

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20

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

IN THE MATTER OF DISCIPLINE )  
OF CHRISTOPHER ARABIA, ESQ., )  
BAR NO. 9749 )  
\_\_\_\_\_ )

Electronically Filed  
Jan 18 2022 02:53 p.m.  
Elizabeth A. Brown  
Clerk of Supreme Court  
Case No. 82173

**STATE BAR OF NEVADA’S  
ANSWER TO APPELLANT’S  
PETITION FOR *EN BANC* REHEARING**

STATE BAR OF NEVADA  
Daniel Hooge, Bar Counsel  
R. Kait Flocchini, Asst. Bar Counsel  
Nevada Bar No. 9861  
3100 W. Charleston Blvd., Ste. 100  
Las Vegas, Nevada 89102  
(702)382-2200

Attorney for State Bar

Thomas F. Pitaro, Esq.  
Nevada Bar No. 250  
Emily K. Strand, Esq.  
Nevada Bar No. 15339  
PITARO & FUMO  
601 Las Vegas Blvd. South  
Las Vegas, Nevada 89101  
(702) 382-9221

Attorney for Appellant

1        **ARGUMENT IN OPPOSITION TO THE PETITION FOR *EN***

2                        **BANC REHEARING**

3        **I.     LEGAL STANDARD**

4           Nevada Rule of Appellate Procedure 40A sets forth the  
5 extraordinary circumstances for an *en banc* Rehearing. NRAP 40A(a)  
6 states:

7           En banc reconsideration of a decision of a panel of the  
8 Supreme Court is not favored and ordinarily will not be  
9 ordered except when (1) reconsideration by the full court is  
10 necessary to secure or maintain uniformity of decisions of the  
Supreme Court or Court of Appeals, or (2) the proceeding  
involves a substantial precedential, constitutional or public  
policy issue.

11           A party may file a petition for *en banc* reconsideration only within  
12 14 days after written entry of a Supreme Court Panel’s decision to deny  
13 rehearing. NRAP 40A(b).

14           NRAP 40A(c) governs the contents of the petition, providing that:

15           A petition based on grounds that full court reconsideration is  
16 necessary to secure and maintain uniformity of the decisions  
17 of the Supreme Court or Court of Appeals shall demonstrate  
that the panel’s decision is contrary to prior, published  
opinions of the Supreme Court or Court of Appeals and shall  
include specific citations to those cases.

18           ...

19           NRAP 40A(c) requires that petitions “based on grounds that the  
20 proceeding involves a substantial precedential, constitutional or public

1 policy issue [(i)] concisely set forth the issue, [(ii)] specify the nature of  
2 the issue, and [(iii)] demonstrate the impact of the panel’s decision  
3 beyond the litigants involved.” *Id.* A petitioner may not reargue  
4 “[m]atters presented in the briefs and oral arguments” and may not raise  
5 a point for the first time. *Id.*

## 6 **II. ARGUMENT**

7 The Petition fails to identify any issue in this matter that meets the  
8 standards, under NRAP 40A, for an *en banc* rehearing.

9 As an initial matter, the Petition fails to meet the procedural  
10 requirements because (i) the October 21, 2021 Petition for Rehearing by  
11 the Supreme Court Panel did not raise the issue of the asserted qualified  
12 immunity and disciplinary jurisdiction over elected District Attorneys  
13 and (ii) the Opening Brief, filed February 5, 2021, did not raise the issue  
14 of whether the “single act” created substantial harm to the administration  
15 of justice. For this reason, the issues of (i) jurisdiction and (ii) evaluation  
16 of the “single act” have either been waived or are not ripe for  
17 consideration by an an *en banc* Court.

18 Furthermore, the panel’s decision does not conflict with any decision  
19 of this Court and does not involve an issue of exceptional importance.  
20 The Petition fails to cite to any cases which are contrary to the current

1 decision to issue a Public Reprimand for violations of RPC 1.7 and RPC  
2 8.4(d). The Petition also fails to explain or support that rehearing is  
3 necessary to address a substantial precedential, constitutional, or public  
4 policy issue.

