SELECTED TOPICS CONCERNING ENFORCEMENT OF JUDGMENTS: APPEALS, STAYS, AND LIENS

by

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BIOGRAPHY

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TABLE OF CONTENTS

I. GENERAL BACKGROUND AS TO ENFORCEMENT OF JUDGMENTS 1

II. APPELLATE RULE CHANGES 1

A. Premature Notices of Appeal 1

B. Certification of Issues 2

C. Requests for Publication 2

D. Font Changes 3

E. Non-Appealability of Orders Granting Motions to Set Aside 3

III. STAYS 4

A. The Myth of the "Automatic Stay" 4

B. Refinement of the *Huneycutt* Procedure 5

C. How to Obtain a Stay 6

D. The Legal Test for When a Stay Will Issue 7

IV. LIENS 9

A. Introduction 9

B. *Argentena* 10

C. Coping with *Argentena* 11

1. Adjusting Fee Agreements 11

2. Adjusting Motions to Adjudicate, and Resulting Orders 12

3. Use of the State Bar Fee Dispute Mechanism 13

D. Some Public Policy Implications of *Argentena* 13

E. Some Remaining Questions After *Argentena* 15

V. ASIDE REGARDING JUDICIAL DUTY TO ASSIST IN ENFORCEMENT. 16

A. Introduction. 16

B. Controlling Law. 16

C. Application, Enforcement, and the Rule of Law.. 17

D. Conclusion. 17

VI. CONCLUSIONS. 18

I. GENERAL BACKGROUND AS TO ENFORCEMENT OF JUDGMENTS

It always seems to come to a surprise to younger lawyers, but judgments are not self-executing. For the most part, if not enforced, they simply grow old, and expire.[1]

This paper is not a comprehensive course on how to enforce judgments; it is intended to be a selective highlighting of topics related to enforcement of judgments that seem to cause recurrent difficulties, and possible solutions to those difficulties, or at least means for coping with them.

II. APPELLATE RULE CHANGES

This office regularly receives requests for assistance by lawyers seeking to challenge judgments on appeal, or respond to such challenges. We've noted that many lawyers – and judges – do not seem to know about a fairly comprehensive set of rule changes that were passed in 2008 and went into effect in 2009. What follows is not comprehensive, but those points that seem to keep coming up as sticking points in family court appeals.

A. Premature Notices of Appeal

In prior practice, a premature appeal had no effect on the jurisdiction of the district court,[2] and was considered "ineffective for any purpose," resulting in automatic dismissal of the appeal.[3] As the time for appeal from the actual final entry typically passed by the time such a dismissal was entered, where counsel made such an error, it typically resulted in denial of an opportunity to appeal the judgment, irrespective of merit.

Modern practice has been made far more lenient. NRAP 4(a)(6) now provides that while a premature notice of appeal still has no effect on the jurisdiction of the district court, dismissal is not automatic, and depends on what remains pending in the district court. Where the appeal was filed after oral rendition of a decision, but before entry of the written order, or before entry of the last-remaining tolling motion,[4] the Court still may dismiss the appeal.

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[1] *See* NRS 11.190(1)(a), detailing six year statute of limitations for filing an action on a judgment or decree of any court of the United States or any State.

[2] *See*, *e.g.*, *Southern Nevada Homebuilders Ass'n v. City of N. Las Vegas*, 112 Nev. 297, 913 P.2d 1276 (1996).

[3] *Hill v. Warden, Nev. State Prison*, 96 Nev. 38, 604 P.2d 807 (1980).

[4] A "tolling motion" is a motion which suspends the running of the time in which an appeal must be filed. They are listed under NRAP 4(a)(4), and include a motion for judgment per NRCP 50(b), for amended/additional findings of fact under NRCP 52(b), and for new trial or to alter or amend a judgment under NRCP 59.

However, in what was previously the most common trap-for-the-unwary situation (filing after an order, but while tolling motions were still pending), if the actual final order resolving the case is issued before the Supreme Court gets around to dismissing the appeal as premature, the appeal will be considered to have been filed after but on the same day as the order from which the appeal was taken.

The bottom line to the amendment is that a malpractice trap has been removed – it is harder to guess wrong about the time to file a notice of appeal. Such developments in the law are rare enough that they should be celebrated when they appear.

B. Certification of Issues

Some members of the bench and Bar apparently missed the amendment of NRCP 54(b) to delete the power of district courts to certify that one or more claims is "final." It is no longer possible for a district court to direct entry of a "final judgment" as to one or more but fewer than all of the claims in a multiple-claim case.

Under the current iteration of NRCP 54(b) it ***is*** possible for a judge to certify that a case is final as to one or more but fewer than all ***parties*** to an action, but not as to claims between parties remaining in litigation.

The impact of this rule change should be to reduce the possible instances in which parties can have trial and appellate proceedings going on simultaneously, hopefully lessening confusion in the trial court and benefitting the economics for both sides. The trade-off is that if a judge makes a fundamentally incorrect ruling early in a case, what could be entirely unnecessary litigation will have to be pursued to completion before appellate review will be possible.

