A legal note from Marshal Willick updating prior items

I often receive inquiries as to how developing matters played out. There have been some substantial developments, good and bad, on the topic of some prior notes, warranting revisiting those topics – so much so that it will take two notes to cover them. This time around: some ramifications of the *Landreth* decision, including its impacts on attorney's liens.

I. "*LANDRETH* & COHABITANT RELATIONSHIP DIVISIONS" (January, 2010)

The Court issued a new *Opinion on Rehearing* on May 12, 2011, withdrawing and reversing its December, 2009, original opinion. The Court sided with the bottom line of the petition for rehearing, and the Amicus briefs submitted by the Family Law Section and the District Judges.

The meat of the majority decision is at page 15:

> By creating a family court division, prescribing its jurisdiction, mandating the number of district court judges who must be judges of the family court, and requiring specialized instruction and training, the Legislature did not restrict the judicial powers of a district court judge sitting in the family court division. Indeed, it would not have the constitutional authority to do so. Instead, the Legislature has recognized that district court judges sitting in the family court division have expanded authority to hear family court disputes by virtue of their specialized training.

The bottom line is that any district court judge can hear any case properly heard by a Nevada district court, but certain classes of cases are statutorily required to be assigned to the family division, and while judges sitting in one division can be transferred to another, for shorter or longer periods, if a judge is transferred to the family division for an extended period, that judge is required to obtain the additional training required of judges elected to the family division.

The Section's *Amicus* brief and the *Opinion on Rehearing* are posted for review at http://www.willicklawgroup.com/appeals.

The district court judges are, apparently, attempting to create a case-assignment list among themselves, so that various causes of action are intelligently directed to the division best-suited to handling them.

For a much more in-depth discussion of the interplay between marital and non-marital property and support cases, including what sort of case should be heard where, and why, see my article in the May, 2011, issue of the Nevada Lawyer, at 6: "The Evolving Concept of Marriage and its Effect on Property and Support law." The full article is posted at http://www.nvbar.org/Publications/NevadaLawyer/2011/May/NevadaLawyer_May2011_Marriage_Expanded.pdf, and at http://www.willicklawgroup.com/published_works.

II. "ATTORNEY LIENS AFTER *ARGENTENA*; ACTUALLY GETTING PAID" (November,

2009)

I had asked the Court to restrict or alter the deleterious effects of *Argentena* in one direct appeal (*Spencer*) and one writ petition (*Seiff*), but both cases were disposed of on procedural grounds without those requests being examined on their merits.

A. AW, *SCHUCK*

The harmful effects of *Argentena* on lawyers were, if anything, exacerbated by *Schuck v. Signature Flight Support*, 126 Nev. ___, 245 P.3d 542 (Adv. Opn. No. 42, Nov. 4, 2010), which added the requirement, in the absence of a client's request for or consent to summary adjudication of fee disputes, that the client's underlying litigation be completed prior to the adjudication.

All of the reasons why it was a bad idea to eliminate the summary-adjudication procedures in place for the 50 years prior to *Argentena*, as discussed in legal note No. 3, posted at http://www.willicklawgroup.com/newsletters, remain true today. Many malpractice carriers effectively forbid attorneys from suing their clients for fees, and the reality is that the Bar's fee dispute resolution mechanism (which can be used by attorneys as an alternative to suing clients) remains effectively "broken" as a means of obtaining timely and useful adjudications. See legal note No. 13, and discussion below.

The topic was discussed at some length in the CLE materials titled "Enforcement of Judgments: Appeals Stays & Liens" (Advanced CLE, 2010), posted at http://www.willicklawgroup.com/published_works.

Many practitioners updated their retainer agreements as suggested in 2009 to provide advance agreement between counsel and client to resolution of any dispute as to fees owed. The recommended language explicitly permits entry of an order resolving the fee dispute by the court hearing the underlying action, without filing a separate lawsuit.

To date, every department known to me in which a lien adjudication was sought after making the suggested retainer agreement changes has approved going forward with, and fully adjudicating, the attorney/client dispute in its entirety. Anecdotal reports continue to circulate that some departments, for unknown reasons, still refuse to adjudicate liens under any circumstances. If true, those departments would appear to be both ducking their responsibility and ignoring the actual directions of the Nevada Supreme Court holdings.

