GEORGE MASON AMERICAN INN OF COURT

THE INTERSECTION OF ETHICS AND PROFESSIONALISM

October 25, 2016

Pupilage Team Members:

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AGENDA

- Introduction and Overview of Intersection of Professionalism and Ethics: 7:30 - 7:40 (Rip Sullivan, Jr.)

- Coordinating Duties to Court, Client, Other Attorneys and Parties (attachment 1)

- The Virginia State Bar Association Mission Statement (attachment 2)

- The Importance of Distinguishing Between Ethics and Professionalism/Civility (attachment 3)

- Presentation of Hypotheticals and Discussion: 7:40 - 8:20 (Panel Members)

1. Hypothetical mirrors fact pattern *In re Mosely*, 273 Va. 688 (2007); Rules 3.3(a)(1), 3.4(e), 3.4(j), 4.1(a), 8.2, and 8.4(a), (b), and (c) highlighted

2. Hypothetical mirrors fact pattern *Zaug v. Virginia State Bar*, 285 Va. 457 (2013) Rule 4.2 highlighted

3. Hypothetical mirrors fact pattern of *Environment Specialist, Incorporated, t/a Howell's Heating and Air Conditioning Co v. Wells Fargo Bank Northwest, N.A.*, 291 Va. 111 (2016); §8.01-271.1 and Rules 3.1, 4.4, 3.1 highlighted

4. Hypothetical mirrors fact pattern of *The Florida Bar v. Robert D. Adams, et al.*, 2016 WL 4493453; Rules 3.1, 3.3, 3.4, 3.7, 4.3, and 4.4 highlighted

5. Hypothetical mirrors fact pattern of *In re Crawford*, Court of Appeal, Second District, Division 6, California, 2016 WL 3090589; contempt highlighted

6. Hypothetical mirror fact pattern of *McKinney v. Haller*, (EDVA 2010) WL 4853306; highlights rules 1.4 and 3.4

(Cases and Rules/Statute attached as attachments 4 and 5)

- Question and Answer Session: 8:20 - 8:30 (time allowing)

- Adjourn—8:30

ATTACHMENT 1

LAWYER/SYSTEM

Topic: Coordinating Duties to Court, Client, Other Attorneys, and Other Parties

This discussion will focus on the tension often present between an attorney's obligations to act in the best interests of the client and the attorney's obligations to act in good faith in dealing with tribunals. Attorneys have at all times a duty to assist tribunals in the operation of the court system and administrative justice. An attorney's oath as an officer of the court requires absolute honesty with the court, even though the client's interests may seem to require contrary result.

- A lawyer's duty to preserve client confidences and secrets must be balanced with the lawyer's duty of absolute honesty with the court.
- Conduct towards the court: ex-parte communications to the court, with a copy to opposing counsel, is permitted, as are ex-parte communications contemplated by law, such as patent applications, default judgments, temporary injunctions and temporary restraining orders.
- General obligations of an attorney as an officer of the court:
    - To reveal a fraud upon a tribunal;
    - To not threaten disciplinary or criminal charges solely to gain advantage in a civil matter;
    - To have general knowledge of the rules of court and respect the court's rulings;
    - To avoid pre-trial, extra-judicial statements in a criminal case that present a substantial likelihood of interfering with the fairness of the trial. (Note that Virginia rules no linger address comments about civil matters.)
    - To avoid contact with jurors or venireman prior to and during trial. Jurors may be contacted after trial, and after their expiration of their terms as jurors, as long as they are not harassed, and as long as the questions or comments are not calculated to influence their actions in future jury service; except in the Eastern District of Virginia, where local federal rules prohibit contact at any time.
    - With respect to contacting witnesses, a lawyer shall not suppress evidence or advise or cause a person not to be available for trial, not contact a witness known to be represented by counsel or without their counsel's consent, nor compensate a witness on a contingent basis for testimony (except for experts under certain circumstances), nor contact opposing party's treating physician without consent.
    - To avoid the implication of improper influence.

- Conflicts between diligent representation of client and being officer of the court. A lawyer shall not:
    - File suits, motions, and defenses merely to harass or delay;
    - Advance unwarranted claims and defenses;
    - Conceal or fail to disclose what is required by law to reveal;
    - Use perjured testimony or false evidence;
    - Make false statements of law or fact;
    - Participate in the creation or preservation of false evidence
    - Fail to respond to lawful discovery requests or interpose unfounded objections to such lawful discovery requests.

ATTACHMENT 2

The Virginia State Bar Association Mission Statement

Principles of Professionalism

Preface.

"The Supreme Court of Virginia endorses the attached Principles of Professionalism for Virginia Lawyers prepared by the Virginia Bar Association Commission on Professionalism. Having been unanimously endorsed by Virginia's statewide bar organizations, the Principles articu- late standards of civility to which all Virginia lawyers should aspire. The Principles of Professionalism shall not serve as a basis for disciplinary action or for civil liability. We encourage the widest possible dissemina- tion of these Principles."

Leroy Rountree Hassell, Sr.
Chief Justice, Supreme Court of Virginia

Preamble

Virginia can take special pride in the important role its lawyers have played in American history. From Thomas Jefferson to Oliver Hill, Virginia lawyers have epitomized our profession's highest ideals. Without losing sight of what lawyers do for their clients and for the public, lawyers should also focus on how they perform their duties. In their very first professional act, all Virginia lawyers pledge to demean themselves "professionally and courteously." Lawyers help their clients, the institutions with which they deal and themselves when they treat everyone with respect and courtesy. These Principles of Professionalism serve as a reminder of how Virginia lawyers have acted in the past and should act in the future.

Principles

In my conduct toward everyone with whom I deal, I should:

- Remember that I am part of a self-governing profession, and that my actions and demeanor reflect upon my profession.
- Act at all times with professional integrity, so that others will know that my word is my bond.
- Avoid all bigotry, discrimination, or prejudice.
- Treat everyone as I want to be treated — with respect and courtesy.
- Act as a mentor for less experienced lawyers and as a role model for future generations of lawyers.
- Contribute my skills, knowledge and influence in the service of my community.
- Encourage those I supervise to act with the same professionalism to which I aspire.

In my conduct toward my clients, I should:

- Act with diligence and dedication — tempered with, but never compromised by, my professional conduct toward others.
- Act with respect and courtesy.
- Explain to clients that my courteous conduct toward others does not reflect a lack of zeal in advancing their interests, but rather is more likely to successfully advance their interests.

In my conduct toward courts and other institutions with which I deal, I should:

- Treat all judges and court personnel with respect and courtesy.
- Be punctual in attending all court appearances and other scheduled events.
- Avoid any conduct that offends the dignity or decorum of any courts or other institutions, such as inappropriate displays of emotion or unbecoming language directed at the courts or any other participants.
- Explain to my clients that they should also act with respect and courtesy when dealing with courts and other institutions.

In my conduct toward opposing counsel, I should:

- Treat both opposing counsel and their staff with respect and courtesy.
- Avoid ad hominem attacks, recognizing that in nearly every situation opposing lawyers are simply serving their clients as I am trying to serve my clients.
- Avoid reciprocating any unprofessional conduct by opposing counsel, explaining to my clients that such behavior harms rather than advances the clients' interests.
- Cooperate as much as possible on procedural and logistical matters, so that the clients' and lawyers' efforts can be directed toward the substance of disputes or disagreements.
- Cooperate in scheduling any discovery, negotiations, meetings, closings, hearings or other litigation or transactional events, accommodating opposing counsels' schedules whenever possible.
- Agree whenever possible to opposing counsels' reasonable requests for extensions of time that are consistent with my primary duties to advance my clients' interests.
- Notify opposing counsel of any schedule changes as soon as possible.
- Return telephone calls, e-mails and other communications as promptly as I can, even if we disagree about the subject matter of the communication, resolving to disagree without being disagreeable.
- Be punctual in attending all scheduled events.

- Resist being affected by any ill feelings opposing clients may have toward each other, remembering that any conflict is between the clients and not between the lawyers.

ATTACHMENT 3

(With Permission from Tom Spahn)

It is important to distinguish between ethics and professionalism/civility.

Every state's ethics rules represent a balance between lawyers' primary duty to diligently represent their clients, and some countervailing duty to others within the justice system (or sometimes, to the system itself). In many situations, lawyers following the ethics rules might have to take steps that the public could consider unprofessional. For example, lawyers often must maintain client confidences when the public might think they should speak up disclosing a client's past crime, warning the victim of some possible future crime, etc. In less dramatic contexts, lawyers generally must remain silent if their adversary's lawyer misses some important legal argument or defense, etc. Thus, ethics principles focus on lawyers' duties to their clients, and the limited ways in which those duties can be "trumped" by duties to others.

In contrast, professionalism has a much more modest focus. Professionalism speaks to lawyers' day to day interaction with other lawyers, with clients, with courts, and with others. Professionalism involves courtesy, civility, and the Golden Rule. When the ethics rules require lawyers to disagree with adversaries or their lawyers, professionalism calls for lawyers to do so without being personally disagreeable.

Applicable Ethics Rules

To be sure, the Bar can discipline lawyers for extreme misconduct amounting to a lack of courtesy.

For instance, under Virginia Rule 3.4(j),

[a] lawyer shall not: . . . [f]ile a suit, initiate criminal charges, 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 another.

Virginia Rule 3.4(j) (emphasis added).

Similarly, under Virginia Rule 4.4,

[i]n representing a client, a lawyer shall not use means that have no purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

Virginia Rule 4.4 (emphasis added).

These ethics rules obviously set a very low minimum standard of conduct. They do not condemn all actions that harass, injure, or embarrass someone. They do not even prohibit actions that primarily have that effect. Instead, these ethics rules only condemn actions that serve "merely" to have such ill effects, and "have no purpose other than to" harm someone. Not surprisingly, not many actions fall below this line. Even the dimmest of lawyers can normally find some other arguable reason to have undertaken an unprofessional act.

The ethics rules generally set the minimum standard for lawyer conduct. However, Virginia's ethics rules contain several unique provisions that set Virginia apart from other states' approach.

The Virginia Rules' Preamble follows the ABA Model Rules in providing some general guidance.

A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials.

. . . .

. . . [A] lawyer is also guided by personal conscience and the approbation of professional peers. A lawyer should strive to attain the highest level of skill, to improve the law and the legal profession, and to exemplify the legal profession's ideals of public service.

. . . .

. . . Within the framework of these Rules, many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules.

Virginia Rules, Preamble (emphases added).

The Virginia Rules' Scope explains that

The Rules do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules. The Rules simply provide a framework for the ethical practice of law.

Id. Preamble.

Unlike the ABA Model Rules, the Virginia rules also contain two specific provisions encouraging day-to-day lawyer civility.

First, one provision provides advice about how lawyers should treat others "involved in the legal process."

