ANNUAL SURVEY OF NEVADA LAW 1999

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INTRODUCTION

With this inaugural issue of the Nevada Law Journal, we introduce what we expect to become a regular feature of the Journal -- the Annual Survey of Nevada Law. This section of the Journal presents a comprehensive set of summaries of cases involving Nevada law, both statutory and common law decisions. The bulk of the cases, of course, stem from the Nevada Supreme Court but this section also includes discussion of federal court cases that address Nevada law in significant part.

The objective of this section is to provide a chronicle of the state's legal doctrine each year as an aid to practicing lawyers and other readers. It also serves the function of providing a contemporaneous and continuing archive of Nevada law for historical reference. Because Nevada's Boyd School of Law and the Nevada Law Journal are relatively new on the state's legal scene, we begin this feature with a look at the decision of 1999, the first full calendar year of the Law School's existence. The next issues will address decisions rendered in 2000 and 2001. Thereafter, the feature will become truly "annual".

Readers should be aware that this feature is a compendium of case summaries written by the Law Journal staff as a whole, with each staff member responsible for a small number of cases. Although the case summaries have been reviewed by the primary editors and other Journal staff, the descriptions of the cases are written by different authors. Some readers may disagree with the characterizations of some cases, just as lawyers and judges frequently disagree over the proper interpretation of decisions.

The Annual Survey of Nevada Law does not purport to be the definitive statement of Nevada law. Only courts can provide the last word on legal meaning. Readers should therefore not attempt to rely upon the summaries presented here but must consult the actual opinions before relying upon them.

We hope readers enjoy this feature of the Journal as well as its articles stu-
In re: Hugo Galvez and Thelma Galvez, Debtors

Court concludes a real estate commission is paid in a lump sum, thus Nev. Rev. Stat. § 21.090(1)(g) does not exempt real estate commission payments from execution.

The issue in this case was whether an independent contractor’s real estate commission was exempt from execution under Nev. Rev. Stat. § 21.090(1)(g). The Nevada Supreme Court certified to the United States Bankruptcy Court for the District of Nevada that a real estate commission is not exempt from execution under this statute as the exemption applies only to periodic payments, and not to lump sum payments such as real estate commissions. 990 P.2d 187, 190 (1999).

In 1997, Hugo and Thelma Galvez filed a voluntary petition for bankruptcy under Chapter 7, Title 11 of the United States Code. The appointed trustee requested that the debtor turn over $3,633.00 in real estate commissions which were in escrow at the time of the bankruptcy filing. The debtors in turn amended their filing and claimed an exemption for $2,750.00. The exemption was based on Nev. Rev. Stat. § 21.090 (1) (g), which in relevant part, provides for an exemption from execution of seventy-five percent of the disposable earnings of a judgment debtor during a given period.

The Nevada Supreme Court determined the issue was one of first impression. The Court considered the legislature’s intent to conform the statute to the Consumer Credit Protection Act (“CCPA”). It noted that some states have interpreted the CCPA to exclude from execution all wages earned through personal services without distinction as to the independent contractor status of the worker, while other states relying on identical language have exempted only those wages earned through an employee-employer relationship. The Court, however, rejected both approaches and instead found the decision of the United States Supreme Court in Kokszka v. Belford to be more persuasive. In that case the Court found necessary the wage garnishment exemption to support wage earners and their families on a week-to-week, month-to-month basis and only exempts periodic payments of compensation. Kokszka v. Belford, 417 U.S. 642, 651 (1974).

In light of the holding in Kokoszka, the Court concluded that since a real
estate commission is paid in a lump sum, rather than as a series of periodic payments, Nev. Rev. Stat. § 21.090(1)(g) did not exempt real estate commission payments from execution. 990 P.2d at 190.

CIVIL PROCEDURE

The Dow Chemical Company v Mahlum

Court holds petition for rehearing not a pending action, thereby rendering new rule on en banc review inapplicable.

This case involved a petition to rehear an appeal and cross-appeal from the district court, as well as an appeal from the district court’s order denying a new trial. In Dow Chemical v Mahlum, 970 P.2d 98 (1998), the Nevada Supreme Court affirmed a district court judgment against the appellant in a negligent undertaking claim. The Court also affirmed the district court’s denial of the appellant’s motion for a new trial. The appellant also filed motions for en banc review of the petition, and for permission to file amicus curiae briefs.

The Court addressed the motion filed by the Chamber of Commerce of the United States and the Medical Device Manufacturers for leave to file amicus curiae briefs. The Court quickly denied the motion, explaining that the issues addressed in the briefs, “will substantially mirror those raised on appeal and rehearing.” Dow Chemical Company, 973 P.2d at 843 n.1.

The Court next considered the appellant’s petition for en banc review. The rule governing en banc review, Nevada Rule of Appellate Procedure 40, was amended and NRAP 40A was created. The rule, effective January 4, 1999, applied to all cases commenced after January 3, 1999, unless application would not be logical, or would create an injustice. The appellant argued that because its petition for rehearing was filed before January 4, 1999, it qualified as an action that was pending at the time Rule 40A was implemented, thereby compelling the use of the new provisions. The Court disagreed and held that the petition was not a pending action, thereby rendering the new rule inapplicable. Moreover, Rule 40A’s design is specifically for the seven-justice Court and the panel system, which the appellant did not encounter.

Dow also argued that a rehearing was necessary because the Court, in its decision to affirm the negligent undertaking claim, misapprehended the facts of the case and the relevant tort principles. In addressing the appellant’s contention, the court relied upon a prior Nevada rule, Nev. R. App. P. 40 (c) (2), which dictated that a petition for rehearing be granted only if it appears that the court overlooked or misunderstood a material matter or in an effort to avoid an injustice. The Court denied the appellant’s petition for rehearing because it did not adequately show that the justices overlooked or misunderstood the facts of the case or the elements of the negligent undertaking claim.
NAD, Inc., A/K/A North American Drager v. Eighth Judicial District Court of the State of Nevada
976 P.2d 994 (Nev. Apr. 26, 1999)

Nevada Supreme Court denies petition for writ of mandamus.

Jason Nault suffered brain damage during a surgical procedure after the endotracheal tube used to supply oxygen became disconnected and the anesthesiologist failed to notice the problem for some period of time. Nault’s wife filed a negligence claim against Southern Nevada Surgical Center (SNSC), where the procedure was performed, Surgex, SNSC’s parent company, Life Support Services (LSSI), who inspected the medical equipment regularly, Clark County Anesthesia Associates, the anesthesiologist’s employer, and NAD, the manufacturer of the anesthesia machine used in Nault’s surgery. The Naults dismissed NAD from the suit, but Surgex later filed a third-party complaint against NAD for contribution and indemnity. In response, NAD filed a motion to dismiss, along with a motion to name CNA, Surgex’s and SNSC’s insurer, as a real party in interest.

Before the motions were heard, a settlement was reached between the Nault family and LSSI, SNSC, Surgex, and CNA. As part of that agreement, the Naults waived all future claims against CNA insured defendants, including wrongful death claims. Further, the settlement made SNSC and Synex responsible for $14 million of the $17 million settlement amount. In order to relieve that debt, SNSC and Synex entered into an agreement with CNA, in which CNA lent the companies the $14 million. The district court approved the settlement agreement, and proceeded to deny NAD’s motion to dismiss, as well as its motion to name CNA as a real party in interest.

NAD and Invivo wanted the deposition of Nick Pisani, a CNA attorney who took part in the settlement negotiations. CNA did not allow the deposition because it felt that Pisani’s information was either irrelevant to NAD’s case or protected by attorney-client privilege. NAD petitioned the Nevada Supreme Court for a writ of mandamus, compelling the district court to name CNA as a real party in interest, in an effort to prevent the injustice caused when CNA denied it access to discoverable facts from the attorney.

NAD claimed that CNA is the subrogee of its insured, who had taken responsibility for discharging the insured’s accrued debt, and is accordingly, a real party in interest. However, the Court pointed out that in Nevada, an insurer is not a real party in interest (or a subrogee for that matter), “when it enters into a valid loan agreement with the insured.” Central Nat. Ins. Co. v Dixon, 93 Nev. 86, 87, 559 P.2d 1187, 1188 (1977). CNA entered into the loan agreement with its insured, providing the $14 million needed to compensate the Nault family. Because the district court determined that the agreement was entered into in good faith, and the appellant was unable to demonstrate that the transaction was not treated as a loan, the Court found no reversible error. Ac-
accordingly, the Supreme Court concluded that the district court properly denied the motion to make CNA a real party in interest, and consequently, denied the appellant’s petition for a writ of mandamus.

**Romo v. Keplinger**  
978 P.2d 964 (Nev. May 19, 1999)

*Trial court abused its discretion by granting a mistrial and by failing to ascertain the extent of witness tampering.*

Appellant in this case sought review of a judgment dismissing appellant’s complaint alleging, inter alia, assault and battery. The case also involves a petition for writ of mandamus or prohibition on behalf of the attorneys of the appellant seeking a review of the district court’s order awarding fees and costs to respondents as sanctions.

The two parties in the original suit engaged in a fistfight resulting in physical damage to both parties. The respondent was dating the appellant’s ex-wife at the time. At trial, the respondent’s attorneys invoked the rule of witness exclusion, section 50.155 of the Nevada Revised Statutes. Problems arose when the court asked one of the appellant’s witnesses if appellant's attorneys had admonished him not to discuss the case with anyone. The witness replied that he had not been admonished. There was some question as to whether the judge told the attorneys it was their duty to warn their witnesses since it was not on record.

The respondents’ attorneys then moved for a mistrial, the judge commented on the time of day, 4:55 p.m., and declared a mistrial. The judge then awarded respondents fees and costs of almost $30,000.

The Nevada Supreme Court delineated several options available to the judge in a similar situation. "The judge may hold the witness in contempt, allow cross-examination concerning the violation, prevent the witness from testifying, give a curative jury instruction and, finally, declare a mistrial.” Romo, 978 P.2d 964 (Nev. 1999). The Court further stated that the trial judge failed to make a record explaining the extent of the violation of section 50.155 of the Nevada Revised Statutes and failed to hold an evidentiary hearing regarding the witness in question. Therefore, the Court concluded that the trial court abused its discretion in granting a mistrial and by failing to ascertain the extent of witness tampering. Pursuant to section 16.150 of the Nevada Revised Statutes, appellants were granted a new trial. A writ of mandamus was also ordered vacating the sanctions against appellant’s attorneys.
Dangberg Holdings v. Douglas County, State of Nevada, and Estate of Katrina D. Glide
978 P.2d 311 (Nev. June 7, 1999)

Intervention and injunction allowed in Douglas County land case.

In 1977, the shareholders of Dangberg Land and Livestock sold their interest in a Nevada ranch to several purchasers with the express condition that the granddaughters of the ranch’s founder would be allowed to use the ranch as a residence for the rest of their lives. On the death of the last surviving granddaughter, the agreement provided that the ranch house and ten adjoining acres would be offered to Douglas County and/or the State of Nevada for use as a museum.

In July 1995, Katrina Glide, the last surviving granddaughter died. In September 1995, a company called Dangberg Holdings purchased, subject to the 1977 agreement, a parcel that included the ranch house and ten acres. In October 1995, the State of Nevada wrote a letter to Douglas County disavowing any interest in using the ranch house for a state park, but expressed the willingness to support Douglas County in any plans it might have to use it as a park. Dangberg, 978 P.2d at 315.

In July 1996, Douglas County filed suit against Dangberg seeking specific performance of the 1977 agreement, with trial set for October 1997. On March 12, 1997, Dangberg made a settlement offer to Douglas County. The offer required Dangberg to take possession of the personal property in the ranch house, transfer it to an existing county museum, and to make a $35,000 donation to the museum. In return, Douglas County would relinquish all claims to the ranch house and ten acres. Douglas County counter-offered asking the donation to be raised to $50,000. Id.

On April 9, 1997, the Glide Estate filed a motion to intervene in the specific performance litigation claiming an unconditional right based on its interest in the personal property. On May 6, 1997, the State of Nevada also moved to intervene to enforce the agreement that the property be used as a museum.

The district court granted both motions to intervene and a subsequent motion for a preliminary injunction to prevent Dangberg and Douglas County from finalizing the settlement agreement. Dangberg petitioned the Supreme Court for a writ of certiorari to force the district court to vacate the order permitting intervention and appealed the issuance of the preliminary injunction.

Dangberg argued that the district court exceeded its jurisdiction by allowing intervention because the litigation had been settled and that the court abused its discretion by ignoring the prejudice inherent to Dangberg and Douglas County from the intervention. Id. at 316. Dangberg also challenged the grant of a temporary injunction alleging that the intervenors had failed to show that success of the intervention was probable or that the intervenors would be irreparably harmed. Id. at 319. In addition, Dangberg argued that the injunction failed to set forth in detail the reasons for the issuance or the actions to be re-
strained. Id. at 320. Finally, Dangberg claimed that the order was void because the Glide Estate had not been required to post a bond required by statute and that Dangberg had not received its due process right of notice in order to respond to the request for an injunction. Id.

The Court upheld the district court's rulings on the intervention, and allowed the injunction to continue. The Court held that there was no evidence that the case had reached a final settlement, pointing out that Dangberg's counsel had admitted that they had quit working on the settlement on order of the court. Id. at 317. Since intervention is not barred until a final judgment has been reached, the court determined that the intervention motions of the State of Nevada and the Glide estate were timely.

In ruling on Dangberg's contention that the district court abused its discretion, the Court found that Dangberg was not requesting a writ of certiorari, but rather, actually requesting a writ of mandamus, which may be used to control an arbitrary or capricious use of discretion. Id. at 318. The Court held that the district court had not used their discretion arbitrarily or capriciously because the State and the Glide Estate had shown an interest in the litigation. Id. In addition, the Court held that the intervention had not seriously prejudiced Dangberg's interests. The Court noted that there had not been unnecessary delay, with both Glide and the State filing intervention motions within two months after being informed of the settlement negotiations between Dangberg and Douglas County. The Court recognized that the intervention caused Dangberg additional litigation expense, but pointed out that Dangberg would also receive long-term benefits from the economy of consolidation of the litigation. Id. at 318-19.

The Court upheld the injunction by reiterating its finding that the State and Glide had significant property rights. The Court held that the planned settlement agreement may well violate the museum clause, thus showing that Glide and the State had proven a likelihood of success. Id. at 319-20.

The Court rejected Dangberg's contention that the injunction lacked specificity. The district court had indicated that the reason for the injunction was to prevent finalization of the settlement agreement and that the court had described in reasonable detail the act to be restrained when it ordered that "any further action on the purported settlement agreement" be stayed until further order of the Court. Id. at 320.

The Court held that Glide was not required to post a bond despite NRCP 65 that requires an injunction not be issued without one. NRCP 65 provides an exemption from the requirement for state agencies. The Court held that since the State was eligible to obtain the injunction without a bond that Glide need not be required to post a bond of its own. Therefore, the failure of Glide to post a bond did not invalidate the district court's preliminary injunction due to the State's exemption. Id. at 321.

Justice Maupin dissented. He agreed that the settlement had not been final-
ized and that consequently the intervention motions were not untimely. But, Justice Maupin argued, extraordinary relief should have been granted because he saw the State’s letter to Douglas County as an unequivocal renunciation of their interests. Id.

Justice Maupin also argued that the Glide estate had conceded in oral argument that the estate had no claim to the personal property involved in the settlement. For this reason, Justice Maupin claimed that any other property dispute between Glide and Dangberg should have been addressed in separate litigation. Also, since the 1977 agreement had considered the possibility that either the State or Douglas County could reject the property outright, Justice Maupin argued that Douglas County had the right, upon the State’s renunciation of interest, to make whatever arrangement it chose with Dangberg unimpeded. Id.

Palace Station v. Jones

Timeliness of offers of judgment calculated by counting backwards from the trial date, excluding the date the trial is to begin.

This personal injury case involved a man whose foot suffered injury as a result of a valet parking attendant’s running over it with a vehicle. The Palace Station Hotel and Casino made an offer of judgment. The lower court ruled the judgment as untimely since the service of the offer was less than ten days before the trial date, not counting the trial date or the date of service. The offer of judgment was made on Thursday, January 26, 1995, and the trial began on Monday, February 6, 1995. Thus, even though the jury award of $2,811.75 to the plaintiff was less than the $4,500 offer of judgment, the plaintiff was declared the prevailing party by the district court, and was awarded attorney’s fees and costs. On appeal, Palace Station argued that pursuant to Rule 68(a) of the Nevada Rules of Civil Procedure and section 17.115 of the Nevada Revised Statutes, the ten-day limit should be calculated from when the offer was made, not by counting backwards ten days from the start of trial. The Court ruled that, in determining if an offer of judgment meets the NRCP 68 and NRS § 17.115 guidelines for timeliness, the “more than 10 days before trial” is calculated by counting backwards ten days from the trial date, not including the date the trial is scheduled to begin, to when the offer was made. Jones, 978 P.2d at 325. The Court found that the offer of judgment was timely. Since the jury award was less than the offer, the defendant was actually the prevailing party. Id. at 325-326. The jury award of attorney’s fees and costs was reversed, and the case was remanded to the district court to determine if the defendant was entitled to attorney’s fees and costs under NRS § 17.115.
Telequest, Inc. v. Norton Cattle Co.
189 F.3d 474 (Table) (9th Cir. July 30, 1999)

When a federal court has jurisdiction by diversity, the choice-of-law rules of the original forum state determine which state's substantive law should be applied.

Telequest appealed the entry of jury verdict in favor of defendants on all claims and Norton cross-appealed the denial of its motion for attorney's fees as a prevailing party.

The Court ruled that when a federal court has jurisdiction by diversity, the choice-of-law rules of the original forum state determine which state's substantive law should be applied. Thus, Nevada's choice of law rules for tort actions was applicable. Under Nevada's choice of law rules, Oregon state law was the applicable law in this matter.

Accordingly, the District Court for the District of Oregon correctly applied Oregon law in this case because Oregon had an "overwhelming interest" in this action by virtue of: (1) the alleged tortious conduct of failing to disclose material facts regarding the sale of the aircraft occurred in Oregon, (2) the "spheres of activity" were centered in Oregon, and (3) the plane and the parties meetings were located in Oregon.

The Ninth Circuit affirmed the denial of the award of attorney's fees to Norton according to an abuse of discretion standard applicable under Oregon law. Oregon law, specifically section 20.096(1) of the Oregon Revised Statutes, permits the awarding of attorney's fees in a contract action where the contract at issue "specifically provides for those fees." In this case, the contract which the trial court ruled "did not create enforceable contractual rights" between the parties was submitted to the jury. This contract contained no explicit provision referencing the awarding of attorney's fees. Norton should not be permitted to recover attorney's fees from a contract that did not contain any provision for the awarding of such fees, especially when that contract did not create any enforceable rights. Thus, the order denying fees was appropriate.

State Engineer of the State of Nevada v. South Fork Band of the Te-Moak Tribe of Western Shoshone Indians of Nevada

Dispute of jurisdiction over the Humbolt Decree, an adjudication of water rights between Nevada and the Western Shoshone Tribe.

The State of Nevada sued the Indian Tribe and the United States as trustees, to enforce the 1931 Humbolt Decree, an adjudication of water rights. The United States removed the action to the United States District Court; the State of Nevada sought remand back to state court. The Court examined three "jurisdictional thresholds" to determine the propriety of removal. First, it looked for statutory authority granting removal. Next, it considered subject matter juris-
The Court found proper authority for removal under the plain language of 28 U.S.C. § 1442, which expressly allows for removal by the United States as a defendant. South Fork, 66 F.Supp.2d at 1167.

The State considered subject matter jurisdiction and contended that state courts hold exclusive jurisdiction over in rem actions concerning state court decrees. The Court found that state jurisdiction was not exclusive in this action, as it was not an in rem action, but rather an in personam enforcement action, involving both state and Federal entities. Id. at 1169. The State further contended that removal would frustrate the state's sovereign rights to allocate and regulate water resources. Although the Court agreed that Nevada has "the right to regulate and distribute its water resources," the Court went on to emphasize that right is not exclusive. Id. The Court characterized federal court jurisdiction here a "minor interference with Nevada's State sovereignty," since state law is applied by the federal courts in such cases. Id. Thus the Court ruled that state law interests "do not warrant staying the exercise of federal jurisdiction," expressing confidence that federal courts are competent to interpret state law. Id. at 1170. Addressing the State's claim of Eleventh Amendment immunity from suit in Federal court, the Court cited an exception to that immunity when a suit against a state is brought by the United States. Id. Thus the Court held that it had subject matter jurisdiction over the action. Id. at 1174.

The State finally claimed that even if the Court finds that subject matter jurisdiction exists, the Court "should not exercise its jurisdiction due to the doctrines of abstention and comity," and should remand the case to State court. The Court addressed each of the four categories of cases identified by the Supreme Court as appropriate for abstention of federal jurisdiction.

The Court held Pullman abstention, articulated in Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941), inapplicable "because we are not faced with any questions of state law that would eliminate any federal constitutional questions if resolved in a certain way." South Fork, 66 F.Supp. at 1174.

The Younger abstention, found in Younger v. Harris, 401 U.S. 37 (1971), is implicated when federal jurisdiction has been invoked for the purpose of restraining state judicial proceedings. Id. Since this action was removed in its entirety to federal court, there were no other state proceedings. The Younger abstention was not applicable. Id. at 1175.

The Burford abstention, Burford v. Sun Oil Co., 319 U.S. 315, 332-34 (1943), begins with the availability of "timely and adequate state-court review." South Fork, 66 F.Supp. at 1176. The Court found such review available here, and continued on to the three required factors for the application of the Burford abstention to apply in the Ninth Circuit. Id. Burford abstention failed, however, since two of the factors weighed against its application. First, the Court found that "the state issues are not complex here, nor difficult to separate from
the federal issues involved.” Id. Second, the Court found that Nevada water law is well settled, and “federal review will not disrupt state efforts to establish a coherent policy.” Id. at 1177.

The last category of abstention involves special circumstances where abstention “is appropriate for reasons of wise judicial administration.” Id. Known as Colorado River abstention, Colorado River v. United States, 424 U.S. 800 (1976), eight factors must be weighed to determine if such special circumstances exist. South Fork, 66 F.Supp. at 1177. The “factors are to be applied in a pragmatic...balancing process...heavily weighted in favor of the exercise of jurisdiction.” Id., citing Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 16 (1983). The Court found that three of the factors weighed in favor of federal jurisdiction: “the policy of avoidance of piecemeal adjudication; the order in which jurisdiction was obtained; and whether federal law or state law provides the rule of decision on the merits.” South Fork, 66 F.Supp. 1181. The Court found four of the factors either neutral or inapplicable. Id. The neutral factors were the geographic inconvenience of the forum, and the adequacy of state court proceedings to protect the litigant’s rights. The inapplicable factors were forum shopping, and state court jurisdiction over Res or property. The only factor weighing in favor of state court jurisdiction was the so-called McCarron Amendment, which creates concurrent state and federal jurisdiction, intended to “facilitate state adjudication of stream systems that contained both reserved and appropriated rights of the United States and Indian tribes.” Id. at 1179. The Ninth Circuit requires that the McCarron Amendment be “weighed more heavily than each of the other factors,” but the court found that the other factors “more than counterbalance the effect of the McCarran Amendment.” Id. at 1181. Thus Colorado River abstention was ruled not applicable.

Since proper authority to remove to federal court existed, the Court had subject matter jurisdiction over the action. The Court ruled that it must exercise jurisdiction in the matter, since none of the abstention categories applied.

The Tribe asked that the Court, upon exercise of jurisdiction, to dismiss the action based on the Tribe’s federal immunity. The Court ruled that the Tribe’s participation in the original decree constituted a waiver of immunity, and the subsequent fifty-plus years of complying with the decree implied a continuing waiver of that immunity. Id. at 1172.

Derosa v. First Judicial Dist. Court of State ex rel. Carson City

The Court directs the clerk of the Court to change the language of the earlier opinion.

The Nevada Supreme Court denied a request for rehearing of the petitions of Jeffery DeRosa and Janice Louis Thomas which had been resolved in
DeRosa v. District Court, 985 P.2d 157 (Nev. August 27, 1999). Thomas had also filed a motion to correct two references to her counsel in the earlier opinion. This motion was granted in part and denied in part.

The first alleged error was a statement that Thomas’ counsel had waived her rights to confront and cross-examine witnesses by failing to object to a lab analyst’s affidavit. The Court stated in its recitation of the facts that counsel for Thomas had objected to the affidavit but later grouped together the actions of DeRosa’s counsel with those of Thomas’ counsel, resulting in an inference that Thomas’ counsel had failed to object to the affidavit. The Court granted this part of Thomas’ motion and directed the clerk of the court to change the language of the earlier opinion. The Court also directed the clerk of the court to correct the caption of the earlier opinion because Thomas had named the wrong judge as a respondent.

Thomas also complained that the court’s suggestion that petitioners seek post-conviction relief disparaged the reputation of her counsel. The Court disagreed and denied this portion of Thomas’ motion, stating that the language of the opinion “does not impugn counsel’s ability in any way.”

Parodi v. Budetti

When separate and distinct suits have been consolidated into one action, the trial court must offset all awards of monetary damages to determine which side is the prevailing party and whether or not the total net damages exceed the $20,000 threshold.

Appellant, Raymond Parodi, challenged a district court order, determining Respondents to be the prevailing party for the purposes of awarding fees and costs.

Frank Budetti owned three separate properties, 1289 Zinfandel, 1292 Zinfandel and 1286 Chardonnay in Gardnerville, Nevada. Raymond Parodi contracted with the Budettis to construct residential homes on the three properties. In 1995, Raymond Parodi filed three separate actions that were later consolidated against the Budettis. The first two claims alleged breach of contract and unjust enrichment. The third action involved an additional complaint for foreclosure of a mechanic’s lien on the Chardonnay property. The same complaint included claims against Lori Musico for slander and interference with contractual relations. Allegedly, Musico made defamatory statements about Parodi which adversely affected business relations. The Budettis filed counterclaims for breach of contract.

After the consolidation, but prior to trial, three offers of judgment were served upon Parodi. The last offer made on March 19, 1997 by both the Budettis and Musico, for the sum of $20,000 including all fees, costs and prejudgment interest was unapportioned between the two parties.

Prior to trial, the court asked both Parodi and the Budettis to submit one
last oral settlement offer. At this time, the Budettis agreed that all of Musico’s actions would be imputed to the Budettis. The court found that both Parodi and the Budettis had breached their contracts and awarded various amounts with respect to each property. In the end, the damage awards resulted in a total net verdict in favor of Parodi in the amount of $18,798.61. The net verdict was less than the oral offer made prior to trial, and $1,201.39 less than the 1997 offer.

Parodi argued that fees could be awarded under section 18.010(2)(a) of the Nevada Revised Statues, while section 18.020 mandated costs. Second the appellant asserted he was entitled to mandatory fees and costs under section 108.237 of the Nevada Revised Statues, the mechanic’s lien statute. Alternatively, the Budettis asserted they were entitled to fees and costs under Nevada Rules of Civil Procedure 68 and sections 17.115, 18.010 and 18.020 of the Nevada Revised Statutes. The district court ruled in favor of the Budettis, holding that the oral settlement offer exceeded the net award of the Parodi’s.

