

Bar Counsel Report

In Re: ANDREW WASIELEWSKI
Bar No.: 6161
Case No.: 86528
Filed: 10/19/2023

ORDER OF SUSPENSION

This is an automatic review of a Southern Nevada Disciplinary Board hearing panel's recommendation that attorney Andrew Wasielewski be suspended from the practice of law in Nevada for five years and one day. The recommended discipline is based on Wasielewski's violations of RPC 1.1 (competence), RPC 1.15 (safekeeping property), RPC 4.1 (truthfulness in statements to others), and RPC 8.4(b) and (c) (misconduct) after pleading no contest to and being convicted of reduced misdemeanor offenses for theft and disorderly conduct based on misappropriating client money.¹

As an initial matter, Wasielewski contends that utilizing his no contest convictions to impose discipline violates his due process rights and does not satisfy the clear and convincing standard to prove he committed the ethical violations. See *In re Discipline of Drakulich*, 111 Nev. 1556, 1566, 908 P.2d 709, 715 (1995) (explaining that the State Bar has the burden of showing clear and convincing evidence that an attorney committed the violations charged). We disagree.

"A certified copy of proof of a conviction is conclusive evidence of the commission of the crime stated in it in any disciplinary proceeding instituted against an attorney based on the conviction." SCR 111(5). In general, there is no distinction between convictions entered upon a plea of guilty, plea of no contest, or plea of not guilty for purposes of determining certain criminal penalties. See *Jones v. State*, 105 Nev. 124, 128, 771 P.2d 154, 156 (1989). And SCR 111 makes no distinctions, treating all as convictions. See SCR 111(1). In the SCR 111 attorney discipline context, we have an obligation to look beyond the label given to an attorney's conviction "to the true nature of the facts, in order to determine whether the underlying circumstances of the conviction warrant discipline." *State Bar of Nev. v. Claiborne*, 104 Nev. 115, 211, 756 P.2d 464, 526 (1988).

Here, the record reflects Wasielewski received fair notice of the charges against him, an opportunity to defend himself, and the chance to challenge the use of his no-contest plea. SCR 111(5) is consistent with due process as it reflects the principle of finality and respects the outcome of criminal court proceedings. In the disciplinary proceedings, the panel considered a certified copy of proof of Wasielewski's misdemeanor convictions and evidence that the convictions resulted from Wasielewski charging \$56,850 on a client's credit card over eight months despite providing no legal services to the client and being removed as counsel by the court, and Wasielewski transferring approximately \$17,050 from another client's trust account to his bank account. See SCR 105(3)(b) (explaining that this court applies a deferential standard of review to a hearing panel's findings of fact). The panel also heard testimony from Wasielewski that he transferred disputed attorney fees to his general account,

notwithstanding his client's objections. Such evidence amounts to conclusive proof to support that the underlying circumstances of the convictions warrant discipline for violating RPC 1.1 (competence), RPC 1.15 (safekeeping property), RPC 4.1 (truthfulness in statements to others), and RPC 8.4(b) and (c) (misconduct).

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 Wasielewski intentionally violated duties owed to his clients (competence, safekeeping property, and truthfulness in statements to others) and the profession (misconduct). His clients were injured as Wasielewski misappropriated approximately \$75,000 of his clients' money. The baseline sanction for Wasielewski'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 4.11 (Am. Bar Ass'n 2017) (recommending disbarment "when a lawyer knowingly converts client property and causes injury or potential injury to a client").

The hearing panel found, and the record supports the following 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 the following three mitigating circumstances under SCR 102.5(2): (1) timely good faith effort to make restitution, (2) full and free disclosure, and (3) imposition of other penalties and sanctions. Specifically, Wasielewski paid restitution in the amount of \$20,000 for the first offense and \$17,050 for the second offense, reported his convictions to the State Bar, and received criminal sanctions for his misconduct. The record further demonstrates Wasielewski may have been owed some of the funds taken as attorney fees as evidenced by the testimony of one of the client's granddaughters.

