

SUPREME COURT OF SOUTH CAROLINA

In re Westmoreland

353 S.C. 44 (2003) · Decided February 3, 2003

SUMMARY

The Supreme Court of South Carolina publicly reprimanded an attorney who represented multiple Bright Acres Associates partners and later represented the estate of one partner in litigation adverse to other former clients. The court found violations involving competence, conflicts of interest, use of former-client information, acting as an advocate-witness, and conduct prejudicial to the administration of justice. The reprimand was imposed pursuant to an Agreement for Discipline by Consent.

CASE DETAILS

COURT	Supreme Court of South Carolina
WRITING FOR THE COURT	Per Curiam; Chief Justice Toal; Justice Moore; Justice Waller; Justice Burnett; Justice Pleicones
JURISDICTION	South Carolina
DECIDED	February 3, 2003
DISPOSITION	other
PROCEDURAL POSTURE	Attorney disciplinary proceeding submitted to the Supreme Court of South Carolina under an Agreement for Discipline by Consent pursuant to Rule 21, RLDE, Rule 413, SCACR.
PRECEDENTIAL VALUE	Published South Carolina Supreme Court disciplinary opinion

TOPICS

- commercial litigation
- real estate
- contracts

PRACTICE AREAS

- legal ethics
- attorney discipline
- conflicts of interest
- arbitration
- partnership and real estate transactions

QUESTIONS PRESENTED

- Whether respondent's admitted conduct violated the specified South Carolina Rules of Professional Conduct and Rules for Lawyer Disciplinary Enforcement.
- Whether a public reprimand was the appropriate sanction under the Agreement for Discipline by Consent.

HOLDINGS

1. Respondent violated Rules 1.1, 1.2(c), 1.2(e), 1.7, 1.8(b), 1.9(a), 1.9(c), 3.7, 8.4(a), and 8.4(e), Rule 407, SCACR, through incompetent representation, undisclosed and conflicting representations, misuse of client information, and failure to withdraw when he was likely to be a necessary witness.
2. Respondent violated Rules 7(a)(1) and 7(a)(5), Rule 413, SCACR, by violating the Rules of Professional Conduct and engaging in conduct tending to pollute the administration of justice or bring the courts or legal profession into disrepute.
3. A public reprimand was the appropriate sanction, and the court accepted the Agreement for Discipline by Consent.

KEY QUOTATIONS

“Accordingly, we accept the Agreement for Discipline by Consent and publicly reprimand respondent for his actions.” (47)

“PUBLIC REPRIMAND.” (47)

FACTUAL BACKGROUND

Respondent represented Bright Acres Associates and its partners in transactions involving the acquisition and sale of partnership interests and prepared the partnership agreement and a sale agreement. After representing the partnership and partners, he represented Leutwiler and later Leutwiler's Estate in litigation against Massey concerning the agreement he had drafted, without disclosing the conflict or obtaining Massey's consent. He later represented the Leutwiler Estate in an arbitration-related action against other former clients, failed to address conflicts and his likely role as a witness, and was ultimately disqualified from representing the estate.

PROCEDURAL HISTORY

The respondent and the Office of Disciplinary Counsel entered into an Agreement for Discipline by Consent in which respondent admitted misconduct and consented to an admonition or public reprimand. The court accepted the agreement, found that a public reprimand was appropriate, and publicly reprimanded respondent.

DISPOSITION

other

CASES CITED

- Zabinski v. Bright Acres Associates, 346 S.C. 580, 553 S.E.2d 110 (2001)
- Zabinski v. Bright Acres Associates, Op. No. 2001-MO-050 (S.C. filed September 4, 2001)

OPINION

PER CURIAM.

PER CURIAM: In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel have entered into an Agreement for Discipline by Consent pursuant to Rule 21, RLDE, Rule 413, SCACR. In the agreement, respondent admits misconduct and consents to the issuance of an admonition or a public reprimand.

We accept the agreement and find a public reprimand is the appropriate sanction. The facts, as set forth in the agreement, are as follows. Facts Bright Acres Associates was a partnership consisting of the following four equal partners: John Leutwiler, Henry Massey, John Brainard, and Leo Zabinski.

