

Bar Counsel Report

In Re: ALLAN P. CAPPS

Bar No.: 4939

Case No.: 80269

Filed: 01/02/2020

ORDER IMPOSING TEMPORARY SUSPENSION AND RESTRICTING HANDLING OF CLIENT FUNDS

This is a petition by the State Bar for an order temporarily suspending attorney Allan P. Capps from the practice of law, pending the resolution of formal disciplinary proceedings against him: The petition and supporting documentation demonstrate that Capps appears to have misappropriated client funds in excess of \$220,000. Capps has not meaningfully responded to the State Bar's inquiry letter regarding his overdrawn client trust account.

SCR 102(4)(b) provides, in pertinent part:

On the petition of bar counsel, supported by an affidavit alleging facts personally known to the affiant, which shows that an attorney appears to be posing a substantial threat of serious harm, to the public, the supreme court may order, with notice as the court may prescribe, the attorney's immediate temporary suspension or may impose other conditions upon the attorney's practice.

In addition, SCR 102(4)(c) provides that we may place restrictions on an attorney's handling of funds.

We conclude that the documentation before us demonstrates that Capps poses a substantial threat of serious harm to the public based on a recent pattern of misappropriation of client funds, and that his immediate temporary suspension is warranted under SCR 102(4)(b). We further conclude that Capps' handling of funds should be restricted.

Accordingly, attorney Allan P. Capps is temporarily suspended from the practice of law, pending the resolution of formal disciplinary proceedings against him.¹ Under SCR 102(4)(d), Capps is precluded from accepting new cases immediately upon service of this order, but he may continue to represent existing clients for a period of 15 days from service of this order. In addition, pursuant to SCR 102(4)(b) and (c), we impose the following conditions on Capps' handling of funds entrusted to him:

1. All proceeds from Capps' practice of law and all fees and other funds received from or on behalf of his clients shall, from the date of service of this order, be deposited into a trust account from which no withdrawals may be made by Capps except upon written approval of bar counsel; and

2. Capps is prohibited from withdrawing any funds from any and all accounts in any way relating to his law practice, including but not limited to his general and trust accounts, except upon written approval of bar counsel.

The State Bar shall immediately serve Capps with a copy of this order. Such service may be accomplished by personal service, certified mail, delivery to a person of suitable age at Capps' place of employment or residence, or by publication. When served on either Capps or a depository in which he maintains an account, this order shall constitute an injunction against withdrawal of the proceeds except in accordance with the terms of this order. See SCR 102(4)(c). Capps shall comply with the provisions of SCR 115.²

It is so ORDERED.³

In Re: RUSSELL D. COLLINGS

Bar No.: 11363

Case No.: 79801

Filed: 01/27/2020

ORDER OF SUSPENSION

This is an automatic review of a Southern Nevada Disciplinary Board hearing panel's recommendation that attorney Russell D. Collings be suspended for five years based on violations of RPC 1.1 (competence), RPC 1.3 (diligence), RPC 1.4 (communication), RPC 1.5 (fees), RPC 1.8 (conflict of interest: current clients), RPC 1.15 (safekeeping property), RPC 1.16 (declining or terminating representation), RPC 3.2 (expediting litigation), RPC 3.4 (fairness to opposing party and counsel), RPC 4.2 (communication with persons represented by counsel), RPC 8.1 (disciplinary matters), and RPC 8.4(d) (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 showing by clear and convincing evidence that Collings committed the violations charged. *In re Discipline of Drakulich*, 111 Nev. 1556, 1566, 908 P.2d 709, 715 (1995). Here, however, the facts and charges alleged in the complaint are deemed admitted because Collings failed to answer the complaint and a default was entered.⁴ SCR 105(2). The record therefore establishes that Collings violated the above-referenced rules by accepting fees from clients and failing to provide legal work, failing to appear on behalf of clients, failing to communicate with clients, accepting an interest in a business in exchange for legal work, failing to respond to the State Bar's requests for information and letters of investigation, and abandoning his legal practice. In one instance, Collings' failure to appear on

behalf of a client resulted in the issuance of a bench warrant against his client, which caused the client to spend several days in jail and lose his job.

Turning to the appropriate discipline, we review the hearing panel's recommendation de novo. SCR 105(3)(b). Although we "must ... exercise independent judgment," the panel's recommendation is persuasive. 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." In *re Discipline of Lerner*, 124 Nev. 1232, 1246, 197 P.3d 1067, 1077 (2008).

