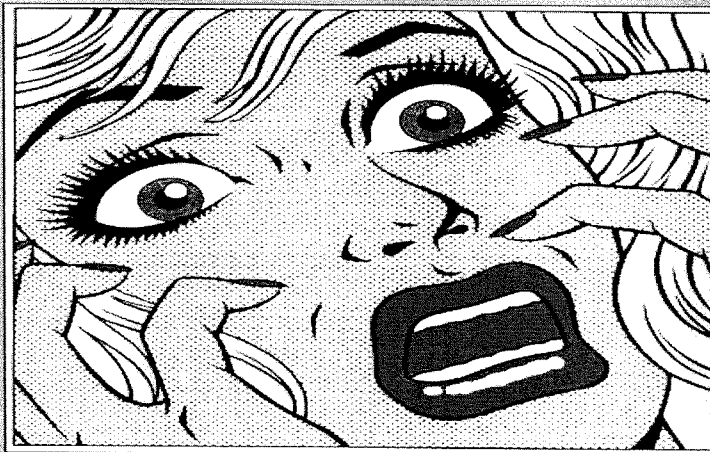


Clark County Bar Association
Las Vegas, Nevada



Coming soon to a Court Room
near you....

Discovery & Ethics: Disclosures, Withdrawal and
Spoliation



Disclosure of Confidential Information

Examples:

- **Accidental:** Opposing party accidentally sends you privileged or confidential information?
- **Intentional** (by someone other than a party): Discovering party “obtains” privileged or confidential information from a non-party.
- **Unsolicited:** Third party sends privileged or confidential information.

Inadvertent Disclosure

Accidental:

- **Attorney duty to pause & notify:**

NRCP 4.4(b): (b) A lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender.

FRCP 26(b)(5)(B): *Information Produced.* If information produced in discovery is subject to a claim of privilege or of protection as trial preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved.

Inadvertent Disclosure (cont.)

Accidental

- ◉ "A lawyer who receives materials that on their face appear to be subject to the attorney-client privilege or otherwise confidential, under circumstances where it is clear they were not intended for the receiving lawyer, should refrain from examining the materials, notify the sending lawyer and abide the instructions of the lawyer who sent them."
 - ABA Formal Opinion 05-437
- ◉ Privilege and confidentiality issues are usually ripe to interlocutory appeal prior to disclosure. However, the opposite is true for interlocutory appeal of and inadvertent disclosure because the disclosure has occurred.
 - *Truckstop.net, LLC v. Sprint Corp.*, 847 F.3d 1068, 9th Circuit (Idaho 2008).

Accidental Disclosure

Accidental

- ◉ Nevada Supreme Court— nothing published.
- ◉ *Gomez v Vernon* 255 F3d 1118, 1131-32 (9th Cir 2001) (cited favorably in *Irsfeld v Allen*, Nevada unpublished Supreme Court Docket No. 53487, 3/17/2010): "when there has been an involuntary disclosure, the privilege will be 'preserved if the privilege holder has made efforts 'reasonably designed' to protect the privilege.... Conversely ... the privilege [will be deemed] to be waived if the privilege holder fails to pursue all reasonable means of preserving the confidentiality of the privileged matter."

Intentional Disclosure

Intentional

- Rule 4.4(a): Respect for Rights of Third Persons:
- "In representing a client, a lawyer shall not . . . use methods of obtaining evidence that violate the legal rights of such a [third] person."
- If the sender of privileged or confidential material has engaged in tortious or criminal conduct, a lawyer who receives and uses the materials may be subject to sanction by a court. See *e.g.*, *Maldonado v. New Jersey*, 225 F.R.D. 120 (D.N.J. 2004) (counsel disqualified after using privileged letter that had allegedly appeared without explanation in client's workplace mailbox)

Unsolicited Disclosure

Unsolicited:

- ABA: "Our opinion that if the providing of the materials is not the result of the sender's inadvertence, Rule 4.4(b) does not apply . . . A lawyer receiving materials under such circumstances is therefore not required to notify another party or that party's lawyer of receipt as a matter of compliance with the Model Rules." ABA Opinion 06-440

Failure to Disclose

The Duty to disclose and supplement:

- ◉ NRPC 3.4
- ◉ NRCP 16.1(a); 26(e)(1)
- ◉ FRCP 26(a),(e)

(see below....)

Failure to Disclose (cont.)

Violations:

- ◉ NRCP 37 (c)
- ◉ FRCP 37(c)

Failure to Disclose (cont.)

