

# The WRIT

OFFICIAL PUBLICATION OF THE WASHOE COUNTY BAR ASSOCIATION

Annual Meeting Luncheon, Wednesday, June 14, 2017, 12 noon, Harrah's

## Meet Your Federal Public Defender

**R**ene Valladares, the Federal Public Defender for the District of Nevada will meet with members of the Washoe County Bar Association to give them an overview of his office and some of the key issues they are currently facing.



Rene L. Valladares is the Federal Public Defender for the District of Nevada. He is an adjunct professor at the University of Nevada, Las Vegas, Boyd School of Law, and the UNLV Criminal Justice Department. He lectures nationally on various criminal law and procedure topics including conspiracy law, search and seizure, and the impact of culture on the criminal justice system. Mr. Valladares also serves as the co-chair of the Federal Defenders' Performance Measurement Working Group and as a member of the Federal Defenders' Death Penalty Working Group. He is co-editor of the first edition of the practice manual, Cultural Factors in Criminal Defense, now in its fourth edition.

**RSVP** no later than Monday, June 12. \$25 per person. \$200 for a table of eight. Sign up online at [wcbar.org](http://wcbar.org).

### WCBA Nominates Slate of Officers for 2017-18

**WCBA** thanks outgoing president Craig Denney.



The executive board of Washoe County Bar, acting as the nominating committee, proposes the following slate of officers for 2017-18. The Bar's bylaws call for notice of the nominations and election of officers at the June annual meeting (June 14, 2017, noon, Harrah's). Vice President Justin Bustos automatically succeeds as President. Nominations: Secretary Patricia Halstead for vice president; Holly Parker for Treasurer; Secretary; Sergeant-at-Arms Chandeni Sendall for Treasurer; Jacey Prupas as Sergeant-at-Arms/Writ Editor.

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# RANDOM THOUGHTS

*Craig Denney  
President*



This is my last month as President of the Washoe County Bar Association. The year has gone by quickly and my travels around the United States during the past year have been robust due to work as a military judge. As I reflect on the past five years of serving on the WCBA board, I have many great memories of the judges, attorneys, and legal professionals I have met.

We have more than 1200 members in the WCBA. I want to say thanks to all of the members for their support of the organization and contributions to the quality of legal practice in Northern Nevada. I also would like to thank all of our guest speakers at the monthly luncheons during the past year. Our speakers have presented on diverse and relevant topics (including ethics; renewable energy; stress management;

language and the law; and legal services for the indigent). But first and foremost, our members contribute to the vitality of the WCBA.

Thanks to my fellow board members (Justin Bustos; Patricia Halstead; Holly Parker; and Chandeni Sendall) and our social chair (Jacey Prupas) for all of their support, ideas, lively debate, and humor at our board meetings, luncheons, and social events in making the organization effective and stronger each year. Finally, I want to give special thanks to Gina MacLellan, the WCBA executive director. Gina is the one who deserves



the lion's share of credit for the WCBA success, and she really makes our organization operate efficiently and effectively. She has so many duties but she is always smiling. She is the reason the mock trial program is a success. And she is also why the pictorial directory is such

a key tool on every attorney's and judge's desk. Thank you, Gina!

I wish the best to my colleague Justin Bustos as he gets ready to begin his tenure as the next WCBA President. Justin is an outstanding attorney who is always professional, thoughtful, and friendly. I am confident he will carry on the fine tradition of the WCBA in leadership.

A final thanks to my family. My spouse (Valerie) and our young children (Cole and Taylor) who kept me inspired in thinking of topics for the president's column in the Writ each month. I hope you enjoyed them.

My final comments as WCBA president are that our families should always come first over work. However, I realize this advice is often easier said than followed. While the legal profession is intellectually challenging and professionally rewarding, our families are what matter in life. I am thankful and fortunate to have my family.

Best to everyone in the WCBA!

## The WRIT

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# ACROSS THE LINE

California Law for Nevada Lawyers

By James E. Simon, Porter Simon

## MED/ARB IN BUSINESS CASES: DISPUTE RESOLUTION WHOSE TIME HAS COME

Let's face it. For most routine business disputes, the civil justice system is rarely utilized all the way through trial. Most sophisticated business owners seek practical resolutions to their legal disagreements and realize that the expense, delay, unpredictability, administrative headache, and in some cases, unfriendly venues involved in traditional court litigation commonly compel them to seek other methods of resolving cases. Most notably, with the assistance of counsel, such cases gravitate towards mediation along a fairly predictable course.

### TRADITIONAL COURSE TOWARDS MEDIATION

From the business litigator's vantage point, the case comes in, the facts are obtained, research is performed, and various claims for relief are identified. Hopefully, early efforts at resolution between the parties directly or through counsel are undertaken, but perhaps to no avail. The aggrieved party then files suit, oftentimes theorizing that the mere prospect of looming expensive litigation will convince the defendant to capitulate. Surprise! Counsel for the defense, either through an insurance company, or self-retained, answers the complaint and fires up a cross-claim for its own affirmative relief, raising the stakes all around. The battle lines are drawn. Discovery begins and the attorney fees meters are whirring away. After a few procedural salvos are fired by each side, and perhaps at the urging of a supervising judge at a case management or status conference, the notion of mediation appears on the radar. Names are exchanged and an

agreeable neutral is selected. Here's where the fun starts. Sort of.

When mediation first came into vogue, lawyers and their clients were universally prepared to actually *settle* the case at the mediation. More recently, counsel have increasingly viewed mediation as merely another tool to accomplish a variety of goals ranging from test-driving factual and/or legal theories with an experienced retired judge, to sizing up the ability and preparation level of opposing counsel. Frequently, the process is used in an effort to discover the weaknesses in the other side's case – hoping that during mediation, the smoking gun document or irrefutable defense might be exposed; the expert's pretrial evaluation might be revealed; or other sensitive information discovered that would assist in the later prosecution or defense of the case. The perceived confidentiality of the process does not seem to diminish counsels' creativity in taking what is learned in mediation and attempting to capitalize on it for the remainder of the case.

At the same time, even an unsuccessful mediation often serves the useful purpose of narrowing the dollar range of settlement, identifying non-monetary alternatives that might be helpful to achieve a resolution, and otherwise getting a read on the overall case theories and client presentation from the mediator. Many times if asked, the mediator (especially if well-known to counsel) will offer some candid thoughts and opinions on almost any aspect of what he or she observes in the process. But yet the case remains unresolved. The parties return to their respective camps, more discovery costs are incurred, and at some point down the line the case

may settle at a second mediation or a few months out from trial. Even, where the parties have contractually agreed or stipulated to arbitrate the case, they usually plot the same course through mediation as when headed to a court trial.

