IN THE SUPREME COURT OF THE STATE OF NEVADA

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JOSEPH S. GILBERT, ESQ.,

Petitioner,

vs.

STATE BAR OF NEVADA,

Respondent.

Case No. 84113

STATE BAR OF NEVADA'S

ANSWER TO PETITION

FOR A WRIT OF MANDAMUS OR PROHIBITION

DANIEL M. HOOGE, Bar Counsel
STATE BAR OF NEVADA
Nevada Bar No. 10620
3100 W. Charleston Blvd, Ste 100
Las Vegas, Nevada 89102
(702) 382-2200

Attorney for the State Bar

DOMINIC P. GENTILE
CLARK HILL PLLC
Nevada Bar No. 1923
3800 Howard Hughes Pkwy., #500
Las Vegas, Nevada 89169

JANEEN V. ISAACSON
LIPSON NEILSON P.C.
Nevada Bar No. 6429
9900 Covington Cross Dr., Ste 120
Las Vegas, Nevada 89144

Attorneys for Joseph S. Gilbert

I. TABLE OF CONTENTS

II. TABLE OF AUTHORITIES

Cases

Statutes

Rules

Treatises

III. ARGUMENT

A. PETITIONER'S BURDEN

Article 6, Section 4 of the Nevada Constitution gives the Nevada Supreme Court and Court of Appeals original jurisdiction to issue writs of mandamus and prohibition. NRS Chapter 34 and NRAP 21 give procedures for these writs.

A writ of mandamus compels the performance of an act that the law requires or to control a manifest abuse of discretion. A writ of prohibition is the counterpart to a writ of mandamus; the Court may issue a writ of prohibition to stop a lower court (or agency, corporation, board, or officer) from acting when such proceedings are either without, or in excess of, the respondent's jurisdiction.[1]

Writs of mandamus and prohibition are extraordinary remedies. Petitioner's burden "is a heavy one."[2] Petitioner must show "a clear right" to

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[1] *See Oxbow Constr., LLC v. Eighth Judicial Dist. Court*, 130 Nev. Adv. Op. 86, 335 P.3d 1234 (2014); *Pan v. Eighth Judicial Dist. Court*, 120 Nev. 222, 88 P.3d 840 (2004); *Smith v. Eighth Judicial Dist. Court*, 107 Nev. 674, 818 P.2d 849 (1991).

[2] *Poulos v. Eighth Judicial Dist. Court*, 98 Nev. 453, 652 P.2d 1177 (Nev. 1982).

compel the respondent.[3] Petitioner must also show that he has no plain, speedy, and adequate remedy in the ordinary course of law.[4]

B. STATEMENT OF THE FACTS.

During the Summer of 2020 Tara C[5] communicated with Carlos Salmoran, a nonlawyer at Joey Gilbert Law.[6] Tara inquired about changing her husband James C's sex offender registration status. James was initially a tier 1 offender nearing the end of his 15-year registration requirement when in 2007, the Nevada state legislature passed Assembly Bill 579 and Senate Bill 471 to implement the federal Adam Walsh Act of 2006.[7] According to the clients, these bills changed James' status to a tier 3 offender, which required lifetime registration. Tara questioned Salmoran about a petition for relief from James's life-time registration requirement.[8]

Tara spoke with Salmoran several times by phone to ensure that Joey Gilbert Law Office ("Gilbert Law") could prosecute James' petition before

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[3] *State ex rel. Cohn v. Mack*, 26 Nev. 85, 86, 63 P. 1125, 1125 (1901).
[4] *Marquis & Aurbach v. Eighth Judicial Dist. Court*, 122 Nev. 1147, 1155, 146 P.3d 1130, 1136 (2006).
[5] The State Bar filed a motion in the disciplinary matter to seal the grievants' names once the matter drew public attention. Petitioner successfully opposed the motion. But publicizing the grievants' identities or James' registration status embarrasses them unnecessarily.
[6] App. at SBN002.
[7] *Id.*
[8] *Id.*

hiring Gilbert Law.[9] Carlos assured Tara that Gilbert Law was "very good" at these types of cases.[10] Tara convinced James to meet with Salmoran in early September.[11]

