Ethics 2017
The Year in Review

Presented by

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OPINION 2017-1

Issued February 10, 2017 Withdraws Opinion 98-9

Advertisement of Contingent Fee Arrangements

QUESTION PRESENTED:

Whether it is proper for a lawyer who advertises to use statements such as "No fee without recovery" or "You pay no fee unless you win" or "There's no charge unless we win your case" or "You pay us only when we win."

APPLICABLE RULES: Prof.Cond.R. 1.5, 1.8, and 7.1

CONCLUSION: Prof.Cond.R. 1.8 permits a lawyer to "advance the court costs and expenses of litigation, the repayment of which may be contingent upon the outcome of the matter." A lawyer is not required to recover the costs and expenses from the client. However, in some instances, a lawyer may require the client to directly repay the costs advanced by the lawyer if the case is unsuccessful or the recovery is too small to recoup the costs of litigation advanced by the lawyer. *See*, Prof.Cond.R. 1.5(c)(1).

A lawyer may not advertise legal services on a contingent fee basis using statements such as "No fee without recovery," "There's no charge unless we win your case," or "You pay us only when we win" if the lawyer intends to recover advanced litigation costs and expenses from the client, regardless of the outcome of the litigation. Such an advertisement is inconsistent with the Prof.Cond.R. 7.1 prohibition against false or misleading communications unless a disclaimer is included that explains the obligations of the client to repay costs and expenses. A lawyer seeking to avoid the inclusion of an explanatory statement regarding the payment of litigation costs also has the option to not advertise his or her services on a contingent fee basis.

OPINION 2017-02

Issued February 10, 2017 Withdraws Opinion 89-32

Duty of Judge to Report Misconduct

QUESTIONS PRESENTED: 1) What is a judge's duty under the Code of Judicial Conduct to report another judge's or lawyer's misconduct?; and 2) If a judge reports a lawyer's violation of the Code of Professional Responsibility, is the judge disqualified from hearing any cases involving that lawyer?

APPLICABLE RULES: Jud.Cond.R. 2.15, Prof.Cond.R. 8.3

SYLLABUS: A judge who has knowledge that another judge has committed a violation of the Code of Judicial Conduct that raises a question regarding the judge's honesty, trustworthiness, or fitness as a judge in other respects is required to report it to the appropriate disciplinary authority. Jud.Cond.R. 2.15(A). Likewise, a judge who has knowledge of a lawyer's violation of the Rules of Professional Conduct has an ethical duty to report it to the disciplinary counsel or a local certified grievance committee. Jud.Cond.R. 2.15(B). A report of misconduct by a judge should be made within a reasonable time after the judge becomes aware of the violation. (Prof.Cond.R. 8.3) If a judge does not have actual knowledge, but receives information indicating a substantial likelihood that another judge or lawyer has committed reportable misconduct, then the judge should take appropriate action, which may include communicating directly with the judge or lawyer involved, communicating with a supervisor, partner, or colleague, or reporting the suspected violation to the appropriate disciplinary authority. Jud.Cond.R. 2.15, cmt. [2]. Additionally, a judge who reports a lawyer's misconduct to the proper disciplinary authority is not presumptively disqualified from presiding over cases in which that lawyer appears. Rather, an objective test is used to determine whether a judge's participation in a case presents an appearance of impropriety. A judge should recuse himself or herself if " 'a reasonable and objective observer would harbor serious doubts about the judge's impartiality.'" *Lynch*, 2013-Ohio-910, at ¶ 8, citing *In re Disqualification of Lewis*, 117 Ohio St.3d 1227, 2004-Ohio-7359 ¶ 8. Moreover, a judge is presumed to be impartial and comply with the law. Jud.Cond.R. 1.1, 2.2. As a result, a judge fulfilling his or her professional duty by reporting a lawyer's violation of the Rules of Professional Conduct does not alone disqualify the judge from hearing cases involving that lawyer.

OPINION 2017-03
Issued April 7, 2017
(Update and Withdrawal of Former Opinion 2004-1)
Solicitation of Professional Employment Via Email

QUESTIONS PRESENTED: 1) Whether it is proper for a lawyer to advertise legal services by sending unsolicited emails to persons. 2) Whether a lawyer can participate in a lawyer referral service or lawyer advertising service that sends unsolicited emails to persons.

APPLICABLE RULES: Prof.Cond.R. 5.3, 7.1, 7.2, and 7.3

SYLLABUS: While an email solicitation is permissible under the Rules of Professional Conduct, additional ethical and legal concerns must be addressed when a lawyer chooses to utilize the method to advertise the availability of legal services. Most importantly, all communications concerning a lawyer or a lawyer's services, regardless of form, must comply with the requirements of Prof.Cond.R. 7.1:

> A lawyer shall not make or use a false, misleading, or nonverifiable communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law or omits a fact necessary to make the statement considered as a whole not materially misleading.

In addition, Prof.Cond.R. 7.3(b) provides that solicitation in any form is not permitted if 1) the person being solicited has made it known they do not desire to be contacted; or 2) the solicitation involves coercion, duress, or harassment, or the lawyer knows or reasonably should know that the person is a minor, incompetent, or cannot exercise reasonable judgment in employing a lawyer. If after sending an email the lawyer receives no response, further email communication with the same recipient may implicate Prof.Cond.R. 7.3(b). Prof.Cond.R. 7.3(b), cmt. [6].

Lastly, Prof.Cond.R. 7.3(c) requires "[e]very written, recorded or electronic communication from a lawyer soliciting professional employment from anyone whom the lawyer reasonably believes to be in need of legal services in a particular matter" to comply with three conditions: 1) disclose accurately and fully the manner in which the lawyer became aware of the identity and specific legal need of the addressee; 2) refrain from expressing any predetermined evaluation of the merits of the addressee's case; and 3) conspicuously include the recital "ADVERTISING MATERIAL" or "ADVERTISEMENT ONLY" at the beginning and ending of any electronic communication. The inclusion of the "ADVERTISING MATERIAL"

or "ADVERTISEMENT ONLY" recital in the subject line of the email satisfies the requirement to include the recital at the beginning of the communication. Additional restrictions concerning the verification that a defendant in a civil action has been served, and the inclusion of the "Understanding Your Rights" statement thirty days after an accident or disaster that gives rise to a claim must also be observed. Prof.Cond.R. 7.3(d), (e). The "Understanding Your Rights" statement must be included in the body of the email solicitation, and not referenced by an attachment or hyperlink. *See* Adv. Op. 20132.

Additional legal considerations for e-mail solicitation

Under Prof.Cond.R. 7.3, communications may be mailed or transmitted by email or other electronic means that do not violate other laws governing solicitations. Prof.Cond.R. 7.3, cmt. [3]. In 2003, the Controlling the Assault of Non-Solicited Pornography and Marketing Act ("CAN-SPAM") was enacted by the United States Congress to regulate the commercial use of email. The law covers all commercial messages, which the law defines as "any electronic mail message the primary purpose of which is the commercial advertisement or promotion of a commercial product or service." Lawyers should be mindful that Ohio also regulates commercial email under R.C. 2307.64.

Question Two

A lawyer may permit a lawyer referral service or lawyer advertising service to transmit a solicitation e-mail on the lawyer's behalf. However, Prof.Cond.R. 5.3 holds the lawyer responsible for the conduct of persons employed by, retained by, or associated with the lawyer that violates Rules of Professional Conduct when the lawyer has ordered or otherwise ratified the conduct. Consequently, the lawyer using a service is responsible for ensuring the service's compliance with the Rules of Professional Conduct applicable to lawyer communications and solicitation. A lawyer participating in a service transmitting an email solicitation on the lawyer's behalf should review the content of the email to ensure its compatibility with the lawyer's professional obligations.

OPINION 2017-4
Issued April 7, 2017
(Update and Withdrawal of Former Opinion 2005-5)
Legal Representation of a Client by Former Magistrate

QUESTION PRESENTED: Is it proper for a former magistrate, now privately practicing law, to represent a client in post-decree matters (modifying child custody, parenting time, or child support, and defending or initiating a contempt order to enforce a prior court order) when he or she served as magistrate in the client's original divorce or dissolution?

