A legal note from Marshal Willick on incremental progress but the unfortunate triumph of chaos in family court, while consistency is necessary for substantial justice.

I. WHY PROPOSALS WERE MADE

Three modest proposals for simplifying and unifying practice and procedure across family court departments were proposed. They were pretty underwhelming – baby-steps toward an increased uniformity of practice (why that is desirable is detailed below). One was approved by the assembled family court judges; two failed. Those facts, and the realities underlying them, provide both a ray of hope and a note of despair about the continuing triumph of form over substance, and of anarchy over uniformity, for no particularly persuasive reasons.

II. "SHORT-FORM" AFFIDAVITS

EDCR 2.21 requires factual contentions in motions to be supported by affidavit or declaration (for those that did not get the memo, a non-sworn declaration is the full legal equivalent of any affidavit; see NRS 53.045; *Buckwalter v. Eighth Judicial Dist. Court*, 126 Nev. ___, 234 P.3d 920 (Adv. Opn. 21, June 24, 2010)). Subsection (c) of the rule states that affidavits must "avoid mere general conclusions or argument."

The ***reason*** for the rule is that a motion might consist of nothing more than the bare bones citation of authority and request for relief – for example, as set out in the form motions included at the back of the rules of civil procedure. So an affidavit must contain enough information for a judge to understand what, precisely, is being requested, and why.

Of course, there is more than one way to write a motion, and the general, better, and nearly-uniform practice is to set out in the body of a motion the underlying factual history, an explanation of the applicable law, and application of the law to the facts of the case. Since the purpose of the affidavit is to have the litigant commit to the factual position asserted, an affidavit incorporating the factual averments made in the body of the motion accomplishes the only legitimate purpose to be served by attaching the thing in the first place.

Where a motion is drafted in that way, it would be an idiotic exercise in redundancy to repeat the same words over again in a lengthy affidavit immediately following the detailed discussion and averment of specific facts – doubling page counts while providing to the judge absolutely no additional useful information.

But some lawyers fixated myopically on the word of the rule rather than the reason for it, and have wasted much time foolishly litigating the "adequacy" of such affidavits – while ignoring the substantive issues, and the purposes to be accomplished. Worse, some judges actually indulged such arguments, wasting judicial resources, and the time and money of everyone involved.

In March, 2011, the assembled family court judges addressed the matter by approving the following

policy:

> In lieu of a full blown affidavit in support:
> Motions (other than for contempt), oppositions or other papers requiring an affidavit in support thereof may be verified by incorporation of all factual averments by reference in substantially the following form:
>
> I have read the foregoing _____, and the factual averments contained therein are true and correct to the best of my knowledge, except as to those matters based on information and belief, and as to those matters, I believe them to be true. Those factual averments contained in the preceding are incorporated herein as if set forth in full.

The apparent reason for the parenthetical – as expressed by various jurists in the several months since March – was that 20 years ago, the Nevada Supreme Court had proclaimed the necessity of an affidavit to support a contempt sanction. *See Awad v. Wright*, 106 Nev. 407, 794 P.2d 713 (1990) (noting minimum due process requirements for contempt citation).

The distinction makes absolutely zero logical sense. Repeating factual assertions twice does not make ***any*** affidavit any more "affidavit-y" than incorporating factual assertions by reference. The reasons for an affidavit are no better served by repetition in contempt actions than in any other kind of actions (actually, quite the opposite), and there is no basis whatsoever for believing that our Supreme Court would fixate on form over substance in one sub-species of cases (contempt proceedings) more than in any other.

Some have suggested that a client is more likely to be careful and candid when signing a lengthy affidavit stated in the first person than in a short-form verification of facts as recited by counsel, but I have seen no evidence of this in decades of practice – rather, most clients tend to sign what is put in front of them, even when it contains factual errors, contradictions, and impossibilities. However, counsel believing that the clients might be more attentive to a detailed affidavit are free to skip a factual recitation entirely, referring the court to the affidavit (placed in the body or at the end) to supply factual material, if desired.

The family court would have done far better by approving ***any*** form of affidavit that serves the purposes for having the things filed at all, and by telling the next lawyer that wishes to waste court time on a head-of-pin-pirouette regarding affidavit "adequacy" to get a life, and to either proceed to the merits of the case, or shut up and sit down.

