A legal note from Marshal Willick on whether violation of a Joint Preliminary Injunction can constitute contempt of court, and more generally on appreciation of "place" by the folks collectively making up the justice system.

A split has developed in the family court bench, between a majority who enforce court rules saying that violation of those rules is punishable by contempt, and a handful of dissenters who have decreed that in their departments, the absence of their signature on the underlying document constitutes the equivalent of a "Get Out of Jail Free" card for violators. Given the failure of the bench to agree to enforce meaningful uniform policies, this has created just one more place where the meaning of "substantial justice" varies excessively from room to room.

In this case, the majority appears to have it right, and the jurists believing otherwise should alter their policy – or counsel handed such rulings should take them up and have them reversed.

I. BACKGROUND: WHAT A JPI IS AND WHY IT EXISTS

The joint preliminary injunction, or "JPI," is a creation of the Eighth Judicial District Court, in rules approved by an administrative order of the Nevada Supreme Court. EDCR 5.85(a) provides:

> At any time prior to the entry of a decree of divorce or final judgment and upon the request of either party in a family relations proceeding, a preliminary injunction will be issued by the clerk against both parties to the action enjoining them and their officers, agents, servants, employees or a person in active concert or participation with them from:
>
> (1) Transferring, encumbering, concealing, selling or otherwise disposing of any of the joint, common or community property of the parties or any property which is the subject of a claim of community interest, except in the usual course of business or for the necessities of life, without the written consent of the parties or the permission of the court.
>
> (2) Molesting, harassing, disturbing the peace of or committing an assault or battery on the person of the other party or any child, step-child or any other relative of the parties.
>
> (3) Removing any child of the parties then residing in the State of Nevada with an intent or effect to deprive the court of jurisdiction as to said child without prior written consent of all the parties or the permission of the court.

The joint preliminary injunction is automatically effective against the party requesting it at the time it is issued, and effective upon all other parties upon service. EDCR 5.85(b). By the terms of the rule itself, the injunction is enforceable by ***all*** remedies provided by law, including contempt. *Id*. It remains in effect until a decree of divorce or final judgment is entered or until modified or dissolved by the court. EDCR 5.85(c).

II. A WASHOE COUNTY CONTRAST

In Washoe County, much of the same purpose and subject matter is covered by WDCR 43(2)(b), which provides that an *ex parte* order may be obtained without notice:

> (1) Where the order mutually restrains the parties from transferring, encumbering, concealing, selling or in any way disposing of any of any property, real or personal, whether community or separate, except in the usual course of business or for the necessities of life, without written consent of the parties or the Court.
>
> (2) Where the order mutually restrains the parties from cashing, borrowing against, canceling, transferring, disposing of, or changing the beneficiaries of any insurance coverage, including life, health, automobile, and disability coverage.
>
> (3) Where the order mutually restrains the parties from cashing, borrowing against, canceling, transferring, or disposing of retirements benefits or pension plans held for the benefit (or election for benefit) of the parties or the minor children.
>
> (4) Where a child's health and safety is in danger.
>
> (5) Where such other circumstances exist as the court may find to warrant the issuance of an order without notice.

No hearing is required or permitted for the issuance of a mutual financial restraining order. All other *ex parte* order requests must be heard within ten days of filing.

The Washoe County procedures are more formal, and because they require issuance by a judge necessarily take longer, and therefore almost certainly cost the litigants a bit more. The trade-off is that the conduct prohibited is somewhat more specific, and the formal judicial signature makes it more likely that third parties will respect the orders once issued, reducing the likelihood of motion practice necessary to recover funds or punish the other spouse for having withdrawn them despite the order.

III. THE SOURCE OF THE JUDICIAL CONNIPTION, AND A RECENT EXAMPLE

I am unaware of any written order from any of the dissenters clearly laying out the reasoning behind their refusal to enforce JPI violations by way of contempt sanctions. From comments at bench/Bar meetings, and at hearings, the reluctance appears to be concern that "the awesome power of the State to punish" by means including incarceration is somehow suspect as a matter of Constitutional due process unless there is first a specific court order, signed by a district court judge, clearly spelling out what must be done, or not done, and then a finding that a person subject to the order, after notice, violated its terms.

