March 2018 Vol. 40, No. 3

The WRIT

OFFICIAL PUBLICATION OF THE WASHOE COUNTY BAR ASSOCIATION

Wednesday, March 14, 2018

CURRENT LEGAL AND REGULATORY FRAMEWORK FOR MEDICAL AND RECREATIONAL MARIJUANA
1 Hour CLE Credit

Please join us for lunch to gain insight and understanding of the current legal and regulatory framework for medical and recreational marijuana. Our speakers for the luncheon will be:

Brian Irvine, Esq. Brian is a partner at Dickinson Wright PLLC. Brian is a Northern Nevada native and a graduate of the University of Nevada Reno and the William S. Boyd School of Law at UNLV. Brian's practice focuses on commercial litigaiton, appeals and creditors' rights. Brian is a member of the Cannabis Working Group at Dickinson Wright and represents a number of cannabis clients on regulatory, government affairs and litigation matters.

Riana Durrett, Esq. Riana serves as the Nevada Dispensary Association's Executive Director, coordinating the NDA's legislative and policy agendas and performing community outreach. Riana is responsible for researching and responding to various issues that affect marijuana dispensaries in Nevada.

Brett Scolari, Esq. Brett is the General Counsel and Director of Government and Regulatory Affairs for Tryke Companies, a cannabis company with operations ("Reef Dispensaries") in Arizona and Nevada. Brett is a Northern Nevada native and is a former partner at the law firm of Jones Vargas and Gordon Silver.

RSVP no later than March 12, 2018. $25 per person for members and $30 for non-members. Register online at www.wcbar.org or call 786-4494.

DUES RENEWAL REMINDER

If you haven't paid your 2018 dues, this will be your last copy of the Writ. You can renew online at www.wcbar.org, call us at 786-4494 or email

APPELLATE BRIEFS

By: Debbie Leonard, McDonald Carano Wilson LLP

LIMITS OF A COURT'S POWER

"The inherent power of the court over attorneys is not limitless." With this emphatic language, the Supreme Court recently held that a Nevada court lacks authority to compel an out-of-state attorney to appear in Nevada for a deposition as a nonparty witness, even where the attorney was earlier admitted pro hac vice in the matter. Quinn et al. v. Eighth Jud. Dist. Ct., 134 Nev. Adv. Op. 5 (February 8, 2018), involved a writ petition challenging a district court order that compelled California lawyers to appear in Las Vegas for depositions after a California court quashed the deposition subpoenas issued there. The Supreme Court considered the matter with unprecedented speed, directing the real parties-in-interest to file an expedited answer within four days of the petition's filing and holding an en banc argument just three days later. The Court then issued a published opinion two months thereafter.

The petitioners were lawyers from the law firm Quinn Emanuel Urquhart & Sullivan based in California, who represented Elaine Wynn from January 2016 to March 2017 in Nevada litigation against Wynn Resorts and its general counsel Kimmarie Sinatra. Approximately six months after the Quinn Emanuel attorneys withdrew from representing Ms. Wynn, Ms. Sinatra filed what the Supreme Court characterized as a "retaliatory" abuse of process counterclaim arising from Ms. Wynn's litigation actions while represented by Quinn Emanuel. Ms. Sinatra caused subpoenas to be issued in California pursuant to California's version of the Uniform Interstate Depositions and Discovery Act ("UIDDA") directing the Quinn Emanuel attorneys to appear for depositions in California.

After objecting and engaging in unsuccessful meet and confer efforts, the Quinn Emanuel attorneys filed a petition to quash the subpoenas in California superior court. The petition alleged defective service and argued that Ms. Sinatra sought protected attorney-client and work product information and could not satisfy the test to depose an opposing party's counsel. Ms. Sinatra filed an ex parte application in the California court on shortened time to compel the depositions prior to the Nevada discovery deadline, which the California court denied but set the matter for hearing in the normal course.

Unsuccessful in California, Ms. Sinatra then filed a motion to compel in the Nevada court. The Quinn Emanuel attorneys opposed the motion, arguing among other things that, under UIDDA, the Nevada court did not have jurisdiction over an ongoing discovery dispute in California. Nevertheless, the Nevada court granted the motion to compel and ordered that the depositions take place in Las Vegas. The Quinn Emanuel attorneys petitioned the Supreme Court for a writ of mandamus or prohibition.

Thereafter, the California superior court held a hearing on Quinn Emanuel's motion to quash and granted it. Determining that it had jurisdiction over the subpoenas, and applying the same test for attorney depositions used in Nevada, the California court concluded that Ms. Sinatra failed to establish a proper basis to depose the Quinn Emanuel attorneys. The California court also sanctioned Ms. Sinatra $10,000 for opposing the petition to quash without substantial justification.

In considering the writ petition, the Nevada Supreme Court analyzed three sources of law: the Nevada Rules of Civil Procedure, the UIDDA (adopted by both California and Nevada) and a court's inherent authority over attorneys who appear before it. From the plain language of Nevada's procedural rules, the Court readily concluded that "the subpoena power of Nevada courts over nonparty deponents does not extend beyond state lines." The UIDDA overcomes that obstacle by requiring a party who seeks out-of-state discovery to submit a subpoena from the trial state (here, Nevada) to the clerk of court in the discovery state (here, California), who reissues it. Any motion practice to quash or enforce the subpoena must occur in the discovery state according to the law of that state.

