9/30/24

No. 24-625

In The
Supreme Court of the United States

Elana Thibault,
Petitioner,
v.
State Bar of California,
Respondent.

On Petition for a Writ of Certiorari
to the Supreme Court of California

PETITION FOR A WRIT OF CERTIORARI

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December 2, 2024 Petitioner in Pro Se

QUESTION PRESENTED FOR REVIEW

In California, an attorney has a constitutionally protected property interest in her right to practice her profession. *Conway v. State Bar,* 47 Cal.3d 1107, 1113 (1989). The state's legislature accords the State Bar of California (the "State Bar") the power to discipline attorneys and prescribes ways how this power may be used. It also authorizes the Board of Trustees to devise rules to be applied in disciplinary proceedings. Under the State Bar's rules of procedure, an attorney's right to practice law may be suspended only if the State Bar demonstrates by clear and convincing evidence, after an adversary hearing, that the attorney is culpable of professional misconduct. A decision must be supported by written findings of fact and is immediately reviewable by the State Bar Court's Review-Department.

The question presented is:

Does the suspension from practice of law and imposition of monetary sanctions by methods that deviate from the prescribed means and offend the sense of fairness and decency amount to unconstitutional deprivation of an attorney's liberty and property interests in the right to practice profession guaranteed by the Fourteenth Amendment of the Federal constitution?

PARTIES TO THE PROCEEDING

Petitioner is Elana Thibault, a party to the original disciplinary action.

Respondent is the State Bar of California, that through its Office of the Chief Trial Counsel ("OCTC"), initiated disciplinary proceedings by filing charges against petitioner.

RELATED CASES

The following proceedings are directly related to this case within the meaning of Rule 14.1(b)(iii):

1. *In re Elana Thibault on Discipline*, S282783. On March 12, 2024, the Supreme Court of California filed its Order denying Petition for Review. Petition for Rehearing was denied by Supreme Court of California on May 1, 2024.

2. *In the Matter of Thibault,* No. SBC-22-O-30033, The State Bar Court of California, Review Department, Opinion filed on October 17, 2023.

3. *In the Matter of Thibault,* No. SBC-22-O-30033-PW, The State Bar Court of California, Hearing Department, Decision filed on October 17, 2022.

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PETITION FOR WRIT OF CERTIORARI

Elana Thibault respectfully submits her Petition for a writ of certiorari to the Supreme Court of California. This Court should grant review and reverse the clearly unconstitutional overreach by the State Bar of California.

OPINIONS BELOW

The Order of the Supreme Court of California denying petition for review is unreported and is reproduced as Appendix A at App.1a-2a. The Order of the Supreme Court of California denying petition for rehearing is unreported and is reproduced as Appendix D at App.82a.

The Opinion of the State Bar's Review Department is unreported and is reproduced as Appendix B at App.3a-42a. The Decision of the State Bar's Hearing Department is unreported and is reproduced as Appendix C at App.43a-81a.

JURISDICTION

The Supreme Court of California denied Petition for Rehearing on May 1, 2024.

On July 26, 2024, Justice Kagan extended the time for filing this petition to September 28, 2024. This Court has jurisdiction under 28 U.S.C. § 1257(a).

On October 4, 2024, the clerk of the court returned all copies of the petition pursuant to rule 14.5 to correct the petition with a new deadline of December 3, 2024.

CONSTITUTIONAL AND STATUTORY PROVISIONS AND RULES

Relevant constitutional and statutory provisions and rules are reproduced at App.83a-88a.

STATEMENT OF THE CASE

A. Legal Framework

The State Bar of California is a public corporation within the judicial branch to assist the state's highest court in regulating the legal profession. It was created by the State Bar Act of 1927, codified as the Business and Professions Code (the "BPC") §§ 6000– 6243 and binding on the State Bar and its members. Pursuant to the BPC §6086, the board of trustees provides "the mode of procedure in all cases of complaints against licensees" conducted through the State Bar Court. Rule 5.103 of the State Bar Rules of Procedure (the "Rules") mandates the State Bar to "prove culpability by clear and convincing evidence." Rules of Proc., rule 5.103. Rule 5.104 facilitates the use of evidence in the disciplinary proceedings, including hearsay and judicial notice. *See* App.86a-88a.

Section 6076 of the BPC allows the board of trustees to formulate the Rules of Professional Conduct, approved by the California Supreme Court under the BPC §§ 6076 and 6077, and applicable to all licensees of the State Bar. On May 10, 2018, the California Supreme Court issued an order approving new Rules of Professional Conduct, effective November 1, 2018.

The former rule 3-310, Avoiding the Representation of Adverse Interests, was in effect from 1992 through October 31, 2018. App.86a. Rule 3-310 was not intended to prohibit a member from representing parties having antagonistic positions in cases, unless representation of either client would be adversely affected.

