IN THE SUPREME COURT OF THE STATE OF NEVADA

IN RE: DISCIPLINE OF KENNETH L. HALL

No. 40728

FILED

JUL 15 2004

BY [signature] DEPUTY CLERK

ORDER OF SUSPENSION

This is an automatic appeal from a Southern Nevada Disciplinary Board hearing panel's recommendation that attorney Kenneth Hall be suspended for forty days, with credit for forty-four days served under a temporary suspension, and that he be assessed the costs of the disciplinary proceeding, based on his criminal conviction for gross misdemeanor child abuse/neglect. We approve the panel's recommendation in its entirety.

The facts underlying Hall's conviction occurred in 1992. Hall engaged in sexual activities with a woman in his law office, in the presence and direct view of the woman's three-year-old daughter. Hall videotaped the encounter. Criminal proceedings were commenced after Hall's former fiancée found the tape and turned it over to authorities in November 1999.

In July 2000, an information was filed, charging Hall with one count of open or gross lewdness, a gross misdemeanor under NRS 201.210, and one count of child abuse and neglect, a gross misdemeanor under NRS

200.508. Hall's motion to dismiss the charges based on the statute of limitations was denied. The district court concluded that the "secret manner" limitations period, NRS 171.095, applied. This statute provides that when a crime is committed in a "secret manner," the statute of limitations begins to run from the discovery of the offense.

Pursuant to plea negotiations, in February 2001, Hall pled guilty to one count of gross misdemeanor child abuse and neglect. At the time of the offense, the crime was defined under NRS 200.508,[1] in pertinent part, as follows:

> 1. A person who:
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> (a) Willfully causes a child who is less than 18 years of age to suffer unjustifiable physical pain or mental suffering as a result of abuse or neglect . . .
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> . . . .
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> is guilty of a gross misdemeanor unless a more severe penalty is prescribed by law for an act or omission which brings about the abuse, neglect or danger.

Hall was sentenced to six months in jail; this sentence was suspended, and Hall was placed on probation for a period not to exceed two years, with various probationary conditions.

After the judgment of conviction was entered, the state bar filed a petition for temporary suspension under SCR 111 with this court, which was assigned Docket No. 38011. We initially granted the petition

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[1]The penalty under NRS 200.508 was changed by amendment in 2001. See 2001 Nev. Stat., ch. 2, § 23, at 22.

on July 11, 2001, and temporarily suspended Hall. The order directed the state bar to commence formal disciplinary proceedings at which the only issue would be the appropriate discipline. But we then granted Hall's motion to set aside the suspension on September 7, 2001. The order nevertheless referred the matter to the disciplinary board for "any action it may deem warranted."[2] Accordingly, Hall was temporarily suspended for forty-four days.[3]

Shortly after the July 11, 2001 temporary suspension order was entered, the state bar filed a formal complaint under SCR 105, thereby commencing the formal disciplinary proceedings required under that order. When the September 7, 2001 order was entered, the state bar voluntarily dismissed that formal complaint. Instead, the state bar started from the beginning of the normal discipline process by opening a grievance file and referring the file to an informal screening panel.[4] The screening panel decided that formal disciplinary proceedings were

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[2]SCR 111(5) (providing that this court shall refer a conviction for a non-"serious crime" to the appropriate disciplinary board for action, except that this court may decline to refer a conviction for a minor offense).

[3]See SCR 115(3) (providing that a suspension is effective fifteen days after entry of the suspension order).

[4]See SCR 105(1) and (2) (setting forth the procedure for initiating a disciplinary matter and for informal screening panels). When an attorney is suspended under SCR 111 for conviction of a serious crime, these two steps are essentially skipped, as the conviction itself supports the initiation of formal disciplinary proceedings.

warranted, and a second formal complaint was thus filed on January 23, 2002.

