IN THE SUPREME COURT OF THE STATE OF NEVADA

In the Matter of Discipline of

TODD M. LEVENTHAL, ESQ.
Nevada Bar No. 8543

Supreme Court Case No.: 83245

APPELLANT'S OPENING BRIEF

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NEVADA RULE OF APPELLATE PROCEDURE 26.1

DISCLOSURE STATEMENT

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. Counsel makes these representations to assist the judges of this Court in evaluating possible disqualification or recusal.

Individual Todd M. Leventhal, Appellant, is represented by David A. Clark of Lipson Neilson P.C. and is the Respondent in this matter.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGE**

RULES **PAGE**

STATUTES

PROFESSIONAL ETHICS AUTHORITY

I. JURISDICTIONAL AND ROUTING STATEMENT.

The Southern Nevada Disciplinary Board Formal Hearing Panel ("Panel") in Case Nos. OBC20-0670 and OBC20-0706 recommends that Appellant Todd M. Leventhal (hereinafter "Mr. Leventhal") receive a 1-year stayed suspension subject to a 5-year probation, and other requirements. Pursuant to Supreme Court Rule ("SCR") 105(3)(b), the Nevada Supreme Court shall automatically review all recommendations for suspension. This Court's review of the conclusions of law and recommended discipline is *de novo;* however, with respect to findings of fact, this Court employs a deferential standard of review. SCR 105(3)(b). The Nevada Supreme Court retains disciplinary matters under Nevada Rule of Appellant Procedure ("NRAP") 17(a)(5).

The Panel Chair filed the *Findings of Fact, Conclusions of Law and Recommendation* on July 13, 2021. **ROA I, 00381-0387**. On July 21, 2021, eight days later, Mr. Leventhal filed a timely *Motion for New Trial pursuant to NRCP 59(a)(1)(D) or, alternatively, to amend the judgment under NRCP 59(e) or to take additional testimony under NRCP 59(a)(2).* **SUPP ROA[1] 001-107**. The State Bar filed the *Record on Appeal* ("ROA") which this Court received the same day, July 21, 2021. **ROA I and II**.

[1] State Bar of Nevada filed a Supplemental Record on November 12, 2021. While not titled as such, the Supplemental ROA is in effect Volume III and will be referred to herein as "SUPP ROA".

Subsequent to the Panel's Hearing on the Motion for New Trial, on November 10, 2021, the Panel Chair entered the Panel's written *Order* denying a new trial and affirming its prior decision in full. The State Bar filed the *Supplemental Record on Appeal* on November 12, 2021.

By separate order entered October 21, 2021, this Court granted Mr. Leventhal's second motion to extend time to file an opening brief. The deadline was 30 days from the date of that Order, or November 22, 2021.

II. STATEMENT OF THE ISSUES.

Mr. Leventhal respectfully opposes the recommendation of the Panel that he receive a 1-year stayed suspension for single violation of Rule of Professional Conduct ("RPC") 1.8(a) Conflict of Interest: Current Clients: Specific Rules) on each Count.

In summary, this case against Mr. Leventhal is predicated upon his alleged taking of collateral as security from two clients in criminal matters, specifically Amalia Sosa-Avila ("Sosa-Avila"-OBC20-0670) and Zan Mitrov ("Mitrov"-OBC20-0706). The State Bar's Complaint consists of two counts alleging a single Rule violation of RPC 1.8 (a), allege that Mr. Leventhal improperly engaged in a business transaction with the client by taking a possessory interest in personal property "adverse to" the interests of the client.

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Sosa-Avila-OBC20-0670

With respect to Sosa-Avila, Mr. Leventhal presents the following issue for this Court's consideration:

3. Because the security collateral in question was stolen, did the State Bar meet its initial burden of proof under RPC 1.8 to establish the necessary elements that Mr. Leventhal took an "interest adverse to a client" in order to then shift the burden shift to Mr. Leventhal to show the transaction was fair and informed?

4. Given the low potential, and literal absence of, injury in this matter, along with mitigating factors as found by the Panel, has the State Bar met the standards of imposing discipline on this Count.

Mitrov-OBC20-0706

With respect to Mitrov, Mr. Leventhal presents the following issues for this Court's consideration:

9. Did the Panel improperly rely upon State Bar Exhibit 19, given that Mitrov later admitted he "deleted some messages from Mr. Leventhal about where my [Dodge] Viper was located?"

10. Did the Panel improperly rely upon Mitrov's live testimony when he later admitted to lying at the hearing in response to a direct question about using methamphetamine during the relevant time period?

11. Did the State Bar engage in prosecutorial misconduct based upon Mitrov's later statements that the State Bar investigator told him not to say anything because it would get him in trouble, that he felt forced to lie, and that the State Bar investigator represented statements from Mitrov that he claims he did not make?

12. Did the Panel err by declining to either re-open the evidentiary hearing, exclude Mitrov's testimony and State Bar Exhibit 19, or amend the Recommended Sanction in response to Mr. Leventhal's Motion for New Trial?

As to Both Counts

With respect to proceedings as a whole, Mr. Leventhal presents the following issues for this Court's consideration:

13. Did the Panel Chairs improperly deny Respondent's Motion for Summary Judgment under NRCP 56 so as to deny Mr. Leventhal "just and proper administration of attorney regulation"?

14. Is the recommended discipline supported by the Hearing Panel's Findings of Fact and Conclusions of Law and appropriate under the applicable American Bar Association Standards for Imposing Lawyer Sanctions ("ABA Standards")?

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III. STATEMENT OF THE CASE.