C. Requests for Publication

A recent change brought some order to what had been the haphazard procedure for requesting publication of unpublished orders resolving appeals. On August 27, 2010, through ADKT 450, the Court modified NRAP 36 to state that it intended to decide a case by published opinion if it:

1. Presents an issue of first impression;
2. Alters, modifies, or significantly clarifies a rule of law previously announced by the court; or
3. Involves an issue of public importance that has application beyond the parties.

The amended rule contains procedures for requesting publication – starting with a motion filed within 15 days of the order, stating which of the above criteria is believed to be involved, and noting that "publication is disfavored if revisions to the text of the unpublished disposition are required."

Practitioners who see recurring issues for which published authority would be useful should take advantage of the new rule to assist in building a body of case law to improve the practice of family law in Nevada.

D. Font Changes

It seems like such a small thing. NRAP 32(a)(5)(A) dictates the size of fonts for appellate briefs as now being 13-point – including block indent quotes, and footnotes. The result is a lot less space in which to present an appellate argument, since the 30-page limit of NRAP 32(a)(7)(A) has remained the same.

We ran a couple of tests comparing the effect on briefs, which previously conformed to the typographical standard of 12-point type, 11-point block indent quotes, and 10-point footnotes. What ***used*** to take 10 pages takes 12.5 pages under the revised rules. Put another way, the 30 pages of material counsel used to have to lay out an appellate argument now must fit in what would have previously been 24 pages.

The Nevada Supreme Court has for years railed that briefs should be concise, precise, and carefully-drafted. The font rule change will indeed force the elimination of material – we will all just have to hope that the necessary deletion of information does not lead to an increase in error.

E. Non-Appealability of Orders Granting Motions to Set Aside

One oddity we have seen several times recently is the filing of appeals from district court orders setting aside default judgments. These are a huge waste of time all around, because such a purported appeal is taken from an unappealable order, is invalid, and will be dismissed, either voluntarily, or upon motion. NRAP 3A states in part:

> (b) Appealable Determinations. An appeal may be taken from the following judgments and orders of a district court in a civil action:
> . . . .
> (8) A special order entered after final judgment, ***excluding an order granting a motion to set aside a default judgment under NRCP 60(b)(1)*** when the motion was filed and served within 60 days after entry of the default judgment.

[Emphasis added.]

A purported appeal from an unappealable order will be dismissed, one way or the other. It is almost always in the enlightened self-interest of everyone involved not to have to go through the process of dismissing such an appeal, by ensuring such appeals are not filed in the first place.

III. STAYS

A. The Myth of the "Automatic Stay"

To our consternation, we continue to run into lawyers – and judges – who have picked up the thought that somehow the filing of a Notice of Appeal automatically stays any further district court action. This simply is not true. The Nevada Supreme Court has noted repeatedly that the argument that there should be an automatic stay is "torture [of] our prevailing rules of court," would "render the language meaningless," and "would do untold mischief to the effective administration of justice."[5]

There is no such thing in this State as an automatic stay of enforcement by simply filing a *Notice of Appeal*, or by filing any motion in the district court[6] – an order is fully enforceable until and unless it is stayed or overturned. In other words, **the fact that an appeal has been filed from an order does not affect the enforceability of that order**.

The myth of the "automatic stay" apparently arises from misunderstanding of the fact that, generally, "a timely notice of appeal divests the district court of jurisdiction to act and vests jurisdiction in [the Supreme] court."[7] However, that is irrelevant to either enforcement of orders, or to litigation of matters collateral to the appeal.

Where the issue is "entirely collateral to and independent from that part of the case taken up by appeal, and in no way affected the merits of the appeal[,]" district courts may grant relief while the case is on appeal.[8]

Many things are "collateral to," and therefore unaffected by, an appeal. Such collateral matters include attorney's fees,[9] and contempt actions, which were directly addressed in *Mack-Manley v. Manley*,[10] where the Nevada Supreme Court directly addressed the power of district courts to hold proceedings for contempt, and issues orders accordingly, while a case is on appeal. The Court

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[5] *See State ex rel. P.C. v. District Court*, 94 Nev. 42, 574 P.2d 272 (1978).

[6] *See* NRCP 62; *State ex rel. P.C. v. District Court*, 94 Nev. 42, 574 P.2d 272 (1978).

[7] *Rust v. Clark Cty. School District*, 103 Nev. 686, 688, 747 P.2d 1380, 1382 (1987).

[8] *Kantor v. Kantor*, 116 Nev. 886, 8 P.3d 825 (2000); *Bongiovi v. Bongiovi*, 94 Nev. 321, 322, 579 P.2d 1246, 1247 (1978).

[9] *Kantor v. Kantor*, 116 Nev. 886, 8 P.3d 825 (2000).

[10] *Mack-Manley v. Manley*, 122 Nev. 849, 138 P.3d 525 (2006).

concluded that district courts ***do*** have jurisdiction to rule on contempt because **a lower court has the power to enforce its prior orders pending appeal**.[11]

Motions seeking enforcement of existing orders "in no way affect the merits of the appeal." The district court retains full jurisdiction to enforce those existing orders – including by way of awarding fees and by holding non-compliant parties in contempt for failure to obey those orders.