The hearing panel concluded that Hall had violated SCR 203(2), and recommended that he be suspended for 40 days, with credit for the temporary suspension, and that he be assessed the costs of the

Limitations period

SCR 106(2) contains the limitations period applicable to lawyer disciplinary proceedings, and provides:

> Formal disciplinary proceedings shall not be commenced against an attorney for alleged misconduct occurring more than 4 years prior to the filing of the complaint by bar counsel. In the event of fraud or concealment, the 4-year period begins on the date the fraud or concealment was discovered by the grievant, or on the date facts were known to bar counsel which should have lead bar counsel to discover the alleged misconduct.

Hall argued to the hearing panel that he did not conceal his conduct from the woman, and so the discovery rule did not apply. Bar counsel argued that Hall concealed his conduct from the authorities, and so the discovery rule did apply. Thus, according to bar counsel, the limitations period did not begin to run, at the earliest, until bar counsel discovered Hall's conduct in 1999. This argument was based in significant part on the district court's decision in the criminal case that the "secret manner" exception to the criminal statute of limitations period applied. The hearing panel determined that the charge against Hall was based on his criminal conviction, and so the limitations period did not begin to run until his conviction in 2001.

On appeal, Hall emphasizes that SCR 203(2) states that an attorney engages in misconduct by committing a "criminal act," not by being convicted. He argues that this language, together with SCR 108 (providing that a discipline matter shall not be deferred pending completion of related criminal or civil litigation), means that the limitations period begins from the act itself, not the conviction. Although Hall asserts that the discovery rule does not apply because he did not conceal anything from the woman with whom he was involved, he ignores his admission that he did not inform her that he was videotaping the incident. More importantly, he refuses to accept that the victim was not the woman but her daughter – a three-year-old child without the capacity to promptly inform authorities.

Hall's failure to properly identify the victim of his conduct exposes the flaw in his reasoning concerning the discovery rule: the person harmed by his conduct lacked the capacity to complain to the state bar. Under these circumstances, the limitations period began when Hall's conduct was discovered by bar counsel, who could pursue a complaint. We specifically noted in Ching v. State Bar of Nevada[5] that the Nevada Bar was a proper complainant because it is harmed whenever a Nevada lawyer violates the rules of professional conduct. In that case, we rejected attorney Ching's argument that reciprocal discipline proceedings against him were barred by the limitations period because his conduct occurred more than four years earlier, stating, "Ching would have this court

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[5]111 Nev. 779, 783-84, 895 P.2d 646, 649 (1995).

sacrifice professional responsibility and ethical obligation in the name of procedure; however, 'the public interest in the ethical practice of law outweighs any blind devotion to procedure.'"[6] We conclude that the disciplinary proceedings were not barred by SCR 106's limitations period.

Laches

Hall also argues that laches applies and bars this proceeding.[7] He asserts that after eleven years, memories have faded. But Hall did not call anyone else as a witness, and it does not appear from his testimony before the panel that his own recollection of the events at issue was substantially impaired. Laches applies only where there is prejudice.[8] We conclude that Hall has not demonstrated any prejudice. While the lapse of time can be considered as a mitigating factor in determining the discipline to impose, and in fact the panel appears to have done so, it is not grounds for dismissal of the disciplinary proceedings.

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[6]Id. at 784, 895 P.2d at 649 (quoting State ex rel. Oklahoma Bar Ass'n v. Lowe, 640 P.2d 1361, 1362 (Okla. 1982)).

[7]See Ching, 111 Nev. at 783, 895 P.2d at 648-49 (stating in dicta that "if sufficient time has elapsed, the equitable doctrine of laches might apply to preclude disciplinary proceedings").

[8]See Besnilian v. Wilkinson, 117 Nev. 519, 522, 25 P.3d 187, 189-90 (2001); Memory Gardens v. Pet Ponderosa, 88 Nev. 1, 5, 492 P.2d 123, 125 (1972) (stating that a delay not causing actual prejudice does not amount to laches).

