Lawyering in a PANDEMIC

BY KYLE E.N. GEORGE, ESQ.

Medical doctors are apocryphally guided by the overarching principle, "first, do no harm." The legal profession has no comparable pithy shibboleth. In our profession, we are compelled by our clients' imperatives while simultaneously constrained by the limitations and safeguards imposed by the law, but because these considerations span an infinite spectrum, there is no single guiding North Star by which we can navigate legal issues. For this reason, **the issues we weigh are often not "do no harm," but rather a balancing test of which harm is less ... well ... harmful.**

In emergency settings, the stakes are directly proportional to the gravity of the emergency. At the lowest point in our nation's history, President Abraham Lincoln unilaterally suspended the writ of habeas corpus in his efforts to hold the country together. In defending his action, the president asked, "[t]o state the question more directly, are all the laws but one to go unexecuted and the Government itself go to pieces lest that one be violated?"[1] In the modern practice of law, however, the question is not which law can be violated for some greater good, but how to respond in the most dire of emergencies while staying within the confines of the law.

Most recently, the field of emergency management law has been tested by the COVID-19 pandemic. As the SARS-CoV-2 virus hit the U.S., governors across the country wrestled with several compelling issues: (1) how to safeguard the public by minimizing the spread of the disease, (2) how to do so in the least disruptive way possible, and (3) how to do so lawfully. Although the executives shared these objectives, the tools at their disposal varied widely from state to state.

The response to a deadly pandemic is necessarily equal parts medical and legal. Broadly speaking, the governor's legal authority to respond resides in three areas: (1) legislative authority explicitly granted to the executive branch, (2) responsibilities vested in executive branch agencies, and (3) inherent authorities vested in the chief executive. Because COVID-19 infection rates grow exponentially when the disease is not controlled, time is the enemy of any response. For this reason, bureaucratic delay ordinarily associated with the administration of government is wholly detrimental to containment and eradication efforts.

In the context of COVID-19, the public health provisions of Nevada Revised Statute (NRS) 441A and to a lesser degree NRS 439 were centrally important. But with a part-time legislature in recess during the early days of the pandemic, the emergency powers legislatively granted to the governor under NRS 414 were among the most responsive tools available for the dynamically changing conditions of the time.

The governor's emergencies powers are axiomatically triggered by the existence of an emergency. In Nevada, an emergency can be "proclaimed by the Governor or by resolution of the Legislature,"[2] and the governor may call the legislature into special session on extraordinary occasions[3] – certainly for the purpose of declaring such an emergency – but when public gatherings were contraindicated by the very emergency at issue, the legislative option was effectively foreclosed. On March 12, 2020, Governor Steve Sisolak proclaimed a state of emergency in response to COVID-19.

This declaration of a state of emergency unleashed vast additional authorities under NRS 414. For example, NRS 414.110 allows licensing bodies to ease licensing requirements for persons critical to the emergency, and immunizes persons working on behalf of the state from suit. It was pursuant to this authority that the Battle Born Medical Corps[4] was born, to bolster the healthcare workforce available to fight COVID-19 in the eventuality of a spike in cases.

CONTINUED ON PAGE 10

CONTINUED FROM PAGE 9

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State agencies also have other means to increase agility in times of emergency. Under Nevada's Administrative Procedure Act, in times of emergency agencies may bypass the lengthy notice and comment, and Legislative Commission review processes to adopt emergency regulations.[5] These emergency regulations need only be endorsed by the governor and filed with the secretary of state to go into effect but cannot be in force for longer than 120 days. An emergency regulation may only be adopted by this procedure once, and if the sponsoring agency wishes to extend the effective period of the regulation, it must engage in the usual process provided for by NRS 233B.

Emergency regulations – like all regulations – must of course be faithful to the underlying statute. Lawyers in the emergency management space must clearly identify the boundaries of the underlying statute and identify opportunities where existing regulations could be amended, or new emergency regulations promulgated to serve their clients' needs.

In a pandemic, some of those needs are obvious. One of the first emergency regulations promulgated in the early days of the pandemic prohibited health insurance companies from imposing out-of-pocket costs on insureds for COVID-19 testing.[6] This same regulation also proactively addressed potential drug shortages by requiring insurance companies to cover off-formulary drugs when formulary drugs were not available. Similarly, the Silver State Health Insurance Exchange used the emergency regulation process to open an Exceptional Circumstance Special Enrollment Period that allowed Nevadans to obtain health insurance at a time when access to healthcare was most critical.