APPLICABLE RULES: Prof.Cond.R. 1.12; R.C. 102.03(A)

SYLLABUS: Under the Ohio Ethics Law, a former magistrate is prohibited for 12 months from representing a client in a matter in which the former magistrate personally participated as a magistrate. R.C. 102.03(A)(1). After that time, a former magistrate, who now is in private practice, may not represent a client in a post-decree matter in which he or she participated personally and substantially as a magistrate, unless all parties give informed consent, confirmed in writing. Prof.Cond.R. 1.12(a). If the former magistrate is disqualified under Prof.Cond.R. 1.12(a), then another lawyer in his or her firm may not represent that client unless the former magistrate is screened, takes no part of the fee in the matter, and written notice is promptly provided to the parties and the tribunal. Prof.Cond.R. 1.12(c).

AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 475

December 7, 2016

This opinion is based on the ABA Model Rules of Professional Conduct as amended by the ABA House of Delegates through August 2016. The laws, court rules, regulations, rules of professional conduct, and opinions promulgated in individual jurisdictions are controlling.

Safeguarding Fees That Are Subject to Division With Other Counsel

A lawyer may divide a fee with another lawyer who is not in the same firm if the arrangement meets the requirements of Model Rule 1.5(e).

When one lawyer receives an earned fee that is subject to such an arrangement and both lawyers have an interest in that earned fee, Model Rules 1.15(a) and 1.15(d) require that the receiving lawyer hold the funds in an account separate from the lawyer's own property, appropriately safeguard the funds, promptly notify the other lawyer who holds an interest in the fee of receipt of the funds, promptly deliver to the other lawyer the agreed upon portion of the fee, and, if requested by the other lawyer, provide a full accounting.

Model Rule 1.15 provides the answer. It explains in relevant part:

> (a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained in the state where the lawyer's office is situated, or elsewhere with the consent of the client or third person. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of [five years] after termination of the representation.
>
> … (d) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 476

December 19, 2016

This opinion does not address the additional and unique issues raised when a lawyer seeks to withdraw from representation in a criminal matter. The opinion is based on the ABA Model Rules of Professional Conduct as amended by the ABA House of Delegates through February 2016. The laws, court rules, regulations, rules of professional conduct, and opinions promulgated in individual jurisdictions are controlling.

Confidentiality Issues when Moving to Withdraw for Nonpayment of Fees in Civil Litigation

In moving to withdraw as counsel in a civil proceeding based on a client's failure to pay fees, a lawyer must consider the duty of confidentiality under Rule 1.6 and seek to reconcile that duty with the court's need for sufficient information upon which to rule on the motion. Similarly, in entertaining such a motion, a judge should consider the right of the movant's client to confidentiality. This requires cooperation between lawyers and judges. If required by the court to support the motion with facts relating to the representation, a lawyer may, pursuant to Rule 1.6(b)(5), disclose only such confidential information as is reasonably necessary for the court to make an informed decision on the motion.

Rule 1.16, paragraphs (a) and (b) read:

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1) the representation will result in violation of the Rules of Professional Conduct or other law;

(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or

(3) the lawyer is discharged.

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:

(1) withdrawal can be accomplished without material adverse effect on the interests of the client;

(2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;

(3) the client has used the lawyer's services to perpetrate a crime or fraud;

(4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;

(5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;

(6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

(7) other good cause for withdrawal exists.

AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 477R*

May 11, 2017, then Revised May 22, 2017

This opinion is based on the ABA Model Rules of Professional Conduct as amended by the ABA House of Delegates through August 2016. The laws, court rules, regulations, rules of professional conduct, and opinions promulgated in individual jurisdictions are controlling.

Securing Communication of Protected Client Information

A lawyer generally may transmit information relating to the representation of a client over the internet without violating the Model Rules of Professional Conduct where the lawyer has undertaken reasonable efforts to prevent inadvertent or unauthorized access. However, a lawyer may be required to take special security precautions to protect against the inadvertent or unauthorized disclosure of client information when required by an agreement with the client or by law, or when the nature of the information requires a higher degree of security.

Since 1983, Model Rule 1.1 has read: "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."

The scope of this requirement was clarified in 2012 when the ABA recognized the increasing impact of technology on the practice of law and the duty of lawyers to develop an understanding of that technology. Thus, Comment [8] to Rule 1.1 was modified to read:

> To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject. (Emphasis added.)

Model Rule 1.6(a) requires that "A lawyer shall not reveal information relating to the representation of a client" unless certain circumstances arise.

The 2012 modification added a new duty in paragraph (c) that: "A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client."

Amended Comment [18] explains:

> Paragraph (c) requires a lawyer to act competently to safeguard information relating to the representation of a client against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3. The unauthorized access to, or the inadvertent or unauthorized disclosure of,

> information relating to the representation of a client does not constitute a violation of paragraph (c) if the lawyer has made reasonable efforts to prevent the access or disclosure.

Therefore, in an environment of increasing cyber threats, the Committee concludes that, adopting the language in the ABA Cybersecurity Handbook, the reasonable efforts standard:

> . . . rejects requirements for specific security measures (such as firewalls, passwords, and the like) and instead adopts a fact-specific approach to business security obligations that requires a "process" to assess risks, identify and implement appropriate security measures responsive to those risks, verify that they are effectively implemented, and ensure that they are continually updated in response to new developments.

Recognizing the necessity of employing a fact-based analysis, Comment [18] to Model Rule 1.6(c) includes nonexclusive factors to guide lawyers in making a "reasonable efforts" determination. Those factors include:

- the sensitivity of the information,
- the likelihood of disclosure if additional safeguards are not employed,
- the cost of employing additional safeguards,
- the difficulty of implementing the safeguards, and
- the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use).

While it is beyond the scope of an ethics opinion to specify the reasonable steps that lawyers should take under any given set of facts, we offer the following considerations as guidance:

1. Understand the Nature of the Threat.
2. Understand How Client Confidential Information is Transmitted and Where It Is Stored.
3. Understand and Use Reasonable Electronic Security Measures.
4. Determine How Electronic Communications About Clients Matters Should Be Protected.
5. Label Client Confidential Information.
6. Train Lawyers and Nonlawyer Assistants in Technology and Information Security.
7. Conduct Due Diligence on Vendors Providing Communication Technology.

AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 478

December 8, 2017

This opinion is based on the ABA Model Code of Judicial Conduct as amended by the ABA House of Delegates through August 2010. The laws, court rules, regulations, rules of professional and judicial conduct, opinions promulgated in individual jurisdictions and the Code of Conduct for United States Judges may be controlling. In addition, standards for judicial notice are beyond the scope of this opinion and discussed throughout only in general terms.

Independent Factual Research by Judges Via the Internet

Easy access to a vast amount of information available on the Internet exposes judges to potential ethical problems. Judges risk violating the Model Code of Judicial Conduct by searching the Internet for information related to participants or facts in a proceeding. Independent investigation of adjudicative facts generally is prohibited unless the information is properly subject to judicial notice. The restriction on independent investigation includes individuals subject to the judge's direction and control.

The Model Code's rule on *ex parte* communication includes a provision that specifically addresses independent investigation of facts. Model Rule 2.9(C) states: "A judge shall not investigate facts in a matter independently, and shall consider only the evidence presented and any facts that may properly be judicially noticed." Comment [6] to Rule 2.9 clarifies that the "prohibition against a judge investigating the facts in a matter extends to information available in all mediums, including electronic."

Importantly, Rule 2.9(C) does not preclude legal research. Rule 2.9(C) carefully proscribes independent research of "facts." Judges may conduct legal research beyond the cases and authorities cited or provided by counsel.

