2023 Employment Law Update

Jordan Walsh

Holland & Hart LLP

Bills Impacting Collective Bargaining for the State

- SB 166
  - Requires separate bargaining units for peace officers
  - This is like the longstanding rule for local law enforcement units, units must only contain law enforcement officers
- SB 319
  - ➢ Redefines the definition of "employee" under NRS 288.425 to distinguish between categories of peace officers (I, II, and III)
- AB 378
  - ➢ Amends the process, especially timing of events, for State collective bargaining
- SB 376
  - Provides 8 weeks of paid family medical leave for employees of the Executive Department
  - Eligibility requirements like the FMLA
  - Effective Jan. 1, 2024

Bills Impacting Collective Bargaining for Local Government Employers

- AB 172 (*Under Dispute – Vetoed after close of the session*)
  - Requires school districts to turn over employee information (mainly contact information records) to their employee organizations twice a year (On or before January 1 and July 1)
  - Confirms that the employee information maintained by public employers is confidential information pursuant to NRS 249
  - Allows employees to opt-out of the semi-annual information disclosure, and prohibits disclosure of the employee information of any employee who opts-out
- SB 166
  - Amends the definition of a supervisory employees for civilian support services staff in law enforcement agencies, like law enforcement employees themselves, support staff supervisory designations are no longer completely reliant on the duties set out in NRS 288.138(1)(a)
- SB 231
  - Establishes additional funding for certified teaching staff and educational support professionals
  - Additional funding to match salary increases provided during the 2023-24 and 2024-25 fiscal years
  - Employers may not decrease their own expenditures on employee wages or benefits based on this funding
- SB 225
  - Changes the employment standards for peace officers / peace officer certification
  - Disqualifies persons from serving as a peace officer / being certified if they have been discharged, disciplined, or asked to resign from any other law enforcement agency for conduct that would grounds for denying application pursuant to NRS 289.510 (i.e. they committed a felony, or were charged with any form of domestic violence)
  - Has new standards for use of marijuana testing and screening
  - Establish continuing education programs, and require all officers to participate in a minimum of 12 hours annually and training on specific topics
  - Effective Oct. 1, 2023
- SB 264
  - Clarifies that administrative staff cannot be included in a metro police department's law enforcement employee organization (they are excluded from NRS 288.140)

Changes to Federal Law

No Mandatory Arbitration of Sexual Assault or Sexual Harassment Claims:

On March 3, 2022, President Biden signed the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act, (2021-2022) (the "Act"), into law. The Act amends the Federal Arbitration Act by rendering all pre-dispute arbitration agreements and pre-dispute joint action waivers entered into on or after March 3, 2022 invalid and enforceable in the context of sexual assault disputes and sexual harassment disputes . H.B. 4445 § 402(a). Instead, the Act leaves it up-to the claimant to elect to arbitrate such claims; the claimant may not be compelled to arbitrate sexual assault and/or sexual harassment claims. Id.

The Act applies to all claims of sexual assault and harassment, regardless of whether the matter is brought under state, federal, or local law. Additionally, the Act expressly provides that regardless of whether an arbitration agreement authorizes an arbitrator to make a determination of arbitrability concerning claims arising under the agreement, a court, not an arbitrator, has the authority to determine the enforceability of an agreement in the context of the Act. Id. at § 402(b).

Counsel should consider the impact of this law when reviewing grievances alleging sexual assault or harassment. While HB 4445 is silent on whether the right of action may be waived in the collective bargaining sphere, based on the language of the act, I would suspect this is a right that cannot be waived prospectively through a grievance procedure.

Limitations Concerning Non-Disparagement and Non-Disclosure Clauses:

On November 16, 2022, the United States Congress passed the Speak Out Act, Public Law No. 117-224 (the "SOA"), and President Biden signed the SOA into law on December 7, 2022. The SOA prohibits employers from using non-disclosure and/or non-disparagement agreements to prevent employees (or former employees) from speaking out about sexual assault and/or harassment that they either observed or experienced. The purpose of the SOA is to combat sexual assault and harassment by empowering victims and survivors to report and publicly disclose the alleged abuses they have suffered or observed, the SOA does not prohibit the general use of non-disclosure/non-disparagement clauses. The SOA at § 2(5). To accomplish this purpose, the SOA provides that any non-disclosure and/or non-disparagement clause is not enforceable if:

a) The non-disclosure/non-disparagement clause was entered into on or after December 7, 2022 (SOA at § 5);

b) The non-disclosure/non-disparagement clause was entered into before a covered sexual harassment dispute and/or sexual assault dispute arose (SOA at § 4(a)); and

c) The non-disclosure/non-disparagement clause requires the employee not to: (i) disclose or discuss conduct, the existence of a settlement involving conduct, or information covered by the terms and conditions of the contract or agreement related to a sexual assault dispute or a sexual harassment dispute; or (ii) make negative statements about another party that relates to the contract, agreement, claim or case (SOA §4(a)).

The SOA applies to claims filed after December 7, 2022, the effective date of the law, and does not affect the enforceability of non-disclosure and non-disparagement clauses executed in connection with disputes concerning claims filed before December 7, 2022. SOA at § 5. The statute does not otherwise specifically address the retroactivity of its application to existing non-disclosure and non-disparagement agreements.

While the NLRA does not apply to public employers in Nevada, the EMRB tends to follow the EMRB. Therefore, out of an abundance of caution, it's worth taking another look at your separation agreements to ensure compliance.

New Proposed Amendments for Exemptions Under the FLSA

- DOL issued proposal on Aug. 30, 2023, with a 60 day public comment period
- Under the proposal, the White Collar Exemption salary threshold increases to $55,000 per year, or $1,059 per week (Up $19,432 from the current minimum of $35,568/$684)
- Under the proposal, the Highly Paid Exemption increases, from $107,432 to $143,988
- In 2016, the Obama Administration tried to implement an increase, but a Court in Texas overturned the changes

Changes to State Employment Law

- AB 163
  - Currently employees who are domestic violence victims are entitled to up to 160 hours of job protected leave (for medical appointments, recovery time, court), and are entitled to reasonable accommodations (that do not impose an undue hardship on the employer). Effective January 1, 2024, these benefits will be extend to sexual assault victims.
  - NRS 608.0198 and NRS 613.222
- SB 147
  - Currently employers must pay employees any wages immediately, if not paid within 3 days of termination, if they fail to do so there are waiting time penalties associated with the late payment (1 day of wages for each day missed). Now if someone is put on a temporary layoff they must be paid immediately as well.
  - This rule is set out in NRS Chapter 608, so it doesn't apply to public employers with collective bargaining agreements, but it's worth keeping in mind.

Re-Examining Internal Investigations

Jordan Walsh

Things to Keep in Mind

- Employee Due Process Rights
- Employee Statutory Rights
- Employee Rights Under the CBA
- Make a Plan
- Follow Your Plan
- Don’t Rush the Conclusion
- Close the Loop
- Taking Action

Employee Due Process Rights

- Public employees have an interested in their continued employment under the Due Process Clause of the 14th Amendment to the United States Constitution.
  - The US Supreme Court has long held that an employee cannot be terminated, suspended, or otherwise disciplined in a manner that negatively impacts their property interest in their job without receiving a due process hearing ahead of the employment action.
  - Due process requires the employer to hold a pre-disciplinary meeting before taking disciplinary action.
  - *Cleveland Bd. of Educ. v. Loudermill*, 470 US 532 (1985) and *Gilbert v. Homar*, 520 US 924 (1997)
- In *Loudermill* the US Supreme Court states that "'the root requirement' of the Due Process Clause as being 'that an individual be given an opportunity for a hearing before he is deprived of any significant property interest. This principle requires "some kind of a hearing" prior to the discharge of an employee who has a constitutionally protected property interest in his employment.'" *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542(internal citations omitted).
- "The **essential requirements** of due process, . . . are **notice** and **an opportunity to respond**.
  - E.G. Employees must be provided an opportunity to present reasons, either in person or in writing, why the proposed disciplinary action should not be taken. *See Id.* 546.
  - Regardless of what you call the meeting – the meeting itself is an essential part of its investigatory procedure because it provides the employee their required due process right to receive notice of the proposed disciplinary action and an opportunity to respond.
  - This process offers an opportunity to present reasons why the employer's proposed disciplinary action should not be taken.
- In *Gilbert*, the U.S. Supreme Court stated: "We noted in *Loudermill* that the purpose of a pre-termination hearing is to determine 'whether there are reasonable grounds to believe the charges against the employee are true and support the proposed action.' By parity of reasoning, the purpose of any pre-suspension hearing would be to assure that there are reasonable grounds to support the suspension without pay." *Gilbert v. Homar*, 520 U.S. 924, 933 (1997).
- **Practical Application**:
  - The due process hearing give the employee an opportunity to exercise their Due Process rights,
  - The due process hearing helps to ensure that disciplinary action is supported by just cause because you take the decision away from the investigator.
  - Its much easier to support a just cause finding when this is your second bite at the apple – i.e. you already know the Union's arguments against discipline and the mitigating facts.

Employee Statutory Rights

- NRS Chapter 289 (Peace Officer Bill of Rights)
  - Creates a statutory procedure (NRS 289.057 – NRS 289.095) for conducting investigations concerning Peace Officers
    - This process is triggered by a potential investigation, employers should review these provisions in detail before initiating an investigation to ensure that they comply with all documentation and notice requirements
- NRS Chapter 391 (School Districts)
  - Applies only to post-probationary certified staff
  - Establishes a statutory procedure (NRS 391.760 – NRS 391.800) that school districts must comply with before issuing severe discipline (demotion, termination, decision not to rehire)
    - This process is triggered after the investigation is complete

Employee Rights Under A CBA

- Each CBA is different, but many give their members additional rights, reviewing the CBA will help you better understand the steps of the process
  - Be sure that you're following any and all procedural requirements for conducting investigations:
    - Issuing proper notice of the investigation
    - Providing notice of the complaint (if required)
    - Redacting complaints (if required)
- Review your employer's policies for additional guidance on employee rights
- Check your past discipline, make sure you're being consistent with past practices
  - You want to know how the employer has handled similar situations in the past

Step 1: The Complaint

- First: make sure the complaint is received in a written form
  - ❖ If you receive an oral complaint, ask the complainant to provide a written statement (that they sign)
  - ❖ If you have a complaint form, have the complainant fill out the form and re-submit their complaint
- Practice Note:

  If the complainant refuses to write down and/or sign the complaint, you **must** ask why.

  - *This is a massive red flag, and should not be ignored:*
    1. The complainant is afraid of the person s/he is complaining about (afraid of retaliation from that person, or the department generally), or
    2. The complainant is submitting the complaint in retaliation for some real or perceived slight, or to further an intraoffice dispute.
       - *Generally, I take oral complaints submitted with a grain of salt.*
       - *However, If the complainant is afraid, the employer must look into the situation, and must act in situations where they find a hostile work environment, sexual harassment, unlawful retaliation, or general discrimination.*

Step 2: Prepare for the Investigation

- Assign a neutral investigator.
  - This person should be in a supervisory role, but (if possible) should not be the direct supervisor of the employee allegedly engaged in misconduct.
- The investigator should initiate the investigation by:
  1. Comparing the alleged violation(s)/misconduct with:
     - ❑ The employer's policies: determining whether the alleged violation is a policy violation (i.e. dress code violation, procedural violation,)
     - ❑ Relevant statutory requirements: determining whether the alleged is a statutory violation (i.e. drunk driving, embezzlement, improper use of confidential information)
     - ❑ The relevant CBA and MOUs: determining whether the employee was allowed to act the way they did under the CBA.
     - ❑ Employer disciplinary history: determining if/how similar misconduct was handled by the employer in the past.
  2. Make copies of the policies, statutes, CBA provisions, and relevant past disciplinary actions that the investigator may relay on later (it's better to have them handy).
  3. In case of law enforcement, review NRS 289.057-NRS 289.095 to make sure they issue the appropriate notices before starting their investigation.
  4. Prepare your Notice of Investigation, and where Appropriate Notice of Administrative Leave.
     - ❑ Notices should comply with your CBA requirements, NRS 289 (for law enforcement), or past practice (whichever applies in your case).
     - ❑ Notices should be dated, have a place for the employee to confirm receipt, should inform the employee that an investigation has been initiated into allegations that they have engaged in misconduct, it should then lay out the allegations presented against the employee, along with the probable violation(s), with reasonable particularity, finally, the notice should specifically inform the employee that administrative leave is not a disciplinary action, but the investigation may lead to disciplinary action.

