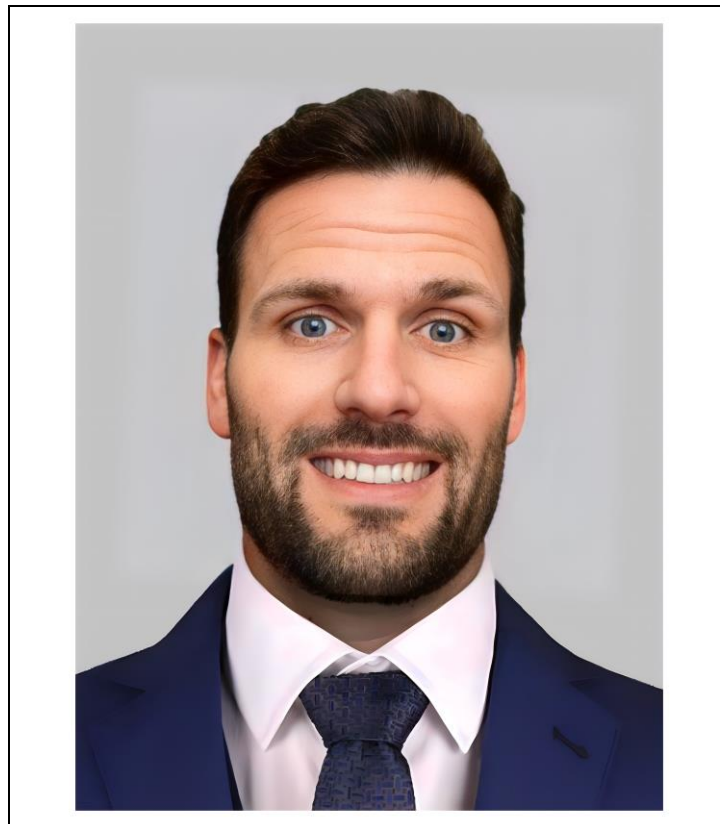
COMMISSION ON JUDICIAL SELECTION APPLICATION

EIGHTH JUDICIAL DISTRICT
DEPARTMENT VII

By

Daniel Hooge



Personal Information

1.	Full Name	Daniel Mink Hooge
2.	Have you ever used or been known by any other legal name (including a maiden name)? If so, state name and reason for the name change and years used.	No
3.	How long have you been a continuous resident of Nevada?	15 years 9 months
4.	City and county of residence	North Las Vegas, Clark County
5.	Age	44

Employment History

6. Please start with your current employment or most recent employment, self-employment, and periods of unemployment for the last 20 years preceding the filing of this Application.

Current or Last Employer	State Bar of Nevada
Phone	702-382-2200
Physical Address & Website	3100 W. Charleston Blvd, Suite 100, Las Vegas, NV 89102 nvbar.org
Date(s) of Employment	August 2018- current
Supervisor's Name and Title	Kimberly Farmer Executive Director
Your Title	Chief Bar Counsel
Describe Your Key Duties	• Provided counsel to the Board of Governors and Executive Director. • Investigated attorney misconduct under the Rules of Professional Conduct or incapacity. • Prosecuted all proceedings under the RPCs before the Northern and Southern Disciplinary Boards and the Nevada Supreme Court in the name of the State Bar of Nevada. • Worked to ensure that lawyer discipline in Nevada addressed grievances and misconduct efficiently without delay and that lawyers received consistent sanctions for misconduct.
Reason for Leaving	I enjoy this work and plan to continue in this role unless appointed.

Previous Employer	Lincoln County
Phone	775-962-8073

Address & Website	181 N Main St, Suite 205, PO Box 60, Pioche, NV 89043 lincolncountynv.org
Date(s) of Employment	May 2007- October 2018
Supervisor's Name and Title	Gregory Barlow was district attorney and my supervisor from May 2007 until December 2010. From January 2011 until October 2018, I was the elected district attorney.
Your Title	Assistant District Attorney / District Attorney
Describe Your Key Duties	• Managed a rural district attorney's office with one deputy district attorney and a legal secretary. • Advised the Board of County Commissioners and other County Boards. • Prosecuted criminal matters from misdemeanors to felony jury trials. • Prosecuted and defended civil lawsuits for and against the County. • Filed appellate briefs and argued appeals before the Appeals Court and Nevada Supreme Court.
Reason for Leaving	I lost the election in 2018 for a third term.

Previous Employer	DMH REAL ESTATE, INC
Phone	801-836-0888
Address & Website	PO Box 303, Lehi UT, 84043
Date(s) of Employment	July 1999- May 2007
Supervisor's Name and Title	I worked as an agent from July 1999 until April 2004 under the owner and my mother, Debbie Hooge. I took over as principal broker and managing partner in April 2004 and continued in this ownership and supervisory role until May 2007.
Your Title	Real Estate Agent / Principal Broker / Managing Partner
Describe Your Key Duties	Marketed real estate. Negotiated real estate sales. Drafted offers and real estate purchase agreements. Managed the real estate agents and non-agent staff. Reviewed agent transactions for legal and ethical compliance.
Reason for Leaving	When I graduated from law school, I left real estate and entered the legal profession.

Educational Background

7. List names and addresses of high schools, colleges and graduate schools (other than law school) attended; dates of attendance; certificates or degrees awarded; reason for leaving.

   American Fork High School
   510 Caveman Blvd
   American Fork, UT 84003

I attended from 1994 to 1996. I graduated with honors and received a diploma.

Utah Tech University
225 S. University Ave
St. George, UT 84770
I attended from 1996 to 1997. I left to serve a mission for The Church of Jesus Christ of Latter-Day Saints in Brazil from 1997 to 1999. When I returned, I chose to transfer to Brigham Young University.

Brigham Young University
150 E 1230 N
Provo, UT 84602
I attended from 1999 to 2002. I received a bachelor's degree in business management with an emphasis in finance.

8. Describe significant high school and college activities including extracurricular activities, positions of leadership, special projects that contributed to the learning experience.

   At American Fork High School, I played football and wrestled. I was captain of the wrestling team. I wrestled on Team Utah at the National Freestyle Wrestling Championships. I was named to the Utah Academic All-State Team in football and wrestling as a varsity starter with a 4.0 grade point average. I also participate in the math club and at math competitions.

9. List names and addresses of law schools attended; degree and date awarded; your rank in your graduating class; if more than one law school attended, explain reason for change.

   J. Reuben Clark Law School of Brigham Young University
   341 E. Campus Dr.
   Provo, Utah 84602
   I attended from 2003 to 2007. I received a Juris Doctorate in May 2007. I finished with a 3.1 grade point average, which ranked me in the top 50% of the class.

10. Indicate whether you were employed during law school, whether the employment was full-time or part-time, the nature of your employment, the name(s) of your employer(s), and dates of employment.

    I worked full-time at DMH REAL ESTATE, INC. as an owner and principal broker throughout law school. I took over as principal broker and managing partner in April 2004 and continued in this ownership and supervisory role until May 2007. This coincided with my time at law school.

11. Describe significant law school activities including offices held, other leadership positions, clinics participated in, and extracurricular activities.

I served as a senior editor for the International Law and Management Review. I also helped organize an intramural flag football team for the law school and an extramural basketball team to play against the S.J. Quinney College of Law at the University of Utah.

Law Practice

12. State the year you were admitted to the Nevada Bar.
    2007

13. Name states (other than Nevada) where you are or were admitted to practice law and your year of admission.

    Utah 2008

14. Have you ever been suspended, disbarred, or voluntarily resigned from the practice of law in Nevada or any other state? If so, describe the circumstance, dates, and locations.

No

15. Estimate what percentage of your work over the last five years has involved litigation matters, distinguishing between trial and appellate courts. For judges, answer questions 16-20 for the five years directly preceding your appointment or election to the bench.

I consider disciplinary cases as administrative litigation. Therefore, I estimate about 70% of my work over the last five years involved litigation matters. Of that work, the majority does not make it to appeal. I estimate that 40% of the disciplinary cases go to the Supreme Court for review after a formal hearing. The percentages were similar for criminal jury trials that went to appeal.

