In Re: NELSON L. COHEN
Bar No.: 7657
Case No.: 72989
Filed: November 29, 2017

ORDER OF SUSPENSION

Attorney suspended five years and one day from the date of his temporary suspension based on violations of RPC 4.1 and RPC 8.4.

This is an automatic review of a Southern Nevada Disciplinary Board hearing panel's recommendation that attorney Nelson L. Cohen be suspended for five years and one day for violating RPC 4.1 (truthfulness in statements to others) and RPC 8.4 (misconduct). This court temporarily suspended Cohen from the practice of law in January 2017. *In re Discipline of Cohen*, Docket No. 71846 (Order Granting Petition for Temporary Suspension, January 20, 2017).

The panel also recommended that Cohen pay restitution in the amount of $214,345 and pay fees and costs of the disciplinary proceedings. Because no briefs have been filed, this matter stands submitted for decision on the record. SCR 105(3)(b). The State Bar has the burden of showing by clear and convincing evidence that Cohen committed the violations charged. (*In re Discipline of Drakulich*, 111 Nev. 1556, 1566, 908 P.2d 709, 715 (1995).) Here, the State Bar presented testimony and documentation showing that for approximately four years, Cohen sought and obtained reimbursement for expenses that he did not actually incur during the course of representing an insurance client. Specifically, Cohen repeatedly made false entries on expense forms, allowed his insurance client to be billed for and pay those false charges, and accepted the fraudulent reimbursement funds totaling $214,345 from his firm. By falsely representing to his client and his firm that he was owed the reimbursements, he engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation. We therefore conclude that clear and convincing evidence supports the panel's findings that Cohen violated RPC 4.1 and RPC 8.4.

Turning to the appropriate discipline, while the hearing panel's recommendation is persuasive, we review the recommendation de novo. SCR 105(3)(b). In determining the appropriate discipline, we weigh four factors: "the duty violated, the lawyer's mental state, the potential or actual injury caused by the lawyer's misconduct, and the existence of aggravating and mitigating factors." *In re Discipline of Lerner*, 124 Nev. 1232, 1246, 197 P.3d 1067, 1077 (2008). Cohen violated a duty owed to his client and to the legal profession: truthfulness in statements to others. Cohen's conduct was intentional and significantly harmed his client and the integrity of the profession. Absent mitigating circumstances, disbarment is appropriate for his misconduct. ABA Standards for Imposing Lawyer Sanctions, *Compendium of Professional Responsibility Rules and Standards*, Standard 4.61 (2016) ("Disbarment is generally appropriate when a lawyer knowingly deceives a client with the intent to benefit the lawyer or another, and causes serious injury or potentially serious injury to a client."); *id*., Standard 5.11(b) (stating that disbarment is appropriate when "a lawyer engages in any other intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice"). The hearing panel found four aggravating circumstances (dishonest or selfish motive, a pattern of misconduct, substantial experience in the practice of law, and illegal conduct) and five mitigating circumstances (absence of a prior disciplinary record, personal or emotional problems and free disclosure or cooperative attitude toward the proceeding, character or reputation, and interim rehabilitation), all of which are supported by the record. In light of the mitigating circumstances, we conclude that a suspension of five years and one day is appropriate and sufficient to serve the purpose of attorney discipline to protect the public, the courts, and the legal profession. *See State Bar of Nev. v. Claiborne*, 104 Nev. 115, 213, 756 P.2d 464, 527-28 (1988).

Accordingly, we suspend attorney Nelson L. Cohen from the practice of law in Nevada for five years and one day, retroactive to January 20, 2017, the date of his temporary suspension. Cohen shall pay $14,345 in restitution, with repayment at a rate of no less than 10 percent of his gross income per year. If Cohen negotiates a repayment amount less than $214,345 with his firm's insurance carrier, he shall pay the remaining funds directly to the Nevada State Bar Client Security Fund. Cohen shall also pay the costs of the disciplinary proceedings, including $2,500 under SCR 120, within 30 days of the date of this order. Cohen must petition for reinstatement under SCR 116, see SCR 102(2). Before he can be reinstated to the practice of law, Cohen must pay the restitution amount in full and also successfully complete the State Bar examination, *see* SCR 116(5), and the Multistate Professional Responsibility Exam (MPRE). (The hearing panel also recommended some other conditions on Cohen's practice of law in the event of his reinstatement; however, we conclude such conditions are more appropriately addressed during reinstatement proceedings.) The parties shall comply with SCR 115 and SCR 121.1. It is so ORDERED.

