

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOSEPH S. GILBERT, ESQ.,

Petitioner

vs.

STATE BAR OF NEVADA,

Respondent.

Case No.

OBC No. OBC21-0136

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**PETITION FOR WRIT OF MANDAMUS, OR ALTERNATIVELY
PROHIBITION AND REQUEST FOR STAY OF DISCIPLINARY
PROCEEDINGS *PENDENTE LITE***

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons as described in NRAP 26.1(a) and must be disclosed. No other corporate entities are nongovernmental parties in this case. These representations are made in order that the judges of this Court may evaluate possible need for disqualification or recusal.

1. Joseph Salvatore Gilbert, Esq.

Petitioner/Appellant;

2. Dominic P. Gentile (Nevada Bar No.: 1923)

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Respectfully Submitted the 21st day of January 2022.

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ROUTING STATEMENT

This matter is presumptively retained by the Supreme Court Per NRAP 17(3), (4), (11) and (12). The matter involves a genuine controversy about what participants in lawyer disciplinary proceedings in Nevada should expect regarding confidentiality under the current rules. State and federal constitutional issues of deprivation of due process of law are at the heart of this matter.

**NOTICE OF PETITION FOR WRIT OF MANDAMUS, OR
ALTERNATIVELY PROHIBITION AND REQUEST FOR STAY OF
DISCIPLINARY PROCEEDINGS *PENDENTE LITE***

TO: Dan Hooge, Bar Counsel, State Bar of Nevada, 3100 W. Charleston, Suite
100, Las Vegas Nevada 89102

YOU AND EACH OF YOU WILL PLEASE TAKE NOTICE that the
foregoing Petition for Writ of Mandamus, or in the Alternative, For Writ of
Prohibition and Appendix of Exhibits 1-8, Bates No.: GILBERT_000001-
000136 will be brought before the above-entitled Court.

Respectfully Submitted the 21st day of January 2022.

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TABLE OF CONTENTS

	<u>Page</u>
NRAP 26.1 DISCLOSURE	ii
ROUTING STATEMENT	iii
NOTICE OF PETITION FOR WRIT OF MANDAMUS, OR ALTERNATIVELY PROHIBITION AND REQUEST FOR STAY OF DISCIPLINARY PROCEEDINGS <i>PENDENTE LITE</i>	iv
I. INTRODUCTION	1
II. ISSUE PRESENTED	4
III. RELIEF SOUGHT.....	5
IV. LEGAL STANDARD FOR WRIT PETITIONS	5
V. STATEMENT OF FACTS	7
VI. DISCUSSION OF THE MERITS	11
A. Respondent’s Conduct Has Violated SCR 105 And 121.....	11
B. The Role of Confidentiality in the Disciplinary Process.	14
C. Petitioner’s Right to Due Process and the Protected Interests Involved	18
D. Remedies: Dismiss the Proceedings and Investigate the Breach of Confidentiality	22
VII. CONCLUSION.....	25
CERTIFICATE OF COMPLIANCE.....	27
CERTIFICATE OF SERVICE	29

TABLE OF AUTHORITIES

CASES

<i>Addington v. Texas</i> , 441 U.S. 418, 99 S.Ct. 1804 (1979).....	19
<i>Agwara v. State Bar of Nevada</i> , 133 Nev. 783, 406 P.3d 488 (2017).....	6
<i>Bolden v. State</i> , 137 Nev. Adv. Op. 28, 491 P. 3d 19, 25 (Nev. 2021)	21
<i>Burleigh v. State Bar of Nevada</i> , 98 Nev. 140, 145, 643 P. 2d 1201 (Nev. 1982)	18
<i>Bus. Comp. Rentals v. State Treas.</i> , 114 Nev. 63, 67, 953 P.2d 13, 15 (1998).....	6
<i>Cheung v. Eighth Jud. Dist. Ct.</i> , 121 Nev. 867, 869, 124 P.3d 550, 552 (2005).....	6
<i>Cuzze v. University and Community College System of Nevada</i> , 123 Nev. 598, 172 P. 3d 131, fn. 29 (Nev. 2007).....	20
<i>Daily Gazette Co., Inc. v. Committee on Legal Ethics of the West Virginia State Bar</i> , 174 W. Va. 359, 326 S.E. 2d 705, 712-13 (W.Va.1984).....	17, 18
<i>Duro v. State Bar of Nevada</i> , 106 Nev. 229, 790 P. 2d 500 (Nev 1990)	14
<i>Ford v. Ford</i> , 105 Nev. 672, 782 P.2d 1304 (Nev. 1989)	20
<i>In re Discipline of Drakulich</i> , 111 Nev. 1556, 1566, 908 P.2d 709, 715 (1995).....	19
<i>In re Discipline of Stuhff</i> , 108 Nev. 629, 634-35, 837 P.2d 853 (Nev.,1992).....	20
<i>In re Matter of Ross (Ross II)</i> , 99 Nev. 657, 668 P. 2d 1089 (Nev. 1983)	22

