

Doc. 1

Board Order of Discipline.

Doc. 1

ORIGINAL

BEFORE THE NEVADA STATE BOARD OF
ARCHITECTURE, INTERIOR DESIGN AND RESIDENTIAL DESIGN

GINA SPAULDING, Executive Director,
NEVADA STATE BOARD OF
ARCHITECTURE, INTERIOR DESIGN
AND RESIDENTIAL DESIGN,

Case Numbers: 08-080R and 11-019R

Complainant

v.

DENNIS EUGENE RUSK,
Registered Architect Number 1309
Dennis E. Rusk, Architect LLC
Respondent

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SEP 27 2011

NEVADA STATE BOARD
OF ARCHITECTURE

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

A hearing in this matter was held on August 16 and September 1, 2011 in Las Vegas, Nevada. Board Staff was represented by Louis Ling, Board Counsel, Mr. Rusk appeared and represented himself, and the Board was advised by Sophia Long, Deputy Attorney General. Board Staff presented the testimony of Don White, William Amor, Darren Dunckel, and Laura Bach. Mr. Rusk presented his own testimony and the testimony of Dr. Robert Fielden and David Dupont. Board Staff presented four exhibits that were entered into evidence in the matter, and Mr. Rusk presented three exhibits that were entered into evidence in the matter. Based upon the testimony and evidence presented and the presentations of the parties, the Nevada State Board of Architecture, Interior Design, and Residential Design (hereinafter the Board) makes the following findings of fact, conclusions of law, and order in this matter. Separate sections of findings of fact are made for each of the two cases that were combined for the purposes of hearing in this matter (Case Nos. 08-080R and 11-019R).

FINDINGS OF FACT FOR CASE NO. 08-08R (The Verge Project)

1. In January 2005, Mr. Rusk entered into a contract Yossi Attia and Moshe Schnapp (hereinafter "the clients") to prepare conceptual drawings for a high-rise building they were interested in building on the corner of Bonanza and Main in downtown Las Vegas. The project was originally intended to be primarily for senior citizen housing with mixed

1 commercial use space. The contract was amended a number of times and the scope of the
2 project changed so that the building, which would be known as the Verge, would consist of
3 condominiums with mixed commercial space on the lower floors.

4 2. According to Mr. Rusk, this was the first high-rise he had ever attempted¹ and the
5 first steel-framed structure he had ever designed. Mr. Rusk had proposed to his clients an
6 unusual and rarely used structural system for constructing a high rise building in the Las
7 Vegas area called a staggered truss system that he had represented would be less expensive
8 to build and would allow virtually unlimited flexibility in terms of the design and placement of
9 the condominium units because the staggered truss system required fewer support columns
10 within the floor space on the condominium floors. According to Mr. Dunkel, the clients used
11 Mr. Rusk's representations regarding the approximate budget to build the Verge in their
12 project budgeting, planning, and financing. The clients also used Mr. Rusk's representations
13 regarding the viability and flexibility of the staggered truss system in their marketing plan and
14 constructability of the project.

15 3. By early 2007, the clients desired to begin the process of obtaining the various
16 permits and approvals to begin construction of the Verge. Based upon Mr. Rusk's
17 representations regarding the likely sequencing of the approvals and construction, the client
18 began its marketing efforts in early 2007. The client's understanding was that the necessary
19 approvals for the shell portion of the project would be received by June 2007. Therefore, the
20 client projected breaking ground in July 2007, with initial occupancy to occur in late 2007.

21 4. Mr. Rusk represented to the clients that it would be quicker to submit the building as
22 a shell building first and then to submit the plans for the various condominium units and
23 commercial spaces in a subsequent submittal or submittals. The client agreed, so Mr. Rusk
24 discussed with officials at the City of Las Vegas his notion of submitting the original submittal
25 as a shell. The City of Las Vegas allowed Mr. Rusk to do so. On March 6 or 7, 2007, Mr.
26 Rusk submitted his first set of design documents for the Verge to the City of Las Vegas
27

28 ¹ In his closing statement, Mr. Rusk claimed that the Verge was not his first steel-structure, high-rise building,
but his statements made in his closing statement cannot be accepted or treated as evidence.

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FINDINGS OF FACT FOR CASE NO. 08-08R (The Verge Project)

1. In January 2005, Mr. Rusk entered into a contract Yossi Attia and Moshe Schnapp (hereinafter "the clients") to prepare conceptual drawings for a high-rise building they were interested in building on the corner of Bonanza and Main in downtown Las Vegas. The project was originally intended to be primarily for senior citizen housing with mixed

1 Building Department.

2 5. On March 22, 2011, Mr. White, an Architectural Plans Examiner for the City of Las
3 Vegas Building Department, issued Plan Review Comments (PRC). Over the six pages of the
4 Plan Review Comments, Mr. White identified 24 specific deficiencies in the design documents
5 submitted by Mr. Rusk. Most of Mr. White's comments focused on various elements of fire
6 and life safety (FLS) design that were lacking in Mr. Rusk's design documents. At the
7 hearing, Mr. White stated that the first set of design documents submitted were unbuildable
8 and unapprovable because of their complete lack of FLS design and coordination. Mr. White
9 stated that he knew that the first set of plans was for a shell building, but FLS design and
10 engineering was still required for two reasons: (1) On several of the lower floors, Mr. Rusk
11 had drawn occupiable space such as health club facilities, meeting rooms, a swimming pool,
12 roof space to be used as terraces, and a restaurant; and (2) On the condominium floors
13 where no condominium units had yet been drawn, the stairwells and other engineering
14 elements were still required for proper FLS design and engineering because workmen on the
15 project and subsequent residents would rely on the FLS design and engineering. Some of
16 the issues were identified by Mr. White to be basic items that should be known by any
17 competent architect. Other elements, particularly the various FLS elements that were lacking,
18 would put any person in the building at substantial risk of death or injury if an emergency
19 situation arose while that person was in the building.

20 6. In Mr. White's PRC document, the first substantive paragraph was entitled "NOTE"
21 and stated as follows:

22 Please review the Fire Life Safety Report (FLS report) for this project, prepared
23 by Schirmer Engineering. Note the last paragraph of the Section 1 of the report,
24 Introduction Statement. The last two sentences state: "This document is
25 intended to serve as coordination for both the design and construction. Where
26 conflicts occur between the report and the design documents, this report shall
27 take precedence." There are several major discrepancies between the plans
28 and this report that must be resolved. I have listed most of them in the body of
this letter.

27 7. On May 21, 2007, Mr. Rusk submitted a second set of design documents. On May
28 23, 2007, Mr. White reviewed the second set of design documents and in an eight page PRC

1 found that ten of the items remained unresolved, one item was partially resolved, twelve of
2 the items had been resolved, and seven new items were identified. Three items were related
3 to accessible parking on the various parking floors. The remaining eighteen unresolved,
4 partially resolved, or new issues were all related to FLS issues such as exiting, stairways and
5 stairwells, fire-rated hallways and separations, and similar FLS design and engineering
6 issues. Mr. White again started his second PRC with a reference to the FLS report prepared
7 by Schirmer Engineering.

8 8. On July 19, 2007, Mr. Rusk submitted a third set of design documents. On
9 August 9, 2007, Mr. White reviewed the third set of documents and in an eight page PRC
10 found that seventeen of the eighteen issues that were unresolved or new in the previous PRC
11 remained unresolved. Yet again, Mr. White started his third PRC with a reference to the FLS
12 report prepared by Schirmer Engineering.

13 9. On September 4, 2007, Mr. Rusk submitted a fourth set of design documents. On
14 September 13, 2007, Mr. White reviewed the fourth set of documents and in a six page PRC
15 found that five of the seventeen outstanding issues remained unresolved. The unresolved
16 issues remained FLS design and engineering elements. Yet again, Mr. White started his
17 fourth PRC with a reference to the FLS report prepared by Schirmer Engineering.

18 10. On October 1, 2007, Mr. Rusk submitted a fifth set of design documents. On
19 November 20, 2007, Mr. White reviewed the fifth set of documents and in a two page PRC,
20 Mr. White indicated that all of the previous issues had been resolved at an express plan
21 review meeting but that the design was still required to comply with the 2006 IECC and that
22 no engineering documents had yet been provided to document the building's compliance with
23 the 2006 IECC.

24 11. On December 6, 2007, Mr. Rusk submitted an Energy Conservation Code
25 Comcheck Envelope report as required by Mr. White's fifth PRC.

26 12. Mr. Dunckel, President of and Marketing Manager for the Verge, explained that
27 throughout the time that Mr. Rusk was trying to get his design documents approved, the
28 client, based upon Mr. Rusk's representations, was moving forward with its marketing and

1 sales of condominium units in the Verge. The client built a sales office on a lot across the
2 street from the Verge at considerable cost to the client. In June 2007, the Verge held a highly
3 publicized sales event at which it began to take deposits from potential condominium owners.
4 Mr. Dunckel related that the client was representing to the potential condominium owners that
5 ground would be broken in July 2007 and occupancy would begin by the end of 2007. Mr.
6 Dunckel further related that by August 2007, over 75% of the condominium units had earnest
7 money deposits on them. Mr. Dunckel also related that as the timeline for breaking ground
8 and obtaining the necessary approvals slid later and later into 2007, the finances for the
9 project became jeopardized, and by the end of 2007, the client determined that financially the
10 project was no longer feasible. The client made Mr. Rusk aware of the infeasibility of the
11 project. A dispute arose between Mr. Rusk and the client over payment of Mr. Rusk's fees
12 and payment of the fees of some of the design professionals on the project. Mr. Dunckel
13 stated that by the end of 2007 and early 2008, the Verge project was "dead." Mr. Dunckel
14 placed much of the blame for the failure of the Verge project upon Mr. Rusk and his inability
15 to get the design drawings completed and approved by the City of Las Vegas. Finally, Mr.
16 Dunckel explained that as a result of the infeasibility of the project, the client has returned
17 most of the earnest money to the potential purchasers and the client filed bankruptcy on the
18 project.

19 13. Mr. Amor, an expert witness put forward by Board Staff, testified that in his opinion
20 Mr. Rusk's conduct related to the Verge was grossly negligent. Mr. Amor testified that in a
21 project such as the Verge, the architect bears ultimate responsibility for all the design and
22 engineering elements of the project, whether produced by the architect himself or as the
23 result of coordination by the architect with the various other disciplines. Mr. Amor testified
24 that when an architect submits a set of design documents for a building, the documents must
25 be complete and completely code-compliant. Mr. Amor testified that an architect must know
26 himself or herself whether the documents are complete and code-compliant because that is
27 the architect's professional obligation, and an architect should not depend upon a plans
28 examiner to catch issues of non-compliance. Mr. Amor believed that Mr. Rusk's first set of

1 design drawings was grossly deficient, and therefore that Mr. Rusk was grossly negligent,
2 because the first set completely lacked any FLS design and engineering which would
3 endanger any people who might go into the structure, whether workmen working on the
4 building or eventual occupants. Mr. Amor believed that the number of additional sheets Mr.
5 Rusk was required to submit after the first set is further evidence of Mr. Rusk's negligence
6 because the issues Mr. Rusk was addressing throughout the review process were all issues
7 that should have been addressed and should have been apparent in what should have been
8 the first submittal. Mr. Amor also expressed concern that many of the issues that were not
9 properly addressed by Mr. Rusk were basic architectural issues that all architects should
10 readily know. Mr. Amor stated that new architects seeking licensure are tested upon many of
11 these issues and if they are missed, the new architect will fail his or her examination.

12 14. Dr. Fielden testified as an expert witness on Mr. Rusk's behalf. Dr. Fielden
13 testified that although Mr. Rusk's operational style was unconventional and not how he would
14 practice, he found that Mr. Rusk's practice in the Verge matter was not below the standard of
15 care for a Nevada architect. On cross-examination, though, Dr. Fielden admitted that, in fact,
16 Mr. Rusk's practices were below the standard of care regarding the failure to incorporate the
17 FLS report data into the design documents where Mr. Rusk had Schirmer Engineering's
18 report and where Mr. Rusk failed to incorporate the FLS data in the report into his own design
19 documents. Dr. Fielden admitted that on a project such as the Verge, the architect is the
20 person ultimately responsible to assure that the design documents are complete, buildable,
21 and approvable.

22 15. Regarding the Verge, Mr. Rusk testified that the Verge was his first steel-framed
23 building and his first ever high-rise design. Mr. Rusk explained that he did not partner or
24 collaborate with another architect or firm with experience with high-rise design because Mr.
25 Rusk considered himself an "individualist architect" who did not collaborate or partner with
26 other architects. Mr. Rusk explained that he was responsible for all of the coordination of all
27 of the engineering and design disciplines except for Schirmer Engineering because Schirmer
28 Engineering had been retained by the clients. Mr. Rusk explained that he met often (at least

1 weekly) with all representatives from all of the disciplines, including representatives from
2 Schirmer Engineering. Mr. Rusk testified that he did not include Schirmer Engineering's
3 report and engineering into his first set of design drawings because he did not receive the
4 report until the day of the first submittal, but Mr. Rusk could not explain why he would submit
5 design drawings that he knew at the time would be utterly deficient of FLS engineering and
6 design. Mr. Rusk did not explain why he did not incorporate Schirmer Engineering's FLS
7 report into his second submittal, even though by his own chronology he had the report by the
8 time of the second submittal. Later, Mr. Rusk changed his testimony and claimed that he
9 personally had filed Schirmer Engineering's drawings with the City of Las Vegas, though he
10 offered no evidence or proof either that Schirmer Engineering had, in fact, ever created any
11 drawings or that the drawings had ever been submitted to the City of Las Vegas. In view of
12 Mr. White's continual and serial conclusions that Mr. Rusk's design documents lacked FLS
13 engineering and design, Mr. Rusk's claim that he filed Schirmer Engineering's drawings
14 appears untrue. Mr. Rusk asserted a number of times that his inability to get his design
15 drawings approved was the fault of the client, the fault of Schirmer Engineering, and the fault
16 of Mr. White because he did not understand how to review Mr. Rusk's shell-building concept.
17 16. Mr. Rusk's demeanor and answers under cross-examination and examination
18 from the Board members raised questions about his credibility. Mr. Rusk was incapable of
19 accepting any responsibility for his actions or his part in the ultimate failure of the Verge
20 project even though he was the lead design professional on whom the ultimate responsibility
21 for the entire project fell. The Board agrees with Mr. Amor's assessment that Mr. Rusk did
22 not know that he did not know what he did not know. Mr. Rusk's arrogance and lack of
23 knowledge and experience in this type of project worked against himself and his client's
24 interests in this matter, resulting, ultimately, in a failed project and the disruption of the plans
25 of numerous members of the public who had attempted to purchase condominiums in the
26 Verge.

27 **FINDINGS OF FACT FOR CASE NO. 11-019R (The Cutting Project)**
28

17. In August 2010, David Cutting submitted to the Clark County Building Department

1 plans for a personal residence he intended to construct as an owner/builder. After being
2 reviewed, the plans were rejected because they were not stamped by Mr. Rusk whose title
3 block was on the detail sheets.

4 18. At hearing, Mr. Rusk admitted that subsequent to the rejection of the plans by the
5 Clark County Building Department, he reviewed the plans and ultimately put the architectural
6 portions of the plans on his title block and sealed them himself for resubmittal. According to
7 Mr. Rusk, he did this as a favor to David Cutting's father, Clarence Cutting. Clarence Cutting
8 was Mr. Rusk's longtime friend and client. Mr. Rusk stated that his original intent was just to
9 provide David Cutting with some architectural detail sheets, but that upon learning that the
10 Clark County Building Department would not file David Cutting's drawings unless they were
11 placed upon a registered architect's title block and with his or her seal, Mr. Rusk decided to
12 place the architectural drawings on his title block and to seal them. Mr. Rusk claimed to have
13 reviewed David Cutting's drawings and claimed that he was satisfied that the drawings that he
14 sealed were code compliant. Mr. Rusk acknowledged that if David Cutting's architectural
15 drawings were insufficient that he, Mr. Rusk, became responsible for the deficiencies when he
16 placed the drawing on his title block and sealed them. Oddly, though acknowledging such
17 responsibility, Mr. Rusk insisted that he did not receive or review the comments from the Clark
18 County Building Department because he understood that the responsibility for the review and
19 addressing of such comments rested with David Cutting; not Mr. Rusk.

20 19. Laura Bach, an Investigator for the Board, testified that it is a violation of Nevada
21 law for a Nevada-registered architect to place his seal on architectural drawings that he did
22 not prepare and that were prepared without his responsible control. Ms. Bach testified that
23 Mr. Rusk's placing of David Cutting's architectural drawings upon Mr. Rusk's title block and
24 thereafter sealing them violated Nevada law because Mr. Rusk did not prepare the drawings
25 himself nor was David Cutting in any way under Mr. Rusk's responsible control.

26 CONCLUSIONS OF LAW

27 1. The Board has jurisdiction over this matter because Mr. Rusk is an architect
28 registered by the Board (#1309).

1 2. Regarding the Verge project, Mr. Rusk's practice of architecture violated NRS
2 623.270(1)(c) and (f) and Rule of Conduct 1.1 as incorporated by NAC 623.900(1). We
3 specifically conclude that Mr. Rusk's conduct throughout the course of events involved in the
4 Verge project were negligent (as defined in NRS 623.270(5)(c)) and incompetent (as defined
5 in NRS 623.270(5)(b)) under NRS 623.270(1)(c), but we also conclude that Mr. Rusk's
6 conduct did not rise to the level of gross incompetence (as defined in NRS 623.270(5)(a)).

7 3. Regarding the Cutting project, Mr. Rusk's practice of architecture violated NRS
8 623.270(1)(d) and (f) and Rule of Conduct 1.1 as incorporated by NAC 623.900(1). We
9 specifically conclude that Mr. Rusk's conduct did not violate NRS 623.270(1)(c).

10 **ORDER**

11 Based upon the foregoing findings of fact and conclusions of law, the Board orders the
12 following as the discipline in this matter made pursuant to NRS 623.270(1):

13 1. Mr. Rusk shall pay a total fine of \$13,000.00 (\$10,000.00 for Case No. 08-080R and
14 \$3,000.00 for Case No. 11-019R). The repayment terms shall be negotiated by and between
15 Mr. Rusk and Board staff upon such terms and conditions as are acceptable to Board staff.

16 2. Mr. Rusk shall pay the Board's fees and costs of investigation and prosecution of
17 this matter in a total amount of \$17,698.57. The repayment terms shall be negotiated by and
18 between Mr. Rusk and Board staff upon such terms and conditions as are acceptable to
19 Board staff.

20 3. All monies paid by Mr. Rusk in satisfaction of the fines ordered in paragraph #1 and
21 the fees and costs ordered in paragraph #2 shall be first applied to the satisfaction of the fees
22 and costs ordered in paragraph #2 until those have been paid in full, at which time all
23 subsequent payments shall be applied to the fines ordered in paragraph #1 until those have
24 been paid in full.

25 4. Mr. Rusk's registration as an architect (#1309) shall be placed on probation for
26 three years from the effective date of this Order subject to the following terms and conditions:

27 (a) Mr. Rusk shall take and satisfactorily pass the following five ICC courses: (i) B1-
28 Residential Building Inspector; (ii) B2-Commercial Building Inspector; (iii) 21-Accessibility

1 Inspector/Plans Examiner; (iv) 66-Fire Inspector I; and (v) 67-Fire Inspector II.

2 (b) Mr. Rusk shall submit written evidence of his satisfactory completion of the five
3 courses listed in paragraph (4)(a) to the Board's office no later than March 21, 2012 so that
4 those materials may be included in the Board's packet for its meeting on March 21, 2012. Mr.
5 Rusk shall personally appear at the Board's meeting on January 18, 2012 to update the
6 Board on his efforts to comply with the coursework required. If Mr. Rusk anticipates that he
7 may not be able to complete the required coursework by March 21, 2012, then at the meeting
8 on January 18, 2012, Mr. Rusk must present probable cause why he needs additional time
9 beyond March 21, 2012 in which to complete the coursework. The Board, in its sole
10 discretion, may grant Mr. Rusk additional time within which to complete some of the
11 coursework based upon Mr. Rusk's presentation and reasons stated on January 18, 2012.

12 (c) If Mr. Rusk does not submit to the Board's office written evidence of his satisfactory
13 completion of the five courses listed in paragraph (4)(a) either by March 21, 2012 or by the
14 extended deadline set by the Board at its January 18, 2012 meeting (if the Board grants such
15 an extension), then Mr. Rusk's registration shall be suspended on the next day without further
16 action of the Board and shall be suspended thereafter for a period of six months. If Mr. Rusk
17 does not complete the coursework by the end of the six-month suspension period, his
18 registration shall continue to be suspended until such time as he provides written evidence of
19 satisfactory completion of all ordered coursework.

20 (d) During the period of probation, Mr. Rusk shall submit to the Board office any and all
21 contracts for architectural services for work or a project to be completed in Nevada either
22 before he executes a contract or within five business days of executing a contract. Within five
23 business days after receiving any such contract, the Board's staff and the Board's
24 investigating board member shall review the scope of the work proposed in the contract to
25 determine whether it is of the type and scope that Mr. Rusk has historically performed or
26 whether the scope of work is unusual for its size, complexity, special design or engineering
27 considerations, or any other similar factors that would give the Board's staff and the Board's
28 investigating board member cause to be concerned whether Mr. Rusk could safely,

1 competently, and professionally complete the scope of the work. If the Board's staff and the
2 investigating board member determine that Mr. Rusk can safely, competently, and
3 professionally complete the scope of work on his own, the Board's staff shall notify Mr. Rusk
4 in writing that he may proceed with the contract without any assistance or consultation.

5 (e) If the Board's staff and the investigating board member determine that Mr. Rusk
6 cannot safely, competently, and professionally complete the scope of work on his own, the
7 Board's staff shall so inform Mr. Rusk and Mr. Rusk shall not be allowed to proceed with the
8 contract unless and until he and the Board's staff and investigating board member identify a
9 Nevada registered architect (hereinafter known as the "peer reviewer") who will collaborate
10 with, consult with, and advise Mr. Rusk on the scope of work, which peer reviewer can be
11 retained as a partner, collaborator, or peer reviewer or mentor. The peer reviewer will be a
12 Nevada registered architect who has experience, knowledge, and expertise in work of a
13 similar type and nature of the work Mr. Rusk proposes to undertake. The peer reviewer will
14 consult with and advise Mr. Rusk to assure that Mr. Rusk's work in the completion of the
15 scope of work is done safely, competently, and professionally, including that the work is in
16 compliance with all applicable statutes, regulations, ordinances, and codes. Mr. Rusk must
17 work cooperatively with the peer reviewer and provide him or her with access to whatever
18 records, drawings, reports, and other work product to allow the peer reviewer to assure that
19 Mr. Rusk is safely, competently, and professionally completing the tasks necessary for the
20 scope of work. The peer reviewer shall report on Mr. Rusk's progress with the scope of work
21 on at least a quarterly basis, and shall report any difficulties and concerns with Mr. Rusk's
22 compliance with this paragraph as those difficulties or concerns might arise. Mr. Rusk will be
23 responsible for the payment of all costs associated with the compliance with this paragraph.

24 (f) During the period of probation, Mr. Rusk shall comply with all statutes, regulations,
25 ordinances, and codes applicable to the practice of architecture in Nevada.

26 (g) If Mr. Rusk has not paid all of the fines and fees and costs ordered herein pursuant
27 to paragraphs 2 and 3 or has not otherwise complied with all the terms and conditions of the
28 probation as ordered within the period of probation, his architect's registration shall remain on

1 probation and all terms and conditions of the probation shall be extended until Mr. Rusk has
2 paid in full all the fines and fees and costs ordered or he has otherwise complied with the
3 terms and conditions of the probation as ordered.

4 5. In the event Mr. Rusk fails to materially comply with any term of this Order, Mr.
5 Rusk's architect's registration in the State of Nevada shall be immediately suspended without
6 any action of the Board other than the issuance of an Order of Suspension by the Executive
7 Director. Upon complying with the term, Mr. Rusk's architect's registration in the State of
8 Nevada will be automatically reinstated, assuming all other provisions of the Order are in
9 compliance. Additionally, Mr. Rusk's failure to comply with any term or condition of this Order
10 may result in further discipline by the Board, up to and potentially including revocation of his
11 license. Board staff may take any and all actions it deems necessary to collect any sums
12 ordered that remain unpaid. If Board staff is required to pursue judicial action to effect such
13 collections, it shall be entitled to recover its attorney's fees and costs incurred in pursuing
14 such judicial action.

15 SIGNED AND EFFECTIVE this 27th day of September, 2011.

16
17 NEVADA STATE BOARD OF ARCHITECTURE,
18 INTERIOR DESIGN AND RESIDENTIAL DESIGN

19
20 By: _____

21 Greg L. Emy, Chairman
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Doc. 2

Rusk Petition/Motion to Vacate
Order of Discipline.

Doc. 2

PET

Robert A. Nersesian

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RECEIVED

JAN 07 2016

**NEVADA STATE BOARD
OF ARCHITECTURE**

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NEVADA STATE BOARD OF)
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AND RESIDENTIAL DESIGN,)

Complainant,) Case No. 08-080R and
11-019R

vs.)

DENNIS EUGENE RUSK,)
Registered Architect Number 1309)
Dennis E. Rusk, Architect LLC)

Respondent.)

**PETITION/MOTION OF DENNIS EUGENE RUSK REQUESTING THAT THE FINAL
DECISION OF THE BOARD BE VACATED OR MODIFIED, BROUGHT IN THE
NATURE OF A PETITION FOR WRIT OF CORAM NOBIS OR OTHER RELIEF TO
SET ASIDE ORDER OF DISCIPLINE OR ALTERNATIVELY, REMIT DISCIPLINE,
AND REQUEST/MOTION FOR APPOINTMENT OF INDEPENDENT COUNSEL**

NOW COMES Dennis E. Rusk ("Petitioner"), and herewith petitions
and moves pursuant to NRS 622A.390(1)(c) that this tribunal set aside order of discipline, or
alternatively, remit the current discipline imposed on Petitioner. This petition and motion is
based on the pleadings and papers on file to date, the attachments hereto, the following
memorandum of points and authorities, and any hearing or oral argument or evidentiary hearing
the Board directs. Further, it is the understanding that legal counsel for the Board is Louis Ling,
and the following calls into question the legal ethics, honesty, and prosecutorial conduct of Ling.