16. Estimate percentage of time spent on:

Legal Discipline	Percentage of Practice
Domestic/family	0
Juvenile matters	3
Trial court civil	1
Appellate civil	1
Trial court criminal	15
Appellate criminal	5
Administrative litigation	55
Other: Please describe	20 (Office management and other State Bar of Nevada matters.)

17. In the past five years, what percentage of your litigation matters involved cases set for jury trials vs. non-jury trials?

    In the last five years, I was District Attorney for six months and Chief Bar Counsel for the other fifty-four months. Disciplinary matters are before a three-member panel. I have not tried a jury trial as Chief Bar Counsel. But in the last six months as Lincoln County District Attorney, I tried three felony jury trials, including a three-week trial that resulted in a guilty verdict for sexual assault and murder. About twenty-five percent of my litigation load as Lincoln County District Attorney was felony jury trials.

18. Give the approximate number of jury cases tried to a conclusion during the past five years with you as lead counsel. Give the approximate number of non-jury cases tried to a decision in the same period.

    I tried three felony jury trials during my last six months as Lincoln County District Attorney. I tried misdemeanor cases, which I approximate at around a dozen. I also concluded a civil case against Lincoln County. As Chief Bar Counsel, I oversaw all disciplinary cases, which exceeded 200. I prosecuted about two dozen disciplinary cases personally. These cases have evidentiary and procedural rules like jury trials but include a three-member panel instead of a jury. All disciplinary matters involving a suspension or disbarment go to the Nevada Supreme Court for review.

19. List courts and counties in any state where you have practiced in the past five years.

    Seventh Judicial District in Lincoln County, Nevada.
    Eighth Judicial District in Clark County, Nevada.
    Supreme Court of Nevada.

20. List by case name and date the five cases of most significance to you (not including cases pending in which you have been involved), complete the following tables:

Case 1
Case name and date: **<u>In the Matter of the Discipline of Cory J. Hilton (2019)</u>**
Court and presiding judge and all counsel: Robert Caldwell chaired a disciplinary panel of the Southern Nevada Disciplinary Board. Michael Warhola, Breen Arntz, and Peter Angulo represented the respondent. I represented the State Bar of Nevada.
Importance of the case to you and the case's impact on you: This case involved a lawyer with $3.5 million dollars of client money missing from his trust account over a decade. Hilton was highly regarded in the legal community and appeared honest and reputable. He blamed his bookkeeper. But my investigator tracked down his bookkeeper. I spoke to him. He wasn't living a lavish life. There was no evidence that he took the money. In fact, he had no access to the account. I also obtained withdrawal receipts on which bank tellers noted that Hilton withdrew client money personally.

It shook my trust in the legal profession. It made me more skeptical of those who profess to be upstanding members of the community. It made me more attuned to financial fraud and embezzlement. It caused me to scrutinize the credibility and financial dealings of those around me with heightened diligence.

Additionally, it heightened my awareness of the potential for people in positions of trust to abuse that trust for their own gain. This gives me greater caution when it comes to granting leniency or showing leniency to respondent or defendants who are in positions of trust.

Overall, this case made me a more discerning and better judge of people. My heightened awareness of the potential for fraud and abuse can help me make more informed and just decisions in the future. It also made me more empathetic to victims of financial crimes, and more determined to hold those who commit such crimes accountable for their actions.

Your role in the case:
I prosecuted the case as Chief Bar Counsel for the State Bar of Nevada.

Case 2

Case name and date:
State of Nevada vs. Jerry Elbert Hudson (May 2018)

Court and presiding judge and all counsel:
Judge Gary Fairman of the Seventh Judicial District Court presided. I represented the State of Nevada as first chair. Franklin Katschke, deputy district attorney, represented the State of Nevada as second chair. Dylan V. Frehner represented the defendant.

Importance of the case to you and the case's impact on you:

I prosecuted Mr. Hudson in 2011 for attempted sexual assault. The victim, an elderly woman, claimed that Hudson entered her apartment late at night. She claimed that Hudson demanded that she perform sexual acts upon him. But he passed out soon after. She did not call for help or take any action until after he awoke and left the apartment hours later. It was a strange case. I questioned the victim's credibility at the time. Her story did not make sense to me. I questioned why Hudson would act that way. I assumed that Hudson was inebriated and stumbled into her apartment by accident. I regret my actions in hindsight. I let Hudson off easy. I negotiated a felony plea for prison time that allowed Hudson to seek parole after four years.

Hudson received parole four years later. Within six months he once again broke into an elderly woman's apartment late at night. This time, unfortunately, he sexually assaulted and murdered the woman. I will never forget her name or my feelings of guilt when I realized that Hudson was the evil that I refused to recognize. It taught me to balance common sense with trust in the witnesses. Testimony may seem unreasonable or incredible, but I needed to assess the witnesses' testimony objectively.

Fortunately, my team prepared and performed well. We obtained convictions for sexual assault and murder. Hudson received a sentence of life in prison. The Supreme Court affirmed his conviction in Hudson v. State, 510 P.3d 138 (Nev. 2022).

This high-profile and high-stakes prosecution pushed my knowledge and experience in the courtroom. The case challenged me but also rewarded me with invaluable experience. I grew to appreciate courtroom procedures and protocols. It gave me skills, knowledge, and experience that I can use to become an effective judge. It empowered me to make fair and just decisions based on the evidence presented, communicate effectively with all parties involved, and maintain order and calm under pressure.
Your role in the case: I represented the State of Nevada as first chair.

Case 3
Case name and date: **Hardy Construction v. Lincoln County (2015)**
Court and presiding judge and all counsel: John "Randy" Jeffries represented Hardy Construction. I represented Lincoln County. Phil Dabney acted as arbitrator. And Gary Fairman of the Seventh Judicial District presided in district court.
Importance of the case to you and the case's impact on you: This case taught me the importance of impartiality. Hardy Construction presented the lowest bid to Lincoln County to construct a park. The County felt that Hardy lacked quality control and failed to follow the plans. Lincoln County assigned engineers to watch Hardy Construction closely to ensure it adhered to the plans with quality work. Hardy later sued the County claiming that it lost millions because of the engineers' close supervision. Essentially, Hardy claimed that the daily monitoring constituted daily "change orders." This was ridiculous in my opinion because the plans were clear about the requirements. The final product met the plans precisely. Nevada law required the County to arbitrate. I prepared for months. I met with a dozen witnesses. I read thousands of documents. Our case was bulletproof. During the arbitration hearing, I presented evidence that the engineers followed the plans precisely and not once demanded that Hardy Construction perform beyond their bargained-for contract terms. The arbitrator agreed but awarded Hardy Construction almost a million dollars anyway. I appealed to the district court. Judge Fairman dismissed the appeal claiming that the arbitration clause tied his hands even though he did not agree with the arbitrator's reasoning or award. It made no sense to me. An arbitrator cannot create an obligation in contradiction to the contract that gives him authority. I appealed the district court's ruling. While researching the issue for my brief, I found significant case law and legislative history to support my position. Hardy Construction requesting a settlement conference. In hindsight, I wish the Board of County Commissioners would have waited for the Supreme Court to issue an opinion. But the County obtained a favorable settlement. After the settlement conference, I spoke to an associate representing Hardy Construction. He told me that they knew the case boiled down to one issue: whether they could get *that* arbitrator. They knew they had won the moment of his appointment. It was frustrating yet eye-opening.

I had stipulated to the arbitrator. I had no reason to question his impartiality. But they pushed for him as arbitrator and won before the battle started. I should have known better. I learned a valuable lesson. A judge or other adjudicator must treat all parties equally and without bias. Impartiality and fair decision-making are essential to the justice system. Everyone must perceive the judge or adjudicator as fair and just.
Your role in the case: I represented Lincoln County as the district attorney.

