▸*Changes to HIPAA regulations discussed in detail on Page 3.*

▸*2005 Nevada legislation update summarized on Page 3.*

▸*Nevada Legal Roundup: new cases discussed on Pages 2 & 3.*

NEVADA LAW Bulletin

ISSUE 1 | VOLUME 2 | SPRING 2006

ETS SEMINAR!

- **ETS will be presenting another Employment Law Seminar at the Peppermill on May 11, 2006.**
- **Additional information regarding the Spring 2006 Employment Law Seminar appears on Page 4 of the *Nevada Law Bulletin.***

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ERICKSON, THORPE & SWAINSTON, LTD.

The Nevada Law Bulletin is a review of legal news and developments affecting the Nevada law firm and our clients.

Nevada's Short Trial Program Significantly Expanded

The Nevada Supreme Court has significantly expanded the scope what is commonly known as the "Short Trial Program" (STP). The STP was initially adopted in 2000 as a form of alternative dispute resolution authorized by the Nevada Legislature in lieu of arbitration.

Under the Nevada Arbitration Rules, cases with a possible value (exclusive of considerations of liability) of less than $40,000 are assigned to mandatory but non-binding arbitration or mediation. Now all appeals (technically, "trials de novo") from cases in the arbitration program, as well as cases not successfully resolved at mediation, will be assigned to the STP for binding resolution. Parties may also elect to have cases not otherwise subject to Nevada's arbitration or mediation programs assigned to the STP.

What is the STP? Basically, it is an abbreviated and expedited version of traditional civil litigation. Parties are still entitled to a trial by jury, the size of which is set at four persons but may be expanded to six or eight. The scope of discovery, however, is restricted and the admissibility of all exhibits is determined in advance of trial. Expert reports are permitted – and encouraged – in lieu of live testimony. Continuances are frowned upon.

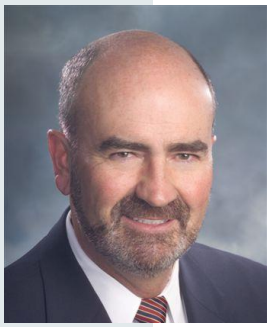
Short trials are conducted by either the district judge assigned the case, a retired senior judge or a qualified attorney appointed as a judge *pro tempore*. Two ETS attorneys, Tom Beko and Bill Cobb, have been appointed as *pro tem* judges. The trials – which must be conducted within 120 days of assignment to the STP – are limited to *one day* with each side allowed a maximum of *three hours* to present its case. The results are binding but subject to appeal.

The STP has enjoyed great success in Clark County (Las Vegas) where courtroom availability is at a premium, and we expect to see similar results in the north. Even though the courts are not as congested here as in the south, the STP affords litigants the opportunity to effect a more expeditious and less expensive means of formally concluding a disputed case.

The attorneys at ETS intend to encourage our clients, in appropriate cases, to pursue Short Trials at the commencement of a case in order to avoid the arbitration process altogether. We anticipate that by doing so a significant cost savings will likely be achieved.

ETS Attorneys in the News

An article on defending informed consent issues in health care malpractice claims written by **William Cobb**, senior partner at Erickson, Thorpe & Swainston, was recently published in the *Defense Counsel Journal*. The *Journal* is a publication of scholarly writings on the law, particularly from the standpoint of the practitioner and litigator in the civil defense and insurance fields, published by the International Association of Defense Counsel.



Bill Cobb

Brent Ryman, associate ETS attorney, has joined the editorial board of *Nevada Lawyer*, a publication of the Nevada State Bar.

Brent Ryman

Ryman, who in addition to being an attorney holds a journalism degree from Bowling Green State University, previously worked as a reporter in Northwest Ohio. Ryman will serve for three years on the editorial board of the monthly publication, which has a circulation of approximately 8,500 Nevada attorneys plus additional subscribers.

Nevada Legal Roundup:

A review of recent decisions shaping Nevada law

Wood v. Safeway

The Nevada Supreme Court recently clarified an important standard, allowing a court to more easily dispose of frivolous suits on motion, while also addressing several key issues of importance to employers. In *Wood v. Safeway*, 121 P.3d 1026 (2005), a mentally handicapped supermarket employee was repeatedly raped while working at the store premises, by a night janitor employed by a cleaning subcontractor of that store. These rapes resulted in pregnancy and the birth of a healthy child.

The employee's guardian brought suit both against the market and against the cleaning company sounding in various claims and species of negligence. The lower court granted summary judgment to both defendants and the Supreme Court affirmed.

To support this affirmation, the Supreme Court disposed of the "slightest doubt" standard previously used in summary judgment motions, whereby any metaphysical doubt as to the operative facts could preclude summary judgment. The Court instead adopted the federal summary judgment standard, which is more favorable to defendants seeking dismissal.

For practical purposes, the decision means many more legal suits may now be decided on motion, precluding the need for a full blown trial.

