IN THE SUPREME COURT OF THE STATE OF NEVADA

IN THE MATTER OF THE DISCIPLINE OF JAMES J. JIMMERSON, ESQ., NEVADA BAR No. 0264.

Case No. 83255

STATE BAR OF NEVADA'S REPLY BRIEF

STATE BAR OF NEVADA
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A. THE EVIDENCE DID NOT SUPPORT THE PANEL'S CONCLUSION THAT JIMMERSON LACKED A SELFISH MOTIVE.

The substantial evidence standard of review does not force the Court to accept blindly any evidence in support of the panel's findings. Rather, it compels the court to determine whether "a reasonable mind might accept [the evidence] as adequate to support a conclusion."[1] The panel has a "duty to qualify evidence as reliable, probative, and substantial."[2] After reviewing the whole record, the Court must determine whether sufficient, worthy evidence—both in quality and quantity—supports the findings of fact.[3]

Here, no reasonable mind could conclude, based on the evidence in the record, that Jimmerson acted without a dishonest or selfish motive.

Jimmerson unequivocally stated his motive.

> A. So I needed to transfer the money to the payroll company on Thursday afternoon, the 21st, so the payroll company then could issue payroll checks to our employees on the 22nd.
> ...

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[1] *Weddell v. H20, Inc.*, 128 Nev. 94, 101, 271 P.3d 743, 748 (2012).
[2] *Nassiri v. Chiropractic Physicians' Bd. of Nev.*, 130 Nev. 245, 249-50, 327 P.3d 487, 490 (2014) (*citing U.S. Steel Mining Co. v. Dir., Office of Workers' Comp. Programs*, 187 F.3d 384, 389 (4th Cir. 1999).
[3] *Id.*

> Q. You agree that the $45,000 withdrawal was, the principal purpose behind that was to make payroll? Did I just hear that right?
>
> A. Yes, and other bills, but yes, sir, you're a hundred percent right. That's the only payroll that these transfers related to. But, yes, sir, that's right.[4]

Nothing in the record contradicts Jimmerson's clearly and unequivocally expressed motive. Even the panel accepted that Jimmerson "used the 11/21/19 transfer to cover payroll."[5]

Jimmerson argues that his firm had no "money problems" because he "had money from other businesses" to make payroll.[6] The State Bar demonstrated his cashflow problems by following the money through firm accounts.[7] Money from other businesses is irrelevant to the firm's cashflow. Sure, Jimmerson could have borrowed from his other businesses, but that only reinforces his motive. His firm *needed* money.

Jimmerson also counters that he "never had any intention to take money that didn't belong to [him]."[8] This, according to Jimmerson, demonstrated his motive. Jimmerson conflates mental state with motive.

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[4] R. at 652:16-22.
[5] R. at 555.
[6] R.'s Ans. Br. at 25.
[7] *See*, *e.g.*, R. at 608-09, 611-12, 3399-401 and 3164.
[8] R.'s Ans. Br. at 25; R. at 3583.

Mental state, along with injury, establish a presumptive or baseline sanction.[9] Motive provides an aggravating or mitigating factor.[10] The Supreme Court of Colorado distinguished mental state from motive.

> Both the mental state and motives of the respondent himself are clearly material to the propriety of a sanction. With regard to the imposition of sanctions, however, the mental state of the respondent refers to his intent or awareness with respect to either his conduct or a result of his conduct. It does not refer to his awareness or construction of a particular ethical proscription or his intent to violate it. Similarly, "the absence of a dishonest or selfish motive," which is included among the enumerated mitigating factors of the ABA Standards for Imposing Sanctions, refers to the lawyer's motive for his conduct, without regard to any awareness on his part whether that conduct is specifically proscribed as unethical. While not necessarily irrelevant, a respondent's awareness that his conduct will violate an ethical proscription is not itself material.[11]

Jimmerson's self-proclaimed lack of intent to harm clients is immaterial to motive. Motive refers to the reason the lawyer committed the misconduct. Motive, as a psychological term, is also known as 'the drive.' It is a seed that blossoms into intent. As such, motive always comes before intent.

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[9] ABA Standard 3.0.
[10] SCR 105(1)(b),(2)(b).
[11] *In re Atty. D*, 57 P.3d 395, 400 (Colo. 2002) (citations omitted); ABA Standards 3.0 and 9.32(b); ANNOTATED STANDARDS at 138.

