IN THE SUPREME COURT OF THE STATE OF NEVADA

IN RE: DISCIPLINE OF AARON AQUINO, BAR NO. 11772.	Case No. 83339

STATE BAR OF NEVADA'S

OPENING BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

Other Authorities

I. STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Should ABA Standard 4.11 be the baseline standard for knowing violations of RPC 1.15 (Safekeeping Property) which cause injury to clients?
2. Is the Panel's finding of mitigating factors supported by the evidence?

II. STATEMENT OF CASE

The State Bar of Nevada ("State Bar") filed two different Complaints against Respondent Aaron A. Aquino ("Respondent") on December 6, 2019 (amended February 27, 2020) and January 25, 2021 based upon seven different grievances.[1] The State Bar alleged substantial violations of Rule of Professional Conduct ("RPC") 1.15 (Safekeeping Property), among other violations.[2]

At the formal hearing, the Panel considered stipulated facts evidencing misappropriation of client funds, a lack of diligence and communication with multiple clients, misrepresentations made to the State Bar during the investigation of one of the grievances, and Respondent's admissions in the hearing that his conduct injured his clients.[3] The Panel found clear and convincing evidence that Respondent knowingly violated RPC 1.15 (Safekeeping Property), 1.3 (Diligence), 1.4 (Communication), 1.16 (Declining or Terminating

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[1] Record on Appeal, filed August 9, 2021, ("R.") at 324-325.
[2] *Id.*
[3] R. at 325-333.

Representation), 1.5 (Fees), 8.1 (Bar Admission and Disciplinary Matters), and 8.4 (Misconduct).[4] The Panel applied Standard 4.12 of the ABA Standards for Imposing Lawyer Sanctions which states "suspension is generally appropriate when a lawyer knows or should know that he is dealing improperly with client property and causes injury or potential injury to a client."[5] The Panel relied on the aggravating factor that Respondent had an "almost uniform failure to monitor what was going on with [his] accounts" when it recommended a three-year suspension with the requirements that Respondent conduct his own audit of the account records and reimburse outstanding funds due to clients or third-parties before petitioning for reinstatement pursuant to SCR 116.[6]

The Panel also found the mitigating factors of (i) acceptance of responsibility, (ii) inexperience in the practice of law, (iii) personal and emotional problems, and (iv) remorse.[7]

The Panel recommended a three-year suspension with evidence of restitution, completion of specific Continuing Legal Education credits, and identification of a mentor before Respondent petitioned for reinstatement.[8]

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[4] R. at 334-336.
[5] R. at 336.
[6] R. at 337.
[7] *Id.*
[8] R. at 337-338.

The State Bar agrees with the Panel's conclusion that Respondent violated seven different Rules of Professional Conduct, chiefly RPC 1.15 (Safekeeping Property) causing injury to his clients and RPC 8.1 (Bar Admission and Disciplinary Matters) causing injury to the integrity of the profession. The State Bar appeals (i) the Panel's recommendation for suspension instead of disbarment and (ii) the Panel's finding of mitigating factors.

III. STATEMENT OF FACTS

A. Respondent misappropriated a total of more than $850,000 from approximately 149 different clients.

Over the course of two years, Respondent received settlement funds on behalf of hundreds of clients who were injured.[9] Respondent admitted that he converted hundreds of thousands of those client funds.[10] Respondent used that money for his own personal benefit.

For example, on July 13, 2018 Respondent had a negative balance in his operating account ending in x3270.[11] Three days later he deposited $15,000 of grievant Gerald Schutzenhofer's settlement funds directly into that account.[12] Respondent proceeded to purchase items at "Casting Networks," Curry House,

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[9] R. at 326 and 340-374.
[10] R. 280 and 298-322.
[11] R. 6950.
[12] *Id.*

Seafood City Super, Ross Stores, and Walgreens.[13] He also paid credit card debts, payroll expenses, advertising expenses, and another client's lienholder.[14] In four days, almost all of Mr. Schutzenhofer's settlement (and his wife's settlement) was gone. By July 30, 2018, Respondent's operating account was overdrawn again.[15] But, Respondent did not disburse anything to Mr. Schutzenhofer or his lienholders.

