Case No. 81018 C/W 81172

IN THE SUPREME COURT OF THE STATE OF NEVADA

RUTH L. COHEN,

Appellant,

v.

PAUL S. PADDA and PAUL PADDA LAW, PLLC,

Respondent.

Appeal from the Eighth Judicial District Court of the State of Nevada, in and for County of Clark

OPPOSITION TO MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF OF SOUTH ASIAN BAR ASSOCIATION OF LAS VEGAS, VETERANS IN POLITICS INTERNATIONAL, INC. AND JAY BLOOM

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OPPOSITION TO MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF OF SOUTH ASIAN BAR ASSOCIATION OF LAS VEGAS, VETERANS IN POLITICS INTERNATIONAL, INC. AND JAY BLOOM

Appellant Ruth L. Cohen ("Cohen"), by and through her attorneys of record, the law firms of Hayes Wakayama and Campbell & Williams, hereby submits her Opposition to the Motion for Leave to File Amicus Curiae Brief of South Asian Bar Association of Las Vegas ("SABA-LV"), Veterans in Politics International, Inc. ("VIPI") and Jay Bloom ("Bloom") (hereinafter collectively "Movants"). This Opposition is made and based upon the following Memorandum of Points and Authorities, the attached exhibit and the pleadings and papers on file herein.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION.

Amicus Curiae briefs are designed to assist the Court with rationales and insights that are not otherwise available from the parties themselves. Movants represent that they "represent legal consumers and the public at large ***and have significant interests in the ethical rules[1] governing attorneys in Nevada***."[2] In general, Movants cite to interests in this case predicated primarily on this matter's

[1] Movants' concerns with ethical principles and the resulting damage to the public appear to be limited to technicalities directed at Cohen and do not address the allegations of Padda's fraudulent conduct perpetrated against Cohen, an elderly/retiring attorney.

[2] *See* Movants' Motion for Leave to File Amicus Brief in Support of Respondents' Answering Brief ("Movants' Brief") on file herein at page 2.

"public importance" and/or the "potential legal consumers" they represent. Like C&S's stated "interest," Movants all but admit that they have no actual interest in the outcome of this appeal and certainly are not involved with any pending cases that could be impacted by potential rulings in this appeal.

Movants have no unique perspective or insight to provide this Court and can only reiterate the positions already taken by the Respondents in this matter, who have every incentive to fully address the rules of professional conduct at issue herein. The question presented by this appeal is whether Cohen's suspension from the practice of law prohibited her from recovering her share of proceeds under a partnership dissolution contract with her former partner, Respondent Paul Padda ("Padda"), where the parties entered into the contract long before Cohen's suspension. As best evidenced by Movants' proposed Amicus Brief, they have no useful perspective to add in this appeal and simply regurgitate Respondents' arguments. Movants' Motion should therefore be denied.

II. LEGAL ARGUMENT.

Nevada Rule of Appellate Procedure 29 governs amicus curiae briefs. In this case, an amicus curiae may file a brief "***only by leave of court granted on motion or at the court's request or if accompanied by written consent of all parties***." NRAP 29(a) (emphasis added). Nevada courts have held "[t]here is no inherent right to file an amicus curiae brief with the Court." *Long v. Coast Resorts, Inc.*, 49

F. Supp. 2d 1177, 1178 (D. Nev. 1999). "It is left entirely to the discretion of the Court." *Id.* (citing *Fluor Corporation and Affiliates v. United States*, 35 Fed. Cl. 284, 285 (1996); *Waste Management of Pennsylvania, Inc. v. City of York*, 162 F.R.D. 34, 35 (M.D. Pa. 1995)). "This is true notwithstanding the fact that the parties may have consented, or do not object, particularly where the applicant's only concern is the manner in which this Court will interpret the law." *Id.* (citing *American College of Obstetricians and Gynecologists, Pennsylvania Section, et al. v. Thornburgh*, 699 F.2d 644 (3rd Cir. 1983)).

