PREPARING TO SAIL IN UNCHARTED WATERS: FAMILY LAW APPEALS

by

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October 14, 2019

BIOGRAPHY

Marshal S. Willick is the principal of the Willick Law Group, an A/V rated Family Law firm in Las Vegas, Nevada, and practices in trial and appellate Family Law. He is a Certified Family Law Specialist, a Fellow of both the American Academy of Matrimonial Lawyers (AAML) and the International Academy of Family Lawyers (IAFL), former Chair of the Nevada Bar Family Law Section and former President of the Nevada chapter of the AAML. He has authored many books and articles on Family Law and retirement benefits issues, and was managing editor of the Nevada Family Law Practice Manual. He is frequent teacher of continuing legal education classes and is often sought as a lecturer on family law issues.

In addition to litigating trial and appellate cases in Nevada, Mr. Willick has participated in hundreds of divorce and pension cases in the trial and appellate courts of other states, and in the drafting of various state and federal statutes in the areas of divorce and property division. He has chaired several Committees of the American Bar Association Family Law Section, AAML, and Nevada Bar, has served on many more committees, boards, and commissions of those organizations, and has been called on to sometimes represent the entire ABA in Congressional hearings on military pension matters. He has served as an alternate judge in various courts, and frequently testifies as an expert witness. He serves on the Board of Directors for the Legal Aid Center of Southern Nevada.

Mr. Willick received his B.A. from the University of Nevada at Las Vegas in 1979, with honors, and his J.D. from Georgetown University Law Center in Washington, D.C., in 1982. Before entering private practice, he served on the Central Legal Staff of the Nevada Supreme Court for two years.

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I. THE PURPOSE OF THIS COURSE

This paper and CLE is not intended to provide a comprehensive course on how to litigate appeals; even a basic course with such pretensions would have to be several days long. There are reference works with more in-depth educational materials for that purpose.[1]

Rather, these materials have two goals. First, to provide to family law practitioners sufficient insight into the appellate process to assist them in better handling family law trials by keeping in mind the possibility of an appeal. Second, to assist family law practitioners, in decision-making with their clients, in deciding whether an appeal makes sense, is feasible, and has a sufficient cost/risk/reward profile to be worth pursuing.

II. THE DECISION TO APPEAL: YEA OR NAY?

Some family law cases cannot be settled and go to trial. Once that happens, in Nevada, the decision on all contested matters is left to the judge. Sometimes, clients are so gravely disappointed or even shocked by the ruling on issues having a serious impact on their future that they want to know what can be done. "Let's appeal" is a natural and understandable reaction, but it is not always a good idea.

Counsel must instruct such clients that an appeal is ***not*** a retrial of the action.[2] As to discretionary matters, the judge might have simply seen the equities differently than did the client and counsel. It may be that Nevada law simply did not allow for the desired outcome. Or, perhaps, the judge made mistakes (of fact, of law, or both).

All three of those possibilities provide the possibility for an altered resolution on appeal,[3] but the relative chances – and difficulty – of achieving an altered result are vastly different among the three, so accurately perceiving what happened and why is the first critical task of any attorney advising a client on the cusp of a potential appeal.

The first task of counsel contemplating an appeal is to determine whether there is a realistic possibility of achieving a different result on appeal. The "common wisdom" is that only about 10-20% of civil cases are reversed on appeal. Accurate statistics as to actual reversals of family law cases in Nevada do not seem to be readily available, but the Nevada Supreme Court's published

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[1] The NEVADA APPELLATE PRACTICE MANUAL (State Bar of Nevada); last edition prior to this seminar is from 2018, but it is regularly updated. See also Matthew Barach, THE FAMILY LAW GUIDE TO APPELLATE PRACTICE (ABA 2019).

[2] Rehearings, motions to reconsider, for new trial, etc., are beyond the intended scope of these materials, but should always be at least considered by counsel, and of course have an impact on appellate decisions and timelines. *See* NRAP 4(a)(4).

[3] By way of finding an abuse of discretion; or altering the law; or having the appellate court find reversible error and act on it.

statistics for 2018 indicate that 2,935 new cases were appealed that year, while 2,695 cases were completed.

Family law has a slender appellate profile, considering its size in the district court – only some 5% of appeals are from family cases, but they comprise about 59% of the total district court cases. In 2018, there were over 56,000 family court cases filed – and more than 31,000 "reopened" cases.

The statistics reported do not appear to still parse out usable information on the point, but historically about one-fourth were simply affirmed, another fourth were "dismissed," another fourth were "dismissed by stipulation," and about 11% were reversed, remanded, or vacated in part or whole.

There are a couple of ways of looking at these statistics. Those appeals that were dismissed were (presumably) improper in some necessary particular, regardless of merit. Those dismissed by stipulation probably include a significant number in which the parties settled on a resolution acceptable – or at least tolerable – to both sides. Deducting these from the statistics alters them considerably – making the reversals in whole or part not some 11% of the total, but more like 25% or more.

While these statistics are still not wildly encouraging, and (as discussed below) the Supreme Court starts with the presumption that decision of the district court was a correct one,[4] "one in four" has a lot better ring to it than "one in ten." Still, the best way of enhancing the odds of a favorable outcome is to accurately assess the chance of prevailing on appeal before filing. As briefly discussed below, trial counsel should consider consulting with experienced appellate counsel as a means of making that determination.

While not every appeal concerns economic issues, just about every appeal has economic consequences. An issue to ensure that every client explicitly considers in relation to a possible appeal is its cost versus the financial benefit of prevailing. An Appellant is responsible for providing the necessary transcripts and record on appeal – almost always being required to pay a few thousand dollars just putting the transcripts together from each relevant hearing (this is further touched on below), plus various filing fees and the cost on appeal bond.

The primary cost, of course, is attorney's fees. This is also exceedingly hard to predict on appeal, but it will include the administrative steps (sketched below), drafting an appellate settlement conference statement for a Supreme Court Settlement Judge and attending the settlement conference, assembling the Appendix (the appellate record), drafting an Opening Brief, reviewing the other side's Answering Brief, drafting a Reply Brief, and possibly preparing for and conducting oral argument – plus whatever indexing of the record and legal research is necessary for all of those projects. Staff can help or prepare with several of these steps, but obviously some of them are attorney-only functions, and – done right – it is very time-intensive work.

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[4] *Kerley v. Kerley*, 111 Nev. 462, 893 P.2d 358 (1995) (trial court rulings "supported by substantial evidence and otherwise . . . free of a clear abuse of discretion" will be upheld, even if the evidence was conflicting).

Counsel attempting to estimate the cost of the legal work for an appeal should attempt at least a rough estimate of the scope of the issues on appeal, the amount of applicable authority to research, review, and apply, whether research into the law of other jurisdictions is likely going to be necessary or helpful, and the total size of the record to be summarized.

That estimated cost should be balanced against the possible financial benefit to be realized if success is achieved. For financial cases, that can usually be at least projected. For non-financial cases, such as custody or relocation, this phase of the "to appeal or not" evaluation requires squarely forcing clients to face the question of putting a price tag on the decision involved. Where a client has been speaking of "the principle of the thing!" this conversation tends to put the perceived economic value of that principle front and center.

Another necessary consideration is whether filing an appeal is likely to provoke a cross-appeal, and whether, even in the absence of such a cross-appeal, there is any realistic possibility that the decision could get even worse for a client after appeal.[5]

Then there is the "cost" in time for the client's continued enmeshment in the legal process. The total time an appeal takes these days is usually a year or more, and often double that. While it could conceivably be faster, no such guarantee could be given, and there is a real human cost to not being able to reach finality – good or bad – and moving on with life.

In other words, before an attorney counsels a client to appeal – or not – there is a bit of a calculus to consider, and it is best performed objectively in view of the facts and applicable law (that being the "counselor at law" part of the job). This means evaluating the possibilities not by wishful thinking, not as if unpleasant facts or negative considerations did not exist, but as to what is ***really*** within the range of "probable possible" results.

