RECENT ETHICS DEVELOPMENTS

Part 1: Self-Regulation

Part 2: Attorney Fees

SPRING ETHICS 2017

Wichita Bar Association

I. Attorney Self-Regulation

A. Kansas Rules of Professional Conduct

"[10] The legal profession is largely self-governing. Although other professions also have been granted powers of self-government, the legal profession is unique in this respect because of the close relationship between the profession and the processes of government and law enforcement. This connection is manifested in the fact that ultimate authority over the legal profession is vested largely in the courts.

"[11] To the extent that lawyers meet the obligations of their professional calling, the occasion for government regulation is obviated. Self-regulation also helps maintain the legal profession's independence from government domination. An independent legal profession is an important force in preserving government under law, for abuse of legal authority is more readily challenged by a profession whose members are not dependent on government for the right to practice.

"[12] The legal profession's relative autonomy carries with it special responsibilities of self-government. The profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar. Every lawyer is responsible for observance of the Rules of Professional Conduct. A lawyer should also aid in securing their observance by other lawyers. Neglect of these responsibilities compromises the independence of the profession and the public interest which it serves." Preamble, KRPC Rule 226 (2017 Kan. Ct. R. 281).

B. Kansas Board for Discipline of Attorneys (Kansas Supreme Court Rule 204.)

- Appointed by Kansas Supreme Court
- 20 members
- Four-year term, up to 12 years
- Supreme Court designates Chair and Vice-Chair
- Current Board:

Patricia M. Dengler, Chairman
John D. Gatz, Vice Chairman

Kim Bonifas	M. Jennifer Brunetti	Stephen M. Cavanaugh
Jeffrey A. Chubb	Shaye L. Downing	John M. Duma
Randall D. Grisell	Glen I. Kerbs	John E. Larson
Kathryn J. Marsh	Jack Scott McInteer	Mira Mdivani
James P. Rankin	Bethany J. Roberts	Lee M. Smithyman

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Gaye Tibbets	Sarah E. Warner	Darcy D. Williamson

C. Review Committee (Kansas Supreme Court Rule 204(b))

- Board assigns 3 attorneys, at least two from Board
- Review and approve or modify recommendations by Disciplinary Administrator for dismissals, informal admonitions, and institution of formal charges
- Do not sit on hearing panels
- Current Review Committee:
  Patty Dengler, Chair
  John Gatz
  Derrick Roberson

D. Investigators:

20th Judicial District Committee
Gregory L. Bauer, Chair
Bauer & Pike, LLC
1310 Kansas Ave.
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Douglas County Committee
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Johnson County Committee
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Prosecutors Committee
Ronald W. Paschal
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Reno County Committee
S. Eric Steinle, Chair
Martindell Swearer, et al
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Riley County Committee
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Wichita Committee
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E. Duty to Report:

1. KRPC 8.3: Reporting Professional Misconduct (Attachment A)

2. *In re Himmel,* 533 N.E.2d 790 (Ill. 1988) (Attorney's failure to report misconduct on part of attorney who has formerly represented client and has converted client's settlement, in violation of rule, warrants one-year suspension, not merely private reprimand.). (Attachment B)

3. *In re Pyle*, 278 Kan. 230, 931 P.2d 1222 (2004) (Attorney violated KRPC 8.3(a) by not reporting what he believed to be attorney misconduct on the part of opposing counsel.). (Attachment C)

4. Hypotheticals (Attachment D)

F. Duty to Cooperate:

1. Supreme Court Rule 207: Duties of the Bar and Judiciary

"(a) The members of the bar or any state or local bar association shall assist the Disciplinary Administrator in investigations and such other matters as may be requested of them.

"(b) It shall be the duty of each member of the bar of this state to aid the Supreme Court, the Disciplinary Board, and the Disciplinary Administrator in investigations concerning complaints of misconduct, and to communicate to the Disciplinary Administrator any information he or she may have affecting such matters.

"(c) It shall be the further duty of each member of the bar of this state to report to the Disciplinary Administrator any action, inaction, or conduct which in his or her opinion constitutes misconduct of an attorney under these rules.

"(d) It shall be the duty of each judge of this state to report to the Disciplinary Administrator any act or omission on the part of an attorney appearing before the court, which, in the opinion of the judge, may constitute misconduct under these rules. Upon receipt of such report, it shall be processed as hereinafter provided for complaints. Nothing herein shall be construed in any manner as limiting the powers of such judge in contempt or other proceedings."

2. KRPC 8.1: Bar Admission and Disciplinary Matters

"An applicant for admission to the bar, or a lawyer in connection with a bar admission application **or in connection with a disciplinary matter**, shall not:

"(a) knowingly make a false statement of material fact; or

(b) fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter, or knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority, except that this rule does not require disclosure of information otherwise protected by Rule 1.6."

3. *In re McDaneld*, 389 P.3d 976 (2017) (attorney disbarred after failing to cooperate in disciplinary proceedings). (Attachment E).

II. Attorney Fees

A. A lawyer's fee shall be reasonable. KRPC 1.5(a).

B. Factors to consider under KRPC 1.5(a) to determine the reasonableness of a fee:

1. Time and Labor required, novelty and difficulty of the questions involved, and the skill required to perform the legal service properly;

2. The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

3. The fee customarily charged in the locality for similar legal services;

4. The amount involved and the result obtained;

5. The time limitations imposed by the client or by the circumstances;

6. The nature and length of the professional relationship with the client;

7. The experience, reputation, and ability of the lawyer or lawyers performing the services; and

8. Whether the fee is fixed or contingent

C. Types of Fee Agreements

1. Hourly Rate: Client agrees to pay lawyer a specific hourly rate for the lawyer to perform all the work necessary to complete the legal service.

   a. Can't round up to nearest hour. *In re Davis*, 296 Kan. 531 (2013).
   b. Six minute increments typically pass muster.

2. Flat or Fixed Fee Agreements: Lawyer agrees to perform a specific service in exchange for a set fee

   a. Must be reasonable to the client, see KRPC 1.5(a), but lawyer can benefit from having a streamlined office operation that saves time.

   b. Lawyer assumes risk that the matter will not take more time than the flat fee represents.

   c. Money must be deposited into trust account until work is actually performed. See *In re Thurston*, 304 Kan. 146, 371 P.3d 879 (2016); *In re Scimeca*, 265 Kan. 742, 962 P.2d 1080 (1998).

d. Must refund unearned fees if terminated early. See Comment 2 to KRPC 1.5 ("A lawyer may require advance payment of a fee, but is obliged to return any unearned portion."); KRPC 1.16(d) ("Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as . . . refunding any advance payment of fee that has not been earned.

e. Must be able to account for hours in order to defend a challenge to reasonableness.

f. Be careful of adding additional tasks or enlarging the scope of representation. If more work is to be performed, best practice is to create a new agreement for the additional work and a new flat fee for that work. See *In re Carson*, 268 Kan. 134, 991 P.2d 896 (1999).

3. Engagement Retainer Fees

a. The Restatement of the Law Governing Lawyers (1998) defines an "engagement retainer fee" as follows:

As used in this Restatement, an "engagement retainer fee" is a fee paid, apart from any other compensation, to ensure that a lawyer will be available for the client if required. An engagement retainer must be distinguished from a lump sum fee constituting the entire payment for a lawyer's services in a matter and from an advance payment from which fees will be subtracted. (see § 38, Comment g). A fee is an engagement retainer only if the lawyer is to be additionally compensated for actual work, if any, performed. In some jurisdictions, an engagement retainer is referred to as a "general" or "special" retainer.

b. "If the contract or agreement between the attorney and the client clearly states that the fee advanced is paid as a nonrefundable retainer to commit the attorney to represent the client and not as a fee to be earned by future services, then it is earned by the attorney when paid and is the attorney's money." If, on the other hand, the retainer is to be earned by future services performed by the attorney, then it remains the client's money and [must be deposited in the lawyer's trust account.]" *In re Scimeca*, 265 Kan. 742, 759-60, 962 P.2d 1080 (1998).

c. True engagement retainer fees are permitted in Kansas. Since they are to ensure the lawyer is readily available to the client, they are earned on receipt and should not be placed in the trust account. Also allowed in Florida, Texas, Washington, and Arkansas.

d. THESE TYPES OF AGREEMENTS ARE EXTREMELY RARE!!!!

i. If challenged, a lawyer would have to show that his commitment to the client caused him to forgo other clients.

ii. Example of an ethically permissible engagement retainer: "Excavating Company inadvertently cuts through a high pressure natural gas pipeline, resulting in the destruction of several neighboring structures, loss of gas service to thousands of customers for two weeks in December, and substantial cleanup and restoration costs. Shirley Wright has litigated numerous pipeline explosion cases for both plaintiffs and defendants. Excavating Company approaches Shirley Wright and offers a $100,000 engagement retainer if Shirley Wright will agree not to represent any other party in the litigation and will agree to represent Excavating Company at the hourly rate of $500 per hour if called upon to do anything further." Philip Ridenour, *Attorney Fees: Where Are We in Kansas?*, Journal of the Kansas Bar Association, September 2004.

iii. In addition to the engagement contract detailing the rationale for the engagement retainer fee, there should be a separate engagement contract regarding the work to be done. The contract should spell out the scope of the representation, the rate or basis of billing, and other basic parameters of the actual representation tasks.

4. Non-Refundable Advance Fee Retainer

a. Definition: A nonrefundable fee a client advances to the lawyer, paid in contemplation that lawyer will perform future services. The fee is considered earned upon receipt, and the lawyer deposits the fee into his or her personal or operating account.

b. Non-Refundable Advance Fee Retainers are PROHIBITED IN KANSAS. See *In re Thurston*, 304 Kan. 146, 371 P.3d 879; *In re Scimeca*, 265 Kan. 742, 962 P.2d 1080 (1998).

5. Contingency Fee Agreement

a. Are not allowed in:
i. Domestic relations matter upon the securing of a divorce or upon the amount of alimony, support, or property settlement;

ii. Representing a defendant in a criminal case; or

iii. In any other matter in which a contingency fee is precluded by statute. KRPC 1.5(f).

b. A contingent fee agreement must be in writing. KRPC 1.5(d).

c. The agreement must state the method by which the fee is to be determined. KRPC 1.5(d)

d. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement, stating the outcome of the matter and, if there is a recovery, showing the client's share and amount and the method of its determination. KRPC 1.5(d).

i. The statement shall also advise the client of the right to have the fee reviewed by the appropriate court having jurisdiction of the matter.

D. Referral Fees

1. A division of fee, which may include a portion designated for referral of a matter, between or among lawyers who are not in the same firm may be made if the total fee is reasonable and the client is advised of and does not object to the division. KRPC 1.5(g).

2. A division of fee is a single billing to a client covering the fee of two or more lawyers who are not in the same firm. Comment 4 to KRPC 1.5(g)

3. A division of fee facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well, and most often is used when the fee is contingent and the division is between a referring lawyer and a trial specialist, or when a lawyer refers a matter to a lawyer in another jurisdiction. Comment 4 to KRPC 1.5(g)

4. KRPC 1.5(g) permits the lawyers to divide a fee by agreement between the participating lawyers if the client is advised, does not object, and the total fee is reasonable.
   a. KRPC 1.5(g) does not require disclosure to the client of the share that each lawyer is to receive. Comment 4 to KRPC 1.5(g).

E. Judicial Review of Fee Agreements. KRPC 1.5(e).

1. Upon application by the client, all fee contracts shall be subject to review and approval by the appropriate court having jurisdiction of the matter.

2. Court shall have the authority to determine whether the contract is reasonable.

3. If the court finds the contract is not reasonable, it shall set and allow a reasonable fee.

4. A court's determination that a fee is not reasonable shall not be presumptive evidence of a violation that requires discipline of the attorney. KRPC 1.5(c).

III. Third-Party Payors

A. A lawyer shall not accept compensation for representing a client from one other than the client unless:

1. the client gives informed consent;

   a. "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 to the proposed course of conduct. KRPC 1.0(f).

2. there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and

3. information relating to representation of a client is kept confidential as required under KRPC 1.6. KRPC 1.8(f).

   B. A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services. KRPC 5.4(c).

B. KRPC 5.4(c) expresses traditional limitations on permitting a third party to direct or regulate the lawyer's professional judgment in rendering legal services to another. Comment 2 to KRPC 5.4(c).

C. Applicable Comments Regarding Third-Party Payors.

1. "A lawyer may be paid from a source other than the client, including a co-client, if the client is informed of that fact and consents and the arrangement does not compromise the lawyer's duty of loyalty or independent judgment to the client. See Rule 1.8(f). If acceptance of the payment from any other source presents a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's own interest in accommodating the person paying the lawyer's fee or by the lawyer's responsibilities to a payer who is also a co-client, then the lawyer must comply with the requirements of [KRPC 1.7(b)] before accepting the representation, including determining whether the conflict is consentable and, if so, that the client has adequate information about the material risks of the representation."

2. "Lawyers are frequently asked to represent a client under circumstances in which a third person will compensate the lawyer, in whole or in part. The third person might be a relative or friend, an indemnitor (such as a liability insurance company) or a co-client (such as a corporation sued along with one or more of its employees). Because third-party payers frequently have interests that differ from those of the client, including interests in minimizing the amount spent on the representation and in

learning how the representation is progressing, lawyers are prohibited from accepting or continuing such representation unless the lawyer determines that there will be no interference with the lawyer's independent professional judgment and there is informed consent from the client." Comment 11 to KRPC 1.8.

3. "Sometimes, it will be sufficient for the lawyer to obtain the client's informed consent regarding the fact of the payment and the identity of the third-party payer. If, however, the fee arrangement creates a conflict of interest for the lawyer, then the lawyer must comply with Rule 1.7 The lawyer must also conform to the requirements of Rule 1.6 concerning confidentiality. Under Rule 1.7(a), a conflict of interest exists if there is significant risk that the lawyer's representation of the client will be materially limited by the lawyer's own interest in the fee arrangement or by the lawyer's responsibilities to the third-party payer (for example, when the third-party payer is a co-client). Under Rule 1.7(b), the lawyer may accept or continue the representation with the informed consent of each affected client, unless the conflict is nonconsentable under the paragraph. Under Rule 1.7(b), the informed consent must be confirmed in writing." Comment 12 to KRPC 1.8.

