

# CIVIL RULEMAKING IN NEVADA: CONTEMPLATING A NEW ADVISORY COMMITTEE

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## INTRODUCTION

In this modest contribution to the Symposium, I use the celebration of Nevada's sesquicentennial as an occasion to reflect on the process by which the Nevada Rules of Civil Procedure are amended. Part I describes the State's current civil rulemaking process. Part II compares our State's process to the approaches of neighboring jurisdictions. And Part III contemplates reform. My intention is to start a conversation about whether the Supreme Court of the State of Nevada should create a standing consultative committee that would, on an ongoing basis, review and propose amendments to the Nevada Rules of Civil Procedure.

### I. NEVADA'S RULEMAKING PROCESS

For more than sixty years, the Nevada Supreme Court has exercised authority over procedural rulemaking. In 1951, as part of a broad national trend to replace the vagaries of code pleading,<sup>1</sup> the Nevada Legislature passed an Enabling Act that delegated to the supreme court authority to adopt and publish rules "for the purpose of simplifying [the rules of civil practice and procedure] and promoting the speedy determination of litigation upon its merits."<sup>2</sup> The Enabling Act did not, however, outline a specific rulemaking process; those details were left for the court.

To draft the first set of the Nevada Rules of Civil Procedure, the court named an advisory committee of nine practicing lawyers from Reno. By 1952 the advisory committee had published a draft set of rules that essentially replicated the Federal Rules of Civil Procedure.<sup>3</sup> After the draft received public

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<sup>1</sup> See Charles E. Clark, *The Proposed Federal Rules of Civil Procedure*, 22 A.B.A. J. 447, 450 (1936). See also Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 910, 914-15 (1987).

<sup>2</sup> NEV. REV. STAT. § 2.120 (2013).

<sup>3</sup> See Prince A. Hawkins, *Proposed Nevada Rules of Civil Procedure*, 16 NEV. ST. B.J. 155, 156 (1951) ("The Advisory Committee, following the resolution of the State Bar, and with the approval of the Supreme Court, is basing its draft on the Federal Rules of Civil Proce-

comment, the court accepted the advisory committee's final recommendation and entered an order adopting the Nevada Rules of Civil Procedure, effective January 1, 1953.<sup>4</sup> Although its assigned task was fulfilled, it appears that the advisory committee continued working.<sup>5</sup> The committee ultimately dissolved, though I cannot confirm when or even whether it was ever formally disbanded.

Since 1953, the Nevada Rules of Civil Procedure have been amended more than twenty times. According to the Nevada Rules on the Administrative Docket,<sup>6</sup> the formal process of amendment commences with a petition filed by a judge,<sup>7</sup> the Director of the Administrative Office of the Courts,<sup>8</sup> or the Board of Governors of the State Bar.<sup>9</sup> The court may also amend on its own initiative.<sup>10</sup> Occasionally, the court appoints an ad hoc advisory committee to study

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ture. These rules have been adopted for state practice in approximately one-third of the states.”) *See also* John B. Oakley & Arthur F. Coon, *The Federal Rules in State Courts: A Survey of State Court Systems of Civil Procedure*, 61 WASH. L. REV. 1367, 1408 (1986) (referring to Nevada as a replica state).

One of the manifest goals (and promises) of the drafters of the Federal Rules of Civil Procedure was to craft a system that “would be so enlightened and simple that intra-state uniformity would follow naturally as states voluntarily adopted the federal model.” Thomas O. Main, “An Overwhelming Question” *About Non-Formal Procedure*, 3 NEV. L.J. 388, 391 n.13 (2002/2003) (citing Thomas Wall Shelton, *A New Era of Judicial Relations*, 23 CASE & COMMENT 388, 393 (1916) (federal rules “would prove a model that would, for reasons of convenience as well as of principle, be adopted by the states”); Charles Clark, *The Handmaid of Justice*, 23 WASH. U. L.Q. 297, 307 (1938) (“The new federal reform is likely . . . to have an important effect, beyond the direct and immediate changes it makes in federal practice, in setting the standard and tone of procedural reform throughout the country generally.”); Thomas O. Main, *Procedural Uniformity and the Exaggerated Role of Rules: A Survey of Intra-State Uniformity in Three States that Have Not Adopted the Federal Rules of Civil Procedure*, 46 VILL. L. REV. 311, 320–21 (2001)).

<sup>4</sup> *See* NEV. REV. STAT. § 2.120; Order Adopting Nevada Rules of Civil Procedure (Aug. 29, 1952).

<sup>5</sup> Leslie B. Gray, one of the original members of that Committee, is referred to in the April 1977 issue of *Inter Alia*, a magazine published by the Nevada State Bar: “[S]ince 1952, a member of the Advisory Committee.” *From the Editor*, INTER ALIA: J. NEV. ST. B., Apr. 1977, at 2, 2. Similarly, Royal A. Stewart penned a letter to the editor dated April 25, 1978 indicating that he had “been a member of the Advisory Committee to the Supreme Court of Nevada on the Rules of Civil Procedure since [1951].” Royal A. Stewart, *Letter*, INTER ALIA: J. NEV. ST. B., Aug. 1978, at 24, 24. Several of the Rules that were amended in the 1950s and 1960s also have “Advisory Committee Notes” from the period, suggesting a continuing role. *See* NEV. R. CIV. P. 3 advisory committee’s note (from 1959); NEV. R. CIV. P. 4 advisory committee’s note (from 1964); NEV. R. CIV. P. 4 advisory committee’s note (from 1971).

<sup>6</sup> NEV. R. ADMIN. DOCKET § 3 (effective since Dec. 3, 1985).

<sup>7</sup> *See, e.g.*, Petition to Amend Nevada Rules of Civil Procedure, ADKT No. 0487 (Nev. Mar. 1, 2013), available at <http://caseinfo.nvsupremecourt.us/public/caseView.do?jsessionid=8235CFEDC318F687B2FDE023ED95C07F?csIID=30900> (doc. 13-06450) (petition filed by two justices of the Nevada Supreme Court); Order Amending Nevada Rules of Civil Procedure 26, 33, 36, ADKT No. 88 (Nev. Dec. 13, 1985) (petition filed by two judges of the Nevada District Court).