The Panel initially held a Formal Hearing on May 20, 2021. The Panel Chair filed the *Findings of Fact, Conclusions of Law and Recommendation* on July 13, 2021.[2] Record on Appeal ("ROA"), Volume I, pp. 381-387. The Panel recommended that Mr. Leventhal receive a one (1) year stayed suspension from the practice of law to go into effect only if he receives any letter of reprimand/public reprimand or worse over the next five (5) years. In addition, over that five (5) year period, he must complete one (1) additional CLE hour for ethics and one (1) additional CLE hour for law practice management each year.

On July 21, 2021, eight days later, Mr. Leventhal filed a timely *Motion for New Trial pursuant to NRCP 59(a)(1)(D) or, alternatively, to amend the judgment under NRCP 59(e) or to take additional testimony under NRCP 59(a)(2).* **SUPP ROA,[3] 001-107**. The State Bar filed the *Record on Appeal*, which this Court received the same day, July 21, 2021. **ROA I and II**.

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[2]Although SCR 105(2)(e) mandates "The hearing panel **shall** render a written decision within 30 days of the conclusion of the hearing," times limits are administrative, not jurisdictional. *See*, SCR 119(2).

[3]The State Bar of Nevada filed a Supplemental Record on November 12, 2021. While not titled as such, the Supplemental ROA is in effect Volume III and will be referred to as "SUPP ROA."

On August 18, 2021, Mr. Leventhal filed with this Court his *Motion for Extension of Time to File Opening Brief, or in the Alternative, Stay in Briefing Pending Outcome of Motion for New Trial.* Following a hearing on September 9, 2021, **(SUPP ROA, 001-007,** *transcript***)**, the Hearing Panel Chair issued his *Decision granting in part the Motion for a New Trial* on September 13, 2021. **SUPP ROA, 116-118**. The reconvened hearing was held on September 27, 2021. **SUPP ROA, 132-150.** On November 10, 2021, the Panel issued a written order denying the Motion for New Trial and affirming the prior Findings, Conclusions, and Recommended Sanction. **SUPP ROA, 121-123**.

As noted *supra*, Mr. Leventhal filed his (first) Motion requesting an extension of time on August 18, 2021. While this Court, by its Order dated September 17, 2021, granted Mr. Leventhal an extension to September 20, 2021, in which to file his opening brief, neither the State Bar nor Mr. Leventhal ever received the Court's September 17, 2021, order until it was electronically served on October 13, 2021, via the Court's e-filing service. The reasons for this turn of events is set forth in Mr. Leventhal's second *Motion for Extension* filed October 13, 2021.

By Order dated October 21, 2021, the Court granted Mr. Leventhal an extension to 30 days from the Court's order to file and serve his opening brief (which falls on Saturday, November 20, 2021).

IV. FACTS.

A. Alleged Facts and Panel Findings.

The State Bar's Complaint consists of two counts involving former clients, but alleges only a single Rule violation of RPC 1.8(a) (Conflict of Interest: Current Clients: Specific Rules) for each count. In Count One, the State Bar alleges that Mr. Leventhal took adverse possessory interest in several items belonging to Amalia Sosa-Avila, including a drone, an IPhone, a Louis Vuitton wallet, and a ring. *State Bar Complaint (Compl.)*, ¶¶ 9, 11. **ROA I, 2-3**. In Count Two, the State Bar alleges that Mr. Leventhal took adverse possessory interest in a Dodge Viper "and/or" a Maserati automobile owned by Zan Mitrov. *Id*. at ¶ 54. In both counts, the State Bar alleges that Mr. Leventhal failed to observe the forms and requirements of RPC 1.8 when "knowingly acquir[ing] a possessory interest adverse to" the client. RPC 1.8(a); *Compl*. at ¶¶ 46, 54.

Sosa-Avila-OBC20-0670. In the case of Sosa-Avila, who never appeared at the formal hearing, Mr. Leventhal agreed to defend her in two criminal matters and also quash a bench warrant in a day (which he did) for a total fee of $6,000.00. **ROA I**, **382,** *Findings of Fact 1 and 2*. Mr. Leventhal did agree to accept collateral as security towards eventual payment of his retainer. He did not take it as payment or a fee as alleged in the Complaint or as found by the Panel. **ROA II**, **454:24 – 455:5,** *Transcript of Hearing*. Those items (a purse, a diamond ring, and an I-Phone) were later dropped off to his office staff.

Mr. Leventhal subsequently determined these items were stolen after reviewing the discovery in Sosa-Avila's cases. He confirmed this with Sosa-Avila:

> I then called -- contacted her. I told her to come back, and she came in. And I said, Listen, you can't -- I can't take stolen stuff. And she agreed that it was stolen, and she agreed at that time that it was going to be turned over to Metro anonymously. And that's what I did, I turned it over. I called a detective friend of mine, they came over.
>
> . . . .
>
> When I told her that that's what I was going to do, she didn't have an issue. She admitted that it was stolen and understood. And then, I don't know, and she filed a Bar complaint.

Id. at 427:16-23; 428:15-18. There is no other evidence to contradict the fact that the items Mr. Leventhal accepted as collateral were stolen property.[4] At the end of the day, Mr. Leventhal appeared in her criminal matters and quashed a warrant. He was never paid anything for his representation (**ROA II, 422:11-21**) and turned over the stolen property to law enforcement.

With regard to this count, the Panel unanimously found that while it believed Respondent knowingly violated RPC 1.8(a) (Conflict of Interest: Current Clients: Specific Rules), this alleged violation caused little or no injury to Ms. Sosa-Avila. **ROA I**, **384,** *Conclusion of Law No. 4*.

