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2 DISTRICT COURT

3 CLARK COUNTY, NEVADA

4
5 STEPHEN P. STUBBS,

Case No. A-18-770351-W

Dept. No. XXII

6 Petitioner,

7 Vs.

8 VICTOR MILLER, in his capacity as
9 BOULDER CITY MUNICIPAL COURT
10 JUDGE,

11 Respondent.

12 **ORDER GRANTING PETITION FOR WRIT OF MANDAMUS**

13 This matter, concerning Petitioner STEPHEN P. STUBBS' Petition for Writ of Mandamus
14 filed March 2, 2018, came on for hearing on the 5th day of April 2018 at the hour of 10:30 a.m.
15 before Department XXII of the Eighth Judicial District Court, in and for Clark County, Nevada, with
16 JUDGE SUSAN H. JOHNSON presiding; Petitioner STEPHEN P. STUBBS, ESQ. appeared in *pro*
17 *se*; and Respondent MUNICIPAL COURT JUDGE VICTOR MILLER was present and appeared by
18 and through his attorneys, CRAIG R. ANDERSON, ESQ. and JACKIE V. NICHOLS, ESQ. of the
19 law firm, MARQUIS AURBACH COFFING. Having reviewed the parties' papers and pleadings on
20 file herein, heard extensive oral argument of counsel and taken this matter under advisement, this
21 Court makes the following Findings of Fact and Conclusions of Law:
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23 **FINDINGS OF FACT AND PROCEDURAL HISTORY**

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25 1. Petitioner STEPHEN P. STUBBS seeks, by way of his Petition for Writ of
26 Mandamus, the restoration of his Constitutional Right of Free Speech he claims was unlawfully

27 ...

SUSAN H. JOHNSON
DISTRICT JUDGE
DEPARTMENT XXII

1 denied him by VICTOR MILLER, BOULDER CITY MUNICIPAL COURT JUDGE as a result of
2 “gag orders” issued against him and/or his client, JOHN HUNT, in February 2018.

3 2. According to the Petition, MR. STUBBS is an attorney who is not only defending
4 MR. HUNT as a result of criminal charges, but he also represents the client as a plaintiff in a federal
5 civil rights lawsuit he lodged against Boulder City for alleged constitutional violations related to
6 MR. HUNT’S arrest. Factually, this Court understands, on June 8, 2016, the Boulder City Police
7 Department, in conjunction with other local police entities, were conducting a crosswalk
8 enforcement activity or, as Petitioner characterizes it, a “sting operation,”¹ where officers issued
9 citations to drivers who failed to yield the right of way to a decoy pedestrian within a crosswalk.
10 MR. HUNT apparently was one of those drivers who was issued such a citation. Shortly thereafter,
11 MR. HUNT, believing the police activity to be “disgusting” and “unfair,”² strode back and forth
12 across the street in the same crosswalk in protest. Ultimately, MR. HUNT was arrested by the
13 Boulder City Police Department and charged with failing to yield to traffic and resisting a public
14 officer in violation of NRS 484B.283 and 199.280, respectively.³ According to MR. STUBBS,
15 these charges were dismissed by the former Boulder City Attorney Dave Olsen.
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18 3. On or about May 30, 2017, MR. HUNT filed his Complaint against Boulder City in
19 the United States District Court, District of Nevada, claiming a violation of his civil rights,
20 stemming from his arrest. *See Hunt v. City of Boulder City*, Case No. 2:17-cv-01519 JCM-NJK,
21 ECF No. 19. According to MR. STUBBS, Boulder City’s then attorney, Dave Olsen, retaliated by
22 filing a criminal complaint against MR. HUNT on June 5, 2017, asserting five misdemeanor counts:
23 (1) failure to yield to pedestrian in a crosswalk; (2) failure to place vehicle registration certificate in
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26 ¹Petitioner refers to the incident as a “sting operation,” on p. 4 of his Petition, and according to Respondent in
27 his Response, p. 3, the police considered it an “enforcement activity.”