<i>In re Ruffalo</i> , 390 U.S. 544, 88 S.Ct. 1222 (1968).....	18, 19
<i>Ivy v. State</i> , 131 Nev. 1303, 2015 WL 7420992 *7 (Nev. Ct. App. 2015)	22
<i>Johnson v. Board of Governors of Registered Dentists of State of Oklahoma</i> , 913 P.2d 1339 (Okla.,1996).....	22
<i>Keresey v. State Bar of Nevada</i> , 112 Nev. 1139, 585-86, 923 P. 2d 583 (Nev. 1996).....	23
<i>Landmark Communications, Inc. v. Virginia</i> , 435 U.S. 829, 98 S.Ct. 1535 (1978).....	4, 15
<i>Matter of Arabia</i> , 137 Nev. Adv. Op. 59, 495 P. 3d 1103, 1117 (Nev. 2021)	19
<i>Matter of Ross (Ross I)</i> , 99 Nev. 1, 13, 656 P.2d 832, 839 (1983).....	23
<i>Mineral County v. State, Dep't of Conserv.</i> , 117 Nev. 235, 243, 20 P.3d 800, 805 (2001).....	6
<i>Nevada Ass'n Servs., Inc. v. Eighth Jud. Dist. Ct.</i> , 130 Nev. Adv. Op. 94, 338 P.3d 1250 (Nev. Dec. 4, 2014).....	6
<i>Nicholson v. State Com'n on Judicial Conduct</i> , 72 A.D.2d 48, 422 N.Y.S.2d 701 (1979).....	15
<i>O'Brien v. State Bar of Nev.</i> , 114 Nev. 71, 952 P.2d 952, 953 (1998).....	6
<i>People v. Pacheco</i> , 199 Colo. 470, 618 P.2d 1102 (Colo., 1980).....	16
<i>PepsiCo, Inc. v. Redmond</i> , 1996 WL 3965, at *30 (N.D.Ill.,1996)(No. 94 C 6838).....	23
<i>Reetz v. Lowe's Companies, Inc.</i> , 2021 WL 3354167 (W.D.N.C., 2021)(No. 5:18-CV-00075-KDB- DCK, August 2, 2021)	23

<i>Shimrak v. Garcia-Mendoza</i> , 112 Nev. 246, 912 P. 2d 822 (1996).....	6
<i>State Bar of Nevada v. Claiborne</i> , 104 Nev. 115, 756 P. 2d 464 (Nev. 1988)	18
<i>State v. Babayan</i> , 106 Nev. 155, 174, 787 P. 2d 805 (Nev. 1990)	24
<i>State v. Merski</i> , 437 A.2d 710, 121 N.H. 901 (N.H., 1981)	16
<i>Wardleigh v. Dist. Ct.</i> , 111 Nev. 345, 350, 891 P.2d 1180, 1183 (1995).....	6
<i>Waters v. Barr</i> , 103 Nev. 694, 747 P.2d 900, 901 (1987).....	7
<i>Whitehead v. Nevada Com’n on Judicial Discipline</i> , 111 Nev. 70, 893 P.2d 866 (Nev 1995)	15, 24
<i>Zana v. State</i> , 125 Nev. 541, 216 P. 3d 244 (Nev. 2009)	22

OTHER AUTHORITIES

<i>Nevada Disciplinary Rules of Procedure Amended November 3, 2021</i>	1
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RULES

Nevada Rules of Civil Procedure 11.....	21
NRAP 17(11)	iii
NRAP 17(12)	iii
NRAP 17(2)	iii
Supreme Court Rule 105.....	1, 18
Supreme Court Rule 105(1)(b)	9
Supreme Court Rule 105(1)(c).....	5, 12

Supreme Court Rule 105(2)	5, 9
Supreme Court Rule 105(2)(f)	20
Supreme Court Rule 105(a)	13
Supreme Court Rule 105(b)	13
Supreme Court Rule 105(c)	11
Supreme Court Rule 105-1(b)	11
Supreme Court Rule 105-2	14
Supreme Court Rule 105-3(a)	11
Supreme Court Rule 121	1, 2, 5, 7, 9, 10, 12, 14, 18, 22, 24
Supreme Court Rule 121-1	1, 9, 14, 20
Supreme Court Rule 121-11	9, 14
Supreme Court Rule 121-2	11
Supreme Court Rule 39	4

I. INTRODUCTION

Petitioner Joseph Salvatore Gilbert is a licensed Nevada lawyer. He has constitutionally protected property and liberty interests in that license and his professional reputation that is an integral component of it which government may not deprive him of without due process of law. Here, Respondent State Bar of Nevada – an arm of this Court – did exactly that when it failed to preserve the confidentiality, to which he was entitled pursuant to SCR 121-1, of an action taken by a screening panel of its Northern Nevada Disciplinary Board. Respondent allowed the release of and authenticated a letter of reprimand to which Petitioner had objected, and regarding which he was proceeding to a formal hearing. This breach was in direct violation of Supreme Court Rules 105 and 121. No witnesses had testified, and no exhibits had yet been received by the formal hearing panel when the letter of reprimand was released. The burden of proof of clear and convincing evidence, by which a formal hearing on lawyer discipline is governed, did not apply to the screening panel that issued the letter of reprimand. As screening panels do not take live testimony and assess credibility or demeanor of witnesses, no deference is given to a screening panel’s findings and conclusions by the formal hearing panel, nor should it be aware of them.¹

¹ See *Nevada Disciplinary Rules of Procedure Amended November 3, 2021*. Disciplinary Rule of Procedure (“DRP”) 9 was completely re-written in this amended version of the DRP and states in part: “A respondent’s rejection of a

Because of the Respondent's breach of confidentiality, that letter of reprimand has received international media attention and has had a damaging impact on the Petitioner's professional reputation, law practice and personal family life. Inexcusably, the breach has also caused the name of Petitioner's former client – the grievant - and the fact that he is a Tier 3 sex offender to be publicized throughout his home state and the world.² Petitioner can only come before this Court in his own right and seek redress for his own grievances, but it is in the interests of every Nevada lawyer – including those who work for Respondent - and every potential grievant to obtain clarity regarding the meaning of SCR 121. Participants in future disciplinary proceedings need this Court to answer the question "Is what happened here consistent with SCR 121's mandate of confidentiality?"

Only a very limited number of persons -the chair of the screening panel who authored the letter of reprimand, certain member(s) of the Northern Nevada Disciplinary Board, personnel of State Bar Counsel's office and Petitioner - have access to the letter of reprimand in the ordinary course of events. The breach of

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."