1 This, together with recent disclosure of these facts to the State Bar of Nevada, calls into question
2 the independence of Ling such that his continuing representation of the Board or actions as
3 prosecutor in this action are subject to a conflict of interest and otherwise contraindicated. In
4 this respect, it is requested that the following be reviewed and addressed by independent counsel
5 as much of what is addressed requires a review of Ling's actions, and even an investigation of
6 Ling's conduct.

7 MEMORANDUM OF POINTS AND AUTHORITIES

8 I. APPOINTMENT OF INDEPENDENT COUNSEL

9
10 The Rules of Professional Responsibility for attorneys in the State of Nevada require that,
11 commensurate with this Petition/Motion, the undersigned also file a disclosure with the State Bar
12 of Nevada setting forth any alleged defalcations of Louis Ling ("Ling") regarding his
13 professional responsibilities. NV ST RPC Rule 8.3, accord, Iowa State Bar Assoc. Committed
14 on Ethics & Practice Guidelines, Opinion 14.02 (2014) (construing a functionally identical
15 provision and noting that on the filing of papers questioning a lawyer's ethics, disclosure to the
16 state bar is mandatory). This disclosure is filed commensurately herewith, and a copy is attached
17 as exhibit A.
18

19 As noted by the Supreme Court of the State of Washington,

20 A prosecutor is "a quasi-judicial officer. He represents the state, and
21 in the interest of justice must act impartially." *State v. Huson*, 73
22 Wn.2d 660, 663, 440 P.2d 192 (1968), cert. denied, 393 U.S. 1096,
21 L. Ed. 2d 787, 89 S. Ct. 886 (1969). If a prosecutor's interest in a
23 criminal defendant or in the subject matter of the defendant's case
24 materially limits his or her ability to prosecute a matter impartially,
25 then the prosecutor is disqualified from litigating the matter, and the
26 prosecutor's staff may be disqualified as well. *See generally State v.*
Stenger, 111 Wn.2d 516, 520-23, 760 P.2d 357 (1988).

26 *State v. Ladenburg*, 67 Wn. App. 749 (Wash. Ct. App. 1992). Indeed, allowing Ling to proceed
27 with this prosecution may well be constitutionally restricted. *Accord Bordenkircher v. Hayes*,
28

1 434 U.S. 357, 365 (U.S. 1978) (“There is no doubt that the breadth of discretion that our
2 country's legal system vests in prosecuting attorneys carries with it the potential for both
3 individual and institutional abuse. And broad though that discretion may be, there are
4 undoubtedly constitutional limits upon its exercise.”).

5 The disqualification of a prosecutor rests with the sound discretion of the tribunal. In
6 exercising that discretion, the tribunal should consider all the facts and circumstances and
7 determine whether the prosecutorial function could be carried out impartially. Collier v.
8 Legakes, 98 Nev. 307, 309-10, 646 P.2d 1219, 1220 (1982) overruled on other grounds by State
9 v. Eighth Jud. Dist. Ct. (Zogheib), 130 Nev. Adv. Op. 18, 321 P.3d 882 (2014). Here, by the
10 contents of this petition, and by the contents of the report to the State Bar of Nevada, Ling is put
11 in a position of having to justify his actions. As the evidence below clearly demonstrates, Ling
12 omitted certain critical exculpatory evidence from his presentation even though he subsequently
13 acknowledged that he knew of its existence. His personal interests are squarely opposed to
14 petitioner’s requests under the law as herein forwarded. The inability of Ling to carry out his
15 functions impartially is patent, and an independently appointed prosecutor/attorney for the Board
16 is required in this matter with respect to these post-decision proceedings.
17
18

19 II. JURISDICTION AND AUTHORITY

20 Under the common law, a tribunal always has authority to modify or address its
21 judgments. Ruben v. Am. & Foreign Ins. Co., 185 A.D.2d 63, 68, 592 N.Y.S.2d 167, 170
22 (1992); People v. Shorts, 32 Cal. 2d 502, 506, 197 P.2d 330, 332 (1948). In Nevada, this is
23 further expanded in that the Nevada Supreme Court has recognized the continuing validity of a
24 writ of coram nobis with respect to tribunals. Trujillo v. State, 129 Nev. Adv. Op. 75, 310 P.3d
25 594 (2013), as modified (Dec. 30, 2013). Further, and most importantly, NRS 622A.390(1),
26 grants Petitioner the authority to bring the current motion to vacate, and mandates that the
27 motion be considered.
28

1 Professional disciplinary proceedings are quasi criminal. In re Ruffalo, 390 U.S. 544,
2 551, 88 S. Ct. 1222, 1226, 20 L. Ed. 2d 117 (1968); Charlton v. F.T.C., 543 F.2d 903, 906 (D.C.
3 Cir. 1976) (“Disciplinary proceedings ‘are adversary proceedings of a quasi-criminal
4 nature,’ and ‘(d)isbarment, designed to protect the public, is a punishment or penalty imposed on
5 the lawyer.’”); In re Berkheimer, 593 Pa. 366, 371, 930 A.2d 1255, 1258 (2007); In re Smith, 123
6 F. Supp. 2d 351 (N.D. Tex. 2000) affd., 275 F.3d 42 (5th Cir. 2001), accord Dutchess Bus.
7 Servs., Inc. v. Nevada State Bd. of Pharmacy, 124 Nev. 701, 191 P.3d 1159 (2008); State Bar of
8 Nevada v. Claiborne, 104 Nev. 115, 225, 756 P.2d 464, 535 (1988). Obviously, the disciplinary
9 action taken here is directly analogous to the disbarment proceedings for attorney’s referenced
10 above, and would carry with it the identical constitutional and legal perspectives and
11 responsibilities.

12 As the decision here was rendered in a quasi-criminal context, the protections afforded
13 criminal defendants are also afforded Petitioner. Coram nobis, the review of a conviction by the
14 rendering tribunal, in context, is obviously one of these protections. Moreover, under NRS
15 622A.390(1)(c), the legislature has obviously seen fit to allow for motions challenging the entire
16 precept of the legitimacy of the prosecution through petitioning to have the decision vacated, and
17 this is such a motion.

18 Seeking vacation of the decision is under the express grant of such authority under NRS
19 622A.390(1)(c), where the Board has continuing authority to vacate its prior determinations and
20 sentences. As the following demonstrates, the original decision of this tribunal was on less than
21 a thorough record which was purposely doctored by the prosecutor, denied substantive due
22 process to the Petitioner, has imposed sanctions outside the scope of the jurisdiction of the
23 tribunal, and arguably most importantly, premised its decision on false precepts including false
24 statements of law presented by prosecutorial staff, and false, if not outright perjured testimony of
25 the Board’s percipient witnesses, as knowingly fostered by the prosecutor, Ling.

26 ///

27 ///

28 ///

III. NATURE OF THE REMEDY SOUGHT

As mentioned, Nevada has expressly held that coram nobis remains a viable course of proceeding on matters of criminal conviction. Trujillo v. State, 129 Nev. Adv. Op. 75, 310 P.3d 594 (2013), as modified (Dec. 30, 2013). The proceeding against Petitioner was quasi-criminal in nature. In re Ruffalo, 390 U.S. 544, 551 (1968); Javits v. Stevens, 382 F. Supp. 131, 138 (S.D.N.Y. 1974) (“Disciplinary proceedings are quasi-criminal in nature”); cf Flamingo Paradise Gaming, LLC v. Chanos, 125 Nev. 502, 518, n.12, 217 P.3d 546, 557, n.2 (2009) (Recognizing a proceeding with fines and professional licensure at issue is quasi-criminal).

A quasi-criminal proceeding must be conducted in a way to preserve and protect a defendant's due process rights, and a failure of due process requires reversal or remission of a conviction. M.J.T. v. A.V.B., No. A-0997-12T1, 2013 WL 3744050, at *8 (N.J. Super. Ct. App. Div. July 18, 2013). As to administrative proceedings involving professional licensure, it has been held that due process rights owed a subject charged in a quasi-criminal proceeding includes the right to confront and impeach the witnesses against him. Rinaker v. Superior Court, 62 Cal. App. 4th 155, 165, 74 Cal. Rptr. 2d 464, 469 (1998). Also included is the Fifth Amendment right against self incrimination. Fowler v. Vincent, 366 F. Supp. 1224, 1226 (S.D.N.Y. 1973). Further, the due process requirement that conviction exceed proof beyond that of a preponderance of the evidence applies in quasi-criminal proceedings. Sealed Appellant 1 v. Sealed Appellee 1, 211 F.3d 252, 254 (5th Cir. 2000). In short, practically the full panoply of due process rights under criminal proceedings are extended to some degree to quasi-criminal administrative proceedings as well.

And above all, all this indicates that in a quasi-criminal proceeding, substantive due process must be granted the subject of a quasi-criminal proceeding. Here a denial of both procedural due process and substantive due process are implicated in the conviction of Petitioner. “[S]ubstantive due process is violated when the government interferes with fundamental rights” Hodges v. Valley View Cmty. Unit Sch. Dist. 365U, No. 11 C 8418, 2013 WL 5289059, at *2 (N.D. Ill. Sept. 18, 2013) aff’d sub nom. Friend v. Valley View Cmty. Unit Sch. Dist. 365U,

1 789 F.3d 707 (7th Cir. 2015), reh'g denied (July 14, 2015). "A [persons] right to substantive due
2 process is violated when the behavior of the state actor is so egregious it may be said to shock
3 the conscience." Stahl v. Main, No. CIV A 07-4123 (SRC), 2008 WL 2446816, at *3 (D.N.J.
4 June 16, 2008); Cnty. of Sacramento v. Lewis, 523 U.S. 833, 847, 118 S. Ct. 1708, 1717, 140 L.
5 Ed. 2d 1043 (1998). Petitioner's interest in his professional license is a property interest entitled
6 to these substantive due process protections and requirements. See Painter v. Abels, 998 P.2d
7 931, 940 (Wyo.2000); Johnson v. Bd. of Governors, 913 P.2d 1339, 1345 (Okla.1996); see also
8 Wash. State Med. Disciplinary Bd. v. Johnston, 99 Wash.2d 466, 474, 663 P.2d 457 (1983);
9 Nguyen v. State, Dep't of Health Med. Quality Assurance Comm'n, 144 Wash. 2d 516, 523, 29
10 P.3d 689, 692 (2001).

11 With these rights and the prior proceeding in mind, Petitioner seeks a remedy analogous
12 to coram nobis, either reversing the order of discipline, vacating the order and directing a new
13 hearing, or modifying the punishment and findings concerning Petitioner. The grounds for
14 vacation of the order, the relief allowable under NRS 62A.390(1), are varied, and include:

- 15 1. Fraud on the tribunal;¹
- 16 2. Surprise;
- 17 3. Excusable neglect;²
- 18 4. The judgment is void;³
- 19 5. Prosecutorial misconduct;⁴ and
- 20 6. Knowing use of false testimony to gain the conviction.⁵

23 ¹ See NC-DSH, Inc. v. Garner, 125 Nev. 647, 218 P.3d 853 (2009)

24 ² See Bruno v. Schoch, 94 Nev. 712, 582 P.2d 796 (1978)

25 ³ Scheeline Banking & Trust Co. v. Stockgrowers' & Ranchers' Bank of Reno, 54 Nev. 346, 16
P.2d 368 (1932)

26 ⁴ Jones v. State, 101 Nev. 573, 577, 707 P.2d 1128, 1131 (1985)

27 ⁵ State v. Jones, 43,053 (La. App. 2 Cir. 2/20/08), 982 So. 2d 105 writ denied, 2008-0710 (La.
28 10/10/08), 993 So. 2d 1282 (La. 2008)

1 In this matter, each of the foregoing exist, and considering the depth of the demonstrable
2 shortcomings of the proceedings, these failures require that the order of discipline be vacated or
3 substantially modified.

4 One other factor should be noted here. There is no laches or timing statute affecting the
5 Petitioner's right to bring this petition/motion. This is clearly shown on the face of the statute
6 where the methods of calling into question the judgment are expressly listed as 1) request for
7 rehearing, 2) a request for reconsideration, 3) a motion to vacate, or 4) a motion to modify the
8 order. NRS 622A.390. Also expressly stated is a time limit for the bringing of a motion for
9 rehearing or reconsideration, and patently absent is any time limit for bringing a motion vacate or
10 to modify the order. Under the rule of expressio unius est exclusio alterius (the expression of
11 one thing is the exclusion of another), the statute allows for the bringing of the motion to vacate
12 or modify at any time after a sanction is ordered. Accord Dep't of Taxation v. DaimlerChrysler
13 Servs. N. Am., LLC, 121 Nev. 541, 548, 119 P.3d 135, 139 (2005); Galloway v. Truesdell, 83
14 Nev. 13, 25, 422 P.2d 237, 246 (1967) ("Every positive direction contains an implication against
15 anything contrary to it, or which would frustrate or disappoint the purpose of that provision.").
16 Thus, the within motion/petition is timely, and ripe for consideration.
17

18 III. FACTS RELEVANT TO THE CURRENT PETITION/MOTION

19
20 Petitioner is, and was, a licensed architect within the State of Nevada and various other
21 jurisdictions. His history in the profession spans decades.

22
23 Petitioner was commissioned to design a project known as Verge. This project design
24 incorporated a unique structural design referred to as "staggered truss." Although exceedingly
25 rare at the time of the commission, despite a worldwide recession quashing most high-rise
26
27
28

1 construction, numerous projects using this system have been undertaken of late.⁶ In short,
2 staggered truss construction is a burgeoning trend.

3 Petitioner completed the design, and submitted it to the City of Las Vegas for approval.
4 He sought to do this under a provision of the law allowing for phased construction with a permit
5 for a shell (“a shell permit”) allowing for commencement of construction. At the time, although
6 expressly allowed under the law, the only published standards adopted for phased construction in
7 Southern Nevada commenced under a shell permit were those propounded by Clark County. See
8 exhibit B as an exemplar. Nonetheless, Petitioner, assuming that the law would apply as written,
9 and an allowable shell permit authorized the submission of the design of a “shell” would result in
10 a building permit to commence construction, submitted a shell design for Verge.
11

12 With this submission, Petitioner also included engineering and fire/life safety plans
13 compiled by a third party professional engineering firm coordinating with Petitioner. With
14 reference to the current proceedings, the most relevant fact is that **fire/life safety engineering**
15 **and plans were submitted with the initial filing.** Exhibit C. Note that this submission
16 includes the file stamp for the City of Las Vegas showing that the submission was on March 6,
17 2006, commensurate with the filing of the initial plans by Petitioner. The set filed with the plans
18 was the only set that Petitioner had at the time of filing the plans as the date supplied by
19
20

21 ⁶ For example, an internet search shows the following projects completed or on line since the
22 Verge commission, with the same search showing that the staggered truss design was adopted for
23 purposes of cost savings, lightness, and versatility:

24 Staybridge Suites, Chicago, 2008

25 169 Nguyen Ngoc Vu – Hanoi. (21 floors) 2013

26 Westin Boston Waterfront Hotel, 2006

27 Toronto Christian Resource Centre Housing Project, 2012 (citing construction savings to system)

28 Godfrey Hotel, Chicago, 2015 (citing to speed of construction and cost savings from staggered
truss system)

Hocking College residence halls, Ohio, 2008

Bookmen Stacks Building, Minneapolis, 2005

Fordham University Law School Building, New York, Under Construction

Project Resettlement Ward 11 – District 6 – Ho Chi Minh City, 2013

1 Schermer Engineering, as noted on the plans, did not leave sufficient time for a duplicate set to
2 be made. Rusk testimony, Record of Proceedings,⁷

3 With respect to this fire/life/safety submission, review of exhibit C shows that it was fully
4 coordinated with Petitioner's plans as the fire/life safety elements were overlaid on plans drafted
5 by Petitioner, and the submission specifically stated that these were the plans governing over any
6 discrepancy between the pre-fire/life safety plans and the plans separately submitted by
7 Petitioner. Exhibit A, p. B 010. These plans, exhibit C, were not included in the Board's proofs
8 at the hearing. Moreover, the plans submitted in exhibit C were not provided by the Board to the
9 Board's expert for his review of the plans. Decision and Order, exhibit , ¶ 13, Record of
10 Testimony, Testimony of Amor, Vol. 4, p. 176, Statement of Member Klai, .

12 The fact that these were in the Board's possession was not discovered until after the
13 hearing. Pointedly, in related civil litigation the deposition of the Board, duces tecum, was
14 taken, and the Board's files were reviewed at the Board's premises. Within that review, exhibit
15 C was discovered. These were reduced to a disc by the Board pursuant to the deposition, and are
16 here presented. If authentication be needed beyond the authentication statement at the end of this
17 document, the undersigned retains the disc supplied by the Board of the files it held in its
18 possession. In short, in the Board's files the fire/life safety plans on file at the time of
19 Petitioner's initial submission of the Verge plans, and these were found to be in the possession of
20 the Board and timely filed.

22 At the hearing, Ling, the prosecutor, made much of the absence of the fire/life safety
23 plans, effectively accusing Petitioner of ignoring the requirement. This was highlighted in his
24 cross examination of Petitioner, and in his closing argument in relevant part, as follows:
25

28 ⁷ The entire record of proceedings in six volumes in two binders is separately filed herewith.

1 Ling: I just want to make sure the record is crystal clear on this -- to submit the first
2 set of documents, which is Exhibit B,⁸ and not to have addressed the fire life
3 safety issues?

4 Rusk: I did.

5 Ling: They're not in Exhibit B; correct?

6 Rusk: I did by submitting the fire life safety report and the fire life safety documents
7 as part of my package.

8 Ling: But there's no proof here today. There's no evidence before the Board?

9 Rusk: And there's no proof that I didn't submit it. I did.

10 * * *

11 Ling: If you don't satisfy him, you don't get a permit.[?]

12 Rusk: No, that is not correct because you're assuming that I did not make sure that
13 the life safety drawings were submitted to the building department. They were.

14 Ling: They're not here.

15 Rusk: You did not review them.

16 Ling: They're not here.⁹

17 * * *

18 Ling: [The fire/life/safety submission is] not before this board. They are not part of
19 those documents [the plans submitted by Ling as the plans submitted by Rusk]

20 ...

21 Rusk: Are you asking me a question. No, that is not correct. If the Board decided
22 not to pick up the life safety documents from the building department, of
23 course, they didn't review them.¹⁰ But that doesn't mean that they didn't exist
24 They, in fact, did exist. And those life safety documents address the fire
25 alarm system, the smoke alarm system and those issues.

26 * * *

27 Ling: I'm talking at the early stages.

28 Rusk: At the very early stages, they were turned in. They were not reviewed, but
they were there. They were at the building department. I physically turned
them in. I put them in my package. They were there.

Ling: There's no evidence of that today, is there? All we have is your word.
I don't have any more questions.

⁸ This exhibit B from the hearing appears in the Record of Proceedings, vol. 2.

⁹ Note that this statement by Ling in failing to acknowledge that he had, in fact, reviewed the fire/life safety engineering appearing in exhibit B had the effect of directly misleading the Board to the effect that they did not exist. In fact, Ling acknowledged in a later proceeding that he was aware of these plans submitted with Rusk's initial submittal to the City of Las Vegas Building Department. Exhibit D, p. 22.

¹⁰ This is obviously Petitioner being surprised by the fact that the fire/life safety plans were not in exhibit B as submitted by Ling as Petitioner's initial submittal. He was searching for an explanation as to why they would be absent, and clearly surmised that Ling had failed to retrieve them or that the reviewer had failed to see them. As shown below, Petitioner's perspective was in error, as was his inclination to provide a reasonable non-devious explanation for their absence. In fact, Ling had the plans and knew that the plans existed, but failed to disclose them to the Board.

1 Transcript of Proceedings, Vol. 5, pp. 128-131. Ling also highlighted that they were nowhere to
2 be found in the documents comprising Petitioner's submission as presented to the Board by him
3 as an exhibit, thusly stating that they were not filed. This is especially pertinent because Board
4 staff represented at the hearing that the initial submission by Petitioner was included as the
5 exhibit before the Board further supporting the false presentation that there were no such
6 documents. See Bach statement, Record of Proceedings, vol. 5, p. 70 (Stating that only the
7 initial set of plans were reviewed which would have necessarily included exhibit B at the
8 hearing). Ling also falsely positively states that it is known that the contents of exhibit C,
9 attached, was never submitted. Record of Proceedings, vol. 5, p. 97. That is, Ling affirmatively
10 represented in the prosecution of Petitioner that exhibit C, attached, did not exist, while he
11 actually knew that it did exist.
12

13 At another point in the proceedings, Petitioner sought to cross examine the Board's
14 expert on the contents of that which he knew he had filed (exhibit C), and Ling interjected as
15 follows:
16

17 "Mr. Chairman, I need to object. Two grounds. First and foremost,
18 we're doing it again. We're assuming a bunch of evidence or a bunch
19 of facts that aren't in evidence before you. . . . To the extent that he
20 wanted to also get in a bunch of information that isn't in fact evidence
21 and isn't likely to be in evidence in this case, I think that that question
22 is objectionable."
23

24 Record of Proceedings, vol. 4, p. 188. As Ling had the very information about which he was
25 objecting in his possession, and had removed it from the proceedings and failed to disclose it to
26 Petitioner, Ling's intent is clear.¹¹ He is seeking to make sure that the relevant and determinative
27 information, only known to him and Board staff, not get in the way of his prosecution and
28

26 ¹¹ Also note that had Ling actually disclosed exhibit B to the Board's expert, Amorr, the
27 questions posed by Petitioner would not have been without foundation, and Ling could only
28 make his objection because he had misled the Board's expert through omission of relevant
documents.

conviction of Petitioner. In other words, he wanted to make sure that the record was not messed up by the truth actually known to him; a clear violation of prosecutorial ethics.

In actuality, the objection by Ling was the perfect and appropriate time for Ling to apologize for the defalcations to that point, admit that the questions asked by Petitioner were relevant in light of the information Ling had withheld from the process, produce exhibit C, attached, and assure that the Board had the actual facts and truth rather than the false record he constructed. Like failing to pipe in when Member Klai noted the absence, he continued to actively keep secret the fact that most of his prosecution on the Verge project was premised on a fallacy he created, yet had the ability to correct. See Klai statement, supra, p. 14. Instead, he relied on his withholding of evidence and tampering with evidence, increased his leverage, and further prejudiced Petitioner's case and justice through his actions.

And finally, Ling then highlighted the alleged lack of fire/life safety engineering in Petitioner's submissions in his closing argument, stating, "If you believe Mr. Rusk, then somewhere, somehow there was a whole set of fire life safety documents that we haven't seen, that aren't part of his original submittal." Transcript of Proceedings, Vol. 5, p. 157. Clearly, it was Ling's goal to accuse Petitioner of failing to submit fire/life safety engineering plans with his initial submission, and to present the absence as his argument concerning Petitioner's alleged failures. In short, Petitioner was convicted on Lings false presentation that Petitioner did not submit fire/life safety engineering with his initial submission.

One other set of facts also impacts the substantive due process failures concerning Petitioner. There were two particular factors the Board found important in determining that Petitioner was negligent concerning the Verge project as indicated in the decision. The first, and most critical, was the finding of the failure of Petitioner to include fire/life safety plans in his initial submittal (now proven false), and the second was that Petitioner lacked any credibility and

1 could not be believed when he stated that the fire/live safety engineering and plans had been
2 submitted. As noted in the Decision, exhibit E, pp. 5-6, ¶ 13, "Mr. Amor believed that Mr.
3 Rusk's first set of design drawings was grossly deficient, and therefore that Mr. Rusk was
4 grossly negligent because the first set completely lacked any FLS [fire/live safety] design and
5 engineering which would endanger any people who might go into the structure" With the
6 subsequently discovered exhibit C, withheld from the proceeding and the expert by Ling, clearly
7 this conclusion was insupportable and based on false evidence orchestrated by the prosecutor.
8 As to credibility, see exhibit D, p. 7, ¶ 16. It is especially pertinent that the Board determined
9 that they agree with Amor that "Rusk did not know what he did not know" Pointedly and
10 gaulingly, it is now shown that it was Amor who "did not know what he did not know" as Ling
11 had failed to disclose exhibit C to Amor.
12

13 This was untrue, devious, intentionally misleading, and downright evil concerning Ling's
14 status as a prosecuting attorney in the quasi-criminal proceeding against Petitioner. Pointedly,
15 Ling knew, at all relevant times, that exhibit C was, in fact, submitted by Petitioner with his
16 initial filing. Note that Ling states, at least twice, that the drawings were not at the Board's
17 offices ("they're not here"). But they were, and that's where they were inspected in the later
18 deposition. And most importantly, Ling now admits that he knew, at all relevant times, that the
19 fire/live safety plans were made with the initial submittal by Petitioner. Attached as exhibit D is
20 the brief filed by Ling in District Court. There, Ling states,
21

22 "Board Counsel was obliged to introduce such evidence and
23 testimony as he deemed necessary and appropriate to prove the
24 allegations made against Mr. Rusk. Mr. Rusk was obliged to introduce
25 such evidence and testimony he deemed necessary and appropriate to
26 defend himself against the allegations made against him, and this
27 obligation inhered even where Mr. Rusk decided to represent himself.
28 The Board Counsel determined that the Schirmer Engineering
documents were not necessary to prove that Mr. Rusk was
negligent or incompetent, so he did not introduce them."

1 Exhibit D, p. 22: 22-27 (emphasis added). That is, Ling acknowledged that he knew of the
2 contemporaneous submission by Petitioner, but did not disclose it to this tribunal.

