

OFFICIAL OPINIONS OF THE ATTORNEY GENERAL - 1978

The following opinions have been furnished by this office in response to inquiries submitted by the various state officers and departments, district attorneys and city attorneys.

222 Care of Mentally Ill—(1) Counties of the State of Nevada have certain financial and custodial responsibilities for indigent persons requiring mental health care and treatment under voluntary, emergency, and court-ordered involuntary admissions to mental health facilities. (2) Counties of the State of Nevada have financial and custodial responsibility for indigent persons who no longer require institutional care and treatment at a Division of Mental Hygiene and Mental Retardation facility but who have disabilities which prevent them from obtaining or holding remunerative employment.

CARSON CITY, JANUARY 26, 1978

CHARLES R. DICKSON, Ph.D., *Administrator, Division of Mental Hygiene and Mental Retardation*, 4600 Kietzke Lane, Suite 108, Reno, Nevada 89502

DEAR DR. DICKSON:

You have recently requested an opinion of this office on the following questions.

QUESTION ONE

Under the Nevada Revised Statutes what is the financial and custodial responsibility of the counties of the State of Nevada for voluntary, emergency, and court-ordered involuntary admissions of indigent persons to mental health facilities?

ANALYSIS—QUESTION ONE

[NRS 433.314](#) provides that the Division of Mental Hygiene and Mental Retardation (hereinafter referred to as MH-MR) is the official state agency responsible for developing and administering mental hygiene and mental retardation services. It is also authorized to operate units or subunits for the care, treatment, and training of clients; such units or subunits are “division (MH-MR) facilities” as defined in [NRS 433.094](#). However, Chapter 433A of Nevada Revised Statutes, which governs admissions to mental health facilities, also applies to admissions to private institutions and public facilities where specified in context. “Public facilities” includes county public hospitals and district hospitals. To determine county responsibility for admissions to mental health facilities, it is therefore necessary to review the [NRS chapters relative](#) to care and treatment of mentally ill persons, county hospitals and county hospital districts, and indigent persons; Chapters 433A, 450, and 428, respectively.

There are three types of admissions to mental health facilities in the State of Nevada. They are voluntary, emergency, and court-ordered involuntary. [NRS 433A.120](#).

VOLUNTARY ADMISSIONS

[NRS 433A.140](#) states that persons may apply to any public or private mental health facility in the State for admission as a voluntary client for the purpose of observation, diagnosis, care, and treatment. Concomitantly, applications for voluntary admission may be made to county public hospitals or district hospitals. See Chapter 450, Nevada Revised Statutes.

Although [NRS 433A.140](#), subsection 2, provides in regard to applications for voluntary admissions to an MH-MR facility that the applicant shall be admitted as a voluntary client if an examination reveals the person needs and may benefit from services offered by the facility, there are no specific provisions governing when county hospitals shall admit persons seeking voluntary admission. However, when mental health services are made available by a county, [NRS 244.160](#) provides that the boards of county commissioners have the jurisdiction and power to take care of and provide for the indigent sick of the county as may be provided by law. In addition, [NRS 450.390](#) states that every county hospital supported by public funds and every hospital established under [NRS 450.010](#) to [450.510](#), inclusive, shall be for the benefit of such county or counties and of persons falling sick or injured or maimed within its limits.

Black's Law Dictionary (Rev. 4th ed. 1968) defines "sickness" as, *inter alia*, "any morbid condition of the body (including insanity) which for the time being hinders or prevents the organs from normally discharging their several functions." Insanity comes within the meaning of the term sickness, *Lewis v. Liberty Industrial Life Insurance*, 185 La. 589, 170 So. 4 (1936); *American Nat. Ins. Co. v. Denman*, 260 S.W. 226 (Tex.Civ.App. 1924); *Robillard v. Societe St. Jean Baptiste*, 21 R.I. 348, 43 A. 635 (1899); *McCullough v. Empressman's Mutual Beneficial Assoc.*, 133 Pa. 142, 19 A. 355 (1890).

[NRS 428.010](#) provides that to the extent moneys are appropriated by boards of commissioners, counties shall provide care, support, and relief to the poor, indigent, incompetent, and those incapacitated by age, disease, or accident. Although "incompetent" is not specifically defined in Chapter 428 of the Nevada Revised Statutes, at [NRS 159.019](#) in the chapter on Guardianship it is defined to include "any person who, by reason of mental illness, mental deficiency, advanced age, disease, weakness of mind or any other cause, is unable, without assistance, properly to manage and take care of himself or his property." Additionally, Webster's Third New International Unabridged Dictionary defines "incompetent" as "a person incapable of managing his affairs because of mental deficiency or immaturity."

In order to provide for indigents applying voluntarily for mental health services at county facilities the board of commissioners of the county may proceed under the provisions of Chapters 428 or 450 of Nevada Revised Statutes. Attorney General's Opinion No. 43, September 15, 1971. Relevant statutes are as follows:

[NRS 428.010](#):

1. To the extent that moneys may be lawfully appropriated by the board of county commissioners for this purpose pursuant to [NRS 428.050](#), every county shall provide care, support and relief to the poor, indigent, incompetent and those incapacitated by age, disease or accident, lawfully resident therein, when such persons are not supported or relieved by their relatives or guardians, by their own means, or by state hospitals, or other state, federal or private institutions or agencies.
2. The boards of county commissioners of the several counties are vested with the authority to establish and approve policies and standards, prescribe a uniform standard of eligibility, appropriate funds for this purpose and appoint agents who will develop rules and regulations and administer these programs for the purpose of providing care, support and relief to the poor, indigent, incompetent and those incapacitated by age, disease or accident.

[NRS 450.410](#), subsection 1:

Supervising boards of county hospitals now or hereafter established in any of the counties of this state are authorized and directed to admit to such county hospital such sick or injured persons as such board may deem proper, and require the payment of reasonable charges and fees therefor; *but the admission of such persons shall not be permitted to interfere with the admission, care and treatment of purely charitable cases.* (Italics added.)

[NRS 450.420](#), subsections 1 and 2:

1. The board of county commissioners of the county in which a public hospital is located shall have power to determine whether or not patients presented to the public hospital for treatment are subjects of charity. The board of county commissioners shall establish by ordinance criteria and procedures to be used in the determination of patient eligibility for medical care as medical indigents or subjects of charity.

2. * * * In fixing charges pursuant to this subsection the board of hospital trustees shall not include, or seek to recover from paying patients, any portion of the expense of the hospital which is properly attributable to the care of indigent patients.

In counties which have established county hospital districts, [NRS 450.700](#) provides:

1. The board of county commissioners of the county in which a district hospital is located shall have power to determine whether or not patients presented to the district hospital for treatment are subjects of charity. The board of county commissioners shall establish by ordinance criteria and procedures to be used in the determination of patient eligibility for medical care as medical indigents or subjects of charity.