[4] The child's drone was a gift and the Panel determined that accepting it failed to constitute a violation of RCP 1.8. *See*, **ROA I**, **382-3** (*Findings of Fact Nos. 6 and 9)*.

Mitrov-OBC20-0706. Mr. Leventhal knew Mitrov through his law practice and over the course of approximately a year, Mr. Leventhal represented him in two criminal matters that went into warrant on charges involving Mitrov's use of methamphetamine. **ROA II**, **64-69**. Mr. Mitrov stated that during this representation,

> I operate a freight shipping broker business. In the past, I have owned and operated an automobile body shop. I also buy and drive vintage cars.

See, **ROA I**, **32-33**, *Declaration of Zan Mitrov in Support of Leventhal's Motion for Summary Judgment*, ¶4. The State Bar Complaint alleges that Mr. Leventhal took adverse possessory interest in a Dodge Viper "and/or" a Maserati automobile owned by Mitrov. **ROA I**, **7** at ¶ 54. With respect to the Dodge Viper, the Complaint alleges that Mr. Leventhal borrowed the Viper and did not return it for an extended period of time. Mitrov "sent Respondent numerous text messages that went unanswered" requesting his Viper be returned. *Id*. at 5, ¶ 40. The Complaint concludes that Mr. Leventhal withdrew from the representation and only returned the Viper "after Mr. Mitrov threatened to report it as stolen." *Id*. at ¶ 43.

The record here also features numerous retractions and contradictions by Mr. Mitrov. During the State Bar's investigation stage, Mr. Mitrov withdrew his grievance (August 2020), and requested again that it be withdrawn in a Declaration supporting Mr. Leventhal's *Motion for Summary Judgment/Motion to Dismiss*, filed December 30, 2020. *See*, **ROA I**, **32-33**, *Declaration of Zan Mitrov*, ¶¶ 3 and 7, and

accompanying email to State Bar investigator, Louise Watson. With respect to both vehicles mentioned in the State Bar Complaint, Mitrov declares,

> I let Mr. Leventhal use a Dodge Viper as a favor, not as payment or collateral for payment of fees. After Mr. Leventhal withdrew as my counsel, I picked up the Viper at the repair shop that Mr. Leventhal had it towed to for repairs. I did not pay him for its return.
>
> As for the Maserati mentioned in the State Bar complaint, Mr. Leventhal never took the vehicle to California, never received title to it from my [sic] nor drove to my knowledge. In fact, I had considered giving it to him outright before he indicated to me he needed money for [victim] restitution. I did not pay him for its return as alleged in paragraph 31 of the State Bar Complaint.

Id. at ¶¶ 5 and 6.[5]

Next, the State Bar failed to provide a counter-declaration to Mr. Leventhal's continued Motion for Summary Judgment. After the Chair gave the State Bar additional time to file one, Louise Watson, State Bar investigator, submitted her own, stating that Mitrov confirmed to her that he had let Mr. Leventhal borrow the Viper, had texted numerous times for its return, and agreed to provide a declaration. She stated she prepared a draft declaration and sent it to Mr. Mitrov. *See*, **ROA II**, **1017-1019**, Respondent's Exhibit D to the Formal Hearing transcript.

At the formal hearing, Mr. Mitrov was the only adverse witness who testified. Mr. Mitrov retained Mr. Leventhal to defend him on charges involving the use of

[5]The Declaration and email is also Respondent's Exhibit C to the Formal Hearing transcript. *See*, **ROA II, pp. 1013-1016.**

methamphetamine. When questioned by Respondent's counsel, Mr. Mitrov denied any drug use at the time of the text messages with Mr. Leventhal allegedly keeping his Viper,

> Q. During this time that he represented you, were you using methamphetamine?
>
> A. No, I didn't.

ROA II, *Transcript of Hearing*, 563:19-23. Mr. Leventhal's testimony to the Panel regarding the drug use and the content of the text messages included:

> Q [CHAIRMAN EDWARDS]. Okay. And at some point in that period of time you told him that the Viper was at the shop and he could pick it up any time he wanted?
>
> A. That's correct, I did. And then I told him, then maybe he forgot, maybe he didn't write it down and then he would call me back all of a sudden saying, I need the Viper, man, you know.
>
> But I don't know his, the level of drugs, but I can tell you that he doesn't -- he might be on point on a couple things but all of a sudden he'll like call me or text me and say, I need the Viper, my wife is going crazy, you know, then I would call him back and say it's over there.
>
> Maybe he just -- you know, I left it on him to go get it because I took it over there. The electrical was not working, they fixed it and it was ready for him.

Id. at 604:11- 605:2. Mr. Leventhal specifically indicated he told Mr. Mitrov where the Viper was so that he could retrieve it. In addition, Mr. Mitrov specifically responded to a direct question that he was not using drugs at this critical time.

Central to the State Bar's case and Mr. Mitrov's credibility is State Bar's Exhibit 19, which is a purported record of text messages between Mr. Mitrov and Mr. Leventhal. In laying the foundation for its admission, Mr. Mitrov testified:

> Q. Thank you. Now, I'm showing you what's been previously marked as Exhibit 19 of the State Bar's exhibits. Now, Mr. Mitrov, does this document look familiar to you?
>
> A. Yeah. It brings back memories.
>
> Q. And can you describe to me what this document shows?
>
> A. Communication between me and Mr. Leventhal, text messages.
>
> Q. Okay. And are these -- does this look like the documents you submitted with your grievance to the State Bar?
>
> A. Yeah, that's right.
>
> Q. Okay. And it looks like, let's see – and did you alter these text messages in any way, shape or form before submitting this to the State Bar?
>
> A. No, those are just snapshots from my cellphone, sir.
>
> Q. Okay. So when you took these snapshots, you didn't do anything to change the contents of it, correct?
>
> A. No, I did not, no.
>
> Q. And these are your text messages with Mr. Leventhal?
>
> A. Yes.
>
> MR. GOSIOCO: Okay. At this point, Mr. Chairman, the State Bar would move to admit Exhibit 19 into evidence.
>
> MR. CLARK: I would ask to be more foundation as to how he got them off his screen and how they were reproduced. I mean –
>
> CHAIRMAN EDWARDS: I think he's testified –
>
> MR. CLARK: Are they copied? Are they sent electronically?