A more strategic approach to dispute resolution has evolved, commonly known as Med/Arb, in which the combined advantages (and disadvantages) of both mediation and arbitration are used in a preordained proceeding.

### THE NEW ROUTE OF MED/ARB

The concept of Med/Arb is one where, when the dispute first arises, the parties mutually design and commit to their own specific ADR process that puts in place a predetermined methodology for determining the outcome of the case with finality by arbitration, while at the same time building in a mediation phase in order to encourage settlement before that arbitration actually takes place. It is the prospect of a final binding arbitration that drives the parties to engage in serious settlement discussions to resolve the dispute in mediation; and at the same time acts as a definitive method for obtaining an outcome one way or the other. Usually, the mediation takes place with the same neutral who, if the case doesn't settle, will be called upon to decide it. The advantages of Med/Arb are many.

Perhaps most importantly, the process gets the matter out of the court system with all of its flaws, delays, procedural barriers, and

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## Across the Line continued

incompetencies. Moreover, it engages the clients directly in definitive legal proceedings that they know will resolve their case if it is not otherwise settled. As we all have come to learn, clients often times just want their “day in court.” In the traditional court process that desire can come at a high price, not only in terms of cost and delay, but also because of all of the ineptitudes inherent in the current court system. To some extent, a traditional mediation without arbitration does allow a party to tell his or her “story” in a context where someone in a quasi-authoritative role is participating. However, the confidential caucus sessions that the mediator has with each side sometimes leave the parties wary of what’s actually going on, and the lack of transparency can breed discontent, or worse, distrust of the outcome. As a result, the confidence in a settlement reached in mediation can be undermined, sometimes leading to further post-mediation disputes. How often do we see breakdowns in the settlement of a business dispute reached at mediation where the nature of the parties’ business or financial relationship is necessarily ongoing (e.g., family trust disputes; business competition disputes; partnership disputes, etc.)? Convening a Med/Arb for which counsel and their clients are fully prepared, gives the clients assurance that if a settlement is not reached at the mediation, a final binding decision in their case will actually be made; right then and there, regardless.

Secondly, because the parties must be ready to actually call witnesses and put on evidence after a failed mediation, the process forces counsel to be fully prepared before engaging in the mediation – thus, perhaps allowing each side to more fully appreciate the strengths and weaknesses of their positions, which arguably should help settlement efforts.

While the agreement to a Med/Arb should be reached at the outset of the dispute, it is best utilized only

after each side is confident that they have engaged in sufficient discovery to thoroughly understand the case, identified key witnesses and evidence, and are focused in on the primary theories of recovery and defense. Contractual arbitration is private and binding by its nature, so Med/Arb allows parties to bargain in advance for what amounts to the arbitrator’s decision if it becomes necessary, without strict application of the law and rules of evidence. As we all know, the extent of pre-trial discovery is not often as critical in arbitration as it is in a case that must suffer along the choppy seas of traditional court litigation. In that environment we have, for some reason, grown accustomed to ‘scorched earth’ tactics because everyone seems to use them as way of posturing their case. In arbitration, the prospect of dealing with an available and interested neutral whom the parties are paying to understand and follow closely their case, those tactics are generally not persuasive, and thus the level of formal discovery necessary is reduced. ADR providers recognize this fact in their arbitration rules.<sup>1</sup>

### CHART YOUR COURSE CAREFULLY

A well thought out and sophisticated written agreement or stipulation to enter into Med/Arb is necessary. Not only must the parties articulate the agreed-upon process specifically as between themselves, but the neutral selected to serve in both capacities must also enter into his or her own separate Med/Arb agreement with the parties and counsel directly, so as to carefully document the process the neutral intends to follow, obtain the appropriate waivers of confidentiality where applicable, and to address the general immunities protecting the neutral in both capacities. Two well-known ADR providers JAMS and ADR Services each have standard forms used for Med/Arb available to review on their websites. Counsel should of course feel free to expand on the provisions of the Med/Arb

engagement suggested by the neutral in order to thoroughly protect the Med/Arb process from challenge. The rules pertaining to mediation and arbitration for the jurisdiction where the process is to take place must be reviewed and addressed, as well as any specific rules governing the proceeding, which might be applicable to the particular case (e.g., AAA rules, JAMS rules, etc.).

### HEADWINDS: CONFIDENTIALITY AND INADMISSIBILITY ISSUES

The two hallmarks of mediation imposed by the law are that the proceedings themselves and everything said or provided in them are confidential; and that statements and materials used in mediation are inadmissible in any later proceeding. The literature on mediation sometimes confuses these notions.

*Inadmissibility* refers to the legal prohibition against the introduction of information prepared or used in mediation in a legal or quasi-judicial proceeding (e.g., trial, arbitration, administrative law hearing, etc.

*Confidentiality* requires that the parties or other persons receiving or hearing the information hold it in confidence and not reveal or share it with others.

In California, Evidence Code section 1119 attempts to address both issues:

Section 1119(a):

No evidence of anything said or any admission made for the purpose of, or the course of, or pursuant to a mediation or a mediation consultation is admissible ....

Section 1119(b):

No writing . . . that is prepared for the purpose of, in the course of, or pursuant to a mediation or a mediation consultation is admissible . . . .

Section 1119(c):

All communications, negotiations, settlement discussions by and between

participants in the course of a mediation or a mediation consultation shall remain confidential.

The most troubling issue inherent in a Med/Arb is how the neutral at the time of arbitration, is to treat whatever confidential information he or she receives in the mediation phase. Or more colloquially stated: How does the neutral 'un-ring the bell' after hearing, or even seeing, each side's dirty laundry or other confidential information?<sup>2</sup> A common approach to this problem is for the parties, and all persons who participate in the mediation, including the neutral, to agree and confirm in writing in the Med/Arb agreement, that the neutral will ignore everything that was communicated in the mediation, and start with a clean slate at the arbitration. In this way, all information imparted to the mediator during the mediation arguably retains its confidential and inadmissible nature (unless introduced by the proponent of the evidence in the arbitration without waiving confidentiality), neither side is aware of the other side's secrets, and the neutral has pledged not to consider such information for any purpose, unless it is actually admitted in the arbitration. Care must be taken to address when the mediation ends so that the confidentiality cut off of the protections afforded by statute is clearly understood by everyone involved.