Case 4
Case name and date: **State of Nevada vs. Michael Alan Kincade (November 2012)**
Court and presiding judge and all counsel: Judge Steven Dobrescu of the Seventh Judicial District Court presided. I represented the State of Nevada. Dylan V. Frehner represented the defendant.
Importance of the case to you and the case's impact on you: The Lincoln County Sheriff's Department investigated Michael Kincade after his ex-wife reported that he was sexually abusing his son and grandson. Cases like these are always difficult because the offenders commit these terrible acts in secret. It was Kincade's word against the word of two young boys. I needed corroboration to present a stronger case to the jury. A Lincoln County detective filed an affidavit for a warrant to search Kincade's home for evidence related to the allegations. A justice of the peace issued a warrant, but the detective failed to attach the probable cause affidavit to the warrant when she served it on Kincade. She found thousands of images of child pornography on Kincade's computer and an external hard drive, including disturbing images of the two victims. Those images would have sealed the case. I filed numerous charges against Kincade for sexual assault and possession of child pornography. Unfortunately, the district court granted Kincade's motion to suppress. The district court found that without an affidavit of probable cause attached, the search violated NRS 179.045(5). I was frustrated and angry at the thought of letting a predator escape on a technicality. I appealed it to the Nevada Supreme Court but lost again. State v. Kincade, 129 Nev. 953, 955, 317 P.3d 206, 207 (2013). I had to press forward without the evidence. I had to prosecute the case based on the testimony of those two boys. The defense hired an expert to interview them, but he was cruel and punishing. I had to meet with the boys often to support and comfort them. The defense pressed hard at trial. But the boys were resilient. They withstood cross-examination. I gave the best closing of my career. We prevailed. The district court sentenced Kincade to life. It taught me that even when the law seems cold and unforgiving, it is the best system in the world for justice. These boys went through a traumatic experience. It was important for me to have empathy and sensitivity towards them. This ability to understand and relate to their experiences, fears, and frustrations was essential for me. I had to consider the impact every decision has on the stakeholders in a case. I had to fight for them to obtain justice.

Your role in the case: I prosecuted the case for the State of Nevada as the Lincoln County District Attorney.

Case 5
Case name and date: **State of Nevada v. David Saletta (2010)**
Court and presiding judge and all counsel: Steven L. Dobrescu of the Seventh Judicial District presided. I represented the State of Nevada as deputy district attorney. Benjamin Gaumond represented the defendant.
Importance of the case to you and the case's impact on you: This case etched a lesson in me that I will never forget. Saletta exposed himself to a busload of high school cheerleaders while stopped at a gas station. He claimed that he was urinating. But he was in front of a gas station, which would be an odd place to urinate. Bathrooms were inside. Also, several cheerleaders described how he waved his penis back and forth with clear intent. The trial went as planned and the jury came back with a guilty verdict after 15 minutes. That is when the case went amiss. After the foreperson read the verdict, the defense asked to poll the jurors. Eleven supported the verdict. One juror recanted. I was a three-year attorney with decent trial experience, but I had never witnessed a juror recant. Both sides were lost as how to proceed. Judge Dobrescu asked the juror questions to determine if she felt coerced or had other problematic reasons for recanting. He then asked if either party wanted to question the juror. I made the mistake of asking her questions hoping to disqualify her. Had I taken a minute to research it, then I would have discovered that NRS 175.531 set forth a procedure for such circumstances. The court could either discharge the jury or send them back for further deliberations. It had been a quick verdict and the juror felt rushed. I should have moved the court to send the jury back for further deliberation. Fortunately, judge Dobrescu followed protocol and sent the jury back for further deliberation. It returned 45 minutes later with another guilty verdict. This time it was unanimous. Saletta appealed and the Nevada Supreme Court reversed his conviction. It held that my questioning the juror constituted undue intrusion into the exclusive province of the jury and pressured the juror to abandon her views. It was frustrating to retry the case. However, I learned a valuable lesson: take the time to look up the rule when in unfamiliar circumstances. Now I will never forget what to do when a juror renounces a verdict.
Your role in the case: I prosecuted the case for the State of Nevada as deputy district attorney.

21. Do you now serve, or have you previously served as a mediator, an arbitrator, a part-time or full-time judicial officer, or a quasi-judicial officer? To the extent possible, explain each experience.

No

22. Describe any pro bono or public interest work as an attorney.

I perform about 50 hours a year of pro bono work usually for other members of my local church congregation that need advice with family matters or small civil matters such as landlord tenant or HOA matters. I have mediated divorce agreements, represented couples in adoptions, and assisted families going through foreclosure.

23. List all bar associations and professional societies of which you are or have been a member. Give titles and dates of offices held. List chairs or committees in such groups you believe to be of significance. Exclude information regarding your political affiliation.

- State Bar of Nevada
- State Bar of Utah
- National Organization of Bar Counsel
- National District Attorney's Association
- Nevada District Attorney's Association
- J. Reuben Clark Law Society

24. List all courses, seminars, or institutes you have attended relating to continuing legal education during the past five years. Are you in compliance with the continuing legal education requirements applicable to you as a lawyer or judge?

Yes, I am in compliance for my mandatory continuing legal education. I completed the following courses:

- *Case Framing*, Nevada Justice Association (1/25/2018)
- *Better Lawyering Through Mindfulness*, State Bar of Nevada (10/10/2018)
- (Presenter) *Trial Skills Institute: Closing Arguments*, State Bar of Nevada (11/29/2018)
- (Presenter) *A Self-Regulated Profession: RPC 8.3 & Impaired Attorneys*, State Bar of Nevada (12/5/2018)
- *2019 Mid-Year Meeting*, National Organization of Bar Counsel (1/23/2019)
- (Presenter) *Meet Your New Bar Counsel: What to Expect from Attorney Discipline*, Clark County Bar Association (3/7/2019)
- (Presenter) *Nevada Government Civil Attorneys' Conference*, State Bar of Nevada (5/15/2019)
- (Presenter) *Frightening Financial Transactions & How to Avoid Them*, Clark County Bar Association (10/29/2019)
- *Constitutional Law with Professor Chemerinsky*, State Bar of Nevada (12/18/2019)
- *2020 NOBC Annual Meeting*, National Organization of Bar Counsel (7/30/2020)
- *All's Fair: Love, War, & Politics*, State Bar of Nevada (10/15/2020)
- *NOBC 2021 Mid-Year Meeting*, National Organization of Bar Counsel (2/12/2021)
- (Presenter) *2021 State Bar of Nevada Annual Bar Conference*, State Bar of Nevada (6/17/2021)
- *NOBC 2021 Annual Meeting*, National Organization of Bar Counsel (8/6/2021)
- *Bar Exam Survey Participation*, State Bar of Nevada (12/1/2021)
- *State Bar of Nevada Annual Bar Conference*, State Bar of Nevada (6/22/2022)

- (Presenter) *Cannabis Law Conference*, State Bar of Nevada (12/16/2022)
- *8 Dimensions of Wellness*, State Bar of Nevada (12/22/2022)

25. Do you have Professional Liability Insurance or do you work for a governmental agency?

    I work for the State Bar of Nevada, which is a private-public partnership. I represent the State Bar and protect the public generally. I do not represent clients individually. Thus, I do not have professional liability insurance.

Business & Occupational Experience

26. Have you ever been engaged in any occupation, business, or profession other than a judicial officer or the practice of law? If yes, please list, including the dates of your involvement with the occupation, business, or profession.

I worked for and later owned and managed DMH REAL ESTATE, INC. from 1999 to 2007. The company marketed and sold real estate as a Coldwell Banker franchise with about a dozen agents.

I founded and owned Columbia Funding Group, Inc. around the same time. Columbia Funding originated mortgages and engaged in other hard-money lending. I closed operations in 2007 when I started my legal career.

I founded and owned Hooge Enterprises, LLC also around the same time. Hooge Enterprises bought distressed properties to remodel and sell for a profit. I closed operations in 2007 when I started my legal career.