For example, a need for money may lead a lawyer to misappropriate client property. But a sick child with medical bills may also lead a lawyer to misappropriate client property. Investigations often identify motive, but motive does not necessarily blossom into misconduct.

Mental state, or *mens rea*, on the other hand, matures during the act of misconduct. It grows from motive and determines the degree of the lawyer's culpability for an unethical action.

The State Bar acknowledges the error in its earlier argument that knowing conversion cannot logically begin with a selfish motive. Even the State Bar conflated motive and intent. Jimmerson is correct.[12] It is rare but possible for an unselfish motive to blossom into intentional conversion.

Intentional misconduct, the highest level of culpability, "arises *when a lawyer acts* with a conscious objective or purpose to accomplish a particular result."[13] Because motive and intentional misconduct both point to a purpose, it is easy to conflate the two. Timing is key.

For example, a lawyer with a sick child and high medical bills has a motive to misappropriate client property. That mitigating motive may

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[12] R.'s Ans. Br. at 28 n. 10.
[13] ABA Standard 3.0; ANNOTATED STANDARDS at 134.

blossom into intentional conversion. If the same lawyer continues to misappropriate after the child recovers and the medical bills subside, then his intentional conversion is aggravated by a new motive—greed or self-enrichment. At all times the lawyer's mental state was intentional. He acted with a conscious objective. His drive or motive changed.

On the other hand, a dishonest or selfish motive may lead a lawyer to consciously accept the risk *without intentionally misappropriating*.[14]

For example, in this case Jimmerson faced cashflow problems. His firm needed money. He had a motive to misappropriate to make payroll. He willfully ignored the risk of misappropriation. His willful ignorance led to actual misappropriation.

If Jimmerson's motive to make payroll influenced his decision to put his client's property at risk, then it is an aggravating—not mitigating—factor.

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[14] *Cf. People v. Carter*, 364 P.3d 1164, 1176 (Colo. O.P.D.J. 2015) (The Supreme Court of Colorado neither aggravated nor mitigated for a dishonest or selfish motive. "Although we do not find that Respondent intended to act dishonestly or selfishly, we also believe she recklessly failed to ensure she understood and followed the rules governing client funds. We cannot reward this laxity by giving her credit in mitigation.")

The panel found that Jimmerson did not risk his client's property to make payroll but "to avoid the work necessary to determine whether the funds could be withdrawn." R. at 557.

This finding contradicts the evidence. As quoted above, Jimmerson expressly told the panel that his "principal purpose" was to make payroll. R. at 652. Never, in over 3,500 pages of the record, does Jimmerson or anyone else claim that Jimmerson's purpose was to avoid work. In fact, Jimmerson's motive could not have been to "avoid work." He admitted that the "first time" he learned about the bookkeeper's "mess" was November 25, 2019—4 days *after* his misappropriation and 3 days *after* payroll.[15] It is clear error when a panel does not accept a respondent's admissions.[16]

Furthermore, Jimmerson withdrew exactly $45,000. There is no other reason to withdraw *that amount* except to make payroll. The evidence shows that Jimmerson shortly thereafter moved $46,958.87 to

[15] R.'s Ans. Br. at 13; *see also* R. at 655, 680-81.
[16] *In re Cleland*, 2 P.3d 700, 704 (Colo. 2000) ("The board erred when it did not just accept [respondent]'s admissions.")

his payroll account and disbursed $46,772.53 from his payroll account over the next few days.[17]

Payroll and cashflow problems induced Jimmerson to withdraw the client funds. Jimmerson's reason, purpose, and motivation was to make payroll—not avoid work. Jimmerson did not withdraw client funds to avoid work. That finding is wholly unsupported by the evidence. No reasonable mind would accept that conclusion. Both the quality and quantity of the evidence lead to one conclusion—Jimmerson risked and misappropriated client property to make *his* payroll. The panel's finding that Jimmerson acted without dishonest or selfish motive is clearly erroneous.

