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THE SUPREME COURT OF THE STATE OF ALASKA

In the Disciplinary Matter
Involving:

RONALD T. WEST,

Respondent.

) Supreme Court No. S-3558
)
)

) ABA File NO. 86.184
)
)

) O P I N I O N
)

[No. 3660 - January 25, 1991]

NOTICE TO COUNSEL: This opinion will be released to the press and public at 12:30 p.m. (Alaska time) on the date indicated. This copy is provided to counsel of record in advance. Prior to the release time, please do not inform persons other than your clients in this case of the outcome.

Clerk of the Appellate Courts

Appeal from the ~~Disciplinary Board of the Alaska Bar Association.~~

Appearances: Walter R. Arden, Anchorage, for Respondent. Stephen J. Van Goor, Bar Counsel, Anchorage, for the Alaska Bar Association.

Before: Matthews, Chief Justice, Rabinowitz, Compton, and Moore, Justices. [Burke, Justice, not participating.]

RABINOWITZ, Justice.
COMPTON, Justice, dissenting.

This appeal concerns issues of attorney misconduct stemming from Ronald T. West's actions with regard to a negotiated property loss settlement. A disciplinary action

West filed a complaint against the state and subsequently entered into settlement negotiations with Northern Adjusters, which was acting on the state's behalf. The state made an offer to settle the suit but this offer was rejected by Briggs. A short time later, on March 7, 1986, Briggs died of a heart attack. His widow, Sandra Briggs, contacted West to inform him of her husband's death and inquire about the lawsuit's future. West discussed the claim with her and suggested that they accept the settlement offer, if it was still open. Mrs. Briggs agreed. West then contacted Northern Adjusters to discuss the settlement. An agreement was reached where, for \$5,500 consideration, West would dismiss the case with prejudice and release the state from liability.

West then requested that Mrs. Briggs come to his office to sign the contemplated release. West, concerned that the settlement offer would be withdrawn if the state learned of Mr. Briggs' death, instructed Mrs. Briggs to sign the release form in both her name and her husband's name.¹

1. West emphasizes throughout his briefing before us that he "considered Mrs. Briggs to be the de facto personal representative of" Mr. Briggs' estate at the time she signed the release. Mrs. Briggs was not officially named as one of the two co-personal representatives of the estate until April 10, 1988, two weeks after the release was signed. The other co-representative was Gary Briggs, a son of Mr. Briggs by an earlier marriage. West explained the delay in having Mrs. Briggs named personal representative: he believed the length of such a

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B. Bar Association Proceedings.

The Panel found that West violated the Code of Professional Responsibility: DR 1-102(A)(4), (5), (6), as well as DR 7-102(A)(5). In determining the appropriate sanction, the Panel used the ABA Standards for Imposing Lawyer Sanctions (1986) as guidelines. The Panel recommended a 90-day suspension for West.

The Board affirmed the Panel's findings as to West's violations of the Code of Professional Responsibility. The Board disapproved of the Panel's recommended 90-day suspension; it concluded that a two-year suspension was more appropriate. The Board also required that West petition for reinstatement and pass the MPRE.

(footnote continued)

situation where if you do the right thing, your client might suffer or suffer a great deal and bending the rules to get something for the client. . . . It just really bothers me that if we had done nothing, the defendant would have prevailed, when they were so clearly at fault.

Prior to sending the letter to the firm handling the estate, West contacted the Alaska Bar Association and told them what happened. Thereafter, disciplinary proceedings were instituted against West.

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fore, violated DR 1-102(A)(4).⁴

Violations of DR 1-102(A)(4) are restricted to intentional acts of misconduct. In re Simpson, 645 P.2d 1223, 1227 (Alaska 1982), methodology modified by Disciplinary Matter Involving Buckalew, 731 P.2d 48 (Alaska 1986). The ABA Standards for Imposing Lawyer Sanctions provide that "intent" encompasses the "conscious objective or purpose to accomplish a particular result." ABA Model Standards, Lawyer Sanctions, Definitions, ABA/BNA at 01:807 (1986).

