Bar Counsel Report

In Re: DAVID LEE PHILLIPS
Bar No.: 538
Case Nos.: 79057 & 79385
Filed: 05/08/2020

ORDER OF SUSPENSION

Docket No. 79057 is an automatic review of a Southern Nevada Disciplinary Board hearing panel's recommendation that a previously stayed one-year suspension be imposed against attorney David Lee Phillips for his failure to comply with probation conditions. Docket No. 79385 is an automatic review of a separate hearing panel's recommendation that Phillips be suspended for three years based on violations of RPC 1.1 (competence), RPC 1.4 (communication), RPC 1.5 (fees), RPC 1.15 (safekeeping property), RPC 1.16 (declining or terminating representation), and RPC 4.1 (truthfulness).[1]

Docket No. 79057

On February 23, 2018, this court suspended Phillips for one year, with the suspension stayed subject to certain probation conditions, including that "there be no grievances submitted by the State Bar challenging Phillips' compliance with the Rules of Professional Conduct concerning events that occurred after May 17, 2017, in which a disciplinary screening panel recommends a formal hearing." *In re Discipline of Phillips,* Docket No. 73592 (Order Approving Conditional Guilty Plea Agreement and Suspending Attorney, Feb. 23, 2018). A screening panel convened on January 22, 2019, to consider four grievances filed against Phillips and recommended the grievances proceed to a formal hearing.[2] Thus, Phillips breached the conditions of his probation and we impose the one-year suspension, beginning from the date of this order. Additionally, Phillips shall pay the costs of the disciplinary proceedings within 30 days from the date of this order.

Docket No. 79385

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).

The State Bar has the burden of showing by clear and convincing evidence that Phillips committed the violations charged. *In re Discipline of Drakulich,* 111 Nev. 1556, 1566, 908 P.2d 709, 715 (1996). We defer to the panel's findings of fact in Docket No. 79385 as they are supported by substantial evidence and are not clearly erroneous.

The record establishes that Phillips failed to pay a client's litigation lender, despite having acknowledged the litigation loan, and then informed the lender the matter was still pending, even though it had been settled. The record further demonstrates that in two separate actions, he failed to reasonably communicate with his clients, inappropriately terminated his representation without taking steps to protect his clients' interests, and failed to timely provide the clients with their files. In one of those instances, he terminated his representation shortly before a summary judgment hearing. Phillips also unreasonably charged a client $7,000 to assist the client in taking a loan out against her inheritance, he had the loan proceeds deposited directly into his account, and he then distributed some of the proceeds in contradiction to the client's directions. Thus, we agree with the panel's conclusions that the State Bar established by clear and convincing evidence that Phillips violated the above-listed rules.

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).

Phillips violated duties owed to his clients (competence, communication, fees, and safekeeping property), the public (truthfulness), and the profession (termination of representation). Substantial evidence supports the panel's finding that Phillips' violations concerning the litigation loan were intentional, that the rest of Phillips' violations were done knowingly, and that Phillips harmed or potentially harmed the lender and his clients. Specifically, the lender was not timely repaid, one client's funds were not properly distributed, and one of his client's cases was dismissed while she was attempting to find other counsel and she is now unable to pay her liens. The baseline sanction for Phillips' 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 "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 seven aggravating circumstances (prior disciplinary offenses, selfish motive, pattern of misconduct, multiple offenses, refusal to acknowledge the wrongful nature of conduct, vulnerability of victim, and substantial experience in the practice of law) and no mitigating circumstances.

Considering all of the factors, we agree with the panel that a downward deviation from the baseline sanction of disbarment is appropriate as disbarment is irrevocable in Nevada and the misconduct does not appear to warrant permanent disbarment. Additionally, 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, as to the misconduct outlined in Docket No. 79385, we hereby suspend attorney David Lee Phillips from the practice of law in Nevada for three years. This suspension shall run consecutively to the one-year suspension we impose in Docket No. 79057 as a result of Phillips' failure to comply with the probation condition in Docket No. 73592. Additionally, Phillips shall pay the costs of both disciplinary proceedings, including $2,500 under SCR 120 as to Docket No. 79385, within 30 days from the date of this order. The parties shall comply with SCR 115 and SCR 121.1.[3]

It is so ORDERED.[4]

CADISH, J., concurring in part and dissenting in part:

"I concur with the imposition of the one-year suspension in Docket No. 79057. I write separately, however, because I would disbar Phillips for his misconduct addressed in Docket No. 79385. I agree with the majority that the baseline sanction for Phillips' misconduct is disbarment, *see* Standards for Imposing Lawyer Sanctions, *Compendium of Professional Responsibility Rules and Standards,* Standard 8.1 (Am. Bar Ass'n 2017), because he has previously and repeatedly engaged in similar misconduct. In fact, despite receiving a stayed suspension in Docket No. 73592, Phillips, once again, engaged in similar misconduct and had multiple disciplinary grievances filed against him while he was on probation.