27. Do you currently serve or have you in the past served as a manager, officer, or director of any business enterprise, including a law practice? If so, please provide details as to:
    a. the nature of the business
    b. the nature of your duties
    c. the extent of your involvement in the administration or management of the business
    d. the terms of your service
    e. the percentage of your ownership

Columbia Funding Group, Inc.	3679 S Panorama Saratoga Springs, UT 84043	Mortgage Lending	Utah Corporation	Manager and Director	100% Owner
DMH Real Estate, Inc.	PO Box 303 Lehi, UT 84043	Real Estate Marketing and Sales	Utah Corporation	Manager and Principal Broker	50% Owner
Blue 22 Aviation, LLC	8775 N Cedar Pass Eagle Mountain, UT 84005	Private flights with a small airplane	Utah Limited	Registered Agent and Director	No ownership

			Liability Company		
Hooge Enterprises, LLC	1447 S 1700 E Spanish Fork, UT 84660	Remodel and resell of distressed properties.	Utah Limited Liability Company	Manager and Director	100% Owner

28. List experience as an executor, trustee, or in any other fiduciary capacity. Give name, address, position title, nature of your duties, terms of service and, if any, the percentage of your ownership.

None.

Civic Professional & Community Involvement

29. Have you ever held an elective or appointive public office in this or any other state?

Yes

Have you been a candidate for such an office?

Yes

If so, give details, including the offices involved, whether initially appointed or elected, and the length of service. Exclude political affiliation.

I ran for and was elected as the Lincoln County District Attorney in 2010 and 2014. I ran again and lost the election in 2018.

30. State significant activities in which you have taken part, giving dates and offices or leadership positions.

The US Olympic Committee chose me as a torchbearer for the 1996 Summer Olympics. Local athletes carried the Olympic Torch after its arrival from Greece to the Pacific Coast of the United States to its destination in Atlanta, Georgia. I carried the torch through a portion of Salt Lake City.

31. Describe any courses taught at law schools or continuing education programs. Describe any lectures delivered at bar association conferences.

- *Best Practices for Ethical Lawyers*, October 2018 (Clark County Bench-Bar)
- *Meet Your New Bar Counsel*, March 2019 (Clark County Bar Association)
- *Proactive Self-Regulation under RPC 8.3*, June 2019 (Presentation with Justice Hardesty at the 2019 Annual Meeting of the State Bar of Nevada in Vail, Colorado)
- *Frightening Financial Transactions*, October 2019 (Clark County Bar Association)
- *How to Find a Professional and Ethical Lawyer*, March 2020 (Kiwanis Club of Las Vegas)
- *Top 10 Ethical Traps and How to Avoid Them*, June 2021 (Clark County Bar Association)

- *Attorney-Client Privilege*, June 2021 (Presentation with Dominic Gentile at the 2021 Annual Meeting of the State Bar of Nevada in Coronado, California)
- *Substance Abuse, Addiction, and Mental Health Issues: Need to close or temporarily close your practice?* October 2021 (Presentation with Kristine Kuzemka for a SBN CLE).
- *Succession Planning*, December 2021 (SBN CLE)
- *Who is Your Client? RPC 1.13*, December 2021 (Annual Meeting of the Public Lawyers Section in Lake Tahoe)
- *Institutional Clients: Loyalty and Confidentiality*, March 2022 (Energy, Utilities, and Communication Law Section)
- *Ethical Issues in Bankruptcy Law*, May 2022 (Bankruptcy Law Section)
- *Ethics from the Desk of Bar Counsel*, September 2022 (Clark County Bar Association)
- *Introduction to the Disciplinary Process*, September 2022 (SBN Incubator Program)
- *Disciplinary Board Training*, December 2022 (Two trainings one to the Northern Disciplinary Board in Reno and one to the Southern Disciplinary Board in Las Vegas)
- *Ethical Issues in Criminal Defense*, December 2022 (Nevada Department of Indigent Defense Services (DIDS) Conference for Public Defenders)
- *Ethical Issues in Cannabis Law*, December 2022 (Cannabis Law Section)

32. List educational, military service, service to your country, charitable, fraternal, and church activities you deem significant. Indicate leadership positions.

- I served a mission for the Church of Jesus Christ of Latter-Day Saints in Brazil from 1997 to 1999.
- I served in the Boy Scouts of America as a scout master from 2003 to 2005 and as a Varsity Scout Coach from 2007 to 2019.
- I currently serve as a bishop for the Church of Jesus Christ of Latter-Day Saints over a congregation of 500. It is an unpaid, voluntary position.

33. List honors, prizes, awards, or other forms of recognition.

I achieved the rank of Eagle Scout in the Boy Scouts of America.

34. Have you at any time in the last 12 months belonged to, or do you currently belong to, any club or organization that in practice or policy restricts (or restricted during the time of your membership) its membership on the basis of race, religion, creed, national origin or sex? If so, detail the name and nature of the club(s) or organization(s), relevant policies and practices, and whether you intend to continue as a member if you are selected for this vacancy.

No

35. List books, articles, speeches and public statements published, or examples of opinions rendered, with citations and dates.

- *How to Avoid a Bar Complaint*, Nevada Lawyer (January 2023).
- *Acting on our Ethics*, Nevada Lawyer (September 2022).
- *Consider Service to Enhance Wellbeing*, Nevada Lawyer (February 2022).
- *Ethical Issues in Tax Law*, Nevada Lawyer (December 2021).
- *Dealing with Dreaded Discipline*, Nevada Lawyer (May 2021).
- *Diversity and Inclusion: Strengthening the Legal Profession*, Nevada Lawyer (January 2021).
- Contributing Editor, *Trust Accounting in Nevada 2021 Ed.,* https://nvbar.org/wp-content/uploads/Trust-Accounts-in-Nevada-2021-Update.pdf, State Bar of Nevada (2021).
- *Fee Considerations for Personal Injury Lawyers (and Any Contingent Fee Case)*, Nevada Lawyer (July 2020).
- *Avoiding the voidable: dealing with fees after termination or withdrawal*, Nevada Lawyer (March 2020).

36. During the past ten years, have you been registered to vote?
Yes

Have you voted in the general elections held in those years?
Yes

37. List avocational interests and hobbies.

I enjoy reading mystery novels, playing the guitar, snowboarding, wakeboarding, and basketball.

Conduct

38. Have you read the Nevada Code of Judicial Conduct and are you able to comply if appointed?
Yes

39. Have you ever been convicted of or formally found to be in violation of federal, state or local law, ordinance or regulation? Provide details of circumstances, charges, and dispositions.
No

40. Have you ever been sanctioned, disciplined, reprimanded, found to have breached an ethics rule or to have acted unprofessionally by any judicial or bar association discipline commission, other professional organization or administrative body or military tribunal? If yes, explain. If the disciplinary action is confidential, please respond to the corresponding question in the confidential section.
No

41. Have you ever been dropped, suspended, disqualified, expelled, dismissed from, or placed on probation at any college, university, professional school or law school for any reason including scholastic, criminal, or moral? If yes, explain.

No

42. Have you ever been refused admission to or been released from any of the armed services for reasons other than honorable discharge? If yes, explain.

No

43. Has a lien ever been asserted against you or any property of yours that was not discharged within 30 days? If yes, explain.

No

44. Has any Bankruptcy Court in a case where you are or were the debtor, entered an order providing a creditor automatic relief from the bankruptcy stay (providing in rem relief) in any present or future bankruptcy case, related to property in which you have an interest?

No

45. Are you aware of anything that may require you to recuse or disqualify yourself from hearing a case if you are appointed to serve as a member of the judiciary? If so, please describe the circumstances where you may be required to recuse or disqualify yourself.
    No

Other

46. If you have previously submitted a questionnaire or Application to this or any other judicial nominating commission, please provide the name of the commission, the approximate date(s) of submission, and the result.
    N/A

47. In no more than three pages (double spaced) attached to this Application, provide a statement describing what you believe sets you apart from your peers, and explains what education, experience, personality or character traits you possess, or have acquired, that you feel qualify you as a supreme court justice. In so doing, address appellate, civil (including family law matters), and criminal processes (including criminal sentencing).

48. Detail any further information relative to your judicial candidacy that you desire to call to the attention of the members of the Commission on Judicial Selection.

49. Attach a sample of no more than ten pages of your original writing in the form of a decision, "points and authorities," or appellate brief generated within the past five years, which demonstrates your ability to write in a logical, cohesive, concise, organized, and persuasive fashion.