In the exercise of professional judgment on those decisions which are for the lawyer's determination in the handling of a legal matter, a lawyer should always act in a manner consistent with the best interests of a client. However, when an action in the best interest of a client seems to the lawyer to be unjust, the lawyer may ask the client for permission to forego such action. The duty of lawyer to represent a client with zeal does not militate against his concurrent obligation to treat, with consideration, all persons involved in the legal process and to avoid the infliction of needless harm. Under this Rule, it would be improper to ask any question that the lawyer has no reasonable basis to believe is relevant to the case and that is intended to degrade any witness or other person.

Virginia Rule 3.4 cmt. [7] (emphasis added). Although this rule uses the term "obligation," it appears that the comment primarily refers to a lawyer's duty to avoid harming others -- which essentially defines the minimum standard of lawyer conduct.

Second, the Virginia rules contain a more limited statement of how litigators should act.

In adversary proceedings, clients are litigants and though ill feeling may exist between the clients, such ill feeling should not influence a lawyer's conduct, attitude or demeanor towards opposing counsel. A lawyer should not make unfair or derogatory personal reference to opposing counsel. Haranguing and offensive tactics by lawyers interfere with the orderly administration of justice and have no proper place in our legal system. A lawyer should be courteous to opposing counsel and should accede to reasonable requests regarding court proceedings, settings, continuances, waiver of procedural formalities, and similar matters which do not prejudice the rights of the client. A lawyer should follow the local customs of courtesy or practice, unless the lawyer gives timely notice to opposing counsel of the intention not to do so. A lawyer should be punctual in fulfilling all professional commitments.

Virginia Rule 3.4 cmt. [8] (emphases added).

Although it obviously has some significance that Virginia has included these comments while the ABA and most states have not, it is also important to recognize that the comments use the verb "should"[1] rather "shall" or "must."

Thus, these comments represent aspirational statements, rather than mandatory standards.

ATTACHMENT 4

273 Va. 688
Supreme Court of Virginia.

In re Jonathan A. MOSELEY.

Record No. 061237.
|
April 20, 2007.

Synopsis
Background: Defendant in two underlying breach of contract cases filed motion to disqualify plaintiff's attorney from representing plaintiff, alleging attorney had per se conflict arising out of joint and several liability with plaintiff for sanctions. The Circuit Court, Arlington County, Benjamin N.A. Kendrick, J., ordered attorney to terminate representation of plaintiff and revoked attorney's right to practice before the Circuit Court. Attorney appealed revocation of privilege to practice before the Circuit Court.

Holdings: The Supreme Court, G. Steven Agee, J., held that:

[1] Circuit Court had jurisdiction to revoke attorney's privilege to practice before that court, and

[2] attorney received adequate notice of the alleged misconduct that was subject of hearing.

Affirmed.

West Headnotes (7)

[1] **Attorney and Client**
Power of Judge at Chambers

Circuit Court had jurisdiction to revoke privilege of attorney, who was found to have engaged in unethical conduct, to practice before that court; the Circuit Court had authority to regulate the conduct of attorney throughout that circuit, but no further, arising from its inherent and constitutional powers. West's V.C.A. Const. Art. 3, § 1, Art. 6 § 1.

2 Cases that cite this headnote

[2] **Attorney and Client**
Certificate or License
Attorney and Client
Power of Judge at Chambers

A license to practice law covers the full panoply of actions an attorney can undertake from writing a will to representing a person in a controversy before a court, and while the issuance of a license to practice law carries with it certain rights for the holder of that license, the ability to practice before a particular court is a distinct and separate consideration.

1 Cases that cite this headnote

[3] **Attorney and Client**
Power of Judge at Chambers

Independently of any statutory restriction, the courts of record of the Commonwealth might, in a proper case, suspend or annul the license of an attorney, so far as it authorized him to practice in the particular court, which pronounced the sentence, but no farther.

Cases that cite this headnote

[4] **Constitutional Law**
Regulation of Practice of Law

A court's authority to discipline attorneys and regulate their conduct in proceedings before that court is a constitutional power derived from the separation of powers between the judiciary, as an independent branch of government, and the other branches. West's V.C.A. Const. Art. 3, § 1, Art. 6 § 1.

1 Cases that cite this headnote

[5] **Constitutional Law**
⇐Practice of Law

The authority of a court to regulate the conduct of attorneys practicing before that court by revoking or suspending that privilege is both an inherent and a constitutional power that is not dependent on its creation by legislative enactment and thus cannot be limited by statute. West's V.C.A. Const. Art. 3, § 1, Art. 6 § 1.

Cases that cite this headnote

[6] **Attorney and Client**
⇐Power of Judge at Chambers

A court's authority in the discipline of attorneys practicing before it is limited to the jurisdictional boundaries of that court and cannot extend to other courts beyond that boundary.

Cases that cite this headnote

[7] **Attorney and Client**
⇐Disqualification Proceedings; Standing
Attorney and Client
⇐Charges and Answers Thereto

Notice to attorney of proceedings against him, including copies of motion to disqualify him as counsel for plaintiff in breach of contract case, statement from complainant to court stating intent to raise issue of e-mail written by attorney, with copies of the message attached, and transcript of hearing detailing evidence on which complainant relied, gave attorney adequate notice of the alleged misconduct that was the subject of hearing for disqualification and revocation of attorney's right to practice before Circuit Court.

Cases that cite this headnote

Attorneys and Law Firms

****191** Joseph Ryland Winston, Richmond, for appellant.

L. Steven Emmert (Sykes, Bourdon, Ahern & Levy, on brief), Virginia Beach, amicus curiae.

Present: HASSELL, C.J., LACY, KEENAN, KOONTZ, LEMONS, and AGEE, JJ., and RUSSELL, Senior Justice.

Opinion

OPINION BY Justice G. STEVEN AGEE.

***690** Jonathan A. Moseley appeals the judgment of the Circuit Court of Arlington County, which revoked his "right to practice before the Circuit Court of Arlington." Moseley contends the circuit court erred for two reasons: First, he argues the court "was without jurisdiction" to revoke his right to practice. Second, he asserts that even if the circuit court had jurisdiction to act, it failed to provide him "notice ***691** of the alleged misconduct" before the revocation. For the reasons set forth below, we will affirm the judgment of the circuit court.

I. BACKGROUND AND MATERIAL PROCEEDINGS BELOW

This case arises from the proceedings in two breach of contract cases filed by Moseley on behalf of his client, Tracy E. Ammons, against The Christian Coalition of America, Inc. ("the Christian Coalition"). In the first suit, both parties denied having a copy of the consulting agreement in controversy, so the circuit court conducted an evidentiary hearing to determine the nature of the agreement. A primary issue before the court was whether the agreement contained an arbitration clause, as the Christian Coalition contended, but which Ammons denied. On cross-examination during the hearing, Ammons testified he had found a copy of the consulting agreement, and that he had given a copy to his attorney, Moseley, who had it in the courtroom. Ammons further admitted that the agreement contained an arbitration clause.

Moseley, acting on behalf of Ammons, immediately requested a nonsuit. The circuit court stated it was compelled to grant the nonsuit, and then strongly reprimanded Moseley for his conduct during the course of the proceedings. In particular, the circuit court cited Moseley's failure to inform the court and opposing counsel that the contract had been located and contained the very arbitration provision he had previously denied existed. Furthermore, the circuit court cited Moseley's prior filing of numerous frivolous pleadings and motions in the matter, which needlessly wasted the time of the court ****192** and counsel. The circuit court then awarded sanctions against Moseley and Ammons, jointly and severally, in the amount of $83,141.24, which represented a portion of the Christian Coalition's attorney's fees and costs related to Moseley's actions ("the monetary sanctions award").[1]

Ammons and the Christian Coalition then entered into arbitration proceedings concerning the Christian Coalition's alleged breach of the consulting agreement. While the arbitration was ongoing, Moseley filed a second motion for judgment on Ammons' behalf, alleging substantially the same claims against the Christian Coalition as in the ***692** first motion for judgment.[2] The Christian Coalition filed a motion to disqualify Moseley from representing Ammons, asserting Moseley had an "irreconcilable and unwaiveable per se conflict" because his "personal interest inextricably [is] intertwined [and] adverse to his own client."[3]

On February 16, 2006, the circuit court heard argument regarding the motion to disqualify Moseley from representing Ammons regarding the second motion for judgment.[4] Despite being sent a copy of the praecipe setting the hearing for that date, Moseley did not appear at the hearing due to an apparent miscommunication from the clerk's office and the judge's chambers, which led Moseley to believe no hearing would occur that day. However, the hearing did proceed as scheduled on February 16th and the Christian Coalition argued its motion to disqualify Moseley from the second motion for judgment proceeding and it urged the court to consider additional sanctions, including issuing a rule to show cause based on Moseley's conduct. In addition, the Christian Coalition called David Ross Rosenfeld to testify as an expert in the field of legal ethics in Virginia. Rosenfeld testified that Moseley had a conflict of interest with Ammons and that Moseley's "conduct falls well below the [ethical and professional] standard of care" for attorneys licensed to practice law in Virginia. Rosenfeld also testified that he examined a letter written by and a motion filed by Moseley, and they contained "entirely inappropriate, inaccurate, and in some instances, just downright ... false" allegations about Judge Alper.[5]

***693** As a result of the hearing, the circuit court entered an order on February 27, 2006 that granted the Christian Coalition's motion to disqualify Moseley and further directed Moseley "to appear before this Court on the 16[th] day of March 2006 to show cause why Moseley's right to practice before this Court should not be revoked."

As directed by the circuit court, Moseley received a copy of the February 27 order and a transcript of the February 16 hearing. Moseley petitioned the circuit court for a rehearing regarding the February 27 order, and explained the reason for his absence from the February 16 hearing. In light of ****193** Moseley's explanation, the circuit court "vacated [the February 27 order] pending the outcome of the March 16, 2006 hearing."

Prior to the March 16 hearing, the Christian Coalition alerted the circuit court that it had just obtained an e-mail written and circulated by Moseley, which the Christian Coalition asked be considered at the March 16 hearing. Moseley was sent a copy of both the Christian Coalition's letter to the circuit court and the e-mail. In the e-mail, Moseley characterized opposing counsel as "certainly demonically empowered. I have never seen anyone who reeks of evil so much." Furthermore, Moseley described the monetary sanctions award entered by Judge Alper as "an absurd decision from a whacko judge, whom I believe was bribed."

At the March 16 hearing, which included the Rule to Show Cause, the circuit court directed the Christian Coalition to reargue its motion to disqualify Moseley. In its opening statement, the Christian Coalition argued "the evidence is overwhelming that [Moseley] should not only be disqualified [from representing Ammons], but within this judicial district [have his right to practice] suspend[ed] or revoke[d]," and have his conduct reported to the State Bar for further investigation. The presiding judge then reiterated that those would be the three issues before the court during the hearing.

The Christian Coalition again called Rosenfeld as an expert witness, and he gave substantially the same testimony as in the February 16 hearing. When asked about Moseley's recent e-mail, Rosenfeld testified that in his expert opinion, "the characterization of a sitting judge as a wacko judge constitutes a per se violation of the standard of care established through Rule 8.2" of the Rules of Professional Conduct in Virginia.