James missed work on September 11, 2020, to meet with Salmoran.[12] James reiterated the nuances of his tier 3 status. No attorney was present.[13] James signed a contract for representation with Gilbert Law.[14] Salmoran, on behalf of Gilbert Law, agreed to prepare and file with the court a petition to either reduce or end James' tier 3 registration requirement.[15] James paid a flat fee of $3,500 the same day.[16] The contract displays a signature from Petitioner. However, the signature looks like a stamp.[17]

James' job made communication during business hours difficult. So, Tara communicated principally with Gilbert Law. Tara and Salmoran exchanged eleven emails in September.[18] Tara gave Salmoran the relevant

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[9] *Id.*
[10] *Id.*
[11] App. at SBN002.
[12] *Id.*
[13] App. at SBN0095, SBN00100.
[14] App. at SBN002.
[15] *Id.*
[16] *Id.*
[17] App. at SBN0030.
[18] App. at SBN007-009.

case numbers, and character reference letters.[19] On September 23, Salmoran told Tara in an email that he "submitted a request to the court" for James' criminal records.[20]

On October 7, Salmoran notified the clients that they needed to request James' records from the court.[21] Tara requested the records from the court and passed the responsive records to Salmoran on October 12.[22] Tara emailed Salmoran four times in the next 10 days.[23] Salmoran told Tara on October 14 that he would call her.[24] He did not. Salmoran emailed Tara on October 22 and told her that Gilbert Law was "working on the motion" and John Durney was "working the case."[25]

Durney received a limited practice certification as a law student under SCR 49.3.[26] Petitioner assumed professional responsibility over Durney as his "supervising lawyer." Petitioner's responsibilities required him to (1) assist, counsel with, and review Durney's activities as necessary for "proper training" and "protection of the clients" and (2) "[b]e continuously

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[19] *Id.*
[20] App. at SBN009.
[21] App. at SBN003.
[22] App. at SBN0012.
[23] App. at SBN0013.
[24] *Id.*
[25] App. at SBN0014.
[26] App. at SBN0099.

personally present" anytime Durney gave "[c]ounsel" or "legal advice" to the clients, and "read and approve any correspondence prepared by the student before mailing."[27]

On October 27, Durney introduced himself to the clients by email. He introduced himself as a "law clerk" to Gilbert Law.[28] He asked the clients for their availability for a phone call.[29] They responded the same day with their availability.[30] Three days later Durney apologized for not calling the clients but told them he "passed along a preliminary draft of the petition to a supervising attorney in the office, who will make edits and proofread it by next week."[31]

Petitioner claims that ***in December 2020*** he "and another attorney working with him" decided "to refund James C's retainer and assist him in obtaining other counsel more experienced in such matters."

However, Gilbert Law did not notify the clients about the alleged December decision to withdraw. Tara and James received no communication from Gilbert Law in December. Tara emailed Durney for an update on

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[27] SCR 49.3.
[28] App. at SBN0073.
[29] *Id.*
[30] App. at SBN0072.
[31] App. at SBN0070.

January 4, 2021.[32] Durney replied on January 6, that he would get with "our criminal filing paralegal" for a status on their "filing and upcoming hearing dates if we have received one from the court!"[33] The next day, on January 7, Durney emailed the clients that "we are still waiting to hear back from the court regarding a hearing date and further steps."[34]

Over the next two weeks, Tara sent five emails to Gilbert Law asking for a copy of the petition and a status update.[35] She checked the Gilbert Law client portal and found no petition.[36] On January 18, she sent an email to Salmoran and Roger O'Donnell, an attorney with Gilbert Law, asking for an update.[37] She called Gilbert Law at 5:09 on January 18.[38] She called again on January 25 at 12:21 pm and spoke with a woman named Jessica, who transferred her call to Durney.[39]

Durney told Tara that Gilbert Law had done nothing for James.[40] Durney apologized for a "horrible lack of communication" at the firm.[41]

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[32] App. at SBN0078.
[33] App. at SBN0021.
[34] App. at SBN0022.
[35] App. at SBN0022-24.
[36] App. at SBN0020.
[37] App. at SBN0025.
[38] *Id.*
[39] App. at SBN0026.
[40] *Id.*
[41] App. at SBN005.

