

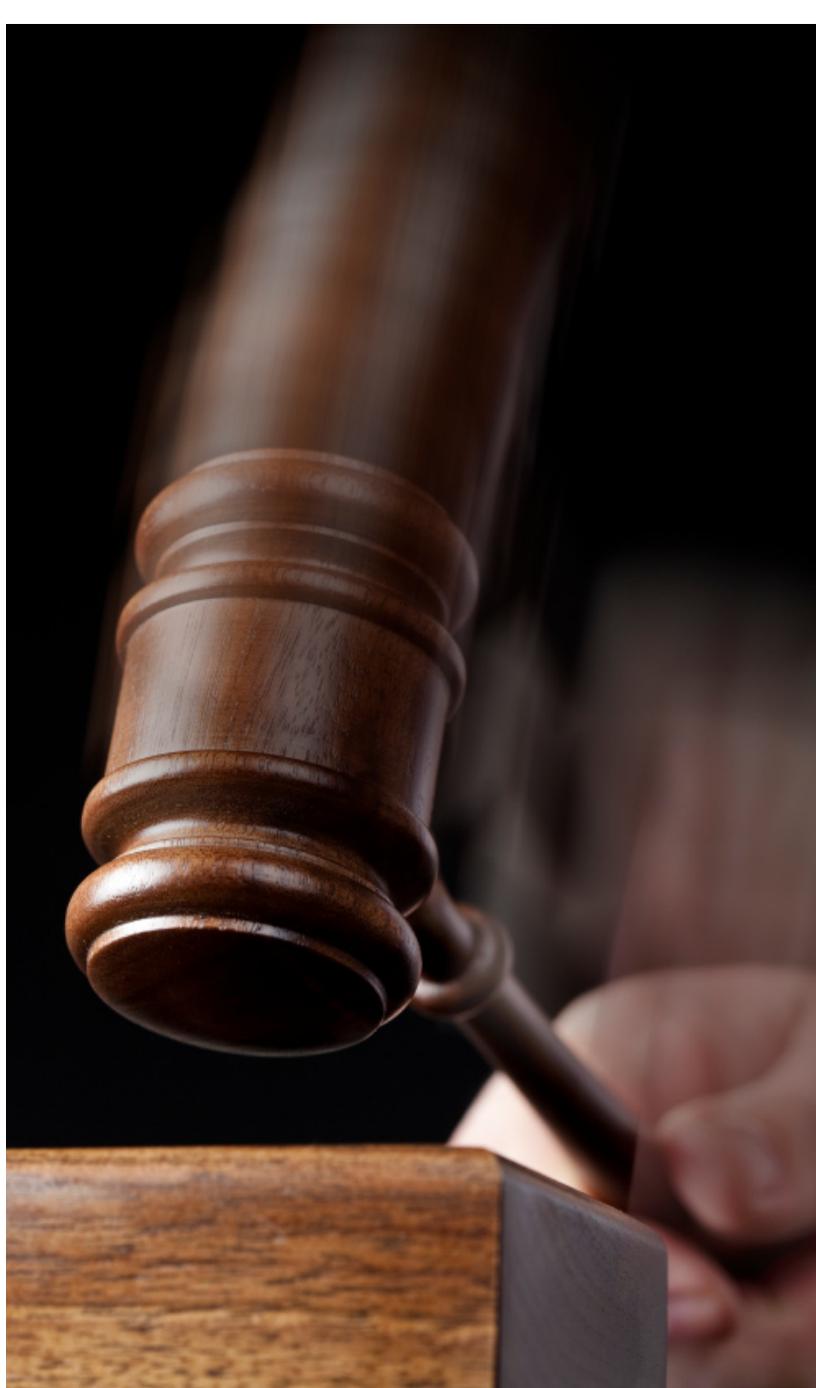
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# NAVIGATING POST- JUDGMENT MOTIONS IN NEVADA STATE COURT

BY MICAH ECHOLS, ESQ.