3 The Board may recall that the decision was premised on the failure of Petitioner to
4 submit the fire/life safety plans with his initial submission. Petitioner's credibility was
5 challenged and determined wanting on the very precept that he must be lying about the
6 submission hidden by Ling. The argument was so forceful that in deliberations the following
7 was stated by Member Klei:

8
9 Member Klai: Is there room for any question at all? I find it [a] little bit
10 baffling. If this matter has been before us for three years and if the fire
11 and life safety drawings are that critical to the matter and seem they are
12 the cusp of all our concerns with regard to negligence and competence
13 and everything else, that the Respondent¹² and/or our Staff didn't take
it upon themselves to bring these drawings forward if they truly
existed from the date of June of '07, and bring it forward again,
beyond just the architecture drawings we've seen here today.

14 Record of Proceedings, vol., p. . The answer to Klai's query is clear. Ling didn't bring them
15 forward in order that he could falsely argue, and successfully so, that Petitioner had never made
16 the submission.

17 Another factor considering the Board's decision and Ling's obstruction in preventing
18 Petitioner from properly defending the matters at the hearing was the absence of any guidance of
19 the standard of care concerning shell building plans and approvals. Shell building submittals are
20 expressly authorized by the building code. IBC § 106. There were no published guidelines as to
21 what will suffice for the City of Las Vegas, but the County of Clark had published such
22 requirements at the time of the hearing. See exhibit B. Petitioner sought to introduce this
23 document, but the Board ruled, at Ling's prompting, that the submission was irrelevant to the
24
25

26
27 ¹² As to the alleged failure of Petitioner to bring them forward, the only file stamped copy was in
28 the possession of Ling, never disclosed to Petitioner, and was assumed by Petitioner, as he had a
right to assume, that the prosecutor [Ling] had fully disclosed, rather than tampered with,
Petitioner's initial submission.

1 issues before the Board because the submittal was of a later publication by a different
2 jurisdiction, albeit another Southern Nevada Jurisdiction. As shown below, Ling's proffer was
3 disingenuous.

4 IV. ANALYSIS

5 A. THE MOST GLARING ISSUE IS THE FRAUD ON THIS TRIBUNAL BY THE 6 PROSECUTOR IN GAINING THE CONVICTION AND SANCTIONS AGAINST 7 PETITIONER

8 1. THE CRITICAL NATURE OF THE ALLEGED LACK OF FIRE/LIFE/SAFETY 9 PLANS IN THE DECISION

10 Due to post-decision research and discovery, it is now incontrovertible that Petitioner
11 supplied fire/life/safety plans and engineering with his initial submission to the City of Las
12 Vegas. Exhibit C. This is put up-front and first in order that the Board can grasp the gravity of
13 the injustice imposed by its order. Following this section are a plethora of additional examples
14 of irregularities warranting the vacation of the order of discipline, but Petitioner trusts that this
15 most extreme example will provide a solid backdrop to what actually occurred in the proceeding
16 against Petitioner, and why the discipline should either be vacated or modified.

17 In the context of the proceedings it was glaringly apparent that one factor appeared most
18 critical to the Board in its decision—Petitioner's alleged failure to provide fire/life/safety plans
19 with his initial submission. Leading the decision of the Board is a two-fold finding that
20 Petitioner was other than credible, and that he submitted his initial plans for review to the City of
21 Las Vegas without required fire and life safety considerations. See Order, Exhibit A, Findings of
22 Fact, ¶ 13 ("[T]he first set [of plans submitted] **completely lacked any FLS design and**
23 **engineering . . .**"), ¶ 15 ("Mr. Rusk . . . offered no evidence or proof either that Schirmer
24 Engineering had, in fact, ever created any drawings or that the drawings had ever been submitted
25 to the City of Las Vegas."), and "Mr. **Rusk's claim that he filed Schirmer Engineering's**
26 **drawings appears untrue.**" (Emphasis added). In fact, and demonstrably so, Petitioner's
27
28

1 statements were completely true, the prosecutor and Board staff in this matter, apparently
2 deviously concerning staff and the prosecutor, held the engineering drawings back and
3 fraudulently prosecuted the case, and the Board was grossly misled towards gaining a conviction
4 of Petitioner.

5 This is further exemplified and amplified by the nature of the questioning of Petitioner,
6 and the statements by the Board in deliberations. First, Ling made it clear that he was accusing
7 Petitioner of having not submitted the fire/life/safety drawings at the hearing. Testimony of
8 Petitioner elicited by Ling, p. 10, supra, Transcript of proceedings, Vol. 5, pp. 128-131. Ling
9 then highlighted this in his closing argument, stating, "If you believe Mr. Rusk, then somewhere,
10 somehow there was a whole set of fire life safety documents that we haven't seen, that aren't part
11 of his original submittal." Transcript of proceedings, Vol. 5, p. 157. Clearly, it was Ling's goal
12 to falsely accuse Petitioner of failing to submit fire/life/safety engineering with his initial
13 submission, and then, through doctoring evidence and misrepresenting facts to the Board, gain a
14 conviction on this fabricated absence of fire/life safety planning.

15
16 The Board very strongly picked up on these alleged proofs, and in their deliberations,
17 demonstrated the critical nature of this alleged oversight in their conclusions. Specifically, the
18 following was stated:
19

20 Member Klai: Is there room for any question at all? I find it [a] little bit
21 baffling. If this matter has been before us for three years and **if the fire and**
22 **life safety drawings are that critical to the matter and seem they are the**
23 **cusp of all our concerns with regard to negligence and competence and**
24 **everything else**, that the Respondent and/or our Staff didn't take it upon
25 themselves to bring these drawings forward if they truly existed from the date
26 of June of '07, and bring it forward again, beyond just the architecture
27 drawings we've seen here today.

28 Transcript of proceedings, Vol. 5, p. 179 (emphasis added). This, when coupled with the
decision at p. 7, ¶ 16, clearly demonstrates that this false premise, fostered and caused directly by

1 the knowing omissions and failure to correct the record by the prosecutor, that the within
2 conviction and attendant sanctions were caused by prosecutorial misconduct.

3 **2. THE NATURE OF THE PROSECUTORIAL MISCONDUCT AND FRAUD UPON** 4 **THIS TRIBUNAL**

5 It is now evident that in his prosecution of Petitioner, Ling violated the following rules of
6 professional conduct: NV ST RPC Rule 3.1; NV ST RPC Rule 3.3; NV ST RPC Rule 3.4; NV
7 ST RPC Rule 3.8; NV ST RPC Rule 4.1; and NV ST RPC Rule 8.4. Highlighting these
8 violations is Ling's representation at the hearing stating, "We do know it [the fire/life safety
9 engineering] wasn't submitted" Record of Proceedings, vol. 5, p. 97: 2. He argued this at
10 closing. And all the while, he knew that the documents existed. Exhibit D, p. 22. Prosecutorial
11 misconduct coupled with substantial prejudice to the party charged sufficiently provides a
12 violation of substantive due process. United States v. Kearns, 5 F.3d 1251, 1254 (9th Cir. 1993).

13 And Ling presented this alleged, yet false, failure with great aplomb, as the decision
14 reflects that the Board found that Petitioner was not credible, essentially lying about the
15 submission, and as he was unbelievable. The Decision also thusly finds that the documents now
16 attached as exhibit C were not filed with Petitioner's initial submittal of plans to the City. On
17 this basis it was concluded that there was a failure to file that which was now indisputably filed
18 as shown by exhibit C. The decision also finds Petitioner negligent for failing to submit this very
19 document now shown to have been timely submitted, and, at all times, known by Ling to have
20 been filed. Ling also apparently chose to doctor the evidence submitted, exempting the fire/life
21 safety documents from the exhibit B, Record of Proceedings, vol. 2, he presented at the hearing.
22 And then he withheld them from review by his expert thusly eliciting false testimony from the
23 expert on numerous occasions due to this submission. All of this was obviously contrived to
24 present a false picture of events to the Board in order to gain a conviction of Petitioner.

25 In undertaking these actions, Ling fell far short on his following ethical obligations:

26 A lawyer shall not bring . . . a proceeding, or assert or controvert an issue therein,
27 unless there is a basis in law **and fact** for doing so that is not frivolous" NV ST
28 RPC Rule 3.1 (emphasis added);

1 “Offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a
2 witness called by the lawyer, has offered material evidence and the lawyer comes to
3 know of its falsity, the lawyer shall take reasonable remedial measures, including, if
4 necessary, disclosure to the tribunal.” NV ST RPC Rule 3.3

5 “[A lawyer shall not] [f]alsify evidence, counsel or assist a witness to testify falsely .
6 . . .” NV ST RPC Rule 3.4

7 As a criminal prosecutor, “[m]ake timely disclosure to the defense of all evidence or
8 information known to the prosecutor that tends to negate the guilt of the accused or
9 mitigates the offense” NV ST RPC Rule 3.8

10 “Fail to disclose a material fact to a third person when disclosure is necessary to
11 avoid assisting a criminal or fraudulent act by a client” NV ST RPC Rule 4.1

12 “Engage in conduct that is prejudicial to the administration of justice.” NV ST RPC
13 Rule 8.4

14 Most of the failures are evident, but some require explanation.

15 On the failure to disclose a material fact to a third person, Ling engaged Mr. Amor, his
16 expert. In providing the information to Amor for Amor to form his expert opinions, Ling
17 omitted the contents of exhibit C. Amor never had an opportunity to review Petitioner’s entire
18 submittal, although Amor did not know there were omissions. Compare Record of Proceedings,
19 vol. 4, p. 176 and exhibit A attached. On this basis, Ling elicited testimony from Amor stating
20 that functionally all of exhibit C, submitted contemporaneously with those plans Ling selected to
21 admit, was absent from Petitioner’s initial submission, and that submission was grossly
22 negligent. Record of Proceedings, vol. 4, pp. 152-156.

23 Also of note in this respect is Ling’s question to Amor on the issue as follows: “The first
24 set of documents you reviewed, which was the March 6 or March 7 submittal had 72 sheets,
25 correct?” Record of Proceedings, vol. 4, p. 152: 12-14. Amor responded affirmatively. Ling did
26 two fraudulent things here. First, he mischaracterized the documents Amor reviewed as “the
27 March 6 or March 7 submittal.” The now demonstratively filed exhibit C was part of that
28 submittal, so Ling mischaracterized the documents Amor was provided as “the submittal,” when
it was a substantially and substantively redacted portion of the submittal, and Ling knew this.

1 Ling then, even more deviously, presented the number of drawings submitted by Petitioner as
2 totaling "72 sheets." Simple review of the file stamped exhibit C shows that Petitioner's initial
3 submittal had at least twenty-five more drawings submitted. It is unknown how many other
4 drawings Ling removed from the purported submittal in order to bolster his case against
5 Petitioner, but these twenty-five omitted drawings are patently evident. He then used the
6 discrepancy between the number of sheets submitted with the initial submittal and the final
7 submittal purporting to show that Petitioner's initial submittal was grossly deficient, and having
8 the expert confirm this. Id.¹³ In short, despite knowing the true facts, Ling underrepresented this
9 alleged deficiency in the number of needed drawings by a factor approaching 50% to the witness,
10 and correlatively to the Board, and then relied on this very same kited false showing to argue that
11 Petitioner's conduct violated his ethical duties.
12

13 Further, as noted above, the proceeding against Petitioner was quasi-criminal, which, by
14 title and constitutional parameters, is a class of criminal proceeding. Ling's duty was to disclose
15 to Petitioner all exculpatory evidence. NV ST RPC Rule 3.8. Ling did not merely violate this
16 proscription, he went the other way and actively relied upon Petitioner's lack of knowledge of
17 the exculpatory evidence to gain a conviction of Petitioner. And he succeeded to the point of
18 actively misleading the Board from the true facts.
19

20 In all forums, fraud upon the tribunal is grounds for vacating a judgment of the tribunal.
21 The fabrication of evidence with the participation of the attorney (here prosecutor) is the sine qua
22 non of fraud on a tribunal. See Occhiuto v. Occhiuto, 97 Nev. 143, 146, 625 P.2d 568, 570
23 (1981). Exhibit B in the hearing before the Board, Record of Proceedings, vol. 2, was fabricated
24 evidence as it constituted a redacted initial submission by Petitioner represented by the
25

26
27 ¹³ In another section of testimony, Amor obliquely acknowledged that had he seen exhibit C,
28 Petitioner may have been compliant with the very factors he testified were absent in his review.
Record of Proceedings, vol. 4, p. 187: 12-20

1 prosecutor and his expert as the entire initial submission by Petitioner. Also fabricated,
2 apparently solely through Ling and likely without knowledge of the witness, was the testimony
3 of Amor to the effect that Petitioner was negligent in failing to submit the contents of exhibit C
4 with his initial submission. The only way this could be elicited from Amor was through Ling's
5 withholding of exhibit C, attached, from Amor and informing Amor that he had received the
6 entire submission. This, too, was fabricated evidence constructed by Ling.

7
8 Then there is the number of plan-sheets submitted in the original submission. Ling
9 submitted seventy-five sheets in his exhibit B at the hearing,¹⁴ omitting the twenty-five sheets in
10 exhibit C attached, and represented through his witnesses that this was the entire submission.

11 Accord Record of Proceedings, vol. 2. Fraud upon the Board in Ling's presentation is patent.

12 Approaching a half-century ago, it was noted in our courts that, "[m]ore than a century of
13 admonitions has failed to engender in all who serve as prosecutors that instinct for propriety and
14 fairness which their public duty obviously demands." Moser v. State, 91 Nev. 809, 815, 544
15 P.2d 424, 428 (1975) holding modified by Collman v. State, 116 Nev. 687, 7 P.3d 426 (2000)
16 (Gunderson concurring). Apparently this now, through Ling's actions, approaches a century and
17 one-half of prosecutors ignoring their fealty to justice and their duties as prosecutors, and Ling
18 jettisoned these responsibilities to gain a conviction on materially misleading evidence, the
19 falsity of which, himself, had a hand in creating and fostering.

20
21 Conduct such as that shown of Ling in this matter are not merely aggressive advocacy.
22 When, as here, the State is seeking to adversely impact the rights of a citizen, the prosecutor is
23 not "the representative not of an ordinary party to a controversy, but of a sovereignty whose
24 obligation to govern impartially is as compelling as its obligation to govern at all." In this sense,
25 his duty is not to win a case, but assure that justice shall be done. Hunt v. Houston, No.
26

27
28 ¹⁴ Ling stated seventy-two sheets at the hearing although exhibit B at the hearing included
seventy-four sheets.

1 4:98CV2354, 2008 WL 822401, at *29 (D. Neb. Mar. 26, 2008), citing to Berger v. United
2 States, 295 U.S. 78, 88 (1935). Obviously, falsifying evidence, hiding evidence, and eliciting
3 false testimony is a base violation of this stricture.

4 Indeed, it is established that a conviction obtained through use of false evidence, known
5 to be such by representatives of the State, must fall under the due process protections of the
6 Fourteenth Amendment. Mooney v. Holohan, 294 U.S. 103 (1935); Pyle v. State of Kansas, 317
7 U.S. 213 (1942); Curran v. State of Delaware, 3 Cir., 259 F.2d 707 (1958). This also includes
8 falsified evidence which causes a false impression of the charged party's credibility. Napue v.
9 People of State of Ill., 360 U.S. 264, 269 (1959). In addition, once it is known to the prosecutor
10 that he elicited false testimony, he holds "the responsibility and duty to correct what he knows to
11 be false and elicit the truth. That the [prosecutor's] silence was not the result of guile or a desire
12 to prejudice matters little, for its impact was the same, preventing, as it did, a trial that could in
13 any real sense be termed fair." Id. At 270. Ling reveled in Amor's testimony reliant on the
14 absence of what is now attached as exhibit C, he knew exhibit C existed, and he not only stood
15 silent, but actually fostered and created the false presentation to the Board. This is a structural
16 defect in the proceedings so egregious that it commands that the conviction of Petitioner be
17 vacated. See State v. White, 81 S.W.3d 561, 570 (Mo. Ct. App. 2002) (Failure of a prosecutor to
18 promptly correct testimony known to be in error is systemic misconduct by the prosecutor).

19 It should also be noted that review of the complaint in this matter does not provide any
20 indication that the Petitioner was being charged with any failure to submit FLS ("Fire, Live,
21 Safety") plans and engineering, only that the submitted plans may have appeared deficient.
22 Nonetheless, this obviously became a great and central bone of contention at the hearing, as
23 expressly noted by member Klai, with the Prosecutor putting on a case that there were no such
24 drawings. Further to the above, as is evident from the testimony of the Board's expert, Mr.
25
26
27
28

1 Amor, the drawings that he was provided to review “completely lacked any FLS design and
2 engineering”¹⁵ As the prosecution’s expert, Mr. Amor would have necessarily been
3 provided the drawings he reviewed by the prosecution team, and by his statement, it is evident
4 that there were no FLS plans and engineering provided to him by the prosecutor. Second,
5 exhibits B and C at the hearing, as discussed in the transcript record, were the exhibits submitted
6 by the prosecutor as exhibits, and while purportedly comprising Petitioner’s first and last
7 submission to the City, they did not contain any FLS drawings now discovered to have been
8 extant during the hearing. Simply, Petitioner had submitted such drawings, and they were
9 obviously purposefully removed by Ling and staff from the submission to the Board and
10 withheld from the Board’s expert in the formulation of this expert’s opinion.
11

12 Further, as to materiality warranting that the decision be vacated, obviously, with the
13 fire/life safety drawings and engineering being in the Board’s possession and now expressly
14 admitted by Ling to have existed, this conclusively demonstrates that the finding by the Board
15 that Peitioner was lying about having submitted these very documents to plan review was
16 absolutely wrong. It also shows that the Board’s conclusion that there was a failure in
17 submitting such documents is in error. These are the two lynchpins of the decision, exhibit E. In
18 short, the existence and discovery of exhibit C demonstrates that the core basis referenced by the
19 Board for its decision against Petitioner are, in a word, wrong. In light of the finding and
20 reliance by the Board on the Board’s expert’s sworn testimony that he had never seen such
21 documents together with the implication that they did not exist (and Ling’s affirmative statement
22 that they did not exist), it also shows that the Prosecutor’s submission was going to be selective
23 and intentionally omit the fire/life safety design drawings. Nor could Petitioner foresee that the
24
25
26

27 ¹⁵ This would have been the testimony and “evidence” for the Board’s conclusion that these
28 items were missing in the initial presentation of the plans for Verge to the City of Las Vegas for
review.

1 Prosecutor and staff would interface with their expert and omit critical information from
2 Peitioner's submittals.

3 It is also established that a conviction obtained by the knowing use of perjured testimony
4 is fundamentally unfair and must be set aside if there is any reasonable likelihood that the false
5 testimony could have affected the judgment of the trier of fact. Riley v. State, 93 Nev. 461, 462,
6 567 P.2d 475, 476 (1977). While possibly not perjury, Amor's statements concerning the
7 absence of fire/life safety plans is certainly false, and known to be false by Ling at the time he
8 elicited this testimony. There is no material distinction between perjured testimony and false
9 testimony created through a prosecutor intentionally withholding evidence from a retained
10 expert. Surely, a prosecutor withholding information and relying upon its absence is also
11 similarly implicated and carries with it the analogous result. Further, prosecutorial misconduct
12 coupled with substantial prejudice to the person charged sufficiently provides a violation of
13 substantive due process. United States v. Kearns, 5 F.3d 1251, 1254 (9th Cir. 1993).

14
15 **B. LING MISLED THE BOARD AS TO THE STANDARD OF CARE THROUGH**
16 **IMPROPER OBJECTIONS**

17 Petitioner was told that he could not cross-examine a Board witness with documents that
18 had not yet been admitted. When he attempted to admit the document, shell building guidelines
19 for Clark County, exhibit B, Ling objected to the guidelines as irrelevant. The Board agreed.
20 Record of Proceedings, vol. 4, pp. 174-175. They were irrelevant, per the Board's rationale,
21 because they addressed Clark County rather than the City of Las Vegas.
22

23 Relevant evidence is evidence that makes a fact of consequence more or less likely in
24 light of that evidence. NRS 48.015. Facts of consequence affected by exhibit B include:

- 25
26 a. Whether phased construction is allowable under the UBC;
27 b. What is necessary to submit for approval of a phase;
28

- 1 c. Impeachment of Ling's contention that the UBC does not allow for phased
2 construction;
- 3 d. Impeachment of Amor's testimony that to allow for phased submission and
4 construction is nothing more than allowing for a sculpture to be built, and this is
5 clearly inappropriate;
- 6 e. The actual requirements of that which should be submitted to construct a phase which
7 is given a certificate of completion;
- 8 f. The fact that there is a distinction between a certificate of completion and a certificate
9 of occupancy, and that the existence of a certificate of completion in addition to an
10 ultimate certificate of occupancy itself demonstrates the propriety of a shell building
11 submittal; and
- 12 g. Whether Petitioner's submittal met the standard of care in the greater Las Vegas
13 Valley.

14 Indeed, Petitioner covered many of these bases in his proffer attendant to his request for
15 admission. Id. Clearly, the fact that the County of Clark building department, applying the same
16 code as that applicable in the City of Las Vegas, recognizes the propriety of Petitioner's actions
17 under that that code is relevant to all of these questions, and actually, critically relevant.¹⁶ Also
18

19 _____

20 ¹⁶ Note that Petitioner attempted to cross-examine the testimony of a material witness based on
21 this document as well, but was refused by the Board. Record of Proceedings, Vol. 4, p. 77.
22 While this portion may not necessarily be ascribed to prosecutorial misconduct, Ling allowed
23 this evidentiary error to stand without correction. Cross-examination about documents not yet in
24 evidence is perfectly allowable and proper. See S. Illinois Airport Auth. v. Smith, 267 Ill. App.
25 3d 201, 641 N.E.2d 1240 (1994) (Recognizing the propriety of questioning on unadmitted public
26 records on cross-examination); State v. Medway, No. A-0929-12T3, 2014 WL 5365626, at *3
27 (N.J. Super. Ct. App. Div. Oct. 23, 2014); Ault v. Miller, No. 05 CV 3115 (RJD), 2008 WL
28 3890373, at *4 (E.D.N.Y. Aug. 19, 2008); Lear Auto. Dearborn, Inc. v. Johnson Controls, Inc.,
No. 04-73461, 2011 WL 64305, at *4 (E.D. Mich. Jan. 10, 2011). Indeed, use of documents for
impeachment on cross examination is perfectly ordinary. See Christou v. United States, No.
1:06-CR-483-WSD-LTW, 2012 WL 279854, at *3 (N.D. Ga. Jan. 31, 2012). Truly, in
addressing an expert witness retained and presented by the prosecution, denying the accused the
ability to openly cross-examine denies due process as that witness only appears in the
prosecution's case in chief.

1 of note here, the relevant inquiry into the standard of care owed by Petitioner is that of the
2 practice of an architect in the greater Las Vegas valley. See Shipley v. Williams, 350 S.W.3d
3 527, 531 (Tenn. 2011) (Defining the locality applicable to assertions of professional malpractice
4 under the locality rule as the “community” in which the action took place).

5 Apparently they were also irrelevant because the expert for the Board determined that
6 there was no room for the structure guidelines defined in exhibit B because it did no more than
7 allow for the construction of a “sculpture.” Record of Proceedings, vol. 4, p. 189. But exhibit B
8 attached, shows that other jurisdictions proximate to the City of Las Vegas and within the area of
9 practice of the architect being tried, clearly view a shell building meeting the requirements of
10 exhibit B as something more than a sculpture. The cross examination off of this document in the
11 manner of evident impeachment of Amor’s “sculpture” testimony, as well as the direct impact
12 validating the standard of care met by Petitioner were both forwarded by admission, or at least
13 allowable cross-examination, off of this document.
14

15 But Ling said the document was irrelevant. Record of Proceedings, vol. 4, p. 174. And
16 the Board listened to him. In light of the patent relevance, this argument by Ling violated NV
17 ST RPC Rule 3.1, and deprived the Board and Petitioner of important information. Moreover,
18 exhibit B, attached, is clearly developed under U.B.C. § 106.3.3 and § 104.11 which, as
19 recognized in exhibit B, allows for phased construction. Ling, nonetheless, maintained that there
20 was no such ability. See Record of Proceedings, Vol. 5, p. 128. The fact that exhibit B even
21 exists clearly belies Ling’s contention, and in this sense is critical evidence of the propriety of
22 Petitioner’s method of design and submission, an issue ultimately decided against Petitioner in
23 the Decision.
24
25

26 In light of this, when Ling represented to the Board the specious claim of irrelevancy of
27 Clark County Standards, he necessarily recognized the relevance and propriety of the submission
28

1 of exhibit B, Record of Proceedings, vol. 2. In doing this, he violated his ethical obligation
2 under NV ST RPC Rule 3.1. As he also made this representation to the Board, he misled his
3 own client as to the law. And the fact that the Board was comprised of lay persons vis a vis legal
4 matters, the Board necessarily looked to him for such answers to legal issues such as relevance.
5 Thus, Ling's misstatement of the law, necessarily obvious to Ling as a misstatement, coupled
6 with the Board's reliance on the misstatement, is all the more egregious. For a second
7 independent reason premised on ethical misconduct of the prosecutor in this action, Petitioner's
8 defense of the claims against him was severely prejudiced, and Petitioner was denied substantive
9 due process.

10 V. CONCLUSION

11 The entire definition of the American condition revolves around the sacrosanct and
12 meticulous application of the rule of law and the protections provided by it. As noted by the
13 authorities above, prosecutors working for the State hold great responsibilities to do justice and
14 avoid injustice under this system. Their actions are circumscribed by both the Constitution and
15 the rules of ethical conduct for attorneys. And above all, in the breach of these duties by a
16 prosecutor, a conviction of person where the prosecutor violates these duties cannot stand.