Emergency regulations could even be used for less-obvious objectives, such as extending drivers' licenses while Department of Motor Vehicles offices were closed to the public. When supply chains were strained to near-breaking point by unprecedented demand, extending expiring commercial drivers' licenses kept truckers on the road to transport personal protective equipment, drugs, food, and cleaning supplies.

But by far, the most high-profile use of power during an emergency is executive action by the governor. Some executive orders are formalistically issued to exercise inherent authority, for example, activating the National Guard as Nevada's commander in chief. Other executive orders, however, target the emergency at hand, and may be directed toward state agencies, toward the Nevada public, or a combination of both.

The governor's authority to issue executive orders is not plenary. Even in the most dire of emergencies, the executive's powers are cabined by the U.S. and Nevada constitutions, and other federal and state laws. The analysis of where the limits on executive power lie are familiar to lawyers; Justice Robert H. Jackson's concise framing of these boundaries[7] is equally applicable at the state level:

1. The executive has constitutional authority to act, and the legislative branch has statutorily granted him additional authority to act;
2. The executive has constitutional authority, but the legislative branch is silent on the subject; or
3. The legislative branch has precluded the executive from acting in that space, and the executive has no independent constitutional authority to act.

Under this analysis, when the governor acts pursuant to NRS 414, "his authority is at its maximum."[8] But NRS 414 is not solely a grant of power to the governor; it also tasks him with responsibility "to promote and secure the safety and protection of the civilian population."[9] Attorneys advising on this responsibility must bridge policy and the law to determine how the executive's policy objectives can be met, even if the underlying plan is problematic. Stated alternatively, in the context of crisis lawyering, summarily concluding that an action cannot be done is insufficient—the attorney should clearly understand the end goal and to the extent legally feasible, find alternative means to advance that objective.

One example of this is the modification to Nevada's Open Meeting Laws promulgated through Emergency Directive 006. NRS 241.020(1) requires that "all meetings of public bodies must be open and public, and all persons must be permitted to attend any meeting of these public bodies." However, in the face of a highly transmittable disease spread through interpersonal contact, creating opportunities for the public to gather was counterproductive.

The solution set forth in Directive 006 was not to simply curtail public access and government transparency. Rather, Directive 006 remained faithful to the spirit and letter of NRS 241 by maintaining the requirement that the public have a means to participate but put the onus on the public body to find alternative ways for that participation to occur. To implement Directive 006, most public bodies provided call-in numbers and streamed their meetings online, which put public attendees on exactly the same footing as meeting participants who were conducting business through the same means.

Lawyers may not have a single slogan that guides our work, but as officers of the court, we have all sworn to "support the Constitution" and uphold the laws of our land. Our commitment to this oath is tested not in times of good fortune, but in times of crisis when the urgency of the moment tempts us to discard the limitations imposed by the laws we swore to defend. As lawyers, we are tasked with ensuring that the choice we present our clients is not which of our laws could be violated, but how they may achieve their goals without violating the law. Disease eradication at the cost of compromising our legal system would be a Faustian bargain we can ill afford.

ENDNOTES:

1. July 4, 1861, Message to Congress in Special Session
2. NRS 414.070
3. Nev. Const., art. 5, § 9
4. Emergency Directive 011
5. NRS 233B.0613
6. https://gov.nv.gov/uploadedFiles/govnewnvgov/Content/News/Emergency_Orders/2020_attachments/2020-03-05_DeclarationOfEmergencyDOI-emergencyRegulationsCOVID-19.pdf
7. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).
8. *Youngstown*, 343 U.S. at 635.
9. NRS 414.070(7)

KYLE E. N. GEORGE serves as First Assistant Attorney General, and in this role supervises more than 100 attorneys across eight divisions in the Attorney General's Office. He has also served as interim general counsel to Governor Steve Sisolak, the chief deputy district attorney in Mineral County, and as counsel and policy advisor to two members of Congress. George earned his J.D. from Georgetown University Law Center and holds bachelor's and master's degrees in chemistry from the University of Nevada, Las Vegas.