May 2017, Vol. 39, No. 5

The Writ

Official Publication of the Washoe County Bar Association

Wednesday, May 10, 2017

Meet Your Legal Service Providers

Luncheon, 12noon, Harrah's Convention Center

The Executive Directors of Washoe Legal Services and the Legal Aid Center of Southern Nevada will meet with members of the Washoe County Bar Association to discuss the important role that legal aid organizations play in protecting Nevada's most vulnerable citizens. James P. Conway, Executive Director of Washoe Legal Services, and Barbara E. Buckley, Executive Director of Legal Aid Center of Southern Nevada, will discuss the different programs offered by their respective organizations in various areas of law such as child welfare, immigration, housing, adult guardianship, consumer protection and family law/domestic violence. They will also present an overview of how legal serves are funded, their organizations' current service levels, gaps in service tthroughout the state, pro-bono opportunities for private attorneys, and strategies to maintain and increase legal-aid funding. They will also discuss the important role that self-help programs play in helping low-income individuals access the courts.

RSVP no later than Monday, May 8. $25 per person. $200 for a table of eight. Sign up online at wcbar.org.

Random Thoughts

Craig Denney
President

Social Media in the Legal Profession: Pitfalls and Landmines

Social media websites have become instrumental over the past decade in the business and practice of law. It would not be a surprise to know that many WCBA members are also members of Facebook, Twitter, and LinkedIn. The Association of Corporate Counsel noted that Facebook has over 1.1 billion users. Nine out of 10 business executives are on Twitter. And LinkedIn has over 238 million users. (https://www.acc.com/chapters/sandiego/upload/The-Ethics-of-Social-Media.pdf)

Attorneys and Law firms use social media for advertising and business development to attract new clients. Legal professionals network with colleagues who they meet at bar conferences and CLEs. They exchange electronic vCards instead of old fashioned paper business cards. They exchange contact information with a text message as opposed to a telephone call. They invite one another to read and comment on blogs about cases and legal issues. Lawyers author and publish articles and press releases about significant cases and trial victories.

But the envelope continues to be pushed on the internet. We see lawyers (and more than a few politicians who may or may not have legal training) use Twitter and Facebook to comment, disagree, and debate various legal issues and case decisions. Some go so far as to cross over the line and even criticize judges in pending cases. Once the comments are typed and sent via blog, email, or text message, are they preserved forever? If you think something is deleted permanently, you may want to think again. The caveat is that one should pause and think before pressing enter or send with an electronic snarky or caustic remark about a legal colleague or issue.

Like many things in life, too much of almost anything can be detrimental for your health. Too much social media can be detrimental to your legal practice if you fail to abide by ethical rules and Rules of Professional Conduct. Attorneys must read, understand, and abide by Rules of Professional Responsibility in advertising their professional services. Bar complaints can be generated when a lawyer's advertisement is misleading. Social media profiles (like LinkedIn, Facebook, Avvo) may be deemed as advertisements. Electronic solicitation can be treated just like an old fashioned mailed solicitation. It should not come as a surprise that California has applied lawyer advertising rules to social media posts.

Lawyers who use social media to author blog posts must be cautious about inadvertently forming an attorney-client relationship with non-lawyers when a person begins interacting with the lawyer to discuss an issue that may turn into consultation about a legal matter. Where is the line crossed?

The legal marketing website Avvo helps people find lawyers on-line for representation and advice. Lawyers must be cognizant that if they begin exchanging emails or texts with a person about a legal question that the person may reasonably be under the impression the lawyer is giving advice (even if an engagement letter is never signed and no retainer is paid). If an attorney client relationship is formed, there are obligations of confidentiality and the duty to avoid conflicts of interest.

Computer forensics consultant and attorney Frederick Lane has published books and articles on "cybertraps." Mr. Lane advises attorneys to be

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The WRIT
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Conversations on Discovery

By Wesley M. Ayres, Discovery Commissioner

Each percipient witness who attends "the courts of this State in any . . . civil suit or proceeding before a court of record . . . in obedience to a subpoena" is generally entitled to be paid a witness fee of $25 for each day's attendance, in addition to a mileage or travel reimbursement. *See* NRS 50.225 (2015). In this context, a deposition is deemed a proceeding before a court of record. *See Waterman v. Oliver, Maner & Fray, LLP,* No. CV411-129, 2011 WL 13056838, at *1 (S.D. Ga. Dec. 14, 2011) ("[a] deposition is a court proceeding"); *State Farm Mut. Auto. Ins. Co. v. Lincow*, 715 F. Supp. 2d 617, 642 (E.D. Pa. 2010) (same). Accordingly, a person is not obligated to appear in a civil action or proceeding unless these payments have been made. *See* NRS 50.225(6) (2015). This point is reinforced by NRCP 45(b)(1), which makes clear that proper service of a subpoena requires delivery of the subpoena to the witness "*and* if the person's attendance is commanded, by tendering to that person the fees for one day's attendance and the mileage allowed by law" (emphasis added).

Experts, of course, are compensated differently. NRCP 26(b)(4)(C) provides that a party seeking discovery generally must "pay the expert a reasonable fee for time spent in responding to discovery under this subdivision." NRCP 30(h)(1) provides more specifically that a party who deposes an expert "shall pay the reasonable and customary hourly or daily fee for the actual time consumed in the examination of that expert by the party noticing the deposition." The party who retained the expert is responsible for any fee charged by the expert in preparing for and reviewing the deposition. Consulting experts generally are not subject to discovery; but if discovery is permitted, "the court shall require the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert." *See* NRCP 26(b)(4)(C).

A treating physician who testifies at trial does not neatly fall within any of these categories. In part, he or she is a percipient witness who has personal knowledge about a party's physical or mental condition. But the physician often is asked to provide opinions based upon his or her perception of the party by applying the physician's special knowledge, skill, experience, training, or education. *See* NRS 50.265, .275 (2015). The hybrid character of a testifying treating physician creates an issue regarding the proper compensation for that witness. A review of the case law reveals a split of authority. Some courts have held that a treating physician should be compensated as a percipient witness, while others believe that the physician should be paid as an expert witness.