IV. Safekeeping Client and Third-Party Money (Trust Accounts)

A. 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 1.15 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. KRPC 1.15(b).

   1. See also KRPC 1.15(d)(2)(i) (lawyer shall promptly notify a client of the receipt of the client's funds).

   2. See also 1.15(d)(2)(iii) (A lawyer shall "[m]aintain complete records of all funds of a client coming into the possession of the lawyer and render appropriate accountings to the client.")

   3. See also KRPC 1.15(d)(2)(iv) (A lawyer shall "[p]romptly pay to the client as requested by a client the funds in the possession of the lawyer which the client is entitled to receive.")

B. 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. KRPC 1.15(a).

C. Funds shall be kept in a separate account maintained in the state of Kansas. KRPC 1.15(a).

1. All funds of clients paid to a lawyer or law firm, including advances for costs and expenses, shall be deposited in one or more identifiable accounts maintained in the State of Kansas with a federal or state chartered or licensed financial institution and insured by an agency of the federal or state government. KRPC 1.15(d).

D. No funds belonging to the lawyer or law firm shall be deposited into a trust account except:

1. Funds reasonably sufficient to pay bank charges may be deposited therein. KRPC 1.15(d)(1)(i).

2. Funds belonging in part to a client and in part presently or potentially to the lawyer or law firm must be deposited therein, but the portion belonging to the lawyer or law firm may be withdrawn when due unless the right of the lawyer or law firm to receive it is disputed by the client, in which event the disputed portion shall not be withdrawn until the dispute is finally resolved. KRPC 1.15(d)(1)(ii).

E. Record Keeping:

1. A lawyer shall keep complete records of trust account funds and preserve such records for a period of five years after termination of representation. KRPC 1.15(a).

a. See also 1.15(d)(2)(iii) (A lawyer shall "[m]aintain complete records of all funds of a client coming into the possession of the lawyer and render appropriate accountings to the client.")

b. Produce all trust account records for examination by the Disciplinary Administrator upon request of the Disciplinary Administrator in compliance with Rule 216A. KRPC 1.15(d)(2)(v).

F. When in the course of representation a lawyer is in possession of property in which both the lawyer and another person claim interests, the property shall be kept separate by the lawyer until there is an accounting and severance of their interests. If a dispute arises concerning their respective interests, the portion in dispute shall be kept separate by the lawyer until the dispute is resolved. KRPC 1.15(c).

G. Third Party Funds

1. "Lawyers often receive funds from third parties from which the lawyer's fee will be paid. If there is risk that the client may divert the funds without paying the fee, the lawyer is not required to remit the portion from which the fee is to be paid. However, a lawyer may not hold funds to coerce a client into accepting the lawyer's contention. The disputed portion of the funds should be kept in trust and the lawyer should suggest means for prompt resolution of the dispute, such as arbitration. The undisputed portion of the funds shall be promptly distributed." Comment 3 to KRPC 1.15.

H. Terminating Representation

1. Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as . . . surrendering papers and property to which the client is entitled and refunding any advance payment of fee that has not been earned. The lawyer may retain papers relating to the client to the extent permitted by other law. KRPC 1.16(d).

   a. "The lawyer may retain papers as security for a fee only to the extent permitted by law." Comment 9 to KRPC 1.16.

   b. Attorney Lien Statute: "An attorney has a lien for a general balance of compensation upon any papers of his or her client which have come into the attorney's possession in the course of his or her professional employment, upon money in the attorney's hands belonging to the client, and upon money due to the client and in the hands of the adverse party, in any matter, action or proceeding in which the attorney was employed, from the time of giving notice of the lien to the party; such notice must be in writing, and may be served in the same manner as a summons, and upon any person, officer or agent upon whom a summons under the laws of this state may be served, and may also be served upon a regularly employed salaried attorney of the party." KSA 7-108

ATTACHMENT A

RELEVANT RULES

KRPC 1.6. Client-Lawyer Relationship: Confidentiality of Information

(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).
(b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:
(1) To prevent the client from committing a crime;
(2) to secure legal advice about the lawyer's compliance with these Rules;
(3) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;
(4) to comply with other law or a court order; or
(5) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.
(c) 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.

KRPC 1.8. Conflict of Interest: Current Clients: Specific Rules

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:
(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which can be reasonably understood by the client; and
(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and
(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.
(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules.
(c) A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift is related to the client. For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.
(d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.
(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and
(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.
(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:
(1) the client gives informed consent;
(2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and
(3) information relating to representation of a client is protected as required by Rule 1.6.
(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client gives informed consent, in a writing signed by the client. The lawyer's disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.
(h) A lawyer shall not:
(1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement; or
(2) settle a claim or potential claim for such liability with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel in connection therewith.
(i) A lawyer related to another lawyer as parent, child, sibling or spouse shall not represent a client in a representation directly adverse to a person who the lawyer knows is represented by the other lawyer except upon consent by the client after consultation regarding the relationship.
(j) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:
(1) acquire a lien authorized by law to secure the lawyer's fee or expenses; and
(2) contract with a client for a reasonable contingent fee in a civil case.
(k) A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced.
(l) While lawyers are associated in a firm, a prohibition in the foregoing paragraphs (a) through (j) that applies to any one of them shall apply to all of them.

KRPC 3.3. Candor Toward the Tribunal

(a) A lawyer shall not knowingly:
(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.
(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.
(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.

Comments:

10] Having offered material evidence in the belief that it was true, a lawyer may subsequently come to know that the evidence is false. Or, a lawyer may be surprised when the lawyer's client, or another witness called by the lawyer, offers testimony the lawyer knows to be false, either during the lawyer's direct examination or in response to cross-examination by the opposing lawyer. In such situations or if the lawyer knows of the falsity of testimony elicited from the client during a deposition, the lawyer must take reasonable remedial measures. In such situations, the advocate's proper course is to remonstrate with the client confidentially, advise the client of the lawyer's duty of candor to the tribunal and seek the client's cooperation with respect to the withdrawal or correction of the false statements or evidence. If that fails, the advocate must take further remedial action. If withdrawal from the representation is not permitted *or will not undo the effect of the false evidence, the advocate must make such disclosure to the tribunal as is reasonably necessary to remedy the situation, even if doing so requires the lawyer to reveal information that otherwise would be protected by Rule 1.6.* It is for the tribunal then to determine what should be done--making a statement about the matter to the trier of fact, ordering a mistrial or perhaps nothing.

11] The disclosure of a client's false testimony can result in grave consequences to the client, including not only a sense of betrayal but also loss of the case and perhaps a prosecution for perjury. *But the alternative is that the lawyer cooperate in deceiving the court, thereby subverting the truth-finding process which the adversary system is designed to implement.* See Rule 1.2(d). Furthermore, unless it is clearly understood that the lawyer will act upon the duty to disclose the existence of false evidence, the client can simply reject the lawyer's advice to reveal the false evidence and insist that the lawyer keep silent. Thus, the client could in effect coerce the lawyer into being a party to fraud on the court.

[12] Lawyers have a special obligation to protect a tribunal against criminal or fraudulent conduct that undermines the integrity of the adjudicative process, such as bribing, intimidating or otherwise unlawfully communicating with a witness, juror, court official or other participant in the proceeding, unlawfully destroying or concealing documents or other evidence or failing to disclose information to the tribunal when required by law to do so. *Thus, paragraph (b) requires a lawyer to take reasonable remedial measures, including disclosure if necessary, whenever the lawyer knows that a person*, including the lawyer's client, intends to engage, is engaging or *has engaged* in criminal or fraudulent conduct related to the proceeding.

[13] A practical time limit on the obligation to rectify false evidence or false statements of law and fact has to be established. The conclusion of the proceeding is a reasonably definite point for the termination of the obligation. A proceeding has concluded within the meaning of this Rule when a final judgment in the proceeding has been affirmed on appeal or the time for review has passed."

KRPC 5.1. Responsibilities of Partners, Managers, and Supervisory Lawyers

(a) A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the rules of professional conduct.
(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the rules of professional conduct.
(c) A lawyer shall be responsible for another lawyer's violation of the rules of professional conduct if:
(1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or
(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

KRPC 5.2. Responsibilities of a Subordinate Lawyer

(a) A lawyer is bound by the rules of professional conduct notwithstanding that the lawyer acted at the direction of another person.
(b) A subordinate lawyer does not violate the rules of professional conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.

KRPC 8.3. Reporting Professional Misconduct

(a) A lawyer having knowledge of any action, inaction, or conduct which in his or her opinion constitutes misconduct of an attorney under these rules shall inform the appropriate professional authority.
(b) A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority.
(c) This rule does not require disclosure of information otherwise protected by Rule 1.6. In addition, a lawyer is not required to disclose information concerning any such violation which is discovered through participation in a Substance Abuse Committee, Service to the Bar Committee or similar committee sponsored by a state or local bar association, or by participation in a self-help organization such as Alcoholics Anonymous, through which aid is rendered to another lawyer who may be impaired in the practice of law.

Comments

[1] Self-regulation of the legal profession requires that members of the profession initiate disciplinary investigation when they know of a violation of the Rules of Professional Conduct. Lawyers have a similar obligation with respect to judicial misconduct. An apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover. Reporting a violation is especially important where the victim is unlikely to discover the offense.

[2] A report about misconduct is not required where it would involve violation of Rule 1.6. However, a lawyer should encourage a client to consent to disclosure where it would not substantially prejudice the client's interests.

[3] The duty to report professional misconduct does not apply to a lawyer retained to represent a lawyer whose professional conduct is in question. Such a situation is governed by the rules applicable to the client-lawyer relationship.

[4] Information about a lawyer's or judge's misconduct or fitness may be received by a lawyer in the course of that lawyer's participation in an approved lawyers or judges assistance program. In that circumstance, providing for an exception to the reporting requirements of paragraphs (a) and (b) of this Rule encourages lawyers and judges to seek treatment through such a program. Conversely, without such an exception, lawyers and judges may hesitate to seek assistance from these programs, which may then result in additional harm to their professional careers and additional injury to the welfare of clients and the public. These Rules do not otherwise address the confidentiality of information received by a lawyer or judge participating in an approved lawyers assistance program; such an obligation, however, may be imposed by the rules of the program or other law.

Kansas Comment

[5] Substance Abuse Committees have earned an important position in the organization of bar association activities and render a valuable and important service to the profession and the public. As such, these committees and other recognized self-help organizations, and the lawyers who serve on them, should be allowed to function without fear of the requirement to report every violation which might be uncovered during the course of their service. To provide otherwise might inhibit free and open communication by the incapacitated lawyer and result in neglected matters remaining so. In this instance, the Kansas Impaired Lawyers Assistance Commission feels that the public is better served by providing a measure of confidentiality to the incapacitated lawyer's communications with those who would help the lawyer in serving clients.

ATTACHMENT B

In re Himmel, 533 N.E.2d 790 (Ill. 1988)

125 Ill.2d 531
Supreme Court of Illinois.

In re James H. **HIMMEL**, Attorney, Respondent.

No. 65946.
|
Sept. 22, 1988.
|
Rehearing Denied Jan. 30, 1989.

In disciplinary proceeding, the Supreme Court, Stamos, J., held that attorney's failure to report misconduct on part of attorney who has formerly represented client and has converted client's settlement, in violation of rule, warrants one-year suspension, not merely private reprimand.

Ordered accordingly.

West Headnotes (7)

[1] **Attorney and Client**
⇦ Evidence

Actions of client would not relieve attorney of his own duty to report another attorney's misconduct, and accordingly, dispute as to whether client informed Attorney Registration and Disciplinary Commission of misconduct on part of client's former attorney is irrelevant to resolving whether attorney violated Disciplinary Rule by failing to disclose information regarding the other attorney's misconduct. Code of Prof.Resp., DR 1-103(a), S.H.A. ch. 110A, foll. ¶ 774.

6 Cases that cite this headnote

[2] **Attorney and Client**
⇦ Defenses

Client's direction that attorney not report misconduct on part of another attorney does not provide defense to charge against attorney for failure to disclose misconduct. Code of Prof.Resp., DR 1-103(a), S.H.A. ch. 110A, foll. ¶ 774.

Cases that cite this headnote

[3] **Attorney and Client**
⇦ Character and Conduct

If attorney's conduct violates rule requiring attorney to report attorney misconduct, imposition of discipline for such breach of duty is mandated. Code of Prof.Resp., DR 1-103(a), S.H.A. ch. 110A, foll. ¶ 774.

2 Cases that cite this headnote

[4] **Attorney and Client**
⇦ Character and Conduct

Information attorney obtained regarding misconduct on part of client's former attorney who had converted client's settlement was not protected by attorney-client privilege, so as to exempt attorney from operation of rule requiring him to report attorney misconduct; client had discussed matter with attorney at times when her mother and her fiance were present, and attorney discussed former attorney's conversion of client's settlement with insurance company involved, insurance company's lawyer, and former attorney himself, with consent of client. Code of Prof.Resp., DR 1-103(a), S.H.A. ch. 110A, foll. ¶ 774.

12 Cases that cite this headnote

[5] **Attorney and Client**
⇦ Character and Conduct

Attorney violates rule requiring him to report attorney misconduct by failing to report another attorney for conversion of client's settlement, and discipline is required. Code of Prof.Resp., DR 1-103(a), S.H.A. ch. 110A, foll. ¶ 774.

3 Cases that cite this headnote

[6] **Attorney and Client**
⇦ Nature and Purpose

When determining nature and extent of discipline to be imposed, attorney's actions must be viewed in relationship to the underlying purposes of disciplinary process, which purposes are to maintain integrity of legal profession, to protect administration of justice from reproach, and to safeguard public.

7 Cases that cite this headnote

[7] **Attorney and Client**
⇦ Definite Suspension

Attorney's failure to report misconduct on part of client's former attorney who has converted client's settlement warrants one-year suspension, not merely private reprimand. Code of Prof.Resp., DR 1-103(a), S.H.A. ch. 110A, foll. ¶ 774.

