

1 **IN THE SUPREME COURT OF THE STATE OF NEVADA**

2
3 IN RE AMENDMENT TO RULES)
GOVERNING ALTERNATIVE)
DISPUTE RESOLUTION, SHORT)
4 TRIAL RULES, AND NRCP 68 TO)
INCREASE THE RATES FOR)
5 COMPENSATION TO)
ATTORNEYS, ARBITRATORS,)
6 MEDIATORS, AND JUDGES PRO)
TEMPORE AND AMENDMENTS)
TO THE SHORT TRIAL PROGRAM)

ADKT NO.:

7
8 **PETITION**

9 The Board of Governors (Board) of the State Bar of Nevada (State Bar)
10 hereby petitions this Court for an Order amending the Rules Governing Alternative
11 Dispute Resolution and Short Trials. The Board also respectfully petitions the
12 Court to amend Nevada Rule of Civil Procedure (NRCP) 68 to allow offers of
13 judgment to be considered in awarding attorney fees in arbitration proceedings.

14 Proposed changes to the Nevada Arbitration Rules (N.A.R.), Nevada
15 Mediation Rules (N.M.R.), and Short Trial Rules are set forth in **Exhibit A and B**,
16 respectively. Proposed changes to NRCP are set forth in **Exhibit C**.

17 Nevada law charges the Nevada Supreme Court (Supreme Court) with the
18 power to set and to amend rules regarding court-annexed Alternative Dispute
19 Resolution (ADR) in this state. Specifically, Chapter 38 (Mediation and
20 Arbitration) of the Nevada Revised Statutes (NRS), *see* NRS 38.258, *et seq.*, grants
the Supreme Court the authority and discretion to adopt ADR rules and procedures.

Attorney Fees Awarded by Arbitrator

This Court set the \$3,000 cap on attorney fees in the court annexed arbitration program more than 27 years ago.¹ The cap set in N.A.R. 16(E) was based on the recommendation of a study committee established in 1989 and does not reflect current market rates nor practices in our sister states.

Other jurisdictions, especially in Western states, have no similar limitations on arbitrators' awards of attorney fees. Our sister states most often permit "reasonable attorney fees" or "reasonable attorney fees to the prevailing party."

In Utah, for example, an arbitrator may award "reasonable attorney fees and other reasonable expenses of arbitration." *See* Chapter 11, Utah Uniform Arbitration Act, Rule 78B-11-122 (Remedies – Fees and expenses of arbitration proceeding). Arizona and Washington have identical rules for awarding attorney fees. *See* Arizona Revised Statutes, Title 12 Courts and Civil Proceedings, Section 12-3021, fees and expenses of arbitration proceedings; *and* Revised Code of Washington, Title 7, Chapter 7.04A.210.

Other neighboring states grant even broader discretion in their arbitration rules and statutes.

Oregon's statute states, "Arbitrator may award attorney fees." Oregon Revised Statutes, Section 36.425 (Filing of Decision and award).

¹ ADKT 126, Order issued September 24, 1993.

1 California's code states, "Arbitrator may award attorney fees to the
2 prevailing party." California Civil Code Section 1717 (Obligations Imposed by
3 Law).

4 The American Arbitration Association ("AAA"), a private arbitration
5 company, places no restrictions on attorney fees. AAA rules state that arbitrators
6 are empowered to award attorney fees when requested to do so by a party without
7 a cap on the amount. *See* AAA Commercial Rule 47(d)(ii).

8 The purpose of using an ADR processes is, of course, to settle disputes in an
9 economical and expeditious manner. Undoubtedly, the Court intended to keep costs
10 down for the parties and encourage arbitration over litigation with its cap on
11 attorney fees.

12 A \$3,000 limit on attorney fees may have been reasonable in 1993. However,
13 our legal community has grown significantly. Litigation has become more difficult
14 and complex. Attorneys now charge hourly rates significantly higher than they did
15 three decades ago while the \$3,000 cap for attorney fees has remained stagnant.