Collings violated duties owed to his clients (competence, diligence, communication, conflict of interest, and safekeeping property), the legal system (expediting litigation and communications with persons represented by counsel), the profession (improper withdrawal from representation and failing to respond to lawful requests for information by a disciplinary authority), and the public (misconduct). Collings' mental state appears to have been knowing or negligent. His misconduct harmed his clients through financial loss, loss of liberty, and loss of business opportunities. Collings' failure to cooperate in the disciplinary investigation harmed the integrity of the profession, which depends on a self-regulating disciplinary system.

The baseline sanction for Collings' misconduct, before consideration of aggravating and mitigating circumstances, is disbarment. See Standards for Imposing Lawyer Sanctions, Compendium of Professional Responsibility Rules and Standards, Standard 4.41 (Am. Bar Ass'n 2017) (recommending disbarment when a lawyer "abandons the practice and causes serious or potentially serious injury to a client," "knowingly fails to perform services for a client and causes serious or potentially serious injury to a client," or "engages in a pattern of neglect with respect to client matters and causes serious or potentially serious injury to a client"). The panel found and the record supports four aggravating circumstances (substantial experience in the practice of law, multiple offenses, bad faith obstruction of the disciplinary process, and pattern of misconduct) and one mitigating circumstance (absence of prior disciplinary record). Considering all the factors and the fact it is unclear what caused Collings to abandon his practice, the recommended five-year suspension is sufficient to serve the purpose of attorney discipline. See *State Bar of Nev. v. Claiborne*, 104 Nev. 115, 213, 756 P.2d 464, 527-28 (1988) (observing the purpose of attorney discipline is to protect the public, the courts, and the legal profession, not to punish the attorney).

Accordingly, we hereby suspend attorney Russell D. Collings from the practice of law in Nevada for a period of five years commencing from the date of this order. Before seeking reinstatement, Collings shall pay the following in restitution: \$14,130 to Erik Fuller; \$2,000 to Terry and Karen Keeney; \$1,200 to Danny Ray Barton; and \$250 to Thomas Pulice. Collings shall complete continuing legal education courses as

required during the period of his suspension. Further, Collings shall pay the costs of the disciplinary proceedings, including \$2,500 under SCR 120, within 30 days from the date of this order. The parties shall comply with SCR 115 and SCR 121.1.

It is so ORDERED.

In Re: KYM S. CUSHING
Bar No.: 4242
Case No.: 78367
Filed: 01/31/2020

ORDER OF SUSPENSION

This is an automatic review of a Southern Nevada Disciplinary Board hearing panel's recommendation that attorney Kym S. Cushing be suspended for nine months, with conditions on his ability to seek reinstatement, based on violations of RPC 3.4(c) (fairness to opposing party and counsel: knowingly disobeying an obligation under the rules of a tribunal), RPC 8.1(a) (disciplinary matters), and RPC 8.4(c) (misconduct).

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, 102, 294 P.3d 427, 428 (2013). In contrast, we review de novo a disciplinary panel's conclusions of law and recommended discipline. SCR 105(3)(b).

The State Bar has the burden of showing by clear and convincing evidence that Cushing committed the violations charged. In *re Discipline of Drakulich*, 111 Nev. 1556, 1566, 908 P.2d 709, 715 (1995). We defer to the panel's findings of fact in this matter as they are supported by substantial evidence and are not clearly erroneous. Cushing wrote himself three checks from his law firm's operating account and deposited them into his personal bank account. When his law firm confronted him about the checks, he lied and stated he was reimbursing himself for payment he made to an expert witness and gave them an address for the expert, which was a property Cushing was renting, and a phone number for the expert, which was the number for Cushing's friend and pro bono client. When the law firm confronted him about the lies, he stated that he wrote the checks to cover gambling losses. At the law firm's request, Cushing then resigned.