1 Cases that cite this headnote

Attorneys and Law Firms

**790 *534 ***708 William F. Moran, III, of Springfield, for the Administrator of the Attorney Registration and Disciplinary Commission.

James H. **Himmel**, of Palos Heights, respondent pro se.

George B. Collins, of Collins & Bargione, of Chicago, for respondent.

Opinion

Justice STAMOS delivered the opinion of the court:

This is a disciplinary proceeding against respondent, James H. **Himmel**. On January **791 ***709 22, 1986, the Administrator of the Attorney Registration and Disciplinary Commission (the Commission) filed a complaint with the Hearing Board, alleging that respondent violated Rule 1-103(a) of the Code of Professional Responsibility (the Code) (107 Ill.2d R. 1-103(a)) by failing to disclose to the Commission information concerning attorney misconduct. On October 15, 1986, the Hearing Board found that respondent had violated the rule and recommended that respondent be reprimanded. The Administrator filed exceptions with the Review Board. The Review Board issued *535 its report on July 9, 1987, finding that respondent had not violated a disciplinary rule and recommending dismissal of the complaint. We granted the Administrator's petition for leave to file exceptions to the Review Board's report and recommendation. 107 Ill.2d R. 753(e)(6).

We will briefly review the facts, which essentially involve three individuals: respondent, James H. **Himmel**, licensed to practice law in Illinois on November 6, 1975; his client, Tammy Forsberg, formerly known as Tammy McEathron; and her former attorney, John R. Casey.

The complaint alleges that respondent had knowledge of John Casey's conversion of Forsberg's funds and respondent failed to inform the Commission of this misconduct. The facts are as follows.

In October 1978, Tammy Forsberg was injured in a motorcycle accident. In June 1980, she retained John R. Casey to represent her in any personal injury or property damage claim resulting from the accident. Sometime in 1981, Casey negotiated a settlement of $35,000 on Forsberg's behalf. Pursuant to an agreement between Forsberg and Casey, one-third of any monies received would be paid to Casey as his attorney fee.

In March 1981, Casey received the $35,000 settlement check, endorsed it, and deposited the check into his client trust fund account. Subsequently, Casey converted the funds.

Between 1981 and 1983, Forsberg unsuccessfully attempted to collect her $23,233.34 share of the settlement proceeds. In March 1983, Forsberg retained respondent to collect her money and agreed to pay him one-third of any funds recovered above $23,233.34.

Respondent investigated the matter and discovered that Casey had misappropriated the settlement funds. In April 1983, respondent drafted an agreement in which Casey would pay Forsberg $75,000 in settlement of any *536 claim she might have against him for the misappropriated funds. By the terms of the agreement, Forsberg agreed not to initiate any criminal, civil, or attorney disciplinary action against Casey. This agreement was executed on April 11, 1983. Respondent stood to gain $17,000 or more if Casey honored the agreement. In February 1985, respondent filed suit against Casey for breaching the

agreement, and a $100,000 judgment was entered against Casey. If Casey had satisfied the judgment, respondent's share would have been approximately $25,588.

The complaint stated that at no time did respondent inform the Commission of Casey's misconduct. According to the Administrator, respondent's first contact with the Commission was in response to the Commission's inquiry regarding the lawsuit against Casey.

In April 1985, the Administrator filed a petition to have Casey suspended from practicing law because of his conversion of client funds and his conduct involving moral turpitude in matters unrelated to Forsberg's claim. Casey was subsequently disbarred on consent on November 5, 1985.

A hearing on the complaint against the present respondent was held before the Hearing Board of the Commission on June 3, 1986. In its report, the Hearing Board noted that the evidence was not in dispute. The evidence supported the allegations in the complaint and provided additional facts as follows.

Before retaining respondent, Forsberg collected $5,000 from Casey. After being retained, respondent made inquiries regarding Casey's conversion, contacting the insurance company that issued the settlement check, its attorney, Forsberg, her **792 ***710 mother, her fiance and Casey. Forsberg told respondent that she simply wanted her money back and specifically instructed respondent to take no other action. Because of respondent's efforts, *537 Forsberg collected another $10,400 from Casey. Respondent received no fee in this case.

The Hearing Board found that respondent received unprivileged information that Casey converted Forsberg's funds, and that respondent failed to relate the information to the Commission in violation of Rule 1-103(a) of the Code. The Hearing Board noted, however, that respondent had been practicing law for 11 years, had no prior record of any complaints, obtained as good a result as could be expected in the case, and requested no fee for recovering the $23,233.34. Accordingly, the Hearing Board recommended a private reprimand.

Upon the Administrator's exceptions to the Hearing Board's recommendation, the Review Board reviewed the matter. The Review Board's report stated that the client had contacted the Commission prior to retaining respondent and, therefore, the Commission did have knowledge of the alleged misconduct. Further, the Review Board noted that respondent respected the client's wishes regarding not pursuing a claim with the Commission. Accordingly, the Review Board recommended that the complaint be dismissed.

The Administrator now raises three issues for review: (1) whether the Review Board erred in concluding that respondent's client had informed the Commission of misconduct by her former attorney; (2) whether the Review Board erred in concluding that respondent had not violated Rule 1-103(a); and (3) whether the proven misconduct warrants at least a censure.

As to the first issue, the Administrator contends that the Review Board erred in finding that Forsberg informed the Commission of Casey's misconduct prior to retaining respondent. In support of this contention, the Administrator cites to testimony in the record showing that while Forsberg contacted the Commission and received a complaint form, she did not fill out the form, return *538 it, advise the Commission of the facts, or name whom she wished to complain about. The Administrator further contends that even if Forsberg had reported Casey's misconduct to the Commission, such an action would not have relieved respondent of his duty to report under Rule 1-103(a). Additionally, the Administrator argues that no evidence exists to prove that respondent failed to report because he assumed that Forsberg had already reported the matter.

Respondent argues that the record shows that Forsberg did contact the Commission and was forwarded a complaint form, and that the record is not clear that Forsberg failed to disclose Casey's name to the Commission. Respondent also argues that Forsberg directed respondent not to pursue the claim against Casey, a claim she had already begun to pursue.

[1] We begin our analysis by examining whether a client's complaint of attorney misconduct to the Commission can be a defense to an attorney's failure to report the same misconduct. Respondent offers no authority for such a defense and our research has disclosed none. Common sense would dictate that if a lawyer has a duty under the Code, the actions of a client would not relieve the

attorney of his own duty. Accordingly, while the parties dispute whether or not respondent's client informed the Commission, that question is irrelevant to our inquiry in this case. We have held that the canons of ethics in the Code constitute a safe guide for professional conduct, and attorneys may be disciplined for not observing them. (*In re Yamaguchi* (1987), 118 Ill.2d 417, 427, 113 Ill.Dec. 928, 515 N.E.2d 1235, citing *In re Taylor* (1977), 66 Ill.2d 567, 6 Ill.Dec. 898, 363 N.E.2d 845.) The question is, then, whether or not respondent violated the Code, not whether Forsberg informed the Commission of Casey's misconduct.

[2] As to respondent's argument that he did not report Casey's misconduct because his client directed him not *539 to do so, we again note respondent's failure to suggest any legal support for such a defense. A lawyer, as an officer of the court, is duty-bound to uphold the rules in the Code. **793 ***711 The title of Canon 1 (107 Ill.2d Canon 1) reflects this obligation: "A lawyer should assist in maintaining the integrity and competence of the legal profession." A lawyer may not choose to circumvent the rules by simply asserting that his client asked him to do so.

As to the second issue, the Administrator argues that the Review Board erred in concluding that respondent did not violate Rule 1-103(a). The Administrator urges acceptance of the Hearing Board's finding that respondent had unprivileged knowledge of Casey's conversion of client funds, and that respondent failed to disclose that information to the Commission. The Administrator states that respondent's knowledge of Casey's conversion of client funds was knowledge of illegal conduct involving moral turpitude under *In re Stillo* (1977), 68 Ill.2d 49, 54, 11 Ill.Dec. 289, 368 N.E.2d 897. Further, the Administrator argues that the information respondent received was not privileged under the definition of privileged information articulated by this court in *People v. Adam* (1972), 51 Ill.2d 46, 48, 280 N.E.2d 205, *cert. denied* (1972), 409 U.S. 948, 93 S.Ct. 289, 34 L.Ed.2d 218. Therefore, the Administrator concludes, respondent violated his ethical duty to report misconduct under Rule 1-103(a). According to the Administrator, failure to disclose the information deprived the Commission of evidence of serious misconduct, evidence that would have assisted in the Commission's investigation of Casey.

Respondent contends that the information was privileged information received from his client, Forsberg, and therefore he was under no obligation to disclose the matter to the Commission. Respondent argues that his failure to report Casey's misconduct was motivated by his respect for his client's wishes, not by his desire for financial *540 gain. To support this assertion, respondent notes that his fee agreement with Forsberg was contingent upon her first receiving all the money Casey originally owed her. Further, respondent states that he has received no fee for his representation of Forsberg.

[3] Our analysis of this issue begins with a reading of the applicable disciplinary rules. Rule 1-103(a) of the Code states:

> "(a) A lawyer possessing unprivileged knowledge of a violation of Rule 1-102(a)(3) or (4) shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation." 107 Ill.2d R. 1-103(a).

Rule 1-102 of the Code states:

> "(a) A lawyer shall not
>
> (1) violate a disciplinary rule;
>
> (2) circumvent a disciplinary rule through actions of another;
>
> (3) engage in illegal conduct involving moral turpitude;
>
> (4) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation; or
>
> (5) engage in conduct that is prejudicial to the administration of justice." 107 Ill.2d R. 1-102.

These rules essentially track the language of the American Bar Association Model Code of Professional Responsibility, upon which the Illinois Code was modeled. (See 107 Ill.2d Rules art. VIII, Committee Commentary, at 604.) Therefore, we find instructive the opinion of the American Bar Association's Committee on Ethics and Professional Responsibility that discusses the Model Code's Disciplinary Rule 1-103 (Model Code of Professional Responsibility DR 1-103 (1979)). Informal Opinion 1210 states that under DR 1-103(a) it is the duty of a lawyer to report to the proper tribunal or authority any unprivileged knowledge of a lawyer's perpetration of any misconduct listed in Disciplinary Rule

1-102. *541 (ABA Committee on Ethics & Professional Responsibility, Informal Op. 1210 (1972) (hereinafter Informal Op. 1210).) The opinion states that "the Code of Professional Responsibility through its Disciplinary Rules necessarily deals directly with reporting of lawyer misconduct or misconduct of others directly observed in the legal practice or the administration of justice." Informal Op. 1210, at 447.

This court has also emphasized the importance of a lawyer's duty to report misconduct. In the case **794 ***712 *In re Anglin* (1988), 122 Ill.2d 531, 120 Ill.Dec. 520, 524 N.E.2d 550, because of the petitioner's refusal to answer questions regarding his knowledge of other persons' misconduct, we denied a petition for reinstatement to the roll of attorneys licensed to practice in Illinois. We stated, "Under Disciplinary Rule 1-103 a lawyer has the duty to report the misconduct of other lawyers. (107 Ill.2d Rules 1-103, 1-102(a)(3), (a)(4).) Petitioner's belief in a code of silence indicates to us that he is not at present fully rehabilitated or fit to practice law." (*Anglin*, 122 Ill.2d at 539, 120 Ill.Dec. 520, 524 N.E.2d 550.) Thus, if the present respondent's conduct did violate the rule on reporting misconduct, imposition of discipline for such a breach of duty is mandated.

[4] The question whether the information that respondent possessed was protected by the attorney-client privilege, and thus exempt from the reporting rule, requires application of this court's definition of the privilege. We have stated that " '(1) [w]here legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived.' " (*People v. Adam* (1972), 51 Ill.2d 46, 48, 280 N.E.2d 205 (quoting 8 J. Wigmore, Evidence 2292 (McNaughton rev.ed.1961)), *cert. denied* *542 (1972), 409 U.S. 948, 93 S.Ct. 289, 34 L.Ed.2d 218.) We agree with the Administrator's argument that the communication regarding Casey's conduct does not meet this definition. The record does not suggest that this information was communicated by Forsberg to the respondent in confidence. We have held that information voluntarily disclosed by a client to an attorney, in the presence of third parties who are not agents of the client or attorney, is not privileged information. (*People v. Williams* (1983), 97 Ill.2d 252, 295, 73 Ill.Dec. 360, 454 N.E.2d 220, *cert. denied* (1984), 466 U.S. 981, 104 S.Ct. 2364, 80 L.Ed.2d 836.) In this case, Forsberg discussed the matter with respondent at various times while her mother and her fiance were present. Consequently, unless the mother and fiance were agents of respondent's client, the information communicated was not privileged. Moreover, we have also stated that matters intended by a client for disclosure by the client's attorney to third parties, who are not agents of either the client or the attorney, are not privileged. (*People v. Werhollick* (1970), 45 Ill.2d 459, 462, 259 N.E.2d 265.) The record shows that respondent, with Forsberg's consent, discussed Casey's conversion of her funds with the insurance company involved, the insurance company's lawyer, and with Casey himself. Thus, under *Werhollick* and probably *Williams*, the information was not privileged.

Though respondent repeatedly asserts that his failure to report was motivated not by financial gain but by the request of his client, we do not deem such an argument relevant in this case. This court has stated that discipline may be appropriate even if no dishonest motive for the misconduct exists. (*In re Weinberg* (1988), 119 Ill.2d 309, 315, 116 Ill.Dec. 216, 518 N.E.2d 1037; *In re Clayter* (1980), 78 Ill.2d 276, 283, 35 Ill.Dec. 790, 399 N.E.2d 1318.) In addition, we have held that client approval of an attorney's action does not immunize an attorney from disciplinary action. (*In re Thompson* (1963), 30 Ill.2d 560, 569, 198 N.E.2d 337; *People ex rel. Scholes v. Keithley* (1906), 225 Ill. 30, 41, 80 N.E. 50.) We *543 have already dealt with, and dismissed, respondent's assertion that his conduct is acceptable because he was acting pursuant to his client's directions.

