

The WRIT

September 2011, Vol. 33, No. 8

OFFICIAL PUBLICATION OF THE WASHOE COUNTY BAR ASSOCIATION

Wednesday, September 14, 12 noon, Harrah's • 1/2 CLE Cr.

2011 Nevada Legislative Session Recap with Jon Ralston, Anjeanette Damon, Sheila Leslie

The 2011 Nevada Legislative Session ended on schedule with a flurry of activity in the final hours of the session. Lawmakers spent much of the session on budget issues including cuts to education, collective bargaining and pay cuts for Nevada workers.

Join WCBA on Wednesday, September 14, noon at Harrah's to hear what happened in Carson City, what didn't happen, and what it means for you and your clients.

Jon Ralston has been a frequent speaker or moderator at WCBA events. He wrote for the *Las Vegas Review-Journal* for 15 years, and he now writes a political newsletter *The Ralston Report* along with RalstonFlash.com, a daily e-mail newsletter containing insider political and business information.

Ralston is also the host of *Face to Face*, a news discussion program that is broadcast live at 6:30 p.m. Monday - Friday on KRNVC-Channel 4 Reno and KENV-Channel 10 Elko.

Anjeanette Damon has also appeared as a panelist for WCBA programs. She is

the *Las Vegas Sun's* lead political reporter. Damon has worked as a journalist in Nevada since 1998, covering the state Legislature and Nevada politics for eight years. She has won multiple awards for her political coverage and has earned national recognition for her work.

Damon also hosts *To the Point with Anjeanette Damon*, an in-depth news program featuring Nevada's top political figures and decision makers.

Sheila Leslie served in the Nevada Assembly from 1999-2009, and she was then elected to the Nevada Senate in 2010. She has participated in ten special and seven regular sessions. Leslie is the the Specialty Courts Coordinator for the Second Judicial District Court.

Leslie has been recognized by numerous health and social services agencies including March of Dimes, Nevada Parents Empowering Parents, Bristlecone Family Resources and Nevada Justice Association.

WCBA invites you to bring your questions for our panelists. We will welcome audience questions at the end of the program.



DIRECTORIES ARE OUT!

You should have received your member copy, along with any additional copies you ordered. Our thanks to Reno-Tahoe Odyssey Director Eric Lerude and all of our cover "models" for the cover photo of the Reno Tahoe Odyssey. Order extra copies at wcbar.org or see page 4.

RSVP no later than Monday, September 12. \$25 per person. \$200 for a table of eight. Vegetarian and special meals by request.

RSVP online at wcbar.org, use the form on page 15 or call 786-4494. We try to seat walk-ins but we cannot guarantee a seat without a reservation.

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Clay Brust, President



THE YEAR IN PREVIEW

The Washoe County Bar Association has numerous events planned for the next year. Each month, there are one to two CLE programs which are usually held at the Thompson Federal Courthouse. The Bar Association is proud to offer excellent CLE seminars at reasonable prices. Please contact Gina MacLellan at 775.786.4494 or visit wcbar.org/events for more information about the following seminars:

- Sept. 7 • Seniors and the Law
- Sept. 29 • DNA & the Crime Lab
- Oct. 6 • Digital Forensics Part I (am)
- Oct. 6 • Financial Forensics I (pm)
- Oct. 13 • Digital Forensics II (am)
- Oct. 20 • Financial Forensics II (pm)
- Oct. 13 • Digital Forensics III (am)
- Oct. 20 • Financial Forensics III (pm)
- Nov. 2 • Entertaining Ethics with Sean Carter (3 cr.) Ethics
- Nov. 10 • Bankruptcy and Foreclosures
- Dec. 14 • Ethics and Other Issues for Public Lawyers

Our lunch meetings this year cover a wide-range of topics and provide an excellent opportunity to see other members of the local bar. The lunches all occur at Harrah's at noon.

On September 14, Jon Ralston, Anjeanette Damon, and Sheila Leslie will recap and comment on the 2011 Nevada Legislative Session. These speakers always

have interesting stories to supplement their reporting of recently enacted laws and the politics involved. Additionally, they will also welcome questions about the most recent legislative session.

On October 5, the Federal Court invites you to the investiture for Magistrate Bill Cobb. The ceremony is at the Thompson Federal Courthouse at 4:00 p.m. with a reception to follow.

The topic for the WCBA luncheon on October 12 will be the Supreme Court Year In Review with Bob Eisenberg.

Members of the Bar are invited to join the Justices, Judges and dignitaries at the swearing-in ceremony for new admittees on October 19, 3:30 p.m. at the Joe Crowley Student Union. WCBA sponsors the reception following the event.

Sean Carter returns to WCBA for Entertaining Ethics on November 2. That 3-credit Ethics CLE replaces our monthly luncheon.

