In Re: DAVID L. MANN
Bar No.: 11194
Case No.: 86516
Filed: 2/09/2024

ORDER OF SUSPENSION

This is an automatic review of a Southern Nevada Disciplinary Board hearing panel's recommendation that attorney David L. Mann be suspended from the practice of law in Nevada for six months and one day. The recommended discipline is based on Mann's violation of RPC 1.3 (diligence) for his insufficient representation of a client.

Mann contends that the panel's findings regarding his lack of preparation and oversight for his client's cases are clearly erroneous as they directly contradict the record on appeal. We disagree. Our review of the hearing "panel's findings of fact is deferential, so long as they are not clearly erroneous and are supported by substantial evidence," but we review any conclusions of law de novo. *In re Discipline of Colin*, 135 Nev. 325, 330, 448 P.3d 556, 560 (2019) (internal citation omitted). In reviewing the hearing transcript, Mann's arguments are belied by the record. Specifically, the panel heard testimony from his paralegal that she primarily handled the complaining client's case without him. Furthermore, the panel heard testimony from the client that more than one hearing was continued due to Mann's lack of diligence which affected her custody and bankruptcy cases. Mann testified that he was not prepared to handle the custody hearing without his paralegal as he did not have all the prepared exhibits and pleadings. Therefore, the panel's findings of fact are supported by substantial evidence and are not clearly erroneous.

Turning to the appropriate discipline, we review the hearing panel's 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 or mitigating factors." *In re Discipline of Lerner*, 124 Nev. 1232, 1246, 197 P.3d 1067, 1077 (2008).

The record supports that Mann knowingly violated duties owed to his client (diligence). His client was injured because she was forced to retain new counsel after multiple continuances due to Mann's lack of diligence negatively affected the client's child custody and bankruptcy proceedings. The baseline sanction for Mann's misconduct, before consideration of 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) (recommending suspension "when a lawyer knowingly fails to perform services for a client and causes injury or potential injury to a client").

The hearing panel found, and the record supports, six aggravating circumstances under SCR 102.5(1): (1) prior discipline, (2) pattern of misconduct, (3) multiple offenses, (4) refusal to acknowledge the wrongful nature of the conduct, (5) the vulnerability of the victim, and (6) substantial experience in the practice of law. The panel also found, and the record supports, two mitigating circumstances under SCR 102.5(2): (1) personal or emotional problems, and (2) physical disability.

Considering all these factors, we conclude that the recommended six-month-and-one-day suspension is appropriate and serves the purposes of attorney discipline to protect the public, the courts, and the legal profession, not to punish the attorney. *In re Discipline of Arabia*, 137 Nev., Adv. Op. 59, 495 P.3d 1103, 1109 (2021). In particular, the circumstances surrounding the violation, including the apparent unauthorized practice of law by Mann's paralegal, the numerous aggravating factors, including Mann's prior discipline history and blatant lack of remorse, coupled with Mann's current administrative suspension for noncompliance with CLE requirements and misleading testimony that he operates a "pro bono" firm despite his paralegal accepting thousands of dollars in legal fees, support a six-month-and-one-day suspension.

Accordingly, we hereby suspend attorney David L. Mann from the practice of law in Nevada for six months and one day commencing from the date of this order.[1] Mann shall also pay the costs of the disciplinary proceedings, including fees in the amount of $2,500, see SCR 120(1), as invoiced by the State Bar 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: MARIA MICHELLE ANNE GARCIA NISCE
Bar No.: 13552
Case No.: 87868
Filed: 01/29/2024

ORDER TRANSFERRING ATTORNEY TO DISABILITY INACTIVE

The State Bar and attorney Maria Michelle Anne Garcia Nisce have filed a joint petition asking this court to transfer Nisce to disability inactive status because Nisce currently is incapable of continuing the practice of law or defending against pending disciplinary proceedings due to a mental infirmity. Having reviewed the petition and supporting documentation, we conclude that Nisce is incapacitated for the purpose of practicing law or defending against pending disciplinary proceedings.

Accordingly, we transfer attorney Maria Michelle Anne Garcia Nisce to disability inactive status commencing from the date of this order. *See* SCR 117(2). Any pending disciplinary proceedings or investigations against Nisce are suspended. Nisce must comply with SCR 117(4) in seeking reinstatement and may resume the active practice of law only upon reinstatement by order of this court. The parties shall comply with SCR 115 and SCR 121.1. *See* SCR 117(7).

It is so ORDERED.