Another approach is for the parties to agree in writing to waive the confidentiality and inadmissibility protection normally afforded to mediation communications and other information disclosed in the mediation entirely. In California, this can be done under Evidence Code section 1122. As a practical matter, there may not be much discussed confidentially in a mediation that actually proves to be of any critical, material significance in the overall case. When mediation does not result in settlement, it is rarely because one party has succeeded in withholding critical evidence or information from the other that would ultimately serve to win the case. To be sure, parties

and their counsel in mediation usually reveal to the mediator in confidence their particular settlement strategies, ranges of settlement value, perhaps even bottom line positions, and occasionally, the existence of what they *believe* are smoking gun pieces of evidence. However, by the time sufficient preparation is made for arbitration where a Med/Arb is used, which includes completion of the agreed upon discovery or exchange of information, the likelihood of any such critical or surprise evidence is significantly reduced. And if a Med/Arb process is selected where confidentiality is waived, counsel can be careful during the mediation phase if settlement appears unlikely, to perhaps hold those cards closer to the vest rather than surfacing them as turning points for the mediation. Judgment calls along those lines are made all the time anyway in most mediations. If a written waiver is selected as the method to address confidentiality and/or inadmissibility, the neutral, along with any other participants in the mediation, must also enter into the agreement allowing disclosure.

A hybrid approach to dealing with confidentiality in the mediation phase of Med/Arb has been utilized where, before beginning the arbitration, the neutral asks each counsel privately to identify substantive materials or other information revealed to the neutral in mediation confidentially that counsel believes might be persuasive in the arbitration of the case. The neutral can then request permission from the side that has disclosed such confidential information to identify it to the other side. If consent is granted, this method surfaces the information to both parties, and allows them to deal with it as they wish in the arbitration. Alternatively, should consent be withheld, the arbitrator must continue to disregard the information according to the terms of the Med/Arb agreement and applicable provisions of law.

At first blush, even the potential of the arbitrator hearing confidential information disclosed to him or her in

the mediation phase may seem to be risky, insofar as a practitioner may be worried that a confidential expression of any concern to the mediator about her client's case might suggest to the neutral that the client was prepared to lose, and might then predispose the neutral to deciding against that party. Others are concerned that their blunt or 'hardball' approach in the mediation may alienate the mediator turned arbitrator. The reality is, an experienced neutral is usually impressed with honest case evaluations by lawyers, understands the need for posturing in settlement, and is very well trained in appreciating the importance of ignoring inadmissible material. After all, neutrals do so routinely in virtually every contested case they hear, one way or the other. The fact that information might be expressed in a mediation where it is protected from admissibility, makes it no less easy to disregard in a later arbitration than in any other context. Furthermore, since counsel is generally in control of the disclosure of any confidences or other information in mediation, she can explain to the mediator how, and why, certain confidential information imparted would have no bearing in a contested arbitration, although it might help in the dynamic of settlement efforts. Counsel can also use the opportunity of the private setting with the mediator to obtain express reassurance from the neutral that he or she will not consider such information in a later arbitration if it becomes necessary.

The concerns about confidentiality and inadmissibility underscore another critical factor in determining whether Med/Arb will work for your clients: The importance of the selection of the single neutral to serve in both capacities. Only a highly trusted and skilled neutral can fulfill both roles in a way that will garner the confidence of counsel and their clients throughout the entire process. To be sure, as in any case, the eventual losing side will be disappointed when arbitration is over. But experience teaches

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that a process in which parties have interaction with a mediator who may later decide the case can produce more satisfaction with the result than where a party has not had such a connection, even when that party ultimately loses. The reasons given by the arbitrator for the ultimate decision in a case may be more easily digested by a litigant after the first course of settlement efforts during mediation has been served up. At some level, a relationship will have been developed between each party and the neutral during mediation that hopefully instills some confidence in the parties that the overall process is fair.

The most attractive feature of Med/Arb is that the process can be tailored to the particular circumstances of the case. The parties can agree to all the usual elements for arbitration (limited discovery, streamlined pre-trial process, relaxed rules of evidence, timing of award) and then build in the pre-arbitration mediation to give the parties and the neutral a very concentrated and informed environment in which to try to resolve the case. They might even

wish to agree in advance to engage in a mediation followed by arbitration, but where a *different* neutral is used for the arbitration or where either side retains the right to opt out of the scheduled arbitration, perhaps at the cost of absorbing the neutral's cancellation fee.

Another creative form of Med/Arb is where the arbitration takes place first, the Arbitrator takes the matter under submission and writes the decision, and the award is held by the arbitrator to allow for a post-hearing mediation. This process would appear to require that the mediation take place before a separate neutral in order to avoid what might be the overwhelming impression that were the arbitrator to hear the dispute and then conduct the mediation, he or she would somehow signal the impact of the decision to the losing party to leverage a settlement. Although that circumstance can also be viewed as an advantage by the parties since it gives a best last chance for settlement. A post-hearing mediation does give the parties the advantage of actually hearing and seeing all of the evidence and arguments made, knowing that unless a settlement is reached, the

arbitration award will be issued, to one party's advantage and the other party's detriment.

Another closely related dispute resolution method akin to Med/Arb is termed "binding mediation." In binding mediation, the parties empower the neutral to simply decide the case at the conclusion of the mediation based on what was presented in the confidential setting. The method has been criticized as undermining the concept of party-controlled settlements; however, at least one court appears to have sanctioned its use by enforcing a settlement agreement that included terms requiring that if the case did not settle in mediation, the neutral would chose either the Plaintiff's demand (\$100,000) or the Defendant's offer (\$5 million). (*See Bowers v. Raymond J. Lucia Companies, Inc.* (2012) 206 Cal.App.4th 724.)<sup>3</sup> It is unclear to the author what waiver of confidentiality or inadmissibility, if any, was made by the parties in order for the decision to be made in the *Bowers*' case. The court approved the result by enforcing the settlement agreement, which adopted the binding mediation process, thus giving sufficient legal regard to the parties' freedom to contract for their own method of dispute resolution.

