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 REPLY BRIEF

LIPSON NEILSON, P.C.
DAVID A. CLARK
Nevada Bar No. 4443
9900 Covington Cross Dr., Suite 120
Las Vegas, Nevada 89144
(702) 382-1500 (Telephone)
(702) 382-1512 (Facsimile)
Counsel for Appellant
Todd M. Leventhal, Esq.

STATE BAR OF NEVADA
GERARD GOSIOCO, ESQ.
Nevada Bar No. 14371
3100 West Charleston Blvd., Suite 100
Las Vegas, Nevada 89102

Counsel for Respondent,
State Bar of Nevada

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I. STATEMENT OF THE ISSUES.

Appellant incorporates by reference herein and relies upon the Statement of the Issues proffered in his Opening Brief as representative of his view of the proper framing of the issues at bar before this Honorable Court. However, for the purposes of this Reply, Appellant will respond to the issues as identified by the State Bar in its Answering Brief, *to wit*:

1. Whether Respondent proved that Appellant violated RPC 1.8(a) as it pertains to Amalia Sosa-Avila (OBC20-0670).
2. Whether Respondent proved that Appellant violated RPC 1.8(a) as it pertains to Zan Mitrov (OBC20-0706).
3. Whether the Panel Chairs correctly denied Appellant's Motion for Summary Judgment.
4. Whether the record supports the Formal Hearing Panel's recommendation to impose a one-year stayed suspension on Appellant.

II. STATEMENT OF THE CASE.

Appellant incorporates by reference herein and relies upon his Statement of the Case in his Opening Brief.

III. STATEMENT OF FACTS.

Appellant incorporates by reference herein and relies upon the Statement of Facts proffered in his Opening Brief. The State Bar's short, perfunctory statement

of facts deliberately fails to capture the full scope of relevant facts, inaccurately portrays conclusory unsupported statements as facts, and largely fails to rebut or add to Appellant's proffer. For example, the record does **not** support that Appellant failed to make the Dodge Viper timely accessible to Mitrov, failed to timely respond to multiple requests to return it, or was the reason Mitrov had to rent a car (the alleged "damages"). The State Bar also incorrectly states as "facts" that Appellant (1) violated RPC 1.8 as to both grievants, (2) gained an adverse possessory interest in items later found to be stolen provided by Sosa-Avila as collateral and (3) gained a possessory interest in Mitrov's Dodge Viper. These are not facts. These are *conclusions of law* contested in this *de novo* review as further discussed below.

IV. DISCUSSION.

A. The record establishes that Mr. Leventhal had reasonable suspicion Sosa-Avila's items were stolen, and that she admitted it directly. (OBC20-0670).

The Sosa-Avila count rests upon whether Mr. Leventhal gained an adverse possessory interest in the items she dropped off as collateral. As noted in his opening brief, Mr. Leventhal did reluctantly agree to accept collateral as security towards eventual payment of his retainer, only because Ms. Sosa-Avila begged him to keep her out of jail on outstanding warrants. ROA III 032 *(20:1-18).* Mr. Leventhal did not take the items as payment for a fee as alleged in the Complaint or as found by the Panel. ROA II, 454:24 – 455:5. Those items (a purse, a diamond ring, and an I-

Phone) were later dropped off to his office staff in response to calls asking for payment. They were subsequently determined to be stolen.

The State Bar argues that whether the items are stolen is actually disputed, and that Mr. Leventhal could not have possibly gleaned they were stolen from reviewing the discovery in Sosa-Avila's criminal cases as he testified. *Answering Brief*, p. 11. This conclusion is based upon the State Bar's assertion that the discovery it viewed did not specifically reference a diamond ring or an I-phone. *Id*. 12. More incredibly, the State asserts that, "nor does Ms. Sosa-Avila ever admit that the Louis Vuitton purse/wallet was stolen." *Id*.

Again, it cannot be overstated that Sosa-Avila did not testify at the formal hearing. Mr. Leventhal represented Sosa-Avila in two separate criminal cases, one involving allegations of selling fake and/or stolen luxury items like handbags, and, the other involving stolen items and bank cards. At the formal hearing, Mr. Leventhal testified at length about the stolen items provided as collateral. Specific questioning led to his testimony that Sosa-Avila admitted to him the items were stolen and that they agreed that he would be turning them over to the police department anonymously to protect her identity. For example:

> A [Mr. Leventhal]: As far as the Louis Vuitton, the purse, the diamond ring, and the iPhone, what happens is, like I indicated, I go to court, I file a motion to quash her bench warrant so she's no longer in warrant status. I then picked up a copy of the discovery, that being the police reports. I went back to my office, I then read through -- I don't even know she, you know, how – it says February. It didn't occur to me until

I read through the police reports that, especially was glaring ***the Louis Vuitton purse was something that she was trying to sell to an undercover Metro officer, and it was in the reports, and she admitted to it in the reports***.