"Because there are no mitigating circumstances present, a downward deviation from disbarment to a three-year suspension is unwarranted. Further, such downward deviation is unsupportable in light of the seven aggravating circumstances: (1) prior disciplinary offenses, (2) selfish motive, (3) pattern of misconduct, (4) multiple offenses, (5) refusal to acknowledge the wrongful nature of conduct, (6) vulnerability of victim, and (7) substantial experience in the practice of law. It is especially concerning that Phillips refuses to acknowledge that his conduct was wrongful and asserts that his clients were not harmed by his misconduct. Because Phillips has failed to learn from his previous disciplines and in light of all of the present aggravating circumstances, the only discipline that will protect the public, the courts, and the legal profession is the baseline sanction of disbarment. *See State Bar of Nev. v. Claiborne,* 104 Nev. 115, 213, 756 P.2d 464, 527-28 (1988) (describing the purpose of attorney discipline). Thus, I dissent because I would disbar Phillips in Docket No. 79385."

In Re: MICHAEL H. HAMILTON
Bar No.: 7730
Case No.: 80556
Filed: 05/08/2020

ORDER OF SUSPENSION

This is an automatic review of a Southern Nevada Disciplinary Board hearing panel's recommendation that the stayed portion of a previously imposed four-year suspension be imposed against attorney Michael H. Hamilton for his failure to comply with probation conditions in an earlier disciplinary matter.

On May 14, 2019, this court approved a conditional guilty plea agreement and suspended Hamilton for four years, with all but six months of the suspension stayed, based on his violations of RPC 1.15 (safekeeping property), RPC 5.4 (professional independence of a lawyer), RPC 5.5 (unauthorized practice of law), RPC 8.4 (misconduct), and SCR 78.5 (maintenance of trust funds). *In re Discipline of Hamilton,* Docket No. 78101 (Order Approving Conditional Guilty Plea Agreement, May 14, 2019). He violated those rules in part by having his trust account out of balance, making personal and business payments from his trust account, and failing to pay medical liens on behalf of clients. *Id.* The stayed portion of his suspension was subject to certain probation conditions, including that he "provide quarterly reports for all of his trust accounts to the State Bar as outlined in the conditional guilty plea agreement" and that he complete 22 hours of continuing legal education during the six-month actual suspension. *Id.*

The State Bar established a schedule and sent correspondence to Hamilton reminding him of his obligation to provide the quarterly reports, but Hamilton did not submit the reports or complete the continuing legal education. He acknowledged his failures to do so at a formal hearing on December 10, 2019, and the hearing panel recommended imposing the stayed portion of his suspension. We agree with the panel's recommendation and therefore impose the remaining 42 months of Hamilton's suspension, beginning from the date of this order. Additionally, Hamilton 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.

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In Re: JANET S. MARKLEY
Bar No.: 4009
Case No.: 80381
Filed: 04/23/2020

ORDER APPROVING CONDITIONAL GUILTY PLEA – SUSPENSION

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 Janet S. Markley. Under the agreement, Markley admitted to violating RPC 1.15 (safekeeping property) and RPC 8.1 (disciplinary matters) and agreed to a one-year suspension and the payment of restitution.

Markley has admitted to the facts and violations as part of her guilty plea agreement. Thus, the record establishes that Markley violated RPC 1.15 (safekeeping property) by having her trust account balance drop below $200 when she should have been holding $42,750 in the account for the payment of a client's medical liens. This misconduct was due in part to Markley leaving signed trust account checks with her office staff while she was out of the office, which her staff utilized to pay office expenses. Additionally, Markley violated RPC 8.1 (disciplinary matters) by failing to respond to the State Bar's requests for information.

The issue for this court is whether the agreed-upon 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) (explaining the purpose of attorney discipline). 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).

Markley admitted to knowingly violating a duty owed to her clients (safekeeping property) and a duty owed to the profession (responding to State Bar inquiries). Her client suffered actual or potential injury because the client's lienholders were not paid. As the panel found, the baseline sanction for such misconduct, before considering aggravating or mitigating circumstances, is suspension. Standards for Imposing Lawyer Sanctions, *Compendium of Professional Responsibility Rules and Standards,* Standard 4.12 (Am. Bar Ass'n 2017) (providing that suspension is appropriate when "a lawyer knows or should know that he is dealing improperly with client property and causes injury or potential injury to a client"). The record supports the panel's findings of one aggravating circumstance (substantial experience in the practice of law) and three mitigating circumstances (absence of a prior disciplinary records, personal or emotional problems, and remorse). Considering all four factors, we conclude that the agreed-upon discipline is appropriate.