B. A PUBLIC REPRIMAND IS AN INAPPROPRIATE SANCTION FOR MISAPPROPRIATION OF CLIENT PROPERTY.

MRLDE Fallacy

Jimmerson's effort to distinguish the ABA Model Rules for Disciplinary Enforcement (MRLDE) is a straw-man fallacy. The State Bar

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[17] R. at 609-12, 3164, 3399. Also, "The fact that [respondent] may not have had a dishonest motive in every single instance of misconduct does not demonstrate that the mitigating factor exists. *In re Cleland*, 2 P.3d at 705.

cited ABA Standard 2.5—not the MRLDE. Standard 2.5 addresses the reprimand, its value, and circumstances appropriate for a reprimand.[18] Under the section *Circumstances Appropriate for Reprimand*, the ABA cites the MRLDE to reiterate that courts following the ABA Standards "shall not" consider misappropriation of funds lesser misconduct for a reprimand.[19] Jimmerson misleads the Court when he argues that the "rule has nothing to do with determining the appropriate level of discipline to impose for an RPC 1.15 violation."[20] The ABA does not mince words when it advises against a reprimand for misappropriation of client funds.

Of course, this Court is not bound by the ABA Standards. This Court *could* issue a reprimand. "In the legal profession, the community has allowed the profession the right of self-regulation."[21] This gives the Court autonomy in constructing discipline. This Court could reject ABA Standard 2.5 and issue a reprimand to Jimmerson for misappropriating client funds to make payroll.

However, courts agree that

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[18] ANNOTATED STANDARDS at 77-82.
[19] *Id.* at 79.
[20] R.'s Ans. Br. at 35.
[21] ANNOTATED STANDARDS at xvii.

> protecting the public, upholding the integrity of the legal system, assuring the fair administration of justice, and deterring other lawyers from similar misconduct are the primary purposes of lawyer discipline.[22]

Lenient sanctions "fail to adequately deter misconduct and thus lower public confidence in the profession."[23] Protecting the public is more than removing unfit lawyers.

> Disciplinary proceedings are a catharsis for the profession, intended to ensure the integrity of the bar and to prevent the transgressions of an individual lawyer from bringing its image into disrepute. Therefore, the public interest is served when sanctions designed to effect general and specific deterrence are imposed on an attorney who violates the disciplinary rules, and those sanctions demonstrate to members of the legal profession the type of conduct that will not be tolerated.[24]

A reprimand in this case would prove the opposite—that the profession tolerates misappropriation. As "lesser misconduct" misappropriation would "not limit the lawyer's right to practice."[25] A reprimand would have little *general* deterrence.

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[22] *Id.* at 1.
[23] ANNOTATED STANDARDS at xii.
[24] *Atty. Griev. Comm'n of Md. v. Shapiro*, 441 Md. 367, 395, 108 A.3d 394, 410-11 (2015) (citations omitted).
[25] ABA Standard 2.5; ANNOTATED STANDARDS at 77.

Improper Weight to Aggravating and Mitigating Factors

Jimmerson correctly notes that the State Bar does not challenge the Panel's findings of aggravation and mitigation except for his dishonest and selfish motive. However, the State Bar asks the Court to weigh those factors *de novo*.[26] The State Bar reiterates the arguments from its Opening Brief and adds the following.

First, Jimmerson emphasized his substantial experience in the practice of law.[27] The panel undervalued his experience and his prior discipline. Both are significant.

The panel mitigated against the prior discipline for remoteness because it occurred in 1994.[28] But it was serious. Jimmerson's intentional misconduct in 1994 would score out as disbarment today.[29] A divorce client asked him to save her community property from foreclosure. Instead, Jimmerson disclosed that confidential client information to a

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[26] SCR 105(3)(b). Jimmerson cites to criminal opinions for the proposition that the Court should not reweigh the evidence. This Court gives deference to the findings of fact but must weigh that evidence to determine an appropriate sanction *de novo*.

[27] R.'s Ans. Br. at 8-9.

[28] R. at 556-57.

[29] R. 877-78; ABA Standard 4.21 ("Disbarment is generally appropriate when a lawyer, with the intent to benefit the lawyer or another, knowingly reveals information relating to representation of a client not otherwise lawfully permitted to be disclosed, and this disclosure cause injury or potential injury to a client").

partner. Together they bought and flipped the property for a 200-percent return.[30] He received mitigation partly because of his "eight years as a bar governor" and "his three years on a disciplinary board."[31]

The panel in this case recognized that Jimmerson's experience was an aggravating—not mitigating—factor. But it gave little weight to his years as a governor and member of the disciplinary board. It frustrates the community to see an experienced, well-known lawyer *blame his bookkeeper*. A former governor and disciplinary board member should know better.

Second, the panel overvalued Jimmerson's mitigation.