Parodi appealed the order, asserting that the district court lacked the authority to base an award of costs and fees upon the oral offers made just prior to trial. According to Nelson v. Peckham Plaza Partnerships, 110 Nev. 23, 866 P.2d 1138 (1994), absent an abuse of discretion, a district court’s award of fees and costs will not be disturbed upon appeal. However, absent a statute or rule, a court does not have the authority to issue an award of attorney’s fees. See State, Dep’t of Human Resources v. Fowler, 109 Nev. 782, 858 P.2d 375 (1993). The Nevada Supreme Court concluded that the district court erred in basing its award upon the oral negotiations of the parties.

The Court considered the application of sections 18.010 and 18.020 to consolidated cases with separate claims. The Court found the present case to be one of first impression and treated it similarly to the situations in two cases involving multiple claims filed in a single action. In those cases, the courts looked to the total judgment, disregarding the individual claims. The Court held that when separate and distinct suits have been consolidated into one action, the trial court must offset all awards of monetary damages to determine which side is the prevailing party and whether or not the total net damages exceed the $20,000 threshold. Based on offsetting the three monetary awards, the net verdict was in favor of Parodi. The Court also stated that since the net verdict does not exceed $20,000, the district court may consider an award of attorney’s fees to Parodi under Chapter 18 of the Nevada Revised Statutes on remand by involving itself in the discretionary analysis included in section 18.010(1)(a).

Lastly, Parodi argued that he was entitled to fees pursuant to section 108.237 of the Nevada Revised Statutes. The Court mandated attorney’s fees to Parodi with regards to preparation and representation relating to the Chardonnay property and the mechanic’s lien, since a lien claimant can recover less than the amount of lien and still be the prevailing party.
The Court, in addressing the Budettis’ argument, looked to a number of cases. The Court decided that since the 1997 offer was not apportioned, it was invalid for the purposes of determining a prevailing party under Nevada Rules of Civil Procedure 68 and section 17.115 of the Nevada Revised Statutes. See Edwards Inds. v. DTE/BTE, Inc., 112 Nev. 1025, 923 P.2d 569 (1996); Morgan v. Demille, 106 Nev. 671, 799 P.2d 561 (1990); Ramadanis v. Stupak, 104 Nev. 57, 752 P.2d 767 (1988).

The Court reversed the attorney fee and cost awards and remanded for recalculation pursuant to the offset of all damage awards.

**Crossroads Partners v. Utah Crossing, Ltd.**

191 F.3d 459 (Table) (D. Nev. Sept. 9, 1999)

*A non-breaching party who successfully defended an action brought by plaintiff in violation of a release agreement is not entitled to an award of attorney’s fees without a statutory, rule-based, or contractual authorization for such an award.*

Plaintiff appealed a District Court order granting of summary judgment in favor of defendants and an award of attorney’s fees on defendant’s counterclaim for breach of a release agreement. The Ninth Circuit affirmed summary judgment, but reversed the award of attorney’s fees to the defendants.

The Ninth Circuit affirmed the granting of summary judgment in favor of defendant Bank of America, Nevada, (BAN) and reversed the award of attorney’s fees to BAN on its counterclaim for breach of a release agreement.

The Nevada Supreme Court has not adjudicated the issue of whether attorney’s fees may be awarded for a breach of a release agreement. However, the Nevada high court has consistently adhered to the “American rule” that “attorney’s fees may not be awarded in absence of a statute, rule or contract granting them,” see Campbell v. Nocilla, 101 Nev 9, 692 P.2d 491, 492 (Nev. 1985), in breach-of-contract claims.

Thus, a “non-breaching party who successfully defended an action brought by plaintiff in violation of a release agreement is not entitled to an award of attorney’s fees without a statutory, rule-based, or contractual authorization for such an award.” Since neither the release agreement between the parties nor any statute or rule provided for the award of attorney’s fees in an action such as this one, the court held that the award of fees to defendant BAN under the release agreement was erroneous. However, the Ninth Circuit advised BAN that, as the prevailing party, it may still move the trial court for the awarding of attorney’s fees under section 18.010(2)(b) of Nevada Revised Statutes, which “permits a court to grant attorney’s fees to a prevailing party when it finds that a claim was brought without reasonable grounds or to harass the prevailing party.”
Abreu v. Gilmer

There is no objective formulaic standard for determining what is, or is not, due diligence and each case is to be decided on its merits.

This case involved an appeal from an order dismissing a complaint for failure to effect service of process.

The Abreus were injured in an automobile accident allegedly caused by Gilmer. The parties did not call the police, but rather exchanged addresses and insurance information. The address Gilmer provided was incorrect.

Under Nevada Rule of Civil Procedure 4(i), service of process must be accomplished within 120 days of filing a complaint. Here, the Abreus filed a complaint against Gilmer on May 14, 1997. After repeated attempts to effect personal service, an attorney finally contacted the Abreus. The attorney stated that he would represent Gilmer on the insurer’s behalf. The attorney would not accept service, and refused to provide the Abreus any assistance in finding Gilmer.

On July 29, 1997, the Abreus filed an affidavit of due diligence and an affidavit for publication of the summons and complaint. The district court entered an order to allow service by publication on August 6, 1997. On September 17, 1997, the Abreus filed an affidavit that service of process by publication was completed.

Gilmer immediately filed a motion to quash service of process, arguing that the Abreus had not exercised due diligence before resorting to publication. The motion provided Gilmer’s new address, and the Abreus obtained a new summons and personally served Gilmer on October 7, 1997, some 146 days after the complaint was filed.

Gilmer filed a motion to dismiss pursuant to Nev. R. Civ. P. 4(i) for failure to personally serve Gilmer within 120 days. On November 14, 1997, the district court heard the motion to quash service of process. Despite testimony that Gilmer had lived at some six different locations between the time of the accident and the hearing and that she would not have provided her address to someone who asked for it, the court granted the motion to quash because the Abreus had not exercised due diligence before service by publication. By subsequent order, the court dismissed the complaint, finding that Abreus failed to demonstrate good cause by failing to complete service within 120 days as prescribed by Nev. R. Civ. P. 4(i).

The Court accepted the case for review even though a petition for a writ of mandamus, not an appeal, is the procedural vehicle for challenging an order quashing service of process. See Jarstad v. National Farmers Union, 92 Nev. 380, 552 P.2d 49 (1976). Here, the order to quash service of process led directly to a dismissal of the complaint. Because the dismissal was a final order of the district court, jurisdiction was properly vested in the Court, which may review due diligence determinations for abuse of discretion.
In its per curiam opinion, the Court reasoned that "there is no objective formulaic standard for determining what is, or is not, due diligence." In light of its "underlying policy to have each case decided on its merits," (citing Christy v. Carlisle, 94 Nev. 651, 654, 582 P.2d 687, 689 (1978)), the Court concluded that the district court abused its discretion when it found that Abreus did not exercise due diligence prior to serving Gilmer by publication. The Court found that Abreus' efforts to effect service were "appropriate and reasonably calculated to accomplish service on Gilmer."

Accordingly, the Court reversed and remanded the order of the district court.

Medical Device Alliance, Inc. v. Ahr
988 P.2d 308 (Nev. Nov. 29, 1999)

By appointing a temporary receiver, the plaintiff became aggrieved party and had standing to appeal trial court's order.

This case involved an appeal from a district court decision appointing a temporary receiver to Medical Device Alliance (MDA), the appellant. The respondents, shareholders in MDA, filed the original motion with the district court seeking a temporary receiver over the corporation. The motion alleged MDA's management had engaged in improper conduct including fraud and mismanagement. Subsequently, the district court found in favor of the respondents and appointed the temporary receiver.

The question presented on appeal was whether the appointment of a temporary receiver to a corporation provides standing for the corporation to pursue an appeal as an aggrieved party. Ahr, 988 P.2d at 310. The respondents argued that MDA was not an aggrieved party and, therefore, had no standing to sue. The respondents also alleged that, although the board of directors may be considered aggrieved parties in this suit, they were not parties in the original action. Id. at 310.

The Court ruled that MDA did, in fact, have standing to appeal the order. The Court held that, by appointing a temporary receiver, MDA became an aggrieved party because the appointment of a temporary receiver to a corporation interferes with a corporation's, "normal operations and processes pursuant to its articles of incorporation and bylaws." Id.

Greene v. The Eighth Judicial District Court of the State of Nevada
990 P.2d 184 (Nev. Dec. 13, 1999)

Complaints may not be amended post-judgment unless judgment has been set aside.

This case concerned a petition for a writ of prohibition. The writ challenged a district court order that permitted the amendment of a complaint following final judgment on the matter. Id.
Following the district court's judgment against defendant/petitioner, Stan Greene, and in favor of plaintiff/real party in interest, Dwaine Anderson, Anderson alleged that Ronnie and Kathleen Ford had helped Greene to transfer assets to other entities. Id. Pursuant to Nev. Rev. Stat. § 21.330, Anderson filed a motion to amend his complaint. Id. He intended to bar Greene from further transfers and to set aside the previous, allegedly fraudulent, conveyances. Id. Over a year after the final judgment, the court granted the motion. Id. Greene and the Fords then filed a writ of prohibition and an emergency motion to stay with the Supreme Court of Nevada; the court granted the motion to stay. Id.

Anderson argued that the district court should have power "to protect its judgments by setting aside fraudulent conveyances by a judgment debtor, and that this inherent power also allows the district court to grant leave to amend a complaint and pursue fraudulent conveyance claims in a post-judgment supplementary proceeding," but the court did not agree. Id. at 186. Instead, granting the petitioners' writ of prohibition, the court announced a prohibition against post-judgment amendment of complaints where the judgment has not first been set aside or vacated. Id. at 187.

However, the court's opinion makes clear that a party in Anderson's position has other options. Id. at 186. Pursuant to Nev. Rev. Stat. § 21.320, a court can order that the property of the debtor be applied to the judgment even if it is currently in the possession of a third-party (so long as the third party does not have an adverse claim to the property in which case the judgment creditor must institute a claim against that third party). Id.

**MRO Communications, Inc., v. AT&T Corp.**

197 F.3d 1276 (9th Cir. Dec. 13, 1999)

*A trial court, in exercising its discretion, must consider four factors and make findings based on the evidence that attorney fees sought are reasonable and justified.*

MRO Communications (MRO) brought an action including claims under state and federal law. AT&T Corp. (AT&T) moved for judgment as a matter of law, which the court granted.

Thereafter, AT&T moved for an award of attorney's fees incurred in defending the Plaintiff's state law claims from the time the MRO rejected the AT&T's offer of judgment. The court granted the motion and awarded fees under section 17.115 of the Nevada Revised Statutes and Nevada Rule of Civil Procedure 68. Plaintiff appealed this award. The Court reviewed the district court's award of attorney's fees under an abuse of discretion standard and affirmed.

MRO argued on appeal that Federal Rule of Civil Procedure 68, as interpreted by the Supreme Court in Delta Airlines v. August, 450 U.S. 346 (1981), precluded an award of attorney's fees because judgment was not obtained by
the offeree (MRO), but by the offeror (AT&T).

The Ninth Circuit noted that the AT&T’s offer of judgment made no reference to attorney’s fees, but was expressly made “for the purposes set forth in F.R.C.P. 68.” F.R.C.P. 68 mandates that when a judgment awarded to a plaintiff is less than the offer made by the defendant, the plaintiff must pay the “costs” which the defendant incurred after making the offer. MRO Communications, Inc. v. AT&T Corp., 197 F.3d at 1280. “Costs” in the Rule 68 context, as construed in Marek v. Chesney, 437 U.S. 1 (1985) was “intended to refer to all costs properly awarded under the relevant substantive statutes” - most of which were federal statutes by which courts could award attorney’s fee’s. Id. Thus pursuant to Rule 68, “costs” signifies “all costs properly awarded under the relevant substantive statute” which creates the mechanism to award costs. However, Rule 68 is inapplicable in cases such as this one in which the defendant, after making an offer in judgment that the plaintiff rejects, obtains a judgment. Id. Thus, Rule 68 could not be the framework by which review is conducted regarding the award of attorney’s fees to AT&T. Id.

Nevada law, specifically section 17.115 of Nevada Revised Statutes and Nevada Rule of Civil Procedure 68, provides the basis for the awarding attorney’s fees to a defendant who makes an offer of judgment that is rejected by the plaintiff, who subsequently fails to obtain a more favorable result. MRO at 1281. “Failing to obtain a more favorable result” includes not obtaining a judgment at all. Id. at 1282.

Though Nevada law requires that an offer in judgment made in a state trial court specify the source that provides for an award of the cost or fee sought, it does not describe the procedure that should be followed in making an offer in judgment in a federal court. This procedure is only found in Federal Rules of Civil Procedure 68, which AT&T followed. But applying Rule 68 leads to a contrary result than does Nevada law. It would be a violation of national policy as set forth in Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938) to permit a result contrary to the policy set forth in Nevada law simply because the forum is federal. MRO at 1283. Even before Erie, the Supreme Court ruled in People of Sioux County v. National Surety Co., 276 U.S. 238, 243 (1928), that a state statute requiring the award of attorney’s fees, such as section 18.020 of the Nevada Revised Statutes, be applied in a case removed from state to federal court. In a case such as this, where MRO filed its state court claims supplemental to its federal claims in federal court, the same principle of continuity in results applies, requiring the reviewing court to look to Nevada Rules of Civil Procedure 68 for guidance.

Beattie, mandates that a trial court, in exercising its discretion to award fees and costs under Nevada Rules of Civil Procedure 68, must consider four factors and make findings based on the evidence that the fee’s sought are “reasonable and justified.” Such inquiries evince the proper exercise of discretion. The factors are:
(1) Whether the plaintiff’s claim as brought in good faith;
(2) Whether the defendant’s timing and amount of judgment offer were reasonable and in good faith;
(3) Whether the plaintiff’s decision to reject the offer and proceed to trial was grossly unreasonable or in bad faith; and
(4) Whether the fees sought by the offeror are reasonable and justified in amount.
MRO at 1283.

Though the trial court made no specific findings as to these four factors beyond announcing that the attorney’s fees are “reasonable,” it was only obligated to “consider” the four factors. It was clear that the trial court reached its decision only after “considering the various affidavits and exhibits of the party’s in support and opposition of AT&T’s motion for attorney’s fees.” Id. at 1284. These documents contained sufficient information to inform the trial court’s decision relative to the four factors. Thus, the trial court did not abuse its discretion in awarding AT&T attorney’s fees.

State of Nevada v. Stu’s Bail Bonds
991 P. 2d 469 (Nev. Dec. 28, 1999)

The district court lacked jurisdiction to exonerate the bail bond of a criminal defendant who fled to Mexico.

The district court exonerated a bail bond after a criminal defendant fled to Mexico, and after the respondent, Stu’s Bail Bonds, incurred legal barring from retrieving the defendant pursuant to the United States/Mexico treaty. The district court granted the respondent’s motion to exonerate the bail bond after concluding that the treaty made it impossible for the respondent to legally retrieve the defendant from a foreign country and that Nev. Rev. Stat. §178.509(1)(b)(4) accounted for this circumstance. See Stu’s Bail Bonds, 991 P. 2d at 470. The appeal to the Nevada Supreme Court challenged the exoneration of the bond. The Court concluded that the district court erred and reversed and remanded the case.

The criminal defendant pled guilty to the offense of conspiracy to commit grand larceny. Id. He was released on bail and when he failed to appear at his sentencing hearing, the district court mailed a notice of intent to forfeit the bail bond to the surety, Stu’s Bail Bonds. Id.

Respondent moved to exonerate the bail bond because the defendant had fled to a foreign country and could not be legally retrieved. Specifically, Respondent alleged the treaty between the United States and Mexico and Mexico’s policy against extradition of nationals, prevented the lawful retrieval of the defendant. Id. Further, respondent argued that these factors amounted to civil detention of the defendant and therefore, were included under the Nevada Statute that allowed for exoneration of a bond under certain circumstances. Id.
The appeal issue was whether the district court correctly interpreted the statute to include the situation where a defendant absconds to another country. The court found that the lower court erred in granting the motion for exoner-ation of the bail bond because a defendant’s nonappearance may only be excused by death, illness, insanity or civil or military detainment. Id. at 471. Since none of those situations occurred, the court lacked the discretion to ex-erate the bail bond.

CONSTITUTIONAL LAW

Geary v. Nevada
977 P. 2d 344 (Nev. Apr. 26, 1999)
Convicted murderer allowed waiver of right to appeal death sentence.

In Geary v. Nevada, 977 P.2d 344 (Nev. 1999), the Nevada Supreme Court considered the appellant’s decision to waive his automatic right to appeal his death sentence. Geary, on parole for a 1973 murder conviction, was convicted for first degree murder of Edward Theodore Colvin. Id. at 345. After a series of penalty hearings and judicial proceedings, Geary decided to waive his right to appeal his death sentence. In its mandatory review, the Nevada Supreme Court noted that it had an obligation to order a hearing concerning Geary’s competence to make this waiver. Under the test for such competence, the court must conclude that the defendant has sufficient present ability to make this decision and that the defendant understands the ramifications of the proceeding. Id. at 346.

In the hearing, Geary and his attorney stated that they had extensively dis-cussed Geary’s decision and that he understood the nature of the proceedings. Further, two psychiatrists reported that Geary was competent to waive his apppellate rights. Id. Having concluded that Geary was competent, the Nevada Supreme Court, as required by its mandatory review, held that the death sen-tence was not imposed due to passion, prejudice, or any arbitrary factor. The court also concluded that the sentence was not excessive due to the brutal na-ture of the Colvin murder. Accordingly, the court affirmed the appellant’s conviction and death sentence. Id. at 347.

182 F.3d 926 (Table) (9th Cir. May 18, 1999)
Absent evidence of joint action in which a private party is a willful partici-pant with the State or its agents, there is no state action for purposes of impos-ing §1983 liability.

In these two unpublished opinions that involve the same pro se plaintiff and almost identical claims arising from two separate incidents, the Court waded through a laundry list of claims without merit, briefly citing its reasons
for affirming summary judgment for defendants on each one. The first set of claims arose out of an incident at a hotel/casino in Las Vegas, in which the plaintiff, Thomas T. Kness was placed under citizen's arrest by three casino employees for trespassing. The second set of claims arose out of another citizen's arrest made by employees of a casino in Reno.

The Court affirmed summary judgment that dismissed Kness's claim against the Las Vegas casino and its employees for allegedly illegally detaining him because 42 U.S.C. § 1983 requires that "a person acting under color of state law committed the conduct at issue." The court held that "[a]bsent evidence of joint action in which a private party is a willful participant with the State or its agents, there is no 'state action' for purposes of imposing § 1983 liability."

The Court also found that summary judgment was proper on Kness's claims that the Las Vegas Metropolitan Police Department (LVMPD), the City of Las Vegas, a LVMPD officer, and a police records supervisor acted to deprive him of several constitutional rights. In order to establish municipal liability, one must show that the alleged constitutional violations were the result of policy or custom of a municipal agency. Kness offered nothing more than his own conclusory statements to prove that it was the policy or custom of the City or the police department to falsely charge casino patrons with trespassing and obtain their social security numbers in order to ensure that they will not obtain future employment in Las Vegas.

**Goodson v. State**  
991 P.2d 472 (Nev. Dec. 29, 1999)

_Trial before non-lawyer justice of the peace did not violate federal or state due process or right to counsel guarantees._

Defendant was convicted in the Fourth Judicial District Court, Elko County, Jack B. Ames, J., of felony count of driving while under the influence of alcohol (DUI), and he appealed. The Supreme Court held that defendant's prior misdemeanor DUI trial before non-lawyer justice of the peace violated neither federal nor state constitutional due process or right to counsel guarantees. The Nevada Supreme Court followed the holding of the U.S. Supreme Court, which requires the state to show that the spirit of constitutional principles was respected in the prior misdemeanor proceedings before the record of the prior misdemeanor may be used for enhancement purposes. The Nevada Constitution provides that the legislature shall determine the qualifications of justices of the peace and how appeals may be taken from the justice courts. NEV. CONST. art. VI, § 8. The legislature has decided that justices of the peace in rural areas and municipal judges need not be lawyers. See Nev. Rev. Stat. § 4.010(2); Nev. Rev. Stat. § 5.020. However, justices of the peace and municipal judges are required to receive instruction in court procedure and substantive law after they take office and in developments in the law approximately once each year.
The United States Supreme Court has addressed "whether an accused, subject to possible imprisonment, is denied due process when tried before a non-lawyer police court judge with a later trial de novo available." North v. Russell, 427 U.S. 328, 329 (1976). North left open the question whether such a trial is constitutional absent the availability of a trial de novo on appeal. See id. at 334. However, the Nevada Supreme Court doubts that the Supreme Court would deem it a violation of due process. "[O]ur federal system warns of converting desirable practice into constitutional commandment. It recognizes in plural and diverse state activities one key to national innovation and vitality. States are entitled to some flexibility and leeway..." Id. at 338 n. 6, 92 S.Ct. 2119, the Nevada Supreme Court recognizes that most questions concerning a judge's qualifications to hear a case are not constitutional ones, because the Due Process Clause of the Fourteenth Amendment establishes a constitutional floor, not a uniform standard. Instead, these questions are, in most cases, answered by common law, statute, or the professional standards of the bench and bar. This holding is a bit suspect in that it casually dismisses the "de novo possibility" caveat contained in North v. Russell, 427 U.S. 328, 329, 96 S.Ct. 2709, 49 L.Ed.2d 534 (1976).

CONTRACTS

Garshman Co., Ltd. v. General Electric Co.
176 F.3d 1 (1st Cir. Mar. 29, 1999)

Nevada's Exclusive Listing Agreement applies to those agreements which (1) are between an owner and a broker; (2) are for the sale of real property; and (3) that exclude other brokers.

Garshman and General Electric (GE) entered into a contract where Garshman would auction the assets of a tungsten mine GE owned but was not utilizing. Garshman was approached by a buyer, to which GE orally agreed to sell the assets of the mine and real estate property. Garshman and GE agreed that Garshman would be paid a commission upon receipt of a letter of intent to purchase a non-refundable deposit of $75,000. Ultimately, the new buyer signed the letter and made the non-refundable deposit, but the deal fell through. GE denied any obligation to pay Garshman. A contract dispute resulted in which Plaintiff Garshman obtained a favorable jury verdict on all its claims except for its claim based on Chapter 93A of Massachusetts Law. Garshman appealed the adverse judgment of the court under Mass. Gen. Laws ch. 93A. General Electric (GE) appeals the trial court's refusal to instruct the jury regarding the application of the Nevada Exclusive Listing Statute, section 645.320 of the Nevada Revised Statutes.

The Court ruled that Nevada's Exclusive Listing Agreement, section 645.320 of the Nevada Revised Statutes, applied to those agreements which (1) are between an owner and a broker; (2) are for the sale of real property; and (3)
that exclude other brokers. Garshman Co. v. General Electric Co., 176 F.3d at 7. This statute only applies to "oral brokerage agreements, such as the oral agreement between Garshman and GE which contemplated the sale of the assets of the mine to the buyer and not at auction, which include a provision for an exclusive listing." Id. at 8. The oral agreement in this case contained no such provision, so the statute was irrelevant.

The Court also ruled that Garshman was not entitled to both a judgment for $404,754.86 recoverable under the liquidated damages provision as well as the $372,000 for GE's breach of the oral agreement as determined by the jury. Damages for breach of contract "should only place the wronged party in as good a position as it would have been had the other fully performed." Id. at 10. The trial court could have appropriately inferred, though not precisely clear from the jury verdict form, that the award of $404,754.86 for liquidated damages was based on the inclusion of the $372,000 (12% of the assumed sale price of $3,100,000) plus Garshman's expenses of $32,754.86. Id. at 10-11. Given these circumstances, the trial court was well within its discretion to not award Garshman the $372,000 on top of the $404,754.86 it received as such award would be duplicative and unjust. Id. at 11-12.

CRIMINAL LAW

Libby v. State
975 P.2d 833 (Nev. Apr. 2, 1999)

Court affirms the district court order denying defendant a new trial.

On April 17, 1990, a jury found Libby guilty for, among other lesser offenses, two counts of first degree murder aggravated by two circumstances for each murder, and was sentenced to a verdict of death for each count. During the jury selection process, prosecutor Bullock used six of his eight peremptory challenges to exclude women from the jury. The defense objected, citing Batson v. Kentucky, 476 U.S. 79, 90 L. Ed. 2d 69, 106, S.Ct. 1712 (1986), which held that the Equal Protection Clause forbids the use of peremptory challenges to exclude jurors based upon race.

Libby appealed to the Supreme Court of Nevada, which affirmed Libby's convictions and death sentences in Libby I, 109 Nev. 905, 859 P.2d 1050. Libby then petitioned for a writ of certiorari with the United States Supreme Court, alleging discriminatory use of peremptory challenges during jury selection based upon gender. The U.S. Supreme Court granted certiorari, vacated Libby I, and remanded to the Supreme Court of Nevada for further consideration in light of J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127, 128 L. Ed. 2d 89, 114 S. Ct. 1419 (1994), which prohibits gender-based peremptory challenges during jury selection.

The Supreme Court of Nevada concluded that Libby had successfully es-
tablished a prima facie case of discrimination. However, the prosecutor had not offered reasons for his peremptory challenges, preventing the court from reviewing the gender discrimination challenge as required by J.E.B. The Court remanded so the district court could conduct an evidentiary hearing to provide the prosecutor with opportunity to offer any gender-neutral bases for the challenges.

The district court conducted the evidentiary hearing on November 12, 1997, nearly eight years after the original trial jury selection. The court found that the State's gender-neutral reasons were sufficient to rebut Libby's prima facie case, and denied a new trial. Libby appealed the district court's denial of a new trial.

The Court considered the three steps laid out by the Supreme Court in J.E.B. First, the defendant must establish a prima facie case of gender discrimination; second, the state must offer gender neutral reasons for the use of peremptory challenges; and third, the trial court must evaluate the evidence to determine if the state's reasons rebut the prima facie case, or are merely a pretext for purposeful discrimination. Libby, 975 P.2d at 836. The Court had already held that Libby established a prima facie case prior to the remand. Thus, its consideration on this appeal concerned the district court findings about steps two and three, as well as issues pertaining to the evidentiary hearing itself. Id.

The Court concluded that the state provided sufficient gender-neutral reasons for its use of peremptory challenges, that the evidentiary hearing was not meaningless, that the court did not err in omitting certain lines of questioning by Libby, and that the court's written order was adequate.

Accordingly, the Court affirmed the district court order denying Libby a new trial.

**Martinez v. State**

974 P.2d 133 (Nev. Feb. 12, 1999)

*A defendant who pleads guilty to criminal charges such as battery with use of a deadly weapon is not required to pay restitution to an insurance company that is not a victim.*

The Court held that a defendant who pleads guilty to criminal charges such as battery with use of a deadly weapon is not required to pay restitution to an insurance company that is not a victim under section 176.015 of the Nevada Revised Statutes. The Court further held that the trial court erred in considering the appellant's ability to pay when the trial court determined the amount of restitution to be paid.

Martinez contested a district court's decision ordering Martinez to pay restitution in excess of $68,000. Martinez was involved in an altercation with two victims on September 27, 1994. During this altercation, Martinez shot one victim in the chest and injured the other in the leg. At the time of the incident, Martinez was an eighteen-year-old illegal immigrant with no financial assets.
The Division of Parole and Probation did not readily identify his victims. After some inquiries, the Division discovered that victim No. 1 had sustained medical bills from Mercy Ambulance and University Medical Center in excess of $66,000. Martinez v. State of Nevada, 974 P.2d 133, 134 (Nev. 1999). Further, $200 of Victim No. 1’s medical bills was covered through Humana Insurance Company of Louisville, Kentucky. Id. Victim No. 2 also owed Mercy Ambulance and University Medical Center $1,500. Id. The Division of Parole and Probation recommended to the district court that Martinez pay restitution to cover his victims’ medical bills to which the court agreed.

