

# bar counsel report

## SOUTHERN NEVADA DISCIPLINARY BOARD

### LETTERS OF REPRIMAND

#### **File No.: 10-063-NA200**

*Letter of Reprimand imposed when an attorney who is not licensed in the state of Nevada submitted a demand letter to an insurance company in Nevada.*

A Senior Security Investigator with Insurance Company, forwarded to the state bar a settlement demand signed by Attorney on behalf of a client of Attorney's firm that was sent directly to Insurance Company's claims department. The letter included a statement of representation, legal analysis and an offer to settle a client's legal claim for a specified amount of compensation. Attorney directed the adjuster to contact Attorney about the settlement offer.

Rule of Professional Conduct 5.5(a)(2) provides, "[a] lawyer shall not assist another person in the unauthorized practice of law." Rule of Professional Conduct 5.5.(d)(2)(iii) further provides, "[a] lawyer who is not admitted to practice in this jurisdiction shall not represent or hold out to the public that the lawyer is admitted to practice law in this jurisdiction."

In Attorney's response to the state bar, Attorney stated that the letter produced by Senior Security Investigator of Insurance Company is not representation to the court, nor a pleading, nor an effort to present himself as an attorney, Attorney did not see the unauthorized practice of law. Attorney stated that relaying his client's demand, on behalf of the office is not practicing law in any way, shape or form.

Attorney's belief is at odds with Nevada law. In the recent case of *In Re Discipline of Lerner*, 197 P.3d 1067 (Nev. 2008), our Supreme Court found that an Arizona attorney unlicensed in Nevada had engaged in the unauthorized practice of law sending settlement demand letters to insurance carriers and negotiating with adjusters. *Id.* at 1074 ("Specific examples of activities found to constitute the practice of law include advising a client about his or her legal rights and recommending future actions, negotiating settlement of a client's claims, and preparing and signing demand letters.") See, also, *People v. Stewart*, 892 P.2d 875, 876 (Colo. 1995); *Mays v. Neal*, 327 Ark. 302, 938 S.W.2d 830, 835-36 (1997); *In re Flack*, 272 Kan. 465, 33 P.3d 1281, 1287 (2001).

The demand letter Attorney authored and signed offers to resolve a client's legal claim and directs the adjuster to contact Attorney directly. Such conduct constitutes the unauthorized practice of law given Attorney's lack of a Nevada license or other authority to practice law in this jurisdiction. Accordingly, based upon the foregoing, Attorney is hereby **REPRIMANDED** for violating RPC 5.5 (Unauthorized Practice of Law).

#### **File No.: 10-114-NA302**

*Letter of Reprimand imposed when an attorney who is not licensed in the state of Nevada attempted to negotiate a settlement in Nevada.*

On February 19, 2010, Attorney forwarded a letter to

counsel for Las Vegas Resort stating that Attorney represented Client and demanded \$2,000,000 to settle civil and criminal claims arising from an alleged altercation between Client and Resort employees on February 1, 2010. The letterhead utilized in this correspondence did not denote the states in which Attorney was licensed to practice law. Attorney is not licensed to practice law in the state of Nevada. As a result, a grievance was received by the state bar and on May 7, 2010. The state bar forwarded the correspondence requesting a response to the specific issues raised by attorney for the Resort within 10 days.

On May 17, 2010, Attorney forwarded a response indicating that Attorney did represent Client and was attempting to negotiate a settlement on his behalf. The letterhead utilized in this correspondence had been altered to indicate the states in which Attorney was licensed to practice.

Nevada Rule of Professional Conduct 5.5 specifically prohibits the unauthorized practice of law. This prohibition includes accepting a personal injury matter arising in Nevada and which would be subject to the state's jurisdiction. As someone not licensed to practice in Nevada, Attorney cannot negotiate settlements regardless of whether the matter proceeds to court. See *In re Boyer*, 988 P.2d 625, 627 (Colo. 1999) (suspended lawyer engaged in the unauthorized practice of law by, *inter alia*, analyzing value of clients' personal injury claims and negotiating with insurer); see also *Cleveland Bar Assn. v. Moore*, 722 N.E.2d 514, 514 (Ohio 2000) (Pennsylvania attorney living in Ohio engaged in unauthorized practice of law by negotiating on behalf of Ohio clients, communicating with their insurance companies, making settlement demands and agreeing to settlements); *Estate of Vafides v. Sheppard Bus Svcs., Inc.*, 469 A.2d 971, 976 (N.J. Super.L.1983)(out-of-state attorneys engaged in unauthorized practice of law by continuing negotiations with insurance company on clients' behalf after denial of their application for pro hac vice admission).