In the Quinn decision, the Supreme Court noted that Ms. Sinatra initially complied with these UIDDA procedures and only strayed from them when the California court quashed the subpoenas. The Supreme Court held that her attempt to enforce the California subpoenas in a Nevada district court was improper because the California court maintained its jurisdiction over the discovery dispute. Under the UIDDA, the Supreme Court concluded, "the Nevada district court had no authority to grant her motion to compel."

Faced with this jurisdictional hurdle, Ms. Sinatra argued that the Nevada court could exercise its inherent authority to order the Nevada depositions because, through their pro hac vice applications, the Quinn Emanuel attorneys subjected themselves to jurisdiction in Nevada. The Supreme Court likewise rejected this argument, stating that "the district court appeared to conflate personal jurisdiction with subpoena power." Personal jurisdiction, the Court explained, is based on conduct that subjects an out-of-state party to Nevada jurisdiction, while the subpoena power

Continued on page 12

Aooellate Briefs continued from page 8

allows the court to compel a nonparty witness. Where the Quinn Emanuel attorneys are not parties, the Court held, their pro hac vice admissions did not overcome the subpoena power limits.

As a final resort, Ms. Sinatra contended that a district court's inherent authority over attorneys who practice before it authorizes the court to compel those attorneys to comply with discovery, similar to the authority to sanction, make referrals to the State Bar for misconduct and investigate conflicts. The Supreme Court rejected this argument as well, emphasizing that "[t]he inherent power of the court over attorneys is not limitless...." A court's authority to regulate the legal profession does not include the power to compel an out-of-state nonparty witness to sit for a deposition. The mere fact that the nonparty witness is an attorney who appeared before the court does not alter this conclusion.

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. McDonald Carano LLP represented the petitioners in the Quinn case.

Muslim Ban continued from page 10

by the Fourth Circuit, in which the Department of Homeland Security and senior intelligence officials stated that there was no evidence that nationals from these countries, based solely on their nationality, posed any security risk to U.S. citizens.

The Ninth Circuit also did not buy President Trump's explanation that allowing more than 50,000 refugees into the U.S. in 2017 would be detrimental to our interests. Under the INA, the president has to determine how many refugees we are going to accept each fiscal year. Obama already determined that 110,000 refugees should be accepted by the U.S. in 2017, and he made this determination after extensive consultation with various agency heads and Congress. Trump did not offer any explanation as to why Obama's 110,000 figure was incorrect, or why the 50,0001st refugee would place our nation at risk.

Finally, the Ninth Circuit found that President Trump's executive order ran afoul of the INA's prohibition on discrimination against the issuance of visas based on nationality. In their briefing, the government argued that the executive order did not bar *issuance* of visas, just entry. But, at argument, the government admitted that the way they planned to bar entry was by not issuing visas.

The United States Supreme Court granted certiorari on both of these decisions, and stayed enforcement of the Ninth and Fourth Circuit orders in June 2017. Oral argument was initially set in October 2017. However, during the pendency of the appeal, EO-2 expired by its own internal deadlines. Accordingly, oral argument was vacated and the Supreme Court issued an order on October 24, 2017 summarily disposing of the appeals as moot. *Trump v. Hawaii,* 138 S. Ct. 377 (October 24, 2017).

In September 2017, while the appeals concerning EO-2 were pending before the Supreme Court, President Trump issued a "Presidential Proclamation" (EO-3) in which he replaced the portions of EO-2 relating to immigrants, but not refugees. EO-3 was again challenged in Maryland (Fourth Circuit) and Hawaii (Ninth Circuit), and preliminary injunctions were issued in October 2017 which blocked implementation of EO-3. In *Hawaii v. Trump ("Hawaii III")*, the Ninth Circuit narrowed the scope of the injunction to give relief only to those immigrants with a "bona fide relationship" with the United States. *Hawaii III*, 2017 WL 6547095, at *26. The Maryland ruling is currently still on appeal before the Fourth Circuit. *Int'l Refugee Assistance Project v. Trump*, No. CV TDC-17-0361, 2017 WL 4674314, at *1 (D. Md. Oct. 17, 2017). In December, the United States Supreme Court stayed both of these appeals.

In October 2017, on the same day that EO-2 expired, President Trump issued a fourth executive order (EO-4) in which he stated that the suspension on refugee admission was no longer necessary, but that certain categories of refugees would continue to require enhanced risk assessment. On December 23, 2017, the federal district court for the western district of Washington issued a nationwide preliminary injunction enjoining implementation of EO-4 except for those refugees who lack a bona fide relationship with a person or entity in the United States. *See John Doe, et al. v. Trump*, 2017 WL 6551491 (W.D. Wash. Dec. 23, 2017).

The executive orders may have changed, but the arguments remain the same: Does President Trump have the authority to issue these executive orders under either the INA or the Establishment Clause? This issue will most likely be addressed by the United States Supreme Court before the current

Therese Shanks is with the law firm of Robison, Sharp, Sullivan and Brust and focuses primarily on appellate practice and civil litigation. Since joining the firm in 2013, Therese has successfully handled hundreds of legal issues for local business owners.