16 Increasing the cap on attorney's fees to \$10,000 would not lead to outrageous,
17 overbearing fees. It would allow arbitrators to award attorney fees that align better
18 with prevailing community rates. RPC 1.5, which lists eight non-exclusive factors
19 to weigh when considering the reasonableness of a fee, reinforces this idea. One
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1 factor in RPC 1.5 is the fees “customarily charged in the locality for similar legal
2 services.” RPC 1.5(a)(3).

3 Accordingly, the Board respectfully petitions the Court to raise the cap on
4 attorney’s fees to \$10,000. Increasing the cap to \$10,000 would more fairly reflect
5 changes in litigation and the practice of law since 1993 by allowing arbitrators to
6 award more equitable attorneys’ fees.

7 **Fees for Arbitrators, Mediators, and Judges Pro Tempore**

8 Similarly, an increase in compensation for arbitrators, mediators, and judges
9 pro tempore would appropriately align it with the prevailing community rates,
10 quality, and character of the work.

11 The Court, upon recommendations of a study committee, has set the
12 compensation for arbitrators and mediators in the court annexed arbitration and
13 mediation programs and reviewed it regularly between 1992 and 2001. In that time,
14 the compensation for arbitrators appointed to hear cases has increased from \$75 per
15 hour and \$500 per case maximum to \$100 per hour and \$1,000 per case maximum.
16 The compensation rate has not been reviewed since 2001. Arbitrator and mediator
17 compensation varies in other states. Nevada’s rate is the lowest of the states that
18 limit the arbitrator’s or mediator’s hourly rate.

19 California rules require an arbitrator, before accepting appointment, to
20 “inform all parties in writing of the terms and conditions of the arbitrator’s

1 compensation. This information must include any basis to be used in determining
2 fees; any special fees for cancellation, research and preparation time.” There is no
3 maximum per hour or per case fee. Cal. R. Ct. 16 (Compensation).

4 In Oregon, “The arbitrator shall set the fee with the agreement of the parties.
5 In the absence of such an agreement, the arbitrator’s fee shall be \$125 per hour for
6 the first four (4) hours, and \$150 per hour for up to four (4) additional hours.” ORS
7 §36 (Mediation and Arbitration).

8 In Washington, “Arbitrators shall be compensated in the same amount as
9 judges *pro tempore* of the Superior Court.” Wash. Rev. Code §7.06.040(4)
10 (Qualifications, appointment, and compensation of arbitrators).

11 The Board respectfully asks the Court to increase the cap on arbitrator and
12 mediator compensation to \$150 per hour with a maximum of \$2,500 for each case.

13 Nevada Short Trial Rules 28 and 30 set forth the allowable fees judges pro
14 tempore may be paid. They are often paid either the same or slightly more than
15 arbitrators in most states. The Board respectfully asks the Court to increase the cap
16 on compensation for judges pro tempore to \$200 per hour with a maximum of
17 \$3,000 for each case.

1 **Short Trials**

2 The State Bar has worked with the Nevada Justice Association to update the
3 rules governing the short trial process. Generally, the proposed amendments
4 would:

5 (a) Specify that short trials would be heard by district court judges or stipulate
6 to have cases, after a trial de novo is filed, by a short trial judge selected from a
7 judicial panel strike list.

8 (b) Require pro tempore judges serving as short trial judges to have
9 participated in at least two civil jury trials as first or second chair trial counsel or,
10 in the alternative, be a retired jurist, or be a presently acting short trial judge with a
11 civil background.

12 (c) Clarify that the recording of the proceedings serves as the official
13 transcript and that they be made available to the parties at no charge.

14 (d) Amend the timeframe for a short trial from 3 to 6 hours, with the time for
15 voir dire included in the overall calculation of time.

16 (e) Remove Short Trial Rule 27 (b)(4) regarding awarding of fees under Rule
17 27(1) and (2).

