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Professional Responsibility

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PROFESSIONAL RESPONSIBILITY

I. HANDLING LEGAL MATTERS WITHOUT ADEQUATE PREPARATION

In two recent disciplinary proceedings, *In re Kitts*¹ and *In re Davis*,² the South Carolina Supreme Court found attorney misconduct worthy of public reprimand. Both cases involved violations of Disciplinary Rule (DR) 6-101(A), which forbids an attorney from handling legal matters without adequate preparation or to neglect legal matters entrusted to him.³ *Davis* also involved violations of DR 7-102(A) and DR 1-102(A).⁴ The court's decision to issue a public reprimand in each case was based in part on the respondent attorneys' ignoring various disciplinary procedures.

The action against Kenneth Russell Kitts arose from his handling of an appeal.⁵ The complaint alleged that the tran-

1. 276 S.C. 242, 277 S.E.2d 602 (1981).

2. ___ S.C. ___, 280 S.E.2d 644 (1981).

3. South Carolina adopted the MODEL CODE OF PROFESSIONAL RESPONSIBILITY effective January 1, 1970. S.C. SUP. CT. R. 32 (Supp. 1980). DR 6-101(A) provides:

(A) A lawyer shall not:

(1) Handle a legal matter which he knows or should know that he is not competent to handle, without associating with him a lawyer who is competent to handle it.

(2) Handle a legal matter without preparation adequate in the circumstances.

(3) Neglect a legal matter entrusted to him.

4. ___ S.C. at ___, 280 S.E.2d at 647. DR 7-102(A) provides in relevant part:

(A) In his representation of a client, a lawyer shall not:

* * *

(5) Knowingly make a false statement of law or fact.

DR 1-102(A) provides in relevant part:

(A) A lawyer shall not

* * *

(4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.

(5) Engage in conduct that is prejudicial to the administration of Justice.

(6) Engage in any other conduct that adversely reflects on his fitness to practice law.

5. Amended Complaint at 1.

script from the magistrate's court was completely inadequate to form the basis of an appeal.⁶ An amendment to the complaint added two more charges of misconduct: the first involving Kitts' failure to close an estate as promised,⁷ and the second involving Kitts' failure to respond to notices of the disciplinary proceedings.⁸

The supreme court found that Kitts' negligent handling of the appeal and his failure to take action in the estate closing violated DR 6-101(A)(2) and (3).⁹ The court also took a "dim view" of Kitts' "apparent unwillingness to cooperate in the investigation and resolution of [the] matter" and concluded that public censure was warranted.¹⁰

The action against Alan Joel Davis was based on seven acts of misconduct over a period of several years.¹¹ Davis' actions in the seven cases were similar. He would be retained to collect an account or to execute an out of state judgment in South Carolina. He would accept a fee, but disregarding the interests of his client, he would fail to bring suit or collect any monies on their accounts. Furthermore, Davis would tell the client that a suit had been filed or that a judgment was imminent when, in fact, no action was pending. After periods of delay ranging from two to eight years, Davis would be discharged and other counsel obtained by the client.¹² In each instance Davis would refund the fee paid by the client.¹³ After two such incidents, the Board of Commissioners on Grievances and Discipline issued letters of caution to Davis.¹⁴ Though the letters were not authorized under the circumstances,¹⁵ the court stated that, authorized or not, the letters could be properly considered in determining the appro-

6. *Id.*

7. Brief of Complainant at 3-4. Kitts allegedly promised to close the estate by a certain date, but never took the necessary action. The decedent's wife eventually closed the estate with the assistance of the probate judge. *Id.*

8. *Id.* at 4. Kitts responded when personally served with the original complaint. *Id.*

9. 276 S.C. at 242, 277 S.E.2d at 602.

10. *Id.* at 242-43, 277 S.E.2d at 602.

11. ___ S.C. at ___, 280 S.E.2d at 645-46.

