A legal note from Marshal Willick on the expanding disconnect between bench and Bar regarding e-filing, and on the use and abuse of *ex parte* motions and letters.

Further developments continue to highlight the level of dysfunction of the Clark County e-filing system. The judicial establishment – having already (by silence) essentially declared that it does not care about the outrageous expense and lack of important functionality – appears to have adopted an attitude of simple denial.

And a couple of recent cases – and individual judicial declarations of policy – highlight some "dos and don'ts" of *ex parte* motion practice, and merit a discussion of when direct communications with the judiciary is, or is not, appropriate.

I. E-FILING

A. RECAP

These legal notes highlighted assorted defects and omissions, amid astronomical costs in the Clark County implementation of e-filing through Tyler Technologies, in notes dated back to July, 2010. See legal notes Nos. 21 "E-filing Problems," 27 "More on E-filing," and 38 "E-FILING 3 - The Contracts, the Math and What Should Happen Next," all posted at http://www.willicklawgroup.com/newsletters.

They contained requests that court administration demand of Tyler technological and functional improvements, such as lawyers having access to their own sealed cases. They protested the swinish $3.5 Million dollars per year being extracted from lawyers and the public and handed over to Tyler for the inefficient process now in ***mandatory*** use by "administrative order." They protested that it costs lawyers in Clark County ***40 to 50 times more per year*** to perform that mandatory electronic filing than it costs to do the same thing in Reno, and they protested the ongoing flagrant violation of the Supreme Court's rules that effectively fleece all lawyers in Clark County to indirectly fund the running of court operations.

The notes analyzed the contracts, set out a series of requests for improvements (technologically and otherwise), and called for immediate steps to renegotiate contracts, with a back-up of wholesale replacement of Tyler with the technology in place in Washoe County, or another replacement. The third note in that series included the conclusion that:

> the process of filing papers in court is slower, more aggravating, and vastly more expensive than it was a year ago. That is ***NOT*** "progress."

Since that time, the clerks assigned to run the program have done what they could with it. To their credit, they have responded to inquiries, and attempted to resolve problems. For instance, for urgent matters, they have implemented an expedited procedure, that is helping to solve the worst of the problems. In addition, the backlog, the usual delay between the time documents are e-filed, and when they actually appear in the court record and one could obtain a file-stamped copy, has dropped

from weeks, which was previously common, to a day or two. Of course that is still a day or two longer than it was when one could walk up to the counter and obtain a file stamp.

Further, the system seems to be incapable of doing some of the basic tasks that the input screens lead users to expect are actually being done – such as actually deliver comments to someone to read, or actually send confirmations to more than one address when more than one address is inserted in the blanks provided.

B. THE GROWING DICHOTOMY BETWEEN BENCH AND BAR ON THE SUBJECT

The virtually unanimous commentary from members of the Bar has been in agreement with the prior legal notes on each point. One senior practitioner (an appellation now ascribed to anyone who was already in practice when I started some decades ago) wrote in, describing the Clark County e-filing system as "a horrendous nightmare" that "should be done away with." He went on to detail repeated over-billing that was only correctable by time-consuming complaints about "outrageous incidents of double dipping," and complained that the entire e-filing implementation wasted his time, injured his practice, and harmed his clients.

And the reaction in the past year and a half from court administration to the complaints, legal notes, and requests? Zero. Zip. Nada. No increased functionality, even to access one's own sealed files. Not even an assigned technology committee to improve the process. No contract-alteration to greatly lower costs to the lawyers and the public. I've heard nothing about our chief judges or court administration summoning a Tyler representative to Las Vegas to entertain complaints, produce a short time-line for functionality improvements, or hear a demand for the lowering of costs.

From anything that has been made public, no one in any position of authority even sent a polite note to Tyler ***asking*** for any of those things. Rather, the Bar is apparently expected to fall all over itself with gratitude for the few bug fixes that have made less frequent the instances where filings are lost entirely for months at a time. And our chief judge tells the press that while she has heard something about complaints, she just does not know what any of them might be.

Instead of taking concrete actions to improve the lot of the Bar and the public, we have this bit of pablum from the district court, in its cover letter to the Supreme Court with proposed amendments to the Eighth Judicial District e-filing rules (ADKT 468, filed September 22, 2011):

> The crossover from paper files to a paperless system has been quite successful. Further, it remains the goal of the EJDC to bring outstanding service to citizens in Clark County.

