ORIGINAL

IN THE SUPREME COURT OF THE STATE OF NEVADA

IN THE MATTER OF DISCIPLINE OF:
ROBERT J. KOSSACK, BAR NO. 2734

Case No. 58388

FILED

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STATE BAR OF NEVADA'S ANSWERING BRIEF

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11-25183

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

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2. Was Respondent unfairly prejudiced when he invoked his Fifth Amendment right against self-incrimination during the disciplinary hearing?

II.
STATEMENT OF CASE

A. Statement of the Case.

This is an automatic *de novo* appeal of a Conditional Guilty Plea pursuant to Supreme Court Rule (SCR) 113 as adopted in the Findings and Recommendations of the duly designated Formal Hearing Panel ("Panel") of the Southern Nevada Disciplinary Board, filed on April 18, 2011. The Panel unanimously recommended that Robert J. Kossack, Esq. ("Kossack") be suspended from the practice of law for three (3) years, that he be required to take and pass the MPRE exam at the end of the suspension, and that if reinstated, he enter into a mentoring agreement for two (2) years. Record on Appeal ("ROA") Volume I, page 61.

The Panel recommended the foregoing sanction after determining unanimously that Kossack had violated the following rules in both counts of the Complaint: Rules of Professional Conduct ("RPC") 1.1 (Competence), RPC 1.3 (Diligence), RPC 1.4 (Communication), RPC 1.15 (Safekeeping Property), RPC 5.3 (Responsibilities regarding Nonlawyers), and RPC 5.5 (Unauthorized Practice of Law).

B. Facts.

The facts are relatively uncontested in this matter. Kossack admits to most of operative facts in his verified Answer and Opening Brief. In any event, Kossack fails to identify any of the Findings of Fact as a contested issue on appeal. *See, Opening Brief*, p. 1, lines 10-11.

The Findings of Fact filed by the Hearing Panel in this matter contain a thorough recount of Kossack's complete abdication of his duty to oversee his bank accounts, his employees, and the operation of his law practice. Findings of Fact 1 – 40. ROA I, pp. 54:9 – 59:23.

1. Kossack Refused To Review His General and Trust Accounts.

Kossack was a sole practitioner who employed nonlawyer assistants Michelle Haehnel ("Haehnel") and Susan Gutierrez ("Susan") from approximately June 2003 through July 2007 to assist him in running his practice. Finding of Fact No 3. Kossack was the sole signatory on his trust account. Haehnel was a signatory on his general account. ROA II, 15:1-7.

Kossack freely admitted that before July 2007, he never reviewed his trust account monthly statements or the cancelled checks. Finding of Fact No. 18; ROA II, 57:1-4. More disturbing, Kossack admitted that he never reviewed the statements or canceled checks from his general account from October 2004 through February 2011. ROA III, 353:14 – 21; *Opening Brief*, 4:21-2. He steadfastly refused to do so, even in the face of the following:

a. Haehnel admitted to him in July 2007 that she had forged his signature on a trust account check to transfer money to the general account where she stole it, repaying the final $20,000 after the discovery by wire transfer. Finding of Fact No. 7, ROA I, 55:3-7.

b. In May 2008, Mike Rosenback, of Interim Funding, met personally with Kossack and informed him that Interim Funding had wire transferred a total of $233,000 into Kossack's trust and general accounts. ROA III, 50 – 52.

c. On May 6, 2010, the State Bar filed and served its formal complaint, alleging that Kossack allowed client (Linda Gutierrez) and third-party (Interim Funding) monies to be stolen from his general account. State Bar Complaint, ¶¶ 10 and 22, ROA I, pp. 3 and 5.

d. On May 24, 2010, Respondent filed his verified Answer, denying the allegations in these paragraphs, the latter on the basis that he was without sufficient knowledge of his own operating account.

Not until the month of the Formal Hearing in this case, February 2011, did Respondent finally obtain the records of the general account and look at them. It should be noted that

while Kossack may claim he lacked the money to order copies from his bank, his bookkeeper, Kay Foster, had those records (ROA III, 433:5-15) and, of course, the State Bar had copies it had subpoenaed to craft the Complaint. Kossack could have examined them at any time before the hearing pursuant to SCR 105(2)(c).

As to his bookkeeper, Kay Foster, Kossack himself hired her in 1997 to provide monthly financial statements and income tax returns. ROA III, 465. However, he claimed that he never received a single monthly report from her, even though she billed every month and her invoice was always paid. Findings of Fact Nos. 10 and 18, ROA I pp. 55, 57; ROA III, 452:24 - 453:10; 463:4-19. Even though he hired her to provide him with monthly statements and tax returns, he testified that he never saw a single one in all the 15 years she worked for him, both before Haehnel worked as his office manager, and afterwards. *Id.*

Indeed, so estranged was Kossack from his practice and finances that, even though Foster required his personal income information to prepare the tax returns for his sole proprietorship, Kossack failed to realize for three (3) years that Foster stopped preparing his tax returns after 2004. Findings of Fact Nos. 14 and 15. ROA I, 56.

