Nevada Secretary of State
Francisco V. Aguilar

Election Law Primer

Prepared by:
Mark Wlaschin, Deputy Secretary for Elections

Agenda

- Overview of Secretary of State & Elections Division
- Federal Laws
- State Laws
- History and role of the EITF
- Overview of election crimes
  - 2020 & 2022
  - 2024
  - Mitigation
- Your role in Nevada's elections

Office of the Secretary of State

- One of six Constitutional Offices established in 1864 by the Nevada Constitution.
- Responsible for maintaining the official records of the acts of the Nevada Legislature and of the Executive Branch of state government (Nevada Constitution – Article 5, Section 20).
- Additional responsibilities include:
  - Chief Officer of Elections (NRS 293.124);
  - Registrar of corporations and other business entities (Title 7 of NRS);
  - Administrator of the Uniform Securities Act (NRS 90.710) and the Commodities Act (NRS 91.310);
  - Registrar of notaries public (NRS 240.010);
  - Registrar of document preparation services providers (NRS 240A.100);
  - Administrator of SilverFlume, Nevada's Business Portal (NRS Chapter 75A);
  - Administrator of the Document Preparation Services, Nevada Lockbox and Domestic Partnership programs.

Office of the Secretary of State

- Secretary of State is a member of the following boards and commissions:
  - Board of Examiners
  - Board of Prison Commissioners
  - Governor's Office of Economic Development Board
  - Executive Branch Audit Committee
  - Chair-State Records Committee
  - Governing Board of the Tahoe Regional Planning Agency (TRPA)
  - Advisory Committee on Participatory Democracy (ACPD)
  - Election Integrity Task Force (EITF)

Office of the Secretary of State

- ~150 staff across eight Divisions:
  - Commercial Recordings,
  - Document Preparation Services/Domestic Partnerships/Nevada Lockbox,
  - Elections,
  - Executive Administration,
  - Nevada Business Portal,
  - Notary,
  - Operations, and
  - Securities.

- Office Locations:
  - **Carson City**: State Capitol, Paul Laxalt Building, 400 King St. & Blasdel Building,
  - **Las Vegas**: City of North Las Vegas City Hall & New State Gov't Complex

Elections Division

- Supports the Secretary as Chief Officer of Elections
  - NRS 293.124: As Chief Officer, the Secretary of State **is responsible for the execution and enforcement** of the provisions of title 24 of NRS and all other provisions of state and federal law relating to elections in this State.

- How
  - Training & standardization of policies and procedures, forms and templates
  - Implementation & refinement of new federal & state election law & administrative codes
  - Oversight and regulation of federal and state elections
  - Conduct elections related tasks (e.g., execute role as a filing office, petitions)
  - Outreach and education

- Provides Fiscal and Operational (only!) analysis of proposed legislation

Elections Division

- Collaborates with all 17 county Clerks/Registrars and 18 city Clerks
  - 15 county and 18 city clerks are elected
  - 2 county registrars (Clark & Washoe) are appointed by County Commissioners

- **Supports 2.0M voters and the 3.3M people whose lives are impacted by the votes they cast**

- The challenge…Since November 2020:
  - Clerks in 11 counties have quit or retired
  - We have counties with >100% turnover in elections-focused staff
  - New state and county election staff have an increased work-load
    - In-person election + Mail ballot election
  - Less experience = Collectively greater risk

US Constitution

- Requirements!

- Article I
  - Section 2 – House of Representatives
  - Section 3 – US Senate

- Article II
  - Section 1 – US President & Vice President

Federal Law

- 42 U.S.C.
  - Civil Rights Act of 1964

- 52 U.S.C.
  - Voting Rights Act of 1965
  - Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA) of 1986
  - National Voter Registration Act (NVRA) of 1993
  - Help America Vote Act (HAVA) of 2002
  - Military and Overseas Voter Empowerment (MOVE) Act of 2008
  - Electoral Count Reform Act (ECRA) of 2022

Nevada Constitution

- Article 2
  - Right to vote
  - Rights of voters
  - ~~Poll tax~~
  - Recall of public officers

- Article 19
  - Initiative and Referendum

Title 24

- Nine chapters

Chapter 293	Elections
Chapter 293B	Mechanical Voting Systems or Devices
Chapter 293C	City Elections
Chapter 293D	Uniformed Military and Overseas Absentee Voters Act
Chapter 294A	Campaign Practices
Chapter 295	Certain State and Local Ballot Questions
Chapter 298	Presidential Electors and Elections
Chapter 304	Election of United States Senators and Representatives
Chapter 306	Recall of Public Officers

Title 24

- Nine chapters of Administrative Regulation (NAC)

- Biennial review during odd numbered years
  - Clarity for elections officials
  - Transparency with public
  - Education and Outreach

Notable Recent Changes

2017

- Replacement of all voting systems

2019

- Same day registration (SDR)
- Automatic Voter Registration (AVR)

2021

- Universal Vote by Mail

Others?

- Vote Centers
- Expansion of EASE to voters with disability and tribal voters on colony or reservation
- Tribal polling locations
- Mandated training & Elections Procedure Manual
- Expansion of AVR
- Funding of Voter Education and Outreach

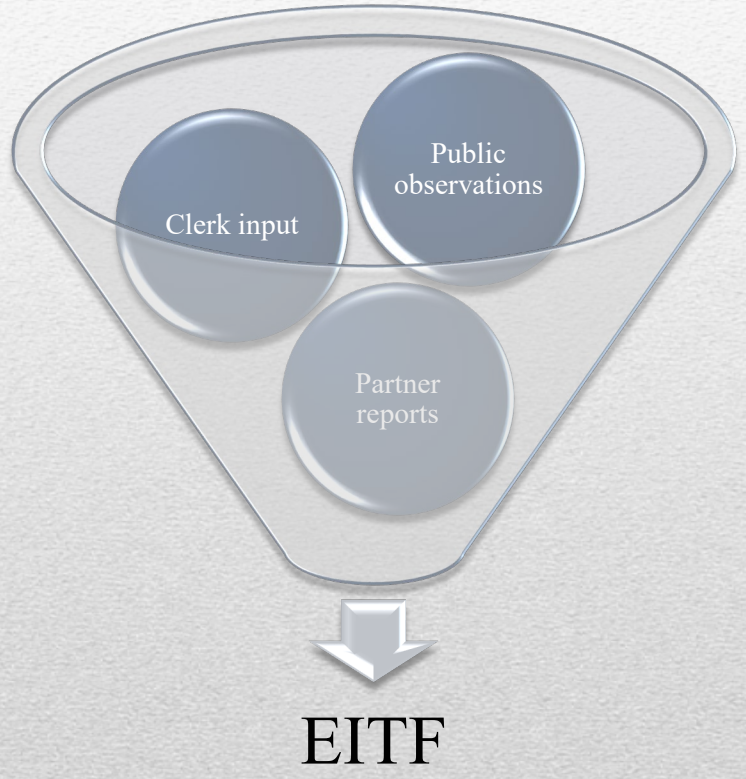
History and Role of the EITF

- Established in 2008 by former Nevada Secretary of State Ross Miller.
- Was continued by Secretary of State Barbara Cegavske in 2015.
  - Further expanded by current Secretary of State Francisco V. Aguilar
- Task-Force members include: Secretary of State's office, Attorney General's office, the Federal Bureau of Investigation (FBI), the U.S. Attorney's Office, and various other state and local law enforcement agencies.
- The EITF investigates complaints regarding questionable voter registration practices, potential voter fraud, and the enforcement of laws regarding voter intimidation.
- Since 2017 and the designation of the nation's election infrastructure as critical infrastructure, EITF membership has also included CISA/DHS and other cybersecurity focused agencies.

Components of the EITF

- Centralized command centers in Las Vegas and Carson City. Allow for the rapid sharing of information and deployment of resources if necessary.
- County election officials and staff maintain communication with the Deputy for Elections and monitor activates such as voter conduct, election irregularities, and equipment problems.
- Complaints can be filed using a form on the Secretary of State's website: www.nvsos.gov. Individuals can also call in with complaints to the Secretary of State's Elections Division hotline: (775) 684-5705.
- Addresses issues across the State.

Components of the EITF



EITF's Successes

- ACORN (2009) – Charged with 26 counts of voter fraud and 13 counts of compensating registering voters.
- Roxanne Rubin (2012) – Charged with attempting to vote twice. Pled guilty to a lesser charge as part of a deal.
- Hortencia Segura-Munoz (2014) – Charged with voter registration fraud and ID theft. Pled guilty to a gross misdemeanor.
- Tina Marie Parks (2016) – Charged with voter registration fraud. Sentenced to 19 to 48 months in prison.
- Renaldo Johnson (2016) – Charged with petition fraud. Pled guilty to lesser charge and was sentenced to 12 to 34 months in prison.
- Patrick Duffy (2018) – Charged with petition fraud. Pled guilty to a reduced charge.
- Craig Frank (2019) – Charged with voting twice in the same election. Sentenced in Feb 2021 to a minimum term of 12 months and a maximum term of 30 months.
- Donald Hartle (2020) – Charged with two felony counts. Pled guilty to a gross misdemeanor.

Common Election Crimes

This space deliberately left blank

Common Election "Crimes"

- Many reported election "crimes" are not crimes
  - First Amendment considerations vs. Civil Rights
  - Perception vs. Reality
  - Lack of understanding of title 24 (9 chapters of NRS)

TITLE 24 — ELECTIONS	
Chapter 293	Elections
Chapter 293B	Mechanical Voting Systems or Devices
Chapter 293C	City Elections
Chapter 293D	Uniformed Military and Overseas Absentee Voters Act
Chapter 294A	Campaign Practices
Chapter 295	Certain State and Local Ballot Questions
Chapter 298	Presidential Electors and Elections
Chapter 304	Election of United States Senators and Representatives
Chapter 306	Recall of Public Officers

  - Or Federal law (CRA, VRA, UOCAVA, NVRA, HAVA, MOVE, ECRA)

Common Election "Crimes"

- Examples:
  - Giving voters a ride to the polls.
  - Giving workers time off in order to vote.
  - Providing voters with information supporting or opposing a candidate, group of candidates, or question on the ballot (**as long as it occurs outside the 100 ft. restricted area**; NRS 293.361).
  - Coming from another state to Get Out the Vote (GOTV) or to be an election **observer**.
  - No polling place/drop box/ability to vote within _____ minutes.
  - Guns…

Common Election "Crimes"

- Guns:
  - There is no Nevada election law (Title 24 of NRS) that specifically addresses the issue of guns in polling places.
  - Accordingly, gun laws found in other sections of NRS provide the rules we follow.
- There are three types of polling places:
  1. Public – Buildings occupied by federal, state, or local governments.
  2. Private – Building not occupied by federal, state, or local governments.
  3. School – Public and private K-12 schools, public colleges and universities, and child care facilities

Common Election "Crimes"

- Guns:
  - Concealed carry is permitted in public buildings UNLESS the building has a metal detector at each public entrance or a sign posted at each public entrance indicating that no firearms are allowed in the building (see NRS 202.3673).
  - In practice, almost all public buildings prohibit concealed carry either because they have a metal detector at each public entrance or a sign posted at each public entrance indicating that no firearms are allowed in the building.
  - LCB legal opinion from 2015 concludes that the open carry of firearms is NOT prohibited in a public building, unless otherwise prohibited by specific statute (e.g., school and the legislative building).

Common Election "Crimes"

- Guns:
  - Many private building owners and operators have no guns or weapons policies, including signs informing people of this policy at building entrances.
  - However, the legal enforceability of these policies is questionable. For example, Texas has a law where a sign can be posted making it illegal to carry a firearm on private property…not in Nevada though.
  - Nevada election officials rely on the voluntary cooperation of private property owners in order conduct early voting and election day voting. As a result, we follow their rules when it comes guns and weapons.

Common Election "Crimes"

- Guns:
  - No guns are ever allowed on school property (NRS 202.265).
  - This includes Nevada System of Higher Education property and private schools.
  - Peace officers and security guards are exempt from this prohibition.
  - Written permission can be given from principal, but this hasn't happened in practice.

Common Election Crimes

- Those that **are** violations of federal or state law:
  - May be explained wrong or cite the wrong statute
  - May be illegal…in CA/UT/AZ/NY/FL/TX, but not NV
  - Time-sensitive vs. not time-sensitive
- Generally found in NRS 293.700 - .840

UNLAWFUL ACTS AND PENALTIES

NRS 293.700	Bribery of elector.
NRS 293.710	Intimidation of voters and other unlawful acts in connection with election process.
NRS 293.720	Suppression of or failure to file nomination paper by public officer.
NRS 293.730	Unlawful interference with conduct of election; unlawful acts relating to certain ballots; unlawful acts inside polling place.
NRS 293.740	Soliciting votes and electioneering inside polling place or within certain distance from polling place prohibited; penalty.
NRS 293.750	Removal or destruction of election supplies or equipment.
NRS 293.755	Tampering or interfering with certain election equipment or computer programs used to count ballots; report of violation to district attorney.
NRS 293.760	Alteration, defacement or removal of posted results of votes cast.
NRS 293.770	Refusal of person sworn by election board to answer questions.
NRS 293.775	Voting by person who knows he or she is not qualified elector; voting using name of another person.
NRS 293.780	Voting more than once at same election.
NRS 293.790	Offer to vote by person whose vote has been rejected.
NRS 293.800	Unlawful acts concerning registration of voters; violations of laws governing elections; crimes by public officers.
NRS 293.805	Unlawful to pay compensation based upon total number of persons preregistered or registered or total number preregistered or registered in particular political party.
NRS 293.810	Preregistration or registration in more than one county at one time.
NRS 293.820	Solicitation of contribution for political organization without prior approval or charter.
NRS 293.830	Betting on election.
NRS 293.840	Civil penalty.

Electioneering (NRS 293.361 & .740)

- Electioneering means campaigning for or against a candidate, ballot question, or political party by:
  - **Posting signs** relating to the support of or opposition to a candidate, ballot question, or political party;
  - **Distributing literature** relating to the support of or opposition to a candidate, ballot question or political party;
  - **Using loudspeakers to broadcast information** relating to the support of or opposition to a candidate, ballot question, or political party;
  - **Buying, selling, wearing, or displaying any badge, button or other insigne** which is designed or tends to aid or promote the success or defeat of any political party or a candidate or ballot question to be voted upon at that election; or
  - **Soliciting signatures** to any kind of petition.

Electioneering (NRS 293.361 & .740)

- If your question is about directly talking to people, .740(2)(a) covers early and day-of voting. If it's about posting signs, distributing literature, wearing pins, etc., it's covered only by .361 for early voting and .740(2)(b) for day-of voting.

- **Early Voting**
  - When the polling place is open, electioneering is prohibited within 100 feet from the entrance to the voting area.
  - The outer limits of the area must have a sign that reads "Distance Marker: No electioneering between this point and the entrance to the polling place."
  - Violation is a gross misdemeanor.

- **Election Day**
  - It is unlawful inside a polling place or
  - Violation is a gross misdemeanor.

Do(es) not apply to the conduct of a person in a private residence or on commercial or residential property that is within 100 feet from the entrance to a building or other structure in which a polling place is located.

Electioneering (NRS 293.361 & .740)

- The law against electioneering is NOT intended to prohibit a person from voting solely because he or she is wearing a prohibited political insigne and is reasonably unable to remove the insigne or cover it.
  - In such a case, the poll workers or the Clerk/Registrar will take action as is necessary to allow the voter to vote as expediently as possible and then assist the voter in exiting the polling place as soon as is possible.

- Rights of the owner:
  - NRS 293.3572 – The legal rights and remedies which inure to the owner or lessor of private property are not impaired or otherwise affected by the leasing of the property for use as a temporary branch polling place for early voting, except to the extent necessary to conduct early voting at that location.

  - NRS 293.437 – The legal rights and remedies which inure to the owner or lessor of private property are not impaired or otherwise affected by the leasing of the property for use as a polling place pursuant to subsection 3, except to the extent necessary to conduct voting at that location.

Voter Intimidation (NRS 293.710)

- It is **unlawful for any person**, in connection with any election, petition or preregistration or registration of voters, **whether acting himself or herself or through another person in his or her behalf**, to:
  - Use or threaten to use any force, intimidation, coercion, violence, restraint or undue influence;
  - Inflict or threaten to inflict any physical or mental injury, damage, harm or loss upon the person or property of another;
  - Expose or publish or threaten to expose or publish any fact concerning another in order to induce or compel such other to vote or refrain from voting for any candidate or any question;
  - Impede or prevent, by abduction, duress or fraudulent contrivance, the free exercise of the franchise by any voter, or thereby to compel, induce or prevail upon any elector to give or refrain from giving his or her vote; or
  - Discharge or change the place of employment of any employee with the intent to impede or prevent the free exercise of the franchise by such employee.
- Voter intimidation is a category E felony.
- Voter intimidation is also a federal crime - 18 U.S. Code § 594.

Voter Intimidation (NRS 293.710)

- What is and is not voter intimidation?
- Examples of voter intimidation could include (this is not an exhaustive list):
  - Physically blocking a polling place so a voter cannot vote.
  - Looking over people's shoulders while they are voting
  - Questioning voters about their political choices, citizenship status, or criminal record.
  - Using threatening language in or near a polling place.
  - Falsely representing oneself as an election official.
  - Spreading false information about voter requirements
    - “You must speak English in order to vote”
    - “Democrats vote on Tuesday and Republicans vote on Wednesday”

Election Observers (NAC 293.245)

- Any person may observe the conduct of voting at a polling place subject to the provisions of NRS 293.245.
- No training or certification is required to be an election observer in Nevada.
- Election observers must sign an acknowledgement form that lists the following prohibitions:
  - Talking to voters within the polling place.
  - Using a mobile telephone or computer within the polling place.
  - Advocating for or against a candidate, political party or ballot question.
  - Arguing for or against or challenging any decisions of county or city election personnel.
  - Interfering with the conduct of voting.
- Election observers must wear a name tag denoting the person's full name.
- Election officials **may limit the number of people** or remove from a polling place a person observing the conduct of voting if the observer is violating the rules.
- Providing meaningful opportunities for the public to observe election processes is critical to maintaining trust in the integrity of the election.

Election Observers (NAC 293.245)

- "Meaningful observation"?
  - **"Meaningful observation"** means a person may observe the identification of voters who appear at a polling place to vote, the distribution of a ballot or voting machine card to a voter, the movement of a voter to a voting booth, the return of a ballot or voting machine card by a voter and the exiting of a polling place by a voter. The term does **not** include allowing a person to:
    - (1) View the personal information of a voter, a voter's ballot or selections on a voting machine; or
    - (2) Listen to any conversation between election board officers or between a voter and an election board officer.

Ballot "Selfies" (NRS 293.274 & .730)

- NRS 293.274 prohibits a member of the general public from photographing the conduct at a polling place (the media is exempt from this prohibition).
- NRS 293.730 prohibits a voter from showing his or her ballot to any person, after voting, so as to reveal any of the names voted for (category E felony).
  - First Circuit Court of Appeals held that New Hampshire's law specifically prohibiting ballot selfies is unconstitutional because it violates the First Amendment.
- Some have argued that ballot selfie bans are narrowly tailored to **prevent "vote buying"** and are therefore constitutional.
- In the end, taking a picture of your marked ballot is against state law so we will enforce it.

Bribery of Elector (NRS 293.700)

- A person who bribes, offers to bribe, or uses any other corrupt means, directly or indirectly, **to influence any elector in giving his or her vote or to deter the elector from giving it** is guilty of a category D felony and shall be punished as provided in NRS 193.130.

Unlawful interference (NRS 293.730)

- Except for an election board officer in the course of the election board officer's official duties, **a person shall not:**

  (a) **Remain in or outside of any polling place so as to interfere** with the conduct of the election.

  (c) **Remove a ballot from any polling place** before the closing of the polls.

  (d) Apply for or receive a ballot at any election precinct or district other than one at which the person is entitled to vote.

  (f) Inside a polling place, ask another person for his or her name, address or political affiliation **or** for whom he or she intends to vote.

  (h) Except when permitted by the voter, **alter, change, deface, damage or destroy** a **mail ballot** or military-overseas ballot prepared by or on behalf of the voter with his or her authorization pursuant to this title.

Unlawful interference (NRS 293.269923)

- 2. Except for an election board officer in the course of the election board officer's official duties, **a person shall not willfully**:

(a) **Impede, obstruct, prevent or interfere with the return of a voter's mail ballot**;

(b) **Deny a voter the right to return the voter's mail ballot**; or…

3. A person who violates any provision of subsection 2 is guilty of a category E felony and shall be punished as provided in NRS 193.130.

Ballot Collecting

- Sometimes referred to as “ballot harvesting”
- **NOT a crime in Nevada**
- As of August 2020:
  - **26 states and D.C. permitted someone chosen by the voter to return mail ballots on their behalf in most cases**
  - 12 states specified who may return ballots (i.e., household members, caregivers, and/or family members) in most cases
  - 1 state explicitly allowed only the voter to return their ballot
  - 13 states did not specify whether someone may return another's ballot
- In practice:
  - Official ballot drop boxes vs. Unofficial drop boxes
  - Key question is: How long have you had these ballots?

Ballot Collecting

- Key question is: How long have you had these ballots?
- NRS 293.269923

(c) **If the person receives the voter's mail ballot and authorization to return the mail ballot on behalf of the voter** by mail or personal delivery, fail to return the mail ballot, unless otherwise authorized by the voter, by mail or personal delivery:

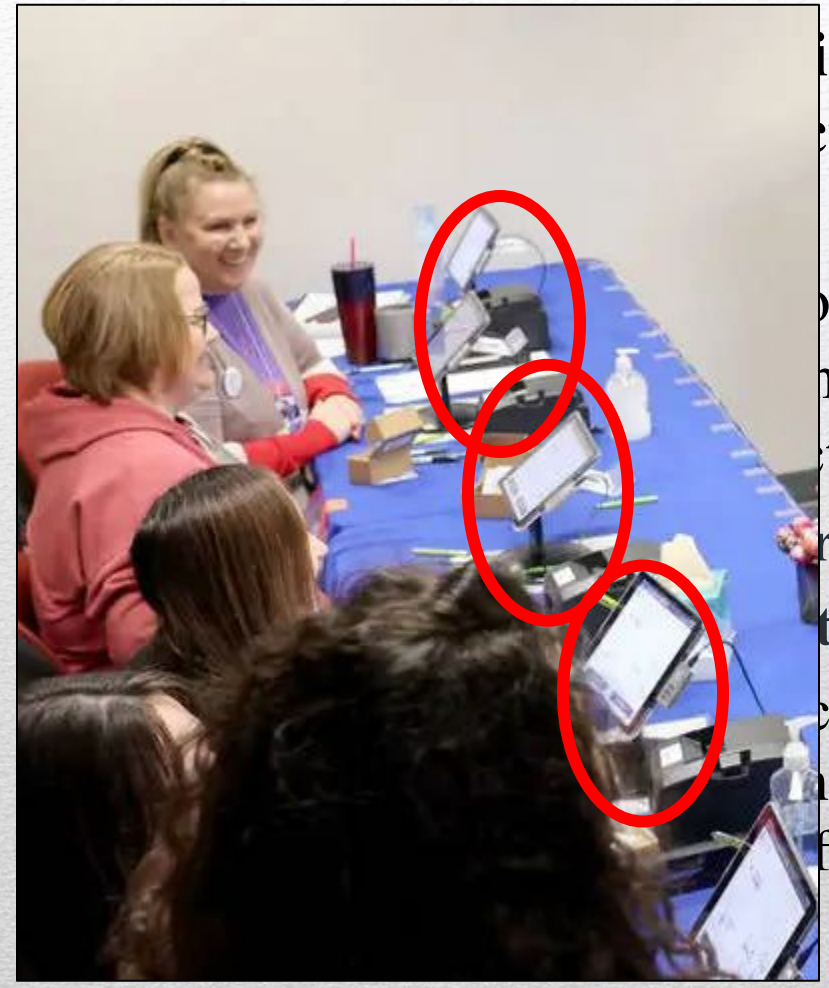
(1) **Before the end of the third day after the day of receipt**, if the person receives the mail ballot from the voter four or more days before the day of the election; or

(2) **Before the deadline established by the United States Postal Service for the mail ballot to be postmarked on the day of the election or before the polls close on the day of the election**, as applicable to the type of delivery, if the person receives the mail ballot from the voter three or fewer days before the day of the election.

Removal or destruction of election supplies or equipment (NRS 293.750)

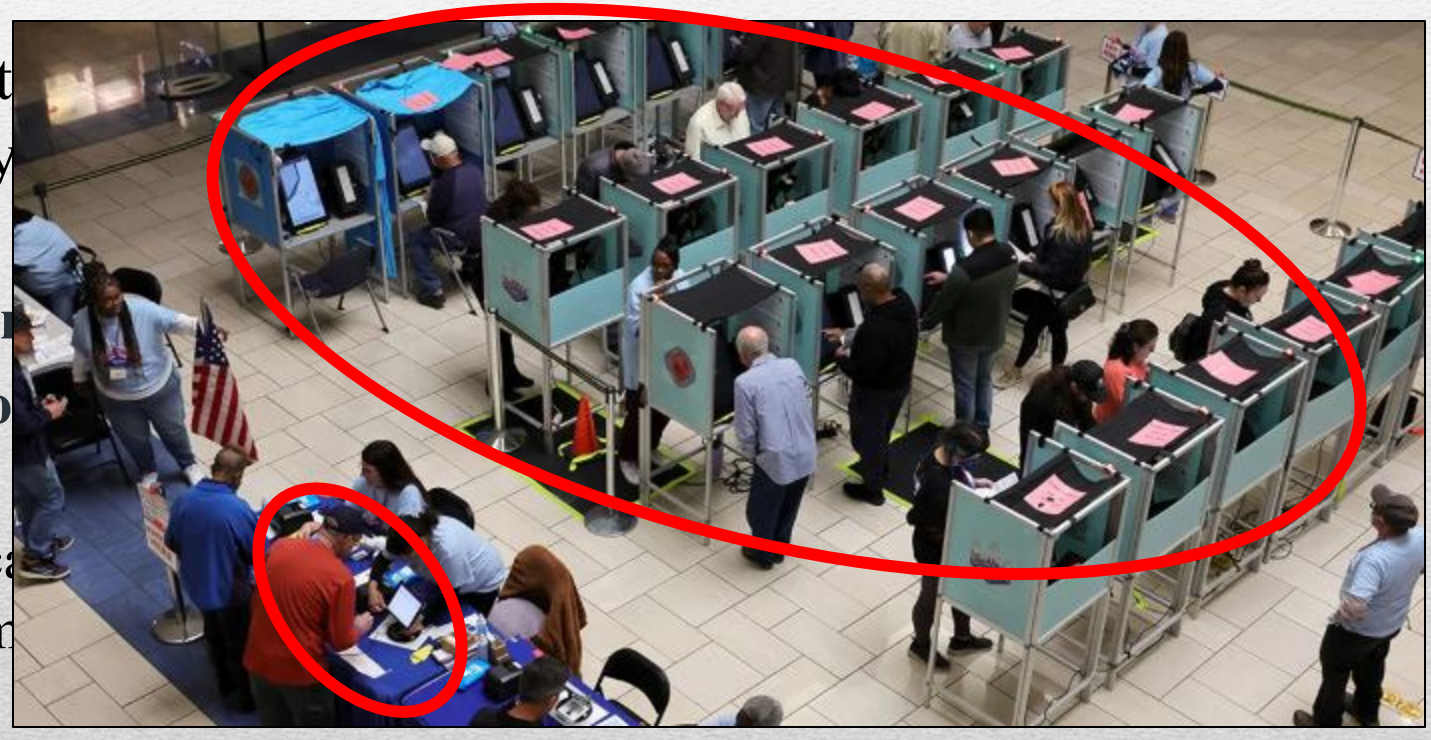
- Any person who, during an election, **removes or destroys** any of the supplies or equipment placed in the booths or compartments or **removes or defaces** the cards of instruction posted as prescribed by this chapter is guilty of a gross misdemeanor.

Tampering with equipment (NRS 293.755)



ing with election equipment or computer programs
tion; clerk shall report of violation to district

r int
ng sy
t an
roper
the o
clerk
all ca
f com



Voting more than once (NRS 293.780)

- A person who is entitled to vote **shall not vote or attempt to vote more than once at the same election**. Any person who votes or attempts to vote twice at the same election is guilty of a category D felony and shall be punished as provided in NRS 193.130.

Voting more than once (NRS 293.780)

- 52 USC § 10307: Prohibited acts
- (e) Voting more than once
  - (1) Whoever votes more than once in an election referred to in paragraph (2) shall be fined not more than $10,000 or imprisoned not more than five years, or both.
  - (2) The prohibition of this subsection applies with respect to any general, special, or primary election held solely or in part for the purpose of selecting or electing any candidate for the office of President, Vice President, presidential elector, Member of the United States Senate, Member of the United States House of Representatives, Delegate from the District of Columbia, Guam, or the Virgin Islands, or Resident Commissioner of the Commonwealth of Puerto Rico.
  - (3) As used in this subsection, **the term "votes more than once" does not include** the casting of an additional ballot if all prior ballots of that voter were invalidated, nor does it include the **voting in two jurisdictions under section 10502 of this title, to the extent two ballots are not cast for an election to the same candidacy or office.**

Threats to an Election Official

- SB406 (2023) – NRS 293.705
  - Making it unlawful for a person to **use or threaten or attempt to use any force, intimidation, coercion, violence, restraint or undue influence** with the intent to **interfere with the performance of duties of an elections official** or retaliate against an elections official for the performance of such duties; making it **unlawful to disseminate certain information about an elections official**
    - 2. The provisions of subsection 1 **apply regardless of whether** a person uses or threatens or attempts to use such force, intimidation, coercion, violence, restraint or undue influence **at a polling place or a location other than a polling place**.
- **(b) "Elections official" means:**

  (1) The Secretary of State or any deputy or employee in the Elections Division of the Office of the Secretary of State who is charged with duties relating to an election;

  (2) A registrar of voters, county clerk, city clerk or any deputy or employee in the elections division of a county or city who is charged with elections duties; or *Includes county staff who are working to support election temporarily

  (3) An election board officer or counting board officer. *Includes part time staff!

Threats to an Election Official

- **But also protects election observers!**
- 5. This section does not limit:

  (a) The applicability of the provisions of law relating to:

  (1) **Observing** the conduct of voting at a polling place pursuant to NRS 293.274 or 293C.269;

  (2) **Observing** the conduct of tests pursuant to NRS 293B.145 or 293C.615;

  (3) **Observing** the handling of ballots upon the closing of the polls pursuant to NRS 293B.330 or 293C.630;

  (4) **Observing** the counting of ballots at the central counting place pursuant to NRS 293B.353;

  (5) **Observing** the delivery, counting, handling and processing of the ballots at a polling place, receiving center and the central counting place pursuant to NRS 293B.354; and

  (6) **Observing** ballot processing pursuant to NRS 293B.380.

  (b) **The ability of a person to give or offer to give prepackaged food items, nonalcoholic beverages, coats, handwarmers or other similar items** to other persons who are at a polling place or any other location described in paragraph (a), if done in accordance with any other law and to the extent such items are not distributed inside of a building which does not permit the distribution of such items in the building as indicated by a sign posted in a prominent place at the entrance of the building.

  (c) The **ability of a person to engage in written recordation** of notes at a polling place or a location other than a polling place; or

  (d) The **ability of a person to communicate** with voters, election board officers or other persons in any way that is not otherwise limited or prohibited pursuant to subsection 1 or 3 or any other provision of law, including, without limitation, NRS 293.740.

Others

- Voting by a person who knows he or she is not eligible – Category D felony (NRS 293.775)
- Voting in the name of another person – Category D felony (NRS 293.775)
- Voter registration fraud – Category E felony (NRS 293.800)
- Compensation based on the number or people registered to vote – Category E felony (NRS 293.805)
- Campaign finance shenanigans
- Political sign violations

2020

- Combination of factors led to mistrust of process, people, and things
- Wide range of reported activities:
  - “Buying votes”
  - Electioneering
  - Intimidation
  - Fraud
  - Double voters
  - Deceased voters
  - Non-citizen voters
  - “Hacked” voting machines
  - Ballot box stuffing
  - Ballot collecting *not a crime in NV
  - Mail theft
  - And more!

