

STATE BAR OF NEVADA

August 17, 2020



LETTER OF REPRIMAND

Joseph J. Wirth, Esq.
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Re: State Bar of Nevada Disciplinary Grievances No. OBC19-0438

www.nvbar.org

Dear Mr. Wirth:

A Formal Hearing Panel of the Southern Nevada Disciplinary Board has reviewed your tender of a Conditional Guilty Plea pursuant to SCR 113 in the above-referenced grievance. The Panel accepted the Plea and, in accordance with it, determined that a Letter of Reprimand be issued for violation of Rule 1.5 (Fees) of the Rules of Professional Conduct (RPC).

FACTS

You were retained to pursue medical malpractice claims on behalf of a client. You were aware that NRS 7.095 governed the amount of attorney's fees available on a contingency basis for recovery of damages in a medical malpractice matter. NRS 7.095 states, in pertinent part:

1. An attorney shall not contract for or collect a fee contingent on the amount of recovery for representing a person seeking damages in connection with an action for injury or death against a provider of health care based upon professional negligence in excess of:
 - (a) Forty percent of the first \$50,000 recovered;
 - (b) Thirty-three and one-third percent of the next \$50,000 recovered;
 - (c) Twenty-five percent of the next \$500,000 recovered; and
 - (d) Fifteen percent of the amount of recovery that exceeds \$600,000.

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The statute defines “recovery” as “the net sum recovered by the plaintiff after deducting any disbursements or costs incurred in connection with the prosecution or settlement of the claim. Costs of medical care incurred by the plaintiff and general and administrative expenses incurred by the office of the attorney are not deductible disbursements or costs.”

You consulted with other lawyers in Las Vegas who represent plaintiffs in medical malpractice cases and, based solely on their representations to you that NRS 7.095 is routinely waived in fee agreements, asked your client to consent to waive the statutory limitations on attorney’s fees in the medical malpractice case and pay you a fee equal to 40% of any gross recovery he received. Your client consented to the waiver. You did not review persuasive case law regarding whether the statutory limitation was waivable and you did not consider whether an attorney’s fee that was greater than the statutory amount was an unreasonable fee.

At the conclusion of your client’s case, you attempted to collect 40% of the \$175,000 recovery as your attorney’s fee. In an effort to try to finalize the distribution of your client’s settlement funds, you agreed to reduce your fee to 35% of the gross recovery. Both amounts exceeded the amount allowed by NRS 7.095.

Your client filed a Fee Dispute with the State Bar of Nevada’s Fee Dispute Arbitration Committee, claiming he neither agreed to nor waived the limitations of NRS 7.095. You voluntarily agreed to make the arbitration binding. The arbitrators found that NRS 7.095 limited the amount of attorney’s fees that you could recover. You accepted the arbitrators’ decision and promptly paid your client his amount due after deducting your attorney’s fees consistent with the limitations of NRS 7.095. After you made full payment, the Chair of the Fee Dispute Panel, rather than the client, grieved to the State Bar.

APPLICATION OF THE LAW

RPC 1.5 (Fees) states “(a) [a] lawyer shall not make an agreement for, charge or collect an unreasonable fee or an unreasonable amount for expenses.”

NRS 7.095 proscribes the amount of a contingency fee available to an attorney and it does not allow for any exceptions to the statutory limitations. This statutory limitation is consistent with the limitations placed on medical malpractice recoveries. The Panel recognizes that the prohibition on contracting around the limitations in NRS 7.095 has not been adjudicated by the Nevada Supreme Court. It also recognizes persuasive case law that suggests such contracts would be disallowed. *See Fineberg v. Harney & Moore*, 255 Cal.Rptr. 299, 207 Cal.App.3d 1049 (Cal. App. 1989) (*addressing California’s substantially similar statute and finding “[a] law established for a public reason cannot be contravened by a private agreement.”*). You have cited to a 2019 decision from Judge Jim Crockett of the Eighth Judicial District Court in Clark County that held the limitations of NRS 7.095 can be waived by the client based on a knowing and voluntary consent. However, that matter settled before the Nevada Supreme Court could review the decision and we do not find it to be persuasive.