The defalcations in this matter occurred in April 2006 (*Gutierrez* matter) and from February through June 2007 (Interim Funding) totaling almost a quarter-million dollars ($243,000). Finding of Fact No. 27; State Bar's Exhibit 9. Had Kossack bothered to review his general account, even just the images of the cancelled checks, he would have easily discovered:

a. The general account checks from September 2004, indicated that Susan was paid a salary of $11,832.50, approximately five times what Kossack believed he was paying her. Finding of Fact No. 38, ROA I, 59; ROA III, 335:16-22.

b. Respondent believed that both Haehnel and Susan were "volunteers" and not paid employees from July 2005 onward. However, both the general account checks and

bookkeeper Kay Foster's monthly statements reflect regular salary payments to both workers long after that date. Finding of Fact No. 5, ROA I, 54.

c. Haehnel cashed casino markers off of the general account totaling $9,000. These markers, complete with the casino name and logo, were processed through the general account and the images appeared with the other canceled checks in February, March, and May 2005. State Bar Exhibit 12.

d. In May 2006, when the $10,000 in proceeds from Linda Gutierrez's settlement was transferred to the general account, checks were written from the general account to Haehnel, her husband, Victor, and daughter, Sharon, totaling upwards of almost $15,000, all at a time Kossack testified none of them was on payroll. Finding of Fact No. 28, ROA I: 58; State Bar Exhibit 7.

Had Kossack even been remotely involved in reviewing his general account he could have easily spotted these glaring irregularities. As to his trust account, the first two (2) wire transfers from Interim Funding, totaling $75,000, went through in February 2007. The next five (5) transfers went through the general account in late March (1), May (3) and June (1), 2007. Had Kossack timely reviewed his trust account, the account only he had signing authority on, he would likely have noticed the large transfers in February and discovered the scheme.

2. Kossack Permitted Haehnel to Engage in the Unauthorized Practice of Law.

Kossack was rarely in his law office. Chris Kissner provided uncontested testimony that Haehnel signed him up, represented herself to him as an attorney, and even met with him in Kossack's private office. Findings of Fact Nos. 29-33, ROA I 58. Kissner made repeated communications to Kossack's office over several months. *Id.*

Moreover, Haehnel was allowed to settle Linda Gutierrez's personal injury case, collect the money, meet with the client, and steal the proceeds, all seemingly without Kossack's involvement, even though he signed up Linda as a client in 2004. Findings of Fact Nos. 19-28, ROA I, 57-58. Kossack testified at the hearing that he was not sure if he was involved in the settlement ("I'm not sure whether I settled the case, the check came in, and they stole it, or whether Shelly [Haehnel] illegally settled the case . . . ."). ROA III, 404:5-8. However, in his Opening Brief, Kossack maintains that, "Michelle settled Linda's case behind Kossack's back." *Opening Brief*, 8:24.

Nevertheless, Kosack further testified that it was his policy and practice that Haehnel would first "nag" the insurance company up to a settlement amount and then Kossack would either accept that amount or try to get more. With respect to an outstanding lien that apparently Haehnel stole (and for which the first Interim Funding monies went to repay), Kossack explained it as follows:

> Q. Who was negotiating the lien?
>
> A. Well, I had assigned Shelly that task of negotiating the lien. I have written actually -- I have written quite a detailed letter itemizing all the reasons that that lien should be reduced such as – because this was separate insurance, it wasn't a doctor lien that took the case, this was a separate insurance. I said, Look, it's only because of me that you're getting that money back anyway. So you should owe a 40 percent fee just on the money that you're getting back.
>
> Secondly, part of that lien that they're claiming is for medical services unrelated to the accident that we're settling and that was the gist of that letter. Now, that letter went out and then, you know, I would send Shelly on the nagging routine to contact them and nag them and so forth.
>
> . . .
>
> Q. How are you monitoring the lien reduction other than just assigning it to Shelly? Because you still had 70,000 sitting in an account.
>
> A. Right. And I every now and then say, Look, have they gotten back to you yet on that? Have you called them? When is the last time you called them? Maybe I should send them another letter, maybe we should just -- you know, can't really sue them necessarily for it. But here's the thing, the longer you keep that money and negotiate with them, the more they're usually willing to come down on it.

. . .

Q. Would you agree or disagree negotiating a lien reduction is engaging in the practice of law?

A. No. No. Only the approval of the lien reduction is engaging in the practice of law.

Q. So Shelly had to negotiate, but she had to come to you for final approval?

A. No. I'd send the original letter saying this is what I think it should be. Then I let her nag them, Well, you know, Robert said that he's not going to pay this and that he'll go to litigation and blah, blah, blah, blah, blah, and then everything was supposed to come to me for approval. So if she were to say, Look, I got them down 40,000, okay, let's see what my letter said and if that's in line with the original letter that I wrote them I would say, Okay. That's good. Tell them to send over a release and we'll settle for that amount.

ROA III, 409:17 – 412:14.

In response to questioning from both Kossack and the State Bar, Susan Gutierrez confirmed this practice of Haehnel:

Q. Do you know who negotiated that settlement?

A. It had to be either Michelle or Robert.

Q. Are you aware that Michelle would negotiate settlements on personal injury claims?

A. Yes.

Q. Do you have personal knowledge of that?

A. Yes, and so did Robert.

Q. What's your knowledge of that?

A. I heard Michelle on the phone go ahead and Robert would be in the office and she would talk to the insurance companies.

