

SUPREME COURT OF APPEALS OF WEST VIRGINIA

Lawyer Disciplinary Board v. John F. Hussell

Lawyer Disciplinary Board v. Hussell · No. No. 13-0544 · Decided November 25, 2014

SUMMARY

In this concurrence, Justice Workman agrees with the majority that the Lawyer Disciplinary Board failed to prove by clear and convincing evidence that John F. Hussell violated the West Virginia Rules of Professional Conduct. The opinion discusses the timing of an alleged sexual relationship with a former client, the termination of legal representation, and advice concerning marital property and alimony. It also advises attorneys to document the termination of representation through an unequivocal disengagement letter.

CASE DETAILS

COURT	Supreme Court of Appeals of West Virginia
WRITING FOR THE COURT	Justice Workman
JURISDICTION	West Virginia
DECIDED	November 25, 2014
DOCKET	No. 13-0544
DISPOSITION	other
PROCEDURAL POSTURE	Lawyer disciplinary proceeding in which the Hearing Panel Subcommittee found violations of the West Virginia Rules of Professional Conduct and recommended a ninety-day suspension, supervised practice, psychiatric treatment, and reimbursement of costs. The Supreme Court of Appeals set the matter for a full hearing and independently reviewed the record.
STANDARD OF REVIEW	The court applies a de novo standard to questions of law, application of law to facts, and appropriate sanctions, while giving respectful consideration to the disciplinary body's recommendations and exercising independent judgment. The court gives substantial deference to factual findings unless they are unsupported by reliable, probative, and substantial evidence on the whole record.
PRECEDENTIAL VALUE	Published state supreme court disciplinary opinion; the provided text is a concurring opinion accompanying the court's disposition.
PARTIES	Lawyer Disciplinary Board v. John F. Hussell

TOPICS

appellate procedure

standard of review

family law

estate planning

PRACTICE AREAS

legal ethics

lawyer discipline

professional responsibility

appellate procedure

QUESTIONS PRESENTED

1. Whether Hussell violated the West Virginia Rules of Professional Conduct through a sexual relationship with a former client when the relationship began after the attorney-client representation had ended.
2. Whether Hussell improperly represented or provided legal advice to Carolyn L. in connection with her divorce and related marital-property and alimony issues.
3. Whether the Hearing Panel Subcommittee's findings and recommended discipline were supported by clear and convincing evidence.

HOLDINGS

1. The majority concluded that Hussell did not commit a sanctionable ethical violation because the sexual relationship began after all legal representation of Carolyn L. and her husband had concluded.
2. The majority concluded that Hussell did not undertake representation of Carolyn L. in the divorce matter and therefore did not commit the alleged ethical violation based on representation in that proceeding.
3. A formal disciplinary charge must be proven by clear and convincing evidence before discipline may be imposed.

KEY QUOTATIONS

“this Court independently examines each case on its own merits in determining what, if any, disciplinary action is warranted.” (1-2)

“A de novo standard applies to a review of the adjudicatory record made for the Committee on Legal Ethics of the West Virginia State Bar [currently, the Hearing Panel Subcommittee of the Lawyer Disciplinary Board] as to questions of law, questions of application of the law to the facts, and questions of appropriate sanctions; this Court gives respectful consideration to the Committee’s recommendations while ultimately exercising its own independent judgment.” (2)

“the HPS failed to prove the charges contained in its report by clear and convincing evidence.” (4)

FACTUAL BACKGROUND

John Hussell represented James and Carolyn L. in estate-planning matters. The sexual relationship between Hussell and Carolyn L. began only after all legal representation had ended, and James L. had discharged Hussell before Hussell undertook any further representation. Although the Hearing Panel Subcommittee believed Hussell improperly advised Carolyn L. about marital property and alimony in her pending divorce, Hussell did not undertake representation of her in that divorce matter.

PROCEDURAL HISTORY

The Hearing Panel Subcommittee recommended discipline against attorney John Hussell. The Supreme Court of Appeals set the matter for full hearing because of concerns that the recommended discipline might be too lenient. After reviewing the record, the majority concluded that the charged ethical violations had not been proven and that no sanctionable violation occurred; Justice Workman concurred.

DISPOSITION

other

CASES CITED

- Committee on Legal Ethics v. McCorkle, 192 W. Va. 286, 452 S.E.2d 377 (1994)

OPINION

PER CURIAM.

No. 13-0544 Lawyer Disciplinary Board v. Hussell FILED November 25, 2014 RORY L. PERRY II, CLERK SUPREME COURT OF APPEALS OF WEST VIRGINIA Justice Workman, concurring: I concur with the decision of the majority in this case.

As explained by the majority, the HPS found that attorney John Hussell violated the West Virginia Rules of Professional Conduct and recommended that Mr. Hussell be sanctioned by suspension for ninety days, supervised practice for one year, psychiatric treatment, and reimbursement of costs.