When deciding whether to independently investigate facts on the Internet, the judge should consider:

1. Is additional information necessary to decide the case? If so, this type of information generally must be provided by counsel or the parties, or must be subject to proper judicial notice.
2. Is the purpose of the judge's inquiry to corroborate facts, discredit facts, or fill a factual gap in the record? If the facts are adjudicative, it is improper for a judge to do so.
3. Is the judge seeking general or educational information that is useful to provide the judge with a better understanding of a subject unrelated to a pending or impending case? If so, the inquiry is appropriate. Judges may use the Internet as they would other educational sources, like judicial seminars and books.
4. Is the judge seeking background information about a party or about the subject matter of a pending or impending case? If so, the information may represent adjudicative facts or legislative facts, depending on the circumstances. The key inquiry here is whether the information to be gathered is of factual consequence in determining the case. If it is, it must be subject to testing through the adversary process.

2017 WL 6048053

PRELIMINARY COPY, SUBJECT TO FURTHER EDITING

Supreme Court of Ohio.

DISCIPLINARY COUNSEL v. FUHRY.

No. 2017–0489

|

Submitted May 3, 2017

|

Decided December 6, 2017

Synopsis – License suspended for failure to get CLEs is still a suspended license, and you are not permitted to practice law.

Background: Attorneys' conduct in continuing to engage in the practice of law while under suspension, misrepresentation of her disciplinary history on securities form, and making a false statement to disciplinary counsel in the initial stages of disciplinary investigation violated rule of professional conduct prohibiting a lawyer from practicing law in a jurisdiction in violation of regulation, rule prohibiting a lawyer who is not admitted from holding out to the public or otherwise representing that lawyer is admitted, rule prohibiting a lawyer from knowingly making a false statement in a disciplinary matter, and rule prohibiting lawyer from engaging in dishonest conduct, as well as rule for government of the bar prohibiting a lawyer from practicing law while suspended. Rules of Prof.Conduct, Rules 5.5(a), (b)(2), 8.1(a), 8.4(c); Ohio Gov. Bar R. 6(10)(C)(1).

Holdings: The Supreme Court held that:

[1] attorneys' conduct in continuing to engage in the practice of law while under suspension, misrepresentation of her disciplinary history on securities form, and making a false statement to disciplinary counsel violated professional rules; and

[2] two-year suspension with the final six months stayed was the appropriate sanction.

Two-year suspension with the final six months stayed was the appropriate sanction for attorney's misconduct in continuing to engage in the practice of law while under suspension, misrepresentation of her disciplinary history on securities form, and making a false statement to disciplinary counsel in the initial stages of the disciplinary investigation. Rules of Prof.Conduct, Rules 5.5(a), (b)(2), 8.1(a), 8.4(c); Ohio Gov. Bar R. 6(10)(C)(1).

Cases that cite this headnote

2017 WL 6048127

PRELIMINARY COPY, SUBJECT TO FURTHER EDITING

Supreme Court of Ohio.

DISCIPLINARY COUNSEL
v.
SCHUMAN
.

No. 2016–1834
|
Submitted May 3, 2017
|
Decided December 6, 2017

Synopsis Conduct of attorney, who filed municipal court action against parents seeking unpaid fees for services as guardian ad litem (GAL) for children at higher rate than that approved by juvenile court, collected more from father than his total GAL fees, and sought joint and several liability against parents even though trial court had ordered each to pay half, violated rules of professional conduct prohibiting attorney from making charging or collecting an illegal or clearly excessive fee, knowingly making or failing to correct false statement of fact or law to a tribunal, engaging in conduct prejudicial to administration of justice, and engaging in conduct that adversely reflected on attorney's fitness to practice law. Rules of Prof.Conduct, Rules 1.5(a), 3.3(a)(1), 8.4(d, h).

Holdings: The Supreme Court held that:

[1] attorney's conduct in filing municipal court action to seek more fees than that to which he was entitled violated rules of professional conduct, and

[2] suspension of one year, with six months stayed on conditions, was appropriate sanction for attorney's misconduct.

2017 WL 6048988

PRELIMINARY COPY, SUBJECT TO FURTHER EDITING

Supreme Court of Ohio.

DISCIPLINARY COUNSEL
v.
DERRYBERRY.

No. 2017–1088
|
Submitted October 17, 2017
|
Decided December 5, 2017

Synopsis - Attorney's failure to adequately communicate his legal strategy in child custody matter did not violate rule of professional conduct requiring a lawyer to act with reasonable diligence in representing a client. Ohio Rules of Prof.Conduct, Rule 1.3.

Fully stayed one-year suspension was the appropriate sanction for attorney's failure to adequately communicate with client regarding legal strategy during brief attorney-client relationship and for attorney's knowingly false statement to disciplinary counsel and false testimony at disciplinary hearing; attorney was entitled to some mitigating credit for making restitution and acknowledging his errors, albeit somewhat belatedly. Ohio Rules of Prof. Conduct, Rules 1.4(a)(3, 4), 8.1(a).

Holdings: The Supreme Court held that:

[1] attorney's failure to adequately communicate his legal strategy in child custody matter did not violate rule of professional conduct requiring a lawyer to act with reasonable diligence in representing a client, and

[2] fully stayed one-year suspension was the appropriate sanction.

Suspension ordered.

2017 WL 6047902

NOTICE: THIS OPINION HAS NOT BEEN RELEASED FOR PUBLICATION IN THE PERMANENT LAW REPORTS. UNTIL RELEASED, IT IS SUBJECT TO REVISION OR WITHDRAWAL.

Supreme Court of Ohio.

ASHTABULA COUNTY BAR ASSOCIATION
v.
BROWN.

No. 2016–1147
|
Submitted November 21, 2017
|
Decided December 1, 2017.

ON NOTICE OF VIOLATION AND MOTION TO LIFT STAY.

Opinion

***1** { ¶ 1} On July 6, 2017, the court suspended respondent, Thomas Christopher Brown, from the practice of law for a period of two years, fully stayed on the conditions that he (1) remove any reference to his firm's having been established in 1981, (2) within 60 days of the date of the suspension order, permanently alter the signage outside his law office to remove the name "O'Neill," (3) within 14 days of the date of the suspension order, destroy all business cards bearing the name "O'Neill & Brown Law Offices" and submit an affidavit to this court averring that the cards have been destroyed, (4) refrain from advertising or communicating in any manner that he is practicing in the "O'Neill & Brown Law Office" except in biographical references to his former law-firm affiliations, and (5) engage in no further professional misconduct. The court further ordered that if respondent violated the conditions of the stay, the stay would be lifted and he would serve the entire two-year suspension.

{ ¶ 2} On October 13, 2017, relator, Ashtabula County Bar Association, filed a notice of violation and motion to lift stay. Upon consideration thereof, it is ordered and adjudged by this court that respondent, Thomas Christopher Brown, Attorney Registration No. 0024054, last known business address in Geneva, Ohio, is found in contempt for failure to comply with the court's July 6, 2017 order. It is further ordered that the previously imposed stay of the suspension is revoked and that respondent shall serve the entire two-year suspension.

{ ¶ 3} It is further ordered that respondent immediately cease and desist from the practice of law in any form and is hereby forbidden to appear on behalf of another before any court, judge, commission, board, administrative agency, or other public authority.

O'Connor, C.J., and O'Donnell, Kennedy, French, Fischer, and DeWine, JJ., concur.

O'Neill, J., not participating.

2017 WL 5900411
Supreme Court of Ohio.

DISCIPLINARY COUNSEL
v.
BUCIO
.

No. 2017–0800
|
Submitted July 11, 2017
|
Decided November 29, 2017

Synopsis - Indefinite suspension, rather than disbarment, was proper sanction for attorney's misappropriation of client funds by retaining all of the proceeds from the sale of client's land and violations of professional rules prohibiting entry into business transactions with client absent satisfaction of specific conditions, prohibiting collection of clearly excessive fees, and prohibiting the commission of illegal acts reflecting adversely on lawyer's honesty; aggravating factors were dishonest motive, commission of multiple offenses, and significant financial harm suffered by client, while mitigating factors were lack of prior discipline and imposition of other penalties, namely, his conviction and sentence for unauthorized use of a client's property. Ohio R. Prof. Conduct 1.5(a), 1.8(a), 8.4(b); Government of the Bar Rule V(13)(B)(1, 2, 4, 6, 8).

