



# COMMUNIQUE

THE OFFICIAL PUBLICATION OF THE CLARK COUNTY BAR ASSOCIATION

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## Catch Up with Colleagues at Bar Luncheons

Mark your calendars and RSVP for bar luncheons  
on October 9 and December 5, 2024

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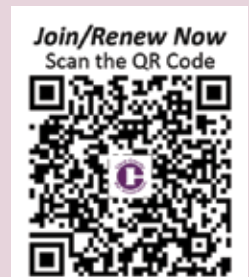
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### Notice

#### **Communique Subscription Expires December 31**

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# COMMUNIQUÉ

THE OFFICIAL PUBLICATION OF THE CLARK COUNTY BAR ASSOCIATION

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For more information about our publication's editorial calendar, deadlines, editorial policy, author guidelines, ad rates, ad specifications, and deadlines, contact the publisher at Clark County Bar Association, 717 S. 8th Street, Las Vegas, Nevada, 89101-7006. Phone: (702) 387-6011.

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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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Bar Services

Advertising Opportunities

CCBA Members get discounted pricing and can benefit from complimentary design for their boxed or full page display ad!

Place a display ad to showcase:

- Firm announcements
• Achievement awards
• Events
• Office, retail space
• Luxury and office products for legal professionals, law firms
• Professional services

Contact StephanieAbbott@clarkcountybar.org, 702-387-6011.

Bar Activities

Event Calendar

Please join us at these upcoming CCBA events:

- Oct. 2 Bystander Intervention: Promoting a Safer and More Inclusive Environment Lunchtime Learning CLE – FREE for CCBA members
• Oct. 3 Navigating AI In Law Practice: Practical Skills, Professional Challenges, & Economic Impacts Lunchtime Learning CLE – FREE for CCBA members
• Oct. 4-5 26th Annual Client Counseling Competition – Volunteer judges needed
• Oct. 9 Bar Luncheon Featuring Barbara Buckley – See page 7
• Oct. 12 Sk8 to Elimin8 Cancer™ Frozen 5k charity event– Join CCBA’s team – See page 12
• Oct. 23 Short Trial Program—Tips from the Judges and Commissioners Lunchtime Learning CLE – FREE for CCBA members – See page 12
• Nov. 14 Recognizing and Responding to Microaggressions Lunchtime Learning CLE – FREE for CCBA members
• Dec. 4 Recognizing Burnout: Building a Supportive Legal Workplace Lunchtime Learning CLE – FREE for CCBA members
• Dec. 5 Annual Meeting & Volunteer Appreciation Luncheon – See page 7

Learn more at https://clarkcountybar.org/events/ or call 702-387-6011.

Bar Services

Join/Renew Now for 2025 CCBA Membership

Early Bird Special Offer Available

CCBA membership is annual and expires on December 31. Join/renew now through November 1, 2024 to benefit from our Early Bird Special Offer.

Learn more at ClarkCountyBar.org or call the CCBA office at 702-387-6011.



# Celebrating and Learning from Professional History

By Paul C. Ray, Esq.

**D**id you get to attend Meet Your Judges last month and the luncheon with Jon Ralston? We had a great time mingling with our judges at the World Market Center. At the September luncheon, Jon Ralston shared intriguing insights into the upcoming elections. We are looking forward to the October luncheon when Barbara Buckley shares her knowledge and thoughts with us about professional responsibility and pro bono service.

In this month's *Communiqué*, we are looking at Medicine and the Law. The challenge for the law has always been to keep up with technology. The repeated cycle is that sooner or later the law must catch up, at least until technology progresses and moves ahead again.

Both the medical profession and the legal profession protect confidentiality as one of the highest professional ethical goals. We know these professional responsibilities as the physician-patient privilege and the attorney-client privilege. Physician-patient confidentiality is part of the Hippocratic Oath, dating back to classical Greece in 400 B.C. The attorney-client privilege dates back to the sixth century A.D., and perhaps earlier.

Our social needs for medical service and healing and for legal service and advocacy are just as great today as ever. In that vein, the Clark County Bar Association (CCBA) is looking at our historical position as professionals in our community.

*Paul C. Ray has practiced business and real estate litigation and appeals for 32 years. He is with the law firm of Paul C. Ray, Chtd. Paul serves as CCBA President through December 31, 2024.*

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*Our social needs for medical service and healing and for legal service and advocacy are just as great today as ever.*

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The beginnings of the CCBA took place between the early Prohibition period in 1922 and the early post-Prohibition period in 1934. The records show that the initial organization was called the Las Vegas Bar Association, which met for dinner and organized in February 1922, and organized with officers through 1927 when A.W. Ham was the President. On January 24, 1934, the Clark County Bar Association met by its current name, with A.W. Ham again serving as President.

We take our professional history, service, and goals for self-improvement seriously. We also want to keep a healthy sense of humor about our place in Las Vegas history. In February, we plan to celebrate the CCBA's "90- or 100-ish" birthday. We plan to commemorate our earliest beginnings as the Fun Bar.

Watch for upcoming details about a Roaring 20's style celebration of our history as Clark County's organization of legal professionals. 🍷



## September Luncheon Highlights

On September 11, 2024, over 80 people attended the Clark County Bar Luncheon featuring Jon Ralston, CEO of *The Nevada Independent*. The luncheon was held at Fogo de Chão Brazilian Steakhouse and sponsored by Bank of Nevada, First Legal, and Hightower Las Vegas.



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Joel Henriod, Jon Ralston, Richard Bryan, and Richard Wright at September bar luncheon.

## October and December Bar Luncheons

- **Sponsors:** Bank of Nevada and First Legal
- **When and where:**
  - **Wednesday, October 9, 2024**—new date—at Vic's Las Vegas, 355 Promenade Pl., Downtown Las Vegas
  - **Thursday, December 5, 2024**, at Fogo de Chão Brazilian Steakhouse, 360 E. Flamingo Rd., Las Vegas
- **Check-in & networking:** 11:30 a.m., Luncheon: 12:00 to 1:00 p.m.
- **Pricing:** \$60/CCBA member, \$75/non-member for each bar luncheon
- **RSVP deadlines:** RSVP to CCBA required by October 4 for October 9 luncheon and November 29 for December 5 luncheon.

