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COMMUNIQUÉ

THE OFFICIAL PUBLICATION OF THE CLARK COUNTY BAR ASSOCIATION

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Editorial Calendar

Cover Date	Topic	Closing Date
January 2024	Five Things	12/1/2023
February 2024	Civil Rights	1/2/2024
March 2024	Criminal Law	2/1/2024
April 2024	Technology in Practice	3/1/2024
May 2024	Ethics	4/1/2024
June/July* 2024	Membership Matters	5/1/2024
August 2024	Education Law	7/1/2024
September 2024	Labor & Employment Law	8/1/2024
October 2024	Law of Medicine	9/1/2024
November 2024	Constitutional Law	10/1/2024
December 2024	Pro Bono	11/1/2024

*The combined June/July issue will be released in June. The editorial calendars, schedules, editorial policies, and writer's guidelines for the *Communiqué* are subject to change without notice.

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Space is available for bar members and select businesses to place an ad to showcase their accomplishments, professional services, and products in upcoming issues of the color print magazine, *Communiqué*. For more information, contact StephanieAbbott@clarkcountybar.org, (702) 387-6011.



Angelina Rivera, Mariteresa Rivera-Rogers, Randa Reiff Shea, Angela Dows and her daughter, Stu Rich, Elizabeth Ashley, Amy Ferreira, Michael Wendlberger, Nathan Topper, Amanda Brookhyser, Steph Abbott, Kim Farkas and Cheryl.

Highlights from CCBA Group Activity at Project 150

On April 6, 2024, a group of CCBA members helped to sort about 500 pounds of clothes donated to Project 150 a local non-profit with a mission to offer free support and services to homeless, displaced, and disadvantaged high school students in the Southern Nevada area so they can remain in school and graduate.

For more information about the CCBA’s community outreach programs, reach out to Stephanie at the CCBA office at (702) 387-6011.

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Taking Comfort in Professionalism

Why do bad things happen to good people? It's an age-old question, and it can be hard to understand. Our hearts go out to the victims of the recent tragedy in our legal community. It makes you think about what is important.

Why do we do what we do, and how should we be doing it? My legal ethics professor in law school touched me with his explanation. He said most people have some kind of hero, whether you are atheist, religious, or agnostic. Whether it be the death row inmate or the losing party in a civil case, each person needs a heroic advocate in the face of great difficulty. As lawyers, we can each be our own kind of heroic advocate.

I take comfort in my hero and savior, Jesus Christ, of whom the Bible says He is the Lord, the Resurrection, and the Life. One of my favorite Christian teachings of comfort is: "In my Father's house are many mansions. . . . I go to prepare a place for you." I am grateful that we all have the freedom to seek comfort where we choose. I hope you will share with me some time the teachings of comfort by one of your heroes.

We know that legal ethics are guideposts for heroic advocacy. We also know that our best selves extend beyond ethical rules and opinions. We can also be counselors and help our clients be their best selves. Many times, we can settle differences. We can be civil and kind. We can share a smile with those who need it.

Thank you for what you do. As lawyers, you advocate for justice, and you heroically help solve problems.

--Paul C. Ray, 2024 CCBA President



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Meet Your Law Students Mixer Highlights

On April 4, 2024, several members of the bench and bar attended the CCBA's 3rd Annual Meet Your Law Students Mixer at Claggett & Sykes Law Firm. The special event was organized by the CCBA and UNLV William S. Boyd School of Law.

The event was hosted by CCBA's Community Service, DICE, and New Lawyers Committees. Special thanks to the many committee volunteers:

- Brianna Bower
- Amy Buchanan
- LaTeigra Cahill
- Nathan Claus
- Joshua Dresslove
- Genevieve Galman
- Christena Georgas-Burns
- Nikki Harris
- Alexandra Matloff
- Stuart Rich
- Tina Talim
- Brandon Thompson
- Michael Wendlberger

The Meet Your Law Students Mixer featured complimentary food and drink tickets for UNLV law students and CCBA members. Special thanks to event sponsors. See left for sponsor highlights. See right for a few photo highlights.

Special thanks to Right Lawyers for offering a special Secret Book raffle. Michael Burnette was the lucky winner of the Secret Book!



Jacquelyn Franco, Judge Melisa De La Garza, Rock Rocheleau



Rock Rocheleau and the Secret Book



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Photos courtesy of Tina Talim and Stephanie Abbott.



Students Samuel Reyes and Eva Guevara-Gutierrez with Amy Buchanan, Christena Georgas-Burns, Brianna Bower, and student Harut Khachoyan



Paul Ray, with students Mercedes Ruiz, Brianda Becerra Larios, Gavin Garcia



Michael Whittaker, Destiny Sarvis-Hooper, student Yilu Song, Paul Ray, Amanda Patanaphan



Madilyn Leavitt Cole, Judge Michelle Leavitt, John Aldrich



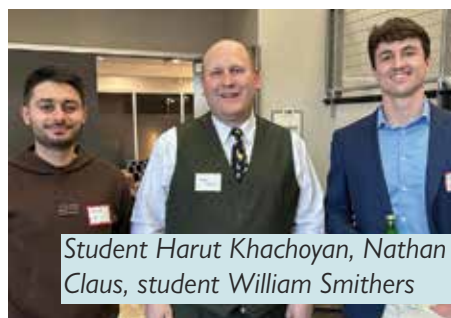
Student Gavin Garcia, Cory Ford, Justin Bolor, Cristina Phipps, Pranava Moody



Hearing Master Jonathan Cooper, student Raymond Wu



Paul Ray, Jay Young



Student Harut Khachoyan, Nathan Claus, student William Smithers



Tina Talim, Hearing Master Amy Ferreira, Michael Wendlberger



Tina Talim, Justice Abbi Silver (Ret.)



