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NEVADA FAMILY LAW REPORT

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Alleging Child Abuse/Neglect in Child Custody Cases: A Double Edged Sword

By Family Court Judge Mathew Harter

You have an initial interview with a prospective client regarding modifying child custody. The client alleges amidst the interview that she believes the child might be subject to abusive/negligent treatment at the co-parent's residence. What is your advice or next move? Your reaction/non-action thereafter could potentially result in: 1) sanctions; 2) a Child Protective Services ("CPS") complaint against the client; 3) a bar complaint and/or malpractice claim against you; and/or 4) criminal action against both you and/or the client. Those who "dabble" in Family Law, please pay particularly close attention. The timeless legal adage of "*ignorance of the law is no excuse*" is still applicable. *Mayenbaum v. Murphy*, 5 Nev. 383, 384 (1870).

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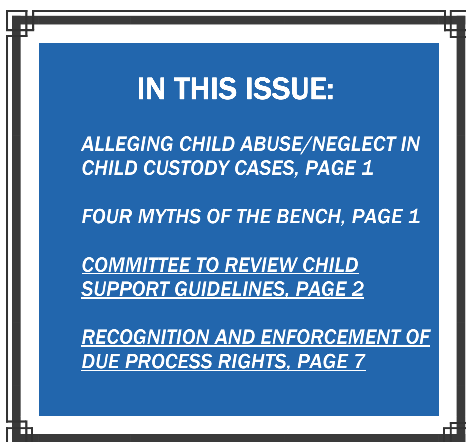
Four Myths of the Bench

By Bruce I. Shapiro

This article focuses on recommendations to increase judicial efficiency in the family court system. The best rule of thumb for judicial departments is simplicity and expediency. Below are several issues that have arisen in the court over the years and need clarification.



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1. Correspondence to the court that is copied to opposing counsel is improper *ex parte* communication.

Some departments in family court return correspondence from counsel relating to an active case believing this is an improper *ex parte* communication. "*Ex parte*" communication, however, does not prohibit counsel from corresponding with the court, as long as certain guidelines are followed. An advisory opinion from the Attorney General of Nevada dated

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Committee to Review Child Support Guidelines

By Kimberly M. Surratt

On July 7, 2015, the Supreme Court of the State of Nevada established a Commission to Study Child Support Guideline Review and Reform. On September 1, 2017, that Commission created a recommendation to move forward at the 2017 Legislative Session with AB 278 to create a permanent commission whose goal is to review the Child Support Guideline Review (mandated by Federal Statute every four years) each time it is conducted and make necessary changes to the Nevada Child Support guidelines.

AB 278 was signed into law by the Governor with an effective date of June 4, 2017 to start the commission. Pursuant to AB 278, the first Commission was to be established by the Department of Welfare and Social Services no later than September 1, 2017. The Commission by statute is to complete their first report to the Child Support Administrator of the Division of Welfare and Supportive Services of the Department of Health and Human Services by July 1, 2018. Once the regulations are adopted by the Administrator NRS 125B.080 will be repealed and the new regulations will provide the framework for all child support calculations in the State of Nevada.

Pursuant to AB 278, two members of the commission are to be members of the Family Law Section of the State Bar of Nevada, appointed by the Executive Council of the Family Law Section. The Executive Council collected applications for the two positions and Kimberly Surratt and Dawn Thorne were selected. The other members of the Commission are: Kathleen Baker, Karen Cliffe, Ellen Crecelius, Senator Farley, Assemblyman Fumo, Judge Hoskin, Nova Murray, Assemblyman Pickard, Judge Robb, Senator Roberson, Joseph Sanford, Judge Shirley, and Justice Stiglich.

The Commission has been formed and the first deadline was met. The Commission held the first hearing on August 10, 2017 in Carson City. At the first hearing, Kimberly Surratt was elected Chair of the Commission and Dawn Thorne was elected Vice-Chair of the Commission. A second hearing was held in Las Vegas on September 8, 2017. Hearings will occur on a semi regular basis (around every 2-3 weeks) as the Commission has a lot of work to complete before a report can be delivered by July 1, 2018. The meetings will all follow open meeting laws with public notice. Each notice will be posted on the Division's web site at http://dwss.nv.gov/ and we will be putting the notice on the Family Law Section listserve for each future meeting. Public comment will be accepted at each hearing.

It is critical that the private bar appear for public comment and follow these meetings. It is a logistical possibility that this Commission could replace all methods of child support calculation in the State of Nevada. Please take this serious and give your input. We need input on what is right or what is wrong with our current system. The Committee's starting ground for discussion is the Review of the Nevada Child Support Guidelines report that was finalized on October 28, 2016. That report is listed and available to the public as an Exhibit to AB 278 on www.leg.state.nv.us under NELIS.

Alleging Child Abuse/Neglect in Child Custody Cases

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I. Definition of abuse/neglect

"*Abuse or neglect of a child*" includes (a) *physical or mental injury* of a nonaccidental nature, (b) sexual abuse or (c) *negligent treatment or maltreatment* of a child caused or allowed by a person responsible for the welfare of the child under circumstances which indicate that the child's health or welfare is harmed **or threatened with harm.**"

NRS 432B.020. (Emphasis added.)

NRS 432B.090 sets forth a detailed list of actions which constitute *physical injury*, such as "temporary disfigurement" (e.g., marks from spanking). "'*Mental injury*' means an injury to the intellectual or psychological capacity or the emotional condition of a child as evidenced by an observable and substantial impairment of the ability of the child to function within a normal range of performance or behavior." NRS 432B.070.

"'*Negligent treatment or maltreatment*' of a child occurs if a child has been subjected to harmful behavior that is terrorizing, degrading, painful or emotionally traumatic, has been abandoned, is without proper care, control or supervision or lacks the subsistence, education, shelter, medical care or other care necessary for the well-being of the child because of the faults or habits of the person responsible for the welfare of the child or the neglect or refusal of the person to provide them when able to do so."

NRS 432B.140.

These definitions purposefully have a wide breadth and depth. The safety of a child is a paramount concern of the State. NRS 432.011; *Harrison v. Harrison*, 376 P.3d 173 (2016) (*citing* NRS 432B).

II. Duty to report

"[An attorney] who . . . in his or her professional or occupational capacity, knows or has *reasonable cause to believe* that a child has been abused or neglected **shall report** the abuse or neglect of the child to an agency which provides child welfare services or to a law enforcement agency . . . **not later than 24 hours** after the person knows or has reasonable cause to believe that the child has been abused or neglected."

NRS 432B.220(1). (Emphasis added.)

Reasonable cause to believe is defined as:

> [i]f, in light of all the surrounding facts and circumstances which are known or which reasonably should be known to the person at the time, a reasonable person would believe, under those facts and circumstances, that an act, transaction, event, situation or condition exists, is occurring or has occurred.
>
> NRS 432B.121.

The specific methods of reporting are set forth in NRS 432B.230.