During the hearing, Moseley repeatedly contended that he had not been given notice that the court was considering

the revocation of his privilege to practice before it. The circuit court rejected Moseley's ***694** argument, finding that Moseley had been given adequate notice of the issue in the motion to disqualify, the transcripts of the February 16 hearing, the specific terms of the February 27 order, particularly the rule to show cause, and the enunciation by counsel and the court of the issues before it at the hearing.

The circuit court then entered an order dated March 16, 2006, finding that Moseley had "an irreconcilable [and unwaiveable] conflict of interest" and ordered that he "immediately terminate his representation" of Ammons. The court also made a specific finding that Moseley "had timely, adequate, and proper notice of this proceeding" and that it had "the inherent power to suspend or annul the license of an attorney practicing before it. § 54.1–3915, Code of Virginia [and] *Legal Club of Lynchburg v. Light,* 137 Va. 249 [, 119 S.E. 55] (1923)." The order then recited that "Moseley's conduct during ... this cause ... raises sufficient and serious questions for this Court regarding [his] competency and fitness to practice law before this Court" and found Moseley had "engaged in unethical conduct in violation of the Virginia Code of Professional Conduct and ... made contemptible, irresponsible and false statements about a sitting judge." The March 16, 2006 order then provided that "Moseley's right to practice before the Circuit Court of Arlington ... be and hereby is revoked" and referred to the Virginia State Board and this Court "consideration of reciprocal revocation of licensure."

We awarded Moseley this appeal from the March 16, 2006 order as to the revocation of his privilege to practice before the Circuit Court of Arlington County.[6]

II. ANALYSIS

On appeal to this Court, Moseley makes two assignments of error. First, he contends the circuit court erred because it "was without jurisdiction" to revoke his entitlement to ****194** practice law before the Circuit Court of Arlington County. Second, Moseley asserts the circuit court failed to properly provide him "notice of the alleged misconduct" prior to taking such action. We address each assignment of error in turn.

***695** A. Jurisdiction of the Circuit Court

[1] Moseley contends the Circuit Court of Arlington County did not have jurisdiction to revoke his entitlement to practice before it because the "whole field of disbarment in Virginia" is now regulated by statute. He argues that because the circuit court did not follow the procedure for disbarment set forth in Code § 54.1–3935, it was without authority to act so as to bar his practice before that court. Moseley distinguishes the circuit court's authority "to remove counsel in a particular case or to punish for contempt," and the type of action here, which removes his ability to appear before the court.

[2] At the outset, it is important to note that Moseley's license to practice law in Virginia was not affected by the March 16, 2006 order. Licensure of an attorney, and revocation of that license, are matters governed by statute. Code §§ 54.1–3928, –3934 et seq. It is not within the jurisdiction of a circuit court to adjudicate the revocation of a license to practice law except in compliance with the statutory authority. Code § 54.1–3935.[7] The circuit court clearly recognized that limitation because it referred any action regarding Moseley's license to practice law to the Virginia State Bar. A license to practice law covers the full panoply of actions an attorney can undertake from writing a will to representing a person in a controversy before a court. And while the issuance of a license to practice law carries with it certain rights for the holder of that license, the ability to practice before a particular court is a distinct and separate consideration.

The matter before the Court on appeal, however, is not the status of Moseley's license to practice law, but whether a court can revoke his privilege to practice before a particular court when no statute specifically provides for that action. The answer to that query is answered by our long-standing jurisprudence.

[3] We addressed the basic issue now before us in 1835 in Ex *Parte Fisher,* 33 Va. (6 Leigh) 619, 624–25 (1835). Our resolution of the issue then remains as valid today as it was nearly two centuries ago. "[I]ndependently of any statutory restriction, the courts of record of this [C]ommonwealth might, in a proper case, suspend or annul the license of an attorney, so far as it authorized him to practice ***696** in the particular court, which pronounced the sentence, but no farther." *Id.* at 624.

Although the local circuit courts had jurisdiction in the 19th century both to issue a license to practice law and control the actual practice before that court, the intervening statutory regimen ceding licensure to the Virginia State Bar (as opposed to the various circuit courts) has no effect on the continuing authority of a court to regulate the privilege of practicing before that court. We explained this concept in *Legal Club of Lynchburg:*

> Independent of statutory authority, all courts of record in Virginia have inherent power in a proper case to suspend or annul the license of an attorney practicing in the particular court which pronounces the sentence of disbarment.

137 Va. at 250, 119 S.E. at 55. This independent and inherent power to regulate the lawyers practicing before it is vested in courts as part of the authority necessary to the existence and function of a court. *See, e.g., Link v. Wabash R. Co.,* 370 U.S. 626, 630–31, 82 S.Ct. 1386, 8 L.Ed.2d 734 (1962).

In Code § 54.1–3935, on which Moseley relies, the General Assembly has set forth the procedure by which the appropriate court is empowered to revoke or suspend a license to practice law that affects the right to practice law throughout the Commonwealth.[8] ****195** However, as recognized in *Legal Club,* this statutory authority does not curtail a court's pre-existing and independent authority to control those who practice before it, including the authority to suspend or revoke an attorney's privilege to practice before that court. 137 Va. at 250–51, 119 S.E. at 55. "Such power does not depend for its existence ***697** upon either constitutional or statutory provisions, but is possessed by all courts of record, unless taken away by express constitutional (or possibly legislative) inhibition." *Id.* at 251, 119 S.E. at 55.

[4] Although *Legal Club* seemed to leave open the possibility that a legislative enactment could circumscribe a court's authority to discipline attorneys practicing before it, this Court's decision in *Norfolk & Portsmouth Bar Ass'n v. Drewry,* 161 Va. 833, 172 S.E. 282 (1934), annuls that possibility. In *Drewry,* we reiterated not only that a court has "an inherent power" to discipline and regulate attorneys practicing before it, but also recognized that "[t]his power, since the judiciary is an independent branch of government, is not controlled by statute." 161 Va. at 836, 172 S.E. at 283. Thus, the court's authority to discipline attorneys and regulate their conduct in proceedings before that court is also a constitutional power derived from the separation of powers between the judiciary, as an independent branch of government, and the other branches. Va. Const. art. III, § 1; art. VI, § 1; *see, e.g., Harlen v. Helena,* 208 Mont. 45, 676 P.2d 191, 193 (1984); *Hustedt v. Workers' Comp. Appeals Bd.,* 30 Cal.3d 329, 178 Cal.Rptr. 801, 636 P.2d 1139, 1142–44 (1981); *R.J. Edwards, Inc. v. Hert,* 504 P.2d 407, 411 (Okla.1972); *State ex rel. Oregon State Bar v. Lenske,* 243 Or. 477, 407 P.2d 250, 254–56 (1965); *In re Sparks,* 267 Ky. 93, 101 S.W.2d 194, 196 (1936). As the circuit court implied, this inherent and constitutional power is essentially acknowledged in Code § 54.1–3915, where even this Court is prohibited from promulgating "any rule or regulation or method of procedure which eliminates the jurisdiction of the courts to deal with the discipline of attorneys."

[5] Our more recent cases continue to recognize this inherent and constitutional authority of a court to discipline attorneys apart from the formal statutory disciplinary procedures affecting the attorney's license to practice law. For example, as recently as March of this year, we summarized our jurisprudence in this area in *Nusbaum v. Berlin,* 273 Va. 385, 641 S.E.2d 494 (2007):

> "[T]his Court has recognized that the courts of this Commonwealth have the inherent power to supervise the conduct of attorneys practicing before them and to discipline any attorney who engages in misconduct. A court's inherent power to discipline an attorney practicing before it includes the power not only 'to remove an attorney of record in a case,' [*Judicial Inquiry and Review Comm'n v. Peatross,* 269 Va. 428, 447, 611 S.E.2d 392, 402 (2005)], but also 'in a proper case to suspend ***698** or annul the license of an attorney practicing in the particular court.' "

Id. at 399, 641 S.E.2d at 501 (citations omitted). Thus, the authority of a court to regulate the conduct of attorneys practicing before that court by revoking or suspending that privilege is both an inherent and a constitutional power that is not dependent on its creation by legislative enactment and thus cannot be limited by statute. Accordingly, under our longstanding precedent, the circuit ****196** court had jurisdiction to revoke Moseley's privilege to practice before that court.[9]

[6] The March 16, 2006 order by its plain terms applies only to Moseley's right to practice before the Circuit Court of Arlington County. By necessity, the circuit court's action is the act of that court and not limited to practice before the individual judge presiding over the case. *See Commonwealth v. Epps,* 273 Va. 410, 414, 641 S.E.2d 77, 80 (2007) (In the context of contemptuous behavior in the courtroom, "[a]ny harm in this case was suffered by the court as an institution, not by [the judge] personally."). By that, we mean the order of March 16, 2006, by its very issuance, is an act binding within the jurisdictional limits of the Circuit Court of Arlington County. Therefore, the Circuit Court of Arlington County, which is coterminous with the 17th judicial circuit, has authority to regulate the conduct of attorneys throughout that circuit, but no further. Indeed, as we recognized in *Ex Parte Fisher, Legal Club,* and *Drewry,* a court's authority in the discipline of attorneys practicing before it is limited

to the jurisdictional boundaries of that court and cannot extend to other courts beyond that boundary.[10]

For all these reasons, we conclude the circuit court had jurisdiction to revoke Moseley's privilege to appear in that court and thus did not err in the judgment of March 16, 2006.

***699** B. Notice of the Alleged Misconduct

[7] Moseley also alleges the circuit court erred in revoking his privilege to practice before the Circuit Court of Arlington County "without notice of the alleged misconduct." Although Moseley also argues on brief the broader contention that he did not have notice "that his right to practice law was in jeopardy," he made no assignment of error as to that issue. We thus limit our review to the specific issue to which he assigned error. Rule 5:17(c); *see Chesapeake Hosp. Auth. v. Commonwealth,* 262 Va. 551, 557, 554 S.E.2d 55, 57 (2001).

Moseley's argument that he lacked notice of the alleged misconduct is without merit. Courts are not required to list with specificity their factual basis for issuing a rule to show cause. Moreover, the record clearly shows Moseley received, inter alia, copies of the motion to disqualify, communication from the Christian Coalition to the court stating the intent to raise correspondence written by Moseley (with copies of the referenced correspondence attached), a transcript of the February 16 hearing detailing the evidence on which the Christian Coalition was relying to support Moseley's disqualification, and the issuance of a rule to show cause in the circuit court's February 27 order. Moseley received more than adequate "notice of the alleged misconduct," which was the subject of the March 16 hearing and embodied in the findings of the March 16, 2006 order. Thus, Moseley's second assignment of error also fails.

III. CONCLUSION

For the reasons set forth above, the circuit court had the jurisdiction to revoke Moseley's privilege to practice before it. Moseley also had adequate notice of the conduct the circuit court would consider in deciding on that revocation. Accordingly, we will affirm the judgment of the circuit court.

