

SUPREME COURT OF NEVADA

In re: Harvey Whittemore
Bar No.: 1089
Docket No.: 64154
Filed: October 8, 2013

ORDER OF TEMPORARY SUSPENSION AND REFERRAL TO DISCIPLINARY BOARD

Attorney convicted of felonies temporarily suspended pending resolution of formal disciplinary proceedings.

Bar Counsel for the State Bar of Nevada has petitioned this court, pursuant to SCR 111, to enter an order temporarily suspending attorney Harvey Whittemore from the practice of law and referring him to the appropriate board for discipline. The petition is supported by certified copies of documents indicating that on September 30, 2013, judgment was entered against Whittemore in the United States District Court, District of Nevada, based on his conviction, pursuant to a jury verdict, of violations of 2 U.S.C. § 441a(a)(1) (making excessive campaign contributions), 2 U.S.C. § 441f (making campaign contributions in the name of another), and 18 U.S.C. § 1001(a)(1) and (2) (false statement to a federal agency), all felonies.¹

Pursuant to SCR 111, temporary suspension and referral to the appropriate disciplinary board are mandatory when an attorney has been convicted of a “serious” crime, which includes a felony. SCR 111(6)-(8). Having reviewed the petition and the supporting documentation submitted by Bar Counsel, we conclude that the petition conclusively establishes Whittemore’s conviction of serious crimes. Accordingly, we temporarily suspend Whittemore from the practice of law and refer this matter to the Northern Nevada Disciplinary Board for the initiation of formal disciplinary proceedings, in which the sole issue to be determined is the extent of discipline to be imposed, subject to SCR 111(7) and (8).

It is so ORDERED.

In re: Harvey Whittemore
Bar No.: 1089
Docket No.: 64154
Filed: November 13, 2013

ORDER DENYING PETITION FOR REINSTATEMENT

Attorney moved for reinstatement following entry of an Order of Temporary Suspension and Referral to Disciplinary Board. Request for reinstatement was denied.

On October 8, 2013, this court entered an order, pursuant to SCR 111(7), temporarily suspending attorney Harvey Whittemore from the practice of law, pending final disposition of a disciplinary proceeding based on Whittemore’s conviction,

in the United States District Court for the District of Nevada, of three felonies.² Whittemore has moved for reinstatement, or to set aside the temporary suspension, the state bar has filed a response, and Whittemore has filed a reply.³

Our determination in this matter is governed by our consideration of the following factors:

1. Whether the public will suffer irreparable harm unless the order of interim suspension issues;
2. Whether the threatened injury to the public outweighs whatever damage the proposed order may cause the attorney temporarily suspended from the practice of law;
3. Whether the proposed order, if issued, would be adverse to the public interest; and
4. Whether there is a substantial likelihood, based on all the available evidence, that a significant sanction will be imposed on the attorney at the conclusion of any pending disciplinary proceedings. *In re Discipline of Trujillo*, 24 P.3d 972, 979 (Utah 2001).

Whittemore points to his past personal and professional record and argues that the public would not suffer harm were he allowed to continue to practice law, pending final disposition of the disciplinary proceedings. But even assuming, for the sake of argument, that this is true, Whittemore’s petition does not satisfy the remaining *Trujillo* factors.

At least two of the crimes of which Whittemore was convicted required proof that he acted knowingly and willfully, indicating a dishonest intent. See 2 U.S.C. § 441f (“No person shall make a contribution in the name of another person or knowingly permit his name to be used to effect such a contribution ... ”); 2 U.S.C. § 437g(d)(1)(D) (describing the penalties for “[a]ny person who knowingly and willfully commits a violation of section 441f of this title involving an amount aggregating more than \$10,000 during a calendar year”); 18 U.S.C. § 1001(a)(2) (making it a crime “in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States” to “knowingly and willfully make [] any materially false, fictitious, or fraudulent statement or representation”). Nevada has adopted the Model Rules of Professional Conduct, and under Model Rule 8.4(b): “It is professional misconduct for a lawyer to . . . [c]ommit a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects.” This court and the underlying bar disciplinary proceeding are not the proper vehicles for his challenge to the legitimacy of his convictions.

When a lawyer has been convicted of a crime encompassed by Rule 8.4(b), it [is] clear that the lawyer should not be permitted to relitigate the facts underlying the conviction. The accused in a criminal case has more procedural rights than a respondent in a disciplinary case, including the benefit of the presumption of innocence and the ‘beyond a reasonable doubt’ standard of proof.

2 Geoffrey C. Hazard, Jr. & W. William Hodes, *The Law of Lawyering*, § 65.4 (3d ed. 2013). “A record of conviction is conclusive evidence that the lawyer committed the offense.” Restatement (Third) of the Law Governing Lawyers § 5 cmt. g (2000). Because a judgment of conviction carries preclusive effect, “[i]nterim suspension

of a lawyer ... is commonly provided for following conviction of a serious crime *regardless of pendency of an appeal.*" *Id.* (emphasis added); accord SCR 111(5) & (7).