2020

- Wide range of reported activities **in other states**:
  - Violence / threats against voters
  - Violence / threats against election workers
  - Violence / threats against election officials
  - Arson (ballot drop boxes)
  - Protests & Riots
  - Looting
  - Cyber-attacks (ransomware; breach/compromise)

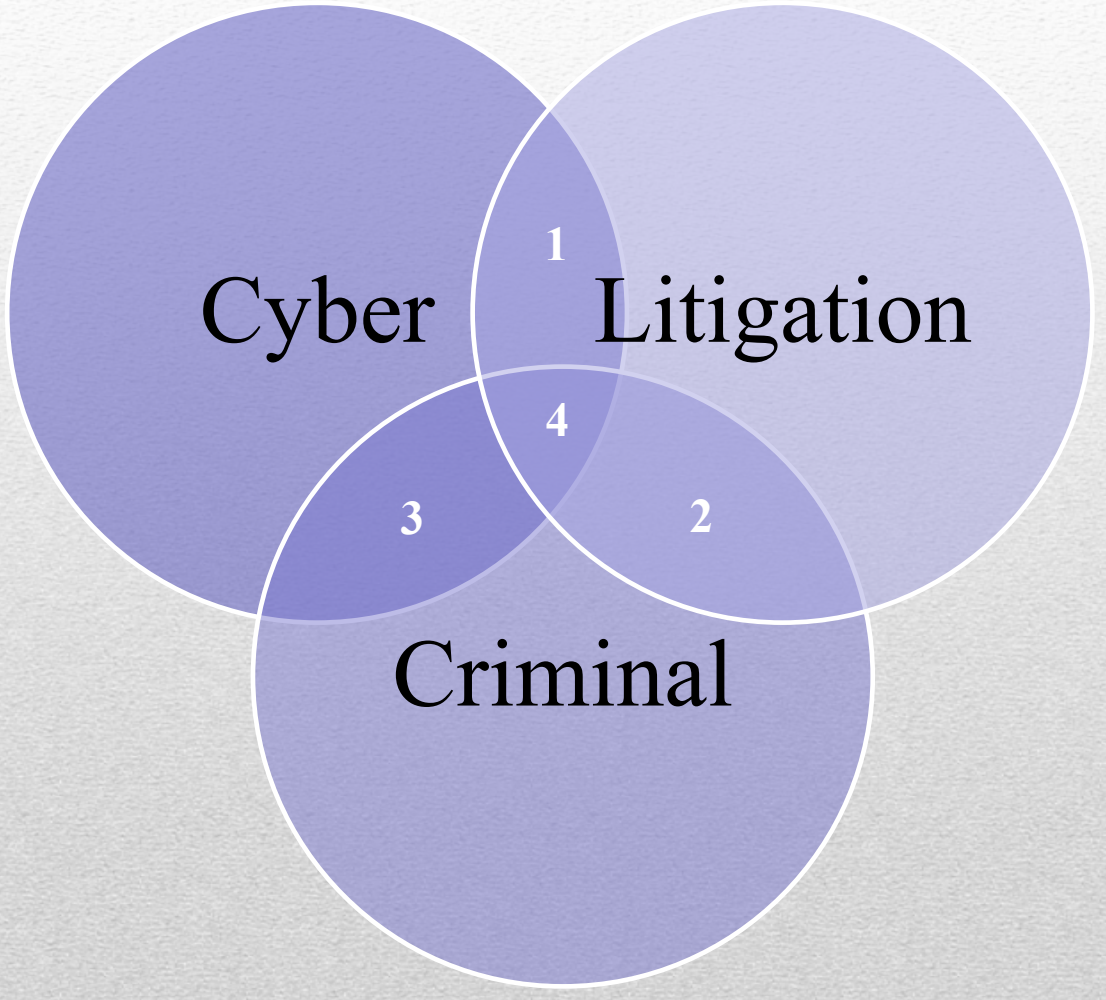
2020

- Compared to now:

	2020	2022	2024
Election laws hard to understand?	X	X	X
Recent complex changes to election laws?	X	X	X
Mis/Dis-information?	X	X	X
New Nevada voters from elsewhere?	X	X	X
Foreign efforts to manipulate?	X	X	X
Cyber-threats?	X	X	X
Social friction / unrest?	X	X	X
Experienced election officials?	X	x	~

2024

- Risks:



1. Cyber-crime that leads to delays or errors in process that require litigation
2. Fraud / violence that leads to delays or errors in process or proven to be more than margin for victory leading to litigation
3. Cyber-crime that leads to public unrest / violence / other criminal acts against election officials, polling locations, etc.
4. All of the above at the same time

Timeline for 2024

- ppp.
- **First Military and overseas ballots mailed** – exact dates vary by county; week of Sept 16-21.
- **EASE (military and overseas system) available for use** - Sept 20
- **Out of state ballots mailed –** exact dates vary by county; Sept 16-26
- **In-state ballots mailed –** exact dates vary by county; Oct 6-22
- **Early voting begins** - Saturday, Oct 19 and runs through Friday, Nov 1.
- **Election Day** - Nov 5.
  - **Last day mail ballots postmarked by Election Day must be accepted** – Nov 9
  - **Last day to cure mail ballot signature** – Nov 12 (normally the 6th day which would be Monday Nov 11, but Nov 11 is Veterans Day and NAC 293.332 extends it to the next business day at 5 pm)
- **Canvass by Boards of County Commissioners** – Completed not later than Nov 15.
- **NV Supreme Court Canvass in Carson City** – Nov 26
- **Electoral College meets** - location TBD Dec 17
- **Congress meets to count Electoral College Votes** – Jan 6, 2025
- **Inauguration for POTUS** – Jan 20, 2025
- **Legislative Session begins** – Feb 3, 2025
- POTUS Inauguration – **January 20, 2025**

1. Elections may see … n according to federal and state l…
2. Elections require … out the year to be secure and fair
3. Democracy is a te…
4. A functioning dem… be done.

QUESTIONS?

Contact the Elections Division

Phone 775-684-5705

Email - nvelect@sos.nv.gov

Zoning, Planning, Acquisition Update

BY: STEVEN M. SILVA

- STEVE!!!

Planning and Zoning

- Planning and Zoning are aspects of land-use regulation
- Source of authority:
  - Inherent aspect of sovereignty
  - Understood by both common law and Roman law
- Recognized as valid exercises of "police power" by United States Supreme Court in Village of Euclid decision.
  - Source of term "Euclidean zoning" – which sounds like Euclidean geometry

Planning and Zoning

- Nevada Supreme Court has parallel Euclid case.
  - State ex rel Davie v. Coleman
  - Importantly, a zoning ordinance contains an "escape valve" in the form of variance and use permits.
  - When regulations that apply to all are "unnecessarily burdensome" to a few because of unique circumstances, a means of relief from the mandate can be provided.

Where Do I Look?

- Land use authority is codified in several places:
  - City Charters (where applicable)
  - NRS Chapter 244
  - NRS Chapter 268
  - NRS Chapter 278
  - NRS Chapter 278A
  - Local ordinances

Where Do I Look?

- State statutes control
  - Pesky no-home rule state.
- Ordinances are typically codified in a local development code.
  - Court will strike down provisions that are inconsistent with NRS Chapter 278.

Sliding scale of process

- Statutes tend to focus on the size of municipalities and counties.
- Clark County (I mean, it could be ANY county over 700,000 people really) has different burdens and requirements for planning than Washoe County or Fernley.
- For example, Clark County and its big cities have to form a regional planning coalition via cooperative agreement, which inter alia must define projects of regional significance and develop regional master planning. Meanwhile Washoe must create a regional planning commission. NRS 278.02507; 278.02514; 278.0262

Caveat

- Nevada statutes are not always the model of clarity
- Nevada jurisprudence is not always the model of clarity

Planning

- State law requires the adoption of a plan
  - Terms "master", "general", "comprehensive" are used in statutes and appear to be synonyms.
  - "plan" can also refer to a regional plan (TRPA) and a "master plan" as in a privately developed master planned community.

- A plan is intended to be a policy document by which the jurisdiction sets forth development goals, favored uses, growth areas, transportation corridors and the like.
  - Purpose is to promote "health, safety, morals, or the general welfare"

NRS 278.020

Zoning

- Zoning ordinances are intended to be adopted in conformance with the general plan.
- Zoning is sorted essentially by type of use
  - E.g. residential, commercial, industrial, agricultural
- Further sorted by density or intensity
  - E.g. single-family residential/multifamily residential; number of units per acre; type of commercial or industrial activity allowed

Subdivision and mapping

- Like many states, Nevada adopted a Map Act governing the subdivision and mapping of parcels.
- Subdivision mapping is generally the bread and butter of land-use and entitlement
- Mapping is usually accomplished by a tentative map followed by a final map or a subdivision map.

Process

- The adoption of master planning and zoning ordinances is initiated by the local jurisdiction.
- The process of seeking a certain land use is initiated by the land-owner or a developer with some interest in the land.

Process

- Most decisions are made at open meeting.
- Ministerial or administrative decisions can be made without need for hearing.
- If a public meeting is required, notice is given in conformity with open meeting law.
- Generally, notice is posted in public notice areas, and on the property sought to be developed.
- Notice is generally mailed to nearby properties, including in particular abutting property owners.

Process

- Nevada custom provides for applicants or their representatives to meet with staff, planning commissioners, other public interest representatives, and even members of the governing body.

- Care must be taken not to improvidently create a quorum in violation of the OML.

Process

- When an application is submitted for a land use change or variance (whether an amendment to the master plan, a rezoning, a use permit) we look for general compatibility with the surrounding areas.
  - Burden of proof is upon the applicant to show that approval is warranted.
  - Burden is on applicant to show that negative impacts will not occur or have been adequately address (i.e. mitigation or offset by exaction).
  - Variances generally require a higher burden (e.g. convincing and substantial)
- Ostensibly we seek to avoid spot-zoning.

- The decision to grant a variance is discretionary.

Process

- Important to understand what standard applies

- A zoning change or a variance or a use permit are discretionary.
- Mapping compliance may be ministerial.
  - Although a map may result in the discretionary imposition of conditions and exactions.
- A proposed use that is already allowed by zoning should be discretionary…. but…

Process

- Disappointed land use applicants or stakeholders may seek review through the process set forth by the local entity. NRS 278.3195.
- Further review is generally taken by a petition for judicial review. All administrative remedies must first be exhausted.
- Standard of review is substantial evidence
- Similarly administrative appeals exist. Writs of mandamus or prohibition are recognized remedies under Nevada law.
- Or you can just sue for a taking. It's the latest trend.

Stratosphere

- 120 Nev. 523 (2004).
- Denial of particular use was not improper when based largely on community opposition even when consistent with zoning.

5th & Centennal

- Amendment to master plan of streets by municipality could qualify as an announcement of intent to condemn for purposes of establishing precondemnation damages cause of action

- But was not itself a taking

5th & Brooks

- Landowner who did not record parcel map did not create legally distinct parcels entitling defendants to multiple trials.

Badlands

- It’s bad.

Badlands

- Essential points:
  - Land developer created planned community with residential component and golf course.
  - Developer sold interest in golf course.
  - Golf course use terminated by owner.
  - Owner applied for residential development.
  - Issue became political—and proposed development was denied.
  - Landowner sued and lost and lost and then won and won and won…. And won.

Badlands

- Has overlap with *Pakdel*.
- How many denials before there is a taking?
- What is taken when a proposed development is denied?

- What vested rights does a landowner have in a zoned parcel?
- What impact does a master plan designation have on a zoned parcel?

Badlands

- Nevada Supreme Court finds in favor of developer.
- Rejects parcel argument from City
- Rejects that a qualified use needs to have both zoning AND land-use designation conformity
- Ignores vested rights argument by finding a total take
- Essentially finds a single denial sufficient by looking at totality of context—including salty texts

ACQUISITION

Government can buy stuff

Nevada Constitution

- Eminent domain in three places:
  - #1 Nevada Constitution Article 1, Section 8(3)
    - Generally consistent with U.S. Amend. V.
  - #2 Nevada Constitution Article 1, Section 22

    (Note: These were renumbered--formerly 8(6) and (21) for your WestLaw/Lexis searching)

  - #3 Nevada Constitution Article 8, Section 7

    Eminent domain by corporations. No right of way shall be appropriated to the use of any corporation until full compensation be first made or secured therefor.

    Does this include municipal corporations?

Nevada Statutes

- NRS Chapter 37
  - Eminent Domain Generally
- NRS Chapter 340
  - Public Works and Planning – Eminent Domain
  - Added in 1935 finding public emergency due to unemployment
- NRS 279.471
  - Eminent domain by Redevelopment Agency

LAND USE DENIAL AS TAKING

- “NO” can be a problem

Badlands

- It’s bad.

Badlands

- Essential points:
  - Land developer created planned community with residential component and golf course.
  - Developer sold interest in golf course.
  - Golf course use terminated by owner.
  - Owner applied for residential development.
  - Issue became political—and proposed development was denied.
  - Landowner sued and lost and lost and then won and won and won…. And won.

Badlands

- Has overlap with Pakdel.
- How many denials before there is a taking?
- What is taken when a proposed development is denied?

- What vested rights does a landowner have in a zoned parcel?
- What impact does a master plan designation have on a zoned parcel?

Badlands

- Nevada Supreme Court finds in favor of developer.
- Rejects parcel argument from City
- Rejects that a qualified use needs to have both zoning AND landuse designation conformity
- Ignores vested rights argument by finding a total take
- Essentially finds a single denial sufficient by looking at totality of context—including salty texts

EXACTIONS

- "Yes, but…." can be a problem

Pakdel v. City and County of San Francisco, California

Pakdel

- But first, a little background.

Williamson

- The old rule was set forth by a case called Williamson County.
- In Williamson, the United States Supreme Court had interpreted takings law in such a way that there was no violation of the 5th Amendment until a government (1) took property and (2) refused to pay for it AND the refusal was backed by the courts of that state.
  - So, Reno refuses to let you develop, you say that it's a taking, you have to first litigate in the State Court to see if the state would decide to pay you.
  - Unless you exhausted your state remedies, you could not go to federal court.

San Remo

- BUT
- If you obtained a final judgment, the United States Supreme Court also said that the final judgment was binding.
- So, you could not go to Federal Court without litigating in State Court, but if you litigated in State Court, you were done.
- This was called by some the San Remo Trap.
- Now, if you think the law ought to be that every violation of a federal constitutional rights (i.e. the 5th Amendment) should be hearable by a federal court, this *Williamson-San Remo* catch-22 was a problem.
- Of course, the door to the STATE courthouse was open.

Knick

- In 2019, in a case called Knick v. Township of Scott, the United States Supreme Court overruled the state court exhaustion requirement.
- Instead, once property is taken and the state has not provided compensation, a Section 1983 claim is ripe.
- Knick did leave in place the requirement that the government action be final. That is in essence that without some final action, there has been no taking.
  - Let's digress and discuss 5th & Centennial here.

Main takeaway

- Knick ends the San Reno trap by expressly overruling a part of Williamson County.
  - Important to remember which part of the trap was eliminated.
  - Litigating in state court first is likely still a bar to a subsequent federal suit.

Issues left post-Knick

- There had been some question after Knick as to the extent of the final decision rule.
- Was a person required to run down every iteration of a proposed plan?
- If the agency that had denied the landowners plans had an administrative appeals process, must the landowner first exhaust their administrative remedies in order to arrive at a "final" decision?

Pakdel

- "The finality requirement is relatively modest. All a plaintiff must show is that 'there [is] no question . . . about how the "regulations at issue apply to the particular land in question."'" Very good, it's all perfectly clear now.

Pakdel

- In *Pakdel v. City and County of San Francisco*, the Pakdels wanted to convert a rental unit into a private residence (by dividing a building owned as tenants-in-common into condominiums). In order to accomplish this change, the City required that the Pakdels give their tenant a lifetime lease.

- The Pakdels agreed, and the City approved their conversion. But then the Pakdels requested to get out of their agreed to condition, and the City refused. The Pakdels could have gone through an administrative appeal, but they did not.
  - Question – why agree and then renege? Why not refuse and sue there? Because now we know the exact problem.

Pakdel

- The Supreme Court explained that the administrative appeal in the Pakdels' case was not part of the final decision process – the flat refusal to let the Pakdels out of their deal was the final decision.

- The Supreme Court did note that in other cases, if an agency has an appeal process that is more of a review process that allows the agency to alter its regulation – then a landowner likely has to follow that process to its end.

- Likewise, Congress could add additional exhaustion requirements to § 1983, and if Congress did so, a landowner would have to follow those requirements. But, Congress has not, and in the Pakdels' case, the City's decision was clearly final. As such, the Pakdels could proceed directly to Court.

Pakdel

- The takeaway here is understanding that where and when a "final decision" is made can be a moving target.
- While the Pakdels' case was truly fairly straightforward, how might this analysis apply in zoning matters? Downzoning matters? Variance or Special Permit Applications?
- How does this apply to planning matters?
  - And let's again discuss 5th & Centennial.

Pakdel v. City of San Francisco

- What is final?
- This is a difficult case for cities.
- Supreme Court decision: When government has reached *de facto* "conclusive" decision, finality is reached.

Monetary Exactions

Essential Nexus and Rough Proportionality

- *Nollan v. California Coastal Commission* (1987) 483 U.S. 825
  - Adjudicative decision that imposed public easement across property as condition on coastal development permit to mitigate for loss of visual access to the ocean from public roadway resulting from development
  - No nexus between loss of visual access and requiring landowner to permit public access to and along their shorefront
- *Dolan v. City of Tigard* (1994) 512 U.S. 374
  - Adjudicative decision that imposed dedication of land and public easement as conditions on building permit application for redevelopment
  - While nexus existed between impacts and conditions, the conditions were not roughly proportional in nature and extent to the impacts of proposed development

Nollan/Dolan Expanded to Certain Monetary Exactions

- *Ehrlich v. City of Culver City* (1996) 12 Cal. 4th 854
  - Adjudicative decision that imposed $280,000 payment for public recreational facilities as condition on rezoning and permit to build condominium project
  - Statutory and constitutional challenges to development fees must be brought through the Mitigation Fee Act process
  - Mitigation Fee Act's "reasonable relationship" standard when applied to adjudicative exactions is consistent with Nollan/Dolan requirements
  - Legislatively imposed development impact fees also subject to Mitigation Fee Act, but under a less demanding standard
  - While an essential nexus existed between the recreational fee and the loss of recreational facilities resulting from proposed project, the record failed to demonstrate rough proportionality between the impacts of the proposed project and the fee

Nollan/Dolan Expanded to Certain Monetary Exactions

- *San Remo Hotel L.P. v. City and County of San Francisco* (2002) 27 Cal. 4th 643
  - Ordinance enacted housing replacement requirement to mitigate impacts associated with conversion of residential hotels to tourist hotels
  - Options included constructing or brining onto market new residential units; sponsoring such construction; or paying in lieu fee established by set formula
  - Held that *Nollan/Dolan* did not apply, citing *Ehrlich* and distinguishing between ad hoc exactions and legislatively mandated, formulaic mitigation fees

Nollan/Dolan Expanded to Permit Denials

- *Koontz* v. *St. Johns River Water Mgmt. Dist.* (2013) 570 U.S. 595
  - District informed the applicant that it would only approve the project if the applicant agreed to either dedicate property to the District or make improvements to District-owned land
  - The applicant refused and the District denied the application
  - "[G]overnment's demand for property from a land-use permit applicant must satisfy the requirements of *Nollan* and *Dolan* even when the government denies the permit and even when the demand is for money."

Unresolved Issues

- *California Building Industry Association v. City of San Jose* (2015) 61 Cal. 4th 435
  - Inclusionary housing ordinance applying to all new residential projects of 20 or more units
    - 15% on-site units; 20% off-site units; in lieu fee based on median sales price of moderate-income family dwelling; dedication of land equal in value to in lieu fee; rehabilitation of comparable number and type of units
  - Held ordinance is a land use restriction and not an exaction
  - FN 11 – *Koontz* did not purport to decide whether *Nollan/Dolan* is applicable to legislatively prescribed monetary permit conditions that apply to broad classes of development

Recent U.S. Supreme Court Decision

- *Sheetz v. County of El Dorado*
  - Challenge to legislatively enacted traffic impact mitigation fee imposed as condition of building permit approval for manufactured home
  - Fee program identified category of fees based on location of project (zones) and type of development (single-family, multi-family, commercial, etc.)
  - Sheetz argued that traffic impact mitigation fee subject to *Nollan/Dolan*
  - California trial and appellate courts held traffic impact mitigation fee not subject to *Nollan/Dolan* because it was a legislatively enacted fee applicable to a broad class of property owners

Recent U.S. Supreme Court Decision

- *Sheetz v. County of El Dorado* (2024) 601 U.S. __
  - Unanimously held that *Nollan/Dolan* does apply to legislatively established development impact fees
  - Court did not analyze whether the fee complies with *Nollan/Dolan*
  - Court left open the possibility of compliance based on "reasonable formulas" or schedules based on "classes of development"
- Potential Impact of Decision
  - Increase in fee challenges
  - Potential need to update or adopt new fee studies

Treatment of Different Categories

- Key Considerations
  - Is it an exaction or only a regulation on the use of land?
  - Is it a fee or a dedication?
  - Is it legislatively adopted or imposed via an adjudicative decision?
- Examples:
  - School Development
  - Low Income Housing
  - Transit/Traffic
  - Coastline Protective Structures

VALUATION ISSUES

Bella Vista Ranch v. RTC of Washoe

- Unpublished April 2021
- Nevada Supreme Court affirmed district court judgment on valuation issues in eminent domain action.
- Landowner bears burden of proof on valuation. This includes demonstrating that a particular proposed highest and best use is "reasonably probable".
- Applied clearly erroneous standard to fact issues on valuation.

Transwest

- 2024
- Supreme Court REVERSES ruling of district court where district court had excluded landowner testimony, excluded an appraisal, and excluded a settlement payment as a "comp".

Landowner Testimony

- In a recent unpublished opinion by the Nevada Supreme Court, the Court reaffirmed its jurisprudence that landowners can testify
  - Possibly broadened the standard to allow landowners to testify based on inadmissible evidence
- Court also allowed an appraisal dated 9 months away from the date of value
- Court ALSO allowed testimony of a DOT settlement.

Landowner Testimony

- Landowners have what amounts to a common law presumption that they are qualified to testify as to value of land.
- This opinion testimony developed before the advent of the modern rules of opinion testimony disclosure (for expert opinions)
- Some states, such as California, have specific requirements for disclosing landowner testimony.

United States v. Cox, 2022 U.A. App. LEXIS 4636 (9th Cir.)

- In an eminent domain action, the property owners asserted that the district court erred in awarding the amount of just compensation for the acquisition of a mine because it did not adopt the property owner's proposed use of the mine.
- They also argued that the district court erred by excluding certain survey evidence.

Issue:

- Did the district court err when it declined to accept the property owner's argument for a proposed use of the property and did it err when it excluded certain surveys?

9th Circuit:

Holding:

- The district court did not err when it concluded that the property owner's proposed large-scale use for the mine was too speculative to be considered when calculating the compensation value. The property owners did not meet their burden of demonstrating that the proposed use was reasonably probable.
- As for the survey exclusion, the district court did not err. The property owners had offered insufficient evidence that the surveys in question were designed and conducted by individuals that were sufficiently qualified to render those surveys reliable. The 9th circuit affirmed.

Windsor Park

- Area within North Las Vegas plagued by subsidence probably caused by the withdrawal of water.
- State passed statute to acquire properties funded by state dollars and City of North Las Vegas dollars.
- Hope is to relocate community in a cohesive manner.
- Statute appears to bar sale of single family residences.

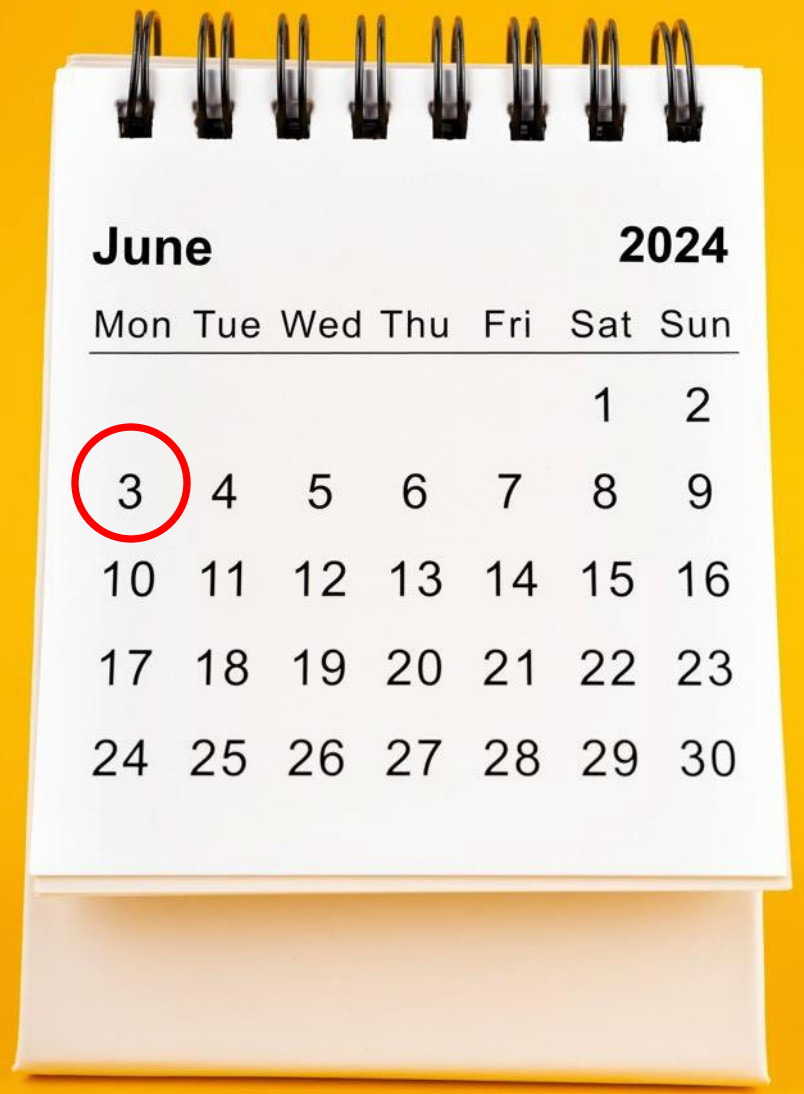
UNIFORM ACT UPDATE

Overview

- Uniform Relocation Assistance and Real Property Acquisition Policies Act
  - The regulations in 49 CFR Part 24, implementing 42 USC Ch. 61, are known as the Uniform Act.
  - The purpose of the act is to provide uniform and equitable treatment of persons displaced from their homes, businesses, farms, or nonprofit organizations and to establish uniform and equitable land acquisition policies for federal and federally assisted programs.
  - If the project is federally funded, the Uniform Act applies.
  - In Nevada, the Uniform Act probably applies to any entity that received federal funds.

Update to Uniform Act

- Uniform Act is being updated for the first time since 2005.
- The new regulations took effect June 3, 2024.
- Purpose of update is to ensure the protections offered under the Uniform Act match the needs of the current time.



What Has Changed?

- Increases the caps on certain benefits, limits on waiver valuations and conflict of interest have increased.
- Cost of living adjustments will be allowed to increase maximum waiver and benefit levels over time.
- Persons and businesses now become eligible for most benefits if they occupy the displaced property for 90 days instead of the previous 180 days.
- Temporarily displaced persons or businesses will be entitled to relocation benefits not previously available.

What Has Changed?

- Tenants displaced by voluntary acquisitions may be eligible for benefits.
- Reverse mortgages are addressed for the first time.
- Procedural changes:
  - Owners can designate a representative to receive notices on their behalf
  - Notices can be received electronically
  - Electronic signatures permitted
  - Use of services other than US Postal Service permitted

What Has Changed?

- Waiver valuations are not appraisals under the Uniform Act and set forth qualifications of persons who may perform the waiver analysis.
- Update rules on persons displaced from or moving into replacement dwellings falling under various government housing programs and subsidies
- Agencies must honor local standards for determining that a dwelling is decent, safe, and sanitary and must meet the most stringent standards regarding the same.

What Has Changed?

- Under prior regulations, the agency's notice of intent to acquire property was necessary to trigger various time frames applicable to relocation assistance. Under the new regulations, the triggering notice can be based on an intent to acquire, rehabilitate, or demolish the real property, even if the agency has no intent to acquire that property in the future.[2] 49 CFR § 24.2(a).

What Has Changed?

- Relocation benefits are now available to "permanently or temporarily" displaced persons as defined by the rule. Temporarily displaced persons must be provided with generally applicable notices and relocation advisory services. 49 CFR § 24.202(a)(1); see also 49 CFR § 24.203.

What Has Changed?

- In the case of a business, if it is shut down due to a project which requires the occupant to vacate the property or denies the occupant physical access to the property, the business will be temporarily relocated and reimbursed for "all reasonable out-of-pocket expenses." 49 CFR § 24.202(a)(3).
- Alternatively, the agency may determine that the business is permanently displaced and provide relocation benefits as provided under the Act.
- Temporary relocation includes reasonable and necessary costs of temporarily moving personal property and, in appropriate circumstances, storage. 49 CFR § 24.202(a)(4).
- A person's temporary move may not exceed 12 months. 49 CFR § 24.202(a)(5). If a displacement of either a person from their dwelling or a business lasts more than 12 months, that person will be considered permanently displaced.
- The agency may not deduct temporary relocation assistance benefits previously provided once it is determined that the displaced person or business is entitled to permanent relocation benefits.
- Temporarily displaced persons are generally entitled to the same notices as permanently displaced persons. See generally 49 CFR § 24.202.

What Has Changed?

- Reimbursement for moving equipment currently in use is based on the lesser of (1) the estimated cost to move the item 50 miles and reinstall it, or (2) the fair market value of the item in place, as is, less the proceeds from the sale. 49 C.F.R. § 24.301(g)(15)(i). If the item is not currently in use, reimbursement is the estimated cost of moving the item 50 miles, as is. 49 C.F.R. § 24.301(g)(15)(ii).

- Reimbursable business, farm or on-profit expenses, may now include expenses such as attorneys' fees incurred in negotiating the purchase of replacement site. 49 C.F.R. § 24.301(g)(18)(i)(F). As an alternative, the funding agency may allow a one-time payment of $1000 for search expenses with minimal or no documentation. 49 C.F.R. § 24.301(g)(18)(ii).

- Individuals are not entitled to recover attorneys' fees incurred as part of a search for replacement dwelling. 49 C.F.R. § 24.301(h)(9). Cosmetic changes, such as new drapes or carpeting, are not eligible for reimbursement. 49 C.F.R. § 24.301(h)(13).

-

What Has Changed?

- A tenant or homeowner displaced from a dwelling is entitled to a payment not to exceed $9,570 for rental assistance, up from $5,250. 49 C.F.R. § 24.402(b).
- An owner occupant displaced for a mobile home is entitled to replacement housing payment not to exceed $41,200, up from $22,500. 49 C.F.R. § 24.502(a).
- Likewise, displaced mobile home tenants are entitled to replacement housing payment not to exceed $9,570, up from $5,250. 49 C.F.R. § 24.503.

Something actually new

- The rule has entirely new provisions regarding reverse mortgages. 49 C.F.R. § 24.401(e).

- In general, to be eligible to have a reverse mortgage replaced, the property owner must have obtained the reverse mortgage more than 180 days prior to the initiation of negotiations. Reverse mortgage payments are conditioned on the owner obtaining a similar reverse mortgage on the replacement dwelling. An interest differential is available, if applicable.

Zoning and Planning Fun Case!!

- Badlands is depressing and the Uniform Act is boring.

- Brand new case from Wisconsin
- Published June 19, 2024
- Wisconsin has a statute that disallows the exercise of eminent domain to acquire land for "a pedestrian way"

- What do you think a pedestrian way is?

Wisconsin

- Interesting granularity issue:
- Can you accomplish by bundling what you cannot accomplish in pieces?
  - E.g. if the dissent had won the day, could you condemn a ROW for a "complete street" system?
- Related implications:
  - You can have different treatment for compensation depending on how you accomplish a task
  - Median barrier for funsies? Might be free. As part of a taking? Probably paying.

BANKRUPTCY BASICS FOR PUBLIC ATTORNEYS

CANDACE C. CARLYON, ESQ.
CARLYON CICA CHTD.
CCCLAW.VEGAS

Special thanks to Tali Frey for her assistance with preparation of these materials

Types of Bankruptcy Cases

Odd Chapters

- Chapter 9 – Municipality-not currently applicable in Nevada
- Chapter 12 – Family Farmer (including rancher, fisherman)
- Chapter 15 – Ancillary and Cross-Border Cases

Chapter 7

- Straight liquidation
- Trustee appointed to collect non-exempt assets and distribute to creditors according to priority
- Business or individual may file
- Post-petition earnings are not property of the estate
- Upon discharge, exempt assets are no longer property of the estate
- Can't be a Debtor-Insurance Company, Bank, S&L, Railroad

Chapter 13

- Chapter 13 – repayment plan for individuals with regular income
- While there is a Chapter 13 Trustee,
  the Debtor remains in possession of assets
- Post-petition earnings are property of the estate
- The plan must include 5 years of net disposable income
- No voting on the plan
- Debt limits
- Super discharge upon completion of plan payments

Chapter 11

- Expensive and complicated
- Business or individuals eligible
- Individual payment must include amount of 5 years net disposable income
- Enhanced financial reporting including monthly operating reports
- Disclosure Statement and Plan with creditor vote

Subchapter V of Chapter 11

- Maximum (non insider) debt (including amounts owed by affiliates) $3,024,725
- Business income and not primarily from single asset real estate
- Debtor must file a plan within 90 days
- Need not have accepting class
- Must pay greater of liquidation value or 3 years projected net operating income through plan

Single Asset Real Estate Debtor

- 11 USC §101(51B) - The term "single asset real estate" means real property constituting a single property or project, other than residential real property with fewer than 4 residential units, which generates substantially all of the gross income of a debtor who is not a family farmer and on which no substantial business is being conducted by a debtor other than the business of operating the real property and activities incidental thereto.

- 11 U.S.C. 1182(1)(A) excludes from definition of a "debtor" in a small business reorganization "a person whose primary activity is the business of owning single asset real estate".

- SARE faces relief from stay if debtor fails to file plan with reasonable possibility of confirmation or commences interest payments at non-default rate to secured creditors within 90 days of bankruptcy

Adversary Proceedings

- A bankruptcy adversary proceeding is equivalent to ordinary litigation
- Same process – complaint, answer, initial case conference/disclosures; discovery
- Most of the Federal Rules of Civil Procedure Apply – see FRBP 7001 et. seq.
- Examples: Objection to discharge, preference or fraudulent conveyance action, determination of validity or priority of liens
- First pleading must object to jurisdiction in order to preserve such objection (same rule with regard to motions and oppositions)

Obtaining Information About a Bankruptcy Case

Obtaining Information

- Court's website: https://www.nvb.uscourts.gov/
- Schedules and Statements
- Monthly Operating Reports (Ch. 11)
- First Meeting of Creditors (341 Meeting)
- 2004 Examination

Notice of Bankruptcy Case

[redacted] [redacted] [redacted] [redacted]

Information to identify the case:

Debtor 1: [redacted]
First Name Middle Name Last Name

Social Security number or ITIN: ____
EIN: __-_______

Debtor 2: (Spouse, if filing)
First Name Middle Name Last Name

Social Security number or ITIN: ____
EIN: __-_______

United States Bankruptcy Court: District of Nevada

Date case filed for chapter: 7 7/15/24

Case number: [redacted]

Official Form 309A (For Individuals or Joint Debtors)

Notice of Chapter 7 Bankruptcy Case -- No Proof of Claim Deadline 10/20

For the debtors listed above, a case has been filed under chapter 7 of the Bankruptcy Code. An order for relief has been entered.

This notice has important information about the case for creditors, debtors, and trustees, including information about the meeting of creditors and deadlines. Read both pages carefully.

The filing of the case imposed an automatic stay against most collection activities. This means that creditors generally may not take action to collect debts from the debtors or the debtors' property. For example, while the stay is in effect, creditors cannot sue, garnish wages, assert a deficiency, repossess property, or otherwise try to collect from the debtors. Creditors cannot demand repayment from debtors by mail, phone, or otherwise. Creditors who violate the stay can be required to pay actual and punitive damages and attorney's fees. Under certain circumstances, the stay may be limited to 30 days or not exist at all, although debtors can ask the court to extend or impose a stay.

The debtors are seeking a discharge. Creditors who assert that the debtors are not entitled to a discharge of any debts or who want to have a particular debt excepted from discharge may be required to file a complaint in the bankruptcy clerk's office within the deadlines specified in this notice. (See line 9 for more information.)

To protect your rights, consult an attorney. All documents filed in the case may be inspected at the bankruptcy clerk's office at the address listed below or through PACER (Public Access to Court Electronic Records at https://pacer.uscourts.gov).

The staff of the bankruptcy clerk's office cannot give legal advice.

To help creditors correctly identify debtors, debtors submit full Social Security or Individual Taxpayer Identification Numbers, which may appear on a version of this notice. However, the full numbers must not appear on any document filed with the court.

Do not file this notice with any proof of claim or other filing in the case. Do not include more than the last four digits of a Social Security or Individual Taxpayer Identification Number in any document, including attachments, that you file with the court.