Considering all these factors, we agree with the panel that a downward deviation from the baseline sanction of disbarment is warranted. We further agree that a suspension of five years and one day is sufficient to serve the purpose of attorney discipline. See *Claiborne*, 104 Nev. at 213, 756 P.2d at 527-28 (noting purpose of attorney discipline is to protect public, the courts, and the legal profession).

Accordingly, we hereby suspend attorney Andrew Wasielewski from the practice of law in Nevada for five years and one day commencing from the date of Wasielewski's temporary suspension, October 22, 2022.² See *In re Discipline of Wasielewski*, Docket Nos. 85435 and 85436, 2022 WL 16595919 (Nev. Oct. 31, 2022). Wasielewski 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: KERRY P. FAUGHNAN
Bar No.: 12204
Case No.: 87052
Filed: 10/13/2023

ORDER OF SUSPENSION

This is an automatic review of a Southern Nevada Disciplinary Board hearing panel's recommendation that attorney Kerry P. Faughnan be suspended from the practice of law in Nevada for three years, with all but six months stayed. The recommended discipline is based on Faughnan's violation of RPC 8.4 (misconduct). Because no briefs have been filed, this matter stands submitted for decision based on the record. SCR 105(3)(b).

The State Bar has the burden of showing by clear and convincing evidence that Faughnan committed the violation 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 that Faughnan violated RPC 8.4 as those findings are supported by substantial evidence and are not erroneous. See SCR 105(3)(b); *Sowers v. Forest Hills Subdivision*, 129 Nev. 99, 105, 294 P.3d 427, 432 (2013). In particular, the record shows that Faughnan pleaded guilty to conspiracy to commit theft, a gross misdemeanor, after obtaining unemployment compensation benefits that he was not entitled to receive. He has paid restitution in the amount of \$37,790.

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).

Faughnan intentionally violated a duty owed to the profession and the public (misconduct). The public was injured by Faughnan's misconduct through his misappropriation of government money for unemployment compensation benefits. The baseline sanction before consideration of aggravating and mitigating circumstances is disbarment. See Standards for Imposing Lawyer Sanctions, *Compendium of Professional Responsibility Rules and Standards*, Standard 5.11 (a) (Am. Bar Ass'n 2017) ("Disbarment is generally appropriate when ... a lawyer engages in serious criminal conduct, a necessary element of which includes ... theft ... or conspiracy ... to commit any of these offenses.").

The hearing panel found, and the record supports the following aggravating circumstances under SCR 102.5(1): (1) dishonest or selfish motive, (2) pattern of misconduct, (3) substantial experience in the practice of law, and (4) illegal conduct. The panel also found, and the record supports four mitigating circumstances under SCR 102.5(2): (1) absence of prior disciplinary record, (2) personal or emotional problems in that Faughnan suffered from clinical depression and substance abuse issues while undergoing contentious divorce proceedings, (3) timely good faith effort to make restitution or to rectify consequences of misconduct, (4) full and free

disclosure to disciplinary authority or cooperative attitude toward proceeding, (5) interim rehabilitation, and (6) remorse.

Considering all four factors, we agree with the hearing panel that a downward deviation from the baseline sanction of disbarment is warranted. We further agree that the recommended partially stayed 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) (noting purpose of attorney discipline is to protect the public, the courts, and the legal profession). Additionally, we agree that the recommended conditions of probation are appropriate.

Accordingly, we hereby suspend attorney Kerry P. Faughnan from the practice of law in Nevada for three years, with all but six months stayed, retroactive to February 16, 2023, pursuant to this court's prior suspension order. *In re Discipline of Faughnan*, No. 85940, 2023 WL 3179684 (Nev. Feb. 16, 2023) (Order Imposing Temporary Suspension and Referring Attorney to Disciplinary Board). After the six-month actual suspension, Faughnan will be on probation and monitored by the State Bar for the remaining 30 months subject to the following conditions: (1) Faughnan must find a mentor that is approved by the State Bar to mentor him during the 30-month period; (2) his mentor must submit quarterly reports to the State Bar regarding Faughnan's progress; (3) Faughnan must continue receiving therapy from Debora Tretiak, M.S., or another therapist approved by the State Bar; (4) Tretiak, or an approved therapist, must submit quarterly reports to the State Bar regarding Faughnan's progress; (5) Faughnan must submit to random alcohol and drug testing; and (6) Faughnan must not open a solo practice during the three-year suspension period. Additionally, Faughnan must 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 of his receipt of the State Bar's invoice. The parties shall comply with SCR 115 and SCR 121.1.