2. The board of trustees shall fix the charges for occupancy, nursing, care, medicine and attendance, other than medical or surgical attendance, of those persons able to pay for the same, as the board may deem just and proper. The receipts therefor shall be paid to the county treasurer and credited by him to the district fund.

Although the above statutes do not specifically state that counties must provide mental health care services to indigent persons when not provided by state hospitals or other state, federal, or private institutions, they do disclose that once a county hospital or district hospital makes mental health care services available to members of the public who can pay the reasonable charges they must also be made available to indigent persons. The admission of persons who can pay for the reasonable charges and fees shall not interfere with the admission, care and treatment of persons who are indigent or subject of charity as determined by the board of county commissioners. If a county public hospital or district hospital offers mental health services which include observation, diagnosis, care, and treatment and the person seeking voluntary admission otherwise qualifies, care and treatment cannot be refused because the person is indigent or a subject of charity. In such instances, the costs of care would be borne by the county pursuant to Chapter 428 or Chapter 450 of Nevada Revised Statutes.

EMERGENCY ADMISSIONS

In regard to emergency admissions, [NRS 433A.150](#), subsection 1, provides that a mentally ill person may be detained in a public or private mental health facility or

hospital as an emergency admission for evaluation, observation, and treatment. For the purposes of emergency admission a “mentally ill person” is one “who has demonstrated observable behavior the consequence of which presents a clear and present danger to himself or others, or presents observable behavior that he is so gravely disabled by mental illness that he is unable to maintain himself in his normal life situation without external support.” [NRS 433.194](#).

Again, the mentally ill person may be detained in the county hospital or district hospital as an emergency admission. When a mentally ill person is detained in the county hospital under such admission, the county may proceed under Chapter 428 of Nevada Revised Statutes or Chapter 450 of Nevada Revised Statutes, specifically [NRS 450.420](#), subsection 3, which provides for payment of costs of emergency admissions as follows:

The county is chargeable with the entire cost of services rendered by the hospital and any salaried staff physician or employee to any person admitted for emergency treatment, including all reasonably necessary recovery, convalescent and followup inpatient care required for any such person as determined by the board of trustees of the hospital, but the hospital shall use reasonable diligence to collect the charges from the emergency patient or any other person responsible for his support. Any amount collected shall be reimbursed or credited to the county.

COURT-ORDERED INVOLUNTARY ADMISSIONS

Following an emergency admission, proceedings for court-ordered involuntary admission may be commenced by filing a petition with the clerk of the district court. [NRS 433A.210](#). Court proceedings for involuntary admission may also be commenced following a voluntary admission or in instances where there is no prior emergency or voluntary admission by filing a petition with the district court of the county where the person to be treated resides. [NRS 433A.200](#).

[NRS 450.470](#) provides that if the county hospital is located in a county seat, the board of hospital trustees is required to provide a room for the detention and examination of persons alleged to be mentally ill and who are to be brought before a district court judge to determine whether the person is to be involuntarily admitted under court order as provided in Chapter 433A, Nevada Revised Statutes.

When a person is detained for the purpose of court-ordered involuntary admission, the statutes are specific as to who bears the financial responsibility for expenses of proceedings, the expenses of hospitalization prior to court-ordered admission, and the expenses of hospitalization of a person released without court-ordered admission.

The entire expenses of proceedings for court-ordered involuntary admission is to be paid by the county in which the application is filed unless the person to be admitted last resided in another county, in which case the county of residence is responsible. [NRS 433A.260](#).

Whether the detention and examination of a person for the purpose of court-ordered admission is at an MH-MR facility or at a county hospital pursuant to [NRS 450.470](#), the expenses of hospitalization prior to court-ordered admission or where there is a release without court-ordered admission are to be borne by the county. The county may then recover all or any part of the expenses from certain persons. [NRS 433A.670](#), which governs the payment of such costs, is as follows:

1. The expenses of hospitalization of:
 - (a) A mentally ill person prior to court-ordered admission; or
 - (b) A person who is admitted to a hospital pursuant to this chapter and released without court-ordered admission, shall be paid by the county in which such person resides, unless voluntarily paid by such person or on his behalf.

2. The county may recover all or any part of the expenses paid by it, in a civil action against:
 - (a) The person whose expenses were paid;
 - (b) The estate of such person; or
 - (c) A relative made responsible by [NRS 433A.610](#), to the extent that financial ability is found in such action to exist.

SERVICES FURNISHED TO INDIGENT
CLIENTS OF MH-MR FACILITIES

In addition to the custodial and financial responsibilities enumerated above, the county may be responsible for certain services furnished to indigent clients of MH-MR facilities, unless the services are provided by the staff of the MH-MR facility or the MH-MR administrator or his designee has authorized the expenditure of state funds for such purpose.

[NRS 433.374](#) states:

The state is not responsible for payment of the costs of care and treatment of persons admitted to a facility not operated by the division except where, prior to admission, the administrator or his designee authorizes the expenditure of state funds for such purpose.

[NRS 433A.680](#) states:

The expense of diagnostic, medical and surgical services furnished to a client admitted to a division mental health facility by persons not on the staff of the facility, whether rendered while the client is in a general hospital, an out-patient or a general hospital or treated outside any hospital, * * * in the case of an indigent client or a client whose estate is inadequate to pay such expenses, shall be a charge upon the county from which the admission to the division facility was made, if the client had, prior to admission, been a resident of such county. The expense of such medical and surgical services shall not in any case be a charge against or paid by the State of Nevada, except when in the opinion of the administrative officer of the division mental health facility to which the client is admitted payment should be made for nonresident indigent clients and funds are authorized pursuant to [NRS 433.374](#).

Although 433A.680 does not specifically state that in the case of indigent clients counties shall be responsible for payment of physicians' services, as distinguished from hospital services, the language of the statute including "diagnostic, medical and surgical services" would include physicians' fees.

CONCLUSION—QUESTION ONE

It is the opinion of this office that pursuant to Chapters 433A, 450, and 428 of Nevada Revised Statutes, the counties of the State of Nevada have the financial and custodial responsibilities as indicated in the foregoing analysis for indigent persons requiring mental health care and treatment under voluntary, emergency, and court-ordered involuntary admissions to mental health facilities.

QUESTION TWO

What is the financial and custodial responsibility of the counties of the State of Nevada for indigent persons discharged from Division of Mental Hygiene and Mental Retardation facilities?

