

# The WRIT

November 2011, Vol. 33, No. 10

OFFICIAL PUBLICATION OF THE WASHOE COUNTY BAR ASSOCIATION

## Entertaining Ethics with Sean Carter Wednesday, November 2, 3-6:20 p.m. • Harrah's

### Sean Carter returns to WCBA Entertaining Ethics 2011

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Sean is a Harvard law graduate who practiced law for a decade at major law firms on both coasts and in-house at a public-traded financial institution. Sean draws heavily on his wealth of experience in the law and on his background as a stand-up comedian.

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### WCBA Nite at the Nevada Discovery Museum Thurs, Oct. 27, 5:30-8 p.m

WCBA invites you to join colleagues, friends and family at the new Terry Lee Wells Nevada Discovery Museum. The Bar is hosting this event for members, their spouses, kids or grandkids. Please bring a donation of food for Food Bank of Northern Nevada.

Explore the Truckee River, see Nevada history, get hands-on in DaVinci's Corner or scurry up the Cloud Climber. Appetizers and drinks in the Atrium. Halloween costumes welcome!

RSVP please at [wcbar.org](http://wcbar.org) or 786-4494.



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*Clay Brust, President*



Some people claim they don't watch TV. I watch it almost every night, but only for a couple hours. I'm also devoted to following my fantasy baseball team. Fantasy baseball is one of the best ways to spend your evening. It's like following your favorite team on TV, but make-believe. This all requires a lot of time reclining in a chair while looking at a screen, something I practice a lot at work. You too may enjoy the seemingly unlimited entertainment options sent directly to your house through cables buried in the ground or through the airwaves via satellites. You can rent movies, watch reality shows, follow the hijinks of your favorite comedy series, or learn about what the president of Djibouti (Ismail Omar Guelleh) did today without ever having to talk to a person.

Not too long ago, before television and computers delivered all the news and entertainment into our houses, people ventured out. They watched courtroom dramas in actual courtrooms! They visited the Mapes, Riverside, Harrah's, Pioneer Theater, local restaurants, friend's houses, and other gathering places. Many of the local restaurants were places where "regulars" met on a regular basis and gossiped about was happening in the community. In Carson City, the Old Globe was (and still is to some degree) a famous gathering spot on Friday evenings to embellish the week's events. I remember growing up during a time when the entire

city (or at least what seemed like the entire city) went to the high school football games and basketball games. Now it seems that only parents and some students attend.

For all that we have gained by having constant world, national and local news in our homes, we have lost something too. It seems that only a generation ago, everybody knew each other in Northern Nevada. That is changing in part because the state is growing. It is also changing because we don't see each other as much.

The Washoe County Bar Association offers several events for its members to maintain community-strengthening social ties. By the time you are reading this, we will be near our Discovery Museum event. Hopefully I'll see you there. In the next few months, we will have two other significant events for our members.

The first event is the 40-Year-Plus luncheon, on December 14th at Harrah's. We will honor current members of the Washoe County Bar Association who have been licensed in Nevada for forty years. This year's honorees are well known to nearly everyone in the Bar: Thomas Belaustegui, Byron Bilyeu, Mike Clasen, Ross de Lipkau, Gordon De Paoli, John Echeverria, David Hamilton, A.J. "Bud" Hicks, James Kosinski, Robert Lyle, Marvin Murphy, Fred Oats, John Ohlson, Steve Peek, Kent Robison, and Ted Schroeder.

Please attend and make comments about these inductees, even if the comments

are inappropriate. Don't worry, I will swear everyone to secrecy after we pledge allegiance to the flag. As president, I can do that. Also, Bud Hicks told me he has the picture of the honorees being sworn in to the bar. That alone will be worth the price of the lunch.

And of course, we have the Santa Fe dinner in January. Monique Laxalt will be our host this year. Monique's father wrote *The Basque Hotel*, which is the story of her family's operation of a Basque hotel in Carson City, Nevada. In the book, Robert Laxalt discusses how Basque hotels/boarding houses and their attached restaurants and bars were gathering places. Indeed, when I was a small boy my parents would socialize with other adults in the bar at the Star Hotel when we visited my grandparents in Elko. My brother and I were given pennies to put on railroad tracks outside for the trains to flatten. When we ran out of pennies, we'd go in to get more and have a heck of a time working our way through the crowd and noise of laughter and spirited conversation. The Sante Fe Dinner is a lot like that—so loud you can't even hear the trains go by. I look forward to seeing you there and appreciate your attendance at WCBA events. If you have any ideas for additional social events for the WCBA, let us know.

By the way, the best part about fantasy sports is that it's a good excuse to meet with the other people in the league several times a year.

## The WRIT

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# CONVERSATIONS ON DISCOVERY

By Wesley M. Ayres, Discovery Commissioner

The Fifth Amendment provides, in pertinent part, as follows: “No person shall . . . be compelled in any criminal case to be a witness against himself.” Identical language is found in the Nevada Constitution, at Article 1, Section 8. Despite the reference to criminal cases, the privilege against self-incrimination may be asserted in other proceedings:

The privilege [against self-incrimination] can be claimed in any proceeding, be it criminal or civil, administrative or judicial, investigatory or adjudicatory . . . [I]t protects any disclosures which the witness may reasonably apprehend could be used in a criminal prosecution or which could lead to other evidence that might be so used.

