IN THE SUPREME COURT OF THE STATE OF NEVADA

IN THE MATTER OF DISCIPLINE OF JOE M. LAUB, ESQ.

No. 49211

FILED

MAR 05 2008

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

ORDER IMPOSING PUBLIC REPRIMAND

This is an automatic review of a Northern Nevada Disciplinary Board hearing panel's recommendation that attorney Joe M. Laub be suspended for six months and one day (thus requiring reinstatement proceedings under SCR 116) for violations of RPC 5.3 (responsibilities regarding nonlawyer assistants) and RPC 5.5 (unauthorized practice of law). We agree that the violations found by the panel are supported by clear and convincing evidence, but we conclude that the recommended discipline is too harsh and that a public reprimand, together with payment of the discipline proceeding's costs, is sufficient to serve the purposes of attorney discipline.

FACTS

Laub was suspended for six months in 2002. Two patterns of conduct formed the primary basis for this discipline, one of which involved Laub's overdelegation to nonlawyer staff. Evidence in the previous case revealed that Laub routinely permitted employees who were not licensed in Nevada to conduct initial client meetings, including making decisions about whether to represent potential clients and advising clients regarding the merits of their cases. The evidence further demonstrated that Laub's employees performed almost all work on the clients' cases with

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little or no supervision by a Nevada-licensed attorney. In some instances, these employees were paralegals, and in others, they were lawyers admitted elsewhere, but not in Nevada.

During and after Laub's suspension, which was effective from January to July 2002, the firm instituted several policies in an effort to ensure compliance with the rules of professional conduct. First, only lawyers could conduct an initial consultation and make the decision whether to represent a client. Next, the firm developed a "do's and don'ts" flyer, which in pertinent part requests clients to schedule consultations with an attorney approximately every thirty days. Also, staff was instructed that any legal questions must be addressed to a lawyer. Another practice that was commenced involved weekly meetings between the lawyers and staff to review the firm's cases. Finally, the firm hired additional lawyers for these duties, apparently doubling the firm's number of Nevada-licensed attorneys. But these policies were not formally reduced to writing, and no employee manual was prepared that collected the firm's policies.

Laub's firm currently maintains four offices, located in South Lake Tahoe, Truckee, Reno, and Carson City. Laub testified that his usual practice is to spend the mornings in the Carson City office and the afternoons in the Reno office. The Carson City office does not have any other lawyer assigned to it on a permanent basis; rather, Laub has contracted with a Carson City lawyer to be available to meet with clients and prospective clients in the afternoons when Laub is in Reno. The permanent full-time staff in the Carson City office consists of a paralegal, who was admitted to the Florida bar in 1968 but is not admitted to the Nevada bar, and his wife, who serves as a receptionist and legal secretary.

The grievant in this matter, Leslie Carlen, was injured when her car was rear-ended by another vehicle. She was taken by ambulance to the hospital and was then released. The next day, a Friday, a friend referred her to Laub's firm. Carlen called and spoke with the receptionist and made an appointment for 2:00 p.m. that afternoon.

The receptionist testified that Carlen was fairly upset during the phone call, and that she insisted on seeing someone that day and did not wish to wait through the weekend. But a few minutes before 2:00 p.m. (well after Carlen would have left for the appointment), the contract attorney called and said that he would be unable to keep the appointment. The receptionist attempted to contact Laub in the Reno office to see if he could return to meet with Carlen but was unable to reach him.

When Carlen arrived for the appointment, the receptionist, who was aware of the firm's policy that prospective clients meet only with attorneys, felt sorry for Carlen and did not tell her that the appointment could not be kept and instead brought her to the paralegal, introducing him as the office manager and paralegal.

The paralegal also testified that he made an exception and met with Carlen because she seemed stressed and in pain, and he did not want to make her wait until the following week to speak to someone. He stated that he thought it would be permissible for him to meet with the client on this one occasion, obtain information about the case, transmit the information to Laub the following Monday, and then arrange a meeting between Carlen and Laub in the near future if Laub believed that the representation should be undertaken. He stated that he simply took notes about her accident, her insurance coverage, and her medical treatment to date. He also indicated that he showed her the firm's contingency fee

agreement but did not explain any of its terms, and she signed it. According to the paralegal, this fee agreement was not signed, at that point, by anyone at the firm. The paralegal gave Carlen a new client's folder that included business cards for him and Laub, the "do's and don'ts" flyer, and a copy of the contingency fee agreement with only her signature.

On the following Monday, the paralegal met with Laub and went over his notes concerning his meeting with Carlen, but he did not tell Laub that the contract attorney was not present for the consultation. After discussing Carlen's case, according to the paralegal, Laub signed the contingency fee agreement and the initial representation letters, including a letter to Carlen, which was mailed to Carlen along with the signed contingency fee agreement.