Heather Rappaport, Student Sonny DeFreitas, Michael Wendlberger



Tina Talim, Samuel Reyes, Genevieve Galman, Michael Wendlberger, Joshua Dresslove, Benjamin Doyle

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Lunchtime Learning CLE

“Probate for the Non-Probate Attorney: Navigating Probate in PI & Wrongful Death Cases”

Speaker: James A. Fontano, Probate Commissioner, 8th Judicial District Court



Course description: You are good at what you do—whether it’s a simple car accident or a complex wrongful death suit, you have spent a lot of time perfecting your craft, and you deliver excellent legal service to your clients. But problems always seem to arise when you have a matter that requires approval of a settlement or an order to distribute the proceeds from the probate court. In this CLE, Probate Commissioner James Fontano will provide tools and tricks to getting your civil case through probate quickly and efficiently, and without those annoying emails telling you that your matter has to be continued or taken off calendar. You will learn:

- How probate works, how long it takes, and what procedural steps are involved
- What a special administration is, and what it allows you to do
- Why probate approval is necessary, and how to get your settlement approved
- How to allocate proceeds between the estate and the decedent’s heirs
- How to convert the special administration to a set aside, summary administration, or general administration, and how to close the estate.

Date: Wednesday, May 8, 2024

Time: 12:00 to 1:15 pm

Location: Online via Zoom

Offers: 1.0 General CLE Credit (NV)

Price:

- Live webcast (via Zoom): FREE for CCBA Members (2024) only
- Recorded materials rental: \$25/CCBA Member or \$50/non-member

RSVP to CCBA by 5/7/2024: ClarkCountyBar.org, (702) 387-6011, or donnaw@clarkcountybar.org

Sponsors:



Lunchtime Learning CLEs

Law Day CLE Series

The Law Day CLE Series will provide an opportunity for CCBA members and USAF attorneys and legal office personnel to learn about a variety of legal issues that service members may face in their personal lives in southern Nevada. The live webcasts (via Zoom) are FREE for CCBA Members (2024) and active U.S. Air Force members only. These events will be held online from 11:30 a.m. to 12:45 p.m. and feature these presentations:

“A Bird’s-Eye View of Landlord-Tenant Law in Nevada (2024)”

- **Date:** May 10, 2024
- **Speakers:** Alex Cherup, Nevada Legal Services and Nicholas Haley, Legal Aid Center of Southern Nevada

“A Bird’s-Eye View of Immigration Law”

- **Date:** May 14, 2024
- **Speaker:** Kathia Quiros, GWP Immigration Law

“A Bird’s-Eye View of Family Law in Nevada (2024)”

- **Date:** May 22, 2024
- **Speaker:** Lorien Cole, Cole Family Law Firm

“A Bird’s-Eye View of Military Pensions”

- **Date:** September 12, 2024
- **Speaker:** Marshal Willick, Willick Law Group

RSVP to CCBA at least 48 hours before event:


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Lunchtime Learning CLE

“Protecting Your Law Firm from Professional Liability Claims”

Topics:

- Introduction to the top 10 things to do to avoid a lawyers professional liability claim.
- Professional liability pitfalls, claims, and the way innocent actions can turn into substantial issues.
- How to develop risk awareness, avoid making critical mistakes, and eliminate the repercussions created by these acts or failures to act.

Speakers:

- **Joel Jarvis**, Producer, Alera Group Las Vegas
- **Noah Fiedler**, Shareholder of Barron & Newburger, P.C.
- **Becky Sargent**, Marketing Specialist, PICA, A ProAssurance Company
- **James Gray**, Senior Business Development Manager, PICA, A ProAssurance Company
- **Michael Littleworth**, JD, Senior Complex Litigation Specialist, PICA, A ProAssurance Company

Date: May 23, 2024

Time: 12:00 to 1:15 p.m.

Location: Online via Zoom

Credits: 1.0 Ethics CLE Credit (NV)

Price:

- Live webcast (via Zoom): FREE for CCBA Members (2024) only
- Recorded materials rental: \$25/CCBA Member or \$50/non-member

RSVP to CCBA by 5/21/2024: ClarkCountyBar.org, donnaw@clarkcountybar.org

Sponsors:



Volunteers Needed for Will-A-Thon

Nevada lawyers are needed to help at a group activity to provide pro bono services to senior citizens served by the Southern Nevada Senior Law Program (SLP).

