Are Nevada Procedural Statutes Still Effective in Federal Courts?

BY MICHAEL LOWRY, ESQ.

Nevada's Legislature has enacted various procedural statutes from Nevada Revised Statutes (NRS) 17.117 and NRS 18.020 to NRS 629.620. Some federal courts in diversity cases have applied these statutes, but their effectiveness remains questionable after the U.S. Supreme Court's recent decision in *Berk v. Choy*, 146 S. Ct. 546 (2026).

Analysis Starts with *Erie* Doctrine

Most personal injury cases in the federal system are based on diversity jurisdiction. Under the *Erie* doctrine, a federal court sitting in diversity must apply federal procedural law and the forum state's substantive law. "Classification of a law as 'substantive' or 'procedural' for *Erie* purposes is sometimes a challenging endeavor."[1] However, it becomes much simpler when the Federal Rules of Civil Procedure cover the topic. As the U.S. Supreme Court explained in *Gasperini v. Center for Humanities*, for "matters covered by the Federal Rules of Civil Procedure, the characterization question is usually unproblematic: It is settled that if the Rule in point is consonant with the Rules Enabling Act, 28 U.S.C. § 2072, and the Constitution, the Federal Rule applies regardless of contrary state law."[2]

But courts have reached conflicting decisions even with the guidance in *Gasperini*. For instance, FRCP 54(d)(1) allows a prevailing party to recover costs. Both 28 U.S.C. § 1920 and Local Rule 54 identify the recoverable costs, but they are narrower than what NRS 18.020 allows. Some federal district court judges in Nevada have concluded that NRS 18.020 confers a substantive right and have applied it in diversity cases.[3] However, the Ninth Circuit Court of Appeals recently disagreed in *Casun Invest, A.G. v. Ponder*, reversing a district court decision that applied NRS 18.020 instead of federal law in awarding costs.[4]

Berk v. Choy Decision Reinforces That Federal Procedural Law Controls

On January 20, 2026, the U.S. Supreme Court decided *Berk v. Choy*.[4] The case arose from alleged medical malpractice in Delaware. Delaware law requires medical malpractice plaintiffs to file an affidavit of merit with their complaint, certifying that a qualified expert has determined the claim has merit. The plaintiff in *Berk* failed to do so, even after receiving an extension.

The federal district court dismissed the complaint, and the Third Circuit Court of Appeals affirmed, holding that the affidavit requirement was substantive under *Erie* and therefore applicable in federal court. The Supreme Court reversed, stating "a valid Rule of Civil Procedure displaces contrary state law even if the state law would qualify as substantive under *Erie*'s test." In doing so, the supreme court simplified the analysis for the federal district courts. "The analysis is straightforward: The Court first asks whether a Federal Rule answers the disputed question. If a Federal Rule does, it governs, unless it exceeds statutory authorization or Congress's rulemaking power."

The Supreme Court emphasized that FRCP 8 governs what a complaint must allege and "sets a ceiling on the information that plaintiffs can be required to provide about the merits of their claims." Because Delaware's affidavit-of-merit statute required more than FRCP 8 permits, it could not be enforced in federal court. The district court therefore erred by dismissing the complaint.

Berk Directly Affects Nevada Litigants

After *Berk*, the sole consideration for federal courts sitting in diversity is whether a federal rule answers the disputed question. If so, federal courts no longer consider whether the statute is substantive. This could directly affect Nevada personal injury litigants in multiple ways, raising a number of interesting questions. For instance:

- **Does noncompliance with NRS 41A.071's affidavit requirement for medical malpractice complaints warrant dismissal in federal court?** *Berk*'s holding indicates no. If so, then design professionals likely cannot rely on noncompliance with the equivalent requirements in NRS 11.258 to seek dismissal in federal court.
- **Can a defendant demand security for costs pursuant to NRS 18.130(1)?** "There is no specific provision in the Federal Rules of Civil Procedure relating to security for costs."[5] The District of Nevada has historically implemented NRS 18.130(1),[6] but an argument exists after *Berk* that FRCP 12 trumps NRS 18.130(1). FRCP 12 lists a defendant's options when responding to a complaint. Demanding security for costs is not one of them. Just as

FRCP 8 set a ceiling in *Berk*, FRCP 12 could set a ceiling for security for costs.