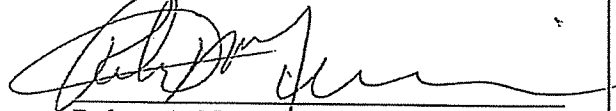
17 Here the prosecutor violated these duties, and did so repeatedly. He stated in court that
18 exculpatory evidence did not exist while he is aware that it is in his possession. He constructed
19 hired testimony by an expert for the state through omitting known and material facts from the
20 experts review. He elicited testimony that he knew to be false. He failed to correct false
21 evidence in the record when it came to his attention, and shouted all the louder that the false
22 evidence was, in fact, true. And the very false evidence and lack of exculpatory evidence he
23 created is then cited by the tribunal as a substantial and substantive body of proof upon which to
24 convict the Petitioner. Before the Board is the very conviction that courts have repeatedly
25 cautioned that cannot stand. The Decision, exhibit E, should be vacated or modified.

26 Petitioner's request is that the Petition be vacated in total, and considering the depth of
27 the malfeasance by Ling, this entire matter be put at an end. Alternatively, as Petitioner has
28 already gone years with his license suspended and an unjust monetary sanction remained

1 pending, that all sanctions and punishment be vacated, together with the findings on the Verge
2 matter, with the injury to date being the sanction imposed. Lastly, the Board could vacate the
3 Decision, and order a new hearing. If this is the decision, however, with the discovery of exhibit
4 C it appears that this may, indeed, present an exercise in futility as Petitioner's conviction was
5 clearly unwarranted under the true facts hidden by Ling.

6 Dated this 7th day of January, 2015.

7 **Nersesian & Sankiewicz**

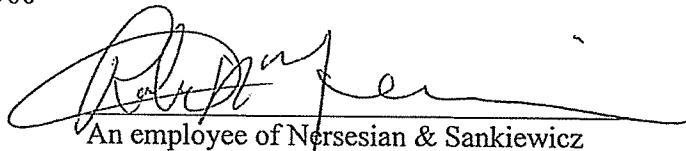
8 

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14 (702) 385-7667 (fax)
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14 **CERTIFICATE OF SERVICE**

15 I hereby certify that on the 7th day of January, 2016, the original hereof was hand
16 delivered to the Nevada State Board of Architecture, et al, 2080 E. Flamingo Road, Suite 120,
17 Las Vegas, NV 89119, together with a copy of the Record of Proceedings, for filing, and a copy
18 of the same, absent the Record of Proceedings, also being hand delivered to:

19 Sophia G. Long
20 Nev. Dep. Atty. General
21 555 E. Washington Ave., # 3900
22 Las Vegas, NV 89101

23 
24 An employee of Nersesian & Sankiewicz
25
26
27
28

Doc. 3

Board Order Denying Petition/
Motion (first)

Doc. 3

BEFORE THE NEVADA STATE BOARD OF
ARCHITECTURE, INTERIOR DESIGN AND RESIDENTIAL DESIGN

Monica Harrison, Executive Director)
NEVADA STATE BOARD OF)
ARCHITECTURE, INTERIOR DESIGN)
AND RESIDENTIAL DESIGN)

Case No. 08-080R and
11-019R

Complainant,

v.

DENNIS EUGENE RUSK,
Registered Architect Number 1309
Dennis E. Rusk, Architect LLC

Respondent.

**FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER REGARDING
PETITION/MOTION OF DENNIS EUGENE RUSK REQUESTING THAT THE FINAL
DECISION OF THE BOARD BE VACATED OR MODIFIED, BROUGHT IN THE NATURE
OF A PETITION FOR WRIT OF CORAM NOBIS OR OTHER RELIEF TO SET ASIDE
ORDER OF DISCIPLINE OR ALTERNATIVELY, REMIT DISCIPLINE, AND
REQUEST/MOTION FOR APPOINTMENT OF INDEPENDENT COUNSEL AND MOTION
TO LIFT STAY OF PETITIONER/MOTION REQUESTING THAT THE FINAL DECISION OF
THE BOARD BE VACATED OR MODIFIED, ETC., AND REQUEST FOR AN EVIDENTIARY
HEARING**

INTRODUCTION

The above-captioned matter having come before the Nevada State Board of Architecture, Interior Design and Residential Design ("Board") during a regular agenda on January 11, 2016, Robert Nersesian, Esq. appeared on behalf of Petitioner, Dennis Risk, who was also present; Louis Ling, Esq. appeared on behalf of the Board; and Sophia Long, Esq., Deputy Attorney General with the Nevada Attorney General's Office, appeared as Board Counsel for the Board. The parties having submitted briefs in the matter, the Board, having reviewed the papers and pleadings on file herein, and pursuant to the provisions of Chapter 623 of the Nevada Revised Statutes ("NRS") and Chapter 623 of the Nevada Administrative Code ("NAC") and Chapter 622A of the Nevada Revised Statutes, hereby makes the following findings of fact, conclusions of law, and order.

FINDINGS OF FACT

A. Background

1. Petitioner Dennis Rusk ("Rusk") was a licensed Architect in the State of Nevada, Registered Architect Number 1309.
2. On August 16 and September 11, 2011, the Board held a hearing on the Complaints (08-080R and 11-019R) against Rusk. The hearing resulted in disciplinary action against Rusk and the Board issued its final Order on September 27, 2011.
3. Subsequently, Rusk appealed this matter to the Clark County District Court and the Supreme Court of Nevada.

B. Rusk's Motions

4. On or about January 7, 2016, Rusk filed with the Board his Petition/Motion Of Dennis Eugene Rusk Requesting That The Final Decision Of The Board Be Vacated Or Modified, Brought In The Nature Of A Petition For Writ Of Coram Nobis Or Other Relief To Set Aside Order Of Discipline Or Alternatively, Remit Discipline, And Request/Motion For Appointment Of Independent Counsel ("Motion to Vacate").
5. Rusk's Motion to Vacate requests that the Board vacate its Order alleging prosecutorial misconduct during Rusk's hearing, specifically that Louis Ling, Esq., the Board's prosecuting attorney, withheld material facts and made affirmative misrepresentations to the Board resulting in "gaining a conviction of Petitioner." See Motion to Vacate, pp. 11-12, 15-16.
6. Rusk's Motion to Vacate further requests that the Board appoint independent counsel to review the Motion to Vacate, address the Motion to Vacate and to investigate prosecutor, Louis Ling's actions.

- 1 7. On January 28, 2016, the Board issued an Order staying the Motion because
2 Rusk alleged prosecutorial misconduct against the Board's prosecuting attorney,
3 Louis Ling, Esq., and in doing so, he also filed a Nevada state bar complaint
4 against Louis Ling, in this matter and involving this matter, therefore, the Board
5 "will stay the hearing of Respondent's motion until the state bar complaint has
6 been concluded."
- 7 8. On September 26, 2016, Rusk filed with the Board his Motion to Lift Stay of
8 Petitioner/Motion Requesting that the Final Decision of the Board be Vacated Or
9 Modified, Etc., and Request For An Evidentiary Hearing ("Motion to Lift Stay").
- 10 9. Rusk's Motion to Lift Stay asserts that the state bar complaint has been
11 concluded.
- 12 10. Rusk's Motion to Lift Stay further requests an evidentiary hearing regarding the
13 actions of Louis Ling, Esq., prosecuting attorney, George Garlock, Board
14 member, and Board staff regarding "how the denial of due process occurred."
15 See Motion to Lift Stay, pp. 2-3.
- 16 11. On or about October 10, 2016, Louis Ling filed his Opposition to both Motions.
- 17 12. If any of the foregoing Findings of Fact are deemed Conclusions of Law, they
18 shall so be construed.

19 CONCLUSIONS OF LAW

- 20 13. Rusk's Motion to Vacate is brought pursuant to NRS 622A.390(1)(c), which
21 states: "After the close of the hearing, a party may file only the following motions:
22 (c) A motion requesting that the final decision of the regulatory body be vacated
23 or modified."
 - 24 a. However, Rusk's Motion to Vacate is based on errors in the hearing such
25 that the Motion alleges the errors were grounds for a conviction. See Motion
26 to Vacate, p. 15;
 - 27 b. Rusk's Motion to Vacate requests that the Order be vacated or modified, but
28 requests further inquiries, hearings and investigations into the same matter;

- c. Rusk's Motion to Vacate requests, in part, for a new hearing. See Motion to Vacate, pp. 6, 27, Motion to Lift Stay, p. 3;
 - d. Pursuant to NRS 622A.390(5)(b), a motion for rehearing or reconsideration is appropriate if a petitioner is alleging errors in a hearing;
 - e. As such, the Board will treat Rusk's Motion to Vacate as a Motion for Rehearing pursuant to NRS 622A.390(1)(a).
14. Pursuant to NRS 622A.390(1)(a), which states "After the close of the hearing, a party may file only the following motions: (a) A motion requesting rehearing." Further, pursuant to NRS 622A.390(2)(b) states: "A motion requesting rehearing or reconsideration **must** be filed with: the regulatory body not later than 15 days after the date of service of the final decision of the regulatory body." (emphasis added). Rusk is time barred as he filed his Motion approximately five years after the date of service of the final decision of the regulatory body.
 15. Regardless of the nature of motion brought by Rusk, Rusk previously filed a petition for judicial review in Clark County District Court alleging identical allegations and arguments. The District Court affirmed the Board's Order. Rusk then appealed to the Nevada Supreme Court, and the Nevada Supreme Court dismissed the appeal. In taking this matter to the District Court, Rusk has effectively admitted to exhausting his administrative remedies. *Allstate Insurance Company v. Thorpe*, 123 Nev. 565, 571, 170 P.3d 989, 993 (2007). The Board does not have jurisdiction over the Motion.
 16. Rusk's Motion includes that it is "Brought in the Nature of a Petition for Writ of Coram Nobis." Pursuant to *Trujillo v. State*, 310 P.3d 594 (2013), coram nobis was a step in the **criminal case**. In Nevada, district courts have continuing jurisdiction to correct mistakes of fact that would have prevented a **conviction**. See *Warden v. Peters*, 83 Nev. 298, 301, 429 P.2d 549, 551 (1967); Nev. Const. art. 6, § 6; NRS 171.010; *Walker v. State*, 78 Nev. 463, 472, 376 P.2d 137, 141 (1962). The Board is not an appellate court nor a district court and the

underlying hearing was not a criminal proceeding, therefore, the Board does not have jurisdiction to decide and lacks the authority over a writ of coram nobis.

17. The Board is a state administrative agency created under NRS 623 and does not have general or common law powers, but only such powers as have been conferred by law expressly or by statute. *Andrews v. Nevada State Board of Cosmetology*, 86 Nev. 207, 467 P.2d 96 (2007). NRS 623 does not confer power on the Board to investigate an attorney. Therefore, the Board does not have authority to appoint independent counsel to investigate Louis Ling.¹ Further, the Motion to Vacate is not an administrative hearing requiring a prosecutor, therefore, none would need to be appointed. Last, the Board is already represented by independent Board Counsel in the post-decision proceedings.

18. As previously mentioned, the Board is a state administrative agency created under NRS 623 and does not have general or common law powers, but only such powers as have been conferred by law expressly or by statute. *Andrews v. Nevada State Board of Cosmetology*, 86 Nev. 207, 467 P.2d 96 (2007). Chapter 233B of NRS (Administrative Procedure Act) and Chapter 622A of NRS (Administrative Procedure Before Certain Regulatory Bodies) governs procedures regarding administrative hearings. Chapters 623, 622A and 233B of NRS do not confer power on the Board to use evidentiary hearings to investigate the conduct of its attorney, members or staff regarding evidence at a hearing. Therefore, the Board does not have authority to investigate its own staff about whether due process was violated during a hearing.

19. If any of the foregoing Conclusions of Law are deemed Findings of Fact, they shall so be construed.

¹ It should be noted that on or about January 7, 2016, Robert Nersesian, Esq. filed a state bar complaint against Louis Ling, Esq. alleging identical allegations and arguments based upon Mr. Ling's conduct at the hearing. The State Bar ultimately issued a finding that "no professional misconduct occurred in this matter." State Bar letter dated February 12, 2016. Robert Nersesian requested reconsideration of the dismissal and the State Bar reaffirmed the original decision. State Bar letter dated March 18, 2016. The administrative agency that has the authority to investigate attorneys decided that "no further action shall be taken" and to dismiss the complaint.

ORDER

The Board, being fully apprised in the premises and good cause appearing to the Board, by a unanimous vote, ORDERS as follows:

IT IS HEREBY ORDERED that Petitioner Dennis Rusk's Motion to Lift Stay is GRANTED as to lifting the stay only;

IT IS HEREBY FURTHER ORDERED that Petitioner Dennis Rusk's Request for an Evidentiary Hearing is DENIED;

IT IS HEREBY FURTHER ORDERED that Petitioner Dennis Rusk's Motion to Vacate is DENIED.

DATED this 8th day of February, 2017.

NEVADA STATE BOARD OF
ARCHITECTURE, INTERIOR DESIGN
AND RESIDENTIAL DESIGN

By:


JAMES MICKEY, A.I.A.
Presiding Chairman

Submitted by:

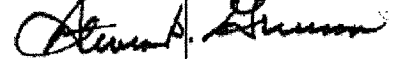
ADAM PAUL LAXALT
Attorney General

By: /SGL/
Sophia G. Long, Esq.
Deputy Attorney General
555 E. Washington Avenue, Suite 3900
Las Vegas, Nevada 89101
(702) 486-3420

Doc. 4

District Court (Weise) Order
Granting Petition/Motion (in
part).

Doc. 4



ORDR

Robert A. Nersesian
Nevada Bar No. 2762
NERSESIAN & SANKIEWICZ
528 South Eighth Street
Las Vegas, Nevada 89101
Telephone: 702-385-5454
Facsimile: 702-385-7667
Attorneys for Petitioner/Appellant

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Dennis Eugene Rusk, and Dennis Rusk, Architect,)	
LLC,)	
PETITIONER/APPELLANT)	Case No.: A-17-750672-W
	Dept. No.: XXX
vs.)	
Nevada State Board of Architecture, Interior)	
Design, and Residential Design,)	
RESPONDENT.)	

**ORDER DETERMINING PETITIONER'S PETITION FOR WRIT ISSUANCE OF A
WRIT OF MANDAMUS, OR ALTERNATIVELY, JUDICIAL REVIEW OF ACTION OF
THE NEVADA STATE BOARD OF ARCHITECTURE**

Petitioner having filed a Petition for Writ of Mandamus or Judicial Review ("Petition for Writ") before this Court contesting the denial of a Petition/Motion of Petitioner to vacate an order of discipline by the Nevada State Board of Architecture, Interior Design, and Residential Design (hereafter "NSBAIDRD" and "NSBAIDRD Petition"), the Court having reviewed the Petition for Writ, the memoranda in support and opposition, having conducted and presided over an evidentiary hearing on May 22, 2017, and being otherwise fully advised in the premises,

NOW THEREFORE,

///

///

///

Nersesian & Sankiewicz
528 SOUTH EIGHTH STREET

IT IS HERBY FOUND, ORDERED, AND ADJUDGED AS FOLLOWS:

FINDINGS OF FACT

PROCEDURAL/BACKGROUND FACTS

1. On September 27, 2011, Petitioner was subjected to discipline by NSBAIDRD in a Findings of Fact, Conclusions of Law, and Order by NSBAIDRD;
2. Petitioner brought a Petition of Judicial Review of the NSBAIDRD decision of September 27, 2011;
3. The District Court denied Petitioner's Petition for Judicial Review of the NSBAIDRD decision of September 27, 2011;
4. Petitioner appealed the denial of his Petition of Judicial Review of the NSBAIDRD decision, and the Nevada Supreme Court dismissed Petitioner's appeal, thus concluding the matter as presented;
5. Subsequently, Petitioner filed with the NSBAIDRD a Petition to vacate or modify the NSBAIDRD's Findings of Fact, Conclusions of Law, and Order of September 27, 2011. In his Petition, Petitioner alleged as the basis for vacating the Findings of Fact, Conclusions of Law, and Order the denial of due process, the withholding of evidence, prosecutorial misconduct, and other irregularities in the original proceeding against him.
6. At a time scheduled for hearing on the NSBAIDRD Petition, NSBAIRD determined that the NSBAIDRD Petition was effectively a petition for rehearing and not a petition to vacate, and that, regardless, NSBAIDRD lacked jurisdiction to consider the NSBAIDRD Petition, indicating that NSBAIDRD did not have authority to grant the relief sought by Petitioner, and thereby denying an evidentiary hearing and denying Petitioner's NSBAIDRD Petition.

1 7. Through filing with this Court of his Petition for Writ on January 7, 2017, Petitioner

2 brought before this Court the denial of relief to Petitioner by NSBAIDRD of his
3 NSBAIDRD Petition;

4 8. The Court conducted an evidentiary hearing concerning the Petition for Writ on May 22,
5 2017.

6 **FINDINGS OF OPERATIVE FACT**

7 9. Among its relevant text, the NSBAIDRD Findings of Fact, Conclusions of Law, and
8 Order of September 27, 2011, provides:

- 9
- 10 a. Mr. Rusk testified that he did not include Schirmer Engineering's report and
11 engineering into his first set of design drawings because he did not receive the
12 report until the day of the first submittal;
- 13 b. Mr. Rusk could not explain why he would submit design drawings that he knew at
14 the time would be utterly deficient of FLS engineering and design;
- 15 c. Mr. Rusk did not explain why he did not incorporate Schirmer Engineering's FLS
16 report into his second submittal, even though by his own chronology he had the
17 report by the time of the second submittal;
- 18 d. Mr. Rusk testified that he personally had filed Schirmer Engineering drawings
19 with the City of Las Vegas, though he offered no evidence or proof either that the
20 Schirmer Engineering had, in fact, ever created any drawings or that the drawings
21 had ever been submitted to the City of Las Vegas;
- 22 e. Mr. Rusk's claim that he filed Schirmer Engineering's drawings appears untrue;
- 23 f. Mr. Rusk's demeanor and answers under cross-examination and examination
24 from the Board Members raised questions about his credibility;
- 25
- 26

27 10. At the hearing before the NSBAIDRD, Mr. Rusk was emphatic that he had submitted the
28 Schirmer fire life safety documents including drawings with his initial submittal, but in

his closing argument, Mr. Ling stated, "There is no evidence of that today, is there? All

we have is your word. . . . If you believe Mr. Rusk, then somewhere, somehow there was a whole set of fire life safety documents that we haven't seen, that aren't part of his original submittal."

11. Although there was evidence submitted by NSBAIDRD at the evidentiary hearing before this Court that NSBAIDRD was aware of the Schirmer fire life safety documents, that such report was in the Board's file all along, that the Board was aware of it being in the file, and that it wasn't the existence of the report and drawings, but the failure to coordinate the fire life safety information into Mr. Rusk's documents, that resulted in the Findings of Fact, Conclusions of Law, and Order of September 27, 2011, the Findings of Fact, Conclusions of Law, and Order of September 27, 2011 seems to indicate otherwise;

12. There is evidence that in submission of the discipline matter against Petitioner to NSBAIDRD, the evidence did not include the Schirmer fire life safety documents;

13. The Schirmer fire life safety documents with a City of Las Vegas file stamp of March 6, 2007, were made available by NSBAIDRD to Petitioner's attorney and Petitioner in response to a subpoena duces tecum filed in an unrelated matter subsequent to the dismissal of Petitioner's Supreme Court appeal;

14. It appears that in the prosecution of Petitioner resulting in the Findings of Fact, Conclusions of Law, and Order of NSBAIDRD of September 27, 2011, that the Schirmer fire life safety documentation with attached drawings was apparently not before the NSBAIDRD at the disciplinary proceeding concerning Petitioner.

15. NSBAIDRD's determination on Petitioner's Petition/Motion to Vacate was clearly erroneous and arbitrary and capricious in the Board's refusal to consider the evidence of the fact that the March 6, 2007, Schirmer Report, with attached drawings, was apparently not before NSBAIDRD when it conducted its hearing in 2011.

CONCLUSIONS OF LAW

1. The Court addresses the current matter as a petition for judicial review;
2. While judicial review is ordinarily limited to the record before the administrative agency, nonetheless, in matters involving alleged irregularities in procedure before an agency that are not shown in the record, the court may receive evidence concerning the irregularities;
3. This Court shall not substitute its judgment for the judgment of an agency on a question of fact;
4. On the current Petition the Court may affirm, remand or set aside in whole or in part the decision of NSBAIDRD denying Petitioners Petition/Motion to Vacate if substantial rights of the Petitioner have been prejudiced because Conclusions of Law, and Order of NSBAIDRD of September 27, 2011 is:
 - a. In violation of constitutional or statutory provisions;
 - b. In excess of the statutory authority of the agency;
 - c. Made upon unlawful procedure;
 - d. Affected by other error of law;
 - e. Clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or
 - f. Arbitrary of capricious or characterized by an abuse of discretion.
5. To be arbitrary and capricious, the decision of the administrative agency must be in disregard of the facts and the circumstances involved.
6. NSBAIDRD's determination on Petitioner's NSBAIDRD Petition was clearly erroneous and arbitrary and capricious in the Board's refusal to consider the evidence of the fact that the March 6, 2007, Schirmer Report, with attached drawings, was apparently not before NSBAIDRD when it conducted its hearing in 2011.

1 7. The NSBAIDRD Petition was not a petition for rehearing, and instead must be treated
2 as a petition to vacate.

3 ORDER

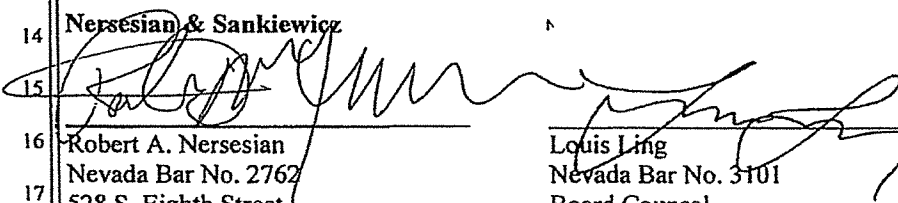
- 4 1. This matter is remanded to NSBAIDRD;
5 2. On remand, NSBAIDRD shall assume jurisdiction and rule upon the Petitioner's
6 NSBAIDRD Petition and consider whether it would be appropriate to vacate its prior
7 decision based upon the newly discovered evidence consisting of the March 6, 2007
8 Schirmer Report and drawings.

9 DATED this 26 day of June, 2017.

10
11 
12 DISTRICT COURT JUDGE
13 

13 Approved as to form and content:

14 Nersesian & Sankiewicz

15 
16 Robert A. Nersesian
17 Nevada Bar No. 2762
18 528 S. Eighth Street
19 Las Vegas, Nevada 89101
20 Telephone: 702-385-5454
21 Facsimile: 702-385-7667
22 Email: vegaslegal@aol.com
23 Attorneys for Petitioner/Appellant

16 Louis Ling
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22 Facsimile: (775) 624-5086
23 Email: louisling@me.com
24 Attorney for Respondent Nevada State Board of
25 Architecture, Interior Design, and Residential
26 Design

23 ///
24 ///
25 ///
26 ///
27 ///
28 ///

Respectfully submitted:

Nersesian & Sankiewicz

/s/ Robert A. Nersesian

Robert A. Nersesian

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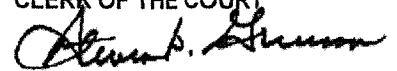
Email: vegaslegal@aol.com

Attorneys for Petitioner/Appellant

Doc. 5

Board's Motion to Dismiss
(first)

Doc. 5



MDSM
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Attorney for Appellee/Respondent
Nevada State Board of Architecture,
Interior Design and Residential Design

DISTRICT COURT
CLARK COUNTY, NEVADA

DENNIS E. RUSK, AND DENNIS E.
RUSK ARCHITECT, LLC

Appellants/Petitioners,

vs.

NEVADA STATE BOARD OF
ARCHITECTURE, INTERIOR DESIGN
AND RESIDENTIAL DESIGN,

Appellee/Respondent.

Case No. A-17-764562-J

Dep't No. 29

MOTION TO DISMISS

Respondent Nevada State Board of Architecture, Interior Design and Residential Design (the Board) moves this Court to dismiss the instant matter pursuant to NRCP 12(b)(1) and NRCP 12(h)(3). This motion is made and based upon the pleadings and papers on file herein and the following points and authorities.

NOTICE OF HEARING

PLEASE TAKE NOTICE that a hearing on Respondent's Motion to Dismiss has been scheduled in the above-captioned court for 9:00 a.m./~~p.m.~~ on the 29 day of January, 2018.

Signed this _____ day of _____, 2017.

COURT CLERK

I. POINTS AND AUTHORITIES

A. PROCEDURAL HISTORY

On February 2, 2017, Petitioners filed a matter entitled: "Petition of Dennis E. Rusk and Dennis E. Rusk Architect, LLC, for Issuance of a Writ of Mandamus, or Alternatively, Judicial Review of Action of the Nevada State Board of Architecture, Interior Design and Residential Design Taken in Reference to a Petition/Motion Filed by the Petitioners and Avoided/Determined Before Said Board on January 11, 2017." (First Petition). The matter was filed with the Eighth Judicial District Court, was given Case Number A-17-750672-W, and was assigned to Department 30 (Judge Weise presiding).

The Board tendered a defense to the First Petition. Judge Weise presided over one-day evidentiary hearing on May 22, 2017. On June 27, 2017, Judge Weise issued his Order Determining Petitioner's Petition for Writ Issuance of a Writ of Mandamus, or Alternatively, Judicial Review or Action of the Nevada State Board of Architecture (Remand Order). By this Remand Order, Judge Weise ordered that the matter be remanded to the Board, and on remand the Board "shall assume jurisdiction and rule upon the Petitioner's NSBAIDRD Petition and consider whether it would be appropriate to vacate its prior decision based upon the newly discovered evidence consisting of the March 6, 2007 Schirmer Report and drawings."

On October 25, 2017, the Board held the hearing on remand ordered by Judge Weise.

On November 9, 2017, Petitioners filed the instant Petition for Judicial Review (Case No. A-17-764562-J). By the instant Petition for Judicial Review, Petitioners expressly indicated that their intent was to seek judicial review of the Board's proceedings conducted on October 25, 2017 even though no written order had yet been issued by the Board.