Accordingly, we hereby suspend attorney Janet S. Markley from the practice of law for one year commencing from the date of this order. Markley shall pay restitution in the amount of $42,750 in the Melissa Strawder-McCurry matter. Lastly, Markley shall pay the costs of the disciplinary proceedings, including $2,500 under SCR 120, within 30 days from the date of this order, if she has not done so already. The parties shall comply with SCR 115 and SCR 121.1.

It is so ORDERED.

In Re: STEVEN J. SZOSTEK
Bar No.: 3904
Case No.: 79960
Filed: 04/23/2020

ORDER APPROVING CONDITIONAL GUILTY PLEA – STAYED SUSPENSION

This is an automatic review under SCR 105(3)(b) 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 Steven J. Szostek. Under the agreement, Szostek admitted to violating RPC 1.3 (diligence) and RPC 8.1 (bar admission and disciplinary matters) and agreed to a six-month-and-one-day suspension, stayed subject to certain conditions, and a 36-month probationary period. He has also agreed to pay restitution to his client and the costs of the disciplinary proceedings.

Szostek 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 failing to timely provide opposing counsel with answers to requests for admissions, resulting in an adverse adjudication of a landlord-tenant matter for his client, and by providing misleading information to the State Bar regarding whether he submitted a claim to his malpractice carrier.

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 Szostek violated, and because he acted knowingly and his conduct resulted in injury or potential injury to his client and the profession, the

baseline sanction before considering 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 2017) ("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 one aggravating circumstance (substantial experience in the practice of law), and two mitigating circumstances (absence of a prior disciplinary record and remorse). Considering the factors outlined in *Lerner,* including the aggravating and mitigating circumstances, we conclude that the agreed-upon discipline is appropriate. *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, we hereby suspend attorney Steven J. Szostek from the practice of law in Nevada for a period of six months and one day commencing from the date of this order, with the suspension stayed subject to the following conditions. Szostek shall be subject to a 36-month probation commencing from the date of this order, during which time he must not have any new grievances filed against him arising out of conduct postdating the conditional guilty plea agreement that results in actual discipline. Szostek must make monthly restitution payments of at least $1,450 on the terms outlined in the guilty plea agreement until the total restitution of $52,100.10 is paid. Additionally, he must pay $2,500 in administrative costs pursuant to SCR 120 and the actual costs of the disciplinary proceeding within the probationary period. Finally, within the probationary period, Szostek must complete 10 hours of continuing legal education in the areas of civil procedure and/or discovery procedure. The State Bar shall comply with 121.1.

It is so ORDERED.

In Re: TORY D. ALLEN
Bar No.: 12680
Case No.: 80319
Filed: 04/23/2020

ORDER APPROVING CONDITIONAL GUILTY PLEA – SUSPENSION

This is an automatic review of a Northern 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 Tory D. Allen. Under the agreement, Allen admitted to violating RPC 1.3 (diligence), RPC 1.15 (safekeeping property), RPC 3.4 (fairness to opposing party and counsel), RPC 8.4 (misconduct), and SCR 78(5) (maintenance of trust funds). He agreed to a 30-month suspension and to comply with certain conditions during the suspension period or until he petitions for reinstatement, whichever is longer. He also agreed to pay the costs of the disciplinary proceedings.

Allen 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 failing to maintain proper records of all funds that he was holding for clients in his trust account; misappropriating $64,651.84 of client funds and converting those funds for personal use; failing to diligently address a probate matter; failing to deposit client funds into his trust account in a divorce matter and failing to properly and promptly distribute those funds to the clients or their creditors; failing to comply with a court order in the divorce matter that directed him to pay community debts with some of the funds he misappropriated; and providing misleading information to the client about payment of the community debt.

The issue for this court is whether the agreed-upon discipline sufficiently protects 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) (recognizing that the purpose of attorney discipline is to protect the public, courts, and the legal profession, not to punish the attorney). 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 Allen violated, and because he acted knowingly and his conduct resulted in injury to his clients and the profession, the baseline sanction before factoring aggravating and mitigating circumstances is disbarment. *See* Standards for Imposing Lawyer Sanctions, *Compendium of Professional Responsibility Rules and Standards,* Standard 4.11 ("Disbarment is generally appropriate when a lawyer knowingly converts client property and causes injury or potential injury to a client."). The record supports the panel's findings of two aggravating circumstances (prior disciplinary offenses and pattern of misconduct), and four mitigating circumstances (personal or emotional problems, full and free disclosure to disciplinary authority/cooperative attitude, inexperience in the practice of law, and remorse). We agree with the hearing panel's finding that the misconduct here does not warrant permanent disbarment, especially in light of the mitigating factors, including Allen's emotional and personal problems and his good faith effort to pursue treatment. Thus, based on the factors outlined in *Lerner,* we conclude that the recommended discipline is appropriate and serves the purpose of attorney discipline.