5 **A. The Petition Fails to Establish the Procedural**  
6 **Requirements of NRAP 40A.**

7 This Court will not reconsider new arguments *en banc*. NRAP  
8 40A(c).

9 1. **Failure to Raise Issue in Original Briefs.**

10 A failure to raise an issue in the original appellate briefing renders  
11 the argument waived. *See Powell v. Liberty Mut. Fire Ins. Co.*, 127 Nev.  
12 156, fn. 3, 252 P.3d 668, 672 (Nev. 2011). The current Petition asks for  
13 reconsideration of the issuance of a Public Reprimand for violation of  
14 RPC 8.4(d) based on an evaluation of whether the ‘single act’ constituted  
15 ‘substantial harm.’ *See* Petition at pg. 6-7. However, The Opening Brief  
16 did not raise that argument. *See Generally*, Opening Brief, filed on  
17 February 5, 2021, pg. 14. The Petition for Rehearing was the first time  
18 the issue of substantial harm was argued, and then, the argument merely  
19 mirrored the dissent in the Panel decision. A failure to raise an issue in  
20

1 the initial appeal bars the argument in this petition for rehearing. Thus,  
2 this Court should not consider the issue of substantial harm.

3 2. Failure to Raise the Public Policy Issue Clearly in Briefs.

4 A petitioner for *en banc* rehearing must clearly raise the issue in  
5 the appellate briefs. NRAP 40A(b); *R & S St. Rose Lenders, LLC v.*  
6 *Branch Banking & Trust Co.*, 2014 Nev. LEXIS 145, \*2 (2014).

7 In *R & S St. Rose Lenders*, the Court held that the appellant waived  
8 a public policy argument because it failed to make the argument in  
9 previous briefs. The dissenting opinion clarified that the Nevada  
10 Supreme Court's decision regarding *en banc* reconsideration in *R&S St.*  
11 *Rose Lenders* came about after a panel decision and panel denial of a  
12 rehearing request. *Id.* at \*11-12. The dissent conceded that the appellant  
13 did not assert the argument prior to the *en banc* petition, but emphasized  
14 that, in its direct appeal, the appellant cited to the support for the  
15 argument-at-issue. The majority of the Court was unpersuaded that a  
16 referenced, but unasserted, argument was a sufficient basis to grant *en*  
17 *banc* reconsideration.

18 Here, the Petition for Rehearing by the Supreme Court Panel  
19 requested that the Panel reconsider the decision to issue a Public  
20 Reprimand generally and, specifically, for a violation of RPC 8.4(d). *See*

1 Appellant's Petition for Rehearing, filed October 10, 2021, pgs. 6-7. The  
2 previous petition also argued that the Panel failed to adequately consider  
3 facts relevant to whether Respondent violated RPC 1.7 (Conflict of  
4 Interest: Current Clients). *See id.* at 2-6. However, the previous Petition  
5 did not seek reconsideration of whether this Court, and the State Bar, had  
6 jurisdiction to sanction a lawyer who had been elected to the position of  
7 District Attorney. Thus, the request to rehear the issue of qualified  
8 immunity/jurisdiction should be denied for failing to satisfy the  
9 procedural requirements of NRAP 40A.

10 **B. No Evidence of Contrary Decisions for Similar**  
11 **Violations of RPC 1.7 and RPC 8.4(d).**

12 The Petition is void of any argument that the Panel's decision that  
13 RPC 1.7 was violated is contrary to prior Supreme Court decisions. In  
14 fact, the Petition fails to argue against the conclusion that RPC 1.7 was  
15 violated; Respondent has accepted that Court found the violation  
16 established and warranting discipline.

17 The Petition focuses on the conclusion that RPC 8.4(d) was violated  
18 and whether a Public Reprimand is the appropriate sanction for the  
19 violation of RPC 1.7. *See* Petition at pg. 6-7.

