

Survey of Family Law Cases 2004-2013

2009 Family Law Survey

Professional Negligence

In *In re Matter of Fisher*, 202 P.3d 1186 (Colo. App. 2009), an attorney appealed from the attorney discipline Hearing Board's numerous findings of violations of the Rules of Professional Conduct for his representation of a wife in her dissolution of marriage action. The wife sought representation from the attorney to obtain survivor benefits and a share of the husband's federal retirement plan through the Office of Personnel Management (OPM). Before permanent orders, the attorney asked the wife to sign a promissory note secured by a deed of trust in the marital residence to secure his fees. The attorney never advised the court of his interest in the marital residence, nor did he supplement the wife's financial affidavit. In November 2003, the court ordered that the wife receive one-half of the husband's OPM benefits and survivor benefits, ordered the sale of the marital residence, and ordered each party to pay his or her own attorney fees. The husband began voluntarily paying the wife one-half of the OPM benefits he received each month, but the attorney never provided an order to the OPM, nor did he make any attempts to contact the OPM to facilitate transfer of the benefits to the wife. By March 2004, the wife terminated the attorney's services. On May 6, 2004, the attorney filed a notice of attorney lien. At the closing for the sale of the marital home, the attorney's promissory note was paid, and the proceeds from the sale were put into the attorney's trust account. In June 2004, the attorney filed a motion to enforce his attorney's lien and was paid from the funds in his trust account.

All Colorado attorneys are presumed to know the rules of professional conduct. Colo. R.P.C. 1.1 states "a lawyer shall provide competent representation. . . ." This includes study and investigation of factual and legal elements of a problem. The Hearing Board affirmed its finding that the attorney violated this rule by failing to contact the OPM, or mailing the decree to the OPM, and taking no steps to secure the wife's share of the husband's OPM benefits. Colo. R.P.C. 1.3 states that a "lawyer must act with reasonable diligence and promptness in representing a client. A lawyer shall not neglect a legal matter. . . ." The Hearing Board affirmed its finding that the attorney neglected the matter of securing the wife's OPM benefits, failed to forward the order to the OPM, failed to contact opposing counsel about the survivor benefits, and failed to take any steps to ensure that the wife received these benefits. Colo. R.P.C. 1.8(a) states that an attorney shall not knowingly acquire an ownership interest in a pecuniary interest adverse to a client unless the terms of the transaction are fair, reasonable, and fully disclosed in writing; the client is informed to seek independent counsel; and the client consents in writing. The attorney's promissory note and deed of trust against the marital residence provided a method for obtaining his fees but reduced the wife's equity in the home; thus, their interests were adverse and the attorney should have complied with the requirements of 1.8(a).

Colo. R.P.C. 1.8(j) states that an attorney shall not acquire a proprietary interest in the cause of action the attorney is conducting for the client; however, an attorney may acquire a lien authorized by law. In Colorado, charging liens are the only liens authorized by law and are excepted from this rule. The promissory note and deed of trust were not authorized by law, and were in violation of this rule.

Although C.R.C.P. 251.19 states that the Hearing Board shall prepare its order within 60 days after the hearing, the fact that the Hearing Board issued its opinion 96 days after the hearing did not cause the Board to lose jurisdiction over the matter, and the attorney could not identify any prejudice from the opinion's being delivered late.

The attorney argued that his attorney discipline hearings were quasi-criminal in nature, and thus he should have been permitted to speak to the Regulation Counsel's expert — who was consulted about OPM benefits — to prevent the attorney's due process rights from being violated. The Hearing Board found that attorney discipline hearings are governed by the rules of civil procedure, which allow litigants to consult experts without disclosing the expert or calling them as a witness.

When the Hearing Board found no violation of a rule, the Board did not make factual findings that could be reviewed. Thus, the Board's findings could only be overturned "if no reasonable fact finder could be unconvinced of a violation . . . by clear and convincing evidence." The dissents disagreed with this standard, stating that the court should remand findings of "no violation" if the Hearing Board's rationale is unclear, rather than affirming findings merely because a possible justification could be speculated.

Colo. R.P.C. 1.7(b) provides that a lawyer shall not represent a client if that representation may be materially limited by the attorney's own interests, unless the lawyer believes the representation will not be adversely affected and the client consents to the consultation. The attorney pursued the sale of the marital home to ensure his fees were paid, and the wife pursued the sale to comply with the court's order to sell the home. Thus, it could be concluded that the attorney and the wife's interests were not adverse to each other, and the attorney did not violate this rule.

Colo. R.P.C. 3.3(a)(1) states that a "lawyer shall not knowingly make a false statement of material fact or law to a tribunal." Failure to disclose material information is equivalent to making a false statement. The concept of materiality, the potential that information could influence a determination, is the focus of this rule. Even though the attorney did not update the wife's financial affidavit to reflect his interest, the Board could have been aware of the attorney's interest, whether secured by a deed of trust or attorney's lien; thus, the deed of trust was not material information and the attorney did not violate this rule.

Colo. R.P.C. 3.4(c) prohibits attorneys from disobeying rules of a tribunal. C.R.C.P. 26.2 requires attorneys to supplement clients' disclosures. Since the Board could have found that the attorney's failure to supplement the wife's affidavit did not materially change the evidence, the attorney did not violate this rule.

Colo. R.C.P. 8.4(c) states that attorneys may not "engage in conduct involving dishonesty, fraud, deceit, or misrepresentation." To violate this rule, an attorney must demonstrate a mental state of recklessness greater than simple negligence. Since the attorney did not demonstrate recklessness when he failed to amend the wife's financial affidavit, the attorney did not violate this rule.

Sanctions will be affirmed unless they "bear[] no relation to the conduct," are "materially excessive or insufficient in relation to the needs of the public" or are "unreasonable." *Id.* at 1203- 1204. Here, suspension for six months after completing two years of probation was reasonable and in relation to the needs of the public.