

1 **BEFORE THE COMMISSION FOR COMMON-INTEREST**
2 **COMMUNITIES AND CONDOMINIUM HOTELS**
3 **STATE OF NEVADA**

4 JOSEPH (J.D.) DECKER, Administrator,
5 REAL ESTATE DIVISION, DEPARTMENT
6 OF BUSINESS & INDUSTRY, STATE OF
7 NEVADA,

8 Petitioner,

9 vs.

10 ANTHEM HIGHLANDS COMMUNITY
11 ASSOCIATION; ROBERT STERN;
12 CHARLES HERNANDEZ; AND RONNIE
13 YOUNG,

14 Respondents.

Case Nos. 2015-3615; 2015-2155;
2015-3100; 2015-2207

FILED

JUL 26 2016

NEVADA COMMISSION OF
COMMON INTEREST COMMUNITIES
AND CONDOMINIUM HOTELS

15 **OPPOSITION TO, AND MOTION TO STRIKE, THE DIVISION'S MOTION TO**
16 **DISQUALIFY RESPONDENT'S COUNSEL**

17 This Opposition to the Division's Motion to Disqualify Respondents' Counsel ("Motion")
18 is brought both out of a duty to respond to the Motion, and to create a record as to the ongoing
19 misconduct of the Division's counsel, Michelle Briggs.

20 The Motion is completely without basis in law, and flies in the face of acceptable conduct
21 within the legal profession. The Division's Motion seeks impermissibly to interfere with Anthem
22 Highlands Community Association's and Charles Hernandez's (collectively, "Respondents") right
23 to counsel; the Motion appeals to authority that this Commission does not have; and the Motion
24 utilizes as "evidence" improperly obtained documentation that is a violation not only of the laws of
25 the State of Nevada, not only of Ms. Briggs's ethical duties as an attorney in Nevada, but is a

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1 violation of any notion of fair play and substantial justice.

2 DATED this 25th day of July, 2016.

3 BOYACK ORME & TAYLOR

4 By: /s/ Edward D. Boyack
5 EDWARD D. BOYACK
6 Nevada Bar No. 005229
7 401 N. Buffalo Drive #202
8 Las Vegas, NV 89145
9 Attorney for Respondents

8 **MEMORANDUM OF POINTS AND AUTHORITIES**

9 **A. Briggs lacks the standing to challenge Respondents' representation.**

10 This defect in the Motion could not be any plainer. As Briggs claims to have relied on the
11 Nevada Rules of Professional Conduct ("the Rules") in preparing the Motion, she should have relied
12 on this very pertinent provision as well:

13 (d) Violation of a Rule should not itself give rise to a cause of action
14 against a lawyer nor should it create any presumption in such a case
15 that a legal duty has been breached. In addition, *violation of a Rule*
16 *does not necessarily warrant any other nondisciplinary remedy,*
17 *such as disqualification of a lawyer in pending litigation.* The Rules
18 are designed to provide guidance to lawyers and to provide a structure
19 for regulating conduct through disciplinary agencies, They are not
20 designed to be a basis for civil liability. Furthermore, *the purpose of*
21 *the Rules can be subverted when they are invoked by opposing*
22 *parties as procedural weapons.* The fact that a Rule is just a basis for
23 a lawyer's self-assessment, or for sanctioning a lawyer under the
24 administration of a disciplinary authority, *does not imply that an*
25 *antagonist in a collateral proceeding or transaction has standing to*
26 *seek enforcement of the Rule.* Nevertheless, since the Rules do
27 establish standards of conduct by lawyers, a lawyer's violation of a
28 Rule may be evidence of a breach of the applicable standard of
conduct.

*Nevada Rules of Professional Conduct, Rule 1.0A(d), titled "Guidelines for
Interpreting the Nevada Rules of Professional Conduct" (emphasis added).*

23 This is the prefatory provision of the Rules- it instructs practitioners and authorities alike how
24 to interpret and apply the Rules. This one section very critically explains, in no less than *three* places,
25 why the Motion is completely improper.

26 First, the Rule states unequivocally that disqualification is not the proper remedy for any

1 enough to merit disqualification. Briggs has not proven a conflict existed; has not proven the alleged
2 conflict was egregious enough to merit disqualification; and has not proven that the alleged conflict
3 sufficiently impacted her rights or potential outcome as a third-party to the relationship between
4 Respondents and counsel in these proceedings.