III. Professional aspects

NRS 432B.225(2)(b) states: "Nothing in this section shall be construed as relieving an attorney from complying with any ethical duties of attorneys as set forth in the *Nevada Rules of Professional Conduct* ['NRPC']." A lawyer is expected to comply with the law. NRPC 1.6(b)(6). A lawyer is *required* to reveal information he believes is likely to cause substantial bodily harm. NRCP 1.6(d). Attorneys are provided both civil and criminal immunity *if* a CPS report is made in good faith. NRS 432B.160. This author has astonishingly witnessed attorneys attempt to take the blame for their client's negligence in this area of law. *Why?!* The client and attorney have separate and distinct reporting duties; neither can absolve the other.

Practice Tip:

The simplest way to fulfill each person's duty is to immediately make the report conjointly at the initial interview via speakerphone. Finally, a judge is tasked with the unfortunate duty to report an attorney for any known misconduct. NCJC 2.15.

IV. Criminal Act

When there is a *failure to report* by an attorney, it is a *misdemeanor* for the first time and a *gross misdemeanor* for every time thereafter. See NRS 432B.240. Many attorneys further seem oblivious that *unless a case is*

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sealed, **it is a crime** (*gross misdemeanor*) to include any information concerning CPS reports and investigations in their motion, which become public record once it is filed. NRS 432B.280; NRS 432B.290(10). As for the prospective client, under NRS 200.508(2):

"A person who is responsible for the safety or welfare of a child pursuant to NRS 432B.130 and who permits or allows that child to suffer unjustifiable physical pain or mental suffering as a result of abuse or neglect or to be placed in a situation where the child may suffer physical pain or mental suffering as the result of abuse or neglect" can result in a gross misdemeanor or even a felony, depending on the level and type of abuse/neglect.

V. Motions to Modify Custody

Family Court judges have been directed to "not lightly grant applications to modify child custody." *Ellis v. Carucci*, 161 P.3d 239, 242 (2007). *Adequate* cause to modify custody arises when the moving party presents a *prima facie* case for modification. *Rooney v. Rooney*, 853 P.2d 123 (1993). *Reasonable cause* (defined above) and probable cause are synonymous, very low burdens of legal proof. *Ortega v. Superior Court*, 135 Cal.App.3d 244 (1982). A motion to change custody employs an elevated *preponderance of the evidence* burden of proof. *Mack v. Ashlock*, 921 P.2d 1258 (1996). Purely as a legal strategist (mandatory reporting aside), why not begin a process that employs a lower burden of proof and/or have an investigative agency (CPS) assist/build your case for you?

Family Court is a court of equity.

"He who comes into court must do so with clean hands. The clean hands rule is of ancient origin and given broad application. It is the most important rule affecting the administration of justice."

Padgett v. Padgett, 199 Cal.App.2d 652, 656 (1962).

The prospective client can be found with *unclean hands* if the abuse/neglect was never reported, yet included in a filed motion. This scenario is *so pervasive* at Family Court this author truly believes there is a misconception that filing a motion containing abuse/neglect allegations equates to adequate reporting. Another common excuse is an attorney or party will proclaim *their* unfulfilling, prior experience(s) with CPS. **Please re-read the unambiguous, mandatory reporting requirements.** Filing a custody motion or having a prior, poor experience are **not** delineated exceptions. Ponder for a moment a pure outsider's perspective. An attorney takes the time and effort to draft a formal motion and file it subject to the obligations in NRCP 11; yet they choose not to abide by the simple, **mandatory** reporting protocol which carries serious professional and/or criminal ramifications? *Simply astonishing!*

VI. Summation

Once you are aware of circumstances requiring a CPS report, you **must** follow the law whether you ultimately accept the case or not. Carefully advise the client. If the prospective client is improperly advised and fails to report, they may be charged with *failure to protect* and then may come back after you for failing to properly advise. Liability for an attorney in this area is *unquestionably daunting*. However, remember you have sworn a duty to uphold the law. Thus, **always** *err on the side of caution.*

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Judge Mathew Harter is a native Nevadan (Bonanza/UNLV) elected to Department N in 2008. He received his J.D. *Cum Laude* from W. Michigan University, where he served on Law Review, received the *Am Jur Award* for National Moot Court competition and worked at two indigent law clinics. He clerked for Judge G. Hardcastle and then started a solo law practice in 1995 primarily in Family Law.

Four Myths of the Bench

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December 26, 1990, specifically provides that if opposing counsel is copied in the same manner and simultaneously with the judge, the communication is not prohibited. In other words, if you email the judge, you must also email opposing counsel at the same time. If an attorney were to email the judge and then notify opposing counsel by regular mail, this may be considered inappropriate *ex parte* communication.

2. Internal procedures are not rules.

A "rule" is different than "procedure." While a judge rightfully has discretion regarding his or her departmental procedure, this should not be confused with an actual rule. Of course, some rules should not be superseded by procedure. For example, if a judge has a procedure that he or she is not going to consider pre-trial exhibits, this "procedure" should not supersede a parties' right to attach relevant documents to a pretrial pleading. The judge may certainly give the exhibit any weight that he or she chooses, but there's nothing in the rules that prevent a party from attaching an exhibit and allowing a judge simply to arbitrarily strike any exhibit.

Moreover, for clarification in the electronic age, simply saying something is "stricken from the record" does not wipe out its existence. It is still part of the record and can still be considered on appeal. A judge is then making a decision using only part of the record, while the reviewing court will be reviewing the entire record. Therefore, it would be wise for a judge to allow most evidence in and give it the "appropriate weight."

There is no reason for a department to create its own rules. Unnecessary rules and lack of uniformity make it more difficult on lawyers and more expensive for the litigants.

3. Court staff doesn't matter

Except for the year prior to their re-election, some judges forget they are elected and are public servants. They think in terms of being a bureaucracy rather than thinking in terms of customer service.

While judges' contact with lawyers, their "consumers," is supposed to be limited, this makes their staff even more important. Many departments do not appear to provide training for staff on how they should speak or interact with lawyers. There is simply no reason for a department's staff to be rude to a lawyer.

While there is no scientific survey to prove it, I am confident that how an attorney is treated by staff is directly reflected on how a lawyer perceives that judge and how a lawyer rates a judge in the judicial surveys. How an attorney is treated by staff may also directly impact an attorney's perception of how competent