Double jeopardy

Hall further asserts that the disciplinary proceeding is barred by double jeopardy because he has already been punished through the criminal justice system. Additionally, he maintains that the second disciplinary complaint, which resulted in the instant recommendation, was barred because the state bar voluntarily dismissed its first complaint, which was based on this court's original temporary suspension order. He cites several federal cases concerning criminal proceedings, but nothing concerning bar discipline proceedings. The state bar counters that the purposes of bar discipline are remedial and to protect the public, and so double jeopardy does not apply. In support, the state bar cites a Utah case,[9] which held that double jeopardy does not apply in attorney discipline matters.

Other jurisdictions have explained that double jeopardy does not apply to bar disciplinary proceedings.[10] Penalties for violations of

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[9]Matter of Discipline of Babilis, 951 P.2d 207 (Utah 1997).

[10]See, e.g., id.; In re Brown, 906 P.2d 1184 (Cal. 1995); In re Cardwell, 50 P.3d 897 (Colo. 2002); In re Asher, 772 A.2d 1161 (D.C. 2001); Cushway v. State Bar, 170 S.E.2d 732 (Ga. Ct. App. 1969); Matter of Sheaffer, 655 N.E.2d 1214 (Ind. 1995); Attorney Griev. Comm'n v. Brown, 517 A.2d 1111 (Md. 1986); Office of Disciplinary Counsel v. Campbell, 345 A.2d 616 (Pa. 1975); In re Chastain, 532 S.E.2d 264 (S.C. 2000); but see State v. Russell, 610 P.2d 1122, 1130 (Kan. 1980) and Mississippi State Bar v. Young, 509 So. 2d 210 (Miss. 1987) (both appearing to assume that double jeopardy could apply to lawyer discipline proceedings, but concluding that under the circumstances presented in those cases, it was not a bar).

attorney norms of professional conduct are not punishment or retribution for double jeopardy purposes.[11] Instead, the aim of attorney discipline is to protect the public, to promote confidence in the legal system, and to maintain high professional standards.[12] Double jeopardy principles do not bar these disciplinary proceedings.

Decision of pre-hearing motions by Board chair

Hall asserts that the procedural rules governing bar proceedings contemplate that motions will be decided by the hearing panel or the panel chair, not by the Board chair. He argues that the Board chair acted improperly in ruling on his prehearing motions to disqualify panel members, to dismiss and to exclude evidence. Additionally, he contends that if this court determines that the rules permit the Board chair to decide such motions, then the rules are unconstitutionally vague. Hall does not cite any authority in support of his due process argument.

The state bar explains that if a panel has been appointed, then the panel chair addresses prehearing motions; if not, then the Board chair addresses them. Relying on a Ninth Circuit case,[13] the state bar argues

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[11]See Babilis, 951 P.2d at 214; Brown, 906 P.2d at 1191.

[12]Brown, 906 P.2d at 1191.

[13]Rosenthal v. Justices of the S. Ct. of California, 910 F.2d 561, 564-65 (9th Cir. 1990) (holding that California procedure more than satisfied due process requirements applicable to bar proceedings, when accused lawyer was given notice and opportunity to be heard and could call witnesses and cross-examine them, burden was on bar to demonstrate misconduct by convincing proof, and recommendation was subject to California Supreme Court's independent review).

that due process is more than satisfied because the Board chair and panel chairs are all duly-appointed Board members, and because all decisions are subject to this court's de novo review.

In reply, Hall asserts that the Board chair decided his motions before the panel was appointed, and then appointed himself panel chair so he could prevent the panel from reconsidering his prehearing decisions.

Hall's arguments are without merit. The procedural rules governing disciplinary matters simply do not mention prehearing motions. The state bar's practice is sensible and satisfies the needs of the parties when prehearing motions are made. Hall has not demonstrated that he was denied due process.

Presence of "competitors" on hearing panel

Hall argues that he was denied due process because the hearing panel consisted mainly of his professional competitors, who thus had an interest in depriving him of his license. This argument was fully considered in a prior writ petition challenging the panel members, Docket No. 40437, and was rejected in an order denying the petition. We decline to reconsider Hall's argument here.