5 **B. The Motion is based off of privileged attorney-client information improperly, and
6 unlawfully, seized from the Anthem Association.**

7 Briggs defines her authority (and the Division's authority) in part as the power to investigate
8 violations of NRS 116. She goes on to say that "The Division and the Commission have an interest
9 in stopping violations of NRS 116." *Motion* at 7. Nowhere in NRS 116 is Briggs, the Division, or
10 the Commission granted the power either to investigate suspected ethical violations under the Rules,
or to compel the production of documents from an association to aid in such an investigation.

11 NRS 116.750 defines the Division's jurisdiction as follows:

- 12 1. In carrying out the provisions of NRS 116.745 to 116.795, inclusive,
13 the Division and the Ombudsman have jurisdiction to investigate and
14 the Commission and each hearing panel has jurisdiction to take
15 appropriate action against any person who commits a violation,
including, without limitation:
(a) Any association and any officer, employee or agent of an
association.

16 Assuming, arguendo that this section even applies to Respondents' counsel (see below, at
17 § C), NRS 116.745 defines a "violation" as a violation of any provision of NRS 116 except NRS
18 116.31184, any regulation adopted pursuant to NRS 116, or any order of the Commission or a
19 hearing panel. In fact, the Attorney General's office issued an Advisory Opinion, dated May 5, 2008,
20 that touched on this salient point: "The process through which a matter proceeds through the Real
21 Estate Division to a hearing before the Commission is specifically limited, at each level, to include
22 only 'violations' as defined in NRS 116.745."¹

23 Absolutely nowhere in NRS 116 is an attorney's representation of a client association subject
24 to oversight by the Division, or by the Attorney General's office. Furthermore, even if Briggs
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26 1. http://red.nv.gov/uploadedFiles/rednv.gov/Content/Publications/Opinions/AGO_5-5-2008.pdf (accessed July 20,
27 2016)

1 believed in good faith that Respondents' counsel was in fact representing Respondents under an
2 active conflict of interest, this is not a violation of any provision of NRS 116, any regulation adopted
3 pursuant to NRS 116, or of any order from the Commission. In fact, the Respondents (specifically,
4 Charlie) have done nothing more than exercise their constitutional, procedural, and due process
5 rights granted to them under NRS 116 and NAC 116 by filing a Motion to Reconsider. The authority
6 and leave to appeal a determination stems from constitutional protections, but more specifically is
7 enshrined in NAC 116.617.

8 The Motion is improper for more reasons than just the fact that a conflict of interest, if
9 present, is not a violation sufficient to trigger the jurisdiction of the Division.

10 First, Briggs improperly and perhaps unlawfully sought the minutes of the Anthem
11 Association's executive session minutes. This possible violation of the law is acknowledged in
12 Exhibit A to the Motion - Declaration of Darik Ferguson, at para. 3: "In my email to [Anthem's
13 community manager], I requested copies of all board minutes for June 2016 *including executive*
14 *sessions.*" (Emphasis added). This request for the executive session minutes is not supported by any
15 grant of authority anywhere in NRS 116, or NAC 116.

16 NRS 116.31085(3) describes the purpose of an executive session:

- 17 3. An executive board may meet in executive session only to:
18 (a) Consult with the Attorney for the association on matters
19 relating to proposed or pending litigation if the contents of the
20 discussion would otherwise be governed by the privilege set
21 forth in NRS 49.035 to 49.115, inclusive [defining the
22 attorney-client privilege].

21 The attorney-client privilege is sacrosanct. In fact, it is the first function of the executive
22 session so listed. Furthermore, the other purposes of an executive session all deal with sensitive
23 issues, such as competency and mental health of employees of the association, a unit owner's
24 financial delinquency, a unit owner's failure to pay construction penalties, or a unit owner's violation
25 of the governing documents. The only enumerated exceptions to the confidentiality of an executive
26 session allow for a unit owner to request the minutes of an executive session's decision regarding
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1 a unit owner's violation of the governing documents, and the minutes are disclosed *only* to the unit
2 owner or their representative.

3 Nothing in NRS 116 or NAC 116 allows for *any* entity, even the Division, to violate the
4 attorney-client privilege by requesting executive session minutes wherein legal strategy was
5 discussed.