B. Factual background and hearing in the superior court.

Petitioner became a member of the California bar in February 2015 (App.5a), having been admitted to practice law in Florida since July 2010. App.29a, fn.20. While working for Anu Peshawaria's law firm ("Peshawaria") (App.5a), in June 2016, she was assigned a matter of Mr. Abhijit Prasad ("Prasad") (App.7a, 49a) who sought to vacate the property judgment in his dissolution of marriage case No. VF07356209, *Rattan v. Prasad,* entered on June 9, 2016, by the Alameda County Superior

Court. App.6a. The judgment after a trial adjudicated all marital property and awarded, among other things, a home in Tracy, California, to Prasad's former wife, Ms. Komal Rattan ("Rattan"). *See* e.g., App. 63a. Once petitioner served Prasad's motion to vacate judgment on Rattan's attorney Mr. Jason Elter ("Elter"), she received an email from his office demanding that she withdrew from the case due to a conflict as her "law firm 'represented' Rattan in this proceeding in 2008.'" App.8a. Petitioner knew it was impossible as Peshawaria was never licensed in California and became eligible to practice law in 2011 in the State of Washington, allowing her to practice immigration law in California. App.5a, fn.3. In 2008, she operated the Immigration and Business Services (the "IBS") as an immigration consultant. App.6a, fn.4. Peshawaria explained that in 2008 Rattan sought her help to file a case against Prasad in India. App.6a, fn.4. The electronic files in Peshawaria's database contained only two documents related to Rattan: a background narrative about Rattan's meeting Prasad in India before the marriage and a fee-sharing retainer agreement between Rattan, a California-licensed attorney who was contracting to represent Rattan in her dissolution of marriage and Peshawaria in an administrative capacity. App.7a., 48a., fn. 4&5. Nevertheless, Peshawaria instructed petitioner to "just withdraw" and petitioner complied with her employer's directive. App.49a.

In May 2018, having parted ways with Peshawaria (App.8a.) and practicing solo, petitioner was retained by Prasad to appear at a hearing on a post-judgment request for Writ of Possession (the "Request") of his home in Tracy, which he was occupying. App.8a. Because Prasad had refused to vacate the house, Rattan filed her pleadings to physically remove Prasad by the sheriff armed with the writ. While Rattan's request was pending, Prasad was taken in federal custody on an unrelated matter and Rattan along with Elter broke into the house and began preparing it for sale by removing Prasad's personal property. Petitioner, anticipating that a conflict-of-interest issue would be raised again, contacted the California bar ethics hotline and was directed to *Ochoa v. Fordel* (2007) 146 Cal.App.4th 898 (the "*Ochoa*"). App.8a-9a.

At the May 21, 2018, hearing, Elter objected to a petitioner's substitution of attorney that was signed by Prasad's brother and told the court about petitioner's conflict of interest. App.9a. Elter advised that he "already had possession of the house" and petitioner requested an injunction. Judge Syren did not "technically allowed" the substitution of attorney and gave Elter time to file a motion to disqualify petitioner from the case. App.9a. Petitioner filed an amended Substitution of attorney with Prasad's signature, her Declaration, citing *Ochoa*, and an ex-parte emergency request to prohibit Rattan and

Elter from entering the house before the request has been adjudicated. App.50a.

On July 3, 2018, Elter filed a motion to disqualify petitioner (App.9a), arguing that her "disqualification was automatic." In void of Rattan's Declaration, the "facts" were supplied by Elter in his "Points and Authority (sic)", where he also asked for various sanctions against Prasad and petitioner, including under the Code of Civil Procedure (the "CCP") sections 128.5 and 128.7, which required mandatory separate motions and a 21-day "safe harbor." *See e.g.,* App.11a. They were not filed by Elter. Petitioner served her Objections to Elter's pleading consisting of twenty-four (24) points including to the improper request for sanctions under CCP 128.5 and 128.7 and sought an evidentiary ruling. Because Elter did not file a Reply, Rattan was allowed to testify at the hearing to "cure" her deficient pleading.

On July 19, Judge Syren abruptly ended the cross-examination of Rattan when petitioner questioned the witness about the two documents from Peshawaria's database to show that Rattan was not telling the truth and along with Elter was committing fraud on the court. App.10a, 50a-51a. Despite petitioner's urging the court to consider additional 2008 documents in the Register of actions and arguing that she was appearing on Writ of Possession and not "divorce," the court disqualified her from the case under *Adams v. Aerojet-General*

Corp. (2001) 86 Cal.App.4th 1324 ("*Adams.*") *See* e.g., App.10a.

Immediately after, over petitioner's renewed objection, she was summarily sanctioned under CCP 128.5 and 128.7 for $5,000. App.11a. The Findings and Order after Hearing (the "FOAH"), prepared by Elter, were entered on January 29, 2019 and contained inserted "findings" that judge Syren did not make from the bench on July 19, 2018.

Petitioner's first appeal from the order was dismissed for a lack of standing. The second appeal resulted in the Court of Appeal's affirming the disqualification and dismissing the appeal of sanctions as a non-appealable order. App.11a. Subsequent petitions for rehearing in the Court of Appeal and a petition for review in the state Supreme Court were summarily denied. App.11a, 52a. After petitioner paid sanctions in August 2021 (App.11a), she filed a Writ of Mandate to review sanctions order; it was also summarily denied. App.11a. Petitioner's motion to set aside the FOAH on jurisdictional grounds in the superior court was denied on January 9, 2023 and a motion to reconsider was denied on May 25, 2023. App.11a-12a. Petitioner's motion to conform the FOAH to the actual pronouncements from the bench was denied on July 16, 2024. The court also declined to entertain a claim that Rattan and Elter committed fraud on the court in bringing the disqualification motion in 2018.