So the court gets a C+ on this one – a good idea, but insufficiently analyzed, and only partially implemented, resulting in some progress for most cases, but at the expense of creating an unjustifiable distinction between types of filings that lacks logical sense, and serves only to create a further Byzantine trap for the unwary, hindering focus on the merits of the cases at hand.

Unfortunately, this was also the best result reached in the three proposals made.

III. UNIFORM PROCEDURES ACROSS DEPARTMENTS

There are a large number of practical details of legal work that are not dictated by court rules and case precedents – the timing of procedures to take a hearing off calendar if settlement is reached, when and how many copies of exhibit books should be submitted, what must be recited in an affidavit of a resident witness, etc., etc.

Under statutes predating the family court – and not modified when the family court was created – ***all*** district court judges in all districts containing more than one district court judge "may make additional rules, not inconsistent with law, which will enable them to transact judicial business in a convenient and lawful manner." *See* NRS 3.020.

Accordingly, the district court judges of the family division have the authority to prescribe uniform procedural rules binding on all judges of the family division. Formalizing that authority was the second "uniform policy" proposal. But when presented with the opportunity to actually prescribe uniform procedures across departments, the judges of the family court refused to do so. This is an unfortunate continuation of a long-standing pattern.

In previous incarnations, committees would propose uniform policies or procedures, only to receive indignant push-back from certain jurists along the lines of "No lawyers are going to tell ***me*** how to run things in ***my*** courtroom!" That response has always been wrong on many levels, not least of which is that judges are stewards, not lords, of the courtrooms in which they sit – but that larger subject will wait for another day; the focus here is on uniform policies.

This time around, the proponents of uniform procedures tried to get the judges to adopt a policy where they ***themselves*** would determine what policies and procedures would be; no matter what the rule was to be, to actually settle on one. They have now refused that invitation as well, choosing anarchy instead. It is indefensible.

"Substantial justice" goes beyond what a given judge might do in a given case. Lawyers and litigants have a right to know in advance what policies and procedures are in place in a court – and to have them be the same in courtroom "X" as in Courtroom "Z." The reasoning is essentially the one explained by the Supreme Court in *Rivero*, addressing child custody standards:

> District courts can use their discretion to make fair determinations in individual child custody cases. However, this becomes unfair when different parties similarly situated obtain different results. Such unreliable outcomes also make it difficult for attorneys to advise their clients and for parties to settle their disputes.

Rivero v. Rivero, 125 Nev. ___, 216 P.3d 213 (Adv. Opn. No. 34, Aug. 27, 2009).

The same rationale applies to every other aspect of practice – it is simply unfair to have different rules apply in different courtrooms, because similarly-situated litigants will necessarily receive different outcomes based, not on the facts and law, but on the biases and peccadillos of the jurist presiding. Predictability and consistency are elements of substantial justice, and for the judges of a court to refuse to take steps toward that end reflects badly on those making that choice.

One judge, musing about a resolution, opined that the problem would be solved if all judges adopted

the "strictest possible interpretation" of every rule. Of course, that is not so – on many points, the possible alternate policies have nothing to do with "strictness" at all, but on interpretation which might reasonably vary from person to person, and in others it is a matter of balancing concerns so as to adopt those practices most likely to get cases handled efficiently. One man's "procedural requirement" is another's useless and meaningless formality.

What can rationally be made of the refusal of the family court judges to abide by policy and procedure decisions of a majority of their fellows? The only logical conclusion suggested is that a majority of the family court judges do not trust ***one another*** to adopt reasonable standardized rules of practice and procedure. The unwillingness to sacrifice a jot of personal autonomy in order to improve the practice for the benefit of the Bar and the public is an unfortunate and embarrassing failure on the part of a court that wishes to be taken seriously by others.

Some experienced practitioners, weary of trying to get judges to look beyond their own cases to the efficient functioning of the court system as a whole, have given up and just asked that where the judges don't agree, they at least make the modest effort to discover those disagreements and publicize them so lawyers are on notice that what requires a week in Department "X" needs only three days in Department "Z," etc.

Others have suggested that they would be happy with even less – that if a department expresses some policy, it remains in effect in that courtroom for some period of time longer than until the next case comes up.

