

IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL SOLID

Petitioner,

vs.

THE EIGHTH JUDICIAL DISTRICT
COURT OF THE STATE OF
NEVADA, IN AND FOR THE
COUNTY OF CLARK, AND THE
HONORABLE VALERIE ADAIR
DISTRICT JUDGE

Respondents,

And

MY ENTERTAINMENT TV; AND
THE STATE OF NEVADA,

Real Parties in Interest.

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CASE NO: 71089

STATE'S RESPONSE TO AMICUS BRIEF OF NACJ

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COMES NOW, the State of Nevada, Real Party In Interest, by STEVEN B. WOLFSON, District Attorney, through his Chief Deputy, STEVEN S. OWENS, on behalf of Real Party In Interest and submits this Response to Amicus Brief of NACJ. This response is based on the following memorandum and all papers and pleading on file herein.

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Dated this 16th day of September, 2016.

Respectfully submitted,

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565

BY /s/ Steven S. Owens

STEVEN S. OWENS
Chief Deputy District Attorney
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MEMORANDUM

In this mandamus proceeding, Petitioner Michael Solid seeks to prohibit My Entertainment TV (hereinafter “MET”) from providing electronic coverage of court proceedings in his pending criminal case. This Court’s Order filed on August 23, 2016, appropriately directed MET, not the State, to respond to the mandamus petition. However, on September 9, 2016, this Court permitted the Nevada Attorneys for Criminal Justice (NACJ) to file an amicus brief and granted five days’ time to “any party” wishing to respond. Because NACJ’s amicus brief accuses the prosecution of ethical violations in its dealings with the media, the State, as a Real Party In Interest and prosecuting agency in the criminal case below, hereby responds to those allegations.

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No Jurisdiction

The narrow issue raised by Petitioner in his motion below exclusively concerned MET's recording and broadcasting of *in court proceedings*. App. 3-13¹ The State declined to take a position on the matter and left it to attorneys from MET to defend their own right of access to the courtroom. Supp. App. 4. At no time were any allegations of ethical violations leveled against the State's prosecutors nor was there any allegation of an inappropriate contract or *extrajudicial statements* to the media. Id. No such issue was raised below and the district court judge did not rule on any such issue. App. 35-37. However, Amicus has now filed a brief which begins its argument with the heading, "The Nevada Rules of Professional Conduct Prohibit the Clark County District Attorney's Office from participating in My Entertainment TV's program." Amicus Brief, p. 2. After accusing the prosecution of ethical violations, Amicus concludes its brief by asking this Court to "find that this current contractual relationship with My Entertainment TV and the Clark County District Attorney's Office is a violation of the Nevada Rules of Professional Conduct." Amicus Brief, p. 12.

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¹ Petitioner only raised the application of the ethical rules to extrajudicial statements for the first time in his mandamus petition, but even then only alleged that MET encourages violation of the rules, not that the prosecutors had in fact breached their ethical obligations. Petition, pp. 21-22.

Because the district court judge in this case was not asked to rule upon the appropriateness of any contract or alleged extrajudicial statements by prosecutors, mandamus is not available on the issue. Mandamus will not lie to compel a lower court to perform an act on an issue with which it was never presented, nor to control an arbitrary abuse of discretion where the lower court was not asked to and has not exercised discretion in the first instance. A condition precedent to mandamus relief is the lower tribunal's actual refusal to perform a necessary duty. Brewery Arts Ctr. v. State Bd. Exam'rs, 108 Nev. 1050, 1053-54, 843 P.2d 369, 372 (1992); see also State ex rel. Phillips v. Second Judicial Dist. Court, 46 Nev. 25, 28-29, 207 P. 80, 81 (1922) (“[B]efore the relator can obtain the writ he must establish sufficient facts to show that he has a legal right to have something done by the inferior tribunal *which it has refused to do.*”) [emphasis added]. With only few exceptions not applicable here, “an amicus curiae must accept the case before the reviewing court as it stands on appeal, with the issues as framed by the parties.” 4 Am Jur 2d Amicus Curiae § 7 (2nd 2015). Amicus is not permitted to raise new issues ancillary to the subject of the instant mandamus proceeding and which are not appropriate for mandamus relief anyway.

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Applicability of Ethical Rules

NACJ's reliance upon the rules of professional conduct is improper. The rules themselves provide guidance on their application and specifically indicate they are not meant to be used in litigation outside the context of a bar complaint:

Violation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached. In addition, violation of a Rule does not necessarily warrant any other nondisciplinary remedy, such as disqualification of a lawyer in pending litigation. The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. Furthermore, *the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons*. The fact that a Rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule. Nevertheless, since the Rules do establish standards of conduct by lawyers, a lawyer's violation of a Rule may be evidence of breach of the applicable standard of conduct.

NRPC 1.0A(d) [emphasis added]. This point is driven home by the only two cases cited by Amicus in its own brief, both of which arise in the context of attorney discipline actions. Gentile v. State Bar of Nev., 501 U.S. 1030, 111 S. Ct. 2720 (1991); Atty. Griev. Comm'n v. Gansler, 377 Md. 656, 663, 835 A.2d 548, 552 (2003). Because the instant proceeding in mandamus does not arise from an attorney discipline action, this Court cannot reach the ethical violation issues urged by Amicus.

