



June 2008 Nevada Lawyer - 80th Anniversary Issue

JUNE 2008-BAR COUNSEL REPORT

SUPREME COURT OF NEVADA

In re: Kevin J. Mirch

Bar No: 923

Docket No: 49212

Filed April 10, 2008

ORDER OF DISBARMENT

Disbarment warranted based on attorney's filing of frivolous lawsuit, aggravated by evidence of pattern of similar conduct.

This is an automatic review of Northern Nevada Disciplinary Board hearing panel's finding that attorney Kevin J. Mirch violated SCR 170 (currently RPC 3.1)¹ and recommendation of disbarment.

The panel found a violation of SCR 170 by Mirch, based on his filing a state court lawsuit against attorney Leigh Goddard and her law firm, McDonald, Carano & Wilson, LLP. The hearing panel found that this lawsuit was frivolous and filed with the intent to interfere and harass Goddard and the law firm in their representation of one of Mirch's former clients in a separate federal lawsuit. The panel concluded that the lawsuit was part of a pattern of misconduct and that disbarment was warranted. This automatic review followed.

Initially, Mirch claims that the state bar and the disciplinary panel committed several procedural errors that necessitate either a finding of no misconduct or a remand for a new hearing. These contentions lack merit.

Due Process

Mirch argues that his due process rights were violated because the complaint insufficiently alleged what actions constituted a violation of SCR 170, he received no notice that the state bar would rely on prior uncharged bad acts as aggravating factors, he was not notified that the state bar would argue that serving the complaint within three days of NCRP 4(i)'s 120-day limit was a violation of SCR 170, and he was not informed that the state bar would argue that a failure to investigate was a violation of SCR 170.

1. Insufficient complaint. The state bar's disciplinary complaint incorporated the District Court's order dismissing the state court action and alleged that the conduct described in the District Court order violated SCR 170. Mirch argues that this was insufficient notice of the charges against him because the order addressed NRCP 11, not SCR 170.

SCR 105(2) requires that the state bar's complaint "be sufficiently clear and specific to inform the attorney of the charges against him or her and the underlying conduct supporting the charges." Mirch provides no legal support for his argument that the state bar

cannot incorporate the District Court order to set forth the conduct that supports the charges. The complaint stated what the charge was, and by incorporating the detailed order, provided an explanation of the actions that supported the charge. Both NRCP 11 and SCR 170 prohibit frivolous claims. The District Court order was 12 pages long and provided a detailed explanation of why the complaint was frivolous and improper. An attorney is expected to understand the ethical rules and how those rules apply to his actions.² As a result, Mirch received adequate notice of the wrongdoing alleged.

2. Prior uncharged bad acts. Mirch's assertion that he was not provided sufficient notice of the use of prior bad acts is inaccurate. The state bar is required under SCR 105(2)(c) to provide to the attorney a list of witnesses and evidence it plans to introduce at the disciplinary hearing. The state bar followed this procedure in this case. It specifically listed some prior cases that it would introduce, along with a general statement that it would introduce other court actions filed by Mirch that had been dismissed as frivolous for the purpose of demonstrating aggravating factors.

3. 120-day rule. Mirch claims that he did not have adequate notice of the state bar's intent to argue that his service of the complaint within three days of NRCP 4(i)'s 120-day limit was a violation of SCR 170. This claim lacks merit. The state bar did not argue that the delayed service violated SCR 170. Rather, the state bar introduced this conduct as part of its effort to show Mirch's intent, which was relevant to the panel's determination of the appropriate discipline to impose.

4. Failure to investigate. Mirch's final due process argument is that he did not receive adequate notice that the state bar would argue that a failure to investigate was a violation of SCR 170. Most of the testimony adduced and the arguments made by Mirch at the disciplinary hearing, however, attempted to prove that he conducted a sufficient investigation. Therefore, his actions refute his argument that he was unaware that the adequacy of his precomplaint investigation would be at issue during the disciplinary hearing. Additionally, Mirch provides no legal authority that requires the state bar to outline all the arguments it may present as to why an attorney's actions violated a professional conduct rule. Regardless, Mirch is expected to know the rules and what they require,³ so he cannot argue that he was unaware that a failure to investigate the facts prior to filing a lawsuit was a violation. Finally, Mirch's own expert stated that SCR 170 imposes a duty to investigate.