The issues before the Court in this case were 1) whether or not the hospital and ambulance company could receive restitution as “victims” under Nevada law; 2) whether or not there was sufficient evidence to support the restitution requirement; and 3) whether Martinez’s ability to pay should have been considered when the lower court made the restitution sentence.

In addressing the issue of whether or not the hospital and ambulance companies were victims under Nevada law, the Court looked to section 176.033(1)(c) of the Nevada Revised Statutes. Id. (“if a sentence of imprisonment is required or permitted by statute, the sentencing court shall: ...if restitution is appropriate, set an amount of restitution for each victim of the offense.”), and 176.015 (5)(b). Id. (Providing a “victim includes: 1) A person, including a governmental entity, against whom a crime has been committed; 2) A person who has been injured or killed as a direct result of the commission of a crime; and 3) A relative of a person described in subparagraph (1) or (2)”)). Based on the statutory language, the Court held that the district court’s order to pay restitution for the victims’ medical bills directly resulting from the incident was proper. Id. In reaching its decision the Court specifically stated that medical care providers treating crime victims are not “victims” as defined by section 176.015(5)(b) of the Nevada Revised Statutes. However, the Court has held in other cases that medical care providers are entitled to restitution when the medical costs of treating crime victims directly result from the crime. See e.g., Norwood v. State, 112 Nev. 438, 441, 915 P.2d 277, 279 (1996).

The Court refused to extend the restitution to insurance companies because insurance companies have a contractual obligation to cover its customers. Id., citing Hewitt v. State, 113 Nev. 387, 936 P.2d 330, 332 (1997).

Specifically, the Court stated that an insurance company covering a crime victim’s medical bills does not suffer an unexpected loss because insurance companies are in the business of paying people’s medical bills. Id. The Court did state, however, that an insurance company may seek subrogation from the criminal defendant for medical bills resulting from a crime. Id.

The Court also stated that the defendant was not entitled to a full evidentiary hearing regarding restitution, but could challenge the amount.
sought by providing evidence to support his claim. Id. In this case, Martínez never challenged the amount of restitution he was required to pay. Additionally, the Court took the opportunity to state that it would not disrupt a district court’s sentencing decision so long as the decision was based on sufficient evidence. Id., citing Lloyd v. State, 94 Nev. 167, 576 P.2d 740 (1978) and Silks v. State, 92 Nev. 91, 545 P.2d 1159 (1976).

For the reasons stated, the Court declined to disturb the district court’s order for the amount of restitution Martinez was required to pay. Id. at 135.

Finally, the Court ruled that the district court did not err by failing to consider Martinez’ ability to pay the restitution. Id., citing section 176.015 of the Nevada Revised Statutes. The Court reasoned that there is no requirement for such a consideration in determining the amount of restitution a criminal defendant would be required to pay. Id.

Meegan v. State

Court corrects mistake in the original opinion, but affirms murder conviction.

James Meegan, convicted of first-degree murder of his ten-month-old daughter, petitioned for rehearing pursuant to Nevada Rules of Criminal Procedure 40(c). Meegan contended that the lower court erred by misstating the facts of the case in the opinion, misapprehending the autopsy evidence, and by denying the defendant’s right to self-representation.

The Nevada Supreme Court affirmed the conviction and life sentence in 1998. However, the Court did take this opportunity upon petition to correct a mistake in the opinion, in which it was purported that Meegan made a statement about his daughter’s death while testifying. This statement was never made, as Meegan never testified, although there was a videotape recording of statements made by Meegan during an interview with a reporter in jail, which was played in court as evidence. The Court concluded that they did not overlook or misapprehend a material matter warranting rehearing. They did, however, order a correction of the opinion.

Meegan then requested that the court identify the basis for a statement made in the opinion regarding part of the prosecution’s closing argument. The Court accordingly identified the basis for the statement using the words of Meegan’s own attorney in defense counsel’s opening statement.

Meegan also asserted that the court misapprehended autopsy evidence regarding a statement made by the court in its opinion. The Court acknowledged that only one doctor spoke and during cross-examination he testified to the effect that his findings could have been consistent with a drug related death. The doctor clarified this statement upon redirect to indicate his findings were not consistent with a drug overdose. Therefore, after looking at the entire testimony including redirect, the Court concluded that it did not misapprehend or
overlook a material matter.

Finally, the appellant challenged the Court's conclusion that the lower court properly denied his request for self-representation and that Meegan later withdrew his request. Again, the Court concluded it did not overlook or misapprehend a material fact or question of law. Even though appellant's petition was denied, the Court ordered the opinion corrected regarding Meegan's statements.

**Davis v. State**

*974 P.2d 658 (Nev. Feb 17, 1999)*

*Claim of ineffective assistance of counsel denied.*

In Davis v. Nevada, the Nevada Supreme Court considered whether an attorney is obligated to obtain a client's consent when deciding not to file an appeal of a guilty plea conviction. The appellant, after pleading guilty to burglary, was sentenced as a habitual criminal under Nev. Rev. Stat. § 207.010. Davis v. Nevada, 974 P.2d 658 (1999). On appeal to the Eighth Judicial District Court, the appellant claimed that his counsel was ineffective for failing to inform him of his right to appeal and for not directly appealing the conviction. Id. at 659 (the appellant also made certain procedural challenges to the conviction.) The appellant asserted that the state did not produce certified copies of his prior convictions pursuant to Nev.Rev.Stat. § 207.010. The Nevada Supreme Court concluded that the record indicated that such documents had been provided. Further, the appellant raised the issue of his adjudication as a habitual criminal. Noting that appellant had failed to raise this claim on direct appeal, the court rejected appellant's arguments.

In its review, the Nevada Supreme Court noted that, consistent with Cruzado v. State, 879 P.2d 1195 (Nev. 1994), a knowing and voluntary unequivocal waiver of the right to appeal made pursuant to a plea bargain is valid and enforceable. Davis, 974 P.2d at 659. The Nevada Supreme Court concluded that the appellant in Davis did not unequivocally waive his right to a direct appeal. Specifically, Nev. Rev. Stat. § 177.015(4) provides for a right to appeal after a guilty plea if the appeal challenges the legality of the proceedings on legitimate constitutional, jurisdictional or other reasonable grounds. Id. According to the court, this statute merely limits appellate rights as opposed to providing an unequivocal waiver of such rights. Id. Thus, the Nevada Supreme Court overruled the lower court's ruling regarding the appellant's right to an appeal.

However, the Nevada Supreme Court rejected appellant's arguments concerning the ineffectiveness of counsel. The court reasoned that a plea memorandum informs a defendant of the right to appeal, thus removing any obligation on behalf of counsel to provide this information. Id.
Jackson v. State
973 P.2d 241 (Nev. Mar. 16, 1999)

A writ of habeas corpus may not be sought after an individual has already served his sentence for a crime.

Appellant, currently serving a life sentence without the possibility of parole in the Nevada State Prison, sought to challenge the validity of two 1975 criminal convictions, 14 years after he had completed the sentences imposed by those convictions. Appellant claimed that his current sentence was enhanced due to the 1975 convictions on the robbery and grand larceny charges (to which he had pleaded guilty). However, he also claimed that those prior convictions were unconstitutional inasmuch as he was never informed that he had a right to an appeal.

The Court, for the sake of judicial economy, consolidated the appellant's petitions for writs of habeas corpus on the two convictions and summarily disposed of them. Jackson, 973 P.2d at 241. The court based its decision on the rule that "a district court may not issue a writ of habeas corpus if the post-conviction petitioner filed the petition challenging the validity of a conviction after having completed the sentence for the challenged conviction." Id. at 242.

Parsons v. State
978 P.2d 963, (Nev. May 18, 1999)

A court may not use a prior misdemeanor DUI conviction to enhance a DUI to a felony unless the records of the conviction demonstrate that the defendant was either represented by counsel or formally waived his right to counsel.

After a trial by jury, Parsons appealed a conviction of felony driving under the influence, which he was charged with in 1991. The complaint contained two prior misdemeanor DUI's which the prosecution used to enhance the charge to a felony. The justice court struck one of the prior misdemeanors and Parsons entered a guilty plea to a reduced charge misdemeanor DUI. The State then petitioned for a writ of certiorari to the district court. The court issued an order reversing the conviction and rescheduling the preliminary hearing before a different magistrate. In the second hearing, on August 21, 1995, Parsons argued that the prior misdemeanor DUI conviction was insufficient because the complaint did not allege all essential elements. The complaint was also questionable as to whether Parsons waived the assistance of counsel or whether there was actual counsel present. The magistrate agreed and dismissed the felony DUI charge.

The State then filed information by affidavit under section 173.035(2) of the Nevada Revised Statutes, to the Fifth Judicial District Court of Nye County. The district court overturned the magistrate below, and found that the error committed was egregious. A one-day trial ensued, the prior DUI's were allowed in and the jury found Parsons guilty of one count of felony Driving Un-
der the Influence.

The Nevada Supreme Court reversed Parsons’ conviction citing Cranford v. Smart, 92 Nev. 89, 91; 545 P.2d 1162, 1163 (1976), which held that section 173.035(2) of the Nevada Revised Statutes “contemplates a safeguard against egregious error by a magistrate in determining probable cause, [and is] not a device to be used by a prosecutor to satisfy deficiencies in evidence at a preliminary hearing.”

Also, the court, looking to Bonds v. State, 105 Nev. 827 828;784 P.2d 1, 1-2 (1989), stated that a court may not use a prior misdemeanor DUI conviction to enhance a DUI to a felony unless the records of the conviction demonstrate that the defendant was either represented by counsel or formally waived his right to counsel. The Court overturned the district court’s decision because the magistrate was faced with ambiguous documentation regarding the prior misdemeanor. The court also believed the State impermissibly attempted to satisfy deficiencies in the evidence at the preliminary hearing.

Barngrover vs. The Fourth Judicial Court of the State of Nevada
979 P.2d 216, (Nev. June 7, 1999)

Supreme Court reiterates that grand juries have a duty to either “indict or be silent.”

Petitioners sought a writ of mandate filed on behalf of petitioners to expunge a grand jury presentment, report and transcripts involving petitioners. The petitioners, employees of the Nevada Division of Wildlife (NDOW) were, among others, the subjects of a grand jury investigation into federal and state officials’ management of public lands in Elko County. In particular, the petitioners were involved in a transaction with the Independence Mining Company (IMC), the United States Forestry Service (USFS) and NDOW, wherein the IMC, desiring to expand its gold mining operations in the Independence Mountain range, sought a permit to begin mining on public lands. As a part of that permit procedure, IMC was required to pay an amount of money to certain agencies in order to mitigate the negative impact that their operations would have on the wildlife of the area. IMC agreed on a settlement, which required it to pay $500,000.00 into a fund to be administered by NDOW, which was ultimately responsible for the mitigation plan.

This transaction was, among others, the subject of a grand jury investigation, which looked into an alleged collusion between state agencies that limited economic activity on public lands in Elko County. On January 9, 1997, the grand jury filed its report, but no indictment or presentment accompanied it. Nevertheless, the report did contain an allegation that NDOW employees had “maliciously withheld . . . permits to which the IMC was entitled in order to force IMC to pay sums of money for habitat development.”

The District Attorney submitted the Grand Jury report to the district court, together with a letter noting that several names of individuals were
contained in the report with accusations of indictable activity. Yet, since the statute of limitations had run, no indictment could issue. Nevertheless, the D.A. indicated that the grand jury desired that the report act as a "presentment" with regard to these individuals pursuant to section 172.267(2)(c) of the Nevada Revised Statutes. The opinion explained that "... a presentment is simply a criminal accusation initialed by the grand jury itself, as opposed to an accusation requested by a prosecutorial agency. Black's Law Dictionary 1184 (6th ed. 1990)." See Barngrover, 979 P.2d 220 (1999).

The district court, recognizing that the report did not comply with section 172.267(2) of the Nevada Revised Statutes, requested that the grand jury clarify its position (to officially press charges), or it would afford those accused with the opportunity for expungement under section 172.267 of the Nevada Revised Statutes. See Barngrover, 979 P.2d at 220. Despite the fact that the statute of limitations had run as to the allegations contained in the report, the grand jury still went forward with its presentment as to the respondents, which petitioners learned of via local newspapers. Hence, the petitioners filed motions for orders directing the grand jury to certify and file a transcript of their proceedings, as required by statute, presumably so that they could go about seeking their expungement. The district court granted a limited order that required only the filing of the "witnesses relied upon by the grand jury in returning the Presentment (citation omitted)" and denied later motions to expand the order to cover the entire grand jury proceedings. Id. at 219.

The writ at issue herein was filed in an effort to obtain an order to expunge the entire record. Petitioners were concerned that since they had been accused of an offense warranting trial, for which they could not be prosecuted due to the statute of limitations, they could not defend themselves against the accusation in a public forum. The Nevada Supreme Court, citing Ormsby Grand Jury, 74 Nev. 80, 84, 322 P.2d 1099, 1101 (1958), stated a concern with the fact that "... a man should not be subject to quasi-official accusation of misconduct which he cannot answer in an authoritative forum." See Barngrover, 979 P.2d at 221. The Court later clarified that "[t]here is no provision for the government to file a document called a 'presentment' and then request the court to determine the matter be closed with no further action" under section 172.267 of the Nevada Revised Statutes.

The Court also clarified the dual role of the grand jury as that of "(1) reporting on matters involving the operation of the government and (2) making accusations of possible criminal conduct." Id. at 220. It further stated that the grand jury should not blur these functions together, as had apparently occurred with this particular grand jury. Biglieri v. Washow Co. Grand Jury, 95 Nev. 696 (1979). Therefore, if the grand jury is acting in the role of making accusations, it must either "indict or be silent (citing Ormsby, supra, and Nev. Rev. Stat. § 172.175(3)." See Barngrover, 979 P.2d at 220.

The Court held that "where the statute was circumvented by filing an inva-
Manley v. State  
979 P.2d 703 (Nev. June 7, 1999)  

Murder conviction set aside on grounds of deprivation of counsel.

Charles Manley killed Roxanne Logan with a shot to the head in March 1995. Manley contended this was an accident but a jury convicted Manley of first-degree murder, robbery and possession of a firearm by an ex-felon. The jury found that five aggravating circumstances outweighed four mitigating factors and sentenced Manley to death. Manley, 979 P.2d at 705.

Manley appealed, contending that the district court committed error in ruling that he waived attorney-client privilege. The Nevada Supreme Court agreed and reversed the conviction.

The reversal focused on questions asked of Manley’s attorneys, Mark Wolf and Roland Robinson. The state wished to question the attorneys regarding the chain of custody of Manley’s truck and clothing. Manley filed a motion to assert attorney-client privilege. The district court ruled that the attorney-client privilege would not be violated if the state only asked whether the attorneys brought Manley’s truck and clothing to the police. The district court later clarified that it had ruled that the attorney-client privilege had been waived between Wolf and Manley but not between Manley and Robinson. See id. at 705-06.

Manley appealed on three grounds: 1) that the district court erred in waiving the privilege without making findings on the record as to the basis of the waiver; 2) that the prosecutor was allowed to cross-examine him about conversations with attorney Robinson; and 3) that the court allowed examination on subjects outside the scope of the waiver. Manley contended that the examination on privileged matters violated his Sixth and Fourteenth Amendment rights. Id. at 706.

The Supreme Court ruled that the attorney-client privilege was violated under Nevada law and that Manley had not waived the privilege. The Court held that the prosecutor delved into matters that were clearly confidential communications.

The privilege is waived for an entire conversation in which the client voluntarily reveals parts of the conversation. However, for waiver to occur the witness’s answers must be wide and deep enough to be a significant part of the communication. Id. at 707.

In this case, Manley testified that Wolf told him not to say anything, that Wolf was upset that Manley had called him and that Manley did not tell Wolf
The Court held that this was not sufficient to be a significant part of his communications with Wolf and as such, that Manley had not waived his privilege with that testimony. Id.

The Court also agreed with Manley’s claim that the district court’s actions violated his Sixth Amendment right to counsel. Governmental intrusion in the right to counsel violates the Sixth Amendment only when it substantially prejudices the defendant. The Court held that the prosecutor’s inquiry into Manley’s confidential relationship was used to damage his credibility and that in this case the defendant’s credibility was crucial. Id. at 707-08.

The Court reviewed the case under the harmless error standard, using the distinction between trial error and structural error established by the U.S. Supreme Court in Arizona v. Fulminante, 499 U.S. 279, 111 S.Ct. 1246 (1991). While not all deprivation of counsel errors are reversible per se the Court held that it could not rule that the deprivation in this case was harmless error beyond a reasonable doubt. Manley, 979 P2d. at 708.

Justice Leavitt argued in dissent that the Court should examine the errors to determine if the verdict would be the same beyond a reasonable doubt had they not occurred. As Justice Leavitt pointed out, the case against Manley was overwhelming. Manley had threatened witnesses, failed to call an ambulance, and fled to California to establish an alibi, all casting doubt on his claim of accident. In addition, the killing had occurred “execution style,” and numerous other facts pointed to Manley’s guilt. Id. at 711. So, despite the Court’s caveat that some deprivations of counsel could be considered harmless, its ruling suggests that virtually all deprivations of right to counsel will be seen as a violation of Sixth Amendment rights due to the inability to find a lack of prejudice towards the defendant beyond a reasonable doubt.

The Court further ruled on various other issues raised by Manley on appeal. The Court held that inappropriate comments made during trial by the prosecution (prosecutors referred to defense attorneys as “mentally challenged”) did not constitute reversible error, but admonished the prosecution not to make such comments in the future. Id. at 709. The Court held that the district court did not abuse its discretion in refusing to sever the ex-felon in possession of a firearm charge from the case, but recommended doing so at retrial. Id.

Thomas v. State
979 P.2d 222 (Nev. June 7, 1999) (en banc)

Only when a defendant expresses a desire to an appeal does an attorney have a duty to advise the defendant of the right to appeal and to perfect an appeal on defendant’s behalf.

On March 7, 1995, Thomas was convicted, pursuant to a guilty plea, of trafficking a controlled substance. He was sentenced to six years in prison with the possibility of parol in three years. Following the conviction, Thomas filed
an untimely appeal, which was dismissed for lack of jurisdiction.

On August 24, 1999, Thomas filed a proper person post-conviction petition for a writ of habeas corpus in the district court and a motion for the appointment of counsel. Thomas claimed that he was not advised of his right to file a direct appeal and that his counsel failed to perfect the direct appeal after he expressed a desire to appeal.

The district court denied Thomas' petition due to lack of information regarding Thomas' claims. Thomas appealed.

The Nevada Supreme Court first addressed Thomas' first claim that he should have been advised of his right to appeal. The Court held that in cases where the defendant pleads guilty, there is no constitutional requirement that counsel always advise the defendant of the right to appeal. Thomas v. State, 979 P.2d at 223. Such does not constitute ineffective assistance of counsel.

The Court recognized that certain circumstances warrant advising of a defendant's right to appeal. Therefore, the Court limited it's holding to cases where a defendant does plead guilty. If, however, the defendant inquires about an appeal or the defendant had a reasonable likelihood of success if he had appealed, then counsel is obligated to inform defendant of his right to appeal. Id. at 223.

Regarding Thomas' second claim, the Court remanded with instructions to conduct an evidentiary hearing to determine if Thomas' counsel failed to perfect an appeal after he expressed a desire to appeal. Id. at 224. If so, Thomas' attorney had a duty to advise Thomas of the right to appeal and to perfect an appeal on his behalf. Id.

**Bargas v. Burns**

179 F.3d 1207 (9th Cir. June 14, 1999)

*Ninth Circuit holds that state rule of procedure is interwoven with federal law when resolution of state procedural law question depends on federal constitutional ruling.*

Willie Bargas, convicted of sexual assault in 1983, raised two contentions in his petition for habeas corpus relief: (1) that his trial counsel was ineffective; and (2) that his guilty plea was not knowing and voluntary. On his guilty plea claim, Bargas claimed that the state attorney failed to mention that mens rea (a guilty mind) was an essential element for conviction under the statute, and that the trial court did not adequately inform him of the penalties associated with a guilty plea.

Bargas filed two state and two federal habeas corpus petitions. The state court denied the first petition. However, Bargas only appealed the denial on the grounds that his guilty plea was not knowing and voluntary. He failed to appeal the decision to deny his ineffective assistance of counsel claim.

The Nevada Supreme Court denied the second petition containing the plea
argument. Bargas then filed the first federal habeas petition that contained both of the original claims. The district court dismissed the petition concluding that Bargas did not exhaust his state court remedies for ineffective assistance of counsel. Bargas, with counsel, then filed his third petition, this time in state court, consisting of both claims. The state court again denied his petition. The court held that Bargas procedurally defaulted on his ineffective assistance of counsel claim because he failed to raise the issue on appeal from the denial of his first petition.

Bargas again sought the assistance of the U.S. District Court. In what was now his fourth petition, the court again denied the plea argument and refused to discuss the ineffective assistance of counsel claim finding that the state court resolved the issue on independent and adequate grounds. In order for a rule to constitute adequate and independent grounds, it must be firmly established and regularly followed. Bargas, 179 F.3d at 1211. Under federal law, "when a state prisoner has defaulted a claim by violating a state procedural rule which would constitute adequate and independent grounds to bar direct review in the U.S. Supreme Court, the claim may not be raised in a federal habeas petition, without a showing of cause and prejudice." Id.

Research revealed no Nevada case law. However, the Ninth Circuit determined that firmly established Nevada law clearly requires a petitioner to raise all claims in the first petition. Id. Thus, it would follow that if Nevada requires all claims to be raised in the first petition, claims that were not raised would be lost absent an appeal. Id. at 1212.

The Ninth Circuit rejected Bargas' contentions that denial of his ineffective assistance of counsel claim was not predicated on independent state grounds because it was interwoven with federal law. Id. at 1213. A state rule of procedure is interwoven with federal law "when resolution of the state procedural law question depends on a federal constitutional ruling." Id. at 1214. No application of federal law was necessary to find that Bargas had defaulted, and thus the state law claim was not interwoven with federal law. Id.

Reaching the merits of the federal law claim also did not affect the ruling. As long as the state court articulated adequate and independent state law grounds to support a finding of procedural default, the fact that the court also issued an alternative holding on federal grounds was irrelevant. The Ninth Circuit concluded its procedural default discussion by stating that "firmly established and clearly followed" Nevada law required petitioner to appeal the denial of his ineffective assistance of counsel claim and his failure to do so constitutes a procedural default. Id.

The Ninth Circuit then focused on Bargas' claim that his guilty plea was not knowing and voluntary because the trial court did not inform him of the mens rea element of sexual assault. Bargas contended that the district attorney should have given him notice that it would have to prove intent because sexual assault is a specific intent crime. However, Nevada law clearly regards sexual
assault as a general intent crime. See Winnerford Frank H. v. State, 112 Nev. 520, 915 P.2d 291, 294 (1996). The trial judge read the statute to Bargas and adequately advised him of his rights, so the Ninth Circuit found Bargas had adequate notice of the charges against him. *Bargas* at 1216.

Bargas also challenged his plea on the theory that the trial court failed to inform him that he would have to appear before a state psychiatric panel before he would be released. The Ninth Circuit held that a trial court does not have to inform a defendant of each and every consequence of a plea. *Id.* Trial courts must only inform a defendant of the direct consequences of a plea, not the collateral consequences. The Ninth Circuit ruled that a statute requiring the defendant to appear before such a panel is a collateral consequence, and thus Bargas' due process rights were not violated. *Id.*

The dissent pointed out that even though the court found no authority, it determined that Nevada had a firmly established and regularly followed rule. *Id.* at 1217-1218.

**Noonan v. State**

*980 P.2d 637 (Nev. July 22, 1999)*

While defendant's initial statement did not indicate intentional endangerment, his testimony at trial contained such an indication.

Defendant appealed a jury instruction outlining second-degree felony murder based on the premise that the information filed against him was devoid of a felony murder theory. Defendant was found guilty of second-degree felony murder in the death of a 16-month old child under his care. At the time of the incident, defendant called for an ambulance for victim, stating the child was in "full arrest." When paramedics arrived, the infant labored to breathe and she was intensely cold. Defendant gave differing versions of events that led to this condition to each of the paramedics and to the police when they arrived. He also initially gave police a false identity. The cause of the infant's death was hypothermia. Defendant's trial testimony differed from versions given earlier to authorities at the scene of the incident. He admitted he left the victim in the bathtub while going to a nearby school to pick up another child, being absent from the residence somewhere between twenty-five and thirty minutes.

The Court found that defendant's initial statement did not indicate intentional endangerment, but his testimony at trial did contain such an indication. *Noonan*, 980 P.2d at 639. Based on the new information obtained during this testimony, the State would be entitled to pursue the underlying felony of willful endangerment or neglect resulting in substantial bodily harm. *Id.*

Defendant also requested and received an instruction on involuntary manslaughter, which under section 200.070 of the Nevada Revised Statutes includes the language "but where the involuntary killing occurs in the commission of an unlawful act, which, in its consequences, naturally tends to destroy the life of a human being, the offense is murder." *This request,* and the applica-
tion of the language contained in the statutes, also supports a felony murder instruction. Id. at 640.

A secondary issue dealt with whether felony child neglect can support a conviction for 2nd degree felony murder. The Court found in the affirmative, stating that there was a strong causal connection between the defendant's decision to leave the victim alone in the bathtub and the eventual death of the victim, and that this risk was inherently dangerous and foreseeable. Id.

The final issue raised dealt with the constitutionality of Nevada's reasonable doubt instruction as codified in section 175.211(1) of the Nevada Revised Statutes, under the due process clauses of both the federal and state constitutions. Both the Nevada Supreme Court and the Ninth Circuit Court of Appeals have upheld the constitutionality of this statute. Id.

The Court ruled that the instruction was properly given and affirmed the conviction.

Sheriff, Washoe County v. Dhadda
980 P.2d 1062 (Nev. July 22, 1999)

Corpus delicti must be demonstrated by evidence independent of the confessions or admissions of the defendant.

Defendant left a note for her husband stating that she and their four-month old infant daughter were "leaving this house and this world forever." The police were notified, and discovered defendant in the Truckee River. Defendant claimed to have lost the child in a strong current while attempting to wash the child, and to have spent several hours trying to find the child before requesting help. Police found the child about 140 yards downstream, wearing a diaper and sleeper, an apparent drowning victim. During questioning at the police station, defendant admitted writing the note. Defendant stated that she stepped into the river with the intent that the current would sweep them both away but changed her mind upon entering the water. She bent to get some water to wash the infant's face and lost control of the child in the strong current.

The State appealed a District Court decision suppressing defendant's statement to police. The State also appealed the District Court decision granting a writ of habeas corpus based on a finding that there was insufficient evidence to establish that the death of the infant resulted from criminal agency. There were three basic questions for the Court to answer: (1) can the prosecution use defendant's statements, made without a clear waiver of her Fifth Amendment rights; (2) was there probable cause for the grand jury to indict the defendant; and (3) was the defendant entitled to a writ of habeas corpus?

The Court stated that under section 172.155(1) of the Nevada Revised Statutes, a grand jury must determine probable cause by establishing: (1) that a crime has been committed, known as the corpus delicti; and (2) that the defendant committed the crime. Sheriff v. Dhadda, 980 P.2d 1061, 1065. To establish the corpus delicti in a murder case, the State must demonstrate: (1) the fact
of death; and (2) that death occurred through the criminal agency of another. Id. The Court found that the State met this burden in this case. In habeas corpus proceedings initiated by a defendant, the Court looks for any substantial evidence that, if true, would support a conviction. Id. The State's evidence is viewed in the light most favorable to its case. Probable cause can be based on slight, even marginal evidence at this point in the proceedings, as guilt or innocence in not is question. The corpus delicti must be demonstrated by evidence independent of the confessions or admissions of the defendant. Id. However, the note left by defendant may be considered, as it is not a post-crime admission.