Affirmed.

All Citations

273 Va. 688, 643 S.E.2d 190

Footnotes

1 Moseley filed a timely notice and petition of appeal from this order. However, on March 15, 2005, this Court dismissed the petition for appeal under Rule 5:11 for failure to timely file a transcript or written statement of facts. The monetary sanctions award against Moseley and Ammons is not before the Court in this appeal.

2 The second motion for judgment attached a copy of the consulting agreement and contended the Christian Coalition waived its right to rely on the arbitration provisions by defending the prior motion for judgment.

3 Among the factors the Christian Coalition cited in its motion to disqualify were: Moseley and Ammons' joint and several liability for the monetary sanctions award, Moseley's subsequent declaration of bankruptcy that would insulate him from collection of the monetary sanctions award, Moseley's failure to perfect an appeal of the monetary sanctions award, and Moseley's potential testimony in the pending case regarding the contract's arbitration clause.

4 Judge Joanne F. Alper was the presiding judge in the proceedings related to the first motion for judgment, and entered the monetary sanctions award. However, Judge Alper "voluntarily recused herself for the limited purpose of hearing from Defendant's Motion to Disqualify." Judge Benjamin N.A. Kendrick presided over the remaining proceedings relevant to this appeal, including the February 16, 2006 and March 16, 2006 hearings.

5 Moseley's letter and motion, which the Christian Coalition introduced into evidence at the hearing, indicated that Judge Alper decided to recuse herself from hearing the motion to disqualify him from representing Ammons because she had engaged in "misconduct" during the first motion for judgment proceedings.

6 Moseley's disqualification from representing Ammons and the referral to the Virginia State Bar are not before this Court

on appeal. The underlying dispute between Ammons and the Christian Coalition has subsequently settled. Consequently, we granted Moseley's motion to dismiss the Christian Coalition as appellee in the matter and the appeal was re-styled *In re Moseley.* The Court designated counsel to argue as amicus curiae in support of the circuit court's actions.

7 Even before the unification of the various bars within the Commonwealth and creation of the Virginia State Bar in 1938, revocation of a license to practice law was a matter governed by statute. *Ex Parte Fisher,* 33 Va. (6 Leigh) 619, 624–25 (1835).

8 Subsection (A) of Code § 54.1–3935 states:

> If the Supreme Court, the Court of Appeals, or any circuit court of this Commonwealth observes, or if a complaint, verified by affidavit is made by any person to such court, that any attorney has been convicted of a misdemeanor involving moral turpitude or a felony or has violated the Virginia Code of Professional Responsibility, the court may assign the matter to the Virginia State Bar for investigation. Upon receipt of the report of the Virginia State Bar, the court may issue a rule against such attorney to show cause why his license to practice law shall not be revoked. If the complaint, verified by affidavit, is made by a district committee of the Virginia State Bar, the court shall issue a rule against the attorney to show cause why his license to practice law shall not be revoked.

The remaining subsections set forth how the case will proceed and the attorney's rights during the proceedings. Subsection (D) specifically authorizes the court to, inter alia, revoke or suspend an attorney's "license to practice law in this Commonwealth" if the attorney is found guilty by the court.

9 Moseley raises no issue as to the sufficiency of the evidence to support the circuit court's judgment, nor does he raise an issue as to whether the circuit court abused its discretion, based on the evidence, in revoking his privilege to practice before the court. Thus, we address neither matter. Rule 5:17(c).

10 As noted above, the March 16, 2006 order, in and of itself, does not affect Moseley's license to practice law. Moseley's license to practice law remains in effect, even within the jurisdictional boundaries of the Circuit Court of Arlington County; he simply cannot appear in that court. We also note that the March 16, 2006 order, by its specific terms, applies only to the Circuit Court of Arlington County, and does not undertake to revoke Moseley's privilege to practice before the juvenile and domestic relations or general district courts of Arlington County.

End of Document

280 Va. 1
Supreme Court of Virginia.

Jonathon Alden MOSELEY, Appellant,
v.
VIRGINIA STATE BAR, ex rel. SEVENTH DISTRICT COMMITTEE, Appellee.

Record No. 092126.
|
June 10, 2010.

Synopsis
Background: State bar filed complaint against attorney, alleging violations of the rule of professional conduct. A three-judge panel of the Circuit Court, Loudoun County, found misconduct and suspended attorney's license to practice law for six months. Attorney appealed.

Holdings: The Supreme Court held that:

[1] attorney violated rule of professional conduct regarding an attorney's statements about a judge or other judicial officer;

[2] attorney had adequate notice and opportunity to answer;

[3] attorney disciplinary proceedings are not subject to any statute of limitations;

[4] the lack of an annual review by the State Bar of the professional regulations governing the practice of law did not invalidate charges or sanction against attorney; and

[5] six-month suspension was justified.

Affirmed.

West Headnotes (13)

[1] **Constitutional Law**
⇐Statements regarding judge or court officials

Public statements by attorneys concerning the integrity of judges and judicial officers are not protected speech because they create a substantial likelihood of material prejudice to the administration of justice. U.S.C.A. Const.Amend. 1; Rules of Prof.Conduct, Rule 8.2.

Cases that cite this headnote

[2] **Attorney and Client**
⇐Dignity, decorum, and courtesy; criticism of courts

Rule of professional conduct regarding an attorney's statements about a judge or other judicial officer was not void for vagueness as applied to attorney who wrote letter to arbitration association stating that a circuit court judge "was caught engaging in serious misconduct" and was the subject of an investigation by the Judicial Inquiry and Review Commission as a result of the misconduct, and who wrote e-mail to colleagues in which he stated that monetary sanctions award entered against him by the circuit court judge was "an absurd decision from a whacko judge, whom I believe was bribed," and that he believed that opposing counsel was demonically empowered. Rules of Prof.Conduct, Rule 8.2.

Cases that cite this headnote

[3] **Attorney and Client**
⇐Deception of court or obstruction of administration of justice

Attorney's conduct, in writing letter to arbitration association stating that a circuit court judge "was caught engaging in serious misconduct" and was the subject of an investigation by the Judicial Inquiry and Review Commission as a result of the misconduct, and who wrote e-mail to colleagues in which he stated that monetary sanctions award entered against him by the circuit court judge was "an absurd decision from a whacko judge, whom I

believe was bribed," and that he believed that opposing counsel was demonically empowered, violated rule of professional conduct regarding an attorney's statements about a judge or other judicial officer. Rules of Prof.Conduct, Rule 8.2.

Cases that cite this headnote

[4] **Attorney and Client**
⚖Nature and form in general

The primary purpose of attorney disciplinary proceedings is to protect the public, not punish the attorney.

1 Cases that cite this headnote

[5] **Constitutional Law**
⚖Conduct and discipline

To satisfy due process, it is only necessary that an attorney subject to attorney disciplinary proceedings be informed of the nature of the charge preferred against him and be given an opportunity to answer. U.S.C.A. Const.Amend. 14.

2 Cases that cite this headnote

[6] **Attorney and Client**
⚖Charges and answers thereto
Attorney and Client
⚖Trial or hearing
Constitutional Law
⚖Conduct and discipline

Attorney subject to attorney disciplinary proceedings had adequate notice and opportunity to answer, and thus was not deprived of due process; attorney was present for the proceedings and responded not only to the charges of misconduct pending against him, but disputed the underlying facts as well. U.S.C.A. Const.Amend. 14.

1 Cases that cite this headnote

[7] **Attorney and Client**
⚖Proceedings

Attorney disciplinary proceedings are not subject to any statute of limitations.

Cases that cite this headnote

[8] **Attorney and Client**
⚖Defenses

The lack of an annual review by the State Bar of the professional regulations governing the practice of law in the Commonwealth did not invalidate charges of misconduct against attorney, or invalidate the circuit court panel's decision to sanction attorney for such misconduct. West's V.C.A. § 54.1–100.

Cases that cite this headnote

[9] **Attorney and Client**
⚖Review

On appeal from imposition of a sanction for attorney misconduct, Supreme Court reviews the decision of the three-judge circuit court panel and conducts an independent examination of the record, considering the evidence and all reasonable inferences therefrom in the light most favorable to the prevailing party below, and gives the factual findings of the three-judge court substantial weight, viewing them as prima facie correct.

Cases that cite this headnote

[10] **Attorney and Client**
⇐Review

The factual conclusions of the three-judge circuit court panel in attorney disciplinary proceedings, while not carrying the weight of a jury verdict, will be sustained on appeal unless they are not justified by the evidence or are contrary to law.

Cases that cite this headnote

[11] **Attorney and Client**
⇐Definite Suspension

Six-month suspension from the practice of law was justified for attorney who prosecuted an action on employment contract knowing that it was stayed by operation of arbitration clause, engaged in abusive and vexatious discovery tactics, filed frivolous pleadings, and made false public statements impugning the integrity of judge and opposing counsel. Rules of Prof.Conduct, Rules 3.3(a)(1), 3.4(e, j), 4.1(a), 8.2, 8.4(a–c).

Cases that cite this headnote

[12] **Attorney and Client**
⇐Discretion

Upon any finding of attorney misconduct, the three-judge circuit court panel has the discretion to impose an admonition with or without terms, a public reprimand with or without terms, a suspension of up to five years, or a revocation. West's V.C.A. § 54.1–3935(D); Integration of the State Bar, Pt. 6, § IV, Par. 13–18(M).

Cases that cite this headnote

[13] **Attorney and Client**
⇐Review

Sanctions imposed by three-judge circuit court panel in attorney disciplinary proceedings are viewed as "prima facie correct" and Supreme Court will not disturb those sanctions on appeal, unless, upon an independent examination of the whole record, the Court finds that the sanctions were unjustified by a reasonable view of the evidence or are contrary to law.

Cases that cite this headnote

Opinion

**588 *1 Upon consideration of the record, briefs, and argument of counsel, the Court is of opinion there is no error in the memorandum order that is the subject of this appeal.

Jonathon Moseley represented Tracy E. Ammons in a breach of contract action against the Christian Coalition of America (CCA). The CCA argued that the proceedings were stayed by the operation of an arbitration clause in the employment contract. Moseley argued that the contract existed, but that his client did not have a copy; therefore, his client was not sure that there was an arbitration clause.

The circuit court held an evidentiary hearing to determine the contents of the employment contract as regards an agreement to arbitrate. On cross-examination, Ammons admitted that he had given a copy of the employment contract to Moseley and that the contract did contain an arbitration clause. The contract was produced and Moseley then made a motion for nonsuit, which was granted.*

The circuit court sanctioned Moseley and Ammons because they proceeded with their decision to have an evidentiary hearing regarding the existence of an agreement to arbitrate, knowing that the alleged employment contract containing an arbitration clause existed. The circuit court also reprimanded Ammons and Moseley, who filed in excess of eighty pleadings and motions in the case, for using abusive discovery tactics and filing frivolous pleadings. The circuit court *2 stated that Ammons and Moseley conducted the proceeding without any basis and with the goal "to specifically harm, deter, and harass the Defendant through vexatious litigation." Moseley and Ammons were sanctioned and

ordered to pay attorney's fees and costs.