Step 3: Putting the Employee on Notice

- Employers should always provide employees with a written notice that they are being investigated, and this notice should tell them why they are being investigated.
  - Best Practices:
    - ✓ Provide the Notice to the employee via personal delivery, with a witness present.
    - ✓ The employee doesn't need to sign to confirm receipt of the notice, but its helpful
    - ✓ Employees should be informed that the investigation is not disciplinary in nature, but could result in disciplinary action
    - ✓ If possible, place the employee on administrative leave with pay, and given him/her directions not to contact your staff about the investigation or come to work until the matter is resolved (this will help ensure a neutral investigation)

Step 4: Collecting and Storing Evidence

- Based on the complaint you'll need to make a list of evidence that you need in order to determine whether the misconduct occurred, evidence typically collected:
  - ❑ Emails
  - ❑ Photographs / Video Footage (typically from witnesses)
  - ❑ Surveillance Footage/Bodycam Footage
  - ❑ Social Media Posts
  - ❑ Relevant documents (including: governing body minutes and agendas, news paper clippings, and video clips from broadcasts – whatever is applicable)
  - ❑ Text messages
  - ❑ Voicemails
  - ❑ Messenger/Slack Messages
  - ❑ Witness Statements (written)
  - ❑ Past disciplinary actions, relevant directives, instructions from a supervisor related to the employee or matter in question
  - ❑ Employee evaluations
- Rule of Thumb:

  If you look at a piece of evidence, you need to store it where it will be safe/available if requested by the employee.
  - Nevada prohibits spoilage of evidence, and even if you don't think the evidence is valuable, if it's lost the presumption will be that it supported the employee's position (even if it didn't)
    - For example, most video surveillance systems write over footage every 30 days, so if you don't store a video of the incident on an external drive, you could lose it. While it may not support the employee's position, if it's lost the arbitrator / court will presume it supported the employee's position.

Step 5: The Interviews

- The investigator should make a list of potential witnesses
- The list of witnesses should always include the employee who is the subject of misconduct.
  - The employer may compel an interview with any employees he/she/they need information from in order to conduct the investigation.
  - Prior to the interviews, the investigator should issue written notice of the interview to the subject employee.
    - If the interview could lead to discipline, the notice should inform the employee that he/she/they has/have a right to have a representative in the room during the investigatory interview.
      - *Weingarten Rule:*
        - *An employee must be notified that they have the right to have a representative present at a meeting which may result in disciplinary action (note: a meeting can start out as a training or correctional meeting, but morph into a disciplinary meeting, where the nature of the meeting changes, the employee is entitled to representation).*
        - *The employer should work with the employee and his/her/their union to schedule the meeting at a time where the employee can be represented.*
          - *Do not force an employee to attend a meeting unrepresented, if they want representation*
        - *The union steward / representative may ask for questions to be clarified, and help the employee form their answers, but he/she/they may not answer on behalf of the employee.*
    - The employe may decline to bring a representative, but it's a due process violation if you fail to advise them of their right.
    - The notice should include the following information: the date, time, and place of the interview, the name of the interview, a brief description of the purpose for the interview, that the employee being compelled to participate is directed to answer questions fully, truthfully, and in a manner that is not misleading, and a warning that providing false, incomplete, or misleading information may lead to discipline.
  - The investigator should record the investigatory interviews, and if they are relevant to the investigation, the interview(s) should be transcribed formally.

Step 6: Preparing To Issue Your Notice of Disciplinary Recommendation

- After gathering all available relevant evidence, the investigator must issue a written statement that contains his/her/their findings, conclusions, and recommendation for disciplinary action.
  - This statement should state clearly:
    - The investigator's findings regarding the alleged violations (from the complaint);
    - The evidence the investigator relied to make his/her/their findings;
    - A statement of their conclusion as to whether the employee's conduct violated a policy, statute, or regulation (stating the exact violation and the basis for the violation);
    - A statement as to whether they believe there is just cause for issuing discipline;
    - A statement about the level of discipline they recommend being issued;
    - A statement as to whether they believe just cause supports the level of discipline they are recommending; and
    - A copy of each piece of evidence he/she/they rely on to support their findings and conclusions (attached as exhibits and cited within the Notice)
  - A notice that a pre-disciplinary hearing has been scheduled, should also set out the date and time of the pre-disciplinary hearing has been scheduled, that they the right to present evidence and argument at that hearing to challenge or otherwise mitigate the findings and conclusions within the statement, that they have the right to be represented at the hearing.
- Practice Tip:
  - *Do Not Rush This Step!*
  - Be methodical and plan out your decision, don't include everything unless you think there's a 75% chance you win on each position
  - Focus on your strongest position(s), support it/them with the evidence, the employer's past practice, and the law. The more you try to throw in, the weaker your position looks. You want to avoid the perception that you're "piling on" because it will undermine your position.
  - Issue the Notice via Certified Mail Return Receipt Requested, or in person with a witness.
  - Be prepared to turn everything over to the employee / the employee's counsel (remember for law enforcement the rules are different, consult NRS 289. 057 and NRS 289.080 to make sure you're turning over records properly)

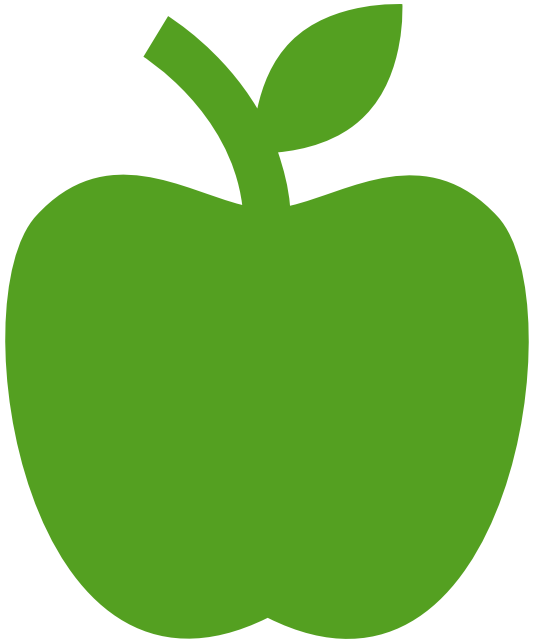
Step 7: The Pre-Disciplinary Hearing

- The employer should have a policy dictating who conducts pre-disciplinary hearings.
  - Generally, these meetings should be conducted someone who is able to issue severe discipline (even if severe discipline is not recommended)
    - If this person is not available, or is somehow involved with the investigation, he/she/they should designate a third party as the decision maker.
    - The decision maker should require the investigator to present his/her/their findings, conclusions, and recommendations at the pre-disciplinary hearing (along with all relevant evidence), the decision maker should then allow the employee to present his/her/their case, including any mitigating information.
    - After hearing both sides, the decision maker should issue a final written decision which states:
      - What evidence the decision maker relied on and/or found persuasive, unpersuasive
      - The individual's findings regarding whether misconduct occurred, and his/her/their basis for finding misconduct (again citing the policy, regulation, and/or statute that they believe was violated). These findings should be detailed, "I found X because Y and Z" (see Record at Ex. 1). I" did not find X argument persuasive because A, B, and C:" The more detail you can provide the more chance you have of having your decision upheld during a challenge.
      - A conclusion as to whether there is just cause supporting the issuance of discipline
      - A conclusion as to whether there is just cause supporting the level of discipline issue
      - A statement informing the employee that there is a process for challenging the decision, and where that process may be found – i.e. challenges must be pursued in compliance with Article X of the CBA.
      - This decision should be issued to the employee via personal delivery or certified mail, return receipt requested.
      - The hearing/meeting should be recorded and the evidence presented should be stored with the recording
      - If the decision is challenged the entity should have the meeting/hearing formally transcribed.
      - Records of these decision should be stored in a depository, this helps aid in consistency.

Close the Loop

- When you complete an investigation - regardless of whether discipline is issued – close the loop with the complainant.
  - At the very least you need to let the person know:
    A. The allegations in the complaint were investigated
    B. The allegations were substantiated / were not substantiated
    C. Corrective action was / was not taken
  - Do not go into the details of the investigator's findings
  - Do let the person know that, from an institutional basis, the matter is viewed as having been addressed/resolved, and the institution has taken steps to prevent the conduct in the future.
- DOCUMENT THE NOTICE OF RESOLUTION
  - An email is typically sufficient.

Questions:

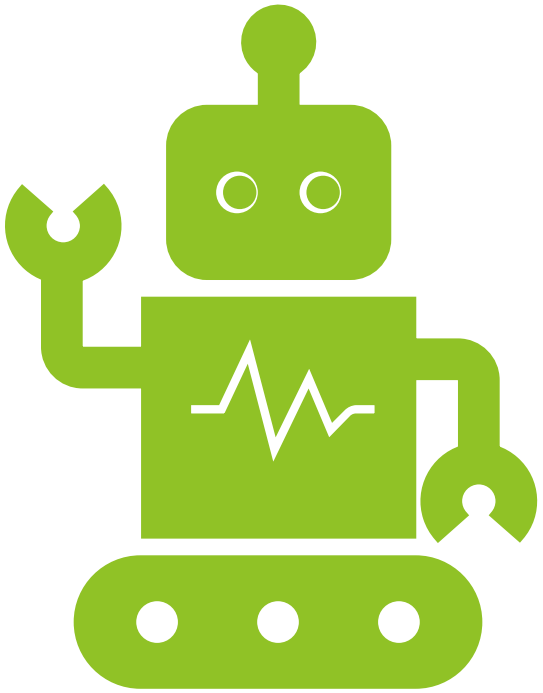


Artificial Intelligence & the Law: the Forbidden Fruit

Alex Velto

Hutchison & Steffen, PLLC


DISCLAIMER



Today's topics:

- (1) Understanding "AI" and ChatGPT
- (2) Why we should understand
- (4) Limits of AI
- (5) Ethical considerations for lawyers (briefly)
- (6) Demonstration

ChatGPT history

Founded in 2015 to advance artificial intelligence to benefit humanity

OpenAI, as a non-profit, fully owns the for-profit entity that owns ChatGPT

For-profit equity structure limits financial returns

- Large investors: Microsoft ($11 billion), Amazon, Sequoia Capital, Elon Musk, Peter Thiel, Sam Altman

Chat GPT-1 and Chat GPT-2 in 2018, 2019

Very simple answers and not human-like

Chat GPT-3 released in 2020

Improved, but relatively simple answers

Chat GPT-4 released March 14, 2023

Gamechanger

High quality answers

Passed Bar Exam (90th percentile)

Human like responses

What is “AI” and ChatGPT

- What is ChatGPT?
  - ChatGPT is an advanced language learning model.
- What is a Language Learning Model?
  - Definition: A type of artificial intelligence that allows machines to understand, respond to, learn from, and generate human language.
  - What is does: an LLM is a program that analyzes patterns in language to generate relevant responses, using the statistical structure of language, such as the likelihood of a word given the previous word in a sentence, to generate human-like text.
  - In practice: an LLM learn patterns from vast amounts of text data and then can generate text based on those patterns.

Other programs like ChatGPT

Bard (Google)

An up-to-date version of Chat GPT
Less conversational than Chat GPT
More general answers

CoCounsel (Casetext)

AI legal assistant
Effective research and memo production
Document review
Being acquired by Thomson Reuters

Claud AI

Anthropic
Can upload documents
Free

Microsoft CoPilot: ChatGPT & Microsoft integration

- Microsoft will begin integrating ChatGPT technology into Microsoft Office
- The functions will include:
  - Summarizing key discussion points of a conversation, and providing recaps, from Teams Meetings
  - Creating PowerPoint presentations from prompts
  - Drafting emails from prompts
  - Analyzing long pieces of text
  - Summarizing data on excel sheets

Why should we understand, and potentially use, AI?

Research:

AI can help process and summarize vast amounts of data.

Can give general legal standards and basic understandings of the law

Legal Drafting

Can draft basic legal documents

Effective writing

First drafts

Other litigation tools

Voire dire

Client letters

Emails

Government lawyers' use of AI

AI can help bridge the gap for legal services for underrepresented clients

(Potentially) Avoids ethical issues of billing for AI

Reduced costs

Similar questions and topics

Limitations of AI

Check the law and legal citations:

It makes up cases… but the rule is usually correct

Knowledge cutoff:

ChatGPT’s knowledge base ends in 2021

This does not apply to Bard or CoCounsel

Misinterpretation

Potential for misinterpretation or misunderstanding of complex legal language and contexts.

AI in the news: Steven Schwartz

Via First Class Mail
Hon. Anne Elizabeth Barnes
The Court of Appeals of the State of Georgia
330 Capitol Ave., S.E.
1st Floor, Suite 1601
Atlanta, Georgia 30334

Re: *Mata v. Avianca, Inc.*, No. 22-cv-1461(PKC) (S.D.N.Y.)

Dear Judge Barnes:

As required by the Order of Hon. P. Kevin Castel dated June 22, 2023 in the above-referenced matter enclosed please find: (i) a copy of the Opinion and Order on Sanctions dated June 22, 2023; (ii) the transcript of the hearing of June 8, 2023 in this matter and (iii) a copy of the Affidavit dated April 25, 2023, including exhibits, that was filed in this matter.

We sincerely apologize for our actions in this matter, which led to the submission of an inauthentic judicial opinion including your name.