The Court reversed the lower court's ruling allowing writ of habeas corpus, and its ruling discharging defendant on the grand jury indictment.

**Ochoa v. State**


*Supreme Court of Nevada allows extension of doctrine of transferred intent to injured innocent bystanders.*

In Ochoa v. State of Nevada, 981 P.2d 1201 (1999), defendant Arturo Torres Ochoa appealed his conviction of second-degree murder with use of a deadly weapon, and attempted murder with a deadly weapon. Defendant appealed contending that the trial court erred by: (1) applying the doctrine of transferred intent to the charge of attempted murder; (2) allowing testimony regarding Ochoa's prior drug transactions; and (3) denying Ochoa's motion to dismiss for prosecutorial misconduct. The court disagreed with Ochoa's contentions and affirmed the convictions. Id. at 1206.

Smith went to an apartment building to purchase cocaine. Smith negotiated a deal with Ortiz. Ortiz, holding a baseball bat, went over to a car in which Ochoa was sitting, and a "hostile" conversation began. Ochoa fired several shots at Ortiz. Ortiz was killed and Smith was wounded. Ochoa testified that he shot Ortiz in self-defense because Ortiz, accompanied by an unidentified man, opened the car door with a baseball bat and Ochoa thought Ortiz was going to hit him with the bat, prompting Ochoa to shoot at him. Ochoa stated he never intended to shoot Smith, and that Smith was wounded by accident. Id. at 1202.

Ochoa argued that the court should not convict him for Smith's murder without evidence of his intent to kill Smith. The government argued Ochoa's intent to kill Ortiz could be attributed to Smith under the doctrine of transferred intent. The court rejected the California approach, which suggests that if the person who was marked for death was killed, liability could not extend to injuries incurred by innocent bystanders. The court instead adopted the Connecticut approach, which allows liability to extend to the death of the intended victim as well as the death of any unintended victims. Id. at 1205.

The court extended the Connecticut rationale beyond murder to attempted
murder. The court held that "[t]he doctrine of transferred intent is applicable to all crimes where an unintended victim is harmed as a result of the specific intent to harm an intended victim whether or not the intended victim is injured." Id. The court therefore affirmed the defendant's conviction for attempted murder of Smith under the doctrine of transferred intent. Id.

Defendant also argued that his prior drug transactions were irrelevant and highly prejudicial. The court concluded that the testimony was admissible under Nev. Rev. Stat. § 48.035(3). The court noted that the drug transactions were so interconnected to the argument between Ortiz and Ochoa, in that the event could not be properly described without referring to the transactions. The court also noted that the transactions went to show motive and to rebut the assertion of self-defense. Ochoa, 981 P.2d at 1205.

This case illustrates the court's extension of the doctrine of transferred intent. Prosecutors may now charge defendants with attempted murder of bystanders who were accidentally injured if the defendant was attempted to kill an intended victim.

Lee v. State
985 P.2d 164 (Nev. Aug. 27, 1999)

Written plea agreement upheld as valid.

The district court convicted appellant, pursuant to a guilty plea, of attempted robbery and ordered appellant to serve time and pay restitution. Appellant challenged his conviction on three bases, arguing: (1) the district court failed to inform appellant that restitution was a possible consequence of his plea; (2) the district court erred in denying appellant's pre-judgment motion to withdraw his guilty plea because he did not receive a promised bail reduction and release on own recognizance, that the district court abused its discretion by refusing to hold a hearing on his motion to withdraw his guilty plea; and (3) the district court sentenced appellant without an adequate factual basis because the pre-sentence report contained insufficient information about him. See Lee, 985 P.2d at 164.

The Nevada Supreme Court affirmed the conviction and restitution order of the lower court. Nev. Rev. Stat. § 174.035(2) only requires the trial court to canvass a defendant when a plea agreement is entered to orally. Here, appellant pled guilty via a written plea agreement, which explicitly provided for restitution, and acknowledged reading it. Id. at 166. Appellant was not entitled to a hearing on his motion to withdraw his plea. Id. Bail reduction and his release on his own recognizance were not part of the plea agreement. Id. Furthermore, appellant confirmed in open court that no other promises were made to him other than what was in the plea agreement. Id. The district court was not required to hold a hearing on appellant's motion to withdraw because appellant was informed of charges, the consequences of his plea, and appellant admitted to committing the crimes. Id. at 167. Finally, appellant's sentence was based on
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the illegal acts he committed, not on the length of the pre-sentence report. Id. The Court also noted that the length of the report was due to the appellant's lack of cooperation with the reporting investigator. Id.

Labastida v. State

Jury's verdict of second-degree murder could not have been product of a finding of first-degree murder tempered by a desire for leniency.

The Nevada Supreme Court granted Labastida's petition for rehearing. In the prior opinion, the Court misapprehended material matters of law and fact; therefore, the Court's present opinion takes its place. Labastida, 986 P.2d at 444.

The prior opinion affirmed Labastida's conviction of one count of felony child neglect and one count of second-degree murder. On petition for rehearing, amicus curie briefs were filed from two interested organizations: the National Association of State Vocal Organizations and the Committee to Aid Abused Women. After review, the Court found that its prior decision affirming one count of second-degree murder was erroneous. The Court reversed Labastida's conviction of second-degree murder and affirmed the conviction of one count of felony child neglect.


In the prior opinion, the Court held that the verdict of second-degree murder could have resulted from a finding of first-degree murder tempered by a desire for leniency. However, the Court on rehearing found that the facts and law do not support such a conclusion.

The Court first erred in articulating jury instructions that were not given to the jury. Not only were the instructions not provided to the jury but also the Court found that they inaccurately reflect a finding of first-degree murder. Id. at 445. The Court suggested that one might passively aid first-degree murder, which is inconsistent with the elements of first-degree murder defined in section 200.030(1)(a) of the Nevada Revised Statutes. Id. at 446. The Court reasoned that "abuse" and "neglect" are statutorily distinct and that the former constitutes first-degree murder while the latter does not. Id. Labastida's inaction was neglectful but not abusive and, therefore, does not amount to first-degree murder. To support this conclusion, the Court noted that the jury acquitted Labastida of willfully committing or aiding and abetting in the commission of a crime. Id. Since the jury did not find her guilty, the Court admitted it should not speculate on Labastida's guilt in this regard. Id. For these reasons the Court abandoned its prior conclusion that the verdict of second-degree murder could be the product of a finding of first-degree tempered for leniency. Id.
Next, the Court admitted to erroneously applying a rule for second-degree murder to Labastida case. In the prior opinion, the majority ruled that the jury could find Labastida guilty of second-degree murder based on a holding in Sheriff v. Morris, 99 Nev. 109, 659 P.2d 852 (1983). In that case, the Court held that second-degree murder could result from a combination of sections 200.070 and 200.030(2) of the Nevada Revised Statutes. Labastida at 448. However, Morris expressed a limitation that the Court felt applies to Labastida's case. To apply the Morris second-degree murder rule, the felony must be "inherently dangerous, where death or injury is a directly foreseeable consequence of the illegal act, and there is a direct causal relationship - without the intervention of some other source or agency - between the actions of the defendant and the victim's death." Id. at 448-49. In Labastida's case, the victim did not die because of Labastida's neglect. Rather, the victim died as a result of Michael Strawser's abuse. Therefore, the Morris rule does not apply and the second-degree murder conviction was reversed. Id. at 449.

Finally, the Court found insufficient evidence to sustain a second-degree felony without the rule since Labastida did not commit any affirmative act to harm the victim, she may have not known the child was in mortal danger and there is insufficient evidence to show intent. Id.

Wade v. State

Rehearing denied for appellant convicted for controlled substance violations.

The Second Judicial Court convicted the appellant, a criminal defendant, on one count of conspiracy to sell a controlled substance, and one count of sale of twenty-eight grams or more of methamphetamine. The Nevada Supreme Court affirmed the appellant's conviction in Wade v State, 114 Nev. 914, 966 P.2d 160 (1998). Appellant petitioned for a rehearing.

The charges against the appellant resulted from a federal drug trafficking investigation, where the Drug Enforcement Agency (DEA) used an informant to arrange meetings between DEA agents and the appellant. The informant also taped several telephone calls, and face-to-face conversations with the appellant. Eventually, the informant made arrangements for the DEA agent to purchase two pounds of methamphetamine from the appellant and two others.

At trial, the DEA's informant could not be located, and the Court allowed the recorded conversations to be admitted into evidence and played for the jury. The Court's decision to admit the tapes stemmed from the holding in United States v Tangeman, 30 F.3d 950, 952 (8th Cir. 1994), which stated that tape recorded statements from an unavailable informant are permissible when "...offered to provide context for the defendant's admissions, not to prove the truth of the matters asserted." On appeal, the Court agreed. The appellant ar-
The argument that Tangeman was applied incorrectly because in that case, the jury was given special instructions pertaining to the tapes, explaining that statements made on the tapes by those other than the defendant were to be used only for the purpose of placing the defendant’s comments in context. No such instruction was given in the appellant’s case.

The Court rejected the appellant’s argument, however, because his attorney never requested a jury instruction similar to the one given in Tangeman. In fact, after voicing his objection to the jury instructions with respect to other portions of the case, the appellant’s counsel stipulated on the record that he had no objection to the instructions provided in the case. In addition, the Court cited other instances where courts have admitted recorded statements to establish the context of the defendant’s remarks, without a special jury instruction. See e.g., United States v. Inadi, 475 U.S. 387, 398 n.11 (1986); United States v. McKneely, 69 F.3d 1067, 1074 (10th Cir. 1995).

The appellant’s second argument concerned the C.I. file on the informant. The appellant first maintained that the Court’s statement, in its prior opinion, that the DEA refused to provide the informant’s file to the State, is false. He argued instead, with no support from the record, that the D.A. had the informant’s file and refused to give it to the defense. The Court conceded that a more accurate statement would have been that the appellant was not furnished with all of the information about the informant. However, the appellant’s inability to cite to the record, combined with the oral arguments and briefs submitted to the Court, led to the inference of the DEA’s neglecting to provide the information to the State, not the State’s refusing to provide it to the defense. The appellant also asserted that the Court’s prior opinion inaccurately stated that defense counsel conceded that the State did not have the DEA’s file on the informant. The appellant contended that while this statement was correct before the trial, at the time of trial, it was no longer accurate. However, according to Nev. R. App. P. 40(c), a rehearing is only warranted when the court has misstated, misapprehended, or overlooked a material fact or law relating to the issue(s) raised on appeal. Here, the Court determined that, even if the appellant was correct in his argument regarding the attorney’s remarks, there was no material misunderstanding to justify a rehearing.

Finally, the appellant claimed that his conviction should be overturned because the state failed to provide the information he requested during discovery. In arguing this point on appeal, he relied, in part, on Roberts v State, 110 Nev. 1121, 881 P.2d 1 (1994), which stated that a reversal might be justified when “material” Brady evidence is not given to the defense, and the possibility exists that such information would have led to a different result at trial. Once again, the Court disapproved of the appellant’s position because his attorney had plenty of opportunity to cross-examine the DEA agent during trial. Accordingly, the missing information on the informant would not have changed the outcome of the appellant’s case.
Department of Motor Vehicles and Public Safety v. Kuemmerlin

Federal park rangers may enforce state traffic laws on federal land.

Kevin John Kuemmerlin was the driver in a motorcycle accident in the Lake Mead National Recreation Area. A federal park ranger responding to the accident found that Kuemmerlin exhibited signs of being under the influence of alcohol and informed him that he would be required under Nevada's implied consent law to provide a blood sample. The test showed Kuemmerlin to be well over the legal limit for blood alcohol content for which the Department of Motor Vehicles (DMV) revoked his driver's license. Kuemmerlin appealed for judicial review to the district court, which overturned the DMV's action. The district court held that Nevada's implied consent law did not apply because Kuemmerlin was driving entirely within a federal park. Consequently, federal law preempted state law and the DMV lacked jurisdiction. Kuemmerlin, 985 P.2d at 751.

The DMV appealed to the Nevada Supreme Court. It argued that the federal park ranger was functioning as a police officer. In Nevada, "police officers" are defined by Nev. Rev. Stat. § 484.118 as those authorized to make arrests for traffic law violations. Nev. Rev. Stat. § 484.118 defines police officer as "every officer authorized to regulate traffic or to make arrests for violations of traffic laws, ordinances or regulations." The DMV argued that federal park rangers fell under that statute, citing the Nevada Supreme Court's holding in Department of Motor Vehicles v. Lovett, 874 P.2d 1247, 110 Nev. 473 (1994).

The Lovett facts were nearly identical with this case with the exception that Lovett was first spotted as a drunk driver inside the federal area but not apprehended until after driving out of the Recreation Area and onto state land. The Court found that regulations governing traffic in federal parks is broad, providing that all state traffic laws are applicable in federal parks. Lovett, 874 P.2d at 478 (citing 36 C.F.R. §4.2 (1992)). The Court then held that the broad language of Nev. Rev. Stat. § 484.118 supported the contention that federal park rangers were police officers authorized to enforce state traffic laws. Thus, the Court held in Lovett that federal park rangers were police officers authorized both by federal regulations and by Nevada law to enforce the Nevada implied consent laws.

The Supreme Court reversed the district court's ruling, citing its Lovett holding. The Court reaffirmed that federal park rangers are police officers within the meaning of the Nevada statute and that they may act as agents of the DMV in revoking a Nevada driver's license. Kuemmerlin incorporated Justice Springer's Lovett dissent in his defense prompting the Court to clarify that it did not decide Lovett based on the fact that Lovett drove outside of park boundaries. Kuemmerlin, 985 P.2d at 751.
Daniels v. State of Nevada
988 P.2d 791 (Nev. Nov. 29, 1999)

Probation conditions limited to initial sentencing hearing.

This case involved an appeal from a district court order revoking appellate, a criminal defendant’s probation. At the appellant’s probation revocation hearing, pursuant to Nev. Rev. Stat. § 193.130(2)(e), the Second Judicial District Court, Washoe County, revoked the defendant’s probation and imposed incarceration rather than rehabilitation. Daniels, 988 P.2d at 792.

At the time of the probation revocation hearing, Nev. Rev. Stat. § 193.130(2)(e) required district courts to suspend the sentences of persons convicted of category E felonies and place them instead on probation. Id. Conditions that could be imposed as terms of probation were limited by Miller v. State, 941 P.2d 456 (Nev. 1997), which held that incarceration cannot be a condition of probation for a category E felony. Id.

The court addressed the issue of whether the limits on probation for category E offenders imposed by Miller apply only to initial sentencing hearings or extend to probation revocation hearings. The court found that Miller applied only to initial sentencing hearings, reversing the decision of the district court. As such, rehabilitation requiring a term of confinement could be imposed as a condition of probation at a probation revocation hearing. Id.

The legislature amended Nev. Rev. Stat. § 193.130(2)(e) in 1999 to allow up to one year of confinement to be a condition of probation, abrogating the application of Miller. Id. at 791.

McNelton v. The State of Nevada

Ineffective assistance of counsel claim fails.

The Eighth Judicial District Court, Clark County, Nevada convicted Appellant of murder and sentenced him to death. McNelton, 990 P.2d at 1266. On appeal, the Supreme Court of Nevada subsequently rejected his “arguments pertaining to the guilt and penalty phases of his trial.” Id. Next, the district court denied the appellant’s post-conviction petition for a writ of habeas corpus. Id. He then appealed to the Supreme Court of Nevada that considered his claims (en banc) of ineffective trial counsel, ineffective appellant counsel and prosecutorial misconduct. Id.

In its opinion, the court states that though it generally defers to the district court’s factual findings in cases where ineffective assistance of counsel is alleged, id. at 1268 (citing Hill v. State, 114 Nev. 169, 175, 953 P.2d 1077, 1082, cert. denied, 525 U.S. 1042, 119 S. Ct. 594, 142 L. Ed. 2d 537 (1998)), claims involving mixed questions of law and fact may be heard by the court. Id. (citing Kirksey v. State, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996)). In such cases involving ineffective assistance of counsel, the
appropriate standard is "reasonably effective assistance." Id. (citing Strickland v. Washington, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984) and Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984)). To show a deficiency based on this standard, the party must demonstrate: "(1) counsel's performance was deficient, i.e., counsel's representation fell below an objective standard of reasonableness, and (2) the deficient performance prejudiced the defendant, i.e., 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" Id. (quoting Strickland, 466 U.S. at 687-89, 694; citing Dawson v. State, 108 Nev. 112, 115, 825 P.2d 593, 595 (1992)).

The first issue addressed by the court concerned the admission of evidence of a prior police response to the house in which McNelton was living and McNelton's subsequent arrest. Id. The court stated that, pursuant to its previous ruling in Petrocelli v. State, 101 Nev. 46, 692 P.2d 503 (1985), the trial court should have held a hearing prior to admission of the evidence. Id. at 1269. According to the court, a "Petrocelli hearing" must be conducted "on the record outside the presence of the jury and determine that: (1) the incident is relevant to the crime charged; (2) the act is proven by clear and convincing evidence; and (3) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice." Id. (citing Tinch v. State, 113 Nev. 1170, 1176, 946 P.2d 1061, 1064-65 (1997); Petrocelli, 101 Nev. at 51-52, 692 P.2d at 507-08). Evidence of McNelton's arrest would not meet this test because it was irrelevant. Id. Under Qualls v. State, 114 Nev. 900, 961 P.2d 765 (1998), the failure to hold a Petrocelli hearing is not grounds for reversal if: "(1) the record is sufficient to determine that the evidence is admissible under Tinch; or (2) the result would have been the same if the trial court had not admitted the evidence." Id. at 1269 (citing Qualls, 114 Nev. at 903-04). The evidence was not admissible under Tinch (since it was found to be irrelevant), nor would exclusion of the evidence had altered the outcome of the trial. Id. at 1269-70. Thus, a reversal was not required. Id.

The court next addressed the appellant's contention that the prosecution should not have been allowed to elicit testimony regarding the fact that McNelton was in custody prior to trial. Id. at 1270. While the court agreed that witness testimony regarding the appellant's incarceration was improper, the court concluded that it merely constituted harmless error and that this could not be used to show ineffectiveness of counsel. Id. at 1270-71.

The court next inquired whether or not the appellant's trial counsel's "[failure] to anticipate, prevent, and/or object to the prosecutor's statement in closing argument that McNelton failed to call . . . an alibi witness" constituted ineffectiveness of counsel. Id. at 1271. The appellant asserted that this comment improperly shifted to him the burden of proof. Id. at 1272. Citing Ross v. State, 106 Nev. 924, 803 P.2d 1104 (1990), the court reasoned that, by calling to the jury's attention the appellant's failure to take advantage of a presumably
friendly witness, the prosecutor had improperly shifted the burden of proof to the appellant. Id. at 1271. However, the court reasoned that the jury would have reached the same verdict with or without the prosecutor’s comment and that it thus constituted harmless error. Id. at 1272.

Regarding the ineffectiveness of his trial counsel, the appellant contended that though he had forbidden his counsel to call his mother as a witness, counsel was not bound by that direction and should have called her as a mitigating witness. Id. at 1272-73. The court ruled that the decision of whether or not to call the appellant’s mother was a tactical decision and not indicative of ineffectiveness, especially given the appellant’s direction that she not be called. Id. at 1273.

Regarding his appellate counsel, the appellant had claimed that they had failed entirely to communicate with him. Id. Though the court found that counsel had not contacted the appellant and that such a failure may be deserving of disciplinary action. Id. (Citing State Bar of Nevada v. Schreiber, 98 Nev. 464, 653 P.2d 151 (1982) it ruled that no reasonable probability existed “that the result of the direct appeal would have been different had McNelton consulted with his counsel with respect to how to proceed.” Id. at 1273.

**Standley v. Warden, Southern Nevada Correctional Center**

*990 P.2d 783 (Nev. Dec. 13, 1999)*

*Judge’s comments were improperly coercive, although not every judicial involvement in plea negotiation process is forbidden.*

Appellant had been charged with three counts of sexual assault of a minor under fourteen years of age and one count of open or gross lewdness. The State offered to dismiss the charges if appellant would plead guilty to one count of sexual assault. At a pre-trial hearing the judge address the appellant, comparing the sentencing consequences that appellant could face, saying at one point, “[It’s] unlikely that you’re going to get life, plus life, plus life, plus life. But, you know, that’s a possibility.” The judge also spoke of his twenty-two years of experience as a defense attorney and commented that he had had many clients who regretted not taking a plea offer when they had the chance. The appellant decided to accept the plea offer and was sentenced to nine years in the Nevada State Prison.

Appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The district court denied the petition as successive, but the Supreme Court disagreed and remanded the matter to the district court for reconsideration. After appellant secured counsel, the district court again denied the petition without holding an evidentiary hearing, this time on the merits. An appeal followed.

As the Court pointed out, “a plea of guilty must be the result of an informed and voluntary decision, not the product of coercion.” Standley, 990 P.2d at 785. The Court mentioned two factors in the judge’s discussion with
the appellant that made his comments improperly coercive and distinguished his conduct from proper judicial involvement in plea negotiation. First, "the judge did more than just facilitate the plea negotiations or make an isolated comment about the plea offer." Instead, he engaged in a lengthy discussion with the appellant and made clear his desire that the appellant accept the plea offer. Id. The Court suggested that the coercive effect of a judge expressing a desire that the defendant accept a plea offer can be very great because the same judge would preside over the trial and would determine the sentence if the trial resulted in a conviction. Id.

Second, the judge made repeated references to his prior experiences as a defense attorney. "The judge thereby adopted the role of counselor to a criminal defendant, foregoing his duty as a neutral arbiter of the criminal prosecution." Id. The Court reversed the district court's order denying appellant's petition and remanded with instructions to allow appellant to withdraw his plea.

The majority cautioned against an "expansive interpretation" of its opinion in this case, noting that the "constitution does not forbid all participation by the judge in the plea negotiation process" and a defendant should only be allowed to withdraw his or her plea when the judge's conduct is improperly coercive. Id.

Sullivan v. State

Where the State agrees to make a particular recommendation, agreement does not restrict State's right to argue in favor of sentence recommendation.

Sullivan v. Nevada involved an appeal from a judgment of conviction, pursuant to a guilty plea, of one count each of robbery with the use of a deadly weapon, burglary, and possession of stolen property. Sullivan agreed to plead guilty to the charges. In exchange for Sullivan's guilty plea, the state agreed to concur with the recommendation of the Division of Parole and Probation. The district court conducted a thorough plea canvass and accepted Sullivan's guilty plea. Id. at 1259.

At sentencing, the prosecutor addressed Sullivan's "quite incredible criminal history" and the serious nature of the charged offenses, and Sullivan did not object. Id. at 1260. Sullivan contended that the state failed to provide him with notice that one of the victims would refer to prior bad acts during the victim impact testimony and, therefore, this case should be remanded for a new sentencing hearing. The court disagreed. Id. at 1259, n1. At issue was whether the state breaches an agreement to concur with the recommendation of the Division of Parole and Probation by advocating in favor of the recommendation.

The court stated that the general principles governing the state's obligation to honor the terms of a plea agreement are well settled. Id. at 1260. "When a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such
promise must be fulfilled.” Id. The court held the state to the “most meticulous standards of both promise and performance” in fulfillment of its part of a plea bargain. The violation of either the terms or the spirit of the agreement requires reversal. Id. The plea agreement is construed according to what the defendant reasonably understood when he or she entered the plea. Id. In this case, the state agreed to concur in the recommendation of the Division of Parole and Probation. The initial question was whether Sullivan could have reasonably understood the plea agreement to preclude the state from advocating in favor of that recommendation by commenting on the facts and circumstances that supported the recommendation. Id.

Sullivan argued that because the State failed to explicitly reserve the right to present facts and argument at sentencing, he understood the plea agreement to preclude the state from commenting on the facts and circumstances supporting the Division’s recommendation. The Court noted that Sullivan failed to object to the prosecutor’s comments. Id. Defendant’s failure to object may be considered as evidence of the defendant’s understanding of the terms of a plea agreement. Id.

Where the State has agreed to stand silent or make no recommendation, the defendant could reasonably understand the plain language of such an agreement to restrict the State’s right to make certain types of statements to the Court that would influence the sentencing decision. Id. at 1261. A promise to recommend a sentence is not a promise to stand silent. Where the State agrees to make a particular recommendation, the agreement, unlike an agreement to stand silent or make no recommendation, does not by its terms restrict the State’s right to argue or present facts in favor of the sentence recommendation. Id.

The Court held that the State may advocate in favor of a sentence that it has agreed to recommend as part of a plea agreement so long as the State does not explicitly or implicitly seek to persuade the sentencing court to impose a harsher sentence than that which the State agreed to recommend. The State did not breach the plea agreement. Id. at 1263. However, the court remanded the case to correct what appeared to be an error in the judgment of conviction. Id.

Thus, unless specifically agreeing to stand silent, the State in entering a plea bargain may comment at the sentencing hearing as long as the State does not explicitly or implicitly seek to persuade the sentencing court to impose a harsher sentence than that which the state agreed to recommend. The Court may review a case with due process implications sua sponte even if defendant failed to contemporaneously object.

Luster v. State
991 P.2d 466 (Nev. Dec. 28, 1999)

Court invokes plain view doctrine to uphold murder conviction.

Appellant Luster challenged his conviction for murder and kidnapping. He argued that a search of his home produced evidence outside the scope of the
search warrant. The court, however, concluded that the district court properly admitted the evidence under the plain view doctrine and affirmed the conviction.

On July 15, 1995, police issued a search warrant of Luster’s home to seize evidence pertaining to Luster’s involvement in a murder. Upon entering the home, police recognized similarities between Luster’s home and the description of a house given to police by a kidnap victim, also linked to Luster. Police took pictures of the premises and seized evidence that implicated Luster in the kidnapping.

The state charged Luster with numerous crimes including Kidnapping with use of a deadly weapon and first-degree murder with use of a deadly weapon. Luster moved to suppress the evidence seized by police because it was beyond the scope of the search warrant. He claimed that the evidence pertained to the kidnap charge, while the search warrant pertained to the murder charge, therefore authorities obtained evidence as part of a search without a warrant.

The district court denied Luster’s motion to suppress the evidence and convicted him of the charges. Luster appealed his conviction on the basis of the evidence’s wrongful admission.

The court affirmed the judgment of conviction, concluding that the lower court did not err in admitting the kidnapping evidence because the police had probable cause to associate the evidence with criminal activity. The court recognized that the plain view doctrine allows seizure of objects not specified in a search warrant in certain situations. Coolidge v. New Hampshire, 403 U.S. 443 (1971). For the plain view doctrine to apply the initial intrusion by police must be lawful. Furthermore, the police must inadvertently discover evidence that immediately appears to be evidence of a crime. The only contested factor in the case was the “immediately apparent” requirement. The court stated that the proper interpretation of “immediately apparent” is seizure of property in plain view is presumptively reasonable, assuming probable cause exists to associate the property with criminal activity. See Koza v. State, 681 P. 2d 44, 49 (Nev. 1984) (applying the Coolidge test); see also Johnson v. State, 637 P.2d 1209, 1211 (1981).