The court in *Baker v. Taco Bell Corp., 163 F.R.D. 348 (D. Colo. 1995)*, offered the following explanation in support of its decision to compensate treating physicians like ordinary fact witnesses:

> Treating physicians are not retained for purposes of trial. Their testimony is based upon their personal knowledge of the treatment of the patient and not information acquired from outside sources for the purpose of giving an opinion in anticipation of trial. They are witnesses testifying to the facts of their examination, diagnosis and treatment of a patient. It does not mean that the treating physicians do not have an opinion as to the cause of an injury based upon their examination of the patient or to the degree of injury in the future. These opinions are a necessary part of the treatment of the patient. Such opinions do not make the treating physicians experts as defined by Rule 26(b)(4)(C).

Id. at 349. Similarly, in *Fisher v. Ford Motor Co.*, 178 F.R.D. 195 (N.D. Ohio 1998), the court reasoned that Rule 26(b)(4)(C) is irrelevant when the proposed deponent is a treating physician:

> Courts consistently have found that treating physicians are not expert witnesses merely by virtue of their expertise in their respective fields. Only if their testimony is based on outside knowledge, not on personal knowledge of the patient and his or her treatment, may they be deemed experts.

Id. at 197. The court recognized that this analysis could result in a substantial loss of income for the witness, especially if a doctor is frequently required to testify as a treating physician. But it emphasized that all percipient witnesses may be compelled to provide testimony regarding their relevant personal knowledge, and that "[n]o exceptions are made for hardship, inconvenience, unfairness, or professional status." *See id.* at 199.

The court in *Hoover v. United States*, No. 01 C 2372, 2002 WL 1949734 (N.D. Ill. Aug. 22, 2002), offers a rationale for providing treating physicians a reasonable fee, rather than just the statutory witness fee. This court recognized that various other courts have viewed treating physicians as occurrence witnesses. But it observed that as of 1993, federal Rule 26(a)(2) contemplates two sets of experts whose opinions may be presented at trial—those who are retained and those who are not retained. Further, Rule 26(b)(4)(C) makes no distinction between the retained and non-retained testifying expert—"[t]he rule squarely directs that all testifying experts who are deposed be paid a reasonable fee." *See id*. at *6. In testifying based on his or her work as a physician, the treating physician will be calling upon specialized knowledge that can only be provided by an expert. Thus, "because a treating physician will offer expert testimony under Rule 702, the treater is included within the class of experts who, if deposed as permitted by Rule 26(b)(4)(A), must be paid a reasonable fee by the party taking the deposition under Rule 26(b)(4)(C)(i)." *See id.*

Haslett v. Tex. Indus., Inc., No. Civ.A. 397-CV-2901D, 1999 WL 354227 (N.D. Tex. May 20, 1999), offers an additional justification for compensating treating physicians as experts. The court concluded that plaintiff's treating physician was not an expert because plaintiff did not specifically employ, hire, or retain him as an expert; rather, the doctor was "an actor or viewer with respect to transactions or occurrences that are part of the subject matter of the lawsuit." S*ee id.* at *1. Nevertheless, the court noted that "[p]hysicians provide invaluable services to the public and should be remunerated for their time when they cannot deliver medical care." *See id.* at *2. In addition, "[t]hey often have substantial overhead costs that they incur whether they are treating a patient or testifying about one." *See id.* For these reasons, the court required defendant to pay the doctor a reasonable fee for his testimony.

Practitioners should be aware that the law governing compensation of a treating physician varies with the jurisdiction, and even between courts within the same jurisdiction. In that regard, Nevada law does not have any provision that specifically addresses compensation to be paid to treating physicians who are required to testify in litigation. But NRCP 16.1(a)(2)(A) provides that "a party shall disclose to other parties the identity of any person who may be used at trial to present evidence under NRS 50.275, 50.285 and 50.305 [i.e., statutes pertaining to expert testimony]" (emphasis added). The drafter's notes accompanying this rule make clear that treating physicians are viewed as nonretained experts who are subject to disclosure. The 2014 note states that "a treating physician could be deposed or called to testify without any requirement for a written report," an observation that would be superfluous if treating physicians were not considered experts. The 2012 note is expressly addressed to expert disclosures concerning treating physicians. The 2016 note provides that a treating physician may be disclosed after the deadline for making expert disclosures under appropriate circumstances.

In addition, as noted above, NRCP 26(b)(4)(A) makes clear that *any* person identified as an expert whose opinions may be presented at trial may be deposed, while NRCP 26(b)(4)(C) requires that "the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery." Moreover, the reasoning offered in *Hoover* is compelling—when a treating physician is testifying based on his or her work as a physician, the doctor will be calling upon specialized knowledge that can only be provided by an expert. The policy concerns identified in *Haslett* are also compelling. Indeed, other kinds of professionals are often *retained* to provide expert testimony (e.g., economists, engineers, etc.), but physicians frequently are *compelled* to participate in legal proceedings merely because their professional and ethical obligations require them to provide treatment to the sick and injured, an indispensable public service. For all of these reasons, the appropriate approach under Nevada law is to regard treating physicians as experts who are entitled to be paid a reasonable fee for the time spent answering questions during a deposition.

Wes Ayres is the Discovery Commissioner for the Second Judicial District Court. His columns are online and searchable at wcbar.org.

Random Thoughts continued from page 2

careful about the advice that they give their clients regarding the preservation of social media accounts. For example, Mr. Lane warns that "telling a client to 'clean up' a social media account might expose an attorney not merely to ethical sanctions but potentially to damages for spoliation. In a criminal case, a prosecutor might view such advice as obstruction of justice." Mr. Lane references a widely-reported case arising out of Virginia in 2011 in which a court ordered an attorney to pay more than $500,000 after finding that the attorney had instructed his paralegal to tell the client to delete certain relevant materials from the client's Facebook account. (Lester v. Allied Concrete).

Another issue involves social media websites that allow attorneys (and non-attorneys) to endorse each other. LinkedIn and Avvo are two popular social media websites that encourage testimonials about lawyers and professionals. State bar rules may place limitations on this behavior especially if the endorsements are misleading or could create an unreasonable expectation of success. Think about that the next time you have an attorney endorse you whom you have never worked with on a case or even met.