And no matter ***how*** convinced counsel might be of the righteousness (or at least likelihood of prevailing) of the client's position, some circumspection (i.e., doubt) is appropriate.[6] Even if counsel does not want to include that essentially cynical corrective into the calculation, it is worth keeping in mind that there is a measure of unpredictability to the universe that cannot be excluded from any reasoned evaluation of probabilities.

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[5] One infamous family law example of such a case is *Gardner v. Gardner*, 110 Nev. 1053, 881 P.2d 645 (1994), in which the husband – incensed at being ordered by the trial court to pay alimony to the wife of $1,300 for 1 year and $1,000 for a second year – appealed, only to achieve an opinion reversing and remanding with instructions to the trial court to extend the alimony award by at least an additional 10 years at $1,000 per month – plus a reservation of jurisdiction for a further and longer award. The case facts are silent as to the degree to which counsel took any responsibility for this $120,000 error in judgment as to whether filing an appeal was a good idea.

[6] A saw occasionally ascribed to both the late Rex Jemison, Esq., and the late Mort Galane, Esq., is that when discussing settlement in evaluating the probability of prevailing on appeal, a good lawyer should always ***start*** with a 15% chance of the opposite of the predicted result occurring, no matter how sure it appears, "just because people are involved."

Where the *actual* choices faced by a client, from that client's perspective, are "bad" and "worse," the client should be encouraged to choose "bad." It does the client no actual good to shield him or her from the reality, and counsel's goal should be achieving the least bad outcome. Counsel should harken back to the Multistate, or the SAT, and choose the "most correct" solution among the choices that actually exist. Those frozen in the litigator's posture of conceding no weakness are not serving their clients' enlightened self-interest, which is usually only visible when the client is made to remain in touch with reality and all the costs of going forward – financial, temporal, and emotional – are considered.

In short, the decision of whether or not to appeal should explicitly take into consideration the actually possible range of outcomes per law and facts, the range of "probable possible" results, the "transactional cost" of litigation, and a randomness factor.

Even counsel who rely entirely on "gut instinct" necessarily do much the same calculation, if unconsciously. Any attorney intending to meaningfully opine as to the advisability of an appeal must do so from some reasoned understanding of the probable range of results that might be expected.

III. OVERVIEW OF THE APPELLATE PROCESS

Perhaps the best way to conceptualize appellate practice is as the inverse of trial litigation. At the trial court level, counsel may employ an unlimited universe of facts, but courts generally only wish to hear about the established statutory and case law governing the kind of dispute at issue.

On appeal, this is turned on its head. The facts are generally constrained to the record of whatever got admitted in the trial court, and anything outside that record basically does not exist.[7] But counsel can bring to the appellate argument law from this State or anywhere else, and both public policy and Constitutional limitations, and can argue to modify, reverse, or overrule existing case law and statutes.

[7] There can be limited exceptions. In *Mack v. Estate of Mack*, 125 Nev. 80, 91-92, 206 P.3d 98, 106 (2009), the Nevada Supreme Court detailed matters about which the Court might take judicial notice, and the policies applicable in doing so. Specifically, the Court held: "we may take judicial notice of facts generally known or capable of verification from a reliable source, whether we are requested to or not. *See* NRS 47.150(1). Further, we may take judicial notice of facts that are "[c]apable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned, so that the fact is not subject to reasonable dispute." *See* NRS 47.130(2)(b)."

A. The Current Appellate System

In 2014, the voters finally[8] approved creation of a second appellate court – the Court of Appeals – currently composed of a single panel of three judges. In Nevada, following a "push-down" or "deflective" model, all cases are first appealed to the Nevada Supreme Court, which then "pushes down" to the Court of Appeals certain classes of cases.

NRAP 17 calls for division of cases between the two courts by type, with all "cases involving family law matters other than termination of parental right or NRS 432B proceedings" presumptively be assigned to the Court of Appeals under NRAP 17(b)(10), but under NRAP 17(a), retaining in the Supreme Court cases involving a question of first impression under the U.S. or Nevada Constitutions or common law, a question of statewide public importance, inconsistency in the published decisions of either appellate court, or a conflict in the decisions of the two courts.

Under the revised appellate rules, both parties must submit a "routing statement" as part of their briefing, indicating the court to which counsel believes the case is most appropriate. If the gist of the appeal is alleged "error correction," that is usually the Court of Appeals.

B. Steps and Timing

If the decision has been made to go forward with an appeal, timeliness is critical, as detailed below. The Notice of Appeal is a simple document, but must be accompanied by a Case Appeal Statement,[9] and the appropriate filing fees. While beyond the scope of these materials, it should be noted that most orders remain enforceable until stayed or reversed.[10]

Virtually all civil cases involving parties represented by counsel are referred to the appellate settlement program before being litigated. Both parties submit confidential settlement statements to the "settlement judge."[11] Usually, both parties and their attorneys are required to personally appear at the appellate settlement conference, where they have one final chance to settle the case before proceeding with the appeal.

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[8] Creation of a court of appeals had been proposed, and defeated at the polls, four times earlier, in 1972, 1980, 1992, and 2010. In 2014, the necessary constitutional amendment was approved by Nevada voters by a 54 percent to 46 percent margin, and Nevada immediately established a Nevada Court of Appeals.

[9] NRAP 3(a)(1).

[10] For a detailed discussion of stays on appeal, see Marshal Willick, "Selected Topics Concerning Enforcement of Judgments: Appeals, Stays, and Liens" in *Advanced Family Law* (State Bar of Nevada, Las Vegas, Nevada, 2010); posted at http://willicklawgroup.com/published-works/.

[11] In terms of authority, more in the position of a mediator than an adjudicator, although settlement judges do have the power to report "bad faith" participation or lack of it, and to recommend the imposition of sanctions by the Nevada Supreme Court. *See* NRAP 16.

If the case does settle, then the appeal ends, a final (usually compromise) order is entered, and the appeal is dismissed. Still, no one can count on a case settling at the conference stage, and anyone initiating an appeal should be prepared to see it through to the end.

If appellate settlement fails, the Appellant must initiate prosecution of the appeal, starting with obtaining the necessary court documents and trial exhibits to send to the appellate court, which are assembled into an Appendix. Of course, there are rules governing what must be in – and must not be in – the Appendix, and a requisite form for the documents to be provided and their index.[12] The rules encourage counsel to confer and agree to the contents of the appendix.[13]

Typically the most single expensive cost is for the transcript of the trial. In courts such as the Family Court of Clark County, it is transcribed from the video record; in some counties, it is produced from the stenographic notes taken down by a court reporter.

Counsel must then perform whatever legal research is necessary to support the appeal, and prepare and file the Opening Brief. It is hard to overestimate the importance of that document, which must fully and fairly summarize the entire historical record, and all relevant law, complete with citations to all relevant trial transcripts, filings, and precedent, interwoven with argument indicating how and why the order appealed from was sufficiently erroneous to merit reversal by the appellate court.[14]

Presuming there has been no cross-appeal, the Respondent's Answering Brief is supposed to be confined to points raised by the Appellant, and refuting the assigned errors and requests for relief set out in the Opening Brief.[15] The Appellant then either may file a Reply Brief, responding to the Answering Brief, or file a statement indicating that no response is deemed necessary.[16]

As to each of these filings, the rules recite the expectation of effort and attention to detail:

> All briefs under this Rule must be concise, presented with accuracy, logically arranged with proper headings and free from burdensome, irrelevant, immaterial or scandalous matters. Briefs that are not in compliance may be disregarded or stricken, on motion or sua sponte by the court, and the court may assess attorney fees or other monetary sanctions against the offending lawyer.[17]

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[12] NRAP 30, 32.

[13] NRAP 30(a).

[14] NRAP 28(a).

[15] NRAP 28(b).

[16] NRAP 28(c).

[17] NRAP 28(j).

In practice, however, as discussed below, the Court has been far more bark than bite.

After briefing, the Chief Justice of the Supreme Court makes the call, after staff briefing, of whether the case will be retained or pushed down to the Court of Appeals. The assigned court eventually issues an order indicating whether the case will be submitted on the briefs and record, or set for oral argument; if in the Court of Appeals, before the three judges, and if in the Supreme Court, either before a three-justice panel or the Court *en banc*.

