

Young Lawyers



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CONSTRUCTING A CASE

The topic for this month's *Nevada Lawyer* is construction law. The term "construction" is commonly defined as the process, art or manner of building something. In the legal profession, attorneys are analogous to contractors in the sense that lawyers construct a case through facts, the rule of law and legal argument.

The facts of a case are the building blocks of a case. The rule of law is the foundation that supports those building blocks, and the legal argument is the masterpiece the attorney seeks to create. Those same principles apply equally in both civil and criminal cases.

For example, in the civil arena, a plaintiff's lawyer builds his or her case by looking at facts of a case and applying those facts to a particular cause of action. Those facts serve as the building blocks of that case. The cause of action serves as the foundation. During the life of a case and particularly at trial, those facts may be presented by lay-witness testimony, expert witness testimony, direct evidence and/or circumstantial evidence. The masterpiece is the final structure the attorney seeks to create through legal argument. Ultimately, the trier of fact, similar to a building

inspector, is tasked with reviewing the structure to make sure that it has been properly constructed both in foundation and with the proper building blocks. If so, the structure will be approved and the outcome will be a success.

In the criminal arena, a prosecutor builds his or her case and decides whether or not to pursue one, by reviewing police reports, witness statements and physical evidence. At trial, the prosecutor is tasked with building his or her case by presenting evidence to support the charged offense. The prosecutor puts on similar evidence with the ultimate goal of obtaining a conviction.

On the other hand, when defending a case, the attorney serves as both a contractor and as a demolitionist. *First*, the defense attorney must build his or her own structure based upon the facts of the case: exposing the relevant building blocks to the law in order to demonstrate that the defense's structure is sound, and that the opposing party's case is unsupported. *Second*, the defense attorney must attempt to "deconstruct" the opposing party's case.

In civil cases, this may take place at numerous stages of the litigation process. The defense attorney can utilize the tools set forth in the Nevada Rules of Civil Procedure to pick apart a plaintiff's case. Early in the process, this task can be done by attacking service of process, filing a motion to dismiss pursuant to NRCP 12(b) (1)–(6) or, later on in process, by filing a motion for summary judgment pursuant to NRCP 56. If the case

makes it to trial, the attorney can continue deconstructing the opposing party's case by revealing bias, flaws or inconsistencies in that case. Effective methods can include dismantling a witness' testimony and challenging the reliability of the evidence presented.

Likewise, in a criminal case, a defense attorney can challenge the sufficiency of evidence, at both the preliminary hearing and at trial. During the preliminary hearing, the state bears the burden of showing "that there is probable cause to believe that an offense has been committed and that the defendant has committed it." *See State v. Sargent*, 122 Nev. 210, 215, 128 P.3d 1052, 1055 (2006). Although the burden of proof is fairly low at this stage in the proceedings, a case can still be dismissed if the prosecutor fails to meet his or her burden. If, however, the state satisfies its burden, the case is bound over to district court. During the criminal trial, the prosecutor has the burden to prove guilt beyond a reasonable doubt. It is the criminal defense attorney's job to pick apart the state's case, until all that is left is a wavering structure, swaying in the wind on the verge of collapse. If the defense attorney accomplishes this task, it may very well lead to an acquittal.

The attorney serves as the architect of each case he or she undertakes. Every case is a new opportunity to create something strong, a new opportunity to create a masterpiece, or in some circumstances, to deconstruct an opposing party's case. **NL**