1 First, the Petition fails to cite any authority that contradicts the  
2 Panel's finding that the 'single act' at issue caused 'substantial harm' to  
3 the administration of justice. The Petition cites to *In re Colin*, 448 P.3d  
4 556 (Nev. 2019) but the panel majority distinguished *In re Colin* on  
5 factual grounds. It did not contradict its legal conclusion. The Petition  
6 merely reargues the facts of the case. *Compare* Petition at pg. 6:18-7:6  
7 and Petition for Rehearing, filed October 10, 2021, pg. 6:14-7:2. It offers  
8 no specific citations to cases that contradict the Panel's decision. Thus,  
9 this disciplinary matter does not meet the requirements for an *en banc*  
10 reconsideration to maintain uniformity of decisions.

11 Second, the Petition fails to cite to any authority that contradicts  
12 the Panel's imposition of a Public Reprimand for the misconduct.<sup>1</sup> The  
13 Petition references that Standard 4.34 of the ABA Standards for  
14 Imposing Lawyer Sanctions should have been applied to the misconduct  
15 and an admonition issued. Petition at pg. 7. But again, the Petition is  
16

---

17 <sup>1</sup> The Petition uses the terms "Letter of Reprimand" and "Public  
18 Reprimand" as the imposed sanction. SCR 102 identifies a Letter of  
19 Reprimand and a Public Reprimand as distinctly different sanctions. The  
20 State Bar acknowledges that the distinction may be virtually in name only  
after the revisions to SCR 121 that imposed complete, unredacted  
publication on all Letter of Reprimand. Nonetheless, the Hearing Panel  
recommended issuance of a Public Reprimand and the Panel accepted  
and approved that recommendation.

1 devoid of decisions so applying Standard 4.34, instead of Standard 6.23,  
2 to similar circumstances. Further, the sanction of an ‘admonition’ is not  
3 available in Nevada; the closest analog is a Letter of Reprimand as the  
4 lowest form of discipline available.<sup>2</sup>

5 **C. No Substantial Precedential, Constitutional, or Public**  
6 **Policy Issue that Warrants *En Banc* Rehearing.**

7 The Petition for *en banc* rehearing argues that disciplining  
8 attorneys in elected positions is “a novel issue with the power to  
9 significantly impact public policy.” The argument focuses on an  
10 interpretation of the application of qualified immunity under NRS  
11 41.032, which the underlying Opening Brief advanced and the  
12 unanimous Panel rejected. *Compare* Petition at pg. 4:7-5:17 and  
13 Opening Brief at pg. 8:14-10:6; *see also In the Matter of Discipline of*  
14 *Christopher Arabia*, 137 Nev. Adv. Opinion, pgs. 5-8 and (dissent) 1

---

15  
16  
17 <sup>2</sup> The ABA Standards for Imposing Lawyer Sanctions provides that an  
18 ‘admonition’ is “the least serious of the formal disciplinary sanction and  
19 is the only private sanction.” *Annotated Standards for Imposing*  
20 *Lawyer Sanctions*, pg. 74 (Am. Bar Ass’n 2015). Since the revision of  
SCR 121 in 2007 and revision of SCR 121.1 in 2016, the lowest form of  
discipline in Nevada is not a private sanction and there is no sanction that  
can be maintained as ‘private.’ *See* ADKT 392 (December 29, 2006) and  
ADKT 518 (Dec. 27, 2016).



1 (September 23, 2021). The Petition asserts that District Attorneys should  
2 be allowed to act with impunity so long as the conduct is “during their  
3 official duties as District Attorneys” and the potential application of the  
4 RPCs would “likely have a chilling effect on attorneys who vote or  
5 otherwise make decisions on controversial public policy issues.” Petition  
6 at pg. 5-6. This argument fails to demonstrate how imposition of the  
7 RPCs will inappropriately chill voting or decision-making attorneys.

8 1. No Dispute that Disciplinary Matters are not ‘Actions’ to Which  
9 Qualified Immunity Might Apply.

10 The Petition argues for a broad interpretation of qualified  
11 immunity as a matter of public policy. However, the Petition provides no  
12 statutory or judicial authority to support the argument.

13 As the majority opinion states, broadening qualified immunity is  
14 not a current public policy issue. On the contrary, accountability and  
15 limiting qualified immunity have become a top priority.<sup>3</sup> The disciplinary  
16 process is a counterbalance to the qualified immunity afforded public  
17 attorneys in other arenas.