Evidence objections

Hall argues that the videotape should not have been admitted because he was not permitted to cross-examine the state bar custodian to properly authenticate the tape.[14] Instead, the tape was admitted based on

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[14]Hall also incorporates by reference his motion in limine to the panel seeking to exclude the documents submitted by the state bar as Exhibit 1. The state bar's Exhibit 1 was a packet of documents consisting

continued on next page . . .

the custodian's affidavit. Hall does not allege any specific inaccuracy in the tape or state what testimony he would have tried to elicit from the custodian.

In the criminal context, this court has held that "[i]t is not necessary to negate all possibilities of substitution or tampering with an exhibit . . . it is sufficient to establish only that it is reasonably certain that no tampering or substitution took place, and the doubt, if any, goes to the weight of the evidence."[15] Also, NRS 52.015(1) specifies that "[t]he requirement of authentication or identification . . . is satisfied by evidence or other showing sufficient to support a finding that the matter in question is what its proponent claims." Here, in light of the lack of any specific objections concerning the tape and the custodian's affidavit verifying that the tape at the discipline hearing was the tape from Hall's criminal case, the panel was reasonably able to conclude that the tape was authentic.

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of copies of the complaint, answer, notice of hearing, proofs of service, and appointment of the hearing panel. The packet also included the prehearing motions, oppositions, and orders issued by the Board chair. Finally, it included some of the documents filed with this court in Hall's two writ proceedings. We conclude that Hall's argument is without merit. These documents were properly part of the record in the disciplinary proceedings.

[15]Sorce v. State, 88 Nev. 350, 352-53, 497 P.2d 902, 903 (1972) (citing Oliver v. State, 85 Nev. 10, 449 P.2d 252 (1969); Carter v. State, 84 Nev. 592, 446 P.2d 165 (1968); Eisentrager v. State, 79 Nev. 38, 378 P.2d 526 (1963)).

Constitutionality of SCR 203(2)

SCR 203(2) provides that it is professional misconduct for an attorney to "[c]ommit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects."

Relying on this court's 2001 opinion in In re Discipline of Schaefer,[16] Hall argues that this language is unconstitutionally vague because it does not "fairly disclose" what conduct is prohibited. In Schaefer, this court addressed the issue of whether SCR 182 (prohibiting direct contact with a represented party) was unconstitutionally vague, and began its analysis with the following statement:

> As stated by the United States Supreme Court in 1926, a statute or rule is impermissibly vague if it "either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." This remains the test today. It is well-settled that, in evaluating whether a statute is vague, judicial opinions construing the statute should be considered. "[T]he touchstone is whether the statute, either standing alone or as construed, made it reasonably clear at the relevant time that the ... conduct was [prohibited]."[17]

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[16]117 Nev. 496, 25 P.3d 191, as modified by 31 P.3d 365 (2001).

[17]Id. at 511-12, 25 P.3d at 201-02 (footnotes omitted) (quoting Connally v. General Constr. Co., 269 U.S. 385, 391 (1926) and United States v. Lanier, 520 U.S. 259, 267 (1997), respectively; citing Bouie v. City of Columbia, 378 U.S. 347, 355, 362 (1964); Winters v. New York, 333 U.S. 507, 514-15 (1948) (noting that an individual is "chargeable with knowledge of the scope of subsequent interpretation" of a statute);

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We held in Schaefer that SCR 182 was vague when an attorney is self-represented because authority interpreting the rule conflicted, and we had not yet issued a controlling opinion.[18] Without analysis or citation to other authority, Hall argues that the same result should obtain here. The state bar responds that SCR 101 (stating that conviction of a crime is grounds for discipline) and SCR 73 (the attorney's oath, requiring an attorney to swear to uphold the Constitution and government of the United States and Nevada and to abide by the professional conduct rules) clearly provide that a criminal conviction is grounds for discipline.