> CHAIRMAN EDWARDS: I think the testimony that he took these. These are screenshots of his text messages. So the objection is overruled and Exhibit 12, or, excuse me, Exhibit 19 will be admitted.
>
> (Thereupon Complainant's Exhibit19 was admitted into evidence.)

Id. at 528:17 – 528:8.

As to a factual basis for a violation, the Bar argued in closing,

> Mr. Mitrov testified that he did file a grievance in June of 2020 to get Mr. Leventhal's attention because at that point, after sending Mr. Leventhal numerous texts asking to pick up the Viper, he still had not received the Viper by the time he signed – submit the grievance to the State Bar.

Id. at 620:9-15. Further, the Chair questioned Mr. Leventhal regarding the texts:

> Q. So after the, you know, say the fifth text message to you saying, I need the Viper back, why didn't you respond back and say, We've already talked about this, it's at the shop, go pick it up any time you want?
>
> A. You mean through text?
>
> Q. Yeah.
>
> A. Yeah. No, I know I talked to him a couple times, but I didn't respond to him in a text all the time.

Id. 605:3-12. Still, the Panel used these text messages to conclude, "Mr. Mitrov asked Respondent to return the Dodge Viper to him multiple times between February 2020 and June 2020." **ROA I**, **383,** *Finding of Fact No. 16*. The Chair noted:

> We find a selfish motive. At least two of the panel members were concerned that the keeping of Mr. Mitrov's car for such a long period of time made it look like he was holding the car hostage in able to -- in an effort to get payment from the client.

Id. at 658:16-20. Moreover, the Chair further revealed that, "Some of the panel members had concerns about Mr. Leventhal's credibility in his testimony." *Id*. at 22. The Panel, by a 2-1 vote, found that the foregoing findings of fact proved by clear and convincing evidence that Mr. Leventhal knowingly violated RPC 1.8(a) (Conflict of Interest: Current Clients: Specific Rules) with regard to the Dodge Viper which caused injury to Mr. Mitrov. **ROA I**, **385**, *Conclusion of Law No. 5*.

However, the day after the formal hearing, Mr. Mitrov, through his new criminal counsel, proffered a signed, notarized handwritten statement:

> When I first filed the Bar Complaint I deleted some messages from Mr. Leventhal about where my Viper was located.
>
> At the time I was on drugs.
>
> When I told [the state bar investigator] this she told me not to say anything because that can get me in trouble.
>
> She also told me that nothing is going to hapen [sic] to Todd Leventhal.
>
> I feel bad for lying but I felt forced by Ms. Watson.
>
> Also saw document Ms. Watson made statements that I didn't say.

SUPP ROA, 17-18, Respondent's *Motion for New Trial*, Exhibit A thereto. The State Bar's Opposition to the Motion stated that Mr. Mitrov's drug use and Ms. Watson's statements could have been gleaned from cross-examination at the hearing and, thus, failed to constitute new evidence. *Id*. at 113:22 – 114:2. After reconvening the Panel to review the statement, the Panel affirmed its decision, finding that: (1)

Mitrov's testimony at the hearing, absent the text messages, supports the Findings, (2) that Mr. Leventhal failed to produce the deleted texts "during the Formal Hearing" in order to establish their materiality,[6] (3) that the drug use statement, while conflicting, did not change the analysis, and; (4) that the accusations against the State Bar investigator "were too vague" to reconsider the Findings, and that,

> Mr. Mitrov's allegation that Ms. Watson advised him to lie is potentially collateral to the issues the Panel is considering.

Id. at 122: 11-21.

B. Orders on Motion for Summary Judgment.

Mr. Leventhal filed timely peremptory challenges, followed by a Motion for Summary Judgment or Motion to Dismiss. The first appointed Panel Chair denied the motion, even though the State Bar offered no countervailing admissible evidence. *See* **ROA I**, **74**, *Respondent's Reply in Support*. The Chair determined,

> It certainly would have been better practice [for the Bar] to have supplemented affidavits sufficient to identify for admissibility purposes the text messages and the statement by Mrs. Sosa-Avila. . . . [But] out of an abundance of caution and deference to the high standard for summary judgment, these documents are being considered . . . .

ROA I, **83:26-28; 84:9-10.**

[6] Mr. Leventhal's Reply Brief, which is omitted from the Record on Appeal but specifically referenced in the Chair's Order Denying New Trial (*Id*. 121:14) pointed out that the State Bar never opposed the motion on the basis of materiality.

However, it was later determined that the Hearing Chair who was appointed and authored the decision had, in fact, been subject to Mr. Leventhal's peremptory challenge. Therefore, a new Chair, Mr. Edwards, was appointed and the parties agreed to resubmit the Motion for Summary Judgment for his decision.