The root of this judicial dithering appears to be the fact that, unlike other injunctions, a Joint Preliminary Injunction in Clark County is issued automatically, by the Clerk's Office, upon request, while the procedure to enforce such an order is the same as that regarding other types of restraining orders and injunctions.

It is a bit ironic that some of the dissenting judges have given notice that they would be happy to enforce JPIs – so long as the procedure for their issuance set out in the rule is ignored in favor of submitting the JPI to the judge for signature, as in Washoe County. The irony is probably lost on anyone who did not practice family law more than 20 years ago when the JPI rules came into existence, but to drive home the fact that they were intended to ***replace*** precisely the procedure the dissenting judges have announced, the rules originally provided that judges would issue ***no*** temporary restraining order covering any matter contained in a JPI. In other words, the newly-announced proposal is another great leap – backward.

And there are real world effects. I recently completed a case in which the opposing party was one of those hopelessly self-centered and delusional folks that just could not distinguish between what he wanted and what was allowed. During trial, we spent more than an hour just trying to figure out how ***many*** contempt counts were pending for evidentiary hearing, eventually figuring out that four or five had simply been lost in the shuffle of the paperwork and never actually presented for a show-cause order.

One of the counts that did get to hearing concerned the party's decision – despite a JPI – to sell a bunch of the spouse's property at a yard sale during the pendency of the case, obviously without permission or the court's consent, and equally obviously in violation of the JPI provision against "selling or otherwise disposing of any . . . property." When the judge got to that count, he simply announced that no contempt sanction could issue because the judge had not personally signed the JPI form when it was issued, and moved on to the next count.

Now, in that case, it made little practical difference to the outcome – the violating party was found in contempt on a dozen or so other counts and sanctioned accordingly, and one more or less would probably have made little difference. On the facts of that case, it is just not worth doing anything about the ruling. ***However***, that will not always be the case, and the law and policy involved in that analysis and ruling should be examined before some litigant is truly denied substantial justice on the basis of an unsupportable analysis.

IV. MORE THAN JUST JPIS ARE INVOLVED

This analysis is not just about Joint Preliminary Injunctions. The Nevada Rules of Civil Procedure are ***filled*** with specific instances in which rule violations can and should result in contempt sanctions.

For example, NRCP 16.2 requires each party to complete and file a Financial Disclosure Form within 45 days of service of the Complaint. The rule further provides that if a party fails to do so without clear and convincing evidence of "good cause" for that failure to file, a court may treat it as a contempt of court.

The rule is designed to compel prompt and efficient obedience to the process of disclosing information. The Nevada Supreme Court has deemed it the duty of the district court to determine whether the rule has been violated, and to treat that rule violation as a contempt if so found. *See* NRCP 16.2(a)(1)(A)(i).

The dissenters, however, will apparently require an additional (and expensive) round of motion proceedings – first to get the judge's signature on an order telling the violator to actually follow the rule, and then seeking to hold the violator in contempt if he or she still fails to do so.

And some judges persist in the maddeningly time-and-money-wasting process of demanding a round of motion proceedings just to issue an order setting ***another*** hearing to decide whether someone is in fact in contempt of court (instead of using the ex parte, in-chambers review of an application for a contempt motion that was supposed to have been agreed upon by the bench many months ago).

Those judges demanding two – or three – rounds of motion practice before issuing a contempt order don't seem to realize, or at least appreciate, that doing so effectively punishes the innocent and abuses parties who comply with the rules, causing them to expend money and suffer ***months*** of delay on interminable proceedings to get to the point of even seeking relief. And, as explained below, the Constitutional rationalization for this abuse of innocent parties is hollow.

The Summons accompanying Complaints is issued by the Clerk, not a judge. And counsel directly draft and issue subpoenas, pursuant to NRCP 45, which like JPIs are issued by the Clerk under seal of the court; the rule provides specifically that failure to obey a subpoena (regardless of its source of issuance) "may be deemed a contempt of court from which the subpoena issued."

A judicial interpretation that the absence of a judge's signature on such documents is equal to permission to ignore them would only slow down and make even less efficient litigation that does not need either slower speed or greater inefficiency.

