

Bar Counsel Report

In Re: DERRICK S. PENNEY
Bar No.: 8606
Case No.: 84201
Filed: 04/29/2022

ORDER OF SUSPENSION

This is an automatic review of a Southern Nevada Disciplinary Board hearing panel's recommendation that attorney Derrick S. Penney be suspended from the practice of law for 36 months, stayed, with an actual suspension of 6 months for violations of RPC 1.3 (diligence), RPC 1.4(a) (communication), RPC 1.15(a), (d) (safekeeping property), RPC 3.2 (expediting litigation), RPC 8.1 (disciplinary matters), and RPC 8.4(c), (d) (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 Penney committed the violations charged. *In re Discipline of Drakulich*, 111 Nev. 1556, 1566, 908 P.2d 709, 715 (1995). We defer to the panel's factual findings that Penney violated the above referenced rules as those findings are supported by substantial evidence and are not clearly erroneous. SCR 105(3)(b); *In re Discipline of Colin*, 135 Nev. 325, 330, 448 P.3d 556, 560 (2019). The record shows that Penney knowingly committed the violations charged above by failing to diligently litigate a probate case, communicate with a client and her family about the status of the case, or distribute the proceeds from the sale of decedent's house; by misappropriating about \$150,000 in client funds and converting those funds for personal use; and by failing to reasonably respond to the State Bar's requests for information. The client testified that she ultimately received the full amount of money from the sale of the house.

Turning to the appropriate discipline, we review the hearing panel's recommendation de novo. SCR 105(3)(b). We must ensure that the discipline is sufficient to protect the public, the courts, and the legal profession. See *State Bar of Nev. v. Claiborne*, 104 Nev. 115, 213, 756 P.2d 464, 527-28 (1988) (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).

Here, Penney knowingly violated duties owed to his client (diligence, communication, safekeeping property, and expediting litigation) and the profession (bar disciplinary matters and misconduct). His misconduct harmed or potentially harmed his client by causing the

unreasonable delay of her case and by misappropriating client funds, which delayed the distribution of funds to other beneficiaries. The baseline sanction for Penney's misconduct, before considering 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) ("Disbarment is generally appropriate when a lawyer knowingly converts client property and causes injury or potential injury to a client."). The panel found, and the record supports, four aggravating circumstances (dishonest or selfish motive, multiple offenses, substantial experience in the practice of law, and illegal conduct), and two mitigating circumstances (absence of a prior disciplinary record and substantial recent personal life changes). Considering all four factors, we agree with the panel's finding that the misconduct here does not warrant disbarment, especially in light of Penney's repayment of the client funds.

Accordingly, we hereby suspend attorney Derrick S. Penney from the practice of law for 36 months, with all but the first 6 months stayed, from the date of this order. Further, Penney is placed on probation during the stayed portion of the suspension subject to the following conditions: (1) he obtains and fully cooperates with a legal practice mentor approved by the State Bar and provides quarterly reports to the State Bar, (2) he will have no contact with client trust accounts, and (3) he completes 9 additional CLE hours in client trust account management. Penney shall also pay the costs of the disciplinary proceedings, including \$2,500 under SCR 120, within 30 days from the date of this order if he has not already done so.¹ The parties shall comply with SCR 115 and SCR 121.1.

It is so ORDERED.²

In Re: KARLON KIDDER
Bar No.: 11622
Case No.: 84155
Filed: 04/29/2022

ORDER OF PUBLIC REPRIMAND

This is an automatic review of a Northern Nevada Disciplinary Board hearing panel's recommendation to publicly reprimand attorney Karlan Kidder for violating RPC 1.1 (competence) and RPC 1.3 (diligence). The panel also recommended requiring Kidder to complete additional continuing legal education (CLE) hours. 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 Kidder committed the violations charged. *In re Discipline of Drakulich*, 111 Nev.

1556, 1566, 908 P.2d 709, 715 (1995). We defer to the panel's factual findings that Kidder violated RPC 1.1 and RPC 1.3 as those findings are supported by substantial evidence and are not clearly erroneous. SCR 105(3)(b); *In re Discipline of Colin*, 135 Nev. 325, 330, 448 P.3d 556, 560 (2019). In particular, the record demonstrates that in Kidder's representation of an estate client, he failed to ensure that notice requirements were met and failed to timely object to a petition for appointment of special administrators, resulting in the appointment of an opposing party, instead of his client.

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). Here, Kidder negligently violated duties owed to his client (competence and diligence). His misconduct had the potential for injury because his client was not appointed as the estate administrator, which had been her initial goal. The baseline sanction for Kidder's misconduct, before consideration of aggravating and mitigating circumstances, is a public reprimand. See Standards for Imposing Lawyer Sanctions, *Compendium of Professional Responsibility Rules and Standards*, Standard 4.43 (Am. Bar Ass'n 2017) (providing that a reprimand is "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"); Standard 4.53 (explaining that a reprimand is appropriate when a lawyer fails to understand relevant legal procedures and causes injury or potential injury to a client). The panel found and the record supports two aggravating circumstances (prior discipline and substantial experience in the practice of law) and one mitigating circumstance (absence of dishonest or selfish motive). Considering all the factors, we agree with the panel that a public reprimand is appropriate 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) (providing that the purpose of attorney discipline is to protect the public, the courts, and the legal profession, not to punish the attorney).