<sup>8</sup> *See, e.g.*, Order Referring Petition to Supreme Court, ADKT No. 7 (Nev. Oct. 30, 1978).

<sup>9</sup> *See, e.g.*, Order Amending Nevada Rules of Civil Procedure 4, 5, 6, 7, 11, 12, 26, 28, 29, 30, 32, 33, 34, 37, 43, and 56, ADKT No. 84 (Nev. Dec. 13, 1985).

<sup>10</sup> *See, e.g.*, Order Amending Nevada Rule of Civil Procedure 4, ADKT No. 426 (Nev. July 8, 2008) (amending Nev. R. Civ. P. 54 to codify a rule first established by case law setting a timing requirement for attorney fees motions).

or to recommend proposed amendments.<sup>11</sup> Typically, the bench and bar are given a substantial opportunity to comment on proposed changes.<sup>12</sup> When the court finds an amendment appropriate, it issues an order with the amendment taking effect sixty days thereafter.<sup>13</sup>

By an administrative order in 2005, the court supplemented the rulemaking process by creating a new Bench-Bar Committee.<sup>14</sup> By rule, the Bench-Bar Committee is composed of the chief justice and all associate justices of the supreme court, twenty practitioners, and one ex-officio member each from the William S. Boyd School of Law and the National Judicial College.<sup>15</sup> The Bench-Bar Committee, which meets quarterly,<sup>16</sup> has a broad mandate that includes assisting the court in its review and consideration of rule changes, evaluating court processes and internal operating procedures, and the development of outreach programs to educate the bar and public.<sup>17</sup> Importantly, the committee's mandate extends beyond civil matters to include criminal, family, and other rules and procedures.

## II. OTHER RULEMAKING MODELS

In this part, I canvass the rulemaking approaches of our neighbors in the Western United States. In particular I focus on those jurisdictions that, like the State of Nevada, are rules (rather than code) states where the state supreme courts (rather than legislatures) are responsible for procedural rulemaking. The most profound difference between Nevada and its neighboring jurisdictions is the more pronounced decentralization of the rulemaking process outside of Nevada. By decentralization of the rulemaking *process*, I refer to the preliminary stages of rulemaking that precede the ultimate adoption of an amendment to a procedural rule. Even in states that have decentralized the process of rulemaking, the ultimate authority to amend state rules of civil procedure is localized in the supreme courts.

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<sup>11</sup> See, e.g., Order Amending Nevada Rules of Civil Procedure, ADKT No. 388 (Nev. Dec. 28, 2007); Order Establishing Committee, ADKT No. 276 (Nev. Aug. 20, 1999); Order Repealing Nevada Rule of Civil Procedure 68 and Adopting New Rule 68, ADKT No. 151 (Nev. July 29, 1998); Order, ADKT No. 94 (Nev. Oct 12, 1990). See NEV. R. ADMIN. DOCKET § 7.1 (“The chief justice may designate one or more persons, groups, committees, agencies, or others, as he deems proper as a study committee.”). *Id.* § 7.2 (“The study committee may hold hearings or solicit input as it sees fit in its study of the matter.”).

<sup>12</sup> See NEV. R. ADMIN. DOCKET § 6. See, e.g., *Appellate Case Management System*, SUP. CT. NEV., <http://caseinfo.nvsupremecourt.us/public/caseView.do?jsessionid=8235CFEDC318F687B2FDE023ED95C07F?csIID=30900> (last visited Apr. 29, 2014).

<sup>13</sup> NEV. REV. STAT. § 2.120(2) (2013).

<sup>14</sup> Order Adopting Rule 14 of the Supreme Court Rules, ADKT No. 386 (Nev. June 10, 2005).

<sup>15</sup> See NEV. SUP. CT. R. 14(2). Unfortunately, academics do not (yet) actually serve on the Bench-Bar Committee. Presumably this is because of oversight on the part of the supreme court, or a lack of interest in service on the part of the faculty.

<sup>16</sup> NEV. SUP. CT. R. 14(4).

<sup>17</sup> NEV. SUP. CT. R. 14(1)(a)–(c).

### A. *The Federal Approach*

The federal rulemaking model is likely the most familiar—and certainly the most elaborate—of the “other” jurisdictions.<sup>18</sup> There are three standing advisory committees through which proposed amendments to the Federal Rules of Civil Procedure typically pass before they reach the US Supreme Court. At the first instance, the Advisory Committee on Civil Rules (“Advisory Committee”) engages in a continuous study of the operation and effect of the Civil Rules, evaluates suggestions for rules amendments, and drafts reports and recommendations with proposed language.<sup>19</sup> Members of the Advisory Committee are named by the Chief Justice of the US Supreme Court;<sup>20</sup> the current committee is chaired by a federal district judge; other members of the committee include three commercial litigators, a plaintiff’s class action lawyer, a lawyer from the Office of the Attorney General, a law professor, and a state judge. Finally, the membership of the Advisory Committee includes seven more federal judges—six trial judges and one appellate judge—but no members of the Supreme Court.<sup>21</sup>

The Committee on Rules of Practice and Procedure (“Standing Committee”) reviews the recommendations of the Advisory Committee.<sup>22</sup> The Standing Committee also reviews the recommendations of the Advisory Committee on Appellate Rules, the Advisory Committee on Bankruptcy Rules, the Advisory Committee on Criminal Rules, and the Advisory Committee on Evidence Rules. Generally speaking, this Standing Committee somewhat resembles the responsibilities of Nevada’s Bench-Bar Committee (even though the Bench-Bar Committee does not have the benefit of perpetual advisory committees—more about that later). Members of the Standing Committee are chosen by the Chief Justice;<sup>23</sup> the current committee is chaired by a federal appellate judge; other

<sup>18</sup> The structure that I describe here is the process followed since 1958. For a description of earlier structures, see *A Self-Study of Federal Judicial Rulemaking: A Report from the Subcommittee on Long Range Planning to the Committee on Rules of Practice, Procedure and Evidence of the Judicial Conference of the United States*, 168 F.R.D. 679, 685 (1995). See also Brooke D. Coleman, *Recovering Access: Rethinking the Structure of Federal Civil Rulemaking*, 39 N.M. L. REV. 261, 265–76 (2009).