In October 2019, Respondent admittedly converted $858 of client Celine Apo's money.[16] Respondent transferred the money from his Client Trust Account to his operating account on October 24, 2019 with the notation "Client Costs 01598 Apo."[17] Yet, Respondent had incurred no 'costs' on behalf of Apo that warranted this transfer.[18] What really precipitated the transfer was that Respondent's operating account had a negative balance of over $900.[19]

The same thing happened with Matthew Grosso's settlement money in January 2020. On January 21, 2020, Respondent deposited $6,000 on behalf of Mr. Grosso.[20] On the same date, Respondent's operating account was overdrawn

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[13] R. at 6950-6951.
[14] *Id.*
[15] R. at 6952.
[16] R. at 283.
[17] R. at 7004.
[18] R. 283.
[19] R. 7004.
[20] R. at 327.

by $1,290.31.[21] Respondent surreptitiously took $3,400 of Mr. Grosso's money and converted it to his own use by transferring it to a saving account with the designation "client costs" and then withdrawing the full amount in cash.[22] Respondent had not distributed any funds to Mr. Grosso or his lienholders, yet Respondent's Client Trust Account had a balance of $34.13 at the end January 22, 2020.[23] On January 31, 2020, Respondent received a second settlement payment of $1,086.67 for Mr. Grosso.[24] Again, Respondent transferred the full amount to another account, this time his operating account, with the false designation "client costs 01482 Gro."[25] Respondent did not pay Mr. Grosso or his lienholders with that money; instead he paid Storage One, Netflix, Avvo, Lifetime, NV Energy, and credit cards.[26] The same day that Respondent converted Mr. Grosso's money, he charged so many expenses/purchases that the account was again overdrawn.[27] Respondent admitted that he never incurred "costs" equal to the amount he designated as "client costs" when making those original transfers.[28]

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[21] R. at 7013.
[22] R. at 327.
[23] R. at 7091.
[24] R. at 327.
[25] R. at 7014.
[26] R. at 7014-7015.
[27] *Id.*
[28] R. at 328 and 333.

These examples are consistent with Respondent's transferring of money from the funds he was tasked by the Court to hold and disburse on behalf of his client Sengdao Thonesavanh ("Sam") and his ex-wife Thuy Tran. By March 2018, Respondent had received $425,556 on behalf of Sam and Ms. Tran.[29] Respondent disbursed $29,000 to Sam and $66,684.31 to pay approved expenses.[30]

Respondent transferred approximately $108,000 out of his Client Trust Account alleging that the transfers were for 'Client Costs 01149 Thonesavanh."[31] Yet, Respondent could not account for any of the alleged costs he paid with those funds.[32] For example, Respondent transferred $5,716.62 on April 18, 2018 into his operating account with the notation "client costs 01149 Tho."[33] During the hearing, Respondent could only speculate that one charge of $487.35 incurred after the April 18 transfer was on behalf of Sam.[34] Respondent's bank records show that he spent all of the money on payroll expenses and advertising costs and it is all gone by April 23, 2018.[35]

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[29] R. 284.
[30] R. at 285-286.
[31] R. at 286.
[32] R. at 286-287.
[33] R. 6940.
[34] R. 456-457.
[35] R. at 6940-6941.

Respondent then transferred another $5,716.62 from his Client Trust Account to his operating account with the notation "Client Costs 01149 Tho."[36] All of the money is gone by May 2, 2018.[37] Again, Respondent did not reference Sam in any of the following transactions which are largely comprised on payments to American Express.[38] During the hearing, Respondent could not identify any of Sam's costs that he paid with the transferred money.[39]

Respondent attempted to hypothesize that the transfers were related to the payment of costs, as directed by his staff according to client needs.[40] Respondent stated that he would attempt to pay Sam's expenses online and transferring them to the operating account facilitated such payments.[41] However, Respondent paid $5,716.62 to Silver State Schools Credit Union for Sam's mortgage on April 18, 2018 using Client Trust Account check number 1755.[42] Thus, Respondent's attempt to justify the conversion of his client's funds in April 2018 is belied by the bank records.

