

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

2 IN THE MATTER OF DISCIPLINE OF
3 CHRISTOPHER ARABIA,
4 NV BAR NO. 9749

Supreme Court No.: 82173
Electronically Filed
Dec 15 2021 07:51 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

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APPELLANT’S PETITION FOR EN BANC RECONSIDERATION

6
7 Appellant, Christopher Arabia (“Mr. Arabia), by and through his attorneys,
8 Thomas F. Pitaro and Emily K. Strand, of the law firm Pitaro & Fumo, Chtd.,
9 petitions this Court for en banc reconsideration of the Majority Opinion issued in
10 the above-captioned case on December 1, 2021. This Petition for Rehearing is based
11 on the following Memorandum of Points and Authorities and all the papers and
12 pleadings on file in this case.

13 **TIMELINESS OF THE PETITION**

14 This Court filed its order denying Rehearing on this matter on December 1,
15 2021. Accordingly, this Petition for En Banc Reconsideration is timely filed in
16 accordance with Nev. R. App. P. 26(a) and 40A.

17 **THE COURT’S DECISION**

18 Nevada R. App. P. 40A permits en banc reconsideration under the following
19 circumstances:
20

1 1. Reconsideration by the full court is necessary to secure or maintain
2 uniformity of decision of the Supreme Court or Court of Appeals, or

3 2. The proceeding involves a substantial precedential, constitutional, or
4 public policy issue.

5 As set forth below, en banc reconsideration is appropriate because the
6 discipline in this case differs significantly from the baseline standard. Furthermore,
7 this case presents substantial, novel, public policy issues with regard to the
8 discipline of attorneys acting in their capacity as public officials.

9 **STATEMENT OF FACTS**

10 The Appellant, Christopher Arabia was elected as the Nye County District
11 Attorney in 2018. When the Appellant first took office, he took over the
12 management of the deputy district attorneys appointed by his predecessor. One such
13 deputy district attorney, was Michael Vieta-Kabell, whom the Appellant terminated
14 from the Nye County District Attorney's office on September 18, 2019.

15 On September 23, 2019, Mr. Vieta-Kabell filed an appeal of his termination
16 with the Nye County Human Resources Department, citing a Nye County Code
17 which provides for appeals of disciplinary actions for some county employees. *ROA*
18 *Vol. 1, pg. 165*. On September 24, 2019, the Nye County Human Resources Director
19 notified Kabell, the Appellant, and the Nye County Manager via email that an
20 appeal hearing had been scheduled for October 9, 2019. *ROA Vol. 1, pg. 167*.
Immediately upon hearing of the meeting, the Appellant reached out to Chief

1 Deputy District Attorney Marla Zlotek and Deputy District Attorney Bradley
2 Richardson. *ROA Vol. 1 pg, 493*. After consulting with the senior deputies and
3 researching the issues, the Appellant emailed the Nye County Human Resources
4 Director and the Nye County Manager, stating that the hearing was improper and
5 that they should cease and desist from conducting the proposed meeting.

6 On September 25, 2019, the Nye County Human Resources Director emailed
7 Kabell, his counsel, the Nye County Manager, and the Appellant to inform them
8 that she had been instructed by the Appellant to ‘cease and desist from conducting
9 the requested hearing’ and stating that there would not be a hearing on Kabell’s
10 appeal. *ROA Vol. 1, pg. 172*. On October 20, 2019, Kabell filed a bar grievance
11 against the Appellant. *ROA Vol. 1, pg. 151*.

12 **STATEMENT OF THE CASE**

13 On April 6, 2020, the State Bar of Nevada filed a complaint against the
14 Appellant alleging violations of Nevada Rules of Professional Conduct 1.7 and 8.4.
15 *ROA Vol. 1, pg. 120*.

