Bar Counsel Report

In Re: HARDEEP SULL
Bar No.: 12108
Case No.: 86781
Filed: 08/22/2024

SUPREME COURT OPINION

Appeal from a disciplinary board hearing panel's order dismissing a complaint against an attorney.

Reversed; attorney reprimanded.

BEFORE THE SUPREME COURT, HERNDON, LEE, and BELL, JJ.

OPINION

By the Court, BELL, J.:

In this matter, we consider whether attorney Hardeep Sull violated the Nevada Rules of Professional Conduct (RPC) concerning the safekeeping of client funds and the duties owed to a client when terminating representation. Specifically, the rules require attorneys to deposit "[a]ll funds received or held for the benefit of clients … including advances for costs and expenses" into a designated client trust account, "to be withdrawn by the lawyer only as fees are earned or expenses incurred." RPC 1.15(a), (c). We conclude that Sull violated RPC 1.15 when she charged a flat fee for a limited scope representation but failed to deposit that fee into a client trust account. We further conclude that Sull violated RPC 1.16(d), which requires an attorney to "refund[] any advance payment of fee[s] or expense[s] that has not been earned or incurred" when the client terminates that representation. Because the hearing panel erred when it concluded that Sull did not violate either of these rules, we reverse the hearing panel's order dismissing the disciplinary charges against Sull. Based on the clear evidence supporting violations of RPC 1.15 and RPC 1.16, and considering the circumstances, we conclude that a reprimand serves the purpose of attorney discipline.

BACKGROUND

Hardeep Sull has been licensed to practice law in Nevada since 2010 and has no prior discipline. Sull's practice primarily consists of immigration matters. In June 2021, a preexisting client retained Sull to prepare and file an E-2 Visa Application. For this representation, the client agreed to pay Sull a flat fee of $15,000, plus a $750 client file fee. The fee agreement provided that, in the event of early termination, Sull's "time completed on the matter will be billed at an hourly rate" of $395 per hour and that Sull would "refund any unused portion of the costs and/or expenses." The client wired the full $15,000 to Sull's firm's operating account. Within a month, Sull had withdrawn all of those funds without attributing the withdrawals to the E-2 Visa matter. At no time did Sull place the client's funds into the firm's client trust account.

In December 2021, the client informed Sull that he did not want to move forward with the E-2 Visa Application. As a result, Sull never filed the application. The next month, the client requested that Sull provide an accounting of work performed on the matter and a refund of any unearned fees. Sull promised to provide the requested accounting within a month but failed to do so. The client continued to request an accounting for several months and eventually filed a grievance with the State Bar. After the parties participated in a fee dispute mediation, Sull provided the client with an accounting. In early 2023, Sull refunded the client $3,500.

The State Bar filed a disciplinary complaint against Sull, alleging that Sull violated RPC 1.15 (safekeeping property) by failing to deposit the client's funds into a client trust account and RPC 1.16 (declining or terminating representation) by failing to provide the client with an accounting or a refund of unearned fees when the client terminated the representation. The hearing panel unanimously concluded that Sull (1) did not violate RPC 1.15 because the $15,000 was a flat fee that did not have to be deposited into a client trust account and (2) did not violate RPC 1.16 because the client did not terminate the representation. The panel dismissed the complaint. The State Bar appeals, arguing that the panel erred in concluding that Sull did not violate RPC 1.15 and RPC 1.16.

DISCUSSION

"Our review of the panel's findings of fact is deferential … so long as they are not clearly erroneous and are supported by substantial evidence." *In re Discipline of Colin*, 135 Nev. 325, 330, 448 P.3d 556, 560 (2019) (internal citation omitted). We review the panel's conclusions of law, including "whether the factual findings establish an RPC violation," de novo. *Id.* (discussing SCR 105(3)(b)).

Because a flat fee is not earned upon receipt, Sull violated RPC 1.15 by failing to deposit the client's funds in her trust account.