*Application of Gault*, 387 U.S. 1, 47-48 (1967) (emphasis in original) (quoting *Murphy v. Waterfront Comm’n*, 378 U.S. 52, 94 (1964) (White, J., concurring)). The privilege against self-incrimination extends to civil suits because “[t]estimony obtained in civil suits . . . could also prove so incriminating that a person compelled to give such testimony might readily be convicted on the basis of these disclosures in a subsequent criminal proceeding.” See *Michigan v. Tucker*, 417 U.S. 433, 441 (1974). Nevertheless, issues can arise when a party attempts to assert the privilege in a civil action, and the Nevada Supreme Court recently addressed some of those issues in *Francis v. Wynn Las Vegas, LLC*, 127 Nev., Adv. Op. 60 (2011).

At the end of a trip to Las Vegas, defendant owed plaintiff \$2 million. He acknowledged the debt and stated his intention to pay it, but later claimed that he was entitled to an unspecified discount. In any event, no payments

were made toward the \$2 million debt. Plaintiff then commenced an action to recover the debt, and defendant asserted affirmative defenses and counterclaims. In connection with his NRCP 16.1 obligations, defendant produced only one document, and he did not conduct any discovery thereafter.

A few months after commencement of the civil action, the district attorney initiated a criminal prosecution against defendant based upon his failure to pay plaintiff the balance owed. When plaintiff subsequently took defendant’s deposition in the civil action, defendant asserted his privilege against self-incrimination in response to nearly every question asked (including an inquiry asking him to state whether he is married, and one asking him to state his father’s name). Defendant made no attempt to cure his improper assertions of the privilege or to waive that privilege. After the close of discovery, and nearly a year after commencement of the civil action, plaintiff filed a motion for summary judgment. Defendant opposed that motion, arguing that discovery should be reopened, that he could cure the improprieties in his deposition, that he might withdraw his privilege, and that he should be permitted to conduct discovery to oppose the motion, under NRCP 56(f); yet no evidence was submitted in support of his opposition. The district court granted summary judgment on all claims and counterclaims, referring to defendant’s deposition conduct as “the most ridiculous exercise of the 5th Amendment I think I’ve ever seen.”

On appeal, defendant argued that the district court improperly penalized him for asserting his privilege against self-incrimination, and that the court should

have accommodated his privilege by reopening discovery proceedings. While an individual’s exercise of the privilege against self-incrimination may not be penalized, see *Francis*, 127 Nev., Adv. Op. 60, at 5; see also *Spevack v. Klein*, 385 U.S. 801, 805 (1977) (“exercise of Fifth Amendment rights should not be made unnecessarily costly”), that privilege is not absolute, see *United States v. Pisani*, 590 F. Supp. 1326, 1342 (S.D.N.Y. 1984). In accordance with federal case authority, the supreme court reasoned that courts “must carefully balance the interests of the party claiming protection against self-incrimination and the adversary’s entitlement to equitable treatment.” See *Francis*, 127 Nev., Adv. Op. 60, at 6 (quoting *SEC v. Graystone Nash, Inc.*, 25 F.3d 187, 194 (3d Cir. 1994)). In that regard, a wide range of remedial measures may be taken, and courts should explore all possible measures to accommodate the privilege when a party makes a timely request for accommodation of a legitimate self-incrimination concern. See *Francis*, 127 Nev., Adv. Op. 60, at 6; see also *United States v. 4003-4005 5th Ave., Brooklyn, N.Y.*, 55 F.3d 78, 84 & n.6 (2d Cir. 1995) (upon timely request, court should explore all possible measures in order to “select that means which ‘strikes a fair balance . . . and . . . accommodates both parties’”) (quoting *United States v. United States Currency*, 626 F.2d 11, 16 (6th Cir. 1980), and *Shaffer v. United States*, 528 F.2d 920, 922 (4th Cir. 1975)).

The court mentioned various factors to be considered in determining how to respond to a party’s request for accommodation. Courts will look at how and when the privilege was invoked, how and when the privilege was attempted

to be withdrawn, the nature of the proceeding, and the extent of prejudice to the opposing party. *See Francis*, 127 Nev., Adv. Op. 60, at 6. With regard to the first factor, the court observed that defendant's exercise of the privilege was unjustifiable. In civil cases, "invocation of the privilege is limited to those circumstances in which the person invoking the privilege reasonably believes that his disclosures could be used in a criminal prosecution, or could lead to other evidence that could be used in that manner." *See id.* at 7 (quoting *Doe ex rel. Rudy-Glanzer v. Glanzer*, 232 F.3d 1258, 1263 (9th Cir. 2000)). Defendant should have sought assistance from the district court (e.g., an order sealing the deposition or limiting the scope of questioning), and he was not entitled to a warning regarding the consequences of an improper exercise of his privilege. *See id.*

Analysis of the second factor weighed heavily against defendant. Despite representations that he would try to cure his deposition, he made no efforts in that regard until after the close of discovery and the filing of plaintiff's motion for summary judgment. The party invoking this privilege is not "freed from adducing proof in support of a burden which would otherwise have been his"—such as the burden of presenting evidence in opposition to a motion for summary judgment. *See id.* at 5 (quoting *United States v. Rylander*, 460 U.S. 752, 761 (1983)). The court viewed this last-minute attempt to withdraw his privilege as evidence that he was abusing the privilege, a factor that can warrant severe remedial measures such as preventing the party from presenting material previously claimed to be protected by the privilege. *See id.* at 6, 8.

The court recognized that pendency of a criminal proceeding based upon the same facts as the civil action presents a danger of self-incrimination. *See id.* at 8. Moreover, a special effort to accommodate the privilege may be warranted when the government is a party in the civil action and also controls the decision as to whether criminal proceedings will be initiated. *See id.* at 6 (citing *Graystone Nash*, 25 F.3d at 193-94)). In fact, a stay of the civil action might be the most appropriate course under those circumstances. But the court emphasized that the civil action

involving defendant was not brought by the government, which lessened the impact of this consideration. *See id.* at 8.