HARDESTY and STIGLICH, JJ., dissenting:

We do not agree that suspension is an adequate discipline for Cohen's violations. Over the course of five years, Cohen intentionally and repeatedly stole more than $200,000 by submitting false expense forms to his firm and billing his client for reimbursement of expenses he did not incur. Before this fraudulent scheme was discovered, partners at his law firm learned that he was padding his billable hours on flat-fee cases to make it appear that he had worked more hours than he actually had. Though this was a fireable offense, the partners allowed him to continue working at the firm

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after he expressed remorse and vowed never to deceive them again. Yet, despite this promise and second chance, Cohen continued to lie to his partners and to his client about his expenses and submit false requests for reimbursements for several more years. At the disciplinary hearing, Cohen minimized the seriousness of his conduct by stating that it did not hinder the administration of justice and neither the client nor the law firm suffered any loss, as the firm reimbursed the client and was itself insured for the amount stolen by Cohen. Cohen himself had not made any attempt to pay back the money he stole. Cohen also appeared to blame his overbilling and theft in part on his law firm's culture and lack of oversight. Given the egregiousness of his misconduct, his violation of fiduciary duties owed to his firm and to his client, and the numerous aggravating factors, including a dishonest or selfish motive and a pattern of misconduct, we believe disbarment is necessary to protect the public and the legal profession. Even considering the mitigating circumstances, we cannot conclude that Cohen's conduct warrants any discipline other than disbarment. Thus, we respectfully dissent.

In Re: ULRICH W. SMITH
Bar No.: 2274
Case No.: 72851
Filed: November 29, 2017

ORDER OF SUSPENSION

Attorney suspended for a period of 90 days following admission of violations of RPC 1.2 (scope of representation and allocation of authority between client and lawyer); RPC 1.4 (communication); RPC 1.5 (fees); RPC 1.7 (conflict of interest: current clients); RPC 1.16 (declining or terminating representation); and RPC 3.1 (meritorious claims and contentions).

This is an automatic review of a Southern Nevada Disciplinary Board hearing panel's recommendation that this court approve, pursuant to SCR 113, a conditional guilty plea agreement in exchange for a stated form of discipline for attorney Ulrich W. Smith.

In the plea agreement, Smith admitted to violating the following Rules of Professional Conduct related to his representation of one elderly client in a trust matter: 1.2 (scope of representation and allocation of authority between client and lawyer); 1.4 (communication); 1.5 (fees); 1.7 (conflict of interest: current clients); 1.16 (declining or terminating representation); and 3.1 (meritorious claims and contentions). Smith violated those rules by informing his client that he would be forwarding her trust distributions to himself for accounting purposes and insisting that she authorize him to do so; failing to provide accounting updates and timely distribute monthly trust dividends to the client; unilaterally retaining a $5,000 fee for himself from a trust distribution; petitioning to appoint himself as guardian for the client who had since terminated his representation and even though he knew that the client had been deemed competent to make her own financial and legal decisions; falsely stating in the guardianship petition that he had never been suspended from the practice of law; refusing to turn over the client's file to new counsel; refusing to provide a billing to the client; and billing for the time he spent trying to pursue an unauthorized guardianship that neither the client nor her family ever consented to or wanted. In exchange for Smith's guilty plea, the State Bar agreed to dismiss charges that Smith violated RPC 1.6 (confidentiality of information), RPC 1.8 (conflict of interest: current clients: specific rules), RPC 1.15 (safekeeping property), RPC 3.3 (candor toward the tribunal), RPC 4.1 (truthfulness in statements to others); and RPC 8.4 (misconduct).

Smith agreed to a 90-day suspension, to pay restitution, to complete four hours of continuing legal education (CLE) in addition to the hours required by SCR 210, and to pay the costs of the disciplinary proceeding and transcript.

Based on our review of the record and weighing the duties violated, Smith's mental state, the potential or actual injury cause misconduct, and the aggravating and mitigating factors, *In re Discipline of Lerner*, 124 Nev. 1232, 1246, 197 P.3d 1067, 1077 (2008), we conclude that the guilty plea agreement should be approved. See SCR 113(1). Although motivated by his concern for the client's trust, Smith acted with intent in violating duties owed to his client, the public, and the profession resulting in actual or potential injury to all. The baseline sanction for misconduct, before considering aggravating or mitigating factors, is suspension. Standards for Imposing Lawyer Sanctions, *Compendium of Professional Responsibility Rules and Standards*, Standard 4.32 (Am. Bar Ass'n 2015) (providing that suspension is appropriate "when a lawyer knows of a conflict of interest and does not fully disclose to a client the possible effect of that conflict, and causes injury or potential injury to a client"); *see id*. Standard 4.42(b) (suspension is the baseline sanction when a lawyer "engages in a pattern of neglect [and] causes injury or potential injury to a client"); Standard 6.22 (addressing failure to bring a meritorious claim and recommending suspension when a lawyer knows he is violating a court rule); Standard 7.2 (recommending suspension 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"). The record supports two aggravating factors (prior disciplinary offenses and substantial experience in the practice of law) and two mitigating factors (character and reputation and remorse). Considering the rule violations, Smith's mental state, the actual and potential injuries to Smith's client, the profession, and the public, and the aggravating and mitigating factors, we conclude that the agreed-upon discipline is sufficient to protect the public, the courts, and the legal profession. *State Bar v. Claiborne*, 104 Nev. 115, 213, 756 P.2d 464, 527-28 (1988).