Q. Would she represent herself to be a lawyer?

A. No.

Q. And she would negotiate -- what would she say to the extent of that? Would she just pass along information or would she negotiate back and forth with them?

A. Well, we can go ahead and -- the medical expenses are this and the expenses are that and she would just go over what all the expenses are, you know, we might be able to go ahead and clear everything up for this amount and that's how she would -- but I didn't hear herself represent herself as an attorney.

Q. And Robert was in the room for these?

A. Robert was sitting in his office, Michelle was in her office, and I was sitting out here.

Q. So he wasn't in with her on the phone call?

A. He wasn't with her on the phone call, but he knew and he said to go ahead and I heard him give her instructions to go ahead and call the insurance company, maybe not for that particular case, but other cases.

Q. How many other cases would you estimate?

A. I don't know.

Q. During the time you were there was this an ongoing practice?

A. Well, Michelle -- Robert would leave Michelle in charge of everything. Michelle was allowed to go ahead and just run the whole show. Robert put a lot of faith and trust in Michelle.

Q. Let me, just so I can focus just on settling the PI cases, it was typical or it was a common practice for her to do this?

A. Yeah, Michelle used to go ahead and settle some of those cases.

Q. And you overheard her doing these?

A. Yes.

ROA III, 153:6 – 154:24.

Q. (KOSSACK) Did you ever say, Robert -- well, let me ask you this: Did you ever witness Shelly sign up anyone as a client?

A. I didn't witness that, but Shelly used to go ahead and interview prospective clients.

Q. Would that be to make out the pink sheet?

A. I don't know what she was doing, she always took them into your office or to her office.

Q. Did you ever hear her discuss with the client the statute of limitations, or court deadlines, or court fees, or procedures?

A. Shelly gave that information.

Q. Did you advise me of that?

A. Robert, you heard Shelly do that.

Q. When did I hear her do that?

A. She used to talk to Portnoff all the time, she used to talk to Ms. Jane Vaughn all the time. (Phonetic.)

Q. What was I in position to overhear her say to them?

A. All I know Shelly used to talk to all the clients in a way that was never appropriate.

ROA III, 162:25 – 163:21.

Q. To your knowledge, did Michelle ever represent herself as an attorney?

A. The only time that I heard Michelle on the phone was talking to insurance companies, going ahead and talking to them about settlements, but I had personally not heard her go ahead and say that on the phone, but I wasn't with her all the time either so -- but I have heard her go ahead and negotiate insurance on the phone.

ROA III, 332:3-10.

3. The Panel Heard Sufficient Evidence that Kossack Engaged in Drug Use.

In his Opening Brief, Kossack does specifically challenge the sufficiency of the Panel's finding of the aggravating factor that Respondent engaged in the illegal use of marijuana during the relevant time period. Finding of Fact No. 39, ROA I, 59.

Haehnel testified at length that she and her family supplied Kossack with money for marijuana. Kossack questioned Susan Gutierrez about Haehnel's allegations:

Q. Did Michelle ever discuss with you that all of her family members would always have to get all sorts of money to bring me -- to constantly keep me in supply of marijuana?

A. I really don't know how to answer that question. I mean, did she discuss with me that she got you marijuana?

Q. Yes.

A. Okay. Yes.

Q. And what was the discussion in that regard?

A. That she would go ahead and have to call up Reggie to go ahead and keep you supplied in pot, that you would go ahead and actually -- if she got you 2- to 300, $400 worth of pot you could sit there and smoke it for the whole entire afternoon all at one time.

Q. That's what she told you?

A. Yes.

Q. Did you ever witness any such behavior?

A. You smoke pot.

Q. Did you ever witness any such behavior?

A. Did I witness you smoking pot?

Q. Yes.

A. Yes.

Q. On how many occasions?

A. When I would come to your house. Not every time that you would smoke pot, but you did smoke pot.

ROA III, 342:12 – 343:12.

In addition, in a civil suit brought by Interim funding regarding the stolen $233,000, Kossack was asked in an interrogatory if he smoked marijuana, and Kossack was questioned on this point in the disciplinary hearing:

Q. You're being sued by Interim Funding?

A. Yeah.

Q. You've engaged in written discovery in that case?

A. Yeah.

Q. I'm just going to ask it because – Interrogatory No. 15, did you ever smoke marijuana at your home or your offices or both and your answer was, Kossack never smoked marijuana in his office with respect to smoking marijuana in the privacy of his own home, Kossack reserves his Fifth Amendment privilege.

Have you ever smoked marijuana in your home?

A. Certainly nothing close to the extent that Michelle Haehnel has testified to. But with respect to whether I'm a casual smoker in the privacy of my own home, I plead the Fifth Amendment. However, I will testify this has never interfered with my work, my written work speaks for itself, my courtroom presence speaks for itself, the success I had in my cases and on my appeals speak for themselves.

ROA III, 419:2-20.