Personal Statement of Daniel Hooge

Mark Twain once wrote, "The difference between the almost right word and the right word is really a large matter–it's the difference between the lightning bug and the lightning." (*Letter to George Bainton*, Oct. 1888). It is a wonderful quote, with a shocking, beautiful image. It captures the importance of a single word. A single word can change the meaning of a statute, the testimony of a witness, or the outcome of a trial. It can condemn a person to prison or set them free. Such high stakes resting on seeming subjectivity can create a perception of injustice.

In *State v. Kincade*, law enforcement had probable cause to search the home of a child predator, but their warrant lacked the words necessary to support probable cause. A judge presided over the case. He interpreted and applied the law without passion or bias. He suppressed valuable evidence. The law was cold and unforgiving. I faced an uphill battle at trial. Those boys suffered through a traumatic experience. I had to fight for them as they relived that trauma. But the system worked. A jury convicted Kincade. Justice triumphed.

That is why I want to serve as a district judge. I want justice to triumph. As a district judge, I would have greater power to shape the world around me. My experience, knowledge, integrity, impartiality, communication skills, temperament, and flexibility will help me.

As chief bar counsel for the State Bar of Nevada, I strived to address grievances and lawyer misconduct with efficiency and consistency. It deepened my understanding of the legal system and the importance of integrity and ethical conduct.

As a district attorney for Lincoln County, I gained invaluable experience in criminal prosecutions and civil cases. I prosecuted serious felonies before a jury with success,

including sexual assault and murder. I fought for victims and the community. Serving as district attorney honed my ability to analyze complex legal issues, evaluate evidence, and make sound decisions.

But the work never stops. The world needs people who will stand up for what is right and who will use their knowledge and skills to make a positive impact. These are my creeds. I have faults. But justice does not require perfection, it requires progress. I am resilient and humble—ready to improve each day.

At American Fork High School, I played football and wrestled. I served as the captain of the wrestling team. This taught me to lead and manage teams, work with others, and unite to achieve common goals. I competed at a national level. But I succeeded only if I put forth the effort. This competitive background taught me the value of hard work, discipline, and perseverance. I earned a place on the Utah Academic All-State Team in football and wrestling as a varsity starter with a 4.0 grade point average. I participated with the math club at math competitions. These experiences fostered my ability to think critically and employ logic to solve problems.

During law school, I served as a senior editor for the International Law and Management Review, where I developed my legal research, writing, and editing. I later honed these skills by writing articles on a variety of legal topics, including ethics, diversity and inclusion, discipline, and trust accounting. My article "Acting on our Ethics" in the *Nevada Lawyer* recommended integrating our actions with our moral standards.

From 1999 to 2007, I worked for, owned and managed DMH REAL ESTATE, INC., which was a Coldwell Banker franchise with about a dozen agents. I marketed, sold real estate, and managed a successful team. During the same period, I also founded and owned Columbia Funding Group, Inc., which originated mortgages and engaged in other hard-

money lending, and Hooge Enterprises, LLC, which bought distressed properties to remodel and sell for a profit. These experiences gave me valuable experience in communication, negotiation, and understanding people. They also gave me experience in managing and leading teams and overseeing projects.

"I slept and dreamt that life was joy. I awoke and saw that life was service. I acted and behold, service was joy." – Rabindranath Tagore. I echo these sentiments. Service has brought me joy.

From 1997 to 1999, I served a mission for the Church of Jesus Christ of Latter-Day Saints in Brazil, where I learned the importance of selfless service and further developed my leadership skills. I also served in the Boy Scouts of America as a scoutmaster from 2003 to 2005 and as a Varsity Scout Coach from 2007 to 2019. I am proud to have achieved the rank of Eagle Scout, which required significant service for each of the preceding ranks and for my Eagle Scout service project. Currently, I serve as a bishop for the Church of Jesus Christ of Latter-Day Saints over a congregation of 500. This is an unpaid, voluntary position where I preside over a congregation and provide spiritual guidance, counseling, and direction to the members of the congregation. This position requires a significant amount of time, responsibility, and leadership. Service has given me a well-rounded perspective and a powerful sense of purpose. It fostered in me the ability to approach different situations and issues with a balance of compassion and impartiality. It blessed me with the patience, open-mindedness, and temperament to listen to all sides of an argument and make an informed decision without rush.

In conclusion, my experience, knowledge, integrity, impartiality, communication skills, temperament, and flexibility qualify me for this position. My passion sets me apart.

Daniel M. Hooge

IN THE SUPREME COURT

OF THE STATE OF NEVADA

IN THE MATTER OF DISCIPLINE OF

LEILA LOUISE HALE, ESQ.,

Bar No.: 7368

Supreme Court No. 84918

STATE BAR OF NEVADA'S

REPLY BRIEF

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III. ARGUMENT

A. CONFESSION OF ERROR

This Court has held that a party confesses error under NRAP 31(d) when the party fails to file an answering brief.[1] This Court has also held that even if a party files an answering brief, but it fails to address a significant issue raised in the appeal, then it confesses error.[2]

Here, the State Bar raised four issues in its appeal: (1) May a lawyer use a fee agreement to deprive a client of the right to approve a settlement? (2) Does a discharge clause in a contingent-fee agreement, which requires the client to pay the full contingency fee or a high hourly rate immediately after discharge, violate RPC 1.5 as an unreasonable fee? (3) Does a lawyer cause injury where, after receiving a client's settlement, the lawyer withdraws her fee immediately and refuses to distribute the rest for over two years? And (4)

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[1] *See County Comm'rs v. Las Vegas Discount Golf*, 110 Nev. 567, 569-70, 875 P.2d 1045, 1046 (1994); *State of Rhode Island v. Prins*, 96 Nev. 565, 566, 613 P.2d 408, 409 (1980).

[2] *See Polk v. State*, 233 P.3d 357, 360 (Nev. 2010); *Bates v. Chronister*, 100 Nev. 675, 681-82, 691 P.2d 865, 870 (1984) (respondent's failure to respond to the appellant's argument was a confession of error); *A Minor v. Mineral Co. Juv. Dep't*, 95 Nev. 248, 249, 592 P.2d 172, 173 (1979) (respondent's answering brief was silent on the issue in question, so respondent confessed the error); *Moore v. State*, 93 Nev. 645, 647, 572 P.2d 216, 217 (1977) (the State provided no legal analysis to support its position and "effect[ively] filed no brief at all," which constituted a confession of error), *overruled on other grounds by Miller v. State*, 121 Nev. 92, 95-96, 110 P.3d 53, 56 (2005).

Is dismissal with a letter of caution an appropriate sanction to protect the public?

Respondent, however, did not address the first three issues.

Respondent merely argued that substantial evidence supported the Panel's findings.[3] But the State Bar appealed the Panel's conclusions of law—not its findings of fact. The Parties stipulated to the facts. There was no question of fact.

Issue One—Obtaining Settlement Authority in a Fee Agreement

The panel found that Respondent did not violate RPC 1.2 because (1) the clause was ambiguous, and (2) the Respondent did not invoke the clause against Danielson.[4] The State Bar asked the Court as a matter of law whether the clause was ambiguous or whether RPC 1.2 required Respondent to invoke the clause.

Respondent did not argue in support of the Panel's legal conclusions. Instead, Respondent argued that RPC 1.2 requires the State Bar to establish a mental state or *mens rea*. And because the Respondent acted in "good

[3] Ans. Br. at 1 (Statement of the Issues Presented for Review).
[4] ROA, Vol. I at 00080.

faith," the State Bar failed to establish her mental state as an element of RPC 1.2.[5]

The State Bar will address the Respondent's mental state argument below. However, this Court should find that Respondent confessed to the error below because she provided no legal argument to support the Panel's conclusion that the clause was (1) ambiguous and (2) benign if not invoked. Essentially, Respondent confessed that her settlement clause violated RPC 1.2 claiming she violated the rule "in good faith."

Issue Two—Unreasonableness of the Discharge Clause

The Panel found that Respondent did not violate RPC 1.5 because "Respondent's fee agreement was not used to take an unreasonable fee upon termination."[6] The State Bar asked the Court as a matter of law whether Respondent needed to "use" the clause because RPC 1.5 states, "A lawyer shall not ***make an agreement for***, ***charge***, or collect an unreasonable fee or an unreasonable amount for expenses."