6 In fact, NAC 116 is very specific as to the records the Division may request from an
7 association:

- 8 1. The Division may investigate and audit all financial accounts related
9 to an association if the Division has reasonable cause to believe that
10 the accounts or records of the association have not been properly
11 maintained and the Division:
 - 12 (a) Has reasonable cause to believe or has received a credible
13 complaint that the association is insolvent or is in any
14 financial condition or has engaged in any financial practice
15 which creates a substantial risk of insolvency; or
 - 16 (b) Determines that the investigation and audit are reasonably
17 necessary to assist the Division in administering or enforcing
18 any other provision of this chapter, chapter 116 of NRS or any
19 other statute that the Division is charged with administering
20 or enforcing.

NAC 116.550(1)(a)-(b).

16 NAC 116.0433 defines "Financial records" as follows:

17 "Financial records" means the financial or transaction records necessary to
18 support the financial statements of an association which include, without
19 limitation, receipts, bank statements, income tax reports, reserve studies,
20 budgets, contracts, minutes of executive board meetings, inventories,
21 investments, expenses, disbursements, obligations, depreciation in property
22 or equipment, contingent liabilities and any other records deemed necessary
23 by the Division or by the accountants or auditors of an association.

24 There is no language provided sufficient to overcome the protection of the attorney-client
25 privilege. Furthermore, as demonstrated above in NAC 116.550, the Division must believe that the
26 records have not been properly maintained *and* the Division must either have a reasonable belief or
27 credible complaint as to the association's insolvency, or the records requested must be reasonably
28 necessary to enforce any provision of this chapter. Nowhere in the Motion was it alleged that the
executive session minutes were improperly maintained, and thus subject to Division oversight or

1 seizure. In fact, the executive session minutes are *draft* minutes that have not even been reviewed
2 and approved by the Board, as evidenced by the very conspicuous stamp of “DRAFT” across each
3 and every page.

4 **Draft** minutes are just as confidential as approved minutes. According to the Division’s
5 brochure, “Association directors as decision makers” at page 2, § 6,

6 Directors has [sic] access to association records that are considered
7 privileged, meaning the information is available only to certain people for
8 certain purposes. This includes any information relating to a unit’s owner,
9 including specific violations; personnel records *and draft documents*.
10 Discussions with attorneys over legal strategy may also be confidential.

11 Those who have access to privileged information have a duty to
12 ensure it remains confidential. They are also obliged not to use the
13 information for personal purposes. Even when the director leaves the board
14 or the community, they may not breach this duty.²

15 As discussed at length above, the alleged conflict of interest is not one for which Briggs can
16 take jurisdiction, and therefore directing her investigator to secure any documents to this end, much
17 less confidential, privileged, and mere draft documents, was wholly improper. This is not some
18 esoteric or arcane concept, where Briggs was simply confused as to her limitations; the Division has
19 specifically upheld the confidentiality of the executive session, to include draft minutes- a stance
20 reaffirmed on multiple occasions.

21 As another example, in Advisory Opinion 12-05-116, effective date November 15, 2012, the
22 Division affirmed that one of the purposes of an executive session was to consult with the attorney
23 on privileged matters, and that these matters are confidential. Furthermore, the Division’s opinion
24 cautioned that the confidentiality of the executive session must be carefully maintained, such than
25 the agenda reflecting the topics of the executive session are not made public. The concern here once
26 more was that the board’s discussions and decisions made during an executive session are to remain
27 confidential, and should not be broadcast to the association or the public at-large. Despite this
28 guidance from the Division itself, Briggs still seized the confidential attorney-client privileged
executive session minutes for her own ends, without any lawful authority to do so.

2. http://red.nv.gov/uploadedFiles/rednv.gov/Content/CIC/Brochures/fiduciary_duties.pdf (accessed July 21, 2016).

1 This all ties in to Briggs's second action: attaching the executive session minutes to the
2 Motion as an exhibit. The Motion, along with this exhibit (the draft executive session minutes
3 containing privileged attorney-client discussions) are now available on the Division's website under
4 the August Commission agenda link³. This is a possible violation of NRS 116 - not just because it
5 violates the attorney-client privilege, but because it violates the provision in NRS 116 against the
6 distribution of confidential information.