18 (f) Increase the allowable fees for pro tempore judges from \$1,500 per case
19 maximum to \$4,000 per case maximum.
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1 (g) Authorize the presiding judge to designate a representative responsible
2 for sequestering the jury.

3 **Offers of Judgment**

4 Finally, the Board petitions the Court to apply offers of judgment to the
5 arbitration program. Nevada Arbitration Rule 16(D) states that the offer of
6 judgment provisions of NRCP 68 (Offers of Judgment) apply to matters processed
7 in the ADR program.

8 The Supreme Court held that it is “well settled” that the NRCP 68 permits
9 attorney fees and costs to be awarded when a party fails to improve upon a rejected
10 offer of judgment in an action before *the District Court* (emphasis added). *See*
11 *WPH Architecture vs. Vegas VP*, 131 Nev. Adv. Op. 88, 360 P.3d 1145 (2015).

12 However, the Supreme Court added that N.A.R. 16(D) and NRCP 68 did not
13 mandate arbitrators to award fees and costs after the prevailing party obtains a more
14 favorable judgment than the offer of judgment. The Court held that arbitrators
15 retained discretion to award fees and costs.

16 Therefore, the Board respectfully requests that the Court amend NRCP 68 to
17 allow the prevailing party in court-annexed arbitration proceedings to invoke the
18 penalties of the rule.

1 **RECOMMENDATION**

2 Considering the intense growth in this state during the last few decades and
3 the ever-increasing complexity of litigation, the Board requests these amendments
4 to compensate attorneys, arbitrators and judges pro tempore consistent with
5 prevailing rates and update the process for the short trial program. Finally, the Board
6 of Governors petitions the Court to amend NRCP 68 to invoke offer of judgment
7 penalties in court-annexed arbitration proceedings.

8
9 RESPECTFULLY SUBMITTED this ___ day of _____ 2021.

10 STATE BAR OF NEVADA
11 BOARD OF GOVERNORS

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19
20
21

1 EXHIBIT A

2 RULES GOVERNING ALTERNATIVE DISPUTE RESOLUTION

3 NEVADA ARBITRATION RULES

4 **Rule 16. Form and content of award.**

5 (A) Awards shall be in writing and signed by the arbitrator.

6 (B) The arbitrator shall determine all issues raised by the pleadings in cases
7 that are subject to arbitration under the program, including issues of comparative
8 negligence, if any, damages, if any, and costs. The maximum award that can be
9 rendered by the arbitrator is \$50,000 per plaintiff, exclusive of attorney's fees,
10 interest and costs.

11 (C) Findings of fact and conclusions of law, or a written opinion stating the
12 reasons for the arbitrator's decision, may be prepared at the discretion of the
13 arbitrator.

14 (D) The offer of judgment provisions of N.R.C.P. 68 and NRS Chapter 17
15 apply to matters in the program.

16 (E) Attorney's fees awarded by the arbitrator may not exceed [~~\$3,000~~]
17 \$10,000, unless the compensation of an attorney is governed by an agreement
18 between the parties allowing a greater award.

19 (F) After an award is made the arbitrator shall return all exhibits to the parties
20 who offered them during the hearing.

Rule 24. Fees for arbitrators.

(A) Arbitrators appointed to hear cases pursuant to these rules are entitled to
be compensated at the rate of [~~\$100~~] \$150 per hour to a maximum of [~~\$1,000~~]
\$2,500 per case unless otherwise authorized by the commissioner for good cause
shown. If required by the arbitrator, each party to the arbitration shall submit,
within 30 days of request by the arbitrator, a sum of up to [~~\$250~~] \$625 as an
advance toward the arbitrator's fees and costs. If a party fails to pay the required
advance, the party may be subject to sanctions, including an award dismissing the
complaint or entry of the non-complying party's default.

1 **NEVADA MEDIATION RULES**

2 **Rule 10. Fees and costs for mediators.**

3 (A) Mediators shall be entitled to remuneration of up to [~~\$1,000~~] \$2,500 per
4 case, unless otherwise authorized by the commissioner for good cause shown.

