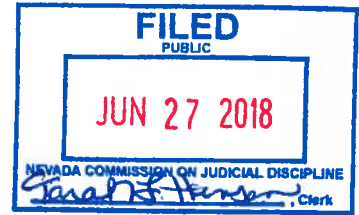


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BEFORE THE NEVADA COMMISSION ON JUDICIAL DISCIPLINE

STATE OF NEVADA



In the Matter of)
THE HONORABLE HEIDI ALMASE, former)
Municipal Court Judge, City of Las Vegas,)
County of Clark, State of Nevada,)
Respondent.)

CASE NO. 2017-099-P

ORDER DENYING MOTION TO RECUSE
PROSECUTING OFFICER KATHLEEN M. PAUSTIAN

Currently before the Commission on Judicial Discipline (“Commission”) is a Motion to Recuse Prosecuting Officer Kathleen M. Paustian (“Motion”), filed by Ms. Heidi Almase (“Respondent”) on May 2, 2018. The Opposition to the Motion (“Opposition”) was filed by the Prosecuting Officer to the Commission (“Prosecuting Officer”) on May 14, 2018. The Reply to the Opposition was filed on May 17, 2018 by Respondent.

STATEMENT OF FACTS

The Formal Statement of Charges (“FSOC”) centers upon Respondent’s re-election campaign and a photoshopped celebrity photo posted to the campaign’s Facebook page. In 2017, Respondent ran for a second term as a Municipal Court Judge. Respondent was initially represented in her bid for re-election by David V. Thomas, Esq., her campaign manager. After Mr. Thomas withdrew as her campaign manager, Respondent entered into an Independent Contractor Agreement with Jennifer C. Barrier, on April 10, 2017, for campaign management. On June 6, 2017, Ms. Barrier posted a photoshopped image of the actor Dwayne Johnson, “The Rock”, with Respondent on her official Facebook page. The image was tagged: “It just makes sense: Re-Elect Judge Heidi Almase” and identified Dwayne Johnson, including his signature. Respondent commented on the page: “I’m ‘almost’ taller than him. Almost.” On or about June 7, 2017, the *Las Vegas Review Journal* (“*Review Journal*”) published an article about the Facebook posting in which the reporter asked Ms. Barrier if she had authority to post the image of Mr. Johnson. Ms. Barrier replied she was “...waiting on written

1 authorization to use his photo..." and added "It was never an endorsement." In her interview with the
2 Commission's Investigator, Respondent said she had no prior knowledge that Ms. Barrier was going to
3 post the image. Respondent also stated that Ms. Barrier assured her, after the image was posted, that
4 she had obtained Mr. Johnson's permission to use his image on Respondent's Facebook page.
5 Respondent stated Ms. Barrier explained that she had "family connections" with Mr. Johnson. The
6 picture was removed from Respondent's official Facebook page shortly after Ms. Barrier spoke to the
7 Review Journal. Respondent later apologized for the Dwayne Johnson Facebook posting in a press
8 release dated June 9, 2017. She also verbally self-reported these actions to the Commission on June 8,
9 2017, and followed up with a letter to the Commission dated June 9, 2017. Respondent lost the election
10 to her opponent.

11 **1. Motion**

12 Respondent alleges that the assigned Prosecuting Officer, Kathleen Paustian, has a long term
13 personal and/or professional relationship with David V. Thomas and his wife Judge Nancy Allf.
14 Respondent notes that she hired Mr. Thomas as her campaign manager in her first election and re-
15 election bid for municipal court judge. During the campaign, Respondent states that she spent a lot of
16 time with Mr. Thomas and Judge Allf; however, when Mr. Thomas terminated representation of
17 Respondent, significant acrimony grew between Respondent and Mr. Thomas. Additionally,
18 Respondent states that shortly thereafter a negative article appeared about Mr. Thomas in the Review
19 Journal.