Learn more at [ClarkCountyBar.org](https://ClarkCountyBar.org) or 702-387-6011. 

## RSVP for the next Bar luncheon!

Scan the QR code to open the luncheon RSVP form at <https://clarkcountybar.org> or call 702-387-6011.



## Messner Reeves LLP is pleased to announce that Katherine Turpen has joined the firm

Ms. Turpen is an experienced Medical Malpractice and Professional Liability Defense Lawyer. She has dedicated her career to defending Nevada's doctors, healthcare professionals and legal professionals in litigation and before their respective licensing boards. She will continue her practice of providing exceptional representation for her clients in the Las Vegas office of Messner Reeves LLP

- Professional Liability Defense
- Medical Malpractice Defense



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Email Katherine Turpen today.  
[kturpen@messner.com](mailto:kturpen@messner.com)

## Notice of Election for 2025 CCBA Executive Board

**Deadline for nominations is Tuesday, October 15, 2024**

Nominations from current members to serve on the 2025 CCBA Executive Board will be accepted Monday, September 2 through Tuesday, October 15, 2024, at 4:00 p.m. Nominations should be sent to the CCBA President, Paul Ray at Prez@ClarkCountyBar.org. The nominating committee shall consider the following criteria and characteristics as applied to each prospective nominee in their application:

- Current CCBA membership in good standing.
- Demonstrated past service to the CCBA.
- Contribution to creating balance on the executive board of representation amongst various areas and types of the practice of law.
- Professionalism.
- Knowledge and expertise in an area in which the CCBA needs or desires assistance.
- Such other factors as the nominating committee may deem relevant and appropriate.

The election will be held at the Annual Meeting & Volunteer Appreciation luncheon on Thursday, December 5, 2024. Get details at clarkcountybar.org or call (702) 387-6011.



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### Special offer for CCBA Members

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## Bar Services

### Nevada Ballet Ticket Special Offers

The CCBA has partnered with Nevada Ballet Theatre for the 2024-2025 season.

The CCBA will get a limited number of VIP level seats for select performances of the Nevada Ballet Theatre productions.

#### Cinderella:

- Sat. 10/19/2024 (7:30pm)

#### The Nutcracker:

- Fri. 12/20/2024 (7:30pm)
- Sat. 12/21/2024 (2:00pm)

**CCBA members are invited to request the use of the CCBA's tickets!**

Send requests via email to CCBA Executive Director Donna Wiessner at [Donnaw@clarkcountybar.org](mailto:Donnaw@clarkcountybar.org).

### No more free tickets from the CCBA?

Request the CCBA's special code for discount pricing on the purchase of your own tickets.

\*Restrictions apply. For more information, see <https://clarkcountybar.org/about/member-benefits/ccba-ballet-tickets-special-offer/> or call (702) 387-6011.

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# Cinderella

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# Nominations for Judicial Award of Excellence Due November 7, 2024

The Clark County Bar Association is accepting nominations for the 2024 Annual Judicial Award of Excellence. The Annual Award of Judicial Excellence honors an individual who has demonstrated judicial excellence through his or her service and commitment to the judiciary and the legal community in Clark County. The recipient is a past or present member of the judiciary who enhances, or has enhanced, the reputation and function of the judiciary by demonstrating judicial excellence, fostering access to justice, improving judicial efficiency and economy, and developing the quality and comradery of the bar through service to the legal community.

## Previous Award Recipients:

- 2019 – Sr. Judge Nancy Oesterle
- 2020 – Judge Ken Cory
- 2021 – Justice Abbi Silver
- 2022 – Chief Judge Jerry Wiese
- 2023 – Judge Frank Sullivan

## Nomination criteria:

- Demonstrates judicial excellence through conduct upholding the rule of law and the impartial administration of justice
- Fosters access to justice through formal or informal programs or other contributions
- Leads process improvements that improve judicial efficiency or economy
- Develops the quality and comradery of the bar through service to the legal community in Clark County, Nevada.

## Nominations must include:

- First and last name
- Address
- Phone number
- A brief description of the nominee and how he or she meets the criteria mentioned above. In your description, make sure to include any organizations this person is currently involved in and specific contributions that demonstrate the nomination criteria.

Submit nominations by Thursday, November 7, 2024, to:

- Donna S. Wiessner, Executive Director
- CLARK COUNTY BAR ASSOCIATION
- DonnaW@ClarkCountyBar.org
- 717 South Eighth Street, Las Vegas, NV
- Fax (702) 387-7867

The award will be presented at the Annual Meeting and Volunteer Appreciation Luncheon, Thursday, December 5, 2024, to be held at Fogo de Chão Brazilian Steakhouse, 360 E. Flamingo Rd., Las Vegas. For more information and to RSVP for the luncheon event, see <https://clarkcountybar.org/bar-luncheon-rsvp-form/> or call (702) 387-6011.

## Bar Activities

# Committee Meetings

CCBA members are invited to participate on bar committees.

- **CLE Committee** – Plans programming for the continuing legal education of CCBA members. *Meets: 2nd Wednesdays.*
- **Community Service Committee** – Plans activities and outreach services to the community at large in southern Nevada. *Meets: 1st Fridays.*
- **Diversity and Inclusion Committee for Equity (DICE)** – Plans activities to facilitate constructive discussion and enhance understanding of diversity issues. *Meets: 3rd Fridays.*
- **New Lawyers Committee** – Coordinates with the William S. Boyd School of Law to produce student competitions. Members volunteer to help with bar events including CCBA pub crawls, UNLV law student competitions, and Meet Your Judges Mixer. The New Lawyers Committee is for attorneys admitted to practice in Nevada within the last seven years, regardless of age. *Meets: 2nd Thursdays, in person.*
- **Publications Committee** – Plans content for upcoming issues of the bar journal *Communiqué*. *Meets: 2nd Fridays.*

Call the CCBA office at (702) 387-6011 to confirm dates, times, and locations.

