

SUPREME COURT OF INDIANA

In the Matter of Anonymous

929 N.E.2d 778 (Ind. 2010) · No. No. 73S00-0812-DI-626 · Decided July 1, 2010

SUMMARY

The Supreme Court of Indiana approved a conditional agreement imposing a private reprimand on an attorney who employed an incarcerated nonlawyer legal assistant in connection with a post-conviction proceeding. The Court concluded that the attorney violated Professional Conduct Rule 5.3 because the circumstances made adequate supervision and compliance with professional obligations impossible.

CASE DETAILS

COURT	Supreme Court of Indiana
WRITING FOR THE COURT	Per Curiam
JURISDICTION	Indiana
DECIDED	July 1, 2010
DOCKET	No. 73S00-0812-DI-626
DISPOSITION	approved
PROCEDURAL POSTURE	Attorney discipline proceeding submitted to the Indiana Supreme Court on the parties' stipulated Statement of Circumstances and Conditional Agreement for Discipline.
PRECEDENTIAL VALUE	Published precedential opinion

TOPICS

post-conviction relief

PRACTICE AREAS

legal ethics

attorney discipline

post-conviction relief

QUESTIONS PRESENTED

1. Whether Respondent violated Indiana Professional Conduct Rule 5.3 by retaining an incarcerated, independent nonlawyer legal assistant whom Respondent could not adequately supervise.
2. What discipline was appropriate for the misconduct.

HOLDINGS

1. Respondent violated Professional Conduct Rule 5.3 because his employment of an incarcerated, independent legal assistant made it impossible for him to exercise the required supervision and ensure that the assistant's conduct was compatible with Respondent's professional obligations.
2. A private reprimand was appropriate under the agreed discipline, considering the age of the misconduct, Respondent's cooperation, lack of disciplinary history, good reputation, and otherwise unblemished record.

KEY QUOTATIONS

“A non-lawyer assistant shall perform services only under the direct supervision of a lawyer authorized to practice in the State of Indiana and in the employ of the lawyer or the lawyer's employer. Independent non-lawyer assistants, to-wit, those not employed by a specific firm or by specific lawyers are prohibited.” (780)

“In this case, Respondent's employment of an incarcerated legal assistant made it impossible for Respondent to supervise properly the assistant's work, to prevent client confidences from being compromised, and to ensure that the inmate would be able to comply with the Rules of Professional Conduct.” (780)

“The Court therefore APPROVES and ORDERS the agreed discipline. For Respondent's professional misconduct, the Court imposes a private reprimand.” (780)

FACTUAL BACKGROUND

Respondent represented a client in a post-conviction relief proceeding as an independent contractor for the State Public Defender. With the client's consent, Respondent arranged for an incarcerated nonlawyer inmate in the same facility to research and prepare the client's PCR petition in exchange for Respondent's representation of the inmate in the inmate's own PCR proceeding. Because the inmate was an independent legal assistant with limited communications, privacy, and research access, Respondent could not adequately supervise the work, protect client confidences, or ensure compliance with professional-conduct rules.

PROCEDURAL HISTORY

The Indiana Supreme Court Disciplinary Commission filed a verified complaint in 2008 concerning conduct occurring in 1998 and 1999. The Commission and Respondent submitted an agreed statement of facts and proposed discipline for the Court's approval. The Court approved the agreement, imposed a private reprimand, assessed costs against Respondent, and discharged the hearing officer.

DISPOSITION

approved

OPINION

PER CURIAM.

929 N.E.2d 778 (2010) In the Matter of ANONYMOUS, Respondent. No. 73S00-0812-DI-626. Supreme Court of Indiana. July 1, 2010. *779 Jeffrey S. Bate, Shelbyville, IN, Attorney for the

Respondent. Seth T. Pruden, Interim Executive Secretary, Laura Iosue, Staff Attorney, Indianapolis, IN, Attorneys for the Indiana Supreme Court Disciplinary Commission. Attorney Discipline Action PER CURIAM.