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[36] R. at 6941.
[37] R. at 6941-6942.
[38] R. at 6941.
[39] R. at 463-465.
[40] R. at 467-469.
[41] *Id.*
[42] R at 321-322 and 7078.

This body of evidence shows that Respondent consistently converted his client's money over a two-year period using false notations to make it appear that his misappropriation was paying 'client costs.'

B. Respondent lied to the State Bar during its investigation into one client's misappropriated funds.

When the State Bar opened its investigation of Mr. Schutzenhofer's grievance, it asked Respondent to provide documents related to receipt of funds and payments on behalf of Mr. Schutzenhofer. In response, Respondent provided copies of checks made out to Mr. Schutzenhofer's medical providers.[43] The medical providers never received those checks and the debts were never paid.[44] Hence, Respondent continued his lies about payment of costs even when faced with a disciplinary proceeding.

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[43] R. at 282.
[44] *Id.*

ARGUMENT

IV. RESPONDENT'S CONDUCT MERITS DISBARMENT

A. Standard of Review

This Court reviews a disciplinary panel's recommendation with two standards.

First, the Court defers to the hearing panel's findings of fact, and will not set them aside unless they are clearly erroneous or unsupported by substantial evidence.[45] The United States Supreme Court has stated that "[a] finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."[46]

The Court reviews a disciplinary panel's conclusions of law and recommended discipline *de novo*.[47] "Although the recommendations of the disciplinary panel are persuasive, this court is not bound by the panel's conclusions and recommendation, and must examine the record anew and exercise independent judgment."[48]

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[45] Nevada Supreme Court Rule ("SCR") 105(3)(b).
[46] *United States v. Gypsum Co.*, 333 U.S. 364, 395, 68 S. Ct. 525, 542, 92 L.Ed. 1147 (1948).
[47] SCR 105(3)(b).
[48] *In re Discipline of Schaefer,* 117 Nev. 496, 515, 25 P.3d 191, 204 (2001).

B. Pursuant to ABA Standard 4.11, disbarment is the appropriate baseline sanction for Respondent's knowing misappropriation of client funds which caused injury to his clients

Misappropriation and conversion of client money is a cardinal sin for practicing attorneys. State Supreme Courts, keenly aware that misappropriation erodes the public's confidence in the legal profession, take swift action to curb misappropriation and conversion.

Standard 4.11 in the ABA Standards for Imposing Lawyer Sanctions states, "Disbarment is generally appropriate when a lawyer knowingly converts client property and causes injury or potential injury to a client." In fact, a number of jurisdictions view disbarment as the only appropriate discipline when a lawyer knowingly converts client funds.[49] "Recognition of the nature and gravity of the offense suggests only one result -- disbarment."[50]

In 1978, the Supreme Court of New Jersey delivered a short, landmark decision that changed sanctioning standards in New Jersey to a degree that no other state had then seen.[51] Attorney Wendell Wilson intentionally converted

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[49] *See In re Wilson,* 409 A.2d 1153 (N.J. 1979).
[50] *Id.* at 1155.
[51] *See In re Wilson,* 409 A.2d 1153 (N.J. 1979).

over $27,000 of his clients' money. Wilson also lied to clients, wantonly disregarded their interests, and advised them to commit fraud. The court held that intentional misappropriation alone warranted disbarment; none of the other violations in that matter were particularly significant to the court. Chief Justice Wilentz, the author of the opinion, minced no words about the seriousness of misappropriation, proclaiming that "[n]o clearer wrong suffered by a client at the hands of one he had every reason to trust can be imagined."[52] Primarily, the court worried over the public's confidence in the bar and the legal system. This moral foundation led to the holding that mitigating factors should rarely shield a lawyer from disbarment. The Wilson court condemned the gratuitous use of mitigating factors and overreliance on ill-defined intent. Particularly, the court criticized the use of experience, or inexperience, as mitigation. The court proclaimed that "[t]his offense against common honesty should be clear even to the youngest; and to distinguished practitioners, its grievousness should be even clearer."[53]

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[52] *Id.* at 1155.
[53] *Id.* at 1157.