Our December 14 luncheon will honor members of the Washoe County Bar Association who have held their membership for forty years. We invite comments and/or stories about the new admittees to the "40+ club". Also, if you would like to comment or share a story about one of the new 40+ admittees, let me know and I will make sure you get time with the microphone.

In January we will hold our premier event—the annual Santa Fe Dinner—

we will pick a date once the Wolf Pack Basketball schedule is set.

Starting on February 8th and continuing on March 14, the luncheons will explore technology in the practice of law. WCBA Vice-President Mike Kattelman is spearheading a multi-faceted presentation of how your practice can be enhanced by the smart use of technology in the office, in the courtroom and in other presentations. April 11 is open, and we welcome ideas. The May 9 luncheon will focus on appellate practice tips. Finally, the June 13, 2012 luncheon will focus on the upcoming 2012 Elections and may even include debates between candidates for judicial or other law-related positions.

In addition to the events scheduled above, we are planning a social outing for lawyers and their children at the new Nevada Discovery Museum this fall. Watch your e-mail and The Writ for details. If you are interested in helping coordinate the event, please let us know.

I look forward to seeing you at these events and again encourage you to become involved in the local Bar, even if it is only socially. As you know, practicing law in Northern Nevada is unique—you will come across the same adversaries and/or judges more than once in your career. Knowing them personally, as well as professionally, will only enhance your practice.

The WRIT

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CHRISTINE CENDAGORTA, MANAGING EDITOR

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CONVERSATIONS ON DISCOVERY

By Wesley M. Ayres, Discovery Commissioner

A party's failure to raise an argument in district court proceedings normally precludes the party from presenting that argument on appeal. *See, e.g., Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981). This rule is one of long standing in Nevada, *See Allen v. Ingalls*, 33 Nev. 281, 286-87, 111 P. 34, 36 (1910), and it has been applied to administrative proceedings as well, *see State, Bd. of Equalization v. Barta*, 124 Nev. 612, 621, 188 P.3d 1092, 1098 (2008) (issues not raised to administrative body generally are deemed waived when raised for first time before district court on judicial review). Presumably, the rule would also apply to appeals from justices' courts or municipal courts to district court. *See Nev. Const. art. 6, § 6* (district courts "have final appellate jurisdiction in cases arising in Justices Courts and such other inferior tribunals as may be established by law"). But should this principle extend to proceedings before a discovery commissioner? In *Valley Health Sys. v. District Court*, 127 Nev., Adv. Op. 15, 252 P.3d 676 (2011), the Nevada Supreme Court answered that question in the affirmative.

Valley Health arose out of allegations by plaintiff that she was sexually assaulted while she was a patient at Centennial Hills Hospital in Las Vegas. During discovery proceedings, plaintiff served the hospital with a request in which she sought the following documents:

[A]ny and all documents or records related to other incidents or complaints of assaults, batteries or sexual assaults or improper conduct by employees, nurses, nurses[,] assistants, doctors, agents,

administrators, staff or independent contractors at Centennial Hills Hospital Medical Center or other facility owned, operated or managed by Defendant.

Defendant owns, operates, or manages four other hospitals in the Las Vegas area. Accordingly, it objected on the grounds that this request was overly broad, and that information from other facilities owned by defendant was irrelevant. Plaintiff thereafter filed a motion to compel, which was heard in the first instance by the court's discovery commissioner. The discovery commissioner ruled that plaintiff's motion should be granted in part, and that defendant should produce documents responsive to this discovery request for the five years preceding the alleged sexual assault. *See Valley Health*, 127 Nev., Adv. Op. 15, at 2-4, 252 P.3d at 677-78.

Defendant filed an objection to the discovery commissioner's decision. In that objection, defendant raised the same points that previously were presented to the discovery commissioner, but it added a new argument as well—that the requested information was privileged pursuant to NRS 439.875. Following a hearing, the district court affirmed the discovery commissioner's decision. Defendant then sought a writ of mandamus to overturn the district court's discovery order. Although extraordinary writs generally are not available to review discovery orders, the supreme court noted that extraordinary relief has been granted to prevent improper discovery in connection with discovery orders that are issued with no regard to relevance, and those that require the disclosure of privileged information. Because the

situation presented in this case fell within the latter category, the court agreed to consider the petition. *See id.* at 4-7, 252 P.3d at 678-79.