Even where the subject matter of the district court proceedings ***are*** on appeal, the Court has left room for common sense. In *Mack-Manley*, even though child custody was the subject of the appeal, the district court always has jurisdiction "to make short-term, temporary adjustments to the parties' custody arrangement, on an emergency basis to protect and safeguard a child's welfare and security."

B. Refinement of the *Huneycutt* Procedure

Sometimes, it is necessary to address matters at the district court level during the pendency of an appeal concerning the same issues. When that happens, the proper procedure to follow is for a remand under *Huneycutt*.[12] Questions have arisen as to some of the mechanics of pursuing such a remand, which were addressed in the recent decision of *Foster v. Dingwall*.[13]

The opinion concerned proceedings on a motion addressing the subject matter already on appeal, ***not*** matters collateral to and outside the scope of that appeal. Specifically, the holding concerns the procedure for "seeking to alter, vacate, or otherwise modify or change an order or judgment challenged on appeal after an appeal from that order or judgment has been perfected in [the Supreme Court]."

The opinion is not relevant to the disposition of tolling motions filed ***before*** the appeal was perfected. The *Huneycutt* procedure is not necessary when seeking relief through a motion made pursuant to NRCP 50(b), 52(b), or 59.[14]

The Court clarified the *Huneycutt* remand procedure, under which a party can seek to have the district court certify its intent to grant the requested relief, and then move the Supreme Court to remand the matter to the district court for the entry of an order granting the requested relief. Notwithstanding the loss of jurisdiction, "the district court nevertheless retains a limited jurisdiction to review motions made in accordance with this procedure."

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[11] Citing to *Rust v. Clark Cty. School District*, 103 Nev. 686, 688, 747 P.2d 1380, 1382 (1987); *Smith v. Emery*, 109 Nev. 737, 740, 856 P.2d 1386, 1388 (1993); and *Huneycutt v. Huneycutt*, 94 Nev. 79, 80, 575 P.2d 585, 585 (1978).

[12] *Huneycutt v. Huneycutt*, 94 Nev. 79, 575 P.2d 585 (1978).

[13] *Foster v. Dingwall*, 126 Nev. ___, 228 P.3d 453 (Adv. Opn. No. 5, Feb. 25, 2010).

[14] *See also Chapman Industries v. United Insurance*, 110 Nev. 454, 458-59, 874 P.2d 739, 741-42 (1994).

Specifically, the district court has jurisdiction to direct briefing on the motion, hold a hearing regarding the motion, and enter an order ***denying*** the motion, but it lacks jurisdiction to enter an order ***granting*** such a motion. The holding repudiated any implication from prior decisions indicating that district courts might not be able to enter an order granting ***or*** denying such a motion.[15]

If the district court is inclined to grant the relief requested, then it may certify its intent to do so, and the moving party could file a motion with the Supreme Court seeking a remand to the district court for entry of the requested relief, which the Supreme Court could grant or deny. If the district court was not inclined to grant the requested relief, then it would simply deny the motion.

Along the way, the Court further ruled that the six-month time period for seeking relief under NRCP 60(b)(2) is not tolled by the perfection of an appeal. To the extent that any statute or court rule under which relief is sought limits how long a party has to seek relief under that statute or court rule, the perfection of a notice of appeal likewise does not toll the running of the applicable time period.

C. How to Obtain a Stay

The way to stop the district court from enforcing existing orders is to post a supersedeas bond "in an amount that will permit full satisfaction of the judgment"[16] and then request a stay of enforcement in accordance with NRCP 62(d). Such a stay is only effective after the bond is filed as security. This point is lost, apparently, on most litigants, who file motions for stays without considering security for the judgment appealed from. NRCP 62 clearly states that there is no stay of enforcement against a judgment on appeal unless a supersedeas bond is on file.

A stay must usually be first requested at the district court and then (if denied) in the Supreme Court.[17] Stays are not preferred, and are not to be presumptively granted; a court does not have to grant a stay, and until and unless one is issued, the underlying order stands, is to be followed, and is enforceable by all lawful means.[18]

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[15] *See Mack-Manley v. Manley*, 122 Nev. 849, 855, 138 P.3d 525, 529-30 (2006); *Kantor v. Kantor*, 116 Nev. 886, 894-95, 8 P.3d 825, 830 (2000); *Rust v. Clark Cty. School District*, 103 Nev. 686, 688, 747 P.2d 1380, 1382 (1987).

[16] *McCulloch v. Jeakins*, 99 Nev. 122, 659 P.2d 302 (1983).

[17] *See* NRAP 8(a) and NRCP 72 through 76(a).

[18] *Id.*

D. The Legal Test for When a Stay Will Issue

The four tests applied in considering whether to grant a stay were set forth in *Fritz Hansen*,[19] and reiterated in the revised NRAP 8(c):

> (1) Whether the object of the appeal/writ petition will be defeated if the stay is denied;
> (2) Whether appellant/petitioner will suffer irreparable or serious injury if the stay is denied;
> (3) Whether respondent/real party in interest will suffer irreparable or serious injury if the stay is granted; and
> (4) Whether appellant/petitioner is likely to prevail on the merits.

