

IN THE SUPREME COURT OF THE STATE OF NEVADA

IN RE: DISCIPLINE OF JOSE C.
PALLARES, ESQ.

No. 42535

FILED

MAR 25 2005

J. Davilla
DEPUTY CLERK

ORDER OF SUSPENSION

This is an automatic appeal from a Southern Nevada Disciplinary Board hearing panel's recommendation that attorney Jose Pallares be suspended for one year, to run from the date of his temporary suspension, May 24, 2003. Pallares did not file an opening brief contesting the recommendation.¹ The state bar, however, filed an opening brief arguing that the recommended discipline was too lenient and that disbarment under the circumstances of this case is warranted. Pallares moved to strike the state bar's brief; the state bar opposed the motion, and asked in the alternative for leave to file an opening brief.

We conclude that the procedural rules regarding bar discipline do not provide for an appeal by the state bar, and so we grant Pallares' motion to strike the state bar's opening brief. We also deny the state bar's request for leave to file an opening brief. Additionally, although clear and convincing evidence supports the panel's findings concerning Pallares' misconduct, the recommended one-year suspension is too lenient. We

¹See SCR 105(3)(b).

Effective date: May 23, 2003*

Bar Number: 4020

*Runs from date of Temp SS in force; may petition for reinstatement after May 23, 2005.

therefore impose a two-year suspension, to run from the date of Pallares' temporary suspension.

FACTS

Pallares was admitted to practice in Nevada in 1991. He worked for the Clark County District Attorney's office, and then for two small Las Vegas law firms, before opening his own solo practice in 1995. He mainly practiced criminal defense, but also accepted some personal injury work.

In December 2000, Pallares was diagnosed with anxiety, depression and alcoholism. Over the next two years, Pallares' compliance with his treatment plan was sporadic. According to Pallares, he would begin to feel better as the medication and abstinence took effect, and he would believe that he had "conquered" his problems and was cured. He would stop the medication, stop attending regular Alcoholics Anonymous (AA) meetings and allow himself "one or two" drinks. Of course, this would result in a relapse. This cycle was repeated three or four times from early 2001 to early 2003.

From April to September 2001, Pallares withheld part of a personal injury settlement that was earmarked to pay a chiropractor's bill. Apparently, Pallares believed that the bill was inflated, but instead of properly contesting the lien, he simply failed to pay it. The chiropractor complained to the state bar, which asked Pallares for a response. By this time, however, Pallares had given the money to the client. Pallares paid the chiropractor in November 2001. The resulting discipline case was resolved when Pallares entered into a conditional plea agreement in exchange for a 90-day suspension for the misappropriation from the

chiropractor.² Pallares did not disclose his problems with depression or alcohol to the state bar at that time; he testified that he was embarrassed and wanted to keep them private. The plea agreement was forwarded to this court for approval in September 2002.

Pallares testified that, in anticipation of the 90-day suspension, he began to shut down his practice. He reduced his staff and stopped taking new cases. He also ceased taking his medication and going to AA meetings. According to Pallares, he would go to court for his remaining criminal calendar in the mornings, return to the office with his files, and then go drink for the afternoon.

The two instances of misconduct charged in the complaint arise from Pallares' representation of three personal injury plaintiffs in a suit to recover underinsured motorist insurance benefits. The misconduct occurred in December 2002 and January 2003, after Pallares had entered into the conditional guilty plea for a 90-day suspension, but before it was approved by this court. Pallares obtained an arbitration award, which was paid by the insurer in December 2002 and January 2003. One plaintiff had a medical bill from a company called Primax for \$623.36. Her settlement statement, prepared by Pallares, indicated that this amount had been paid, along with other medical bills and Pallares' fees and costs. Pallares remitted the net amount owed to the client, about \$40,000, but he did not pay Primax.

Another plaintiff was also to receive a net amount of about \$40,000. In addition, she had a \$950 medical bill from a doctor that was to

²See Discipline of Pallares, Docket No. 40168 (Order Approving Conditional Guilty Plea in Exchange for Stated Form of Discipline, February 7, 2003).

be paid from the proceeds. Pallares prepared a settlement statement stating that the doctor had been paid, and he sent a check for \$24,000 to the client. At this time, Pallares told the client that another check would be coming from the insurance company, and that she would be paid the remainder then. In fact, the insurance company had already sent Pallares all amounts owed under the arbitration award. Also, the doctor had not been paid. Instead, Pallares used the funds to pay his office lease and his remaining staff member. This court's order of suspension was entered on February 7, 2003.