Before entering into the transaction, Bucio failed to comply with the professional-conduct rule designed to protect a client against his or her attorney's potential overreaching when the attorney enters into a business transaction with the client. For example, Bucio failed to fully disclose in writing the terms on which he was acquiring an interest in Heuker's property, he failed to advise her of the desirability of seeking independent legal counsel before entering into the transaction or give her a reasonable opportunity to seek such advice, and he failed to obtain her informed consent to the essential terms of the transaction and his role in it. Consequently, the parties stipulated that he violated Prof.Cond.R. 1.8(a) (prohibiting a lawyer from entering into a business transaction with a client unless specific conditions are met).

Bucio's law firm had transferred Heuker's farmland to a real-estate company owned by the law-firm partners, which then sold the land for $135,000. After paying various expenses—including Heuker's outstanding mortgage on the land and a judgment against her from a related municipal-court case—the real-estate company netted $127,767.02 from the sale, and through various real-estate transactions, the company transferred that money to Bucio. However, neither Bucio nor anyone associated with his law firm advised Heuker of the sale or the sale price of her land. Based on this conduct, the parties stipulated that Bucio violated Prof.Cond.R. 1.4(a)(3) (requiring a lawyer to keep the client reasonably informed about the status of a matter).

Beginning in 2011, Heuker attempted to contact Bucio on multiple occasions about the remaining money from the sale of her farmland. Bucio, however, did not return her phone calls. He also cancelled appointments that she had made with his staff. The parties stipulated that Bucio's failure to communicate with his client violated Prof.Cond.R. 1.4(a)(4) (requiring a lawyer to comply as soon as practicable with reasonable requests for information from the client). **[Holding:]** The Supreme Court held that indefinite suspension, rather than disbarment, was warranted as sanction.

In August 2011, Bucio informed Heuker of his position that she was not entitled to any portion of the farmland's sale proceeds because he had accepted the land as a flat fee for representing her in the criminal case. Bucio later acknowledged, however, that he spent only about 40 hours working on Heuker's case and that if he had charged his hourly rate of $225, he would have received $9,000 for the representation. Thus, the parties stipulated that by accepting Heuker's land as a fee for representing her in the criminal matter, Bucio collected a clearly excessive fee in violation of Prof.Cond.R. 1.5(a) (prohibiting a lawyer from making an agreement for, charging, or collecting an illegal or clearly excessive fee).

In 2012, Heuker retained counsel and filed a civil lawsuit against Bucio and others for legal malpractice and related claims. However, a trial court found her claims time barred under the one-year limitations period for malpractice actions, and that decision was affirmed on appeal. *See Heuker v. Roberts, Kelly & Bucio, L.L.P.*, 2013-Ohio-3987, 998 N.E.2d 827 (3d Dist.). Nonetheless, the Shelby County prosecuting attorney had heard about the situation and asked the Ohio Bureau of Criminal Investigation to investigate the transaction between Bucio and his client. That investigation eventually led to Bucio's 2016 guilty plea to one count of unauthorized use of property in violation of R.C. 2913.04(A), a fourth-degree felony. In January 2017, the Shelby County Court of Common Pleas sentenced Bucio to five years of community control and ordered him to pay a $5,000 fine. Based on his conviction, the parties stipulated that Bucio violated Prof.Cond.R. 8.4(b) (prohibiting a lawyer from committing an illegal act that reflects adversely on the lawyer's honesty or trustworthiness).

In February 2016, Bucio agreed to pay Heuker $97,767.02 to settle the matter. The parties calculated the restitution amount by deducting $30,000—Bucio's flat fee for representing Heuker in the pretrial stage of her criminal case pursuant to their fee agreement—from $127,767.02, which was the amount that he had received from the sale of her farmland. By January 2017, Bucio paid Heuker the entire amount, and the parties stipulated that no additional restitution is owed. Suspension ordered.

Sanction

Christopher Ramon Bucio is indefinitely suspended from the practice of law in Ohio, with no credit for time served under his interim felony suspension. He may not petition for reinstatement until he successfully completes or is released from the community-control sanction imposed as part of his criminal sentence. Costs are taxed to Bucio.

150 Ohio St.3d 1439
(The decision of the Court is referenced in the North Eastern Reporter in a table captioned "Supreme Court of Ohio Motion Tables".)
Supreme Court of Ohio.

DISCIPLINARY COUNSEL
v.

SARVER
2017-1081
|
September 22, 2017

CASE ANNOUNCEMENTS

DISCIPLINARY CASES

On August 7, 2017, the Board of Professional Conduct filed a final report in the office of the clerk of this court pursuant to Gov.Bar R. V(16), in which the board accepted the agreement entered into by relator, disciplinary counsel, and respondent, Jason Allan Sarver. The agreement set forth the misconduct and the agreed, recommended sanction of a two-year suspension from the practice of law, with the entire suspension stayed on the condition that respondent engage in no further misconduct. The board recommended that the agreement be accepted. The court, sua sponte, issued an order waiving the issuance of a show cause order, and this matter was submitted to the court on the report and record filed by the board.

Sua sponte, the recommended sanction is rejected. Pursuant to Gov.Bar R. V(17)(D), this cause is remanded to the Board of Professional Conduct for further proceedings, including consideration of a more severe sanction. Proceedings before this court in this case are stayed until further order of this court. Costs to abide final determination of the case.

O'Neill, J., dissents and would adopt the agreement and suspend the respondent for two years with the entire suspension stayed.

All Citations

150 Ohio St.3d 1439, 82 N.E.3d 1173 (Table), 2017 -Ohio- 7742

150 Ohio St.3d 335
Supreme Court of Ohio.
CLEVELAND METROPOLITAN BAR ASSOCIATION

v.
HEBEN.

No. 2016–1495.
|
Submitted April 5, 2017.
|
Decided July 27, 2017.

Synopsis - Under rule permitting attorney to reveal client information reasonably necessary to establish claim or defense on behalf of lawyer in controversy between lawyer and client, lawyer was not justified, in alleged fee dispute, in disclosing legal advice he had given to client and in describing client's allegedly objectionable and potentially illegal actions; attorney never filed motion to intervene or fee application, and information disclosed by attorney went well beyond what would have been necessary to prove that he was entitled to certain amount of fees. Rules of Prof.Conduct, Rule 1.6(b)(5).

Under rule permitting attorney to reveal client information to mitigate substantial injury to financial interests or property of another that has resulted from client's commission of illegal or fraudulent act using lawyer's services, lawyer was not justified, in alleged fee dispute, in revealing client's allegedly objectionable and potentially illegal actions causing financial injury to her former husband; attorney's vague assertions did nothing to mitigate financial injury to client's former husband, and attorney failed to establish that client had used his legal services to commit fraudulent acts. Rules of Prof.Conduct, Rule 1.6(b)(5).

Even if attorney reasonably believed that he was justified in disclosing client's allegedly fraudulent conduct, attorney was required to notify or communicate with client about allegations in his affidavit prior to filing it and was required to limit public access to document. Rules of Prof.Conduct, Rule 1.6(b).

A fundamental principle in the attorney-client relationship is that the attorney shall maintain the confidentiality of any information learned during the attorney-client relationship.

[Holding:] The Supreme Court held that one-year suspension, fully stayed on condition that he commit no further misconduct, was warranted for attorney who revealed confidential client information.

So ordered.

150 Ohio St.3d 382
Supreme Court of Ohio.

LORAIN COUNTY BAR ASSOCIATION
v.
WILLIAMSON.

No. 2017–0226.
|
Submitted April 5, 2017.
|
Decided July 27, 2017.

Synopsis - Public reprimand was warranted for attorney who violated professional-conduct rules regulating an attorney's written advertising communications with prospective clients; attorney had no prior discipline, she lacked dishonest or selfish motive, and she made free and full disclosures and cooperated in disciplinary process. Rules of Prof.Conduct, Rules 7.1, 7.3(c)(1), (d).