Respondent did not argue in support of the Panel's legal conclusions. Instead, Respondent argued that RPC 1.5 also requires the State Bar to establish *mens rea* and because the Respondent acted in "good faith," the

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[5] Ans. Br. at 19-24.
[6] ROA, Vol. I at 00081.

State Bar failed to establish her mental state as an element of RPC 1.5.[7] Respondent mixed *quantum meruit* arguments into her answering brief, but she presented them subordinate to her "good faith" argument.

The State Bar will address the Respondent's mental state and *quantum meruit* arguments below. However, this Court should find that Respondent confessed to the error below because she provided no legal argument to support the Panel's conclusion that she did not "use the clause" to take an unreasonable fee.

Issue Three—Injury from a Two-Year Delay

The panel found that although Respondent violated RPCs 1.15 and 1.16 by failing to disburse Danielson's property, Respondent "caused little to no actual or potential harm to Danielson."[8] The State Bar asked the Court as a matter of law whether withholding property from the client and lienholders for over two years causes injury as a matter of law.

Respondent did not address the injury. Respondent did not argue in support of the Panel's legal conclusion. Instead, Respondent argued that "HIL's right to withdraw those funds had not yet ripened" and therefore she did not violate RPC 1.15 and 1.16 by withholding client and lienholder

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[7] Ans. Br. at 24-35.
[8] ROA, Vol. I at 00081.

property.[9] Respondent cites no authority for this argument but claims that she withheld the property with hope of obtaining for them "a greater amount" from the Uber Lawsuit.[10]

Nevertheless, this Court should find that Respondent confessed to the error below because she provided no legal argument and made no attempt to support the Panel's conclusion that Respondent "caused little to no actual or potential harm to Danielson."

Thus, the State Bar asks the Court to find that Respondent confessed error in the Panel's conclusions of law that Respondent did not violate RPCs 1.2, 1.5, and caused little or no injury from her RPC 1.15 and 1.16 violations.

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[9] Ans. Br. at 40. Respondent's argument makes little sense from the client and lienholder's perspective. RPCs 1.15 and 1.16 required Respondent to disburse their property "promptly." She had no right to withhold their undisputed property while waiting for a potential recovery from Uber. Delay does not benefit Danielson or the lienholders. It harms them. Worse, Respondent does not represent Danielson in the Uber matter. Respondent has no control over *that* disbursement. She is just another lienholder. Even if the new firm obtains a recovery from Uber, then *it* will disburse proportionately and promptly—*not Respondent*. An additional recovery would not change Respondent's obligation to disburse the ***undisputed*** interests in the UIM portion ***promptly***.

[10] *Id.*

B. MENS REA, OR A GUILTY MIND, IS NOT AN ELEMENT OF RPC 1.2 OR 1.5.

Respondent argues "the State Bar cannot establish that Ms. Hale was at least negligent in regard to the Settlement Clause. This fact alone precludes any discipline from being imposed in regard to County One."[11] Respondent makes a similar argument for Count Two.

> For the reasons explained in the previous section, this precludes the imposition of discipline under the ABA Standards for the language contained in the termination Clause—as Ms. Hale had no culpable frame of mind in continuing to use the portions of the Termination Clause that were not found to violate RPC 1.5 in the 2018 Hale Proceeding.[12]

Respondent conflates mitigation with misconduct. She cannot commit misconduct in "good faith" by following the crowd.

Twenty-six rules of professional conduct have a specified *mens rea*, or mental state, requirement. For example, RPC 3.3(a) provides that a lawyer "shall not ***knowingly*** . . . make a false statement of fact or law to a tribunal, ... fail to disclose" adverse legal authority, or "offer evidence that the lawyer ***knows*** to be false." Under RPC 8.2(a), a lawyer may not "make a statement that the lawyer ***knows*** to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of judge."

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[11] Ans. Br. at 21.
[12] Ans. Br. at 28.

But just as many rules do not require a mental state. For example, RPC 1.6 provides that a lawyer "shall not reveal information relating to the representation of a client" except under certain circumstances. RPC 1.7(a) prohibits a lawyer from representing a client "if the representation involves a concurrent conflict of interest," except under certain conditions. With respect to mishandling client funds, RPC 1.15(a) requires a lawyer to keep client funds separate from lawyer funds and to keep "[c]omplete records of such account funds and other property." RPC 7.1 provides that "[a] lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services."

Courts have routinely held that these rules do not require the prosecution to prove a mental state. For example, a New York appellate court held that a New York rule prohibiting conduct adversely reflecting on fitness to practice law similar to RPC 8.4(b) "has no scienter requirement."[13] A District of Columbia appellate court held that its RPC 1.15 analog on misappropriation of client funds "does not require scienter."[14] The Supreme Court of Arizona explained it well when suspending an attorney for multiple violations, including a violation of Arizona's RPC 1.4 analog. It stated,

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[13] *In re Latimore*, 252 A.D.2d 217, 219 (N.Y. App. Div. 1999).
[14] *In re Harrison*, 461 A.2d 1034, 1036 (D.C. 1983).

> Moreover, Respondent once again misreads a scienter requirement into ER 1.4. The intentionality or unintentionality of an attorney's conduct is irrelevant in determining a violation of ER 1.4. The question is simply whether or not the attorney provided the client with sufficient information to enable the client to make an informed decision regarding the representation. In this case, we find that Respondent did not.[15]

The Supreme Court of Delaware in 2018 reviewed a case in which the respondent's arguments were similar to Respondent's arguments in this case. The respondent in *In re Beauregard* violated several rules related to his handling of client property. He argued that he handed those duties over to a qualified, third-party bookkeeper and therefore lacked even a negligent mental state. The office of disciplinary counsel ("ODC") argued that there was no mental state element to the rules unless expressly stated. The court stated,

> Whether the absence of a mental state requirement in some of our rules implies a strict liability standard for those rules has not been addressed by our Court and is the subject of debate under the Model Rules. Although we have as a reference the commentary and reports accompanying the rules at both the national and state levels, the best that can be gleaned from those resources is the purposeful addition of a state of mind requirement to some rules, and its absence from others. Lacking pre-adoption guidance on the state of mind issue, we look to the plain language of each rule and interpret the rules as 'rules of

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[15] *In re Shannon*, 179 Ariz. 52, 63, 876 P.2d 548, 559 (1994).

> reason' and 'with reference to the purposes of legal representation and of the law itself.'[16]

The court considered each of the three rules in question, which were Delaware analogs to RPCs 1.15, 5.3, and 8.4. It found that RPC 1.15 and 8.4(d) were both strict liability offenses because they did not include a mental state. RPC 1.15, for example, placed an affirmative duty on the attorney to act as a professional fiduciary in safekeeping client property. However, the court found that the RPC 5.3 analog—responsibilities regarding nonlawyer assistants—contains "reasonable" and "reasonableness" standards of care and a "knowing" state of mind requirement for subsections (a), (b), and (c), respectively. The court also found that the RPC 8.4(c) analog—misconduct involving dishonesty, fraud, deceit, or misrepresentation—implies a state of mind requirement. The court interpreted the reasonable standard of care in subsections (a) and (b) as negligence scienter.[17]

Similarly, in *In re Fink*,[18] the Supreme Court of Vermont addressed how the ABA Standards treat the mental state in the RPC 1.15 analog and other rules without an express mental state. It stated,

> It bears emphasizing that this standard is relevant for the mental state determination relative to ***sanctions only***. … Thus, while

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[16] *In re Beauregard*, 189 A.3d 1236, 1245-46 (Del. 2018).
[17] *Id*. at 1247-48.
[18] 2011 VT 42, ¶ 41, 189 Vt. 470, 489-90, 22 A.3d 461, 475-76.

> a lawyer's ***good faith***, but unreasonable, belief that his actions are not misconduct is ***not a defense*** to a violation, such an error can be a factor in imposing discipline.[19]

Here, Respondent claims a subjective, good faith belief that both her settlement authority clause and termination fee clause were acceptable. First, Respondent claims that State Bar inaction gave her safe harbor. Second, she claims that wide-spread use in the personal-injury community make the termination fee clause an "industry standard."

