A legal note from Marshal Willick about how the Nevada Supreme Court has just half fixed a problem, and missed an opportunity to do a lot better

On November 10, 2009, the Nevada Supreme Court amended SCR 48.1 to add a second peremptory challenge in some circumstances. This would be good news except that, in doing so, the Court squandered the opportunity to actually address the issue of personal bias by judges against attorneys.

Savvy trial lawyers have long used peremptory challenges tactically. Supreme Court Rule 48.1 has, at least since 1982, permitted an attorney for either side to remove a case from a judicial department and have it randomly re-assigned. This has permitted counsel to prevent cases from being heard in places where the lawyer perceives the assigned judge's predisposition, or prejudices, might result in an unfavorable ruling. The theory is that, since both parties have the same right, by default most cases will be heard in a department that is at least acceptably neutral to both sides.

In practice, the rule has been problematic. Some judges, outraged that their impartiality could or would be questioned by anyone, took retribution on lawyers seeking peremptory challenges. One such conflict caused a virtual civil war in the Nevada judiciary, inflicting wounds all around that still linger, and causing the Legislature to amend the State Constitution to remove from the Supreme Court the power to control judicial discipline proceedings. *See Mosley v. Comm'n on Judicial Discipline*, 117 Nev. 371, 22 P.3d 655 (2001) (recounting the tragic history of the ***four*** separate, drawn-out, and acrimonious cases entitled *Whitehead v. Commission on Judicial Discipline* I-IV).

On this history, one would figure that the Court would go to great lengths to prevent personal bias from creeping into cases at any level. Unfortunately, other factors have apparently prevented that from being perceived as the most important consideration.

Human nature being what it is, most people who are being honest will acknowledge the existence of ***some*** people toward whom they have feelings – positive or negative – making it impossible for them to be truly impartial. And this certainly includes judges.

In family court, this led to the evolution of what became known as the "midstream recusal policy," for use where there was a clear record of extreme hostility between a judge and a lawyer. Whenever the lawyer was working on a case prior to its assignment to the judge, the department recused; when a case had been assigned to the judge prior to the lawyer being hired, the lawyer refused to take the case and referred the would-be client elsewhere.

It worked well for many years, until the Nevada Supreme Court issued the decision in *Millen v. Dist. Ct.*, 122 Nev. 1245, 148 P.3d 694 (2006), which opinion unfortunately lumped in the existence of personal prejudice with "personal knowledge of disputed facts," as matters "best resolved on a case-by-case basis."

This eliminated the recusal lists for personal bias, and led to several instances of judges in family court exercising personal vendettas against lawyers they did not care for. And the clients, of course, were caught in the resulting cross-fire, because a lawyer assigned a case in which he sincerely believed the judge to be biased would be ethically required to advise the client that the judge's

pervasive hostility against counsel could result in a negative outcome having nothing to do with the case. Lawyers released cases when they were re-assigned to such departments (even after years of litigation), and clients felt forced to fire lawyers out of fear that a personal grudge could be taken out on them.

This result was ironic, because the core holding of *Millen* was that when a judge's duty to sit conflicts with a client's right to choose counsel, the client's right generally prevails, so that the client is assured his counsel of choice. The elimination of recusal lists based on the personal bias of judges against specific lawyers had precisely the opposite effect, resulting in many clients effectively being denied counsel of their choice.

In early 2008, a proposal was put before the Court on the administrative docket ("ADKT") to fix the problem by re-establishing the mid-stream recusal policy and recusal lists for personal bias. After a year and a half, however, the Court simply amended SCR 48.1 to permit a second peremptory challenge when a case is reassigned for any reason other than the exercise of a peremptory challenge.

That was a positive development – it allows actual biases for conflict to be addressed when a case is re-assigned in mid-litigation. But it did not go nearly far enough, and still allowed the problem originally complained of to continue. Multiple attorneys have a two-judge conflict situation in Las Vegas, so using the renewed peremptory to transfer out of one inevitably will sometimes drop the client, and attorney, into the other.

The lawyer in question then has the Hobson's choice complained of, irrespective of how long he has been on the case or the stage of proceedings – abandon the case and client by withdrawing, or litigate in a department where he is convinced that his client will be disfavored solely because of the conflict between lawyer and judge.

The Court thus has embraced a "solution" that really does not solve the problem, and still permits the cancer of personal bias to exist in our courts and affect the outcomes of cases.

In *Mosley*, the Court held that "a fair trial in a fair tribunal is a basic requirement of due process." That is true, and is why the court system should be actively and predominantly concerned with eliminating actual ***bias***, in both reality and perception. It is hard to perceive what would cause the Court to fail to act to eliminate bias, when a means of doing so was in its hands, other than a desire to maintain the facade that judges are magically able to rise above the human nature that limits other mortals.

The instinct to protect appearances at the cost of actual damage to real people is unfortunate, and sets the courts up to repetition of the *Whitehead* fiasco. Ironically, it also contradicts the public policy goal that *Millen* states is the ***purpose*** of the judicial canons – "to promote public confidence in the judiciary." Tolerating decision-makers sitting in cases where bias has been established, and lawyers telling their clients that the deck is stacked against them before they ever appear in the courtroom, is the most efficient mechanism one can imagine for eroding public confidence in the judiciary.

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