The Nevada Rules of Professional Conduct require that "[a]ll funds received or held for the benefit of clients by a lawyer … shall be deposited in [the lawyer's] trust account." RPC 1.15(a); *see* also SCR 78(1)(a) (requiring attorneys to "deposit all funds held in trust in this jurisdiction" into a trust account). "All funds held in trust" includes fees paid in advance of the lawyer providing the agreed-upon services. "Legal fees and expenses that have been paid in advance" may "be withdrawn [from the trust account] by the lawyer only as fees are earned or expenses incurred." RPC 1.15(c). The rules are clear that fees paid in advance may only be withdrawn as the fees are earned. Accordingly, fees paid in advance must be placed into the lawyer's trust account until the lawyer earns the fees by performing the agreed-upon work. Although the rules allow a lawyer to charge a fixed or

"flat" rate for legal services, the lawyer must still account for the work performed to demonstrate that the fee has been earned. *See* RPC 1.5(a)(8) (permitting a lawyer to charge a fixed fee for services). An attorney cannot avoid accounting for work performed by labeling the fee as a "flat fee." Indeed, "[t]he client must be in a position to understand what the lawyer will do for the agreed upon fees, and, of equal importance, what the lawyer will not do. Simply put, the client must know what [the client] bargained for." *In re Seare*, 493 B.R. 158, 206 (Bankr. D. Nev. 2013) (emphasis omitted), *as corrected* (Apr. 10, 2013), aff'd, 515 B.R. 599 (B.A.P. 9th Cir. 2014).

The American Bar Association recently issued an opinion addressing the proper treatment of flat or fixed fees paid in advance. "If a flat or fixed fee is paid by the client in advance of the lawyer performing the legal work, the fees are an advance. Use of the term 'flat fee' or 'fixed fee' does not transform [an] arrangement into a fee that is 'earned when paid.'" ABA Comm. on Ethics & Pro. Resp., Formal Op. 505, at *4 (2023). We agree. Fees paid in advance of legal services being performed are not earned upon receipt. When a lawyer receives an advance of fees, "that fee must be placed in a Rule 1.15-compliant trust account, to be disbursed to the lawyer only after the fee has been earned." *Id.* A prudent way to comply with the rule would be to set milestones by which specified portions of an advanced fee may be earned. *Id.* at *5 (citing *In re Mance*, 980 A.2d 1196, 1202, 1204-05 (D.C. 2009)). Doing so "allows the lawyer to be paid in part before the end of the representation and provides some assistance in determining the refund amount in case of early termination." *Id.* For example, once the lawyer reaches a certain stage of representation or completes a designated task, they could provide the client with an accounting demonstrating that the task has been completed, and then the lawyer could transfer the agreed-upon portion of funds for that task out of the trust account. "Of course, 'extreme "front-loading" of payment milestones in the context of the anticipated length and complexity of the representation' may not be reasonable." *Id.* (quoting *Mance*, 980 A.2d at 1204-05).

The fee agreement at issue provided that the $15,000 fee was for "legal services to be rendered" and indicated that Sull would send billing statements to the client explaining how any deposited fees would "be applied towards the balance of the legal services rendered." By the terms of the agreement, the client's fees in this matter were paid in advance. Consistent with RPC 1.15(c), those fees should have been deposited in a client trust account and withdrawn by Sull only as fees were earned or expenses incurred. Sull instead treated the funds as "earned upon receipt," placing the client's funds directly into her operating account without first performing the work to earn those funds. By doing so, Sull violated RPC 1.15. We cannot agree with the hearing panel's contrary conclusion.

The client terminated Sull's representation before she completed the task for which she was retained.

The Nevada Rules of Professional Conduct provide that, "[u]pon termination of representation, a lawyer shall … surrender[] papers and property to which the client is entitled and refund[] any advance payment of fee or expense that has not been earned or incurred." RPC 1.16(d). The question here is whether the client terminated the representation.

Sull's client had previously retained Sull for two other matters, one of which is still pending. Each matter was distinct and had its own fee agreement. *See* RPC 1.2(c) ("A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent."). The third matter was the E-2 Visa Application, which formed the basis of the State Bar's complaint. The record establishes that the client terminated the representation for the E-2 Visa after Sull had completed some work but before Sull filed the application. Because the E-2 Visa was a separate representation from the other matters, we conclude that the client terminated the representation, triggering RPC 1.16. The fact that Sull remained counsel of record for the client on an unrelated matter has no bearing on whether the client terminated Sull's representation for the E-2 Visa. The record fails to support the hearing panel's finding that the client had not terminated the representation.