The *Wilson* rule has also been adopted by Rhode Island,[54] Arizona,[55] Florida,[56] Kansas,[57] Louisiana,[58] Maryland,[59] New Hampshire,[60] North Carolina,[61] Illinois,[62] North Dakota,[63] Oregon,[64] Utah,[65] Washington,[66] Iowa,[67] Colorado,[68] Delaware,[69] Georgia,[70]_Oklahoma,[71] and Wyoming.[72]

The Nevada Supreme Court has also cited to *Wilson* with approval, stating, "[t]he state bar has provided us with numerous cases from other states holding that disbarment is the only appropriate discipline for intentional misappropriation of client funds in light of the high trust and ethical responsibilities that attorneys have to safeguard their clients' property. We

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[54] *Carter v. Ross,* 461 A.2d 675 (R.I. 1983).
[55] *In re LaLonde,* 834 P.2d 146 (Ariz. 1992)
[56] *Fla. Bar v. Korones,* 752 So. 2d 586 (Fla. 2000).
[57] *In re Veith*, 843 P.2d 729 (Kan. 1992).
[58] *In re Grady,* 782 So. 2d 570 (La. 2001).
[59] *Att'y Grievance Comm'n v. Whitehead,* 950 A.2d 798 (Md. 2008).
[60] *In re Carroll,* 503 A.2d 750 (N.H. 1985).
[61] *N.C. State Bar v. Leonard,* 632 S.E. 2d 183 (N.C.App. 2006).
[62] *In re Stillo,* 368 N.E.2d 897 (Ill. 1977).
[63] *In re Disciplinary Action Against McDonagh,* 822 N.W.2d 468 (N.D. 2012).
[64] *In re Maroney,* 927 P.2d 90 (Or. 1996).
[65] *In re Discipline of Grimes,* 297 P.3d 564 (Utah 2012).
[66] *In re Disciplinary Proceeding against Schwimmer,* 108 P.3d 761 (Wash. 2005).
[67] *Iowa Supreme Ct Att'y Disciplinary Bd. V. Nelsen,* 807 N.W.2d 259 (Iowa 2011).
[68] *People v. Young,* 864 P.2d 563 (Colo. 1993).
[69] *In re Benge,* 783 A.2d 1279 (Del. 2001).
[70] *In re Quist,* 483 S.E.2d 569 (Ga. 1997).
[71] *State ex rel. Okla. Bar Ass'n v. Gray,* 948 P.2d 1221 (Okla. 1997).
[72] *Bd. Of Prof'l Responsibility v. Shifrar,* 286 P.3d 1027 (Wyo. 2012)

conclude that disbarment is appropriate discipline when client funds have been misappropriated."[73]

This Court has disbarred attorneys that convert client funds for their personal use and attempt to cover up that conversion. For example, in *in re Graham*, the Court applied Standard 4.11 and disbarred attorney Robert Graham because of his conversion of approximately $17 million in client funds and his conduct intended to conceal his misappropriation.[74] In *in re Morishita*, the Court disbarred attorney Robert Morishita pursuant to Standard 4.11, Standard 4.41 (re: abandoning a practice), and Standard 5.11(a) (re: criminal conduct or intentional conduct involving dishonesty, etc.).[75]

In *in re Dennie*, this Court disbarred the attorney for misappropriating approximately $725,000.[76] Dennie routinely underpaid clients and overpaid alleged earned fees. This is extremely similar to Respondent's conduct in failing to pay lienholders and clients while falsely alleging increased costs associated with those clients.

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[73] *In re Discipline of Knott, No. 44645* (Nev. 2005) (Citing, among others, *In re Wilson*.)
[74] *In re Graham*, 133 Nev. 1027, 401 P.3d 1066 (2017)
[75] I*n re Morishita*, 413 P.3d 846, 2018 Nev. Unpub. LEXIS 197, (March 9, 2018)
[76] *In re Dennie*, 2019 Nev. Unpub. LEXIS 745, 443 P.3d 1121 (July 5, 2019).

