

SUPREME COURT OF GEORGIA

In re Woodham

296 Ga. 618 (Ga. 2015) · Decided February 16, 2015

OPINION

PER CURIAM.

Per curiam. This disciplinary matter arises from bond validation proceedings in which attorney John Floyd Woodham (State Bar No. 775066) intervened on behalf of himself and Citizens for Ethics in Government, LLC, filed objections to the validation of the bonds, and later offered to withdraw the objections if developers concerned in the bonds paid a substantial amount of money.

Following the filing of a grievance, the Investigative Panel of the State Bar of Georgia found probable cause to charge Woodham with violations of Georgia Rules of Professional Conduct 3.1, 3.5 (c), 4.2 (a), and 8.4 (a) (4). Woodham then filed a petition for voluntary discipline, in which he agreed to a Review Panel reprimand for violations of only Rules 3.5 (c) and 4.2 (a).

Although the State Bar made no objection to the petition, we rejected it, noting that the petition did not address the alleged violations of Rules 3.1 and 8.4 (a) (4), the latter of which concerns “professional conduct involving dishonesty, fraud, deceit or misrepresentation” and is, therefore, among the most serious violations with which a lawyer can be charged.

See *In the Matter of Woodham*, 291 Ga. 255 (728 SE2d 659) (2012). *619After we rejected the petition for voluntary discipline, the State Bar filed a formal complaint, charging Woodham with violations of Rules 3.1, 3.5 (c), 4.2 (a), and 8.4 (a) (4).

The State Bar, however, subsequently abandoned the charges for violations of Rules 3.1 and 3.5 (c). A special master¹ heard evidence on the remaining charges, and in his report and recommendation, the special master found that Woodham violated Rules 4.2 (a) and 8.4 (a) (4), and he recommended that Woodham be suspended for three months and receive a public reprimand.

Both Woodham and the State Bar sought further review before the Review Panel, and in its report and recommendation, the Review Panel found only a violation of Rule 8.4 (a) (4), but it recommended that Woodham be suspended for six months and receive a Review Panel reprimand.

The matter is now before this Court on the report and recommendation of the Review Panel. For the reasons that follow, we agree with the Review Panel that the evidentiary record shows no violation of Rule 4.2 (a), and we conclude that the record also fails to show clearly and

convincingly a violation of Rule 8.4 (a) (4).² Because those were the only charges with which the State Bar proceeded before the special master, we dismiss these disciplinary proceedings.

1. According to the report and recommendation of the special master, the circumstances that led to this disciplinary matter are as follows: On October 29, 2008, District Attorney Paul Howard filed two bond validation proceedings in the Superior Court of Fulton County to confirm the issuance of alleged bonds by the Atlanta Development Authority.

The first proceeding alleged the issuance of an amount not to exceed \$70,000,000 for a project by 13th Street Holdings, LLC. The second alleged the issuance of an amount not to exceed \$60,000,000 for a project by Mezzo Development, LLC. Both 13th Street Holdings, LLC and Mezzo Development, LLC (“Developers”) are managed by Tivoli Properties, Inc. Scott Leventhal is the CEO of Tivoli Properties.

Michelle Barnett and Daniel McRae were bond counsel for the Developers in those transactions. *620 On November 17, 2008, [Woodham] filed complaints in intervention in each of the bond cases, objecting to the issuance of the proposed bonds. [Woodham] filed on his own behalf and on behalf of Citizens for Ethics in Government, LLC. [Woodham] did not file any claims against the Developers, but did raise relevant questions which related to whether the bonds in question should be validated.

[Woodham]’s purpose in intervening was to defeat the [petitions for bond validation based upon his opinion that the proceedings involved bond transactions known as phantom bonds. [Woodham] opined that the overall result of such a phantom bond is an illegal and unconstitutional tax abatement in favor of the Developers. Two days after filing the complaints in intervention, [Woodham] telephoned the offices of Tivoli Properties and asked to speak to the company’s in-house counsel.

When [Woodham] was told that the company no longer employed in-house counsel, he asked for the name of the company’s outside litigation counsel. Later that day, Mr. Leventhal returned [Woodham]’s call and inquired why [Woodham] had called. [Woodham] advised Mr. Leventhal that he wanted to speak to someone other than the Developers’ bond counsel about a possible resolution of the complaints in intervention.

[Woodham] advised Mr. Leventhal [that] he was not prepared to discuss the matter further without a lawyer participating on the Developers’ behalf. Mr. Leventhal contacted attorney Patricia Roy, the Developers’ litigation counsel. Ms. Roy called [Woodham], advised that she represented the [D]evelopers, and suggested that the two of them have a conference call with her client.