We hereby suspend attorney Ulrich W. Smith from the practice of law in Nevada for a period of 90 days from the date of this order. Smith must also comply with the following conditions. Within 60 days from the date of this order, Smith must pay $5,000 in restitution to the client named in the complaint. Within 30 days from the date of this order, Smith must pay $2,500 in costs and the actual cost of the disciplinary hearing transcript. *See* SCR 120. Within 1 year from the date of this order, Smith must complete 4 hours of CLE, 2 of which must be in ethics and law management, in addition to the hours required by SCR 210. The parties shall

comply with SCR 115 and SCR 121.1.

It is so ORDERED.

PICKERING, HARDESTY, and STIGLICH, JJ., dissenting:

We would reject the conditional guilty plea agreement because the length of the suspension is insufficient to serve the purpose of attorney discipline considering the nature of the misconduct, the actual and potential harm resulting from Smith's misconduct, and Smith's previous disciplinary history, which included some of the same rule violations that occurred in this matter. Accordingly, we dissent.

MICHELLE R. BUMGARNER
Bar No.: 10525
Case No.: Obc15-0406
Filed: January 9, 2017

PUBLIC REPRIMAND

To Michelle R. Bumgarner:

You represented Reno Cab Company in the lawsuit *Cheeseman et al. v. Warne, et al.,* case no. CV13-02220, in the Second Judicial District Court (the "Lawsuit"). The Lawsuit alleged that Richard Warne and Reno Cab Company Inc. were liable for the wrongful death of Bradley Driscoll Cheeseman. Warne drove a taxi for Reno Cab. Warne drove Cheeseman in his taxi in December 2012. An altercation happened between Warne and Cheeseman and Cheeseman died thereafter.

There is a dispute in the Lawsuit over whether Warne was an independent contractor, and thereby separate from Reno Cab, or an employee for Reno Cab. Someone at Reno Cab Company instructed Warne to seek your advice after he had been served with the Complaint in the Lawsuit. You identified that there was a conflict of interest between Reno Cab and Warne. You attempted to convey that conflict to Warne and to explain to him that you could not represent him. Multiple times Reno Cab requested that you represent Warne and you believed that you conveyed to Reno Cab and Warne that you could not do so.

You believed that if Warne did not file an Answer it would be detrimental to your client, Reno Cab. Therefore, you gave Warne a form Answer, told him generally what answers were available to him for answering the allegations of the complaint, and told him to go to the Court to file it.

You also believed that if Warne failed to respond to Plaintiffs' written discovery requests then it would be detrimental to your client, Reno Cab. Warne asked you for help in responding to Plaintiffs' written discovery. You helped Warne obtain an extension of time for serving his discovery responses in the Lawsuit. You obtained the extension of time to respond for Warne, because he sought your help in preparing responses and you were unable to assist him right then because you were in the hospital and had a newborn baby in the NICU.

You drafted discovery responses for Warne's review and comment. You emailed the drafts to him. You then met with Warne to review his discovery responses before they were finalized and served in August 2014, you served Warne's discovery responses for him.

Warne testified at a hearing in the Lawsuit that in his written response to at least one of Plaintiff's Requests for Admission was a statement contrary to his personal belief; to wit, he believed himself to be an employee of Reno Cab and the response denied such a status and asserted that he was an independent contractor. If Warne was deemed an employee of Reno Cab Company, then it may have been (i) obligated to provide him with defense counsel and/or (ii) liable for his conduct in the altercation with Cheeseman. Warne testified that you prepared that particular response to Plaintiff's Request for Admission and that he and you went "round and round" about the issue of his employment status. He testified that he ultimately deferred to your preferred response because he believed you were his attorney.

You and Plaintiffs' counsel often served documents on each other, or corresponded with each other, in the Lawsuit without including Warne separately. You have asserted that prior to assisting Warne with his Answer, and prior to assisting Warne with his discovery responses, you told Warne on the telephone and in person that you could not represent him, but Warne claims that he did not understand that until the day of his deposition. On November 24, 2014, the day that Warne was deposed in the Lawsuit, you again told Warne unequivocally that you did not represent him, would not be representing him at the deposition, and would not represent him at trial. Warne testified that that was the first time he realized that you were not representing him in the Lawsuit. You believe that Warne understood you did not represent him, or his interests, long before the morning of the deposition, but there is no evidence, such as written communications from you, that supports your belief.