Amicus briefs are typically only permitted in four circumstances: (1) when a party is not represented competently; (2) when a party is not represented at all; (3) when the amicus has an interest in some other case that may be affected by the decision in the present case; or (4) when the amicus has unique information or perspective. *Soos v. Cuomo*, 470 F. Supp. 3d 268, 284 (N.D.N.Y. 2020) (quoting *Payphones, Inc. v. Dobrin*, 410 F. Supp. 3d 457, 465, n.3 (E.D.N.Y. 2019)). "Otherwise, leave to file an amicus brief should be denied." *Id*. This has been the standard for over 100 years. *N. Sec. Co. v. United States*, 191 U.S. 555, 556, 24 S. Ct. 119 (1903).

The *Long* court referred to a decision issued by Chief Judge Posner, of the Seventh Circuit, who wrote,

[t]he vast majority of amicus curiae briefs are filed by allies of litigants

> and duplicate the arguments made in the litigants' briefs, in effect merely extending the length of the litigant's brief. *Id*. (quoting *Ryan v. Commodity Futures Trading Commission*, 125 F.3d 1062, 1063 (7th Cir. 1997)). ***Such amicus briefs should not be allowed. They are an abuse. The term 'amicus curiae' means friend of the court, not friend of a party***. *Id.* (emphasis added).

Significantly, courts should only grant leave to appear as an amicus if the information offered is "**useful**." *Long*, 49 F. Supp. 2d at 1178 (quoting *Waste Management*, 162 F.R.D. at 36) (emphasis added).

A. BOTH PARTIES TO THIS APPEAL ARE REPRESENTED BY COMPETENT COUNSEL.

In this case, there is simply no need for an amicus curiae brief to be filed. Cohen is represented by two law firms with decades of experience in Nevada, while Padda is currently represented by three different law firms (in addition to representing himself in these proceedings) with similar levels of experience. *See Soos*, 470 F. Supp. 3d at 284. The competency of Cohen and Padda's representation is not in question. Equally as important, Movants failed to identify an interest in <u>any</u> other case[3] that may be affected by the decision in the present case. *See id.*

B. MOVANTS HAVE NO UNIQUE OR USEFUL INFORMATION FOR THE COURT.

A cursory review of Movants' proposed Amicus Curiae Brief reveals that

[3] This, despite claiming that they represent the interests of "the public at large," "an organization with 29 chapters spread across the United States" as well as "the veteran community." *See* Movants' Brief at pages 2, 3 and 4.

Movants have no unique or useful information for the Court's consideration. *See Soos*, 470 F. Supp. 3d at 284. Rule 29(c) requires the movant to state their "interest" in the pending matter. NRAP 29(c)(1). Once again, Movants proclaim that they represent the interests of "the public at large," "an organization with 29 chapters spread across the United States" as well as "the veteran community."[4] According to Movants, because of their global interests, they are qualified amicus curiae as they "represent legal consumers" and "potential legal consumers." In violation of Rule 29(c)(1), Movants failed to state their interest in a private dispute between two former law partners over a partnership dissolution agreement. Movants stated "interest" in this matter would operate to provide them an interest in potentially any legal matter (or non-legal matter) under review. Such a broad net of connections renders the *interest* and *useful perspective* expected of amicus parties completely meaningless.

The governing standard does not contemplate amicus briefing from any organization under the sun. To the contrary, the governing standard provides "[t]here is no inherent right to file an amicus curiae brief with the Court"[5] and that the same should only be permitted "when the amicus has unique information or perspective" that can "offer insights not available from the parties." *Soos*, 470 F.

[4] *See* Movants' Brief at pages 2, 3 and 4.
[5] *Long*, 49 F. Supp. 2d at 1178.

Supp. 3d at 284. "Otherwise, leave to file an amicus brief should be denied." *Id.* Movants' assertions of generalized connections to this appeal fall woefully short of demonstrating an "interest" or the useful and unique perspective courts expect from amicus parties. If Movants' claimed "interests" qualified it to submit an amicus brief in this matter, anyone claiming an interest in "ethics" or "the public interest" would qualify as a party with "unique information or perspective" in this matter. The purpose of an amicus party is not to open the flood gates for briefs advancing generalized notions of ethics and public interest. The purpose is to permit advocacy of unique perspectives that are useful in analyzing the specific issues before this Court. *Long*, 49 F. Supp. 2d at 1178; *Soos*, 470 F. Supp. 3d at 284. Movants failed to state any relevant interest in this matter.