After all Final Disclosures had been served (**ROA I**, **239-249**), a hearing on Mr. Leventhal's Motion was held May 6, 2021 (***Id*. at 250-252**) (two weeks before the scheduled formal hearing). At that hearing, the Chair directed the State Bar to provide a counter Declaration from Mr. Mitrov or another one explaining why the Bar could not secure one from the grievant. The State Bar failed to provide a responsive declaration until May 18, 2021. *See*, **ROA II**, **1017-1019**, Respondent's Exhibit D to the Formal Hearing transcript. The next morning the Chair denied the Motion, stating, "Given the lack of discovery in a disciplinary matter, and specifically the inability to compel deposition testimony, it is not clear whether summary judgment is applicable to disciplinary proceedings." **ROA I**, **377, 18-20**.[7]

V. ARGUMENT.

A. Legal Standard and Authority.

The State Bar has the burden of proving ethical violations by clear and convincing evidence. The State Bar must prove lawyer misconduct by substantial, clear, convincing, and satisfactory evidence. *In re Lober*, 78 P.3d 442 (Kan. 2003).

[7] The Order on Motion to Reconsider is also omitted from the ROA. In it, the Chair affirmed, finding "SCR 110(7) does not appear to provide a mechanism for the State Bar to take Mr. Mitrov's deposition."

Clear and convincing evidence is "evidence that establishes every factual element to be ***highly probable***." *Butler v. Poulin*, 500 A.2d 257, 260 n.5 (Me. 1985) (***emphasis*** added). The Formal Hearing Panel may only find violations of the Supreme Court Rules of Professional Conduct as charged in the Complaint. *In re Schaeffer*, 25 P.3 191, 204, *mod.* 31 P.2d 365 (Nev. 2000) (*cit. State Bar of Nevada v. Claiborne*, 104 Nev. 115, 756 P.2d 464 (1988) (noting that due process requirements must be met in bar proceedings)).

The purpose of attorney discipline is not punishment, but rather to protect the public and confidence in the integrity of the bar. *See, State Bar of Nevada v. Claiborne*, 104 Nev. 115, 129, 756 P.2d 464, 473 (1988). Standard 1.3 of the *ABA Standards for Imposing Lawyer Sanctions* confirms that the sanction must reflect individual circumstances. *See, i.e. Romero-Barcelo v. Acevedo-Vila*, 275 F.Supp.2d 177 (D.P.R. 2003) (discipline must reflect each individual lawyer's circumstances and aggravating and mitigating factors in each case).

Nevada's RPC 1.0A (Guidelines for Interpreting the Nevada Rules of Professional Conduct) provides that:

> (c) Failure to comply with an obligation or prohibition imposed by a Rule is a basis for invoking the disciplinary process. ***The Rules presuppose that disciplinary assessment of a lawyer's conduct will be made on the basis of the facts and circumstances as they existed at the time of the conduct in question and in recognition of the fact that a lawyer often has to act upon uncertain or incomplete evidence of the situation.*** (***emphasis*** added).

Even if there is a finding of a Rule violation, the question of whether or not any discipline should be imposed remains open. RPC 1.0(c) states,

> [T]he Rules presuppose that ***whether or not discipline should be imposed for a violation***, and the severity of a sanction, depend on all the circumstances,

> such as the willfulness and seriousness of the violation, extenuating factors and whether there have been previous violations.

B. The State Bar Failed to Prove a Valid Possessory Interest By Ms. Sosa-Avila.

The State Bar Complaint alleged that Mr. Leventhal took "possessory interest in multiple items **which were adverse** to Ms. Sosa-Avila." **ROA I**, **6**, ¶46. The Panel made a finding that Mr. Leventhal did not abide by RPC 1.8 (Conflict of Interest: Current Clients: Specific Rules) "before receiving possessory interests in the aforementioned items from Ms. Sosa-Avila." **ROA I**, **383**, *Finding of Fact No. 8*.

While this count did not meaningfully factor into the Panel's ultimate recommendation for a stayed suspension, the record does not support any RPC 1.8 (a) violation rising to the level of imposing discipline.

> In a discipline case, **once proof has been introduced that the lawyer entered into a business transaction with a client**, the burden of persuasion is on the lawyer to show that the transaction was fair and reasonable and that the client was adequately informed.

Restat 3d of the Law Governing Lawyers, § 126 (**emphasis** added). Thus, the State Bar must first prove each element of the prohibited transaction before the burden shifts to Mr. Leventhal.

It is well-settled that possession of stolen property is a crime. *See*, Nev. Rev. Stat. § 205.275(1) (crime to possession stolen property knowingly or under circumstances that would cause a reasonable person to so know.). Given that her possession is unlawful, there cannot be a lawful possessory interest. *Cf. Phillips v.*

State, 99 Nev. 693 (Nev. 1983) (defendant could not be guilty of robbery where State failed to prove victim, a customer present during jewelry store robbery, had a possessory interest in any of the items stolen from the jewelry store). Here, it is undisputed that the three items in question were stolen. Respondent submits that, as a matter of law, this grievant cannot have a legally cognizable possessory interest in stolen property. Therefore, Mr. Leventhal cannot acquire a possessory interest "adverse to the client" regarding the "several items" that were stolen property.

Upon learning the items were stolen, Mr. Leventhal turned them over to law enforcement anonymously. Thus, he never acquired an adverse interest at all nor kept it once he discovered they were stolen. On these plain facts, Count One should be dismissed. Indeed, it would work a perversion of the Rules of Professional Conduct to sanction an attorney for coming into possession of stolen property and doing the right thing by turning it over to law enforcement.

Moreover, as set forth in RPC 1.8(a) and pled in the State Bar's Complaint, a violation requires that the attorney "**knowingly** acquire a possessory interest adverse to a client." RPC 1.8(a); *State Bar Compl*.¶ 12 ("Mr. Leventhal "did not abide by RPC 1.8 (Conflict of Interest: Specific Rules) **before receiving** possessory interests in the aforementioned items from Ms. Sosa-Avila." (**emphasis added**)).