We know that prospective jurors use social media. Lawyers are now doing research on jurors by examining public pages to find out more about them before making a decision to exercise a challenge. For obvious reasons, ethical rules prohibit sending a 'friend request' connecting with a juror. Common sense is helpful in the analysis. Social media is essentially communication. You may be fine in doing general research on prospective juror to determine if they are biased but you can't communicate with them.

The above issues are just a handful of social media dangers in the legal profession. There are many more pitfalls and landmines when social media intersects with the practice of law. Using common sense and good judgment should be the starting point before one decides to communicate via social media.

For more information, the American Bar Association provides articles and advice for avoiding ethical issues with social media. *See e.g.*, ABA Business Law Today, "10 Tips for Avoiding Ethical Lapses When Using Social Media", authored by attorneys Christina Harvey, Mac McCoy, and Brook Sneath; Law Practice Today article on "Social Media's Impact on Litigation" (http://www.lawpracticetoday.org/article/

KELLY WATSON, who retired as a partner from Watson Rounds (now Brownstein Hyatt Farber Schreck) in 2011, died of complications from cancer on April 13, 2017. He was 61. Kelly was born and raised in Simi Valley, California. He moved to South Lake Tahoe in his early 20's and subsequently became a police officer. According to Kelly, he discharged his firearm only one time, to put a rabbit with a broken leg out of its misery. He was adept at reasoning with everyone, including hardened criminals.

Kelly subsequently attended law school at Pepperdine University and became licensed in Nevada (1985) and California (1986). He tried over 100 cases to verdict in Nevada and California, and was one of the state's best trial attorneys during his distinguished career. Kelly had phenomenal reading comprehension and loved the Courtroom. Outside the office, he enjoyed all outdoor activities, and taught most of the Watson Rounds employees how to slalom water ski. He is survived by his wife Catrina and his daughter Alex, a Reno physician.

FAMILY LAW

By Alexander Morey, Silverman Kattelman Springgate, Chtd.

Student Loans Acquired During Marriage: Character and Remedies

Recently, a case presented the question whether debts for student loans taken out during marriage were community or separate liabilities. The issue is interesting because people use student loans to acquire education (or other "career assets") usually intended to enhance the recipient's earning power, but that earning power is not an asset a court may value and allocate at divorce. So, in some cases, it feels unfair to treat student loan debts as community liabilities while the student takes the increased earning power—the obvious case is the doctor who graduates from medical school with $200,000 in debt and immediately divorces his wife. What to do in those cases?

California passed legislation calling for reimbursement to the community. Nevada has no such statute, and there is no Nevada law dealing directly with student loans. Nevada does, however, have established case law on characterizing debts acquired during marriage. (1) Debts incurred during marriage are presumed community liabilities. (2) It takes clear and convincing evidence to overcome the community property presumption. (3) If the lender relied on the separate property of one spouse to make a loan, the loan is a separate obligation. Nothing in Nevada law exempts student loans from these rules. A student loan incurred during marriage should be presumed a community liability absent clear and convincing evidence to the contrary, which may be evidence of the lender's intent. Applying these rules will likely make most student loans incurred during a marriage community liabilities, even the $200,000 incurred by a doctor who leaves his wife at graduation.

Don't despair; Nevada courts have tools to address inequities. First, Nevada courts may make an unequal division of community property for "compelling reasons". The doctor situation was given an express example of a compelling reason for an unequal division during the legislative process. Second, Nevada courts may award "just and equitable" alimony, including rehabilitative alimony, taking into account the acquisition of education or job skills by each spouse during the marriage and the provision of support during education by the spouse who would receive alimony. So, while Nevada law provides a ridged structure to characterize student loans, it also gives lawyers and judges options to craft the best and fairest apportionment of the economic effects of divorce.

[1]*See* "New Study Finds that Earning Power is Increasingly Tied to Education; The Data is Clear: A College Degree is Critical to Economic Opportunity" https://cew.georgetown.edu/wp-content/uploads/2014/11/collegepayoff-release.pdf.

[2]Cal. Fam. Code § 2641 (Deering 2017).

[3]*Jones v. Edwards*, 49 Nev. 299, 305, 245 P. 292, 293 (1926). *See also Dubler v. Moret*, No. 51187, 2009 Nev. LEXIS 85, at *2 (Nov. 3, 2009).

[4]*Kelly v. Kelly*, 86 Nev. 301, 309, 468 P.2d 359, 364 (1970).

[5]*Norwest Fin. v. Lawver*, 109 Nev. 242, 246, 849 P.2d 324, 326 (1993) ("The standard for determining whether a debt is community or separate entails factually discerning the intent of the lender when granting the loan.") *Schulman v. Schulman*, 92 Nev. 707, 716-17, 558 P.2d 525, 531 (1976).

[6]*See McDougall v. Lumpkin*, 11 P.3d 990, 994 (Alaska 2000); *In re Marriage of Davis*, No. 2 CA-CV 2012-0132, 2013 Ariz. App. Unpub. LEXIS 214, at *3-4 n.1 (Ct. App. Mar. 8, 2013); *McCoy v. McCoy*, No. 02-15-00208-CV, 2016 Tex. App. LEXIS 7201, at *4-5 (App. July 7, 2016).

[7]NRS 125.150(1)(b).

[8]Comments on Assembly Bill 347, Nevada Senate Daily Journal May 10, 1993 at *9, http://www.leg.state.nv.us/Division/Research/Library/LegHistory/LHs/1993/AB347,1993.pdf.

[9]NRS 125.150(9)(h); 125.150(10). *See also Heim v. Heim*, 104 Nev. 605, 611, 763 P.2d 678, 682 (1988).

Alexander Morey served as the Honorable Judge Deborah Schumacher's law clerk from 2008 through 2010 before entering private practice with Silverman, Kattelman, Springgate Chtd. where he practices family law.

Note: Please let us know if there are any requests to address topics of interest to family and non-family lawyers.