Duty to investigate under SCR 170

Mirch asserts that SCR 170 imposes no duty to investigate. However, Mirch's own expert witness testified that, under the rule, a lawyer must research the applicable law and investigate the facts of the case to determine if a cause of action could be brought in good faith. We therefore reject Mirch's argument.

Bifurcated hearing

Mirch asserts that the panel erred by allowing prior bad acts and victim impact testimony before a violation was found because this evidence improperly influenced the panel. Mirch failed to request a bifurcated disciplinary hearing, however, and thus he waived this argument.⁴

Right to confront accuser

The disciplinary complaint against Mirch was based on then-District Judge Hardesty's order granting summary judgment in the state court action. Mirch attempted to subpoena Hardesty to testify at the disciplinary hearing, but the state bar successfully moved to quash the subpoena, arguing that a judge is protected from inquiry into his thought processes when ruling on a case. Mirch contends that his inability to question Hardesty violated his constitutional right to confront his accuser. Mirch's argument is based on the Sixth Amendment, which provides the defendant in a criminal case the right to confront his accuser.

While the United States Supreme Court has stated that attorney discipline is a quasi-criminal proceeding, and therefore due process rights apply,⁵ a disciplinary hearing is not the same as a criminal trial and not all of the constitutional guarantees afforded a criminal defendant apply.⁶ SCR 107 states that a disciplinary proceeding may proceed even if the complainant refuses to participate. In addition, other states have held that a lawyer has no right to confront a disciplinary complainant. Specifically, these courts concluded that the complainant in an attorney discipline situation is different from an accuser in a criminal proceeding, and therefore the right does not apply.⁷

Additionally, the United States Supreme Court has held that a judge cannot be questioned concerning his thought processes in reaching a decision in a case.⁸ Mirch failed to indicate what information, other than Hardesty's thought processes in the case, he would have sought. Therefore, Mirch failed to demonstrate that he was harmed by the decision to quash the subpoena. As a result, we conclude that no constitutional violation occurred.

Mirch's claim that Laxalt's testimony was unsworn

Mirch claims that the hearing panel allowed the unsworn testimony of witness Bruce Laxalt and that the panel erred by not striking the testimony. However, the disciplinary hearing transcript shows that Laxalt was sworn prior to his testimony. Therefore, Mirch's argument is refuted by the record and lacks merit.

SCR 170 violation

While a disciplinary panel's findings are persuasive, we review the record de novo to determine whether discipline is proper.⁹ Our de novo review extends to the credibility of the witnesses that testify at the disciplinary hearing.¹⁰ In disciplinary matters, the findings of fact must be "supported by clear and convincing evidence."¹¹ Clear and convincing evidence requires "evidence of tangible facts from which a legitimate inference may be drawn."¹²

After reviewing the entire record and the parties' briefs, we agree with the panel's finding that Mirch violated SCR 170. The pertinent part of SCR 170 stated 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.

The state lawsuit filed by Mirch was frivolous and lacked any basis in law or fact. As a result, a violation occurred and discipline is proper.

Appropriate discipline

The disciplinary panel recommended that Mirch be disbarred for his misconduct. Based on the circumstances surrounding Mirch's filing of the lawsuit, in connection with evidence that this action represented only one instance in a pattern of similar conduct by Mirch, we approve the disciplinary panel's recommendation and disbar Mirch.¹³ Additionally, Mirch is responsible for the payment of the disciplinary proceeding's costs (\$15,219.25).

It is so ORDERED.¹⁴

In re: Vicki Carlton
Bar No: 2863
Docket No: 50371
Filed April 10, 2008

ORDER DENYING REINSTATEMENT

Denial of reinstatement petition due to applicant failing to meet burden of proof by clear and convincing evidence that she has moral qualifications, competency and learning of law required for admission to practice law. Costs (\$2,161) were also awarded to the state bar.

This is an automatic review of the Southern Nevada Disciplinary Board hearing panel's recommendation to deny suspended attorney Vicki Carlton's petition for reinstatement. Having reviewed the record, we conclude that the panel correctly found that Carlton has failed to meet her burden of showing by clear and convincing evidence that she should be reinstated.

