ANTOINE SALLOUM, Appellant, *v.* BOYD GAMING CORPORATION, dba MAIN STREET STATION, a Delaware Corporation, Respondent.

No. 80769

September 23, 2021 495 P.3d 513

Appeal from a district court order granting a motion to dismiss in an employment discrimination matter. Eighth Judicial District Court, Clark County; Kathleen E. Delaney, Judge.

Affirmed.

Watkins & Letofsky, LLP, and *Theresa M. Santos* and *Daniel R. Watkins*, Henderson, for Appellant.

Snell & Wilmer, LLP, and *Hayley J. Cummings, Kelly H. Dove*, and *Paul S. Prior*, Las Vegas, for Respondent.

Before the Supreme Court, Cadish, Pickering, and Herndon, JJ.

OPINION

By the Court, Cadish, J.:

In this appeal, we consider whether the Legislature's enlargement of a limitation period revives previously expired claims and conclude that, absent explicit provision by the Legislature, it does not. After respondent terminated appellant's employment, appellant sent a letter of inquiry to the Equal Employment Opportunity Commission and ultimately filed a charge of discrimination. The limitation period for appellant's potential claims against respondent expired on either the day he filed his letter of inquiry or shortly after he requested a right-to-sue letter from the Commission. The Legislature subsequently amended NRS 613.430, providing aggrieved employees an additional 90 days to file a claim after receiving a right-to-sue letter. After the amended statute became effective, appellant filed the underlying district court complaint, alleging discrimination based on age and sex. Respondent moved for dismissal, arguing that appellant's claims expired under the former version of NRS 613.430 before that statute was amended and the Legislature's amendments to the statute did not revive them. The district court agreed and granted the motion, also rejecting appellant's arguments that the equitable tolling doctrine applied.

Given that the 2019 amendment to NRS 613.430 does not state it applies to claims that expired before the amendment's effective date, we hold that the district court correctly determined the amendment does not apply to revive appellant's already-expired claims.

Furthermore, we conclude that appellant failed to establish the requirements for equitable tolling, particularly that his noncompliance with the statute of limitations resulted from external factors beyond his control. Accordingly, the district court properly dismissed appellant's complaint with prejudice.

FACTS AND PROCEDURAL HISTORY

On August 15, 2018, respondent Boyd Gaming Corporation discharged appellant Antoine Salloum from employment for alleged violations of company policies. Salloum sent an inquiry letter to the EEOC on or around February 11, 2019, alleging that Boyd discharged him based on his sex, national origin, and age, and requesting that the EEOC investigate his termination. On June 10, Salloum filed a formal charge of discrimination against Boyd with the EEOC and the Nevada Equal Rights Commission (NERC), alleging that Boyd terminated him due to his sex, national origin, and age in violation of the Civil Rights Acts of 1964 and the Age Discrimination in Employment Act of 1967. On August 12, Salloum requested a right-to-sue letter from the EEOC, which it issued the next day.

On November 1, 2019, Salloum filed the underlying district court complaint, alleging that Boyd committed unlawful employment practices by subjecting him to a hostile work environment and terminating him due to his age and sex. Boyd moved for dismissal, arguing that Salloum's claims expired under the 1983 version of NRS 613.430 (giving a claimant 180 days from the act complained of to file an unlawful employment practice complaint), which controlled through September 30, 2019. Salloum opposed, arguing that the 2019 amendment to NRS 613.430 (giving a claimant 180 days from the act complained of or 90 days from NERC issuing a right-to-sue letter, whichever is later, to file an unlawful employment practice complaint) retroactively applied such that his complaint was timely. At the hearings on the motion, Salloum also argued that the district court should deny Boyd's motion under a theory of equitable tolling.

The district court granted Boyd's motion to dismiss with prejudice, concluding that Salloum's claims expired on February 11, 2019, under the 1983 version of NRS 613.430 when no formal administrative charge was filed by that date and that the 2019 amendment to NRS 613.430 did not resurrect Salloum's claims.[1] The district court

[1]Salloum argues that his filing of a letter of inquiry with the EEOC constituted the filing of a complaint with NERC such that tolling is appropriate under the 1983 version of NRS 613.430 (providing that the 180-day limitation period to file an unlawful employment practice complaint "is tolled . . . during the pendency of the complaint before [NERC]"). Thus, he contends that the district court erred in concluding that his claims expired on February 11, 2019. Even if Salloum's argument is correct, which we take no position on, his claims still

concluded that equitable tolling did not apply because the statute has clear time limitations with which Salloum did not strictly comply.

DISCUSSION

When, as here, a district court considers matters outside of the pleadings, we review an order resolving a motion to dismiss under NRCP 12(b)(5) as one for summary judgment under NRCP 56. *Schneider v. Cont'l Assurance Co.*, 110 Nev. 1270, 1271, 885 P.2d 572, 573 (1994); NRCP 12(d). We review "a district court's grant of summary judgment de novo, without deference to the findings of the lower court." *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Summary judgment is appropriate if the pleadings and other evidence on file, viewed in the light most favorable to the nonmoving party, demonstrate that no genuine issue of material fact remains and that the moving party is entitled to judgment as a matter of law. *Id*.

The 2019 amendment to NRS 613.430 did not revive Salloum's expired claims

Salloum argues that the 2019 amendment to NRS 613.430 retroactively applies, thereby reviving his expired claims against Boyd, because it relates to procedures. Salloum contends that his claims against Boyd were timely under the 2019 amendment because he filed them within 90 days of receiving a right-to-sue letter. Thus, the first question before us is whether the 2019 amendment to NRS 613.430 retroactively applied and revived Salloum's claims.

"[W]e generally presume that [newly enacted statutes] apply prospectively unless the Legislature clearly indicates that they should apply retroactively or the Legislature's intent cannot otherwise be met." *Valdez v. Emp'rs Ins. Co. of Nev.*, 123 Nev. 170, 179, 162 P.3d 148, 154 (2007). However, "statutes that *do not change substantive rights* and instead relate solely to remedies and procedure . . . appl[y] to any cases pending when . . . enacted." *Id*. at 179-80, 162 P.3d at 154 (emphasis added).

Determining whether a statute alters substantive rights and thereby has a retroactive effect "is not always a simple or mechanical task." *Sandpointe Apartments, LLC v. Eighth Judicial Dist. Court*, 129 Nev. 813, 820, 313 P.3d 849, 854 (2013) (quoting *Landgraf v. USI Film Prods.*, 511 U.S. 244, 268 (1994)). When making such a determination, we "take a 'commonsense, functional' approach," focusing on "fundamental notions of 'fair notice, reasonable

expired the day after he received the right-to-sue letter from the EEOC. Thus, under either the district court's conclusion or Salloum's argument on appeal, Salloum's claims expired under the 1983 version of NRS 613.430 before the 2019 amendment took effect.

reliance, and settled expectations.'" *Pub. Emps.' Benefits Program v. Las Vegas Metro. Police Dep't*, 124 Nev. 138, 155, 179 P.3d 542, 553-54 (2008) (quoting *Immigration & Naturalization Serv. v. St. Cyr*, 533 U.S. 289, 321 (2001)).

Salloum relies upon *Valdez v. Employers Insurance Company of Nevada* to argue that the 2019 amendment to NRS 613.430 is procedural in nature and thus retroactively applies. There, a work-related accident left a worker quadriplegic, "requiring continuous care by a urologist." *Valdez*, 123 Nev. at 172-73, 162 P.3d at 150. The Nevada State Industrial Insurance System (SIIS) covered the worker's claim, and the worker began treatment with a urologist "located approximately one mile from [his] home." *Id*. at 173, 162 P.3d at 150. After the Legislature privatized SIIS, the resulting entity, Employers Insurance Company of Nevada, assumed responsibility for the claim and notified the worker that he must choose a new urologist within its network. *Id*. The worker objected, but the Nevada Department of Administration ultimately concluded "that the issue of physician choice was procedural and therefore the provisions" privatizing SIIS retroactively applied to the worker's claim. *Id*. On appeal, we held "that managed care and physician choice [were] acceptable procedural and remedial mechanisms for administering a vested entitlement. Legislative provisions to that effect are retroactive in the absence of a clear statement of contrary legislative intent." *Id*. at 179, 162 P.3d at 154.

The analysis in *Valdez* does not apply here, as the injured worker in *Valdez* had acquired a substantive right to medical treatment before the Legislature's overhaul of the SIIS. Whether the injured worker retained his urologist or selected a new one did not alter the worker's right to treatment. Here, application of the new limitation period *would* alter Boyd's substantive rights, as Salloum's claims against it had expired under the 1983 version of NRS 613.430, thus eliminating potential liability thereunder. Therefore, Salloum's reliance upon *Valdez* is misplaced, and we decline to apply *Valdez* here.

We similarly reject Salloum's reliance upon *Friel v. Cessna Aircraft Co.*, 751 F.2d 1037 (9th Cir. 1985). There, the personal representative of the decedent brought claims against the manufacturer of an aircraft relating to an apparent crash over the Pacific Ocean. *Id*. at 1038. At the time of the crash, a two-year limitation period controlled. *Id*. Not long after the crash, Congress repealed the statute and enacted in its place a three-year limitation period. *Id*. The personal representative sued more than two years after the crash but within the three-year limitation period. *Id*. The court held that the three-year limitation period controlled, as "[t]he two-year time bar was not yet complete and the action was viable when [Congress lengthened] the limitation period . . . to three years" and "defendants had acquired no vested right to immunity from suit for their

alleged wrong under [the then-controlling statute]." *Id*. at 1040. Here, Salloum's claims against Boyd expired before the Legislature lengthened the limitation period.[2] *Friel* therefore does not support application of the 2019 amendment's limitation period here.

We previously addressed whether the Legislature's subsequent lengthening of a limitation period governing the collection of child support arrearages revived a claim that expired under the prior limitation period in *McKellar v. McKellar*, 110 Nev. 200, 871 P.2d 296 (1994). There, the mother filed an action in 1991 to collect child support arrearages dating back to 1977, relying on a 1987 legislative amendment that removed the statute of limitations for such collection actions. *Id*. at 201-03, 871 P.2d at 297-98. The district court concluded that the amendment retroactively applied and affirmed the referee's award of arrearages dating back to 1977. *Id*. at 202-04, 871 P.2d at 297-98. On appeal, we held that the Legislature's removal of the limitation period did not retroactively apply to allow the mother to collect arrearages that were time-barred under the prior limitation period. *Id*. at 203-04, 871 P.2d at 298. Because the Legislature specifically removed a section of the bill providing for retroactive application, we could not conclude that the Legislature intended the enlarged limitation period to revive time-barred claims. *Id*. at 203, 871 P.2d at 298. We also could not "conclude that retroactive application [was] necessary to satisfy the [L]egislature's intent." *Id*. Accordingly, we held that the mother could only recover arrearages that were not time-barred under the pre-amendment six-year limitation period. *Id*. at 203-04, 871 P.2d at 298.

McKellar is in accord with the majority of jurisdictions that have addressed the question of whether a limitation period extended by statutory amendment should apply to revive expired claims. *See, e.g.*, *Quarry v. Doe I*, 272 P.3d 977, 983 (Cal. 2012) ("Once a claim has lapsed (under the formerly applicable statute of limitations), revival of the claim is seen as a retroactive application of the law under an enlarged statute of limitations. Lapsed claims will not be considered revived without express language of revival."); *State of Minn. ex rel. Hove v. Doese*, 501 N.W.2d 366, 369-70 (S.D. 1993) (collecting cases regarding the same); *see also* 51 Am. Jur. 2d *Limitation of Actions* § 52 (2021 update) ("An act enlarging or lengthening a limitation period governs those actions not previously barred by the original limitation period, but ordinarily does not apply to those claims in which the original limitation period has already run." (internal citations omitted)). We now explicitly

[2]The Legislature passed the 2019 amendment to NRS 613.430 on May 21, 2019. 2019 Nev. Stat., ch. 100, § 8, at 550. But the amendment did not provide an effective date, and thus, pursuant to NRS 218D.330 (providing effective date for legislative measures where Legislature does not specifically designate one), it took effect on October 1, 2019.

hold that this general principle—that statutory enlargements of limitation periods do not operate to revive a previously barred action absent a clear expression of such application by the Legislature—applies in Nevada. Thus, whether the 2019 amendment to NRS 613.430 retroactively applies and revives Salloum's previously time-barred claims turns on whether the Legislature expressly provided for retroactive application or whether retroactive application is necessary to meet the act's purpose. *Valdez*, 123 Nev. at 179, 162 P.3d at 154.

The 2019 amendment to NRS 613.430 provided,

> No action authorized by NRS 613.420 may be brought more than 180 days after the date of the act complained of [.] ***or more than 90 days after the date of the receipt of the right-to-sue notice pursuant to [NRS 613.412], whichever is later.*** When a complaint is filed with the Nevada Equal Rights Commission, the limitation provided by this section is tolled as to any action authorized by NRS 613.420 during the pendency of the complaint before the Commission.

2019 Nev. Stat., ch. 100, § 8 at 550. Nothing in the amendment expresses any intent for retroactive application. *See Pub. Emps.' Benefits Program*, 124 Nev. at 155, 179 P.3d at 553 ("[W]hen the Legislature intends retroactive application, it is capable of stating so clearly."). Furthermore, we cannot conclude that we must retroactively apply the 2019 amendment to NRS 613.430 to meet the Legislature's intent. *See McKellar*, 110 Nev. at 203, 871 P.2d at 298 ("Prospective application [of an enlarged limitation period] advances the [L]egislature's intent, despite the resulting preclusion of recovery for time-barred claims."). We therefore hold that the Legislature did not provide for retroactive application of the 2019 amendment to NRS 613.430, nor is retroactive application necessary to advance the amendment's purpose. Accordingly, the 2019 amendment to NRS 613.430 does not retroactively apply to Salloum's expired claims.

Equitable tolling does not apply to Salloum's claim

Although the district court erred by flatly concluding that equitable tolling could not apply to Salloum's claim, *see Copeland v. Desert Inn Hotel*, 99 Nev. 823, 826, 673 P.2d 490, 492 (1983) (holding that equitable tolling may apply to claims of discriminatory employment practices), we conclude that the district court's error was harmless on this record because Salloum failed to demonstrate the factors that would make equitable tolling appropriate here. *See Am. Sterling Bank v. Johnny Mgmt. LV, Inc.*, 126 Nev. 423, 428, 245 P.3d 535, 538 (2010) ("When the material facts of a case are undisputed, the effects of the application of a legal doctrine to those facts

are a question of law that this court reviews de novo."); NRCP 61 (providing that courts "must disregard all errors and defects that do not affect any party's substantial rights").

