclosures include the disclosure of impeachment evidence. This is in contrast to the *FRCP*.

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VI. EXPERT WITNESS FEES.

Expert fees are governed by *NRCP 30(h)*. The rule contemplates a reasonable and customary hourly or daily fee for the actual time consumed. Thus, payment of a two-hour minimum fee is not required.

A motion must be made to secure a reasonable fee. Treating physicians are also entitled to reasonable expert fees. *See e.g., Axelson v. Hartford Insurance Co.*, 2013 WL 1261757 (D. Nev.) (Not reported).

PRACTICE TIP: *Be prepared to justify an expert's fee based on such things as the work performed, the expert's credentials, and the customary fee for similarly qualified experts. See, Axelson*, where the court discussed that the amount of the expert fee, and how it may vary depending upon whether the treating physician is a retained expert or a non-retained expert.

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VII. INSPECTION OF PREMISES PURSUANT TO *NRCP 34*.

During the pre-litigation phase, an attorney may inspect property as part of his or her Rule 11 obligations. However, if the property to be inspected requires a court order to do so, this must be obtained in advance of the inspection. Once litigation has commenced, proper notice is required to conduct a *Rule 34* inspection. The inspection will be permitted if "relevant." *See e.g., Voggenthaler v. Maryland Square, LLC*, 2010 WL 4934036 (D. Nev.) (Not reported).

PRACTICE TIP: *Ensure the Rule 34 Notice describes with specificity the inspection to be completed.* Failure to be specific in describing the inspection to be performed may result in the inspection being denied. *Id., Voggenthaler.*

Also ensure that your Rule 34 request is made timely. Failure to make a timely *Rule 34* request may also result in a denial of the inspection. *See e.g., Singleton v. Jupiter Communities, LLC.*, 2014 WL 251659 (D. Nev.).