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## Short Trial Program CLE Free for CCBA Members on October 23, 2024

Alternative Dispute Resolution/Discovery Commissioners Erin Lee Truman and Adam Ganz will make a special presentation for the continuing legal education of Nevada lawyers during a lunchtime learning program produced by Stephen F. Smith of the Clark County Bar Association's CLE Committee. "Short Trial Program—Tips from the Judges and Commissioners" will be presented as a live webcast and is free for CCBA members to attend on October 23, 2024.

For more informatin, see below for spotlight or contact Donna Wiessner at [donnaw@clarkcountybar.org](mailto:donnaw@clarkcountybar.org) or (702) 387-6011. 

### CCBA Lunchtime Learning CLE

Sponsored by Bank of Nevada and Las Vegas Legal Video

## Short Trial Program—Tips from the Judges and Commissioners

#### • Speakers:

- **Erin Lee Truman** and **Adam Ganz**, ADR/Discovery Commissioners for the Eighth Judicial District Court



#### • Topics:

- Changes to Short Trial Rules
- Pitfalls to avoid in short trial
- Pointers from the bench

- **When:** Wednesday, October 23, 2024, 12 to 1:15 p.m.
- **Where:** Online via Zoom
- **Credits:** 1.0 General CLE Credit (NV)
- **Live webcast (via Zoom):** FREE for CCBA Members (2024) only
- **Recorded materials rental:** \$25/CCBA Member or \$50/non-member
- **RSVP to CCBA by 10/21/2024:** [ClarkCountyBar.org](http://ClarkCountyBar.org), 702-387-6011



### Community Outreach

## Mark's Blanket the Homeless Program

The CCBA will use the monies towards the purchase and distribution of blankets to local organizations that serve homeless people.

**Donate now:** <https://clarkcountybar.org/community-service-activities/blanket-the-homeless/>.

**Sponsorships available:** To become a sponsor, complete the form at <https://clarkcountybar.org/marketplace/sponsorship-opportunities/>.

### Community Outreach

## Sk8 to Elimin8 Cancer™ Frozen 5k

Skate with CCBA's team in the charity event to benefit Scott Hamilton CARES Foundation

- **When:** Sat., October 12, 2024, 4:20-5:00 p.m.
- **Where:** City National Arena in Las Vegas
- **Who:** CCBA members, friends, and family. Pre-registration required
- **Sign up now:** <https://fundraise.scottcares.org/vegas/Team/View/197472/CCBA>





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## Business Court Bench-Bar Meeting

- **Host:** Eighth Judicial District Court
- **When:** November 7, 2024, 12:00 to 1:00 p.m.
- **Where:** Regional Justice Center, Courtroom 16A and Zoom
- **Agenda:** Alternative uses of ADR Services - Special Masters, Referees, etc.
- **Lunch Sponsors:** Hon. Jay Young (Ret.) for first 20-25 attendees
- **Contact:** hoskint@clarkcountycourts.us

## Civil Bench-Bar Meeting (EJDC)

- **Host:** Eighth Judicial District Court – Civil Department
- **When:** October 8, 2024, 12:00 to 1:00 p.m.

- **Where:** Regional Justice Center, Courtroom 10D and Zoom
- **Contact:** EJDCBenchBar@gmail.com

## Civil Bench-Bar Meeting (LVJC)

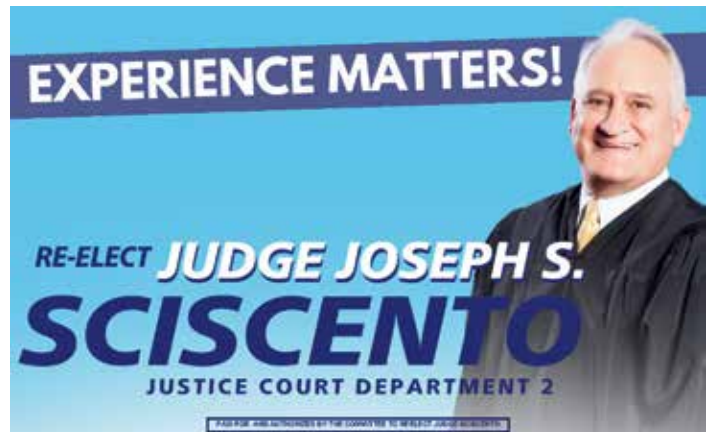
- **Host:** Las Vegas Justice Court – Civil Department
- **When:** October 1, 2024, 12:00 to 1:00 p.m.
- **Where:** Regional Justice Center, Courtroom 6B
- **Topic:** ADKT 607, changes to the Justice Court Rules of Civil Procedures
- **Contact:** Shelby.Lopaze@ClarkCountyNV.gov

## Probate Bench-Bar Meeting

- **Host:** Eighth Judicial District Court – Probate Department
- **When:** October 22, 2024, 12:00 to 1:00 p.m.
- **Where:** Regional Justice Center, Courtroom [TBA] and Zoom
- **Offer:** This meeting has been approved for 1 CLE credit for NV lawyers
- **Note:** Members of the probate bar can submit questions to probate@clarkcountycourts.us up to a week before the meeting on any topic they would like discussed. I will do my best to address all questions submitted. If you are interested in sponsoring the event, please reach out to my Assistant, Andrea Simpson, at (702) 455-2650 or SimpsonA@clarkcountycourts.us.

## Medical Malpractice Case Reassignments Ordered Effective August 12, 2024

On July 31, 2024, Chief Judge Jerry Wiese signed an order in the administrative matter of reassigning medical malpractice court cases at the Eighth Judicial District Court. *See* Administrative Order 24-03.



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Per Administrative Order 24-03:

*IT IS THEREFORE ORDERED, pursuant to EDCR 1.30(b), effective August 12, 2024, fifty-seven medical malpractice cases currently assigned to Department 8 will be re-assigned to Department 1, Department 7, Department 15, Department 20, Department 21 and Department 25, as set out below[.]*

To see the detailed list of the 57 specific cases with re-assignments, read the six-page administrative order. For more information about EJDC rules and administrative orders, visit <http://www.clarkcountycourts.us/general/court-rules-and-administrative-orders/>.