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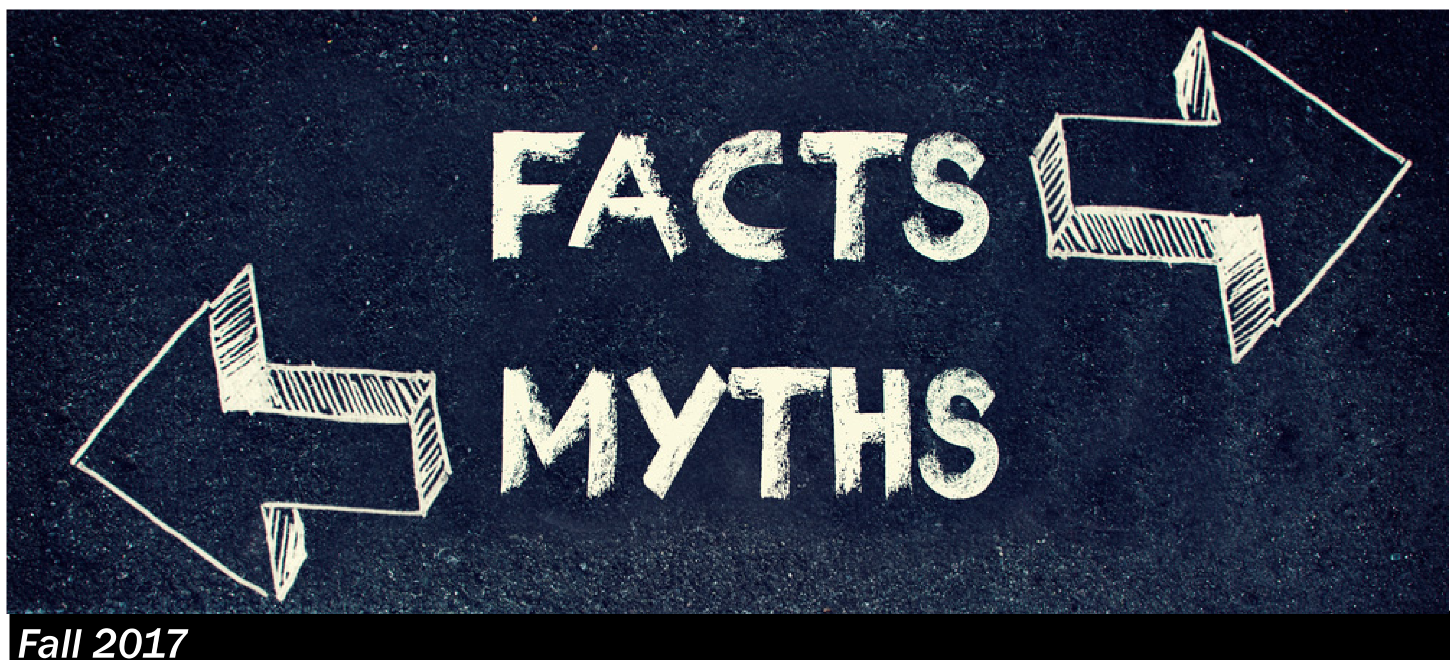

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a judge is and how vigorously an attorney is going to support a judge in an election. While a staff member doesn't necessarily have to go out of his or her way for an attorney, it's not a coincidence that the judges who are more respected have staff that do just that. Helpful and courteous staff have a positive reflection on the judge and conversely, poor staff have a negative impact on the perception of a judge.

As far as law clerks, the sharp ones realize they are going to be out in the real world some day and their performance as a clerk will directly reflect on their employment prospects. Some law clerks fully maximize their temporary "power trip" and end up paying for it later when they are in the job market. Why does a clerk who's been out of law school for six months and hasn't passed the bar believe he or she can lecture a 30 year practitioner on the law? It would be wise for judges to reign in their law clerks, especially the "lifers" who do not appear to have accountability because they don't believe they are ever going to have to make it in the real world.

4. Litigants want their day in court no matter the cost or time involved

Some departments don't seem to want to make a decision and will do anything to delay that inevitability no matter how long it takes. Mediation, return, interview, return, evaluation, return, evidentiary hearing, submit, decision - maybe.

Many experienced lawyers have concluded that child custody evaluations in most situations are useless. A truly comprehensive evaluation is generally unnecessary and too expensive in most circumstances to be helpful. As a consequence, most evaluations simply reflect what the parties and collateral witnesses tell the evaluator. The evaluator then weighs their credibility and makes his or her own conclusions based on these limited interviews. The evaluator then testifies in court what they were told. In the vast majority of cases this is completely useless. In addition to adding an expensive layer to the process and adding three to six months to the litigation, it simply provides the court with an easy way out by having the evaluator make the *de facto* decision. Giving credit to the judges who are willing to disregard an evaluator's recommendations, I then ask, what is the point of having the evaluation to begin with?

In the vast majority of cases, the court is in a better position to weigh the credibility of the witnesses than an evaluator. Absent a medical issue or addiction, most of the judges have enough experience to ferret out when a party is being dishonest. While the over use and abuse of child custody evaluations has decreased over the years, in virtually every case the best resolution is simply having a resolution. Skipping the evaluation saves time and money, forces the attorneys to promote a settlement and with a real deadline, forces the parties to compromise.

In sum, judges, attorneys and litigants would all be better served if departments viewed themselves as a service provider, rather than a government bureaucracy. A judge should strive to make attorneys' jobs easier, which serves the court's ultimate consumer, the litigant, by making the process more efficient and cost effective.

Bruce Shapiro attended the University of Nevada, Las Vegas, and received his Bachelor's degree in 1984 and his master's degree in 1986. He graduated from Whittier College School of Law in 1990, Magna Cum Laude. He has practiced in family law since 1990 and has served as a Domestic Violence Commissioner, pro tempore, URESA/ Paternity Hearing Master, Alternate, Municipal Court Judge, Alternate, Judicial Referee, Las Vegas Justice Court, Small Claims. Mr. Shapiro has written several articles in the area of family law and has served on the Nevada Children's Justice Task Force, Clark County Family Court Bench-Bar Committee, State Bar of Nevada, Child Support Review Committee, the State Bar of Nevada Southern Nevada Disciplinary Board, State Bar of Nevada Standing Committee on Judicial Ethics and Election Practices and the Continuing Legal Education Committee. Mr. Shapiro also served on the Board of Governors for the State Bar of Nevada from 2003-2005 and 2008-2010.

Recognition and Enforcement of Due Process Rights in Family Court Criminal Contempt Proceedings

By Vincent Mayo

The use of contempt powers to enforce court orders is a critical component of the legal system.[i] It is even more so in family law matters where the Court's ability to compel compliance[ii] can directly impact the fundamental Constitutional rights of the other litigant, such as the ability to exercise custody of his or her children.[iii] The Nevada Supreme Court has made it clear in a number of recent decisions, however, that the Constitutional right to due process in contempt proceedings of a "criminal" nature is just as important and must not be discounted or abridged in family law cases.[iv]

Despite this mandate, the protection of due process rights poses a challenge for family practitioners due primarily to confusion regarding the character of the contempt itself.[v] While usually called civil or criminal, said proceedings are, strictly speaking, neither. They may best be characterized as *sui generis*[vi] in the law in that they may partake of the characteristics of both.[vii] For example, both types of proceedings can arise in civil and criminal matters, be related to violations of the same order, result in jail time and fines and be punitive and coercive at the same time.[viii] Because of this, practitioners may be dealing with contempt proceedings that, while appearing to be civil in form, are actually "criminal" in effect, without fully recognizing the Constitutional consequences on their clients' rights or properly preparing their defenses.[ix]

Therefore, attorneys must recognize when contempt proceedings give rise to criminal due process rights and be sufficiently versed in relevant criminal law and procedures in order to be proficient in their representation of clients and avoid malpractice concerns. Judges must also understand their obligations in regards to safeguarding litigants' rights when contempt charges are criminal in nature and adjudicate the proceedings accordingly. To that end, this article will focus on the legal analysis dealing with this issue in the most recent Nevada cases, identification of Constitutional rights and provide practice tips regarding the effective adjudication of said rights.