16 Specifically, the State Bar alleged that there was “a significant risk” that the
17 Appellant’s advice to the Nye County Human Resources Director in his capacity as
18 District Attorney was materially limited by his own personal interest in defending
19 his termination of a former employee. *ROA Vol. 1, pg. 123*. Thus, the State Bar
20 alleged that the Appellant violated RPC 1.7 Conflict of Interest: Current Clients by

1 not informing the Nye County Human Resources Director of the alleged
2 concurrent conflict of interest and obtaining informed written consent to proceed
3 with advising the County. *Id.*

4 In their second claim, the State Bar alleged that the Respondent violated RPC
5 8.4 by using his position as an advisor to Nye County to improperly influence
6 whether an employee he'd previously terminated received an appeal hearing thus,
7 engaging in conduct that is prejudicial to the administration of justice. *Id.*

8 The Panel ultimately concluded, in a two to one vote, there was clear and
9 convincing evidence that Respondent violated RPC 1.7 (Conflicts of Interest:
10 Current Clients) and RPC 8.4(d) (Misconduct). *Id.* The Panel unanimously
11 concluded that the Respondent's mental state was negligent and that the misconduct
12 injured the legal profession and the representation of Respondent's client, Nye
13 County. *Id.* The panel recommended that the Appellant be issued a public reprimand
14 for violations of 1.7 (Conflicts of Interest: Current Clients) and RPC 8.4(d)
15 (Misconduct-prejudicial to the administration of justice). *Id.*

16 **STATEMENT OF ISSUES**

17 1. Whether the State Bar of Nevada, Southern Nevada Disciplinary
18 Board's Findings of Fact, Conclusions of Law, and Recommendation varies
19 substantially enough from prior disciplinary findings that it disturbs the uniformity
20 of previous Nevada Supreme Court Decisions.

1 2. Whether the State Bar of Nevada is the proper venue to bring an action
2 against an attorney who is also an elected public official when the conduct in
3 question arose from his official duties.

4 **ARGUMENT**

5 **I. The decision as to whether or not the State Bar of Nevada has authority**
6 **to use their power to interfere with the duties of duly elected officials**
7 **who are also barred attorneys is a novel issue with the power to**
8 **significantly impact public policy.**

9 Nev. Rev. Stat. § 41.032 states that no action may be brought against the
10 state, state agencies, political subdivisions, or any officer or employee of the state,
11 its agencies, or its political subdivisions based upon the exercise or performance of
12 a discretionary function or duty, whether or not the discretion involved is abused.
13 Discretionary acts are defined as those which require the exercise of personal
14 deliberation, decision and judgment. *Wayment v. Holmes*, 112 Nev. 232, 234, 912
15 P.2d 816, 817 (1996).

16 In *Wayment*, a deputy district attorney was fired and brought a tortious
17 discharge suit. The Second Judicial District Court granted the respondent district
18 attorney's office's motion for summary judgment in part on the grounds that the
19 district attorney's office and its supervisors were immune from suit under Nev. Rev.
20 Stat. § 41.032(2). The court found that the district attorney's office was not an entity
subject to suit because it is a department of Washoe County, and in the absence of
statutory authorization, a department of the municipal government may not, in the

1 departmental name, sue or be sued. More important in relation to the instant matter
2 is that the *Wayment* Court held that the supervisor that ordered the termination was
3 immune because it was within the discretion of the district attorney to fire at-will
4 employees. Therefore, because the supervisor was not acting in his individual
5 capacity, due to the fact that the termination was undertaken pursuant to his duties,
6 he was immune from liability.

7 In the present case, the disciplinary complaint in question arose from the
8 Appellant's duties as a District Attorney. Specifically, under NRS 252.160, the
9 Appellant, in his capacity as District Attorney for Nye County, had an ethical and
10 statutory duty to provide legal advice to Nye County and its administrators. Here,
11 he advised the county as to how to respond to a hearing request from an employee
12 who had been terminated. In doing so, he relied heavily on not only his own
13 knowledge but also the recommendations of two other senior Deputy District
14 Attorneys. Because District Attorney Arabia's advice was given during the
15 performance of his statutorily obligated duties, he argued that he should have been
16 immune from any action based on his advice, as he believed he had immunity
17 pursuant to NRS § 41.032.