<sup>19</sup> *Procedures for the Judicial Conference’s Committee on Rules of Practice and Procedure and Its Advisory Rules Committee*, U.S. CTS. § 440.20.10, [www.uscourts.gov/uscourts/RulesAndPolicies/rules/Procedures\\_for\\_Rules\\_Cmtes.pdf](http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Procedures_for_Rules_Cmtes.pdf) (last updated Oct. 12, 2011) (as codified in *Guide to Judiciary Policy*, Vol. 1, § 440) (citing 28 U.S.C. § 331 (2006)) [hereinafter *Guide to Judiciary Policy*].

<sup>20</sup> *Committee Membership Selection*, U.S. CTS., <http://www.uscourts.gov/RulesAndPolicies/rules/about-rulemaking/committe-membership-selection.aspx> (last visited Apr. 29, 2014).

<sup>21</sup> See *Committees on Rules of Practice and Procedure: Chairs and Reporters*, U.S. CTS., <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/committee-roster.pdf> (last visited Apr. 29, 2014) (listing members of the Advisory Committee on Civil Rules).

<sup>22</sup> 28 U.S.C. § 2073(b) (2012). The functions prescribed to this Committee include (1) coordinating the work of the advisory committees, (2) suggesting proposals for them to study, (3) considering proposals they recommend for publication. *Guide to Judiciary Policy*, *supra* note 19, at § 440.30.10.

Although the popular name for the Committee on Rules of Practice and Procedure is the “Standing Committee,” this is an unfortunate nickname since all three of the committees referenced here are standing committees in the sense that they are perpetual or permanent, as opposed to *ad hoc* committees.

<sup>23</sup> *Committee Membership Selection*, *supra* note 20.

members of the committee include two law professors, four practicing lawyers, and one state judge.<sup>24</sup> Finally, the membership of the Standing Committee includes six more federal judges—three trial judges and three appellate judges—but again no members of the Supreme Court.

The Standing Committee sends its recommendations, in turn, to the Judicial Conference of the United States (“Judicial Conference”). The Judicial Conference is chaired by the Chief Justice of the US Supreme Court and has twenty-six members, to-wit: the chief judge of each of the thirteen courts of appeals and the US Court of International Trade, and a district judge elected from each of the twelve regional circuits.<sup>25</sup> The Judicial Conference is the policy-making arm of the judiciary; oversight of procedural rulemaking is only one of their manifold responsibilities.<sup>26</sup>

The Judicial Conference sends the proposed changes that it approves to the Supreme Court. The Supreme Court then approves, modifies, or disapproves of the proposed amendments, with approved changes then transmitted by the Supreme Court to Congress.<sup>27</sup> Unless Congress affirmatively modifies or blocks them, the proposed amendments take effect according to a timetable prescribed by statute.<sup>28</sup> Complexity notwithstanding, the federal rulemaking process generates a prodigious number of amendments.<sup>29</sup>

#### B. *Other Western States’ Approaches*

I chose ten states in the West as a comparison group. Eight of these ten states have modeled their state rules of procedure on the Federal Rules. The eight model states are Arizona, Colorado, Idaho, Montana, New Mexico, Utah, Washington, and Wyoming; of course Nevada is also a model state. These state schemata are not exact replicas of the Federal Rules: some were never true replicas and others started as replicas but no longer conform because amendments to the Federal Rules were not incorporated.<sup>30</sup> Still, the procedural systems in these states share fundamental similarities with each other and with the Federal Rules.<sup>31</sup> One might fairly assume, then, that rulemaking in the model states could piggyback on the elaborate rulemaking process in the federal

<sup>24</sup> See *Committees on Rules of Practice and Procedure: Chairs and Reporters*, *supra* note 21 (listing members of the Standing Committee on Rules of Practice and Procedure).

<sup>25</sup> 28 U.S.C. § 331 (2012).

<sup>26</sup> See *id.* For a list of activities of the Judicial Conference, see *Reports of the Proceedings*, U.S.CTS., <http://www.uscourts.gov/FederalCourts/JudicialConference/Proceedings.aspx> (last visited Apr. 29, 2014).

<sup>27</sup> 28 U.S.C. § 2074(a) (2012).

<sup>28</sup> *Id.*

<sup>29</sup> See Thomas O. Main, *Traditional Equity and Contemporary Procedure*, 78 WASH. L. REV. 429, 480–81 (2003). See also *infra* note 89–92 and accompanying text.

<sup>30</sup> See Oakley & Coon, *supra* note 3 (referring to Nevada as a replica state). See also Glenn S. Koppel, *Toward a New Federalism in State Civil Justice: Developing a Uniform Code of State Civil Procedure Through a Collaborative Rule-Making Process*, 58 VAND. L. REV. 1167, 1172–73 (2005); John B. Oakley, *A Fresh Look at the Federal Rules in State Courts*, 3 NEV. L.J. 354, 357, 376 (2002/2003).

<sup>31</sup> See Oakley, *supra* note 30, at 356–57. The effect of the Federal Rules on state systems of procedure extends even to those states that never adopted the Federal Rules as a model. See Charles Alan Wright, *Procedural Reform in the States*, 24 FED. RULES DECISIONS 85, 85–86 (1960).

courts. After all, how much infrastructure is necessary for civil rulemaking at the state level when the federal infrastructure gathers the relevant research, evaluates alternatives, vets the proposals, and publishes detailed reports? In all eight model states, the answer to that question seems to be: a significant amount. Perhaps this should not surprise: each state faces unique circumstances and has unique preferences;<sup>32</sup> differences in legal culture are easy to imagine, even if difficult to measure. And, of course, because “procedure is power” we should expect the different variables between state and federal courts (and between and among state courts) to yield different outcomes.<sup>33</sup>

The eight model states divide naturally into two groups. In one group, the rulemaking committees are formally constituted by and for the state supreme courts. In the other group, the rulemaking committees are formally constituted by the state bar associations; the supreme courts then integrate the work of these bar committees into the rulemaking process.