Will-a-Thon

- **Date:** Wednesday, June 12, 2024
- **Time:** 10:00 a.m. – 1:00 p.m.
- **Location:** East Las Vegas Community Center, 250 N. Eastern Ave, Las Vegas, NV 89101
- **Offers:** 1 Hour CLE credit for 3 Hours of Pro Bono Service
- **CLE Training Prior to Event:**
- **Date:** Thursday, May 30, 2024
- **Time:** 12:00-1:00 pm
- **Location:** Southern Nevada Senior Law Program/SLP, 7690 W Sahara Avenue, Las Vegas, NV 89117 or via Zoom
- **Format:** Live in-person and via Zoom; recorded training also available on demand
- **Registration:** Contact Casi Colobong at SLP@ccolobong@snslp.org. Please complete CLE training no later than June 7, 2024. 📍

Special event hosted by the Clark County Bar Association (CCBA)

Clark County Bar Luncheon

Featuring Rob Bare

Presenting

“State Bar Grievances & Complaints from the Defense Point of View”

Offering 1.0 Ethics CLE (NV)

**All members of the bench and bar
are invited to attend; however,
space will be limited.**

June 20, 2024

Check-in & Networking:
11:30 a.m. – 12:00

Luncheon program:
12:00 p.m. – 1:00 p.m.

CLE presentation:
12:15 to 1:15 p.m.

**RSVP to the CCBA
required by 6/14/2024**

702-387-6011

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Scan QR Code for RSVP form



Civil Judges Meeting

- **Host:** Eighth Judicial District Court – Civil Department
- **When:** May 15, 2024, 12:00 p.m.
- **Where:** Regional Justice Center, Courtroom 14A and via Zoom
- **What:** Presentation by Probate Commissioner. Agenda and Zoom link to be announced the week before. For more information, contact the JEA to Judge Clark Newberry, Eighth Judicial District Court, Dept. 21.

Las Vegas Justice Court Judges Meeting

- **When:** Wednesday, June 12, 2024, 11:30 a.m.
- **Where:** Regional Justice Center, Courtroom 7A, 7th Floor
- **What:** Agenda to be announced the week before. For more information, contact the Judicial Executive Assistant to Judge Cynthia Cruz, Justice Court, Department 5.

Applications Due May 3, 2024, for Positions at Las Vegas Justice Court

The Las Vegas Justice Court is seeking 2 attorneys to serve as prosecutor and defense counsel for misdemeanor defendants ordered into LVJC Specialty Court as a condition of a suspended sentence. The application deadline is May 3, 2024. Additional details relating to the job description, roles and responsibilities, qualifications, monthly compensation, and the application process can be found at this link: https://www.lasvegasjusticecourt.us/news_detail_T23_R28.php

Applications Available for Vacancy of Eighth Judicial District, Department 14

On April 17, 2024, Governor Joe Lombardo announced the vacancy for the Eighth Judicial District Court of Nevada, Department 14. Department 14 will become available due to the retirement of the Honorable Adriana Escobar in May. Applications for Department 14 are due May 14, 2024. Applicants interested in applying must contact Ms. Margarita Bautista at mbautista@nvcourts.nv.gov to receive the required application materials.

Application instructions can be found at: https://nvcourts.gov/_media/media/folders/committees_and_commissions/judicial_selection.

Nevada Supreme Court Media Contact: MediaInquiries@nvcourts.nv.gov.

Eighth Judicial District Court Administrative Order 24-01

On April 17, 2024, Chief Judge Jerry A. Wiese filed an order in the administrative matter of department reassignments and hearing master assignments. *See* Administrative Order 24-01.


The order cites NRS 3.025, EDCR 1.30(b), and the recent appointment of Erika Mendoza to fill the judicial seat in Department 27.

Per the order, “pursuant to EDCR 1.30(b), effective April 22, 2024:

“All cases currently assigned to Department 27 shall be reassigned to Department 14;

All cases currently assigned to Department 14, except those retained for court efficiency, shall be reassigned to Department 27.

It is further ordered, pursuant to EDCR 1.30(b), effective April 1, 2024, Holly Roys shall be assigned to hearing Civil Commitment Court, MAT Re-Entry Court, Assisted Outpatient Treatment Court, and Co-Occurring Disorders Court, and Claudia Romney shall be assigned to Domestic Violence Temporary Protection Order Court.”

For more information about the Eighth Judicial District Court Rules and Administrative Orders, visit the court’s website at <http://www.clark-countycourts.us/>. 



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The Call of Duty

By Chief Judge Cynthia Cruz

About a month ago, I received a jury duty summons in the mail. (Yes—even judges can get summoned). The first thought I had was not a favorable one and was almost a knee-jerk, negative one. But then I stopped and asked myself why I was thinking that way. Am I not an attorney and judge who has done jury trials? Am I not someone who understands how challenging it is to get people to actively participate in our justice system through jury service? I had sufficient time to adjust my schedule and make plans for appearing, going through the selection process, and serving if selected. I have a position with the flexibility where I can do that, and jury service would be in the very courthouse where I work each day. So why all the negative thoughts?