Two elements must be demonstrated to show a violation of SCR 203(2): (1) a criminal act (2) that reflects adversely on a lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects. The first two terms, honesty or trustworthiness, are not at all vague. The issue, then, is whether the final quality, "fitness as a lawyer in other respects," is unconstitutionally vague. We note that, as discussed below, Hall's conduct appears to demonstrate a lack of honesty and trustworthiness; arguably, then, whether "fitness" is vague need not be considered. But the panel specifically found that Hall's conduct adversely

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Minnesota v. Probate Court, 309 U.S. 270, 273-74 (1940); Lanzetta v. New Jersey, 306 U.S. 451, 456 (1939); Hicklin v. Coney, 290 U.S. 169, 172 (1933); Bandini Co. v. Superior Court, 284 U.S. 8, 17-18 (1931); and Fox v. Washington, 236 U.S. 273, 277 (1915)).

[18]Id. at 512, 25 P.3d at 202.

reflected on his fitness, without mentioning the other two qualities, and so we consider Hall's argument.

Schaefer emphasized that cases construing a rule and accompanying rule provisions must be considered in determining whether the rule is vague.[19] SCR 203(2) was adopted in 1986, and is identical to ABA Model Rule 8.4(b), which was approved in 1983 and has never been modified.[20] The Model Rule updated the former Model Code provision, adopted in 1969, which prohibited "illegal conduct involving moral turpitude" and "any other conduct that adversely reflects on [a lawyer's] fitness to practice law."[21] It appears that most, if not all, states have adopted professional conduct rules based on either the Model Code or the

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[19]Id. (distinguishing Matter of Beaver, 510 N.W.2d 129 (Wis. 1994) and United States v. Hearst, 638 F.2d 1190 (9th Cir. 1980) because the rules in those cases were clarified and explained by case law and accompanying rules).

[20]The Ethics 2000 changes to the Model Rule added some language to paragraph (e), together with related changes to the Official Comment, but paragraph (b) was not altered at all. ABA Center for Professional Responsibility Ethics 2000 web site, available at http://www.abanet.org/cpr/e2k-84_202.html. Also, the ABA's Official Comment to the Rule was modified in 1998, but the modification concerned paragraph (d) of the rule and so is not pertinent to this case. ABA Annotated Rules of Professional Conduct 583-85 (Fourth Ed. 1999).

[21]ABA Model Code of Professional Responsibility Disciplinary Rule 1-102(A)(3) and (6), ABA Compendium of Professional Responsibility Rules and Standards 166 (1999).

Model Rules.[22] Accordingly, the language at issue had been in effect and subject to interpretation for over twenty years at the time of Hall's misconduct in 1992.

The Colorado Supreme Court expressly concluded that this language was sufficiently clear in People v. Meier.[23] The complainant in Meier was a young woman who was considering a divorce.[24] The court noted that in an earlier case, it had rejected a vagueness challenge to the Model Code predecessor.[25] In the earlier case, the court had reasoned that when the rules were

> measured by the "licensed lawyer" standard, we are convinced that these disciplinary proscriptions are adequate to inform the respondent and other licensed lawyers of the nature of the prohibited conduct and that they provide sufficiently clear norms of conduct for the objective administration of the disciplinary process. . . . It requires little imagination to conclude that any practicing attorney would know that counseling illegal activity is a violation of the highest standards of

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[22]Annotated Rules at vii (noting that following its adoption in 1969, "the vast majority of state and federal jurisdictions" adopted rules based on the Model Code, and that by 1999, more than two-thirds of the jurisdictions had adopted rules based on the 1983 Model Rules).

[23]954 P.2d 1068 (Colo. 1998) (relying on an earlier case rejecting a vagueness challenge to the same language in Colorado's version of the Model Code, People v. Morley, 725 P.2d 510 (Colo. 1986)).

[24]Id. at 1069.

[25]Id. at 1071.

> morality and reflects adversely on that lawyer's fitness to practice law.[26]

Similarly, in Meier, the court concluded that "'any practicing attorney would know' that asking a prospective and obviously vulnerable divorce client about the size of her breasts would 'adversely reflect[] on the lawyer's fitness to practice law.'"[27] Accordingly, the Colorado court upheld the imposition of a public censure against Meier.