5 (B) Mediators are entitled to recover the costs, not to exceed [~~\$250~~] \$625,
6 that the mediator reasonably incurs. Costs recoverable by the mediator are limited
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1 EXHIBIT B

2 NEVADA SHORT TRIAL RULES

3 **Rule 3. Presiding judge.** A short trial may be conducted by either a district
4 court judge or a pro tempore judge.

5 (a) **Assignment of presiding judge.** Short trials shall be heard by district
6 court judges. Within 120 days after the trial de novo is filed, the parties may
7 stipulate to have their case heard by a short trial judge selected from a judicial
8 panel strike list that the parties request be issued by the ADR Commissioner’s
9 Office. Upon a timely stipulation by the parties to have the case heard by a judge
10 from a judicial panel strike list, [No] not later than 21 days [after] thereafter [a case
11 enters the short trial program], the commissioner shall assign a short trial judge to
12 preside over the case. The presiding judge shall be selected by one of the following
13 methods:

14 (1) By stipulation. The parties, within 15 days from the date a case enters
15 the short trial program, may stipulate to have a particular short trial judge serve as
16 the presiding judge. The judge must be selected from the panel of short trial judges
17 and the judge must consent to the assignment. Except that the parties may also
18 stipulate to have a particular district judge serve as presiding judge, provided that
19 the district judge also consents to serve as such.

20 (2) Random selection. Absent a timely stipulation under subdivision
(a)(1) of this rule, the commissioner shall randomly select the names of 3 judicial
panelists and send the same to the parties. Each party may strike one name within
10 days, and the commissioner shall select the judge from the remaining name(s).
For purposes of this rule, if several parties are represented by one attorney, they
shall be considered as one party.

(b) **Panel of short trial judges.** The commissioner shall maintain a list of
judges available to hear short jury trials. The list shall include all qualified pro
tempore judges for the judicial district.

(c) **Pro tempore judges.** Pro tempore judges shall be selected and trained
by a committee composed of the chief judge of the judicial district or the chief
judge’s designee, the commissioner, and a representative of the Alternative
Dispute Resolution (ADR) Committee of the State Bar of Nevada. The selection
committee shall seek to create a diverse group of qualified pro tempore judges. A

1 pro tempore judge may be added to or removed from the panel of short trial judges
2 pursuant to procedures adopted by each of the district courts. A pro tempore judge
shall, however, meet the following minimum qualifications:

3 (1) Be an active member of the State Bar of Nevada;

4 (2) ~~[Have the equivalent of 10 years of civil trial experience or, in the
alternative, be a retired jurist, or presently acting short trial pro tempore judge with
a civil background]~~ Must have participated in at least two civil jury trials as first or
5 second chair trial counsel or, in the alternative, be a retired jurist, or is presently
acting as a short trial pro tempore judge with a civil background;

6 (3) Fulfill at least 3 hours of accredited continuing legal education
7 annually as deemed appropriate by the commissioner. Failure to do so may
8 constitute grounds for temporary suspension or removal from the panel of short
trial judges.

9 **(d) Authority.** While presiding over a case that is in the short trial
10 program, the pro tempore judge shall have all the powers and authority of a district
11 court judge except with respect to the final judgment. A final judgment is one that
12 finally resolves all claims against all parties to the action and leaves nothing for the
13 pro tempore judge's future consideration except for post-judgment issues such as
14 attorney's fees and costs.

15 (1) Not later than 10 days after the rendering of a jury verdict in a jury
16 trial or upon a decision by the presiding judge in a trial to the bench, the judge pro
17 tempore shall submit to the district court judge to whom the case is assigned a
18 proposed judgment.

19 (2) The judge pro tempore shall provide written notice of the proposed
20 judgment to the parties. Any objections to the proposed judgment shall be filed
within 10 days after the written notice of the proposed judgment is served on the
parties, and any responses to such objections shall be filed within 5 days after such
objections are served.