And so when I went back, I looked in the box and I saw there was the iPhone. And I double-checked the discovery again, and again there was a stolen iPhone that she was being charged with that I didn't know when I went down to first represent her. I found out through the discovery.

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.

…

Q. Okay. And to the best of your ability, could you describe how the purse looked?

A. So it's not really a purse, it's more like a wallet. It's a Louis Vuitton. It's about -- well, ***there's a picture in the discovery***, but it's about I believe like a women's Louis Vuitton wallet. It's about like, I don't know, a few inches wide and it goes into a purse, I believe.

…

Q. Now, you stated that you had, you know, after reviewing the discovery provided by the D.A.'s office, Clark County D.A.'s office, that you had realized that the items given to you by Miss Sosa-Avila or her husband were allegedly stolen; is that right?

A. Well, yeah, allegedly. You can use allegedly, but I believe that ***she admitted to the undercover Metro officer who was investigating her that it was stolen, so, but, yeah, she hadn't been convicted of it yet***. But, yes, they were stolen.

Q. Okay. And approximately when did you realize, I guess when did you, approximately when did you realize that the items were stolen or allegedly stolen?

…

A. You know, I can't give you a date exactly. It occurred to me, like I said, after I read through the discovery. I don't read the discovery right

> away when I pick up a case because usually we set out preliminary hearings three, four months out, and so I don't get back to my office, review it.

ROA III 035-036 (31:21-35:11.) (***emphasis*** added).

The police reports provided in the State Bar proceedings reference items including an IPad Pro and wallet, and also reference additional items in various locations of the room. ROA I 0115, 0117. The stolen Louis Vuitton wallet is referenced at ROA I 0157. Mr. Leventhal testified above that upon his suspicions, he confirmed with his client that these items were in fact stolen, and she agreed to the plan that he would turn them in anonymously to his Metro detective contact.

Had the State Bar produced Sosa-Avila at hearing, the Panel could have examined her and assessed her credibility as it appears they were inexplicably inclined to doubt Mr. Leventhal. It is simply false to say the record does not support that Mr. Leventhal had reason to suspect the items were stolen. Moreover, it is uncontested that she admitted they were stolen items. The State Bar's assertion otherwise is patently false.

B. Mitrov's testimony lacks corroboration by any other source, is wholly unreliable, and was given undue weight by the panel. (OBC20-0706).

The State Bar's argument with regard to Mitrov's testimony is that "if we are to believe that Mr. Mitrov is not credible and/or reliable as Leventhal suggests, then it follows that the credibility and/or reliability of Mr. Mitrov's new statement is in

question as well." *Answering Brief*, 13. Not to be glib, but that is both *exactly* the point while somehow missing it entirely.

Selectively relying upon *any* portion of Mitrov's testimony flies in the face of reason. Once the well is poisoned, there are no safe drops to drink. It is all equally tainted. *See, also Riley v. State*, 93 Nev. 461, 462 (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).

Mr. Mitrov, the State Bar's star witness, attempted to withdraw his grievance, recanted his written statement drafted by the State Bar, recanted his testimony at the formal hearing, was abusing mind-affecting drugs, and asserted that he was coerced. *See e.g.* ROA III 001-018; 067; 151.

Never in these proceedings has the State Bar bothered to deny (much less contest) the allegations that Mr. Mitrov was told by the State Bar staff to withhold testimony, that he felt coerced by staff to lie and that as a result, the State Bar in effect suborned perjury. This goes to the heart of Appellant's argument that Mr. Mitrov's credibility has been shown to be unreliable time and again upon the record, yet the State Bar's entire case rests upon cherry-picking which of Mitrov's statements support its narrative and are therefore deemed "credible" while completely disregarding everything else. Risky sips from that poisoned well.

The singular piece of purported corroborating evidence of Mr. Leventhal's alleged *lack* of response regarding the location and return of the Viper—the screen caps of texts on Mitrov's phone--*was undisputedly altered*. Mitrov later admitted he deliberately omitted and deleted certain texts ("***about where my Viper was located***"), which the Panel accepted as true. While finding this "troubling," the Panel stated their concern that Leventhal himself did not produce the deleted texts and therefore they could not conclude if the deleted texts were material. ROA III 142:22- 143:8.