Durney said Gilbert Law never should have taken the case in the first place.[42] Durney followed up with an email at 1:05 pm apologizing for the "bad news" and promising a full refund.[43]

The following day, January 26, Tara emailed Durney, Salmoran, and O'Donnell about the decision to withdraw.[44] She asked Gilbert Law to return the complete file and the original character reference letters.[45]

Tara filed a grievance with the State Bar on January 29.[46] Gilbert Law issued a refund on February 1.[47]

The State Bar opened an investigation and sent investigation letters to O'Donnell and Petitioner.

In O'Donnell's response, he explained that the firm issued a full refund to the clients on February 1, 2021, prior to receiving notice of their grievance and supplied a copy of the cleared check.[48] O'Donnell confirmed that Salmoran was a nonlawyer who "initially speaks with potential clients" for the Gilbert firm.[49] O'Donnell said that he had limited involvement in the

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[42] *Id.*
[43] App. at SBN005, SBN0026.
[44] App. at SBN005, SBN0028-29.
[45] *Id.*
[46] App. at SBN001.
[47] App. at SBN0049-51.
[48] *Id.*
[49] *Id.*

matter, which was to help Durney with his research and writing.[50] He said that he and Gilbert decided in December 2020 to not file the client's petition because they were uncomfortable with the complex area of law.[51] He was unaware of the reasons for the delay in the refund and communication.[52]

In Petitioner Gilbert's response, he also admitted that Salmoran's role as a nonlawyer was to speak with potential clients.[53] Although Petitioner later claimed that he attended the meeting by telephone.[54] Petitioner acknowledged that he agreed to supervise Durney under SCR 49.3.[55] Petitioner claimed that in December 2020, he and O'Donnell agreed that they were not comfortable with the matter.[56] Petitioner claimed that he instructed his staff to refund the entire $3,500 retainer.[57] Petitioner admitted that the refund "fell through the cracks" and that Gilbert Law did not write a refund check to James "until after the holiday."[58] Petitioner supplied a copy of the returned check dated February 1.[59]

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[50] *Id.*
[51] *Id.*
[52] *Id.*
[53] App. at SBN0052-53.
[54] *Id.*
[55] *Id.*
[56] *Id.*
[57] *Id.*
[58] App. at SBN0052-53.
[59] App. at SBN0054.

The clients supplied copies of all fifty-three emails between them and Gilbert Law.[60] None of the fifty-three emails list Petitioner as sender or recipient.

On August 19, 2021, Assistant Bar Counsel Kait Flocchini presented the matter to a screening panel. Flocchini recommended no discipline for O'Donnell. She recommended a Letter of Reprimand for Petitioner. The Screening Panel unanimously voted to issue Petitioner a Letter of Reprimand.

On August 27, 2021, screening panel chair Richard Williamson signed the Letter of Reprimand.[61] An employee of Gilbert Law signed for receipt of the Letter of Reprimand on August 30.

The Letter of Reprimand[62] stated:

> RPC 1.3 (Diligence): You failed to diligently and promptly determine that you did not want to represent [James]. Further, you made this determination one month after your subordinate law student told the client that you would be filing his petition imminently. Finally, after you determined you would terminate the representation, you failed to diligently and promptly convey that information to the client.
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> RPC 5.5 (Unauthorized Practice of Law): You allowed Salmoran to meet with [James], without a licensed lawyer present, when

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[60] App. at SBN007-29, SBN0055-79.
[61] App. at GILBERT_000067.
[62] App. at GILBERT_000063-67.

> [James] initially retained the office and signed the retainer agreement.
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> RPC 5.3 (Responsibilities Regarding Nonlawyer Assistants): As Salmoran and Durney's supervisor you failed to ensure that (i) Salmoran did not engage in practice of law and (ii) Durney accurately and timely communicated with the [client]s.
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> RPC 1.16 (Declining or Terminating Representation): For at least one month after you made the decision, you failed to (i) tell the client that you terminated the representation and (ii) return the unearned fee and client's papers to him.

On September 10, Petitioner filed written objections to the Letter of Reprimand with the basis for his objections. On September 28, the State Bar filed against and served on Petitioner a formal complaint.[63]

Petitioner failed to answer the complaint within 20 days. The State Bar filed a notice of intent to proceed on a default basis on October 22. The State Bar gave Petitioner an additional 20 days, until November 15, to answer. Petitioner again failed to answer. Petitioner was in default after November 15. On November 16, Petitioner filed a motion to dismiss. The State Bar filed an opposition on November 30 noting the untimeliness of Petitioner's motion. Northern Nevada Disciplinary Board Chair Eric Stovall denied Petitioner's motion on December 1 for untimeliness.