The court determined that probable cause existed, because the police knew of the kidnaping and were already aware of Luster’s possible involvement. Also, during the execution of the search warrant, police realized that the house matched the kidnapping victim’s description and properly concluded that it might contain evidence pertaining to the kidnapping. Therefore, the seizure of the items was reasonable under the plain view doctrine and properly admitted because the court found probable cause to associate the property with criminal activity.
ANNUAL SURVEY OF NEVADA LAW

Barajas v. State
991 P.2d 474 (Nev. Dec. 29, 1999)

Guilty plea presumptively valid, and defendant has burden to prove that plea was not entered knowingly or voluntarily.

Following the entry of a guilty plea charge of possession of a controlled substance, the defendant moved to set aside his plea on the ground that his plea was involuntary. The district court denied the motion, and the defendant appealed. The Nevada Supreme Court held that (1) the failure of trial court to advise the defendant of the possible immigration consequences of his guilty plea did not render the plea involuntary, and (2) the defense counsel's failure to advise the defendant of any possible immigration consequences of his guilty plea did rise to the level of ineffective assistance of counsel. A guilty plea is presumptively valid, and the defendant has the burden to prove that the plea was not entered knowingly or voluntarily. The possibility of deportation of the defendant is a collateral consequence that does not affect the voluntary nature of a guilty plea. A trial court's failure to advise a defendant of the possible immigration consequences of a guilty plea does not render the plea involuntary.

Schlafer v. State
979 P.2d 712 (Nev. June 16, 1999)

Untimely response to discovery order by State does not create a presumption of bad faith.

The defendant appealed a guilty verdict on the grounds that the State had not turned over in a timely manner notes made by a jailhouse informant. The Court ruled that although the State did not exercise due diligence in responding to a discovery order, the defendant's cross-examination of the witness was not significantly impaired. Schlafer, 979 P.2d at 716. Since the defendant was not deprived of a fair trial by the State's violation of the court's discovery order, the conviction was affirmed. The Court admonished the State, however, and held that in future cases, a similar violation "may result in a presumption" of bad faith to prejudice a criminal defendant. Id. at 717.

EMPLOYMENT LAW

Clark County School District v. Clark County Classroom Teachers Association and Archie Kleingartner
977 P.2d 1008, (Nev. May 24, 1999)

Arbitration hearing officers have subpoena power.

Appellant, Clark County School District ("School District"), suspended Respondent Kleingartner and notified him of the School District's intention to recommend his dismissal to the School District Board. These actions were the result of alleged statements Kleingartner made regarding his administrator,
which students overheard and for inadequate professional performance, which jeopardized the graduation of two other students. Kleingartner, represented by the Clark County Classroom Teachers Association, filed a timely request for binding arbitration and received it. He also requested that the hearing officer issue subpoenas to provide the identification of the students who allegedly heard Kleingartner's statements or were jeopardized by Kleingartner's performance. He further requested the issuance of subpoenas to obtain documents relating thereto.

The hearing officer issued the subpoenas and the School District sought review of the decision through the Eight Judicial District Court that denied the School District declaratory relief and granted the Respondents' counter-motion for enforcement of the subpoenas. The School District then appealed the decision to the Nevada Supreme Court.

The Nevada Supreme Court affirmed the district court findings. Kleingartner, 977 P.2d at 1012. In its reasoning the Court examined Nev. Rev. Stat. § 391.3192 (2) and determined that while the word subpoena was not used in the statute, the statute did grant authority to the hearing officer to require witnesses to testify under oath and to produce evidence relevant to the investigation. The court concluded the legislature must have intended the hearing officer to have the power to order compliance with the authority conferred on him by statute, including an implied right to use the subpoena authority for limited pre-hearing discovery. Without such authority, the court ruled, the authority given to the hearing officer would be meaningless.

Associated Builders and Contractors, Inc. v. Southern Nevada Water Authority

979 P.2d 224 (Nev. June 7, 1999)

Project labor agreements (PLAs) do not violate Nevada's competitive bidding, right-to-work, or freedom of association statutes.

The Southern Nevada Water Authority, a political subdivision of the State of Nevada created to address the water needs of southern Nevadans, is responsible for preparation and implementation of the Capital Improvements Plan. The Plan's goal is to develop a reliable water system to supplement the existing system. In furtherance of the Plan, an excavation project was scheduled for contract bidders.

On April 14, 1994, then Governor Bob Miller issued an executive order directing all state boards, authorities, and agencies to implement project labor agreements (PLAs) in public projects. A PLA is an agreement between the project owner and a labor union that a contractor is obligated to sign to perform work on the project. The PLA ensures that no labor disputes or strikes will disrupt the project. The governor created an exception to the rule only if the benefits of a non-PLA project exceed the benefits of a PLA project.

On March 21, 1996, the board approved a PLA. Although the Water Au-
Authority did not believe it was required by the governor's executive order to have such an agreement, it favored the agreement due to concerns over possible labor disputes or strikes that might interrupt water delivery to southern Nevadans.

The bid occurred on June of 1996. American Asphalt, a bidding competitor, contacted the Water Authority and informed the project manager that it would bid, but refused to comply with the PLA if awarded the project. The manager replied that its bid would likely be rejected.

American Asphalt submitted the lowest bid, but it was not awarded the project. American Asphalt instituted an action, which resulted in an appeal to the Nevada Supreme Court.

The issue before the Court was whether the imposition of the PLA violated Nevada's competitive bidding, right-to-work, and freedom of association statutes. A sub-issue concerned whether the governor's executive order obligated the Water Authority to proceed with a PLA. Under the sub-issue, the Court held that the Water Authority had discretion to implement the PLA. Associated Builders, 979 P.2d at 227. On the prevailing question, the Court held that the PLA in question conformed to the mentioned statutes. Id. at 227-30.

The Court first addressed Nevada's competitive bidding statute, NRS §§ 338.140; 338.147(1). Id. at 228-229. In determining whether the PLA violated this statute, the Court followed the New York Court of Appeals two-prong focus, which the Court found to comport with the statute as well as Nevada case law. The two-prong focus includes: (1) prevention of favoritism; and (2) protection of the public funds. Under the first prong, the Court found that since both union and non-union contractors were allowed to bid on the project, non-union contractors could hire up to seven core employees, and employees were not required to join the representative union under the PLA, competition would abound to guard against favoritism. Id. at 229. Under the second prong, the Court found that the Water Authority's concern about saving public tax funds by mitigating the likelihood of labor strikes was indicative of true concern about protecting public funds. Id. In addition, according to a statistical analysis on PLAs, the Court found that after the adoption of PLAs, more funds were saved and competition increased. Id. Accordingly, the PLA did not violate Nevada's competitive bidding statute.

Next, the Court examined the PLA under Nevada's right to work statute, NRS §§ 613.250. Id. at 230. The Court found that unlike a previous case that violated the statute by excluding non-union workers, this case allows both union and non-union contractors to bid on projects and does not require that a contract employer hire only union employees. Id. at 230; see also Bldg. Trades v. Bonito, 280 P.2d 295 (Nev. 1995). Therefore, the PLA did not violate the right to work statute. Finally, the Court examined the PLA under Nevada's freedom of association statute, NRS § 614.090(1). Id. The Court found that the PLA did not violate the statute simply because it
did not interfere with the employees right to associate with a union. Associated Builders at 230. No restrictions were imposed under the PLA to join a union or not. Id.

**Balint v. Carson City**

180 F.3d 1047 (9th Cir. June 14 1999) (en banc)

Court remands Title VII case for consideration of burden caused by alternative policies.

This was an appeal from a decision of the United States District Court for the District of Nevada, to grant summary judgment for the respondent in a Title VII religious discrimination case brought by the appellant, a city employee. Balint, 180 F.3d at 1049.

Title VII of the Civil Rights Act of 1964 prevents religious discrimination against any individual with respect to that person's compensation, terms, conditions or privileges of employment. 42 U.S.C. § 2000e-2(a)(1) (1964). The court set forth the two-step analysis to determine religious discrimination under Title VII. First, the employee must establish a prima facie case of discrimination. Balint, 180 F.3d at 1050. A prima facie case for discrimination exists if: "(1) the employee has a bona fide religious belief, the practice of which conflicts with an employment duty; (2) the employee informs the employer of the belief and conflict; and (3) the employer threatens or subjects the employee to discriminatory treatment because of the employee's inability to fulfill the job requirements." Id. (quoting Tiano v. Dillard Dep't Stores, Inc., 139 F.3d 679, 681 (9th Cir. 1998)). Second, the employer must show that attempts were made to accommodate the religious beliefs of the employee or that any accommodation would be overly burdensome. Id. at 1050-51.

The court considered the facts in the light most favorable to the non-moving party, the appellant, because it was a motion for summary judgment, and the court assumed a prima facie case of discrimination. Id. at 1051. Next, the court considered whether accommodation of the appellant's religious practices would place an undue burden on the respondent. Id. at 1051-56. The court noted that 42 U.S.C. § 2000e-2(h) provides that seniority systems are not unlawful unless they are used to carry out the discriminatory intent of the employer. Id. at 1051. Although an employer does not have to interfere with its seniority system to accommodate the religious practices of an employee, it must examine whether there is an alternative that would not cause an undue impact to the seniority system. Furthermore, the employer must consider the costs. If implementing the alternative, its cost should be minimal. Id. at 1053.

The court looked at two methods of accommodating the appellant's religious practices, voluntary shift trades and shift splitting, to determine whether the respondent could reasonably implement them. Id. at 1054-1056. The Court determined that there was no genuine issue of material fact as to whether volun-
tary shift trading would cause the respondent undue hardship, in view of the cost and personnel problems involved. Id. at 1055. The Court found that a genuine issue of material fact existed as to whether the implementation of a split shift would cause the respondent undue hardship. Id. at 1056.

The Court reversed and remanded, finding that the case contained questions of fact that precluded summary judgment and that the district court failed to apply the correct substantive law. Id. at 1054, 1056. The Court further found that the use of a seniority system does not relieve employers of the duty to make reasonable attempts to accommodate employees religious practices if those accommodations do not interfere with the seniority system and do not present more than a minimal cost to the employer. Id. at 1054.

Judge Kleinfeld, joined by Judge Brunetti, Judge Kozinski, and Judge Fernandez, dissented. While they agreed with the majority as to the pertinent law, they disagreed with the manner in which the majority applied the law to the facts. Id. at 1056. The dissenting judges found no genuine issues of material fact as to whether split shifts would cause undue hardship. Id. at 1056-57. The dissent further found that "the majority gives too little weight to the preclusive effect a bona fide seniority system has on religious discrimination claims, and erroneously converts a de minimis cost standard into something more demanding." Id. at 1057.

Bank of America, Nevada v. Bourdeau

Statements made to FDIC subject to a conditional privilege.

Respondent Bourdeau was a branch manager of the Lake Tahoe branch of Appellant bank, but was fired when an internal investigation revealed violations of bank policy, some of which exposed the bank to potential civil or criminal liability. Respondent subsequently denied the allegations presented against him alleging a conspiracy on the part of the bank’s internal investigators. However, he resigned under an agreement that allowed him to retain his bonus if he did not consult an attorney.

Respondent then assembled a group of investors who contributed $3.5 million as part of a plan to start the Bank of Lake Tahoe, which would be run by respondent as CEO and president. As part of the application process for the new bank, an investigation was conducted by, the Nevada Division of Financial Institutions and the Federal Deposit Insurance Corporation (FDIC), pursuant to these agencies’ typical procedure. An investigator for the FDIC spoke with several employees of Bank of America and thereafter filed a report recommending that Bourdeau not be approved as CEO and president of the new bank.

Respondent filed an action in the district court against Bank of America Nevada and several of its employees alleging, among other things, intentional interference with a prospective business relationship due to the allegedly defamatory statements made to FDIC investigators. On this interference claim,
the jury found for the respondent and granted an award of $1.2 million.

In this appeal, Bank of America Nevada sought a finding that the trial court had abused its discretion by not allowing a jury instruction with regard to an absolute or conditional privilege as to any communication made to the FDIC, inasmuch as it claimed that the agency was acting in a quasi judicial capacity. The Court held that the statements made to the FDIC were subject to a conditional privilege, as long as they were made "in good faith on [a] matter in which the person communicating has an interest, or in reference to which he has a right or a duty, if it is made to a person with a corresponding interest or duty." Bourdeau, 982 P.2d at 476. Hence, as the Court explained, in order for Bourdeau to overcome the privilege, he must prove that the privilege was abused in some way, such as if the statements were made with "actual malice, knowledge they were false, or reckless disregard for whether the statements were false." Id. at 475.

In this regard, the Court found that since the statements were made by bank employees to an FDIC investigator, and since the employees had a duty to cooperate with the examiner, the appellant bank or its employees could not be held liable for any statements made in good faith. Id. at 476. As a result, the Court reversed the part of the opinion with regard to the intentional interference claim and remanded the action for a new trial on the issue of the conditional privilege as it relates to this claim.

Dillard’s Department Stores, Inc. v. Beckwith

Wrongful discharge of long-term employee may violate public policy.

Deloris Beckwith (Beckwith) injured her back at work and filed a workers' compensation claim. Beckwith worked 25 years for Dillard's Department Stores (Dillard's), 19 of those years as an area sales manager. Even though she was an exemplary employee, when she failed to return to work because her doctor refused to release her, Dillard's filled her position with another manager. Upon her return, Dillard's demoted her to an entry-level position. Beckwith filed suit against Dillard's, claiming tortious constructive discharge and intentional infliction of emotional distress. The jury awarded more than $600,000 in compensatory damages and $1,872,084 in punitive damages. Dillard's appealed.

The Supreme Court of Nevada, en banc, affirmed the district court's ruling, holding Dillard's retaliatory discharge for filing a workmen's compensation claim by an injured employee was actionable in tort, and that trial judge's decision to allow Dillard's' nationwide worth, rather than in-state worth alone, to determine the amount of punitive damages, was not error. Beckwith, 989 P.2d at 88.

Dillard's contended that Beckwith had no cause of action since Nevada Revised Statute, § 616D.030 states, in pertinent part, "I. No cause of action
may be brought or maintained against an insurer or a third-party administrator who violates any provision of this chapter . . . 2. The administrative fines provided for in Nev. Rev. Stat. § 616B.318 and § 616D.120 are the exclusive remedies for any violation of this chapter . . ."). The court disagreed, reasoning that a retaliatory discharge stemming from the filing of a worker's compensation claim is actionable in tort and the cause of action and remedies governed by the law of torts, not the worker's compensation statutes. Beckwith, 989 P.2d at 885.

"At-will employment" gives the employer the right to discharge an employee for any reason, so long as the reason does not violate Nevada's public policy favoring "economic security for employees injured while in the course of their employment." Id. at 885-86. In this case, the court found that Dillard's request for Beckwith to return to work without a medical release from her doctor authorizing her return, coupled with a demotion when she did return to work, was improper and violated public policy. Id. Consequently, the court affirmed the tortious constructive discharge judgment.

Substantial evidence existed to support Beckwith's claim of intentional infliction of emotional distress. Dillard's did not offer Beckwith her previous position as area sales manager when she returned to work in spite of the fact that there were two openings; Beckwith was forced to take a 40% pay reduction and entry-level position; and the demotion was directly related to her claim for worker's compensation. Therefore, the court affirmed judgment for intentional infliction of emotional distress. Id. at 886.

Dillard's also contested the damages, citing the lack of evidence showing that Beckwith took steps to mitigate her damages. The court held that Beckwith's attempts to obtain employment at three other department stores were adequate efforts to mitigate damages for purposes of claim of constructive discharge against public policy. Id. at 886-87.

The court affirmed the use of Dillard's nationwide worth in determining punitive damages for constructive discharge and intentional infliction of emotional distress. The court reasoned, based on Ainsworth v. Combined Ins. Co., 104 Nev. 587, 763 P.2d 673 (1988), that the award of punitive damages is meant to deter the defendant from repeating the misconduct as well as punish for the past behavior, and as such, the wealth of the defendant is directly relevant to the size of an award. Id. at 887. The determination of that award rests with the trier of fact and, unless evidence shows that the award would destroy or annihilate the defendant, there will be no adjustments. Id. Since the award would not financially destroy or annihilate Dillard's, the punitive damage award was affirmed.

The court also affirmed the award of attorney's fees to Beckwith because Beckwith's offer to settle for $187,000 prior to discovery was refused by Dillard's and trial court found rejection of this "rock bottom" offer unreasonable. Therefore, award of attorney's fees was proper. Id. at 888.
WORKERS COMPENSATION

Russell Mauer v. Employers Insurance Company of Nevada

Self-inflicted injury not an accident under worker's compensation.

Appellant, while working, twice hit his head on the corner of a large rooftop air conditioning unit. Mauer v. Employers Insurance Company of Nevada, 983 P.2d 411 (1999). When appellant hit his head a second time, he angrily hit the unit with his fist. Id. Appellant suffered a superficial skull abrasion, which Respondent Employers Insurance accepted. Id. Appellant was denied his claim for his fractured right hand. A hearing officer and an appeals officer upheld the claim denial, and the district court denied judicial review. Id.


NRS § 616A.030 n7 defines "accident" as "an unexpected or unforeseen event happening suddenly and violently, with or without human fault, and producing at the time objective symptoms of an injury." Id. at 413. The result of appellant's angry act could not be characterized as either unexpected or unforeseeable. Id. Thus, the Court held that an intentional violent act that produced a foreseeable and reasonably expected self-injury was not an "accident" and the resulting injury was not covered under Nevada's workers' compensation law. Id. at 414.

ENVIRONMENTAL LAW

United States v. Alpine Land & Reservoir Co.
174 F.3d 1007 (9th Cir. Apr. 8, 1999)

A court was able to enjoin proceedings in another court regarding property that was first subject of jurisdiction in the other court.

Churchill County appealed a lower court decision granting a water rights transfer application to the United States Fish and Wildlife Service ("USFWS"). The district court enjoined the state court proceedings as it interfered with the district court's exclusive jurisdiction to hear appeals regarding the water rights that had been originally adjudicated in the district court. The County appealed
again to the Ninth Circuit.

The Newlands Reclamation Project started a massive project along the Truckee and Carson River that would irrigate nearby lands and store water from the rivers. A decree adjudicating the water rights of the users of the Truckee River in northern Nevada was entered in 1944 known as the Orr Ditch Decree. A similar decree, known as the Alpine Decree, adjudicated the rights along the Carson River and was entered in 1980. Under the decrees, applications to change water rights governed by the decrees were to be directed to the state engineer.

In 1996, USFWS filed two applications with the state engineer to change the manner of water use rights purchased from other users under the two decrees. Churchill County protested the applications asserting that the new uses would deplete the County’s groundwater supply, harm its tax base, and create a dust hazard. The state engineer conducted a study and found that none of the County’s concerns would arise. Churchill County then appealed the state engineer’s ruling. The state court denied the engineer’s motion to dismiss for lack of jurisdiction. The engineer then filed a motion to enjoin the proceedings in state court. Before a ruling was entered on the state engineer’s motion, the state court granted a motion filed by Churchill County to enjoin the federal proceedings.

The Ninth Circuit rejected Churchill County’s contention that the district court did not have jurisdiction. Alpine Land & Reservoir Co., 174 F.3d at 1011. The three-judge panel found that the decrees express provision for continuing jurisdiction over transfer applications. Although the Orr Ditch Decree did not expressly provide the federal district court jurisdiction over the state engineer’s decision, the panel interpreted Nevada law to provide for federal court review of the engineer’s decisions. Id. The panel rejected arguments that federal courts only have jurisdiction when federal interests are implicated. The jurisdictional arrangement has been called “highly extraordinary” because it permits federal district court review of state court rulings. Id. at 1012. Nevertheless, the Ninth Circuit has specifically approved of this arrangement. Id.

After the panel determined that the transfer application falls within the district court’s continuing jurisdiction, it then addressed whether that jurisdiction was exclusive. The district court found that it had exclusive jurisdiction because the Alpine and Orr Ditch matters are in rem actions and the district court gained jurisdiction over the property first. Id. at 1013.

The Ninth Circuit affirmed and expressed two reasons why the district court has exclusive jurisdiction. Id. The panel analogized the situation to a settlement agreement where a court retains jurisdiction over the matter. If the court did not retain exclusive jurisdiction over the matters, a subsequent state court could apply its judgment to the future conduct of the parties. Then, a state court would be construing the district court ruling potentially frustrating the district court’s purpose. Id.
The Ninth Circuit’s discussion then focused on the Anti-Injunction Act, 28 U.S.C. § 2283. Id. at 1014. The Act prohibits federal courts from enjoining state court proceedings unless an exception of the Act applies. Exceptions include: (1) express authorization by Act of Congress; or, (2) where necessary in aid of its jurisdiction; or, (3) to protect or effectuate its judgments. The district court relied on the second exception of the Act. Id. at 1015.

The Ninth Circuit concluded that the district court acted appropriately because courts have long been able to enjoin proceedings in another court regarding property that was first the subject of jurisdiction in another court. The Court also revisited its settlement agreement analogy and found that the “where necessary in aid of its jurisdiction” exception applies because subsequent jurisdiction in another court would frustrate the district court’s original jurisdiction. Id.

EVIDENCE

Hansen v. University Health Services of Nevada, Inc.
974 P.2d 1158 (Nev. Mar. 24, 1999)

Supreme Court addresses evidentiary rulings and trial court discretion.

Thalgott performed spinal surgery on Hansen attaching a steel plate to Hansen’s spine, using bone screws. The surgery was performed at Valley Hospital, which at the time was owned by University Health Services of Nevada, Inc. (UHS).

Following the surgery, Hansen’s incision became infected resulting in “gross contamination.” Hansen thereafter brought a negligence suit against Thalgott and UHS. The cause of the infection was debated at trial, with Hansen’s expert witness attributing the cause to negligence of either the Hospital or the doctor. Conversely, the defense attributed the cause to Hansen’s adjacent tissue.

A jury found in favor of Thalgott and UHS. Hansen appealed, arguing that the district court abused its discretion in making certain evidentiary rulings that prevented him from adequately presenting his case.

First, Hansen argued that the district court erred in excluding evidence that the FDA did not approve of the surgical procedure performed on him. Several medical documents mentioned this fact. Hansen claimed that a heightened standard of care is required when the FDA does not approve of a procedure. However, the district court, in its discretion, redacted any mention of FDA status at trial finding that such evidence would be irrelevant and confuse the jury. The Nevada Supreme Court held that the district court did not abuse its discretion “even though a contrary finding would also have been within the trial court’s discretion with regard to the standard of care upon which the jury was instructed.” Hansen, 974 P.2d at 1160.

Hansen argued that the district court erred in excluding the State Industrial
Insurance System (SIIS) survey of medical complications experienced by Thalgott’s patients who also had the surgery. Hansen argued that use of the reports would show a pattern of Thalgott’s unsuccessful surgeries. However, the district court excluded the evidence because of the possible misleading effect it may have had on the jury. The Court upheld the district court’s ruling since the evidence could prolong the trial and confuse the jury. Id.

Next, Hansen argued that that the district court erred in excluding inadequacies in Valley Hospital’s infection control practices. For the same reasons mentioned above, the Court upheld the district court’s ruling. Id.

Finally, Hansen argued that the district court erred in refusing to allow Hansen’s untimely-designated experts to testify at trial. The district court set a deadline for the designation of experts. Hansen submitted a second, untimely designation of experts, which the district court refused even though it was submitted within the time limit allowed by Nevada Rule of Civil Procedure 26(b)(5)(B). The Court agreed, stating that a district court is vested with discretion to limit the number of witnesses and such discretion also supercedes the mentioned statute. Id. at 1161.

The dissent favored allowing the evidence because of its probative value. Specifically, the dissent believed that the non-FDA evidence and the SIIS audit would have been relevant, and influential evidence at trial. Id. at 1161-62.

Mortensen v. State

986 P.2d 1105 (Nev. Sept. 27, 1999)

Trial court did not abuse its discretion regarding exclusion of a witness’s prior bad acts, admission of expert testimony, preservation of evidence, and admission of newly discovered evidence.

On May 14, 1997, Mortensen was tried and convicted of first-degree murder with the use of a deadly weapon. He was sentenced to two consecutive terms of life imprisonment without the possibility of parole.

On December 27, 1996, Mortensen, an officer with the Las Vegas Metropolitan Police Department, celebrated his thirty-first birthday at a Las Vegas drinking establishment. He left the party with a fellow police officer, Chris Brady. Both men were armed with their police weapons. Brady, the driver, pulled into an alley, which was an area known for gang activity. A group was gathered in the alley at that time. Mortensen was the only passenger in the vehicle, which faced the group. Six shots were fired and Daniel Mendoza was killed. The vehicle pulled away from the scene.

Following the accident both men in the vehicle went to a bar. Later, Brady drove Mortensen home. The next morning, Brady claimed to discover Mortensen’s gun in the vehicle. Brady removed the bullets and placed the gun on his bathroom cabinet. Brady contacted his father, also a police officer, and went with him to the police station to report the incident and turn in Mortensen’s weapon.
Evidence used at trial included Mortensen’s gun, which according to expert testimony, was the weapon that produced strikes at several objects at the murder scene. The gun had Mortensen’s fingerprints on it. Also, Brady’s vehicle was produced as evidence, although it had been altered in several ways. Mortensen requested on two occasions that the vehicle and other possible evidence be preserved but the Court did not intervene. When Mortensen finally obtained the evidence, it had already been altered. Five witnesses testified that the perpetrator was a large, white male who wore sunglasses the night of the incident. This description better fit Mortensen than it did Brady.

Mortensen testified at trial that Brady was the actual shooter. According to Mortensen, Brady used Mortensen’s gun and reached across the cab to fire on the group. After asking Brady why he did such a thing, Mortensen said that Brady called himself “evil.”

There were several issues raised on appeal: (1) whether evidence of Brady’s prior bad acts should have been admitted and not restricted by section 48.045 of the Nevada Revised Statutes; (2) whether the State’s failure to provide the defense with expert testimony reports prior to trial justified a mistrial; (3) whether Mortensen’s due process rights were violated by the State’s failure to preserve evidence; and, (4) whether newly discovered evidence should have required a new trial.

Mortensen attempted to introduce into evidence that Brady was reported to internal affairs on two prior occasions for ruffian acts. Mortensen argued that the district court should not have barred the evidence under NRS 48.045(2) because the provision applies only to the accused and not witnesses. The Court disagreed. The Court held that NRS 48.045(2) applies to “persons” as it states, which also includes witnesses, so the district court did not abuse its discretion. Mortensen, 986 P.2d at 1110. Also, the Court noted that the exception to the rule against character evidence is available only where a positive identification of the perpetrator has not been made, and the offered evidence establishes a signature crime. Id. The Court found that Brady’s prior bad acts would not apply to the exception because they did not demonstrate a signature crime. Id.

On the same issue, Mortensen argued that NRS 48.045(2) is unconstitutional since it denies his Sixth Amendment right to confrontation and his Fourteenth Amendment right to due process. The Court disagreed. It reasoned that since Mortensen was able to cross-examine Brady and that Brady’s acts did not exculpate Mortensen, Mortensen’s rights were not violated. Id. at 1110 n.6.

Mortensen next argued that the State’s failure to provide the defense with expert testimony reports prior to trial amounted to a mistrial. The Court again disagreed. Mortensen cited McKee v. State, 112 Nev. 642, 917 P.2d 940 (1996), where the State secretly and purposefully kept evidence to impeach the accused by surprise. The Court found that the State’s actions in that case were more egregious than in the instant case. Mortensen, 986
Moreover, the evidence pertained to the vehicle used in the murder and not to the accused as in McKee. Lastly, there was nothing to suggest the State intended harm as it received the reports late. Id. The State forwarded the reports as soon as it received them. Id.

