



## ALLEGING CHILD ABUSE/NEGLECT IN CHILD CUSTODY CASES: A DOUBLE EDGED SWORD

By Family Court Judge Mathew Harter



You have an initial interview with a prospective client regarding modifying child custody. The client alleges amidst the interview that she believes the child might be subject to abusive/negligent treatment at

the co-parent's residence. What is your advice or next move? Your reaction/non-action thereafter could potentially result in: 1) sanctions; 2) a Child Protective Services ("CPS") complaint against the client; 3) a bar complaint and/or malpractice claim against you; and/or 4) criminal action against both you and/or the client. Those who "dabble" in Family Law, please pay particularly close attention. The timeless legal adage of "*ignorance of the law is no excuse*" is still applicable. *Mayenbaum v. Murphy*, 5 Nev. 383, 384 (1870).

[\(cont'd. on page 3\)](#)

## FOUR MYTHS OF THE BENCH

By Bruce I. Shapiro

This article focuses on recommendations to increase judicial efficiency in the family court system.

**IN THIS ISSUE:**

[ALLEGING CHILD ABUSE/NEGLECT IN CHILD CUSTODY CASES, PAGE 1](#)

[FOUR MYTHS OF THE BENCH, PAGE 1](#)

[COMMITTEE TO REVIEW CHILD SUPPORT GUIDELINES, PAGE 2](#)

[RECOGNITION AND ENFORCEMENT OF DUE PROCESS RIGHTS, PAGE 7](#)

The best rule of thumb for judicial departments is simplicity and expediency. Below are several issues

that have arisen in the court over the years and need clarification.

### **1. Correspondence to the court that is copied to opposing counsel is improper *ex parte* communication.**

Some departments in family court return correspondence from counsel relating to an active case believing this is an improper *ex parte* communication. "*Ex parte*" communication, however, does not prohibit counsel from corresponding with the court, as long as certain guidelines are followed. An advisory opinion from the Attorney General of Nevada dated

[\(cont'd. on page 5\)](#)

## Alleging Child Abuse/Neglect in Child Custody Cases

cont'd. from page 1

### I. Definition of abuse/neglect

“*Abuse or neglect of a child*” includes (a) *physical or mental injury* of a nonaccidental nature, (b) sexual abuse or (c) *negligent treatment or maltreatment* of a child caused or allowed by a person responsible for the welfare of the child under circumstances which indicate that the child’s health or welfare is harmed **or threatened with harm.**”

NRS 432B.020. (Emphasis added.)

NRS 432B.090 sets forth a detailed list of actions which constitute *physical injury*, such as “temporary disfigurement” (e.g., marks from spanking). “*Mental injury*” means an injury to the intellectual or psychological capacity or the emotional condition of a child as evidenced by an observable and substantial impairment of the ability of the child to function within a normal range of performance or behavior.” NRS 432B.070.

“*Negligent treatment or maltreatment*” of a child occurs if a child has been subjected to harmful behavior that is terrorizing, degrading, painful or emotionally traumatic, has been abandoned, is without proper care, control or supervision or lacks the subsistence, education, shelter, medical care or other care necessary for the well-being of the child because of the faults or habits of the person responsible for the welfare of the child or the neglect or refusal of the person to provide them when able to do so.”

NRS 432B.140.

These definitions purposefully have a wide breadth and depth. The safety of a child is a paramount concern of the State. NRS 432.011; *Harrison v. Harrison*, 376 P.3d 173 (2016) (citing NRS 432B).

### II. Duty to report

“[An attorney] who . . . in his or her professional or occupational capacity, knows or has *reasonable cause to believe* that a child has been abused or neglected **shall report** the abuse or neglect of the child to an agency

which provides child welfare services or to a law enforcement agency . . . **not later than 24 hours** after the person knows or has reasonable cause to believe that the child has been abused or neglected.”

NRS 432B.220(1). (Emphasis added.)

Reasonable cause to believe is defined as:

[i]f, in light of all the surrounding facts and circumstances which are known or which reasonably should be known to the person at the time, a reasonable person would believe, under those facts and circumstances, that an act, transaction, event, situation or condition exists, is occurring or has occurred.

NRS 432B.121.

The specific methods of reporting are set forth in NRS 432B.230.