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Accordingly, we hereby suspend attorney Tory D. Allen from the practice of law in Nevada for a period of 30 months commencing from the date of this order. During the suspension period or until he petitions for reinstatement, whichever is longer, Allen must (1) continue treatment with a licensed drug and alcohol counselor and/or mental health provider; (2) attend Alcoholics Anonymous or Alanon meetings at the direction of his counselor or mental health provider, but no less than twice per week; (3) on a quarterly basis, provide a report to the Office of Bar Counsel in accordance with the requirements outlined in the conditional guilty plea agreement. When filing a petition for reinstatement, he must provide proof of payment of no less than 35 percent of the amount owed to the parties from whom he misappropriated funds. Finally, he must pay $2,500 in administrative costs pursuant to SCR 120 and the actual costs of the disciplinary proceeding 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: JAY B. FREEDMAN
Bar No.: 12214
Case No.: 80276
Filed: 04/23/2020

ORDER DENYING PETITION FOR RECIPROCAL DISCIPLINE AND SUSPENDING ATTORNEY

This is a petition under SCR 114 to reciprocally discipline attorney Jay B. Freedman, based on discipline imposed on him in California. Freedman was disbarred from the practice of law in California on December 16, 2015, and he did not self-report the discipline to the Nevada State Bar. He has not opposed this petition.

The California State Bar's Notice of Disciplinary Charges (NDC) alleged six counts of misconduct based on Freedman's representation of one client in a civil action for fraud. Freedman failed to respond to the NDC, resulting in a default. Based on his default, the factual allegations supporting the charges were deemed admitted. The admitted facts establish that Freedman violated California RPC 3.110(A) (competence) by willfully failing to perform the services for which he was retained, including failing to (1) appear at a show cause hearing on the dismissal of the client's complaint, (2) respond to discovery requests and oppose motions to compel discovery, and (3) seek a waiver of costs before filing a request for voluntary dismissal. Freedman violated California Business and Professions Code (BPC) § 6106 (moral turpitude: misrepresentation) by knowingly or with gross negligence making a false statement to the client when he stated that the defendant in the litigation admitted facts pertinent to the client's claims. Freedman willfully violated BPC § 6068(m) (communication) by not keeping the client informed about developments in the case. He willfully violated California RPC 3-700(D)(l) (release of file) by failing to promptly return the client's file after his representation was terminated. Freedman willfully violated BPC § 6068(i) (cooperation with disciplinary investigation) by failing to respond to the California State Bar's inquiries. Finally, he willfully violated California RPC 1-110 (compliance with conditions set in reproval) by failing to comply with probation conditions imposed by the State Bar Court in a previous order.[5]

Freedman did not move to have the default set aside. Therefore, he was disbarred pursuant to California State Bar Rule of Procedure 5.85, which requires an attorney's disbarment when the attorney's default is entered for failing to respond to disciplinary charges and the attorney fails to have the default set aside.

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. In particular, we conclude that disbarment is not warranted because disbarment in Nevada is irrevocable and thus not equivalent to the disbarment imposed in California, which allows a disbarred attorney to seek reinstatement. *Compare* SCR 102(1), *with* Cal. State Bar R. Proc. 5.442(B). Moreover, Nevada does not require disbarment when an attorney fails to have a default order set aside in a discipline case. Thus, based on the duties violated, Freedman's knowing mental state,[6] the potential or actual injury caused by his misconduct, and the absence of aggravating or mitigating factors, *see In re Discipline of Lerner,* 124 Nev. 1232, 1246, 197 P.3d 1067, 1077 (2008) (listing factors to consider in determining appropriate discipline), we conclude that a five-year-and-one day suspension is more appropriate than disbarment, *see* Standards for Imposing Lawyer Sanctions, *Compendium of Professional Responsibility Rules and Standards,* Standard 4.42 (Am. Bar Ass'n 2018) ("Suspension is generally appropriate when a lawyer knowingly fails to perform services for a client and causes injury or potential injury to a client."); Standard 7.2 ("Suspension is generally appropriate 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.").

Accordingly, we deny the petition for reciprocal discipline and instead suspend Freedman from the practice of law in Nevada for five years and one day, commencing from the date of this order. Freedman and the State Bar shall comply with SCR 115 and SCR 121.1.

