COMMUNIQUÉ

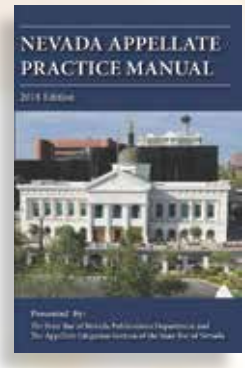
THE OFFICIAL PUBLICATION OF THE CLARK COUNTY BAR ASSOCIATION
SEPTEMBER 2020

Appellate Practice

In this Issue

BOOKS FROM THE BAR

The State Bar of Nevada has several reference publications available to meet the needs of Nevada attorneys, from comprehensive guides to compilations of templates in a variety of practice areas.



Nevada Appellate Practice Manual – 2018 EDITION

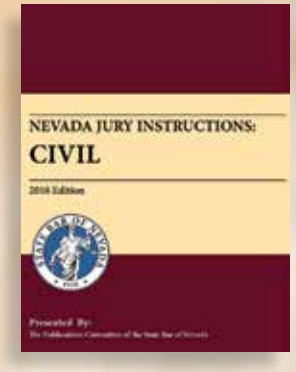
The 2018 edition has been painstakingly edited by experts in appellate practice and reflects all recent changes in the law as well as the most up-to-date procedures for practicing in Nevada's appellate courts. Some topics covered include: initiating an appeal, jurisdiction, settlement, criminal appeals, fast-track child custody, oral arguments and record preparation...in addition to many others.

Nevada Gaming Law Practice and Procedure Manual

Written by attorneys with decades of experience in the practice of gaming law, this reference manual includes 18 chapters covering topics such as licensing, financing, gaming devices, race and sports books, compliance reporting requirements, interactive gaming and much more.

Contract Templates for Nevada Attorneys

This publication provides lawyers with a large selection of form contracts drafted for a wide variety of transactions, with specific regard to the laws of Nevada. The customizable forms are designed as a starting point for practitioners to craft custom agreements for use in commercial and residential purchases and leases, employment, intellectual property, deeds and cyber law...to name a few.



Nevada Jury Instructions: Civil - 2018 EDITION

Nevada Jury Instructions: Civil provides attorneys participating in civil jury trials in Nevada with downloadable sample jury instructions in an easy-to-use format. The language in each template has been adapted from documents actually used in trial with an eye to being as party-neutral as possible. The book includes subjects such as: contractual relationships, employment law, evidence, experts, intentional torts, fiduciary relationships, personal injury damages, eminent domain and more!

We've Got More!

The state bar's online store includes additional titles of interest to attorneys practicing in Nevada, such as Nevada Business Entities, Succession Planning in Nevada and the Guide to the Tribal Courts of the Inter-Tribal Council of Nevada.

To see all of the current titles available, visit:
www.nvbar.org > Publications > State Bar Publications

OFFICIAL Clark County Bar Association PUBLICATION

COMMUNIQUÉ

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On the Cover

Photo of Supreme Court of Nevada courtesy of Stephanie Abbott.

Highlights

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Clark County Bar President's Message

Great news for CCBA members!

By Mariteresa Rivera-Rogers, Esq.

This month I share with you our accomplishments in a couple of areas that will make your membership benefits more valuable and your website access smoother. Stephanie and Donna have been hard at work to make these new benefits accessible to you. Please read and follow their advice to connect to the website and explore or sign up for our health plan options if you happen to need one.

Clark County Bar revamps website

We recently began a revamp of the bar's website, www.clarkcountybar.org. We have built pages to highlight information about the CCBA, including member benefits and events. We will be adding functionality for members and site visitors in the coming weeks and months. The biggest changes to the site affect the member directory, recorded CLE seminars, and member login credentials:

- **Member directory:** It has limited functionality right now, but we plan to fix that. Look for improvements to the directory in the coming months!
- **Recorded CLE seminars:** We are in the process of uploading our extensive library of recorded and alternative format CLE library to the website. You may browse the available titles and order online as titles go live. Be sure to login to get the CCBA Member price. And you will need to login to watch/listen to the recorded CLE seminars.
- **Member login credentials:** Active members will need to login and reset their password on the account details page at https://clarkcountybar.org/my-account/edit-account/. To reset your password, simply follow the prompt for "Lost your password?"

If you have any questions, please reach out to StephanieAbbott@clarkcountybar.org

Comprehensive health plan options now available to CCBA members

CCBA has partnered with Prominence Health Plan to bring our attorney members and staff affordable, quality health coverage. There are a variety of health plans to choose from and all feature an array of important medical benefits at an affordable cost. Your offices can now consider and enroll in these options. Medical rates are guaranteed August 1, 2020 through September 30, 2021. If your practice currently has insurance through another carrier, you can work with your existing broker to get NEW CCBA Association Health Plans through Prominence Health Plan. You don't have to wait for your traditional renewal period! If you don't have an existing broker, you can contact Dillon Health at 702-518-0929 or 775-560-7006. For more information, see content listed on pages 5-6.

Join us for the CCBA Health Plans Webinar on Thursday, September 17, 2020 (12-1pm) to learn more! For more information, see details listed on page 7.

As always, we thank you for your membership and support and encourage you to participate in our programs, take advantage of our benefits to members, and attend CLE's via audiovisual means from our new offerings, or from our library.

Dealing with COVID-19 for half a year now, has not been easy. We hope you have been able to stay afloat and ride with the tide in these murky waters. **C**

Mariteresa Rivera-Rogers, Esq. is an associate at the Las Vegas criminal defense firm Wright Marsh & Levy, practicing in criminal defense. Mariteresa serves as president of the Clark County Bar Association through December of 2020.

2020 Association Health Plans for Clark County Bar Association

Don't Wait for Your Renewal to Get a Quote!
Rolling enrollment effective now, plans renew October 2021

Clark County Bar Association members with 2 (unrelated) to 50 full-time employees can now offer insurance coverage for their employees and their families with a high-quality, affordable Association Health Plan medical plan from Prominence.

Not an Association member? Enroll at www.clarkcountybar.org

Large Group Benefits for Small Employer Groups

- A range of coinsurance options
- Copays for widely used benefits like PCP visits, specialists and lab services
- Statewide HMO open access
- National Cigna PPO network access

Employers Have Options… and Flexibility

- Choose from six health plan options, including HSA-qualified – see reverse
- Affordable monthly premiums

PARTICIPATING AREAS INCLUDE:

Clark County Nye County

PROMINENCE ASSOCIATION HEALTH PLANS

Our Association Health Plans allow small employers to join as one entity to purchase the type of coverage that is traditionally available to large group employers. This results in less expensive and richer health plan options that can then be passed along to the employee.

PLAN HIGHLIGHTS YOU DON'T WANT TO MISS!

- **Cigna National Network -** Prominence has partnered with Cigna to create a national network for use outside of Nevada for those members enrolled in either a POS or PPO health plan.
- **Teladoc -** 24/7 member care via telephone or video from licensed physicians, psychiatrists, clinical social workers and counselors for a $0 cost share. Note, High Deductible Health Plans are subject to deductible first and benefits will be rendered at the contractual rate based upon type of service.
- **Comprehensive Provider Network -** Includes many notable and board certified physicians throughout the state, offering members excellent access to quality medical services.

Contact your broker or PHP-GroupQuotes@uhsinc.com for more information

Clark County Bar Association

Prominence® Health Plan

CLARK COUNTY BAR ASSOCIATION BENEFIT GUIDE FOR 2020

Statewide HMO with no specialist referrals for members; benefits listed below are in-network; * indicates plans with Cigna network access