²See Petition for Writ of Mandamus, p. 4.

³See Response to Petition for Writ of Mandamus, p. 5; and Exhibit A-1 attached to Response. In MR.
28 STUBBS’ view, MR. HUNT was arrested “for his First Amendment expression.” *See* Petition for Writ of Mandamus, p.
4.

1 vehicle, surrender upon demand of certain persons; (3) impeding ability of driver to yield prohibited;
2 (4) obstruct a public officer; and (5) resist a public officer.⁴ Upon Mr. Olsen's retirement, the new
3 Acting City Attorney,⁵ STEVE MORRIS, "chose[] to continue the prosecution of [MR. HUNT]."
4 MR. HUNT'S criminal matters are being heard by Boulder City's only municipal court judge,
5 JUDGE VICTOR MILLER.

6
7 4. In February 2018, MR. STUBBS posted his concerns concerning MR. MORRIS'
8 "views of the First Amendment"⁶ and "the conflict of interest inherent in a City Attorney being the
9 Stake President over Boulder City's only judge"⁷ on Facebook, a social media and networking
10 service. Specifically, on February 19, 2018, MR. STUBBS made the following post:

11 Hey Boulder City! This is what your new City Attorney Steve Morris is doing!

12 After the BCPD sends a press release warning citizens that they MUST use crosswalks
13 during a pedestrian sting, City Attorney Steve Morris is pressing an "Obstruction" charge
14 and going to trial against a citizen, specifically charging him with "walking back and forth in
15 a crosswalk being used for the enforcement activity."

16 My client was protesting what he saw as an unfair crosswalk sting, walked at a normal pace
17 across the crosswalk in protest 3 times, and his protest took a total of 56 seconds.

18 So much for the 1st Amendment...City attorney Steve Morris doesn't care.⁸

19 5. MR. STUBBS' Facebook post came to the attention of JUDGE MILLER in hearing
20 on or about February 22, 2018. According to MR. STUBBS, JUDGE MILLER "issued a broad gag
21 order from the bench, restricting Mr. Stubbs, John Hunt, anyone in the City Attorney's Office, and
22 anyone in the Boulder City Police Department, from speaking publicly about the case or criticizing
23

24 ⁴See Exhibit A-1 attached to Response to Petition for Writ of Mandamus.

25 ⁵MR. MORRIS has since been appointed City Attorney of Boulder City.

26 ⁶See Petition for Writ of Mandamus, p. 8.

27 ⁷*Id.* MR. MORRIS is alleged to be the President of the Church of Latter Day Saints' (LDS) Stake, an
28 administrative unit encompasses multiple congregations or wards, of which Boulder City is a part. According to MR.
STUBBS, JUDGE MILLER is a member of a ward located in MR. MORRIS' Stake. From an ecclesiastical standpoint,
MR. MORRIS has "very significant authority" (*Id.*, p. 7) and an LDS "faithful member" would feel obligated to comply
with the Stake President's wishes or directives. "More importantly, it is the culture and common belief within the LDS
Church membership that criticizing your stake president or going against him in any way is a rebellion against God." *Id.*

⁸*Id.*; also see Exhibit A-4 attached to Response to Petition for Writ of Mandamus.

1 an attorney that is in the case in any way.”⁹ Further, “[a]s a direct result of Judge Miller’s broad gag
2 order, Mr. Stubbs was unable to participate in the political process in the 6 days preceding the City
3 Council’s decision to permanently appoint Steve Morris as City Attorney.”¹⁰

4 6. On February 27, 2018, “at 5:30pm, (sic) just an hour and a half prior to the City
5 Council meeting to discuss Steve Morris’s possible permanent appointment as City Attorney,”¹¹
6 JUDGE MILLER amended and limited the scope of his previous decision and ordered “all counsel
7 are prohibited from engaging in extrajudicial communications that in any way disparage or
8 otherwise comment on opposing counsel relative to this case.”¹²