20 Respondent argues that Ms. Paustian and Judge Allf were law partners as far back as 2002, and
21 that Ms. Paustian, Judge Allf and Mr. Thomas have socialized together at various State Bar events,
22 Judge Allf appointed Ms. Paustian to the Standing Committee on Judicial Ethics and Election
23 Practices, and are friends on Facebook. Therefore, Respondent argues that to avoid the appearance of
24 bias, the Commission should appoint a different and neutral prosecuting officer. Respondent cites to
25 the Commission's Procedural Rules, Exhibit A, Rules 4.1 and 4.3 regarding challenges for actual or
26 implied bias or prejudice regarding disqualifying a commissioner as there is no procedural rule to
27 disqualify a prosecuting officer.

28 Respondent opines that a presumption of honesty and integrity cloaks those who serve as
adjudicators citing to *Gilman v. Nevada State Bd. Of Veterinary Med. Examiners*, 120 Nev. 263, 269,
89 P. 3d 1000, 1004 (2004), *disapproved by Nassiri v. Chiropractic Physicians' Bd.*, 130 Nev. Adv.
Op. 27, 327 P. 3d 487 (2014)(citation omitted). However, Respondent argues that the Prosecuting
Officer may have implicit or explicit bias.

1 **2. Opposition**

2 The Prosecuting Officer's Opposition notes that her legal partnership with Judge Allf ended
3 almost 10 years ago, and that she occasionally socializes with Mr. Thomas and Judge Allf at social
4 group gatherings. Moreover, the Prosecuting Officer explains that the Nevada Bar is very small and
5 with over thirty years of law practice she knows many lawyers who have become judges.

6 The Prosecuting Officer goes on to note that what occurred between Respondent and Mr.
7 Thomas is not relevant to the underlying case, and that she was unaware, until she accepted assignment
8 of this case, that Mr. Thomas represented Respondent in the 2017 election cycle.

9 The Prosecuting Officer acknowledged that the newspaper clippings Respondent attached as
10 exhibits indicate that Ms. Paustian was at many legal community events, wherein Mr. Thomas and
11 Judge Allf were also present. However, she argues this does not indicate bias as these events occurred
12 more than ten years ago. Further, she argues that although Judge Allf was on the State Bar Board of
13 Governors ("Board") when the Prosecuting Officer was appointed to the Standing Committee on
14 Judicial Ethics and Election Practices ("Committee"), this does not indicate bias, as all fourteen Board
15 members voted for the Prosecuting Officer to serve on the Committee. The Prosecuting Officer further
16 opines that just because she is Facebook friends with both Mr. Thomas and Judge Allf also does not
17 indicate bias.

18 The Prosecuting Officer asserts that there is no conflict of interest in this matter. She states that
19 there is no evidence that Judge Allf was involved in Mr. Thomas' decision to terminate Respondent as
20 his client, and Mr. Thomas never discussed his political representation of Respondent with the
21 Prosecuting Officer. Finally, the Prosecuting Officer professes that there is no provision within the
22 Commission's Procedural Rules to challenge a prosecuting officer. She argues that a prosecuting
23 officer is different than that of jurist, wherein it is difficult for a prosecuting officer to interject bias into
24 the Commission's process.

25 **3. Reply**

26 Respondent notes that the Prosecuting Officer did not deny that she has or had a personal
27 and/or professional relationship with Mr. Thomas and his wife Judge Allf, but rather challenged the
28 supporting exhibits as dated. Respondent notes the exhibits demonstrate the length of the relationship

1 between the Prosecuting Officer and Mr. Thomas and Judge Allf. Furthermore, Respondent states that
2 the Prosecuting Officer failed to cite to any points and authorities in her opposition.

3 Respondent further argues that the investigation delved into Ms. Barrier's former employment
4 with Mr. Thomas and Respondent's interactions with Mr. Thomas prior to his termination of his
5 campaign representation. Respondent cites to *Lucky Dogs LLC v. City of Santa Rosa*, 913 F. Supp. 2d
6 853, 862 (N.D. Cal. 2012) arguing that the Constitution is concerned with not only actual bias but the
7 appearance of justice. She notes that there is no Commission Procedural Rule to disqualify a
8 Prosecuting Officer. However, Respondent opines that there are conflict rules for attorneys and due
9 process is required in judicial discipline proceedings. Moreover, Respondent argues that Procedural
10 Rule 4 of Exhibit A to the Commission Procedural Rules has analogous implications for Prosecuting
11 Officers as Ms. Paustian may have implicit or explicit bias based upon her long-term professional
12 relationship with Judge Allf and Mr. Thomas.