COURTS

On March 24, 2017, the Nevada Supreme Court signed the *Order Amending Rule 10 of the Local Rules of Practice for the Second Judicial District Court of the State of Nevada (WDC 10).* Rule 10 of the Local Rules outlines the proper format of pleadings presented to the District Court for filing. As stated in the Order, the revisions reflect statutory and rule changes, supports the transition to mandatory electronic filing, and promotes access to justice by simplifying requirements for document filing. These revision will become effective on Sunday, April 23, 2017.

The revised Local Rule 10 can be found on the District Court's website at www.washoecourts.com.

LAW LIBRARY/ PRO BONO CORNER

Book Review

Expert Witness Answer Book 2016 from Practising Law Institute is a 599 page book in 31 chapters. It also has two appendices and an index. The chapters all follow a question and answer format.

It has three editors—Terry Budd, Eric R.I. Cottle and Clifton T. Hutchinson—and many contributors. All these are from the law firm, K&L Gates LLP.

The book covers every aspect of key areas in the use of expert witnesses. In the introductory chapters, it answers the question, what is an expert witness? Following, is a discussion of the decision in Daubert and subsequent cases replacing the Frye rule pertaining to standards for experts. Chapters address how to qualify experts and disqualify them. Other chapters discuss the use of experts in pretrial and at trial.

Next are a number of chapters that address the use of experts in various types of cases such as products liability, toxic torts, trademark, copyright, patents, economic damages, criminal trials, defamation and employment cases.

The book provides current information about the topic, the expert witness, generally. And, the later chapters discussing the use of expert witnesses in particular cases look to be invaluable to a practitioner using an expert in such cases.

by Brian Keefe, Librarian II

Pro bono corner – April Lawyer in the Library Volunteers

(bold denotes volunteering more than once this year)

Thank you for volunteering! Our program runs on Tuesday and Wednesday evenings from 5:00 p.m. to 7:00 p.m. Tuesday evenings is family law and Wednesday evenings is general law. Each volunteer sees up to 10 people in an evening. We also have mentoring by an experienced volunteer available with all newcomers. If you are interested in volunteering for Lawyer in the Library, please contact Emily Reed at emily.reed@washoecourts.us or 775-325-6625.

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John Boyden
Samantha Rice

APPELLATE BRIEFS

By: Paul Georgeson, McDonald Carano Wilson

ATTORNEY DISQUALIFICATION

In a recent case, the Nevada Supreme Court clarified when an attorney and his new firm should be disqualified based on the attorney's employment at a previous firm. In *New Horizon Kids Quest III, Inc. v. Eighth Jud. Dist. Ct.*, 133 Nev. Adv. Op. 14 (April, 2017), the Court was asked to consider whether an attorney and his current firm should be disqualified from representing the Plaintiff in a case where the attorney's prior firm represented the opposing party in a previous and separate case.

In *New Horizon*, the attorney at issue worked in a law firm as an associate in 2007 when that firm represented New Horizon. However, the attorney did not work on that case and never obtained any confidential information about New Horizon while he was at the firm. A few years later, the attorney left his old firm and started at a new firm. Several years after that, the new firm was retained to represent a Plaintiff in a case filed against New Horizon. At some point in the litigation, both the new firm and New Horizon realized that the attorney at issue had previously worked for the firm that represented New Horizon in a prior action. New Horizon moved to disqualify the Plaintiff's law firm. In response to the motion, the attorney at issue submitted an affidavit indicating that, while at the previous firm, he was not involved in any way with the litigation relating to New Horizon and that he never obtained any confidential information about New Horizon. Another attorney at the old firm also confirmed those statements in a separate affidavit.

The District Court denied the motion to disqualify the attorney or the new firm. The District Court concluded that because the attorney never obtained confidential information about New Horizon while working at his old firm, the new firm did not have to be disqualified. In response, New Horizon filed a Petition for Writ of Mandamus with the Supreme Court.

In reviewing the petition, the Supreme Court first noted that a Petition for Writ of Mandamus was the appropriate procedure for challenging the District Court's decision. The Court noted that it has consistently held that Mandamus is the appropriate vehicle for challenging Orders that relate to the disqualification of counsel. Thus, the Court confirmed that the Writ was properly before it.

Next, the Court noted that it pays substantial deference to a District Court's familiarity with the facts of the case at issue to determine if disqualification is warranted. It applies an abuse of discretion standard to issues of attorney disqualification and it grants the District Court broad discretion to decide those issues.

The Court then turned to the applicable Rules of Professional Conduct. Beginning with Rule 1.9(b) of the RPC, the Court noted that a lawyer cannot knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented the client: "1) whose interests are materially adverse to that person and; 2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter. . .". The Court further noted that, pursuant to RPC 1.10(a), if an attorney is disqualified under RPC 1.9, that disqualification is imputed to the new law firm. However, the Court did note that imputed disqualification of the new law firm can be overcome in some circumstances, such as by implementing certain screening and notice procedures.

The Court then turned to the issue of whether the attorney acquired confidential information about New Horizon while working at his prior law firm. The Court noted that the requirement that the attorney actually acquire confidential information about the former firm's client is not presumed. Instead, the District Court must make a factual inquiry. In addition, if the District Court finds that the attorney never obtained confidential information and is therefore not personally disqualified, then the issue of imputed disqualification of the new firm does not apply.

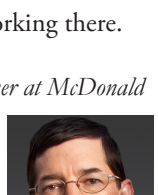
In reviewing the record, the Court held that the District Court did not abuse its discretion in determining that the attorney did not obtain confidential information about New Horizon as a result of his work at the prior firm. Therefore, the Court found that the District Court did not abuse its discretion in denying the Motion for Disqualification. Then with the finding that the individual lawyer was not disqualified, the Court concluded that it did not have to evaluate issues of imputation of disqualification to the new firm.

In analyzing the issue, the Court looked to comments from the American Bar Association. Noting that the applicable ABA Model rule is identical to the Nevada Model Rule, the Court found that the comments to the ABA Model Rules were instructive. Quoting from the Model Rule comments, the Court noted that if a lawyer with one firm acquires no

knowledge or information relating to a particular client of that firm, and the lawyer later joined another firm, neither the lawyer individually nor the second firm is disqualified from representing another client in the same or related matter even though the interest of the two clients conflict. The Court also noted in prior rulings that with respect to non-lawyer disqualification, where it has found that the mere access to confidential information, without proof that the person at issue actually obtained confidential information, is insufficient to warrant disqualification.