The Panel found West in violation of DR 1-102(A)(4). It concluded that West "intentionally notarized a signature that he knew to be false and, in the course of doing so, made statements and representations which he knew were false." The Panel further concluded that West's purpose was to cause the state "to enter into settlement at a time when [West] believed that if the facts were known the settlement might not be agreed to." The Board affirmed the Panel's conclusion with regard to DR 1-102(A)(4).

4. Disciplinary Rule 1-102(A)(4) provides that:

(A) A lawyer shall not:

.

(4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.

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particularly, West argues that his actions, although admittedly improper, were intended to "facilitate" justice. Additionally, West asserts that justice was not obstructed since the questioned release was never intended to be filed in court.

West's contentions are devoid of merit. The record clearly reveals that West violated DR 1-102(A)(5). West admits that he notarized a statement which he knew to be false. It is beyond dispute that such conduct is in fact prejudicial to the administration of justice.⁷

C. DR 1-102(A)(6).

West first contends that DR 1-102(A)(6) applies to such "other conduct" as is not proscribed by DR 1-102(A)(3)-(5) and is only to be used when the other subsections of DR 1-102 are

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. . . .

(5) Engage in conduct that is prejudicial to the administration of justice.

7. This court has found DR 1-102(A)(5) violations where an attorney fabricated a deed and attached it to an amended complaint, Walton, 676 P.2d at 1081-88; where an attorney submitted an inaccurate interrogatory response, Simpson, 645 P.2d at 1228; and, where an attorney signed an affidavit, which was filed with the court, stating that a note was prepared and sent on a certain date when the note was actually prepared five years later, Stump, 621 P.2d at 267.

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(Iowa 1979) (DR 1-102(A)(6) not violative of a "reasonable attorney" due process standard as applied to alleged intimate physical contact by attorney with inmate client during prison visits). West's conduct involved dishonesty which clearly reflected upon his fitness to practice law. Therefore, we conclude that DR 1-102(A)(6), as applied to West, does not violate due process.⁹

D. Appropriate Sanctions.

In Buckalew, we stated that "we will refer to the ABA Standards [for Imposing Lawyer Sanctions] and methodology as an appropriate model for determining sanctions for lawyer misconduct in this state," 731 P.2d at 52. The ABA Standards provide a four-pronged test for determining disciplinary sanctions:

(1) What ethical duty did the lawyer violate?
(A duty to a client, the public, the legal system, or the profession?)

(2) What was the lawyer's mental state? (Did the lawyer act intentionally, knowingly, or negligently?)

(footnote continued)

adversely reflects on his fitness to practice law.

9. We note that the Panel, with the Board affirming, also found West in violation of DR 7-102(A)(5) ("In his representation of a client, a lawyer shall not . . . knowingly make a false statement of law or fact."). Review of the record shows that West admits he violated DR 7-102(A)(5), but contends the "violation was de minimis" in view of his overall "legitimate goal of receiving the proceeds of the prior settlement of the

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Each of these violations constituted breaches by West of ethical duties. See ABA Model Standards, Lawyer Sanctions § 4.6 (Duties Owed to Clients; Lack of Candor); § 5.1 (Duties Owed to Public, Failure to Maintain Personal Integrity); § 6.1 (Duties Owed to the Legal System; False Statements, Fraud and Misrepresentation); § 6.2 (Duties Owed to the Legal System; Abuse of Legal Process). See also ABA Model Code of Professional Responsibility EC 1-5 (1980) ("Because of his position in society, even minor violations of law by a lawyer may tend to lessen public confidence in the legal profession. Obedience to law exemplifies respect for law. To lawyers especially, respect for the law should be more than a platitude.").

(ii). Mental State.