A variation of both Med/Arb and binding mediation along the lines of *Bowers* could be adopted in a circumstance involving a business dispute where after a lawsuit is filed, the parties agree to arbitration and settle their basic claims, leaving other matters for later resolution or arbitration. The settlement terms resolving the basic claims could leave open the details of matters involved in carrying out the settlement. An interim step could be built into the settlement agreement where the parties agreed that the mediator would, upon request by either party, hear any disputes over carrying out the terms of the settlement and would then make a written recommendation, supported by factual and legal analysis to an arbitrator selected by the parties.<sup>4</sup> By agreement, the recommendation by the mediator would become binding between the

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Congratulations to  
my partner of ten years and my dear friend,

**ANN OSBORNE HALL**

on her new adventure. Ann has had enough fun living by the tenth-of-an-hour billing unit. She has accepted a position as in-house counsel at the Grand Sierra Resort.

I, on the other hand, will continue to have fun living by the tenth-of-an-hour billing unit at Bowen Hall and will maintain my office at 555 South Center Street in Reno, NV 89501 (775-323-8678).

**GO, ANN!**

**Dan C. Bowen**  
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# LAW LIBRARY/ PRO BONO CORNER

## Pro bono corner – April Lawyer in the Library Volunteers

(bold denotes volunteering more than once this year)

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

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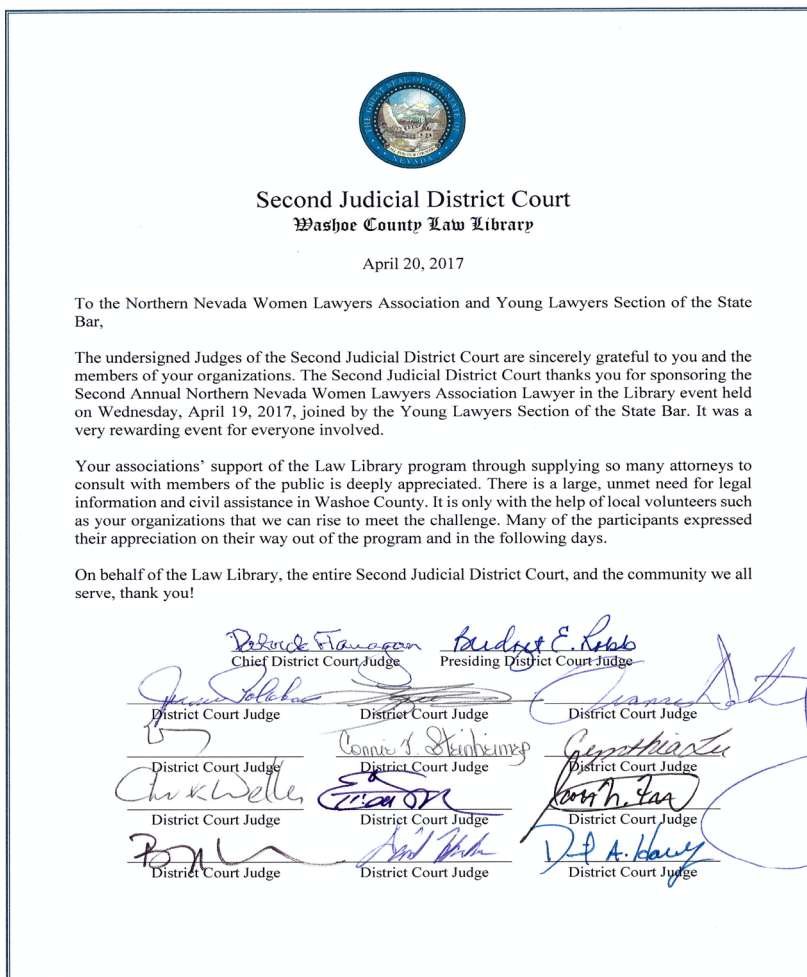
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## Book Review

*The Devil's Advocate* is by Michael S. Lief and H. Mitchell Caldwell, copyright 2006, 436 pages with index. This book is the last in the authors' three part series that highlights the best closing arguments in American legal history. This particular volume focuses on criminal law. The authors consider eight famous cases that have set precedents in the law.

John Adams defends the despised as he argues for the British soldiers who killed Americans during the Boston Massacre. Clarence Darrow argues for a black family defending themselves with deadly force against a mob. In the case of Randy Weaver and the Ruby Ridge killings, Gary Spence demonstrates that where violence erupts between citizens and the federal government, it is not always the citizens who are at fault. Congressman Daniel Sickles is tried for killing a man who was committing adultery with his wife. In that case, the defense of temporary insanity was argued and established. The last case is the trial of Aaron Burr on the charge of treason.

The two authors do an excellent job of delineating the social and legal context of these cases, including a historical introduction, brief biographies of the attorneys, and highlights of trial testimony and a summary of the cases' impacts on the country. What is somewhat less stellar are the closing arguments themselves. They are sometimes too long and disjointed. However, this is a fascinating book. Brian Keefe, Librarian II



# APPELLATE BRIEFS

By: *Debbie Leonard, McDonald Carano Wilson*

## THE SUPREME COURT'S DECISION-MAKING PROCESS

Attorneys and litigants alike often wonder how their case makes its way through the Supreme Court. You file a notice of appeal and docketing statement and then brief the case according to the Court's scheduling order. But what is happening behind the scenes? Who decides the case, and what does the decisional process look like? An abridged description follows. This information comes from the Supreme Court's Internal Operating Procedures, which can be found on the Court's website.

### **Jurisdictional Check**

One of the first things that happens once an appeal is docketed is screening by Supreme Court staff to ensure that appellate jurisdiction exists. The appellant assists with this jurisdictional check by accurately responding to the docketing statement questions regarding timeliness of the notice of appeal and substantive appealability. If the Court has concerns regarding its jurisdiction, it will issue an order to show cause why the case should not be dismissed. Generally, in civil appeals, even if the respondent files a motion to dismiss for lack of jurisdiction, the Court will wait until after the settlement process is completed before making a decision regarding its jurisdiction.

### **Assignment to the Court of Appeals**

The docketing statement also helps the Supreme Court determine which cases should be assigned to the Court of Appeals. The Supreme Court presumptively assigns certain types of cases according to NRAP 17(b).

### **Decisional Tracks**

For appeals that the Supreme Court decides to retain, cases are assigned to one of four decisional tracks in order to tailor the decision-making process to the needs of each case. These tracks

are: (1) en banc chambers track; (2) panel chambers track; (3) en banc staff track; and (4) panel staff track. Some cases are automatically designated as en banc cases soon after the case is docketed. These include cases that involve ballot or election questions; judicial or attorney discipline; the death penalty; approval of pre-paid legal service plans; questions of law certified by a federal court; disputes between branches of government; the administration of the judicial system; or that raise as a principal issue a question of first impression involving the Nevada Constitution.