1. The Object of the Appeal

What this factor addresses is whether an appeal would be rendered moot if an order appealed from was allowed to go into effect (the starkest example would be, for example, application of the death penalty, which pretty much makes a reversal useless). The question is whether enforcing the judgment appealed from would "destroy the subject matter of the appeal."[20]

Put another way, the question is whether a stay is necessary to "preserve the issues of this appeal for determination" – whether the "object of the appeal" is imperiled by enforcement of the underlying order, or the appeal would be rendered moot by such enforcement.

When the issue on appeal is strictly monetary, the "object of the appeal" is not usually imperiled by enforcement of an existing judgment. Money is fungible, and whether the order is affirmed or reversed, the actual legal issues before the appellate court are not "defeated." In such circumstances, no stay is necessary to "preserve the issues for appellate determination."

2. "Irreparable Harm" – Appellant

In *Hansen*, the Court explicitly held that litigation expenses "are neither irreparable nor serious."[21] Other courts have gone further, and held that "[m]ere injuries, however substantial, in terms of

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[19] *Fritz Hansen A/S v. Dist. Ct.,* 116 Nev. 650, 6 P.3d 982 (2000); *see also*, *e.g.*, *Wiese v. Granata*, 110 Nev. 1410, 887 P.2d 744 (1994); *State ex rel. Pub. Serv. Comm'n v. First Judicial Dist. Court ex rel. Carson City*, 94 Nev. 42, 574 P.2d 272 (1978).

[20] *Cf. Wiese*, *supra* (lower court order, if not stayed, would have constituted a custody change in violation of due process).

[21] *Hansen*, *supra* at 658, *citing Dixon v. Thatcher*, 103 Nev. 414, 415, 742 P.2d 1029, 1029-30 (1987).

money, time and energy necessarily expended in the absence of a stay are not enough" to show irreparable harm.[22]

So, a claim that money would change hands under an order is probably not enough justification for a stay, because paying money under a judgment is generally not "irreparable harm," especially when a party could be made whole later if necessary, ***if*** that party prevailed on appeal.

More persuasive would be assertions that the welfare of a child would be imperiled by way of a custody change being challenged, or some other harm would befall the appellant during the pendency of the appeal that reversal would not ameliorate.

3. "Irreparable Harm" – Respondent

Obviously, this is the flip side to the prior factor. As a strictly theoretical legal matter, the "relative interests of the parties" are equal when the issue is strictly monetary, since a dollar going to one party obviously deprives the other of that same dollar.

However, money may not always be a zero sum game. Where the parties' situations are vastly different, even money changing hands could have vastly different impacts on the parties' relative welfare during the pendency of an appeal – an inconvenience to one could be a matter of life and death to the other.

4. Likelihood of Prevailing

The Nevada Supreme Court held in *Hansen* that when moving for a stay pending an appeal or writ proceeding, a movant must "present a substantial case on the merits when a serious legal question is involved and show that the balance of equities weighs heavily in favor of granting the stay."[23] This essentially requires the party requesting the stay to pre-argue the merits of the appeal.

For counsel on both sides, this is a tricky argument – to succinctly state the legal merits of their respective positions, and show why reversal is or is not likely.

Applications for stay are sometimes made by parties asserting meritless appeals, in an effort to try to delay collection, and sometimes to further oppress an economically disadvantaged prevailing party. The court hearing a stay application must be sensitive to the potential for abuse of the process, and closely mindful of the real-world ramifications of granting – or denying – the requested relief.

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[22] *Wisconsin Gas Co. v. F.E.R.C.*, 758 F.2d 669, 674 (D.C. Cir.1985); *Berryman v. Int'l Bhd. Elec. Workers*, 82 Nev. 277, 280, 416 P.2d 387, 389 (1966).

[23] 116 Nev. at 659 (emphasis added), *quoting from Ruiz v. Estelle*, 650 F.2d 555, 565 (5th Cir. 1981).

IV. LIENS

A. Introduction

Lien claims are statutory. An attorney's lien is provided by statute under NRS 18.010(1):

> The compensation of an attorney and counselor for his services is governed by agreement, express or implied, which is not restrained by law.

NRS 18.015(1) states in part that an attorney's lien "is for the amount of any fee which has been agreed upon by the attorney and client" (or, in the absence of an agreement, for the reasonable value of services rendered). NRS 18.015(4) states that on motion by an attorney who has such a lien, the court ***shall*** adjudicate the rights of the parties on five days' notice.

In most post-divorce actions, there is little or no *res* to which a lien may attach. The advantage the attorney gains from his retaining lien is the possibility of forcing his client to settle because of the embarrassment, inconvenience, or worry caused by the attorney's asserting the lien.[24]

Prior to *Argentena*,[25] it was common for attorneys in family court to continue to represent clients who were unable or unwilling to comply with the requirement of keeping funds paid in advance on retainer, in contemplation of having an efficient and inexpensive way of fixing, adjudicating, and collecting fees at the conclusion of representation. The reasoning essentially was as follows:

The attorney's right to compensation is based upon the contract between him and the client, not limited to his lien. To hold that an attorney's right to compensation is limited to his lien rights is in effect to deprive him of any right to contract for other than a contingent fee, since no fee contract could ever be enforced save in event of a successful recovery to which a lien might attach, and a lien is only security for the contractual right to payment.[26]

The trial court's control over its processes, parties, and officers gave it jurisdiction not only over the subject matter of the dispute but over the parties to it as well. The attorney's appearance as counsel of record gave the court incidental jurisdiction to resolve disputes between an attorney and a client relating to the litigation before the trial court.[27]

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[24] *See Figliuzzi v. District Court*, 111 Nev. 338, 890 P.2d 798 (1995).