In Re: DOUGLAS K. FERMOILE
Bar No.: 662
Case No.: SBN23-00025 & SBN23-00656
Filed: 02/08/2024

REPRIMAND

To Douglas K. Fermoile:

This Public Reprimand reflects your failure to adequately communicate with two separate clients, Atlantic-Pacific

Agricultural Co., Inc. ("Atlantic-Pacific") and Silver State Elevator, for whom you served as registered agent.

You served as counsel and registered agent for Atlantic-Pacific, a Nevada corporation, for several years. Between January 2022 and January 2023, the president of Atlantic-Pacific attempted to contact you by phone, fax, email and mail between January 2022 and January 2023 and did not receive any response. The president was attempting to request delivery of Atlantic-Pacific corporate documents that were in your possession.

In addition to the President's direct efforts, General Counsel for Atlantic-Pacific sent you a letter on November 7, 2022, requesting items from Atlantic-Pacific's file. Although you represent that you spoke with the General Counsel on the phone and sent an invoice for the shipping costs of the requested documents, the General Counsel has no record of a response to his request.

You did not follow up with the President or the General Counsel regarding the requested documents and your request for advance payment of shipping and handling costs.

In January 2023, Atlantic-Pacific's president informed the State Bar of Respondent's lack of response. As a result, the State Bar sent you a letter of investigation requesting an explanation of your failure to communicate with them. In March 2023, you provided the "shipping costs" invoice to the State Bar as part of your response to the grievance. The State Bar forwarded the invoice to the General Counsel on or about March 24, 2023. Six days later, he sent the requested $100 to you.

You deposited the check on April 18, 2023. Despite knowing since January 25, 2023, that your client still wanted the documents forwarded and depositing the requested payment in April, 2023, you did not mail the requested documents until May 21, 2023. The General Counsel received the documents on May 25, 2023.

You also served as Silver State Elevator's Resident Agent since at least 2019. In October 2022, Silver State Elevator sent you a $750 check for the filing of Silver State's annual documents and asked to revise the company's list of officers and arrange for some company shares to be gifted to others before the annual documents were filed.

On or about October 20, 2022, you met with Ernest Rosaia, President of Silver State Elevator, in your office and discussed the requested additional tasks. Rosaia believed that the additional tasks could not be accomplished before the filing deadline of October 31, 2022, and therefore, the annual documents would be filed with the historical information. You believed that Rosaia wanted to wait to file the annual documents until he had decided how to amend the list of officers and distribute company shares. You did not file the annual documents before the October 31, 2022 deadline. You also did not confirm that Rosaia wanted to wait to file or follow-up with Rosaia for the additional information.

Starting in November 2022, Rosaia left you several phone messages and emailed you requesting information about the filing he assumed had been completed. But Rosaia received no response.

Rosaia discovered that the annual filings had not been done and then found another commercial registered agent who filed Silver State Elevator's annual list and paid the filing and late fees on Silver State Elevator's behalf.

Violations of the Rules of Professional Conduct

RPC 1.4 (Communication) provides that lawyers have a duty to (i) "reasonably consult with the client about the means by which the client's objectives are to be accomplished;" (ii)" keep the client reasonably informed about the status of the matter;" and (iii)" promptly comply with reasonable requests for information.

You negligently violated RPC 1.4 when you failed to follow-up with these clients regarding achieving their objectives and/or promptly respond to the client's attempts to communicate. Your clients were minimally injured and could have been greatly injured by Respondent's violation of RPC 1.4.

Application of the ABA Standards for Imposing Lawyer Sanctions

ABA Standard 4.43 provides "[r]eprimand is generally appropriate when a lawyer is negligent and does not act with reasonable diligence in representing a client and causes injury or potential injury to a client." ABA Standard 4.44 provides "[a]dmonition is generally appropriate when a lawyer is negligent and does not act with reasonable diligence in representing a client and causes little or no actual or potential injury to a client."

Although Standard 4.44 might best apply to the foregoing facts, the aggravating factors of your (i) prior discipline for a similar violation of RPC 1.4 (Communication) and (ii) substantial experience in the practice of law, the sanction of a Reprimand is appropriate.

Reprimand

In light of the foregoing, you violated Rule of Professional Conduct ("RPC") 1.4 (Communication) and are hereby REPRIMANDED. Please promptly conclude this matter by remitting the cost of $1,500 within 30 days of the issuance of this sanction. SCR 120(3).