After a full evidentiary hearing on the issue, you were disqualified from representing Reno Cab in the Lawsuit because the Court found that you assisted Warne and when doing so you acted for the benefit of Reno Cab and to detriment of Warne. You were ordered to pay the attorney's fees incurred as a result of the evidentiary hearing made necessary by your assistance of Warne.

The Court also re-opened discovery in the Lawsuit because of your actions in assisting Warne. The trial in the Lawsuit, originally a fourth set with a start date of April 27, 2015, was also continued. The trial in the Lawsuit was reset for 20 months later.

Violations of the Rules of Professional Conduct

You had a duty, pursuant to RPC 4.3 (Dealing with Unrepresented Person) to: (i) not state or imply that you were disinterested when dealing, on behalf of Reno Cab Company, with Warne, a person who

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was not represented by counsel, (ii) correct Warne's misunderstanding of your role in the matter when you knew or reasonably should have known that Warne misunderstood, and (iii) not give legal advice to Warne, other than the advice to secure counsel, if you knew or reasonably should have known that Warne's interests were, or had a reasonable possibility of being, in conflict with your client's interests.

By advising Warne on his Answer and written discovery responses and assisting him with preparation of those documents, you knowingly violated RPC 4.3 (Dealing with Unrepresented Person). Warne was injured by your conduct, although the direct injury has been mitigated by the Court's subsequent actions. The judicial process was injured by your conduct because the trial in the Lawsuit had to be reset for 20 months later as a result of your conduct and disqualification. Finally, the integrity of the profession was injured by your conduct because the laypeople involved in the Lawsuit may have received the impression that you could advise an unrepresented person that was adverse, or potentially adverse, to your client.

You also had a duty, pursuant to RPC 1.1 (Competence) to provide competent representation to your client, Reno Cab. By advising and assisting Warne, an unrepresented co-defendant in the Lawsuit, you knowingly failed to apply the legal knowledge and skill necessary to competently represent Reno Cab Company. Your client was injured by your conduct because it had to retain new counsel in the Lawsuit which cost money and delayed the Lawsuit.

You also had a duty, pursuant to RPC 8.4(d) (Misconduct) to not engage in conduct prejudicial to the administration of justice. You knowingly violated this duty when you advised and assisted Warne in the Lawsuit. Your conduct resulted in prejudice to the administration of justice, and thus injury to the judicial process and integrity of the profession, because Warne was almost bound by legal responses that were not in his best interest and were not what he intended to assert in the litigation and the only way to undo the harm to Warne was to continue the Lawsuit, which delayed resolution for the other parties and hindered efficiency of the judicial system.

Aggravating and Mitigating Factors

The Panel is concerned that you identified the conflict of interest between your client and Warne, but you were nonetheless persuaded by your client and by Warne's continued request for assistance. You knew that it was inappropriate to counsel Warne, but when faced with repeated requests to do so, and potential adverse consequences for your client, you helped him.

The Panel finds in mitigation (i) that you have no prior discipline record (SCR 102.5(2)(a)), (ii) you had a complicated pregnancy and the premature birth of your child at the time that you engaged in the misconduct (SCR 102.5(2)(c), and (iii) the imposition of sanctions by the District Court including payment of $2,500 in attorney's fees and removal from the Lawsuit and the implicit penalty of the loss of Reno Cab Company as a client (SCR 102.5(2)(1)).

In light of the foregoing, you violated Rule of Professional Conduct ("RPC") RPC 4.3 (Dealing with Unrepresented Person), RPC 1.1 (Competence), and RPC 8.4(d) (Misconduct prejudicial to the administration of justice) and are hereby PUBLICLY REPRIMANDED and ordered to pay the costs of the disciplinary proceedings in the amount of $500 plus all mailing and court reporter expenses incurred by the State Bar of Nevada.

In Re: GERALDINE KIRK-HUGHES
Bar No.: 3444
Case No.: 68880
Filed: December 11, 2017

ORDER OF SUSPENSION AND REMAND

Attorney suspended four years following violations of RPC 1.8(a) (conflict of interest: current clients), RPC 1.15 (safekeeping property), RPC 8.1(a) (bar admission and disciplinary matters), and RPC 8.4(a) and (c) (misconduct; conduct involving dishonesty, fraud, deceit or misrepresentation).

This is an automatic review of a Southern Nevada Disciplinary Board hearing panel's findings of fact, conclusions of law and recommendation for discipline regarding attorney Geraldine Kirk-Hughes.