[25] *Argentena Consol. Mining Co. v. Jolley Urga*, 125 Nev. ___, 216 P.3d 779 (Adv. Opn. No. 40, Sept. 24, 2009).

[26] *Gordon v. Stewart*, 74 Nev. 115, 324 P.2d 234 (1958).

[27] *Dotson v. Las Vegas Auto Parts*, 73 Nev. 58, 307 P.2d 781 (1957).

In short, the lien adjudication process was one that permitted clients to have representation, and attorneys some reasonable assurance that they would eventually get paid for their efforts. All of which was intended to serve the Nevada Supreme Court's pronouncement that the ***purpose*** of NRS 18.015 is to secure attorney's fees and to "encourage attorneys to take cases of those who could not otherwise afford to litigate."[28]

B. *Argentena*

In *Argentena*, the Nevada Supreme Court effectively made it more difficult for attorneys to collect on either retaining or charging liens. The primary holding of the case was that in the absence of an enforceable charging lien, a client's request to liquidate a retaining lien, or a client's consent to the district court's adjudication of a retaining lien, the district court lacks jurisdiction to adjudicate an attorney/client dispute as to fees owed.

Partially overruling precedent from the past 50 years, the Court found that no valid charging lien could be applied when no recovery was obtained for the client (as when the client's case was purely defensive, and no money judgment was obtained from the opponent). Further, the Court found that any summary adjudication would be reversible error in the absence of a "basis for its decision in awarding the fees" as to reasonableness of the fees charged in light of the factors recited in *Brunzell*[29] and *Wilfong*.[30] Finally, the Court found that the summary adjudication process would be entirely improper if a malpractice claim was pending by the client.

Before *Argentena*, it was common practice in family court to adjudicate the attorney's entire claim for compensation under the retainer agreement as to fees outstanding. Once adjudicated, attorney's liens could be recorded like other judgments, constituting clouds on title so that counsel would be (eventually) paid when realty was bought and sold, or used as the basis for garnishment of bank accounts or salaries.

Hindering or eliminating that efficient and inexpensive means of actually getting paid – which is what most members of the bench and Bar have concluded was done in *Argentena* – has had the necessary effect of causing attorneys to withdraw earlier and more aggressively in a wide variety of family law actions, necessarily clogging the courts with more proper person litigants.

This is so because the alternative mechanism for attorneys to actually get paid that was suggested by the Court – filing suit against the client – is essentially prohibited by most policies of malpractice

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[28] *Muije v. A North Las Vegas Cab Co.*, 106 Nev. 664, 667, 799 P.2d 559, 561 (1990); *see Bero-Wachs v. Law Offices of Logar & Pulver*, 123 Nev. 71, 157 P.2d 704 (2007).

[29] *Brunzell v. Golden Gate National Bank*, 85 Nev. 345, 349, 455 P.2d 31, 33 (1969).

[30] *Miller v. Wilfong*, 121 Nev. 619, 119 P.3d 727 (2005).

insurance (many companies ask on their applications whether counsel sues clients for fees, and refuse to offer policies at all if the answer is "yes").

In short, the alternative to the established policy and procedures for adjudicating attorney's fees due and owing, in the case in which the fees were incurred, is for attorneys to bail immediately from cases as soon as their clients' retainers are depleted. The Court's decision in *Argentena* makes it all but impossible for attorneys to actually get paid in a large number of family law cases – creating conditions bad for the bench, Bar, and public.

C. Coping with *Argentena*

1. Adjusting Fee Agreements

The language of the *Argentena* case suggests some defensive actions that could be taken by counsel to prevent going unpaid for their work, although those solutions have not yet been tested on appeal.

The two necessary changes to retainer agreements should include, immediately below the recitation of the firm's fee schedule, words to the effect:

> Client agrees that these fees are reasonable on the basis of Attorney's ability, training, education, experience, professional standing and skill, and the difficulty, intricacy, importance, and time and skill required to perform the work to be done.

This language mirrors the necessary considerations for an attorney's fee award under *Brunzell* and *Wilfong*.

In addition, every retainer agreement should have a section as to liens and adjudication. Our model language reads:

> Client hereby grants Attorney a lien on any and all claims or causes of action that are related to the subject of Attorney's representation under this Agreement. Attorney's lien will be for any sums due and owing to Attorney at the conclusion of Attorney's services. The lien will attach to any recovery Client may obtain, whether by arbitration award, judgment, settlement, or otherwise. Any amounts received by Attorney's office on Client's behalf may be used to pay Client's account.
>
> 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.