Pallares testified that he planned to repay the client by selling his house, which in the current market he expected to sell quickly and at a substantial profit. But his wife, who shared title to the house, refused to agree to his plan since it was their sole asset and also was the home for their two small children.

The two clients were subjected to collection efforts by Primax and the doctor and complained to the state bar. Pallares, who by now was serving the 90-day suspension, stipulated to a temporary suspension under SCR 102(4), beginning when his 90-day suspension ended.³ A formal complaint was filed, charging violations of SCR 154 (communication), SCR 165 (safekeeping property), and SCR 203(3) (conduct involving misrepresentation, deceit, dishonesty or fraud).⁴ In his answer, Pallares admitted that he had misappropriated the remainder of

³Discipline of Pallares, Docket No. 41438 (Order of Temporary Suspension, May 21, 2003).

⁴The complaint also included allegations that Pallares had violated SCR 187 (nonlawyer assistants) and 189 (unauthorized practice of law), but these charges were dropped before the formal hearing.

the client's recovery, and denied that he had failed to pay Primax or the doctor. Sometime before the hearing, Pallares changed counsel. At the hearing, Pallares admitted that after going through his records, he could not locate evidence that Primax and the doctor had been paid. Shortly after the complaint was filed, Pallares paid restitution of all amounts owed to the client, Primax and the doctor; Pallares obtained the money from his father.

By March 2003, Pallares realized that he needed continuous treatment, and he began consulting his doctor again. He started taking medication, and enrolled in an outpatient detoxification clinic. After Pallares had successfully completed the clinic's program, he was also prescribed medication to help alleviate alcohol cravings, and he began attending regular AA and Lawyers Concerned for Lawyers meetings. Pallares testified at the hearing that he now realizes he needs help, and that he cannot control his problems on his own. Also, he has developed a positive attitude toward taking his medications for the long term. He has also learned to overcome his reluctance to ask for help when needed.

Before the hearing, the state bar filed a well-researched trial brief strongly arguing that disbarment was the only appropriate discipline in this case, because Pallares had already been subject to a suspension for similar misconduct, and in fact was awaiting entry of the suspension order when he engaged in the misconduct at issue in this case. The state bar maintained its position at the hearing.

Pallares' doctor, Dr. Michael Levy, who specializes in addictions, testified at the hearing on Pallares' behalf. Dr. Levy is one of 200 fellows in addiction medicine in this country. Dr. Levy testified that alcoholism, and in Pallares' case, his depression, too, are chronic,

incurable, but treatable conditions. According to Dr. Levy, these conditions are not unlike diabetes, asthma or hypertension, which cannot be cured but can be controlled with proper care. He stated that any prediction for the future would be speculation, but that he would not hesitate to recommend Pallares as a lawyer so long as Pallares adheres to his treatment plan. Dr. Levy noted that he sits on the state bar's Moral Character & Fitness Committee, and so he is aware of attorney ethical standards.

Pallares admitted his misconduct and recognized its seriousness, but he presented a vigorous defense concerning the discipline to be imposed and pled for a suspension. He stated that he would agree to whatever conditions the panel and any eventual reinstatement panel thought appropriate, including limiting his practice areas or practice settings for some probationary period and continuing to adhere to his treatment plan.

Pallares presented extensive character evidence. District Judge Valerie Adair, and Justices of the Peace Doug Smith and Tony Abbatangelo, who were subpoenaed for the hearing, along with Clark County Deputy District Attorney Lynn Robinson and lawyers Tony Sanchez and Joseph Sciscento all testified on Pallares' behalf. They uniformly praised Pallares' legal skills, especially as a criminal defense attorney, and stated that they would trust him despite the misconduct charged. Judge Abbatangelo and attorney Sciscento met Pallares in law school. Judge Adair, Judge Smith and attorney Robinson met him while they all worked at the district attorney's office. Attorney Sanchez met Pallares through their work together at the Latin Chamber of Commerce

and their efforts to re-establish the Latino Bar Association. Sanchez praised Pallares' community activities.

The panel unanimously decided to recommend a one-year suspension, running from May 24, 2003, the date of Pallares' temporary suspension. The panel further recommended several conditions for any eventual reinstatement. These conditions are: (1) that Pallares continue treatment for his anxiety, depression and alcoholism, as prescribed by his physician; (2) that Pallares continue regular attendance at AA and Lawyers Concerned for Lawyers meetings, as directed by his physician; and (3) that Pallares be prohibited from acting as a signatory on any client trust account for a period to be determined by any reinstatement panel. The panel also assessed the costs of the proceedings against Pallares. At the end of the hearing, one panel member cautioned Pallares that this was his last chance—if he committed additional misconduct after his reinstatement, then he would be disbarred.