The Panel shifted the burden of proof onto Mr. Leventhal both to know that texts were deleted and to produce the deleted texts at hearing. Thus, it was Respondent's burden to correct the State Bar's perjured testimony and fabricated evidence.[1]

The Panel determined that, "Mr. Mitrov's testimony, even absent the text messages, still supports our findings." *Id*. 143. Thus, the Panel weighed the testimony of Mr. Leventhal against Mr. Mitrov (the only evidence on this point), and decided Mr. Mitrov was more selectively credible, even though Mr. Mitrov admitted to perjury the next day. The Panel gave the benefit of the doubt to the State Bar

[1] All this completely ignores the limited retention policies for text message content by all major US carriers, which range from "not retained at all" to 90 days on average. *See e.g*. *Cell Phone Forensics*. Fordham J. of Corporate and Financial Law (June 2016).https://news.law.fordham.edu/jcfl/2016/06/02/cell-phone-forensics-powerful -tools-wielded-by-federal-investigators (last visited March 21, 2022). Without the phone itself, content is typically unavailable by subpoena to the carrier.

despite both Mitrov and Mr. Leventhal testifying (ultimately) he did substantively respond to Mitrov and the deleted texts would have been proof of that. *Id*.

Regarding Mr. Mitrov's notarized retraction the day after the hearing, the State Bar argues the Panel "gave more than enough consideration of Mr. Mitrov's new statement by reconvening the Panel." *Answering Brief*, 14. However, "consideration" is distinguished from "weight." To that point, the State Bar argues it is "impossible" to know how much weight the Panel gave to Mr. Mitrov's new testimony. It is not impossible. The real question is what weight the Panel gave to Mr. Mitrov's testimony *as a whole*. Since the case rests almost entirely on Mr. Mitrov's version of events at selected points in time and rejects Mr. Leventhal's testimony out of hand, it can be reasonably concluded the Panel gave material and substantive weight to Mitrov's admitted false testimony.

C. The Panel Chairs improperly denied twice Respondent's NRCP 56 Motion, depriving Mr. Leventhal of "just and proper administration of attorney regulation."

The State Bar's answering brief misses Mr. Leventhal's deprivation of due process when it focuses on NRCP 50. *Answering Brief*, 15. The State Bar improperly defended the motion, and both Chairs' decisions were erroneous under NRCP 56. The Motion should have been granted.

The first Chair's Order dated February 12, 2021, expressly considered inadmissible evidence, the hearsay text messages and written statement of Ms. Sosa-

Avila, in denying summary judgment. ROA I, 83:26-28; 84:9-10. Had that hearsay been properly excluded, the motion would have been essentially unopposed.

On May 6, 2021, two weeks before the Formal Hearing (ROA I at 250-252), the new Chair gave the State Bar an additional week to submit a more proper declaration.[2] The Chair then denied Mr. Leventhal's 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. In the Order Denying Reconsideration, the Chair reiterated its belief that, "SCR 110(7) does not appear to provide a mechanism for the State Bar to take Mr. Mitrov's deposition." ROA IV, Supp2ROA 0041- Supp2ROA 0044.

First, it is a clear misstatement of law to conclude NRCP 56 is inapplicable to disciplinary hearings. As to deposition testimony, the Chair erroneously states that the rules governing discipline prohibit compelling deposition testimony. Both are clear error under NRCP 56's and SCR 110's express language, respectively.

SCR 110(7) only allows a deposition "if the witness is not subject to a subpoena or is unable to attend to testify at a hearing because of age, illness or other infirmity." Appellant expressed repeated and grave concerns about Mitrov's credibility. The State Bar knew Mitrov wanted to withdraw his grievance and refused to provide a declaration. ROA II, 1017-1019. Because the Chair ruled

[2] *See*, ROA II, 1017-1019**,** Respondent's Exhibit D to the Formal Hearing transcript.

erroneously there was no mechanism for a deposition, the formal hearing was both the first opportunity to secure Mitrov's testimony and too late to do anything about defects (and perjury) in that testimony pre-trial, such as with NRCP 56.[3] When, as here, a respondent in disciplinary matters is prevented from conducting meaningful prehearing discovery, due process suffers.[4]

