



# THE DOUGLAS COUNTY BAR ASSOCIATION

NOVEMBER 13, 2007

AN ONLINE NEWSLETTER - VOL. 1, NO. 11

**The opinions expressed in The DCBA Record are those of the author and not necessarily those of the Douglas County Bar Association or of its officers or members.**

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## Douglas County Bar Hosts Collaborative Family Law CLE Program, Thursday, November 15, 2007



**Collaborative law, with an emphasis on family law, is the topic of this month's DCBA Noon CLE Luncheon, Thursday, November 15, 2007 in the Downstairs Meeting Room at the Carson Valley Museum at 1477 Highway 395, Gardnerville. Catered lunch, tax, tip, and 1 hour of approved CLE credit is \$17.00.**

**The presenters are attorneys Caren Jenkins and Kim Surratt along with Linda Peterson, Ph.D. Caren Jenkins is the principal of the Jenkins Law Office. She combines a wealth of legal experience in Nevada and California practice and has a broad background representing international corporations and individuals alike. She serves on Nevada's statewide Commission on Ethics and is an adjunct professor of law at Golden Gate University in San Francisco. Kimberly M. Surratt, Esq. is a family law practitioner in Reno.**

**Collaborative Practice is a non-adversarial approach to addressing legal issues that arise in relationships. When couples separate or divorce, they must find a way to resolve their differences on all relevant issues. Collaborative practice is designed to minimize conflict while working toward that resolution. Parties to divorce and their attorneys agree to make a good faith attempt to reach a mutually acceptable settlement without going to court. Working together, they strive to dissolve the marriage in a way that addresses everyone's legal, financial, and emotional needs.**

**Registration and lunch begin at 11:30 am and the 60-minute program starts promptly at 12 Noon. ###**



## ***On Becoming a Client: What establishes an attorney-client relationship?***

**By Mauricio "Mo" Hernandez, Esq.**

***Your brother-in-law phones you about a problem involving his live-in girlfriend who's been accused of embezzling money from the grocery store where they both work. He wants to know what implications?***

***The phone rings in your office and on the other line, a woman explains about her estranged husband in California and how he wants custody of their 8-year-old daughter living with her in Nevada.***

***You are at a barbecue following your son's soccer game. An assistant coach sidles up to you and asks you about problems his mother is having at the retirement home where she lives.***

***Finally, an elderly man with a real property and estate-planning problem makes an appointment with you and sees you for a 45-minute preliminary consultation. You decide you can't help him because he just moved here from Montana and you are uncomfortable advising him about the multi-jurisdictional aspects of his situation. He pays your \$200.00 consultation fee and you refer him to another lawyer.***

**When does someone become an attorney's "client"? In the preceding hypotheticals, every instance implicates an attorney-client relationship and consequently, a confidential communication.<sup>1</sup> And whether you are retained or paid is irrelevant so long as the person consulting you does so "with a view to obtaining legal services."<sup>2</sup>**

**The only reason this matters is because of the protections of the attorney-client privilege upon which clients rely. And with a firm grip on the obvious: for an attorney-client privilege to be raised, an attorney-client relationship must exist. But from the foregoing examples, it is not always so obvious. Some lawyers would argue only the last instance, when the interviewee paid \$200.00, did the relationship exist and the privilege attach. Still others maintain that someone becomes a "client" only when there is an express contract, that is, a retainer paid and a file opened.**

**Absent an express acknowledgement by the lawyer, courts, too, have grappled with the nuances implied by the conduct of the parties.**

<sup>1</sup> NRS 49.055 defines a confidential communication as one *not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional services to the client or those reasonably necessary for the transmission of the communication.*

<sup>2</sup> NRS 49.045

Ironically, even a lawyer's express acknowledgement can be insufficient in some circumstances. In a recent motion to quash a subpoena, the lawyer-witness in a criminal case invoked attorney-client privilege but it was unavailing. Under NRS 49.102, *the person who was the lawyer at the time of the communication may claim the privilege but only on behalf of the client. His authority to do so is presumed in the absence of evidence to the contrary.*

The court, *sua sponte*, rightfully gave greater weight to preserving the defendant's right to a full and complete defense. This, despite opposing counsel's failure to make that argument. Instead, she mistakenly maintained that a witness's confidential communications with her lawyer about the criminal dimensions of the case had not created an attorney-client relationship protected by the privilege.