For all other cases, the decisional track is generally determined through screening by staff attorneys after the answering brief is filed. Cases tracked for en banc decision are limited to those that raise substantial precedential, constitutional or public policy issues, or where en banc consideration is necessary to secure or maintain uniformity of the Supreme Court's decisions. Cases that are tracked for panel decision involve legal issues that have limited precedential value or have no impact beyond the litigants.

Generally, cases that require considerable personal attention from the justices will be tracked to chambers. Such cases include ones that present unsettled questions of general importance or that will allow the Court to better develop important areas of Nevada law. In contrast, cases that are tracked to staff can be resolved by the application of settled law. In addition to recommending a decisional track, the screening attorneys also assign a weight to each case based on the complexity of the issues presented and the anticipated time necessary for resolution. Ultimately, the chief justice, based upon the

recommendation from the screening attorneys, makes the decision as to how a case will be tracked.

### **Oral Argument or Presentations**

For cases that are assigned to chambers, generally, a law clerk will prepare a bench memorandum for the justices to review. Staff attorneys prepare the bench memorandum for cases that are on the staff track. After preparation of the bench memorandum, the chief justice (in en banc cases) and the assigned panel (in panel cases) reviews the case to determine whether oral argument is warranted. For the most part, oral argument is only held in cases that raise precedential or public policy issues or that involve unsettled areas of the law. However, to the extent the justices believe that oral argument will substantially aid them to better understand the facts or otherwise resolve the issues on appeal, the Court may schedule it. For staff-tracked cases or motions, in lieu of oral argument, staff attorneys may make oral presentations to a panel of justices to assist with the decisional process.

### **Resolution**

For each case that is tracked to staff, staff prepares a proposed disposition under the supervision of the Court's central staff legal counsel. The chief justice (in en banc cases) and the presiding justice (in panel cases) may assign a justice to supervise the staff's preparation of the bench memorandum or disposition.

For each case in which oral argument occurs, following each day's argument, the justices who are assigned to a case hold a conference to share their respective views. The justices try to reach a tentative decision and determine whether the disposition will take the form of a published



opinion or unpublished order. After a chambers case is submitted, either with or without oral argument, the case is assigned to a justice for preparation and circulation of a draft disposition.

A draft disposition will go through an extensive editing process that involves the justices and staff. The Court sets internal deadlines for each stage of the drafting and editing process. At the time a draft disposition is prepared, the author must research the Court's issue-tracking and opinion databases to ensure that the new disposition accounts for the Court's precedents.

These are just a few highlights from the Court's Internal Operating Procedures to illustrate how the Court's decision-making process is designed to provide for the fair and expeditious resolution of each case.

*Debbie Leonard is a partner at McDonald Carano LLP, where her practice focuses on appeals before Nevada's appellate courts, the Ninth Circuit Court of Appeals and administrative agencies. She served as the 2013-2014 Chair of the State Bar's Appellate Litigation Section and is Lead Editor of the Nevada Appellate Practice Manual, 2016 edition. She is also a mediator and Nevada Supreme Court settlement judge.*



**In Memory of E. Pierre Gezelin (April 11, 1941 - March 19, 2017)**

E. Pierre Gezelin became a proud member of the Nevada State Bar in 1971 after graduating from the McGeorge School of Law at the University of the Pacific. From 1971 to 1977 he served as an Assistant U.S. Attorney for the District of Nevada. He then went into private practice until 1991 in Reno. The last 26 years of his distinguished legal career were spent diligently serving as Deputy Attorney General in Carson City with the Department of Transportation. After a courageous battle with cancer, Pierre passed away at his home on March 19, 2017, surrounded by family and loved ones. Pierre will be remembered not only for being a skilled and accomplished attorney but also as a loving father, brother, uncle and friend.



**In Memory of Debby Lumkes (January 3, 1950 - April 17, 2017)**

Debby Lumkes was born in San Mateo, California. Debby graduated in 1972 from UNR with a degree in journalism. Debby worked for the CIA, before going to law school at McGeorge School of Law. In 1980 she graduated from law school and became a member of the State Bar of Nevada and WCBA. In 1992, Debby was hired as the first female Court Master in Washoe County. Debby has been a Judge Pro Tem in the Reno Justice Court, and a Judge Pro Tem in the Reno Municipal Court since 1985. In 2006, Debby was awarded the Child Advocate Attorney of the Year Award.

**SUSAN HALLAHAN ANNOUNCES RETIREMENT IN JULY 2017**

After 25 years of service, Susan will retire as the Chief Deputy District Attorney for the Family Support Division.

Susan attended Reed High

school, third generation Nevadan, graduated from UNR with a Bachelor in Criminal Justice in 1988, and graduated from law school with a J.D. from Santa Clara University in 1991, and was admitted to practice law in Nevada in 1991.

While in law school, Susan spent two summers (1989 and 1990) working for the private law firm of Walther, Key, et. al. In the spring semester of 1991, Susan did a full-time externship in Federal Court with Judge Howard McKibben until her graduation in May 1991. Susan took the bar exam in July 1991 and then began working for Federal Judge Bruce R. Thompson. Susan served as his law clerk, court clerk, and administrative assistant until his passing in 1992.

Susan was hired by the Washoe County District Attorney's Office, Family Support Division, on July 13, 1992. This was Susan's ultimate dream job. Susan and her sister were raised by a single mom without financial assistance from their father and Susan wanted to help people like her mom and assist in providing financial stability for children. Susan wanted to make a difference! She was hired by then DA Dorothy Nash Holmes and continued to work under Dick Gammick and now under Chris Hicks.

Susan was promoted to Chief Deputy District Attorney in 1994 and has been in that position ever since. Her Division collects over \$2 million per month in child support and are currently the top performing child support office in the State of Nevada. "What a time to retire!! I'm so proud of all who work with me in the Family Support Division and who focus on furthering our mission every day".

When people ask me what I'm going to do after I retire, here is my answer: "I'm going to do what's most fun!"

"I will sincerely miss this job and working with all of the many wonderful people whom I have met and have had the opportunity to collaborate with and for in the last 2 1/2 decades!!"