V. WHY CONTEMPT IS CONSTITUTIONALLY PROPER FOR A JPI VIOLATION

A. SUPREME COURT JUSTICES ARE JUDGES TOO

The court rules were issued by the Nevada Supreme Court – which rules prescribe (and proscribe) behavior, and mandate that upon a finding that the requirements have been violated, deem such actions or inactions contempt of court. And the Justices of the Nevada Supreme Court unanimously signed the order establishing those rules – ***that*** is the "judicial signature" necessary for any constitutional purpose before a contempt may be established.

To date, there has not been an explicit Nevada Supreme Court opinion stating that the district courts can and should do what that Court's rules tell them to do, but it would be absurd to speculate that the Court would do anything other than hold that the rules it promulgated are enforceable as written.

The Court has already approved the finding, moreover, that a JPI has legal effect, affirming the

unequal distribution of community property based upon a spouse's ***violation*** of a joint preliminary injunction. *Lofgren v. Lofgren*, 112 Nev. 1282, 926 P.2d 296 (1996).

In fact, even in the ***absence*** of an explicit court rule, or a statute, a court has power to punish for contempt; the Nevada Supreme Court has long held that such authority is "inherent" in courts. *See Halverson v. Hardcastle*, 123 Nev. 245, 163 P.3d 428 (2007) (a trial court has the inherent authority to construe its orders and judgments, and to ensure they are obeyed); *Grenz v. Grenz,* 78 Nev. 394, 274 P.2d 891 (1962) (a trial court has the inherent power to construe its judgments and decrees); *Murphy v. Murphy*, 64 Nev. 440, 183 P.2d 632 (1947); *Lindsay v. Lindsay*, 52 Nev. 26, 280 P. 95 (1929); *Reed v. Reed*, 88 Nev. 329, 497 P.2d 896 (1972) (court has inherent power to enforce its orders and judgments); *In re Chartz*, 29 Nev. 110, 85 P. 352 (1907) ("The power of courts to punish for contempt and to maintain decency and dignity in their proceedings is inherent, and is as old as courts are old").

In light of this century of pretty clear authority, the judicial reticence to find that contempt power extends to violation of terms proclaimed by the Nevada Supreme Court, and duly served on a party, seems inexplicable. It is clearly within the power of a court to determine if a particular action is a violation of a preliminary injunction, and what liability or punishment for the action will lie. *Bell v. Bell*, 896 S.W.2d 559 (Tenn. Ct. App. 1994).

What has been delegated by the Nevada Supreme Court to the district courts is the fact-finding function of determining ***whether*** a JPI was properly served, and, if so, whether the terms set out in the JPI were violated, and the discretion upon those two findings to determine whether punishment for contempt is warranted.

What was ***not*** delegated to the district courts was authority to determine whether the Nevada Supreme Court ***could*** decide that the violation of the terms of an approved JPI is a contemptible act. As the condition, violation of which constitutes contempt, has been issued by a superior tribunal, it is not within the province of a district court to determine that the Nevada Supreme Court lacked such authority.

B. AN ANALOGY

NRCP 70 permits a judge to direct the Clerk of the Court to sign a deed or other official document in place of the owning party. It is not an excess of authority for the Clerk to do so: the Clerk obtains the authority by delegation from a tribunal entitled to perform the same act – the district court. Why, then, is it so hard for district court judges to acknowledge that they have the authority (and responsibility) for finding contempts of violations prescribed by a superior authority (the Nevada Supreme Court)?

VI. THE TREATMENT OF SIMILAR LAWS ELSEWHERE

EDCR 5.85 is essentially identical to Arizona's joint preliminary injunction statute (A.R.S. § 25-

315), which likewise directs the clerk of the court to issue a preliminary injunction in all dissolution actions enjoining the parties. The only difference is that Arizona requires the joint preliminary injunction be issued in ***all*** divorce actions, whereas in Clark County it is only issued upon request of a party.

The Ninth Circuit examined the Arizona statute authorizing such injunctions in *Minnesota Mut. Life Ins. Co. v. Ensley*, 174 F.3d 977 (9th Cir. 1999). It approved the injunctions as enforceable, despite the lack of any district court judge's signature: "The Arizona injunction was of a temporary nature, designed to preserve the property of the marital estate and to keep it within the reach of the court." *Id*., citing to *Briece v. Briece*, 703 F.2d 1045, 1047 (8th Cir. 1983). Sanctions for the violation of an injunction are generally administered by the court under the authority of which the injunction was issued.

