IN THE SUPREME COURT OF THE STATE OF NEVADA

Robert Kern, Esq.,

Petitioner,

vs.

EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK COUNTY and THE HONORABLE NANCY ALLF, DISTRICT COURT JUDGE,

Respondent.

Supreme Court Case No: 83636

REPLY IN SUPPORT OF PETITION FOR EXTRAORDINARY RELIEF

From the Eighth Judicial District Court, Clark County
The Honorable Nancy Allf, District Judge
District Court Case No. A-19-803488-B

REPLY IN SUPPORT OF PETITION FOR EXTRAORDINARY RELIEF

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RULE 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the Judges of this Court may evaluate possible disqualification or recusal. Petitioner Robert Kern has no parent corporations, no stock, no corporate affiliation, and is present under his true name. He is self-represented, and has been the attorney for the Defendants in the underlying matter. He expects to be represented by no other counsel in this matter.

DATED this 9th day of February, 2022

KERN LAW

By: /s/ Robert Kern

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I.

DISPUTED FACTS

Petitioner Kern must begin by addressing statements in the Answering Brief ("AB") that are falsely reported as fact. The Answering Brief repeatedly states that Mr. Kern "instructed his staff to stiff arm the District Court's staff" and instructed his staff to refuse to let the District Court speak to him. (AB p.12). This is not only explicitly false, but also a proposition of fact that is stated without any reference to the record that might support such a statement. Mr. Kern gave his staff no such instruction; he was neither in his home, nor in the office, and his staff truthfully told the Court that they were unable to reach him. The Respondent's characterization of this as an intentional instruction to "strong-arm" the District Court is unsupported, and disingenuous.

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II.

ARGUMENT

THE DISTRICT COURT ERRED BY IMPOSING SANCTIONS ON MR. KERN FOR CONDUCT THAT DID NOT CONSTITUTE MISCONDUCT, WITHOUT NOTICE OR AN OPPORTUNITY TO BE HEARD ON THE MATTER

a. Standard of Review

Despite this Court's clear statement in *Lioce v Cohen*, that the determination of whether an act constitutes misconduct is an issue of law reviewed de novo[1], the Answering Brief argues that the District Court's failure to cite to any statute or rule gives it greater authority, and makes the entire matter reviewed as abuse of discretion (rather than just the question of whether the misconduct warranted sanctions). *Lioce v. Cohen*, 124 Nev. 1, 174 P.3d 970, 982 (Nev. 2008)(AB p.10). Respondent's argument that the context of the matter was a motion for a new trial is irrelevant. The Court held that the question of whether the act was misconduct is a question of law; nothing in the holding indicated that conclusion was limited to motions for a new trial.

[1]"Whether an attorney's comments are misconduct is a question of law, which we review de novo . . ." "[W]e review the district courts' decisions regarding whether Emerson's comments were misconduct de novo . . ."

The argument that the failure to cite any rule or statute that was violated, makes the decision *less* subject to review, is only supported by a general citation to the *Watson Rounds* decision, which contains absolutely nothing to support the argument. *Watson Rounds v. Eighth Jud. Dist. Ct*., 358 P. 3d 228 (NV S.Ct. 2015). The law is clear that the question of whether particular conduct constitutes misconduct, is reviewed *de novo*, whereas the question of the appropriateness of the sanctions is reviewed for abuse of discretion. *Young v. Johnny Ribeiro Bldg., Inc*., 787 P. 2d 777 (NV S.Ct. 1990).

b. There Was No Misconduct Sufficient to Incur Attorney Sanctions.

The Answering Brief acknowledges that issuance of sanctions requires actual misconduct, and/or "litigation abuses". (AB p.8). However Respondent fails to establish any sort of actual misconduct. The only basis Respondent cites, for the proposition that failure to attend a hearing is misconduct, is a Mississippi case in which the attorney intentionally violated a written court order to appear. *Wyssbrod v. Wittjen*, 798 So.2d 352, 359 (Miss. 2001). Respondent provides neither supporting law, nor logical explanation, as to how the failure to agree to attend a same-day hearing, with three hours notice, for which there was no written order to appear, is misconduct, when the attorney has a legitimate and verifiable conflict.

Respondent's arguments that it might have been physically possible for Mr. Kern to attend the hearing despite the conflict ignore the fact that Mr. Kern told the Court he had a conflict, and that the conflict was actual, and verified. Courts do not have unlimited authority to compel attorneys to attend a hearing against their will; it was Mr. Kern's professional judgment that preparing for, and attending a hearing on a different matter would be too much interference with oral argument preparation to be ethically appropriate. Whether Respondent agrees or disagrees does not change that as a licensed attorney subject to the Nevada Rules of Professional Conduct, it was his determination to make, whether the hearing would prevent him from fulfilling his duty to the other client. Respondent has no idea how much preparation was needed for that other case, nor of the difficulties in arranging the schedules of six appellate attorneys at the same time, nor of what amount of preparation would have been required to prepare for the emergency hearing; these are all issues particularly within Mr. Kern's knowledge, and he was the only party who was ethically bound to ensure that his other matter was adequately represented. In this case, there was not a court order to appear; nor any form of scheduling that would have given Mr. Kern notice that his attendance would be expected. If any attorney can not be given some deference in determining

the needs of his cases, how can attorneys expect to operate while litigating multiple matters?

