

*Millen v. Dist. Ct., Nev. Adv. Op. No. 105 (Dec. 21, 2006)*<sup>1</sup>

**CIVIL PROCEDURE – RECUSAL LISTS & RIGHT TO COUNSEL**

**Summary**

The district court judge disqualified petitioner’s counsel because petitioner’s counsel was on the judge’s recusal list. Petitioner filed a writ of mandamus to prevent the district court judge’s disqualification of her attorney from representing her at trial.

**Disposition/Outcome**

The Nevada Supreme Court granted petitioner’s writ of mandamus because the record did not disclose a sufficient basis for Judge Del Vecchio’s disqualification of petitioner’s counsel.

**Factual and Procedural History**

In September 2002, petitioner’s, Nan Bell Millen, ex-husband Richard Don Millen filed for divorce against her in the Eighth Judicial District Court. After two years of trial continuances, reassignments of judges, and petitioner’s prosecution for criminal solicitation of murder, the divorce case was assigned to Judge Anthony Del Vecchio.

Judge Del Vecchio set a trial date for September 2004, but the parties stipulated to continue the trial to February 2005. The parties stipulated to continue the trial to June 2005 after petitioner was sentenced to a period of twelve months of incarceration in the Clark County Detention Center.

Judge Del Vecchio permitted petitioner to hire a new attorney after her original attorney withdrew, and he granted her new attorney one last continuance to prepare for trial, which was set for September 30, 2005. Despite the trial date being less than a month away, Judge Del Vecchio granted petitioner’s new attorney’s motion to withdraw as counsel at the September 1, 2005 mandatory settlement conference.

Two weeks before trial, attorney Robert W. Lueck filed a notice of appearance on petitioner’s behalf. Judge Del Vecchio, however, disqualified Lueck because Lueck was on his recusal list. Petitioner filed a writ of mandamus seeking to prevent Lueck’s being prevented from representing her at trial.

**Discussion**

*1. Standard For Writ of Mandamus Relief*

One is entitled to a writ of mandamus “to compel performance of an act of law that requires as a duty resulting from an office, trust, or station, or to control an arbitrary or capricious exercise of discretion.” The writ is also appropriate to challenge district court orders

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<sup>1</sup> By Sherry Moore

that disqualify attorneys from representing parties,<sup>2</sup> but is purely within the discretion of the court.<sup>3</sup>

Judge Del Vecchio disqualified Lueck from representing petitioner via an oral pronouncement contained in the clerk's minutes. Ordinarily, oral pronouncements from the bench, the clerk's minute order, or an unfiled written order are ineffective for any purpose.<sup>4</sup> However, oral pronouncements will be effective if they concern, *inter alia*, scheduling and administrative matters that do not permit a party to gain an advantage.

Because Judge Del Vecchio's oral pronouncement involved scheduling and administrative matters that did not result in either party gaining an advantage, the pronouncement is enforceable and thus subject to review.

## 2. *Problems With Recusal Lists*<sup>5</sup>

Neither the petitioner nor Judge Del Vecchio express disdain with the use of recusal lists in general. However, Judge Del Vecchio addresses two problems with the recusal list policy: 1) secrecy; and 2) lack of uniform standards concerning the inclusion of attorneys on these lists.

Judge Del Vecchio notes that a judge's recusal list is kept secret from the judge's colleagues, lawyers, and the general public. Such secrecy, he argues, leaves no way to verify whether a judge's choices are supported by judicial canons, rules, or statutes, not to mention undermining public confidence in the judiciary. Furthermore, if the list is kept secret, the judge can keep a long list of conflicted attorneys, effectively reducing his caseload.

Judge Del Vecchio further argues that the recusal list policy lacks objective criteria to guide judges in deciding whether an attorney should be added to his list. Accordingly, he advocates that recusal lists should be made public, and guidance on what conditions are required for a judge to place an attorney on his recusal list.

## 3. *Propriety of Recusal Lists in General*

A trial judge has a duty to sit and "preside to the conclusion of all proceedings, in the absence of some statute, rule of court, ethical standard, or other compelling reason to the contrary."<sup>6</sup> In other words, a judge has a general duty to preside over a case to its conclusion, unless a judicial canon, statute or rule requires the judge's disqualification.

