

State of Nevada
Commission on Judicial Discipline

2008 Summary Report

and

Case Study: District Judge Douglas W. Herndon

Prepared by:

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Why retain us for help in obtaining government appropriations?

Many technology companies believe the only path to government funds is through small SBIR grants. However, our clients see an average return-on-investment (ROI) of 150% in less than one year with funding amounts in the multi-million dollar range.

Services: Government Appropriations

The Busick Group guides technology companies in the federal appropriations and agency grant processes. We also actively lobby on behalf of our clients to change existing laws and support the enactment of new legislation within their home state. Our consulting team has a successful track record of obtaining government funding, expert knowledge of the federal appropriations process, and a vast network of federal agency and military contacts.

Why retain us for legislative change support?

We are experienced in working with elected officials, public agencies and private groups in making changes to existing laws and enacting new laws.

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Working with state legislators, public agencies, private companies and individuals, The Busick Group drafts legislative changes and supports the enactment of new laws. We lobby on behalf of clients during state legislative sessions. In addition, we create Political Action Committees (PACs) to educate voters and support the passage of legislative and constitutional changes.

Our experience in state and local government enables us to understand the importance of change. Leveraging our knowledge of state and local issues, we are able to draft much needed legislation and obtain the necessary support for its passage. With our federal background we are then able to secure the necessary endorsements and funding to educate citizens as to the importance of their vote in favor or opposition to that which we are working.

In Nevada, we are currently working with state legislators, public agencies, private companies and individuals to draft historic judicial changes.

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State of Nevada Commission on Judicial Discipline

Summary Report and Case Study 2008

History: The State of Nevada Commission on Judicial Discipline (the “Commission”) was organized in the mid-1970’s. The Commission receives its authority from Article 6, Section 21 of the Nevada Constitution; Section 1.425 to 1.4695, inclusive, of the Nevada Revised Statutes; and by its own adopted procedural rules. The Commission is designed to review complaints regarding judicial officers’ conduct or disability. When “the Commission finds that a judicial officer failed to adhere to the Nevada Code of Judicial Conduct...the Commission is granted the independent power to discipline or caution a judicial officer...”

(<http://judicial.state.nv.us/guidencjd3new.html>, 4/21/06)

Summary: The State of Nevada Judicial Discipline Commission’s structure is inherently flawed and does not provide its citizenry an effective tool for addressing improper judicial conduct or disability.

The obligations of the complainant serve to deter the layperson from filing. The complaint process is cloaked in secrecy and provides unequal protection through its “obligation to maintain confidentiality.” This requirement serves only to protect the judicial officer who is the subject of the complaint and exposes the complainant to personal and legal risks, including but not limited to “contempt or other remedy.” Further, the panel is chiefly comprised of judicial officers and attorneys who review and evaluate the merits of a complaint against judicial officers. Matters that may have a public interest are privately reviewed and decided.

Findings of Fact:

- The State of Nevada Constitution inappropriately defines the Commission’s composition, thereby making the process to modify the Commission’s structure overly cumbersome. (Article 6, Section 21.2)
- Equal protections are not granted to both the complainant and judicial officer. The judicial officer receives all protections, while the complainant receives negligible protections. (NRS 1.4683 (2); NRS 1.468; Guide to the Ethical Obligations of Nevada Judges and Filing a Complaint with the Nevada Commission on Judicial Discipline; Verified Statement of Complaint)
- Matters that may have public importance are privately resolved. The Nevada State Legislature gave wide latitude to the Commission to make confidential the complaints. (Article 6, Section 21 (5)b; NRS 1.4683)

- Complainants are denied the right to discuss or disclose their complaint, the findings, and resolution to any person or entity without the express consent of the Commission. (NRS 1.4683)
- The primary composition of the Commission is judicial officers and attorneys. (Article 6, Section 21.2) These individuals are considered peers and professional co-workers to judicial officers. This creates the appearance of bias for complaint review and resolution.
- Filing and service procedures are thorough and clearly defined. (Procedures, 10/05/05)
- Complaints are on the rise; however, information regarding the nature of complaints and resolution is not readily available to the public. Case in point, of the 168 complaints received in 2007: how many were dismissed without merit; how many were made available to the public; and how many resulted with some kind of disciplinary sanction or punishment?
- There exists no documented review or oversight process for the operation, conduct, and execution of the duties of Commission and its members.

