

# Bar Counsel Report

**In Re: WESLEY S. WHITE**  
**Bar No.: 9715**  
**Case No.: 83448**  
**Filed: 10/06/2021**

## ORDER IMPOSING RECIPROCAL DISCIPLINE AND SUSPENDING ATTORNEY

*This is a petition under SCR 114 to reciprocally discipline attorney Wesley S. White based on his two-year suspension from the practice of law in North Carolina for one violation of RPC 1.3 (diligence), five violations of RPC 1.4 (communication), one violation of RPC 3.2 (expediting litigation), one violation of RPC 3.4 (fairness to opposing party and counsel), and two violations of RPC 8.4 (misconduct). Pursuant to a discipline-by-consent agreement, White admitted to violating these rules by improperly appealing a moot issue; failing to adequately respond to discovery requests multiple times, which resulted in his client's answer being stricken, a default being imposed, and an award of attorney fees to the opposing party; and failing to inform the client about the risks the client faced at a contempt hearing, which resulted in the client being sentenced to 30 days in jail for contempt. The discipline-by-consent order requires White to serve a three-month actual suspension before he may apply for a stay of the remaining suspension as long as he has met certain conditions, including winding down his practice, communicating with the North Carolina State Bar, and obtaining a mentor. White has not responded to the SCR 114 petition.*

Under SCR 114(4), this court must impose identical reciprocal discipline unless the attorney demonstrates or this court determines that (1) the other jurisdiction failed to provide adequate notice, (2) the other jurisdiction imposed discipline despite a lack of proof of misconduct, (3) the established misconduct warrants substantially different discipline in this jurisdiction, or (4) the established misconduct does not constitute misconduct under Nevada's professional conduct rules. None of these exceptions apply here, and "[i]n all other respects, a final adjudication in another jurisdiction that an attorney has engaged in misconduct conclusively establishes the misconduct for the purposes of a disciplinary proceeding in this state." SCR 114(5).

Accordingly, we grant the petition for reciprocal discipline and hereby suspend Wesley S. White from the practice of law in Nevada for two years starting from the date of this order. If White's North Carolina suspension is stayed during that period, White may notify the Nevada State Bar of the stay, and the suspension from the practice of law in Nevada will then be stayed after White has completed a three-month actual suspension in Nevada, but any stay will be subject to the conditions set forth in the North Carolina order.<sup>1</sup>

It is so ORDERED.

**In Re: DOUGLAS J. GARDNER**  
**Bar No.: 4609**  
**Case No.: 83062**  
**FILED: 09/24/2021**

## ORDER OF SUSPENSION

*This is an automatic review of a Southern Nevada Disciplinary Board hearing panel's recommendation that attorney Douglas J. Gardner be suspended from the practice of law in Nevada for 18 months, based on violations of RPC 1.3 (diligence), RPC 1.4 (communication), and RPC 1.16(d) (terminating representation), to run consecutively with a 21-month suspension in Docket No. 77063, based on breach of probation conditions. Because no briefs have been filed, this matter stands submitted for decision based on the record. SCR 105(3)(b).*

This matter concerns two grievances. The first was a client grievance concerning Gardner's representation in an estate matter. The State Bar initiated the second one in regard to Gardner's noncompliance with the discipline order from *In re Discipline of Gardner*, Docket No. 77063 (Order Approving Conditional Guilty Plea Agreement, Nov. 9, 2018), in which we suspended Gardner for 24 months, with 21 of those months stayed subject to certain probation conditions.

The State Bar has the burden of showing by clear and convincing evidence that Gardner 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 complaints are deemed admitted because Gardner failed to answer the complaints and a default was entered.<sup>2</sup> SCR 105(2). The record therefore establishes that Gardner violated the above-referenced rules by failing to communicate with the client about the status of her case and failing to terminate representation and return the client's file after allowing the case to linger for over six years without activity, resulting in the client failing to meet her obligations as personal representative and having to obtain new counsel to close the estate. The record further establishes that, by not providing the State Bar with: (1) proof that he paid the roughly \$22,000 in restitution ordered; (2) complete quarterly reports on his trust account activity; and (3) proof of additional CLE attendance, Gardner failed to fully comply with the conditions of the stayed portion of the suspension in Docket No. 77063.