Finally, there is language within *Argentena* indicating that if the client wishes to assert a malpractice claim against an attorney, the summary adjudication procedure is not available. The question has been raised as why that could not be made a matter of contract, as well. Presuming it's allowable,

such an adjustment would further modify the sentence in the "Liens and Adjudications" section of a retainer agreement to read:

> Client consents to the district court's adjudication of any such lien in the underlying action without requiring the filing of a separate action, regardless of whether any other action might be or has been filed by either Attorney or Client against the other, including any action alleging malpractice.

Such a modification warrants a clear and strongly-worded warning, usually at the end of the agreement:

> This Agreement is a formal legal contract for Attorney's services. It protects both you and your attorney, is intended to prevent misunderstandings, and it may vary the law otherwise applicable to attorney's liens and resolution of fee disputes. **DO NOT SIGN THIS AGREEMENT UNTIL YOU HAVE READ IT THOROUGHLY AND ARE SURE YOU UNDERSTAND ITS TERMS.** If you do not understand it or if it does not contain all the agreements discussed, please call it to our attention and be sure this written Agreement contains **all** terms you believe are in effect between us. You have an absolute right to discuss this agreement with independent counsel (or any other advisor) before entering into this agreement, and we encourage you to do so.

The purpose of all this additional language is to jump through the hoops set out in *Argentena* by way of advance agreement by contract. The question is whether the Court will require that any agreement to adjudication be made at the time of the adjudication, rather than at the outset of representation.

Frankly, any such decision would be hard to perceive in any way except deliberately hostile to the ability of lawyers to make a living. In most other contexts, the Court has expressed that people with arguably adverse interests should be free to contract as to how to resolve their disputes.[31]

2. Adjusting Motions to Adjudicate, and Resulting Orders

Just altering the retainer agreement is not enough to cope with all that *Argentena* requires. In addition to the two changes to a standard retainer agreement discussed above, a motion seeking adjudication of an attorney's lien, and the resulting order, are now required to be much more detailed.

Since an adjudication would be reversible without findings under *Brunzell* and *Wilfong*, any motion for adjudication should make representations as to the required factors, and any order adjudicating a lien should include corresponding findings, as to:

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[31] *See*, *e.g.*, *Gilman v. Gilman & Callahan v. Callahan*, 114 Nev. 416, 956 P.2d 761 (1998) (divorce decree was a contract, and the parties "were free to place that cohabitation provision in their divorce decree" and make it "valid and enforceable"). Freedom to contract for a means of resolving disputes is why, for example, arbitration clauses are generally permissible.

1. *The Qualities of the Advocate*:
2. *The Character of the Work to Be Done*:
3. *The Work Actually Performed by the Lawyer*:
4. *The Result:*

All of this extra work is a burden, but it is still a lot faster, easier, and cheaper than filing a separate action for recovery against a client, and therefore actually in the interest of both attorney and client so that any disputes as to fees owed can be expeditiously, efficiently, and economically resolved.

3. Use of the State Bar Fee Dispute Mechanism

For many years the State Bar of Nevada has permitted disgruntled clients to file fee disputes, triggering mediation or arbitration before volunteer attorneys acting in those capacities, leading to decisions as to whether fees are actually owed and, if so, providing a route to obtain a judgment for those fees.

Not all lawyers know that the Bar process could be initiated by either a lawyer ***or*** a client, and *Argentena* led to far greater interest in that process for both.

Without ever admitting that the fee dispute resolution system has been "broken" for years, the Bar has apparently recently taken steps to greatly improve its timeliness in resolution of pending disputes. Presuming that it can be kept functional so that disputes are actually resolved within some reasonable time, it provides an alternative to the traditional summary lien adjudication process.

The jury is still out on that presumption, but it should be a priority of the organized Bar, which owes a duty to the lawyers it serves, and to the public being injured, to make the fee dispute process actually work in acceptable time frames.

D. Some Public Policy Implications of *Argentena*

The whole *Argentena* premise seems rather curious. As between parties, the case law is beyond "well established" that award of attorney's fees under our statutes rest in the sound discretion of the trial court, taking into consideration the amount involved, the character of the services rendered, and the time employed.[32] If there is substantial evidence to support the allowance it will not be disturbed, and the statutory discretion in fixing the allowance will not be interfered with if it does not appear to have been abused.[33]

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[32] *Brunzell v. Golden Gate National Bank*, 85 Nev. 345, 455 P.2d 31 (1969); *Miller v. Wilfong*, 121 Nev. 619, 119 P.3d 727 (2005).

[33] *Peccole v. Lusce & Goodfellow*, 66 Nev. 360, 212 P.2d 718 (1949).

What is it, precisely, that makes the same judge, in the same case, any less capable or informed to resolve fee disputes between a lawyer and client? The judge presiding over the underlying case – not some judge sitting in a separate action for recovery of fees – will have seen the qualities of the advocate, know the character of the work actually performed, observed the effort expended, and will be knowledgeable of the nuances of the result obtained. How could any other jurist be considered better positioned to resolve a dispute between attorney and client as to the amount of fees owed?

From another perspective, requiring some other court to learn all that the judge presiding over the trial already knows is a massive waste of time contradictory to any notion of judicial economy.