I have had the pleasure of working my entire career at one law firm. However, that is appearing more and more to be an unusual circumstance. Any time a lawyer moves from one firm to another, it is both necessary and important to conduct thorough reviews of conflict checks. However, even the most thorough conflict check is unlikely to alert the firm to the situation that occurred in New Horizon. Therefore, it is good to know that if a firm hires a new attorney, it will not be disqualified just because that attorney worked at a prior firm that represented an adverse party, so long as the attorney did not obtain confidential information about the adverse party while working there.

Paul Georgeson is a partner at McDonald Carano and practices primarily in the areas of commercial litigation, construction law, and appellate law. He is a member of the firm's Appellate Practice Group and regularly handles appeals and writ proceedings in state and federal courts.



Judge Sanctions Both Sides After Data Exposure by NonLawyer

by Ira Victor, Chief Digital Forensic Analyst

Maybe you heard about an insurance case in which both sides got sanctioned over inadvertent exposure of confidential information – facilitated by a nonlawyer associate. This story skims the surface of a deep reservoir filled with unhappy tales about the many ways electronically stored information (ESI) can get away from you

For legal practitioners, putting privileged information into the hands of employees is a fact of life. Outside investigators, expert witnesses, and other third-party service providers are another necessity.

Habeas Hard Drive will share some thoughts on tightening control of ESI when it travels though many hands, but first, here's the story.

The relevant cast of characters are: Attorneys for the Plaintiff (Harleyville), an insurance company seeking a ruling to support denial of a claim on a fire that was deliberately set; An investigator for the parent company, Nationwide Insurance (Thomas Cesario); The National Insurance Crime Bureau, an entity that supports the insurance industry by collecting and providing crime data (NICB); NICB's employee (Wes Rowe); Defense attorneys for the claimant (Defense). In a passive role, we have the file-sharing site Box, Inc. (Box), used as a convenient method for storing and sharing information electronically.

Investigator Cesario was working for Nationwide, parent company of Plaintiff insurance company Harleyville. Cesario uploaded a video of the fire scene to the file-sharing site Box. He then provided a hyperlink for access to the Box site via email to Rowe at the NICB.

There was no password for the Box account, only the link. The email from Cesario to Rowe contained a routine confidentiality notice, including a prohibition on copying or distribution of the material. Rowe accessed the Box site twice, and downloaded the video once.

Months later, Cesario uploaded some additional material intended for review by Harleyville attorneys, consisting of the insurance claim file and the fire investigation file. He also provided the same hyperlink he'd sent to NICB. No password. Just click and view.

Several weeks later, Defense issued a subpoena ordering NICB to produce the entire file related to the fire. In response, they received the files, but also received a copy of the email from Cesario to Rowe containing the link to the Box account. Despite the confidentiality notice, Defense reviewed the contents without notifying the opposing legal team that they'd received potentially privileged information.

The exposure of the documents was revealed to Harleyville after several months, when it received a thumb drive from Defense with documents that included its own privileged data.

Harleyville then moved, unsuccessfully, to have Defense disqualified.

But Judge Pamela Meade Sargent slammed both sides. Harleyville had waived privilege by failing to take reasonable steps to protect privileged data, she said. The judge characterized the unsecured Box account as the digital equivalent of leaving the case files on a park bench.

Defense was errant as well, she said, and was ordered to pick up the tab for the ruling.

The pertinent portion is reproduced on the Habeas Hard Drive website, as an addendum to this article. http://bit.ly/2pDDhPd, or you can read the entire decision at http://bit.ly/2oMqpVy.

HOW A BUSINESS ASSOCIATE AGREEMENT CAN BE USEFUL

Information has a way of slipping its leash, and the data security folklore is full of stories about costly, devastating third-party screw-ups, and fatal mistakes by employees, whether well-intentioned or otherwise.

For employees the answer is training, supervision, and leading by example with best practices for handling ESI. But for outsiders, with whom you have no daily influence, Habeas Hard Drive recommends litigators adopt a practice by medical providers, who also deal with a wide variety of outsiders, and also have ultimate responsibility for HIPAA violations.

In healthcare, a "Business Associates Agreement" is used to put third parties on notice of their obligation to protect confidential healthcare information. Similarly, law firms should obtain agreements from vendors and other third parties which make explicit the obligation to protect privileged and confidential information. The agreement establishes that confidential information is to be used only in the course of performing specific tasks for which the contractor was engaged by the law firm. It should also spell out technical requirements for safeguarding the information from misuse, and the consequences for failure to do so. This puts the law firm and the business association on track to comply with relevant legal ethical duties.

IMPROVE INFORMATION GOVERNANCE

The Harleyville story, and similar incidents that end up in the headlines

Continued on page 14

JUDICIAL ETHICS

Honorable David Hardy, Second Judicial District Court

Charles Henry Belknap

Thomas Porter Hawley

Charles Henry Belknap (1972-1874; 1881–1904). Justice Belknap's career illustrates the importance of substantive merit and personal relationships. He was born in 1841 in New York, and his immediate ancestors were described as "pioneer American stock," from which "he inherited sterling virtues and love of country."[1] He attended both public and private schools, and graduated from the Polytechnic Institute in Brooklyn. At the age of 24 he moved to Nevada where he practiced mining law in Austin and Virginia City. He was law partners with statehood champion Charles DeLong and served as mayor of Virginia City until he moved to Carson City to work as Governor L.R. Bradley's personal secretary.

Justice Belknap's association with Governor Bradley was a fortuitous, life-changing event. In 1872, Governor Bradley appointed Justice Belknap to the Nevada Supreme Court to fill the vacancy created by Justice Garber's retirement. Justice Belknap was only 31 years of age at the time. In 1983, Justice Belknap married Governor Bradley's daughter at the Governor's mansion.