	GROUPS CAN CHOOSE UP TO THREE ASSOCIATION HEALTH PLANS TO ENROLL					
WCBA Association Health Plans	**HMO 1000**	**HMO 4000**	**HMO 7000**	**POS 1000 HMO/PPO***	**POS 4000 HMO/PPO***	**PPO HDHP 6900*[1]**
Calendar Year Deductible (CYD)						
Individual	$1,000	$4,000	$7,000	$1,000/$1,500	$4,000/$4,000	$6,900
Family	$3,000	$8,000	$14,000	$2,000/$3,000	$8,000/$8,000	$13,800
Coinsurance						
	20%	30%	50%	20%/20%	30%/30%	0%
Out-of-Pocket Maximum						
Single	$4,000	$7,100	$8,150	$4,000/$6,500	$7,300/$8,000	$6,900
Family	$8,000	$14,200	$16,300	$8,000/$13,000	$14,600/$16,000	$13,800
Provider Office Visits						
Telemedicine - Teladoc	$0 copay	$0 copay	$0 copay	$0 copay	$0 copay	CYD/$0 copay
Primary Care Provider (PCP)	$25 copay	$35 copay	$35 copay	$15/$30 copay	$30/$60 copay	CYD/0%
Specialist	$50 copay	$70 copay	$70 copay	$30/$60 copay	$60/$90 copay	CYD/0%
Emergent/Urgent Care						
Ambulance – Ground & Air	$250 copay per trip	$500 copay per trip	$1,000 copay per trip	$250 copay per trip	$1,000 copay per trip	CYD/0%
Emergency Room	$500 copay	$1,000 copay	$1,000 copay	$500 copay	$1,000 copay	CYD/0%
Urgent Care	$50 copay	$70 copay	$70 copay	$50/$100 copay	$50/$100 copay	CYD/0%
Hospital/Facility/Surgical						
Outpatient Surgical	$250 copay	$1,000 copay	$1,000 copay	$250 copay/ CYD 20%	$100 copay/ CYD 30%	CYD/0%
Inpatient Hospital	CYD/$1,000 copay	CYD/30%	CYD/50%	CYD $1,000/ CYD 20%	CYD 30%/CYD 30%	CYD/0%
Pharmacy						
FDA-approved Preventive	No Charge	No Charge	No Charge	No Charge	No Charge	No Charge
Generic/Brand/Non-Brand	$25/$50/$75	$25/$50/$75	$25/$50/$75	$25/$50/$75	$25/$50/$75	CYD/0%
Specialty	20%	20%	20%	20%	20%	CYD/0%
Radiology						
Routine X-Ray & Diagnostic	$25 copay	$35 copay	$35 copay	$15/$30 copay	$30/$60 copay	CYD/0%
CT Scan & MRI	$250 copay	$1,000 copay	$1,000 copay	$250 copay/ CYD 20%	$1,000 copay/ CYD 30%	CYD/0%
Complex Diagnostic	$250 copay	$1,000 copay	$2,000 copay	$250 copay/ CYD 20%	$1,000 copay/ CYD 30%	CYD/0%
Maternity						
Prenatal Care & Delivery	$200 copay per delivery	$200 copay per delivery	$200 copay per delivery	$200 copay/CYD 20% per delivery	$200 copay/CYD 30% per delivery	CYD/0%
Delivery Room & Well-baby Hospital	CYD/$1,000 copay	CYD/30%	CYD/50%	CYD $1,000 copay/ CYD 20%	CYD 30%/CYD 30%	CYD/0%
Mental Health/Alcohol & Drug Abuse Services						
Inpatient	CYD/$1,000 copay	CYD/30%	CYD/50%	CYD $1,000/ CYD 20%	CYD 30%/CYD 30%	CYD/0%
Outpatient	$250 copay	$1,000 copay	$1,000 copay	$250 copay/ CYD 20%	$1,000 copay/ CYD 30%	CYD/0%
Office Visit	$25 copay	$35 copay	$35 copay	$15/$30 copay	$30/$60 copay	CYD/0%
Lab and Pathology						
	No Charge	No Charge	No Charge	No Charge	No Charge	CYD/0%
Pediatric Dental & Vision - Diagnostic and Preventive (up to age 19)						
	No Charge	No Charge	No Charge	No Charge	No Charge	No Charge

[1] High Deductible Health Plans are subject to deductible first and benefits will be rendered at the contractual rate based upon type of service.

Refer to the Summary of Benefits document for benefit details, limitations and exclusions. This document is for plan comparison purposes only.

Bar Activities

CCBA Health Plans Webinar

Learn about our newest member benefit—Clark County Bar Association Health Plans from Prominence—now available for CCBA members and their staff.

- Date: Thursday, September 17, 2020, 12-1pm
- Location: Online via Zoom
- RSVP: Send your contact information to StephanieAbbott@clarkcountybar.org for details to participate via Zoom.

Continuing Legal Education

The following CLE programs have been produced by the CCBA's CLE committee and sponsored by Bank of Nevada and Las Vegas Legal Video.

"Fraud Prevention, Detection, and Investigation "

- **Speakers:** Mark D. Rich, CPA, CFF and Joseph Garrett, CPA, CVA, CFE of Rich, Wightman & Company, CPAs, LLC
- **CLE:** 1 General CLE Credits for Nevada lawyers
- **Format:** Audio or video recording
- **Fee:** $25 for CCBA members or $50 for non-members

"Real Estate Development & Entitlements"

- **Speaker:** Cody Winterton, Senior Vice President of Raintree Investment Corporation
- **CLE:** 1 General CLE Credits for Nevada lawyers
- **Format:** Audio or video recording
- **Fee:** $25 for CCBA members or $50 for non-members

"Preparing a Better Deposition: Don't Let a Deposition Sink Your Case"

- **Speakers:** Mike Carman, Esq. and Corinne Price, Esq. of Fine Carman Price
- **CLE:** 2 General CLE Credits for Nevada lawyers
- **Format:** Audio or video recording
- **Fee:** $50 for CCBA members or $100 for non-members

"Federal Faux Pas: The "Do's and "Don'ts" of Federal Practice"

- **Speakers:** U.S. Magistrate Judge Brenda Weksler, David Chavez, Judicial Term Clerk, and Emily Gesmundo, Judicial Career Clerk
- **CLE:** 1 General CLE Credit for Nevada lawyers
- **Format:** Audio or video recording

Activities *continued on page 9*

Bar Services

CLE Programming Opportunities

The Clark County Bar Association (CCBA) is an Accredited Provider with the Nevada Board of Continuing Legal Education (CLE). CCBA offers recorded CLE seminars for Nevada lawyers to download to a computer or mobile device for their review.

Orders for recorded CLE seminars can be made online at ClarkCountyBar.org (see "CCBA Shop") or via e-mail to CCBA Executive Director Donna Wiessner via Donnaw@clarkcountybar.org.

Special thanks to the following businesses for their support of the CCBA's CLE programming services:

Clark County Bar

Advertiser index

CCBA activities and services

Advertising space available

For more information and to confirm space reservations, proposals of content, artwork specifications, rates, discounts, and deadlines, contact the Clark County Bar Association, (702) 387-6011, StephanieAbbott@clarkcountybar.org.

COMMUNIQUÉ

About Communiqué

Communiqué is published eleven times per year with an issue published monthly except for July by the Clark County Bar Association, P.O. Box 657, Las Vegas, NV 89125-0657. Phone: (702) 387-6011. *Communiqué* is mailed to all paid members of CCBA, with subscriptions available to non-members for $75.00 per year.

Communiqué accepts advertisements from numerous sources and makes no independent investigation or verification of any claim or statement made in the advertisement. All articles, letters, and advertisements contained in this publication represent the views of the authors and do not necessarily reflect the opinions of the Clark County Bar Association. All legal and other issues discussed are not for the purpose of answering specific legal questions. Attorneys and others are strongly advised to independently research all issues.

Editorial Calendar

Cover date	Issue topic
January 2020	Five Things
February 2020	Labor & Employment
March 2020	Technology in Law Practice
April 2020	Cannabis Law
May 2020	Sports & Entertainment Law
June/July 2020*	Mental Health
August 2020	Family Law
September 2020	Appellate Practice
October 2020	Local Courts
November 2020	Administrative Law
December 2020	Pro Bono

*The June/July issue is published in June. There is no publication released in July. The editorial calendar may change without notice at any time.

Space reservations are encouraged at least two months in advance. Space is limited with placement only guaranteed to paid advertisements. The deadline for submission of all content is 30 days prior the first day of the desired month of publication.

Communiqué will not publish self-serving articles promoting a specific named product or services of an individual or firm.

Article Opportunities

To write an article for publication, send a proposal to the Clark County Bar Association, Attn: Editor-in-Chief, via e-mail to StephanieAbbott@clarkcountybar.org. Proposals should include the following information:

- Author(s) name(s) and Nevada bar #(s)
- Summary paragraph providing the focus and scope for the article (include relevant rules/statutes/procedures, etc.)
- Proposed issue for placement (see editorial calendar above)

All proposals and articles submitted will be considered for publication. However, *Communiqué* will not publish self-serving articles promoting a specific named product or services of an individual or firm. Articles must be on topic and original, unpublished works. Preference will be given to articles written by attorney members of the CCBA.

Advertising Opportunities

Space is available for paid announcements of professional achievements, goods, and services. Rates, policies, and specifications are available upon request. Contact the Clark County Bar Association to confirm availability of placement, graphic design services, and discounts.

Activities *continued from page 7*

- **Fee:** $25 for CCBA members or $50 for non-members

"Streamlined Bankruptcy Option for Small Business"

- **Speakers:** Candace Carlyon, Esq. and Dawn Cica, Esq. of Carlyon Cica Chtd.
- **CLE:** 1 General CLE Credit for Nevada lawyers
- **Format:** Audio or video recording
- **Fee:** $25 for CCBA members or $50 for non-members

Order recorded CLE from the CCBA Shop at https://www.clarkcountybar.org. Members will need to login to the website prior to purchase to get the discounted rate. The CCBA is an Accredited Provider with the Nevada Board of Continuing Legal Education. For more information about the CCBA's CLE programming, contact DonnaW@clarkcountybar.org.

Bar Committee Meetings

CCBA members are invited to volunteer to help plan activities and services for CCBA members. Bar members are invited to attend an upcoming meeting of a CCBA committee:

- **Publications:** Tues., Sept. 1 (12-1 p.m.)—RSVP to Steph
- **Community Service:** Fri., Sept. 4 (12-1 p.m.)—RSVP to Steph
- **New Lawyers:** Thur., Sept. 10 (12-1 p.m.)—RSVP to Donna
- **CLE:** Fri., Sept. 11 (12-1 p.m.)—RSVP to Donna

To participate in an upcoming meeting, CCBA members will need to RSVP to Steph (StephanieAbbott@clarkcountybar.org) or Donna (Donnaw@clarkcountybar.org) in order to receive details for participation in the meeting via Zoom. For more information about each committee, see https://www.clarkcountybar.org/committees/.

Picture Day

CCBA members are invited to sit for a professional portrait:

- **When:** Tuesday, October 27, 2020- 9:30 a.m. to 2 p.m. (New date)
- **Where:** CCBA, 717 S. 8th Street, Las Vegas, NV 89101
- **Planning:** Wear a mask to our office. Mask can be removed for portrait session.
- **RSVP:** Send your contact information to StephanieAbbott@clarkcountybar.org.