More importantly, Movants' proposed Amicus Brief asserts three primary *insights* and/or *perspectives*: (1) the plain language of the governing rules control and contradict Cohen's position; (2) the public would be harmed if Cohen's position were sustained as she "abandoned" and "hid" from her clients; and (3) Nevada Committee on Ethics & Professional Responsibility Formal Opinion No. 18 controls the issue at bar. Movants' first two *insights* are thoroughly covered by Respondents' Answering Brief.[6] Just like C&S, Movants essentially regurgitate the "insight"

[6] *See* Respondent's Answering Brief on file herein at Sections V(B) and V(D).

offered by Respondents in their Answering Brief. This fact is best evidenced by the following argument from Movants' proposed Amicus Brief itself:

> ***The Padda Parties responded in their Answering Brief by arguing*** and citing to the facts set forth in the preceding three paragraphs above. PAB 37-39. ***In her Reply Brief filed April 23, 2021 in this case, Ms. Cohen fails to dispute*** any of the facts cited by the Padda Parties in support of Ms. Cohen's abandonment of the cases and clients at issue ***and conspicuously ignores the authorities cited by [Padda]*** . . ."[7]

Once again, the purpose of amicus briefs is not to permit a party to submit a sur-reply or otherwise lengthen their previous brief. "The vast majority of amicus curiae briefs are filed by allies of litigants and duplicate the arguments made in the litigants' briefs, in effect merely extending the length of the litigant's brief. Such amicus briefs should not be allowed. *Long*, 49 F. Supp. 2d at 1178 (quoting *Ryan*, 125 F.3d at 1063).

Movants final *insight* or *perspective* (Nevada Committee on Ethics & Professional Responsibility Formal Opinion No. 18) is erroneous and therefore not of assistance to the Court. Formal Opinion No. 18 is focused on the narrow issue of fee splitting between an attorney that was hired and then terminated by a client and the client's subsequent attorney. The issues at bar are wholly inapposite. Cohen was not terminated by the subject clients. Padda was not the subject clients' subsequent attorney. Rather, the subject clients retained the law firm of Cohen &

[7] *See* Movants' Amicus Brief on file herein at page 11 (emphasis added).

Padda and, after Cohen decided she wanted to end the partnership, Cohen and Padda entered into a dissolution agreement concerning the assets of their business. Accordingly, the Nevada Committee on Ethics & Professional Responsibility's conclusion that "[a] terminated attorney is entitled to a quantum meruit settlement of fees at the conclusion of the client's case" is wholly irrelevant in this proceeding.[8]

The purpose of the opinion was to address how the terminated attorney would be compensated vis a vie the successor attorney because there was no agreement concerning fee splitting between the two. That question does not exist in this case; Cohen and Padda entered into a contract and expressly agreed to the allocation of fees. Indeed, the author(s) specifically recognized that, if it were present, "significant weight" would be given to any express language concerning the fee allocation after a termination.

> An additional consideration would be whether the fee agreement contains a clause which sets the fee amount in the event of a termination without cause. Such a clause, if openly arrived at and reasonable under the circumstances, would be given significant weight in the event of termination and a subsequent fee dispute.[9]

The opinion indicated that "significant weight" would be afforded such a clause, *versus it simply being accepted as a valid and binding agreement*, due to

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[8] *See* April 29, 1994, Nevada Committee on Ethics & Professional Responsibility Formal Opinion No. 18 attached as **Exhibit 1** at page 4.
[9] *See id.* at Page 3.

variables that do not exist in this case (*i.e.,* how much work the first/terminated attorney actually performed). This variable has no relevance to the facts of this appeal as Cohen and Padda are not making competing quantum meruit claims, but rather, litigating Padda allegedly defrauding Cohen out of fees she was promised in a dissolution agreement. In other words, this is not a case of two unrelated attorneys fighting over who should receive what percentage of a judgment/settlement. This case is about two partners that owned a business together and agreed to an allocation of profits and business assets in connection with the dissolution of the business. Opinion No. 18 has zero relevance to the issues before this Court and therefore will not assist the Court. Indeed, amicus briefs are supposed to supplement the record and "aid the court" with "insights not available from the parties." *Soos*, 470 F. Supp. at 268.