Justice Belknap campaigned to retain his seat in 1874, but was defeated by Justice Warner Earll. Undeterred, he successfully sought election 1886 and served until January 1, 1905. He was a member of the Nevada Supreme Court for 26 years.

In 1881, the Belknaps purchased a home in Carson City at 1206 N. Nevada Street, which is listed on the National Register of Historic Places as the Belknap House. (It was previously owned by two other statehood pioneers: legislators Henry Beck and Oscar Barber.) An 1897 photograph of Justice and Mrs. Belknap in front of their home was displayed in the second floor hall gallery of the state capitol for decades and is now reposed at the Nevada Historical Society.

Justice Belknap died in San Francisco on October 6, 1926. The Nevada Supreme Court memorial reads in part:

> A review of the many decisions written by Judge Belknap reveals a conciseness of expression and a lucidity of thought that challenges the admiration of all lovers of unadorned truth. In no instance did he attempt to embellish either statements of fact or declarations of juridical principles with flights of rhetoric. While his opinions were almost laconic in brevity, yet they clearly and correctly applied all of the necessary legal principles essential for a proper solution of the controverted issues. His integrity was spotless and his courage was unwavering. He did not hesitate on several occasions to write opinions running counter to popular currents of public sentiment. On the bench he knew no friends and off the bench he knew no enemies. In private life he was always an urbane, courteous, and sympathetic gentleman and friend, and in domestic life he was an ideal husband and father.

The themes of courage, courtesy, and brevity were continued by others who memorialized Justice Belknap. U.S. Attorney Sardis Summerfield wrote that Justice Belknap was a mentor to many newly admitted lawyers and ever cheerful with a "happy faculty of condensation." Justice Belknap "could write more law in one sentence than most judges could in a page" and his decisions demonstrate

his ability to "present in concise, brief language the law which was virtually decisive of the case." Further, he went "against the current popular belief" in several cases and "other cases in which he rose to that high degree of judicial fairness, disregarding what might be the evanescent reasons of popular sentiment and adhering to the well-determined principles of the law."

Justice Belknap's daughter Caroline Belknap Brown submitted a letter to the Nevada Supreme Court after her father's death:

> Despite father's long service upon the bench, it was his family life rather than his public life that really counted. There never was a truer gentlemen. In all his life I never knew of his saying, doing, or thinking an unfair or unkind thing of anybody. Always gentle and always kind, during the last years of his life father was very feeble, and at times seemed to know very little, but there never was a time when he was not showing kindness in abundance.

Thomas Porter Hawley (1872-1890). Justice Thomas Hawley was born in 1830 in Indiana and remained there through his childhood. In 1852, he crossed the plains to California and lived in Placerville before moving to Grass Valley. He was a miner between 1852 and 1855. He served as Nevada County (Grass Valley) Clerk in 1855-66 and began practicing law in 1857. He served one term as district attorney in Nevada County before moving to Hamilton, Nevada in 1868. He relocated to Eureka in 1970, and was elected to the Nevada Supreme Court in 1872 to fill the vacancy created by the retirement of Justice James F. Lewis.

In 1890, after 18 years on the Nevada Supreme Court, President Benjamin Harrison appointed Justice Hawley to the U.S. District Court. Beginning in 1895, he was assigned to sit with the federal Circuit Court of Appeals in San Francisco. He retired from the federal bench on June 30, 1906, having served more than 34 years as a judge. He died on October 17, 1907.

The Nevada Supreme Court memorialized Justice Hawley on December 2, 1907. After hearing several oral tributes, Chief Justice Benjamin W. Coleman said, "As with loved ones in our immediate families, we are never ready to lose our eminent citizens who must go as inevitably as all others. It seems but yet yesterday they were with us in the strength of manhood and mental vigor. In the course of nature we are here this brief day, to-morrow we will be gone, and others will have taken our places." He continued:

> Their greatest fame and most enduring monument remains from what they did in furtherance of justice, and for the general good in fitting to the jurisprudence of this developing State the common law, which, although it is based on the wisdom and experience of ages in other countries before it was transplanted here, yet is progressive and elastic enough to meet and cover the new conditions and necessities which arise in the affairs of men. Their exemplary and industrious careers and self-acquired success remind us forcibly of what may be accomplished by right living, close application, and honest endeavor, and of the opportunities afforded under this great government and a beneficent Creator.
>
> . . . .
>
> *Be It Resolved*, That we most deeply deplore the death of one who was not only our professional brother, but a just, upright, and able judge, worthy in every way of our honor, respect, and esteem.
>
> *Resolved*, That while keenly sensible of the loss we have sustained, we nevertheless feel a mournful pleasure in knowing that our deceased brother and friend had more than lived out the allotted age of man, and that, although he had personally gone from our midst, both his private life and his public career will be a source of inspiration and a beacon star of hope for untold generations to come.

Death invites reflection in which the positive is accentuated and the negative is concealed. The deceased are naturally honored with platitudes and superlatives. This phenomenon is apparent in the memorials of Justices Belknap and Hawley. Whether literal or even an honest assessment, words of honor teach those who live about how to live. As judges and lawyers, we can be inspired by the attributes ascribed to those who precede us. We can emulate their best moments and strive to a higher standard of professional ethics.

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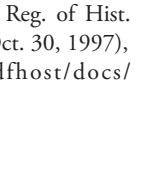
[1]References for this essay include the History of the Bench and Bar of Nevada (J. P. O'Brien ed., 1913); A History of the State of Nevada (Hon. Thomas Wren ed., 1904); *In Memoriam, Charles Henry Belknap*, 50 Nev. 443 (1926); *In Memoriam, Thomas P. Hawley*, 29 Nev. 597 (1907); Nat'l Reg. of Hist. Places Registration Form (Oct. 30, 1997), http://focus.nps.gov/pdfhost/docs/NRHP/Text/97001302.pdf.

This is number 103 in a series of essays on judicial ethics authored by Judge David Hardy, Second Judicial District Court, Dept. 15.



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SPECIALTY COURTS

by Honorable Dorothy Nash Holmes,

Is there fun after sobriety?