### 1. Model States with Court Committees

Of the eight model states, five—Colorado, Idaho, Montana, New Mexico, and Utah—have committees that share the following characteristics: (1) the committee members are appointed by their state supreme courts; (2) the committees are permanent, as opposed to *ad hoc*; and (3) the committees are focused exclusively on the rules of civil practice and procedure.

Of course there are also some differences among the approaches of these five states. Some committees meet only once per year, while others meet monthly. Some have fewer than a dozen members while others have nearly two dozen. In four of the five states the committees are chaired by distinguished practitioners. In two states, there are no justices of the supreme court serving as members of the rulemaking committee; in two states, the rules contemplate justices of the supreme court serving as liaison members to the committee; and in one state a justice of the supreme court chairs the committee. The committees have various names, but the word *advisory* is often used; naturally, the committees serve in an advisory capacity to the ultimate rulemakers, their respective supreme courts.

A cursory look at the rulemaking committees in each of the five model states may be useful to some readers.

In Colorado, the supreme court has a standing Civil Rules Committee.<sup>34</sup> This committee is charged with the responsibility of “periodic review, correcting, updating and improvement” of the rules of civil procedure.<sup>35</sup> The chair

<sup>32</sup> This point evokes debates that surrounded adoption of the Federal Rules of Civil Procedure in the first instance. In the 1930s, Connor Hall and Thomas Walsh argued that uniformity of federal procedure was inconsistent with the size and diversity of the United States. See Stephen N. Subrin, *Federal Rules, Local Rules, and State Rules: Uniformity, Divergence, and Emerging Procedural Patterns*, 137 U. PA. L. REV. 1999, 2007–11 (1989).

<sup>33</sup> See Stephen B. Burbank, *Procedure, Politics and Power: The Role of Congress*, 79 NOTRE DAME L. REV. 1677, 1703 (2004). See also Thomas O. Main, *The Procedural Foundation of Substantive Law*, 87 WASH. U. L. REV. 801, 818–22 (2010) (collecting authorities).

<sup>34</sup> See *Civil Rules Committee*, COLO. CTS., [http://www.courts.state.co.us/Courts/Supreme\\_Court/Committees/Committee.cfm?Committee\\_ID=5](http://www.courts.state.co.us/Courts/Supreme_Court/Committees/Committee.cfm?Committee_ID=5) (last visited Apr. 29, 2014).

<sup>35</sup> *Id.*

of the committee is a distinguished practitioner; one of the justices of the supreme court serves as a liaison to the committee; and the remainder of the committee of more than twenty persons is populated by judges, magistrates, a court clerk, law school professors, and a large number of practitioners representing various areas of practice.<sup>36</sup> Members are appointed by the supreme court.<sup>37</sup> This committee meets at least seven times per year and makes its recommendations directly to the supreme court.<sup>38</sup>

In Idaho, the supreme court has a standing Civil Rules Advisory Committee.<sup>39</sup> This committee has eleven members—nine practitioners and two judges. One of these judges is a trial judge, and the other is a justice of the supreme court who also chairs the committee.<sup>40</sup> The committee usually meets only once or twice per year.<sup>41</sup> This may appear to be a relatively modest infrastructure, but Idaho has a constellation of standing advisory committees, including an Appellate Rules Advisory Committee, Criminal Rules Advisory Committee, Evidence Rules Advisory Committee, and Juvenile Rules Advisory Committee.<sup>42</sup> This constellation suggests that the Civil Rules Advisory Committee can focus almost exclusively on the Idaho Rules of Civil Procedure. Further still, the Civil Rules Advisory Committee is not the only standing committee that is proposing amendments to the Idaho Rules of Civil Procedure; the Idaho Supreme Court's Advancing Justice Committee recently proposed amendments as well.<sup>43</sup>

In Montana, there is an Advisory Commission on Rules of Civil and Appellate Procedure.<sup>44</sup> As its name suggests, the advisory commission's rulemaking responsibility includes review of both trial and appellate proce-

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<sup>36</sup> *Members of the Committee on Rules of Civil Procedure*, COLO. CTS. [http://www.courts.state.co.us/userfiles/file/Court\\_Probation/Supreme\\_Court/Committees/Civil\\_Rules\\_Committee/Civil%20RulesMemberListAugust292013.pdf](http://www.courts.state.co.us/userfiles/file/Court_Probation/Supreme_Court/Committees/Civil_Rules_Committee/Civil%20RulesMemberListAugust292013.pdf) (last visited Apr. 29, 2014).

<sup>37</sup> *Civil Rules Committee*, *supra* note 34.

<sup>38</sup> *See id.*

<sup>39</sup> *Idaho Supreme Court - Judicial Committees*, ST. IDAHO JUD. BRANCH, <http://www.isc.idaho.gov/problem-solving/judicial-committees> (last visited Apr. 29, 2014).

<sup>40</sup> *Id.*

<sup>41</sup> According to Cathy Derden, the Reporter to the Committee, members of the Advisory Committee typically serve one or two six-year terms. There are no law professors on the current Committee; however, any law faculty member who is interested in serving would likely be added to the Committee. Author's telephone conversation with Cathy Derden, Comm. Reporter (Feb. 3, 2014).

<sup>42</sup> *Idaho Supreme Court - Judicial Committees*, *supra* note 39.