C. The Panel's Findings and Recommendation.

The Panel found unanimously by clear and convincing evidence that Respondent violated the following in both counts: Rules of Professional Conduct ("RPC") 1.1 (Competence), RPC 1.3 (Diligence), RPC 1.4 (Communication), RPC 1.15 (Safekeeping Property), RPC 5.3 (Responsibilities regarding Nonlawyers), and RPC 5.5 (Unauthorized Practice of Law). ROA I, Conclusion of Law No. 2, 60. The Panel further unanimously found present nine (9) aggravating factors as set forth in SCR 102.5:

a. prior disciplinary offenses;

b. dishonest or selfish motive;

c. a pattern of misconduct;

d. multiple offenses;

e. refusal to acknowledge the wrongful nature of conduct;

f. vulnerability of victim;

g. substantial experience in the practice of law;

h. indifference to making restitution;

i. illegal conduct, including that involving the use of controlled substances.

III.
STANDARD OF REVIEW

This Court has held, in regards to a disciplinary hearing conducted pursuant to SCR 105, that "[a]lthough the recommendations of the disciplinary panel are persuasive, this court is not bound by the panel's findings and recommendation, and must examine the record anew and exercise independent judgment." *In re Schaefer*, 117 Nev. 496, 515, 25 P.3d 191, 204, *mod.* 31 P.3d 365 (2001), *cert. denied*, 534 U.S. 1131 (2002).

The State Bar is required to establish allegations of professional misconduct by clear and convincing evidence. SCR 105; *see also, Schaefer*, 117 Nev. at 515, 25 P.3d at 204. This Court has described clear and convincing evidence as "evidence which need not possess such a degree of force as to be irresistible, but there must be evidence of tangible facts from which a legitimate inference...may be drawn." *Id.*

Furthermore, the Formal Hearing Panel may only find violations of the Supreme Court Rules of Professional Conduct as charged in the Complaint. *Schaefer*, 117 Nev. at 515, 25 P.3d at 204, *cit. State Bar of Nevada v. Claiborne*, 104 Nev. 115, 756 P.2d 464 (1988).

IV.
ARGUMENT

A. Clear and Convincing Evidence Supports the Findings of Respondent's Rules Violations.

1. Respondent's deliberate lack of supervision violated RPC 1.15 (Safekeeping property).

> Courts view holding money in trust for clients as a nondelegable fiduciary responsibility that is not excused by ignorance, inattention, incompetence, or dishonesty. Although lawyers may employ nonlawyers to assist in fulfilling this fiduciary duty, lawyers must provide adequate training and supervision to ensure that ethical and legal obligations to account for clients' monies are being met.

In re Cater, 887 A.2d 1, 13 (D.C. 2005) (quoting from the comment to Rule 5.3 in the Annot. Model Rules, 5th edition). In *Cater*, the attorney's secretary had, over a nine-month period, embezzled more than $47,000. Cater had delegated review of the month bank statements to

the secretary and failed to discover the defalcation. *Id.* at 7. The court, in suspending the attorney for 6 months, and quoting from the findings, observed that, "there can be no dispute that 'the regular and periodic review of the bank statements is a critical element of the duties of an attorney who is charged with protecting and accounting for entrusted funds.'" *Id.* at 13-14.

In the case of *Matter of Stransky*, 612 A.2d 373, 374 (N.J.,1992), the respondent was suspended for one year when, unbeknownst to him, his wife, who was also his secretary/bookkeeper, misappropriated a total of $32,341.60 from respondent's trust account for her own use over a period of years. Respondent's wife was able to keep this information from him because he trusted her completely and also because he failed to exercise proper supervision over his attorney accounts. The court observed,

> It is clear that respondent was guilty of more than negligent recordkeeping that often leads to the negligent invasion of client funds. He was completely irresponsible in the management of his attorney accounts and totally abdicated his fiduciary responsibilities to his clients for at least an entire year. Were his actions reasonable? As an individual, it might be reasonable, albeit perhaps unwise, to delegate all personal financial matters to one's spouse. As an attorney, such conduct cannot be tolerated. The attorney's fiduciary responsibility for client trust funds is a non-delegable duty. In turning over his attorney trust account to his wife without any attempt to supervise the disposition of client trust funds, respondent violated that duty. Moreover, his actions set up the scenario through which his wife was able to steal client trust funds.

Id. at 376.

In the case of *Disciplinary Counsel v. Crosby*, 921 N.E.2d 225 (Ohio 2009), respondent violated the rule of safekeeping property by, among other things, failing to train his office employee regarding use of the client trust account. In suspending the lawyer for two years, the court stated that, "[T]he 'mishandling of clients' funds either by way of conversion, commingling, or just poor management, encompasses an area of the gravest concern of this court in reviewing claimed attorney misconduct.'" *Id.* at 229 (citations omitted).

Finally, the California Supreme Court, in the case of *Coppock v. State Bar*, 749 P.2d

1317 (Cal. 1988), sanctioned an attorney for a client's fraudulent use of a separate client trust fund when the attorney had failed to review account statements and relinquished all control of the trust account. The court rejected the attorney's defense that he was unaware of the client's misconduct, holding that, "Assuming arguendo that petitioner was, as he maintains, unaware of [client's] misuse of the account, his ignorance of the facts is no excuse, for it resulted from his own dereliction of duty. He was unable to prevent the fraud against the [third-party] precisely because he failed to supervise his account." *Id.* at 1326.