ANALYSIS—QUESTION TWO

Regarding indigent persons discharged from MH-MR facilities, [NRS 433A.400](#) is applicable. Subsections 1 and 2 provide:

1. An indigent resident of this state discharged as having recovered from his mental illness, but having a residual medical or surgical disability which prevents him from obtaining or holding remunerative employment, shall be returned to the county of his last residence. A nonresident indigent with such disabilities shall be returned to the county from which he was involuntarily court-admitted. The administrative officer of the mental health facility shall first give notice in writing, not less than 10 days prior to discharge, to the board of county commissioners of the county to which the person will be returned.

2. Delivery of the indigent resident defined in subsection 1 shall be made to an individual or agency authorized to provide further care.

Under [NRS 433A.400](#), counties have financial and custodial responsibility under certain circumstances for an indigent resident or nonresident who is discharged from an MH-MR facility and has recovered from “mental illness” as defined in [NRS 433.164](#) or is no longer a “mentally ill person” as defined in [NRS 433.194](#). If the person is a state resident who has a residual medical or surgical disability which prevents him from obtaining or holding remunerative employment, he is to be returned to the county of last residence and delivered to an individual or agency authorized to provide further care. If the person is a nonresident with such disabilities, he is to be returned to the county from which he was involuntarily court-admitted.

[NRS 433A.400](#) does not specifically address itself to the situation where an indigent person no longer requires institutional care and treatment at an MH-MR facility and should be discharged but who, nevertheless, suffers from some mental deficiency which makes it difficult to obtain or hold remunerative employment. However, a statute should be construed so as to avoid absurd results, *Western Pacific R.R. v. State*, [69 Nev. 66](#), 241 P.2d 846 (1952), in light of its purpose, *Berney v. Alexander*, [42 Nev. 423](#), 178 P. 978 (1919). A construction of the statute effectuating its purpose requires that such person not be denied the protection provided in [NRS 433A.400](#) to those suffering from “residual medical or surgical disability.” A construction otherwise would effectively discriminate against indigent persons with a residual mental disability or persons with a combination of disabilities which prevents remunerative employment, i.e., medical-mental or surgical-mental. The discrimination would be a direct derogation of the purpose of the welfare statutes to provide income support, health care, social services, educational services, and housing to the people of the State. Such care is also in accordance with [NRS 428.010](#), which states that every county shall provide for the poor, indigent, incompetent, and incapacitated when not supported or relieved by state hospitals or other institutions. The statute’s provisions would therefore apply to and the county would be responsible for indigent persons discharged as inappropriate for further institutional care in an MH-MR facility but who are poor, indigent, incompetent, or incapacitated.

CONCLUSION—QUESTION TWO

Under [NRS 433A.400](#) counties of the State of Nevada have the financial and custodial responsibilities as indicated in the foregoing analysis for indigent persons who no longer require institutional care and treatment at an MH-MR facility but who have disabilities which prevent them from obtaining or holding remunerative employment.

Respectfully submitted,

ROBERT LIST, *Attorney General*

By EMMAGENE SANSING, *Deputy Attorney General*

223 Planning Functions and Water Permits—In formulating master plans or approving or rejecting proposed subdivisions, local authorities have the power to make their own independent determination as to the availability of water. The State Engineer may disapprove a tentative subdivision map on the basis of water quantity, or may approve or conditionally approve a tentative subdivision map for the use of less water than the amount available for development under a permit, provided conditions warrant the reduction. The State Engineer has the authority to regulate the actual use of water diverted under the permission conferred by a permit and, under the necessary conditions, may make such rules, regulations, and orders as are deemed essential for the welfare of the area involved.

CARSON CITY, March 28, 1978

THE HONORABLE LARRY R. HICKS, *Washoe County District Attorney*, P.O. Box 11130,
Reno, Nevada 89520

Attention: LARRY D. STRUVE, *Chief Civil Deputy*

DEAR MR. HICKS:

You requested advice on four questions pertaining to the authority of the Washoe County Board of Commissioners and the State Water Engineer, respectively, to make planning decisions based upon water availability, particularly in light of water permits previously issued by the State Engineer. Your first two questions may be considered together and may be summarized as follows:

QUESTIONS ONE AND TWO

In adopting a master plan, is the board of county commissioners bound by the determination of the State Engineer as to the amount of water that may be subject to appropriation through water permits, and in approving or disapproving subdivisions, may the board of county commissioners make an independent determination of water availability or is it bound by the State Engineer's water permits concerning water appropriation?

ANALYSIS OF QUESTIONS ONE AND TWO

Chapters 533 and 534 of Nevada Revised Statutes grant authority to the State Engineer to determine the appropriation of water in the State for the beneficial use of our citizens. For this purpose, the State Engineer may issue water permits based upon his determination of the availability of water. [NRS 534.110](#), subsection 3. However, Chapter 278 of Nevada Revised Statutes vests certain planning authority in the board of county commissioners, particularly with respect to subdivisions. [NRS 278.160](#) provides:

1. The master plan, with the accompanying charts, drawings, diagrams, schedules and reports, shall include such of the following subject matter or portions thereof as are appropriate to the city, county or region, and as may be made the basis for the physical development thereof:

* * *

(b) **Conservation Plan.** For the conservation, development and *utilization* of natural resources, including *water and its hydraulic force, underground water*, water supply, forests, soils, rivers, and other waters, harbors, fisheries, wildlife, minerals and other natural resources * * *. (Italics added.)

* * *

(f) **Population Plan.** An estimate of the total population *which the natural resources of the city, county or region will support on a continuing basis without unreasonable impairment.* (Italics added.)

With respect to subdivision approvals, [NRS 278.349](#), subsection 3(b), provides that a governing body shall consider:

* * * *the availability of water which meets applicable health standards and is sufficient for the reasonably foreseeable needs of the subdivision.* (Italics added.)

In short, the Legislature has particularly enjoined upon the county commissioners the duty of insuring that the natural resources of the county, including ground water and water supply in general, are not unreasonably impaired.

These chapters give the State Engineer and boards of county commissioners, respectively, the authority to make determinations on water availability. None of these chapters, however, place the State Engineer or boards of county commissioners under the authority of the other with respect to such determinations.

It should be noted that Chapter 278 was enacted after Chapters 533 and 534 were passed by the Legislature. The Legislature in enacting a statute must be presumed to be acting with full knowledge of statutes already existing and relating to the same subject. *Ronnow v. City of Las Vegas*, [57 Nev. 332](#), 366, 65 P.2d 133 (1937). One statute is not presumed to impliedly repeal another. *Mengelkamp v. List*, [88 Nev. 542](#), 545-546, 501 P.2d 1032 (1972). Statutes relating to the same subject matter are to be harmonized and each given effect. *State v. Ducker*, [35 Nev. 214](#), 224, 127 P. 990 (1912); *State v. Rogers*, [10 Nev. 319](#), 321 (1875).

