A legal note from Marshal Willick about recent case law developments on: disqualification and confidential information; sanctions after dismissal; and "taking the Fifth" in a civil case. And a brief note of appreciation for those that labor to improve legal systems without seeking attention.

The Nevada Supreme Court has logically applied and extended the Rules of Professional Conduct to circumstances not precisely covered, and learning the applications of those rules can save lawyers, and their clients, a whole lot of grief.

## I. INADVERTENT DISCLOSURES AND ANONYMOUS TIPS

### A. BACKGROUND: THE RULE OF PROFESSIONAL CONDUCT GOVERNING "INADVERTENT DISCLOSURES"

In the age of "Reply All" e-mail, and a host of other technologies that make communications of all sorts both faster and easier, the odds of inadvertently revealing to an opposing party, or counsel, information or documents intended to be confidential have increased several-fold. The question addressed by the rules is the duty of the lawyer who comes into possession of such information – to say something, look or refrain from looking at it, report it, or otherwise.

After the "Ethics 2000" reforms (which, in the interest of historical accuracy, were actually not promulgated by the ABA until 2002, and were not acted on in Nevada until 2006; see "Nevada Legal Ethics (Ethics 2000 Committee recap)," posted at http://www.willicklawgroup.com/published_works) went through, the final rule decided on was RPC 4.4(b):

> A lawyer who receives a document relating to the representation of the lawyer's client and who knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender.

That's the entire duty, which comes as a considerable surprise to many. Comment 2 to the rule states in part:

> Whether the lawyer is required to take additional steps, such as returning the original document, is a matter beyond the scope of these Rules, as is the question of whether the privileged status of a document has been waived. Similarly, this Rule does not address the legal duties of a lawyer who receives a document that the lawyer knows or reasonably should know may have been wrongfully obtained by the sending person.

The discussion of the new standard, which is three pages long, states that the rule consciously rejected the 1992 ABA formal ethics opinion requiring non-use by the receiving attorney. It notes that, in light of the rule change, the 1992 opinion has been withdrawn, effective in 2005, and noticed that the States are all over the map as to what to do about the change.

The new Nevada Rules of Professional Responsibility adopted 4.4(b) word for word as proposed by the ABA. The short list of Nevada Formal Opinions issued since 2005 appears to include no direct

commentary bearing on the question of how to apply it.

### B. *MERITS INCENTIVES v. DIST. CT.*: ANONYMOUS PACKAGES

*Merits Incentives v. Dist. Ct.*, 127 Nev. ___, ___ P.3d ___ (Adv. Opn. No. 63, Oct. 6, 2011) involved litigation between a company called Bumble, which manufactured "high-end salon products," and its distributors in Las Vegas ("Merits"), who Bumble accused of violating their contract by entering into gray market sales with unauthorized retailers.

One day, "an anonymous package from Lebanon" appeared in the mail at the headquarters of Bumble, stamped "highly confidential." The package included a note saying it should be forwarded to Bumble's attorney. A few weeks later, Bumble's attorney served on Merits supplemental NRCP 16.1 mandatory pretrial discovery disclosures, including a copy of the disk and the envelope it arrived in.

Shortly thereafter, Bumble propounded additional discovery, demanding authentication of the documents that had been copied on the disk. Merits objected with an assortment of mealy-mouth legalese ("overbroad, unduly burdensome," etc.) and an assertion of both attorney/client and attorney work product privilege. The Nevada Supreme Court made a point of noting that such an objection is "insufficient to assert a privilege."

Merits later filed a motion to throw out Bumble's suit or disqualify its attorney, asserting misuse of materials it contended were sent to Bumble in violation of an injunction in a separate lawsuit by Merits against one of its prior employees, who it contended must have sent the anonymous package. The trial court refused both motions, finding that only one of the documents was privileged and that the receiving attorney acted reasonably. Merits filed a writ petition.