On December 1, 2017, the Board issued its Findings of Fact, Conclusions of Law, and Order Regarding Remand From Judge Weise to Determine Whether to Vacate its September 27, 2011 Board Order Based Upon the Newly Discovered Evidence Consisting of the March 6, 2007 Schirmer Report and Drawings (Board Order on Remand).

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B. LEGAL ARGUMENT

NRCP 12(b)(1) allows for a matter to be dismissed for “lack of jurisdiction over the subject matter.” NRCP 12(h)(3) provides: “Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, *the court shall dismiss the action.*” (Emphasis supplied.) A prematurely filed petition for judicial review does not confer subject matter jurisdiction upon a court and must be dismissed. *Johnson v. State of Idaho*, 280 P.3d 749, 754 (Idaho App. 2012).

As the above procedural history shows, Petitioners have already commenced a proceeding before Judge Weise (Case No. A-17-764562-J) regarding Petitioners proceedings before the Board. The very hearing of which Petitioners seek this Court’s review is the hearing ordered by Judge Weise in Petitioners’ case before him. Furthermore, the instant petition for judicial review was filed almost one month prematurely since it was filed November 9, 2017 whereas the Board’s Order was not final until December 1, 2017.

Because Judge Weise has already taken jurisdiction over the subject matter of the instant petition, and because it was filed one month prematurely, this Court cannot and does not have jurisdiction over the subject matter of this dispute. Petitioners may be entitled to judicial review of the Board’s hearing and rulings resultant from the hearing it conducted on October 25, 2017, but Judge Weise already has subject matter jurisdiction over that proceeding because he ordered it. The instant matter must be dismissed pursuant to NRCP 12(b)(1) and NRCP 12(h)(3).

II. CONCLUSION AND RELIEF REQUESTED

As has been shown, Judge Weise, in Case No. A-17-764562-J, already has exercised subject matter jurisdiction over the subject matter of the instant matter, and the petition was filed one month prematurely. This Court cannot and does not have subject matter jurisdiction over this matter: Judge Weise already has it. The instant matter must be dismissed pursuant to NRCP 12(b)(1) and NRCP 12(h)(3).

Signed this 21st day of December, 2017.

/s/ Louis Ling

LOUIS LING, Board Counsel
Nevada Bar No. 3101
Counsel for Appellee/Respondent

CERTIFICATE OF SERVICE

I certify that on this day I mailed via regular U.S. Mail the attached document to:

Robert A. Nersesian
Nersesian & Sankiewicz
528 South Eighth Street
Las Vegas, Nevada 89101

Dated this 21st day of December, 2017.

/s/ Louis Ling

LOUIS LING, Board Counsel
Nevada Bar No. 3101
Counsel for Nevada State Board of Architecture,
Interior Design and Residential Design

Doc. 6

Minute Order (Weise) Vacating
Motion and Closing Case on
Board's Motion to Dismiss
(first)

Doc. 6

DISTRICT COURT
CLARK COUNTY, NEVADA

Writ of Mandamus

COURT MINUTES

January 04, 2018

A-17-750672-W Dennis Rusk, Plaintiff(s)
vs.
Nevada State Board of Architecture Interior Design and Residential Design,
Defendant(s)

January 04, 2018 09:00 AM Respondents Motion to Dismiss

HEARD BY: Wiese, Jerry A. COURTROOM: RJC Courtroom 14A

COURT CLERK: Ortega, Natalie

RECORDER:

REPORTER: Clark, Kristy

PARTIES PRESENT:

Louis A. Ling Attorney for Defendant

Robert A. Nersesian Attorney for Plaintiff

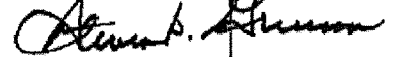
JOURNAL ENTRIES

Arguments by counsel regarding the merits of the motion. COURT ORDERED, case STATISTICALLY CLOSED based on the Court's prior order. COURT NOTED the case was transferred to the board and they had a hearing as ordered. FURTHER, all of the other issues could be fought in front of the Supreme Court. COURT FURTHER ORDERED, motion VACATED.

Doc. 7

Transcript of Board Hearing on Remand

Doc. 7



1 TRANS
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4 Las Vegas, Nevada 89101
Telephone: 702-385-5454
5 Facsimile: 702-385-7667
Attorneys for Appellants/Petitioners

6
7 **DISTRICT COURT**
8 **CLARK COUNTY, NEVADA**

8 Dennis E. Rusk, and Dennis E. Rusk)
9 Architect, LLC)

10 Appellants/Petitioners,)

11 vs.)

12 Nevada State Board of Architecture,)
13 Interior Design and Residential Design)

14)
15 Appellee/Respondent.)
16

Case No.: A-17-764562-J
Dept. No.: 29

17 **CERTIFIED REPORTER'S TRANSCRIPT**

18 Attached is the certified Reporter's Transcript of Review, Discussion and Possible Action
19 to Vacate Order Before the James Mickey, Chairman, dated Wednesday, October 25, 2017.

20 Dated this 8th day of December, 2017.

21
22 **NERSESIAN & SANKIEWICZ**

23 /s/ Robert A. Nersesian
24 Robert A. Nersesian, Esq.
25 Nevada Bar No. 2762
26 528 South Eighth Street
27 Las Vegas, Nevada 89101
28 Attorneys for Appellants/Petitioners

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CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of December, 2017, I served a copy of the foregoing
Certified Reporter's Transcript, by depositing the same into the U.S. Mail in Las Vegas, Nevada,
postage prepaid, addressed as follows:

Lois Ling, Esq.
933 Geer Street
Reno, Nevada 89503

Sophia G. Long
Nev. Dep. Atty. General
555 E. Washington Ave., # 3900
Las Vegas, NV 89101

/s/ Rachel Stein
An employee of Nersesian & Sankiewicz

1 CASE NOS.: 08-080R and 11-019R

2

3 NEVADA STATE BOARD OF ARCHITECTURE,
4 INTERIOR DESIGN AND RESIDENTIAL DESIGN

5 -oOo-

6

7 REPORTER'S TRANSCRIPT
8 OF
9 REVIEW, DISCUSSION AND POSSIBLE ACTION TO VACATE 9/27/2011
10 ORDER
11 BEFORE THE JAMES MICKEY, CHAIRMAN
12 WEDNESDAY, OCTOBER 25, 2017

10

11

12 APPEARANCES:

13 For the Board: LOUIS LING, ESQ.

14

15 For Dennis Rusk: ROBERT NERSESIAN, ESQ.

15

16 Members of the Board: James Mickey, Chairman; Kimberly
17 Ciesynski, Secretary/Treasurer; Greg Erny, Ann Fleming, John
18 Klai, John Morelli, Nathaniel Waugh

19

20 Also present: Sophia Long, Esq., legal counsel; Monica
21 Harrison, Executive Director; T. Kenani Aguada, Executive
22 Assistant; Ginger Hahn, public information coordinator; and
23 Laura Bach

24 REPORTED BY: JOHANNA VORCE, CCR NO. 913

25 JOB NO.: 424644

TRANSCRIPT OF PROCEEDINGS - 10/25/2017

<p>1 I N D E X Page 2</p> <p>2</p> <p>3 OPENING STATEMENT: PAGE</p> <p>4 By Mr. Nersesian 9</p> <p>5 By Mr. Ling 18</p> <p>6 By Mr. Nersesian 28</p> <p>7</p> <p>8 Q and A 33</p> <p>9</p> <p>10 BOARD DELIBERATIONS 59</p> <p>11</p> <p>12</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>	<p>Page 4</p> <p>1 MR. MICKEY: So I want to go through --</p> <p>2 MS. LONG: For the record, Sophia Long from the</p> <p>3 Attorney General's Office acting as counsel for the Board.</p> <p>4 MR. MICKEY: So one of the first things I want to</p> <p>5 kind of do is just give everybody a heads up on our agenda</p> <p>6 to make sure we're clear as to what we're going to get</p> <p>7 through today. Need to kind of go through a few</p> <p>8 housekeeping items, kind of talk about the way that we're</p> <p>9 going to let everybody address the Board, Q and A portion of</p> <p>10 it, deliberations, and finally kind of looking at what</p> <p>11 possible actions may come from this.</p> <p>12 So a couple of the things just to remind everybody</p> <p>13 kind of the intent of what we're looking at for in today's</p> <p>14 session. Kind of going back through a number of documents</p> <p>15 here that kind of got us to this issue. But from the letter</p> <p>16 that was sent for everybody on kind of the reminder and the</p> <p>17 invite for this, please note that this agenda item is</p> <p>18 specifically limited to to determine whether the order to</p> <p>19 vacate its September 27, 2011 Order in light of the Schirmer</p> <p>20 Engineering Report and drawings.</p> <p>21 Other than this, the Board will not review any</p> <p>22 additional evidence outside of the original hearing. Also,</p> <p>23 other than this, the Board will not make any other</p> <p>24 determinations. And so when we go through and we look at</p> <p>25 the minutes from the May 22nd District Court Hearing, on the</p>
<p>Page 3</p> <p>1 LAS VEGAS, CLARK COUNTY, NV, WEDNESDAY,</p> <p>2 OCTOBER 25, 2017</p> <p>3 10:04 A.M.</p> <p>4 - cCo-</p> <p>5 (The Court Reporter was relieved of her duties</p> <p>6 under NRCP 30(b) (4).)</p> <p>7 P R O C E E D I N G S</p> <p>8 MR. MICKEY: All right. So we are a little bit</p> <p>9 behind here, but let's reconvene the October 25th, 2017</p> <p>10 Nevada State Board of Architecture, Interior Design and</p> <p>11 Residential Design Board Meeting.</p> <p>12 Next on our agenda is Item 4, the matter to review</p> <p>13 discussion and possible action regarding whether the Board</p> <p>14 would vacate its September 27th, 2011 Order in light of the</p> <p>15 Schirmer Engineering Report and drawings in Case Nos.: 08-080R and 11-019R. And so, if I can ask for the</p> <p>16 appearance for the state and the respondent, if everybody</p> <p>17 would just want to come up and grab a seat. And, please,</p> <p>18 for the record, if everybody could go ahead and introduce</p> <p>19 themselves.</p> <p>20</p> <p>21 MR. NERSESIAN: Good morning. Robert Nersesian,</p> <p>22 Nersesian and Sankiewicz appearing for Dennis Rusk and</p> <p>23 Dennis Rusk Architect, LLC. And with me today is Mr. Rusk.</p> <p>24 MR. RUSK: Dennis Rusk, Architect.</p> <p>25 MR. LING: Louis Ling, Board Counsel.</p>	<p>Page 5</p> <p>1 last paragraph from the judge's order we have it that the</p> <p>2 Board to consider whether it would be appropriate to vacate</p> <p>3 its prior decision based upon the newly discovered evidence</p> <p>4 consisting of the March 6th, 2007 Schirmer Report and</p> <p>5 drawings.</p> <p>6 And so as we all discuss part of the packet</p> <p>7 everybody should have received and has gone through, so</p> <p>8 basically this is what the judge has asked us to take a look</p> <p>9 at. This is what everybody got in terms of that. And then</p> <p>10 for everybody's packet, which was distributed, we have the</p> <p>11 respondent's answer and brief from January 7th, 2015; we</p> <p>12 have the District Court Order dated June 26th, 2017; we have</p> <p>13 the two-day transcript of the Board versus Dennis Rusk</p> <p>14 Hearing dated August 16th and September 1st, 2011 and all</p> <p>15 the accompanying exhibits; we have the Board Order dated</p> <p>16 September 27th, 2011; and then finally, once again, we have</p> <p>17 a copy of the March 6th, 2007 Schirmer Engineering Reports</p> <p>18 and drawings.</p> <p>19 I just want to make sure that that is what</p> <p>20 everybody has been reviewing, everybody has -- that that's</p> <p>21 what our packet is, and that's what we've been going</p> <p>22 through.</p> <p>23 Oh, yes. And then from there, we have the briefs.</p> <p>24 So we have, also, what came in as Judge Wiese's Order. We</p> <p>25 have the brief filed pursuant to the Board's Directive of</p>

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<p style="text-align: right;">Page 6</p> <p>1 8/29/17. Sorry. We have the Board's response to the Board 2 Staff's Hearing Brief versus Judge Wiese's order that was 3 distributed. And then we have the petitioner's reply to the 4 Board Staff's Hearing Brief for Judge Wiese's Order, has 5 also been distributed to everybody. 6 Am I missing anything? Or does everybody 7 understand that that's kind of what -- I believe that 8 quantifies about 1700 pages worth of documents for 9 everybody. So I appreciate everybody's chance to get 10 through that and review it and look at those things. 11 So those are all the items that we have. And once 12 again, going through for the -- all the orders, the 13 paperwork, what we're looking at doing then is go ahead and 14 let the -- address the Board. And then from there, as I 15 mentioned, we're going to go into Q and A. 16 One of the things I do need to ask for everybody 17 is, unfortunately, we've had something come up in which 18 we've got some Board members that need to leave today for a 19 little while. And we're trying to -- we have to split this 20 up. And so we're wondering if you guys would be able to 21 come back at 3:30. 22 What we'd like to do is kind of get through 23 everybody's address to the Board. And if you're able to 24 come back later for Q and A, or if we need to do Q and A 25 this morning. We're just trying to get a gage as to would</p>	<p style="text-align: right;">Page 8</p> <p>1 described because they were not here at the time of the 2 hearing. 3 MR. MICKEY: Okay. 4 MR. WAUGH: Yes. 5 MR. MORELLI: Yes. 6 MS. LONG: Can you identify who's name -- 7 MR. WAUGH: Nathaniel Waugh, yes. 8 MR. MORELLI: John Morelli, residential designer, 9 yes. 10 MS. FLEMING: Ann Fleming, yes. 11 MR. MICKEY: Jim Mickey, architect, yes. 12 MR. LING: Okay. Thank you. 13 The other thing -- and I've heard in your opening 14 presentation that we were going to be limited to not 15 introducing any new evidence. And I do want to make sure 16 that the record is clear. Both Mr. Nersesian and we have 17 attached some exhibits to our briefs. And I want to make 18 sure those are part of the evidence today. Those are things 19 that were generated in the matter before Judge Wiese. And 20 they have been looked at and considered by you. We need to 21 make sure that those are part of the evidence and record in 22 this case so we can refer to them. 23 MR. MICKEY: Yeah. In recognition of the briefs 24 that were filed by both parties as well as the responses, 25 yes.</p>
<p style="text-align: right;">Page 7</p> <p>1 everybody be able to come back about 3:30 so we can finish 2 this up. 3 MR. NERSESIAN: I'm available. 4 Are you available? 5 MR. RUSK: Yes. 6 MR. MICKEY: It's just kind of this Q and A 7 portion as to where if people can return, we can take that 8 break and come back at 3:30, that would be great. 9 MR. NERSESIAN: I'm available, yes. 10 MR. MICKEY: Okay. All right. With that, then 11 thank you everybody for your participation today. 12 And Mr. Nersesian. 13 MR. NERSESIAN: Before I start, may I approach and 14 use the copy that the Board has of the PLS drawings? 15 MR. MICKEY: Oh, these are not drawings. 16 MR. NERSESIAN: There's drawings in there. 17 MR. MICKEY: Oh, yes. 18 MR. LING: Mr. Mickey, if I may, just some 19 preliminary matters. I would like two things, at least 20 request to the Board. One would be that the Board members 21 who were not on the hearing in this matter, and there are 22 four of them, affirm, because we need to do this for 233B 23 purposes, that they have reviewed all the materials. And we 24 need to make sure on the record that they affirm that 25 they've all reviewed the 1700 pages of materials that you</p>	<p style="text-align: right;">Page 9</p> <p>1 MR. LING: And it's the attachments that I'm 2 referring to because those are not evidence from the 3 original hearing in this matter. They are things that came 4 up in front of Judge Wiese, but they've been presented to 5 you to supplement this so you -- for your consideration. I 6 just want to make sure that it's clear on the record that 7 those are part of the record in this matter and we can refer 8 to those. 9 MR. MICKEY: Yes. Correct. 10 So with that, we've got it set up as we originally 11 initiated the agenda that -- 15 minutes for each. And then, 12 Mr. Nersesian, you have five minutes afterwards for any 13 followup. So let the -- 14 MS. LONG: Mr. Nersesian, did you want any sort of 15 two-minute warning, minute warning, for your 15 minutes? 16 MR. NERSESIAN: No. I'll just naturally go over. 17 I have my watch, so okay. 18 MS. LONG: Okay. 19 MR. NERSESIAN: Thank you. 20 OPENING STATEMENT 21 MR. NERSESIAN: Good morning, ladies and 22 gentlemen. My name is Robert Nersesian. For those of you 23 who have not met him before, next to me here is Dennis Rusk, 24 an architect of some accomplishment that has been an 25 architect for decades in Las Vegas. Some of the things you</p>

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<p style="text-align: right;">Page 10</p> <p>1 might know that he has done a few churches, I will give you 2 perhaps he was also the architect and the sole architect on 3 the entirety of Alexis Park. That gives you an idea of the 4 level of stuff he does. And he's done a number of full 5 condominium complexes in town as well.</p> <p>6 Addressing what Mr. Mickey brought up at the 7 beginning, I understand what the Board's letter says. What 8 the judge's order says is that this Board shall consider the 9 petition that was filed by Mr. Rusk. That petition is 10 before you in the evidence. It is not anywhere near as 11 narrow as what I am apparently restrained to talk to. I 12 will attempt to live within those restraints, but understand 13 you're addressing the petition in its entirety and that's by 14 the Court's order.</p> <p>15 In this respect, please don't ignore the initial 16 briefing. And everything in that original filing by the 17 District Court's Order remains before you and is mandated to 18 be considered. And from that initial briefing, three things 19 are evident and also undisputable under the law. And this 20 all relates to the prosecution of Mr. Rusk.</p> <p>21 First, a prosecutor -- I'm sorry. Yeah. First, a 22 prosecutor violates his oath of office and commits 23 prosecutorial misconduct when he makes false statements to a 24 tribunal while knowing they are false towards the 25 prosecution and conviction of the subject of the</p>	<p style="text-align: right;">Page 12</p> <p>1 entire prosecution was based on and Mr. -- and the 2 prosecutor relied upon the statement that "Everything has to 3 be build ready on that initial submittal," which was the 4 pre-submittal in this instance. And Mr. White testified, I 5 think he stated three times, that this is the pre-submittal.</p> <p>6 So, obviously, in a pre-submittal, the idea that 7 you have to have build ready plans is patently not even 8 available because the idea of a pre-submittal is to identify 9 issues that will come up in the submittal.</p> <p>10 In the record of testimony, I believe at Volume 11 II, page 157, the prosecutor directly tells this tribunal at 12 that initial hearing that the fire life safety report was 13 not -- was not part of the original submittal for the Verge. 14 We know -- we absolutely know this is false. By the way, 15 the Verge is the project that all of this is related to.</p> <p>16 And I will quote to you from something the 17 prosecutor said in front of Judge Wiese that -- in the 18 remand order that you're all addressing here today. He 19 says, and I quote, regarding the fire life safety plans, "We 20 all knew it existed." "We all knew it existed."</p> <p>21 Remember Klai, you saw in his deliberations, said, 22 "If these things exist, where are they?"</p> <p>23 The prosecutor asked Mr. Rusk. I don't have -- 24 I -- I -- I didn't say I don't have any. "Where are these 25 mythical plans?" They were in his pocket, and he knew they</p>
<p style="text-align: right;">Page 11</p> <p>1 prosecution.</p> <p>2 Second, and perhaps even more important, a 3 prosecutor cannot offer testimony or evidence which he knows 4 is false.</p> <p>5 Third, when a prosecutor discovers that a tribunal 6 has operated under a mistake of fact, he has a duty to 7 inform them of that mistake.</p> <p>8 Here we have all three things occurring. The 9 record is, frankly, replete of these legal restrictions on a 10 prosecutor. And I'll list a few of them briefly. Eliciting 11 false testimony from the expert, that's Mr. Amor, in the 12 form that Exhibit B from the original hearing contains no 13 fire life safety coordination. And also in that respect, 14 that he was -- he had not -- or Mr. Rusk had not submitted 15 anything regarding fire life safety. Mr. Amor testified to 16 both of those things from his review.</p> <p>17 Second, informing the court that there was no fire 18 life safety submission with the initial submission to the 19 Court -- to Las Vegas. That's from both the prosecutor and 20 Mr. Amor. And eliciting false testimony from his expert to 21 the effect that the initial pre-submittal, pre-submittal -- 22 you got in my last brief testimony that shows that this 23 initial submittal everybody was talking about was a 24 pre-submittal for the very purpose of identifying issues and 25 moving forward with the actual submittal. And yet, the</p>	<p style="text-align: right;">Page 13</p> <p>1 existed. And yet, he continued a prosecution pretending 2 that what I'm holding up here, the Schirmer Engineering 3 Report, filed with the City of Las Vegas, and that's law of 4 the case here. District Court has determined that it was 5 filed with the City of Las Vegas on March 6th, 2007, which 6 is the date of the entire submittal, was so filed. And the 7 prosecutor was telling the members of the Board, "No, it 8 doesn't exist. There's no such thing."</p> <p>9 And then the other thing, even when you look at 10 the briefing, is, "Well, this deals with lack of 11 coordination. That's really what this was about." Well, it 12 wasn't. You can look at the record, and it was the fact 13 that there was nothing like this anywhere. And as I said in 14 the deliberations, remember Klai and the person on the Board 15 he was speaking to, recognized and reacted to the fact that 16 this very document that I'm holding up did not exist in 17 convicting Mr. Rusk. And it does exist, and it's right here 18 before you, and it came from the Board's files, and the 19 prosecutor knew it existed and repeatedly alluded and at one 20 point even stated "There's no such thing." That's 21 prosecutorial misconduct personified.</p> <p>22 I want to point out a couple other things about 23 this report. Other arguments are, "Well, this isn't 24 Mr. Rusk's." Right on the face of it, "Prepared for Dennis 25 E. Rusk, Architect." It is his. He hired or worked with an</p>

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<p style="text-align: right;">Page 14</p> <p>1 engineer to provide him with the documents to submit to the 2 City. And it says right on the front. They're his. Yet 3 the prosecutor was presenting an entire case based on the 4 fact that there wasn't any of this.</p> <p>5 And to bring this full circle, as to the lack of 6 due process that was provided here, for those of you who 7 were at the original hearing, Exhibit B, which is in your 8 package as submitted in the original hearing, I believe were 9 eight-and-a-half-by-eleven reductions of full sheets. And 10 Amor, stated that there was no fire life safety coordination 11 and, in fact, Exhibit B was devoid of fire life safety. 12 That was the testimony elicited by the prosecutor through 13 its expert at the hearing convicting Mr. Rusk. "No fire 14 life safety coordination in Exhibit B." Again, 15 eight-and-a-half-by-eleven reductions.</p> <p>16 The fact is, also from the very digital copy you 17 have been provided, we made full size blowups. And I bring 18 them here today, and I will leave them with you to review as 19 well. And you can compare them with the Exhibit B that was 20 used at that hearing. Here's the front page. Right at the 21 top and compare it -- this is the very Exhibit B you've been 22 provided that the prosecutor elicited testimony and thus 23 must have reviewed that was devoid of fire life safety and 24 did not coordinate with the Schirmer Fire Life Safety 25 Report.</p>	<p style="text-align: right;">Page 16</p> <p>1 report submitted by Mr. Rusk, as he testified and now known 2 to exist. There are three color and four color drawings on 3 extended sizes paper. Again, Mr. Amor testified there were 4 only 52 drawings submitted in the initial submittal. I 5 think he missed 30 of them and didn't include them in his 6 testimony upon which Mr. Rusk was convicted.</p> <p>7 Also, I would point out that he likely didn't 8 include them because he didn't know about them. And how 9 doesn't he know about them? The only way that this doesn't 10 exist in Mr. Amor's file is it was never shown to him. 11 Never.</p> <p>12 And what is -- and then the prosecutor elicits 13 testimony that this doesn't exist. That is the presentation 14 with knowledge of false testimony drawing toward a 15 conviction. And look at the decision. The decision turns, 16 turns on the absence of exactly what I'm telling you.</p> <p>17 The test for whether or not to vacate is whether 18 or not substantive due process was met. And substantive due 19 process fails in the face of prosecutorial misconduct. It 20 fails in the instances where false testimony with knowledge 21 of the prosecutor is presented. And again, he said to Judge 22 Wiese, "We all knew these were there." He knew it. It was 23 with knowledge. It was withheld. And the testimony 24 elicited was false. And the decision that was entered, the 25 decision that was entered, was based on false evidence.</p>
<p style="text-align: right;">Page 15</p> <p>1 As you go through this, you will see the fire code 2 is repeatedly cited. There are fire ratings for given walls 3 throughout Exhibit B. There is a pressurized vestibule for 4 the elevators, which is a critical fire fact- -- safety 5 factor that is incorporated in Exhibit B. There are plans 6 for and designation of a fire control room in Exhibit B. 7 The prosecutor and the prosecutor's expert told all of you 8 at that hearing, "There's no fire life safety." You have it 9 in front of you. And as you look at these blowups, you can 10 read it. It was a direct misrepresentation to this Board 11 that there was no fire life safety coordination in the 12 original exhibit.</p> <p>13 If you look at the original exhibits, in the 14 eight-and-a-half-by-eleven stature, they're unreadable. 15 Now, this is the actual digital copy that is -- that is 16 being left here for you. And it has been blown up to a size 17 you can read. I don't know what Mr. Amor was given by the 18 prosecutor, but if he said there's no fire life safety in 19 Exhibit B, he would have been given 20 eight-and-a-half-by-eleven unreadable sheets.</p> <p>21 Why does that happen and how does that comport 22 with due process to misrepresent to the Court or to you that 23 there's no fire life safety when it's everywhere? It's 24 everywhere in the 76-page report.</p> <p>25 I want you to note the drawings that are on this</p>	<p style="text-align: right;">Page 17</p> <p>1 Look to the decision and you'll see that.</p> <p>2 I realize I'm running out of time. So to try and 3 fool Ms. Long and not go over, I will sum up with don't -- 4 oh, one other quick thing. Don't get side tracked by the 5 draft indicator. It was filed. That's what it says. And 6 the draft indicator is a draft because it is exactly what it 7 was supposed to be, an initial submittal on a pre-submission 8 for review by the City for issues to be identified.</p> <p>9 It exists, and it's there.</p> <p>10 Cutting to the chase, this tribunal determined 11 that Mr. Rusk ignored FLS issues. It determined that he was 12 a liar because he said this existed. We now know that 13 that's false. Somebody was lying, but it wasn't Mr. Rusk. 14 He told the truth when he said that this was submitted. It 15 is now determined as a matter of law that he told the truth. 16 And he was denied due process by the prosecutor, with 17 knowledge saying --</p> <p>18 MS. BACH: Time.</p> <p>19 MR. LING: -- or convincing you that he was a 20 liar.</p> <p>21 So with all of that, if the false statements are 22 known and material, and obviously in the decision they are 23 material, vacation of the decision is actually mandated by 24 law. And that's what I ask that this Board do.</p> <p>25 Thank you.</p>