{ ¶ 3} According to the parties' stipulations, Williamson sent a letter to David Chopcinski in Lorain, Ohio, informing him that (1) a notice of lis pendens had been filed in the Lorain County Recorder's office, (2) if he failed to respond to the notice within 28 days, a default judgment could be entered against him and an expedited foreclosure sale could be conducted, and (3) if he failed to vacate his property at the time of the foreclosure sale, the new owner could immediately begin eviction proceedings under various Ohio statutes. Williamson's letter further informed Chopcinski that her law firm could assist him in stopping the foreclosure process, keeping his home, and reducing his monthly mortgage payment.

{ ¶ 4} Although the letter included the recital "Advertising Material," Chopcinski did not realize that the letter was an advertisement, and he became concerned that he could lose his home. He showed the letter to his attorney, Zachary Simonoff, who reviewed the county recorder's files and discovered that a notice of ***383** lis pendens had not, in fact, been filed regarding Chopcinski. Rather, Wells Fargo had filed a complaint for foreclosure against Chopcinski in the Lorain County Court of Common Pleas. Simonoff subsequently filed a grievance with relator alleging that Williamson sent a false and misleading advertisement to his client.

{ ¶ 5} During the disciplinary process, Williamson stipulated that the advertisement included material misrepresentations of fact and law in an attempt to market her law firm's services. Specifically, she acknowledged that a notice of lis pendens had not been filed with the Lorain County Recorder regarding Chopcinski and that her advertisement cited sections of the Revised Code that were irrelevant to his circumstances. During her disciplinary hearing, she testified that although her law firm had created the advertisement, she had personally approved it—despite failing to verify that the information in the letter was accurate. Based on this conduct, Williamson stipulated and the board found that she had violated Prof.Cond.R. 7.1 (prohibiting a lawyer from making or using a false, misleading, or nonverifiable communication about the lawyer or the lawyer's services).

{ ¶ 6} Williamson also stipulated that the letter failed to accurately and fully disclose how she became aware of Chopcinski's identity and his legal needs. And she admitted that she failed to verify that Chopcinski had been served with notice of Wells Fargo's foreclosure complaint before sending the advertisement. The parties stipulated and the board found that this conduct violated Prof.Cond.R. 7.3(c)(1) (requiring that a written communication from a lawyer soliciting professional employment from a prospective client disclose accurately and fully the manner in which the lawyer became aware of the identity and specific legal need of the addressee) and 7.3(d) (requiring that a lawyer verify that a prospective client who has been named as a defendant in a civil suit was served with notice of the action prior to the lawyer making any written solicitation of professional employment to the prospective client).

[Holding:] The Supreme Court held that public reprimand was warranted for attorney who violated professional-conduct rules regulating an attorney's written advertising communications with prospective clients.

2017 WL 3085094
Supreme Court of Ohio.

DISCIPLINARY COUNSEL
v.
PICKREL.

No. 2017–0225.
|
Submitted April 5, 2017.
|
Decided July 20, 2017.

Synopsis - Attorney disciplinary proceeding was initiated against inactive attorney.

On or about December 2, 2015, Beck discovered a discrepancy between the number of hours Pickrel had reported working for the last two weeks of November 2015 and the number of hours Pickrel had been logged on to the secure website during that period. When notified of the discrepancy, Pickrel stated that the application she had used to track her hours was "all screwed up" and that her hours may have "been inaccurate for the past month possibly." But upon performing a comprehensive audit of the time records from January 1, 2012, through November 15, 2015, the firm discovered that Pickrel had overbilled it by more than $87,000 over four years, with the excess billing accounting for 53 percent to 89 percent of her annual compensation.

Conduct of attorney, who submitted false time reports over four-year period that overbilled law firm for nonattorney document-review services and made misleading statements in an attempt to conceal her misconduct, violated rules of professional conduct prohibiting attorney from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation and from engaging in conduct that adversely reflected on attorney's fitness to practice law. Rules of Prof.Conduct, Rule 8.4(c, h).

Although Pickrel was not registered as an active attorney at the time of her misconduct and her conduct did not arise from her practice of law, she remained subject to the Rules of Professional Conduct. *See, e.g., In re Nicotera,* 65 Ohio St.3d 163, 602 N.E.2d 612 (1992) (attorney's inactive status does not preclude discipline); Prof.Cond.R. 8.4, Comment 2 (stating that "[a]lthough a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice" and recognizing that offenses involving dishonesty and breach of trust fall in that category). We therefore adopt the board's findings of fact and misconduct.

Holdings: The Supreme Court held that:

[1] conduct of attorney in engaging in pattern of deceitful billing practices violated rules of professional conduct

[2] attorney's remained subject to discipline under rules of professional conduct notwithstanding inactive status; and

[3] two-year suspension, with one year stayed on conditions, was appropriate sanction for attorney's misconduct.

Suspension ordered.

2017 WL 3085079
Supreme Court of Ohio.

LORAIN COUNTY BAR ASSOCIATION
v.
JOHNSON.
Trumbull County Bar Association
v.
Johnson.

Nos. 2014–0136, 2014–1403.
|
Submitted March 1, 2017.
|
Decided July 20, 2017.

Synopsis - Conduct of attorney, who failed to seek client's written consent when he entered into fee-splitting arrangement with attorney outside his firm, to maintain receipts documenting his handling of client's settlement funds, and to account for $12,500 of settlement funds, violated rules of professional conduct requiring attorney to prepare closing statement to be signed by attorney and client in contingent-fee arrangement, to seek client's consent to attorneys in different firms dividing fees, to maintain copy of fee agreement, to maintain trust account records, and to promptly deliver funds or other property that the client was entitled to receive. Rules of Prof.Conduct, Rules 1.5(c, e), 1.15(a, d).

Conduct of attorney, who entered into flat fee agreement with divorce client without written fee agreement, requested additional payment to conduct deposition that never occurred, and failed to respond to client's requests for information about correction to divorce decree or refund unearned fees to client, violated rules of professional conduct requiring attorney to act with reasonable diligence in representing client and prohibiting attorney from charging flat fee without simultaneously advising client in writing that client might be entitled to refund if attorney did not complete representation. Rules of Prof.Conduct, Rules 1.3, 1.5(d).

Holdings: The Supreme Court held that:

[1] conduct of attorney regarding consent of client and settlement funds violated rules of professional conduct;

[2] conduct of attorney regarding flat fee agreement and communications with client violated rules of professional conduct;

[3] conduct of attorney regarding communications with client and refund of fees violated rules of professional conduct; and

[4] indefinite suspension was appropriate sanction for attorney's misconduct.

Suspension ordered.

151 Ohio St.3d 63
Supreme Court of Ohio.

ASHTABULA COUNTY BAR ASSOCIATION
v.
BROWN.

No. 2016–1147.
|
Submitted Feb. 8, 2017.
|
Decided July 6, 2017.

Synopsis – Following Brown's admission to the Ohio bar in 1981, he and William M. O'Neill—who presently serves as a justice of this court—practiced law together at the O'Neill & Brown Law Office. Although they ceased practicing law together in 1997, Brown began using their old firm name with Justice O'Neill's consent in July 2015. Brown installed a sign outside his office advertising it as "O'Neill & Brown Law Office (EST 1981)." He also began distributing business cards bearing the firm name "O'Neill & Brown Law Office" to court personnel, opposing counsel, and potential clients.

{ ¶ 9} Relator began to investigate allegations of professional misconduct arising from Brown's firm name, signage, and business cards in late July 2015. Brown responded to relator's inquiry in writing, explaining his past affiliation with Justice O'Neill and inquiring as to which rules his conduct may have violated. After relator advised Justice O'Neill that Brown's sign violated the Rules of Professional Conduct, Justice O'Neill instructed Brown to remove his name from the sign.

{ ¶ 10} Relator later filed a complaint alleging that Brown's use of Justice O'Neill's name violated Prof.Cond.R. 7.1 (prohibiting a lawyer from making or using false, misleading, or nonverifiable communication about the lawyer or the lawyer's services), 7.5(a) (prohibiting a lawyer from using a firm name, letterhead, or other professional designation that is false or misleading), and 7.5(c) (prohibiting the use of the name of a lawyer who holds a public office in a law firm's name during any substantial period in which the lawyer is not actively and regularly practicing with the firm).