<sup>43</sup> *See IRCP 56: Revisions Recommended by Advancing Justice Committee*, ST. IDAHO JUD. BRANCH, [http://www.isc.idaho.gov/proposals/AJC\\_ProposedAmendments\\_IRCP56andIRCP16\\_02-26-14.pdf](http://www.isc.idaho.gov/proposals/AJC_ProposedAmendments_IRCP56andIRCP16_02-26-14.pdf) (last visited Apr. 19, 2014). *See also* Order, In re: Amendment of Idaho Rule of Civil Procedure (I.R.C.P.) 3(a) (Idaho Nov. 25, 2013), available at [http://www.isc.idaho.gov/orders/IRCP\\_3a\\_01-14.pdf](http://www.isc.idaho.gov/orders/IRCP_3a_01-14.pdf) (amending the Idaho Rules of Civil Procedure upon a recommendation by the Supreme Court's Guardianship and Conservatorship Committee). The Administrative Conference, another standing committee also has responsibilities that include, among many others, some oversight of procedural rulemaking. IDAHO CT. ADMIN. R. 43A (enumerating the responsibilities of the Administrative Conference).

<sup>44</sup> *Advisory Commission on Rules of Civil and Appellate Procedure*, MONT. JUD. BRANCH, [http://courts.mt.gov/supreme/boards/advisory\\_commission/default.mcp](http://courts.mt.gov/supreme/boards/advisory_commission/default.mcp) (last visited Apr. 29, 2014).

dure.<sup>45</sup> The advisory commission has eleven members appointed by the supreme court. Membership includes nine practitioners (one of whom chairs the advisory commission), one trial judge, and one appellate judge (but no justices of the supreme court).<sup>46</sup> The advisory commission meets on an as-needed basis.<sup>47</sup> The supreme court also appoints a separate standing committee called the Uniform District Court Rules Commission.<sup>48</sup> The uniform commission has seven members, including four practitioners (one of whom chairs the uniform commission), two trial judges, and a law professor.<sup>49</sup> The uniform commission focuses on unifying the local rules of the fifty-six district courts in Montana. Because the district courts are the trial courts of general jurisdiction in Montana, and therefore are subject to the Montana Rules of Civil Procedure, there is some overlap between the rulemaking responsibilities of the uniform commission and the advisory commission. In areas of overlap, the uniform commission may bring matters to the attention of the advisory commission.<sup>50</sup>

In New Mexico, the supreme court has a standing Rules of Civil Procedure for the District Courts Committee that meets at least six times per year.<sup>51</sup> This committee “is responsible for Rules of Civil Procedure for the District Courts, and Civil Forms for the district court.”<sup>52</sup> The committee includes nine practitioners who are appointed by the supreme court to “reflect geographic balance” and who will “represent the various factions of the bar.”<sup>53</sup> The state bar and the court may each also appoint a liaison member to the committee.<sup>54</sup> Members are appointed for one or two terms of three years each.<sup>55</sup>

Finally, in Utah, the supreme court has six advisory rulemaking committees. The rulemaking committees are devoted to the following subjects: civil procedure, criminal procedure, juvenile court procedure, appellate procedure, evidence, and the rules of professional practice.<sup>56</sup> The Advisory Committee on the Rules of Civil Procedure meets approximately eight times per year.<sup>57</sup>

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<sup>45</sup> The Advisory Commission’s charge does not, however, include responsibility of evidence rulemaking, for example. See *Commission on Rules of Evidence*, MONT. JUD. BRANCH, <http://courts.mt.gov/supreme/boards/evidence/default.mcp>x (last visited Apr. 29, 2014).

<sup>46</sup> *Advisory Commission on Rules of Civil and Appellate Procedure*, *supra* note 44.

<sup>47</sup> Author’s conversation with Gregory S. Munro, Professor of Law, University of Montana (Feb. 18, 2014).

<sup>48</sup> *Uniform District Court Rules Commission*, MONT. JUD. BRANCH, [http://courts.mt.gov/supreme/boards/uniform\\_dc\\_ruls/default.mcp](http://courts.mt.gov/supreme/boards/uniform_dc_ruls/default.mcp)x (last visited Apr. 29, 2014).

<sup>49</sup> *Id.*

<sup>50</sup> Author’s conversation with Professor Gregory S. Munro, *supra* note 47.

<sup>51</sup> N.M. R. ANN. 23-106(M)(2).

<sup>52</sup> *Id.* Other standing committees include Courts of Limited Jurisdiction, Appellate Rules Committee, Rules of Evidence Committee, Rules of Criminal Procedure for the District Courts Committee, Children’s Court Rules Committee, and the Joint Committee on Rules of Procedure for New Mexico State Courts. *Id.*

<sup>53</sup> *Id.* at 23-106(B).

<sup>54</sup> *Id.* at 23-106(F), (G). Typically, the Office of Supreme Court Counsel designates a staff attorney to serve as the Court’s liaison to standing committees. See SUPREME COURT OF N.M., RULES COMMITTEE HANDBOOK § 3, at 7–8 (2013) (on file with author).

<sup>55</sup> N.M. R. ANN. 23-106(D).

<sup>56</sup> See *Boards and Committees*, UTAH CTS., <http://www.utcourts.gov/committees/index.cgi> (last visited Apr. 29, 2014).

<sup>57</sup> See *Civil Procedures Committee*, UTAH CTS., <http://www.utcourts.gov/committees/civ-proc/> (last visited Apr. 29, 2014).

Chaired by a distinguished practitioner, this committee of more than twenty includes practitioners, academics, court professionals, and trial and intermediate appeals court judges.<sup>58</sup> The Advisory Committee makes its recommendations directly to the supreme court.<sup>59</sup>

## 2. *Model States with Bar Committees*

Of the eight model states, three—Arizona, Washington, and Wyoming—pursue a different course of rulemaking. In these states, the committees that undertake the laboring oar in the earlier stages of civil rulemaking are appointed by the state bar associations, rather than by the state supreme courts. In other respects, however, these committees resemble the approaches of the other five model states: the committees are permanent, as opposed to *ad hoc*; and their recommendations to their respective supreme courts are merely advisory.