C. Disciplinary proceeding in the State Bar Court

1. Decision of the Hearing Department

Upon judge Syren's referral, the Office of the Chief Trial Counsel (the "OCTC") of the State Bar instituted a disciplinary proceeding against petitioner by filing a Notice of Disciplinary Charges on February 2, 2022. App.40a. The four counts of professional misconduct alleged: 1) violation of the court order pursuant to the BPC § 6103 (Count One); 2) failure to report sanctions under the BPC § 6068(o)(3) (Count Four); 3) representation adverse to former client under former rule 3-310(E) of the Rules of Professional Conduct (Count Two) and 4) failure to maintain client's confidences under the BPC § 6068(e)(1) (Count Three). App.4a. On April 6, 2022, the proceedings were abated based on petitioner's then pending Writ of Mandate to review sanctions order. App.4a. On June 27, 2022, Petitioner's second plea for abatement – based on a motion to void the sanctions order in the superior court -- was denied by the hearing judge, who concluded that "regardless of the success of [set aside sanctions order], it would not affect culpability under the counts as alleged." App.4a-5a.

OCTC requested the court to take judicial notice of the register of actions (*Rattan v. Prasad*) from the inception on November 14, 2007 through January 18, 2022, a transcript of July 19, 2018, hearing, the Court of Appeal's Opinion, over petitioner's objection, and the appeal's docket. The "narrative" that OCTC claimed contained Rattan's "policy and strategy" was not produced in evidence by OCTC. App.48a, fn.4 & fn. 5. Petitioner filed her request for judicial notice, including of CCP §§ 128.5 and 128.7.

At trial on July 21, 2022, Rattan was confronted with, and confirmed, her statement that she gave to the State Bar investigator three weeks prior trial, where she specifically said that in 2008 she was seeking Peshawaria's services to file a request for domestic violence protective order against Prasad. Elter also testified and explained that the Writ of Possession request was an enforcement of 2016 judgment. *See* e.g., App.54a, fn.6. Both Rattan and Elter acknowledged judgments entered in the case.

Petitioner testified on her behalf and, over objections of the State Bar, introduced Rattan's story written in 2008 (Exhibit 1004) and a fee-sharing retainer agreement (Exhibit 1005) (App.48a., fn.4 & fn. 5), as well as several documents from the *Rattan v. Prasad* court's file, including two substitutions of attorneys for Rattan filed by two different attorneys on June 24, 2008 and September 26, 2008 (App. 7a, 48a), Rattan's Request for Domestic

Violence Protective Order (the "DVPO") filed in proper persona on June 26, 2008 against Prasad and petitioner's pleadings on behalf of Prasad filed in 2018. App.52a. During the trial, the hearing judge sustained her own objections to petitioner's evidence that was detrimental to the State Bar's case in chief.

In her written decision, the hearing judge Wang concluded that "the gravamen of this matter involves allegation arising from information Thibault had access . . . while working . . . for Peshawaria's office from August 2015 through March 2018." App.46a. Having acknowledged that OCTC was required to prove its case by clear and convincing evidence, the hearing judge found -- "on review of the evidence" -- petitioner culpable on three counts. App.43a.

The culpability on Count One was determined by rejecting petitioner's "subjective belief as to the validity of the sanctions order on procedural defects." App.55a. In addition, judge Wang found the order was a "final order" for disciplinary purposes and summarily concluded that petitioner "willfully waited over eight months after finality to pay Elter the sanctions." App.55a.

As Count Four was a corollary to Count One, the hearing judge sustained culpability, impliedly rejecting petitioner's good faith defense. App.56a-57a.

In determining petitioner's culpability on Count Two, the hearing judge announced that "on consideration

of evidence. . . not only is there substantial support for the superior court's findings, but through an independent evaluation of the evidence – admissions by Thibault that she made no effort to secure Rattan's consent in accepting representation of Prasad and the credible testimony of Rattan, as well as review of the admitted exhibits – the court finds a violation by clear and convincing evidence." App.58a. The Decision recounted Rattan's testimony that in 2008, she shared "issues of child and spousal support and property division" and that petitioner accessed database in 2016 and then in 2018. App.59a. The hearing judge viewed petitioner's claim that she represented Prasad in the "post-divorce" phase as "meritless" (App.63a), although two judgments – related to property and custody and support – were in evidence, and both Rattan and Elter confirmed judgments and explained that a Writ of Possession in 2018 was to remove Prasad from the house, that had been adjudicated in 2016. App.67a.

The judge found an "attorney-client relationship was formed in 2008 between Peshawaria's firm and Rattan." App.59a. Yet, "in sum," the Decision stated that "the superior court's findings that there was an attorney-client relationship between Peshawaria and Rattan is supported by substantial evidence, and this court's independent review leads to the same conclusion." App.60a.

The hearing judge also found that *"Rattan shared confidential information with Peshawaria of which [petitioner] accessed."* App.61a. The hearing judge specifically noted that petitioner violated the rule because "without seeking Rattan's permission, [she] again accessed the database and printed out these two documents, in preparation for responding to the disqualification motion in superior court." App.61a. The issue of "materiality" of information was not discussed in the Decision. *See* App.61a-62a.

Although the third finding, addressed in subsection *"Thibault did not secure Rattan's consent"* was undisputed, the Decision spent some time explaining why it was wrong for petitioner to do so. App. 62a-63a.

