OCDC Spotlight

Disciplinary Cases From Other States Are Instructive

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In early August, the National Organization of Bar Counsel met in San Francisco at the same time as the ABA Annual Meeting was taking place there. The organization is made up of bar counsel across the United States who are involved in the disciplinary system – some as full-time investigation and trial counsel, some as volunteers, and some performing ethics advisory or other functions. One of the most valuable sessions at this conference is the summary of reported cases from across the country, which provides guidance on a court's interpretation of the ethical rules as applied to unique applications. Sometimes it's the most entertaining part of the program, as well. (*See the first two examples below.*)

Vituperative Comments

A South Dakota lawyer who may have longed to be a novelist combined his lawyering with his literary interest. In written materials related to a lawsuit, he referred to the opposing party and lawyer as wanting "not only her pound of flesh … but wants all of the blood associated with it" and that she exhibits "a rancid animosity … which not only defies logic but apparently knows no bounds."[1] When the trial judge ruled against him, he wrote a letter to the judge lecturing him on the quality of his decision and continuing his attacks on opposing counsel. His inappropriate actions were not confined to bad judgment in letters and pleadings. He was also found to have filed unwarranted disciplinary complaints. One in particular was in retaliation against a lawyer who had reported him to disciplinary authorities. He was also found to have presented misleading information to a judge in a criminal case. The attorney's conduct was found to be prejudicial to the administration of justice, and he was found to have filed a frivolous complaint. He was also found culpable of failing to show respect for opposing counsel and parties and was suspended from practice for 100 days.

In Missouri, the following Supreme Court Rules would be implicated by this attorney's conduct: Rule 4-4.4, "Respect for Rights of Third Persons"; Rule 4-3.1, "Meritorious Claims and Contentions"; and 4-8.4(d), "Misconduct," which includes engaging in conduct that is prejudicial to the administration of justice.

Physical Altercation at Deposition

In Michigan, a lawyer got in trouble for obnoxious behavior at a deposition.[2] While he was deposing a medical expert, he believed opposing counsel was coaching the witness and told him he was not to say anything other than "objection." While this comment and caution may have been well-founded, the animosity created by the situation rose beyond the bounds of propriety. An argument ensued in which he called the opposing counsel a weasel, prompting opposing counsel's response, "You're a bigger weasel." Incensed by the insult, the deposing attorney invited the other lawyer to "take it outside" with the comment, "Let's go," and shouted, "You don't ever say that to me again ever," and grabbed his opponent's tie. The tie-pulling lawyer was found culpable of Rule 6.5(a) in Michigan ("a lawyer shall treat with courtesy and respect all persons involved in the legal process") and with conduct prejudicial to the administration of justice.

Missouri does not have a rule 6.5. However, the Michigan court, in imposing a reprimand against the attorney, cited its reluctance to countenance any behavior in the conduct of a legal matter that would lead to a physical altercation. Perhaps the same logic would be considered by the Supreme Court of Missouri in evaluating whether a violation of Rule 4-8.4 (conduct

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prejudicial to the administration of justice) is appropriate. The summary materials I was provided at my conference do not say what, if anything, happened to the other "You're a bigger weasel" lawyer, but it appears the Michigan court was most upset by the physical aspects of the tie-pulling lawyer's conduct.

Misuse of Notary Power is Dishonest Behavior

In Washington state, a lawyer prepared a deed for signature by a man who had been dead for 16 years, advised the man's widow to sign it, and notarized the signed deed for her and had it recorded. This lawyer was disbarred.[3] His prior disciplinary history included a censure several years earlier for suggesting a client backdate a deed in order to divest herself of property so she would qualify for welfare.

In Missouri, this lawyer's conduct would probably be evaluated under Supreme Court Rule 4-8.4(c) prohibiting dishonesty, fraud, deceit or misrepresentation. Rule 4-4.1,

"Truthfulness in Statements to Others," also addresses the need to disclose material facts to a third person to avoid assisting a fraudulent act by the client.

Dishonesty Over Client Funds Results in Disbarment

In relation to a real estate closing, a Rhode Island lawyer withheld $5,000 to fund necessary repairs to correct fire code violations. The repairs were completed by the buyer, but the lawyer never repaid the money. In another matter, he received funds from a client to pay a judgment, but told the client the judgment amount was higher than it truly was, thereby receiving an additional $300 to which he was not entitled. He then delayed in paying over the funds to the judgment creditor until disciplinary action was threatened. The Rhode Island Supreme Court, rejecting a recommendation of suspension, disbarred the lawyer, stating "the presumptive sanction for intentional misappropriation of client funds is disbarment."[4]

In Missouri, the Supreme Court generally follows the ABA Standards for Imposing Lawyer Sanctions in determining the appropriate discipline for an attorney's conduct. ABA Standard 4.11 - "Failure to Preserve the Client's Property" states that absent mitigating circumstances, disbarment is generally appropriate when a lawyer knowingly converts client property and causes injury or potential injury to a client. Dealing improperly with client funds which does not amount to misappropriation or conversion warrants suspension according to ABA Standard 4.12.