The State Bar reaffirms Appellant's point when it argues "…once a trial has taken place the focus is on the evidence actually admitted…" *Answering Brief*, 15. This finger-trap is further supported by the State Bar where it goes on to point out Mr. Leventhal can argue the sufficiency of the evidence, but only through a Rule 50(a) motion *before the case is submitted to the ju*ry and, if successful, renew the motion under Rule 50(b) after the hearing. So Mr. Leventhal had reasonable suspicion that Mitrov had credibility issues, but could not depose him before hearing, and thus had no grounds to challenge him until after the hearing, at which point as a

[3] ABA *Model Rules of Lawyer Disciplinary Enforcement* allow a respondent to depose witnesses under state rules of civil procedure. As of 2015, 35 states allow the Respondent to take a deposition. *See*, https://nysba.org/app/uploads/2020/02/Final-Discovery-Report-approved-7-24 2015.pdf (last visited March 21, 2022).

[4] Technically, SCR 110(5) only prevents a respondent from seeking deposition testimony absent good cause. Arguably, the State Bar could notice a deposition for any reason. ("*Restriction on discovery***.** Discovery **by the attorney**, other than under Rule 105(2)(d), is not permitted prior to hearing, except by the order of the chair for good cause.") (**emphasis** added)).

Respondent he is required to have had the requisite evidence for the trial, an Oroboros equation that provides no end *and no relief.*

The State Bar's argument that in civil matters there can be no appeal taken from a denial of summary judgment after a trial on the merits is inapposite. This is not a civil trial, but rather a quasi-criminal hearing with a *de novo* review unique to disciplinary matters. SCR 105(3)(b); *In re Schaefer*, 117 Nev. 496, 515, 25 P.3d 191, 204, *modified by* 31 P.3d 365 (2001). Moreover, this misses the issues Mr. Leventhal raised on appeal, that the Chairs denied summary judgment on procedural defects and misapprehension of the rules governing discipline actions.

D. The Panel's Recommended Sanction Is Not Supported by Clear and Convincing Evidence.

The State Bar argues the Panel's recommendation was lenient. However, this flows from the threshold proposition that Mr. Leventhal knowingly violated RPC 1.8 on each count by clear and convincing evidence. Before applying aggravating and mitigating factors, first there must be misconduct. Mr. Leventhal's position is simple. There was no violation on either count because the State Bar failed to meet its burden by clear and convincing evidence.

As argued in prior briefing, Ms. Sosa-Avila provided stolen items to Mr. Leventhal's office as *collateral* until she could pay his fees. He quashed her warrant, kept her out of jail, and later came to suspect she had provided his office stolen goods

based on his review of records in her criminal cases he was handling. He spoke to her and she confirmed the items were stolen and agreed they needed to be returned to law enforcement. The items were collateral, not payment, and the client was responsible for payment of his fees in funds, not trade. The stolen nature of the items matters for the purpose of establishing an adverse possessory interest pursuant to RPC 1.8 only.

As a matter of law, Ms. Sosa-Avila cannot have a legally cognizable possessory interest in stolen property. Therefore, Mr. Leventhal cannot acquire a possessory interest "adverse to the client" in such stolen property. Once again, an RPC 1.8(a) violation requires that the attorney "**knowingly** acquire a possessory interest **adverse to a client**." RPC 1.8(a); *State Bar Compl.*¶ 12.

As to Mitrov, the record is replete with evidence of the ubiquitous fact that he is not credible and was not reliable at any time applicable to the bar proceedings. The State Bar argues despite his later contradictions and retractions, Mitrov's initial testimony (favorable to the Bar's narrative) should be accepted because who can tell when he was lying or not lying. This circular argument, if it proves anything, goes to Mr. Leventhal's point that <u>all</u> of Mitrov's testimony is tainted.

Moreover, what evidence of misconduct is there on this count absent Mr. Mitrov's "word?" The altered texts he provided? His recollection of events while he was abusing drugs? Even then, *arguendo,* the discipline rendered is factored on Mr.

Mitrov being damaged by having to get a rental car. Here, the State Bar's Answering Brief notes, "Mr. Mitrov rented a car because he did not have a vehicle with working A/C." *Answering Brief*, 4-5.

