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June 24, 2015

Tracie K. Lindeman
Clerk of the Supreme Court
Supreme Court Clerk's Office
201 South Carson Street
Carson City, Nevada 89701

Re: ADKT No. 0504, Proposed Amendments to NRAP 36, Repeal of SCR 123

Dear Ms. Lindeman:

Bailey❖Kennedy supports ADKT No. 0504, the proposed amendments to Nevada Rule of Appellate Procedure ("NRAP") 36 and the repeal of Supreme Court Rule ("SCR") 123. However, as detailed below, we believe that the Court should allow parties to cite all unpublished dispositions, not just those issued after ADKT No. 0504's effective date. (*See* Petition, ADKT No. 0504, Feb. 27, 2015, at 2, ¶ 6.)

Due to the Nevada Supreme Court's overburdened docket, published opinions—which require substantial time and resources—are not available for legal guidance with respect to many principles of Nevada law. Where a published opinion is lacking, an unpublished disposition is often the only guidance from the Court on an issue. The lack of published authority creates a lack of predictability with respect to Nevada law. As this Court has noted on numerous occasions, this lack of predictability hinders business growth in Nevada. Although the newly established Court of Appeals will assist the Court in the development of Nevada law on significant legal issues, allowing parties to cite unpublished dispositions will give at least some form of guidance on issues where no published opinion does so.

Under the current rules, neither parties nor district courts may rely on these unpublished dispositions even as persuasive authority. Instead, parties may only look to authorities from other jurisdictions or secondary sources. Thus, prohibiting parties from citing this Court's unpublished dispositions often requires district courts to ignore this Court's analysis of legal issues—albeit, in an unpublished disposition—in favor of authorities from other jurisdictions when evaluating questions of Nevada law. In fact, because SCR 123 does not prohibit the citation of unpublished opinions or orders from other jurisdictions, district courts may rely on unpublished authorities so long as they are not issued by this Court—a nonsensical outcome.

Further, we believe that the revisions to NRAP 36 should not be limited to unpublished dispositions issued after ADKT No. 0504's effective date. In other words, we believe parties should be allowed to cite all unpublished dispositions issued by this Court. There is a wealth of

authority available in prior unpublished dispositions issued by this Court. For example, the following unpublished dispositions illustrate situations where parties or district courts could rely upon this Court's prior analysis—as persuasive authority—on topics that have not been addressed in a published opinion:

- *Richman v. Eighth Jud. Dist. Ct.*, No. 60676, 2013 WL 3357115 (Nev. May 31, 2013) (attached as Exhibit 1). This unpublished disposition is the Court's only analysis of attorney disqualification pursuant to Nevada Rule of Professional Conduct 1.18 (Duties to Prospective Client). The unpublished disposition is thorough and also provides a four-factor test to determine whether disqualification is appropriate. *Id.* at *3.

- *Bullivant Houser Bailey PC v. Eighth Jud. Dist. Ct.*, No. 57991, 2012 WL 1117467 (Nev. Mar. 30, 2012) (attached as Exhibit 2). This unpublished disposition is the Court's only analysis of whether the litigation privilege extends past claims for defamation and shields attorneys from liability for other intentional torts. *Id.* at *2-4.

- *In re Discipline of Janice E. Smith, Esq.*, No. 43165, Doc. No. 05-05842 (Nev. March 25, 2005) (attached as Exhibit 3). This unpublished disposition analyzes an attorney's duties as corporate counsel and conflicts of interest in representing one corporate officer against another.

- *In re Discipline of Joe M. Laub*, No. 36322, Doc. No. 02-00502 (Nev. Jan. 9, 2002) (attached as Exhibit 4). This unpublished disposition is the Court's only analysis of an attorney's duty to negotiate, on behalf of a client, reductions on medical liens.

Enabling parties to cite unpublished dispositions such as these will give guidance to district courts where no published opinion addresses the issues at hand. To the extent that concerns exist over the lack of detail in some unpublished dispositions, we believe that the district courts are equipped to evaluate the weight of authority to give to unpublished dispositions.

The opposition to ADKT No. 0504 appears to be primarily premised upon the notion that unpublished dispositions lack the "meat of a published decision," and "miss the clarity of a published decision." (*See, e.g.*, Letter from Eckley M. Keach, Chtd., *et al.*, No. 15-16013, at 1.) Although unpublished dispositions may not be as polished as published opinions, we believe the

opposition's analysis is flawed for two primary reasons. First, even if unpublished dispositions are not as polished as published opinions, they are often the *only* available Nevada legal authority on point. We believe that unpolished Nevada authority is better than no Nevada authority. Second, the proposed revisions to NRAP 36 contemplate that unpublished dispositions are only *persuasive* authority, not controlling authority. As stated above, we believe that district courts will be able to evaluate the weight of authority to give to unpublished dispositions.

In sum, Bailey❖Kennedy supports ADKT No. 0504 and believes that parties should be able to cite all of this Court's unpublished dispositions as persuasive authority.[1] Nevada lacks authority on numerous legal issues—allowing parties to cite unpublished dispositions will assist parties and district courts to evaluate those legal issues where no controlling authority from this Court exists.

Sincerely,

Dennis L. Kennedy, Esq.
Sarah E. Harmon, Esq.
Paul C. Williams, Esq.

DLK:slm

Enclosures (4)

[1] Dennis L. Kennedy, Esq. would like to make an oral statement regarding Bailey❖Kennedy's support of ADKT No. 0504 at the public hearing currently scheduled for July 1, 2015, at 1:00 p.m.

Exhibit 1

Exhibit 1

2013 WL 3357115
Unpublished Disposition
Only the Westlaw citation is currently available.
An unpublished order shall not be regarded as precedent and shall not be cited as legal authority. SCR 123.
Supreme Court of Nevada.

Michael RICHMAN; Luzviminda O. Dapat; and Michael Richman Marketing Company, LLC, Petitioners,
v.
The EIGHTH JUDICIAL DISTRICT COURT OF the STATE of Nevada, In and for The County of Clark; and The Honorable Kenneth C. Cory, District Judge, Respondents,
and
Haines & Krieger, LLC; Haines & Krieger Loan Modifications, LLC; George Haines; and David Krieger, Real Parties in Interest.

No. 60676. | May 31, 2013.

Synopsis

Background: Joint venturers with attorneys, their law firm, and their loan modification company, filed suit against attorneys, firm, and company. Defendants filed motion to disqualify joint venturers' attorney based on their status as prospective clients of attorney in a prior matter. The Judicial District Court, Clark County, Kenneth C. Cory, J., granted motion. Joint venturers filed petition for writ of mandamus challenging their attorney's disqualification.

[Holding:] The Supreme Court held that attorney's disqualification was required.

Affirmed.

West Headnotes (3)

[1] **Attorney and Client**
Particular Cases and Problems

Attorney and Client
Partners and Associates

45 Attorney and Client
45I The Office of Attorney
45I(B) Privileges, Disabilities, and Liabilities
45k20 Representing Adverse Interests
45k21.5 Particular Cases and Problems
45k21.5(1) In General
45 Attorney and Client
45I The Office of Attorney
45I(B) Privileges, Disabilities, and Liabilities
45k20 Representing Adverse Interests
45k21.15 Partners and Associates

Founders of real estate firm and related entities had been "prospective clients" of attorney and law firm he worked for, for purposes of determining whether attorney was disqualified from representing plaintiffs in their subsequent suit against founders and related entities pursuant to rule prohibiting lawyers from using or revealing information learned in a consultation with a prospective client except as rules of professional conduct permitted; founders' partners in real estate firm had previously consulted with the attorney regarding their potential liability with respect to demand letter and draft complaint they had received from their former employer, which alleged that founders, their partners, real estate firm, and founders' law firm had all engaged in wrongdoing. Rules of Prof.Conduct, Rule 1.18.

Cases that cite this headnote

[2] **Attorney and Client**
Particular Cases and Problems

Attorney and Client
Partners and Associates

45 Attorney and Client
45I The Office of Attorney
45I(B) Privileges, Disabilities, and Liabilities
45k20 Representing Adverse Interests
45k21.5 Particular Cases and Problems
45k21.5(1) In General
45 Attorney and Client
45I The Office of Attorney
45I(B) Privileges, Disabilities, and Liabilities
45k20 Representing Adverse Interests
45k21.15 Partners and Associates

Disqualification of attorney for plaintiffs in their suit against founders of real estate

company and related entities was required, under rule prohibiting lawyers from using or revealing information learned in a consultation with a prospective client except as rules of professional conduct permitted, as plaintiffs' suit was substantially similar to prior matter involving a complaint by former employer for two of four founders of real estate company and related entities, in which attorney had consulted with the two founders, attorney's representation of plaintiffs in current matter would be adverse to founders and related entities, and attorney had received confidential information that could be harmful to founders and related entities in current litigation. Rules of Prof.Conduct, Rule 1.18.

Cases that cite this headnote

[3] **Attorney and Client**

Disclosure, Waiver, or Consent

45 Attorney and Client
45I The Office of Attorney
45I(B) Privileges, Disabilities, and Liabilities
45k20 Representing Adverse Interests
45k21.10 Disclosure, Waiver, or Consent

Defendants did not waive their right to seek disqualification of plaintiffs' attorney by waiting to long to file motion for disqualification, as defendants could not adequately file a motion for disqualification before plaintiffs filed their complaint because its contents would have been unknown, and defendants filed their motion to disqualify just over a month after complaint was filed.

Cases that cite this headnote

Attorneys and Law Firms

Law Office of Daniel Marks

Bailey Kennedy

Ogletree Deakins Nash Smoak & Stewart

ORDER DENYING PETITION

*1 This is an original petition for a writ of mandamus challenging a district court order disqualifying petitioners' counsel and an order denying rehearing of that ruling. Eighth Judicial District Court, Clark County; Kenneth C. Cory, Judge.

In late 2010, real parties in interest George Haines and David Krieger entered into a business relationship with Adam Fenn and Ryan Howard to form Haines & Krieger Realty, LLC (H & K Realty). On December 16, 2010, Fenn and Howard's former employer, Merit Realty, sent a demand letter and draft complaint (the Merit complaint) concerning the formation of H & K Realty and alleging wrongdoing by Fenn, Howard, Haines, Krieger, Haines & Krieger Law Firm (H & K Law Firm), and H & K Realty. Haines and Krieger requested that Fenn and Howard obtain advice on behalf of all the named defendants in the Merit complaint. On December 17, 2010, Fenn and Howard met with Adam Levine of the Law Office of Daniel Marks to discuss the demand letter and Merit complaint. The parties dispute many of the facts surrounding this consultation. The real parties in interest allege that Fenn and Howard provided Levine with confidential and in-depth details regarding facets of H & K Realty. The petitioners allege that Fenn and Howard never indicated they were seeking advice on the behalf of Haines and Krieger. After Merit Realty filed its complaint, all of the defendants chose different representation than Levine and the Law Office of Daniel Marks.

A year later, Levine, on behalf of Michael Richman, a former client of the H & K Law Firm; Luzviminda O. Dapat; and Michael Richman Marketing Company, LLC, (collectively, the Richman Parties) filed a complaint against Haines, Krieger, the H & K Law Firm, and Haines & Krieger Loan Modifications, LLC (collectively, the H & K Parties). The Richman Parties had been involved in a joint venture regarding loan modifications with Haines and Krieger that dissolved in November 2010.

On July 20, 2011, the H & K Parties filed a motion to disqualify the Law Office of Daniel Marks based on their status as prospective clients to Levine and an alleged conflict of interest under Nevada Rule of Professional Conduct (NRPC) 1.18. The H & K Parties alleged that the Richman Parties' complaint included specific allegations arising out of Fenn and Howard's discussion with Levine during their initial consultation about the formation and operation of H & K Realty.

On January 30, 2012, the district court entered its order granting the motion to disqualify and nearly four months later, denied the Richman Parties' motion for rehearing. It did not hold an evidentiary hearing regarding the contested issues of fact surrounding the information disclosed during Fenn and Howard's initial consultation with Levine. The Richman Parties filed an original petition for writ of mandamus challenging the district court's orders, arguing that the district court manifestly abused its discretion by disqualifying their counsel under NRPC 1.18 and abused its discretion by failing to hold an evidentiary hearing as to contested issues of fact.

