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## Agwara v. State Bar of Nev., 133 Nev. Adv. Op. 96 (Dec. 7, 2017) (en banc)

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## CONSTITUTIONAL LAW: ATTORNEY COMPLIANCE WITH STATE BAR SUBPOENAS

### Summary

The Court adopted the three-prong test in *Grosso v. United States*, and held that an attorney cannot assert the privilege against self-incrimination to withhold client trust documentation sought in a State Bar investigation. However, the State Bar must have a compelling reason to force disclosure of tax records.

### Background

Petitioner's bankruptcy proceedings prompted the Nevada State Bar to open an investigation into petitioner's handling of client funds. During investigation, the State Bar discovered that petitioner commingled his personal funds with his clients' and law practice's funds, and, further, petitioner habitually failed to distribute client funds.

The State Bar served petitioner with two subpoenas. The first subpoena sought documents regarding attorney-client relationships with individuals whose funds were handled by petitioner using petitioner's Nevada State Bank trust account as well as petitioner's personal and business tax records for a span of five years. The second subpoena sought the same documents regarding attorney-client relationships with individuals whose funds were handled by petitioner using petitioner's Wells Fargo Bank trust account. In response to both subpoenas, petitioner objected and invoked the Fifth Amendment privilege against self-incrimination. The State Bar then filed a formal disciplinary complaint and, in response, petitioner filed a petition for writ relief. Here, the Court considered a petition for writ of mandamus or prohibition regarding whether an attorney can assert the privilege against self-incrimination to quash subpoenas in an investigation by the Nevada State Bar into the attorney's mishandling of funds.

### Discussion

A writ of mandamus compels performance of a duty whereas a writ of prohibition compels a party to cease performance.<sup>2</sup> The Court has inherent authority over the Nevada State Bar and, accordingly, has authority to consider a petition arising from the State Bar's conduct.<sup>3</sup> Nevada Supreme Court rules require client funds be kept separate from attorney's funds and require all records be preserved for five years after final disposition of the underlying matter.<sup>4</sup> Every member of the Nevada State Bar is presumed to have consented to making all records available for the State Bar's inspection upon request.<sup>5</sup> The Nevada Rules of Professional Conduct also require attorneys to keep funds separate and keep records of client funds for seven years.<sup>6</sup> The State Bar has the authority to investigate attorney misconduct and subpoena attorneys for documentation.<sup>7</sup>

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<sup>1</sup> By Lucy Crow

<sup>2</sup> *We the People Nev. v. Miller*, 1124 Nev. 874, 879, 192 P.3d 1166, 1170 (2008); *Halverson v. Miller*, 124 Nev. 484, 487, 186 P.3d 893, 896 (2008).

<sup>3</sup> *O'Brien v. State Bar of Nev.*, 114 Nev. 71, 73, 952 P.2d 952, 953 (1998).

<sup>4</sup> NEV. SUP. CT. R. 78.5(1)(a); NEV. SUP. CT. R. 78.5(1)(b).

<sup>5</sup> NEV. SUP. CT. R. 78.5(5); NEV. SUP. CT. R. 78.5(1)(b).

<sup>6</sup> NEV. RULES OF PROF'L CONDUCT 1.15(a); NEV. RULES OF PROF'L CONDUCT 8.4(a).

<sup>7</sup> NEV. SUP. CT. R. 104(1)(a); NEV. SUP. CT. R. 110(1).

As an attorney practicing in Nevada, petitioner is subject to all of the above rules; however, petitioner is not excluded from asserting the Fifth Amendment privilege against self-incrimination. The Court adopted the *Grosso v. United States* three-prong test to determine when a person is prohibited from asserting their privilege against self-incrimination.<sup>8</sup> The *Grosso* test is to be treated as an exception. An individual cannot assert the privilege against self-incrimination if: “(1) the purpose of the inquiry is essentially regulatory, (2) the person asserting the privilege regularly maintained the records sought, and (3) the records have a public aspect.” Other state courts in Maryland, Florida, and Louisiana have used the *Grosso* test in similar circumstances to conclude that an attorney cannot assert the privilege against self-incrimination to avoid disclosing documents with public aspects.

The Court found that each part of the *Grosso* test was easily met in the current matter. First, the Court finds that the State Bar’s inquiry was regulatory because the State Bar is a self-regulating body that investigates attorney misconduct. Second, petitioner, as an attorney subject to Nevada law, should have maintained the requested client trust records. Third, the records have a public aspect because mandating compliance with professional rules “protects the public and the integrity of the legal profession.” Accordingly, the Court denied petitioner’s petition asserting that the privilege against self-incrimination protecting him from disclosing the documents.

The Court then turned to the second matter: whether the privilege against self-incrimination protected petitioner from disclosing tax records. The Court, following federal guidance, established that tax records must be reasonably relevant and material to the matter at hand in order for the court to force production of the tax returns.<sup>9</sup> The agency seeking tax records must have a compelling reason to do so. Tax records receive heightened scrutiny because one’s financial status need not be revealed merely because it has been asked for. The Court could not determine if petitioner’s tax records were reasonably relevant or material to the issue at hand. Further, the Court could not conclude whether the request was too broad. Accordingly, the Court directed the Southern Nevada Disciplinary Board to hold a hearing on the matter and to assess whether the State Bar has a compelling need for petitioner’s tax records.

## **Conclusion**

The Court denied petitioner’s writ of mandamus requesting the subpoenas be quashed, but vacated the Southern Nevada Disciplinary Board’s order to produce tax records until the tax records have been deemed relevant and material. An attorney cannot assert the privilege against self-incrimination when ordered to disclose client trust account records. However, an attorney cannot be forced to disclose tax records unless there is a compelling reason for him to do so.

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<sup>8</sup> 390 U.S. 62 (1968).

<sup>9</sup> *Hetter v. Eighth Judicial Dist. Court*, 110 Nev. 513, 519, 874 P.2d 762, 765 (1994).