Taking these rules of statutory construction into consideration, it is the opinion of this office that Chapters 533 and 534 and Chapter 278 of Nevada Revised Statutes are in full force and effect and each grants the State Engineer and boards of county commissioners, respectively, the independent authority to make determinations pertaining to water availability. Neither is bound by the other. Thus, regardless of the basis for a master plan formulated by local authorities, at least with respect to water availability, the State Engineer has full authority under Chapters 533 and 534 to grant water permits as he sees fit in accordance with the applicable facts available to him. By the same token, the fact that the State Engineer has issued water permits as he sees fit in accordance with the applicable facts available to him. By the same token, the fact that the State Engineer has issued water permits in an area does not bind the hands of the local planning authorities in formulating master plans or approving or disapproving proposed subdivisions based upon their findings as to the availability of water. Their discretion to act in such matters is set forth in Chapter 278 of Nevada Revised Statutes, as noted above.

Obviously, local planning authorities must be prepared to face the consequences of their actions if their determinations are at variance with the State Engineer's. It should be observed here, that if the State Engineer has issued water permits on the basis of his determination of water availability in an area, but the local authorities reject a proposed subdivision solely on the basis of their own determination of the unavailability of such water, the local authorities might be subject to a claim that they acted arbitrarily or capriciously in light of the State Engineer's determinations. However, if the action of the local authorities can be sustained by a judicial finding of insufficient water supply their decision would be upheld.

In this connection, however, it should be noted that the existence of a permit means that water is legally available to the permittee, i.e., that he has permission from the State to divert and use the public waters of the State. Whether water is actually available can be determined for certain only after the well is drilled and pumped. This actual use of water is subject to regulation by the State Engineer as explained below.

CONCLUSION TO QUESTIONS ONE AND TWO

It is the opinion of this office that neither the State Engineer nor a board of county commissioners is bound by the decision of the other with respect to the availability of water. In formulating master plans or approving or rejecting subdivisions, local authorities have the power to make their own independent determination as to the availability of water.

QUESTION THREE

Does the State Engineer have the legal authority to disapprove a tentative subdivision map after having issued a permit to appropriate ground water to the prospective developer, if it is determined that the outstanding permits to appropriate water in the regions in question could result in an over-appropriation of water from the ground water basins?

ANALYSIS OF QUESTION THREE

With respect to water permits previously granted, [NRS 534.110](#), subsection 2(b), and 534.110, subsection 6, authorize the State Engineer to conduct investigations to determine whether ground water supply is adequate to meet the needs of all permittees and to order, if necessary, that water withdrawals be restricted to conform to priority rights. In addition, [NRS 534.120](#), subsection 1, authorizes the State Engineer to make such rules, regulations, and orders regulating the usage of water permits when he finds that the ground water basin is being depleted. The fact that water permits have been granted, therefore, does not mean that the State Engineer is prohibited from restricting the appropriation of water if conditions, in his opinion, warrant such restrictions.

The State Engineer also possesses certain powers under Chapter 278 of Nevada Revised Statutes. Under [NRS 278.355](#), tentative subdivision maps must be submitted to the State Engineer for his approval, disapproval, or conditional approval. Under [NRS 278.373](#) and [278.377](#), subsection 2, the State Engineer must certify final subdivision maps as to water quantity.

CONCLUSION TO QUESTION THREE

It is the opinion of this office that under the authority of [NRS 278.335](#), [278.373](#), and [278.377](#), the State Engineer may disapprove a tentative subdivision map on the basis of water quantity, or may approve or conditionally approve a tentative subdivision map for the use of less water than the amount available for development under the permit held by the subdivider, provided the condition of the resource warrants the reduction.

These actions may be taken even in light of water permits previously granted since with respect to those permits, the State Engineer has the authority, under the necessary conditions, pursuant to [NRS 534.110](#), subsection 2(b), and 534.110, subsection 6, and [NRS 534.120](#), subsection 1, to order restrictions on water withdrawal or to make rules, regulations, and orders regulating the usage of water permits issued.

QUESTION FOUR

After the State Engineer has issued permits to appropriate water in a particular region, does the State Engineer have the legal authority to revoke any such permits prior to the time permit holders have been allowed to prove beneficial use of the water, in the event the actual use of water in a region exceeds the perennial annual recharge in the region?

ANALYSIS TO QUESTION FOUR

Chapters 533 and 534 of Nevada Revised Statutes do not speak in terms of "revocation." Instead the authority given to the State Engineer by Chapters 533 and 534 is the authority to *regulate* the actual use of water diverted under the permission conferred

by a permit. As stated in the previous question, where it appears to the State Engineer that the average annual replenishment to ground water supply may not be adequate to meet the needs of all permittees and vested rights claimants and if in his judgment the ground water basin is being depleted, [NRS 534.110](#), subsection 2(b), and 534.110, subsection 6, and [NRS 534.120](#), subsection 1, authorize the State Engineer to order such restrictions on water withdrawals or make such rules, regulations, and orders as are deemed essential for the welfare of the area involved. Such authority could include an order by the State Engineer to cease and desist pumping water to the extent necessary to protect the resource.

CONCLUSION TO QUESTION FOUR

The State Engineer has the authority to regulate the actual use of water diverted under the permission conferred by a permit. Under the necessary conditions, the State Engineer may make such rules, regulations, and orders as are deemed essential for the welfare of the area involved.

Respectfully submitted,

ROBERT LIST, *Attorney General*

224 Justice and Municipal Courts Lack the Authority to Suspend Sentence and Grant Probation—Since there can be no implied powers in courts of limited jurisdiction and the Nevada Constitution limits authority to suspend sentence and grant probation to district courts, justice courts and municipal courts lack authority to suspend sentences or to grant probation.

CARSON CITY, March 16, 1978

THE HONORABLE WILLIAM R. BEEMER, *Justice of the Peace, Reno Township*, Washoe County Courthouse, Room 212, Reno, Nevada 89510

DEAR JUDGE BEEMER:

This is in response to your request for an opinion concerning the power of justice courts and municipal courts of Nevada to suspend sentences and grant probation.

QUESTIONS

Do justice courts or municipal courts have the power to suspend sentences and grant probation? Do these courts obtain such power by virtue of the provisions of [NRS 201.050](#)?

ANALYSIS

In addressing the questions presented, it must be recognized that the Legislature can validly confer powers upon courts only if those powers are not in derogation of a constitutional provision. (20 Am.Jur.2d Courts, § 91.) Pertinent provisions of the Nevada Constitution provide:

The Judicial power of this State shall be vested in a court system, comprising a Supreme Court, District Courts, and Justices of the Peace. The Legislature may also establish, as part of the system, Courts for municipal purposes only in incorporated cities and towns. (Art. 6, Section 1.)