Respondent alleges that Mr. Kern wrongfully gave preference to one client over another, ignoring that the same logic would equally prevent giving preference to the present matter over the matter set for oral argument. Further is the fact that a Supreme Court Oral argument has a significantly greater bearing on the outcome of a matter, than a hearing to ask for access to your business partner's warehouse. Add to this that the Supreme Court oral argument was scheduled well in advance, and it is clear that Mr. Kern's decision to honor his commitment to the appellate case was at the very least, justifiable.

Respondent's accusation that Mr. Kern instructed his staff to “strong-arm” the District Court's attempts to reach him are explicitly false, and honestly offensive. First, the allegation is made with no reference to the record, or any supporting information, by an attorney who had no personal knowledge of the matter whatsoever; this is in direct violation of NRAP 28(e)(1). Mr. Kern's staff informed the Court they were unable to reach him because they were in fact unable to reach him. To allege, with no basis whatsoever, that Mr. Kern maliciously instructed his staff to obstruct the District Court, and to use that allegation to support a central argument of the Answering Brief, is highly improper. If the facts

that are actually on record are insufficient to support a finding of misconduct, then there should not be a finding of misconduct.

Mr. Kern has pursued this writ, rather than pay a $100 sanction, because his professional reputation is of immense importance to him. There is simply no basis to find sanctionable misconduct against Mr. Kern for not ignoring his duty to one client (for a proceeding that would be fully dispositive of 8 years of litigation), in favor of another (for a proceeding with three hours notice, that would have no effect whatsoever on the ultimate outcome of the case). Mr. Kern did everything in his power to moderate the decision; he gave notice to the Court and opposing counsel that he was unable to attend, and explained why he was unable to attend. There is no dispute whatsoever that Mr. Kern's conflict was truthful. The Court scheduled the hearing, with less than three hours notice, after being informed that Mr. Kern was not able to attend. The Court knew he could not attend when it scheduled the hearing, but scheduled it anyway. (See 6/10 Opp & Emails, Appendix p.9). Whatever deference the Court is entitled to on these matters, a Court can not be given the authority to sanction an attorney for using reasonable professional judgment to honor his ethical duties to his clients.

c. Issuance of Sanctions Requires Notice and an Opportunity to be Heard.

Respondent's arguments regarding notice and opportunity to be heard, both depend upon misreadings of the same decision. Based upon this Court's decision in *Valley Health*, Respondent argues that 1) the Court asking Mr. Kern to explain his actions was all the notice and opportunity to be heard that was required, and 2) that the failure to file a motion for reconsideration waives any allegation that such notice and opportunity were not provided. *Valley Health Sys., LLC v. Estate of Doe by and through Peterson*, 134 Nev. 634, 427 P.3d 1021 (NV S.Ct. 2018). That decision supports neither argument.

The holding in *Valley Health* was that a notice that did not give advance notice that sanctions against the attorney were being considered, was a deficient notice for due process purposes[2]. The only portion of the holding that found that Due Process was satisfied, came from the fact that the attorney ***did*** file a motion for reconsideration, the filing of which cured the deficiency. *Id.* At 1033. There is nothing contained in the decision to support the idea that choosing to appeal immediately, rather than filing a motion for reconsideration, somehow waives the Constitutional right to Due Process. If anything the Valley Health decision clearly establishes that a notice of hearing that does not give notice that

[2]"The order did not mention that the district court would be considering sanctions against Hall Prangle ... Thus, this notice was deficient under due process principles." *Valley Health Sys., LLC v. Estate of Doe by and through Peterson*, 134 Nev. 634, 427 P.3d 1021, 1032 (NV S.Ct. 2018).

attorney sanctions are being considered, is deficient for Due Process notice purposes.

VII.

CONCLUSION

As clearly outlined in this petition, the District Court manifestly abused its discretion by entering its unfounded order imposing attorney sanctions, without being able to identify any actual misconduct on the part of the attorney. Petitioner respectfully requests this Court to issue a writ of mandamus compelling the District Court to vacate its order issuing sanctions against Mr. Kern.

ATTORNEY'S CERTIFICATE OF COMPLIANCE

1. I hereby certify that this Petition 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 Word 97 in Times New Roman 14pt type.
2. I further certify that this brief complies with the page- or 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 or more, and contains 1,617 words.
3. Finally, I hereby certify that I have read this Petition, 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 9th day of February, 2022.

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By: /s/ Robert Kern

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CERTIFICATE OF SERVICE

I certify that on the 9th day of February, 2022, a true and correct copy of the foregoing Reply in Support of Petition for Extraordinary Relief, was electronically filed with the Nevada Supreme Court by using the Nevada Supreme Court E-Filing system.

/S/ Robert Kern
An employee of Kern Law, Ltd.