While a disciplinary panel's recommendation is persuasive, we review a petition for reinstatement de novo.¹⁵ The person seeking reinstatement bears the burden of proof, and must show by clear and convincing evidence that she "has the moral qualifications, competency, and learning in a law required for admission to practice law in this state, and that [her]... resumption of the practice of law will not be detrimental to the integrity and standing of the bar, to the administration of justice, or to the public interest."¹⁶

Based on the record before this court, we conclude that Carlton has failed to meet her burden under SCR 116 to show that she is entitled to reinstatement. Accordingly, we approve the panel's recommendation and deny the petition for reinstatement.¹⁷ Additionally, we approve the panel's recommendation that Carlton shall pay the costs of the disciplinary board's proceedings (\$2,161) within 30 days of the date of this order.

In re: Arnold Weinstock
Bar No: 810
Docket No: 50969
Filed April 23, 2008

ORDER OF REINSTATEMENT

Applicant granted reinstatement to the practice of law with conditions following prior suspension.

Suspended attorney Arnold Weinstock has petitioned for reinstatement to practice law under SCR 116. A Southern Nevada Disciplinary Board hearing panel has recommended that the petition be granted, subject to certain conditions, and we conclude that the panel's recommendation should be approved.

SCR 116(2) requires that a lawyer seeking reinstatement must:

Demonstrat[e] by clear and convincing evidence that [the attorney] has the moral qualifications, competency, and learning in law required for admission to practice law in this state, and that [the attorney's] resumption of the practice of law will not be detrimental to the integrity and standing of the bar, to the administration of justice, or to the public interest.

Weinstock presented testimony from his employer, an attorney with whom he has closely worked, as well as the potential testimony of three witnesses as an "offer of proof," in support of his petition.

Having reviewed the record, we conclude that clear and convincing evidence supports the panel's findings, and that its recommendation should be approved. Accordingly, Arnold Weinstock is hereby reinstated to the practice of law, subject to the conditions set forth in the panel's findings and recommendations. Specifically, these conditions provide: (1) Weinstock may not practice as a solo practitioner and must be supervised by a Nevada licensed attorney; (2) in the event that Weinstock wishes to resume a solo practice, he must petition the Southern Nevada Disciplinary Board for the right to do so; (3) if Weinstock obtains employment with either a government agency, law firm, or in-house counsel, and is subsequently terminated, he must notify the Nevada State Bar within five days; (4) Weinstock must timely respond to all inquiries from the Nevada State Bar involving disciplinary matters or the conditions of reinstatement; and (5) he must pay the reinstatement proceeding's costs (\$667.45) within 30 days of this order.

In re: C. Andrew Wariner

Bar No: 3228

Docket No: 51085

Filed April 10, 2008

ORDER IMPOSING RECIPROCAL DISCIPLINE

Reciprocal public reprimand granted based upon Utah discipline.

This is a petition under SCR 114 to reciprocally discipline attorney C. Andrew Wariner, based on his public reprimand in Utah. Wariner has not responded to the petition.¹⁸

Wariner appears to reside in Utah and was publicly reprimanded by the Ethics and Discipline Committee of the Utah Supreme Court on December 13, 2007, for violating the equivalent of RPC 1.2(a) (scope of representation), RPC 1.3 (diligence), RPC 1.4 (communication), RPC 4.1 (truthfulness in statement to others), RPC 8.4(c) (misconduct: conduct involving deceit, misrepresentation, dishonesty, or fraud), and RPC 8.4(d) (misconduct: conduct prejudicial to the administration of justice).

According to the findings, conclusion, and recommendation by the Utah Supreme Court's Ethics and Discipline Committee's screening panel, Wariner agreed to represent a client in a personal injury matter. He did not communicate to her the need for medical release authorizations. He then accepted a settlement on her behalf without consulting with or informing her. He falsely advised the arbitrator that the client had approved the settlement, and he falsely advised the opposing party and counsel that he could not reach his client. Based on this misconduct, the Utah Supreme Court's Ethics and Discipline Committee imposed a public reprimand.

SCR 114(4) provides that this court shall impose identical reciprocal discipline unless the attorney demonstrates or this court determines that one of four exceptions applies:

- a) The procedure in the other jurisdiction was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process; or
- b) There was such an infirmity of proof establishing the misconduct as to give rise to the clear conviction that the court could not, consistent with its duty, accept the decision of the other jurisdiction as fairly reached;
- c) The misconduct established warrants substantially different discipline in this state; or
- d) The misconduct established does not constitute misconduct under any Nevada Rule of Professional Conduct.