Nearly any case that makes its way through trial is also worthy of an appeal. But, before an appeal is filed, post-judgment motions to change the judgment are often filed, especially in jury trial cases. Motions for attorney's fees, costs and interest are almost automatic. Sometimes with all the motions and other documents being filed in post-judgment proceedings, it is difficult to keep track of the deadlines, whether or not the particular motion has tolled the time to appeal the judgment and whether or not a notice of appeal, separate from the appeal of the principal judgment, is needed at the conclusion of the post-judgment proceedings. Without a correct understanding of the applicable rules and the law governing post-judgment motions, the motions may be untimely, the motion may not have the desired tolling effect and appeal rights may be waived.

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This article provides an overview of common post-judgment motions and their deadlines, whether or not these common post-judgment motions have a tolling effect on the principal judgment and whether or not a notice of appeal separate from the one which challenged the principal judgment is needed for the order resolving the post-judgment motions. A careful review of the applicable court rules, statutes and case law associated with these post-judgment motions will ensure that deadlines are met, the motions have a tolling effect and appeal rights are preserved.

## Common Post-Judgment Motions and Their Deadlines

Since a case may be disposed of prior to trial, some post-judgment motions and other filings may apply even if there has been no trial. Although the deadlines to file these common post-judgment motions are fairly straightforward, the lines can become blurred when they are all filed at the same time. Having a clear understanding of the deadlines for these motions will greatly assist

in correctly understanding their possible tolling effect and whether or not another notice of appeal needs to be filed.

#### ***Memorandum of Costs/Motion to Retax***

Pursuant to NRS 18.110(1), a memorandum of costs must be filed within five days after the entry of judgment.<sup>1</sup> However, the deadline may be extended to “such further time as the court or judge may grant....” And, the Nevada Supreme Court has held that the deadline to file a memorandum of costs is *not* jurisdictional.<sup>2</sup> According to NRS 18.110(4), a motion to retax costs must be filed within three days after service of a copy of the memorandum. For purposes of counting days, the Nevada Supreme Court has clarified NRCP 6(a) and held that when a deadline is less than 11 days, judicial days are first counted and then any days for service are added as calendar days.<sup>3</sup>

#### ***Motion for Attorney’s Fees***

In contrast to the memorandum of costs, which must be filed within five days after the entry of judgment, NRCP 54(d)(2)(B) requires a motion for attorney’s fees to be filed within 20 days after the notice of entry of judgment is served. This rule also states that the deadline to file the motion for attorney’s fees is jurisdictional: “The time for filing the motion may not be extended by the court after it has expired.”

#### ***Motion for Reconsideration/Rehearing***

A motion for reconsideration/rehearing filed under the authority of EDCR 2.24, or other similar local rules, must be filed within 10 days after service of the notice of the order or judgment.

#### ***Motion for Relief from Judgment***

A motion for relief from judgment filed according to NRCP 60(b) must be filed within six months unless some exception to the rule applies, such as: (1) the act complained of constitutes fraud upon the court, in which case there is no six-month deadline;<sup>4</sup> (2) the judgment is void;<sup>5</sup> or (3) the judgment has been satisfied, released, discharged or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that an injunction should have prospective application.<sup>6</sup>

#### ***Motion for Stay***

According to the terms of NRCP 62(a), there is an automatic stay of most orders and judgments of 10 days following service of written notice of its entry. While there is no firm deadline to file a motion for stay, it should be done prior to the execution of the order or judgment.

#### ***Post-Judgment Tolling Motions***

NRAP 4(a)(4) identifies the four recognized types of tolling motions:

1. A motion for judgment under Rule 50(b);
2. A motion under Rule 52(b) to amend or make additional findings of fact;

3. A motion under Rule 59 to alter or amend the judgment; and
4. A motion for a new trial under Rule 59.

According to NRCP 50(b), 52(b) and 59, these tolling motions must be filed within 10 days after service of the written notice of entry of the judgment or order. Aside from timely *filing* a tolling motion, the filing party must also *serve* the motion within the 10-day period.<sup>7</sup> Otherwise, the tolling motion is not timely, and the trial court is without jurisdiction to consider an untimely tolling motion.<sup>8</sup>