Salloum argues that equitable tolling is appropriate because he "acted in good faith upon his understanding of the [2019 amendment to NRS 613.430]" and because tolling would not prejudice Boyd. We disagree.

When weighing whether to apply equitable tolling, courts must consider

> the diligence of the claimant; the claimant's knowledge of the relevant facts; the claimant's reliance on authoritative statements by the administrative agency that misled the claimant about the nature of the claimant's rights; any deception or false assurances on the part of the employer against whom the claim is made; the prejudice to the employer that would actually result from delay during the time that the limitations period is tolled; and any other equitable considerations appropriate in the particular case.

Copeland, 99 Nev. at 826, 673 P.2d at 492. Addressing the diligence aspect of these considerations, we recently stated that plaintiffs seeking equitable tolling must "demonstrate that, despite their exercise of diligence, extraordinary circumstances beyond their control prevented them from timely filing their claims." *Fausto v. Sanchez-Flores*, 137 Nev. 113, 117, 482 P.3d 677, 681 (2021).

Here, Salloum made no argument, and the record contains no evidence, that an administrative agency or Boyd misled him to his detriment. He also made no argument that his lack of knowledge regarding the facts of his claims precluded him from timely filing his complaint. Even if he had, the record demonstrates that Salloum had all the requisite knowledge to pursue his claim when he sent his letter of inquiry to the EEOC. Finally, the record before us does not demonstrate that extraordinary circumstances prevented Salloum from timely filing his complaint. Rather, Salloum argues that we should apply equitable tolling to save his otherwise-expired claims because of his "miscalculation of an amended statute" while represented by counsel. Simply stated, a miscalculation by Salloum or his counsel under these facts does not constitute extraordinary circumstances warranting the application of equitable tolling.

CONCLUSION

After review of our caselaw and the weight of authority from our sister jurisdictions, we now definitively hold that we will not retroactively apply a lengthened limitation period enacted after a claim expired, effectively resurrecting the claim, absent an express statement from the Legislature to that effect. As the 2019 amendment

to NRS 613.430 contains no such statement, we hold that the 2019 amendment does not retroactively apply to revive Salloum's time-barred claims. Furthermore, Salloum failed to demonstrate that equitable tolling applies in this instance. We therefore affirm the district court's dismissal of Salloum's complaint.

PICKERING and HERNDON, JJ., concur.

JAY LESLIE JIM, aka JAY LEE JIM, aka LITTLE JAY, aka LITTLE J., Appellant, *v.* THE STATE OF NEVADA, Respondent.

No. 81545

September 23, 2021 495 P.3d 478

Appeal from a judgment of conviction, pursuant to a guilty plea, of trafficking a schedule I controlled substance under NRS 453.3385(1)(b) and possession of a firearm by a prohibited person under NRS 202.360(1). Fourth Judicial District Court, Elko County; Nancy L. Porter, Judge.

Affirmed.

Jeff Kump, PLLC, and *Jeffrey J. Kump*, Elko, for Appellant.

Aaron D. Ford, Attorney General, Carson City; *Tyler J. Ingram*, District Attorney, and *Jeffrey C. Slade*, Deputy District Attorney, Elko County, for Respondent.

Before the Supreme Court, Cadish, Pickering, and Herndon, JJ.

OPINION

By the Court, Pickering, J.:

Following a lawful stop and arrest, an Elko Police Department (EPD) officer found contraband in appellant Jay Jim's car. The officer observed the contraband during a warrantless inventory search that produced no formal inventory. After the State brought criminal charges against Jim, he filed a motion to suppress the evidence recovered from the vehicle, alleging that the items were the products and fruits of an illegal search. The district court denied the motion on the ground that the officer validly discovered the evidence under the plain-view exception to the warrant requirement of the United States and Nevada Constitutions. Jim appeals from his subsequent judgment of conviction, arguing that the plain-view exception does not apply because the officer did not complete the inventory. But because the officer's presence in the vehicle was legally justified at the time he observed the contraband, we hold that the plain-view exception to the warrant requirement applies and therefore affirm.

I.

Officers Joshua Chandler and Jeremy Shelley of the EPD responded to a report of suspicious activity at the Red Lion Hotel parking lot in Elko. When the officers arrived, they encountered Jim attempting to start a silver Chevrolet Impala that he did not own.

After calling the car's registered owners and confirming that Jim planned to purchase the Impala, the officers told Jim that they would take "enforcement action" if he drove the car, because its registration was expired. But Jim did not heed this warning—one day later, Chandler saw and stopped Jim driving the same Impala in Elko's West Sage area, still with expired registration. Based on Jim's past failures to appear in court, Chandler arrested Jim for failure to produce valid registration, insurance, and a current driver's license, and for failure to wear a seatbelt.

Shelley responded to the scene as back-up, and after Chandler handcuffed Jim and placed him in the back of the patrol car, Shelley began an impound inventory of the Impala. Under EPD policy, if a car's driver is arrested and is not its registered owner, then the car will be impounded and "an impound inventory will be done and given to the tow truck driver." A different EPD policy applies if the car has "evidentiary value": "When impounding a vehicle of evidentiary value, the vehicle will be secured with evidence tape and the officer will follow the vehicle . . . to the police garage where it will be secured for processing." Shelley testified that he initially entered the Impala under the policy for impounded vehicles without evidentiary value, to either turn the car off or retrieve the keys, when he saw the butt of a Glock handgun and two small bags of a crystalline-like substance wedged between the driver's seat and center console. Shelley immediately recognized these items as contraband. Shelley and Chandler photographed the firearm and bags in place and on the front seat of the Impala before Shelley removed the items and secured them in his patrol car.

Shelley testified that upon finding the contraband items, he determined that the Impala may have evidentiary value. So, in accordance with the EPD policy for vehicles with evidentiary value, he seized the Impala, followed the car to the police garage, and delivered the car to Officer Jason Checketts, who placed evidence tape on its entry points. At the station, Shelley determined that the Glock handgun had been reported stolen, and the crystalline-like substance tested presumptively positive for methamphetamine. With this evidence as grounds for probable cause, Officer Matthew Miller applied for and received a warrant to search the Impala. On executing the warrant, Miller recovered a blue Superior Balance digital scale, a black Weighmax digital scale, and "a paper receipt containing methamphetamine" from the Impala. Miller listed these items on the warrant log, but at no point did Miller, Shelley, or any other EPD officer complete an inventory of personal items in the Impala.

The State charged Jim with trafficking in a schedule I controlled substance and possession of a firearm by a prohibited person and sought punishment under the habitual criminal statute. Jim moved to suppress all evidence recovered from the Impala, alleging that

the items were the products and fruits of an illegal search. But the district court concluded that Shelley recovered the firearm and methamphetamine under the plain-view exception to the Fourth Amendment's warrant requirement and denied Jim's motion. Jim pleaded guilty to one count of trafficking a controlled substance under NRS 453.3385(1)(b)[1] and one count of possession of a firearm by a prohibited person under NRS 202.360(1). As a term of his plea agreement, Jim reserved the right to appeal the suppression decision and now challenges the district court's denial of his motion to suppress and the resulting judgment of conviction.

II.

The United States and Nevada Constitutions both guarantee "[t]he right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures." U.S. Const. amend. IV; Nev. Const. art. 1, § 18; *see also State v. Beckman*, 129 Nev. 481, 486, 305 P.3d 912, 916 (2013). A warrantless search is per se unreasonable unless an exception to the warrant requirement applies. *State v. Lloyd*, 129 Nev. 739, 743, 312 P.3d 467, 469 (2013). This court reviews de novo whether a valid exception to the warrant requirement applies. *See Beckman*, 129 Nev. at 485-86, 305 P.3d at 916 (holding that this court reviews a district court's denial of a motion to suppress de novo as to legal conclusions and that the reasonableness of a search is a legal inquiry); *Scott v. State*, 110 Nev. 622, 628, 877 P.2d 503, 507 (1994) (noting that a non-owner driver has a reasonable expectation of privacy in a vehicle that he or she lawfully possesses).

The "plain-view" exception to the warrant requirement applies when (1) an officer is lawfully present in a place where evidence can be viewed, (2) the item is in plain view, and (3) the item's incriminating nature is immediately apparent. *Horton v. California*, 496 U.S. 128, 136 (1990); *State v. Conners*, 116 Nev. 184, 187 n.3, 994 P.2d 44, 46 n.3 (2000). Jim does not contest that the items in question here were in plain view once Shelley entered the Impala, that Shelley immediately recognized the incriminating nature of the items, or that towing of the Impala was reasonable. Accordingly, the narrow issue here is whether Shelley was lawfully present in the Impala when he entered the car to conduct a standard inventory search but never completed the inventory.

To be "lawfully present" under the plain-view exception, a warrant or warrant exception must justify the officer's presence in the

[1]The parties stipulate to correct a clerical error in the judgment of conviction indicating that Jim was convicted of trafficking in a schedule I controlled substance under NRS 453.3385(1)(c) by conforming the judgment to the court's sentencing minutes, which indicate that Jim was convicted of trafficking in a schedule I controlled substance under NRS 453.3385(1)(b).

first instance. *See Horton*, 496 U.S. at 136 (holding that the officer must not have "violate[d] the Fourth Amendment in arriving at the place from which the evidence could be plainly viewed"). And an inventory search carried out in good-faith compliance with "standardized official department procedures" is a well-established exception to the Fourth Amendment's warrant requirement. *Weintraub v. State*, 110 Nev. 287, 288, 871 P.2d 339, 340 (1994) (citing *South Dakota v. Opperman*, 428 U.S. 364 (1976)); *see also Colorado v. Bertine*, 479 U.S. 367, 374 (1987). An officer's compliance with standard procedures ensures that an inventory search is truly "designed to produce an inventory" and is not just "a ruse for a general rummaging . . . to discover incriminating evidence." *Florida v. Wells*, 495 U.S. 1, 4 (1990).

Applying this standard, this court has held that without a sufficiently complete inventory of the subject vehicle or item searched, the officer failed to comply with the applicable department inventory procedures, rendering the inventory warrant exception inapplicable. *State v. Greenwald*, 109 Nev. 808, 810-11, 858 P.2d 36, 38 (1993) ("Without an inventory, we can have no inventory search."); *see also State v. Nye*, 136 Nev. 421, 423-24, 468 P.3d 369, 371-72 (2020); *Weintraub*, 110 Nev. at 289, 871 P.2d at 340. To wit, in *State v. Nye*, this court held that the inventory search was invalid because the officer only listed "bag" on the inventory log instead of listing the items in the bag, as was required under the policy. *Id.* at 424, 468 P.3d at 372-73. The booking officer further failed to comply with department policy by not conducting the search in view of a camera, signing the inventory receipt, or testifying as to how the search was conducted. *Id.* at 424, 468 P.3d at 373.

While an officer's failure to complete an inventory per department policy may foreclose the inventory warrant exception, such a failure does not per se establish that an officer's motive for *beginning* an inventory was a subterfuge. *See Wells*, 495 U.S. at 4 ("[A]n inventory search must not be a ruse for a general rummaging in order to discover incriminating evidence."); *United States v. Garay*, 938 F.3d 1108, 1111-12 (9th Cir. 2019) (noting that an inventory search is valid if the search motive is administrative and holding that officers' failure to create an inventory sheet did not render the search motive as pretextual). And, unlike *Nye* where the searching officer strayed far afield from the applicable inventory policy, Shelley complied with the EPD policy for impounded vehicles when he entered the Impala to inventory its contents, which he had a legal right and obligation to do. *See Collins v. State*, 113 Nev. 1177, 1181, 946 P.2d 1055, 1059 (1997) (holding that an officer has a "right and obligation" to enter a vehicle to inventory its items for safekeeping). While lawfully present in the vehicle to conduct a standard inventory—to that point pursuant to and consistent with

EPD policy—Shelley saw the firearm and bags of a crystalline-like substance in plain view between the driver's side seat and center console, and he immediately recognized those items as contraband based on his law-enforcement training. Shelley then changed course and followed the applicable EPD policy for vehicles with evidentiary value by halting his search, following the Impala to the police garage, directing Checketts to secure the vehicle with evidence tape, and seeking a search warrant. Shelley very well could have continued and completed the inventory search at that time, thus inevitably discovering all of the items that EPD eventually recovered under the warrant. Instead, Shelley halted the search and sought and obtained a search warrant, consistent with the Fourth Amendment.

Jim further argues that Shelley failed to comply with EPD policies by not having the Impala secured with evidence tape until after the vehicle was towed to the police garage. But this is beside the point—Shelley's alleged deviation from the policy was slight and does not show that his search motive was pretextual because Shelley did not continue his search at the scene. Indeed, EPD did not recover further incriminating evidence before Checketts secured the vehicle with evidence tape and Miller obtained and eventually executed a search warrant.

III.

Shelley's close adherence to EPD policies, along with his decision to terminate a legal inventory search to secure a warrant, show that his motive was administrative and not an investigatory ruse. Shelley was lawfully present in the Impala when he saw the firearm and bags of methamphetamine in plain view. *See Horton*, 496 U.S. at 135 (holding that the plain-view exception applies when "a police officer is not searching for evidence against the accused, but nonetheless inadvertently comes across an incriminating object") (citing *Harris v. United States*, 390 U.S. 234, 235-36 (1968) (holding that an officer was lawfully present for purposes of the plain-view exception when he entered a car to roll up the windows pursuant to a police department policy concerning impounding vehicles and found incriminating evidence in plain view)). And the plain-view warrant exception therefore applies to validate Shelley's seizure of the firearm and bags of methamphetamine, along with the items recovered under the warrant. *See Collins*, 113 Nev. at 1182, 946 P.2d at 1059 (holding that warrant was valid when premised on items seized under valid warrant exception). We accordingly affirm.

Cadish and Herndon, JJ., concur.

KEVIN SUNSERI, Appellant, *v.* THE STATE OF NEVADA, Respondent.