No Extrajudicial Statements Have Been Disseminated

Even if this were an attorney discipline action, Amicus grossly misunderstands the scope of the rules of professional conduct. On its face, NRPC 3.6 and 3.8(f) respecting trial publicity only concern the dissemination of an attorney's extrajudicial statements to the public when they have a substantial likelihood of materially prejudicing a pending trial. Incongruously, Amicus asserts that the contract and relationship with MET violate these ethical rules, even while recognizing that "because the shows may not air for some time, it is impossible to identify what information was conveyed . . . ," and that "a petitioner would never be able to identify the information until a later date." Amicus Brief, p. 11. In other words, the alleged extrajudicial statements are intentionally not disseminated to the public until well after the criminal case is concluded, precisely so that the statements do not prejudice potential jurors or effect the outcome of the trial as the ethical rules mandate.

In the Gentile case cited by Amicus, the United States Supreme Court explained that ethical rules constitutionally may only impose narrow and necessary limitations on lawyers' speech which is 1) likely to influence the outcome of the trial, and 2) likely to prejudice the jury venire. Gentile v. State Bar of Nev., 501 U.S. 1030, 1075, 111 S. Ct. 2720, 2745 (1991). Accordingly, the Court noted that restricting the speech of lawyers while they are involved in "pending" cases does not

prohibit speech altogether but "merely postpones the attorneys' comments until after trial." Id. The concern is the prejudice to the trial while it is "pending," not after it is over. In the present case, the criminal trial is over, the Defendant was found guilty, the jury has been discharged, and yet the airing of MET's associated television episode is still many months away.² There simply has not been any dissemination of an attorney's extrajudicial statements during the pendency of the case which could possibly influence the jury or affect the outcome of the now concluded trial.

The speculative concern of Amicus as to the potential for prejudice should the case be reversed on appeal and remanded for retrial, is far too tenuous. Amicus fails to cite any authority for this speculative theory of prejudice. See Commonwealth v. Lambert, 723 A.2d 684, 692 (Pa. Super. Ct. 1998) ("We cannot agree that the possibility of a new trial, to be conducted at some time in the future, necessarily compels a trial court to limit publicity in any given case"). Seeing how the Notice of Appeal has not yet been filed in the criminal case, Amicus has failed to show that retrial is likely, let alone imminent. See Gentile, supra (statements made six months before trial inadequate to show a "substantial likelihood of material" prejudice); see also ABA Annotated Model Rules of Professional Conduct §3.6 (2015) (timing of

² Although MET's episode has not yet aired, local news agencies also filmed the trial and have already reported on many aspects of this high profile case: <http://www.reviewjournal.com/crime/homicides/man-gets-20-years-life-las-vegas-ipad-killing>

statement a significant factor in determining seriousness and imminence of threat). Amicus has unfairly impugned the integrity of the District Attorney's Office without any serious legal thought or research behind its allegations.

Because the television episode has not aired yet, Amicus fails to show that any alleged extrajudicial statements exceed the scope of what attorneys are permitted to communicate to the public, even during the pendency of a trial. For example, a prosecutor is permitted to make statements "that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose." NRPC 3.8(f). Attorneys may also discuss "information contained in a public record." NRPC 3.6(b). Because no extrajudicial statements have been disseminated in the present case, the NACJ's unfounded concern as to their content is unwarranted.

Criminal Defense Bar

Amicus claims there is an "ongoing controversy" and concern amongst the criminal defense bar statewide, including both public and private attorneys, respecting MET's media coverage of courtroom trials. Amicus Brief, pp. 1-2. But this is the opinion of one attorney, Lisa Rasmussen, "[t]he only counsel appearing for NACJ in this proceeding at this time." *Id.* Her minority viewpoint is not even shared by members of her own organization. On its public website, NACJ celebrates the "impressive work" of two of its member attorneys in securing an acquittal in a

high profile sexual assault case of defendant Li Zheng. State's App. 1 (*retrieved on September 14, 2016, from <http://www.nacjonline.com/?p=440>*). Ironically, that same case was the subject of an MET television episode in which the Defendant and his attorneys agreed to extrajudicial filming of pretrial defense strategy sessions and confidential client communications outside the presence of the prosecutor. State's App 2-10.³

Notably, the Li Zheng episode did not air and was not disseminated to the public until three months *after* the acquittal, at an appropriate time when the extrajudicial comments could in nowise taint a prospective jury panel or influence the outcome of the trial. Several other defense attorneys have similarly seen fit to voluntarily participate in MET's filming of extrajudicial comments which only air after the conclusion of the trial. State's App. 11-19. Attorneys are free to decline participation in extrajudicial filming with MET if they so choose. But Amicus should not condemn the First Amendment right of many attorneys who feel otherwise and find it serves an effective and valuable means of communicating with the public post-trial.

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³ That full episode resulting in a defense acquittal, which can be viewed at <https://drive.google.com/file/d/0B23JCvQKbfLOSHFyNjhYSTZ0UzA/view>, also belies the claim that District Attorney Wolfson utilizes his final editorial review to control the content so as to only promote his office and its deputies.

CONCLUSION

WHEREFORE, the State requests that allegations of ethical violations against its prosecutors be discarded as unfounded and ultimately irrelevant to MET's right of access to the courtroom, which issue the State submits to the discretion of the Court.

Dated this 16th day of September, 2016.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. **I hereby certify** that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14 point font of the Times New Roman style.
2. **I further certify** that this brief complies with the page and type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points, contains 1,903 words and does not exceed 30 pages.
3. **Finally, I hereby certify** that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 16th day of September, 2016.

Respectfully submitted

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on September 16, 2016. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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I further certify that I served a copy of this document by hand delivering a true and correct copy thereof, to the chamber of:

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BY /s/ E.Davis
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SSO//ed