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[63] App. at GILBERT_000008-14.

Three years earlier, on November 28, 2018, bar counsel adopted a Discipline Records Request Procedure.[64] It states, in pertinent part, "Discipline files are confidential until the State Bar of Nevada files a formal complaint. If the matter is dismissed or closed without a formal complaint filed, then the file is public upon its conclusion."[65] Bar counsel adopted this policy based on SCR 121.

On December 8, 2021, Associated Press reporter Samuel Metz sent an email to State Bar executive director Kimberly Farmer with questions about Petitioner's disciplinary case.[66] One of Metz' questions asked, "*Can you confirm the authenticity of the document that I have attached?*"[67] He had attached a scanned copy of the August 27 letter of reprimand issued by the screening panel. Farmer forwarded the email to bar counsel Daniel Hooge.[68] Bar counsel answered:

> Yes. It was a letter of reprimand issued by a screening panel of the Northern Nevada Disciplinary Board. ***However, a screening panel's letter of reprimand is unofficial like an offer until accepted by the attorney.*** The attorney can reject that discipline and request a hearing. Mr. Gilbert rejected the discipline. So, the letter never became official. The State Bar filed a complaint and the matter will proceed to a formal hearing

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[64] App. at SBN00109-112.
[65] App. at SBN00109.
[66] App. at GILBERT_000078.
[67] *Id*.
[68] App. at GILBERT_000077.

> before the Disciplinary Board. Mr. Gilbert has not received any discipline for the underlying conduct at this time.[69]

Metz followed up with a question about the panel.[70] Again, bar counsel cautioned:

> Three members of the Disciplinary Board are randomly assigned to a screening panel. Two must be lawyers and one must be a non-lawyer, member of the community. ***But take caution because Gilbert did not accept the panel's letter of reprimand.*** The panel writes the letter so that the lawyer can review it and know the proposed language for publication. Absent that context, the letter misleads the reader into believing that Gilbert received discipline already.[71]

On December 13, Petitioner's counsel, Dominic Gentile called bar counsel about the emails to Metz.[72] Bar counsel confirmed the communication. Bar counsel explained to Gentile that Petitioner's disciplinary matter had been public since September 28 when the State Bar filed the formal complaint. Bar counsel directed Gentile to SCR 121 and State Bar policy.

Two days later, on December 15, ***one month after his default***, Petitioner filed a verified answer denying all allegations.

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[69] *Id.* (emphasis added).
[70] App. at GILBERT_000076.
[71] *Id.* (emphasis added).
[72] Pet.'s App., at 72-73 (Gentile Aff., ¶¶ 8,9).

On December 17, multiple members of the Associated Press published Metz' story. Metz reported, "Bar counsel Daniel Hooge said the letter was unofficial and Gilbert would not be formally disciplined until the panel holds another hearing."[73]

IV. ARGUMENT

A. DISCIPLINE RECORDS PUBLIC AFTER FORMAL COMPLAINT.

Petitioner argues that SCR 121(2) requires the State Bar to keep all disciplinary proceedings confidential *until their conclusion*. Petitioner misrepresents SCR 121. SCR 121(2) requires the State Bar to keep all disciplinary proceedings confidential *until it files a formal complaint*. Only if the State Bar files no complaint, for example, where a screening panel dismisses the matter, do records become public at conclusion.

SCR 121 states,

> 1. Generally. All proceedings involving allegations of misconduct by an attorney shall be kept confidential ***until the filing of a formal complaint***. All participants in a proceeding, including anyone connected with it, shall conduct

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[73] *See, e.g.*, Sam Metz, *Governor candidate Joey Gilbert fights State Bar misconduct reprimand as campaign intensifies*, USA Today, *available at* https://www.usatoday.com/story/news/politics/2021/12/17/nevada-governor-candidate-joey-gilbert-fights-state-bar-reprimand-misconduct-gop-vaccine-mandate/8942288002/?msclkid=9746aa75a6ea11ec8a93ef290dbcd8c6 (last visited March 18, 2022).