After a hearing, the panel found that Kirk-Hughes violated RPC 1.8(a) (conflict of interest: current clients), RPC 1.15 (safekeeping property), RPC 8.1(a) (bar admission and disciplinary matters), and RPC 8.4(a) and (c) (misconduct; conduct involving dishonesty, fraud, deceit or misrepresentation) based on her failure to inform a client of a conflict of interest, her failure to safeguard client property, her inaccurate responses to the State Bar during its investigation into these matters, and facilitating the hiding and misappropriation of money from a vulnerable victim. The panel found eight aggravating factors (prior disciplinary offenses; dishonest or selfish motive; a pattern of misconduct; multiple offenses; submission of false evidence, statements, or other deceptive practices during the disciplinary proceedings; refusal to acknowledge wrongful nature of conduct; vulnerability of victim; and substantial experience in the practice of law) and one mitigating factor (the delay in the disciplinary proceedings). Ultimately, the panel recommended a six-year suspension and that Kirk-Hughes pay the costs and staff salaries associated with the disciplinary proceeding.

The disciplinary proceeding grew out of three separate grievances. In the first grievance, J.K., a struggling alcoholic, became acquainted with and married a woman who was the daughter of a real estate agent in Kirk-Hughes' real estate firm. J .K.'s wife exerted control over J.K.'s assets and hired Kirk-Hughes to assist her. During the marriage, J.K. gave Kirk-Hughes $400,400 to be held in trust for future real estate purchases. Kirk-Hughes then aided J.K.'s wife

in deceiving J.K. to sign a power of attorney giving the wife control over his money, the money held in trust by Kirk-Hughes, and a half-million dollar tax refund J.K. had no knowledge of. Kirk-Hughes also used J.K.'s money for her own benefit, including to improve a real estate project she was part owner of, without written permission. During the investigation of J.K.'s grievance, Kirk-Hughes provided inaccurate accountings of J.K.'s money multiple times.

In the second grievance, Kirk-Hughes persuaded her client C.W. to leave approximately $121,000 in trust with her while he looked for a home to purchase. Kirk-Hughes made numerous unauthorized transfers of that money and, when C.W. demanded his money back, Kirk-Hughes stated he owed more than $20,000 in attorney fees, despite not having sent C.W. any bills. Kirk-Hughes denied any mismanagement of C.W.'s funds.

In the final grievance, DCP Services, LLC, alleged that Kirk-Hughes failed to timely release funds to pay four medical liens DCP held against Kirk-Hughes' clients. In responding to the State Bar's investigation, Kirk-Hughes misstated how long the funds to resolve the liens had been in her trust account. Also, the State Bar discovered that Kirk-Hughes had an additional trust account that she had not reported as required.

Rather than focus on the violations alleged and found, Kirk-Hughes devotes much of her briefing to procedural issues including but not limited to the subpoenas the State Bar issued to the banks where Kirk-Hughes maintained her trust accounts. Kirk-Hughes asserts that, under NRS 239A.100(a), the State Bar was required to serve her with copies of the subpoenas. At oral argument, the State Bar responded that service was not required under NRS 239A.070(6), which creates an exception to NRS 239A.100(a)'s service requirement for regulatory agency subpoenas. The State Bar did not cite or discuss NRS 239A.070(6) in its opposition brief because Kirk-Hughes did not raise her NRS 239A.100 challenge until she filed her reply brief. An issue not raised in an appellant's opening brief is waived because, as this case illustrates, it deprives this court and the respondent of the opportunity to fully address the issue. *See Phillips v. Mercer,* 94 Nev. 279, 283, 579 P.2d 17 4, 176 (1978). Kirk-Hughes' citation of NRS 239A.100 in her motion practice to this court, after the filing of her opening brief, does not change our conclusion that she waived the NRS 239A.100 challenge made in her reply brief. We also note that Kirk-Hughes stipulated to the admission of the bank records. *See Second Baptist Church v. Mount Zion Baptist Church,* 86 Nev. 164, 172, 466 P.2d 212, 217 (1970) ("[V]alid stipulations are controlling and conclusive and both trial and appellate courts are bound to enforce them."). Similarly, having considered Kirk-Hughes' remaining arguments regarding the withholding of evidence, the violation of her right to confront witnesses, and numerous procedural and constitutional issues with the disciplinary process and hearing, we conclude that they either lack merit, are not supported by relevant legal authority, or were waived by not raising and/or entering into inconsistent stipulations respecting them before the hearing panel. *See Edwards v. Emperor's Garden Rest.,* 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006); *Old Aztec Mine, Inc. v. Brown,* 97 Nev. 49, 52, 623 P.2d 981, 983 (1981).

