

IN THE SUPREME COURT OF THE STATE OF NEVADA

LAS VEGAS SANDS CORP., a Nevada corporation; SANDS CHINA LTD., a Cayman Islands corporation; SHELDON G. ADELSON, in his individual and representative capacity; VENETIAN MACAU, LTD., a Macau corporation, DOES I-X; and ROE CORPORATIONS I-X,

Petitioners,

vs.

CLARK COUNTY DISTRICT COURT,
THE HONORABLE DAVID BARKER,
DISTRICT JUDGE, DEPT. 18,

Respondents,

and

STEVEN C. JACOBS,

Real Party in Interest.

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**PETITION FOR REHEARING OF
ORDER DENYING WRIT OF
PROHIBITION OR MANDAMUS
RE ORDERS DENYING MOTION
TO DISQUALIFY JUDGE
ELIZABETH GONZALEZ
WITHOUT A HEARING**

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TABLE OF CONTENTS

	PAGE NO.:
TABLE OF AUTHORITIES.....	ii
I. INTRODUCTION AND SUMMARY OF ARGUMENT.....	1
II. DISCUSSION.....	4
A. The Appropriate Standard of Review for the Uncontested Facts of Judge Gonzalez's Conduct is De Novo.....	5
B. Waiver is Inapplicable Where the Uncontested Facts and Legal Arguments Presented Are Consistent in Proceedings Before this Court and the District Court.	6
C. Guidance from the Court that will Inform the Public and Assist the Bench and Bar is Needed.	10
CERTIFICATE OF COMPLIANCE	14
CERTIFICATE OF SERVICE	15

TABLE OF AUTHORITIES

PAGE NO.:

CASES

<i>Dermody v. City of Reno</i> , 113 Nev. 207, 931 P.2d 1354 (1997)	6
<i>Dutchess Bus. Servs. v. Nev. State Bd. Of Pharm.</i> , 124 Nev. 701, 191 P.3d 1173 (2008)	3, 8, 12
<i>Goudlock v. Thompson</i> , No. 08cv00204 BEN (RBB), 2011 U.S. Dist. LEXIS 33360; 2011 WL 1167545 *17 (D.C. So. Cal., Jan. 28, 2011)	9
<i>Hoffman v. General Motors Acceptance Corp.</i> , 814 F. 2d 1385 (9th Cir. 1987)	3
<i>In re Boston's Children First</i> , 244 F.3d 164 (1st. Cir. 2001)	12
<i>In re Dunleavy</i> , 104 Nev. 784, 769 P.2d 1271 (1988)	4
<i>Int'l Game Tech., Inc. v. Second Jud. Dist. Ct.</i> , 122 Nev. 132, 127 P. 3d 1088 (2006)	2
<i>Mirage Casino-Hotel v. Beale St. Blues Co. Las Vegas, LLC</i> , No. 64535, 2016 Nev. LEXIS 261 (Apr. 1, 2016)	5
<i>Old Aztec Mine v. Brown</i> , 97 Nev. 49, 623 P.2d 981 (1981)	6
<i>Powers v. Powers</i> , 105 Nev. 514, 779 P.2d 91 (1989)	6
<i>Pressler v. City of Reno</i> , 118 Nev. 506, 50 P.3d 1096 (2002)	5
<i>S. Nev. Operating Eng'rs Contract Compliance Tr. v. Johnson</i> , 121 Nev. 523, 119 P.3d 720 (2005)	5
<i>Schultz v. Wal-Mart Stores, Inc.</i> , 68 Fed Appx., 130 (9th Cir. 2003)	3, 8

<i>United States v. S. Fla. Water Mgmt. Dist.</i> , 290 F. Supp. 2d 1356 (S.D. Fla. 2003)	12
<i>Youssef v. Tishman Constr. Corp.</i> , 744 F.3d 821 (2d Cir. 2013)	8

STATUTES

Nevada Revised Statute 1.235	2
------------------------------------	---

OTHER AUTHORITIES

8 James Wm. Moore, Moore's Fed. Practice (3d ed. 2010)	9
NCJC Preamble (3)	10
NCJC Rule 1.2	passim
NCJC Rule 2.10	2, 3, 7, 9, 12
NCJC Rule 2.10(a)	9
NCJC Rule 2.11	passim
Nevada Rule of Appellate Procedure 40	1
Nevada Rule of Appellate Procedure 40(b)(2)	3, 4, 6

Petitioners Las Vegas Sands Corp. ("LVSC"), Sands China Ltd. ("Sands China") and Sheldon G. Adelson respectfully petition the Court under NRAP 40 for rehearing and reconsideration of its May 11, 2016 Order (the "Order") sustaining District Judge David Barker's orders denying the disqualification of Judge Elizabeth Gonzalez without hearing.

I. INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioners (collectively referred to as LVSC) initiated the process culminating in this writ proceeding to disqualify Judge Gonzalez, based on her admitted, actual out-of-court conduct in this case: statements to the news media on this case. LVSC pointed out in the initial petition to this Court, as it did to Judge Barker in the district court, the impropriety and legal consequences of Judge Gonzalez's conduct with the news media, particularly *Time Magazine*, after she learned the media was speculating that the purchase of the *Las Vegas Review Journal* by the Adelson family was somehow linked to this pending case. PA1990; Pet. at 4,5,6. LVSC went on to point out that NCJC Rule 1.2 requires a judge to refrain from conduct that casts doubt on her impartiality: "A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary and shall avoid impropriety and the appearance of impropriety." Pet. at 12. This Court, in its Order,

acknowledged that LVSC's petition "'raise[s] important issues in need of clarification, involving significant public policy concerns, of which this court's review would promote sound judicial economy.'" Order at 5, citing *Int'l Game Tech., Inc. v. Second Jud. Dist. Ct.*, 122 Nev. 132, 142–43, 127 P. 3d 1088, 1096 (2006).

The Court accepted LVSC's writ petition recognizing the importance of providing guidance to the district courts and Nevada attorneys on these topics. The Court's Order, however, did not address Rule 1.2's admonitions, nor did the Court address the specific conduct of Judge Gonzalez that LVSC's petition discussed at length that requires her disqualification under Rules 1.2 and 2.11. Instead, the Court ruled that by failing to cite NCJC Rule 2.10 ("Judicial Statements on Pending and Impending Cases"), which is not a rule of disqualification, LVSC "waived" its rights under NRS 1.235 and NCJC Rules 1.2 and 2.11, which is a rule of disqualification ("A judge shall disqualify[] herself in any proceeding in which the judge's impartiality may be questioned . . . "), to contend that the very conduct the Court found warranted consideration by writ would not be considered by the Court.

This, LVSC respectfully submits, requires rehearing and consideration of the facts and controlling authority under the appropriate

standard of review. NRAP 40(b)(2). *See Dutchess Bus. Servs. v. Nev. State Bd. Of Pharm.*, 124 Nev. 701, 722–23, 191 P.3d 1173 (2008) (en banc) (failure to cite to a statute or regulation in imposing discipline that the Pharmacy Board was authorized to impose does not invalidate the discipline); *see also Hoffman v. General Motors Acceptance Corp.*, 814 F. 2d 1385, 1387 (9th Cir. 1987) (district court erred in denying motion for reconsideration for failure to specify the rule under which reconsideration was sought); *Schultz v. Wal-Mart Stores, Inc.*, 68 Fed Appx., 130, 131 n. 1 (9th Cir. 2003) (failure to cite to a specific rule implicated by a motion under another rule did not constitute a waiver under either rule).

The Court's Order also recognized the uncontroverted fact that the district court judge *elected* to initiate contact with the media, and then later recounted that contact in terms that she *knew or reasonably should have known* portrayed a litigant before her—Sheldon Adelson—in a negative light. Order at 3–4. These facts are significant, and they present issues to the Court under NCJC Rules 1.2, 2.10, and 2.11 that have not been the subject of consideration in previous cases. Thus, the Court appears to have overlooked the opportunity to consider the substantive merits of LVSC's writ petition, which raised novel issues of importance to the bench, the public, and the bar in this age of constant coverage of litigation by news

media, about the propriety of a judge speaking to the media outside of court about matters and litigants in litigation before the court.