[5] Respondent does not argue that Casey's conversion of Forsberg's funds was not illegal conduct involving moral turpitude under Rule 1-102(a)(3) or conduct involving dishonesty, fraud, deceit, or misrepresentation under Rule 1-102(a)(4). (107 Ill.2d Rules 1-102(a)(3), (a)(4).) It is clear that conversion of client funds is, indeed, conduct involving moral turpitude. (*In re Levin* (1987), 118 Ill.2d 77, 88, 112 Ill.Dec. 708, 514 N.E.2d 174; *In re Stillo* (1977), 68 Ill.2d 49, 54, 11 Ill.Dec. 289, 368 N.E.2d 897.) We conclude, then, that respondent possessed unprivileged knowledge **795 ***713 of Casey's conversion of client funds, which is illegal conduct involving moral turpitude, and that respondent failed in his duty to report such misconduct to the Commission. Because no defense exists,

we agree with the Hearing Board's finding that respondent has violated Rule 1-103(a) and must be disciplined.

The third issue concerns the appropriate quantum of discipline to be imposed in this case. The Administrator contends that respondent's misconduct warrants at least a censure, although the Hearing Board recommended a private reprimand and the Review Board recommended dismissal of the matter entirely. In support of the request for a greater quantum of discipline, the Administrator cites to the purposes of attorney discipline, which include maintaining the integrity of the legal profession and safeguarding the administration of justice. The Administrator argues that these purposes will not be served unless respondent is publicly disciplined so that the profession will be on notice that a violation of Rule 1-103(a) will not be tolerated. The Administrator argues that a more severe sanction is necessary because respondent deprived the Commission of evidence of another attorney's conversion and thereby interfered with *544 the Commission's investigative function under Supreme Court Rule 752 (107 Ill.2d R. 752). Citing to the Rule 774 petition (107 Ill.2d R. 774) filed against Casey, the Administrator notes that Casey converted many clients' funds after respondent's duty to report Casey arose. The Administrator also argues that both respondent and his client behaved in contravention of the Criminal Code's prohibition against compounding a crime by agreeing with Casey not to report him, in exchange for settlement funds.

In his defense, respondent reiterates his arguments that he was not motivated by desire for financial gain. He also states that Forsberg was pleased with his performance on her behalf. According to respondent, his failure to report was a "judgment call" which resulted positively in Forsberg's regaining some of her funds from Casey.

[6] In evaluating the proper quantum of discipline to impose, we note that it is this court's responsibility to determine appropriate sanctions in attorney disciplinary cases. (*In re Levin* (1987), 118 Ill.2d 77, 87, 112 Ill.Dec. 708, 514 N.E.2d 174, citing *In re Hopper* (1981), 85 Ill.2d 318, 323, 53 Ill.Dec. 231, 423 N.E.2d 900.) We have stated that while recommendations of the Boards are to be considered, this court ultimately bears responsibility for deciding an appropriate sanction. (*In re Weinberg* (1988), 119 Ill.2d 309, 314, 116 Ill.Dec. 216, 518 N.E.2d 1037, citing *In re Winn* (1984), 103 Ill.2d 334, 337, 82 Ill.Dec. 664, 469 N.E.2d 198.) We reiterate our statement that " '[w]hen determining the nature and extent of discipline to be imposed, the respondent's actions must be viewed in relationship "to the underlying purposes of our disciplinary process, which purposes are to maintain the integrity of the legal profession, to protect the administration of justice from reproach, and to safeguard the public." (*In re LaPinska* (1978), 72 Ill.2d 461, 473 [21 Ill.Dec. 373, 381 N.E.2d 700].)' " *In re Levin* (1987), 118 Ill.2d 77, 87, 112 Ill.Dec. 708, 514 N.E.2d 174, quoting *In re Crisel* (1984), 101 Ill.2d 332, 343, 78 Ill.Dec. 160, 461 N.E.2d 994.

[7] *545 Bearing these principles in mind, we agree with the Administrator that public discipline is necessary in this case to carry out the purposes of attorney discipline. While we have considered the Boards' recommendations in this matter, we cannot agree with the Review Board that respondent's conduct served to rectify a wrong and did not injure the bar, the public, or the administration of justice. Though we agree with the Hearing Board's assessment that respondent violated Rule 1-103 of the Code, we do not agree that the facts warrant only a private reprimand. As previously stated, the evidence proved that respondent possessed unprivileged knowledge of Casey's conversion of client funds, yet respondent did not report Casey's misconduct.

This failure to report resulted in interference with the Commission's investigation of Casey, and thus with the administration **796 ***714 of justice. Perhaps some members of the public would have been spared from Casey's misconduct had respondent reported the information as soon as he knew of Casey's conversions of client funds. We are particularly disturbed by the fact that respondent chose to draft a settlement agreement with Casey rather than report his misconduct. As the Administrator has stated, by this conduct, both respondent and his client ran afoul of the Criminal Code's prohibition against compounding a crime, which states in section 32-1:

> "(a) A person compounds a crime when he receives or offers to another any consideration for a promise not to prosecute or aid in the prosecution of an offender.
>
> (b) Sentence. Compounding a crime is a petty offense." (Ill.Rev.Stat.1987, ch. 38, par. 32-1.)

Both respondent and his client stood to gain financially by agreeing not to prosecute or report Casey for conversion. According to the settlement agreement, respondent would have received $17,000 or more as his fee. If Casey had satisfied the judgment entered against him for failure *546 to honor the settlement agreement, respondent would have collected approximately $25,588.

We have held that fairness dictates consideration of mitigating factors in disciplinary cases. (*In re Yamaguchi* (1987), 118 Ill.2d 417, 428, 113 Ill.Dec. 928, 515 N.E.2d 1235, citing *In re Neff* (1988), 83 Ill.2d 20, 46 Ill.Dec. 169, 413 N.E.2d 1282.) Therefore, we do consider the fact that Forsberg recovered $10,400 through respondent's services, that respondent has practiced law for 11 years with no record of complaints, and that he requested no fee for minimum collection of Forsberg's funds. However, these considerations do not outweigh the serious nature of respondent's failure to report Casey, the resulting interference with the Commission's investigation of Casey, and respondent's ill-advised choice to settle with Casey rather than report his misconduct.

Accordingly, it is ordered that respondent be suspended from the practice of law for one year.

Respondent suspended.

All Citations

125 Ill.2d 531, 533 N.E.2d 790, 127 Ill.Dec. 708, 57 USLW 2246

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ATTACHMENT C

In re Pyle, 278 Kan. 230, 91 P.2d 1222 (2004)

KeyCite Yellow Flag - Negative Treatment
Distinguished by In re Comfort, Kan., June 8, 2007

278 Kan. 230
Supreme Court of Kansas.

In the Matter of E. Thomas **PYLE**, III, Respondent.

No. 91,077.
|
June 25, 2004.

Synopsis
Background: Disciplinary proceedings were brought against attorney.

[Holding:] The Supreme Court held that public censure of attorney, in addition to the requirement that attorney attend and complete four additional hours of professional responsibility continuing legal education each year for the next three years, was warranted.

Public censure ordered.

West Headnotes (12)

[1] **Attorney and Client**
⇦ Review

In disciplinary proceedings, the Supreme Court considers the evidence, the findings of the disciplinary panel, and the arguments of the parties and determines whether violations of Kansas Rule of Professional Conduct (KRPC) exist and, if they do, what discipline should be imposed.

1 Cases that cite this headnote

[2] **Attorney and Client**
⇦ Weight and sufficiency

Any attorney misconduct must be established by substantial, clear, convincing, and satisfactory evidence.

Cases that cite this headnote

[3] **Attorney and Client**
⇦ Review

In an attorney disciplinary case the Supreme Court views the findings of fact, conclusions of law, and recommendations made by the disciplinary panel as advisory, but gives the final hearing report the same dignity as a special verdict by a jury or the findings of a trial court.

3 Cases that cite this headnote

[4] **Attorney and Client**
⇦ Review

In an attorney disciplinary case the disciplinary panel's report will be adopted where amply sustained by the evidence, but not where it is against the clear weight of the evidence.

2 Cases that cite this headnote

[5] **Attorney and Client**
⇦ Review

In an attorney disciplinary case, when the disciplinary panel's findings relate to matters about which there was conflicting testimony, the Supreme Court recognizes that the panel, as the trier of fact, had the opportunity to observe the witnesses and evaluate their demeanor; therefore, the Supreme Court does not reweigh the evidence or pass on credibility of witnesses.

Cases that cite this headnote

[6] **Attorney and Client**
⇦ Grounds for Discipline

Attorney's conduct in drafting a second affidavit for client's boyfriend, who was also the defendant in client's personal injury action, and having client deliver the affidavit to boyfriend for his signature constituted a violation of the rules of professional conduct prohibiting a lawyer from communicating

about the subject of his representation with a party the lawyer knows to be represented by another lawyer, absent consent from the other lawyer. Sup.Ct.Rules, Rule226, Rules of Prof. Conduct, Rule 4.2.

1 Cases that cite this headnote

[7] **Attorney and Client**
⇦ Grounds for Discipline

Attorney's conduct in failing to report what he believed to be attorney misconduct by the opposing attorney in a personal injury case constituted a violation of the rules of professional conduct that required a lawyer having knowledge of any action, inaction, or conduct that he believed constituted misconduct to report the conduct to the appropriate professional authority. Sup.Ct.Rules, Rule 226, Rules of Prof.Conduct, Rule 8.3(a).

1 Cases that cite this headnote

[8] **Attorney and Client**
⇦ Deception of court or obstruction of administration of justice

Attorney's conduct in writing a letter to opposing counsel that threatened to file a disciplinary complaint against counsel if counsel failed to settle case with attorney within 20 days constituted violations of the rules of professional conduct prohibiting a lawyer from using means that have no substantial purpose other than to embarrass, delay, or burden a third person while representing a client, and engaging in conduct that is prejudicial to the administration of justice. Sup.Ct.Rules, Rule 226, Rules of Prof.Conduct, Rules 4.4, 8.4(d).

2 Cases that cite this headnote

[9] **Attorney and Client**
⇦ Charges and answers thereto

In an attorney disciplinary case, due process requires only that the charges must be sufficiently clear and specific to inform the attorney of the misconduct charged, but the State is not required to plead specific rules, since it is the factual allegations against which the attorney must defend. U.S.C.A. Const.Amend. 14.

Cases that cite this headnote

[10] **Attorney and Client**
⇦ Charges and answers thereto

Where the facts in connection with the charge in an attorney disciplinary case are clearly set out in the complaint an attorney is put on notice as to what ethical violations may arise therefrom.

Cases that cite this headnote

[11] **Attorney and Client**
⇦ Factors Considered

To determine the appropriate discipline, in an attorney disciplinary proceeding, the Supreme Court must evaluate the nature of the duty violated, the attorney's mental state, the potential or actual injury caused by the misconduct, and the existence of aggravating or mitigating factors.

Cases that cite this headnote

[12] **Attorney and Client**
⇦ Conditions

Public censure of attorney, in addition to the requirement that attorney attend and complete four additional hours of professional responsibility continuing legal education each year for the next three years, was warranted, in attorney disciplinary case, where attorney had his client communicate with an opposing party, even though attorney knew the opposing party was represented by counsel, he failed to report alleged professional misconduct by another attorney, and he threatened to report alleged misconduct by another attorney in order to gain an advantage in a lawsuit. Sup.Ct.Rules, Rule 226, Rules of Prof.Conduct, Rules 4.2,

4.4, 8.3(a) 8.4(d, g); Sup.Ct.Rules, Rule 203(a)(3).

2 Cases that cite this headnote

Attorneys and Law Firms

**1224 Alexander M. Walczak, deputy disciplinary administrator, argued the cause and was on the formal complaint for petitioner.

E. Thomas **Pyle**, III, respondent, argued the cause pro se.

*230 ORIGINAL PROCEEDING IN DISCIPLINE

PER CURIAM:

This is a contested proceeding in discipline filed by the Disciplinary Administrator against E. Thomas **Pyle**, III, an attorney licensed to the practice of law in Kansas. A hearing panel of the Kansas Board for the Discipline of Attorneys determined that respondent E. Thomas **Pyle**, III, violated Kansas Rule of Professional Conduct (KRPC) 4.2 (2003 Kan. Ct. R. Annot. 442) (communication with person represented by counsel); KRPC 4.4 (2003 Kan. Ct. R. Annot. 444) (respect for rights of third parties); KRPC 8.3(a) (2003 Kan. Ct. R. Annot. 463) (reporting professional misconduct); and KRPC 8.4(d) and (g) (2003 Kan. Ct. R. Annot. 464) (misconduct). **Pyle** argues that the panel's findings were not supported by the evidence and that the proposed discipline of public censure is inappropriate.

We adopt and affirm the hearing panel's findings and hereby order public censure of respondent.

The hearing panel's findings of fact are summarized as follows:

Pyle practices law in McPherson, Kansas. Sallie Moline was **Pyle's** client in a personal injury case against Ricci Gutzman. Moline was romantically involved with Gutzman.

On August 2, 1999, Moline tripped over a dog cable in Gutzman's driveway, injuring her knee. Moline contacted **Pyle** regarding her injury, and **Pyle** agreed to represent her in an action against Gutzman. Before filing a lawsuit, **Pyle** helped to prepare an affidavit for Gutzman to sign. The affidavit stated:

"1. I am Ricci Gutzman....

"2. "I am the defendant in a lawsuit filed by Sallie L. Moline....

*231 "3. "On August 2, 1999, Sallie injured her left leg and knee at my residence....

"4. Sallie injured her left leg and knee after tripped [*sic*] over a dog cable that was wrapped around a basketball goal and stretched out over the driveway. Sallie was walking to my car early in the morning and during the rain when she tripped over the dog cable and injured her left leg and knee.

"5. I normally and routinely removed the dog cable from the driveway every evening. However, the night before the accident, I neglected and failed to remove the dog cable from the driveway and Sallie was unaware of this failure.

"6. It is my understanding that Sallie has sustained permanent injuries to her left leg and knee, has incurred medical expenses, and has lost wages as a result of this accident.