The second prong of the test requires determining West's mental state.¹⁰ The Panel, with the Board affirming, concluded that West's misconduct was both knowing and

10. As we explained in Buckalew, 731 P.2d at 53 nn.18 & 19:

The ABA Standards define "Intent" as: "the conscious objective or purpose to accomplish a particular result." ABA Standards, Definitions, ABA/BNA at 01:807. Accord AS 11.81.900(a)(1) (defining criminal intent as a conscious objective to cause a particular result).

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(iii). Injury or Potential Injury.¹²

The Panel, with the Board affirming, found actual injury to both the public and the legal profession as a result of West's misconduct. At a minimum, it impairs confidence in attorneys' honesty. Additionally, the Panel, with the Board affirming, found the potential for injury "to the estate, Mrs. Briggs, and the state as settling party, as a result of [West's] actions in permitting [the] false release to be signed and used in settlement of the Briggs' lawsuit."

West asserts that his misconduct caused no actual injury to anyone. West points out that the estate was satisfied

12. The ABA Model Standards provide definitions for "injury" and "potential injury":

"Injury" is harm to a client, the public, the legal system, or the profession which results from a lawyer's misconduct. The level of injury can range from "serious" injury to "little or no" injury; a reference to "injury" alone indicates any level of injury greater than "little or no" injury.

. . . .

"Potential injury" is the harm to a client, the public, the legal system or the profession that is reasonably foreseeable at the time of the lawyer's misconduct, and which, but for some intervening factor or event, would probably have resulted from the lawyer's misconduct.

ABA Model Standards, Definitions, ABA/BNA at 01:807.

settlement or suggested that they would have acted in any other manner.

Concerning West's contentions that there was no potential injury as a consequence of his conduct we take a different view. It was "reasonably foreseeable" that, at the time West notarized the release, harm could come to the Briggs' estate, the public, the legal system and the legal profession. As Bar counsel points out, had the settlement been withdrawn because of West's misconduct, the ensuing legal entanglements would have injured the following: the estate, at the least, in not receiving the settlement money; the state, in spending time and resources to assert its position and defend its actions; the legal system, in expending time and resources to settle any dispute arising from the false release; and the public, in ultimately paying for the implications of West's misconduct.

(iv). Recommended Sanctions in Light of West's Misconduct.

The Board's decision found

. . . that Mr. West's conduct constituted serious criminal misconduct involving intentional interference with the administration of justice, false swearing and misrepresentation, and this is more appropriately described under paragraphs 5.11 and 5.12 [sanction standards]. The Board disapproves of the committee's recommended sanction of 90 days suspension as not severe enough for these serious violations. The lack of proof of a selfish motive, the remoteness of prior offenses and the presence of personal and medical problems serve to mitigate the

or suspension are generally appropriate sanctions given the nature of West's misconduct,¹⁵ and specifically reject West's assertion that Section 5.13 (Reprimand) is applicable in this factual context.

(footnote continued)

these offenses; or

- (b) a lawyer engages in any other intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice.

Section 5.12 states:

Suspension is generally appropriate when a lawyer knowingly engages in criminal conduct which does not contain the elements listed in Standard 5.11 and that seriously adversely reflects on the lawyer's fitness to practice.

15. The Panel concluded that Section 6.12 applied to West's misconduct. This standard reads:

Suspension is generally appropriate when a lawyer knows that false statements or documents are being submitted to the court or that material information is improperly being withheld, and takes no remedial action, and causes injury or potential injury to a party to the legal proceeding, or causes an adverse or potentially adverse effect on the legal proceeding.

We reject West's contention that his actions should not be construed as involving a false statement made to the court. In submitting the release, West knew that his misstatement of fact would be implicated in a legal proceeding.

Sanctions, § 9.21(a), ABA/BNA at 01:841. West violated the Code of Professional Responsibility on three occasions prior to the present action. On each occasion, West received a private admonition as a sanction. Thus, we find no merit in West's contention that neither the Panel nor the Board should have considered these prior disciplinary offenses.

A dishonest or selfish motive is also relevant in an aggravating factors analysis. ABA Model Standards, Lawyer Sanctions, § 9.21(b), ABA/BNA at 01:841. West had a one-third contingency fee plus costs arrangement with Briggs. West's share of the settlement proceeds was \$1,650. It is conceivable that the collection of this money provided a motive for West to act as he did.