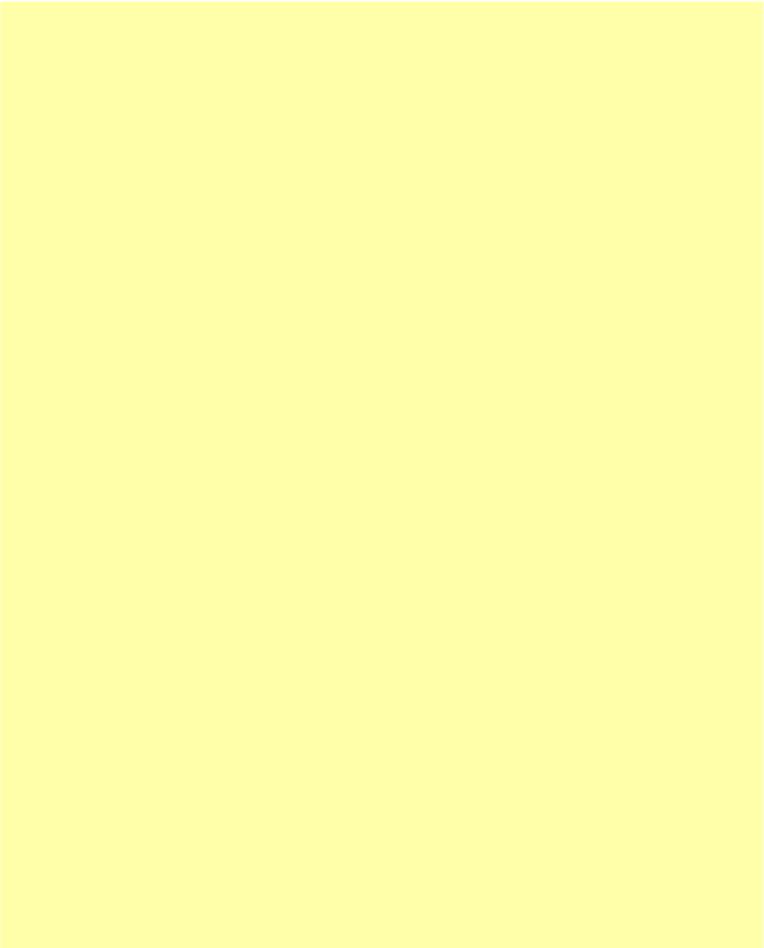
#### ***Tolling Effect of Some Post-Judgment Motions***

Just because post-judgment motions have been filed does not mean that the time to appeal the principal judgment is automatically tolled. Rather, only some post-judgment motions have a tolling effect and other motions, which are not independently tolling, have a tolling effect only when combined with other pending tolling motions. For the most part, however, the only tolling motions are the four listed in NRAP 4(a)(4).

#### ***Memorandum of Costs/Motion to Retax***

Nothing in NRS 18.110 identifies that a memorandum of costs or a motion to retax costs will have a tolling effect. However, the Nevada Supreme Court has held that special orders entered after final judgment, such as an award of costs, when entered during

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the pendency of the resolution of NRAP 4(a)(4) tolling motions, do not need to be appealed until after the tolling motions have been resolved.<sup>9</sup> The court reasoned that requiring an appeal from an award of costs before an appeal could even be filed from the post-judgment orders, would result in unnecessary piecemeal litigation.<sup>10</sup> Thus, the time to appeal an award of costs is tolled when entered within the pendency of tolling motions. However, a memorandum of costs or a motion to retax costs standing alone has no tolling effect on the time to appeal a final judgment.