Counsel's assertions revealed her miscomprehension of how an attorney-client relationship might be implied by the conduct of the parties. In Nevada, an attorney-client relationship may be implied: when a person seeks advice or assistance from an attorney; the advice or assistance sought pertains to matters within the attorney's professional competence; and the attorney expressly or impliedly agrees to give or actually gives desired advice or assistance.<sup>3</sup>

And as succinctly stated by yet another court, the attorney-client relationship is established when it is shown that a client seeks and receives the advice of a lawyer on the legal consequences of the client's past or contemplated actions.<sup>4</sup>

Certain lawyers believe someone does not become a "client" until money has been exchanged. And still others, despite the payment of fees, continue to aver otherwise. For example, one lawyer several years ago met with a prospective client for a preliminary interview. She received a consultation fee and reviewed documents but declined representation. And after referring her to me, unabashedly asserted to me that the prospect had not been her client.

The test of an attorney-client relationship for purposes of the privilege is the client's subjective intention to seek legal advice and reasonable belief that he is consulting the lawyer in a professional capacity.<sup>5</sup>

In 1950, the court in *United States v. United Shoe Mach. Corp.*, 89 F. Supp. 357, 358-59, defined the attorney-client privilege this way. "(1) Where legal advice of any kind is sought (2) from a professional legal adviser in his [or her] capacity as such, (3) the communication relating to that purpose, (4) made in confidence, (5) by the client, (6) are at his [or her] instance permanently protected (7) from disclosure by [the client] or by the legal adviser, (8) except the protection be waived."

The US Supreme Court has held that the elements of attorney client privilege are: (1) a communication between client and counsel, (2)

<sup>3</sup> *Todd v. State*, 113 Nev. 18, 19 (1997).

<sup>4</sup> *People v. Bennett*, 810 P.2d 661 (Colo. 1991).

<sup>5</sup> *Westinghouse Electric Corp. v. Kerr-McGee Corp.*, 580 F.2d 1311, 1319 (11<sup>th</sup> Cir.) cert. Denied. 439 US 995 (1978).

<sup>6</sup> *Fisher v. United States*, 425 U.S. 391, 403 (1976).

<sup>7</sup> *In re Spalding Sports Worldwide, Inc.*, 203 F.3d 800, 805 (Fed. Cir.) (2000).

<sup>8</sup> *Haynes v. State*, 103 Nev. Adv. Op. 69 (1978).

intended to be and in fact kept confidential, and (3) made for the purpose of obtaining or providing legal advice. Moreover, according to the Federal Circuit, the "central inquiry" in determining whether a communication is privileged is "whether the communication is one that was made by a client to an attorney for the purpose of obtaining legal advice or services." <sup>7</sup>

In Nevada, when does the privilege attach? The answer is when someone satisfies the definition of "client" under NRS 49.045 as a person, corporation or other entity "who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services from him." The scope of the attorney-client privilege is expressly set forth at NRS 49.095,

***A client has a privilege to refuse to disclose, and to prevent any other person from disclosing, confidential communications:***

- 1. Between himself or his representative and his lawyer or his lawyer's representative.***
- 2. Between his lawyer and the lawyer's representative.***
- 3. Made for the purpose of facilitating the rendition of professional legal services to the client, by him or his lawyer to a lawyer representing another in a matter of common interest.***

The attorney-client privilege is predicated on public policy considerations. In other words, upon the rationale that encouraging clients to make full disclosure to their attorneys enables the latter to act more effectively, justly and expeditiously, a benefit outweighing the risks opposed to truth finding.<sup>8</sup>

In sum, applying the rules to the hypothetical examples, the party-turned-client need not have a writing, a file or pay a fee. The party does not even have to actually hire the lawyer for the privilege-triggering relationship to be created. Prudent practitioners, then, should be wary about inquiry phone calls from would-be clients or impromptu cocktail chatter from acquaintances or friends. And certainly, persons who make an office appointment come to consult *with a view to obtaining professional legal services* ---- whether or not a fee is ever collected or a file is ever opened.