I. Lewis, Peterson and Bohannon

All three of the recent relevant cases dealt with a family district court holding a litigant in criminal contempt of court without due process rights being provided. The first of which, *Lewis v. Lewis*, involved a father who was held in contempt for failing to pay child support and to take his child to tutoring classes.[x] On appeal, the Nevada Supreme Court held that the family court's finding of contempt was criminal in nature, meaning the father should have been provided Constitutional rights.[xi]

The Supreme Court started by going through the already established analysis for determining the character of a contempt proceeding: Contempt is civil in nature if the court's sanction attempts to coerce compliance with an order or the sanction ordered can be characterized as "indeterminate or conditional."[xii] By contrast, contempt is criminal in nature if it serves to punish the accused for non-compliance in a determinate or unconditional manner as to the punishment and duration.[xiii]

However, the Nevada Supreme Court in *Lewis* identified an additional factor for consideration, based

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on the U.S. Supreme Court's decision in *Hicks v. Feiock*, 485 U.S. 624, 108 S. Ct. 1423 (1988) – i.e. whether the contempt order included a "purge clause."[xiv] The goal of a purge clause is to give a contemnor the ability to purge him or herself of the contempt, and related sanctions, by complying with the provisions in the order.[xv] In other words, a purge clause allows a contemnor to "carry the keys of their prison in their pockets."[xvi] Without such a right, a contempt sanction is "criminal" as it is definitive in nature and not contingent on any conduct on the part of the contemnor.

The second case, *Peterson v. Eighth Judicial District Court of the State of Nevada*, dealt with a divorce in which the husband (obligor) stipulated to a 25-day stayed jail sentence related to his prior contempt arising from a failure to make payment of an ordered obligation.[xvii] This stipulation was conditioned on husband providing a loan payment to a court-appointed receiver in the future.[xviii] Husband failed to initially pay the entire amount owed, but did so eventually.[xix] The receiver nevertheless notified the court. The Court, without providing notice of its intention to hold husband in contempt or setting a hearing, issued a minute order holding husband in contempt and imposing the stayed 25-day jail sentence.[xx]

The Supreme Court reversed the trial court's order, finding that the contempt sanction was criminal in nature as husband could do nothing to cure his contempt for husband had already provided the remainder of the loan payment to the receiver. The Supreme Court considered the courts orders as new sanctions, meaning husband should have been "afforded full criminal process."[xxi] These rights included at least notice and a hearing.[xxii]

Bohannon v. Eighth Judicial District Court of the State of Nevada dealt with facts similar to those in *Lewis*.[xxiii] *Bohannon* involved a mother who was found in contempt for having unsupervised visits with her child (when the district court ordered visitations to be supervised). The court sentenced mother to 160 days of incarceration but stayed the sentence for three years during which time the mother was ordered not to consume alcohol or use illegal drugs or willfully violate its orders.[xxiv] Mother subsequently tested positive on

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the Patch program.[xxv] The court concluded from the positive test that mother failed to remain free of illegal drugs and alcohol and ordered mother to serve 30 of the 160-day jail sentence.[xxvi] On review from a Writ filed by mother, the Supreme Court held that the district court provided "no mechanism by which [mother] could change her behavior to be released prior to the expiration of the 30-day sentence."[xxvii] Therefore, since the contempt proceeding was criminal in nature and mother was not afforded Constitutional due process rights, the contempt sanctions were vacated.[xxviii]

While these cases are insightful in helping distinguish between civil and criminal contempt, additional problems related to the similarities between the two types of contempt remain to be addressed. For example, sanctions for criminal contempt are not just limited to physical incarceration but extend to monetary fines as well.[xxix] A fine ordered by a court is civil if it is conditional, allowing a contemnor to avoid payment via compliance, or if it compensates a complainant for monetary losses suffered.[xxx] In the inverse, a fine is criminal in nature if the contemnor cannot do anything to avoid or reduce the fine or the funds are not provided to the opposing party.[xxxi] Hence, as with incarceration, the goal of the fine is determinative of the character of the contempt and the rights that arise.[xxxii]

The possibility that a civil (coercive) contempt sanction may also turn into a criminal penalty is also of concern. This can occur in cases where a person is subjected to continued "coercive" incarceration despite the reality that ongoing confinement will not coerce compliance (i.e. such as an ability to pay monies owed).[xxxiii] Such a scenario is problematic from a due process point of view since a confined litigant, who was not provided the benefit of Constitutional rights, is receiving punishment that is criminal in nature. Both counsel for the contemnor and the court should therefore strive to ensure the length of incarceration is reasonable in relation to the goal of coercion.

Courts must additionally ensure that a contemnor incarcerated on civil contempt can actually purge the sanction from behind bars. Such confinement can obviously limit a contemnor's ability to do so, thereby defeating the goal of the sanction and making it criminal in nature. Orders should be cautiously crafted to avoid such situations.

II. Constitutional Rights and Procedures

Due process in criminal matters includes the protection of numerous rights. Care must be taken to successfully invoke these rights and incorporate them into a client's defense in criminal contempt proceedings.[xxxiv]

Right to Counsel

The Sixth Amendment guarantee of the right to counsel applies in proceedings of a criminal nature, which in certain circumstances includes criminal contempt.[xxxv] The Sixth California Court of Appeals elaborated on this, finding that an accused is entitled to counsel when a litigant may lose "his or her physical liberty" – which includes incarceration for failure to pay child support or otherwise follow court orders.[xxxvi]

The right to counsel therefore places the burden on the courts to put an accused on notice of their right.[xxxvii] Failure to place a pro per litigant on notice, regardless of whether they are indigent or not, can cause a subsequent finding of contempt to be reversed.[xxxviii] This obligation stems from the principal that in order for a litigant to represent themselves in criminal matters, they must understand, "(1) the nature of the charges against him, (2) the possible penalties, and (3) the dangers and disadvantages of self-representation."[xxxix] Without such knowledge, an accused cannot "knowingly, intelligently and voluntarily" waive the right to counsel.[xl]

Notice of Rights

Fair notice of charges is an essential part of criminal jurisprudence and the right applies equally to criminal contempt in family law proceedings.[xli] The problem in family court is that there is no arraignment

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or indictment process in family law contempt proceedings. Thankfully, the issue can be addressed via an existing mechanism – the order to show cause. The Virginia Court of Appeals in *Steinberg v. Steinberg*, 21 Va. App. 42, 461 S.E.2d 421 (1995) held that where an accused in a family law case was served with a show cause order specifically setting forth the details of his alleged offense and where the record plainly established that he had knowledge prior to the hearing that the case was being tried as a **criminal contempt,** the service requirements for due **process** purposes were satisfied and the accused did not have to be indicted or arraigned.[xlii]

Beyond a Reasonable Doubt

Like almost all other criminal charges, criminal contempt must be proven beyond a reasonable doubt.[xliii] Reasonable doubt is defined in NRS 175.211, which states:

> "A reasonable doubt is one based on reason. It is not mere possible doubt, but is such a doubt as would govern or control a person in the more weighty affairs of life. If the minds of the jurors, after the entire comparison and consideration of all the evidence, are in such a condition that they can say they feel an abiding conviction of the truth of the charge, there is not a reasonable doubt. Doubt to be reasonable must be actual, not mere possibility or speculation."