## *Motion for Attorney's Fees*

Since an order resolving a motion for attorney's fees in post-judgment proceedings is considered a special order entered after final judgment, the same *DeBoer* tolling rule applicable to awards of costs also applies to awards of attorney fees.<sup>11</sup>

## *Motion for Reconsideration/Rehearing*

Historically, motions for reconsideration have been categorically treated as not having a tolling effect upon a final judgment. In fact, EDCR 2.24(b), and other similar local rules, state, "a motion for reconsideration does not toll the 30-day period for filing a notice of appeal from a final order or judgment." However, the Nevada Supreme Court has recently taken a functional approach to determine whether a motion for reconsideration or rehearing should be treated as tolling: "[W]e hold that so long as a post-judgment motion for reconsideration is in writing, timely filed, states its grounds with particularity, and 'request[s] a substantive alteration of the judgment, not merely the correction of a clerical error, or relief of a type wholly collateral to the judgment,' ... there is no reason to deny it NRCP 59(e) status, with tolling effect under NRAP 4(a)(4)(C)."<sup>12</sup>

As long as a motion for reconsideration or rehearing meets these conditions, it does have a tolling effect on the time to appeal the final judgment.

## *Motion for Relief from Judgment*

NRAP 4(a)(4) does not list a motion for relief from judgment as a tolling motion and NRCP 60(b) specifically states, "A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation." So, the filing of an NRCP 60(b) motion does not automatically stay the enforcement of the judgment.

## *Motion for Stay*

NRCP 62 allows for a stay from the execution of a judgment, but nothing within this rule or case law allows the motion for stay to have a tolling effect upon the time to appeal the judgment.

## *Post-Judgment Tolling Motions*

As long as a motion under NRCP 50(b), 52(b) or 59 has been properly and timely filed and served, it has a tolling effect under NRCP 50(b), 52(b) and 59. However, an untimely tolling motion has no tolling effect upon the time to appeal from the final judgment. If there is any doubt on whether the post-judgment motion will have a tolling effect, it is best to file a notice of appeal from the final judgment so as to not potentially waive appeal rights.

## *Separate Notice of Appeal Needed for Post-Judgment Order?*

The filing of a notice of appeal from the principal judgment does not mean that all post-judgment orders will be considered by the Supreme Court on appeal. While an appeal from a final judgment calls into question interlocutory orders entered *prior* to the final judgment, the orders entered after the final judgment are not necessarily subject to review.<sup>13</sup> The basic test of whether a post-judgment order qualifies as an appealable special order under NRAP 3A(b)(8), requires that "a special order made after final judgment must be an order affecting the rights of some party to the action, growing out of the judgment previously entered. It must be an order affecting rights incorporated in the judgment."<sup>14</sup>

## *Memorandum of Costs/Motion to Retax*

An order granting or denying an award of costs has consistently been recognized as a special order when entered after final judgment.<sup>15</sup> So, any challenge to an award of costs must be separately appealed according to NRAP 3A(b)(8).

## *Motion for Attorney's Fees*

A post-judgment award of attorney's fees is treated the same as a post-judgment award of costs and must be separately appealed according to NRAP 3A(b)(8).<sup>16</sup>

## *Motion for Reconsideration*

In earlier case law, the Nevada Supreme Court held that there can be no appeal from a post-judgment order denying reconsideration because no statute or court rule expressly authorized such an appeal.<sup>17</sup> However, more recent case law holds that the Nevada Supreme Court will review an order denying a post-judgment motion for reconsideration in the course of an appeal from the final judgment when (1) the district court elects to decide the motion for reconsideration on its merits; and (2) the notice of appeal from the final judgment is filed after the order resolving the motion for reconsideration.<sup>18</sup>

## *Motion for Relief from Judgment*

NRAP 3A(b)(8), allowing for an appeal from a special order entered after final judgment, specifically excludes from being appealable "an order granting a motion to set aside a default judgment under NRCP 60(b)(1) when the motion was filed and served within 60 days after entry of the default

judgment.” Yet, as long as the post-judgment order otherwise satisfies the *Gumm v. Mainor* test, an order resolving a motion for relief from judgment is appealable.

### Motion for Stay

An order resolving a motion for stay is not identified in any statute or rule as being appealable.<sup>19</sup> Instead, stay relief must be addressed by NRCP 62 and NRAP 8, which is typically by motion.

