CHAPTER 20

DISMISSAL OF ACTIONS

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SYNOPSIS

§ 20.01 Introduction and Scope

This chapter governs voluntary and involuntary dismissals arising under NRCP 41. Included is the procedure for obtaining a dismissal, and its effect. This chapter does not discuss dismissals under other rules, including the following:

- Dismissals pursuant to NRCP 11. *See* Ch. 5, *Complaints*.
- Dismissals pursuant to NRCP 12(b). *See* Ch. 9, *Answers, Replies, and Responsive Motions*.
- Discovery sanctions under NRCP 16.1(e) and NRCP 37. *See* Ch. 17, *Discovery Motion Practice*.
- Dismissal under NRCP 25(a) upon the failure to timely substitute after the death of a party. *See* Ch. 4, *Parties*, Ch. 39, *Estates of Deceased Persons*.

Although this chapter will refer routinely to the dismissal of a complaint, the rules

in this chapter apply equally to other claims, as NRCP 41(c) specifically directs that the provisions of Rule 41 "apply to the dismissal of any counterclaim, cross-claim, or third-party claim."

To the extent that there are similarities between NRCP 41 and its federal counterpart, applicable federal case law is provided in this chapter and should be applicable in Nevada courts. *Executive Management, Ltd. v. Ticor Title Ins. Co.*, 118 Nev. 46, 53, 38 P.3d 872, 876 (2002) (expressly approving use of case law interpreting Federal Rules of Civil Procedure as "strong persuasive authority" because Nevada Rules of Civil Procedure are "based in large part upon their federal counterparts"). One major substantive difference between NRCP and the federal rules is Nevada's provision for specific time-based dismissals for want of prosecution under NRCP 41(e), for which there is no federal equivalent.

In some Nevada cases, moving parties make reference to "summary judgment" instead of dismissal. However, a "dismissal" should never be confused with "summary judgment." Summary judgment is limited strictly to NRCP 56 and always operates as an adjudication on the merits of the case. In contrast, a Rule 41 dismissal may or may not operate as an adjudication on the merits, depending on the circumstances.

§ 20.02 Dismissals "With" and "Without" Prejudice and the "Two Dismissal" Rule

A dismissal "with" prejudice operates as an adjudication on the merits of the lawsuit and has a preclusive effect on subsequent claims and actions. A dismissal "without" prejudice does not constitute an adjudication on the merits and generally does not bar a subsequent lawsuit.

NRCP 41(a) and (b) contain opposite directives as to whether a dismissal is with or without prejudice. A notice of dismissal under Rule 41(a) is *without* prejudice unless stated otherwise in the notice. *Emerson v. District Ct.*, 127 Nev. Adv. Op. 61, 263 P.3d 224, 230 n.2 (2011). In contrast, a Rule 41(b) involuntary dismissal is *with* prejudice unless the dismissal is for a lack of jurisdiction, improper venue, or failure to join a party under NRCP 19.

Practice Pointer: When drafting a notice of dismissal, moving for a dismissal, or preparing an order of dismissal, avoid later confusion and be clear as to whether the dismissal is with or without prejudice. If you are filing a notice of dismissal and the case has not finally settled, clearly state that the dismissal is without prejudice.

Under the "two dismissal" rule of NRCP 41(a)(1)(i), a notice of dismissal will operate as an adjudication on the merits "when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim."

By its terms, the "two dismissal" rule applies regardless of whether the dismissals were in state or federal court. The actions do not need to be identical; the rule applies as long as both lawsuits were "based on or including the same claim." The rule may apply even when plaintiff voluntarily dismisses only some of the defendants because the rule "may be invoked to dismiss less than all of the parties." *Lake at Las Vegas*

Investors Group, Inc. v. Pacific Malibu Dev. Corp., 933 F.2d 724, 728 (9th Cir. 1991).

The text of the rule suggests, and courts conclude, that the "two dismissal" rule applies only when both actions have been dismissed by a "notice of dismissal" under Rule 41(a)(1)(i). *Poloron Prods., Inc. v. Lybrand Ross Bros. & Montgomery*, 534 F.2d 1012, 1018 (2d Cir. 1976). In other words, a stipulated dismissal or other dismissal without prejudice (i.e., for lack of personal jurisdiction) followed by a notice of dismissal "does not activate the 'two dismissal' bar against bringing an action based on or including the same claim." *Poloron Prods., Inc. v. Lybrand Ross Bros. & Montgomery*, 534 F.2d 1012, 1018 (2d Cir. 1976).