No. 81551

September 23, 2021 495 P.3d 127

Appeal from a judgment of conviction, pursuant to a guilty plea, of robbery and ownership or possession of firearm by prohibited person. Eighth Judicial District Court, Clark County; Michael Villani, Judge.

Vacated and remanded with instructions.

Nevada Defense Group and *Damian Robert Sheets* and *Kelsey L. Bernstein*, Las Vegas, for Appellant.

Aaron D. Ford, Attorney General, Carson City; *Steven B. Wolfson*, District Attorney, *Alexander G. Chen*, Chief Deputy District Attorney, *John T. Niman*, Deputy District Attorney, and *Christopher J. Lalli*, Assistant District Attorney, Clark County, for Respondent.

Before the Supreme Court, Cadish, Pickering, and Herndon, JJ.

OPINION

By the Court, Herndon, J.:

Appellant Kevin Sunseri was incarcerated in Nevada when a warrant for his arrest was issued, but the warrant was not executed for 25 months, until he was set to be released from prison. Sunseri entered into a guilty plea agreement based on the new charges and then suffered a mental breakdown. When he regained competency, he obtained new counsel and sought to withdraw his guilty plea, alleging that his right to a speedy trial had been violated and his former counsel had not advised him of the violation prior to his acceptance of the guilty plea offer. The district court denied the motion to withdraw the guilty plea, denied Sunseri's subsequent motion to dismiss the charges, and entered a judgment of conviction based on the guilty plea. We conclude the district court erred in denying the motion to withdraw the guilty plea because withdrawal was just and fair, as Sunseri had a strong argument that his right to a speedy trial had been violated and a colorable claim that his counsel was ineffective. Therefore, we vacate the judgment of conviction, reverse the denial of the motion to withdraw the guilty plea, and remand with instructions to reconsider the motion to dismiss the charges in light of this opinion.

FACTS AND PROCEDURAL HISTORY

On December 10, 2015, Sunseri robbed a man at gunpoint. On May 25, 2016, Sunseri began serving a two-to-five-year sentence in the Nevada Department of Corrections for an unrelated crime. A warrant for Sunseri's arrest concerning the robbery was issued roughly two months later, on July 28, 2016, while Sunseri was incarcerated, but the warrant was not immediately executed.

Meanwhile, while in prison, Sunseri received his high school diploma, earned a college degree, published a book, and earned a certification in personal training. Sunseri worked with a caseworker before his scheduled release on August 27, 2018, to ensure there was no reason to hold him. He learned that he had a charge pending against him in Florida for driving under a revoked license and entered into an agreement to have that charge vacated in exchange for a payment of $10,000 in restitution. Sunseri was unaware of any other warrants against him that would jeopardize his release or that there was ever an investigation into the underlying crimes. Instead of being released as anticipated on August 27, however, the 2016 arrest warrant was executed, and Sunseri was transferred to the jail.

Sunseri agreed to plead guilty to robbery and ownership or possession of a firearm by a prohibited person. Before sentencing, Sunseri became suicidal, required mental health treatment, was deemed incompetent, and was transferred to a mental health facility to receive treatment. When Sunseri regained competency, he obtained new counsel and filed a motion to withdraw his guilty plea agreement on the grounds that his constitutional right to a speedy trial was violated and his previous counsel never advised him that the charges could potentially have been dismissed as a result of the violation.

At the evidentiary hearing on the motion, Las Vegas Metropolitan Police Department's records technician testified that her search through the records did not show any attempt to locate Sunseri before his anticipated release from prison or to execute the arrest warrant. Sunseri testified that his previous counsel never discussed any violation to his right to a speedy trial or filing a motion to dismiss the charges. He further stated that at the time he entered the guilty plea, he was unaware that his right to a speedy trial may have already been violated. Finally, he testified that his memory of the facts surrounding the underlying crime was not as clear as it would have been if the warrant had been executed in 2016. Sunseri's former counsel did not testify.

The district court denied the motion to withdraw the guilty plea. Sunseri then filed a motion to dismiss the case because of his violated speedy-trial right, which the district court denied, concluding that he waived this argument by entering into the plea agreement.

Sunseri was convicted and sentenced to 66 to 180 months under the guilty plea.

DISCUSSION

"[A] district court may grant a defendant's motion to withdraw his guilty plea before sentencing for any reason where permitting withdrawal would be fair and just . . . ." *Stevenson v. State*, 131 Nev. 598, 604, 354 P.3d 1277, 1281 (2015); NRS 176.165 (permitting withdrawal of a guilty plea before sentencing). Courts should not focus exclusively on whether the plea was knowingly, voluntarily, and intelligently pleaded, *Stevenson*, 131 Nev. at 603, 354 P.3d at 1281, nor should courts consider the guilt or innocence of the defendant, *Hargrove v. State*, 100 Nev. 498, 503, 686 P.2d 222, 226 (1984). In determining whether withdrawal of a guilty plea would be fair and just, courts should "consider the totality of the circumstances." *Stevenson*, 131 Nev. at 603, 354 P.3d at 1281.

In reviewing a denial of a motion to withdraw a guilty plea, this court gives deference to the district court's factual findings as long as they are supported by the record. *Id.* at 604, 354 P.3d at 1281. Because Sunseri's claim that the district court should have permitted him to withdraw his guilty plea is based on his argument that his speedy-trial right was violated, we must start our analysis there before also considering the issue of whether his counsel was ineffective.

The Barker-Doggett *speedy trial test*

The United States Supreme Court set out a four-part balancing test for determining if a defendant's Sixth Amendment right to a speedy trial has been violated: "[1] whether delay before trial was uncommonly long, [2] whether the government or the criminal defendant is more to blame for that delay, [3] whether, in due course, the defendant asserted his right to a speedy trial, and [4] whether he suffered prejudice as the delay's result." *Doggett v. United States*, 505 U.S. 647, 651 (1992) (citing *Barker v. Wingo*, 407 U.S. 514, 530-33 (1972)). This court adopted the four-factor test, noting that no factor was determinative and that each must be considered together, along with all the relevant circumstances of the case. *State v. Inzunza*, 135 Nev. 513, 516, 454 P.3d 727, 731 (2019).

In regard to the first factor, in order to trigger the *Barker-Doggett* speedy-trial analysis, the delay must be presumptively prejudicial, which occurs around the one-year mark. *Id.* Here, the underlying warrant was executed 25 months after it was issued. Thus, the first factor has been met, as the delay was uncommonly long.

"The second factor, the reason for the delay, focuses on whether the government is responsible for the delay and is the focal inquiry in a speedy trial challenge." *Id.* at 517, 454 P.3d at 731 (internal

quotations omitted). If the delay results from the government's negligence, that is weighted less heavily than if it is the result of a deliberate delay to hamper the defense, but it is still relevant because "the ultimate responsibility for such circumstances must rest with the government rather than with the defendant." *Id.* at 517, 454 P.3d at 732 (internal quotations omitted). Additionally, this court's "toleration of negligence varies inversely with the length of the delay that the negligence causes." *Id.* (quoting *United States v. Oliva*, 909 F.3d 1292, 1302 (11th Cir. 2018)). In *Inzunza*, the 26-month delay was caused by the government's "gross negligence," as the police knew of the defendant's whereabouts in New Jersey but did nothing to contact him or arrest him. *Id.* at 518, 454 P.3d at 732. This case is more egregious than *Inzunza* because Sunseri was in the government's custody. A simple search would have found him. Thus, the delay here was caused by the State's gross negligence.

The third factor looks at whether the defendant asserted his right to a speedy trial in due course. In considering this factor, courts are warned to only consider the time in which the defendant knew of the charges. *Id.* at 518, 454 P.3d at 732. If the defendant had no knowledge of the charges until the tardy arrest, the court cannot hold that against the defendant. *Id.* While Sunseri did not have knowledge of the charges until two years after the warrant was issued, when he learned of the charges he entered a plea agreement. Thereafter Sunseri did not raise the issue of a speedy trial for eight months.[1] While we recognize this factor would generally weigh against Sunseri in determining whether his speedy-trial right was violated, as discussed further below, because Sunseri has a colorable claim for ineffective assistance of counsel and may not have been aware that his right had been violated, this factor does not weigh strongly against him.

The last factor considers the prejudice of the delay to the defendant and specifically considers "oppressive pretrial incarceration, anxiety and concern of the accused, and the possibility that the defense will be impaired."[2] *Id.* (internal quotations omitted). Sunseri demonstrated actual prejudice when he testified that he suffered a mental breakdown upon learning that he would not be released from prison because of the State's dilatory execution of the underlying warrant. He became suicidal and required mental health treatment. Thus, Sunseri met his burden of showing the delay prejudiced him by causing him anxiety and concern. Further, Sunseri testified that

[1]We recognize Sunseri was committed and deemed incompetent for a portion of those eight months, so the entirety of the delay may not be appropriately held against him.

[2]While Sunseri argues that he need not show actual prejudice because the delay was more than one year so prejudice is assumed, he is incorrect because prejudice is only presumed for this factor if the delay is five years or more. *Inzunza*, 135 Nev. at 519, 454 P.3d at 733.

his recollection of the underlying crime was not as clear as it would have been earlier. While this alone likely does not show an impairment of his defense, it does provide further support for his claim of prejudice.

Considering all four factors, Sunseri made a strong argument that his right to a speedy trial had been violated and the charges against him should be dismissed. The fact that he entered into the guilty plea is the only factual circumstance potentially weighing against him, but he asserts that he did so as a result of ineffective assistance of counsel. Thus, we must next consider whether his counsel was ineffective in failing to advise him regarding the possible violation of his speedy trial right.

Ineffective assistance of counsel

As an initial matter, the State argues that Sunseri can only make an argument that his counsel was ineffective in a petition for a writ of habeas corpus and cannot make such an allegation in a motion to withdraw a guilty plea. While we recognize that we have never specifically stated that ineffective assistance of counsel can be grounds for withdrawal of a guilty plea, we reaffirm that the consideration for when a guilty plea can be withdrawn before sentencing is when withdrawal is fair and just. *Stevenson*, 131 Nev. at 604, 354 P.3d at 1281. Thus, if ineffective assistance of counsel resulted in a fair and just reason to withdraw a guilty plea before sentencing, doing so would be appropriate. *See id.* (considering whether counsel's alleged lies and coercion provided grounds for withdrawing a guilty plea prior to sentencing).

To demonstrate ineffective assistance of counsel sufficient to invalidate a judgment of conviction based on a guilty plea, a defendant must show counsel's performance was deficient in that it fell below an objective standard of reasonableness and prejudice resulted in that, but for counsel's errors, there is a reasonable probability the defendant would not have pleaded guilty and would have insisted on going to trial. *Hill v. Lockhart*, 474 U.S. 52, 58-59 (1985); *Kirksey v. State*, 112 Nev. 980, 987-88, 923 P.2d 1102, 1107 (1996).

As discussed above, Sunseri has demonstrated prejudice because, if not for the guilty plea, he had a probable chance that the charges against him would be dismissed under *Barker-Doggett*. Regarding whether Sunseri's former counsel's performance was below an objective standard of reasonableness, the record is underdeveloped because the district court did not fully consider Sunseri's claim that his counsel was ineffective and did not hear evidence from Sunseri's former counsel regarding his conversations with Sunseri or the advice he provided to Sunseri. Nevertheless, based on the record before us, Sunseri testified that his counsel never discussed with him whether his speedy-trial right had been violated before he

agreed to the guilty plea agreement. While a criminal defendant may be aware that a waiver of his statutory speedy-trial right waives the right to have a trial in 60 days, the average, uneducated criminal defendant cannot be expected to understand or know that a delay in executing an arrest warrant can constitute a constitutional violation of his right to a speedy trial. A defendant may only be aware of such a violation if informed by his or her counsel. Sunseri's former counsel, however, did not testify at the hearing. Thus, the State failed to rebut Sunseri's claim that his former counsel's performance was unreasonable.[3]

Accordingly, while we are unable to fully address Sunseri's ineffective-assistance-of-counsel claim because of the insufficient record on this issue, we conclude that Sunseri made at least a colorable claim that his counsel was ineffective. This colorable claim, coupled with Sunseri's strong argument that his right to a speedy trial was violated, demonstrates a fair and just reason for the withdrawal of Sunseri's guilty plea. Accordingly, we conclude the district court erred in denying Sunseri's motion to withdraw the guilty plea.

CONCLUSION

The *Barker-Doggett* factors weigh in favor of Sunseri's argument that his right to a speedy trial was violated. Sunseri's strong argument in that regard, coupled with his colorable claim that his counsel was ineffective by not advising him that his right to a speedy trial had potentially been violated before he entered the guilty plea agreement, present a just and fair reason to grant Sunseri's motion to withdraw his guilty plea. Accordingly, we vacate the judgment of conviction, reverse the district court's denial of Sunseri's motion to withdraw his guilty plea, and remand this matter. Additionally, because the district court denied Sunseri's motion to dismiss the charges on the ground that he had waived his right to a speedy trial in his guilty plea, and because the guilty plea has now been withdrawn, we direct the district court to reconsider that motion on remand.

CADISH and PICKERING, JJ., concur.

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[3]While the State argues Sunseri's former counsel did not have to inform Sunseri that his speedy trial right may have been violated because this court had yet to issue its opinion in *State v. Inzunza*, 135 Nev. 513, 454 P.3d 727 (2019), as the United States Supreme Court had already laid out the test for determining whether a defendant's right to a speedy trial had been violated and numerous other jurisdictions had applied that test, the State's argument lacks merit.

IN THE MATTER OF DISCIPLINE OF CHRISTOPHER R. ARABIA, BAR NO. 9749.

No. 82173

September 23, 2021 495 P.3d 1103

Automatic review of a disciplinary board hearing panel's recommendation for attorney discipline.

Attorney publicly reprimanded.

[Rehearing denied December 1, 2021]

[En banc reconsideration denied February 10, 2022]

PICKERING, J., dissented in part.

Pitaro & Fumo, Chtd., and *Thomas F. Pitaro* and *Emily K. Strand*, Las Vegas, for attorney Christopher R. Arabia.

Daniel M. Hooge, Bar Counsel, Las Vegas, and *R. Kait Flocchini*, Assistant Bar Counsel, Reno, for State Bar of Nevada.