	About Debtor 1:	About Debtor 2:
1. Debtor's full name	[redacted]	
2. All other names used in the last 8 years		
3. Address	[redacted]	
4. Debtor's attorney Name and address	CANDACE C CARLYON CARLYON CICA CHTD 265 E. WARM SPRINGS RD, STE 107 LAS VEGAS, NV 89119	Contact phone (702) 686-4444 Email: ccarlyon@carlyoncica.com
5. Bankruptcy trustee Name and address	ROBERT E. ATKINSON 376 E WARM SPRINGS RD STE 130 LAS VEGAS, NV 89119	Contact phone 702 617-3200

For more information, see page 2 >

[redacted]

Information to identify the case:

Debtor [redacted] EIN: [redacted]

Name

United States Bankruptcy Court District of Nevada Date case filed for chapter: 11 7/13/23

Case number: [redacted]

Official Form 309F1 (For Corporations or Partnerships)

Notice of Chapter 11 Bankruptcy Case 10/20

For the debtor listed above, a case has been filed under chapter 11 of the Bankruptcy Code. An order for relief has been entered.

This notice has important information about the case for creditors and debtors, including information about the meeting of creditors and deadlines. Read both pages carefully.

The filing of the case imposed an automatic stay against most collection activities. This means that creditors generally may not take action to collect debts from the debtor or the debtor's property. For example, while the stay is in effect, creditors cannot sue, assert a deficiency, repossess property, or otherwise try to collect from the debtor. Creditors cannot demand repayment from the debtor by mail, phone, or otherwise. Creditors who violate the stay can be required to pay actual and punitive damages and attorney's fees.

Confirmation of a chapter 11 plan may result in a discharge of debt. A creditor who wants to have a particular debt excepted from discharge may be required to file a complaint in the bankruptcy clerk's office within the deadline specified in this notice. (See line 11 below for more information.)

To protect your rights, consult an attorney. All documents filed in the case may be inspected at the bankruptcy clerk's office at the address listed below or through PACER (Public Access to Court Electronic Records at https://pacer.uscourts.gov)

The staff of the bankruptcy clerk's office cannot give legal advice.

Do not file this notice with any proof of claim or other filing in the case.

1. Debtor's full name	[redacted]	
2. All other names used in the last 8 years		
3. Address	[redacted]	
4. Debtor's attorney Name and address	[redacted] FOX ROTHSCHILD LLP 1980 FESTIVAL PLAZA DRIVE STE 700 LAS VEGAS, NV 89135	Contact phone: [redacted] Email: [redacted]
5. Bankruptcy clerk's office Documents in this case may be filed at this address. You may inspect all records filed in this case at this office or online at https://pacer.uscourts.gov	300 Las Vegas Blvd., South Las Vegas, NV 89101	Office Hours: 9:00 AM – 4:00 PM Contact phone: (702) 527-7000 Date: 7/13/23
6. Meeting of creditors The debtor's representative must attend the meeting to be questioned under oath. Creditors may attend, but are not required to do so.	**August 17, 2023 at 09:00 AM** The meeting may be continued or adjourned to a later date. If so, the date will be on the court docket.	Location: **Call-in Number: 877-920-8646, Passcode: 7968994**

For more information, see page 2 >

[redacted]

Debtor [redacted] Case number: [redacted]

7. Proof of claim deadline	**Deadline for filing proof of claim:** **11/15/23** For a governmental unit: **1/9/24** A proof of claim is a signed statement describing a creditor's claim. A proof of claim form may be obtained at www.uscourts.gov or any bankruptcy clerk's office. Your claim will be allowed in the amount scheduled unless: • your claim is designated as *disputed, contingent,* or *unliquidated;* • you file a proof of claim in a different amount; or • you receive another notice. If your claim is not scheduled or if your claim is designated as *disputed, contingent,* or *unliquidated,* you must file a proof of claim or you might not be paid on your claim and you might be unable to vote on a plan. You may file a proof of claim even if your claim is scheduled. You may review the schedules at the bankruptcy clerk's office or online at https://pacer.uscourts.gov. Secured creditors retain rights in their collateral regardless of whether they file a proof of claim. Filing a proof of claim submits a creditor to the jurisdiction of the bankruptcy court, with consequences a lawyer can explain. For example, a secured creditor who files a proof of claim may surrender important nonmonetary rights, including the right to a jury trial.
8. Exception to discharge deadline The bankruptcy clerk's office must receive a complaint and any required filing fee by the following deadline.	If § 523(c) applies to your claim and you seek to have it excepted from discharge, you must start a judicial proceeding by filing a complaint by the deadline stated below. **Deadline for filing the complaint:** None
9. Creditors with a foreign address	If you are a creditor receiving notice mailed to a foreign address, you may file a motion asking the court to extend the deadlines in this notice. Consult an attorney familiar with United States bankruptcy law if you have any questions about your rights in this case.
10. Filing a Chapter 11 bankruptcy case	Chapter 11 allows debtors to reorganize or liquidate according to a plan. A plan is not effective unless the court confirms it. You may receive a copy of the plan and a disclosure statement telling you about the plan, and you may have the opportunity to vote on the plan. You will receive notice of the date of the confirmation hearing, and you may object to confirmation of the plan and attend the confirmation hearing. Unless a trustee is serving, the debtor will remain in possession of the property and may continue to operate its business.
11. Discharge of debts	Confirmation of a chapter 11 plan may result in a discharge of debts, which may include all or part of your debt. See 11 U.S.C. § 1141(d). A discharge means that creditors may never try to collect the debt from the debtor except as provided in the plan. If you want to have a particular debt owed to you excepted from the discharge and § 523(c) applies to your claim, you must start a judicial proceeding by filing a complaint and paying the filing fee in the bankruptcy clerk's office by the deadline.

Initial Notice Includes

- Date of filing
- Case number (including judge initials)
- Debtor's counsel contact
- Date of 341 meeting
- May include bar date for filing claims
- Note later bar date for governmental entities
- If appears to be no assets, notice will state claims need not be filed, such that filing claims is optional (but doing so is better practice)

Important Deadlines

- Objections to exemptions – 30 days after the meeting of creditors is concluded.
- Complaint to object to a discharge – 60 days after the first date set for the first meeting of creditors
- Filing claims – generally 180 days from the filing of the petition for governmental agencies. Review notice of bankruptcy for claims bar date.

Jurisdiction/ Immunity

11 U.S.C. 106
Waiver of Sovereign Immunity

(a) Notwithstanding an assertion of sovereign immunity, sovereign immunity is abrogated as to a governmental unit to the extent set forth in this section with respect to the following:

(1) Sections 105 [power of the bankruptcy court to issue any order, process or judgment necessary or appropriate to carry out the provisions of the Bankruptcy Code], 106, 107, 108, 303, 346, 362 [automatic stay], 363 [use, sale or lease of property], 364 [obtaining credit], 365 [executory contracts/leases], 366 [utility service], 502 [allowance of claims], 503 [allowance of administrative expenses], 505 [determination of tax liability], 506, 510, 522, 523 [exceptions to discharge], 524 [effect of discharge], 525 [protection against discriminatory treatment of debtors by governmental units], 542 [requirement to turnover property of the estate], 543, 544 [trustee's "lien creditor" powers to avoid liens], 545 [trustee's "bfp" powers to avoid liens], 546, 547 [preferences], 548 [fraudulent transfers], 549 [avoidance of unauthorized post-petition transactions], 550, 551, 552, 553, 722, 724, 726 [distribution of property of the estate], 744, 749, 764, 901, 922, 926, 928, 929, 944, 1107, 1141 [effect of confirmation], 1142, 1143, 1146 [no tax on transfer pursuant to plan], 1201, 1203, 1205, 1206, 1227, 1231, 1301 [chapter 13 consumer debt co-debtor stay], 1303, 1305, and 1327 of this title.

106

(2) The court may hear and determine any issue arising with respect to the application of such sections to governmental units.

(3) The court may issue against a governmental unit an order, process, or judgment under such sections or the Federal Rules of Bankruptcy Procedure, including an order or judgment awarding a money recovery, but not including an award of punitive damages. Such order or judgment for costs or fees under this title or the Federal Rules of Bankruptcy Procedure against any governmental unit shall be consistent with the provisions and limitations of section 2412(d)(2)(A) of title 28.

106

- **(b)** A governmental unit that has filed a proof of claim in the case is deemed to have waived sovereign immunity with respect to a claim against such governmental unit that is property of the estate and that arose out of the same transaction or occurrence out of which the claim of such governmental unit arose.

"Governmental unit" 11 USC 101(27)

- "means United States; State; Commonwealth; District; Territory; municipality; foreign state; department, agency, or instrumentality of the United States (but not a United States trustee while serving as a trustee in a case under this title), a State, a Commonwealth, a District, a Territory, a municipality, or a foreign state; or other foreign or domestic government."

- "[T]he definition of "governmental unit" exudes comprehensiveness from beginning to end". *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin*, 599 U.S. 382, 388, 143 S. Ct. 1689, 1696, 216 L. Ed. 2d 342 (2023).

I meant what I said and I said what I meant

- "We conclude that the Bankruptcy Code unequivocally abrogates the sovereign immunity of any and every government that possesses the power to assert such immunity." *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin*, 599 U.S. 382, 388, 143 S. Ct. 1689, 1696, 216 L. Ed. 2d 342 (2023).

Determination of Tax Liability

11 U.S.C. §505(a)(1) provides:

- Except as provided in paragraph (2) of this subsection, the court may determine the amount or legality of any tax, any fine or penalty relating to a tax, or any addition to tax, whether or not previously assessed, whether or not paid, and whether or not contested before and adjudicated by a judicial or administrative tribunal of competent jurisdiction.

- Exceptions:
  - Tax contested and adjudicated
  - Determination of right to tax refund cannot be made by the bankruptcy court until 120 days after earlier of refund requested or governmental unit determination

Limits on Jurisdiction of Bankruptcy Judges

- Cannot conduct jury trials without consent
- Cannot issue final judgments on non-core matters
- Cannot issue final judgments on certain core matters
- Cannot try personal injury or wrongful death claims without consent

Local Rules Regarding Consent to Jurisdiction

- LR 7008: In an adversary proceeding or contested matter, in addition to the statements required by Fed R. Bankr. P. 7008(a), the first pleading, motion, or paper must contain a statement that the pleader does or does not consent to the entry of final orders or judgments by the bankruptcy judge if it is determined that the bankruptcy judge, absent consent of the parties, cannot enter final orders or judgments consistent with Article III of the United States Constitution. Failure to do so constitutes consent to the matter being heard and final orders or judgment being entered by the bankruptcy court.
- LR 7012: Same with respect to opposition or answer.

Consent-trap for the unwary

9014.2 CONTESTED MATTERS, CONSENT TO ENTRY OF FINAL ORDER OR JUDGMENT

- (a) In addition to the requirements of LR 9014, LR 9014.1, and Fed. R. Bankr. P. 9014(a), the moving party in a contested matter must include a statement that the pleader does or does not consent to the entry of final orders or judgment by the bankruptcy judge.
- (b) The non-moving party must submit with its response a statement that the responding party does or does not consent to the entry of final orders or judgment by the bankruptcy judge.
- (c) Should any party fail to consent to the entry of final orders or judgment by the bankruptcy judge, then the bankruptcy judge may require the parties to submit pleadings in support of or in opposition to the entry of final orders or judgment by the bankruptcy judge. Unless otherwise provided, Fed. R. Bankr. P. 9014 and LR 9014 will govern this procedure. The bankruptcy court may sua sponte determine and enter an order on whether the proceeding is subject to entry of final orders or judgment by the bankruptcy court, unless the district court withdraws the reference first.

Claims in Bankruptcy

Filing Claims and Claim Objections

- Properly filed claim is prima facie evidence of validity and amount
- Include calculation of amounts due and copy of writing which is basis for claim
- Note if priority or secured
- Generally, any creditor may object to claim
- Claims objection may be by motion or adversary
- If objection pending, claim not deemed allowed until determined; court may allow for purpose of plan voting and may estimate amount
- Deadlines ("Bar Date") may be different for filing prepetition claims, filing rejection claims after contract rejected, filing administrative claims

Claim broadly defined 11 USC 101(5)

- The term “claim” means—
- **(A)** right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or
- **(B)** right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured.

Priority Claims

- 11 U.S.C. Section 507 (a) governs priority claims, in order, including:
  - Domestic support obligations
  - Up to $15,150 [subject to adjustment] for wages, commissions, and certain benefits
  - Consumer deposits up to $3,350 [subject to adjustment]
  - Certain governmental claims
  - Death or injury due to DUI

Governmental Claim Priorities

(8) Eighth, allowed unsecured claims of governmental units, only to the extent that such claims are for—

(A) a tax on or measured by income or gross receipts for a taxable year ending on or before the date of the filing of the petition—

(i) for which a return, if required, is last due, including extensions, after three years before the date of the filing of the petition;

(ii) assessed within 240 days before the date of the filing of the petition, exclusive of—

(I) any time during which an offer in compromise with respect to that tax was pending or in effect during that 240-day period, plus 30 days; and

(II) any time during which a stay of proceedings against collections was in effect in a prior case under this title during that 240-day period, plus 90 days; or

(iii) other than a tax of a kind specified in section 523(a)(1)(B) or 523(a)(1)(C) of this title, not assessed before, but assessable, under applicable law or by agreement, after, the commencement of the case;

Governmental Claim Priorities (Cont)

(B) a property tax incurred before the commencement of the case and last payable without penalty after one year before the date of the filing of the petition;

(C) a tax required to be collected or withheld and for which the debtor is liable in whatever capacity;

(D) an employment tax on a wage, salary, or commission of a kind specified in paragraph (4) of this subsection earned from the debtor before the date of the filing of the petition, whether or not actually paid before such date, for which a return is last due, under applicable law or under any extension, after three years before the date of the filing of the petition;

(E) an excise tax on—

(i) a transaction occurring before the date of the filing of the petition for which a return, if required, is last due, under applicable law or under any extension, after three years before the date of the filing of the petition; or

(ii) if a return is not required, a transaction occurring during the three years immediately preceding the date of the filing of the petition…

Taxes collected and held in trust (507(a)(8)(c))

- A trust fund tax is always given a priority and is never subject to discharge in bankruptcy. 11 U.S.C. §§ 507(a)(6)[now 8](C), 523(a)(1)(A). An excise tax, however, is given a priority and is not subject to discharge if the transaction occasioning the tax occurred less than three years prior to the filing of the bankruptcy petition. 11 U.S.C. §§ 507(a)(6)[now 8](E), 523(a)(1)(A). Consequently, "stale" claims for excise taxes are not entitled to a priority and are dischargeable.

In re Shank, 792 F.2d 829, 830 (9th Cir. 1986).

Secured claims

- Property taxes
- Perfected security interests
- Setoffs (including deposits)(subject to the automatic stay)

Non-Dischargeable Claims Section 523

11 U.S.C. §523 (a)

(a) A discharge under section 727, 1141, 1192 [1] 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt **(1)** for a tax or a customs duty--

- **(A)** of the kind and for the periods specified in section 507(a)(3) or 507(a)(8) of this title, whether or not a claim for such tax was filed or allowed;
- **(B)** with respect to which a return, or equivalent report or notice, if required--
  - **(i)** was not filed or given; or
  - **(ii)** was filed or given after the date on which such return, report, or notice was last due, under applicable law or under any extension, and after two years before the date of the filing of the petition; or
  - **(C)** with respect to which the debtor made a fraudulent return or willfully attempted in any manner to evade or defeat such tax

Fines, penalties or forfeitures within three years

- **(7)** to the extent such debt is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss, other than a tax penalty--
- **(A)** relating to a tax of a kind not specified in paragraph (1) of this subsection; or
- **(B)** imposed with respect to a transaction or event that occurred before three years before the date of the filing of the petition

Non-Dischargeable Claims

- A debtor is entitled to a discharge of all pre-petition debts except for nineteen categories of debts set forth in the Code. 11 U.S.C. §§ 727(b), 523(a). One of the exceptions makes non-dischargeable a debt "for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss." 11 U.S.C. § 523(a)(7).

In re Albert-Sheridan, 960 F.3d 1188, 1192 (9th Cir. 2020)

The Automatic Stay

Automatic Stay-11 USC §362

- "Automatic" – an injunction for the price of a filing fee
- Generally prohibits any action including collection activities, invoices, demands, commencement or continuation of lawsuits against the Debtor
- Prohibits action against or attempts to obtain possession of property of the estate
- Prohibits "any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case" (note exception relating to tax audit/assessment)
- Actions taken in violation of the automatic stay are void
- Penalties for knowing violations
- Although set off rights preserved in bankruptcy, exercise requires relief from stay

Exceptions to Automatic Stay Include

- Government or regulatory actions
- Tax audits and assessments and setoff of tax refunds
- Most domestic support, divorce, custody and paternity proceedings
- Notice of perfection (546(b)) such as mechanic's lien

Tax audit and assessment

11 USC §.1129(b)(9) the filing of a petition does not stay:

(A) an audit by a governmental unit to determine tax liability;

(B) the issuance to the debtor by a governmental unit of a notice of tax deficiency;

(C) a demand for tax returns; or

(D) the making of an assessment for any tax and issuance of a notice and demand for payment of such an assessment (but any tax lien that would otherwise attach to property of the estate by reason of such an assessment shall not take effect unless such tax is a debt of the debtor that will not be discharged in the case and such property or its proceeds are transferred out of the estate to, or otherwise revested in, the debtor).

Still Prohibited

- Collection demands
- Notice of intent to levy
- Threat to seize assets
- Commencement of continuation of administrative or legal suits for collection
- Collection activities

In re Payack, No. 20-60345, 2020 WL 9211311, at *3 (Bankr. N.D.N.Y. Nov. 12, 2020)

In particular, § 362(b)(9)(B) provides an exception to the automatic stay for "the issuance to the debtor by a governmental unit of a notice of tax delinquency." 11 U.S.C. § 362(b)(9)(B). This subsection does not permit a taxing authority to include in its notice of tax deficiency a demand for payment. However, § 362(b)(9)(D) expressly allows a taxing authority to make an assessment and issue "a notice and demand for payment of such an assessment," 11 U.S.C. § 362(b)(9)(D), although it does not permit a lien to be created on the debtor's property or property of the estate, *id.* When the exception to the automatic stay relates to the pecuniary interest of a governmental unit rather than to the exercise of police powers to protect public health and safety, as is true for both of these subsections under § 362(b)(9), the Court must apply the general rule that exceptions to the automatic stay are to be narrowly construed to effectuate the public policy of federal bankruptcy law to grant broad relief to the debtor.

In re Payack

- The exception to the automatic stay afforded by § 362(b)(9)(B) is not absolute. To the contrary, it is narrow and allows the governmental entity only to give notice of the tax deficiency or default. [*Gaff v. Town of Pembroke (In re Doolan)*, 447 B.R. 51, 61 (Bankr. D.N.H. 2011)]("Since a demand for payment is not excepted, it is prohibited by § 362(a)(6)."). "It is when the taxing authority engages in post-petition attempts to collect pre-petition tax claims that it exceeds the authority afforded under §362(b)(9) and violates the automatic stay. *Id.* (citing *Headrick v. Georgia (In re Headrick)*, 203 B.R. 805, 810 (Bankr. S.D. Ga. 1996)); 9B Am. Jur. 2d Bankruptcy § 1816 (post-petition attempts to collect pre-petition tax claims violate the automatic stay, and the tax authorities must submit their claims in accordance with the usual bankruptcy process) (collecting cases). A taxing authority may not, for example, include in notices of tax delinquencies language that, in order to avoid commencement of a tax lien process and additional expenses, debtors would have to pay the taxes in full by a date specified. 9B Am. Jur. 2d Bankruptcy § 1816. This conduct constitutes "post-petition collection activity that is outside the scope of the stay exception and violative of the automatic stay." *Id.* (citing *Doolan*, 447 B.R. 51).

Payack

- In this case, the County did do more than merely inform Debtor of the tax liability by mailing Debtor the Tax Notice. The County urged Debtor to pay the delinquent taxes on or before August 31, 2020, and it threatened additional costs and the loss of the Property in the event of nonpayment. It also contained a threat to publish a notice of the delinquency in the Times Telegram. The content of the Tax Notice mirrors the content of the letters at issue in *Layton,* 220 B.R. at 516, with the difference being added content in *Layton* referencing the filing of a notice and petition of foreclosure.

Limited tax setoff exception

- [U]nder subsection (a), [automatic stay does not apply to] the setoff under applicable nonbankruptcy law of an income tax refund, by a governmental unit, with respect to a taxable period that ended before the date of the order for relief against an income tax liability for a taxable period that also ended before the date of the order for relief, except that in any case in which the setoff of an income tax refund is not permitted under applicable nonbankruptcy law because of a pending action to determine the amount or legality of a tax liability, the governmental unit may hold the refund pending the resolution of the action, unless the court, on the motion of the trustee and after notice and a hearing, grants the taxing authority adequate protection (within the meaning of section 361) for the secured claim of such authority in the setoff under section 506(a)

Police Powers Exception

- 11 USC 362(b)(4) provides exception "under paragraph (1), (2), (3), or (6) of subsection (a) of this section, of the commencement or continuation of an action or proceeding by a governmental unit or any organization exercising authority under the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, opened for signature on January 13, 1993, to enforce such governmental unit's or organization's police and regulatory power, including the enforcement of a judgment other than a money judgment, obtained in an action or proceeding by the governmental unit to enforce such governmental unit's or organization's police or regulatory power". (Emphasis added.)

In other words, there is an exception to the prohibition on

- (1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;
- (2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;
- (3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;
- (6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title

For a governmental agency to

- "to enforce such governmental unit's or organization's police and regulatory power, including the enforcement of a judgment **other than a money judgment**, obtained in an action or proceeding by the governmental unit to enforce such governmental unit's or organization's police or regulatory power"

(Emphasis added.)

1988 Amendments

- Note that, prior to the 1988 amendments to Section 362, amendment, the exception of § 362(b)(4) only applied to the stay arising under § 362(b)(1), and the exception of § 362(b)(5) applied only to the stay provided for in § 362(a)(2).

- After the amendment, the "police power" exception under new § 362(b)(4) applied to the stay provided for in §§ 362(a)(1), (a)(2), (a)(3) or (a)(6). *See United States v. Klein* (*In re Chapman*), 264 B.R. 565, 570 (9th Cir. BAP2001)

In re Dunbar, 235 B.R. 465, 471 (B.A.P. 9th Cir. 1999), aff'd, 245 F.3d 1058 (9th Cir. 2001)

- This exception is intended to allow governmental units to sue a debtor "to prevent or stop violation of fraud, environmental protection, consumer protection, safety, or similar police or regulatory laws, or attempting to fix damages for violation of such a law...." House and Senate Reports (Reform Act of 1978) (H.Rep. No. 595, 95th Cong., 1st Sess. 343 (1977); S.Rep. No. 989, 95th Cong., 2d Sess. 52 (1978)).

In re Universal Life Church, Inc., 128 F.3d 1294, 1297 (9th Cir. 1997), as amended on denial of reh'g (Dec. 30, 1997)

- This section permits government to initiate or continue an action under its police or regulatory powers free of the restrictions of the automatic stay. 3 Collier on Bankruptcy ¶ 362.05[5][b], at 362–58 (15th ed.1996). The theory of this exception is because bankruptcy should not be "a haven for wrongdoers," the automatic stay should not prevent governmental regulatory, police and criminal actions from proceeding. 3 Collier on Bankruptcy ¶ 362.05 [5][a], at 362–54 (15th ed.1996).
- The phrase "police or regulatory power" refers to the enforcement of laws affecting health, welfare, morals and safety, but not regulatory laws that directly conflict with the control of the res or property by the bankruptcy court. *Hillis Motors, Inc. v. Hawaii Auto. Dealers' Ass'n,* 997 F.2d 581, 591 (9th Cir.1993)

Universal Life Church, Inc

- There are two tests for determining whether agency actions fit within the section 362(b)(4) exception: (1) the "pecuniary purpose" test and (2) the "public policy" test. *NLRB v. Continental Hagen Corp.,* 932 F.2d 828, 833 (9th Cir.1991). Under the pecuniary purpose test, the court determines whether the government action relates primarily to the protection of the government's pecuniary interest in the debtor's property or to matters of public safety and welfare. *Id.* If the government action is pursued solely to advance a pecuniary interest of the governmental unit, the stay will be imposed. *Thomassen v. Division of Med. Quality Assurance (In re Thomassen),* 15 B.R. 907, 909 (9th Cir. BAP 1981).
- The public policy test "distinguishes between government actions that effectuate public policy and those that adjudicate private rights." *Continental Hagen,* 932 F.2d at 833 (quoting *NLRB v. Edward Cooper Painting, Inc.,* 804 F.2d 934, 942 (6th Cir.1986))(Cited with approval in *Berg v. Good Samaritan Hospital (In re Berg),* 230 F.3d 1165 (9th Cir.2000))

Example-how hard this is-*In re Albert-Sheridan*, 658 B.R. 516, 534 (9th Cir. BAP 2024)

- In 2015 and 2016, the State Bar commenced disciplinary proceedings against Albert by filing Notices of Disciplinary Charges ("NDCs") in the State Bar Court alleging that she had failed to (1) cooperate with its investigations, (2) pay court-ordered discovery sanctions, (3) perform competent legal services, (4) account for client funds, and (5) refund unearned attorney's fees.
- In December 2017, the California Supreme Court entered an order ("2017 Suspension Order") in which it adopted most of the State Bar's recommendations and suspended Albert from the practice of law for at least 30 days, but continuing until she paid the 2017 Discovery Sanctions, as well as $18,714 in disciplinary costs awarded to the State Bar. Debtor/attorney suspended pre-petition, after 30 day mandatory suspension could reinstate license upon payment of restitution, discovery sanctions, and costs.
- Albert did not immediately pay either the 2017 Discovery Sanctions or the Disciplinary Costs. Instead, on February 20, 2018, she filed a chapter 13 petition.
- The State Bar argued that the 2017 Discovery Sanctions and Disciplinary Costs were nondischargeable debts under § 523(a)(7) and that it properly continued Albert's suspension after the initial 30 days based on her failure to pay those debts. The State Bar also sought to dismiss Albert's other claims for relief.

In re Albert-Sheridan

- While its motion to dismiss was pending, on June 1, 2018, the State Bar reinstated Albert effective as of March 16, 2018. It did not explain why it changed its position.
- On June 26, 2018, the bankruptcy court converted the bankruptcy case to chapter 7. The State Bar then reimposed Albert's suspension pending payment of the 2017 Discovery Sanctions and Disciplinary Costs.
- BAP held that the 2017 Discovery Sanctions and Disciplinary Costs were nondischargeable under § 523(a)(7); Ninth Circuit held that Disciplinary Costs were nondischargeable, and the State Bar could properly condition Albert's reinstatement on payment of the Disciplinary Cost; but 2017 Discovery Sanctions were compensatory rather than punitive in nature and were not excepted from discharge under § 523(a)(7). *See Albert-Sheridan v. State Bar (In re Albert-Sheridan)*, 2019 WL 1594012, at *5-7 (9th Cir. BAP Apr. 11, 2019) ("*Albert I*"), *aff'd in part, rev'd in part and remanded*, 960 F.3d 1188 (9th Cir. 2020) ("*Albert II*"),*and aff'd*, 808 F. App'x 565 (9th Cir. Jun. 10, 2020) ("*Albert III*").
- In a separate case, the Ninth Circuit held in *Kassas v. State Bar*, 49 F.4th 1158 (9th Cir. 2022) *("Kassas II")*, *rev'g Kassas v. State Bar (In re Kassas)*, 631 B.R. 469 (Bankr. C.D. Cal. 2021) ("*Kassas I*"), that restitution obligations payable to the CSF were dischargeable in bankruptcy.

In re Albert-Sheridan

- In July 2019 the California Supreme Court issued a second disciplinary order against Albert ("2019 Suspension Order"). The misconduct covered by this order was separate from that covered by the 2017 Suspension Order. It mostly concerned Albert's retention by Dr. Nira Schwartz-Woods as patent litigation counsel between 2014 and 2016. But it also addressed $875 in unpaid discovery sanctions imposed against Albert in 2015 in a lawsuit she prosecuted as plaintiffs' counsel against Fin City Foods, Inc. ("Fin City Sanction"). Between 2016 and 2018, the State Bar issued multiple NDCs regarding these matters and continued its investigation and prosecution of these disciplinary charges while Albert's bankruptcy case was pending. On January 9, 2019, prior to Albert's discharge, the State Bar Court found that she willfully failed to: (1) perform her representation of Dr. Woods with competence; (2) account for client funds; (3) refund $20,000 in unearned fees; (4) cooperate in the State Bar's disciplinary investigation; (5) release the client's file; and (6) obey the sanctions order in the Fin City Foods litigation.
- Based on these findings of misconduct, the California Supreme Court issued the 2019 Suspension Order. It placed Albert on probation for two years and suspended her from practice for a minimum of six months. The suspension would continue until she repaid the $20,000 retainer fee plus interest to Dr. Woods ("Woods Restitution"), the Fin City Sanction, and $18,841.90 in further Disciplinary Costs.
- Between 2019 and 2021, Albert and the State Bar communicated about the terms and status of her probation and the amounts she needed to pay to be eligible for reinstatement. Some of these communications took the form of quarterly probation reports the State Bar required Albert to fill out and the State Bar's responses to her efforts. The State Bar also issued additional NDCs and sent Albert emails in response to her inquiries regarding what she needed to pay to be reinstated ("Alleged Email Violations").

In re Albert-Sheridan

- Debtor received her discharge under chapter 7 on February 26, 2019.
- Thus, by June of 2020, it was established by the various Ninth Circuit decisions that the restitution and discovery sanction amounts were dischargeable, and the disciplinary costs and Client Security Fund obligations were non-dischargeable.
- Albert paid the Disciplinary Costs and the CSF Obligation on April 21, 2021, and was reinstated by the bar on May 5, 2021
- The State Bar promptly reimbursed Albert for her payment of the CSF Obligation after the Ninth Circuit issued *its Kassas II* decision

In re Albert-Sheridan-Holding

- Police powers exception to automatic stay ”covers professional disciplinary proceedings conducted by state licensing agencies. It does not, however, apply to actions solely serving a pecuniary interest.”
- From February 20, 2018- March 16, 2018, no issue. State was entitled to enforce the 30-day mandatory suspension which did not have payment requirements attached to reinstatement.
- From March 17, 2018-June 1, 2018, state’s refusal to reinstate without payment violated the stay. While Albert was in chapter 13, all debts owed to the State Bar were dischargeable under § 1328(a), including the Disciplinary Costs, because § 523(a)(7) does not apply in chapter 13. Continued suspension was effort to collect on dischargeable debt.

In re Albert-Sheridan-Holding

- On June 26, 2019, when the case was converted from Chapter 13 to Chapter 7, the Disciplinary Costs became nondischargeable while the 2017 Discovery Sanctions remained dischargeable
- Police powers exception does not include efforts to collect a money judgment
- While § 362 does not differentiate between dischargeable and nondischargeable debts in the application of the stay or its exceptions, binding authority in this circuit holds that creditors who obtain a nondischargeable judgment are not stayed from collecting nondischargeable debts so long as collection is sought from property that is not property of the bankruptcy estate.