The question of whether the "two dismissal" rule applies becomes ripe only in the third action, if it is filed, and must be determined in that court. The court in the second action loses jurisdiction over the second action once the notice of dismissal is filed. *Commercial Space Management Co., Inc. v. Boeing Co., Inc.*, 193 F.3d 1074, 1076 (9th Cir. 1999).

§ 20.03 Voluntary Dismissal—NRCP 41(a)

[1] Overview of Voluntary Dismissal

Voluntary dismissal occurs most commonly as a result of the settlement of the dispute between the parties. However, there are other valid strategic reasons for voluntarily dismissing an action, including the following:

- Seeking a more favorable forum.
- Preventing removal to federal court.
- Avoiding dismissal on the merits/preclusive effect.
- Avoiding or limiting sanctions or potential liability for abuse of process (note that a party and its counsel may still be subject to possible Rule 11 sanctions even after a case is dismissed).

Before dismissing a case voluntarily, carefully consider the following:

- A Rule 41(a)(1) dismissal is permanent. A voluntary dismissal cannot be set aside unless it was not the result of a "free, calculated, and deliberate" choice. *See* NRCP 60; *Warfield v. AlliedSignal TBS Holdings, Inc.*, 267 F.3d 538, 542 (6th Cir. 2001).
- The statutes of limitation for claims are *not* tolled and there is no "relation back" to the filing of the first lawsuit.
- The "two dismissal" rule and the risks of malpractice that go with it.
- Costs may be awarded to the defendant in certain instances.
- Voluntary dismissal cannot be used to circumvent a jury trial waiver.

[2] Dismissal by Plaintiff—NRCP 41(a)(1)(i)

A plaintiff may generally dismiss an action by filing a notice of dismissal "at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs." NRCP 41(a)(1)(i).

A notice of dismissal is *not* allowed in class actions or cases where a receiver has been appointed, or in any other action where "any statute" requires court approval for dismissal. *See* NRCP 41(a)(1)(i), 23(e), 66.

The rule only provides for the dismissal of an "action." Rule 41(a)(1)(i) may *not* be used to voluntarily dismiss discrete claims.

Practice Pointer: The proper procedure in this instance is to amend the pleading in accordance with NRCP 15. *See Ethridge v. Harbor House Restaurant*, 861 F.2d 1389, 1392 (9th Cir. 1988), citing 5 Moore's Federal Practice ¶ 41.06 (1987).

NRCP 41(a)(1)(i) *does* allow for the dismissal of discrete parties to the action. The dismissal of one of several co-defendants dismisses the "action" as to "fewer than all" of the named defendants, and is thus allowed under the rule. *Pedrina v. Chun*, 987 F.2d 608, 609 (9th Cir. 1993).

When appropriate, dismissal under NRCP 41(a)(1)(i) is an absolute right, without the necessity of court approval or stipulation of the parties. The plaintiff's motive in dismissing is not relevant, and the court may not retain jurisdiction over the action once it is dismissed. *Federal Sav. & Loan Ins. Corp. v. Moss*, 88 Nev. 256, 259, 495 P.2d 616, 618 (1982) (defendant cannot "fan the ashes of that action into life and the court has no role to play" after dismissal); *Bailey v. Shell Western E&P, Inc.*, 609 F.3d 710, 719 (5th Cir. 2010) (right to dismiss "may not be extinguished or circumscribed by adversary or court").

Timing is important. A Rule 41(a)(1)(i) notice of dismissal may be filed "at any time" before service of an answer or motion for summary judgment, whichever occurs first. *In re Phillip A.C.*, 122 Nev. 1284, 1289, 149 P.3d 51, 55 (2006). Service (and not filing) is the key consideration, because a filed but unserved answer or Rule 56 motion will not terminate the unilateral right to dismiss. *Aero-Colours, Inc. v. Propst*, 114 F.R.D. 107, 108 (S.D. Tex. 1987). In unique circumstances, a court may treat a letter sent to defendant's counsel signaling the intent to dismiss as a notice of dismissal itself for the purposes of this rule. *Wilson v. City of San Jose*, 111 F.3d 688, 693 (9th Cir. 1997).

To extinguish the right to dismiss voluntarily, service of the answer or motion for summary judgment must be by the adverse party. It is irrelevant if another defendant has already filed an answer or motion for summary judgment. *Sheldon v. Amperex Elec. Corp.*, 449 F.2d 146, 147 (2d Cir. 1971) (dismissal appropriate against one defendant "after it has been severed from a multi-defendant suit").