Sull delayed providing the client with an accounting of work performed and a refund of unearned fees for several months after the representation for the E-2 Visa terminated. The record demonstrates by clear and convincing evidence that Sull violated the duty to "surrender[] papers and property to which the client is entitled and refund[] any advance payment of fee or expense that has not been earned or incurred." RPC 1.16(d); *see also In re Discipline of Drakulich*, 111 Nev. 1556, 1566, 908 P.2d 709, 715 (1995) (recognizing the burden of proof in a disciplinary matter).

A reprimand is appropriate discipline for Sull's violations.

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). Although the hearing panel's recommendation is persuasive, we determine the appropriate discipline de novo. *See In re Discipline of Schaefer*, 117 Nev. 496, 515, 25 P.3d 191, 204 (2001); SCR 105(3)(b).

Based on the record provided, we conclude that the State Bar proved by clear and convincing evidence that Sull's actions caused actual or potential injury to the client by depriving the client of access to and use of the client's own funds for over one year. *See In re Watt*, 717 N.E.2d 246, 248-49 (Mass. 1999) ("Deprivation arises

CONTINUED ON PAGE 40

CONTINUED FROM PAGE 39

Bar Counsel Report

when an attorney's intentional use of a client's funds results in the unavailability of the client's funds after they have become due, and may expose the client to a risk of harm, even if no harm actually occurs."). The record also supports that Sull negligently violated RPC 1.15 and knowingly violated RPC 1.16. Because the most serious misconduct was the knowing violation of duties owed when the client terminated the representation, the baseline sanction, before considering aggravating or mitigating circumstances, is suspension. See Standards for Imposing Lawyer Sanctions, *Compendium of Professional Responsibility Rules and Standards*, at Standard 7.2 (Am. Bar Ass'n 2023) ("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.").

The record further demonstrates substantial evidence of one aggravating circumstance (substantial experience in the practice of law) and five mitigating circumstances (absence of a prior disciplinary record, absence of a dishonest or selfish motive, personal or emotional problems, cooperative attitude toward proceedings, and character and reputation). See SCR 102.5 (listing "[a]ggravating and mitigating circumstances [which] may be considered in deciding what sanction to impose"). Given that this is Sull's first discipline and that the mitigating circumstances significantly outweigh the one aggravating circumstance, we conclude that a downward deviation from the baseline sanction is appropriate. Considering all of the factors, we conclude that a reprimand serves the purpose of attorney discipline. *See In re Discipline of Arabia*, 137 Nev. 568, 571, 495 P.3d 1103, 1109 (2021) (recognizing that the purpose of attorney discipline is to protect the public, the courts, and the legal profession).

CONCLUSION

Sull violated the Nevada Rules of Professional Conduct by mishandling client funds and by failing to account for and refund client funds after the client terminated her representation. Given the clear evidence of violation, we reverse the hearing panel's order dismissing the disciplinary charges against Sull. Considering the aggravating and mitigating circumstances, particularly that Sull has had no prior attorney discipline, we conclude that a reprimand is sufficient to serve the purpose of attorney discipline.

Accordingly, we reprimand attorney Hardeep Sull for violating RPC 1.15 (safekeeping property) and RPC 1.16 (declining or terminating representation). Sull shall pay the costs of the disciplinary proceedings, including $1,500 under SCR 120, within 30 days after the State Bar provides an invoice for those costs. The State Bar shall comply with SCR 121.1.

In Re: DAVID M. CROSBY
Bar No.: 3499
Case No.: SBN23-00615
Filed: 08/23/2024

REPRIMAND

To David M. Crosby:

A disciplinary panel of the Southern Nevada Disciplinary Board reviewed this matter against you. We unanimously find that you violated Rule 3.1 (Meritorious Claims and Contentions) of the Nevada Rules of Professional Conduct ("RPC"). The misconduct, your mental state, the degree of injury, and a balancing of aggravating and mitigating circumstances requires us to issue a Reprimand with some conditions to ensure your professionalism and adherence to our ethical standards as attorneys. We encourage you to take appropriate action to prevent similar misconduct in the future.