Accordingly, we hereby publicly reprimand attorney Karlon Kidder for violating RPC 1.1 (competence) and RPC 1.3 (diligence). Additionally, Kidder shall complete two hours of CLE in ethics and two hours of CLE in probate, in addition to his annual CLE requirements, by December 31, 2022. Kidder shall also pay the costs of the disciplinary proceedings, including \$1,500 under SCR 120(3), within 30 days from the date of this court's order.

The State Bar shall comply with SCR 121.1.
It is so ORDERED.³

In Re: NADIN J. CUTTER
Bar No.: 11548
Grievance File: SBN20-00011
Filed: 04/01/2022

ORDER OF REPRIMAND

To Nadin J. Cutter:

A Southern Nevada Disciplinary Board Screening Panel convened on March 15, 2022, to consider the above-referenced grievance against you. The Panel concluded that you violated the Nevada Rules of Professional Conduct and that you should be reprimanded for your handling of your client's personal injury matter. This letter constitutes delivery of the Panel's reprimand.

Your client Yer Vang retained you to represent her and her toddler for injuries sustained in a motor vehicle collision occurring on August 2, 2017. On August 31, 2018, you presented a demand letter to the adverse insurance carrier. On March 5, 2019, that carrier closed their file as your office had not responded to their responsive replies.

On August 2, 2019, and August 19, 2019, you filed a complaint and amended complaint respectively. The complaint was not timely served upon the defendant in accord with the time frame of NRCP 4, nor did you seek a time extension under NRCP 4. Months later, our courts were impacted with the Governor's emergency orders of March 12 and March 30, 2020. The defendant was ultimately served on June 28, 2020.

On July 20, 2020, defense counsel filed a motion to dismiss the complaint. You did not file a timely opposition. The court granted you an extension of time of two weeks for you to file an opposition by September 3, 2020. You again did not timely file an opposition.

NRPC 1.3 states: "A lawyer shall act with reasonable diligence and promptness in representing a client." In a similar vein, NRPC 3.2(a) states "A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client." Here, you negligently failed to act with reasonable diligence and promptness and did not take reasonable efforts to expedite litigation. You did not attempt or seek timely service of your complaint and amended complaint upon the defendant. Thereafter, you negligently failed to provide the court with a timely opposition to the defendant's motion to dismiss on two successive occasions. While your client ultimately obtained a recovery, despite the court granting the defendant's motion to dismiss, potential injury occurred in that recovery could have been precluded by your successive late filings.

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ABA Standards for Imposing Lawyer Sanctions, (2nd Ed. 2019), Standard 4.43 (Violation of duties to clients) states: "Reprimand 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." Similarly, Standard 6.23 (Abuse of Legal Process) applicable to 3.2(a) states: "Reprimand is generally appropriate when a lawyer negligently fails to comply with a court order or rule, and causes injury or potential injury to a client or other party, or causes interference or potential interference with a legal proceeding."

Here, you were on notice of concerns from former client's grievances in 2017 and 2018 involving diligence under NRPC 1.3 along with other NRPC rules. These grievances were founded in that you received a Letter of Reprimand and a Public Reprimand from this Board.

Based on the foregoing, you are hereby REPRIMANDED for a violation of NRPC 1.3 and 3.2(a). Please promptly conclude this matter by remitting the cost of \$1,500 within 30 days of the issuance of this sanction. SCR 120(3).

Please allow this reprimand to serve as a thoughtful reminder of the practitioner's professional ethical obligations. We wish you well in your new role serving the public from the bench and trust that no similar problems will arise in the future.

RESIGNATIONS (VOLUNTARY, NO DISCIPLINE PENDING)

S.C.R. 98(5)(a) states:

Any member of the state bar who is not actively engaged in the practice of law in this state, upon written application on a form approved by the state bar, may resign from membership in the state bar if the member: (1) has no discipline, fee dispute arbitration, or clients' security fund matters pending and (2) is current on all membership fee payments and other financial commitments relating to the member's practice of law in Nevada. Such resignation shall become effective when filed with the state bar, accepted by the board of governors, and approved by the supreme court.