Respondent's conduct is also similar to that of Allan Capps, another disbarred Nevada lawyer. Capps misappropriated $183,976.01 in client funds and lied to the State Bar about protecting his client's funds when it initially investigated a related grievance.[77]

Respondent's misconduct is egregious and causes injury to dozens of clients and the integrity of the profession. Nothing less than disbarment is appropriate to protect the public and the profession from future harm.

C. There are no mitigating factors that warrant a deviation from the baseline sanction of disbarment.

There are the particularly sympathetic situations of lawyers who convert client funds and are afflicted with some form of physical or mental conditions or addictions, such as alcoholism, drug addictions, or compulsive gambling. Where such lawyers have rehabilitated themselves, courts should consider such mitigation because the lawyer is no longer the same person. The Court and panels could apply such mitigation without eroding the deterrent effect of disbarment. Meaningful application of this mitigation would include finding, with a thorough explanation, that the lawyer is no longer a threat.

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[77] *In re Capps*, 2020 Nev. Unpub. LEXIS 1213, 477 P.3d 1128 (December 23, 2020

The Supreme Court of Maryland stated it well, "We have consistently held that when an attorney is found to have betrayed the high trust imposed in him by appropriating to his own use funds of others entrusted to him, then, ***absent the most compelling extenuating circumstances***, disbarment should follow as a matter of course."[78] This would preserve the public's confidence in the system.

The Hearing Panel concluded that Respondent (i) accepted responsibility for his misconduct, (ii) was inexperienced in the practice of law, (iii) had personal and emotions problems, and (iv) expressed remorse.[79]

First, the record does not support these conclusions. Although Respondent stipulated to facts identifying that client money was misappropriated and client debts were not paid, he continued to assert in the hearing that debts were actually paid.[80] Respondent stated he didn't " believe it's anywhere close to whatever the allegations are."[81] This is not acceptance of responsibility for the misconduct.

Respondent submitted to the Panel that he had depression, ADHD, and some familial medical issues that impacted his ability to safekeep his clients'

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[78] *Att'y Grievance Comm'n v. Cockrell*, 499 A.2d 928, 304 Md. 379 (Md., 1984) (emphasis added) (citations omitted).
[79] R. at 337.
[80] R. at 475-477.
[81] R. at 484.

money and not lie to the State Bar.[82] Yet, Respondent offered no objective evidence showing any diagnoses, related medications, or nexus between the identified problems and his misconduct.

Respondent was also asked by the Panel if he felt remorse for the harm caused by his misconduct. Respondent's answer was that this experience was a "most embarrassing thing" which he recognized effected his business, his former staff, his former clients, his wife and kids.[83] Respondent stated that he would not "wish [this experience] on anybody."[84] This is not remorse for harming others; this is embarrassment for being caught.

Second, the listed mitigating factors are not compelling extenuating circumstances that warrant deviating from the sanction of disbarment. Inexperience is not a sufficient reason to mitigate conversion of client funds for personal benefit. Further, none of the identified mitigating factors evidence a circumstance that can be rehabilitated, like an addiction that impacts one's ability to measure right from wrong.

This Court should conclude that there are no substantiated mitigating factors that warrant deviation from the baseline sanction of disbarment.

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[82] R. at 432 and 485.
[83] R. at 488.
[84] *Id.*

V. CONCLUSION

This Court should disbar Respondent from practicing law in Nevada. The record establishes knowing misappropriation, which warrants disbarment under ABA Standard 4.11, with no mitigating factor that warrants a lessor sanction.

DATED this 8th day of September 2021.

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VII.
CERTIFICATE OF COMPLIANCE

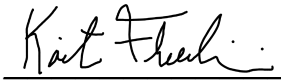
1. I hereby certify that this Opening Brief complied with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Word 2016 in Georgia 14-point font size.

2. I further certify that this brief complies with the page or type volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7), it is proportionately spaced, has a typeface of 14 points or more and contains 3,839 words.

3. Finally, I hereby certify that I have read the foregoing Opening 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 NRAP, 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 8th day of September 2021.

STATE BAR OF NEVADA
Daniel M. Hooge, Bar Counsel

By: 

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing **OPENING BRIEF** was placed in a sealed envelope and sent by U.S. regular mail in Reno, Nevada, postage fully prepaid thereon for first class mail, addressed to:

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