Also of interest to employers, the Court found that the victim's injuries fell within the coverage of the Nevada Industrial Insurance Act ("NIIA") because the victim's employment had contributed to and increased the risk of the assaults, thus rendering Safeway immune from negligence claims. The Court further found that since the cleaning subcontractor could not reasonably foresee its employee's intentional conduct (he previously had a clean record and there were no complaints regarding his behavior) it could not be held liable for the assaults under the Nevada law. Finally, the Court also found that the rapist/employee's actions were an intervening and superseding cause relieving the cleaning contractor from negligence liability.

While the *Wood* decision strengthens the immunities afforded employers by the NIIA and renders motion practice more favorable to defendants, it should also alert employers to the importance of screening procedures and the careful monitoring of employee behavior for any indication of a violent or sexually abusive history. Without a reasonably foreseeable basis to anticipate an employee's assault on another person, such employer should be left in a strong defensive position from a victim's suit.

Shuette v. Beazer Homes Holding Corp.

The *Beazer Homes* decision involved a construction defect case where myriad defects were alleged to be spread over more than 200 single-family residences. On appeal, the Nevada Supreme Court held that class action certification is inappropriate where single-family residence construction defect litigation raises diverse, individualized claims and defenses. In such cases, the Court stated, the class action certification requirements generally cannot be met. The Court also held that attorneys fees constitute an element of damages in construction defect cases that are to be determined by the court.

The *Beazer Homes* decision is widely considered a victory for the construction defect defense bar because the Court now requires lower courts to make a detailed factual inquiry into whether

construction defect litigation is appropriate for a class action. However, the true importance of this decision will only be determined as the lower courts review future class actions, including those in which ETS attorneys are involved, and decide whether to allow plaintiffs to proceed as a group or forces them to continue on their own.

New HIPAA Regulations Impact Small Businesses

The Health Insurance Portability and Accountability Act of 1996 (HIPAA) contains provisions intended to change the maintenance and distribution of health care records from a largely paper-based system into the computer system. The goal is to increase the speed and efficiency of the transmission of information for health care providers, insurers, pharmacies and others who need medical files.

Under the new standard, which many employers were required to meet by April 2004, all identifiable health information pertaining to employees required privacy protections. For the information to be disclosed, consent or authorization is required from the employee. This system required all organizations that had health-care related information to secure their documents, forms and employee information privately. The Privacy Rule, as it has become known, was backed by the Secretary of Health and Human Services with the power to impose serious civil and criminal penalties.

The latest round of HIPAA updates enforce the Privacy Rule by adding Security Rules which must be met by all employers – including small businesses – by April 20, 2006.

The new rules require that no personal information will be accessible electronically, whether server, network, wireless or electronic hard-copy, without proper consent or authorization from that individual. The Security Rules also go into detail regarding the transmission of PHI and EPHI to and from health care providers, insurers, pharmacies and others who need medical files. Penalties for noncompliance are the same as the Privacy Rule penalties.

For more information, the attorneys of ETS will field any questions you may have concerning the effects of the Security Rules upon you and your business.

Nevada Legislative Update

The following section is a review of select 2005 legislation passed during the 2005 Regular Session, the provisions of which became effective October 1, 2005:

A.B. 79 (Chapter 32) – This section revises the penalty for contempt of court giving the court the option of requiring a person found in contempt to pay reasonable expenses, including attorney's fees, incurred by a party as a result of the contempt.

A.B. 166 (Chapter 58) – This section revises the formulas relating to offers of judgments in civil actions as to whether a party received a more favorable judgment.

A.B. 468 (Chapter 122) – Of most importance, this measure increases the threshold amount for submitting an action in district court from $40,000 to $50,000. Additional changes were made with regard to short trial procedures. This measure was effective on May 18, 2005.

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ETS Employment Law Seminar 2006

The Spring 2006 ETS Employment Law Seminar will be held May 11, 2006, at the Peppermill Hotel & Casino in Reno, from 1:30 until 4:30 p.m.

Please contact Lori Del Piero at (775) 786-3930, or by email at ldelpiero@etsreno.com to obtain additional information.

We are pleased to announce that the attorneys of ETS will be presenting another Employment Law Seminar, this time on May 11, 2006, at the Peppermill Hotel & Casino in Reno.

The Spring 2006 Seminar will pick up where our Fall 2005 Seminar left off. We will first discuss the top five things an employer can do to protect itself *before* a wrongful termination lawsuit is filed by a disgruntled former employee.

We will be covering the areas where the ADA, the FMLA and workers' compensation law overlap, a topic we were not able to cover in detail last fall. By attending this seminar, you will learn how these important employee benefits are the same, and how they differ. Just because an employee does not have rights under one does not mean that they might not be protected under another.

The Spring 2006 ETS Employment Law Seminar will be by invitation only. Please look for your invitation to arrive during April 2006.

TOPIC #1 – THE BEST DEFENSE IS A GOOD OFFENSE

The Spring 2006 ETS Employment Law Seminar will teach you the five best ways to protect your company from a wrongful termination lawsuit.

TOPIC #2 – DEFINING DIFFERENCES AMONG ADA, FMLA and WORKERS' COMPENSATION

We will present you with information concerning the differing rights covered by these important areas of employee protection.