If you are a CCBA member who needs a professional portrait done BEFORE October 27, 2020, you can reach out to Portraits to You to schedule a sitting at their studio and still get the CCBA member discount.

Virtual ¡Andale! 5K Run/Walk!

CCBA members are invited to participate in the Las Vegas Latino Bar Association's second annual scholarship fundraising event "Virtual ¡Andale! 5K Run/Walk." Sign up at https://www.andale5k.com/. Please be sure to join our team "CCBA Courthouse Tour".

Court News

Eighth Judicial District Court

How to Pay Criminal Fines/ Fees Owed in 8th JD Court During Coronavirus

Litigants who owe fines or fees in the Nevada Eighth Judicial District court should pay them remotely. The Clerk's Office is closed to foot-traffic as a safety measure to prevent the spread of coronavirus. Those who need to pay fines or fees should call 702-671-0726, Monday through Friday, between 9 a.m. and 4 p.m. for Visa or MasterCard payment. Mail payments can be made with a money order sent to: District Court Clerk, 200 Lewis Ave – 3rd Floor, Las Vegas, NV 89155. Read more at https://eighthjdcourt.wordpress.com/2020/07/28/how-to-pay-criminal-fines-fees-owed-in-8th-jd-court-during-coronavirus/. July 28, 2020.

Need to Know Info About Requesting Records from NV 8th JD Court During Coronavirus Pandemic

The Eighth Judicial District Court Clerk's Office remains closed to in-person filing for the safety of the clerks and to minimize building traffic. The Clerk's Offices at both the Regional Justice Center and the Family Court will remain closed to in-person filing until further notice. Filings must be completed electronically. Read more at https://eighthjdcourt.wordpress.com/2020/07/28/how-to-pay-criminal-fines-fees-owed-in-8th-jd-court-during-coronavirus/. July 24, 2020

Random Reassigning of Civil Domestic Cases in Department L

On July 16, 2020, Chief Judge Linda Bell filed an order in the administrative matter of randomly reassigning civil domestic cases in Department L of the Eighth Judicial District Court. See Administrative Order 20-19. Effective retroactively to July 6, 2020, civil domestic cases pending in Department L will be randomly reassigned to the remaining civil domestic district court judges until further notice. A list of reassignments is to be available from Court Administration. For more information, see http://www.clarkcountycourts.us/general/court-rules-and-administrative-orders/. August 7, 2020.

North Las Vegas Municipal Court

North Las Vegas Seeks Pro Tempore Judges

North Las Vegas Municipal Court is seeking attorneys to serve as Municipal Court Judge Pro Tempore on an as-needed basis to preside over criminal misdemeanor and traffic matters.

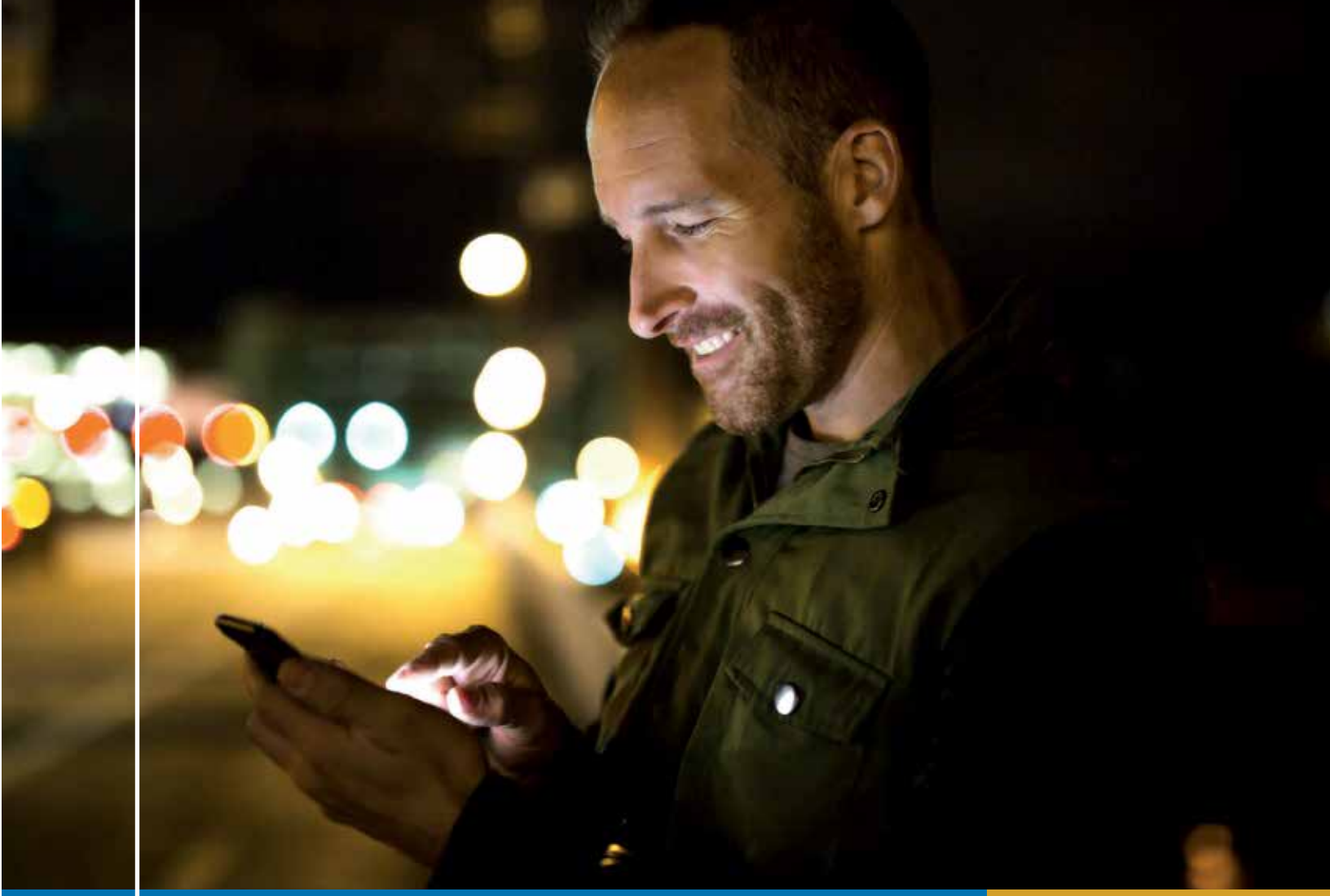
Pursuant to NRS 5.023, attorneys who wish to serve as a Municipal Court Judge Pro Tempore must:

- Be a member in good standing of the State Bar of Nevada;
- Be an adult resident of the city.

Applicants must consent to a criminal background check and a status check with the State Bar of Nevada. Applicants will be approved by the Municipal Court Judge and the North Las Vegas City Council.

A Municipal Court Judge Pro Tempore may not appear as attorney of record in any case pending in North Las Vegas Municipal court. City Ordinance No. 2890 sets the compensation of judges pro tempore at $150/ half-day and $300/full day.

Attorneys who are interested in serving as Judge Pro Tempore should submit a letter of interest and resumé to: Gail L. Moreland, Judicial Executive Assistant 2332 Las Vegas Blvd, North, Suite 100, North Las Vegas, NV 89030.



Your business doesn't stop working at night.

BANK OF NEVADA®

At Bank of Nevada, we don't clock out until you do.

We do what it takes to give our clients peace of mind, and that includes making ourselves available when it's convenient for you.

Bank on Accountability®

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Jeffrey Miracle
Vice President, Commercial Banking
jmiracle@bankofnevada.com
(702) 252-6127

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Top 10 – Forbes Best Banks

EQUAL HOUSING LENDER · WAL LISTED NYSE

Bank of Nevada, a division of Western Alliance Bank, Member FDIC. Western Alliance ranks top ten on Forbes' Best Banks in America list, five years in a row, 2016-2020.

Nevada Supreme Court Highlight

NV Supreme Court Offers Lexis Digital Library Online Access

The Nevada Supreme Court Law Library now offers access to the Lexis Digital Library (LDL) at no cost to you! LDL is a collection of legal treatises and primary sources such as:

- Michie's Nevada Revised Statute's Annotated
- Nevada Civil Practice Manual
- Larson's Workers Compensation
- Corbin on Contracts
- Family Law & Practice
- Water and Water Rights
- And dozens more

You can check out up to five volumes at a time and keep them for seven days. You can also add items to a holds list so that you can access them once the current user's loan period has expired. If you need the book after your loan period has ended, you can also put a hold on it to be notified when it becomes available again!

Borrowed e-books may also be read offline with the LDL app (available for iOS and Android). You can also create color-coded highlighting and notes that are visible only to you. You also have the ability to copy or download annotations with citation information for quicker document assembly.

To sign up, or if you have any questions, send an email to reference@nvcourts.nv.gov. See our Guide (https://nvsctlawlib.libguides.com/LDL) for more information and tips on how to use the LDL features, such as highlighting and annotations.

New Services at the Nevada Supreme Court Law Library

Chat Reference

The Law Library now offers another way to get in touch with us: chat. On every page of the Law Library's website (https://nvcourts.gov/Law-Library/) and on all of our Research Guides (https://nvsctlawlib.libguides.com/?b=g&d=a) , you will have an opportunity to speak with a librarian in real time during regular hours (8am to 5pm, Monday through Friday, excluding holidays) to assist you with your legal research needs.