The court then emphasized that "[a] point not urged in the trial court, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal." *See id.* at 7, 252 P.3d at 679 (quoting *Old Aztec Mine*, 97 Nev. at 52, 623 P.2d at 983). It noted that one purpose served by this rule is to allow the lower court the first opportunity to decide the issue, and it found this purpose would likewise be accomplished by allowing a discovery issue to first be heard by the discovery commissioner. *See id.* In addition, sharp practices would be encouraged if the rule were otherwise:

A contrary holding would lead to the inefficient use of judicial resources and allow parties to make an end run around the discovery commissioner by making one set of arguments before the commissioner, waiting until the outcome is determined, then adding or switching to alternative arguments before the district court. All arguments, issues, and evidence should be presented at the first opportunity and not held in reserve to be raised after the commissioner issues his or her recommendation. All objections are to be presented to the commissioner so that he or she may consider all the issues before making a recommendation, so as not to "frustrate the purpose" of having discovery commissioners.

See id. at 8, 252 P.3d at 679-80.

Interestingly, the court's reasoning was partly based upon cases involving federal magistrate judges. It observed that the

procedural interaction between a federal magistrate judge and a district judge is similar to that between a discovery commissioner and a Nevada district judge, in that federal magistrate judges may be designated to conduct hearings and to submit proposed findings of fact and recommendations to the district judge. *See id.* at 8 n.8, 252 P.3d at 679 n.8; *see also* 28 U.S.C. § 636(b)(1)(B) (2006 & Supp. III 2009). Federal courts have held that a party generally may not raise an issue for the first time in an objection to a magistrate judge's report. *See, e.g., Marshall v. Chater*, 75 F.3d 1421, (10th Cir. 1996); *Greenhow v. Secretary of Health & Human Servs.*, 863 F.2d 633, 638 (9th Cir. 1988), *overruled on other grounds by United States v. Hardesty*, 977 F.2d 1347 (9th Cir. 1992).

Although defendant's privilege argument was deemed waived, the supreme court nonetheless elected to consider the merits of that argument. Under NRS 439.875, certain medical facilities must establish internal patient safety committees, which will (a) receive reports about "sentinel events" (i.e., unexpected occurrences involving facility-acquired infection, death, or serious physical or psychological injury or the risk thereof, including any process variation for which a recurrence would carry a significant chance of a serious adverse outcome); (b) evaluate actions of the facility's patient safety officer in connection with alleged sentinel events; (c) review and evaluate measures carried out by the facility to improve the safety of patients; and (d) make reports regarding the number of sentinel events that occurred at the medical facility and recommendations to reduce the number and severity of sentinel events that occur at the medical facility. *See* NRS 439.875(1), (4) (2011). The statute relied upon by defendant, NRS 439.875(5), provides: "[t]he proceedings and records of a patient safety committee are subject to the same privilege and protection from discovery as the proceedings and records described in NRS 49.265." NRS 49.265(1) provides that "proceedings and records" of medical or dental peer review committees, and those of certain other "[o]rganized committees of hospitals" responsible for the "evaluation and improvement of the quality of care," are not subject to

discovery. Defendant argued that these statutes protect against the disclosure of documents that otherwise would fall within the scope of plaintiff's request.

The court explained that in an earlier case it held that the privilege afforded by NRS 49.265 is extremely limited, and that it does not encompass hospital "occurrence reports." *See Valley Health*, 127 Nev., Adv. Op. 15, at 10, 252 P.3d at 680; *see also Columbia/HCA Healthcare v. District Court*, 113 Nev. 521, 531, 936 P.2d 844, 851 (1997). The rationale underlying that decision was that the occurrence reports were not generated by a medical review committee or produced during its review process. *See Columbia/HCA*, 113 Nev. at 529-31, 936 P.2d at 849-50. The court also was concerned about the possibility that a contrary ruling would encourage efforts by a hospital to immunize itself from discovery by submitting records and documents to committees that fall within this privilege, a result that would contravene public policy. *See id.*, at 529, 936 P.2d at 849. The *Valley Health* court held that the rationale limiting the scope of NRS 49.265(1) was equally applicable to NRS 439.875(5). Since plaintiff was not seeking anything produced by the

patient safety committee (a limitation expressly acknowledged by plaintiff), the information sought was not privileged. *See Valley Health*, 127 Nev., Adv. Op. 15, at 10, 252 P.3d at 680-81.

Valley Health will enhance the efficiency of discovery proceedings by ensuring that all arguments are raised when the matter is considered by a discovery commissioner, and the analogy it drew to federal magistrate judges might prove instructive on other procedural issues as well. The supreme court also offered solace to those who might remain concerned about the breadth of plaintiff's request or the potential burden imposed by that request. In its final footnote, the court instructed the parties that they "should focus on discovery related to sexual misconduct," and it confirmed that defendant was not obligated to interview all past and present employees or agents in responding to plaintiff's request. *See id.* at 11 n.10, 252 P.3d at 681 n.10.