II. DISCUSSION

Nevada Rule of Appellate Procedure 40(b)(2) governs a petition for rehearing of an en banc decision. A petition is appropriate when the "petitioner believes the court has "overlooked or misapprehended a material fact," a "material question of law," or "overlooked, misapplied or failed to consider controlling authority." NRAP 40(b)(2). A petition for rehearing may also be considered "in such other circumstances as will promote substantial justice." *In re Dunleavy*, 104 Nev. 784, 786, 769 P.2d 1271, 1272 (1988).

Rehearing is warranted in this case for three reasons: (1) the Court reviewed LVSC's writ petition under an incorrect standard of review; (2) the waiver theory on which the Court's decision rests is not consistent with the facts of record or with the arguments presented by LVSC on the facts; and (3) LVSC's petition presents novel issues of judicial conduct that are important to the bench, bar, and to the public, as the Court pointed out in its Order, but which the Court did not address. Order at 5.

A. The Appropriate Standard of Review for the Uncontested Facts of Judge Gonzalez's Conduct is De Novo.

Judge Gonzalez acknowledged approaching and speaking to a *Review Journal* news reporter in her courtroom. PA2213–15. She also acknowledged reciting that exchange with two other reporters, most recently for an article *Time Magazine* wrote about *her* involvement in this very case. *Id.* Given these uncontested facts, the Court was asked to consider the law applicable to them *de novo*. *Mirage Casino-Hotel v. Beale St. Blues Co. Las Vegas, LLC*, No. 64535, 2016 Nev. LEXIS 261, at *2 (Apr. 1, 2016) (questions of law are reviewed *de novo*); *S. Nev. Operating Eng'rs Contract Compliance Tr. v. Johnson*, 121 Nev. 523, 528, 119 P.3d 720, 724 (2005) ("this court reviews pure legal questions *de novo*"); *Pressler v. City of Reno*, 118 Nev. 506, 509, 50 P.3d 1096, 1098 (2002) (same).

Whether the Judge's admitted conduct rose to the level of a disqualifying event—as Petitioners for good reason believe and at least one recognized expert in judicial conduct under the Code of Judicial Conduct also believes—should have been considered under NCJC 2.11. *See* SA004:3–6. By analyzing the pure legal questions presented by LVSC to the district court under an abuse of discretion standard, the Court overlooked or misapplied its prior precedent calling for *de novo* review.

Rehearing should be granted to review *de novo* the law applicable to the uncontested facts. NRAP 40(a)(2).

B. Waiver is Inapplicable Where the Uncontested Facts and Legal Arguments Presented Are Consistent in Proceedings Before this Court and the District Court.

The Court has previously said that "[a] *point not urged* in the trial court, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal." *Old Aztec Mine v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) (emphasis added); *Dermody v. City of Reno*, 113 Nev. 207, 210, 931 P.2d 1354, 1357 (1997) ("[p]arties 'may not raise a new theory for the first time on appeal, which is inconsistent with or different from the one raised below'" (quoting *Powers v. Powers*, 105 Nev. 514, 516, 779 P.2d 91, 92 (1989))). In this case, however, the point of the legal significance of Judge Gonzalez's conduct *was urged* in the district court and in this Court under the NCJC generally, and under NCJC Rules 1.2 and 2.11 specifically. *See, e.g.*, PA1990-91; Pet. at 4, 5, 6. Her conduct with the news media and the law applicable to it was unmistakably presented to Judge Barker *twice* and thereafter to this Court, not in the context of an exercise of discretion but as an unprecedented legal question for determination under Nevada law. *Id.*; PA2330-31.

The point that the Judge's decision—her personal decision—to discuss this case with the media was improper and violative of the NCJC was forcefully raised in the district court, PA1990 at 16– 22, generally and under Rules 1.2 and 2.11 specifically because LVSC's motion sought her disqualification, which is addressed in Rule 2.11. The argument in this Court regarding her improper contact with the media is the same argument presented to Judge Barker and is entirely consistent with the position taken in this Court: Judge's Gonzalez's decision to put herself into the media spotlight in this case violated the NCJC, which Rule 1.2 proscribes and Rule 2.10 illustrates, thus mandating her recusal under pain of disqualification under Rule 2.11; *see also* Reply in Support of Pet. At 1-2, n.1 (urging the Court to consider the facts under the appropriate section of the NCJC. The Court's reliance on "waiver" is not a correct ruling under the uncontested facts presented to Judge Barker and this Court.