13 ISSUES

14 Whether the Prosecuting Officer should be recused based upon implied or actual bias.

15 STANDARD OF LAW

16 Rules of Professional Conduct

17 Rule 1.7. Conflict of Interest: Current Clients

18
19 (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the
20 representation involves a concurrent conflict of interest

21 ...

22 NV ST RPC Rule 1.7

23 Rule 1.9. Duties to Former Clients

24 (a) A lawyer who has formerly represented a client in a matter shall not thereafter represent
25 another person in the same or a substantially related matter in which that person's
26 interests are materially adverse to the interests of the former client unless the former
27 client gives informed consent, confirmed in writing.

28 ...

NV ST RPC Rule 1.9

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Rule 1.10. Imputation of Conflicts of Interest

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7, 1.9, or 2.2, unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.

...

NV ST RPC Rule 1.10

Disqualification

District courts are responsible for controlling the conduct of attorneys practicing before them, and have broad discretion in determining whether disqualification is required in a particular case. *See Robbins v. Gillock*, 109 Nev. 1015, 1018, 862 P.2d 1195, 1197 (1993); *Cronin v. District Court*, 105 Nev. 635, 640, 781 P.2d 1150, 1153 (1989). Courts deciding attorney disqualification motions are faced with the delicate and sometimes difficult task of balancing competing interests: the individual right to be represented by counsel of one's choice, each party's right to be free from the risk of even inadvertent disclosure of confidential information, and the public's interest in the scrupulous administration of justice. *See Hull v. Celanese Corp.*, 513 F.2d 568, 570 (2d Cir.1975). While doubts should generally be resolved in favor of disqualification, *see Cronin* at 640, 781 P.2d at 1153; *Hull*, 513 F.2d at 571, parties should not be allowed to misuse motions for disqualification as instruments of harassment or delay. *See Flo-Con Systems, Inc. v. Servsteel, Inc.*, 759 F.Supp. 456, 458 (N.D.Ind.1990).

When considering whether to disqualify counsel, the district court must balance the prejudices that will inure to the parties as a result of its decision. *Cronin*, 105 Nev. at 640, 781 P.2d at 1153. To prevail on a motion to disqualify opposing counsel, the moving party must first establish "at least a reasonable possibility that some specifically identifiable impropriety did in fact occur," and then must also establish that "the likelihood of public suspicion or obloquy outweighs the social interests which will be served by a lawyer's continued participation in a particular case." *Id.* at 641, 781 P.2d at 1153 (quoting *Shelton v. Hess*, 599 F.Supp. 905, 909 (S.D.Tex.1984)).

Brown v. Eighth Judicial Dist. Court ex rel. County of Clark, 116 Nev. 1200, 1205, 14 P.3d 1266, 1269-70 (2000).

The appearance of impropriety standard is no longer applicable to attorney disqualification issues. *Liapis v. Second Judicial District Court*, 128 Nev. 414, 418, 282 P. 3d. 733, 736 (2012).

"[A] motion to disqualify normally should be decided on the basis of the declarations and documents submitted by the parties. An evidentiary hearing should be held only

1 when the court cannot with confidence decide the issue on the written submissions. Such
2 instances should be rare, as when an important evidentiary gap in the written record must
3 be filled, or a critical question of credibility can be resolved only through live
4 testimony.... Of course, whether to conduct an evidentiary hearing is a matter left to the
5 discretion of the trial court.” *Richman v. Haines & Krieger, LLC*, 2012 WL 9051047
(Nev. Dist. Ct.), citing *In re Complex Asbestos Litig.*, 283 Cal. Rptr. 732, 738 n.5 (Cal. Ct.
6 App. 1991).