A sub-issue raised by Mortensen concerned the probative value of the expert’s testimony. Mortensen cited Wrenn v. State, 89 Nev. 71, 506 P.2d 418 (1973) to argue that the expert testimony was speculative and uninformed. In Wrenn, the Court ruled against the testimony of an expert where the expert attempted to recreate an event, which occurred two years prior and relied on several factual assumptions. Id. at 73-74, 506 P.2d at 419-20. The Court found in this case, however, that the expert was competent and the crime scene, unlike Wrenn, was still fresh for examination. Mortensen, 986 P.2d at 1111.

Mortensen argued that his due process rights were violated by the State’s failure to preserve Brady’s vehicle and clothing involved in the accident. To establish a violation of this sort, the Court reasoned that the State must (1) lose or destroy the evidence in bad faith, or (2) the loss of evidence must unduly prejudiced the defendant’s case because it possessed an apparent exculpatory value before it was destroyed. Id. at 1111-1112. The Court found that Mortensen failed to show either. Id. at 1112. Mortensen did not show bad faith because the State did not intend to try Brady or even consider him a suspect. Therefore, the State had no reason to preserve the evidence. Mortensen argued that he notified the State of his legal strategy to pin the blame on Brady through several avenues. Regardless, the Court found that no notification was presented to satisfactorily substantiate his claim of bad faith by the State. Id. at 1112 n.7.

Likewise, the Court found that Mortensen failed to demonstrate the second prong of the test, that Mortensen was unduly prejudiced. Mortensen argued that altered evidence prejudiced his case and based his argument on Cook v. State, 114 Nev. 120, 953 P.2d 712 (1998). In Cook, the Court reversed a conviction because the police lost certain evidence. The Court distinguished Cook from the present case since the police did not actually lose anything. Mortensen, 986 P.2d at 1112.

Moreover, certain evidence Mortensen claimed was sold was recovered and available for trial. Id. All other alteration claims relied on by Mortensen the Court found as insignificant to have any prejudicial effect. Id. at 1113.

Mortensen’s final argument was that newly discovered evidence warranted a new trial. The new evidence included: allegations of people who heard Brady refer to himself as “evil;” letters written by the expert witness; and allegations supposedly made by a fellow officer that Brady desired to do a drive by shooting.

As to the occurrences where Brady referred to himself as “evil” to oth-
ers, Mortensen argued that these statements conform to a similar reference allegedly made by Brady after he fired the weapon. The Court held that this new evidence was not likely to produce a different result upon a new trial, mainly because such references are inapposite in showing culpability and they tend to demonstrate character more than anything, which is barred under section 48.045(2) of the Nevada Revised Statutes. Id. at 1114.

As to the letters written by the expert witness, Mortensen argued that the letters suggest the possibility of a third gun and that such letters discredit the expert's testimony. The Court held again that the evidence would not produce a different result because Mortensen himself testified that his gun was the murder weapon. Id. at 1114-15. As to the effect of the letter on the expert’s testimony, the Court found that it would have no effect on retrial. Id.

Lastly, Mortensen argued that Brady’s statement made to a fellow officer demonstrate that Brady had a propensity to engage in a shooting of this nature. The Court held that this new evidence would not render a different result upon retrial because the officer denied that any statements when questioned. Id. Moreover, at trial, Brady's own testimony demonstrated that it was his idea to commence a pattern of citizen harassment that night. Id. With this and other concessions about Brady’s propensities, the Court found that the jury had ample evidence to make a proper decision about Brady’s involvement. Id. The Court added that Brady’s involvement, as cast at trial, might warrant criminal prosecution. Id. Nevertheless, the weight of the evidence, according to the Court, clearly pointed more toward Mortensen and any testimony by the proposed fellow officer would be insufficient to satisfy a new trial. Id.

Roever v. Nevada
979 P.2d 1285 (Nev. Mar. 24, 1999)
Lower court did not “overlook or misapprehend any material matter.”

In a per curiam opinion issued to replace an earlier unpublished order, the Nevada Supreme Court denied a petition for rehearing of the court’s decision to reverse and remand appellant’s conviction. Roever was convicted of first degree murder and possession of a controlled substance, but the Court reversed the conviction in 1995 and remanded for a new trial. Roever v. Nevada, 114 Nev. 867, 869; 963 P.2d 503, 504 (Nev. 1998). At Roever’s second trial, the jury once again found her guilty of the same charges. Id. Again, the Court reversed and remanded the conviction, holding that the testimony of several witnesses to prior bad acts was improperly admitted as rebuttal evidence to rebut several statements made by Roever in an audiotaped interview.

The issue presented by the state’s petition was whether the court had correctly concluded that the admission of the rebuttal evidence was reversible error. The court had given several reasons in its earlier opinion for its holding
that the evidence should not have been introduced, one of which was that it did not rebut evidence presented by Roever in her defense. Roever v. Nevada, 979 P.2d at 1285. The court acknowledged that it had incorrectly determined that the audiotape, which was a defense exhibit, was first used by the state in its case-in-chief. However, the court held that the other grounds discussed in its earlier opinion were sufficient to support the holding that the admission of the rebuttal evidence was reversible error. Id. Because the court found that it did not “overlook or misapprehend any material matter,” it denied the petition for rehearing.

Derosa v. Nevada; Thomas v. Nevada
985 P.2d 157 (Nev. Aug. 27, 1999)

Affidavits of lab analysts deemed insufficient as evidence in DUI trials.

In the cases of Derosa v. Nevada and Thomas v. Nevada, the Nevada Supreme Court considered issues involving the Confrontation Clause rights of the Sixth Amendment and the admissibility of lab analysts affidavits for D.U.I. convictions. The petitioners, Jeffrey DeRosa and Janice Louise Thomas, were convicted in separate trials for misdemeanor D.U.I. In both cases, the state introduced affidavits of lab analysts who sampled and tested the petitioners’ blood for alcohol content. Derosa, 985 P.2d at 159 (1999). In each trial, the municipal court rejected petitioners objections to the admission of such affidavits in the absence of corresponding live testimony from the affiants. Id. On appeal, both petitioners challenged the constitutionality of the statutory scheme providing for the admissibility of such affidavits. Specifically, they argued that their right to confront witnesses against them as provided by the Sixth Amendment was violated by the statutory exceptions. Id. at 160-61. Petitioner Thomas also challenged the statutory distinctions made between misdemeanor and felony defendants as violations of the Equal Protection Clause. Id. at 160.

In its analysis of the Confrontation Clause issue, the Nevada Supreme Court noted that an initial inquiry must be made as to whether the evidence was admissible under a firmly rooted hearsay exception. Id. at 161. The state argued that the affidavits concerning DeRosa were admissible under a business record exception and that those concerning Thomas were admissible under a public record exception. Id. Concluding that the affidavits did not constitute a record conducted in the ordinary course of business consistent with Nev. Rev. Stat. § 51.135, the court rejected the states business record exception. The documents lacked the required indicia for such an exception. In particular, the analysts prepared the documents for litigation purposes and not for use by a business responsible for the documents preparation. Id.

Further, the court rejected the state’s public records exception arguments. In order to qualify as a public record, a public official or agency must prepare the document. Id. In both the Thomas and DeRosa cases, the documents were not prepared by public officials, but by laboratory and hospital employees. Id.
However, the Nevada Supreme Court reasoned that the affidavits could be admissible if they "possess particularized guarantees of trustworthiness." Id. at 162. If such evidence is at least as reliable as evidence admitted under a hearsay exception, its admission would not violate the Confrontation Clause. The court noted the indicia of trustworthiness that it associated with the lab analysts' affidavits. The affiants who prepare such affidavits are trained professionals whose primary duty is to provide accurate results. The utility of live testimony and cross-examination is consequently questionable since the analysts may not have specific recollections of the individual tests. Id. Further, the court noted that a number of jurisdictions already permit the admission of such statutory evidence. Id.

According to the court's rationale for admissibility, the statutory scheme also provides for the defendant's protection by allowing the defendant to object in writing and to compel the affiant's testimony where a bona fide dispute of facts exists. Id. Within this framework, the right to appeal provides an additional safeguard against possible abuses. Id. As a result, the court held that the absence of a bona fide dispute of fact in the petitioners' cases and their failure to provide a written objection to the admission of the affidavits precluded a Confrontation Clause claim. Id. at 163. The court asserted that if the affidavits concerned a controversial or particularly subjective test, it is possible that complete reliance upon the chemist's affidavit may violate the Confrontation Clause.

Regarding the Equal Protection Clause, Petitioner Thomas argued that the statutory scheme placed a heavier burden on misdemeanor defendants than felony defendants in asserting their right to cross-examination. In rejecting this claim, the court reasoned that the state had a reasonable objective in promoting judicial efficiency by expediting the prosecution of less serious cases. Id. at 164. Further, the court held that misdemeanor and felony defendants could be statutorily distinguished in terms of applicable procedural protections. A felony defendant faces a more substantial loss of liberty and higher penalties than a misdemeanor defendant, thus justifying additional levels of protection for the felony defendant. Id. The court also noted that the statutory scheme, while limiting the misdemeanor defendant's statutory rights, did not entirely eliminate procedural protections for such defendants. NRS§ 50.315 states that a misdemeanor defendant can object to the lack of cross-examination where the defendant can demonstrate that a bona fide dispute of the facts exists. Id. Accordingly, the court held that such protections were sufficient for Equal Protection Clause purposes despite the disparity in procedural treatment between the two types of defendants.
Potter v. West Side Transportation, Inc.

Parties may have had the psychotherapist-patient privilege, but waived their rights to it when they voluntarily placed their mental state at issue in the case.

On September 12, 1997, the Potter family was involved in a severe car accident. Both parents and one of three children survived. As a result of the accident, psychological professionals treated each of the surviving Potters. It was reported that there was some psychological treatment before the accident. Residents of the State of California performed the psychological treatment in that state.

The Potters objected to the Defendant’s motion to compel the production of all of the psychological records pertaining to the Potter’s mental and emotional well being and sought to invoke the psychotherapist-patient privilege. They maintained that this is a private matter and would result in great embarrassment if disclosed. Further, the Potters argued that they did not intend to call their treating psychotherapists but would rely on an expert to prove their emotional distress claims. Id.

The Court held that the Defendants were entitled to this information because it was relevant to the subject matter of the Potters’ claims and might reveal more admissible evidence. Id. Additionally, the Court found that the Potters were not entitled to protection under the psychotherapist-patient privilege because, by initiating a claim of emotional distress, they voluntarily placed their psychological well being at issue. Id.

In reaching its conclusion, the Court looked at two issues. First, the Court determined the relevance of the prior records. Second, the Court addressed the issue of privilege.

In determining whether or not the prior treatment was relevant, the Court relied on the Federal Rules of Evidence 401. The Court reasoned the records were necessary to determine the extent of the Potters’ emotional suffering as well as determine their psychological state before and after the accident in order to gauge whether or not the accident was a contributing factor to their current mental state. Id. The Court held that it would not simply rely on the Potters’ word that it was a private matter. The Court determined that the evidence should be admitted because the Potters’ expert would need to review their previous mental history prejudicing the Defendants’ ability to properly cross examine the expert about his opinion. Id.

In analyzing the issue of privilege, the Court relied on State law. The Court held that because the action was brought in the State of Nevada and the accident occurred in the State of Nevada, Nevada law governed. Id. As a result, the Court looked to section 49.209 of Nevada Revised Statute governing the privilege between psychologist and patient. Id. The statute provides, “no privilege for communication relevant to an issue of the treatment of the patient...
in any proceeding in which the treatment is an element of a claim or defense.” Id.

Relying on the statute, the Court concluded that the Potters may have had the privilege, but waived their rights to it when they voluntarily placed their mental state at issue in this case. Id.

**Lincoln v. State**  
988 P.2d 305, (Nev. Nov. 29, 1999)

*Failure to hold the requisite trustworthiness hearing may not result in a reversal if the failure to grant the trustworthiness hearing was harmless error under circumstances.*

The Appellant, Lincoln, was married to Richardson. They had three daughters together. They divorced four years after they were married. At the time of the divorce, Richardson resided in New Mexico and Lincoln was stationed in Virginia. Their divorce agreement provided that neither parent could take the children out of their state of residence without the permission of the other.

Lincoln owned a Ford Bronco that he gave to Richardson. In June 1993, Richardson was cleaning the car and found a receipt for a motel in Reno, Nevada. The receipt contained dates covering a period of time when Lincoln had visitation time with the children. Richardson never permitted Lincoln to take the girls to Nevada.

Richardson questioned her older daughter about the incident and recorded the conversation with a tape recorder. When Richardson asked her daughter about the trip she testified that her daughter would “curl up in a ball, stick her fingers in her mouth, and talk like a baby” Lincoln, 988 P.2d at 306. Richardson noted that this behavior was uncharacteristic of her daughter. Richardson’s daughter stated that her father’s “pee-pee had come to get her.” Id. After more questioning, Richardson’s daughter denied that her father molested her. However, based on her daughter’s tone of voice and body language, Richardson believed the incident did in fact occur and her daughter just did not want to talk about it.

Richardson notified military authorities of the incident and the military authorities interrogated Lincoln. Eventually, Lincoln signed a confession detailing the molestation of his daughter. He initialed six separate lines in the confession indicating that he understood his rights and acknowledging that he could end the interview at his own discretion.

After the confession, Lincoln also spoke with counselors and a naval social worker. The social worker informed Lincoln the conversation would be confidential unless there were any incidents of child abuse. Id. The social worker told Lincoln he would be required to disclose those conversations to the authorities. Id. Lincoln told the social worker he was sorry for it but he never specified what “it” meant. Id.
Lincoln was tried and convicted of lewdness with a minor and sentenced to four years in prison. The four-year sentence was suspended, and Lincoln was placed on probation for an indeterminate period of time, not to exceed sixty months.

Lincoln appealed his conviction arguing that the court committed reversible error by not holding a separate hearing, outside of the jury, to determine whether or not his daughter's testimony was trustworthy. In its decision, the Court agreed that the district court erred. Id. at 307. However, the Court refused to reverse the district court's ruling.

In reaching its decision, the Court relied on section 51.385 of the Nevada Revised Statutes. Id. The statute provides that a child under the age of ten may make a statement of "any sexual conduct performed with or on the child" and that statement will be admissible in a criminal proceeding. Id. Additionally, the statement will only be permitted if, in a separate hearing, without a jury present, the Court finds that the statement "provides sufficient circumstantial guarantees of trustworthiness; and the child testifies at the proceeding or is unavailable or unable to testify." Id. The Court has previously found that a failure to hold the requisite trustworthiness hearing constitutes reversible error. See Brust v. State, 108 Nev. 872, 877, 839 P.2d 1300, 1302 (Nev. 1992); Quevedo v. State, 113 Nev. 35, 38, 930 P.2d 750, 751 (Nev. 1997); Lytle v. State, 107 Nev. 589, 591, 816 P.2d 1082, 1083 (Nev. 1991). However, the Court noted that such an oversight may not result in a reversal, if the failure to grant the trustworthiness hearing was a harmless error under the particular circumstances. In this case, the Court held that the error was harmless and therefore affirmed Lincoln's conviction. Lincoln, P.2d at 307.

The Court concluded that the hearsay statements from Richardson's daughter resulted in harmless error. The Court affirmed the decision based on other evidence including Richardson's own testimony, the social worker's statements, and Lincoln's signed confession. Id.

In addition to the ruling on the evidence, the Court also struck down Lincoln's argument that his conversations with the naval social worker were privileged. The Court found that Lincoln was not entitled to privilege protection because the social worker informed him that any reports of child abuse had to be disclosed. Therefore, Lincoln could not have expected any additional communications to be confidential. Id. at 308.

Wood v. Nevada

Hearsay statements excluded. Fast track appeals process held constitutional.

In Wood v. Nevada, 990 P.2d 786 (Nev. 1999), the Nevada Supreme Court considered the appellant's challenges to his convictions for attempted murder, solicitation to commit murder, and conspiracy to commit murder. Wood, 990
The appellant, Allen Dwight Wood, argued that the admission of out-of-court statements implicating him in a murder conspiracy constituted a reversible error and that his conviction for solicitation to commit murder was invalid under Nevada's criminal statutes. The appellant also asserted that Nevada's Fast Track criminal appeals procedure was unconstitutional.

In 1996, the appellant and his ex-wife had an altercation, which led to a subsequent violent attack upon the appellant’s ex-wife. Two minors, Justin Anderson and Brian Bardin, were arrested for the assault upon the appellant’s wife. After receiving immunity, they implicated the appellant in a murder conspiracy. One of the minors, Brian Bardin, made a statement to a third party, Amanda Greene, that the appellant had asked Bardin to murder the appellant's ex-wife. This statement was admitted at trial as a valid form of hearsay, although Bardin, as the hearsay declarant, did not testify.

The appellant argued that the trial court's admission of statements made by Bardin to Amanda Greene violated the Confrontation Clause of the Sixth Amendment. In its reversal of the appellant’s conviction on Sixth Amendment grounds, the Nevada Supreme Court noted that the Confrontation Clause serves as a limitation on the state's ability to use hearsay as evidence when the hearsay declarant does not testify. In order to be sufficiently reliable as a substitute for cross-examination, such hearsay statements must fall within an “affirmly rooted hearsay exception.” If the hearsay does not qualify for such an exception, the state must show that particularized guarantees of trustworthiness support the statements.

In Wood, the court noted that Bardin's statements to Greene were not made in furtherance of the conspiracy. In order for such statements to constitute valid hearsay, the hearsay declarant must make the statements to a third party in order to induce that party to either join the conspiracy or to assist in the conspiracy’s objectives. Bardin, however, did not inform Greene of the intentions to murder the appellant’s wife in order to induce Greene’s participation in the conspiracy.

Further, Bardin’s statements were not valid under a firmly rooted hearsay exception since a co-defendant’s statements against the accused are inadmissible when they implicate both the accused and the co-defendant. Moreover, the prosecution did not provide particularized guarantees of trustworthiness that would validate the statements as admissible hearsay. Although Bardin’s implication of himself may suggest trustworthiness, his contradictions at a preliminary hearing, that the appellant alone assaulted the victim, undermined the statement’s veracity.
the court noted that Bardin's statements could have been the deciding factor in the jury's decision. This necessitated a reversal of the appellant's conviction since the court could not conclude beyond a reasonable doubt that Bardin's statements were harmless at trial. Id.

The Nevada Supreme Court also reversed the appellant's conviction for solicitation to commit murder. The court concluded that Nevada's criminal statutes prohibit a conviction for solicitation to commit murder if the accused is convicted of conspiracy to commit murder. Id. In fact, a conspiracy "triggers the exclusionary clause in the solicitation statute." Wood, 990 P.2d at 789. Since the state can only convict a defendant of either solicitation to commit murder or, alternatively, a conspiracy to commit murder, the court must reverse the redundant convictions. Id. The court therefore remanded the appellant's case since he could only face conviction for one of the charges.

The court, however, refused to accept the appellant's constitutional challenge to Nevada's Fast Track appellate process, which attempts to expedite appellate procedures. The appellant argued that the system violated his unrestricted right to a fully briefed appeal. Id. Procedurally, the Fast Track process provides that the defendant has an opportunity to examine the transcripts of the lower court proceeding prior to presenting an appellate claim. Id. at 791. The process also provides for a written presentation of the arguments and a conference with one justice if the court concludes that the case warrants such a review. If the case presents a substantial, substantive issue, which is not susceptible to quick disposition, the full court may examine the appeal. Id.

In its review of the Fast Track process, the Nevada Supreme Court explained that the system provides procedural protections absent in similar systems in other states. For example, the court noted that New Mexico does not provide for the filing of a transcript prior to appeal and does not permit oral arguments. The New Mexico Court of Appeals has validated this more restrictive process. Id.

The Nevada Supreme Court also distinguished Nevada's system from New Hampshire's system, the only appellate process that a court has invalidated as a violation of a defendant's due process rights. New Hampshire used a discretionary procedure which disposed of appeals without any indication of the court's view on the merits. Id. The First Circuit rejected this process as a due process violation since the system did not provide the defendant with either a transcript or with an opportunity to persuade the court to accept the appeal. Id. (citing Bundy v. Wilson, 815 F.2d 125 (1st Cir. 1987)). The Nevada Supreme Court concluded that the Fast Track system was valid since it lacked similar defects and provided adequate procedural protections for the defendant. Wood, 990 P.2d at 791.
Fletcher v. Nevada
990 P.2d 192 (Nev. Dec. 28, 1999)

Court sets out requirements of the automobile exception regarding exclusion of seized evidence.

Smith filed a police report alleging that she had been kidnapped and beaten by Fletcher. At that time, Smith informed the police that Fletcher was involved in drug trafficking. She also informed the police of Fletcher’s manner of selling drugs and the location of the drugs in Fletcher’s automobile. A detective attempted to purchase drugs from Fletcher but, feeling uncomfortable, Fletcher refused. A week later, the police decided to arrest Fletcher for the kidnapping and battery of Smith. The officers pulled his car over and conducted a search upon the vehicle. During the search, the officers removed two bags of cocaine from the steering column area of Fletcher’s car, the location identified by Smith. Fletcher was charged with kidnapping, battery, coercion, and drug trafficking.

The district court denied Fletcher’s motion to suppress the drug evidence obtained during the search of his vehicle. The court ruled that there was probable cause to arrest Fletcher on the trafficking charges that allowed police to perform a search without a warrant. Alternatively, the court found the evidence admissible as a proper inventory search or under the doctrine of inevitable discovery. Fletcher was convicted of trafficking and misdemeanor battery. Fletcher appealed to the Nevada Supreme Court, claiming the district court abused its discretion in admitting the drug evidence seized from his vehicle.

The Court held that the automobile exception states that a warrant-less search of a parked, immobile, unoccupied automobile requires: (1) probable cause to believe that the vehicle contains contraband; and (2) exigent circumstances sufficient to dispense with the need for a warrant. Fletcher, 990 P.2d at 194. The Nevada Supreme Court has not done away with the exigency requirement in the same manner as the U.S. Supreme Court. See id. at 195.

The Court found that the police had probable cause to believe Fletcher’s car contained evidence of drug trafficking due to Smith’s testimony and the previous unsuccessful attempt to buy drugs. Id. Next, the Court distinguished the case from those where exigent circumstances were not present by noting that the search without a warrant arose from an arrest on a separate charge. The Court determined that because Fletcher’s car would be left on the roadside until impounded, sufficient exigent circumstances existed. Id. It would be unreasonable to require the police to wait for a warrant or ride along with the car to the impound yard and then conduct the search, so the Court concluded that the district court properly admitted the drug evidence in Fletcher’s automobile. Id.
Hayes v. Gallacher
972 P.2d 1138 (Nev. Feb. 12, 1999)

Court remands custody challenge for consideration of the best interest of the child analysis.

This case was an appeal from a decision of the Eighth Judicial District Court, Clark County, which denied appellant's motion to relocate outside the state of Nevada with her minor children. Hayes, 972 P.2d at 1139. Also appealed was the district court decision granting change of custody to the respondent, the children's father, if the appellant chose to leave the state. Id.

The Nevada Supreme Court had to determine whether the district court had followed the appropriate standards in making its decisions in this case. Id. at 1140. See Primm v. Lopes, 853 P.2d 103, 104 (1993); Sims v. Sims, 109 Nev. 1146, 1148 (1993). The court additionally had to consider three conflicting policies: (1) the right of a child to associate with and have a relationship with both parents, (2) the right of a parent to chose where to live, and (3) the right of a parent to have access to their children. Hayes, 972 P.2d at 1140.

The Court set forth a two-step analysis for determining whether to grant a motion for relocation. The trial court must first consider whether the parent has a good faith reason for moving, which was not here in conflict, as the appellant wished to move to be with her new husband who had been transferred to Japan by his employer, the United States Air Force. The court must then consider additional factors including the availability of alternative visitation options. Id. Here, the alternative visitation options posed a problem because of the cost and difficulty involved with the children's visitations to either parent. Id.

The Supreme Court adopted the approach set forth in Section 2.20 of the American Law Institute's Principles of the Law of Family Dissolution, (Tentative Draft No. 3, Mar. 20, 1998), for cases where the relocation would eliminate the possibility of traditional visitation options. Id. The first consideration under these standards is whether the changed circumstances would impair the other parent's ability to exercise his or her responsibilities under the current parenting plan. Id. at 1141. As the respondent's ability to exercise his responsibilities would be significantly impaired, a reexamination of the best interest of the children was justified. Id. The Court found that the district court failed to conduct such an examination, as it did not hear any evidence and made findings of fact contrary to the evidence. Id. The lower court also failed to consider the fact that a protective order had been issued against the respondent as a result of domestic violence he committed. Id. Such consideration is required by Nev. Rev. Stat. § 125.480(4). Nev. Rev. Stat. § 124.480(5) establishes that when it has been proven that a parent has committed domestic abuse, a rebuttable presumption exists that the best interests of the child include no parental sole or
joint custody. Id.

The Court further found fault in the district court's decision in that it was punitive in nature. Id. at 1142. It altered the custody of the children without provision for visitation by the appellant, and thus forced her to choose between her new husband and her children. Id. Courts are not permitted to utilize child custody to punish parents for their actions, but must instead consider what would be in the best interest of the child. Id.

The Court reversed and remanded the case, finding that the district court failed to consider all relevant factors in making its decision. Id. The court acknowledged that the appellant's proposed move to Japan would interfere with respondent's responsibilities to his children. Id. at 1141. As such, the court directed the lower court to conduct a reexamination of the children's custody, considering all appropriate factors, but primarily the best interests of the children as required by Nev. Rev. Stat. § 125.480(4). Id. at 1042.

Manson v. Manson
975 P.2d 340 (Nev. Apr. 20, 1999)

Supreme Court affirms decision preventing parent from relocating with minor child.

The appellant argued that the court erred in denying her motion to relocate to Florida with her minor child. When the parties divorced in April of 1996, the district court awarded primary custody of the minor child to the appellant. The respondent had specified visitation rights. The appellant wished to relocate to the state of Florida with the child.

The district court, after a lengthy evidentiary hearing, denied the motion to remove based on its application of the five factors set forth in the case of Schwartz v Schwartz. 107 Nev. 378, 812 P.2d 1268 (1991). Schwartz suggested that a court should consider the following criteria when evaluating a motion for relocation:

(1) the extent to which the move is likely to improve the quality of life for both the children and the custodial parent; (2) whether the custodial parent's motives are honorable, and not designed to frustrate or defeat visitation rights accorded to the non-custodial parent; (3) whether, if permission to remove is granted, the custodial parent will comply with any substitute visitation orders issued by the court; (4) whether the non-custodian's motives are honorable in resisting the motion for permission to remove, or to what extent, if any, the opposition is intended to secure a financial advantage in the form of ongoing support obligations or otherwise; (5) whether, if removal is allowed, there will be a realistic opportunity for the non-custodial parent to maintain a visitation schedule that will adequately foster and preserve the parental relationship with the non-custodial parent. See Manson, 975 P.2d at 341 n.1.

The district court concluded that the appellant had not satisfied Schwartz's first element, requiring a good faith basis for the relocation. The appellant's lack of good faith was evidenced by her history of attempts to frustrate the visi-
tation rights of the respondent. When all five of the Schwartz factors were taken into account, the district court found that the appellant would most likely continue to intrude upon the respondent’s visitation rights, thereby eliminating the possibility of establishing alternative custody and visitation agreements.