Respectfully submitted,

Steven A. Schwartz

Peter LoDuca

Levidow, Levidow & Oberman P.C.
By: Thomas A. Corvino

Mandatory Certification Regarding Generative Artificial Intelligence

All attorneys appearing before the Court must file on the docket a certificate attesting either that no portion of the filing was drafted by generative artificial intelligence (such as ChatGPT, Harvey.AI, or Google Bard) or that any language drafted by generative artificial intelligence was checked for accuracy, using print reporters or traditional legal databases, by a human being. These platforms are incredibly powerful and have many uses in the law: form divorces, discovery requests, suggested errors in documents, anticipated questions at oral argument. But legal briefing is not one of them. Here's why. These platforms in their current states are prone to hallucinations and bias. On hallucinations, they make stuff up—even quotes and citations. Another issue is reliability or bias. While attorneys swear an oath to set aside their personal prejudices, biases, and beliefs to faithfully uphold the law and represent their clients, generative artificial intelligence is the product of programming devised by humans who did not have to swear such an oath. As such, these systems hold no allegiance to any client, the rule of law, or the laws and Constitution of the United States (or, as addressed above, the truth). Unbound by any sense of duty, honor, or justice, such programs act according to computer code rather than conviction, based on programming rather than principle. Any party believing a platform has the requisite accuracy and reliability for legal briefing may move for leave and explain why. Accordingly, the Court will strike any filing from an attorney who fails to file a certificate on the docket attesting that the attorney has read the Court's judge-specific requirements and understands that he or she will be held responsible under Rule 11 for the contents of any filing that he or she signs and submits to the Court, regardless of whether generative artificial intelligence drafted any portion of that filing. **A template Certificate Regarding Judge-Specific Requirements is provided here.**

AI in the news: U.S. District Judge Brantley Starr's mandatory certification

Ethical considerations for lawyers

- Competence
- Confidential Information
- Billing
- Disclosure

Effective Prompt Writing

Position ChatGPT	• Its role • Its style and tone
Prompt Writing	• Its goal • How it should achieve the goal • What it needs to do
More information = better results	• Background information • Detail, detail, detail

Demonstration
(1) ChatGPT
(2) Claude AI

Ethics and Social Media

Sarah A. Bradley, Esq.

2023 Nevada Government Civil Attorneys' Conference

Electronic Communications in General

- Clients should not use anyone else's computer or device to communicate with you. A client's work computer, tablet, or company supplied smart phone do not belong to the client and the employing company has the right to monitor communications that occur on its system.
  - For public attorneys, clients should communicate with us via government email and phones and not personal devices, especially if those emails or devices are shared with spouses, family members, or others.
  - Be careful of using public Wi-Fi systems or public computers such as those in a hotel or resort business center. The terms of service for those generally allow the monitoring of the communications.

In General

- If the action is not permissible in person or via non-social media means, it is not permissible on social media.
- Advice that an attorney would give to clients in the pre-Internet and pre-social media world is the same but is merely "repackaged" to account for technology.
- Ensure that conversations about social media and electronic communications are communicated in writing with the client aka "don't do stupid warning".
  - For most private attorneys, this goes in the engagement letter that the client reviews, initials, and signs.
  - How do public lawyers handle this with clients?
  - NRCP 1.4 governs communication and conversations with clients about social media and electronic communications related to the representation may be deemed a part of complying with NRCP 1.4.

Counsel Clients About Social Media (1)

- "When a producing party claims inadvertent disclosure, it has the burden of proving that the disclosure was truly inadvertent." *Fox v. Massey-Ferguson, Inc.*, 172 F.R.D. 653, 671 (E.D. Mich. 1995).
- In *Lenz v. Universal Music Corp.*, 2010 WL 4286329 (N.D. Cal. 2010) plaintiff was suing Universal for giving YouTube allegedly improper notice that the video of her toddler dancing to a Prince song was an unauthorized use.
  - During litigation, she blogged and chatted online about her motivations for pursuing the action and specific legal strategies.
  - The Court ruled she waived attorney-client privilege.

Counsel Clients About Social Media (2)

- Teen's Facebook Post Costs Father $80K Legal Settlement (Associate Press/NBC Miami, March 3, 2014)
  - A Florida teenager's Facebook post has cost her father an $80,000 legal settlement. The Palm Beach Post reported that the father had sued a Miami-area preparatory school for age discrimination after he lost his job as headmaster.
  - Dana Snay's father, Patrick Snay, had settled an age discrimination case with his former employer, Gulliver Preparatory School. The school agreed to settle the case for $80,000 and the settlement agreement included a stipulation that the man and his wife not disclose details of the settlement with anyone.
  - The daughter posted on Facebook that the money would pay for family vacation to Europe: "Mama and Papa Snay won the case against Gulliver. Gulliver is now officially paying for my vacation to Europe this summer. SUCK IT," she posted.
  - The Facebook post invalidated the settlement.

Nevada Rules of Professional Conduct

- Review the Nevada Rules of Professional Conduct and any relevant case law and ethics opinions.
  - https://www.leg.state.nv.us/courtrules/rpc.html.
- Draft office policy regarding social media.
- Incorporate/update other existing policies.
- *See also* What Employers Should Consider When Drafting a Social Media Policy, available at https://www.forbes.com/sites/alonzomartinez/2020/02/06/what-employers-should-consider-when-drafting-a-social-media-policy/?sh=2192bf8f1d6e and How to Create an Effective Social Media Policy, available at https://www.shrm.org/resourcesandtools/hr-topics/employee-relations/pages/how-to-create-an-effective-social-media-policy.aspx.

NRCP 1.1: Competence

- Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.
- In addition to acquiring this competence, every lawyer must also maintain it.
- ABA Model Rule 1.1 Comment: Requires lawyers to "keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology."
- Includes investigations and case preparation using social media.
- Ignorance or disregard of social media or other modern technologies may create the potential for ethical misconduct, including violating Rule 1.1 regarding competent representation.
  - Failure of a lawyer to look for social media evidence may be malpractice.
  - Include social media in discovery requests.

NRCP 1.3: Diligence

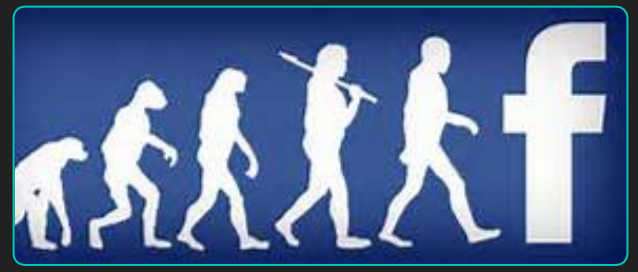
- A lawyer shall act with reasonable diligence and promptness in representing a client.
- May require the actual use of social media to screen a client's social media page or an opposing party's social media account in order to gather the relevant information and take the steps necessary to vindicate a client's cause or endeavor.
- Social media is now a "tool" for lawyers to better represent their clients.
- Provides "rich repositories of potential pre-litigation intelligence and fodder for cross-examination."
- A basic search of social media profiles associated with clients, opponents, and witnesses is now considered to be a minimum level of due diligence expected of a competent litigator.
  - Andy Radhakant & Matthew Diskin, How Social Media Are Transforming Litigation, 39 A.B.A. J. SEC. LITIG. 3 (2013).
  - *Griffin v. Maryland*, 192 Md.App. 518, 535 (2010): The holding in Griffin v. Maryland regarding the "authentication of the social media evidence was overruled on appeal, but the appellate court took no issue with the idea that attorneys have an obligation to review social media evidence as part of their due diligence."

NRCP 1.6: Confidentiality

- A lawyer shall not reveal information relating to representation of a client, unless client gives informed consent or disclosure is impliedly authorized in order to carry out the representation.
- Confidential information is broadly defined in the ABA comment to Rule 1.6:
  - Not just matters communicated in confidence, but also all information relating to the representation, whatever its source.
- Blogs about work (and clients).
- California Bar's Committee on Professional Responsibility and Conduct: Lawyers are never truly "off duty" from their ethical obligations to clients, due to the "fiduciary nature of the legal profession."

NRCP 1.6 = Broad

- Nevada Standing Committee on Ethics and Professional Responsibility, Formal Opinion No. 41 (June 24, 2009), available at https://www.nvbar.org/wp-content/uploads/opinion_41.pdf.
- QUESTION – Confidentiality – What types of information does Rule 1.6 restrict the lawyer from revealing?
  - ANSWER – ALL information relating to the representation of the client.
  - "In view of the unrestricted language of Rule 1.6, all lawyers should pause and think before revealing any information relating to the representation of a client unless the client has given informed consent."



NRCP 1.8: Prospective Clients

- Legal advice via social media:
  - Perception of what constitutes legal advice is very unclear.
  - Creation of attorney-client relationship through social media?
  - Q&A sessions on Twitter or blog post welcoming legal inquiries?
- Without a disclaimer or reasonably understandable warning that would limit the lawyer's obligations, a consultation is likely to have occurred if the lawyer requests or invites the submission of information about a potential representation.
- Appearance of giving legal advice that could be relied upon?
  - New York: Answer general questions, okay, but specific legal advice may create attorney-client relationship.
    - Be clear whether attorney-client relationship has or has not been created.
  - Virginia State Bar:
    - Unsolicited confidential information submitted by person via the Internet, no attorney-client relationship.
    - If website invites the visitor to submit the information by email to the firm for evaluation of his or her claim, a limited attorney-client relationship will have been created.

NRCP 5.2 and 5.3: Supervision

- Duty to ensure that subordinate attorneys and nonlawyer employees conform to the rules of professional conduct.
- May be responsible for other lawyer's violation (or nonlawyer employee) if fail to take remedial action when aware of specific conduct.
- Investigations and deceitful "friending."
  - Inherently misleading to "friend" a litigation opponent represented by counsel, when the true purpose of the communication is to secure evidence for the adversarial proceeding.

NRCP 7.1 and 7.2: Advertising

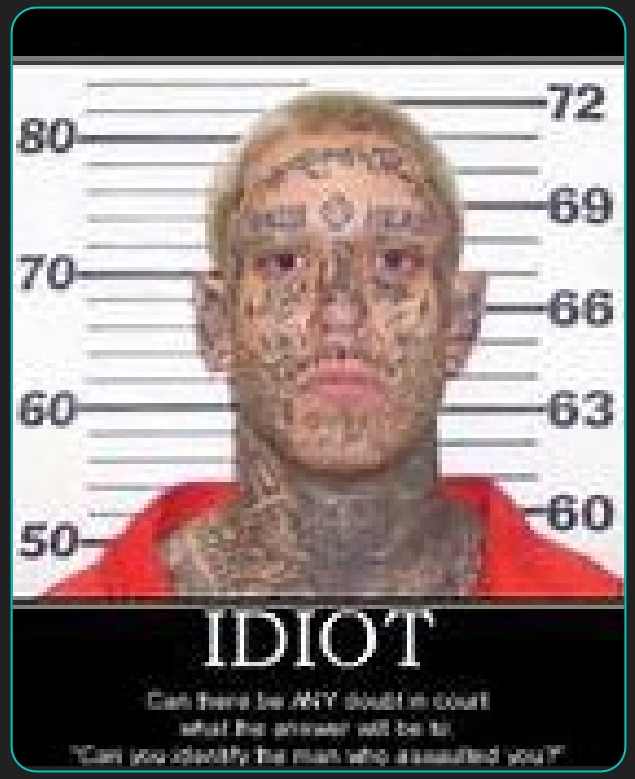
- A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services.
  - Includes testimonials or endorsements.
- What about LinkedIn "skill endorsement"?
  - Random, law-related skills that lawyer may know nothing about.
  - Can be turned off.
- Other social media recommendations, endorsements, reviews, and testimonials. (AVVO, Facebook, Twitter, Google+, Instagram)
- North Carolina State Bar says no display or acceptance of endorsements from judges on social media pages because it may give the appearance of judicial partiality.
- Other states look at truthfulness of statement and whether it is misleading.
- Bottom line: Lawyer must acknowledge his or her responsibility for all of the social media content that is posted and take reasonable measures to ensure that third-party social media posts do not violate ethics rules.
- *See also* Jennifer L. Lewkowski, "Staying Ethical in the Digital Age: A Primer for Taking Advantage of Technology Within Ethical Guidelines", Nevada Lawyer March 2013, available at https://www.nvbar.org/wp-content/uploads/NevLawyer_March_2013_CLE_ARTICLE.pdf.

Ethical Pitfalls of Social Media Use

- Negative impact on outcome of a case.
- Sanctions from the court and/or professional discipline.
- Liability or malpractice for the legal professional.
- Inadvertent establishment of the attorney-client relationship.
- Breach of confidentiality (Rule 1.6) or waiver of attorney-client privilege.
- Violation of advertising or solicitation rules.
- Failure to abide by Rule 4.2 - "no contact" rule.
- Ex parte communications with the bench.
- Violation of Rule 3.6(a) prohibition on extrajudicial statement disseminated by means of public communication with substantial likelihood of materially prejudicing an adjudicative proceeding.
- Under Rule 5.3 your actions can be imputed upon your lawyers/firm.

Confidentiality Breaches

In the Matter of Peshek, No. 6201779 (Ill. 2009)



- Kristine Peshek was a 19-year public defender who wrote an internet blog.
- In posts, Peshek refers to one judge as "Judge Clueless" and another as "a total asshole".
- Peshek posts details of cases.
  - In a case representing a defendant charged with drug possession: "This stupid kid is taking the rap for his drug-dealing dirtbag of an older brother because 'he's no snitch.' "
  - In another post, Peshek writes client "Laura" testified in court that she was drug free and received a light sentence of five days' jail time, and subsequently confided to Peshek that she was using methadone and could not go five days without it. Peshek wrote that her reaction was, "Huh? You want to go back and tell the judge that you lied to him, you lied to the presentence investigator, you lied to me?"
- Peshek is fired, suspended from the practice of law for 60 days, and charged with violating Rule 1.6 [Confidentiality]; Rule 3.3 [failing to disclose a material fact]; and Rule 8.4 [conduct prejudicial to the administration of justice].
- Reciprocal discipline in WI: *In re Disciplinary Proceedings Against Peshek*, 334 Wis.2d 373 (2011).