Application of Attorney Discipline

The Annotated Standards for Imposing Lawyer Sanctions (2019 ed.) ("ABA Standard") state that when imposing a sanction, a disciplinary panel should consider the following factors: (1) the duty violated; (2) the lawyer's mental state; (3) the actual or potential injury caused by the lawyer's misconduct; and (4) the existence of aggravating or mitigating circumstances. ABA Standard 3.0. Pursuant to Rule 102.5 of the Nevada Supreme Court Rules ("SCR"), a disciplinary panel will consider the first three factors to determine a baseline sanction and then consider any aggravating or mitigating circumstances to increase or decrease that sanction. SCR 102.5(2).

Misconduct

RPC 3.1 (Meritorious Claims and Contentions) states in relevant part the following: "[a] lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law."

In this matter, you violated RPC 3.1 (Meritorious Claims and Contentions) by seeking and obtaining a district court order in a probate matter to transfer a fifty-percent interest in real property that the petitioner was not entitled to receive. The decedent in this matter had previously filed a disclaimer of title to the real property, which was the "sole and separate property" of his wife who predeceased him by fourteen (14) days. You filed petitions on behalf of both husband and wife. However, the real property belonged to the wife as "[a]n Unmarried Woman" per the disclaimer of title. The husband's estate was not entitled to a fifty-percent interest in the real

property but to a share of the community property from the wife's estate in the separate probate matter. Your prayer of relief for a fifty-percent interest of the real property itself in the husband's estate was therefore not based in fact or law.

Mental State

A respondent acts negligently if he fails "to heed a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in this situation." ABA Standard, p. xxi. In this matter, you negligently asserted a claim without a basis in law and fact that was not frivolous based upon the contents of the petition, your prayer for relief, and the corresponding order. You could have pled the husband's petition—by your own admission—more clearly to avoid this mistake. The court's consideration of the husband's petition before resolving the wife's petition further compounded this mistake. Since you filed both petitions on behalf of husband and wife, this mistake was still yours and you took responsibility for it.

Injury

An injury can range from "serious or potentially serious" to "little or no actual or potential" injury. ABA Standard, pp. 138–39. In this matter, you caused an injury to another party and/or interference with a legal proceeding. The injury was not "serious or potentially serious" but was greater than "little or no actual or potential" injury. New counsel for the wife's estate was required to file a motion to reopen the husband's estate to unwind the wrongful order. This required added litigation, attorney's fees, costs, and court resources. To your credit, you eventually signed a stipulation and order approving the commissioner's report and recommendation to grant the motion to set aside the estate and accept that you and/or your client are required to pay fees and costs for the added litigation.

ABA Baseline Sanction

Based upon the conduct above, your state of mind, and the injury, the baseline sanction for this matter is a Reprimand. ABA Standard 6.23 states that a 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.

Aggravating & Mitigating Circumstances

Although your substantial experience in the practice of law is an aggravating circumstance, your absence of a prior disciplinary record is a mitigating circumstance pursuant to SCR 102.5. A balancing of these two circumstances does not warrant an upward or downward deviation from the ABA baseline sanction: a Reprimand.

Reprimand

In light of the foregoing, you violated RPC 3.1 (Meritorious Claims and Contentions) and are hereby REPRIMANDED. You are ordered to complete twelve (12) additional hours of CLE before August 6, 2025, and submit proof of completion to the Office of Bar Counsel. You shall complete six (6) additional CLE hours in ethics/professional conduct and six (6) additional CLE hours in probate law, which is intended to protect the public and increase the integrity of the legal profession pursuant to SCR 102(2). You are also ordered to pay costs, provided for in SCR 120, in the amount of $1,500 plus the hard costs of the court reporter and Nationwide Legal Nevada LLC within thirty (30) days after the filing of an order accepting your admission.

TIP FROM THE BAR COUNSEL

Clients Need Attorneys to Serve as Knowledgeable Advisors

What comes to mind when we hear the term "advisor?" A financial planning company who prepared a series of brochures to point out basic investment options available? Someone who gave you an updated estimate when your car was in the repair shop? Perhaps a technical advisor for the latest legal or military film or television show you enjoyed? Our clients see us as all the above, and more.