It is so ORDERED.

In Re: REINSTATEMENT OF BRENT A. BLANCHARD
Bar No.: 7605
Case No.: 80227
Filed: 05/08/2020

ORDER OF REINSTATEMENT

This is an automatic review of a Southern Nevada Disciplinary Board hearing panel's recommendation to reinstate suspended attorney Brent A. Blanchard with certain conditions. As no briefs have been filed, this matter stands submitted for decision. SCR 116(2).

This court suspended Blanchard from the practice of law for three years and required he (1) comply with his outstanding CLE requirements and pay the associated fees; (2) complete an additional 15 CLE hours in ethics; (3) pass the MPRE; (4) report his discipline to the Utah State Bar; (5) execute a quitclaim deed for property belonging to a client's family trust; (6) pay fees and costs as ordered in a district court case; (7) continue his treatment for depression and provide satisfactory proof that he is mentally capable of resuming the practice of law; and (8) pay the costs of the disciplinary proceeding. Blanchard has completed the suspension and complied with the requirements in the disciplinary order.

Based on our de novo review, we agree with the panel's conclusions that Blanchard has satisfied his burden in seeking reinstatement by clear and convincing evidence. SCR 116(2); *Application of Wright,* 75 Nev. 111, 112-13, 335 P.2d 609, 610 (1959) (reviewing a petition for reinstatement de novo). We therefore approve the panel's recommendation that Blanchard be reinstated. We also approve the conditions on reinstatement recommended by the panel, as set forth below.

Accordingly, Brent A. Blanchard is hereby reinstated to the practice of law in Nevada. For three years from the date of this order, Blanchard shall have a law mentor who is an active attorney, not affiliated with Blanchard's business interests, has no attorney discipline, and has practiced law for 10 or more years. Blanchard shall meet with his mentor at least once a month to discuss his legal practice and obtain mentorship and guidance. His mentor shall submit quarterly reports to the State Bar. Blanchard shall also maintain his mental health treatments for three years or until his medical provider opines the treatments are no longer necessary. Blanchard's medical provider shall submit quarterly reports to the State Bar that Blanchard is attending or keeping his appointments, Blanchard is complying with the medical provider's advice and recommendations, and a general opinion that Blanchard continues to be fit to practice law. Additionally, Blanchard shall pay the costs of the reinstatement proceeding, including $2,500 under SCR 120, within 30 days of this order, if he has not done so already.

It is so ORDERED.

In Re: HAROLD P. GEWERTER
Bar No.: 499
Case No.: OBC19-1044
Filed: 04/06/2020

LETTER OF REPRIMAND

To Harold P. Gewerter:

On March 24, 2020, a Screening Panel of the Southern Nevada Disciplinary Board considered the above-referenced grievances. Based on the evidence presented, the Panel concluded that you violated the Rules of Professional Conduct ("RPC") and should be issued a Letter of Reprimand. This letter shall constitute a delivery of that reprimand.

This grievance addresses four rules: RPC 1.2 (Scope of Representation), 1.3 (Diligence), 1.4 (Communication), and 1.16 (Withdrawal).

Here, the grievant Christine Hillyer was named in a lawsuit between co-owners of the business for which she worked. One co-owner sued Hillyer and the other co-owner. The defendant co-owner retained you to represent him in the suit. He also asked you to represent Hillyer although he paid the legal fees.

You represented both from approximately March 2018 until February 2019 when you attempted to withdraw from representation for lack of payment. Before your attempt to withdraw, Hillyer would not receive any communications from you unless she asked your staff. Further, you did not discuss the reasons for withdrawal with Hillyer or notify her of your intent to withdraw. You filed a motion with the court but sent it to Hillyer at a wrong address. The court verbally granted your motion but asked you to file a written order. You did not file an order until November 2019 – nine months later. During that time Hillyer was to produce discovery, prepare for a non-jury trial, and oppose a motion for summary judgment. She obtained new counsel in October 2019 – before you filed the order granting your motion to withdraw as counsel. Fortunately, Hillyer's new counsel was able to protect her rights and avoid summary judgment, but your lack of diligence and communication created a potential for harm.

Rule 1.2 states, "a lawyer shall abide by a client's decision concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued."

Although the defendant co-owner paid your legal fees, you had an obligation to Hillyer. Your obligation required you to consult with Hillyer sufficiently about her objectives and your ultimate withdraw.

Rule 1.3 states, "A lawyer shall act with reasonable diligence and promptness in representing a client." This includes all actions until the lawyer completes his withdrawal.