In re Albert-Sheridan-Holding

- When Debtor received her chapter 7 discharge on February 26, 2019, automatic stay was replaced with discharge injunction, violation of which is punishable by contempt
- Discharge applied only to the non-dischargeable portions of the judgment, not the Discovery Sanctions
- While state bar's effort to collect the dischargeable Woods Restitution, CSF Obligation, and Fin City Sanction imposed under the 2019 Suspension Order violated the discharge injunction, contempt was not shown

In re Albert-Sheridan-Holding

- Prior to the Ninth Circuit's decisions in *Albert II* and *Kassas II*, bankruptcy courts and the BAP ruled that liabilities like the Fin City Sanction, Woods Restitution, thus there was "objectively reasonable basis" for the State Bar to believe that its actions did not violate the discharge, precluding contempt sanctions under *Taggart v. Lorenzen*, 587 U.S. 554 (2019)
- By the time the Ninth Circuit decided Kassas II, Albert's license had been reinstated for over a year.
- Albert did not prove she had suffered damages with respect to the State Bar's enforcement efforts with respect to the dischargeable portions of the judgment in addition to the appropriate enforcement of the dischargeable portions
- And she did not prove additional damages in connection with the 14-day period between payment of the non-dischargeable amounts and reinstatement of her license

Additional cautions regarding examples

- The scope of the automatic stay is intended to be "quite broad." *Hillis Motors, Inc. v. Haw. Auto. Dealers' Ass'n,* 997 F.2d 581, 585 (9th Cir.1993)
- "[n]ot every police or regulatory action is automatically exempt...." *Commonwealth of Mass. v. First Alliance Mortg. Co. (In re First Alliance Mortg. Co.),* 263 B.R. 99, 107 (9th Cir. BAP 2001)
- Because the automatic stay is one of the fundamental debtor protections under bankruptcy law, the exceptions to the automatic stay set forth in § 362(b) are narrowly construed to bolster its effectiveness. *See, e.g., Hillis Motors,* 997 F.2d at 590 ("Exceptions to the automatic stay should be read narrowly."); *Stringer v. Huet (In re Stringer),* 847 F.2d 549, 552 (9th Cir.1988)("Exemptions to the stay ... should be read narrowly to secure the broad grant of relief to the debtor."). *In re Rodriguez,* No. 03-BK-12360-EWH, 2008 WL 8448043 (9th Cir. BAP July 10, 2008)
- Violations of the automatic stay have consequences. Actions taken in violation of the automatic stay are void. *Schwartz v. United States (In re Schwartz)*, 954 F.2d 569, 571-72 (9th Cir. 1992). Additionally, § 362(k) allows individual debtors to recover damages caused by a violation of the automatic stay. *In re Albert-Sheridan*, 658 B.R. 516, 533–34 (B.A.P. 9th Cir. 2024)

Examples-actions found to be within police powers

- Revoking the tax exempt status of a religious corporation on the ground that the Church had engaged in activities outside the religious activities contemplated by I.R.C. § 501(c)(3). *Universal Life Church*
- Securities fraud enforcement action and related claims. *California ex rel. Brown v. Villalobos*, 453 B.R. 404, 414 (D. Nev. 2011)
- Consumer protection action seeking restitution for its alleged unfair and deceptive loan practices, so long as state sought only the entry, and not the enforcement, of a money judgment. *In re First All. Mortg. Co.,* 263 B.R. 99, 111 (B.A.P. 9th Cir. 2001)
- Enforcement of alcohol laws. *In re B.Y.O.B. Inc.,* No. 11-62347-11, 2012 WL 528232 (Bankr. D. Mont. Feb. 17, 2012)
- Interpreting and enforcing zoning laws. *In re Leed Corp.,* No. 20-40984-NGH, 2023 WL 4673614 (Bankr. D. Idaho July 20, 2023)

Examples-actions found to be within police powers

- Civil forfeiture action as to residence used for the manufacture and distribution of marijuana. *In re Chapman,* 264 BR 565 (9th Cir BAP 2001)
- License revocation hearings by California Board of Medical Quality Assurance. *In re Thomassen,* 15 B.R. 907 (9th Cir.1 BAP 981)
- Action to revoke insurance license on grounds of fraud and professional incompetence. *In re Fitch,* 123 B.R. 61, 63 (Bankr. D. Idaho 1991)
- Setting utility rates. *Pacific Gas & Electric Co. v.* Lynch, 263 B.R. 306 (Bankr. N.D. Cal. 2001)
- Continuation of environmental enforcement action. *In re Basinger,* No. 01-02386, 2002 WL 33939736 (Bankr. D. Idaho Jan. 31, 2002)

Examples-actions found not within police powers exception

- Actions to acquire property by eminent domain. *In re PMI-DVW Real Est. Holdings, L.L.P.,* 240 B.R. 24, 31 (Bankr. D. Ariz. 1999)
- Denying a license based upon failure to pay debts. *In re Ray*, 355 B.R. 253, 260 (Bankr. D. Or. 2006)
- Governmental actions to recover prepetition expenses against Debtor's bond. *In re Sec. Gas & Oil, Inc.,* 70 B.R. 786, 791 (Bankr. N.D. Cal. 1987)
- Claims for administrative penalties and restitution. *In re Yun,* 476 B.R. 243, 247 (B.A.P. 9th Cir. 2012)(affirmed bankruptcy court decision that exception did not apply in light of commissioner's failure to provide a transcript, assumed facts supported judgment…)

Examples-gray areas

- Automatic non-renewal of gaming license for failure to pay taxes. *In Matter of NLV Casino Corp.,* No. BK-LV 80-889, 1981 WL 157765 (Bankr. D. Nev. Aug. 19, 1981)(Nevada bankruptcy court enjoined state from non-renewal, noting: "Congress drew a careful distinction between actions taken by governmental entities in the direct exercise of their police or regulatory powers, to preserve public health or safety, and attempts by such entities to utilize these inherent powers simply in order to enhance their pecuniary advantage vis-a-vis a debtor's estate. The latter sort of proceedings are automatically stayed, despite the exceptions found in 11 U.S.C. §§ 362(b)(1) & (4); the former actions are not so stayed.")
- License revocation based on monetary delinquencies. *Compare In re Poule*, 91 B.R. 83, 88 (B.A.P. 9th Cir. 1988)(finding that revocation of contractor's license for failure to pay civil penalties was within the exception where the penalties were excepted from discharge under section 523(a)(7)) with *In re Bertuccio*, 414 B.R. 604, 616 (Bankr. N.D. Cal. 2008), *aff'd in part sub nom. Emp. Dev. Dep't v. Bertuccio*, No. 09-CV-05209-LHK, 2011 WL 1158022 (N.D. Cal. Mar. 28, 2011)(effort to suspend contractors' licenses for failure to pay employment taxes failed pecuniary purposes test-stay applied)

Examples-gray areas

- Actions for restitution to private parties *In re Charter First Mortg., Inc.*, 42 B.R. 380, 384 (Bankr. D. Or. 1984)("Debtor argues that Washington, by seeking restitution of moneys on behalf of certain of its citizens, is attempting to collect private claims outside the bankruptcy system. With this we agree"). Compare *Kelly v. Robinson,* 479 U.S. 36, 107 S.Ct. 353, 93 L.Ed.2d 216 (1986)(criminal restitution obligation not dischargeable, even though payable to victim), as criticized in *In re Albert-Sheridan*, 960 F.3d 1188, 1195 (9th Cir. 2020)(discovery sanctions constitute compensation for actual pecuniary loss and are therefore dischargeable).
- Refusal to transfer liquor license without payment of taxes. *In re Farmers Markets, Inc.*, 792 F.2d 1400, 1404 (9th Cir. 1986)(violated automatic stay even though there was not right to transfer the license without payment; state should have sought relief from the bankruptcy court. Note that the holding references 362(a)(6), not included in the police powers exception until 1998); *compare In re Albert-Sheridan*, 960 F.3d 1188, 1195 (9th Cir. 2020)(state bar could condition reinstatement of license on payment of non-dischargeable debts)

Brown v. Villalobos, 453 B.R. 404 (D. Nev. 2011)

- Case involved civil enforcement/securities fraud
- Reversed decision of bankruptcy court Judge Zive
- Bankruptcy court should not consider the merits of the enforcement action
- Urgent need to prevent imminent harm is not required for the police power exemption
- Ongoing or future harm is not required for exemption
- Disgorgement, civil penalties, and restitution all satisfy a public purpose, and the seeking thereof does not convert the action into one that fails the pecuniary purpose test

Other exceptions to automatic stay under 11 USC §362(b)

- (1) the commencement or continuation of a criminal action or proceeding against the debtor;
- (2) (B) the collection of a domestic support obligation from property that is not property of the estate; or (C) with respect to the withholding of income that is property of the estate or property of the debtor for payment of a domestic support obligation under a judicial or administrative order or a statute;
- (14) under subsection (a) of this section, of any action by an accrediting agency regarding the accreditation status of the debtor as an educational institution;
- (15) under subsection (a) of this section, of any action by a State licensing body regarding the licensure of the debtor as an educational institution;
- (18) under subsection (a) of the creation or perfection of a statutory lien for an ad valorem property tax, or a special tax or special assessment on real property whether or not ad valorem, imposed by a governmental unit, if such tax or assessment comes due after the date of the filing of the petition;

Bad Check Collection/Markers- In re Nash, 464 B.R. 874 (9th Cir. B.A.P. 2012)

- Nash utilized casino markers, ultimately he had insufficient funds in his bank account to cover $12,500 in markers owed to Hard Rock.
- Hard Rock referred these debts to the Bad Check Diversion Unit of the DA.
- The DA sent Nash a letter in January 2009, demanding full payment of the markers, plus administrative fees, within ten days. Nash contacted the DA and was informed that, to avoid prosecution, he could repay the debt in six monthly payments starting on February 26, 2009. At the time, Nash was working in a restaurant earning $200 per week and was unable to make the first payment.
- On March 26, 2009, the DA sent Nash a second letter, informing him that a criminal complaint had been filed against him in Las Vegas, and that a warrant for his arrest had been issued. The letter indicated that a copy of the complaint was attached, but Nash insists that he never saw the complaint.
- Nash filed a petition under chapter 7 of the Bankruptcy Code on August 27, 2009. In his Schedule F, he listed an undisputed debt of $13,876 owed to Hard Rock. Neither the DA nor Hard Rock appeared in the bankruptcy case. Nash was granted a discharge in the bankruptcy case on January 20, 2010.
- On March 22, 2010, Nash was arrested by border police while returning to the United States from Vancouver, B.C., based on the outstanding warrant from Clark County.

Nash (cont'd)

- Nash retained counsel, Ms. Huelsman, who moved to reopen the bankruptcy case on April 1, 2010. The motion was granted on April 9, 2010.
- Huelsman contacted the DA on April 8. An attorney for the DA informed Huelsman that the DA was aware of Nash's bankruptcy case and discharge, but that the DA would be pursuing the matter as a criminal proceeding. Huelsman later testified that the DA lawyer told her "if you can work out something with the Hard Rock, then we will postpone—and the word I do know he used was 'postpone'—the criminal case." Hr'g Tr. 16:7–10 (Dec. 14, 2010).
- Huelsman contacted a manager at Hard Rock by phone later the same day. In the telephone conversation, the Hard Rock manager told Huelsman that Hard Rock was aware of Nash's bankruptcy case and discharge, but that its position was not impacted by the discharge because Hard Rock had originally acted in response to Nash's criminal activity. The manager explained Hard Rock's general policies concerning payment of past-due **marker** accounts to Huelsman, but the manager made no demand for payment. Instead, perhaps strategically, the manager suggested that Nash's counsel "get back to me if you want to make us any kind of firm offer." Hr'g Tr. 18:18–19 (Dec. 14, 2010).

Nash (cont'd)

- On May 12, 2010, after voluntarily waiving extradition from Washington to Nevada, Nash was arraigned in Clark County and released on bail. He returned to Clark County on October 31, 2010, where he entered into a settlement agreement with the DA. Under the terms of that agreement, Nash agreed to pay $500 per month until the full amount of the debt was paid off.
- On May 26, 2010, Nash filed an adversary "Complaint for Sanctions for Violation of the Discharge Injunction" against the DA and Hard Rock in the bankruptcy court. The complaint sought a declaratory judgment that his debt to Hard Rock was discharged, an injunction against Hard Rock and the DA to prevent any further **collection** activities, and the imposition of sanctions against Hard Rock and the DA under § 105(a) for their intentional violation of the discharge injunction.
- Neither Hard Rock nor the DA responded to the complaint. Nash filed a motion for entry of default on July 12, 2010. The motion was not contested, and the bankruptcy court entered an Order of Default on August 11, 2010. Nash then moved for entry of a default judgment, which the bankruptcy court set for an evidentiary hearing.

Nash (cont'd)

- Only Nash and his counsel appeared at the hearing on December 14, 2010. Although the hearing was uncontested, the bankruptcy court directed Nash to present evidence in support of his claims. The court cautioned Nash's attorney that, although a declaratory judgment that his debt was discharged was likely to be granted, the Ninth Circuit's decision in *Gruntz v. County of Los Angeles (In re Gruntz),* 202 F.3d 1074 (9th Cir.2000) (en banc), suggested that sanctions against Hard Rock and the DA would be very difficult to establish.

Nash (cont'd)

- In this case, the contact between Nash and Hard Rock was initiated by the debtor through his attorney, and at the direction of the DA. Hard Rock merely responded to a phone inquiry by Nash's lawyer and made no further attempts to collect on the debt. Since there were no other contacts between Nash and Hard Rock post-discharge, there is no basis to find that Hard Rock acted to "harass" Nash. Under these facts, the bankruptcy court properly found that Hard Rock took no post-discharge acts that would violate the discharge injunction.
- The bankruptcy court did not abuse its discretion in declining to award sanctions against Hard Rock.

In re Byrd, 256 B.R. 246, 250 (Bankr. E.D.N.C. 2000)

- Section 362(b)(1) of the Bankruptcy Code provides that the filing of a bankruptcy petition does not stay "the commencement or continuation of a criminal action or proceeding against the debtor." 11 U.S.C. § 362(b)(1). A discharge, however, "operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor...." 11 U.S.C. § 524(a)(2).

- The apparent dichotomy between these statutes is obvious, given that many criminal actions are prompted by a debtor/defendant's failure to pay a debt. In the court's view, however, they can in this instance be reconciled. Moreover, the court concludes that these statutes authorize not only the commencement or continuation of the criminal action by Clark County against Byrd, but also Clark County's recovery of the discharged debts for the purpose of providing restitution to the casinos.

Byrd (cont'd)

- The court acknowledges, then, that a state may initiate or continue criminal prosecutions regardless of the pendency of a bankruptcy case, and further that it may do so even when the state's—or a complaining witness's—primary purpose is the collection of a debt. However, a *creditor* does not have the full protection of § 362(b)(1), and an entity other than the government's prosecuting authority may not commence a criminal action for the primary purpose of recovering a debt that is dischargeable in bankruptcy. If a creditor already has brought its grievance to the attention of law enforcement officials prior to the debtor's bankruptcy filing, those officials may proceed as they deem appropriate and may elect to prosecute, or not.

In re Lake, 11 B.R. 202, 204 (Bankr. S.D. Ohio 1981)

- It is quite apparent in this case that the criminal proceedings against the Lakes were not instituted to vindicate the rights of the people of the State of Ohio.

- They were instituted in order to collect a bad check debt. Columbus Check Recovery offered to drop the criminal charges if the checks were made good and the $10.00 service charge for each check were paid. As such, the actions taken by Columbus Check Recovery on behalf of its clients, Corvairs, Drug Emporium, and Food World, constitute an impermissible and unlawful infringement upon the benefits granted to a debtor in seeking the protection of a bankruptcy court by the filing of a Chapter 13 petition.

Relief From Stay

- For cause
- Including lack of adequate protection
- Property not necessary to an effective reorganization and debtor lacks equity in the property
- Single asset real estate case-failure to either commence interest payments or propose plan with reasonable likelihood of success within 90 days
- To continue non-bankruptcy litigation (factors-In re Curtis, 40 B.R. 795, 799-800 (Bankr. D. Utah 1984))

Abstention

- The district court may, in the interest of justice or in the interest of comity with State courts of respect for State law, abstain from hearing a particular proceeding arising under the Bankruptcy Code or related to a bankruptcy case
  - 28 U.S.C. §1334

Abstention – Factors Considered

- The extent to which state law issues predominate over bankruptcy issues
- Difficulty or unsettled nature of the applicable law
- Presence of related proceeding in non-Bankruptcy Court
- Substance rather than form of an asserted core proceeding
- Feasibility of severing state law claims from core bankruptcy matters to allow judgments to be entered in state court with enforcement left to the Bankruptcy Court; and
- Likelihood of forum shopping

Arbitration

- Bankruptcy court may grant relief from stay to proceed with arbitration
- Bankruptcy Court must enforce valid arbitration agreements and compel the arbitration of non-core state law contract claims, with discretion to enforce arbitration clauses in core proceedings. In re Lucas, 321 B.R. 407, 409-10 (Bankr. D. Nev. 2004); In re Gurga, 176 B.R. 196, 198-200 (9th Cir. BAP 1994).

Withdrawal of the Reference

- The Federal District Court has original jurisdiction over bankruptcy matters, but may "refer" bankruptcy cases to the Bankruptcy Court
- All bankruptcy cases are "automatically referred" to the Bankruptcy Courts. Bankruptcy petitions and related matters are filed with the Bankruptcy Court, not the District Court

Rule 5011. Withdrawal and Abstention from Hearing a Proceeding

- (a) **Withdrawal**. A motion for withdrawal of a case or proceeding shall be heard by a district judge.
- (b) **Abstention From Hearing a Proceeding**. A motion for abstention pursuant to 28 U.S.C. §1334(c) shall be governed by Rule 9014 and shall be served on the parties to the proceeding.
- (c) **Effect of Filing of Motion for Withdrawal or Abstention**. The filing of a motion for withdrawal of a case or proceeding or for abstention pursuant to 28 U.S.C. §1334(c) shall not stay the administration of the case or any proceeding therein before the bankruptcy judge except that the bankruptcy judge may stay, on such terms and conditions as are proper, proceedings pending disposition of the motion. A motion for a stay ordinarily shall be presented first to the bankruptcy judge. A motion for a stay or relief from a stay filed in the district court shall state why it has not been presented to or obtained from the bankruptcy judge. Relief granted by the district judge shall be on such terms and conditions as the judge deems proper.

LR 5011

- (a) **Form of request and place for filing**. A request for withdrawal of the reference in whole or in part of a matter referred to the bankruptcy judge, other than a request by the bankruptcy court on its own or the automatic withdrawal as provided in a jury case by LR 9015(e) must be by motion and filed timely with the clerk of the bankruptcy court. All such motions must conspicuously state that "RELIEF IS SOUGHT FROM A UNITED STATES DISTRICT JUDGE."
- (b) **Time for filing**. A motion to withdraw the reference of a bankruptcy case in whole or in part must be served and filed at or before the time first scheduled for the meeting of creditors held under 11 U.S.C. § 341(a). A motion to withdraw the reference of an adversary proceeding, in whole or in part, must be served and filed on or before the date on which the party enters its first appearance in the case. A motion to withdraw the reference of a contested matter must be served and filed concurrently with the first motion, opposition, or other paper filed in connection with the contested matter by the party requesting withdrawal of the reference.

Bankruptcy Provisions Applicable to Governmental Entities

Anti-Discrimination 11 USC §525

(a) …[A] governmental unit may not deny, revoke, suspend, or refuse to renew a license, permit, charter, franchise, or other similar grant to, condition such a grant to, discriminate with respect to such a grant against, deny employment to, terminate the employment of, or discriminate with respect to employment against, a person that is or has been a debtor under this title or a bankrupt or a debtor under the Bankruptcy Act, or another person with whom such bankrupt or debtor has been associated, solely because such bankrupt or debtor is or has been a debtor under this title or a bankrupt or debtor under the Bankruptcy Act, has been insolvent before the commencement of the case under this title, or during the case but before the debtor is granted or denied a discharge, or has not paid a debt that is dischargeable in the case under this title or that was discharged under the Bankruptcy Act.

(c)(1) has similar provisions with respect to government student loan, grant or guaranty programs.

Utilities-11 U.S.C. §366

- **(a)** Except as provided in subsections (b) and (c) of this section, a utility may not alter, refuse, or discontinue service to, or discriminate against, the trustee or the debtor solely on the basis of the commencement of a case under this title or that a debt owed by the debtor to such utility for service rendered before the order for relief was not paid when due.

- **(b)** Such utility may alter, refuse, or discontinue service if neither the trustee nor the debtor, within 20 days after the date of the order for relief, furnishes adequate assurance of payment, in the form of a deposit or other security, for service after such date. On request of a party in interest and after notice and a hearing, the court may order reasonable modification of the amount of the deposit or other security necessary to provide adequate assurance of payment.

Utilities-11 U.S.C. §366

- (c)(1)(A) For purposes of this subsection, the term "assurance of payment" means--
  (i) a cash deposit;
  (ii) a letter of credit;
  (iii) a certificate of deposit;
  (iv) a surety bond;
  (v) a prepayment of utility consumption; or
  (vi) another form of security that is mutually agreed on between the utility and the debtor or the trustee.

- (B) For purposes of this subsection an administrative expense priority shall not constitute an assurance of payment.

Utilities-11 U.S.C. §366

- (2) Subject to paragraphs (3) and (4), with respect to a case filed under chapter 11, a utility referred to in subsection (a) may alter, refuse, or discontinue utility service, if during the 30-day period beginning on the date of the filing of the petition, the utility does not receive from the debtor or the trustee adequate assurance of payment for utility service that is satisfactory to the utility.
- (3)(A) On request of a party in interest and after notice and a hearing, the court may order modification of the amount of an assurance of payment under paragraph (2).

(B) In making a determination under this paragraph whether an assurance of payment is adequate, the court may not consider--

(i) the absence of security before the date of the filing of the petition;

(ii) the payment by the debtor of charges for utility service in a timely manner before the date of the filing of the petition; or

(iii) the availability of an administrative expense priority.

- (4) Notwithstanding any other provision of law, with respect to a case subject to this subsection, a utility may recover or set off against a security deposit provided to the utility by the debtor before the date of the filing of the petition without notice or order of the court.

Plan provisions -11 U.S.C. §1129

- **Requirement for confirmation under (d)(6):** Any governmental regulatory commission with jurisdiction, after confirmation of the plan, over the rates of the debtor has approved any rate change provided for in the plan, or such rate change is expressly conditioned on such approval.
- 11 USC 1129(d) - Notwithstanding any other provision of this section, on request of a party in interest that is a governmental unit, the court may not confirm a plan if the principal purpose of the plan is the avoidance of taxes or the avoidance of the application of section 5 of the Securities Act of 1933. In any hearing under this subsection, the governmental unit has the burden of proof on the issue of avoidance.

QUESTIONS? COMMENTS?

THANK YOU!

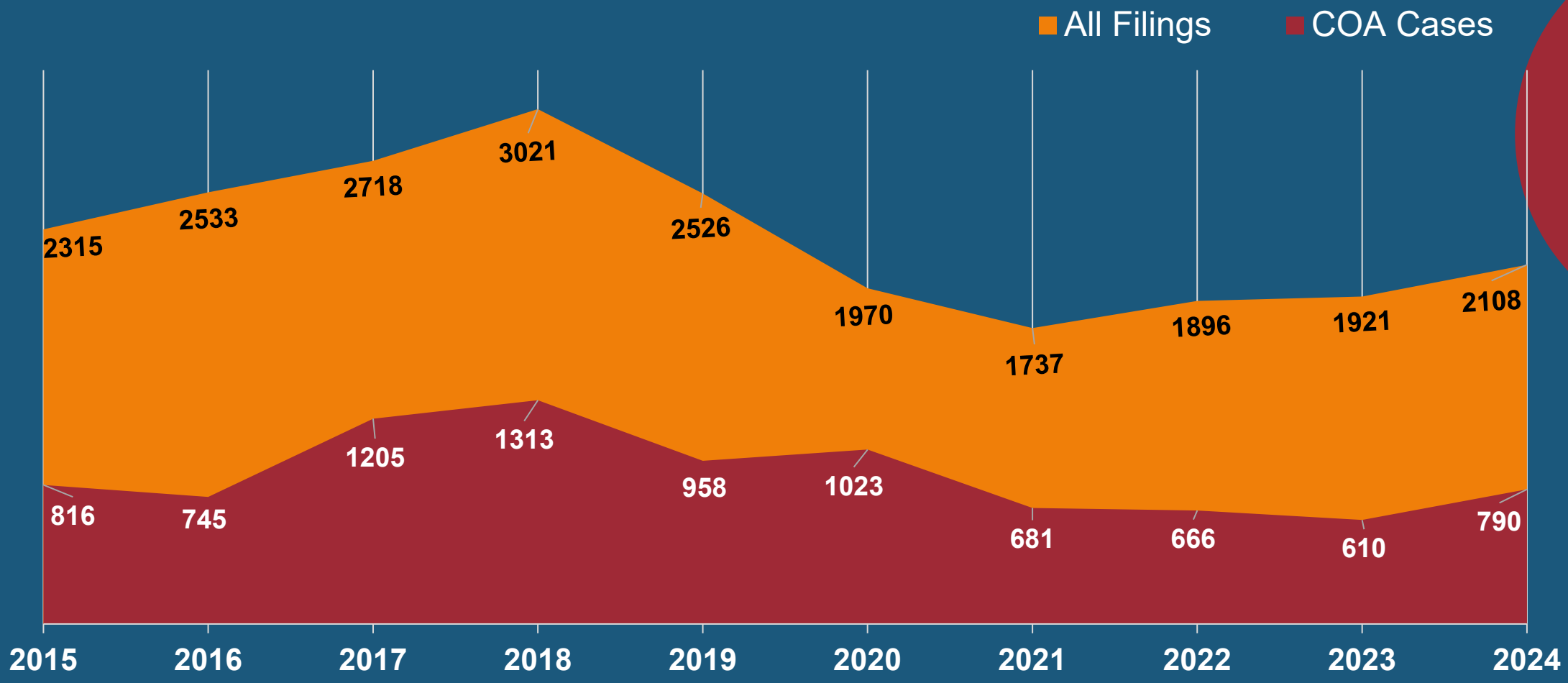
CANDACE CARLYON, ESQ.
CARLYON CICA, CHTD.
CCCLAW.VEGAS
CCARLYON@CARLYONCICA.COM
702-685-4444

Nevada Supreme Court Update

Nevada Public Lawyers'
Section Conference
October 10, 2024

The long and winding road

What happens once a case is filed with the Nevada Supreme Court?



Got your number! A Decade of Filings

2024 numbers estimated on filings to date

NRAP 17 – What goes where

Retained by Nevada Supreme Court

- Death penalty
- Ballot/election cases
- Business Court
- Judicial and attorney discipline
- Intergovernmental disputes and tax, water, or public utility case
- Certification of a juvenile to adult criminal court
- Termination of parental rights
- Inconsistency in published decisions

Presumptively Assigned to Court of Appeal

- Tort cases with damages awarded between $1 and $250,000
- Contract cases with amount in controversy under $150,000
- Statutory lien matters
- Writs regarding discovery matters
- Trust and estate cases under estate tax exemption amount
- Criminal and post-conviction appeals for guilty pleas and non-Category A offenses
- Family law cases other than termination of parental rights and juvenile certification

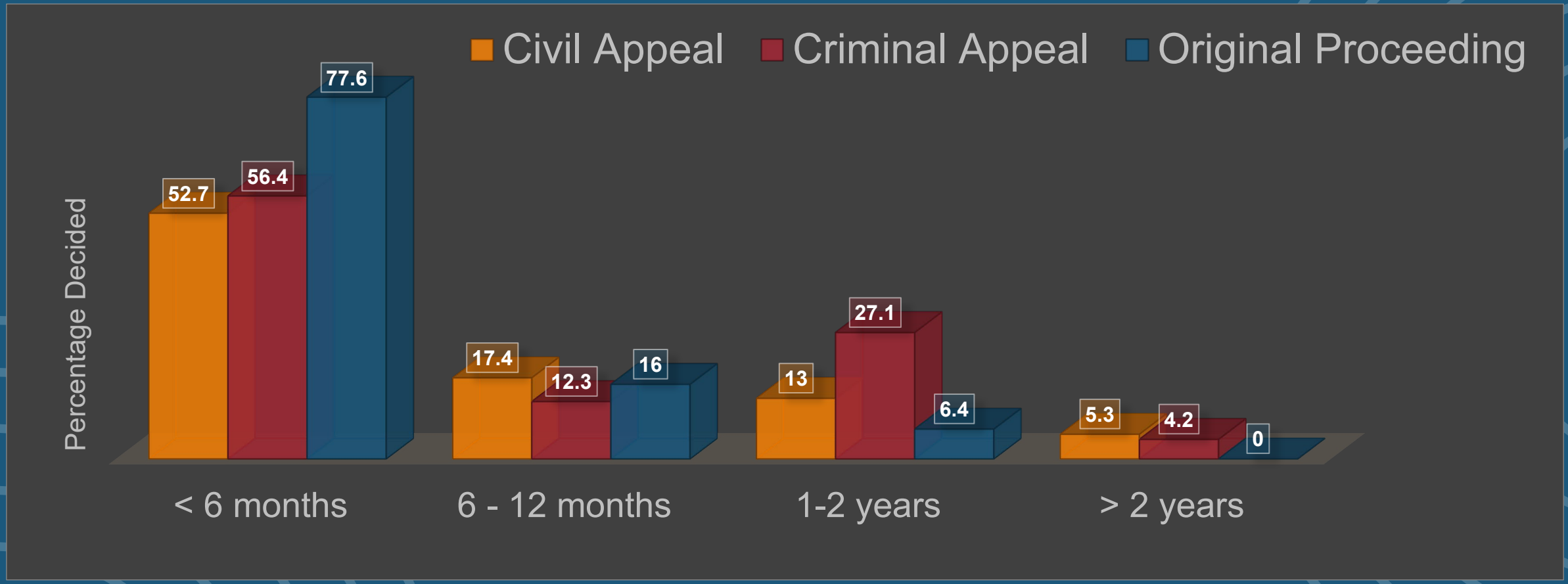
Routing statements:
Do you know where you're going to?

Under the rule changes, routing statements must now indicate whether the case is retained by the Supreme Court, is presumptively assigned to the Court of Appeal, or does not fall into a category.

Except for cases always retained by the Supreme Court, a party may request retention by the Supreme Court or assignment to the Court of Appeals.

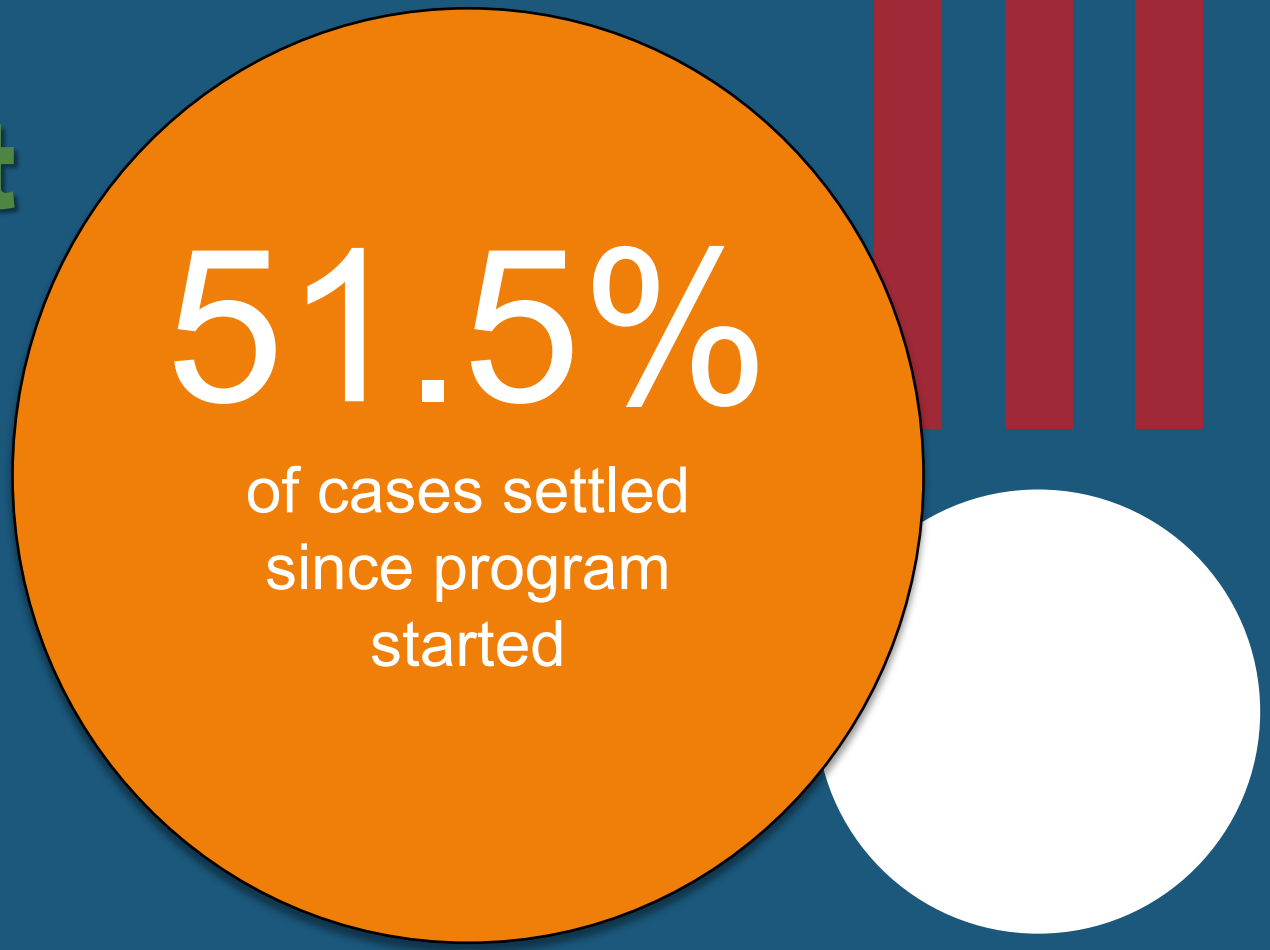
Factors for retention include matters of first impression; legal questions regarding the validity of a statute, ordinance or rule; questions of constitutional interpretation; or matters of statewide public importance.

Get a move on:
Time to Disposition



Find Common Ground

Supreme Court Settlement Program



What are the pros and cons of the Supreme Court Settlement Conference Program?

Sorry to Interrupt

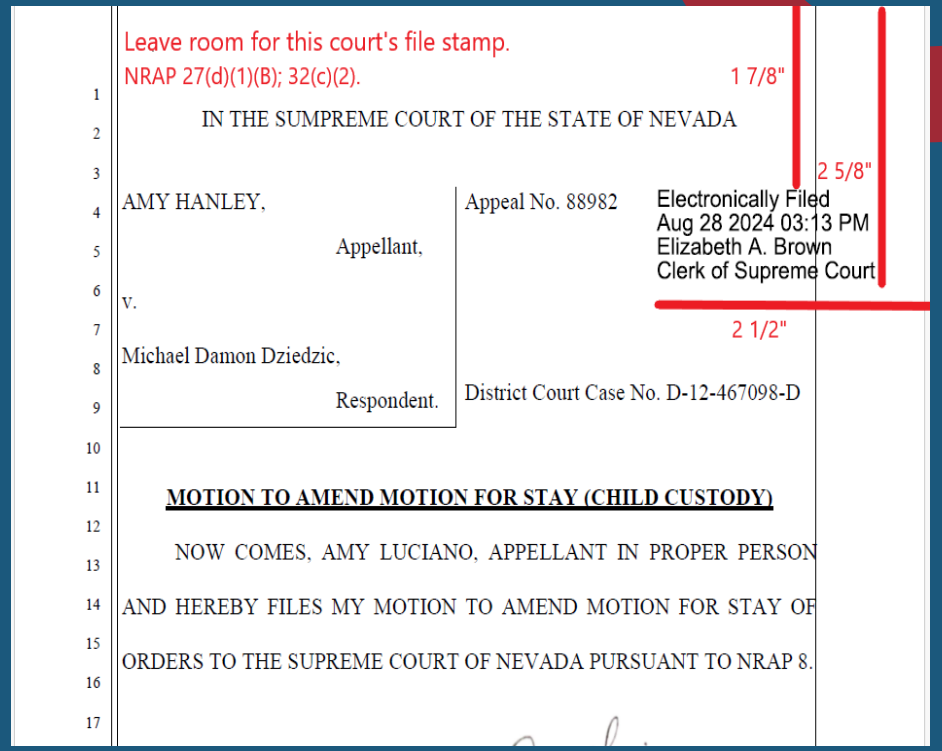
10-Year Average of Original Writ Petitions Granted

10.9%

What makes for a compelling originial writ petition?

Play by the Rules

- Leave room for court file stamp
- 1 inch margins on all sides of a document
- Number exhibits to motions
- Indexes must be filed as a separate document from the appendix and must include both alphabetical and chronological indexes.
- Appendices must be submitted in a searchable format



Leave room for this court's file stamp.
NRAP 27(d)(1)(B); 32(c)(2).
1 7/8"

IN THE SUMPREME COURT OF THE STATE OF NEVADA

2 5/8"

AMY HANLEY,
Appellant,
v.
Michael Damon Dziedzic,
Respondent.

Appeal No. 88982

Electronically Filed
Aug 28 2024 03:13 PM
Elizabeth A. Brown
Clerk of Supreme Court

2 1/2"

District Court Case No. D-12-467098-D

MOTION TO AMEND MOTION FOR STAY (CHILD CUSTODY)

NOW COMES, AMY LUCIANO, APPELLANT IN PROPER PERSON AND HEREBY FILES MY MOTION TO AMEND MOTION FOR STAY OF ORDERS TO THE SUPREME COURT OF NEVADA PURSUANT TO NRAP 8.

Make a long story short

What makes for effective advocacy in briefs?

Citation to unpublished opinions

NRAP 36 allows citation to unpublished decisions for persuasive value only.

Nevada Supreme Court – unpublished orders issued on or after January 1, 2016

Court of Appeals – unpublished orders issued on or after August 15, 2024

Take a Mulligan

Effective presentation of petitions for rehearing reconsideration and review

Repeat After Me

10 year averages

2.5%

Petitions for Rehearing Granted

4.0%

Petitions for En Banc Reconsideration Granted

7.2%

Petitions for Review of COA Decisions Granted

New time to file petition for rehearing/ reconsideration/ review

14 days from the filing of the disposition

Warning! These times have been shortened!

