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IN THE SUPREME COURT OF THE STATE OF NEVADA

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Mar 18 2011 02:28 p.m.
Tracie K. Lindeman

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FERRILL J. VOLPICELLI,

CASE NO. 56747

Appellant,

District Court: CV09-03442

vs.

SCOTT EDWARDS,

Respondent.

_____ /

**RESPONDENT EDWARDS' RESPONSE TO APPELLANT'S
CIVIL PROPER PERSON APPEAL STATEMENT**

As ordered by this Court on January 18, 2011, Respondent Scott Edwards herein responds to the arguments made in Appellant Ferrill Joseph Volpicelli's "Civil Proper Person Appeal Statement."

At the core of Appellant Volpicelli's "Civil Proper Person Appeal Statement" is his contention that his attorney malpractice action in the district court against Respondent Edwards should be governed by NRS 11.207's 4-year "after the plaintiff sustains damage" statute of limitations. His position is based upon what he contends is authority contained in Clark v. Robinson, 113 Nev. 949, 994 P.2d 788 (1997). Yet a careful reading of Clark v. Robinson explains that the 4-year statute of limitations period for legal malpractice associated with, or arising from, a criminal action does not exist until

1 post-conviction or appellate relief is granted. Morgano v.
2 Smith, 110 Nev. 1025, 1029, 879 P.2d 735, 737 (1994). “[T]he
3 plaintiff must plead that he or she has obtained appellate or
4 post conviction relief in order to overcome a motion for summary
5 judgment or a motion to dismiss.” Id. Other states have
6 addressed this issue, holding that a litigant's malpractice
7 claim is not ripe until post-conviction or appellate relief is
8 granted. Once relief is granted, the statute of limitations for
9 legal malpractice begins to run. Shaw v. State, Dept. of Admin.,
10 PDA, 816 P.2d 1358 (Alaska 1991); Stevens v. Bispham, 316 Or.
11 221, 851 P.2d 556 (1993) (for a convicted criminal to maintain a
12 legal malpractice action against former defense counsel,
13 plaintiff must allege exonerated of the underlying offense
14 through reversal on direct appeal, post-conviction relief or
15 other means). This Supreme Court specifically adopted this “no
16 relief-no harm” approach in Morgano. Yet Appellant Volpicelli's
17 “Civil Proper Person Appeal Statement” admits that he was denied
18 post conviction relief by the Supreme Court. See “Civil Proper
19 Person Appeal Statement,” page 6, line 2. Because he never
20 received post conviction relief, he is unable to avail himself
21 of the 4-year period of limitations contained within NRS 11.207.

22 Appellant Volpicelli's reliance upon Clark v. Robinson is
23 also misplaced for another significant reason. Clark v.
24 Robinson was decided based upon facts, and statutory language,
25 in effect before Nevada's 1997 Legislature amended NRS 111.207's
26 periods of limitation. Of particular relevance here is the 1997

1 Legislature's addition of language to NRS 11.207 which makes a
2 plaintiff's claims subject to a 2-year period of limitations
3 after the plaintiff discovers, or through the use of reasonable
4 diligence, should have discovered the material facts which
5 constitute the cause of action. See Section 2 of chapter 184,
6 Statutes of Nevada 1997, at page 478. Additionally, the 1997
7 session law which amended NRS 11.207 could have had no impact on
8 the Clark v. Robinson case because the legislature specifically
9 provided that the act's provisions did not apply to actions
10 filed before July 1, 1997, as was the underlying district court
11 case in Clark v. Robinson.

12 Appellant Volpicelli also complains that the defense of the
13 statute of limitations should have been raised as an affirmative
14 defense, rather than as it was in a "Suggestion of Lack of
15 Subject Matter Jurisdiction." The ability to raise the absence
16 of subject matter jurisdiction is never waived and generally may
17 be brought to the court's attention at any time and in almost
18 any manner. Meinhold v. Clark County School District, 89 Nev.
19 56, 59, 506 P.2d 420, 422 (1973); S.G. & R. Bank v. Milisich, 48
20 Nev. 373, 390, 233 P. 41, 46 (1925). An objection based on the
21 absence of subject matter jurisdiction may be raised at any time
22 and it may be raised by suggestion of the parties or otherwise.
23 NRCP 12(h) (3). Subject matter jurisdiction is never waived.
24 Phillips v. Welch, 11 Nev. 187, 1876 WL 4547 (1876). As far as
25 the burden of proof necessary to support a suggestion of lack of
26 subject matter jurisdiction based upon a statute of limitations

1 argument, the district court, in dismissing his Complaint,
2 relied upon the dates set forth by Appellant Volpicelli himself
3 in the Complaint he originally filed with the District Court in
4 this action.

