

Getting It (Nearly) All Wrong

AUTHOR: SANDBERG PHOENIX

Occasionally, you will read about a legal case that is a comedy of errors. In such cases you're reminded of cartoons where a character has a bucket fall on his head, then trips and steps on a rake, which immediately leaps up and hits him in the face, before stumbling two more steps into a window and then blindly stepping out of the way of an anvil about to fall on his head.

These cases would be funny if it weren't for the potential harm to the parties involved and, in professional liability cases, the potential harm to an attorney's clients. Ohio's Supreme Court recently handed down a disciplinary decision in such a case, where the accused attorney did nearly everything wrong every step of the way but avoided the "death penalty" of disbarment through luck and the high "clear and convincing" burden of proof for disciplinary cases.

The attorney accused of misconduct allegedly failed to properly notify clients he lacked malpractice insurance, commingled client and personal funds, failed to account for client funds in his trust account, failed to keep records for client-related expenditures, failed to cooperate in the disciplinary proceeding and engaged in a variety of misconduct during the trial of a client's case. This alleged misconduct included withdrawing previously submitted exhibits, refusing to cross-examine a witness, performing a perfunctory direct examination of his client, and giving a thirty-second closing argument after the Court refused to allow him to withdraw from representing his client.

In total, the attorney was accused of violating the following professional conduct rules:

- Failing to notify clients on a separate form, signed by the clients, that he did not have liability insurance;
- Failing to hold the property of his clients in a separate interest-bearing trust account;
- Failing to maintain a record for each client on whose behalf funds are held;
- Failing to perform a monthly reconciliation of transactions involving the client trust account;
- Failing to deposit legal fees paid in advance into the client trust account;
- Failing to act with reasonable diligence to represent a client;

- Attempting to withdraw from representation in a proceeding without leave of court when the rules of the tribunal so require;
- Engaging in conduct prejudicial to the administration of justice; and
- Knowingly failing to respond to a demand for information by a disciplinary authority during an investigation.

The attorney's license to practice was saved by a few particular circumstances. First, the disciplinary counsel could not prove the attorney misappropriated any client funds commingled with personal funds; second, the disciplinary counsel could not prove the attorney misappropriated unaccounted-for client funds in the amount of \$1,302.27; and third, the disciplinary counsel could not prove the attorney refused to abide by a client's decisions concerning the objectives of representation.

Notably, the attorney may have engaged in the behavior the disciplinary counsel could not prove; the counsel simply could not meet the burden of showing "clear and convincing" evidence. In part, the attorney may have protected himself by his failure to cooperate. He refused to provide the disciplinary counsel with a settlement statement related to the client's missing \$1,302.27 and also refused to provide a release from his client concerning the settlement statement, claiming it would violate attorney-client privilege to provide the settlement statement. Additionally, the client he represented at trial refused to testify for the disciplinary counsel, who therefore could not prove whether the attorney abided by her instructions at trial.

Ultimately, the Supreme Court suspended the attorney's license to practice law for two years, with the second year's suspension stayed on the condition he commit no further misconduct, and with reinstatement contingent on restitution of \$1,302.27 to his client. He narrowly avoided disbarment, but such a long suspension would have a severe impact on anyone's career.

Attorneys should take note to prevent these easily avoidable mistakes. Furthermore, to state the obvious, attorneys should represent their clients to the best of their ability at trial, especially when the Court practically begs them to do so, as apparently occurred in this case. The attorney here claimed he was at the end of his career anyway, but attorneys should avoid this kind of career burnout. If you're going to refuse to represent your clients effectively or fail to diligently protect your trust account, you should just go ahead and retire instead.

By Tyler Thompson

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