A legal note from Marshal Willick about *Garner*, rogue attorneys, fraud on the court, and whether represented parties must now sign consents to orders (and an invite to an open house)

I recently appeared in Family Court on what was supposed to be submission of a stipulated *Decree*. The judge stated that he did not believe he could safely accept a stipulated *Decree of Divorce* signed by me (Plaintiff's counsel), on behalf of the Plaintiff, and by the Defendant in *proper person*, on the basis of *NC-DSH, Inc. v. Garner*, 125 Nev. ___, ___ P.3d ___ (Adv. Opn. No. 50, Oct. 29, 2009). Specifically, the judge expressed the opinion that the case appeared to make it mandatory to get a personal affidavit from the client, in addition to the signature of the attorney, in order to bind the client to the terms of a stipulated order.

I told the judge that I would be very surprised to hear it, as such a holding would appear to overrule many decades of consistent holdings on the point. He invited me to research the matter and, if I disagreed, to draft a memo on the point for the family court bench and Bar. This Legal Note is excerpted from that memo.

I do not believe *Garner* can fairly be read to create the new restriction. *Garner* involved a "rogue" attorney, Larry Davidson, who "without the knowledge or approval of his clients, . . . settled their case for $160,000, forged the necessary settlement papers, and disappeared with the money." The district court vacated the stipulated final judgment under NRCP 60(b) for fraud on the court. The hospital appealed, claiming that the Garners should be stuck with the "benefit" of the bargain struck by their criminal/fraudulent attorney.

The affirmance on appeal centered on the Nevada Supreme Court's approval of the primary holding – that Davidson had committed "fraud upon the court," which is not subject to NRCP 60(b)(3)'s six-month limitations period, and can be addressed by a court at any time, even *sua sponte*. *See Murphy v. Murphy*, 103 Nev. 185, 186, 734 P.2d 738, 739 (1987).

Fraud on the court simply trumps normal considerations of *res judicata* and settled expectation. The problem, of course, is defining what conduct qualifies. Our Court adopted the definition used by the Sixth Circuit, holding that it:

> embrace[s] only that species of fraud which does, or attempts to, subvert the integrity of the court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases . . . and relief should be denied in the absence of such conduct.

The Supreme Court affirmed the trial court's finding that:

> the court, equally with the Garners, the Hospital, and the Hospital's lawyer, was defrauded by Davidson, and its conclusion that this fraud was intolerable and justified vacating the stipulated judgment the court had signed, were well within its discretionary authority to decide.

The key to the holding is ***not*** whether the clients signed off on the document. As noted in the opinion, they appeared to have done so, since "Davidson forged each of the Garner family member's

signatures in original ink on the release, even going so far as to steal a notary stamp from a neighboring office and forging the notary's signature on the release."

Rather, while the lower court included the finding as a matter of fact that "Davidson accomplished his fraud without the express, implied, or apparent authority of his clients," the key to the holding was the lawyer's superseding fraud on the court, which justified setting aside the resulting order, whether it had 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 signature on the documents, the result would have been no different.

This conclusion is supported by footnote four, noting that when a different district court judge in another case found that Davidson had acted within the scope of the authority granted him (i.e., "fraud on the court" had ***not*** been made out), the Nevada Supreme Court affirmed that decision, as well.

To put the matter in context, the Nevada Supreme Court has, for the past ***eighty 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).

As put by the Court in *Moore*: "Petitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent. Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent, and is considered to have 'notice of all facts, notice of which can be charged upon the attorney.'"

Similarly, as stated in *Wehrheim* (*quoting from Gottwals v. Rencher*, 60 Nev. 35, 92 P.2d 1000 (1939)): "a litigant party shall not be permitted to deny the authority of his attorney of record, whilst he stands as such on the docket. He may revoke his attorney's authority, and give notice of it to the court and to the adverse party; but whilst he so stands, the party must be bound by the acts of the attorney."

None of these holdings were addressed, nevertheless overruled, in *Garner*, and they all remain good law today.

In short, there has been created no new rule by way of which stipulated judgments are any less "valid" if the plaintiff's attorney signs for the plaintiff without a separate affidavit. Such an affidavit makes the resulting judgment neither less nor more susceptible to being set aside if a party – ***any*** party – can satisfy the "heavy burden" under the precedents of proving that the judgment was procured by way of fraud on the court.

CONCLUSION: There is no reason to institute any new procedure for having a represented party submit a personal affidavit from the client or sign any document approving it as to form and content;

such a signature just does not make any legal difference to the analysis of which stipulated judgments are enforceable in Nevada.

YOU ARE INVITED TO AN OPEN HOUSE: Bob Cerceo, Esq., and The Willick Law Group are pleased to provide an evening with "Tierra Negra & Muriel Anderson," in concert – new world flamenco guitar. At the Willick Law Center, 3591 East Bonanza, on Wednesday, January 6, from 5:30-7:30 p.m. Soft drinks, wine, beer, and light snacks provided, and CDs will be available. Flyer attached to this e-mail.

To visit our web site and review its contents, go to http://www.willicklawgroup.com/home. For various materials relating to ethical issues, go to http://www.willicklawgroup.com/family_law_ethics.

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.