On the merits, the State Bar has the burden of showing by clear and convincing evidence that Kirk-Hughes committed the violations charged. SCR 105(2)(f); *In re Discipline of Drakulich,* 111 Nev. 1556, 1566,908 P.2d 709, 715 (1995). We employ a deferential standard of review with respect to the hearing panel's findings of fact, SCR 105(3)(b), and will not set them aside unless they are clearly erroneous or not supported by substantial evidence. *See generally Sowers v. Forest Hills Subdivision* 129 Nev. 99, 105, 294 P.3d 427, 432 (2013); *Ogawa v. Ogawa,* 125 Nev. 66, 668, 221 P.3d 699, 704 (2009).

Turning first to RPC 1.8(a), Kirk-Hughes asserts that 1.8(a) prohibits an attorney from entering into a business transaction with a client without first obtaining written consent and that she could not have violated this rule in her dealings with J.K. because she did not have an attorney-client relationship with him. But the panel did not premise its finding that Kirk-Hughes violated 1.8(a) on a finding that J.K. was Kirk-Hughes' client. Rather, the 1.8(a) violation is based on Kirk-Hughes' attorney-client relationship with J.K.'s wife-a relationship that Kirk-Hughes does not dispute. (Kirk-Hughes complains that her due process rights were violated because the State Bar complaint based the 1.8(a) violation on an alleged attorney-client relationship with J.K. but that the hearing panel's ultimate recommendation based the violation of RPC 1.8(a) on an attorney-client relationship with J.K.'s wife. Because this argument was not cogently argued or supported by relevant legal authority, we decline to address it. *See Edwards,* 122 Nev. at 330 n.38, 130 P.3d at 1288 n.38.). Substantial evidence supports the finding that Kirk-Hughes violated duties owed to J.K.'s wife as a result of that attorney-client relationship because Kirk-Hughes spent money entrusted to her on her real estate project without obtaining written consent from J.K.'s wife. *See* RPC 1.8(a). Based on this conclusion, we need not, and do not, decide whether Kirk-Hughes had an attorney-client relationship with J.K. Assuming for the sake of argument that J.K. was not Kirk-Hughes' client; the remaining charges concerning J.K. still stand. RPC 1.15 requires an attorney to safeguard funds of "clients *or third parties"* (emphasis added). Thus, Kirk-Hughes' failure to safeguard money that J.K. entrusted to her violates RPC 1.15 whether J.K. was her client or not. RPC 8.1(a) addresses Kirk-Hughes' duty to provide accurate information to the State Bar in the course of a disciplinary proceeding and does not require an attorney-client relationship to support a violation. Substantial evidence supports that Kirk-Hughes provided inaccurate reports to the State Bar regarding the funds she held for J.K., which establishes the 8.1(a) violation. RPC 8.4(a) and (c)

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focus on misconduct that can involve, but does not require an attorney-client relationship: RPC 8.4(a) makes it misconduct to violate or attempt to violate the rules of professional conduct, personally or through the acts of another, or to assist another in doing so; and RPC 8.4(c) makes it a violation to engage in conduct "involving dishonesty, fraud, deceit, or misrepresentation." The record establishes, as the panel found, that Kirk-Hughes violated Rule 8.4(a) and 8.4(c) "by assisting and counseling [J.K.'s wife] in the perpetration of a fraud upon [J.K.] to deprive him of money and property."

Substantial evidence also supports the panel's findings that, in her dealings with C.W. and DCP, Kirk-Hughes violated RPC 1.15 (safekeeping property); RPC 8.1(a) (bar admission and disciplinary matters); and RPC 8.4(a) and (c) (misconduct). The evidence demonstrates that Kirk-Hughes failed to keep safe funds that these clients entrusted to her, she provided inaccurate accountings to the State Bar regarding her trust funds in an attempt to hide her misconduct as to C.W.'s funds, add [sic] she committed misconduct by misappropriating C.W.'s funds and hiding that fact from C.W. Accordingly; we agree with the hearing panel that Kirk-Hughes committed the violations as set forth above.

The panel recommends a six-year suspension for the foregoing violations. Though persuasive, the hearing panel's recommendation is not binding and we review the proposed form of discipline de novo. SCR 105(3)(b); *In re Discipline of Schaefer,* 117 Nev. 496, 515, 25 P.3d 191, 204 (2001). In determining the appropriate discipline, we weigh four factors: "the duty violated, the lawyer's mental state, the potential or actual injury caused by the lawyer's misconduct, and the existence of aggravating or mitigating factors.11 *In re Discipline of Lerner,* 124 Nev. 1232, 124p. 197 P.3d 1067, 1077 (2008). The discipline should be "consistent with the sanction for the most serious instance of misconduct." ABA Standards for Imposing Lawyer Sanctions, *Compendium of Professional Responsibility Rules and Standards (Standards)* 452 (2016).

