

Scholarly Commons @ UNLV Boyd Law

Nevada Supreme Court Summaries

Law Journals

9-23-2021

**In re: Discipline of Christopher R. Arabia, 137 Nev. Adv. Op. 59
(Sep. 23, 2021).**

Sarah Voehl

Follow this and additional works at: <https://scholars.law.unlv.edu/nvscs>

This Case Summary is brought to you by the Scholarly Commons @ UNLV Boyd Law, an institutional repository administered by the Wiener-Rogers Law Library at the William S. Boyd School of Law. For more information, please contact youngwoo.ban@unlv.edu.

PROFESSIONAL RESPONSIBILITY: NEVADA SUPREME COURT DISCIPLINE AS
APPLIED TO DISTRICT ATTORNEYS

Summary

In an opinion drafted by Justice Herndon, the Nevada Supreme Court considered whether attorneys who hold public office are subject to the disciplinary jurisdiction, boards, and hearing panels created by the Supreme Court Rules. The respondent, attorney Christopher R. Arabia, argued he should be exempted from the rule because (1) he is entitled to qualified immunity, or (2) he is only subject to the jurisdiction of the Commission on Ethics for his misconduct while he holds public office. The Court rejected both arguments and held that an attorney who engages in professional misconduct while in public office is subject to the disciplinary jurisdiction of the Court and the disciplinary boards and hearing panels created under the Supreme Court Rules regardless of whether the misconduct also falls within the Commission on Ethics' jurisdiction. The Court adopted the hearing panel's recommendation to reprimand Arabia for violations of RPC 1.7 (conflict of interest: current clients) and RPC 8.4(d) (misconduct prejudicial to the administration of justice).

Facts

Arabia is the Nye County District Attorney and has been licensed to practice law since 2006. He has no prior discipline. On September 15, 2019, Arabia fired Vieta-Kabell's as assistant district attorney. Vieta-Kabell claimed he was terminated because he was attempting to unionize assistant district attorneys, but Arabia claimed it was due to job performance. Vieta-Kabell appealed his termination. The Human Resources Director, Shamrell, scheduled the appeal for a hearing, and Arabia sent Shamrell an email instructing her to cease and desist from conducting the hearing because Vieta-Kabell was an at-will employee and therefore a hearing was not available to him. Shamrell later testified that the District Attorney's office provided legal advice to the county, and because of Arabia's status as the District Attorney, she cancelled the hearing the next day.

Vieta-Kabell filed a grievance to the State Bar. Arabia replied that he was not representing the county, but that Bruch was, and the county decided to cancel the hearing. However, Bruch was not retained as counsel until after Arabia emailed Shamrell to cancel the hearing. At the hearing, Arabia testified that it was only a request for the hearing to be cancelled, and he waited to involve Bruch because he did not think the hearing would trigger her involvement. Arabia stated that telling the county not to hold the hearing was the right thing to do, but that he would take the hit if it was wrong. The hearing panel found Arabia violated RPC 1.7 and 8.4(d), but found his conduct was negligent rather than intentional. The panel found two aggravating circumstances, substantial experience in the practice of law and failure to accept wrongfulness of the conduct, and one mitigating circumstance which was lack of prior discipline. The panel recommended Arabia be reprimanded and pay the costs of the disciplinary hearing.

¹ By Sarah Voehl.

Discussion

The Court started by addressing Arabia's contention that the State Bar should have been disqualified from pursuing the complaint because Vieta-Kabell worked for the State Bar and the State Bar employed two other attorneys Arabia had fired. The Court found that because Vieta-Kabell was not employed by the State Bar during most of the investigation, and the two prior employees Arabia fired had been screened from the matter, there was no conflict of interest.