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



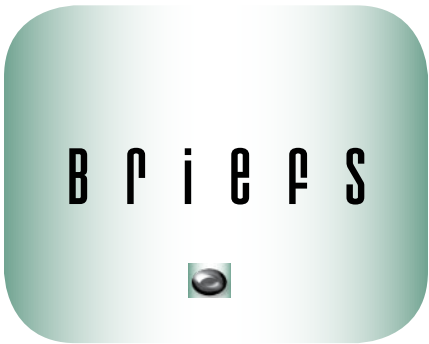
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WCBA Board Actions

The Board met for its regular monthly meeting on August 4, 2011. Board members considered or acted on the following items:

Luncheon & Events schedule

- September 14— Legislative Recap: Jon Ralston, Anjeanette Damon, and Senator Leslie have confirmed that they will attend as speakers. WCBA has received approval for .5 credit hour of CLE.
- October 12 — Supreme Court: A Year in Review: Bob Eisenberg has confirmed that he will speak on this topic. WCBA is seeking CLE credit for this program.
- November 2—Entertaining Ethics, 3:00-6:15 p.m., 3 hours Ethics CLE. Speaker is Sean Carter.
- December 14—40+ Member luncheon: The WCBA Board is seeking an emcee for the event.
- Discovery Museum event for members and families: To be determined.
- Annual Santa Fe dinner will be scheduled after the UNR Basketball schedule is published to avoid any conflict.

Board members also reviewed and considered future Post Bar Exam gatherings; Nevada Legal Services recruiting of volunteers report; the 2012 Judicial Survey; and progress on the redesign of the Bar's website.

Board members and staff welcome your ideas, criticism and comments on WCBA programs, events, publications and member benefits. Please contact any board member or staff member with your thoughts.

Speaker Opportunities

Expanding on the volunteer opportunities mentioned in Random Thoughts last month, WCBA is seeking local lawyers to speak to schools, business groups, clubs and other organizations. We will promote our "speaker service" to these organizations and groups through letters and public service announcements.

Since WCBA partners with the Washoe County Bar Foundation to produce and distribute the legal "survival guides" for young adults and for senior citizens, we especially welcome lawyers who can speak on those topics. We will be enhancing the websites that match those print publications, and we hope to have a wider reach with seniors, young adults, their families, employers and care providers.

If you are interested, simply give us a call at 786-4494 or send an e-mail to chris@wcbar.org or gina@wcbar.org. You may also contact any of the officers listed on page 2.

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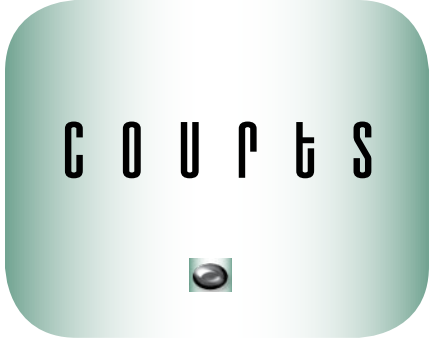
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Sparks Justice Courts Adopts 4-Day Week

Pending formal notification to the Board of County Commissioners, the Sparks Justice Court will be closed on Mondays beginning Monday, August 15. The court will go to a 4 day-a-week, 9 hour schedule, with the staff working from 7:30 a.m. to 5 p.m. and taking only a half-hour lunch. The judges will continue to work full time and remain on call 7 days a week and will be available for search warrants and other critical matters by telephone or e-mail. An after hours number will be provided to law enforcement to contact the judges on Mondays.

While the court had considered many other options to meet the mandated 7% wage and benefit reductions, this was the

only option that allowed the court to provide services without losing any more staff. We hope there will be additional savings realized by county departments that will not have to appear or provide services to the court on Mondays.

The courthouse will be open to the public from 8 a.m. to 5 p.m. Tuesday through Friday. We will eliminate the current lunch hour closures. In conjunction with the Reno Justice Court, arrangements will be made for emergency matters, such as applications for protective orders, to be heard by the other open court. Any matters currently set on Mondays on or after August 15 will be reset.

Chief Judge Kevin Higgins says "We will continue to work diligently to provide full service to the citizens of Sparks. This change will be for at least the rest of this fiscal year."

Family Court Bench Bar Meets September 8

The Next Family Court Bench Bar Meeting will be held on Thursday, September 8th at 12 noon in the Dept. 12 courtroom.

Please join members of the family court bench and bar for a meeting with the Domestic Violence Unit Court Masters—open discussion of the ex-parte and court process for protection order cases. Included will be a brief presentation on the unit's motion practice and access to court video and documentary records.

**You are invited to attend the
United States District Court
Formal Investiture Ceremony
for
Honorable William G. Cobb**

**Wednesday, October 5, 2011 at 4:00 p.m
Joe Crowley Student Union Ballroom
University of Nevada, Reno
1664 N. Virginia Street, Reno, Nevada**

Reception Following the Ceremony



**He's baaaack!
Sean Carter returns to WCBA
for
Entertaining Ethics 2011**

**Wednesday, November 2, 3-6:20 p.m.
3 credits Ethics CLE • Harrah's**

Register online at wcbar.org/events

Back by popular demand, all new programming!