Notably, according to the paralegal, the contract attorney, and Laub, nothing about Laub's Monday morning meeting with the paralegal was different from the usual situation when the contract attorney performed an initial consultation: the paralegal customarily attended such consultations and took notes, and the following business day, he would review these notes with Laub. The contract attorney routinely had no direct contact with Laub regarding these initial consultations; only if a case presented an unusual circumstance would the contract attorney directly discuss an initial consultation with Laub.

According to Carlen, she was not told that the paralegal was not a Nevada-licensed lawyer, and she assumed during their meeting that he was a lawyer. She indicated that he discussed her case with her, told her about the statute of limitations, went over the contingency fee agreement with her, and mentioned that she had good coverage under her own auto insurance policy that would pay for her medical expenses until

she obtained a settlement from the responsible driver. She also testified that Joe Laub's signature was already on the contingency fee agreement that she signed.

Carlen terminated Laub's services in March 2006, because she was dissatisfied that the firm would not handle her property damage claim; rather, it limited its representation to her bodily injury claim. She then retained new counsel, who informed her that the paralegal was not a Nevada-licensed attorney and encouraged her to file a disciplinary complaint against Laub. She did so, with her new counsel's assistance, in late May or early June 2006.

Laub did not learn that the contract attorney had not been present until the bar grievance was received in June 2006. Laub admonished both the receptionist and the paralegal for their conduct once he learned of it and emphasized to all staff the importance of having attorneys conduct initial consultations and advise clients of their rights.

In response to a panel member's question about why Laub's policies, set in place after his 2002 suspension, were not written or compiled into an employee manual, Laub stated that most of his staff have been with the firm for over ten years, and that he was confident that they were aware of the policies. He acknowledged that his protective measures had not worked in this instance and accepted responsibility for this failure, but he asserted that except for this one incident, the measures implemented since 2002 have adhered to ethical requirements. He argued that if any discipline was warranted, then it should be only a reprimand.

The panel unanimously found that Laub had violated RPC 5.3 and RPC 5.5. As to the recommended discipline, four members voted for the six-month-plus-one-day suspension, while the remaining member

voted for a six-month suspension, which would not require reinstatement proceedings.

In determining the appropriate discipline, the panel considered Laub's 2002 six-month suspension and recommended the next step: a suspension that would require reinstatement proceedings. This automatic review followed.

DISCUSSION

As we recognized in In re Stuhff, "[t]hough persuasive, the [disciplinary panel's] findings and recommendations are not binding on this court. This court must review the record de novo and exercise its independent judgment to determine whether and what type of discipline is warranted."[1] To support the imposition of discipline, the panel's findings must be supported by clear and convincing evidence.[2]

The panel concluded that Laub had violated two ethical rules, RPC 5.3 (supervision of nonlawyer employees) and RPC 5.5 (unauthorized practice of law). We consider each in turn. RPC 5.3 sets forth a lawyer's obligations concerning nonlawyer employees, and requires the lawyer to take reasonable measures to ensure that a nonlawyer employee acts in conformity with professional conduct rules:

> With respect to a nonlawyer employed or retained by or associated with a lawyer:
>
> (a) A partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in

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[1]108 Nev. 629, 633, 837 P.2d 853, 855 (1992).

[2]In re Drakulich, 111 Nev. 1556, 1566, 908 P.2d 709, 715 (1995).

> effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;
>
> (b) A lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and
>
> (c) A lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:
>
> (1) The lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or
>
> (2) The lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

The Kansas Supreme Court has held that this rule requires a supervising lawyer to ensure that nonlawyer employees do not give legal advice to clients.[3] The Colorado Supreme Court has reached a similar conclusion.[4] But the mere fact that an employee acted improperly does not necessarily result in lawyer discipline; the lawyer is not per se vicariously responsible for an employee's misconduct.[5]

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[3]Matter of Farmer, 950 P.2d 713 (Kan. 1997).

[4]People v. Fry, 875 P.2d 222 (Colo. 1994) (failing to supervise legal assistant resulted in assistant engaging in unauthorized practice of law).

[5]Matter of Galbasini, 786 P.2d 971 (Ariz. 1990).

Here, the unrebutted testimony of Laub, the receptionist, and the paralegal is that Laub was unaware that the firm's policies had not been followed in Carlen's case until he received the bar complaint. It thus appears that any violation was not willful, and also that Laub did not ratify or condone his employees' conduct.