Provision shall be made by law prescribing the powers[,] duties and responsibilities of any Municipal Court that may be established in pursuance of

Section One, of this Article; and also fixing by law the jurisdiction of said Court so as not to conflict with that of the several courts of Record. (Art. 6, Sec. 9.)

A review of the municipal charters of the several Nevada cities confirms that municipal courts possess no greater authority to suspend sentences and grant probation than do justice courts. Their charters consistently provide for their being established in accord with Nevada Revised Statutes (NRS) Chapter 5 and Chapter 266; that they shall have powers and jurisdiction in the municipality as are provided by law for justices of the peace; and their practice and proceedings shall conform, as nearly as practicable to the practice and proceedings in justice courts in similar cases. See also Attorney General's Opinion No. 64, dated June 16, 1959, where this office stated, "The first of these principles is, of course, the well-established rule that municipal courts are courts of limited or restricted jurisdiction, authorized to exercise only such jurisdiction as has been expressly or specifically granted by applicable law, whether constitutional, legislative, or through a valid municipal ordinance. (See Art. VI, Sections 1 and 9, Nevada Constitution; McQuillin, *Municipal Corporations*, 3rd Edition, Vol. 9, p. 533, § 27.02.)"; and the Nevada Supreme Court decisions of *Meagher v. County of Storey*, [5 Nev. 244](#) (1869), and *In the Matter of the Application of Dixon*, [40 Nev. 228](#), 161 P. 737 (1916), both of which limit the powers of municipal courts.

With these points in mind, we will consider the related power or authority of justice courts.

Early in Nevada's statehood, the jurisdiction of justice courts was addressed by our Supreme Court. In the case of *A. B. Paul & Co. v. W. H. Beegan, et al.*, [1 Nev. 327](#) (1865), the Court noted:

And Section 8, Article VI. [Nevada Constitution] declares that "the Legislature shall determine the number of Justices of the Peace * * *, *and shall fix by law* their powers, duties and responsibilities; * * *." (Emphasis in original.)

[I]f the jurisdiction is not expressly granted to those courts by law, no implication or necessity whatever can confer it upon them. *Id.* at 330.

In a similar context, the Supreme Court in *Paul v. Armstrong*, [1 Nev. 82](#) (1865), stated:

It is an acknowledged rule that courts of justices of the peace are of special and limited jurisdiction. They can take nothing by intendment or implication. They are creatures of the statute, and as they proceed they must move step by step with its requirements, or their acts will be void. *Id.* at 99-100.

Some years later in *Levy & Zentner Co. v. Justice Court*, [48 Nev. 425](#) (1925), the Court noted:

It has been held repeatedly by this and other courts that nothing is presumed in favor of the jurisdiction of courts of limited jurisdiction. *Id.* at 429.

As a related consideration, it is recognized that at common law a trial court had no inherent power or authority to suspend or cancel operation of all or part of its sentence so as to relieve the accused from the suffering imposed. Even when authorized by statute, such statutory power must be strictly construed. See *State v. Eighth Judicial District Court*, [85 Nev. 485](#), 457 P.2d 217 (1969); *Ex parte United States*, 242 U.S. 27, 37 S.Ct. 72 61 L.Ed. 129 (1916); and *State v. Murphy*, [23 Nev. 390](#), 48 P. 628 (1897).

The existing Nevada Revised Statutes dealing with sentencing expressly provide that a convicted party shall be sentenced to a definite term of imprisonment within the limits prescribed by applicable statutes [[NRS 176.033](#), subsection 1]; the term of

imprisonment designated in the judgment shall begin on the date of sentence [[NRS 176.335](#), subsection 3]; and the defendant must forthwith be committed to the custody of the proper officer, and by him detained until the judgment is complied with [[NRS 176.305](#); See also State v. Pray, [30 Nev. 206](#), 94 P. 218 (1908)].

The authority to suspend sentence of imprisonment and to grant probation by the Nevada court system, was established in 1950 by an amendment to the Nevada Constitution (Article 5, Sec. 14) whereby the Legislature was authorized:

* * * to pass laws conferring upon the *district courts* authority to suspend the execution of sentences, fix the conditions for, and to grant probation, and within the minimum and maximum periods authorized by law, fix the sentence to be served by the person convicted of crimes in said courts. (1949 Statutes of Nevada, p. 684, ratified at the 1950 general election, emphasis added.)

The express authority to suspend sentence of imprisonment and to grant probation was subsequently vested in the district courts by statutory enactment of the Legislature. (1967 Statutes of Nevada, p. 1434 through 1437; see [NRS 176.175](#) et seq.)

A related rule should be noted:

It is settled that affirmative words in a constitution, that courts shall have the jurisdiction stated, naturally include a negative that they shall have no other. Lake v. Lake, [17 Nev. 230 at 238 \(1882\)](#).

A review of Nevada statutes defining the jurisdiction and authority of justice courts ([NRS 4.370](#) and [185.015](#) et seq.) and municipal courts ([NRS 5.050](#) and [266.540](#) et seq.), pertinent provisions of criminal procedure laws (Title 14, [NRS 169.015](#) et seq.), and statutes addressing criminal conduct ([NRS 193.120](#) et seq.) reveals no instance of specific legislative attempts to authorize justice courts or municipal courts to suspend their sentences of imprisonment or to grant probation.

It should also be noted that there was a recent joint resolution of the Nevada Legislature, to amend the Constitution (Article 5, Sec. 14) to permit the Legislature to enact laws enabling courts inferior to district courts to suspend sentences and grant probation. (Senate Joint Resolution No. 10 of the 57th Session, 1975 Statutes of Nevada, p. 1883). This constitutional amendment was defeated in the 1976 general election.

In keeping with the foregoing, it is clear that the Constitution and Statutes of Nevada grant the authority to suspend sentences imposed and to grant probation only to district courts.

CONCLUSION

Since there can be no implied powers in courts of limited jurisdiction and the Nevada Constitution only authorizes the Legislature to grant judicial authority to suspend the execution of sentences imposed and to grant probation to district courts, justice courts and municipal courts do not have the requisite jurisdictional authority or power to suspend sentences or to grant probation.

Further, to the extent that Nevada statutes relating to DESERTION AND NON-SUPPORT OF WIFE AND CHILDREN ([NRS 201.015](#) to [201.080](#), inclusive) involve suspending a sentence of imprisonment and the granting of probation ([NRS 201.050](#)), justice courts and municipal courts do not have jurisdictional authority to undertake the issuance of such orders.

I trust the foregoing is of assistance.