## New Judges in Southern Nevada

On September 5, 2024, Eighth Judicial District Court Judges Erika Mendoza and Tina Talim were ceremonially sworn in at an investiture at the Clark County Government Center Commission Chambers. Judge Erika Mendoza serves on the bench in Department 27. Judge Tina Talim serves on the bench in Department 14.

On September 26, 2024, U.S. Magistrate Judge Maximiliano D. Couviller III was ceremonially sworn in at an investiture at the Lloyd D. George U.S. Courthouse.


For more information about the Eighth Judicial District Court, visit <http://www.clarkcountycourts.us/>. For more information about the U.S. District Court - District of Nevada, visit <https://www.nvd.uscourts.gov/>.

## Order Addresses Election-Related Matters Filed on November 5, 2024

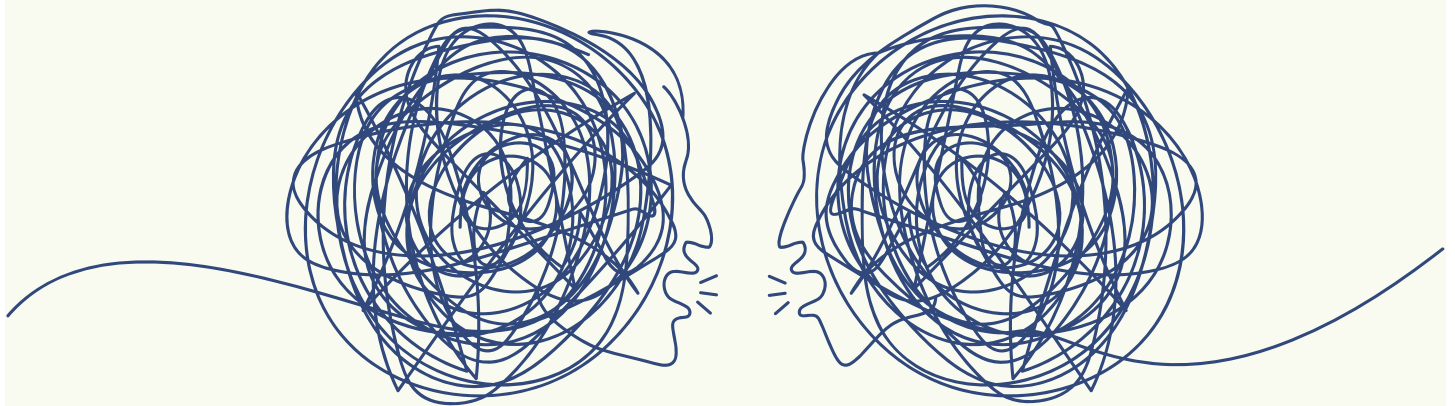
On August 23, 2024, Eighth Judicial District Court Chief Judge Wiese filed an order in the administrative matter of election-related matters filed on November 5, 2024. See Administrative Order 24-07.

Per Administrative Order 24-07:

*The court intends to prepare for the possibility that actions pertaining to the election process may be filed during or after regular business hours and further intends to implement fair and expeditious process by which election-related actions can be heard and adjudicate through the end of Election Day.*

For more information about EJDC rules and administrative orders, visit <http://www.clarkcountycourts.us/general/court-rules-and-administrative-orders/>. 

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# Evolution of the Expert Affidavit Requirement in Med-Mal Cases

By Chief Judge Jerry Wiese

It may seem that over the years, decisions relating to medical malpractice law in Nevada have been inconsistent. In reality, cases with varying facts and issues have been presented to our appellate courts and the law has evolved. The evolution of the expert “affidavit of merit” requirement is a perfect example. Some of us recall the medical-legal screening panel which required expert testimony to support a claim for malpractice. Failure to attach the required expert affidavit subjected the case to dismissal. NRS 41A.071 was enacted in 2002, ending the screening panel process and mandating the requirement of an “affidavit of merit” to support a complaint in Nevada’s Eighth Judicial District Court. Since then, the courts have stayed busy interpreting NRS 41A, and its mandates with regard to the affidavit, and I’ve provided below a general overview of the highlights:

- Expert affidavits must be completed by an expert practicing in a “substantially similar” but not the “same” area as the defendant. *Borger v. Eighth Judicial Dist. Ct.*, 120 Nev. 1021, 102 P.3d 600 (2004).
- An expert affidavit is not required when the malpractice action is based solely on “res ipsa loquitur.” *Szydel v. Markman*, 121 Nev. 453, 117 P.3d 200 (2005).
- Complaints filed without a supporting medical expert affidavit are *void ab initio*, must be dismissed, and cannot be cured by amendment. *Washoe Medical Center v. Second Judicial Dist Ct.*, 122 Nev. 1298, 148 P.3d 790 (2006), *Fierle*

*v. Perez*, 125 Nev. 728, 219 P.3d 906 (2009) and *Wheble v. Eighth Judicial Dist. Ct.*, 128 Nev. 119, 272 P.3d 134 (2012).