Thereafter, Cushing misrepresented the reason for his resignation to a prospective employer. When the State Bar petitioned to have Cushing temporarily suspended, his attorney opposed the petition on Cushing's behalf, stating that Cushing was struggling with a gambling addiction. Cushing later admitted that he does not have

CONTINUED ON PAGE 48

Bar Counsel Report

CONTINUED FROM PAGE 47

a problem with gambling and only told his law firm that he did in an effort to save his job. In denying the petition to temporarily suspend Cushing, this court directed Cushing to report to Nevada Lawyers Assistance Program (NLAP) and comply with treatment recommendations. Cushing entered the NLAP program but failed to comply with its treatment recommendations from July 4 to August 21, 2018. Lastly, Cushing was dishonest with the State Bar during the disciplinary matter by falsely asserting that (1) he was not misrepresenting why he left his former law firm to clients and prospective employers; (2) his delay in reporting to NLAP was caused by NLAP administrators; (3) he had returned a loaner car to the dealership, when it had been repossessed by the dealership; and (4) his personal car was still being repaired when it had been repaired already. Thus, we agree with the panel's conclusions that the State Bar established by clear and convincing evidence that Cushing violated the above-listed rules.⁵

While Cushing argues that his failure to comply with NLAP treatment recommendations cannot be a violation of RPC 3.4(c) because it did not involve his representation of a client, nothing in RPC 3.4(c) limits an attorney's duty to comply with court orders and rules to when the attorney is representing a client. Thus, we conclude RPC 3.4(c) may apply outside of an attorney's representation of a client. Additionally, a screening panel did not need to consider the allegation that Cushing had violated RPC 3.4(c) before the State Bar could amend the pending disciplinary complaint to include that violation and Cushing's due process rights were not violated because he had notice of the amended complaint and an opportunity to oppose the allegation that he had violated RPC 3.4(c). Lastly, because the order imposing conditions on Cushing's practice of law stated that it was our final decision in the matter and "[a]ny further proceedings involving Cushing shall be docketed as a new matter," *In re Discipline of Cushing*, Docket No. 75149 (Order Denying Petition and Imposing Conditions on Continued Practice, March 6, 2018), Cushing's violation of that order was properly brought before this court through the underlying disciplinary proceeding.

In determining the appropriate discipline, this court weighs 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." *In re Discipline of Lerner*, 124 Nev. 1232, 1246, 197 P.3d 1067, 1077 (2008). Although this court determines the appropriate discipline de novo, SCR 105(3)(b), the hearing panel's recommendation is persuasive, *In re Discipline of Schaefer*, 117 Nev. 496, 515, 25 P.3d 191, 204 (2011).

Cushing violated duties owed to the legal system (failure to comply with a court order) and the profession (disciplinary matters and misconduct). Substantial evidence supports the panel's findings that Cushing's mental state was intentional and that his misconduct harmed the public and the legal profession and potentially harmed his pro bono client.⁶ The baseline sanction for Cushing's conduct, before consideration of aggravating and mitigating circumstances, is disbarment. Standards for Imposing Lawyer Sanctions,

Compendium of Professional Responsibility Rules and Standards, Standard 5.11(b) (Am. Bar Ass'n 2017) (providing that disbarment is appropriate when "a lawyer engages in any [noncriminal] intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice").

The record supports the panel's findings of seven aggravating circumstances (dishonest or selfish motive, pattern of misconduct, multiple offenses, bad faith obstruction of the disciplinary proceeding by intentionally failing to comply with rules or orders, submission of false statements and other deceptive practices during the disciplinary hearing, refusal to acknowledge the wrongful nature of conduct, and substantial experience in the practice of law) and two mitigating circumstances (absence of prior disciplinary record and personal and emotional problems). While Cushing asserts additional mitigating circumstances should apply and that certain aggravating circumstances were wrongly applied, the record does not support those arguments.

Considering all of the factors, including Cushing's personal and emotional problems, we agree with the panel that a downward deviation from the baseline sanction of disbarment is appropriate with certain conditions on Cushing seeking reinstatement. Thus, we conclude the recommended discipline serves the purpose of attorney discipline. See *State Bar of Nev. v. Claiborne*, 104 Nev. 115, 213, 756 P.2d 464, 527-28 (1988) (recognizing that the purpose of attorney discipline is to protect the public, courts, and the legal profession).

Accordingly, we hereby suspend attorney Kym S. Cushing from the practice of law in Nevada for nine months from the date of this order.⁷ Before seeking reinstatement, Cushing shall participate in the NLAP and comply with any treatment recommendations; complete an anger management program approved by the State Bar; and complete 10 CLE credits, in addition to the annual requirement, with at least 5 of those additional CLE credits in the area of substance abuse. Additionally, Cushing shall pay the costs of the disciplinary proceedings, including \$2,500 under SCR 120, within 30 days from the date of this order. The parties shall comply with SCR 115 and SCR 121.1.