Respectfully submitted,

ROBERT LIST, *Attorney General*

By D. G. MENCHETTI, *Deputy Attorney General*
Chief, Criminal Division

225 Recall of United States Senator—Article 2, Section 9 of the Nevada Constitution does not authorize the filing of a notice of intent to circulate a petition to recall a United States Senator. The Secretary of State should refuse to file such a notice of intent.

CARSON CITY, June 8, 1978

THE HONORABLE WILLIAM D. SWACKHAMER, *Secretary of State*, 400 W. King Street,
Carson City, Nevada 89710

DEAR MR. SWACKHAMER:

You have requested advice concerning an interpretation of Article 2, Section 9 of the Nevada Constitution and Chapter 306 of Nevada Revised Statutes.

FACTS

An individual wishes to file with your office a notice of intent to circulate a petition to recall one of Nevada's United States Senators. You state that you wish to know if the State's recall provisions apply to a United States Senator, in order to determine if this notice of intent should be accepted for filing.

QUESTION

Is a United States Senator subject to the recall provisions of Article 2, Section 9 of the Nevada Constitution and its implementing legislation?

ANALYSIS

Article 2, Section 9 of the Nevada Constitution provides, in part, as follows:

Every public officer *in* the State of Nevada is subject, as herein provided, to recall from office by the registered voters of the State, or of the county, district, or municipality, from which he was elected * * *. (Italics added.)

Chapter 306 of Nevada Revised Statutes was enacted to implement this constitutional provision. Such statutory provisions pertaining to recall petitions are intended to safeguard the operations of recall procedures and the failure to comply with such statutory provisions would be fatal to a recall movement. *Fiannaca v. Gill*, [78 Nev. 337](#), 345, 372 P.2d 683 (1962).

[NRS 306.015](#) provides that persons wishing to circulate a recall petition must file a notice of intent with the officer with whom the person sought to be recalled filed his papers for nomination. The notice of intent must be signed by three registered voters who actually voted in the State, or in the county, district, or municipality electing such public officer at the last preceding general election. It must also be verified before the appropriate officer. The notice of intent, after being filed, is valid for 60 days and no petition for recall is valid unless it is filed with the proper officer on or before the expiration of the notice of intent.

There are no cases in Nevada directly interpreting the language of Article 2, Section 9 regarding its applicability to federal officers. However, in the case of *State v. Scott*, [52 Nev. 216](#), 285 P. 511 (1930) the Nevada Supreme Court in passing stated:

By the provisions of section 9, article 2, of the constitution approved and ratified by the people at the general election of 1912, every public officer *of* this state is made subject to recall from office by the qualified electors of the state, or the county, district or municipality from which he is elected. (Italics added.)

In the view of this court, the words “Every public officer in the State of Nevada,” as found in Article 2, Section 9, only refer to public officers of the State. This term is defined as those officers whose positions are created by the constitution and laws of the State of Nevada. See [NRS 281.005](#); *Mullen v. Clark County*, [89 Nev. 308](#), 311, 511 P.2d 1036 (1973). Obviously, federal legislative officers, such as United States Senators, do not occupy positions created by the Constitution and laws of Nevada. United States Senators, of course, occupy positions created by the United States Constitution.

The case which comes closest to this situation is *Santini v. Swackhamer*, [90 Nev. 153](#), 521 P.2d 568 (1974). That case dealt with Article 6, Section 11, a Nevada constitutional provision which prohibits justices of the Supreme Court and district judges from being eligible “to any office” other than a judicial office during the term for which they had been elected or appointed as judges. The Supreme Court noted that the words “any office” could arguably be said to refer not only to state offices, but to federal offices as well. However, after a consideration of state constitutional history as well as case law dealing with the right of states to control the election of federal officers under the United States Constitution, the Nevada Supreme Court concluded that this language could apply only to state officers. In reaching this conclusion, the court quoted Justice Story of the United States Supreme Court as follows:

The truth is, that the States can exercise no powers whatsoever, which exclusively spring out of the existence of the national government, which the Constitution does not delegate to them. They have just as much right and no more, to prescribe new qualifications for a representative, as they have for a president. Each is an officer of the Union, deriving his powers and qualifications from the Constitution, and neither created by, dependent upon, nor controllable by the States. It is no original prerogative of State power to appoint a representative, a senator, or President for the Union. Those officers owe their existence and functions to the united voice of the whole, not of a portion of the people. Before a State can assert the right, it must show that the constitution has delegated and recognized it. No State can say that it has reserved what it never possessed. *Santini v. Swackhamer*, *supra* at 155.

In essence, a state cannot add qualifications concerning federal officers and their eligibility to hold office to those which are contained in the United States Constitution, unless the United States Constitution allows the states that right.

Although the *Santini* case deals with the issue of whether a state can add a qualification of eligibility for a person campaigning for federal office, the principle is the same with respect to whether a state can add something to the United States Constitution concerning the removal of federal legislative officers. A review of the United States Constitution, particularly Article I, reveals there is no provision in that document for the removal of federal legislative officers prior to the end of their terms other than Article I, Section 5. This section provides, in part, as follows:

Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behavior, and, with the Concurrence of two thirds, expel a Member.¹

The authority given to the states over federal legislative officers is found in Article I, Section 4 of the United States Constitution, which provides, in part, as follows:

The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof * * *.

¹The impeachment provisions of Article II, Section 4 of the United States Constitution do not apply to members of Congress. 17 Opinions of the U.S. Attorney General 419 (1882).

Therefore, although the states are given the authority to regulate the times, places and manner of holding elections for senators and representatives, there is nothing in the United States Constitution which gives the states the authority to enact laws for the removal of senators and representatives prior to the end of the terms for which they were elected. If, absent a provision to the contrary in the United States Constitution, it is not a prerogative of state power to appoint a United States Senator, it cannot be a prerogative of state power to remove one. Cf. *Santini v. Swackhamer*, supra at 155. Therefore, only the United States Senate or the House of Representatives can remove its own members prior to the end of the terms for which they were elected, pursuant to Article I, Section 5.

Accordingly, it is the opinion of this office that Article 2, Section 9 of the Nevada Constitution and its implementing legislation do not apply to federal officers and the filing of a notice of intent to circulate a petition to recall one of Nevada's United States Senators is not authorized.

The Secretary of State, of course, is in many respects a ministerial officer. As such, he is generally required to file all documents which are in accordance with statutory form and which are required to be filed with him. Thus, the Secretary of State is compelled to accept and file documents which are in proper order. However, the Secretary of State does have discretion in matters of form. Such discretion, though, may not be exercised beyond the face of the documents submitted to him. *State v. Brodigan*, [44 Nev. 212](#), 215, 192 P.263 (1920).