The record establishes that Mr. Leventhal had no prior agreement as to the IPhone. The drone was an unsolicited gift and the IPhone was unexpected.

Furthermore, he and his office were demanding money payments towards the fee, not personal property, when Sosa-Avila dropped off the wallet and ring. **ROA I**, **26**, *Declaration of Todd Leventhal*, ¶¶ 6, 7. Therefore, Mr. Leventhal could not have "knowingly" acquired a possessory interest and had no opportunity to "abide by" the requirements of RCP 1.8 prior to receipt of the (stolen) items.

Simply stated, the State Bar bears the initial burden to establish the elements of a business transaction when it charges that a lawyer took an interest adverse to the client. Here, since the goods were stolen, the record cannot establish that element of the transaction. There is no adverse interest that triggers RPC 1.8 (a).

Moreover, this single violation as to Sosa-Avila is a crucial factor because, together with Mitrov, they form the basis for finding a pattern of misconduct in aggravation. **ROA I**, **385**, *Conclusion of Law No. 8(c).*

B. Zan Mitrov's Fabricated Evidence and Lies Cannot Support a Rule Violation or Imposition of Discipline.

Mr. Mitrov provided and undisputed statement admitting the text messages (State Bar Exhibit 19) was fabricated, that he lied regarding his drug use, and "felt forced to lie" by State Bar personnel. Falsified evidence should never be a basis for civil litigation, criminal procedure, or especially for the regulation of attorney ethics.

1. The Panel did not give sufficient consideration to Mitrov's admission to fabricating the text messages and its substantial and material impact on its findings.

"I deleted some messages from Mr. Leventhal ***about where my Viper was located***." **SUPP. ROA**, **17-18**, Respondent's *Motion for New Trial*, Exhibit A. (***emphasis*** added). This is the heart of the case, the notion that Mitrov's many requests to Mr. Leventhal for the Viper to be returned were materially ignored and/or rebuffed until he filed his bar grievance. That evidence is doctored and misleading.

a. <u>The text messages were material to the Panel's findings</u>.

State Bar's Exhibit 19 was material and substantial to the Panel's findings of a Rule violation. The State Bar argued them as direct evidence of an adverse possessory interest, which is a necessary element the State Bar must prove by clear and convincing evidence. The questioning by the Chair confirms this:

> Q. So after the, you know, say the fifth text message to you saying, I need the Viper back, why didn't you respond back and say, We've already talked about this, it's at the shop, go pick it up any time you want?
>
> A. You mean through text?
>
> Q. Yeah.
>
> A. Yeah. No, I know I talked to him a couple times, but I didn't respond to him in a text all the time.

ROA II, 0605:3-12, *Transcript.*

Yet Mitrov now admits only after his formal hearing testimony that, <u>a year before</u> when he filed the State Bar Grievance, he deliberately deleted texts from Mr. Leventhal specifically about the location of the Viper.

The Panel used these text messages to conclude, "Mr. Mitrov asked Respondent to return the Dodge Viper to him multiple times between February 2020 and June 2020." **ROA I**, **383,** *Finding of Fact No. 16*. The Chair noted:

> We find a selfish motive. At least two of the panel members were concerned that the keeping of Mr. Mitrov's car for such a long period of time made it look like he was holding the car hostage in able to -- in an effort to get payment from the client.

***Id.* at 658:16-20**. Lastly, as the Panel specifically explained:

> As to Count 2, by a vote of two to one the panel has concluded there was a rules violation, a 1.8A violation as it relates to the Viper. The respondent's possession of the Viper became adverse when the client repeatedly demanded its return and the vehicle was not returned. At that point in time the obligation, Mr. Leventhal had an obligation to comply with Rule 1.8A.

ROA II, **633:11-16.**

Mr. Mitrov's admission to deleting texts, "***from Mr. Leventhal about where my Viper was located***" contradicts the basis for the Panel's conclusion that Mr. Leventhal was holding the Viper hostage. And, it supports Mr. Leventhal's testimony that he did, in fact, tell me Mr. Mitrov where to pick up the Viper. This directly contradicts the Panel's conclusion: "Some of the panel members had concerns about Mr. Leventhal's credibility in his testimony." *Id*. at 22. The veracity and completeness of the text messages is a substantial factor in the State Bar's proof of adverse possessory interest, the Panel's finding of a selfish motive, and the belief that Mr. Leventhal was not credible.

b. <u>The State Bar, not Mr. Leventhal, bears the burden to produce the text messages alleged deleted by the grievant</u>.

In the resulting November 10, 2021, Order Denying Mr. Leventhal's motion and affirming the Panel's July 13, 2021, Findings and Recommendations, the Panel drew crucial conclusions that were simply not supported by the record, the applicable disciplinary authority, or both.

> The Panel stated that Mr. Mitrov's testimony at the Formal Hearing still supports their Findings despite the alleged deleted and/or missing text messages. The Panel further stated that they are concerned that Respondent did not show the alleged deleted text messages during the Formal Hearing, and thus, the Panel could not conclude that any alleged deleted and/or missing text messages were material.

SUPP. ROA, 122:12-16.

First, the texts as a complete record were material (nor did the State Bar assert Mr. Mitrov's admissions were immaterial) as discussed above. Evidence that Mr. Leventhal did, in fact, inform Mr. Mitrov of the Viper's location is material.

Second, it is not Respondent's burden of proof in this prosecution. It is the State Bar's. It is not Mr. Leventhal's burden to fix the State Bar's fabricated evidence, particularly evidence regarding deletion of text messages sent a year before their admission in this case.