Suspension of two years, fully stayed upon conditions, was warranted for attorney who engaged in false or misleading communication about his law practice by continuing to use name of former member of firm in name of attorney's firm even after member had left firm and had become justice of state Supreme Court; attorney had prior disciplinary record, his misconduct reflected selfish motive, he committed multiple offenses, he failed to acknowledge wrongful nature of his conduct, and he continued to use justice's name on his sign and business card for approximately four months after being informed that his actions might constitute professional misconduct. Rules of Prof.Conduct, Rules 7.1, 7.5(a, c).

[Holding:] The Supreme Court held that suspension of two years, fully stayed upon conditions, was warranted for attorney who engaged in false or misleading communication about his law practice.

So ordered.

JOHN TIMOTHY McCORMACK, J., of the Eighth District Court of Appeals, sitting for O'NEILL, J.

[Dissent:] O'Donnell, J., filed dissenting opinion in which O'Connor, C.J., and Fischer, J., joined.

O'DONNELL, J., dissenting.

***5 O'DONNELL, J., dissenting.**

{ ¶ 26} Respectfully, I dissent.

{ ¶ 27} Attorney Thomas Brown installed a sign and printed and distributed business cards bearing the name of "O'Neill & Brown Law Office." I agree with the majority that Brown's conduct violates Prof.Cond.R. 7.1 (prohibiting false, misleading, or nonverifiable communications about the lawyer or the lawyer's services), 7.5(a) (prohibiting use of a false or misleading firm name, letterhead, or other professional designation), and 7.5(c) (prohibiting use of the name of a lawyer who holds a public office in a law firm's name when the lawyer is not practicing with the firm).

***6** { ¶ 28} The majority apparently agrees with the board's determination that it is a mitigating factor that "Justice O'Neill participated in the decision to use the 'O'Neill and Brown Law Office' name on the sign in front of Brown's office." Majority opinion at ¶ 21.

{ ¶ 29} In my view, there is nothing mitigating about that fact.

{ ¶ 30} Because judges are prohibited from lending their names to law firms, the fact that Brown obtained consent to use the "O'Neill" name cannot be deemed mitigating; rather, this is aggravating misconduct. For this reason, a fully stayed suspension from the practice of law is not a sufficient sanction in these circumstances.

150 Ohio St.3d 227
Supreme Court of Ohio.
CLEVELAND METROPOLITAN BAR ASSOCIATION

v.
CALLAHAN.

No. 2017–0223.
|
Submitted April 5, 2017.
|
Decided July 6, 2017.

Synopsis - Attorney admitted that his conduct in failing to file a lawsuit for client before the statute of limitations had expired, and offering to settle a potential malpractice claim without informing client to seek independent counsel violated the professional conduct rules that required a lawyer to act with reasonable diligence in representing a client, to keep a client reasonably informed about the status of a matter, and prohibited a lawyer from settling a potential malpractice claim without notifying the client in writing that the client should seek independent counsel. Rules of Prof.Conduct, Rules 1.3, 1.4(a)(3), 1.8(h)(2).

[Holding:] The Supreme Court held that public reprimand of attorney was warranted.

Public reprimand ordered.

149 Ohio St.3d 509
Supreme Court of Ohio.

DISCIPLINARY COUNSEL
v.
MOORE.

No. 2016–1160.
|
Submitted Jan. 11, 2017.
|
Decided March 15, 2017.

Synopsis - In April 2013, Beth Cochran hired Moore to represent her in a child-custody matter involving Cochran's granddaughter. Cochran told Moore that she had concerns about the child's safety while she was in the care of her parents. Believing that the situation Cochran described was serious and urgent, Moore prepared a motion for emergency custody and an affidavit supporting the motion. Moore signed Cochran's name to the affidavit without indicating either that the signature was not Cochran's or that she had signed Cochran's name with Cochran's authorization. She then notarized her signing of Cochran's name, falsely representing that it had been "sworn to and subscribed in" her presence by Cochran. Moore filed the motion and affidavit in the Knox County Juvenile Court on May 1, 2013. The parties stipulated and the board found that by engaging in this conduct, Moore knowingly made a false statement of fact or law to a tribunal in violation of Prof.Cond.R. 3.3(a)(1).

[Holding:]
The Supreme Court held that public reprimand was warranted by attorney's misconduct of signing client's name to affidavit without indicating that signature was not client's or that she had signed client's name with client's authorization.

So ordered.

See Disciplinary Counsel v. Mezacapa, 101 Ohio St.3d 156, 2004-Ohio-302, 803 N.E.2d 397 (publicly reprimanding an attorney who, with the permission of his client, signed the client's name to an affidavit and notarized the signature as the client's own without indicating that he had signed it on ****1254** the client's behalf); *Disciplinary Counsel v. Flowers,* 139 Ohio St.3d 338, 2014-Ohio-2123, 11 N.E.3d 1174 (publicly reprimanding an attorney who, on two separate occasions and with her client's permission, signed her client's name to five affidavits and then improperly notarized the client's purported signatures); *Disciplinary Counsel v. Wilson,* 142 Ohio St.3d 439, 2014-Ohio-5487, 32 N.E.3d 426 (publicly reprimanding an attorney who signed the name of her granddaughter's mother to an affidavit without noting that she had signed it with the affiant's authorization, filed it in court, and encouraged the affiant to claim the signature as her own).

149 Ohio St.3d 505
Supreme Court of Ohio.

DISCIPLINARY COUNSEL
v.

BARBERA.
No. 2016–1159.
|
Submitted Jan. 11, 2017.
|
Decided March 15, 2017.

Synopsis - Barbera fundamentally misunderstood the purpose of a client trust account and therefore had misused his. Specifically, Barbera believed that all money coming into his law practice had to ****1250** be "washed" through his client trust account, so he deposited all the money he received from clients into that account, even money that he had already earned, which resulted in his commingling his earned fees with client funds. In addition, Barbera later admitted that his accounting and recordkeeping practices were "poor and disorganized," that he had not always performed the required monthly reconciliations of his client trust account, and that because of a computer problem, he had not maintained the records for his client trust account—including individual client ledgers, deposit receipts, canceled checks, and monthly reconciliation ledgers—that the disciplinary rules required him to retain.

{ ¶ 6} Based on this conduct, the board found that Barbera had violated Prof.Cond.R. 1.15(a) (requiring a lawyer to hold property of clients in an interest-bearing client trust account, separate from the lawyer's own property) and 1.15(a)(2) through (5) (requiring a lawyer to maintain certain records regarding funds held in a client trust account and certain bank records as well as to perform and retain a monthly reconciliation of the account).

Holdings: The Supreme Court held that:

[1] attorney's mismanagement of client-trust account constituted misconduct;

[2] attorney's failure to cooperate in the disciplinary investigation constituted misconduct; and

[3] one-year suspension, fully stayed on stringent conditions, was appropriate sanction.

Suspension ordered and conditionally suspended.

148 Ohio St.3d 606
Supreme Court of Ohio.

DISCIPLINARY COUNSEL
v.
ELUM.

No. 2016–0848.
|
Submitted Aug. 17, 2016.
|
Decided Dec. 21, 2016.

Synopsis - {¶ 4} On May 11, 2015, Antonio Pettis approached Judge Elum in the Massillon Municipal Court parking lot and requested the judge's legal assistance regarding a dispute with his landlord, Susan Beatty. Pettis told Judge Elum that although he had money to pay his rent, Beatty would not accept it. Judge Elum recognized Pettis because the day before, the judge's wife, a former school teacher, had invited Pettis into the judge's home to assist him with a scholarship application. In the parking lot, Judge Elum agreed to help Pettis and took him into his chambers.