Discipline elsewhere is res judicata, as SCR 114(5) also provides, "[i]n all other respects, a final adjudication in another jurisdiction

that an attorney has been guilty of misconduct conclusively establishes the misconduct for the purposes of a disciplinary proceeding in this state.”¹⁹

Wariner has not demonstrated that any of the SCR 114(4) exceptions apply. Consequently, we grant the petition. Wariner is hereby publicly reprimanded for his ethical violations in Utah.²⁰

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:

Jane A. Steckbeck	Bar No. 3820	Order 51006	Filed 03/04/08
Patricia Lee Van Den Broeke	Bar No. 2500	Order 51291	Filed 04/07/08
Elizabeth E. Wachsman	Bar No. 6529	Order 51007	Filed 03/04/08

ENDNOTES

1. The former version of the Supreme Court Rules governing professional misconduct is cited in this order, since Mirch's actions occurred before the Rules of Professional Misconduct were renumbered and amended in 2006.

2. *People v. Corbin*, 82 P.3d 373, 376 (Colo. O.P.D.J. 2003); *Matter of Farmer*, 747 P.2d 97, 99-100 (Kan.1987).

3. *Id.*

4. *See Diamond Enters., Inc. v. Lau*, 113 Nev. 1376, 1378, 951 P.2d 73, 74 (1997).

5. *In re Ruffalo*, 390 U.S. 544, 551 (1968).

6. *See Matter of Jacobs*, 44 F.3d 84, 89 (2d Cir. 1994); *In re Dasent*, 845 N.E.2d 1133, 1135 (Mass. 2006); *People v. Varallo*, 913 P.2d 1, 3 (Colo. 1996); *State v. Scott*, 639 P.2d 1131, 1134 (Kan.1982).

7. *Daniels v. Commission for Lawyer Discipline*, 142 S.W.3d 565, 571 (Tex. Ct. App. 2004); *State v. Turner*, 538 P.2d 966, 974 (Kan.1975).

8. *United States v. Morgan*, 313 U.S. 409, 422 (1941).

9. *In re Discipline of Schaefer*, 117 Nev. 496, 25 P.3d 191, *as modified by* 31 P.3d 365 (2001).

10. *See In re Drakulich*, 111 Nev. 1556, 1569, 908 P.2d 709, 717 (1995).

11. *In re Stuhff*, 108 Nev. 629, 635, 837 P.2d 853,856 (1992).

12. *Id.*, quoting *Gruber v. Baker*, 20 Nev. 453, 477, 23 P. 858, 865 (1890).

13. *See Parler & Wobbler v. Miles & Stockbridge*, 756 A.2d 526, 545 (Md. 2000).

We note that this disbarment is imposed according to the former version of SCR 102, under which Mirch may petition for reinstatement after three years. The formal complaint against Mirch was filed on June 15, 2004, when the former rule was in effect. See SCR 122 (2007).

14. The Honorable William Maupin and James Hardesty, Justices, voluntarily recused themselves from the participation in the decision of this matter.

15. *In Re Nubar Wright*, 75 Nev. 111, 335 P.2d 609 (1959) (noting that consideration of the record is made without deference to the

hearing panel's findings).

16. SCR 116(2).

17. In any future reinstatement petition, Carlton should be prepared to demonstrate significant restitution efforts to Rosa Montoya and the State Bar of Nevada's Client Security Fund. Also, shortly after Carlton was suspended in 2005, a check she wrote to pay a peremptory challenge fee in District Court Case No. D208843 was returned for insufficient funds; Carlton should address this matter as well.

18. See SCR 114(3) (providing an attorney 15 days to file a response to a reciprocal discipline petition).

19. SCR 114(1) requires attorneys licensed in this state to inform Nevada bar counsel if they are subjected to professional disciplinary action in another jurisdiction. Wariner kept Nevada bar counsel informed throughout the Utah proceedings.

20. See *Matter of Discipline of Pierce*, 122 Nev. 77, 128 P.3d 443 (2006) (imposing reciprocal discipline for misconduct penalized by United States Patent and Trademark Office).