The summary adjudication process that has been used for decades in family law matters has proceeded under the long-standing holding that a district court's *in personam* jurisdiction to adjudicate a fee dispute based on a lien is derived from the fact that the client has already submitted himself or herself to the court's jurisdiction, and the court has personal jurisdiction over the attorney due to the attorney's appearance as the client's counsel.[34] The efficiency and economy of that interpretation benefited the enlightened self-interest of both client and attorney.

It would be hard to overstate the negative impacts that the *Argentena* case has caused in family court. The gap between the "haves" and the "have-nots" in terms of their ability to have counsel in family law cases has been widened. Access to justice is being lost, because attorneys without some practical means of obtaining payment for their services are forced to withdraw from their clients' cases – usually at the very worst time for the clients, and increasing the burden on *pro bono* and self-help facilities.

And family law attorneys – already battered in this economic climate – have been hit directly. Some attorneys have always ceased work for clients as soon as they ran out of cash. More sympathetic or dedicated counsel have continued trying to represent cash-strapped clients to the conclusions of their cases, if possible, counting on the judiciary to assist in providing some rational means for their eventual compensation for their unpaid service.

A primary way for that second group of counsel to someday be paid for their work, done when their clients could not or would not pay their bills, had been to reduce liens to judgment at the end of cases, and either execute against assets or record those judgments and wait for someone to eventually sell some real estate. With the real estate meltdown, the actual value of judgments received and recorded was already far less than it had been. After *Argentena*, it is considered by pretty much everyone difficult or impossible to get such a judgment at all.

All of this will injure the family court itself. As lawyers are effectively forced to withdraw from representing anyone who cannot pay for their family law cases in advance, those litigants will become additional *pro pers*, whose cases will increasingly clog the court dockets, leading to slower

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[34] *Argentena v. Jolly Urga*, 125 Nev. ___, 216 P.3d 779 (Adv. Opn. No. 40, Sept. 24, 2009).

resolutions and worse outcomes for more and more people. This sequence of consequences has already begun.

In short, just as it is in the best interest of the bench, the Bar, and the public, for competent counsel to diligently attend to the representation of litigants, it is in the best interest of ***no one*** involved to construe or create rules that cannot help but have the opposite effect. The latter is the legacy of *Argentena* in family court.

E. Some Remaining Questions After *Argentena*

Presuming that *Argentena* is not effectively reversed by further decision, or legislatively overturned to restore the prior lien procedure, a bunch of questions remain as to how, exactly, NRS 18.015 works and is to be applied.

What if the client does nothing when an attorney asserts a lien? Under EDCR 2.20(c), a lack of opposition is construed as consent to the granting of the requested relief. Is there any reason this should not apply to liens?

Is a dispute as to the ***amount*** to be adjudicated equal to a consent to the ***process*** of adjudication? If a client asserts no opposition to the ***adjudication*** of the lien – just to the sum actually owed, is that not consent to adjudication as well?

If *Argentena* is taken at face value – as a finding of lack of "subject matter jurisdiction" – does that mean that all lien adjudications for the past 50 years since *Gordon* in 1958 (or at least those still within the statute of limitations) are subject to collateral attack? Theoretically, there is "no time limit" for an attack based on subject matter jurisdiction.[35] Have all such awards over the last several years been retroactively invalidated?

If the attorney and client, in the retainer agreement, have a specific contract of consent for adjudication of an attorney's retaining lien by the trial court, is that sufficient "consent" to allow adjudication of the sums owed by the client to the lawyer, and entry of judgment accordingly, at the end of the case?

Can, after *Argentena*, a "charging lien" be found to exist at all in a divorce case, since arguably both parties to such a case are already co-owners of all property to be distributed, so that no "recovery" is actually obtained for the client in a divorce case?

If a charging lien ***can*** be found to exist in a divorce case (since the attorney's services are obviously required for the client to obtain property, alimony, etc., which is a "recovery"), what about ancillary family law cases without property, per se, such as straight custody, or paternity cases?

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[35] *See Swan v. Swan*, 106 Nev. 464, 796 P.2d 221 (1990).

Does the Nevada Supreme Court's silence in *Argentena* as to the statutory mandate in NRS 18.015(4) that a district Court "shall" adjudicate a lien after five days' notice, mean that district courts are no longer actually required to adjudicate liens, instead leaving them to parse retaining and charging liens as set out in *Argentena*, and refusing to adjudicate where the parameters set out in that opinion are not clearly met?

Was the *Argentena* analysis intended to apply in the family court context at all, since it will inevitably cause the wholesale withdrawal of counsel from cases, burdening the courts with a surge in proper person litigants, and almost certainly at the most critical stages of their cases?

V. ASIDE REGARDING JUDICIAL DUTY TO ASSIST IN ENFORCEMENT

A. Introduction

Too many judges of the family court have distorted the concept of "equal justice under law" to the point of taking no interest in the relative Justice (big "J:) of the causes in front of them – treating those established as evil no differently from those established as being just. And that is a mistake – the emotional distance from the actual justice of the cause examined may make the day to day job of judging easier, but it makes the courts part of the problem.

B. Controlling Law

Lest this become too nebulous, let's keep to a grounded and finite subject – enforcement of already-rendered judgments.