See NRAP 40(d); NRAP 40B; NRAP 40A(c)

The shortest distance between two points

Under the new NRAP, a party no longer has to seek reconsideration of a panel decision before seeking en banc reconsideration.

A petition for en banc reconsideration cannot be filed while a motion to reconsider a panel decision is pending.

See NRAP 40A(c)

Additional tips for appellate and non-appellate practitioners

Thank you

The Justices of the Nevada Supreme Court

Nevada Appellate Courts Statistics

Nevada Supreme Court Filings and Dispositions

	2015	2016	2017	2018	2019	2020	2021	2022	2023	2024 (9/30/24)
Filings	2,351	2,533	2,718	3,021	2,526	1,970	1,737	1896	1,921	1,581
Dispositions	1,958	1,679	1,594	1,639	1,846	1,654	1,283	1,285	1,308	1,073
Original Proceedings Filed	398	354	407	464	355	298	295	265	305	220

Nevada Court of Appeals Filings and Dispositions

	2015	2016	2017	2018	2019	2020	2021	2022	2023	2024 (9/30/24)
Cases Transferred To COA/ Percentage	816/ 35%	745/ 29%	1,205/ 44%	1,313/ 43%	958/ 38%	1,023/ 52%	681/ 39%	666/ 35%	610/ 32%	593/ 38%
Dispositions	710	706	1,039	1,170	1,151	1,056	765	620	588	519
Original Proceedings Transferred	31	19	272	288	117	73	50	42	34	26

Nevada Supreme Court Original Writ Petitions

	2015	2016	2017	2018	2019	2020	2021	2022	2023	2024 (9/30/24)
Total Original Writ Petitions Resolved	374	333	181	172	232	245	195	228	225	204
Petitions Denied/ Dismissed	336/ 90%	301/ 90%	145/ 80%	152/ 88%	216/ 93%	221/ 90%	166/ 85%	207/ 91%	208/ 92%	190/ 93%
Petitions Granted/ Granted in Part	38/10%	32/10%	36/20%	20/12%	16/7%	24/10%	29/15%	21/9%	17/8%	14/7%

NRAP 5 Cases

	2019	2020	2021	2022	2023	2024 (9/30/24)	Total (9/30/24)
NRAP 5 Cased Filed	4	5	3	1	2	2	**17**

Nevada Supreme Court Petitions for Rehearing (En Banc and Panels)

	2015	2016	2017	2018	2019	2020	2021	2022	2023	2024 (9/30/24)
Total Petitions for Rehearing filed	267	226	216	235	245	281	200	190	189	152
Petitions Denied	257/ 96%	221/ 98%	209/ 97%	227/ 97%	233/ 95%	270/ 96%	197/ 99%	186/ 98%	189/ 100%	151/ 99%
Petitions Granted	10/4%	5/2%	7/3%	8/3%	12/5%	11/4%	3/1%	4/2%	0/0%	1/1%

Petitions for En Banc Reconsideration

	2015	2016	2017	2018	2019	2020	2021	2022	2023	2024 (9/30/24)
Total Petitions for EB Recon filed	66	63	38	39	53	73	56	55	61	43
Petitions Denied	65/ 98%	61/ 97%	36/ 95%	39/ 100%	51/ 96%	71/ 97%	53/ 95%	51/ 93%	58/ 95%	41/ 95%
Petitions Granted	1/2%	2/3%	2/5%	0/0%	2/4%	2/3%	3/5%	4/7%	3/5%	2/5%

Petitions for Review

	2015	2016	2017	2018	2019	2020	2021	2022	2023	2024 (9/30/24)
Total Petitions for Review filed	34	62	92	93	111	108	115	64	71	53
Petitions Denied	33/97%	56/90%	83/90%	81/87%	109/98%	103/95%	106/92%	57/89%	66/93%	52/98%
Petitions Granted	1/3%	6/10%	9/10%	12/13%	2/2%	5/5%	9/8%	7/11%	5/7%	1/2%

Nevada Supreme Court Settlement Program

	2019	2020	2021	2022	2023	2024 (9/30/24)
Cases Processed/Cases Settled	428/213	317/149	264/147	350/180	303/159	253/135
Percentage of Cases Settled	50%	47%	56%	51%	52%	53%

Antisemitism and the Law:

Overview of Government Entities' Legal Obligations to Address Antisemitism

Chief Justice Elissa Cadish
Tori N. Sundheim

October 10, 2024
2024 Nevada Government Civil Attorneys Conference

ROADMAP

- Antisemitism Overview
- Laws Prohibiting Antisemitic Discrimination
- Defining Antisemitism
- Applying the Definition
- Pending Litigation and Claims
- Recommendations for Governmental Entities to Meet their Legal Obligations to Address Antisemitism

Jewish Population in Nevada

Northern Nevada: Estimated 7,500 people (1% reg pop)

Southern Nevada: Estimated 70,000 people (3% reg pop)

Every day antisemitism experienced in Nevada often stems from tokenization, ignorance and a lack of awareness about the Jewish faith, ethnicity, and culture.

“Jewish communities impacted by antisemitic discrimination and violence are increasingly concerned about their safety.”

“Although high-profile incidents of antisemitism have drawn much attention, antisemitism has become a widespread, consistent threat. Surveys and reports from civil society actors reach similar conclusions.”

U.S. National Strategy to Counter Antisemitism, “Framing the Challenge and Solution”

U.S. Commission on Civil Rights (2005)

“Antisemitism persists on college campuses and is often cloaked as criticism of Israel.”

Consistent with **1,866** antisemitic incidents reported on college campuses since October 7, 2023

Antisemitic Incidents in 2021 and 2022

- **2,717 in 2021** (highest number since 1979)
- **36% of Jews experienced antisemitic harassment online in 2021**
- **3,697 in 2022, 36% increase from 2021**

U.S. National Strategy to Counter Antisemitism, "Framing the Challenge and Solution"

“Antisemitism reaching historic levels in the United States” - FBI Director Christopher Wray (Oct. 2023)

“Our statistics would indicate that for a group that represents only about 2.4% of the American public, they account for something like 60% of all religious-based hate crimes.”

The FBI's Recent Statistics Released Sept 23, 2024 are Even More Shocking

1,832 anti-Jewish hate crimes reported by the FBI

An increase of **63%** *since* 2023

General misunderstanding of Jewish Identity results in the inability to identify antisemitism in its two primary modern forms.

1. Shared secular heritage, history, ethnicity and culture.

2. Religion for those who observe.

Raise your hand if your agency receives federal funding, programs, activities, or research.

Is subject to the 1st or 14th Amendments?

Laws Prohibiting Antisemitic Discrimination

- Federal Civil Rights
- Constitutional Civil Rights
- State Constitutional Rights
- Local ordinances
- Contractual obligations

Federal Civil Rights Laws Prohibiting Antisemitic Discrimination

- Title II of the 1964 Civil Rights Act
- Title III of the 1964 Civil Rights Act
- Title IV of the 1964 Civil Rights Act
- *Title VI of the 1964 Civil Rights Act*
- Title VII of the 1964 Civil Rights Act
- Fair Housing Act
- Equal Credit Opportunity Act
- Religious Land Use and Institutionalized Persons Act (RLUIPA)

Title VI of the Civil Rights Act of 1964

"***No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."*** 42 U.S.C. § 2000d, et seq.; 34 C.F.R. § 100, et seq.

Note: DOES NOT COVER discrimination based on religion

Federal Courts and Federal Agency Civil Rights' decisions are currently defining antisemitism in the context of Title VI discrimination claims:

- The factual circumstances amounting to antisemitic discrimination
- The adequacy of policies, programs, and activities in addressing antisemitism
- Application of the IHRA definition of antisemitism

Title VI of the Civil Rights Act of 1964 (cont.)

These protections have been interpreted to extend to individuals who have experienced discrimination, including harassment, based on their **actual or perceived**

(i) shared ancestry or ethnic characteristics, or

(ii) citizenship or residency in a country with a dominant religion or distinct religious identity.

“Federal Financial Assistance” defined by 28 C.F.R. § 42.102(c)

1. Grants and loans of federal funds,
2. The grant or donation of federal property and interests in property,
3. The detail of federal personnel,
4. The sale and lease of, and the permission to use (on other than a casual or transient basis), federal property or any interest in such property . . .;
5. Any federal agreement, arrangement, or other contract which has as one of its purposes the provision of assistance.

Title VI Legal Manual (Updated), Civil Rights Division, U.S. Department of Justice, Sec. 5 at 1, 4 (*retrieved at* https://www.justice.gov/crt/book/file/1364106/dl?inline (last seen 7/30/2024).

Title VI Administration Offices of Civil Rights

Department of Justice	Department of Agriculture	Department of Commerce	Corporation for National & Community Service	Environmental Protection Agency	Department of Homeland Security	Department of Housing & Urban Development
Department of the Interior	National Endowment for the Arts	National Science Foundation	Small Business Administration	Department of Transportation	Department of State	Department of Education
Department of Energy	Department of the Treasury	Department of Veterans Affairs	Department of Health and Human Services	Department of Homeland Security	General Services Administration	NASA
Department of Labor	Nuclear Regulatory Commission	Department of Defense	National Archives and Record Administration			

Federal Constitutional Laws Prohibiting Antisemitic Discrimination

First Amendment

- “Time, Place, Manner” restrictions
- Right to religious freedom and exercise
- Freedom of speech and expression

“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”

Fourteenth Amendment

- Right to equal treatment and access to public resources

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Nevada State Constitutional Laws Prohibiting Antisemitic Discrimination

Art. 1, Sec. 4 Liberty of conscience. The free exercise and enjoyment of religious profession and worship without discrimination or preference shall forever be allowed in this State . . .

Art. 1, Sec. 9 Liberty of speech and the press. Every citizen may freely speak, write and publish his sentiments on all subjects being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press . . .

Art. 1, Sec. 10 Right to assemble and to petition. The people shall have the right freely to assemble together to consult for the common good, to instruct their representatives and to petition the Legislature for redress of Grievances.

Art. 1, Sec. 24. Equality of rights. Equality of rights under the law shall not be denied or abridged by this State or any of its political subdivisions on account of race, color, creed, sex, sexual orientation, gender identity or expression, age, disability, ancestry or national origin.

Mack v. Williams, 522 P.3d 434 (Nev. 2022)

- Private rights of action for damages under the Nevada Constitution, implied right of action

- No qualified immunity

Other Claims

- Breach of Contract
- Covenant of Good Faith and Fair Dealing
- Local Ordinances
- Employment Laws

Potential Outcomes

- Incorporation of antisemitism into policies, procedures, and programs with judicial or administrative oversight
- Damages
- Federal funding implications
- Restoration of claimants' rights
- PR implications

Multiple Contexts

Agency Responsibilities

- Employees
- Public/Communities
- Elected Officials/Boards and Commissions

Agency Functions

- Programs
- Services
- Funding
- Licensing

Modern Antisemitism hides behind a good faith political debate to attack Jewish people or label them as evil by:

1. Delegitimization of Jewish national origin and extensive history of antisemitism
    - “settler colonialism” and other claims undermining Jewish identity and indigeneity (language, history, culture/cuisine)
2. Use of Israel/Zionism as a substitute “collective Jew”
3. Double-Standards when discussing Israel
4. Use of tokenism to ignore or attack Jewish opinions

How Antisemitism is Defined

Executive Order 13899 “Combating Antisemitism” (2019)

- Directs the executive branch to enforce Title VI against discrimination “rooted in anti-Semitism as vigorously as against all other forms of discrimination prohibited by Title VI.”
- To consider the definition of antisemitism promulgated by the International Holocaust Remembrance Alliance (“IHRA”), an intergovernmental organization comprised of thirty-five member countries including the U.S.

U.S. National Strategy to Counter Antisemitism (May 2023)

- Described as the “most ambitious and comprehensive U.S. government- led effort to fight antisemitism in American history.”
- Reaffirmed Executive Order 13899
- The Department of Education launched its Antisemitism Awareness Campaign
- Reinforces the use of the IHRA Definition of Antisemitism in investigating antisemitism claims
- Provides Recommendations to Government Agencies (and other entities)

International Holocaust Remembrance Alliance (IHRA)

Unites governments and experts to strengthen, advance and promote Holocaust education, remembrance, and research worldwide and uphold the commitments of the 2000 Stockholm Declaration and the 2020 IHRA Ministerial Declaration.

IHRA Working Definition of Antisemitism (2016): Part 1

“Antisemitism is a certain perception of Jews, which may be expressed as hatred toward Jews. Rhetorical and physical manifestations of antisemitism are directed toward Jewish or non-Jewish individuals and/or their property, toward Jewish community institutions and religious facilities.”

IHRA Working Definition of Antisemitism (2016): Part 2

“Manifestations might include the targeting of the state of Israel, conceived as a Jewish collectivity. However, criticism of Israel similar to that leveled against any other country cannot be regarded as antisemitic. Antisemitism frequently charges Jews with conspiring to harm humanity, and it is often used to blame Jews for ‘why things go wrong.’ It is expressed in speech, writing, visual forms and action, and employs sinister stereotypes and negative character traits.”

Contemporary examples of antisemitism in public life, the media, schools, the workplace, and in the religious sphere could, taking into account the overall context, include, but are not limited to:

1) Calling for, aiding, or justifying the killing or harming of Jews in the name of a radical ideology or an extremist view of religion.
2) Making mendacious, dehumanizing, demonizing, or stereotypical allegations about Jews as such or the power of Jews as collective — such as, especially but not exclusively, the myth about a world Jewish conspiracy or of Jews controlling the media, economy, government or other societal institutions.
3) Accusing Jews as a people of being responsible for real or imagined wrongdoing committed by a single Jewish person or group, or even for acts committed by non-Jews.
4) Denying the fact, scope, mechanisms (e.g. gas chambers) or intentionality of the genocide of the Jewish people at the hands of National Socialist Germany and its supporters and accomplices during World War II (the Holocaust).

Contemporary examples of antisemitism (cont)

5) Accusing the Jews as a people, or Israel as a state, of inventing or exaggerating the Holocaust.
6) Accusing Jewish citizens of being more loyal to Israel, or to the alleged priorities of Jews worldwide, than to the interests of their own nations.
7) Denying the Jewish people their right to self-determination, e.g., by claiming that the existence of a State of Israel is a racist endeavor.
8) Applying double standards by requiring of it a behavior not expected or demanded of any other democratic nation.
9) Using the symbols and images associated with classic antisemitism (e.g., claims of Jews killing Jesus or blood libel) to characterize Israel or Israelis.
10) Drawing comparisons of contemporary Israeli policy to that of the Nazis.
11) Holding Jews collectively responsible for actions of the state of Israel.

IHRA Definition Widely Accepted

- 1,116 global entities have adopted and endorsed the Working Definition (Dec 2022)
- The federal government, 30 U.S. adopting states and several U.S. cities
- 7/10 Canadian provinces

Applying the Definition: Antisemitism in the Law

Department of Education, Office of Civil Rights: May 7, 2024 Guidance

- “harassing conduct that otherwise appears to be based on views about a country’s policy or practices [that] is targeted or infused with discriminatory comments about persons from or associated with a particular country” may implicate Title VI
- “[h]arassing conduct need not always be targeted at a particular person in order to create a hostile environment for a student or group of students,” but “may be directed at anyone.”

Hostile Environment Analysis

(1) a hostile environment based on race, color, or national origin exists;

(2) actual or constructive notice of the hostile environment; and

(3) failed to take prompt and effective steps reasonably calculated to

(i) end the harassment,

(ii) eliminate any hostile environment and its effects, and

(iii) prevent the harassment from recurring.

Notice: How Can Governmental Entities Know of a Hostile Environment?

- Independent Responsibility
- A comment or report by an employee or other individual;
- A complaint filed;
- An employee or member of the public observing harassing behavior;
- Awareness of information shared by members of the community or the media; or
- Information shared by other means.

Constructive Notice and Agents or Employees

- Imputes knowledge of the harassment when the recipient could have (or should have) found out about the harassment had it made a proper inquiry.
- If the alleged harasser is an agent or employee of a recipient, the recipient will be deemed to have constructive notice.

“A recipient violates Title VI if one of its agents, acting within the scope of their official duties, has treated an individual differently on the basis of national origin in the context of an educational program or activity without a legitimate, nondiscriminatory reason so as to deny or limit the ability of the individual to participate in or benefit from the services, activities, or privileges provided by the recipient.”

Who are your Agents?

- Boards and Commissions
- Elected Officials
- Employees
- Sponsored Events or Programs
- Social Media

What must be done to address a hostile environment once known?

To redress a hostile environment based on race, color, or national origin, the legal duty is to take prompt and effective steps that are reasonably calculated to:

- (1) end the harassment
- (2) eliminate any hostile environment and its effects, and
- (3) prevent the harassment from recurring.

Responsive actions are evaluated by assessing whether they are reasonable, timely, and effective.

Discrimination and Freedom of Speech

OCR interprets Title VI and its implementing regulations consistent with other Constitutional rights.

The "fact that harassment may involve conduct that includes speech in a public setting or speech that is also motivated by political or religious beliefs . . . does not relieve a [government entity] of its obligations to respond under Title VI . . . if the harassment creates a hostile environment in school for a student or students"

Pending Litigation and Claims

Tori N. Sundheim

UCLA (*Frankel*)
(Public, USDC)

- **Federal constitutional rights**
  - Equal Protection Clause
  - Free Speech Clause
  - Free Exercise Clause;
- **Federal civil rights violations**
  - Title VI violations
  - conspiracy to interfere with civil rights
  - failure to prevent conspiracy
- **State constitutional rights**
  - California Equal Protection Clause
  - California Free Exercise Clause;
- **State civil rights violations**
  - Sec 220 of the California Education Code
  - Ralph Civil Rights Act of 1976
  - Bane Civil Rights Act.

*Frankel v. Regents of the University of California (*USDC Central District of California, Case No. 2:24-cv-04702-MCS-PD)

On August 13th, 2024, the U.S. District Court for the Central District of California, **granted a preliminary injunction against UCLA f**inding that Jewish students were likely to prevail on Free Exercise claims for being harassed and excluded by campus “encampments.”

Facts Overview

- Royce Quad is a major thoroughfare and gathering place and borders several campus buildings, Powell Library and Royce Hall.
- The encampment was rimmed with plywood and metal barriers.
- Protesters established checkpoints and required passersby to wear a specific wristband to cross them.
- The encampment's entrances were guarded by protesters, and "Zionists" or people who supported the existence of the state of Israel were kept out of the encampment.
- Protesters associated with the encampment "directly interfered with instruction by blocking students' pathways to classrooms."

Preliminary Injunction Granted in *Frankel*

The court's opinion described as "unimaginable" and "abhorrent to our constitutional guarantee of religious freedom" the fact that Jewish students were excluded from portions of the UCLA campus because they "refused to denounce their faith," namely their "religious beliefs concerning the Jewish state of Israel."

Exclusion of Jewish students based on their perceived or actual beliefs is prohibited.

The court prohibited UCLA “from allowing or facilitating the exclusion of Jewish students from ordinarily available portions of UCLA's programs, activities, and campus areas,” and directed the university to “instruct…all campus security teams…that they are not to aid or participate in any obstruction of access” for Jewish students to “programs, activities, and campus areas ordinarily available to other students.”

UCLA's Policy Changes Subject to Continued Scrutiny

UCLA argues that remedial actions make any "future injury speculative at best.

The Court disagreed, the changes do not minimize the risk that Plaintiffs "will again be wronged" by their exclusion from UCLA's ordinarily available programs, activities, and campus areas based on their sincerely held religious beliefs below "a sufficient likelihood."

"It remains to be seen how effective UCLA's policy changes will be with a full campus. . . the Court perceives an imminent risk that such exclusion will return in the fall with students, staff, faculty, and non-UCLA community members."

Frankel Court Directly Addresses First Amendment

"Nor is this case about the content or viewpoints contained in any protest or counterprotest slogans or other expressive conduct, which are generally protected by the First Amendment. See Virginia v. Black, 538 U.S. 343, 358 (2003) ("The hallmark of the protection of free speech is to allow 'free trade in ideas'—even ideas that the overwhelming majority of people might find distasteful or discomforting." (quoting Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting)); see also Texas v. Johnson, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.")."

Harvard (*Kestenbaum)*
(Private, USDC)

- Count I: Title VI
  - Deliberate Indifference
  - Direct Discrimination (Dismissed)
- Count II: Breach of Contract
- Count III: Implied Covenant of Good Faith and Fair Dealing

Kestenbaum v. President and Fellows of Harvard College (USDC D. Massachusetts, Case No. 24-10092-RGS)

Kestenbaum Claims

- Alleges Harvard "ignored discrimination against Jewish and Israeli students"
- Breach of Contract and Implied Covenant of Good Faith and Fair Dealing claims
- Motion to Dismiss Denied Aug 6, 2024

The court found that Harvard failed "… to address… an eruption of antisemitism on the Harvard campus… [T]he facts as pled show that Harvard failed its Jewish students…[and] plausibly establish that Harvard's response failed Title VI's commands."

Key Findings in Order Denying MTD

Title VI Deliberate Indifference

- Court dubious that Harvard can "hide behind the First Amendment to justify avoidance of its Title VI obligations."
- As pled, Harvard's reaction was, at best, indecisive, vacillating, and at times internally contradictory.
- The teeth of this argument will be decided later.

Title VI Direct Discrimination

- "[T]he mere existence of disparate treatment—even widely spread disparate treatment—does not furnish [an] adequate basis for an inference that the discrimination was racially motivated."

Key Findings in Order Denying MTD

Breach of Contract

- Establishing a violation of the implied covenant further requires proof of "at least bad faith conduct."

Implied Covenant Claim

- FAC alleges several instances in which students were penalized for violating various Harvard policies, but the students allegedly engaged in antisemitic conduct have not faced any discipline.
- "Comparator" argument survives for this claim.

New York University (“NYU”)
(Private, USDC, Settled)

- The suit claimed there had been a “steadily increasing incidence of antisemitic attacks at NYU” over the past 10 years
- NYU failed to enforce its own policies to protect Jewish students.
- Civil rights were violated over the university’s handling of discrimination and against Jewish students.

Ingber, et al., v. NYU (S.D.N.Y. 2024, Case No. 1:2023cv10023)(SETTLED)

NYU Non-Confidential Settlement Terms

- “Title VI Coordinator” position that ensures adequate and consistent response
- Annual report about disciplinary data and disciplinary responses to discrimination allegations since 2018.
- Update NYU’s Guidance and Expectations for Student Conduct to include antisemitism
- Including antisemitism in training on the NYU NDAH that is mandatory for all NYU students and staff.
- Annual message from the Office of the President to NYU students, faculty, and staff conveying NYU’s “zero tolerance” for antisemitism and all other discrimination and harassment prohibited by the NDAH;
- Dedicate additional academic resources and opportunities that will include a focus on the study of antisemitism and Hebrew and Judaic studies
- Strengthen NYU’s existing relationship with Tel Aviv University.

Settlement Implementation Update

Accordingly, the following will implicate Title VI:

- using code words like ‘Zionist’
- excluding Zionists from an open event
- calling for the death of Zionists
- applying a “no Zionist” litmus test for participation in any NYU activity
- using or disseminating tropes, stereotypes, and conspiracies about Zionists (e.g., “Zionists control the media”)
- demanding a person who is or is perceived to be Jewish or Israeli to state a position on Israel or Zionism
- minimizing or denying the Holocaust
- invoking Holocaust imagery or symbols to harass or discriminate

“[F]or many Jewish people, Zionism is a part of their Jewish identity,” thus making a speech against Zionism a violation of Title VI of the Civil Rights Act of 1964 and university policy on religious discrimination.

Brown University
(DOE OCR Complaint, Settled)

- OCR Complaint No. 01-24-2116 filed resulting in investigation into whether the University failed to respond to alleged harassment of students based on national origin (shared Jewish ancestry) consistent with Title VI
- OCR issued a Letter to the University
- Resolution Agreement Between Brown and OCR

Brown University Resolution Agreement

Action Item 1: Policies and Procedures

Action Item 2: Training

Action Item 3: Recordkeeping

Action Item 4: Review for Academic Years 23/24 and 24/25

Action Item 5: Climate Assessment and Analysis

Brown University
Policy and Procedure Revision Requirements

- Nondiscrimination and Anti-Harassment Policy
- Discrimination and Harassment Complaint Resolution Standard Operating Procedures
- Protest and Demonstration Policy
- Reporting Requirements

Requires submission to OCR for review and approval

RECOMMENDATIONS

Recommendation No. 1: Assign Legal, Human Resources, and DEI Managers to follow this body of law.

Recommendation No. 2: Read and Follow the U.S. National Strategy to Combat Antisemitism

Recommendation No. 3: Update Plans, Policies, Programs, and Trainings to Include Antisemitism for Compliance with Title VI and other Constitutional Protections

Ensure your agency addresses Title VI antisemitism and religious accommodation requirements consistent with the U.S. National Strategy to Counter Antisemitism across:

- HR Policies
- Other Policies (especially Protest, Title VI, and Discipline Policies)
- Employee and Board trainings
- Plan for addressing incidents
- Review diversity, equity, inclusion, and accessibility (DEIA) programs
- Trainings
- Update “time, place, manner” restrictions

Recommendation No. 4 : Use your own speech to offer internal and external programming and other opportunities to increase the cultural competency of your employees and constituents on antisemitism

- Offer trainings to help people understand Jewish communities, antisemitism, and ways to counter antisemitism.
- Celebrate Jewish Heritage events, i.e. International Holocaust Remembrance Day and Jewish American Heritage Month to raise awareness of antisemitism and Jewish American history.
- Include Jewish holidays on calendars and avoid calendaring hearings or meetings especially on Rosh Hashanah, Yom Kippur, or the first day of Passover (and for other religions).
- Public statements against antisemitism.

Thank You

Resource Slides

Federal and State Orders

Executive Order No. 13899 (Dec. 11, 2019), *retrieved at* https://trumpwhitehouse.archives.gov/presidential-actions/executive-order-combating-anti-semitism/ (last viewed 9/24/24)

U.S. National Strategy to Counter Antisemitism (May 2023), *retrieved at* https://www.whitehouse.gov/wp-content/uploads/2023/05/U.S.-National-Strategy-to-Counter-Antisemitism.pdf (last viewed 9/24/24)

- Appendix A: New York City Training– "Understanding Jewish Experiences and Antisemitism" for cultural competencies.
- Appendix B: Federal Civil Rights Laws Prohibiting Antisemitic Discrimination
- Appendix C: Illustrative Federal Enforcement Actions

Use of the Working Definition in the U.S., American Jewish Committee, *retrieved at* https://www.ajc.org/use-of-the-working-definition-in-the-us (last viewed 9/24/24) (provides links to 35 State Executive Orders and 86 City and County Resolutions).

Definition of Antisemitism

- Working Definition of Antisemitism, International Holocaust Remembrance Alliance (IHRA),*retrieved at* https://holocaustremembrance.com/resources/working-definition-antisemitism (last viewed 9/24/24)
- Fact Sheet, Special Envoy to Monitor and Combat Antisemitism, June 8, 2010, *retrieved at* https://2009-2017.state.gov/j/drl/rls/fs/2010/122352.htm (last viewed 9/24/24)
- Definition of Antisemitism, European Commission, *retrieved at* https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/combatting-discrimination/racism-and-xenophobia/combating-antisemitism/definition-antisemitism_en (last viewed 9/24/24).
- European Commission, Directorate-General for Justice and Consumers, Steinitz, B., Stoller, K., Poensgen, D. et al., *Handbook for the practical use of the IHRA working definition of antisemitism*, Publications Office, 2021, *retrieved at* https://data.europa.eu/doi/10.2838/72276 (9/24/24)

Legal Resources

- Civil Rights Offices of Federal Agencies, Civil Rights Division, U.S. Dept. of Justice, *retrieved at* https://www.justice.gov/crt/fcs/Agency-OCR-Offices (9/24/24).
- Title VI Legal Manual, Civil Rights Division, U.S. Department of Interior, *retrieved at* https://www.justice.gov/crt/fcs/T6manual (last viewed 8/1/24).
- Civil Rights Offices of Federal Agencies and How to File Complaints, *retrieved at* https://www.justice.gov/crt/fcs/Agency-OCR-Offices (last viewed 8/1/24)
- Questions and Answers on Executive Order 13899 (Combating Anti-Semitism) and OCR's Enforcement of Title VI of the Civil Rights Act of 1964, Dept. of Education Office of Civil Rights, https://www2.ed.gov/about/offices/list/ocr/docs/qa-titleix-anti-semitism-20210119.pdf
- Dear Colleague Letter: Protecting Students from Discrimination, such as Harassment, Based on Race, Color, or National Origin, Including Shared Ancestry or Ethnic Characteristics, Dept. of Education Office of Civil Rights (May 7, 2024), *retrieved at* https://www2.ed.gov/about/offices/list/ocr/letters/colleague-202405-shared-ancestry.pdf (last viewed 9/24/24)
- Fact Sheet: Harassment base on Race, Color, or National Origin on School Campuses, Office for Civil Rights, United States Department of Education at 5 (July 2, 2024), *retrieved at* https://www2.ed.gov/about/offices/list/ocr/docs/ocr-factsheet-race-color-national-origin-202407.pdf (last viewed 8/1/24)

Federal Court and Office of Civil Rights Cases

- *Frankel v. Regents of the University of California (*USDC Central District of California, Case No. 2:24-cv-04702-MCS-PD)
- *Kestenbaum v. President and Fellows of Harvard College* (USDC D. Massachusetts, Case No. 24-10092-RGS)
- *Ingber, et al., v. NYU* (S.D.N.Y. 2024, Case No. 1:2023cv10023)(SETTLED)
  - Joint Statement on Settlement of Suit, NYU (Jul 9, 2024) *retrieved at* https://www.nyu.edu/about/news-publications/news/2024/july/a-joint-statement-on-lawsuit.html (last viewed 9/24/24)
- *Students Against Antisemitism, Inc. et al v. Columbia University and Barnard College* (USDC Southern District of New York, Case No. 1:24-cv-01306)
- Brown University, OCR Complaint No. 01-24-2116, Dept. of Education, Office of Civil Rights
  - OCR Letter to University, *retrieved at* https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/01242116-a.pdf (last viewed 9/24/24).
  - Resolution Agreement of Complaint Against *Brown University* Alleging Antisemitic Discrimination (July 8, 2024), *retrieved at* https://www.brown.edu/sites/default/files/resolution-agreement-07-08-2024.PDF (last viewed 9/24/24)
- Database of Complaints, Dept of Education, Office of Civil Rights, *retrieved at* https://www.jta.org/2024/02/29/united-states/search-our-database-of-title-vi-discrimination-investigations-at-schools-and-colleges-since-oct-7 (last viewed 9/24/24)

NOTE: There are dozens of pending cases not included here.

Antisemitism Statistics

- 2023 Hate Crime Statistics Report, FBI (Sept 23, 2024), retrieved at https://cde.ucr.cjis.gov/LATEST/webapp/#/pages/explorer/crime/hate-crime (last viewed 9/24/24).
- AJC Warns: Staggering FBI Hate Crimes Data Likely Represents Under-Reporting of Anti-Jewish Hate Crimes, American Jewish Committee, *retrieved at* https://www.ajc.org/news/ajc-warns-staggering-fbi-hate-crimes-data-likely-represents-under-reporting-of-anti-jewish (last viewed 9/24/24).
- The State of Antisemitism in America 2023, American Jewish Committee, *retrieved at https://www.ajc.org/AntisemitismReport2023* (last viewed 9/24/24).
- FBI Releases Supplement to the 2021 Hate Crime Statistics, *retrieved at* https://www.justice.gov/crs/highlights/2021-hate-crime-statistics (last viewed 9/24/24).
- *See also* U.S. National Strategy to Combat Antisemitism (2023).

Additional Information Slides

How has Antisemitism been defined in the law since 2005?

Antisemitism in the United States (2005 to present)

- In 2005, the U.S. Commission on Civil Rights expressed great concerns in particular that "**Antisemitism persists on college campuses and is often cloaked as criticism of Israel.**"
- Specific concerns were raised about Columbia, San Francisco State University, and the University of California at Irvine, among others, where there were significant increases in hostility and intimidation both inside and outside the classroom.

On April 3, 2006, the Commission adopted findings and recommendations:

- Many college campuses throughout the United States continue to experience incidents of anti-Semitism, a serious problem warranting further attention
- When severe, persistent or pervasive, this behavior may constitute a hostile environment for students in violation of Title VI of the Civil Rights Act of 1964
- Anti-Israeli or anti-Zionist propaganda has been disseminated on many campuses that include traditional anti-Semitic elements, including age-old anti-Jewish stereotypes and defamation.
- Anti-Semitic bigotry is no less morally deplorable when camouflaged as anti-Israelism or anti-Zionism
- Substantial evidence suggests that many university departments of Middle East studies provide one-sided, highly polemical academic presentations and some may repress legitimate debate concerning Israel.

Nearly Twenty Years Later…

- The Anti-Defamation League (ADL) recorded 3,697 antisemitic incidents in **2022**—an increase of 36% over 2021 and the highest number since the ADL began tracking these numbers in 1979.
- The ADL estimates that 36% of Jews experienced antisemitic harassment online in **2021**.
- **1,866 t**otal reported antisemitic incidents on college campuses since October 7, 2023 (as of August 19, 2024)

Timeline: First Working Definition

- **In 2010**, the European Monitoring Center on Racism and Xenophobia developed a working definition of antisemitism
- **June 2010**, President Obama's Special Envoy to Monitor and Combat Antisemitism adopted the working definition and contemporary examples of antisemitism, including ways that antisemitism manifests itself with regard to the State of Israel.
- **2016:** The International Holocaust Remembrance Alliance (IHRA) produced a refined version of this definition.

Timeline: IHRA Definition of Antisemitism

- **May 6, 2016** The plenary in Bucharest adopted the refined IHRA working definition of antisemitism.
- **November 29, 2018**, the EU entered into a Permanent International Partnership with the International Holocaust Remembrance Alliance, resulting in a refined working definition of antisemitism.
- **Executive Order 13899 (2019) "Combating Antisemitism"**
  - Directs the executive branch to enforce Title VI against discrimination "rooted in anti-Semitism as vigorously as against all other forms of discrimination prohibited by Title VI"
  - To consider the definition of antisemitism promulgated by the International Holocaust Remembrance Alliance ("IHRA"), an intergovernmental organization comprised of thirty-five member countries.
- **January 8, 2021**, the European Commission and the IHRA published a "handbook for the practical use of the IHRA working definition of antisemitism."
  - The 35 good practices are ranging from training for law enforcement to incident recording and reporting.
  - Includes 22 sourced incidents of antisemitism in Europe that highlight the relevance of the IHRA working definition of antisemitism when assessing manifestations of antisemitism.
- **May, 2023:** U.S. National Strategy to Counter Antisemitism (adopting EO 13899).