Count Three -- predicated on petitioner's alleged failure to maintain Rattan's confidences while cross-examining her during the disqualification hearing -- was dismissed with prejudice in view of the Evidence Code § 958 (App.84a) that operated as an exception to an "attorney-client privilege" to a claim of an alleged breach of duty by petitioner. App.64a-65a.

The hearing judge imposed monetary sanctions and recommended a 30-day actual suspension from practice of law, while a one-year suspension was stayed. App. 44a. Petitioner's subsequent motion for reconsideration and a motion to disqualify judge Wang from the matter were denied. App.5a.

2. The Review Department Opinion

The Opinion, endorsed by a panel of three judges, affirmed the hearing judge's "culpability findings, the aggravating and mitigating circumstances and the discipline recommendation." App.4a. The Opinion acknowledged a few facts that were left out in the hearing judge's decision, e.g., that "Rattan wrote a check to Anu Peshawaria/IBS on June 25, 2008." App.6a, fn. 4. The Opinion changed judge Wang's assertion that Peshawaria "represented Rattan" (App.49a) to a notion that Rattan "consulted with Peshawaria regarding an on-going marital dissolution matter that involved domestic violence with her then-husband Abhijit Prasad." App.6a. It also cited Rattan's testimony about signing a retainer agreement with Peshawaria and preparing a narrative. App.6a-7a. The panel also corrected judge Wang's misstatement that Peshawaria "became licensed in California in February 2015" (App. 52a) by clarifying that Peshawaria "has never been licensed to practice law in California," and that she obtained her law license in the State of Washington in November 2011." App.5a., fn.3.

The Opinion misstated that in June 2016, "[t]he pending issues in the case were related to child custody, child and spousal support, and the division of marital property" contradicting the record. App.7a. The Register of Actions reflected the

property judgment entered on June 9, 2016, a judgment related to custody and support was entered on November 9, 2016, after a trial that took place in February 2016, and a 2010 dissolution status-only judgment. (St. Bar's Exh. 1).

In describing the disqualification hearing in the superior court, the Opinion seized only the ending of the cross-examination by judge Syren through his exchange with petitioner. App.10a. The Opinion also quoted verbatim judge Syren's words spoken "at the end of July 19, 2018 hearing." App.10a-11a.

In affirming the Decision's finding of culpability on Count Two, the Opinion agreed that "the record supports" it "by clear and convincing evidence." App.13a.[1] The panel reached this ruling by rejecting petitioner's arguments that (1) no attorney-client relationship existed between Peshawaria and Rattan; (2) the information [petitioner] gained was not "by reason" of her representation of Rattan; (3) the information was not material to her representation of Prasad. App.13a. Regarding the first point, the panel agreed with judge Wang's "reliance on the superior court's findings and the Court of Appeal's opinion" that "Rattan believed she

[1] At oral argument held on July 20, 2023, judge McGill, who authored the Opinion, was entertaining the dismissal of Count 2, as it appeared that petitioner convinced the panel that the charge could not be sustained for the lack of factual and legal grounds.

formed an attorney-client relationship with Peshawaria." App.13a. The panel also added that Rattan and Peshawaria had an "implied attorney-client relationship." App.14a. In discussing the second argument, the Opinion focused on petitioner's access to "confidential information" and its use "adversely to oppose Elter's motion to disqualify her from the matter." App.19a. Lastly, in one paragraph the Opinion determined that information was "material," as petitioner "intended to use [the database documents] to Prasad's advantage when she attempted to cross-examine Rattan." App.19a-20a.

In affirming culpability on Count One, the Opinion found that petitioner "willfully violated section 6103" (App.20a) because "her actions were not reasonable and constituted a violation of the superior court order." App.24a. The panel rejected petitioner's argument that the order was not final and biding and that "she was denied due process" in the superior court as "meritless." App.21a. In dismissing petitioner's good faith belief defense, the panel pointed out that a "failure to take any action for eight months after the order became final and binding does not demonstrate good faith." App.22a.

The Opinion disallowed petitioner's defense on Count Four and found her culpable as charged. App.24a-25a.

The Opinion recommended the Supreme Court of California to adopt the discipline and award costs to the State Bar. App.33a-41a.

C. Petitions to the Supreme Court of California

On January 9, 2024, petitioner filed her Petition for Review with the Supreme Court of California, docket No. S282783 on the grounds provided in rule 9.16(a) of the California Rules of Court, including the lack of fair trial. On March 12, 2024, the Supreme Court of California, en bank, issued its order denying the petition for review. App.1a. In her petition for rehearing, petitioner raised due process claims under both California Constitution art. I, § 7 and the Fourteenth Amendment of the U.S. Constitution that protected the property interest in her right to practice her profession that could not be taken away without due process of law citing *Conway v. State Bar,* 47 Cal.3d at p. 1113. Petitioner claimed that the State Bar's Opinion impaired her freedom to pursue her occupation as a lawyer in an arbitrary and irrational manner, amounting to a true abuse of power that triggered a substantive due process violation. Petitioner further claimed that the Opinion was a prima facie case of due process violations under a "deliberate flouting of the law" standard pursuant to *Galland v. City of Clovis*, 24 Cal.4th 1003, 1036 (2001), citing to *County of*

Sacramento v. Lewis, 523 U.S. 833 (1998). Petitioner further argued that the State Bar Court violated her due process rights when it found her culpable based on the findings that did not comport with the plain language of the statute. On May 1, 2024, the Supreme Court of California summarily denied the petition for rehearing. App.82a. Pursuant to the Court's order, Petitioner was suspended from the practice of law for 30 days and paid $27,483.45 to the State Bar.

