IN THE SUPREME COURT OF THE STATE OF NEVADA

IN THE MATTER OF DISCIPLINE OF CHRISTOPHER ARABIA, NV BAR NO. 9749	Supreme Court No.: 82173

APPELLANT'S REPLY BRIEF

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A. The District Attorney of Nye County has qualified immunity for discretionary actions taken as an elected official.

In their Answering Brief, the State Bar of Nevada first argued that qualified immunity does not apply in this case because it only applies to tort actions and not disciplinary actions. *Respondents Answering Brief (hereafter "RAB"), page 5, line 5.* Next, they argued that granting the Appellant qualified immunity in this case would be wrong because it would create an unacceptable two-tier system to the detriment of public agencies. *RAB p. 6, lines 14-15.* Finally, they argued that even if qualified immunity applied to this case, the Appellants actions did not qualify. *RAB p. 7, lines 1-3.* None of these arguments are persuasive.

i. NRS 41.032 applies to all actions, including disciplinary actions.

First, the argument that the qualified immunity doctrine contained in NRS 41.032 does not apply because the present case is not a tort action is incorrect. NRS 41.032 specifies that no ***action*** may be brought against the state, state agencies, political subdivisions, or any officer or employee of the state, its agencies, or its political subdivisions based upon the exercise or performance of a discretionary function or duty, whether or not the discretion involved is abused. *(emphasis added)*. It is well-settled that when examining a statute, the Court should

ascribe plain meaning to its words, unless the plain meaning was clearly not intended. *Cote H. v. Eighth Judicial Dist. Court*, 124 Nev. 36, 37, 175 P.3d 906, 907 (2008). Moreover, the Nevada Supreme Court has held that, "statutes with a protective purpose should be liberally construed in order to effectuate the benefits intended to be obtained." *Id.*

Here, the qualified immunity statute clearly states that no *action* can be taken against a public official. It does not limit the protective purpose of the statute to torts, nor does it exclude disciplinary *actions.* Moreover, because the qualified immunity statute serves a *protective purpose* it should be liberally construed. As such, the Respondent's argument that the Appellant cannot benefit from qualified immunity must fail.

ii. Granting District Attorneys Qualified Immunity will not lead to a two-tiered system.

Next, the Respondent claims that following NRS 41.032 and granting the Appellant qualified immunity will lead to a "two-tiered system to the detriment of public agencies." *RAB, pg. 6, line 14.* They fret that such a system would protect District Attorneys from sanctions while other private attorneys were punished for the same conduct. This is unnecessary alarmism.

NRS 41.032 only applies to situations where a public officer or employee is a) relying on a statute or b) making a discretionary decision as part of his or her

official duties. Therefore, the majority of misconduct cases would not fall under the qualified immunity statute. If a District Attorney hides evidence or steals funds, those actions aren't going to be any more protected because they are a DA than if they were a member of the private bar. The offending DA's conduct could not be said to be a result of "relying on a statute," in fact, such actions would be contrary to statute. Additionally, such misconduct would not be considered a "discretionary decision" nor part of "official duties" and thus would not qualify for protection.

Thus, the number of decisions that qualify for immunity are rather small, and there is generally not a private-bar equivalent which would lead to a two-tiered system. For example, it is within a District Attorney's right to file, amend, or drop charges in a criminal case. They need qualified immunity to do so, otherwise every decision by the DA's office would be under constant attack from defendants, crime victims and witnesses, the public, the media, and more. Every time a DA decided not to prosecute a public official, a police officer involved in a shooting, or a city employee, it would lead to allegations that they were doing so because of a conflict of interest. The private bar does not have to worry about such issues and thus does not need immunity.

On the flip side, the private bar has the freedom to choose which cases to take, which actions to file, and to withdraw from cases. The District Attorney's office does not have the same luxury. They must follow whatever the law is,

regardless of their personal feelings, and for that reason, they are granted some immunity if they make the wrong decision when attempting to follow the law or when making a discretionary decision.