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. In crafting his presentations, Sean draws heavily on his wealth of experience in the law and on his background as a stand-up comedian. His often "lawpsided" approach to the everyday dilemmas faced by lawyers has made him a favorite at legal conferences from Hawaii to Maine.





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Reno's New Misdemeanor Co-Occurring Mental Health and Substance Abuse Disorder Court

Beginning in March 2011, Reno Municipal Court began accepting referrals for their new Co-Occurring Mental Health and Substance Abuse Disorder Specialty Court. The new court has been added as a way to enhance the Courts' existing adult drug courts. The goal is to help defendants with co-occurring disorders, integrate services, and fill a gap in services for offenders charged with DUI or Domestic Violence.

"I'm proud to say that Reno Municipal Court is working hard to become a leader in addressing the needs of people with substance use and mental disorders in the Reno Nevada area," said Lisa Keating, Ph.D. Clinical Director

Since February 2011, we have helped 14 clients start their way toward recovery. As we move forward, we plan to:

- Increase the number of referrals into the program. We plan to serve 60 people a year in our program.
- Help people find access to quality psychiatric, medical and mental health treatment. We have developed a relationship with Access to HealthCare Network. This gives our clientele immediate psychiatric care when they enter the program. Clientele is able to continue treatment after they graduate our program.
- Clients receive substance abuse treatment as well as Cognitive-Behavior

Therapy to help them develop ways to manage mental health and substance abuse problems on their own.

Please give Mary Baker a call at (775) 334-3092 to answer any other questions you may have or help with your referrals.

SERVICES PROVIDED IN 2011

- 14 people have been served and all have been successfully referred and have begun treatment.
- Our clients, left unaddressed, utilize the emergency rooms and social programs in Reno, cycling in and out without making any real changes.
- Our program offers at no cost to you a full array of services including:
- Assessment & screening; Outpatient services; Individual case management; Medication monitoring; Probation monitoring; HIV screening.
- Referrals can be made by anyone; judges, attorneys, and officers who identify a person who has a substance abuse history AND who indicate a history of mental health needs. Referrals must have a criminal case pending with Reno Municipal Court.
- Participants must have a multi-axial diagnosis by a licensed psychologist to include Axis I depression, substance abuse (social, phobias), OCD, bipolar, schizophrenia, PTSD, anxiety.

CLIENT CHARACTERISTICS AT INTAKE

- 21.4% of the participants are employed
- Frequent Emergency Room (ER) Use: About half of our clients visited local ER's, largely for physical complaints. You can help us address ER misuse in

the Reno area.

- 85% have been tested for HIV; 7% reported IV drug use.
- Our clients are white or American Indian

DRUGS REPORTED USING

- At intake, clients reported using the following:
 - Alcohol 78.6%
 - Marijuana/hashish 35.7%
 - Percocet 28.6
 - Hallucinogens 21.4%
 - Methamphetamine 13.3%
 - Cocaine/crack 6.7%
 - Morphine 6.7%
 - Oxycontin/oxycodone 6.7%
 - Benzodiazepines 6.7%
 - Inhalants 6.7%

CO-OCCURRING DISORDERS

- While almost all our clients report problems due to psychological or emotional problems...over 86% indicated these problems were considerable or extreme.
- Only 15% received outpatient treatment for mental or emotional difficulties prior to starting our program

CRIMINAL JUSTICE INVOLVEMENT

- 61% reported being arrested in the past 30 days, with half of those arrests for drug related offenses

For referrals or more information, please contact our staff at Mary K. Baker, Special Services Supervisor Telephone: (775) 334-3092

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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

The motion is irresponsible, absurd, astonishing and dwells in “the land of Mr. Disney and Dr. Seuss”¹

I usually write about a particular theme. This month I write about a particular judge. The facts leading to the judge’s removal from office are interesting and instructive. They illustrate the risks of reposing judicial authority in the wrong individual. Additionally, the judge’s recent petition for a writ of certiorari in the U.S. Supreme Court reveals the uncertainties flowing from the Court’s newly-discovered “probability of bias” standard within the Due Process Clause of the 14th Amendment.

Pennsylvania Judge Ann Lokuta was charged with six counts of unethical conduct relating to demeanor, conduct bringing the judicial office into disrepute, failing to dispose of court business promptly, failing to conduct herself in a manner that promotes public confidence in the judiciary, failing to disqualify herself from cases in which she manifested a personal bias or prejudice, and prejudicing the proper administration of justice.² The description of Judge Lokuta’s behavior reminds me of former Nevada Judge Elizabeth Halverson. However, the context of Judge Lokuta’s judicial district and discipline proceeding is important.