As to timing, the right of dismissal is absolute as long as it is filed before service of an answer or motion for summary judgment. This can occur even after significant activity has already taken place in the action, such as a motion to compel arbitration, a Rule 12 motion to dismiss (even with the court announcing its intended ruling), or a full evidentiary hearing and ruling on a motion for preliminary injunction. *See Miller v. Reddin*, 422 F.2d 1264, 1266 (9th Cir. 1970) (Rule 12 motion); *Hamilton v. Shearson Lehman American Express, Inc.*, 813 F.2d 1532, 1535 (9th Cir. 1987) (motion to compel arbitration); *American Soccer Co., Inc. v. Score First Enterprises*, 187 F.3d 1108, 1110–12 (9th Cir. 1999). However, the right to dismiss will be extinguished

when a court converts a Rule 12(b)(5) motion into a Rule 56 motion for summary judgment. *Exxon Corp. v. Maryland Cas. Co.*, 599 F.2d 659, 661–62 (5th Cir. 1979).

Practice Pointer: If you are representing a defendant, do not wait to file an answer or summary judgment motion, particularly if there is substantial early activity in a case. This will prevent the plaintiff from filing a tactical dismissal and will terminate the plaintiff's right to unilaterally amend the complaint under NRCP 15(a).

If a defendant has appeared in the action and incurred filing fees, the party filing the notice of dismissal must pay the defendant's filing fees to make the dismissal effective. *In re Phillip A.C.*, 122 Nev. 1284, 1289, 149 P.3d 51, 55 (2006).

NRCP 41(a)(1)(i) references only payment of the defendant's filing fees when filing a notice of dismissal; it says nothing about payment of other costs or attorney's fees. Notably, Rule 41(d) gives a district court in the second action discretion to direct the plaintiff only to pay the defendant's costs from the first action. It is unclear whether a defendant may seek costs under NRS Chapter 18 as a "prevailing party" after the plaintiff has filed a Rule 41(a)(1)(i) notice of dismissal without prejudice for the first time.

[3] Dismissal by Stipulation—NRCP 41(a)(1)(ii)

The parties may always dismiss an action by "filing a stipulation of dismissal signed by all parties who have appeared in the action." There is no time limit on this rule, and such a stipulation may be filed even after trial, while the matter is on appeal. *See Jeep Corp v. District Ct.*, 98 Nev. 440, 443, 652 P.2d 1183, 1186 (1982). Also, a written stipulation for dismissal made under Rule 41(a)(1)(ii) does not require a court order and is effective on filing. *McCall-Bey v. Franzen*, 777 F.2d 1178, 1185 (7th Cir. 1985).

An oral stipulation for dismissal without a written filing will suffice if the stipulation is entered in open court, on the record, and with approval of the district court judge. *Prostack v. Lowden*, 96 Nev. 230, 231, 606 P.2d 1099, 1099–1100 (1980). However, by the terms of the rule, all parties who have appeared in the case must execute the stipulation. An unwilling co-defendant may prevent dismissal of an action by stipulation. In that instance, the plaintiff must resort to moving for dismissal of the action by court order under NRCP 41(a)(2).

In federal court, a stipulation for dismissal of the action may be conditioned on the satisfaction of certain conditions, such as reserving jurisdiction for the court to enforce the terms of a settlement agreement. In that case, the terms of the settlement may or may not be included in the stipulation. *See, e.g., Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 381–82 (1994) (relying on "upon such terms and conditions as the court deems proper" language of FRCP 41). However, the Nevada Supreme Court has held the opposite, because the district court loses jurisdiction over a case after a dismissal even when the parties have expressly provided in their settlement agreement that the district court will have jurisdiction to enforce the agreement. *SFPP, L.P. v. District Ct.*, 123 Nev. 608, 609, 173 P.3d 715, 715–16 (2007).

Practice Pointer: If terms of a settlement require performance over time, such as periodic payments, consider instead executing a stipulation and order to stay the action rather than dismiss it, pending performance of the settlement terms. Make sure

to stay all relevant deadlines under NRCP 41(e) in the stipulation, and note that the district court may be reluctant to approve the stipulation, depending on the length of performance involved.

As with NRCP 41(a)(1)(i), this rule speaks only of dismissal of "actions" and not discrete claims within an action. Dismissal of a discrete claim does not constitute dismissal of an "action" within the meaning of Rule 41(a)(1)(ii). *Ethridge v. Harbor House Restaurant*, 861 F.2d 1389, 1392 (9th Cir. 1988); *Gobbo Farms & Orchards v. Poole Chem. Co., Inc.*, 81 F.3d 122, 123 (10th Cir. 1996).