7 That provision reads as follows:

- 8 1. Except as otherwise provided in this section and NRS
9 239.0115, a written affidavit filed with the Division pursuant
10 to NRS 116.760, all documents and other information filed
11 with the written affidavit and all documents and other
12 information compiled as a result of an investigation
13 conducted to determine whether to file a formal complaint
14 with the Commission are confidential. The Division shall not
15 disclose any information that is confidential pursuant to this
16 subsection, in whole or in part, to any person, including,
17 without limitation, a person who is the subject of an
18 investigation or complaint, unless and until a formal
19 complaint is filed pursuant to subsection 2 and the disclosure
20 is required pursuant to subsection 2.
- 21 2. A formal complaint filed by the Administrator with the
22 Commission and all documents and other information
23 considered by the Commission or a hearing panel when
24 determining whether to impose discipline or take other
25 administrative action pursuant to NRS 116.745 to 116.795,
26 inclusive, are public records.

27 *NRS 116.757(1)-(2).*

28 Obviously, this information was confidential in that it was the record of an executive session
of the Anthem Association's Board. Under subsection 1, the executive session minutes (assuming
they were not protected as attorney-client communications) would be "documents and other
information compiled as a result of an investigation" and thus should be confidential. Under
subsection 2, the Motion is not a formal complaint filed with the Commission, and thus the executive
session minutes (despite being protected as attorney-client communications) can not be deemed

3. http://red.nv.gov/uploadedFiles/rednv.gov/Content/Mectings/CIC/2016/Supporting_Material/August/anthemmotion_todisqualifyrespondentsCounsel.pdf (Accessed July 21, 2016).

1 public record. Either of these subsections would only apply, of course, if a conflict of interest
2 between Respondents and their lawyer was a violation of NRS 116. It is not, therefore compiling
3 these minutes for use as an exhibit to the Motion was improper from inception.

4 This would appear to leave Briggs with two obvious avenues to attempt to excuse the
5 inclusion of the draft executive session minutes, both of which fail. First, Briggs may claim that the
6 draft executive session minutes were not, as required under subsection 1, compiled in order to
7 determine whether to file a formal complaint with the Commission, thus they are not confidential.
8 If true, however, then Briggs would be admitting that she had no basis even to request them in the
9 first place, as there was no intent to investigate whether to file a complaint (and again, ignoring for
10 the sake of argument that the draft minutes are protected under attorney-client privilege).

11 Second, Briggs may try to argue that the Motion is in fact related to the underlying
12 Complaint, thus subsection 2 makes them public documents. This is the more likely of her
13 arguments, given that she is now claiming, for the first time, that it is a breach of fiduciary duty for
14 the Anthem Association to waive any perceived conflict of interest. By alleging a new breach of
15 fiduciary duty against the Anthem Association—one not related to any of the allegations contained
16 in the June Commission Complaint—Briggs would be bootstrapping the “investigation” of
17 Respondents’ counsel to that Complaint in an effort to make inclusive the draft executive sessions
18 minutes improperly seized in violation of Respondents’ attorney-client privilege.

19 This would, of course, be a violation of Respondents’ rights in multiple ways.

20 First, the Division may not insert its own discretion or decision-making into the affairs of an
21 association. NRS 116.755(3) states, unequivocally, that the Commission may not intervene in any
22 internal activities of an association unless it is preventing or remedying a violation. As the Division
23 investigates and recommends discipline to the Commission, then it is only logical to conclude that
24 the Division’s power to investigate is limited to those issues or violations that the Commission may
25 take jurisdiction over, and impose discipline upon. As stated multiple times herein, an alleged
26 conflict of interest with an association’s counsel is not a violation of NRS 116 over which the
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1 Commission may take jurisdiction or impose discipline, thus the Division is without the authority
2 to investigate.

3 Second, to allow the publication of privileged communications between an attorney and
4 client, even if such communications are pertinent to an investigation, eviscerates the attorney-
5 privilege with absolutely no legal authority, and flies in the face of the perennial exceptions to the
6 privilege. *See NRS 49.035 to 49.115, inclusive.* In other words, Briggs would be arguing that the only
7 thing needed to circumvent one of the most sacrosanct protections of the legal profession—the
8 attorney-client privilege—would be some tenuous belief, not supported by any reasonable inferences,
9 that an investigation is necessary. From that point, any privileged communications would somehow
10 lose their confidentiality, and become subject to publication for any and all who wish to click a link
11 on a webpage.

12 To allow such an exception has no basis in law, precedent, or common sense.

13 Briggs's conduct is of concern and flies in the face of long-established principles of legal
14 practice, due process, and simple notions of equity, fairness, and good faith. By demanding from the
15 Anthem Association its privileged, confidential communications, Briggs violated multiple provisions
16 of the law, and vastly exceeded her authority under NAC 116.