During the years immediately preceding the judge’s discipline proceeding, two other judges (each of whom had served as Judge Lokuta’s presiding administrative judge) were involved in criminal activity referred to as “Cash for Kids.”³ In summary, the owner of a for-profit juvenile detention facility paid \$2.6 million to the two judges to direct juveniles into his facility. These two disgraced judges have been convicted of federal crimes and await sentencing.⁴ Both of these judges were witnesses against Judge Lokuta, who claims they

orchestrated the discipline proceeding to divert attention away from themselves and satisfy a vendetta against her. Two other witnesses against Judge Lokuta in the discipline proceeding were involved in criminal misbehavior.⁵

The Pennsylvania Court of Judicial Discipline conducted a lengthy hearing at which 30 witnesses testified. A lawyer member of the Discipline Court, who served as chief judge of the trial panel with authority to make evidentiary decisions, contemporaneously represented the payor in the Cash for Kids corruption scandal. Judge Lokuta sought his recusal, to which he responded that her motion was irresponsible, absurd, astonishing, and dwelled in “the land of Mr. Disney and Dr. Seuss.”⁶

Judge Lokuta disputed the witness testimony and contended that all witnesses lied to further a conspiracy to harm her. The Court found the judge’s defense to be unpersuasive, noting “[w]e find that the Board’s witnesses were credible, did not give false testimony, and did not commit perjury. We find, on the other hand, that [the judge and her secretary’s] insistence that each and every one of these witnesses gave false testimony and committed perjury is, to put it gently, far-fetched.”⁷

The Court of Judicial Discipline’s decision was 226 pages in length. It is far too lengthy to summarize in this brief essay. With regard to punctuality, the Court concluded:

[The judge’s] custom of arriving 15, 20 minutes, or a half hour or an hour or more late for scheduled court sessions is the quintessential discourtesy to litigants, jurors, witnesses, and lawyers. When it is commonplace, as here, it takes on the character of arrogance and disrespect

for the judicial system itself, as well, of course, disrespect for those who, bidden by the court to be in court at a time chosen by the court, wait, sometimes in a “packed courtroom,” for the arrival of the judge.⁸

The Court found the judge’s demeanor to be impatient, undignified, and discourteous to court personnel, court reporters, court administrators, deputy sheriffs, attorneys, witnesses, victims, parties, and probation officers. At one point in the decision it listed more than 70 phrases and adjectives used by witnesses to describe the judge’s conduct. Examples include: venom, combative, irrational, hostile, curt, diabolical, harsh, condescending, intimidating, loud, unapproachable, vindictive, horrendous, oppressive, and sarcastic.⁹

The Court concluded the misconduct was so astonishing and recurrent “that anything we might say about it would be superfluous. . . . the choice of adjectives made by those witnesses in responding to those questions paint a picture of a judge whose behavior was entirely antithetical to standards of common decency as well as to the standards set out in the Code of Judicial Conduct. In our view her behavior qualifies as scandalous; it certainly is such that brings the judicial office into disrepute.”¹⁰

The judge’s intemperate demeanor was not limited to the courtroom. She “created a tense and stressful atmosphere in her chambers and had a serious negative effect on the ability of members of her staff to properly perform their duties.”¹¹ The judge “isolated herself and her office from other court departments, including . . . the court administrator as well as the [presiding judge]. . . . [S]he was ever-aggrieved and confrontational.

Communications between her office and other departments and presiding judges [were strained such that she would permit communications] only by written memorandum if a ‘witness’ was present.”¹²

The Court further concluded the judge had a “penchant—actually her compulsion—to spread on the public record bitter complaints about her [presiding] judge, other [county judges], and other court departments, particularly the office of the court administrator.”¹³

The Court found it difficult to “call up any course of conduct which would be more antagonistic” to the administration of justice.¹⁴ The judge’s digressions made public the judge’s “disaffection with the court system and the perceived discriminatory treatment she was receiving from the [presiding] judge. These digressions were delivered to captive audiences composed of people with business to do, and with such frequency that they became ‘routine.’”¹⁵

For these and other reasons, including improbable reports of assault and battery upon the judge, misusing court staff for personal benefit, and a substandard work ethic, the judge was removed from office and prohibited from ever holding judicial office in the State of Pennsylvania.¹⁶

Judge Lokuta appealed the substantive decision and filed a writ petition with the Pennsylvania Supreme Court challenging the propriety of the discipline proceeding in which four witnesses against her were embroiled in (and later convicted) of criminal misconduct. The Supreme Court stayed imposition of punishment and remanded the case to the Court of Judicial Discipline for the limited purpose of examining if after-discovered evidence arising from the judicial corruption required a further hearing or otherwise affected the decision to remove Judge Lokuta from office.¹⁷ On remand, the Court of Judicial Discipline concluded no hearing was necessary and its previous determination should be upheld. In so doing it denied Judge Lokuta the opportunity to develop a record of her defense theory.¹⁸