[Woodham] and Ms. Roy exchanged e[-]mails regarding participation in a conference call. That evening[,] Ms. Roy spoke with [Woodham] to confirm that she would be on the line with Mr. Leventhal for a conference call. [Woodham] advised Ms. Roy that he wanted to discuss a possible

resolution of the bond matters. [Woodham] and Ms. Roy ultimately agreed that all matters they discussed should remain confidential and that there would be no recording of the conversation.

Ms. Roy and Mr. Leventhal separately discussed the conditions and agreed to be bound. *621[Woodham] sent Ms. Roy an e-mail to confirm the terms of the conversation. Ms. Roy responded by e-mail[,] agreeing to all of the terms and stating she would initiate a conference call. Ms. Roy placed the call to Mr. Leventhal and [Wood-ham].

The three parties to the call were in three different locations. Mr. Leventhal began recording the conversation at some point after it began. [Woodham] stated that[,] although he did not have an issue with the Developers, he believed the bond transactions to be illegal. [Woodham] advised Mr. Leventhal that he would dismiss the complaints in intervention if the Developers would pay 1 [percent] of the bond issuance to him and Citizens for Ethics in Government.

Mr. Leventhal advised [Woodham] [that] he would get back to him about the offer. He never did. By this conduct, the special master found, Woodham violated Rules 4.2 (a) and 8.4 (a) (4). As noted earlier, the Review Panel found that the State Bar proved only a violation of Rule 8.4 (a) (4). 2. Commonly known as the “no-contact” or “anti-contact” rule, Rule 4.2 (a) provides that “[a] lawyer who is representing a client in a matter shall not communicate about the subject of the representation with a person 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 to do so by law or court order.” The special master concluded that, “[w]hen [Woodham] contacted the Developers without the consent of bond counsel in order to discuss settlement of the complaints in intervention, he violated [Rule] 4.2 (a).” The Review Panel disagreed, however, reasoning: There is no dispute that [Woodham] communicated with counsel for Tivoli Properties and the CEO of Tivoli... on the subject of pending litigation when he knew that Tivoli (as the management company for the Developers) was represented by different counsel in the pending litigation.

The question is whether this conduct violates Rule 4.2. There is no direct authority in Georgia on this specific issue. Two advisory opinions from other jurisdictions provide guidance, American Bar Association Formal Opinion 06-443 (2006) and D. C. Ethics Opinion 331 (2005). Both opinions consider the analogous question of contact by an opposing lawyer with in-house counsel of an organization regarding a matter when the organization is represented in the same matter by *622outside counsel.

ABA Opinion 06-443 provides, “In general, a lawyer may communicate with in-house counsel of a represented entity about the subject of the representation without obtaining the prior consent of the entity’s other counsel.” Likewise, D. C. Ethics Opinion 331 states, “In general, a lawyer may communicate with in-house counsel of a represented entity about the subject of the representation without obtaining the prior consent of the entity’s other counsel.” Both opinions conclude that the

safeguards inherent in the anti-contact rule are not necessary when the person being contacted is a lawyer.

The D. C. Opinion makes the following observation, “We start by noting that the foregoing rationale for the anti-contact rule does not apply where a lawyer desires to contact an organization’s in-house counsel. Such a communication would be lawyer[-] to[-]lawyer, and concerns about protecting the organization from overreaching and deception by the lawyer initiating the communication should not apply.

Nor is it likely that in-house counsel would inadvertently make disclosures harmful to the organization, as a non-lawyer might do.” In this instance, [Woodham] participated in conversations with litigation counsel and the corporate representative of Tivoli regarding the pending litigation. Tivoli was represented by counsel in all substantive conversations regarding the pending litigation....

[T]he Review Panel finds that [Woodham]’s conduct does not fall within the scope and purpose of Rule 4.2. As noted in D. C. Ethics Opinion 331, “The problem of one lawyer trying to take advantage of the fact that an opponent may have multiple lawyers with varying degrees of knowledge or involvement is a different issue.” (Footnotes omitted). Generally speaking, we agree with the analysis of the Review Panel.

First, we agree with the Review Panel that contact with in-house counsel about litigation in which the organization is represented by outside counsel generally does not violate Rule 4.2 (a). See generally American Bar Association Formal Opinion 06-443 (2006).