Before the Supreme Court, CADISH, PICKERING, and HERNDON, JJ.

OPINION

By the Court, HERNDON, J.:

Attorneys who practice law in Nevada are "subject to the exclusive disciplinary jurisdiction of the supreme court and the disciplinary boards and hearing panels created by [the Supreme Court Rules]." SCR 99(1). In this attorney discipline case, we are asked to make an exception for attorneys who hold public office either because they are entitled to qualified immunity or because they are subject exclusively to the jurisdiction of the Commission on Ethics for misconduct committed while in office. We reject both arguments. When an attorney is elected to public office and then violates the Rules of Professional Conduct, the attorney's position as an elected official does not entitle the attorney to qualified immunity from professional discipline. Further, the Commission on Ethics' authority over public officers is not exclusive. Therefore, an attorney who engages in professional misconduct while in public office remains subject to the disciplinary jurisdiction of this 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. Because the State Bar proved by clear and convincing evidence that attorney Christopher Arabia violated two rules of professional conduct and a public reprimand sufficiently serves the purpose of attorney discipline under

the circumstances, we adopt the hearing panel's recommendation and 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).[1]

FACTS

Arabia has been licensed to practice law in Nevada since 2006 and has no prior discipline. He is currently the duly elected Nye County District Attorney.

On September 15, 2019, Arabia terminated Michael Vieta-Kabell's employment as an assistant district attorney. Vieta-Kabell maintained that he was terminated because he had been attempting to unionize assistant district attorneys, but Arabia asserts the termination was the result of Vieta-Kabell's job performance.

Vieta-Kabell filed an appeal of his termination with Nye County on September 23, 2019. The Human Resources Director for Nye County, Danelle Shamrell, sent both Vieta-Kabell and Arabia an email on September 24, scheduling the appeal for a hearing. That same day, Arabia sent an email to Shamrell, but not Vieta-Kabell, stating, "[i]t is my legal opinion as the Nye County District Attorney that you must cease and desist from conducting the proposed hearing." Arabia's email asserted that because Vieta-Kabell was an at-will employee, Arabia had the right to terminate Vieta-Kabell at any time, and thus, an appeal hearing was not available to Vieta-Kabell. Arabia ended the email by stating, "[p]lease confirm via e-mail no later than 4:00 p.m. on Thursday, September 26, 2019 that you have vacated the proposed hearing regarding Mr. Vieta-Kabell." At the subsequent disciplinary hearing, Shamrell testified that "[t]he DA's Office provides legal advice to the County, and he told me to cancel it. And so, based on the fact that he's who he is, the DA, I did what I was told to do." Thus, the next day, on September 25, Shamrell emailed Vieta-Kabell stating, "[b]ased on direction from Chris Arabia, Nye County District Attorney I have been instructed to cease and desist from conducting the requested hearing and as such there will not be the hearing."

Vieta-Kabell filed a grievance against Arabia with the State Bar. Arabia responded to the grievance stating he "was not acting as the County's counsel with respect to this matter and therefore provided no advice or counsel." Arabia further asserted that "[t]he County had Attorney [Rebecca] Bruch representing it and decided to cancel the hearing." However, Arabia later provided emails demonstrating that Bruch was not retained until the morning of September 25, after he had sent the email requesting the hearing be canceled. Additionally, Bruch testified that when she was retained by Nye

[1]Pursuant to NRAP 34(f)(1), we have determined that oral argument is not warranted.

County, her scope of representation did not include whether there should be a County hearing, and instead, related to an Employee Management Relations Board claim filed by Vieta-Kabell.

Before the disciplinary hearing, Arabia moved to dismiss the bar complaint twice, the first time because he asserted he was protected under qualified immunity, and the second time because he argued the State Bar lacked jurisdiction over him as an elected official. Arabia's motions were denied.

At the hearing, Arabia testified that he did not direct the hearing to be vacated and that "it was a request." In contrast to his letter responding to the grievance, he testified that he did not wait for Bruch to become involved because he did not think that the hearing would even trigger her involvement. He acknowledged that if terminating Vieta-Kabell's employment "was wrong, then I'm going to take the hit on that. I get that. I'm talking about me as the District Attorney." Arabia, however, also stated that telling the County not to hold the hearing was the right and proper thing to do.

The hearing panel found in a 2-1 vote that Arabia violated RPC 1.7 (conflict of interest: current clients) and RPC 8.4(d) (misconduct prejudicial to the administration of justice), but unanimously found that his conduct was negligent, rather than knowing or 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 (lack of prior discipline). The panel has recommended Arabia be reprimanded and ordered to pay the costs of the disciplinary proceeding.

DISCUSSION

Before we consider the hearing panel's findings and the appropriate discipline, we must address Arabia's arguments that this matter should be dismissed because he has qualified immunity and the State Bar lacked jurisdiction over him.[2]

[2]Arabia also contends the State Bar should have been disqualified from pursuing the underlying disciplinary complaint because Vieta-Kabell worked for the State Bar when he filed the grievance and because the State Bar has employed two other attorneys Arabia fired from the Nye County District Attorney's Office. While Vieta-Kabell filed the underlying grievance during his State Bar employment, his employment lasted just one-and-a-half months, and because Arabia did not respond to the grievance until after Vieta-Kabell left the State Bar, Vieta-Kabell was not employed by the State Bar during the majority of the investigation or disciplinary proceedings. The record further demonstrates that the two former Nye County Deputy District Attorneys who worked at the State Bar were properly screened from this matter. Additionally, in an abundance of caution, this matter was handled by bar counsel in the Northern Nevada office, when it would normally be assigned to the Southern Nevada office. Thus, we conclude there was no conflict of interest requiring the State Bar's disqualification.

Qualified immunity does not apply to attorney disciplinary proceedings

Arabia contends that he cannot be professionally disciplined because his actions are entitled to protection under the qualified immunity doctrine, and thus, this matter must be dismissed. We disagree.

The qualified immunity doctrine "provides that government actors following statutory guidelines or exercising their discretion are immune from common law tort actions in connection with their statutory duties or their discretion." *City of Boulder City v. Boulder Excavating, Inc.*, 124 Nev. 749, 756, 191 P.3d 1175, 1179 (2008). NRS 41.032(2) provides in relevant part that "no action may be brought . . . against an . . . officer or employee of the State . . . which is . . . [b]ased upon the exercise or performance or the failure to exercise or perform a discretionary function or duty." The first step to determining whether qualified immunity is available to Arabia is to determine if an attorney discipline proceeding qualifies as an "action" under NRS 41.032.

As discussed in *Boulder City*, qualified immunity generally applies in actions where the plaintiff seeks damages or redress for the government employee's actions. 124 Nev. at 756, 191 P.3d at 1179. An attorney discipline proceeding is not such an action. The purpose of an attorney discipline proceeding is to protect the public, the courts, and the legal profession, not to make the grievant whole or punish the attorney. *State Bar of Nev. v. Claiborne*, 104 Nev. 115, 213, 756 P.2d 464, 527-28 (1988). Therefore, even though disciplinary proceedings are generally treated as civil actions, *see* SCR 119(3) (providing that "[e]xcept as otherwise provided in these rules, the Nevada Rules of Civil Procedure and the Nevada Rules of Appellate Procedure apply in disciplinary cases"), they are not the type of common law actions to which qualified immunity generally applies.

The conclusion that qualified immunity does not extend to an attorney discipline proceeding finds support in cases where courts have determined that a prosecutor enjoyed qualified immunity from civil liability. In particular, courts often point to the availability of professional discipline as a counterbalance that offers a means to deter misconduct when qualified immunity otherwise protects a prosecutor from civil liability. For example, the United States Supreme Court has explained that a prosecutor's immunity from liability in Section 1983 suits "does not leave the public powerless to deter misconduct" because a prosecutor is subject "to professional discipline by an association of his peers." *Imbler v. Pachtman*, 424 U.S. 409, 428-29 (1976). Similarly, a few of our sister states have recognized that where a civil action must be dismissed because of qualified immunity or litigation privilege, the attorney may still be

subject to professional discipline. *See, e.g.*, *Silberg v. Anderson*, 786 P.2d 365, 373-74 (Cal. 1990) (recognizing that although a tort action based on communications between participants in earlier litigation is precluded under immunity or privilege principles, an attorney may nevertheless be subject to discipline for such a communication); *Wright v. Yurko*, 446 So. 2d 1162, 1164 (Fla. Dist. Ct. App. 1984) (providing that there can be no civil action for slanderous statements made during the course of an action and the remedies for such slander "are left to the discipline of the courts, the bar association, and the state"); *Hawkins v. Harris*, 661 A.2d 284, 288 (N.J. 1995) ("Although the public policy served by the absolute privilege immunizes the defamer from a civil damage action, the privilege does not protect against professional discipline for an attorney's unethical conduct."); *Kirschstein v. Haynes*, 788 P.2d 941, 950 (Okla. 1990) (recognizing that the litigation privilege may apply to protect statements made by an attorney from tort liability, but such privilege does not protect against professional discipline if those statements are also unethical conduct), *superseded by rule on other grounds as stated in Dani v. Miller*, 374 P.3d 779, 785 n.1 (Okla. 2016); *see also* Casey L. Jernigan, *The Absolute Privilege Is Not a License to Defame*, 23 J. Legal Prof. 359, 365-70 (1999); Judith Kilpatrick, *Regulating the Litigation Immunity: New Power and a Breath of Fresh Air for the Attorney Discipline System*, 24 Ariz. St. L. J. 1069, 1081 (1992).

Because attorney disciplinary proceedings are a mechanism for deterring professional misconduct and protecting the public, the courts, and the legal profession, we conclude a disciplinary proceeding is not the type of action to which NRS 41.032 applies. Therefore, an attorney who is a public officer or employee cannot rely on qualified immunity to escape professional discipline.

The State Bar had jurisdiction over the underlying grievance against Arabia

Arabia next contends the State Bar lacked jurisdiction over him because only the Commission on Ethics can bring a disciplinary complaint against him for conduct undertaken as a public officer.[3] We disagree because the Commission's jurisdiction over public officers is not exclusive.

The Legislature passed the Nevada Ethics in Government Law, NRS Chapter 281A, to promote the integrity and impartiality of public officers. *See* NRS 281A.020 (stating legislative findings and declarations); 1977 Nev. Stat., ch. 528, § 3, at 1103 (noting the passing of the law). In doing so, the Legislature created the Commission

[3]Arabia acknowledged in his reply brief that the State Bar and the Commission on Ethics could have dual jurisdiction except where qualified immunity is at issue. To the extent Arabia still challenges the State Bar's jurisdiction despite our conclusion regarding qualified immunity, we address that jurisdictional argument herein.

on Ethics and authorized it to issue advisory opinions and resolve ethics complaints against public officers. NRS 281A.680; NRS 281A.710; NRS 281A.765. "[T]he Commission has jurisdiction to investigate and take appropriate action regarding an alleged violation of [NRS Chapter 281A] by a public officer" when an ethics complaint has been filed with or initiated by the Commission. NRS 281A.280(1).

When interpreting a statute, we focus on its plain language. *City of Sparks v. Reno Newspapers, Inc.*, 133 Nev. 398, 402, 399 P.3d 352, 356 (2017) ("When interpreting a statute, if the statutory language is facially clear, this court must give that language its plain meaning." (internal quotation marks omitted)). Nothing in NRS 281A.280(1) or elsewhere in NRS Chapter 281A states that the Commission's jurisdiction is exclusive.[4] In contrast, the Legislature has used explicit language elsewhere when it intends to grant exclusive jurisdiction. For example, NRS 1.440(1) provides that the Commission on Judicial Discipline "has exclusive jurisdiction" to discipline judges. *See also* NRS 3.223(1) (affording the family court "original, exclusive jurisdiction" over certain identified proceedings); NRS 7.275(1) (providing that the State Bar of Nevada is "under the exclusive jurisdiction" of the Nevada Supreme Court); NRS 32.255 (providing that the court that appoints a receiver "has exclusive jurisdiction to direct the receiver and determine any controversy related to the receivership or receivership property"); NRS 62B.320(1) (providing that "the juvenile court has exclusive original jurisdiction" over certain proceedings involving a child in need of supervision).

Similarly, nothing in the Supreme Court Rules suggests that the normal disciplinary authority over attorneys practicing law in Nevada is limited when the attorney involved is an elected official. The State Bar is authorized to investigate and prosecute all possible attorney misconduct. SCR 104(1)(a), (c) (providing "State Bar counsel shall . . . [i]nvestigate all matters involving possible attorney misconduct" and "[p]rosecute all proceedings under these rules"). SCR 99(1) provides that "[*e*]*very* attorney admitted to practice law in Nevada . . . is subject to the exclusive disciplinary jurisdiction of the supreme court and the disciplinary boards and hearing panels created by these rules." (Emphasis added.) Accordingly, the State Bar has jurisdiction to pursue attorney discipline against any attorney practicing law in Nevada, regardless of whether the attorney is an elected official.

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[4]In fact, NRS 281A.280(2) recognizes that the Commission on Ethics' jurisdiction is not exclusive when the grievance concerns an employment issue. *See* NRS 281A.280(2) (providing dual jurisdiction when an employment-related grievance pertains to alleged discrimination or harassment but also includes separately or concurrently alleged conduct that is sanctionable under NRS Chapter 281A).

The scope of the Commission's jurisdiction further indicates that its jurisdiction is not exclusive when it comes to public officers who are attorneys. Specifically, the Commission only has jurisdiction over alleged violations of the ethics standards set forth in NRS Chapter 281A. Those standards are not coextensive with the Rules of Professional Conduct that establish ethical guidelines for attorneys practicing law in this state. For example, RPC 3.8(f) lays out special responsibilities for prosecutors, including not "making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused." There is no similar provision in the ethical standards set forth in NRS 281A.400-.550. Thus, if the Commission had exclusive jurisdiction over an elected district attorney, there would be no means to deter a prosecutor or protect the public and the profession when a prosecutor engaged in misconduct that clearly violates the Rules of Professional Conduct but does not also implicate the ethics standards set forth in NRS Chapter 281A. That absurd result further convinces us that an attorney's election to public office does not deprive the State Bar of its authority to initiate disciplinary proceedings against that attorney for a violation of the Rules of Professional Conduct.