Pursuant to Indiana Admission and Discipline Rule 23(11), the Indiana Supreme Court Disciplinary Commission and Respondent have submitted for approval a "Statement of Circumstances and Conditional Agreement for Discipline" stipulating agreed facts and proposed discipline.

The Respondent's 1980 admission to this state's bar subjects him to this Court's disciplinary jurisdiction. See IND. CONST. art. 7, § 4. The Court approves the agreement and finds that Respondent engaged in attorney misconduct by employing a legal assistant whose incarceration made it impossible for Respondent to ensure that the assistant's conduct was compatible with Respondent's professional obligations to his client.

For this misconduct, we find that Respondent should receive a private reprimand. Background The State Public Defender assigned Respondent as an independent contractor to represent a client in a post-conviction relief ("PCR") proceeding. With the client's consent, Respondent entered into an agreement with a nonlawyer inmate in the same facility where the client was incarcerated under which the inmate would assist in researching and preparing a PCR petition for the client.

In exchange, Respondent agreed to represent the inmate in his own PCR proceeding. Respondent retained the inmate as an independent legal assistant who was not employed by a specific firm or lawyer. The inmate had limited access to communication, no expectation of privacy, and limited access to research resources. Respondent had limited ability to review the inmate's work.

Respondent could not supervise the inmate and could not ensure that the inmate would be able to comply with the Rules of Professional Conduct. These events took place in 1998-1999. There was considerable delay in the submission of a grievance to the Commission, which filed a verified complaint against Respondent in 2008. Facts in mitigation include: (1) Respondent has no disciplinary history; (2) he fully cooperated with the Commission; and (3) he has a good reputation in the area in which he practices.

Discussion Professional Conduct Rule 5.3, concerning an attorney's responsibilities regarding nonlawyer assistants, states: With respect to a nonlawyer employed or retained by or associated with a lawyer: (b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer....

(Emphasis added.) Comment [1] to this rule provides: Lawyers generally employ assistants in their practice, including secretaries, investigators, law student interns, paralegals and other paraprofessionals.... A lawyer must give such assistants appropriate instruction and supervision

concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information *780 relating to representation of the client, and should be responsible for their work product.

The measures employed in supervising nonlawyers should take account of the fact that they may not have legal training and are not subject to professional discipline. (Emphasis added.) The Court has provided guidelines to assist lawyers in their use of non-lawyer assistants, which provide in relevant part: Introduction Subject to the provisions in Rule 5.3, all lawyers may use non-lawyer assistants in accordance with the following guidelines.

Guideline 9.1. Supervision A non-lawyer assistant shall perform services only under the direct supervision of a lawyer authorized to practice in the State of Indiana and in the employ of the lawyer or the lawyer's employer. Independent non-lawyer assistants, to-wit, those not employed by a specific firm or by specific lawyers are prohibited. A lawyer is responsible for all of the professional actions of a non-lawyer assistant performing services at the lawyer's direction and should take reasonable measures to insure that the non-lawyer assistant's conduct is consistent with the lawyer's obligations under the Rules of Professional Conduct.

(Emphasis added.) In this case, Respondent's employment of an incarcerated legal assistant made it impossible for Respondent to supervise properly the assistant's work, to prevent client confidences from being compromised, and to ensure that the inmate would be able to comply with the Rules of Professional Conduct. Conclusion The Court concludes that Respondent violated Professional Conduct Rule 5.3.

The parties propose the appropriate discipline is private reprimand. The discipline the Court would impose for Respondent's misconduct would likely be more severe had this matter been submitted without an agreement.

The Court also notes that Respondent's misconduct occurred more than a decade ago and that his record in nearly 30 years of practice is otherwise unblemished. The Court therefore APPROVES and ORDERS the agreed discipline.

For Respondent's professional misconduct, the Court imposes a private reprimand. The costs of this proceeding are assessed against Respondent. The hearing officer appointed in this case is discharged. The Clerk of this Court is directed to give notice of this opinion to the hearing officer and to the parties or their respective attorneys.

The Clerk is further directed to post this opinion to the Court's website, and Thomson Reuters is directed to publish a copy of this opinion in the bound volumes of this Court's decisions. All Justices concur.