² The Office of Bar Counsel is currently attempting to walk-back their improper conduct with respect to the grievant by filing a Motion to Seal before the Northern Disciplinary Formal Hearing Panel Chair, but this Motion comes after the grievant's name was deliberately included in the Letter of Reprimand and the Complaint filed on September 28, 2021.

confidentiality and release of the letter of reprimand was done by one of them. Petitioner has submitted declarations from himself and all but one of the employees of Joey Gilbert Law in which they swear that it wasn't them. Petitioner's declaration establishes that the remaining employee confirmed to him that he did not personally leak the Letter of Reprimand to the Associated Press.³ A grievant ordinarily does not have access to a letter of reprimand at this stage of the proceedings and, if that practice was followed here, could not have been responsible for its dissemination.

Respectfully, this situation cries out for an investigation by this Court. The absence of such will tacitly place this Court's *imprimatur* upon what occurred and invite its repetition. The Respondent's violation of confidentiality has resulted in the letter of reprimand and its references to Petitioner and grievant being published in local and regional newspapers, broadcast on network and cable television and appearing in such international news media as Newsweek (Exhibit 8, Bates No.: GILBERT_000099-000109), US News and World Report (Exhibit 8, Bates No.: GILBERT_000094-000098), and other news outlet subscribers to the Associated Press news service (Exhibit 8, Bates No.: GILBERT_000079-000093; 000110-000136).⁴

³ See group Exhibit 3, Bates No.: GILBERT_000015-000059.

⁴ Once the Associated Press received the letter of reprimand it behaved in a manner protected by the First and Fourteenth Amendments to the Constitution of the United States of America and Article 1, section 9 of the Constitution of the

Moreover, it will leave unanswered the question clearly begged by these circumstances: “Why did it happen in this instance?” One need not stretch imagination to conclude that the likely answer is because Petitioner is visibly seeking the Republican nomination for the office of Governor of Nevada and those involved in the breach want to thwart that pursuit. That conclusion is supported by the fact that the AP reporter asked the question “what does it say about a candidate running on their legal acumen that the Bar believes they harmed a client?”⁵ While constitutional protections for speech and press cover the media’s activity here and provide safeguards for conduct that is political speech, they neither insulate nor immunize those to whom the Supreme Court Rules apply.

This case presents a genuine controversy about what participants in disciplinary proceedings in Nevada should expect regarding confidentiality under the current rules. NRS 7.275 and SCR 39 make it clear that only this Court has the constitutional authority to resolve it.

II. ISSUE PRESENTED

DID THE STATE BAR OF NEVADA VIOLATE PETITIONER’S RIGHT TO DUE PROCESS OF LAW WHEN IT BREACHED ITS DUTY TO MAINTAIN CONFIDENTIALITY OF A LETTER OF REPRIMAND

State of Nevada. See *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 98 S.Ct. 1535 (1978). It was the Respondent that behaved in an unlawful manner by failing to preserve the confidentiality.

⁵ See Exhibit 1, Bates No.: GILBERT_000002, attached.

**AUTHORED BY THE CHAIRMAN OF A SCREENING PANEL OF THE
NORTHERN NEVADA DISCIPLINARY BOARD?**

III. RELIEF SOUGHT

1. An Order of this Court staying all further proceedings in #OBC 21-0136⁶ currently pending before the State Bar of Nevada, Northern Nevada Disciplinary Board until this Court decides the issues put forth in this Petition;
2. An Order of this Court directing Respondent to dismiss Complaint #OBC 21-0136 currently pending before the State Bar of Nevada, Northern Nevada Disciplinary Board upon a final decision in this matter;
3. An Order of this Court appointing a Special Master to conduct an independent investigation into the facts that lead to the breach of confidentiality flowing from the public disclosure of the letter of reprimand which has been challenged by Petitioner pursuant to Supreme Court Rule (“SCR”) 105(1)(c) and 105(2), and thus was confidential. SCR 121;
4. An Order of this Court awarding attorneys’ fees and costs to Petitioner for the prosecution of this writ;
5. Such other remedies as this Court determines necessary and just.

IV. LEGAL STANDARD FOR WRIT PETITIONS

An extraordinary writ may be issued where “petitioners have no plain, speedy, and adequate remedy at law other than to petition this court.” *Wardleigh v. Dist. Ct.*,

⁶ See Exhibit 2, Bates No.: GILBERT_000007-000014, attached.

111 Nev. 345, 350, 891 P.2d 1180, 1183 (1995). Extraordinary relief may also be justified “[w]here an important issue of law needs clarification and public policy is served by this court's invocation of its original jurisdiction.” *Mineral County v. State, Dep't of Conserv.*, 117 Nev. 235, 243, 20 P.3d 800, 805 (2001); *see also Bus. Comp. Rentals v. State Treas.*, 114 Nev. 63, 67, 953 P.2d 13, 15 (1998) (same). The Court also may exercise its discretion to consider such a petition when there are important legal issues that need clarification to promote judicial economy and administration. *Nevada Ass’n Servs., Inc. v. Eighth Jud. Dist. Ct.*, 130 Nev. Adv. Op. 94, 338 P.3d 1250 (Nev. Dec. 4, 2014) (quoting *Cheung v. Eighth Jud. Dist. Ct.*, 121 Nev. 867, 869, 124 P.3d 550, 552 (2005)).

The Supreme Court Rules at issue in this matter have the force of law and are binding upon the Respondent. *Shimrak v. Garcia-Mendoza*, 112 Nev. 246, 251, 912 P. 2d 822 (1996). This Court has inherent supervisory authority over the Respondent and has the power to fashion an appropriate remedy to ensure that it and all its functionaries perform their duties properly, and therefore has the power to consider a petition for writ relief arising from a State Bar matter. *Agwara v. State Bar of Nevada*, 133 Nev. 783, 785-86, 406 P.3d 488 (2017)(unreported) (citing *O’Brien v. State Bar of Nev.*, 114 Nev. 71, 73, 952 P.2d 952, 953 (1998)).