NCJC Canon 3E(1) lists the situations when a judge should not preside over a case. More specifically, NCJC Canon 3E(1)(a) provides a subjective basis for disqualification.<sup>7</sup> NCJC Canon 3E(1)(b)-(d), in contrast, provide objective bases for disqualification, and maintaining a

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<sup>2</sup> Cronin v. Dist. Ct., 781 P.2d 1150, 1152 n.4 (Nev. 1989).

<sup>3</sup> Smith v. Dist. Ct., 818 P.2d 849, 851 (Nev. 1991).

<sup>4</sup> Rust v. Clark County. Sch. Dist., 747 P.2d 1380, 1382 (Nev. 1987).

<sup>5</sup> A recusal list is a registry of people with respect to whom the judge has some disqualifying relationship that would warrant the judge's disqualification from hearing the case. They are also used to streamline case management, thereby preventing delays in initial case assignments.

<sup>6</sup> Las Vegas Downtown Redev. v. Dist. Ct., 5 P.3d 1059, 1061 (Nev. 2000) (quoting Ham v. Dist. Court, 566 P.2d 420, 424 (1977)).

<sup>7</sup> Subjective basis means that only the judge can determine whether he has a personal bias or prejudice towards litigants or their counsel or possesses personal knowledge about the case.

recusal list on any of these grounds would not present a conflict between a judge's duty to sit and a litigant's right to choose counsel.<sup>8</sup>

Thus, the use of a recusal list, the purpose of which is case management, is proper only if it is based on the objective bases for disqualification enumerated in NCJC Canon 3E(1)(b)-(d), and can no longer be based on the subjective bases contained in NCJC Canon 3E(1)(a). Recusal cannot be based on the subjective bases because recusal on such grounds occurs only upon an examination of the facts of each particular case, which means that the case management objectives are not met in such situations.

Additionally, recusal lists must contain not only the registry of attorneys' names, but also the specific NCJC Canon 3E(1)(b)-(d) basis for disqualification. Further, the judge must periodically review such recusal lists and said lists must be disclosed to the public, thereby eliminating the problems of secrecy and lack-of-public-review problems.

Here, Judge Del Vecchio improperly placed Lueck on his recusal list because his reasons for doing so – that he and Lueck were former colleagues and that Lueck had asked him to reschedule a prior, unrelated case – did not constitute an objective basis required under NCJC Canon 3E(1)(b)-(d).

#### *4. Disqualification of Counsel v. Client's Right To Choose Counsel*

Attorney disqualification is an extreme remedy that will not be taken lightly because disqualification causes delay, increases costs, and deprives parties the right to hire the counsel of their choice. Therefore, courts will only disqualify counsel when no practical alternative exists.<sup>9</sup> However, courts may disqualify counsel when a lawyer is retained for the purpose of forcing a judge's disqualification, for one should be precluded from causing a disqualification by virtue of his own intentional actions.<sup>10</sup>

Because the record does not reflect that petitioner retained Lueck for the purpose of disqualifying Judge Del Vecchio, Judge Del Vecchio abused his discretion by disqualifying Lueck from representing petitioner.

### **Conclusion**

A judge's oral pronouncement disqualifying counsel is administrative in nature and thus, subject to review. Recusal lists are proper but they must be public and identify the applicable NCJC Canon 3E(1)(b)-(d) disqualifying relationship that excuses the judge's general duty to sit. Further, the client's right to choose counsel prevails over the judge's duty to sit unless the client retained counsel for the purpose of disqualifying the judge. Because the record does not disclose a sufficient basis for the disqualification of petitioner's counsel, Judge Del Vecchio improperly disqualified Lueck.

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<sup>8</sup> Some examples of objective bases listed in NCJC Canon 3E(1)(b)-(d) are: 1) judge has an economic interest in the case or is presiding over a case in which an immediate family member is a party in interest.

<sup>9</sup> Lemm v. Adams, 955 S.W.2d 70, 74 (Tenn. Ct. App. 1997); Whalley Dev. v. First Citizens Bancshares, 834 S.W.2d 328, 331-32 (Tenn. Ct. App. 1992); Bd. of Educ. of N.Y. City v. Nyquist, 590 F.2d 1241, 1246 (2d Cir. 1979).

<sup>10</sup> Las Vegas Downtown Redev. Agency v. Hecht, 940 P.2d 127, 138 (Nev. 1997); McCuin v. Texas Power & Light Co., 714 F.2d 1255, 1264 (5th Cir. 1983) (noting that one of the rationales for this principle is maintaining public confidence in the judicial system).