**1225 "7. I take full responsibility for the accident and admit that I am responsible for Sallie's injuries.

"8. I have homeowner's insurance with American Family, which includes personal liability coverage. I direct my insurance company to admit liability in this claim and to make every possible effort to settle the claim for a reasonable and fair amount."

After Gutzman signed the affidavit, **Pyle** filed Moline's lawsuit against Gutzman.

American Family Insurance, Gutzman's homeowner's insurer, hired John D. Conderman to represent Gutzman in the lawsuit. Conderman filed an answer to Moline's petition, denying liability. After receiving the answer, **Pyle** wrote a letter to Conderman, which contained the following language:

"I have received your answer, request for Rule 118 statement, and defendant's interrogatories to plaintiff. I will forward the same to my client.

"However, please be advised that we have two options at this point. One, we can settle the case. Two, I can file a motion for sanctions pursuant to K.S.A. 60–211, a motion for partial summary judgment, and other legal and administrative pleadings.

"In regard to option one, the defendant (*i.e.* your client, not the insurance company) has admitted all liability in the claim and has taken full responsibility for the accident and injuries. Enclosed for your review is a copy of an affidavit from the defendant.

"It is my understanding that you were aware of this affidavit prior to filing the frivolous answer and interrogatories. In light of the defendant's admission and your awareness of the admission, your answer and interrogatories are frivolous and subject to immediate sanctions pursuant to K.S.A. 60–211.

***232** "You represent the defendant, not the insurance company. The defendant has admitted liability and taken full responsibility for his actions and omissions. You are his advocate and when you filed the answer, you were not advocating his position, but instead were advocating the insurance company's position and interests. Not only do I find this behavior frivolous, but I also find it unethical.

"The defendant is insured by American Family. The defendant and American Family entered in a contract. Each party to that contract made certain promises.

"Among the promises, the defendant promised to pay his premiums and cooperate with the insurance company in the event that a claim was filed. Just because a defendant admits responsibility and liability does not mean that he is not cooperating with his insurance company. Cooperating does not mean that the defendant has to ignore the truth. The defendant has kept his promises, however, the insurance company has not.

"Among the promises, the insurance company agreed to provide insurance coverage to the defendant and to provide the defendant with a defense in the event that a lawsuit was filed against [*sic*]. A defense includes an attorney who represents the defendant, insured, and not the insurance company. If the defendant's and insurance company's interests are in conflict, then the insurance company needs to hire an independent lawyer to represent the defendant and then their own lawyer to represent their interests. A truly independent lawyer listens to his or her client and advocates their positions [*sic*]—not the insurance company's position.

"It is completely unacceptable and unethical for an attorney to represent an individual, ignore that individual's admissions, and then advocate the insurance company's position. John, you know better than that. (I note in your advertisement in the Kansas Legal Directory that you are on the Kansas Board for Discipline of Attorneys from 1996 to present. You really should know better!) There is no excuse for your behavior. Just because the insurance company is paying your attorney fees does not give you the right to deny liability and contest an admitted case. Just because you file a denial of liability in 100% of the cases you defend also does not give you that right. In fact, an attorney ****1226** who states that he files a denial of liability in 100% of the cases he defends, has made an outright admission that he has filed frivolous pleadings.

"John, as an advocate for my client, I have a duty to represent my client zealously and maximize her recovery. I also have a duty to the Kansas courts, Kansas Supreme Court, Kansas attorneys, and the Kansas Rules of Professional Conduct. Your behavior (*i.e.* ignoring the defendant's admissions, advocating the insurance company's positions, and filing frivolous pleadings) has violated Rules 3.1, Meritorious Claims and Contentions, 3.2, Expediting Litigation, 3.3, Candor Toward the Tribunal, and 3.4, Fairness to Opposing Party and Counsel.

"In light of your behavior and the insurance company's position, I have been given the authority to accept a settlement offer for the policy limits of $300,000.00. Please forward this offer to both the defendant and the insurance company and then let me know if it is acceptable. However, please be advised that if we do not ***233** settle this matter and reach a negotiated resolution of this case within the next twenty (20) days, then I will take the following action:

1. File a motion for sanctions, including but not limited to attorney fees, interest, and penalties for the filing of the frivolous answer and interrogatories.

2. File a motion for partial summary judgment on the issue of liability;

3. Turn the facts of the case over to the Disciplinary Administrator;

4. Recommend to the defendant, through a letter to you, that he find another attorney that will represent his interests and not the insurance company's interests, recommend that he sue his current attorney and his insurance company, recommend that he file an ethics complaint against you with the Disciplinary Administrator, and recommend that he file a complaint against his insurance company with the Kansas Insurance Commissioner;

5. Consider filing a motion to disqualify you from representing the defendant because of your frivolous pleadings and desires to protect the insurance company instead of the defendant; and

6. File Requests for Admission regarding the issue of liability, the petition, and the defendant's affidavit.

"I take no pleasure in writing this letter or making the statements that I am making. However, because you have ignored your client's affidavit and admissions, I have no other alternative than to put you on notice of my intentions. You can remedy the wrong by either settling the case or more importantly, by filing an amended petition admitting liability and then restricting the scope of your discovery to the issue of damages. If you would do at least the latter of the two, I would be willing to waive any attorney fees and costs incurred in responding to the frivolous pleadings and discovery.

"So that you can evaluate our settlement offer, enclosed for your review are copies for the following records:

1. List of Medical Expenses;

2. Statement from Ricci L. Gutzman;

3. August 8, 2001, report from Dr. Harbin; and

4. Medical records from Memorial Hospital of Abilene, Salina Physical Therapy, Salina Regional Health Center, Salina Sports Medicine & Orthopedic Clinic, Salina Surgical Hospital, and Anesthesia Associates of Central, Kansas.

"As I indicated, our offer of settlement is open for twenty (20) days. If we do not resolve this matter or if I do not hear back from you, I will proceed as outlined above. Please forward my letter to both the defendant and the insurance company. Thank you for your immediate attention to this most serious matter."

After Conderman received this letter, Moline called **Pyle** and relayed statements made by Gutzman. In response, **Pyle** prepared a second affidavit, which he had Moline deliver to Gutzman without *234 Conderman's permission. Gutzman signed the affidavit and Moline returned it to **Pyle**. This second affidavit stated:

"1. I am Ricci Gutzman....

**1227 "2. I am the defendant in a lawsuit filed by Sallie L. Moline....

"3. On the 12th day of September, 2001, I had a conference with my attorney, John D. Conderman.

"4. Mr Conderman explained to me that had two choices. One, I could cooperate with the insurance company. Two, the insurance company could file a lawsuit against me and drop all of my insurance coverage.

"5. I am cooperating with the insurance company. I have given them copies of all of the legal papers filed against me, I have given them a factual history of the accident, and I have made myself available for conference. Just because I have admitted liability and responsibility for the accident, does not mean that I am not cooperating with the insurance company. The insurance company should not be able to hold me hostage to the truth just so that they do not have to pay a legitimate claim.

"6. I do not believe that Mr. Conderman is representing my interests. I do believe that Mr. Conderman is looking out for the insurance company's interests instead of my own interests. I am disgusted by Mr. Conderman's behavior and I do not want him to represent me."

It was delivered to Moline by **Pyle** with a cover letter stating the following:

"This letter follows your telephone call last night and my telephone call to you this morning. Enclosed please find a proposed affidavit to be signed by Mr. Gutzman. As a party to the case, you have the right to

communicate with Mr. Gutzman. Therefore, *please talk with him* and see if he will sign the enclosed affidavit. The affidavit will help us with your claim and will help him tremendously to defeat any claim by the insurance company and to document his potential claim against his attorney and his insurance company." (Emphasis added.)

Pyle then wrote a second letter to Conderman. A portion of that letter stated:

> "[P]lease be advised that any reporting to the Disciplinary Administrator is not connected to any settlement offer or negotiation in this case. Instead of proceeding with an ethics complaint and a motion for sanctions pursuant to K.S.A. 60–211, I would have preferred that you would [*sic*] amend your petition and discovery requests so that we could litigate the issue of damages."

Conderman sent a copy of **Pyle's** first letter and copies of the petition and answer to the Disciplinary Administrator's office and withdrew as Gutzman's counsel, claiming **Pyle's** behavior had undermined *235 his relationship with his client. **Pyle** has argued in this proceeding that the relationship between Gutzman and Conderman was undermined by Conderman's words to Gutzman, not by **Pyle's** behavior.

The disciplinary panel in this matter discerned no violation of the Kansas Rules of Professional Conduct by Conderman.

Pyle has contended that his first letter to Conderman was not intended as a threat. He also says in his exceptions to the panel's final hearing report that he wrote this letter in response to information relayed to him by Moline. Gutzman allegedly told Moline that Conderman had said he represented Gutzman's insurer rather than Gutzman and that Conderman denied liability in 100 percent of his cases regardless of the facts.

Pyle admits the letter was unprofessional but minimizes his conduct by saying that he sent the letter to Conderman in the "heat of battle." **Pyle's** exceptions attach a draft of a letter he claims was preferable. At his hearing, **Pyle** agreed that he should not have sent the first letter to Conderman and testified that it "adversely reflect[ed] on his fitness to practice law." He stated that he would not send similar letters in the future and that he would not "use his client to obtain an affidavit from an opposing party represented by counsel."

Pyle argues that he did not communicate with Gutzman when he prepared the second affidavit. He maintains he told Moline that he could not communicate with Gutzman but **1228 that she could, and he asserts he prepared the second affidavit at her direction.

In addition to finding that **Pyle** violated KRPC 4.2, 8.3(a), and 8.4(g), as alleged in the formal complaint, the panel considered whether **Pyle** violated KRPC 4.3 (2003 Kan. Ct. R. Annot. 443), dealing with an unrepresented person, and 8.4(a), violating the rules through the acts of another. The panel found neither violation. The panel also considered whether **Pyle** violated KRPC 4.4 regarding respect for the rights of third persons and KRPC 8.4(d) regarding misconduct, by threatening to report Conderman to the Disciplinary Administrator's office to gain an advantage in the lawsuit. The panel found violations of these rules.

*236 The panel considered the factors outlined by the American Bar Association in its Standards for Imposing Lawyer Sanctions (1991) and unanimously recommended that **Pyle** be publicly censured by this court. The panel also recommended that **Pyle** attend and successfully complete 4 additional hours of professional responsibility continuing legal education each year for the next 3 years, in addition to the 12 hours required by the rules.

Analysis

[1] [2] [3] [4] [5] In disciplinary proceedings, "this court considers the evidence, the findings of the disciplinary panel, and the arguments of the parties and determines whether violations of KRPC exist and, if they do, what discipline should be imposed. [Citation omitted.] Any attorney misconduct must be established by substantial, clear, convincing, and satisfactory evidence." *In re Lober,* 276 Kan. 633, 636, 78 P.3d 442 (2003).

"This court views the findings of fact, conclusions of law, and recommendations made by the disciplinary panel as advisory, but gives the final hearing report the same dignity as a special verdict by a jury or the findings of a trial court. Thus, the disciplinary panel's report will be adopted where amply sustained by the evidence, but not where it is against the clear weight of the evidence. [Citations omitted.] When the panel's findings relate to matters about which there was conflicting testimony, this court recognizes that the panel, as the trier of fact, had the opportunity to observe the witnesses and evaluate their demeanor. Therefore, we do not reweigh the evidence or pass on credibility of witnesses." *Lober,* 276 Kan. at 636–37, 78 P.3d 442.

KRPC 4.2

[6] The hearing panel found that **Pyle** violated KRPC 4.2 by preparing the second affidavit and having Moline deliver it to Gutzman for his signature.

KRPC 4.2 states: "In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so."

The panel considered whether Gutzman also violated KRPC 8.4(a) but concluded that 8.4(a) was incorporated in 4.2. Because of this, the panel reasoned that finding **Pyle** also in violation of *237 8.4(a) would not serve any useful purpose. KRPC 8.4(a) states: "It is professional misconduct ... to: [v]iolate ... the rules of professional conduct ... through the acts of another." The panel relied on American Bar Association Formal Opinion 95–396 and this court's decision in *In re Marietta,* 223 Kan. 11, 569 P.2d 921 (1977).

American Bar Association Formal Opinion 95–396 states:

> "A lawyer may not direct an investigative agent to communicate with a represented person in circumstances where the lawyer herself would be prohibited from doing so. Whether in a civil or criminal matter, if the investigator acts as the lawyer's 'alter ego,' the lawyer is ethically responsible for the investigator's conduct."

In *Marietta,* an attorney prepared a release of liability for back child support for his client to have the client's ex-wife sign; she had representation. The rule in effect at that time, DR 7–104A(1) of the Code of Professional Responsibility, 214 Kan. lxxxvvviii, stated: "During the course of his representation of a client a lawyer shall not: (1) Communicate *or cause another to communicate* **1229 on the subject of the representation with a party he knows to be represented by a lawyer in that matter...." (Emphasis added.) Marietta argued that he was not the *cause* of the communication; instead, he was merely a scrivener following his client's orders. This court held that Marietta violated DR 7–104A(1) by "preparing said release, ... knowing its significance and its intended use, [and] caus[ing] his client to communicate with his ex-wife without the consent of his ex-wife's attorney." *Marietta,* 223 Kan. 11, 569 P.2d 921.

In the present case, the hearing panel found "that even though KRPC 4.2 does not contain the language 'or cause another to communicate,' ... attorneys are prohibited from using another, including a client, to do that which the attorney could not do himself."

The United States District Court for the District of Kansas has interpreted KRPC 4.2 similarly. In *Holdren v. General Motors Corp.,* 13 F.Supp.2d 1192 (D.Kan.1998), Holdren, an employee of General Motors (GM), spoke with his attorney about getting statements from GM employees, including management. Holdren's attorney advised him on obtaining affidavits from the other *238 employees, informing Holdren of the admissibility of out-of-court statements versus "signed sworn statements." The attorney then showed Holdren how to draft an affidavit. GM requested a protective order against Holdren's attempts to get affidavits from employees. GM "concede[d] that the parties ... are not prohibited from communicating directly with each other" but argued that Holdren's counsel violated KRPC 4.2. 13 F.Supp.2d at 1193. The court noted that the facts "present[ed] a close case" but granted GM's protective order because Holdren's counsel "circumvented KRPC 4.2 through the actions of his client." 13 F.Supp.2d at 1193.