Mr. Leventhal testified he had permissive use of the Viper as a favor effectively for a day, after which it broke down in Pahrump. Mr. Leventhal left it at a mechanic for Mr. Mitrov to pick up, and he even had it repaired. He testified that it was "actually in my possession for two days." ROA II 0468 (*Transcript*, 73:13-22). Mr. Mitrov testified about the Viper and the rental as follows:

> A. I mean, when I -- when I picked it [Viper] up, it looked like the car was never driven. I picked it up at a shop in North Las Vegas.
>
> Q [Mr. Gosioco]. Okay. Thank you, Mr. Mitrov. And because you didn't have the Viper for about a year, that's the reason you rented a rental car from Hertz; is that right?
>
> A. No. I mean, I had -- I have multiple cars because the Maserati, to be precise, it's – it didn't have no A/C and it was starting to getting hot, and I rented the, you know, the car beginning of June.
>
> Q. Okay. But did you rent that car because you didn't have the Viper?
>
> A. Because it was hot, and I was thinking if I have the Viper maybe I can drive it. I don't know.

ROA II 0542-33 (*Transcript*, 147:23 – 148:13)

> Q [Mr. Clark]. So you weren't forced to rent the vehicle because you didn't have the Viper, you just chose to rent the vehicle?
>
> A. I choose, correct.

Id. at 0545 (150:7-10).

The Viper was not collateral, it had nothing to do with fees, and Mr. Mitrov failed to pick it up despite it being available to him for months. Why? Much like we do not know what is truth and what are lies with Mr. Mitrov, who is to say why he did not pick up the Viper. We now know that he was abusing methamphetamine at this time by his own post-hearing admission (but too late for cross-examination and real-time credibility assessment by the Panel members). He had other vehicles available to him. Mr. Leventhal had the Viper two days. Whatever the case, Mr. Leventhal was not the proximate cause of Mr. Mitrov needing a rental because the Viper was just waiting for Mitrov to pick it up. There was neither adverse possessory interest in the Viper nor any damage to Mr. Mitrov caused by Mr. Leventhal.

Appellant agrees that SCR 107 functions as a necessary public protection in that the grievant (victim) is a witness and the State Bar as prosecutor has standing to proceed on its own initiative. However, SCR 107 also specifically states that a grievant's withdrawal or refusal to proceed may also be considered in determining whether to abate. Mr. Mitrov attempted to withdraw his grievance on *several* occasions that had *nothing* to do with Mr. Leventhal. In context under the totality of these facts, Mr. Mitrov's wish to withdraw his grievance and the reasons for that are both relevant and probative to these proceedings. His testimony and the perjured evidence he provided materially and substantively formed the basis of the Panel's decision to find a violation, which weight is not commensurate with his well-

established lack of credibility. On this record, a stayed one-year suspension and five-years of probation are unwarranted.

V. CONCLUSION.

Nothing in the State Bar's Answering Brief disproves Mr. Leventhal's arguments that the record lacks clear and convincing evidence to support the finding he violated RPC 1.8 in this case on either count. Further, the Panel's reliance upon altered evidence and recanted testimony combined with the one-way, closed discovery process in disciplinary matters deprived Mr. Leventhal of due process in this particular instance. Mr. Leventhal respectfully repeats his request that the Court grant his request to dismiss entirely, or in the alternative, a remand for further evidence.

Respectfully submitted this 24th day of March 2022.

LIPSON NEILSON P.C.

By: */s/ David A. Clark*

DAVID A. CLARK
Nevada Bar No. 4443
9900 Covington Cross Dr., Suite 120
Las Vegas, Nevada 89144
Attorney for Todd M. Leventhal, Esq.

VI. CERTIFICATE OF COMPLIANCE.

I hereby certify that this reply 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 reply 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 4,212 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 reply brief is not in conformity with the requirements of the Nevada

Rules of Appellate Procedure.

Respectfully submitted, this 24th day of March, 2022.

LIPSON NEILSON P.C.

By: */s/ David A. Clark*

DAVID A. CLARK
Nevada Bar No. 4443
9900 Covington Cross Dr., Suite 120
Las Vegas, Nevada 89144
Attorney for Todd M. Leventhal, Esq.

CERTIFICATE OF SERVICE

Pursuant to NRAP 25, I certify that I am an employee of LIPSON NEILSON P.C. and that on the 24th day of March, 2022, a true and correct copy of the foregoing **Appellant's Reply 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:

STATE BAR OF NEVADA
GERARD GOSIOCO, ESQ.
Nevada Bar No. 14371
3100 West Charleston Blvd., Suite 100
Las Vegas, Nevada 89102

/s/ Michele Stones

An employee of Lipson Neilson P.C.