

Abiding the Proper Authority: Takeaways from the *Gardner* Case for Personal Representatives and All Attorneys

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The *Gardner* Case

In 2014, attorney Scott Gardner was appointed as the personal representative for an estate pending in probate court. In place at the time was Section 473.153, RSMo 2000, which provides that compensation may be allowed to personal representatives upon final settlement or partial compensation upon application to the court. Attorney Gardner submitted a motion requesting payment prior to the final settlement of the estate. The circuit court initially overruled the motion, noting that receiving a fee when the estate closes is a powerful incentive to encourage a personal representative to get the estate closed. Later, however, the court issued a second order authorizing approximately half of the personal representative fee, but specifically declining to order the full payment until the estate had been settled.

Several months after the sanctioned partial payment of the fee, attorney Gardner paid himself the remainder of the personal representative fee, though this time without the authorization of the court. The estate had not been settled, but attorney Gardner rationalized that Section 473.433, which generally allows for claims against the estate to be paid by the personal representative without court order, gave him the authority to pay his claim against the estate for fees. Attorney

Gardner did not notify the probate Court at the time he paid himself the remainder of the fee, nor did he specifically include the payment in a final settlement spreadsheet filed at the eventual conclusion of the estate.

The Office of Chief Disciplinary Counsel filed an information charging attorney Gardner with violating Rule 4-1.15 (failing to safekeep client property); Rule 4-3.3 (making a false statement of fact to a tribunal); Rule 4-3.4(c) (taking a fee without court authorization and in violation of the court's order) and Rule 4-8.4(c) (engaging in deceitful conduct). At hearing, a former associate circuit judge, who had presided over probate matters for 20 years, indicated that he believed attorney Gardner could lawfully pay himself without a court order because it was a claim against the estate, payable under the general statute. In light of the statute regarding fees and the circuit court's order specifically ordering that attorney Gardner not be paid the remainder of the fee until the conclusion of the estate, however, the disciplinary hearing panel recommended that attorney Gardner be suspended with no leave to apply for reinstatement for at least six months.

Statutory Construction and the Payment of Fees for Personal Representatives

Upon review, the Missouri Supreme Court analyzed both statutes in question and concluded that one general statute allows a personal representative to pay a claim against the estate without court order. The other statute specifically provides that a personal representative is not entitled to even a partial payment of fees before final settlement in the absence of an application for approval. The Court rebutted attorney Gardner's argument that his fee was a claim under the general statute, able to be paid without court authorization, noting that it is well established that where one statute deals with a subject, generally, and another in a specific way, the specific statute prevails. The Court further concluded that personal representatives are not mere creditors of the estate, but instead have a fiduciary obligation to the estate and must avoid conflicts of interest. Finally, the Court noted that even if attorney Gardner was mistaken about which statute prevailed, his conduct specifically ran afoul of the circuit court's direct order that attorney Gardner not be paid the personal representative fee until the conclusion of the case.

Disciplinary Sanction Analysis

In a 4-3 published decision, the Missouri Supreme Court majority found attorney Gardner had violated several Rules of Professional Conduct, but also considered mitigating factors, including attorney Gardner's state of mind, which the Court concluded was a mixture of knowing and negligent conduct. *In re*

Gardner, 565 S.W.3d 670 (Mo. banc 2019). The majority noted that attorney Gardner was actually entitled to the fee that was prematurely taken and felt that attorney Gardner did not evidence a lack of a selfish motive. As such, the majority ordered attorney Gardner's suspension stayed. The dissent, while agreeing that attorney Gardner violated multiple Rules of Professional Conduct, concluded that the facts in this case were not so substantial as to justify the reduced sanction in light of the egregious misconduct Gardner displayed by intentionally violating a direct court order. In the case of *In re Charron*, 918 S.W.2d 257 (Mo. banc 1996), an attorney serving as a personal representative had paid his fee before final settlement of the estate and the Missouri Supreme Court, while also finding that the attorney was entitled to the fee taken, still concluded that the attorney's conduct warranted a suspension with leave to apply for reinstatement in one year. The dissent set forth its belief that a reduction in the sanctioning of attorney Gardner diminishes the profession in the eyes of the public and does not appropriately address the gravity of attorney Gardner's misconduct.

Takeaways

What can we take away from these cases? For attorneys serving as personal representatives, both the Courts in *Charron* and *Gardner* have conclusively stated that the specific statute pertaining to the payment of fees controls and that absent a court order, the payment of fees is to occur at the conclusion of the estate. Local custom or general statutes will not permit an attorney serving as a personal

representative to take a fee from the estate prior to its settlement. For all attorneys, these cases indicate the seriousness with which the courts contemplate an attorney who intentionally violates court order, even when the same attorney believes the conduct to be otherwise permissible. The majority in the *Gardner* case found that the facts specific to that matter warranted a sanction less than what was otherwise indicated, but the three-judge dissent makes clear that a different set of facts may result in significant discipline for an attorney who evidences the knowing disobedience of a court order.

Disobeying Court Orders

In isolation, an attorney's obligation to follow the orders of the tribunal is seemingly a matter of common sense. Rule of Professional Conduct 4-3.4(c) sets forth that an attorney who knowingly disobeys an obligation under the rules of a tribunal, except for an open refusal based on an assertion that a valid obligation exists, is guilty of professional misconduct. In the *Gardner* case, attorney Gardner asserted his belief that he could pay himself a personal representative fee based on the general statute allowing for the payment of estate claims, but did so only after a disciplinary action was instituted. Attorney Gardner could not legitimately assert that his refusal to follow the court's order was based on his belief that he was not required to seek court approval because he had previously sought the court's authorization for the first early payment of fees. Other states, who, like Missouri, have conduct rules based on the ABA Model Rules, have spoken as to what constitutes an "open refusal" to follow a

court order and have determined that, at a minimum, the rule requires an attorney to put the court on notice that the attorney will not comply with the court-imposed obligation. See *Gilbert v. Utah State Bar*, 379 P.3d 1247, 1255 (Ut. 2016) (citations omitted). Similarly, several state supreme courts have noted that an attorney who believes a court order to be erroneous is not relieved of the duty to obey it and is expected to follow the appropriate course of appellate action. *Id.*

Conclusion

In summary, the dissent in *Gardner* stated that "anything less than an actual, indefinite suspension suggests this Court tolerates lawyers knowingly violating court orders..[.]" All practitioners can conclude that a failure to abide by the appropriate authority, be it a statute or a court order, may result in professional discipline. However, the discipline for a an attorney's knowing failure to abide a court order will be based on retrospective analysis of the facts and it is unworthy of the risk that comes from possible misinterpretation.