In short, District Attorneys need qualified immunity in order to do their jobs. Such immunity does not make them immune from any prosecution, disciplinary matters, or the dangers of election season. It merely makes sure that they can perform their duties as required, even when doing so is not a popular decision. Such instances are rare and far between and would not lead to the type of chaos that the Respondent insinuates in their pleadings.

iii. The Appellant's actions satisfy all the requirements for immunity.

The Respondent's third argument is that the Appellant's actions do not meet the *Berkovitz-Gaubert* test for qualified immunity laid out in *Boulder City v. Boulder Excavating Inc.,* 124 Nev. 749, 191 P.3d 1175 (2008). The test provides the basis for a determination as to whether an action is "discretionary." It states that "To fall within the scope of discretionary-act immunity, a decision must (1) involve an element of individual judgment or choice and (2) be based on considerations of social, economic, or political policy." *Id.*

The Respondent argues that the Appellant's decision does not meet the qualifications under the test because "he was aware that a district attorney's conduct is limited by the Rules of Professional Conduct" and "it is apparent in the policies

and procedures that result in the delegation of outside counsel." *RAB pg. 7, lines 14-18.* They fail to specify how those two points demonstrate that the Appellant's actions fail the above-referenced test.

The Appellant's actions are exactly the kind of discretionary actions for which the qualified immunity statute was created. The Appellant had a duty to advise the county and provide an opinion on its legal matters. By definition, an opinion involves an element of individual judgment or choice. It is well settled that differing legal minds are likely to come to a multitude of different conclusions, and that the mere fact that another attorney disagrees does not render a particular piece of legal advice "bad' or "wrong." *See Foster v. State,* 121 Nev. 165, 111 P.3d 1083, 1085 (2004) ("Judicial review of counsel's representation is highly deferential."), *Lara v. State,* 120 Nev. 177, 178, 87 P.3d 528, 529 (2004) ("trial counsel's strategic or tactical decisions will be virtually unchallengeable absent extraordinary circumstances."), and *Iliescu v. Hale Lane Peek Dennison & Howard Prof'l Corp.,* 455 P.3d 841 (Nev. 2020) ("in both litigation and transactional malpractice cases, the plaintiff must prove that "but for" the alleged malpractice, "the harm or loss would not have occurred.").

Here the legal advice that the Appellant gave was factually correct. The disgruntled employee was not entitled to a hearing on his termination because he was an at will employee.[1] Thus, the first part of the test is satisfied.

Next, in order to be discretionary, the decision needs to be based upon "considerations of social, economic, or political policy." Here, the Appellant and his team met to discuss the hearing in depth. *ROA Vol. 1 pg., 493.* Ultimately, the decision was based upon the Nye County Code. Holding the hearing would have been a waste of county resources (an economic consideration) and it would have led to additional disgruntled former DAs requesting hearings (a social and economic consideration). Therefore, the Appellant and the rest of his team made the discretionary decision to nip the problem in the bud, rather than allow it to become a bigger issue that would cost the county additional money, time, and resources. *ROA Vol. 1 pg., 493.* Therefore, the second prong of the test is satisfied, as the reason for cancelling the hearing was based on social, economic, and political policy.

Accordingly, the Appellant's actions fell squarely within the *Berkovitz-Gaubert* test outlined in *Boulder City*. His decision to advise the county to cancel

[1] Any other decision would effectively give the county manager the power to re-appoint former Deputy District Attorneys who had been terminated, a ludicrous outcome given that the power to appoint deputy district attorneys is reserved to the District Attorney him/herself pursuant to statute. *See* NRS 252.070.

the hearing was discretionary and thus is protected under the qualified immunity doctrine of NRS 41.032.

B. NRS 281A.020 does not supersede Supreme Court Rule 99, it is a stopgap which allows for disciplining elected officials, even if they have immunity from other sources.

The Respondent's next argument is that the Appellant is arguing that NRS 281A.020 supersedes Supreme Court Rule 99 which provides that every attorney admitted to practice in Nevada "is subject to the exclusive disciplinary jurisdiction of the supreme court and the disciplinary boards and hearing panels created by these rules." Again, that is simply not the case.