Everyone I spoke to seemed to impart that this was something I needed to explore “getting out of.” I thought about the various excuses prospective jurors have given me, as both an attorney and judge, as to why they cannot serve. Those people also were given weeks of notice, so they, too, could work on adjustments to their schedule or even request a postponement. So why do we all have this angst about jury service? Is it just that we do not like our routines shifted for a short period of time? Are our days so full that shifting to another schedule on a temporary basis is too stressful? I wonder if it is the word “duty” that causes the problem.

Chief Judge Cynthia Cruz was elected to Las Vegas Justice Court Department 5 in 2012 and re-elected in 2018.

Perhaps, we should emphasize the word “service” over “duty” and realize that we are giving back to our community by sitting on a jury.

Perhaps, we should emphasize the word “service” over “duty” and realize that we are giving back to our community by sitting on a jury. Perhaps, we should remember that sitting on a jury is a cherished right provided to us in our Constitution. Maybe, we should recognize that sitting on a jury is a privilege that some countries do not offer.

I began telling people that I had jury duty and noting that a summons was not a bad thing.

My day to appear was the same day I wrote this article. Following the instructions, I called last night to check on my jury status. The jury system told me that I was not required to appear. This means that I have a few days to catch up on matters on my desk since I had moved all my meetings. So, in essence, my jury duty summons ended up being a good thing, not a negative thing.

The next time I receive a jury summons, I will approach it positively and as an honor for me to serve my community.

As Thomas Jefferson once said, trial by jury is “the only anchor ever yet imagined by man by which a government can be held to the principles of its Constitution.” **C**



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Red Flags: Deposition Misconduct and Judicial Remedies

By Adrienne Brantley-Lomeli and Ogonna Brown

Deposition misconduct is far too often tolerated and accepted as part of the adversarial process. But deposition misconduct simply should not be tolerated, given the attendant expenses of depositions. Depositions are a key tool in a lawyers' trial preparation. And while many lawyers have been taught effective techniques to elicit useful testimony, a trial lawyer should also know what behaviors to look for when facing deposition misconduct. Whether dealing with an evasive witness or a hostile lawyer, courts are not shying away from issuing sanctions orders for deposition misconduct. Indeed, in May of 2022, officials in the Eighth Judicial District Court, Clark County attempted to quell deposition misconduct by issuing the document "Administrative Order Regarding Deposition Behavior." AO 22-08.

Under NRC 37(a), if a party gives an evasive or incomplete answer, that party can be ordered to answer and could face sanctions for not doing so. This exposure to sanctions has been extended to attorneys as well.

The two most common issues of sanctionable deposition conduct are issues with a witness's answer and counsel's objections. A witness's answers are sanctionable in instances where they 1) provide a non-responsive nar-

The two most common issues of sanctionable deposition conduct are issues with a witness's answer and counsel's objections.

ative; 2) make impertinent statements; 3) refuse to give estimates; or 4) feign lack of knowledge. *Rapaport v. Soffer*, No. 2:10-CV-935-MMD-RJJ, 2012 WL 6799742, at *7 (D. Nev. Dec. 31, 2012). Some of these answers may be acceptable under proper circumstances, but such answers, when not appropriate, cross the line into deposition misconduct. For instance, the court in *Wausau Underwriters Ins. Co. v. Danfoss, LLC*, held that the witness's use of an outline during a deposition was not a "script", and therefore did not rise to misconduct. 310 F.R.D. 683 (S.D. Fla. 2015). Similarly, the court in *Jenkins v. Corizon Health Inc.*, found that a doctor's statement that he did not think the "particular type of issue" the pre-trial detainee experienced had "changed in the last 30 year[s]" was not so non-responsive to the question to require sanctions. 584 F. Supp. 3d

Adrienne Brantley-Lomeli is an associate at Lewis Roca in the firm's litigation practice group with a focus on commercial litigation. Adrienne's experience includes commercial finance litigation, bankruptcy disputes, and appeals.

Ogonna Brown is a partner at Lewis Roca in the litigation and bankruptcy and creditors' rights practice groups. Ogonna focuses her practice on creditors' rights, secured party representation, commercial litigation, and bankruptcy litigation. She has extensive experience representing bankruptcy trustees and state court receivers.



1364, 1372 - 3 (S.D. Ga. 2022). What may seem to be evasive or non-responsive answers during a deposition may be brought on by the line of questioning.