- An unsworn declaration made under penalty of perjury is sufficient. *Buckwalter v. Eighth Judicial Dist. Ct.*, 234 P.3d 920 (2010). See also *Mountainview Hospital, Inc. v. Eighth Judicial Dist. Ct.*, 128 Nev. 180, 273 P.3d 861 (2012).
- Parties asserting claims for contribution based on medical malpractice must satisfy the affidavit requirement of NRS 41A.071. *Pack v. LaTourette*, 128 Nev. 264, 277 P.3d 1246 (2012).
- NRS 41A.071 does not require the affidavit to be physically attached to the complaint, or even physically filed. If the complaint references a pre-existing affidavit, which is then filed and served with the complaint, and no party contests the authenticity, the affidavit may be treated as part of the complaint. *Baxter v. Dignity Health*, 131 Nev. 759, 357 P.3d 927 (2015).
- If a claim involves medical diagnosis, treatment, or judgment, and the standard of care requires explanation from a medical expert, the claim is for medical malpractice and an affidavit is required. *Szymborski v. Spring Mountain Treatment Center*, 133 Nev. 638, 403 P.3d 1280 (2017).
- A claim of negligent hiring, supervision or train-

**View** continued on page 18

**Chief Judge Jerry Wiese** serves in Department 30 of the Eighth Judicial District Court Bench. Since taking the bench in January of 2011, Judge Wiese has presided over numerous trials, both civil and criminal, and has presided over many settlement conferences. He coordinates the Judicial Settlement Conference Program and presides over the Medical Malpractice Sweeps. He was elected Chief Judge by his peers and has served as the Chief Judge of the District Court since July 2022.







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**View** continued from page 16

ing, does not require an affidavit when underlying facts do not fall within the definition of medical malpractice or professional negligence. *Id.*

- Affidavit requirements of NRS 41A.071 do not violate equal protection or due process, under a “rational basis” analysis. *Peck v. Zipf*, 133 Nev. 890, 407 P.3d 775 (2017).
- Leaving an IV needle in a patient does not qualify under the “res ipsa loquitur” exception to the affidavit requirement because insertion of a needle is not “surgery.” *Id.*
- The “res ipsa loquitur” exception to the affidavit requirement (dealing with a foreign substance being left in the body) does not apply to “bacteria.” *Montanez v. Sparks Family Hospital, Inc.*, 137 Nev. 742, 499 P.3d 1189 (2021).
- A premises liability claim, based on the medical facility’s lack of cleanliness, is inherently linked to the provision of medical treatment, and consequently, an affidavit of merit is required. *Id.*
- Claims under NRS Chapter 41A and claims for “elder abuse,” under NRS 41.1395 are “separate and distinct.” *Yafchak v. South Las Vegas Medical Investors LLC*, 519 P.3d 37 (2022).

- NRS 41A.071 does not require any discussion of legal or proximate causation. An affidavit of merit is sufficient if it opines as to the professional standard of care and the breach of that standard of care. *Engelson v. Dignity Health*, 542 P.3d 430 (2023).
- An affidavit must “identify by name, or describe by conduct, each provider of health care who is alleged to be negligent” and “set forth factually a specific act or acts of alleged negligence separately as to each defendant in simple, concise and direct terms.” *Monk v. Ching*, 531 P.3d 600 (2023). Compare with *Zohar v. Zbiegien*, 130 Nev. 733, 334 P.3d 402 (2014).
- The “res ipsa loquitur” exception to the affidavit requirement does not apply “where a foreign object was left in the body during a procedure other than surgery.” *Monk v. Ching*, 531 P.3d 600 (2023).
- The “common knowledge” affidavit exception previously recognized by the court in *Estate of Curtis* was overruled. *Limprasert v. PAM Specialty Hospital of Las Vegas LLC*, 550 P.3d 825 (2024).

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# Corporate Practice of Medicine in Nevada and the Friendly PC-MSO Structure

By Michael Roitman

**T**he business of healthcare requires compliance with a variety of state and federal laws and regulatory schemes. This includes licensing of healthcare professionals, standards of practicing medicine, methods of compensation, safeguards against fraud, waste, and abuse, and—as addressed in this article—the ownership of healthcare businesses. This article will take a closer look at Nevada state regulations on healthcare businesses and their relationships with Management Services Organizations (“MSOs”).

Nevada’s Corporate Practice of Medicine (“CPOM”) Doctrine prohibits persons who are *not* healthcare providers from owning businesses that practice medicine. *See* Op. Nev. Att’y Gen. No. 219 (1977); *see also* Op. Nev. Att’y Gen. No. 10 (2002). A Nevada Attorney General Opinion from 1977 (the “1977 AGO”) makes clear that for-profit corporations incorporated under Nevada Revised Statutes (“NRS”) Section 78 (2023) are barred from practicing medicine as broadly defined by NRS Section 630.020 (2015), and that such practice is expressly reserved for professional corporations. The CPOM Doctrine arises, according to the American Medical Association, from a number of public policy concerns, such as preventing (a) “commercialization of the practice of medicine;” (b) misalignment between the obligations of shareholders and

a physician’s obligations to patients; and (c) interference with a physician’s independent medical judgement, which could result should a physician be employed by a corporation. American Medical Association, *Issue Brief: Corporate Practice of Medicine*, Advocacy Resource Center <https://www.ama-assn.org/media/7661/download> (last visited Aug. 30, 2024).

In Nevada, the CPOM Doctrine is not expressly provided for in caselaw or statute, but instead stems from three Attorney General Opinions (each an “AGO”) from 1977, 2002, and 2010. *See* Op. Nev. Att’y Gen. No. 219 (1977); *see also* Op. Nev. Att’y Gen. No. 10 (2002); *see also* Op. Nev. Att’y Gen. No. 1 (2010). In at least two instances since the 2010 AGO, Nevada legislators have attempted to codify portions of the CPOM Doctrine into law. The most recent attempt was vetoed by Governor Lombardo in 2023. *See* AB. 11, 82d Leg. (2023), <https://www.leg.state.nv.us/App/NELIS/REL/82nd2023/Bill/9536/Text> (last visited Sept. 3, 2024). The 2023 bill’s proponents wanted to accomplish two purposes: (1) confirming the AGO determination that hospitals cannot employ physicians, and (2) providing a carveout from such prohibition for not-for-profit medical schools. *See* Assemb. Comm. Health and

**Corporate** continued on page 22

*Michael Roitman is the managing attorney of Roitman Legal, a boutique corporate law firm located in Nevada. Michael advises his clients—companies, entrepreneurs, and professionals—on various commercial transactions (including real estate, mergers & acquisitions, and other business contracts), corporate and legal strategy, and regulatory compliance. Michael has experience with healthcare mergers & acquisitions and compliance, including the Nevada and Federal fraud and abuse regulations, such as Anti-Kickback Statute and Stark Law, and the Corporate Practice of Medicine Doctrine.*







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**Corporate** continued from page 20

Human Services *Corporate Practice of Medicine Doctrine*, <https://www.leg.state.nv.us/Session/82nd2023/Exhibits/Senate/HHS/SHHS1069L.pdf> (last visited Sept. 3, 2024).