Most of all, given case and statutory authority, resist being overly sanguine or unduly dismissive about the possibility of creating unforeseen attorney-client relationships. So long as the communications are made with the prospect of obtaining advice or representation, an ethical duty has attached. Additionally, a conflict of interest has attached. And unwittingly, a lawyer in unwarily establishing an attorney-client relationship, takes on the ethical duty not to disclose the privileged communications to anyone. More importantly, she is further required to claim the privilege unless the client waives it. ### [Thanks to Matt Ence, Esq. for his thoughtful review].

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## Ten Settlement Conference/Mediation Traps for the Unwary

By Victoria Pynchon, Esq.  
*Reprinted with express permission.*

### **1. Leaving stakeholders at home.**

**Who's a "Stakeholder"?**

**Anyone who can green or red light the final agreement.**

**Why Can't They Simply Be Available By Telephone?**

**For the same reason you don't want your jury to "call in." A settlement negotiation is part process, part presentation, part drama, and, part human interaction.**

**Those who don't participate will never understand the principled reasons for the settlement achieved by day's end. I cannot tell you how distressed many (particularly young) attorneys are when the "partner in charge" or client questions their wisdom (or sanity!) for recommending a settlement that no one but those in the room could possibly understand in all of its texture and dimensionality.**

**Leave stakeholders home at your risk. Not only might you blow a significant chunk of change on the mediator's fee, you risk losing a day's worth of time for yourself and your client "representative." Perhaps more importantly, this particular settlement opportunity may never present itself again.**

### **2. Leaving too soon.**

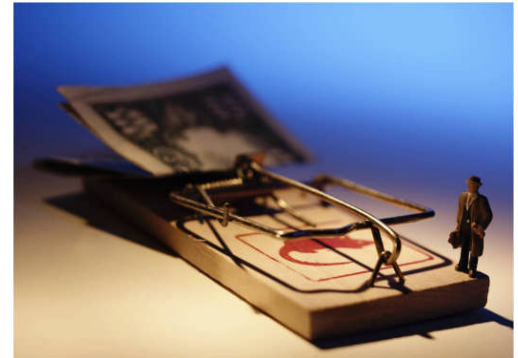
**"Americans" (and I use the term loosely for anyone, citizen or not, who buys retail) become uncomfortable after two or three bargaining "moves," i.e., offer, counter-offer, counter-counter, "I'm outta here."**

**Unfortunately, lawyers have readily at hand the legal version of a weapon of mass destruction -- the threat of which is usually phrased as "see you in court, buster."**

**Until the mediator or settlement judge tells you that she/he is convinced the parties' aren't already secretly in agreement, i.e., willing to accept a settlement within the other's "bottom line," you risk losing the best deal you're likely going to get by leaving the negotiation too early.**

### **3. Failing to take clues from the mediator/settlement conference judge.**

**Just as you will *always* know more about your bargaining position and the business interests underlying it than the mediator does, the mediator will *always* know more about your opponent's bargaining position and ability to settle the lawsuit than you do.**



**Remember, the mediator is honor bound not to disclose information that is highly beneficial to your bargaining position. Unless you've hired a disreputable or simply unreliable mediator (and you know who they are after you've hired them *once*) don't ignore the mediator's suggestions that a little patience with the process might result in a big reward for your client.**

#### ***4. Failing to strategically use joint and separate caucuses.***

To everything there is a season . . . .

Rigidly adhering to *any* negotiation or settlement conference format reduces your ability to strategically use whispered confidences in the hallway; candid conversations between counsel without their clients; meetings between the mediator and a difficult client without his/her/ attorney; discussions between the mediator and one or more of the attorneys without their clients; and, meetings between the disputants without anyone else's presence.