Counsel's actions may be sanctionable where counsel coaches the witness or continually lodges inappropriate objections. Coaching the witness may occur during breaks or through improper deposition objections. *Coyote Springs Inv., LLC v. Eighth Jud. Dist. Ct. of State ex rel. Cnty. of Clark*, 131 Nev. 140, 146, 347 P.3d 267, 271 (2015). And in the age of remote depositions, counsel should be on the lookout for other types of misconduct. For example, in *Barksdale Sch. Portraits, LLC v. Williams*, the United States District Court for the District of Massachusetts issued sanctions based on the conduct of defendant and defense counsel during remote video deposition. 339 F.R.D. 341 (D. Mass. 2021). There, while the defendant and defense counsel were seated in the same room and wearing face masks, citing "COVID rules," defense counsel surreptitiously provided answers to defendant. *Id.* at 344. The court determined that by exploiting the remote nature of the deposition to improperly assist defendant, defense counsel frustrated plaintiffs' rights to fair examination of defendant. *Id.* at 345. As a result, the court warned that counsel's conduct had the effect of sowing seeds of doubt

in minds of litigators and judges as to the effectiveness of remote deposition proceedings. *Id.*

If misconduct occurs during a deposition, it is important to make a record during the deposition using the proper objections. Counsel should first attempt to resolve any issue without court intervention. Use of the "Administrative Order Regarding Deposition Behavior" may be helpful in reminding counsel or an unruly witness of appropriate behavior. Counsel should also object on the record, in a concise and nonargumentative way, and identify the specific inappropriate behavior or line of questioning. One option is for counsel to contact chambers or the discovery commissioner to immediately address the improper behavior during the deposition. Counsel should preserve the misconduct issue on the record and after the deposition and seek a remedy under the rules of civil procedure and the local rules regarding discovery disputes.

Counsel has the right to a fair examination. And as the discovery commissioners warned "gamesmanship has no place in depositions; it will result in sanctions." AO 22-08. Understanding when misconduct occurs and the remedies to which a party is entitled are fundamental to protecting that right. **C**

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And Now . . . A Few Words About Fees

By Dennis L. Kennedy and Joshua P. Gilmore

A couple of things have happened to your ability to collect attorney's fees since the last time we spoke. They are important, so read on.

Fees paid in advance for contemplated services

Remember “flat fees,” “fixed fees,” “non-refundable fees,” and “earned-on-receipt fees”? That is about all they are now—(probably fond) memories. Nowadays, “a fee paid to a lawyer in advance for services to be rendered in the future must be placed in the client trust account and may be withdrawn only as earned by the performance of the contemplated services.” This is the current state of the law as summarized in American Bar Association Formal Opinion No. 505 (5/3/23).

It does not matter what a lawyer calls it; with quite rare exceptions, a fee paid for work to be performed in the future must be placed in the trust account and disbursed to the lawyer only when the work is performed. This may require the lawyer to divide the full scope of the work into segments or stages, or for single function engagements, to collect the fee upon completion of the work.

Opinion 505 contains several instructive hypotheticals. Here they are:

1. **Family law nonrefundable retainer**

The client pays the lawyer a \$6,000 retainer to file a divorce complaint, prepare a motion to enjoin the transfer of assets, seek a protective order, attend hearings, etc. Approximately 20 hours of work is contemplated. The retainer agreement provides that no portion of the fee shall be refunded or returned to the client for any reason. Shortly thereafter, the parties reconcile. The lawyer is entitled to her hourly rate of \$300 for time spent on the matter. The balance must be returned to the client.

2. **Commercial litigation general retainer**

The client pays the lawyer a \$6,000 non-refundable general retainer (deemed in the retainer agreement to be “earned upon receipt”) for purposes of retaining the lawyer and assuring her availability for a civil case, with payment at the lawyer's \$300 hourly rate if the lawyer expends “more than 20 hours” working on the case. The lawyer files a complaint, and the case quickly settles. The lawyer is entitled to her hourly fee for the time spent and must refund the balance of the \$6,000.

Dennis L. Kennedy and Joshua P. Gilmore are partners at Bailey Kennedy, LLP. Alongside defending attorneys subject to possible disciplinary action before the Nevada State Bar, they advise attorneys on legal ethics and compliance-related issues that arise in the course of their practices, including permissive advertising and marketing, conflicts, lawyer departures, and charging liens. They were counsel (along with Rebecca L. Crooker) for the Dimopoulos Law Firm in the case referenced above.



3. **Criminal matter flat fee**

The client pays the lawyer a \$15,000 “flat fee” for defending a criminal matter, deemed non-refundable for any reason, and agrees that the fee is earned “regardless of the time expended on the matter or how it is resolved.” The lawyer makes the initial appearance, but shortly thereafter is discharged by the client. The client demands an accounting and refund of the unused retainer. The lawyer may charge for time spent on the matter and must refund the balance.

Be aware that these requirements—(i) deposit of the retainer in the trust account; (ii) disbursement of funds as earned; and (iii) refund of the balance when the entire amount is not earned—are being enforced by the Office of Bar Counsel and endorsed by the Supreme Court of Nevada. *See, e.g., In re Bachman*, 519 P.3d 1266 (Nev. 2022); *In re Joseph W. Houston, II*, Southern Nevada Disciplinary Board, Case No. SBN22-00250; *In re K. Alexandra Monaco*, Southern Nevada Disciplinary Board, Case No. SBN22-00219; *In re Ryan Cann*, Southern Nevada Disciplinary Board, Case Nos. OBC21-0289 and OBC21-0353.

Punitive termination fees

Another thing that is fading fast is the high-priced termination fee contained in many retainer agreements—primarily for personal injury cases—that disincentivizes clients from terminating their lawyers. These provisions commonly provide that if the client terminates the law firm before the case is over, the firm is entitled to a quantum meruit fee calculated at \$1,000 per hour for all work done on the matter by lawyers and non-lawyer personnel alike.