If submitted on the briefs and record, counsel simply wait for a decision. If the case is set for oral argument, which is addressed in some more detail below, there is more to do.

Either way, there is the waiting for an appellate decision, which sometimes issues shortly after submission or argument, but much more often is issued many months later.

The decision on appeal can take several forms. It can be a formal, published Opinion affirming, reversing, or granting partial relief. It can be an unpublished order, either affirming the decision appealed from, or reversing. In either case, the Opinion or order can stand on its own as a final resolution, or direct a remand of the case either for entry of specified orders, or generally for "proceedings consistent" with the appellate decision.

The rules have changed several times since establishment of the Court of Appeals, but as of now the published opinions of both courts may be cited as binding authority, and the unpublished orders of the Supreme Court, but not the Court of Appeals, may be cited as persuasive authority.[18]

IV. SELECTION OF APPELLATE COUNSEL

My firm, and probably other firms with serious appellate practices, routinely meet in consultation with prospective appellate clients ***and if possible their trial lawyers***, to go over the pros and cons of the appeal, including who could best handle it. The reality is that the appeals process has rules and procedures very different than those governing trial practice. Even a gifted trial lawyer requires use of a different skill set to evaluate, write, and speak as an effective appellate advocate, and there is a learning curve to acquiring those skills.

The written submissions on appeal are not merely recycled trial court briefs and motions; the appellate universe is much more "closed" factually, and "open" legally, than most trial lawyers are used to, and writing to a standard of review is often different than writing to establish a preponderance of evidence. Generally, briefs written by experienced appellate attorneys tend to be quite different than those written by trial counsel.

[18] NRAP 36(c)(3).

Then there is the emotional component. Trial counsel are sometimes as emotionally invested in their cases as their clients. Convinced of the correctness of positions previously taken, they may lack the objectivity necessary to perceive the merits of the case from an appellate perspective, which is focused on reversible error.

Trial counsel tend to approach a case asking what result would be fair, and presenting "what the evidence will show." Who is credible, or not, and why, takes up a great deal of attention, along with how the trial court's discretion should most appropriately be exercised. The client's directions, with the lawyer required to "abide by a client's decision concerning the objectives of representation," are front and center.[19]

None of that is of great interest to the Nevada Supreme Court, which views each alleged point of error through the lens of the applicable standard of review (discussed below), and is mainly interested in whether that test is passed or failed as to each issue, and moving on. An appellate attorney brought in post-trial will look at the result, and the record, cold – the same way the appellate court will see it. Sometimes, appellate counsel will not even meet, or spend much time dealing with, the client.

It is ***possible*** for a proper person litigant to file and prosecute an appeal. Nevada does have a program permitting proper person appeals, and even in *forma pauperis* procedures.[20] Few people without legal training are able to put together a convincing appellate case, however. While it is likely that some such litigant has been successful, none of the significant cases in the recent family law list of decisions appear to have been prosecuted by a litigant in proper person.

So, in deciding who should prosecute an appeal, the expression "A man who is his own lawyer has a fool for a client"[21] should be enlarged by at least an exclamation point. And the reality is that trial counsel may not be best suited to handle a case once it enters the world of appeals, either. It is often in the client's best interest to obtain separate appellate counsel.

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[19] NRPC 1.2(a).

[20] NRAP 24.

[21] This proverb is based on the opinion, probably first expressed by a lawyer, that self-representation in court is likely to end badly. As with many proverbs, it is difficult to determine a precise origin but this expression apparently first began appearing in print in the early 19th century. An early example comes in *The flowers of wit, or a choice collection of bon mots*, by Henry Kett, 1814: "observed the eminent lawyer, 'I hesitate not to pronounce, that every man who is his own lawyer, has a fool for a client.'"

V. APPEALABLE ORDERS

Not every decision is appealable, and where there is no statutory authority to appeal, no right to do so exists.[22] Generally, an appeal may be taken only from the final judgment of the district court.[23] However, an appeal may be possible from certain other orders as provided by law.[24] The laundry list is set out in NRAP 3A(b); of primary interest to family law practitioners are (1) for "A final judgment entered in an action or proceeding"; (7) for "An order entered in a proceeding that did not arise in a juvenile court that finally establishes or alters the custody of minor children"; and (8) for "A special order entered after final judgment" (discussed below).[25]

Since only "an aggrieved party" may appeal,[26] attorneys adversely affected by rulings in cases generally are not permitted to appeal them on their own behalf.[27] Curiously, however, a party to a case can appeal such an order, making this a bizarre case where only one of two contestants can appeal an order if unhappy with it.[28]

With the most recent changes to the Nevada Rules of Civil Procedure effective in 2019, courts may again certify that one or more *claims* is "final" under NRCP 54(b), as well as a judgment final as to one or more but not all of the *parties*.

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[22] See, *e.g.*, *Castillo v. State*, 106 Nev. 349, 792 P.2d 1133 (1990) (no appeal lies from an order certifying a juvenile to stand trial as an adult); *Taylor Constr. Co. v. Hilton Hotels*, 100 Nev. 207, 678 P.2d 1152 (1984) (no appeal from an order denying summary judgment); *Kokkos v. Tsalikis*, 91 Nev. 24, 530 P.2d 756 (1975) (no appeal from an order setting aside a default).

[23] NRAP 3A(b)(1).

[24] *See* NRAP 3A(b)(2)-(10).

[25] This has a highly technical meaning too involved to fully discuss here, but generally an order not attacking the original final judgment but deciding a motion based on some change in fact or law since the original judgment qualifies. *See Burton v. Burton*, 99 Nev. 698, 669 P.2d 703 (1983).

[26] *See*, *e.g.*, *Albany v. Arcata Assocs.*, 106 Nev. 688, 799 P.2d 566 (1990).

[27] *Albert D. Massi, Ltd. v. Bellmyre*, 111 Nev. 1520, 908 P.2d 705 (1995) (an attorney who is economically injured by a ruling still cannot appeal, because the attorney is not a "party," and therefore not entitled to appeal); *Valley Bank v. Ginsburg*, 110 Nev. 440, 874 P.2d 729 (1994); *Albany v. Arcata Assocs.*, 106 Nev. 688, 799 P.2d 566 (1990).

[28] Although counsel would have no right to appeal from the order if dissatisfied with it, counsel can apparently be compelled to be a responsive party to an appeal from an order adjudicating an attorney's lien if the person ordered to pay the money is unhappy. *See Bero-Wachs v. Law Office of Logar & Pulver*, 123 Nev. 71, 157 P.3d 704 (2007); *Argentena Consol. Min. Co. v. Jolley Urga*, 125 Nev. 527, 216 P.3d 779 (2009).

A. Final Orders

Regardless of how an order is titled, the Nevada Supreme Court has declared that it will "look past labels in determining whether or not an order is a "final judgment" under NRAP 3A(b)(1), in service to what the Court considers the "main objective" of the rule – promoting judicial economy by avoiding the specter of piecemeal appellate review.[29] To do so, the Court reviews "what the order does," not "what it is called."[30]

The key question is whether the order in question is "one that disposes of the issues presented in the case . . . and leaves nothing for the future consideration of the court, except for post-judgment issues such as attorney's fees and costs."[31] A test that sounds simpler than it tends to be in application is to ask whether a further order is anticipated – if yes, the order is probably not "a final judgment."

An amendment to a judgment that simply strikes out an award of costs does not affect the rights and obligations of the parties as to the substance of the original judgment and therefore does not extend the time to appeal.[32]

B. "Special Orders After Final Judgment"

In some circumstances, post-judgment rulings constitute "special orders after final judgment."[33] To be appealable, such an order must be "an order affecting the rights of some party to the action, growing out of the judgment previously entered . . . affecting rights incorporated in the judgment."[34]

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[29] *Valley Bank v. Ginsburg*, 110 Nev. 440, 874 P.2d 729 (1994); *State, Taxicab Authority v. Greenspun*, 109 Nev. 1022, 1025, 862 P.2d 423, 425 (1993); *Hallicrafters Co. v. Moore*, 102 Nev. 526, 528-29, 728 P.2d 441, 443 (1986); *see also Van Cauwenberghe v. Biard*, 486 U.S. 517, 521-22 n. 3, 108 S.Ct. 1945, 1949 n. 3, 100 L.Ed.2d 517 (1988).