The goal of any specialty court is sobriety on a continual basis, i.e."Recovery." Some addicts or abusers of drugs or alcohol think they can "manage" their drug or alcohol use, and thereby achieve intermittent sobriety, or at least lessen the damage caused by their use or abuse. However, most people who have achieved Recovery accept that there is no such thing for them as "one and done." In other words, that next drink will be followed by many, and that next hit or ingestion of a drug, will re-start the cycle again.

Sooner or later, people in Recovery begin to recognize that Recovery can be depressing, boring and simply, not fun. After all, their lives were powered by chaos, turmoil, the roller coaster that is intoxication-sobriety-shame-self-hatred and the mental gymnastics it takes to keep track of the unending circle of lies. It is not unusual for an alcoholic to slip into depression while striving for, or after reaching, Recovery. Normal life is sometimes unexciting, lonely, lacking direction or friendship. Recovery often requires changing one's lifestyle, residence, employment and friends. I tell people in my specialty courts that everyone needs a place (home), a purpose (job, goal, passion or interest) and people.

The place must be supportive and safe. The purpose takes some deep introspection and some guts to seek out. The people, however, are the key to connecting a person in Recovery to the rest of the "normal" world.

Besides a self-help group like Alcoholics or Narcotics or Marijuana Anonymous, what can a person in Recovery do to find his people, to find companionship, to have some fun?

For college students, including those at the University of Nevada, Reno and Truckee Meadows Community College, there is N-RAP. That stands for "Nevada's Recovery and Prevention" community. According to its brochure, N-RAP, a project of the university's Center for the Application of Substance Abuse Technologies (CASAT), is an organization that "provides an environment of nurturing support and peer connections for students recovering from substance and behavioral addictions and students choosing a substance-free lifestyle." It facilitates and encourages social support through peer-to-peer services and student engagement. It provides academic support and professional development through study, advisement, program participation, seminars, scholarships and student-led activities. It has its own AA or NA meetings. Its members buy tickets to college sports events en mass. N-RAP connects students to housing that supports the sober, drug/alcohol-free student lifestyle. N-RAP members promote and help organize Doors to Recovery, and art-based fund-raiser for Transforming Youth Recovery, to spread the good news of drug-free life.

The Stacie Mathewson Foundation in Nevada initially funded N-RAP with some "seed money" to get started. Since then, it has funded close to 200 additional colleges or universities across America to create, support and promote this lifestyle for students on campus.

Alcohol-free vacations are growing in popularity, too. At Club Med Ixtapa Pacific in Mexico, more than 500 people a week participate in alcohol-free sports, activities, parties and social gatherings. Sober Vacations International (SVI), is a Los Angeles-based group that plans and guides alcohol-free trips, tours, cruises, safaris, river-rafting, skiing and other adventures to places all over the world. Future trips are scheduled to include Cuba, Jamaica, Thailand and New Zealand. In the past 30 years, SVI has organized more than 100 trips taken by more than 40,000 sober people in Recovery.

A new trend among millennials in Fort Lauderdale, Florida is a monthly Conscious Family Dinner. It can be vegan, or theme-based (yoga, career goals, motivational speakers) but is always alcohol-free. Its founder, Ben Rolnik says the dinners are about creating a new form of play that facilitates meaningful connections, not the vapid chitchat of cocktail parties or bars. "Dry Dinners" are being planned for 200-person events in Los Angeles, for $35 a ticket. Similar parties are being found in cities like New York, Miami and Chicago.

What all these events have in common is the recognition that sober people, those in Recovery, still need friends, parties, adventures, soul-mates and companions. In my specialty courts, I encourage people to try yoga, meditation, regular gym work-outs, or other similar activities where they might encounter people like them—people working on self-improvement, and people trying to re-channel that energy that used to go into destructive activities. We give out pairs of movie tickets to our graduates, to promote good, clean fun.

Pat Cashell, the former Reno Mayor's son and now executive at the Community Assistance Centers (homeless shelters) operated by Volunteers of America, found bicycle riding and racing as his outlet when

Speciality Courts Continued

he sought Recovery from 10 years of addiction. He's now a fitness "star" and a well-known local bike racer, and a constant in the Recovery community in Reno. Reno has more than enough "pub crawls." But we need more Pat Cashells and more event-planners who can bring the latest sober-fun trends to Reno.

Judge Dorothy Nash Holmes *presides over Dept. 3 in Reno Municipal Court. She is adjunct faculty at TMCC and UNR, and teaches a course on Specialty Courts for the online Justice Management Master's Degree Program at UNR.*

Data Exposure Continued from page 9

have their roots in poor information governance.

"Information governance" is the set of policies and controls organizations use (or should be using) to manage and protect their information assets. That protection includes information-handling procedures that limit risk of data exposure, reduce legal liability, and comply with regulations.

Information governance is a challenge for every company, large and small. ESI has made the task even harder for litigators, who bear the ultimate responsibility for a breach of confidential data, and have less control than they've ever had over its custody.

Qualified information security experts can help craft internal information governance procedures. Such experts can also offer help with training, and with specific language for Business Associate Agreements with best practices for third parties.

While there is no licensing requirement for information security experts, industry experts often point out that "the IT people" are not information security experts. IT people are focused on delivering information services on time and on budget. Information security is a different discipline. Qualifications for information security may include any of the following certifications:

- Certified Information Systems Security Professional (CISSP)
- Global Information Assurance Certifications (GIAC)
- Information Systems Audit and Control Association Certifications (ISACA)

May 18, 2017
Lunch & Learn 12 noon to 1:00 p.m.
Digital Video Evidence: What you see is almost always NOT what you get
1 Hour CLE
Presented by: Ira Victor, Digital Forensics and eDiscovery Practice

Digital video surveillance devices are everywhere. So are smark phones, dash cams and cop cams. But recovering video evidence is challenging, partly because the few standards exist for the hardware and software producing the images. This is just one reason recovering video evidence is challenging.

In this CLE, we will cover:

- Why you must read carefully with digital evidence preservation and extraction
- The video admissibility hurdle
- Why video evidence needs to be bolstered with ancillary evidence
- How to apply science to a standards-free medium
- Audio and visual distortions

EVENTS

MAY

3 Douglas-Carson Legal Professionals 12 noon, Red's 395 Grill, Carson City, Speakers are announced on website, www.douglascarsonlegalprof.org.