In Arizona, the President of the State Bar, with the approval of the Board of Governors, appoints members of the Civil Practice and Procedure Committee.<sup>60</sup> That committee presently includes nearly forty members, more than two-thirds of whom are practitioners (including one distinguished practitioner who chairs the Committee). The committee also includes five trial judges, two intermediate appeals court judges, and a few staff attorneys from the supreme court.<sup>61</sup> The committee meets monthly, and has a number of subcommittees to fulfill its broad charge. The committee's mandate includes review, not only of matters pertaining to the Arizona Rules of Civil Procedure, but also of matters pertaining to appellate procedure in the court of appeals and supreme court.<sup>62</sup> The committee also studies and makes recommendations regarding the rules of evidence.<sup>63</sup> Recommendations of the committee are forwarded to the Board of Governors of the Arizona State Bar for their approval; the Board of Governors, in turn, submits them to the supreme court. The committee both initiates reforms and comments on reforms proposed by others. A number of proposed reforms are initiated outside the committee process because the amendment process is triggered by petition to the supreme court, and these petitions can be filed by "any person, association, or public agency."<sup>64</sup>

<sup>58</sup> *Boards and Committees*, *supra* note 56.

<sup>59</sup> See Minutes of the Utah Supreme Court Advisory Committee on the Rules of Civil Procedure (Oct. 23, 2011), available at <http://www.utcourts.gov/committees/civproc/minutes/2013-10-23.pdf>.

<sup>60</sup> STATE BAR OF ARIZ., STANDING COMMITTEE GUIDELINES 1 (2013) (citing the State Bar of Ariz. Bylaws, art. VIII, § 8.02(A)).

<sup>61</sup> See *State Bar of Arizona: Civil Practice and Procedure Committee Roster 2013-2014*, ST. B. ARIZ., [http://www.azbar.org/media/497498/civil\\_practice\\_and\\_procedure\\_2013-2014\\_roster\\_3.pdf](http://www.azbar.org/media/497498/civil_practice_and_procedure_2013-2014_roster_3.pdf) (last visited Apr. 29, 2014).

<sup>62</sup> *Civil Practice and Procedure Committee 2013-14 Plan Summary*, ST. B. ARIZ. (Sept. 30, 2013), [http://www.azbar.org/media/736906/cppc\\_2013-14\\_committee\\_charter.pdf](http://www.azbar.org/media/736906/cppc_2013-14_committee_charter.pdf).

<sup>63</sup> *Id.* Matters related to criminal procedure are referred to a separate standing committee, to-wit: the Criminal Practice & Procedure Committee. See *Criminal Practice & Procedure Committee*, ST. B. ARIZ., [http://www.azbar.org/sectionsandcommittees/committees/criminal\\_practiceprocedure](http://www.azbar.org/sectionsandcommittees/committees/criminal_practiceprocedure) (last visited Apr. 29, 2014).

<sup>64</sup> ARIZ. SUP. CT. R. 28(A)(1).

In Washington, the process is substantially similar to the approach in Arizona.<sup>65</sup> The Washington State Bar Association appoints members to its Court Rules and Procedures Committee, which proposes and reviews proposed amendments to the Rules of Civil Procedure.<sup>66</sup> This, too, is a very large committee of more than thirty members, including one trial judge and one intermediate appeals court judge. This committee meets monthly and also employs subcommittees.<sup>67</sup> The charge of this committee is broader than others because it includes rule changes for both civil and criminal procedure. Again, recommendations of the committee are forwarded to the Board of Governors of the State Bar for their approval; the Board of Governors, in turn, submits their own recommendation to the supreme court. The committee both initiates reforms and comments on reforms proposed by others. Indeed, by supreme court rule, all proposed amendments are referred to the state bar to give the committee the opportunity for comment.<sup>68</sup>

Finally, in Wyoming, the President of the State Bar Association appoints members to a standing committee called the Permanent Rules Advisory-Civil Division.<sup>69</sup> As we have seen in other contexts above, the Wyoming State Bar has a constellation of five rulemaking committees: Civil, Criminal, Appellate, Evidence, and Juvenile.<sup>70</sup> The Advisory Committee, which meets periodically, has ten members, including one trial judge.<sup>71</sup> Unlike Arizona and Washington, it appears that the Advisory Committee's recommendations are submitted directly to the supreme court (rather than through the hierarchy of the state bar).<sup>72</sup>

### 3. *The Code States*

The only two states in the West with procedural schemata that are not modeled on the Federal Rules are California and Oregon.

California is a code state where the rules of practice and procedure are promulgated through the legislative process.<sup>73</sup> Formal standing committees in

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<sup>65</sup> WASH. GEN. R. 9(d).

<sup>66</sup> *Court Rules and Procedures Committee*, WASH. ST. B. ASS'N, <http://www.wsba.org/Legal-Community/Committees-Boards-and-Other-Groups/Court-Rules-and-Procedures-Committee> (last visited Apr. 29, 2014).

<sup>67</sup> *See 2013 - 2014 Court Rules & Procedures Committee Meeting Schedule*, WASH. ST. B. ASS'N (Aug. 27, 2013), [http://www.wsba.org/Legal-Community/Committees-Boards-and-Other-Groups/~media/Files/Legal%20Community/Committees\\_Boards\\_Panels/Court%20Rules/Meeting%20Schedule.ashx](http://www.wsba.org/Legal-Community/Committees-Boards-and-Other-Groups/~media/Files/Legal%20Community/Committees_Boards_Panels/Court%20Rules/Meeting%20Schedule.ashx).

<sup>68</sup> WASH. GEN. R. 9(f)(2).

<sup>69</sup> *See Permanent Rules Advisory-Civil*, WYO. ST. B., [http://www.wyomingbar.org/contact\\_us/boardlisting.html?committee=Permanent%20Rules%20Advisory-Civil&search\\_term=PermanentRulesCivil](http://www.wyomingbar.org/contact_us/boardlisting.html?committee=Permanent%20Rules%20Advisory-Civil&search_term=PermanentRulesCivil) (last visited Apr. 29, 2014). *See also* Wyo. State Bar Bylaws, art. X, § 1(b).

<sup>70</sup> *Boards and Committees*, WYO. ST. B., [http://www.wyomingbar.org/contact\\_us/boards\\_and\\_committees.html](http://www.wyomingbar.org/contact_us/boards_and_committees.html) (last visited Apr. 29, 2014).