[4] Dismissal by Order of Court—NRCP 41(a)(2)

Once the plaintiff's right to dismiss voluntarily has been extinguished, and absent the ability to dismiss by stipulation, the plaintiff must obtain court approval to dismiss an action. This request must be made by noticed motion to all parties, and the court cannot consider the request on an *ex parte* basis. *Monroe, Ltd. v. Central Tel. Co.*, 91 Nev. 450, 453, 538 P.2d 152, 154 (1975).

If a counterclaim has already been pleaded at the time of the motion, the court may not grant the motion over the defendant's objection unless the counterclaim "can remain pending for independent adjudication by the court." This part of the rule mirrors FRCP 41(a)(2), which seems most concerned with permissive counterclaims that do not independently satisfy the requirements for federal subject matter jurisdiction. Because Nevada state courts do not have the same issues as federal court with regard to subject matter jurisdiction, this part of the rule would seem to have rare application in state court.

Under this rule, dismissal is subject to "such terms and conditions as the court deems proper." The court should consider (1) whether dismissal "infringes the legal or equitable rights" of the defendant; (2) whether dismissal should be with or without prejudice; and (3) what, if any, conditions should be placed on the dismissal. *Spencer v. Moore Business Farms, Inc.*, 87 F.R.D. 118, 119 (N.D. Ga. 1980). The court has wide discretion to make these determinations. *Desert Plaza Apartments, Inc. v. Freeman*, 75 Nev. 170, 172, 336 P.2d 771, 771–72 (1959) (abuse of discretion standard applied on appeal).

In determining whether a dismissal would prejudice the defendant, courts look at whether "plain legal prejudice" will arise; the risk of facing a second lawsuit is not considered "prejudicial" under this rule. *Westlands Water Dist. v. United States*, 100 F.3d 94, 96 (9th Cir. 1996). Nor is the inconvenience of potentially litigating in another forum. *Durham v. Florida East Coast Rwy. Co.*, 385 F.2d 366, 368 (5th Cir. 1967). However, dismissal may be denied when it will result in the loss of a complete statute of limitations defense if the plaintiff were to re-file in another jurisdiction with a longer limitations period. *See Elabor v. Tripath Imaging, Inc.*, 279 F.3d 314, 318 (5th Cir. 2002). When possible, a court will grant a dismissal but impose conditions on the dismissal to ameliorate prejudice to the defendant.

Expense is not a basis for the kind of prejudice that warrants denial of a motion to dismiss. The reasoning is that an award of expenses is one of the "terms and conditions" that a court can impose on dismissal of the lawsuit. *In re Lowenschuss*, 67

F.3d 1394, 1400–01 (9th Cir. 1995). Although such an award is not mandatory, courts typically condition dismissal on payment of attorney's fees and costs to the defendant. *Brown v. Baeke*, 413 F.3d 1121, 1126 (10th Cir. 2005); *Stevedoring Services of Am. v. Amarilla Int'l*, 889 F.2d 919, 921 (9th Cir. 1989); *Victory Beauty Supply, Inc. v. La Maur, Inc.*, 98 F.R.D. 306, 309 (N.D. Ill. 1983). However, awards for fees should be limited to work that would have to be done again in the second action to compensate the defendant for the unnecessary expense of having to proceed in the first action. *Cauley v. Wilson*, 754 F.2d 769, 772 (7th Cir. 1985). Such a fee award is not considered a "sanction" against counsel or the party. *Heckethorn v. Sunan Corp.*, 992 F.2d 240, 242 (9th Cir. 1993).

Practice Pointer: When seeking fees and costs, do not forget to consider other statutory or contractual bases for an award that may be available.

The failure to satisfy any conditions set by the district court under Rule 41(a)(2) will result in a dismissal with prejudice. *Lau v. Glendora Unified Sch. Dist.*, 792 F.2d 929, 930 n.2 (9th Cir. 1986).

Practice Pointer: If the district court imposes conditions, be sure that the order includes a deadline to comply and a clear and express warning that the court will enter a subsequent order for dismissal with prejudice if the conditions are not satisfied.

§ 20.04 Involuntary Dismissal—NRCP 41(b)

A defendant may move for the dismissal of an "action or of any claim" based upon the failure by the plaintiff "to comply with these rules or any order of court" NRCP 41(b).

Rule 41(b) contains notable differences compared to other parts of Rule 41. First, a Rule 41(b) dismissal may dismiss the entire action *or* discrete claims. Second, a Rule 41(b) dismissal operates as an adjudication on the merits, unless otherwise stated in the order, or if the dismissal is based on lack of jurisdiction, improper venue, or failure to join a party under Rule 19. *See Home Sav. Ass'n v. Aetna Cas. & Sur. Co.*, 109 Nev. 558, 561, 854 P.2d 851, 853 (1993); *Dubin v. Harrell*, 79 Nev. 467, 471, 386 P.2d 729, 731–32 (1963).