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Rule 1.16 states, a lawyer may withdraw from representing a client if: (1) Withdrawal can be accomplished without material adverse effect on the interests of the client; … [or] (5) The client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled; …"

Here, you attempted to withdraw from representing Hillyer while discovery, trial, and a motion for summary judgment were imminent. Further, you did not diligently file the order granting your motion to withdraw.

Accordingly, you are hereby REPRIMANDED for violating RPC 1.2, 1.3, 1.4, and 1.16. In addition, pursuant to Supreme Court Rule 120(3), you are required to remit to the State Bar of Nevada the amount of $1,500 *within 30 days* of this letter. I trust that this reprimand will serve as a reminder to you of your ethical obligations, and that no such problems will arise in the future.

In Re: CRYSTAL L. ELLER
Bar No.: 4978
Case No.: OBC19-1253
Filed: 04/06/2020

LETTER OF REPRIMAND

To Crystal L. Eller:

On March 24, 2020, a Screening Panel of the Southern Nevada Disciplinary Board considered the above-referenced grievance. Based on the evidence presented, the Panel concluded that you violated the Rules of Professional Conduct ("RPC") and should be issued a Letter of Reprimand. This letter shall constitute a delivery of that reprimand.

On or about September 12, 2019, you were retained by Adriana Cusinato (hereinafter "Ms. Cusinato") to assist her in obtaining excess proceeds from the foreclosure sale of her property. RPC 1.5 (Fees) states, in pertinent part, that a lawyer "shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses." Your contract would have entitled you to 16.5% ($12,328.44) of the excess proceeds recovered. Receiving $12,328.44 for, at most, two weeks of work constitutes an unreasonable fee. Under ABA Standard 7.3, reprimand is generally appropriate when a lawyer negligently 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. This type of ethical breach could have caused potential injury to Ms. Cusinato, the public, as well as the legal profession.

Rule 5.4 (Professional Independence of a Lawyer) states that unless one of five narrow exceptions are applicable, a lawyer or law firm "shall not share legal fees with a nonlawyer." Your contract states that "disbursements will be made to Attorney, Client, and Calex Enterprises, Inc in accordance with agreements between Client & Attorney and Client & Calex Enterprises, Inc." Since none of the exceptions apply, you cannot share legal fees with Calex Enterprises, Inc. (hereinafter "Calex") as they are non-lawyers. Under ABA Standard 7.3, reprimand is generally appropriate when a lawyer negligently 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. This type of ethical breach could have caused potential injury to Ms. Cusinato, the public, as well as the legal profession.

Rule 7.3 (Solicitation of Clients) states, in pertinent part, that a lawyer "shall not solicit professional employment from a 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." The term "solicitation" denotes a communication initiated by or on behalf of a lawyer or law firm that is directed to a specific person the lawyer knows or reasonable [sic] should know needs legal services in a particular matter and that offers to provide, or reasonably can be understood as offering to provide, legal services for that matter. You concede that you and Calex were in a business relationship wherein Calex researches and obtains the clients, and you do the legal work. Calex contacted Ms. Cusinato and sent her legal documents for her to sign, which included your "Attorney Engagement Agreement" and "Power of Attorney." Ms. Cusinato did not speak to you, or your associate, prior to signing those documents. Under ABA Standard 7.3, reprimand is generally appropriate when a lawyer negligently 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. This type of ethical breach could have caused potential injury to the public, as well as the legal profession.

RPC 8.4 (Misconduct), in pertinent part, states that it is professional misconduct for a lawyer to "violate or attempt to violate the RPC, knowingly assist or induce another to do so, or do so through the acts of another." By engaging in the aforementioned conduct, you violated several Rules of Professional Conduct. Under ABA Standard 7.3, reprimand is generally appropriate when a lawyer negligently 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. This type of ethical breach could have caused potential injury to Ms. Cusinato, the public, as well as the legal profession.

Accordingly, you are hereby REPRIMANDED for violating RPC 1.5 (Fees), RPC 5.4 (Professional Independence of a Lawyer), RPC 7.3 (Solicitation of Clients), and RPC 8.4 (Misconduct). In addition, pursuant to Supreme Court Rule 120(3), you are required to remit to the State Bar of Nevada the amount of $1,500 *within 30 days* of this Letter. I trust

that this reprimand will serve as a reminder to you of your ethical obligations, and that no such problems will arise in the future.