The district court did not manifestly abuse its discretion in disqualifying the Richman Parties' counsel pursuant to NRPC 1.18

***2** "A writ of mandamus is properly used to challenge a district court's order disqualifying counsel." *Brown v. Eighth Judicial Dist. Court*, 116 Nev. 1200, 1206, 14 P.3d 1266, 1271 (2000). "A writ of mandamus is available to compel the performance of an act that the law requires or to control an arbitrary or capricious exercise of discretion." *Nevada Yellow Cab Corp. v. Eighth Judicial Dist. Court*, 123 Nev. 44, 49, 152 P.3d 737, 740 (2007); *see also* NRS 34.160.

The district court has broad discretion in attorney disqualification matters, and we will not overturn the district court's decision absent a manifest abuse of that discretion. *Nevada Yellow Cab Corp.*, 123 Nev. at 54, 152 P.3d at 743. Disqualification may be necessary to prevent disclosure of confidential information that may be used to an adverse party's disadvantage. *Id.* at 53, 152 P.3d at 743. "[D]oubts should generally be resolved in favor of disqualification." *Brown*, 116 Nev. at 1205, 14 P.3d at 1270. District courts are faced with a "difficult task of balancing competing interests: the right to be represented by counsel of one's choice, each party's right to be free from the risk of even inadvertent disclosure of confidential information, and the public's interest in the scrupulous administration of justice." *Id.* at 1205, 14 P.3d at 1269–70.

To prevail on a motion for disqualification, the moving party must establish: (1) " 'at least a reasonable possibility that some specifically identifiable impropriety did in fact occur,' " and (2) " 'the likelihood of public suspicion or obloquy outweighs the social interests which will be served by a lawyer's continued participation in a particular case.' " *Brown, 116 Nev.* at 1205, 14 P.3d at 1270 (quoting *Cronin v. Eighth Judicial Dist. Court*, 105 Nev. 635, 641, 781 P.2d 1150, 1153 (1989), *disapproved of by Nevada Yellow Cab Corp.*, 123 Nev. at 54 n. 26, 152 P.3d at 743 n. 26).

NRPC 1.18(b) states that even when no attorney-client relationship is formed, a lawyer shall not use or reveal information learned in a consultation with a prospective client, "except as Rule 1.9 would permit with respect to information of a former client ."[1] NRPC 1.18(c) prohibits lawyers from representing clients with interests that are materially adverse to those of prospective clients in the same or substantially related matters when the lawyer receives "information from the prospective client that could be significantly harmful to that person in the matter...." Further, NRPC 1.18(c) disqualifies all lawyers in the firm of the disqualified lawyer, except for narrow exceptions. These exceptions allow representation if: (1) the affected client and prospective client give informed, written consent; or (2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information, is timely screened, and written notice is given to the prospective client. *See* NRPC 1.18(d).

***3** Given the similarities between NRPC 1.9 and NRPC 1.18, we turn to case law discussing disqualification under NRPC 1.9 for guidance. In *Nevada Yellow Cab Corp.*, we concluded that disqualifications under NRPC 1.9 require the moving party to show: "(1) that it had an attorney-client relationship with the lawyer, (2) that the former matter and the current matter are substantially related, and (3) that the current representation is adverse to the party seeking disqualification." 123 Nev. at 50, 152 P.3d at 741. Thus, disqualifications under NRPC 1.18 should require the moving party to show that (1) it was a prospective client of the lawyer, (2) the current matter and the former matter are substantially related, (3) the current representation is adverse to the party seeking disqualification, and (4) the lawyer received confidential information that could be significantly harmful to the moving party. *See* NRPC 1.18(c); *see also Factory Mut. Ins. Co. v. APComPower, Inc.*, 662 F.Supp.2d 896, 900 (W.D.Mich.2009) (concluding that motions to disqualify premised on RPC 1.18 "should be analyzed the same as a motion to disqualify pursuant to a former client relationship with the additional requirement that the lawyer receive information that could be 'significantly harmful' "); *Sturdivant v. Sturdivant*, 367 Ark. 514, 241 S.W.3d 740, 746–47 (Ark.2006) (applying Arkansas' version of RPC 1.18, a wife's lawyer in a custody matter was disqualified because the husband had consulted with a member of the lawyer's firm and disclosed confidential information concerning the

children and former wife that could be significantly harmful to the husband, the moving party).

Substantial evidence supported the district court's finding that the H & K Parties were prospective clients for purposes of NRPC 1.18

[1] The Richman Parties argue that the H & K Parties were not prospective clients, and NRPC 1.18 does not recognize a prospective client by agency. We disagree.

We review a' district court's factual determinations deferentially and will not overturn such findings if supported by substantial evidence, unless clearly erroneous. Ogawa v. Ogawa, 125 Nev. 660, 668, 221 P.3d 699, 704 (2009). NRPC 1.18(a) defines a prospective client as "[a] person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client." We have previously recognized third-party standing in disqualification matters and numerous jurisdictions recognize prospective clients by agency or through third-parties. *See* Liapis v. Second Judicial Dist. Court, 128 Nev. ——, ——, 282 P.3d 733, 737–38 (2012) (citations omitted) (concluding that standing to bring a motion to disqualify based on a third-party conflict of interest involves establishing that (1) the lawyer's representation impacts a legal interest because a "specifically identifiable impropriety has occurred," (2) an ethical breach "infects the litigation," or (3) there is a "breach of the duty of confidentiality owed to the complaining party, regardless of whether a lawyer-client relationship existed"); *see also* Jack Eckerd Corp. v. Dart Grp. Corp., 621 F.Supp. 725, 732 (D.Del.1985); Matter of King Res. Co., 20 B.R. 191, 198 (D.Colo.1982); In re Modanlo, 342 B.R. 230, 235–36 (D.Md.2006); Harkobusic v. Gen. Am. Transp. Corp., 31 F.R.D. 264, 266 (W.D.Pa.1962); Grand Jury Proceedings Under Seal v. United States, 947 F.2d 1188, 1191 (4th Cir.1991).

***4** We conclude that substantial evidence supported the district court's finding that Fenn and Howard consulted with Levine regarding the potential liability of the defendants in the Merit complaint, which included Fenn and Howard as well as the H & K Law Firm, H & K Realty, Haines, and Krieger. The parties dispute what was actually discussed at the initial consultation, but, at the initial consultation, Fenn produced the Merit complaint and demand letter that alleged wrongdoing by Fenn, Howard, Haines, Krieger, H & K Realty, and the H & K Law Firm. Fenn also listed his place of employment as H & K Realty on the new client information sheet during the initial consultation, and Levine sent the draft retainer agreement to Fenn's H & K Realty email address. Levine should have been aware of the potential for representing all defendants involved. Haines and Krieger attest that they asked Fenn and Howard to obtain legal advice because the Merit demand letter required a response by December 17, 2010. Haines and Krieger did not seek the advice of separate counsel before this deadline. The H & K Law Firm reimbursed Fenn for the consultation. These facts provided substantial evidence to support the district court's finding that all defendants became prospective clients of Levine and the Law Office of Daniel Marks.

Substantial evidence supported the district court's findings, under NRPC 1.18, that the current matter is substantially similar to the former matter, the current representation would be adverse to the H & K Parties, and confidential information was received and could be harmful to the H & K Parties

[2] [3] The Richman Parties argue that their interests were not materially adverse to Fenn or Howard and did not involve the "same or substantially-related matter" to the Merit action. The Richman Parties further argue that respondents have failed to demonstrate how any information communicated by Fenn or Howard would be significantly harmful or that an impropriety occurred.[2] We disagree.

Whether two matters are substantially related requires the district court to make a factual determination. *See* Waid v. Eighth Judicial Dist. Court, 121 Nev. 605, 610, 119 P.3d 1219, 1223 (2005) (discussing how to determine whether two matters were substantially related as it relates to disqualification under former SCR 159, equivalent to NRPC 1.9). In *Waid,* we adopted a three-part test for determining whether a former and present matter are substantially related: the district court must "(1) make a factual determination concerning the scope of the former representation, (2) evaluate whether it is reasonable to infer that the confidential information allegedly given would have been given to a lawyer representing a client in those matters, and (3) determine whether the information is relevant to the issues raised in the present litigation." *Id.*

The district court, here, found that "[i]t is 'reasonable to infer' that Mr. Levine received confidential information from Messrs. Fenn and Howard during the meeting on December 17, 2010[sic] related to the formation and operation of H & K

Realty," and such information "is relevant to the issues raised in this litigation."

*5 The H & K Parties contend that there were at least five allegations in the Richman complaint directly relating to the confidential information regarding the formation and operation of H & K Realty that Fenn and Howard conveyed to Levine. The Richman complaint alleges that the Richman Parties "developed the idea that they could become a one-stop shop for shorts [sic] sales, residential loan modifications and commercial loan modifications" and approached the H & K Parties about the idea. The complaint also alleges that "[f]rom February 2010 through approximately September 2010 Plaintiffs Richman and Dapat organized and created the Haines and Krieger short sale department. Defendant Haines informed Plaintiffs that they wanted Dapat to do all of the listings and pay the Defendants a kick back in the form of a marketing fee." The Richman complaint further alleges that "[the H & K Parties] gave control of the short sale department to someone other than Plaintiff Dapat." The H & K Parties assert that this reference to "someone other" is H & K Realty, Fenn, and Howard. The Richman complaint's cause of action for quantum merit alleges that the Richman Parties provided uncompensated services to the H & K Parties, including the creation of the H & K short sale department and loan modification department in Arizona.

There is sufficient information to support the district court's determination that Fenn and Howard consulted with Levine regarding the potential liability regarding all defendants in the Merit complaint, that the information given to Levine would have related to the formation and operation of H & K Realty, that this information would have been given to the H & K Parties' counsel in the Merit action, and that it is relevant to the present litigation. There is sufficient evidence to support a conclusion that the Merit action is substantially similar to the Richman Parties' action. *See* Waid, 121 Nev. at 610, 119 P.3d at 1223.

The district court also found that "[i]nformation learned by Mr. Levine and the Marks Law Office from Messrs. Fenn and Howard could be significantly harmful to the Defendants [the H & K Parties] ... if used in this matter." Specifically, information related to the formation and operation of H & K Realty could be harmful. The district court further found that Levine, the Law Office of Daniel Marks, and the Richman Parties did not provide informed, written consent regarding the representation. We conclude that substantial evidence supported the district court's finding that the Richman Parties' interests are materially adverse, and the information learned could be significantly harmful to the H & K Parties.

Based on the record, the district court also weighed the varying interests of the parties and that of the public as required by Brown. *See Brown v. Eighth Judicial Dist. Court*, 116 Nev. 1200, 1205, 14 P.3d 1266, 1269–70 (2000). Therefore, we conclude that the district court did not manifestly abuse its discretion when it granted the H & K Parties' motion to disqualify because it properly considered the competing interests involved. *See Nevada Yellow Cab Corp.*, 123 Nev. at 54, 152 P.3d at 743 (noting that the district court was more familiar with the case than this court and had the best opportunity to evaluate the validity of a disqualification).[3]

The district court did not abuse its discretion in determining that an evidentiary hearing was not required

*6 The Richman Parties argue that the district court should have conducted an evidentiary hearing to resolve disputed issues of material fact prior to the disqualification to determine what Fenn and Howard actually told Levine. The Richman Parties argue that NRPC 1.18 requires at least some disclosure of the information discussed at the prospective client consultation. We disagree.

A district court, in determining the nature of a hearing, should ensure that the parties present sufficient information to support its decision. *Bahena v. Goodyear Tire & Rubber Co.*, 126 Nev. ——, ——, 235 P.3d 592, 601 (2010).[4] Under NRPC 1.9, we have explained that "[i]n proving that a prior representation is substantially related to present litigation ... the moving party is not required to divulge the confidences actually communicated, nor should a court inquire into whether an attorney actually acquired confidential information in the prior representation which is related to the current representation." *Robbins v. Gillock*, 109 Nev. 1015, 1018, 862 P.2d 1195, 1197 (1993); *see also* NRPC 1 .6(a) (a "lawyer shall not reveal information relating to representation of a client unless the client gives informed consent."). "The court should instead undertake a realistic appraisal of whether confidences might have been disclosed in the prior matter that will be harmful to the client in the later matter." *Robbins*, 109 Nev. at 1018, 862 P.2d at 1197.

We conclude that the district court acted within its discretion in declining to hold an evidentiary hearing since the disqualification. matter is not case-concluding. *See Bahena*,

126 Nev. at ——, 235 P.3d at 600–01. Prospective clients meeting with an attorney must have the "utmost confidence" that confidential information disclosed to an attorney will remain confidential. *See Ryan's Express*, 128 Nev. at ——, 279 P.3d at 169. "One purpose of disqualification is to prevent disclosure of confidential information that could be used to a former client's disadvantage." *Nevada Yellow Cab Corp.*, 123 Nev. at 53, 152 P.3d at 743. Forcing prospective clients to divulge confidential information at a hearing could lessen a client's ability and willingness to candidly communicate with his or her attorney during initial consultations.