The majority of the time, an attorney who is elected to public office is still going to be subject to the discipline by the State Bar, just as a doctor or teacher who was elected would be subject to discipline from their individual boards for actions they took in their capacity as licensed professionals. However, the instant case provides a unique issue, because unlike a doctor or teacher, who might also serve as a state representative or legislator, there is significant overlap between the Appellant's duties as a public official and his duties as an attorney. In fact, one of mandatory qualifications to be a District Attorney is to be a licensed attorney in the State of Nevada and part of job description includes a statutory obligation to advise the county on its legal matters.

Which leads to the question of who has jurisdiction when a district attorney is accused of misconduct. For example, in this case, the Appellants decision was made in his capacity as an elected official, however it also relied on his knowledge as an attorney. NRS 281A.020 allows for the Commission on Ethics to have jurisdiction. It also allows for dual jurisdiction with other agencies such as the State Bar and the majority of the time, both agencies would have the right to discipline an elected official.

However, this case is unique, in that, the State Bar cannot prosecute the case. As discussed *supra,* the State Bar's action is barred due to the qualified immunity provided by NRS 41.032. Which creates a perfect demonstration of the purpose of NRS 281A.020, which is to provide a specific avenue to punish elected officials for decisions made in their elected capacity, regardless of whether or not other avenues are available.

Based upon that premise, in this specific case, given NRS 41.032 and the qualified immunity issue, the Commission on Ethics would be the sole organization with subject matter jurisdiction over the Appellant's case. As such, the Appellant's Motion to Disqualify the State Bar was erroneously denied, and the decision should be reversed.

C. The Disciplinary Board's Order is not supported by sufficient evidence.

i. There was no conflict of interest and even if there was, it did not rise to the level of being a "significant risk" that the representation would be "materially limited."

The entire premise of the State Bar's case against the Appellant was that he had a "concurrent conflict of interest" meaning that "there was a *significant* risk that the representation of one or more clients would be *materially* limited … by a personal interest of the lawyer." *RPC 1.7 (emphasis added)*. The State Bar simply did not prove that. The Respondent argues that the Appellant did not need to have an *actual* conflict, that there could still be a "significant risk" of a "material limitation." While that is theoretically possible, it's not the case in this instance.

First and foremost, when no *actual* conflict exists, it greatly reduces the likelihood that there is a "significant risk" is being created. All that is left is a theoretical vested interest that the State Bar must then prove would "materially limit" the lawyer's ability to represent his or her client. Here, the Respondent alleges that there was a "significant risk" that the Appellant's ability to represent Nye County was "materially limited" by his desire not to have to defend his own actions at the hearing. That is simply not the case.

The Appellant gave the advice that he did, not because of his own interest, but because the law on the issue was clear: the disgruntled employee in question was simply not entitled to a hearing. That answer would not have changed,

regardless of who was advising the county. Therefore, the State Bar has not proven that there was ever a "significant risk" that the Appellant's ability to represent the county was limited by his own interests.

Even if the Respondent had met that bar, the next step would be to prove that the limitation was "material," which again, they cannot do. Even if there had been a conflict of interest in this case, and that conflict created a "significant risk," such a conflict would only have required that the Appellant get consent to continue with representation. Here, that would only have required that the Appellant notify the Nye County HR that he was the one who terminated the disgruntled employee and then obtain a release prior to giving advice. Given that the Nye County manager and HR officials clearly knew that the Appellant was the one who terminated the employee and still went to him for advice, there is a strong indication that they consented to the representation, thus nullifying any arguments that there was a "significant risk" of "material limitation." Therefore, the Respondent has not met their burden and the Hearing Panel's findings should be dismissed.

ii. <u>Even if there was a conflict of interest the Hearing Panel's findings are excessive under Standard 4.34.</u>

In the unlikely event that the Court determines that the Respondent met their burden, the punishment imposed by the panel was more severe than was warranted by the rules and thus is should be reversed.