- **Can a plaintiff rely on NRS 629.620, addressing compelled mental or physical examinations, to trump FRCP 35?** In *Dayley v. LVGV, LLC*, a federal district court in Nevada concluded that while the *texts* of FRCP 35 and NRS 629.620 "do not directly conflict, the two laws occupy the same field of operation and, in effect, speak on—and disagree about—the same subject" such that there was a "direct conflict" between them.[7] Despite this conclusion, the *Dayley* court determined NRS 629.620 was substantive and controlled. However, *Berk* appears to compel the opposite result. If FRCP 35 and NRS 629.620 do, in fact, occupy the same field of operation, then FRCP 35 should control.
- **Can a party examine prospective jurors during jury selection under NRS 16.030(6)?** After a judge conducts an initial examination, NRS 16.030(6) states, "the parties or their attorneys are entitled to conduct supplemental examinations which must not be unreasonably restricted." By contrast, FRCP 47 gives the district court discretion as to whether to permit examination by the parties. Both occupy the same field of operation, making NRS 16.030(6) likely inapplicable in a federal diversity case after *Berk*.
- **Can a prevailing party recover taxable costs pursuant to NRS 18.020?** The Ninth Circuit concluded no in *Casun*, and *Berk* seems to reinforce that conclusion. Again, FRCP 54(d)(1) allows a prevailing party to recover costs. Both 28 U.S.C. § 1920 and Local Rule 54 identify the recoverable costs. They occupy the same field of operation as NRS 18.020 and thus control in diversity cases.
- **Can parties serve offers of judgment under NRS 17.117?** Under FRCP 68, only defendants may serve offers of judgment. If the plaintiff does not beat the offer of judgment, the defendant is allowed to recover costs excluding attorneys' fees. Conversely, NRS 17.117 allows all parties to serve offers of judgment and recover attorneys' fees if the offers are not beaten.

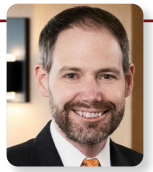
This analysis is complicated by the U.S. Supreme Court's decision in *Alyeska Pipeline Service Company v. Wilderness Society*.[8] There, the plaintiffs sued to block permits for the trans-Alaska oil pipeline under 30 U.S.C. § 185 and 42 U.S.C. § 4321. A lower court awarded attorneys' fees, but that award was reversed for lack of statutory basis.

Footnote 31 in the *Alyeska Pipeline* decision contrasted this result with the possible result in a diversity case. In this footnote, the Supreme Court explained that, before *Erie*, it "held that a state statute requiring an award of attorneys' fees should be applied in a case removed from the state courts to the federal courts." The court then commented, "[w]e see nothing after *Erie* requiring a departure from this result." The Ninth Circuit Court of Appeals later applied that footnote to mean that NRS 18.010 could apply in a diversity case.[9] Another Ninth Circuit case applied NRS 17.115, NRS 17.117's predecessor.[10]

These rulings can be questioned. *Alyeska Pipeline*'s footnote 31 appears to be dicta. The question presented was whether attorneys' fees were recoverable under the federal statutes under which the plaintiffs sought relief. The federal courts had jurisdiction because of a federal question, not through diversity. The Supreme Court did not consider or decide what would happen in a diversity case. Moreover, the footnote relied on a previous Supreme Court decision that came out in 1928 before FRCP 68 existed. That case could not have considered whether a state attorneys' fees statute occupied the same field of operation as FRCP 68.

Think Before Crossing Street

Berk adds further considerations when evaluating whether to cross the street from state to federal court based on diversity jurisdiction. Some of these changes may change the analysis over whether removal is beneficial to specific clients.



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ENDNOTES:

1. 518 U.S. 415, 427 (1996).
2. *Id.* at 427, n.7.
3. *Hendrix v. Progressive Direct Ins. Co.*, Case No. 2:20-cv-01856-RFB-EJY, 2024 U.S. Dist. LEXIS 21151, *7 (D. Nev. Feb. 7, 2024); *see also Atwell v. Cent. Fla. Invs.*, Case No. 2:15-cv-02122-RFB-PAL, 2020 U.S. Dist. LEXIS 262995, *5-6 (D. Nev. December 1, 2020).
4. 119 F.4th 637, 648 (9th Cir. 2024) ("Because § 1920 controls the question at issue and is constitutional, it applies in this case. The district court therefore erred as a matter of law in concluding that Nevada law applied so as to require it to award costs to Casun.").
5. *Simulnet E. Assocs. v. Ramada Hotel Operating Co.*, 37 F.3d 573, 574 (1994).
6. *Hamar v. Hyatt Corp.*, 98 F.R.D. 305 (D. Nev. 1983).
7. Case No. 2:23-cv-00456-CDS-EJY, 2024 U.S. Dist. LEXIS 188759, *5, 2024 WL 4512099 (D. Nev. October 16, 2024).
8. 421 U.S. 240 (1975).
9. *Bevard v. Farmers Ins. Exch.*, 127 F.3d 1147 (9th Cir. 1997).
10. *MRO Communs., Inc. v. AT&T Co.*, 197 F.3d 1276 (9th Cir. 1999).