7 DISCUSSION

8 Attorneys admitted to practice in the State of Nevada must adhere to the standards of the Nevada
9 Rules of Professional Conduct (“RPC”) as adopted and amended from time to time by the Supreme
10 Court of Nevada. In determining whether disqualification is warranted, a court must undertake a
11 balancing test to “weigh the prejudices that the parties will suffer based on the district court’s decision,
12 consider the public interest in the administration of justice, and discourage the use of such motions for
13 purposes of harassment and delay.” *Nevada Yellow Cab Corp. v. Eighth Jud. Dist. Ct.*, 123 Nev. 44, 53,
14 152 P.3d 737, 742–43 (2007). If an ethical violation is established, the court has broad discretion in
15 determining whether disqualification, or some lesser sanction, is warranted. *Nevada Yellow Cab*, 123
16 Nev. at 53–54, 152 P.3d at 743. Although “doubts should generally be resolved in favor of
17 disqualification,” the court should not allow parties to “misuse motions for disqualification as
18 instruments of harassment or delay.” *Brown v. Eighth Jud. Dist. Ct.*, 116 Nev. 1200, 1205, 14 P.3d
19 1266, 1270 (2000).

20 The appearance of impropriety standard is no longer applicable to attorney disqualification
21 issues. *Liapis v. Second Judicial District Court*, 128 Nev. 414, 418, 282 P. 3d. 733, 736 (2012). An
22 appearance of impropriety by itself does not support a lawyer’s disqualification. *Id.* at 419, 282 P 3d. at
23 737. “To prevail on a motion to disqualify opposing counsel, the moving party must first establish at
24 least a reasonable possibility that some specifically identifiable impropriety did in fact occur, and then
25 must also establish that the likelihood of public suspicion or obloquy outweighs the social interests
26 which will be served by a lawyer’s continued participation in a particular case.” *Brown v. Eighth*
27 *Judicial Dist. Court*, 116 Nev. 1200, 1205, 14 P.3d 1266, 1270 (2000) (quotation marks omitted).

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1 Respondent did not cite to any RPC in her Motion but rather cited to the Commission's
2 Procedural Rules. However, RPC apply to a motion for disqualification.¹ In order to file a motion, a
3 person must have standing. This matter is similar to that of *Liapis v. Dist. Ct.*, 128 Nev. 414, 416, 282
4 P.3d 733, 735 (2012). In that matter, the Court noted that "love" did not create a conflict of interest. In
5 *Liapis*, a son represented his father in a case against the son's mother. *Id.* The Court held that the
6 mother lacked standing to seek disqualification of the parties' son from representing the father in the
7 divorce action. *Id.* at 420-421. The Court noted that the mother was neither a former nor current client of
8 her son, and the mother did not argue that the son's representation of the father constituted an ethical
9 breach as to her or impacted her legal rights. *Id.* But rather, the mother argued that the son's love for his
10 parents impacted his ability to represent the father and not the mother. *Id.* The Court concluded that
11 absent an ethical breach by the attorney that affects the fairness of the entire litigation, or a proven
12 confidential relationship between the nonclient parent and the attorney, the nonclient parent lacks
13 standing to seek disqualification under RPC 1.7. *Id.* at 421-22.

14 In this instance, Mr. Thomas is not a former or current client of the Prosecuting Officer but
15 rather is known to the Prosecuting Officer through her former law partnership with his wife, now Judge
16 Allf. Respondent failed, as did the mother in *Liapis*, to establish that some "specifically identifiable
17 impropriety" occurred, *Brown*, 116 Nev. at 1205, 14 P.3d at 1270 (quoting *Cronin v. District*
18 *Court*, 105 Nev. 635, 641, 781 P.2d 1150, 1153 (1989), *disavowed on other grounds by Nevada Yellow*
19 *Cab*, 123 Nev. at 54 n. 26, 152 P.3d at 743 n. 26). Moreover, the Nevada Supreme Court has
20 acknowledged that Nevada has a very small bar membership and thus frequent interactions will occur
21 between lawyers and judges. *City of Las Vegas Downtown Redevelopment Agency v. Hecht*, 113 Nev.
22 632, 635-36, 940 P.2d 127, 129 (1997). The Court noted that if litigants successfully challenged judges
23 based upon mere allegations of bias against counsel for the litigant, "it 'would bid fair to decimate the
24 bench'" *Id.* at 635 (citations omitted). In this instance, the former law partnership with Mr. Thomas'
25 wife and social engagements by the Prosecuting Officer and Mr. Thomas do not implicate the fairness