There are dozens of different permutations and combinations of attorney-client-mediator dyads, triads and the like.

Think about it. Each different relationship draws out of us someone slightly different. We're more or less comfortable, deferential, authoritative, subject to persuasion or persuasive depending upon our "audience."

During the course of the mediation, the mediator learns about these dynamics and is able to use them toward what *should* be the mediator's goal -- to serve as many of the parties' interests as possible in an agreed upon settlement by day's end.

Not only should you listen to the mediator about these dynamics, you should hip the mediator to those you likely understand better than she/he ever will.

The mediator is your teammate. Don't miss the opportunity to call as many game "plays" during the day as possible.

#### ***5. Letting the Judge or Mediator Act the Bully.***

It's *always* easier to get what you want by talking about the reasons you desire or need it than by bullying the other side into accepting *what you want*.

A judge or mediator who is bullying you or your client to settle simply hasn't gotten the knack of asking questions and creating opportunities. He/she is still too used to wielding power. If it's important enough to spend your day mediating, it's important enough to tell the Judge or mediator that you or your client are feeling bullied and would prefer to explain your interests and positions than to be pressured to accept a deal you're not comfortable with.

If the Judge/mediator is unable to shift from power to collaboration, try to get as much out of the negotiation as possible and find yourself a new mediator for the next settlement conference.



## **6. Believing that any competent judge or mediator can help you achieve the best settlement.**

Face it; you wouldn't hire a personal injury lawyer to try your complex insurance coverage action. Nor would you hire a Skadden Arps attorney to handle a motion to increase your spousal or child support.

Mediators are *not* all-purpose "peace-makers" or negotiators. As Colin Powell has said, the most important factor in an international diplomatic negotiation is to "be inside the other guy's decision cycle."

What does that *mean*? In a personal injury case, it means understanding the claims adjusters' levels of authority and pressures to bring back to the office a settlement that is in line with similar cases -- better than those of his or her colleagues if at all possible. In a commercial case, it often means satisfying not only General Counsel, but the CEO or CFO or even the shareholders.

It's not so much the *law* the mediator needs to know, as it is the *culture* in which the law is being applied.

Listen. I've been retained for the sole reason that I'm a woman. I'm not *wild* about this because I bring 25+ years of high-level commercial corporate legal experience to a mediation and am much, much more valuable as a commercial mediator than I am as any random woman with a little skill in law or mediation. But it's ok because I *am* a woman and there *are times* when that's important to the settlement of the matter. There are some things that you just need a woman for. And some you need a man or an African-American or a Korean or an expert on the construction of toilet seats for. You should be thinking about *all* of these variables.

Most of all, you should choose a mediator or settlement judge who you believe is most "inside the other guy's decision cycle." Would Colin Powell steer you wrong? Well . . . about something other than the War in Iraq?

## **7. Sidelining Your Client on the Day of Mediation**

If you've been practicing for more than, say, five years, you know that your client *never tells you everything that is important to its case*. If you had the luxury of trying cases to a jury early in your career like I did, you learn this most quickly at trial. Usually when you receive a copy of a subpoena of someone you've never heard of.

"Harold," I said as a first year associate second-chairing the third trial day, "who is Jean McCarthy at the Sutter Mill Nursing Home?"

Harold, the Plaintiff, who was *retired because of his injuries*, hadn't worked at all for the last five years and had already given moving testimony to the jury about how difficult his life had been.

"Uh," Harold responded, "she's my . . . uh . . . boss."

"What????????????!!!!!!!!!!!!!!!!!!!!!!!!?????????????????????"

"Well, I've been doing odd jobs for the Nursing Home for the last several years."