Rule 2.10 describes conduct that is inappropriate for a sitting judge. Although engaging in such conduct subjects the judge to disqualification, the rule does not mention disqualification. Disqualification is addressed in Rule 2.11 that LVSC cited to support disqualification for the Judge's inappropriate conduct with the media. PA 1976 (purchase of the *Review Journal* "has attracted contributions to the media's coverage by the

Honorable Elizabeth Gonzalez, who is currently presiding over this lawsuit The Court's comments have become a part of the saturated coverage . . ."); PA1979 – 80 ¶¶ 14–17, 25–27 (setting forth the facts supporting petitioners' objections to Judge Gonzalez's improper interjection into the media frenzy); PA1989–90 (objecting to district court's election to contribute to articles about this case). Whether Rule 2.10 was cited or not, Judge Gonzalez admittedly *initiated media discussions* about this pending case, to the detriment of LVSC. That conduct violated the Nevada Code of Judicial Conduct, and she should be disqualified under Rule 2.11 as a consequence. To hold otherwise elevates form over substance.

Omitting reference to Rule 2.10 was harmless and of no moment. *See Dutchess*, 124 Nev. at 722, 191 P.3d at 1173 (holding that the Pharmacy Board's failure to cite to its specific statutory authority to impose a disciplinary fine did not make imposition of the fine arbitrary or capricious); *see also Schultz*, 68 Fed Appx. at 131 n. 1 (refusing to find waiver because of defendant's failure to cite to a specific rule and the relevant law to support an argument); *Youssef v. Tishman Constr. Corp.*, 744 F.3d 821, 824 n.3 (2d Cir. 2013) (holding that the format and content of a letter did not preclude the court from analyzing the issue presented by the letter under the appropriate rule); *Goudlock v. Thompson*, No. 08cv00204

BEN (RBB), 2011 U.S. Dist. LEXIS 33360; 2011 WL 1167545 *17 (D.C. So. Cal., Jan. 28, 2011) (holding that the title of a brief and failure to cite Rule 41 was irrelevant to Court's ability to consider the merits of the brief) (citing 8 James Wm. Moore, *Moore's Fed. Practice* § 41.33[4][b] (3d ed. 2010) ("Failure to label the document a notice of dismissal is generally harmless if the intent for filing is clear"))).

LVSC made specific arguments in its initial district court disqualification motion about the impropriety of Judge Gonzalez speaking to the news media about this case outside of court. PA1989–90. Although the arguments did not specifically cite to Rule 2.10, they clearly presented what Rule 2.10(a) counsels judges not to do:

Throughout this case, the [District] Court had a choice about the extensive media coverage of this case: (1) provide comments to the media and recuse itself or (2) *abide by the NCJC's rules and not provide any comments about a case before the Court* and, thus, not raise concerns about its impartiality. For years, the Court appeared to choose the former, but the Court recently elected to become a participant in the media coverage.

PA1990 at 16–22 (emphasis added). Judge Gonzalez's decision and her personal interest in becoming a part of the media coverage of this case was unmistakably the primary issue that was raised at the outset of proceedings before Judge Barker. To hold that the absence of a specific reference to Rule 2.10, which recites the same facts on which

disqualification was presented to Judge Barker, "waived" application of the NCJC and the invocation of Rule 2.11 that calls for disqualification on the facts and law presented to Judge Barker *twice* misconstrues both *and* diminishes the efficacy of the NCJC. (This Court's conclusion of waiver appears to have been influenced by Jacobs's contention that "There was absolutely no disqualifying facts even alleged in [the motion to disqualify]," SA015:7–8, when the record, as we have shown, clearly reflects otherwise).

C. Guidance from the Court that will Inform the Public and Assist the Bench and Bar is Needed.

This novel case presents questions that are of importance to the bar, the bench, and the public, as the Court recognizes in its Order.

The [Nevada] Code of Judicial Conduct establishes standards for the ethical conduct of judges and judicial candidates. It is not intended as an exhaustive guide for the conduct of judges The Code is intended, however, to provide guidance and assist judges in maintaining the highest standards of judicial and personal conduct, and to provide a basis for regulating their conduct through disciplinary agencies.

NCJC Preamble (3). Adherence to the Code preserves public confidence in the judiciary.