REASONS FOR GRANTING THE WRIT

The Due Process Clause of the Fourteenth Amendment historically has been applied to deliberate decisions of government officials to deprive a person of life, liberty or property. *Daniels v. Williams,* 747 U.S. 327, 331 (1986). The Due Process Clause's substantive component bars certain arbitrary, wrongful government actions regardless of the fairness of the procedures used to implement them. *Foucha v. Louisiana* 504 U.S. 71, 80 (1992). A standard of proof, as the component "embodied in the Due Process Clause and in the realm of factfinding, functions:

> "[T]o instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication, and allocates the risk of error between the

> litigants and to indicate the relative importance attached to the ultimate decision."

Addington v. Texas, 441 U.S. 418, 423 (1979).

This Court has used "clear, unequivocal and convincing" standard of proof to protect particularly important individual interests in various civil cases. *Addington v. Texas,* 441 U.S. at p. 424. In this case, clear and convincing standard was meant "to strike[] a fair balance" (*Addington v. Texas*, at p. 431) between the petitioner's right to continuously practice her profession (*see Barry v. Barchi,* 443 U.S. 55 (1979)) and the legitimate concerns of the State Bar of California.

The State Bar Opinion's certification that upon its "independent review of the record," the "charges were proven under clear and convincing standard," is nothing more than an indefensible abuse of power on par with the state action in *Rochin v. California,* 342 U.S. 165 (1952) ("*Rochin*"), where this court reversed the criminal conviction because it was obtained by methods offensive to the Due Process Clause of the Fourteenth Amendment. The State Bar's methods -- revealed through their stark departure from the legal canons imposed in disciplinary context -- are also offensive to a sense of justice.

The panel's findings on Count Two were predicated on a complete erosion of the clear and convincing evidentiary standard of proof under which the State

Bar was ought to "establish the existence of an element essential to that party's case, and on which that party [bore] the burden of proof at trial." *Celotex Corp. v. Catrett,* 477 U.S. 317, 322-323 (1986).

The Opinion's verdict on Count One was a capricious overreach where no due consideration was given in accordance with the legal standards and that did not "measure up to the essentials of due process and fair treatment." *In re Gault*, 387 U.S. 1, 30 (1966). That petitioner was determined to be "culpable of willfully violating section 6103" (App.25) was a violation per se of the plain language of the statute that called for a finding of "willful violation of a court order." *See* BPC § 6103 discussed *infra.* Rejecting petitioner's defense of good faith – arbitrarily – without applying the legal standard violated the sense of decency and fair play. Deliberately substituting the legal terms in ad hoc fashion was in furtherance of the Opinion's goal to rubber-stamp culpability which the State Bar Court entertained even before the trial had started.

Since good faith belief defense was not good for Count One, it was dismissed as not vital to Count Four.

That the Opinion below was issued by the State Bar, the agency regulating attorneys, only raises up the need for this Court's review. Apart from baselessly compromising petitioner's constitutional interest, the State Bar's methods made meaningless

a function of legal process with its aim to ascertain the truth. *See Estes v. Texas* 381 U.S. 532, 540 (1965). ("Court proceedings are held for the solemn purpose of endeavoring to ascertain the truth which is the sine qua non of a fair trial.") Instead of "truthfinding," the State Bar turned the statutory process into an instrument of oppression, which the Due Process Clause intended to prevent. *County of Sacramento v. Lewis*, 523 U.S. at p. 840.

Given all this, the State Bar's Opinion raises questions of constitutional magnitude ripe for this Court's review. It presents a "clear showing that the limits of due process have been overstepped" because no fair hearing has been given, no proper findings made, and other statutory requirements were not satisfied. *Federal Power Comm'n v. Natural Gas Pipeline Co.* 315 U.S. 575, 586 (1942). Here, this Court's inquiry is needed because the State Bar of California did not act within the limits that the Due Process Clause substantively set (*Kansas v. Hendricks*, 521 U.S. 346, 374 (1997) (Breyer, J., dissenting)) and the arbitrary result was produced.

I. THE STATE BAR'S OPINION IS A SHEER ABUSE OF POWER INTOLERABLE TO THE CONSTITUTION

A. Conclusion on Count Two achieved by total annihilation of the clear and convincing standard

1. No attorney-client relationship was found within the meaning of rule 3-310(E)

The Opinion's conclusion that an attorney-client relationship between Rattan and Peshawaria – as a prerequisite of applicability of rule 3-310(E) -- was proven by clear and convincing evidence cannot be squared with a perspective that "[a] conflict of interest decision – is a mixed determination of law and fact. [Citation.] The decision is properly described in this way because it requires and results from the application of a legal standard to the established facts of a case." *Wheat v. United States* 486 U.S. 153, 167 (1988) (Marshall, J., dissenting.)

By its terms, rule 3-310(E), applies only to a member of State Bar of California. *See* rule 3-310(E), App.86a ("A member shall not. . ."); *see also* BPC § 6002 (b) ("'[M]ember of the State Bar" shall be deemed to refer to a licensee of the State Bar.'") For rule 3-310 (E) to apply, "there is a requirement that there be an attorney-client relationship. [Citation.]