26 ¹ In *In re Cox*, 481 S.W.3d 289, 293-94 (Tex. App. 2015), the court held that the policy reasons articulated by the court of
27 criminal appeals to support disqualification of an entire district attorney's office on the basis of a conflict of interest simply
28 do not apply to an attorney in private practice appointed as a special prosecutor in a single case. (citation omitted). Further,
the court noted that a private attorney appointed as a special prosecutor nonetheless remains a private attorney and
is disqualifiable on conflict-of-interest grounds that need not rise to the level of a due-process violation. *Id.*

1 of the proceeding. At best, Mr. Thomas can be viewed as a “friend” of Ms. Paustian’s through a prior
2 work relationship, but that friendship fails to impede the impartiality or fairness of the Commission’s
3 proceedings against Respondent that would require disqualification. *Jacobson v. Manfredi*, 100 Nev.
4 226, 230–31, 679 P.2d 251, 254 (1984) (providing that the mere allegation of a judge’s prior
5 relationship with a party to the case did not demonstrate bias sufficient to warrant disqualification). In
6 this case, Ms. Paustian is not the judge but the Prosecuting Officer; therefore, more than an appearance
7 of impropriety is required for disqualification. Thus, Respondent lacks standing regarding
8 disqualification based upon the work-related friendship.

9 The Commission finds that even if Respondent had standing, the Prosecuting Officer’s
10 professional association with Mr. Thomas’ wife and Mr. Thomas does not warrant disqualification.
11 While this case is not a criminal matter, reference to criminal prosecutors is helpful.² To disqualify a
12 criminal prosecutor requires a strong showing of a conflict of interest as prosecutors advocate on behalf
13 of the public. *State v. Gonzales*, 138 N.M. 271, 282 (2005). The Nevada Supreme Court notes that the
14 appearance-of-impropriety standard has been rejected; however, the Court will, in criminal cases,
15 continue to determine whether the conflict of interest undermines the public trust and confidence in the
16 criminal justice system. *State v. Eighth Judicial Dist. Court of State ex rel. County of Clark*, 61860,
17 2013 WL 1097820, at *1 (Nev. Mar. 14, 2013) (unpublished). The Court further stated that other states
18 allow recusal “only if the conflict would render it unlikely that the defendant will receive a fair trial.”
19 *Id.* While judicial discipline matters are neither criminal nor civil, the Commission notes that
20 Respondent is entitled to a fair trial as the Commission is a constitutionally established court of judicial
21 performance and qualifications. *Whitehead v. Nevada Com’n On Judicial Discipline*, 110 Nev. 128,
22 906 P.2d 230 (1994), *decision clarified on denial of rehearing*, 110 Nev. 380, 873 P.2d 946 (1994).

23 In *Wallace v. Nevada State Bd. of Psychological Examiners*, 126 Nev. 767, 367 P.3d 832 (2010)
24 (unpublished), the Nevada Supreme Court noted that it had adopted, from the United States Supreme
25 Court, the requirement that the party contesting the impartiality of an administrative agent must satisfy a

26 ² Judicial discipline proceedings “are neither civil nor criminal in nature; they are merely an inquiry into the conduct of a
27 judicial officer the aim of which is the maintenance of the honor and dignity of the judiciary and the proper administration of
28 justice rather than the punishment of the individual,” *Goldman v. Nevada Comm’n on Judicial Discipline*, 108 Nev. 251,
264, 830 P.2d 107, 115 (1992), *disapproved of on other grounds by In re Fine*, 116 Nev. 1001, 13 P.3d 400 (2000)(citations
omitted).

