

# The WRIT

OFFICIAL PUBLICATION OF THE WASHOE COUNTY BAR ASSOCIATION

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JAN 16 2018

Thursday, January 25, 2018

McDonald Cararo Wilson LLP **Annual Basque Dinner Celebration**

**Louis' Basque Corner**  
301 E. 4th Street, Reno NV

This year the WCBA Board has named recently retired Judge Janet Berry as our Honorary Dinner Host. Each January since 2006, Washoe County Bar and guests have celebrated the Association's 1905 founding with a dinner. In previous years, the dinner was held at the Santa Fe, but with the temporary closing of the Santa Fe, we're moving to Louis' Basque Corner.



Please join Judge Berry and your colleagues for a picon punch or two. The Bar opens at 5:30 p.m. and dinner seating will begin at 6:30 p.m. Dinner is served family style. Reservations are limited to the first 150 guests. Tickets are \$45 per person or \$450 for a table of ten with signage. Tickets are available online at [www.wcbar.org/events](http://www.wcbar.org/events).

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# APPELLATE BRIEFS

By: Debbie Leonard, McDonald Carano Wilson, LLP

## Judicial Review of Administrative Decisions

The Nevada Supreme Court recently addressed the circumstances in which judicial review of an administrative decision is available. In *State of Nevada Dep't of Health and Human Servs. v. Samantha, Inc.*, 133 Nev. Adv. Op. 100 (Dec. 14, 2017), the Court held that denial of an application for a certificate to operate a medical marijuana dispensary is not subject to judicial review under the Nevada Administrative Procedures Act, NRS 233B.010, et seq. The Court reiterated, however, that even where the APA does not create a right of review, alternative relief may be available by way of declaratory judgment, mandamus or other means.

### Background on the APA

The APA is the primary statutory authority for judicial review of executive branch agency determinations, although other statutes authorize judicial review of the actions of specific public entities. See, e.g., NRS 278.0235 (local land use decisions); NRS 533.450 (actions by the State Engineer). A number of agencies are, by statute, exempt from the requirements of the APA. See NRS 233B.039. A district court only has jurisdiction to review those decisions for which the APA provides review and that are challenged according to the APA's procedures.

To obtain review under the APA, a person or entity must be identified as a party of record in the administrative proceeding and "[a]ggrieved by a final decision in a contested case." NRS 233B.130(1). The APA defines a contested case as "a proceeding, including but not restricted to rate making and licensing, in which the legal rights, duties or privileges of a party are

required by law to be determined by an agency after an opportunity for hearing, or in which an administrative penalty may be imposed." NRS 233B.032.

### The Analysis in *Samantha, Inc.*

The *Samantha* case turned on whether the application process under NRS 453A.322 for a medical marijuana dispensary certificate constitutes a "contested case" within the meaning of the APA. The Court readily concluded that the certificate for a medical marijuana establishment registration was a license. However, the Court analyzed the application process and concluded that because the Department provided no opportunity for hearing, the statutory definition of "contested case" was not satisfied and judicial review under the APA was not available.

Specifically, the Court noted that the statute authorizes the Department to issue only a limited number of certificates annually. The Department evaluates and ranks applications according to considerations set forth in the governing statute and accompanying regulations, with the highest-scoring applicants receiving certificates until the statutorily available permits are exhausted. Nothing in the statutory and regulatory provisions, the Court found, "envisio[n]s any form of hearing..." As a result, the Court agreed with the Department that judicial review under the APA is not available to a disappointed applicant who is denied a certificate. The Court remanded to the district court with instructions to dismiss the applicant's petition for judicial review.

### Other Avenues of Relief From Administrative Decisions

The *Samantha* decision may be more

interesting for what it says about the availability of judicial review generally rather than its specific discussion of whether the facts of the medical marijuana dispensary licensing process created a "contested case." First, the Court specifically stated that "Nevada has not endorsed [a] presumption" of availability of judicial review that is recognized under federal law. Yet in reaching that conclusion, the Court specifically cited a Nevada case, *Checker Cab Co. v. State*, 97 Nev. 5, 8, 621 P.2d 496, 498 (1981), in which the Court held that "[a]ll presumptions are in favor of a right to judicial review for those who are injured in fact by agency action." The Court considered language in *Private Investigator's Licensing Bd. v. Atherly*, 98 Nev. 514, 515, 654 P.2d 1019, 1020 (1982) to call into question the presumption articulated in *Checker Cab*. The *Atherly* case, however, stated only the unnoteworthy proposition that "[p]ursuant to the [APA], not every administrative decision is reviewable." It said nothing about a whether or not a presumption in favor of review exists.

Second, in *Samantha*, the Court articulated that the unavailability of review under the APA "does not place the Department's processes beyond the reach of the judiciary." Rather, the Court identified actions for mandamus, injunctive, declaratory or other equitable relief as additional avenues to obtain judicial review of an agency decision. The limitation in the *Samantha* case was that no other forms of relief had been pled in the district court. But the *Samantha* decision is clear that where the APA does not afford judicial review, the aggrieved party may still seek judicial review through other means.

Although this conclusion is good for those aggrieved by agency decisions

## APPELLATE BRIEFS CONTINUED

that fall outside the ambit of the APA, it underscores the varying standards that may end up being used to review administrative decisions. Under the APA, a reviewing court must determine whether the agency's action was arbitrary or capricious or characterized by abuse of discretion. NRS 233B.135(3). Mandamus is generally reserved for when an agency exceeds its jurisdiction. *State v. Eighth Jud. Dist. Ct.*, 111 Nev. 1023, 1025, 899 P.2d 1121, 1122 (1995). And injunctive relief requires a showing of irreparable harm. When seeking review of an administrative decision, choosing the appropriate legal mechanism for review may turn on what the aggrieved party must demonstrate to obtain the relief sought.



*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.*

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## QUICK HITS FROM YOUR STATE BAR BY VERNON "GENE" LEVERTY, ESQ., PRESIDENT, STATE BAR OF NEVADA

One of the things I enjoy most about serving as president of the State Bar of Nevada is speaking with bar members and getting their feedback on how to improve our works-in-progress, or encourage lawyers on how to get involved in the service of our noble profession. In the past six months, the state bar's Board of Governors has made progress on several projects, including:



- Preparing to host the upcoming National Mock Trial High School Championships in Reno on May 10-12 (volunteer judges are still needed!);
- Asking bar members to participate in a new demographics survey, collecting vital information about the makeup of the bar's membership (look for the survey with your license renewal information);
- Exploring whether it should be mandatory for Nevada attorneys to carry malpractice insurance;
- Collaborating with the Nevada Board of Continuing Legal Education to more efficiently collect CLE dues, without an increase;
- Surveying bar members about ideas related to developing a random trust account audit program, similar to that used in other professions; and
- Putting together a truly excellent line-up of fascinating speakers for this year's Annual

Meeting in Chicago on July 12-14, where we'll be celebrating the Rule of Law.

Your feedback is welcome on these initiatives, as well as many more! You can learn much more either in Nevada Lawyer magazine or on the state bar's website, [www.nvbar.org](http://www.nvbar.org).

## PARALEGAL STUDIES CERTIFICATE PROGRAM WITH EXTENDED STUDIES AT THE UNIVERSITY OF NEVADA, RENO FEBRUARY 10 - APRIL 29, 2018

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