The elements of at least two of the crimes for which Whittemore was convicted involve a "criminal act that reflects adversely on [his] honesty, trustworthiness or fitness as a lawyer." RPC 8.4(b). Also troubling is the fact that, in committing the acts that led to the convictions, Whittemore involved employees and family members, who presumably relied on his counsel and encouragement. In light of these facts and the further fact that a felony is, per se, a serious crime under SCR 111, we believe that the public's confidence in the legal profession and the judicial system would be diminished were we to allow Whittemore to continue to practice law despite his judgment of conviction on three felony counts in federal court. Accordingly, we deny Whittemore's petition for reinstatement. The temporary suspension, imposed by this court's October 8, 2013, order, shall take effect immediately from the date of this order.

It is so ordered.⁴

HARDESTY, J., with whom GIBBONS, J., agrees, concurring in part and dissenting:

I agree with the majority's utilization of standards for evaluating good cause applications to set aside or modify temporary suspensions pursuant to SCR 111(7). In the past, this court has received a limited number of such requests, but we have not set forth the appropriate standards for their analysis, and it is my view that we should do so in a published opinion. See Internal Operating Procedures Rule 9(a). I further concur that the majority's selection of the factors set forth in *Trujillo* provide a reasonable framework for the court's analysis of a request under SCR 111(7). However, I would weigh the *Trujillo* factors differently, keeping in mind that in the context of disciplinary matters, this court must consider "all the relevant factors and mitigating circumstances on a case-by-case basis." *State Bar of Nev. v. Claiborne*, 104 Nev. 115, 219, 756 P.2d 464, 531 (1988) (quoting *Murray v. State Bar of Cal.*, 709 P.2d 480, 485 (Cal. 1985)).

The purpose behind the mandatory temporary suspension provided for in SCR 111 is to halt the continued practice of an attorney who has been convicted of committing a serious crime. The first two factors in *Trujillo* emphasize that the primary purpose of a temporary suspension is the protection of the public from further harm caused by an attorney who has been convicted of a serious crime. However, within SCR 111 itself, this court has recognized that the attorney can make a request to set aside the temporary suspension, for good cause shown, pending final disposition of disciplinary proceedings. Other states have recognized that a temporary suspension, imposed under rules substantially similar to SCR 111, can be stayed, see *In re Downey*, 960 A.2d 1135 (D.C. 2008) (granting attorney's motion to stay an interim suspension "for good cause shown" after applying factors substantially similar to those set forth in *Trujillo*), or modified to tailor

the temporary suspension to the facts and circumstances unique to the matter at hand, see *State v. Kirsch*, No. CR980178336, 2000 WL 1825398 (Conn. Super. Ct., Nov. 21, 2000).

Consistent with the purposes of SCR 111 and the approaches taken in *Downey* and *Kirsch*, I would grant a modified temporary suspension, limiting Whittemore's representation to his current clients and barring him from appearing in any state court.

In his petition requesting that this court set aside its order of temporary suspension, Whittemore represents that he has no prior record of discipline (a representation the state bar does not refute); after full disclosure to his current clients of the facts and circumstances surrounding his convictions, his clients consented to his continued representation, pending his incarceration; the crimes he was convicted of were committed while Whittemore was employed in a business setting and not while he was engaged in the active practice of law; the transactions giving rise to his convictions occurred nearly seven years ago; and a legitimate dispute exists concerning the legal issues to be presented at his criminal appeal. Further, Whittemore acknowledges that if he is incarcerated, he can no longer represent his clients. These representations demonstrate that Whittemore's continued practice, pending final disposition of the disciplinary proceedings, would not pose an undue risk of harm to the public. The majority appears to concede the point, thus satisfying the first two *Trujillo* factors.

I presume the majority concludes that the fourth *Trujillo* factor – whether there is a substantial likelihood that a significant sanction will be imposed at the conclusion of the disciplinary proceedings – weighs in Whittemore's favor, as it was not analyzed. In fact, the outcome of that issue is not clear and we should not treat it as preordained. While Whittemore has been convicted of serious crimes, the disciplinary panel and this court must take into consideration numerous factors and mitigating evidence before imposing discipline.