The Nevada Supreme Court affirmed. The Court reasoned that RPC 4.4(b) did not apply because the package was not sent "inadvertently," but quite deliberately. The Court elected to apply the same duty (notifying the other side) as in the inadvertent disclosure situation where an attorney receives documents or evidence from an anonymous source or a third party unrelated to the litigation. The Court found the requirement to be a reasonable balance, adding that receiving counsel should put opposing counsel on notice that the documents were not received in the course of normal discovery and describe "with particularity" how they were obtained.

The Court put the burden on notified counsel – if convinced that the notifying counsel was acting unethically or possessed privileged information – to promptly seek return of the documents or the disqualification of notifying counsel. As to such disqualifications, the Court adopted a non-exhaustive, six-point test promulgated by the Texas Supreme Court that seeks to balance the interests of the parties and importance of the information.

There is perhaps no field in which all such disclosures are more prevalent than in family law, where a host of family, friends, and multiple interested partisans of both sides may have information that they want known but do not want to take responsibility for having revealed. The take-away for

counsel is both straightforward and reasonable. When information or documents arrives outside the normal discovery process – inadvertently or anonymously – counsel should make as prompt and full a disclosure as possible to the other side of what was received and how, seeking to filter out privileged information.

### C. THE BOUNDS WOULD GO FURTHER

The AAML Bounds of Advocacy (2000 ed.) are a set of aspirational directions intended to "guide matrimonial lawyers confronting moral and ethical problems" intended to address subjects on which the formal Rules of Professional Conduct "provided insufficient, or even undesirable, guidance."

The current version of the Bounds would have counsel do far more than what is set out above, but as they are strictly aspirational and state that they defer to local law wherever that would be different, those Bounds that do apply would appear to be superseded on the topic addressed here.

Specifically, as to inadvertent disclosures, under Bound 7.6, an attorney who receives materials that appear to be confidential should refrain from reviewing the materials and return them to the sender, as soon as it becomes clear they were inadvertently sent to the receiving lawyer.

This is in line with (and explicitly based upon) the older ABA formal opinion, which was reversed and withdrawn after issuance of Ethics 2000, and should be treated, given the history, as outdated, and to be disregarded. Presumably, the Academy will update the Bounds to reflect the changed balancing of ethical duties.

The Bounds also lean more toward confidentiality relating to materials received from a third party, but that is probably due to the outdated and more restrictive ABA rule as well. Bound 7.7 states that an attorney may use materials intentionally sent from an unknown or unauthorized source unless the materials appear to be confidential. Confidential materials should be deposited with the court and a ruling sought.

In light of *Merits*, this too appears to be a dead letter, which can and should be disregarded by counsel.

The Bounds have been adopted as part of the Eighth Judicial District rules through EDCR 5.04. It is a bit of an aside, but it is a ***decade*** past due that those who submit rule changes for the EDCRs request that the Supreme Court update the reference from the 1991 edition in the current rule to the 2000 edition (which itself should, shortly, be replaced). Perhaps the rule could simply be made to reference "the most current version of the Bounds of Advocacy."

## II. SANCTIONS CAN ISSUE IN A POST-DISMISSAL ORDER

*Emerson v. Dist. Ct.*, 127 Nev. ___, ___ P.3d ___ (Adv. Opn. No. 61, Oct. 6, 2011) started out as a personal injury action stemming from a multi-vehicle accident. A jury rendered a defense verdict.

One of the defense counsel made comments at trial, however, leading the Nevada Supreme Court to reverse on appeal, deeming the comments prejudicial and improper.

On remand, the district court set the matter for a new trial. Plaintiff requested sanctions against the defense counsel who had made the comments. The parties settled the underlying auto accident case, which was dismissed with prejudice, after which the trial court entered an award for over $19,000 in sanctions against defense counsel on the sanctions motion. Defense counsel sought a writ from the Nevada Supreme Court, claiming that because the case was dismissed with prejudice, the district court lacked jurisdiction to issue the sanctions order.

On appeal, the Court recounted prior opinions in which it held that "jurisdiction over matters related to the merits of a case terminates upon dismissal." But the Court noted that even after one party appeals a decision (and so divests the district court of jurisdiction, vesting it in the appellate court), the district court retains jurisdiction to enter an award of attorney's fees because the "collateral matter did not affect the merits of the appellant's appeal," citing *Kantor v. Kantor*, 116 Nev. 886, 8 P.3d 825 (2000).