U.S. National Strategy to Counter Antisemitism

Recommendations directed at State and local government entities

White House Recommendations

- We call on state and local leaders to speak out about combating antisemitism, including through efforts to educate their constituents. They should also use International Holocaust Remembrance Day and Jewish American Heritage Month to raise awareness of antisemitism and Jewish American history. They should celebrate the positive contributions Jewish Americans have made to their communities and to our Nation
- We call on employers to have a plan to address antisemitism specifically when Jews are attacked or face discrimination, such as a double standard because of their perceived power. Employers should respond quickly and firmly to any and all forms of antisemitic attack. Employers should know that antisemitism can manifest distinctively. Discrimination and double standards that impact the terms and conditions of employment are not only wrong, but also can expose employers to legal liability under federal, state, and local anti-discrimination laws.
- We call on employers to support Jewish employees by promoting employee resource groups, including for Jewish staff. Employers should work with these groups, especially in issuing both internal and external statements when instances of antisemitism arise.

White House Recommendations (Cont.)

- We call on DEIA professional associations to ensure full inclusion of antisemitism awareness in DEIA trainings as well as religious accommodation requirements and best practices.
- We call on employers to leverage DEIA efforts to share information with employees about American Jewish heritage, culture, and history and provide resources on countering antisemitism. For example, employers can acknowledge Jewish holidays and other important days and events to the Jewish community, such as International Holocaust Remembrance Day or Jewish American Heritage Month, and invite Jewish employees to share their family stories and Jewish identities.
- We call on state, local, and private cultural institutions to highlight Jewish American heritage, culture, identity and history as well as histories of antisemitism in cultural festivals and institutions.

White House Recommendations (Cont.)

- We call on states and localities to offer trainings to help people understand Jewish communities, antisemitism, and ways to counter antisemitism in their neighborhoods. For example, New York City has a training called, “Understanding Jewish Experiences and Antisemitism,” to develop cultural competence and understanding of the city’s diverse Jewish communities. (For further details, see Appendix A: New York City Training — “Understanding Jewish Experiences and Antisemitism.”) Such trainings can also focus on specific professions and partner with local museums or educational institutions. For example, the USHMM runs programs to teach law enforcement, military personnel, and judges about the central role these professions played in the Holocaust. These programs give law enforcement, military personnel, and judges the opportunity to learn about antisemitism and reflect on their own roles in a democratic society today. The Administration urges states and localities to adapt such trainings for their communities.
- We call on employers—including states, cities, K-12 schools, institutions of higher education, private companies, and non-profits—to review their own diversity, equity, inclusion, and accessibility (DEIA) programs to ensure full inclusion of antisemitism awareness and training as well as workplace religious accommodation requirements and best practices to prevent religious discrimination. For example, after a recent incident involving a local law enforcement officer who had a history of antisemitic remarks, the City of Cleveland began training officers within the Cleveland Division of Police in understanding Jewish experiences and recognizing antisemitism

White House Recommendations (Cont.)

- We call on employers to develop and disseminate workshops on the intersection of antisemitism, racism, and xenophobia. Reciprocal learning about antisemitism and other forms of hate help identify how to counter such hate more effectively.
- Additionally unions should incorporate antisemitism into broader diversity and solidarity-building trainings.

Illustrative Examples from the Department of Education's Office of Civil Rights

Fact Sheet: Harassment based on Race, Color, or National Origin on School Campuses (07/02/2024)

- What is Harassing Conduct?
  - Harassing conduct is unwelcome conduct that may include verbal abuse, graphic or written statements, physical assault, or other conduct that may be threatening, harmful, or humiliating.
  - Agencies apply the IHRA definition to determine whether the harassment is motivated by antisemitism
- Where Can Harassing Conduct Occur?
  - Harassing conduct may occur in many different contexts and locations, including classrooms (including virtual classes), residence halls, hallways, cafeterias, school buses, playgrounds, athletic fields, locker rooms, bathrooms, on the internet, and on social networking sites and apps.
- When Does Harassing Conduct Create a Hostile Environment that Violates Title VI?
  - Generally, unwelcome conduct based on race, color, or national origin creates a hostile environment under Title VI when, based on the totality of the circumstances, it is:
    - subjectively and objectively offensive; and
    - so severe or pervasive that it limits or denies a person's ability to participate in or benefit from the recipient's education program or activity.

Example 1

At a college, several students organize a pro-Israel demonstration. After the demonstration, the students, many of whom were Israeli and Jewish, who organized the demonstration receive messages that include antisemitic slurs and death threats via a social media messaging app and via text messages from other students at the college. One message states that there are too many Israeli Jewish students at the college and that “Hitler got it right.” After receiving these messages and reporting the messages to college administrators, the affected students miss class and seek mental health support at a campus clinic, and one student requests to finish the semester remotely. The following week, the college issues a statement condemning antisemitism and denouncing the messages as not aligned with the college’s views. The college does not conduct any further investigation of the allegations relating to the social media or text messages to determine whether the Israeli and Jewish students experienced a hostile environment in the school’s education program or activity, nor does the school assess whether they need additional supports.

Analysis 1

OCR would have reason to open an investigation based on this complaint.

Because the complaint alleges specific facts that suggest that students may have experienced a hostile environment based on their Israeli national origin and their shared Jewish ancestry or ethnic characteristics, an investigation by OCR is warranted. If OCR's investigation confirms these allegations, these actions could constitute harassing conduct that is subjectively and objectively offensive as well as so severe or pervasive that it limits or denies the student's ability to participate in or benefit from the school's education programs or activities. Additionally, if OCR's investigation confirms that the school did not take actions beyond condemning antisemitism and denouncing the messages, and otherwise failed to take prompt and effective steps reasonably calculated to (1) end the harassment, (2) eliminate any hostile environment and its effects, and (3) prevent the harassment from recurring, OCR could find a violation of Title VI

Illustrative Federal Enforcement Action

In August 2022, the Department of Education's Office for Civil Rights determined that an Arizona school district violated Title VI by failing to respond appropriately to notice of ongoing antisemitic harassment of a student by numerous classmates, both in school and on social media for over five months. The harassment included antisemitic slurs and disparaging remarks about the student's Jewish heritage. In the resolution agreement, the school district promised to address the student's academic and counseling needs; revise its policies and procedures to address the fact that Title VI's prohibition against harassment includes harassment based on Jewish ancestry; and train staff on these issues.

Illustrative Federal Enforcement Action

In April 2023, the Department of Education's Office for Civil Rights resolved an investigation of the University of Vermont's responses to allegations of antisemitic incidents that targeted Jewish students. The investigation confirmed that the University's responsive steps were delayed; not designed to rectify concerns communicated to the University, including regarding the existence of a hostile environment; and may have discouraged students and staff from raising further concerns with the University regarding antisemitic harassment. To resolve the investigation, the University's commitments include reviewing and revising policies and procedures to include a description of forms of discrimination that can manifest in the university environment, training university staff and leadership on the Title VI prohibition against harassment based on national origin, and submitting for Federal review copies of case files of complaints of antisemitism.

Illustrative Federal Enforcement Action

In September 2022, the Department of Education's Office for Civil Rights found that peer harassment that included mimicking "Heil Hitler" salutes and drawing Swastikas on photographs of students' faces created a hostile environment that another Arizona school district had notice of and failed adequately to address. To remedy the violations, the district agreed to provide support and remedies to affected students, conduct a climate assessment regarding harassment, review and revise policies to address harassment, train staff including regarding implicit bias, and provide developmentally appropriate educational programs for students about how to recognize and report harassment.


Ethical


Issues


Affecting


Government


Lawyers


in Civil


Practice

Daniel Hooge is Chief Bar Counsel for the State Bar of Nevada. While the Supreme Court of Nevada retains ultimate authority to regulate the legal profession, Mr. Hooge and the Office of the Bar Counsel serve as the Court's arm to investigate and prosecute claims that a lawyer has violated the Rules of Professional Conduct.

“a lawyer shall abide by a client’s decisions concerning the objectives of representation and [. . .] shall consult with the client as to the means by which they are to be pursued.”

RPC 1.2

Whose decisions must a government lawyer abide? Who does the lawyer consult?

Maggie represents the City of North Las Vegas. Who is her client?

The Citizens of North Las Vegas 0%

The Mayor 0%

The City Council 0%

The City 0%

All of the above 0%

“A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.”

RPC 1.13(a)

Entities aren’t real people. They can’t speak. Who is the duly authorized constituent?

A dissenting city council member asks you, the city attorney, for an opinion on the constitutionality of a proposed ordinance. What should you do?

Research and draft an opinion 0%

Ask for a city council vote 0%

Deny the request 0%

Ask for an attorney general opinion 0%

Seek outside counsel 0%

Rule 1.13. Organization as Client.

…

(g) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

Comment 2 to RPC 1.13

"When a constituent communicates with the organization's lawyer in that person's organizational capacity, the communication is protected by Rule 1.6. For example, Rule 1.6 protects the confidentiality of a lawyer's constituent interviews if the organization asks its lawyer to investigate allegations of wrongdoing. However, the constituents are NOT clients of the lawyer. The lawyer may not disclose information to the constituents unless authorized by the organization."

RPC 1.13(f)

"In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client to the constituent and reasonably attempt to ensure that the constituent realizes that the lawyer's client is the organization rather than the constituent."

- If a potential conflict appears, the lawyer must advise the constituent that the lawyer cannot represent him or her and recommend independent counsel.
- The lawyer must also advise the constituent that their discussions may not be privileged.

John is the city attorney for Reno. He reads in the Reno Gazette that the city manager was arrested the previous night for domestic assault and will be arraigned in the morning. The following persons have requested appointments with John:

- A member of the city council and chairperson of the Personnel Committee want to see John about how to terminate "employment agreements".
- The city's chief of police who obtained a copy of the incident report from the sheriff's department wants to fill the city attorney in on all the details of the arrest so the city attorney "may be better informed."
- The city manager wants to see the lawyer after bonding out of jail to get some advice on criminal procedures and how the arrest may affect his employment

May John speak to the city councilmember and the chairperson of the Personnel Committee?

Yes, there is no conflict.

0%

Yes, but only after notifying them that he does not represent them.

0%

No, there is a conflict of interest.

0%

No, unless the City Council gave directions to act.

0%

None of the above

0%

May John speak to the chief of police and accept the incident report?

Yes, there is no rule against obtaining information.

0%

Yes, as long as he obtained the report legally.

0%

Yes, as long as he does not disclose any information to the chief.

0%

All of the above.

0%

No.

0%

Should John meet with the city manager?

Yes, as long as he doesn't give legal advice.

0%

Yes, as long as he informs the city manager that he does not represent him.

0%

Yes, if he tells the city manager that he may share information with the City Council.

0%

None of the above

0%

Rule 1.7. Conflict of Interest: Current Clients.

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) The representation of one client will be directly adverse to another client; or

(2) There is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

. . .

Rule 1.7. Conflict of Interest: Current Clients.

. . .

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) The lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) The representation is not prohibited by law;

(3) The representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) Each affected client gives informed consent, confirmed in writing.

Rule 1.9. Duties to Former Clients.

1. **Don't Take Sides Against Your Old Client:** If you've represented someone before, you can't turn around and help a new person against that old client in the same or a very similar case—unless the old client consents in writing. This rule protects your old client's trust and secrets.
2. **Don't Help Someone New if You Know Secrets from Your Old Firm:** If you used to work at a law firm and they represented someone in a case, you can't now help a new person against that old client if:
   - The old client's interests go against the new person, and
   - You know secrets about the old client that are important to the case.
   - The only way around this is if the old client says it's okay in writing.
3. **Keep Your Old Client's Secrets:** After you've stopped representing someone:
   - You can't use what you learned from them to hurt them in a new case.
   - You can't share their secrets, just like you wouldn't share a current client's secrets, unless a rule says you must.

Rule 1.11. Special Conflicts of Interest for Former and Current Government Officers and Employees.

. . .

(d) Except as law may otherwise expressly permit, a lawyer currently serving as a public officer or employee:

(1) Is subject to Rules 1.7 and 1.9; and

(2) Shall not:

(i) Participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless the appropriate government agency gives its informed consent, confirmed in writing; or

(ii) Negotiate for private employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially, except that a lawyer serving as a law clerk to a judge, other adjudicative officer or arbitrator may negotiate for private employment as permitted by, and subject to the conditions stated in, Rule 1.12(b).

A group of law firms "Defense Group" have had a contract with the county for the past 15 years to perform indigent criminal defense services. Before becoming county attorney, you successfully represented a member of one of Defense Group in a lawsuit against the county for fees, costs and expenses related to indigent defense services delivered in a complicated felony case. The former client in that lawsuit is now a district court judge.

During the current budgeting process, the county board is considering whether to renew or rebid the Defense Group contract. The county board wants access to Defense Group's records of time, costs and expenses over a multi-year period and intends to question Defense Group about the records at a public meeting.

Can you represent the county in contract negotiations and public meetings on the indigent defense issue?

Yes, there is no duty of loyalty to a former client. 0%

Yes, there is a duty of loyalty but you have no confidential information. 0%

No, there is a duty of loyalty and you likely have confidential information. 0%

No, you have an interest in the contract negotiations. 0%

None of the above 0%

The board of county commissioners hires outside counsel to handle negotiations with Defense Group. Should commissioners and outside counsel copy you on their emails?

Yes, you could provide important and valuable insight.

0%

No, you should not participate in any way.

0%

Yes, you can read the emails as long as you don't share information.

0%

None of the above

0%

A local citizen wants to know why public funds are being used to hire another law firm, when you are employed to advise the county board. What can you tell the citizen?

Everything. You represent the county and the citizen is a member of the county. 0%

Nothing. You have a duty of confidentiality to the county. 0%

You can explain Rule 1.9 and the conflict of interest. 0%

None of the above 0%

Lucy currently serves as the city attorney for North Las Vegas. She decides to run for an open county commission seat and wins. Can she keep her position as city attorney?

No, city attorney and county commissioner are incompatible offices. 0%

No, it is a conflict of interest. 0%

Yes. 0%

Yes, but she may need to abstain from participating and voting on matters involving the city. 0%

None of the above 0%

Doug is an assistant city attorney for Reno. He is assigned to work with HR on labor relations and personnel. The city manager asks him to serve on the city's employee grievance board from which employees may appeal their grievances. Can he accept?

Yes, there is no conflict.

0%

No, there is a conflict of interest.

0%

- Doug's client is the city. RPC 1.13(a) (He "represents the organization as distinct from its directors, officers, employees, members, shareholders, or other constituents.")
- His representation of the city would be materially limited by his responsibilities to the grievance board. RPC 1.7(b).
- RPC 1.7's "materially limited" definition must be interpreted from the view-point of a disinterested lawyer.
- The lawyer's duties of loyalty would motivate him to find for the city in grievance appeals.
- Doug would be involved in writing and reviewing policies, and in counseling management in supervisory and employment matters, which are the very policies or procedures which would be the subject of grievances.
- If Doug gets involved with a grievance at a lower level, he might gain information from the immediate supervisor or others concerning the matter which is not presented at the supervisory grievance board level. RPC 1.6(b).

- The City of Sparks manages the city's public housing units through the city housing authority, which is a city department but funded in large part by federal grants.
- The city holds title to the low-income properties managed by the housing authority. The city council appoints members of the housing authority upon recommendation by the city manager.
- The city attorney initiates all evictions and other legal proceedings for the housing authority. The city attorney represents the housing authority in court.
- You represent the city of Sparks. A recently elected member of the city council is a lawyer. This lawyer has represented clients against the housing authority in the state courts and wants to continue.
- The city council asks you for an opinion.

May the city council member continue to represent clients against the housing authority?

Yes, a lawyer on the city council may practice law in that city. 0%

Yes, a lawyer on the city council may not represent criminal defendants against the city, but they can rep… 0%

Yes, as long as the city is not a party or directly interested. 0%

No. 0%

None of the above 0%

May other lawyers in the city councilman's law firm represent clients against the housing authority?

Yes, if the city councilman is screened from those matters.

0%

Yes, if the city councilman receives no part of the fees.

0%

Yes, if the firm gives written notice to the city.

0%

All of the above.

0%

Whistleblower Protections

RPC 1.13(b)

- IF constituent action is or would be
  - A violation of the organization's legal obligation; AND
  - Likely to result in substantial injury to the organization
- THEN the lawyer shall refer the matter to higher authority ***in the organization***.

Whistleblower Protections

RPC 1.13(b)

- Ask the constituent to reconsider unless the matter requires immediacy.
- Before blowing the whistle consider:
  - the seriousness of the violation and its consequences,
  - the responsibility in the organization and the apparent motivation of the person involved, and
  - the policies of the organization concerning such matters.
- Reveal only the minimum amount of information necessary.


QUESTIONS?

Preventing and Responding to Ethics Issues

STAY ON THE PATH

"A public office is a public trust and shall be held for the sole benefit of the people"

NRS 281A.020

WHY AN ETHICS LAW?

- Watergate Scandal Triggered Enactment of Government Ethics Laws
  - Federal Ethics in Government Act (1978)
  - Nevada Ethics Law (1975)

ETHICS VS. ETHICS

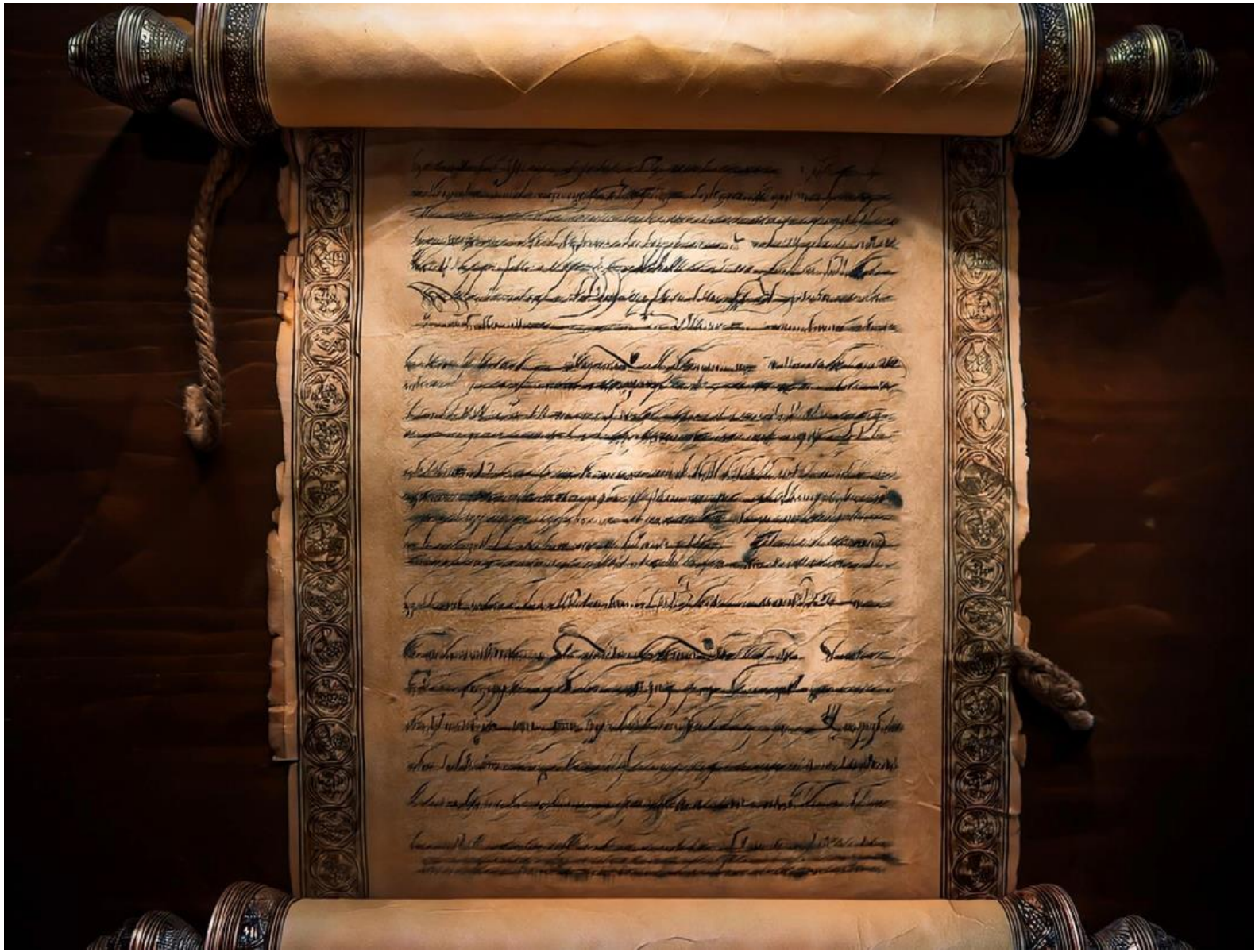
Nevada Rules of Professional Conduct	Nevada's Ethics Law – NRS 281A
Adopted by Supreme Court	Nevada's Legislative Process
General Topics	
Competence, Scope, Communication, Confidentiality	Disclosure and Abstention
Conflict of Interest	Conflict of Interest & Improper Benefits
Fees, Advertising, Handling Property/Money	Cooling Off
Duties to others	
Meritorious claims, candor, fairness	
Jurisdiction Over	
Lawyers and non-lawyers (unauthorized practice)	Public Officers & Employees

PART I:
PREVENTING ETHICS ISSUES FOR YOUR CLIENT

UNDERSTANDING TERMS

POLICIES AND PROCEDURES

BUILDING AN ETHICAL CULTURE



UNDERSTANDING TERMS: PUBLIC OFFICER NRS 281A.160

Elected or appointed position

+

Established in law

+

Involves the exercise of a public power, trust, or duty

UNDERSTANDING TERMS: PUBLIC EMPLOYEE NRS 281A.150

Performs public duties

+

Under the direction and control of a public officer

+

Compensated

UNDERSTANDING TERMS: CONFLICT OF INTEREST

Nevada Rules of Professional Conduct	Nevada's Ethics Law – NRS 281A
Duties to current clients 1.7 / 1.8	Duty to the Public Interest
Duties to former clients 1.9	Reasonable impartiality
Champions for a client can't then be champions for an adverse client	Collision between public interests and 1) own pecuniary interests 2) interests of others 3) because you got a gift
Factors for waiving (consent, representation, etc.)	Disclosure and abstention

UNDERSTANDING TERMS: COMMITMENT IN A PRIVATE CAPACITY - NRS 281A.065

Spouse / Domestic Partner

Member of Household

3rd Degree of Consanguinity / Affinity

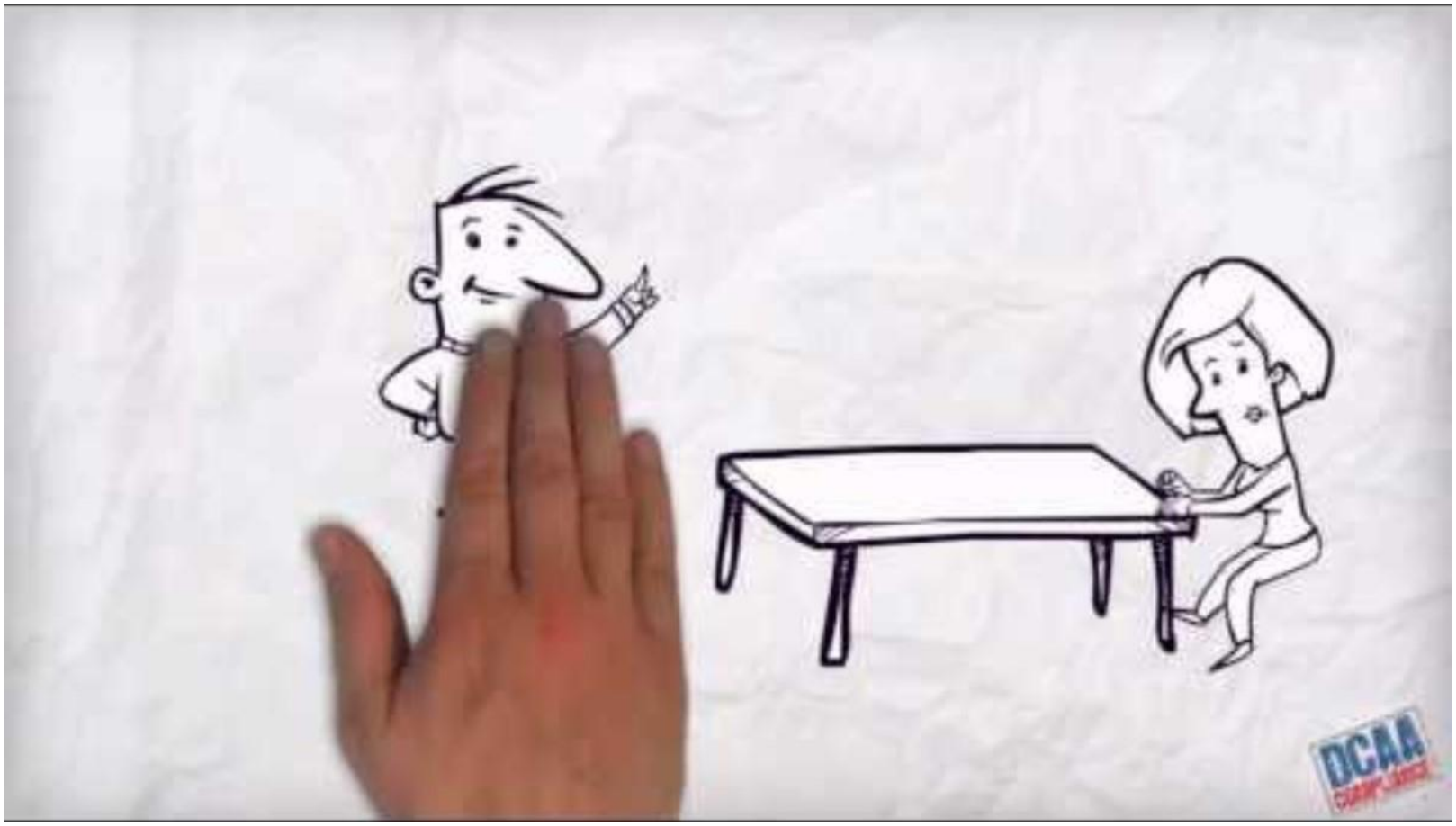
Employer

Substantial and Continuing Business Relationship

Substantially Similar

UNDERSTANDING TERMS: ETHICS CATEGORIES

POLICIES AND PROCEDURES



POLICIES AND PROCEDURES: AGENCY OPERATIONS

- NRS 281A.400(1) Gifts
- NRS 281A.400(2) Unwarranted Privileges
- NRS 281A.400(7) Use of government time, property, equipment

POLICIES AND PROCEDURES: CALL MY LAWYER

- Ethics Safe Harbor Provision & Advisory Opinions
- Do you have a designated ethics expert on your team? *Rule 1.1 Competence*
- Organization vs. individual representation. *Rule 1.13 Organization As a Client*
- Attorney as Adviser. *Rule 2.1*

BUILDING AN ETHICAL CULTURE

Weave ethics education into onboarding, ongoing team development, and departure

Designate an ethics lead for the agency

Adopt policies and procedures to guide officers and employee

Set the tone

ETHICAL CULTURE:
POLICY SUGGESTIONS CHECKLIST

- Disclosure and abstention
  - For officers and employees
- Use of buildings, equipment, and time
- Gifts
- Travel
- Procurement and contracting
- Ethics training

PART 2: RESPONDING TO ETHICS COMPLAINTS

- Incoming complaints
- Internal detection

"I'VE RECEIVED AN ETHICS COMPLAINT; WILL YOU REPRESENT ME?" REPRESENTING ETHICS SUBJECTS CONSISTENT WITH NRPC 1.1

- Complaint → Jurisdictional Determination
- Yes Jurisdiction → Notice to Subject → Review Panel
- Review Panel → Adjudicatory Hearing

- First steps
  - Consider waiving statutory timeframes,
  - Is agency attorney involved?

TIPS FOR LAWYERS REPRESENTING CLIENTS IN ETHICS CASES: PRE-PANEL

Written Response NRS 281A.720
After Jurisdictional Determination before Panel
Investigatory Phase
Two audiences 1) Executive Director 2) Review Panel
Suggested content • Is client a public officer or employee? • Is conduct within statute of limitations? • Nature of the benefit • Nature of relationship to beneficiary • Disclosure or abstention? • Limited use exception? • Mitigating factors? • Safe harbor provisions triggered?

Thinking about the audience
Other investigatory paths the Commission should take?
Documentation that should be reviewed?
What do you want review panel to do? • Dismiss • Dismiss with letter of caution/instruction • Stipulated agreement • Referral to Commission
Subject does not appear at the Review Panel

RESEARCHING PRIOR DECISIONS

ONLINE ETHICS OPINIONS DATABASE

LEXIS NEXUS

ANNOTATED STATUTES IN THE LAW LIBRARY

TIPS FOR LAWYERS REPRESENTING CLIENTS IN ETHICS CASES: POST-PANEL

Referral to Adjudicatory Hearing
Discovery phase
Again, consider time frames • If no time waiver, do you have enough time to deliver a competent (NRPC Rule 1.1) defense?
Considerations • Commission will not hear about motives of person who filed the complaint • If a hearing occurs, three step process 1. Is there a violation? NRS 281A.765 2. Was the violation willful or not? NRS 281A.775 3. What should be the penalty? NRS 281A.785

Benefits to a Stipulated Agreement
Secure a non-willful finding or if willful prevent impeachment/petition for removal
Focus on mitigating factors
Commission places an emphasis on • Training • Policy change • Subjects becoming part of larger ethics solution
Limit monetary penalties
Expedites litigation – NRPC 3.2
Attorney's Role as Advisor – NRPC 2.1

INTERNAL DETECTION

When it all goes wrong

- Stop the bleeding
- Inject training
- Advisory Opinion
- File a complaint

CONTACT INFO

@ethics_nevada

Nevada Commission on Ethics

Ross Armstrong, Esq.; Executive Director

rarmstrong@ethics.nv.gov

Sam Harvey; Outreach & Education

samharvey@ethics.nv.gov

Nevada Commission on Ethics

ncoe@ethics.nv.gov

775-687-5469

ethics.nv.gov

FEEDBACK

The Public Utility Commission's Role in Renewable Energy Development and Practice Tips

2024 Nevada Government Civil Attorneys' Conference

Tori N. Sundheim, Assistant Staff Counsel, PUCN

October 10, 2024

DISCLAIMER

The views and characterization of issues, either stated or perceived, do not represent any of my current or former employers' or clients' views, including the Nevada Association of Counties, the Nevada Office of the Attorney General, the Division of Water Resources/State Engineer, the Division of State Lands, the Nevada Indian Commission, the Department of Wildlife, or the Public Utilities Commission.

Roadmap

Introduction to the Public Utilities Commission of Nevada

Developing Renewable Generation Facilities

Utility Environmental Planning Act (UEPA) Process

Integrated Resource Planning (IRP) Process

Practice Before the Commission

What is the PUCN

- Ensures investor-owned utilities comply with laws enacted by the Nevada Legislature. The PUCN's basic regulatory duties, powers, and scope of work are defined by the Legislature and codified in statute at NRS and NAC Chapters 703 and 704.
- Regulates approximately 400 investor-owned utilities engaged in electric, natural gas, telecommunications, water, and wastewater services; gas and electric "master meter" service at mobile home parks; and some propane systems.
- The PUCN is also involved in monitoring gas pipeline safety, rail safety, and underground excavation near subsurface installations.
- PUCN responsibilities vary by jurisdiction, but typically have similar overarching duties.

PUCN DUTIES

To provide for fair and impartial regulation of public utilities.

To provide for the safe, economic, efficient, prudent and reliable operation and service of public utilities.

To balance the interests of customers and shareholders of public utilities by providing public utilities with the opportunity to earn a fair return on their investments while providing customers with just and reasonable rates.

PUCN Makeup

Commission

- Quasi-judicial body appointed by the Governor in staggered four-year terms, presides over contested cases and makes decisions regarding the operations of public utilities.
- General Counsel, Commissioners, Policy Analysts, Hearing Officer, Executive Director

Regulatory Operations Staff

- Independent division that investigates/audits utility operations and participates as a party in all proceedings before the Commission.
- Staff Legal Counsel, Director and Divisions (Financial Analysis, Resource and Markets Analysis, Engineering), Consumer Complaint Resolution, Rail Safety

Renewable Generation Facilities

Who owns renewable generation facilities?

- Mostly third parties, sometimes the utility.

What type of renewable generation is included?

- Geothermal, Wind, Solar (typically with batteries)
- Nevada has an Energy Storage procurement goal, which we have exceeded

Which PUCN Proceedings Impact these facilities?

- Issuing permits for the construction of utility facilities in certain circumstances as provided by the Utility Environmental Protection Act (UEPA) (NRS 704.820 to NRS 704.900)
- Integrated Resource Planning (IRP) through the approval of Power Purchasing Agreements (PPA) between regulated utilities and the facility owner or for approval of the regulated utility's development plan.
- Other Renewable Energy Related Statutes (i.e. Renewable Portfolio Standard 50% by 2030 (29% in 2023) NRS 704.7801 to NRS 704.7828; Net Metering Systems NRS 704.766 to NRS 704.776; Distributed Resource Planning NRS 704.741(4))

Nevada Utility Environmental Protection Act (UEPA).

- NRS 704.865 provides a person, other than a local government, constructing a utility facility in Nevada must obtain a UEPA permit from the Commission.
- UEPA permits granted by the PUCN apply to:
  - Conventional power plants.
  - Renewable energy power plants rated over 70 megawatts (nameplate).
  - Electric transmission facilities rated over 200 kilovolts.
  - Gas transmission lines and associated facilities.
  - Water transmission lines and associated facilities.
  - Sewer transmission and treatment facilities.

UEPA PERMITS ISSUED DURING BIENNIUM	
Entity	**Number**
Renewable Energy Plant or Transmission facilities	23
Electric facilities	7
Water facilities	0
Natural Gas facilities	0
Total	**30**

2023 Biennial Report, Public Utilities Commission of Nevada (July 1, 2020 – June 30, 2022)

Filing a UEPA Application with the Commission

- Noticing Deadlines (5 Days)
- Meet with Staff as a deadline roundup
- Provide list and timelines for relevant Permits

Application Contents

- Description of the location and the facility to be built.
- Summary of any environmental studies and a copy of each such study.
  - Federal EA or EIS: an amended application is filed within 30 days of issuance
- Description of reasonable alternate location(s) for the facility.
- Description of the benefits and detriments for each location.
- Explanation of why the preferred location or plan was selected.

Commission Findings and Determinations

- The probable effects on the environment.
- The extent to which facility is needed for reliability if it emits greenhouse gases and does not use renewable energy as its primary source for generating electricity.
- The need for the facility balances any adverse effects on the environment.
- The facility represents the minimum adverse effects on the environment given current technology and feasible alternatives.
- All permits, licenses and approvals required by federal, state, and local jurisdictions are obtained or in the process of being obtained for construction.
- The facility will serve the public interest.