On the other hand, Laub could have done more to ensure that his employees conformed their conduct to the required standard. Written polices or a written employee handbook setting forth the policies and the reasons for them would have resulted in a useful tool for employees faced with the dilemma present in this case, and moreover, having these policies in writing would have reinforced their importance. Also, it appears that the Carson City office's practice for initial consultations was flawed. Although the contract attorney in almost all instances met with the client when Laub could not, and so a lawyer was available to answer any questions the client might have, the contract attorney then had no further role in the case, unless at some point he was assigned the litigation for that client. By failing to require any communication between the contract attorney, who conducted the initial consultation, and Laub, who after that point assumed primary responsibility for Carson City files, the firm's general practice allowed the instant case to "fall through the cracks." Had the contract attorney and Laub conferred regularly about the initial consultations performed, then Laub would have been aware that Carlen had not met with a lawyer, and he could have scheduled an appointment immediately to review her case. It thus appears that clear and convincing evidence supports the panel's finding that Laub violated RPC 5.3.

RPC 5.5 provides, in pertinent part, "A lawyer shall not . . . [a]ssist another person in the unauthorized practice of law." Here, the

paralegal was not a licensed Nevada lawyer, and so he was prohibited from giving legal advice. While the paralegal maintained that he did not give Carlen any legal advice, but only took notes on her case to discuss with Laub, the panel apparently found Carlen's testimony on this point to be more credible: that the paralegal discussed the statute of limitations, her insurance coverage, and had her sign the contingency fee agreement, which at least in her mind resulted in the establishment of an attorney-client relationship. It thus appears that the panel properly found, by clear and convincing evidence, that the paralegal's conduct overstepped permissible bounds, and that Laub's failure to properly supervise the Carson City office in this instance contributed to the paralegal's unauthorized practice of law, thereby violating RPC 5.5.

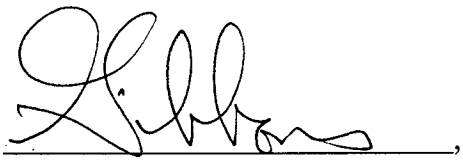
It appears, however, that the recommended sanction is overly harsh. The panel's statement of why the majority decided to impose a lengthy suspension requiring reinstatement proceedings is quite short, and it simply indicates that the panel believed that it should go a step further than the six-month 2002 suspension. But the 2002 suspension was based on significant misconduct in addition to Laub's violation of the supervision and unauthorized practice rules. Also, under the firm's policies at the time of the conduct leading to the 2002 suspension, initial client intake was performed almost exclusively by nonlawyers, and many clients had little or no contact with a lawyer during the entire time their cases were being handled. As a result, the unauthorized practice of law was the firm's norm.

The evidence in this matter indicates that, while additional protective steps must be taken to ensure adequate supervision in the Carson City office, significant steps have been taken by the firm since the

2002 suspension and have resulted in much greater attorney oversight. We therefore conclude that a lengthy suspension is not necessary in this case. Rather, a public reprimand is sufficient to serve the purposes of attorney discipline.

Accordingly, we hereby publicly reprimand attorney Joe M. Laub for violations of RPC 5.3 and RPC 5.5. Also, Laub shall pay the costs of the disciplinary proceeding.

It is so ORDERED.



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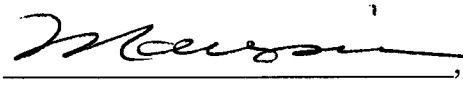
Gibbons



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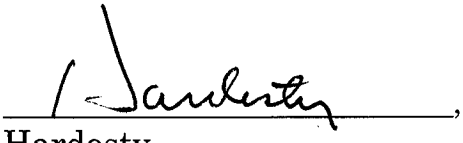
Maupin



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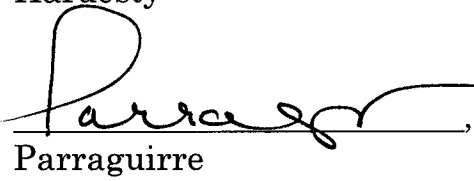

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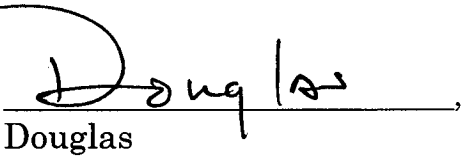
Parraguirre



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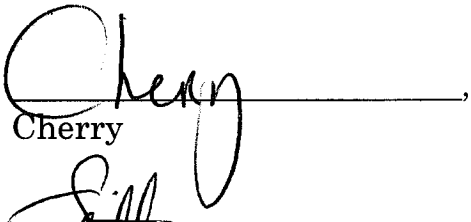
Douglas



_____, J.
Cherry

_____, J.
Saitta

cc: John B. Mulligan, Chair, Northern Nevada Disciplinary Board
Rob W. Bare, Bar Counsel
Kimberly K. Farmer, Executive Director
Jeffrey A. Dickerson