17 **C. This Commission is not empowered to disqualify Respondents' counsel.**

18 The discipline that may be imposed by this Commission does not include any manner of
19 censure, remedy, or adverse action ordered against a respondent's advocate. The Commission's
20 remedies are defined under NRS 116.785. This section does not include any language that could ever
21 be inferred as granting to the Commission the power to divorce a respondent from his advocate. In
22 fact, all of the discipline authorized under those sections specifically refer to the discipline imposed
23 on the *respondent*. Even if the Commission believes that it has the authority to censure, disqualify,
24 or otherwise to impose discipline over a respondent's advocate, NRS 116.785(1) requires that the
25 disciplined party be given notice and a hearing. Under NRS 116.765(5), this would have required
26 a separate Complaint to be filed before the Commission, and naming Respondents' counsel as the
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1 substantial question as to that lawyer's honesty, trustworthiness
2 or fitness as a lawyer in other respects, shall inform the
3 appropriate professional authority.

4 (c) This Rule does not require disclosure of information otherwise
5 protected by Rule 1.6 or information gained by a lawyer or judge
6 while participating in an approved lawyers assistance program,
7 including but not limited to the Lawyers Concerned for Lawyers
8 program established by Supreme Court Rule 106.5.
9 *Nevada Rules of Professional Conduct, Rule 8.3(a), (c).*

10 The standard under Rule 8.3(a) is not discretionary- the lawyer *shall* inform the appropriate
11 professional authority. Instead, Briggs chose to bring an improper motion before this Commission-
12 a motion that has no basis in the law; a motion that is based off of an improper seizure, analysis, and
13 publication of confidential attorney-client information; and a motion that is not even within this
14 Commission's authority to grant.

15 Briggs would have to have truly known that a conflict existed in order to report Respondents'
16 counsel for an ethical violation. In order to know for sure, Briggs would have to know that there is
17 no waiver of the alleged conflict, or that some other exception may have applied that would have
18 excused Respondents' counsel from acting even in light of a conflict of interest. *See generally*
19 *Nevada Rules of Professional Conduct, Rule 1.7* . Nothing in the Motion indicates that Briggs made
20 any effort to determine whether a waiver was in place, or even if one was required- she simply
21 substituted her own, subjective analysis of the representation.

22 In addition to knowledge of an active, unresolved conflict of interest, Briggs would have to
23 have believed that it raised "a substantial question as to that lawyer's honesty, trustworthiness or
24 fitness as a lawyer in other respects". A conflict may be accidental and unintentional; it may be the
25 result of a difference of opinion and thus opposing counsel does not even believe that a conflict
26 exists (see below, § D). Even in the presence of a known, unresolved conflict of interest, such a
27 conflict would not by itself have called into question the honesty, trustworthiness, or fitness of
28 Respondents' counsel absent some other evidence or indicia of impropriety. Briggs did not even
bother to look, or even to reach out to Respondents' counsel- she simply seized privileged

1 documents and attached them in her Motion as “evidence”. In the presence of an actual conflict, Rule
2 1.7 allows for written waiver of the conflict by Respondents. Such a waiver would not necessarily
3 have been present in draft minutes of the most recent executive session, thus Briggs had a duty to
4 investigate further to determine if in fact the alleged conflict could have, and was, waived.

5 Regardless, even with true knowledge of an unresolved conflict, and a belief that
6 Respondents’ counsel was unfit to represent Respondents, Rule 8.3 excepts from disclosure any
7 information protected by Rule 1.6. Rule 1.6(c) requires a lawyer to “make reasonable efforts to
8 prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating
9 to the representation of a client.” Not only did Briggs violate this provision by publishing the
10 executive session minutes, Rule 1.6(c) should have foreclosed her “complaint” regardless, whether
11 before the appropriate authority or in the form of the Motion to the Commission.

12 Ignoring even these defects in Briggs’s errant allegation of a conflict, it is clear that the
13 Motion was brought before this Commission for an improper purpose. This is a violation of NRC
14 Rule 11.⁴

15 Under that Rule, any motion submitted or advocated before a tribunal must meet the
16 following criteria:

- 17 (1) it is not being presented for any improper purpose, such as to
18 harass or to cause unnecessary delay or needless increase in
19 the cost of litigation;
- 20 (2) the claims, defenses, and other legal contentions therein are
21 warranted by existing law or by a nonfrivolous argument for
22 the extension, modification, or reversal of existing law or the
23 establishment of new law;
- 24 (3) the allegations and other factual contentions have evidentiary
25 support or, if specifically so identified, are likely to have
26 evidentiary support after a reasonable opportunity for further
27 investigation or discovery; and
- 28 (4) the denials of factual contentions are warranted on the
 evidence or, if specifically so identified, are reasonably based
 on a lack of information or belief.