Only an advice from a licensed attorney would clearly establish a conflict of interest under Rule 3-310(E)." *Allen v. Academic Games Leagues of America, Inc.*, 831 F. Supp. 785, 787 (C.D. Cal. 1993) ("*Allen*"). A person who is not qualified to act as an attorney within the meaning of rule 3-310(E), cannot form a relationship as that of attorney and client. *Allen*, at p. 787 ("Inasmuch as an attorney before passing a bar did not represent plaintiff as a "client," the relationship is not controlled by 3-310(E).")

There is no dispute that Peshawaria was never a member of the California bar. There is no evidence that Rattan secured any legal advice from Peshawaria. As a matter of law, Peshawaria could not form a relationship under the rule. However, neither law nor the rule stopped the panel from implying that a non-member of the State Bar -- an immigration consultant -- formed an attorney-client relationship with her "client." This finding, like the hearing judge's finding of a relationship between "Peshawaria' firm and Rattan" cannot be reconciled with *Allen* and rule 3-310(E).

Once on the wrong path, the Opinion's every next adjudicatory step was wrong, setting a chilling example of power nefariously exploited. The State Bar's rule 5.104(H) allows use of hearsay evidence to supplement or explain other evidence. Rule 5.104(D) authorizes the court to take judicial notice of records relevant to the proceeding. Neither of the rules

provides for accepting for the truth the hearsay statements in the documents judicially noticed over objection. Under the state law, a "judicial notice is properly taken of the existence of a factual finding but not of the truth of that finding. [Citation.] A court may take judicial notice of another court's action but may not use it to prove the truth of the facts found and recited." *Steed v. Department of Consumer Affairs* (2012) 204 Cal.App.4th 112, 120-121; *see e.g., North Beverly Park Homeowners Assn. v. Bisno* (2007) 147 Cal.App.4th 762, 778 ("The hearsay rule precludes consideration of [judicially noticed] statements for their truth.")

The Opinion's approval of the hearing judge's "reliance on the superior court's findings and the Court of Appeal's opinion" to "determine that Rattan believed she formed an attorney-client relationship with Peshawaria when she consulted with her regarding her marriage dissolution matter in 2008" disobeyed not only the State Bar rules. App.13a. The reliance was egregious because the findings of the courts were not based on the same evidence that was admitted in the State Bar proceeding, precisely, the documents from the database and in the Register of actions. Moreover, "the findings in the civil action are not binding" in disciplinary proceeding. *In re Wright* (1973) 10 Cal.3d 374, 377. They must be accessed "independently under more stringent standard of proof applicable in State Bar

disciplinary proceedings." *Maltaman v. State* Bar (1987) 43 Cal.3d 924, 947

Additionally, the civil finding that "Rattan retained Peshawaria based on her belief that Peshawaria was an attorney licensed to practice law in California," (App. 14a) was not germane to the substance of rule 3-310(E). The reason why Rattan retained Peshawaria was not significant to a finding, -- not made by the superior court or the court of appeal -- of an attorney-client relationship. More importantly, Rattan's "subjective belief that an attorney-client's relationship exists, standing alone, cannot create such a relationship or a duty of care owed to that client. [Citation.] It is intent and conduct of the parties that control." *Zenith Ins. v. O'Connor* (2007) 148 Cal.App.4th 998, 1010.

The Opinion's own questionable theory that Rattan and Peshawaria had an implied attorney-client relationship in 2008 emerged from the same proposition that "[a]ttorney-client relationship can arise by inference from conduct of parties." App.14a. The conduct of Rattan and Peshawaria – by the admissible evidence in the disciplinary proceeding– demonstrated that neither intended to form an attorney-client relationship. The record contained conflicting documentary evidence from 2008, including a fee-sharing agreement where Peshawaria's role was in administrative capacity and Rattan's DVPO request in proper persona filed

with the court the next day after she purportedly had hired Peshawaria as her attorney. App.6a-7a.

The Opinion's insistence that documentary evidence "reveal that Peshawaria held herself out as a California attorney by advertising. . ." perhaps explained Rattan's perception as to why she "believed" that Peshawaria was an attorney. App.15a. But this evidence does not explain Peshawaria's stark absence from Rattan's dissolution of marriage case and does not mean that the relationship was formed. Significantly, it cuts against other documentary evidence contradicting Rattan's side of the events. With the record in this state, the evidence was not up to a constitutional bar as it is only "in the absence of any conflicting evidence, ... evidence is clear and convincing." *Nijhawan v. Holder* (2009) 557 U.S. 29, 43.

Failing the clear and convincing standard of proof of facts, the State Bar leveraged its power in throwing out petitioner's legal authorities – *Allen v. Academic Games* and *O'Gara Coach Company, LLC v. Joseph Ra,* 30 Cal.App.5th 1115 (2019) -- under the pretext that "neither is an attorney discipline case," (App.16a) only to insert, in the next paragraph, *National Grange of the Order of Patrons of Husbandry v. California Guild,* 38 Cal.App.5th 706 (2019), also not an "attorney discipline case," but "persuasively cite[d]" by OCTC. App.17a. However, not only *National Grange* was factually and legally

inapposite to the petitioner's circumstances, it was concerned with application of former rule 3-310(D). As "vicarious disqualification rules are a product of decisional law," (*City and County of San Francisco v. Cobra Solutions, Inc.*, 38 Cal.4th 839, 847 (2006)), the State Bar had no case under *Allen* and *O'Gara.*