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<p style="text-align: right;">Page 18</p> <p>1 MR. MICKEY: Thank you, Mr. Nersesian. 2 Mr. Ling. 3 OPENING STATEMENT 4 MR. LING: Thank you, Mr. Chairman, members of the 5 Board. 6 I guess let's start with the question how we got 7 here today. This matter came to us as a complaint in 2008 8 from the owners and developers of this particular project, 9 the Verge, and we started investigating. Nothing terribly 10 unusual about that. That's what we do. 11 We investigated the case. We ultimately 12 determined that Mr. Rusk, in our judgment, had been 13 negligent in some of his activities related to this, so we 14 charged up the case and off we go to hearing. 15 When this matter started, Mr. Rusk was represented 16 by counsel, and we worked with counsel before a hearing. 17 Counsel pulled out just before the hearing. What's 18 important about that to know is simply that prehearing we 19 had presented to Mr. Rusk, through his counsel, the 20 documents we intended to introduce into evidence. So they 21 knew before the hearing. 22 At the hearing -- and we've put this in our 23 brief -- Mr. Rusk stipulated to the admission of the 24 exhibits. So he had reviewed them, knew what we were going 25 to be presenting to the Board, knew that the Schirmer Report</p>	<p style="text-align: right;">Page 20</p> <p>1 pulled out of the record and stitched together to say, 2 "Here's an argument that Mr. Ling was a bad guy," was 3 presented to Judge Israel. Didn't avail. Okay. Judge 4 Israel did not hold that I had committed prosecutorial 5 misconduct. And, in fact, he upheld the order. 6 This has already been litigated once. Okay. 7 They then appeal this matter to the Supreme Court. 8 And the final order from the Supreme Court was in May of 9 '14, and they dismissed Mr. Rusk's appeal. And in -- in any 10 other case, that's the end of the hunt. Okay. 11 You've appealed it. You've gone as far as you 12 can. And it's -- the Board's Order has been upheld all the 13 way along the way. 14 So then what happens and how did we get here? Why 15 are we sitting here today if the matter is over as of May of 16 '14? 17 Well, here's how we get there. 18 In August of '14, they serve a subpoena duces 19 tecum on the Board in a related case in which Mr. Rusk and 20 the developers on this project were in litigation. We give 21 them our access to all of our boxes. We don't care what 22 they look at. All we make sure of is that they tagged 23 everything they wanted copied. Okay. 24 Mr. Nersesian and I worked that out. He came in, 25 he looked at everything, tagged a bunch of stuff, copied it.</p>
<p style="text-align: right;">Page 19</p> <p>1 was not contained in our submittal, never was, stipulated to 2 that and so those were put into evidence. 3 We have our hearing. Okay. That's in 2011. The 4 Board issues its order in September of '11. And in that 5 Board Order you did not revoke Mr. Rusk's license. You did 6 find that he committed acts of negligence related to the 7 Verge Project. And what you did is you ordered -- largely, 8 your order was remedial. You ordered him to go take some 9 classes so that he could show you and the public that he did 10 have the code knowledge to which the case seemed to evidence 11 that he did not have. And you ordered that that all be done 12 by March of 2012 and that he submit evidence to you that 13 that was done. 14 Mr. Rusk did not follow through with the order. 15 And in May of 2012, this Board suspended him because he did 16 not comply with your order. He's been suspended ever since 17 then. 18 That matter then gets appealed, and we go to Judge 19 Israel. And we go through the whole briefing process in 20 front of Judge Israel. And that all ends up in an order in 21 August of 2012. And Judge Israel completely upholds all of 22 your Findings of Fact Conclusions of Law and order. 23 And what is important to know for these 24 proceedings is these very same arguments about my alleged 25 prosecutorial misconduct, the very same quotations that were</p>	<p style="text-align: right;">Page 21</p> <p>1 We don't hear anything more about this until January of '15. 2 So keep in mind that's, what, a year -- no, that's six 3 months or so. We hear nothing. And then suddenly we get 4 this writ of coram nobis that you're looking at today. And 5 suddenly we are hearing about how they have, quote, 6 discovered that this document was in our files. Oh, golly 7 gosh. And now they didn't know about that. I will go into 8 that in a bit. That discovery is false. Okay. That's 9 untrue. And that those serve as the very basis for their 10 writ of coram nobis that they brought to you today. 11 You issue your order denying the writ of coram 12 nobis in February of this year. We go to hearing in front 13 of Judge Wiese on that. That was in May. And in June, 14 Judge Wiese issues the order. That's how we get here. 15 We shouldn't be here. This has already been 16 resolved. The Supreme Court dismissed the appeal years ago. 17 We're here because of this claim, and it is only a claim, 18 that they, quote, discovered this document when they 19 executed the subpoena in August of '14. They didn't. Okay. 20 We've presented evidence to you in our brief, 21 starting at page 1674 of your packet. Let me get there. 22 And what that is -- what page 1674 is, this was documents 23 that was presented to Judge Wiese. I'm almost there. 24 And what this first document was is it is a letter 25 from Mr. Rusk to us in the course of the investigation, so</p>

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<p style="text-align: right;">Page 22</p> <p>1 this is back in 2010, in which Mr. Rusk tells us and does 2 give to us this document. He's the one that brought it to 3 us in 2010.</p> <p>4 So is he -- could he possibly be surprised to find 5 that in our files? Obviously not. He gave it us. And 6 that's on page 1674.</p> <p>7 This is a letter from Mr. Rusk to the Board, to 8 Gina and Laura. And he says in that letter, "I'm also 9 providing you with the fire protection report from Schirmer 10 Engineering submitted 3/6/2007." Here it is. He gave it to 11 us.</p> <p>12 Later we have our hearing. It's a couple days 13 after the hearing. Mr. Rusk writes a letter to you, to the 14 Board, in which he says -- this is now August 19, 2011 -- 15 "Upon returning to file away the documents from the hearing 16 of August 16, 2011, I found a box with documents from the 17 City of Las Vegas with the first submittal of the highrise 18 fire protection report for the Verge Project by Schirmer 19 Engineering, dated March 6th, 2007."</p> <p>20 He's writing to you three days after the hearing 21 saying: I looked in my boxes. There it was. I had it. 22 Okay.</p> <p>23 Later in the appeal to Judge Israel, he then 24 submits a sworn statement to Judge Israel. And in that 25 sworn statement he says, "In June of 2010, I received a call</p>	<p style="text-align: right;">Page 24</p> <p>1 saying this all along.</p> <p>2 You're getting a misrepresentation today of the 3 function of the Schirmer Report. The function of the 4 Schirmer Report was not to provide a set of drawings that 5 Mr. Rusk was going to hand to the City of Las Vegas and have 6 them interweave with his documents. No. This is a report.</p> <p>7 They looked at his documents, and they gave him 8 their expert review of it and said, "You're missing certain 9 things." And look at the letter submitted on February 6th, 10 2007. This was in your packet originally in this hearing.</p> <p>11 In that letter, they are telling Mr. Rusk -- 12 Schirmer is telling Mr. Rusk, "We've looked at your drawings 13 from January of 2007 and your drawings, Mr. Rusk, your 14 drawing are missing the following life safety elements."</p> <p>15 He knows this a month before he makes his first 16 submittal. He gets this expert review from Schirmer and 17 Schirmer says, "These things need to be in your drawings." 18 What does he submit? That's what you looked at in the 19 hearing of this matter, and that's what Mr. Nersesian has 20 now blown up for you.</p> <p>21 We only submitted to Mr. Amor, we only submitted 22 to you, Mr. Rusk's work product. Why? Because he has to be 23 able to defend his work product. He has to be able to show 24 you that his work product was or was not negligent. He has 25 to be able to show you therefore that the life safety</p>
<p style="text-align: right;">Page 23</p> <p>1 from Chazz Reinholt at the city." He had a bunch of plans 2 and stuff I'm going to get to in part here I had. "The set 3 I received from Mr. Reinholt was the original set received 4 by the City and stamped on the first page March 6th, 2007, 5 City of Las Vegas. On October 4th, 2010, I," Mr. Rusk, 6 "personally gave this original document to Laura Bach, the 7 investigator for the Board, at a meeting I had with her at 8 the Board's office.</p> <p>9 So there's Mr. Rusk, again, confirming that in 10 2010, he gave this to us. Okay.</p> <p>11 So can you possibly and actually and truthfully be 12 surprised when you show up in 2014 and execute a subpoena 13 and you find the very document you gave us? That is not a 14 surprise. That is not a newly discovered evidence.</p> <p>15 That is them making a misrepresentation to Judge 16 Wiese and to this Board that this was somehow newly 17 discovered evidence that I had hidden from people.</p> <p>18 I did not hide it. The Board's staff did not hide 19 anything from Mr. Rusk. We were as up front with him as we 20 could be. Prior to hearing, we told him what we were going 21 to submit. It did not contain the Schirmer Report.</p> <p>22 At hearing, he again saw those documents and 23 stipulated to them knowing the Schirmer Report was not in 24 there.</p> <p>25 And here's why it doesn't matter. And we've been</p>	<p style="text-align: right;">Page 25</p> <p>1 elements that were identified to him by Schirmer were, in 2 fact, properly incorporated into his drawings.</p> <p>3 He did not. They were not. We know that as a 4 matter of fact because the very first submittal that was 5 reviewed by the City came up with a whole long list of plan 6 review comments, that they were completely deficient in fire 7 life safety in his work product, Mr. Rusk's work product.</p> <p>8 The city did have this, and they were comparing 9 his drawings, Exhibit B in your hearing, to this. And they 10 were saying, "This says you got to have this. This says you 11 got to have this." And there was a whole long list of those 12 things that were not in Mr. Rusk's drawings.</p> <p>13 Now, Mr. Rusk only wins and only shows to you that 14 he has not committed negligence if you find that the 15 standard of care is met when an architect files deficient 16 plans but files a binder full of a report from an engineer. 17 That's not the standard of care.</p> <p>18 It wasn't the standard of care as it was presented 19 to you. It's not the standard of care today. The standard 20 of care is you take the engineer's report, you build it into 21 your drawings. And that way when the plan checker looks at 22 those drawings, he can see, "Oh, yeah, there's all that fire 23 life safety stuff is in here. Good for him."</p> <p>24 That's not what happened here. Okay. There is no 25 case law. There's been no evidence. There is no</p>

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<p style="text-align: right;">Page 26</p> <p>1 standard-of-care evidence presented to you that simply 2 filing this binder satisfies the architect's obligation. 3 It's not true. That's not the law. 4 So you found that he committed negligence based on 5 his work product. You looked at his drawings. You looked 6 at the first 72 pages, and then you looked at the subsequent 7 54 pages that it took for him to finally get this approval. 8 By the way, he hasn't said this, but this 54 pages 9 he submitted, which finally got the fire life safety issues 10 all dealt with, who drew those? He did. Schirmer didn't 11 draw those. He didn't submit Schirmer's plans in there to 12 fill in those gaps. He finally got around to doing it 13 himself. It took him nine months. It took him 54 extra 14 sheets. And he finally got there. Okay. But when he did 15 that, all of that is evidence of the negligence. 16 Also, he wants to say that this is exculpatory 17 evidence. That means in the law that is that had this been 18 in front of you that would have proven he didn't commit 19 negligence. But I ask you, and we would submit, look at 20 the -- what this actually proves. 21 This proves that the day he submitted his first 22 set of drawings, he just got this. That's been his 23 testimony all along. So how could he have read this, built 24 it into his drawings, and actually satisfied his legal 25 obligation to his client when he just gets it that day and</p>	<p style="text-align: right;">Page 28</p> <p>1 producing a document that we did not need to provide to 2 prove our case. Thank you. 3 MS. LONG: Just real quick. Nersesian has another 4 five minutes. John, we know you need to go. 5 MR. KLAI: I do. 6 MS. LONG: So the court reporter will be back at 7 3:30; is that correct? 8 THE COURT REPORTER: Um-hmm. 9 MS. LONG: So the court reporter should have -- by 10 3:30, do you think you can have the five minutes that 11 Mr. Nersesian says transcribed? 12 THE COURT REPORTER: Yeah. 13 MS. LONG: Okay. And then Mr. Klai can review it 14 before -- okay. Sounds good. Thank you. 15 REBUTTAL OPENING STATEMENT 16 MR. NERSESIAN: Thank you again. 17 I can't believe this keeps going on. You were 18 just told by the prosecutor, you were told that this is the 19 same issue that was on appeal. I will bring back this 20 afternoon, if you have questions about it, a copy of his 21 briefing to Judge Israel about this issue. 22 He is saying because what Mr. Rusk had at that 23 time, I think it was a May 23rd copy of this, because that's 24 what he had in his files, and he said, "Here's evidence that 25 it existed." He didn't say that this was what was</p>
<p style="text-align: right;">Page 27</p> <p>1 walks down and just throws the binder at the City and says, 2 "Here, here's my drawings, and here's this binder full of 3 stuff from my engineer, figure it out." That's not what an 4 architect is supposed to do. That is not coordination. 5 Mr. Rusk -- I would -- I would invite you, if you 6 want to, come on up and look. It's easier to read on the 7 big old drawings here. Mr. Rusk never included Schirmer -- 8 MS. BACH: Time. 9 MR. MICKEY: Okay. Thank you. 10 -- Schirmer in his own team. It's not on his 11 drawings. 12 If I may, my conclusion, we would simply ask that 13 you deny the motion for writ today. It's based on a false 14 premise. And that false premise therefore should not be 15 allowed to sustain an additional review beyond what the 16 Supreme Court has already dismissed. 17 We would ask in doing so that you find that 18 Mr. Rusk did not satisfy his professional obligation and was 19 negligent. You should also discuss this Schirmer Report 20 today and decide whether that actually changes your 21 conclusion as to whether he committed negligence. 22 We need you to -- we are asking you to find that 23 this whole concept of discovery, this discovery of this new 24 evidence is false. And we are asking that you find that no 25 prosecutorial misconduct was committed therefore by not</p>	<p style="text-align: right;">Page 29</p> <p>1 submitted. He said, "Here's evidence that it existed." And 2 he attached a May 23rd later iteration of the same report. 3 And what does the prosecutor on that appeal say? 4 He says even now Mr. Rusk cannot come forward with any 5 report that was submitted, that was submitted with his 6 initial submission. He is doubling down on the idea that 7 there's no such report. And you saw it in the places I 8 cited in the transcript. He said there's no such report. 9 And the question is: Is there? And, yes, there is. And 10 that was falsely represented to the Court. 11 Now, coordination, you now have the documents. 12 Remember, Amor said there's nothing in there about fire life 13 safety, and he harped on that. He said the same thing that 14 White testified, that there was an absence of FLS. It's all 15 in here. And if you look at this Exhibit B blown up where 16 you can actually read it and compare it with the FLS 17 submitted on March 6th, they correlate directly. 18 Also on coordination, Mr. Rusk did testify that he 19 coordinated. He said he was meeting weekly, weekly with all 20 of the engineering specialties. And when you look at 21 Exhibit B, you have to conclude that Schirmer was one of 22 them. Just because there's an ultimate report submitted 23 does not show lack of coordination. And the evidence showed 24 total coordination, especially, again, when you look to 25 Exhibit B and see the fire life safety elements, which the</p>

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<p style="text-align: right;">Page 30</p> <p>1 expert said didn't exist and which Mr. Ling told you did not 2 exist at that hearing.</p> <p>3 The Court has called this new evidence. Mr. Ling 4 went off just now on a whole thing about how this is not new 5 evidence, Mr. Rusk knew about it, he wrote letters years 6 earlier saying, and he told you exactly where it went. "I 7 gave this," this is what he said in the letter by Mr. Ling 8 to Ms. Bach. He doesn't have it. He gave it to the Board 9 by that letter. Why does that mean he -- that just shows 10 that he expected them to understand and make sure that this 11 was presented, and it wasn't. It was withheld. Mr. Klai 12 noticed it was withheld. The decision notes it was 13 withheld. The decision. If this wasn't withheld, how can 14 the decision say Mr. Rusk lacked credibility and there was 15 no such document? It's right here.</p> <p>16 As to discovery, it's true, if Mr. Rusk had this, 17 he would have attached it to the appeal. He would have 18 submitted it. It was with the Board, as the letter said. 19 And they withheld it. That's it.</p> <p>20 This was prosecutorial misconduct. This was 21 convicting this gentleman. And by the way, why isn't this 22 suf- -- sufficient in, as Mr. White testified to, a 23 pre-submittal, which is for the purpose of identifying 24 issues? That's exactly what you do, pre-submittal. I cited 25 line and verse in the documentation where it was stated that</p>	<p style="text-align: right;">Page 32</p> <p>1 not discuss it either amongst yourselves or with anyone 2 else.</p> <p>3 MR. MICKEY: All right.</p> <p>4 MR. NERSESIAN: I will also leave Exhibit B for 5 anybody who wants to look at it. And I will be available 6 when I come back, or I'll stay right now and point out the 7 FLS elements of Exhibit B that Mr. Amor testified did not 8 exist.</p> <p>9 MR. MICKEY: Thank you for your offer, but we 10 can -- within the rules of -- we're taking a break, no 11 further discussions or anything until we reconvene.</p> <p>12 MS. LONG: Correct. But as Mr. Nersesian stated, 13 in the interim if you wanted to individually go up and look 14 at the drawings, please feel free to do so.</p> <p>15 MR. MICKEY: Apologize for the break, but thank 16 you for helping us out with this. And we will reconvene on 17 Agenda Item No. 4 at 3:30 p.m. this afternoon. 18 (Recess taken.)</p> <p>19 MR. MICKEY: It looks like we are on 3:30 here, so 20 thank you everybody for allowing us to take this break in 21 between this. Kind of get back on track here.</p> <p>22 The one thing that I do want to make sure is that 23 as you are doing with the petitioner's rebuttal was 24 transcribed and has been put together. John, you've been 25 given a copy of it and have had a chance to now start to</p>
<p style="text-align: right;">Page 31</p> <p>1 this was a pre-submittal.</p> <p>2 How do you conflate pre-submittal with "This has 3 to be perfect," which was what Amor said. "It has to be 4 buildable on the initial submission."</p> <p>5 Now, I can't say most of you put plans and 6 products through review for approval with city agencies. 7 The idea that an 11-story highrise with a novel construction 8 methodology would be submitted in a pre-submittal without 9 any comments whatsoever -- nobody did this at the time, but 10 Amor's testimony was patently ridiculous. As also cited, 11 Mr. White specifically testified at the hearing, you can 12 expect --</p> <p>13 MS. BACH: Time.</p> <p>14 MR. NERSESIAN: -- with the pre-submittal four 15 submissions in total.</p> <p>16 Everything that Mr. Rusk was convicted on, or 17 material things that he was convicted on, did not exist. 18 The law says in that circumstance when the prosecutor knew 19 the truth, it must be vacated. We ask you to follow the 20 law. Thank you.</p> <p>21 (Discussion off the record between 22 Ms. Long and Mr. Mickey.)</p> <p>23 MS. LONG: So we're going to table Agenda Item 4 24 until 3:30 this afternoon. So just a reminder for the Board 25 members that this is still an open agenda item, so please do</p>	<p style="text-align: right;">Page 33</p> <p>1 review it. I just want to affirm that he is the one we 2 wanted to make sure had copies of all that stuff, so we got 3 that in place.</p> <p>4 So from here, I believe on our agenda we were 5 getting ready to move into the question-and-answer kind of 6 session. And so for everybody here on the Board you've got 7 an opportunity to ask Mr. Rusk, Mr. Ling, our staff, or 8 amongst each other here if we have any questions or anything 9 we would like to bring up, kind of go through that in an 10 open forum.</p> <p>11 Once we finish with Q and A, then we'll kind of 12 move into Board deliberation. And then from there, we move 13 into any possible actions. That's kind of what is left on 14 the agenda for getting through some of this. So kind of 15 start it off here on the Board and just start at this end.</p> <p>16 So, Greg, is there anything for you that you 17 would -- any questions or anything that you would kind of 18 like to start leading up or go through anything?</p> <p>19 Q and A</p> <p>20 MR. ERNY: I guess I would ask --</p> <p>21 MS. LONG: Just to be clear.</p> <p>22 MR. ERNY: Go ahead.</p> <p>23 MS. LONG: The -- if you have questions of the 24 parties, it's -- we're not in Board deliberation. So if you 25 have comment, just hold that off until Board deliberation.</p>

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<p style="text-align: right;">Page 34</p> <p>1 MR. ERNY: Okay. Understood.</p> <p>2 I would ask Mr. Rusk or counsel that it's my</p> <p>3 understanding, based on your position, that this document we</p> <p>4 believe to be the responsibilities as an architect to</p> <p>5 integrate the iterations of references at sections of codes</p> <p>6 and what have you and to the documents for the -- in the</p> <p>7 design and construction documents in the file, is that -- is</p> <p>8 that what I'm --</p> <p>9 MR. NERSESIAN: Not the least, Mr. Erny. And I</p> <p>10 apologize for being contentious right from the start. But</p> <p>11 no. That's not what this is about at all. Okay.</p> <p>12 It does not necessarily relieve Mr. Rusk of the</p> <p>13 question of law or mixed law and fact as to whether or not</p> <p>14 or what level of coordination has to be there.</p> <p>15 What it does is it goes to the decision of this</p> <p>16 Board. If you recall, Mr. Rusk at the hearing testified and</p> <p>17 wanted to cross-examine, for example, Mr. Amor about what</p> <p>18 that type of document does with respect to his obligations.</p> <p>19 And if you go back to the decision -- not the decision, the</p> <p>20 record, you will see that at that point Mr. Ling steps up</p> <p>21 and says, "Objection." And then he goes off on this</p> <p>22 diatribe about Mr. Rusk, again, trying to get that in to ask</p> <p>23 questions about and says, "There is absolutely no evidence</p> <p>24 that such a document exists, and Mr. Rusk hasn't produced</p> <p>25 it." I think he even goes, "And where is this document?"</p>	<p style="text-align: right;">Page 36</p> <p>1 MR. NERSESIAN: Your question was: Is it my</p> <p>2 position that this satisfies the coordination requirement,</p> <p>3 and I said, no, my position is X. That is directly</p> <p>4 responsive.</p> <p>5 Moreover, as to the coordination requirement, as I</p> <p>6 said, it's a mixed question of law and fact, and there was</p> <p>7 mixed testimony from two experts as to what level of</p> <p>8 coordination is necessary, especially in unbundled services.</p> <p>9 But that being said, all of this is moot because</p> <p>10 now with the blowup of Exhibit B you can see that Mr. Rusk</p> <p>11 was also telling the truth, that he had regular meetings</p> <p>12 with all of the engineering professionals, and he</p> <p>13 incorporated what they were doing into his initial submittal</p> <p>14 for the pre-submittal process. And it's here now at a size</p> <p>15 you can see it, and it has the fire life safety at that</p> <p>16 level for that stage within it.</p> <p>17 Again, fire control room is in here. It cites to</p> <p>18 firewall ratings. It cites to the fire code repeatedly.</p> <p>19 Exhibit B, it has all of the exit planning that you also see</p> <p>20 in the Schirmer Report incorporated. The idea that there</p> <p>21 was a lack of coordination is itself a misnomer from the</p> <p>22 very exhibits, all be it in miniature and unreadable size</p> <p>23 presented during the hearing, that are now here and show</p> <p>24 that this very coordination, which Mr. Ling was representing</p> <p>25 never existed, and indeed that there -- I think, yes, you'll</p>
<p style="text-align: right;">Page 35</p> <p>1 And the answer was it was in his pocket. His entire</p> <p>2 objection was fabricated.</p> <p>3 This is about justice at a hearing. And when the</p> <p>4 prosecutor stands up and says that this doesn't exist and</p> <p>5 I'm objecting to Mr. Rusk even bringing it up, when the</p> <p>6 prosecutor knows, one, that it does exist and, two, talks</p> <p>7 about how it doesn't exist to the tribunal in the middle of</p> <p>8 the hearing -- during and hearing and convinces all of you,</p> <p>9 as indicated in the decision, that, one, Mr. Rusk is a liar</p> <p>10 because he said this exists and, two, that the entire</p> <p>11 submittal, and this was a part of the submittal, was devoid</p> <p>12 of fire life safety.</p> <p>13 Those are in the decision. That's the basis of</p> <p>14 the decision. And it was false. And Mr. Ling pretending</p> <p>15 and leading the Board to believe that there is no such thing</p> <p>16 as a Schirmer Fire Life Safety Report was material to the</p> <p>17 decision. And he did lead the Board to believe it. He even</p> <p>18 said in his closing argument it doesn't exist. Okay. But</p> <p>19 it did, and he had it, and that was a misrepresentation to</p> <p>20 the Board. And it was a misrepresentation directly</p> <p>21 prejudicial to Mr. Rusk. Now --</p> <p>22 MR. MICKEY: Mr. Nersesian, please. Your question</p> <p>23 was the relevance of the document. It's not --</p> <p>24 MR. ERNY: You haven't answered my question.</p> <p>25 You're taking it down another --</p>	<p style="text-align: right;">Page 37</p> <p>1 see it. "Exhibit B is devoid of fire life safety." That's</p> <p>2 what Mr. Amor said. You now know that that was a false</p> <p>3 statement. And from the plans, as they existed in full size</p> <p>4 which had to be reduced by the prosecutor, the prosecutor</p> <p>5 knew that too.</p> <p>6 This was a denial of due process. But we are not</p> <p>7 here to test whether or not Mr. Rusk was negligent or not</p> <p>8 negligent. The vacation of a decision is premised on</p> <p>9 whether or not he was afforded due process through the</p> <p>10 presentation, in this case, by the prosecutor by -- through</p> <p>11 our allegations. And I believe that -- and I hope you</p> <p>12 agree -- that the evidence shows that the prosecutor played</p> <p>13 hide the ball, did it throughout, and then relied on what he</p> <p>14 hid, which just very briefly and I'll tie --</p> <p>15 MR. MICKEY: Mr. Nersesian, please.</p> <p>16 MR. ERNY: You're taking the discussion someplace</p> <p>17 totally beyond where I was asking the question.</p> <p>18 MR. NERSESIAN: Okay.</p> <p>19 MR. ERNY: And I'm satisfied with your response at</p> <p>20 this point.</p> <p>21 MR. NERSESIAN: All right. Thank you.</p> <p>22 MS. FLEMING: No questions.</p> <p>23 MS. LONG: No questions.</p> <p>24 MR. MICKEY: Kim?</p> <p>25 MS. CIESYNSKY: I have two questions.</p>