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In addition, a client's consent to a particular fee cannot abrogate the unreasonableness of that fee. *See In re Sinnott*, 845 A.2d 373 (Vt. 2004).

Your contract for, and attempt to collect, a fee in the medical malpractice matter was in excess of the statutorily provided amount, and therefore, was unreasonable.

Standard 7.2 of the ABA Standards for Imposing Lawyer Sanctions provides that “[s]uspension is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional and causes injury or potential injury to a client, the public, or the legal system.” In this instance, you knew that NRS 7.095 limited the amount of fees you could earn and you specifically attempted to contract around the limitation. Your client would have been monetarily injured if you had collected the unreasonable fee. Thus, the appropriate baseline sanction for your violation of RPC 1.5 (Fees) is suspension.

The Panel takes into consideration your absence of related prior discipline, your cooperative attitude toward the disciplinary proceedings, the fact that you voluntarily paid the client the full amount due to him prior to any opening of a discipline investigation, and your expressed remorse. Based on the mitigating factors, the Panel finds that it is appropriate to deviate downward from the baseline sanction of a suspension and issue a Letter of Reprimand.

REPRIMAND

Based upon the foregoing, you are hereby REPRIMANDED for your conduct related to representation of the foregoing client, which conduct violated RPC 1.5 (Fees) because you contracted for, and attempted to collect, a contingency fee in excess of the amount allowed by statute.

Finally, in accordance with Nevada Supreme Court Rule 120 you are assessed costs in the amount of \$1,500 which is due on the 30th day after issue of this letter.

Sincerely,



Reed Werner (Sep 24, 2020 14:47 PDT)

Reed Werner, Esq., Formal Hearing Panel Chair
Southern Nevada Disciplinary Board






proposed LOR (SBN V. Wirth)

Final Audit Report

2020-09-24

Created:	2020-09-24
By:	Kait Flocchini (Kaitf@nvbar.org)
Status:	Signed
Transaction ID:	CBJCHBCAABAAOa6t1aEZHOpvTh8RmaCbEUf3mX4746H

"proposed LOR (SBN V. Wirth)" History

-  Document created by Kait Flocchini (Kaitf@nvbar.org)
2020-09-24 - 9:43:24 PM GMT- IP address: 107.220.215.132
-  Document emailed to Reed Werner (reed.werner@thehartford.com) for signature
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-  Document e-signed by Reed Werner (reed.werner@thehartford.com)
Signature Date: 2020-09-24 - 9:47:17 PM GMT - Time Source: server- IP address: 162.136.192.1
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CERTIFICATE OF SERVICE BY MAIL

The undersigned hereby certifies a true and correct copy of the foregoing **Letter of Reprimand** was deposited in the United States Mail at Las Vegas, Nevada, postage fully pre-paid thereon for certified mail, return receipt requested, addressed to:


Joseph J. Wirth, Esq.
c/o Lipson Neilson P.C.
David A. Clark, Esq.
Jessica A. Green, Esq.
9900 Covington Cross Drive, Suite 120
Las Vegas, Nevada 89144

Certified Mail Receipt No.: **7020 1290 0001 2717 6535**

and via email to:

1. Reed J. Werner, Esq. (Panel Chair): Reed.werner@thehartford.com
2. David A. Clark, Esq.. (Counsel for Respondent): DClark@lipsonneilson.com
3. Jessica A. Green, Esq. (Counsel for Respondent) jgreen@lipsonneilson.com
4. R. Kait Flocchini, Esq. (Assistant Bar Counsel): kaitf@nvbar.org

DATED this 16th day of October, 2020.



Kristi Faust, an employee of
the State Bar of Nevada.