NRCP 41(b) is also different from its federal counterpart in that the Nevada rule does not take into account the plaintiff's "failure to prosecute" a case, which is specifically reserved for NRCP 41(e).

Like its federal counterpart, NRCP 41(b) does not specifically mention lesser sanctions as an alternative to dismissal. Yet, many federal courts will consider lesser sanctions short of dismissal, including awards of fees and costs and conditional dismissal. *Henderson v. Duncan*, 779 F.2d 1421, 1424 (9th Cir. 1986). The court is not required to "exhaust every sanction short of dismissal before finally dismissing a case" but must merely "explore possible and meaningful alternatives." *Henderson v. Duncan*, 779 F.2d 1421, 1424 (9th Cir. 1986). This approach is consistent with the Nevada Supreme Court's consideration of NRCP 37(b) sanctions in *Young v. Johnny Ribeiro Bldg., Inc.*, 106 Nev. 88, 787 P.2d 777 (1990). Although *Young* involved discovery sanctions under NRCP 37, the policies set forth in *Young* are analogous to

those in Rule 41(b) and should be raised if sanctions are being considered under Rule 41(b).

§ 20.05 Costs of Previously Dismissed Action—NRCP 41(d)

After the voluntary dismissal of an action, if the plaintiff files "in any court" another action "based upon or including the same claim against the same defendant," the district court *may* order "payment of the costs in the previous action" and *may* further "stay the proceedings in the action until the plaintiff has complied with the order."

If the previous action was based on a different claim from the one asserted in the second action, costs may not be awarded. *Volpert v. Papagna*, 83 Nev. 429, 434, 433 P.2d 533, 536 (1967).

The "any court" language directs that it does not matter where the original action was filed. Moreover, the permissive language of Rule 41(d) directs that the award and the decision to stay the action is not mandatory and within the court's sound discretion. A finding of bad faith is not a prerequisite for imposing costs. Yet, costs may be awarded when the plaintiff attempts to gain a "tactical advantage by dismissing" and refiling the suit. *Rogers v. Wal-Mart Stores, Inc.*, 230 F.3d 868, 874 (6th Cir. 2000).

Federal courts are split as whether an award of "costs" under Rule 41(d) includes an award of attorney's fees. Some courts analogize to Rule 41(a)(2) and thus favor an award of attorney's fees as "costs" under Rule 41(d). *See Esquivel v. Arau*, 913 F. Supp. 1382, 1390–92 (C.D. Cal. 1996). Other courts favor awarding attorney's fees only when the prior action was one in which attorney's fees would have been awardable as "costs." *See Rogers*, 230 F.3d at 874–75. Nevada's exclusion of attorney's fees from the definition of "costs" under NRS 18.005 suggests that attorney's fees are likely not be recoverable under NRCP 41(d). *See Bergmann v. Boyce*, 109 Nev. 670, 681, 856 P.2d 560, 567 (1993) (routine secretarial costs are part of ordinary attorney overhead and not recoverable as "costs").

§ 20.06 Dismissal for Want of Prosecution—NRCP 41(e)

[1] Overview

Nevada has crafted three time-based deadlines providing for the dismissal of an action based upon the failure to prosecute a case. The "two-year," "three-year," and "five-year" rules have their own unique issues and pitfalls for the unwary. The purpose of these rules is to "compel expeditious determinations of legitimate claims." *Baker v. Noback*, 112 Nev. 1106, 1110, 922 P.2d 1201, 1203 (1996).

Rule 41(e) is "clear, unambiguous and requires no construction other than its own language." *Thran v. District Ct.*, 79 Nev. 176, 180–81, 380 P.2d 297, 300 (1963). A dismissal under Rule 41(e) may be sought by motion or on the court's own initiative, but the plaintiff must first be given notice and an opportunity to be heard before dismissal is entered. The court retains its inherent authority to dismiss a case for want of prosecution, apart from NRCP 41(e). *Volpert*, 85 Nev. at 439, 456 P.2d at 849.