C. MOVANTS' ATTACKS AGAINST COHEN ARE SIMILARLY NOT USEFUL.

This case involves two law partners that agreed to dissolve the partnership and separate. This happens regularly in every state. Notwithstanding the same, Movants, C&S and Respondents insist on vilifying Cohen in an effort to inject needless emotion into the case. Specifically, Movants' Motion and proposed brief are riddled with attacks that Cohen "abandoned" her clients, "hid" from her clients and is seeking a "windfall" for services she never provided. Other than Padda's

alleged fraud that followed, the dissolution of Cohen & Padda happened in much the same fashion as any other law firm dissolution. Notwithstanding the same, Movants, C&S and Respondents have done their best to vilify Cohen as a sneaky lawyer that "abandoned" her clients. Such frivolous attacks are entirely unnecessary and certainly do not need to be echoed by an amicus party. Amicus briefs are supposed to supplement the record and "aid the court" with "insights not available from the parties." *Soos*, 470 F. Supp. at 268.

III. CONCLUSION.

Based on the foregoing, Appellant respectfully requests that this Court deny the Motion for Leave to File Amicus Curiae Brief of South Asian Bar Association of Las Vegas, Veterans in Politics International, Inc. and Jay Bloom.

DATED this 7th day of May, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing **OPPOSITION TO MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF OF SOUTH ASIAN BAR ASSOCIATION OF LAS VEGAS, VETERANS IN POLITICS INTERNATIONAL, INC. AND JAY BLOOM** was filed electronically with the Nevada Supreme Court on the 7th day of May, 2021. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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Exhibit 1

STATE BAR OF NEVADA
STANDING COMMITTEE ON
ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion No. 18
April 29, 1994

QUESTION

What portion of a contingent fee is a discharged attorney entitled to when the discharge occurs after an initial offer of settlement has been made?

ANSWER

The attorney is entitled to a recovery in quantum meruit.

AUTHORITIES RELIED ON

Nevada Rule of Professional Conduct (Supreme Court Rule) 155, and 166.4, NRS 18.015, Formal Opinions #4 and #17, *In re Kaufman*, 93 Nev. 452, 567 P.2d 957 (1977)), ABA Informal Op. 86-1521 (1986), *Hayes v. Secretary of Health and Human Services*, 923 F.2d 418 (6th Cir. 1991), G. Hazard & W. Hodes, *The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct* (1985); R. Aronson, *Professional Responsibility in a Nutshell* (1990).

DISCUSSION

Supervision of contingent fee agreements rests with the state supreme courts. In Nevada, as in the majority of jurisdictions, the supreme court has determined through case law that disputes arising out of contingent fee agreements based upon the discharge of the attorney are to be determined in quantum meruit.[1]

The question asked of this committee presupposes that the contingent fee agreement at issue was in writing, that the terms were reasonable and that the discharge was without cause. This committee's response is based upon those

[1] Because of the universal application of this standard, attorneys are advised to keep complete and accurate time records in contingency fee cases. See Closen and Tobin, *The Contingent Contingency Fee Arrangement: Compensation of the Contingency Fee Attorney Discharged by the Client*, 76 Ill. B.J. 916 (1987).

presuppositions, but would point out that an attorney normally has an obligation to advise a prospective client of alternative fee arrangements, such as a reasonable fixed fee, if there exists any doubt as to the reasonableness of a contingent fee under the circumstances. ABA Informal Op. 86-1521 (1986).

If a dispute and subsequent discharge arises between an attorney and a client, the attorney must take affirmative steps not to prejudice the client's case. NRS 18.015, authorizes and sets out the procedure for exercising an attorney's lien for an attorney's lien for fees. It does not authorize the retention of a client's papers. While SCR 166.4 recognizes that an attorney" …may retain papers relating to the client to the extent permitted by other law", the case law developed pursuant to the issue appears to condemn such an approach. (The case law specifically recognizes NRS 18.015 as the charging lien, as opposed to a common law retaining lien). The exercise of retaining liens in Nevada has resulted in sanctions against the attorney when the client can demonstrate prejudice. *In re Kaufman*, 93 Nev. 452, 567 P.2d 957 (1977). SCR 166.4 calls upon the terminated attorney to "surrender papers and property to which the client is entitled..". SCR 166.4 also calls upon the terminated attorney to "take steps to the extent reasonably practicable to protect a client's interests..".

