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Summary of In re Mosley, 120 Nev. Adv. Rep. 94

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**JUDICIAL DISCIPLINE- EX PARTE COMMUNICATIONS, MISUSE OF
JUDICIAL LETTERHEAD, AND FAILURE TO RECUSE IN A TIMELY
MANNER**

Summary

This case is an appeal of the evidentiary findings of the Nevada Commission on Judicial Discipline (Commission) on eleven different counts of an official complaint filed by a special prosecutor against the Honorable Donald M. Mosley (Judge Mosley). The complaint listed eleven inappropriate actions Judge Mosley allegedly committed from August of 1997 through August 1999. The counts alleged that Judge Mosley:

Count I- Wrote a personal letter on official judicial letterhead to the principal of his son's school in August 1999;

Count II- Wrote a personal letter on official judicial letterhead to the principal of his son's school in February 1998;

Count III- Engaged in an ex parte conversation with friend Barbara Orcutt, regarding the arrest and release of Robert D'Amore in August 1999;

Count IV- Ordered the release of Robert D'Amore on his own recognizance, without notifying the district attorney's office, after the police arrested D'Amore on a bench warrant issued by a different district court judge in August 1999;

Count V- Engaged in an ex parte telephone conversation with Catherine Woolf, an attorney representing Joseph McLaughlin in a criminal case that was assigned to Judge Mosley's chambers;

Count VI- Engaged in an ex parte conversation in his chambers with attorney Woolf in August 1997;

Count VII- Engaged in an ex parte conversation with Woolf, McLaughlin and McLaughlin's wife in August 1997;

Count VIII- Failed to recuse himself from McLaughlin's criminal case until after Mrs. McLaughlin had testified in Judge Mosley's custody case;

Count IX- Communicated with McLaughlin's wife regarding McLaughlin's incarceration;

Count X- Assisted McLaughlin's wife in obtaining the return of her vehicle;

Count XI- Continued to communicate with McLaughlin and his wife after recusing himself in McLaughlin's criminal case, the continued communication creating an appearance that Judge Mosley was rewarding the McLaughlins for assisting him in his custody dispute.

After a three-day evidentiary hearing, the Commission concluded that Judge Mosley committed the violations admitted in Counts I, II, III, IV, VI, VII, and VIII, and dismissed Counts V, IX, X, and XI. Judge Mosley was ordered to attend the first general ethics course at

¹ By Christopher Carson.

the National Judicial College at his own expense, to pay a \$5,000 fine and to receive strongly worded censures for violating ethics rules. Judge Mosley appealed the findings on the grounds that there was insufficient evidence to support the Commission's findings and that the Commission erred in other respects.

Chief Justice Miriam Shearing, writing for the majority, cited *Goldman v. Nevada Commission on Judicial Discipline*² and held that the findings of the Commission were not subject to de novo review. The Court held that *Goldman* limited the scope of appellate review of the Commission's decision to whether the Commission's findings were supported by clear and convincing evidence.³

Counts I & II: Use of judicial letterhead

The circumstances surrounding the misuse of judicial letterhead stems from the bitter custody dispute between Judge Mosley and his ex-girlfriend Terry Mosley (aka Figliuzzi), over their son Michael. After Judge Mosley was issued custody of Michael, he wrote two letters to Michael's school on official Eighth Judicial District Court letterhead. The letters asked that the school prohibit Figliuzzi from visiting Michael at school.

The Commission found that Judge Mosley violated NCJC Canon 2B which states in pertinent part:

A judge shall not allow family, social, political or other relationships to influence the judge's judicial conduct or judgment. A judge shall not lend the prestige of judicial office to advance the private interests of the judge or others; nor shall a judge convey or permit others to convey the impression that they are in a special position to influence the judge.

Subsequently, the court adopted the objective reasonable person standard for interpreting judicial canons and held that there was clear and convincing evidence that an objective reasonable person could conclude that Judge Mosley wrote the letters on official letterhead to obtain a personal advantage in violation of NCJC Canon 2B.