Second, we agree with the Review Panel that the general rule for in-house counsel offers useful guidance in this case. When Woodham first contacted Tivoli Properties, he was attempting to make contact with its in-house counsel. When he learned that it had no in-house counsel, he discontinued his communications. There was nothing wrong with that. Later, it was Mr. Leventhal who reestablished contact with Woodham, and at that time, although Woodham disclosed in general terms the reasons for his earlier attempt to contact in-house counsel, he declined to discuss anything of substance with Mr. Leventhal without the presence of a lawyer for Tivoli.

At that point, Mr. Leventhal asked Ms. Roy, an attorney, to facilitate further communications with Woodham about a possible resolution of the bond validation cases. When Ms. Roy agreed to do so, she undertook to represent Tivoli in connection with those cases, even if only for the limited purpose of discussing a resolution of the cases with Woodham.

Accordingly, when Woodham finally had a substantive discussion with Ms. Roy and Mr. Leventhal, he was communicating with and in the presence of a lawyer representing Tivoli in the bond cases, notwithstanding that she may never have entered an appearance in those cases and was not, therefore, counsel of record.

On the facts of this case, we find no violation of Rule 4.2 (a). 3. Rule 8.4 (a) (4) forbids a lawyer to “engage in professional conduct involving dishonesty, fraud, deceit or misrepresentation.” The special master found that, “[w]hen [Woodham] asked the Developers to pay him 1 [percent] of the bond amount to dismiss his complaints in intervention, he violated [Rule] 8.4 (a) (4).” In support of this finding, the special master reasoned: The first principle of a bond validation proceeding is protection of the public, not pursuit of personal gain.

[When Woodham proposed a resolution of his complaints in intervention,] [h]e as much as said... that he, and by extension the public, would suffer the illegality of the bond transactions if he was privately paid money. He thereby subverted the first principles of the bond validation proceeding. His conduct was dishonest because he sought to benefit personally, even though he states that his intention in filing the interventions was to [e]nsure the denial or dismissal of bond transactions he believed to be illegal.

In other words, by filing the complaints in intervention, Woodham implicitly represented that his purpose in doing so was to vindicate the public interest, rendering his later offer to compromise the public interest for private gain dishonest.

The Review Panel agreed with this analysis. We do not. Although the general purpose of the bond validation process may be to protect the public interest, that purpose is accomplished by *624permitting “[a]ny citizen of this state who is a resident of the county, municipality, or political subdivision desiring to issue the bonds [to] become a party to the proceedings —” OCGA § 36-82-23 (concerning bond validation generally).

See also OCGA § 36-82-77 (a) (concerning revenue bond validation) (“Any citizen of this state who is a resident of the governmental body which desires to issue such bonds may become a party to the proceedings____”). Such a citizen may intervene and object to the validation of the bonds, and they may do so without any showing of their particular interest in the bond issue.

Accordingly, they may do so only for the purpose of vindicating the public interest, or they may do so for ulterior and personal reasons.³ Standing to intervene in a bond validation proceeding does not depend on the reasons for which the intervention is made.

For that reason, the entire premise of the finding of dishonesty in this case — that Woodham had somehow undertaken to represent the public by filing his complaints in intervention, only later to betray the public by his offer to settle for private gain — is misplaced. Yet, that was the entire foundation for the findings of the special master and the Review Panel that Woodham violated Rule 8.4 (a) (4).⁴ The dissent would find that Woodham acted dishonestly for somewhat different reasons, namely, that Woodham filed his complaints in intervention in furtherance of a “dishonest” scheme to misuse the bond validation process to reap personal financial gain to which he would not have been entitled even if his objections to *625validation had prevailed.

Such a scheme might well amount to an abuse of the litigation process and, therefore, a violation of Rules 3.1 or 3.5 (c).⁵ But again, the State Bar abandoned the charges that Woodham violated those Rules, and whether Woodham violated Rule 3.1 or 3.5 (c) is not a question presented to us in this case. Rule 8.4 (a) (4) prohibits “professional conduct involving dishonesty, fraud, deceit or misrepresentation,” that is, conduct that is intended or likely to mislead another.

Neither the State Bar, the special master, the Review Panel, nor the dissent points to any false or misleading conduct by Woodham in connection with his filing of the complaints in intervention or his attempts to secure a payment from the Developers. And simply calling his conduct “dishonest” — as the dissent does repeatedly — does not make it so. Woodham may have acted badly, he may have attempted to misuse a legal process, and he may have attempted to get money to which he had no legal claim, but there is no evidence that he misled or attempted to mislead the Developers about the filing of the complaints in intervention or the legal remedies to which the intervenors might be entitled in the bond validation proceeding.