NRPC Rule 3.4. Fairness to Opposing Party and Counsel. A lawyer shall not:

- (a) *Unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;*
- (b) Falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;
- (c) Knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;
- (d) In pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;
- (e) In trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused; or
- (f) Request a person other than a client to refrain from voluntarily giving relevant information to another party unless:
 - (1) The person is a relative or an employee or other agent of a client; and
 - (2) The lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

Failure to Disclose (cont.)

• **NRPC 37(c) Failure to Disclose; False or Misleading Disclosure; Refusal to Admit.**

(1) A party that without substantial justification fails to disclose information required by Rule 16.1, 16.2, or 26(e)(1), or to amend a prior response to discovery as required by Rule 26(e)(2), is not, unless such failure is harmless, permitted to use as evidence at a trial, at a hearing, or on a motion any witness or information not so disclosed. In addition to or in lieu of this sanction, the court, on motion and after affording an opportunity to be heard, may impose other appropriate sanctions. In addition to requiring payment of reasonable expenses, including attorney's fees, caused by the failure, these sanctions may include any of the actions authorized under Rule 37(b)(2)(A), (B), and (C) and may include informing the jury of the failure to make the disclosure.

Failure to Disclose

FRCP 37(c) If a party fails to provide information or identify a witness as required by Rule 26(a) or 26(e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless. In addition to or instead of this sanction, the court, on motion and after giving an opportunity to be heard:

- (A) may order payment of the reasonable expenses, including attorney's fees, caused by the failure;
- (B) may inform the jury of the party's failure; and
- (C) may impose other appropriate sanctions, including any of the orders listed in Rule 37(b)(2)(A)(i)-(vi).

Failure to Disclose: How do you fix it?

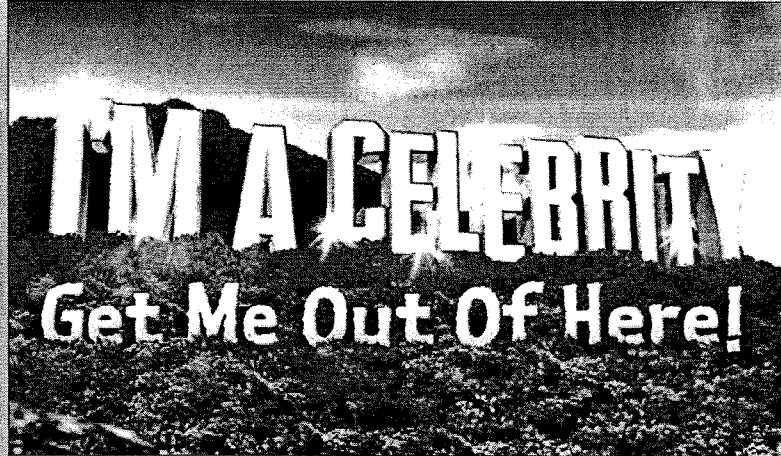
- ◎ "He who hesitates . . . is lost."

Foster v Dingwall, 2010 WL679069 (2010) ("prejudice from delay is presumed."
internal citation omitted)

Young v. Johnny Ribeiro Building, 106 Nev. 88, 93, 787 P.2d 777, 780 (1990) (factors: degree of willfulness, prejudice to non-offending party if there is a lesser sanction, severity of the sanction of dismissal compared to severity of the discovery abuse, whether any evidence has been irreparably lost, feasibility and fairness of less severe sanctions, such as an order deeming facts relating to improperly withheld or destroyed evidence to be admitted, policy favoring adjudication on the merits, whether sanctions unfairly penalize a party for the misconduct of their attorney, and the need to deter both the parties and future litigants from similar abuses.)

Arnold v Kip, 123 Nev 410, 168 P3d 1050, 1054 (2007) (Factors considered on motion to dismiss include: "the length of the delay, whether the defendant induced or caused the delay, whether the delay has otherwise impeded the timely prosecution of the case")

Withdrawal from Representation



Withdrawal

A litigation client has fired me, why is it important to file the motion?

Required by Ethics

RISK MANAGEMENT !!!

Statute of Limitations Trigger

Withdrawal

NRS 11.207 Malpractice actions against attorneys and veterinarians.

1. An action against an attorney or veterinarian to recover damages for malpractice, whether based on a breach of duty or contract, must be commenced within 4 years after the plaintiff sustains damage or within 2 years after the plaintiff discovers or through the use of reasonable diligence should have discovered the material facts which constitute the cause of action, whichever occurs earlier.
2. This time limitation is tolled for any period during which the attorney or veterinarian conceals any act, error or omission upon which the action is founded and which is known or through the use of reasonable diligence should have been known to the attorney or veterinarian.

The Rules

Rule 1.16. Declining or Terminating Representation.

