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The Writ

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Thursday, November 15, 2018, Bruce R. Thompson Federal Courthouse
1:30 to 4:45 p.m.

WCBA ANNUAL ENTERTAINING ETHICS

WHAT DRUG DEALERS AND CELEBRITIES TEACH LAWYERS ABOUT PROFESSIONAL RESPONSIBILITY

3 Hours CLE including 2 Ethics & 1 Substance Abuse

Believe it or not, but the problems faced by some of the most notorious drug dealers actually allow us to understand the requirement to eliminate the barriers to justice for all. Plus, the issues that celebrities face gives us a chance to talk about conflicts, inclusion, and substance abuse. Join the CLE Performer, Stuart Teicher, Esq., as he examines the intersection of several aspects of professional responsibility - access to justice, ethics, substance abuse, and diversity...all in a way that will keep you engaged!

Stuart I. Teicher, Esq. is a professional legal educator who focuses on ethics law. A practicing attorney for over two decades, Stuart's career is now dedicated to helping fellow attorneys survive the practice of law and thrive in the profession.

Mr. Teicher is a Supreme Court appointee to the New Jersey District Ethics Commission where he investigates and prosecutes grievances filed against attorneys.

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APPELLATE BRIEFS

By Adam Hosmer-Henner, McDonald Carano

"YOU STILL HAVE TO FOLLOW THE RULES"

How does a plaintiff go from winning $6,000,000 after trial to having the entire case dismissed eight years later after an appeal? One way, as illustrated by the Nevada Supreme Court in *Rodriguez v. Fiesta Palms, LLC*, 134 Nev. Adv. Op. 78 (Oct. 4, 2018), is to have counsel of record withdraw, leaving the plaintiff to proceed pro se. *Rodriguez* stands for the principle in the NRCP 60(b) context that while "district courts should assist pro se litigants as much as reasonably possible," there are limits and "a pro se litigant cannot use his alleged ignorance as a shield to protect him from the consequences of failing to comply with basic procedural requirements."

Appellant Rodriguez was injured in 2006 when an employee of the Fiesta Palms sportsbook threw merchandise into a crowd, causing another customer to dive into Rodriguez's knee. After filing suit in November 2006 and prevailing in a bench trial in 2010, Rodriguez obtained a $6,051,589 judgment against the Respondent, Fiesta Palms. Respondent appealed the judgment arguing that there were evidentiary errors and improperly excluded expert witnesses. The Court reversed and remanded for a new trial. *FCH1, LLC v. Rodriguez*, 130 Nev. 425, 435, 335 P.3d 183, 190 (2014).

Remittitur was issued in November 2014 and Rodriguez's trial counsel withdrew the next month. Thereafter, Rodriguez attempted to obtain new counsel, which he did, only to have new counsel also withdraw approximately one month before the new trial date in February 2016. The district court continued trial again but Rodriguez was unable to obtain counsel for a hearing on the sixteen motions in limine filed by Fiesta Palms or for a hearing on Fiesta Palm's motion to dismiss. The district court denied Rodriguez's request for further continuance and told him "while we are to accord some accommodations and deference to self-represented litigants, *you still have to follow the rules*." (emphasis added). Thereafter, the district court granted Fiesta Palm's motion to dismiss because it was unopposed and deemed meritorious. Rodriguez eventually obtained replacement counsel who filed an NRCP 60(b) motion to set aside the order of dismissal, five months and three weeks after the challenged order. The district court denied the NRCP 60(b) motion and Rodriguez appealed.

NRCP 60(b)(1) provides that a district court "may relieve a party or a party's legal representative from a final judgment, order, or proceeding" on grounds of "mistake, inadvertence, surprise, or excusable neglect." In *Yochum v. Davis*, the Court identified

four factors relevant to whether NRCP 60(b)(1) relief is appropriate: "(1) a prompt application to remove the judgment; (2) the absence of an intent to delay the proceedings; (3) a lack of knowledge of procedural requirements; and (4) good faith." 298 Nev. 484, 486, 653 P.2d 1215, 1216 (1982).