Assuming *arguendo* that mandamus is not an appropriate vehicle for bringing these issues before the Court, this Court nevertheless has inherent supervisory

authority over the Respondent and a strong interest in assuring that not only bar counsel, but all members of the State Bar of Nevada, and all its functionaries, perform their duties properly. *Waters v. Barr*, 103 Nev. 694, 747 P.2d 900, 901 (1987).

V. STATEMENT OF FACTS⁷

In 2004, the Court granted Petitioner Joseph Salvatore Gilbert a license to practice law in Nevada.⁸ In 2009 he commenced operating his private law practice. From its inception, Joey Gilbert Law engaged in a multimedia marketing program which attracted his early clients. As he established a satisfied client base, his good reputation has resulted in client and lawyer referral as an important source of new clients, in response to which he added more lawyers and legal assistants to service them.

In late Summer 2020, Joey Gilbert Law was contacted on multiple occasions by James and Tara [REDACTED] inquiring as to obtaining professional services for James relating to a criminal conviction that occurred in 1998. James was required to register as a sex offender, and he was seeking relief from that obligation. The

⁷ As the original grievance form filed by the [REDACTED] Petitioner's letter in response thereto and Petitioner's Objections to the purported letter of reprimand are still subject to SCR 121's mandate of confidentiality, they are not included as exhibits to this Petition. Petitioner invite's this Court to *sua sponte* call for them *in camera* or make them a sealed exhibit if it deems them necessary in reaching its decision.

⁸ See Exhibit 3a, Bates No.: GILBERT_000017.

same type of services had been performed for a different client of Joey Gilbert Law by an attorney who was no longer with the firm, but not by anyone on the current legal staff. The earlier file and the pleadings filed therein were still in the possession of Joey Gilbert Law.

The firm was engaged by James [REDACTED] on September 11, 2020. The [REDACTED] were unable to provide necessary historic documents from the 1998 criminal conviction until October 2020, and substantial legal work commenced upon receipt of those documents. In December 2020 Petitioner and another attorney working with him determined that, if James was to maximize his possibility of success, the [REDACTED] matter required experience that they did not possess. A decision was made by Petitioner to refund James [REDACTED]'s retainer and assist him in obtaining other counsel more experienced in such matters. This was communicated to the [REDACTED] in January 2021. The retainer was refunded and cleared the [REDACTED] bank on February 3, 2021.⁹

A few days later, on February 8, 2021, Petitioner received a letter from Respondent informing him that the [REDACTED] had filed a grievance against him to which Petitioner was required to respond by February 26, 2021. On February 18, 2021, Petitioner filed a response. More than six months later, and after he publicly declared his candidacy for the Republican nomination for Governor of Nevada, on

⁹ Exhibit 4, Bates No.: GILBERT_000060-000061, attached.

August 27, 2021 Petitioner received a letter of reprimand signed by the Screening Panel Chair, Richard Williamson. It was accompanied by a cover letter signed by R. Kait Flocchini, Assistant Bar Counsel.¹⁰ The cover letter notified Petitioner that he had fourteen (14) days within which to file objections to the letter of reprimand and, if that time passed without an objection being filed, it would not be appealable and be deemed closed. It further advised him that “[o]nce the disciplinary proceeding is closed the record of the proceeding becomes public in accordance with SCR 121.” (emphasis added). It further called Petitioner’s attention to ADKT 518 and its requirement that a Letter of Reprimand “be published in the state bar publication” and specifically mentioned the Nevada Lawyer. Petitioner opted to contest the screening panel’s decision and, on September 10, 2021, served his written objections in compliance with SCR 105(1)(b). The formal hearing process commenced on September 28, 2021 when a Complaint was filed pursuant to SCR 105(2).¹¹

On December 8, 2021 Petitioner received an email from Samuel Metz, a journalist with the Associated Press. In it, Mr. Metz advised that “[t]he Nevada Bar just verified the authenticity of a letter of reprimand which Mr. Gilbert received in

¹⁰ Exhibit 5, Bates No.: GILBERT_000062-000070, attached.

¹¹ Exhibit 2, Bates No.: GILBERT_000007-000014, attached. Pursuant to SCR 121-1, “All proceedings involving allegations of misconduct by an attorney shall be kept confidential until the filing of a formal complaint.” At that point, all papers filed in the formal proceeding are part of the public record and confidentiality does not apply to them. SCR 121-11.

August 2021” and attached a copy of it to the email.¹² The email addressed several questions to Petitioner, including “[w]hat does it say about a candidate running on their legal acumen that the bar believes they harmed a client?” On December 13, 2021, Petitioner’s counsel contacted Daniel Hooze, State Bar Counsel, to inquire as to whether the Respondent authenticated the letter of reprimand as reported by Mr. Metz.¹³ Mr. Hooze confirmed that he did so and sent Petitioner’s counsel a copy of an email thread between Mr. Metz and various personnel of the Respondent.¹⁴

Mr. Metz and the Associated Press then published that Petitioner had been reprimanded by Respondent.¹⁵ The story went on social media and spread throughout the world. A Google search of “Joey Gilbert reprimand” returned the following selection of articles published about Petitioner being reprimanded:

<https://www.youtube.com/watch?v=ku4WRhvJBdu>; Reno Gazette Journal; US News & World Report; Newsweek; TheNevadaIndependent.com; KOLO TV; Independent.co.uk;¹⁶ LancasterOnline.com; PennsylvaniaNewsToday.com; The Daily Times; MSN.com; TaiwanNews.com; Reddit.com; MankatoFreePress.com;

¹² See Exhibit 1, Bates No.: GILBERT_000001-000006.

¹³ See Exhibit 6, Bates No.: GILBERT_000071-000073, Declaration of Dominic P. Gentile.