It is so ORDERED.

In Re: KENT VANDERSCHUIT
Bar No.: 6854
Case No.: 87175
Filed: 10/19/2023

ORDER DENYING RECIPROCAL DISCIPLINE AND SUSPENDING ATTORNEY

This is a petition for reciprocal discipline of attorney Kent VanderSchuit pursuant to SCR 114. VanderSchuit has been disbarred from the practice of law in California. He has not opposed this petition.

VanderSchuit's California misconduct arises from his representation of one client. He failed to take any action on behalf of the client after February 2, 2021, and effectively withdrew from representation. VanderSchuit failed to respond to the California State Bar's disciplinary charges, resulting in a default. Pursuant to California State Bar Rule of Procedure 5.85, which requires disbarment when an attorney fails to have a default order set aside, VanderSchuit was disbarred.

CONTINUED ON PAGE 38

Having considered the petition for reciprocal discipline, we conclude that discipline is warranted but “[t]hat the misconduct established warrants substantially different discipline in this state,” SCR 114(4)(c), and thus deny the petition for reciprocal discipline. In particular, we conclude that disbarment is not warranted because it is irrevocable in Nevada, while in California a disbarred attorney may seek reinstatement after five years. *Compare* SCR 102(1), with Cal. State Bar R. Proc. 5.442(B). Furthermore, Nevada does not require disbarment when an attorney fails to have a default order set aside in a discipline case.

Thus, we must consider what discipline is more appropriate than disbarment based on the “duty violated, the lawyer’s mental state, the potential or actual injury caused by the lawyer’s misconduct, and the existence of aggravating or mitigating factors.” *In re Discipline of Lerner*, 124 Nev. 1232, 1246, 197 P.3d 1067, 1077 (2008) (setting out the factors to consider when determining the appropriate discipline). VanderSchuit knowingly violated duties owed to his client (termination of representation) and the profession (compliance with bar inquiries) and injured or potentially injured his client. The baseline sanction for the 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) (“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 before this court does not include any aggravating or mitigating factors. Considering all the factors, we conclude that a six-month-and-one-day suspension achieves the purpose of attorney discipline. *In re Discipline of Arabia*, 137 Nev. 568, 571, 495 P.3d 1103, 1109 (2021) (providing that the purpose of attorney discipline “is to protect the public, the courts, and the legal profession”).

Accordingly, we deny the petition for reciprocal discipline, but suspend Kent VanderSchuit from the practice of law in Nevada for six months and one day commencing from the date of this order. The parties shall comply with SCR 115 and SCR 121.1.

It is so ORDERED.

In Re: NICHOLAS M. WAJDA
Bar No.: 11480
Case No.: 87141
Filed: 10/13/2023

ORDER DENYING RECIPROCAL DISCIPLINE AND SUSPENDING ATTORNEY

This is a petition under SCR 114 to reciprocally discipline attorney Nicholas M. Wajda based on his six-month probated suspension from the practice of law in Texas for violating RPC 3.1 (meritorious claims and contentions), RPC 3.2 (expediting litigation), RPC 5.3(c)(1) (responsibilities regarding nonlawyer assistants: ordering, ratifying, or failing to rectify wrongful conduct of nonlawyers), and RPC 8.4(c)

(misconduct: dishonesty, fraud, deceit, or misrepresentation). The Texas probated suspension was based on Wajda’s representation in two bankruptcy actions. In the first bankruptcy case, he accepted a postpetition retainer without the necessary leave from the court, failed to amend incomplete or inaccurate pleadings, filed a nonsensical debtor’s plan, and failed to appear at meetings or hearings. In the second bankruptcy case, he filed a fraudulent bankruptcy petition without speaking with the petitioner and instead relying on the petitioner’s husband’s assertions that the petitioner wished to file the petition. Wajda responded to the SCR 114 petition and requested any suspension imposed in Nevada run concurrent with his Texas probated suspension.