(3) After reviewing the proposed judgment and any objection to the
proposed judgment, the district court shall:

(A) Approve the proposed judgment, in whole or in part; or

(B) Reject the proposed judgment, in whole or in part, and order such
relief as may be appropriate.

1 (4) A proposed judgment from a judge pro tempore is not effective until
2 expressly approved by the district court as evidenced by the signature of the district
3 court judge.

4 **Rule 20. Reporting of testimony.** ~~[There shall be no formal reporting of the~~
5 ~~proceedings unless paid for by the party or parties requesting the same.] The~~
6 ~~proceedings shall be audibly recorded by the court at no charge to the parties.~~
7 The recording shall be the official transcript of the proceedings.

8 **Rule 21. Time ~~[limits]~~ for conduct of trial.** A short trial shall be conducted
9 in two judicial days. Plaintiff(s) and defendant(s) shall be allowed [~~3~~] 6 hours
10 each to present their respective cases unless a different time frame is stipulated to
11 and approved by the presiding judge. Presentation includes voir dire, opening
12 statements, closing statements, presentation of evidence, examination and cross-
13 examination of witnesses, and any other information to be presented to the jury or
14 presiding judge, including rebuttal. Cross-examination of witnesses shall be
15 attributed to the party cross-examining for calculation of time allowed. For the
16 purposes of this Rule, all plaintiffs collectively shall be treated as one plaintiff,
17 and all defendants collectively shall be treated as one defendant.

18 **Rule 23. Juror selection and voir dire.** Twelve potential jurors will be
19 selected from the county jury pool for a jury of 4 members; 14 potential jurors
20 will be selected for a jury of 6 members; and 16 potential jurors will be selected
for a jury of 8 members. Each side shall be allowed [~~15 minutes of voir dire,~~
~~which time shall not be deducted from the 3]~~ as much of their 6 hours of
presentation time provided under Rule 21 as they deem necessary. [~~At the~~
~~discretion of the judge, the time for voir dire may be expanded to 20 minutes per~~
~~side.] Each side shall be entitled to strike 2 jurors by peremptory challenge.
Challenges for cause will remain the same as provided by statute. In the event the
resulting jury panel is greater than 4 members for a 4-member jury, the first 4
members called will constitute the jury panel. In the event the resulting jury panel
is greater than 6 members for a 6-member jury, the first 6 members called will
constitute the jury panel. In the event the resulting jury panel is greater than 8~~

1 members for an 8-member jury, the first 8 members called will constitute the jury
2 panel.

3 **Rule 27. Attorney's fees, presiding judge's fees and costs.**

4 **(a) Attorney's fees, costs and interest for cases removed from the short
5 trial program.** In cases removed from the short trial program pursuant to Rule 5,
6 attorney's fees, costs and interest shall be allowed as follows:

7 (1) The prevailing party at the trial following removal from the short trial
8 program is entitled to all recoverable fees, costs, and interest pursuant to statute or
9 N.R.C.P. 68.

10 (2) Exclusive of any award of fees and costs under subdivision (a)(1), a
11 party is entitled to a separate award of reasonable attorney's fees and costs as set
12 forth in paragraphs (A) and (B) below. If both parties demanded removal from the
13 short trial program, the provisions of N.A.R. 20(B)(2) apply in lieu of (A) and (B)
14 below.

15 (A) Where the party who demanded removal from the short trial program
16 fails to obtain a judgment that exceeds the arbitration award by at least 20 percent
17 of the award, the nondemanding party is entitled to its reasonable attorney's fees
18 and costs associated with the proceedings following removal from the short trial
19 program.

20 (B) Where the party who demanded removal from the short trial program
fails to obtain a judgment that reduces by at least 20 percent the amount for which
that party is liable under the arbitration award, the nondemanding party is entitled
to its attorney's fees and costs associated with the proceedings following removal
from the short trial program.