The district court was very aware of the importance of client confidences and the attorney-client privilege; and hesitant to force a client, former client, or prospective client to take the stand under oath and testify to confidential matters and the substance of their interactions. It made its findings based on substantial evidence, including numerous declarations and affidavits, pleadings, the information sheet, unsigned retainer agreement, notes from the initial consultation, emails, and letters. Among these, the district court found that it was reasonable to infer that: (1) Fenn and Howard consulted with Levine regarding the liability of the draft complaint in the Merit action on behalf of the H & K Parties, and (2) Levine received confidential information from Fenn and Howard regarding the formation and operation of H & K Realty that was relevant to the issues raised in this litigation. It further found that information Levine and the Law Office of Daniel Marks learned from Fenn and Howard could be significantly harmful to the H & K Parties if used by the Richman Parties in this matter. Conducting an evidentiary hearing to determine specifics regarding what Fenn and Howard said to Levine would run counter to our analysis that opposing counsel under NRPC 1.9 are not required to divulge confidences actually communicated. *See Robbins*, 109 Nev. at 1018, 862 P.2d at 1197.

*7 Accordingly, we ORDER the petition DENIED. [5]

Footnotes

1 Rule 1.9 prohibits an attorney's representation of a new client if the matter is (1) substantially similar to that of a former client, (2) materially adverse to that former client, and (3) the attorney acquired confidential information from the former client that is relevant to the new matter. In these cases, the former client must give informed, written consent before the attorney can represent the new client. See NRPC 1.9(a) and (b)(3). NRPC 1.9(c) prohibits lawyers from using or revealing information relating to a former client except as the "Rules would permit or require with respect to a client." In other words, the former client would need to provide informed, written consent.

2 The Richman Parties argue that the H & K Parties waived their right to seek disqualification by waiting too long to seek disqualification. However, the H & K Parties could not adequately file a motion for disqualification before the Richman Parties filed their complaint because its contents would have been unknown. The H & K Parties filed their motion to disqualify just over a month after the Richman Parties filed their complaint on June 10, 2011. Delay alone is insufficient to establish a waiver and the H & K Parties did not relinquish a known right. See *Nevada Yellow Cab Corp.*, 123 Nev. at 48–50, 152 P.3d at 740–41 (holding hat a delay of two years was not sufficient to waive rights when counsel's conduct did not demonstrate a clear intent to relinquish its right to challenge the potential conflict).

3 The Richman Parties also argue that Levine can still be timely screened from this matter, so this court should not impute disqualification to the Law Office of Daniel Marks. We conclude that it is too late to properly screen Levine. See *Ryan's Express v. Amador Stage Lines*, 128 Nev. ——, ——, 279 P.3d 166, 172 (2012) (discussing that "the timing of implementation of screening measures in relation to the occurrence of the disqualifying event is relevant in determining whether the screen was properly erected"). Levine has already worked on substantive portions of the case, made multiple appearances, and filed motions on behalf of the Richman Parties. The record also does not indicate that Levine took any reasonable steps to avoid exposure to disqualifying information.

4 Recently, we concluded that an evidentiary hearing was required when determining whether a lawyer has been properly screened. *Ryan'sExpress*, 128 Nev. at ——, 279 P.3d at 173. This case is distinguishable because screening determinations are not as likely to involve confidential attorney-client communications. Therefore, the determination of whether to hold an evidentiary hearing involving disqualifications based on prospective clients remains in the district court's discretion.

5 We have considered the parties' remaining arguments and conclude they are without merit.

End of Document

Exhibit 2

Exhibit 2

2012 WL 1117467
Unpublished Disposition
Only the Westlaw citation is currently available.
An unpublished order shall not be
regarded as precedent and shall not
be cited as legal authority. SCR 123.
Supreme Court of Nevada.

BULLIVANT HOUSER BAILEY PC,
a Foreign Corporation, Petitioner,
v.
The EIGHTH JUDICIAL DISTRICT COURT
OF the STATE of Nevada, in and for the
COUNTY OF CLARK; and the Honorable
Allan R. Earl, District Judge, Respondents,
and
L.A. Pacific Center, Inc., a Nevada
Corporation, Real Party in Interest.

No. 57991. | March 30, 2012.

Synopsis

Background: Purchaser brought action against attorney that represented vendors in real estate sales transaction, alleging abuse of process, slander of title, intentional interference with contractual relationship, and intentional interference with prospective advantage. The Eighth Judicial District Court, Clark County, Allan R. Earl, J., denied attorney's special motion to dismiss pursuant to strategic lawsuits against public participation (anti-SLAPP) statute. Attorney petitioned for writ of mandamus.

Holdings: The Supreme Court held that:

[1] petition for writ of mandamus was proper avenue for review, and

[2] claims were precluded by absolute litigation privilege of anti-SLAPP statute.

Writ issued.

West Headnotes (2)

[1] **Mandamus**
Dismissal or Nonsuit, and Reinstatement
250 Mandamus
250II Subjects and Purposes of Relief
250II(A) Acts and Proceedings of Courts, Judges, and Judicial Officers
250k43 Dismissal or Nonsuit, and Reinstatement

Petition for writ of mandamus was appropriate avenue to seek review of trial court's grant of motion to reconsider and vacatur of previous grant of attorney's special motion to dismiss pursuant to strategic lawsuits against public participation (anti-SLAPP) statute in action by purchaser against attorney who had represented vendors in real estate sales transaction, alleging abuse of process, slander of title, intentional interference with contractual relationship, and intentional interference with prospective advantage; requiring attorney to defend itself during a full trial would have been inappropriate when the absolute litigation privilege required the district court to grant attorney's special motion to dismiss. West's NRSA 34.160, 41.660.

Cases that cite this headnote

[2] **Pleading**
Frivolous Pleading
302 Pleading
302XVI Motions
302k351 Striking Out Pleading or Defense
302k358 Frivolous Pleading

Purchaser's abuse of process, slander of title, intentional interference with contractual relationship, and intentional interference with prospective advantage claims against attorney who represented vendors in real estate sales transaction were precluded by the absolute litigation privilege of the strategic lawsuits against public participation (anti-SLAPP) statute, where majority of attorney's alleged wrongdoing consisted of communications made by attorney in its capacity as legal counsel for

vendors during the course of litigation. West's NRSA 41.660.

Cases that cite this headnote

Attorneys and Law Firms

Prince & Keating, LLP

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ORDER GRANTING PETITION

***1** This is an original petition for a writ of mandamus challenging a district court order granting reconsideration and vacating a previous order to dismiss a complaint in a real estate transaction dispute.

Petitioner Bullivant Houser Bailey PC ("BHB") represented the sellers of two properties in litigation against Real Party in Interest L.A. Pacific Center, Inc. BHB's former clients Hotels Nevada, LLC; Inns Nevada, LLC and Louis Habash (collectively "Hotels") entered into a real estate transaction with LA Pacific for the purchase of two adjacent properties ("the Purchase and Sale Agreement"). One year after the closing of the transaction, BHB was retained to bring suit against LA Pacific for fraud in connection with the Purchase and Sale Agreement. BHB filed complaints and lis pendens both in California and Nevada on Habash's behalf. This litigation forms the factual basis for the claims asserted by LA Pacific against BHB in the instant litigation.

LA Pacific brought suit against BHB in January 2010 on claims of (1) abuse of process, (2) slander of title, (3) intentional interference with contractual relationship, and (4) intentional interference with prospective advantage. BHB then filed a special motion to dismiss pursuant to NRS 41.660 (Nevada's anti-SLAPP[1] statute), arguing that their actions in representing their clients were protected activities and were done in good faith. The district court granted BHB's special motion to dismiss. However, LA Pacific successfully brought a motion for reconsideration. The district court's grant of the motion for reconsideration therefore vacated its previous order granting BHB's special motion to dismiss. BHB now seeks a writ of mandamus instructing the district court to vacate its order granting LA Pacific's motion for reconsideration and directing the district court to reinstate its previous order granting BHB's special motion to dismiss pursuant to NRS 41.660.

In this original proceeding, the following issues are presented: (1) whether a writ of mandamus is procedurally appropriate, (2) whether the district court erred in denying application of NRS 41.660 to this case, and (3) whether the district court erred in determining that LA Pacific's claims are not precluded by the absolute litigation privilege. For the reasons set forth below, we grant BHB's petition for a writ of mandamus. As the parties are familiar with the facts, we do not recount them further except as necessary to our disposition.

Writ relief is appropriate

[1] BHB argues that this court should exercise its discretion to entertain this writ petition because the district court acted improperly in its application of the law. Specifically, BHB contends that there are important issues of law and public policy with respect to Nevada's anti-SLAPP statute involved, as well as the application of the absolute litigation privilege to intentional tort claims made against attorneys, and that both issues require consideration and clarification.

***2** A writ of mandamus is available to compel the performance of an act that the law requires "as a duty resulting from an office, trust or station." NRS 34.160. Review may also be proper to control a manifest abuse of discretion or an arbitrary or capricious exercise of discretion. *Round Hill Gen. Imp. Dist. v. Newman*, 97 Nev. 601, 603–04, 637 P.2d 534, 536 (1981). We may also review a petition if there is "an important issue of law [that] needs clarification and considerations of sound judicial economy and administration militate in favor of granting the petition." *International Game Tech. v. Dist. Ct.*, 124 Nev. 193, 197–98, 179 P.3d 556, 559 (2008). Mandamus is an extraordinary remedy and we have full discretion to determine whether a petition will be considered. *Cote H. v. Dist. Ct.*, 124 Nev. 36, 39, 175 P.3d 906, 908 (2008). Writ relief will not be available when an adequate and speedy legal remedy exists. NRS 34.170. BHB argues that this court should review its petition in order to clarify important issues of law relating to the application of the anti-SLAPP statute to private parties, as well as the application of the absolute litigation privilege to a wide range of intentional torts. As BHB asserts, these issues have little or no jurisprudential precedent in this state. Additionally, judicial economy favors review of this petition because the underlying litigation is in its early stages. No answer has been filed, nor has any discovery been conducted. The early

stages of litigation also support our determination that there is no speedy legal remedy. *Id.* Requiring BHB to defend itself during a full trial would be inappropriate when the absolute litigation privilege required the district court to grant BHB's special motion to dismiss.[2] *See* Round Hill, 97 Nev. at 603–04, 637 P.2d at 536.

The district court erred in determining that LA Pacific's claims are not precluded by the absolute litigation privilege

[2] BHB contends that the district court erred in vacating its order granting BHB's special motion to dismiss because LA Pacific's claims are precluded by the absolute litigation privilege. LA Pacific counters that the absolute litigation privilege does not apply here because the privilege is limited to communications that give rise to defamation claims, and has never been extended by this court to shield attorneys from liability for intentional torts. It asserts that the basis of its claims is the tortious conduct in which BHB actively participated, not merely the communications made by BHB while acting as legal counsel.

Whether the absolute litigation privilege is applicable is a question of law reviewed de novo. Clark County Sch. Dist. v. Virtual Educ., 125 Nev. 374, 382, 213 P.3d 496, 502 (2009).

Nevada follows the " 'long-standing common law rule that communications [made] in the course of judicial proceedings [even if known to be false] are absolutely privileged.' " *Id.* (alterations in original) (quoting Circus Circus Hotels v. Witherspoon, 99 Nev. 56, 60, 657 P.2d 101, 104 (1983)). In order to facilitate the policy of zealous advocacy by attorneys underlying this privilege, its scope is "quite broad," and that it should be applied "liberally." Fink v. Oshins, 118 Nev. 428, 433–34, 49 P.3d 640, 643–44 (2002). As such, when "determining whether the privilege applies [we] resolve any doubt in favor of a broad application." Virtual Educ., 125 Nev. at 382, 213 P.3d at 502.

