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### Summary of In re Assad., 124 Nev. Adv. Op. No. 38

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**NEVADA COMMISSION ON JUDICIAL DISCIPLINE – JUDICIAL ETHICS EXPERT TESTIMONY-- DUE PROCESS – VIOLATION OF CANON 2A OF THE JUDICIAL CODE OF CONDUCT – PUBLIC CENSURE**

**Summary**

On appeal from the Nevada Commission on Judicial Discipline, the Nevada Supreme Court considers whether, in the disciplinary proceedings for Las Vegas Municipal Judge George Assad, the Commission properly denied admission of Judge Assad's proposed judicial ethics expert testimony; whether the Commission's actions during the proceedings denied Judge Assad due process; whether the record demonstrates clear and convincing evidence to support the Commission's finding that Judge Assad violated Canon 2A; and whether the Commission properly imposed a public censure against Judge Assad for violations of the Code of Judicial Conduct.

**Disposition/Outcome**

Affirmed in part and reversed in part. The Nevada Supreme Court first held that the Commission did not abuse its discretion in refusing to admit judicial expert testimony because the proposed testimony would not have assisted the Commission to understand the evidence or resolve a disputed fact. Second, the Court concluded that Judge Assad's several due process objections to the proceedings were without merit. Third, the Court affirmed the Commission's finding that Judge Assad violated Canon 2A because the record provided clear and convincing evidence to support this violation. Lastly, the Court reversed the Commission's imposition of public censure against Judge Assad finding that sanction too excessive for his non-willful conduct. Instead, the Court ordered Judge Assad to issue an apology to the party injured by his conduct and to attend a judicial ethics class.

**Factual and Procedural History**

The charges against Las Vegas Municipal Court Judge Assad relate to an incident that occurred in his courtroom on Monday, March 31, 2003, concerning Joshua Madera's unpaid traffic tickets. Joshua Madera was to start a new job on the same day the court had scheduled his hearing before Judge Assad. On the Friday before the scheduled hearing, Madera called the court clerk to ask for a telephone continuance. When the court clerk denied Madera's request due to the lengthy delay in paying the fines, Madera then asked whether someone could appear on his behalf. The conversation between Madera and the court clerk then made a turn for the worse when Madera made a comment to the court clerk that was perceived as a threat of bodily harm. The court clerk logged Madera's comment in the court's computer system. Prior to the traffic court session, the information provided to Judge Assad, in preparation for the hearing, indicated the court clerk's record of Madera's purportedly threatening comment.

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<sup>1</sup> By Candace Oranges

Following Madera's conversation with the court clerk, Ann Chrzanowski, Madera's girlfriend, called the court and spoke with a different court clerk. That court clerk stated that Chrzanowski could appear on his behalf so long as Madera was not "in warrant." Therefore, the following Monday, Chrzanowski appeared in court before Judge Assad on behalf of Madera.

At the hearing, the interaction between Chrzanowski and Judge Assad quickly escalated when Judge Assad discovered that Madera had sent another person to appear on his behalf, in light of the comment Madera made to the court clerk the previous Friday. Judge Assad declared to Chrzanowski, "Unless you get him down here real quick, we're going to have to lock you up until he gets here." Despite Chrzanowski's attempt to explain the circumstances, Judge Assad ordered her to follow the marshal, Raul Saavedra, to a back room to call Madera to inform him that he must appear.

After Chrzanowski called Madera, who informed her that he could not come at that time, Saavedra detained her in the court's holding cell. Only upon Madera's arrival at the courthouse, later that afternoon, did Saavedra release Chrzanowski from the court's custody. Subsequently, Chrzanowski filed a judicial discipline complaint against Judge Assad, which resulted in formal charges alleging that the judge violated several judicial canons, including Canons 2A, 3B(2), 3B(4), and 3B(7).

The Nevada Commission on Judicial Discipline conducted a formal hearing to consider the allegations against Judge Assad. As part of the judicial disciplinary proceedings, the Commission considered testimony offered by several individuals concerning the events of March 31, 2003. Specifically, Judge Assad testified that he had not intended the marshal to hold Chrzanowski after she called Madera and Saavedra testified to a misunderstanding of Judge Assad's instructions to hold Chrzanowski until Madera arrived.

The Commission also considered testimony from other witnesses describing Judge Assad's devotion to the law and to public service. Judge Assad presented further support of his good character by presenting into evidence thank you letters, certificates and commendations for his community service and involvement.