5 In his final argument, Appellant Volpicelli contends that
6 "the district court failed to act, sua sponte, on a clear
7 conflict of interest that was, and potentially will be in the
8 future, highly prejudicial to Volpicelli, in this case as well
9 as in his criminal case." See "Civil Proper Person Appeal
10 Statement," page 7, lines 22 - 26. Based upon his earlier
11 criminal prosecution by the Washoe County District Attorney's
12 Office, Appellant Volpicelli now apparently believes that the
13 Civil Division of the Washoe County District Attorney's Office
14 should be barred from defending against his civil case. But
15 Appellant Volpicelli's argument here fails to recognize that the
16 disqualification of a prosecutor's office rests with the sound
17 discretion of the district court. Tomlin v. State, 81 Nev. 620,
18 407 P.2d 1020 (1965); Hawkins v. Eighth Judicial District Court,
19 67 Nev. 248, 216 P.2d 601 (1950); Trone v. Smith, 621 F.2d 994
20 (9th Cir. 1980). In exercising that discretion, the trial judge
21 should consider all the facts and circumstances and determine
22 whether the prosecutorial function could be carried out
23 impartially and without breach of any privileged communication.
24 As stated in State v. Tippecanoe County Court, 432 N.E.2d 1377,
25 1379 (Ind.1982):

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1 (E)thical rules require that a lawyer should avoid even the
2 appearance of professional impropriety and that in certain
3 situations the disqualification of one lawyer within a law
4 firm means that all members of the firm are also
5 disqualified. Canons 5 and 9, DR 5-105(D). While this
6 principle is strictly enforced in the context of civil
7 actions conducted by private law firms, it is less strictly
8 applied to government agencies. Where a lawyer who has
9 represented a criminal defendant on prior occasions is one
10 of the deputy prosecutors, disqualification of the entire
11 office is not necessarily appropriate. Individual rather
12 than vicarious disqualification may be the appropriate
13 action, depending upon the specific facts involved.

14 Further, Appellant Volpicelli's apparent belief in the
15 existence of a conflict of interest is raised for the first time
16 in his "Civil Proper Person Appeal Statement." Under Collier v.
17 Legakes, 98 Nev. 307, 311, 646 P.2d 1219, 1221 (1982), the
18 Nevada Supreme Court has held that disqualifying the district
19 attorney's office without holding an evidentiary hearing
20 amounted, in essence, to a failure to exercise discretion.
21 Under Collier, district courts may only disqualify district
22 attorney's offices after conducting a fully evidentiary hearing
23 and considering "all the facts and circumstances." Id.
24 Disqualification based on an appearance of impropriety is
25 warranted only in "extreme" cases where the appearance "is so
26 great that the public trust and confidence in our criminal
justice system could not be maintained without such action."
Id. at 310, 646 P.2d at 1221. The argument put forth here by
Appellant Volpicelli could not have been decided by the district
court, for two important reasons: it was not before the
district court and the district court cannot act on such an
issue without an evidentiary hearing. It is improper to raise

1 this argument now. Ford v. Warden, 111 Nev. 872, 884, 901 P.2d
2 123, 130 (1995) (stating that petitioner cannot change theory on
3 appeal).

4 AFFIRMATION PURSUANT TO NRS 239B.030

5 The undersigned does hereby affirm that the preceding
6 document does not contain the social security number of any
7 person.

8 Dated this 18th day of March, 2011.

9 RICHARD A. GAMMICK
10 District Attorney

11 By /s/ David C. Creekman
12 DAVID C. CREEKMAN
13 Chief Deputy District Attorney
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CERTIFICATE OF SERVICE BY MAIL

Pursuant to NRCP 5(b), I certify that I am an employee of the Office of the District Attorney of Washoe County, over the age of 21 years and not a party to nor interested in the within action. I certify that on this date, I deposited for mailing in the U. S. Mails, with postage fully prepaid, a true and correct copy of the foregoing RESPONDENT EDWARDS' RESPONSE TO APPELLANT'S CIVIL PROPER PERSON APPEAL STATEMENT in an envelope addressed to the following:

Ferrill J. Volpicelli #79565
Lovelock Correctional Center
1200 Prison Road
Lovelock, NV 89419

Dated this 18th day of March, 2011.

 /s/ Michelle Foster
MICHELLE FOSTER