After the evidentiary hearing, Roberta Combs, the president of the CCA, filed a complaint with the Virginia State Bar, alleging that Moseley had acted in an unprofessional manner by filing nearly 90 pleadings and also writing letters to the CCA that were unprofessional and intended to intimidate and harass the CCA.

Moseley also wrote a letter to the AAA, stating that the circuit court judge who had adjudicated the evidentiary hearing "was caught engaging in serious misconduct" and that the circuit court judge was the subject of an investigation by the Judicial Inquiry and Review Commission as a result of this misconduct. Additionally, Moseley sent an email to colleagues in which he stated that the monetary sanctions award entered by the circuit court judge was "an absurd decision from a whacko judge, whom I believe was bribed," and that he believed that opposing counsel was demonically empowered.

After these and other incidents, Moseley's right to practice in the Circuit Court of Arlington County was revoked. Moseley appealed that revocation to this Court, where it was affirmed. *In re: Moseley,* 273 Va. 688, 643 S.E.2d 190 (2007). The circuit court also referred the issue to the Virginia State Bar and this Court "for consideration of reciprocal revocation of licensure."

The Seventh District Committee of the Virginia State Bar filed a complaint against ****589** Moseley, after investigating the various allegations, and charged Moseley with violating Sections 1.7, 3.1, 3.3, 3.4, 3.7, 4.1, 8.2 and 8.4 of the Rules of Professional Conduct. Moseley requested a three-judge circuit court panel (the panel) pursuant to Code § 54.1–3935 and appeared before the panel. At the conclusion of the hearing, the panel found that Moseley had violated Rules 3.3(a)(1), 3.4(e), 3.4(j), 4.1(a), 8.2 and 8.4(a), (b), and (c). The panel suspended Moseley's license to practice law for six months. Moseley appeals.

Moseley contends that the Rule 8.2 violations were improperly based on private speech that should not have been a predicate for discipline under the Rules of Professional Conduct. He also argues that Rule 8.2 is void for vagueness because it does not distinguish between private attorney speech and public attorney speech. Moseley relies on ***3** *Anthony v. Virginia State Bar,* 270 Va. 601, 609, 621 S.E.2d 121, 126 (2005), for the proposition that a lawyer's right to free speech is limited only by the lawyer's obligation to abstain from public debate that will obstruct the administration of justice.

[1] [2] [3] However, as we have previously stated, public statements by attorneys concerning the integrity of judges and judicial officers are not protected speech because they create a " 'substantial likelihood of material prejudice' to the administration of justice." *Id.* at 610, 621 S.E.2d at 126 (quoting *Gentile v. State Bar of Nevada,* 501 U.S. 1030, 1074–75, 111 S.Ct. 2720, 115 L.Ed.2d 888 (1991)). Moseley clearly made derogatory statements about the integrity of the judicial officer adjudicating his matters and those statements were made either with knowing falsity or with reckless disregard for their truth or falsity. Therefore we hold that Moseley's contentions that Rule 8.2 is void for vagueness and that his statements were not a proper predicate for discipline under that Rule are without merit.

Moseley also contends that his due process rights were violated. Moseley argues that the disciplinary proceedings are quasi-criminal; therefore, he asserts that the original complaint was not valid because it was not verified by an affidavit that included detailed allegations which could not be amended during the proceedings. Moseley also argues that the panel erred in failing to dismiss as invalid various allegations that never identified the precise conduct violating the rules.

[4] [5] [6] We have previously stated that the proceeding to discipline an attorney is a civil proceeding. *Norfolk & Portsmouth Bar Ass'n v. Drewry,* 161 Va. 833, 837, 172 S.E. 282, 284 (1934). The primary purpose of such disciplinary proceedings is to protect the public, not punish the attorney. *Virginia State Bar v. Gunter,* 212 Va. 278, 284, 183 S.E.2d 713, 717 (1971). To that end, "it is only necessary that the attorney be informed of the nature of the charge preferred against him and be given an opportunity to answer." *Id.* The record reflects that Moseley had adequate notice and opportunity to answer, as he was present for the proceedings and responded not only to the charges of misconduct pending against him, but disputed the underlying facts as well. Further, the Virginia State Bar complied with the statutory requirements of Code § 54.1–3935 by verifying the district committee complaint by affidavit. Therefore, we reject Moseley's contention that his due process rights were violated by the proceedings before the panel.

[7] ***4** Moseley contends that the panel erred in its decision because the actions of the Virginia State Bar were barred by the statute of limitations. As we have previously stated, disciplinary proceedings are not subject to any statute of limitations. *See Drewry,* 161 Va. at 842, 172 S.E. at 286. The Virginia State Bar did not violate any statute of limitations in filing a complaint against Moseley and we hold that Moseley's claim that it did so is without

merit.

[8] Moseley also asserts that the panel's decision is invalid because the Virginia State Bar did not conduct an annual review of the professional regulations governing the practice of law in the Commonwealth as required under Code § 54.1–100. Moseley bases this argument on *United States ex rel. Accardi v. Shaughnessy,* 347 U.S. 260, 266–67, 74 S.Ct. 499, 98 L.Ed. 681 (1954), a case in which the Supreme Court of the United States stated that a federal agency's actions may be invalid if the agency fails to follow its own procedures ****590** and regulations. We hold that the lack of an annual review did not invalidate the charges of misconduct, nor did the lack of an annual review invalidate the panel's decision to sanction Moseley.

[9] [10] The remainder of Moseley's assignments of error address the sufficiency of the evidence. On appeal, this Court reviews the decision of the three-judge panel and conducts "an independent examination of the record, considering the evidence and all reasonable inferences therefrom in the light most favorable to the prevailing party below," and gives "the factual findings of the three-judge court substantial weight, viewing them as prima facie correct." *Barrett v. Virginia State Bar,* 272 Va. 260, 268–69, 634 S.E.2d 341, 345–46 (2006). Furthermore, "[t]he factual conclusions, while not carrying the weight of a jury verdict, will be sustained unless they are not justified by the evidence or are contrary to law." *Id.* at 269, 634 S.E.2d at 346.

We have conducted an independent review of the record and, after considering the evidence and the legal conclusions of the panel, we find that there was sufficient evidence to sustain the panel's findings.

[11] [12] [13] Moseley also argues that a six-month suspension was inappropriate in light of the fact that this Court upheld a reprimand imposed for public comments in *Anthony,* 270 Va. at 604, 621 S.E.2d at 122. However, upon any finding of misconduct, the panel has the discretion to impose an admonition with or without terms, a public reprimand with or without terms, a suspension of up to five years, or a revocation. *See* Code § 54.1–3935(D) (providing that "if the attorney ***5** is found guilty by the court, his license to practice law in this Commonwealth shall be revoked or suspended for such time as the court may prescribe," and that "[i]n lieu of revocation or suspension, the court may impose any other sanction authorized by Part Six, Section IV, Paragraph 13 of the Rules of Court"); *see also* Va. Sup.Ct. R., Part 6, § IV, ¶ 13–18(M) (listing available sanctions). In determining whether a particular punishment is appropriate, this Court reviews such decisions for an abuse of discretion. *Maddy v. First District Committee,* 205 Va. 652, 658–59, 139 S.E.2d 56, 60–61 (1964). Such sanctions imposed are viewed as "prima facie correct" and we will not disturb those sanctions, unless, upon an independent examination of the whole record, we find that the sanctions were unjustified by a reasonable view of the evidence or are contrary to law. *Tucker v. Virginia State Bar,* 233 Va. 526, 534, 357 S.E.2d 525, 530 (1987).

The panel was within the bounds of the law in imposing a six-month suspension because the panel's factual findings supported numerous violations of the Rules of Professional Conduct. We hold that the six-month suspension imposed upon Moseley was justified by a reasonable view of the evidence and was not contrary to law.

For the foregoing reasons, the judgment of the three-judge panel of the Circuit Court of Loudoun County is affirmed. The appellant shall pay to the appellee thirty dollars damages.

Justice MIMS took no part in the consideration of this case.

All Citations

280 Va. 1, 694 S.E.2d 586

Footnotes

* The case concerning the employment contract proceeded to arbitration before the American Arbitration Association (AAA).

End of Document

285 Va. 457
Supreme Court of Virginia.

Heather Ellison ZAUG
v.
VIRGINIA STATE BAR, EX REL. FIFTH DISTRICT—SECTION III COMMITTEE.

Record No. 121656.
|
Feb. 28, 2013.

Synopsis
Background: Attorney appealed from judgment entered by a three-judge panel of the Circuit Court, City of Alexandria, Lon Edward Farris, James F. Almand, and John J. McGrath, Jr., Judges Designate, in a disciplinary hearing.

[Holding:] The Supreme Court, William C. Mims, J., held that attorney did not violate professional conduct rule relating to communications with persons represented by counsel by failing to hang up on caller to attorney's firm as soon as attorney realized that caller was a plaintiff in medical malpractice action in which attorney's firm was representing physician.

Reversed, vacated, and dismissed.

West Headnotes (8)

[1] **Attorney and Client**
⚖Weight and sufficiency

The State Bar has the burden in an attorney disciplinary proceeding of proving by clear and convincing evidence that the attorney violated the relevant Rules of Professional Conduct.

1 Cases that cite this headnote

[2] **Attorney and Client**
⚖Review

When reviewing a lawyer discipline proceeding, the Supreme Court conducts an independent examination of the entire record.

Cases that cite this headnote

[3] **Attorney and Client**
⚖Review

On review of a lawyer discipline proceeding, the Supreme Court considers the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the State Bar, the prevailing party in the trial court.

Cases that cite this headnote

[4] **Attorney and Client**
⚖Review

The Supreme Court accords the trial court's factual findings in a lawyer discipline proceeding substantial weight and views those findings as prima facie correct.

Cases that cite this headnote

[5] **Attorney and Client**
⚖Review

Although the Supreme Court does not give the trial court's conclusions in a lawyer discipline proceeding the weight of a jury verdict, the Supreme Court will sustain those conclusions unless it appears that they are not justified by a reasonable view of the evidence or are contrary to law.

Cases that cite this headnote

[6] **Attorney and Client**
⇐Review

The interpretation of the rules of a professional conduct is a question of law that the Supreme Court reviews de novo.

1 Cases that cite this headnote

[7] **Attorney and Client**
⇐Relations, dealings, or communications with witness, juror, judge, or opponent
Attorney and Client
⇐Grounds for Discipline

State Bar must prove three separate facts to prove a violation of professional conduct rule relating to communications with persons represented by counsel: (1) that the attorney knew that he or she was communicating with a person represented by another lawyer; (2) that the communication was about the subject of the representation; and (3) that the attorney (a) did not have the consent of the lawyer representing the person and (b) was not otherwise authorized by law to engage in the communication. Rules of Prof.Conduct, Rule 4.2.