The Busick Group “TBG” Recommends:

- Require all complaints, findings, determinations, and forms of discipline applied to the judicial officer be made public; unless agreed upon in writing by both the complainant and judicial officer in question.
 - Draft new language to amend NRS 1.4683 at the 2009 Nevada State Legislative Session.
- Remove the “Obligation to Maintain Confidentiality” from the Complainant.
- Rewrite language contained in NRS Section 1.425 to 1.4695 to provide greater protection to complainants.
 - Draft revised language for consideration at 2009 Nevada State Legislative Session.
- Revise the Commission composition to achieve greater diversity and include more laypersons.
 - Draft new language to modify Article 6, Section 21 of the Nevada State Constitution
- Require the Nevada Commission on Judicial Discipline to provide more detailed information to the general public regarding the nature of complaints and resolutions.
- Advocate the development and incorporation of a formal review and oversight process for the operation, conduct, and execution of the duties of the Commission and its members.

SUPPORTING DOCUMENTATION:

- Excerpt State of Nevada Constitution: Article 6, Section 21
- Excerpt Nevada Revised Statutes: NRS 1.425 to 1.4695, inclusive
- Excerpt Part VI. Nevada Code of Judicial Conduct
- Excerpt Online State of Nevada Commission on Judicial Discipline (<http://judicial.state.nv.us/>)
 - Purpose of the Commission, 04/11/06
 - Guide to the Ethical Obligations of the Nevada Judges and Filing a Complaint with the Nevada Commission on Judicial Discipline, 4/21/06
 - Biographical Sketches of Commission Members and Staff, 08/13/07
 - Complaint Process Confidential and Public Proceedings
 - Procedures, 10/05/06
 - Complaints, 09/27/07
- Nevada Commission on Judicial Discipline: Verified Statement of Complaint
- 2008 Case Study: District Judge Douglas W. Herndon

2008

CASE STUDY:

District Judge Douglas W. Herndon

STATE OF NEVADA COMMISSION ON JUDICIAL DISCIPLINE 2008 CASE STUDY SUMMARY:

It is difficult to find a more biased and less public-friendly complaint system than the Nevada Commission on Judicial Discipline (the "Commission"). The following case study serves to demonstrate why the general public may not risk the process. The process itself creates fear and added legal risks for the complainant.

Personal and legal risks include retaliation by the judicial officer against whom the complaint is filed, contempt, and other remedies that could potentially include jail or a separate action for perjury. Given the nature of the process requiring that a complainant not disclose they've filed a complaint to any "person or entity," how then are they to seek counsel and relief if they are persecuted, prosecuted, or jailed for their complaint or alleged violations of the confidentiality clause contained on the Verified Statement of Complaint? The system is inherently flawed and does not afford the complainant protections from judicial misconduct or disability.

In the case study presented I, Alecia D. Biddison, am a witness subpoenaed to testify on behalf of the Defense at a highly publicized hearing. Demonstrated by a Statement of Facts, the judge clearly violated the Nevada Revised Statutes and the Nevada Code of Judicial Conduct. The nature of the conduct and specific violations necessitate a complaint be filed; however, the potential risks associated with the complaint process are too great to utilize the system designed to address judicial misconduct.

The judge's personal biographical summary reveals a judicial officer with an extensive legal background and who was a long practiced attorney prior to being appointed to the bench. His professional experience and tenure as a judicial officer demonstrate he knowingly violated more than one provision of the Nevada Code of Judicial Conduct and knowingly failed in the performance of his judicial duties.