The *Holdren* court reviewed decisions addressing whether attorneys violated KRPC 4.2 by "causing" their clients to

act. *Holdren,* 13 F.Supp.2d at 1194–95 (citing *Marietta,* 223 Kan. 11, 569 P.2d 921; ABA Formal Opinion 95–396). The court found that Holdren's counsel, "while attempting to walk the appropriate line ever so delicately, ha[d] simply stepped over that line" by encouraging Holdren to obtain affidavits from GM employees, and "facilitat[ing Holdren's] actions by advising him how to draft an affidavit," albeit at Holdren's request. *Holdren,* 13 F.Supp.2d at 1195–96. *Holdren* held that because KRPC 8.4(a) prohibits violations of the professional code "through the acts of another," plaintiff's counsel was in violation of KRPC 4.2 when he encouraged his client to contact certain GM employees. An attorney "may not circumvent KRPC 4.2 by directing his client to contact [those] employees." *Holdren,* 13 F.Supp.2d at 1194.

Pyle relies on the Comment to KRPC 4.2, which states "parties to a matter may communicate directly with each other." He claims that an attorney's client is not an "agent of a lawyer—instead an agent of a lawyer would be an employee [or an] independent contractor.... A client is not the alter ego of the lawyer." **Pyle** is correct in stating that KRPC 4.2 does not restrict communication between the parties; and, in certain cases, communication between the parties should be encouraged.

Under the facts of this case, however, the hearing panel's conclusion that **Pyle** violated KRPC 4.2 was supported by clear and convincing evidence. **Pyle's** claim that he did not cause the affidavit to be delivered to Gutzman is very similar to Marietta's argument. *239 Even though DR 7–104A(1), the rule relied on by this court in *Marietta,* has changed, the analysis of its restrictions on lawyers' behavior still has vitality. See *Holdren,* 13 F.Supp.2d 1192. **Pyle** prepared an affidavit for Gutzman concerning the very nature of the case, albeit at his client's request, and encouraged Moline to deliver it to Gutzman, who was represented by counsel. **Pyle** knew Moline would obtain Gutzman's signature on the affidavit without opposing counsel's consent. **Pyle**, through his client, communicated with Gutzman about the subject of the case without Conderman's approval. **Pyle** circumvented the constraints of KRPC 4.2 by encouraging his client to do that which he could not.

KRPC 8.3(a)

[7] The hearing panel found that **Pyle** violated KRPC 8.3(a) by not reporting what **1230 **Pyle** believed to be attorney misconduct on Conderman's part.

KRPC 8.3(a) states: "A lawyer having knowledge of any action, inaction, or conduct which in his or her opinion constitutes misconduct of an attorney under these rules *shall* inform the appropriate professional authority." (Emphasis added.)

Pyle argues that the word "substantial" found in the comments to the rule should be read into KRPC 8.3(a), requiring there to be knowledge of "substantial misconduct" before a duty to report arises. He also claims that reporting Conderman's alleged misconduct would have required publicizing confidential information, protected by KRPC 1.6 (2003 Kan. Ct. R. Annot. 368), and that he did eventually report the matter in a timely fashion.

Pyle's argument that the word "substantial" should be read into the rule is without merit. The language of the rule requires a lawyer to report "*any* ... conduct" which the lawyer thinks is misconduct. The language of the rule is clear. Further, in **Pyle's** brief he stated that at the time he wrote the first letter to Conderman, he believed Conderman's conduct to be substantial misconduct.

Moreover, **Pyle** believed Conderman committed misconduct by filing an answer and interrogatories frivolously. The evidence to support that belief was contained in the filings, not in the confidential communications between **Pyle** and Moline. The filings included *240 Gutzman's first affidavit admitting liability and Conderman's answer and interrogatories. **Pyle** would not have violated KRPC 1.6 by reporting Conderman's supposed frivolous filings.

Pyle simply states that he reported Conderman's misconduct in a timely fashion without pointing out his report in the record. Further, at his hearing, **Pyle** testified that he never filed a KRPC 8.3 complaint against Conderman. **Pyle** argues that the requirements of KRPC 8.3 were met when he responded to Disciplinary Administrator Stan Hazlett's letter regarding his own conduct, which referred to Conderman's behavior. **Pyle's** response to a letter questioning his own misconduct is not an independent report of another attorney's misconduct. He never met the requirements of KRPC 8.3 after forming an opinion that Conderman had committed an ethical violation. It is apparent from the clear and convincing evidence before the panel that **Pyle** believed

that Conderman had committed misconduct but did not report it, choosing instead to write a letter threatening Conderman to gain settlement advantage. KRPC 8.3(a) was violated.

KRPC 8.4(g)

Pyle admits to violating KRPC 8.4(g).

KRPC 4.4 AND KRPC 8.4(d)

[8] The Formal Complaint did not contain allegations that **Pyle** violated KRPC 4.4 (2003 Kan. Ct. R. Annot. 444) or 8.4(d). Nevertheless, the hearing panel found that **Pyle** violated these rules by writing the first letter to Conderman and by threatening to file a complaint with the Disciplinary Administrator's office.

KRPC 4.4 states: "In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal right of such a person."

KRPC 8.4(d) states: "It is professional misconduct for a lawyer to: ... engage in conduct that is prejudicial to the administration of justice."

At the formal hearing, a member of the panel questioned **Pyle** regarding his intent in sending the letter: "Right, it was [the] threat *241 that you would file a complaint unless he admitted liability, correct?" **Pyle** answered: "That's the way it reads." The member further questioned **Pyle**: " [L]ook at your language.... 'If we do not settle this ... within the next 20 days, I will take the following action: ... turn the facts of the case over to the Disciplinary Administrator.' That's a threat that if it's not settled you're going to turn it in, right?" **Pyle** answered: "That's what the letter says."

The panel described **Pyle's** demeanor as "Clintonesque" in answering this line of questioning; **Pyle's** answers "did not meet straight on the substance of the questions." **1231 The panel concluded that **Pyle** wrote the letter merely to threaten Conderman with the sole purpose "of attempting to frighten or to put pressure on opposing counsel to settle the lawsuit upon the terms dictated and desired by [**Pyle**]." In a footnote to the final hearing report, the panel opined that **Pyle** also may have committed blackmail, pursuant to K.S.A. 21–3428. The panel's conclusion on **Pyle's** motives is adequately supported by the evidence and the panel's judgment on his credibility. See ***In re Lober,*** 276 Kan. at 637, 78 P.3d 442.

The first letter written to Conderman indicated that Conderman had two choices: He could either settle the lawsuit or have a motion for sanctions and a disciplinary action filed against him. **Pyle** asserted that by filing an answer to the lawsuit, Conderman was in violation of KRPC 3.1 (2003 Kan. Ct. R. Annot. 418), 3.2 (2003 Kan. Ct. R. Annot. 420), 3.3 (2003 Kan. Ct. R. Annot. 424), and 3.4 (2003 Kan. Ct. R. Annot. 429). **Pyle** later admitted that this letter was unprofessional and should never have been sent. This admission is tantamount to acknowledging that the letter was used as a tool to gain a better bargaining position in the lawsuit. In our view, there was clear and convincing evidence that **Pyle** sent a letter that had "no substantial purpose other than to embarrass, delay, or burden" Conderman. KRPC 4.4. His conduct was obviously prejudicial to the administration of justice.

[9] [10] **Pyle** also challenges the procedure followed by the panel regarding these two violations. Under certain circumstances, rules not cited in the formal complaint may be considered by the hearing panel. ***In re Swisher,*** 273 Kan. 143, 148, 41 P.3d 847 (2002); *State v. Caenen,* 235 Kan. 451, 681 P.2d 639 (1984). "Due process requires *242 only that the charges must be sufficiently clear and specific to inform the attorney of the misconduct charged, but the State is not required to plead specific rules, since it is the factual allegations against which the attorney must defend." *Caenen,* 235 Kan. at 458, 681 P.2d 639. *Caenen* held: "Where the facts in connection with the charge are clearly set out in the complaint a respondent is put on notice as to what ethical violations may arise therefrom." *Caenen,* 235 Kan. 451, Syl. ¶ 3, 681 P.2d 639.

Pyle contends that he was not given adequate notice that he would be accused of violating KRPC 4.4 and 8.4(d). We disagree.

The facts set out in the formal complaint included excerpts from **Pyle's** first letter to Conderman and stated that **Pyle** used the threat of reporting Conderman's alleged misconduct to the Disciplinary Attorney's office "as leverage to force Mr. Conderman to settle the lawsuit. The said conduct of the Respondent is prejudicial to administration of justice and adversely reflects on the Respondent's fitness to practice law." **Pyle** received

adequate notice that KRPC 4.4 and KRPC8.4(a)were implicated by his actions.

Discipline

[11] " 'To determine the appropriate discipline we must evaluate the nature of the duty violated, the attorney's mental state, the potential or actual injury caused by the misconduct, and the existence of aggravating or mitigating factors.... The discipline must be based on the specific facts and circumstances of each case, so other disciplinary actions provide little guidance. [Citation omitted.] Historically, we have applied the ABA Standards for Imposing Lawyers Sanctions as a guide for determining the appropriate discipline.' " *In re Lober,* 276 Kan. at 640, 78 P.3d 442 (citing *In re Rumsey,* 276 Kan. 65, 78, 71 P.3d 1150 [2003]).

[12] The hearing panel unanimously recommended that **Pyle** be publicly censured by this court and that he attend and successfully complete 4 hours of professional responsibility continuing legal education, in addition to the 12 hours required by the rules, each year for the next 3 years.

We are not bound by the panel's proposed discipline. Rule 212(f) (2003 Ct. R. Annot. 270); *In re Bailey,* 268 Kan. 63, 64, 986 P.2d 1077 (1999).

Pursuant to ABA Standard 3, the panel considered the following factors:

*243 "*Duty Violated.* The Respondent violated his duty to the profession to maintain personal integrity.

**1232 "*Mental State.* The Respondent negligently violated his duty.

"*Injury.* As a result of the Respondent's misconduct, the Respondent caused actual injury to the attorney/client relationship between Mr. Conderman and Mr. Gutzman.

"*Aggravating or Mitigating Factors.* Aggravating circumstances are any considerations or factors that may justify an increase in the degree of discipline to be imposed. Mitigating circumstances are any considerations or factors that may justify a reduction in the degree of discipline to be imposed. In reaching its recommendation for discipline, the Hearing Panel, in this case, found no aggravating or mitigating factors present."

The panel also considered the following ABA Standards:

Standard 6.33: "Reprimand is generally appropriate when a lawyer is negligent in determining whether it is proper to engage in communication with an individual in the legal system, and causes injury or potential injury to a party or interference or potential interference with the outcome of the legal proceeding."

Standard 7.3: "Reprimand is generally appropriate when a lawyer negligently engages in conduct that is a violation of a duty owed to the profession, and causes injury or potential injury to a client, the public, or the legal system."

Pyle requests that this court consider informal admonition or private censure because he "engaged in an isolated instance of negligence and caused little or no actual or potential injury to a party, or caused little or no actual or potential interference with the outcome of a legal proceeding."

After consideration of the facts in this case and the appropriate ABA Standards, we accept the panel's recommendation of published censure.

IT IS THEREFORE ORDERED that the respondent, E. Thomas **Pyle**, III, be censured in accordance with Supreme Court Rule 203(a)(3) (2003 Kan. Ct. R. Annot. 226) for the violations found herein.

IT IS FURTHER ORDERED that this order be published in the official Kansas Reports and that the costs of this action be assessed to respondent.

All Citations

278 Kan. 230, 91 P.3d 1222

End of Document

ATTACHMENT D
HYPOTHETICALS

HYPOTHETICAL 1

Your law partner tells you that while attending the local chapter of SOABs, he overheard that a very prominent local divorce attorney, Les C. Vious, is charging contingent fees, based on the amount of alimony he can obtain for his clients. Are you required to report Mr. Vious to the Disciplinary Administrator's Office? Why or why not?

HYPOTHETICAL 2

Jane Doe retains you to file a motion to modify her child support. During the course of your representation, Ms. Doe confides that her former attorney and boyfriend, Les C. Vious, under-reported her income in the Domestic Relations Affidavit, that was previously filed in the case. Jane explains that even though she and Les are no longer together, she does not wish for him to get into any trouble, so she tells you not to disclose the misconduct. Are you nevertheless obligated to report Les' misconduct to this office? Do you need to disclose his actions to anyone else?

HYPOTHETICAL 3

Les C. Vious hires you to represent him in an attorney disciplinary proceeding after Jane Doe's ex-husband files a complaint with this office, alleging that Les and Jane became paramours during Les' representation of Jane in the divorce proceeding. Les tells you that he falsely reported Jane's income in the Domestic Relations Affidavit so she would be entitled to a larger amount of alimony. Les refuses to self-report. Do you have a duty to report this information to the Disciplinary Administrator's Office? Why or why not?

HYPOTHETICAL 4

You are a lawyer and a KALAP volunteer. As part of your duties, you are asked to mentor Les C. Vious, a local divorce attorney who is seeking assistance for sex addiction. During the course of your mentorship, Les disclosed that he routinely engaged in sexual conduct with his clients after being retained in their divorce proceedings. Are you required to report Les' misconduct to the Disciplinary Administrator's Office? Why or why not?

HYPOTHETICAL 5

Fresh out of law school, you have just been hired by a law firm. The managing partner, Hyde N. Sand, and another attorney in the firm, Les C. Vious, take you out for drinks to celebrate your passage of the bar exam. While at the bar, Les discloses that he is a recovering sex addict, and that for years he engaged in sexual relations with his clients after the legal relationship commenced. Hyde advises he was aware of Les' conduct, but took no further action because Les always obtained informed consent in writing from the clients prior to entering into the romantic relationship. As such, Hyde instructs you not to disclose this information to anyone. Do you have a duty to report Les or Hyde? Why or why not?