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10 7. As noted above, MR. STUBBS now petitions this Court for mandamus “to restore his
11 Constitutional Right of Free Speech that has been unlawfully denied him by Victor Miller through
12 unconstitutional prior restraint on speech and publication.”¹³ JUDGE MILLER admits he issued the
13 Order prohibiting the lawyers from disparaging each other, specifically as set forth in Paragraph 6
14 above. He has responded, arguing (1) the activity restrained poses a serious or imminent threat to
15 the administration of justice, (2) the order is narrowly tailored, and (3) no lesser restrictive
16 alternatives are available. JUDGE MILLER also urges this Court to sanction MR. STUBBS as he
17 has since made additional Facebook posts, as well as a YouTube video, disparaging MR. MORRIS,
18 which is in violation of the February 27, 2018 Order.

19 CONCLUSIONS OF LAW

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22 1. A writ of mandamus is an extraordinary remedy and is available when the petitioner
23 has no “plain, speedy and adequate remedy in the ordinary course of law.” *See* NRS 34.170 and
24 34.330; *also see* American Home Assurance Co. v. District Court, 122 Nev. 1229, 1234, 147 P.3d

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26 ⁹*Id.*

¹⁰*See* Petition for Writ of Mandamus, p. 9.

¹¹*Id.*

¹²*See* Exhibit 1 attached to Petition for Writ of Mandamus, p. 5; *also see* Exhibit A-5 attached to Response to
27 Petition for Writ of Mandamus, p. 5.

¹³*See* Petition for Writ of Mandamus, p. 2.

1 1120, 1124 (2006). A writ of mandamus is appropriate “to compel the performance of an act which
2 the law requires as a duty resulting from an office or where discretion has been manifestly abused or
3 exercised arbitrarily or capriciously.” Stephens Media, LLC v. District Court, 125 Nev. 849, 857,
4 221 P.3d 1240 (2009), *quoting* Hidalgo v. District Court, 124 Nev. 330, 334, 184 P.3d 369, 372
5 (2008), *in turn, quoting* Redeker v. District Court, 122 Nev. 164, 167, 127 P.3d 520, 522 (2006).