A dismissal of any kind under Rule 41(e) "is a bar to another action upon the same claim for relief against the same defendants unless the court otherwise provides." This

provision was specifically added to Rule 41(e) after the Nevada Supreme Court's decision in *Dubin v. Harrell*, 79 Nev. 467, 386 P.2d 729 (1963). *See Williams v. Jensen*, 81 Nev. 658, 660 n.2, 408 P.2d 920, 921 n.2 (1965). A Rule 41(e) dismissal may be without prejudice only if the district court concludes in its discretion that "justice so requires." *United Ass'n of Journeymen and Apprentices of Plumbing & Pipe Fitting Indus. v. Manson*, 105 Nev. 816, 821, 783 P.2d 955, 958 (1989). In this instance, the order must specifically state that that dismissal is without prejudice. *Brent G. Theobald Constr., Inc. v. Richardson Constr., Inc.*, 122 Nev. 1163, 147 P.3d 238, 241 (2006), *overruled on other grounds by Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 181 P.3d 670 (2008).

However, even if a Rule 41(e) dismissal does not operate as a "bar" to another action, obvious issues will arise with regard to statutes of limitation on claims that are raised in any subsequent action. As a result, a dismissal without prejudice under Rule 41(e) may be little more than cold comfort for a litigant who is effectively barred from litigating its claims.

[2] Discretionary Dismissal—The Two-Year Rule

NRCP 41(e) provides as follows:

> The court may in its discretion dismiss any action for want of prosecution on motion of any party or on the court's own motion and after due notice to the parties, whenever plaintiff has failed for 2 years after action is filed to bring such action to trial.

Although rarely invoked, the "two-year" rule allows a court to dismiss an action for want of prosecution when the plaintiff has failed to bring an action to trial within two years. By its terms, application of the "two-year" rule is discretionary. A request for dismissal under this rule must be made by noticed motion. *Monroe*, 91 Nev. at 453, 538 P.2d at 154. The burden to prosecute the case is on the plaintiff, and prejudice is presumed from the delay in failing to prosecute the case to a final determination. *Northern Ill. Corp. v. Miller*, 78 Nev. 213, 217, 370 P.2d 955, 956 (1962); *Thran*, 79 Nev. at 181, 380 P.2d at 300. A decision to dismiss under the "two-year" rule is subject to an abuse of discretion standard on appeal. *Volpert*, 85 Nev. at 440, 456 p.2d at 850.

Although not specifically stated by the Nevada Supreme Court, the "two-year" rule appears to be limited to cases in which the plaintiff fails to diligently pursue its case for nearly the entire two-year period. In *Spiegelman v. Gold Dust Texaco*, 91 Nev. 542, 547, 539 P.2d 1216, 1219 (1975), the Court reversed as an abuse of discretion a "two-year" dismissal when the plaintiff had obtained a trial date and had been diligent in prosecuting the case for one year before dismissal, even though he had not been diligent in the first year of the lawsuit.

[3] Mandatory Dismissal—The Five-Year Rule

NRCP 41(e) provides as follows:

> Any action heretofore or hereafter commenced shall be dismissed by the court in which the same shall have been commenced or to which it may be transferred on motion of any party, or on the court's own motion, after due

> notice to the parties, unless such action is brought to trial within 5 years after the plaintiff has filed the action, except where the parties have stipulated in writing that the time may be extended.

Rule 41(e) mandates that the action be dismissed if it has not been "brought" to trial within five years after its commencement. *Baker*, 112 Nev. at 1110, 922 P.2d at 1203. If the time period of Rule 41(e) has expired, the court has no discretion to retain jurisdiction, and must dismiss the action. *D.R. Horton, Inc. v. District Ct.*, 131 Nev. Adv. Op. 86,358 P.3d 925 (2015).

As the rule expressly provides, the five-year period may be extended by written stipulation of all parties. *Id.*; *Morgan v. Las Vegas Sands, Inc.*, 118 Nev. 315, 320, 43 P.3d 1036, 1039 (2002). If all parties will not stipulate to extend the five-year rule, a plaintiff may seek a preferential trial setting. *Carstarphen v. Milsner*, 128 Nev. Adv. Op. 5, 270 P.3d 1251 (2008). Before granting a preferential setting, the court must consider (1) the time remaining in the five-year period, and (2) plaintiff's diligence moving the case forward. *Carstarphen*, 270 P.3d at 1254.

The five-year period commences at the filing of the complaint. The timing of pleadings filed thereafter, such as an amended complaint or a counterclaim, or even the substitution of plaintiffs, is irrelevant for the purpose of calculating this time period. *See Johnson v. Harber*, 94 Nev. 524, 527, 582 P.2d 800, 801 (1978).

Rule 41(e) operates to dismiss the entire action, not discrete claims, and thus will result in the dismissal of the entire action, including counterclaims, cross-claims, and third-party claims. *Manson*, 105 Nev. at 821, 783 P.2d at 957.