Qualified immunity does not apply to attorney disciplinary proceedings

Arabia claimed he could not be professionally disciplined because his actions were protected by qualified immunity. The Court did not agree. The Court first determined whether an attorney discipline proceeding qualifies as an "action" under NRS 41.032.² The Court cited *Boulder City*, which states that qualified immunity generally applies when the plaintiff seeks damages or redress for the actions of a government employee.³ However, an attorney discipline proceeding does not fall into that category because the purpose is to protect the public and the legal profession, not to make the grievant whole or punish the attorney.⁴ Thus, even though disciplinary actions are generally treated as civil actions,⁵ they are not the type that qualified immunity applies to. To provide further support, the Court cited to cases in which the courts have determined that a prosecutor enjoyed qualified immunity from civil liability.⁶ These courts commonly pointed to the fact that professional discipline acts as a counterbalance to deter misconduct when qualified immunity applies. Therefore, the Court concluded a disciplinary hearing is not the type of action to which NRS 41.032 applies, and an attorney who is a public officer or employee cannot rely on qualified immunity to avoid discipline.

The State Bar had jurisdiction over the underlying grievance against Arabia

Next, Arabia contended the State Bar lacked jurisdiction because only the Commission on Ethics could discipline him for conduct undertaken as a public officer. However, he acknowledged that there could be dual jurisdiction as applied to qualified immunity. The Court explained that the Legislature passed the Nevada Ethics in Government Law, NRS Chapter 281A, to encourage the integrity of public officers.⁷ The Legislature also created the Commission on Ethics and gave it the power to write advisory opinions and resolve complaints.⁸ The Court interpreted NRS 281A.280(1) by its plain language, and found that nothing in NRS Chapter 281A states that the Commission's jurisdiction is exclusive.⁹ Moreover, the Legislature had used explicit language in

² NEV. REV. STAT. § 41.032(2) (2015) ("no action may be brought . . . against an . . . officer or employee of the State . . . which is . . . [based] upon the exercise of performance or the failure to exercise or perform a discretionary function or duty.").

³ *City of Boulder City v. Boulder Excavating, Inc.*, 124 Nev. 749, 756, 191 P.3d 1175, 1179 (2008).

⁴ *State Bar of Nev. v. Claiborne*, 104 Nev. 115, 213, 756 P.2d 464, 527-28 (1988).

⁵ SCR 119(3).

⁶ *Imbler v. Pachtman*, 424 U.S. 409, 428-29 (1976); *see also* *Silberg v. Anderson*, 786 P.2d 365, 373-74 (Cal. 1990); *Wright v. Yurko*, 446 So. 2d 1162, 1164 (Fla. Dist. Ct. App. 1984).

⁷ *See* NEV. REV. STAT. § 281A.020 (stating the legislative intent).

⁸ NEV. REV. STAT. § 281A.680 (2015); NEV. REV. STAT. § 281A.710 (2015); NEV. REV. STAT. § 281A.765 (2015).

⁹ NEV. REV. STAT. § 281(A)(280)(1) (2015) ("[T]he Commission has jurisdiction to investigate and take appropriate action regarding an alleged violation of [NRS Chapter 281A] by a public officer.").

other statutes where it intended jurisdiction to be exclusive.¹⁰ The Court also noted that the Supreme Court Rules do not suggest that the disciplinary authority over attorneys is limited when they hold public office,¹¹ and the scope of the Commission's jurisdiction does not indicate its jurisdiction is exclusive when it comes to public officers who are attorneys.¹² The Commission's jurisdiction only includes the ethics standards in NRS Chapter 281A, and those standards are not the same as the Rules of Professional Conduct. Therefore, the Court held the State Bar could proceed with disciplinary proceedings against Arabia regardless of whether his conduct also fell within the Commission on Ethics' jurisdiction.