The Colorado court's reasoning is sound. We therefore reject Hall's argument, and conclude that SCR 203(2) is not unconstitutionally vague.

Whether Hall's conduct violated SCR 203(2)

Hall argues that, even if the rule is constitutional, his conduct did not violate it. He vigorously maintains that he was not the woman's attorney, and so no misconduct as an attorney can be shown. Additionally, he persistently argues that the conduct on the tape was consensual and so there was no harm to the woman, whom Hall terms the "victim."

We agree with the state bar that an attorney-client relationship is not a necessary predicate for an ethical violation and that

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[26] Morley, 725 P.2d at 516.

[27] Meier, 954 P.2d at 1071 (quoting Morley, 725 P.2d at 516, and Colo. R. Prof. Cond. 8.4(h), respectively).

harm to one other than a client, particularly one to whom the attorney stands in a position of trust, should also be considered.[28]

Here, regardless of whether a formal attorney-client relationship was established, it is clear that the woman trusted Hall and sought his advice on a somewhat regular basis. Hall engaged the woman in criminal conduct and so jeopardized her and subjected her to a criminal conviction based on the acts shown on the tape. In addition, the daughter was completely vulnerable and had no way to protect herself. Hall abused the woman's trust and completely disregarded the welfare of her daughter in favor of his own interests; thus his conduct demonstrates a lack of trustworthiness. Moreover, he did not inform the woman that he was taping the encounter, and therefore his conduct demonstrates deceit. Finally, the state bar's arguments concerning how Hall's conduct reflects on his fitness to practice, particularly in light of his significant family and domestic violence practice, are persuasive:

> . . . Appellant's position that he should not be held professionally accountable for criminal conduct victimizing a minor is both arrogant and disturbing. The license to practice law is a privilege that essentially facilitates public trust. Appellant's misconduct severely diminishes that trust and his avoidance of appropriate professional sanctions would likewise diminish public opinion regarding the self-regulating structure of the legal profession. An attorney's disregard for the laws of

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[28]See In re Slattery, 767 A.2d 203 (D.C. 2001); Rogers v. The Mississippi Bar, 731 So. 2d 1158 (Miss. 1999); State ex rel. Oklahoma Bar Ass'n v. Munson, 848 P.2d 555 (Okla. 1993).

> this State and the rights of others should not go unchecked by the profession if its members expect to maintain that trust. Accordingly, the recommendation in this case is both proper and warranted.

Courts in other jurisdictions, dealing with somewhat similar circumstances, have determined that the conduct at issue reflected adversely on the lawyer's fitness to practice.[29] In particular, the Maryland Supreme Court, in Attorney Grievance v. Thompson,[30] indefinitely suspended an attorney convicted of stalking a thirteen-year-old boy. The disciplinary hearing judge had concluded that the conduct did not

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[29]See Matter of Christie, 574 A.2d 845 (Del. 1990) (imposing three-year suspension without credit for temporary suspension for convictions related to attorney's actions in inviting teenage boys to his house, serving them alcohol, showing them X-rated videos and masturbating in their presence); Matter of Haecker, 664 N.E.2d 1176 (Ind. 1996) (imposing six-month suspension for attorney's actions in secretly videotaping private activities of a couple in the neighboring duplex; court found conduct implicated dishonesty as well as fitness); In re Ketter, 992 P.2d 205 (Kan. 1999) (imposing three-year probation with conditions for lewd and lascivious conduct convictions based on pattern of conduct over several months); Attorney Grievance v. Thompson, 786 A.2d 763 (Md. 2001) (imposing indefinite suspension based on attorney's conviction of stalking a thirteen-year-old boy); Attorney Griev. Comm'n v. Goldsborough, 624 A.2d 503 (Md. 1993) (concluding that attorney's pattern of conduct in spanking a client and his secretary related to his practice and adversely reflected on his fitness, and imposing a two-year suspension); Matter of Discipline of Peters, 428 N.W.2d 375 (Minn. 1988) (imposing public reprimand for law school's deans sexual harassment of four employees, including two student interns).