He was openly biased and improper in his activities. The judge allowed and participated in discourteous conduct towards a witness. He used his position on the bench and ruling remarks to call me out by name, to question my conduct, and undermine my character and credibility. By his statements on the record, the judge tells the court I am not credible or believable and that I lack propriety in the conduct of my activities. He did these things in the view of the public and under the scrutiny of a highly publicized case where both national and local media were present.

The judge's conduct is in direct violation of the Nevada Code of Judicial Conduct. Despite my strong desire to make known the judge's conduct by utilizing the formal complaint procedure specified by the Nevada Commission on Judicial Discipline, the fear of potential retaliation by the Commission and/or judge are too great to take the risk. Given this judge was willing to commit several violations in the presence of the public and media, and without regard for the long term implications on the witness [me] or himself, there is no assurance he won't [under the Commission's cloak of secrecy] use his position and professional relationships to further harass or attack my character and credibility. More importantly, I cannot risk being held in contempt or being subjected to some other remedy, which could include jail or a separate action for perjury.

The State of Nevada needs to provide its citizenry with a complaint process system containing appropriate and equal protections whereby complaints are filed and resolved by a Commission with a composition designed to represent its people. Nevadans should have no need to fear the process, retaliation, contempt or other remedy for merely filing a complaint. False allegations must be addressed; however, the complaint itself should not be cloaked in secrecy nor veiled with threats of legal action against the complainant. The people of Nevada have a justifiable right to make complaints for improper judicial conduct and disability. These rights cannot be limited merely to the right to complain, but must also encompass the right to make known the complaint and resolution, including the findings and any discipline, sanctions or punishments levied. We must eliminate the personal legal risks of “contempt and other remedy” from the process.

Until such time the laws and procedural rules are changed Nevadans’ right to due process and equal protection under the law is arguably restrained.

STATEMENT OF FACTS: Required by the Verified Statement of Complaint.

The following is my explanation as to why District Judge Douglas W. Herndon of the 8th District Court located in Las Vegas, Nevada has violated the Nevada Code of Judicial Conduct:

I am a witness. Alecia D. Biddison.

Judge Douglas W. Herndon did the following things that I believe constitute misconduct:

Judge Herndon demonstrated an appearance of impropriety and showed a lack of probity and fairness during his conduct of the January 15-18, 2008 State of Nevada vs. Darren Roy Mack (CV06-1386/07-C-237716-C) motion to withdraw guilty plea hearing. He allowed and encouraged an officer of the court (Special Prosecutor Christopher Lalli) to conduct himself unprofessionally and failed to admonish the behavior as required by the Nevada Code of Judicial Conduct. Further, Judge Herndon used his position on the bench to make unwarranted, factually inaccurate, and discourteous comments regarding my character and conduct.

Canon 2 "A judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities."

Violation of Judicial Canon 2(B):

Judge Herndon used his nearly two hour ruling dissertation during the January 18, 2008 hearing on motion to withdraw guilty plea to praise the character and conduct of attorneys Scott Freeman and David Chesnoff. He openly dismissed and discredited evidence provided by witness testimony and legal declarations showing conduct and character of the attorneys to the contrary and, more importantly, failed to address the clear inconsistencies between the attorneys' own testimony. (TOP, 1/16/08, pp. 1-209 & TOP, 1/17/08, pp. 266-438)

Judge Herndon is on the record acknowledging that attorney David Chesnoff is an "at least" professional friend, Mr. Chesnoff recommended his appointment to the bench, and he was also a campaign contributor. Judge Herndon also acknowledged his "at least" professional friendship and prior working relationship with Special Prosecutor Christopher Lalli. His detailed comments praising David Chesnoff lend the appearance that his "social and other relationships" may have influenced the judge's ability to effectively evaluate evidence and testimony by witnesses, including myself, in opposition to Mr. Chesnoff's testimony and conduct. (TOP, 1/16/08, pp. 56-57)

Canon 2(B). A judge shall not allow family, social, political or other relationships to influence the judge's judicial conduct or judgment. A judge shall not lend the prestige of judicial office to advance the private interests of the judge or others; nor shall a judge convey or permit others to convey the impression that they are in a special position to influence the judge. A judge shall not testify voluntarily as a character witness.