**Don't miss the opportunity to let the mediator have a little chat with your client and learn both the good and the bad of your case -- some of which you may well not yet (or ever) be privy to.**

### ***8. Failing to use the Mediator to Help You Bring Reality to Your Client.***

This differs from Trap No. 7 but has some of the same causes. When your client explains his/her case to you, he/she presents it in the very best light. *Your side of the case rarely gets better over time.* Your client, however, has not had the same opportunity to see the "dark side" of the case as you have during discovery. Your clients often feel as if you're betraying them if you point out the differences between your view of the case on Day 1 and your view of the case on Day 632. Let the mediator help you out with that.

### ***9. Failing to Maximize the Mediator's Strategic Skills***

The mediator is your partner. And you are his/hers. Take the time to learn and maximize your unique skill-sets and knowledge to the highest advantage.

### ***10. Negotiating in the Nano- and strato- spheres.***

Spending a significant amount of time negotiating numbers that are far out of the range of potential agreement is not only a waste of everyone's valuable time, it strains the parties' patience and often results in impasse even when the parties' "zones of potential agreement" overlap.

One of the parties has to have the courage to step up to the line of potential impasse at some point in the mediation. The person who does so first will always gain the bargaining advantage as a result.

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Contact Victoria Pynchon at *Settle It Now Dispute*

*Resolution Services* 499 North Canon Drive, Suite 400,

Beverly Hills, California 90210







## **IDEAS FOR THE LAW FIRM – RESEARCH USING GOOGLE.COM**

**By Janabeth Fleming Evans (Taylor) R.N., R.N.C.**

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**Every day we are asked to "find" something....I've found Google to be a good research tool for many tasks. Some of the more common uses utilized in the Plaintiff Law Firm are given below:**

**If you use Google's "advanced search" feature, you can limit your search to PowerPoint files.**

**On the "file format" section, set the search parameter to return only files in the format "Microsoft PowerPoint (.ppt)". Then enter your search term, e.g., "Laminectomy". All hits will be in the form of PowerPoint presentations, many of these are posted by medical students, doctors, etc.**

**Another way to search for PPT presentations is to use your search term (such as Laminectomy) plus the word "PowerPoint".**

**It is also useful to use Google to locate images, most of which can then be downloaded and used in PowerPoint. An image search for "laminectomy" returns over 230 hits.**

**The image search is selected from the main (home) page of Google, not on the advanced search page.**

**And if you are looking for say "Daubert motion Steven Clark" sometimes you can get lucky there and find them online with a Google search in the general search feature.**

**Another idea is to do a search for "motion" "brief" with key words....and if you don't find it at the search result link, use the "cache" feature.**

**The cache feature will highlight with a different color for each search term everywhere it occurs in the webpage/document. Very handy for looking for a certain name, etc. I have found warrants, court orders, etc. More and more documents are being archived online and available to the public.**

**New Feature to monitor appearance of future references to search terms**

**Now on Google you can specify a search term, and Google will let you know via email if it appears on the web...you can use it to search for any term you wish...put in the name of a surgical procedure, an expert, a defendant, even your "favorite" opposing attorney...this feature is found at**

**<http://www.google.com/webalerts/>**

## Too many results?

### Ever do a search and still feel like you have too many results?

Instead of trying a new search, you might have more luck narrowing down the set of matches you've already generated. Google makes this process easy through a "Search Within" feature. After performing a search, click on the "Search within results" link that appears at the bottom of the results page, next to the search box, on the results page.

### Customize your results using the Preferences Page

Pick the Language...you can do a search in the translation of your choice from the Preferences Page OR you can translate a page in a language foreign to you by selecting the "translate" feature on the search results page...

Select the number of results per page, the default is 10, but you can select 20, 30, 50 or 100 if you wish Using the "New Results Page" feature allows you to keep your search page open, and any link clicked on will open in a new browser page/window...this eliminates back browsing and repetitive search requests.

### Various search commands

Include search term "+" sign (most do this by default but it will not hurt to use this symbol) this has same effect as AND

Exclude search term "-" sign (in effect same as NOT)

Must include phrase "" (quotes around phrase to be included)

### Search Within Designated website

The word "site" followed by a colon enables you to restrict your search to a specific site. To do this, use the search term site: sample domain.com syntax in the Google search box.