Quite successful? Outstanding service? Maybe those in the insulated anthill are so completely out of touch with the daily lives of litigants and practitioners that they really don't see just how frustrated and angry the public and Bar are with electronic filing as implemented here, from the long lines to being looted month after month. Or – as one attorney wrote in to comment – having solved its own personnel and cost issues, the court simply doesn't give a damn ***what*** lawyers or the public think.

C. NEWEST DEVELOPMENTS; IT'S NOT GETTING BETTER

On August 1, 2011, the Nevada Supreme Court issued an "Order Amending Nevada Electronic Filing Rules" (ADKT 410). The first "whereas" sentence in its preamble states that the Court "is concerned about the statewide uniformity of rules regarding electronic filing."

Still contained in the revised rules is NEFR 5(i), stating that e-filing "should be publicly funded to eliminate the need to impose surcharges for filing of or access to electronic documents." The rule continues, however, to have the escape clause permitting court to impose such charges, or use a private vendor that does so, "when sufficient public funding is not available."

And the rule continues to contain the completely-ignored directive that "Such surcharges must be limited to recouping the marginal costs of supporting electronic filing processes if collected by the court or to a reasonable level if imposed by a private vendor."

As pointed out in the prior legal notes, the "marginal cost" of e-filing is ***ZERO***, since the process now costs ***less*** in equipment and personnel time than filing documents did previously. But Clark County is extracting several thousand dollars per lawyer per year for this function anyway – totaling about $3.5 ***Million*** per year being handed to Tyler Technology.

This reality caused one lawyer (who wishes to remain anonymous) to write in wondering just who got paid off to concoct this ongoing mugging, since it seems impossible that this bad of a decision would have been made for ***no*** reason.

The same rule requires an "annual audit" of any outside vendor to determine whether the fee charged is "reasonable," and at minimum, a biennial "performance audit" to determine whether the service provided is adequate for the court, the public and the Bar, specifically to include reliability, integrity, security, timeliness of access, and privacy.

If any such audits are being conducted, Clark County court administration is keeping it under wraps, and in light of just the information disclosed in the past three legal notes on the topic, it is ***impossible*** that the existing system could survive any audit conducted in good faith. But the rule on its face permits such audits to be performed by "internal staff or external experts"; since the foxes have been given permission to audit the henhouse, hope of transparency, honesty, and meaningful improvement does not appear to be warranted.

Could we at least have a public announcement of who, exactly, is doing the audit, and a promise that it will be published to the Bar? This is something our presiding and chief judges could do in moments – if they wanted to.

Among the various things the revised rules require is automatic service of all filed documents on all registered users of the system, via a clerk-maintained service list (NEFR 9(c)-(d)). This is done automatically, apparently painlessly, and without cost in Washoe County, and in Nevada Supreme Court cases, and by Pacer in the federal system.

The court administrators in Clark County, however, upon being informed of the new rules, flatly stated that it was "impossible." Apparently the rule – which was supposed to be in effect State-wide as of September 1 – is being and will continue to be disregarded in Clark County.

And if such service was ***made*** possible, the contract our court administration made with Tyler Technology allows them to charge even ***more*** money on top of the millions they are getting now, apparently to the tune of an ***additional*** two dollars for ***every document served***. For a lawyer filing 100 documents a month, that's an additional $200 monthly, pushing the annual cost estimate for that lawyer from the $4,200 projected in legal note No. 27, to $6,600 per year – and increasing Tyler's haul from the lawyers and public of Clark County from $3.5 Million, to somewhere north of $5.5 Million per year.

If anyone has an excuse to offer for that obscenity, they have been pretty quiet about it.

D. WHO SHOULD DO WHAT

There was some hope that actions would be taken by court administration to address the list of specific steps outlined in legal note No. 38 to improve the situation. The silence has been total; the administrators have done nothing, and their bosses, the judges, have apparently not demanded any more than that from them.

Apparently, it will fall to lawyers to ***force*** the system to respond. Far too often, however, the lawyers that run for elected positions in the Sections or general Bar seem to be interested in not much beyond resume lines and attending quarterly meetings, preferably in exotic locations. Lawyers who are frustrated and angry with the state of e-filing don't seem to think that any of their "representatives" listen to or much care about their complaints – that is why they write to me.

One lawyer cannot do a whole lot to make the system respond. But the formal Bar organization is – or at least surely ***should*** be – about more than policing misconduct and ineffectually dithering about logos. Given the multiple millions of dollars extracted from Clark County lawyers and shipped off to Tyler, why hasn't the Bar done ***anything*** to protect its membership from the ongoing rip-off, not to mention serve the public interest?

