Bar Counsel Report

In Re: D. BRIAN BOGGESS
Bar No.: 4537
Case No.: 79316
Filed: 06/04/2020

ORDER OF SUSPENSION

This is an automatic review of a Southern Nevada Disciplinary Board hearing panel's recommendation that attorney D. Brian Boggess be suspended for three years and a stayed 21-month suspension from a previous matter be imposed to run concurrently. The recommended discipline is based on violations of RPC 1.3 (diligence), RPC 1.4 (communication), RPC 1.15 (safekeeping property), RPC 3.4 (fairness to opposing party and counsel), and RPC 8.4(d) (misconduct).[1]

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 u. 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).

As an initial matter, Boggess argues he could not have violated RPC 1.3 (diligence) and RPC 1.4 (communication) related to his work as a trustee on the Alice C. Capps Trust and in closing the Capps estate because the beneficiaries who filed the underlying grievance against him were not his clients. Boggess is correct that RPC 1.3 does not apply because the beneficiaries were not his clients. However, RPC 1.4(a)(4) requires an attorney to "[p]romptly comply with reasonable requests for information" regardless of whether such request came from a client or a third party. Accordingly, RPC 1.4 applies even though the beneficiaries were not Boggess's clients.

The State Bar has the burden of showing by clear and convincing evidence that Boggess 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 regarding all the violations except RPC 1.3 as they are supported by substantial evidence and are not clearly erroneous. One of the Capps' beneficiaries testified that she was unable to contact Boggess. Boggess also failed to provide the beneficiaries with a complete accounting. Further, at the time of Boggess's misconduct here, he was under a disciplinary order from this court that subjected him to a stayed suspension on the condition that he not commit any further disciplinary violations during the probationary period.[2] *In re Discipline of Boggess,* Docket No. 69152 (Order Approving Conditional Guilty Plea Agreement, Jan. 22, 2016).

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 or 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 the purpose of attorney discipline).

Boggess violated duties owed to the beneficiaries (communication and safekeeping property) and the profession (misconduct). Boggess's violations were knowing as he was aware of the terms of his stayed suspension and knew of his duty to promptly distribute the estate's funds and close the estate. The beneficiaries and the estate's creditors were at least potentially injured by the delay in the distribution of estate funds. The baseline sanction for Boggess's conduct, before consideration of aggravating and mitigating circumstances, is disbarment. *See* Standards for Imposing Lawyer Sanctions, *Compendium of Professional Responsibility Rules and Standards,* Standard 8.1 (Am. Bar Ass'n 2017) (explaining that disbarment is appropriate when a lawyer "knowingly violates the terms of a prior disciplinary order and such violation causes injury or potential injury to a client, the public, the legal system, or the profession" or when the lawyer "has been suspended for the same or similar misconduct, and intentionally or knowingly engages in further similar acts of misconduct that cause injury or potential injury to a client, the public, the legal system, or the profession"). The record supports the panel's findings of six aggravating circumstances (prior disciplinary offenses, substantial experience in the practice of law, pattern of misconduct, multiple offenses, refusal to recognize the wrongful nature of his conduct, and vulnerability of the victims) and one mitigating circumstance (personal or emotional problems).

We agree with the panel that a downward deviation from the baseline sanction of disbarment is warranted. Considering all of the factors, including Boggess's personal and emotional problems, we conclude the panel's recommended three-year suspension protects the public, the courts, and the legal profession. Additionally, Boggess violated the terms of his stayed suspension from Docket No. 69152. Thus, we also impose the previously stayed 21-month suspension.

Accordingly, we hereby suspend attorney D. Brian Boggess from the practice of law in Nevada for 3 years from the date of this order, to run concurrent with the separate 21-month suspension. Boggess shall also comply with the audit requirement imposed in Docket No. 75883. Additionally, Boggess 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: EDWARD E. VARGAS
Bar No.: 8702
Case No.: 80665
Filed: 05/15/2020

ORDER APPROVING CONDITIONAL GUILTY PLEA AGREEMENT

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 Edward E. Vargas. Under the agreement, Vargas admitted to violating RPC 1.3 (diligence), RPC 1.4 (communication), RPC 1.5 (fees), RPC 1.16 (declining or terminating representation), RPC 3.2 (expediting litigation), and RPC 3.4 (fairness to opposing party and counsel). Under the agreement, Vargas agreed to a six-month-and-one-day suspension, with all but the first three months stayed for two years, subject to certain conditions. He also agreed to the payment of costs.

Vargas has admitted to the facts and violations as part of his guilty plea agreement. The record therefore establishes that he violated the above-listed rules by knowingly entering into a contingency fee agreement that did not include required language; failing to properly communicate with his client about the status of the client's case; failing to respond to motions filed by opposing counsel, leading to the case being adjudicated against his client; and failing to appear at multiple hearings.

The issue for this court is whether the agreed-upon discipline sufficiently protects the public, the courts, and the legal profession. 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).