Turning to the 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).

Gardner knowingly violated duties owed to his client of communication and diligence. The client suffered actual

injury as her estate matter lingered unreconciled for years, Gardner refused to return her file, and she had to obtain new counsel to close the estate and comply with court directives. Also, Gardner has not satisfied his restitution obligations for his earlier misconduct. The baseline sanction for his misconduct, 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 ... to a client").

The record supports the hearing panel's findings of five mitigating circumstances (absence of dishonest or selfish motive, personal or emotional problems, cooperative attitude, physical disability, and remorse) and four aggravating circumstances (prior discipline, multiple offenses, vulnerable victim, and substantial experience in the practice of law). Having considered the four *Lerner* factors, we agree with the panel that suspension is appropriate for Gardner's RPC violations and that the stayed portion of his suspension from his earlier disciplinary matter should be imposed based on his breach of probationary terms.

Accordingly, as to the misconduct related to his estate matter client, we hereby suspend Douglas J. Gardner from the practice of law in Nevada for 18 months. This suspension shall run consecutively to the remaining 21-month suspension we impose as a result of Gardner's failure to comply with the probation conditions in Docket No. 77063. The 21-month suspension from Docket No. 77063 shall commence from the date of this order. Gardner shall also pay \$2,000 in restitution to Njemile Sauda as outlined in the hearing panel's recommendation. Further, Gardner shall pay the costs of the disciplinary proceedings, including \$2,500 under SCR 120, within 30 days of the date of this order.

It is so ORDERED.

**In Re: KEVIN D. HOLTMAN**  
**Bar No.: 11603**  
**Case No.: 82993**  
**Filed: 09/24/2021**

## ORDER OF SUSPENSION

*This is an automatic review of a Southern Nevada Disciplinary Board hearing panel's recommendation that attorney Kevin D. Holtman be suspended from the practice of law for three years based on violations of RPC 1.3 (diligence), RPC 1.4 (communication), and RPC 8.1 (bar disciplinary matters). 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 Holtman committed the violations charged. See *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 Holtman failed to answer the complaint and a default was entered. SCR 105(2). The record therefore establishes that Holtman violated the above-referenced rules by failing to file a personal injury suit on behalf of his client despite telling the client he had filed it and that the case was close to settlement.<sup>3</sup> He also stopped communicating with the client for a number of years and did not respond to the State Bar's letters or complaint regarding the client's grievance.

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).

The above actions violated the duties Holtman owed to his client, the legal system, and the profession. His mental state was intentional, and his actions caused actual injury to his client and the profession, with the potential for further injury. Holtman's client lost the ability to pursue her personal injury claims and had to pay for some of her medical treatment out of pocket. And the profession is harmed whenever an attorney refuses to participate in the disciplinary process. The baseline sanction for Holtman's misconduct, before considering aggravating and mitigating circumstances, is suspension. See Standards for Imposing Lawyer Sanctions, *Compendium of Professional Responsibility Rules and Standards*, Standards 4.42(a) & 7.2 (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" and when "a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional and causes injury or potential injury to a client, the public, or the legal system"). The panel found, and the record supports, two aggravating circumstances (multiple offenses and a vulnerable victim) and one mitigating circumstance (absence of a prior disciplinary record). Considering all the factors, we conclude the recommended 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).

Accordingly, we hereby suspend attorney Kevin D. Holtman from the practice of law in Nevada for a period of three years commencing from the date of this order. Holtman shall also pay the costs of the disciplinary proceedings, including \$2,500 under SCR 120, within 30

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days from the date of this order. The parties shall comply with SCR 115 and SCR 121.1.

It is so ORDERED.

## RESIGNATIONS (VOLUNTARY, NO DISCIPLINE PENDING)

SCR 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:

JOHN W. AEBI, Bar No. 2110, Order No. 83470, Filed 10/05/2021

### ENDNOTES:

1. The North Carolina order requires White to meet monthly with a mentor; ensure the mentor submits quarterly reports to the North Carolina State Bar; provide complete responses to all requested documentation from the North Carolina Bar; remain current in payment of bar dues, fees, and costs; not violate any rule of professional conduct during the stay; and remain current on his Continuing Legal Education requirements.
2. Gardner appeared at the initial case conference to discuss discovery and other procedural or administrative issues and offered mitigation evidence at the disciplinary hearing.
3. The statute of limitations for that claim has since expired.