The Supreme Court has held "that the liquidation of any judgment for arrearages may be scheduled in any manner the district court deems proper...."[36] Quoting *Reed*, the Court further stated in *Kennedy* that a judgment ***must*** actually be satisfied to have any meaning, by "a payment schedule which will allow for liquidation of arrearages on a reasonable basis."[37]

In other words, sums awarded must be actually ***paid***. This Court has an obligation to the innocent party to ensure that it is done. The principle is quite an old one, but unfortunately usually espoused as noble sentiments long on rhetoric but short on enforceability.[38]

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[36] *Reed v. Reed*, 88 Nev. 329, 497 P.2d 896 (1972).

[37] *Kennedy v. Kennedy*, 98 Nev. 318, 646 P.2d 1226 (1982).

[38] *See Halverson v. Hardcastle*, 123 Nev. 245, 163 P.3d 428 (2007) (a trial court has the inherent authority to construe its orders and judgments, and to ensure they are obeyed); *Grenz v. Grenz,* 78 Nev. 394, 274 P.2d 891 (1962) (a trial court has the inherent power to construe its judgments and decrees); *Murphy v. Murphy*, 64 Nev. 440, 183 P.2d 632 (1947); *Lindsay v. Lindsay*, 52 Nev. 26, 280 P. 95 (1929); *Reed v. Reed*, 88 Nev. 329, 497 P.2d 896 (1972) (court

C. Application, Enforcement, and the Rule of Law

Where the record shows that an obligor has made no attempt to satisfy any outstanding judgments – has voluntarily made ***no*** payments toward, say, child support arrears, tort judgments, or attorney's fees, then judicial action in enforcement of the outstanding judgments is morally obligatory.

In the absence of such judicial action, there is absolutely zero reason to believe that such an attitude of defiance – which in some cases goes on for ***decades*** – will ever change. We have had several cases where the judges numbly go through the motions of setting endless status checks, assessing – but never enforcing – fee awards, and otherwise exacerbating misbehavior through inaction that simple, forceful, orders could end.

It is lamentable that the Nevada Supreme Court has not gone beyond the tepid wording of *Reed* and *Kennedy* to directly instruct district court judges that they have a duty craft orders that will actually cause the satisfaction of outstanding judgments.

In the absence of such direction, it falls to counsel and district courts to evaluate the legitimacy of outstanding judgments and orders. If they are sound, it is incumbent upon the court to see that they are satisfied – within a ***reasonable*** period of time. I respectfully suggest that no judgment should normally be set for payment in greater than a term of five or six years.

If that means ordering a long-term deadbeat parent to pay 25% of his entire income toward outstanding judgments before moving on to do other things in his life – on pain of contempt and incarceration upon non-satisfaction of the judgment – then that is ***exactly*** what judges should do. To do otherwise effectively sentences the innocent party to continued involvement in the legal system, cost, delay, and deprivation; in the balancing of things, that burden should fall to the one that has ignored a lawful debt.

D. Conclusion

There comes a time when it is no virtue to be patient with evil. Doing so only punishes the innocent and law-abiding, and permits the wrongdoer to inflict more damage. It is the role and responsibility of courts to prevent such from occurring.

As the matter was put a century ago by Haile Selassie:

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has inherent power to enforce its orders and judgments); *In re Chartz*, 29 Nev. 110, 85 P. 352 (1907) ("The power of courts to punish for contempt and to maintain decency and dignity in their proceedings is inherent, and is as old as courts are old").

> Throughout history, it has been the inaction of
> those who could have acted; the indifference of
> those who should have known better; the silence of
> the voice of justice when it mattered most; that
> has made it possible for evil to triumph.

If courts are to do anything other than abdicate their responsibility to justice and the protection of innocent parties, they must act with sufficient force to stop ongoing harm. In the tiny microcosm of family court, that translates to making sure that those that owe arrearages in support and property judgments actually ***pay*** those sums within a reasonable time – or pay a large cost for electing to do otherwise.

VI. CONCLUSIONS

By the time there is a judgment, there is a history, indicating that the merits of a dispute have been examined and resolution reached as to who was right, who was wrong, and who owes whom what because of it.

Of course, it possible for those decisions to be in error. That is why we have courts of appeal, and methodologies for the potential granting of stays during the pendency of those appeals. As detailed above, the world of appeals is technical, and not all changes to the rules have truly served the ends of improving the likelihood that justice will result.

Stays, and liens, are mechanisms developed to try to increase the chances that justice will be done. They do not always succeed in their intended purpose, and it is the educated application of the rules governing such matters, by bench and Bar, that provides the greatest likelihood that these procedures will enhance, rather than limit, the chances of justice being done.

In all cases, judges must be mindful of the real-world implications of their actions – and inaction. A failure to vigorously exact justice can sometimes result in the infliction of greater injustice. And in few places is this truer than where the old adage "justice delayed is justice denied" most applies. Time is a necessary component of judicial decision-making, and should be ever-present in a judge's mind when deciding who must do what, and when.

Ultimately, the process of justice is not often neat, clean, and simple. It takes work, and persistence, and sometimes the threat or actual imposition of unfortunate consequences, to get some to do that which they were ordered to do. But it is worth the extra effort:

> "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

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