¹⁴ See Exhibit 7, Bates No.: GILBERT_000074-000078.

¹⁵ See Exhibit 8, Bates No.: GILBERT_000079-000136.

¹⁶ The last page of this publication credits “Richard Williamson”. As can be seen from the Declaration of Dominic P. Gentile, Petitioner recognizes that this could be a mere coincidence and may not be the Richard Williamson that authored the letter of reprimand that was released in violation of SCR 121.

X99news.com; Cengnews.com;TheBharatExpressNews.com; Bestinau.net
Granthshalanews.com; KEYT.com; GettysburgTimes.com;
Hindustannewshub.com

VI. DISCUSSION OF THE MERITS

A. Respondent's Conduct Has Violated SCR 105 And 121.

A disciplinary proceeding does not become public until final. SCR 121-2. As a letter of reprimand becomes public upon conclusion of the matter, there is a right of appeal provided to the subject of the grievance investigation. SCR 105-1(b). If an appeal is initiated, a letter of reprimand does not become public until a formal hearing occurs, a decision is rendered by the hearing panel imposing a letter of reprimand as discipline and the lawyer does not appeal the decision to this Court. SCR 105(c)(“The issuance of a letter of reprimand not objected to by the attorney within 14 days of notice shall be final and shall not be appealable.”) SCR 105-3(a) makes clear that the decision of the formal hearing panel is not final, and thus the matter is not concluded, if an appeal from the hearing panel's decision is filed within 30 days after it has been served upon the lawyer. If so, the matter proceeds to the Nevada Supreme Court and will not be deemed concluded, and thus will not be final, until this Court enters a final order.

In evaluating what happened in this case, one must look to the Respondent's cover letter of August 27, 2021. On page 1, under “Appeal Procedures”, it states

that Petitioner can object to the issuance of the letter of reprimand within 14 days. If he does, “A Formal Hearing will be set concerning the grievance, in accordance with SCR 105(1)(c). A Formal Hearing Panel may recommend *any disciplinary action it deems appropriate, up to and including suspension or disbarment.*” [Emphasis added]. This is telling the Petitioner that if he doesn’t accept the letter of reprimand it will be treated as if the screening panel recommended a formal hearing, and the case starts anew. The letter of reprimand is never issued. It simply becomes a draft piece of paper which contains a breakdown of the screening panel’s analysis and deliberations. It has no legal significance.

Page 2 of the cover letter specifically discusses SCR 121. It states “Issuance of a Letter of Reprimand ***without objection*** will result in closure of this disciplinary proceeding. Once the disciplinary proceeding is closed, the record of the proceeding becomes public in accordance with SCR 121. As required by the Rule, only bar counsel’s work product and the panel deliberations remain protected. Accordingly, the Respondent will release the record of the disciplinary proceedings upon receipt of a public record request for information concerning the lawyer’s discipline record, or this grievance in particular. You are encouraged to review SCR 121 in all its subparts in this regard.” [Emphasis added].

But Petitioner did object. By the Respondent’s own correspondence, there was no “Issuance of a Letter of Reprimand” and the file was never closed. As a

result, we are left with a piece of paper signed by the chairman of the screening panel, containing a summary of the screening panel's thoughts, deliberations and analysis which according to Respondent's cover letter has absolutely no relevance and is not evidence, being published worldwide. By Respondent's own statement's in the cover letter, that draft piece of paper is not a part of the Formal Hearing file. What's worse in Petitioner's case, that letter of reprimand draft includes a disclosure of a previous letter of caution, which remains confidential even after issuance and was never intended to be made public under SCR 105(a) and (b). Someone associated with the disciplinary mechanism managed for this Court by Respondent, with knowledge and aforethought, released a letter of caution to the press that looks like a finalized letter of reprimand because by its terms it says "...you are hereby **REPRIMANDED.**"

There are many questions which flow from this scenario. One of them is "How is it that an executed Letter of Reprimand- instead of something clearly marked "draft" or "proposed" or "recommended" or unsigned - was created before Petitioner had a chance to accept or reject it?" Historically, the procedure was, after a screening, to create a draft of the proposed language for a letter of reprimand. That draft language would be approved by the chair and sent to the Respondent unsigned and entitled "proposed" or "recommended" letter of reprimand with the appeal

letter. That allowed the attorney to view the proposed language and decide whether to accept it or appeal the screening panel's recommendations.

B. The Role of Confidentiality in the Disciplinary Process.

In *Duro v. State Bar of Nevada*, 106 Nev. 229, 231, 790 P. 2d 500 (Nev 1990), this Court determined that under SCR 121, prior to being amended into its current version, all disciplinary proceedings involving allegations of misconduct by an attorney are confidential until the disciplinary agency files a recommendation for the imposition of public discipline in this Court. Thus, unless this Court otherwise ordered, all matters comprising the record made and considered by the disciplinary panel of the State Bar of Nevada remained confidential. Only upon the filing in this Court of a recommendation of the panel for the imposition of public discipline did the formal records of the subsequent proceedings occurring in this Court become open to the public.

Subsequent amendments to SCR 121 have shifted when it becomes public to an earlier point in the disciplinary process. Now, in the case of a letter of reprimand to which the subject of the grievance objects, the fact of a disciplinary matter even existing doesn't become public until the filing of a formal complaint by State Bar Counsel. SCR 105-2 and SCR 121-1. At that point all documents filed in the now formal disciplinary proceeding are available to the public just as they were under the previous version of SCR 121-11 as interpreted by this Court in *Duro*. The filing of

the formal complaint after a letter of reprimand is proposed by a screening panel and rejected by the lawyer facing discipline equates the screening panel's finding with one of probable cause upon which the formal complaint is based. See *Whitehead v. Nevada Com'n on Judicial Discipline*, 111 Nev. 70, 105, 893 P.2d 866 (Nev 1995). In that case, this Court relied upon *Nicholson v. State Com'n on Judicial Conduct*, 72 A.D.2d 48, 422 N.Y.S.2d 701 (1979), for the proposition that:

Clearly, where the Commission's investigation is still in a preformal complaint stage, the confidentiality mandate of the statute warrants sealing of the record. The assertion that a Judge who challenges the Commission forfeits his or her statutory right to confidentiality is totally without merit and would frustrate the clear legislative intent to maintain confidentiality in the initial stages of the inquiry. In effect, such assertion, if adopted, would create an intolerable and unreasonable choice between passive submission to possibly improper proceedings and irreparable damage to reputation

Id. at 109.