[30] *Valley Bank v. Ginsburg*, 110 Nev. 440, 874 P.2d 729 (1994); *Taylor v. Barringer*, 75 Nev. 409, 344 P.2d 676 (1959).

[31] *Lee v. GNLV Corp.*, 116 Nev. 424, 996 P. 2d 416 (2000); *Alper v. Posin*, 77 Nev. 328, 330, 363 P.2d 502, 503 (1961); *accord*, *O'Neill v. Dunn*, 83 Nev. 228, 230, 427 P.2d 647, 648 (1967).

[32] *Morrell v. Edwards*, 98 Nev. 91, 640 P.2d 1322 (1982).

[33] *Gumm v. Mainor*, 118 Nev. 912, 59 P.3d 1220 (2002).

[34] *Id*.

An order awarding attorney's fees is explicitly such a special order.[35] An order setting aside a default judgment is explicitly ***not*** such an order.[36]

In *Gumm*, the Court discussed (but did not overrule) the "different analytical framework for deciding whether an order denying a motion to amend a decree is appealable as a special order made after final judgment" set out in *Burton*[37] in 1983. The earlier case held that where a party is seeking to amend a divorce decree based on changed circumstances, rather than "attacking the original judgment," the order adjudicates the facts and law at issue in the motion, and is appealable as a special order made after final judgment.

Notably, where a motion to amend is based on an asserted change in either factual ***or*** legal circumstances, and the moving party is not attacking the original judgment, "the denial of a motion for modification serves as the only adjudication of the facts and law at issue in the motion and should be appealable as a special order made after final judgment."[38]

The Court explained: "[s]uch a motion is generally based upon some change in fact or law which occurred after the judgment was granted, and in light of which the moving party claims that the judgment is no longer just. . . . The analysis above is in keeping with this court's practice of reviewing the merits of orders denying motions to modify divorce decrees."[39]

The Commission appointed to amend Nevada's child support laws in 2019 explicitly wanted to avoid application of this line of authority, and so added to their proposed regulations that elimination of the prior child support statutes (NRS ch. 125B) and enactment of the new regulations would not "by itself" constitute grounds for amendment of existing child support orders, so as to not cause a flood

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[35] *See Comstock Mill & Mining Co. v. Allen*, 21 Nev. 325, 31 P. 434 (1892); *Smith v. Crown Fin. Servs. Of Am.*,111 Nev. 277, 890 P.2d 769 (1995); NRAP 3A; Marshal Willick, *Enforcement of Judgments: Appeals Stays & Liens* (State Bar of Nevada Advanced CLE, 2010).

[36] 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:
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> . . . .
>
> (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.]

[37] *Burton v. Burton*, 99 Nev. 698, 669 P.2d 703 (1983).

[38] *Burton v. Burton*, 99 Nev. 698, 669 P.2d 703 (1983); *Rivero v. Rivero*, 125 Nev. 410, 216 P.3d 213, 228 (2009) ("Modification is appropriate if there has been a factual or legal change in circumstances since the district court entered the support order").

[39] *Id*. at 700-701 [multiple citations omitted].

of modification cases. Whether that attempt would survive a court challenge remains, as of this writing, to be seen.

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. Lots of parties are known to file appeals of unappealable orders anyway, out of ignorance or simply to inflict costs on the other party, knowing that awards of fees on appeal are essentially nonexistent.

C. Distinction of Appeals From Writs

As discussed in some detail below, an appeal is definitionally distinct from an original proceeding for a writ of mandamus or prohibition. The latter are governed by their own rule,[40] and while superficially similar in form, have essentially the opposite basis than appeals, in that they only ***may*** be filed when a lower court proceeding will ***not*** yield a final order from which an appeal may be taken, and where there is therefore no "plain, speedy, and adequate" legal remedy available.[41]

VI. TIMELINESS

A. Being Too Late (Untimely Appeals)

An appeal must be filed within 30 days after service of notice of entry of the final order to be appealed.[42] This is jurisdictional – if the deadline is missed, the appeal is barred.[43] Figuring out when the time runs, however, can be a little tricky.

Tolling motions[44] defer the running of the clock until their resolution, and both rules and actions can delay the time as well. Merely getting the order may not be enough; EDCR 7.03(b), for example, states that "the placement into an attorney of record's folder" of an order is *not* notice of entry, which "shall be prepared and processed by the prevailing party's counsel." Similarly, if the prevailing party

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[40] NRAP 21.

[41] *International Game Tech. v. Dist. Ct.*, 1124 Nev. 193, 179 P.3d 556 (2008).

[42] NRAP 4(a)(1).

[43] *Alvis v. State, Gaming Control Bd.*, 99 Nev. 184, 660 P.2d 980 (1983).

[44] 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.

sends out two different notices of entry, the receiving party is entitled to rely upon the latter of them as for when the clock starts to run.[45]

If one party says that notice of entry of an order was sent and the other denies receiving it, a question of fact is developed which might require "a balancing of the weight and credibility of witnesses by the trial court."[46] This is never a good position to be in. The lessons from the case law are to be fanatically scrupulous, to obtain proof of service whenever possible, and to ensure that the Notice of Appeal is filed before the jurisdictional deadline.

B. Being Too Early (Premature Appeals)

In prior practice, a premature appeal had no effect on the jurisdiction of the district court,[47] and was considered "ineffective for any purpose," resulting in automatic dismissal of the appeal.[48] As the time for appeal from the actual final entry typically passed by the time such an appellate 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 order resolving the last-remaining tolling motion,[49] the Court still may dismiss the appeal.

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.

In sum, a malpractice trap has been removed – it is harder to guess wrong about the time to file a notice of appeal by being too early, encouraging counsel to do so when in doubt.

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[45] *Ross v. Giacomo*, 97 Nev. 550, 635 P.2d 298 (1981).

[46] *Zugel v. Miller*, 99 Nev. 100, 659 P.2d 296 (1983), *rev'd on other grounds*, 100 Nev. 525, 688 P.2d 310 (1984).

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

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

[49] 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.

VII. THE CRITICAL NEED: AN ADEQUATE RECORD

It is impossible to overstate the importance of the adequacy of the record to obtaining satisfactory results on appeal. The Supreme Court has stated that it will not even consider issues raised on appeal if a party fails to submit a transcript or statement of proceedings in the lower court containing the alleged error.[50] Counsel failing to include a transcript of trial will not be heard to even assert arguments as to what was said in open court.[51]

The burden is on the Appellant, and failure to at least minimally meet that burden can have consequences. A grossly inadequate record was cited by the Court in one case as one basis for the imposition of a personal fine against counsel, and a stinging personal rebuke as part of denial of the filed appeal.[52]

And the record has to actually contain the errors asserted, and the objection to those errors, because the appellate courts have repeatedly held that they will not entertain most issues and arguments that were not raised in the trial court.[53]

That brings us to the critical matter of offers of proof. If the trial court excludes a witness, or testimony, or a any document or evidence that you think is important for your case, you ***must*** utter the magic words : "I wish to make an offer of proof," followed by whatever the witness, document, or other evidence ***would*** have stated.
The absence of those magic words will probably make it impossible for counsel on appeal to save the issue or argument, because from the appellate court's point of view, that testimony or documentation did not exist. If you are prevented from introducing a piece of evidence important for your case, and you think the judge was wrong in doing so, it is absolutely critical to preserve the record by making an offer of proof about what you intended to present. That is the ***only*** way you can argue on appeal that the critical fact would have made a difference, and if error in exclusion can be shown, that reversal and remand is required.

The rule governing the appendix to be filed contains a lengthy discussion of sanctions that can be imposed "for nonconforming copies or substantial underinclusion."[54] The same rule threatens sanctions for ***over***-inclusion: "Brevity is required; the court may impose costs upon parties or

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[50] *Kockos v. Bank of Nevada*, 90 Nev. 140, 520 P.2d 1359 (1974).