In this case, the most serious instance of misconduct was Kirk-Hughes' trust account mismanagement and using client and third-party funds for her own benefit. By knowingly misappropriating and misusing the funds entrusted to her, Kirk-Hughes violated duties owed to those who trusted her with their money, which resulted in serious injury, especially for J.K. *Cf. id.,* Standard 4.12. (While Standard 4.12 provides that suspension is appropriate "when a lawyer knows or should know he is dealing improperly with client property and causes injury or potential injury to a client," *Standards,* Standard 4.12, we find Standard 4.12 applicable to Kirk-Hughes' misuse of J.K.'s funds as RPC 1.15 applies to both third-parties and clients.) Kirk-Hughes also has a lengthy disciplinary history comprising seven prior disciplinary sanctions, including a ninety-day suspension, and she refuses to acknowledge any misconduct in regard to her actions. When considering this, along with the six other aggravating factors and one mitigating factor, we agree that a suspension is warranted. *See id.* We do not agree, however, with the panel's recommended period of suspension as it is not consistent with prior discipline imposed in cases involving similar misconduct. *See id.,* Standard 1.3 (promoting "consistency in the imposition of disciplinary sanctions for the same or similar offenses"). Rather, we conclude that a four-year suspension is sufficient to protect the public and the legal profession. *In re Discipline of Lerner,* 124 Nev. at 1246, 197 P.3d at 1077; *see also In re Discipline of Reade,* 133 Nev., Adv. Op. 87 (2017) (four-year suspension for attorney's complicity in a sham currency-trading scheme which allowed his client to defraud third parties of approximately $16 million); *In re Discipline of Whittemore,* Docket No. 66350 (Order of Suspension; Mar. 20, 2015 (four-year suspension arising from attorney's conviction on three felony counts); *In re Discipline of Gage,* Docket Nos. 58640 & 64988 (Order Approving Conditional Guilty Plea Agreement, May 28, 2014) (four-year suspension for committing criminal acts reflecting adversely on the lawyer's fitness for practice, amongst other violations). (While we recognize that Kirk-Hughes has not been convicted of any crime, her actions in misappropriating client and third-party funds that were entrusted to her are egregious.)

Finally, we consider the panel's recommendation that Kirk-Hughes pay the costs including staff salaries associated with the disciplinary proceedings. The State Bar did not file its original or amended memoranda of costs in time for Kirk-Hughes to have a fair opportunity to contest the reasonableness of those costs before the hearing panel. *See* SCR 120(1) (2007) (allowing an attorney to be assessed costs that the panel deems reasonable and allocable to the proceeding). And, because we do not make findings of fact in the first instance, *see Ryan's Express Transp. Servs., Inc. v. Amador Stage Lines, Inc.,* 128 Nev. 289, 299, 279 P.3d 166, 172 (2012), we remand to the hearing panel so that it can hear and make a recommendation regarding Kirk-Hughes' challenges to the costs and staff salaries sought by the State Bar.

Accordingly, we suspend attorney Geraldine Kirk-Hughes from the practice of law in Nevada for a period of four years commencing from the date of this order. Kirk-Hughes shall comply with SCR 115. Under SCR 115(7), Kirk-Hughes has 15 days within which to wrap up or complete matters she is handling for existing clients. The State Bar shall comply with SCR 121.1.

It is so ORDERED. (We deny the motion filed on November 14, 2017, and direct the clerk of this court to detach and return, unfiled, the "Notice of Supplemental Authorities to Oral Argument" received on the same date.)

In Re: BRIAN MALCOM KEITH
Bar No.: 4110
Case No.: 73314
Filed: December 11, 2017

ORDER OF SUSPENSION

Attorney suspended three years, retroactive to December 15, 2016, following violations of RPC 8.4 (misconduct).

This is an automatic review of a Southern Nevada Disciplinary Board hearing panel's recommendation that attorney Brian M. Keith be suspended for three years retroactive to December 15, 2016, for his violation of RPC 8.4 (misconduct). Because no briefs have been filed, this matter stands submitted for decision based on the record. SCR 105(3)(b).

The State Bar has the burden of demonstrating by clear and convincing evidence that Keith committed the violation charged. *In re: Discipline of Drakulich,* 111 Nev. 1556, 1566, 908 P.2d 709, 715 (1995). We employ a deferential standard of review with respect to the hearing panel's findings of fact, SCR 105(3)(b), and thus, will not set them aside unless they are clearly erroneous or not supported by substantial evidence, *see generally Sowers v. Forest Hills Subdivision,* 129 Nev. 99, 105, 294 P.3d 427, 432 (2013); *Ogawa v. Ogawa,* 125 Nev. 660, 668, 221 P.3d 699, 704 (2009). In contrast, we review de novo a disciplinary panel's conclusions of law and recommended discipline. SCR 105(3)(b).