Counts III & IV: Ex parte communications and own recognizance release

The facts surrounding these counts stem from the communications surrounding, and subsequent release of, a Robert D'Amore. D'Amore had been arrested for a burglary and eventually pled to an attempted theft. As a requirement of the plea D'Amore was to make restitution payments of \$10,000 a month. When D'Amore failed to attend required court hearings and pay his court-ordered restitution, a bench warrant was issued and D'Amore was arrested.

D'Amore's former employer Barbara Orcutt, a friend of Judge Mosley, called and asked Judge Mosley to release D'Amore on his own recognizance (OR). Judge Mosley then called Judge John McGroarty, who was presiding over D'Amore's case and asked Judge McGroarty if he minded if Judge Mosley issued a OR release for D'Amore. It was uncontested that Judge

² 108 Nev. 2512, 267, 830 P.2d 107 117-18 (1992), *overruled on other grounds by* Matter of Fine, 116 Nev. 1001, 1022 n.17, 13 P.3d 400, 414 n.17 (2000).

³ *Id.*

Mosley had the power to order the OR release; however, Judge McGroarty testified that no judge of an equal jurisdiction had ever previously overridden one of his bench warrants.

Judge Mosley also issued the OR release without informing the District Attorney (DA) assigned to the case. At the hearing the DA testified that she would have opposed the OR if she had been contacted. The Commission found that Judge Mosley violated NCJC Canons 1,⁴ 2,⁵ 2A and 3B(7)⁶ by engaging in an ex parte communication with Orcutt regarding D'Amore's arrest and OR release and violated NCJC Canons 1, 2, 2A and 2B by ordering the release of D'Amore on OR at Orcutt's request, without notifying the DA's office.

However, the court reversed the Commission's findings on Count III & IV because of special circumstances surrounding the communication and release. Apparently, the practice in Nevada prior to the enacting of Rule 3.80 of the Rules of Practice of the Eighth Judicial Court,⁷ was to allow ex parte communications and OR release requests by a judge's family, friends, and other members of the law enforcement community. Since the local district attorneys had acquiesced to this practice for over thirty years, the court could not support the Commission's holdings despite its comport with the letter of the law.

Counts VI, VII, and VIII: Ex parte communication and delayed recusal

The factual basis behind Counts VI, VII, and VIII again relate to Judge Mosley's custody battle for Michael. Joseph McLaughlin was charged with kidnapping, robbery with use of a weapon, and cheating at gambling. Attorney Catherine Woolf represented Mr. McLaughlin on these charges. Prior to trial Mr. McLaughlin entered into plea negotiations where he pleaded guilty to robbery without the use of a weapon in exchange for the dropping of the kidnap charge and agreeing to testify against his co-defendant. In July 1997, McLaughlin's case was transferred to Judge Mosley's courtroom.

Woolf soon learned that Figliuzzi, the mother of Judge Mosley's son Michael was living with the McLaughlins and that Mr. McLaughlin had concerns for how Figliuzzi was caring for Michael at this time. At this point, McLaughlin was allegedly unaware that his case had been reassigned to Judge Mosley. Woolf then told McLaughlin that if he testified for Judge Mosley in his custody matter Judge Mosley would have to recuse himself from his criminal case and that would be to his benefit since Judge Mosley had a reputation for giving harsh sentences.

Woolf subsequently had an ex parte meeting with Judge Mosley in chambers where she informed Judge Mosley of McLaughlin's case status before him and the information he had about Figliuzzi and Michael. Woolf then testified that Judge Mosley asked her to meet with

⁴ NCJC Canon 1 provides in pertinent part: "A judge should participate in establishing, maintaining, and enforcing high standards of conduct, and shall personally observe those standards so that the integrity and independence of the judiciary is preserved."

⁵ NCJC Canon 2 provides in relevant part:

A. 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.

B. A judge shall not allow...social...relationships to influence the judge's judicial conduct or judgment. A judge shall not lend the prestige of judicial office to advance the interests...of others; nor shall a judge convey or permit others to convey the impression that they are in a special position to influence the judge.