Is there any kind of appetite by any of the organized Sections of the Bar to suggest actually doing something about this situation? Is there any chance that the Board of Governors could actually be roused from somnolent placidity to file a writ of mandamus with the Supreme Court demanding correction of the obvious equal protection violation on daily display, as its Clark County members are forced to pay 50 times more than their Reno counterparts to perform the basic function of filing papers with the court?

To those that ran for "leadership" positions in the organized Bar: it is past time to actually do some "leading" for the benefit of the membership. Hello?

II. *EX PARTE* MATTERS

A. MOTIONS AND ORDERS

Many different court rules permit filing motions and obtaining orders "*ex parte*" – literally, "from the part," meaning from one party only, and possibly without notice to or argument from the adverse party. But when, and how, such applications should be made varies considerably, as do the responsibilities of counsel to provide notice, depending on the purpose and context.

For example, several local rules permit the issuance of certain run-of-the-mill orders upon application, on which no notice is required because there are essentially no grounds for opposing their issuance. In Clark County, such would include Joint Preliminary Injunctions issued per EDCR 5.85(a); in Washoe County, restraining orders covered by WDCR 43(2)(b).

Other *ex parte* requests may be made for strictly procedural relief, such as under EDCR 2.30(b), transferring exhibits to amended pleadings, or to extend or shorten time, as under EDCR 2.25 and 2.26.

In all such situations, however there is no good reason ***not*** to inform the other side of the request, at the time the request is made. Attorneys who wait until such requests are granted before copying their opponents with the underlying motion are at least engaging in sharp practice without reason, and skirting the line of ethical conduct under Nevada Rules of Professional Conduct 3.4 ("Fairness to Opposing Party and Counsel") and 3.5 (Impartiality and Decorum of the Tribunal and Relations with Jury").

One judge, in fact, has declared that in that department, no such *ex parte* motion will be granted until after it has been served on the other side.

But requests can be made to a court for ***quite*** substantive relief without notice to the other side, where the situation warrants it. Both the rules and many judges are understandably skittish about such requests.

The Seventh Judicial District's Rule 13 tersely provides that *ex parte* orders are "disfavored and counsel are encouraged to move with notice whenever possible." Eighth Judicial District Rule 5.20(d) permits *ex parte* motions for pretty much any family law matter, but provides that those not relating to domestic violence, exclusive possession of a residence, or issuance of a JPI "will be considered only in cases of extreme emergency," and upon an affidavit of counsel showing what notice was given, or why it should not be required. Bound of Advocacy 7.13 provides that "An Attorney should not seek an *ex parte* order without prior notice to other counsel except in exigent circumstances."

In practice, such applications should only be made where notice to the opposing party of the request would frustrate the purpose intended to be served or create unnecessary risk of harm.

For example, in family practice, *ex parte* requests for pick up of a child believed to be in danger of

kidnap or other harm are clearly appropriate where the facts warrant it. Various rule sets contemplate such applications and orders. In Hague Convention cases involving international kidnaping, for example, Article VII of the Convention, and 42 U.S.C. § 11604(a), specifically empower a court to enter such orders as are necessary, under federal or state law, "to prevent the child's further removal or concealment before the final disposition of the petition" as a "provisional remedy."

Similarly, NRS 125.470(3) provides for a minimum of 24 hours advance notice of any order changing custody of a child, unless the court deems that requiring the notice would "likely defeat the purpose for the order." It has long been clear that *ex parte* order may be used to temporarily award or change custody prior to trial. *Whitney v. Second Judicial District Court*, 68 Nev. 176, 227 P.2d 960 (1951); Nevada Family Law Practice Manual, 2008 Edition § 1.48 ("in practice . . . courts often issue temporary emergency orders relating to child custody . . . when they deem it necessary to protect a minor child from a imminent danger of physical harm"); *see also Turner v. Saka*, 90 Nev. 54, 518 P.2d 608 (1974) (a "showing of necessity" is best understood as an ***alternative*** to notice, in emergency situations).

There are multiple contexts in which such orders may be sought for property-related matters, as well. Probably most common is for the inspection and inventorying of safe deposit boxes or other repositories, where there is some reason to believe the property or information at issue will be hidden or destroyed if advance notice of the inspection is given.

Making any such request puts a burden on moving counsel to "inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse." NRPC 3.3(d). In other words, such orders are obtained on the credit of a lawyer's credibility – a currency which should not be squandered.

But when such circumstances are fairly made out, *ex parte* orders should be issued. They are in many contexts the only way to prevent children from being harmed, property from being lost, or information from being concealed from ever being discovered, and judges are not only umpires ensuring the noticed fairness of the process, but also guardians of the vulnerable, and arbiters of the truth, with a duty to ensure that it is revealed.