[51] *Toigo v. Toigo*, 109 Nev. 350, 849 P.2d 259 (1993) (a lawyer who files an appeal "without providing the trial transcript or at least a statement permitted by NRAP 10(e) does a disservice to his client"); *Primm v. Lopes*, 109 Nev. 502, 853 P.2d 103 (1993) (without transcripts, the appellate court is without evidence to assess claim of error).

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

[53] *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49,52, 623 P.2d 981, 983 (1981) (claims not argued below are waived on appeal).

[54] NRAP 30(g).

attorneys who unnecessarily enlarge the appendix."[55] In reality, especially in the years since records have been made largely electronic, it is usually better to err on the side of more than less; in most family law cases, virtually the entire district court record is typically made into the appellate appendix.

The Court has expressed little tolerance for gamesmanship with the record. It has previously commented upon selective deletions from the record as "not proficient advocacy," but fraud on the Court and a violation of ethical rules warranting professional discipline.[56]

The "dos and don'ts" of how to build and submit a proper Appendix could be the topic for an entire CLE in its own right, but the bottom-line lesson is to follow the rules scrupulously, be exactly correct in inclusion and exclusion of relevant and irrelevant documents (respectively), and to generally play it straight in every respect when dealing with the record on appeal.

VIII. STANDARDS OF REVIEW

Most decisions of family law issues, including child custody and visitation, are reviewed for an abuse of discretion.[57] Generally, a court abuses its discretion when it makes a factual finding which is not supported by substantial evidence and is "clearly erroneous."[58] An open and obvious error of law can also be an abuse of discretion,[59] as can a court's failure to ***exercise*** discretion when required to do so.[60] Also, a court can err in the exercise of personal judgment and does so to a level meriting appellate intervention when ***no*** reasonable judge could reach the conclusion reached under the particular circumstances.[61]

A court does ***not*** abuse its discretion when it reaches a result which could be found by a reasonable judge.[62]

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[55] NRAP 30(b).

[56] *See Sierra Glass & Mirror v. Viking Industries*, 107 Nev. 119, 808 P.2d 512 (1991) (omitting pertinent part of deposition violated SCR 172(1)(a)&(d) and merited referral to Bar for discipline).

[57] *Rivero v. Rivero*, 125 Nev. 410, 428, 216 P.3d 213, 226 (2009); *Wallace v. Wallace*, 112 Nev. 1015, 1019, 922 P.2d 541, 543 (1996).

[58] *Real Estate Division v. Jones*, 98 Nev. 260, 645 P.2d 1371 (1982).

[59] *Franklin v. Bartsas Realty, Inc.*, 95 Nev. 559, 598 P.2d 1147 (1979).

[60] *Massey v. Sunrise Hospital*, 102 Nev. 367, 724 P.2d 208 (1986).

[61] *Franklin v. Bartsas Realty, Inc.*, *supra*; *Delno v. Market Street Railway*, 124 F.2d 965, 967 (9th Cir. 1942).

[62] *Goodman v. Goodman*, 68 Nev. 484, 236 P.2d 305 (1951).

This is the hardest standard of review for an Appellant to satisfy, but it is not the only one available. At the opposite end of deference to the trial court's findings (i.e., "no deference is given to the trial court") are any questions deemed reviewable *de novo*. This category includes reviews of the granting of a summary judgment,[63] constitutional challenges (including questions of whether a statute is constitutional),[64] and any other issue characterized as a "question of law."[65] A "question of law" is found whenever the core dispute concerns review of the trial court's conclusions of law rather than its factual findings,[66] including interpretation of a statute[67] or a contract (specifically including a premarital agreement).[68]

The odds are with the house. The Court has repeatedly stated that "generally," in reviewing matters related to divorce or annulment, it "reviews district court decisions . . . for an abuse of discretion" which it will not find if it concludes that the rulings are "supported by substantial evidence."[69]

The Court has also stated that it will ***find*** "substantial evidence" to exist whenever it concludes that the evidence before the trial court was that which a "sensible person"[70] or "reasonable person"[71] may "accept as adequate to sustain a judgment." For property cases, a valuation is not an abuse of discretion "so long as the value placed on the property falls within a range of possible values demonstrated by competent evidence."[72]

Appellate counsel's easiest path to avoiding such a conclusion is found in those cases where the record does not include explicit findings of fact. Repeatedly, the Court has cited the absence of

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[63] *Tore, Ltd. v. Church*, 105 Nev. 183, 772 P.2d 1281 (1989).

[64] *Rico v. Rodriguez*, 121 Nev. 695, 120 P.3d 812 (2005); *West v. State*, 119 Nev. 410, 75 P.3d 808 (2003); *Sanders v. State*, 119 Nev. 135, 67 P.3d 323 (2003).

[65] *Matter of Parental Rights as to D.R.H.*, 120 Nev. 422, 92 P.3d 1230 (2004); *Waldman v. Maini*, 124 Nev. 1121, 1128, 195 P.3d 850, 855 (2008).

[66] *Bopp v. Lino*, 110 Nev. 1246, 885 P.2d 559 (1994).

[67] *Irving v. Irving*, 122 Nev. 494, 134 P.3d 718 (2006); *Carson City District Attorney v. Ryder*, 116 Nev. 502, 998 P.2d 1186 (2000).

[68] *Sogg v. Nevada State Bank*, 108 Nev. 308, 832 P.2d 781 (1992); *Fick v. Fick*, 109 Nev. 458, 851 P.2d 445 (1993).

[69] *Ellis v. Carucci*, 123 Nev. 145, 161 P.3d 239 (2007); *Shydler v. Shydler*, 114 Nev. 192, 196, 954 P.2d 37, 39 (1998).

[70] *See Schmanski v. Schmanski*, 115 Nev. 247, 251, 984 P.2d 752, 755 (1999); *Williams v. Williams*, 120 Nev. 559, 97 P.3d 1124 (2004).

[71] *Ellis v. Carucci*, 123 Nev. 145, 149,161 P.3d 239, 242 (2007).

[72] *Alba v. Alba*, 111 Nev. 426, 892 P.2d 574 (1995).

"specific findings of fact supported by substantial evidence" as the basis on which it hung a reversal of the order appealed from.[73]

It has been made clear that the absence of findings explicitly reciting statutory factors will constitute a basis for reversal and remand, no matter the obviousness of the equities or intended rulings.[74]

Sometimes, it can seem rather arbitrary whether an issue is characterized as one of fact (great deference) or law (no deference). For example, while child custody and visitation are considered discretionary calls, if the issue is perceived – or characterized – as whether a "stipulated visitation order is final," it can be reviewed as a pure question of law subject to *de novo* review.[75]

And the Court has given itself a substantial amount of wiggle room even when deciding cases that it deems to be reviews of discretionary determination made by the trial court, by sometimes further holding that "the district court must have reached its conclusions for the appropriate reasons,"[76] while at other times holding that a decision will be affirmed even if the district court reached the right result for the wrong reasons.[77]

The lines can be pretty flexible. For example, alimony is one of the most discretionary calls that a trial court can make, given that the statutory scheme defines the trial court's power to make any award that it deems "just and equitable."[78] This has not stopped the Court from reviewing such orders anyway, however, finding that it would not "extend deference . . . in instances where an abuse of . . . discretion is evident from a review of the entire record."[79]

This is a large, if subtle, part of appellate advocacy, because establishing the standard of review may very well determine the outcome of the entire case, and there may well be more than one way of characterizing the issue to be reached by the appellate court.

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[73] *Rivero v. Rivero*, 125 Nev. 410, 216 P.3d 213 (2009); *In re Parental Rights as to C.C.A.*, 128 Nev. 166, 273 P.3d 852 (2012).

[74] *Davis v. Ewalefo*, 131 Nev. 445, 451, 352 P.3d 1139, 1143 (2015); *Devries v. Gallic*, 128 Nev. 706, 712-13, 290 P.3d 260, 264-65 (2012) (reversing and remanding the spousal support portion of the divorce decree where there was no indication in the decree that district court gave adequate consideration to the appropriate statutory and legal factors); *Miller v. Miller*, 134 Nev. ___, ___ P.3d ___ (Adv. Opn. No.16, Mar 15, 2018).