The partnership was created in 1980 in order to buy, renovate, and sell thirty apartments and approximately twenty-six acres of land on Hilton Head Island. Respondent prepared the partnership agreement, which expressly provided for arbitration of all controversies or claims arising out of the partnership agreement.

However, notice of the arbitration clause was not typed in underlined capital letters or rubber-stamped prominently on the face of the partnership agreement as required by the South Carolina Arbitration Act, S.C.Code Ann. § 15-48-10(a) (Supp.2002). See Zabinski v. Bright Acres Associates, 346 S.C. 580, 553 S.E.2d 110 (2001). Respondent represented the partnership, or individual partners, between 1980 and 1991, in matters involving (1) the acquisition of property, (2) Brainard's assignment of his interest to his children, and (3) Massey's agreement to purchase Leutwiler's 25% interest in Bright Acres.

Respondent prepared the Massey/Leutwiler agreement. In 1990, Leutwiler sued Massey over a dispute concerning the obligations, terms, and conditions of the sale document respondent had drafted for Leutwiler. Respondent represented Leutwiler (and later, Leutwiler's Estate) in this suit, and *46that litigation continued for over ten years. Respondent failed to disclose his involvement to Massey and obtain Massey's consent prior to commencing the litigation on behalf of Leutwiler.

In 1998, Zabinski and Brainard brought an action against Bright Acres, Massey and the Leutwiler Estate to compel arbitration pursuant to the arbitration clause in the partnership agreement. Respondent filed an answer, counterclaim, cross-claim and third-party complaint on behalf of the Leutwiler Estate claiming the arbitration clause in the partnership agreement he prepared was not valid under section 15-48-10.

At no time did respondent consult Zabinski, Brainard or Massey about conflicts of interest arising from his representation of the Leutwiler Estate nor did he obtain their consent to proceed against them. When it became apparent respondent would be required to testify in the trial of the matter both as a witness to some events and as a party-defendant to others, he failed to withdraw from representation of the Leutwiler Estate.

On September 21, 2000, an order was issued disqualifying respondent from further participation as attorney for the Leutwiler Estate. That order was affirmed by this Court. *Zabinski v. Bright Acres Associates*, Op. No. 2001-MO-050 (S.C. filed September 4, 2001). Law Respondent admits that by his conduct he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.1 (a lawyer shall provide competent representation to a client); Rule 1.2(c) (a lawyer may limit the objectives of the representation if the client consents after consultation); Rule 1.2(e) (when a lawyer knows a client expects assistance not permitted by the Rules of Professional Conduct, the lawyer shall consult with the client regarding relevant limitations on the lawyer's conduct); Rule 1.7 (a lawyer shall not represent a client if the representation of that client is directly adverse to another client or it may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests); Rule 1.8(b) (a lawyer shall not use information relating to representation of a client to the disadvantage of the client *47unless the client consents after consultation); Rule 1.9(a) (a lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation); Rule 1.9(c) (a lawyer who has formerly represented a client in a matter shall not thereafter use information relating to the representation to the disadvantage of the former client); Rule 3.7 (a lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness); Rule 8.4(a) (it is professional misconduct for a lawyer to violate the Rules of Professional Conduct); and Rule 8.4(e) (it is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice).

Respondent has also violated the following provisions of the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR: Rule 7(a)(1) (violating the Rules of Professional Conduct) and Rule 7(a)(5) (engaging in conduct tending to pollute the administration of justice or to bring the courts or the legal profession into disrepute or conduct demonstrating an unfitness to practice law).

Conclusion We find that a public reprimand is the appropriate sanction in this case. We do so after considering the mitigating circumstances, including respondent's belief that his involvement in representing the partnership itself was so limited as to not create a conflict, his efforts to find substitute counsel for the Leutwiler Estate after determining there was a conflict, and his reluctance to abandon his client, as well as the fact that the litigation at issue did have some legitimate basis.

Accordingly, we accept the Agreement for Discipline by Consent and publicly reprimand respondent for his actions. **PUBLIC REPRIMAND.** TOAL, C.J., MOORE, WALLER, BURNETT and PLEICONES, JJ., concur.