1 heavy burden. *Id.* citing to *City Plan Dev. v. State, Labor Comm'r*, 121 Nev. 419, 429, 117 P.3d 182,
2 189 (2005); *Withrow v. Larkin*, 421 U.S. 35, 47, 95 S.Ct. 1456, 43 L.Ed.2d 712 (1975). In *Wallace*, the
3 Court agreed with the Board's finding that Dr. Wallace failed to provide sufficient evidence that Deputy
4 Attorney General ("DAG") Reed, serving as counsel or prosecutor for the Board, had a conflict of
5 interest because his father was the presiding judge in the federal lawsuit against the Board filed by Dr.
6 Wallace. *Id.* The Court found that Dr. Wallace failed to explain how the alleged conflict prejudiced
7 him. *Id.* Therefore, the Court held that Dr. Wallace's due process rights were not violated by DAG Reed
8 serving as counsel or prosecutor for the Board at the disciplinary hearing.

9 Respondent failed to explain or demonstrate any bias on the part of the Prosecuting Officer that
10 would lessen Respondent's ability to obtain a fair trial, and it is not evident how she is prejudiced by the
11 Prosecuting Officer's association with Mr. Thomas. Mr. Thomas' interactions with Respondent do not
12 relate to "The Rock" Facebook post at issue. Mr. Thomas' actions were limited to his termination of
13 Respondent as a client, and were far removed from the Facebook posting that is at the heart of this case.
14 The fact that Ms. Barrier, who posted "The Rock" on Respondent's Facebook page, was Mr. Thomas'
15 former employee does not impact the fairness of the trial. The Prosecuting Officer's tangential
16 relationship with Mr. Thomas regarding the actions at issue in the FSOC fails to rise to the level of a
17 conflict of interest that would impact Respondent's ability to have a fair judicial discipline proceeding.

18 Moreover, in *Whitehead v. Nevada Comm'n on Judicial Discipline*, 110 Nev. 874, 883, 878 P.2d
19 913, 918-19 (1994), the Nevada Supreme Court noted that the policy rationale behind requiring the
20 Commission to use an independent prosecutor in judicial discipline proceedings ensures that
21 disciplinary proceedings are not pursued for personal, partisan, or political gain, and it ensures that one
22 branch of government does not usurp the vital functions of another or place itself in the position of
23 holding the others hostage. There is no evidence that the Prosecuting Officer is pursuing this case for
24 personal gain, as a favor to Mr. Thomas or any other untoward reason. The Prosecuting Officer was
25 assigned to this case and accepted the same without any knowledge that Mr. Thomas had previously
26 represented Respondent. *See* Opposition p. 5 and Affidavit of Kathleen Paustian.

27 Respondent failed to show that she has standing to contest or that the prosecutorial function
28 could not be executed impartially by the assigned Prosecuting Officer. Respondent's argument that the

1 familiar relationship between Mr. Thomas, his wife, and the Prosecuting Officer will impact
2 impartiality lacks merit. The Prosecuting Officer's role is to file and prosecute the case based upon the
3 determination issued by the Commission. The FSOC reflect the determination issued by the
4 Commission, and the judicial discipline hearing will focus on the unauthorized Facebook post by
5 Respondent's election staff and Respondent's comment on the same. Mr. Thomas was not involved and
6 was not a witness to what occurred between Ms. Barrier and Respondent regarding the posting of "The
7 Rock" on Respondent's campaign Facebook page. Therefore, if any friendship exists between the
8 Prosecuting Officer and Mr. Thomas, it will not impact the prosecution of Respondent.

9 Therefore, the Motion to Disqualify the Prosecuting Officer, Ms. Paustian, is hereby denied.

10 The Honorable Thomas Armstrong is authorized to sign this order on behalf of the full
11 Commission.

12 IT IS SO ORDERED.

13 DATED this 27 day of me, 2018.

14 STATE OF NEVADA
15 COMMISSION ON JUDICIAL DISCIPLINE

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17 Honorable Thomas Armstrong, Commissioner
18 Presiding Officer
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CERTIFICATE OF SERVICE

I hereby certify on this 3rd day of June, 2018, I transmitted a copy of the foregoing ORDER DENYING MOTION TO RECUSE PROSECUTING OFFICER KATHLEEN M. PAUTIAN, via email and by placing said document in the U.S. Mail, postage prepaid, addressed to:

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Tarah Hansen, Commission Clerk