Special attention by practitioners should be paid to the family judges' understanding of the definition of reasonable doubt. Family judges' experiences are predominantly in civil family law proceedings, not criminal procedure, and therefore the possibility of misapplication of the standard of proof is of concern. This concern is not intended to be offensive towards the honorable courts since it should be noted that even experienced criminal judges' understanding or interpretation of the law can differ from department to department, with their perception of what constitutes reasonable doubt being no exception. In *Collins v. State*, 111 Nev. 56, 888 P.2d 926 (1995), the Nevada Supreme Court overturned the Defendant's conviction where the Judge stated to the jury that reasonable doubt **is** "a little stronger than preponderance of the evidence" and "almost equal to clear and convincing."[xliv] Similarly, the conviction of the Defendant was reversed where the court incorrectly conveyed the concept of reasonable doubt to the jury by placing the reasonable doubt concept on a numerical scale.[xlv] The same applies to clarifying comments made by a court in addition to the statutory definition of reasonable doubt, comments which can constitute reversible error.[xlvi] Because of this, nothing bars counsel from providing a family court the equivalent of "jury instructions" in Pretrial Memorandums or closing arguments or asking for findings to ensure the correct standard of proof has been followed.

The Presumption of Innocence and the Right to Remain Silent

The presumption of innocence, and its ancillary doctrine – the right to remain silent – are a cornerstone of the U.S. criminal justice system and a key component to representing individuals accused with a criminal offense. What happens then to these Constitutional rights when a litigant is served an Order to Show Cause in a family law case and required to "show cause" why they should not be held in contempt of court? Should a litigant be held in contempt if they do not waive their right to remain silent?

The answer depends on whether the contemptuous conduct or violation is a crime or will be sanctioned as one.[xlvii] Therefore, it is incumbent on family law practitioners to ask the court at the time of the first hearing whether the court deems the potential violation criminal in nature / whether the potential sanction the court is being asked to impose, or plans to impose, will be of a criminal nature.[xlviii] If so, then counsel, after having previously conferred with their client, will need to inform the court that their client will plead the fifth and cannot respond to the show cause order.[xlix]

Once a client pleads the fifth, counsel representing an

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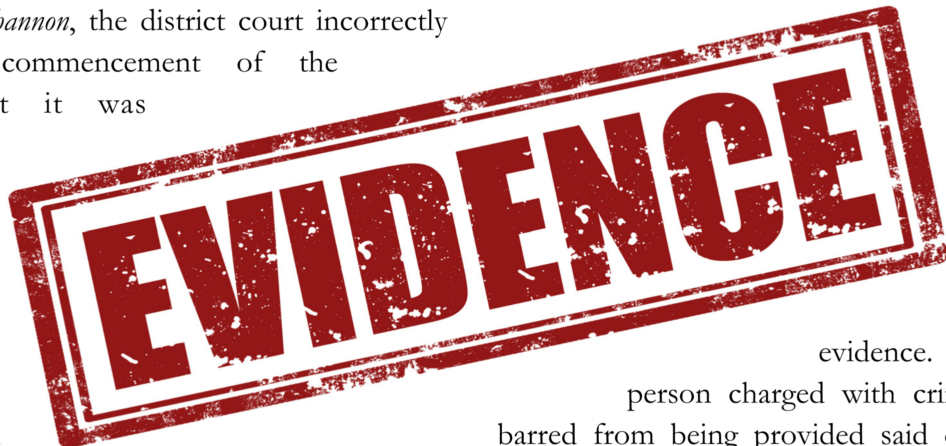
accused should request that the Court advise the accused of their rights and provide the accused counsel an opportunity to set discovery and procedures in line with the accused's Constitutional rights.[l]

Care must also be given to not waive a client's right to remain silent by making admissions in ongoing civil family proceedings. A request should be made to suspend civil proceedings until the criminal contempt is adjudicated.

Recognizing where the burden lies in criminal contempt proceedings is another area of major importance. In *Bohannon*, the district court incorrectly stated at the commencement of the proceedings that it was mother's burden to demonstrate why she should not be held in contempt, confusing the burden being on the accused in civil contempt proceedings[li] with the burden being on the state or opposing party in criminal contempt cases.[lii] Mother denied any alcohol or illegal drug use and testified that she had only taken the prescription drugs Suboxone and Klonopin, as well as NyQuil.[liii] Further, a representative from the Patch program confirmed that these drugs could have caused dirty patches.[liv] Nevertheless, the district court found mother had failed to meet her burden to show cause, regardless of the fact the court would be imposing criminal sanctions. Because of this, the Supreme Court found that the district court incorrectly placed the burden of proof on mother.[lv]



The right to remain silent, however, should not be confused with an accused's burden when wishing to present a defense. It is on the accused to present evidence that disproves guilt.[lvi] While doing so in a responsive pleading or during the initial order to show hearing may not be mandatory, it may have the benefit of resulting in a dismissal of the matter, thereby avoiding trial. In Nevada, the applicable burden in regards to **evidence that tends to mitigate or disprove guilt of a crime need only be proven** by a preponderance of the evidence.[lvii]

Exculpatory Evidence and Criminal Procedure

Persons facing criminal charges have the right to exculpatory evidence and at least some criminal procedure. In criminal court, this means an accused is entitled to have the prosecution provide any evidence that tends to establish a person's innocence or mitigates punishment.[lviii] Obviously, family court cases do not involve prosecutors and the criminal code[lix] only references prosecutors having the obligation to provide said evidence. Does this mean a person charged with criminal contempt is barred from being provided said evidence from the opposing party? The answer is likely no. The Court in *Peterson* cited the U.S. Supreme Court in *Int'l Union, United Mine Workers of Am. v. Bagwell*, 512 U.S. 821, 826, 833, 114 S. Ct. 2552, 129 L. Ed. 2d 642 (1994) where the High Court held that "[c]riminal contempt is a crime in the ordinary sense" and requires full criminal process.[lx] In full criminal proceedings (i.e. those falling under the criminal procedure statutes and rules), a litigant is entitled to exculpatory evidence. There is no reason why the same requirement would not apply to criminal contempt proceedings in civil cases.[lxi] Hence, counsel for the accused should at the initial court hearing request the disclosure of said information by the party alleging contempt since without this evidence, the accused will likely not be able to properly prepare their case.

Another issue that is unclear is whether only those

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portions of criminal procedural statutes that bear directly on Constitutional rights are applicable or all of the procedural requirements under NRS 174 and 175. The *Bohannon* decision holds that different procedural "safeguards" are required (i.e. criminal in proceedings of a criminal nature), but none of the aforementioned cases, including *Bohannon*, specify that criminal contempt proceedings fall under the provisions of the criminal statutes. As the issue is unresolved and an analysis of full criminal procedure exceeds the scope of this article, it is incumbent on counsel to examine and argue for or against the applicability of specific criminal statutes and case law.