---

18  
19 <sup>3</sup> See, e.g., ABA, QUALIFIED IMMUNITY,  
20 [https://www.americanbar.org/groups/public\\_education/publications/insights-on-law-and-society/volume-21/issue-1/qualified-immunity/](https://www.americanbar.org/groups/public_education/publications/insights-on-law-and-society/volume-21/issue-1/qualified-immunity/).

1           2. Imposition of the Nevada Rules of Professional Conduct on a  
2           District Attorney is not Novel.

3           The Petition reiterates the argument that this Court's holding in  
4 *Wayment* immunizes *any* decision that a District Attorney makes.  
5 Petition at pg. 4-5. *Wayment* seems relevant because it involved a  
6 dispute over the termination of a deputy district attorney and the initial  
7 issue in this disciplinary matter arose because Respondent terminated a  
8 deputy district attorney. But, this argument shows a continued failure to  
9 recognize that the issue is with Respondent's conduct *after* the  
10 termination- not the termination itself.<sup>4</sup> The decision to terminate an  
11 employee is a supervisory decision, not a lawyering decision.

12           At issue in this disciplinary matter is Respondent's lawyering  
13 decision to provide advice despite a conflict of interest. Respondent  
14 acknowledges he made a lawyering decision, pursuant to NRS 252.160,  
15 when he advised the Nye County Human Resources Administrator.  
16 Petition at pg. 5. The Majority Opinion found his conduct to be governed

---

17  
18  
19           <sup>4</sup> As recognized by the Majority Opinion, this disciplinary matter is also  
20 not about the content of the advice Respondent provided, which could be  
deemed discretionary in nature. The disciplinary proceeding measures  
whether Respondent should have provided *any* advice at all regarding  
the procedure of a hearing that would question the propriety of his own  
decision.

1 by the Nevada Rules of Professional Conduct, just like his lawyering  
2 conduct in a court proceeding would be governed by RPC 3.8 (Special  
3 Responsibilities of a Prosecutor), RPC 3.3 (Candor Toward the Tribunal),  
4 RPC 3.4 (Fairness to Opposing Party and Counsel), or RPC 3.5  
5 (Impartiality and Decorum of the Tribunal and Relations with Jury).  
6 There is nothing novel or policy-forming about uniformly imposed all of  
7 the Nevada Rules of Professional Conduct on all lawyers, including  
8 elected District Attorneys.

9 **E. Conclusion.**

10 For the foregoing reasons, this Court should deny the petition for  
11 rehearing *en banc*.

12  
13 Respectfully submitted this 18th day of January 2022.

14 **STATE BAR OF NEVADA**  
15 **DANIEL M. HOOGE, BAR COUNSEL**


16 By: Kait Flocchini  
17 R. Kait Flocchini, Assistant Bar Counsel  
18 Nev. Bar No. 9861  
3100 W. Charleston Blvd, Suite 100  
Las Vegas, Nevada 89102  
19 **Attorney for State Bar of Nevada**  
20



1 in the event that the accompanying brief is not in conformity with the  
2 requirements of the Nevada Rules of Appellate Procedure.

3 DATED this 18<sup>th</sup> day of January 2022.

4 **STATE BAR OF NEVADA**  
5 DANIEL M. HOOGE, BAR COUNSEL

6  
7 By:   
8 R. Kait Flocchini, Asst. Bar Counsel  
9 Nevada Bar No. 9861  
3100 W. Charleston Blvd, Suite 100  
Las Vegas, Nevada 89102  
(775) 329-4100

1  
2  
3  
4  
5  
6  
7  
8  
9  
0  
1  
2  
3  
4  
5  
6  
7  
8  
9  
0

2  
3  
4  
5  
6  
7  
8  
9  
0  
1  
2  
3  
4  
5  
6  
7  
8  
9  
0

7  
8  
9

# O

- 11

3

4  
5  
6  
7  
8  
9  
0

6  
7  
8  
9  
0