***3** Consistent with its broad applicability, this court has concluded that "the privilege applies not only to communications made during actual judicial proceedings, but also to 'communications preliminary to a proposed judicial proceeding.' " Fink, 118 Nev. at 433, 49 P.3d at 644 (2002) (quoting Bull v. McCuskey, 96 Nev. 706, 712, 615 P.2d 957, 961 (1980), *abrogated on other grounds by* Ace Truck v. Kahn, 103 Nev. 503, 507, 746 P.2d 132, 135 (1987), *abrogated by* Bongiovi v. Sullivan, 122 Nev. 556, 138 P.3d 433 (2006)). Additionally, there is "no reason to distinguish between *communications* made during the litigation process and *conduct* occurring during the litigation process." Clark v. Druckman, 218 W.Va. 427, 624 S.E.2d 864, 870 (W.Va.2005); *see also* Maness v. Star–Kist Foods, Inc., 7 F.3d 704, 709 (8th Cir.1993) (applying Minnesota law and explaining that the privilege can extend to an attorney's "actions arising out of his professional relationship"); Levin, Middlebrooks v. U.S. Fire Ins. Co., 639 So.2d 606, 608 (Fla.1994) (explaining that the privilege may be extended to "any act ... regardless of whether the act involves a defamatory statement or other tortious behavior"). When applicable, "[a]n absolute privilege bars *any* civil litigation based on the underlying communication." Hampe v. Foote, 118 Nev. 405, 409, 47 P.3d 438, 440 (2002) (emphasis added), *overruled in part on other grounds by* Buzz Stew, LLC v. City of N. Las Vegas, 124 Nev. 224, 228 n. 6, 181 P.3d 670, 672 n. 6 (2008).

In this case, the majority of BHB's alleged wrongdoing consists of communications made by BHB in its capacity as legal counsel for Habash during the course of litigation. In LA Pacific's complaint, it alleges that BHB filed the Nevada lawsuit and recorded numerous lis pendens for the improper purpose of clouding its title and disrupting the sale of the property. These acts are communications made in the course of litigation that are absolutely privileged, and thus, as a matter of law, cannot constitute the basis of LA Pacific's claims against BHB. *See* Ringier America v. Enviro–Technics, Ltd., 284 Ill.App.3d 1102, 220 Ill.Dec. 532, 673 N.E.2d 444, 447 (Ill.App.Ct.1996) ("[N]early every jurisdiction to consider the question has extended the absolute privilege accorded statements made in the course of litigation to include the filing and/or recording of a *lis pendens* notice."); Restatement (Second) of Torts § 586 cmt. a (1977) (explaining that an attorney's filing of "all pleadings and affidavits necessary to set the judicial machinery in motion" are absolutely privileged).

BHB also allegedly plotted with Habash to retake the property and, to that end, generated a research memorandum identifying potential theories upon which Habash could seek rescission of the purchase agreement. BHB also wrote a demand letter on behalf of Habash to LA Pacific feigning ignorance of the 60–month closing date. These actions are plainly communications made in contemplation of litigation and relate to the subject of the litigation. Thus, the communications are covered by the absolute litigation privilege. *See* Fink, 118 Nev. at 434, 49 P.3d at 644 (privilege

protects attorney's pre-litigation discussions with client); *Richards v. Conklin*, 94 Nev. 84, 85, 575 P.2d 588, 589 (1978) (privilege protects letters written by attorneys to their clients' adversary before the initiation of a malpractice suit). All of these communications are protected by the absolute litigation privilege even if they were known to be false or made with malicious intent. *Virtual Educ.*, 125 Nev. at 382, 213 P.3d at 502. Because the absolute litigation privilege applies to these communications, all claims based on them are barred. *Hampe*, 118 Nev. at 409, 47 P.3d at 440.

***4** In addition to BHB's privileged communications discussed above, LA Pacific argues that BHB acted affirmatively and with the intent to disrupt the sale of the property to a third party. Such conduct does not form a basis for LA Pacific's claims because all causes of action are based on BHB's filing of complaints and lis pendens, which we have already determined are privileged communications. Furthermore, even if it were established that BHB had scrubbed its files clean of evidence that showed Habash had agreed to a 60 month hold-back period, any filings that contained such misleading information would still be privileged. *See Virtual Educ.*, 125 Nev. at 382, 213 P.3d at 502. Any alleged misconduct by BHB would have ultimately manifested itself in a privileged communication.[3] For the foregoing reasons, we

ORDER the petition GRANTED AND DIRECT THE CLERK OF THIS COURT TO ISSUE A WRIT OF MANDAMUS instructing the district court to vacate its order granting LA Pacific's motion for reconsideration and to enter an order dismissing LA Pacific's case on basis that it is barred by the absolute litigation privilege.

Footnotes

1 "SLAPP" is an acronym for strategic lawsuits against public participation.

2 Because this case is disposed of by the absolute litigation privilege, we do not reach the issue of the applicability of NRS 41.660 to this case.

3 After this case was submitted for decision, LA Pacific filed a motion to supplement the record with a recent California decision related to the parties. We deny LA Pacific's motion because the California decision is inapplicable and does not affect our disposition.

End of Document

Exhibit 3

Exhibit 3

IN THE SUPREME COURT OF THE STATE OF NEVADA

IN RE: DISCIPLINE OF JANICE E. SMITH, ESQ.

No. 43165

FILED

MAR 25 2005

JANETTE M. BLOOM
CLERK OF SUPREME COURT
DEPUTY CLERK

ORDER OF SUSPENSION[1]

This is an automatic appeal from a Southern Nevada Disciplinary Board hearing panel's recommendation that attorney Janice E. Smith be suspended from the practice of law for thirty days, based on the panel's findings that she violated Supreme Court Rules 157 (conflict of interest), 165 (safekeeping property), 170 (meritorious claims), 172 (candor to the tribunal), and 203(3) and (4) (misconduct involving misrepresentation and conduct that is prejudicial to the administration of justice). The panel found the following mitigating factors: (1) Smith cooperated and participated in good faith in the disciplinary process, (2) she has practiced law for approximately twenty-three years, and (3) she has had no prior discipline. In addition to the suspension, the panel recommends that Smith be ordered to pay the disciplinary proceeding's costs.

Although the recommendations of a disciplinary panel are persuasive, this court is not bound by a panel's findings and

[1]The Honorable A. William Maupin, The Honorable Mark Gibbons, and The Honorable Ronald Parraguirre, Justices, voluntarily recused themselves from participation in the decision of this matter.

05-05842

recommendations, and must examine the record anew and exercise independent judgment when determining whether and what type of discipline is warranted.[2] Ethical violations must be proven by clear and convincing evidence, which this court has described as evidence which "'need not possess such a degree of force as to be irresistible, but [which must include] evidence of tangible facts from which a legitimate inference . . . may be drawn.'"[3]

In 1998, Smith incorporated Accent's, Inc. on behalf of Donald Suttle and Ruth Roy, who were made equal partners of the corporation. Smith acted as the corporation's registered agent and corporate counsel. On the list of corporate officers and directors that Smith filed with the Secretary of State, Suttle was listed as president and Roy was listed as secretary/treasurer.

In April 2000, Suttle and Roy began disputing the distribution of corporate money and the re-payment of Suttle's start-up loans. Roy also asserted that Suttle had hired illegal aliens to work for Accent's. In June 2000, Roy seized corporate funds and delivered them to Smith, who deposited the funds into her attorney trust account. Smith testified that she represented to both Suttle and Roy that she only represented the corporation. Suttle claimed in a letter, however, that he had received a letter from Roy, faxed from Smith's office, in which Roy indicated that she had received legal advice from Smith. Roy testified that she went to Smith, as a friend, after she seized the corporate proceeds, and Smith said

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[2]See In re Kenick, 100 Nev. 273, 680 P.2d 972 (1984).

[3]In re Stuhff, 108 Nev. 629, 635, 837 P.2d 853, 856 (1992) (quoting Gruber v. Baker, 20 Nev. 453, 477, 23 P. 858, 865 (1890)).

she would place the funds in her trust account. At some point, Roy retained independent counsel regarding her concerns about the corporation and Suttle's alleged conduct.

According to the record, Suttle sent letters to Smith directing her to pay bills on behalf of the corporation from the funds she held. In response, Smith informed Suttle that she had paid the bills from the funds held in trust. When Suttle subsequently retained counsel, however, he learned that Smith had not paid all the forwarded bills. Suttle's counsel tried several times to contact Smith, but she did not respond. Subsequently, Suttle filed a complaint against Roy and Smith for an accounting, breach of fiduciary duty, and for injunctive relief. The court granted Suttle a preliminary injunction against Roy and directed Roy and Smith to provide an accounting. Smith testified during the disciplinary proceeding that she had paid all bills for which she received proper invoicing and/or documentation.

In July 2000, Suttle wrote a letter to Smith terminating her as corporate counsel. Initially, Smith refused to accept the termination until Suttle provided her with proof that he was the corporation's president. Eventually, Smith resigned.

In October 2000, Smith, who primarily practices bankruptcy law and is an accountant, filed a petition for involuntary bankruptcy against Suttle on behalf of three creditors: Apollo Credit, Bland Ford House Movers, and JTR Enterprises. JTR Enterprises is a business that Smith incorporated on behalf of Jeff Anderson. Anderson was Roy's boyfriend, and Anderson and Suttle had previously been partners in a home moving business. The bankruptcy petition was filed eight days after

the preliminary injunction was entered in the district court. Suttle retained counsel to defend himself.

Suttle then moved to dismiss the involuntary bankruptcy. The motion was granted, and Suttle was awarded $1,000 in attorney fees and $78 in costs. Additionally, the court informed Suttle that if he wanted additional fees, he had to prove bad faith at an evidentiary hearing. In July 2001, an evidentiary hearing was held. Testimony established that Smith did not have an attorney-client relationship with two of the three creditors that she purported to represent in the bankruptcy proceedings: Apollo Credit and Bland Ford House Movers. Consequently, the bankruptcy court found that Smith had filed the involuntary bankruptcy petition in bad faith. Accordingly, Smith and JTR Enterprises were ordered to pay Suttle, jointly and severally, $5,000 in compensatory damages, $1,000 in punitive damages, $5,622.50 in attorney fees, and $51.80 in costs.

After the bankruptcy proceedings concluded, Suttle filed a grievance with the State Bar concerning Smith's conduct. Following a disciplinary hearing, the panel recommended a thirty-day suspension. Smith did not file a brief in this court opposing the panel's recommendation.

SCR 157 (conflicts of interest) provides that an attorney must not represent a client if the representation of that client is directly adverse to another client, unless the attorney obtains each client's consent and the attorney reasonably believes that the representation will not adversely

affect the relationship with the other client.[4] Moreover, an attorney must not represent a client if the representation might be materially limited by the attorney's responsibilities to another client, unless the attorney obtains each client's consent and the attorney reasonably believes that representing the new client will not be adversely affected by representing the other client.[5]

The panel found a conflict of interest, under SCR 157, based on Smith's representation of one corporate officer against another officer. When Roy came to Smith with allegations that a monetary conflict existed and that Suttle was putting the corporation at risk by hiring illegal aliens, Smith did not notify Suttle of what was transpiring. If Smith was representing Roy as corporate counsel, then she was also representing Suttle and clearly had a conflict. Once Smith was aware of the conflict, she should have sought consent from both parties to represent Roy, or at the very least advised them to seek independent counsel. Moreover, Smith could not reasonably have believed that advising Roy would not adversely affect Suttle. Thus, we conclude that clear and convincing evidence support's the panel's findings that a conflict of interest existed.[6]

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[4]SCR 157(1)(a) and (b). Also, it appears that Smith's conduct in filing the involuntary bankruptcy on behalf of JTR Enterprises against Suttle violated SCR 159 (conflict of interest: former client), but the panel did not charge her with this violation. See In re Discipline of Schaefer, 117 Nev. 496, 516, 25 P.3d 191, 204, as modified by 31 P.3d 365 (2001) (noting that violations of professional conduct rules not charged in an attorney disciplinary complaint will not be considered by this court).

[5]SCR 157(2)(a) and (b).

[6]In re Stuhff, 108 Nev. 629, 837 P.2d 853.

The panel also found that Smith violated SCR 165(2) (safekeeping property) when she failed to immediately inform Suttle that she was in possession of the corporate funds, and when she failed to render a full accounting at Suttle's request. Smith placed the corporate proceeds in her trust account and was not entirely forthright with Suttle regarding whether corporate bills had been paid with the funds. The panel's findings regarding violation of SCR 165 are supported by clear and convincing evidence.[7]

The discipline panel concluded, in addition to the conflict of interest and safekeeping property violations, that Smith violated SCR 170 (meritorious claims). This rule is violated when an attorney brings or defends a proceeding, or asserts an issue that is frivolous.[8] Although the panel did not explicitly identify the basis upon which it found a violation by Smith, the panel likely based its finding on the involuntary bankruptcy proceedings. The panel also concluded that Smith violated SCR 172 (candor to the tribunal) in light of her false statements regarding her representation of two corporate creditors in the involuntary bankruptcy proceedings. Finally, the panel concluded that "the involuntary bankruptcy should never have been filed" and that Smith's misconduct involved misrepresentation (SCR 203(3)) and was prejudicial to the administration of justice (SCR 203(4)). Each of these violations is supported by clear and convincing evidence, especially in light of the bankruptcy court's bad faith findings.[9]

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[7]Id.