LibGuides

The Law Library is also happy to announce a more public face to our research guides (https://nvsctlawlib.libguides.com/?b=g&d=a). The librarians have created these guides to assist visitors across the state with researching Nevada law as well as highlighting special parts of our collection. For those who have never had a chance to visit the Nevada Supreme Court Library in person, we invite you to check out the "About the Nevada Supreme Court Law Library" guide! (https://nvsctlawlib.libguides.com/aboutthelibrary).

Curbside Pick-up

Effective August 3, 2020, the Law Library will offer curbside pickup for specific items requested in advance by filling out this form. Only books that are eligible for check-out will be provided. To find a book in the Library, search our catalog available at https://catalog.nvcourts.gov/.

A library card is required to check out books. If you do not have a library card, you can apply for one at https://catalog.nvcourts.gov/cgi-bin/koha/opac-memberentry.pl.

Pickup times will be from 9am to 11am on Tuesdays and 1pm to 3pm on Thursdays. Items must be requested by 8:30 am on Tuesday or Thursday for pick up that day. Items will be held for one week. If for any reason we are unable to complete your request, or if we need additional information, we will contact you by phone or email as soon as possible. Please do not come to the library before hearing from us that your request is ready. You will pick up your items from Stewart Street entrance to the Supreme Court. There is a short-term parking area immediately in front of the building you may use. When you arrive at the Court, please call us at 775-684-1640. Please do not attempt to enter the Law Library. We will bring your item(s) out to you.

If you have items to return to the Law Library, please place them in the book drop located outside the Law Library's Stewart Street entrance.

Source: Nevada Supreme Court Law Library

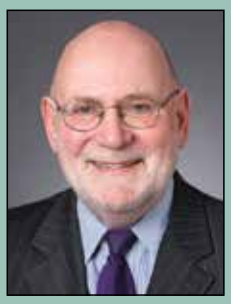
Nevada Neutrals

Mediators. Arbitrators. Neutral Evaluators. *Problem Solvers.*

Hon. Stewart L. Bell (Ret.)

Bruce A. Edwards, Esq.

Kenneth C. Gibbs, Esq.



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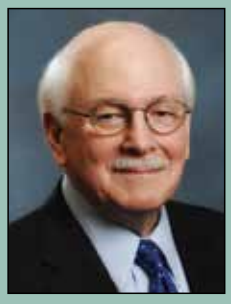
Floyd A. Hale, Esq.

Hon. Carl W. "Bill" Hoffman (Ret.)

Eleissa Lavelle, Esq.



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To schedule an in-person or virtual mediation or arbitration, please visit jamsadr.com/lasvegas or call 702.457.5267.

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View from the Bench

How Busy Appellate Courts Ensure Your Case Gets Due Attention During the Pandemic

By Chief Judge Michael Gibbons

The Nevada Supreme Court and Court of Appeals combined decide several thousand cases each year. The decisions include simple two-page orders and lengthy opinions addressing complex issues. How can appellate courts ensure that your case gets due attention?

This topic would have been addressed at the annual Nevada State Bar Conference in New Orleans. The June conference was canceled due to the COVID-19 Pandemic. Nevertheless, the issue was tackled in a July webinar hosted by the State Bar and presented by Chief Justice Kristina Pickering, Justice James Hardesty, Judge Bonnie Bulla, and myself, with Joel Henriod, Esq., as the moderator.

This was the second State Bar webinar I participated in this summer. The Nevada Family Law Conference in Bishop, California, in March 2020 was abruptly canceled halfway through due to the shutdown order in California. Judge Bulla, Judge Bridget Robb, and I were scheduled to provide the appellate case update, but we

instead made the presentation via Zoom in June.

In lieu of talking with hundreds of Nevada lawyers at these two conferences, we spoke to dozens by video. The feedback from the participants was positive, but we wish we had more interaction. We also postponed appellate oral arguments in March but resumed them by video in May, which was successful. The problems experienced by the appellate courts, however, were trifling compared to the staggering amount of trials and hearings that had to be canceled or delayed in the trial courts. Meanwhile, the appellate court justices, judges, and staff could work from home with no reduction in efficiency because the record on appeal and the briefs from counsel are available electronically. We can also communicate by video, telephone or email to deliberate. Thus, the appellate courts have been able to ensure that your cases receive due attention.

In addition, appellate courts have a laser focus in reviewing cases. We rely upon the issues stated, the record presented, and the briefs of counsel. We do not look for new issues or information outside the record. Of course we conduct legal research, but it is critical for counsel to make a record in the trial court through pleadings, hearings and objections. Counsel can then direct us to the places in the record that document the trial court rulings and the supporting or contravening facts, and provide controlling precedent. Remember that many appellate decisions are guided by the abuse of discretion or substantial evidence standards; therefore, we give substantial deference to decisions made by the trial courts and juries.

Other authors in this issue of *Communiqué* will be discussing making the record, embedding counsel, and framing the appellate issues. These are important subjects for both trial and appellate counsel because the record made in the trial court is often the most important factor in determining the outcome of an appeal—whether in a pandemic or not. **C**

Chief Judge Michael Gibbons was appointed to the inaugural Nevada Court of Appeals by Governor Brian Sandoval in 2014 and was elected in 2016. He previously served for twenty years as a district judge.

Looking Ahead: Embedding Appellate Counsel in the Trial Team

By Tami D. Cowden, Esq.

Once upon a time, "trial counsel" and "appellate counsel" would be the same. After a verdict, the trial attorneys moved to the appellate court to either challenge a loss or defend a victory. But making that sort of shift in focus can be daunting because, while the goal for both trial and appellate counsel is victory for the client, there is a very significant difference in how that victory must be achieved. Trial counsel necessarily view their cases with the object of persuading a fact finder to decide in the client's favor. Appellate counsel view these cases with the goal of persuading appellate judges that either the law and/or public policy are best served from the client's point of view. In some respects, it is a sort of a "seeing the trees" versus "seeing the forest" difference in perspective.

Thus, the rise in appellate advocacy as a distinct practice focus is explained. And, not surprisingly, last-minute inclusion of appellate counsel on a trial team to "protect the record" has become a frequent practice. But appellate counsel can offer much more than "just" record-protection. Depending on when appellate counsel joins the trial team, there can be significant benefits.

The role of appellate counsel in pretrial proceedings

The appellate attorney's role can be limited to mere consultation, discussing the legal issues, and reviewing the most significant motions. Or, that attorney could be fully embedded, working with the trial team by reviewing all filings, advising in discovery, analyzing deposition transcripts, and drafting the significant discovery and dispositive motions. And, depending on the client's preference, the participation could fall anywhere between these two extremes.

But regardless of the extent of the involvement, the appellate counsel *should* do the following: First, identify legal issues and see that those issues are properly developed, advising the trial team of the facts needed to support those issues. And counsel should watch for issues that could merit immediate appellate or writ review, such as jurisdiction, arbitrability, or discovery/privilege disputes, and ensure that the best possible record is made to support any immediate review. These actions will not only assist in getting the best outcome possible at the trial court level, but will also insure that the record contains the necessary elements for effective appellate review.

Role of appellate counsel during the trial stage.

Again, the extent of the appellate attorney's role immediately before and during trial will vary depending upon the client's preference. But appellate counsel should be expected to take the lead in preparing the evidentiary motions, trial briefs, and jury instructions. This is generally the minimum necessary to insure the "record protection."

Additional assistance could be

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offered in preparing "pocket briefs" concerning legal issues that might arise, and to participate in pretrial conferences or any motion arguments. Anticipating objections and preparing scripts for trial counsel can help smooth trial counsel's path. While presence at the entire trial is ideal, if this is not feasible, the appellate attorney should be present during anticipated critical testimony.

One thing that should be clear is that lead trial counsel must be captain of the ship. Appellate counsel should advise as to issues in advance wherever possible, but ultimately, trial decisions must be made by trial counsel.

The role of appellate counsel during the post-trial stage

Once a verdict is obtained, appellate counsel should take the lead role for the preparation of post-trial motions and any litigation over the form of the verdict. The appellate attorney is generally in the best position to determine what efforts should be taken at this point to best smooth the path to defending or challenging the judgment. And, of course, appellate counsel will also take the lead in the actual appeal.

Cases that merit embedding appellate counsel

Any expansion of the trial team is costly, and therefore embedding appellate counsel is not feasible for all cases. But there are many cases where, for one reason or another, eventual appeal is likely, if not inevitable. Cases that involve significant legal issues of first impression are obvious choices. Early involvement of appellate counsel can be particularly useful as the decisions in such cases may impact multiple future cases. Cases with the potential for a very high dollar judgment also warrant early investment in the long view, whether for the plaintiff or the defendant. And clients who face any type of repeat litigation can benefit from engaging appellate counsel to develop a unified legal strategy and to avoid duplication of efforts across cases.

Ultimately, embedding appellate counsel makes the trial counsel's job easier. Appellate counsel's focus on the "forest" of the legal issues allows trial counsel to devote their energies to the "trees" of facts, and most significantly, to persuading the jury to see those facts as the client sees them.

Preserving the Record – the Basics of Objections and Offers of Proof

By John M. Naylor, Esq.