With respect to recall elections, this view on the ministerial and the discretionary powers of a filing officer was observed in *State v. Scott*, supra. That case dealt with the refusal of the Las Vegas City Clerk to accept a recall petition. The court stated:

* * * The clerk is given no authority to consider or determine matters outside of the petition. His discretion is limited to ascertaining if the petition *on its face* is such as the law requires. (Italics added.) *State v. Scott*, supra at 229.

A notice of intent to circulate a recall petition, which must be filed pursuant to [NRS 306.015](#), has three elements concerning its form which the Secretary of State may review for sufficiency. First, it must apply to a public officer in the State of Nevada, which this office interprets as meaning an officer whose position is created by the constitution or laws of the State of Nevada. Cf. *State of Scott*, supra; *Santini v. Swackhamer*, supra. Second, it must be signed by three registered voters who actually voted in the State or in the county, district or municipality electing such officer at the last preceding general election. Third, it must be verified before the appropriate officer. If a notice of intent meets these three requirements, then the Secretary of State is required to perform his ministerial duty and accept the notice of intent for filing.

In the question before us, a federal legislative officer, such as a United States Senator, is not an officer whose position is created by the Constitution or laws of the State of Nevada. Therefore, if anyone attempts to file a notice of intent to circulate a petition to recall a United States Senator, it is the opinion of this office that the notice

would be defective. It would not, on its face, meet the first element concerning proper format required by Article 2, Section 9 of the Nevada Constitution and [NRS 306.010](#). Under these circumstances, it is the opinion of this office that the Secretary of State should refuse to file a notice of intent to circulate a petition to recall a United States Senator.

CONCLUSION

In the opinion of this office, Article 2, Section 9 of the Nevada Constitution does not authorize the filing of a notice of intent to circulate a petition to recall a United States Senator. It is also the opinion of this office that the Secretary of State should refuse to file such a notice of intent after determining from the face of the document that its filing is not permitted by the United States and Nevada Constitutions.

Respectfully submitted,

ROBERT LIST, *Attorney General*

By DONALD KLASIC, *Deputy Attorney General*

226 County Ordinances—The time period specified by [NRS 244.100](#), subsection 1, for final action by a board of county commissioners for the enactment of a proposed county ordinance is directory in nature only. If anything, this will allow the public more time to devote their attention and input into county ordinances before their enactment.

CARSON CITY, June 9, 1978

THE HONORABLE LARRY R. HICKS, *Washoe County District Attorney*, P.O. Box 11130,
Reno, Nevada 89520

Attention: LARRY D. STRUVE, *Chief Deputy District Attorney*

DEAR MR. HICKS:

You requested advice on two questions pertaining to [NRS 244.100](#), subsection 1.

FACTS

Subsection 1 of [NRS 244.100](#) reads as follows:

All proposed ordinances, when first proposed, shall be read by title to the board [of county commissioners], immediately after which at least one copy of the proposed ordinance shall be filed with the county clerk for public examination, *and final action thereon shall be deferred until the next regular meeting of the board;* but in cases of emergency, by unanimous consent of the whole board, final action may be taken immediately or at a special meeting called for that purpose. (Italics added.)

You have stated that some Nevada district attorneys take the position that the emphasized language is directory and that final action on a proposed county ordinance may be taken at a future regular meeting of the county commissioners later than the regular meeting immediately succeeding the introduction of the proposed ordinance. Reasons for such delay include needing time to circulate the proposed ordinance to county department heads for their review and comment, needing time to draft and

circulate for review amendments to the ordinance, needing time to schedule public hearings on the ordinance before the board acts upon it and the possibility of needing extra time to schedule final action upon the ordinance pursuant to the mandatory notice requirements for public meeting agendas under the Open Meeting Law.

You have also stated that other Nevada district attorneys interpret the emphasized language to be mandatory, thus absolutely requiring final action on a proposed ordinance at the regular meeting of the board of county commissioners immediately following the introduction of the ordinance. Under this interpretation, you state that any amendment to the proposed ordinance would require another first reading of the ordinance by title, followed by placement of the amended proposed ordinance in the office of the county clerk prior to final action by the board at the next regular meeting following introduction of the amended proposed ordinance.

QUESTION ONE

Is the requirement that final action upon a proposed county ordinance be deferred after its first reading until the next regular meeting of the board of county commissioners, as specified in [NRS 244.100](#), subsection 1, directory or mandatory in nature?

ANALYSIS OF QUESTION ONE

Use of the verb “shall” ordinarily connotes a mandatory intention on the part of the Legislature. *Fouchier v. McNeil Construction Co.*, [68 Nev. 109](#), 227 P.2d 429 (1951); *Ewing v. Fahey*, [86 Nev. 604](#), 472 P.2d 347 (1970). However, this is not a conclusive presumption and may be overcome by other considerations. *Jersey City v. State Board of Tax Appeals*, 133 N.J.L. 202, 43 A.2d 799 (1945); *Gay v. Pope & Talbot, Inc.*, 183 Misc. 162, 47 N.Y.S.2d 16 (1944); *Klecan v. Schmal*, 196 Neb. 100, 241 N.W.2d 529 (1976).

With respect to the question of whether a statute is mandatory or directory in operation, the courts will apply that construction which best reflects legislative intent and the purpose of the statute under consideration. *State ex rel. Baker v. Wichman*, [52 Nev. 17](#), 279 P. 937 (1929); *Eddy v. Board of Embalmers*, [40 Nev. 329](#), 163 P. 245 (1917). In the statute under consideration, the intention of the Legislature appears to be simply to permit public inspection of all proposed county legislation before the legislation is enacted. This is shown by the requirement that after its first reading a copy of the proposed ordinance is to be filed with the county clerk “for public inspection.” Delaying final action on the proposed ordinance until “the next regular meeting of the board” is designed to allow time for such public inspection.

The delay in final action does not really go to the essence or validity of the proposed law. It is merely a procedural device designed to foster public inspection of proposed county legislation. A general rule of statutory construction pertaining to directory and mandatory legislation is that if the directions given by the statute do not go to the essence of the thing to be done, but are given only with a view to establishing the procedure involved in the conduct of the business, such directions are directory only. This is particularly the case when no rights are prejudiced by any delay in carrying out the procedure. *Odd Fellows Savings & Commercial Bank v. Quillen*, [11 Nev. 109](#) (1876); *Kohler v. Barnes*, 123 N.Y.Super. 69, 301 A.2d 474 (1973); *Burton v. Ferrill*, 531 S.W.2d 197 (Tex.Civ.App. 1975); *State v. Linwood*, 79 N.M. 439, 444 P.2d 766 (1968); *State ex rel. Werlein v. Elamore*, 33 Wis.2d 288, 147 N.W.2d 252 (1967); *Lomelo v. Mayo*, 204 So.2d 550 (Fla. 1967); *Carrigan v. Illinois Liquor Control Commission*, 19 Ill.2d 230, 166 N.E.2d 574 (1960). See also Attorney General’s Opinion No. 79, dated July 13, 1916. In this instance, no apparent prejudice exists to the rights of citizens from any reasonable delay in enacting such legislation.