2. The Opinion's ruling that information was material was arbitrary

The quintessence of the Opinion's egregious abuse of power was its ruling on the "materiality" of information, the sine qua non of former rule 3-310(E). Beginning with *Adams*, the application of rule 3-310(E) necessarily involves a determination of the "substantial relationship" between "the prior and the present representation" where "the subjects of the prior representation are such as to 'make it likely the attorney acquired confidential information' that it relevant and material to the present representation." *Adams*, at p. 1332, *City and County of San Francisco v. Cobra Solutions, Inc.*, 38 Cal.4th at p. 847. The information obtained during the first representation is "material" when it is "directly in issue or of some critical importance to the second representation." *Farris v. Fireman's Fund Ins. Co.* (2004) 119 Cal.App.4th 671, 680, ("*Farris*"). App. 24a.

The Opinion's assertion that "[u]sing *Farris*, the documents obtained from Peshawaria's database were clearly material, as [petitioner] intended to use

them to Prasad's advantage when attempted to cross-examine Rattan," is *Rochin's* "stomach pumping" in the legal context. App.24a.

There is no dispute that petitioner's cross-examination of Rattan occurred during a hearing on Rattan's motion to disqualify petitioner and the panel attested that "a motion for disqualification was at issue for Thibault in the superior court." App.16a. Generally, the matter of disqualification of attorney is collateral to the merits of the case. *Meehan v. Hoppes*, 454 Cal.2d 213, 216-17 (1955). As a party to the collateral matter, petitioner was entitled under Evidence Code § 958 to disclose communications relevant to the issue of the alleged breach of duty. Petitioner was also entitled and obligated under *Adams* to "carry the burden of proving that [she] had no exposure to confidential information relevant to the current action while [she] was a member of the former firm." *Adams,* at p. 1341. The Opinion's summary that petitioner "accessed Rattan's case file and attempted to use Rattan's written narrative and an unsigned retainer agreement adversely to oppose Elter's motion to disqualify her from the matter" is a nullity under *Adams* and *Cobra Solutions*. App.19a.

Since "Elter's motion" was brought against petitioner, Prasad was not a party to the disqualification matter, and it was not a "second representation" within the meaning of *Farris*. Under *Farris*, the

"second representation" would have been petitioner's cancelled appearance for Prasad on the Writ of Possession request.

Thus, the Opinion was void of the necessary analysis under *Farris* (and also *Adams* and *Cobra*) to show what "critical importance" did the database documents carry or whether they were "directly in issue" to petitioner's attempted defense of Prasad in his eviction matter in 2018. The record contained petitioner's pleadings filed on Prasad's behalf in 2018, objected by the State Bar at the trial, which were ought to be looked in for an answer. The Opinion's generalizing about "the docket" with "the same case number", "the same marital dissolution proceeding," and even "specifically the marital home located in Tracy" did not comport with the inquiry under the law, much less under the clear and convincing standard. App.19a.[2]

The fact that no tribunal involved in this case – including the superior court and the Court of Appeal -- made a finding that the information that Rattan allegedly confined to Peshawaria (as this was the only evidence presented by the State Bar) was

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[2] While the Opinion deliberately omits the two judgments entered in the case in 2016, Rattan's and Prasad's rights were determined in 2016 to all issues. *See* CCP § 577 ("A judgment is a final determination of the rights of the parties in an action or proceeding.") Therefore, the 2018 Writ of Possession request was a post-judgment enforcement of the 2016 judgment.

material to petitioner's representation of Prasad in 2018 is shocking and ordains that petitioner could not be found culpable on Count two (nor disqualified from the Prasad' defense under *Adams*.)

The panel's summation that "upon our independent review, we reject petitioner' arguments and find the record supports Thibault's culpability under count two by clear and convincing evidence" (App.38a) is offensive to this Court's legacy that gave constitutional meaning to clear and convincing standard. *See Addington v. Texas,* 441 U.S. at 425-433 ("[T]o commit an individual to a mental institution in a civil proceeding, the State is required by the Due Process Clause to prove by clear and convincing evidence the two statutory preconditions to commitment"); *see also Woodby v. INS* (1966) 385 U.S. 276, 286 ("No deportation order may be entered unless the Government proves by clear, unequivocal and convincing evidence that the facts alleged as grounds for deportation are true.") Here, with complete lack of evidence and absence of dispositive findings, the State Bar was able to, unfairly, declare petitioner "unethical."

B. Overstepping the plain language of the statute, the Opinion eviscerated it from any meaning

The Opinion's deliverance on Count One is a cavalier divergence from a maxim that "before a man

can be punished, his case must be plainly and unmistakably within the statute." *U.S. v. Classic,* 313 U.S. 299, 331 (1941) (J. Douglas, dissenting). In view of this Court, the plain meaning of legislation should be conclusive, except in the rare cases in which the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters. *United States v. Ron Pair Enters., Inc.* 489 U.S. 235, 242 (1989). Holding petitioner "culpable of willfully violating section 6103" (App.20a) cannot be squared with the unambiguous intent of the state legislature to subject an attorney to suspension only upon "[a] willful disobedience or violation of an order of the court requiring him to do or forbear an act connected with or in the course of his profession, which he ought in good faith to do or forbear." BPC § 6103. App.84a.