Based on the duties Vargas violated, and because he acted knowingly and his conduct resulted in actual or potential injury to his client and the profession, the baseline sanction before factoring aggravating and mitigating circumstances is suspension. *See* Standards for Imposing Lawyer Sanctions, *Compendium of Professional Responsibility Rules and Standards,* Standard 4.42 (Am. Bar Ass'n 2018) (providing that suspension is generally appropriate when "a lawyer knowingly fails to perform services for a client and causes injury or potential injury to a client"). The record supports the panel's findings of four aggravating circumstances (prior disciplinary offenses, pattern of misconduct, multiple offenses, and substantial experience in the practice of law), and four mitigating circumstances (absence of dishonest or selfish motive, full and free disclosure to disciplinary authority/cooperative attitude, physical disability, and remorse). Considering the factors outlined in *Lerner,* we conclude that the recommended discipline is appropriate and 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, not to punish the attorney).

Accordingly, commencing from the date of this order, we hereby suspend attorney Edward E. Vargas from the practice of law in Nevada for a period of six months and one day with all but the first three months stayed for a period of two years. During the two-year probationary period, Vargas must (1) not have any new grievances filed against him arising out of conduct post-dating the conditional guilty plea agreement that results in a letter of reprimand or greater discipline; and (2) obtain a "practice of law mentor" who must submit quarterly reports to the State Bar and with whom Vargas must meet at least monthly for guidance on his legal practice. Additionally, Vargas must pay the costs of the disciplinary proceeding, 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: LEILA L. HALE
Bar No.: 7368
Case No.: OBC17-0374 +1
Filed: 01/28/2020

PUBLIC REPRIMAND

To Leila L. Hale:

Rochelle Mortensen ("Mortensen") and Mahogeny Bennett ("Bennett") retained you to represent them in personal injury matters. In both matters, you, pursuant to office policy, sent your non-attorney employee, Fermin G. Serafin ("Serafin") to conduct 'home visits.' In these visits, Serafin presented the potential clients with retainer agreements as well as various other legal documents, including a HIPPA release, a general authorization, a Medicare, Medicaid, and SCI-HP Extension Act reporting form, and a power of attorney form. Pursuant to your office policy, Serafin read through these documents with Mortensen and Bennett.

In addition, in the Bennett matter, Serafin advised Bennett regarding potential attorney's liens that may be filed by her already-retained counsel if she were to switch counsel. Serafin also advised Bennett that it would be best to have one attorney handle both matters.

Pursuant to the decision of the Supreme Court, these home visits constituted the unauthorized practice of law, and, as such, Serafin's actions under your supervision constitute a violation of Rule of Professional Conduct 5.3 (Responsibilities Regarding Non-Lawyer Assistants).

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Further, in both the Bennett and Mortensen matters, the retainer agreement presented contained a provision which, in the event of withdraw by Hale Law, or the early discharge of Hale Law called for, at a minimum, a "combined firm rate" of $1,000 per hour for "all attorney and staff time".

As this panel found, such an agreement is unreasonable and violates Rule of Professional Conduct 1.5 (Fees).

In light of your violation of Rules of Professional Conduct 1.5 and 5.3, you 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.*

The following members resigned pursuant to this Rule:

Name	Bar No.	Order No.	Filed
Denise Abramow	5851	81168	05/21/2020
William M. Dillion	1843	81170	05/21/2020
Scott T. Jordan	1681	81161	05/21/2020
Robert A. Kelley	1900	81167	05/21/2020
Kim H. Robinson	10477	81188	05/21/2020
Clara A. Padilla Silver	7856	81164	05/21/2020
Theresa J. Thienhaus	81162	81162	05/21/2020

Endnotes:

1. Pursuant to NRAP 34(f)(1), we have determined that oral argument is not warranted in this matter.
2. This court extended that probationary period in a subsequent discipline matter. *In re Discipline of Boggess,* Docket No. 75883 (Order Approving Conditional Guilty Plea, Sept. 7, 2018).

TIP FROM THE BAR COUNSEL

When Communicating with Clients, More is Better

A lawyer's obligations under RPC 1.4 (Communications) can seem amorphous, but there are some bright lines to follow.

A lawyer has an obligation to a client to (i) consult with the client about the means by which the client's objectives are to be accomplished and (ii) keep the client reasonably informed about the status of a matter. This means at the start of the representation, the lawyer must have a conversation with the client about the goals of the representation and the plan to accomplish them. The lawyer may also need to have additional strategy conversations during the representation as the matter develops. Regardless if the strategy needs updating, the lawyer must communicate with the client about status at reasonable intervals.

Communicating with clients can be difficult; they are usually inexperienced with legal processes and anxious because of the situation that has resulted in the underlying matter. A lawyer must decide how to best communicate the necessary information to a client. The Office of Bar Counsel suggests that "real-time" communication is best, particularly for the initial strategy conversation. That might mean a scheduled telephone call, videoconference or in-person meeting. The important part of "real-time" communication is allowing the client to respond to you and getting a feel for whether the client is understanding what you are saying. A best practice is to follow-up "real-time" communication with confirming written communication. It may seem time-consuming, but this two-pronged approach will better ensure that you and your client are clear on what to expect as the matter proceeds.

A lawyer also has an obligation to third parties to comply with reasonable requests for information. Third parties include those with an interest in the resolution of the matter, such as beneficiaries of an estate or lienholders of a personal injury client. In these instances, it may be best to communicate in writing only to avoid precarious situations where you need to convey some information but are prohibited from disclosing other information because of your confidentiality obligations.

A lack of communication is one of the most frequent complaints that the Office of Bar Counsel receives. Simply put, "more is better" for communicating with clients, and other interested parties.