April 2019 Vol. 41, No. 4

The WRIT

OFFICIAL PUBLICATION OF THE WASHOE COUNTY BAR ASSOCIATION

Wednesday, April 24, 2019, Harrah's Convention Center
12:00 p.m. - 1 Hour CLE

WCBA Welcomes State Bar Chief Counsel - Dan Hooge

Meet your new Bar Counsel, Daniel Hooge. Dan will cover what to expect from attorney discipline including:

- Goal of Discipline
- Why is Discipline Public?
- Types of Discipline
- Factors to Consider when Imposing Discipline
- Aggravating Factors
- Mitigating Factors
- Discipline Process
- Screening Panel Options
- Diversion/Mentoring
- Hearing Panels
- Formal Hearing
- Supreme Court Review
- Negotiated Pleas
- Bar Counsel's Tips

Daniel Hooge is the Chief Bar Counsel for the State Bar of Nevada. While the Supreme Court of Nevada retains ultimate authority to regulate the legal profession, Mr. Hooge and the Office of Bar Counsel serve as the Court's arm to investigate and prosecute claims that a lawyer has violated the Rules of Professional Conduct. Previously, Mr. Hooge served two terms as the District Attorney for Lincoln County, Nevada where he prosecuted criminal matters and represented the County in civil matters.

RSVP by April 22, 2019. $25 per person for members, tables of eight with signage $200 and $35 for non-members. Register online at www.wcbar.org or call 786-4494.

Mr. Hooge has written and lectured on legal topics relating primarily to prosecution and professional responsibility. He is a member of the National Organization of Bar Counsel and was formerly a member of the Nevada and National District Attorneys Association.

He earned his J.D. in 2007 from Brigham Young University and his B.A. in Business Management and Finance in 2003 from Brigham Young University. He is admitted to the bars of Nevada and Utah.

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APPELLATE BRIEFS

By Adam Hosmer-Henner, McDonald Carano

APPELLATE REVIEW OF ORDERS COMPELLING THE DISCLOSURE OF PRIVILEGED INFORMATION

A "writ of prohibition is an appropriate remedy to correct an order that compels disclosure of privileged information." *L.V. Dev. Assocs. v. Eighth Jud. Dist. Ct.,* 130 Nev. 334, 338, 325 P.3d 1259, 1262 (2014). Alternatively, the Nevada Supreme Court might have said that a writ is the remedy in such a situation as the Nevada Rules of Appellate Procedure do not authorize an interlocutory appeal. While the Supreme Court of Nevada does entertain writ petitions challenging the required disclosure of privileged information, the issuance of a writ is purely discretionary.

Writ relief is "rarely available with respect to discovery orders," but there is a recognized exception if the discovery order involves privileged information. *Valley Health Sys., LLC v. Eighth Judicial Dist. Court of State ex rel. Cty. of Clark,* 127 Nev. 167, 169, 252 P.3d 676, 677 (2011). The rationale behind this exception is that "once information is produced, any privilege applicable to that information cannot be restored." *Id.; see also Wardleigh v. Second Judicial Dist. Court In & For Cty. of Washoe,* 111 Nev. 345, 350–51, 891 P.2d 1180, 1183–84 (1995) (recognizing the availability of writ relief to "remedy an order compelling the disclosure of allegedly privileged information, which would 'irretrievably lose its and privileged quality and petitioners would have no effective remedy, even by a later appeal.'") (internal quotations omitted); see also *City of Petaluma v. Superior Court*, 248 Cal. App. 4th 1023, 1031, 204 Cal. Rptr. 3d 196, 202–03 (2016) ("Writ review is appropriate here . . . An appeal following a final judgment does not offer an adequate remedy because there is no way to undo the harm resulting from the disclosure of privileged materials."). As this rationale would seem to apply to every order compelling the disclosure of privileged information, an automatic interlocutory appeal rather than a discretionary writ proceeding could be a more appropriate option for appellate review.

NRAP 3A(b)(1) allows appeals to be taken from final judgments, but NRAP 3A(b)(3)-(6) and NRAP 3A(b)(9)-(10) also permit certain interlocutory appeals. *See* NRAP 3A(b)(3) (authorizing an appeal from an order granting or refusing to grant an injunction); see also NRAP 3A(b)(10) (authorizing an appeal from an interlocutory judgment in an action for partition). The Rule does not, however, provide for an interlocutory appeal from an order compelling the disclosure of privileged information. This is similar to procedure in California and many other states, but it is not universal. For example, Ohio deems an order compelling the production of materials alleged to be protected by the attorney-client privilege to be a final, appealable order. Ohio Rev. Code 2505.02(B)(3)-(4).