The fourth factor, prejudice to the opposing party, also militated against defendant. Indeed, this factor is often dispositive, and extensive remedial measures generally may be taken when the opposing party would otherwise suffer prejudice. *See id.* at 6. Here, as explained by the supreme court,

Francis's tactics had already resulted in unnecessary expense to Wynn and probable delay in obtaining discovery documents. Wynn would have been further prejudiced if Francis were allowed to withdraw his invocation or reopen discovery because Wynn had been forced to conduct its discovery without the benefit of Francis's deposition.

*Id.* at 8. Taken together, the court found that these considerations weighed heavily in favor of the district court's remedial measures, and it upheld that court's refusal to allow defendant to withdraw his privilege or to reopen discovery proceedings.

As noted above, defendant also requested the opportunity to conduct discovery pursuant to NRCPC 56(f), which permits a court to deny a summary judgment motion or to continue the matter to permit discovery that arguably will lead to the creation of a genuine issue

of material fact. *See Aviation Ventures v. Joan Morris, Inc.*, 121 Nev. 113, 118, 110 P.3d 59, 62 (2005). Our high court reaffirmed that a district court may properly deny such a request for discovery if the requesting party "failed diligently to pursue discovery." *See Francis*, 127 Nev., Adv. Op. 60, at 9 (quoting *Chance v. Pac-Tel Teletrac Inc.*, 242 F.3d 1151, 1161 (9th Cir. 2001)). Although defendant sought to subpoena certain bank records and depose two individuals, he did not explain why the information and documents were not previously obtained during the discovery process. In fact, defendant had not diligently pursued discovery, and the district court's decision not to permit further discovery was therefore affirmed. *See id.* at 9-10. All that remained was for the supreme court to determine whether the district court's decision to grant summary judgment was proper. After recounting the substantial evidence submitted by plaintiff in support of its motion, and observing that defendant submitted no evidence to create a genuine issue of material fact in connection with plaintiff's claims or his own counterclaims, the court had no problem affirming the district court's order granting summary judgment. *See id.* at 10-11.

*Wes Ayres is Discovery Commissioner for the Second Judicial District Court. His columns are online and searchable at wcbar.org.*







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Terry Lee Wells Nevada Discovery Museum

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## WCBA News

Washoe County Bar has several upcoming events and programs scheduled for the rest of 2011 and early 2012. We encourage you to join us at the newly opened Nevada Discovery Museum on October 27th, to attend our annual Entertaining Ethics seminar on November 2ns—yes, we brought Sean Carter back with an all new program—and to congratulate our 40+ honorees at the December 14 luncheon.

Also on December 14 at Harrah's, we offer a full day seminar on Negotiations. Our speakers are Mark Lenz and Rusty Hoover (9-4:45, 6 cr., Dec. Bar Luncheon included).

The Board approved the addition of a new monthly e-publication focused solely on technology. Watch your e-mail for "Tech Bytes" beginning in November. We are hoping some of you "techie" out there will contribute tips to valuable website and sources.

We are awaiting the UNR Basketball schedule before we choose a date for the annual dinner at the Santa Fe Hotel. Monique Laxalt is our host this year. It sells out early so watch for your invitation in early December.

WCBA has signed on to participate in the State Bar's Solace Program: the program assists any lawyer, law firm employee, judge, courthouse employee or law student who suffers a loss or develops a particular need as a result of a catastrophic event, injury or illness. More details will be coming in the *Writ*.

WCBA sends dues renewals in early November for the following year. We have also been running a "special" that offered first-time members 15 months for the price of 12—join in October and get all of 2012 included. It's been a successful effort that brought many new members to WCBA.

Ready for Life—The *Writ* will be reporting on law firms and lawyers who

sign the Ready for Life compact, adopt a school or otherwise participate in that program. Please send news of your involvement to [chris@wcbar.org](mailto:chris@wcbar.org).

Upcoming luncheon programs include a two-month series on office technology: cloud computing on February 8 and trial technology on March 14.

The Bar conducts its biennial Judicial Performance Survey in 2012. WCBA has selected BallotBox LLC as the online tool for the 2012 survey. Meridian Advantage will again serve as the independent accounting firm for the Survey.

WCBA Board members and staff welcome your ideas and suggestions. Please contact any Board or staff member listed on page 2 of the *Writ*.

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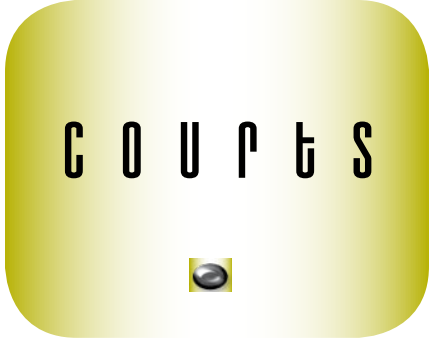
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## Supreme Court Justice Michael Cherry Receives National Indigent Defense Award

Nevada Supreme Court Justice Michael Cherry received the 2011 Champion of Indigent Defense Award from the Washington, D.C.-based National Association of Criminal Defense Lawyers.

It is the first time since the award was initially presented in 2002 that a judge has received the honor, according to NACDL attorney John Gross.

Justice Cherry chairs the Supreme Court's Indigent Defense Commission, which has been examining how Nevada's justice system treats criminal defendants who cannot afford to hire their own attorneys.