In glaring juxtaposition with the statute's plain words, the Opinion was concerned with a proposition that "an attorney willfully violates section 6103 when she is aware of a final, binding court order and intends her acts or omissions in violating that order." App.20a. A court order is "final for disciplinary purposes once review is waived or exhausted." App.23a. According to the Opinion, the sanctions order was final and binding for the purposes of discipline on December 30, 2020, when the California Supreme Court denied petition for review. App.22a. However, this view is not supported by other evidence

in the record, including the State Bar's own position regarding the finality of the order. The court of appeal dismissed the appeal of the sanctions order, leaving it "unreviewed." It was regarded as such by the State Bar when the proceeding was abated once petitioner filed a writ of mandate to review the sanctions order in February 2022. App.4a. Because the writ of mandate was summarily denied, without adjudication on the merits, petitioner filed a motion in the superior court to void the sanctions order. App.23a. The hearing judge denied the second request for abatement, on June 27, 2022, reasoning that "culpability" on Count One "would not be affected by the action in the superior court"[3] and not because the order was "final and binding." App.4a-5a. The Review Department affirmed the denial on the grounds stated by the judge. Thus, pre-trial, the State Bar did not think that the order was final and binding.

Even if the order was final and binding, it was not definitive because "in reading a statute we must not look merely to a particular clause but consider in connection with it the whole statute." *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA,* 559 U.S. 573, 588 (2010). The statute here provided for a good faith defense – a "separate protection from liability." *Jerman v. Carlisle, McNellie, Rini, Kramer*

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[3] This was not mentioned by the hearing judge or the Review panel in their respective written findings.

& Ulrich LPA, 559 U.S., at p. 588. The State Bar's standard for a good faith defense -- that an attorney's "beliefs [are] both honestly held and reasonable" *(In the Matter of Rose* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 646)) -- is compatible with this Court's test of "existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good faith belief." *Scheuer v. Rhodes*, 416 U.S. 232, 247-248 (1974).

Petitioner's reasonable grounds for her belief that the order was invalid were formed with the Objections served in response to Elter's inadequate request for sanctions during the disqualification proceeding in the superior court (Exh. 1010) and were based on CCP 128.5 and 128.7. In disciplinary proceeding, petitioner moved the hearing judge to judicially notice the statutes, and testified as to her belief that the sanctions order was invalid. The Opinion also acknowledged that petitioner challenged the order in the reviewing courts on "due process" grounds, but rejected the defense in error describing her "actions are not objectively reasonable" and that she "did not have a good reason for failing to comply with the superior court's sanctions order." App.23a. These were not the factors that the Opinion was constitutionally required to take into an account.

In the same ad hoc fashion, the Opinion summed up – offending a sense of justice once again -- that

petitioner's "actions were not reasonable and constituted a violation of the superior court's order" which on its face did not justify the suspension that is prescribed only to those who willfully violated the court order. App.24a. The Opinion failed to align the legislature's particulars with the petitioner's factually distinct conduct in part relying on the State Bar's precedents. App.20a. For a reason that they are deficient, these "contemporaneous and longstanding agency interpretations must fall to the extent they conflict with statutory language." *The Public Employees Retirement System of Ohio v. Betts* 492 U.S. 158, 171 (1989). For the same reason, the Opinion's finding of misconduct on Count One must fall, too. It also cannot stand because the sanctions stemmed from the unwarranted disqualification, and in the disciplinary proceeding, from Count Two, that was unfairly and arbitrarily adjudicated.

Because due process of law required the State Bar to consider statutory components, supported by clear and convincing evidence in the record, outcome on Count One is subject to judicial review to ensure compliance with the constitutional mandate.

C. The Opinion's dismissal of good faith belief defense was based on ad hoc application

Count Four – failure to report sanctions to the State Bar – cannot be viewed separately from Count One, as both counts are based on the same July 19,

2018 order to pay sanctions. The Opinion rejected petitioner's defenses of "honest mistake" and good faith belief that the order was neither "final and binding" nor "valid." App.22a, 25a. Since petitioner's defense to Count Four is the same as to Count One, the resolution of the latter will govern the former.

In addition, Count Four, like Count One, cannot stand in view that it resulted from the mistaken disqualification, followed by the constitutionally infirm sanctions order.

II. THIS CASE IS AN EXCELLENT VEHICLE TO RESOLVE IMPORTANT ISSUES

The decision below is an excellent vehicle for this Court's weighing in. As the State Bar's purpose of disciplining attorneys is protection of public, the public, petitioner and the State Bar plainly have an interest in a correct decision. *See Federal Deposit Insurance Corporation v. Mallen* 486 U.S. 230 (1988) ("[A] petitioner plainly has an interest . . .shared by the State Bar and the public, in a correct [decision].") Because due process of law requires that a decision considering statutory factors be supported by clear and convincing evidence in the record, this Opinion is subject to this Court's review not only to ensure compliance with the constitutional mandate so that the decision be a correct one but importantly to give meaning to the constitutional limitations. For the

same reasons propositioned in *Rochin*, this case should be reviewed by this Court, and for the same reasons invoked in *Rochin,* reversed.

In this case, the State Bar actions endangered a clear expectation of continued enjoyment of a license absent proof – within the constitutional constraints -- of culpable conduct by petitioner. If this Court does not step in, this irrational decision of the State Bar would be left intact, and that would be incompatible with a recognition that a licensee's right to due process cannot exist in any practical sense without a remedy against its abrogation.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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