

**IN THE SUPREME COURT OF THE
STATE OF NEVADA**

E&T VENTURES, LLC,
Petitioner,

vs

EIGHTH JUDICIAL DISTRICT
COURT OF THE STATE OF
NEVADA, IN AND FOR THE
COUNTY OF CLARK, THE
HONORABLE JOANNA KISHNER,

Respondents,

EUPHORIA WELLNESS, LLC a
Nevada limited liability company,

Real Party in Interest.

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Mar 07 2022 08:01 a.m.
Elizabeth A. Brown
Clerk of Supreme Court

Supreme Court Case No. TBD

District Court Case: A-19-796919-B

**PETITION FOR WRIT OF PROHIBITION OR, IN THE ALTERNATIVE,
PETITION FOR WRIT OF MANDAMUS**

LAW OFFICE OF MITCHELL STIPP
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Counsel for Petitioner

DISCLOSURE STATEMENT

NRAP 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:

1. E&T Ventures, LLC is a private, Nevada limited liability company, which is no longer a going concern.
2. Joseph Kennedy is the beneficial owner of 100% of the membership interests in E&T Ventures, LLC.
3. Mitchell Stipp, Nevada Bar No. 7531, of the Law Office of Mitchell Stipp, represents E&T Ventures, LLC.

DATED this 4th day of March, 2022.

LAW OFFICE OF MITCHELL STIPP

/s/ Mitchell Stipp

MITCHELL STIPP, ESQ.

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Counsel for Petitioner

I. Jurisdictional/Routing Statement.

Pursuant to Article 6, Section 4 of the Nevada Constitution: “[t]he court shall also have power to issue writs of mandamus, certiorari, prohibition, quo warranto, and habeas corpus and also all writs necessary or proper to the complete exercise of its appellate jurisdiction.” The decision to entertain a writ petition lies solely within the discretion of the Nevada Supreme Court. Smith v. Eighth Judicial Dist. Court, 107 Nev. 674, 677, 818 P.2d 849, 851 (1991). A writ of mandamus or prohibition may issue only “where there is not a plain, speedy and adequate remedy in the ordinary course of law.” NRS 34.170; NRS 34.330; see also State ex rel. Dep’t Transp. v. Thompson, 99 Nev. 358, 662 P.2d 1138 (1983). However, “each case must be individually examined, and where circumstances reveal urgency or strong necessity, extraordinary relief may be granted.” See Jeep Corp. v. Dist. Ct., 98 Nev. 440, 443, 652 P.2d 1183, 1185 (1982) (citing Shelton v. Dist. Ct., 64 Nev. 487, 185 P.2d 320 (1947)).

The Nevada Supreme Court will also exercise its discretion to consider writ petitions, despite the existence of an otherwise adequate legal remedy, when an important issue of law needs clarification, and this Court’s review would serve considerations of public policy, sound judicial economy, and administration. See

Dayside Inc. v. Dist. Ct., 119 Nev. 404, 407, 75 P.3d 384, 386 (2003), overruled on other grounds by, Countrywide Home Loans, Inc. v. Thitchener, 124 Nev. Adv. Op. No. 64, 192 P.3d 243 (2008). The Nevada Supreme Court has noted that a petition for a writ of mandamus is the appropriate vehicle to seek disqualification of a judge. City of Sparks v. District Court, 112 Nev. 952, 954, 920 P.2d 1014, 1015-16 (1996).

II. Petitioner's Requested Relief.

For the reasons set forth in this Petition, the Petitioner seeks the following relief:

A. An order disqualifying Judge Joanna Kishner of Department 31 in the Eighth Judicial District Court, State of Nevada, from presiding over the district court case below.

B. An order instructing the Clerk of the Eighth Judicial District Court to re-assign the case to another Business Court Judge.

C. An order vacating any orders entered by Judge Kishner after the initial application/affidavit in support of disqualification was filed by Petitioner.

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III. Statement of the Issues Presented for Review.

1. Whether the Chief Judge of the Eighth Judicial District Court has the power and authority to decide the issue of disqualification in the absence of disagreement between the parties over the judge to consider the matter?

Answer: No.

2. Whether a district court judge has the power and authority to conduct an evidentiary hearing while a new affidavit under NRS 1.235(1) alleging bias or prejudice was filed?

Answer: No.

2. Whether a district court judge has the power and authority to refuse to transfer a case despite failing to provide a written response to a new affidavit under NRS 1.235(1) alleging bias or prejudice?

Answer: No.

IV. Statement of Facts.

Petitioner filed an application to disqualify Judge Kushner. See App., **Exhibit 1** (App. 5-236). Judge Kushner provided her written response to the application on

February 7, 2022 at 1:19 p.m. Id., **Exhibit 2** (App. 241-255). After Judge Kishner filed her response, counsel for real-party-in-interest, Euphoria Wellness, LLC (“Euphoria”), Nicole Lovelock, and Petitioner’s counsel worked to select a judge to decide the matter in accordance with NRS 1.235(6). Id., **Exhibit 4** (Exhibit 1 to motion, APP 264, 276-279) Before the parties reached an agreement on the judge to rule on disqualification (i.e., there was no disagreement), on February 10, 2022, at 7:52 a.m., Chief Judge Linda Bell issued her decision. Id., **Exhibit 3** (APP 256-263). In response, on February 10, 2022 at 7:10 p.m., Petitioner filed a motion for Chief Judge Bell to withdraw her decision as premature or in the alternative to reconsider the same based on a **new affidavit** pursuant to NRS 1.235(1) alleging bias or prejudice (as confirmed by the statements contained within Judge Kishner’s actual response to the original application for disqualification). Id., **Exhibit 4** (APP 264-286). The matter was scheduled for a hearing. Id., **Exhibit 5** (APP 287-288) Judge Kishner was provided notice of the motion (since the motion was filed on the docket in her department). A paper copy also was sent to Judge Kishner’s chambers for personal service. Id., **Exhibit 6** (APP 289-325).