Case No.: SBN23-00700
Filed: 01/04/2024

ADMONITION

To [Attorney]:

The State Bar received an overdraft notice regarding your client trust account. The State [Bar] sent you a letter inquiring about the overdraft. You did not respond. The State Bar also called you at your office twice. It left messages. You did not respond.

The State Bar audited your account to verify compliance with the recordkeeping requirements of Supreme Court Rule 78.5(1)(b) and RPC 1.15 (Safekeeping). The State Bar discovered that a bank error caused the overdraft. Your clients' funds were safe.

However, you did not respond to the State Bar's investigation.

NRPC 8.1 (Bar Admission and Disciplinary Matters) states in pertinent part: "… a lawyer … in connection with a disciplinary matter, shall not … knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority."

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You did not respond to multiple demands for information from bar counsel. The baseline sanction for your conduct is admonition. ABA Standards for Imposing Lawyer Sanctions (2nd Ed. 2019), Standard 7.4 states: "Admonition is generally appropriate when a lawyer engages in an isolated instance of negligence in determining whether the lawyer's conduct violates a duty owed as a professional and causes little or no actual or potential injury to a client, the public or the legal system."

A Southern Nevada Disciplinary Board Screening Panel convened on December 12, 2023 to consider the above-referenced grievance against you. The Panel concluded that you violated the Nevada Rules of Professional Conduct ("NRPC") and admonished you for your failure to respond to the State Bar's lawful demand for information.

Based on the foregoing, you are hereby ADMONISHED for violating NRPC 8.1. Please promptly conclude this matter by remitting the cost of $750 within 30 days of the issuance of this sanction. SCR 120(3).

Please allow this Admonition to serve as a thoughtful reminder of your professional ethical obligations. We wish you well in your practice and trust that no similar problems will arise in the future.

Case No.: SBN23-00611
Filed: 01/24/2024

ADMONITION

To [Attorney]:

A Southern Nevada Disciplinary Board Screening Panel convened on January 16, 2024, to consider the above-referenced grievance against you. The Panel concluded that you violated the Nevada Rules of Professional Conduct ("NRPC") and reprimanded you for your failure to supervise an attorney in your firm. This letter constitutes delivery of the Panel's admonition.

You are a managing attorney of your law firm. Your firm does not practice in Bankruptcy Court. An associate attorney in your firm handled a matter in bankruptcy court and was not competent. The Bankruptcy Court issued an order indicating, "[Attorney] is bound by ethical rules that among other responsibilities require competency. Without making a finding of a specific ethical violation, this court believes that [Attorney] overestimated his competency in bankruptcy law. While reprehensible, [Attorney's] actions do not rise to the type of reprehensible behavior that would support the amount Debtor requests in punitive damages."

The Bankruptcy Court made additional findings as to the firm's conduct indicating, "[I]t, too, has ethical obligations to which it must adhere, including an obligation to supervise the attorneys in its employ. Without making a finding of a specific ethical violation, this Court believes that the Firm's supervision of [Attorney] was lacking. But such failures, while unfortunate, are not so reprehensible to support Debtor's full request for punitive damages."

Here, you did not make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurances that all lawyers in the firm conform to the Rules of Professional Conduct.

NRPC 5.1 (Responsibilities of Partners, Managers, and Supervisory Lawyers) states in pertinent part:

a) A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.

b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:

   1) The lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

   2) The lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

The baseline sanction for your conduct here is admonition. ABA Standards for Imposing Lawyer Sanctions (2nd Ed. 2019), Standard 7.4 states: "Admonition is generally appropriate when a lawyer engages in an isolated instance of negligence in determining whether the lawyer's conduct violates a duty owed as a professional and causes little or no actual or potential injury to a client, the public or the legal system."

Based on the foregoing, you are hereby ADMONISHED for a violation of NRPC 5.1. Please promptly conclude this matter by remitting the cost of $750 within 30 days of the issuance of this sanction. SCR 120(3).

Please allow this Admonition to serve as a thoughtful reminder of your professional ethical obligations. We wish you well in your practice and trust that no similar problems will arise in the future.

ENDNOTE:

1. To the extent Mann's additional arguments are not addressed herein, including that the panel did not properly account for mitigating circumstances, we conclude they do not warrant a different outcome.

TIP FROM THE BAR COUNSEL

Ethical Duties of an Attorney

An attorney has a duty to negotiate for the client to the best of their ability. This duty to negotiate isn't limited to the opposing party or the opposing party's insurer. A lawyer must also negotiate with the client's own medical providers. *In re Discipline of Laub*, No. 86322 at 31-32 (Jan. 9, 2002).