That said, the commentary to Rule 1.2 emphasizes that "any conduct," whether identified in Rule 2.10 or not, "that compromises or appears to

compromise the independence, integrity, and impartiality of a judge undermines public confidence in the judiciary. Because it is not practicable to list all such conduct, the Rule is necessarily cast in general terms."

In this case, a seasoned judge deliberately chose to confront a *Review Journal* reporter in her courtroom, a public place, and to thereafter continue her pursuit of media attention by speaking to a *national* magazine that created an article, *as a result of that interview*, titled, "**Meet the Judge at the Center of Sheldon Adelson's Strange Deal to Buy a Newspaper,**" subtitled, "**Elizabeth Gonzalez has emerged as a key figure in the casino magnate's surprising purchase,**" (emphasis added), PA2214 at ¶15,, PA2226-30, which the Judge then *made part of this case*. She did so with knowledge (she previously gave a local interview and read the resulting article) that the story would connect her comments to this case and Sheldon Adelson. PA2214 at ¶¶ 13–14, PA2220–24. She was so sensitive to the possible issues this conduct would provoke that she elected to have witnesses to her interviews. PA1953 ("I had witnesses for every background conversation I had with a reporter for a reason").

These essential facts are not in dispute. The *de novo* legal question for the Court is whether these facts constitute grounds for disqualification under the Code. This Court has the last word on this subject, which it did

not deliver when it denied LVSC's writ petition on the grounds that LVSC did not cite Rule 2.10, although it described and discussed in detail the conduct this Rule is concerned with. Rehearing should be granted to correct his oversight. *See Dutches*, 124 Nev. at 722, 191 P.3d at 1173 (failure to cite specific to impose discipline did not invalidate the discipline).

Guidance from the Court is also necessary to establish parameters for a judge speaking to the news media about an active case before her. *See United States v. S. Fla. Water Mgmt. Dist.*, 290 F. Supp. 2d 1356, 1358 (S.D. Fla. 2003) ("judges should neither give interviews to the media about a matter then pending before that judge nor comment about the merits of the case or the parties thereto"); *In re Boston's Children First*, 244 F.3d 164, 169–70 (1st. Cir. 2001) (reiterating that "in newsworthy cases where tensions may be high, judges should be particularly cautious about commenting on pending litigation.").

If the Court agrees with LVSC, then the Court must then determine whether Judge Gonzalez's interviews by the media – prompted by her and her role in this case and her decision to make the purchase of the *Review Journal* part of *this* case – could reasonably give rise to the belief that she is not impartial. If so, she is disqualified, irrespective of NCJC Rule 2.10, and

that is something that courts and counsel—and the public—should know now and for the future.

LVSC's writ petition should be reheard.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that I have read this **PETITION FOR REHEARING OF ORDER DENYING WRIT OF PROHIBITION OR MANDAMUS RE ORDERS DENYING MOTION TO DISQUALIFY JUDGE ELIZABETH GONZALEZ WITHOUT A HEARING**, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. 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.

2. I also certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the typestyle requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Palatino 14 point font and contains 2,762 words.

3. Finally, I certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular Nev. R. App. P. 28(e), which requires every section of the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied is to be found.

/s/ STEVE MORRIS
STEVE MORRIS

CERTIFICATE OF SERVICE

Pursuant to Nev. R. App. P. 25(b) and NEFR 9(f), I hereby certify that I am an employee of Morris Law Group; that on this date I electronically filed the following document: **PETITION FOR REHEARING OF ORDER DENYING WRIT OF PROHIBITION OR MANDAMUS RE ORDERS DENYING MOTION TO DISQUALIFY JUDGE ELIZABETH GONZALEZ WITHOUT A HEARING** with the Clerk of the Court for the Nevada Supreme Court by using the Nevada Supreme Court's E-Filing system (Eflex). Participants in the case who are registered with Eflex as users will be served by the Eflex system as follows:

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I further certify that pursuant to Nev. R. App. P. 25, that I am an employee of MORRIS LAW GROUP; that, in accordance therewith, I caused a copy of the aforementioned document to be hand delivered, in a sealed envelope, on the date and to the addressee(s) shown below:

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Respondent

Courtesy Copy To:

Judge Elizabeth Gonzalez
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DATED this 23rd day of May, 2016.

By: /s/ Fiona Ingalls