Potential Right to a Jury Trial

A party may also be entitled to a jury trial in a criminal contempt matter. Normally, a person who is charged with a misdemeanor in Nevada cannot request a jury trial. Misdemeanors are considered petty offenses (i.e. offenses that carry a maximum six months or less in jail) and only defendants charged with a serious offense (in excess of six months) are entitled to a jury trial.[lxii] However, a person who is charged with two or more misdemeanors whose total jail term may exceed six months could conceivably request a jury trial. Even in such circumstances though it is incumbent on counsel to decide whether the time and expense associated with conducting a jury trial is warranted and if so, place on the record and put the court on notice that if the sentence will exceed six months, a jury trial is requested. If the request is denied and the eventual sentence exceeds six months, the record is preserved for potential writ relief.

Double Jeopardy

The Double Jeopardy Clause[lxiii] protects a person against a "second prosecution for the same offense after acquittal" and a "second prosecution for the same offense after conviction…."[lxiv] Courts have found the Double Jeopardy Clause applies to criminal contempt,[lxv] which includes family court criminal contempt proceedings.[lxvi] However, **criminal prosecution is not barred by double jeopardy** when there is a prior imposition of a civil contempt sanction that acts as a deterrent related to the same acts.[lxvii] This was the case in *Yates v. United States* where the petitioner, a witness in a court proceeding, was first sanctioned for civil contempt for refusal to answer questions, resulting in her incarceration until petitioner agreed to answer.[lxviii] Petitioner did not, even after being confined. Petitioner was then called to the stand again and again refused to answer the questions.[lxix] After the trial was over, the trial judge sentenced petitioner to additional incarceration based on a finding of criminal contempt to punish the petitioner's non-compliance related to the two days of testimony.[lxx]

Defenses and Mitigating Factors

Just as in civil cases, there are equitable defenses available in criminal contempt proceedings. For example, if an order a litigant is being accused of violating is ambiguous or vague, a finding of contempt cannot stand.[lxxi] "An order on which a judgment of contempt is based must be clear and unambiguous, and must spell out the details of compliance in clear, specific and unambiguous terms so that the person will readily know exactly what duties or obligations are imposed on him."[lxxii] "A court order which does not specify the compliance details in unambiguous terms cannot form the basis for a subsequent contempt order."[lxxiii] The Nevada Supreme Court in *Bohannon* made it clear the test of ambiguity applies regardless of the nature of the contempt proceeding.[lxxiv] Related to this requirement is the unenforceability of an order based on a case or statutory provision that requires specific findings as a condition to making the underlying order enforceable.[lxxv] Even when specific findings are not required by statute, contempt orders that do not include findings pertaining to the adjudication of the matter are discouraged by the Nevada Supreme Court and can be a basis for the order to be overturned.[lxxvi]

The equitable defenses of waiver, estoppel and laches are available in criminal contempt proceedings just as they are in civil cases, unless precluded by statute.[lxxvii] Doing so is only equitable since punishment is

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not warranted when an accused's lack of compliance is based on the other party's conduct.

Along these lines, failure to willfully violate a court order due to forces outside an accused's control may also be a defense.[lxxviii] For example, if a parent is financially unable to make a support payment, despite their best efforts to do so, their inability to comply should not be punished with criminal sanctions.[lxxix] However, the burden to prove an inability to comply with an order is on the accused.[lxxx]

An additional defense, potentially one with far reaching consequences, is that a finding of criminal contempt is against public policy. The Nevada Supreme Court stated as dicta at the conclusion of their decision in *Bohannon* the following concern:

> The court notes that this case presents potentially important public policy considerations regarding the imposition of jail time as a sanction in family law cases, especially if the sanctioned conduct has posed no actual threat to the safety or well-being of the minor child. However, based upon the current record and briefing, this issue is not fully developed for review at this time.[lxxxi]

Bohannon dealt with a mother who was found in criminal contempt for failing a drug test when she already only had supervised visitation. The Supreme Court's statement strongly suggests that in criminal contempt proceedings related directly to the care of a child, district courts should evaluate a child's best interests in deciding whether or not to hold a litigant in contempt. By the same reasoning, and based on the facts in *Bohannon*, criminal contempt is not a proper way to coerce good behavior, such as in *Bohannon* via punishment for drug use, where a modification of custody may better accomplish the goals of the court.

Finally, mitigating factors, while not a defense, are available in criminal matters and likewise in criminal contempt proceedings.[lxxxii] Mitigation has the ability to minimize the severity of the violation, potentially leading the district court to impose penalties that are not criminal in nature or as severe as requested. Examples of some mitigating factors in family law criminal contempt matters are when a litigant who fails to timely pay a support order nevertheless does so late, or fails to return a child at a designated exchange time due to some isolated event.

Appellate Review

Because no rule or statute authorizes review of a contempt order on appeal,[lxxxiii] contempt orders must be challenged via a writ requesting extraordinary relief.[lxxxiv] However, contempt can be reviewed via an appeal if it may be "challenged in the context of an otherwise substantively proper appeal",[lxxxv] such as when there are other issues on appeal. Criminal contempt orders are reviewed for an abuse of discretion by the district court, the same as civil orders.[lxxxvi]

Conclusion

Many contempt proceedings in family court, while litigated according to civil procedure, are in fact criminal in nature. The character of the sanctions is determinative, with criminal contempt giving rise to a host of Constitutional due process rights. In such cases, the courts and family practitioners defending their clients should strive to ensure those rights are protected.

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Endnotes:

i. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 111 S. Ct. 2123 (1991).

ii. *See Hidahl v. Hidahl*, 95 Nev. 657, 601 P.2d 58 (1979).

iii. *Troxel v. Granville*, 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000).

iv. *Lewis v. Lewis*, 132 Nev. Adv. Rep. 46, 373 P.3d 878 (2016); *Peterson v. Eighth Judicial Dist. Court of the State of Nevada*, 2016 Nev. Unpub. LEXIS 773, 385 P.3d 35 (2016); *Bohannon v. Eighth Judicial Dist. Court of the State of Nevada*, 2017 Nev. Unpub. LEXIS 205 (2017).

v. *United States v. Rylander*, 714 F.2d 996, 998, 1983 U.S. App. LEXIS 24301 (9th Cir. 1983), *cert. Denied*, 467 U.S. 1209 (1984) ("Courts frequently have difficulty distinguishing between civil and criminal contempt").

vi. Latin for "unique."

vii. *Warner v. Second Judicial Dist. Court In & For County of Washoe*, 111 Nev. 1379, 1382, 906 P.2d 707 (1995)(quoting *Marcisz v. Marcisz*, 65 Ill.2d 206, 312, 357 N.E.2d 477, 479 (1976)).

viii. *See generally* NRS 22.010; NRS 22.100; NRS 199.340; and NRS 193.150; *see also United States v. United Mine Workers*, 330 U.S. 258, 67 S. Ct. 677 (1947); *United States v. Ryan*, 810 F.2d 650, 653 (7th Cir. 1987); *Hubbard v. Fleet Mortgage Co.*, 810 F.2d 778, 781-82 (8th Cir. 1987); *United States v. Rose*, 806 F.2d 931, 933 ((9th Cir. 1986). It is of note that even a fixed sentence of incarceration imposed as punishment can also coerce subsequent compliance with present and future court orders.