The Nevada Supreme Court has not articulated the exact minimum threshold for bringing an action to trial. However, the Court has concluded that an action is considered "brought" to trial within the time period when the plaintiff "obtains a trial date within the statutory period, appears for trial in good faith, argues motions, and examines jurors." *Smith v. Timm*, 96 Nev. 197, 200, 606 P.2d 530, 531 (1980). Proceedings leading up to the granting of summary judgment qualify as bringing a matter to "trial" as long as it resolves all issues in the case as to that party. *Manson*, 783 P.2d at 957–58; *Monroe*, 123 Nev. at 99–101, 158 P.3d at 1010–11. *Cf. Allyn v. McDonald*, 117 Nev. 907, 910–11, 34 P.3d 584, 586 (2001) (resolution of "issue" as opposed to entire action does not constitute bringing matter to trial).

A case is also considered "brought to trial" when even one witness testifies. *Ad-Art, Inc. v. Denison*, 94 Nev. 73, 74, 574 P.2d 1016, 1017 (1978) (three witnesses testified before mistrial was declared). The witness must be one with personal knowledge of the facts of the case. *A French Bouquet Flower Shoppe, Ltd. v. Hubert*, 106 Nev. 324, 326, 793 P.2d 835, 836 (1990). However, a "sham" proceeding will not satisfy Rule 41(e). *Lippitt v. State*, 103 Nev. 412, 743 P.2d 108 (1987) (plaintiff called opposing counsel to testify who had no personal knowledge of facts of case).

Practice Pointer: The holding of *Ad-Art* has spawned the questionable practice of "bringing" a matter to trial (particularly a bench trial) by calling a single witness to testify, swearing in that witness, and having the witness provide little more than his/her name before temporarily recessing the "trial" to a later date. This is no doubt

done for convenience of the parties or the court, but it is extremely risky. The Nevada Supreme Court has never explicitly approved or disapproved of this practice and thus it is unknown whether the practice—which is unapologetically undertaken to circumvent Rule 41(e)—complies with the spirit or the letter of the rule.

If a Rule 41(e) motion to dismiss based on the five-year rule is improperly denied, any order that was entered thereafter is void *ab initio*. *Cox v. District Ct.*, 124 Nev. 918, 925, 193 P.3d 530, 534 (2008).

[4] Mandatory Dismissal—The Three-Year Rules

NRCP 41(e) provides as follows:

> When, in any action after judgment, a motion for a new trial has been made and a new trial granted, such action shall be dismissed on motion of any party after due notice to the parties, or by the court of its own motion, if no appeal has been taken, unless such action is brought to trial within 3 years after the entry of the order granting a new trial, except when the parties have stipulated in writing that the time may be extended.
>
> When in an action after judgment, an appeal has been taken and judgment reversed with cause remanded for a new trial (or when an appeal has been taken from an order granting a new trial and such order is affirmed on appeal), the action must be dismissed by the trial court on motion of any party after due notice to the parties, or of its own motion, unless brought to trial within 3 years from the date upon which remittitur is filed by the clerk of the trial court.

The "three-year" rules are triggered only in the event of an order granting a new trial or directing a trial after the reversal of a judgment on appeal. After an appeal, the operative date for commencement of the three-year period is the filing of a remittitur in the district court. *Carstarphen*, 270 P.3d at 1251, *overruling Rickard v. Montgomery Ward & Co.*, 120 Nev. 493, 96 P.3d 743 (2004).

[5] Tolling and Exceptions

As stated above, the only express exception to mandatory dismissal under NRCP 41(e) is the execution of a written stipulation extending the specified time period. *Morgan*, 118 Nev. at 320, 43 P.3d at 1039. An oral stipulation will suffice if made in open court, approved by the district court judge, and recorded in the court minutes. *Prostack v. Lowden*, 96 Nev. 230, 231, 606 P.2d 1099, 1099 (1980). However, an agreement may never be implied by conduct, and any extension to extend the deadline must be express and clear. *Carstarphen*, 270 P.3d at 1253. The plaintiff bears the burden of ensuring compliance with Rule 41(e). *Morgan*, 118 Nev. at 321, 43 P.3d at 1040.

Practice Pointer: If possible, do not rely on an oral stipulation. If you must, be sure to check the court minutes after the hearing to ensure that they accurately reflect the stipulation of the parties. If the minutes are incomplete or unclear, make sure to complete the record by moving to correct the minutes, seeking another hearing, or obtaining a written stipulation.