B. COMMUNICATIONS

There are few areas in which there seem to be a greater variety of opinions, mis-information, and inconsistent practice among departments than on the subject of direct communications between lawyers and judges or their staffs. While most departments review and evaluate communications individually, some have adopted blanket policies refusing to respond to – or sometimes even open and read – any letter communications from lawyers. The latter policy is a mistake.

The rule behind such policies is apparently NRPC 3.5(b), which states that "A lawyer shall not communicate ex parte with a judge, juror, prospective juror or other official except as permitted by law." But of course, that begs the question of what is "permitted."

First, judges (or judicial staff) may communicate ex parte "for scheduling, administrative, or emergency purposes" under the Code of Judicial Conduct. And extensive case law from around the country indicates that any communication to a court that is simultaneously copied to opposing counsel is not even ***defined*** as "ex parte." *See*, *e.g.*, *Colorado v. Holmes*, 921 P.2d 44, 47 (Colo. 1996).

But it is not necessary to go too far afield for such authority. Back in 1990, then-Referee Gloria Sanchez obtained a written Opinion from the Attorney General's Office verifying that correspondence to a judge, simultaneously copied to opposing counsel, is ***not*** a prohibited *ex parte* communication under SCR 174(2) [now NRPC 3.5(b)] and thus ***is*** a proper means of communicating matters relating to the process of the litigation, such as notifying the Court that opposing counsel has not signed off on a proposed order and submitting it without countersignature, or responding to a request for information by notifying the Court where in the record a requested exhibit could be found.

In the decades since that Opinion issued, nearly all departments expressly noting it have relied upon it as guidance for efficiently and fairly saving time and money.

The only alternatives to permitting such communications are far worse – not submitting orders at all, submitting the order without countersignatures and having the Court ***guess*** why, or filing a motion to have yet ***another*** hearing just to have an order signed from the ***prior*** hearing, despite the unnecessary waste of time and money such a process would inflict on all sides.

"Zero tolerance" policies on most subjects tend to produce absurd results. In matters of *ex parte* motions, orders, and letters, a far superior policy is the individual weighing of what are, necessarily, individual situations.

And this is yet ***another*** matter about which uniform practices among departments would be of value to the Bar and public. Sadly, my files includes a never-responded-to letter to a then-Presiding Judge of the Family Division, making that same request on this same subject – eight years ago.

III. CONCLUSIONS

E-filing as implemented in Clark County is just awful, allowing court administration to balance its budget and save internal salaries at monstrous cost to the public and the Bar in lost productivity, wasted time, and indefensible out-of-pocket expense, day after month after year.

In the 17 months since these notes began detailing all the ways in which the system is both defective and deficient, there has been not the slightest indication that either the judges or the administrators they employ care a whit about the mess they have created and imposed on everyone else, or have any intention to ever meaningfully fix it.

And now, a confluence of rule mandates and absurd contract terms mean that Clark County e-filing does not comply with Nevada Supreme Court requirements, and if the system ***is*** made to comply,

the lawyers will get to pay an ***additional*** two million dollars a year to an out-of-State company to obtain that incremental service, on top of existing fees that would make a hedge fund manager blush.

Anyone actually concerned with "access to justice" should be both dismayed and alarmed. More to the point, anyone with such concern, and the authority to act, would ***do something about it***.

As to *ex parte* proceedings, fuzzy thinking has often led to illogical practices, and policies. For lawyers, motions should be copied upon filing to opposing counsel, unless there is some particularly good reason not to do so. And when such is suggested, judges should take the time to figure out whether *ex parte* relief is warranted – case by case, not by way of some blind edict.

Ditto with communications, which should be read and evaluated on their individual merits, and individually dealt with. Doing so takes some extra effort beyond deciding "policy" in advance regardless of circumstances. Of course, that is why it is called "work."

IV. QUOTES OF THE ISSUE

"Denial ain't just a river in Egypt."
– Mark Twain

"Let them eat cake."
– Marie Antoinette (attrib.) (just before the peasants revolted)

"Remain calm! All is well!"
– (Chip [Kevin Bacon] to crowd in mid-riot), *Animal House* (Universal Pictures, 1978)

"Bureaucracies are inherently antidemocratic. Bureaucrats derive their power from their position in the structure, not from their relations with the people they are supposed to serve. The people are not masters of the bureaucracy, but its clients."
– Alan Keyes

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Special thanks to Bruce Shapiro, Esq., who authored a memo from which some of the above cites were lifted.

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