

IN THE SUPREME COURT OF THE STATE OF NEVADA

IN THE MATTER OF DISCIPLINE OF
HARVEY WHITTEMORE, BAR NO.
1089.

No. 64154

FILED

NOV 13 2013

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *[Signature]*
DEPUTY CLERK

ORDER DENYING PETITION FOR REINSTATEMENT

On October 8, 2013, this court entered an order, pursuant to SCR 111(7), temporarily suspending attorney Harvey Whittemore from the practice of law pending final disposition of a disciplinary proceeding based on Whittemore's conviction, in the United States District Court for the District of Nevada, of three felonies.¹ Whittemore has moved for reinstatement or to set aside the temporary suspension, the State Bar has filed a response, and Whittemore has filed a reply.²

Our determination in this matter is governed by our consideration of the following factors: "(1) whether the public will suffer irreparable harm unless the order of interim suspension issues, (2) whether the threatened injury to the public outweighs whatever damage the proposed order may cause the attorney temporarily suspended from

¹SCR 111(7) states that upon the filing of a petition demonstrating that an attorney has been convicted of a "serious crime, . . . the court shall enter an order suspending the attorney, regardless of the pendency of an appeal, pending final disposition of a disciplinary proceeding." A felony is a "serious crime." See SCR 111(6).

²SCR 111(7) provides that "[f]or good cause, the court may set aside its order suspending the attorney from the practice of law."

the practice of law, (3) whether the proposed order, if issued, would be adverse to the public interest, and (4) whether there is a substantial likelihood, based on all the available evidence, that a significant sanction will be imposed on the attorney at the conclusion of any pending disciplinary proceedings.” *In re Discipline of Trujillo*, 24 P.3d 972, 979 (Utah 2001).

Whittemore points to his past personal and professional record and argues that the public would not suffer harm by allowing him to continue to practice law pending final disposition of the disciplinary proceedings. But even assuming for the sake of argument that this is true, Whittemore’s petition does not satisfy the remaining *Trujillo* factors.

At least two of the crimes Whittemore was convicted of required proof that he acted knowingly and willfully, indicating a dishonest intent. See 2 U.S.C. § 441f (“No person shall make a contribution in the name of another person or knowingly permit his name to be used to effect such a contribution . . .”); 2 U.S.C. § 437g(d)(1)(D) (describing the penalties for “[a]ny person who knowingly and willfully commits a violation of section 441f of this title involving an amount aggregating more than \$10,000 during a calendar year”); 18 U.S.C. § 1001(a)(2) (making it a crime “in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States” to “knowingly and willfully . . . make[] any materially false, fictitious, or fraudulent statement or representation”). Nevada has adopted the Model Rules of Professional Conduct, and under Model Rule 8.4(b), “It is professional misconduct for a lawyer to . . . [c]ommit a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects.” This court and

the underlying bar disciplinary proceeding are not the proper vehicles for his challenge to the legitimacy of his convictions.

When a lawyer has been *convicted* of a crime encompassed by Rule 8.4(b), it [is] clear that the lawyer should not be permitted to relitigate the facts underlying the conviction. An accused in a criminal case has more procedural rights than a respondent in a disciplinary case, including the benefit of the presumption of innocence and the 'beyond a reasonable doubt' standard of proof.

2 Geoffrey C. Hazard, Jr. & W. William Hodes, *The Law of Lawyering*, § 65.4 (3d ed. 2013). "A record of conviction is conclusive evidence that the lawyer committed the offense." Restatement (Third) of the Law Governing Lawyers § 5 cmt. g (2000). Because a judgment of conviction carries preclusive effect, "[i]nterim suspension of a lawyer . . . is commonly provided for following conviction of a serious crime *regardless of pendency of an appeal.*" *Id.* (emphasis added); *accord* SCR 111(5) & (7).

The elements of at least two of the crimes for which Whittemore was convicted involve a "criminal act that reflects adversely on [his] honesty, trustworthiness or fitness as a lawyer." RPC 8.4(b). Also troubling is the fact that, in committing the acts that led to the convictions, Whittemore involved employees and family members who presumably relied on his counsel and encouragement. In light of these facts and the further fact that a felony is, per se, a serious crime under SCR 111, we believe that the public's confidence in the legal profession and the judicial system would be diminished were we to allow Whittemore to continue to practice law despite his judgment of conviction on three felony counts in federal court. Accordingly, we deny Whittemore's petition

for reinstatement. The temporary suspension imposed by this court's October 8, 2013, order shall take effect immediately from the date of this order.

It is so ORDERED.³

Pickering, C.J.
Pickering

Douglas, J.
Douglas

Cherry, J.
Cherry

Saitta, J.
Saitta

³The Honorable Ron Parraguirre, Justice, has voluntarily recused himself in this matter.