Because nothing in NRS Chapter 281A provides the Commission on Ethics with exclusive jurisdiction and the attorney discipline system serves a different purpose than the Ethics in Government Law codified in NRS Chapter 281A, we conclude the State Bar could proceed with disciplinary proceedings against Arabia regardless of whether his conduct also fell within the Commission on Ethics' jurisdiction. If an attorney who is subject to NRS Chapter 281A violates the Rules of Professional Conduct *and* the ethics standards in NRS Chapter 281A, the State Bar disciplinary process would address the violation of the Rules of Professional Conduct and the Commission on Ethics would address the NRS Chapter 281A violation. Any discipline imposed by the Commission on Ethics could be considered in the State Bar disciplinary process. *See* SCR 102.5(2)(l) (providing that "imposition of other penalties or sanctions" qualify as mitigating circumstances in disciplinary proceedings). Accordingly, the Disciplinary Panel Chairman did not err by denying Arabia's motion to dismiss for lack of jurisdiction on this ground.

Substantial evidence supports the panel's findings of misconduct

As to the merits of the complaint, Arabia argues the State Bar failed to prove the allegations by clear and convincing evidence because (1) he had no personal stake in the outcome of the County hearing so he had no conflict of interest, and (2) he did not exert control over County employees to have the hearing vacated. We disagree.

The State Bar has the burden of showing by clear and convincing evidence that Arabia committed the violations charged. *In re Discipline of Drakulich*, 111 Nev. 1556, 1566, 908 P.2d 709, 715 (1995). To be clear and convincing, evidence "need not possess such a degree of force as to be irresistible, but there must be evidence of tangible facts from which a legitimate inference . . . may be drawn." *In re Discipline of Schaefer*, 117 Nev. 496, 515, 25 P.3d 191, 204 (internal quotation marks omitted), *as modified by* 31 P.3d 365 (2001). Our review of the panel's findings of fact is deferential, SCR 105(3)(b), and we will uphold the factual findings regarding an attorney's misconduct if they "are not clearly erroneous and are supported by substantial evidence," *Sowers v. Forest Hills Subdiv.*, 129 Nev. 99, 105, 294 P.3d 427, 432 (2013) (explaining deferential standard of review in civil actions).

Arabia violated RPC 1.7

RPC 1.7(a) precludes a lawyer from representing "a client if the representation involves a concurrent conflict of interest." A concurrent conflict of interest may exist if "[t]here is a significant risk that the representation of one or more clients will be materially limited . . . by a personal interest of the lawyer." RPC 1.7(a)(2). If a lawyer believes he or she may still provide competent and diligent representation in spite of the concurrent conflict of interest, the lawyer may still represent the client if, among other requirements, "[e]ach affected client gives informed consent, confirmed in writing." RPC 1.7(b)(4).

The impetus of the conflict of interest rule is to ensure "[l]oyalty and independent judgment[, which] are essential elements in the lawyer's relationship to a client." *Model Rules of Prof'l Conduct* r. 1.7 cmt. 1 (Am. Bar Ass'n 2016). Thus, a "lawyer's own interests should not be permitted to have an adverse effect on representation of a client." *Id.* at cmt. 10. "For example, if the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice." *Id.* "The primary rationale behind the general rule on adverse personal interests is simple: When there's friction between the interests of a lawyer and a client, the lawyer's loyalties are divided or confused and her effectiveness is diminished." *Lawyers' Manual on Professional Conduct: Practice Guides*, 51 Conflicts of Interest 401, 401.20.50 (Am. Bar Ass'n & Bureau of Nat'l Affairs, Inc. 2021). In particular, when a client's interests are inconsistent with the lawyer's personal interests, the lawyer "may be tempted to recommend courses of action that benefit the lawyer more than the client, or may be inclined to avoid choices that could damage or impair [the lawyer's] own interests." *Id.*

Personal interests that may impair a lawyer's representation of a client include "the financial, business, property, professional or

personal aspects of the lawyer's life." *Id.* at 401.10. While the most obvious examples involve the lawyer's financial or familial relationships, not all personal conflicts fall into these areas. Restatement (Third) of the Law Governing Lawyers § 125 cmt. c (Am. Law Inst. 2000). "Clients' interests also clash sometimes with their attorneys' own interests in their professional reputations and affiliations." 51 Conflicts of Interest at 401.20.190. Thus, a lawyer's political, social, professional, or emotional interests or beliefs may lead the lawyer to act in the lawyer's own self-interest or in others' interests, rather than in their client's best interest. Bruce A. Green & Rebecca Roiphe, *Rethinking Prosecutors' Conflicts of Interest*, 58 B.C. L. Rev. 463, 472 (2017). Accordingly, determining if a lawyer's personal interests create a concurrent conflict with a client depends on the facts and circumstances of each case.

Considering the facts and circumstances here, substantial evidence supports the panel's finding that Arabia had a concurrent conflict of interest because he had a personal interest in ensuring Nye County vacated Vieta-Kabell's termination appeal hearing. First, it was in Arabia's interest to have the appeal hearing not only vacated, but vacated quickly. Arabia sent his cease-and-desist email almost immediately after the hearing was scheduled. He acknowledged at the disciplinary hearing that he knew it was common practice for the County to retain independent counsel in similar circumstances and generally that counsel was retained quickly. Thus, the record supports that he knew it would be in his best interest to immediately send a strongly worded email to the County's human resources director stating his legal opinion that she must vacate the hearing. Second, Arabia had a professional interest in ensuring the hearing was vacated. It is clear from the record that Arabia did not want to be forced to rehire Vieta-Kabell. Further, Vieta-Kabell's grievance complains that he was terminated primarily because he was attempting to unionize the deputy district attorneys in the office, and if such a complaint were addressed at the appeal hearing, a significant conflict-of-interest risk emerges based on Arabia's interest in maintaining his professional reputation. Arabia even acknowledged he had a professional interest at the disciplinary hearing by stating that he would "take the hit" if terminating Vieta-Kabell had been wrong.

In a case addressing similar conflict-of-interest concerns, the New Jersey Supreme Court determined that even though the Legislature permitted the same person to hold two municipal offices, an attorney could not serve as both the municipal attorney and the clerk-administrator for the same municipality because such service would present concurrent conflicts of interest based on the attorney's own professional interests. *In re Advisory Comm. on Prof'l Ethics, Docket No. 18-98*, 745 A.2d 497, 502 (N.J. 2000). In reaching that decision, the court reasoned that there would likely come a

time when the municipal attorney would have to give the municipal body—the mayor and council—advice concerning his own conduct as clerk-administrator. *Id.* For example, the court noted there may come a time when the clerk-administrator's decision in an employment matter is challenged and the municipal body would need access to independent counsel and advice from the municipal attorney concerning whether the employment decision was proper. *Id.*

To the extent Arabia argues the County had independent counsel appointed to represent it in this matter, the record demonstrates that the County did not contact Bruch until after Arabia sent his cease-and-desist email, and even then the County contacted Bruch about a different matter.[5] Additionally, the panel's finding that Arabia's email qualified as legal advice is supported by substantial evidence. While the dissent asserts that Arabia testified he was acting in his executive capacity, the record does not support this assertion as Arabia never provided testimony regarding his "executive capacity." Additionally, in the email itself, Arabia wrote, "It is my *legal opinion* as the Nye County District Attorney . . . ." (Emphasis added.) Further, Shamrell testified that she regularly received legal advice on County matters from Arabia, and nothing in the email indicated this instance was different from any other time Arabia provided such advice. Therefore, the record supports the panel's conclusion that Arabia sent his cease-and-desist email as part of his representation of the County. Because there was a significant risk that Arabia's representation of the County would be materially limited by his personal interest in having the appeal hearing vacated, Arabia had a duty to disclose the conflict of interest to the County and obtain a written waiver before advising the County on whether the appeal hearing was appropriate, which he did not do here. Accordingly, substantial evidence supports the panel's finding that Arabia violated RPC 1.7 (conflict of interest: current clients).[6]

Arabia violated RPC 8.4(d)

RPC 8.4(d) provides "[i]t is professional misconduct for a lawyer to . . . [e]ngage in conduct that is prejudicial to the administration of justice." "For purposes of this rule, prejudice requires either repeated conduct causing some harm to the administration of justice

[5]The dissent overstates the scope of Bruch's representation and the impact it had on the County's decision to vacate the hearing. Bruch testified that she was not retained in relation to this hearing.

[6]While the dissent concludes that the record does not support the panel's finding that Arabia violated RPC 1.7(a)(2) because there was not substantial evidence that Arabia had a disabling personal interest that caused harm to his representation of Nye County, the dissent misstates the rule. RPC 1.7(a)(2) provides that a concurrent conflict of interest may exist if "[t]here is *a significant risk* that the representation of one or more clients will be materially limited . . . by a personal interest of the lawyer." (Emphasis added.)

or a single act causing substantial harm to the administration of justice." *In re Discipline of Colin*, 135 Nev. 325, 332, 448 P.3d 556, 562 (2019) (internal quotation marks omitted). RPC 8.4(d) addresses conduct that "is intended to or does disrupt a tribunal." *Id.* The rule applies to conduct occurring inside or outside of a courtroom and because other adjudicatory bodies, such as administrative tribunals, may administer justice, RPC 8.4(d) applies to an attorney's conduct in relation to an administrative proceeding. *See id.*; RPC 1.0(m) ("'Tribunal' denotes a court, an arbitrator in a binding arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party's interests in a particular matter.")[7]

The record demonstrates that Shamrell canceled the hearing based solely on Arabia's cease-and-desist email. Arabia's conduct not only disrupted an administrative tribunal, but prohibited the administrative proceeding from ever occurring.[8] Thus, substantial evidence supports the panel's finding that Arabia's conduct violated RPC 8.4(d) (misconduct prejudicial to the administration of justice).

A reprimand is appropriate

In determining the appropriate discipline, this court weighs four factors: "the duty violated, the lawyer's mental state, the potential or actual injury caused by the lawyer's misconduct, and the existence of aggravating or mitigating factors." *In re Discipline of Lerner*, 124 Nev. 1232, 1246, 197 P.3d 1067, 1077 (2008). Although this court determines the appropriate discipline de novo, SCR 105(3)(b), the hearing panel's recommendation is persuasive, *Discipline of Schaefer*, 117 Nev. at 515, 25 P.3d at 204.[9]

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[7]While we reference the definition of "tribunal" under RPC 1.0(m) as part of our discussion of Arabia's violation of RPC 8.4(d), we note that Arabia has not challenged whether the instant proceedings met the definition of "tribunal."

[8]If the hearing had been improper as Arabia alleged, that would have been determined in due course, instead of the hearing being canceled on the advice of someone who had a personal interest in the hearing never occurring. We note even the dissent acknowledges that the issue of whether the hearing was proper should not have been resolved on such short notice. If Arabia had not expedited his cease-and-desist demand, Nye County would have had a matter of weeks to determine whether it should conduct the hearing.

Nevertheless, the issue presented here is not whether Arabia gave correct advice, but whether he should have given the advice at all based on a conflict of interest, without a written waiver. Because this matter concerns Arabia's ethical violations and does not concern whether the hearing was proper, we do not reach that issue.

[9]Arabia focused his arguments on whether he committed misconduct and did not present any argument regarding what would be appropriate discipline for such misconduct.

Arabia violated duties owed to his client (conflict of interest) and the profession (misconduct). Nye County was potentially injured, and Arabia interfered with an administrative proceeding.[10] The record supports the panel's finding that Arabia's violations were negligent. The baseline sanction for Arabia's conduct, before consideration of aggravating and mitigating circumstances, is reprimand. *See Compendium of Professional Responsibility Rules and Standards: Standards for Imposing Lawyer Sanctions*, Standard 6.23 (Am. Bar Ass'n 2017) (explaining that reprimand is appropriate when a lawyer negligently fails to comply with a rule "and causes injury or potential injury to a client or other party, or causes interference or potential interference with a legal proceeding"). The record supports the two aggravating circumstances (substantial experience in the practice of law and failure to accept the conduct was wrong) and the single mitigating circumstance (lack of prior discipline). Considering all four factors, we conclude the panel's recommended reprimand serves the purpose of attorney discipline. *State Bar of Nev. v. Claiborne*, 104 Nev. 115, 213, 756 P.2d 464, 527-28 (1998) (recognizing that the purpose of attorney discipline is to protect the public, courts, and the legal profession).

CONCLUSION

An attorney cannot avoid professional discipline by asserting qualified immunity. Further, even if an attorney is an elected official, the State Bar has authority to investigate and prosecute alleged violations of the Rules of Professional Conduct, and this court, along with the disciplinary boards and hearing panels, has exclusive jurisdiction to discipline an attorney when such violations are proven. Because substantial evidence supports the panel's findings that Arabia violated RPC 1.7 and RPC 8.4(d), we conclude a reprimand is appropriate discipline.

Accordingly, we hereby reprimand attorney Christopher R. Arabia for violating RPC 1.7 (conflict of interest: current clients) and RPC 8.4(d) (misconduct prejudicial to the administration of justice). Additionally, Arabia must pay the costs of the disciplinary

[10]We disagree with the dissent's conclusion that interference with an administrative proceeding based on an attorney's own personal interest can cause no harm to the client. While the dissent argues that Nye County's position in other proceedings regarding the termination of Vieta-Kabell could have been hindered by the internal, administrative proceeding, the dissent overlooks the County's interest in ensuring its own internal policies and procedures are followed.

Further, while the dissent disagrees with the imposition of a reprimand because the dissent concludes the County was not harmed, the ABA Standards only require a potential injury to the client to warrant a reprimand. *Compendium of Professional Responsibility Rules and Standards: Standards for Imposing Lawyer Sanctions*, Standard 6.23 (Am. Bar Ass'n 2017).

proceeding plus $1,500 under SCR 120(1) & (3) within 30 days from the date of this opinion.

Cadish, J., concurs.