Introduction

In addition to winning, trial counsel must also be focused on preserving issues for appeal in the event of an adverse result. As a general rule, appellate courts will consider an issue waived if trial counsel failed to properly preserve it. *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981). Indeed, Chief Judge Michael P. Gibbons of the Nevada Court of Appeals emphasized that point at a recent Nevada Bar CLE. ("How Busy Appellate Courts Ensure Your Case Gets Due Attention," Nevada State Bar Webinar, July 17, 2020). A technical exception to this rule is plain error not brought to the attention of the trial judge that affects substantial rights. NRS 47.040(2). The obligation to preserve an issue is squarely on the appellant. *Cuzze v. Univ. & Cmty. Coll. Sys.*, 123 Nev. 598, 603, 172 P.3d 131, 135 (2007). This article provides an introduction to the two basic tools for preserving the record: the objection which deals with evidence that is improperly admitted and an offer of proof which deals with evidence that is improperly excluded.

Objecting to evidence that is improperly admitted

Claims of reversible error are frequently based on improperly admitted evidence. To preserve these issues, counsel must either make an objection at the time of trial or move to strike. NRS 17.040(1)(a); *In re Parental Rights as to J.D.N.*, 128 Nev. 462, 468, 283 P.3d 842, 846 (2012). This may result in trial counsel renewing and rearguing an objection made during motion practice leading up to the trial. For example, in *Townsend v. State*, 103 Nev. 113, 734 P.2d 705 (1987), the defendant made several objections to testimony when the prosecutor was examining a witness as part of an offer of proof which took place outside the presence of the jury. The trial court allowed the testimony, and the defendant failed to make the same objections when the witness testified before the jury. While the Supreme Court still considered the issue on appeal, it cautioned counsel that the far better practice is to repeat and renew the objections during the trial itself. 103 Nev. at 119, 734 P.2d at 709 n.2.

Objections must be specific as to its grounds and to the specific parts of the evidence to which there is an objection. *In re Parental Rights as to J.D.N.*, 128 Nev. at 468, 283 P.3d at 846. For example, a party may try to introduce a document where some portions are admissible and some are not. Opposing counsel may not make a blanket objection to the entire document; the objection must specify the objectionable portions and the grounds. *Id*. Failing to be specific may result in a waived issue. *Id*.

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Offers of proof

Reversible error can also be based on improperly excluded evidence. To preserve those types of issues, trial counsel must make an offer of proof at the time of trial and before the close of evidence. NRS 47.040(1)(b); *S. Pac. Transp. Co. v. Fitzgerald*, 94 Nev. 245, 246, 579 P.2d 1251, 1252 (1978). An offer of proof serves two purposes. First, it fully discloses to the court and opposing counsel the nature of the evidence that has been excluded. Second, it preserves the issue for appeal. *Las Vegas Convention & Visitors Auth. v. Miller*, 124 Nev. 669, 688, 191 P.3d 1138, 1150-51 (2008). Failing to make an offer of proof waives the ability of an appellate court to review the excluded evidence. *Gunderson v. D.R. Horton Inc.*, 130 Nev. 67, 74, 319 P.3d 606, 611 n.2 (2014); *Burgeon v. State*, 102 Nev. 43, 47, 714 P.2d 576, 579 (1986).

Offers of proof should be as detailed as possible. *Las Vegas Convention & Visitors Auth.*, 124 Nev. at 688, 191 P.3d at 150-51. Failure to provide detail may not be sufficient to preserve the issue. The Supreme Court has said on more than one occasion that it will not speculate as to the nature of excluded evidence. *See, e.g.*, *Burgeon*, 12 Nev. 43. The burden is entirely on the party offering the excluded evidence to make the offer. *Id.*

To meet the burden, trial counsel must proffer evidence and not just summarize it. *Las Vegas Convention & Visitors Auth.*, 124 Nev. at 688, 191 P.3d at 150-51. For example, if you are trying to get testimony admitted, you must actually provide evidence of what that testimony will be. This can be done by having the witness testify, offering a declaration of the witness, or offering deposition testimony. A trial counsel's description of what a witness may say if permitted to testify is generally not enough on its own, and the Supreme Court has at times described those statements by attorneys as speculation and conjecture. *Id.*

Conclusion

There are basically two general rules that counsel should keep in mind during trial. First, remember to make objections and offers of proof. Without them, the issue will probably be waived. Second, when counsel does make an objection or offer of proof, make them as specific as possible. Failure to do so may also result in waiver.

Tip: Maintain a Vision of The Opinion You Hope to Receive

By Joel Henriod, Esq. and Adrienne Brantley-Lomeli, Esq.

Appeals should not be intimidating. Every law student learns the key to appellate success from the beginning, as they study judicial opinions in preparation for Socratic grilling. Even if you graduated 50 years ago, you may still recall *Hadley v. Baxendale*, 156 ER 145, 9 ExCh 341 (1854) (where the late delivery of a machine part rendered a mill dormant for several days, the court held that liability for the late delivery would not include the mill's lost profits because the delivery company would not have reasonably contemplated lost profits to be a probable consequence of delayed performance).

Every appeal ends with an opinion or decision that contains the same components, a brief statement of the facts, the applicable law and governing concepts, a short analysis, and a holding. Yours will too. Success lies in helping the appellate court write that opinion.

Imagine your case from the perspective of the bench

As you frame your issue and define the relief you request, keep this question in mind: How will the appellate judges or justices view the facts and legal issues? Anticipate their reactions. Analyze their prior opinions and the types of questions they ask during oral arguments. Then reorient yourself, forget your side for a moment, and examine the case from their perspective.

The reason law students study judicial opinions is because *they are law*. The appellate court's perspective must include not just your case, but also the efficacy of the judicial system that resolves tens of thousands of cases every year. Appellate courts exist to correct serious errors not nitpick. They also must be concerned for the precedent that each case sets. The court is like that adult in your childhood who said, "if I were to do this for you, I'd have to do it for everyone." Your case will affect the law, even if unpublished.

To win, think hard about those concerns. Propose results that both are correct in your case and make sense at a systemic level. On procedural issues, imagine yourself being on the opposite side in the next case, and recommend a rule you could live with then too. On substantive matters, advance holdings that improve the common law, and would be fair and practical. If your preferred outcome is counterintuitive, demonstrating justness will require explanation.

Remember "the life of the law has not been logic; it has been experience." Oliver Wendell Holmes, Jr..

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Appellate judges and justices are human. So their life experience and wisdom will factor into decisions.

Keep it Simple

An appellate decision is an exercise in simplification. It's no accident that legal opinions are reduced to parentheticals. Appellate courts use even complex cases to announce simple rules that guide behavior and make future cases easier to resolve. The process entails distilling volumes of pleadings, evidence and complex laws down to manageable issues until they can be decided with straightforward rules or tests. That's more difficult than it appears, especially for busy appellate courts.

Be straightforward. What should the core facts and procedural history be in the eventual opinion? Focus your briefs on that simple narrative, weaving in only important details.

Be clear and concise, but complete. Just as Warren Buffet "never invest[s] in a business [he] can't understand," appellate courts are wary of reversing a lower court if they are unsure of the relevant circumstances. Give them confidence by distilling factually complex records and issues down to summaries that are short but sufficient, and painstakingly accurate.

The eventual opinion will follow a "C.R.A.C." outline: conclusion, rule, analysis, (analogous) cases. Follow that pattern yourself. Strive to make your brief a draft of the opinion you want to see.

Imagine the opinion in which you lose

Our friend Dan Polsenberg advises, "it's hard to win if you're oblivious to how you could lose." After years of living with a case and advocating for a client, it's easy to forget the weaknesses in one's case and the strengths of the other side. The more skewed our view becomes, the farther it drifts from the neutral perspective the appellate court will bring and the less mindful we'll be of the systemic concerns the justices must also weigh.

Be clear-eyed. To win, force yourself to imagine the possible opinion ruling against you. What facts, authorities, analyses and public policies does that nightmare include? Face them, so you can handle them.

You can do this. You've been preparing since the first day of law school. **C**

Do Not Let Your Appeal Be Dead Upon Arrival: Appeals Arising Under Titles 12 and 13

By Jeffrey P. Luszeck, Esq. and Alan D. Freer, Esq.

Like any other civil case, a will contest, a trust contest, or other litigation involving trusts and estates can be appealed from the probate court, which is defined as a court "sitting in probate or otherwise adjudicating matters pursuant to this title." *See* NRS 132.116. However, certain matters under Titles 12 and 13 require an immediate appeal. The right to an immediate appeal is due, in large part, to the fact that the administration of estates may take months or years to complete. Consequently, after the entry of an order in a probate or trust proceeding, a practitioner should determine if the order is appealable or else the order will become final, and the right to pursue an appeal will be waived. *See, e.g.*, *Estate of Herrmann*, 100 Nev. 1, 677 P.2d 594 (1984).

For example, and by no means of limitation, NRS 155.190(1) requires an appeal on certain interlocutory orders to be filed within 30 days after the entry of an order:

(a) Granting or revoking letters testamentary or letters of administration.
(b) Admitting a will to probate or revoking the probate thereof.
(c) Setting aside an estate claimed not to exceed $100,000 in value.
(d) Setting apart property as a homestead, or claimed to be exempt from execution.
(e) Granting or modifying a family allowance.
(f) Directing or authorizing the sale or conveyance or confirming the sale of property.
(g) Settling an account of a personal representative or trustee.
(h) Instructing or appointing a trustee.
(i) Instructing or directing a personal representative.
(j) Directing or allowing the payment of a debt, claim, devise or attorney's fee.
(k) Determining heirship or the persons to


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whom distribution must be made or trust property must pass.
(l) Distributing property.
(m) Refusing to make any order mentioned in this section.
(n) Making any decision wherein the amount in controversy equals or exceeds, exclusive of costs, $10,000.
(o) Granting or denying a motion to enforce the liability of a surety filed pursuant to NRS 142.035.