In addition to the Nevada CPOM Doctrine, certain providers of health care, though not all, are also subject to NRS Section 89. *See* NRS 629.03. Under Section 89, certain professionals, including physicians and mental health professionals, as well as lawyers and architects, must organize and incorporate as professional entities (e.g., professional corporations, limited liability companies, or partnerships), and such professional entities must be owned only by the applicable professionals. *See* NRS 89 (2023). In addition, certain providers of healthcare which were explicitly discussed in the 1977 AGO, such as dentists, have statutes analogous to the CPOM Doctrine codified into law. *See* NRS 631 (2023) (providing a scheme for control over dentistry practice with non-dentist ownership and permitting dentists to organize under NRS 89); *see also* Op. Nev. Att’y Gen. No. 219 (1977). Other providers of healthcare, such as nurses, have no such limitations in their statutory schemes and are not expressly authorized to form a professional corporation. *See* NRS 89, 632 (2023). However, due to Nevada CPOM, it is generally advisable, to the



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extent a business employs nurses to furnish healthcare, that the owners of such businesses are licensed in the practice of medicine as well.

In response to the CPOM Doctrine, many healthcare businesses (i.e., “professional entities”, known colloquially as “PCs”) enter into relationships with companies called Management Services Organizations (aka MSOs) that furnish management, administrative, and other non-healthcare services to healthcare companies. The arrangements between PCs and MSOs,—oftentimes memorialized in a “Management Services Agreement,”—vary based on some key terms, including the length of the term, management fee, and amount of control the MSO has over the PC. MSOs generally provide substantial management and administrative services in exchange for a portion of the profits, with the purpose of increasing the efficiency of the non-medical functions by bringing in business minded operators and allowing healthcare providers to focus exclusively on medicine. This is similar to arrangements made with billing and medical coding vendors. Sometimes, often in private equity driven regional or national “roll-ups”, MSOs are vehicles for acquisition strategies wherein PC owners are paid large lump-sum payouts in exchange for management fees that constitute most or even all of the

PC’s profits (aka a “sweep”). In such cases, the sellers generally remain as owners and employees of the PC—but are subject to strict and broad non-competes, earn-outs, and buy-out provisions.

Though an MSO can take many forms, the transaction usually involves (1) an analysis of the management fee, which may require a determination of fair market value under some circumstances; and (2) compliance with limitations on the MSO’s ability to control medical decision making, which is strictly prohibited. Notwithstanding such prohibition, certain structures, such as the “Friendly PC Model” (which is utilized when the MSO has made a substantial investment in the PC), can permit the MSO to retain a certain level of control over the healthcare business by its right to force the PC owner to sell the PC to the MSO’s designated healthcare professional. Under the Friendly PC Model MSO, the Management Services Agreement with the PC can be up to 20 years (even though the seller may no longer own or practice for the PC). While the Friendly PC Model can provide a certain level of certainty to the MSO, it must be carefully crafted to avoid permitting the business goals of the enterprise to influence medical decision-making of the healthcare professionals and to comply with other applicable law. **G**

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# Unraveling the Patient Safety and Quality Improvement Act

By Alia A. Najjar, M.D., Esq.

The privilege granted by the Patient Safety and Quality Improvement Act of 2005 (“PSQIA”) is among the more perplexing privileges. The Supreme Court of Nevada recently addressed the issue of waiver in *Sunrise Hosp. & Med. Ctr. v. The Eighth Judicial Dist. Court of the State*, 544 P.3d 241, (Nev. 2024). This article offers a concise overview of PSQIA, examines the *Sunrise* decision, and presents a few key points for legal practitioners.

## Brief overview of the PSQIA

PSQIA, codified at 42 U.S.C. §§ 299b-21 to 299b-26, established a voluntary reporting system designed to enable healthcare providers to conduct candid evaluations of patient care and address medical errors without fear of retribution, thereby enhancing patient safety and healthcare quality issues. It forms part of a broader framework that aims to balance this need against the need for transparency and accountability. PSQIA enables health care providers to voluntarily gather and submit data concerning patient safety, health care quality, and outcomes to Patient Safety Organizations (“PSOs”). These PSOs compile and examine the data and provide feedback to promote education and avert future errors.

PSQIA promotes reporting by establishing an evidentiary privilege for patient safety work product (“PSWP”),

which protects PSWP from being disclosed in federal, state, and administrative proceedings. To gain this evidentiary protection, providers must report to a PSO that is federally listed and maintained by the Agency for Healthcare Research and Quality (“AHRQ”).

## What is PSWP?

PSWP encompasses data, reports, records, analyses, or statements designed to enhance patient safety and healthcare quality. This includes materials prepared for reporting to a PSO, developed by a PSO, or associated with the deliberations or reporting processes of a Patient Safety Evaluation System (“PSES”). A provider’s PSES is tasked with gathering, managing, or analyzing information for reporting to or by a PSO. PSWP does not include patient medical records, billing, discharge details, or any other original patient/provider data, or information maintained separately. Additionally, information generated to fulfill mandatory reporting obligations does not fall under the definition of PSWP.

PSWP is classified as either identifiable or nonidentifiable, and information designated as PSWP may be withdrawn from a PSES if it has not been submitted to a PSO and the withdrawal and date of the same are properly recorded. *See* 42 CFR § 3.20.