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) “there was such an infirmity of proof establishing the misconduct” in the other jurisdiction that this court could not accept the decision of that jurisdiction, (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 Nicholas M. Wajda from the practice of law in Nevada for six months retroactive to the date of Wajda’s Texas suspension of March 1, 2023, with the suspension stayed subject to the conditions outlined in Wajda’s Texas suspension. Those conditions required Wajda to (1) not violate the terms of the suspension, (2) not engage in any professional misconduct, (3) not violate any state or federal criminal statute, (4) keep the State Bar notified of his current contact information, (5) comply with the minimum Continuing Legal Education (CLE) requirements, (6) complete an additional 15 CLE credits in the area of ethics or law practice management and verify completion of those additional CLE credits to the State Bar, (7) comply with interest on lawyers trust account requirements, (8) promptly respond to any request from the State Bar, and (9) make contact with the State Bar’s office regarding compliance with these conditions within seven days.

It is so ORDERED.

In Re: VLADIMIR GAGIC
Bar No.: 8459
Case No.: 87020
Filed: 10/19/2023

ORDER DENYING RECIPROCAL DISCIPLINE AND SUSPENDING ATTORNEY

This is a petition under SCR 114 to reciprocally discipline attorney Vladimir Gagic based on his one-year suspension from the practice of law in Arizona for violating SCR 79, RPC 3.5(d) (decorum of the tribunal), RPC 8.2(a) (judicial and legal officials), and RPC 8.4(d) (misconduct). The Supreme Court of

Arizona affirmed the suspension concluding that Gagic violated the above-listed rules when he made a significant number of unprofessional, insulting, or false comments in writing regarding three different judges and an opposing counsel. Gagic 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 Vladimir Gagic from the practice of law in Nevada for one year starting from the date of this order. Gagic and the State Bar shall comply with SCR 115 and SCR 121.1. It is so ORDERED.

In Re: DERRICK S. PENNEY
Bar No.: 8606
Case No.: 87118
Filed: 10/19/2023

ORDER OF REINSTATEMENT

This is an automatic review of a Southern Nevada Disciplinary Board hearing panel's recommendation to grant suspended attorney Derrick S. Penney's petition for reinstatement. This court suspended Penney from the practice of law for 36 months, with all but the first 6 months stayed, in April 2022. In re Discipline of Penney, No. 84201, 2022 WL 1302176 (Nev. Apr. 29, 2022) (Order of Suspension). Before the term of Penney's actual suspension expired, we imposed an additional concurrent six-month-and-one-day suspension. In re Discipline of Penney, No. 85118, 2022 WL 6589933 (Nev. Oct. 10, 2022) (Order of Suspension).

We review the hearing panel's conclusions of law and recommendation de novo. Application of Wright, 75 Nev. 111, 112-13, 335 P.2d 609, 610 (1959) (reviewing a petition for reinstatement de novo). Having considered the record, we agree with the hearing panel's conclusion that Penney did not satisfy all of the criteria set forth in SCR 116(2)(a)-(g) by clear and convincing evidence. However, we also agree with the panel's conclusion that Penney presented good and sufficient reasons supporting reinstatement. See SCR 116(2) (providing that if an attorney does not satisfy the criteria stated in the rule, the attorney may be reinstated if the attorney "presents good and sufficient reason why the attorney should nevertheless be reinstated"); see also *Shoen v. State Bar of Nev.*, 136 Nev. 258, 2581, 464 P.3d 402, 403-04 (2020) (acknowledging that

"an attorney who cannot demonstrate the criteria still may be reinstated if [they] 'present[] good and sufficient reason why [they] should nevertheless be reinstated'" (quoting SCR 116(2))).

Accordingly, we grant the petition and reinstate attorney Derrick S. Penney to the practice of law in Nevada effective on the date of this order. As a condition of his reinstatement, Penney will be on probation for the remainder of his 36-month stayed suspension. During that term of probation, Penney will be subject to the following conditions: (1) obtain and fully cooperate with a legal practice mentor approved by the State Bar who will provide quarterly reports to the State Bar, (2) have no contact with client trust accounts, and (3) complete 9 additional CLE hours in client trust account management. Penney must also submit to binding fee dispute arbitration consistent with this court's order of suspension in Docket No. 85118, if he has not already done so. Finally, Penney shall pay the costs of the reinstatement proceeding, including \$2,500 under SCR 120, within 30 days from the date of this order, if he has not already done so.