Moreover, as if it needs to be stated, if the State Bar "has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable

remedial measures, including, if necessary, disclosure to the tribunal."[8] It is curious that the State Bar's sole objection to considering Mr. Mitrov's admission was not that State Bar's Exhibit 19 was fabricated, but that it was not "newly-discovered evidence" and Mr. Leventhal should have uncovered it. *See, State Bar's Opposition to Motion for New Trial,* **SUPP. ROA, 113: 15-21.**

2. The Panel did not give sufficient consideration to Mitrov's admission to lying in response to a direct question about his drug use and its substantial and material impact on its findings.

Mitrov's recanted testimony about his drug use goes directly to his extremely questionable credibility, already tarnished on other grounds. In denying a new trial, the Panel stated: "As to Mr. Mitrov's alleged drug use, the Panel concluded that his statement conflicts with this prior testimony, but that it does not change their analysis." **SUPP. ROA, 122:17-18.**

But remember Mr. Leventhal's testimony:

> [CHAIRMAN EDWARDS]. Okay. And at some point in that period of time you told him that the Viper was at the shop and he could pick it up any time he wanted?
>
> A. That's correct, I did. And then I told him, then maybe he forgot, maybe he didn't write it down and then he would call me back all of a sudden saying, I need the Viper, man, you know.
>
> ***But I don't know his, the level of drugs, but I can tell you that he doesn't -- he might be on point on a couple things but all of a sudden***

[8] RPC 3.3(a)(3) (Candor Toward the Tribunal).

> ***he'll like call me or text me and say, I need the Viper, my wife is going crazy, you know, then I would call him back and say it's over there***.

ROA II, **604:11- 605:2**, *Transcript of Hearing* (***emphasis*** added). Moreover, Mr. Mitrov alleged in his post-hearing statement that the State Bar counseled him to lie about his prior drug use. So, when he lies in response to a direct question about whether he was on drugs at the time of the representation, this perjury undermines Mr. Leventhal's assertion that he did, in fact, tell him the location of the Viper, as well as hide from the finder of fact the State Bar's alleged misconduct. There is only one count of one rule violation against Mr. Leventhal regarding Mitrov, which was substantially and materially based upon Mitrov's live testimony and recollection of the facts. This recollection should have been considered in the context of his use of meth during the time, and for which he was already facing charges.

3. The Panel did not give sufficient consideration to Mitrov's assertion that the State Bar counseled him to lie about his drug use and that it prepared a false statement of his testimony.

> At the time I was on drugs.
>
> When I told [the state bar investigator] this she told me not to say anything because that can get me in trouble.
>
> . . . .
>
> I feel bad for lying but I felt forced by Ms. Watson.
>
> Also saw document Ms. Watson made statements that I didn't say.

SUPP. ROA, **17-18**, Respondent's *Motion for New Trial*, Exhibit A thereto. In denying a new trial, the Panel summarily dismissed this alleged misconduct:

> Lastly, as it pertains to Louise Watson . . ., the Panel concluded that Mr. Mitrov's new statement is too vague for the Panel to reconsider the Findings. Further, Mr. Mitrov's allegation that Ms. Watson advised him to lie is potentially collateral to the issues the Panel is considering.

Id. at 122:18-21. Yet, this allegation is material for at least two purposes.

First, it is alleged prosecutorial misconduct in a disciplinary proceeding, which is quasi-criminal in nature.

> In *Jimenez v. State*, this court held that a prosecutor is forbidden from using perjured testimony to secure a conviction based on principles of fairness, and the conviction must be set aside if the false testimony affected the jury's verdict. 112 Nev. 610, 622, 918 P.2d 687, 694 (1996). Likewise, a prosecutor cannot allow a discovered false statement "to go uncorrected when it appears." *Giglio v. United States*, 405 U.S. 150, 153, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972) (internal quotations omitted).

Caprodriguez v. State, No. 55295, 2012 Nev. Unpub. LEXIS 1095, at *21 (July 31, 2012); *see, also, Riley v. State*, 93 Nev. 461, 462, 567 P.2d 475, 476 (1977) (truth seeking function of the trial is corrupted by such perjury whether encouraged by the prosecutor or occurring without his knowledge. If the character of material evidence is false, due process inevitably is denied the accused). The Panel certainly relied on the false testimony regarding the text messages. If Mr. Mitrov was on drugs, that would also support Mr. Leventhal's explanation that, although he told Mr. Mitrov repeatedly where the Viper was, Mr. Mitrov would forget and call again. This goes to both a selfish motive and Mr. Leventhal's credibility.

Moreover, the Panel simply dismissed any notion of State Bar misconduct as "potentially collateral to the issues." And the State Bar did not even bother to deny the allegation in its Opposition to the Motion for New Trial, oddly asserting instead that because Respondent cross-examined Mrs. Watson, the allegation is not "newly-discovered evidence." **SUPP. ROA**, 113:22-114:2. Thus, apparently sworn claims the State Bar suborned perjury do not require any further examination before imposing sanctions on an attorney for unethical conduct.

Second, though, is Mr. Mitrov's reference to the prepared declaration relating to the motion for summary judgment: "Also saw document Ms. Watson made statements that I didn't say." As discussed below, this adds to the impropriety for the Chair (s) allowing the State Bar to ignore its obligations under NRCP 56 to defend properly a motion for summary judgment.

In sum, the recanted and fabricated evidence of Mr. Mitrov undermines and pollutes the entire record against Mr. Leventhal. As the only adverse witness called by the State Bar, and especially in light of the unexamined alleged misconduct by the prosecutor, this Court should reject the Findings, Conclusion, and Recommendations regarding Count Two of the State Bar Complaint.