In notifying Justice Cherry of the award, NACDL president Lisa Wayne, stated, "Your long and persistent dedication to improving indigent defense systems in the State of Nevada, and in



particular your role as the chairman of the Indigent Defense are truly remarkable and are examples of how members of the judiciary can help effect meaningful reform of our criminal justice system."

"Justice Cherry's passionate commitment throughout his legal career to the defense of those who cannot afford their own counsel makes him truly worthy of this award. Our state is fortunate to have such a tireless advocate in this most important area of law," Chief Justice Nancy Saitta said.

Justice Cherry was nominated for the award by former Nevada Federal

Public Defender Franny Forsman, who noted that "for 40 years, Michael Cherry has demonstrated his commitment to criminal defense, and more particularly, the defense of those who are unable to afford retained counsel."

Former Supreme Court Justice William Maupin, who spearheaded the creation of the Indigent Defense Commission in 2007 and appointed Justice Cherry its chairman, commented, "The greatness of our country and our state must be judged by how we dispense justice to people from all walks of life. This must begin with the judges and justices that preside over the criminal justice system and end with the lawyers that commit their careers to defending those who are unable to defend themselves."

Justice Cherry has practiced law in Nevada since 1970, beginning as a deputy public defender before going into private practice. In 1998, he was elected a district court judge and then elected to the Supreme Court in 2006.

As part of its work, the Indigent Defense Commission recommended performance standards for criminal defense attorneys, which were approved by the Supreme Court in 2009. The Indigent Defense Commission also studied whether caseload limits should be set for public defenders in Nevada.

The Commission's Rural Subcommittee issued a report making several recommendations to improve the delivery of defense services across the state.

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# C O U R T S



## Sidekick Launched in Pahrump

The Nevada Supreme Court launched its Sidekick Program September 28th in the Pahrump Justice Court of Justice of the Peace Tina Brisebill.

Nye County Commissioner Dan Schinhofen of Pahrump joined Judge Brisebill in her courtroom to experience first hand the challenges she faces on a daily basis, the indispensable role the courts play, and demonstrate the impact judges have on the daily lives of Nevadans.

The program is designed to provide public officials with personal insight into the daily responsibilities, volume, complexity, and variety of judicial duties and responsibilities of the courts at every level, from the Supreme Court down to the Municipal Courts. The Sidekick Program is a statewide program sponsored by the Nevada Supreme Court's Judicial Public Information Committee (JPIC).

Nevada Supreme Court Chief Justice Nancy Saitta, who chairs JPIC, emphasized that "the courts and the other branches of government maintain a partnership that works to benefit the public."

"Each branch of government has its role and each branch has its challenges," Chief Justice Saitta said. "In today's economic climate, we recognize the challenges of those who must fund the courts. The courts at every level have been doing all they can to fulfill their constitutional responsibilities while working within the fiscal realities."

"The role of the courts is sometimes not as well understood as we would like, and if we can provide an opportunity to bridge the gap it is in the best interests not only of the courts and those who fund the courts, but the public as well," Chief Justice Saitta said.

In the program, Legislators, County Commissioners, and City Council

"The role of the courts is sometimes not as well understood as we would like, and if we can provide an opportunity to bridge the gap it is in the best interests not only of the courts and those who fund the courts, but the public as well," Chief Justice Saitta said.

members will spend time visiting a court in their district, county, or city. During the visit, the lawmakers will observe court proceedings, tour court facilities, and meet with a host judge and perhaps the presiding judge and court administrator. This will provide an opportunity to

discuss issues of mutual concern about the judiciary and court facilities.

While Judge Brisebill will kick off the Sidekick Program, judges from across the state have volunteered to participate in programs in their communities.

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# J U D I C I A L E t h i C S

Hon. David Hardy, Second Judicial District Court, Department 15

“[Senator Raggio] knows what the right thing is, and always does it.”<sup>1</sup>

I have a lifelong love affair with books. I have never had a television in my bedroom. For 25 years, my wife and I have ended each night by reading until one of us falls asleep. My reading interests trend between history, historical fiction, and biography. I occasionally read the suspense novel of the day. And when I'm desperate I read one of my wife's mindless mystery novels.

I try to read good books, and I occasionally stumble into a great book. I keep a shelf in my library of books that are better than great—they are the timeless books I re-read every few years. These books compose my lifetime reading list.

I have never written a book review. Several years ago I attempted to write a review of the book *Contempt of Court: The Turn-of-the-Century Lynching that Launched 100 Years of Federalism*. The book details a sham trial and hasty lynching in Chattanooga, Tennessee. I loved the book's structure and narrative. It did what great books do: it gripped me page-by-page and subtly led me to inspiration and resolve. The book also reminded me I am a better reader than writer, as my review was horribly written and never published.

I wrote an essay this month in which I presented several examples of entertaining judicial misconduct from other states. However, I keep reflecting upon a book I finished just days ago. I therefore discarded my essay in lieu of this second attempt to review a book that entertained and inspired me. Through its pages I resolved to be a better person and a better judge. I write of *A Man of His Word: The Life & Times of Nevada's Senator William J. Raggio*.

Author Michael Archer's thorough research reveals his intellectual honesty and literary balance. Senator Raggio does emerge from the pages as a heroic public figure, but not through the insincere adulation of an ingratiating author. Archer's greatest skill is revealing Senator Raggio's authenticity. Archer does not tell his readers who Senator Raggio is. Instead, he reveals Senator Raggio through well-sourced events and invites readers to measure Raggio for themselves, knowing there are inescapable conclusions: 1) Senator Raggio is a man of singular importance to contemporary Nevada; 2) Senator Raggio's influence is grounded in his inviolate and enduring character; and 3) Senator Raggio is more than a man of his word—he is a man whose word is informed by his experience and wisdom.