These types of provisions are unenforceable, and their attempted enforcement may violate the Nevada Rules of Professional Conduct. *See Steve Dimopoulos, LLC v. Harris Law Firm, LLP*, Case No. A-21-28630-C, Eighth Jud. Dist. Ct., Clark County, Nevada. These provisions are punitive because they: (i) interfere with the client’s absolute right to discharge the lawyer at any time with or without cause, *see In re Kaufman*, 93 Nev. 452, 567 P.2d 957 (1977); and (ii) seek to collect a fee from the client without regard for the Brunzell factors, *see Logan v. Abe*, 131 Nev. 260, 350 P.3d 1139 (2015). As such, they should be removed from your retainer agreements. **G**



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Legal Ethics Fun Facts

By Joseph Garin

**About the CCBA's Article #17: "Legal Ethics Fun Facts" offers 1.0 Ethics Continuing Legal Education (CLE) credit to Nevada lawyers who complete the test and order form per the offer described in the May 2024 issue of Communiqué. See pp. 22–29. The CCBA is an Accredited Provider with the NV CLE Board.*

The practice of law is constantly changing, and our ethical rules are doing their best to keep up. As things shift, it is crucial for lawyers to stay mindful of ethics. This article reviews three recent legal ethics topics: the “reply all” e-mail dilemma, the ins and outs of practicing law in our tech-driven world, and the ethical implications of new legal tech. In addition, here is the best part: this article is interactive! Read through the article, answer ten True or False questions, and earn some continuing legal education credit—all while lounging on your couch. This is an easy way to stay sharp on ethical issues and get credit for your time.

Reply all e-mail

Rule of Professional Conduct 4.2, colloquially termed the “no-contact” rule, states:

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

The rule is clear in establishing the “no-contact” prohibition. What happens, though, when an opposing lawyer copies their client on a substantive, case-specific e-mail to you? Is it a violation of Rule 4.2 if you “reply all” to the e-mail, including the opposing client, with a substantive response? The American Bar Association Standing Committee on Ethics and Professional Responsibility recently considered this issue in ABA Formal Opinion 503.

In some states, sending a “reply all” response to an e-mail that includes an opposing party represented by another lawyer may constitute a violation of Rule 4.2. These states argue that there is no “implied consent” from the sending lawyer for the opposing client’s inclusion in the “reply all” response. On the flip side, some states hold the opposite view, suggesting that the opposing lawyer tacitly consented to a “reply all” response by including the client in the e-mail thread. It’s akin to discussing the case in an elevator where both clients and lawyers are present.

To clear all this up, ABA Formal Opinion 503 says lawyers who copy their clients on e-mails to other lawyers are inviting a “reply all” from that other lawyer. If the send-

Joseph Garin has represented more than 1,000 lawyers and law firms in cases in Nevada, Utah, Colorado, Michigan, and Illinois, including trials, discipline hearings, and appeals. He frequently teaches CLEs on legal malpractice and ethics and also works as an expert witness in cases involving attorney liability and fee petitions.



ing attorney does not want a “reply all” responding e-mail, that lawyer should not have copied their client. The ABA’s view is that the proper route would be to separately forward the e-mail to the client, thereby avoiding the risk of the “reply all” responding e-mail.

Remote depositions and witness preparation

The ethical duty of competence established by Rule 1.1 states: “A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.” The rule requires that a lawyer make an effort to prepare a witness for deposition and establishes that inadequate preparation of the witness could violate the duty of competence.

Remote depositions present a new level of challenges for the unwary lawyer. Questions arise concerning the appropriate methods of preparing a witness for testimony and the permissible actions for attorneys during the deposition itself. ABA Formal Opinion No. 508, titled “The Ethics of Witness Preparation” (August 5, 2023), guides lawyers on permissible actions to prepare a witness to testify:

Facts continued on page 24



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Facts continued from page 23

- Remind the witness that they will be under oath
- Emphasize the importance of telling the truth
- Explain that telling the truth can include a truthful answer of “I do not recall”
- Explain case strategy and procedure, including the nature of the testimonial process or the purpose of the deposition
- Suggest proper attire and appropriate demeanor and decorum
- Provide context for the witness’s testimony
- Inquire into the witness’s probable testimony and recollection
- Identify other testimony that is expected to be presented and explore the witness’s version of events in light of that testimony
- Review documents or physical evidence with the witness, including using documents to refresh a witness’s recollection of the facts
- Identify lines of questioning and potential cross-examination
- Suggest choice of words that might be employed to make the testimony clear
- Tell the witness not to answer a question until it has been completely asked
- Emphasize the importance of remaining calm and not arguing with the questioning lawyer
- Tell the witness to testify only about what they know and remember and not to guess or speculate
- Familiarize the witness with the idea of focusing on answering the question, i.e., not volunteering information

While it is appropriate to prepare a witness to testify, ethical rules establish clear boundaries between preparation and misconduct. Model Rule 3.4(b) mandates that a lawyer shall not “falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law.” A New York lawyer was disciplined for advising his client to “downplay” the frequency of their meetings while preparing for testimony. ABA Formal Opinion 508 cites to *In re Meltzer*, 21 N.Y.S.3d 63, 64 (2015), which considered the lawyer’s instruction to his client and another witness to “downplay” the number of times they met to prepare so that it did not appear they had “rehearsed the perfect story.” An instruction to lie violates Rule 3.4 and Rule 8.4, both of which protect the integrity of the legal profession.