Violation of Judicial Canon 3(B)4&5:

Judge Herndon, against objection from defense counsel and without legal relevance and basis, allowed Special Prosecutor Christopher Lalli (his friend and former coworker) to cross-examine me regarding an unrelated subject matter not covered in direct examination. It appeared only for the express purpose of harassing me and unsuccessfully attacking my credibility. (TOP, 1/15/08, pp.190)

Judge Herndon not only allowed Special Prosecutor Christopher Lalli to be unprofessional and disrespectful towards me during cross-examination, but Judge Herndon proceeded to make a joke of Mr. Lalli's discourteous behavior. He then allowed Mr. Lalli to continue questioning me on an unrelated subject matter, choosing to overrule the objection from defense counsel. (TOP, 1/15/08, pp.191-192)

Judge Herndon allowed Special Prosecutor Christopher Lalli to make a statement "Why are you smiling at me?" in a very aggressive and confrontational tone that I perceived as sexual harassment based on my gender. (TOP, 1/15/08, pp.191) Similar statements were not made to any of the male witnesses who may have smiled at Mr. Lalli during their testimony, which I know by having reviewed the transcripts.

Further, Judge Herndon's racial stereotyping of Italians as loud and who don't like it when other people smile is offensive, undignified, discourteous, and is in direct violation of the code of conduct. (TOP, 1/15/08, pp. 191)

Canon 3B(4) A judge shall be patient, dignified and courteous to litigants, jurors, witnesses, lawyers and others with whom the judge deals in an official capacity, and shall require similar conduct of lawyers, and of staff, court officials, and others subject to the judge's direction and control.

(5) A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, and shall not permit staff, court officials and others subject to the judge's direction and control to do so.

A judge must refrain from speech, gestures or other conduct that could reasonably be perceived as sexual harassment and must require the same standard of conduct of others subject to the judge's direction and control.

I am concerned after reviewing the "verbatim" transcripts from January 18, 2008 that specific statements conveyed in the courtroom by Judge Herndon are missing. More disconcerting is that I have been unable to obtain a copy of the audio of the hearing after contacting numerous media and court-related sources to validate the altered transcript. (TOP, 1/18/08, pp. 139)

Violation of Judicial Canon 3(B)5:

Judge Herndon's discretionary decision to communicate that my conduct when typing legal declarations for the Law Office of Laub and Laub was "highly inappropriate" is considered manifest bias, specifically prejudice based upon socioeconomic status. I have a legal right to type documents for any organization, individual, or business entity without prejudice.

On the record Special Prosecutor Christopher Lalli determined I prepare documents for incarcerated persons in an effort to assist them and reduce their legal fees. (TOP, 1/15/08, pp. 187-190) I was asked to type legal declarations for several Mack family members (Jory Mack, Joan Mack, Landon Mack and Darren Mack) in an effort to reduce their legal expenses. Each of the Mack family members identified above provided me with their hand written and/or typed statements. I transferred their prepared statements onto Laub and Laub legal stationary and submitted them to defense attorney William Routsis. (TOP 1/15/08, pp. 187) Nothing about the conduct of typing statements prepared by Mack family members or the preparation of documents for other incarcerated persons is unlawful or inappropriate. Judge Herndon's unwarranted, unnecessary, and inaccurate statement on the record serves to negatively impact my ability to provide similar services to others in need of assistance. (TOP 1/18/08, pp. 139)

Canon 3B(5) A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, and shall not permit staff, court officials and others subject to the judge's direction and control to do so.