In addition to the interlocutory orders identified in NRS 155.190(1), an appeal may be filed within 30 days after notice of entry of a final order in the following matters: (1) a will contest, *see* NRS 137.140; (2) determination of questions regarding advancements made by a decedent to heirs or devisees, *see* NRS 151.160; (3) questions concerning the internal affairs of a trust, *see* NRS 164.015(6); (4) instructions relating to the administration of the trust or for a construction of a trust instrument, *see* NRS 164.030(4); (5) conveyance, transfer, or delivery of trust property, *see* NRS 164.033(6); and (6) the approval of a final accounting, *see* NRS 165.1214(4)(b).

If a party timely files a motion for judgment under NRCP 50(b), a motion to amend or make additional findings of fact under NRCP 52(b), a motion to alter or amend the judgment under NRCP 59, or a motion for a new trial under NRCP 59, the time to appeal matters identified in NRS 155.190(1) runs for all parties from entry of an order disposing of the last such remaining motion, and the notice of appeal must be filed no later than 30 days after the date of service of written notice of entry of that order. *See* NRS 155.190(2). It is important to note, that before the Nevada Legislature amended NRS 155.190 in 2009 to include subsection (2), there were a series of cases wherein the Supreme Court of Nevada found that certain motions brought pursuant to NRCP 50, 52, and 59 did not toll the 30-day deadline to file an appeal. *See, e.g.*, *Matter of Estate of Miller*, 111 Nev. 1, 888 P.2d 433 (1995) (motion to amend findings of fact or conclusions of law in district court order directing partial distribution of testate estate did not toll running of 30–day period for appealing interlocutory probate orders). Consequently, practitioners should not assume that a motion under NRCP 50, 52, or 59 will automatically toll the deadline to file an appeal under NRS 151.160, NRS 164.015(6), NRS 164.030(4), NRS 164.033(6), or NRS 165.1214(4)(b) as said statutes do not contain explicit language regarding this issue like NRS 155.190(2). Further, even though NRS 137.140 specifically provides that "[a]n appeal from a final order determining the contest of a will is governed by the Nevada Rules of Appellate Procedure" and "[a] party may make any motion after the determination that is provided by the Nevada Rules of Civil Procedure," the issue still remains unclear.

Just like Titles 12 and 13 identify certain orders that are immediately appealable, there are certain orders that are not appealable, such as the appointment of a special administrator, *see* NRS 140.020(3)(b), or the appointment of a temporary trustee. *See, e.g.*, *Matter of Paul D. Burgauer Revocable Living Tr.*, 465 P.3d 222 (Nev. App. 2020) ("[W]e conclude NRS 155.190(1)(h) provides for an appeal from an order appointing a trustee, not an order appointing a temporary trustee.").

As a final matter, if an order is not immediately appealable, a party should consider whether writ relief is appropriate pursuant to NRS 34. Neither an appeal nor a writ proceeding stay an order or an estate or trust proceeding unless otherwise ordered by the probate court or the Supreme Court of Nevada. *See* NRS 155.195. **C**

Nevada Appellate Summaries

Advance Opinion Summary (8-7-20)

By Joe Tommasino, Esq.

Supreme Court of Nevada

Administrative procedure: (1) NRS 233B.130 provides for judicial review of a final judgment in an administrative proceeding, and a petition for judicial review "must be served upon the agency and every party" under NRS 233B.130(5), but the statute does not specify the method of service; and (2) a petition for judicial review is best construed in this context as a post-complaint filing, so personal service is unnecessary and an alternative method of service under NRCP 5(b) will suffice. Because all the parties are already aware of the underlying matter, a petition for judicial review is best construed as a post-complaint pleading in this context, and a more relaxed standard of service is appropriate. Personal service of a petition for judicial review is unnecessary, and NRCP 5(b)'s alternative methods of service are sufficient. *State, Dep't of Corr. v. DeRosa*, 136 Nev. Adv. Op. No. 37, ___ P.3d ___ (July 9, 2020).

Anti-SLAPP statutes: Nevada's anti-strategic lawsuit against public participation (anti-SLAPP) statutes, which include a procedural mechanism to summarily dismiss meritless lawsuits aimed at chilling speech, do not violate the constitutional right to a jury trial. NRS 41.660 allows a party to file an anti-SLAPP motion to dismiss and sets forth a two-pronged test for determining whether the district court should grant or deny such a motion. Under *prong one*, the court must only decide whether the *defendant* demonstrated that the relevant communications were made in good faith. Because the district court need not make any findings of fact specifically regarding a plaintiff's underlying claim and cannot defeat a plaintiff's underlying claim under prong one, prong one itself does not render the jury-trial right practically unavailable. Under *prong two*, the court must only decide whether the plaintiff demonstrated with prima facie evidence a probability of prevailing on the claim. The court does not make any findings of fact. Rather, prong two merely requires a court to decide whether a plaintiff's underlying claim is legally sufficient. In other words, the prima-facie-evidence standard requires the court to decide whether the plaintiff met his or her burden of production to show that a reasonable trier of fact could find that he or she would prevail. Nevada's anti-SLAPP statutes do not interfere with the jury's ability to make findings of fact as to a plaintiff's underlying claim. Rather, they function as a procedural mechanism, much like summary judgment, that allows the court to summarily dismiss claims with no reasonable possibility of success. Upon making the requisite showing under prong two, a plaintiff can proceed to a jury trial on the underlying claim. A plaintiff who fails to meet this burden would not have been entitled to a jury trial, even absent an anti-SLAPP motion to dismiss. *Taylor v. Colon*, 136 Nev. Adv. Op. No. 50, ___ P.3d ___ (July 30, 2020).

Civil procedure: (1) NRCP 60(b)(1) provides that a district court may grant relief "from a final judgment, order, or proceeding" based on a showing of "mistake, inadvertence, surprise, or excusable neglect"; (2) the district court must consider factors announced in *Yochum v. Davis*, 98 Nev. 484, 486, 653 P.2d 1215, 1216 (1982), *overruled in part by Epstein v. Epstein*, 113 Nev. 1401, 1405, 950 P.2d 771, 773 (1997), when determining if excusable neglect has been established; and (3) district courts must issue express factual findings, preferably in writing, pursuant to each *Yochum* factor to facilitate appellate review. To determine whether grounds for NRCP 60(b)(1) relief exist, the district court must apply four *Yochum* factors:

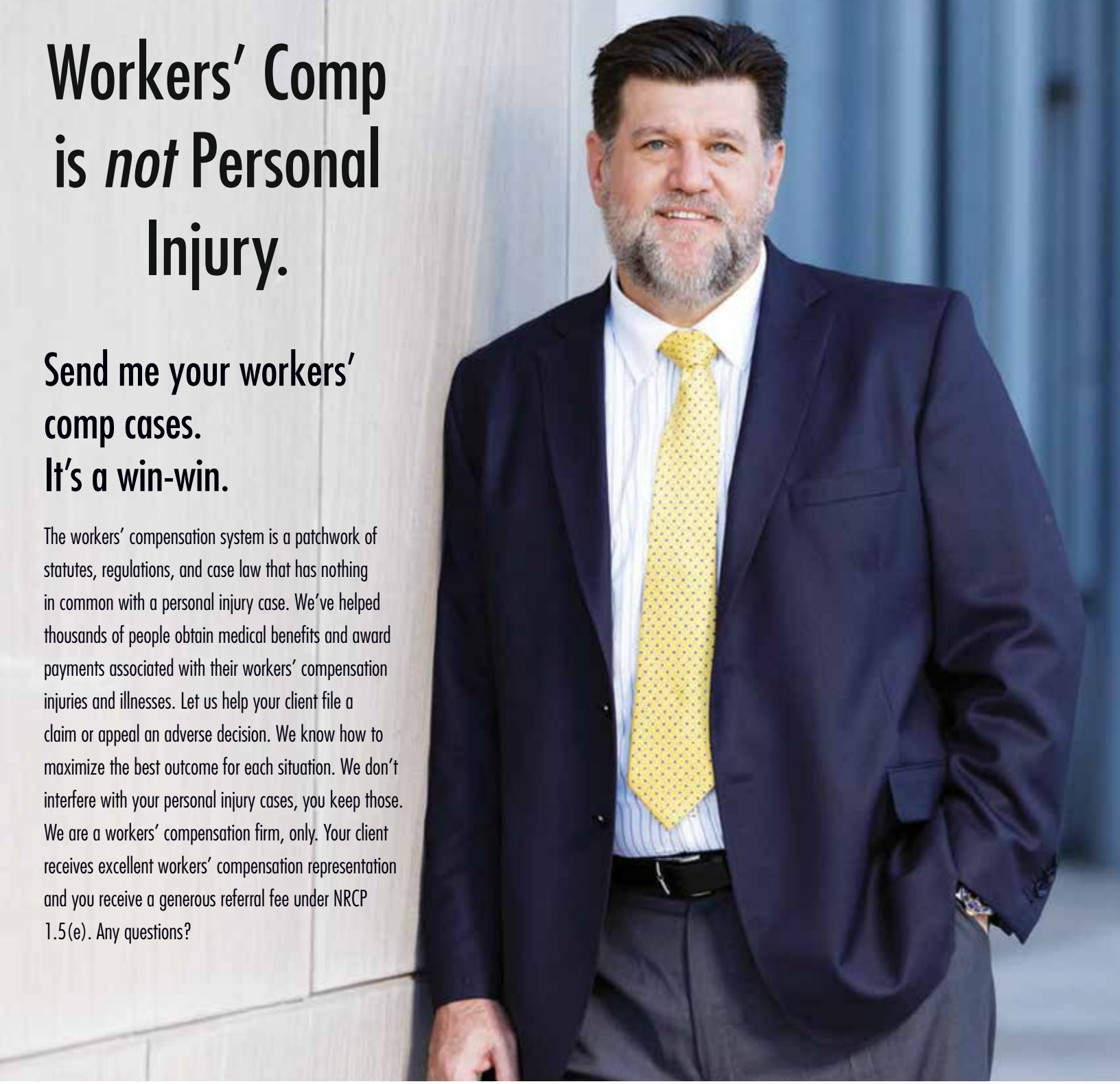
(1) A prompt application to remove the judgment;