*Man of His Word* is much more than a biography; it is a wonderful narrative of Nevada history throughout the 20th Century. It may be divided into four subparts, which I summarily introduce.

## EARLY NEVADA AND THE DEVELOPMENT OF RENO

Because Senator Raggio is a fourth-generation Nevadan, I learned about the hardscrabble lives of his progenitors and other early settlers in Northern Nevada. I learned about the influences of prohibition, prostitution, the divorce industry, and the emergence of gaming and tourism in the development of Reno. I learned details about local places and people whose names I had only heard. Through *Man of His Word* I was able to see a young city during idyllic but challenging times. Through *Man of His Word*, I better understand my state and community.

## THE PROSECUTION YEARS

Senator Raggio accepted District Attorney Jack Streeter's invitation to join the prosecutor's office in 1952. Raggio was elected District Attorney in 1958. *Man of His Word* contains 21 chapters detailing Raggio's service as the chief prosecuting attorney in Washoe County. The chapters introduce many of the high profile and horrific crimes Senator Raggio prosecuted. These stories include many familiar lawyer and judge names from our recent past.

Senator Raggio's ongoing feud with Joe Conforti is examined in these chapters, and it is easy to smile when reading about how Senator Raggio outmaneuvered Conforti in a bribery and extortion scandal. Raggio was present when Conforti's brothel was burned to the ground. And years later, Raggio again bested Conforti during the trial of federal judge Harry Claiborne.

Raggio confronted and conquered problems within the Reno City Council and Reno Police Department during his years as a prosecutor. He emerged as a minister of justice who took professional risks to protect our community from those who were unwilling to comply with our social compact. I now walk the hallways of the courthouse with Senator's Raggio's indelible footsteps in mind.

## THE EARLY POLITICAL YEARS

Senator Raggio hoped to be governor and had a clear path to Carson City in the 1970 election. Yet he yielded his personal ambitions when President Nixon and Vice-President Agnew recruited him to run against incumbent U.S. Senator Howard Cannon during the same election

year. Raggio lost the election, which facilitated his election to the Nevada State Senate in 1972. The chapters composing this subpart provide the best history of contemporary statewide Nevada politics I have ever read.

## THE NEVADA STATE SENATE

The final 21 chapters explore Senator Raggio's service in the Nevada Senate. Each session during Raggio's tenure enjoys its own chapter and Raggio's "velvet glove" of leadership is the common thread connecting legislative issues and personalities. I was struck by the deep friendships Senator Raggio developed with allies and political foes. As with the previous chapters, this subpart is a compelling account of the countless people who have served and fought for their constituent interests.

Years ago I read a professional discipline decision from the Nevada Supreme Court captioned as *In re Raggio*.<sup>2</sup> I loved the Court's dicta: "Every licensed attorney knows that he belongs to a profession with inherited standards of propriety and honor which experience has shown necessary in a calling dedicated to the accomplishment of justice." The Court reminded lawyers to follow the law fearlessly, without regard to consequences. It further noted it was "never surprised when persons, not intimately involved with the administration of justice, speak out in anger or frustration about our work and the manner in which we perform it, and shall protect their right to so express themselves."

These are interesting themes I wanted to explore but I resisted my interests because of my deep respect for Senator Raggio. I did not know the circumstances leading to the Court's decision and I did not want to embarrass Senator Raggio by resurrecting a long-forgotten public disagreement he had with the Supreme Court. I was therefore pleased to read about this event in *A Man of His Word*. As I suspected, there was a rich back story about Senator Raggio's dispute with the Court, which vindicates Senator Raggio's professionalism and honesty. But more importantly, the inclusion of this event reveals Senator Raggio's honest approach to biography.

As an epilogue to Senator Raggio's

disagreement with the Court in 1971, the judiciary has known no better legislative friend than Senator Raggio. As former Chief Justice Bob Rose was quoted in *Man of His Word*, "Bill's purpose was to make sure that the Nevada judiciary functioned, and functioned the best it could with the money it had. If you asked every chief justice in the last twenty years, they would say the same thing about how Bill took care of the courts. We all really appreciate what he has done for the judiciary."<sup>3</sup>

There is a distinction between an honest comment in the moment and living an honorable life. Momentary honesty reveals little about moral dimensions. A recent judicial decision illustrates the point. A Kentucky judge was presented with a stipulation to dismiss all pending motions and vacate trial. The judge responded in his written order:

And such news of an amicable settlement has made this Court happier than a tick on a fat dog because it is otherwise busier than a one legged cat in a sandbox and, quite frankly, would have rather jumped naked off of a twelve foot step ladder into a five gallon bucket of porcupines than have presided over a two week trial of the herein dispute, a trial which, no doubt, would have made the jury more confused than a hungry baby in a topless bar and made the parties and their attorneys madder than mosquitoes in a mannequin factory.<sup>4</sup>

In contrast to the judge's momentary honesty, an honorable life is predicated upon a lifelong pattern of honest conduct. Given the constant spotlight of scrutiny and conflicting interests, the "honorable life"

of a public official can be elusive. Senator Raggio has transcended the moment and established a public standard of integrity that may never be matched. As Archer noted in his introduction: "[Senator Raggio] is also a person of honor. In what I found to be a remarkable illustration of consistency, nearly everyone I interviewed for this book voiced the identical phrase in describing him—'A man of his word.'"