Jimmerson points to testimony from his older son James to support the panel's finding of personal or emotional problems. But James' testimony does not prove a causal connection. James testified that the loss "forever changed" Jimmerson and that Jimmerson worked with the Nevada Donor Network to honor Jacob as recently as November 13, 2019.[32] James did not testify, however, that Jimmerson's loss caused Jimmerson to misappropriate client property. The State Bar does not challenge the panel's factual findings because a SCR 102.5(2)(c) requires

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[30] R. 877-78.
[31] R. at 880-81.
[32] R. at 3558-59.

no causal connection. However, a mentally disabled attorney would receive *no mitigation* without a causal connection.[33] Fairness demands that Jimmerson's significant, but unrelated loss receive proportionate weight.

Also, Jimmerson relies on expert testimony from former bar counsel, Rob Bare. The Panel relied on this testimony over the State Bar's objection.[34] The State Bar did not raise this issue in its Opening Brief because the Court reviews discipline *de novo*.[35] But Jimmerson relied on Bare's "opinion" often in his Answering Brief. Thus, the State Bar addresses the opinion as a "new matter set forth in the opposing brief."[36]

Bare's expert opinion was that the panel should give Jimmerson "A pluses … in grading him essentially on the mitigating factors in the case."[37] This Court has repeatedly held that weighing the four ABA factors to determine the appropriate discipline is the prerogative of the Court—not a factual finding subject to deference.[38] Furthermore, NRS 50.275 only permits expert witnesses to

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[33] SCR 102.5(2)(i)(2).
[34] R. at 122-55.
[35] SCR 105(3)(b).
[36] NRAP 28(c).
[37] R. at 3610-12.
[38] *See, e.g., In re Gewerter*, 485 P.3d 1247 (Nev. 2021).

> testify to matters within the scope of their expertise so long as that testimony will assist the trier of fact to understand the evidence or to determine a fact in issue. Therefore, expert witness testimony that amounts to a legal conclusion is not admissible because it does not help the trier of fact 'understand the evidence' or 'determine a fact in issue.'[39]

Bare's opinion "grad[ed]" mitigation for the panel. Bare directed the panel on how it should "devote deliberative energy."[40] Bare spent considerable time instructing the panel on how to score the facts under the ABA Standards over repeated objections from the State Bar.[41]

Bare's opinion did not help the panel understand the evidence or determine a fact in issue. His opinion was an inadmissible legal conclusion and sanctioning recommendation. Not even an injured client can offer a sanctioning recommendation.[42] The Court should disregard Bare's testimony.

But, also, the State Bar implores the Court for a ruling on this trend. The disciplinary process would benefit from a holding that expert opinions on mitigation weight and sanctioning recommendations are inadmissible.

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[39] *Pundyk v. State*, 467 P.3d 605, 608 (Nev. 2020) (citations omitted) (*quoting Collins v. State*, 133 Nev. 717, 724, 405 P.3d 657, 664 (2017)).
[40] R. at 3614.
[41] R. at 3610-20.
[42] SCR 102.5(3)(e).

IV. CONCLUSION

This Court should find that Jimmerson had a selfish motive when he misappropriated trust funds so he could make his payroll. This Court should also weigh Jimmerson's aggravating and mitigating factors *de novo*. There is insufficient evidence to mitigate his misconduct to a reprimand. A suspension would serve as a deterrent to Jimmerson and other attorneys, protect the public, and promote public confidence in the integrity of the profession.[43]

Respectfully submitted this 18th day of November 2021.

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[43] *See In re Discipline of Reade*, 133 Nev. 711, 716 (November 16, 2017) (discussing how suspension is designed to protect the public).

V. CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complied 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 for Office 365 in Georgia 14-point font size.

2. 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), it is proportionately spaced, has a typeface of 14 points or more and contains 3,237 words.

3. Finally, I hereby certify that I have read the foregoing Stater Bar of Nevada's Answering Brief, and to the best of my knowledge, information and belief, this brief is not frivolous or interposed for any improper purpose. I further certify this brief complies with all applicable Nevada Rules of Appellate Procedure, including the requirement of NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be supported by appropriate references to the record on appeal.

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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.

Dated this 18th day of November 2021.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing **REPLY BRIEF** was placed in a sealed envelope and sent by U.S. regular mail in Las Vegas, Nevada, postage fully prepaid thereon for first class mail, addressed to:

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Dated this 18th day of November 2021.

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Sonia Del Rio, an employee of the
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