Finally, an attorney's experience in the practice of law is relevant in an aggravating factors analysis. ABA Model Standards, Lawyer Sanctions, § 9.21(i), ABA/BNA at 01:842. West has been a member of the Alaska Bar Association since 1971. In our view, West's extensive practice experience provides the only significant aggravating circumstance in this case.¹⁷

17. We agree with the Panel and the Board that two of the prior disciplinary actions are remote in time, and that all are dissimilar to the misconduct at issue. Additionally, the amount of money West stood to gain is not, in our view, sufficient to have induced West to risk getting caught.

was suffering from intermittent depression which, ultimately, caused him to seek psychiatric assistance. Respondent is presently under the care and counseling of a psychiatrist. Respondent also called several attorneys as witnesses to his good character and reputation. This testimony was not substantially refuted by the Bar and is accepted as a mitigating factor by the panel.19/

In our view, the Panel's findings concerning mitigating circumstances are fully supported by the record.

III. CONCLUSION.

Our study of the record and the arguments of the parties to this appeal persuades us that the Panel's recommended sanction should be adopted as the appropriate sanction in this case. In its conclusions regarding sanctions, which we expressly adopt, the Panel stated,

Bar counsel has recommended that Respondent be suspended for a period of time not to exceed two years as a result of his conduct. Conversely, Respondent argues that he should be issued a private reprimand. The panel has concluded that a private reprimand is not sufficient to express the seriousness of Respondent's conduct. The bar and the public have a right to expect that lawyers will not counsel their clients to affix false signatures to legal documents, misuse their notary power to verify what the attorney

19. In its decision, the Board found that the "lack of proof of a selfish motive, the remoteness of prior offenses and presence of personal and medical problems serve to mitigate the otherwise appropriate sanctions of disbarment, or more lengthy suspension."

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period of 90 days is appropriate. The panel recommends a 90 day suspension.20/

Ronald T. West is suspended from the practice of law for a period of 90 days.

20. West has additionally argued that Bar counsel's disclosure to the Panel of other grievances concerning West was a breach of confidence in violation of Alaska Bar Rule 22(b) and constituted prejudicial error. West, prior to the Panel's decision in the Briggs matter, alleged that Bar counsel had breached a confidentiality. Bar counsel brought this matter to the attention of the Panel in a closed proceeding at which West's counsel, John Strachan, was present. The Panel inquired as to the basis for the allegations. Bar counsel stated that he had discussed with another of West's attorneys, Richard Crabtree, "other grievances" in which West was involved. It is the reference to "other grievances" that West argues constitutes prejudicial error.

Regardless of the merits of the initial breach of confidentiality claim, no prejudicial error is found in Bar counsel's conduct. First, a reference to "other grievances" is not enough, in our opinion, to prejudice the Panel. Second, the precedential effect of West's position would be to make Bar counsel unable to respond to allegations of improper conduct involving himself or herself which were initiated by another party.

West also argues that, due to the Panel's confusion and uncertainty in dealing with procedural motions, good cause exists for his failure to file a peremptory challenge motion within the specified time period and, as a result of the error in denying his challenge, he suffered prejudice. There is no evidence of this "confusion" and "uncertainty." Indeed, the Panel found that the Bar Association had repeatedly attempted to inform West of the Panel's membership, yet West did not accept his mail. The Panel's decision was not, in our opinion, erroneous.

We have reviewed West's remaining assertions of error and conclude they are without merit.

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conclusions regarding the appropriate sanction, a 90-day suspension.

In adopting the Panel's conclusions, the court must be saying that it has concluded, independently of the Panel's recommendations, that a 90-day suspension is an appropriate sanction. Except by reference to the Panel's conclusions, the court does not say why 90 days is appropriate. The Panel's own conclusions are based in large part on a comparison of three disciplinary cases, two of which predated our adoption of ABA Standards as guidelines in disciplinary proceedings, and one of those two is not even an Alaska decision. I cannot agree that knowing, intentional misconduct of the kind engaged in by West is deserving of only a 90-day suspension.