In our case, Kossack refused to exercise any supervision over his general and trust accounts. He admitted that he never bothered to look at a single statement or cancelled check from his general account, even in the face of admitted theft, claims of hundreds of thousands of dollars stolen, and the filing of a bar complaint against him.

As to his trust account, the very heart of a lawyer's fiduciary duty, Kossack admitted that he never reviewed it prior to Haehnel admitting she stole money from it, presumably client money. After he closed the account in July 2007, he failed to go back and investigate to see if there were other thefts.

While he claims that he lacked the money to order copies of the records, the reasons for that were that he failed to maintain the records as required under SCR 78.5. Also, the reason he lacked the money was because the IRS had garnished his accounts – because of his own dereliction in filing taxes for his personal income and employee withholding.

Throughout his Opening Brief, Kossack fails to take any responsibility for the thefts from his law practice accounts, except to opine that his liability, at best, is based upon *respondeat superior*. *Opening Brief*, p. 27:17-18. This is simply untrue and demonstrates his complete lack of responsibility or appreciation for his duties under RPC 1.15.

2. Respondent clearly violated RPC 5.5 (Unauthorized practice of law) pursuant to this Court's decision in *In re Lerner*.

The Panel found that Kossack had violated RPC 5.5 (Unauthorized practice of law) by allowing Haehnel to negotiate liens, settle Linda Gutierrez's personal injury matter, and sign up Chris Kissner, all with complete impunity. Kossack testified that he allowed Haehnel to "nag" insurance companies in settling cases, and failed to exercise any supervision, spending most of his time outside the office. Susan testified that she heard Haehnel negotiating cases while in the office and confirmed that this was the office practice and that Kossack knew about and allowed it.

This Court, in *In re Discipline of Lerner*, 197 P.3d 1067 (Nev. 2008) found that the respondent aided in the unauthorized practice of law when his nonlawyer assistant, "routinely conducted initial client consultations and decided whether the representation should be accepted, negotiated clients' claims (which included making legal arguments in support of the clients' position), and served as the clients' sole contact in the firm. All of these activities have been held by other courts to constitute the practice of law." *Id.* at 1074. Lerner himself was ethically responsible under RPC 5.3 since the nonlawyer's conduct was in accordance with the office's policies and practices. *Id.* at 1075-76.

Kossack's office practices closely parallel those of Lerner's but are even more egregious. Lerner's nonlawyer assistant was an Arizona licensed attorney, possessing formal training and competence established by examination. Haehnel was a former waitress with an apparent gambling and thieving problem. Kossack actively encouraged her to negotiate with insurance companies, a skill she then used to steal from Linda Gutierrez. Susan testified that Haehnel routinely met with clients, and that Kossack was routinely out of the office, which allowed Haehnel to hold herself out to Kissner as a lawyer and sign him up as a client. There is ample evidence from Kossack's own words and the uncontested testimony of the client-

victims that the Panel used to find that Kossack violated RPC 5.5 facilitating the exact client and public harm the rule is designed to prevent.

3. Respondent violated RPC 5.3 (Responsibilities regarding nonlawyer assistants).

Kossack's utter lack of any daily involvement in his law practice clearly supports the Panel's findings that he violated RPC 5.3. With respect to the unauthorized practice of law, Kossack states that he posted rules under the glass atop his employees' desks. *Opening Brief*, 28:11-12. But, a piece of paper is pointless if Kossack's practice is to allow Haehnel to negotiate claims. And a piece of paper is no substitute for an active and daily presence to prevent Haehnel from holding herself out as a lawyer and meeting with client's in Kossack's own personal office.

With respect to the stolen money the evidence is even more overwhelming to support a violation of RPC 5.3. Kossack tends to acknowledge this but stops short of accepting it. "Kossack, by his failure to personally audit his books on a regular basis, could be deemed to not have made reasonable efforts to ensure. . . ." *Opening Brief*, 28:12-13. However, he also asserts that when he hired Haehnel and Susan there was no evidence of dishonesty. *Id* at 4:11-12; ROA II 14-15.

> [A] lawyer's failure to supervise or review an employee's work may contravene Rule 5.3(b) even if the lawyer does have reason to believe the employee is both honest and capable. "[R]easonable efforts to ensure" that an employee's conduct is compatible with the lawyer's professional obligations is a proactive standard that requires more than careful selection and appropriate training of the employee. As authoritative commentary to the Rule and case law make clear, proper supervision is necessary also. In important matters such as the maintenance of financial records for a conservatorship and the monitoring (or handling) of client funds, there must be some system of timely review and internal control to provide reasonable assurance that the supervising lawyer will learn whether the employee is performing the delegated duties honestly and competently or not. If no such system is in place, it will not do for a lawyer to profess ignorance of the employee's dishonesty or incompetence. Internal controls and supervisory review are essential precisely because employee dishonesty and incompetence are not always identifiable in advance.