Anya Cintron Stern

- Stern was a public defender in Miami-Dade County.
- During a trial break, the family of her client brings him fresh clothing including a pair of leopard print briefs.
- Stern takes a picture of the briefs and posts them on her Facebook page with the caption "Proper attire for Trial?"
- Stern posts pictures for Friends only, but a Friend notifies the Judge, who declares a mistrial.
- http://www.miamiherald.com/2012/09/12/2999630/lawyers-facebook-photo-causes.html.

Tip #1

- Attorneys may not contact a represented person through social networking sites.

SDCBA Legal Ethics Opinion 2011-2

- Attorney representing a former employee in a wrongful termination lawsuit identifies two high ranking current employees who he believes are unhappy and would be likely to post derogatory comments about their employer.
- Attorney sends Friend requests to the two employees using his real name.
- Friend request is impermissible communication with represented parties under NRCP 4.2.
- Violation of attorney duty not to deceive by not disclosing that the Friend request was to gather evidence for litigation. NRCP 4.1.
- Full opinion available at https://www.sdcba.org/?pg=LEC2011-2.

SDCBA Legal Ethics Opinion 2011-2 (cont.)

- "We have concluded that those rules bar an attorney from making an ex parte friend request of a represented party. An attorney's ex parte communication to a represented party intended to elicit information about the subject matter of the representation is impermissible no matter what words are used in the communication and no matter how that communication is transmitted to the represented party. We have further concluded that the attorney's duty not to deceive prohibits him from making a friend request even of unrepresented witnesses without disclosing the purpose of the request. Represented parties shouldn't have "friends" like that and no one – represented or not, party or non-party – should be misled into accepting such a friendship."

Tip #2 and #3

- Attorneys may not contact a party or a witness by pretext. This prohibition applies to other parties and witnesses who are either identified as a witness for another party or are witnesses the lawyer is prohibited from contacting under the applicable Rules of Professional Conduct.
- Attorneys may contact unrepresented persons through social networking websites but may not use a pretextual basis for viewing otherwise private information on those websites.

Philadelphia BA Professional Guidance Committee Opinion 2009-2

- Attorney asks a third party whose name a key witness wouldn't recognize to contact the witness through her Facebook and MySpace pages. The third party does not disclose his association with the attorney in his Friend request.
- The Ethics Committee finds that the Attorney's activities violated Rule 4.1 [Truthfulness in Statements to Others] and Rule 8.4(c) [Engaging in Conduct involving Dishonesty] reasoning that the attorney's behavior was deceptive.
- Do not create false personas or have others "friend" an individual for investigative purposes.
- Nevada's NRCP are the same as those cited above.
- Full Opinion.

NYCBA, Committee on Professional Ethics, Opinion 2010-2

- "A lawyer may not attempt to gain access to a social networking website under false pretenses, either directly or through an agent."
- Violates Rules 4.1 and 8.4(c), which prohibit attorneys from making false statements and engaging in dishonest conduct respectively.
- Prohibition extends to lawyer's agents and investigators.
- Full Opinion.
- Again, same NRCP apply in Nevada.

Tip #4 and #5

- Attorneys may advise clients to change the privacy settings on their social media page. In fact, lawyers **should** discuss the various privacy levels of social networking websites with clients, as well as the implications of failing to change these settings.
- Attorneys may instruct clients to make information on social media websites "private," but may not instruct or permit them to delete/destroy relevant photos, links, texts, or other content, so that it no longer exists. This rule is no different from the obligation not to destroy physical evidence, i.e., evidence is evidence, regardless of how it was created.

Preservation of Social Media Evidence

- Address this early on in representation.
- Clients must preserve all relevant information on their social media sites.
- Deleting this information is "spoliation."
- Telling your client to delete social media site information would be a violation of NRCP 3.4 (fairness to opposing party and counsel) and/or 8.4 (misconduct).
- Social media site information is retrievable from the site, even if it is deleted by the client.

Allied Concrete v. Lester, 2011 WL12663430 (Va. Cir. 2011)

- Isaiah Lester sues Allied Concrete Company and company driver Sprouse for negligence and wrongful death stemming from a traffic accident with a concrete truck resulting in the death of Lester's wife.
- Defendants requests production of screen print copies of Lester's Facebook account, including all of his pictures, message board, status updates, and messages sent or received. Defendants attach to the request a photo of Lester, after his wife's death, holding a beer can while wearing a t-shirt with the logo "I ♥ hot moms."

Sanctions in *Lester*

- Lester's counsel directs his paralegal to instruct Lester to "clean it up" [his Facebook account] because "we don't want blowups of this stuff at trial" and the paralegal sends two emails to Lester instructing him accordingly.
- Lester deletes his account, a fact he later denies at his deposition and during trial, and the next day provides his discovery response: "I do not have a Facebook page on the date this is signed, April 15, 2009." Upon advice of counsel Lester then reactivates and "cleans up" his Facebook account for discovery.
- Subsequent discovery through Facebook produces evidence of spoliation.
- Lester awarded $10 million by jury; court sanctions Murray $542,000 and Lester $180,000 post-trial.
- Appeal: *Allied Concrete Co. v. Lester*, 285 Va. 295 (Va. Sup. Ct. 2013).

Tips #6 through #9

- Attorneys must obtain a copy of a photograph, link, or other content posted by clients on their social media pages to comply with request for production or other discovery requests.
- Attorneys must make reasonable efforts to obtain photographs, links, or other content about which they are aware if they know or reasonably believe it has not been produced by their clients.
- Attorneys should advise clients about the content of their social networking sites, including their obligations to preserve information, and the limitations of removing information.
- Attorneys may use information on social networking websites in a dispute or lawsuit. The admissibility of the information is governed by the same standards applied to all other evidence.

Social Media Evidence is Generally Discoverable

- *Romano v. Steelcase, Inc.*, 907 N.Y.S.2d 650 (2010)
  - Plaintiff brought a personal injury case alleging she sustained permanent injuries that prevented her from engaging in various activities.
  - A review of Plaintiff's public Facebook page revealed that she was living an active lifestyle and traveled to Florida and other places during a time period wherein she claimed that her injuries prohibited her travel.

Social Media Evidence

- Defendant sought a court order granting access to Plaintiff's current and deleted Facebook and MySpace accounts.
- Plaintiff opposed, asserting a right to privacy in the non-public pages.

Purpose of Social Media is to Share, i.e., Make Content Public

- "[T]here is a reasonable likelihood that the private portions of her sites may contain further evidence such as information with regard to her activities and enjoyment of life, all of which are material and relevant to the defense of this action."
- "[W]hen plaintiff created her Facebook and MySpace accounts, she consented to the fact that her personal information would be shared with others, notwithstanding her privacy settings. Indeed, that is the very nature and purpose of these social networking sites, else they would cease to exist. Since plaintiff knew that her information may become publicly available, she cannot now claim that she had a reasonable expectation of privacy."

No Expectation of Privacy

- Regardless of privacy settings, Courts have held that there is no reasonable expectation of privacy on social media.
- Further, Courts have held that the personal privacy settings on an individual's social media account have no bearing on the admissibility analysis.
- "If you post a tweet, [it is] just like you scream it out the window, [and] there is no reasonable expectation of privacy."
  - *Fawcett v. Altieri,* 960 N.Y.S.2d 592 (2013).

Social Media Evidence Still Must Be Relevant

- *Richards v. Hertz Corp.*, 953 N.Y.S.2d 654 (2012)
- Plaintiff claimed an auto accident left her with an impaired ability to play sports and caused pain that was worse in cold weather.
- Defendants showed the Court pictures from the public portions of Plaintiff's Facebook page that showed her skiing after her accident.
- Court allowed relevant portions of her Facebook page to be admitted in the case. Her entire Facebook page was not deemed relevant.

Tip #10

- Attorneys may not reveal confidential client information in response to negative online reviews without a client's informed consent. Thus, responses should be proportional and restrained.

In re Skinner, 292 Ga. 640 (2013)

- Attorney Margrett Skinner is discharged by a client.
- Client posts negative reviews on Skinner's abilities on consumer websites.
- Skinner posts on the internet personal and confidential information about the client gained in the course of representation.
- Supreme Court of Georgia finds that Skinner violated Rule 1.6 and imposes a 90-day suspension.

Tip #11

- Attorneys may review a juror's Internet presence.

Use of Social Media in Investigations

- Social media should be used to research the backgrounds of witnesses, jurors, and defendants/respondents, and judges or other decisionmakers.
- This information is helpful to prepare for depositions, hearings, and voir dire.
- HOWEVER: Only the public portions may be reviewed outside of formal discovery requests.

Searching a Juror's Litigation History

- *Johnson v. McCullough,* 306 S.W.3d 551 (Mo. Sup. Ct. 2010).
  - After a verdict was rendered in favor of Defendants in a medical malpractice action, plaintiff's attorney conducted a search of the jurors through Missouri's automated case record service and discovered that a juror had failed to disclose that she was a defendant in a number of cases. Plaintiff moved for a mistrial.
  - Court granted new trial based on juror non-disclosure but noted that "in light of advances in technology allowing greater access to information that can inform a trial court about the past litigation history of venire members, it is appropriate to bring such matters to the court's attention at an earlier stage."

NYCBA, Committee on Professional Ethics Opinion 2012-2

- Attorneys may use social media to research jurors as long as no communication occurs.
- If a juror learns of an attorney's viewing or attempted viewing of their account, that is a prohibited communication.
- Attorneys who unknowingly or inadvertently cause a communication with a juror may violate the Rules of Professional Conduct.
- Full Opinion.

But What if a Juror Uses Social Media?

Wilgus v. F/V Sirius, Inc., 665 F.Supp.2d 23 (D.Me. 2009)

- Four days after the jury returned a defense verdict on plaintiff's claims for personal injury and wrongful death stemming from a sunken vessel, plaintiff's lawyer received an e-mail from one of the jurors.
- Juror had friended plaintiff on Facebook after trial and sent pictures from plaintiff's Facebook account to plaintiff's lawyer that allegedly showed plaintiff's drug use.
- Court found that the juror did not discover information during trial or deliberations in plaintiffs' action, and thus, did not commit juror misconduct requiring new trial.

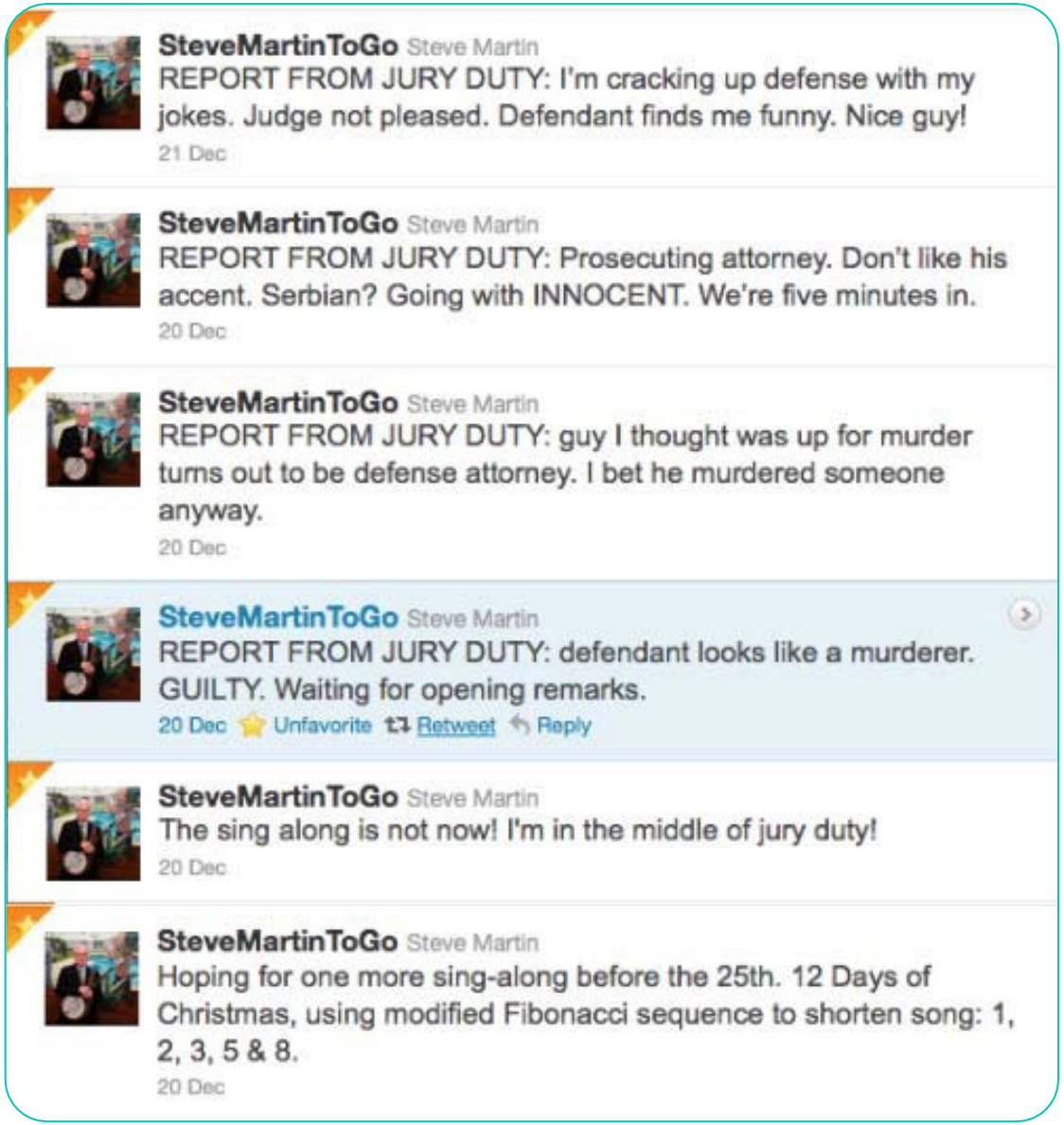
Commonwealth v. Werner, 967 N.E.2d 159 (Mass.App.Ct. 2012)

- After client's conviction for larceny, defense attorney discovered a juror had made Facebook postings during the trial and had friended three fellow jurors. Counsel argued that they may have been exposed to extraneous influences during deliberations.
- The posts said among other things that: –"Superior Court in Brockton picks me ... the case could go at least 1 week. OUCH OUCH OUCH." Juror B's wife replied, "Nothing like sticking it to the jury confidentiality clause on Facebook.... Anyway, just send her to Framingham quickly so you can be home for dinner on time."
- Court held posts were "attitudinal expositions" on jury service, protracted trials, and guilt or innocence that fell far short of the prohibition against extraneous influence; posts contained no identifying information about defendant or the crimes.
- Advises future jury instructions should extend to social media and that instruction about internet use should go beyond prohibitions on research.