The following members resigned pursuant to this rule:

NAME	Bar. No.	Order No.	Filed
JENNIFER J. WALT	3180	84630	05/12/2022
KURT WEINRICH	5818	84632	05/12/2022
WAYNE A. YBARRA	7219	84635	05/12/2022
JENNIFER ANN SMITH	610	84618	05/12/2022
PETER J. SMITH	820	84619	05/12/2022
THOMAS S. SMITH	2161	84620	05/12/2022
BARBARA IRENE JOHNSTON	3748	84593	04/26/2022

BARBARA S. MCCARTHY	2843	84594	04/26/2022
RICHARD ALAN MEADOWS	15283	84595	04/26/2022
JOEL LA VERNE PETIT	11438	84596	04/26/2022
SUSAN ELIZABETH SCHOLLEY	531	84598	04/26/2022
GREGORY L. JENSEN	1421	84570	04/19/2022
PAULA BAUER	5868	84525	04/19/2022
MICHAEL J. BRENNAN	9766	84526	04/19/2022
THEODORE ROSS CERCOS	5603	84527	04/19/2022
MELANIE DIANE FOSTER	215	84528	04/19/2022
MARGUERITE FRIEDLANDER	7611	84529	04/19/2022
JOHN L. GAVIN	3417	84531	04/19/2022
KIRK H. GIBSON	2710	84532	04/19/2022
ROBERT GREENBAUM	7361	84533	04/19/2022
JUSTIN JAMES HENDERSON	13349	84535	04/19/2022
CHARLES HILSABECK	4289	84536	04/19/2022
JOHN MARTY HOWARD	1052	84537	04/19/2022

ENDNOTES:

- The panel also recommended that Penney be required to pay \$3,100 to the Client Security Fund of the State Bar, which is the fee paid to Penney by the client. The record, however, reflects that the panel did not find this fee excessive given the work done by Penney. And the record does not show that the client suffered a monetary injury or had any claims paid by the Client Security Fund. Accordingly, this monetary sanction is more akin to a punitive fine, which is contrary to the purpose of attorney discipline. See *In re Discipline of Reade*, 133 Nev. 711, 717, 405 P.3d 105, 109 (2017) (holding that a monetary fine exceeds the scope of sanctions that may be imposed with a suspension). Therefore, we do not adopt this recommendation.
- The Honorable Mark Gibbons, Senior Justice, participated in the decision of this matter under a general order of assignment.
- The Honorable Mark Gibbons, Senior Justice, participated in the decision of this matter under a general order of assignment.



TIP

FROM THE BAR COUNSEL

Leaving the Firm? Know Your Ethical Obligations

Gone are the days when a lawyer stays at one firm until retirement. Most lawyers change firms four or five times during their careers. A lawyer might want better partnership prospects, greater responsibility, a new industry focus, more money, or independence as a solo. Whatever the reason, a lawyer's departure creates a thorny situation for the lawyer, firm, and client.

A departing lawyer and the firm have ethical obligations to clients and to each other. Both the departing lawyer and the firm have legitimate business interests in keeping the client relationship. Employment or partnership agreements create obligations. Substantive Nevada law on partnerships, agency, property, contracts, and unfair competition can also create obligations. These obligations and interests often clash.

The client stands to lose the most when a lawyer leaves a firm. American Bar Association Formal Opinion 489, published December 4, 2019, offers the departing lawyer and law firm valuable insight. Opinion 489 recommends that the law firm and lawyer should send a “joint” letter to the lawyer’s clients letting them know of the lawyer’s departure and giving them the choice to (1) remain with the firm, (2) go with the departing lawyer, or (3) seek another lawyer or firm entirely. Lawyers and firms must communicate adequate information promptly to allow each client to make an informed decision per Rule of Professional Conduct (RPC) 1.4. The lawyer and firm should ask the client for a written response and keep the client’s written response in the client file. If the firm and lawyer cannot agree on a joint letter, then the firm cannot prohibit the departing lawyer from contacting or soliciting the clients. Remember, RPC 5.6 generally prohibits firms from offering or signing a partnership, shareholder, or employment agreement that restricts the right of a lawyer

to practice after termination of the relationship. RPC 5.6 prohibits these non-compete clauses, in part, because they limit clients’ ability to freely choose counsel. And RPC 1.16(3) gives clients the right to discharge a lawyer or firm at any time without cause. Opinion 489 reminds us that “clients are not property.”

The Rules of Professional Conduct do not address whether a departing lawyer must tell the firm before the clients. But firm lawyers have a fiduciary duty to treat each other fairly and honestly. Bar Counsel strongly encourages lawyers to notify the firm before contacting clients and to cooperate in drafting a “joint” letter.

In this vein, Opinion 489 encourages firm management “to establish reasonable procedures and policies to assure the ethical transition of client matter when lawyers elect to change firms.” Firm policy may require a departing lawyer to notify the firm before notifying the client and to coordinate with the firm to organize and update client files and insure the continuing confidentiality of client information.

The opinion offers the departing lawyer and firm management caution. While firms may request a reasonable notification period, firms should not specify a fixed period. Again, the client’s interests are paramount. “... these notification periods cannot be fixed or rigidly applied without regard to client direction, or used to coerce or punish a lawyer for electing to leave the firm, nor may they serve to unreasonably delay the diligent representation of a client.” The opinion also cautions firm management not to cut the departing lawyer off from resources for effective representation such as research tools, database systems, and support staff.

Leaving for a new opportunity may be a tremendous opportunity for a lawyer’s career; one they have a right to exercise. The client, however, should not have to pay for that departing lawyer’s opportunity. It is incumbent upon the departing lawyer and the firm to work together, for a little while longer, to meet or exceed their professional responsibility to their clients.