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## Ethical Issues in Tax Law

**Attorneys who practice tax law must comply with both state and federal rules of ethics. Different ethical rules can create practical concerns. This month's tip from bar counsel provides some advice.**

### Conflicts of Interest

Conflicts of interest create ethical dilemmas for all attorneys. Tax attorneys are no exception.

Nevada Rule of Professional Conduct (RPC) 1.7 sets out the general conflict-of-interest principles. Subsection (a) of RPC 1.7 provides that a lawyer cannot represent a client if there is a concurrent conflict.

Subsection (b), allows written, informed consent from both clients unless the attorney cannot provide competent and diligent legal representation, or the clients are directly adverse.

The American Institute of Certified Public Accountants (AICPA) Code of Professional Conduct § 1.100 and § 1.110 also contains conflict-of-interest rules. The AICPA standard for conflicts of interest somewhat mirrors RPC 1.7, but it also provides a “formula” with qualitative and quantitative factors to evaluate the severity of a conflict of interest. *See id.* § 1.110.010. It also gives additional detail about threats and mitigating safeguards. The AICPA Code provides a greater guide to evaluate conflicts of interest. RPC 1.7 provides a general, broadly construed rule.

Circular 230 contains the most stringent conflict-of-interest rules. It requires a tax attorney to confirm written, informed consent no later than 30 days after discovering a conflict. *Id.* § 10.29. Neither RPC 1.7 nor the AICPA Code give a time limit a conflict waiver. Also, Circular 230 requires that tax attorneys retain copies of the written consents for at least 36 months after the conclusion of a representation. Circular 230 § 10.29(c). Neither RPC 1.7 nor the AICPA Code provide a specific retention period for waivers.

One example of a common potential conflict is a trust fund recovery penalty investigation. Tax attorneys know that a trust fund recovery penalty may be assessed against the directors or officers of a business entity that fail to pay trust fund taxes (Social Security and Medicare) on behalf of its employees. Directors and officers may dispute who are ultimately the “responsible persons” creating a conflict of interest.

Another example is when one partner, director, or officer of a business discloses that he or she willingly failed to deposit employment taxes. This fact might absolve the other partners of liability, but disclosure could breach confidentiality. It presents a clear conflict of interest.

### Contingent Fees

Take caution when charging contingent fees in a tax matter. While RPC 1.5 only prohibits “unreasonable fees” in tax matters—not necessarily contingent fees, both Circular 230 and the AICPA Code prohibit contingent fees.

Circular 230 § 10.27 prohibits “unconscionable fees” and contingent fees with some exceptions. Circular 230 § 10.27(b).

The AICPA Code expressly prohibits contingent fees for the “prepar[ation of] an original or amended tax return or claim for a tax refund for a contingent fee for any client.” AICPA Code § 1.500.001.01(b).

### Amended Returns

Circular 230 § 10.21 requires a tax attorney to advise his or her client of the consequences of noncompliance, error, or omission in a tax return.

This rule does not require the attorney to file an amended return to correct the error. *Badaracco v. Commissioner*, 464 U.S. 386, 393 (1984) (stating that tax law does not require filing of an amended return). But the tax attorney must explain the consequences of failing to correct the error or omission, such as the exposure to penalties, criminal action, its effect on future filing obligations, possibility of an audit, or effect on duties to third parties such as stockholders or partners.

If the tax attorney committed the error, then he or she creates a potential conflict of interest. The attorney should disclose the conflict to the client and advise that the client to seek independent advice about correcting the return or obtain written, informed consent.

Of course, the attorney cannot “force” the taxpayer to correct the error or omission, but you may want to consider whether continuing the representation, given the client’s decision to keep the error or omission, is in your best interest.

Use common sense but strive to make ethical decisions. Tax attorneys should consider each regulatory standard to act ethically, lawfully, and ultimately in the best interests of the public and his or her client.