> themselves so as to maintain the confidentiality of the proceeding until a formal complaint is filed.
>
> 2. ***When no formal complaint filed***. In the event no formal complaint is filed, the disciplinary proceeding shall become public upon its conclusion, whether by dismissal or otherwise.
>
> …
>
> 11. What becomes public. Once a matter has become public pursuant to this rule, all records of the lawyer discipline agency shall become public except bar counsel's work product and the panel's deliberations.
>
> …

Petitioner's recitation of SCR 121(2) is wildly inaccurate. He claims that SCR 121(2) declares "*A disciplinary proceeding does not become public until final.*"[74] Yet, the heading of SCR 121(2) "**When no formal complaint filed,**" plainly contradicts Petitioner's assertion. Petitioner makes no effort to support this false statement of the law or distinguish it from the facts of his case.[75] "When those false statements are made by an attorney, it also erodes the public's confidence in the integrity of attorneys admitted to our

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[74] Pet. for Writ at 11. (Petitioner uses no signal before his citation to SCR 121 indicating that SCR 121 clearly and directly supports his text. *See*, THE BLUEBOOK, Rule 1.2 (21st ed. 2020)).

[75] Petitioner cites *Duro v. State Bar*, 106 Nev. 229, 790 P.2d 500 (1990) as support for his claim but concedes that the 2007 amendments to SCR 121 overruled *Duro*.

bar and damages the profession's role as a crucial source of reliable information."[76]

Here, the State Bar filed a complaint against Petitioner on September 28, 2021. On December 8, 2021, when bar counsel confirmed the authenticity of the letter of reprimand, Petitioner's disciplinary records were public. His records had been public for over two months.

The rejected letter of reprimand was part of the public record. It was neither bar counsel's work product nor panel deliberations. The rejected letter of reprimand became a public record on September 28 with the other records in the file.

Petitioner infers that the letter of reprimand draft was not public because it was not part of the "Formal Hearing" file. SCR 121 makes no distinction for a "Formal Hearing" file. It states, "***all records*** of the lawyer discipline agency shall become public except bar counsel's work product and the panel's deliberations."[77]

Petitioner's policy arguments also lack merit. The American Bar Association states,

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[76] *Matter of Giuliani*, 2021 NY Slip Op 04086, ¶ 17, 197 A.D.3d 1, 146 N.Y.S.3d 266, 283 (App. Div.); *See also* RPC 3.3 (Candor Toward the Tribunal).
[77] SCR 121(11).

> Once a finding of probable cause has been made, there is no longer a danger that the allegations against the respondent are frivolous. The need to protect the integrity of the disciplinary process in the eyes of the public requires that at this point further proceedings be open to the public. An announcement that a lawyer accused of serious misconduct has been exonerated after a hearing behind closed doors will be suspect. The same disposition will command respect if the public has had access to the evidence.[78]

A screening panel found probable cause to believe Petitioner violated the Rules of Professional Conduct. After the panel's review, there was no longer a danger that the allegations against Petitioner were frivolous. Petitioner's demand for confidentiality during a political campaign is the type of secrecy that generates suspicion in the eyes of the public. Secrecy in this matter would harm the integrity of the disciplinary process.

B. DUE PROCESS DOES NOT DEMAND SECRECY OR AN ADVERSARIAL SCREENING.

Petitioner argues that the State Bar violated his right to due process by "issu[ing] a textually unconditional letter of reprimand and fail[ing] to preserve its confidentiality."[79] Constitutional due process gives Petitioner the right to receive notice of the allegations against him and a hearing before the

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[78] ABA, MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT, Commentary to Rule 16.
[79] Pet. for Writ at 20.

Disciplinary Board or this Court imposes discipline. However, a rejected letter of reprimand from a screening panel does not violate due process. Petitioner's due process claims lack merit.

The State Bar agrees with Petitioner's premise that a license to practice law is a property right protected by the due process clauses in the United States and Nevada Constitutions.[80] Due process entitles Petitioner to fair notice of the charges and an opportunity to be heard before receiving discipline.[81]

However, none of the cases cited by Petitioner support his argument that a rejected letter of reprimand violates due process.

Ruffalo, cited by Petitioner, addressed the propriety of adding a charge at hearing—not a rejected letter of reprimand.[82]

Addington v. Texas[83] addressed the propriety of involuntary commitment proceedings.