18 The Majority Opinion in this matter held that District Attorneys are not
19 immune from discipline from the State Bar for conduct that arose during their
20 official duties as District Attorneys. Such a decision has wide-ranging implications

1 for the District Attorney's offices in all seventeen of Nevada's counties as well as
2 for senators, assemblymen, the Attorney General, and any other attorney that serves
3 in a dual capacity as both an elected official and member of the bar. This decision
4 will likely have a chilling effect on attorneys who vote or otherwise make decisions
5 on controversial public policy issues. For these reasons, the Majority Opinion is one
6 of serious public importance and en banc reconsideration is appropriate.

7 **II. The decision to issue Letter of Reprimand for a single instance of**
8 **conduct contradicts previous Supreme Court Decisions regarding**
9 **attorney misconduct.**

10 The Disciplinary Panel held that Mr. Arabia violated RPC 8.4(d) when he
11 sent the September 24 email instructing the County Manager to "cease and desist"
12 from having the hearing. RPC 8.4(d) provides that "[i]t is professional misconduct
13 for a lawyer to ... [e]ngage in conduct that is prejudicial to the administration of
14 justice." "For purposes of [Rule 8.4(d)] 'prejudice' requires 'either repeated
15 conduct causing *some* harm to the administration of justice or a single act causing
16 *substantial* harm to the administration of justice." *Colin*, 135 Nev. At 332, 448 P.3d
17 at 562 (quoting *In re Discipline of Stuhff*, 108 Nev. 629, 634, 837 P.2d 853, 855
(1992)) (emphasis added).

18 The instant offense does not rise to the level requested to establish
19 "prejudice" under *Colin*. The alleged violation consists of a "single act" – Arabia
20 sending the September 24 email to Nye County's human resources director without

1 copying the deputy. That single act did not rise to the level constituting “substantial
2 harm to the administration of justice.” *Id.* The Deputy promptly learned of Arabia’s
3 communication and the hearing was properly cancelled due to the fact the deputy
4 was never entitled to it in the first place. There was no prejudice to the deputy or
5 Nye County, let alone prejudice that rose to the level of being “substantial” enough
6 to warrant discipline.

7 Furthermore, the record is clear the Mr. Arabia has no prior attorney
8 discipline and the panel found that his conduct in sending the email was negligent,
9 not knowing or intentional. Under these circumstances, even if Mr. Arabia had
10 violated RPC 1.7(a)(2), the sanction of a formal public reprimand is unwarranted.
11 At most, the email warranted an admonition. *See Compendium of Professional*
12 *Responsibility Rules and Standards: Standards for Imposing Lawyer Sanctions*,
13 Standard 4.34 (Am. Bar Ass’n 2017) (“admonition is generally appropriate when a
14 lawyer engages in an isolated instance of negligence in determining whether the
15 representation of a client may be materially affected by the lawyer’s own
16 interests...and causes little or not actual or potential injury to a client.”)

17 Allowing the Appellant to receive a letter of reprimand for such a minor
18 instance contradicts this Court’s previous approach to attorney discipline at lowers
19 the bar significantly for future cases. As such, en banc reconsideration is
20 appropriate.

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CONCLUSION

Based upon the fact that this case presents novel issues of significant importance and the fact that it contradicts prior Nevada Supreme Court holdings regarding the appropriate form a discipline for a single instance of misconduct, en banc reconsideration is appropriate.

Dated this 15th day of December, 2021.

Respectfully submitted,

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I further certify that with the page count of 10 pages, and word count of 2175 complies with the page or type volume limitation of NRAP 32(a)(7), excluding parts of the brief exempting NRAP 32(a)(7)(C).

I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, including NRAP 28(e), that every assertion in the briefs regarding matters in the record be supported by a reference to the page and volume number, if any, of the appendix where the matter relied on is to be found.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify and affirm that the foregoing Petition for Rehearing/Reconsideration was filed electronically with the Nevada Supreme Court on the 15th day of December, 2021. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows;

SERVICE LIST

Attorney of Record	Party Represented	Method of Service
Kait Flocchini, Esq. State Bar of Nevada Office of Bar Counsel 3100 W. Charleston Boulevard, Suite 100 Las Vegas, Nevada 89102	State Bar of Nevada	Email Service; Electronic Means

/s/ Kristine Tacata
An employee of PITARO & FUM