It is so ORDERED.

In Re: BLAKE WILSON

Bar No.: 12894

Case No.: 79737

Filed: 12/20/2019

**ORDER DENYING RECIPROCAL DISCIPLINE
AND SUSPENDING ATTORNEY**

This is a petition for reciprocal discipline of attorney Blake Wilson pursuant to SCR 114.⁸ Wilson has been disbarred from the practice of law in California. He did not self-report the disbarment to the Nevada State Bar and has not opposed this petition.

Wilson's California misconduct arises from his representation of one client. After that client terminated the attorney-client relationship, Wilson failed to return the client's file for more than a year and, after entering into the California equivalent of a conditional guilty plea in exchange for a stated form of discipline, he was placed on probation. Wilson then violated the terms of his probation and failed to respond to the California Bar's disciplinary charges for the probation violation. As a result, a default was entered. Pursuant to California State Bar Rule of Procedure 5.85, which requires disbarment when an attorney fails to have a default order set aside, Wilson was disbarred.

Having considered the petition for reciprocal discipline, we conclude that discipline is warranted but that "the misconduct established warrants substantially different discipline in this state," SCR 114(4)(c), and thus deny the petition for reciprocal discipline. In particular, we conclude that disbarment is not warranted because disbarment in Nevada is not equivalent to the disbarment imposed in California, as disbarment in Nevada is irrevocable while in California a disbarred attorney may seek reinstatement after five years. Compare SCR 102(1) with Cal. State Bar R. Proc. 5.442(B). Furthermore, Nevada does not require disbarment when an attorney fails to have a default order set aside in a discipline case. Thus, we conclude that a five-year-and-one-day suspension is more appropriate than disbarment based on the "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." *In re Discipline of Lerner*, 124 Nev. 1232, 1246, 197 P.3d 1067, 1077 (2008) (setting out the factors to consider to determine appropriate discipline).

Accordingly, we deny the petition for reciprocal discipline, but suspend Blake Wilson from the practice of law in Nevada for five years and one day from the date of this order. The parties shall comply with SCR 115 and SCR 121.1.

It is so ORDERED.

In Re: ROBERT E. GLENNEN
Bar No.: 2143
Case No.: OBC18-0784
Filed: 09/23/2019

PUBLIC REPRIMAND

To Robert E. Glennen:

Ana Ariza ("Ariza") retained you in a family-law matter filed on August 29, 2014. The opposing party filed a Motion seeking to deny paternity, to remove his name from birth certificates, and to terminate orders for support. You did not file a timely opposition to the motion. The Court held a hearing regarding the motion. You arrived late to the hearing. Prior to your arrival the Court called the case and the Court, hearing

no opposition to the motion, granted it. You filed a motion for reconsideration which the Court denied. You filed an appeal with the Nevada Supreme Court, which entered an Order of Reversal and Remand.

The Court set a hearing on the remand. You were present at the hearing and the Court ordered Ariza to obtain a DNA test and a status check was scheduled, the Court ordered you to prepare a proposed Order. You failed to prepare the Order as directed by the Court. You also failed to appear at the status check. The Court entered an Order to Show Cause and Set Status Check Hearing. You appeared at that hearing and submitted the Order for DNA testing. The next status hearing was scheduled for June 25, 2018. On June 22, 2018, you and opposing counsel entered a stipulation to continue the status hearing. The Court continued the hearing. You did not notify Ariza of the continuance. Ariza drove from California to be present for the hearing. Ariza arrived and called you to inquire why no one was at the hearing. You were not available to answer her questions.

Your conduct caused harm to your client. Your client suffered needless worry, frustration, and anxiety. She had to make an unnecessary trip from California for a proceeding that had been continued by stipulation. Your conduct also delayed court proceedings and caused harm to the legal system.

Rule 1.3 (Diligence) requires a lawyer to meet deadlines and appear at scheduled legal proceedings. Rule 1.4 (Communication) requires lawyers to promptly convey important information about the client's matter. You failed to uphold these ethical standards.

In light of the foregoing, you violated RPC 1.3 (Diligence) and RPC 1.4 (Communication) and are hereby PUBLICLY REPRIMANDED.