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[80] *In re Ruffalo*, 390 U.S. 544, 552, 88 S. Ct. 1222, 1226 (1968).
[81] *Id.*
[82] *Id.* Also, note that most states do not use the term "letter of reprimand" but use "admonition" for discipline offered before formal complaint. ABA, MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT, Rule 11.
[83] 441 U.S. 418, 427, 99 S. Ct. 1804, 1810 (1979).

In re Discipline of Stuhff[84] did not address due process and rejected the respondent's other constitutional challenges. The Court admonished Stuhff for disclosing his judicial complaint to the respondent judge, but he disclosed the complaint before the commission filed formal charges.[85]

In *Ford v. Ford*,[86] a divorce case, the husband challenged the district court's finding that his medical practice held goodwill. The Court affirmed the district court's inclusion of goodwill from the husband's practice in the marital estate, but it never addressed discipline or the concept of due process.

In *Bolden v. State*,[87] this Court addressed whether a preliminary hearing transcript can satisfy NRS 173.035(2)'s affidavit requirement. It did not address discipline.

In *Johnson v. Bd. of Governors of Registered Dentists of Okla.*,[88] the Supreme Court of Oklahoma addressed due process in dental disciplinary proceedings but focused on "an impartial and disinterested tribunal" not a rejected offer of discipline.

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[84] 108 Nev. 629, 637, 837 P.2d 853, 857 (1992).
[85] *Id.*
[86] 105 Nev. 672, 681, 782 P.2d 1304, 1310 (1989).
[87] 491 P.3d 19, 21 (Nev. 2021).
[88] 1996 OK 41, ¶ 14, 913 P.2d 1339, 1344.

In fact, bar counsel has found no authority that supports Petitioner's claim that a rejected offer of discipline prior to formal hearing violates due process.

The American Bar Association (ABA) addressed the question of due process in its Model Rules for Lawyer Disciplinary Enforcement (Model Rules). Although, the ABA uses the term *admonition*, this Court adopted a similar process.[89] SCR 105 allows a screening panel to offer a *letter of reprimand*, which the respondent may reject.[90] One significant difference in the ABA framework is that accepted admonitions stay private. Nevada letters of reprimand become public when accepted. Here is what the ABA states about the constitutionality of the process:

> Admonitions should be in writing and served upon the respondent. If the respondent does not consent to the admonition or probation, formal charges are instituted. The procedure is similar to the rejection of a settlement offer in a civil case or a plea bargain in a criminal case, which results in a trial.
>
> The fact that refusal to consent to the admonition or probation subjects the respondent to formal charges and potentially more serious discipline does not violate due process any more than does the fact that a person charged with a crime is subject to

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[89] *Compare* SCR 105 *with* ABA, MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT, Rule 11.
[90] SCR 105(1).

> conviction of a more serious offense when he or she refuses to plead to a lesser crime.[91]

Due process requires a notice and a hearing for discipline. But a screening panel's letter of reprimand is not discipline unless accepted. A lawyer implicitly waives the right to a hearing when he accepts the discipline. Petitioner understood this process because he accepted letters of reprimand in 2014 and 2016. A rejected letter of reprimand is a rejected offer, which consistent with due process, proceeds to formal complaint and a hearing. Due process does not require notice and a hearing for a rejected offer. Petitioner may have suffered a loss of reputation and livelihood. But his loss did not come from the screening panel's offer of a letter of reprimand. Bar counsel cautioned Metz about Petitioner's right to a hearing. Metz' article in the Associated Press correctly noted that Petitioner received no discipline and had a right to a hearing. Petitioner's loss, if any, came from his conduct. Metz' report was accurate. The public deserves this transparency.

C. REMEDIES.

Petitioner argues that any "breaches of confidentiality" from the State Bar "mandate" dismissal.[92] Petitioner's argument fails for two reasons. First,

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[91] ABA, MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT, Commentary to Rule 11.
[92] Pet. for Writ at 22.

Petitioner gives no evidence that the State Bar breached confidentiality in his disciplinary matter. Second, this Court *In re Ross (Ross I)*[93] held that a lack of impartiality—not confidentiality—mandates dismissal. Dismissal would be unjust.