The rationale for confidentiality in lawyer and judicial discipline proceedings addresses the need to encourage persons to come forward to report possible misconduct as well as to protect our legal system and its lawyers and judges from unfair reputational damage. In *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 835, 98 S.Ct. 1535 (1978) the United States Supreme Court noted:

The substantial uniformity of the existing state plans suggests that confidentiality is perceived as tending to insure the ultimate effectiveness of the judicial review commissions. First, confidentiality is thought to encourage the filing of complaints and the willing participation of relevant witnesses by providing protection against possible retaliation or recrimination. Second, at least until the time when the meritorious can be separated from the frivolous complaints, the confidentiality of the proceedings protects judges from the

injury which might result from publication of unexamined and unwarranted complaints. And finally, it is argued, confidence in the judiciary as an institution is maintained by avoiding premature announcement of groundless claims of judicial misconduct or disability since it can be assumed that some frivolous complaints will be made against judicial officers who rarely can satisfy all contending litigants.

These same values and dynamics apply to lawyer discipline. In *State v. Merski*, 437 A.2d 710, 715, 121 N.H. 901, 910 (N.H., 1981) the New Hampshire Supreme Court, considering a matter wherein the lawyer subject to discipline raised the confidentiality issue, analyzed it similarly to the judicial discipline process's need for it. There the court held:

Defendant's principal argument seems to be grounded in the false premise that confidentiality is the "defendant's right" alone. "(T)he primary purpose underlying the imposition of confidentiality ... is to protect the reputation of an attorney. A second purpose ... is to protect the anonymity of complainants.... A third purpose ... is to maintain the integrity of pending (g)rievance (c)ommittee investigations." It has been held that "(t)he privilege is not of the attorney alone but of the State bar. (The attorney) waives it when ... he places his reputation as an attorney in issue. But his waiver does not affect the privilege of the State Bar acting for itself and the public." "(T)here is an equally weighty state interest, namely, that of 'preventing public disclosure that would endanger ... the interests of those from whom (the State) has obtained information on a confidential basis.' " We note that courts applying rules of confidentiality in judicial inquiry proceedings are in accord.

Id. (internal citations omitted)(emphasis added).

The Colorado Supreme Court, in *People v. Pacheco*, 199 Colo. 470, 618 P.2d 1102 (Colo., 1980) held, in pertinent part:

...[T]he primary purpose underlying the imposition of confidentiality on grievance proceedings is to protect the reputation of an attorney charged with unprofessional conduct until such time as the charges are formally proven and

acted upon by this Court. A second purpose of the rule is to protect the anonymity of complainants who desire that their complaints remain confidential, at least until a formal determination is made by the Grievance Committee to institute proceedings against the attorney-respondent.

The Supreme Court of West Virginia in *Daily Gazette Co., Inc. v. Committee on Legal Ethics of the West Virginia State Bar*, 174 W. Va. 359, 326 S.E. 2d 705, 712-13 (W.Va.1984) held that once a determination had been made that probable cause existed to substantiate certain allegations and formal disciplinary charges had been filed “the hearing on such charges shall be open to the public, who shall be entitled to all reports, records, and non-deliberative materials introduced at such hearing, must be publicly accessible, including the record of the final action taken.” Although that court did not directly address the right of access to pre-complaint documents, it did so indirectly when it held, as has this Court in its rule making function, that once a complaint of unethical conduct in an attorney disciplinary proceeding is dismissed for lack of probable cause, the public has a right of access to the complaint and the findings of fact and conclusions of law which are presented in support of such dismissal. *Id.* at 714. In further pursuit of public transparency of the lawyer discipline process, it went on to abolish the use of private reprimands, as has this Court. The West Virginia Supreme Court held:

[U]se of private reprimands by the State Bar as a method of official discipline is in direct contravention with the “open courts” provision of West Virginia Constitution art. III, § 17. The disciplining of attorneys is performed for the benefit of the public, and therefore “is the public business and should not be disposed of in other than a public manner.” Accordingly, we hold that the right

of public access to attorney disciplinary proceedings precludes utilization of private reprimand as a permissible sanction.

Id.

These courts recognize that until a lawyer disciplinary matter is concluded, either by discipline or dismissal, anything that has not been filed in the formal hearing on the merits or said by a participant therein is confidential. SCR 105 and 121 mandate the same by their terms, which were not followed by Respondent in this case resulting in serious damage and harm to Petitioner's constitutionally protected property and liberty interests in his license to practice law.

C. Petitioner's Right to Due Process and the Protected Interests Involved

A license to practice law in Nevada is a valuable property right of which one cannot be dispossessed, in whole or in part, absent due process of law. *Burleigh v. State Bar of Nevada*, 98 Nev. 140, 145, 643 P. 2d 1201 (Nev. 1982); *State Bar of Nevada v. Claiborne*, 104 Nev. 115, 123, 756 P. 2d 464 (Nev. 1988). The Supreme Court of the United States has recognized that lawyer discipline proceedings involve interests protected by the due process clause of the Fifth and Fourteenth Amendments to the Constitution of the United States of America. It addressed the issue in *In re Ruffalo*, 390 U.S. 544, 88 S.Ct. 1222 (1968), where it held:

Disbarment, designed to protect the public, is a punishment or penalty imposed on the lawyer. ...He is accordingly entitled to procedural due process...Therefore, one of the conditions this Court considers in determining whether disbarment by a State should be followed by disbarment here is whether 'the state procedure from want of notice or opportunity to be heard

was wanting in due process.’ ... These are adversary proceedings of a quasi-criminal nature.