Likewise, the ethical rules prohibit signals, text messages, private chat windows, and similar means of communication between a lawyer and the witness during testimony. In *Florida Bar v. James*, 329 So. 3d 108, 109—12 (Fla. 2021), a Florida lawyer was disciplined for sending text messages regarding testimony to the witness during a deposition. Based on this conduct, the lawyer was determined to have violated Florida’s equivalents to Model Rule 8.4 (commission of any act that is unlawful or contrary to honesty and justice), Model Rule 3.4(a) (obstructing another party’s access to evidence), and ABA Rule 8.4(d) (conduct prejudicial to the administration of justice).

Nevada case law and guidance from the Eighth Judicial District Court provide additional clarity on behavior during depositions. In *Coyote Springs Inv., LLC v. Eighth Judicial Dist. Court*, 131 Nev. 140, 149 (2015), the Court ruled that discussions between a witness and their lawyer during a break aren’t confidential unless the break was taken to protect a privilege, follow a court order, or file a motion to limit depositions. After the break, the witness’s lawyer must state on record (1) that a conference happened, (2) what it was about, and (3) if a privilege was claimed. The Eighth Judicial District Court published an administrative order to establish guidelines for behavior during depositions. See <https://nvbar.org/wp-content/uploads/Ad->

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ministrative-Order-22-08.pdf All of this aligns with Rule 8.4, which underscores the obligation to maintain the integrity of the legal profession. A lawyer should consider these limitations when preparing a witness to testify.

Artificial intelligence

Artificial intelligence (AI) is expected to enhance efficiency and elevate the quality of work for lawyers as they integrate it into the practice of law. However, with these advancements come new ethical and legal risk challenges. The ethical rules establish boundaries, but figuring out how they apply to AI is still a bit of a mystery. This lack of clear guidance puts legal professionals in a tough spot as they adjust to AI in their work.

The rise of AI implicates several ethical rules:

- Rule 1.1 establishes the duty of competence and includes an ethical obligation for lawyers using AI to understand the risks of using AI. Rule 1.1, Comment 8 explains that lawyers should “keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology” Lawyers need to be mindful that the use of AI can present new ethical concerns.

Facts continued on page 26

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- Rule 1.5 covers fees and establishes an ethical duty that a lawyer's fees and expenses must be reasonable. The Florida Bar recently published a Proposed Advisory Opinion that instructs: "[r]egarding fees, a lawyer may not ethically engage in any billing practices that duplicate charges or that falsely inflate the lawyer's billable hours. Though generative AI programs may make a lawyer's work more efficient, this increase in efficiency must not result in falsely inflated claims of time. In the alternative, lawyers may want to consider adopting contingent fee arrangements or flat billing rates for specific services so that the benefits of increased efficiency accrue to the lawyer and client alike." See Professional Ethics of the Florida Bar, Proposed Advisory Opinion 24-1, p. 7 (January 19, 2024).
- The International Association of Privacy Professionals explains that AI training models rely on data that "is often obtained by data scraping at a mass scale." That data can contain sensitive information, creating a risk that someone's private information

could be revealed in the AI's output. See <https://iapp.org/news/a/what-does-ai-need-a-comprehensive-federal-data-privacy-and-security-law/>. Rule 1.6 establishes an ethical duty for lawyers to protect confidential client information. It requires client consent to disclose confidences to a third party, including an AI platform. The Florida Bar's Proposed Advisory Opinion states, "[u]se of a 'self-learning' generative AI raises the possibility that a client's information may be stored within the program and revealed in response to future inquiries by third parties."

- Rule 1.18 pertains to duties owed to prospective clients. It outlines the responsibilities of lawyers when potential clients consult them regarding potential legal representation, even if no attorney-client relationship ultimately arises. The Florida Bar explains that a lawyer cannot assign to AI tasks that require a lawyer's personal judgment and participation such that they would constitute the practice of law. Lawyers should "include clear and reasonably understandable disclaimers limiting the lawyer's obligations" when using a chatbot interface.