Example of a UEPA Docket

Docket No. 17-07024

SOLAR PARTNERS XI, LLC APPLIES FOR A PERMIT TO CONSTRUCT A PHOTOVOLTAIC SOLAR PLANT AND ASSOCIATED FACILITIES

Order

- Introduction
- Summary
- Procedural History
- Motion- To Receive Four Permits for Each Phase of the Project
  - Phase 1 – Tortoise Fence Installation (10 Compliances)
  - Phase II – Temporary Staging Areas and Site Preparation (12 Compliances)
  - Phase III – Interconnection and On-site Substation (14 Compliances)
  - Phase IV – Solar Array and Electrical Collection Construction (12 Compliances)
- No construction may commence until after the Company files proof of compliances and the Commission issues a Permit for each phase.

PERMIT TO CONSTRUCT

The Commission issues a UEPA permit to construct utility facilities once all other relevant permits have been obtained by the developer. The process balances the potential environmental impact of a proposed utility with the public interest served by such facility.

PUBLIC UTILITIES COMMISSION OF NEVADA

PERMIT TO CONSTRUCT

Solar Partners XI, LLC

UEPA No. 494
Docket No. 17-07024

The Public Utilities Commission of Nevada ("Commission") finds that Solar Partners XI, LLC has met all the requirements of the Commission's Order dated November 4, 2020, and has met all of the requirements of Nevada Revised Statutes 704.820 to 704.900, inclusive, for a permit to construct Phase IV of the Gemini Solar Project. Therefore, the Commission hereby grants to Solar Partners XI, LLC this Permit to Construct, issued pursuant to the Utility Environmental Protection Act, authorizing Solar Partners XI, LLC to construct Phase IV of the Project described below.

> Phase IV consists of construction of the solar array and electrical collection and distribution systems to be located approximately 33 miles north of Las Vegas in Clark County, Nevada, as provided in Exhibit 1, attached hereto.

This Permit to Construct shall not be conveyed or transferred without the Commission's prior approval.

By the Commission,

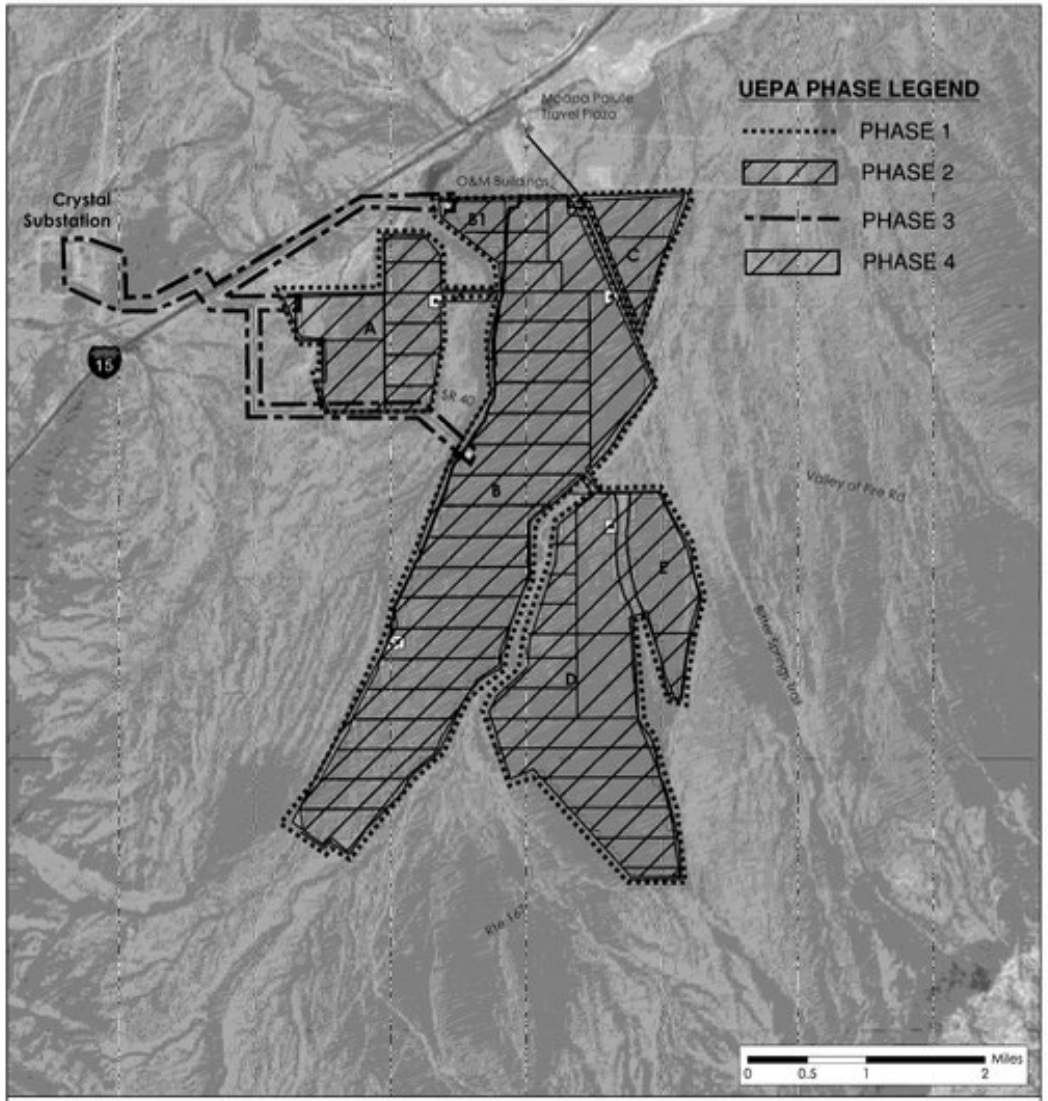
HAYLEY WILLIAMSON, Chair

C.J. MANTHE, Commissioner

Abstained
TAMMY CORDOVA, Commissioner

EXHIBIT 1

FACILITIES PLAN



Updates on UEPA Example (Gemini Solar Project)

- **Docket No. 17-07024 (UEPA)**
  - Project Update filed in docket Dec. 2023
  - 690-megawatt photovoltaic solar electric generating plant
    - Co-located with 380 MW of 4-hour battery storage
  - 1.8 million solar panels
  - Anticipated date for commercial operation Feb. 2024
- **Docket No. 19-06039 (IRP):** The power generated from the project will be sold to NV Energy under a power purchase agreement. The power will be sold at the rate of $0.038kWh for a period of 25 years.
- **July 18, 2024:** Commercial Operation Announcement

Integrated Resource Planning (IRP) Process

- An IRP is a utility's long-term (20 year) plan to meet demand for gas, water, wastewater or electric services in an efficient, reliable and sustainable manner at the lowest reasonable cost to consumers.
- The 20-year IRP includes an immediate 3-year plan.
- State Specific
  - Not all states have an IRP component.
  - Most states use the IRP for informational purposes and do not make a pre-acquisition determination of prudence in advance of a general rate case.
  - Nevada is unique in that the Commission approves of action plans; extends to water.

IRP PROCESS (CONT.)

IRPs are referred to as planning prudence determinations, meaning utility expenditures for plant, generation, transmission and distribution are scrutinized and approved by the PUCN before the facilities are actually acquired or constructed.

A determination is made by the PUCN in an IRP that a specific facility is a prudent investment and the utility should proceed with its plan for the facility. The IRP process is thorough and analyzes and assesses many different ways to meet forecasted demand, including conservation and renewable energy resources.

Frequency of IRP Filings

- **3-year IRP "Action Plan" (See NAC 704.568)**
  - The Commission approves a 3-year action plan, within the context of a 20-year planning horizon.
  - The shorter schedule provides flexibility for continuing changes in consumer needs.
  - Construction predicted may or may not come to fruition as the utility's IRP changes as customer demand grows or slows
- **Amendments to Action Plan (NAC 704.5685 to 704.5687)**
- **Hearing Process:** IRP filings must go through the PUCN's hearing process (see IRP Hearing Process below) to determine whether the utility's plans to meet future demand are efficient, reliable and sustainable and will be achieved at the lowest possible cost to consumers.

IRP Highlights for Renewable Energy

- "Purchased power procurement plan" that establishes the utility's purchased power portfolio (see NRS 703.025, 704.210, 704.741), balancing:
  - Minimizing the cost of purchased power
  - Minimizing retail volatility
  - Maximizing the reliability of purchased power over the term of the energy supply plan.
- Financial Commitment that evidences the developer's plan and fitness to complete construction of a renewable energy project, including relevant contracts, permits, and rights. See NAC 704.9067.
- "Long-term purchased power obligations" with a term of more than 3 years must be submitted to the Commission for approval. See NAC 704.9113, NAC 704.8885.
  - A long-term portfolio energy credits contract
  - long-term renewable energy contract or energy efficiency contract
  - Any other contract, including a multiple seasonal contract, with a term of more than 3 years.
- Note: Renewable Energy PPA price terms must be filed publicly in Nevada, not confidentially.

Example of an IRP with a PPA

Docket No. 22-03024

Joint Application of Nevada Power Company d/b/a NV Energy and Sierra Pacific Power Company d/b/a NV Energy for approval of the first amendment to its 2021 Joint Integrated Resource Plan.

- Contents of Application
  - Transmittal Letter
  - Table of Contents
  - Certificate of Service
  - Application
    - Exhibit A – Narrative
    - Exhibit B – Draft Notice
    - Exhibit C – Updated Loads and Resources Table
  - Prepared Direct Testimony (11 Witnesses)

Appendices to Application

- Fuel and Purchased Power Price Forecasts (Confidential)
- Renewable Plan
  - North Valley Geothermal Power Purchase Agreement (“PPA”)
  - Confidential Due Diligence Review of the North Valley Project
  - Manufacturer’s costs of the Battery Energy Storage System (“BESS”) on the former site of the Reid Gardner Generating Station
  - Assessment of candidate projects sites not selected
  - Screening level cost comparison of the 2-hour BESS and a combined-cycle facility
  - Comparable Projects and Studies
- Generation Plan
- Economic Plan
- Financial Plan
- Note: Sections of this information are confidential and redacted.

Execution Version

LONG-TERM RENEWABLE POWER PURCHASE AGREEMENT

BETWEEN

SIERRA PACIFIC POWER COMPANY D/B/A NV ENERGY

AND

ORNI 36 LLC

North Valley Geothermal
Washoe County, Nevada

TABLE OF CONTENTS

EXHIBITS

Order and Stipulation

b. A Supply Plan addition of the North Valley geothermal facility PPA for 25 MW of renewable energy, which energy profile is complementary to solar photovoltaic ("PV") resources. Commercial operation is expected in December 2022, with a 25-year term at a flat energy price of $57.40 per megawatt-hour. NV Energy is not, and will not be, seeking collection of the costs associated with the impact of the imputed debt from the North Valley PPA as a component of the base tariff energy rate, as contemplated in NAC 704.88875(5), either in this proceeding or in future cases.

IRP Practice Considerations

- 180 Day Timeline for the PUCN to “accept or deem inadequate”
- Electric utility IRP proceedings are typically contested cases, involving many parties to the proceeding conducting discovery and presenting evidence at a hearing.
  - Staff is an automatic party to all dockets; Bureau of Consumer Protection (BCP- AGO) has a right to participate; Petitioners must state an interest.
- Even though the application is processed through a contested case, it is still an *application* that must be approved based on substantial evidence in the record.
- The Procedural Schedule is set during the Prehearing Conference (“PHC”).
  - Notice sets deadlines for Petitions for Leave to Intervene (“PLTI”) and sets the Prehearing Conference date.
  - The PHC determines phases, PLTI’s, and the procedural schedule.
  - The Commission typically issues a Procedural Order following the PHC.

Procedural Schedule for IRPs

Procedural Schedule

Often Scheduled by Phases, or Agreed-Upon Issues

Three Main Components:

- Staff and Intervenors Direct Testimony (Written)
- Company's Rebuttal Testimony (Written)
- Hearing (In Person Cross-Examination on Written Testimony)

General Administrative Practice Considerations

- Highly collegial (especially compared to court).
- Communicate with Staff/BCP/Utility for scheduling as early as possible (especially before the PHC).
- Rules of Evidence do not apply but are used as a guideline and often followed (See NAC 703.702 and NAC 703.705)
- Be aware of related dockets (especially true for IRPs with multiple amendments)
- Be aware of recent statutory changes and any rulemakings.
  - All rulemakings are assigned Dockets, searchable on the PUC website at https://puc.nv.gov/Dockets/Dockets/
  - The Legislative website is not always up to date.
- Reach out to Staff Counsel for pointers.

Discovery (See NAC 703.680)

- From the moment a filing is made until shortly before a hearing begins, Staff investigates the facts and issues raised in the utility's filing by conducting discovery.
- The discovery process involves the exchange of information by the parties to further their investigation and formulate their positions
- Information obtained through discovery is not public information.
- As part of discovery, parties request evidence from the utility, including information and documentation, through "Data Requests."
- All parties are entitled to conduct discovery.
- Staff may also conduct infrastructure inspections, review plant and financial records and assess the quality of the utility's customer service.
- Confidential information is subject to NRS 703.196, NRS 703.196, NRS 703.340, NAC 703.527 – NAC 703.5282, and Protective Agreements entered into between the Applicant and each Intervenor.

Thank You

Tori Sundheim

Tnsundheim@puc.nv.gov

(775) 548-6081

Relevant Information for UEPA

- PUCN Dockets: https://puc.nv.gov/Dockets/Dockets/
- PUCN Biennial Report before Legislature (2020-2022): https://puc.nv.gov/uploadedFiles/pucnvgov/Content/About/2023BiennialReport.pdf
  - Renewable Energy Projects Approved and/or Permitted by the PUCN: https://puc.nv.gov/Renewable_Energy/ApprovedREFacilities/
  - List of new and proposed generation plants in Nevada, including renewable energy facilities: https://puc.nv.gov/Utilities/Electric/Generation/
- Fact Sheets: https://puc.nv.gov/Consumers/Be_Informed/PUCN_Fact_Sheets/
  - IRP Fact Sheet https://puc.nv.gov/uploadedFiles/pucnvgov/Content/Consumers/Be_Informed/Fact_Sheets/Fact_Sheet_IRP.pdf
  - Utility Regulation in Nevada Fact Sheet https://puc.nv.gov/uploadedFiles/puc.nv.gov/Content/Consumers/Fact_Sheets/Utility_Regulation_Fact_Sheets/Fact_Sheet_Utility_Regulation.pdf
- UEPA: NRS 704.820 – 704.900; NAC 703.415 – 703.427
- Practice Before the Commission: NAC 703.481 – 703.845

Relevant Statutes and Regulations for Administrative Proceedings

- NRS 704.301 to NRS 703.377 “Administrative Proceedings”
- NAC 703.481 et seq. “Practice Before Commission”
  - NAC 703.510 Representation
  - NAC 703.530 et seq. Pleadings
  - NAC 703.578 et seq. Petitions for Leave to Intervene
  - NAC 703.610 et seq. Service of Documents
  - NAC 703.655 et seq. Hearings
  - NAC 703.680 et seq. Discovery
  - NAC 703.845 Stipulations for Settlement of Issues.
  - NAC 703.527 – NAC 703.5282 “Confidentiality of Information”
    - See also NRS 703.330, NRS 703.196

To Advise or Not To Advise?

Sarah A. Bradley, Esq.

Disclaimers

- I have no financial interests to disclose.
- This presentation contains my thoughts and opinions and does not reflect the opinions of my employer or the State of Nevada.

Objectives

- Provide an overview of advisory opinions, including the process for requesting and drafting them;
- Discuss the pitfalls of advisory opinions, as well as possible scenarios where they may be appropriate; and
- Discuss issues related to advisory opinions such as guidance provided in newsletters and frequently asked questions.

What is an Advisory Opinion?

- Generally, it is a non-binding opinion (*) regarding the effect of the law in a presented scenario. Usually, compliance in good faith is a “safe harbor.”
- Often issued by federal and state administrative agencies and some state courts. Federal courts may only decide actual cases or controversies and may not issue advisory opinions. (U.S. Const. Art. III).
- *It’s not always non-binding. Some states and many federal agencies deem them binding on the parties if certain requirements are followed.
- Interesting: Advisory opinions originated very early in English law. Then not usually regarding questions of law.

History of the APA (in most States)

- Uniform Law Commission, https://www.uniformlaws.org/home, "established in 1892, provides states with non-partisan, well-conceived and well-drafted legislation that brings clarity and stability to critical areas of state statutory law."
- First draft "Model State Administrative Procedure Act" in 1946. Subsequently amended in 1961, 1981, and 2010.
  - Link to 2010 Version.
  - Much of the 1961 draft was adopted by states across the country.
  - Example, Nevada's APA was adopted in 1965.
  - Model State APA now refers to advisory opinions as "guidance documents."
    - Binding on agency and parties if published.

Guidance Documents (aka Advisory Opinions)

- In the APA for Arizona, Michigan, Virginia, Washington State.
  - Arizona: Ariz. Stat. § 41-1001 "substantive policy statement" and § 41-1091.
  - Michigan: Mich. Comp. Laws § 24.203, 24.224. "Guideline," binds agency but not other parties.
  - Virginia: Va. Stat. § 2.2-4103.1. "Guidance documents" relied upon by the agency. Filed with the Registrar for publication in the Virginia Register of Regulations.
  - Washington State: Wash. Stat. § 34.05.230. "Interpretative or policy statements" are encouraged. Advisory only until promulgated to rules, which is also encouraged.
- Recommended by the American Bar Association's Section of Administrative Law and Regulatory Practice.

Federal APA

- A final order, opinion, *statement of policy, interpretation*, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency if
  - (i) it has been indexed and either made available or published as provided by this paragraph; or
  - (ii) the party has actual and timely notice of the terms thereof.

    5 U.S.C.A. § 552.
- Essentially, binding if published and/or party has been noticed regarding statement of policy or interpretation.

Nevada Statutory Language re: Advisory Opinions

- **NRS 233B.120 Petitions for declaratory orders and advisory opinions; disposition.** *Each agency shall provide by regulation for the filing and prompt disposition of petitions for declaratory orders and advisory opinions as to the applicability of any statutory provision, agency regulation or decision of the agency*. Declaratory orders disposing of petitions in such cases shall have the same status as agency decisions. A copy of the declaratory order or advisory opinion shall be mailed to the petitioner. (Added to NRS by 1965, 966).
- Applies to (nearly) all state agencies in Nevada.

NRS 622.085: Petitions re: Criminal History

- NRS 622.085: Requires a process be created by (nearly) all licensing boards for a person to request a determination whether his or her criminal history will disqualify the person from obtaining a license from the board.
- Any person, any time (prior to education or application or not).
- Determination from board must be provided in 90 days after receiving the petition. Petitions limited to one every two years.
- Board is not bound by determination, determination may be rescinded at any time, and board may provide instructions to remedy a determination of disqualification (then can petition again in six months).
- Board may charge up to $50 to process these petitions.
- Limited to information contained in or submitted with petition. Department of Public Safety says statute is not sufficient to independently obtain criminal history report.
- May publish a list of crimes on board's website that disqualify a person from obtaining licensure with the board.

(Possibly) Required, but What is the Process?

- In Nevada, all agencies must promulgate regulations that contain the process.
  - *See* NAC 644A.970 through NAC 644A.985 for the Nevada State Board of Cosmetology.
  - *See* NAC 630.450 for the Nevada State Board of Medical Examiners.
- Generally, (1) Petition for Advisory Opinion received in specified time period, (2) Petition is added to public meeting agenda, (3) Board considers the Petition at the public meeting, (4) Petition is granted or denied.
  - Usually required that the requester have actual stake in the question, aka "standing."

(Possibly) Required, but What is the Process?

- If granted, order is drafted and served upon the party who must comply.
- Order is public document. (In Nevada, but probably everywhere, subject to redactions.)
- Probably should be published so that it is readily available to the public.
  - (Probably) not binding on the public but may help advise conscientious licensees regarding good conduct.
  - Could be used as a safe harbor by a licensee in disciplinary matter. Potentially as mitigation if not outright compliance.

Drafting

- Who should draft advisory opinions?
  - It depends.
    - Usually legal counsel or agency expert.
  - Narrowly tailor to issue presented.
  - Use appropriate language. Think of the audience.
  - Timeframe?
    - 90 days, 60 days, . . .
    - Check statute or regulation.
    - Consider including this in the process.
  - Costs?
    - Federal OIG charges $176 per hour. Can get estimate first. Can set maximum amount.

Danger! aka Should It Really be a Rule?

- A regulation is **"[a]n agency rule, standard, directive or statement of general applicability** which effectuates or interprets law or policy, or describes the organization, procedure or practice requirements of any agency." NRS 233B.038(1)(a).
- A regulation is not "[a]n advisory opinion issued by an agency that is not of general applicability." NRS 233B.038(2)(f).
- Question: Does everyone have to follow this advisory opinion?
  - If so, maybe better as a regulation and not an advisory opinion.

Appropriate Subject Matter (1)

- Advisory opinion must be regarding "***the applicability of any statutory provision, agency regulation or decision of the agency***." NRS 233B.120.
- Individual situation specific to person asking for advisory opinion.
  - Example 1: Nevada Commission on Ethics provides **(confidential)** advisory opinions to public officers or employees "regarding the applicability of his or her circumstances under the provisions of the Ethics in Government law."
    - All published online.
    - Not binding but likely will be followed by Commission if there is a complaint filed against the requester regarding that situation.
  - Example 2: Standing Committee on Ethics and Professional Responsibility for of the State Bar of Nevada issues advisory opinions regarding legal ethics. SCR 225.
    - Formal advisory opinions available for public review. Identity of requester is confidential.
    - Not binding.

Appropriate Subject Matter (2)

- *But see Public Service Com'n of Nevada v. Southwest Gas Corp.*, 662 P.2d 624 (Nev. Sup. Ct. 1983) (Order in a contested case was directed only at Southwest Gas, but was generally applicable because it affected other gas utilities and their customers by "flattening" rates.).
- No licensee may use the terms "osteopractor" or "osteopractic."
  - *Dunning v. Nevada State Bd. of Physical Therapy Examiners*, 132 Nev. 963, 2016 WL 3033742 (Nev. Sup. Ct. 2016).
  - Policy published in newsletter and online.
  - Generally applicable; should have been a regulation.

Attorney General Opinions?

- Are they advisory opinions?
  - NRS 228.150: May be requested by state or local government officials regarding questions of law.
- Are they binding?
  - Not in Nevada.
    - *Blackjack Bonding v. City of Las Vegas Municipal Court*, 14 P.3d 1275 (Nev. Sup. Ct. 2000).
    - *Goldman v. Bryan*, 787 P.2d 372 (Nev. Sup. Ct. 1990).
  - If a government official relies on an AGO in good faith, official is not personally liable for damages incurred by governmental entity if AGO is incorrect.
    - *Cannon v. Taylor,* 493 P.2d 1313 (Nev. Sup. Ct. 1972).
    - *See also State ex rel. Attorney General v. Broadaway,* 93 S.W.2d 1248 (Ark. Sup. Ct. 1936); *Standard Surety & Casualty Co. v. State of Oklahoma,* 145 F.2d 605 (10th Cir. 1944); *State v. Meier,* 115 N.W.2d 574 (N.D. Sup. Ct. 1962).
  - Possibly persuasive to the courts (if the courts agree).

Frequently Asked Questions?

- NRS 630.144 requires that the Nevada State Board of Medical Examiners publish FAQs on its website.
- Missouri Board of Pharmacy
  - Questions
- Texas Board of Nursing
  - Lots of topics, including for licensees and the public and scope of practice questions. Includes position statements and items that I would classify as "guidance."
- Washington State Board of Dentistry
  - Generally, cites to RCW or WAC in each answer.

Cease and Desist Order and FAQs (1)

- *United Pharmacal Co. of Missouri, Inc. v. Missouri Bd. of Pharmacy,* 159 S.W.3d 361 (Miss. Sup. Ct. 2005).
  - Business selling animal supplies, including drugs, received a cease and desist letter from the Board of Pharmacy indicating that the business must stop selling animal drugs without a pharmacy license.
  - Letter referred to general provisions of Missouri law overseen by the Board of Pharmacy.
  - Board website had a FAQ regarding selling veterinary legend drugs to owners of animals.
    - FAQ stated that prescription was needed from a veterinarian, and drugs could not be sold directly to owner of animal based on a prescription without the seller being licensed as a pharmacy.

Cease and Desist Order and FAQs (2)

  - Another option was to be licensed as a drug distributor, if business was selling to veterinarians or other wholesalers.
  - FAQ no longer on Board website at the time of the Supreme Court appeal.
- Rulemaking process not followed for FAQ.
- Board denies that the FAQ is a rule.
- "Not everything that is written or published by an agency constitutes an administrative rule."
  - The FAQ was not a rule.
  - No attempt to promulgate it at as a rule, and, therefore, cannot challenge it. (Seems dangerous to me!) Also, *see Dunning.*
- The cease and desist letter did not reference the FAQ. It referenced general statutes.
- Prior to *FTC v. North Carolina Dental*, would the challenge have been different today?

Case Law (1)

- *Baker v. Commonwealth of Kentucky,* 2007 WL 3037718, KY Ct. App. (October 19, 2007).
  - At issue was a long-standing, unwritten, Personnel Cabinet Policy.
  - KY agency relied on the "policy" and this negatively affected Baker's benefits.
  - Policy was an administrative regulation and should have been properly promulgated before being relied on by the agency.
    - Generally applicable, implements, interprets, or prescribes law or policy.
    - Agency intended that policy applied to all persons who retired from employment with KY.
  - Monetary damages of $525.40.

Case Law (2)

- *Coury v. Whittlesea-Bell Luxury Limousine*, 721 P.2d 375 (Nev. Sup. Ct. 1986).
  - "Agency makes a rule when it does nothing more than state its official position on how it interprets a requirement already provided for and how it proposes to administer its statutory function."
  - Cites to *K-Mart Corp. v. State Indus. Ins. Sys.,* 693 P.2d 562 (Nev. Sup. Ct. 1985). Implementation of statute to individuals is allowed and does not require agency to engage in rulemaking. In *K-Mart Corp.*, applying formula provided in statute is not rulemaking. (But others in this case were improper.)
  - Ad hoc rulemaking when a new standard was set without following the rulemaking process.
  - New standard was generally applicable and set policy for the future.

Case Law (3)

- *Las Vegas Transit System, Inc. v. Las Vegas Strip Trolley*, 780 P.2d 1145 (Nev. Sup. Ct. 1989).
  - The Public Service Commission engaged in ad hoc rulemaking when it defined "trolley bus" or "trolley" and set a standard of general applicability without following the rulemaking process.
  - Granted licensure to Las Vegas Strip Trolley.
  - No definition of "trolley" or "trolley bus" previously existed.
  - But, in the Commission's November 9, 1987 "Opinion" and accompanying "Order," the Commission defined a new kind of vehicle and generated interest beyond the confines of this case.

Case Law (4)

- *State Farm Mut. Auto. Ins. Co. v. Commissioner of Ins.*, 958 P.2d 733 (Nev. Sup. Ct. 1998).
  - Statutory law change in 1987 prohibited cancellation, nonrenewal or increase in premiums when insured was "not at fault." Division engaged in ad hoc rulemaking by defining "chargeable accident." Definition was a statement of general applicability.
  - "[A]n interpretive ruling is merely a statement of how the agency construes a statute or a regulation according to the specific facts before it." *See General Motors Co. v. Ruckelshaus,* 742 F.2d 1561, 1565 (U.S.App.D.C. 1985) (holding that an "interpretive rule" in the federal context means a rule that simply states what the administrative agency construes a statute to mean, and only reminds affected parties of existing legal duties).

Case Law (5)

- *Labor Com'r of State of Nevada v. Littlefield,* 153 P.3d 26 (Nev. Sup. Ct. 2007)
  - Statute requires Labor Commissioner to determine and publish, annually, the prevailing wage in each county for "each craft or type of work."
    - Prevailing wage laws govern the wages of workers employed on public works projects.
      - Is this generally applicable? Is it arguably a regulation without going through the process? Possibly, but specifically directed and required by statute.
    - Part of making these determinations requires that the Commissioner classify different jobs.
  - Published prevailing wage pursuant to statute but deleted two job classifications.
  - Court said this is a "regulation" and was subject to the rulemaking process.
    - Why? This was a generally applicable directive.
    - Setting wages and placing workers into specific classes was okay. But deleting, adding, or substantially modifying worker classifications requires APA process for rulemaking.

Case Law (6)

- *State Bd. of Equalization v. Sierra Pac. Power Co.*, 634 P.2d 461 (Nev. Sup. Ct. 1981).
  - The title placed upon administrative pronouncement does not determine whether or not an agency is engaged in rulemaking.
    - *See United Parcel Service, Inc. v. Oregon Trans. Commission*, 555 P.2d 778 (Or. Ct. App. 1976) (stating that not every administrative action with public consequences is a rule and calling something one does not make it one).
  - "A properly adopted substantive rule establishes a standard of conduct which has the force of law." *Pacific Gas & Electric Co. v. Federal Power Com'n*, 506 F.2d 33, 38 (D.C.Cir.1974).
  - In the above case: State Board engaged in hoc rulemaking by changing applied formulas against landholder which affected tax charged.

Case Law (7)

- *Morgan v. Stimson Lumber Co.*, 607 P.2d 150 (Or. Sup. Ct. 1980).
  - "[A]n agency makes a rule, within the broad meaning of that term, when it does nothing more than publish its official position on how it interprets a requirement, standard, or procedure already provided in the governing statute itself, and how it proposes to administer this statutory provision."
    - *See* Or. Stat. § 183.310(9).
  - Financial sanctions "announcement" is a rule and should have been properly promulgated under the APA.
    - Board argued that this was an "announcement of how [the agency] interprets and intends to administer the statute."
  - Workers' Compensation Board wins anyway because opposing side did not argue that the rule was ad hoc rulemaking.

Case Law (8)

- *Montanans Against Assisted Suicide v. Board of Medical Examiners*, 347 P.3d 1244 (Mont. Sup. Ct. 2015).
  - Board adopted a "position statement" explaining the effect of a Montana Supreme Court decision on the Board's discipline policy for physicians participating in "aid-in-dying" for consenting terminally ill patients.
    - Requested by two medical doctors.
  - Board subcommittee allowed for notice and comment from interested persons regarding the position statement on January 12, 2012.
  - Position statement was amended after comment and posted on Board website on January 20, 2012.
  - On March 12, 2012, MAAS asked that the Board vacate the position statement and remove from its website.

- On March 16, 2012, the Board revised the position statement but did not vacate or remove from website.
- On July 6, 2012, MAAS repeated its request.
- The Board denied MAAS's request.
- On September 27, 2012, MAAS filed a petition with the Board asking for a declaratory ruling that the position statement was invalid.
- On November 16, 2012, the Board held a hearing on the petition and ultimately denied the petition.
- On December 17, 2012, MAAS filed a petition for judicial review of the Board's decision with the District Court.
- MAAS claimed that the adoption of the position statement exceeded the Board's authority.

- While matter was pending with the District Court, on September 20, 2013, the Board passed a motion to rescind all of its position statements, including this one.
  - Number for this one was Position Statement No. 20, so there must have been at least 19 others?
  - This position statement was removed from the Board's website.
- Board moved to dismiss the case as moot because position statement (and 19 others?) were rescinded and removed from its website.
- District court agreed and dismissed as moot.

- If the Montana Supreme Court decides the issue, then it would be issuing an advisory opinion…
  - No longer a case or controversy.
- Board effectively gave MAAS the relief it sought:
  - Vacating the opinion and removing it from the Board's website.
- Nothing else to do.
- No decision on the merits. ☹
- Current website has no position statements.

Case Law (9)

- *In re: Appeal of Hughes and Coleman*, 60 S.W.3d 540 (Kent. Sup. Ct. 2001).
  - Decision of the Attorneys' Advertising Commission disapproved 20 advertisements containing phrase "injury lawyers" because it implies that the lawyer is a specialist.
  - Law firm appealed because received three different results from three different applications to the Commission.
    - First time lapsed, second approved, third disapproved.
  - "[U]nfair to change the rules in the middle of the game without providing any supporting reasoned explanation for the change."
  - Commission vested with "quasi-judicial authority" and subject to "qualified form of the doctrine of *stare decisis*."

- "[A]n administrative agency either must conform with its own precedents or explain its departure from them." (citing *Ohio Fast Freight, Inc. v. U.S.*, 574 F.2d 316 (6th Cir. 1978)).
- "An agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored."
- Advertisements in this case must be approved.
- But Nevada! (no administrative stare decisis):
  - *Northern Pacific Railway Co. v. U.S.*, 41 F.Supp. 439 (D.Minn. 1941).
  - *Gray Line Tours of Southern Nevada v. Public Service Commission of Nevada*, 626 P.2d 263 (Nev. Sup. Ct. 1981).
  - *Motor Cargo v. Public Service Com'n of Nevada*, 830 P.2d 1328 (Nev. Sup. Ct. 1992).
  - *Desert Irrigation, Ltd. v. State*, 944 P.2d 835 (Nev. Sup. Ct. 1997).
  - *State Dept. of Taxation v. Chrysler Group*, LLC, 300 P.3d 713 (Nev. Sup. Ct. 2013).

Case Law (10)

- *General Motors Corp. v. Ruckelshaus,* 742 F.2d 1561 (DC Cir. 1984).
  - Question: Is EPA's "interpretive rule" legislative or interpretative?
    - If legislative rule, then notice and comment procedures are required. If interpretive, then not required.
  - An agency's own label, while relevant, is not dispositive.
  - Here, it is an interpretative rule.
    - Did not create new rights, responsibilities, or duties, and restated consistent practice of the agency and what the agency thinks the statute means, reminds affected parties of existing duties.
  - "In a turn of phrase particularly apt in this case, the distinction between legislative and nonlegislative rules has been described as **'enshrouded in considerable smog.'**" *American Bus Association v. ICC*, 627 F.2d 525, 529 (D.C.Cir.1980) (quoting *Noel v. Chapman*, 508 F.2d 1023, 1030 (2d Cir.1975) (discussing definition of "general statement of policy")).

Publishing “Policy-Rules” in Newsletters

- Remember *Dunning*?
  - General applicability broad “no licensee may” statement published in Board newsletter. Clearly applied to all licensees.
- Providing information, such as guidance, is preferred and not official positions of the agency, unless there is specific authority for that.
  - http://epubs.nsla.nv.gov/statepubs/epubs/620964-2019-9.pdf.
    - IV Hydration Scope of Practice: What Registered Nurses Need to Know (pages 6-7)
      - Contains information, such as relevant statutes, and explains how those statutes apply to IV hydration clinics. Does not create new standards or new definitions.
- No matter where/how “policy” (that is really a rule) is published (even if in a newsletter), it can still cause problems.
- Solutions: Remove “policy-rules” from website, rescind policy-rules, initiate rulemaking process.