HARDESTY, J., with whom GIBBONS, J., agrees, concurring in part and dissenting:

I agree with the majority's utilization of standards for evaluating good cause applications to set aside or modify temporary suspensions pursuant to SCR 111(7). In the past, this court has received a limited number of such requests, but we have not set forth the appropriate standards for their analysis, and it is my view that we should do so in a published opinion. See Internal Operating Procedures Rule 9(a). I further concur that the majority's selection of the factors set forth in *Trujillo* provide a reasonable framework for the court's analysis of a request under SCR 111(7). However, I would weigh the *Trujillo* factors differently, keeping in mind that in the context of disciplinary matters, this court must consider "all the relevant factors and mitigating circumstances on a case-by-case basis." *State Bar of Nev. v. Claiborne*, 104 Nev. 115, 219, 756 P.2d 464, 531 (1988) (quoting *Murray v. State Bar of Cal.*, 709 P.2d 480, 485 (Cal. 1985)).

The purpose behind the mandatory temporary suspension provided for in SCR 111 is to halt the continued practice of an attorney who has been convicted of committing a serious crime. The first two factors in *Trujillo* emphasize that the primary purpose of a temporary suspension is the protection of the public from further harm caused by an attorney who has been convicted of a serious crime. However, within SCR 111 itself, this court has recognized that the attorney can make a request to set aside the temporary suspension, for good cause shown, pending final disposition of disciplinary proceedings. Other states have recognized that a temporary suspension, imposed under rules substantially similar to SCR 111, can be stayed, see *In re Downey*, 960 A.2d 1135 (D.C. 2008) (granting

attorney's motion to stay an interim suspension "for good cause shown" after applying factors substantially similar to those set forth in *Trujillo*), or modified to tailor the temporary suspension to the facts and circumstances unique to the matter at hand, see *State v. Kirsch*, No. CR980178336, 2000 WL 1825398 (Conn. Super. Ct., Nov. 21, 2000).

Consistent with the purposes of SCR 111 and the approaches taken in *Downey* and *Kirsch*, I would grant a modified temporary suspension, limiting Whittemore's representation to his current clients and barring him from appearing in any state court.

In his petition requesting that this court set aside its order of temporary suspension, Whittemore represents that he has no prior record of discipline (a representation the State Bar does not refute); after full disclosure to his current clients of the facts and circumstances surrounding his convictions, his clients consented to his continued representation pending his incarceration; the crimes he was convicted of were committed while Whittemore was employed in a business setting and not while he was engaged in the active practice of law; the transactions giving rise to his convictions occurred nearly seven years ago; and a legitimate dispute exists concerning the legal issues to be presented at his criminal appeal. Further, Whittemore acknowledges that if he is incarcerated, he can no longer represent his clients. These representations demonstrate that Whittemore's continued practice, pending final disposition of the disciplinary proceedings, would not pose an undue risk of harm to the public. The majority appears to concede the point, thus satisfying the first two *Trujillo* factors.

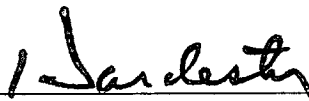
I presume the majority concludes that the fourth *Trujillo* factor—whether there is a substantial likelihood that a significant

sanction will be imposed at the conclusion of the disciplinary proceedings—weighs in Whittemore's favor as it was not analyzed. In fact, the outcome of that issue is not clear and we should not treat it as preordained. While Whittemore has been convicted of serious crimes, the disciplinary panel and this court must take into consideration numerous factors and mitigating evidence before imposing discipline.


The majority's denial of Whittemore's SCR 111(7) request rests solely on the argument that the elements of at least two of the convictions involve a violation of RPC 8.4(b), and thus adversely affect the public's confidence in the legal profession. I reject this argument for three reasons. First, it should be noted that the State Bar did not argue that any of Whittemore's convictions violated RPC 8.4(b) and we should not leap to that conclusion without appropriate briefing and analysis by the disciplinary panel. Second, in the context of an order lifting or modifying a temporary suspension, I would place greater weight on the threat the lawyer presents to public harm and the conditions the court can impose to protect the public than the public's perception of the legal system. While the public's confidence in the legal profession is an important factor in the ultimate discipline of a lawyer, the issue before the court concerns a remedy which our rule, the legal profession, and the public contemplate. Third, the majority's analysis essentially forecloses any modification of a temporary suspension order in the future, rendering SCR 111(7) and the *Trujillo* factors hollow.

Because the modification of a temporary suspension order operates as an injunction to maintain the status quo, I would allow Whittemore to continue to practice law on a limited basis, pending final disposition of the disciplinary proceedings or further order of this court.

Accordingly, I would grant Whittemore's petition for reinstatement, in part, and vacate the order of temporary suspension subject to the terms and conditions contained in our October 23, 2013, order limiting Whittemore's practice to his existing clients and prohibiting him from appearing in Nevada's state courts.


_____, J.
Hardesty

I concur:


_____, J.
Gibbons

cc: Thomas Susich, Esq., Chair, Northern Nevada Disciplinary Board
David A. Clark, Bar Counsel
Kimberly K. Farmer, Executive Director, State Bar of Nevada
Gordon Silver
Perry Thompson, Admissions Office, United States Supreme Court