Like the Delaware Supreme Court, this Court should look to the plain language of each rule.

RPC 1.2(a) states, in part, "A lawyer shall abide by a client's decision whether to settle a matter." The plain language places an affirmative duty on the lawyer not to interlope in a client's decision to settle a matter. This is a strict liability offense.

RPC 1.5(a) states, in part, "A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses." The plain language places an affirmative duty on the lawyer not to negotiate, charge, or collect an unreasonable fee. This also is a strict liability offense.

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[19] *Id.* (emphasis added).

Respondent's first argument fails against a strict liability offense as a matter of law. She cannot subjectively believe that she obtained implicit approval from the State Bar to violate the plain language of RPCs 1.2(a) or 1.5(a).

For example, a driver ticketed for speeding—a strict liability offense—cannot defend the ticket by claiming that she sped past a law enforcement officer earlier in the day without receiving a ticket and it led her to believe that speeding was lawful. Even the reasonableness of her belief is not a defense. It can be a mitigating factor.[20]

Respondent's second argument also fails against a strict liability offense as a matter of law. She cannot subjectively believe that "following the crowd" gave her safe harbor to violate the plain language of RPCs 1.2(a) or 1.5(a).

Returning to the speeding ticket analogy, a driver ticketed for speeding cannot defend the ticket by pointing out other drivers who were also speeding.[21]

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[20] Although the Panel did not address the reasonableness of her claim, a reasonable lawyer would not equate inaction with endorsement.
[21] The Equal Protection Clause would protect drivers in a protected class from discriminatory enforcement, but that was not at issue in this case.

The State Bar recognizes that the personal-injury bar uses similar clauses. But "the purpose of professional disciplinary proceedings is both to protect the public and also to maintain public confidence in the bar as a whole."[22] Although the Disciplinary Board has issued countless letters of caution to personal injury attorneys for these same clauses, the personal-injury bar continues to use them. They continue to chill the clients' rights to settle and to discharge their attorney. This continued, wide-spread use demonstrates the ineffectiveness of private cautions to deter misconduct.

In *In re Lassen,*[23] the Supreme Court of Delaware captured the essence of lawyer discipline when it stated, "The guiding principle in determining whether a sanction should be public or private remains the protection of the public."[24] It further stated,

> To shelter such conduct from the light of public scrutiny does violence to the policies underlying the lawyer disciplinary system and undermines public confidence in the profession which traditionally has been built on trust and self-regulation. Dispensing a non-public sanction in this case runs a substantial risk of damaging the reputation of the Bar and the Court with the community at large and provides an improper message to practitioners that egregious misdeeds may be engaged in without fear of public opprobrium. Moreover, Respondent's proposed result here may result in a dangerous and sometimes unworkable

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[22] *State Bar v. Claiborne*, 104 Nev. 115, 224, 756 P.2d 464, 535 (1988).
[23] 672 A.2d 988, 1002 (Del. 1996).
[24] *Id*. at 1001; *See also ABA Standard* 1.2.

precedent and would be unfair to other publicly sanctioned lawyers.[25]

Thus, the Court should reject the Respondent's "good faith" defense. The Court must protect the public from these unfair and overreaching clauses. A private caution only protects Respondent at the public's expense.

C. <u>RESPONDENT'S TERMINATION CLAUSE AND SUBSEQUENT LIEN WERE UNREASONABLE</u>

Respondent alternatively claims that her termination fee honored RPC 1.5 and would have been reasonable through *quantum meruit* principles. Respondent errs in fact and in law.

Respondent argues that "even under a quantum meruit analysis, recovering a percentage of the total recovery (when the attorney is terminated) is possible."[26]

Sure, a percentage recovery under a quantum meruit theory is possible. But the Panel never considered quantum meruit. It never considered the eight factors in RPC 1.5. It never considered the *Brunzell*[27] factors. The Panel found "that Respondent's fee agreement was not used to take an unreasonable fee upon termination."[28]

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[25] *Id.* at 1002.
[26] Ans. Br. at 29.
[27] *Brunzell v. Golden Gate Nat'l Bank*, 85 Nev. 345, 455 P.2d 31 (1969).
[28] ROA, Vol. I at 00081.

"Quantum meruit historically was one of the common counts—a subspecies of the writ of indebitatus or general assumpsit—available as a remedy at law to enforce implied promises or contracts.[29]" "A party who pleaded quantum meruit sought recovery of the reasonable value, or 'as much as he has deserved' for services rendered."[30]

Initially, contingency fee attorneys used quantum meruit theories to recover for the work they performed after the client discharged but before the contingency triggered. As stated in the Opening Brief, most courts would not allow contingency fee attorneys to convert their fee to an hourly fee after termination.

Contingency fee attorneys then tried to charge their clients a percentage of the recovery after discharge. Courts agreed that it "is not enough to simply say that a contract is a contract. There are ethical considerations overlaying the contractual relationship."[31]

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[29] *Certified Fire Prot. Inc. v. Precision Constr. Inc.*, 128 Nev. 371, 379, 283 P.3d 250, 256 (2012) (citing 1 Joseph M. Perillo, Corbin on Contracts § 1.18(b), at 53 (rev. ed. 1993); 7 C.J.S. Action of Assumpsit § 2 (2004)).
[30] *Id.* (citing Black's Law Dictionary 1361 (9th ed. 2009) (defining quantum meruit)).
[31] *Hoover Slovacek LLP v. Walton*, 206 S.W.3d 557 (Tex. 2006).

Furthermore, "whether a contract, including a fee agreement between attorney and client, is contrary to public policy and unconscionable at the time it is formed is a question of law."[32]

Requiring *immediate payment* forces the client to liquidate her claim as a penalty for discharging the lawyer, imposes an undue burden on the client's ability to change counsel, and violates public policy, which makes it unreasonable as a matter of law.[33]

Unequal risk-sharing attributes also make a termination fee unreasonable.[34] High hourly rates upon a loss combined with high percentages upon a win shift the risks almost exclusively to the client and the benefits almost exclusively to the attorney.[35] This "heads lawyer wins, tails client loses" ignores the reasonableness factors in *Brunzell*[36] and RPC 1.15 to the client's detriment.

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[32] *Id*. at 562.
[33] *Id*. at 563.
[34] *Id*.
[35] *Id*. at 564.
[36] *Brunzell v. Golden Gate Nat'l Bank*, 85 Nev. 345, 349, 455 P.2d 31, 33 (1969) (courts should consider (1) the qualities of the advocate; (2) the character of the work to be done; (3) the work actually performed by the lawyer; and (4) the result).

Respondent points to her clause's "trigger" or "threshold" criteria of a demand. But the Panel did not consider the work Respondent performed to produce the demand.

Respondent's case notes illustrate that nonlawyer Suzy Tuano performed all the work through demand, including intake.[37] Respondent already took $25,000 surreptitiously from Danielson as payment for Tuano's work. Now Respondent claims her interest is another 20%[38] of an estimated $1.5 million recovery. She would receive this additional $300,000 fee despite her termination.

But Respondent made an agreement for and charged more. She demanded between "thirty-three and one third percent, forty percent or fifty percent of the gross amount recovered."[39] Her "full fee" under the agreement would have been forty percent before discharge. But after discharge she demanded up to fifty percent *after termination*.

Respondent made an agreement for and charged through her lien a fee between 33 1/3% and 50%. The problem with percentage-based fees in a quantum meruit analysis is that quantum meruit bases recovery off the work

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[37] ROA Vol. II at 00710-01205.
[38] 50% of 40%.
[39] ROA, Vol. II at 04740.

performed and the benefit produced.[40] Percentages in Respondent's termination clause are subjective. No reasonable person would conclude that nonlawyer Tuano's work in drafting the demand and the additional work of drafting a complaint were worth or benefitted Danielson between $525,000 and $775,000. Respondent filed no motions, deposed no witnesses, never appeared in court, and appealed nothing. Respondent's percentage-based termination fee was not reasonable based on the circumstances. It did not originate from quantum meruit principles. Even Respondent acknowledged the unreasonableness of her fee when she accepted a reduced fee of 20%.[41]

Contingent fees encourage efficiency and diligence to obtain the best possible results, but Respondent's termination fee provision encourages her to escape the contingency as soon as practicable, and take on other cases, thereby avoiding the demands and consequences of trial and appeal.[42] If either party appeals in the Uber case, then Respondent's fee will increase. She will provide no additional work or benefit to the client, but her fee will increase. That is the antithesis of quantum meruit.