Obviously, if the Legislative branch can promulgate rules, the finding of violation of which constitute "contempts," a superior ***court*** has the same power. And this is where it is worth reiterating that the rules governing the Eighth Judicial District were enacted by the Nevada Supreme Court. Per the directions of that superior tribunal, it is the task of the district court to determine whether or not a party had been served with notice of a joint preliminary injunction, and violated its terms – and in that event to punish that violation by way of a finding of contempt.

A number of states have similar "automatic" injunctions, restraining the parties in a domestic matter from transferring, encumbering, concealing, selling or otherwise disposing of any of the joint, common or community property, without consent of the parties or the permission of the Court. These States include Arizona, Kansas, Missouri, New York, and Texas. Violation of those injunctions is, almost universally, punishable by contempt sanction. In other words, although a joint preliminary injunction is not signed by a judge, it is enforceable by contempt sanction.

VII. A PROPER SENSE OF PLACE

For a district court to find that it has no contempt power regarding a JPI violation is, in effect, to overrule the Nevada Supreme Court edict finding that such authority exists. This is an act of hubris disguised as, or confused with, humility.

In the parable of the Blind Men and the Elephant, each perceived and announced that he had identified the whole of the creature from the part he touched – the one touching the trunk identified a snake, the one touching the tail identified a rope, the one touching a leg identified a tree, and the one touching a side identified a wall. All were incorrect to so describe the entire elephant.

In precisely the same way, it is arrogant and incorrect for anyone – litigant, lawyer, or judge – to confuse his or her part in the justice system with the whole of it. District court judges – like lawyers and litigants – are cogs in the machine of law, not divinely-inspired living embodiments of Justice, and it is when they lose sight of their place in the process that talk begins of "black robe fever" having taken hold.

In this small example, it means that a district court judge should accept that the assigned role is that of fact-finder – applying tests imposed by a higher authority – and the role is limited to determining whether notice has been given and the rule has been violated, in which case the duty is clear. An assumed role greater or lesser than this task is either unauthorized excess or unwarranted timidity, and in either event improper.

In short, it is simply absurd to argue that a joint preliminary injunction is not enforceable via the district court's contempt power, given that the rule so stating was promulgated and approved by the Nevada Supreme Court. Such a position entails the untenable belief that the Supreme Court lacked either the power or intention for the rules it passed to be enforced by the judges whom it oversees.

VIII. CONCLUSIONS

It is completely within the power of the district court to enforce the terms of a joint preliminary injunction, if violated, by way of an order of contempt. Refusing to do so is an abrogation of the job of district court judge. Lawyers faced with judicial refusal to execute that duty should appeal, or file a petition for writ of mandamus. And judges refusing to do their duty as prescribed by court rule should expect to be reversed, and criticized accordingly.

This discussion also give rise to a few "bigger picture" conclusions.

First, "Substantial Justice" entails ***both*** dealing with individual litigants fairly, ***and*** treating similarly-situated litigants the same way from case to case. The continuing refusal of the family court judges to abide by the majority opinion of their own members as to matters of policy and procedure undercuts such consistent treatment. It is damaging to both the perceived status and actual efficacy of the court as a whole, and therefore also harmful to the litigants, and the Bar.

Second, the variety of procedures and results detailed above highlight that insufficient attention is being paid to the time and money of innocent litigants who comply with the rules. As with so many other matters, a continuous focus on making family practice regarding contempts more efficient, economical, and rational for the ***litigants*** should be part of the daily job of every lawyer, and every judge.

Third, those active in the Family Law Section should consider making JPI practice the next area (after Financial Disclosure Forms) where State-wide uniformity would be a useful step in furthering the goal of integrating family practice throughout Nevada. With conscientious effort, the era in which it is heard in Las Vegas that "Practicing law in Reno is like practicing law on Mars" [and the reverse is heard in Reno] could be relegated to the past, as it should be – in our lifetimes.

IX. QUOTES OF THE ISSUE

"Humility leads to strength and not to weakness. It is the highest form of self-respect to admit mistakes and to make amends for them."

– John (Jay) McCloy

"Sometimes only a change of viewpoint is needed to convert a tiresome duty into an interesting opportunity."
– Alberta Flanders

"All the world's a stage,
And all the men and women merely players:
They have their exits and their entrances;
And one man in his time plays many parts . . . ."
– Shakespeare, *As you Like It*

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