*Alia A. Najjar, M.D., Esq. has practiced healthcare law for almost 15 years. As a physician with training in general surgery, Alia focuses her legal practice on representation of healthcare practitioners and entities before state and federal administrative agencies, regulatory compliance issues, and complex issues related to personal injury and professional negligence/medical malpractice matters. She is the managing member of Najjar Law Firm and serves as Of Counsel at Wolfe & Wyman LLP.*






## The Supreme Court of Nevada's *Sunrise Hosp. & Med. Ctr. v. The Eighth Judicial Dist. Court of the State* decision

*Sunrise* involved a premature infant whose condition worsened after a NICU nurse changed fluid lines, resulting in cardiac arrest and permanent developmental harm from hypoxic brain injury, which was investigated by the hospital's patient safety committee. Plaintiff deposed the chief medical officer, seeking information on the committee's review process. *Sunrise* objected based on PSQIA and state law privileges, halting the deposition. In the motion to compel that followed, the district court ruled that the privileges were waived. *Sunrise* thereafter filed a writ petition.

In this decision of first impression, the Supreme Court of Nevada held that the district court erred in failing to determine whether the testimony sought constituted identifiable or nonidentifiable PSWP and held that identifiable PSWP privilege was absolute and could not be waived. Pursuant to 42 CFR § 3.208, PSWP disclosed in accordance with 42 CFR § 3.204(b)(1) or disclosed impermissibly remains privileged. The district court interpreted this regulation to mean that PSWP disclosed permissibly loses its privilege. The Supreme Court of Nevada disagreed.

First, the regulation only states when the privilege was maintained, not lost. Second, the Court cited the exceptions set forth in 42 CFR § 3.204(b). Finally, the Court noted that 42 CFR § 3.204(b)(4), which applies to non-identifiable PSWP, specifically contemplates waiver via voluntary disclosure. The Court found that adding new exceptions to 42 CFR § 3.208 renders the exceptions in 42 CFR § 3.204(b) superfluous and held that the identifiable PSWP privilege was absolute and issued a writ of prohibition.

### A few points for legal practitioners.

- Only providers contracted with a certified PSO may assert this privilege.
- State privileges may still be applicable whether or not PSQIA privilege applies.
- While not required by law, implementing PSES policies and procedures are helpful in determinations by courts as to whether information is, in fact, PSWP.
- The PSQIA privilege may be asserted by plaintiffs as well to limit information the defense seeks to introduce in defense of an action. 

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# Health Care Power of Attorneys and Living Wills

By Amanda Stevens and Whitney Short

In Nevada, there are four types of documents whereby you can give instruction on the health care you would like to receive regarding a specific medical situation if you are unable to make the decision for yourself due to incapacity. Regarding these documents, the term “health care” encompasses all “care, treatment, service or procedure to maintain, monitor, diagnose or otherwise affect the physical or mental illness, injury or condition of an individual.” NRS 162A.736. This article will discuss what each of these documents does and how they relate to one another.

## 1. Durable power of attorney for health care (“HPOA”), also known as advance health care directive (NRS 162A.700–162A.870).

A HPOA is a document where you state your wishes as they relate to a multitude of health care decisions and appoint one or more agents to carry out your wishes. You can also designate a successor agent to act if an agent resigns, dies, becomes incapacitated, or declines to serve. A HPOA is effective upon signing, unless you state in your HPOA that it becomes effective at a future date or upon incapacity as determined in writing by an advanced practice registered nurse, physician, psychiatrist, or licensed psychologist. A HPOA terminates when you revoke it; at a termination date if your HPOA includes one; upon your

death; or if your named agent dies, and your HPOA does not list a successor agent. You can update your HPOA at any time, and your new HPOA automatically revokes any previous HPOA. You must make sure your health care providers have the most updated version of your HPOA.

## 2. Declaration (NRS 449A.415, 449A.433-449A.481).

A declaration is a document in which you direct the withholding or withdrawal of life-sustaining treatment or designate another person to make those decisions for you. One common example is that a declaration is used to withhold life support if you are in a persistent vegetative state. You can sign a declaration at any time. This declaration can be included as part of your HPOA or as a separate document. You can revoke a declaration at any time, by any means (written or orally), without regard to your mental or physical condition. Any revocation is effective upon its communication to your attending physician or other health care provider by you or a witness to the revocation.

## 3. Do-Not-Resuscitate Order (“DNR”) (NRS 450B.510–450B.525).

A DNR is a written directive that emergency life-resuscitating treatment must not be administered to you. Life-resuscitating treatment means “cardiopulmonary resuscitation or a component of cardiopulmonary resus-

*Amanda L. Stevens and Whitney E. Short of Short & Stevens Law, LLC. Amanda and Whitney met during law school at Boyd School of Law and have been active members of the CCBA since graduating in 2015. Short & Stevens Law practices exclusively in the areas of estate planning, probate, business law, and real estate law.*

citation, including chest compressions, defibrillation, cardioversion, assisted ventilation, airway intubation or administration of cardiotoxic drugs.” NRS 450B.450. A DNR can only be issued in writing by a Nevada licensed physician or advanced practice registered nurse and to a patient who has a terminal condition. A DNR will only be effective if you (as the patient) have agreed to its terms in writing while you have capacity to make such a decision. However, if you provided authority to your agent in your HPOA and you no longer have capacity, your agent can agree to the terms of the DNR. You may revoke your DNR by removing or destroying it or requesting the removal or destruction.



**4. Provider order for life-sustaining treatment (“POLST”) (NRS 449A.542), also known as a “living will.”**

A POLST is a standardized form in which you state if you want to make anatomical gifts as well as your wishes regarding life-resuscitating treatment and life-sustaining treatment. The POLST directs your health care provider to adhere to your wishes. A POLST can be revoked at any time and in any manner so long as you have capacity upon communicating your desire to revoke the POLST to your health care provider. Your health care provider will make your revocation part of your medical record.

If the above four documents happen to contradict each other, your health care provider is directed to follow the document that was the most recently created so long as you had capacity when creating it. Importantly, Nevada has created a secure database where you can register your HPOA, called the Nevada Lockbox Advanced Directive Registry. This database contains a copy of each document filed by you which is kept confidentially and readily available for authorized health care providers to access in a medical emergency.