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[40] *Certified Fire*, 128 Nev. at 379, 283 P.3d at 256.
[41] Respondent negotiated 50% of the total fee with the new firm. The current fee is 40%. Therefore, Respondent's current split is 20% and will increase if either party appeals.
[42] *Hoover*, 206 S.W.3d at 564.

Again, the State Bar recognizes that the personal injury bar widely uses these termination clauses with the expectation that local courts will later divide the fee equitably. But such a custom does not make the clause ethical or protect the public. This custom chills the clients' right to discharge an attorney. It punishes them for discharge. It violates RPC 1.5 for "mak[ing] an agreement for" or "charg[ing]" an unreasonable fee.

"The law, rightly understood, is not a business where the bottom-line dictates the conduct that is permissible. The law is a profession where a near monopoly of access to the courts is granted to a trained group of men and women on the basis that they will follow the profession's rules of conduct and in so doing serve the cause of justice."[43]

This Court should opine on this issue of first impression in Nevada whether a termination clause to a contingency fee can (1) require immediate payment, (2) convert to an hourly rate, or (3) charge the same contingency percentage or more. This Court should hold that RPC 1.5 does not permit such unreasonable terms.

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[43] *Gardner v. State Bar*, 284 F.3d 1040, 1043 (9th Cir. 2002).

D. RESPONDENT'S OBLIGATION TO DISBURSE WAS RIPE.

As stated above, Respondent did not address the State Bar's appeal against the Panel's finding of little or no injury from the two-year delay in disbursal. Respondent did not argue in support of the Panel's legal conclusion. Instead, Respondent argued that disbursal once the funds were no longer in dispute "makes no sense" because "the potential for the lien providers to receive a greater amount—if not their full amount—still existed."[44] Respondent cites no authority for this argument.

Respondent's unsupported argument makes little sense from the client and lienholder's perspective. RPCs 1.15 and 1.16 required Respondent to disburse their property "promptly." She had no right to withhold their undisputed property while waiting for a potential recovery from Uber. Delay does not benefit Danielson or the lienholders. It harms them.

Worse, Respondent does not represent Danielson in the Uber matter. Respondent has no control over *that* disbursement. She is just another lienholder. Even if the new firm obtains a recovery from Uber, then *it* will disburse proportionately and promptly—*not Respondent*.

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[44] Ans. Br. at 40.

A larger, future recovery would not change Respondent's obligation to disburse the ***undisputed*** interests in the UIM portion ***promptly***. Unquestionably, Danielson and the lienholders would rather receive their portions of the UIM settlement promptly as the rule requires and receive additional compensation from Uber later rather than wait years for both. Respondent's unsupported argument is self-serving and nonsensical.

Thus, RPC 1.15 required Respondent to disburse the UIM settlement property promptly after the lienholders settled any dispute over the funds by reducing their liens. The panel correctly found two violations: (1) one for misappropriating $25,000 while the funds were in dispute and (2) a second for refusing to disburse the funds after the lienholders resolved the dispute.

E. RESPONDENT CONSCIOUSLY VIOLATED MULTIPLE RULES OF PROFESSIONAL CONDUCT, CAUSED SUBSTANTIAL INJURY, AND SHOULD RECEIVE A PROPORTIONATE SANCTION.

Respondent misappropriated $25,000 for herself immediately. But she made everyone else wait. Respondent withheld property from Kristen and medical lienholders for over two years. Justice delayed is justice denied. Respondent's misconduct warrants a suspension.

Mental State

Respondent argues that she acted negligently. The Panel confusingly found that "Respondent should have known that she was dealing improperly with client property."[45]

It creates confusion because this language mirrors the language in ABA Standard 4.12, "Suspension is generally appropriate when a lawyer knows or *should know that he is dealing improperly with client property* and causes injury or potential injury to a client."[46]

But the Panel found that the appropriate baseline was ABA Standard 4.14, which states, "Admonition is generally appropriate when a lawyer is negligent in dealing with client property and causes little or no actual or potential injury to a client."[47]

The Panel contradicted itself. Perhaps the Panel focused only on the injury and not the mental state.

Either way Respondent acted with knowledge.

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[45] ROA, Vol. I at 00081.
[46] ABA, *Annotated Standards for Imposing Lawyer Sanctions*, §4.12 (2d ed. 2019).
[47] *Id.* at §4.14.

"Knowledge is the conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result."[48]

The difference between knowledge and negligence is awareness. Respondent claims she was unaware, but the record contradicts her claim. She was aware of her fee agreement. She even notes in her answering brief that she developed her fee agreement after consulting with other members of the personal-injury community.[49]

It is not possible for Respondent to be unaware of the clauses she developed. She was consciously aware.

She was also astutely aware of her misappropriation and withholding. She signed the check misappropriating $25,000 from Danielson on January 6, 2020.[50] After Respondent's staff asked her for authorization to disburse, on April 14, 2020, she told her staff to "Hold on BV's [balance verifications] and payments until 3P [Uber] claim resolved." [51]

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[48] *See* ABA, *Annotated Standards for Imposing Lawyer Sanctions*, xxi (2d ed. 2019).; *In re Fried*, 134 Nev. 955, 421 P.3d 283 (2018).
[49] Ans. Br. at 20.
[50] ROA, Vol. II at 00288.
[51] ROA, Vol. II at 00578.

To claim that Respondent was unaware of her actions mocks the integrity of lawyer discipline.

Injury

The State Bar has already addressed the Respondent's argument regarding lack of injury. Respondent claims Danielson and the lienholders suffered no injury because Respondent could not disburse until the Uber case concluded. Again, Respondent's claim is unsupported and self-serving.

As the State Bar hears from 1,200 to 2,000 grievants every year, attorneys can be deaf to their clients' concerns and blind to their clients' best interests where the attorneys' own interests compete.

This is an industry-wide problem in which personal injury attorneys take from the settlement immediately and withhold distribution from clients and lienholders for months or years. There is no justification for the delay. Attorneys lack priority and there is no dispute to resolve. Delay often facilitates misappropriation. Clients and lienholders continue to complain, but personal injury attorneys and even disciplinary board members see no harm. It must stop.

Baseline Sanction

ABA Standard 4.12 states,

> Suspension is generally appropriate when a lawyer knows or should know that she is dealing improperly with client property and causes injury or potential injury to a client.[52]

Respondent's conduct in this case not only injured Kristen and the medical providers, but it also injured the profession. Respondent reinforced the public's perception that lawyers are greedy and self-serving.

Respondent has mitigating circumstances, but she also has aggravating circumstances. Neither compel a significant deviation from the suggested discipline.

The State Bar asks the Court for a six-month and one day suspension. Anything less sends the wrong message to the community.

IV. CONCLUSION

Respondent violated five rules of professional conduct. She contracted away Kristen's absolute right to settle her case. She contracted an unreasonable and punitive fee for termination. She misappropriated part of Kristen's settlement while the funds were in dispute.

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[52] ABA, *Annotated Standards for Imposing Lawyer Sanctions*, §4.12 (2d ed. 2019).

She refused to disburse Kristen's settlement after the dispute resolved.

Respondent's misconduct merits a six month and one day suspension.

Respectfully submitted this 24th day of October 2022.

STATE BAR OF NEVADA

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V. CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Georgia font.

2. I further certify that this brief complies with the page or type volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more and contains 5,602 words.

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the

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accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 24th day of October 2022.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing **REPLY BRIEF** was placed in a sealed envelope and sent by U.S. regular mail in Las Vegas, Nevada, postage fully prepaid thereon for first class mail, addressed to:

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Dated this 24th day of October 2022.

Sonia Del Rio

Sonia Del Rio, an employee of the
State Bar of Nevada