{¶ 5} Judge Elum then called Beatty and, according to the judge, identified himself as "Eddie Elum from the Massillon Court." Judge Elum urged Beatty to accept Pettis's late rent payment. After Beatty told the judge that Pettis had violated his lease and that she had already given him a three-day notice to vacate, the judge proceeded to discuss with Beatty the amount of Pettis's security deposit and inquired whether she would give him two additional days to remove his belongings from the property. During the nine-minute phone call, Judge Elum openly, and within Beatty's hearing, consulted with Pettis. At one point, Beatty told Judge Elum that she may have already changed the locks on the property, and the judge responded that she could not do that without a writ of restitution. The judge also asked that she have her lawyer contact him.

{¶ 6} Pettis moved out of the rental property the following day, and according to Beatty, he left furniture and trash on the lawn, which required her to rent a dumpster. Judge Elum later called Beatty on two occasions—purportedly to inquire whether the matter was resolved and to inform her that he had not heard from her lawyer. Beatty, however, did not return the judge's phone calls. Beatty was surprised and intimidated by Judge Elum's initial phone call and felt bullied in light of the fact that he was a judge. She later filed the grievance that initiated this disciplinary action.

{¶ 8} Based on this conduct, the parties stipulated and the board found that Judge Elum violated Jud.Cond.R. 1.2 (requiring a judge to act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary and to avoid impropriety and the appearance of impropriety), 3.1(C) (prohibiting a judge from participating in activities that would appear to a reasonable person to undermine the judge's independence, integrity, or impartiality), and 3.1(D) (prohibiting a judge from engaging in conduct that would appear to a reasonable person to be coercive) and Prof.Cond.R. 8.4(d) (prohibiting a lawyer from engaging in conduct that is prejudicial to the administration of justice). We agree with these findings of misconduct.

[Holding:] The Supreme Court held that stayed one-year suspension was proper.

Stayed suspension ordered.

148 Ohio St.3d 602
Supreme Court of Ohio.
CLEVELAND METROPOLITAN BAR ASSOCIATION

v.
KING.

No. 2016–0845.
|
Submitted Aug. 17, 2016.
|
Decided Dec. 21, 2016.

Synopsis - In August 2014, King agreed to represent Brian Simms and Edward Ackles in separate legal matters. King failed to inform these clients in a separate writings signed by them, that he did not carry professional liability insurance of at least $100,000 per occurrence and $300,000 in the aggregate.

Holding: Suspension of six months, with entire suspension stayed on conditions, was warranted for attorney who failed to inform two clients that he did not carry professional liability insurance and failed to cooperate in ensuing disciplinary investigations. Government of the Bar Rule V(9)(G); Rules of Prof.Conduct, Rules 1.4(c), 8.1(b).

Suspension ordered.

148 Ohio St.3d 683
Supreme Court of Ohio.
CINCINNATI BAR ASSOCIATION

v.
WIEST.

No. 2016–0263.
|
Submitted May 4, 2016.
|
Decided Dec. 19, 2016.

Synopsis - On October 21, 2010, in the course and scope of his employment, Wiest received an e-mail from WSP Environmental and Energy, Inc. ("WSP"), an environmental consultant group that collaborated with Thompson Hine on various Stanley projects. The e-mail requested that Wiest perform due-diligence services for the potential ****625** acquisition by Stanley of InfoLogix, Inc. Attached to the e-mail was a document prepared by or for Stanley that provided details of the proposed acquisition, including Stanley's willingness to pay $4.75 a share for InfoLogix stock.

{ ¶ 7} Wiest had never heard of InfoLogix before he received the October 21, 2010 e-mail. Wiest understood that Stanley's interest in acquiring InfoLogix was nonpublic and confidential information from the time he received the e-mail until the acquisition was made public on December 15, 2010. He stipulated that at no time from September 2010 to December 15, 2010, did any agent of Stanley inform him that the information provided to him on October 21, 2010, ceased to be nonpublic and confidential. And at no time from October 21, 2010, through December 15, 2010, did he seek permission from anyone at Stanley, WSP, or Thompson Hine to use any nonpublic or confidential client information for securities-trading purposes.

***685** { ¶ 8} On October 21, 2010, InfoLogix publicly disclosed that its stock had been delisted from the NASDAQ stock market effective at the open of trading that day. The delisting was due to the company's failure to satisfy a minimum $2,500,000 stockholder's equity requirement. InfoLogix shares began trading over the counter with another electronic quotation service. Wiest learned of these developments shortly after they were announced but did not inquire as to whether they would have any impact on Stanley's proposed acquisition of InfoLogix. After receiving an October 26, 2010 inquiry from WSP about the status of the environmental due diligence for the proposed acquisition, Wiest completed the task and provided the results to both WSP and Stanley.

{ ¶ 9} On October 28, 2010, Wiest placed a market order to purchase 10,000 shares of InfoLogix common stock using his Thompson Hine 401K account. His broker purchased 9,500 shares at $2.84 each and 500 shares at $2.77 each. From November 8 through November 16, Wiest acquired an additional 25,000 shares at prices ranging from $1.95 to $2.15 a share. On November 18, as the price continued to drop, Wiest placed a day-limit order to sell 25,000 shares of the stock at a limit price of $1.35 a share. That order resulted in the sale of 13,510 shares at $1.35 a share, for a loss of $17,701.36, and left Wiest with 21,490 shares of InfoLogix stock.

{ ¶ 10} After the stock market closed on December 15, 2010, Stanley publicly announced that it was acquiring InfoLogix for $4.75 a share. The next day, Wiest searched the Internet for a lawyer with expertise in SEC matters and contacted an attorney in Fort Lauderdale, Florida, for advice. On the advice of that counsel, he sold his remaining shares of InfoLogix stock for a pretax profit of $56,291.97.

The Panel Unanimously Dismissed an Alleged Violation of Prof.Cond.R. 1.6(a) on Due–Process Grounds

{ ¶ 11} At the hearing and in posthearing briefs, relator argued that Wiest violated Prof.Cond.R. 1.6(a) by providing confidential client information to the SEC and by testifying before the SEC without first seeking Stanley's informed consent. Wiest urged the panel to dismiss this alleged violation on the ground that relator did not provide him with adequate notice of the charge against him. He argued that in each of its complaints (its original complaint and three amended complaints),

relator alleged that Wiest's misconduct occurred in the context of his trading in InfoLogix shares—not in his alleged disclosure of Stanley's confidential information ****626** to the SEC, as relator argued at the hearing.

***686** { ¶ 12} In its written report, the panel unanimously dismissed the alleged violation of Prof.Cond.R. 1.6(a) on the ground that none of relator's complaints provided Wiest with sufficient notice of the activity upon which relator intended to base the charge—i.e., that his misconduct was alleged to have occurred in the context of disclosing Stanley's confidential information to the SEC. The panel found that relator had not alleged *any* facts regarding Wiest's disclosure of confidential client information to the SEC in any of the complaints that it filed in this case or even in its prehearing discovery correspondence with Wiest's counsel. The panel therefore concluded that the complaint did not give Wiest sufficient notice that it was that alleged conduct—rather than his trading in InfoLogix stock—that formed the basis of his alleged ethics violation. Neither party has objected to the panel's dismissal of the alleged violation of Prof.Cond.R. 1.6(a).

We Dismiss an Alleged Violation of Prof.Cond.R. 8.4(b)

[1] { ¶ 13} Despite having found that Wiest had no notice that his alleged disclosure of Stanley's confidential information to the SEC was at issue, the panel and board found that by engaging in that conduct, Wiest violated R.C. 1333.81 (prohibiting an employee from knowingly disclosing without the employer's consent confidential information obtained in the course and scope of employment) and Prof.Cond.R. 8.4(b).

{ ¶ 14} Wiest objects to these findings on the ground that relator's eleventh-hour change in the theory of its case deprived him of due process. He argues that none of relator's four complaints alleged any factual allegations that would put him on notice that he was expected to defend his disclosure of information to the SEC—rather than his alleged trading activity—before the day of the hearing. He therefore contends that he did not have an adequate opportunity to prepare his defense against these allegations.