5 State Bar of Nevada, Northern Board of Governors, hosts Cinco De Mayo at Bertha Miranda's from 5 -7p.m. RSVP to gene@levertylaw.com.

9 Tahoe Truckee Bar, 1 hr. CLE (Calif.) on "This Was the (IP) Year That Was", 5:00 p.m. Refreshments, 5:30 p.m. CLE. $10 for TTBA members, $20 all others. Please RSVP by Friday, May to hrschulze@hollandhart.com

10 Washoe County Bar Luncheon, Meet Your Legal Service Providers, RSVP by 5/8 at www.wcbar.org or fax the form below to 324-6116.

15 NALS of Washoe County (legal secretaries & paralegals) general meeting, 12 noon, Black Bear Diner. $18 inc. 1 hour CLE. Please RSVP by 5/13 to Tori Francis at 353-7620 or email vfrancis@washoecounty.us. Non-members are welcome to attend!

15 The Assoc. of Defense Counsel luncheon and discussion with Judge Sattler, 11:45 a.m. to 1:00 p.m., Dept. 10, RSVP, Dane Littlefield at 786-6868.

18 WCBA CLE, Digital Video Evidence Lunch & Learn, 1 Hour CLE Credit, lunch included. Register at www.wcbar.org or call 786-4494.

19 SNAP (The Sierra Nevada Assoc. of Paralegals) will hold its annual seminar from 9:00 a.m. to 4:30 p.m. at the State Bar of Nevada. Please contact Amy Hodgson for information at amy@surrattlaw.com.

24 Directory Cover Photo session, 12 noon, Wingfield Park. Please call to confirm, 786-4494.

JUNE

14 WCBA Luncheon State and Federal Public Defenders, Harrah's, 12noon, RSVP by 6/12/17.

14 Flag Day Celebration, 5:30 p.m., Courthouse Patio at 1 South Sierra Street

Pro Bono Volunteers Needed: Washoe Legal Services, Inc. (WLS) invites attorneys in and around Washoe County to participate in its new Child Advocacy Pro Bono Program. This is an excellent opportunity to fulfill your pro bono obligations while serving as an advocate and mentor to a child who has been removed fron his/her parents' custody due to allegations of abuse and neglect. WLS employs seven full-time attorneys who solely represent children in dependency and neglect cases. However, current staffing levels allow WLS to represent less than half of the children who are involved in these cases. Thus, hundreds of children are unrepresented every year. Participating volunteers will receive training and administrative support, and they will be assigned a mentor who is experienced in child advocacy law. They will also be covered by WLS's malpractice insurance. Volunteer today for this opportunity to make a difference in a child's life. Interested volunteers should contact James P. Conway, Executive Director, Washoe Legal Services, 775.785.5701 or jconway @washoelegalservices.org.

Is your spouse, mother, father, sister, brother, aunt or uncle an attorney? If so, we want you to be part of the cover for the 2017/18 WCBA Directory.

Photo session scheduled for Wednesday, May 24, Wingfield Park, 12 noon. Please contact WCBA to confirm.

PRE-ORDER 2017/18 PICTORIAL DIRECTORY - Prices go up 6/1/17 call 786-4494

Please send upcoming events to gina@wcbar.org.

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EMPLOYMENT

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FAMILY LAW ATTORNEY wanted full time at the Law Office of Marilyn D. York. Nevada bar and 3+ years experience in family or civil litigation law. Excellent references, legal, writing and court skills are necessary. Balance a nice lifestyle with pay to $149,000/year with great benefits. Family law is interesting, exciting and rewarding - ask us all about it. Marilyn and her Associates enjoy helping male Clients get fair treatment including visitation and child custody because Children need their fathers too. Applicants' skills will be heavily tested. Personal and professional references will be contacted. Drug testing is required. Our new hire will have good growth potential, a private office and a nice place to work (no smoking environment). Principals (applicants) only, visit www.MarilynYork.net and then please email your resume to york@gbdev.com

COMMUNITY DEVELOPMENT ATTORNEY with NEVADA LEGAL SERVICES (NLS). NLS is looking to hire a second community development attorney (0-3 years of experience) for the Reno office. J.D. required and license to practice in any state, preferably Nevada. If licensed outside of Nevada, eligibility for licensure under Supreme Court Rule 72.1. Experience or familiarity in community organizing/development in the Reno/Sparks area a plus. $42,154+DOE. NLS is an equal opportunity employer. Please visit wcbar.org/classified for details.

FULL-TIME ATTORNEY WANTED seeking a Nevada licensed attorney to fill a full-time position. Applications will be accepted from candidates having 1-2 years of experience, however applicants who have recently passed the bar will also be considered. Please send resumes and cover letters electronically via email (celewski5@gmail.com) or through the mail (Current Recipient: P.O. Box 34194 Reno, Nevada 89533). Interviews will begin in April.

THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEVADA is accepting applications for Lawyer Representatives. Applications due May 19, 2017.

THE FIRST JUDICIAL DISTRICT COURT AND THE CARSON CITY JUSTICE/MUNICIPAL COURT are accepting Letters of Interest from licensed Nevada attorneys who are in good standing to perform legal services for indigent defendants when the State Public Defender's Office has declared a conflict. Please email mcortes@carson.org.

LEGAL SECRETARY for reputable Reno law firm. Excellent Legal Writing Skills and (Spanish) Bi-lingual a must. WordPerfect or Word required. Salary depending on experience, payable up to $150.00 an hour. Submit resume to: rdfoffice@hotmail.com or to 227 Clay Street, Reno, NV 89501. No phone calls please.

SECOND JUDICIAL DISTRICT COURT Employment Opportunities: (please visit www.washoecourts.com)

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PROFESSIONAL OFFICE SPACE available for lease, 679 Sierra Rose Dr., Ste. B. 2200+ sq ft., six separate offices, reception area, kitchen/break room, conference room. 775.786.4646 or gmuirltd@gmail.com

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