In re Cater, 887 A.2d 1, 15-16 (D.C. 2005). The supervisory duties under RPC 5.3 are not static. An attorney cannot simply "set and forget" safeguards to ensure employee compliance with the Rules of Professional Conduct. It requires the active diligence of a fiduciary, a licensed professional whose expertise clients trust with their important legal affairs. The record clearly demonstrates that Kossack not only fails to appreciate this duty, he seems to purposely and active ignore it.

4. Respondent breached his duties of competence, diligence and communication.

Kossack signed up Linda Gutierrez as a client. What happened? Did he just forget about her? It appears Kossack lacked any system of monitoring his cases and following up with established clients.

Linda's unchallenged testimony was that she never heard anything until she received the call from Susan to come pick up a $1,000 check. Prior to that, neither Kossack nor his staff informed her of what the demand was, was the settlement offer was or whether she wanted to accept the settlement. ROA II, 78-79; Findings of Fact Nos. 19-23, ROA I, 57.

She was lied to about the larger settlement check. The rest of her settlement money was stolen, her signature forged, and the medical liens went unpaid. These are clear violations of competence, diligence, and communication.

Chris Kissner likewise gave unchallenged testimony. By his lack of involvement and supervision, Kossack allowed Haehnel to sign up Kissner as a client and take possession of Kissner's file. Kissner even met with Haehnel at Kossack's law office. Findings of Fact Nos. 29-34, ROA I, 58.

Interestingly, Kissner called Kossack's offices from June 2007 through April 2008. *Id.* at No. 33. This is after the time (July 2007) that Kossack testified he banned Haehnel from the office and supposedly reasserted himself into his practice. ROA I, Verified Answer, ¶ 6. It

begs the question where was Kossack during this time and how could Kissner stop by the office and leave telephone messges for Kossack and never get a return call? The Panel correctly found that Kossack had violated his duties of diligence, communication and competence with respect to Kissner, as well.

B. Ample Evidence Supports The Panel's Finding Of Numerous Aggravating Factors.

Pursuant to SCR 102.5(1), the Panel found that the following aggravating factors existed that would justify an increase in the degree of discipline to be imposed:

a. prior disciplinary offenses;
b. dishonest or selfish motive;
c. a pattern of misconduct;
d. multiple offenses;
e. refusal to acknowledge the wrongful nature of conduct;
f. vulnerability of victim;
g. substantial experience in the practice of law;
h. indifference to making restitution;
i. illegal conduct, including that involving the use of controlled substances.

With three (3) Letters of Reprimand, Kossack has prior discipline. While he argues the sanctions are too remote in time, this simply goes toward weight, not admissibility or existence. It does show that prior private discipline has been ineffective.

Kossack has also demonstrated a consistent selfish motive for staying at home away from the office and failing to exercise any supervision whatsoever over his staff or, more importantly, his bank accounts. Further, the sheer longevity of his refusal to even look at his bank records – 6.5 years – alone supports the findings of a pattern of misconduct and multiple offenses. Add to that the defalcations of monies from Linda Gutierrez, the multiple undiscovered wire transfer from Interim Funding, and the 15 years of ignoring the monthly financial statements from Kay Foster (or ignoring their absence) and Kossack clearly has shown multiple offenses and a consistent pattern of misconduct.

With respect to restitution, Kossack has not offered to make any such provisions,

asserting that he is without funds because of tax problems – problems he caused with his failure to pay taxes. He maintains that Interim Funding, not he, is responsible for its loss of $233,000. *Opening Brief*, 27:21-22 ("Rosenbach's loss was more due to his own greed and utter lack of due diligence"). It is telling that Kossack indicts Rosenbach for a lack of diligence that he declines to apply to his own conduct.

As to acknowledging the wrongful nature of his conduct, while Kossack makes note of it ("My liability is that somewhere maybe I stepped over the bounds") in his Opening Brief (5:5) he spends more time blaming everyone else: his staff, his bookkeeper, the family, including the children, the court's e-filing system, his automobile accident, and even his "study in animal behavior" for the reasons that a quarter-million dollars went into his trust and general bank accounts, only to be promptly stolen. *Opening Brief*, 15:16; 29:24 – 30:14.

Finally, the finding of illegal drug use is based upon Kossack's own woods corroborated by Susan. There is clear support for all of the aggravating factors that the Panel determined existed in this case.

C. There is No Evidence Respondent Invoking His Fifth Amendment Right at the Disciplinary Hearing Was Held Against Him.

Kossack states that his "invocation of his Fifth Amendment right" when responding to the question of his marijuana use was held against him, which was improper. *Opening Brief*, 25:9-12.

First, his testimony was,

> Q. Have you ever smoked marijuana in your home?
>
> A. ***Certainly nothing close to the extent that Michelle Haehnel has testified to***. But with respect to whether I'm a casual smoker in the privacy of my own home, I plead the Fifth Amendment. ***However, I will testify this has never interfered with my work***, my written work speaks for itself, my courtroom presence speaks for itself, the success I had in my cases and on my appeals speak for themselves. (emphasis added).

ROA III, 419:2-20. Arguably Kossack has answered the question outside of invoking his Fifth Amendment right against self-incrimination. This is a basis independent of drawing an adverse inference.