Attorney Michael Alonso describes Senator Raggio as knowing "what the right thing is, and always [doing] it." In the film adaptation of *The Winslow Boy*, Sir Robert Morton challenges the British Parliament to exonerate the honor of a young cadet expelled from the Royal Naval College for forgery and theft. The genius of the film is its overarching theme: Let "right be done" despite distorted justice, public opinion and personal sacrifice. Senator Raggio embodies this theme and falls within a singular position in Nevada history. I have a new timeless book on my shelf, which I wholeheartedly commend to all.

## NOTES

- <sup>1</sup> Michael Archer, *Man of His Word: The Life & Times of Nevada's Senator William J. Raggio* 420 (2011), quoting Michael Alonso.
- <sup>2</sup> 87 Nev. 369, 487 P.2d 499 (1971).
- <sup>3</sup> Archer, *Man of His Word*, *supra* at 359.
- <sup>4</sup> *Kissel v. Schwartz & Maines & Ruby Co., LPA*, No 09-CI-00165 (Ky. 2011).

*This is number 49 in a series of essays on judicial ethics authored by Judge David Hardy, Second Judicial District Court, Dept. 15.*









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# A C R O S S   T H E   L I N E

*Jim Porter, Porter Simon*

## IT IS O.K. TO WALK AWAY FROM A HOME LOAN

Let me get right out there and say that it may be appropriate to advise your clients to walk away from their “upside-down” home loan.

### “UNDERWATER” LOAN

Let’s say that Jim and Marianne purchased or refinanced a home in 2005, 2006 or 2007 for \$600,000. They borrowed \$500,000, and now the home is worth \$350,000, so they are “upside-down” \$150,000. That is the scenario I am seeing with clients every week.

There are over 17 million homes nationwide that are “underwater” or “upside-down”. In terms of numbers of foreclosures, California and Nevada are right up there—59,386 new foreclosures in California in August alone. Per Gary Zimmerman, Senior Economist of the Federal Reserve Bank of San Francisco, whom I spoke with last week, one-fourth of mortgages in the U.S. are underwater and half of those by 25% or more.

### “UNDERWATER” OPTIONS

Property owners underwater with their loan have several options. They can keep paying. For some that means exhausting savings. They can try and pay down the loan. Easier said than done. The best would be to modify the loan. Should be easy, right?

### LOAN MODIFICATION

Modifying the loan makes the most sense, but the big lenders are overwhelmed with loan defaults and not competent at handling them. The larger

foreclosures take a minimum of four months; however the average time in California is now 333 days...This may be a good time to applaud Nevada for its mandatory mediation program and supportive case law.

.....

banks like JP Morgan Chase, Wells and B of A, (and others), generally mistreat their upside-down homeowners. There I said it—got it off my chest. The banks could do better with these properties.

Most of my clients that ask their lenders about loan modifications are told they must stop making payments, “*then we can talk about a loan modification.*” The rationale being, if you are still paying on the loan, there is no reason for the lender to entertain a loan modification—which could include a principal reduction (that will almost never occur) or an extension of the term on the loan or a reduction in interest to market rates. While the “right hand” of the lender tells its borrower to stop paying, the “left hand” sends a notice that the borrower is in default and notifies credit agencies, which results in increased interest rates on credit cards. Hmm. Something wrong with that picture.

### LOAN MOD NIGHTMARE

To qualify for a loan modification, it is usually necessary to document a “hardship,” so the homeowner-borrower sends a package of financial information. Forms filled out and mailed in. The lender claims it did not receive them. Forms are re-sent. The lender does not receive *all* of the documents. All the documents are re-sent. “That person no longer works for the bank.” On and on. Finally after several months the borrower learns he or she doesn’t qualify for a hardship. At no time does the lender return calls. That is the standard nightmare according to my clients—lots of them.

But it gets worse. An example. Three different clients have recently had their lender *finally* agree to let them try a three-month reduced payment loan modification program, which all three successfully completed. They expected to receive paperwork from their lender for a better (modified) loan. Instead, all three were told—without explanation—they did NOT qualify for a loan modification. THEN they received a delinquency notice and late fees because the reduced loan payments they made for three months were lower than the original loan payments! In my book that is fraud.

### SHORT SALE

At some point the homeowner-borrower grows weary of trying to modify the loan and talks to the lender about a short sale. “Talk” is an overstatement. Again, the borrower generally must qualify for a hardship to complete a short sale, going through the same frustrating experience as trying to modify the loan. Sometimes it works—despite the lender. Until 2011 changes to Code of Civil Procedure 580(e), many lenders would not sign off on a short sale unless the borrower agreed in writing to be responsible for the short-fall. Now a lender on a one-to-four unit California residence may not pursue the homeowner after a short sale.

Upside-down borrowers sometimes offer a deed-in-lieu of foreclosure to the lender, which it will not accept, even when there are no intervening liens. That would be too easy.

When my clients first come in they tell me they had been unable to accomplish a loan modification and gave up on a short sale. Foreclosure becomes the next option.

## FORECLOSURE

I tell my clients, who often are current on their loan payments, and want sincerely to work with their lender—who they (appropriately) do not blame for their predicament—they should have no guilt or remorse about not making payments. No one likes to default, but a mortgage is a contract—a legal document—not a moral promise. The deed of trust has language that should the borrower default, the lender can take back the property. That was the deal. And, they should get over the perceived negative social stigma—at least that is my advice if the lender is uncooperative—which per *all* of my upside-down clients, is the case.