**(b) Attorney's fees, presiding judge's fees, costs and interest following
short trial.** Attorney's fees, presiding judge's fees and costs shall be allowed
following a short trial as follows:

(1) The prevailing party at the short trial is entitled to all recoverable fees,
costs and interest pursuant to statute or N.R.C.P. 68.

(2) Exclusive of any award of fees and costs under subdivision (b)(1), a party
is entitled to a separate award of fees and costs as set forth in N.A.R. 20(B)(2) in
cases that enter the short trial program upon a request for trial de novo.

1 (3) The prevailing party at the short trial is also entitled to recover any
fees and costs the party paid to the presiding judge.

2 ~~[(4) An award of fees under subsections (1) or (2) of this rule may not~~
3 ~~exceed a total of \$3,000, unless the parties otherwise stipulate or the attorney's~~
4 ~~compensation is governed by a written agreement between the parties allowing a~~
~~greater award.]~~

5 ~~[(5) 4.]~~ Recovery of expert witness fees is limited to \$500 per expert
unless the parties stipulate to a higher amount.

6 **Rule 28. Fees for presiding judge.**

7 (a) **Allowable fees.** Pro tempore judges shall be entitled to remuneration of
\$150 per hour, with a maximum per case of [~~\$1,500~~] \$4,000, unless otherwise
8 stipulated.

9 (b) **Itemized bill required.** To recover fees, the judge pro tempore must
10 submit to the parties an itemized bill within 10 days of the verdict or judgment in a
bench trial, or within 10 days of notice of removal of the case from the program by
11 resolution or otherwise, whichever is earlier. The judge pro tempore shall indicate
the advance deposits paid by the parties and adjust the amount requested
accordingly.

12 (c) **Payment.** The fees shall be paid equally by the parties unless otherwise
stipulated. Any dispute regarding the requested fees must be filed within 5 days of
13 the date that the judge pro tempore serves the itemized bill. The commissioner
shall settle all disputes concerning the reasonableness or appropriateness of the
14 fees. If a timely dispute to the itemized bill is not filed, the fees shall be paid within
15 10 days of the date that the judge pro tempore serves the itemized bill. If fees are
disputed, the parties shall pay the costs as determined by the commissioner within
16 5 days from the commissioner's decision.

17 (d) **Exception for indigent party.** If one of the parties to the short trial is
an indigent person who was exempted under NRS 12.015 from paying a filing fee,
18 no fees for a short trial judge may be collected from any party to the short trial.

19 **Rule 30. Deposits; failure to pay.** Each party to a case within the short trial
program shall deposit with the presiding judge, no later than 10 days after the
20 mandatory discovery and settlement conference, [~~\$875~~] \$1,625 as an advance
toward the presiding judge's fees and costs, unless the presiding judge is a district

1 judge, in which case no payment of judge's costs or fees is required. If a party fails
2 to pay the required advance, the district court shall, after giving appropriate notice
and opportunity to be heard, hold the delinquent party in contempt and impose an
appropriate sanction.

3 **Rule 34. Support personnel.** Short trials shall not require a bailiff or court
4 clerk, but, on the day of the trial, the court administrator or designated
5 representative shall be responsible for providing the panel of jurors for a short
6 jury trial. The presiding judge may designate a representative who shall be
responsible for sequestering the jury.

DRAFT

1 **EXHIBIT C**

2 **AMENDMENT TO NRCP 68**

3
4 **Rule 68. Offers of Judgment**

5 (a) **The Offer.** At any time more than 21 days before trial in district court or
6 in a court-annexed arbitration pursuant to the Nevada Arbitration Rules, any party
7 may serve an offer in writing to allow judgment to be taken in accordance with its
8 terms and conditions. Unless otherwise specified, an offer made under this rule is
9 an offer to resolve all claims in the action between the parties to the date of the
10 offer, including costs, expenses, interest, and if attorney fees are permitted by law
11 or contract, attorney fees.
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