For example, to find admission information on Stanford's site, enter:

*example:*

admission site:w w w .stanford.e  Google Search

### Yellow Page Directory-type search feature

Google Local integrates yellow pages-style information right into your search. Search for pizza 75662 or pizza Marshall, TX and up will pop a little compass with a couple results. Click the compass, and you'll get a full listing of nearby results, with distance, maps, directions, related web pages, phone numbers, and more. You can narrow it down by category and distance, and look at a map of all the results. Wireless Froogle. Froogle is Google's product search service. To use Froogle on your cell phone, just point your phone's browser to <http://wml.froogle.com/> Then enter your search terms in the box/select search, using your phone's keypad arrows to scroll through the results. At the store looking for a PDA, whip out your cell phone/use Froogle and never wonder again if you paid too much.

### Travel Information

To see delays and weather conditions at a particular airport, type the airport's three-letter code followed by the word "airport." For example, San Francisco International Airport updates can be found by searching for "SFO airport."

**example:**

sfo airport

Google Search

<http://www.jdsupra.com/post/documentViewer.aspx?fid=c621a0e0-1719-44b4-8b89-e5803c9b4da1>

To check the status of a U.S. flight, type the name of the airline followed by the flight number. For example, to see the status for United Airlines flight 11 search for "United 11."

**example:**

united 11

Google Search

Google has added more search by number features:

- **UPS tracking numbers - example search:**  
"1Z9999W999999999"
- **FedEx tracking numbers - example search:**  
"999999999999"
- **USPS tracking numbers - example search:** "9999 9999  
9999 9999 9999 99"
- **Vehicle ID (VIN) numbers - example search:**  
"AAAAA999A9AA99999"
- **UPC codes - example search:** "073333531084"
- **Telephone area codes - example search:** "650"
- **Patent numbers - example search:** "patent 5123123".  
*Remember to put the word "patent" before your patent number.*
- **FAA airplane registration numbers - example search:**  
"n199ua". *An airplane's FAA registration number is typically printed on its tail.*
- **FCC equipment IDs - example search:** "fcc B4Z-34009-PIR".  
*Remember to put the word "fcc" before the equipment ID.*

#### More Google Web Search Features

Google has many special features to help you to find exactly what you're looking for. Go here to find more information on each feature listed below: <http://www.google.com/help/features.html>

- **Cached Links - View a snapshot of each page as it looked when we indexed it.**
- **Calculator - Use Google to evaluate mathematical expressions.**
- **Definitions - Use Google to get glossary definitions gathered from various online sources.**
- **File Types - Search for non-HTML file formats including PDF documents and others.**
- **Froogle - To find a product for sale online, use Froogle - Google's product search service.**
- **I'm Feeling Lucky - Bypass our results and go to the first web page returned for your query.**
- **Local Search - New! - Search for local businesses and services.**

- **News Headlines - Enhances your search results with the latest related news stories.**
- **PhoneBook - Look up U.S. street address and phone number information.**
- **Search By Number - Use Google to access package tracking information, US patents, and a variety of online databases.**
- **Similar Pages - Display pages that are related to a particular result.**
- **Site Search - Restrict your search to a specific site.**
- **Spell Checker - Offers alternative spelling for queries.**
- **Stock Quotes - Use Google to get stock and mutual fund information.**
- **Street Maps - Use Google to find U.S. street maps.**
- **Travel Information - Check the status of an airline flight in the U.S. or view airport delays and weather conditions.**
- **Web Page Translation - Provides English speakers access to a variety.**

