

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOSEPH S. GILBERT, ESQ.,

Petitioner,

vs.

STATE BAR OF NEVADA,

Respondent.

Case No. 84113

OBC No. OBC21-0136

Electronically Filed
Apr 01 2022 11:17 a.m.
Elizabeth A. Brown
Clerk of Supreme Court

**PETITIONER JOSEPH GILBERT'S REPLY TO STATE BAR OF
NEVADA'S ANSWER TO PETITION FOR WRIT OF MANDAMUS OR
PROHIBITION**

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I.

INTRODUCTION

It appears the parties are at least partially in agreement, as the Respondent State Bar of Nevada does not oppose an investigation into how, in an admitted absence of a public records request (Answer, pg. 26, fn. 95), the rejected proposed Letter of Reprimand came to be possessed by the Associated Press. (Answer, pg. 31). Yet it does so while stating that had there been a public records request, it would have provided the rejected proposed Letter of Reprimand in response to it. It asserts that, in its interpretation of this Court's rules, as of the filing of the Formal Complaint on September 28, 2021 it was mandated to do so. (Answer, pg. 27). The Petitioner disagrees with this interpretation and submits that once a formal proceeding is initiated by the Complaint itself and the allegations therein, only papers and exhibits filed thereafter are available to the public until the conclusion of the matter, whenever and however that may occur pursuant to this Court's rules. Upon conclusion, it would then be available. That is why Petitioner maintains that a proposed letter of reprimand from the Screening Panel should never be signed by the Chairperson until accepted. Therefore, the parties leave for this Court's resolution the questions (1) should a proposed letter of reprimand be signed until accepted, and, if so, (2) when does a proposed Letter of Reprimand signed by the Chairman of a Screening Panel of a Disciplinary Board become a publicly accessible

document if, as here, it is met with rejection and a demand for a formal hearing by the subject of the investigation?

All parties to this proceeding agree that where a letter of reprimand is accepted by the subject it becomes public. SCR 121(2). All parties agree that where the screening process concludes in dismissal - and perforce no formal complaint was filed - the papers in that disciplinary matter file become public. All parties further must agree that Rule 9 of the Nevada Disciplinary Rules of Procedure (DRP) reads, in pertinent part, “[a] respondent’s rejection of a screening panel’s Letter of Reprimand shall constitute an offer and a rejection like the rejection of a settlement offer in a civil case or a plea offer in a criminal case, which later proceeds to trial... Neither party may disclose a screening panel’s offer of a Letter of Reprimand to the formal hearing panel.” Although that rule became effective thirty-six (36) days after the Formal Complaint was filed in the matter before the Court, it is a reflection of the understanding of the Disciplinary Board Chairs and Board of Governors during the deliberations and years of work leading to its creation and the goal of “ensuring the just and proper administration of attorney regulation.” DRP 1(b). Therefore, DRP 9 should be taken into consideration in this matter in determining whether State Bar Counsel’s interpretation here is inconsistent with that goal.

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II.

STATEMENT OF LAW AND ARGUMENT

A. Publishing A Rejected Letter of Reprimand Prior To The Conclusion Of Disciplinary Proceedings Imposes Punishment Without Due Process Of Law.

The purpose of an attorney discipline proceedings is to protect the public, the courts, and the legal profession, not to make the grievant whole or to punish the attorney. *Matter of Discipline of Arabia*, 137 Nev. Adv. Op. 59, 495 P. 3d 1103, 1110 (Nev. 2021). Respondent concedes that a license to practice law is protected by the due process clauses of the constitutions of the United States and the State of Nevada and that notice of the accusations and an opportunity to be heard and defend against them must be had prior to the imposition of discipline. (Answer, pg. 21). Further, Respondent begrudgingly concedes that Petitioner “may have suffered a loss of reputation and livelihood” due to the release and publication of the rejected Letter of Reprimand but disavows responsibility for it, contending it was public anyway under its interpretation of SCR 121. (Answer, pg. 24)¹. For this Court to