Judge Assad also sought to introduce judicial ethics expert testimony to refute the allegations that he violated the judicial canons. However, the Commission denied the motion to admit the expert testimony concluding the testimony would not be helpful to the issues presented by the case.

At the conclusion of the hearing, the Commission found that two violations of Canon 2A were proved by clear and convincing evidence. The Commission, thereby, imposed upon Judge Assad a public censure as the appropriate disciplinary measure. This appeal followed.

## **Discussion**

In this appeal, the Nevada Supreme Court considers the following issues arising from the disciplinary proceedings for Judge Assad: (1) whether the Commission properly denied admission of Judge Assad's proposed judicial ethics expert testimony; (2) whether the

Commission's actions during the proceedings denied Judge Assad due process; (3) whether the record demonstrates clear and convincing evidence to support the Commission's finding that Judge Assad violated Canon 2A; and (4) whether the Commission properly imposed a public censure against Judge Assad for violations of the Code of Judicial Conduct.

### **Expert Testimony**

Judge Assad first argues that due process required the Commission to admit his proposed judicial ethics expert testimony. He further argues that the Commission abused its discretion in denying the admission of Judge Assad's proposed expert testimony.

Commission Procedural Rule 24, which governs the admissibility of evidence during judicial disciplinary proceedings, states "[t]he rules of evidence applicable to civil proceedings apply at the hearing." Therefore, pursuant to NRS 50.275, "[i]f scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by special knowledge, skill, experience, training or education may testify to matters within the scope of such knowledge." Moreover, only relevant evidence is admissible.<sup>2</sup> The Commission has the discretion to determine the admissibility of expert testimony.<sup>3</sup>

To support his argument that due process required the Commission to admit his proposed expert testimony, Judge Assad relies on Pineda v. State<sup>4</sup> and Vipperman v. State.<sup>5</sup> Based on the holding of each of these cases, Judge Assad contends that any expert testimony is admissible if it helps the proponent's case.

In Pineda, the court considered the defendant's argument that the district court should have admitted his expert testimony because the evidence was relevant to the defendant's theory of self-defense.<sup>6</sup> Contrary to Judge Assad's argument, Pineda merely affirmed the evidentiary rule that the court should admit evidence only when it is relevant to the issues presented, and if it assists the trier of fact to understand the evidence.<sup>7</sup>

Moreover, Vipperman did not even involve expert testimony; rather it makes a simple statement regarding a defendant's right to produce any evidence to prove the theory of his case.<sup>8</sup> The court's decision in that case affirmed the lower court's exclusion of irrelevant evidence because it was not relevant to the defendant's assertion of an alibi defense, though it may have been relevant to other legal theories.<sup>9</sup>

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<sup>2</sup> See Nev. Rev. Stat. § 48.025(1); 48.015.

<sup>3</sup> See Matter of Moseley, 120 Nev. 908, 922, 102 P.3d 555, 565 (2004) (reviewing the Commission's evidentiary decisions for abuse of discretion).

<sup>4</sup> 120 Nev. 204, 88 P.3d 827 (2004).

<sup>5</sup> 96 Nev. 592, 614 P.2d 532 (1980).

<sup>6</sup> Pineda, 120 Nev. at 213, 88 P.3d at 834.

<sup>7</sup> *Id.*

<sup>8</sup> Vipperman, 96 Nev. at 596, 614 P.2d at 534.

<sup>9</sup> *Id.* at 595, 614 P.2d at 534.

Here, the expert's affidavit Judge Assad attempted to admit to evidence in his defense contained credibility determinations and conclusions of evidence that are tasks reserved for the Commission. Expert testimony on these issues would not have assisted the Commission to understand the evidence or resolve a disputed fact. Furthermore, much of the affidavit concerned matters irrelevant to the issues before the Commission, and thus, it was not admissible. Accordingly, the Court concludes that the Commission did not abuse its discretion in refusing to admit Judge Assad's proposed judicial ethics expert testimony.

While the Court concludes the Commission did not abuse its discretion in rejecting the affidavit, the Court finds flawed the other two arguments given by the Commission for denying admission of the expert's affidavit.

First, the Commission, relying on Matter of Mosley,<sup>10</sup> noted that it was not required to admit evidence. The Court finds this justification relies on an overly narrow interpretation of its opinion in Mosley. While the Court acknowledges that Mosley addresses the discretion the Commission possesses in admitting evidence, the Court finds the Commission misstated the rule set forth in the case. Indeed, the Commission is not compelled to admit expert testimony simply because it was offered, but the Commission must make this determination in accordance with NRS 50.275.