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7 2. In American Home Assurance Co., 122 Nev. at 1234, 147 P.3d at 1124, the Nevada
8 Supreme Court held there is “no other adequate means [besides the filing of an extraordinary writ]
9 by which to challenge the district court’s refusal to allow [a petitioner] to intervene.” The reason
10 being is a denial of an application to intervene is not an appealable order. Aetna Life & Casualty v.
11 Rowan, 107 Nev. 362, 363, 812 P.2d 350, 350-351 (1991). Similarly, JUDGE MILLER’S Order
12 Re: Extra Judicial Communications filed February 27, 2018, prohibiting the lawyers, including MR.
13 STUBBS, “from engaging in extra judicial communications that in any way disparage or otherwise
14 comment on opposing counsel relative to this case” is not appealable; MR. STUBBS, therefore,
15 must seek reprieve from the municipal court’s order via a petition for extraordinary relief.
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17 3. Notwithstanding the aforementioned, this State’s high court has stated “where an
18 important issue of law needs clarification and public policy is served by this court’s invocation of its
19 original jurisdiction, our consideration of a petition for extraordinary relief may be justified.”
20 Mineral County v. State Department of Conservation, 117 Nev. 235, 243, 20 P.3d 800, 805 (2001),
21 *quoting* Business Computer Rentals v. State Treasurer, 114 Nev. 63, 67, 953 P.2d 13, 15 (1998). In
22 this Court’s view, MR. STUBBS’ petition implicates significant policy concerns, most notably, the
23 balancing of a lawyer’s freedom of speech against the state’s interest in fair judicial determinations.
24 This Court, therefore, exercises its discretion to consider the merits of MR. STUBBS’ petition.
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26 4. “It is a prized American privilege to speak one’s mind, although not always with
27 perfect good taste, on all public institutions.” New York Times Co. v. Sullivan, 376 U.S. 254, 269,
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1 84 S.Ct. 710, 11 L.Ed.2d 686 (1964). However, at the same time, “a trial judge has an affirmative
2 constitutional duty to minimize the effects of prejudicial pretrial publicity.” Gannett Co. v.
3 DePasquale, 443 U.S. 368, 378, 99 S.Ct. 2898, 61 L.Ed.2d 608 (1978). In this regard, the United
4 States Supreme Court “has held that the Constitution [does] not allow absolute freedom of
5 expression [or] a freedom unrestricted by the duty to respect others needs fulfillment of which
6 makes for the dignity and security of man.” Pennekamp v. Florida, 328 U.S. 331, 351, 66 S.Ct.
7 1029, 90 L.Ed. 1295 (1946) (Frankfurter, J. concurring), *citing* Schenck v. United States, 249 U.S.
8 47, 39 S.Ct. 247, 63 L.Ed. 470 (1919). Justice Oliver Wendell Holmes, Jr.’s famous “‘clear and
9 present danger’ test is the penultimate embodiment in First Amendment law of the principal that
10 freedom of speech is critically important, but that ‘its exercise must be compatible with the
11 preservation of other freedoms essentially to a democracy and guaranteed by our Constitution.’”
12 United States v. Scarfo, 263 F.3d 80, 90-91 (3rd Cir. 2001), *quoting* Pennekamp, 328 U.S. at 353, 66
13 S.Ct. 1029 (Frankfurter, J. concurring). Suffice it to say, to have full force and effect, the First
14 Amendment may not be truncated just because of appealing circumstances; the regulation of speech-
15 connected activities must be carefully restricted. Tinker v. Des Moines School District, 393 U.S.
16 503, 513, 89 S.Ct. 733, 21 L.Ed.2d 731 (1968).

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19 5. The United States Supreme Court has provided guidance on balancing competing
20 rights in the First Amendment context. As applicable here, and in Gentile v. State Bar of Nevada,
21 501 U.S. 1030, 111 S.Ct. 2720, 115 L.Ed.2d 888 (1991), the Court examined the competing interests
22 between lawyers in a pending case wishing to speak to the media about that case and a district court
23 attempting fairly to adjudicate that action. Here, this Court faces a similar tension between a
24 lawyer’s right to speak in social media about his adversary and a pending case, and the municipal
25 court’s constitutional duty to try a case fairly without the negative impact of unfavorable pretrial
26 publicity.
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1 6. An order like the one issued against MR. STUBBS is a restraint on speech that
2 impacts rights under the First Amendment. As a rule, “the speech of lawyers representing clients in
3 pending cases may be regulated under a less demanding standard than that established for regulation
4 of the press.” Gentile, 501 U.S. at 1074, 111 S.Ct. 2720, 115 L.Ed.2d 888. That is, a lawyer’s right
5 to free speech in a pending case may be circumscribed in the courtroom and is limited outside the
6 courthouse as well. *See* Gentile, 501 U.S. at 1073, 111 S.Ct. 2720, 115 L.Ed.2d 888. A lawyer
7 admitted to the bar of a court must expect the disciplinary limitations of his or her profession. In
8 other words, lawyers should not be surprised when they learn their chosen professional status
9 restricts their conduct and speech at times.