[30]786 A.2d 763.

adversely reflect on the lawyer's fitness, because the lawyer's practice areas did not involve children, and declined to impose any discipline. The court disagreed, and eloquently stated the duties owed to children:

> It is well established in Maryland that children, by nature of their youth, require different levels of protection and care . . . . '[Y]outh is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage. Our history is replete with laws and judicial recognition that minors, especially in their early years, generally are less mature and responsible than adults.' . . . The General Assembly, presumably in recognition of those differences, has enacted a number of statutes placing the responsibility on adults to protect and promote the welfare of children. We too have acknowledged similarly the importance of protecting children.
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> It naturally follows, considering the inherent vulnerability of children, that interaction between children and adults be viewed with close scrutiny. Because of the disparities of power, intellect, maturity, and judgment between the two, children are often without the resources and capabilities, both mentally and physically, to protect themselves from harm. The burden, therefore, is on the adult to act responsibly in his or her interactions with children to preserve their best interests, not to prey on their innocence. That implicit trust and duty is placed upon all adults, even those outside the home and school, including strangers coming into contact with a child in

> public. These are values we hold as a society, which are not novel to humanity generally.[31]

While Hall's conduct did not rise to the level of conduct addressed in Thompson, his practice does involve a significant amount of family law. In addition, he victimized a young child simply because he was "hot" for the child's mother and so disregarded the effect his conduct could have on the child. His actions reflect adversely on his honesty, trustworthiness and his fitness, and we uphold the panel's finding that Hall violated SCR 203(2).

Propriety of recommended discipline

At the hearing, bar counsel did not request a particular sanction, but argued that a suspension should be considered. Additionally, bar counsel left it to the panel's discretion whether to give Hall credit for the time he was temporarily suspended. Hall likewise did not argue for a specific sanction, because he did not admit to a rule violation. But his counsel's closing argument emphasized that Hall has already endured a great deal: a criminal conviction, significant financial hardship due to the closure of his practice when the temporary suspension was imposed and which is still recovering, and enormous humiliation because of the publicity generated by his case.

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[31]Id. at 769-770 (quoting Stebbing v. State, 473 A.2d 903, 921 (Md. 1984)) (citing Maryland's statutes concerning child abuse and neglect and foster care and Maryland cases emphasizing that the paramount consideration in child custody matters is the child's best interests) (other citations and footnotes omitted).

The panel determined that a forty-day suspension, with credit for the time spent on temporary suspension (which was forty-four days) was appropriate. Although the panel did not state its reasoning, it appears that it considered several mitigating factors: the lapse of time since the conduct at issue, the fact that this appeared to be an isolated incident in Hall's life, the absence of any prior discipline, and the imposition of other substantial penalties.[32] We note that aggravating factors were also shown: selfish motive and vulnerability of victim.[33] The recommended discipline is appropriate in light of the competing factors, and so we approve the recommendation.

Whether assessing costs is a due process violation

In addition to the suspension, the panel recommended that Hall pay the costs of the disciplinary proceedings. Hall argues that assessing costs only upon a finding that he disobeyed the rules violates due process. He asserts that the due process violation is even more egregious because there is no reciprocity: if the attorney is found to have complied with the rules, then the attorney cannot recover costs. He further contends that the inclusion of staff salaries as an allowable item of costs means that the state bar has an incentive to drive up costs.

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[32]ABA Standards for Imposing Lawyer Sanctions 9.3, Compendium of Professional Responsibility Rules and Standards 353-54 (1999) (setting forth factors to be considered in mitigation).

[33]Id. at 352-53 (Standard 9.2, setting forth factors to be considered in aggravation).

The state bar maintains that costs are permissible, because they are awarded only by the hearing panel and this court. Members of the panel and this court are not bar employees and have no responsibility for the bar's finances. Finally, the decision to proceed with a discipline case is not made by bar counsel, but by a screening panel whose members are not state bar employees and who have no responsibility for state bar finances.