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- Rule 3.1 establishes a duty for lawyers to present meritorious arguments in good faith and based on an extension, modification, or reversal of existing law. Rule 3.3 establishes an ethical duty of candor to tribunals. A lawyer violated these rules by using AI to draft a legal brief that included fictitious legal citations referencing precedential cases. *Mata v. Avianca*, 2023 U.S. Dist. LEXIS 108263 (S.D.N.Y. June 22, 2023). In a 43-page ruling, the court ordered that the lawyer send individually addressed letters via first-class mail to judges falsely linked to the nonexistent, fabricated legal opinions, in addition to paying a \$5,000 sanction.
- Rules 5.1 and 5.3 outline responsibilities for overseeing subordinate lawyers and non-lawyer staff. Those in supervisory roles have an ethical obligation to ensure that the use of AI is appropriate and complies with ethical rules.
- The lawyer advertising rules and prohibitions on misleading or manipulative statements are concerns. Lawyers using AI must ensure they do not provide misleading information or act intrusively. A chatbot interface should be clearly identified to

prospective clients to explain that they are interacting with an AI program, not a lawyer or firm employee. Lawyers should consider screening questions to limit chatbot interactions with individuals already represented by another lawyer. Finally, lawyers may advertise their use of generative AI, but they cannot claim to have a superior practice unless objectively verified.

Existing and emerging technologies bring both promise and complexity to the practice of law. As we navigate the integration of AI, address challenges like “reply all” e-mail incidents, and adapt to the nuances of remote depositions and witness preparation, legal professionals must carefully consider ethical implications. This dynamic landscape demands a commitment to ongoing professional development while upholding the foundational principles that define our esteemed profession. **G**



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CCBA CLE Article #17

Quiz

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Complete the quiz. Each question has only one correct answer. Circle “True” or “False.”

No-contact rule

1. **True or False:** Rule 4.2 prohibits a lawyer from copying their client on an email to the opposing attorney about the substance of a case.

2. **True or False:** If a lawyer copies their client on an email to an opposing lawyer, inviting a reply to all, this reply including an opposing party would not violate the no-contact rule, Rule 4.2.

Witness preparation and deposition conduct

3. **True or False:** According to ABA Opinion 508, a lawyer is allowed to remind a witness about the importance of telling the truth during witness preparation.

4. **True or False:** Failure to adequately prepare a witness, as per the ABA Model Rules, may be classified as a violation of the duty of competence in various situations.

5. **True or False:** A Nevada lawyer can request a break in a deposition to instruct the witness to avoid specific facts in their answers to questions.

6. **True or False:** A lawyer can send text messages to a witness during a deposition to instruct the client to minimize how much was done to prepare for the deposition.

Artificial intelligence

7. **True or False:** A lawyer is required to disclose to the court if AI was used to write a brief.

8. **True or False:** Open for all AI platforms are confidential, and lawyers may use these platforms to deliver legal services to their clients in a way that ultimately reduces the client’s legal expenses.

9. **True or False:** Rule 3.3 establishes a lawyer’s ethical duty to protect client confidences when utilizing AI.

10. **True or False:** Absent actual knowledge of a problem, a partner cannot be disciplined if an associate used AI to write a brief, and the brief includes legal citations that are not legitimate.

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Pro Bono Conflicts Ask-a-Lawyer

By Michael Wendlberger, Esq.

Ask-a-Lawyer programs offered by legal aid organizations are an excellent way for attorneys to give back to the community in a limited time. Today, many ask-a-lawyer events occur telephonically, reducing the time commitment to assisting those in need—there is no need for attorneys to drive across town to provide consultations. Attorneys can help expand access to justice from the comfort of their home or office.

But what about conflicts? When an attorney takes on a new case, they must run conflicts to ensure they are not conflicted out of a matter due to the representation of a current or prior client, see Nevada Rules of Professional Conduct 1.7 & 1.9.

How does an attorney from the comfort of their home run conflicts before engaging in an Ask-a-Lawyer program? The answer is short: they don't. An attorney who wants to participate in an Ask-a-Lawyer program with a legal aid provider falls under an exception found in NRPC Rule 6.5. Under rule 6.5 (a) (1), an attorney "Is subject to Rules 1.7 and 1.9(a) **only if the lawyer knows that the representation of the client involves a conflict of interest**"... (*emphasis added*). Thus, an attorney without actual knowledge of a conflict can proceed with the free consultation. Of course, if an attorney sees a name and knows it's a conflict, then the attorney must decline to provide consultation to that person. Note - If an attorney knows of a conflict with a firm member, the attorney will not continue the Ask-a-Lawyer. Otherwise, the Ask-a-Lawyer can proceed.

NRPC 6.5 provides attorneys an excellent way to get involved in pro bono. The attorney is not creating an ongoing attorney-client relationship and allows for brief consultations without the necessity of going through the conflict check process. The rule encourages attorney participation on every level, from private practice to government attorneys in city attorneys' offices, attorney general offices, district attorneys' offices, and prosecutors' offices. Everyone can participate. The only requirement is buy-in from the top of these organizations, allowing their attorneys the green light to do pro bono and give back to the community.

•

Michael Wendlberger, Esq. is the Director of the Pro Bono Project at Legal Aid Center of Southern Nevada. The Pro Bono Project pairs volunteer attorneys with screened clients in the areas of family, consumer, landlord tenant, civil rights, immigration, bankruptcy, and other areas of law. Interested attorneys should contact Michael at 702 386-1429 or mwendlberger@lacs.org.



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14 SL 12:05pm	15	16 TAC 7:05pm	17 TAC 7:05pm	18 TAC 7:05pm	19 TAC 7:05pm	20 TAC 7:05pm
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