Id. at 390 U.S. 544, 550–51 (1968).

Thus, pursuant to *In re Ruffalo*, an attorney facing professional discipline in Nevada has a right to procedural due process, which includes fair notice of the charges against him which the State Bar of Nevada has the burden of proving, by clear and convincing evidence, that the attorney committed the violation charged. *Matter of Arabia*, 137 Nev. Adv. Op. 59, 495 P. 3d 1103, 1117 (Nev. 2021) (citing *In re Discipline of Drakulich*, 111 Nev. 1556, 1566, 908 P.2d 709, 715 (1995)). This high standard of proof was recognized as being necessary in certain matters by the Supreme Court of the United States in *Addington v. Texas*, 441 U.S. 418, 99 S.Ct. 1804 (1979)). *Addington* recognized the constitutional necessity for an intermediate standard of proof employing some combination of the terms “clear,” “cogent,” “unequivocal,” and/or “convincing,” in circumstances where the interest is greater than a mere money judgment but less than a generic criminal proceeding. *Id.* at 424. It recognized “some jurisdictions accordingly reduce the risk to the defendant of having his reputation tarnished erroneously by increasing the plaintiff’s burden of proof,” *id.* (*emphasis added*) and concluded a higher standard of proof than a mere preponderance is constitutionally required to reflect society’s concern with the consequence of a mistake the lower burden of proof necessarily makes more likely.

This Court recognized the need for this higher standard in *In re Discipline of Stuhff*, 108 Nev. 629, 634-35, 837 P.2d 853 (Nev.,1992), well knowing that it has historically recognized that a lawyer's reputation is an integral part of the value of a license to practice law. See *Ford v. Ford*, 105 Nev. 672, 678-79, 782 P.2d 1304 (Nev. 1989)(goodwill exists in a going professional practice and is a reputation that will probably generate future business); *Cuzze v. University and Community College System of Nevada*, 123 Nev. 598, 606, 172 P. 3d 131, fn. 29 (Nev. 2007) (Reputation is a factor in assessing what is a reasonable fee for a particular attorney in a given matter). Thus, an attorney's constitutionally protectable professional license, business reputation and ability to earn a living for his family at his chosen calling were implicitly recognized by this Court as the underlying basis for requiring this higher standard of proof than applies where money alone is at stake when it enacted SCR 105(2)(f) and its predecessors which govern procedure in attorney disciplinary matters.

Yet, instead of recognizing the damage that would be caused to these important interests of Petitioner, adhering to the mandate of SCR 121-1 and affording Petitioner due process of law prior to imposing any discipline, Respondent issued a textually unconditional letter of reprimand and failed to preserve its confidentiality. There had been no public hearing at which witnesses testified and had their memories and credibility probed or demeanor observed. No exhibits were

introduced subject to the rules of evidence. The clear and convincing evidence standard did not pertain at the screening panel. Respondent issued a letter of reprimand based upon a star chamber proceeding, conducted entirely upon the written word and governed by either no standard of proof at all or, at best, the “slight or even marginal evidence” standard employed for probable cause. *Bolden v. State*, 137 Nev. Adv. Op. 28, 491 P. 3d 19, 25 (Nev. 2021).

In our criminal justice system, we do not impose punishment after a preliminary hearing at which probable cause is found upon that standard of proof. Neither do we, in our civil justice system, grant the relief sought in a complaint for monetary damages or other relief, based merely upon its filing in compliance with NRCP 11’s “reasonable inquiry” standard. In the matter that forms the basis of Petitioner’s request for relief from this Court, Respondent published – deliberately, recklessly, negligently or otherwise – a textually unconditional discipline on its letterhead signed by the Chair of the Screening Panel.¹⁷ Further, Respondent did not take sufficient steps to insure that confidentiality was not breached. A professional whose license is at stake is entitled to be treated according to a

¹⁷ It should be noted that below the signature of Richard Williamson, Chair of the Screening Panel, appears the following: “RW/rkf”. It should further be noted that R. Kait Flocchini is the author of the cover letter that accompanied it. See Exhibit 5, Bates No.: GILBERT_000066, 68-69. Common usage of such suggests that an inference be taken that Assistant Bar Counsel Flocchini authored and prepared the letter of reprimand for Chair Williamson’s signature.

previously established uniform system of published rules and regulations. The loss of a professional license is more than a monetary loss; it is a loss of a person's livelihood and loss of a reputation. See *Johnson v. Board of Governors of Registered Dentists of State of Oklahoma*, 913 P.2d 1339, 1344-46 (Okla.,1996).

In the case before this Court, Respondent did not follow the mandates of SCR 121 regarding confidentiality. From all outward appearances, there are no internal security safeguards in place in Respondent's disciplinary operations to ensure that it is honored.