(2) The absence of an intent to delay the proceedings;

Summaries *continued on page 26*

Joe Tommasino has served as Staff Attorney for the Las Vegas Justice Court since 1996. Joe is the President of the Nevada Association for Court Career Advancement (NACCA).

Workers' Comp is *not* Personal Injury.



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Summaries *continued from 24*

(3) A lack of knowledge of procedural requirements; and
(4) Good faith.

Here, the district court believed that it need not apply the *Yochum* factors when determining the existence of sufficient grounds for NRCP 60(b)(1) relief from an order, as opposed to a judgment. However, NRCP 60(b) does not distinguish between relief from a "final judgment, order, or proceeding." *Willard v. Berry-Hinckley Indus.*, 136 Nev. Adv. Op. No. 53, ___ P.3d ___ (August 6, 2020).

Constables: (1) NRS 258.007 requires a constable to become certified as a category II peace officer within a certain amount of time or forfeit the office; and (2) the statute does not give a board of county commissioners power to remove a constable from office, nor does it necessitate *quo warranto* proceedings, as the statute works an automatic forfeiture of office if the constable fails to become certified. The Supreme Court of Nevada distinguished NRS 258.007, which sets forth a requirement for holding office, from other statutes that designate events or circumstances as triggering forfeiture. With the latter, judicial proceedings are likely necessary to establish the facts triggering the forfeiture and provide the officer with due process. Here, however, POST certification is an eligibility requirement, and unless the constable contests POST's determination, judicial proceedings are unnecessary to determine whether the constable has met that statutory requirement for holding office. *Clark County v. Eliason*, 136 Nev. Adv. Op. No. 49, ___ P.3d ___ (July 30, 2020).

Controlled substances: (1) NRS 453.337 prohibits a person from possessing, for the purpose of sale, flunitrazepam, gamma-hydroxybutyrate, or any schedule I or II controlled substance; and (2) the identity of a substance is an element of the crime described in NRS 453.337, such that each schedule I or II controlled substance simultaneously possessed with the intent to sell constitutes a separate offense. NRS 453.570 points toward substance identity being an element of NRS 453.337 because it requires that the type of drug be proven at trial. NRS 453.570 provides that "[t]he amount of a controlled substance needed to sustain a conviction of a person for an offense prohibited by the provisions of NRS 453.011 to 453.552 . . . is that amount necessary for identification as a controlled substance by a witness qualified to make such identification." Because a witness must positively identify a substance as a specific controlled substance, a substance's identity is necessarily an element of the crime described in NRS 453.337. Further, the identity of a substance determines the applicable schedule of controlled substances, which may determine the applicable punishment. Controlled substances are classified according to their potential for abuse, medical use, and potential dependence. The State Board of Pharmacy places a substance in schedule I if the substance "[h]as high potential for abuse" and "no accepted medical use in treatment in the United States or lacks accepted safety for use in treatment under medical supervision." The Board places a substance in schedule II if the substance "has high potential for abuse," "has accepted medical use in treatment in the United States, or accepted medical use with severe restrictions," and "abuse of the substance may lead to severe psychological or physical dependence." NRS 453.337 outlines the applicable sentences for a violation of the statute, unless the greater penalties described in NRS 453.3385 (dealing with flunitrazepam; gamma-hydroxybutyrate; precursors to flunitrazepam or gamma-hydroxybutyrate; and schedule I controlled substances, except marijuana), NRS 453.339 (dealing with marijuana and concentrated cannabis), or NRS 453.3395 (dealing with schedule II controlled substances) apply. Thus, the Supreme Court of Nevada concluded that the identity of a substance is an element that must be proven to sustain a conviction under NRS 453.337, rather than a means of committing the offense. *Figueroa-Beltran v. United States*, 136 Nev. Adv. Op. No. 45, ___ P.3d ___ (July 16, 2020).

Counterclaims: This record neither supports the district court's determination that the parties tried a counterclaim by consent nor supports upholding the related damages award; thus, the district court improperly awarded damages to respondents in the absence of an express or implied counterclaim. NRCP 15(b) provides that an issue not raised in the pleadings may nevertheless be tried by the parties' "express or implied consent," and that the court should treat such issues "as if they had been raised in the pleadings." Here, the record does not show that the parties tried a counterclaim by implied consent. The defendants

failed to mention a counterclaim or propose a damages award in either their motions for summary judgment or their pretrial proposed findings of fact and conclusions of law. Moreover, the defendants never made an obvious attempt to raise a counterclaim at trial, and the trial judge gave no indication, before his ruling, that he was considering awarding damages against the plaintiff. Separately, the Supreme Court of Nevada found that neither NRCP 8(c) nor NRCP 54(c) warrant upholding the damages award. *Yount v. Criswell Radovan, LLC*, 136 Nev. Adv. Op. No. 47, ___ P.3d ___ (July 30, 2020).

Defamation: (1) The judicial-proceedings privilege absolutely protects statements made during judicial proceedings, and those statements cannot form the basis of a defamation claim; (2) this privilege extends to statements made during quasi-judicial proceedings, but the issue here was whether the public-comment periods of planning-commission and improvement-district meetings are quasi-judicial proceedings; and (3) in this case, the public-comment portions of the meetings were not quasi-judicial because they lacked the basic due-process protections one would normally expect to find in a court of law. To qualify as a quasi-judicial proceeding for purposes of the absolute privilege, a proceeding must, at a minimum,

> (1) provide the opportunity to present and rebut evidence and witness testimony,
>
> (2) require that such evidence and testimony be presented upon oath or affirmation, and
>
> (3) allow opposing parties to cross-examine, impeach, or otherwise confront a witness.

Because the public-comment periods in this case lacked basic due-process protections normally found in a court of law, they were not quasi-judicial in nature. Thus, the absolute privilege that attaches to judicial and quasi-judicial proceedings did not apply. *Spencer v. Klementi*, 136 Nev. Adv. Op. No. 35, ___ P.3d ___ (July 9, 2020).

Discovery (1) Here, the Supreme Court of Nevada had to determine whether a government entity (the State of Nevada Department of Taxation) has "possession, custody, or control" over the content on the personal cell phones of former workers hired through a temporary employment agency, so as to be required under NRCP 16.1 to disclose that material; (2) the Court held that a party has "possession, custody, or control" over documents, electronically stored information, or tangible things if the party has either actual possession of, or the legal right to obtain, the material; and (3) the Court concluded that the personal cell phones at issue fall outside the government entity's "possession, custody, or control" under NRCP 16.1. Ordering a party to procure documents that it does not have the legal right to obtain will oftentimes be futile, precisely because the party has no certain way of getting those documents. Furthermore, the civil-procedure rules provide a mechanism for seeking materials from a nonparty under NRCP 45, and that rule grants nonparties subject to a subpoena certain protections, such as quashing or modifying the subpoena if necessary. Accordingly, the Court held that documents, electronically stored information, or tangible things are within a party's "possession, custody, or control" under the Nevada Rules of Civil Procedure if the party has either actual possession of or the legal right to obtain the same. Here, the workers' cell phones are outside the Department's "possession, custody, or control" under NRCP 16.1; therefore, the district court exceeded its authority when it compelled the Department to produce that information. *State, Dep't of Taxation v. Dist. Ct. State, Dep't of Taxation v. Dist. Ct.* Adv. Op. No. 42, ___ P.3d ___ (July 9, 2020).

Experts: NRS 50.295 expressly permits expert witnesses to proffer testimony that embraces ultimate issues, which includes opinions about a defendant's mental state when he or she has entered a not-guilty-by-reason-of-insanity plea, so long as that testimony is otherwise admissible under Nevada's evidence code and does not stray from psychological opinions about factual matters to conclusions about the appropriate verdict. Here, the district court abused its discretion by preventing the defendant's psychiatric expert witness from opining about his mental state for purposes of supporting his not-guilty-by-reason-of-insanity plea under NRS 174.035(6). Because there is a reasonable probability that the psychiatric expert-witness testimony would have affected the outcome of the trial, the district court's error was not harmless. *Pundyk v. State*, 136 Nev. Adv. Op. No. 43, ___ P.3d ___ (July 16, 2020).