No Breach of Confidentiality

Petitioner alleges that the State Bar breached confidentiality when it "allowed the release of and authenticated a letter of reprimand to which Petitioner had objected… ."[94] Petitioner's argument breaks into two parts. First, he accuses the State Bar of "allowing the release of" the letter of reprimand. Second, he asserts that bar counsel breached confidentiality when he confirmed the letter's authenticity. Both accusations are false.

Petitioner presents no evidence to support his first accusation against the State Bar. In fact, the overwhelming weight of evidence suggests that Metz received the letter from Petitioner's office.

As discussed above, Petitioner's disciplinary records became public on September 28, 2021, when the State Bar filed a formal complaint. This gave the State Bar no motive to *leak* the letter. It was public. The State Bar would have given any member of the public the letter upon request. If the State Bar

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[93] 99 Nev. 1, 13, 656 P.2d 832, 839 (1983).
[94] Pet. for Writ at 1.

wanted to publicize the disciplinary hearings, which it did not, then it would have called the reporter and suggested that he request the public records.[95] It would be nonsensical for the State Bar to *leak* a public document.

Also, Metz emailed the State Bar's executive director asking, "Can you confirm the authenticity of the document that I have attached?"[96] If the State Bar were Metz' source, then he would have no reason to confirm its authenticity. An outside source must have given Metz the document.

Furthermore, the copy Metz provided to the State Bar showed staples, folds in the paper, highlights, and handwritten notations.[97] It was a scanned copy. State Bar disciplinary records are digital. Even documents sent to the panel chair are digital. Panel Chair Richard Williamson signed the letter of reprimand with a digital signature.[98] It is unlikely that the State Bar would print a digital copy, staple it, highlight it, annotate it, and then rescan it to send to a reporter. A State Bar source would have simply emailed a digital copy. It is also unlikely that a reporter would receive a digital copy, staple it, highlight it, annotate it, and then rescan it to resend to the State Bar for confirmation.

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[95] The State Bar received no public records requests in the underlying matter.
[96] Pet.'s App. to Pet. at 78 (email from Metz to Farmer).
[97] *Id*. at 3-6 (attachment from Metz).
[98] *Id*. at 6.

Although irrelevant, it is more probable that someone in Petitioner's office sent the letter of reprimand to Metz.[99] But the State Bar did not "allow" or take part in its release.

Second, bar counsel did not breach confidentiality by confirming the authenticity of the letter. As discussed above, Petitioner's disciplinary records became public on September 28, 2021, when the State Bar filed a formal complaint. On December 8, when Metz contacted the State Bar, Petitioner's disciplinary records had been public for over two months. No duty of confidentiality attached to Petitioner's disciplinary records.

Even if Petitioner's disciplinary records had been confidential, then bar counsel would have a duty to confirm the letter of reprimand once known to the public.

> The confidentiality that attaches prior to a finding of probable cause and the filing of formal charges is primarily for the benefit of the respondent and protects against publicity predicated upon unfounded accusations. … [However,] if the nature of the accusation is known to the public, the basis for confidentiality no longer exists. Where information has become widely known, interested individuals and particularly the media often seek comment from the disciplinary agency involved. The existence of privacy requirements places the disciplinary agency in the awkward position of being unable to acknowledge the existence

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[99] The State Bar sent the letter of reprimand to Petitioner's registered SCR 79 address, 405 Marsh Ave, Reno, Nevada 89509, which is the address of his law firm.[100] ABA, MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT, Commentary to Rule 16.

> of an investigation. This could lead to a mistaken notion that the agency is unaware of or uninterested in allegations of misconduct, without in any way protecting the reputation of the lawyer.[100]

Petitioner implies that the State Bar should have refused to acknowledge the existence of his disciplinary matter. But the Associated Press already held a copy of the letter of reprimand. It contained the State Bar's seal. Metz' believed that the letter was final and "non-appealable."[101] Bar counsel's refusal would have led to the mistaken notion that the State Bar was hiding discipline against Petitioner. The State Bar would appear partisan and manipulative without in any way protecting Petitioner's reputation. Silence would have harmed both the State Bar and Petitioner. Thus, Bar Counsel had a duty to confirm the letter of reprimand and to clarify its unofficial nature. This protected all parties.

Petitioner Misrepresents *In re Ross*.

Second, this Court *In re Ross (Ross I)*[102] did not hold that a *breach of confidentiality* mandates dismissal but a *lack of impartiality*. Petitioner misrepresents this Court's holding.