C. Both Panel Chairs' Orders Denying Summary Judgment Were Error.

The clear facts demonstrate that the State Bar knew in August and September 2020, before it filed this Complaint December 4, 2020, that Mr. Mitrov wanted to

withdraw his grievance and not testify against Mr. Leventhal. While SCR 107 certainly allows the State Bar to proceed without a grievant, it was on notice that it needed to secure his testimony. Both the first Chair's decision, and the current Chair's decision denying Mr. Leventhal's motion for summary judgment improperly allowed the State Bar to ignore its obligation under NRCP 56(c) to produce admissible evidence demonstrating a genuine issue of material fact.

> The first Chair's decision expressly considered inadmissible evidence.
>
> It certainly would have been better practice [for the Bar] to have supplemented affidavits sufficient to identify for admissibility purposes the text messages and the statement by Mrs. Sosa-Avila. . . . [But] out of an abundance of caution and deference to the high standard for summary judgment, these documents are being considered . . . .

ROA I, **83:26-28; 84:9-10.** The second decision plainly misstates the law, "Given the lack of discovery in a disciplinary matter, and specifically the inability to compel deposition testimony, it is not clear whether summary judgment is applicable to disciplinary proceedings." **ROA I**, 377, 18-20.

NRCP 56 clearly applies to disciplinary proceedings.[9] Further, the Utah Supreme Court specifically found that Rule 56 applied to disciplinary proceedings**,** ruling that the Office of Professional Conduct may not rest upon the mere allegations or denials of his pleading. *In re Discipline of Sonnenreich*, 2004 UT 3, ¶¶ 41-42, 86

[9] SCR 119(3)(Additional rules of procedure) ("Except as otherwise provided in these rules, the Nevada Rules of Civil Procedure and the Nevada Rules of Appellate Procedure apply in disciplinary cases.").

P.3d 712 (2004). The discipline rules clearly allow the State Bar to take depositions. SCR 110(7), which expressly provides,

> *Deposition in lieu of appearance*. With the approval of the chair, testimony may be taken by deposition or by commission if the witness is not subject to subpoena or is unable to attend or testify at the hearing because of age, illness, or other infirmity.

The State Bar had five months from the filing of Mr. Leventhal's Motion for Summary Judgment to seek to preserve Mr. Mitrov's testimony. Instead, the Hearing Chairs in this case either considered inadmissible evidence or indulged the State Bar's deficient (and now alleged false) declaration by State Bar staff to deny improperly Mr. Leventhal's dispositive motion. When it failed, not once, but twice, to defend against the motion, the Chair (either one) should have granted summary judgment. Their denials constitutes error in this case warranting rejection of the Recommendation and dismissal of the Complaint and both Counts.

D. The Record Does Not Support The Panel's Recommendation For A Stayed One Year Suspension, Nor Any Public Discipline.

A one-year stayed suspension and five-year probation under these circumstances and on these records is unfair and not crafted to the offense. The purpose of attorney discipline is not punishment, but rather to protect the public and confidence in the integrity of the bar. *State Bar v. Claiborne*, 104 Nev. 115, 756 P.2d 464, 473 (1988).

Here, Mr. Leventhal received as collateral property from Ms. Avila-Sosa, which turned out to be stolen.[10] By definition, she had no interest to which he was in adverse possession. And he did the correct thing and turned it over to law enforcement for return to the rightful owner, doing so anonymously to protect his former client (s*ee, i.e. Dean v. Dean*, 607 So. 2d 494, 498 (Fla. 1992) (RPC 1.6 constraints on revealing client information include the client's identity regarding stolen property, when the mere identity may expose the client to prosecution).

On Count Two (Mitrov), this record does anything but "protect the public and confidence in the integrity of the bar." The findings are largely based on withdrawn and doctored evidence all sourced with Mitrov. If the aggravating factors of a pattern, injury, and selfish motive are removed based on the foregoing arguments, this matter would not rise to the level of clear convincing evidence warranting *any* discipline.

VI. CONCLUSION.

It is the State Bar's burden to prove misconduct by "clear and convincing evidence" and even if the State Bar does prove a violation, this Court of course may still decline to impose a sanction because "whether or not discipline should be

[10] Sosa-Avila never actually paid anything pursuant to her retainer agreement with Mr. Leventhal.

imposed for a violation, and the severity of a sanction, depend on all the circumstances," and that "the sanction must reflect individual circumstances."

The individual circumstances in this case bear reminding that it goes against public policy and the tenets of the legal professional and jurisprudence to allow discredited testimony and doctored evidence to stand as a basis for punitive action or the imposition of sanctions.

For all the foregoing reasons, the record in this case does not support the Hearing Panel's recommendation. Mr. Leventhal respectfully requests that this Honorable Court instead dismiss the case or remand for further evidence and consideration of Mr. Mitrov's statements.

Respectfully submitted, this 22nd day of November, 2021.

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By: */s/ David A. Clark*

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VII. CERTIFICATE OF COMPLIANCE.

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14 points, Times New Roman Style.

I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains 7,631 words.

Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found.

/ / /

I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Respectfully submitted, this 22nd day of November, 2021.

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CERTIFICATE OF SERVICE

Pursuant to NRAP 25, I certify that I am an employee of LIPSON NEILSON P.C. and that on the 22nd day of November, 2021, a true and correct copy of the foregoing Appellants' Opening Brief in Case No. 83245 was filed and served electronically with the Clerk of the Nevada Supreme in accordance with the master service list as follows:

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