The Court finds that the Commission mischaracterizes the holding in that opinion. The Court points out that the Commission mistakenly relies not on the words of the court rather on an excerpt from the case that quotes a scholarly article which warns of the dangers of ascribing greater weight to expert testimony than to the Commission's members' own independent knowledge and expertise. Therefore, the Court finds the Commission's reliance on Mosley flawed and inappropriate.

Second, the Commission asserted that its decision to exclude the expert affidavit should be upheld to preserve its role in the proceeding. The Court contends that expert testimony only threatens to usurp the role of the Commission if the Commission replaces its own judgment and evaluation of the evidence for that of the expert. The Court states that NRS 50.295 expressly permits expert testimony. Therefore, the Court finds no reason to exclude expert testimony on this basis.

### **Miscellaneous Due Process Objections**

Judge Assad raises several due process objections to the proceedings. The Court concludes that they are without merit.

First, Judge Assad contends the Commission's failure to adhere to its deadlines for preparing a written decision denied him due process. Under Commission Procedural Rule 28, the Commission "shall prepare and adopt a written statement" within 20 days or reaching a decision. Commission members then have ten days to dissent or object to the written statement. Rule 28 further provides, "[u]pon filing, the commission must promptly serve a copy of the foregoing on the respondent."

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<sup>10</sup> 120 Nev. 908, 102 P.3d 555 (2004).

Here, the Commission reached its decision on November 30, 2006. After various extensions and subsequent delays due to various circumstances, the Commission eventually filed the written statement on February 8, 2007.

Judge Assad contends the delayed filing of the written decision denied him due process. However, the Court notes that Judge Assad fails to assert he suffered any prejudice as a result.<sup>11</sup> The Court concludes that pursuant to the various rules that govern the judicial disciplinary proceedings, the Commission did not act improperly by extending the time for filing its written decision and the resulting short delay did not deny Judge Assad due process.<sup>12</sup>

Secondly, Judge Assad asserts that the Commission denied him due process when it found that he violated Canon 3B(7) by engaging in conduct not included in the formal charges. However, a review of the Commission's decision reveals the Commission made no such finding. The Commission did not find that Judge Assad committed any violation, by reviewing the clerk's computer case notation about the alleged threat. Moreover, the Commission did not sanction Judge Assad for this conduct. Accordingly, the Court rejects Judge Assad's argument that the Commission denied him due process in this respect.

Finally, Judge Assad argues the Commission denied him due process because Canon 2A does not provide adequate notice of the conduct it prohibits. However, Judge Assad fails to cite any authority discussing Canon 2A's language. In contrast, the Commission's brief cites ample authority from other jurisdictions upholding the constitutionality of language identical to Canon 2A.<sup>13</sup> The Court, therefore, concludes that Judge Assad's vagueness challenge of Canon 2A lacks merit.

### **Violation of Canon 2A**

The Commission found Judge Assad violated Canon 2A based on his threats to detain Chrzanowski until Madera arrived and the use of language that Saavedra reasonably believed instructed him to detain Chrzanowski. Judge Assad argues the Commission's findings are not supported by clear and convincing evidence.

Under Commission Procedural Rule 25, the Commission must base its determination on the special prosecutor's demonstration of clear and convincing evidence.<sup>14</sup> In the standard applied to review the Commission's factual findings, the Court must base its determination solely on the record.<sup>15</sup>

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<sup>11</sup> See *Bergendahl v. Davis*, 102 Nev. 258, 260, 720 P.2d 694, 695 (1986); *Anderson v. Richards*, 96 Nev. 318, 323, 608 P.2d 1096, 1099 (1980).

<sup>12</sup> Judicial Discipline Procedure 3 permits extensions of any time limits in the Commission's procedures or its rules for good cause. Nevada Commission Procedural Rule 37 incorporates the Nevada Rules of Civil Procedure for purposes of time computations; specifically, NRCP 6 permits time extensions in most circumstances.

<sup>13</sup> *Matter of Young*, 522 N.E.2d 386, 387-88 (Ind. 1988); *Miss. Com'n on Jud. Performance v. Spencer*, 725 So.2d 171, 176 (Miss. 1998); *In re Hill*, 8 S.W.3d 578, 582-83 (Mo. 2000); *In Re Disciplinary Action Against McGuire*, 685 N.W.2d 748, 761-62 (N.D. 2004).