Pickering, J., concurring in part and dissenting in part:

I join the court in rejecting both Arabia's qualified immunity claim and his argument that only the Nevada Commission on Ethics can discipline an elected district attorney. I write separately because I disagree that the record supports the professional discipline imposed. It takes clear and convincing evidence to establish a violation of the Nevada Rules of Professional Conduct (RPC), *In re Discipline of Colin*, 135 Nev. 325, 329, 448 P.3d 556, 560 (2019), and "the Rules presuppose that disciplinary assessment of a lawyer's conduct will be made on the basis of the facts and circumstances as they existed at the time of the conduct in question and in recognition of the fact that a lawyer often has to act upon uncertain or incomplete evidence of the situation." RPC 1.0A(c); *see Model Rules of Prof'l Conduct*, Scope, ¶ 19 (Am. Bar Ass'n 2018).[1] Accepting this perspective, I have difficulty concluding that the email Arabia sent the Nye County human resources director on September 24, 2019 violated the RPC. At most, the email amounted to a negligent and isolated violation of RPC 1.7(a) (prohibiting concurrent conflicts of interest) that did not cause the client harm. The strongest sanction appropriate for such a violation is an admonition, not a formal public reprimand.

I.

The events giving rise to the disciplinary charges against Arabia took place over a few days' time. On September 18, 2019, Arabia terminated a Nye County deputy district attorney. Several days later, on September 23, the deputy emailed the Nye County human resources director, asking to appeal his termination to the Nye County manager pursuant to an informal review process that the Nye County Code and Personnel Policy Manual established for certain nonexempt county employees. The next morning, the human resources director sent Arabia and the deputy an email setting the review hearing the deputy requested two weeks out, for October 9. The email asked the parties to reply and confirm their availability.

Arabia did not believe that the informal review process applied to the deputy because it would substitute the county manager for the district attorney as the person with the final say over the deputy's termination. Still new to the office, Arabia consulted with two

[1]Nevada drew its RPC from the ABA Model Rules of Professional Conduct. Although it did not adopt the preamble and comments to the ABA Model Rules, RPC 1.0A provides that they "may be consulted for guidance in interpreting and applying" the RPC.

long-term chief deputy district attorneys (both of whom later testified at the State Bar disciplinary hearing). They advised that the review process did not apply to Nye County deputy district attorneys, whose employment was at will and whose hiring and firing NRS 252.070 made the district attorney's prerogative, exclusively.[2] At 4:42 p.m. on September 24, Arabia responded to the human resources director's email of the day before with his own email explaining this position. In his email, which Arabia did not copy the deputy on, he objected to the October 9 hearing and demanded that the human resources director cancel it. About 24 hours later, on September 25 at 3:57 p.m., the human resources director sent emails to both Arabia and the deputy canceling the hearing.

The disciplinary panel finds that "[b]etween September 23, 2019 and September 25, 2019, no other attorney, representing Nye County, communicated with the Nye County Human Resources Director regarding the requested appeal hearing." To the extent this finding suggests that the human resources director acted alone and without access to a lawyer in deciding to cancel the hearing, it is clearly erroneous. *See Colin*, 135 Nev. at 330, 448 P.3d at 560 (noting that this court is not bound by findings of fact that are clearly erroneous). The county manager—himself an attorney and a former Nye County deputy district attorney—was copied on all emails, including Arabia's. And the Nye County human resources director testified that she consulted with the Nye County manager before canceling the hearing. Also on September 25 at 11:15 a.m., almost 5 hours before the human resources director canceled the hearing, Nye County's insurer retained outside counsel, Rebecca Bruch, based on the litigation threat the deputy's termination posed.

The record repels the majority's suggestion, *ante* at 578 n.8, that the terminated deputy district attorney had a legal right to the informal hearing. Citing authority, Arabia argued to the disciplinary panel orally and in writing that the deputy was not eligible for this particular type of code- and personnel-manual-based hearing—in other words, that the legal opinion expressed in Arabia's email was correct. State Bar counsel did not dispute this, instead maintaining that, for purposes of deciding attorney discipline, "it did not matter whether Mr. Arabia's opinion was correct or not." Taking the State Bar at its word, it is appropriate to assume that the law did not entitle the deputy to have the county manager review his termination. *Cf. Einhorn v. BAC Home Loans Servicing, LP*, 128 Nev. 689, 693 n.3, 290 P.3d 249, 252 n.3 (2012) ("[a] party may not raise new issues, factual and legal, [on appeal] that were not presented to the district court") (internal quotation marks omitted).

[2]One of the two chief deputy district attorneys had worked for the Nye County district attorney's office for 25 years. She could not recall a single instance where the county manager reviewed a deputy district attorney's termination pursuant to the informal hearing process the deputy invoked here.

II.

An attorney facing professional discipline has a right to procedural due process, which includes fair notice of the charges against him. *In re Ruffalo*, 390 U.S. 544, 550 (1968). The State Bar charged Arabia with violating RPC 1.7 and RPC 8.4. To prevail, the State Bar had to prove by clear and convincing evidence that Arabia committed the violations charged. *In re Discipline of Drakulich*, 111 Nev. 1556, 1566, 908 P.2d 709, 715 (1995). Conduct extraneous to the violations charged cannot make up for the State Bar's failure to prove their elements by clear and convincing evidence.

A.

The State Bar principally charged Arabia with violating RPC 1.7. This Rule prohibits a lawyer from representing a client if the representation involves a concurrent conflict of interest:

> [A] lawyer shall not represent a client if the representation involves a concurrent conflict of interest. *A concurrent conflict of interest exists if*:
>
> (1) The representation of one client will be directly adverse to another client; or
>
> (2) *There is a significant risk that the representation of one or more clients will be materially limited* by the lawyer's responsibilities to another client, a former client or a third person or *by a personal interest of the lawyer.*

RPC 1.7(a) (emphases added). This matter does not involve a direct conflict of interest arising from a lawyer's representation of multiple clients. RPC 1.7(a)(1). Instead, it involves a single client—Nye County—and an allegation that the lawyer, Arabia, had a "personal interest" that posed a "significant risk" of "materially limit[ing]" his representation of that client. RPC 1.7(a)(2).

RPC 1.7(a) distinguishes direct multiple-representation conflicts from those involving self-interest. The reasons for the distinction are clear. "When multiple representation exists, the source and consequences of the ethical problem are straightforward: 'counsel represents two clients with competing interests and is torn between two duties. . . . He must fail one or do nothing and fail both.'" *Beets v. Scott*, 65 F.3d 1258, 1270 (5th Cir. 1995) (quoting *Beets v. Collins*, 986 F.2d 1478, 1492 (5th Cir. 1993) (Higginbotham, J., concurring), *on reh'g en banc*, 65 F.3d 1258 (1995)). "Conflicts between a lawyer's self-interest and his duty of loyalty to the client," by contrast, "fall along a wide spectrum of ethical sensitivity from merely potential danger to outright criminal misdeeds." *Id.*

A "personal interest" potentially creating conflict between the lawyer and his or her client might arise from any number of sources, not all of them consequential. A lawyer's emotive state or subjective

"feelings" normally fall outside RPC 1.7(a)(2). *See Sands v. Menard, Inc.*, 787 N.W.2d 384, 405 (Wis. 2010) (Abrahamson, J., dissenting) (4-3) (noting "that the phrase 'personal interest' " in Wisconsin's analogous rule governing professional conduct, SCR 20:1.7(a)(2), "refers not to [the lawyer's] own emotive state or stake, but rather to substantive, material conflicts of interest"). A "serious question" concerning "the probity of a lawyer's own conduct," by contrast, or "discussions concerning possible employment with an opponent of the lawyer's client," "business transactions with clients," or the instances referenced in RPC 1.8 can create a concurrent conflict of interest under RPC 1.7(a), depending on circumstances. *See Model Rules*, r. 1.7 cmt. 10, *discussed in Sands*, 787 N.W.2d at 405. "[T]he virtually limitless cases in which a 'conflict' may theoretically arise" out of a lawyer's personal interest pose "a very real danger of analyzing these issues not on fact but on speculation and conjecture." *Essex Cty. Jail Annex Inmates v. Treffinger*, 18 F. Supp. 2d 418, 432 (D.N.J. 1998). To guard against this danger, "when a conflict of interest issue arises based on a lawyer's self-interest, a sturdier factual predicate must be evident than when a case concerns multiple representation" of clients whose interests directly conflict. *Id.*

The disciplinary panel concluded, on a split vote, that Arabia violated RPC 1.7 "when he opined to the Nye County Human Resources Director that the requested appeal hearing was improper and demanded that the hearing be vacated within 48 hours of his demand, without recognizing the substantial risk that his personal interest in defending against the appeal could materially limit his ability to fulfill his responsibilities to his client, Nye County." The majority opinion adds that Arabia had a personal interest in having the hearing vacated quickly because the county would soon hire outside counsel and "Arabia did not want to be forced to rehire" the deputy. Maj. op., *ante* at 576. It also suggests that Arabia wanted to cancel the hearing to protect his professional reputation, since a hearing would reveal that Arabia had fired the deputy for attempting to unionize the Nye County district attorney's office.

These reasons have too much of speculation and conjecture in them to establish the "sturd[y] factual predicate" needed to find a disabling conflict of interest. *Treffinger*, 18 F. Supp. 2d at 432. Canceling the informal hearing would not make the deputy and his wrongful termination claims go away—and nothing in the record suggests that Arabia irrationally thought it would. By the time Arabia sent his email, the deputy had hired a lawyer. Arabia knew this because the deputy referenced his lawyer in his response to the human resources director's email setting the hearing date, on which he copied Arabia. Nye County's retention of insurance defense counsel followed as a matter of course, before the human resources director emailed to cancel the hearing. And, as Arabia

knew, the deputy had options besides the review by the county manager, including a "245" hearing (apparently referring to NRS 245.065) and filing a lawsuit in court. Unlike the review process, which is informal, both are forms of public hearing. As such, they carried a greater risk to Arabia of public criticism than the canceled review hearing did. The court cites Arabia's reference to "tak[ing] the hit," Maj. op., *ante* at 576, for the termination decision as evidence of his disabling personal interest, but that statement did not refer to the informal review hearing. It came in the context of Arabia's testimony about the 245 hearing the deputy separately sought—a hearing Arabia supported but that the deputy later decided not to pursue. Arabia's support of the 245 hearing, his brassy statement that he welcomed a 245 hearing because it would let him publicly explain his reasons for the termination, and his willingness to "take the hit" if the 245 hearing panel disagreed with him do not square with the fear of public criticism on which the court grounds its conflict analysis. And the possibility the informal review would require Arabia to reinstate the deputy seems remote, especially if it was not something the deputy had a legal right to pursue in the first place.

A lawyer's personal interest does not create a disabling conflict of interest requiring client disclosure and consent or withdrawal unless it carries a significant risk of materially and adversely affecting the client. *See Model Rules*, r. 1.7 cmt. 10 (noting that under Rule 1.7(a)(2), "[t]he lawyer's own interests should not be permitted to have an adverse effect on representation of a client"); Restatement (Third) of the Law Governing Lawyers § 121 (Am. Law Inst. 2000) (providing that for a prohibited conflict of interest to arise, there must be "a substantial risk that the lawyer's representation of the client would be materially and adversely affected by the lawyer's own interests"). "Unless there is risk that the lawyer's representation would be affected 'adversely,'" in other words, "there is no conflict of interest." Restatement (Third) of the Law Governing Lawyers § 121 cmt. c(i). Here, the State Bar does not explain how canceling the informal hearing materially and adversely affected Nye County (or carried a "significant risk" of doing so). In fact, the opposite appears true. Proceeding with the informal hearing would have buttressed the deputy's position that he could not be terminated except for good cause; this would hurt the county's probable litigation position that his employment was at will. The State Bar's effective concession that review by the county manager was not something the deputy was entitled to as a right further confirms that Arabia's email demanding that the human resources director cancel the hearing did not cause the county legal harm.

Arabia had both executive and legal responsibilities to Nye County. Although he testified that he believed he was acting in his executive and not his legal capacity in sending the email, the disciplinary panel and the majority disagree. *But see Model Rules of*

Prof'l Conduct, Scope, ¶ 18 (noting that "[u]nder various legal provisions, including constitutional, statutory and common law, the responsibilities of government lawyers may include authority concerning legal matters that ordinarily reposes in the client in private client-lawyer relationships" and providing that "[t]hese [r]ules do not abrogate any such authority"); *id.* at 1.13 cmt. 9 (addressing the difficulties inherent in a lawyer representing a governmental entity and noting that "[d]efining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context and is a matter beyond the scope of these Rules"). Ideally, the matter of who had authority over the termination would not have arisen on such short notice, allowing for clarification without confrontation. *See id.* at 1.7 cmt. 35 (discussing the challenges and need for occasional clarification when a lawyer serves an entity as both a business and a legal adviser). But with the hearing requested one day and set the next, to occur just two weeks out, time did not permit a measured discussion, making reasonable Arabia's decision to consult with two experienced deputies and insist on the hearing's cancellation as legally unfounded. *See id.* at 1.10(a)(1) (providing that a concurrent conflict of interest that is based on a lawyer's personal interest under Model Rule 1.7(a)(2) is not imputed to other lawyers who practice with that lawyer unless their representation, too, presents "a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm").

Our review of the disciplinary panel's findings of fact is deferential, "so long as they are not clearly erroneous and are supported by substantial evidence." *Colin*, 135 Nev. at 330, 448 P.3d at 560. And "we determine de novo whether the factual findings establish an RPC violation." *Id*. Here, the panel's findings of a disabling personal interest causing harm to Arabia's representation of Nye County are clearly erroneous and do not support holding that Arabia's email violated RPC 1.7(a)(2).

B.

The State Bar also charged Arabia with violating RPC 8.4(d) based on the same September 24 email. RPC 8.4(d) provides that "[i]t is professional misconduct for a lawyer to . . . [e]ngage in conduct that is prejudicial to the administration of justice." "For purposes of this [R]ule [8.4(d)], 'prejudice' requires 'either repeated conduct causing some harm to the administration of justice or a single act causing substantial harm to the administration of justice.'" *Colin*, 135 Nev. at 332, 448 P.3d at 562 (quoting *In re Discipline of Stuhff*, 108 Nev. 629, 634, 837 P.2d 853, 855 (1992)). The facts in this case do not rise to the level required to establish "prejudice" under *Colin*. It proceeds from a "single act"—Arabia sending

the September 24 email to Nye County's human resources director without copying the deputy—and that act did not cause "substantial harm to the administration of justice." *Id.* The deputy promptly learned of Arabia's communication, and the hearing was properly canceled for the reasons already discussed. Accordingly, the RPC 8.4(d) charge is a legal nonstarter and should be dismissed.