Sluss v. Commonwealth, 381 S.W.3d 215 (Ky.Sup.Ct. 2012)

- Court held status of two jurors as "friends" of minor victim's mother on a social-networking website was not, standing alone, a ground for a new murder trial based on juror bias; it was the closeness of the relationship and the information that the jurors knew that framed whether the jurors could reasonably be viewed as biased.
- "It is proper and ethical under Rule 3.5 for a lawyer to undertake a pretrial search of a prospective juror's social networking site, provided that there is no contact or communication with the prospective juror and the lawyer does not seek to friend jurors, subscribe to their Twitter accounts, send jurors tweets or otherwise contact them. During the evidentiary or deliberation phases of a trial, a lawyer may visit the publicly available Twitter, Facebook or other social networking site of a juror but must not "friend" the juror, email, send tweets to the juror or otherwise communicate in any way with the juror or act in any way by which the juror becomes aware of the monitoring. Moreover, the lawyer may not make any representations or engage in deceit, directly or indirectly, in reviewing juror social networking sites."

Juror Tweets (X's??) During Trial



Dimas-Martinez v. State, 385 S.W.3d 238 (Ark.Sup.Ct. 2011)

- An Arkansas juror tweeted during criminal trial, "Choices to be made. Hearts to be broken. We each define the great line." It was brought to the attention of the court after counsel discovered it and realized a reporter was following the juror.
- Trial judge found that the juror disregarding a specific instruction not to tweet was not a material breach of the juror's oath. Juror continued to tweet in a similar manner despite constant reminders not to do so.
- On appeal before the Arkansas Supreme Court, the Court reversed and remanded the conviction as a result of this juror's misconduct and also ordered a committee to examine limiting juror's access to mobile phones during trial.

Possible Jury Instructions re: Social Media

- Florida Supreme Court amended Standard Jury Instructions in civil and criminal cases: "In this age of electronic communication, I want to stress that you must not use electronic devices or computers to talk about this case, including tweeting, texting, blogging, e-mailing, posting information on a website or chat room, or any other means at all. Do not send or accept any messages, including e-mail and text messages, about your jury service. You must not disclose your thoughts about your jury service or ask for advice on how to decide any case."
- New Jersey state courts amended Model Civil Jury Instruction: "You also should not attempt to communicate with others about the case, either personally or through computers, cell phones, text messaging, instant messaging, blogs, Twitter, Facebook, Myspace, personal electronic and media devices or other forms of wireless communication."

Tip #12

- Attorneys may connect with judges on social networking websites provided the purpose is not to influence judges in carrying out their official duties.

Use of Social Media by Judges

- American Bar Association Formal Opinion 462 (February 21, 2013)--Judge's Use of Electronic Social Networking Media:
  - "A judge may participate in electronic social networking, but as with all social relationships and contacts, a judge must comply with relevant provisions of the Code of Judicial Conduct and avoid any conduct that would undermine the judge's independence, integrity, or impartiality, or create an appearance of impropriety."
  - https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/formal_opinion_462.authcheckdam.pdf.
- Florida, Oklahoma, and Massachusetts - a judge may utilize social media in his or her personal and professional life but may not engage in social networking with anyone who may appear before the judge; and may not allow those individuals to identify the judge as a "friend" on their profile page. Florida Judicial Ethics Advisory Committee, Opinion 2012-12 (May 9, 2012); Oklahoma Judicial Ethics Advisory Panel, Opinion 2011–3 (July 6, 2011); Massachusetts Committee on Judicial Ethics, Opinion 2011-6 (December 28, 2011).
- California requires counsel to "unfriend" the judge if appearing in his/her court. California Judges Association, Judicial Ethics Committee Opinion 66 (November 23, 2010).

Judge Criss of Galveston, Texas "Friends" All Attorneys…

- Attorney who appeared before Judge Criss and was her "friend" asks for a continuance due to the death of her father and the need to attend services.
- During her absence Attorney posts a string of status updates on Facebook, detailing her week of drinking, going out and partying.

Be Careful Who You "Friend"

- On her return, Attorney requests another continuance which Judge Criss denies, and Judge Criss presents Attorney with hardcopy from Facebook and reports her to the State Bar for violation of Rule 3.3(a) [Candor Toward the Tribunal].
  - Same rule in Nevada.
- http://www.abajournal.com/news/article/facebooking_judge_catches_lawyers_in_lies_crossing_ethical_lines_abachicago/.

Youkers v. State, 400 S.W.3d (Tex. Ct. App. 2013)

- Communication with and designation of trial judge as a "friend" by assault victim's father on social media website was insufficient to show actual or apparent bias, as required for recusal of judge who ruled on defendant's motion for new trial.
- Judge testified at the motion regarding his limited relationship with father, and stated that he ceased reading father's message once he realized it was an ex parte communication, placed a copy of the communications in court's file, disclosed incident to the lawyers, and contacted judicial conduct commission to determine if further steps were required.

Personal Use of Social Media by Attorneys

Florida Bar v. Sean William Conway, 2008 WL 4748577 (Fl.Sup.Ct. 2008)

- Broward County criminal defense lawyers create a blog.
- Defense attorney Conway is frustrated with Judge Cheryl Aleman and created a post titled "Judge Aleman's New (illegal) One Week to Prepare Policy"
- Refers to her throughout the posting as "EVIL UNFAIR WITCH."

Florida Bar v. Sean William Conway, 2008 WL 4748577 (Fl.Sup.Ct. 2008) (Cont.)

- States:
  - she was "seemingly mentally ill"
  - had an "ugly condescending attitude"
  - "is clearly unfit for her position" and
  - "there's nothing honorable about that malcontent"
- Violations:
  - Behavior contrary to honesty and justice
  - Statements regarding qualifications of Judge
  - Conduct that is prejudicial to the administration of justice
- Public Reprimand and Costs of $1,200.

Sarah Peterson

- Peterson was a Research Attorney for a Kansas Court of Appeals Judge.
- Former Kansas Attorney General Phill Kline was appearing before the Kansas Supreme Court, where he was facing ethics charges.
- Peterson is fired for her live tweets during the hearing.
- https://www.cjonline.com/story/news/politics/state/2013/12/20/disciplinary-panel-fired-research-attorneys-tweets-constitute-violation/16685601007/.

Sarah Peterson (cont.)

KANSAS CITY, Kan. — A research attorney for a Kansas Appellate Court judge is in some hot water following a tweet she posted on Twitter during an ethics case before the state

State v. Usee, 800 N.W.2d 192 (Minn. App. 2011)

- On appeal from a conviction on attempted first degree murder, defendant argued that the district court erred by denying his request for a hearing after he presented evidence that prosecutor had posted comments on her public Facebook page discussing one of the jurors and making other general statements before the case was submitted to the jury.
- Court ruled that defendant did not present evidence that any juror had been exposed to the Facebook comments, and absent evidence of juror exposure, did not establish a prima facie case of prosecutor misconduct.

Helpful Resources

- https://www.americanbar.org/groups/business_law/resources/business-law-today/2017-february/ethics-corner/
- https://www.nvbar.org/wp-content/uploads/social-media-and-the-attorney-client-priviledge-warning-nv.pdf
- Legal Ethics and Social Media, A Practitioner's Handbook, by Jan L. Jacobowitz and John G. Browning, available for purchase at https://www.americanbar.org/products/inv/book/425707691/.
- The Minefield of Social Media and Legal Ethics: How to Provide Competent Representation and Avoid the Pitfalls of Modern Technology, American Bar Association, Section of Labor and Employment Law, March 24, 2017, available at: https://docplayer.net/58091409-The-minefield-of-social-media-and-legal-ethics-how-to-provide-competent-representation-and-avoid-the-pitfalls-of-modern-technology.html.
- Ethics Opinion 371, DC Bar, November 2016, available at https://www.dcbar.org/for-lawyers/legal-ethics/ethics-opinions-210-present/ethics-opinion-371.
- New York State Bar Association Social Media and Ethics Guidelines of the Commercial and Federal Litigation Section, available at http://www.nysba.org/2019guidelines/.
- Social Media: Ethical Obligations for Lawyers in the Modern Era II, available at https://technology.findlaw.com/modern-law-practice/social-media-ethical-obligations-for-lawyers-in-the-modern-era.html.
- Social Media Follies: Watch Your Step, by Karen Rubin, June 28, 2018, available at https://www.thelawforlawyerstoday.com/2018/06/3945/.
- 4 Tips for Attorneys Navigating the Social Media Ethics Minefield, August 8, 2018, https://www.natlawreview.com/article/4-tips-attorneys-navigating-social-media-ethics-minefield.
- Ethics, Social Media, and Lawyers: 8 Tips to Stay in Line with the ABA, https://webpresenceesq.com/ethics/ethics-social-media-and-lawyers-8-tips-to-stay-in-line-with-the-aba/.

Stress and Lawyering

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Agenda

- Stress and the Legal Profession.
- Stress 101.
- Ethical/civility considerations and examples.
- Stress Management for Lawyer.

Hazelden Betty Ford Study/CoLAP (2016)

- <u>13,000 practicing lawyers:</u>
  - 21%-36% qualify as problem drinkers.
  - 28% experiencing symptoms of depression.
  - 19% struggling with symptoms of anxiety.
- <u>And the study identified the following other problems:</u>
  - Suicide
  - Social alienation
  - Work addiction
  - Sleep deprivation
  - Incivility
  - Work-life balance
  - Excessive alcohol consumption

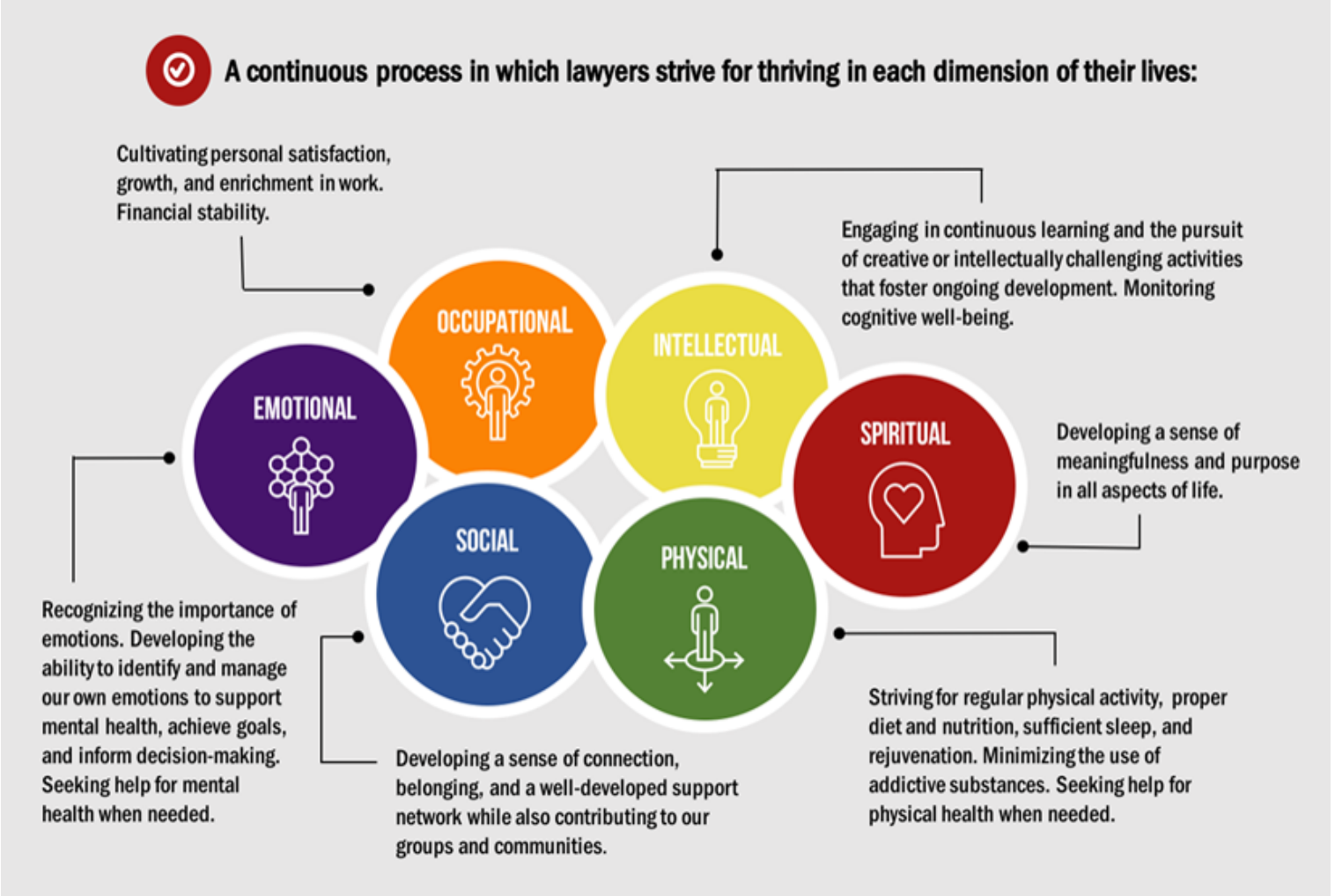
How Lawyer Well-being Became a Thing:

- August 2017.
- Three reasons to take action:
  - Organizational success.
  - Ethics and professionalism.
  - “The right thing to do.”
- Call to action:
  - Identifying role each stakeholder can play in reducing toxicity in the profession.
  - Ending stigma surrounding help-seeking.
  - Emphasizing well-being as an indispensable part of the duty of competence.
  - Expanding educational outreach and programming for well-being issues.
  - Changing the tone of the profession one small step at a time.