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<p style="text-align: right;">Page 38</p> <p>1 First of all, to Laura. I just want to be really 2 clear. On September 7th, 2010, there was a letter to you 3 from Mr. Rusk saying that I don't know what documentation is 4 in the Board's possession, that has difficulty identifying 5 what would be most helpful, so he wanted to come in and look 6 at these documents and then also what the building 7 department has. 8 So you had everything. Did Mr. Rusk come in and 9 see you and look at these documents? Did you hide anything? 10 I mean, I just want to know what the procedure is for that. 11 MS. BACH: He came in with his expert witness 12 Mr. Fielden, and they -- they came in twice. The first time 13 it was -- they met with the previous executive director and 14 myself, and we asked questions of them. Then they came back 15 a second time and actually looked up all the -- the drawings 16 that we had. And Mr. Rusk was addressing questions from 17 Mr. Fielden, and I was just in here with them. 18 MS. CIESYNSKY: And was the Schirmer Report there 19 then? 20 MS. BACH: I don't believe so. 21 MS. CIESYNSKY: Okay. When did -- did -- when did 22 you receive that? I guess I'm confused on when you got 23 that. 24 MS. BACH: I got that from Mr. Rusk prior -- I 25 believe prior to the hearing.</p>	<p style="text-align: right;">Page 40</p> <p>1 MS. LONG: Correct. 2 MS. CIESYNSKY: And then still -- 3 MS. LONG: Be licensed, correct. 4 MS. CIESYNSKY: -- be licensed, but then go -- go 5 to court and try to prove himself another way and got the 6 money back, essentially, if he would have won; is that right 7 or how does that work? 8 MS. LONG: I'm sorry. When you say "got the money 9 back"? 10 MS. CIESYNSKY: Well, I'm just saying that if he 11 paid a fine and then the courts found in his favor, that we 12 could have given him his money back, that that wouldn't 13 preclude him from going and arguing that he did nothing 14 wrong and -- 15 MS. LONG: Definitely true. But it is his case, 16 so he's allowed to move forward as he wishes. 17 MS. CIESYNSKY: Okay. 18 MS. LONG: So right. 19 MS. CIESYNSKY: There was no impediment if he -- 20 if he had paid the fine -- 21 MS. LONG: Right. Correct. 22 MS. CIESYNSKY: Okay. 23 THE COURT REPORTER: If he had paid the what? 24 MS. CIESYNSKY: Paid the fine and taken the 25 classes.</p>
<p style="text-align: right;">Page 39</p> <p>1 MS. CIESYNSKY: Prior to the hearing. Okay. 2 Okay. That makes sense. All right. At that moment, you 3 didn't have it. 4 And then the second question I have for Sophia. I 5 mean, taking someone's license away is -- is very unsettling 6 and not something that, you know, I certainly want to do. 7 If -- if somebody is found, like Mr. Rusk, to be 8 in violation and he has these requirements, can he do those 9 requirements but then still come back and say -- you know, 10 going through the court and then get his money back or 11 whatever. How does that work where he could have gotten his 12 license back five years ago, I'm thinking? I don't know. 13 MS. LONG: Well, I believe it might be a question 14 for Laura. I think my understanding was the reason why his 15 license was taken away is because he did not comply with the 16 Board Order, and then when he went back to -- I think his 17 license expired to reapply, I think. He was told to, I 18 guess, comply with the Board's Order and he possibly could 19 get his license back. So it's just the fact that right now, 20 as he sits, he hasn't complied with the Board Order. 21 MS. CIESYNSKY: Okay. 22 MS. LONG: And I believe that's my understanding 23 of it, so... 24 MS. CIESYNSKY: But he could have complied with 25 the Board Order?</p>	<p style="text-align: right;">Page 41</p> <p>1 So essentially, he could have had his license back 2 five years ago. 3 MS. LONG: Well, at that time, he could have done 4 whatever he wanted. He could have -- five years ago, they 5 could have done the motion for reconsideration, motion to 6 vacate, whatever motion, or even take it to court, which is 7 basically what they did. 8 MR. MICKEY: But there is nothing that -- he could 9 have complied with the order -- 10 MS. LONG: Prevented -- 11 MS. CIESYNSKY: Prevented him -- 12 MS. LONG: Correct. 13 MR. MICKEY: -- and then still have gone back 14 to -- 15 MS. LONG: Correct. Because it is a final 16 decision from the Board. 17 MR. MICKEY: Okay. 18 MS. CIESYNSKY: Okay. 19 MS. LONG: And he can appeal any final decision 20 from the Board. 21 MR. MICKEY: Okay. 22 MS. LONG: Regardless of whether -- yeah, whether 23 he paid, complied, or anything. 24 MS. CIESYNSKY: Got it. Okay. Thank you. 25 MR. WAUGH: I just had a couple questions for</p>

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<p style="text-align: right;">Page 42</p> <p>1 Mr. Nersesian.</p> <p>2 I, obviously, wasn't on the Board at the time, so</p> <p>3 I just kind of have to go based on what I saw, so -- you</p> <p>4 know, so kind of to the point you made this morning was that</p> <p>5 the March 6th submittal was a pre-submittal. So -- so you</p> <p>6 said that the point of the pre-submittal process was so that</p> <p>7 way those kind of errors could be identified. So my</p> <p>8 ques- -- so I have two questions.</p> <p>9 First question is going to be: So if -- if that</p> <p>10 was the case, so you did the -- the pre-submittal, you got</p> <p>11 the plan reviewed, and it said these are all the things we</p> <p>12 needed, and then so -- then it took nine -- nine months and</p> <p>13 several more submissions to get those. So were those also</p> <p>14 pre-submittals, or when was the final submittal?</p> <p>15 And the second question is: Since this is to</p> <p>16 vacate the entire ruling and not -- decision and not just a</p> <p>17 rehearing with new information, so does that also mean that</p> <p>18 the -- kind of the actions, the second cause of action</p> <p>19 original hearing, the cutting residence, and then all the</p> <p>20 other things that were part of it incorporated with the</p> <p>21 Verge, are those therefore baseless as well?</p> <p>22 I mean, so I'm just curious when you say "vacate</p> <p>23 the whole thing," is -- is it the assertion, also, that</p> <p>24 every action that the Board took at the time was wrong</p> <p>25 including the ones not related to the Verge Product? And</p>	<p style="text-align: right;">Page 44</p> <p>1 is especially frustrating, even on the record in front of</p> <p>2 you -- you had some two people, a Nevada architect, not some</p> <p>3 California architect who isn't familiar with Las Vegas'</p> <p>4 submittal process, and -- a Nevada architect and the person</p> <p>5 with the City of Las Vegas confirming that Mr. Rusk's</p> <p>6 processes were exactly what was expected.</p> <p>7 The only people saying that they weren't were the</p> <p>8 prosecutor, staff, and Mr. Amor, who was apparently</p> <p>9 testifying to standards he knew nothing about because he</p> <p>10 didn't even know this was a pre-submittal. The first --</p> <p>11 where Exhibit B went in. Although it was. And the record</p> <p>12 is clear on that.</p> <p>13 I don't think he even knew what a pre-submittal</p> <p>14 was. He -- he testified that was the submittal and they had</p> <p>15 to be build ready. Well, how can build ready comport with</p> <p>16 Mr. White's testimony of the process of no less than three</p> <p>17 submittals being common in a situation like this?</p> <p>18 There were five submittals in total: A</p> <p>19 pre-submittal, a submittal, a submittal, a submittal, and an</p> <p>20 approval. That's three submittals before the approval.</p> <p>21 There it is.</p> <p>22 There was nothing weird here, but it got conflated</p> <p>23 and exaggerated and presented in no small part because you</p> <p>24 had a guy who didn't have an attorney and somebody who knew</p> <p>25 that this could be kept out of the hearing with strategic</p>
<p style="text-align: right;">Page 43</p> <p>1 then the first question of the FLS elements in the</p> <p>2 subsequent submissions.</p> <p>3 MR. NERSESIAN: Okay. Thank you.</p> <p>4 If you look at the initial pre-submittal and then</p> <p>5 look at the letters following the submittals, okay, Mr. Rusk</p> <p>6 was working diligently at addressing those items that he</p> <p>7 could address. Others were tabled for further discussion</p> <p>8 with Mr. White. His responses are attached to those as</p> <p>9 well. And you see that he is consistently and constantly</p> <p>10 moving forward to fulfill Mr. White's requests. Okay.</p> <p>11 In doing so, if you go back to the testimony, you</p> <p>12 will see that Dr. Fielden testified that it is a process.</p> <p>13 Mr. White also testified, again, that it is a process.</p> <p>14 Mr. White himself said, "You will often see,</p> <p>15 especially on projects of this size, no less than three</p> <p>16 submittals." That's how many Mr. Rusk made before this</p> <p>17 process culminated in him meeting all of the requirements.</p> <p>18 Even Mr. White testified that the process that</p> <p>19 Dr. Fielden referred to was followed.</p> <p>20 Mr. Fielden or Dr. Fielden?</p> <p>21 MR. RUSK: Doctor.</p> <p>22 MR. NERSESIAN: Dr. Fielden referred to was</p> <p>23 followed, followed correctly, and reached the culmination of</p> <p>24 approval.</p> <p>25 What you had in front of you -- and this is what</p>	<p style="text-align: right;">Page 45</p> <p>1 objections.</p> <p>2 I know there was a second part to your question.</p> <p>3 What was it?</p> <p>4 MR. WAUGH: I'll -- I'll just make it -- I'll --</p> <p>5 I'll cut it all down because I did a lot of talking.</p> <p>6 Why a vacation not a rehearing?</p> <p>7 MR. NERSESIAN: Oh, yes. Well, that's the remedy</p> <p>8 that is spoken to in the Nevada Case Law and in common law.</p> <p>9 I recognize -- I do recognize that there is that signature</p> <p>10 issue with the cutting residence that is divorced from</p> <p>11 anything we've presented.</p> <p>12 I don't know what the effect or what the latitude</p> <p>13 is. I can only quote what courts have said, "The decision</p> <p>14 must be vacated."</p> <p>15 If Ms. Long thinks that there might be something</p> <p>16 that could be carved out to create a different remedy</p> <p>17 when -- if the remedy is met, that it -- that the decision</p> <p>18 on the Verge Project was affected by material misstatements</p> <p>19 or withholding of evidence to the court, perhaps, she could</p> <p>20 construct something or the Attorney General can assist.</p> <p>21 I just know that the law says, "If there is</p> <p>22 misconduct or a failure of due process that materially</p> <p>23 affects the decision, then the decision should be vacated."</p> <p>24 I wish that I could tell you, but I think you</p> <p>25 understand that the law is not black and white, and that</p>

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<p style="text-align: right;">Page 46</p> <p>1 people or boards or tribunals are often looking for ways to 2 do other things that they want to do. I can't craft that. 3 Perhaps, it exists. That's over with your attorney right 4 now. I would like to -- 5 MR. MICKEY: I was going to say, does that answer 6 your question? 7 MR. WAUGH: Yes. 8 MR. MICKEY: Okay. 9 MR. NERSESIAN: Okay. 10 MR. MICKEY: Thank you. 11 MR. NERSESIAN: I think. Thank you. 12 MR. MICKEY: Did you have anything else? 13 MR. WAUGH: No. That solved my -- (inaudible). 14 THE COURT REPORTER: I'm sorry. That what? 15 MR. WAUGH: That was just the clarification I 16 needed. 17 MR. MICKEY: I was going to say, John Klai, any 18 questions at the moment? 19 MR. KLAI: no. 20 MR. MICKEY: Okay. John Morelli? 21 MR. MORELLI: no. 22 MR. MICKEY: I do have a couple questions myself. 23 On the drawings that were submitted to building 24 department on March 6th, were those wet stamped? 25 MR. RUSK: Yes.</p>	<p style="text-align: right;">Page 48</p> <p>1 wouldn't care. Staff was perfectly prepared to allow that 2 in. We just didn't need it to prove our case, and so we 3 didn't put it in our submittals. I thoroughly expected, 4 quite honestly, that he would, if he wanted this in front of 5 you, would have tried to ask to introduce it. 6 I did object to the -- some -- some of the other 7 stuff, which we don't need to get into today having to do 8 with the shall permit guidelines from another jurisdiction. 9 I never would have objected to this. It was never 10 proffered. He had it. We've proven that today. And he 11 didn't ever ask to introduce it, even though he knew prior 12 to hearing and throughout the hearing that it wasn't before 13 you. 14 So there was no strategic objection on my part to 15 keep this out of these proceedings. We would have allowed 16 them. Had he said, Mr. Ling, I want to put this into 17 evidence, I would have said, sure, that's fine. So that's 18 simply not true, and that's not what the record shows. 19 The other thing that the record does not show is 20 this whole new notion that he has been telling you today 21 that that first set of documents was a pre-submittal. That 22 was not in the hearing doc- -- hearing that was presented to 23 you back a few years ago. It was not argued in the 24 proceeding before Judge Israel. That is a figment of 25 Mr. Nersesian's creation, and it gets him around certain</p>
<p style="text-align: right;">Page 47</p> <p>1 MR. MICKEY: Okay. So they were wet stamped. 2 Okay. And then in your documents here -- where 3 did it go? 4 So you had a letter to the Board on August 19th, 5 2011 that was in our packet and basically outlining some of 6 the things before the hearing. But it says, Included with 7 the report was a memo from the Building and Safety 8 Department of the City of Las Vegas titled that you were 9 using the permits expressed plan review process. 10 Is that correct? 11 MR. RUSK: Yes. 12 MR. MICKEY: Those were my one or two questions. 13 Is there -- 14 MR. LING: Mr. Mickey, may I be just heard briefly 15 since you've received about 20 minutes of argument from 16 Mr. Nersesian in answer to your questions? Because he's 17 made some representations to you that aren't correct, and I 18 want to make sure that I clear those up. 19 MR. MICKEY: Please proceed then. 20 MR. LING: Just a couple of things, because one of 21 the accusations directed at me was simply not true. He 22 accused me, just a few minutes ago, of, quote, strategic 23 objections to keep Mr. Rusk from introducing this document. 24 That's not true. Okay. 25 Had he ever asked to introduce that document, I</p>	<p style="text-align: right;">Page 49</p> <p>1 things that cause trouble to his case. But it was never 2 argued in the appeal of your original order, and it was 3 never presented to you that way by Mr. Rusk at the original 4 hearing. 5 So the first submittal here that was being done in 6 March -- keep in mind the testimony that was actually 7 presented to you showed that Mr. Rusk had agreed to -- to go 8 forward and try to get this thing approved so they could 9 break ground in June, as I remember the testimony being. 10 Don't hold me to that, but I think that was the testimony, 11 that they were supposed to get the ground broken in June, 12 and this thing was supposed to be finished by the end of the 13 year. 14 And so he had been working on these documents. 15 And you have some of those in the record that were in the 16 record before you that showed that in January he had a draft 17 set of drawings. He had given that to Schirmer in February 18 when he gave you his comments. And that first submittal in 19 March was, in fact, a first submittal. 20 This whole notion of pre-submittal -- and he's 21 going to give you some quotes from Mr. White, I think. 22 Mr. White said there was a pre-submittal process, and there 23 was. But what those quotes don't say is that the first set 24 of documents submitted here was part of that pre-submittal 25 process. That simply isn't what the record before you was.</p>

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<p style="text-align: right;">Page 50</p> <p>1 It's not what you found. Okay.</p> <p>2 We're not here -- and that's fundamentally why I</p> <p>3 wanted to get to this point. We're not here to retry that</p> <p>4 case, even though Mr. Nersesian keeps trying to tell you</p> <p>5 what the record said and what the record held and all of</p> <p>6 that. We've done that. All right. That's what we did in</p> <p>7 front of Judge Israel years ago, is they challenged the</p> <p>8 sufficiency of the evidence.</p> <p>9 We're supposed to be here today to decide whether</p> <p>10 I did something in accord with this, and, most importantly,</p> <p>11 whether once you've looked at this, does this change your</p> <p>12 mind about Mr. Rusk and whether he was negligent. That's</p> <p>13 why we're here. We're not here to retry the original case.</p> <p>14 And so for Mr. Nersesian to be keep constantly</p> <p>15 trying to revise what they wished they had presented at the</p> <p>16 hearing and what they wished they had presented in front of</p> <p>17 Judge Israel is simply not what Judge Wiese ordered. That's</p> <p>18 not what we're here to do today.</p> <p>19 MR. MICKEY: Thank you, Louis. So...</p> <p>20 MR. NERSESIAN: May I respond, please?</p> <p>21 MR. MICKEY: You've had --</p> <p>22 MR. NERSESIAN: I did not, no. He -- he did that.</p> <p>23 Now, I would normally ordinarily -- I did not do argument.</p> <p>24 I answered questions. He did argument. I would at least be</p> <p>25 entitled to a brief rebuttal.</p>	<p style="text-align: right;">Page 52</p> <p>1 MR. MICKEY: Right.</p> <p>2 MR. NERSESIAN: -- for Dennis Rusk.</p> <p>3 MR. MICKEY: Yes.</p> <p>4 MS. CIESYNSKY: I wrote the same thing.</p> <p>5 MR. MICKEY: That's what I want to say. I thought</p> <p>6 I heard you say that Mr. Rusk had hired Schirmer, and so</p> <p>7 that's what I had written down.</p> <p>8 MR. NERSESIAN: If I did, I put it out of order</p> <p>9 because he was hired --</p> <p>10 MR. MICKEY: That's what I wanted to make sure,</p> <p>11 that that's --</p> <p>12 MR. NERSESIAN: He was hired to provide items to</p> <p>13 Mr. Rusk.</p> <p>14 MR. MICKEY: Right. So technically, Mr. Rusk was</p> <p>15 not under the responsible control of Schirmer Engineering?</p> <p>16 MR. NERSESIAN: Could not be and --</p> <p>17 MR. MICKEY: Right.</p> <p>18 MR. NERSESIAN: Yes.</p> <p>19 MR. MICKEY: That's why --</p> <p>20 MR. NERSESIAN: But he was coordinating with him,</p> <p>21 as he testified.</p> <p>22 MR. MICKEY: Right. Okay. And then -- okay.</p> <p>23 All right. No, that was it. I just -- I wanted</p> <p>24 to make -- double check on that one, so...</p> <p>25 MR. NERSESIAN: So may I please just limit it to</p>
<p style="text-align: right;">Page 51</p> <p>1 MR. LING: I was simply responding to his -- his</p> <p>2 answers to your questions.</p> <p>3 MR. MICKEY: Okay. Actually, I still -- I looked</p> <p>4 at my notes. I still do have a couple more questions I</p> <p>5 would like to ask as well. And, actually, I was seeking</p> <p>6 some clarification, Mr. Nersesian, to something you said</p> <p>7 earlier, so I just want to make sure that I heard it</p> <p>8 correctly or you may have misspoke.</p> <p>9 But early on you had mentioned that Mr. Rusk had</p> <p>10 hired Schirmer Engineering, and I was just wondering if I</p> <p>11 didn't hear that correctly or -- because I wrote it down on</p> <p>12 here, and it says -- I have it that Mr. Rusk had hired. And</p> <p>13 I thought it was the owner had hired.</p> <p>14 MR. NERSESIAN: If I said that, I misspoke. My</p> <p>15 recollection is --</p> <p>16 MR. MICKEY: That's why I wanted to make sure</p> <p>17 that --</p> <p>18 THE COURT REPORTER: I'm sorry. One at a time.</p> <p>19 MR. NERSESIAN: -- is that I said Schirmer</p> <p>20 Engineering was hired to prepare plans for Mr. Rusk.</p> <p>21 MR. MICKEY: Right. So --</p> <p>22 MR. NERSESIAN: And that is what -- that is what</p> <p>23 he was hired for. He was hired by the developer --</p> <p>24 MR. MICKEY: Right.</p> <p>25 MR. NERSESIAN: -- to prepare for Mr. Rusk --</p>	<p style="text-align: right;">Page 53</p> <p>1 what Mr. Ling just said? It's very --</p> <p>2 MR. MICKEY: I will allow it because I will -- two</p> <p>3 minutes.</p> <p>4 MR. NERSESIAN: Okay.</p> <p>5 MR. MICKEY: Please. Two minutes.</p> <p>6 MR. NERSESIAN: First, page 2 of our reply brief</p> <p>7 we cite to the transcript where Exhibit B is being discussed</p> <p>8 and Mr. White testifies it's a pre-submittal. It's cited in</p> <p>9 there page 2 of our reply brief.</p> <p>10 Second, I want to quote for you because it's</p> <p>11 always been said he wasn't keeping it out. So as far as</p> <p>12 this objection goes, we weren't -- he wasn't trying to get</p> <p>13 it in. It wasn't in. He didn't have it. He was --</p> <p>14 Mr. Rusk was trying to question about the report, not trying</p> <p>15 to submit the report. And that was the objection. And the</p> <p>16 objection was, "The report doesn't exist. You have nothing</p> <p>17 to show you that it exists. Don't let him question about</p> <p>18 it. Don't let him question about it."</p> <p>19 And Mr. Ling was sustained. And Mr. Rusk was told</p> <p>20 to move on to something else. He couldn't even question</p> <p>21 people about the report that he didn't have. And,</p> <p>22 obviously, he didn't have it. And for that I want to</p> <p>23 highlight this.</p> <p>24 This is from the Petition Exhibit D, page 21. And</p> <p>25 you heard earlier today that Mr. Ling said, "Oh, no, all of</p>