11 7. Gentile held the “substantial likelihood of material prejudice” standard is
12 constitutionally permissible to balance the lawyer’s interest in free speech against the state’s interest
13 in fair judicial determinations. Extrajudicial statements by lawyers pose a threat to a pending
14 proceeding’s fairness because attorneys have access to information through discovery and client
15 communication, and as their statements are likely to be received as especially authoritative. Scarfo,
16 263 F.3d at 93. Accordingly, this Court examines the record to determine whether JUDGE
17 MILLER’S order prevented a substantial likelihood of material prejudice to the judicial proceeding,
18 as any limitation on the lawyers’ speech must be narrow and necessary, carefully aimed at comments
19 likely to influence the trial or judicial determination. *See* Gentile, 501 U.S. at 1075, 111 S.Ct. 2720,
20 115 L.Ed.2d 888.

23 8. The evils against which a “gag” order may appropriately apply are those generally
24 associated with the risk of prejudice to the jury pool. *Id.* However, there are other forms of
25 prejudice to the actual outcome of a trial. For example, preventing a carnival atmosphere in a high
26 profile case is also a legitimate reason to gag an attorney. *See* United States v Brown, 218 F.3d 415,
27 429 (5th Cir. 2000).

1 9. Here, there is no prejudice to a jury pool, because, as the municipal court is one of
2 limited jurisdiction, it does not conduct trials by jury, and no jurors will be impaneled in the case
3 lodged against MR. STUBBS' client. Further, the five misdemeanor charges pending against MR.
4 HUNT, which consist mostly of traffic violations, could hardly be classified as highly profile or
5 even interesting to Boulder City's residents. To put it bluntly, this Court concludes MR. STUBBS
6 has not, and frankly, cannot create a "carnival atmosphere" by making posts about the case and his
7 adversary on his Facebook page.
8


9 10. While the Order, p. 4, indicates judge's concern of the Facebook posting "disrupting
10 a 'tribunal' or 'prejudicing an adjudicative proceeding,'" it appears JUDGE MILLER is more
11 concerned of the prejudice to him in deciding the legal issues. However, as noted in Scarfo, 263
12 F.3d at 94, "there [is] no risk of prejudice to the Judge because judges are experts at placing aside
13 their personal biases and prejudices, however obtained, before making reasoned decisions. Judges
14 are experts at closing their eyes and ears to extraneous or irrelevant matters and focusing only on the
15 relevant in the proceedings before them." Here, as in Scarfo, JUDGE MILLER did not articulate
16 any specific or general prejudice he would suffer and this Court sees none. At best, one might glean
17 JUDGE MILLER would be upset when or if he read the Facebook post. His concern, however, does
18 not rise to any measurable level of prejudice. "A[] perturbed judge is not necessarily a prejudiced
19 judge...." Scarfo, 263 F.3d at 94-95. In sum, there is no identifiable prejudice or risk of prejudice,
20 and thus, in this Court's view, JUDGE MILLER'S Order was erroneous.
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22 11. Notwithstanding the aforementioned, this Court is concerned concerning the Order's
23 breadth. Indeed, as couched, the Order is so broad both MR. STUBBS and MR. MORRIS could
24 violate the mandate if they disparage their adversary even in a private conversation with their
25 spouses or friends within the sanctity of their homes. In other words, this Order is not carefully
26 tailored or narrowed to meet JUDGE MILLER'S concerns.
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1 Accordingly, based upon the foregoing Findings of Fact and Conclusions of Law,

2 **IT IS HEREBY ORDERED, ADJUDGED AND DECREED** Petitioner STEPHEN P.
3 STUBBS' Petition for Writ of Mandamus filed March 2, 2018 is granted, and the Order of the
4 Boulder City Municipal Court Judge is reversed.

5 DATED this 16th day of April 2018.

6 
7 SUSAN H. JOHNSON, DISTRICT COURT JUDGE

8 **CERTIFICATE OF SERVICE**

9 I hereby certify, on the 16th day of April 2018, I electronically served (E-served), placed
10 within the attorneys' folders located on the first floor of the Regional Justice Center, or mailed a true
11 and correct copy of the foregoing ORDER GRANTING PETITION FOR WRIT OF MANDAMUS
12 to the following party and counsel, and that first-class postage was fully prepaid thereon:

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