ABA National Task Force on Lawyer Well-Being

- ABA National Task Force on Lawyer Well-Being. The Path to Lawyer Well-Being: Practical Recommendations for Positive Change (Aug. 14, 2014), *available at* http://lawyerwellbeing.net/wp-content/uploads/2017/11/Lawyer-Wellbeing-Report.pdf.

“Well-Being”


A continuous process in which lawyers strive for thriving in each dimension of their lives:
Cultivating personal satisfaction, growth, and enrichment in work. Financial stability.
OCCUPATIONAL
Engaging in continuous learning and the pursuit of creative or intellectually challenging activities that foster ongoing development. Monitoring cognitive well-being.
INTELLECTUAL
EMOTIONAL
SPIRITUAL
Developing a sense of meaningfulness and purpose in all aspects of life.
SOCIAL
PHYSICAL
Recognizing the importance of emotions. Developing the ability to identify and manage our own emotions to support mental health, achieve goals, and inform decision-making. Seeking help for mental health when needed.
Developing a sense of connection, belonging, and a well-developed support network while also contributing to our groups and communities.
Striving for regular physical activity, proper diet and nutrition, sufficient sleep, and rejuvenation. Minimizing the use of addictive substances. Seeking help for physical health when needed.

The state of lawyer well-being was bad.
The pandemic made things worse!

Post-Pandemic Statistics

- <u>3400 lawyers working in firms reported:</u>
  - 35% stated they feel depressed.
  - 67% reported anxiety.
  - ¾ reported the legal profession has a negative impact on their mental health.
  - 64% reported that their personal relationships have suffered as a result of work.
  - 19% answered “yes” to the question: “in your professional career, have you contemplated suicide?”

- <u>Gender Gap:</u> “*Stress, Drink, Leave.*”
  - 55.9% of women engaged in risky drinking
  - 46% of women reported feeling stress all the time.
  - 24% of women considering leaving the profession due to mental health, burnout or stress.

Sources of Lawyer Stress

- Always on call/can’t disconnect.- 72%
- Billable hour pressures.- 59%
- Client demands.-57%
- Lack of sleep.- 55%

Also:

- Excessive competition.
- Workloads.
- Job security.
- A culture that rewards immediate accessibility.
- Incivility

Causes of Incivility

- Lack of wellness!
  - Stress/hard work as a badge of honor.
  - Substance abuse and mental health issues.
  - Performance pressure.
    - Increased competition for clients due to growth of the bar.
    - Adversarial nature of the legal system
    - Civility as a sign of weakness
    - Client demands for “Bulldogs”, “Rambo Litigators” and “Scorching the Earth”.
- Unhealthy people are often unpleasant people.

Isolation

- *Our epidemic of Loneliness and Isolation 2023:* The U.S. Surgeon General's Advisory on the Healing Effects of Social Connection and Community.
- Findings:
  - Social connection matters.
  - Lack of social connection poses a significant risk for individual health and longevity.
  - Isolation can increase the risk of premature death as much as smoking 15 cigarettes a day.
- Suicide rates up 30% since 2000 (CDC)
- Social pain leads to sadness, loneliness, and bitterness.
- Judiciary, solo practitioners and retired lawyers.

Hinderances to seeking and getting help:

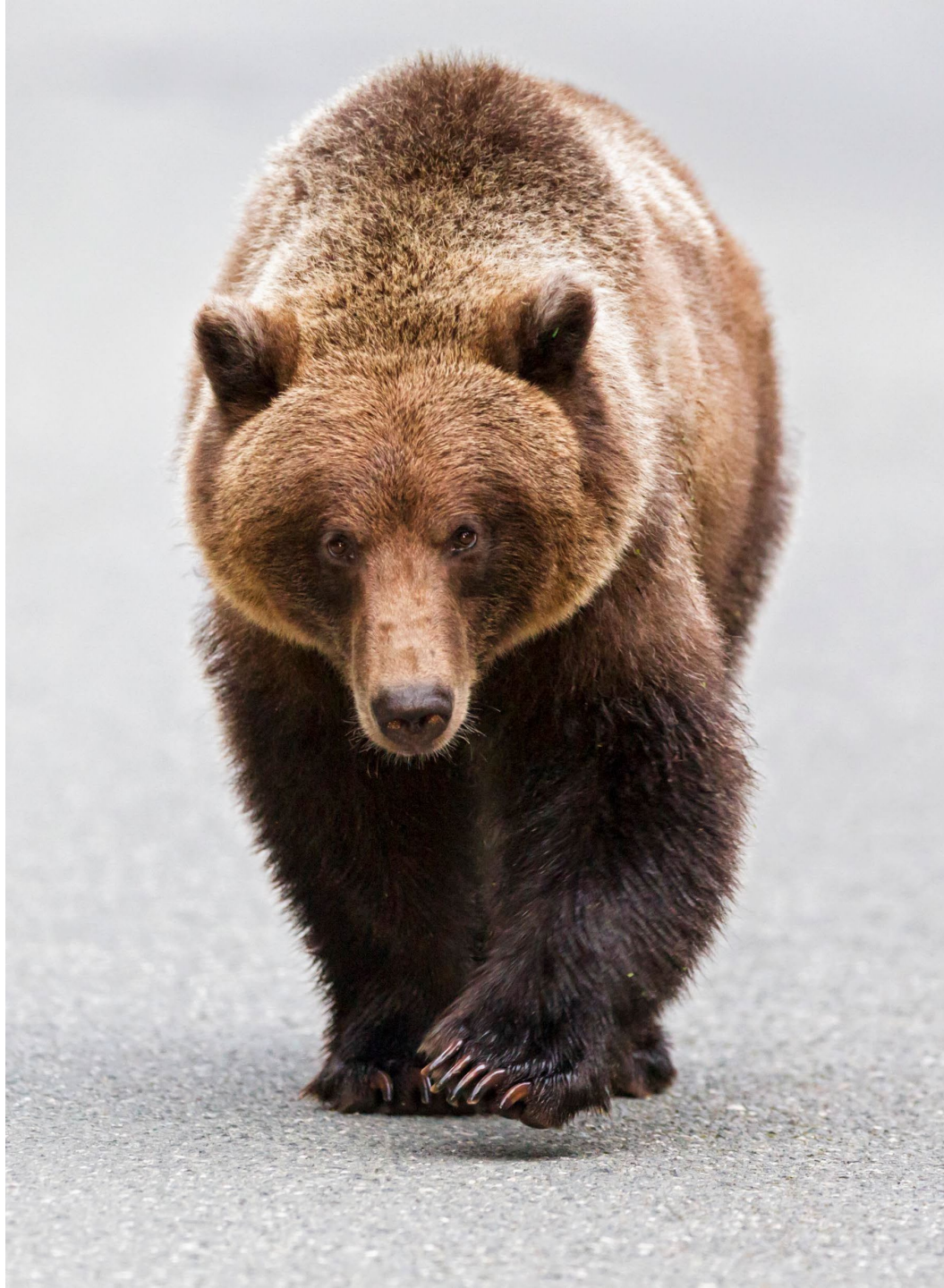
- Failure to recognize symptoms.
- Not knowing how to obtain appropriate treatment.
- Fear of adverse reactions by others whose opinion is important.
- Feeling ashamed.
- Preference for self-reliance or having a tendency toward perfectionism.
- Fear of career repercussions.
- Concerns about confidentiality.
- Lack of time.
- Expense.
- Threats to bar admission, employment and academic status.

Stress 101

- Stressors: “Stress is all around us.”
- We experience stress all the time in all areas of life.
- Our bodies are designed to handle stress.
- Depending on how we view and manage our stress, stress can make us stronger and more resilient, or it can wear us down and defeat us.
- We must adequately prepare for and recover from stress in order to stay physically, emotionally and mentally healthy.

The Stress Response:

- A stressor is anything that disrupts our homeostasis.
- A stressor involves a physiological response.
  - We begin in a state of homeostasis.
  - We encounter a stressor that disrupts homeostasis.
  - We enter the “alarm” phase as we respond to the stressor
    - Physical reactions.
    - Cortisol.
  - We recover and rebuild.
  - We return to homeostasis with a new baseline stronger than we were before.



Stress is a full body experience.

- Autonomic nervous system takes over- fight or flight.
- Immune system will immediately look for pathogens to attack.
- Endocrine system will flood the body with stress hormones.
- Cardiovascular system will start pumping blood faster.
- Digestive system and fluid electrolyte regulations slows down.
- Other energy costly processes are downregulated.
- Over time muscular systems and connective tissues will slow down production of collagen and calcium.

Bad Stress - Distress

- Lasts a long time.
- Is chronic and ongoing.
- Is negative, depressing and demoralizing.
- De-motivates and paralyzes us.
- Breaks us down.

Example: A boss you hate.

Good Stress - Eustress

- Short-lived, infrequent and ends quickly.
- Part of an overall positive life experience.
- Inspires us to action.
- Is related to skills we have or a challenge we enjoy.
- Helps build us up.

Example: PUPPIES!

Chronic Stress

- Repeated exposure to stressors without adequate time to recover.
- When we do not have time to recover, we get stuck in the “alarm” phase without returning to homeostasis.
- Overtime:
  - Hormonal disruptions.
  - Slower metabolism.
  - Fatigue.
  - Sleep disruption.
  - Autoimmune diseases.
  - PTSD.

How stress shapes our behaviors

- Adaptive:
  - Ideally, we respond to stress with adaptive behaviors.
  - Behaviors that are helpful and productive.
  - We respond with actions.

- Maladaptive:
  - Misfit between the situation and what a healthy response would be.
  - Behaviors that are unhelpful and unproductive.
  - Respond with harmful actions or no actions at all.

Maladaptive Mobilization v. Immobilization

- Maladaptive Mobilization:
  - “Shoot first, ask questions later.”
  - Constant busyness.
  - Impulsive and compulsive decisions.
  - Do things that make us feel better now, but worse in the long run.
    - Drinking, Eating, Shopping, Gambling.
- Maladaptive Immobilization:
  - Feeling incapacitated or overwhelmed.
  - Feeling stuck.
  - Isolation.

Ethics- Duty of Competence

- Model Rule of Professional Conduct 1.1:
  - "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."
- Proposed New Comment 9:
  - "[9] Lawyers should be aware that their mental, emotional, and physical well-being may impact their ability to represent clients and, as such, is an important aspect of maintaining competence to practice law."
  - "Resources supporting lawyer well-being are available at: _____ (insert contact for resources here). "
  - "Other Rules that may be relevant include: 1.16 (a)(2): Declining or Terminating Representation; 5.1: Responsibilities of Partners, Managers, and Supervisory Lawyers; 5.2: Responsibilities of Subordinate Lawyers;5.3: Responsibilities Regarding Nonlawyer Assistants; 8.3: Reporting Professional Misconduct."

Larry Lawyer

- Anxiety to the point that Larry Lawyer could not read his emails. He missed:
  - Motion for summary judgment;
  - Order granting summary judgment against his client; and
  - Motion for attorney's fees and order granting same.
- Larry Lawyer is sleep-deprived and falls asleep in his client's criminal trial.
  - *United States v. Ragin,* 820 F.3d 609 (2017).
- Larry Lawyer is depressed, takes a leave of absence leaving his office to his trusted assistant who misappropriates funds from client trust accounts and disappears.

Cindy Civility

- Cindy Civility is called “a slimy son-of-a-bitch” repeatedly by a witness in deposition without any intervention by opposing counsel.
    - Cindy goes home drinks a bottle of wine which causes disruption to her sleep.
    - Despite her disruption in sleep, she gets up at 5 am, does a grueling CrossFit workout flooding her already overstressed body with cortisol.
    - She drinks three cups of coffee sits down to read her email.
- Cindy Civility responds to an email from a different opposing counsel in different case, “You are inept…I beg you to start zealously representing your client with competence and stop wasting her money and my time.”
- *Carroll v. Jaques Admiralty Law Firm, P.C.,* 110 F.3d 290 (1997); *Barrett v. Virginia State Bar,* 611 S.E.2d 375 (2005).