1 Cases that cite this headnote

[8] **Attorney and Client**
⇐Grounds for Discipline

Attorney did not violate professional conduct rule relating to communications with persons represented by counsel when, after realizing that caller to her law firm was a plaintiff in medical malpractice action in which attorney's firm was representing physician, attorney failed to hang up instantaneously, but listened no longer than 30 seconds more to caller's emotional outburst about the toll the litigation was taking on her family before telling caller that attorney's firm could not help her, stating that caller needed to try to reach her own counsel, and terminating the call; rule did not obligate attorney to hang up on a represented person without regard to courtesy. Rules of Prof.Conduct, Rule 4.2.

Cases that cite this headnote

***915** From the Circuit Court of the City of Alexandria, Lon Edward Farris, James F. Almand, and John J. McGrath, Jr., Judges Designate.

Attorneys and Law Firms

Seth M. Guggenheim, Assistant Ethics Counsel (Edward L. Davis, Bar Counsel; Kathryn R. Montgomery, Deputy Bar Counsel, on brief), for appellee.

Bernard J. DiMuro (Michael S. Lieberman; DiMuroGinsberg, Alexandria, on briefs), for appellant.

Amicus Curiae: Virginia Association of Defense Attorneys (Jeffrey H. Geiger: Sands Anderson, on brief), in support of appellant.

Present: All the Justices.

Opinion

Opinion by Justice WILLIAM C. MIMS.

In this appeal of right from a judgment entered by a three-judge circuit court in a disciplinary hearing, we consider whether an attorney violated Rule 4.2 of the Virginia Rules of Professional Conduct.

I. BACKGROUND AND MATERIAL PROCEEDINGS BELOW

Heather Ellison Zaug is an attorney licensed to practice law in the Commonwealth of Virginia and admitted to the Bar of this Court. In April 2010, Zaug and Richard L. Nagle, her partner, represented a doctor in a medical malpractice action brought by Ian, Yanira, and Vincent W. Copcutt. The Copcutts were represented by Judith M. Cofield.

On April 15, Yanira Copcutt ("Yanira") telephoned the firm's office to speak with Nagle. He could not take the call because he was on his way to depose Vincent Copcutt ("Vincent"). A staff member transferred the call to Zaug. Zaug admits that she knew the call concerned Vincent's deposition but she denies knowing who the caller was when she answered. There is no recording or transcript of the call.

The parties agree that Yanira was distraught. According to Zaug, the call lasted approximately 60 seconds. It is undisputed that Yanira told Zaug about the toll the litigation was taking on her family and that Vincent's deposition needed to be cancelled. According to Zaug, she apologized and told Yanira that she could not help her and that Yanira needed to contact Cofield.

***916** According to Zaug, she then attempted to terminate the call but Yanira resisted "with an outpouring of emotion." Yanira said that she had been unable to reach Cofield and that she wanted to speak to Nagle. Zaug reiterated that "[w]e can't help you. You need to try to reach Ms. Cofield. I'll try to contact Mr. Nagle and they'll have to sort this out." She then terminated the call.

Another attorney at the firm witnessed part of the call. The witness testified that it lasted about 30 seconds from the time Zaug realized who the caller was and corroborated her recollection of her side of the conversation from that point forward.

According to Yanira, Zaug addressed her by name when she answered the call, saying, "Hi, Mrs. Copcutt." Yanira told Zaug that Vincent's deposition needed to be cancelled. When Zaug asked what was wrong with the deposition, Yanira started crying, rambling, and describing the emotional difficulties associated with the injury caused by Zaug's client's alleged malpractice. Further, Yanira told Zaug that she wanted to dismiss the lawsuit.[1]

After Vincent's deposition, Yanira told Cofield about her conversation with Zaug. Cofield thereafter filed a complaint with the Virginia State Bar ("the State Bar") in which she set forth Yanira's account of the conversation. The State Bar issued a charge of misconduct alleging that Zaug had violated Rule 4.2 of the Virginia Rules of Professional Conduct.

The charge of misconduct was heard by the Fifth District Section III Committee pursuant to Paragraph 13–16 of Part 6, Section IV of the Rules of this Court. After a hearing, the district committee issued a determination that Zaug's conduct constituted a violation of the Rule. The district committee imposed the sanction of a dismissal *de minimis.*

Zaug appealed the district committee's determination to the circuit court pursuant to Paragraph 13–17(A) of Part 6, Section IV of the Rules of this Court. Sitting by designation pursuant to Code § 54.1–3935(B), a three-judge panel of the court affirmed the findings of the district committee and the sanction of a dismissal *de minimis.* Zaug perfected a timely appeal of right from the court's judgment pursuant to Code § 54.1–3935(E) and Rule 5:21(b)(2)(ii).

II. ANALYSIS

[1] [2] [3] [4] [5] [6] When we review a lawyer discipline proceeding, "the State Bar has the burden of proving by clear and convincing evidence that the attorney violated the relevant Rules of Professional Conduct." *Weatherbee v. Virginia State Bar,* 279 Va. 303, 306, 689 S.E.2d 753, 754 (2010) (citing *Barrett v. Virginia State Bar,* 272 Va. 260, 268 n. 4, 634 S.E.2d 341, 345 n. 4 (2006); *Blue v. Seventh District Committee,* 220 Va. 1056, 1062, 265 S.E.2d 753, 757 (1980); *Seventh District Committee v. Gunter,* 212 Va. 278, 284, 183 S.E.2d 713, 717 (1971)).

> We conduct an independent examination of the entire record. We consider the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the Bar, the prevailing party in the trial court. We accord the trial court's factual findings substantial weight and view those findings as prima facie correct. Although we do not give the trial court's conclusions the weight of a jury verdict, we will sustain those conclusions unless it appears that they are not justified by a reasonable view of the evidence or are contrary to law.

Id. at 306, 689 S.E.2d at 754–55 (quoting *Anthony v. Virginia State Bar,* 270 Va. 601, 608–09, 621 S.E.2d 121, 125 (2005) (internal quotation marks and citation omitted)). The ***917** Virginia Rules of Professional Conduct are Rules of this Court. *See* Code § 54.1–3909. The interpretation of such Rules is a question of law we review de novo. *LaCava v. Commonwealth,* 283 Va. 465, 469–71, 722 S.E.2d 838, 840 (2012).

Rule 4.2 of the Virginia Rules of Professional Conduct states that "[i]n representing a client, a lawyer 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 by law to do so." The commentary provides guidance for interpreting the scope and meaning of the Rule. Comment 3 states,

> [t]he Rule applies even though the represented person initiates or consents to the communication. A lawyer must *immediately* terminate communication with a person if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this Rule. A lawyer is permitted to communicate with a person represented by counsel without obtaining the consent of the lawyer currently representing that person, if that person is seeking a "second opinion" or replacement counsel.

(Emphasis added.) Further, Comment 4 states, in relevant part, "This Rule does not prohibit communication with a represented person ... concerning matters outside the representation."

[7] Viewed in the light of the commentary, it is clear that the Bar must prove three separate facts to establish a violation of the Rule: (1) that the attorney knew that he or she was communicating with a person represented by another lawyer; (2) that the communication was about the subject of the representation; and (3) that the attorney (a) did not have the consent of the lawyer representing the person and (b) was not otherwise authorized by law to engage in the communication. While the first two facts may occur in any order, both must occur before an attorney violates the Rule.

Zaug admits that she was aware of the subject of the telephone call when she answered it, and this is reflected in the district committee's factual findings. However, the record does not disclose when she became aware that the caller was a represented person. Although Yanira testified at the hearing on her motion to disqualify counsel that Zaug addressed her as Mrs. Copcutt when she answered the call, thereby indicating Zaug knew the identity of the caller at the time she answered, Zaug denied knowing the identity of the caller until Yanira described the emotional toll the litigation was having on her family.

The circuit court made no factual findings and merely affirmed the district committee's determination. However, the district committee made no finding resolving this dispute of fact. To the contrary, the district committee found only that Zaug "was aware she was speaking with Copcutt either at the time she took the telephone call or concomitantly therewith." We are unable to decipher the meaning of this finding. "Concomitantly" means "in a concomitant manner." Webster's Third New International Dictionary 471 (1993) means "accompanying or attending esp[ecially] or incidental way[;] occurring along with or at the same time as and with or without a causal relationship." *Id.*

Accordingly, the finding does not determine whether Zaug knew the identity of the caller when she answered or soon thereafter. Consequently, this finding does not answer the question of when Zaug knew both (a) the identity of the party with whom she was communicating and (b) the subject of the communication.[2] Further, at oral argument, the State Bar conceded that there was no evidence of how much time elapsed between the instant Zaug knew both pieces of information and the end of the call.

***918** Nevertheless, "[w]e conduct an independent examination of the entire record." *Weatherbee,* 279 Va. at 306, 689 S.E.2d at 754. Zaug testified that she answered, "This is Heather, how can I help you?" The caller responded, "I need to speak with Mr. Nagle. The deposition needs to be cancelled." Nonplussed by the response, Zaug then said, "This is Heather Zaug. I work with Mr. Nagle on the case. Who is this? How can I help you?" At that point, according to Zaug, Yanira began her emotional outburst, stating that the litigation was too much for her family. Zaug then knew the identity of the caller.

According to Zaug, she then said, "I'm sorry. I cannot help you. You need to try to speak with Ms. Cofield. Have you tried to reach Ms. Cofield?" Yanira's emotional outpouring continued for an unspecified number of seconds before Zaug concluded the call by stating, "I'm sorry. We can't help you. You need to try to reach Ms. Cofield. I'll try to contact Mr. Nagle and they'll have to sort this out." Zaug's witness testified that this interval lasted no longer than 30 seconds. The dispute between Zaug and the State Bar focuses on this uncertain period of time.

[8] Both parties argue the meaning and intent of the word "immediately" in Comment 3. The State Bar argues that

Zaug violated the Rule when she failed to terminate the call by hanging up during Yanira's emotional outburst. Zaug argues that such conduct would violate the principles of professionalism which infuse and imbue the proper practice of law. "Immediately," she contends, does not mean "instantaneously," and the Rule does not obligate an attorney to hang up on a represented person without regard to courtesy. We agree with Zaug.

In the course of being admitted to the Bar of this Court, every attorney swears the following oath:

> Do you solemnly swear or affirm that you will support the Constitution of the United States and the Constitution of the Commonwealth of Virginia, and that you will faithfully, honestly, *professionally, and courteously* demean yourself in the practice of law and execute your office of attorney at law to the best of your ability, so help you God?

(Emphasis added). *See also* Code § 54.1–3903.

Further, the State Bar publishes principles of professionalism on its website. The preamble states,

> From Thomas Jefferson to Oliver Hill, Virginia lawyers have epitomized our profession's highest ideals. Without losing sight of what lawyers do for their clients and for the public, lawyers should also focus on how they perform their duties. In their very first professional act, all Virginia lawyers pledge to demean themselves "professionally and courteously."