¹Because it was a signed letter by the chair instead of an unsigned draft letter that is finalized upon acceptance or failure to object, it is easy to understand why the media thought it was final. If State Bar personnel do that to save steps, the downside is excessive. If it had been sent unsigned with a draft stamp on it, the damage would have been reduced substantially. This case is a text book example of the State Bar’s lack of consideration of lawyers as people and disregard of the unwarranted and irreversible damage that can be done to their reputation by taking shortcuts.

accept that as permissible is to ignore the holding in *Matter of Discipline of Reade*, 133 Nev. 711, 714-16, 405 P. 3d 105 (Nev. 2017). There this Court recognized that disciplinary authority and power must be strictly constrained, that loss of a lawyer's reputation and income is concomitant with imposition of discipline upon that lawyer, and such discipline and loss can never occur without due process. But such loss did occur here and will any time a proposed and rejected letter of reprimand, signed or not, is made public prior to the conclusion of the disciplinary proceedings.

Further, Respondent seems to misapprehend the bases of Petitioner's objections. Petitioner is not complaining or contending that "a rejected offer of discipline prior to a formal hearing violates due process". (Answer, pg. 23). The parties agree that if a proposed letter of reprimand is accepted by the subject of the disciplinary matter, the matter is over, and the letter of reprimand can be published. In such circumstances the right to notice and a hearing – the cornerstones of due process of law – have been waived by the subject of the disciplinary matter and the discipline has been accepted by the subject. It is making a rejected offer of a letter of reprimand public prior to the completion of the formal hearing process that is the violation, as it creates damage to the income and reputation of the lawyer without first providing the advantage of an opportunity to contest the allegations. The same allegations that lead to the proposed letter of reprimand are entirely permissible to

reiteration in the Complaint, but not the conclusion of the Screening Panel and the admitted recommendation of Bar Counsel. (Answer, pg. 13).

III.

CONCLUSION

This Court should continue its path of seeking to balance the need to protect the public and the profession from the damage that can be done by unfit lawyers and for transparency in lawyer disciplinary proceedings that instills public confidence in our system of justice. At the same time, this Court should continue its constitutionally mandated obligation to protect subjects in disciplinary proceedings from suffering harm without first having notice and an opportunity to be heard and defend.

Respondent's interpretation of this Court's rules governing attorney discipline was incorrect and resulted in grave damage in this matter. If, as Respondent predicts, it was Petitioner's office personnel responsible for the release of the rejected letter of reprimand, the goal of public transparency is served by the facts being determined and revealed. Such is particularly true here where all but one employee of Petitioner – a person who bears the same surname as the Chairman of the Northern Nevada Disciplinary Board who denied Petitioner's Motion to Dismiss in the disciplinary matter - have denied it under oath. Thus, one or more of the affidavits submitted by Petitioner to this Court may – or may not – have been perjured. Petitioner certainly

doesn't want to support such conduct and this Court shouldn't countenance it. However, as the only employee who declined to submit an affidavit may be the one who proves Respondent's theory correct and, further, may be a blood relative of the Chairman of the Northern Nevada Disciplinary Board, the Court should want to know that as well in its pursuit of insuring the non-biased fairness of disciplinary procedures. (Answer, pg. 14).

Notwithstanding what an investigation determines to have been the source of the revelation of the rejected letter of reprimand, dismissal of this matter is appropriate pursuant to prior decisions of this Court. The damage to Petitioner's reputation and income has already occurred in the absence of prior due process.

Respectfully Submitted the 1st day of April 2022.

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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, Times New Roman style, and a 14-font size. I further certify that this brief complies with the page-or type-volume limitations of NRAP 32(a)(7) because it is either:

Proportionally spaced, has a typeface of 14 points or more, and contains 1,264 words, starting from the statement of the case.

Finally, I hereby certify that I have read this 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 the 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.

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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.

Respectfully Submitted the 1st day of April 2022.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that pursuant to NRAP 25(1(d) on the 1st day of April 2022, I did serve at Las Vegas, Nevada a true and correct copy of, on all parties to this action by Electronic Filing.

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