Accordingly, Attorney was hereby **REPRIMANDED** for having violated RPC 5.5 (Unauthorized Practice of Law).

#### **File No.: 10-148-2672**

*Letter of Reprimand imposed when attorney filed meritless claim and then failed to properly dismiss or defend it, resulting in large fee award against client.*

Client retained Attorney regarding his union's denying him pension benefits. Client's grievance to the state bar complained, in part, of lack of communication from Attorney. However, Client also complained that Attorney had sued the wrong party and failed to take corrective action, resulting in a judgment against him.

Client attached a January 22, 2010, order from the United States District Court for the District of Nevada in his case. The order granted the union's request for \$15,557.55 in attorney's fees and costs against Client. The court found, in part, that the argument against the union was meritless.

There was a geographical restriction (all of Clark County, Lincoln County and Nye County south of the Mt. Diablo Base Line) where Client could not both work and continue to receive pension payments. The geographical restriction area was also the union's geographical jurisdiction. Client was working at the Nevada Test Site, which was south of the Mt. Diablo Base Line and within the union's jurisdictional area. Apparently the

complaint argued that an amendment to the union's collective bargaining agreement had removed that restriction. However, the existence of the purported amendment was denied by the union and never produced by either Attorney or Client.

The order also noted that the pension plan fund, although named as a defendant, was never served with the complaint. The order cited authority that, in seeking to recover pension benefits, relief must be sought from the plan itself.

Attorney's response to the state bar denied any allegations of fraud, malpractice, incompetence or bad faith by Attorney in regard to Client being denied pension benefits while he was still working. Attorney noted that Client approached Attorney for representation after the 90-day period to appeal the pension board's decision had expired.

However, Attorney did not provide any explanation as to why Attorney proceeded with a lawsuit in light of the 90-day provision. A review of court records indicated that the summary judgment order did not reference this 90-day provision as it found that the failure to serve the pension plan in the lawsuit was fatal given that the union was not a proper party.

Attorney also did not explain why the pension fund itself was not served except to note that service was required to be made to the plan's president or sitting officer. Attorney alleged that the court agreed with the pension fund's argument that the Client's appeal rights were not exhausted under ERISA. However, the order dismissing the fund solely discussed the fund not being served within the 120-day period pursuant to Federal Rule of Civil Procedure 4(m). Attorney also argued that the claims against the defendants were nearly identical and thus Client would not have prevailed in any event given the court's findings.

Attorney's response further claimed that Attorney had advised Client that, if the lawsuit was unsuccessful, he might be liable for attorney's fees under ERISA. Attorney also claimed that opposing counsel's initial application for attorney's fees "was denied after our opposition."

Attorney's response concluded by noting that the firm "discounted the total billing to the client."

Client's reply maintained his original allegations, noting that the issue was not whether he was working, but rather the jurisdiction in which he was working.

A review of court records in the federal case indicated that Attorney took no further action in the case after filing the complaint in the matter. Attorney did not oppose the union's motion for summary judgment, nor did Attorney oppose either motion for attorney's fees and costs. Attorney moved to withdraw from the lawsuit on July 16, 2010. The court subsequently granted the motion.

The court's first order denying the union fees and costs was filed on November 16, 2009. This order noted that no opposition had been filed. However, the court denied the motion as the union had not complied with procedural requirements to seek fees. The union subsequently obtained leave to re-file the motion with the appropriate information and, on January 22, 2010, the court granted the motion. The court declined to make Attorney jointly liable for fees and costs.

Based upon the above, Attorney was hereby **REPRIMANDED** in this matter for violating RPC 1.1 (Competence), RPC 1.3 (Diligence), RPC 1.4 (Communication), RPC 3.1 (Meritorious Claims and Contentions), and RPC 8.1 (Bar Admission and Disciplinary Matters). ■

**PLEASE NOTE: In the June 2011 Nevada Lawyer we reported the temporary suspension of David L. Tanner, Bar No. 2366. He should not be confused with David A. Tanner with Bar No. 8282, who is licensed and in good standing.**

## 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](http://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.