1. Pursuant to NRAP 34(f)(l), we have determined that oral argument is not warranted in these matters.
2. While the screening panel did not enter an order directing the matters be considered at a formal hearing until April 4, 2019, nothing in the SCRs requires a screening panel to enter an order, and generally screening panels do not enter orders. Thus, we conclude the grievances were referred to a formal hearing panel during Phillips' probation period.
3. To the extent the parties' additional arguments are not addressed herein, we conclude they do not warrant a different result.
4. The Honorable Abbi Silver voluntarily recused herself from participation in the decision of this matter.
5. The violations in the California NDC are equivalent to RPC 1.1 (competence), RPC 1.4 (communication); RPC 1.16 (declining or terminating representation), RPC 8.1 (disciplinary matters); RPC 8.4(c) (misconduct: misrepresentation); and RPC 3.4 (fairness to opposing party and counsel: knowingly disobeying obligation under rules of a tribunal) and/or RPC 8.4(d) (misconduct: prejudicial to the administration of justice).
6. We disagree with the State Bar that the California State Bar court's "willful'" finding is equivalent to an "intentional" mental state in Nevada, and instead conclude that Freedman's willful conduct is akin to a knowing mental state. *See* ABA Standards for Imposing Lawyer Sanctions at 452 (defining acting with knowledge as a "conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result," and the more culpable mental state of intent as acting with "conscious objective or purpose to accomplish a particular result").

PRO BONO *Honor Roll*

The State Bar of Nevada Board of Governors and the Nevada Supreme Court Access to Justice Commission extend a special thanks to attorneys who generously accepted cases or participate in an Ask-A-Lawyer through the Legal Aid Center of Southern Nevada, Nevada Legal Services, Southern Nevada Senior Law Program, Volunteer Attorneys for Rural Nevadans (VARN) or Washoe Legal Services. One case can change many lives – www.onepromisenevada.org.

Attorneys who accepted new pro bono cases:

Deborah Amens
Bradley Austin
Joice B. Bass
Alexis L. Brown
Jordan J. Butler
Sarah V. Carrasco
Jonathan Chung
Terry A. Coffing
Daniel E. Curriden
Robert P. Dickerson
Megan K. Dorsey
James L. Edwards
Christian J. Gabroy
Maria Gall
Kristen T. Gallagher
Marybeth Gardner
Vanessa S. Goulet
A. Jill Guingcangco
Rikki J. Hevrin
Michael T. Hua
Amanda L. Ireland
Rachel M. Jacobson
Laura L. Johns-Bolhouse
Zachary Jones
James P. Kemp
Linda Lam Lay
Benjamin J. Leavitt
James T. Leavitt
Brittany M. Llewellyn
Bryce C. Loveland
Lisa A. McClane
Emily M. McFarling
J. Scott MacDonald
Mikyla Miller
Angela T. Otto
Sean Patterson
Morgan T. Petrelli
Lisa A. Rasmussen
Michael Paul Rhodes
Jeremy R. Robins
Bradley S. Schrager
Atif Sheikh
Thomas Stafford
Daniel H. Stewart
Natalia Vander Laan
Edward E. Vargas
Dan R. Waite
John L. Waite, III
John White
Shannon R. Wilson

Attorneys who participated in Ask-A-Lawyer, Lawyer in the Library or other clinics:

Seth Adams
Alyssa Aklestad
Norman Allen
Michael G. Alonso
Elizabeth M. Bittner
Robert H. Broili
Marilyn Caston
Robert Cerceo
Michelle Darque-Kaplan
Kristine Davis
Lisa M. Frass
Marybeth Gardner
Marjorie Guymon
Nicole M. Harvey
Kendra J. Jepsen
Allison Joffee
Bronagh M. Kelly
David Krieger
Linda Lay
Bonnie Lonardo
Colton T. Loretz
Adam P. McMillen
Susan Maheu
Philip M. Mannelly
Shell Mercer
Mikyla Miller
Rebecca Miller
Carlos Morales
Jean Parraguiree
Aaron V. Richter
Jacob Reynolds
Yasnai Rodriguez-Zaman
Michael V. Roth
Kevin P. Ryan
John M. Samberg
Glenn Schepps
Gary Silverman
Tehan W. Slocum
James Smith
Cassie Stratford
Janet E. Traut
Natalia Vander Laan
Leah Wigren
Bruce Woodbury
Marilyn York

BOLD honors multiple cases accepted and/or sessions conducted within the month.

Be sure to follow the Nevada Supreme Court Access to Justice Commission on Facebook & Twitter @NevadaATJ to stay up to date!

TIP FROM THE BAR COUNSEL

Fee Considerations for Personal Injury Lawyers (and Any Contingent Fee Case)

Gordon Gekko, the antagonist in the 1987 film "Wall Street," was the quintessential capitalist, but he would have made a terrible lawyer. Considering the public's perception of lawyers, even a hint of greed can be devastating.

In Nevada, a lawyer must charge a reasonable fee. It is not enough for a lawyer to defend his fee with a contract. "The fact that a client agrees to a fee does not itself make a fee reasonable." American Bar Association (ABA), Annotated Model Rules of Professional Conduct, Rule 1.5 (9th ed. 2019).