ATTACHMENT E

In re McDaneld, 389 P.3d 976 (2017)

389 P.3d 976
Supreme Court of Kansas.

In the MATTER OF Jason Richard
MCDANELD, Respondent.

No. 116,640
|
March 3, 2017

Synopsis

Background: Attorney disciplinary proceeding was instituted, after which hearing panel of Board for Discipline of Attorneys made findings of fact, conclusions of law, and recommended attorney's disbarment.

Holdings: The Supreme Court held that:

[1] attorney violated professional conduct and Supreme Court rules governing unauthorized practice of law, conduct prejudicial to the administration of justice, failure to disclose a fact necessary to correct a known misapprehension, failure to cooperate in disciplinary investigation, failure to file answer in disciplinary proceeding, and notification of clients upon suspension, and

[2] disbarment was appropriate sanction for attorney's misconduct.

Attorney disbarred.

West Headnotes (4)

[1] Attorney and Client
⇦ Review

In an attorney disciplinary proceeding, the Supreme Court considers the evidence, the findings of the disciplinary panel, and the arguments of the parties and determines whether violations of Kansas Rules of Professional Conduct (KRPC) exist and, if they do, what discipline should be imposed. Kan. Sup. Ct. R. 211(f).

Cases that cite this headnote

[2] Attorney and Client
⇦ Weight and sufficiency

Attorney misconduct must be established by clear and convincing evidence at an attorney disciplinary proceeding; clear and convincing evidence is evidence that causes the factfinder to believe that the truth of the facts asserted is highly probable. Kan. Sup. Ct. R. 211(f).

Cases that cite this headnote

[3] Attorney and Client
⇦ Grounds for Discipline

Attorney and Client
⇦ Deception of court or obstruction of administration of justice

Attorney and Client
⇦ Misconduct as to Client

Attorney violated professional conduct and Supreme Court rules governing unauthorized practice of law, conduct prejudicial to the administration of justice, failure to disclose a fact necessary to correct a known misapprehension, failure to cooperate in disciplinary investigation, failure to file answer in disciplinary proceeding, and notification of clients upon suspension by continuing to practice law after his license had been suspended for failure to pay continuing legal education fee and for failure to comply with continuing legal education requirements, and by his lack of response to resulting disciplinary proceeding. Kan. R. Prof. Conduct 5.5(a), 8.1(b), 8.4(d); Kan. Sup. Ct. R. 207(b), 211(b), 218(a).

Cases that cite this headnote

[4] Attorney and Client
⇦ Disbarment;Revocation of License

Disbarment was appropriate sanction for attorney's misconduct in continuing to practice law after his license was suspended, and failure to participate in resulting disciplinary proceeding, in violation of

professional conduct and Supreme Court rules; attorney's contempt of order suspending his license was evidenced by his court appearances on behalf of multiple clients, and once disciplinary investigation began, attorney systematically and intentionally failed to cooperate, culminating with his failure to appear before hearing panel or Supreme Court. Kan. R. Prof. Conduct 5.5(a), 8.1(b), 8.4(d); Kan. Sup. Ct. R. 207(b), 211(b), 218(a).

Cases that cite this headnote

*977 Original proceeding in discipline.

Attorneys and Law Firms

Penny R. Moylan, Deputy Disciplinary Administrator, argued the cause, and Stanton A. Hazlett, Disciplinary Administrator, was with her on the formal complaint for the petitioner.

Respondent did not appear.

ORIGINAL PROCEEDING IN DISCIPLINE

Per Curiam:

This is an uncontested original proceeding in discipline filed by the office of the Disciplinary Administrator against respondent, Jason Richard **McDaneld**, of Topeka, an attorney admitted to the practice of law in Kansas in 2008.

On July 7, 2016, the office of the Disciplinary Administrator filed a formal complaint against respondent alleging violations of the Kansas Rules of Professional Conduct (KRPC), and on July 12, 2016, the same office filed an amended formal complaint. Respondent did not file an answer. A hearing was held on the complaint before a panel of the Kansas Board for Discipline of Attorneys on September 7, 2016, where the respondent did not appear. The hearing panel determined that respondent violated KRPC 5.5(a) (2017 Kan. S. Ct. R. 361) (unauthorized practice of law); 8.4(d) (2017 Kan. S. Ct. R. 379) (engaging in conduct prejudicial to the administration of justice); 8.1(b) (2017 Kan. S. Ct. R. 377) (failure to respond to lawful demand for information from disciplinary authority); Supreme Court Rule 207(b) (2017 Kan. S. Ct. R. 246) (failure to cooperate in disciplinary investigation); Rule 211(b) (2017 Kan. S. Ct. R. 251) (failure to file answer in disciplinary proceeding); and Rule 218(a) (2017 Kan. S. Ct. R. 262) (notification of clients upon suspension).

Upon conclusion of the hearing, the panel made the following findings of fact and conclusions of law, together with its recommendation to this court:

"*Findings of Fact*

....

"6. On September 24, 2014, the Kansas Supreme Court issued an order suspending the respondent's license to practice law for failing to pay the continuing legal education fee and for failing to comply with the continuing legal education requirements. A copy of the order was sent to the respondent and the respondent knew or should have known of his suspension.

"7. After his license to practice law had been suspended, the respondent continued to practice law. The respondent appeared in court as attorney of record in at least the following cases in Shawnee County District Court:

'a. State v. Kennedy, 2014-CR-934;

'b. State v. Kuykendall, 2014-CR-2339;

'c. State v. Dalrymple, 2014-TR-7584;

'd. State v. Kelly, 2014-CR-2192;

'e. State v. Slusser, 2014-TR-6649;

'f. State v. Lopez, 2014-CR-2349;

'g. State v. Murphy, 2014-TR-830;

'h. State v. Merryfield, 2014-CR-1794.'

"8. On April 27, 2015, Gray Horse Farms, LLC filed a petition against the respondent and DL&K Enterprises, Inc. d/b/a Ichabod Laundra Bar in Shawnee County District Court, case number 2015LM4891, seeking damages. On May 11, 2015, 8 months after being suspended, the respondent filed an answer to the petition on behalf of himself and DL&K Enterprises,

Inc. d/b/a Ichabod Laundra Bar. Additionally, the respondent filed a motion to continue a hearing on behalf of DL&K Enterprises, Inc. d/b/a Ichabod Laundra Bar. DL&K Enterprises, Inc. d/b/a Ichabod Laundra Bar is wholly owned by the respondent. The motion to continue included the following: 'The reason for this request is the Defendant is an attorney and has to be in Municipal Court at the same time as the current setting.' Again, at the time the respondent filed the motion, the respondent's license to practice law remained suspended.

"9. On May 26, 2015, Kate Baird, deputy disciplinary administrator sent a letter to the respondent, explaining that the disciplinary administrator's office had received a report that the respondent was practicing law even though his license to ***978** do so was suspended. Ms. Baird directed the respondent to provide an explanation within 15 days. The respondent failed to respond to the letter.

"10. On November 2, 2015, Wesley F. Smith filed a complaint against the respondent, alleging that the respondent practiced law without a license.

"11. On November 3, 2015, Ms. Baird sent a second letter to the respondent, explaining that the disciplinary administrator's office had docketed the complaint for investigation. Pat Scalia was appointed to investigate the complaint.

"12. On November 16, 2015, Ms. Scalia directed the respondent to provide a written response by November 30, 2015. The respondent failed to provide a written response to the complaint as directed by Ms. Scalia.

"13. On February 9, 2016, Terry L. Morgan, special investigator for the disciplinary administrator sent an electronic mail message to the respondent, requesting that the respondent contact Stanton A. Hazlett. That same day, the respondent responded as follows:

> 'I have chosen a different career path. I don't have the time to accommadate [*sic*] Mr. Hazlett in any way. If they want to simply suspend my license that is fine. For the time being, I am done practicing. I would prefer not to receive any further communications.'

"14. On July 7, 2016, Ms. Moylan filed the formal complaint in this case. The disciplinary administrator's office forwarded a copy of the formal complaint to the respondent by certified mail and by regular mail. The copy of the formal complaint sent by certified mail was returned to the disciplinary administrator's office. The copy of the formal complaint sent by regular mail was not returned.

"15. On July 12, 2016, Ms. Moylan filed an amended formal complaint. The disciplinary administrator's office forwarded a copy of the amended formal complaint to the respondent by regular mail. The copy of the amended formal complaint was not returned.

"*Conclusions of Law*

"16. It is appropriate to consider violations not specifically included in the formal complaint under certain circumstances. The law in this regard was thoroughly examined in *State v. Caenen*, 235 Kan. 451, 681 P.2d 639 (1984), as follows:

> 'Supreme Court Rule 211(b) (232 Kan. clxvi), requires the formal complaint in a disciplinary proceeding to be sufficiently clear and specific to inform the respondent of the alleged misconduct.
>
> 'The seminal decision regarding the applicability of the due process clause to lawyer disciplinary proceedings is found in ***In re Ruffalo***, 390 U.S. 544, 88 S.Ct. 1222, 20 L.Ed.2d 117, *reh. denied* 391 U.S. 961, 88 S.Ct. 1833, 20 L.Ed.2d 874 (1968). There the United States Supreme Court held that a lawyer charged with misconduct in lawyer disciplinary proceedings is entitled to procedural due process, and that due process includes fair notice of the charges sufficient to inform and provide a meaningful opportunity for explanation and defense.
>
> 'Decisions subsequent to *Ruffalo* have refined the concept of due process as it applies to lawyer disciplinary hearings, and suggest that the notice to be provided be more in the nature of that provided in civil cases. The weight of authority appears to be that, unlike due process provided in criminal actions, there are no stringent or technical requirements in setting forth allegations or descriptions of alleged offenses. ... Due process requires only that the charges must be sufficiently clear and specific to inform the attorney of the misconduct charged, but the state is not required to plead specific rules, since it is the factual allegations against which the attorney

must defend. ... However, if specific rules are pled, the state is thereafter limited to such specific offenses. ...

'Subsequent to the *Ruffalo* decision, the due process requirements in lawyer disciplinary proceedings have been given exhaustive treatment by this court. In *State v. Turner*, 217 Kan. 574, 538 P.2d 966, 87 A.L.R.3d 337 [(1975)], the court summarized prior Kansas and federal ***979** precedent on the question, including *Ruffalo*, and held in accordance with established precedent that the state need not set forth in its complaint the specific disciplinary rules allegedly violated ..., nor is it required to plead specific allegations of misconduct. ... What is required was simply stated therein:

"We must conclude that where the facts in connection with the charge are clearly set out in the complaint a respondent is put on notice as to what ethical violations may arise therefrom. ...

....

"It is not incumbent on the board to notify the respondent of charges of specific acts of misconduct as long as proper notice is given of the basic factual situation out of which the charges might result." '

235 Kan. at 458–59, 681 P.2d 639 (citations omitted). Thus, when the formal complaint alleges facts that support a violation of a rule not referenced specifically in the complaint, the court will consider and may find that additional violation. In this case, the disciplinary administrator included sufficient facts in the formal complaint to warrant consideration of a violation of Kan. Sup. Ct. R. 218. Thus, the hearing panel concludes that it is proper to consider a violation of Kan. Sup. Ct. R. 218.

"17. Based upon the findings of fact, the hearing panel concludes as a matter of law that the respondent violated KRPC 5.5, KRPC 8.1, KRPC 8.4, Kan. Sup. Ct. R. 207, Kan. Sup. Ct. R. 211, and Kan. Sup. Ct. R. 218, as detailed below.

"18. The respondent failed to appear at the hearing on the formal complaint. It is appropriate to proceed to hearing when a respondent fails to appear only if proper service was obtained. Kan. Sup. Ct. R. 215 governs service of process in disciplinary proceedings. That rule provides, in pertinent part as follows:

'(a) Service upon the respondent of the formal complaint in any disciplinary proceeding shall be made by the Disciplinary Administrator, either by personal service or by certified mail to the address shown on the attorney's most recent registration, or at his or her last known office address.

....

'(c) Service by mailing under subsection (a) or (b) shall be deemed complete upon mailing whether or not the same is actually received.'

In this case, the Disciplinary Administrator complied with Kan. Sup. Ct. R. 215(a) by sending a copy of the formal complaint and the notice of hearing, *via* certified United States mail, postage prepaid, to the address shown on the respondent's most recent registration. The hearing panel concludes that the respondent was afforded the notice that the Kansas Supreme Court Rules require and more.

"KRPC 5.5

"19. KRPC 5.5(a) prohibits the unauthorized practice of law. After the Kansas Supreme Court suspended the respondent's license to practice law, the respondent continued to practice law. Specifically, the respondent repeatedly appeared in Shawnee County District Court. Additionally, the respondent filed pleadings on behalf of his company, DL&K Enterprises, Inc. d/b/a Ichabod Laundra Bar. As such, the hearing panel concludes that the respondent violated KRPC 5.5(a). *See also* Kan. Sup. Ct. R. 218(c).

"KRPC 8.4(d)

"20. 'It is professional misconduct for a lawyer to ... engage in conduct that is prejudicial to the administration of justice.' KRPC 8.4(d). The respondent engaged in conduct that was prejudicial to the administration of justice when he appeared in court on behalf of clients and when he filed pleadings on behalf of his company after his license was suspended. As such, the hearing panel concludes that the respondent violated KRPC 8.4(d).

"KRPC 8.1 and Kan. Sup. Ct. R. 207(b)

"21. Lawyers must cooperate in disciplinary investigations. KRPC 8.1(b) and Kan. Sup. Ct. R. 207(b) provide the requirements in this regard. '[A] lawyer in connection with a ... disciplinary matter, *980 shall not: ... knowingly fail to respond to a lawful demand for information from [a] ... disciplinary authority ...'. KRPC 8.1(b).

> 'It shall be the duty of each member of the bar of this state to aid the Supreme Court, the Disciplinary Board, and the Disciplinary Administrator in investigations concerning complaints of misconduct, and to communicate to the Disciplinary Administrator any information he or she may have affecting such matters.'