When there are insufficient funds to satisfy everybody with their hands out, the attorney must negotiate with lienholders. The client may need to take less. And the attorney will often agree to a smaller fee.

On the other hand, the Office of Bar Counsel has received recent complaints from lienholders that attorneys are withholding disbursement as leverage—sometimes for years. This violates our Rules of Professional Conduct.

Your Obligations When You Receive a Settlement

When an attorney receives property, usually money, in connection with a representation and others have an interest in the funds, the attorney must of course place the funds into a client trust account.

Under RPC 1.15 (Safekeeping Property) if a third party—a lienholder for example—has an "interest" in the funds, the attorney has three ethical obligations:

(1) To promptly notify the client and the lienholder when the attorney receives the funds;

(2) To "promptly deliver" to the client and the third party any funds that the client or third person is entitled to receive, and

(3) Upon request by the client or third person, to promptly render a full accounting regarding the funds.

This is an exception in which the lawyer has ethical duties to someone other than the client. You must promptly disburse settlements not just to yourself and the client, but also to lienholders. You may not withhold a surplus settlement from lienholders to negotiate a larger portion for the client. Negotiate before you settle.

What if the client instructs you not to disburse to a lienholder?

Disburse anyway. An attorney must promptly disburse a surplus settlement even if the client has instructed the lawyer to the contrary!

In *Achrem v. Expressway Plaza Limited*, 112 Nev. 737, 917 P.2d 447 (1996), a personal injury plaintiff's attorney disbursed settlement proceeds to the client despite the attorney's knowledge of a lienholder. The lienholder sued the attorney personally for the lien amount. The attorney claimed a fiduciary duty to obey the client's express instructions not to pay the lien. The Nevada Supreme Court held that the attorney was not to disburse the assigned funds to the client, because, under the law of assignments, the client had no "interest" in the assigned funds. The funds no longer belonged to the client. Instead, the lienholder owned the assigned funds, and the attorney had an ethical and legal duty to disburse the funds to the lienholder in the amount of the lien. The Supreme Court's holding harmonizes with RPC 1.15. An attorney must promptly disburse settlement funds not just to the client but also to lienholders.

Is there a time when I should withhold disbursement?

Yes. If lien amounts exceed the settlement amount, and the lienholders and attorney refuse to reduce their liens, then RPC 1.15 prohibits the attorney from distributing any funds until they resolve the dispute.

It makes explicit—an attorney is in line with everyone else. The Nevada Supreme Court reiterated this fact in *Michel v. Eighth Judicial Dist. Court of State*, 117 Nev. 145, 153, 17 P.3d 1003, 1008 (2001).

In *Michel*, a plaintiff's attorney deducted his fees from a settlement and filed an interpleader action naming his client and lienholders as defendants. The attorney then asked the court to discharge him from the action. The district court refused discharge. The attorney then sought an extraordinary writ, and the Supreme Court of Nevada agreed. It held that even when an attorney has a perfected lien, the attorney must tender the entire amount to the court so that it may determine the respective rights of all interested parties. Note that attorneys no longer need to tender the amount to the court but should retain it in their client trust account.

Put another way, if the settlement is in deficit, then the entire settlement is in "dispute." And the attorney must keep the entire settlement in their client trust account until they resolve the dispute.

How long do I hold disputed funds?

Often plaintiff attorneys give up on negotiations, withdraw their fees and costs in violation of the rules, and move onto other projects. After withdrawing their fees and costs, they are less concerned about resolving the dispute. Recent lienholders have complained that plaintiff's attorneys withheld distribution for years.

Frustrated lienholders find the costs of litigating against the attorney prohibitive. They give up and write off the lien or accept a substantial discount. By withdrawing purported fees and costs, the attorney violates RPC 1.15(e). And if the attorney uses the delay as an extortionate debt collection tactic, then it could aggravate their misconduct to a higher sanction.

Attorneys cannot withhold settlement funds in their client trust accounts indefinitely. When negotiations reach an impasse, *Achrem* provides guidance for the lawyer who is tired of arguing with the lienholders. The court in *Achrem* held that when a conflict exists between the parties, the attorney should request "a court to direct" distribution in an interpleader action pursuant to NRCP 22.

Bottom Line

Promptly disburse surplus settlements. Do not withhold surplus settlements to negotiate. Withhold settlements in deficit. But do not withdraw your fees or costs. Negotiate reductions until you reach an impasse, then file an interpleader. A threat of an interpleader – including the cost and delay – can prompt the lienholders to find reason and agree to a resolution.