The statute does not impose any penalties upon county commissioners for delaying the enactment of proposed legislation nor does the statute void such legislation if it is enacted later than the next regular meeting of the board after the introduction of the

proposed ordinance. Where no consequences for noncompliance are stated in the statute, this may be considered as a factor in determining that a statute is merely directory. *Corbett v. Bradley*, 7 Nev. 784 (1871); *Sullivan v. Credit River Tp.*, 217 N.W.2d 502 (Minn. 1974); *Fallon v. Hattemar*, 229 App.Div. 397, 242 N.Y.S. 93 (1930); *State v. Heath*, 345 Mo. 226, 132 S.W.2d 1001 (1939).

CONCLUSION TO QUESTION ONE

Taking the above considerations into account, it is the opinion of this office that [NRS 244.100](#), subsection 1, is directory in nature with respect to the matter of the time for performing the final action of the board of county commissioners in enacting proposed county ordinances. Thus, in the opinion of this office, it would be permissible for a board of county commissioners to take its final action on proposed county ordinances at a reasonably later time than the next regular meeting of the board after a proposed ordinance is introduced and has its first reading. If anything, this will allow the public more time to devote their attention and input into county ordinances before they are enacted.

QUESTION TWO

If an ordinance is enacted at a later time than the next regular meeting of the board of county commissioners after the proposed ordinance's introduction, is that ordinance legally defective so as to be considered void or violable?

ANALYSIS TO QUESTION TWO

With respect to this question, Sutherland's *Statutory Construction* states:

The important distinction between directory and mandatory statutes is that violation of the former is attended with no consequences, while the failure to comply with the requirements of the latter either invalidates purported transactions or subjects the noncomplier to affirmative legal liabilities. 1A Sutherland, *Statutory Construction* § 25.03.

See also *State v. Whittington*, 290 A.2d 659 (Del. 1972); *Hester v. Kamykowski*, 13 Ill.2d 481, 150 N.E.2d 196 (1958).

CONCLUSION TO QUESTION TWO

Considering the above analysis and our opinion that [NRS 244.100](#), subsection 1, is directory with respect to the time for performing the final action of the board of county commissioners in enacting a county ordinance, it would be the opinion of this office that an ordinance which was enacted at a time later than the next regular meeting of the board after the introduction of the proposed ordinance would not be legally defective so as to be void or voidable.

Respectfully submitted,

ROBERT LIST, *Attorney General*

By DONALD KLASIC, *Deputy Attorney General*

227 Initiative Petitions—Persons signing initiative petitions may not remove their names from the petitions after they have been officially filed with the appropriate filing officer.

CARSON CITY, November 28, 1978

THE HONORABLE STEVEN D. MCMORRIS, *District Attorney*, Courthouse, Minden, Nevada
89423

Attention: BRENT KOLVET, *Deputy District Attorney*

DEAR MR. MCMORRIS:

You have requested advice concerning [NRS 295.115](#).

FACTS

An initiative petition has been filed with the county clerk pursuant to the provisions of [NRS 295.035](#) to [295.125](#), inclusive. Under [NRS 295.115](#), the board of county commissioners must consider the proposed initiative ordinance and either enact it or put the question to the ballot. However, several persons who signed the petition have requested that their names be removed and this, if enough people were to make similar requests, would put the question of the sufficiency of the petition in doubt.

QUESTION

May a person who signs an initiative petition have his name removed from said petition after it has been officially filed with the appropriate filing officer and, if so, what procedure for removal should be followed?

ANALYSIS

This exact question has not been considered before with respect to initiative petitions, but has been considered with respect to recall and referendum petitions.

In *State ex rel. Matzdorf v. Scott*, [52 Nev. 216](#), 285 P. 511 (1930), the question of whether persons signing a recall petition could remove their names from the petition after it was filed was considered. The court noted there was nothing in the statute which permitted withdrawal of names. *Matzdorf v. Scott*, *supra*, at 229. The clerk was required to judge the sufficiency of the petition only from the face of the document and could not consider matters outside the form of the petition as it was filed with him. *Matzdorf v. Scott*, *supra*, at 229.

The court then quoted from an Iowa Supreme Court case, *Seibert v. Lovell*, 92 Iowa 507, 61 N.W. 197, 199 (1894), in which a board was required to take action after a petition was filed:

We hold, then, that the question of jurisdiction is to be determined from the petition as it was when filed, and without regard to the subsequent acts of the petitioners * * * [.] So far as affecting the jurisdiction which had already attached was concerned, the protests and remonstrances were of no effect * * * [.] It must be remembered that jurisdiction did not attach as of the date when the board acted, but as of the date when the *legal* petition was filed. The power to act having been conferred upon the board by virtue of a *legal* petition, it could not be impaired or taken away by the protests, remonstrances, or attempted withdrawals of some of the petitioners. (Nevada Supreme Court's emphases.) *Matzdorf v. Scott*, *supra*, at 230.

Finally, the court noted that before the petition was filed, it was still in the control of the signers and they could control their own signatures. After filing, however, the public has an interest in the petition and the signees, after initiating statutory procedures, should not be permitted to "capriciously" undo the work. *Matzdorf v. Scott*, *supra*, at 230.¹

An opinion similar to this was reached in Attorney General's Opinion No. 379, dated July 14, 1930, in which the Attorney General considered the question of whether persons signing a referendum petition could withdraw their signatures after the petition was filed. Relying on the reasoning stated in the case of *Matzdorf v. Scott*, supra, the Attorney General concluded that persons signing referendum petitions could not remove their names from such petitions after they were officially filed.

CONCLUSION

[NRS 295.075](#) to [295.125](#), inclusive, makes no provision for the removal of names from an initiative petition at the request or demand of its signers. Therefore, relying on the Supreme Court's reasoning in *Matzdorf v. Scott*, supra, and upon the reasoning of Attorney General's Opinion No. 379, supra, it is the opinion of this office that persons signing initiative petitions may not remove their names from the petitions after they have been officially filed with the appropriate filing officer.

Respectfully submitted,

ROBERT LIST, *Attorney General*

By DONALD KLASIC, *Deputy Attorney General*

¹As a result of the reasoning in this case, [NRS 306.040](#) was amended to permit the signers of a recall petition to withdraw their names at a court hearing to be held on the sufficiency of the petition. No similar provision was added to Chapter 295 of Nevada Revised Statutes, pertaining to initiative and referendum petitions.