Kan. Sup. Ct. R. 207(b). The respondent knew that he was required to forward a written response to the initial complaint—he had been repeatedly instructed to do so in writing by the disciplinary administrator and the attorney investigator. Because the respondent knowingly failed to provide a written response to the initial complaint, the hearing panel concludes that the respondent violated KRPC 8.1(b) and Kan. Sup. Ct. R. 207(b).

"Kan. Sup. Ct. R. 211(b)

"22. The Kansas Supreme Court Rules require attorneys to file answers to formal complaints in disciplinary cases. Kan. Sup. Ct. R. 211(b) provides the requirements:

> 'The respondent shall serve an answer upon the Disciplinary Administrator within twenty days after the service of the complaint unless such time is extended by the Disciplinary Administrator or the hearing panel.'

Kan. Sup. Ct. R. 211(b). The respondent violated Kan. Sup. Ct. R. 211(b) by failing to file an answer to the formal complaint or the amended formal complaint. Accordingly, the hearing panel concludes that the respondent violated Kan. Sup. Ct. R. 211(b).

"Kan. Sup. Ct. R. 218

"23. When the Kansas Supreme Court issues an order suspending an attorney's license to practice law, lawyers are required to take certain action under Kan. Sup. Ct. R. 218(a).

> '(a) Attorney's Duty. When the Supreme Court issues an order or opinion suspending or disbarring an attorney or striking the attorney's name from the roll of attorneys, the attorney must, within 14 days of the order or opinion:
>
> (1) notify each client, in writing, that the attorney is suspended, disbarred, or is no longer authorized to practice law and the client should obtain new counsel;
>
> (2) notify all opposing counsel, in writing, that the attorney is suspended, disbarred, or is no longer authorized to practice law;
>
> (3) notify all courts where the attorney is counsel of record and the chief judge of the district in which the attorney resides, in writing, that the attorney is suspended, disbarred, or is no longer authorized to practice law;
>
> (4) file a motion to withdraw in each case in which the attorney is counsel of record; and
>
> (5) notify each jurisdiction, in writing, where the attorney is or has been authorized to practice law that the attorney is suspended, disbarred, or is no longer authorized to practice law.'

Following the respondent's suspension, he continued to enter his appearance on behalf of clients, appear in court on behalf of clients, and file pleadings on behalf of clients. Thus, because the respondent continued to practice law following his suspension, it is clear that the respondent failed to notify his clients, opposing counsel, and the courts of his suspension and failed to file motions to withdraw from each case in which the respondent was counsel of record. As such, the hearing panel concludes that the respondent violated Kan. Sup. Ct. R. 218.

"*American Bar Association Standards for Imposing Lawyer Sanctions*

"24. In making this recommendation for discipline, the hearing panel considered the factors outlined by the American Bar Association in its Standards for Imposing Lawyer Sanctions (hereinafter 'Standards'). Pursuant to Standard 3, the factors to be considered are

the duty violated, the lawyer's mental state, the potential or actual injury caused by the lawyer's misconduct, *981 and the existence of aggravating or mitigating factors.

"25. *Duty Violated.* The respondent violated his duty to the public to maintain his personal integrity, his duty to the legal system to refrain from practicing law without a license, and his duty to the legal profession to cooperate in disciplinary investigations.

"26. *Mental State.* The respondent knowingly and intentionally violated his duties.

"27. *Injury.* As a result of the respondent's misconduct, the respondent caused actual injury to the administration of justice in the case involving DL&K Enterprises, Inc. d/b/a Ichabod Laundra Bar. Further, the respondent's misconduct resulted in potentially serious injury to his clients, the public, and the legal system.

"28. *Aggravating and Mitigating Factors.* Aggravating circumstances are any considerations or factors that may justify an increase in the degree of discipline to be imposed. In reaching its recommendation for discipline, the hearing panel, in this case, found the following aggravating factors present:

'a. A Pattern of Misconduct. The respondent engaged in a pattern of misconduct by repeatedly appearing in court after his license to practice law was suspended.

'b. Multiple Offenses. The respondent committed multiple rule violations. The respondent violated KRPC 5.5, KRPC 8.1, KRPC 8.4, Kan. Sup. Ct. R. 207, Kan. Sup. Ct. R. 211(b), and Kan. Sup. Ct. R. 218. Accordingly, the hearing panel concludes that the respondent committed multiple offenses.

'c. Bad Faith Obstruction of the Disciplinary Proceeding by Intentionally Failing to Comply with Rules or Orders of the Disciplinary Process. The respondent failed to provide a written response to the complaint and respond to correspondence forwarded by the disciplinary administrator and the investigators. The respondent's failure to cooperate in the disciplinary investigation amounts to bad faith obstruction of the disciplinary proceeding by intentionally failing to comply with rules and orders of the disciplinary process.

'd. Refusal to Acknowledge Wrongful Nature of Conduct. On February 9, 2016, the respondent sent an email message to Mr. Morgan which amounted to a clear refusal to cooperate. The hearing panel concludes that the respondent's refusal to communicate with the disciplinary administrator's office, in any way, constitutes a refusal to acknowledge the wrongful nature of his misconduct.

'e. Substantial Experience of the Practice of Law. The Kansas Supreme Court admitted the respondent to the practice of law in 2008. At the times of the respondent's misconduct, he had been practicing law from 6 to over 8 years. The hearing panel concludes that the respondent had enough time as a practicing attorney to know that he should refrain from practicing law following a suspension and that he should cooperate fully with the disciplinary administrator in disciplinary investigations and cases. Thus, the hearing panel concludes that the respondent had substantial experience in the practice of law.'

"29. Mitigating circumstances are any considerations or factors that may justify a reduction in the degree of discipline to be imposed. In reaching its recommendation for discipline, the hearing panel, in this case, found the following mitigating circumstance present:

'a. Absence of a Prior Disciplinary Record. The respondent has not previously been disciplined.'

"30. In addition to the above-cited factors, the hearing panel has thoroughly examined and considered the following Standards:

'7.1 Disbarment is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional with the intent to obtain a benefit for the lawyer or another, and causes serious or potentially serious injury to a client, the public, or the legal system.

*982 '8.1 Disbarment is generally appropriate when a lawyer:

(a) intentionally or knowingly violates the terms of a prior disciplinary order and such violation causes

injury or potential injury to a client, the public, the legal system, or the profession; or

(b) has been suspended for the same or similar misconduct, and intentionally or knowingly engages in further acts of misconduct that cause injury or potential injury to a client, the public, the legal system, or the profession.'

"*Recommendation*

"[ ]. The disciplinary administrator recommended that the respondent be indefinitely suspended from the practice of law.

"31. The respondent's misconduct can be summarized as follows: The respondent continued to practice law, despite the Kansas Supreme Court's order of suspension. The evidence establishes that he entered his appearance, made court appearances, and filed pleadings in numerous cases. The respondent also refused to cooperate in the disciplinary investigation. The respondent refused to provide a written response to the complaint. The respondent failed to file an answer to the formal complaint or amended formal complaint. The respondent failed to appear before the hearing panel. Finally, the only correspondence sent by the respondent was a message sent *via* electronic mail to the special investigator that he did not have time to respond to the complaint and that he would prefer to receive no additional communications.

"32. In considering what discipline to recommend, the hearing panel considered ***In re Paulson***, 346 Or. 676, [722–23,] 216 P.3d 859 (2009). While the respondent in this case does not have a prior disciplinary history like Paulson, many of the other relevant facts are remarkably similar to the facts in Paulson. Most importantly, both Paulson and the respondent engaged in the practice of law following suspension and both Paulson and the respondent refused to cooperate in the disciplinary investigation. The Oregon court stated:

'This case distinguishes itself from those in which we have ordered long suspensions because of the multiple different matters in which the accused committed the violations. In addition, the accused has a history of past violations. We agree with the trial panel that, in combination, the accused's current and past conduct demonstrate a persistent disregard for the rules of professional conduct and the duties that the accused owes to his clients, the public, the legal profession, and the legal system.

'That disregard is particularly evidenced by the accused's intentional practice of law despite this court's order of suspension. The accused's conduct in that regard might, without more, justify his disbarment. In ***In re Devers***, 328 Or. 230, 974 P.2d 191 (1999), among other conduct involving the practice of law, the accused lawyer continued to represent a client in settlement negotiations despite his suspension; the accused lawyer did so because the client, who knew of the suspension, asked the lawyer to continue in the matter. This court determined that disbarment was "clearly" an appropriate presumptive sanction for the accused's conduct. *Id.* at 243, 974 P.2d 191. The court further concluded that there were both aggravating factors (prior disciplinary record; a pattern of misconduct involving same violations; multiple offenses; refusal to acknowledge wrongful nature of conduct; and substantial experience in the practice of law) and mitigating factors (personal problems; cooperation with disciplinary proceedings; good reputation). *Id.* at 243–44, 974 P.2d 191. The court ultimately determined, however, that the mitigating factors were not of sufficient weight to reduce the sanction; the court ordered disbarment as a sanction. *Id.* at 245, 974 P.2d 191.

'Here, there are no mitigating factors. There are only significant aggravating factors. Any one of several violations that the accused committed in the various matters involved here, were it a single violation with those aggravating ***983** factors, could justify a long suspension. And the accused's unauthorized practice of law alone is enough to justify disbarment. Considering the violations in combination, however, and in the context of the several aggravating factors present in this case, disbarment is well-warranted under Oregon case law.'

"33. In entering an order of disbarment in ***In re Paulson***, the Oregon court likewise considered Standards 7.1 and 8.1. Regarding Standard 8.1, the Oregon court stated:

'... Here, as we have found, the accused did not withdraw from representing several clients and took few or no steps to aid them in transferring their cases to other lawyers in advance of his suspension.

> The accused also practiced law while suspended. His misconduct caused both actual and potential injury to his clients, and, in the Loucks child custody case, the actual injury was serious.' [*Paulson*, 346 Or.] at 884, 217 P.3d 182.

Regarding Standard 7.1 the court stated:

> '... Here, the accused systematically and intentionally failed to cooperate with the Bar's investigation of complaints against him despite a clear duty to do so. The accused's conduct resulted in potentially serious injury to his clients, the public, and the legal system.' [*Paulson*, 346 Or.] at 885, 217 P.3d 182.

"34. The respondent's disregard for the rules and orders of the Kansas Supreme Court leads the hearing panel to conclude that disbarment is the appropriate recommendation to make in this case. Accordingly, based upon the findings of fact, conclusions of law, and the Standards listed above, the hearing panel unanimously recommends that the respondent be disbarred.

"35. Costs are assessed against the respondent in an amount to be certified by the Office of the Disciplinary Administrator."

DISCUSSION

[1] **[2]** In a disciplinary proceeding, this court considers the evidence, the findings of the disciplinary panel, and the arguments of the parties and determines whether violations of KRPC exist and, if they do, what discipline should be imposed. Attorney misconduct must be established by clear and convincing evidence. ***In re Foster***, 292 Kan. 940, 945, 258 P.3d 375 (2011); see Supreme Court Rule 211(f) (2017 Kan. S. Ct. R. 252). Clear and convincing evidence is " 'evidence that causes the factfinder to believe that "the truth of the facts asserted is highly probable." ' " ***In re Lober***, 288 Kan. 498, 505, 204 P.3d 610 (2009) (quoting ***In re Dennis***, 286 Kan. 708, 725, 188 P.3d 1 [2008]).

[3] Respondent was given adequate notice of the formal complaint, to which he did not file an answer. Respondent was also given adequate notice of the hearing before the panel and the hearing before this court. He filed no exceptions to the hearing panel's final hearing report. With no exceptions before us, the panel's findings of fact are deemed admitted. Supreme Court Rule 212(c), (d) (2017 Kan. S. Ct. R. 255). Furthermore, the evidence before the hearing panel establishes the charged misconduct violated KRPC 5.5(a) (2017 Kan. Ct. R. 361) (unauthorized practice of law); 8.4(d) (2017 Kan. Ct. R. 379) (engaging in conduct prejudicial to the administration of justice); 8.1(b) (2017 Kan. Ct. R. 377) (failure to respond to lawful demand for information from disciplinary authority); Rule 207(b) (2017 Kan. S. Ct. R. 246) (failure to cooperate in disciplinary investigation); Rule 211(b) (2017 Kan. S. Ct. R. 251) (failure to file answer in disciplinary proceeding); and Rule 218(a) (2017 Kan. S. Ct. R. 262) (notification of clients upon suspension) by clear and convincing evidence and supports the panel's conclusions of law. We therefore adopt the panel's findings and conclusions.

[4] The only remaining issue before us is the appropriate discipline for respondent's violations. At the panel hearing, at which the respondent did not appear, the office of the Disciplinary Administrator recommended indefinite suspension, but the hearing panel unanimously recommended that the respondent be disbarred. Then, when arguing before this court, the office of the Disciplinary Administrator changed its recommendation ***984** to disbarment. The Deputy Disciplinary Administrator explained the reason for that change by citing ***In re Barker***, 302 Kan. 156, 163, 351 P.3d 1256 (2015), in which this court stated: "Certainly, the lack of an appearance at a hearing before this court qualifies as an additional aggravator."

We agree that disbarment is the appropriate sanction. Respondent demonstrated his blatant disregard for this court's order suspending his license to practice law. His contempt of that order led to his unauthorized practice of law, as evidenced by his court appearances on behalf of multiple clients. Once the disciplinary investigation began, respondent systematically and intentionally failed to cooperate, culminating with his failure to appear before the hearing panel or this court. All of these actions constitute serious and intentional violations of the duties respondent owed to his clients, the public, the legal profession, and the legal system and caused potential and actual harm that warrants the severe sanction of disbarment. See ***In re Barker***, 302 Kan. at 163, 351 P.3d 1256; ***In re Batt***, 296 Kan. 395, 294 P.3d 241 (2013).

CONCLUSION AND DISCIPLINE

IT IS THEREFORE ORDERED that Jason Richard **McDaneld** be and is hereby disbarred in accordance with Supreme Court Rule 203(a)(1) (2017 Kan. S. Ct. R. 234), effective on the filing of this opinion.

IT IS FURTHER ORDERED that the costs of these proceedings be assessed to respondent and that this opinion be published in the official Kansas Reports.

All Citations

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