[8]SCR 170.

[9]Id.

Although the panel recommended a thirty-day suspension, we conclude that this recommended discipline is too lenient. Smith's main practice area is bankruptcy, and she is an accountant. The record establishes that Smith took sides with Roy against Suttle during the corporate conflict, all without Suttle's consent, that she failed to immediately inform Suttle that she was in possession of the corporate funds or to render an accounting, that she filed the involuntary bankruptcy petition in bad faith, and that Smith's misconduct involved misrepresentation and was prejudicial to the administration of justice. Accordingly, Smith shall be suspended from the practice of law for ninety days.[10] In addition, Smith shall pay the costs of the disciplinary proceedings.

It is so ORDERED.[11]

Becker, C.J.
Becker

Rose, J.
Rose

Douglas, J.
Douglas

Hardesty, J.
Hardesty

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[10]Under SCR 115, the suspension is effective fifteen days from the date of this order. Smith and the State Bar shall comply with SCR 115.

[11]This constitutes our final disposition of this case. Any future proceedings concerning Smith will be filed under a new docket number.

cc: Howard M. Miller, Chair, Southern Nevada Disciplinary Board
Allen W. Kimbrough, Executive Director
Rob W. Bare, Bar Counsel
Potter Law Offices
Perry Thompson, Admissions Office, U.S. Supreme Court

Exhibit 4

Exhibit 4

IN THE SUPREME COURT OF THE STATE OF NEVADA

IN RE: DISCIPLINE OF JOE M. LAUB. | No. 36322

ORDER OF SUSPENSION

This is an automatic appeal from a Northern Nevada Disciplinary Board hearing panel's recommendation that attorney Joe M. Laub be suspended for six months, and that he be ordered to pay the costs of the disciplinary proceeding. In his briefs to this court, Laub denies that his conduct violates the Rules of Professional Conduct, with two "technical" exceptions, and that no more than a private reprimand for these "technical" violations is warranted. We conclude that the hearing panel's recommendation should be approved.

FACTS

Background

Joe Laub was admitted to practice in Nevada in 1989 and is also licensed in California. He is currently a partner in the firm Laub & Laub with his father, Melvin Laub. In 1997, when Melvin Laub's ability to practice was limited for health reasons, he relinquished the firm's day-to-day operations to Joe Laub. The firm has offices at Lake Tahoe and in Reno, and is engaged primarily in plaintiffs' personal injury work and some criminal cases. Joe Laub works in both the Reno and Lake Tahoe offices. Testimony at the disciplinary hearing indicates that Laub is an avid tennis player and skier, and that at times he was absent from the office to pursue these interests. He has not been subject to any prior discipline.

Charles Perez runs three affiliated companies -- PSI, Medical Acquisition Corporation, and Horizon Five Plus -- that are engaged in two areas of business that are relevant to this case, both related to the medical services field.

02-00502

First, Perez offers "surgery on a lien" services to personal injury plaintiffs who require medical treatment but cannot afford it because they do not have health insurance or sufficient assets to pay for the treatment. In such situations, Perez investigates the likelihood of the plaintiff's recovery based on the case for liability and the availability of insurance to cover the cost of the treatment plus prior medical bills. If Perez is satisfied that the plaintiff has a good case and that there is sufficient insurance, he will negotiate with medical providers, many of which are part of a network he maintains. The medical providers agree to discount their normal fees in exchange for a cash payment from Perez, and to assign their bills, in their customary amounts, to him. Once a settlement is reached (or recovery is otherwise obtained), Perez is repaid from the proceeds. The difference between the cash amount Perez actually paid and the customary amount he receives from the proceeds constitutes Perez's profits. If no recovery is obtained, then Perez loses his "investment."

The second activity in which Perez and his companies engage is known as "medical factoring." Unlike "surgery on a lien," in which Perez is involved in making arrangements for medical services, medical factoring occurs after medical services have been rendered, without arrangement by Perez. Perez negotiates with medical providers to purchase their liens for medical services at a discount, in exchange for an assignment of the lien in its original amount. Perez is then repaid from the recovery, and the difference between the discounted amount he paid and the original lien amount is his profit. It appears from Perez's testimony that, for both types of activities, he sometimes passes on a portion of the savings to the injured plaintiff, but feels no obligation to do so.

Relationship between Perez and Laub

Perez and Laub met in the summer of 1995, apparently when a California lawyer employed by Laub & Laub, Jordan Morgenstern, introduced them. Morgenstern learned of Perez's "surgery on a lien" services, and believed they would be useful to some of the firm's clients. Laub introduced Perez to the firm's employees in the Reno office and stated that he could be of assistance if a client needed medical treatment but had no ability to pay. The testimony conflicted as to whether Laub also introduced Perez to the Lake Tahoe office employees. The evidence

also conflicted as to the scope of assistance Laub told the employees to give Perez. Sheila Parker, a legal assistant formerly employed by the firm in its Reno office, testified that if an employee thought a client might benefit from Perez's services, she was required to obtain Laub's permission before contacting Perez. But she also testified that Perez was given "carte blanche" to come in and view client files in search of cases he might be interested in.

Laub and Perez both testified that at their initial meeting, Perez discussed only the "surgery on a lien" services, not his "medical factoring" activities. Perez stated that he did not disclose the medical factoring to Laub because it was "none of his business." Perez repeatedly stated that he needed no authority to buy the liens, and that he was free to do as he wished in this area.

Laub indicated that if he had known of the factoring activities, he would not have dealt with Perez. Nevertheless, the record reflects that Laub continued to deal with Perez for over a year after the last possible date he could have learned of Perez' factoring activities.

Also, Laub accepted several payments from Perez after Perez had arranged medical services and obtained assignments of medical liens for at least two Laub & Laub clients.[1] In March 1996, Perez issued Laub a check for $10,000. In 1997, Perez issued two more checks to Laub, one for $1,900 and one for $6,360.41. The last two checks bore a notation that they were for "legal fees." But all three checks were deposited in Laub's personal account, not the Laub & Laub account. Perez testified that the first check was to "thank" Laub for referring him to other lawyers in Nevada, and that the other checks were for legal services rendered by Laub in evaluating a few cases (in which the plaintiffs were not represented by Laub & Laub) for Perez. Laub also indicated that the last two checks were for legal services, and that they were not deposited in the firm's account because he did not use firm staff and "it was efforts that [he] had done . . . basically outside of Laub & Laub and [its] operation." Laub stated that he was not sure why he was given the first check, but assumed it was for marketing assistance he rendered Perez. Perez issued

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[1]Laub's acceptance of these payments could indicate a conflict of interest. See SCR 157(2). For unknown reasons, however, no such violation was charged in the disciplinary complaint.

1099 statements to Laub, and Laub paid income tax on these amounts. In March 1998, at Melvin Laub's request, Laub returned the full amount of these payments to Perez, to avoid the appearance of impropriety. We note that Laub accepted the two 1997 payments well after he knew of Perez's factoring activities.

The Sartain case

Theresa Sartain was rendered a quadriplegic in a one-vehicle accident involving a Peterbilt truck in which she was a passenger. She and her husband, Gary, and their two children live outside Chicago, Illinois. The accident took place in Nevada on August 26, 1995. Gary was notified of the accident, and he and the children flew to Reno on August 27th.

A few days after the accident, Gary took the children for a walk from Washoe Medical Center, where Theresa was hospitalized. Along the way, they passed Laub & Laub's Reno office. Gary went in and asked to speak to an attorney about Theresa's case. He was told that there was no attorney present at the moment, but that he could come back the following day and meet with one.

Gary returned the following day and met with Jordan Morgenstern. Morgenstern was an experienced personal injury lawyer licensed in California, but he was not admitted in Nevada. He worked in both the Reno and Lake Tahoe offices of Laub & Laub.

Morgenstern and Gary executed a contingency fee agreement providing that the firm would receive one-third of any recovery as its fee, and would also be reimbursed for costs. The agreement did not contain the mandatory language of SCR 155(3), in bold as required by the rule, that in the event of a loss, the client could be liable for the opposing party's attorney fees and costs. Laub testified that the Sartain case was the largest ever handled by Laub & Laub.

Gary testified that his understanding was that the firm would pursue all possible defendants, including the driver and his employer, any maintenance providers, and the manufacturer of the truck and/or sleeping berth, on all possible theories, including negligence and products liability. After an investigation, the firm made a demand on the employer's liability policy for the policy limit of $1,000,000. The demand letter was signed by Laub. The insurer initially took the position that it would not pay, because there was evidence suggesting that Theresa may have contributed

to the accident, and because the driver may not have been acting in the course and scope of his employment at the time of the accident. Despite this initial defense, a settlement was eventually reached.

Gary is a carpenter, and has health insurance through the carpenter's union. At the time of Theresa's accident, there was some confusion over whether he had sufficient hours as a carpenter for full medical coverage. As a result, coverage for Theresa's medical bills was initially denied.

In September 1995, Theresa was scheduled to be released from the hospital to a rehabilitation center, but the Sartains could not find a center that would accept her because of their health insurance issues. Morgenstern told Gary that Perez might be able to help and gave him Perez's number. After Gary called Perez, and told him about Theresa's situation, Perez investigated the case and agreed to arrange for Theresa's admission to a rehabilitation center. He contracted with the center to pay Theresa's bill there at a discount, in exchange for an assignment to Perez of the full customary amount. Theresa was transferred to the rehabilitation center on September 18, 1995.

Shortly thereafter, Theresa expressed a desire to return to Chicago. Gary and the children had returned weeks before, and Theresa did not want to stay in Reno, so far away from her home and family. Because of her medical condition, the only way to transport her to Chicago was by an air ambulance with adequate medical personnel to monitor her. Gary researched such services, and found that it would cost between $15,000 and $28,000. The Sartains could not afford this amount.

Gary contacted Perez, and Perez arranged for Theresa to travel to Chicago by air ambulance. He agreed to pay the company $7,500 in cash, and they assigned him their bill in the amount of their customary charge, $26,000. Theresa was flown home on October 4, 1995.

The case settled in November 1995 for the full policy limit of $1,000,000. At the disciplinary hearing, conflicting testimony was presented concerning how anxious the Sartains were to receive the proceeds. Mona Atnip, a legal assistant and office manager of the Lake Tahoe office, testified that the Sartains called frequently asking why a settlement had not been reached yet and demanding that some recovery be obtained immediately. After the settlement, they repeatedly demanded that the money be disbursed as soon as possible. Gary testified that he

and Theresa were most interested in obtaining the maximum amount from all possible defendants, not in this particular settlement. Gary stated that the only reason for urgency was that Morgenstern had told him that the trucking company (or the insurance company – the record is not clear) was in financial trouble and might go into bankruptcy, and so the settlement should be concluded as soon as possible.

On December 9, 1995, Morgenstern met with the Sartains in Chicago to complete the settlement documents. Documents executed at this meeting included a release in favor of the trucking company and a "cost and disbursement statement."

The cost and disbursement statement was intended to summarize how the settlement proceeds would be distributed. It indicated that Laub & Laub would receive one-third of the settlement as its fee, plus a small amount that had been advanced for costs. It also listed several medical bills that would be paid from the proceeds, and that Laub & Laub would attempt to reduce the amount of these bills. Finally, it stated that a portion of Laub & Laub's fee would stay in the trust account to serve as a fund from which to cover costs in any products liability case. The statement did not indicate that any sums would be paid to Perez, or to anyone other than the listed medical providers, nor did it indicate that anyone other than Laub & Laub would negotiate with the medical providers. Gary and Theresa signed the statement.

By January 1996, Perez had negotiated with most of Theresa's medical providers to purchase their liens. Two exceptions were Washoe Medical Center and Hoffman Estates Medical Center (a medical center in the Chicago area where Theresa stayed after her return to Illinois). Through one of his companies, Perez sent a demand to Laub & Laub for payment of the amount of the liens, minus a $45,000 discount. A check, signed by Melvin Laub, was issued the following day.