[75] *Rennels v. Rennels*, 127 Nev. 564, 257 P.3d 396 (2011).

[76] *Rico v. Rodriguez*, 121 Nev. 695, 701, 120 P.3d 812, 816 (2005) (*quoting Primm v. Lopes*, 109 Nev. 502, 504, 853 P.2d 103, 104 (1993)); *Sims v. Sims*, 109 Nev. 1146, 865 P.2d 328 (1993).

[77] *Barry v. Lindner*, 119 Nev. 661, 81 P.3d 537 (2003); *Bongiovi v. Sullivan*, 122 Nev. 556, 138 P.3d 433 (2006).

[78] NRS 125.150(1)(a).

[79] *Gardner v. Gardner*, 110 Nev. 1053, 881 P.2d 645 (1994).

IX. THE APPELLATE SETTLEMENT CONFERENCE: REALITY CHECK AND SOMETIME VALUE TEST

This appellate settlement program was implemented over 20 years ago, modeled on programs elsewhere, to take some of the crushing backlog off of the Nevada Supreme Court. It has surprised even its proponents by just how many cases actually settle at that stage. As noted above, the available historical statistics indicate that about a fourth were dismissed by stipulation. It is a fair bet that a large percentage of those settlements were attributable to the appellate settlement conferences.

In practice, there are a large variety of approaches pursued at those conferences,[80] which tend to be more akin to mediation sessions than adjudicatory proceedings. In several cases, just having an impartial neutral evaluate the result reached, and discuss the prospects of altering that result on appeal, brings the parties to a space where resolution is possible.

Of course, this is not always so – where an appeal was filed (or is perceived to have been filed) without valid basis, or to harass, or delay, it is difficult for the party who prevailed at trial to willingly give up any portion of whatever was finally achieved just to get the proceedings to end. Those settlement conferences become a test of the value of the result achieved in district court; the cost (in money and time) to the prevailing party of proceeding to final appellate resolution often becomes the measuring stick of whether and how much the non-prevailing party can get a better result.

Preparation for the conference is essential. More that one mediator has complained that folks show up for these conferences utterly unprepared, waiting for "the magic of mediation" to solve their problems. Doing so also leaves the unprepared party susceptible to manipulation and mistake. At one recent CLE, the basics of preparation for mediation involved many separate elements, starting with complete familiarity with the case, decision, and analysis of probable outcomes on appeal.[81]

For financial cases, the conferences tend to come down to a pretty straightforward economic analysis of the transactional cost of going forward with the appeal, multiplied by the perceived percentages of prevailing, versus the financial concessions (if any) being offered by the party who prevailed at trial in exchange for being spared the expense and time spent on the appeal.

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[80] This brief discussion is by no means an exhaustive review of the mediation process. Books have been written on approaches and strategies. The AAML basic mediation training course is a 40-hour course, and the advanced mediator course takes another couple of days.

[81] The seminar listed as necessary things to know for any mediation: "How to best prepare yourself for mediation; How to prepare your client for mediation in a way that assists with client satisfaction while maximizing mediation results and minimizing malpractice exposure; Best and worst mediation practices; Turn your mediator into your co-negotiator with the other party to the mediation; Rules of Professional Conduct regarding client preparation; Rules of Professional Conduct regarding truthfulness in mediation; Rules of Professional Conduct regarding client self-determination in mediation."

Custody, visitation, and relocation cases are more difficult to quantify, but the number of such disputes that end with an accommodation, even after years of trial court litigation, is remarkable. Many litigants, facing the prospect of revisiting the issues for another year or two on appeal, simply need an honorable way to disengage.

Unfortunately, there are appellate settlement judges who seem unwilling to even discuss the legal merits of the appellate proceedings instead focusing exclusively on reaching any kind of stipulated agreement rather than permitting the appellate process to continue. It is not always a good idea – for the prevailing party, or for justice – to insist on a settled resolution.

X. THE OPENING BRIEF

It is not possible, within the scope of these materials, to do justice to the art of writing an effective appellate brief, and these materials will not go into the technicalities. As a starter, practitioners are urged to review in detail the rules, explanations, and discussion in the Nevada Appellate Practice Manual.

Too many lawyers get caught up in the procedural requirements of the brief,[82] and appear to forget that they are writing for an audience – the appellate court and its staff of law clerks and Central Staff attorneys – who actually have to read those submissions. The whole of the document should be written as much as possible in plain English; the rules on their face encourage references to people as recognizable names or descriptive titles, rather than abstract formalizations.[83] No one should read a Statement of the Issues, for example, and come away without an understanding of what is being asked for and why.

Perhaps most critical, and the place where so many lawyers falter, is in the Statement of Facts. The rules require that ***every*** factual assertion be "supported by a reference to the page and volume number . . . of the appendix."[84] If the admissibility of evidence is in controversy, ***that*** must be specified.[85] While not strictly required, it is generally better to point out where there was conflicting evidence than letting your opponent do so in response.

The whole of the Statement of Facts should tell a story – ***without delving into argument*** – that illustrates the history of the controversy and issues fully, fairly, and clearly, so that the legal issues can be reviewed in light of an actual dispute between real people. A good Opening Brief Statement of Facts should show, not tell, how and why error occurred.

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[82] *See* NRAP 28.

[83] I.e., Fred and Wilma, or adoptive parent and natural parent, rather than petitioner and respondent. NRAP 28(d).

[84] NRAP 28(e).

[85] NRAP 28(e)(1)-(2).

Like most important tasks of appellate advocacy, it is harder than it looks to do well, and one of the hardest things for lawyers used to the rough and tumble of trial practice to get used to doing without unfairly embellishing, going beyond the record, or failing to point out the places where the evidence conflicted, or was adverse to their position. Such, however, is the Appellant's burden.

XI. THE ANSWERING BRIEF; COUNTER-PUNCHING

A Respondent has a substantial brief-writing burden as well. Mastery of the record, and the law applicable to the case, is required, so that every deficiency, omission, and mis-statement of the Appellant can be evaluated. Not every such error is relevant or worthy of note, but where a matter of fact or law is unclear or missing, and could lead to an altered result in view of the applicable standard of evidence, this is the Respondent's single opportunity to prevent the appellate court from being led to an incorrect conclusion.

This is not the place for the Respondent to re-argue the case below; it is to show how the evidence, in light of the applicable standard of review, could fit within the acceptable range of discretionary results for a trial court to reach.

XII. THE REPLY BRIEF

The Reply Brief should not regurgitate the argument made in the Opening Brief; rather, it should dissect any mis-steps or errors in the Answering Brief. It is the last written word available to the Appellant, and an opportunity too often squandered on irrelevancies.

XIII. ORAL ARGUMENT: A (VERY POLITE) CRUCIBLE

Again, practitioners are referred to the Nevada Appellate Practice Manual for the mechanics. For the purpose of these materials, there are a few practicalities worth reciting.

There is never enough time. Virtually always, the total oral argument is a half hour – 15 minutes per side – in which time counsel must present all necessary factual history, all applicable legal theory and precedent, apply one to the other, answer all questions, and rebut the opponent's position. It can't be done, of course; the trick is to do what can actually be done in the time allotted.

An old saying is that appeals are won on the briefs, and lost at oral argument. It is possible for a lawyer to snatch defeat from the jaws of victory. If that most rare and golden of opportunities presents itself – counsel is told the equivalent of "We understand your position and would like to hear from your opponent" – take the compliment for what it is, offer to answer any questions, and sit down.

The entire case should be thoroughly reviewed before oral argument; knowing what is – and is not – in the record, and which arguments were – and were not – made by each side in the briefs, is mandatory. The trial court's findings, and what evidence, precisely, was used to reach those findings, is foundational.

In modern practice, appellate judges do not read the record, and may or may not have read any of the briefs. Be prepared to provide as much of the factual background of the case as may be necessary just in case a member of the appellate court did not read the bench memo closely or it did not reveal the facts deemed most important to the resolution of the case, but at the same time do not squander precious minutes on too detailed a factual explanation. Appellants should almost always reserve some time for rebuttal. Pay attention to the timing lights.