Keith has a prior misdemeanor DUI conviction in Oregon and a separate felony DUI conviction in California. Keith was suspended for two years in 2008 as a result of the felony conviction. After being reinstated, in March 2016, Keith was convicted in Nevada of misdemeanor DUI after being pulled over for driving 70 mph in a 35 mph zone, admitting to consuming alcohol before driving, smelling strongly of alcohol, failing the field sobriety test, and having difficulty walking or standing without support. Keith was temporarily suspended on December 15, 2016. As a result of the March 2016 conviction, the panel found that Keith violated RPC 8.4(b) (misconduct: commission of a criminal act that reflects adversely on a lawyer's honesty, trustworthiness or fitness as a lawyer). We defer to the hearing panel's findings of fact in this matter as they are supported by substantial evidence and are not clearly erroneous. Based on those findings, we agree with the panel's conclusions that the State Bar established by clear and convincing evidence that Keith violated RPC 8.4(b).

In determining whether the panel's recommended discipline is appropriate, we weigh four factors: "the duty violated, the lawyer's mental state, the potential or actual injury caused by the lawyer's misconduct, and the existence of aggravating and mitigating factors." *In re Discipline of Lerner,* 124 Nev. 1232, 1246, 197 P.3d 1067, 1077 (2008). We must ensure that the discipline is sufficient to protect the public, the courts, and the legal profession. *See State Bar of Nev. v. Claiborne,* 104 Nev. 115, 213, 756 P.2d 464, 527-28 (1988) (noting purpose of attorney discipline).

Keith knowingly violated a duty owed to the profession (failure to maintain personal integrity) by engaging in criminal conduct—driving under the influence of alcohol. Keith's criminal acts could be detrimental to the integrity and standing of the bar. The panel found and the record supports three aggravating circumstances (prior disciplinary offense, pattern of misconduct, and illegal conduct) and two mitigating circumstances (absence of dishonest or selfish motive and imposition of other penalties or sanctions). (The panel also found the aggravating circumstance of multiple offenses, but this circumstance is not supported by the record as the underlying bar complaint deals with a single DUI conviction.)

Considering all of these factors, we agree that a suspension is warranted. *See* Standards for Imposing Lawyer Sanctions, *Compendium of Professional Responsibility Rules and Standards,* Standard 5.12 (Am. Bar Ass'n 2015) ("Suspension is generally appropriate when a lawyer knowingly engages in criminal conduct ... that seriously adversely reflects on the lawyer's fitness to practice."). Further, considering that Keith's illegal conduct continues along a pattern of misconduct for which he has been previously disciplined, we conclude that the panel's recommended three-year suspension protects the public, the courts, and the legal profession.

Accordingly, we hereby suspend Brian M. Keith from the practice of law in Nevada for three years commencing from December 15, 2016. Keith shall pay SCR 120(1) fees in the amount of $2,500 and the costs of the disciplinary proceedings within 30 days of the date of this order, if he has not done so already. The State Bar shall comply with SCR 121.1.

It is so ORDERED.

TIPS FROM THE OFFICE OF BAR COUNSEL

You're at a deposition and the young attorney defending at the deposition is very good. You could use a new associate with her skills and consider offering her a job. Before you do that, remember RPC 1.10 (Imputation of Conflicts of Interest) prohibits a firm from representing a client in a matter in which one of the firm's lawyers would be prohibited from the representation.

A lawyer is prohibited from such representation when the interests of the former client and new client are materially adverse and the lawyer knows information that is protected by RPC 1.6 and RPC 1.9(c), unless the former client gives informed consent, confirmed in writing.

The only time that the firm can continue with such a representation is if:

1. The personally-prohibited lawyer did not have a substantial role in, or primary responsibility for, the matter that causes the disqualification,
2. The personally-prohibited lawyer is timely screened from the matter and receives none of the fees earned in the matter, and
3. The former client is given prompt written notice of the lawyer's employment at the firm.

All of these conditions *must* be met! You cannot screen an attorney that had a substantial role, or knowledge of, the other representation. See Ethics Opinion No. 39, dated April 24, 2008.

Consider connecting this young attorney with your friend, who is also looking for a new associate; your friend can return the favor by suggesting another attorney that won't create so many potential issues for your firm. If you do try to move forward with hiring a personally-prohibited lawyer, review the screening suggestions in Ethics Opinion No. 39.