The Court found that imposition of sanctions, under NRCP 11 or otherwise, likewise is "collateral" to the merits of a case because the purpose of such sanctions is to "command obedience to the judiciary and to deter and punish those who abuse the judicial process." The Court then spent some time exploring the "broad discretion" of trial courts to impose sanctions for professional misconduct at trial, indicating that the "inherent power" to do so goes beyond specific rules or statutes to "any litigation abuse not specifically proscribed." The Court found the award made in this case not "grossly disproportionate" to the harm caused.

In family law cases, the economic reality of the litigants sometimes requires counsel to settle a case instead of proceeding to a full trial, despite the misconduct of opposing counsel. *Emerson* stands as authority for the proposition that in such cases, the innocent party may wish to bring a motion for sanctions, despite settlement of the merits, when the facts call for it.

## III. "TAKING THE FIFTH" AND ITS EFFECT IN CIVIL CASES

It is pretty basic criminal procedure that when a defendant asserts his Fifth Amendment right to avoid self-incrimination and therefore refuses to answer a question or to testify at all, exercise of that privilege may not be penalized – say, by the prosecution making an argument to a jury that "If he did not have anything to hide, why wouldn't he testify?" *See*, *e.g.*, *Spevack v. Klein*, 385 U.S. 511 (1967).

It is surprising to some folks that the privilege may be invoked a civil action as well as in a criminal prosecution. *Lefkowitz v. Cunningham*, 431 U.S. 801 (1977). And it is surprising to many lawyers that the opposing party and the court have a broader palette of potential responses to such an assertion when it is made in a civil action than in a criminal case.

The Nevada Supreme Court has now held, in *Francis v. Wynn*, 127 Nev. ___, ___ P.3d ___ (Adv.

Opn. No. 60, Oct. 6, 2011), that making the choice to assert the privilege in a civil case has consequences, and they are not always friendly to the party making the assertion.

The case stemmed from a collection suit by Wynn against a high-roller (Francis) who skipped town leaving some $2 Million in unpaid markers. The casino turned the unpaid debt over to the D.A.'s office, which issued a criminal complaint charging Francis with theft and passing a check with intent to defraud. While it was pending, the civil collection suit entered discovery.

At deposition in the civil suit, Francis "asserted his Fifth Amendment privilege to nearly every question," including whether he had ever been to Nevada, whether he was married, and his mother's name. Eventually, discovery closed. Francis sought to extend discovery, claiming the case was "still in its infancy," but Wynn countered with a motion for summary judgment, noting the total lack of discovery by Francis and his stymying of Wynn's discovery.

At the ensuing motion hearing, Francis' counsel "gave vague indications that [Francis] would like to withdraw" his assertion of privilege, but did not squarely ask to do so.

The district court judge was unamused, labeling the answers to the questions at the deposition to have been "the most ridiculous exercise of the 5th Amendment I think I've ever seen." The court denied the motion to reopen discovery and granted Wynn summary judgment. Francis appealed.

The Nevada Supreme Court was not overly sympathetic, first finding the matter of "response to a civil litigant's request for accommodation of his or her Fifth Amendment privilege" to be a matter of the trial court's discretion. The Court then turned to providing guidance, taken from federal case law, as to how to "strike the balance" in such cases.

First, the trial court should "examine the nature of the invocation," so as to "explore all possible measures to accommodate" the privilege. But if the invoking party subsequently attempts to withdraw the invocation of the privilege (say, in an effort to reopen discovery), the trial court should look at the "manner and timing" of the attempt and, if at the last minute, consider the "strong indication" that the invoking party is "abusing" the privilege to gain an unfair advantage. If the court so concludes, it should "take severe remedial measures," such as excluding any evidence previously claimed as protected.

Next, the trial court should consider the "nature of the civil proceeding," especially where the civil and any criminal cases are "parallel" and brought by different government entities.