ix. *See generally* Nev. Const., Art. 1, Sec. 8(5).

x. *Lewis v. Lewis*, 132 Nev. Adv. Rep. 46 (2016).

xi. *Id.*

xii. *Lewis*, 373 P.3d at 881, citing *Rodriguez v. Eighth Judicial Dist. Court*, 120 Nev. 798, 804-05, 102 P.3d 41 (2004). *See also Lamb v. Lamb*, 83 Nev. 425, 433 P.2d 265 (1967).

xiii. *Rodriguez v. Eighth Judicial Dist. Court*, 120 Nev. 798, 804-05, 102 P.3d 41 (2004). *See also Alper v. Eighth Judicial Dist. Court of Nev.*, 131 Nev. Adv. Rep. 43, 352 P.3d 28 (2015); *See generally*, Gino F. Ercolino, Comment, *United Mine Workers v. Bagwell*; *Further Clarification of Civil and Criminal Contempt*, 22 New Eng. J. on Crim. & Civil. Confinement, 291, 295 (1996)("A determinative jail sentence is regarded as criminal because it serves no coercive effect.").

xiv. *Hicks v. Feiock*, 485 U.S. 624, 634 (1985).

xv. *Lewis*, 373 P.3d at 881.

xvi. *Hicks*, *supra*, at 633, *citing In re Nevitt*, 117 F. 448 (8th Cir. Ct. 1902).

xvii. *Peterson v. Eighth Judicial Dist. Court of the State of Nevada*, 385 P.3d 35 (2016).

xviii. *Id.*

xix. *Id.*

xx. *Id.*

xxi. *Peterson,* 385 P.3d at 35.

xxii. *Id.*

xxiii. *Bohannon v. Eighth Judicial Dist. Court of the State of Nevada*, 2017 Nev. Unpub. LEXIS 205 (2017).

xxiv. *Bohannon*, 2017 Nev. Unpub. LEXIS at 3.

xxv. *Id.*

xxvi. *Id.*

xxvii. *Bohannon*, 2017 Nev. Unpub. LEXIS at 8.

xxviii. *Id.*

xxix. *Int'l Union, United Mine Workers of Am. v. Bagwell*, *512 U.S. 821, 114 S. Ct. 2552* (1994); *In re Contempt of Rochlin*, 186 Mich. App. 639, 465 N.W.2d 388 (Mich. App. 1990); *See generally Warner v. Second Judicial Dist. Court In & For County of Washoe*, 111 Nev. 1379, 906 P.2d 707 (1995).

xxx. *Int'l Union, United Mine Workers of Am.*, *512 U.S. at 829.*

xxxi. *Id.*

xxxii. *United States v. United Mine Workers*, 330 U.S. 258 (1947); *United States v. Ryan*, 810 F.2d 650 (7th Cir. 1987).

xxxiii. Doug Rendleman, *Disobedience and Coercive Contempt Confinement: The Terminally Stubborn Charged*, 48 Wash. & Lee L. Rev. 185, 200 (1991); *see generally* Linda S. Beres, *Civil Contempt and the Rational Charged*, 69 Ind. L. J. 723, 724 (1994) (describing the "no realistic possibility of compliance" standard); *See also Hughes v. Dept. of Human Resources*, 269 GA. 587, 502 S.E.2d 233 (Ga. 1998)(holding that if a delinquent parent proves they cannot financially cure the contempt, the court must terminate the incarceration); *but see Moss v. Superior Court*, 17 Cal.4th 396, 950 P.2d 59 (Cal. 1998)(finding that civil incarceration may continue when a parent's financial inability to comply with an order is due to their refusal to find employment).

xxxiv. Before doing so, however, practitioners must consider all of the factors when deciding whether to invoke due process rights in a potential criminal contempt case. Such factors include: How serious is the nature of the violation? Is the contempt charge the first against the client? Is the judge assigned to the case strict or lax regarding compliance with its orders? Is the client facing a simple fine or numerous days in jail? Further, Judges are understanding and sympathetic individuals and there are times when it may be better to explain to the court why a violation was an isolated event, excusable and/or simply seek forgiveness from the court than to make a mountain out of a mole hill. Seeking forgiveness and not drawing the ire of the court is at times the better part of wisdom – especially if a party's non-compliance is beyond question.

xxxv. *United States* v. *Dixon*, 509 U. S. 688, 113 S. Ct. 2849 (1993); *Cooke* v. *United States*, 267 U.S. 517, 45 S. Ct. 390 (1925); *Lewis*, 373 P.3d at 880. Additionally, indigent litigants have a right to have counsel assigned to them. *Lewis*, 373 P.3d at 883.

xxxvi. *County of Santa Clara v. Sup. Ct.,* 2 Cal.App.4th 1686, 1693, 5 Cal. Rptr. 2d 7, 11 (6th Cal. App. 1992).

xxxvii. *Duprey v. State*, 2017 Nev. App. Unpub. LEXIS 291 (2017).

xxxviii. *Looney v. Eighth Judicial Dist. Court of Nev.*, 2014 Unpub. 131 (2014); *Emerick v. Emerick*, 28 Conn. App. 794; 613 A.2d 1351 (1992).

xxxix. *Duprey*, 2017 Nev. App. Unpub. LEXIS at 291.

xl. *Hudson v. State*, 2017 Nev. App. Unpub. LEXIS 17 (2017).

xli. *In re Houston*, 92 S.W.3d 870, 2002 Tex. App. LEXIS 9125 (Tex. App. 2002); *In re Caron*, 110 Ohio Misc. 2d 58, 744 N.E.2d 787 (Ohio C.O. Apr. 27, 2000).

xlii. *See also Green v. United States*, 356 U.S. 165, 187, 78 S. Ct. 632 (1958)(wherein the U.S. Supreme Court held that criminal contempt need not be prosecuted by indictment); *In re Houston*, 92 S.W.3d at 878.

xliii. *Bohannon v. Eighth Judicial Dist. Court of Nev.*, 2017 Nev. Unpub. LEXIS 205 (2017); *Collins v. State*, 111 Nev. 56, 888 P.2d 926 (1995).

xliv. *Collins*, 111 Nev. at 57.

xlv. *McCullough v. State*, 99 Nev. 72, 657 P.2d 1157 (1983).

xlvi. *Milligan v. State*, 101 Nev. 627, 708 P.2d 289 (1986).

xlvii. *Warner*, 111 Nev. at 1382.

xlviii. However, even waiting until the first hearing may not be sufficient notice and may potentially cause additional due process issues. In the Eighth Judicial District Courts, an application for an Order to Show Cause is accompanied by a motion to hold in contempt. EDCR 5.509. An accused could answer the motion and then only later, upon learning from the court that its intention is to proceed with criminal contempt, realize he unintentionally waived his rights. To avoid such problems while simultaneously satisfying notice requirements, courts should require detailed Orders to Show Cause. Such orders would include a complete disclosure of the charges; the potential consequences, including the possible sentence or sanctions; the constitutional right to confront and cross-examine all witnesses; the right to present evidence at trial, the right to either testify or remain silent; the right to a public trial; the right to have witnesses subpoenaed to testify on one's behalf and to obtain evidence that exonerates; the right to have competent counsel at all stages of the proceedings and have appointed counsel represent the accused if the accused is unable to afford counsel.