This court has already rejected arguments basically identical to Hall's in Burleigh v. State Bar of Nevada,[34] in which we held that no due process violation was shown when the hearing panel that could impose costs had no interest in a cost award and had no financial responsibility for the bar. The same reasoning supports the inclusion of staff salaries as an item of costs, because a screening panel determines whether a discipline matter results in formal proceedings. We therefore reject Hall's argument and conclude that cost awards do not violate due process.

Whether cost award in this case was procedurally defective

Hall argues that even if a cost award is generally permissible, then the procedure followed in this case was improper. The panel simply ordered Hall to pay costs, without any opportunity for Hall to review and object to the state bar's claimed costs. Hall notes that under SCR 119(3), rules governing civil procedure apply when not inconsistent with the

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[34] 98 Nev. 140, 643 P.2d 1201 (1982); cf. In re Ross, 99 Nev. 1, 656 P.2d 832 (1983) (concluding that Board of Governors, which has responsibility for state bar's finances, could not impose costs).

discipline procedure rules, and so the panel should have followed customary practice under NRS 18.110 or NRAP 39. Hall does not specifically object to any particular item of costs claimed by the state bar, so it is not clear what relief in this regard (other than a disallowance of any costs) Hall seeks. Bar counsel notes that Hall did not object to the cost award when the panel directed him to pay costs.

Although we conclude that an attorney generally has a right to object to the cost award, Hall's briefs argue only generally that an award of costs, especially staff salaries, is improper and do not challenge any particular item. Since Hall did not include in his briefs any particular objection to the costs claimed in this case, the panel's failure to afford Hall an opportunity to challenge the costs was harmless error. Accordingly, we approve the cost award.

Disposition of videotape

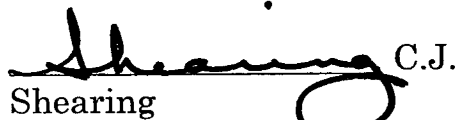
Hall asks that, upon the conclusion of this matter, the videotape be returned to him. But the stipulation and order under which it was released from the record in Hall's criminal case specifically requires that it be returned to the district court clerk upon the conclusion of the discipline case. We therefore conclude that the tape must be dealt with as required by the stipulation, and direct that it be returned with the rest of the record to the state bar, for return to the district court.

Conclusion

We reject Hall's due process, statute of limitations, laches and double jeopardy arguments, and we conclude that any error concerning the cost award procedure was harmless. We uphold the panel chair's rulings concerning admission of the videotape and documents. We approve the

panel's finding that Hall's conduct violated SCR 203(2), and we approve the recommended discipline of a forty-day suspension, with credit for the temporary suspension, together with payment of costs.

It is so ORDERED.[35]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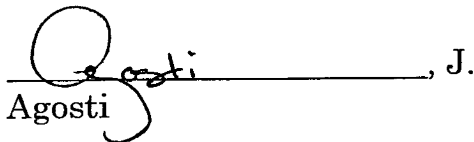
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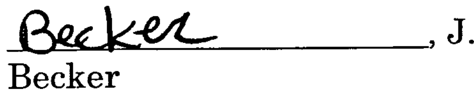
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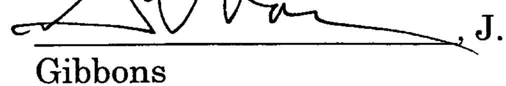
Becker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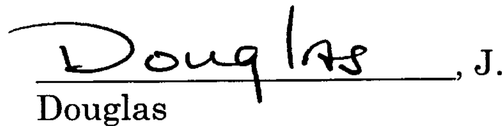
Gibbons


, J.
Douglas

cc: Howard Miller, Chair, Southern Nevada Disciplinary Board
Rob W. Bare, Bar Counsel
Allen W. Kimbrough, Executive Director
Law Offices of James J. Ream
Perry Thompson, U.S. Supreme Court Admissions Office

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[35]The Honorable A. William Maupin, Justice, voluntarily recused himself from participation in the decision of this matter.