Substantial evidence supports the panel's findings of misconduct

Arabia argues the State Bar did not prove the allegations by clear and convincing evidence because (1) he had no personal stake in the outcome and therefore he had no conflict of interest, and (2) he did not exert control to have the hearing vacated. The Court disagreed with these claims. The Court acknowledged that the State Bar has the burden to show Arabia committed the violations by clear and convincing evidence.¹³ They stated that their review is deferential to the panel and that they will uphold the factual findings if they are not clearly erroneous and are supported by substantial evidence.¹⁴

Arabia violated RPC 1.7

The Court first stated that RPC 1.7(a) precludes a lawyer from representing a client when the representation involves a concurrent conflict of interest.¹⁵ There may be a conflict when there is a significant risk that the representation will be limited by the personal interest of the lawyer.¹⁶ A lawyer must receive informed consent in writing from the client if they believe they could still provide representation.¹⁷ The Court explained the impetus behind the rule, and stated that determining whether there is a conflict depends on the facts and circumstances of each case. In considering the facts here, the Court found substantial evidence to support the finding of a conflict of interest because Arabia had a personal interest in ensuring the county vacated the termination appeal hearing. They reasoned that it was in his interest to have it vacated quickly and pointed out that the county did not contact Bruch until after Arabia's cease-and-desist email and contacted Bruch about a different matter. Second, the Court reasoned Arabia had a professional interest in having the hearing vacated because he did not want to be forced to rehire Vieta-Kabell. Further, if Vieta-Kabell's complaint was addressed at the hearing, that he was terminated because of his attempts to unionize, there would be a conflict of interest based on Arabia's desire to protect his reputation.

In addition, the Court found that Arabia's email qualified as legal advice. Arabia's email specifically stated that it was written in his legal opinion as the Nye County District Attorney. Further, Shamrell testified that she had received legal advice from Arabia in the past, and the email

¹⁰ See NEV. REV. STAT. § 1.440(1) (2015); see also NEV. REV. STAT. § 3.223(1) (2015).

¹¹ SCR 104(1)(a).

¹² NEV. REV. STAT. § 281(A) (2015); see also RPC 3.8(f).

¹³ In re Discipline of Drakulich, 111 Nev. 1556, 1566, 908 P.2d 709, 715 (1995).

¹⁴ Sowers v. Forest Hills Subdiv., 129 Nev. 99, 105, 295 P.3d 427, 432 (2013).

¹⁵ RPC 1.7(a)

¹⁶ RPC 1.7(a)(2)

¹⁷ RPC 1.7(b)(4)

at issue did not claim to be any different. Therefore, the Court found that the record supported the conclusion that Arabia's email was sent as part of his representation. Because he did not obtain a written waiver before advising the County, Arabia violated RPC 1.7 (conflict of interest: current clients).

Arabia violated RPC 8.4(d)

The Court also found that the record indicated Arabia violated RPC 8.4(d),¹⁸ which applies to an attorney's conduct in relation to an administrative proceeding. This rule addresses conduct that disrupts, or is intended to disrupt, a tribunal.¹⁹ The rule not only applies to court proceedings, but also to other adjudicatory bodies.²⁰ The Court found that the record showed that Shamrell canceled the hearing based only on Arabia's email, and thus he prohibited the administrative proceeding from occurring. Therefore, they found that substantial evidence supported the panel's finding that Arabia's conduct violated RPC 8.4(d).

A reprimand is appropriate

The Court weighed four factors to determine the appropriate discipline for Arabia: the duty violated, Arabia's mental state, the injury caused by the misconduct, and the existence of aggravating or mitigating factors.²¹ They stated the standard of review for discipline is de novo, but added that the hearing panel's recommendation is persuasive.²² The Court agreed with the panel that there were two aggravating circumstances and a single mitigating circumstance. The Court found Arabia violated duties owed to his client as well as to the profession. The Court concluded the panel's recommendation for a reprimand served the purpose of attorney discipline.²³

Conclusion

The Supreme Court of Nevada concluded a reprimand was appropriate discipline for Arabia based on substantial evidence in the findings. Therefore, the Court reprimanded attorney Christopher R. Arabia for violating RPC 1.7 and RPC 8.4(d). They also ordered that Arabia must pay for the costs of the disciplinary program plus \$1,500 within 30 days of the date of the opinion.