xlix. In fact, if the matter is being presented to the court via a motion by the opposing party, then the accused's intention to plead the Fifth may need to be made clear in their response.

l. *Ikie v. State*, 107 Nev. 916, 823 P.2d 258 (1991); *Furtado v, Furtado.* 380 Mass. 137, 402 N.E.2d 1024 (1980).

li. *McCormick v. Sixth Judicial Dist. Court*, 67 Nev. 318, 218 P.2d 939 (1950).

lii. *Bohannon*, 2017 Nev. Unpub. LEXIS at 10.

liii. *Id.*

liv. *Id.*

lv. *Id.*

lvi. To the extent the prosecution, or potentially the complainant, do not have said evidence. *See* endnote "lviii."

lvii. *Jimenez v. State*, 112 Nev. 610, 918 P.2d 687 (1996).

lviii. *State of Nevada v. Huebler*, 128 Nev. 192, 200, 275 P.3d 91 (2012).

lix. NRS 174.235.

lx. *Int'l Union, United Mine Workers of Am.*, *512 U.S. at 829, citing Bloom v. Illinois, 391 U.S. 194, 201, 20 L. Ed. 2d 522, 88 S. Ct. 1477 (1968).*

lxi. *See also Bohannon v. Eighth Judicial Dist. Court of the State of Nevada*, 2017 Nev. Unpub. LEXIS 205 (2017); *Hicks v. Feiock*, 485 U.S. 624 (1988).

lxii. *Amezcua v. Eighth Judicial Dist. Court of Nev.*, 130 Nev. Adv. Rep. 7, 319 P.3d 602, 604 (2014). *See also Blanton v. N. Las Vegas Mun. Court*, 103 Nev. 623, 629, 748 P.2d 494, 497 (1987).

lxiii. Nev. Const., Article VIII, Sec. 1; U.S. Const., Amend. V; U.S. Const., Amend. XIV.

lxiv. *Gordon v. Eighth Judicial Dist. Court*, 112 Nev. 216, 220, 913 P.2d 240, 243 (1996); *citing Unites States v. Halper*, 490 U.S. 435, 440, 104 L. Ed. 2d. 487, 496, 109 S. Ct. 1892, 1897 (1989*)(overruled by*, *Hudson v. United States*, 522 U.S. 93, 118 S. Ct. 488, 139 L. Ed. 2d 450 (1997) on other grounds).

lxv. *United States v. Dixon*, 509 U.S. 688; 113 S. Ct. 2849 (1992); *People v. Gray*, 36 Ill. App. 3d 720; 344 N.E.2d 683 (1st Dist. 1976); *State v. Goodnow*, 140 N.H. 38; 662 A.2d 950 (1995).

lxvi. *People of New York v. Wood*, 260 A.D.2d 102, 698 N.Y.S.2d 122 (N.Y. App. Div. 1999) (where the family court contempt proceeding, while represented by the trial court to be civil in nature, was deemed to be criminal due to the nature of the sanction and the contemnor was subsequently prosecuted under the same fact pattern). However, double jeopardy would not apply in cases where a crime can be simultaneously punishable under the criminal statute as well as criminal contempt, such as those under NRS 193.300.

lxvii. *Hudson v. United States*, 522 U.S. 93, 104, 118 S. Ct. 488 (1997); *Yates v. United States*, 355 U.S. 66, 78 S. Ct. 128 (1957); *United States v. Ryan*, 810 F.2d 650, 653 (7th Cir. 1987); *United States v. Patrick*, 542 F.2d 381, (7th Cir. 1976), *cert. denied*, 430 U.S. 931 (1977).

lxviii. *Yates, supra.* at 68-69.

lxix. *Id.*

lxx. *Id.*, at 69-70.

lxxi. *Bohannon,* 2017 Nev. Unpub. LEXIS at 205.

lxxii. *Div. of Child & Family Servs., v. Eighth Judicial Dist. Court*, 120 Nev. 445, 454-55, 92 P.3d 1239, 1245 (2004) (quoting *Cunningham v. Eighth Judicial Dist. Court*, 102 Nev. 551, 559-60, 729 P.2d 1328, 1333-34 (1986)).

lxxiii. *Id.* at 455, 92 P.3d at 1245.

lxxiv. *Bohannon v. Eighth Judicial Dist. Court of the State of Nevada,* 2017 Nev. Unpub. LEXIS 205 (2017).

lxxv. *See generally Rivero v. Rivero*, 125 Nev. 410, 216 P.3d 213 (2009).

lxxvi. *Houston v. Eighth Judicial Dist. Court*, 122 Nev. 544, 135 P.3d 1269 (2006).

lxxvii. *Thompson v. Thompson*, 147 Misc. 2d 297, 556 N.Y.S.2d 217 (1921); *Ellingwood v. Ellingwood*, 25 Ill. App. 3d 587, 323 N.E.2d 571 (1st Dist. 1975). *Parkinson v. Parkinson*, 106 Nev. 481, 796 P.2d 296 (1990); *see also Juers v. Juers*, 2003 Conn. Super. LEXIS 1043 (Conn. Super. Ct. Apr. 8, 2003); *Cole v. Cole*, 147 Misc. 2d 297; 556 N.Y.S.2d 217 (Fam. Ct. 1995); *Archer v. Archer*, 907 S.W.2d 412 (Tenn. App. 1995).

lxxviii. *State of Iowa v. Lipcamon,* 438 N.W.2d 605 (Iowa 1992).

lxxix. NRS 201.051.

lxxx. *Hicks v. Feiock*, 485 U.S. 624 (1988); *Moss v. Superior Court,* 17 Cal.4th 396, 950 P.2d 59 (Cal. 1998); *State ex rel. Mikkelsen v. Hill*, 315 Or. 452, 847 P.2d 402 (Or. 1993); *Ex parte Roosth*, 881 S.W.2d 300 (Tex. 1994).

lxxxi. *Bohannon v. Eighth Judicial Dist. Court of the State of Nevada,* 2017 Nev. Unpub. LEXIS 206 (2017).

lxxxii. *Garrett v. State*, 876 So.2d 24, 29 Fla. L. Weekly D 1198 (Fla. 1st DCA 2004); *Furtado v, Furtado*, 380 Mass. 137, 402 N.E.2d 1024 (1980); *Pugliese v. Pugliese*, 347 So.2d 422 (Fla. 1977).

lxxxiii. *Pengilly v. Rancho Santa Fe Homeowners*, 116 Nev. 646, 5 P.3d 569 (2000).

lxxxiv. *Bohannon v. Eighth Judicial Dist. Court of the State of Nevada*, 2017 Nev. Unpub. LEXIS 205 (2017).

lxxxv. *Mack-Manley v. Manley*, 122 Nev. 849, 859, 138 P.3d 525, 532 (2006); *Consolidated Generator v. Cummins Engine*, 114 Nev. 1304, 971 P.2d 1251 (1998).

lxxxvi. *Bohannon v. Eighth Judicial Dist. Court of the State of Nevada*, 2017 Nev. Unpub. LEXIS 205 (2017).