You all know this, but things your client should consider before stopping their mortgage payments are how long do they think it will take for their property to increase in value to be equal to the loan balance, what is the cost of renting a home, do they passionately or desperately need to continue living in the home, and how important is their credit rating—because they will take a hit—apparently in the area of 150 to 300 points. For many, by the time they are considering a foreclosure, their credit is already tanked.

Another disadvantage of a foreclosure is that the borrower's name will be in the legal notices in the newspaper as the lender publishes a Notice of Trustees Sale—the auction—three times. If they owe payments to a homeowner association, any assessment lien will be wiped out following the lender's foreclosure, but the HOA obligation remains a personal obligation—unlike property taxes.

If your California client has a second loan, it can get complicated as “the second” note obligation may survive the senior lender's foreclosure. But see *Simon v. Superior Court* (1992) 4 CA 4<sup>th</sup> 63 and *Union Bank v. Wendland* (1996) 54 CA 3d 393 if the same lender holds both deeds of trust.

If your California clients are considering a short sale or foreclosure,

they should talk to their accountant to consider potential tax liability, especially “forgiveness of debt” income, the loan amount they did not have to pay because of the short sale or foreclosure—“the other shoe.” There are federal and California exemptions however if the loan is for a primary residence.

Stopping payments on a home loan is an important decision with potential pitfalls and unintended consequences. Many factors weigh into that decision, but sometimes foreclosure is better than continuing to dump money down a black hole. Sometimes folks need to get on with their lives. Or so my clients generally conclude.

## DEFICIENCY JUDGMENT

Remind your clients that California is a no-deficiency state. If the lender forecloses by the usual Notice of Default and (three months later) Notice of Trustees Sale, as is done about 99 percent of the time in California, versus a judicial foreclosure, the lender may not come after the borrower for the deficiency on that loan, but as noted, the lender can sometimes send a 1099 for forgiveness of debt income. Foreclosures take a minimum of four months; however the average time in California is now 333 days.

This may be a good time to applaud Nevada for its mandatory mediation program and supportive case law.

## CALIFORNIA AND FEDERAL CASES

The frustrations experienced by homeowners facing foreclosure has resulted in at least four class-action lawsuits—working their way through the courts—accusing large banks of not complying with the federal Home Affordable Modification Program.

Additionally there are a handful of lawsuits challenging foreclosures because the lenders transferred their trust deeds to Mortgage Electronic Registration Systems, Inc. (MERS). MERS is an agent for lending banks to facilitate assignment of their deeds of trust, in part so they never show of record and no one knows who owns what. My take. However in June, the 2<sup>nd</sup> District Court of Appeal dealt a blow to attacks on

MERS under California Law. *Ferguson v. Avelo Mortgage LLC*, 211DJDA 7892 (Cal App. 2d Dist June 1, 2011), also see *Gomes v. Countrywide Home Loans, Inc.* (2011) 192 CA 4<sup>th</sup> 1149, 121 CR 3d 819. However, several bankruptcy courts have upheld challenges when MERS is involved in foreclosures. See *In Re Salazar* (BANKR SD 2011) Cal, Apr. 12, 2011, NO. 10-17456-MM13; *In Re Agard* (BANKR ED NY 2011) 444 BR 231. For successful foreclosure cases also see *Aceves v. US Bank NA* 192 Cal.App.4th 218 (2011) and *Garcia v. World Savings FSB* 183 Cal.App.4th 1031 (2010).

This is a complicated area of California law and this article is more personal opinion than a definitive statement of the law. In case there was any doubt.

*Jim Porter is an attorney with Porter Simon, with offices in Truckee, South Lake Tahoe and Reno. He is a California real estate broker, and was the Governor's appointee to the Fair Political Practices Commission and McPherson Commission, both involving election law and the Political Reform Act. Jim may be reached at porter@portersimon.com or at the firm's web site portersimon.com. © 2011*



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# PEOPLE

## Here's to the crazy ones

This month's People column is dedicated to a non-lawyer, a Californian, and someone I doubt any of the Writ's readers ever met in person—Steve Jobs.

Why? Because your publications—beginning with the 1987 Pictorial Directory, The Writ (1991 forward), wcbar.org, Bar Flash, countless invitations and awards were and are produced on Macintosh computers.

When WCBA was looking for someone to resurrect the Pictorial Directory in 1985, President Gregg Zive called the State Bar's Reno office and was forwarded to me in the Publications Department. We talked about the project and within weeks I was contracted to produce the book. The printer handled all the typesetting and layout that first year. Then the Mac debuted and with it, page layout software that was accessible (relatively) to non-designers—especially those, like me, who had a the good sense to have a younger brother teaching high school yearbook and journalism. . . on Mac computers.

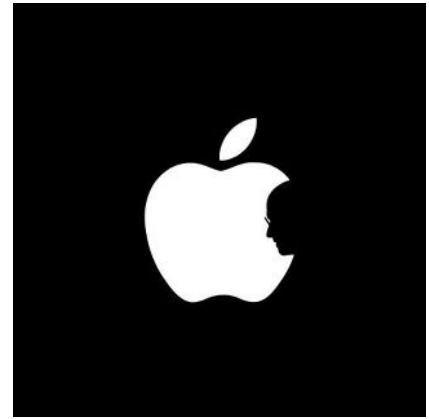
WCBA's offices have been all Apple since that early decision. In the early

days it meant having to run Word Perfect or Word docs through a translator but that didn't last long. Over a series of computers, from the original, boxy Mac SE to my current iMac—with one of those cute raspberry iMacs as an extra—our computers and software have served us well and allowed us to produce all the Bar's communications in-house.