The United States Supreme Court adopted a hardline for discovery appeals in federal cases in *Mohawk Industries, Inc. v. Carpenter*, 558 U.S. 100, 112 (2009), holding that orders compelling disclosure of potentially privileged material did not qualify for immediate appeal under the collateral order doctrine. The Court determined that the "limited benefits of applying 'the blunt, categorical instrument of § 1291 collateral order appeal' to privilege-related disclosure orders simply cannot justify the likely institutional costs . . . Permitting parties to undertake successive, piecemeal appeals of all adverse attorney-client rulings would unduly delay the resolution of district court litigation and needlessly burden the Courts of Appeals." *Id*. This language highlights the judicial economy concerns raised by permitting a wider range of interlocutory appeals. The Court did minimize the impact on litigants in a somewhat surprising manner though by stating that one option for an aggrieved party was to "defy a disclosure order and incur court-imposed sanctions." *Id*. at 111. Thereafter, a party could obtain postjudgment review or, if held in contempt, access a direct appeal "at least when the contempt citation can be characterized as a criminal punishment." *Id*.

A litigant in federal court clearly has a much more difficult appellate choice to make than a litigant in Nevada state court, who does not have to incur criminal contempt to obtain appellate review, through a writ petition, of a discovery order regarding privilege. The sanction/contempt procedural option outlined in *Mohawk* (that in fairness was just one of several options discussed in the opinion) is in sharp contrast to the readily accessible, interlocutory appeal authorized in Ohio. The approach in Nevada falls in the middle of this spectrum by generally recognizing that immediate appellate review should be available but requiring parties to seek discretionary writ relief.

Nevertheless, there is still significant procedural uncertainty present in the writ petition process that would not be present if an interlocutory appeal was authorized in NRAP 3A(b). Recently, the Nevada Supreme Court entertained

a writ petition challenging an order requiring the disclosure of emails that the petitioner claimed were protected by the attorney-client privilege. *Vistana Condo. Owners Ass'n, Inc. v. Eighth Judicial Dist. Court in & for Cty. of Clark*, 432 P.3d 218 (Nev. 2018). The merits of the petition, however, were not addressed in detail with the Court simply writing that "[h]aving considered the petition, we are not convinced that our intervention is warranted." Id. Relying on the discretionary nature of the writ process, the Court did not render a decision that the emails were or were not privileged, leaving the petitioner to wonder whether intervention was not warranted because the emails were not privileged or because the issue was not significant. This uncertainty is the result of the balance struck in the current Nevada Rules of Appellate Procedure against the "institutional costs" of more frequent interlocutory appeals.

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.

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charged felons with SMI. There are few crisis stabilization beds at NNAMHS and if admitted, they are released to the streets within hours. In Reno hospitals, ERs are full and inpatient mental treatment is for those with cash or commercial insurance, not Medicaid (even NNAMHS, a state agency, won't accept Medicaid). From my bench, the prospects for a solution seem bleak.

[1]The federal Substance Abuse and Mental Health Services Administration of the U.S. Department of Health and Human Services.

[2]The report and a video presentation of the data are available at https://www.samhsa.gov/data/nsduh/reports-detailed-tables-2017-NSDUH.

[3]Northern Nevada Adult Mental Health Services.

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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[1]http://www.pewresearch.org/fact-tank/2019/01/17/where-millennials-end-and-generation-z-begins/.

[2]The Rise of the Millennial Workforce, https://www.wired.com/insights/2013/08/the-rise-of-the-millennial-workforce/.

[3]The Rise of the Millennial Workforce, https://www.wired.com/insights/2013/08/the-rise-of-the-millennial-workforce/.

[4]Legal Sector Trends in the United States: Witnessing Change, CBE, https://www.cbre.us/research-and-reports/2017-US-Law-Firm-Trends.

[5]Jeanette Settembre, Millennials are taking over the workforce, Market Watch, April 2018, https://www.marketwatch.com/story/millennials-are-taking-over-the-workforce-2018-04-16-11884422.

[6]NRPC 1.6(c).

[7]THE STATE BAR OF CALIFORNIA STANDING COMMITTEE ON PROFESSIONAL RESPONSIBILITY AND CONDUCT FORMAL OPINION INTERIM NO. 08-0002, http://www.calbar.ca.gov/Portals/0/documents/publicComment/2009/Prop-Opin-Tech-Confidentiality.pdf?ver=2017-05-19-142143-280.

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