Counsel will almost always have to pick which arguments merit being addressed and stressed, but sometimes the appellate court will have very different ideas about what merits discussion, and counsel must be prepared to deal with whatever subjects are of concern to the court. Above all, be forthright and direct in responding to questions; dissembling and evasion are usually transparent, and not helpful to the client's cause.

XIV. REHEARINGS

Now that there are two appellate courts, rehearings have become more complicated. A party losing in the Court of Appeals or the Supreme Court can petition for rehearing.[86] A party losing in the Court of Appeals can seek review from the Supreme Court.[87] A party losing in a Supreme Court panel decision can request *en banc* reconsideration "to secure or maintain uniformity of decisions of the Supreme Court or Court of Appeals" or because "the proceeding involves a substantial precedential, constitutional or public policy issue."[88]

So – conceivably – a single case could get heard, and reconsidered by the Court of Appeals, then reviewed, decided, and reheard by a panel, and then again reheard by the entire Supreme Court. To date, there do not seem to be any cases that have had that extreme an appellate journey, but some cases have gone to full briefing and decision in the Court of Appeals, and then again in the Supreme Court.[89]

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[86] NRAP 40.

[87] NRAP 40B.

[88] NRAP 40A.

[89] *See*, *e.g.*, *Vaile v. Vaile*, 133 Nev. ___, 396 P.3d 791 (Adv. Opn. 30, June 22, 2017) (*Vaile III*); *Phung v. Doan*, No. 69030, Order Affirming in Part, Reversing in Part, and Remanding (Unpublished Disposition May 10, 2018).

The popular wisdom indicates that rehearings are extremely rare, but the reality is that some of the most significant decisions of the past decade or two have actually been issued on rehearing, after the fallout from initial decisions has been observed and evaluated.[90] Sometimes the first appellate opinion is emphasized or altered, while being maintained.[91]

For the mechanics of seeking either rehearing, or *en banc* rehearing, see the Nevada Appellate Practice Manual. But consider requesting rehearing whenever it appears that a material issue of fact or law was overlooked or misapprehended. The appellate courts of Nevada are some of the busiest appellate courts in the country, and the simple truth is that, sometimes, things are missed.

XV. REMITTITUR & POST-APPEAL PROCEEDINGS

A. No Set Procedure

Unless the appellate court explicitly directs a particular proceeding on remittitur, it is usually left to counsel and the district court what to do with a case after the appeal is concluded. Sometimes, all that is required is the submission of an appropriate order, but more commonly, either a motion or the setting of an evidentiary proceeding is required to bring the appellate direction to completion.

The appellate resolution determines the law of the case,[92] and necessarily constrains what can and cannot be done thereafter, but counsel should proactively seek a way of advancing their clients' interests within whatever scope of available opportunities are left by the appellate resolution – without seeking to undercut or undo that resolution.[93]

B. Requests for Publication

In 2010, the Court modified NRAP 36 to state that a case that should result in a published opinion:

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[90] *Rivero v. Rivero*, 125 Nev. 410, 216 P.3d 213 (2009) (*Rivero II*); *Landreth v. Malik*, 127 Nev. 175, 251 P.3d 163 (2011) (*Landreth II*).

[91] *See Vaile III*, *supra*; *Phung*, *supra*.

[92] Finality and efficiency of the judicial process are promoted by the "law of the case" doctrine, and it protects against the disruption of settled issues by preventing re-litigation of those issues in a single case once those issues have been decided. *Cohen v. Brown University*, 101 F.3d 155, 167 (1st Cir. 1996). *See*, *e.g.*, *Hornwood v. Smith's Food King No. 1*, 107 Nev. 80, 807 P.2d 208 (1991); *Wickliffe v. Sunrise Hospital*, 104 Nev. 777, 766 P.2d 1322 (1988); Black's Law Dictionary 893, (7th ed. 1999).

[93] Sometimes, district court judges have trouble accepting reversal and seek to re-impose the just-reversed orders that led to the appeal; the Supreme Court has been known to reassign cases where necessary "in the interest of justice." *See*, *e.g.*, *Wickliffe*, *supra*; *Sogg v. Nevada State Bank*, 108 Nev. 308, 832 P.2d 781 (1992).

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.

XVI. FEES

At least theoretically, sanctions in the form of fees and costs can be imposed against counsel doing sub-standard work on appeal,[94] but in practice, the Court has issued only the most timid and slight penalties for violations of its rules.[95] In *Barry v. Lindner*,[96] the Court sanctioned Appellant's counsel $500 for failures to cite to the record, provide relevant authority, and comply with the procedural and substantive rules governing appellate litigation. The Court expressed its intent to enforce its nearly 20-year-old expectation that "all appeals . . . be pursued with high standards of diligence, professionalism, and competence."

In *Miller v. Wilfong*,[97] the Court again imposed a $500 fine where the appellant's performance was so sub-standard that additional work was generated on the part of both the respondent and the Court.

NRAP 28(j) states:

> All briefs under this Rule must be concise, presented with accuracy, logically arranged with proper headings and free from burdensome, irrelevant, immaterial or scandalous matters. Briefs that are not in compliance may be disregarded or stricken, on motion or

[94] *See Burke v. State*, 110 Nev. 1366, 887 P.2d 264 (1997) (court may sanction attorney whose performance falls below required standards of diligence, professionalism, and competence); *Hansen v. Universal Health Serv. of Nev., Inc.*, 112 Nev. 1245, 924 P.2d 1345 (1996).

[95] *See Pittman v. Lower Court Counseling*, 110 Nev. 359, 871 P.2d 953 (1994) (appellant sanctioned for failure to cite to the record); *Varnum v. Grady*, 90 Nev. 374, 528 P.2d 1027 (1974) (appellant sanctioned for failure to comply with multiple procedural rules); *In re Candidacy of Hansen*, 118 Nev. 570, 574 n.9, 52 P.3d 938, 940 n.9 (2002) (sanctions may be imposed for defective appendix).

[96] *Barry v. Lindner*, 119 Nev. 661, 75 P.3d 388 (2003).

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

> sua sponte by the court, and the court may assess attorney fees or other monetary sanctions against the offending lawyer.

The rules and multiple published opinions warn counsel of the ramifications of disregard for the obligation to cite ***relevant*** legal authority and otherwise adequately discharge appellant's duties.[98] And attorney's fees may be imposed under NRAP 38 "as costs on appeal . . . to discourage like conduct in the future" when an appeal has "been processed in a frivolous manner," and "the appellate processes of this court have otherwise been misused."[99]

Despite repeated invitations to actually impose sanctions when faced with grossly defective appellate filings, however, the Court has declined all invitations to back up its threats to "end the lackadaisical practices of the past" and "impress upon the practitioners appearing before this court that we will not permit flagrant violations of the Nevada Rules of Appellate Procedure"[100] by issuing sanctions sufficient to make whole the parties injured by the violations.

So far as can be determined, as a matter of policy, the Nevada Supreme Court does not want to get into the business of administering substantive attorney's fees awards, even where clearly called for under the rules. Instead, even when the target of such orders has been "wholly deficient and worthy of sanctions," and cost the diligent party substantial sums to rectify or alleviate the deficiencies, the Court has never gone beyond harsh language and imposition of $500 wrist-slap fines payable to the law library.

The Court ***often*** issues orders stating that it wishes to "discourage like conduct in the future and . . . reiterate that [it] will not tolerate lackadaisical practices in the pursuit of appellate relief," but the verbiage has – so far – not been followed up by any action that might actually cause the desired change in behavior by those who engage in it. Until that changes, no real change in the attention paid by that segment of the Bar can reasonably be expected, either.

XVII. FAST-TRACK CUSTODY CASES

The rule set was substantially revised in the past decade or so, and is set out in detail as what is now Chapter 18 in the Nevada Appellate Practice Manual.

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[98] *See* NRAP 28(a)(4); *State, Emp. Sec. Dep't v. Weber*, 100 Nev. 121, 123-24, 676 P.2d 1318 (1984) (advising counsel of sanctions for failure to refer to relevant authority); *Smith v. Timm*, 96 Nev. 197, 606 P.2d 530 (1980) (inadequate "discharge of the appellant's obligation to cite legal authority"); *Carson v. Sheriff*, 87 Nev. 357, 487 P.2d 334 (1971) (contentions not supported by relevant authority need not be considered).