I feel that what Judge Douglas W. Herndon should have done is the following:

1. *Judge Douglas W. Herndon should have requested another District Judge preside over the January 15-18, 2008 State of Nevada vs. Darren Roy Mack (CV06-1386/07-C-237716-C) motion to withdraw guilty plea hearing.*

His admitted professional friendships and past working relationships with the prior defense counsel and prosecution team create the appearance of impropriety. Judge Herndon was presented evidence in motions prior to the hearing that the conduct and integrity of Mr. Mack's prior attorneys (Freeman & Chesnoff) and prosecution team (Lalli & Daskas) were in question and they would be called as witnesses for the defense. (TOP, 12/10/07, pp. 13, lins. 15-21 & TOP, 12/10/07, pp. 14, lins. 23-24) A reasonable person would acknowledge the difficulty in evaluating testimony and evidence against your professional friends and co-workers. Judge Herndon placed himself in a position whereby he must believe people he does not know or trust his over his friends and then render an unbiased and fair opinion given all the testimony and evidence presented. His conduct demonstrated an appearance of impropriety as he praised the work of prior counsel and made disparaging remarks characterizing defense witnesses as not credible or believable. (TOP, 1/18/08, pp. 139-140) A reasonable person would acknowledge this is an unfair task, creates the appearance of impropriety and bias, and would step aside to allow for a fair and impartial hearing of the all the testimony and evidence.

2. *Judge Douglas W. Herndon should have refrained from using his position on the bench to praise and commend the conduct and representation of attorneys Scott Freeman and David Chesnoff while serving to undermine the personal character and credibility of defense witnesses.*

Judge Herndon's decision to use his ruling remarks to make unnecessary, unwarranted, and inaccurate statements regarding my personal conduct and character was improper. The purpose of his comments serves only to intimidate me, negatively impact my personal credibility, and disrupt my ability to provide important and necessary services to others.

3. *Judge Douglas W. Herndon must enforce the proper legal practice of law in his courtroom.*

It is incumbent upon the Judge to ensure the courtroom conduct follows the Constitution he is sworn to uphold and procedurally follows the laws established to govern the proceedings. Allowing the cross examination of subject matter not covered in direct examination violates basic legal principles and practices. Further, allowing continued cross-examination after a second objection under the guise "I understand in a legal way" is willful misconduct. (TOP, 01/15/08, pp. 190, lin. 19)

4. Judge Douglas W. Herndon should maintain proper courtroom decorum and refrain from discourteous and rude conduct towards witnesses; he should require similar conduct of lawyers.

Not only did Judge Herndon fail to address the unprofessional, harassing, and discourteous conduct of Special Prosecutor Christopher Lalli towards me, Judge Herndon participated by making a joke of Mr. Lalli's behavior.

5. Judge Herndon's racial stereotyping has no place in the courtroom.

Judge Herndon should be required to attend ethics, diversity, and sexual harassment training courses to prevent this conduct in the future.

I request the following remedy:

1. Request this complaint be investigated and all findings and determinations made by the Commission regarding all aspects of the complaint are made available to the public.

2. Request Judge Douglas W. Herndon is admonished for his failure to adhere to the Nevada Code of Judicial Conduct.

3. In lieu of a public apology, request Judge Douglas W. Herndon be required to submit a letter to the court in the matter of the State of Nevada vs. Darren Roy Mack (CV06-1386/07-C-237716-C) regarding the evidentiary hearing conducted January 15-18, 2008 expressly stating after a thorough review of the transcripts all comments and statements made by Judge Herndon during his ruling on January 18, 2008 relating to Ms. Alecia D. Biddison are withdrawn.

4. Require Judge Douglas W. Herndon to attend ethics, diversity, and sexual harassment training courses to prevent this conduct in the future.

ANNEXES

Annex A: Excerpt – Transcript of Proceeding, December 10, 2007, pp. 1 & 13-14.

Annex B: Excerpt - Transcript of Proceeding, January 15, 2008 pp. 1-3 & 186-192.

Annex C: Excerpt - Transcript of Proceeding, January 16, 2008 pp. 1-2 & 56-57.

Annex D: Excerpt – Transcript of Proceeding, January 18, 2008 pp. 1-2 & 138-140.

Annex E: Nevada Commission on Judicial Discipline Verified Statement of Complaint

Annex F: Excerpt – Nevada Code of Judicial Conduct

Annex G: Biographical Sketch District Judge Douglas W. Herndon