### III. Professional aspects

NRS 432B.225(2)(b) states: “Nothing in this section shall be construed as relieving an attorney from complying with any ethical duties of attorneys as set forth in the *Nevada Rules of Professional Conduct* [‘NRPC’].” A lawyer is expected to comply with the law. NRPC 1.6(b)(6). A lawyer is *required* to reveal information he believes is likely to cause substantial bodily harm. NRPC 1.6(d). Attorneys are provided both civil and criminal immunity *if* a CPS report is made in good faith. NRS 432B.160. This author has astonishingly witnessed attorneys attempt to take the blame for their client’s negligence in this area of law. *Why?!* The client and attorney have separate and distinct reporting duties; neither can absolve the other.

#### Practice Tip:

The simplest way to fulfill each person’s duty is to immediately make the report conjointly at the initial interview via speakerphone. Finally, a judge is tasked with the unfortunate duty to report an attorney for any known misconduct. NCJC 2.15.

### IV. Criminal Act

When there is a *failure to report* by an attorney, it is a *misdemeanor* for the first time and a *gross misdemeanor* for every time thereafter. See NRS 432B.240. Many attorneys further seem oblivious that *unless a case is*

(cont'd. on page 4)

## Alleging Child Abuse/Neglect in Child Custody Cases

*cont'd. from page 3*

*sealed, it is a crime (gross misdemeanor)* to include any information concerning CPS reports and investigations in their motion, which become public record once it is filed. NRS 432B.280; NRS 432B.290(10). As for the prospective client, under NRS 200.508(2):

“A person who is responsible for the safety or welfare of a child pursuant to NRS 432B.130 and who permits or allows that child to suffer unjustifiable physical pain or mental suffering as a result of abuse or neglect or to be placed in a situation where the child may suffer physical pain or mental suffering as the result of abuse or neglect” can result in a gross misdemeanor or even a felony, depending on the level and type of abuse/neglect.

### V. Motions to Modify Custody

Family Court judges have been directed to “not lightly grant applications to modify child custody.” *Ellis v. Carucci*, 161 P.3d 239, 242 (2007). *Adequate* cause to modify custody arises when the moving party presents a *prima facie* case for modification. *Rooney v. Rooney*, 853 P.2d 123 (1993). *Reasonable cause* (defined above) and *probable cause* are synonymous, very low burdens of legal proof. *Ortega v. Superior Court*, 135 Cal.App.3d 244 (1982). A motion to change custody employs an elevated *preponderance of the evidence* burden of proof. *Mack v. Ashlock*, 921 P.2d 1258 (1996). Purely as a legal strategist (mandatory reporting aside), why not begin a process that employs a lower burden of proof and/or have an investigative agency (CPS) assist/build your case for you?

Family Court is a court of equity.

“He who comes into court must do so with clean hands. The clean hands rule is of ancient origin and given broad application. It is the most important rule affecting the administration of justice.”

*Padgett v. Padgett*, 199 Cal.App.2d 652, 656 (1962).

The prospective client can be found with *unclean hands* if the abuse/neglect was never reported, yet included in a filed motion. This scenario is *so pervasive* at

Family Court this author truly believes there is a misconception that filing a motion containing abuse/neglect allegations equates to adequate reporting. Another common excuse is an attorney or party will proclaim *their* unfulfilling, prior experience(s) with CPS. **Please re-read the unambiguous, mandatory reporting requirements.** Filing a custody motion or having a prior, poor experience are **not** delineated exceptions. Ponder for a moment a pure outsider’s perspective. An attorney takes the time and effort to draft a formal motion and file it subject to the obligations in NRCP 11; yet they choose not to abide by the simple, **mandatory** reporting protocol which carries serious professional and/or criminal ramifications? *Simply astonishing!*

### VI. Summation

Once you are aware of circumstances requiring a CPS report, you **must** follow the law whether you ultimately accept the case or not. Carefully advise the client. If the prospective client is improperly advised and fails to report, they may be charged with *failure to protect* and then may come back after you for failing to properly advise. Liability for an attorney in this area is *unquestionably daunting*. However, remember you have sworn a duty to uphold the law. Thus, **always err on the side of caution.**

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**Judge Mathew Harter** is a native Nevadan (Bonanza/UNLV) elected to Department N in 2008. He received his J.D. *Cum Laude* from W. Michigan University, where he served on Law Review, received the *Am Jur Award* for National Moot Court competition and worked at two indigent law clinics. He clerked for Judge G. Hardcastle and then started a solo law practice in 1995 primarily in Family Law.