Also in January 1996, the money remaining in the trust account to fund a products liability suit was disbursed to Laub & Laub's general account. Melvin Laub testified that the funds were released because the firm had determined that there was no viable products

liability case.[2] He also testified that they had attempted to refer the Sartains' case to several lawyers who practice in that area, and none was willing to take the case. The record contains no evidence that anyone at the firm communicated to the Sartains that no products liability case would be pursued, and Gary testified that he did not receive any such notice.

By March 1996, the Sartains apparently were unhappy with the firm's representation, particularly the failure to aggressively pursue a products liability claim. That month, the Sartains met with Laub and Melvin Laub in Carson City. This meeting was contentious, but at its end, the Sartains were still represented by Laub & Laub. Other than a brief introductory meeting between Laub, Theresa, Gary and Morgenstern at the Reno rehabilitation center in late September 1995, this was the only time Laub met with either Sartain.

By April 1996, the carpenter's union had agreed to cover at least some of Theresa's bills, including the Washoe Medical Center bill (except a $3,000 co-pay) and the Hoffman Estates bill. Perez negotiated with Washoe Medical Center to purchase its rights to the $3,000 co-pay; he also negotiated with the union to purchase its claim for reimbursement of the amounts it had paid to Washoe Medical Center and Hoffman Estates. Then, through one of his companies, he sent a demand to Laub & Laub for these amounts, with no discount. Perez testified that Laub was angry that Perez did not discount his demand, and attempted to convince Perez to reduce his demand so that more money could go to the Sartains. Perez refused, and had his lawyer send a demand letter to Laub & Laub with a threat to sue if the money was not paid promptly. A check, signed by Laub, was issued the next day.

At the disciplinary hearing, Gary testified that he had understood that no funds from the lawsuit would be paid to Perez. Theresa stated that she was unaware of any arrangement for the Reno rehabilitation center, but knew that Perez would be reimbursed from the proceeds for the air ambulance flight. Perez testified that he told them that he would be reimbursed for both the rehabilitation center bill and the

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[2]It is not clear who made this determination: Morgenstern, Laub, Melvin Laub, or some combination. Morgenstern did not testify at the panel hearing.

air ambulance flight bill from the lawsuit proceeds. Perez testified that he explained to the Sartains, but not to Laub, that he would purchase prior medical liens in order to have a first position lien on the lawsuit proceeds. The Sartains stated that they believed Perez was an employee of, or at least formally affiliated in some way with Laub & Laub, based on statements made by Morgenstern and Perez.

The record reflects that Morgenstern was assigned primary responsibility for the Sartain case, despite his lack of a Nevada license. At some point during the pendency of the Sartain case, personality conflicts between Laub and Morgenstern reached a critical point, and Morgenstern was reassigned to the Lake Tahoe office. He took the Sartain case with him. Despite Laub's admission that the Sartain case was the largest ever handled by the firm, his personal involvement with the case appears to have consisted of the September 1995 meeting at the Reno rehabilitation center, the March 1996 meeting in Carson City, and signing the demand letter to the insurance company. Laub did not clarify why he, rather than Morgenstern, signed the demand letter.

The Landrith case

David Landrith was homeless and unemployed, and had no health insurance. He was seriously injured when he was struck by a car while walking and was treated at Washoe Medical Center. Michael Decker, a nonlawyer employee of Laub & Laub, initially met with Landrith at the hospital to discuss his case. Decker then executed a contingency fee agreement on behalf of the firm. Landrith signed the agreement. The agreement was on the same form as in the Sartain case, which did not contain the attorney fees and costs language in bold as required by SCR 155(3).

Decker testified at the disciplinary hearing that it was the firm's normal practice for him to conduct the initial meeting with a client and execute the fee agreement. Laub testified that this policy has since been changed, and that attorneys now conduct all initial meetings, and only attorneys can execute fee agreements. Laub nevertheless contends in his brief that there was nothing improper in Decker performing these activities, and asserts that many other "volume" personal injury firms assign such tasks to nonlawyers.

Landrith required a halo cast as a result of his injuries. Apparently, this type of cast can only be removed surgically, and Landrith

had no insurance or assets to pay for the surgery. A Laub & Laub employee gave Landrith Perez's number and told him that Perez might be able to arrange for the surgery. Perez testified that, after investigation, he made the arrangements, but that Landrith did not have the surgery. Landrith did not testify at the hearing, and so it is not known why he did not have the surgery, or whether and how the cast was eventually removed.

While the case was pending, Landrith asked Laub for some money to help with his living expenses. On two occasions, Laub advanced him funds -- the first time $2,000, and the second time $1,000. Laub stated that he did not know that this practice was prohibited by SCR 158(5) (conflict of interest: prohibited transactions; advancing money to client), that he was only trying to help an indigent client, and that after learning of the rule's provisions, he no longer advances funds in this manner.

The case settled for the driver's insurance policy limit of $100,000. The cost and disbursement statement for the case lists Laub & Laub's fee (one-third of the settlement), the two advances together with two $75 "administrative charges" for the advances, and unspecified "medical bills."

While the case was pending, Perez successfully negotiated with Washoe Medical Center for assignment of its lien in exchange for payment at a discount. His company then made a demand upon Laub & Laub for the full amount of the bill. Laub issued a check the next day. Laub testified at the hearing that he was angry that Washoe Medical Center would negotiate with Perez when it refused to negotiate with local lawyers,[3] and was angry with Perez for not discounting his demand, but that he was required to pay the lien. Additionally, Laub testified that Landrith tried to convince Laub to give him the amount owed to Washoe

[3]At the hearing, the testimony of Laub and others indicated that Washoe Medical Center consistently refuses to reduce its liens when approached by local personal injury lawyers. It appears that Washoe Medical Center gave Perez a discount by mistake, and later attempted to collect additional sums from Landrith. Washoe Medical Center eventually dropped these efforts and wrote off the remaining amount. The record does not reveal whether Laub or the firm assisted Landrith in persuading Washoe Medical Center to cease its collection efforts.

Medical Center; Laub refused because of the statutory lien held by the hospital.

Disciplinary proceedings

The Sartains and Landrith complained to the state bar. After investigation and presentation to a screening panel, the state bar filed a two-count formal complaint concerning both grievances.

Count I concerned the Sartain case. It contained a description of Perez's involvement in the case, and contained a general allegation that Laub's conduct violated SCR 151 (competence), SCR 154 (communication), SCR 165 (safekeeping property) and SCR 203(3) (misconduct involving dishonesty, fraud, deceit or misrepresentation). The products liability claim is not mentioned anywhere in the complaint, nor were any violations of SCR 156 (confidentiality) or SCR 157(2) (conflict of interest) charged.

Count II concerned the Landrith case. It alleged several violations based on specific conduct, as follows:

- SCR 189(2) (unauthorized practice of law) and SCR 187 (responsibilities concerning nonlawyer assistants), because Laub permitted Decker to execute contingency fee agreements and to consult with clients concerning the merits of their cases in initial interviews;
- SCR 155(3) (fees: contingency fee agreements), because the fee agreement did not contain the mandatory language in bold concerning attorney fees and costs;
- SCR 154 (communication), because Laub failed to communicate with Landrith concerning the fee agreement before it was signed;
- SCR 153 (diligence), because Laub failed to adequately investigate whether Washoe Medical Center had asserted a lien against Landrith's settlement at the time the proceeds were received and available for distribution, did not distribute the insurance proceeds to Landrith after deduction of the firm's fees and costs, did not attempt to reduce the amount of Washoe Medical Center's lien, and/or did not advise Landrith that he was entitled to the funds if a lien had not been properly perfected by Washoe Medical Center;[4]

[4]It appears that this last allegation would more properly be a violation of SCR 154 (communication).

- SCR 154 (communication), because Laub failed to communicate the status of Landrith's obligation to pay Washoe Medical Center from the settlement proceeds, and failed to explain that a reduction may have been possible;
- SCR 153 (diligence), because Laub failed to adequately investigate whether Washoe Medical Center had assigned its lien to Perez's company and if it had, the amount Perez paid;
- SCR 154 (communication), because Laub failed to inform Landrith of the status and nature of a hospital account, of his right to the proceeds in the absence of a validly perfected lien, that the lien had been assigned to Perez's company, and that Washoe Medical Center might have been willing to reduce its bill;[5]
- SCR 165 (safekeeping property), because Laub failed to notify Landrith of the receipt of funds, and paid Perez's company without a valid perfected lien by Washoe Medical Center or any authorization from Landrith to pay Perez's company; and
- SCR 158(5) (conflict of interest: prohibited transactions), because Laub advanced money to Landrith.

Laub filed an answer to the bar's complaint. With regard to the Sartain case, Laub denied that he had any knowledge of Perez's medical factoring activities, and pointed out that the demand letter from Perez's company does not identify Perez in any way, and is signed by another individual. Laub denied that he had violated any of the rules charged by the state bar. With respect to the Landrith case, Laub admitted that he violated SCR 155(3), because the contingency fee agreement did not contain the mandatory language. He also admitted to a violation of SCR 158(5), because he advanced money to Landrith, but pointed out in mitigation that Landrith was indigent and needed funds, and that the settlement was consummated less than two weeks later. Laub denied the remaining violations.

At the formal hearing, witnesses included Theresa and Gary Sartain, Michael Decker, Sheila Parker, Charles Perez, Mona Atnip, and Melvin and Joe Laub. The panel found that Laub had committed two

[5]This charge appears duplicative of the previous SCR 154 charge.

violations of SCR 151 (competence), one violation of SCR 154 (communication), and one violation of SCR 203(3) (misconduct involving dishonesty, fraud, deceit or misrepresentation) in his representation of the Sartains; the panel found that Laub had not violated SCR 165 (safekeeping property). With respect to the Landrith case, the panel found that Laub had committed one violation each of SCR 153 (diligence), SCR 154 (communication), SCR 155(3) (fees), SCR 158(5) (conflict of interest: prohibited transactions), SCR 187 (responsibilities concerning nonlawyer assistants), and SCR 189(2) (unauthorized practice of law); the remaining violations charged in the complaint were not found. Based on its written findings, the hearing panel issued a recommendation that Laub be suspended for six months. This automatic appeal followed.

DISCUSSION

Sartain products liability claim

Two of the violations found by the panel with respect to the Sartain case concern the Sartains' possible products liability claim. Specifically, the panel found that Laub violated SCR 151 (competence), by failing to pursue such a claim, and SCR 154 (communication), by failing to communicate with the Sartains about whether they had a viable products liability claim or about the decision to transfer the funds held back for costs from the firm's trust account to the general account.

Laub argues that he has been denied due process because the complaint did not assert any charges based on a possible products liability claim, and so he was not notified of any such charges. The state bar weakly argues that since it attached the cost and disbursement statement to the complaint, and the statement mentioned a possible products liability claim because of the funds being held back for costs, Laub was on notice that his conduct concerning the products liability claim was subject to review. The state bar also argues that Nevada is a notice-pleading jurisdiction, and that its complaint was sufficient under this standard. In reply, Laub argues that the rules of civil procedure do not apply to bar complaints; rather, SCR 105(2) governs.

This court recently reiterated in In re Discipline of Schaefer[6] that due process requirements must be met in bar proceedings, and that

[6]117 Nev. ___, 25 P.3d 191, as modified by 31 P.3d 365 (2001).

an attorney charged with misconduct must be notified of the charges against him. Also, SCR 105(2) provides that "[t]he complaint shall be sufficiently clear and specific to inform the respondent of the charges against him or her." Here, the complaint makes no mention whatsoever of the products liability claim, and the record reflects that the state bar never sought to amend the complaint to include violations based on this claim. We conclude that Laub was not adequately notified of any charge against him based upon the Sartains' possible products liability claim, and that these violations must be disregarded.

Misstatements in Sartain cost and disbursement statement

Another violation found by the panel concerned the cost and disbursement statement from the Sartain case, which indicated that Laub & Laub was attempting to reduce the amounts of medical bills. The panel found that this statement was false and misleading, because there was no evidence that any such reductions were sought by Laub & Laub. The panel thus concluded that Laub violated SCR 203(3) (misconduct involving dishonesty, fraud, deceit or misrepresentation). Laub argues that he did not prepare the statement, sign it, or view it before the Sartains signed it, and so cannot be responsible for any inaccuracies. The state bar did not respond to this argument in its answering brief.