⁶ NCJC Canon 3B(7) provides: A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law. A judge shall not initiate, permit, or consider ex parte communications made to the judge outside the presence of the parties...

⁷ 2004 (which expressly forbids such actions)

Judge Mosley's attorney Carl Lovell. Woolf stated that Judge Mosley never indicated at that meeting that he was planning to recuse himself from McLaughlin's criminal case.

A second meeting took place with Judge Mosley, attorneys Lovell and Woolf, McLaughlin and McLaughlin's wife. Woolf again mentioned that Judge Mosley was assigned to McLaughlin's criminal case. Lovell testified that this was the first time that he had heard of this potential conflict. Both McLaughlin and his wife signed affidavits for Judge Mosley to use in his custody case.

Subsequently, according to Woolf's testimony, the McLaughlins testified in Judge Mosley's behalf at the custody hearing on October 10, 1997. Woolf stated that at the time of the McLaughlins' testimony she had not received notification that Judge Mosley had recused himself from the McLaughlin's criminal case. It was later established that Judge Mosley did not recuse himself until after the custody hearing began. It was also established that this deviated from Judge Mosley's normal recusal procedure.

The Commission found that Judge Mosley violated NCJC Canon 3B(7)⁸ for engaging in an ex parte meeting with Woolf in his chambers (Count VI) and for meeting with Woolf and the McLaughlins at Lovell's office (Count VII) and that he violated NCJC Canons 1, 2, 2A, and 2B⁹ when he failed to recuse himself until after the McLaughlins had testified (Count VIII) making Judge Mosley's decision to recuse appear based solely on the testimony and its content.

Judge Mosley's arguments against these Counts are weak at best because Woolf's testimony shows that substantive issues of McLaughlin's case were discussed at the meeting so Count VI easily meets the clear and convincing evidence standard. Also the emergency exception of NCJC 3B(7)(a)¹⁰ does not apply here because a) Judge Mosley had to realize that it was unlikely for Woolf to approach him with this information for any other reason than a tactical advantage and more importantly 2) Judge Mosley failed to inform the prosecutor of either of his meetings with the McLaughlins. The court concluded that all the evidence on these Counts met the clear and convincing standard.

Expert Witness

Judge Mosley also asserted on appeal that the Commission erred in disallowing the testimony of his expert witness Professor Jeffrey Stempel, an ethics expert. The Commission reasoned, per N.R.S. 50.275,¹¹ that it did not need the assistance of Professor Stempel to determine if Judge Mosley's acts were unethical. The court held that the Commission did not abuse its discretion its decision in excluding Judge Mosley's expert witness. The remainder of Judge Mosley's arguments pertaining to alleged due process violations were found without merit.

⁸ See *supra* n. 6.

⁹ See *supra* n. 4 & 5.

¹⁰ NCJC 3B(7)(a) provides in relevant part:

Where circumstances require, ex parte communications for...emergencies that do not deal with substantive matters or issues on the merits are authorized provided:

- (i) the judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the ex parte communication, and
- (ii) the judge makes provision promptly to notify all other parties of the substance of the ex parte communication and allows an opportunity to respond.

¹¹ NEV. REV. STAT. 50.275 (2003) (allowing expert testimony if it will "assist the trier of fact to understand the evidence or to determine a fact at issue.")

Issue and Disposition

Issue

Was there sufficient evidence to support the Nevada Commission on Judicial Discipline's findings that the Honorable Judge Donald Mosley violated various Nevada Code of Judicial Conduct Canons when he:

Count I- Wrote a personal letter on official judicial letterhead to the principal of his son's school in August 1999.

Count II- Wrote a personal letter on official judicial letterhead to the principal of his son's school in February 1998.

Count III- Engaged in an ex parte conversation with a friend Barbara Orcutt, regarding the arrest and release of Robert D'Amore in August 1999.

Count IV- Ordered the release of Robert D'Amore on his own recognizance, without notifying the district attorney's office, after the police arrested D'Amore on a bench warrant issued by a different district court judge in August 1999.