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[100] ABA, MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT, Commentary to Rule 16.
[101] Pet.'s App. to Pet. at 78 (email from Metz to Farmer).
[102] *In re Ross (Ross I)*, 99 Nev. 1, 13, 656 P.2d 832, 839 (1983).

At the time of *Ross I*, the Board of Governors oversaw disciplinary proceedings. The Court repealed this rule in 1979, when it revised lawyer disciplinary procedure. Now, two disciplinary boards oversee disciplinary hearings under SCR 103. Members of the Board of Governors cannot sit on the disciplinary boards.[103]

In *Ross I*, two attorneys, John Tom Ross and Peter L. Flangas received a total of $70,000 for services to non-resident heirs of a wealthy estate. That considerable sum in 1973 caused suspicions of conspiracy between the two attorneys and the district judge, Richard Waters. The State Bar pursued a lengthy investigation but found no evidence of a conspiracy. However, the State Bar found the attorneys guilty of untruthfulness during the investigation. It charged the attorneys with the costs of $34,000, much of which came from the failed investigation.[104] Ross and Flangas saw the finding as a biased attempt by the Board of Governors to recoup the cost of its failed investigation.

Flangas—not Ross—alleged due process violations for "leaks" in federal court, but the federal district court enjoined the Nevada Supreme Court for

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[103] SCR 103(1).
[104] *In re Ross* (Ross I), 99 Nev. 1, 3 n.1, 656 P.2d 832, 833 (1983).

bias not for breach of confidentiality.[105] The Ninth Circuit reversed until the Supreme Court of Nevada could address the bias.[106] Neither this Court nor the federal district court held that breach of confidentiality mandated dismissal.

Petitioner's reliance on *In re Writ of Prohibition (Whitehead)*[107] is similarly misplaced. This Court in *Whitehead* admonished the attorney general and special prosecutor Don Campbell for opposing "any inquiry into the source of the leaks."[108] But the Court did not find that either was the source of the leaks or mandate dismissal because of leaks.

Furthermore, *Whitehead* supports the State Bar's position. This Court explicitly stated that disciplinary proceedings "remain confidential *until* there has been a finding of probable cause and a *formal statement of charges has been filed* as a public document."[109] A screening panel's review and the State Bar's formal charges distinguish Petitioner's case from the facts in *Whitehead*.

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[105] *Flangas v. State Bar of Nevada*, 655 F.2d 946 (1981).
[106] *Id.*; *In re Ross* (Ross I), 99 Nev. at 3 n.1, 656 P.2d at 833.
[107] 878 P.2d 913, 922 (Nev. 1994).
[108] *Id.* at 923.
[109] *Id.* (emphasis added).

To be clear, the State Bar does not oppose an investigation into the alleged *leak*. It will cooperate in any investigation ordered by this Court. It is confident that an investigation will show Petitioner's office as the source. On the other hand, the point is moot. Petitioner's disciplinary records were public.

V. CONCLUSION

Petitioner failed to establish "a clear right" to compel the State Bar to dismiss charges against him. The State Bar takes offense at Petitioner's accusation that it "ignore[d], disobey[ed], or cavalierly overlook[ed]"[110] the rules. On the contrary, Petitioner misrepresented the rules. The State Bar honored its duty of transparency under SCR 121. It pleaded caution from the press to protect Petitioner. The State Bar respectfully asks the Court to deny the Petition. A writ is unwarranted. A stay of the disciplinary proceeding or a dismissal is also unwarranted.

Respectfully submitted this 16th day of March 2022.

STATE BAR OF NEVADA

Daniel M. Hooge

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Daniel M. Hooge, Bar Counsel
Nevada Bar No. 10620
3100 W. Charleston Blvd., Suite 100
Las Vegas, Nevada 89102
(702)-382-2200
Attorney for State Bar of Nevada

[110] Pet. for Writ at 25.

VI. 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 6,064 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.

Respectfully submitted this 16th day of March 2022.

STATE BAR OF NEVADA

Daniel M. Hooge

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Daniel M. Hooge, Bar Counsel
Nevada Bar No. 10620
3100 W. Charleston Blvd., Suite 100
Las Vegas, Nevada 89102
(702)-382-2200
Attorney for State Bar of Nevada