[2] [3] [4] { ¶ 15} In disbarment proceedings, an attorney accused of misconduct is "entitled to procedural due process, which includes fair notice of the charge." *In re Ruffalo,* 390 U.S. 544, 550, 88 S.Ct. 1222, 20 L.Ed.2d 117 (1968), citing *In re Oliver,* 333 U.S. 257, 273, 68 S.Ct. 499, 92 L.Ed. 682 (1948). "The charge must be known before the proceedings commence. [The proceedings] become a trap when, after they are underway, the charges are amended on the basis of testimony of the accused. He can then be given no opportunity to expunge the earlier statements and start afresh." *Id.* at 551, 88 S.Ct. 1222. The "absence of fair notice as to the reach of the grievance procedure and the precise nature of the charges" deprives an attorney facing discipline of procedural due process. *Id.* at 552, 88 S.Ct. 1222. Applying these principles, we have held that an attorney may not be found to have misled disciplinary authorities during the investigation or proceedings in violation of Prof.Cond.R. 8.4(c) unless such ***687** conduct was alleged in the complaint against the attorney. *Cincinnati Bar Assn. v. Sigalov,* 133 Ohio St.3d 1, 2012-Ohio-3868, 975 N.E.2d 926, ¶ 42, 46.

{ ¶ 16} Here, the panel found that relator's failure to allege any facts that would put Wiest on notice that his disclosure of documents to and testimony before the SEC were at issue was fatal to the alleged violation of Prof.Cond.R. 1.6(a). That failure likewise proves fatal to relator's belated claim that the same conduct also violated Prof.Cond.R. 8.4(b). Therefore, we sustain Wiest's first objection and dismiss the alleged violation of Prof.Cond.R. 8.4(b).

***688 Wiest Violated Prof.Cond.R. 8.4(c)**

[6] { ¶ 20} The only charge that remains is an allegation that Wiest engaged in dishonesty, fraud, deceit, or misrepresentation in violation of Prof.Cond.R. 8.4(c). Relator's complaints alleged that Wiest used confidential information obtained in the course and scope of his representation of Stanley to trade in InfoLogix stock and failed to consult with either his client or his employer before doing so.

{ ¶ 21} Wiest testified that his purchase of InfoLogix stock was based on factors wholly independent of the confidential information he obtained from his client. He claimed that it was the delisting and resulting volatility of the stock that attracted him, and he offered evidence that he had previously purchased other delisted stocks. He also cited his personal opinion that

Stanley was not moving forward with its plans to purchase InfoLogix, based on a number of factors, including (1) the delisting of the stock on the same day he received his first environmental due-diligence assignment on the project—October 21, 2010, (2) his perception that there was a lack of urgency in his work assignment, (3) his own delay of almost a week in completing that project, (4) his delay in responding to a second assignment on the project, and (5) the impending October 30, ****628** 2010 closing deadline stated in the client's confidential materials—which he later noted fell on a Saturday.

{ ¶ 22} Simply stated, the panel (and the board) found that Wiest's testimony regarding his motivation for purchasing the stock and his belief that the deal was not moving forward were not credible. Instead, the panel and board found that Wiest engaged in inherently dishonest and deceitful behavior not only by using confidential client information to purchase the stock for his own pecuniary benefit but also by failing to seek the informed consent of his client or his firm before doing so.

{ ¶ 23} Wiest objects to this finding, arguing that relator failed to prove by clear and convincing evidence that he believed that Stanley was going to move forward with the transaction and traded based on that information such that he engaged in intentional acts of dishonesty, fraud, deceit, or misrepresentation. He contends that independent, undisputed, and uncontradicted evidence substantiates his testimony that he did not believe that Stanley was moving forward with the acquisition of InfoLogix.

{ ¶ 24} To the extent that Wiest and the board focus solely on Wiest's "use" of confidential client information in deciding to purchase InfoLogix stock, they misapprehend the true nature of his dishonesty and deceit and overlook Wiest's profound failure to appreciate what is perhaps one of the most fundamental of his ***689** professional obligations—his duty to communicate openly with his client. Although relator's complaints focused primarily on Wiest's use of Stanley's confidential information, they also alleged that he failed to disclose his actions to his client (or his firm) or to seek his client's informed consent to his actions.

[7] [8] { ¶ 25} The primary purpose of the attorney-client privilege is "to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." *Upjohn Co. v. United States,* 449 U.S. 383, 389, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981). The confidentiality afforded by the privilege encourages clients to make full disclosure to their attorneys without fear of disclosure or reprisal. *Id.,* citing *Fisher v. United States,* 425 U.S. 391, 403, 96 S.Ct. 1569, 48 L.Ed.2d 39 (1976).

[9] [10] { ¶ 26} In conjunction with the attorney-client privilege, the Rules of Professional Conduct not only encourage but require attorneys to engage in frank discussions with their clients regarding matters that may affect the legal affairs their clients have entrusted to them. For example, Prof.Cond.R. 1.4 requires a lawyer to communicate with a client by promptly informing the client of decisions or circumstances affecting the lawyer's representation that require the client's informed consent, by reasonably consulting with the client about the means by which the client's objectives are to be accomplished, by keeping the client reasonably informed about the status of a matter, and by explaining a matter to the extent necessary to permit the client to make informed decisions regarding the representation. Prof.Cond.R. 1.4(a)(1) through (3) and 1.4(b). And Prof.Cond.R. 1.6(a) prohibits a lawyer from revealing confidential client information without first obtaining the client's informed consent. As used in the Rules of Professional Conduct, informed consent "denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives ****629** to the proposed course of conduct." Prof.Cond.R. 1.0(f). Thus, in every instance in which the rules permit an attorney to act with the client's informed consent, they require the attorney to engage in a meaningful discussion with the client about the material risks of and alternatives to the proposed action.

{ ¶ 27} In this case, relator charged Wiest with a violation of Prof.Cond.R. 1.8(b), which prohibits a lawyer from using information relating to the representation of a client to the client's disadvantage without first obtaining the client's informed consent. The panel unanimously dismissed that count on the ground that relator failed to present sufficient evidence that Wiest's actions placed Stanley at a disadvantage. But relator's failure to carry its burden of proving that Wiest's conduct caused actual disadvantage to the client did not relieve Wiest of his duty to engage in a meaningful discussion with his client about the risks of ***690** and alternatives to his proposed stock purchases—purchases that Wiest acknowledged would have been inappropriate or even illegal if he had believed that Stanley still was contemplating acquisition of InfoLogix.

{ ¶ 28} We cannot conceive of a situation in which an attorney could divorce a client's confidential communication that it was willing to pay more than 50 percent above a stock's current trading price from his desire to invest in that stock, and we

find that Wiest's claims that he did so are disingenuous. But even if we were to credit his claim in that regard, the actions he took for his own pecuniary benefit created at least an appearance that he was using confidential client information for his personal gain and a substantial risk that his client's interests would be negatively impacted, which also triggered his duty to communicate with his client.

{¶ 29} Rather than pick up the phone and talk with his client, Wiest pieced together a string of evidence that no reasonable person, let alone an attorney, would rely upon to unilaterally determine that his client's proposed business deal was dead. He then failed to disclose his purchase of stock in the very company that his client had engaged his services to acquire. Not only did he conceal from his client his intention to purchase, he remained silent upon learning that his client was moving forward with its acquisition of that company and once again remained silent when the SEC issued a subpoena compelling him to produce his client's confidential information. Thus, it is Wiest's repeated concealment of information that he was duty-bound to communicate to his client from which we infer his intent to engage in dishonesty, fraud, deceit, or misrepresentation. *See, e.g., Disciplinary Counsel v. Robinson,* 126 Ohio St.3d 371, 2010-Ohio-3829, 933 N.E.2d 1095, ¶ 18–21 (rejecting a respondent's self-serving claims and inferring his state of mind from his conduct and the surrounding circumstances). We therefore overrule Wiest's objection and find that his conduct in this matter violated Prof.Cond.R. 8.4(c).

Holding: Suspended from the practice of law in Ohio for two years with the second year stayed on the condition that he engage in no further misconduct. If Wiest fails to comply with the condition of the stay, the stay will be lifted and he will serve the entire two-year suspension. Costs are taxed to Wiest.

Judgment accordingly.