Finally, the court should try to weigh the prejudice to the opposing party if remedial action is not taken, to "prevent unfairness."

Here, since Francis never sought any accommodation through which to withdraw the assertion of privilege, the Court found little reason not to affirm, stating that Francis had provided no "evidence" on the basis of which to find any genuine issue of material fact.

The bottom line is that assertion of a Fifth Amendment privilege is available to a civil litigant, but

assertion of that privilege has consequences, including the reality that the absence of evidence is not equivalent to a genuine issue of material fact for summary judgment purposes.

## IV. ASIDE REGARDING THOSE WHO WORK FOR THE GOOD OF ALL

Occasional feedback received from these legal notes has indicated that some of those who invest their time and energy pursuing good works have felt discomfiture, dejection, irritation – even anger – with some of the railing these notes express against the failings of the system. In some cases, the notes have been taken as criticism of those that ***do*** try to improve things, from volunteer fee dispute mediators, to members of the myriad committees and projects attending to everything from CLE to forms design, to other volunteers of every stripe.

This notation is for you folks.

Please believe, gentles, that you are very much not the intended object of any criticism, and that your selfless efforts to lighten the loads of others, increase the efficacy of dispute resolution and the providing of services, and generally improve the lot of those around you for its own sake should be celebrated, acknowledged, and honored. It certainly is, at least by me.

Rather, these notes are directed "To the Person Sitting in Darkness" (apologies to Mark Twain) who does not see, does not comprehend – or worst of all, does not care – that the myopic fixation on immediate profit, abuse of authority, mindless disregard of consequences, and slavish doting on the mechanics of bureaucracy diminish us all, and oppose that which is best in us all. If these notes have a "target," it is those only concerned with their own advancement, comfort, profit, or position. Such self-focused incogitants need an awakening.

For those that do their part to improve the commonwealth of the legal community, I salute your unsung efforts, and thank you.

## V. CONCLUSIONS

A number of non-family law cases have had significant implications for domestic relations practice – perhaps more so in family law than in the fields in which the cases arose.

If inadvertent or anonymous information drops into the lap of counsel, the basic guidance is to act honorably – provide disclosure of what you have and why you have it. Everyone touched will probably be better served by how the matter pays out. To the degree older conduct codes would lead to other actions, counsel must be educated on current rule sets, and mindful as to which rules to observe and which should be treated as outdated.

If your opponent has acted improperly – if you have observed unethical or inappropriate conduct during a case, even if you were forced to settle and dismiss the underlying action – consider filing a sanctions motion once the substance of the case is over. Judges should review such motions on

their merits without dismissing them in the interest of "getting along" or "getting to the next case." The only way to stop such behavior is to squarely address it.

If someone "takes the Fifth," the matter does not end. Counsel in a civil case should put such parties to the test of proving their case without evidence on the points as to which they would not provide a response, and let the chips fall where they may.

Those that use their time and expend their effort for the good of others without compensation or expectation of reward should be thanked and honored by all who recognize that such efforts build pillars on which a civil society rests.

## VI. QUOTES OF THE ISSUE

"Each time a man stands up for an ideal or acts to improve the lot of others or... strikes out against injustice, he sends forth a tiny ripple of hope."
– Robert Kennedy

"Joy can be real only if people look upon their life as a service and have a definite object in life outside themselves and their personal happiness."
– Leo Tolstoy

"I shall tell you a great secret, my friend.
Do not wait for the last judgment, it takes place every day."
– Albert Camus

.....

To visit our web site and review its contents, go to http://www.willicklawgroup.com/home. For the archives of previous legal notes, go to http://www.willicklawgroup.com/newsletters.

This legal note is from Marshal S. Willick, Esq., 3591 E. Bonanza Road, Ste 200, Las Vegas, NV 89110. If you are receiving these legal notes, and do not wish to do so, let me know by emailing this back to me with "Leave Me Alone" in the subject line. Please identify the email address at which you got the email. Your State would be helpful too. In the mean time, you could add this to your email blocked list. And, of course, if you want to tell me anything else, you can put anything you want to in the subject line. Thanks.