The testimony at the hearing indicates that Laub was the attorney responsible for handling the Sartains' case. While the record reflects that Jordan Morgenstern performed most of the work on the case, Morgenstern was not a Nevada licensed attorney. Thus, his activities on behalf of the Sartains could only be those of a law clerk or paralegal, and could only permissibly be performed under the direct supervision of a Nevada attorney, in this case, Laub.[7] We therefore conclude that Laub was responsible for the content of the cost and disbursement statement, and consequently, for any misrepresentations contained in it. "[A]n

[7]See SCR 77 (providing that "no person may practice law . . . who is not an active member of the state bar"); SCR 189(2) (providing that "[a] lawyer shall not . . . [a]ssist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law"); NRS 7.285(1)(a) (providing that "[a] person shall not practice law in this state if the person . . . [i]s not an active member of the State Bar of Nevada or otherwise authorized to practice law in this state pursuant to the rules of the supreme court").

attorney is liable, in malpractice or as an ethical violation, for his paralegal's acts."[8]

We also agree with the hearing panel that the statement was misleading, because there is no evidence that any Laub & Laub employee sought reductions in any of the medical liens. In addition, the reductions obtained by Perez were not for the Sartains' benefit. Accordingly, we conclude that the violation of SCR 203(3) has been shown by clear and convincing evidence.

Expert testimony and SCR 151 violation in Sartain case

The panel concluded that Laub violated SCR 151 (competence) by failing to properly investigate Perez before allowing him to become involved with the firm's clients, and by failing to attempt to reduce the Sartains' medical bills.

With respect to his investigation of Perez, Laub argues that he checked Perez's references and that this effort was adequate. He further asserts that any problems arising from Perez's involvement concerned his medical factoring activities, and that Perez did not disclose these activities to him.

Laub also argues that while his practice is generally to attempt to reduce a client's medical bills by negotiating with the provider, such a practice is not required. According to Laub, a failure to do so should not be an ethical violation, since the medical providers are in fact under no duty to reduce their bills and, in the absence of any claim that a bill is improper, are entitled to payment. Laub does not assert that any reductions were attempted.

Finally, analogizing to malpractice cases, Laub argues that to establish a violation of SCR 151, the state bar must show through expert testimony what a competent lawyer would have done, and that his conduct fell below that standard. As the state bar presented no such evidence, Laub asserts that this violation is not supported.

The state bar argues that the violation concerning Laub's investigation of Perez consists of the inadequate investigation coupled with the "carte blanche" access to the firm's files that was afforded to

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[8]In re Estate of Divine, 635 N.E.2d 581, 587 (Ill. App. Ct. 1994); see also SCR 187 (responsibilities concerning nonlawyer assistants).

Perez.[9] The bar further asserts that "[a]s experienced practitioners, the panel determined Laub had a duty pursuant to SCR 151 (competence) to at least attempt a good faith reduction of medicals." The bar appears to argue that the rule itself provides a standard of competence ("legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation"). The bar does not specifically address Laub's contention that expert testimony is required, and does not argue that any was presented.

With regard to his investigation of Perez, Laub testified that Perez gave him the names of two attorneys in Southern California as references, that he called these attorneys and "they praised [Perez]." He recalled the name of one, but could not recall the other. Perez testified that he did not initially mention his medical factoring activities to Laub because they were "none of his business"; the record reflects that, at the absolute latest, Laub learned of Perez' involvement in medical factoring activities in April 1996. Sheila Parker testified that Perez had "carte blanche" access to client files; Laub admitted that the type of access described by Parker would jeopardize the attorney-client privilege, but denied that this scope of access was afforded to Perez. Joe and Melvin Laub both testified that their general practice was to attempt to reduce medical bills, but both stated that it was not required.

It appears that the panel gave weight to Parker's testimony over Laub's concerning the access provided to Perez. Also, the panel either disbelieved Laub's testimony concerning his efforts to investigate Perez, or considered them to be so inadequate as to be no investigation at all. Clearly, the panel did not believe that it required expert testimony to establish a standard of competence.

We have found no case in which expert testimony was required to establish a lack of competence in a disciplinary proceeding.[10]

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[9]It appears that the crux of this violation is the broad access given to Perez; it is not clear from the record why a violation of SCR 156 (confidentiality) was not charged.

[10]See In re Flanagan, 690 A.2d 865 (Conn. 1997); In re Masters, 438 N.E.2d 187, 191-92 (Ill. 1982); In re Disciplinary Action Against Howe, 621 N.W.2d 361, 365 (N.D. 2001); In re Disciplinary Action Against McDonald, 609 N.W.2d 418, 424 (N.D. 2000); Hawkins v. Commission for Lawyer Discipline, 988 S.W.2d 927 (Tex. App. 1999).

Reasons given by these courts for not requiring expert testimony include that it would not be helpful to the disciplinary body, that the disciplinary body was a panel of experts and so was able to assess the lawyer's conduct independently, that ethical rules set forth standards acceptable to members of the bar in general, not of any specialty, that requiring expert testimony would place too onerous a burden on both sides in discipline cases, and that interpretation of ethical rules involves a question of law for the court, and so no expert testimony is required. We find the reasoning of these cases persuasive.

Here, Laub was found to have violated SCR 151 (competence) in the Sartain case. We conclude that expert testimony was not necessary to establish that a competent lawyer will at least attempt to reduce a client's medical liens, especially when the lawyer has specifically represented that such efforts will be made. In this regard, we note that an attorney has a duty to negotiate for the client to the best of his or her ability, whether those negotiations be with the opposing side, the opposing side's insurer, or the client's own medical providers.

Next, the extent of access to client files that was provided to Perez seriously jeopardized the attorney-client privilege of the firm's clients. Expert testimony was not needed to establish that a lawyer does not act competently by causing the clients' confidences to be placed in such a precarious state.

Finally, a lawyer has a duty to conduct a reasonable investigation of persons to whom the lawyer refers his client for services such as those rendered by Perez. We are not satisfied that Laub's two phone calls fulfilled this duty.

We thus conclude that the violation of SCR 151 is supported by clear and convincing evidence.

Violations of SCR 154, 187, and 189 in Landrith case

The panel determined that Laub violated SCR 187 (responsibilities regarding nonlawyer assistants) and SCR 189(2) (unauthorized practice of law) by failing to adequately supervise Michael Decker and by permitting him to engage in conduct that constituted the practice of law in connection with the firm's representation of Landrith. Specifically, the panel found that Decker met with Landrith, concluded that he had a meritorious claim, explained the contingency fee agreement to him, and signed the agreement on the firm's behalf. The panel also

found that Laub violated SCR 154 (communication) by not being involved at the time the fee agreement was executed and by his failure to explain the contingency fee agreement to Landrith before he signed it.

Laub argues that Decker's actions did not constitute the practice of law, and that Decker previously engaged in similar activities when he worked for another personal injury firm. In addition, Laub points out that Decker evaluated personal injury cases in his previous career as an insurance claims adjuster, and had considerable experience in this area. Laub contends that the fee agreement was self-explanatory and needed no elaboration by Decker, and that Decker simply used a form agreement – he did not engage in negotiations with Landrith or exercise discretion in preparing the document.

Laub asserts that many people who are not licensed to practice law in Nevada engage in similar conduct, such as a nurse or hospital employee explaining a release that a patient is asked to sign. He further argues that bar counsel, law clerks, Supreme Court staff attorneys, and certain justices of the peace are not required to have Nevada law licenses, and engage in conduct that even more clearly resembles the practice of law, "yet nobody would suggest that these people should be prosecuted by the State Bar for committing ethical violations of Rules 187 and 189." Finally, Laub asserts that the bar's position "ignores the realities of plaintiffs' personal injury practice in modern society." He claims that many plaintiffs would not be able to find counsel if plaintiffs' personal injury lawyers could not delegate a great deal of work to paralegals and staff.

The state bar argues that Decker's experience is irrelevant; if he does not have a license, he cannot practice law. Similarly, Decker was not employed in a position covered by a specific exception to the general rule that requires a law license, such as those applicable to bar counsel, staff attorneys, etc., and so these exceptions are irrelevant. The state bar notes that fee agreements "are not always clear and unambiguous, especially to a lay person." The state bar also asserts that a determination as to whether a potential client has a viable case requires a legal conclusion, and that only a lawyer should be permitted to accept or reject a case and sign a fee agreement on behalf of a firm.

SCR 187(2) provides that "[a] lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that

the person's conduct is compatible with the professional obligations of the lawyer." SCR 187(3)(a) provides that if a nonlawyer employee engages in conduct that would be an ethical violation if performed by a lawyer, the lawyer engages in misconduct by ordering or ratifying the conduct. SCR 189(2) provides that a lawyer shall not assist a nonlawyer in conduct that constitutes the unauthorized practice of law.

Neither Laub nor the state bar cites to any authority defining what constitutes the practice of law, or to any authority discussing factually similar cases. We have reviewed several cases from other jurisdictions,[11] and conclude that the decision of whether to represent a particular client calls for an exercise of professional judgment, and that the attorney-client relationship must be formed with the attorney, not a nonlawyer assistant. In addition, a nonlawyer assistant may not be delegated the task of advising a client or potential client about his or her legal rights and remedies.

Decker's activities crossed the line between permissible paralegal duties and those that must be performed by a lawyer. The firm's relationship with Landrith was initially formed, not with the attorney, but with the paralegal. Decker was not subject to any supervision in making the determination to represent Landrith, nor in any statements he may have made to Landrith about the terms of the fee agreement or the viability of Landrith's case. In particular, Decker should not have had the authority to advise potential clients about the possibility of recovery, or to make the decision about whether to represent a client.

We also note that Laub's argument concerning the "realities" of plaintiffs' personal injury practice is without merit. Since the commencement of this disciplinary proceeding, Laub & Laub has changed its practices so that an attorney always conducts the initial interview with a potential client. While many duties may be delegated to nonlawyer assistants, the lawyer must retain control over the case, and must properly supervise the nonlawyer. That did not happen in this case. The

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[11]See McMackin v. McMackin, 651 A.2d 778 (Del. Fam. Ct. 1993); Louisiana State Bar Ass'n v. Edwins, 540 So. 2d 294 (La. 1989); Attorney Griev. Comm. v. Hallmon, 681 A.2d 510 (Md. 1996); Attorney Griev. Com'n v. James, 666 A.2d 1246 (Md. 1995); In re Opinion No. 24, 607 A.2d 962 (N.J. 1992).

violations of SCR 187 and 189 are supported by clear and convincing evidence.

With respect to the SCR 154 (communication) violation, Laub argues that there is no evidence that Landrith had any questions about the fee agreement, or that any explanation was required. Laub asserts that the panel is attempting to set a standard for personal injury attorneys without any evidence, in the form of expert testimony or otherwise, to support what that standard should be. In contrast, the state bar argues that SCR 154 contemplates that a lawyer, not a nonlawyer, will communicate important aspects of the case to the client, and that communications concerning a contingency fee agreement fall within the category of "important aspects."

SCR 154 provides that a lawyer shall keep a client reasonably informed, shall explain a matter to the extent reasonably necessary for the client to make informed decisions, and shall promptly comply with reasonable requests for information from the client. As discussed above, the duties delegated to Decker, including responsibility for the initial client meeting at which the client's potential claims would be discussed, exceeded the scope of duties that may permissibly be delegated to a nonlawyer. By failing to meet with Landrith himself, or to have a licensed Nevada attorney meet with him to advise him about the viability of a claim, Laub failed to adequately communicate with Landrith. Accordingly, this violation is supported by clear and convincing evidence.

Violation of SCR 153 in Landrith case

The panel found that Laub violated SCR 153 (diligence) by failing to adequately investigate whether Perez's company had properly acquired Washoe Medical Center's lien, and whether that lien was perfected, before paying Perez's demand the following day.

Laub asserts that he or his staff did investigate the claim. He also argues that regardless of whether the lien was perfected, there is no question that Washoe Medical Center was actually owed the amount asserted, or that Perez's company was assigned Washoe Medical Center's rights. The state bar, on the other hand, contends that the panel did not find Laub's testimony that he investigated the claim to be credible. The state bar further makes the conclusory argument that one day is insufficient for a proper investigation.

We conclude that one day was sufficient time for the firm to verify the fact and amount of Washoe Medical Center's bill, and that it was validly assigned to Perez's company. The documentation in the record demonstrates that both the bill itself and the assignment were valid. We therefore conclude that this violation is not supported by clear and convincing evidence.

Violations of SCR 155(3) and 158(5) in Landrith case

Laub admitted that his contingency fee agreement in the Landrith case did not meet the requirements of SCR 155(3) (fees: contingency fee agreements). The violation is thus supported by clear and convincing evidence. If he has not already done so, he must revise the firm's form agreements in accordance with SCR 155(3).