<sup>14</sup> *Mosley*, 120 Nev. at 912, 102 P.2d at 558-59; *Matter of Fine*, 116 Nev. 1001, 1013, 13 P.3d 400, 408 (2000).

<sup>15</sup> *Mosley*, 120 Nev. at 912, 102 P.2d at 559.

Canon 2A provides, “A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.” Here, Judge Assad admitted he had no legal authority to detain Chrzanowski based on Madera’s failure to appear and pay the fine. Thus, Judge Assad knew his threat to Chrzanowski failed to comply with the law, did not show respect for the law, and did not promote public confidence in the judiciary’s integrity. The Court concludes that the record provides clear and convincing evidence to support this violation.

The Court also affirms the Commission’s conclusion that Saavedra reasonably interpreted Judge Assad’s language to mean that he should detain Chrzanowski until Madera arrived. The Court relies on the transcript, which it deems to provide clear and convincing evidence to support this violation.

Lastly, the Court rejects Judge Assad’s contention that the federal court’s dismissal of Chrzanowski’s civil rights lawsuit against him as “conclusive” of this discipline proceeding. In contrast to the determinations made by the Commission pursuant to the Code of Judicial Conduct, the district court and the Ninth Circuit considered a civil rights action under 42 U.S.C. § 1983. The respective proceedings differ so drastically from one another that the dismissal of one has no bearing on the outcome of the other. Therefore, the Court affirms the Commission’s findings concerning the Canon 2A violations.

### **Propriety of Sanction**

The Commission imposed a public censure against Judge Assad based on the violation it found. Judge Assad argues that a public censure in this case was excessive, even if the Commission properly found a violation.

Under article 6, section 21 of the Nevada Constitution, on appeal, the Nevada Supreme Court may reverse a Commission’s discipline decision or take any alternative action provided therein. The Court must exercise its independent judgment in determining the appropriate sanction warranted based on the factual findings of the Commission.<sup>16</sup>

NRS 1.4653(1) permits the Commission to remove, censure, or impose other discipline on a judge if the Commission determines that the judge has engaged in willful misconduct, willfully or deliberately failed to perform judicial duties, or is habitually intemperate. NRS 1.4653(2) provides that the Commission may censure or impose other forms of discipline on a judge if the Commission determines that the judge has committed an ethical violation “that is not knowing or deliberate.” NRS 1.4677 lists other forms of discipline, which include, among other things, a fine, probation subject to conditions, training or educational courses, remedial action, and a public apology.

Here, the Court finds that Judge Assad’s actions on March 31, 2003 were improper and warrant discipline. However, the Court notes the Commission’s own findings indicate that Judge Assad’s conduct was not willful, as demonstrated by the “obvious misunderstanding” between

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<sup>16</sup> *Fine*, 116 Nev. at 1021, 13 P.3d at 413 (quoting *Goldman v. Nevad Comm’n on Judicial Discipline*, 108 Nev. 251, 268, 830 P.2d 107, 118 (1992)); *see also* *Matter of Davis*, 113 Nev. 1204, 1225, 946 P.2d 1033, 1047 (1997).

Judge Assad and Saavedra. The Court further notes the mitigating evidence that supports Judge Assad's commitment to the public, his community service, and his sincere desire to do justice. Furthermore, no other misconduct by Judge Assad has been noted before or since March 31, 2003.

Based on these observations, the Court agrees with Judge Assad that the Commission's imposition of the harshest sanction available for nonwillful conduct was too harsh. Therefore, the Court reverses the Commission's disciplinary measures. The Court declares instead Judge Assad shall issue an apology to Chrzanowski and shall attend, at his own expense, the next available judicial ethics course offered by the National Judicial College.<sup>17</sup>

### **Conclusion**

The Nevada Supreme Court holds that the Commission did not abuse its discretion to admit expert testimony. Thereby, the Commission did not deprive Judge Assad of due process by this refusal or by any other action of the Commission. The Court also holds that the record provides clear and convincing evidence to support the Commission's findings concerning the Canon 2A violations. Thus, the Court affirms that portion of the Commission's decision. However, the Court finds the Commission's decision to impose a public censure against Judge Assad too severe in this case, because the record does not support a finding of willful conduct. Accordingly, the Court reverses the Commission's imposition of a censure. Rather, the Court orders Judge Assad to issue a formal apology to Ann Chrzanowski and enroll, at his own expense, in the next available judicial ethic class at the national Judicial College.

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<sup>17</sup> See Nev. Rev. Stat. § 1.4677(4), (6).