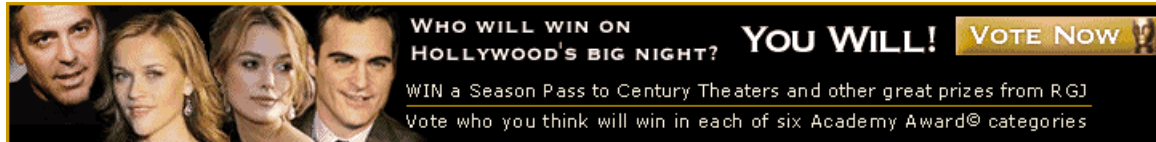


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Questions arise over judge selection in Nugget embezzlement case

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The process for picking the judge who will decide whether former Sparks Nugget lawyer Richard Davenport goes to prison or gets probation on charges of embezzling more than \$3 million from the casino-hotel is being criticized by some who say the standard procedure should have been followed to avoid any question of impropriety.

Instead of allowing the case to be randomly assigned by the court clerk -- the standard practice -- Washoe District Chief Judge Jerry Polaha passed over a list of judges and sent the case directly to recently retired and now senior judge Peter Breen.

And Polaha made the assignment two days before Davenport, who is well-known and well-connected in the legal community, was arrested and charged with two counts of embezzlement. Davenport was general counsel for John Ascuaga's Nugget for 15 years. Before that, he worked in a private law practice in Reno. His lawyer, Cal Dunlap, has said Davenport plans to plead guilty. Each count carries a maximum of 10 years in prison.

Washoe District Attorney Richard Gammick said Friday that he was behind the change. Gammick said he asked Polaha to assign a judge outside the normal list of district court judges because he believed most of the judges had relationships with Davenport that could be seen as conflicts.

And Polaha said Thursday that it's his prerogative as chief judge to select a different course, especially in a case like this.

"We usually don't have somebody who everybody knows," he said.

The chief judge said he selected Breen to avoid concerns about conflicts -- two judges, Janet Berry and Robert Perry, used to work in a law practice with Davenport, and Berry owns property with Davenport at Lake Tahoe. Also, one of Davenport's daughters had been a law clerk for Judge Steven Elliott.

But Polaha acknowledged that several other judges would not have had a problem with hearing the case.

Polaha said he talked with Judge Connie Steinheimer and learned that she did not have a conflict with Davenport, but he said he didn't pick her because she said she didn't want the case. And Polaha acknowledged that he had not asked judges Brent Adams or Steven Kosach. Polaha was busy with a trial and did not have time to ask the judges, he said.

"I was not asked," Kosach said when questioned whether he would be open to handling Davenport's sentencing and whether he had any conflicts of interest with Davenport.

"If I were assigned that case, I would treat it like any other," Kosach said. "If there's any question of impropriety, why not go ahead and assign it to a judge outside the district?"

Adams also said that no one asked him whether he had conflicts with Davenport. Adams said he did not, and would welcome the case into his court and treat Davenport the same as any other defendant.

He said he has concerns about how the case was assigned.

"It's extremely important to the integrity of our system that the same process be followed in every case," Adams said Friday. "The process of selecting the judge should be uniform in all criminal cases."

Initially when told Friday that Gammick and Polaha had discussed who would be the judge, Dunlap said he was concerned.

"Especially if Dick Gammick is talking to the judge without the defense counsel present," Dunlap said. "That is improper. You don't tell the judge who you want or don't want."

But since both he and the prosecutor are happy with Breen, Dunlap said that there is no problem.

"There is no basis for argument of preferential treatment," he said. "There's only a controversy if one party or the other is not OK with the judge assigned."

In most cases, Adams said, a person is charged, has a preliminary hearing or waives the hearing, and then the case is sent to the district court, where a clerk randomly assigns it to a judge in one of eight departments.

If a judge has a conflict on interest with the case, he or she will step down and the case will return to the clerk for another random assignment. That process continues until all parties are in agreement.

In this case, Davenport was charged and waived his preliminary hearing on Wednesday, but Polaha had already decided on Monday that it would go to Breen's court.

On Wednesday, the case appeared on the District Court's Web site as being assigned to Berry's court. She said Friday that she was in the process of writing an order to have the case removed.

Regardless of the clerk's assignment, the case was sent to Breen.

Polaha said that he assigned the new judge before Davenport's arrest because "the DA had to do some pre-filing," and needed access to a district court judge. Since they knew it was going to Berry, and Berry had a conflict, he assigned Breen.

But when Gammick was asked whether he needed something from the district court before the arrest, he said, no, that he had followed the normal procedure of going to the Sparks Justice Court and getting an arrest warrant.

When told about what Polaha said about needing a district judge for pre-filing, Gammick said there might have been something, but he couldn't remember.

Gammick said he was behind getting the case out of the regular district court departments to ensure a fair hearing. He said he didn't want to wait for the cases to be randomly assigned, because it could have meant a long list of challenges by his office.

"The chief judge is there to resolve issues whenever there are administrative issues," Gammick said. "That's how the system is set up."

"I told him, 'find me a judge who does not have issues with Mr. Davenport,'" Gammick added. "He came back and said it would go to Judge Breen, and I said great."

But Adams said making that assumption was improper.

"I've never heard of an instance where a senior judge preempted that process by assuming that all judges in the district would be disqualified, and then selecting a senior judge to take the case," he said. "And I've never heard of any case where the judge was selected before the case arrived at the court."

"As far as I know, no polling of the judges by the chief judge on the question of disqualification was ever done," Adams said.