**RESIGNATIONS (VOLUNTARY,
NO DISCIPLINE PENDING)**

S.C.R. 98(5)(a) states:

Any member of the state bar who is not actively engaged in the practice of law in this state, upon written application on a form approved by the state bar, may resign from membership in the state bar if the member: (1) has no discipline, fee dispute arbitration, or clients' security fund matters pending and (2) is current on all membership fee payments and other financial commitments relating to the member's practice of law in Nevada. Such resignation shall become effective when filed with the state bar, accepted by the board of governors, and approved by the supreme court.

CONTINUED ON PAGE 50

Bar Counsel Report

CONTINUED FROM PAGE 49

The following members resigned pursuant to this Rule:

Name	Bar No.	Order No.	Filed
Brian E. Cody	7964	80199	12/24/2019
William B. Cossitt	3484	80200	12/24/2019
Marilee A. Ryan	7502	80202	12/21/2019

1. Capps may request that this order of temporary suspension be dissolved or amended by filing a petition with this court as provided by SCR 102(4)(e).
2. This matter was originally docketed as confidential because a formal disciplinary complaint had not yet been filed. Since we are granting the petition, this matter is now public. SCR 121(5). This order constitutes our final disposition of this matter. Any new proceedings involving Capps shall be docketed as a new matter.
3. The Honorable Lydia Stiglich, Justice, did not participate in the decision of this matter.
4. Collings initially emailed the State Bar regarding the first grievance filed against him to ask for additional time to provide the State Bar with his formal response to that grievance. He then failed to respond to any of the grievances. The complaint and the notice of intent to take a default were served on Collings through regular and certified mail at his SCR 79 address and another potential address.
5. To the extent Cushing argues the panel could not determine without a handwriting expert's testimony that he had signed his name differently on the signature line and the endorsement line for each check he wrote himself from his firm's operating account, we conclude an expert's testimony was unnecessary as the signatures were markedly different. Further, while Cushing argues a letter he wrote to his car dealership concerning the loaner car that was overdue could not establish a violation of RPC 8.4(c), we need not consider this issue because the panel did not conclude that Cushing violated RPC 8.4(c) by writing the letter, and instead, only relied on the letter as evidence to support an aggravating circumstance (submission of false evidence, false statements, or other deceptive practices during the disciplinary hearing).
6. Cushing conceded at the disciplinary hearing that involving his pro bono client in his attempt to cover up his fraudulent checks exposed the pro bono client to potential harm.
7. To the extent the parties' additional arguments are not addressed herein, we conclude they do not warrant a different outcome.
8. Wilson is currently CLE suspended in Nevada.

TIP FROM THE BAR COUNSEL

Soliciting Prospective Clients in Class Action Cases

Consumer protection laws provide individuals with a mechanism to combat abusive business practices. Specifically, these laws seek to prevent providers of goods and services from taking advantage of a consumer's lack of information or bargaining power. The most common abuse occurs when consumers are most vulnerable. For example, many consumer protection lawsuits challenge predatory lending schemes such as burying various fees and penalties in the fine print or charging outlandish interest rates.

Victims of abusive business practices often experience minor economic damage. Damages can make litigation impractical for a single consumer. As such, class action lawsuits have become a common vehicle to fight for consumers' rights. Attorneys pursuing a class action lawsuit should know the differences between the Nevada Rules of Professional Conduct (RPC) and the American Bar Association (ABA) Model Rules regarding solicitation.

In Nevada, RPC 7.3, Communications with Prospective Clients, regulates how attorneys may solicit clients. RPC 7.3 states, in pertinent part, that "a lawyer shall not solicit professional employment from a prospective client with whom the lawyer has no family or prior professional relationship, by mail, in person or otherwise, when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain." Solicitation includes any contact whether in person, by telephone, or in writing. The Nevada rule does not specifically address class action lawsuits.

Unlike RPC 7.3, ABA Model Rule 7.3 was amended in 2018 to allow attorneys to solicit potential class action members. ABA Model Rule 7.3(d) states that "[t]his Rule does not prohibit communications authorized by law or ordered by a court or other tribunal." Further, comment [8] of ABA Model Rule 7.3 clarifies that such communications include notices to potential class members in class action litigation. See ABA Formal Ethics Op. 07-445 (2007). But defense counsel has the same right to contact putative class members.

Pay attention to jurisdictional differences, as some states, like Nevada, stay silent about soliciting potential class members, while others may have exceptions similar to ABA Model Rule 7.3(d). Unless Nevada adopts an exception for class action solicitation, it is best to err on the side of caution.