Client Communication

A public defender in Wisconsin was reprimanded for her conduct in neglecting two client matters.[5] She was appointed as appellate counsel for both clients. In the more serious matter, she never met with the client to discuss the appealable issues, but did write him a letter indicating she saw only one issue that she was going to pursue, but did not respond to any of the client's communications to her. She filed a brief on his behalf without sending him a copy. When the client learned of this, he wrote to the court expressing dissatisfaction and filed a disciplinary complaint. Thereafter, she filed a motion to withdraw the brief and submitted a "no merit" report, indicating that, contrary to her prior position, she now saw no grounds for appeal. New counsel who was appointed prevailed on the issues previously raised in her brief.

Missouri Supreme Court Rules contain the basic requirement that a lawyer keep the client reasonably informed about the status of a matter and promptly comply with reasonable requests for information (Rule 4-1.4-"Communication"). Aside from the basic premise that a lawyer should act in the best interests of their client, another Missouri rule which may be implicated by these facts is 4-1.7, "Conflict of Interest," in that representation of this client may have been materially limited by this lawyer's own interests or concerns. While a request to withdraw from representation may have been warranted, the damaging act to the client's cause by filing the no merit report was not appropriate under the circumstances if the lawyer's judgment was clouded by the fact that a disciplinary complaint had been filed against her.

Lack of Diligence and Concealment

In Louisiana, a workers' compensation lawyer filed an appeal out of time which was dismissed. However, the lawyer did not inform the client of the dismissal. The lawyer also agreed to represent the same client in a related social security case and in a personal injury case but failed to perform, other than a few phone calls. Another client hired the lawyer in two matters in which he failed to properly follow through. This lawyer was suspended for one year and one day, which was deferred subject to successful completion of an 18-month supervised probation.[6]

In Idaho, a lawyer told a client she had filed a stipulated judgment, after a long delay on her part, when in fact this was not true. When the client found out and confronted her, the lawyer did file the judgment and said she would not charge for the subsequent garnishment action. However, the lawyer *did* send bills for the garnishment action and did not respond to the client's requests for an accounting of the fees previously paid, resulting in the client's complaint to the disciplinary office. The lawyer compounded her mistake by lying to disciplinary counsel about the reasons for the delay, blaming everyone from the client for failing to pay the filing fee to the court for failing to timely process the check, to the debtor for failing to sign the stipulated judgment. She was suspended for six months and placed on two years' probation.[7]

The Missouri Supreme Court Rules which may be implicated by these actions are Rule 4-1.15 (b) – "Safekeeping Property," which requires a lawyer to promptly render a full accounting of funds to a client upon request; Rule 4-8.4(c), prohibiting conduct involving dishonesty or misrepresentation; Rule 4-1.3 – "Diligence," requiring reasonable diligence and promptness in representing a client; and Rule 4-8.1 regarding false statements in a disciplinary matter.

Conclusion

While these cases are certainly not precedent for Missouri lawyers, they do provide guidance for how other courts have interpreted the ethical responsibilities all lawyers share.

Footnotes

[1] This matter is referenced as 2003 SD 40, decided April 16, 2003. Formal citations to these cases are intentionally not provided. Each state has its own unique reporting system and procedures for maintaining those disciplinary decisions which are public and rules on disclosure differ from state to state. Time did not allow for checking with each state before publication of this article to ascertain the public nature of each of these decisions; therefore only those obviously available in a public reporter system will be given citation references.

[2] This Michigan case is referenced as No. 00-61-GA (May 7, 2003).

[3] *In re Robert Kuvara,* 149 Wash. 2d 237, 66 P.3d 1057 (2003).

[4] This case is referenced as No. 2002-692 M.P. (R.I. January 27, 2003).

[5] This case is referenced as No. 03-OLR-05 (Wisconsin March 25, 2003).

[6] This Louisiana case is referenced as No. 2003-B-0910 (LA, May 2, 2003).

[7] This case is referenced as No. 2003 WL 1741152 (Idaho).