On appeal, the Nevada Supreme Court affirmed the ruling from the district court, and elaborated on the significance of attempts to frustrate a non-custodial parent’s visitation rights. Although previously regarded as an issue of good faith, in connection with Schwartz’s first prong, the Court held that the appellant’s propensity to interfere with the respondent’s visitation is relevant to Schwartz’s fifth factor. The Court reasoned that plaintiffs could demonstrate a good faith motive for removal, such as a job offer, and still intend to frustrate the opposing parties’ visitation schedule from the new location.

**Hardy v. Commissioner of Internal Revenue**

181 F.3d 1002 (9th Cir. June 2, 1999)

*Court finds woman liable for taxes on her husband’s income.*

This was an appeal from a decision in the United States Tax Court affirming income tax assessment upon appellant’s community property share of her husband’s income. Hardy, 181 F.3d at 1003.

The Court of Appeals affirmed the Tax Court decision, finding the appellant liable for a one-half interest in her husband’s income. Id. at 1008. The court observed a presumption in the Tax Court that deficiency notices are correct as long as some substantive evidence supports them. Id. at 1004. If such evidence is presented, the burden of proof shifts to the taxpayer to show that the deficiency was arbitrary or erroneous. Id. If the taxpayer is able to prove by a preponderance of the evidence that the deficiency is arbitrary or erroneous, the burden returns to the Commissioner to show that the assessment was justified. Id. at 1005.

Substantive evidence of unreported income existed in the form of proof of Mr. Hardy’s income, shifting the burden to the appellant. Id. Hardy claimed that she and her husband had made an oral agreement to manage their finances independently during their marriage, and thus she should not be held liable for tax assessments on his income. Id. at 1006. The court rejected this argument however, on the basis that Nevada is a community property state, and there is a presumption that income earned during the marriage is community property. Id. This presumption can only be rebutted through clear and convincing evidence to the contrary. Id. The court found that spouses’ opinions as to the status of their income and property are irrelevant. Id.

The court noted four exceptions to the presumption of community property in Nevada as set forth in Nev. Rev. Stat. § 123.220 (1997): “(1) an agreement in writing between the spouses, which is effective only between the spouses; (2) a decree of separate maintenance issued by a court of competent jurisdiction; (3) a written agreement from one spouse to another to permit that spouse
to maintain his or her own earnings; (4) a court decree or an agreement to divide property when one spouse is institutionalized.” Id. at 1006. None of these exceptions apply in this case, as there was neither a written agreement nor a court decree dividing control of property. Id. at 1006-07.

Hardy further argued, based on Weimerskirch v. Commissioner, 596 F.2d 358 (9th Cir. 1979), that the assessment should not be presumed correct because unreported income is involved. Id. at 1005. The Court rejected the argument, finding that Weimerskirch applies only in cases of illegal income where the Commissioner is unable to provide any evidence to support the deficiency notice. Id. The Court observed that by conceding that certain facts were incorrect, the Commissioner does not lose the presumption of correctness for other facts, as such a practice would interfere with justice and common sense. Id.

The Court found that the appellant did not qualify for protection under the “innocent spouse provisions” set forth in the Internal Revenue Code § 66. Id. at 1007. The “innocent spouse provisions” allow a spouse who lives in a community property state to avoid paying taxes on the other spouse’s income from which the spouse did not receive benefit. Id. The first provision applies if the spouses have been living apart, a condition that did not exist here. Id. The second provision gives the Secretary the discretion to prevent a taxpayer from taking advantage of the community property laws if the taxpayer acted as if he or she was entitled to the entire income and failed to notify the spouse of the income prior to the due date for filing taxes. Id. Since this is a discretionary provision, the appellant could not claim entitlement to relief under the second provision. Id. The third provision provides tax relief for an innocent spouse if (1) the spouse does not file a joint tax return for any taxable year; (2) if the spouse does not include community income in their gross income; (3) the innocent spouse did not know of, and had no reason to know of, the community income, and (4) it is inequitable to include the community income in the innocent spouse’s gross income. Id. Here, Hardy had reason to know that her husband was earning a taxable income and as such could not receive protection from the third innocent spouse provision. Id. at 1007-08.

FEES

Nicolaus v. West Side Transport, Inc.

Applying the Nevada rule, rather than the federal rule, would encourage forum shopping, and violate a principle purpose of the Erie doctrine.

Defendants West Side Transport, Inc., and West Side Unlimited Corp employed Defendant Reimers. Nicolaus, 185 F.R.D. at 610. On August 27, 1996, Reimers, while driving one of his employer’s trucks, rear-ended a Roadway Express truck driven by Nicolaus. Id. Following the accident, Nicolaus re-
ceived worker’s compensation benefits from Helmsman, his employer’s worker’s compensation administrator. Id. Nicolaus then initiated a personal injury action against the defendants alleging negligence on the part of Reimers. Id. Helmsman subsequently intervened in order to assert it’s right of subrogation. Id. On January 19, 1999, a jury awarded Nicolaus $426,000. Id. at 610-11. In this opinion, the Court sought to resolve a number of post-trial motions including: "(a) Intervenor Helmsman Management Services, Inc.’s (‘Helmsman’) motion for enforcement of subrogation rights; (b) Helmsman’s motion for attorney fees and costs; (c) Defendants’ objections to Helmsman’s bill of costs; (d) Defendants’ objections to Plaintiff’s bill of costs; and (e) Defendants’ objection to Helmsman’s filing of an opposition to Defendants’ objections to Helmsman’s bill of costs.” Id. at 610.

The Court granted Helmsman’s motion for enforcement of subrogation rights. Id. at 611. Based on records of Helmsman’s indemnification of Nicolaus, the court awarded Helmsman a portion of Nicolaus’ recovery from Defendant’s and further ordered that “[a]s to Helmsman’s obligation for future indemnity and medical expenditures, that obligation is suspended to the extent of Plaintiff’s remaining recovery of the jury’s verdict from defendant’s.” Id. (citing AT&T Tech. v. Reid, 109 Nev. 592, 596, 855 P.2d 533, 536 (1993)).

Helmsman demanded attorney fees and costs based on Federal Rules of Civil Procedure (FRCP) 54(d) and 68 and Rule 68 of the Nevada Rules of Civil Procedure. Id. The Court’s opinion states that the relevant inquiry under FRCP 54(d) when “assessing a prevailing intervenor’s request for costs is whether the intervenor substantially contributed to the resolution of the issues presented.” Id. (citing American Pub. Gas Ass’n v. Federal Energy Regulatory Comm’n, 587 F.2d 1089, 1098-99 (D.C. Cir. 1978) and MDT Corp. v. New York Stock Exchange, Inc., 858 F. Supp. 1028, 1033 (C.D. Cal. 1994)). According to the Court, Helmsman had both prevailed and “substantially contributed to the resolution of the issues involved by conducting discovery, proposing jury instructions, and presenting pre-trial argument . . .” Id. Thus, the Court concluded that Helmsman was entitled to costs. Id..

Defendants also asserted that, under Fed. R. Civ. P. 68 and Rule 68 of the Nevada Rules of Civil Procedure, Helmsman could not recover costs and fees because it was not a defendant in the case. Id. The Court began its analysis of this assertion by distinguishing the two rules. Id. “Federal Rule 68 provides that, if a defending party makes an offer to allow judgment to be taken against it, and that offer is rejected, the defending party may recover its post-offer costs where the attacking party obtains a judgment less than the amount offered.” Id. Thus, the federal rule makes no provision for intervening plaintiffs such as Helmsman. Id. The Nevada rule, however, makes no such distinction and allows both attacking and defending parties to recover. Id.

Having distinguished between the two rules, the Court resorted to the Erie Doctrine to determine which rule should be applied. Id. (citing Erie R.R. Co. v.
Tompkins, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938) and Hanna v. Plumer, 380 U.S. 460, 85 S. Ct. 1136, 14 L. Ed. 2d 8 (1965)). The court cited Healy Co. v. Milwaukee Metro. Sewerage Dist., 60 F.3d 305 (7th Cir. 1995), in which the Seventh Circuit Court of Appeals held “that Wisconsin’s offer-of-settlement rule supplanted Federal Rule 68 under the Erie doctrine.” Nicolaus, 185 F.R.D. at 612-613. The Seventh Circuit found no direct conflict between the two rules, found no influence over state substantive outcomes, determined that the Wisconsin rule would not encourage forum shopping, and reasoned that the rule would not upset the balance between plaintiff and defendant rights. Id. at 613. The Court found the reasoning applied in Healy to be persuasive on the issue of costs, but determined that the issue of attorney’s fees required further consideration. Id.

Under the Nevada rule, “post-offer attorney fees are recoverable as a matter of course,” id. (citing Yamaha Motor Co. v. Arnoult, 114 Nev. 223, 955 P.2d 661 (1998) and Nev. R. Civ. P. 68(f)(2) (1997)), the federal rule only allows for the recovery of fees when those fees are included as costs by the substantive statute. Id. (citing Nusom v. Comh Woodburn, Inc., 122 F.3d 830 (9th Cir. 1997). The substantive statute applied in the present case, Nevada Revised Statute § 41.130, contained no provision for the awarding of attorney’s fees. Id. The Court determined that the state and federal rules were in conflict. Id. (citing Aceves v. Allstate Ins. Co., 68 F.3d 1160, 1168 (9th Cir. 1995)). The Court reasoned that applying the Nevada rule, rather than the federal rule, would encourage forum shopping, and violate a principle purpose of the Erie doctrine. Id. at 614. The Court held that, under the circumstances of this case, the Erie doctrine prevents the recovery of attorney fees through the application of state law. Id.

GAMING LAW

Coury v. Robison
976 P.2d 518 (Nev. Apr. 26, 1999)

City’s right to restrict gaming limited.

In Coury v. Robison, the Nevada Supreme Court considered gaming licensing restrictions initiated by the Henderson city council to promote its goal of limiting gaming activity within the city. In 1989, the City of Henderson provided the appellants, operators of the Thirstbuster tavern, with a restricted gaming license to operate fifteen gaming machines. Coury, 976 P.2d at 518. In 1991, the city rejected appellants’ application for an expansion of its gaming activities. After the appellants filed a district court action, the city council resolved the matter under a 1992 settlement agreement that allowed the tavern to expand to forty machines.

This resolution depended upon the appellants’ agreement that they would never seek further expansion of their gaming activities as long as they were the
corporation's sole shareholders. Id. However, between 1992 and 1995, the city council approved at least eighteen applications for expanded gaming activities by competing businesses within the tavern's geographic area. Subsequently, given the increase in competition, the appellants sought approval for additional gaming machines. Id. After the City Council rejected this request, the appellants sought a special use permit to remove the forty-machine restriction contained in the settlement agreement. The City Clerk refused to file this application or to place the issue on the City Council agenda. Id. Although the appellants obtained a district court writ of mandate compelling the City Clerk to place the matter on the agenda, the council refused to approve the application. Id.

As a result, the appellants and the city government respondents initiated cross-motions for summary judgment on the appellants' declaratory relief claim. The district court, without a formal comment, rejected the appellants' claim. Id. On appeal, appellants argued that the previous settlement agreement was void as an ultra vires act and that the doctrine of changed conditions invalidated the forty machine restriction. Id. at 519-20.

The Nevada Supreme Court, however, overruled the district court's dismissal of the appellants' claim due to the doctrine of changed conditions. Although it was within the City Council's power to limit gaming activity, it could not restrict such activity in a manner producing an inequitable or oppressive effect upon the appellants' use of their property. Id. The Court noted that it had adopted the doctrine of changed conditions in the restrictive covenant context where that the changed condition fundamentally thwarted the restrictions' original purpose. Id. at 521. Significantly, the Court extended the application of the doctrine beyond the restrictive covenant context to evaluations of city restrictions on gaming activity.

The Court determined that the restrictions may be invalid under the doctrine if gaming conditions in the Henderson area had changed fundamentally since the 1992 settlement agreement. Consequently, if the city's geographical limitation on gaming activity was no longer operative, the underlying purpose for the restrictions in the settlement agreement might no longer be promoted. Since the city had approved of an increase in gaming activity for appellants' competitors, this changed condition within the community could invalidate the 1992 settlement agreement since the original goal of limiting such activity may no longer be consistent with the city's actions.

The Court, therefore, determined that a genuine issue of material fact existed and that the district court's dismissal of appellants' claim was in error. The court subsequently remanded the case so as to allow the City Council to make findings as to whether such changed conditions contradict the original purposes of the settlement agreement's restrictions. Id.
Schoels v. The State of Nevada
975 P.2d 1275 (Nev. Mar. 24, 1999)

Interests in fairness and avoidance of unfair prejudice supercede the lower
court's legitimate interest in efficiency and judicial economy.

This case involved the rehearing of appellant's petition for review of con-
viction at the district court level. Schoels, 975 P.2d at 1275-1276. The dis-
trict court convicted the appellant (jury verdict) "for first-degree murder with
use of a deadly weapon and possession of a firearm by an ex-felon." Id. at
1275-76. Upon rehearing, the Nevada Supreme Court found that the district
court's refusal to allow Schoels to sever and plead guilty to the charge of pos-
session of a firearm by an ex-felon was not harmless error and remanded the
case for new trial. Id. at 1278.

Before trial, Appellant had moved that the district court allow him to plead
guilty to the charge of possession of a firearm by an ex-felon. Id. at 1276. He
intended to prevent the jury from hearing of his prior conviction for robbery.
Id. "The court denied [the motion], saying that the change of plea was 'highly
detrimental to the state.'" Id. Appellant then moved to sever the charge, but
the court, citing judicial economy, refused to do so. Id. at 1277.

Citing the lower court's interest in assuring fairness to the prosecution, the
Court initially concluded that the lower court had not abused its discretion. Id. However, on rehearing, the appellant cited to Brown v. State, a recent case in
which the Court had "held that henceforth where the state seeks conviction on
multiple counts, any counts of ex-felon in possession of a firearm must be sev-
ered so that the jury trying the other counts will not be exposed to evidence of a
defendant's prior felony convictions." Id. The Court stated that the interests in
fairness and avoidance of unfair prejudice embodied in the Brown ruling super-
cede the lower court's "legitimate interest in efficiency and judicial economy." Id.

Though the state argued that the new rule applied in Brown should only be
applied prospectively and thus would not apply to the present case, the court
stated that two material distinctions justified an independent approach to the
present case. Id. (citing Gier v. District Court, 106 Nev. 208, 212, 789 P.2d
1245, 1248 (1990) ("New rules apply prospectively unless they are rules of
constitutional law, and then they apply retroactively only under certain circum-
stances.")). First, in Brown, the appellant cited to Brown v. State and had failed to preserve the issue
through timely objection. Id. As mentioned previously, the appellant in the
present case preserved both the issue of the guilty plea and severance through
objections at trial. Id. Second, the appellant in Brown had sought only sever-
ance. Id. In the present case, the appellant had first sought to plead guilty
rather than to sever the trial. Id. Thus, at least initially, rather than decreasing
judicial economy by requiring new proceedings, the plaintiff's plea of guilty would have furthered judicial economy. Id.

The Court determined that the "character of the error [made] it possible that absent the evidence of his prior conviction for robbery, the jury might have given Schoels the benefit of the doubt and found him guilty of only second-degree murder rather than premeditated first-degree murder." Id. The Court reversed the judgment of conviction in regard to first-degree murder, and remanded the case for retrial. Id.

INSURANCE


A suit under RICO does not impair Nevada law under section 2(b) of the McCarran-Ferguson Act.

Plaintiff-respondents are the beneficiaries of group health insurance policies issued by Humana. Humana Inc., 525 U.S. at 302, 119 S. Ct. at 714. As part of the policy, plaintiff-respondents would pay 20% of charges while Humana would pay 80%. Id. Upon receiving care at Humana Hospital-Sunrise, the beneficiaries paid more than 20%, while Humana paid less than 80%, all due to a concealed agreement between the hospital and the insurer, which gave the insurer large discounts on the insurer's portion of the bill. Id. The beneficiaries brought suit alleging that Humana violated RICO through a pattern of racketeering activity; however, Humana moved for summary judgment, citing §2(b) of McCarran-Ferguson Act. Id. The McCarran-Ferguson Act's 2(b) provides that no federal statute "shall be construed to invalidate, impair, or supersede any State law enacted for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance." 15 U.S.C. § 1012(b).

The United States District Court granted Humana's motion for summary judgment, but the Ninth Circuit reversed in part. Humana, 525 U.S. at 304-305. The District Court found that RICO's treble damages provision so exceeded Nevada's administrative penalties for insurance fraud that it was tantamount to federal intervention in an area left to the states. Id. at 304. The Ninth Circuit, however, reversed in relevant part. The Circuit adopted a "direct conflict" test for determining when a federal law "invalidates, impairs, or supersedes" a state law governing insurance (See Merchants Home Delivery Serv., Inc. v. Frank B. Hall & Co., 50 F.3d 1486 (1995)). Id. at 305. Following Merchants Home and assuming that Nevada law provided for administrative penalties only, the Ninth Circuit held that the McCarran-Ferguson Act did not bar suit under RICO by the beneficiaries. Id.

Since the circuit courts have divided on the question of "Does a federal
law, which proscribes the same conduct as state law, but provides materially different remedies, 'impair' state law under the McCarran-Ferguson Act," the United States Supreme Court granted certiorari to address the question. Id.

The Supreme Court held that even though RICO did not specifically relate to the business of insurance, the McCarran-Ferguson Act nevertheless does not preclude its application. Id. at 306. Using the standard definitions of "invalidate" and "supercede", RICO's application to the beneficiaries' complaint would neither invalidate nor supercede Nevada law. Id. In addition, RICO proscribed the same conduct as in Nevada law, but provides for materially different remedies. Id. at 309. Furthermore, under Humana's definitions, Human suggests that Congress intended to cede the field of insurance regulation to the states except where Congress expressly orders otherwise, a concept the Court rejects. Id. On the other hand, the Court declined to accept the opposite view of permitting federal legislation whenever it does not conflict with state regulation. Id.

The U.S. Supreme Court announced a standard to determine if federal law impairs state law. Id. There is no impairment if federal law did not "directly conflict with state regulation," application of federal law did not "frustrate any declared state policy," or "interfere with a State's administrative regime." Id. Under this standard, the Court, in a unanimous opinion, affirmed the judgment of the Ninth Circuit. Id.

A suit under RICO would not impair Nevada law and therefore is not precluded by the McCarran-Ferguson Act. Id. at 311. Nevada's insurance laws provide administrative as well as private actions. Id. In addition, punitive damages may be awarded where there is clear and convincing evidence that the an insurer is guilty of "oppression, fraud or malice." Id. at 313. RICO's private right of action and treble damages complement Nevada's claims for relief. Id. As a result, a suit under RICO does not impair Nevada law under section 2(b) of the McCarran-Ferguson Act because RICO advances Nevada's interest in combating insurance fraud, and does not frustrate any Nevada law. Id.

**Powers vs. United Servs. Auto. Ass'n and USAA Casualty Ins. Co.**

979 P.2d 1286 (Nev. Apr. 2, 1999)

*It is only in the rarest of cases involving deception in the claims process that the materiality issue can be taken from the jury.*

Appellant Powers' boat sank. Powers initially informed insurer USAA that an exhaust hose had deteriorated before the boat sank. It was later determined that Powers had cut the exhaust hose in his attempt to stop a siphoning effect. The respondent insurer USAA denied coverage on the basis that Powers had lied about cutting the hose. Powers sued.

Following a jury trial, the court held that respondent admitted that the misstatement by Powers was not material and did not impede or hamper the insurer's investigation. The court also determined that the misstatement had no
effect on coverage because it was immaterial, and that, therefore, the insurer was liable for insurance coverage. The Supreme Court of Nevada affirmed in Powers v. United Servs. Auto. Ass’n, 114 Nev. 690, 962 P.2d 596 (1998). Rehearing was sought but the Court affirmed its original decision.

The Court ruled that materiality of a misrepresentation is generally a question of fact, and only where reasonable minds cannot differ may the issue be resolved as a matter of law. Powers, 979 P.2d at 1289. The Court reemphasized “it is only in the rarest of cases involving deception in the claims process that the materiality issue can be taken from the jury.” Id.

**Capitol Indemnity Corp. v. Blazer**

51 F. Supp. 2d 1080 (D. Nev. Apr. 27, 1999)

*Insurer not required to defend insured in assault case.*

The United States District Court for the District of Nevada held the Plaintiff had no duty to defend or indemnify the defendant due to the exclusion provisions of the insurance policy.

Capitol Indemnity Corp. ("Capitol") brought a motion for summary judgment to determine its obligation to indemnify or defend its insured, Blazer. In addition, Capitol requested reimbursement for the cost of litigation from the Blazer. The court held that the exclusion provisions of the policy precluded coverage.

Defendant Blazer is the owner and operator of the Bird Off Paradise Lounge. The underlying case involved an assault and battery of a patron by fellow patrons of the bar. The victim filed a civil suit, naming Blazer as a defendant. Blazer maintained a commercial general liability policy with Capitol, which was effective at the time of the assault and battery. The policy provided coverage for bodily injury only if it was caused by an occurrence. See Blazer, 51 F. Supp 2d at 1082. The policy defined occurrence as an “accident.” Id. The policy also contained various exclusions for events that qualified as occurrences, including an assault and Battery Exclusion, a Liquor Liability Exclusion and an exclusion for bodily injury that is “expected” from the standpoint of the insured. Id.

Capitol filed a Complaint for declaratory relief on July 13, 1998, alleging that it had no duty to defend or indemnify the defendants in the underlying case. After Blazer filed his answer, Capitol moved for summary judgment.

The court first sought to determine whether an intentional tort such as assault and battery could be defined as an occurrence. The policy defined occurrence as an “accident” but “accident” was not defined in the policy. The court relied on Nevada case law which defines “accidental” from the perspective of the insured as to whether the result of his actions was accidental, rather than looking at the intended nature of the means. See Catania v. State Farm Life Ins. Co. Inc., 598 P.2d 631 (Nev. 1979). Since Capitol presented no evidence that Blazer expected or intended the resulting injury to the victim, the actions
could not suggest something other than an occurrence. Thus, the court could not award summary judgment as to that issue.

However, the court explained that even if the injuries constituted an occurrence, the other exclusionary provisions could still bar coverage. See Blazer, 51 F. Supp 2d at 1085. The policy excluded coverage for injuries "arising out of assault and/or battery." But, as with any restriction in an insurance policy, Capitol was required to have clearly communicated to Blazer the nature of the limitation. Id. Any ambiguity would be construed in Blazer's favor. The court addressed Blazer's contention that the exclusion should not apply because the policy does not include language regarding tortious assault and battery by third persons and the application of the exclusion to the situation involving third persons renders the exclusion ambiguous.

The court rejected Blazer's assertions that the Assault and Battery Exclusion was ambiguous. The court found a New York Court of Appeals decision, Mt. Vernon Fire Ins. Co. v. Creative Hous., Ltd., 93 F. 3d 63 (2d Cir. 1996), instructive on the subject. The New York Court employed a "but for" approach and decided, "the crucial inquiry is not who perpetrated the assault, but rather whether the cause of action would exist 'but for' the assault." Id at 66. Although Nevada had not specifically addressed the "arising out of" language in the context of an assault and battery exclusion, the court noted Nevada's broad policy of interpretation of such provisions. See Blazer, 51 F. Supp 2d at 1089. The court found that none of the victim's claims could have arisen without the commission of assault and battery. Therefore, the absence of reference to third parties in the policy did not render the policy ambiguous. Thus, the exclusion precluded coverage and Capitol had no duty to defend or indemnify for damages resulting from the assault and battery.

The court also found the Liquor Liability Exclusion barred coverage on some of the claims for relief. It focused on the nexus between the allegations and the consumption of alcohol and found that the Liquor Liability Exclusion barred claims having a direct nexus to the service of or the consumption of alcohol. Id. But, the exclusion would not bar coverage for any allegations that could arise in a non-alcohol related context. Nonetheless, all of the claims were barred under the Assault and Battery Exclusion.

Finally, the court found that Capitol was not entitled to reimbursement for expenses incurred in the defense and investigation of the claims against Blazer. In order for a right of reimbursement to exist, there must be an understanding between the parties of such an agreement. Id. at 1090. The court found no evidence presented by Capitol to indicate the existence of an agreement that the insured could be held responsible for the costs incurred. Therefore, the court denied Capitol's request for reimbursement of costs.
Perelman v. Nevada
981 P.2d 1199 (Nev. Aug. 20, 1999)

*Nevada Supreme Court finds insurance fraud a continuing offense under NRS § 686A.291.*

Defendant appealed his conviction for insurance fraud. He claimed that insurance fraud was not a continuing offense under NRS § 686A.291. Furthermore, he claimed the statute of limitations had run by the time the complaint was filed because each of the false statements was a separate offense. Perelman v. State of Nevada, 981 P.2d 1199, 1200 (1999).

The court considered the statutory language of NRS § 686A.291 and determined that the statute treated insurance fraud as a continuing offense. The court held that if insurance fraud were the result of a single, criminal intent and a continuous course of conduct. *Id.* The court concluded that the statute of limitations did not begin to run until the continuous commitment of the offense is completed. *Id.*

Defendant also claimed that the complaint did not allege any facts establishing when his continuous course of conduct ended. The court stated that neither the continuing nature of the insurance fraud nor the statute of limitations was an element of the crime. Thus, neither had to be pleaded in the complaint. *Id.*

The court also noted that although there may have been questions of fact for the fact finder to resolve on the statute of limitations defense, defendant's failure to request such an instruction waived the issue. *Id.* at 1201. Therefore, the court affirmed the appellant's judgment of conviction.

Advanced Countertop Design, Inc. v. Nevada
984 P.2d 756 (Nev. Sept. 23, 1999)

*An employer who commits an intentional tort upon an employee cannot claim that the intentional act resulted in accidental injury.*

Employee, Tenney was injured on his first day of his job with Petitioner Advanced Countertop Design, Inc., a Nevada corporation, "ACD." While using a table saw which had an unshielded blade, Tenney lost part of three fingers of his right hand. As a result of the accident, Tenney filed a claim with the State Industrial Insurance System "SIIS," which accepted the claim and paid him a full settlement in excess of $19,000.00, in the form of a lump sum. Nevertheless, Tenney later brought an action in the trial court seeking damages against ACD on negligence theories, as well as for an intentional tort, specifically "intentional knowing and willful failure to provide safeguards for the saw Tenney used."

The trial court dismissed the negligence claims; however, they refused to dismiss the intentional tort claim under a misreading of two prior Nevada Supreme Court opinions. As argued by Tenney, the Court, in Arteaga v. Ibarra,
109 Nev. 772, 776, 858 P.2d 387, 390 (1993), held that “an injured employee’s acceptance of a final SIIS award acts as an accord and satisfaction of any common law rights, thereby extinguishing any common law right the employee might have had against his employer.” But the Court also held in Barjesteh v. Faye’s Pub, 106 Nev. 120, 122, 787 P.2d 405, 406 (1990), that “[a]n employer who commits an intentional tort upon an employee cannot claim that the intentional act resulted in accidental injury.” As a result, Tenney’s advanced the argument that Arteaga must mean that the acceptance of a final SIIS settlement acted to dispose of the negligence claim, but not the intentional tort claim. The Court disagreed with this argument and granted the writ of mandate in favor of petitioner ordering the trial court to dismiss Tenney’s intentional tort claim.


Court adopts two-factor test to determine whether activity engaged in is a “business pursuit.”


PROFESSIONAL RESPONSIBILITY

In Re; Discipline of Roderic A. Carucci
Nev. LEXIS 22 (Mar. 8, 1999)

Court upholds attorney suspension but reduces fine.