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

- (1) The representation will result in violation of the Rules of Professional Conduct or other law;
- (2) The lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or
- (3) The lawyer is discharged.

* * *

(c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.

Withdrawal

EDCR Rule 5.28. Withdrawal of attorney in limited services ("unbundled services") contract.

(a) An attorney who contracts with a client to limit the scope of representation shall state that limitation in the first paragraph of the first paper or pleading filed on behalf of that client. Additionally, if the attorney appears at a hearing on behalf of a client pursuant to a limited scope contract, the attorney shall notify the court of that limitation at the beginning of that hearing.

(b) An attorney who contracts with a client to limit the scope of representation shall be permitted to withdraw from representation before the court by filing a Notice of Withdrawal of Attorney with the clerk's office. The Notice of Withdrawal of Attorney shall state that the attorney is withdrawing from the case because the attorney was hired to perform a limited service, that service has been completed, and shall include a copy of the limited services retainer agreement between the attorney and the client. The Notice of Withdrawal of Attorney shall also state that the client will be representing himself or herself in proper person unless another attorney agrees to represent the client and shall contain the client's address, or last known address, and telephone number at which the client may be served with notice of further proceedings taken in the case. The attorney must serve a copy of the Notice of Withdrawal of Attorney upon the client and all other parties to the action or their attorneys. No attorney shall be permitted to withdraw from representation pursuant to this Rule if such attorney has failed to complete any service required of the attorney by the court during any hearing the attorney attended in the subject legal proceeding.

Withdrawal

EDCR Rule 7.40. Appearances; substitutions; withdrawal or change of attorney.

(a) When a party has appeared by counsel, the party cannot thereafter appear on the party's own behalf in the case without the consent of the court. Counsel who has appeared for any party must represent that party in the case and shall be recognized by the court and by all parties as having control of the case. The court in its discretion may hear a party in open court although the party is represented by counsel.

(b) Counsel in any case may be changed only.

(1) When a new attorney is to be substituted in place of the attorney withdrawing, by the written consent of both attorneys and the client, which must be filed with the court and served upon all parties or their attorneys who have appeared in the action, or

(2) When no attorney has been retained to replace the attorney withdrawing, by order of the court, granted upon written motion, and (i) If the application is made by the attorney, the attorney must include in an affidavit the address, or last known address, at which the client may be served with notice of further proceedings taken in the case in the event the application for withdrawal is granted, and the telephone number, or last known telephone number, at which the client may be reached and the attorney must serve a copy of the application upon the client and all other parties to the action or their attorneys, or (ii) If the application is made by the client, the client must state in the application the address at which the client may be served with notice of all further proceedings in the case in the event the application is granted, and the telephone number, or last known telephone number, at which the client may be reached and must serve a copy of the application upon the client's attorney and all other parties to the action or their attorneys.

(c) No application for withdrawal or substitution may be granted if a delay of the trial or of the hearing of any other matter in the case would result.

Spoliation

Spoliation of evidence is the intentional or negligent withholding, hiding, alteration or destruction of evidence relevant to a legal proceeding.

Nevada Rule

The Nevada Supreme Court recently addressed the issue of spoliation of evidence in *Bass-Davis v. Davis*, 134 P.3d 103, Nev. Adv. Op. 39 (2006). In that case the Court clarified the differences in the Trial Court's treatment of evidence that is "willfully suppressed" and evidence that is "negligently lost or destroyed". Where the evidence is willfully suppressed, NRS 47.250(3) applies and a disputable (or rebuttable) presumption is made: when the evidence is negligently lost or destroyed, an adverse inference applies. As noted in the last post, our office requests that video tapes (and other information) be given to us or retained for litigation when we first become involved in a case to avoid any allegations by the adverse party that they did not know a claim or lawsuit might be made in the future. In addition, these items should be sought during Discovery through the use of Requests for Production, Depositions and the use of subpoena power. Where the items are not produced, especially when they are being willfully suppressed, Motions to Compel before the Discovery Commissioner will be required.

Instructions / Presumptions

NRS 47.250 Disputable presumptions. All other presumptions are disputable. The following are of that kind:

* * *

3. That evidence willfully suppressed would be adverse if produced.

4. That higher evidence would be adverse from inferior being produced.

A tort or not a tort?

Other jurisdictions that have followed California's lead and recognized negligent spoliation of evidence as a separate tort include: the District of Columbia, Florida, Illinois, and New Jersey. They require the typical elements of a negligence action, duty, breach, causation, and damages, to state a cause of action for the negligent spoliation of evidence. The Supreme Court in Idaho has engaged in the analysis of elements required under the tort.