On January 14, 2011, the Supreme Court of Pennsylvania issued an opinion regarding the judge’s removal and the

cont. next page

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DNA & the Crime Lab

4 Hours CLE

October 6, 13 & 20 • 10:00 a.m. to 12:15 p.m.
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Financial Forensics (3-Part Series)

2 Hours CLE per session

November 2 • 3:00 p.m. to 6:20 p.m.
Entertaining Ethics w/Sean Carter (Harrah’s)

3 Hours Ethics CLE

November 10 • 1:00 p.m. to 4:15 p.m.
Bankruptcy & Foreclosures

3 Hours CLE

December 14 (Harrah’s) • 9:00 a.m. to 4:45 p.m.
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Judicial Ethics Cont.

nature of the discipline proceedings.¹⁹ The Court concluded the factual findings and imposition of sentence should not be disturbed. The Court also rejected the judge's argument that the attorney member of the Discipline Court should have recused himself because of his concomitant representation of those involved in criminal corruption.²⁰

Judge Lokuta filed a petition for a writ of certiorari in the U.S. Supreme Court on June 28, 2011.²¹ Not surprisingly, she focused on the discipline process itself and not the overwhelming evidence of her misconduct. She alleged the attorney member of the Discipline Court failed to recuse himself when he was "contemporaneously representing clients who were integrally involved in the wide-scale corruption and criminality of key witnesses against [Judge Lokuta], and whose interests could be affected by the nature and scope of the record created in this case." According to Judge Lokuta, this attorney member sought to control the public record in a manner that enriched his client and the two corrupt judges who testified against her.²²

Judge Lokuta's legal issues are topical. She pointed to disparate applications of the U.S. Supreme Court's *Caperton* decision since its publication in 2009.²³ She seeks to broaden the *Caperton* holding beyond judicial election campaign contributions.²⁴ She seeks clarification under *Caperton* of when a judge's competing obligations create a serious risk of actual bias--based on objective and reasonable perceptions.²⁵ She also challenged the Pennsylvania Supreme Court's approval of the subjective, self-assessment for bias that *Caperton* seems to disallow.

In addition to the *Caperton* issues, Judge Lokuta challenged the liberal civil standard for amending complaints and the denial of her confrontation rights in a quasi-criminal disciplinary proceeding. She also presented an issue of first impression by challenging the confidentiality provisions of the discipline proceeding.

I am most interested in Judge Lokuta's arguments relating to *Caperton*. Under *Caperton*, recusal is required when

circumstances and relationships create a constitutionally intolerable probability of actual bias.²⁶ The *Caperton* dissent specifically identified 40 questions arising from this new constitutional standard.²⁷ Judge Lokuta's arguments implicate the uncertainty of the *Caperton* holding.

The likelihood of certiorari is low as the Supreme Court entertains only a very small percentage of petitions for review. Nonetheless, the issues Judge Lokuta presented are compelling and it will be interesting to see what the Supreme Court does.

NOTES

- ¹ *Lokuta*, writ petition, at page 11.
- ² *In re Lokuta*, 964 A.2d 988 (Court of Judicial Discipline of Pennsylvania 2008).
- ³ Petition for a Writ of Certiorari, *Lokuta* (2001) No. 11 page 4-11.
- ⁴ *Id.*
- ⁵ *Id.*
- ⁶ *Id.* at 11.
- ⁷ *In re Lokuta*, 964 A.2d 988 (Court of Judicial Discipline of Pennsylvania 2008).
- ⁸ *Id.*
- ⁹ *Id.* at 1032.
- ¹⁰ *Id.*

- ¹¹ *Id.* at 1034.
- ¹² *Id.*
- ¹³ *Id.* at 1064.
- ¹⁴ *Id.* at 1067.
- ¹⁵ *Id.*
- ¹⁶ *Id.* at 1136.
- ¹⁷ *In re Lokuta*, 964 A.2d 988 (Pa. 2009)(staying order).
- ¹⁸ *In re Lokuta*, 11 A.3d 527 (Pa. 2011) (upholding the decision of the Pennsylvania Court of Judicial Discipline).
- ¹⁹ *Id.*
- ²⁰ *Id.*
- ²¹ Petition for Writ of Certiorari, *Lokuta* (2001) No. 11.
- ²² *Id.*
- ²³ *Caperton v AT Massey Coal, Inc.*, 129 S. Ct. 2252 (2009).
- ²⁴ Petition for Writ of Certiorari, *Lokuta* at 22.
- ²⁵ *Id.*
- ²⁶ *Caperton*, 129 S. Ct. 2252 at 2257.
- ²⁷ *Id.* at 2269-2272.