The message communicated by these practitioners seems pretty clear – on matters of policy and procedure, the current chaos is wasteful, unnecessary, and inadequate. A judiciary that will not accept criticism or suggestions from outside its own ranks is bad enough; one that will not find the vision to agree upon internally consistent processes from the views of its own members invites ridicule.

IV. AUTHORITY OF LAWYERS TO SIGN DECREES ON BEHALF OF LITIGANTS

Apparently, one judge was so spooked by the decision in *NC-DSH, Inc. v. Garner*, 125 Nev. ___, 218 P.3d 853 (Adv. Opn. No. 50, Oct. 29, 2009) that the judge implemented a policy of requiring a personal affidavit from the client, in addition to the signature of the attorney, in order to bind the client to the terms of any order or decree.

All the reasons why this conclusion is simply wrong are detailed in legal note No. 6 (posted at http://www.willicklawgroup.com/newsletters); in short, in that case, the lawyer's superseding fraud on the court justified setting aside the order in question, whether that order was based on ostensible (or even actual) agreement by the client, or not. The surrounding text makes it clear that if the lawyer had fraudulently connived to get an authentic client signature on the documents, the result would have been no different.

That judge has steadfastly refused to back off on the contrived, artificial, and unnecessary

"requirement," however, and has now rationalized it as "protecting lawyers" from clients moving to set aside orders entered on their behalf.

What is new is that the family court as a whole has now refused to adopt a rule stating that "Lawyers may sign all decrees, orders and papers on behalf of their clients unless any statute or rule requires otherwise." This was the third "uniform policy" recommendation, which the family court has declined to implement.

One would think that the proposed policy would not have been much of a stretch, since the Nevada Supreme Court has, for the past ***ninety years***, held that "a party is bound by the stipulations and actions of his attorney." *See*, *e.g.*, *Moore v. Cherry*, 90 Nev. 390, 528 P.2d 1018 (1974); *Wehrheim v. State*, 84 Nev. 477, 443 P.2d 607 (1968); *see also Aldabe v. Adams*, 81 Nev. 280, 402 P.2d 34 (1965); *Aldabe v. Aldabe*, 84 Nev. 392, 441 P.2d 691 (1968); *Rahn v. Searchlight Mercantile Co.*, 56 Nev. 289, 49 P.2d 353 (1935); *Dechert v. Dechert*, 46 Nev. 140, 205 P. 593 (1922).

None of those holdings were addressed, nevertheless overruled, in *Garner*, and they all remain good law today. In other words, judgments are no less "valid" if the plaintiff's attorney signs for the plaintiff; obtaining a separate affidavit from the party makes the resulting judgment neither less nor more susceptible to being set aside if any party can satisfy the "heavy burden" of proving that the judgment was procured by way of fraud on the court. But, hey, what's a century of precedent in light of judicial whim?

V. CONCLUSIONS

Regularly achieving justice with a capital "J" requires making the practice and procedure of justice with a little "j" as simple, economical, reasonable, and consistent as can possibly be achieved. And that requires jurists to be a lot more concerned about there being ***a*** policy as to matters on which opinions might vary than that it be ***their*** policy.

Unfortunately, with the simple proposals for uniform policy and procedure, as it has been with topics ranging from assessment of fees to calculations of custodial time-share, the judges of family court seem much more dedicated to singing "I Did it My Way" – each in their own key – than actually making the machinery of the court operate as well as it might. They could, and should, resolve to do better.

VI. QUOTES OF THE ISSUE

"One of the most dangerous forms of human error is forgetting what one is trying to achieve."
– Paul Nitze.

"'Our rules of procedure are not simply a minuet scored for lawyers to prance through on pain of losing the dance contest should they trip.' . . . . The rules do not exist for their own benefit [but are only] a framework for the fair and uniform adjudication of cases brought into our system. . . [and]

'should be subordinated to their true role, i.e., simply a means to the end of obtaining just and expeditious determinations between the parties on the ultimate merits.'"
– *Ponden v. Ponden*, 863 A.2d 366, 371-72 (N.J. Super. App. Div. 2004).

"Anytime I can't make an actual change in a circumstance, there's not but one thing left to do: make fun of it and try to make fun out of it."
– Jill Conner Browne, *The Sweet Potato Queens' Big Ass Cookbook (and Financial Planner)*.

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