However, even if an adverse inference is made, it does not follow that such an inference is violative of Respondent's constitutional rights. In a disciplinary proceeding, a lawyer's invocation of their Fifth Amendment privilege cannot itself subject him to discipline. *Spevack v. Klein*, 385 U.S. 511, 516 (1967). Due process concerns dictate that an attorney who invokes his or her Fifth Amendment rights at a disciplinary hearing cannot be disbarred simply for doing so. *Id., see also Garrity v. New Jersey*, 385 U.S. 493, 500 (1967) (due process prohibits person from being penalized with loss of job for invoking constitutional rights). Thus, Respondent may not only invoke his Fifth Amendment privilege at a disciplinary hearing, but he may do so without having to worry that the invocation, in and of itself, will result in professional discipline.

Regardless of whether Respondent invokes his Fifth Amendment privilege at the disciplinary proceeding, the State Bar remains obligated to prove the misconduct alleged against Respondent by clear and convincing evidence. *See* SCR105(2)(e); *see also United States v. Stein*, 233 F.3d 6, 16 (1st Cir. 2000) (holding that if disciplined attorney had pleaded Fifth Amendment privilege in disciplinary hearing, disbarment would not be automatic and bar counsel would still bear requisite burden of proof).

D. This Court Has Consistently Upheld The Propriety of the Chair Alone Signing the Findings and Recommendations.

Kossack argues that the Fiondings and Recommendation are invalid since only the Cahir signed them. *Opening Brief*, 29:8-20. SCR 105(2)(d) provides that, "A decision to impose or recommend discipline requires the concurrence of four members of the panel." The Findings and Recommendation in this matter clearly provide that the Panel was

unanimous in its decisions. ROA I, Conclusions of Law Nos. 2, 4, 5, and Decision and Recommendation, pp. 60-61. The written Findings are consistent with the transcript of the Panel's decision. ROA III, 562:25 – 563:5. This Court has held, consistently and correctly, that the decision must have a four-member concurrence, but the actual pleading is properly signed by the Chair alone. *See, i.e. In the Matter of Discipline of William W. Seegmiller*, Order Imposing Public Reprimand, Case No. 45537 (December 8, 2005)("Nothing in the rule requires that all five panel members sign the decision.")

E. The Panel Correctly Decided That Kossack's Misconduct Warrants Long-Term Suspension.

Kossack's complete absence of supervision and review allowed the theft of at least $243,000 from his attorney trust and general bank accounts. The Panel correctly recommended a substantial suspension, followed by a period of mentoring, "We have deliberated and unanimously have come to the conclusion, Mr. Kossack, that your actions have indeed put the public in jeopardy, warranting discipline, warranting significant discipline . . . ." ROA III, 563:4-7. Kossack had recommended a warning letter or private reprimand at the hearing. *Id.* at 559:10-12. In his Opening Brief he recommends a sanction less than suspension.

1. The purpose of attorney discipline is to protect the public and the integrity of the Bar.

"[The] paramount objective of bar disciplinary proceedings is not additional punishment of the attorney, but rather to protect the public from persons unfit to serve as attorneys and to maintain public confidence in the bar as a whole." *State Bar of Nevada v. Claiborne*, 104 Nev. 115, 129, 756 P.2d 464, 473 (1988). The ABA *Standards for Imposing Lawyer Sanctions* (Center for Professional Responsibility, 1991) ("ABA *Standards*") Section 1.1 provides,

1.1 Purpose of Lawyer Discipline Proceedings

> The purpose of lawyer discipline proceedings is to protect the public and the administration of justice from lawyers who have not discharged, will not discharge, or are unlikely properly to discharge their professional duties to clients, the public, the legal system, and the legal profession.

It is not simply respondent's own conduct that courts look to in assessing the appropriate disciplinary sanction. Due consideration must also be given to the public's perception of the integrity of the legal system, and the message sent to other members of the bar in order to educate the bar and deter unethical behavior among all members of the profession. *See, Matter of Carroll*, 602 P.2d 461 (Ariz. 1979); *State ex rel. Oklahoma Bar Ass'n v. Mayes*, 977 P.2d 1073, 1082 (1999) ("[A] fit factor to be considered in arriving at appropriate discipline is the deterrent effect upon both the offending respondent and other attorneys who might contemplate similar conduct in the future.").

2. Kossack's abdication of his duty to safeguard monies held in trust, resulting in substantial public harm, requires significant suspension.

Courts have consistently imposed substantial suspensions in cases where the attorney's failure to monitor their bank accounts have allowed employees to steal monies held in trust. *In re Cater*, 887 A.2d 1, 13 (D.C. 2005) (Six month suspension when attorney's secretary embezzled more than $47,000 over nine-month period); *Matter of Stransky*, 612 A.2d 373, 374 (N.J.,1992) (One year suspension when, without his knowledge, attorney's wife, who was also his secretary/bookkeeper, misappropriated $32,341.60 from trust account over a period of years).