Virginia State Bar, Principles of Professionalism, http://vsb.org/pro-guidelines/index.php/principles/ (last visited Jan. 10, 2013). The principles state that, "In my conduct toward everyone with whom I deal, I should [r]emember that I am part of a self-governing profession, and that my actions and demeanor reflect upon my profession," and "I should [t]reat everyone as I want to be treated—with respect and courtesy." *Id.*

The Virginia Rules of Professional Conduct are precisely what they are described by their title to be: rules of professional conduct. They exist to further, not to obstruct, the professionalism of Virginia attorneys. Professionalism embraces common courtesy and good manners, and it informs the Rules and defines their scope. Accordingly, we will not construe the Rule to penalize an attorney for an act that is simultaneously non-malicious and *polite.*

The State Bar argues that to permit Zaug's conduct creates a so-called "distraught caller exception" or a "60–second call exception" to Rule 4.2, obscuring an otherwise bright-line rule of ethical conduct. We agree with the State Bar that attorneys must understand that they are ethically prohibited from communicating about the subject of ***919** representation with a person represented by another attorney unless they have that attorney's consent or are authorized by law to do so. The Rule categorically and unambiguously forbids an attorney from initiating such communications and requires an attorney to disengage from such communications when they are initiated by others. But the Rule does not require attorneys to be discourteous or impolite when they do so.

In this case, it is undisputed that Zaug did not initiate the telephone call. There is no evidence in the record, and the State Bar does not assert, that Zaug intended to gain advantage from it. Likewise, there is no evidence that Zaug deliberately or affirmatively prolonged it. On these specific and narrow facts, and construing Rule 4.2 to advance behavior that is both professional and ethical, we conclude that no violation occurred in this case. For these reasons, we will reverse the judgment of the circuit court, vacate the sanction imposed, and dismiss the charge of misconduct.

Reversed, vacated, and dismissed.

All Citations

285 Va. 457, 737 S.E.2d 914

Footnotes

1 Yanira testified at a hearing to disqualify Zaug as counsel in the underlying litigation. Nagle objected that her description of Zaug's statements was inadmissible hearsay. On the basis of Cofield's response that the statements were not offered for the truth of the matter asserted, the circuit court overruled the objection. Accordingly, the parties to this appeal dispute the evidentiary value of Yanira's testimony for the purpose of the disciplinary proceeding. For the

reasons stated herein, we do not address this question.

2 The district committee found that Zaug knew Copcutt was a represented person and that Zaug neither had Cofield's consent nor was authorized by law to engage in the communication. Those facts are not in dispute.

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291 Va. 111
Supreme Court of Virginia.

ENVIRONMENT SPECIALIST, INCORPORATED, t/a Howell's Heating and Air Conditioning Co.
v.
WELLS FARGO BANK NORTHWEST, N.A., as Trustee of the GSA Fredericksburg FBI 2013 Pass–Through Trust.

Record No. 150693.
|
Feb. 12, 2016.

Synopsis

Background: Contractor brought action to enforce a mechanics lien. After contractor's attorney refused to permit trustee of deed of trust relating to the property in question to file a late answer, trustee moved for leave to file the answer out of time and for fees and costs. The Circuit Court, Stafford County, Michael E. Levy, J., granted the motion and awarded sanctions against contractor's attorney. Contractor appealed.

[Holding:] The Supreme Court, Donald W. Lemons, C.J., held that trial court did not have authority to sanction attorney for his refusal to voluntarily extend time in which defendant was to file its answer.

Reversed and remanded.

West Headnotes (6)

[1] **Attorney and Client**
⇐Power of judge at chambers

Court's inherent power to discipline an attorney practicing before it includes the power not only to remove an attorney of record in a case, but also in a proper case to suspend or annul the license of an attorney practicing in the particular court.

Cases that cite this headnote

[2] **Attorney and Client**
⇐Liability for costs; sanctions

Trial court may only impose a monetary sanction against an attorney if the authority to do so is granted to the trial court by a statute or rule.

1 Cases that cite this headnote

[3] **Attorney and Client**
⇐Liability for costs; sanctions

Trial court did not have authority to sanction plaintiff's attorney for attorney's refusal to voluntarily extend time in which defendant was to file its answer in mechanics lien action; attorney's conduct did not involve a "pleading, motion, or paper," as required by statute governing sanctions, and attorney, who followed his client's express direction by not extending time, did not engage in behavior that could be characterized as unprofessional, an ethics violation, or behavior that was subject to statutory sanctions. West's V.C.A. § 8.01–271.1; Sup.Ct.Rules, Rule 3:8(a).

1 Cases that cite this headnote

[4] **Attorney and Client**
⇐Liability for costs; sanctions

An attorney may be sanctioned for filing a motion that is well-grounded in fact and warranted by existing law if that motion is nonetheless filed for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. West's V.C.A. § 8.01–271.1.

Cases that cite this headnote

[5] **Attorney and Client**
Liability for costs; sanctions

There is nothing in statute allowing sanctions for the filing of a frivolous pleading that gives a trial court authority to impose sanctions on an attorney for failing to voluntarily agree to an extension of a deadline for an opposing party. West's V.C.A. § 8.01–271.1.

1 Cases that cite this headnote

[6] **Attorney and Client**
Standards, canons, or codes of conduct

Principles of professionalism for lawyers are aspirational, and they shall not serve as a basis for disciplinary action or for civil liability.

Cases that cite this headnote

Attorneys and Law Firms

****147** William B. Cave (Cave & Associates, on briefs), Chester, for appellant.

Jennifer A. Brust (William E. Evans; Bean, Kinney & Korman, on brief), Arlington, for appellee.

Present: All the Justices.

Opinion

Opinion by Chief Justice DONALD W. LEMONS.

***113** In this appeal, we consider whether the trial court erred when it awarded $1200 in sanctions against plaintiff's counsel for counsel's failure to voluntarily extend the time in which a defendant might file its answer.

***114 **148** I. Facts and Proceedings

Environment Specialist, Inc., t/a Howell's Heating & Air Conditioning Co. ("ESI") filed a complaint in the Circuit Court of Stafford County ("trial court") against Stafford Office One, LLC, Stafford Office Two, LLC, Stafford Management I, LLC (collectively the "Stafford defendants"), Lawyers Title Realty Services, Inc., and Wells Fargo Bank Northwest, N.A., Trustee ("Wells Fargo"), in order to enforce a mechanics lien. According to the complaint, ESI had contracted with the Stafford defendants, the owners of the property in question, to perform certain HVAC improvements. At the time the complaint was filed, ESI asserted that there was an unpaid balance of $24,449.30 that it was owed. Wells Fargo was named in the complaint because it was the trustee and secured party under the "Credit Line Deed of Trust, Security Agreement, Assignment of Leases and Rents, and Fixture Filing Statement" dated March 25, 2013, related to the property in question.

ESI's complaint was filed with the trial court on October 21, 2013. On October 29, 2013, the complaint was forwarded via the Secretary of the Commonwealth to Wells Fargo, and the Secretary filed a certificate of compliance with the clerk of the trial court on October 30, 2013. *See* Code § 8.01–329. Counsel for Wells Fargo, however, did not learn of the filing of the complaint until November 21, 2013. Counsel for Wells Fargo contacted counsel for ESI and requested a brief extension of the deadline within which to file its answer. Counsel for ESI did not consent to the requested extension. Wells Fargo then filed a motion for leave to file answer out of time, asking for leave to file the answer on or before November 26, 2013, and requested its "fees and costs incurred with regard to the motion." Wells Fargo did not cite any authority for the court's award of "fees and costs."

On January 2, 2014, the trial court entered a consent order between ESI and the Stafford defendants. The Stafford defendants agreed that they owed ESI the amount specified in the complaint, and agreed that the mechanics lien was a valid and enforceable lien against the property. Judgment was therefore entered jointly and severally against the Stafford defendants. Despite the entry of the consent order, on January 6, 2014, ESI filed a motion for default ***115** judgment against all the defendants, because none of the defendants had filed a responsive pleading within the 21–day period afforded by Rule 3:8.

The trial court held a hearing on February 3, 2014, to consider Wells Fargo's motion for leave to file answer out of time and ESI's motion for default judgment. The trial court granted Wells Fargo's motion and ordered ESI's counsel to reimburse Wells Fargo's counsel $1200 for

"fees and costs" incurred regarding the motion for leave to file answer out of time. In that order, the trial court required that the payment be made within 30 days, which was subsequently done "under protest." By separate order, the trial court granted ESI's motion for default judgment against defendant Lawyers Title Realty.

Thereafter, Wells Fargo, the only remaining defendant, and ESI advised the court that the matter had been settled. In its final order, entered February 18, 2014, the trial court stated that the judgment entered on January 2, 2014, had been satisfied and therefore released the mechanics lien. The trial court also stated that it had issued the $1200 sanctions award against ESI's counsel "for its failure to voluntarily extend the time in which Wells Fargo might file its answer." In its order, the trial court recites no statute or rule authorizing its award, nor does it invoke its inherent authority to do so.

There was no transcript of any proceeding related to the award of "fees and costs." Counsel for ESI submitted a written statement in lieu of a transcript pursuant to Rule 5:11(e) and counsel for Wells Fargo filed an objection thereto. However, the trial judge did not sign the statement in lieu of transcript and neither counsel placed the matter on the court's docket to accomplish this purpose.

ESI appealed to this Court and we granted the appeal on the following assignment of error:

> 1. The trial court erred in the following respect: By awarding sanctions ****149** against Counsel for the Plaintiff/Appellant for his failure to voluntarily agree to extend the time in which Counsel for the Defendant/Appellee was to file its Answer, as required by Rule 3:8(a) of the Rules of the Supreme Court of Virginia.

***116** II. Analysis

[1] In *Nusbaum v. Berlin,* 273 Va. 385, 641 S.E.2d 494 (2007), we examined the trial court's inherent powers to discipline attorneys, and considered whether that power included the authority to issue monetary sanctions in response to attorney misconduct. We recognized that the courts of this Commonwealth have long had the inherent power to supervise the conduct of attorneys practicing before them and to discipline any attorney who engages in misconduct. *Id.* at 399, 641 S.E.2d at 501 (citing *Judicial Inquiry & Review Comm'n of Va. v. Peatross,* 269 Va. 428, 447, 611 S.E.2d 392, 402 (2005); *Richmond Ass'n of Credit Men, Inc. v. Bar Ass'n of Richmond,* 167 Va. 327, 335, 189 S.E. 153, 157 (1937); *Norfolk & Portsmouth Bar Ass'n v. Drewry,* 161 Va. 833, 836, 172 S.E. 282, 283 (1934); *Legal Club of Lynchburg v. Light,* 137 Va. 249, 250, 119 S.E. 55, 55 (1923)). A court's inherent power to discipline an attorney practicing before it includes the power not only "to remove an attorney of record in a case," *Peatross,* 269 Va. at 447, 611 S.E.2d at 402, but also "in a proper case to suspend or annul the license of an attorney practicing in the particular court." *Legal Club of Lynchburg,* 137 Va. at 250, 119 S.E. at 55; *accord Norfolk & Portsmouth Bar Ass'n,* 161 Va. at 836–37, 172 S.E. at 283–84.