In my view, West's misconduct falls squarely within § 5.11(a) of ABA Standards for Imposing Lawyer Sanctions, which provides:

Disbarment is generally appropriate when:

(a) a lawyer engages in serious criminal conduct a necessary element of which includes intentional interference with the administration of justice, false swearing, misrepresentation, fraud, extortion, misappropriation, or theft; or the sale, distribution or importation of controlled substances; or the intentional killing of another; or an attempt or conspiracy or solicitation of another to commit any of these offenses.

ABA Standard for Imposing Lawyer Sanction § 5.11(a) (1986), reprinted in ABA/BNA Lawyer's Manual on Professional Conduct 01:829 (1986).

Mrs. Briggs committed perjury by signing her deceased

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of perjury is not a defense for West. AS 11.16.120(a)(2)(A).

There is no distinction between accessories and principals to a crime. Rice v. State, 589 P.2d 419, 420 (Alaska 1979).³ Perjury is a Class B felony AS 11.56.200(c). First offense Class B felons in most instances face no presumptive sentence, yet they may be sentenced, in an exceptional case, to up to ten years. AS 12.55.125(d). Normally, however, "a first offender should receive a more favorable sentence than the presumptive sentence for a second offender." Austin v. State, 627 P.2d 657, 658 (Alaska App. 1981). Second offenders face a presumptive sentence of four years. AS 12.55.125(d)(1). Thus, if prosecuted, West conceivably could have received a four-year sentence. His misconduct cannot be considered petty. I view conduct considered by the laws of Alaska to be a Class B felony serious criminal conduct as contemplated by § 5.11(a) of the ABA Standards.⁴

Even were § 5.11(a) inapplicable, at a minimum West's misconduct falls within the ambit of § 5.11(b), which provides:

2. (...continued)
death.

3. Rice cites former AS 12.15.010 for the rule of law abrogating all distinctions between accessories and principals. 589 P.2d at 420 n.4. AS 12.15.010 was repealed during a revision of Alaska criminal laws which had as a goal placing Alaska's criminal laws within the appropriate titles of the Alaska Statutes. Ch. 166, §§ 1 & 21, SLA 1978. The fact that AS 12.15.010 was repealed during this revision of the criminal laws does not affect the rule of law established in Rice.

4. Cf. Alaska Bar R. 26(b) (defining "serious crime" for purposes of interim suspension as, alternatively, any which "would be a felony" under Alaska law, or involves false swearing as an element).

an effort to avoid the injustice he thought might result if he acted ethically. He believes that he was the victim of a hopeless dilemma, not a wrongdoer.

There are also mitigating factors: West was experiencing financial and emotional problems at the time these events occurred; to his credit he has sought psychiatric counselling; and several attorneys and members of the community vouched for West's good character and reputation. He claims also that he was suffering from mental disability or impairment at the time, which I view as simply an aspect of West's emotional problems. I do not view this as a separate mitigating factor in this case.

Balancing the aggravating and mitigating factors, and giving some consideration to the fact that public censure is a cross that will be borne by West into the future, I conclude that a substantial suspension instead of disbarment is appropriate. I view West's conduct as at least as deserving of suspension as the suspension meted out in Disciplinary Matter Involving Walton, 676 P.2d 1078 (Alaska 1983), and thus would suspend West for at least eighteen months.

ORDER	
Pursuant to Appellate Rules 508(e) and (f) (l), attorney fees of \$ <u>4,000</u> - are awarded to <u>A.B.A.</u>	
the <u>A.B.A.</u>	and
shall serve and file with this court an itemized and verified cost bill by <u>2-4-91</u> . Entered by direction of Justice <u>Rahmouni</u> .	
Dated: <u>2-3-91</u> Deputy: <u>C. Indurall</u>	