Things we can do to help ourselves

- Exercise/Intentional Movement
- Sleep
- Nutrition
- Connection
- Stress Mindset

Exercise/Intentional Movement

- Stand up! (Sitting is the new smoking!)
- Join a group exercise class.
  - Instruction
  - Connection
  - Accountability
  - Easy scheduling
- Make an appointment with yourself.
  - Put it on your calendar.
  - The earlier in the day the better.
  - Choose something near the office or home.
- Find your fun!
  - Jui jitsu?
  - Olympic weightlifting?
  - Salsa dancing?
  - Krav Maga?
  - Try something new, or return to an old love.

Nutrition for Stress

- Emphasize whole foods.
- Get enough quality protein.
- Incorporate lots of vegetables.
- Prioritize high nutrient density.
- Minimize highly processed foods.
- Avoid alcohol and sugar.
- Be careful with caffeine!
- Hydrate!

“It’s me and my 4 hours of sleep against the world!”

- 7-9 hours of sleep each night (there is no sleep bank).
- Moderate sleep-deprivation produces the same effects as alcohol intoxication on cognitive and motor functions.
  - Inability to retain information.
  - Impaired focus.
  - Inability to multitask.
  - Impaired productivity.
- Sleep tips:
  - Establish a sleep routine.
  - No electronics!
  - Wind down your household too.
  - Avoid alcohol, caffeine, and sugar.

Tips to Combat Isolation:

- Hold on to old and childhood friendships.
- Maintain a close support circle of friends and relatives.
- Take initiative to engage in activities outside of the legal system.
- Learn the basics of stress management techniques.
- Serve as a mentor to new lawyers.
- Also:
  - Pets!
  - Book clubs!
  - Hobbies!
  - Fantasy football!

Stress Mindset and Resiliency

- *Stress Mindset*: a set of beliefs about the consequences of experiencing stress.
- Stress as an asset:
  - Respond in ways that improve our performance and encourage adaptability and resourcefulness.
  - We notice evidence of our resilience.
  - We build deep health and fitness to continue handling stress.
  - When confronted with new stress we believe we are capable of rising to the challenge.

Resilience

- *Resilience*: The ability to successfully tolerate and recover from stress and traumatic events.
- Resilience is the flip side of stress.
- Resilience is:
  - Ability to rebound from setbacks.
  - Ability to persist and endure setbacks.
  - Ability to learn from setbacks.
- When we practice our stress mindset it helps us be more resilient and open to change.

3 Key Facts about Stress and Recovery

- We all experience stress.
- We all have the capacity to recover from stress.
- If we recover well, we can thrive personally and professionally.

1% per day!

“Collectively, small steps can lead to transformative culture change in a profession that has always been, and will remain, demanding.”

(The Path to Lawyer Well-Being, page 11)

Applause

2023
Eminent Domain and Takings Update

By: Steven M. Silva

NOSSAMAN LLP

Overview

- **Background**
- **Case Law**
  - United States Supreme Court
  - Circuit Courts
  - Nevada Courts
- **Local Issues and Trends**

The Power of Eminent Domain

- People have rights
- Government has power

The Power of Eminent Domain

- Eminent domain is described as an inherent aspect of sovereignty
- It is the power of a sovereign to supersede rights in land within the domain of the sovereign.
  - If the king needs your farm for a defensive fort—the king gets a defensive fort.
- Power of kings is recognized throughout history.
  - Eminent domain is even in the Bible
    - Threshing floor Araunah vs. Vineyard of Naboth.
- Check on power in Anglo-American tradition comes from Magna Carta.
- Described by Hugo Grotius in De Jure Belli et Pacis.

Now that we're done with kings, let's talk power

- Generally thought of as a "government" power.
- Not limited to government entities.
- Key question is on ultimate nature of "use".
  - Private entities can exercise eminent domain for public use (when authorized by the relevant sovereign).

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)

  - #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.

Direct Condemnation

- In a direct condemnation case, the condemning entity initiates a law suit to acquire property.
  - Generally requires planning.
  - If done by a government entity, generally required elected/board level approval.
  - Different rules apply to utilities
  - Procedure generally laid out in NRS Chapter 37
  - See also NRS Chapter 340

Inverse Condemnation

- When property is *de facto* taken by an entity with the power of eminent domain, and that entity has not instituted eminent domain proceedings, we call this “inverse condemnation”.
- State Highway Dep’t is paving a new freeway, but misses the property line by 25 feet.
- County Water Authority releases water from a near-capacity reservoir, and floods a house.
- City approves up-hill development and approves a drainage plan…which floods a down-hill house.

Regulatory Taking

- Government action can be a “taking” even if there is no actual physical invasion of property.
- Law prohibiting any economic use.
- Law prohibiting development in order to facilitate some public use.
- Law authorizing intrusion into land, even if no intrusion actually occurs.

- These are called regulatory takings because it is the regulation itself that “goes too far” and becomes a taking.

Unconstitutional Conditions

- Development of land is subject to regulation by government.
- The government may condition approvals to develop on the developer doing some thing (such as building a road) or giving some thing (such as money).

- Depending on how the situation unfolds, an excessive condition might not be a “taking” because the developer might get their development off the ground—and have thus not had anything taken.
- But it still “offends” the takings clause and is its own claim.

Precondemnation Damages

- Where the government announces its intent do condemn property but then:
    - Waits too long
    - Causes economic damage to the property
    - Behaves abusively
- Claim for damages.

- Nevada jurisprudence on this is very murky.
    - Takings-only constitution

CASE LAW

Cedar Point Nursery v. Hassid, 594 U.S. ___ (2021)

The Big One.

Background:

- A statute granted union representatives access to private agricultural property up to three hours a day, 120 days a year to recruit new union members.
- At Cedar Point Nursery, union representatives entered the facility and used bullhorns to inform the workers that they should join the union, thereby disturbing the facility's operations. Notably, the union representatives did not provide the proper notice required under the statute.
- At the Fowler Packing Company, union organizers also attempted to gain access, but were unsuccessful.

Issue:

- Did the union access regulation constitute a per se physical taking of private property?

- Does an uncompensated appropriation of an easement that is limited in time (3 hours a day, 120 days a year) effect a per se taking?

District Court and 9th Circuit:

- District Court dismissed, on the grounds that this was not a per se taking, but rather should be analyzed as a regulatory taking and judged the Penn Central test.

- 9th Circuit affirmed the dismissal.

U.S. Supreme Court:

Holding:

- The union access regulation appropriated a right to invade the growers' property and therefore the statute itself constituted a per se taking.
- Government action that physically appropriates property is no less a physical taking because it arises from regulation.
- The issue of duration only bears on the amount of compensation, not on whether or not there has been an invasion.

Cedar Point Nursery – Right to Exclude

- Increased focus on the right to exclude others from land.
  - Hence, “Invasion.”
  - Where property is subject to any invasion, Court seems inclined to find a taking.

Cedar Point Nursery: Take-Aways

- This expansive view of what constitutes a per se taking is a massive victory for property owners.

- It also calls into question the government's ability to regulate private property.
  - When a regulation allows entry into land – but ties that land to a particular use, what result?

  - *Sisolak v. McCarran*: Nevada case from 2010 finding regulation permitting overflights within 500 feet to be a taking.

PennEast Pipeline Company, LLC v. New Jersey, 549 U.S. ___ (2021)

Background:

- Gas companies building interstate pipelines require a certificate of public convenience and necessity from the Federal Energy Regulatory Commission to use eminent domain.
- PennEast Pipeline Co. was granted a certificate and sought to acquire land that was owned, in part, by the State of New Jersey.
- New Jersey sought to dismiss the complaint on the grounds of sovereign immunity – meaning property could not be condemned from non-consenting states.

Issue:

- Can a private party exercise the federal eminent domain power to seize land that belongs to a state without violating the Eleventh Amendment?

- Can New Jersey assert sovereign immunity to the condemnation suit?

3rd Circuit:

- The 3rd Circuit determined that certificate holders could not condemn property from non-consenting states.

- Reasoning: While the federal government can delegate its eminent domain power to private parties, the 3rd Circuit did not believe the federal government could also delegate its exemption for state sovereign immunity. Meaning, states did not automatically give consent to be sued.

U.S. Supreme Court:

Holding:

- State sovereign immunity cannot bar a condemnation suit when the condemning entity has been granted the federal eminent domain power via a certificate of public convenience and necessity.

- States consented to the federal eminent domain power upon their ratification of the Constitution and thus waived their sovereign immunity protection.

PennEast Pipeline: Take-Aways

- This case discussed in detail the source and scope of the federal eminent domain power, including its history, its ability to be delegated, and its superior position to state eminent domain power.

- This case also establishes precedential value for other pipeline projects that will need to exercise the federal eminent domain power to build interstate pipelines.

Pakdel v. City and County of San Francisco, California

141 S.Ct. 2226 (June 28, 2021)

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.

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.

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.

Tyler v. Hennepin County
598 U.S. ___ (2023)

Background:

- Minnesota, like most states, imposes property tax. If a landowner fails to pay property tax for long enough, then—like most states—Minnesota will eventually foreclose on the property, and usually sell it to a new purchaser who takes clean title.

- Unlike most states, however, Minnesota would retain the entire amount realized from the foreclosure sale. Most states only retain the amount of the tax lien, plus penalties and interest.

Background:

- Under Minnesota statutory law, if a person fails to pay their taxes (and any associated penalties and interest) the county can obtain a judgment against the property that transfers limited title to the state. The landowner remains the beneficial owner of the property, and has three years to “redeem” their whole title by paying the balance owed.
- However, if the landowner does not timely redeem title in Minnesota, the whole title is “vested” in the state, and the tax debt is extinguished. Once the State owns the property, it may keep the property for a public use.

Background:

- Or, it may choose to sell the property. Importantly, in Minnesota, if the property sells for more than the amount owed, the excess is not returned but is instead split between the county and the local school district.
- Geraldine Tyler owed a total of $15,000 in back taxes, penalties, and interest, on a condominium she no longer lived in, but continued to own. She did not pay and redeem within the statutory three year period, and Hennepin County, MN, eventually sold the condo for $40,000—a surplus of $25,000—and retained the excess proceeds. Ms. Tyler sued, arguing that Minnesota's system resulted in a taking of her home equity.

Issue:

- Whether the plaintiff had sufficiently plead a claim for inverse condemnation based on the alleged taking of a property interest in the excess property funds.

District Court and 8th Circuit:

- The Federal District Court dismissed her complaint for failure to state a claim, and the Eighth Circuit affirmed.

U.S. Supreme Court:

- Holding: because the surplus funds from a property sale belongs to the taxpayer/landowner, the Takings Clause of the 5th Amendment does not allow the state to appropriate more than it is owed.

U.S. Supreme Court:

- The Supreme Court began by explaining that state law may allow government to impose property taxes; that interest and late fees may be imposed; and that property may be seized and sold to satisfy the amount owed.

- This is all favorable to the government.

U.S. Supreme Court:

- But, the Supreme Court explained that while state law is a primary source of determining what property rights exist, state law is not the absolute answer. Instead, the Supreme Court looks to state law, but also traditional property law principles, historical practices, and the Supreme Court's own precedents. By broadening the scope of the inquiry, the Supreme Court has taken a more protective stance on property rights. The Supreme Court explained that this approach would prevent states from avoiding the Takings Clause by legislating away traditional property rights.

U.S. Supreme Court:

- Tracing the history of tax forfeitures to the Magna Carta of King John, through the treatment of tax sales in early American history, and through post-Civil War Supreme Court jurisprudence, the Supreme Court concluded that while the government may seize and sell a property to satisfy a debt to the public, any excess proceeds belong to the now dispossessed landowner, subject to claims by lienholders.

U.S. Supreme Court:

- In the Court's words, paraphrasing a Biblical passage, "The taxpayer must render unto Caesar what is Caesar's, but no more." In essence, a government may satisfy the debt in money or property, but may not retain the surplus. Because the surplus belongs to the taxpayer/landowner, the Supreme Court concluded that Ms. Tyler had a plausible claim that Hennepin County took her property interest in the excess funds, and the Supreme Court reversed the judgment of the Eighth Circuit.

U.S. Supreme Court:

- State law remains primary source of determining what even is property.
- Thus, state law remains primary for determining what is compensable under the law.
- But, state law is not the final answer. Court will protect traditional property rights.
    - Some tension with Murr.

CIRCUIT COURT CASES

RLR Invs., LLC v. City of Pigeon Forge, 2021 U.S. App. LEXIS 20681 (2021 WL 2932686) (6th Cir.)

- The City decided to construct a riverside pedestrian walkway and initiated condemnation proceedings. The City applied for an order of possession, which was granted.
- The property owner filed a complaint in federal court and alleged that the Tennessee state court opinion was unconstitutional and asked for the federal court to enjoin the state court's order. The Federal District court determined there was no subject-matter jurisdiction under the *Rooker-Feldman* doctrine.

Issue:

- Does the Rooker-Feldman doctrine bar federal actions commenced after the grant of interlocutory relief in a state court proceeding?
  - Rooker-Feldman: Federal courts (outside of U.S. Supreme Court) cannot become courts of appeal for state court decisions.
  - A state court appellant has to find a state court remedy, or obtain relief from the U.S. Supreme Court.

6th Circuit:

Holding

- Rooker-Feldman prohibits the federal court from hearing a suit based on an interlocutory order, not just final orders.
- Rooker-Feldman applies to cases brought by “state-court losers” complaining of injuries caused by a state-court judgment rendered before the federal district court proceedings commenced.