Nevada Rule of Professional Conduct 1.5 follows the model rule. It states, "A lawyer shall not make an agreement for, charge, or collect an unreasonable fee ...." Note a lawyer cannot collect an unreasonable fee—even if a client agrees. See *In re Sinnott,* 845 A.2d 373 (Vt. 2004) ("lawyers, unlike some other service professionals, cannot charge unreasonable fees even if they are able to find clients who will pay whatever a lawyer's contract demands.") Courts scrutinize a personal injury lawyer's fee agreement through the lens of a fiduciary. They judge reasonableness objectively from the client's perspective. See *Anglo-Dutch Petro. Intl., Inc. v. Greenberg Peden, P.C.,* 267 S.W.3d 454, 471-72 (Tex. App. 14th Dist. 2008). Thus, a wise personal injury lawyer will have a fair contingency fee agreement.

Lawyers should consider the factors in Rule 1.5. Evaluate the time and labor required; the novelty and difficulty of the case; the fees other personal injury lawyers customarily charge in the area; and the lawyer's own experience, reputation and skill.

What is an acceptable contingency fee? It depends. Expect courts and the State Bar of Nevada to closely scrutinize contingent fees above 50 percent. A Texas court held that a 70 percent contingent fee was unconscionable. *Curtis v. Comm'n for Lawyer Discipline,* 20 S.W.3d 227, 233 (Tex. App. 14th Dist. 2000).

Even a 33 percent contingency fee can be unreasonable in some circumstances. In Indiana, a lawyer agreed to a 33 percent contingent fee with an elderly, hospitalized woman. The case was simpler than he expected. He easily recovered more than $450,000. He claimed more than $160,000 in fees. But the Supreme Court of Indiana stated:

> Respondent's acts in securing the inflated fee represent greedy overreaching. His proper course of action would have been to renegotiate his fee after it became apparent that collection of [the client]'s assets was a simple, uncontested matter. His failure to immediately do so indicates a conscious attempt to secure an excessive fee, which imparts added culpability to Respondent's acts.
>
> *In the Matter of Everett E. Powell,* 953 N.E.2d 1060 (Ind. 2011).

The best practice is to evaluate the amount of work, time and expertise that will be needed to represent the client zealously. Offer a fee structure that does not push the boundaries of reasonableness, and then explain the structure to the client. Accepting a lower percentage in cases of clear liability or greater damages will prove valuable in defending higher contingency fees for complex and uncertain cases.

Also, remember to memorialize contingency fee agreements in writing. Here are a few guidelines to consider in a contingency fee agreement:

1. The scope of representation: Always include when you will "earn" and withdraw your fee. This often presents a problem when a personal injury attorney withdraws a fee from the client's settlement before disbursing to the client or lienholders. Unless otherwise excluded, a personal injury case requires negotiating with lienholders and disbursing the settlement. A personal injury lawyer does not "earn," and should not withdraw, a fee until then.
2. Termination or withdrawal: Lawyers should discuss with the client the potential for, and impact of, a retaining or charging lien if the client terminates the lawyer without cause. Lawyers should also discuss with the client reasons for withdrawal. If a client is coming to you after terminating a previous lawyer, make sure to disclose how the previous lawyer's fee might affect the disbursement. Also, obtain a conflict-of-interest waiver to negotiate fee reductions with former counsel. See Rule 1.7.
3. Initial estimate for costs and expenses: This may be difficult to assess, but the best practice is to give the client an idea of the costs or expenses that may reduce his or her recovery. Avoid charging for overhead or flat charges for expenses. These are generally unreasonable.
4. The necessity of the client's cooperation: This is an important clause for any contingency fee matter, but avoid clauses that grant you settlement authority or force the client to settle. Both violate Rule 1.2. Poor client cooperation is a good reason for withdrawal. Describe the client's responsibilities with specificity in your fee agreement. The Office of Bar Counsel and disciplinary boards often dismiss complaints against good personal injury firms because they have a detailed account of the client's failures to communicate and cooperate. Detailed records also support a withdrawal motion and lien for fees.
5. Fee sharing: If you are associating with co-counsel, include that lawyer's share in the fee agreement. Also, disclose the division of each lawyer's responsibilities. The best practice is to get a separate signature for that clause or separate the clause in an individual document to obtain clear consent. See Rule 1.5(e).

Tony Robbins' idea of wealth generation is a better fit for lawyers than Gordon Gekko's theory. Robbins said, "The secret to wealth is simple: Find a way to do more for others than anyone else does. Become more valuable. Do more. Give more. Be more. Serve more."