The panel specifically stated that it had seriously considered the state bar's position, and believed that the state bar's arguments had some merit and were well-supported in the case law. But the panel determined that since Pallares will be required to demonstrate his fitness in a reinstatement hearing before he can practice again, and in light of mitigating factors, including the significant support shown for him, his cooperation in the discipline process, his payment of restitution and his resumption of treatment and counseling, a suspension rather than disbarment is appropriate.

After the record was docketed in this court, the state bar filed an opening brief, arguing that the panel's recommendation is too lenient and that disbarment is warranted. Pallares moved to strike the brief,

asserting that under SCR 105, the state bar may not appeal from a panel's recommendation. The state bar opposed the motion, and alternatively asked for permission to file an opening brief in this matter. Pallares has also moved to expedite this matter.

DISCUSSION

Motion to strike

In moving to strike the state bar's opening brief, Pallares argues that SCR 105(3)(b) does not contemplate an opening brief by the state bar. The state bar argues that the rule does not preclude it from filing an opening brief, but to the extent that the rule is viewed as not authorizing a brief, the state bar asks for leave to file its brief.

SCR 105(3) provides, in pertinent part and with emphasis added:

3. Review by supreme court.

(a) Time and manner of appeal. A decision of a hearing panel shall be served on the respondent Except as provided in subsection 3, paragraphs (b) and (c) of this rule, a decision is final and effective 30 days from service, unless an appeal is taken by the respondent within that time. An appeal from a decision of a hearing panel shall be treated as would an appeal from a civil judgment of a district court and is governed by the Nevada Rules of Appellate Procedure.

(b) Automatic appeal of suspension or disbarment. A decision recommending suspension or disbarment . . . shall be automatically appealed to the supreme court. An appeal under this paragraph shall be commenced by the hearing panel forwarding the record of the proceedings before it to the court within 30 days of entry of the decision. Receipt of the record in such cases shall be acknowledged in writing by the clerk of the supreme court. Thereafter, the matter shall be

treated as any other civil appeal following docketing of the record.

Respondent-attorney shall have 30 days from the date this court acknowledges receipt of the record within which to file an opening brief or otherwise advise the court if he or she intends to contest the hearing panel's findings and recommendations. If the attorney files an opening brief, briefing shall thereafter proceed in accordance with NRAP 31(a). If the attorney does not file an opening brief, the matter will be submitted for decision on the record without briefing or oral argument.

Pallares argues that the emphasized portions of the rule mean that only the disciplined attorney, not the state bar, may challenge a hearing panel's recommendation. According to Pallares, this result is further supported by SCR 105(1)(d), which specifically grants bar counsel the right to appeal, to a five-member hearing panel, a screening panel's dismissal of a grievance. According to Pallares, similar language would appear in SCR 105(3) if bar counsel could appeal to this court from a hearing panel's recommendation.

The state bar relies on the language in SCR 105(3)(a) stating that an appeal from a hearing panel's recommendation is to be treated like any other civil appeal and is governed by the Nevada Rules of Appellate Procedure. The state bar argues that under Ching v. State Bar of Nevada,⁵ it is an aggrieved party that may appeal under NRAP 3A(a).

In one sense, neither side in a bar discipline appeal is the appellant or the respondent, because the appeal is automatic and this court's review is plenary and de novo. Also, Ching does not address

⁵111 Nev. 779, 895 P.2d 646 (1995) (holding that the state bar had standing as a "complainant" to file a bar complaint against an attorney).

whether the state bar may file a brief in the absence of an attorney's opening brief. If the rule's language merely set forth the most common briefing schedule, when an attorney wishes to challenge recommended discipline, then perhaps the state bar's argument would have more force. But the rule goes further: if the attorney does not file a brief, the matter is submitted for decision. Thus, the rule does not contemplate briefing initiated by the state bar rather than the attorney, and so the state bar has no right to file an opening brief. We therefore grant the motion to strike.

We also deny the state bar's request for leave to file an opening brief. This court should not ignore the provisions of SCR 105(3). Also, we note that the thorough trial brief already contained in the record more than adequately sets forth the state bar's position, and so it does not appear that additional briefing is necessary and would only further delay resolution of this matter.

Propriety of recommended discipline

As noted above, Pallares admitted to the misconduct found by the panel. Thus, the only issue to be determined is the discipline to be imposed.

In its trial brief, the state bar notes that this case represents Pallares' fourth discipline proceeding. The previous three cases were resolved through conditional guilty pleas under SCR 113, with progressively more severe discipline: first a private reprimand, then a public reprimand, and finally the 90-day suspension for misconduct that was almost identical to the conduct at issue in this proceeding. Moreover, Pallares' agreement to be suspended for ninety days was pending before this court when Pallares misappropriated his client's money.