We do not think this conduct can be fairly characterized as “dishonest,” and the dissent cites no authority for the proposition that it should be so characterized. 4. The dissent calls Woodham’s conduct “egregious, improper and appalling,” and we do not dispute those characterizations.

We too are troubled by the conduct proved in the record. We offer no opinion about whether that conduct might amount to a violation of Rules 3.1 or 3.5 (c), insofar as the State Bar has abandoned its charges of such violations.

We also express no opinion about whether Woodham violated Rule 8.4 (a) (4) by conduct other than that alleged by the State Bar as a basis for the Rule 8.4 (a) (4) charge.⁶ We conclude only *626that the State Bar failed by clear and convincing evidence to prove the alleged violations of Rules 4.2 (a) and 8.4 (a) (4) as charged by the State Bar.

The State Bar having failed to prove the alleged violations on which it elected to proceed to hearing, these disciplinary proceedings are dismissed. Dismissed. All the Justices concur, except Benham and Hunstein, JJ., who dissent. This Court appointed Thomas E. Cauthorn III as special master in this matter. A disciplinary violation must be proved by clear and convincing evidence.

See Ga. Bar Rule 4-221 (e) (2). Consider, for instance, an intervention to object to the validation of bonds to fund a development near a residential neighborhood. If a resident of that neighborhood were qualified to intervene and did so, it would not matter whether his reason for doing so was to vindicate the public interest as an advocate of taxpayers generally or instead was to stop a development that would, in his view, impair his own quality of life in the neighborhood.

His reason for intervening is immaterial to his right to intervene. Perhaps intervention should be forbidden to those who seek to do so only for personal gain, but that is a policy question for the legislature. See *FDIC v. Loudermilk*, 295 Ga. 579, 594 (3) (761 SE2d 332) (2014).

We note, however, that substantial disincentives already exist for those who would abuse the right of intervention. Among other things, a court may award attorney fees against one asserting a frivolous claim in civil litigation, OCGA § 9-15-14 (a), against one bringing an action that “lacked substantial justification” or “was interposed for delay or harassment,” OCGA § 9-15-14 (b), or against one who “unnecessarily expanded the proceeding by other improper conduct, including, but not limited to, abuses of discovery procedures.” *Id.* Indeed, in the very bond validation proceedings that led to these disciplinary proceedings, it appears that the validation court awarded more than \$400,000 in attorney fees and expenses to the interested developers and the Atlanta Development Authority as a sanction against Woodham and Citizens for Ethics in Government under OCGA § 9-15-14, an award that was affirmed without opinion by the Court of Appeals in *Woodham v. Atlanta Development Auth.*, 318 Ga. App.

XXIV, Case No. A12A2334 (Nov. 29, 2012). By the way, we note the sanctions award only because it illustrates one of the several disincentives that exist for one who would be tempted to abuse the bond validation process, not because it would mitigate in any way a violation of the Rules of Professional Conduct. Rule 3.1 (a) forbids a lawyer in the representation of a client to “file a suit, assert a position, conduct a defense, delay a trial, or take other action on behalf of the client when the lawyer knows or when it is obvious that such action would serve merely to harass or maliciously injure anotherf.]” Rule 3.1 (b) forbids a lawyer in the representation of a client to “knowingly advance a claim or defense that is unwarranted under existing law, except that the lawyer may advance such claim or defense if it can be supported by good faith argument for an extension, modification or reversal of existing law.” Rule 3.5 (c) forbids a lawyer to “engage in conduct intended to disrupt a tribunal.” At least to some extent, these Rules forbid the same sort of conduct for which attorney fees and expenses might be awarded as a sanction under OCGA § 9-15-14.

But because the State Bar abandoned the charges against Woodham for violating Rules 3.1 and 3.5 (c), we express no opinion about whether the evidence, in fact, shows a violation of those Rules. According to the record, a few weeks after Woodham offered to withdraw his complaints in intervention for one percent of the bond amounts (and after Woodham discovered that his offer had been brought to the attention of the validation court), Woodham prepared and sent a letter in which he said that he had intended to ask for only 0.1 percent of the bond amounts and that he intended to give the money to a homeless shelter.

But the validation court and the *626special master found this letter was a misrepresentation of Woodham’s actual intent at the time he extended the offer to the Developers, and the special master found that Woodham gave testimony about the letter in his disciplinary proceedings that was not credible.

The State Bar did not, however, charge Woodham with violating Rule 8.4 (a) (4) by such conduct, nor did the special master or Review Panel identify such conduct as a basis for the finding that Woodham violated Rule 8.4 (a) (4).

We express no opinion, therefore, about whether such conduct amounts to a violation of the Rule.