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<p style="text-align: right;">Page 54</p> <p>1 this was argued in front of Judge Israel."</p> <p>2 Here's a quote from his brief. "What is evident</p> <p>3 from the face of the document is" -- meaning, the</p> <p>4 exhibits -- or the fire life safety that Mr. Rusk had</p> <p>5 attached that he did have in his files, which, as I</p> <p>6 mentioned earlier, was the later iteration.</p> <p>7 Quote: What is evident from the face of the</p> <p>8 document is that it could not be the set of Schirmer</p> <p>9 Engineering documents that he claims he filed with his first</p> <p>10 submittal because his first submittal was on March 6th,</p> <p>11 2007. And the fugitive Schirmer documents to which he</p> <p>12 directs this court were not prepared until May 23rd, 2007.</p> <p>13 How can Rusk make such nasty aspersions against the Board</p> <p>14 staff when he himself cannot produce, even now before this</p> <p>15 court, a document that proves that he filed the report from</p> <p>16 the City of Las Vegas?" How can he say that? Because he</p> <p>17 didn't have it. Mr. Ling did.</p> <p>18 MR. MICKEY: All right.</p> <p>19 MR. NERSESIAN: And when Mr. Ling wrote this --</p> <p>20 MR. MICKEY: Mr. Nersesian, that's your two</p> <p>21 minutes.</p> <p>22 MR. NERSESIAN: That's my two minutes.</p> <p>23 -- he knew it was there, and he lied to Judge</p> <p>24 Israel too, just that clear, or hid it from Judge Israel.</p> <p>25 Thank you.</p>	<p style="text-align: right;">Page 56</p> <p>1 thought was the difference between an express and a pre- --</p> <p>2 MR. MORELLI: A preliminary --</p> <p>3 MS. LONG: Right.</p> <p>4 MR. MORELLI: A preliminary plans check and</p> <p>5 express.</p> <p>6 MS. LONG: Right. Because he's the one that</p> <p>7 wrote, that wrote in the letter. So in theory -- like, I</p> <p>8 know you understand, Mr. Nersesian, what they are. But what</p> <p>9 was Mr. Rusk's intent or what he thought at the time that he</p> <p>10 wrote the letter?</p> <p>11 MR. LING: And if I could interpose an objection</p> <p>12 before there's an answer. God knows I'm going to now create</p> <p>13 some more issues here. But we are not here to create a new</p> <p>14 record. Okay. And so Mr. Nersesian -- or Mr. Rusk is going</p> <p>15 to now start trying to change the testimony he gave the</p> <p>16 Board at the earlier hearing by answering your question</p> <p>17 because that's not what he testified to at the earlier</p> <p>18 hearing. I'm just concerned about that. And I'm objecting</p> <p>19 that we would be -- by allowing Mr. Rusk to answer that</p> <p>20 question is now going to allow him to be changing his</p> <p>21 testimony, and that's not what Judge Wiese ordered in this</p> <p>22 matter.</p> <p>23 MR. MORELLI: He answered the question.</p> <p>24 MR. NERSESIAN: All right.</p> <p>25 MR. MICKEY: Okay.</p>
<p style="text-align: right;">Page 55</p> <p>1 MR. MICKEY: So I'll give it one more last --</p> <p>2 MR. WAUGH: I was going to make a motion, but if</p> <p>3 you want to...</p> <p>4 MR. MICKEY: Oh, no, no. Actually, what we'll do</p> <p>5 now if there is no more questions for --</p> <p>6 MR. MORELLI: I had a question.</p> <p>7 MR. MICKEY: John.</p> <p>8 MR. MORELLI: To Mr. Rusk, you had a letter</p> <p>9 August 19th, 2011 regarding your submittal. And in your</p> <p>10 letter, you refer to this as the express plans check, and</p> <p>11 you keep referring to it as a preliminary plan check.</p> <p>12 Which one was it?</p> <p>13 MR. RUSK: One in the same.</p> <p>14 MR. NERSESIAN: The methodology that was employed</p> <p>15 by the City is in the expressed plan check process, and this</p> <p>16 is -- Mr. White later confirmed this at a deposition we did</p> <p>17 attend --</p> <p>18 MR. MICKEY: Mr. Nersesian, the question was</p> <p>19 directed to Mr. Rusk.</p> <p>20 MR. NERSESIAN: Well, he has an attorney here, and</p> <p>21 his attorney is always allowed to answer questions and be</p> <p>22 his mouth piece. That is what being represented by an</p> <p>23 attorney is, with all deference.</p> <p>24 MS. LONG: Well, we're in an administrative</p> <p>25 hearing, and the question was pretty much what Mr. Rusk</p>	<p style="text-align: right;">Page 57</p> <p>1 MS. CIESYNSKY: I had one final question.</p> <p>2 The Schirmer Report you gave to the Board, but you</p> <p>3 didn't keep a copy of it? I'm just confused.</p> <p>4 MR. RUSK: There was only one copy.</p> <p>5 MS. CIESYNSKY: So you didn't copy it?</p> <p>6 MR. RUSK: There was only one original.</p> <p>7 MS. CIESYNSKY: Yeah. But you didn't copy it</p> <p>8 before you gave it to the Board?</p> <p>9 MR. RUSK: No. I trusted the Board. Please don't</p> <p>10 make -- the staff. Please don't make that same mistake.</p> <p>11 MR. MICKEY: So take one more look around the</p> <p>12 table. So if there's no further questions --</p> <p>13 MR. LING: Mr. Mickey, I'm sorry. I keep doing</p> <p>14 this. But I want to make sure the record is clear.</p> <p>15 Both Mr. Rusk and Ms. Bach are -- were under oath</p> <p>16 at the original hearing. You did not swear them in today.</p> <p>17 We've received testimony from both of them. We either need</p> <p>18 to have them affirm that their testimony was under oath or</p> <p>19 you need to remind them that they were under oath from the</p> <p>20 hearing. I -- one way or the other, we need to make sure</p> <p>21 that their testimony is covered by an oath. Okay. Because</p> <p>22 they were allowed to speak today, and they were not under</p> <p>23 oath.</p> <p>24 MS. LONG: And it was Ms. Bach, Mr. Rusk.</p> <p>25 MR. NERSESIAN: May I briefly state that I wholly</p>

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<p style="text-align: right;">Page 58</p> <p>1 disagree. The questions to Ms. Bach and Mr. Rusk were</p> <p>2 informational. They were not evidentiary. If we want to</p> <p>3 have an evidentiary hearing, then we would be entitled to an</p> <p>4 evidentiary hearing, and this wasn't. I believe that we</p> <p>5 were supposed to have one, and we got a different order from</p> <p>6 the Board.</p> <p>7 MS. LONG: You can still affirm them.</p> <p>8 (Discussion off the record between</p> <p>9 Ms. Long and Mr. Mickey.)</p> <p>10 MR. MICKEY: I guess, can -- so I guess we all</p> <p>11 understand that this is not a hearing?</p> <p>12 MR. NERSESIAN: Oh, no. It's a hearing. It is an</p> <p>13 argument on a petition.</p> <p>14 MR. MICKEY: No.</p> <p>15 MR. NERSESIAN: I was not noticed for any</p> <p>16 evidentiary hearing. I was not told -- I was told, in fact,</p> <p>17 that I did not have subpoena power. I was allowed a</p> <p>18 15-minute presentation. I would love to have an evidentiary</p> <p>19 hearing. I would love for you to retry this whole case</p> <p>20 because it was unjust to begin with. But that's not what we</p> <p>21 have today.</p> <p>22 (Discussion off the record between</p> <p>23 Ms. Long and Mr. Mickey.)</p> <p>24 MR. MICKEY: So affirmation then, Ms. Bach, that</p> <p>25 today what you've spoken is the truth?</p>	<p style="text-align: right;">Page 60</p> <p>1 MR. ERNY: To consider whether it be appropriate</p> <p>2 to vacate the prior decision based upon the newly discovered</p> <p>3 evidence consisting of the March 6th, 2007 Schirmer Report.</p> <p>4 When I look at the report, it is basically a</p> <p>5 bunch -- a listing of a lot of code references. There are</p> <p>6 drawings in there, but they deal with issues of smoke and</p> <p>7 the fire sprinkler zones.</p> <p>8 The -- the -- the difference here, in my opinion,</p> <p>9 is coordination and incorporation are two different things.</p> <p>10 And there was a letter that predates this that already</p> <p>11 addressed the issues that -- that were going to be in the</p> <p>12 contents of the fire safety report or the -- yeah, this</p> <p>13 report, that should be incorporated into the documents that</p> <p>14 are going to be submitted. They did not get included, hence</p> <p>15 the big, long list of responses that came out of the plan</p> <p>16 department.</p> <p>17 So in light of -- in full consideration of this</p> <p>18 report and reviewing all the documentation, again, almost</p> <p>19 2,000 pages between the various documents that we were given</p> <p>20 to look at this, all the brief evidence and listening to the</p> <p>21 testimony today, I see no cause for vacating.</p> <p>22 MR. NERSESIAN: Did you review Exhibit B, the</p> <p>23 full-size drawings? Because they --</p> <p>24 MS. LONG: Mr. Nersesian.</p> <p>25 MR. MICKEY: Mr. Nersesian, please. This is</p>
<p style="text-align: right;">Page 59</p> <p>1 MS. BACH: Yes.</p> <p>2 MR. MICKEY: Mr. Rusk, an affirmation as to what</p> <p>3 you've spoken today is the truth?</p> <p>4 MR. RUSK: Could you repeat what I said?</p> <p>5 MR. MICKEY: It's on record.</p> <p>6 MR. RUSK: I'd like to know what I'm swearing to.</p> <p>7 MR. MICKEY: What you have spoken today is the</p> <p>8 truth.</p> <p>9 MR. RUSK: Which is what?</p> <p>10 MR. MICKEY: Which is what we have on record and</p> <p>11 any comments that you have made.</p> <p>12 MR. RUSK: Can you rerepeat it?</p> <p>13 MS. LONG: The court reporter can repeat it.</p> <p>14 (Page 57, lines 1-10 read.)</p> <p>15 (Page 55, lines 8-13 read.)</p> <p>16 (Pages 46, 47, lines 22-11 read.)</p> <p>17 MR. RUSK: I'm satisfied. Yes.</p> <p>18 MR. MICKEY: So with that, we'll close anything</p> <p>19 with questions and answers and move into the Board's</p> <p>20 deliberation. I guess I'll start to my right. Greg.</p> <p>21 BOARD DELIBERATIONS</p> <p>22 MR. ERNY: Well, I look at what we've been asked</p> <p>23 to do by Judge Wiese.</p> <p>24 Is that how you correctly pronounce his name?</p> <p>25 MS. LONG: Yes.</p>	<p style="text-align: right;">Page 61</p> <p>1 deliberation for the Board only.</p> <p>2 MR. NERSESIAN: I understand.</p> <p>3 MR. RUSK: That's a lie.</p> <p>4 MR. MICKEY: Please, please respect that we are in</p> <p>5 deliberation.</p> <p>6 MR. NERSESIAN: Okay.</p> <p>7 MR. MICKEY: This is for the Board to go through</p> <p>8 and discuss this amongst ourselves.</p> <p>9 MR. ERNY: Again, reliance of those terms</p> <p>10 (inaudible) --</p> <p>11 MR. NERSESIAN: Well, then --</p> <p>12 MR. ERNY: For your consideration, yes.</p> <p>13 MR. NERSESIAN: And you don't see fire life safety</p> <p>14 coordination?</p> <p>15 MR. ERNY: No, sir. There may be some</p> <p>16 coordination.</p> <p>17 MR. NERSESIAN: The Supreme Court will.</p> <p>18 MR. ERNY: Excuse me, sir. There is a difference,</p> <p>19 and I just said, between coordination and inclusion, so --</p> <p>20 MR. MICKEY: Greg.</p> <p>21 MR. ERNY: That's my opinion, sir, and that's my</p> <p>22 comments regarding -- there's a difference between</p> <p>23 incorporation and coordination.</p> <p>24 MR. MICKEY: All right. Anything else, sir?</p> <p>25 MR. ERNY: No. That's it.</p>

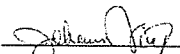
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<p style="text-align: right;">Page 62</p> <p>1 MR. MICKEY: Ann, anything you would like to?</p> <p>2 MS. FLEMING: No. Same.</p> <p>3 I'm new to this -- to this case, so I did take</p> <p>4 time to review all the documents carefully and hear the</p> <p>5 testimony today. I do not see reason to vacate the order.</p> <p>6 MR. MICKEY: All right. Kim?</p> <p>7 MS. CIESYNSKY: So two things. Is this a</p> <p>8 discussion or do we just have to do statements?</p> <p>9 MR. MICKEY: No.</p> <p>10 MS. CIESYNSKY: It's a discussion. Okay.</p> <p>11 MR. MICKEY: We discuss things.</p> <p>12 MS. CIESYNSKY: All right. Because -- that's</p> <p>13 good. Yeah. Can we ask questions amongst ourselves?</p> <p>14 MS. LONG: Yes.</p> <p>15 MS. CIESYNSKY: Okay. Okay. That's good because</p> <p>16 there's -- there's a couple things in here that -- that I --</p> <p>17 that I found.</p> <p>18 Don Wikes is a senior plan examiner. On his page</p> <p>19 37 this is what he says, "So I put in there because it was</p> <p>20 obvious that when I did the first review that the design</p> <p>21 professional hadn't even looked at the fire life safety</p> <p>22 report and hadn't even meshed together."</p> <p>23 So when I read that, I thought that kind of goes</p> <p>24 to the heart of what we're looking at, is kind of unbundling</p> <p>25 all of these things, that you're supposed to kind of put</p>	<p style="text-align: right;">Page 64</p> <p>1 MR. MICKEY: Right.</p> <p>2 MR. KLAI: Yeah.</p> <p>3 MR. MICKEY: Responses?</p> <p>4 MR. KLAI: No. I'm just saying I was the one that</p> <p>5 asked that question way back as a previous question. I</p> <p>6 heard it brought back again. But again, it's -- it's --</p> <p>7 what Kim kind of alluded to, again, without the full</p> <p>8 integration of what the report says, I don't know that much</p> <p>9 is really changed, anything has changed.</p> <p>10 MR. NERSESIAN: Except that Mr. Rusk is not a</p> <p>11 liar --</p> <p>12 MR. MICKEY: Mr. Nersesian.</p> <p>13 MR. NERSESIAN: -- which you found.</p> <p>14 MR. MICKEY: Mr. Nersesian, please. This is not a</p> <p>15 time for your comments. This is for the Board, our</p> <p>16 deliberations only.</p> <p>17 Mr. Nersesian, please. This is in deliberations,</p> <p>18 and it's for our conversations only. Thank you.</p> <p>19 Anything else for anybody?</p> <p>20 I'll do my comments. So a couple things that I</p> <p>21 was looking at was, one, just what the City of Las Vegas and</p> <p>22 the intent of the expressed plan review. You go through and</p> <p>23 look at it, not only today or what was in place back then,</p> <p>24 it is for the purpose of obtaining a building permit. It is</p> <p>25 an expedient review. Necessarily to where, yes, there are</p>
<p style="text-align: right;">Page 63</p> <p>1 everything into the building department, the building</p> <p>2 department is supposed to somehow figure it all out.</p> <p>3 Are they supposed to -- the building department</p> <p>4 supposed to design this? I -- I was thinking that</p> <p>5 everything should be meshed together, put into the building</p> <p>6 department. And they might have a few things, but they're</p> <p>7 not actually supposed to design it and put this with this</p> <p>8 and, you know, all together.</p> <p>9 So I just felt all that telling from the plan</p> <p>10 examiner. And then also to the building department that</p> <p>11 you're putting in all these things and just hoping to get</p> <p>12 back comments so that you can fix it all. You should, you</p> <p>13 know, bring kind of a comprehensive document where you're</p> <p>14 meshing things before it gets to the building department.</p> <p>15 MR. KLAI: Integration, yeah.</p> <p>16 MS. CIESYNSKY: Yeah, integration.</p> <p>17 So those are -- those are my concerns. That's all</p> <p>18 I have.</p> <p>19 MR. MICKEY: Mr. Klai?</p> <p>20 MR. KLAI: No. Nothing.</p> <p>21 MR. MICKEY: Okay. Okay. So, John, I guess the</p> <p>22 question -- out there earlier on today, there was the</p> <p>23 reference as your testimony before with the reference to --</p> <p>24 MR. KLAI: Asking about where the fire life safety</p> <p>25 report was.</p>	<p style="text-align: right;">Page 65</p> <p>1 comments and returns and going through some of that stuff.</p> <p>2 The mere fact that drawings were wet stamped with the</p> <p>3 indication that at that day when you were doing the first</p> <p>4 plan review if all was in accordance to anything that the</p> <p>5 City may be looking for, you would have been issued a</p> <p>6 building permit, especially because you turned in wet</p> <p>7 stamped drawings, even from the expressed plan review.</p> <p>8 I did take the opportunity with the drawings that</p> <p>9 had been left behind, what I could go through and look at.</p> <p>10 And I did a comparison with just a few items that was on the</p> <p>11 Schirmer's original letter from February 6th, 2007, and just</p> <p>12 went through a couple of the items. The questions that they</p> <p>13 had about vestibule requirements, elevator lobbies, exit</p> <p>14 continuity and exit discharge. Doing a quick review looking</p> <p>15 at the drawings, none of those items had been picked up or</p> <p>16 addressed.</p> <p>17 And so when I look at it from the transition of</p> <p>18 these initial comments and then going through as to what was</p> <p>19 later elaborated on in more detail in the book, to me, I</p> <p>20 don't necessarily see that there was anything (inaudible.)</p> <p>21 THE COURT REPORTER: I don't see that there was</p> <p>22 anything what in there?</p> <p>23 MR. MICKEY: Oh, that there was any -- that the</p> <p>24 content from the original Schirmer Report had anything --</p> <p>25 wasn't much different from the initial letter from</p>

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<p style="text-align: right;">Page 66</p> <p>1 February 6th. It just elaborated a lot of things in more 2 detail. So that's kind of where I was seeing some things. 3 But especially from the understanding that the -- 4 what was presented in that original memo that it was part of 5 the expressed plan review, the intent that those -- City of 6 Las Vegas is doing that for issuing a building permit. 7 Even the way that the process is set up for 8 initial reviews, submit the drawings one week prior to the 9 appointment and then being able to go through and review it 10 with all the code officials, letters are usually issued and 11 then returned very shortly. Sometimes basically within one 12 to four days. So those are some of the things when I look 13 at this was set up as part of the original expressed plan. 14 MR. ERNY: Are we ready for a motion? 15 MR. MICKEY: Before we make a motion, there are 16 two things probably. 17 Okay. Let me make a reminder. And I want to read 18 it exactly from Judge Wiese's minutes, so I don't say it 19 incorrectly. So just as a reminder, just so everybody is 20 clear with this, and this is from the court minutes from 21 May 22nd, 2017, and this is a petition, "For the judicial 22 review is hereby granted and the Court hereby remands this 23 matter to the Board to consider whether it would be 24 appropriate to vacate its prior decision based upon the 25 newly discovered evidence consisting of the March 6th, 2007</p>	<p style="text-align: right;">Page 68</p> <p>1 MR. WAUGH: Okay. So I'll end. 2 Do you want me to restate it correctly then? 3 MS. LONG: That's fine. 4 MR. ERNY: Second. 5 MR. MICKEY: Any discussion, further discussion on 6 the motion? 7 I'll call for a vote. All those in favor? 8 (All members join in ayes.) 9 MR. MICKEY: Anybody opposed? 10 Motion carries. 11 With that, I believe the next step is that we must 12 draw up an order. So he if -- I -- I can't if you would get 13 that please and we could go ahead and get the order crafted. 14 Thank you. 15 MR. NERSESIAN: Thank you. 16 MR. MICKEY: And we will adjourn. 17 MR. NERSESIAN: So I will get an order and nothing 18 is effective and no time frames are running until I get the 19 order? 20 MS. LONG: That's correct. 21 MR. NERSESIAN: Okay. Can I get a copy of the 22 transcript please? Thank you. Thank you all. 23 MR. MICKEY: Thank you everybody. 24 MR. NERSESIAN: And how you can find that a 25 finding that Mr. Rusk is a liar was not material --</p>
<p style="text-align: right;">Page 67</p> <p>1 Schirmer Report and drawings." 2 So that is the minutes and the order that we have 3 received from the judge. 4 And then, also, today -- I'm not going to say this 5 correctly. Yeah. There were some other items out there for 6 prosecutorial misconduct and regarding to the Schirmer 7 Report and whether you decide to take that into 8 consideration or not. 9 MS. LONG: Just to clarify, you know, the Board 10 doesn't -- you know, prosecutorial misconduct is for the 11 licensing, the Board that issued the attorney license. So 12 you're not here to regulate attorneys. However, if you do 13 feel that, you know, statements made during the original 14 hearing were material and materially affect, I guess, the 15 hearing, the original hearing, then you can pretty much take 16 that into account in your motion. 17 MR. MICKEY: So anything else for deliberations 18 for anybody? 19 All right. With that, the desire for action. 20 MR. WAUGH: I'll make a motion. 21 After reviewing the previous proceedings, previous 22 evidence, and after listening to both sides, I move that the 23 Board uphold the September 27th Order and that Cases Nos. 24 08-080R and 11 -- oh, doesn't -- 25 MS. LONG: That's it.</p>	<p style="text-align: right;">Page 69</p> <p>1 THE COURT REPORTER: Are we still on? 2 MS. LONG: Yes. 3 MR. NERSESIAN: -- to that decision is beyond me. 4 And that's the only question. So we'll see you in court. 5 MR. MICKEY: So with that, I will make an official 6 announcement that we are done with Item No. 4. 7 MR. NERSESIAN: I'm sorry about that outburst. 8 Thank you. Seriously, I apologize. Shouldn't have said 9 that, but I did. 10 MR. MICKEY: Can we take a five-minute break to 11 reorganize ourselves to continue on with our agenda, and 12 we'll finish everything up and make sure everybody can get 13 on with their day. Thank you. 14 (The proceeding was concluded at 15 4:25 p.m.) 16 ///// 17 ///// 18 ///// 19 ///// 20 ///// 21 ///// 22 ///// 23 ///// 24 ///// 25 /////</p>

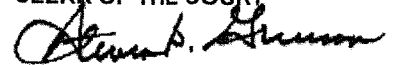
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1	REPORTER'S CERTIFICATE	Page 70
2	STATE OF NEVADA)	
) SS	
3	COUNTY OF CLARK)	
4	I, Johanna Vorce, Certified Shorthand Reporter, do	
5	hereby certify that I took down in Shorthand (Stenotype) all	
6	of the proceedings had in the before-entitled matter at the	
7	time and place indicated; and that thereafter said shorthand	
8	notes were transcribed into typewriting at and under my	
9	direction and supervision and the foregoing transcript	
10	constitutes a full, true, and accurate record of the	
11	proceedings had.	
12	IN WITNESS WHEREOF, I have hereunto affixed my	
13	hand this 8th day of November, 2017.	
14		
15	 Johanna Vorce, CCR No. 913	
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Doc. 8

Board's Motion to Dismiss for
Lack of Jurisdiction (first-
withdrawn)

Doc. 8



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11 Interior Design and Residential Design

12 DISTRICT COURT
13 CLARK COUNTY, NEVADA

14 DENNIS E. RUSK, AND DENNIS E.
15 RUSK ARCHITECT, LLC

Case No. A-17-764562-J

16 Appellants/Petitioners,

Dep't No. 29

17 vs.

MOTION TO DISMISS

18 NEVADA STATE BOARD OF
19 ARCHITECTURE, INTERIOR DESIGN
20 AND RESIDENTIAL DESIGN,

21 Appellee/Respondent.

22 Respondent Nevada State Board of Architecture, Interior Design and Residential Design (the
23 Board) moves this Court to dismiss the instant matter pursuant to NRCP 12(b)(1) and NRCP 12(h)(3).
24 This motion is made and based upon the pleadings and papers on file herein and the following points
25 and authorities.

26 NOTICE OF HEARING

27 PLEASE TAKE NOTICE that a hearing on Respondent's Motion to Dismiss has been scheduled
28 in the above-captioned court for 9:00 a.m./p.m. on the 29 day of January, 2018.

Signed this ____ day of _____, 2017.

COURT CLERK

I. POINTS AND AUTHORITIES

A. PROCEDURAL HISTORY

On February 2, 2017, Petitioners filed a matter entitled: "Petition of Dennis E. Rusk and Dennis E. Rusk Architect, LLC, for Issuance of a Writ of Mandamus, or Alternatively, Judicial Review of Action of the Nevada State Board of Architecture, Interior Design and Residential Design Taken in Reference to a Petition/Motion Filed by the Petitioners and Avoided/Determined Before Said Board on January 11, 2017." (First Petition). The matter was filed with the Eighth Judicial District Court, was given Case Number A-17-750672-W, and was assigned to Department 30 (Judge Weise presiding).

The Board tendered a defense to the First Petition. Judge Weise presided over one-day evidentiary hearing on May 22, 2017. On June 27, 2017, Judge Weise issued his Order Determining Petitioner's Petition for Writ Issuance of a Writ of Mandamus, or Alternatively, Judicial Review or Action of the Nevada State Board of Architecture (Remand Order). By this Remand Order, Judge Weise ordered that the matter be remanded to the Board, and on remand the Board "shall assume jurisdiction and rule upon the Petitioner's NSBAIDRD Petition and consider whether it would be appropriate to vacate its prior decision based upon the newly discovered evidence consisting of the March 6, 2007 Schirmer Report and drawings."

On October 25, 2017, the Board held the hearing on remand ordered by Judge Weise.

On November 9, 2017, Petitioners filed the instant Petition for Judicial Review (Case No. A-17-764562-J). By the instant Petition for Judicial Review, Petitioners expressly indicated that their intent was to seek judicial review of the Board's proceedings conducted on October 25, 2017 even though no written order had yet been issued by the Board.

On December 1, 2017, the Board issued its Findings of Fact, Conclusions of Law, and Order Regarding Remand From Judge Weise to Determine Whether to Vacate its September 27, 2011 Board Order Based Upon the Newly Discovered Evidence Consisting of the March 6, 2007 Schirmer Report and Drawings (Board Order on Remand).

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B. LEGAL ARGUMENT

NRCP 12(b)(1) allows for a matter to be dismissed for “lack of jurisdiction over the subject matter.” NRCP 12(h)(3) provides: “Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, *the court shall dismiss the action.*” (Emphasis supplied.) A prematurely filed petition for judicial review does not confer subject matter jurisdiction upon a court and must be dismissed. *Johnson v. State of Idaho*, 280 P.3d 749, 754 (Idaho App. 2012).

As the above procedural history shows, Petitioners have already commenced a proceeding before Judge Weise (Case No. A-17-764562-J) regarding Petitioners proceedings before the Board. The very hearing of which Petitioners seek this Court’s review is the hearing ordered by Judge Weise in Petitioners’ case before him. Furthermore, the instant petition for judicial review was filed almost one month prematurely since it was filed November 9, 2017 whereas the Board’s Order was not final until December 1, 2017.

Because Judge Weise has already taken jurisdiction over the subject matter of the instant petition, and because it was filed one month prematurely, this Court cannot and does not have jurisdiction over the subject matter of this dispute. Petitioners may be entitled to judicial review of the Board’s hearing and rulings resultant from the hearing it conducted on October 25, 2017, but Judge Weise already has subject matter jurisdiction over that proceeding because he ordered it. The instant matter must be dismissed pursuant to NRCP 12(b)(1) and NRCP 12(h)(3).

II. CONCLUSION AND RELIEF REQUESTED

As has been shown, Judge Weise, in Case No. A-17-764562-J, already has exercised subject matter jurisdiction over the subject matter of the instant matter, and the petition was filed one month prematurely. This Court cannot and does not have subject matter jurisdiction over this matter: Judge Weise already has it. The instant matter must be dismissed pursuant to NRCP 12(b)(1) and NRCP 12(h)(3).

Signed this 21st day of December, 2017.

/s/ Louis Ling

LOUIS LING, Board Counsel
Nevada Bar No. 3101
Counsel for Appellee/Respondent

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CERTIFICATE OF SERVICE

I certify that on this day I mailed via regular U.S. Mail the attached document to:

Robert A. Nersesian
Nersesian & Sankiewicz
528 South Eighth Street
Las Vegas, Nevada 89101

Dated this 21st day of December, 2017.

/s/ Louis Ling

LOUIS LING, Board Counsel
Nevada Bar No. 3101
Counsel for Nevada State Board of Architecture,
Interior Design and Residential Design

NEVADA STATE BOARD OF
ARCHITECTURE, INTERIOR DESIGN
AND RESIDENTIAL DESIGN,

VS.

and

Real Parties in Interest.

**Real Parties in Interest's Appendix to Real Parties in Interest's Brief in
Opposition to Petitioner's Petition for Writ of Prohibition**

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Dated this 22d day of October, 2018

Nersesian & Sankiewicz

/s/ Robert A. Nersesian

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