In the vast majority of lawyer disciplinary cases, this Court adopts such findings and recommendations. However, this Court has the ultimate decision-making authority on lawyer ethics and on occasion decides to set the matter for full hearing, after which it may accept or modify the HPS recommendations.

As succinctly stated in Committee on Legal Ethics v. McCorkle, 192 W.Va. 286, 452 S.E.2d 377 (1994), “this Court independently examines each case on its own merits in determining what, if any, disciplinary action is warranted.” 192 W.Va. at 290, 452 S.E.2d at 381.1 Ironically, this matter was set for a full 1 Rule 3.12 of the Rules of Lawyer Disciplinary Procedure provides: If the parties consent to the recommended disposition, the matter shall (continued...)

1 hearing due to our concerns regarding possible over-leniency in this disciplinary action against lawyer John Hussell. Having examined this matter in its entirety, with due regard to the applicable standards of review,² it is now clear that there is no factual dispute that the sexual 1 (...continued) be filed with the Supreme Court of Appeals for entry of an order consistent with the recommended disposition.

If the Court does not concur with the recommended disposition, the Clerk of the Supreme Court of Appeals shall promptly establish a briefing schedule and notify the parties of the date and time of oral argument or submission of the case without oral argument before the Supreme Court of Appeals. Whenever the Office of Disciplinary Counsel advocates any position before the Supreme Court of Appeals which differs from findings of fact, conclusions of law, or recommended disposition of the Hearing Panel Subcommittee, it shall provide notice to the Hearing Panel Subcommittee, whether by service of a copy of its brief or otherwise, and the Hearing Panel Subcommittee shall be permitted, if it so desires, to file, within thirty days of receipt of such notice, its own brief before the Supreme Court of Appeals, in support of its findings of fact, conclusions of law, and recommended disposition.

Following oral argument or submission of the case without oral argument, the Court will file an opinion or order disposing of the case. Unless otherwise provided in the Court's opinion or order, any sanction will not take effect until after expiration of the rehearing period or the denial of any petition for rehearing. 2 "A de novo standard applies to a review of the adjudicatory record made for the Committee on Legal Ethics of the West Virginia State Bar [currently, the Hearing Panel Subcommittee of the Lawyer Disciplinary Board] as to questions of law, questions of application of the law to the facts, and questions of appropriate sanctions; this Court gives respectful consideration to the Committee's recommendations while ultimately exercising its own independent judgment.

On the other hand, substantial deference is given to the Committee's finding of fact, unless such findings are not supported by reliable, probative, and substantial evidence on the whole record." McCorkle, 192 W.Va. at 287, 452 S.E.2d at 378, syl. pt. 3. 2 relationship between Mr. Hussell and Mrs. Carolyn L. did not commence until all legal representation in the estate planning matters had concluded.

Again, there is no factual dispute that Mr. James L. discharged Mr. Hussell as attorney in these matters and that no further legal representation by Mr. Hussell was thereafter undertaken. What muddies up the waters is that, prior to Mr. James L. terminating Mr. Hussell, a letter outlining the "rules" of continued joint representation of the L's designed to protect each of their interests had been sent to the L's.

It is unclear why Mr. L signed and returned the letter in view of the fact that he had just fired Mr. Hussell shortly before. Additionally, the HPS felt that Mr. Hussell improperly represented Mrs. Carolyn L. in connection with the divorce pending between the L's by giving her legal advice on marital property and alimony matters. Mr. Hussell did not undertake any type of representation of Mrs. L. in the divorce matter.

Consequently, the majority concludes that Mr. Hussell did not commit an ethical violation sanctionable by the West Virginia Rules of Professional Conduct. Had the evidence demonstrated

that a sexual relationship existed between Mr. Hussell and Carolyn L. during Mr. Hussell's legal representation of her and/or her husband, this Court unquestionably would have found violations of the Rules of Professional Conduct, and Mr. Hussell would have been sanctioned accordingly.

The wiser course for Mr. Hussell to have followed was to memorialize the termination of the legal representation agreement in this matter by means of an unequivocal ³ disengagement letter by Mr. Hussell. Although there is no current ethical rule that requires such a disengagement letter, if an attorney wishes to avoid allegations of ethics violations for questionable conduct with a former client, he or she would be well-advised to specifically and emphatically memorialize key elements of the process of legal representation and its termination.

In consequence of our full review of this record, I must concur with the majority that the HPS failed to prove the charges contained in its report by clear and convincing evidence.³ Hopefully, though, this case will capture the attention of the Bar for the principle that attorneys should document termination of representation agreements for both the clients' protection as well as the lawyers' protection.

³ Rule 3.7 of the West Virginia Rules of Lawyer Disciplinary Procedure states: "In order to recommend the imposition of discipline of any lawyer, the allegations of the formal charge must be proven by clear and convincing evidence." ⁴

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