This is number 47 in a series of essays on judicial ethics authored by Judge David Hardy, Second Judicial District Court, Dept. 15.



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PEOPLE

IN MEMORIAM: JUDGE ANDREW J. PUCCINELLI

Elko District Judge Andrew Puccinelli died August 8 in Reno after a battle with cancer. “Nevada has lost one of its great legal minds and finest public servants with the death of Judge Andrew Puccinelli,” Gov. Brian Sandoval said. Puccinelli, 58, first took the bench in 2002 when former District Judge Jack Ames retired near the end of his last term.



Former Gov. Kenny Guinn appointed Puccinelli to finish out Ames’ term, and then Puccinelli won election in 2004 and in 2008.

Puccinelli just completed a term as president of the Nevada District Judges Association and was an alternate on the Judicial Discipline Commission.

“The judiciary in Nevada has lost an outstanding judge, but more importantly, Nevada has lost a good person,” said Nevada Supreme Court Chief Justice Michael Douglas.

“While some in the court system complain about being asked to do more with less, Judge Puccinelli was out finding more ways to help. He found ways to increase the effectiveness of his Drug Court when there was no more money. He created more problem-solving courts although he already was logging long days in court. He knew people needed help with their troubles, so he helped them out,” Douglas said. “In essence, Judge Puccinelli was what we look for in a leader. He always knew the right thing to say and, more importantly, he was always willing to listen to other people,” he said. “Nevada is poorer for his passing and our hearts go out to his family.”

Judge Puccinelli established the Adult Drug Court program for Elko County in 2005, and he established the Juvenile Drug Court Program in 2007. “The criminal justice system was breaking

under the weight of those people going to prison,” Puccinelli said. In a 2008 interview he said that he was proud of his establishment of the drug court, stating that he was exposed to the concept in 1998-1999 when he was president of the Nevada Bar Association and sat in on a proceeding in Clark County. “It just made sense to me,” he said at that time.”

Elko County Commissioner Charlie Myers said Puccinelli’s death “is a great loss to the community.”

Puccinelli was also a referee with the Northeastern Nevada Officials Association for “maybe 20-25 years,” and he was still active last season. “He was a great official.” He was a referee for both football and basketball games and had been a commissioner with the officials association.

Puccinelli began practicing law in Elko in 1978. He graduated with a bachelor of arts degree from the University of the Pacific in Stockton, Calif., and earned his juris doctorate from the McGeorge School of Law in Sacramento.

He is survived by his wife, Margaret, and three children, Cassie, James and Phillip.

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We would like to thank the following attorneys who participated in Lawyer in the Library programs during the month of July: Leah Wigren, Donald Pope, David O’Mara, and Richard Cornell who volunteered for our Wednesday

night program. We would also like to thank Alison Colvin, Victoria Mendoza, Alex Morey, and Kait McLendon-Kent for volunteering for our Tuesday night program, which is reserved for family law matters.

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1 4 WCBA Luncheon, Legislative Recap, 1/2 cr. CLE included. Harrah's Reno, 12 noon. RSVP online at wcbar.org or call 786-4494. \$25 per person.

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6 WCBA CLE, Digital Forensics and Net Security 1 (3-Part Series, 2 hours CLE per session), 10-12:15 a.m. Federal Courthouse. Register online at wcbar.org or call 786-4494.

6 WCBA CLE, Financial Forensics 1 (3-Part Series, 2 hours CLE per session), 2-4:15 p.m. a.m. Federal Courthouse.

1 2 WCBA Luncheon, Supreme Court Year in Review with Bob Eisenberg, Lemons, Grundy & Eisenberg. CLE credit included. Harrah's Reno, 12 noon.

1 3 WCBA CLE, Digital Forensics and Net Security 2 (3-Part Series, 2 hours CLE per session), 10-12:15 a.m. Federal Courthouse.

1 3 WCBA CLE, Financial Forensics 1 (3-Part Series, 2 hours CLE per session), 2-4:15 p.m. a.m. Federal Courthouse. Register online at wcbar.org or call 786-4494.

2 0 WCBA CLE, Digital Forensics and Net Security 3 (3-Part Series, 2 hours CLE per session), 10-12:15 a.m. Federal Courthouse.

2 0 WCBA CLE, Financial Forensics 1 (3-Part Series, 2 hours CLE per session), 2-4:15 p.m. a.m. Federal Courthouse.

2 0 NNWLA, 12:00 noon at the Atlantis in Reno, Bankruptcy Law, Cecilia Lee. \$25 for members, \$30 for non-members and includes lunch. 30 minutes of CLE pending. RSVP to Kelly at kgunderson@gundersonlaw.com.

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2 WCBA CLE, Entertaining Ethics with Sean Carter. Harrah's. 3 hours CLE. Mark your calendar!

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