Count VI- Engaged in an ex parte conversation in his chambers with attorney Woolf in August 1997.

Count VII- Engaged in an ex parte conversation with Woolf, McLaughlin and McLaughlin's wife in August 1997.

Count VIII- Failed to recuse himself from McLaughlin's criminal case until after Mrs. McLaughlin had testified in Judge Mosley's custody case.

Disposition

(Shearing, C.J. and Agosti, J.) Majority opinion Yes as to Counts I, II, VI, VII, and VIII, and No as to Counts III, and IV. (Counts V, IX, X, and XI were dismissed by the Nevada Commission on Judicial Discipline above) The majority also upheld the Commission's determination of discipline for Judge Mosley including attendance at a general ethics course, a \$5,000 fine, and a strongly worded censure.

(Maupin, J., Becker, J., and Puccinelli, D.J.) Concurring in part, dissenting in part- Yes as to Counts I, II, VI, VII, VIII and No as to Count III (as majority opinion); however, would also affirm as to Count IV (dissenting as to majority).

(Rose, J.) Concurring in part, dissenting in part- Concur as to majority opinion except as to Count VII.

(Gibbons, J.) Dissenting- No as to all counts because failure to allow Judge Mosley's expert witness to testify violated his procedural due process rights and constituted an abuse of discretion. Would reverse the decision and remand the case with instructions to consider Judge Mosley's expert's testimony.

Commentary

State of the Law Before *Mosley*

Judicial discipline cases in Nevada Prior to *Mosley* have run the gamut from cases removing judges from office for willful misconduct¹² to a reversal of a public reprimand for a justice of the peace when he engaged in ex parte communications with a criminal defendant in a case where he had recused himself.¹³ However, this area of jurisprudence is growing as rapidly as the state is. With the increase in population there is a greater need for judges, and in turn, a greater number of instances where misconduct may occur. The increase in the size of the legal community also plays a role in the increase in judicial disciplinary hearings based on mathematics and probability alone.

The growth in the legal community requires that the level of informality that previously existed in the Nevada legal community to cease. For example, communication or acts by legal professionals that were acceptable twenty years ago are now no longer allowed. The *Mosley* Court overturned Count IV above where Judge Mosley provided an OR release for a Robert D'Amore, an ex-employee of an acquaintance of Judge Mosley's. While this might have violated the letter of the law, it was standard practice in Nevada over the past thirty years to allow ex parte communications and OR releases in this manner. After *Mosley* it is abundantly clear that actions like this will not be tolerated. Therefore, *Mosley* has importance in establishing an updated ethical framework for judicial acts in Nevada.

Effect of *Mosley* on Current Law

Mosley presented several issues of first impression to the Nevada Supreme Court. *Mosley* stands for the proposition that judicial letterhead may not be used for anything other than official business, that ex parte communications should not be engaged in lightly even when issues wholly unrelated with the case at bar occur, and that the previous practice of granting OR releases to friends and family members of judges cannot stand as common practice. Perhaps more importantly *Mosley* exists as a signpost to the Nevada judiciary that the boundaries of what is acceptable conduct for a judge in Nevada is evolving.

Conclusion

Nevada is growing and evolving as a state. This growth and evolution comes with its own unique problems for the Nevada judiciary. Things that were perfectly acceptable, even commonplace, twenty years ago now qualify as acts that open a judge up to potential disciplinary hearings. The Nevada judiciary must learn to evolve to the current standards of ethical behavior, and the decision in *Mosley* helps them to do just that.

¹² In re Fine, 116 Nev. 1001, 13 P.3d 400 (2002) (upholding removal of judge for willful misconduct ranging from various ex parte communications to nepotism in appointing a first cousin as a mediator in a child custody matter).

¹³ In re Varain, 114 Nev. 1271, 969 P.2d 305 (1998) (reversing reprimand in case where judge engaged in ex parte communications with criminal defendant and his family, which the judge knew, due to exigent circumstances).