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# JUDICIAL ETHICS

*Honorable David Hardy, Second Judicial District Court*



*Hon. Warner Earll*



*Hon. William H. Beatty*

**W**arner Earll (Nevada Supreme Court: 1875-1876).<sup>1</sup> Justice Earll was born in New York on January 18, 1816, and moved to Wisconsin as a young man. He was elected justice of the peace and served in the Wisconsin legislature. In 1849, he “followed the tide of immigration” to California. He lived in Red Bluff for 10 years and was elected district attorney and judge in Tehama County. He was one of two lawyers admitted to practice in the newly-created Eleventh Judicial District (Elko) on August 16, 1869, and licensed by the Nevada Supreme Court on January 11, 1871. Little is known about his practice in Elko, and he appeared as counsel in two appeals before the Nevada Supreme Court.

Justice Earll ran for the Nevada Supreme Court on the Republican ticket against the newly appointed Democrat Charles Belknap. (Justice Belknap was the 31-year-old who had been appointed by his father-in-law Governor Bradley to fill the vacancy created by Justice Garber’s retirement.) Justice Earll, who was “said to be the railroad candidate,” defeated Justice Belknap by 580 votes.

Justice Earll wrote 13 opinions while serving on the Nevada Supreme Court. His opinions are direct and free of personal style. His subjects were mining, corporate, constitutional, criminal, and divorce law. After a single term on the Nevada Supreme

Court, he returned to California and opened a law practice in San Francisco. Almost immediately, however, he moved to Arizona to represent the Southern Pacific Railway. Ten years later he returned to California and formed a law partnership with his son.

Justice Earll died unexpectedly on January 10, 1888. The San Luis Obispo Tribune reported about his death:

The community was greatly shocked . . . by the report of the sudden death from heart disease, of Judge Warner Earll. Seated in his office in consultation with his client . . . apparently in his usual health, without premonition death called him. He leaned back in his chair and became insensible. Kind hands supported him, friends and physicians were hastily summoned but the end had come and in a few moments the last flickering evidences of life ceased. It was the close of a long career of usefulness, of the record of a blameless life. A man of profound learning, eminent in his profession, distinguished in public life, and greatly loved and esteemed in every social and private relation, full of years

and honors, our friend has entered a new life, meeting the great change, just as he himself had in fact indicated he would have desired it, instantly and painlessly, “in the twinkling of an eye.” With his hand upon the plow, he sank down in the furrow.

The Nevada Supreme Court memorialized Justice Earll six days later, on January 16, 1888: “Although his term of judicial service was brief, and the number of opinions written by him limited, he remained long enough and wrote enough to impress the judiciary and bar of this state very favorably, both as to his legal learning and judicial ability, as well as to his high personal and moral integrity, and secured for himself a permanent abiding place in the regard and esteem of his associates.” After other accolades, the court concluded: “Whether as an attorney, judge or citizen he conscientiously sought to do that which he believed to be right, and around his memory there will ever remain, to those who knew him well, a fame that no amount of financial success, so eagerly sought by most men, can give.”

William H. Beatty (Nevada Supreme Court: 1875-1880; California Supreme Court: 1888-1914). Justice Beatty has the rare distinction of being the son of a

Nevada Supreme Court justice and serving as Chief Justices of both the Nevada and California Supreme Courts. His place among jurists is legendary.

Justice Beatty was born in Ohio in 1838. He attended public schools and moved with his family to California in 1853. He reminisced about his childhood: "When I was a boy I lived in the country and liked hunting and fishing better than anything else. To do one or the other was by long odds my first choice whenever I had a whole day, or even a part of a day to myself. If for any reason fishing and hunting were both out of the question (on account of bad weather or a crippled gun, or exhausted ammunition), I cannot remember any other sport or occupation that was a second choice. It was anything to get through the day, and generally it was a dull day at best."

Justice Beatty moved to Virginia in 1855 for his university education, but returned to California after two years to study law in his father's office. He was admitted to the California bar in 1861. He practiced with his father in Sacramento, and they both moved to Nevada in 1863. "Nevada was then in the height of the fame of its marvelous mining discoveries, and drew men from all parts of the world," and "[i]n those days the legal profession had fewer representative practitioners in that state than at present, and the people were not slow to recognize the caliber of the young lawyer in their midst." Justice Beatty served as city attorney in Austin, and in 1864 he was elected to the district court bench. He was elected to the Nevada Supreme Court in 1874.

Justice Beatty served one term on the Nevada Supreme Court but was defeated for re-election. He returned to private practice in Sacramento and was elected to the California Supreme Court in 1887. He entered office in 1888 and served until 1914, including 25 years as the Chief Justice. "His opinions . . . are to be found in ninety volumes . . . covering a period of distinguished service unequalled in judicial history." Justice Beatty was aware of his failing health, and he died of a heart attack on August 4, 1915.

The California and Nevada Supreme Courts both memorialized Justice Beatty. The California memorial begins: "The death of no other man in the State of California could have moved its legal profession so profoundly as it was moved by the recent death of the revered Chief

Justice, William H. Beatty." After reciting the highlights of his life and career, the California Supreme Court wrote: "[H]e feared no man, and he never failed to meet unflinchingly every danger. Throughout his long life he knew but one fear, and that was the fear of doing an injustice to his fellow man. His judgments sprang from his convictions alone, unswayed by popular clamor, uninfluenced by thought of consequences."

The California Court continued: "His opinions are the works of a master, not only in their logic and in their evidences of profound learning, but also in the literary quality which marks the cultured scholar." Justice Beatty "put honor before opportunity; he revered the law and strove to make it always the instrument of justice; he loved his friends; he feared not his foes, and he dedicated his life to the highest service of the Commonwealth." The California State Bar joined in the memorial:

The opinions of Chief Justice Beatty are in general characterized by clear statement and cogent reasoning from legal rules and adjudicated cases. They command the respect of those who are compelled, sometimes, to dissent from the conclusions drawn . . . . His description of mining processes is a delight to the reader, who has a general knowledge of the subject, but who is yet not an 'expert' in that line; while his statement and application of the law have been questioned only by those whose misfortune it has been to be on the losing side.

The California Supreme Court lamented that Justice Beatty would not contribute to his memoirs. "It was the hope of those who knew him best that years and health might be vouchsafed him, after the close of his judicial career, in which he might be induced to put his recollections into permanent form. That hope has failed, but his genial tones, his anecdotes of the brave days of old, and his attractive personality are abiding treasures to those who will

continue to count amongst their most cherished memories the fact that he was their friend."

The Nevada Supreme Court noted its "pride in the fact that this State first recognized and honored his high abilities both as a lawyer and a judge." Chief Justice Talbot wrote, "His industry kept pace with his capacity, and his integrity was never questioned. Possessed in a high degree of the judicial temperament and that impartiality which holds the scales of justice in equal poise, his decisions were always rendered with a view to the right and to the advancement of the welfare and happiness of his fellow men."