Many people think it is too early to have these types of documents prepared. However, no one can foresee when they will need them. A common misconception is that spouses, domestic partners, and parents can automatically make health-care decisions for their spouse, domestic partner, or adult child, but that is not always the case. Such decisions should not be made without the appropriate documents. Loved ones will be tasked with a variety of challenges during these heartbreaking moments, and this is one less situation they must worry about. ●

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# ABA Launches Task Force for American Democracy

By Rachel J. Anderson

In 2023, American Bar Association (ABA) president Mary L. Smith formed the ABA Task Force for American Democracy (Task Force) to ensure an enduring American democracy and help fulfill lawyers' special duties to preserve and enhance our democracy. It is a call to action and to fulfill our unique opportunity and obligation as lawyers to support and defend rules of law, the foundation of our democracy. Information about the work of the task force is available here: [https://www.americanbar.org/groups/leadership/office\\_of\\_the\\_president/american-democracy/](https://www.americanbar.org/groups/leadership/office_of_the_president/american-democracy/). The ABA is taking the lead on engaging its lawyer members and working with state and local bar associations, the judiciary, law schools, and other democracy non-governmental organizations.

## Cross-Country Listening Tour

The Task Force has been convening listening tours in seven states: Arizona, Georgia, Michigan, Nevada, North Carolina, Pennsylvania, and Wisconsin. The panel discussions addressed, *e.g.*, election administration, civility, the state of democracy, and increasing confidence in our government and electoral process. Videos of the listening tours are available on the ABA's website.

## Continuing Legal Education

The Task Force, together with Troutman Pepper, hosted a free, virtual CLE series entitled "A Lawyer's Role in Protecting the Rule of Law, Civil Discourse, and Election

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*It is a call to action and to fulfill our unique opportunity and obligation as lawyers to support and defend rule of law, the foundation of our democracy.*


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Integrity" spanning July to September 2024. The sessions discussed American democracy, the rule of law, finding ways to disagree better, election law, what we can do as lawyers.

## Online Resources

The Task Force has a collection of online resources that includes working papers, background papers, a democracy database, toolkits, and speaker/discussion guides. They are available on the ABA's website.

## Nevada Democracy Task Force

The non-partisan Nevada Democracy Task Force is an extension of the ABA's Task Force for American Democracy. For more information and to get involved, go to <http://Nevada.Democracy-TaskForce.org>. 

*Professor Rachel Anderson co-chairs the Nevada Democracy Task Force, is a member of the Supreme Court of Nevada's Access to Justice Commission, and served as former General Counsel for the Office of the Nevada Attorney General.*





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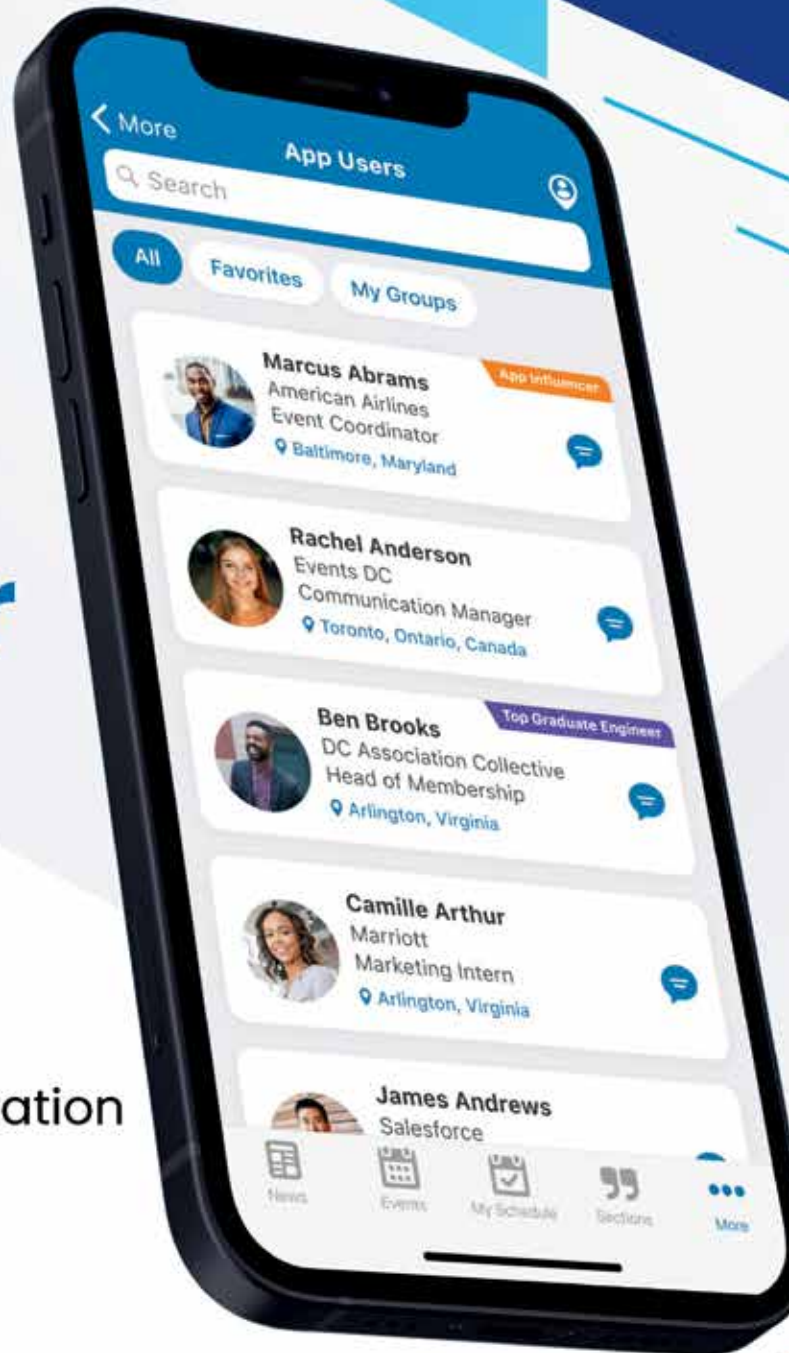


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