As I attended conferences with other Bar association publications and communications staff, I watched as one-by-one they migrated to Apple. When you get this issue I will be in Nashville at the National Association of Bar Executives Communications Workshop. I can guarantee the room will be filled with iPhones, iPads and MacBooks and much of the conversation will be on the loss of Steve Jobs' creativity and vision.

The Writ printed an article on Macs in the Office last year that quoted Jason Diedrich of Mac-O-Rama saying that the iPhone is "the gateway drug" to Apple. The iPad will soon be ubiquitous in courtrooms, law libraries and lawyer's offices around the country.

As promised on the Briefs page of this issue, WCBA will begin producing



a monthly Tech Bytes e-newsletter with tips, advice, websites and sources that we hope will help you choose, use and benefit from technology in your practice. We welcome your tips and suggestions to that newsletter and I promise not to let my Apple bias take over.

Steve Jobs left us with more than computers and iPhones though. His powerful Stanford commencement speech is on YouTube. A Google search produced 13,200,000 sources for quotable Jobs like this one:

*Here's to the crazy ones. The misfits. The rebels. The troublemakers. The round pegs in the square holes. The ones who see things differently. They're not fond of rules. And they have no respect for the status quo. You can quote them, disagree with them, glorify or vilify them. About the only thing you can't do is ignore them. Because they change things.*

Christine Cendagorta, Man. Editor

# LIBRARY

## LIBRARY HOURS

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Tues- Wed	10am - 7pm
Thurs.	8am - 5pm
Fri.	8am. - 12noon
Sat.	Closed
Sun.	Closed

The Law Library will be closed on Mon., Nov. 12<sup>th</sup> in observance of Veteran's Day. In observance of the Thanksgiving Holiday we will be closing early at 5pm on Wed., Nov. 22<sup>nd</sup> and will be closed through Nov. 27<sup>th</sup>. We will re-open on Monday, Nov., 28<sup>th</sup>.

We would like to thank the following attorneys who participated in Lawyer in the Library programs during the months of Sept.: Richard Cornell, Madelyn

Shipman, Craig Etem, and Eric Lerude who volunteered for our Wednesday night program. We would also like to thank Dixie Grossman, Alison Colvin, Graeme Reid, and Muriel Skelly for volunteering for our Tuesday night program, which is reserved for family law matters.

Please call Nikki Britt at 328-3250 if you would like to volunteer for our weekly Lawyer in the Library programs.

## See [wcbar.org/events](http://wcbar.org/events) for details and registration

### OCTOBER

**2 6** WCBA Lunch & Learn, Clients' Security Fund, 1 cr. Ethics. Speakers: Chris Wicker and Gene Leverty. 1 hours Ethics Details and registration at [wcbar.org](http://wcbar.org).

**2 7** WCBA Nite at the Nevada Discovery Museum. Details page 1 and [wcbar.org](http://wcbar.org). Hosted by WCBA for members, spouses, kids and grandkids.

### NOVEMBER

**2** NNWLA meets at 12:00 at the Atlantis. Presentation by UNR Professor Jennifer Ring on Gender in the Workplace. One hour of Ethics CLE pending. \$25 for members, \$30 for non-members and includes lunch. Please RSVP to Kelly at [kgunderson@gundersonlaw.com](mailto:kgunderson@gundersonlaw.com).

**2** WCBA CLE, Entertaining Ethics with Sean Carter. Harrah's. 3 hours CLE. Details p. 1. Outline and registration at [wcbar.org](http://wcbar.org).

**3** Attention Young Lawyers Section members! Please join us at Buckbean Brewing Company on November 3 as we welcome new bar admittees and network with YLS members. 5:30 to 7:00 p.m. at 1155 S. Rock Blvd., Suite 490 (enter from S. McCarran Blvd.). RSVP to Jenny at [jsparks@lionelsawyer.com](mailto:jsparks@lionelsawyer.com) no later than October 28, 2011.

**8** The Bruce R. Thompson Chapter of the American Inns of Court will meet on the Eighth Floor Thompson Federal Courthouse. Judges of Nevada's U. S. District Court will present a program on federal civil practice. Tom Bradley, Rebecca Bruch and Lori Story will facilitate a lively discussion among the bench and bar. The program concludes with an admissions ceremony and "When Your Client Wants to Make a Federal Case out of It—Practice Tips

for Federal Court." The social meeting starts at 5:15 p.m. and the 90-minute presentation begins at 5:45 p.m. Members and guests are welcome to attend.

**1 0** WCBA CLE, Bankruptcy Resolution in Foreclosure, 1-4:15 p.m. Thompson Federal Courthouse, 3 hours CLE. Shelley O'Neil and Craig Demetras. Details and registration at [wcbar.org](http://wcbar.org).

**1 5** Please join SNAP Tues., Nov. 15 at noon at Palais de Jade for a presentation by Dr. Larry Pinson, Executive Secretary of the Nevada State Board of Pharmacy. One NALA CLE credit. \$18 for members and guests; \$15 for student members (includes lunch and beverages). RSVP to [jessica@silverman-decaria.com](mailto:jessica@silverman-decaria.com).

**1 7** WCBA CLE, Ethics Update, 1 1/2 cr. Ethics CLE. Meet the new Northern Nevada Bar Counsel Patrick King. Registration and details at [wcbar.org/events](http://wcbar.org/events).

**WED. NOV. 2, HARRAH'S 3-6:20 P.M. • 3 CR. ETHICS**

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