I continue these brief memorials of deceased jurists because they illustrate how lives well lived can create longitudinal imprints. We write our own memorials as we choose to live privately and professionally. Also, perspective reflection can be an antidote to the difficulties we experience in our conflict-driven profession. I am inspired by the best among us, and hope we may be worthy of the Nevada Supreme Court's assessment of Justice Beatty: "After the years of honor, he went to rest, leaving behind him a record which should be an example and an inspiration to men of his profession and a guide to good citizenship."

<sup>1</sup>References for this essay include the HISTORY OF THE BENCH AND BAR OF NEVADA (J. P. O'Brien ed., 1913); A HISTORY OF THE STATE OF NEVADA (Hon. Thomas Wren ed., 1904); Russell W. McDonald, BIOGRAPHICAL SUMMARIES ABOUT NEVADA'S TERRITORIAL, DISTRICT, SUPREME COURT AND FEDERAL JUDGES, 1856-1993 (Typescript, Nevada Supreme Court Library) (unpublished); In Memoriam, Warner Earll, 19 Nev. 453 (1888); In Memoriam, William Henry Beatty, 37 Nev. 511 (1914); In Memoriam, William Henry Beatty, 168 Cal. 799 (Cal. 1915); Obituary, SAN LUIS OBISPO TRIBUNE, Jan. 13, 1888; History of the Bench and Bar of California (Oscar T. Shuck ed., 1901); SACRAMENTO DAILY UNION, Oct. 31, 1874, Vol. 48, No. 7356; THE SAN FRANCISCO BAY REGION, Vol. 3, pp. 373-75 (transcribed by Donna Becker; available at <http://freepages.genealogy.rootsweb.ancestry.com/~nmpelton/sfbbeat.htm>).

*This is number 104 in a series of essays on judicial ethics authored by Judge David Hardy, Second Judicial District Court, Dept. 15.*



parties unless, within 10 days, a party lodged a request for arbitration on the issue presented. The settlement agreement could further provide that in that circumstance, the arbitrator could consider the recommendation of the mediator, but may not be bound by it, permitting the parties to conduct a full arbitration on the disputed matter before the appointed arbitrator. The idea behind such a process is that the parties would have enough confidence in the mediator – who, by virtue of the lengthy mediation, would be intimately familiar with the nature of the case and the areas of dispute – and that a reasonable recommendation by the mediator would stand a good chance of being accepted by both sides. The mediator's recommendation would be based on a depth of understanding that might not necessarily be available to the arbitrator in the more restrictive context of a fact finding resolution process. However, if the mediator's recommendation were unacceptable to either side, a contested hearing would take place. The arbitrator could then give the mediator's recommendation the weight and consideration he or she determined it might deserve in light of the evidence presented. The procedure described here is not dissimilar to the interim appointment of a referee to determine specified contested facts, e.g., value of property; the parties' historical conduct under contested contract terms, etc. Of course, care must be taken to properly document an agreement as elaborate as this example supports.

#### **BE CREATIVE WITH MED/ARB**

Arguably, there is no limit to the creativity that counsel might envision in order to cooperatively create a Med/Arb process that suits the unique needs of their clients' case. Med/Arb clauses might well be inserted into contracts in the place of standard separate mediation and arbitration provisions. An "early Med/later Arb" procedure could be adopted whereby an early settlement effort is made through mediation followed by a hiatus in the process during which discovery is obtained, experts are engaged, and more thorough preparation is

made; followed by arbitration on a date certain by the same neutral and perhaps preceded by another final half day effort at mediation. Parties to a Med/Arb might partially settle in mediation, but agree to continue to arbitrate certain remaining issues, such as damages or the specific dates upon which agreed upon events must occur as called for in the settlement. A word of caution for counsel is however needed: Because there are now emerging issues arising primarily out of the mediation world, a thorough understanding and appreciation of not only the substantive rules governing mediation and arbitration is necessary, but also the way in which the rules governing professional conduct might be implicated by the particular method of dispute resolution selected.<sup>5</sup>

By thinking in terms of utilizing our skills in identifying issues and problem solving and then combining some of the methods used in traditional ADR, we can create individualized methods of dispute resolution tailored to the unique characteristics of specific cases and clients.

Reaching out early to opposing counsel to consider developing a method of Med/Arb is always a good idea. If the process is agreeable, it can provide a well-defined course of action by which a guaranteed resolution of the case will occur in a more controlled environment that the court process allows. The parties will have an interested neutral in place who has agreed to devote significant time and develop proper familiarity with the parties and their case. Counsel will have specific dates certain selected for both the mediation and the arbitration, allowing for a complete process to have been developed in advance by which they will know that their case will be resolved in a relatively short timeframe.

When the opportunity arises, select a case that you think might benefit from Med/Arb, work out the details with opposing counsel, review and plan your case in accordance with the rules governing the process involved, and give it a try. You might be surprised how well it works.

*This article is for informational purposes only and not for the purpose of providing*

*legal advice. This article contains the personal views and opinions of the author only as to California law, and does not necessarily reflect those of the Washoe County Bar Association or the Porter Simon law firm. The author makes no claims, promises or guarantees about the accuracy, completeness, or adequacy of the contents of this article and expressly disclaims liability for any errors and omissions in this publication.*

*James E. Simon is an attorney practicing in California and managing shareholder of the Porter Simon law firm located in Truckee. He has practiced in civil litigation of all types for over forty years, with an emphasis on business and real estate matters and also regularly serves as a mediator and arbitrator. Jim may be reached at [simon@portersimon.com](mailto:simon@portersimon.com) or at the firm's web site [www.portersimon.com](http://www.portersimon.com).*

#### **ENDNOTES**

<sup>1</sup>Incidentally, as one astute retired judge and now successful mediator reminded me recently, the term "alternative" as used in the euphemism "Alternative Dispute Resolution," should refer to the current court system as the "alternative" to the parties' own mutually agreeable methods for resolving their disputes. I.e., perhaps we ought to shift our thinking so that traditional litigation is thought of as the "alternative" to more party-controlled methods, like mediation and arbitration.

<sup>2</sup>Issues of confidentiality in mediation are largely governed by statute or rule in both California and Nevada, which authorities should be consulted for the particular circumstances of any Med/Arb process in which counsel may be involved. (See e.g., Nevada Rules Governing Alternative Dispute Resolution; Nevada Arbitration Rules; and California Evidence Code § 1115 et seq.)