NRC Rule 11(b)(1)-(4).

Furthermore, NRC Rule 11 requires such motions to be based on “the best of the person’s

4. The Nevada Rules of Civil Procedure have been made applicable to administrative proceedings through Rule 81.

1 knowledge, information, and belief, *formed after an inquiry reasonable under the circumstances*” ...
2 *Id.*

3 Here, Briggs’s Motion obviously fails Rule 11's standard. Briggs did not honor her own
4 obligation under the Rules to ensure that she had positive knowledge that an unresolved conflict did,
5 in fact exist, and that Respondents’ counsel was compromised by that conflict. Likewise, she did not
6 report her concerns to the proper authority but instead sought to parlay the allegation into a
7 procedural advantage in these proceedings. As mentioned above, this is indicative of bad faith and
8 thus is a violation sufficient to trigger Rule 11 sanctions.

9 As Briggs did not report her concerns to the appropriate authority, but instead chose to bring
10 her concerns here in an effort to disqualify Respondents’ counsel, one can only assume either that
11 she herself did not believe this supposed conflict was sufficient to merit mandatory reporting under
12 the Rules. Instead, she is seeking to use this theory of an unresolved conflict to gain a strategic
13 advantage in the ongoing Anthem Association ordeal- an improper purpose, given her ethical
14 obligation to report violations of the Rules. Additionally, the Motion is not based on any claims or
15 legal contentions that are warranted by existing law. Since this Commission is without the authority
16 to disqualify counsel, the Motion is entirely frivolous and it can only be assumed that it was brought
17 to harass, embarrass, threaten, or otherwise annoy Respondents and their counsel. This is especially
18 likely considering the improper and unlawful violation of Respondents’ attorney-client privilege, and
19 the publication of confidential documents. Furthermore, Briggs could not reasonably have believed
20 that there was likely to be any evidentiary support for her claims of conflict. Many conflicts, if
21 present, are waiveable, and there is nothing to suggest that such a waiver, if required, would have
22 been limited only to the minutes seized by Briggs. Indeed, such a waiver could have been secured
23 months ago, or it may not even be present in the form of board minutes, as such a waiver itself is
24 protected under attorney-client privilege and would not be discoverable through a Division

1 investigation.⁵

2 Lastly, and most importantly on this point, Briggs violated the prefatory duty of Rule 11- the
3 duty to certify the Motion under her best knowledge, information, and belief, formed from
4 reasonable inquiry.

5 Briggs sent her investigator to demand attorney-client documents to support her theory of a
6 conflict of interest. She viewed minutes that she had no business viewing- not merely because they
7 were privileged and confidential, but because they were draft minutes and had not even been
8 approved as to form and content. Furthermore, she did not make any further inquiries as to whether
9 the conflict did, in fact, exist; whether it was waiveable; whether it had been waived; or any other
10 questions that may have helped to prevent her from filing such an improper pleading as the Motion
11 at issue.

12 **D. The Anthem Association's interests are not adverse to Charlie's.**

13 Prudence demands that Respondents respond to the allegation of a conflict, even where
14 Respondents do not believe such an allegation to have any merit. Accordingly, Respondents hereby
15 deny that their interests are adverse to one another. Briggs feels that a conflict exists because Charlie
16 prevailing via reconsideration will mean some burden is shifted to the Anthem Association. This is
17 not only disingenuous, but it ignores the reality of the Commission's findings at the hearing.

18 Charlie is moving for reconsideration on several points, not just the one point that Briggs has
19 seized upon. First, if this Commission agrees that there is no such thing as "knowing and willful"
20 negligence, then that would drastically alter the outcome of the discipline imposed for both Charlie's
21 *and* the Anthem Association's benefit. The knowing and willful descriptor is, for the reasons put
22 forth in the motion for reconsideration, without basis in the law, and contradictory of itself.
23 Nevertheless, application of a "knowing and willful" descriptor subjects the respondent (Charlie) to
24 certain forms of discipline not capable of being imposed on an association- namely the removal of

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26 5. For the record, Respondents wish to clarify that such a waiver is referred to in the hypothetical not to imply that it
27 does not exist, but because Respondents are under no obligation to produce even more attorney-client documents
28 than those the Division has already improperly seized.