<sup>71</sup> *Permanent Rules Advisory-Civil*, *supra* note 69.

<sup>72</sup> *See, e.g.*, Order Adopting Amendments to Rules 16, 26, 50, 54, and 77 of the Wyoming Rules of Civil Procedure (Apr. 21, 2010), *available at* [http://www.courts.state.wy.us/CourtRules/Orders/OrderWyomingRulesOfCivilProcedure\\_20100701.pdf](http://www.courts.state.wy.us/CourtRules/Orders/OrderWyomingRulesOfCivilProcedure_20100701.pdf).

<sup>73</sup> *See, e.g.*, S.B. 384, 2011 Leg., Reg. Sess. (Cal. 2011). *See generally* Glenn S. Koppel, *Populism, Politics, and Procedure: The Saga of Summary Judgment and the Rulemaking*

the California legislature monitor and propose changes to civil practice and procedure;<sup>74</sup> only legislators are members of these committees. California also has a Judicial Council which has some responsibility for civil rulemaking. The Judicial Council, in turn, has advisory committees, including a Civil and Small Claims Advisory Committee.<sup>75</sup> This advisory committee has twenty-five members, about half of whom are trial and appellate judges; none of the members, however, are justices of the California Supreme Court.<sup>76</sup>

Oregon is the other code state. But the Oregon legislature has delegated the task of amending its procedures to a standing committee called the Council on Court Procedures.<sup>77</sup> By statute, the Council consists of one supreme court judge, one court of appeals judge, eight trial court judges, twelve lawyers, and one member of the public. The Council meets monthly.<sup>78</sup> Amendments favored by the Council are reported to the Legislature at the beginning of each session and become effective on January 1 thereafter unless the Legislature rescinds or modifies them.<sup>79</sup> Even this code state, then, has a rulemaking procedure that shares certain characteristics with the rulemaking processes in other Western states.

### III. CONTEMPLATING REFORM

A comparison of Nevada's civil rulemaking process with the approaches of other Western states yields two important observations. First, the size of Nevada's infrastructure for civil rulemaking is very modest. And second, the participation of supreme court justices in all stages of the rulemaking process is unusual. I will substantiate each of these observations before interrogating the possibility of reform.

The rulemaking infrastructure in Nevada is modest because we are one of only two states in the West without a standing advisory committee that is focused exclusively on the operation of the rules of civil practice and procedure. To be sure, the Bench-Bar Committee is a standing committee that proposes and reviews changes to the Nevada Rules of Civil Procedure. But the Bench-Bar Committee, which meets only quarterly, is charged not only with civil procedure, but also with the procedural rules for criminal, family, and other matters.<sup>80</sup> By contrast, the states of Utah and New Mexico have commit-

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*Process in California*, 24 PEPP. L. REV. 455 (1997) (discussing the rulemaking power of the California Legislature).

<sup>74</sup> See SENATE JUDICIARY COMMITTEE, <http://sjud.senate.ca.gov/committeehome> (last visited Mar. 10, 2014); CAL. ST. ASSEMBLY COMMITTEE JUDICIARY, <http://ajud.assembly.ca.gov/committeehome> (last visited Apr. 29, 2014).

<sup>75</sup> CAL. CT. R. 10.41.

<sup>76</sup> *Civil and Small Claims Advisory Committee*, CAL. CTS. (Jan. 2, 2014), <http://www.courts.ca.gov/documents/civcom.pdf>.

<sup>77</sup> OR. COUNCIL CT. PROCS., <http://legacy.lclark.edu/~ccp/> (last visited Mar. 10, 2014). Notwithstanding its broad title, the Council's efforts are focused almost exclusively on "creating, reviewing, and amending the Oregon Rules of Civil Procedure . . ." *Id.*

<sup>78</sup> See *Meeting Schedule 2013–2015*, OR. COUNCIL CT. PROCS., <http://legacy.lclark.edu/~ccp/CurrentBienniumMeetings.htm> (last visited Mar. 10, 2014).

<sup>79</sup> See *History of the Council*, OR. COUNCIL CT. PROCS., <http://legacy.lclark.edu/~ccp/LegislativeHistory.htm> (last visited Mar. 10, 2014).

<sup>80</sup> See *supra* Part I.

tees that typically meet twice as often as the Bench-Bar Committee meets, and the agendas of those Utah and New Mexico rulemaking committees are limited to matters of civil procedure.<sup>81</sup> Only the State of Washington expects one committee to manage a rulemaking portfolio as diverse as Nevada's Bench-Bar Committee, and Washington's committee has more than thirty members, meets monthly, and has a network of subcommittees.<sup>82</sup>

The rulemaking infrastructure in Nevada is also distinctive because the justices of the supreme court are involved in all stages of the rulemaking process. First, justices often file the petitions to initiate the rulemaking process.<sup>83</sup> By rule, petitions may only be filed by "[a]ny judge, the director of the administrator office of the courts, or the board of governors of the state bar of Nevada . . . ."<sup>84</sup> Gate-keeping may be an admirable goal, but it can be time-consuming for the gate-keepers who must act as screeners for bad ideas and as couriers for good ideas. Next, the chief justice of the supreme court must review and, within a (long) month, rule on each petition, no matter the filer—rejecting the petition, referring it directly to the court for consideration, or referring it to a committee.<sup>85</sup> Expertise and judgment are assured; but discernment can take time. When the appropriate next step is an advisory committee, the chief justice must also find the appropriate experts to populate a committee.<sup>86</sup> And finally, when the matter is referred to the Bench-Bar Committee, this too demands the attention of the justices of the supreme court. One (or two) justices chair(s) the Bench-Bar Committee and formally, even if not in practice, all of the justices are members of the Bench-Bar Committee.<sup>87</sup>

By contrast, in the other Western states, generally speaking, the supreme courts' involvement in procedural rulemaking is much more limited. Several states have a rulemaking process like Nevada's that is initiated by a petition. But even in these states, the justices are not filing the petitions; and with a standing committee, the petitions can simply be referred by the court without substantial involvement in the first instance. In other jurisdictions, the supreme court is genuinely engaged in rulemaking only at the end of the process—after the relevant literature and data has been assembled and digested, after the alternatives have been explored, and after the vetting has fine-tuned the proposal. Although the rulemaking committees in other states involve judges in all stages of the rulemaking process, in the earlier stages these tend to be trial or intermediate appeals judges, not supreme court justices.