Concurrence in part and Dissent in part

Justice Pickering joined the Court's decision to reject Arabia's qualified immunity claim, as well as his stance that only the Commission on Ethics can discipline a district attorney. However, she disagreed with the Court's stance that the record supported the discipline imposed. She stated that she did not find Arabia's email to Shamrell to violate the Rules of Professional Conduct. At most, she wrote, the email was a negligent and isolated violation of RPC 1.7(a), and the strongest sanction for such a violation would be an admonition.

¹⁸ RPC 8.4(d) ("[i]t is professional misconduct for a lawyer to . . . [e]ngage in conduct that is prejudicial to the administration of justice.").

¹⁹ *Id.*

²⁰ *Id.*

²¹ *In re Discipline of Lerner*, 124 Nev. 1232, 1246, 197 P.3d 1067, 1077 (2008).

²² *Discipline of Schaefer*, 117 Nev. 496, 515, 25 P.3d 191, 204 (2001).

²³ *Claiborne*, 104 Nev. at 213, 756 P.2d at 527-28.

In reviewing the facts, Justice Pickering noted Arabia did not believe the informal review process applied to Vieta-Kabell because it would replace the county manager with the district attorney in terms of who had the final say on termination. Arabia was new to the office, so he consulted with two long-term chief deputy district attorneys. They advised Arabia that the review process did not apply to deputy district attorneys because their employment was at will. Justice Pickering also pointed out that the county manager was copied on all emails, and Shamrell consulted with the manager before canceling the hearing. Five hours before she cancelled, the county retained Bruch based on the litigation threat. Further, Justice Pickering pointed out that the State Bar did not dispute the fact that the Vieta-Kabell was not eligible for that type of informal hearing. She stated that if she were to take the State Bar at its word, it could assume the law did not entitle the deputy to have the county manager review his termination.

Turning first to RPC 1.7, Justice Pickering noted that an attorney facing discipline has a right to procedural due process, including fair notice of the charges.²⁴ She stated that this matter did not involve a direct conflict of interest due to a lawyer's representation of multiple clients.²⁵ Rather, it involved a single client with a lawyer that had a personal interest posing a significant risk of materially limiting his representation of the client.²⁶ Justice Pickering wrote that a personal interest potentially creating conflict can occur for a number of reasons, but not all of them are consequential. A lawyer's subjective "feelings" are not within the scope of RPC 1.7(a)(2).²⁷ Justice Pickering found that the reasons provided by the panel consisted of too much speculation and conjecture to establish a disabling conflict of interest.²⁸ Justice Pickering explained that canceling the hearing would not make the deputy's claims go away, and that by the time Arabia sent the email, Vieta-Kabell had hired a lawyer. She also stated that the State Bar did not explain how canceling the informal hearing would materially and adversely affect Nye County. In conclusion, she found the panel's findings of a disabling personal interest causing harm to Arabia's representation of Nye County was clearly erroneous and did not support the holding that Arabia's email violated RPC 1.7(a)(2).

Regarding the second violation, Justice Pickering found that the facts did not rise to the level required to establish conduct that is prejudicial to the administration of justice. She held that because the deputy promptly learned about Arabia's email, and the hearing was properly canceled, the RPC 8.4(d) charge should be dismissed. In her conclusion, Justice Pickering further emphasized Arabia had no prior attorney discipline and the panel found that his conduct was negligent, not intentional. Therefore, while she agreed with the majority's decision regarding qualified immunity and exclusive jurisdiction, she did not agree that the sanction of a formal public reprimand was warranted in this case.

²⁴ *In re Ruffalo*, 390 U.S. 544, 550 (1968).

²⁵ RPC 1.7(a)(1).

²⁶ RPC 1.7(a)(2).

²⁷ *See Sands v. Menard, Inc.*, 787 N.W.2d 384, 405 (Wis. 2010) (Abrahamson, J., dissenting).

²⁸ *Essex Cty. Jail Annex Inmates v. Treffinger*, 18 F. Supp. 2d 418, 432 (D.N.J. 1998).