

1 **IN THE SUPREME COURT OF THE STATE OF NEVADA**

2 In Re: Discipline of

Case No.: 70143

3 TIMOTHY R. TREFFINGER

4 Nevada Bar No. 12877

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Tracie K. Lindeman
Clerk of Supreme Court

6 RESPONDENT’S BRIEF IN OPPOSITION OF

7 STATE BAR OF NEVADA’S BRIEF IN SUPPORT OF SCR 111(4)

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9 On April 13, 2016, the State Bar of Nevada filed a petition with this Court regarding a
10 criminal proceeding against the Respondent.

11 On May 18, 2016 this Court directed briefing on the issue of whether SCR 111(4)’s
12 definition of “conviction” to include a guilty plea where a sentence is deferred or suspended, is
13 in conflict with NRS 453.3363(4) which provides for a discharge/dismissal of criminal
14 proceedings after completion of the diversion program, is not a conviction for the purposes of
15 employment or license. In particular the Court directed attention to the recent decision found in
16 *Hohenstein v. Nev. Emp’t Sec. Div.*, 131 Nev. Adv. Op. 17, 346 P.3d 365 (2015).
17

18 INTRODUCTION

19 In the State of Nevada the Supreme Court has the power to govern the legal profession,
20 as well as to promulgate the rules related to practice in this profession. One of those rules 111(1)
21 does in fact define conviction as to include the entry of a guilty plea regardless of whether a
22 sentence is deferred or suspended.
23

24 While Respondent has in fact entered a guilty plea under NRS 453, Respondent disagrees
25 with the contention that *Hohenstein, supra*, fails to alter the analysis that the diversion
26 proceedings should be appropriate for consideration of the Respondent’s suitability to practice
27 law.
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1 ARGUMENT

2 I. Respondent's "Conviction"

3 Petitioner continuously refers to the matter at hand as a "conviction" solely because of
4 the way conviction is defined in SCR 111. In truth, at the present time, Respondent has not been
5 convicted of anything. What happens, pursuant to 453.3363, is that upon an entry of plea the
6 proceedings are immediately suspended and the defendant is placed on the diversion program.
7 No judgment of conviction exists in fact, unless the defendant fails to complete the diversion
8 program and is adjudged a felon at that time.
9

10 NRS 453.3363 specifically states that discharge or dismissal is without adjudication of
11 guilt, is not a conviction for the purposes of "employment, civil rights, or any statute or
12 regulation, or any other public or private purpose. That section then proceeds to carve out the
13 exception noted for professional licensing boards.
14

15 Respondent concedes that as the rules are currently constructed allows diversion
16 proceedings to be considered by the disciplinary boards.
17

18 II. *Hohenstein*

19 Petitioner adequately lays out the facts of the *Hohenstein* decision. Like Respondent, the
20 teacher in that case, had not been adjudged guilty and he had been placed into a diversion
21 program. Ultimately it was determined that while in the diversion program *Hohenstein* could not
22 be terminated solely based on the guilty plea, nor could he be denied unemployment benefits as a
23 result of the guilty plea he entered when being placed on diversion.
24

25 This court in *Hohenstein* clearly notes that the "obvious goal" of the statute that Nevada's
26 diversion statute it based on was to afford "protection to first offenders in certain controlled
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1 dangerous substance cases.” *Id.* Those protections include a dismissal and an expunged arrest
2 that shall not be taken into account for employment, or other purposes.

3 The disciplinary proceedings that the State Bar is attempting to initiate in this case
4 directly effects employment. Respondent is a solo-practitioner, relying on his Nevada Bar
5 License to work in order to support himself, his family, and ultimately his ability to successfully
6 complete diversion, which is by no means a cheap process.

7
8 The State Bar in this case is attempting to do exactly what the WCSD attempted to do in
9 *Hohenstein* and that is equate a guilty plea as a felony conviction. There is nothing in the charge
10 that the Respondent plead to that would show misconduct related to his employment as attorney.
11 The Respondent has not ever submitted a dirty urinalysis sample, and has been tested no less
12 than 5 times since the inception of his diversion program. The Respondent has never been
13 sanctioned for inappropriate behavior in any court of law, nor has ever been accused of being
14 under the influence of a controlled substance while performing his duties as an attorney.
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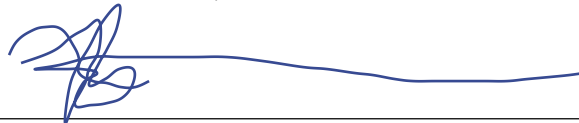
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17 By filing this petition the State Bar institutes proceedings that require a MANDATORY
18 suspension from practice while the matter is referred to the disciplinary board, unless set aside
19 for good cause which Respondent has already requested in a separate motion. Yet the Petitioner
20 admits in their own brief that the outcome of the diversion program is a critical consideration for
21 an attorney subject to discipline. It would make far more sense, and avoid more unreasonable
22 results, if the attorney were subject to disciplinary if he or she were to fail the diversion program
23 and have a judgment of conviction entered against them. The way the rule currently reads allows
24 for an attorney to be suspended from gainful employment, and yet potentially never be convicted
25 of a crime, or have his guilty plea held against him in any other fashion. Not to mention it seems
26 unconscionable that, solely because a person is of the legal profession, he should be put through
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1 a more rigorous time completing the diversion program because they are unable to practice their
2 profession during the course of doing the things as required by the Court as Respondent has done
3 since his entry into the program.

4 CONCLUSION

5 This Court's decision in *Hohenstein* and NRS 453.3363 directly conflicts with SCR 111.
6
7 The Respondent respectfully requests that this Court find that a guilty plea that results in the
8 immediate suspension of proceedings and institution of the diversion program should not trigger
9 the reporting requirements of SCR 111. As the Petitioner admits in their own conclusion
10 consideration on the attorney's ability to practice law NECESSARILY includes the success or
11 failure in the diversion program. If that is Petitioner's contention, how can any disciplinary
12 proceeding be held in the meantime without that result being known? The Respondent's position
13 is that it should not. NRS 453.3363 was constructed to protect first time offenders, and the
14 current construction of SCR 111 potentially strips those protections away by resulting in an
15 immediate automatic suspension that ultimately places the person on diversion in immediate
16 jeopardy of failing the program, due to lack of ability to pay for the costs and fees associated
17 with diversion, as well as not allowing their continued employment which would violate yet
18 another diversion condition.

19 RESPECTFULLY SUBMITTED this 29TH of June, 2016.

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