But of course a different process is not necessarily an inferior process. One advantage of Nevada's current approach is that the need for amendment must reach some tipping point before the process is initiated: only a judge or the administrative office or the Board of Governors of the State Bar can trigger

<sup>81</sup> See *supra* notes 51, 57 and accompanying text.

<sup>82</sup> See *supra* note 67 and accompanying text.

<sup>83</sup> See, e.g., Petition to Amend Nevada Rules of Civil Procedure, *supra* note 7; Order Amending NRCP 16.2 and Adding NRCP 16.205, ADKT No. 0476 (Aug. 1, 2012); Order Adopting NRCP 7.1, NRAP 26.1 and Amending NRAP 28, ADKT No. 0466 (Nov. 4, 2011); Order Amending NRCP 16.1(a)(2), ADKT No. 0472 (Aug. 1, 2012).

<sup>84</sup> NEV. R. ADMIN. DOCKET § 3.2.

<sup>85</sup> NEV. R. ADMIN. DOCKET § 4.3.

<sup>86</sup> See *supra* Part I.

<sup>87</sup> See *supra* note 15 and accompanying text.

the process.<sup>88</sup> One disadvantage, then, of establishing a standing committee devoted to Nevada civil practice could be the proliferation of unnecessary amendments to the Nevada Rules of Civil Procedure. Every rule change imposes some externality on those who must use and interpret the new rule; unnecessary amendments impose unnecessary costs. And every rule change introduces the possibility of unintended consequences.<sup>89</sup>

“Too much change” is a fair concern. Indeed, the federal Advisory Committee on Civil Rules has been so criticized.<sup>90</sup> Specifically, the charge has been that much of that Committee’s “recent activity is expressly aimed not at making procedure better, but at tinkering with terminology.”<sup>91</sup> Professor Freer has linked this output to the Committee’s structure: “Any standing committee is probably under pressure to justify its existence . . . . No one wants to say, ‘I served on the Committee and during my years it set forth no amended rules.’ ”<sup>92</sup>

Yet establishing a permanent advisory committee need not lead inevitably to hyperactive tinkering. The federal Advisory Committee on the Rules of Evidence, for example, has been criticized for its *inactivity*.<sup>93</sup> Most importantly, however, one must remember that a standing committee devoted to review and improvement of the rules of civil procedure would be merely an advisory committee. Only the supreme court can amend the Nevada Rules of Civil Procedure. Moreover, by constituting and populating an advisory committee on civil procedure, the supreme court could establish priorities and expectations for the committee.

I would anticipate that an advisory committee on civil rules could be an important part of an excellent system of civil rulemaking in the State. I imagine a standing committee that could be informed with empirical data about civil litigation in Nevada and familiar with the relevant scholarly and practical literature. A standing committee would have the continuity to recognize and reflect upon trends, to study the consequences of its prior amendments, and to address problems within their larger contexts. The alternative is the status quo: reactive triage by the supreme court and/or a Bench-Bar Committee that has divided responsibilities. Even if the status quo is working well now, query whether it is built to withstand whatever awaits us in the future of civil litigation.

In my experience, great ideas often take time to develop. The life cycle of a great idea often progresses in an order that looks something like this: dumb\_ reckless\_ strange\_ peculiar\_ intriguing\_ brilliant. Unfortunately, many people

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<sup>88</sup> See *supra* notes 7–9 and accompanying text.

<sup>89</sup> See, e.g., Richard D. Freer, *The Continuing Gloom About Federal Judicial Rulemaking*, 107 Nw. U. L. REV. 447, 471 (2013).

<sup>90</sup> *Id.* at 468.

<sup>91</sup> *Id.* The charge of tinkering takes two forms. One is justifying their existence. The other is tinkering to forestall more meaningful reform. See Letter of Transmittal, 446 U.S. 996, 997, 1000 (1980) (Powell, J., dissenting) (dissenting from the Supreme Court’s adoption of the 1980 amendments to the discovery rules not because they were “inherently objectionable” but rather because “these tinkering changes will delay for years the adoption of genuinely effective reforms”).

<sup>92</sup> Freer, *supra* note 89.

<sup>93</sup> See, e.g., Michael Teter, *Acts of Emotion: Analyzing Congressional Involvement in the Federal Rules of Evidence*, 58 CATH. U. L. REV. 153, 160 (2008).

abandon their ideas when they incur the resistance of the first few stages of that life cycle. But if one is persistent, the resistance can shape and even improve the idea until, all of a sudden, its brilliance is apparent to all. A committee can give attention to the development of ideas that a busy supreme court and a busy Bench-Bar Committee may not have the luxury to offer.

Alternatively, my suggestion of a permanent advisory committee is the aforementioned dumb idea. But dialogue is the grand ambition of scholarship, and the dumb idea presented here may trigger a conversation that shapes and improves it. In any event, it seems timely—and fitting upon a sesquicentennial celebration—to contemplate some initiative of the bench, the bar, and the academy that may have an important legacy. An advisory committee on civil rules would be an opportunity for the bench, the bar, and the academy to learn from the experiences and perspectives of each other while pursuing a shared priority: ever improving the delivery of civil justice in the State of Nevada.

#### CONCLUSION

The Nevada Supreme Court should consider creating a standing advisory committee on civil rules. The committee's charge should be to engage in a continuous study of the operation and effect of the Nevada Rules of Civil Procedure, to evaluate suggestions for rule amendments, and to draft reports and recommendations with proposed language. The committee's recommendations would be only advisory to the supreme court. Membership on the advisory committee should ensure representation by trial judges and by practicing attorneys of diverse practice areas. Academics could be added as reporters or as members.