### Post-Judgment Tolling Motions

Of the four tolling motions listed in NRAP 4(a)(4), not all are independently appealable. An order denying a motion filed under NRCP 50(b) is not independently appealable, but since the motion is tolling, the Nevada Supreme Court will consider the 50(b) proceedings in the context of an appeal from the final judgment.<sup>20</sup> The same holds true for an order denying a motion to alter or amend filed under NRCP 59(e).<sup>21</sup> However, an order resolving a motion for new trial is independently appealable,<sup>22</sup> but only if the order is entered post-judgment.<sup>23</sup> When in doubt of which order to name in the notice of appeal, it is best to name additional orders that may not be appealable instead of failing to identify the proper orders. And if a separate notice of appeal is required by the rules, it should be a new and separate notice of appeal instead of an amended notice of appeal.<sup>24</sup>

In conclusion, failure to follow the rules governing post-judgment proceedings can be potentially fatal to a case. However, a proper understanding of these rules will ensure that post-judgment motions are timely filed, have the desired tolling effect and are properly preserved for Nevada Supreme Court review if an appeal is necessary. ■



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- 1 NRS 18.110(1).
- 2 See *Eberle v. State ex rel. Nell J. Redfield Trust*, 108 Nev. 587, 836 P.2d 67 (1992).
- 3 *Winston Prods. Co. v. DeBoer*, 122 Nev. 517, 134 P.3d 726 (2006).
- 4 *NC-DSH, Inc. v. Garner*, 218 P.3d 853 (Nev. 2009).
- 5 NRCP 60(b)(4).
- 6 NRCP 60(b)(5).
- 7 *Morrell v. Edwards*, 98 Nev. 91, 640 P.2d 1322 (1982); see also Drafter’s Note for NRCP 59, 2004 Amendment: “Subdivision (e) is amended to provide that a motion to alter or amend a judgment **must be filed, not just served**, within the specified time period.” (emphasis added).
- 8 *Oelsner v. Charles C. Meek Lumber Co.*, 92 Nev. 576, 555 P.2d 217 (1976)

(stating that the district court was without jurisdiction to consider an untimely tolling motion filed under NRCP 59(e)).

- 9 *DeBoer*, 122 Nev. at 526, 134 P.3d at 732.
- 10 *Id.*
- 11 *Id.*
- 12 *AA Primo Builders, LLC v. Washington*, 245 P.3d 1190, 1195 (Nev. 2010) (citation omitted).
- 13 *Consul. Generator-Nevada, Inc. v. Cummins Engine Co., Inc.*, 114 Nev. 1304, 1312, 971 P.2d 1251, 1256 (1998).
- 14 *Gumm v. Mainor*, 118 Nev. 912, 59 P.3d 1220 (2002).
- 15 See *DeBoer*.
- 16 See *Thomas v. City of N. Las Vegas*, 122 Nev. 82, 90, 127 P.3d 1057, 1063 (2006); see also *Lee v. GNLV Corp.*, 116 Nev. 424, 426, 996 P.2d 416, 417 (2000) (holding that a post-judgment order awarding attorney fees and costs may be appealed as a special order made after final judgment).
- 17 *Phelps v. State*, 111 Nev. 1021, 900 P.2d 344 (1995).
- 18 See *Arnold v. Kip*, 123 Nev. 410, 168 P.3d 1050 (2007).
- 19 *Brunzell Constr. Co., Inc., of Nevada v. Harrah’s Club*, 404 P.2d 902, 81 Nev. 414 (1965), superseded by statute on other grounds by *Casino Operations, Inc. v. Graham*, 86 Nev. 764, 476 P.2d 953 (1965).
- 20 *Krause Inc. v. Little*, 117 Nev. 929, 34 P.3d 566 (2001).
- 21 See *AA Primo Builders*, 245 P.3d at 1197.
- 22 NRAP 3A(b)(2).
- 23 *Reno Hilton Resort Corp. v. Verderber*, 121 Nev. 1, 106 P.3d 134 (2005).
- 24 *Weddell v. Stewart*, 261 P.3d 1080 (2011).

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