<sup>3</sup>The mediator ultimately selected the \$5 million number.

<sup>4</sup>In California, this provision would require express agreement of all participants under Evidence Code section 1121. It is not unusual for mediated settlement agreements to allow for the neutral who conducted the mediation to resolve any later disputes over the settlement. Counsel sometimes draft provisions in mediated settlement agreements purporting to reserve to the neutral "jurisdiction" to resolve disputes that may arise in implementing the settlement. The formalities attendant to such contractual dispute resolution provisions should not be overlooked in order to protect the settlement from later attack.

<sup>5</sup>For example, in response to a Supreme Court decision precluding admissibility of statements made in mediation in a later malpractice claim against an attorney (*Cassell v. Superior Court* (2011) 51 Cal.4th 113), the California Law Revision Commission has engaged a study entitled: "Relationship Between Mediation Confidentiality and Attorney Malpractice and Other Misconduct, Study K-402, which may soon result in some proposed legislation.

# SPECIALTY COURTS

by Honorable Dorothy Nash Holmes,

## The “high” of graduation

School is getting out. Graduation parties are planned. Teens will lie to their parents so they can have all-nighters and party in rented motel rooms, while Mom and Dad sleep soundly knowing that Junior or Sissy would never do anything stupid like drinking or drugging all night long. Not much has changed in the decades since our generation graduated, or has it?

Marijuana is now legal for recreational use in Nevada and four other states. The tetrahydrocannabinol (THC)—the ingredient that cause the “high” from Marijuana—is said to be much stronger than the stuff of the 1960s, and therefore, potentially toxic or capable of inducing psychosis if taken in excess. Proponents say Marijuana is less addictive than alcohol, less toxic, less likely to be associated with violent or criminal behavior. Opponents say it is dangerous because people don’t yet understand that today’s Weed is “not your father’s weed.” It is also converted to “wax” or “oil” or “butter” or stronger tar-like CBD substances. Some say that “high” can last 15 hours long; some say it can kill. In open sales states, Marijuana edibles and candy-like products are sold and those could entice children. Whether or not Marijuana is physically addicting, no one can argue that regular users experience more academic failures, job losses, ruined relationships, undirected activity, complacency, lack of personal achievement or success. Undoubtedly, Marijuana DUIs, or combinations of Weed with alcohol or other controlled substances, are occurring in all the states with “medical Marijuana” and increasingly so in those with recreational Marijuana.

The news media has reported extensively about college hazing deaths involving freshman forced or encouraged to drink alcohol to the point of fatal self-poisoning. Nineteen-year-old Timothy Piazza, died at Penn State in February, during a 12-hour partying

binge in which students laughed at him, poured liquor on him, dragged his limp body to other rooms, hit him in the face, and left him lying at the bottom of a stairwell he had fallen down to his death. Eighteen fraternity members have been charged in connection with the death and eight of them face felony charges. Wikipedia even has a report on hazing deaths beginning in the 1800s. It says there has been at least one per year from 1969 to 2017.<sup>1</sup>

Periodically, we hear of 21-year-olds who try to celebrate their passage to adulthood by consuming 21 shots of hard liquor, only to unintentionally poison themselves, some fatally. And, of course, the tragedy of DUI-caused deaths both to drivers and passengers is a never-ending story.

The stories of “skittles parties” have floated around for years. The formula is simple: kids raid the family medicine cabinet, steal a few pills from each container and attend a party where they all throw their stolen booty into a big bowl and everyone grabs handfuls and swallows them to see who can get the highest, the quickest, and act the most bizarrely and ostensibly, hilariously. It’s a horrifying thought to any parent, but it has been going on in every community for years. The party-goers get younger and younger.

Anyone with a television, radio, newspaper or iPad has seen or heard the news of the opioid epidemic in our country, beginning with younger teens taking them for fun and including the middle-aged or elderly who get addicted after surgery that started them on pain-killers. Heroin is inexpensive today and teens all know where to get it. Nevada remains in the top four states, per capita, with young adult deaths and overdoses caused by opiates. In 2015, Nevada became the 31<sup>st</sup> state to authorize the use of “rescue drugs” (naloxone, Narcan) by family, friends, fellow drug-users, and all levels of emergency responders to try

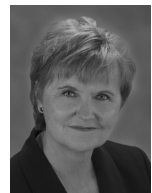
to revive a person who is in respiratory failure from drug overdose. The Good Samaritan Law was passed to shield people from prosecution or lawsuit or professional discipline as long as they call 911, administer the “rescue drug” and then await medical personnel or transport the person to a hospital.

Synthetic narcotics (Spice, K2, Kratom, and hundreds of other names) are still around, but, hopefully, the horror stories of users going berserk and killing or maiming others for no reason have tempered their use in many states. The latest unbelievable synthetic drug is a version of Fentanyl, a very strong pain-killer, that is laced with “elephant tranquilizer” and sold on the streets, literally leaving piles of zombie-like teens and young adults on corners unconscious or dying. News stories have reported this from the East Coast to the West, and as close as Sacramento.

I don’t know if science will ever fully understand the addicted brain, or the impulse or compulsion humans have to get “out of their minds” or numb their senses, but at the very least, parents in our community can read, observe, listen, pay attention and exercise control so their kids enjoy “Graduation Season” this year without endangering their health or safety.

<sup>1</sup>Nuwer, Hank, 2017, *Hazing Death* and 2001, *Wrongs of Passage: Fraternities, Sororities, Hazing and Binge Drinking*, Indiana University Press. ISBN 0-253-21498-X.s.

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



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# E V E N T S

## JUNE

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

**1 4** Washoe County Bar Luncheon, Annual Meeting & Federal Public Defender, Rene Valladares. Harrah's, 12 noon. RSVP by 6/12 at www.wcbar.org or email gina@wcbar.org.

**1 4** Flag Day Celebration, 5:30 p.m., Courthouse Patio at 1 South Sierra Street

**2 1** NALS of Washoe County (legal secretaries & paralegals) general meeting, 12 noon, Black Bear Diner. \$18 inc. 1 hour CLE. Please RSVP by 6/93 to Tori Francis at 353-7620 or email vfrancis@washoecounty.us. Non-members are welcome to attend!

**1 4** Flag Day Celebration, 5:30 p.m., Courthouse Patio at 1 South Sierra Street

Please send upcoming events to gina@wcbar.org.

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