Laub also admitted that his actions in advancing money to Landrith violated SCR 158(5) (conflict of interest: prohibited transactions; advancing money to client), but maintains that he did so only to help an indigent client, and in ignorance of the rule's prohibition on such an advance. We conclude that this violation is established by clear and convincing evidence. Laub's ignorance is no excuse, nor is it a mitigating factor. Laub, and every Nevada lawyer, is responsible for knowing what the Rules of Professional Conduct require. In addition, while Laub's motives may have been innocent, such conduct is clearly prohibited by the rule. We also note that Laub's claims of sympathy for the client are somewhat belied by the "administrative charge" assessed against Landrith for each of the advances.

Propriety of recommended discipline

Based on its findings, the panel recommended a six-month suspension and payment of costs. Laub argues that this sanction is grossly disproportionate to his conduct. He argues that his conduct was at most negligent, and that a suspension is not warranted.

In support, Laub relies on In re Drakulich,[12] in which this court rejected a hearing panel's recommendation for a ninety-day suspension and concluded that no discipline was warranted. In Drakulich, the hearing panel had given credence to the testimony of two former secretaries in determining that Drakulich had entered into a fee-sharing

[12]111 Nev. 1556, 908 P.2d 709 (1995).

arrangement with an employee of Reno Orthopedic Clinic.[13] This court, conducting a de novo review of the record, rejected the panel's findings and accepted the testimony of Drakulich and the clinic employee that the arrangement did not involve the sharing of fees.[14] Laub asks this court to follow Drakulich and impose no more than a private reprimand for his "technical" violations of SCR 155(3) (fees: contingency fee agreements) and SCR 158(5) (conflict of interest: prohibited transactions; advancing money to client).

Finally, Laub asserts that no further discipline is required to protect the public, but that if this court determines that some sanction should be imposed, a private reprimand is more than sufficient. He argues that a public reprimand will have serious financial consequences for the firm, which advertises heavily, and will punish Melvin Laub as well. Laub also maintains that the panel recommended such a harsh sanction because the panel members do not like personal injury lawyers who advertise heavily, such as Laub.

According to the state bar, the panel found a lack of candor in Laub's testimony at the hearing, and his conduct demonstrated more than mere negligence. The state bar also disputes Laub's charge that the panel members were biased against him. Finally, the state bar maintains that the recommended discipline is appropriate.

At the hearing, bar counsel argued that if the panel concluded that Laub's conduct was no more than negligent, then a public reprimand would be appropriate discipline. Bar counsel maintained, however, that the evidence supported a finding that Laub was more than negligent, and consequently, more severe discipline was warranted. According to bar counsel, the free access provided to Perez, coupled with the payments from Perez to Laub that were deposited in Laub's personal account, support an inference that Laub was aware of Perez's activities and acquiesced in them.

Although the recommendations of the disciplinary panel are persuasive, this court is not bound by the panel's findings and recommendation, and must examine the record anew and exercise

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[13]Id. at 1557, 908 P.2d at 709-10.

[14]Id. at 1570-72, 908 P.2d at 717-19.

independent judgment.[15] In determining whether the recommended discipline is appropriate, the ABA Standards for Imposing Lawyer Sanctions[16] may be consulted for guidance. In this case, application of the ABA Standards to the violations shown could result in a public reprimand, suspension or disbarment.[17]

Considering these standards, and in light of the fact that Laub has received no prior discipline, we conclude that a six-month suspension falls squarely within these guidelines, and that it is an appropriate form of discipline in this case. Although we disregard the violations based on the Sartains' products liability claim and the SCR 153 violation in the Landrith case, the remaining violations demonstrated by the record amply support the panel's recommended discipline.

In addition, we reject Laub's assertion of bias on the part of the panel members. He has not supported his contention with any citation to the record, and our review of the record has not revealed any evidence of bias during the proceedings.

"Unpublished" discipline decisions

In support of his contention that the recommended discipline is too harsh, Laub attached an appendix to his brief consisting of summaries of recent Nevada Lawyer discipline decisions. He asserts that since these dispositions were published in the Nevada Lawyer, they can be cited as authority, even though they are not opinions of this court.

The state bar argues that under SCR 123 (citation to unpublished opinions and orders), the Nevada Lawyer articles cannot be

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[15]In re Kenick, 100 Nev. 273, 680 P.2d 972 (1984).

[16]American Bar Ass'n, ABA Standards for Imposing Lawyer Sanctions, in ABA Compendium of Professional Responsibility Rules and Standards 329 (1999).

[17]See Standard 4.51 (providing that "[d]isbarment is generally appropriate when a lawyer's course of conduct demonstrates that the lawyer does not understand the most fundamental legal doctrines or procedures, and the lawyer's conduct causes injury or potential injury to a client"); Standard 4.42(b) (providing that "[s]uspension is generally appropriate when . . . a lawyer engages in a pattern of neglect and causes injury or potential injury to a client"); and Standard 4.63 (providing that "[r]eprimand is generally appropriate when a lawyer negligently fails to provide a client with accurate or complete information, and causes injury or potential injury to the client").

relied upon. Laub, however, argues that his citation of Nevada Lawyer discipline articles does not violate SCR 123, because they were not cited as binding legal precedent. Rather, they were cited so that this court could conduct a "consistency analysis" in determining whether the recommended discipline was appropriate. Laub notes that in Drakulich,[18] this court cited to an anonymous reprimand that did not appear in the Nevada Reports, and that this court has cited to its own unpublished orders as providing factual examples related to the court's consistency,[19] as well as to unpublished decisions of other courts.[20] Laub also argues that SCR 123 does not require that cited authority be published in the Nevada Reports, and that publishing in the Nevada Lawyer is sufficient. Finally, Laub argues that this court serves as the sentencing body in discipline cases, and so it is appropriate to consider additional information bearing on the determination of what sentence to impose.

SCR 123 provides that an unpublished opinion or order of this court shall not be regarded as precedent and shall not be cited as legal authority except in limited circumstances, which do not apply to this case. SCR 115(3) provides that orders imposing suspensions or disbarment shall be "published" in the same manner as advance opinions, and SCR 115(5) provides that such orders shall be "published" in the state bar journal and in a newspaper of general circulation in the county in which the attorney practiced. SCR 121 provides that a public reprimand by this court shall be "published" in the same manner as advance opinions, and that a public reprimand issued by the state bar[21] shall be "published" in the state bar publication.

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[18]111 Nev. at 1571, 908 P.2d at 718.

[19]State, Dep't of Transp. v. Barsy, 113 Nev. 709, 941 P.2d 969 (1997), overruled in part by GES, Inc. v. Corbitt, 117 Nev. __, 21 P.3d 11 (2001).

[20]Naovarath v. State, 105 Nev. 525, 529-30, 779 P.2d 944, 947 (1989) (citing to unpublished draft opinion); Christensen v. Chromalloy Amer. Corp., 99 Nev. 34, 38 n.1, 656 P.2d 844, 847 n.1 (1983) (citing to unpublished federal decision).

[21]See SCR 113(5) (providing that the state bar shall issue and publish a public reprimand when discipline imposed pursuant to a conditional guilty plea in exchange for stated form of discipline includes a public reprimand).

We conclude that the word "unpublished" in SCR 123 means an opinion or order that is not published in the Nevada Reports. The rule appears almost immediately after SCR 121 and SCR 115, both of which provide that discipline orders shall appear in the Nevada Lawyer and be disseminated in the same manner as advance opinions. If Laub's interpretation were correct, then SCR 123 would have no meaning in bar discipline cases, because every discipline order of this court would be published. Clearly, the rule is not meant to render every discipline order from this court a published opinion, with the same precedential value as those opinions that appear in the Nevada Reports.

We nevertheless conclude that discipline orders appearing in the Nevada Lawyer may be cited to this court for the limited purpose of providing examples of the discipline imposed in similar fact situations. This approach has also been taken by several other courts.[22]

We caution counsel, however, that such orders generally do not include a full statement of the facts, and are often brief, with little discussion of the reasoning supporting the decision. Accordingly, they may easily be distinguished and are not entitled to undue reliance. Discipline orders that are the result of a conditional guilty plea pursuant to SCR 113 are, by their nature, especially summary. As pointed out by the Washington Supreme Court, "a lesser, stipulated sanction [is] analogous to a plea bargain – and just as irrelevant for purposes of attorney discipline as a plea bargain in another criminal case would be for sentencing purposes following a jury trial."[23]

We have considered the unpublished discipline orders discussed by Laub in his briefs and compiled in his appendix. We note that the vast majority of the orders cited by Laub were not issued by this court, but by panels of the respective disciplinary boards, and thus provide no assistance. The few orders from this court that are discussed in Laub's

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[22]See, e.g., Berman v. City of Daly City, 26 Cal. Rptr. 2d 493, 496 n.5 (Ct. App. 1993); Marez v. Dairyland Ins. Co., 638 P.2d 286, 289 n.2 (Colo. 1981); Manderfeld v. Krovitz, 539 N.W.2d 802, 807 n.3 (Minn. Ct. App. 1995); Leisure Hills of Grand Rapids v. DHS, 480 N.W.2d 149, 151 n.3 (Minn. Ct. App. 1992).

[23]In re Boelter, 985 P.2d 328, 340 (Wash. 1999).

briefs involved very different facts, and do not demonstrate that the recommended suspension here is too harsh.

CONCLUSION

The following violations are supported by clear and convincing evidence: SCR 151 (competence) based on Laub's failure to protect the attorney-client privilege, his failure to adequately investigate Perez, and his failure to attempt to reduce the Sartains' medical bills; SCR 203(3) (misconduct involving dishonesty, deceit, fraud or misrepresentation), based on the misleading cost and disbursement statement provided to the Sartains; SCR 154 (communication), SCR 187 (responsibilities regarding nonlawyer assistants) and SCR 189 (unauthorized practice of law), based on Laub's overdelegation of duties to Decker; SCR 155(3) (fees: contingency fee agreements), based on the absence of mandatory language in Laub's contingency fee agreements; and SCR 158(5) (conflict of interest: prohibited transactions; advancing money to client), based on Laub's advances to Landrith. We disregard the violations of SCR 151 (competence) and SCR 154 (communication), concerning the products liability claim in the Sartain case, and SCR 153 (diligence), concerning Laub's investigation of the basis for Perez's demand in the Landrith case.

Based upon the violations shown, we suspend attorney Joe M. Laub from the practice of law for six months. In addition, Laub shall pay the costs of the disciplinary proceeding. Laub and the state bar shall comply with SCR 115. We note that as the suspension is for no more than six months, Laub need not petition for reinstatement.[24]

It is so ORDERED.

Young, J.
Young

Shearing, J.
Shearing

Agosti, J.
Agosti

Rose, J.
Rose

Leavitt, J.
Leavitt

Becker, J.
Becker

[24]See SCR 116(1).

MAUPIN, C.J., dissenting:

I dissent. I agree with the statements of law articulated by the majority, but dissent with regard to the extent of discipline imposed.

It is evident that Mr. Laub exhibited bad judgment and was not truly connected to the operation of his law practice. Also, the panel's factual findings reveal a pattern of negligence and a lack of understanding of the obligations inherent in the attorney-client relationship. However, rather than suspend Mr. Laub, I would impose a public reprimand. In my view, this type of discipline is consistent with the ABA Standards for Imposing Lawyer Sanctions,[25] and given Laub's lack of prior discipline and other mitigating circumstances,[26] would be more appropriate here.

Maupin, C.J.
Maupin

cc: James W. Bradshaw, Chair,
Northern Nevada Disciplinary Board
Rob W. Bare, Bar Counsel
Allen W. Kimbrough, Executive Director
Lemons Grundy & Eisenberg

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[25]American Bar Ass'n, ABA Standards for Imposing Lawyer Sanctions, in ABA Compendium of Professional Responsibility Rules and Standards 329 (1999). In particular, see Standards 4.43 ("Reprimand is generally appropriate when a lawyer is negligent and does not act with reasonable diligence in representing a client, and causes injury or potential injury to a client.") and 4.63 ("Reprimand is generally appropriate when a lawyer negligently fails to provide a client with accurate or complete information, and causes injury or potential injury to the client.").

[26]See Standards 9.31 (mitigation consists of any circumstance that may justify a reduction in the degree of discipline to be imposed), 9.32(a) (absence of a prior disciplinary record can be a mitigating factor), and 9.32(k) (interim rehabilitation can be a mitigating factor).