1 a respondent from the board. If Charlie and the association succeed on reconsideration of this point,
2 his removal from the Anthem Board is reversed and thus the Anthem Association is spared the
3 considerable expense of a special election (and the expense *is* considerable- see the Motion at Ex.
4 B, wherein the Anthem Board President, Frank Capello, tells Briggs that the special election will
5 have a “significant cost”). Also, no more attorney fees incurred by Anthem as the matter will be
6 resolved and closed. Also, on-going mis-application of the law equals more on-going expense to the
7 association in legal fees. Both parties greatly benefit if the motion to reconsider is successful.
8 Everyone indeed benefits because the law is upheld and properly applied. How would getting the
9 correct legal interpretation be bad for anyone; except perhaps the division and its counsel.

10 Thus, even if the Commission elects to require Anthem to pay the fine heretofore imposed
11 on Charlie personally, this would in fact be *less* than the cost of the special election. Charlie
12 prevailing on this one issue of his motion to reconsider would thus save the Anthem Association
13 money, not cost it even more, as Briggs errantly alleges.

14 The motion to reconsider raised several other points of error, both for reconsideration and
15 in order to preserve a record for the district court’s potential consideration of Charlie’s timely
16 Petition for Judicial Review of the Commission’s findings and order. Success on any of these other
17 points of error would mean a complete reversal of the findings, and thus *no* liability would attach
18 to the Anthem Association. Also, its inconceivable how Anthem would benefit if it holds an election,
19 only to have Charlie returned to a board position because the law was misapplied.

20 Finally, Briggs made the audacious statement that Charlie’s motion to reconsider somehow
21 violates a fiduciary duty- either on his part or on the current board’s. The only logical inference to
22 be taken from this is that Briggs is arguing that once someone becomes a member of any association
23 board, they somehow lose their constitutional and due process rights to appeal any adverse finding
24 against them. While this unfounded accusation is cloaked in semantics about indemnification and
25 recouping costs of defense, the salient point Briggs is trying to make is that Charlie has no right to
26 an appeal, and the Anthem Association somehow violates a duty if it allows him to pursue one.

1 Ignoring for a moment the fact that such an appeal is a constitutional guarantee—a guarantee
2 reproduced in NRS 116, 233B, and NAC 116—Briggs’s position fails to appreciate that if Charlie’s
3 appeal is successful then the Anthem Association, Charlie, and every other association in Nevada
4 will have benefitted from the proper application of justice, and the correction of a wrong.

5 In fact, the Motion here at issue, with violations of the law, and general bad faith, only serves
6 to show that the Division’s process needs a serious double-take. Briggs’s contention that
7 associations, and in particular the Anthem Association, “should want the Commission to find a
8 knowing and willful violation, so the Association would not be responsible for any fine or costs
9 imposed” (*Mot.* at 4) is utterly reprehensible, and shocks the conscious that a public officer, sworn
10 to uphold justice, would take such a distorted view of our adversarial process. Her perspective on
11 her job, and the Division’s job, is that associations should throw their officers to the wolves at the
12 first sign of trouble; not that the association should support the members who give their time, effort,
13 energy, and personal resources to make their communities better places.

14 **CONCLUSION**

15 Based on the foregoing, the Motion should be DENIED. Additionally, the Motion should be
16 stricken from the record, both because it is improper, and because it contains confidential
17 information not appropriate for public dissemination.

18 DATED this 25th day of July, 2016.

19 BOYACK ORME & TAYLOR

20 By: /s/ Edward D. Boyack
21 EDWARD D. BOYACK
22 Nevada Bar No. 005229
23 401 N. Buffalo Drive #202
24 Las Vegas, NV 89145
25 Attorney for Respondents
26
27
28

1 **CERTIFICATE OF MAILING**

2 I HEREBY CERTIFY that on this 25th day of July, 2016, a true and correct copy of the
3 foregoing **OPPOSITION TO, AND MOTION TO STRIKE, THE DIVISION'S MOTION TO**
4 **DISQUALIFY RESPONDENT'S COUNSEL** via electronic mail, to the following:

5 Commission for Common-Interest Communities and
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By: /s/ Norma Ramirez
An Employee of Boyack Orme & Taylor