12. *Id.* at ___, 280 S.E.2d at 645-46.

13. *Id.* at ___, 280 S.E.2d at 646.

14. *Id.* at ___, 280 S.E.2d at 645.

15. *Id.* at ___, 280 S.E.2d at 645. Letters of caution are only authorized only in cases in which the Executive Committee, after reviewing the initial complaint, finds that there is no probable cause to file a formal charge and complaint for trial by a panel in the usual fashion. *Id.*

priate sanctions to be taken.¹⁶

The court unanimously concluded that Davis' conduct warranted disciplinary sanction and differed only in the severity of that sanction,¹⁷ with two justices favoring indefinite suspension and three preferring the less severe public reprimand.¹⁸ Accordingly, the court issued the public reprimand.

The court in *Davis* placed strong emphasis on the fact that the case did not involve an isolated incident of misconduct,¹⁹ while reserving the question of how severe a sanction would be warranted by a single act of misconduct of the same nature.²⁰ The court noted that several instances of Davis's misconduct occurred after he had received the letters of caution,²¹ and gave no weight to Davis's argument that in spite of his misconduct, none of his clients had suffered monetary loss.²²

Kitts and *Davis* are important to the practitioners in South Carolina for several reasons. First, they give notice that attorney conduct toward clients that is less than totally candid and honest will be highly suspect. The supreme court appears to place a strong emphasis on the fiduciary nature of the attorney-client relationship, and *Kitts* and *Davis* exemplify the type of attorney conduct toward clients that will not be tolerated. Second, *Davis* alerts practitioners that the argument of no monetary loss to clients is not a valid defense. The court stated that such a claim "can be argued, but can never be proved,"²³ apparently indicating that the argument would fail not only in *Davis*, but in all cases. Finally, both cases alert practitioners to the court's intolerance of attorneys' failure to cooperate in grievance proceedings. In *Kitts* the court was concerned with an attorney's cooperation with the actual disciplinary proceedings; in *Davis*, it was concerned with an attorney's failure to heed letters of caution. The court makes it clear that it takes the entire disciplinary pro-

16. *Id.* at ___, 280 S.E.2d at 645.

17. *Id.* at ___, 280 S.E.2d at 647.

18. *Id.* at ___, 280 S.E.2d at 647.

19. *Id.* at ___, 280 S.E.2d at 647.

20. *Id.* at ___, 280 S.E.2d at 647. The court said that unusual delay, amounting to a total disregard for the rights of a client, might or might not be sufficient to warrant an indefinite suspension. *Id.*

21. *Id.* at ___, 280 S.E.2d at 647.

22. *Id.* at ___, 280 S.E.2d at 647.

23. *Id.* at ___, 280 S.E.2d at 647.

cess seriously and expects practitioners to do likewise.

Attorney disciplinary actions involve set disciplinary rules and ethical standards. Case law interpreting those rules and standards and their application to specific fact situations provide guidance for the practitioner in dealing with similar situations. Each new case provides clearer insight into the manner in which those rules and standards are to be applied. *Kitts* and *Davis* provide good examples of attorney misconduct in dealing with clients. The cases also alert practitioners that the process for applying the rules of conduct is to be taken as seriously as the substantive content of the rules themselves.

Richard P. Fulmer

II. FAILURE TO KEEP A CLIENT INFORMED; FAILURE TO PROPERLY DISBURSE SETTLEMENT FUNDS

In *In re Boensch*²⁴ the South Carolina Supreme Court publicly reprimanded attorney Arthur Cranwell Boensch after finding him guilty of professional misconduct. The court found that he had committed three offenses in his handling of a single case: misrepresenting facts to the client, failing to properly disburse settlement funds to a client, and failing to keep the client informed of the progress of the case. In a per curiam opinion, the court concurred with the unanimous recommendations of both the Hearing Panel and the Executive Committee of the Board of Commissioners on Grievances and Discipline²⁵ that Boensch be publicly reprimanded.²⁶

Dr. James Altman retained Boensch to represent him in a personal injury suit. After suit was filed, Altman's insurance company retained Boensch to represent its subrogated interest

24. ___ S.C. ___, 283 S.E.2d 442 (1981).