The Supreme Court heard an automatic appeal of a decision by the Northern Nevada Disciplinary Board that recommended attorney, Roderic A. Carucci, be suspended for three months from the practice of law for a violation of SRC 203(3). The Board also recommended that Carucci be required to pay a substantial fine and costs. The Board found that Carucci violated the canon that forbids attorneys from engaging in conduct of dishonesty, fraud, deceit or misrepresentation. Carucci engaged in such conduct by false duplicate tax returns in order to qualify for a loan for a yacht.

The Court held that the disciplinary panel’s findings and recommendation are persuasive but not binding on the Court. The Court will review such findings de novo. The Court supported the Board’s findings and upheld the suspension, but ruled the Board’s fine excessive and reduced it.
In Re Discipline of Gary Keith Salomons

1999 Nev. LEXIS 24 (Mar. 25, 1999)

Discipline ordered for attorney convicted of out-of-state felony.

A hearing panel of the Southern Nevada Disciplinary Board recommended disciplinary action in Nevada for an attorney convicted of a felony in California. The Court agreed with the panel’s recommendation and imposed an order for discipline.

A California court convicted Salomons, a member of both the California and Nevada bars, of aiding and abetting the structuring of a transaction to evade federal reporting requirements. The California bar imposed a suspension of one year and a probationary period of three years. In addition, Salomons was to abide by the conditions of his criminal probation, to attend the California State Bar Ethics School and pass the MPRE.

The panel recommended reciprocal discipline, mirroring the California sanctions. The panel sought disciplinary action on the finding that Salomons violated Nevada Supreme Court Rule 203(2) and 202(3) in that he committed a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer, and he engaged in conduct involving dishonesty, deceit, fraud or misrepresentation. This case was brought before the Court on an automatic appeal from the panel’s recommendation of discipline.

The Court agreed with and accepted the panel’s recommendation for disciplinary action.

In re Discipline of Lee E. Walker


Attorney seeking to overcome a petition by the state bar counsel for a temporary suspension of licensure must present convincing, certified evidence of a reason not to be suspended.

Bar counsel for the State Bar of Nevada petitioned the court to enter an order temporarily suspending attorney Lee E. Walker from the practice of law pursuant to the provisions of Nevada Supreme Court Rule 111 (SCR 111). The petition was documented with a certified copy of a judgment of conviction entered against Walker on February 3, 1999, from the Fifth Judicial District Court, Washington County, Utah, pursuant to a jury verdict, of one count of securities fraud, a felony under Utah law, and one count of money laundering, a second degree felony under Utah law. Walker was placed on probation for a period of thirty-six months, ordered to pay restitution, and prohibited from violating the law or engaging in any transaction involving the offer or sale of securities to any third person. Walker opposed the petition, asserting he was moving for post-conviction relief and a new trial, and would be appealing his conviction if those motions were unsuccessful. Walker’s supporting partial unofficial transcript was not certified or attested to as accurate.
The legal issues presented concerned the procedure for temporary suspension of law license and a determination of what the disciplinary proceedings are in order to decide the extent of discipline to be imposed.

The Court noted that the petition and the supporting documentation submitted by bar counsel conclusively established Walker's conviction. In Re Discipline of Lee E. Walker, 1999 Nev. LEXIS 25 *1 (March 25, 1999). Walker had failed to present adequate supporting documentation, presenting only an uncertified, unattested document that did not even clearly identify the transcriber in his defense and opposition to the motion.

The Court held that the petition conclusively established Walker's conviction of a serious crime warranting temporary suspension, and temporarily suspended Walker from the practice of law and referred the matter to the Southern Nevada Disciplinary Board for the initiation of formal disciplinary proceedings. The sole issue to be determined was the extent of discipline to be imposed. Id.

An attorney seeking to overcome a petition by the state bar counsel for a temporary suspension of licensure will have to present convincing, certified evidence of a reason not to be suspended in accordance with Nev. Sup. Ct. R. 111(1) through 111(3). Id. at 2. Once suspended, the sole issue before the Court is whether the Disciplinary Board proceedings may be dealing is the extent of discipline to be impose. Id.


Court found clear and convincing evidence in support of recommendations of Southern Nevada Disciplinary Board.

Attorney Gelb filed a petition for reinstatement to the practice of law. In July 1993, the Court suspended Gelb from the practice of law for six months and one day. Gelb filed his petition for reinstatement in April 1998.

The Southern Nevada Disciplinary Board of the State of Nevada conducted a hearing on Gelb's petition for reinstatement. The Board concluded that Gelb had met his burden pursuant to Nev. Sup. Ct. R. 116(3), and recommended that Gelb be reinstated subject to certain conditions, among which was the condition that Gelb fulfill the Continuing Legal Education, "CLE," requirements as set forth in Nev. Sup. Ct. R. 210, complete two additional hours of ethics CLE, and attend the Bridge the Gap program offered by the state bar. The Court found clear and convincing evidence in support of the recommendations of the Board, and approved its recommendations in substantial part.
In re: Reinstatement of Eugenia Ohrenschall Ross

1999 Nev. LEXIS 35 (Nev. May 20, 1999)

Court ordered attorney automatically reinstated, based on submission of proof that she is no longer precluded from practicing law.

In 1989, the court ordered Eugenia Ohrenschall Ross to disability inactive status based on a disabling bone disease, which prevented her from the practice of law pursuant to SUP. CT. R. 117. Any disciplinary proceedings at that time were suspended. Subsequently, the court additionally suspended attorney Ross from the active practice of law for failure to comply with continuing education requirements under SUP.CT. R. 213. In April 1999, attorney Ross filed a petition for reinstatement to active status.

The court ordered that attorney Ross shall automatically be reinstated, based on submission of proof that she is no longer precluded from practicing law or defending herself in disciplinary proceedings. Furthermore, the court ordered that she has fully comply with the continuing education requirements as set forth in SUP.CT. R. 213. The court further ordered resumption of disciplinary proceedings previously suspended.

In re Discipline of Arnold Weinstock.

1999 Nev. LEXIS 36 (Nev. May 27, 1999)

Clear and convincing evidence supported Southern Nevada Disciplinary Board’s findings of violations.

The Southern Nevada Disciplinary Board charged the Petitioner for violating various disciplinary rules. The panel, finding that certain alleged violations were supported by evidence, ordered a six-month suspension of the petitioner’s license to practice law. The board also required that petitioner pass the state’s professional responsibility exam within six months of the court order and take additional hours of continuing legal education.

This action was brought as an automatic appeal from the board’s hearing and report, where the Court found that clear and convincing evidence supported the Board’s findings of violations. Hence, the Court found that the board’s recommendation was appropriate.

In re Discipline of Christopher Maglaras

1999 Nev. LEXIS 34 (Nev. May 27, 1999)

Attorney disbarred and ordered to pay the costs of disciplinary proceeding.

This action is an automatic appeal from the recommendation of the Southern Nevada Disciplinary Board that attorney, Mr. Maglaras, be disbarred and ordered to pay restitution to former clients from whom he had misappropriated funds. The panel found various violations of professional conduct on the part of Maglaras, including misappropriation of client funds in an amount of at least $183,284.00 for his own use. Since Maglaras failed to answer the charges
brought by the hearing panel, they were deemed admitted and the panel’s recommendations were approved. Therefore, Maglaras was disbarred and ordered to pay the costs of the disciplinary proceeding as well as to make restitution to his former clients.

In re Discipline of Peter A Perry  
Nev. LEXIS 80 (Nev. Nov. 19, 1999)  
Attorney suspension for commission of serious crime upheld  
The State Bar of Nevada requested that the Supreme Court temporarily suspend attorney, Peter A. Perry, from the practice of law. Perry was convicted of wire fraud in federal district court of Nevada, fined and sentenced to six months in a community confinement center to be followed by three years of supervised release.

The Court found that the Bar’s evidence conclusively established Perry’s conviction and held that the conviction for committing a serious crime warranted Perry’s temporary suspension from the practice of law. The Court referred the matter to the Northern Nevada Disciplinary Board for decision on the extent of discipline to be imposed.

Snyder v. York  
988 P.2d 793 (Nev. Nov. 29, 1999)  
Court refused to enforce attorney’s fees clause in contract when in excess of $15 statutory limit for attorney’s fees in small claims court.  
This case involved an appeal from a district court order granting summary judgment and denying attorney’s fees in excess of $15, the amount limited by Nev. Rev. Stat. § 73.050 for appeals from small claim actions. Snyder, 988 P.2d at 794.

The appellant sold a house to the respondent. The purchase agreement provided that if a dispute arose between the buyer and seller, attorney’s fees would be awarded to the prevailing party. The respondent brought a claim for $2,500 against the appellant, in justice court, alleging that appellant did not disclose known defects to the house. The appellant prevailed on the claim and requested $11,932.50 in attorney’s fees. As the amount of attorney’s fees requested exceeded the jurisdictional amount of the justice court, the court transferred the appellant’s Motion for Attorney’s Fees to the district court to be heard with the respondent’s appeal. Id. at 793. The District Court found that its original jurisdiction to consider the Motion for Attorney’s Fees was limited by Nev. Rev. Stat. § 73.050 and granted the appellant’s Supplemental Motion for Attorney’s Fees in the amount of $15. Id. at 793-94. The appellant filed a separate action in district court for attorney’s fees pursuant to the purchase agreement between the parties. The district court granted summary judgment to the respondent, as the appellant received reasonable attorney’s fees under
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Nev. Rev. Stat. § 73.050. The appellant appealed, resulting in this decision. Id. at 794.

The court affirmed the district court’s decision, finding that “the legislature intended to make the small claims court a ‘people’s court’ and to discourage attorneys from appearing.” Id. at 795. The court further found it absurd to award large attorney’s fees in a small claims case, observing that the small claims appeals form clearly indicates the $15 limit on attorney’s fees. Id.

In re Reinstatement of Danny M. Winder

Court affirmed Nevada State Bar panel’s denial of reinstatement for failure to comply with the terms set forth in the plea agreement.

A Nevada attorney, indefinitely suspended in 1990 from law practice pursuant to a plea-agreement, petitioned the Nevada State Bar for reinstatement. A panel of the Bar denied his petition. The attorney appealed this denial to the Nevada Supreme Court. The Court affirmed the panel’s denial of reinstatement for failure to comply with the terms set forth in the plea agreement without prejudice, thus permitting the attorney to re-petition for reinstatement once the terms of the plea agreement were met.

The panel’s decision to deny the petition was based on Winder’s failure to comply with three of the ten conditions he agreed to at the time of his indefinite suspension. The panel was concerned about Winder’s testimony that he had lied in the original discipline proceeding about having a gambling problem. Specifically, in the original discipline proceeding, Winder testified that he had a gambling problem, and that this contributed to his disciplinary troubles. Subsequently, at the reinstatement hearing, Winder testified that he had previously lied about having a gambling problem, and stated that he had claimed to have such a problem because he thought it was more acceptable than a drug problem. Winder’s testimony to this effect at the reinstatement hearing was intended to show that the condition with respect to gambling should not be considered important. However, one of Winder’s counselors also testified at the reinstatement hearing, and stated that he had treated Winder for a gambling problem after Winder was suspended.

In re Reinstatement of Gary Keith Salomons, Esq.

Southern Board of State Bar recommended reinstatement of attorney on certain conditions.

The Nevada Supreme Court suspended the petitioner Gary Keith Salomons on June 23, 1998 for one year. After conducting a hearing pursuant to Nevada Supreme Court Rule 116(3) upon petition for reinstatement, the Southern Board of the State Bar recommended reinstatement of Salomons on condition
that: (1) he provide Nevada bar counsel with quarterly reports that petitioner is providing California bar counsel until his California bar probation expires, (2) he notify Nevada bar counsel of any violation of his California bar probation, and (3) he notify Nevada bar counsel of any violation of his criminal probation.

In re Discipline of Mark L. Sturdivant No. 33359
1999 Nev. LEXIS 26 (Nev. March 25, 1999)

This is an automatic appeal by an attorney who represented a husband and wife in the husband's adoption of the wife's two children. The appellant engaged in a series of baffling lies to his clients, resulting in a delay. The appellant readily admits to lying and misleading his clients in regard to the filing of the adoption petition and court dates that were never scheduled. Courts holding and analysis: the courts accepted the recommendation of the Disciplinary Board, calling for suspended disbarment and a monetary fine of $5,000.

PROPERTY

County of Clark v Briant Buckwalter
974 P.2d 1162 (Nev. Apr. 9, 1999)

Supreme Court replaces “highest price” with “most probable price” standard in land valuation.

This case is an appeal from a jury verdict in the Eighth Judicial District Court, Clark County. The respondents purchased the property in question in the early 1980’s, and used it to house apartment buildings, despite its’ commercial zoning. In September of 1993, Clark County adopted a resolution of “need and necessity”, and sought to condemn the parcels for an expansion of the Las Vegas Convention Center. When negations between the parties failed, the appellant filed a condemnation action against the landowners.

Prior to trial, the respondents filed a motion to define the fair market value of the land as the “highest price” that would be yielded on the open market. This interpretation conflicted with Nev. Rev. Stat. § 37.009 (1993), which defines the fair market value as the “most probable price” the land would yield on the open market. Nevada Revised Statute § 37.009 provides that, “’Value’ means the most probable price which a property would bring in a competitive and open market under the conditions of a fair sale, without the price being affected by undue stimulus, whereby the sale is consummated on a specified date and the title to the property is passed from the seller to the buyer.”

Respondents argued that the statute was unconstitutional because the legislature had no authority to determine the fair market value. The district court granted the respondents’ motion, and instructed the jury accordingly. The jury returned a special verdict, dictating that the proper value of the property was $9,000,000.00. This figure was substantially higher than the $4,560,000.00 es-
timate from Clark County’s expert, based on the “most probable price” standard.

The appellants contended that the district court committed reversible error in adopting the “highest price” standard. The county claimed that the jury instruction regarding the “highest price”, assumed from Wheeler v State Department of Transportation, 105 Nev. 217, 773 P.2d 728 (1989), was rejected by the Nevada legislature in 1993, with the amendment of Nev. Rev. Stat. § 37.009.

The Nevada Supreme Court agreed with appellants. The Court also found that § 37.009 is not unconstitutional because the legislature has authority to make laws concerning eminent domain, despite prior holdings dictating that just compensation for private property is a judicial function that cannot be interfered with by statute. Further, the Court expressly overruled the portions of Wheeler that referenced this issue.

In concurring, Justice Maupin separated from the majority’s holding that § 37.009, as amended, warranted an overruling in the Wheeler case. Maupin concluded that the terms “highest price” and “most probable price” are synonymous. The theory is that if the jury were given two instructions, one concerning the statutory language, and the other defining the “highest price” as that which would be agreed to buy a buyer and seller under normal market conditions, the outcome would have been the same, and the Wheeler case could remain intact.

Schmanski v. Schmanski
984 P.2d 752 (Nev. Aug. 27, 1999)

Court makes community property division of family trusts.

At issue are the proceeds of three trusts in a divorce proceeding between Dean and Kim Schmanski. Dean’s father Don established the first two trusts from a stock gift to Dean. Dean subsequently sold the stock and placed the proceeds in a joint account to which both Dean and Kim Schmanski had access and used for community purposes. Later, Dean used funds from the account to purchase shares of stock that were transferred to the two trusts. Don established the third trust for the benefit of Dean and any children of Dean under the terms of a stock purchase agreement in which the trust was to pay for the stock with a note issued on a non-recourse basis. Don was to fund the payments on the note with annual contributions.

The district court decided that the first two trusts were community property and ordered an equal division. The district court found the third trust was 85.12% community property and 14.88% Deans separate property -- the division being made on the basis of the note already paid by Dean’s father Don. Schmanski v. Schmanski, 984 P.2d 752, 756 (1999). Dean appealed the district court decision and the Nevada Supreme Court upheld the district court’s rulings as to the first two trusts, but reversed as to the third, declaring the proceeds of
the trust to be Dean’s separate property.

In the court’s analysis of the first two trusts, the court focused on three issues: whether Nev. Rev. Stat. § 125.150(2) requires that separate property placed into joint tenancy is irrevocably transmuted into community property, whether separate property placed into joint tenancy is presumed to be a gift to the community and whether the ability to purchase the stock placed in the trust was a function of a special relationship of the son and the father or a result of employment within the marriage.

The court determined that Nev. Rev. Stat. § 125.150 (2) did not require the irrevocable transmutation of separate property placed into joint tenancy into community property, but only required that it be disposed of in the same manner, subject to other provisions. The court further determined that in accordance with Gordon, separate property placed into joint tenancy is presumed to be a gift to the community unless the presumption is overcome by clear and convincing evidence. It further concluded that the opportunity to purchase the stock, which had been placed into the trusts, was a function of the employment of Dean during the marriage, as the opportunity was given to other employees, and as such, was not a gift from the father. Based on this analysis, the court determined the district court’s decision was supported by substantial evidence and affirmed the decision as to the first two trusts. Id.

As to the third trust, the court focused on the intent of Dean’s father Don in establishing the trust, and on a community obligation for the balance of the note used to purchase the stock. The court reviewed the testimony of Don and found the intent of the donor was to benefit only Dean and any children of Dean. It further determined that since the note used to purchase the stock was non-recourse, there was no community obligation for its payment. Since the determination of the district court that 85.12% of the trust was community property based on a community obligation to pay the note, the Nevada Supreme Court reversed the district court’s order with respect to the third trust and determined the trust proceeds were the separate property of Dean. Id.

TORTS

Sahara Gaming Corporation v. Culinary Workers Union Local 226
984 P. 2d 164 (Nev. Aug. 27, 1999)

Defamation claim denied in union’s use of false allegations from foreign state case.

In Sahara Gaming Corporation v. Culinary Workers Union Local 226, 984 P. 2d 164 (Nev. 1999), the Nevada Supreme Court considered whether the publication by a labor union of false and malicious fraud allegations made in an out of state judicial proceeding constituted defamation. Id. Appellant Sahara Gaming was involved in a labor dispute at the time it was negotiating a multi-
million dollar gaming management and land sales contract with Players International. Respondent labor union sent a letter to Players International in which it quoted from a complaint filed against Sahara Gaming in Mississippi. The union’s letter noted the fraud allegations against Sahara Gaming in the out of state complaint. Id. at 165. After receiving the letter, Players International cancelled the management consulting agreement that would have provided a $2,900,000 consulting fee. Sahara filed suit against the union for defamation, civil conspiracy, interference with contract, and interference with prospective economic advantage. Sahara alleged that the union knew that the fraud allegations were false and that it published the allegations with the intent to injure Sahara Gaming. Id.

The district court granted the union’s motion for summary judgment on the defamation claim. The trial court held that the union had fairly and accurately quoted the allegations contained in the Mississippi complaint and that the union had the right to provide a fair recital of the court case. Id. Since the civil conspiracy and interference with contract and economic advantage claims were derivative of the defamation claim, the district court granted the union’s summary judgment motions on these issues as well. Id.

In its affirmation of the district court’s ruling, the Nevada Supreme Court considered whether an immunity privilege could be extended to the union’s actions. It noted that courts provide a special privilege of absolute immunity from defamation liability to the news media and the general public when reporting events in a judicial proceeding. Id. at 166. The Court explained that the same privilege extends to any person who republishes material from a judicial proceeding available to the general public. According to the Court, this privilege applies even when a party publishes the defamatory statements with full knowledge of their falsity and with intent to injure. Id.

The Court established that the defamatory statement must meet a broad relevancy requirement to be privileged. Specifically, the defamatory material must have some bearing on the subject matter of the judicial proceeding in order to be absolutely privileged. Id. at 168. Since the Court viewed the union’s letter as a fair and accurate republication of the fraud allegations relevant to the issues in the Mississippi judicial proceeding, the union could not be held liable on a defamation claim. The Court justified this approach by asserting that promotion of freedom of speech in such circumstances by the common law privilege outweighs the risk that individuals will abuse the privilege with false and malicious statements.

A number of concurring opinions challenged this rationale. Justice Shearing, joined by Justice Agosti, disputed the majority’s analysis of the relevant case law and disagreed with the limitations placed upon the privilege by The Restatement (Second) of Torts 611. Id. at 168-69. Chief Justice Rose and Justice Young opposed the majority’s broad application of the privilege to cases involving the publishing party’s knowledge of the falsity of the defama-
tory material. In contrast, Chief Justice Rose and Justice Young would remove the privilege in cases involving actual malice. They affirmed the lower court ruling only due to the lack of an issue of material fact that could be tried in court. Id. at 171. Similarly, Justice Becker reasoned that courts should apply an absolute privilege to the press but only a limited and conditional privilege to the general public. For Justice Becker, the privilege should not be available to individuals who have actual knowledge of the falsity of the information contained in a legal proceeding. Id. at 172.

**Vinci v. Las Vegas Sands, Inc.**

984 P.2d 750 (Nev. Aug. 27, 1999)

Court concludes there is no statutory or common-law duty imposed upon Sands or its employees to warn patrons that conduct is unlawful.

The plaintiff, Angelina Vinci, brought one claim against the Sands Hotel for a trip-and-fall accident, and another for abuse of process, negligence, and negligent hiring and training. These claims stemmed from an incident in which she was arrested for accepting gaming chips without a marker. The charges against Vinci were ultimately dropped. However, two of the Sand’s employees were indicted on charges of conspiracy under sections 199.480 and 465.070 of the Nevada Revised Statutes. The district court granted partial summary judgment for the Hotel and refused to continue the trip-and-fall case until Vinci’s appeal was decided since they involved two separate and distinct issues. Vinci stipulated to dismiss the remaining claim because the court excluded evidence of the gaming incident from the trip-and-fall claim.

The Nevada Supreme Court concluded there were no issues of material fact to Vinci’s negligent hiring and training claim, citing Nevada Rules of Criminal Procedures 56(c) and Sawyer v. Sugarless Shops, 106 Nev. 265, 267; 792 P.2d 14, 15 (1990). The Court stated there was no evidence in the record to support the notion that the Sands failed in any of its duties regarding employee hiring and training. Vinci did not appeal the dismissal of her abuse of process claim.

Citing Warmbrodt v. Blanchard, 100 Nev. 703, 707; 692 P.2d 1282, 1285 (1984), the Court concluded that there is no statutory or common-law duty imposed upon the Sands or its employees to warn patrons that their conduct is unlawful, and that the district court correctly determined that section 456.101 of the Nevada Revised Statutes does not create such a duty.

In reaching its conclusion, the Court expressly overruled two cases that implied there was a duty on casinos and employees to warn patrons of unlawful conduct, and in El Dorado Hotel, Inc. v. Brown, 100 Nev. 622, 625; 691 P.2d 436, 439 (1984), casino employees knew that a patron, who was later arrested, was playing a slot machine out of adjustment. In Hazelwood v. Harrah’s, 109 Nev. 1005, 1007-09; 862 P.2d 1189, 1191 (1993), a patron, who also was arrested, was allowed by an employee to search for a winning keno ticket that had been thrown in the trash for which he had not paid. The Court expressly
stated that the decision in Vinci overruled these two cases and concluded that neither the Sands nor its employees have any duty to warn patrons of illegal conduct. Therefore the Court decided the claim was properly dismissed by the district court.

Kusmirek v. MGM Grand Hotel, Inc., et al.
73 F.Supp.2d 1222 (Nev. Sept. 29, 1999)

MGM not negligent for plaintiff's injuries caused when third party exited valet area.

At the valet area of the MGM Hotel and Casino, Defendant Machowsky received his car from an attendant. Kusmirek v. MGM Grand Hotel, 73 F.Supp.2d at 1223 (Nev. 1999). The car was running when Machowsky entered it. Id. Machowsky put the car into gear and it shot forward, pinning Plaintiff Kusmirek between the back of her car and the front of Machowsky's car. Id. Kusmirek, as a result of the accident, lost her left leg and underwent surgical amputation of her right leg above the knee. Id. Defendant MGM seeks summary judgment against plaintiff and Machowsky. Id. The Court granted MGM's motion for summary judgment. Id. at 1227.

The Court held the plaintiff failed to raise a genuine issue of material fact as to whether MGM's alleged negligence was the proximate cause of plaintiff's injuries. First, MGM had no duty to take precautions to protect guests from sudden acceleration by vehicles in the valet area. There were no past similar accidents to put MGM on notice to reasonably anticipate negligent conduct by third parties or mechanical malfunctions likely to endanger the safety of persons in the valet area. Id. at 1225. Second, MGM's failure to provide additional personnel in valet area was not proximate cause of injury. It is mere speculation that additional personnel in the valet area would have prevented the accident. Id. at 1226. Furthermore, the forward surge of the car was the intervening cause of the accident. Id. Finally, MGM's duty to deliver cars does not require that the vehicle would be first in line to exit valet area. This proposal would impose upon MGM a burden out of proportion to the anticipated risk by increasing driver inconvenience and wasting valuable valet time. Id. at 1226-1227.

Grotts v. Zahner

Standing for intentional infliction of emotional distress claim limited to family members.

In Grotts v. Zahner, 989 P.2d 415 (Nev. 1999), the Nevada Supreme Court considered whether the fiancé of an accident victim had standing for an action based on bystander emotional distress. Id. at 416. With respect to her negligent infliction of emotional distress claim against Gertrude Zahner, the appel-
lant, Kellie Grotts, asserted that she had standing due to her "affianced relationship to the victim." Id. The appellant claimed that such damages were justifiable due to the death of her fiancé and the appellant's resulting distress as a bystander.

In its affirmation of the district court's dismissal of the claim, the Nevada Supreme Court noted that a witness to an accident can recover damages for emotional distress in limited situations. Id. In Zahner, the court concluded that standing for such claims is dependent upon the closeness of the relationship between the victim and the bystander. As a general proposition, the relationship should be based upon family membership, either by blood or by marriage. Id. As a matter of law, immediate family members would satisfy this standing requirement. If the relationship extends beyond the immediate family, the fact finder must assess the nature and quality of the relationship to determine if the it is close enough to confer standing. Id.

Such relationships constitute the few cases in which standing becomes an issue of fact. Zahner, 989 P.2d at 416 (the Zahner court's approach overruled its previous decision in State Department of Transportation v. Hill, 963 P.2d 480 (Nev. 1998). In Hill, the Court held that the closeness of the relationship between the bystander and victim was a question of fact. In contrast, the Zahner court concluded that a more limited approach was needed, thus justifying a denial of recovery as a matter of law for claimants in non-family relationships).

In rejecting the appellant's standing, the Nevada Supreme Court held that, as a matter of law, non-family relationships fail to qualify for the required standing for such claims. The Court noted that the appellant, although the victim's fiancé, was not a member of the victim's family by blood or by marriage. Lacking the required close relationship with the victim, the appellant lacked standing for a bystander emotional distress claim. Id. The majority reasoned that such a limitation was necessary in order to promote predictability and fairness in such cases. Id. at 416 - 17.

In dissent, Chief Justice Rose challenged the majority opinion's departure from its recent ruling in Hill. Specifically, the dissent argued that the Zahner opinion undermined the consistency and predictability promoted by the doctrine of stare decisis. Chief Justice Rose concluded that the majority had prematurely disregarded its recent precedent in Hill. Id. at 417. Further, the dissent argued that a rule limiting recovery only to those with a marital or blood relationship to the victim was prejudicial to those who had non-traditional relationships. The dissent also noted that, by preventing a factual determination of the standing issue, the Zahner rule would preclude recovery by those who had a loving, non-family relationship. Id. at 417 n.6.

In response to the dissent, the majority opined that, in the absence of an objective test, almost any type of close relationship could justify a "triable" claim.