IN THE SUPREME COURT OF THE STATE OF NEVADA

IN THE MATTER OF DISCIPLINE OF KEVIN J. MIRCH, ESQ.

No. 49212

FILED

APR 10 2008

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF DISBARMENT

This is an automatic review of a 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.

[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.

Effective Date: April 10, 2008
Bar Number: 923

08-08931

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 NRCP 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.

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[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).

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

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[3]Id.

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 Judge 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 Judge 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

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[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).

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 Judge 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

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[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).

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

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

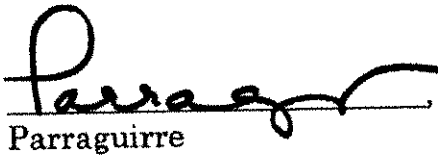
[11]In re Stuhff, 108 Nev. 629, 635, 837 P.2d 853, 856 (1992).

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

disciplinary panel's recommendation and disbar Mirch.[13] Additionally, Mirch is responsible for the payment of the disciplinary proceeding's costs.

It is so ORDERED.[14]

C.J.
Gibbons



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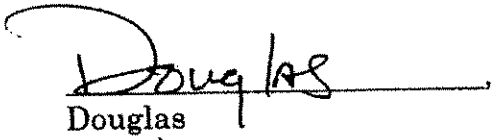

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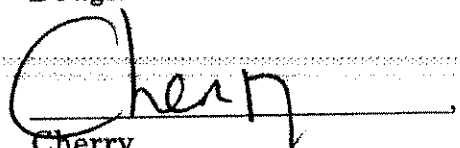

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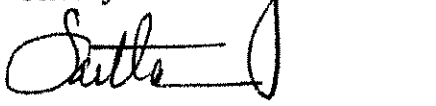

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[13]See Parler & Wobber v. Miles & Stockbridge, 756 A.2d 526, 545 (Md. 2000).

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 participation in the decision of this matter.

cc: John B. Mulligan, Chair, Northern Nevada Disciplinary Board
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