#### **New Search Features:**

- **GOOGLE for Mobile Devices - If you have a mobile device and need to Google something, they released a mobile page you can navigate to via your Palm, Pocket PC or phone. Just load <http://www.google.com/xhtml> in your browser and it will come up.**
- **PICASSA 2 - A great idea for picture organization on your computer. (As well as sharing photos with others, and allows you to edit the quality of photos as well. <http://google.picasa.com/>**
- **GOOGLE - Desktop Search - Google Desktop Search is how our brains would work if we had photographic memories. It's a desktop search application that provides full text search over your email, computer files, chats and web pages you've viewed. By making your computer searchable, Desktop Search puts your information easily within your reach and frees you from having to manually organize your files, emails and bookmarks. After you download Google Desktop Search, the application creates an index of all your searchable information and stores it on your computer, allowing you to search your personal items as easily as you search the Internet using Google. Unlike traditional computer search software that updates once a day, Desktop Search updates continually for most file types; when you receive a new email in Outlook, for example, you can search for it within seconds. To download and read more information on this feature go to: <http://desktop.google.com/about.html>**

**Google Earth - Mapping/Image search - Want to know more about a specific location? Dive right in -- Google Earth combines satellite imagery, maps and the power of Google Search to put the world's geographic information at your fingertips. Some of the features include Visually fly from space to your neighborhood, type in an address and zoom right in, Search for schools, parks, restaurants, hotels, get driving directions And you can tilt and rotate the view to see 3D terrain and buildings. In addition, you can save and share your searches and favorites...even add your own notations. This is a great resource for exhibits, school projects... and just for fun! ..and the best news? It is free. This feature is found at: <http://earth.google.com/> ###**

**Janabeth F. Taylor, R.N., R.N.C. has a degree in Nursing from Oklahoma State University of Oklahoma Law Center. She was a nursing instructor for 10 years and has been a medical legal consultant since 1990. Ms. Taylor is currently President/Owner of Attorney's Medical Services, Inc. in Corpus Christi, TX. In 2002, she was named the Association of Trial Lawyers of America's Paralegal of the Year. She provides litigation support for attorneys across the United States and specializes in case reviews and Internet information resources.**

*Her website is <http://www.attorneysmedicalservices.com> and her e-mail address is [jana@attorneysmedicalservices.com](mailto:jana@attorneysmedicalservices.com)*

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## DISTINGUISH BETWEEN *THAT* AND *WHICH*



*Reprinted with permission.*

By Judge Mark P. Painter

Use *that* restrictively and *which* nonrestrictively. (In Commonwealth England, *which* is used both ways.) That is, if the clause can stand alone, it is preceded by *which*. If it cannot stand by itself, *that* is appropriate. Consider the following examples:

The law *that* we follow is just.

The law, *which* is of ancient origin, is the one that we follow.

The court's role is limited to determining the constitutionality of the specific laws *that* the legislature enacts.

But this court can only deal with what we have before us, *which* is an unconstitutional law.

The failure to distinguish appropriately is a common error and one that (not which) I have been guilty of on occasion. But I now have it down, I think. Take my word that the distinction is important.

The easy way to remember is that *which* is preceded by a comma; *that* is not.

Some editors have a penchant for removing unnecessary *thats*. But it is usually better to keep them in, unless you can remove them without opening up any possibility of confusion.

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*Mark Painter has been a judge on the Ohio First District Court of Appeals for 12 years, after 13 years on the Hamilton County Municipal Court. He has taught as an Adjunct Professor at the University of Cincinnati College of Law since 1990. Judge Painter has authored 340 nationally published decisions, 105 legal articles, and 5 books, including The Legal Writer: 40 Rules for the Art of Legal Writing. It is available from <http://books.lawyersweekly.com>.*



**PROGRAM**

***Collaborative Family Law***

**Presenters: Caren Jenkins, Esq., Kim Surratt, Esq., and Linda Peterson, Ph.D.**

**DATE: Thursday, November 15, 2007**

**REGISTRATION: 11:30**

**PROGRAM: 12:00 to 1:00 p.m.**

**PLACE: Carson Valley Museum, Gardnerville**

**PROGRAM**

***What You Forgot – Judge David Gamble on Evidence***

**Presenters: Hon. David Gamble**

**DATE: Thursday, December 20, 2007**

**REGISTRATION: 11:30**

**PROGRAM: 12:00 to 1:00 p.m.**

**PLACE: Donegal Room, Carson Valley Inn, Minden**

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**Please note the NEW Location of this month's program:  
CARSON VALLEY MUSEUM , Downstairs Meeting Room, Free  
on-site parking.**