Summaries *continued on page 28*

Summaries *continued from 27*

Family law: (1) While joint preliminary injunctions under EDCR 5.517 are injunctions, NRAP 3A(b)(3) permits appeals only from injunctions pursuant to NRCP 65, and joint preliminary injunctions under EDCR 5.517 are not subject to NRCP 65; and (2) the Supreme Court of Nevada does not have jurisdiction to review such an order under NRAP 3A(b)(3). Because no court rule or statute permits an appeal of a district-court order denying a request for a joint preliminary injunction pursuant to EDCR 5.517, the Court dismissed this appeal. *Nelson v. Nelson*, 136 Nev. Adv. Op. No. 36, ___ P.3d ___ (July 9, 2020).

Homeowners' associations: (1) Here, the Supreme Court of Nevada addressed whether the entire amount of a homeowners' association's (HOA) yearly assessment can be included in the superpriority piece of an HOA's lien under NRS 116.3116; (2) the Court concluded that the entire amount of a yearly assessment is entitled to superpriority status, so long as the assessment became due in the 9 months preceding the HOA's recording of its notice of delinquent assessments; and (3) because the first-deed-of-trust holder in this case did not tender the entire superpriority amount before the HOA foreclosed on its lien, the HOA foreclosure sale extinguished the first deed of trust on the property. The plain language of NRS 116.3116 allows for the entire amount of a yearly assessment to be included in the superpriority piece of the HOA's lien. NRS 116.3116(2) specifically provides that the amounts subject to superpriority status are those that "would have become due in the absence of acceleration during the 9 months immediately preceding institution of an action to enforce the lien." Here, the parties agree that the HOA imposed yearly, rather than monthly, assessments, and that the yearly assessment became due in the 9 months preceding the notice of delinquent assessments, which is the act that institutes the enforcement of the lien. Nothing in NRS Chapter 116 prohibits an HOA from making its assessments payable annually, rather than monthly. While parties often refer to the superpriority lien as being equal to 9 months' worth of assessments, that is when the reference is to assessments assessed monthly, rather than yearly. Thus, the plain language of NRS 116.3116(2) supports the interpretation that, if an HOA makes assessments payable annually, the entire assessment amount can have superpriority status if it becomes due in the 9 months preceding the notice of delinquent assessments. *Anthony S. Noonan IRA, LLC v. U.S. Bank*, 136 Nev. Adv. Op. No. 41, ___ P.3d ___ (July 9, 2020).

Judicial discipline: By statute, a public reprimand may be given only where a judge has violated the Code of Judicial Conduct in a knowing or deliberate manner or where aggravating factors are present. Disciplinary proceedings for judges generally should not arise from disputes over legal decisions or factual findings, absent exceptional circumstances such as where a judge abuses her authority, disregards fundamental rights, intentionally disregards the law, or exhibits a pattern of error inconsistent with faithfully discharging the judicial function. For claims where relief may ordinarily lie in the appeals process, disciplinary proceedings should be pursued sparingly. Proceeding otherwise risks chilling the exercise of judicial discretion and harms the administration of justice. Here, an appropriate resolution might have been to dismiss the complaint without holding a hearing and issue a non-disciplinary letter of caution, warning the judge of the need to more closely supervise the clerk in the preparation of minutes. *In re Hughe*s, 136 Nev. Adv. Op. No. 46, ___ P.3d ___ (July 16, 2020).

Jurors: (1) The district court must clearly explain its determinations and reasoning under *Batson v. Kentucky*, 476 U.S. 79 (1986), when ruling on an equal-protection objection to the use of a peremptory challenge to remove a veniremember; (2) a clear record from the district court is particularly important when the explanation for the peremptory challenge depends on the veniremember's demeanor; and (3) while the Supreme Court of Nevada is primed to afford the district court's decision great deference, the Supreme Court cannot do so if the district court does not engage in the sensitive Batson inquiry and explain its conclusions. Here, the Supreme Court was faced with a record devoid of any findings regarding the credibility of the State's demeanor-based explanation for its peremptory challenge of an African-American veniremember. Although the State offered nondemeanor explanations for the peremptory challenge, those explanations are belied by the record. Thus, the Supreme Court concluded that it is more likely than not that the State used the peremptory challenge for impermissible

reasons. *Matthews v. State*, 136 Nev. Adv. Op. No. 38, ___ P.3d ___ (July 9, 2020).

Kidnapping: (1) Under NRS 201.540, the Nevada Legislature has criminalized sexual conduct between certain school employees or volunteers and students who are old enough to consent to sexual conduct; (2) such a crime is *not* an unlawful act perpetrated upon the person of a minor such that it is a predicate offense for first-degree kidnapping under NRS 200.310(1); and (3) accordingly, the first-degree kidnapping convictions here cannot stand. Interpreting the language in NRS 200.310(1) to include *any* crime involving a minor would expand an already broad kidnapping statute beyond what is reasonable, leading to absurd results. The relevant provision in NRS 200.310(1) is more narrowly focused on crimes upon or against a minor's body. Because NRS 201.540 is indifferent regarding the student's actual consent or the offender's actual exploitation of the student, it is the offender's status that is the gravamen of the offense in NRS 201.540. The offender's status of school employee or volunteer in a position of authority lends itself to the perception that the offender influenced or exploited the student. It is thus the offender's status that makes the sexual conduct unlawful. Given that NRS 201.540 is predominately concerned with the appearance of impropriety rather than actual impropriety, its focus is on decency and morals rather than harm to a particular individual. Because this is consistent with the chapter in which the Legislature chose to codify the offense and the gravamen of the offense, and without a clear statement of intent by the Legislature to treat a violation of NRS 201.540 as a crime against the minor's person for purposes of NRS 200.310, the defendant's convictions of first-degree kidnapping cannot stand. *Lofthouse v. State*, 136 Nev. Adv. Op. No. 44, ___ P.3d ___ (July 16, 2020).

Professional negligence: (1) Under NRS 41A.071, if a party files an action for professional negligence against a provider of health care without a supporting medical-expert affidavit, the district court must dismiss the action; (2) in *Szydel v. Markman*, 121 Nev. 453, 459, 117 P.3d 200, 204 (2005), the Court adopted the "common-knowledge" exception to the affidavit requirement for claims falling under NRS 41A.100 (the *res ipsa loquitur* statute), and the common-knowledge exception provides that where lay persons' common knowledge is sufficient to determine negligence without expert testimony, the affidavit requirement does not apply; and (3) the common-knowledge exception can also be applied to determine whether a claim that appears to sound in professional negligence, and does not fall under NRS 41A.100, actually sounds in ordinary negligence and is not subject to NRS 41A.071. Here, the Court considered whether a nurse's mistake in administering a drug to one patient, when the drug was prescribed to a different patient, as well as the alleged failure to monitor the patient, are matters of professional negligence subject to NRS 41A.071's affidavit requirement or a matter of ordinary negligence that would not require a supporting affidavit under the common-knowledge exception. The Court concluded that the exception applies to the drug's administration, as lay jurors could understand that mistakenly administering a drug to the wrong patient is negligent without the benefit of expert testimony. Thus, any claim based solely on that act would not be subject to dismissal under NRS 41A.071 for failing to attach a supporting medical-expert affidavit. However, the Court concluded that the other allegation of failing to monitor the patient after administering the drug is subject to NRS 41A.071's affidavit requirement. *Est. of Curtis v. S. Las Vegas Med. Inv'rs*, 136 Nev. Adv. Op. No. 39, ___ P.3d ___ (July 9, 2020).

[EDITOR'S NOTE: The remaining summaries content from this installment of Nevada Appellate Summaries can be read online at www.clarkcountybar.org.]

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Pro Bono Corner

A Different Physics: Our Pro Bono Litigation Today

By Mohamed A. Iqbal, Jr., Esq.

Before COVID, pro bono cases at our small firm blended into the calendar with the same flow of other litigation matters—they entailed the same obligations, fed on the same hope, triggered the same pressures, and experienced roughly the same life-cycle from complaint onward. As they should, to be sure, given that zealous advocacy is due to all clients without exception.

COVID, however, with its pace and indiscriminate aggression, altered the fundamental physics of our pro bono cases. Indeed, from the initial flares of angst at the end-nodes of our professional and social networks, to the weeks of lockdown and uncertainty, COVID has been a uniform event afflicting our individual clients, our local businesses, and the multi-national corporations we represent in the pharmaceutical industry. Late March 2020 saw a surge in calls from retail tenants unable to make rent payments and independent contractors with suddenly-vulnerable services agreements. We continue to help many of them on a pro bono basis, and committed to representing more under-served Nevada clients following the George Floyd murder, especially citizens of color and indigent military veterans.

Those decisions and the resulting engagements emit a hopeful energy and pull from us passion anew. These cases have nourished the ideals that drew us to this profession in the first place, including of being a good neighbor in times of need and equal justice for all, and they have had an uplifting and communal vibe and fiber to them. Perhaps this is due to both the gravity of two back-to-back cataclysmic social events and the loss, anguish, and introspection they have foisted upon the whole of the American family, sparing none.

Our recent legal aid cases have made me feel more free—and yet also more conflicted; more serene—and yet more emotional; more powerful—and yet also frail. Above all, they have made me more appreciative of the trust society has placed in our hands as advocates. And I hope it endures.

Mo Iqbal, Esq. maintains an extensive litigation practice and a separate pharmaceutical/regulatory practice, where he helps initiate clinical trials addressing key public health issues, including opioid addiction and chronic pain.

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