Standard 4.34 states that "Admonition is generally appropriate when a lawyer engages in an isolated incident of negligence… and causes little or no actual or potential injury." Here, there was no injury to the County because the advice the Appellant gave was correct. Thus, the only issue is the Respondent's state of mind.

Given that the Appellant could have avoided this entire process if he'd merely reminded the County that he had been the one to terminate the employee and thus needed a waiver before continuing, it does not stand to reason that his mental state was "knowing." The risk-to-reward is simply not there. Instead, it is clear that the Appellant's actions were, at most, negligent and therefore, the imposition of a public reprimand is excessive under the standards. The case law is clear that the purpose of the Rules of Professional Procedure and the State Bar hearing process are not to punish lawyers but to protect the public and ensure that lawyers correct their mistakes. Given that, assuming the Court finds the Respondent met their burden, the more appropriate response in this case, taking into account that the Appellant's mindset was likely negligent, would be to provide the Appellant with a private reprimand/admonition.

D. <u>The State Bar of Nevada has a conflict of interest that should have prevented them from participating in this case.</u>

Finally, the Respondent argues that the State Bar did not have a conflict of interest in this matter, despite the fact that the grievant in this case worked for the

bar, as did two other former deputy district attorney's whom the Appellant had terminated.

RPC 1.11(a) (Special Conflicts of Interest for Former and Current Government Officers and Employees) states: "a lawyer who has formerly served as a public officer or employee of the government……shall not otherwise represent a client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee…" The rule goes on to say that "When a lawyer is disqualified from representation under paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:

(1) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this rule."

Here, the primary complaining witness for the State Bar was Mr. Vieta-Kabell, the disgruntled employee who the Appellant terminated and whose hearing was cancelled. Mr. Vieta-Kabell was an employee and public officer when he worked in the DA's office and he participated personally and substantially in the instant matter when began sparring with the Appellant and when he testified as to whether or not DAs were at-will employees at a union hearing. While he was then

fired and requested the hearing and filed the grievance during his unemployment, it does not change the fact that the grievance was still pending when he began working for the Respondent. The Respondent alleges there are no rule violations because the Appellant's Response to the initial grievance was filed after Mr. Vieta-Kabell left the State Bar, but the fact that the investigation and solicitation of a response from the Appellant was ongoing while Mr. Vieta-Kabell worked for the State Bar constitutes a conflict.

Similarly, there were two other former Nye County DA's who the Appellant had terminated and who later came to work for the bar: Mr. Young and Mr. Giosco. While they may not have both been working for the Respondent when the initial grievance was filed, both worked for the State Bar during the pendency of the case, and both had substantial involvement with the Appellant and the termination process in Nye County during the time as county employees. Thus, they too had conflicts.

In response, the State Bar argues that none of these conflicts matter because all three of the employees were screened. However, that is not sufficient. In addition to screening matters, Rule 1.11 also requires that written notice be promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this rule. Given that the appropriate agency

would likely be the State Bar, this creates another obvious conflict, as the Bar cannot be expected to police itself.

This entire situation is exactly why Supreme Court Rule 104(3) exists. The State Bar should have recused itself and referred the Appellant's case to the Board of Governor's for the appointment of conflict counsel. Since they did not do so, the entire hearing process was tainted, the Appellant was not afforded a fair hearing, and the findings of the Hearing Panel should be dismissed.

IX. CONCLUSION

Based upon the foregoing, the Findings of Fact, Conclusions of Law, and Recommendation by the Disciplinary Board should be **vacated**.

Dated this 14th day of April, 2020.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to NRAP 25 and NEFCR Rule 9, I hereby certify that on the 14th day of April, 2021 a true and correct copy of the foregoing **APPELLANT'S REPLY BRIEF** was served by the following method(s):

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☐ VIA FACSIMILE: by transmitting to a facsimile machine maintained by the attorney or the party who has filed a written consent for such manner of service.

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