Case Law Lessons (1)

- If “policy” is generally applicable, and negatively affects a person, consider making a regulation.
- If official position of the agency sets a new standard, consider making a regulation.
- If “order” or “opinion” defines a term that is not already defined in law or regulation, consider making a regulation.
- If publication required by statute, deletes, adds, or substantially modifies classifications or categories that have previously existed, consider making a regulation. Also, be sure that your publication sticks to clearly defined statutory parameters.

Case Law Lessons (2)

- If agency decision changes the formula applied against a person or entity, consider making a regulation.
- If agency “announcement” provides for financial sanctions, consider making a regulation.
- Removing policies or position statements [that probably should have been regulations] from websites may limit liability.
- Follow previous decisions of agency whenever possible and discuss departures from previous decisions, if/when necessary.
- Know if your state law recognizes “administrative stare decisis.”

Case Law Lessons (3)

- If opinion creates new rights, responsibilities, or duties, consider making a regulation.
- If opinion restates what the agency thinks the statute means, or reminds affected parties of existing duties, it may truly be a valid advisory opinion.
  - But don’t define new terms in opinion. (See previous lessons).

Recommendations

- Advise very carefully, if at all. Be aware of specific statutory requirements.
- FAQs should generally not add to existing law. May provide factual information, such as contact information.
- If there are lots of questions in an area that the law does not address, make a regulation, and then include that new regulation in your agency's FAQs.
- Guidance may be very helpful, and some states (and federal agencies) require it be provided. But…
  - Avoid using guidance as if it was binding without specific statutory authority.
- When in doubt, make a regulation.

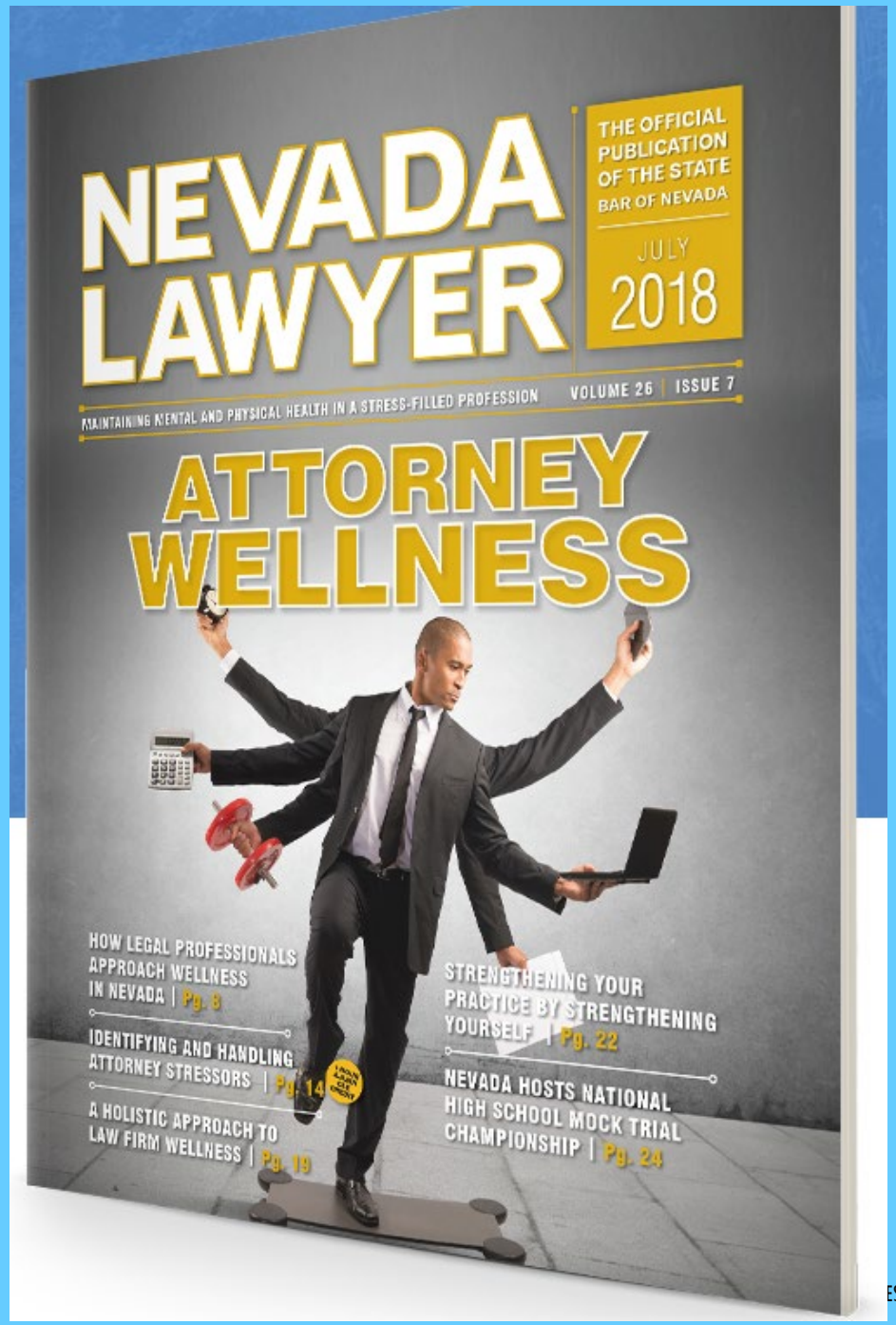

YOU'VE GOT
QUESTIONS...
I MIGHT
HAVE
ANSWERS
imgflip.com

THE RESILIENT LAWYER: AN EXPERIENTIAL CLE

Margaret Crowley, Esq.
Amy N. Tirre, Esq.

THE RESILIENT LAWYER

Why us?


NEVADA LAWYER
THE OFFICIAL PUBLICATION OF THE STATE BAR OF NEVADA
JULY 2018
MAINTAINING MENTAL AND PHYSICAL HEALTH IN A STRESS-FILLED PROFESSION
VOLUME 26 | ISSUE 7
ATTORNEY WELLNESS
HOW LEGAL PROFESSIONALS APPROACH WELLNESS IN NEVADA | Pg. 8
IDENTIFYING AND HANDLING ATTORNEY STRESSORS | Pg. 14
A HOLISTIC APPROACH TO LAW FIRM WELLNESS | Pg. 19
STRENGTHENING YOUR PRACTICE BY STRENGTHENING YOURSELF | Pg. 22
NEVADA HOSTS NATIONAL HIGH SCHOOL MOCK TRIAL CHAMPIONSHIP | Pg. 24

LEARNING OBJECTIVES

National Task Force on Lawyer Well-Being

"The Path to Lawyer Well-Being: Practical Recommendations for Positive Change"

- Emphasizing that well-being is an indispensable part of a lawyer's duty of competence;
- Educating lawyers, judges and law students on practical well-being issues; and
- Taking small, incremental steps to change how law is practiced and how to instill greater well-being in the profession

AMY & MARGARET'S LEARNING OBJECTIVES

- Understand neuro-physiological impacts of chronic stress on lawyers and their mental health
- Learn and practice techniques to reduce stress
- Improve resilience

WHY THIS MATTERS FOR OUR PROFESSION

- 18% of attorneys are problem drinkers – almost twice the 10% estimated prevalence of alcohol abuse and dependency among American adults as a whole;
- 19% of lawyers suffer from statistically significant elevated levels of depression, in contrast to an estimated 3-9% of individuals in western industrialized countries;
- 11.5% of lawyers have reported having had suicidal thoughts at some point during their careers;
- Approximately 25% of lawyers are workaholics, more than double the rate for American adults in general

DEEP BREATHING TO REDUCE STRESS

- Longer exhales cause the parasympathetic nervous system to activate and relax our bodies
- There are a variety of controlled breathing techniques
- You can do them anywhere – at your desk, while driving, at a meeting, while waiting in line at a store

WHAT IS STRESS?

- A state of mental or emotional strain or tension resulting from adverse or very demanding circumstances
- Synonyms: strain, pressure, (nervous) tension, worry, anxiety, trouble, difficulty; informal hassle
- English origin “distress”
- Acute vs. chronic stress

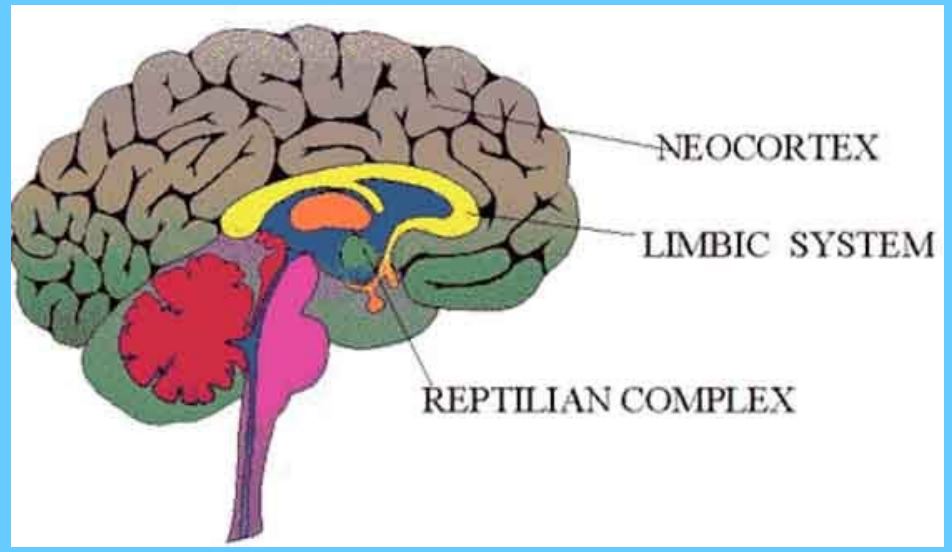
STRESSORS FOR LAWYERS

- Demanding Clients
- Deadlines
- High Pressure for Winning/Results
- Performance Anxiety
- Our performance impacts client's life, livelihood, family
- What else?

WHAT HAPPENS WHEN WE'RE STRESSED: A LOOK AT THE BRAIN

Brain Basics

- Reptilian – survival
- Limbic – emotions / memories / arousal
- Neocortex – high-order thinking



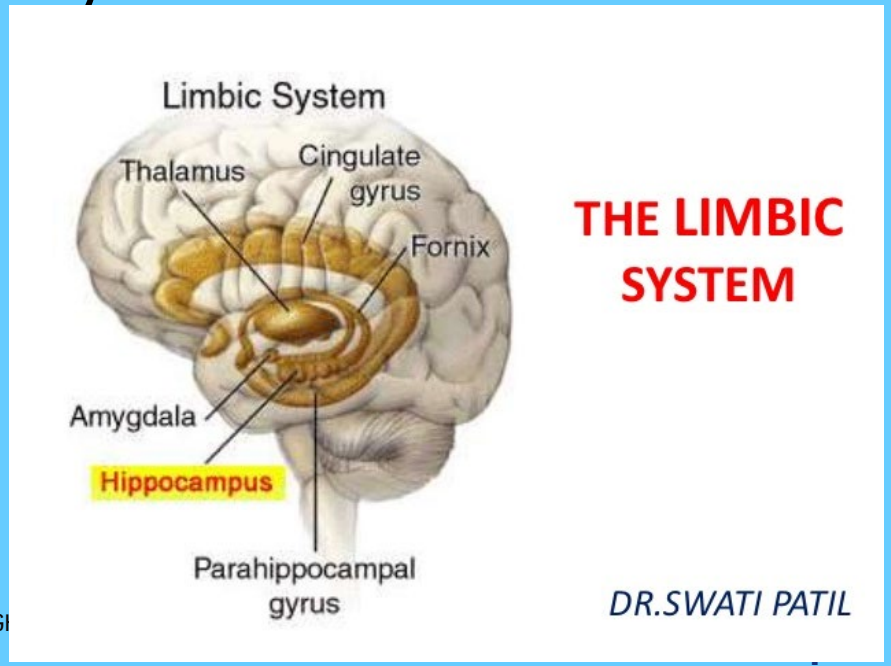
A LOOK AT THE BRAIN

Limbic system: self-preservation; preservation of the species

Limbic system:

- **Emotional reactivity (thalamus and hypothalamus)**
- **Regulation of aggressive behavior (cingulate gyrus)**
- **Emotional center (amygdala)**

Fight, Flight or Freeze

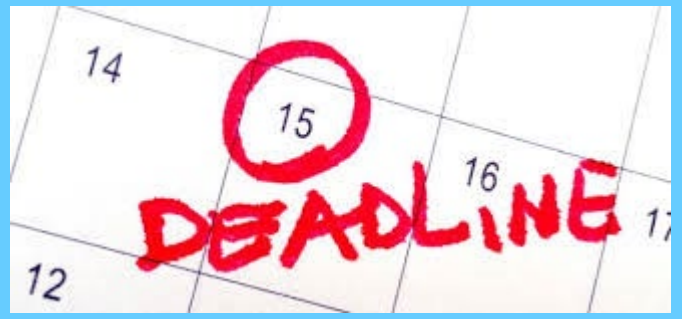


FIGHT OR FLIGHT OR FREEZE

When we perceive a threat, the limbic system is activated and the prefrontal cortex shuts down

We can't think!

MODERN DAY PREDATORS



FIGHT, FLIGHT OR FREEZE

Non-physical threats (modern day predators):

- Exact same reaction:
  - Fight or flee or freeze
  - Overwhelmed by emotions
  - Neocortex is shut down

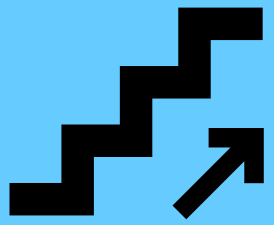
The amygdala hijack

Daniel Goleman: Emotional Intelligence

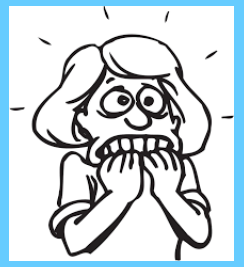
SIGNS OF AN AMYGDALA HIJACK

- Strong emotional reaction
- Sudden onset
- Changes in your heart rate and breathing, an increase in body temperature, a tensing of the muscles or clenching of the jaw
- Post-episode realization that the reaction was inappropriate
- "Going Postal"

FIGHT, FLIGHT OR FREEZE



What's Happening?



We have five times more fear-based circuits in the brain, and pay about 80% more attention to potential threats than rewards

STRESS & HORMONES

When we are stressed, our bodies release stress hormones and neurotransmitters like:

- **Adrenalin**: increases heart rate and blood pressure; **does not linger in the body**

Norepinephrine: increases heart rate, triggers the release of glucose (sugar) into the blood; **does not linger in the body**

- **Cortisol**: activates the amygdala and makes us feel angry, fearful, anxious; **lingers in the body and becomes dangerous**

STRESS – ACUTE VERSUS CHRONIC

Short-term, temporary, acute stress

- **Adrenaline** and **Norepinephrine** can enhance body's response to stress:
  - Help body to move fast
  - Oxygenate brain for better performance
  - Superhuman pain resistance
  - Unleash maximum physical strength
  - Speed up wound healing
  - Fight infection

STRESS: ACUTE VERSUS CHRONIC

Long-term, chronic stress

- Causes elevated levels of Cortisol
- Public Enemy #1 – **Elevated Cortisol**
  - Impacts adrenal glands, leaving you wired but tired
  - Linked to weight gain, cancer, heart disease, hormone imbalances, osteoporosis, digestive problems, diabetes
  - Causes memory loss, brain fog, anxiety and worry
  - Changes your brain's function and structure down to the level of your DNA

THE WAYS CHRONIC STRESS AFFECTS YOUR BRAIN & MENTAL HEALTH

1. Creates free radicals that kill brain cells
2. Makes you forgetful and emotional
3. Creates a vicious cycle of fear and anxiety
4. Halts production of new brain cells
5. Depletes critical brain chemicals thereby causing depression

THE WAYS CHRONIC STRESS AFFECTS YOUR BRAIN & MENTAL HEALTH

6. Creates greater risk for mental illness of all kinds
7. Decreases cognitive ability
8. Lets toxins into your brain
9. Increases risks of dementia and Alzheimer's
10. Contributes to brain inflammation

How do we keep the excess cortisol out and instead let in "happy hormones" like oxytocin and dopamine?

Ride the rewards pathway = cultivating resilience

CULTIVATE RESILIENCE

- Resilience is the ability to bounce back from stress
- People differ in what restores and depletes them
- Our sources of restoration and depletion change over time

Source: Restore Yourself: The Antidote for Professional Exhaustion, by Edy Greenblatt, PhD.

RESILIENCE: SNEAKY DEPLETERS

1. Interruptions
2. Legal Culture of Relentless Drive

RELIABLE RESTORERS

1. Sleep
2. Sunlight
3. Movement
4. Breathing
5. Flow
6. Sensory Integration

RELIABLE RESTORER: FLOW

- A psychophysical state where you are so engaged that you become one with the activity
- Examples: reading a good book, running, and even working on something you enjoy
- Lawyers:
  - Hyper-focus when researching, writing, preparing, analyzing a case

RELIABLE RESTORER: MOVEMENT

SITTING IS THE NEW SMOKING

Sitting for too long increases your risk of:

- Chronic health problems, such as heart disease, diabetes and some cancers
- Mental health issues
- Physical issues:
  - neck and shoulder pain
  - obesity
  - musculoskeletal disorders
  - stress
  - lower back pain
  - carpal tunnel
- Lawyers are generally “desk potatoes”

People with sedentary behaviors have 20-30% higher risk of all-cause mortality than those who almost regularly practice moderate-intensity physical activities.

SITTING IS THE NEW SMOKING

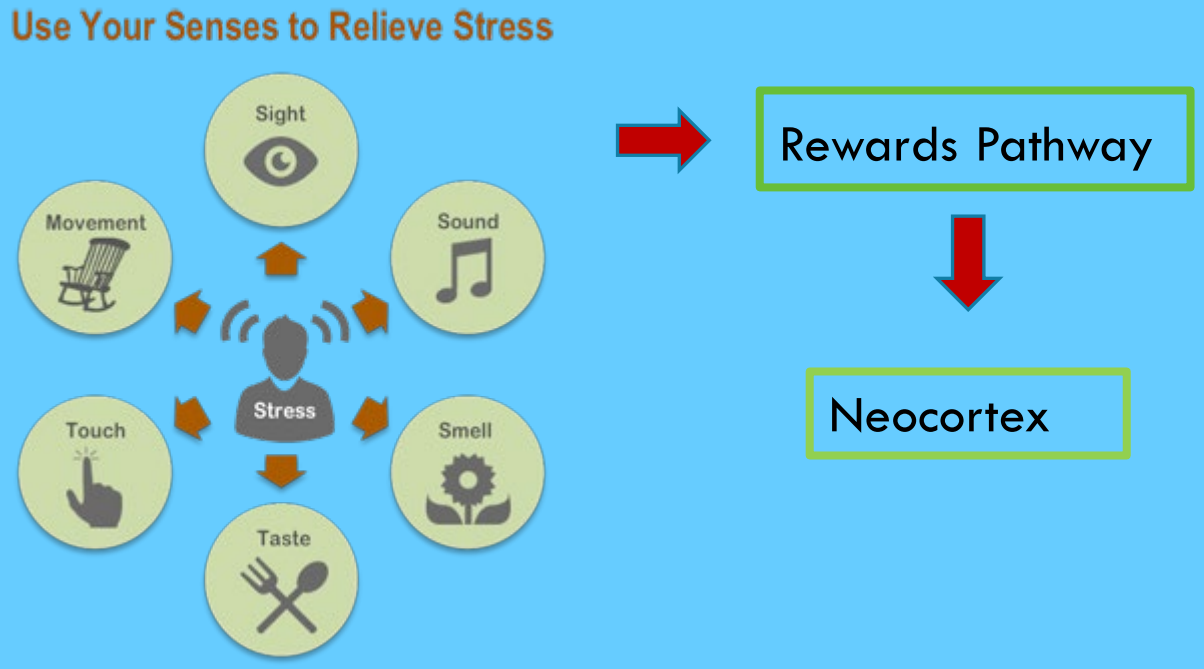
What can we do?

- Set an alarm to get up and move at least every hour
- Take calls while standing
- Get a sitting/standing desk
- Treadmill desk
- Breathing exercises
- Chair stretches

WHAT ELSE CAN WE DO FOR STRESS: SENSORY INTEGRATION

The best way to rapidly and reliably relieve stress is through the senses:

- Smell
- Taste
- Touch
- Sound
- Sight



SMELL

- Olfactory nerve sends signals to limbic system and amygdala, (in charge of emotions, mood and memory)
- The limbic system and amygdala can turn on our sympathetic nervous system (go!) or the parasympathetic nervous system (relax)
- Scent triggers physical reactions in our bodies that last after scent is gone
- Inhaling any scent – good or bad – affects cortisol levels
- Unpleasant smells increase cortisol and pleasant smells decrease cortisol

AROMATHERAPY

- Essential oils:
  - Are extracted from plants
  - Can be diffused into air or rubbed on pressure points on the body
- Research shows that aromatherapy can alter brain wave patterns and behavior
- Aromatherapy can reduce the perception of stress, relax the body, and decrease levels of cortisol

STRESS REDUCING BENEFITS OF ESSENTIAL OILS

Lavender: calms the nervous system, lowers blood pressure, heart rate, and skin temperature and changes brain waves to a more relaxed state.

Bergamot: reduces heart rate, blood pressure, chronic pain and even changes brain wave patterns on an EEG

Citrus Fruits: soothe stress and anxiety and lower heart rate in just 10 minutes with effects lasting for almost half an hour

TASTE

- Cortisol causes food cravings especially for sugar
- Cortisol triggers an enzyme in our fat cells converting cortisone to more cortisol
- Stress causes us to accumulate more belly fat
- Belly fat cells are linked to a greater risk for heart disease and diabetes and have four times as many cortisol receptors as regular fat cells

FOODS THAT FIGHT STRESS

Avocados - rich in glutathione, a substance that specifically blocks intestinal absorption of certain fats that cause oxidative damage

Asparagus - high in folate, which stabilizes mood and reduces anxiety

Cashews – zinc; low levels of zinc are linked to anxiety and depression

Oatmeal – serotonin and beta glucan; calming and maintains blood sugar

Oranges – vitamin C; counteracts cortisol

Oysters – zinc; low levels of zinc are linked to anxiety and depression

Walnuts – high in alpha-linoleic acid – reverses signs of brain aging

FOODS THAT REDUCE CORTISOL

Berries – vitamin C; counteract cortisol

Black tea – found to promote post-cortisol episode recovery

Chamomile Tea – calms nervous system and promotes sleep

Green Tea – theanine; improves cognition and brain function

Dark Chocolate – antioxidants; improve mood and reduce depression

Garlic – antioxidants; strengthen immune system

Olive Oil – reduces production of cortisol

Turmeric – reduces cortisol levels

Wild-caught Salmon – omega 3 fatty acids; inhibits production of cortisol

SOUND: MUSIC

Music

Music activates so many parts of our brain that it doesn't have a center

- Frontal lobe and temporal lobe process the sounds
- If the song has lyrics, the parts of the brain that process language are activated

SOUND: MUSIC

Music

- Can trigger neurons in the motor cortex (tap your feet)
- Cerebellum tries to figure out where a piece of music will go next, based on all the other songs it's heard before
- Limbic system is stimulated because it evokes memories

SOUND

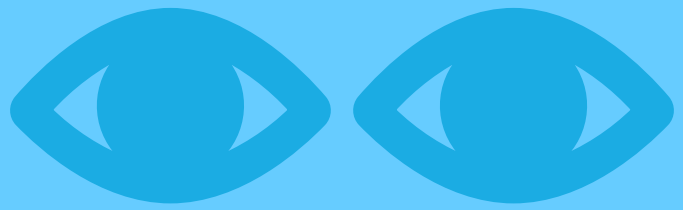
- Sound therapies are a way of relaxing and restoring health
- Neuroscientists identified musical tunes having the greatest impact on the human body's relaxation response
- The top song produced a greater state of relaxation than any other music
- "Weightless" resulted in a striking 65 percent reduction in overall anxiety and a 35 percent reduction in physiological resting rates

SOUND: MOST RELAXING PLAYLIST

10. "We Can Fly," by Rue du Soleil (Café Del Mar)
9. "Canzonetta Sull'aria," by Mozart
8. "Someone Like You," by Adele
7. "Pure Shores," by All Saints
6. "Please Don't Go," by Barcelona
5. "Strawberry Swing," by Coldplay
4. "Watermark," by Enya
3. "Mellomaniac (Chill Out Mix)," by DJ Shah
2. "Electra," by Airstream
1. "Weightless," by Marconi Union

SIGHT

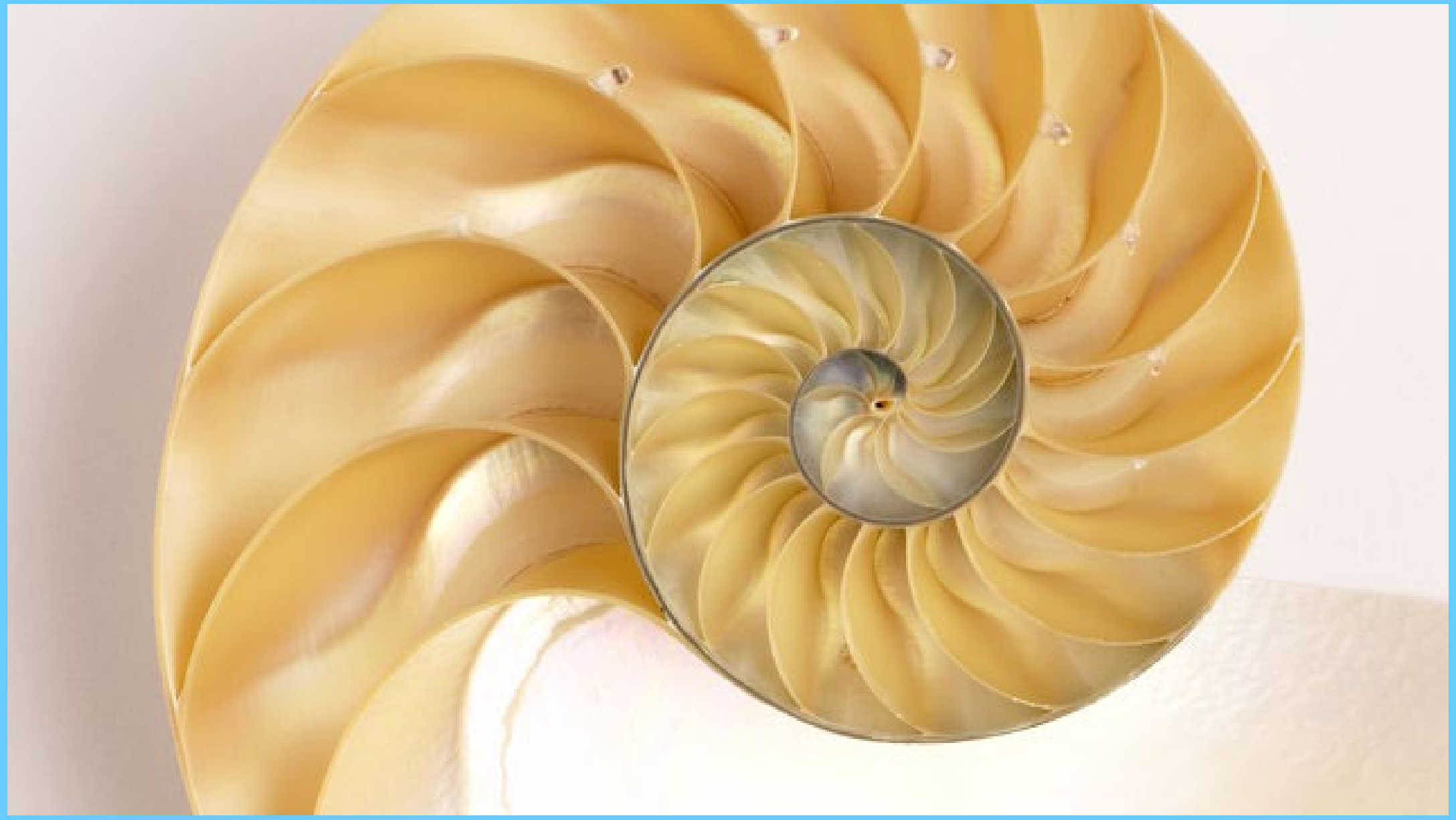
- Fight/flight/freeze: peripheral vision narrows
  - Our eyeballs actually rotate towards the nose
- We want to broaden our vision, allowing our eyes to relax and take in a wider panorama or view

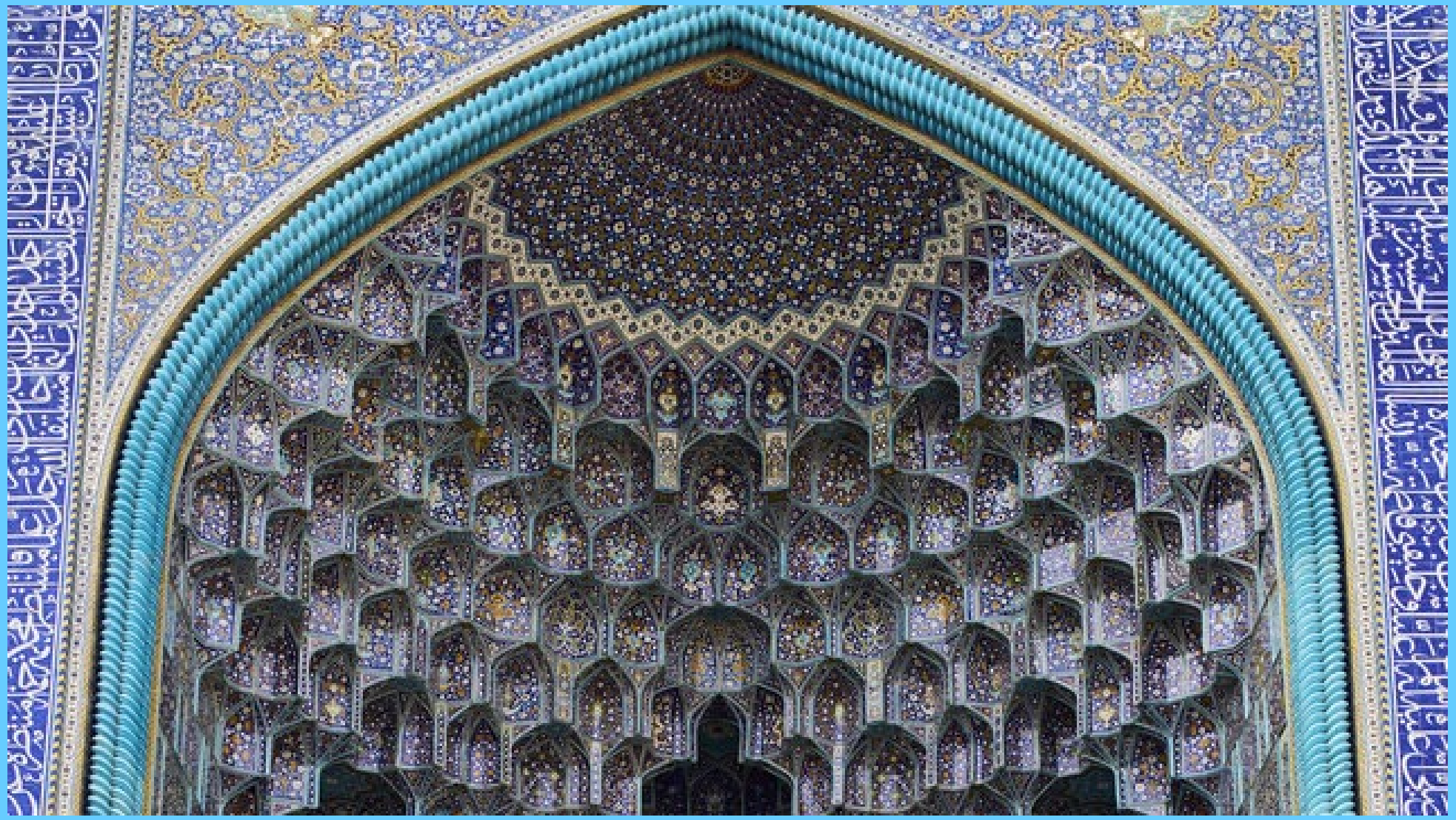


- Keep your eyes open and look directly ahead of you.
- Keep your eyes and head relatively still.
- Expand your field of view and soften your eyes.
- Focus on seeing as much of your environment around you as possible — left, right, top and bottom — to the point where you can see yourself in that environment
- Hold as long as possible

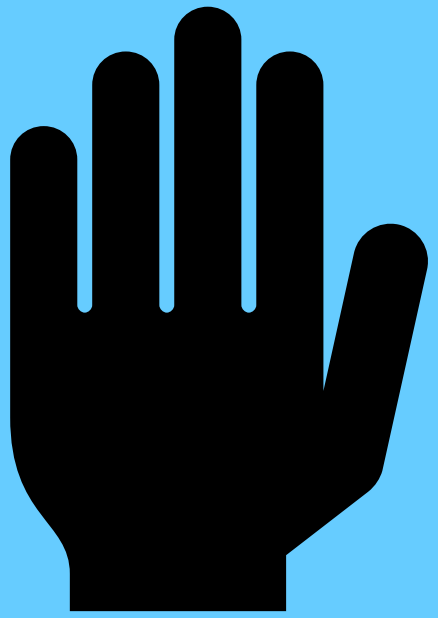
SIGHT: VIEWING FRACTALS

Fractals: repeating patterns that recur on finer and finer scales





TOUCH



- Touch activates the prefrontal cortex and signals the rewards pathway
- The right kind of touch elicits the release of oxytocin and counteracts cortisol, e.g. massage
- We self soothe by doing things like rubbing our hands or necks, or massaging our foreheads

TOUCH

Exercise:

- Your lips have parasympathetic fibers spread throughout them
- Touching them activates the parasympathetic nervous system (relaxation response)
- Take one or two fingers and lightly run them over your lips

GUIDED RELAXATION USING THE SENSES

CONTACT US!

Amy N. Tirre
Law Offices of Amy N. Tirre, A Professional Corporation
3715 Lakeside Drive, Suite A
Reno, NV 89509
(775) 828-0909 Telephone
(775) 828-0914 Facsimile
(775) 742-6681 Cell
E-mail: amy@amytirrelaw.com
www.amytirrelaw.com

Ms. Tirre is licensed in Nevada and California with a solo practice in Reno, Nevada, practicing in the areas of bankruptcy and commercial litigation.

She is a Certified Professional Coach (CPC) and works with mid-career professionals and lawyers in transition.

CONTACT US!

Margaret M. Crowley
Crowley Mediation, L.L.C.
255 W. Moana Lane, Ste. 209
Reno, NV 89509
(775) 233-6711Telephone
Email: Margaret@Crowleymediation.com
www.CrowleyMediation.com

Ms. Crowley has been licensed to practice law in Nevada since 1991. For the past 15 years, the sole focus of her practice has been mediating in a variety of areas, teaching beginning & advanced mediation trainings & conflict resolution workshops.


The End