The majority's denial of Whittemore's SCR 111(7) request rests solely on the argument that the elements of at least two of the convictions involve a violation of RPC 8.4(b), and thus adversely affect the public's confidence in the legal profession. I reject this argument for three reasons: First, it should be noted that the state bar did not argue that any of Whittemore's convictions violated RPC 8.4(b), and we should not leap to that conclusion without appropriate briefing and analysis by the disciplinary panel; second, in the context of an order lifting or modifying a temporary suspension, I would place greater weight on the threat the lawyer presents to public harm and the conditions the court can impose to protect the public than the public's perception of the legal system. While the public's confidence in the legal profession is an important factor in the ultimate discipline of a lawyer, the issue

continued on page 38

bar counsel report

before the court concerns a remedy which our rule, the legal profession, and the public contemplate; third, the majority's analysis essentially forecloses any modification of a temporary suspension order in the future, rendering SCR 111(7) and the *Trujillo* factors hollow.

Because the modification of a temporary suspension order operates as an injunction to maintain the status quo, I would allow Whittemore to continue to practice law on a limited basis, pending final disposition of the disciplinary proceedings or further order of this court. Accordingly, I would grant Whittemore's petition for reinstatement, in part, and vacate the order of temporary suspension subject to the terms and conditions contained in our October 23, 2013, order limiting Whittemore's practice to his existing clients and prohibiting him from appearing in Nevada's state courts.

Hardesty, J.

I concur:
Gibbons, J.

In re: Joseph D. Bunin
Bar No.: 5594
Docket No.: 60257, 61494, & 62584
Filed: November 21, 2013

ORDER OF SUSPENSION

Attorney suspended for four years, six months and one day, with conditions, for three separate bar matters. Conditions to include medical treatment, restitution, continuing legal education and taking the bar exam.

These are three separate bar discipline matters concerning attorney Joseph D. Bunin. Docket Nos. 60257 and 61494 are automatic reviews, pursuant to SCR 105(3)(b), of Southern Nevada Disciplinary Board hearing panels' findings that Bunin violated various Rules of Professional Conduct (RPC) and their recommendations that he be suspended for six months and seven years, respectively. Docket No. 62584 is an automatic review of a hearing panel's recommendation that this court approve Bunin's conditional guilty plea in exchange for a stated form of discipline pursuant to SCR 113.

The three matters include 19 grievances against Bunin and 90 violations of the RPCs, stemming from Bunin's failure to diligently represent clients and failure to communicate with clients and the state bar. The three matters involve similar conduct.

In Docket Nos. 60257 and 61494, on automatic review to this court under SCR 105(3)(b), the hearing panels found violations of RPC 1.1 (competence) (two violations), RPC 1.3 (diligence) (two violations), RPC 1.4 (communication) (two violations), RPC 1.15 (safekeeping property), RPC 3.2 (expediting litigation), RPC 5.3 (responsibilities regarding non-lawyer assistants) (two violations), RPC 5.5 (unauthorized

practice of law), RPC 8.1(b) (bar admission and disciplinary matters) (two violations), and RPC 8.4 (misconduct).

In Docket No. 60257, the panel recommended that Bunin be suspended for six months and one day and that he take 12 additional hours of CLE, including six hours related to law office management, three hours regarding proper client communication, and three ethics credits. Bunin was also to pay the costs of the proceeding. The recommendation in Docket No. 61494 included a suspension of seven years. The panel recommended that Bunin take 12 additional hours of CLE related to law office management, attend counseling with an approved medical professional, pay restitution totaling \$8,570.51, retake and pass the bar exam as a condition precedent to reinstatement and pay the costs of the proceeding, including salaries up to \$10,000.

While a disciplinary panel's findings are persuasive, this court's automatic review of a panel decision is conducted de nova. SCR 105(3)(b); *In re Discipline of Droz*, 123 Nev. 163, 168, 160 P.3d 881, 884-85 (2007). The panel's findings of misconduct must be supported by clear and convincing evidence. *In re Discipline of Drakulich*, 111 Nev. 1556, 1566, 908 P.2d 709, 715 (1995).

Based on our review of the record, we conclude that the panels' findings in these matters are supported by clear and convincing evidence. Accordingly, we approve the panels' recommendations that Bunin be suspended with conditions. However, we determine that the seven-year suspension recommended in Docket No. 61494 should be reduced as explained below.

Docket No. 62584 is an automatic review, pursuant to SCR 113, of a conditional guilty plea in exchange for a stated form of discipline. In this matter, Bunin admitted to eight violations of RPC 1.1 (competence), 11 violations of RPC 1.3 (diligence), 11 violations of RPC 1.4 (communication), six violations of RPC 1.5 (fees), seven violations of RPC 1.15 (safekeeping property), eight violations of RPC 13.2 (expediting litigation), and nine violations of RPC 8.1 (bar matters and discipline).

The agreement provides for a suspension of four years. Bunin agreed to voluntarily cease practicing law by January 1, 2013, and the suspension is to begin retroactively on that date. Bunin also agreed to pay restitution totaling \$13,837 and pay the costs of the disciplinary proceeding. Bar Counsel recommended that the seven-year suspension in Docket No. 61494 be reduced to four years to run concurrently with this four-year suspension.⁵

Based on our review of the record, we conclude that Bunin committed the violations to which he pleaded guilty, and we approve the stipulated discipline suspending Bunin subject to conditions. Accordingly, combining the discipline for these three matters, Bunin is hereby disciplined as follows.