In *The Florida Bar v. Riggs*, 944 So.2d 167 (2006), an attorney was suspended for three years, followed by three years of probation and monthly certified audits by a CPA, after he was found to committed numerous trust account violations. *Id.* at 170. The attorney blamed his trust account problems on a paralegal who had stolen account funds. *Id.* In

affirming the recommended sanction, the Florida Supreme Court held that,

> Riggs's failure to supervise his employee constitutes intent because he knowingly assigned his trust account responsibilities to Campbell and then failed to manage her activities. Knowingly or negligently engaging in sloppy bookkeeping amounts to intent under rule 4-8.4(c). *See Fla. Bar v. Smith*, 866 So.2d 41, 46 (Fla. 2004) (holding that the respondent had the requisite intent and therefore violated rule 4-8.4(c) because she had deliberately or knowingly engaged in negligent bookkeeping).

Id. at 171.

In two similar cases decided a few months apart, the Delaware Supreme Court imposed significant suspensions for attorneys who caused client harm by prolonged dereliction in maintaining proper records and controls over their trust accounts.

In *In re Shamers*, 873 A.2d 1089, 1097 (Del. 2005), the court held that a two-year suspension from the practice of law was warranted where the attorney failed to maintain client books and records or to safekeep client funds for five years and failed to supervise his wife/bookkeeper and nephew in the maintenance of those records, which resulted in embezzlement by the nephew. In rejecting Shamers' request to continue practicing in a limited practice, the court responded, "That is an unacceptable risk for this Court to permit even in a limited or restricted capacity. Shamers must be sanctioned for the ethical violations he has committed and the public must be protected until he has demonstrated his rehabilitation." *Id.* at 1098.

Following *Shamers*, the same court held that a three-year suspension, with ability to apply for reinstatement after two years if certain conditions were satisfied, was the appropriate sanction for an attorney who for many years failed to maintain proper books and records and safeguard client funds, failed to timely file and pay personal state and federal income taxes, and for ten years failed to accurately report the status of his books and records on his Certificates of Compliance. *In re Fountain*, 878 A.2d 1167, 1175 (Del. 2005).

As the above cases affirm, an attorney cannot shift blame to thieving employees for

violations of the duty to safekeep property when the attorney has abandoned all semblance of supervision and proper recordkeeping. It is a nondelegable duty and the failure of the attorney to honor it sets the stage for employee theft and client harm. Safeguarding and properly accounting for monies held in trust rests at the very core of a lawyer's duty to clients and the public. The courts will not hesitate to impose severe discipline in order to maintain that public trust and impress upon its lawyers the gravity of that obligation.

Such discipline is all the more warranted where, as here, the attorney has demonstrated a prolonged and deliberate inability to understand and appreciate that duty and the consequences for violating it. Kossack's breach of this duty resulted in substantial client and public harm, which is all the more frustrating given the fact that if he had exercised even the most minimal of review of his bank records, he could have easily averted this ha

Furthermore, his conduct exhibits an almost cavalier attitude toward this dut ignored every check and bank statement from his operating account for more than six years, his trust account for at least three years. He hired a bookkeeper and then ne years, either read a monthly financial statement or even realized he'd never see bookkeeper then quit out of frustration and he failed to even notice for three claimed he could not find her, even though she had the same contact infor years, including when she was his client.

After his office manager admitted to forging his signature and stealing trust account (which, for an attorney would be disbarment), he banned h However, he failed to change the locks on his office. To the contrary, h key to her daughter, and continued to rely upon the daughter to collect h addition, he still allowed telephone calls to be directed from his office to months without his supervision.

recommended length of the suspension is substantial,

consideration of the large number of aggravating factors present in this case. Chief am them is the widespread pattern and longevity of the misconduct set against Kossa experience in the practice of law and his seeming inability to grasp the seriousness of misconduct.

Section 1.1 of the ABA *Standards* quoted above states that lawyer discipline seek protect the public from attorney who are unlikely properly to discharge their professi duties to clients, the public, the legal system, and the legal profession. The rec demonstrates that Kossack lacks a fundamental understanding of his duties to supervise staff and protect his bank accounts. Indeed, he goes to illogical lengths to purposely av taking responsibility for either his staff or his finances. The recommended sanction refl the Panel's considered opinion that Kossack is unlikely to discharge his duty and will rema great threat to the public and the profession.

V.
CONCLUSION.

Kossack himself said it best, "Well, I just worked away and let the money take itself . . . . I suppose you could say that I'm more interested in my work than actually track of my pennies." ROA III, 386:3-12. $243,000 is a lot of pennies. Kossac understand that a lawyer's work includes keeping track of those pennies. Until he remains a real and proven threat to his clients, the public, and the profession. reasons, the State Bar urges this Court to adopt the recommendations of the Pan

DATED this 15th day of August 2011.

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VI.
ATTORNEY'S NRAP 28.2 CERTIFICATE

I hereby certify that I have read the foregoing Answering Brief of the State Bar of Nevada, and to the best of my knowledge, information and belief, this brief is not frivolous or interposed for any improper purpose. I further certify this brief complies with all applicable Nevada Rules of Appellate Procedure, including the requirement of NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be supported by appropriate references to the record on appeal. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 15th day of August 2011.

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CERTIFICATE OF SERVICE BY MAIL

The undersigned hereby certifies that a true and correct copy of the foregoing **STATE BAR OF NEVADA'S ANSWERING BRIEF** was placed in a sealed envelope and sent by U.S. regular mail in Las Vegas, Nevada, postage fully prepaid thereon for first class mail, addressed to:

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