C.

Arabia has had no prior attorney discipline, and the panel found that his conduct in sending the email was negligent, not intentional. Furthermore, the hearing's cancellation caused Nye County little or no actual or potential harm. Under these circumstances, even accepting for purposes of argument that Arabia's email violated RPC 1.7(a)(2), the sanction of a formal public reprimand is unwarranted. At most, the email warranted an admonition. *See Compendium of Professional Responsibility Rules and Standards: Standards for Imposing Lawyer Sanctions*, Standard 4.34 (Am. Bar Ass'n 2017) ("Admonition is generally appropriate when a lawyer engages in an isolated instance of negligence in determining whether the representation of a client may be materially affected by the lawyer's own interests . . . and causes little or no actual or potential injury to a client.").

While I join the parts of the opinion rejecting qualified immunity and the claim of exclusive jurisdiction of the Nevada Commission on Ethics, I otherwise respectfully dissent.

GRADY EDWARD BYRD, Appellant, *v.* CATERINA ANGELA BYRD, Respondent.

No. 80548-COA

September 30, 2021 501 P.3d 458

Appeal from a special order after final judgment modifying a decree of divorce. Eighth Judicial District Court, Clark County; Rhonda Kay Forsberg, Judge.

Reversed and remanded.

Mills & Anderson Law Group and *Daniel W. Anderson* and *Byron L. Mills*, Las Vegas, for Appellant.

Webster & Associates and *Jeanne F. Lambertsen* and *Anita A. Webster*, Las Vegas, for Respondent.

Before the Court of Appeals, Gibbons, C.J., Tao and Bulla, JJ.

OPINION

By the Court, Bulla, J.:

Four years after entering a divorce decree incorporating a marital settlement agreement, the district court granted a motion to modify that decree under NRCP 60(b)(6), which allows for relief from a judgment for any justifiable reason besides those otherwise specifically listed in that rule, and awarded respondent lifetime alimony. In so doing, the court refused to allow appellant to participate virtually from the Philippines, where he resides. In this appeal from the district court's modification order, we determine (1) whether the divorce decree was properly reopened under NRCP 60(b)(6) based on alleged misrepresentations made when the marital settlement agreement was entered, (2) whether federal preemption precludes the district court from ordering alimony to be paid directly from a veteran's disability benefits as indemnification for waiving a portion of a military pension plan, and (3) whether a district court may summarily deny a party's request to testify via audiovisual transmission pursuant to Part IX-B(B) of the Nevada Supreme Court Rules.

We conclude that NRCP 60(b)(6) relief was inappropriate in the instant case, that federal law prohibits state courts from ordering reimbursement and indemnification from a veteran's disability payments for the purpose of offsetting military pension waivers, and that the district court must consider the relevant good cause factors and the policy in favor of allowing parties to appear via audiovisual transmission when considering such a request. Accordingly, we reverse and remand.

I.

Appellant Grady Byrd and respondent Caterina Byrd were married in 1983. Because Grady was an active military member, the couple moved frequently and eventually relocated to Las Vegas in 2008. That same year, however, the couple ceased cohabitation. In June 2014, the district court granted the parties a summary divorce and merged their marital settlement agreement (MSA) into the divorce decree. Later, Grady moved to the Philippines, where he currently resides.

Although the decree of divorce specifies that "neither party shall be required to pay spousal support to the other," it also provides that Grady will pay Caterina $1,500 per month to assist with her mortgage (the mortgage assistance provision) and that this payment may cease if Caterina's financial situation changes. The decree also provides that Caterina is entitled to 50 percent of Grady's military retirement pay. From 2014 until September 2018, Grady paid Caterina $3,000 per month total under these provisions.

In 2018, without explanation, Grady stopped making payments, and Caterina moved the district court to enforce the divorce decree. At the initial hearing on the motion, the district court opened discovery and set the matter for a status check but preliminarily concluded that the mortgage assistance provision constituted an alimony provision and that Grady was obligated to continue paying Caterina pending further proceedings. The court also found that 50 percent of Grady's military retirement pay was $1,500, as demonstrated by Grady paying Caterina $3,000 per month—$1,500 pursuant to the mortgage assistance provision and $1,500 as her portion of the retirement pay—for four years.

In April 2019, Grady filed a motion for reconsideration and argued that the district court's temporary order should be set aside, as the mortgage assistance provision was not an alimony provision and the parties mutually agreed to waive any alimony. Additionally, Grady argued that his net military retirement pay was $128.40 per month, entitling Caterina to $64.20 as her community share, and the remainder of his retirement pay was waived when he took disability pay pursuant to 10 U.S.C. § 1408 and 38 U.S.C. § 5305. Caterina opposed, arguing that the district court did not err in finding that Grady wrongfully terminated payments to Caterina and ordering him to continue the same. Caterina also counter-moved for relief from the decree pursuant to NRCP 60(b)(6) and to modify the decree, should the district court be inclined to grant Grady's motion for reconsideration. In particular, Caterina argued that, at the time of divorce, Grady misrepresented to her that his retirement pay was valued at approximately $3,000 per month, such that her 50-percent interest would be approximately $1,500 per month. Thus, she reasoned that if he intended for Caterina to waive alimony based on

this misrepresentation, then he fraudulently induced Caterina into signing the MSA. At the hearing on Grady's motion, the district court set the matter for an evidentiary hearing and stated that he would be required to be present. Further, the court concluded that its temporary order[1] should be set aside, as the mortgage assistance provision was not alimony but rather constituted a community property distribution. The district court also ordered Grady to continue paying Caterina as previously ordered until such time that he proved her financial circumstances had changed, pursuant to the terms of the MSA.

Grady did not make monthly payments as ordered, and Caterina filed an emergency motion for an order to show cause why Grady should not be held in contempt. At the hearing on Caterina's motion, the courtroom clerk attempted to contact Grady at the phone number provided to the court, but the call failed to go through. Additionally, at the hearing, the court noted that Grady's counsel represented Grady would not pay Caterina, despite the court's interim orders, until the evidentiary hearing resolved the issues. Further, the district court noted at the hearing and in its subsequent order that Grady had not filed an opposition to the motion. Accordingly, the district court issued an order to show cause why Grady should not be held in contempt, to be heard at the same time as the evidentiary hearing to modify or set aside the divorce decree.

Prior to the evidentiary hearing, Grady filed a request with the district court to appear via audiovisual transmission, citing his inability to fly internationally because of a pulmonary condition. Although no order appears in Grady's appendix on appeal, he represented in his motion for reconsideration and on appeal that the district court summarily denied his request without any explanation. In its order following the evidentiary hearing, the district court likewise denied Grady's motion for reconsideration on this issue.

At the evidentiary hearing, which Grady did not attend, it was revealed through Caterina's testimony, as well as various documents, that prior to the couple's divorce, Grady had waived nearly $3,000 of his monthly retirement pay in favor of receiving veterans' disability benefits pursuant to federal law. As a result, the value of Grady's pension was reduced from $3,017 to $128.40 per month, entitling Caterina to a monthly payment of only $64.20. But, according to Caterina's testimony, Grady represented at the time of the parties' divorce that his monthly retirement pay was $3,017 and, therefore, under the decree he was obligated to pay her

[1]The Honorable Kathy Hardcastle, Senior Judge, conducted the initial hearing on Caterina's motion to enforce the decree, but Grady's motion for reconsideration was heard by The Honorable Rhonda Kay Forsberg, Judge. Similarly, while Senior Judge Hardcastle presided over the subsequent evidentiary hearing, Judge Forsberg signed the final order stemming from that hearing.

$3,000 per month—$1,500 pursuant to the mortgage assistance provision and $1,500 as her one-half interest in his military retirement, which was consistent with the payments Grady made for the first four years after the decree was entered, until he ceased paying in 2018. Notably, because Grady was not permitted to appear remotely and did not appear in person, he did not testify to rebut any of this evidence.

After the evidentiary hearing, the district court modified the decree, concluding, among other things, that (1) the alimony waiver was unenforceable; (2) because Grady waived a portion of his military retirement pay, he must continue to pay Caterina monthly from his veteran's disability benefits; (3) Grady owed Caterina a fiduciary duty, which he breached by misrepresenting his assets, thus making NRCP 60(b)(6) relief appropriate; (4) Caterina's request for NRCP 60(b)(6) relief was timely; (5) the divorce decree's mortgage assistance and military pension clauses were vague and ambiguous; and (6) Caterina was entitled to lifetime alimony. Grady now appeals.

In this appeal, we address the following issues: (1) whether the district court abused its discretion in modifying the decree of divorce under NRCP 60(b)(6), (2) whether the district court erred when it ordered Grady to pay alimony directly from his veteran's disability benefits, and (3) whether the district court abused its discretion when it summarily denied Grady's request to appear via audiovisual transmission.

II.

We first address the district court's decision to modify the divorce decree under NRCP 60(b)(6). When Grady stopped paying Caterina $3,000 per month, the amount she believed she was entitled to under the decree, Caterina moved to enforce the decree. After additional motion practice, the district court ultimately held an evidentiary hearing, concluded that portions of the decree should be set aside pursuant to NRCP 60(b)(6), and modified the decree to award Caterina lifetime alimony. Grady challenges this decision on appeal, asserting that NRCP 60(b) relief was improper.

The district court has inherent authority to interpret and enforce its decrees. *Henson v. Henson*, 130 Nev. 814, 820 n.6, 334 P.3d 933, 937 n.6 (2014) (citing *In re Water Rights of the Humboldt River*, 118 Nev. 901, 906-07, 59 P.3d 1226, 1229-30 (2002), for the proposition that the district court has inherent authority to enforce its orders); *Kishner v. Kishner*, 93 Nev. 220, 225, 562 P.2d 493, 496 (1977) (explaining that the district court "has inherent power to construe its judgments and decrees for the purpose of removing any ambiguity"). But "[a] decree of divorce cannot be modified or set aside except as provided by rule or statute." *Kramer v. Kramer*, 96 Nev. 759, 761, 616 P.2d 395, 397 (1980). Here, the district court purported

to partially set aside and modify the decree of divorce pursuant to NRCP 60(b)(6).

The district court has broad discretion to grant or deny a motion to set aside a judgment under NRCP 60(b), and "[i]ts determination will not be disturbed on appeal absent an abuse of discretion." *Cook v. Cook*, 112 Nev. 179, 181-82, 912 P.2d 264, 265 (1996). "An abuse of discretion occurs if the district court's decision is arbitrary or capricious or if it exceeds the bounds of law or reason." *Skender v. Brunsonbuilt Constr. & Dev. Co.*, 122 Nev. 1430, 1435, 148 P.3d 710, 714 (2006). Although review for abuse of discretion is deferential, "deference is not owed to legal error." *AA Primo Builders, LLC v. Washington*, 126 Nev. 578, 589, 245 P.3d 1190, 1197 (2010).

NRCP 60(b) provides, as pertinent here, that "the court may relieve a party . . . from a final judgment, order, or proceeding for . . . (1) mistake, inadvertence, surprise, or excusable neglect; . . . (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party; . . . or (6) any other reason that justifies relief." "A motion under Rule 60(b) must be made within a *reasonable time*—and for reasons (1) . . . and (3) no more than *6 months* after the date of the proceeding or the date of service of written notice of entry of the judgment or order, whichever date is later." NRCP 60(c)(1) (emphases added). Furthermore, the time limits set forth in NRCP 60 are generally applicable to divorce decrees. *See, e.g.*, *Mizrachi v. Mizrachi*, 132 Nev. 666, 673, 385 P.3d 982, 986 (Ct. App. 2016); *see also Kramer*, 96 Nev. at 762-63, 616 P.2d at 397-98.

NRCP 60(b)(6) is a recent addition to the Nevada Rules of Civil Procedure. *See In re Creating a Comm. to Update & Revise the Nev. Rules of Civil Procedure*, ADKT 0522 (Order Amending the Rules of Civil Procedure, the Rules of Appellate Procedure, and the Nevada Electronic Filing and Conversion Rules, December 31, 2018). According to the advisory committee, "[t]he amendments generally conform Rule 60 to FRCP 60, including incorporating FRCP 60(b)(6) as Rule 60(b)(6)." NRCP 60(b) advisory committee's note to 2019 amendment. It is well established that when, as here, there is no mandatory decisional law interpreting a rule of civil procedure, this court looks to federal cases for guidance. *McClendon v. Collins*, 132 Nev. 327, 330, 372 P.3d 492, 494 (2016) (concluding that the "[f]ederal cases interpreting the Federal Rules of Civil Procedure are strong persuasive authority, because the Nevada Rules of Civil Procedure are based in large part upon their federal counterparts" (internal quotation marks omitted)).

Generally, Rule 60(b)(6) has a limited and unique application. As the United States Supreme Court has acknowledged, "Rule 60(b)(6) is available only in extraordinary circumstances," *Buck v. Davis*, 580 U.S. 100, 123 (2017) (internal quotation marks omitted), "which are not addressed by the first five numbered clauses of the Rule and

only as a means to achieve substantial justice." *Tanner v. Yukins*, 776 F.3d 434, 443 (6th Cir. 2015) (internal quotation marks omitted). In other words, NRCP 60(b)(6) provides an independent basis for relief that is mutually exclusive of clauses (1)-(5). *See* 11 Charles Alan Wright, Arthur R. Miller & Mary K. Kane, *Federal Practice and Procedure* § 2864 (3d ed. 2012) (explaining "that clause (6) and the first five clauses are mutually exclusive and that relief cannot be had under clause (6) if it would have been available under the earlier clauses"); *see also Klapprott v. United States*, 335 U.S. 601, 613-15 (1949) (stating that subsection (6) applies "for all reasons except the five particularly specified" in Rule 60(b)(1)-(5) when "appropriate to accomplish justice").