Bunin shall:

1. Serve an actual suspension of four years, six months and one day. Such suspension shall be retroactive to January 1, 2013;⁶
2. Pursue a course of counseling with a recognized medical professional approved by the state bar, who

will develop a treatment plan and certify that Bunin has met treatment goals;

3. Pay restitution totaling \$22,407.51 to 12 affected clients;⁷
4. Take an additional 24 CLE units, comprised of 18 credits related to law office management, three credits covering proper client communication and three ethics credits, as a condition precedent to seeking reinstatement. This requirement is in addition to any CLE Bunin must complete to rectify his existing CLE suspension. *See supra* n.2;
5. Retake and pass the bar exam as a condition precedent to seeking reinstatement. ■

-
1. The court declared a mistrial on one count of violating 18 USC § 1001 (causing a false statement to the Federal Election Commission).
 2. SCR 111(7) states that upon the filing of a petition demonstrating that an attorney has been convicted of a “serious crime, ... the court shall enter an order suspending the attorney, regardless of the pendency of an appeal, pending final disposition of a disciplinary proceeding.” A felony is a “serious crime.” *See* SCR 111(6).
 3. SCR 111(7) provides that “[f]or good cause, the court may set aside its order suspending the attorney from the practice of law.”
 4. The Honorable Ron Parraguirre, Justice, has voluntarily recused himself in this matter.
 5. Each of the matters included further conditions restricting Bunin’s practice after his reinstatement, if any. We conclude that such conditions are more appropriately considered in the context of reinstatement.
 6. Bunin has been CLE suspended since December 28, 2012. *See In re Continuing Legal Education*, Docket No. 61517 (Order Dismissing Petition as to Certain Respondent Attorneys and Granting Petition as to Certain Respondent Attorneys, December 28, 2012). Accordingly, in addition to petitioning for reinstatement pursuant to SCR 116 and satisfying the conditions outlined in this order, Bunin must also comply with the reinstatement requirements set forth in SCR 213 prior to seeking reinstatement to the practice of law in Nevada.
 7. Bunin shall pay restitution to the following clients in the indicated amounts:

1. Paula Jackson	\$5,020.51
2. Shelly Vincent	\$2,550
3. Tina Dixon	\$1, 000
4. Renard Polk	\$2,000
5. Jay Kalbfleisch	\$500
6. Plamen Donovan	\$1,000
7. Steven Billings	\$1,500
8. Thomas Walker	\$1,289
9. Robert Yarina	\$1,500
10. Joyce Davis	\$3,000
11. Eric and Marsha Sanders	\$1,789
12. Rommel Blanco	\$1,259

DISCIPLINE KEY

Resignation with charges pending: SCR 98(5)(b)
Types of possible discipline listed generally: SCR 102
Attorneys convicted of crimes: SCR 111
Conditional guilty plea agreements (discipline by consent): SCR 113
Reciprocal discipline: SCR 114
Disbarred/Suspended attorneys: SCR 115
Reinstatement: SCR 116
Disability Inactive: SCR 117

Supreme Court Rules (SCRs):
www.leg.state.nv.us/CourtRules/SCR.html

DISBARMENT – License to practice revoked.

SUSPENSION – License suspended for a time certain, ineligible to practice. More than six months requires petition for reinstatement and court order.

DISABILITY INACTIVE – Ineligible to practice until further order of the court. In the interim, disciplinary proceedings held in abeyance.

INTERIM TEMPORARY SUSPENSION – Interim suspension based on showing of a substantial threat of serious harm to the public, in effect until further court order, usually after hearing.

RESIGNATION WITH CHARGES PENDING – Ineligible to practice. Requires Bar Counsel approval. Resignation is irrevocable, with readmission only possible upon application as a new admittee.

PUBLIC REPRIMAND – Misconduct found and public censure issued, including attorney’s name and the underlying facts and charges. Published in *Nevada Lawyer* and made available to the press. Remains eligible to practice law.

LETTER OF REPRIMAND – Lowest level of discipline. Not published, but disclosed upon request under the new rules. May also include up to a \$1,000 fine and restitution. Remains eligible to practice.

ADMINISTRATIVE SUSPENSION – Attorneys may be administratively suspended for failure to pay bar fees (SCR 98(12)), and/or for failure to complete and report the required Continuing Legal Education hours (SCR 212). While these are **not disciplinary suspensions**, the attorney is **ineligible to practice law** until the deficiency is remedied and the procedures to transfer back to active status completed as set forth in the applicable rules.