First, the Court noted that even though Rodriguez's motion to set aside the judgment was technically within the six-month mandatory time limit of NRCP 60(b), it was only an outer limit, and he still did not act promptly or within a reasonable time given the circumstances. Second, the Court found that the record supported a finding that Rodriguez intended to delay the proceedings due to his numerous requests for continuances. Interestingly, the Court found that Rodriguez "intended to delay trial until he secured new counsel, rather than proceeding without representation." This conclusion seems somewhat harsh as it is certainly reasonable, as illustrated by the *Rodriguez* opinion itself, for a party to want to proceed with counsel rather than without. Third, the Court found that Rodriguez was aware of the procedural requirements imposed upon him. Fourth and finally, the Court declined to consider whether Rodriguez acted in good faith given the district court's silence on this factor, but still held that it would affirm based on the first three factors.

The Court's opinion illustrates the difficulty in "balanc[ing] the preference for resolving cases on the merits with the importance of enforcing procedural requirements." This balance is found within the Nevada Rules of Appellate Procedure, which are replete with special dispensations to pro se parties. *See* NRAP 10(b)(1) (exempting pro se parties from the rule requiring the preparation of the record); NRAP 28(k) (permitting pro se parties to file informal briefs); and NRAP 30(i) (preventing pro se parties from filing an appendix). Contrastingly, there are other provisions that specifically reaffirm their applicability for pro se parties. *See* NRAP 9(b) ("A pro se appellant in a civil appeal shall identify and request all necessary transcripts."); NRAP 21(a)(4) (mandating that "pro se writ petitions shall be accompanied by an appendix").

Unlike these provisions though, NRCP 60(b) is not tailored one way or the other toward pro se parties. Lack of counsel typically does not constitute "excusable neglect" warranting relief from a judgment. See *Bonnell v. Lawrence*, 128 Nev. 394, 404, 282 P.3d 712, 718 (2012) (internal quotations omitted) ("Fundamental rules governing the finality of judgments cannot be applied differently merely because a party not learned in the law is acting pro se.") The district court demonstrated significant flexibility toward Rodriguez, before entering judgment, by granting multiple continuances and providing repeated cautions about the consequences of failing to respond. Once the dismissal order was entered though, the approach shifted to something more along the lines of enough is enough. Rodriguez argued that his delay in filing the NRCP 60(b) motion was excusable because he was struggling to find counsel, he was living outside of Nevada, and he was in poor physical and mental health. Earlier in the action, these grounds warranted continuances of trial, but it seems that they do not outweigh "the need to swiftly administer justice" once judgment is entered.

Adam Hosmer-Henner is a partner at McDonald Carano and practices primarily in the areas of commercial litigation and appellate law. He regularly handles appeals and writ proceedings at the Nevada Supreme Court and the United States Court of Appeals for the Ninth Circuit.

Mediation Continued from page 7

Coben focused on 2013 through 2015, finding that state or federal courts interpreted the UMA to resolve a dispute about confidentiality in mediation only 16 times nationwide. This accounts for only 8% of all state and federal cases addressing mediation confidentiality disputes in that three-year period. Professor Coben compared those results to California, which has not adopted the UMA. During that same time period, California state and federal courts issued nearly 50 opinions on mediation confidentiality – 6 times more than in all UMA jurisdictions combined.

While it may not be the best idea to consult California statutes on mediation confidentiality when looking at how best to strengthen Nevada's statute, there may be some elements worth examining. For example, the California Legislature has just passed a provision requiring informed consent for mediation. On January 1, 2019, Senate Bill 954 will take effect. The new bill requires attorneys to obtain their client's signature on a separate printed disclosure form confirming the client understands mediation confidentiality. The statute will actually contain a sample form attorneys can use to ensure they are complying with the new law. A form such as this is an excellent way to confirm that clients understand mediation communications cannot be used outside of the session.

Without doubt, ensuring mediation confidentiality is crucial. Until Nevada augments the language contained in NRS 48.109, using a good, solid confidentiality agreement, perhaps modeling language from California's Senate Bill 954, is a prudent measure. What happens in mediation should stay in mediation!

Margaret Crowley is an experienced mediator, Supreme Court Settlement Judge, EEOC Mediator, Second JD Custody & Dependency Mediation Panels, Pro Tem Family Court Master and mediation instructor.