Here, we agree with Grady that relief under NRCP 60(b)(6) was improper. While Caterina argued in her motion practice below that the district court could modify the decree because extraordinary circumstances existed warranting NRCP 60(b)(6) relief, her basis for relief sounded in NRCP 60(b)(1) or 60(b)(3). Specifically, Caterina alleged that Grady "misinformed [her] and led her to believe that he would give her $3,000.00 per month for his lifetime." These allegations sound in fraud, misrepresentation, mistake, or excusable neglect. Thus, Caterina's assertions fell within the ambit of NRCP 60(b)(1) or 60(b)(3) rather than NRCP 60(b)(6). And because Caterina's claim is one that is specifically contemplated by the first five enumerated sections of NRCP 60(b), relief under NRCP 60(b)(6) is unavailable. *Klapprott*, 335 U.S. at 613-15; *see also* 11 Wright, Miller & Kane, *supra*, § 2864.

Moreover, motions for relief based on mistake, inadvertence, surprise, or excusable neglect, or fraud, misrepresentation, or misconduct, under NRCP 60(b)(1) or 60(b)(3), respectively, must be brought within six months of service of the written notice of entry of the judgment. NRCP 60(c)(1). Therefore, even if the district court had construed Caterina's motion as seeking relief under NRCP 60(b)(1) or 60(b)(3), rather than 60(b)(6), such a motion would have been untimely here, and relief on that basis would have likewise been improper. Accordingly, the district court abused its discretion in granting relief pursuant to NRCP 60(b). *See Cook*, 112 Nev. at 182, 912 P.2d at 265.

But this does not end our analysis. As noted above, Caterina initially moved to enforce the decree, asserting that the mortgage assistance payment was truly an alimony award and that Grady refused to provide Caterina with any documentation demonstrating she was receiving her portion of the retirement pay, such that she did not know whether she was receiving her awarded interest. And the district court has the inherent authority to interpret and enforce its decrees. *Henson*, 130 Nev. at 820 n.6, 334 P.3d at 937 n.6; *Kishner*, 93 Nev. at 225, 562 P.2d at 496. Yet here, the district court failed to

consider Caterina's motion on this basis. Thus, reversal and remand is warranted for the district court to consider the issues presented under the appropriate authority.[2] And, in light of this conclusion, we find it necessary to address Grady's remaining arguments on appeal to ensure this matter is properly considered on remand.

III.

Grady next contends that the district court erred when it ordered him to make alimony payments to Caterina directly from his veteran's disability benefits. Under federal law, "a State may treat veterans' 'disposable retired pay' as divisible property, *i.e.*, community property divisible upon divorce." *Howell v. Howell*, 581 U.S. 214, 217 (2017) (citing 10 U.S.C. § 1408(c)(1)). However, "amounts deducted from that pay 'as a result of a waiver . . . required by law in order to receive' disability benefits" are excluded from this rule. *Id.* at 217 (citing 10 U.S.C. § 1408(a)(4)(B)). The amounts are excluded from the divisible property allocation even when that means the value of a spouse's share of the military retirement pay is worth less than the spouse believes at the time of the divorce. *Id.* at 221. Therefore, under federal law, only a veteran's net disposable retirement pay is divisible as community property, whereas his or her waived amount, taken in the form of disability pay, is not community property subject to such division. *Mansell v. Mansell*, 490 U.S. 581, 594-95 (1989) (holding that federal law wholly preempts states from treating military retirement pay that has been waived to receive veterans' disability benefits as community property).

In *Howell*, John, the ex-husband, "elected to receive disability benefits and consequently had to waive about $250 per month of the roughly $1,500 of military retirement pay he shared with Sandra [his ex-wife]." *Howell*, 581 U.S. at 219. Sandra moved the Arizona family court to enforce the decree, requesting that the court "restor[e] the value of her share of John's total retirement pay." *Id.* The family court "ordered John to ensure that Sandra 'receive her full 50% of the military retirement without regard for the disability.'" *Id.* Subsequently, the Arizona Supreme Court affirmed, reasoning that the family court's ruling did not implicate federal preemption because it "simply ordered John to 'reimburse' Sandra for 'reducing . . . her share' of military retirement pay." *Id.* John petitioned the

[2]We recognize that the district court concluded the decree was ambiguous and interpreted the mortgage assistance provision as periodic payments constituting alimony despite the parties' purported agreement to waive alimony in the MSA. And we note that alimony may be modified under certain circumstances pursuant to NRS 125.150. But because the district court ultimately decided to set aside part of the decree and modify it pursuant to NRCP 60(b), failing to consider NRS 125.150 in so doing, we make no comment as to the merits of these conclusions. Instead, we remand the matter for the district court to consider these issues in the first instance.

United States Supreme Court for certiorari, and the Court granted his petition. *Id.* at 220.

In its opinion, the Court noted that, consistent with *Mansell*, "federal law completely pre-empts the States from treating waived military retirement pay as divisible community property." *Id.* In light of *Mansell*, the Court concluded that it was compelled to reverse the decision of the Arizona court because "the reimbursement award" to Sandra was tantamount to "an award of the portion of military retirement pay that John waived in order to obtain disability benefits," which is precisely "the portion that federal law prohibits state courts from awarding to a divorced veteran's former spouse." *Id.* at 221. Moreover, the Court noted, "[r]egardless of their form, such reimbursement and indemnification orders displace the federal rule and stand as an obstacle to the accomplishment and execution of the purposes and objectives of Congress. All such orders are thus pre-empted." *Id.* at 222. Additionally, the timing of the waiver—i.e., whether it occurred prior to or after the divorce—is irrelevant to the analysis. *Id.* at 221.

Here, the district court concluded that Grady was obligated to pay Caterina $1,500 per month from his military retirement and that he could not reduce this payment by claiming it was disability pay. The court went on to conclude that because Grady waived a portion of his retirement in favor of veterans' disability benefits and Caterina needed support, "Caterina should receive lifetime alimony." The district court then ordered Grady to reimburse Caterina "from [his] military pension disability." This was error.

Like in *Howell*, the district court ordered Grady to indemnify Caterina directly from his disability benefits to offset the loss of her interest in the retirement benefits based on Grady's retirement waiver. But pursuant to *Howell*, such orders are exactly what federal law forbids, and therefore, "[a]ll such orders are . . . pre-empted" by federal law and invalid. 581 U.S. at 222. Accordingly, because the district court ordered Grady to reimburse Caterina directly from his disability benefits, which is prohibited by federal law, the district court's order is invalid as a matter of law.

To the extent that both the district court and Caterina appear to suggest that *Mansell* and *Howell* are distinguishable from the instant case, and that the Nevada Supreme Court's decision in *Shelton v. Shelton*, 119 Nev. 492, 78 P.3d 507 (2003), controls, we disagree. In *Shelton*, the district court did not order the ex-husband to reimburse the ex-wife directly from his disability benefits. Instead, the court concluded that pursuant to the parties' agreement, the ex-husband was obligated to pay the ex-wife $577 per month. *Shelton*, 119 Nev. at 497, 78 P.3d at 510.

Importantly, the court did not order those payments to come directly from the ex-husband's disability pay; indeed, the court noted that "[i]t appears that [the ex-husband] possesses ample other

assets from which to pay his obligation without even touching his disability pay." *Id*. at 498, 78 P.3d at 510-11. Thus, the court concluded that under the divorce agreement the ex-husband was obligated to pay his ex-wife $577 and he could satisfy that obligation from any one of his available assets. *Id*. Notably, when first determining the value of the parties' assets at divorce, the district court may take into account that some military retirement pay might be waived, and it likewise may take into account reductions in the value of the retirement pay "when it calculates or recalculates the need for spousal support." *Howell*, 581 U.S. at 222. We also note that *Shelton* predates *Howell*, and *Howell* confirmed and clarified the scope of federal preemption in this context.

Here, by contrast, the district court specifically ordered Grady to reimburse Caterina "from [his] military pension disability," which patently violates *Mansell* and *Howell*. And the district court cannot avoid this problem by referring to the allocation as alimony rather than community property because, as the *Howell* court recognized, the form of the allocation is irrelevant. 581 U.S. at 222. In other words, the order's effect is more important than how it is styled. Thus, the order at issue in this case violates federal law because it directs Grady to indemnify Caterina directly from his disability benefits. Consequently, we conclude that this portion of the district court's order is preempted by federal law and is therefore invalid.

IV.

Finally, Grady argues that the district court abused its discretion when it summarily denied his initial request, as well as his motion for reconsideration, to testify from his home in the Philippines via audiovisual transmission pursuant to Part IX-B(B) of the Nevada Supreme Court Rules.

This court reviews a district court's decision whether to permit a witness to testify via audiovisual transmission for an abuse of discretion. *See LaBarbera v. Wynn Las Vegas, LLC*, 134 Nev. 393, 395, 422 P.3d 138, 140 (2018). In order "[t]o improve access to the courts and reduce litigation costs, courts shall permit parties, to the extent feasible, to appear by simultaneous audiovisual transmission equipment at appropriate proceedings pursuant to these rules." *Id*. (quoting SCR Part IX-B(B)(2)) (internal quotation marks omitted). Under these rules, "shall" is mandatory. SCR Part IX-B(B)(1)(5).

Proceedings that are considered appropriate for audiovisual transmission include "[t]rials [and] hearings at which witnesses are expected to testify . . . provided there is good cause as determined by the court in accordance with Rule 1(6)." SCR Part IX-B(B)(4)(1)(a). "Good cause" may consist of any number of factors as determined by the court, including whether a timely objection has been made; whether allowing the appearance would cause any undue surprise

or prejudice; the convenience of the parties, counsel, and the court; any cost and time savings; whether the appearance by audiovisual equipment would allow effective cross-examination; the importance of live testimony; and the quality of the communication, among other things. SCR Part IX-B(B)(1)(6)(a)-(k). "The Nevada Supreme Court Rules favor accommodation of audiovisual testimony upon a showing of good cause." *LaBarbera*, 134 Nev. at 395, 422 P.3d at 140.

Here, Grady produced documentation from three healthcare providers indicating that he was unable to travel internationally due to his underlying health condition. Additionally, the district court was fully aware that Grady resided in the Philippines, which could make it costly to travel, and therefore denying his request could mean that he would not be present at the evidentiary hearing to testify. Moreover, Caterina's opposition failed to assert, and there was no finding of, any undue surprise or prejudice. In contrast, the record demonstrates that the district court found Grady's medical notes were not credible because Grady failed to provide any evidence of an actual diagnosis, as the medical notes he provided indicated only that he should follow up with his doctors at the Department of Veterans Affairs. Additionally, the district court indicated that it had previously attempted to contact Grady during a hearing and was unable to do so, such that it had concerns regarding whether Grady would actually be available during the evidentiary hearing, and Grady had openly defied the court's prior orders. Ultimately, the district court denied Grady's initial request and then denied his motion for reconsideration.

Based on the foregoing, we recognize that there were a number of factors pertinent to the district court's decision. And while the district court has discretion in determining whether to grant a request to appear via audiovisual transmission, the court must determine whether good cause exists based on all of the relevant factors and in light of the policy in favor of allowing such appearances. *See LaBarbera*, 134 Nev. at 395, 422 P.3d at 140. Here, nothing in the record demonstrates whether the court considered the SCR Part IX-B(B)(1)(6) factors in denying Grady's request, and the district court failed to make any good cause findings. While the record indicates that the district court considered Grady's medical notes and concluded they were not credible, in denying reconsideration of the denial of his request to appear by audiovisual equipment, consideration of these notes alone is insufficient, as the district court is required to consider all of the relevant good cause factors under SCR Part IX-B(B)(1)(6) in light of the policy in favor of allowing audiovisual appearances. *See id.* As a result, we would normally conclude that the district court abused its discretion in denying Grady's request to appear telephonically.

Nevertheless, at the time set for the evidentiary hearing on the motions relating to the terms of the decree, the matter was also set for a show cause hearing regarding Grady's failure to pay the monthly amounts previously ordered by the court. In this case, the show cause hearing was not set as a stand-alone hearing but rather with the evidentiary hearing, and Grady's personal appearance was required for the hearing pursuant to the order to show cause.[3] SCR Part IX-B(B)(4)(2)(b) (providing that personal appearance is required for those ordered to appear for a show cause hearing). Notably, Caterina argued on appeal that Grady was required to appear for the order to show cause hearing, and Grady failed to address this argument in his reply brief. Therefore, under the particular facts of this case, we cannot conclude that the district court abused its discretion in requiring Grady's appearance at the time set for hearing on the order to show cause, even though his participation by audiovisual equipment for the evidentiary hearing may have otherwise been appropriate. Regardless, because we find it necessary to reverse and remand on the issues discussed above, we note that on remand the district court should consider all of the relevant factors when determining whether Grady's personal appearance is required for any future hearings should Grady again request to appear via audiovisual equipment.

V.

In summary, the district court abused its discretion in modifying the decree of divorce pursuant to NRCP 60(b)(6), as Caterina's assertions sounded in NRCP 60(b)(1) or 60(b)(3) and NRCP 60(b)(6) only applies in extraordinary circumstances not addressed by NRCP 60(b)(1)-(5). The district court likewise abused its discretion in ordering Grady to pay Caterina alimony directly from his veteran's disability benefits, as such an order is preempted by federal law. Finally, while a district court abuses its discretion in summarily denying a request to appear via audiovisual transmission without addressing the good cause factors, because the record

[3]We note that when a party is required to appear personally for a show cause hearing but seeks to appear via audiovisual equipment for a separate hearing, like an evidentiary hearing, the district court could bifurcate the show cause hearing from the pending substantive motions. In such a case, the district court could continue the hearing on the order to show cause to a date when the party can appear in person, while still permitting the party to appear remotely for the evidentiary hearing only, to ensure the party can meaningfully participate in the evidentiary hearing. *See LaBarbera*, 134 Nev. at 396, 422 P.3d at 140 (concluding that the district court's denial of a request to appear via audiovisual equipment was prejudicial because the party's absence prevented him from responding to the testimony presented at trial); *see also Fisher v. McCrary Crescent City, LLC*, 972 A.2d 954, 983 (Md. Ct. Spec. App. 2009) ("A party's right to be present at a hearing or trial is a substantial right.").

here demonstrates that the matter was also set for a show cause hearing, we ultimately cannot conclude that the district court abused its discretion in requiring Grady's appearance at the hearing. Nonetheless, on remand, the district court must consider the relevant factors when considering whether Grady must appear in person at any future hearings should he again request to appear via audiovisual transmission.

Accordingly, we reverse the district court's modification order and remand with instructions for the district court to conduct further proceedings consistent with this opinion.

Gibbons, C.J., and Tao, J., concur.