"A lawyer (also called attorney, counsel, or counselor) is a licensed professional who *advises* and represents others in legal matters."[1] While we are known more for representing others, our first order of business is to advise a client before we represent them. Our court has directed: "The attorney's role is to not only communicate on behalf of his [or her] client, but also to counsel, render candid advice, and advocate for [their] client." *Dezzani v. Kern & Assocs*. 134 Nev. 61, 69, 412 P.3d 56, 62 (2018).

Whether we serve in a transactional law or litigation law capacity, we have a mandatory functional role as a legal advisor. Nevada Rule of Professional Conduct ("RPC") 2.1 (Advisor)[2] states:

> In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.

RPC 2.1 works hand-in-hand with our Scope of Representation duty under RPC 1.2(a) and our Communication duty of RPC 1.4. RPC 2.1 gives us the basic principles of how we approach our advisor role at the outset, before we get to the mechanics of how we communicate our advice to our clients.

RPC 1.2 rule offers help. We are not constrained to provide merely the legal answer. The rule expressly allows us to bring into our advisor role our common, everyday humanity into our client counselling sessions.[3] While our client's position may be fully meritorious, our representation efforts in moving our advice forward may be client-problematic. Our "first-line" of advice may be cost-prohibitive for their situation, cause adverse family or social dissonance for them, or may impinge upon their conscience. Do our clients always tell us (or do we thoroughly inquire) what factors motivate their need for our help? Do our clients always bring to our attention a change in their circumstances that affects the transactional or litigation landscape? Do our clients consistently tell us what we need to properly advise them? How are they supposed to know what is important to tell us?

The ABA Model Rule comments are very helpful in helping us approach our advisor role more thoughtfully. Comment No.1 states that despite "unpleasant facts" that a client may wish to avoid considering: "A client is entitled to straightforward advice expressing the lawyer's honest assessment." Comment No. 2 in part, reminds us to get out of our head. "Advice couched in narrow legal terms may be of little value to a client." Our clients compare the value of the fee they pay us to how understandable and meaningful our advice to them has been.[4]

Comment No. 3 reminds us that client experience and sophistication matters. When a client inexperienced in legal matters requests legal advice, the "call of the question" reply will not suffice. Comment No. 3 also tells us: "the lawyer's responsibility as advisor may include indicating that more may be involved than strictly legal considerations." Comment No. 4 encourages us to commend outside expertise of another profession to the client for matters going beyond "strictly legal questions."

Finally, Comment No. 5 guides us about when to specifically offer advice. The comment in part states, "In general, a lawyer is not expected to give advice until asked by the client. However, when a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal consequences to the client, the lawyer's duty to the client under Rule 1.4 may require that the lawyer offer advice if the client's course of action is related to the representation … A lawyer ordinarily has no duty to initiate investigation of a client's affairs or to give advice that the client has indicated is unwanted, but a lawyer may initiate advice to a client when doing so appears to be in the client's interest."

Just as we sought out college advisors in our undergraduate years, even more so should we guide our clients, despite the challenge. As we once were, our clients often are – they don't know what they don't know. As social philosopher Thomas Sowell spoke about advisors: "When you want to help people, you tell them the truth. When you want to help yourself, you tell them what they want to hear."

ENDNOTES:

1. *What is a Lawyer*? American Bar Association, FAQ, September 10, 2019 (americanbar.org/groups/public_education/resources/public-information). [Emphasis added].
2. Nevada along with 42 other states have adopted the ABA Model Rule 2.1 language.
3. Our jurors have similar latitude: "Although you are to consider only the evidence in the case in reaching a verdict, you must bring to the consideration of the evidence your everyday common sense and judgment as reasonable men and women. Thus, you are not limited solely to what you see and hear as the witnesses testify. You may draw reasonable inferences from the evidence which you feel are justified in the light of common experience, keeping in mind that such inferences should not be based on speculation or guess." Nevada Pattern Jury Instruction 1.05
4. Abraham Lincoln is credited saying: "A lawyer's time and advice is [their] stock in trade." Maya Angelou is credited with stating: "I've learned that people will forget what you said, people will forget what you did, but people will never forget how you made them feel."