**Lunch Catered by *The Full Belly Deli*, Gardnerville**



**Carson Valley Museum  
1477 U.S. Highway 395 N  
Gardnerville, Nevada 89410  
Phone: (775) 782-2555**

<http://www.jdsupra.com/post/documentViewer.aspx?fid=c621a0e0-1719-44b4-8b89-e5803c9b4da1>  
**DCBA Membership Application**

**Date:** \_\_\_\_\_  
**Name:** \_\_\_\_\_  
**Mailing Address** \_\_\_\_\_

\_\_\_\_\_  
**Employer:** \_\_\_\_\_  
**Position Title:** \_\_\_\_\_  
**Home Phone:** \_\_\_\_\_  
**Business Phone:** \_\_\_\_\_  
**Fax:** \_\_\_\_\_  
**Preferred e-mail address:** \_\_\_\_\_

**Your Area of Emphasis:**  
 Criminal  
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## **The Chicken or the Client? Lawyers can't focus on their cases to the exclusion of those who bring them**

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By Gerald Hecht, Esq.

**There's an old tale of a poor widow who saves for months to buy a chicken for her family for Sabbath dinner. While preparing to cook the chicken, she accidentally drops it on the floor.**

**She takes the chicken to the village rabbi and asks him if the chicken is still fit to eat. The rabbi thoroughly inspects the chicken, looking inside it, holding it up to the light, turning it over. After an hour of watching the rabbi do this, the widow exclaims, "Rabbi, I'm the one with the problem, not the chicken."**

**I repeat this story frequently to clients, friends and family members, because it succinctly summarizes what we do as lawyers. Unlike the rabbi, whose focus was entirely on the chicken to the exclusion of the troubled widow, we attorneys focus exclusively on the widow.**

**Doctors, dentists and computer consultants, to stretch the analogy, only deal with the chicken and its problem. The person who houses the bad knee or bad tooth is given short shrift in lieu of the professional's target goal to remedy the ailment.**

**Not for us lawyers. The client is the problem, not the lawsuit, or the indictment or the intended transaction. We have to deal with the client before we can deal with the legal problem.**

**When I was a young lawyer, I was petrified of saying to a client: "Give me \$1,000, and I'll solve your problem for you." No more. Not for the pecuniary aspects of the profession, but for the *pas de deux* between lawyer and client; one who is troubled and one who is a healer.**

**People frequently ask, "What kind of lawyer are you?" (I sardonically answer "A good one"), or "What kind of work do you do?" and my initial response is "Forget television and the movies, and I'll tell you." It is a constant battle between what we are perceived as doing and what happened on Court TV last night.**

**The profession has taught me, or at least after 30 years I like to think I've been taught, that reality is far more "real" and interesting than the law on television. As a general practitioner, I help "real people with real problems," and I have adopted that slogan as my**

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**professional credo. And it is a great answer to the inquiry “What kind of law do you practice?”**

**Grappling with the client, and not the chicken, enables the attorney to deal with the divorcing mother of three, the debt-ridden restaurateur and the juvenile offender. Another lawyer once told me, “We all know what the law is—the hard part is finding out what the client is.”**

**The public does understand this: but they just prefer to be entertained by that old razzle-dazzle (like the lawyer in the musical *Chicago*) and ignore the realities of the profession. It is said that people hate lawyers as a group but love their own lawyers.**

**For me and my practice, the proof of that is in the telephone. It rings. People want advice. People send money for that advice. It’s a nice system.**

**I have learned that the system is geared for the lawyer to assist the client, salve their wounds, remediate the problem and to obtain a goal. It’s almost spiritual.**

**But it only works when we don’t confuse the chicken with the client.**

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*Gerald Hecht is the head of a small firm in Danbury, Conn., and a member of the ABA General Practice, Solo & Small Firm Division.*