In *Nusbaum,* we determined that a monetary sanction against an attorney was not "in *accord* with the purpose of a trial court's inherent power to discipline an attorney, which is 'not to punish [the attorney], but to protect the public.' " 273 Va. at 400, 641 S.E.2d at 502 (citation omitted). Accordingly, we concluded that, absent the authority granted by a statute or rule, "a trial court's inherent power to supervise the conduct of attorneys practicing before it and to discipline an attorney who engages in misconduct does not include the power to impose as a sanction an award of attorneys' fees and costs to the opposing party." *Id.* at 400–01, 641 S.E.2d at 502.

[2] Our holding in *Nusbaum* therefore makes it clear that a trial court may only impose a monetary sanction against an attorney if the authority to do so is granted to the trial court by a statute or rule. As we stated above, the trial court in this case did not identify the authority under which it was imposing the monetary sanction against counsel. Upon review we can find no Rule of Court that ***117** applies, and, as outlined above, the trial court does not have inherent authority to justify its actions.

Although nothing in the record on appeal reveals that counsel or the trial court relied upon Code § 8.01–271.1 as a basis for its ruling, nonetheless we will consider whether the "sanctions" or "award of fees and costs" are justified pursuant to the statute. We have held that "a court's imposition of a sanction will not be reversed on appeal unless the court abused its discretion in 1) its decision to sanction the litigant, or 2) in the court's choice of the particular sanction employed." *Switzer v. Switzer,* 273 Va. 326, 331, 641 S.E.2d 80, 83 (2007).

[3] We note that the trial court's order recites that the "sanction" was awarded because counsel for ESI failed to

"voluntarily extend the time in which Wells Fargo might file its answer." The action by counsel declining to agree to an extension of time does not involve a "pleading, motion, or other paper" filed by counsel for ESI. In this regard, the award of sanctions is patently incorrect and completely without basis under the governing provisions of Code § 8.01–271.1, which provides in pertinent part:

> The signature of an attorney or party constitutes a certificate by him that (i) he has read the pleading, motion, or other paper, (ii) to the best of his knowledge, information and belief, formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and (iii) it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay ****150** or needless increase in the cost of litigation.

[4] [5] Nonetheless, and in plain disregard of the stated reason for the trial court's award, Wells Fargo argues for the first time on appeal that the trial court did not abuse its discretion in awarding sanctions because ESI filed its motion for default judgment against Wells Fargo with an improper purpose, and therefore the trial court had authority to issue sanctions under that portion of Code § 8.01–271.1. Wells Fargo is correct that an attorney may be sanctioned for filing a motion that is well grounded in fact and warranted by existing law if that motion is nonetheless filed for an ***118** improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. We recently affirmed a trial court's decision to issue sanctions on that exact basis. *See Kambis v. Considine,* 290 Va. 460, 468–69 & n. 3, 778 S.E.2d 117, 121–22 & n. 3 (2015) (affirming trial court's decision to award sanctions against plaintiff and plaintiff's counsel for filing numerous pleadings with an improper purpose of intimidating and injuring the defendant). However, there is nothing in the trial court's orders indicating that it ever made a finding that ESI's counsel had filed the motion for default judgment with an improper purpose. Rather, the trial court specifically held, in its final order, that it had imposed sanctions for counsel's "failure to voluntarily extend the time in which Wells Fargo might file its answer." It is well established law in this Commonwealth that a trial court speaks only through its written orders. *Davis v. Mullins,* 251 Va. 141, 148, 466 S.E.2d 90, 94 (1996). There is nothing in Code § 8.01–271.1 that gives a trial court authority to impose sanctions on an attorney for failing to voluntarily agree to an extension of a deadline for an opposing party.

On brief and in oral argument before this Court, counsel for Wells Fargo characterized ESI's counsel's behavior as "unprofessional." She asserted that in her 24 years of practicing law she had never heard of an attorney refusing to extend the type of professional courtesy she had requested. Counsel for Wells Fargo claimed that "the sanctions award was clearly intended to educate Plaintiff's counsel as to the level of professionalism [the trial judge] expected of counsel, as well as to reimburse Defendant's counsel for the unnecessary time and expense incurred in coming to [c]ourt to argue the [motion for leave to file an answer out of time]."

While professionalism embraces aspirational values of civility, courtesy, public service and excellent work product, legal ethics rules and statutory provision of sanctions express the lowest level of permissible conduct at the Bar, below which an attorney may be subject to discipline or sanctions. The legal profession has been self-regulating, and its attempts to regulate the conduct of its members has created a tension between the aspirational goals of professionalism and the bare minimum of ethical requirements and conduct required by written rules and statutes.

***119** In 1984, Chief Justice Warren Burger delivered a speech to the American Bar Association ("ABA"), voicing concerns over the decline in the public's perception of and confidence in lawyers. Warren E. Burger, *The State of Justice,* 70 A.B.A. J. 62 (1984). He asked the ABA to create a study group to examine these problems. *Id.* at 66. Chief Justice Burger's 1984 speech is generally considered the beginning of what many refer to as the Professionalism Movement: a concerted effort across the legal profession to address professionalism within its own ranks. *See, e.g.,* Jack L. Sammons, *The Professionalism Movement: The Problems Defined,* 7 Notre Dame J.L. Ethics & Pub. Pol'y 269 (1993). In response to Chief Justice Burger's call for action, the ABA established the Commission on Professionalism. This Commission studied the challenges for continued professionalism in the modern practice of law, and recommended nearly thirty specific actions to be undertaken by all members of the legal profession. ABA Comm'n on Professionalism, *In the Spirit of Public Service: A Blueprint for the Rekindling of Lawyer Professionalism,* 112 F.R.D. 243, 300 (1986) (reporting the conclusions of the ABA Commission on Professionalism).

The second important development in the Professionalism Movement was the founding ****151** of the American Inns of Court, also upon the encouragement of Chief Justice Burger. The American Inns were founded to "promote the goals of legal excellence, civility, professionalism, and ethics on a national level." *See* American Inns of Court, About Us–History, http://home.innsofcourt.org/AIC/About_Us/History/AIC/AIC_About_Us/History_of_the_American_Inns_of_Court.aspx (last visited Feb. 4, 2016). The first Inn was established in Utah in 1980, and a committee of the Judicial Conference of the United States recommended in 1983 the creation of a national foundation to support the expansion of the American Inn concept. *Id.* The American Inns of Court Foundation was created in 1985 to support the inns, and today there are nearly 400 chartered American Inns of Court, with more than 30,000 active members. *Id.*

In addition to the Inns of Court, fourteen states have established professionalism commissions as joint efforts between bar associations and the judiciary. *See* American Bar Ass'n, Professionalism Commissions, http://www.americanbar.org/groups/professional_responsibility/resources/professionalism/profcommissions.html (last ***120** visited Feb. 8, 2016). Fourteen more state bar associations have professionalism committees. *Id.* Thirty-eight states plus the District of Columbia have codes or creeds for professionalism in legal practices. *See* American Bar Ass'n, Professionalism Codes, http://www.americanbar.org/groups/professional_responsibility/resources/professionalism/professionalism_codes.html (last visited Feb. 8, 2016).

Virginia lawyers have been active participants in the promotion of professionalism. A high level of professionalism has always been expected and encouraged of all attorneys in this Commonwealth. Before being admitted to the Bar of this Court, every attorney swears the following oath:

> Do you solemnly swear or affirm that you will support the Constitution of the United States and the Constitution of the Commonwealth of Virginia, and that you will faithfully, honestly, *professionally,* and courteously demean yourself in the practice of law and execute your office of attorney at law to the best of your ability, so help you God?

(Emphasis added.) *See also* Code § 54.1–3903.

In 1987, this Court issued an order requiring all new attorneys in Virginia to take a mandatory course on professionalism, which is designed to encourage attorneys to uphold and elevate the standards of honor, integrity, and courtesy in the legal profession. *See* Virginia State Bar, About the Bar–Professionalism, https://www.vsb.org/site/about/professionalism (last visited Feb. 3, 2016). Additionally, in 2008, responding to the efforts of the Virginia Bar Association, this Court endorsed the Principles of Professionalism for Virginia Lawyers, which articulate standards of civility to which all Virginia lawyers should aspire. *See* Virginia State Bar, Principles of Professionalism, http://www.vsb.org/pro-guidelines/index.php/principles (last visited Feb. 3, 2016). These principles include guidelines on how counsel is expected to interact with clients, judges and court personnel, and opposing counsel. With respect to opposing counsel, attorneys should "[c]ooperate as much as possible on procedural and logistical matters," "[c]ooperate in scheduling discovery, negotiations, meetings, closings, hearings or other litigation or transactional events, accommodating ***121** opposing counsel's schedules whenever possible," and "agree whenever possible to opposing counsel's reasonable requests for extensions of time that are consistent with [an attorney's] primary duties to [the] client's interests." *Id.*

[6] It is important to recognize, however, that the principles of professionalism are aspirational, and, as we stated when this Court approved their adoption, they "shall not serve as a basis for disciplinary action or for civil liability." *Id.* Moreover, the principles themselves recognize that conflicts may arise between an attorney's obligations to a client's best interests and the professional courtesy of agreeing to an opposing counsel's request for an extension of time. *Id.* In this case, it is clear that the trial court sanctioned plaintiff's counsel "for its failure to voluntarily extend the time in which Wells Fargo might file its answer." However, in this case, counsel ****152** may not have been acting in his client's best interests if he had agreed to the requested extension of time. In fact, ESI directed counsel not to agree to the requested extension.

We applaud the bench and the bar as they encourage the aspirational values of professionalism. But there is a difference between behavior that appropriately honors an attorney's obligation to his client's best interest, behavior that falls short of aspirational standards, and behavior that is subject to discipline and/or sanctions. In this case, Wells Fargo was in default. Counsel for ESI satisfied his obligation to pursue his client's best interest, and in this case followed the client's express direction. Counsel did

not engage in behavior that could be characterized as unprofessional, an ethics violation or behavior that is subject to statutory sanctions. Accordingly, we reverse the trial court's order awarding $1200 in sanctions against plaintiff's counsel for counsel's failure to voluntarily extend the time in which Wells Fargo could file its answer.

III. Conclusion

For the reasons stated, we will reverse the judgment of the trial court regarding sanctions and remand for further proceedings not inconsistent with this opinion, including an order directing counsel for Wells Fargo to return the payment of $1200 to counsel for ESI.

Reversed and remanded.

All Citations

291 Va. 111, 782 S.E.2d 147

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