Since an attorney's fee in a contingent fee case has not been earned until there has been a recovery, an attorney acts at extreme risk in exercising a lien against a client's file. The preferred method, as set out in NRS 18.015, would be to notify the client, the succeeding attorney and the insurance carrier (if one exists) as to the written agreement, so that when the matter is resolved, the fees of the first attorney, to the extent earned, will be protected.

Ethics authorities have recognized that a strict application of the terms of the contingent fee, for example a claim of one third of the settlement after the deduction of expenses, would work an undue hardship on the client in the pursuant of subsequent legal help. See G. Hazard & W. Hodes, *The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct* (1985); R. Aronson, *Professional Responsibility in a Nutshell* (1990). The first attorney is obligated to wait for the conclusion of the case in order to determine what, if any, fee the attorney is entitled to. It is possible that a subsequent loss of the case at trial will result in no recovery to the first attorney, even if a settlement offer had been previously advanced.

Once the case is resolved and the total recovery is known, the two attorneys can then determine how much of their individual efforts should be proportioned against a total legal fee of one third. If NRS 18.015 is utilized, the court can be asked to settle the matter if the attorneys cannot come to an agreement. Since the one third fee (or other agreed amount) can be placed in escrow pending this resolution and one third would be the total legal fee under most circumstances, distribution of proceeds in whole or

substantial part can be made to the client, thus avoiding unnecessary delay.[2]

Quantum meruit is simply the application of a reasonable fee based upon the results, the time expended and the other factors enumerated in SCR 155. See our Formal Opinion #17. The Sixth Circuit has opined that a fee is presumed to be reasonable if it does not exceed twice the prevailing fee in the relevant market for comparable work charged on an hourly basis. Hayes v. Secretary of Health and Human Services, 923 F.2d 418 (6th Cir. 1991). However, what is reasonable will always be fact specific and is an issue for the court (or fee dispute committee) to decide on a fully developed record. See our Formal Opinion #4.

This committee does not have enough information to offer an opinion as to whether one third of the initial offer is reasonable, with the second attorney taking one third of any subsequent increases of that offer. The initial offer may have been made based upon an immediate recognition of liability and damages. The first attorney may have received such an offer only after a few hours of time expended. In such a situation, the hourly rate may amount to several thousand dollars an hour, which would be unreasonable and a violation of SCR 155. On the other hand, the first attorney may, by reputation, experience and ability have acquired an offer which would not normally have been made at a given stage in the case, and which offer constitutes a significant percentage of the total recovery. In that event the first attorney may be entitled to a proportion of the legal fees in excess of twice the hourly rate. The novelty and complexity of the case and the issues it presents, the more reasonable it becomes to apply a time expended/hourly rate analysis.

An additional consideration would be whether the fee agreement contains a clause which sets the fee amount in the event of a termination without cause. Such a clause, if openly arrived at and reasonable under the circumstances, would be given significant weight in the event of termination and a subsequent fee dispute.

This committee cannot emphasize enough the importance of advising the client as to his or her fee options, drafting a comprehensive and fair fee agreement which takes into account the demands of the case, and of keeping good time records. For when a fee dispute arises, the burden will be placed upon the attorney to establish the reasonableness of the fee. What is reasonable will be based upon the time expended, results obtained, the nature of the case and the understanding of the parties.

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[2] SCR 165.2 requires a prompt notification and delivery of funds received on behalf of a client. SCR 165.3 permits any disputed portion of funds (property) to be set aside until the dispute is resolved. Caution must be exercised here as at least two reported cases have held that a refusal to turn over unearned fees constitutes misappropriation. See In Re Garcia, 366 N.W. 2d 482 (N.D. 1985); In Re Hedrick, 301 Or. 750, 725 P.2d 343 (1986).

CONCLUSION

A terminated attorney is entitled to a quantum meruit settlement of fees at the conclusion of the client's case. The total fee must be reasonable, and the terminated attorney should protect his or her fee in accordance with NRS 18.015. The fact that an offer of settlement has been made to the first attorney is just one factor to be considered in reaching an equitable division of fees.