After Chief Judge Bell issued her order denying disqualification on February 10, 2022, the Nevada Supreme Court denied Petitioner’s writ petition in Case No.

84133. See Dkt. No. 22-04532. The petition in that case concerned Judge Kushner’s order for Petitioner’s counsel to produce and serve an out-of-state, non-party witness with process to appear at an evidentiary hearing to consider case ending sanctions against Petitioner. See Dkt. No. 22-02590-97 (Petition as Supported by Volumes 1-7 of Appendix). Immediately after the Nevada Supreme Court denied the petition in that case, Judge Kushner *sua sponte* issued an amended order on February 10, 2022 at 2:34 p.m. **again ordering the appearance of the same out-of-state, non-party witness for an evidentiary hearing set for 3:00 p.m. on February 11, 2022.** See App., **Exhibit 7** (APP 326-329). While the Nevada Supreme Court’s order did not explain its decision, Petitioner assumed that this Court elected not to intervene because the evidentiary hearing had not yet occurred (i.e., “no harm, no foul”).

At the commencement of the evidentiary hearing on February 11, 2022, Petitioner’s counsel objected to Judge Kushner presiding because of the pending motion to withdraw/for reconsideration supported by a new affidavit pursuant to NRS 1.235(1). Judge Kushner overruled the objection, and the evidentiary hearing proceeded. See App., **Exhibit 8** (APP 330-331). On **March 3, 2022** (almost a month after the evidentiary hearing before Judge Kushner), Chief Judge Bell issued her decision on the motion to withdraw/for reconsideration. See App., **Exhibit 9**

(APP 332-337). Noteworthy. Judge Kishner *failed to respond to the motion* (including the *new affidavit* pursuant to NRS 1.235(1)).

V. Points and Authorities.

NRS 1.235(5) provides as follows:

5. *Except as otherwise provided in subsection 6*, the judge against whom an affidavit alleging bias or prejudice is filed *shall proceed no further* with the matter and shall:

(a) *If the judge is a district judge, immediately transfer the case to another department of the court*, if there is more than one department of the court in the district, or request the judge of another district court to preside at the trial or hearing of the matter;

6. *A judge may challenge an affidavit alleging bias or prejudice by filing a written answer with the clerk of the court within 5 judicial days after the affidavit is filed*, admitting or denying any or all of the allegations contained in the affidavit and setting forth any additional facts which bear on the question of the judge's disqualification. *The question of the judge's disqualification must*

thereupon be heard and determined by another judge agreed upon by the parties or, if they are unable to agree, by a judge appointed:

(a) If the judge is a district judge, by the presiding judge of the judicial district in judicial districts having more than one judge, or if the presiding judge of the judicial district is sought to be disqualified, by the judge having the greatest number of years of service[.]

(emphasis added).

Chief Judge Bell's initial decision was premature. Despite the lack of knowledge of whether the parties reached or failed to reach an agreement on the district court judge to decide the issue, she issued her decision. Chief Judge Bell's power and authority to decide the matter *was conditional* by the plain meaning of the statute. See NRS 1.235(6) ("*if* they are unable to agree"). It is not necessary to consider whether the decision should have been re-considered because it should have been withdrawn as premature. Even so, Chief Judge Bell did not consider the new bases for disqualification set forth in the motion as supported by Petitioner's affidavit pursuant to NRS 1.235(1).

Judge Kisher held an evidentiary hearing on February 11, 2022 in accordance with her amended order (notwithstanding Petitioner’s objection and actual notice of the motion). See App., **Exhibit 8** (APP 330-331). Judge Kishner had the right to respond to the motion as supported by the new affidavit in accordance with NRS 1.235(6). She failed to do so. Therefore, NRS 1.235(5) **requires** Judge Kishner to “immediately transfer the case to another department of the court[.]” As of the date of this Petition, Judge Kishner has failed to do so.

VI. Conclusion

For the reasons set forth in this Petition, Petitioner seeks the following relief:

A. An order disqualifying Judge Kishner from presiding over the district court case below.

B. An order instructing the clerk of the court to re-assign the case to another business court judge.

C. An order vacating any orders entered by Judge Kishner after the initial application/affidavit in support of disqualification was filed by Petitioner.

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DATED this 4th day of March, 2022

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/s/ Mitchell Stipp

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CERTIFICATE OF COMPLIANCE

1. The petition has been prepared in a proportionally spaced typeface using Microsoft Word, Version 16.11.1, in 14 point, Times New Roman.
2. The petition does not exceed 15 pages.

LAW OFFICE OF MITCHELL STIPP

.s/ Mitchell Stipp

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VERIFICATION

I hereby certify that I have read the 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 petition complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 21. I understand that I may be subject to sanctions in the event that the petition is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

LAW OFFICE OF MITCHELL STIPP

/s/ Mitchell Stipp

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 4th day of March, 2022, I filed the foregoing **PETITION FOR WRIT OF PROHIBITION OR, IN THE ALTERNATIVE, PETITION FOR WRIT OF MANDAMUS**, using the court's electronic filing system. Notice of the filing of the Petition was made upon acceptance by the Nevada Supreme Court using the District Court's electronic filing system to the following e-service participants in District Court Case and by mail to the addresses as indicated:

Judge Joanna Kishner:

Dept31lc@clarkcountycourts.us

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200 Lewis Ave.
Las Vegas, NV 89155

Euphoria Wellness, LLC as Real Parties-in- Interest:

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By:

/s/ Mitchell Stipp

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