Despite the absence of any other express exceptions to Rule 41(e), the Nevada

Supreme Court has recognized certain instances in which Rule 41(e) should not apply. The most notable is the *Boren* exception, in which "[a]ny period during which the parties are prevented from bringing an action to trial by reason of a stay order shall not be computed in determining the five-year period of [NRCP] 41(e)." *D.R. Horton*, 131 Nev. Adv. Op. 86, 358 P.3d 925, 930 (2015), quoting *Boren v. City of N. Las Vegas*, 98 Nev. 5, 638 P.2d 404 (1982). The plaintiff's diligence (or lack thereof) during the stay is irrelevant as long as a valid stay is in place preventing the case from proceeding, even if the plaintiff could have sought to lift the stay but failed to do so. *D.R. Horton*, 925P.3d 925, 930–31.

Other cases involving tolling and exceptions to Rule 41(e) include the following:

- *Automatic bankruptcy stay*—An automatic bankruptcy stay tolls Rule 41(e) while it is in effect but only as to "the particular defendant who is engaged in the bankruptcy proceedings. The bankruptcy stay does *not* toll Rule 41(e) as to nondebtor defendants. *Edwards v. Ghandour*, 123 Nev. 105, 159 P.3d 1086 (2007).
- *Mandatory arbitration*—Time spent participating in the state's mandatory arbitration program does not toll the calculation of the five-year rule. *Morgan*, 118 Nev. at 320, 43 P.3d at 1039.
- *Special master*—Reference to a special master under NRCP 53 does not toll calculation of the five-year rule. *Garden Park Townhouse Ass'n v. Homewood Builders, Inc.*, 97 Nev. 630, 631–32, 637 P.2d 1214 (1981).
- *Appeal*—All time limitations under Rule 41(e) are tolled during the pendency of an appeal, even if the appeal does not involve the party seeking dismissal. *Massey v. Sunrise Hosp.*, 102 Nev. 367, 370, 724 P.2d 208, 210 (1986).
- *No equitable tolling*—The Nevada Supreme Court has rejected equitable tolling as a consideration on a Rule 41(e) motion. *Monroe*, 123 Nev. at 99–100, 158 P.3d at 1010; *Kee v. Terrible's Primm Valley Casino Resorts*, 2015 Nev. App. Unpub. LEXIS 3, at *4 (Jan. 21, 2015) (unpublished).
- *Settlement conferences*—Time spent in a failed settlement conference does not toll calculation of the five-year rule. *Cox*, 124 Nev. at 925, 193 P.3d at 534.
- *Settlement agreements*—Rule 41(e) does not apply when there is "a written and signed settlement agreement that resolves all of the issues raised in the complaint," as the case is deemed to be "brought to trial" in that instance. *The Power Co. v. Henry*, 130 Nev. 21, 321 P.3d 858, 861–62 (2014). However, a mere understanding of settlement, without an enforceable written agreement, has no effect on the proceedings, and thus Rule 41(e) applies. *Henry*, 321 P.3d at 862, *clarifying Smith v. Garside*, 81 Nev. 312, 402 P.2d 246 (1965).
- *Legal malpractice*—Rule 41(e) time period *may be* tolled while the underlying lawsuit in which the alleged malpractice occurred is being litigated. *Kopicko v. Young*, 114 Nev. 1333, 1336–37 n.3, 971 P.2d 789, 791 n.3 (1998). Note that footnote 3 in *Kopicko* is unclear as to whether the Rule 41(e) tolling period is automatic or if a court-ordered stay of the case must be obtained. The better

practice is to seek a formal stay.

- *Construction defects*—Rule 41(e) is tolled during a court-ordered stay issued to require compliance with pre-litigation requirements of NRS Chapter 40. *D.R. Horton*, 358 P.3d at 925. Note that the commencement of a Chapter 40 proceeding does not, by itself, create tolling; rather, tolling in *D.R. Horton* was by virtue of an express stay order issued by the court.
- *Medical malpractice screening panel*—The Rule 41(e) time period is tolled while the matter is pending before a medical malpractice screening panel. *Baker*, 112 Nev. at 1111–12, 922 P.2d at 1204.

The *Baker* case specifically instructs that any matter that is "analogous" to a court-ordered stay described in *Boren* should qualify for tolling under Rule 41(e) to the extent a plaintiff is "prevented from bringing an action to trial." *Baker*, 112 Nev. at 1110, 922 P.2d at 1203. However, there is much gray area to this principle, as evidenced by *Morgan*, in which the period was not tolled even though the parties were forced to proceed through the mandatory court-annexed arbitration. *Morgan*, 118 Nev. at 320, 43 P.3d at 1039. Notably, *Morgan* contains a dissent in which three justices concluded that there was "no distinction" between the court's mandatory arbitration program and a court-ordered stay. 118 Nev. at 323, 43 P.3d at 1041.