Schuck, however, throws a bit more spin on the situation, and out of an abundance of caution, a few more words are now advisable in each retainer agreement. In family court, especially, an attorney might leave a case years before it is concluded (some family law cases are never "completed" in the sense that other kinds of cases can be). It would be an unreasonable burden to require the lawyer to wait those years before adjudicating the fees owed.

Previously, the suggested retainer agreement language was:

> Attorney will retain possession of Client's file and all information therein until full payment of all costs, expenses, and fees for legal services, subject to turnover or destruction of the file as set out in Paragraph 9. Client consents to the district court's adjudication of any such lien in the underlying action without requiring the filing of a separate action.

Given *Schuck's* remarks about the timing of the adjudication, that language should be modified slightly by adding the words "and during the pendency of" after "in" on the last line, to eliminate any argument that adjudication of the attorney's fee could be delayed for however many years it might take to "await resolution of the proceedings" in family law litigation involving, say, custody of children.

B. EFFECT OF *LANDRETH*

Some legal commentators started questioning the underlying logic of the *Argentena* decision the day that *Landreth* issued. And their questions make a great deal of sense.

Under the standard practice over the past half-century preceding *Argentena*, the question of what fee was actually owed for work done on a case was presented to the judge who had actually observed the work being done, had a personal familiarity with both the effort involved and results obtained, and otherwise knew what was going on in the underlying case for which fees were claimed.

The message of *Argentena* is to throw that knowledge away, and start over, requiring both attorney and client to spend time and money to go to a completely different judge who knows nothing about what was done or why, and educate that jurist about the work done, the results achieved, and why (or why not) the fees charged should be paid.

In what world could ***that*** make any logical sense, looking to either the economies of the parties to the dispute ***or*** the conservation of judicial resources?

And now we have *Landreth*, which holds that family court judges are district court judges with all the same powers and jurisdiction as any other judges. Given that ruling, what possible sense could there be in requiring the client and attorney who litigated a family court case, perhaps for years, to file a new case in the civil division as to what fees might be owing for the work performed? The obvious answer is "none whatsoever."

The question is whether the Court will see – and care enough to eliminate – the expensive burden it has imposed on both lawyers and clients, or ignore the financial repercussions and leave it to the Nevada Legislature to do so – someday.

III. "THE BAR'S FEE DISPUTE MECHANISM IS BROKEN" (March, 2010)

Over a year ago, I asked the Bar to amend its fee dispute procedures because

> the State Bar fee dispute . . . system is so dysfunctional that it is not a viable mechanism for

> such disputes, making [it] at best illusory, and at worst hypocritical.

I suggested immediate reform of the rules so that disputes were heard and resolved within 30 days, and decisions were issued days – not months – after hearings. The Bar's response? None, whatsoever, as far as I can tell.

This office has had, since the prior legal note, one fee dispute, which we filed in November, 2010 – six months ago. In that time, the Bar has not managed to even assign a non-conflicted panel to start – to begin – to commence – to convene – a hearing on the dispute. Who knows how long it will take to actually get a decision – six more months? Another year? As long as the theme song to Bar fee disputes remains "*Mañana*," the fee dispute process remains effectively useless, making the economic harm of *Argentena* that much worse.

A ***year*** ago, in legal note No. 17, I observed that

> If anyone is doing anything to actually fix the system (getting new panels, amending the rules, altering the required time for automatic submissions, etc.) I have not heard about it.

Since then – utter silence. If anyone on the Board of Governors cares a whit about actually doing something useful for either lawyers or their clients, that might be a good place to direct some attention.

IV. QUOTES OF THE ISSUE

"We accept the verdict of the past until the need for change cries out loudly enough to force upon us a choice between the comforts of further inertia and the irksomeness of action."
– Learned Hand

"Unless you understand the history of a situation, you can't ever hope to solve problems."
– Denis Healy

"Here's to plain speaking and clear understanding."
– Dashiell Hammett, *The Maltese Falcon*

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