[99] *See Works v. Kuhn*, 103 Nev. 65, 732 P.2d 1373 (1987); *Flangas v. Herrmann*, 100 Nev. 1, 677 P.2d 594 (1984); *Holiday Inn v. Barnett*, 103 Nev. 60, 732 P.2d 1376 (1987).

[100] *Barry v. Lindner*, *supra*, quoting from *Smith v. Emery*, 109 Nev. 737, 743, 856 P.2d 1386, 1390 (1993).

In short, since 2006 there has been a "fast track" program for child custody cases seeking to "assure that cases involving child custody and visitation issues are resolved in a fair, yet expedited manner."[101]

For an appeal to qualify, the Appellant must be represented by an attorney. The other party, if unrepresented, is held to the same standard as counsel. The existence of issues in addition to child custody and visitation matters clouds the fast track appeals process, and it is not clear how the fast track rules apply to such cases.

Once a case is assigned to fast-track status, NRAP 3E(b) dictates the filings of a notice of appeal, case appeal statement, docketing statement, transcript or rough draft transcript request form, and a fast track statement identifying the appellate issues that are raised. The normal appellate deadlines are shortened, but are stayed like regular appeals for appellate settlement efforts, and are frequently extended by requests to extend deadlines.

An appellant's fast track statement (brief) is limited to 15 pages or must comply with the "type volume limitations" detailed in NRAP 3E(e)(2) (no more than 7,000 words or 650 lines of text). It must contain a statement of jurisdiction for the appeal, a statement of the case and procedural history, a concise statement of facts, an outline of the alleged errors, legal argument including authorities, and certain other procedural matters.

The respondent's fast track response is limited to 10 pages (or no more than 4,667 words or 433 lines of text) It must contain facts and law necessary to rebut the contentions made in the appellant's fast track statement. The rules are a bit unclear, but appear to contemplate a Reply.

For any of the statements, a party may seek leave to expand the length of the fast track statement or response if justified by the complexity of the case and issues.

The court may elect to resolve the appeal based on the transcripts, fast track statement and response, and other documents filed, or may direct full briefing. Either party may move to remove an appeal from the fast track program and have full briefing. The motion must demonstrate that the specific issues raised in the appeal are too complex or numerous for resolution in the fast track program.

The court rules state that the court "must dispose of all fast track child custody appeals within 90 days of the date the fast track response is filed." As a practical matter, fast track cases routinely take several times the stated time. Apparently, no separate timing statistics are kept; if they are kept, they are not made public. Anecdotal accounts vary wildly, but reported times cases remain under submission of six months to a year are not uncommon.

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[101] ADKT 381, "In the Matter of Amendments to the Nevada Rules of Appellate Procedure" (April 7, 2006).

XVIII. "EVERYTHING'S BETTER WHEN IT SITS ON A WRIT"[102]

Sometimes an interlocutory order can be reviewed before a case proceeds to a final judgment, or a decision not amounting to a "special order after final judgment" can be reviewed. Upon petition, the Nevada Supreme Court has the discretion to exercise its powers of extraordinary review, the most common being petitions for writs of mandamus, prohibition, and certiorari.

For a detailed discussion of the filing of writ petitions in the Nevada Supreme Court, practitioners should refer to the Writ Petitions chapter of the Nevada Appellate Practice Manual, but a few observations can be made here.

No writ is permitted if there is a right to appeal. If an appeal will lie, the Court considers that route of potential relief a "plain, speedy, and adequate" method of addressing the alleged error.[103] If an immediate appeal is available, the time for filing a notice of appeal continues to run regardless of whether a party files a writ petition. While there are no express time limitations for filing a writ petition, the Court may, in its discretion, apply the doctrine of laches.[104]

Sometimes it is difficult to tell whether writ relief or an appeal is the desirable method of addressing an assertion of error. For example, in 2004, the Court issued *Pan v. Eighth Judicial District Court*,[105] holding that when a case is dismissed for *forum non conveniens*, ***only*** an appeal, and ***not*** a petition for Writ of Mandamus was the appropriate vehicle for challenging the dismissal, although the reverse had been suggested by prior cases.[106]

Pan acknowledged that prior decisions did not address the interplay between writ relief and the availability and adequacy of appeal. Generally, the opinion stated that appeal is an adequate legal remedy and, thus, writ relief is precluded: "If all of the prerequisites for finality are met, an order that dismisses a case for forum non conveniens is a final judgment that should be reviewed on appeal, not through a writ petition."

In determining the writ application was improper, the Court went back to the simple logic set out in *Perkins* 160 years earlier: "Because this petition challenges a District Court order that dismissed petitioners' complaint, which is ***a final, appealable judgment*** under NRAP 3A(b)(1), writ relief is inappropriate." (Emphasis added.)

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[102] Apologies to Nabisco.

[103] *See* NRS 34.170; NRS 34.330; *International Game Tech. v. Dist. Ct.*, 1124 Nev. 193, 179 P.3d 556 (2008); *Columbia/HCA Healthcare v. Dist. Ct.*, 113 Nev.521, 936 P.2d 844 (1997).

[104] *See State v. Dist. Ct.*, 116 Nev. 127, 994 P.2d 692 (2000).

[105] *Pan v. Eighth Judicial District Court*, 120 Nev. 222, 88 P.3d 840 (2004).

[106] *I.e.*, *Pan* recites that prior case law indicated that "mandamus is the proper method for challenging the dismissal of a case on forum non conveniens grounds."

The same conclusion (dismissal = final judgment) has shown up in many other contexts. In *Valley Bank of Nevada v. Ginsburg*,[107] this Court stated that "***any*** dismissal order – even if the result of a stipulation – would unquestionably have constituted a final judgment." The opinion stated that the Court "has consistently looked past labels . . . and instead taken a functional view of finality, ... This court determines the finality of an order of judgment by looking to what the order or judgment actually *does*, not what it is called."[108]

A party can be denied relief entirely if that party – or even the appellate court – gets it wrong as to whether a writ or appeal is the proper mechanism.

There are several other fuzzy areas, where the alleged error is essentially jurisdictional, implicating writ relief, but the district court action in question leads to what looks like a final order. In such circumstances, a practitioner ***could*** file one, or the other, and hope for the best, or ask the Court to treat the one as the other if it believes the attorney guessed wrong. Our practice if we just can't tell what to file is to file both, and consolidate them. Sometimes that doesn't work either, and review is denied as to both.

While writ petitions have a greater latitude of permissible form, generally the form and content requirements for a brief should be followed.[109] The various formalities are specified in NRAP 21.

XIX. 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 is possible for those decisions to be in error. That is why we have appellate courts – a world apart from trial practice, with its own very technical rules and procedures. Whether they are ultimately resolved at a settlement conference, or on the briefs and appendix, or after oral argument, appellate cases require meticulous attention to detailed organization and rendition of the facts, comprehensive research into all applicable areas of law, and a thorough and scholarly legal argument.

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[107] *Valley Bank of Nevada v. Ginsburg*, 110 Nev. 440, 445, 874 P.2d 729 (1994).

[108] *Id*. at 444-45 (emphasis in original). The single exception to this reasoning appears to be where service of process is quashed; a line of authority continues to exist that in that procedural context, an appeal will not lie, and a writ application must be filed. *See Jarstad v. National Farmers Union Property & Cas. Co.*, 92 Nev. 380; 552 P.2d 49 (1976); *Peccole v. Eighth Judicial Dist. Court*, 111 Nev. 969; 899 P.2d 569 (1995); *Firouzabadi v. First Judicial Dist. Court*, 110 Nev. 1349; 885 P.2d 617 (1994); *Orme v. District Court*, 105 Nev. 712, 782 P.2d 1325 (1989); *Davis v. District Court*, 97 Nev. 332, 629 P.2d 1209 (1981).

[109] *See* NRAP 21(a); NRAP 32.

Ultimately, litigation of appeals is a painstaking and difficult process, and it is perhaps the most challenging and technically difficult area of family law. It can also be the most rewarding – and the most fun!

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