The state bar cites ABA Standard for Imposing Lawyer Sanctions 4.11,⁶ which provides that disbarment is generally appropriate when a lawyer knowingly converts a client's property and causes injury or potential injury to a client. In addition, Standard 8.1(b) states that disbarment is warranted when a lawyer has been previously suspended for similar misconduct and knowingly engages in further acts of misconduct.⁷ The state bar's trial brief also points out that the record supports several aggravating factors, including selfish motive, vulnerable victims,⁸ and substantial experience in the practice of law.⁹

The state bar's trial brief also relies on several cases holding that disbarment is presumptively appropriate in misappropriation cases, especially when coupled with intentional deceit.¹⁰ These cases emphasize

⁶ABA Compendium of Professional Responsibility Rules and Standards 345 (1999).

⁷Id. at 352.

⁸According to the state bar, the two clients are both seniors, and the one whose money was taken by Pallares lives in North Dakota and relied on Pallares to protect her interests in this state.

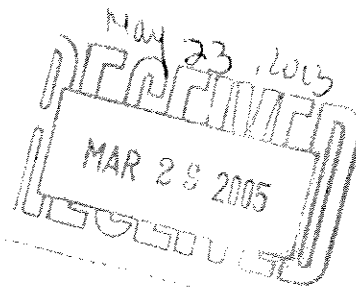
⁹Id. at 352-53 (Standard 9.22, listing factors which may be considered in aggravation).

¹⁰People v. Torpy, 966 P.2d 1040 (Colo. 1998); In re Addams, 579 A.2d 190 (D.C. 1990) (containing an excellent discussion of the differing views on this topic in the majority, concurrence and dissent); The Florida Bar v. Massari, 832 So. 2d 701 (Fla. 2002); In re Stillo, 368 N.E.2d 897 (Ill. 1977); Attorney Grievance v. Smith, 829 A.2d 567 (Md. 2003); Matter of Wilson, 409 A.2d 1153 (N.J. 1979); Matter of Reynolds, 39 P.3d 136 (N.M. 2002); Matter of Marks, 424 N.Y.S.2d 229 (App. Div. 1980); Conduct of Murdock, 968 P.2d 1270 (Or. 1998); Office of Discipl. Counsel v. Monsour, 701 A.2d 556 (Pa. 1997); Carter v. Ross, 461 A.2d 675 (R.I. 1983); Discipline of Ennenga, 37 P.3d 1150 (Utah 2001).

the public trust purposes served by lawyer discipline. Additionally, many of these cases state that the presumption of disbarment can only be overcome by extraordinary mitigating circumstances, such as addictive behavior that caused the misconduct and that is demonstrated to be under control. The "usual" factors such as cooperation and restitution have been held to be insufficient.

We agree with the cases relied upon by the state bar that misappropriation is one of the most serious forms of misconduct that a lawyer can commit. A lawyer occupies a position of trust and must always strive to protect the client's interests. But in light of the substantial mitigating evidence presented by Pallares, we conclude that discipline in the form of disbarment would be too harsh in this case. On the other hand, a one-year suspension, as recommended by the panel, would be too lenient. Instead, a two-year suspension, to run from the date of Pallares' temporary suspension, best serves the purposes of lawyer discipline in this case.

Accordingly, we suspend Pallares for two years, beginning May 24, 2003. We further agree that the conditions recommended by the panel are appropriate for consideration by any reinstatement panel, but we specifically note that the reinstatement panel is not limited to these conditions and may issue its recommendation based on the evidence presented to it. Finally, Pallares shall pay the costs of the disciplinary proceeding. To the extent not already completed with respect to Pallares' 90-day suspension and temporary suspension, Pallares and the state bar



shall comply with the notice and publication provisions of SCR 115 and SCR 121.1.

It is so ORDERED.¹¹

Becker, C.J.
Becker

Rose, J.
Rose

Maupin, J.
Maupin

Gibbons, J.
Gibbons

Douglas, J.
Douglas

Hardesty, J.
Hardesty

Parraguirre, J.
Parraguirre

¹¹This order is our final disposition of this matter. Any future cases concerning Pallares shall be filed under a new docket number. We deny the motion to expedite as moot in light of this order.

cc: Howard Miller, Chair, Southern Nevada Disciplinary Board
Rob W. Bare, Bar Counsel
Allen W. Kimbrough, Executive Director
Frank J. Cremen
Perry Thompson, Admissions Office,
Supreme Court of the United States