Ballinger v. City of Oakland, 2022 U.S. App. LEXIS 2862 (9th Cir.)

- Property owners rented out home. Later, they planned to move back in and "evicted" the tenants. The City of Oakland municipal code required landlords to pay the tenant a relocation fee when the tenant is evicted under certain circumstances.
- Property owners argued this was a physical taking of their money for a private purpose and without just compensation. Alternatively, they argued that it was an unconstitutional exaction.
- The district court dismissed the case for failure to state a claim on the grounds that the relocation fee is a requirement sourced in the City's legislation and that is was not the result of a property-specific administrative determination or quasi-judicial adjudication.

Issue:

- Was the relocation payment an unconstitutional taking or an unconstitutional exaction?

9th Circuit:

Holding:

- This was not a physical taking of the money or an exaction.
  - The City has the power to regulate the actions of a landlord, and this was just another action, particularly as the property owners chose to enter the rental market willingly. Ninth Circuit held that money can be the subject of a taking. However, that money must be identified as a specific fund of money.
  - The Court determined this was not an unconstitutional exaction as the monetary relocation fee was triggered by the property owners' actions, not a burden on the interest in the property. It does not matter who imposes the exaction (administrative v. legislative), but what the exaction does.

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.

Barber v. Charter Twp. Of Springfield, 2022 U.S. App. LEXIS 9622 (6th Cir.)

- Plaintiff sought a preliminary injunction to prevent the town, county, and parks and rec department from removing a dam near her property.
- She alleged the removal of the dam amounted to an unconstitutional taking and a trespass.
- Defendants filed a motion on the pleadings, alleging her claims were not ripe and she lacked standing, which was granted.

Issue:

- Whether the court had the power to hear her claims (not whether the claims would succeed).

NEVADA

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.

Iliescu v. RTC of Washoe, 138 Nev. Adv. Op. 172 (2022)

- Not an eminent domain case, but dispute started out as one

- After acquisition of certain rights in a condemnation proceeding, landowner sued RTC asserting numerous causes of action.
- Bulk were dismissed or disposed of on summary judgment.
- Largely affirmed
  - However trespass cause of action was returned to district court for proceeding.

Mack v. Williams – Not an eminent domain case

- And our decisions have, in other contexts, recognized a cause of action under the Nevada Constitution, *see, e.g., Fritz v. Washoe County*, 132 Nev. 580, 583-84, 376 P.3d 794, 796 (2016) (permitting an aggrieved party to file a claim for inverse condemnation against state actors to recover "just compensation" after "a governmental entity takes property without [such] compensation, or [without] initiating an eminent domain action"), despite that it does not expressly provide one, see Nev. Const. art. 1, § 8, cl. 3 (guaranteeing "just compensation" for "[p]rivate property ... taken for public use"). Accordingly, we do not interpret the absence of language in the Nevada Constitution regarding a private damages action to enforce Article 1, Section 18 as a limitation on the judiciary's inherent powers to recognize such an action. See Nev. Const. art. 6, § 1 (vesting the "[j]udicial power of this State ... in a court system, comprising a Supreme Court, a court of appeals, district courts and justices of the peace"); see also *Marbury*, 5 U.S. (1 Cranch) at 177 ("It is emphatically the province and duty of the judicial department to say what the law is."). Ultimately; then, although the Nevada Constitution does not address enforcement of individual rights, it also does not foreclose an implied right of action for money damages based on violations of those rights. Confronted with no affirmative indication of intent, we accordingly move to step two of our newly adopted framework.

TRENDS ON HORIZON

Increased focus on what is a “taking”

- Supreme Court appears to be willing to revisit precedent.
- Supreme Court appears willing to create a federal common law of property rights.
- Recent cases focusing on physical damage vs. appropriation of property right.

Increased focus on common law privileges

- Hurricane Harvey cases
  - Upstream vs. Downstream
- Common enemy defense
- Police Power
  - SWAT cases
- Litigation over response to “emergency”
  - Fire; Flood; Pestilence
  - Nevada Constitution may have unique issues in that regard.

NOTABLE NEVADA DEVELOPMENTS

Badlands

- It’s bad.

Badlands

- Submitted for decision and assigned to the en banc Nevada Supreme Court
- Oral argument seems likely
- Docket No. 84345/84640
  - Related dockets 77771, 78792, 84221, 84640

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?

QUESTIONS?

Thank you!

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This presentation and opinions expressed herein are solely mine, and cannot be attributed to my firm, any client, or other colleague.

….unless I'm right. Then probably people wouldn't mind.

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THE NEVADA PUBLIC RECORDS ACT

CODIFIED AT NRS § 239 *ET SEQ.*

BY: JACKIE NICHOLS ESQ.

NPRA PRESENTATION

- Brief Overview of the NPRA
- Obligations in Responding to Public Record Requests
- Litigation in NPRA Actions
- Recent Supreme Court Cases
- Outstanding issues

BRIEF OVERVIEW

- Purpose and policy is transparency – NRS 239.001
  - Liberal Construction
  - Exemption/Exceptions must be construed narrowly
- No definition of "Public Record"
  - Should pertain to a "provision of public service"
- Presumed to Be a Public Record
  - Statutory Exemptions
  - "Unless otherwise declared by law"
  - Balancing tests
- Requests may be oral or written
  - Inspect or request copies
- Response required within 5 **business** days
- Penalties → willfully failing to comply

RESPONDING TO PUBLIC RECORD REQUESTS

- Request for a Public Record
  - Oral Request/*Unapproved* Written Request
    - Confirm in Writing
  - Does a record exist
    - No duty to create a record
    - Nothing in NPRA creates an ongoing obligation after denial
  - Is it a "Public" Record
    - Does it pertain to a provision of public service.
      - *LVMPD v. Blackjack Bonding*, 131 Nev. 80, 82, 343 P.3d 608 (2015).
      - MW Definition: "a record by a public officer or a government agency in the course of the performance of a duty."
      - *Reno Newspapers v. Gibbons*, 127 Nev, 873, 266 P.3d 623 (2011) (implicitly recognizing that personal nature of emails was proper basis for withholding records under the NPRA)

RESPONDING TO PUBLIC RECORD REQUESTS

- Do you know what the Request is seeking?
  - NRS 239.0107(c)
    - Make a reasonable effort to assist the requester to focus the request in such a manner as to maximize the likelihood the requester
    - *Dep't of Emp., Training & Rehab., Emp. Sec. Div. v. Sierra Nat'l Corp.*, 136 Nev. 98, 100, 460 P.3d 18, 21 (2020) (could have sought clarification to determine whether the request encompassed certain records)
  - Emails or Communications
    - Require requester to identify:
      - Individuals involved – if outside of agency, have them provide the email address
      - Time frame – specific dates
      - Keywords

RESPONDING TO PUBLIC RECORD REQUESTS

- Within 5 Business days
  - As expeditiously as possible
  - If not available
    - Provide a date certain (not just timeframe)
    - Must explain why not available and what you are doing
  - Advise if another government agency has the record
- Confidentiality/Privileges
  - Statutory Exemptions
    - Including Federal Law ("unless declared by other law")
    - Attorney-client privilege/work product privilege
  - Common Law Exemptions
    - Deliberative Process Privilege
    - Exemptions adopted by common law in other states
  - Balancing of Interests
    - Government interests (*Reno Newspapers, Inc. v. Gibbons*, 127 Nev. 873, 878, 266 P.3d 623, 626 (2011)); and
    - Non-trivial privacy interests (*CCSD v. LVRJ*, 134 Nev. Adv. Op. 84 (2018))

RESPONDING TO PUBLIC RECORD REQUESTS

- Balancing Test
  - *Gibbons*
    - Government's interest in non-disclosure outweighs public's interest in access
    - Not limited to confidentiality arguments
  - Non-Trivial Privacy Interest (*CCSD v. LVRJ*)
    - Personal privacy interest
    - More than de minimis (embarrassment; harassment; stigma)
    - Burden shifts – advance a significant public interest and information sought is likely to advance that interest
- Burdensome requests
  - Other states have adopted common law exception
  - Subject to *Gibbons* balancing test
  - *Blackjack Bonding*
    - Denied LVMPD's argument regarding burdensome because Court assessed costs
  - Costs involved – NRS 239.052

RESPONDING TO PUBLIC RECORD REQUESTS

- Public Domain Doctrine
  - Publicly known information cannot be withheld even if exemption exists
- Waiver
  - NRS 239.011: The rights and remedies recognized by this section are in addition to any other rights or remedies that may exist in law or in equity.
- Redactions & *Vaughn* Index
  - Obligation to redact privilege/confidential information
  - Privilege log
    - *Reno Newspapers, Inc. v. Gibbons*, 127 Nev. 873 (2011)
    - No prelitigation duty
  - Inspection v. Copy (*PERS v. NPRI*, 134 Nev. Adv. Op. 81 (2018)
    - Individual file may not be inspected in its entirety
  - Balancing test, generally, cannot be used to withhold document in its entirety, just because some information within the document is personal

PUBLIC RECORDS LITIGATION

- No longer limited to denial of access
  - Denial of access
  - Unreasonable delay
  - Excessive costs
- Burden
  - Confidentiality- Preponderance of the evidence
  - *Gibbons* – Preponderance of the evidence
  - Privacy Interest – De minimis
    - Burden then shifts to Requester
  - Affidavits
    - *Nevada Indep. v. Whitley*, 138 Nev. 122, 128, 506 P.3d 1037, 1043 (2022)
  - *In camera* Review (*Gibbons*)

PUBLIC RECORDS LITIGATION

- NRCP 3
  - Complaint includes Petition
- Does NRCP, including discovery apply?
  - NRS 239.011
    - Court Order to Access
    - Relief related to the amount of fee
  - Supreme Court previously applied NRCP and discovery to NPRA action
- Summary Judgment (*Clark v. State* COA 2022)
  - Nothing conflicts with NRS 239.011 or NRS 34
  - No specific procedure
  - Provides additional briefing for Government.

PUBLIC RECORDS LITIGATION

- Attorney Fees
  - Requester must **prevail**
  - Catalyst Theory – *LVMPD v. Center for Inv. Reporting*
    - Government agency must substantially change its position as a result of the suit
    - (1) when the documents were released, (2) what actually triggered the documents' release, ... (3) whether [the requester] was entitled to the documents at an earlier time;[4] whether the litigation was frivolous, and [5] whether the requester reasonably attempted to settle the matter short of litigation
    - INCLUDES Appellate fees and costs
- Immunity for acting in good faith
  - Immune from liability for damages – Rio/ACLU Gang case
- Penalties for "Willfully failing to comply with the NPRA"
  - (a) For a first violation within a 10-year period, $1,000; (b) For a second violation within a 10-year period, $5,000; (c) For a third or subsequent violation within a 10-year period, $10,000.
  - Willful not defined
    - conscious wrong or evil purpose on the part of the actor
    - "requires some degree of intent to do harm."
  - Legislature intended for penalties to apply in situations where the records are clearly public records

RECENT DECISIONS
THE NEVADA SUPREME COURT

- *LVRJ v. LVMPD*: NPRA Does Not Permit a Waiver of Privileges – even after 2019 amendments
- *Conrad v. Reno Police Dep't*: NRS 289.025 applies to videos
- *LVRJ v. LVMPD*: NRS 49.335 – Identify of informer means more than a name
- Motive is irrelevant
  - *Dep't of Emp., Training & Rehab., Emp. Sec. Div. v. Sierra Nat'l Corp.*, 136 Nev. 98, 100, 460 P.3d 18, 21 (2020) (including litigation)
  - *Las Vegas Metro. Police Dep't v. Blackjack Bonding, Inc.*, 131 Nev. 80, 84 n.2, 343 P.3d 608, 611 n.2 (2015) (observing that a requester's motive is not relevant to the duty to disclose under the NPRA);
  - *Comstock Residents Ass'n v. Lyon Cty. Bd. of Comm'rs*, 134 Nev. 142, 143, 414 P.3d 318, 320 (2018) (addressing a case where a residents' association sued the local board of commissioners and, "[a]s part of that suit," made a public records request for information that pertained to the lawsuit)

OUTSTANDING ISSUES

- Are Internal Affairs/Internal Investigations by local government employers Public Records?
  - ACLU v. CCSD
  - NRS 289.080(9) and NRS 613.075
- What is the extent of costs a government agency can assess under NRS 239.052
  - "Actual cost" means the direct cost **~~[related to the reproduction]~~ incurred by a governmental entity in the provision** of a public record **~~[.]~~** , **including, without limitation, the cost of ink, toner, paper, media and postage**. The term does not include a cost that a governmental entity incurs regardless of whether or not a person requests a copy of a particular public record
  - Can you charge for staff time?
    - Assembly Hearing
    - Letter from LCB
  - Contracted Work
  - Require pre-payment

OUTSTANDING ISSUES

- Can a government agency initiate an action when a dispute regarding Public Records arise?
  - NRS 43.100 – Petition for Judicial Examination and Determination
  - *In Re Public Record Request* (LVMPD v. LVRJ; Mayorga; Ronaldo – Currently on appeal before the Nev. Sup. Ct.
- Record v. "Public" Record"
  - FERPA
  - NRS 179A.070 – Records of Criminal History
    - NRS 239.010 amended after *Donrey* to include NRS 179A.070 in statutory exemption
  - Best Practices

QUESTIONS?

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