D. Remedies: Dismiss the Proceedings and Investigate the Breach of Confidentiality

This Court has recognized that breaches of confidentiality in lawyer disciplinary proceedings mandate dismissal. In *In re Matter of Ross* (Ross II), 99 Nev. 657, 668 P. 2d 1089 (Nev. 1983) this Court held that although the lawyers involved in disciplinary proceedings there were "entitled to confidential proceedings conducted with decorum, and consistently with a presumption of innocence, it is clear that they have been subjected to an extensive amount of improper, inflammatory, unfair and concerted public obloquy" and therefore this Court dismissed the proceeding. *Id.* at 660. Courts have recognized the maxim that one cannot "unring a bell". *Ivy v. State*, 131 Nev. 1303, 2015 WL 7420992 *7 (Nev. Ct. App. 2015)(unreported)(citing *Zana v. State*, 125 Nev. 541, 545-46, 216 P. 3d 244 (Nev. 2009)). Courts have also recognized that confidentiality – once breached –

cannot be restored. See *PepsiCo, Inc. v. Redmond*, 1996 WL 3965, at *30 (N.D.Ill.,1996)(No. 94 C 6838)(once disclosed, trade secrets and confidential information lose their secrecy forever); *Reetz v. Lowe's Companies, Inc.*, 2021 WL 3354167 (W.D.N.C., 2021)(No. 5:18-CV-00075-KDB-DCK, August 2, 2021). As this Court observed in it prior decision in *Matter of Ross* (Ross I), 99 Nev. 1, 13, 656 P.2d 832, 839 (1983):

[I]t should be noted that the United States Supreme Court has made it clear that the fullest review by this court would not “cure” a defective adjudicatory proceeding below...[A] “trial court procedure [may not] be deemed constitutionally acceptable simply because the State eventually offers a defendant an impartial adjudication. Petitioner is entitled to a neutral and detached judge in the first instance.”

Petitioner has set forth in this record several adverse consequences that have befallen him which were caused by the Respondent's breach of its duty to maintain confidentiality of the proceedings.¹⁸ Several of them fall squarely within what this Court considered when it dismissed disciplinary proceedings against the attorney in *Keresey v. State Bar of Nevada*, 112 Nev. 1139, 585-86, 923 P. 2d 583 (Nev. 1996). (lost income from law practice and damage to reputation). The acts which cause this problem were squarely in the control of Respondent. Its failure to takes steps to ensure that the letter of reprimand was not released to anyone outside of the disciplinary process, and thus maintain the assurance that all who came into

¹⁸ Exhibit 3a, Bates No.: GILBERT 000020.

possession lawfully of the document would obey SCR 121, is the administration of this Court's lawyer disciplinary system equivalent of prosecutorial misconduct in the criminal justice setting. This Court has supervisory powers that must, at times, be exercised to insure the integrity of both through dismissal of the action. See *State v. Babayan*, 106 Nev. 155, 174, 787 P. 2d 805 (Nev. 1990)(exercising its supervisory power to dismiss while observing "The circumstances of this case therefore reveal urgency and strong necessity; thus, extraordinary relief is appropriate").

The need to investigate the breach is systemic and will demonstrate that this Court means what it says about obeying its rule of confidentiality. Perhaps the most controversial and institutionally damaging matter in Nevada judicial history was fought over the breach of confidentiality in the Nevada judicial discipline process. There are no fewer than five fully published written opinions from this Court in the Judge Jerry Carr Whitehead litigation. It is useful here to paraphrase a segment of one of those opinions, *Whitehead v. Nevada Commission on Judicial Discipline*, 110 Nev. 874, 889-90, 878 P. 2d 913 (Nev. 1994) where this Court observed:

The [State Bar of Nevada] is entrusted with the ... responsibility of safeguarding the confidentiality of [lawyer discipline] proceedings until, under the current [Supreme Court] rules, there has been a finding of probable cause [by a screening panel and, if followed by an objection thereto by the lawyer, a filing of a formal complaint before the relevant Disciplinary Board]. One would therefore assume that the [State Bar of Nevada] would be greatly concerned about the breaches of confidentiality in this case.... One would further assume or at least hope that as soon as the [State Bar of Nevada] learned of these [rule] violations it would have taken immediate steps to uncover the source of the breaches and of the "leaks" that have punctuated

these proceedings and expanded them into a vastly more complex and multi-dimensional dispute. To our dismay, the [State Bar of Nevada has] not ... evinced ... concern about the breaches of confidentiality, ... It is most apparent that someone must get to the bottom of these flagrant ... infractions.

VII. CONCLUSION

The Supreme Court Rules that govern lawyer disciplinary proceedings are designed to achieve the goals of protecting the public, the lawyer and the potential grievant while encouraging the reporting of possible professional misconduct. They are designed to aid this Court in ensuring ethical professional conduct by members of the bar. The aim of all should be to uphold the general confidence in the integrity of our system of fair and impartial justice.

While this Court is the Guardian of this system, the personnel of the State Bar of Nevada and its Disciplinary Boards are its functionaries. When they ignore, disobey or cavalierly overlook the breach of the rules they drag the system and this Court into disrepute. That cannot be tolerated even once.

This Court should enter an order staying the disciplinary proceedings until such time as it resolves the issues raised in this Petition. After consideration on the merits, this Court should grant this Petition, dismiss the underlying disciplinary

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matter and direct an investigation into the causes of the breach of confidentiality.

Dated this 21st day of January 2022.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this petition 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 petition been prepared in a proportionally spaced typeface using Microsoft Word, Times New Roman style, and a 14-font size.

I further certify that this petition complies with the page-or type-volume limitations of NRAP 21(3)(d) because it is:

Proportionally spaced, has a typeface of 14 points or more, and contains 6,500 words, starting from the introduction of the case.

Finally, I hereby certify that I have read this petition, 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 petition complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 21.

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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 21st day of January 2022.

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CERTIFICATE OF SERVICE

I, the undersigned, declare under penalty of perjury, that I am over the age of eighteen (18) years, and I am not a party to, nor interested in this action. On January 21, 2022, I mailed the foregoing **PETITION FOR WRIT OF MANDAMUS, OR ALTERNATIVELY PROHIBITION AND REQUEST FOR STAY OF DISCIPLINARY PROCEEDINGS *PENDENTE LITE***, by U.S. Mail and by Certified Mail to the following address listed below:

Daniel M. Hooge, Esq., Bar Counsel
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/s Tanya Bain
Employee of Clark Hill, PLLC