It is so ORDERED.

ENDNOTES:

1. Pursuant to NRAP 34(f)(1), we have determined that oral argument is not warranted in this matter.
2. To the extent Wasielewski's additional arguments are not addressed herein, we conclude they do not warrant a different outcome.

ETHICS HOTLINE FOR ATTORNEYS

Call now:

1-800-254-2797



Attorneys with questions about ethics and the Rules of Professional Conduct may reach out to the Office of Bar Counsel for informal guidance during any business day.

Each day, a State Bar of Nevada attorney is assigned to take calls from lawyers with questions about the legal profession in our state.



TIP

FROM THE BAR COUNSEL

Ethical Witness Preparation

Witness preparation is a necessary skill for lawyers, but it also presents ethical landmines. How can lawyers help their clients and witnesses testify effectively without influencing their testimony or violating the Rules of Professional Conduct (RPCs)?

What are the best practices and pitfalls of witness preparation in the age of remote technology? The ABA Standing Committee on Ethics and Professional Responsibility addressed these issues in Formal Opinion 508.¹ It provided guidance for lawyers who want to prepare witnesses ethically and competently.

A lawyer has a right and a duty to interview witnesses and to prepare clients for cross-examination.² But there is a line between preparing and coaching. Here is a practical guide for ethical preparation.

Lawyers may and often should:

- Remind the witness of their oaths to tell the truth;
- Explain that telling the truth can include a truthful answer of “I do not recall;”
- Explain case strategy and procedure, including the nature of the testimonial process or the purpose of the deposition;
- Suggest proper dress and demeanor;
- Probe the witness’s testimony and recollection;
- Identify conflicting evidence to clarify the witness’s recollection;
- Review documents or evidence, including to refresh the witness’ recollection; and
- Identify lines of questioning for potential cross-examination.

On the other hand, lawyers must never violate RPC 3.4(b), which prohibits a lawyer from advising or assisting a witness to give false testimony. Lawyers rarely coach a witness to lie outright. Instead, they encourage witnesses to exaggerate favorable facts or to “downplay” the detrimental facts.

Lawyers should NOT:

- Tell a witness, “The less you recall the better” or encourage a witness to state “I do not recall” for information they remember;

- Prepare a script for the witness;
- Offer a “speaking objection” that coaches the witness about what to say or not to say;
- Give a witness subject to the exclusionary rule statements of other witnesses;
- Request a break to control the damage from opposing counsel’s questions;
- Signal to a witness with a wink, whisper, nod, note, or other signal to influence a witness’ in-progress testimony;
- Send a text message to a witness during the in-progress testimony;
- Answer a question for a witness or client during in-progress testimony; or
- Offer a witness a financial or other incentive to testify or not to testify (with exceptions for expert witnesses).

The ABA opinion also warns lawyers about the risks of remote technologies, such as Zoom, that unethical lawyers can abuse to coach witnesses during depositions or trials.

The opinion suggests preventive measures, such as:

- Asking the witness to show their surroundings and turn off any devices or notifications;
- Requesting that the witness and the lawyer be in separate locations and visible on camera;
- Having the witness swear or affirm that they are not receiving any assistance or communication from anyone;
- Seeking an order for uninterrupted testimony; and
- Raising the coaching issue during a skillful cross-examination.

Witness preparation is good. Witness coaching is bad. Don’t be like Jack McCall’s lawyer in “The Trial of Jack McCall.” Be like Atticus Finch in “To Kill a Mockingbird.” Or better yet, be yourself. Just make sure you follow the Rules of Professional Conduct.

ENDNOTES:

1. https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba-formal-opinion-508.pdf
2. See, RPC 1.1 (Competence), RPC 1.3 (Diligence), RPC 1.4 (Communication), and Rule 2.1 (Advisor).