25. The Board of Commissioners on Grievances and Discipline is appointed by the South Carolina Supreme Court and consists of a number of members of the South Carolina Bar from each Judicial Circuit equal to the number of Circuit Judge's in each respective circuit. S.C. CODE ANN., RULES OF COURT, RULE ON DISCIPLINARY PROCEDURE § 3(a)(Supp. 1981). The court then designates one member of the Board to serve as chairman. *Id.*, § 3(b). From the remaining membership of the Board, the chairman recommends and the court appoints four additional members who, together with the chairman, comprise the Executive Committee. *Id.*, § 4(A). The Hearing Panel consists of three members of the Board, excluding the Executive Committee, chosen by the Chairman to hear complaints. *Id.* § 2(G).

26. ___ S.C. at ___, 283 S.C.2d at 443-44.

in property damage and personal injury claims paid to Altman. Over the next nine months, four written inquiries from the insurance company to Boensch seeking the status of the case went unanswered. Finally, ten months after he had agreed to represent the insurance company, Boensch contacted the company and informed it that he expected the case to go to trial the following month. When the case did go to trial two months later, the result was a verdict for Altman. The case was subsequently settled for an increased amount.²⁷

Following the settlement, Altman signed a release and an attorney associated with Boensch on the case distributed the proceeds to Altman.²⁸ However, the amount of the insurance company's subrogated claim was not deducted. In the sixteen months following the settlement, the insurance company repeatedly and unsuccessfully sought to learn the progress of the case and the status of its funds, eventually learning that the case had been settled.²⁹ Eighteen months after the settlement, the company filed suit against Boensch to recover its money. Six months after this suit was filed, Boensch and the two attorneys associated with him on the Altman case paid the amount of the company's subrogated claim less attorneys' fees.³⁰

The South Carolina Supreme Court cited a South Carolina Code of Professional Responsibility Disciplinary Rule³¹ and two South Carolina cases³² for the proposition that the failure to properly disburse settlement proceeds subjects an attorney to disciplinary proceedings. The court further noted that Boensch's failure to keep the client informed of the status of the case and

27. *Id.* at ___, 283 S.E.2d at 443.

28. *Id.* Boensch associated a second attorney to aid him in handling the case. The second attorney associated a third attorney to handle the trial. The second attorney handled the actual disbursement of the settlement funds to Altman. *Id.*

29. *Id.* Boensch did not reply to several written inquiries made by the insurance company, but finally informed the company by phone of the settlement and disbursement of funds. This conversation took place in March 1979, five months after the case had gone to trial and four months after the settlement proceeds had been disbursed. At that time, Boensch indicated that there was some ambiguity in the settlement regarding property damage and promised to later contact the company. Thereafter, Boensch tried unsuccessfully to recover from Altman the money incorrectly paid to him. *Id.*

30. *Id.* The second attorney actually issued the check. Each of the three attorneys involved in the case contributed one-third of the amount. *Id.*

31. S.C. SUP. CT. R. 32, DR 9-102(B)(Supp. 1981).

32. *In re Crosland*, 270 S.C. 546, 243 S.E.2d 198 (1978); *In re Shuford*, 271 S.C. 304, 247 S.E.2d 323 (1978).

his neglect in effecting the prompt disbursement of the settlement funds violated disciplinary rules contained in the Code of Professional Responsibility.³³ The court publicly reprimanded Boensch for these acts, but revealed that “[t]here is substantial thinking on the part of the Court to the effect that he should be indefinitely suspended. . . .”³⁴

Boensch clearly violated the two provisions of Disciplinary Rule 9-102(B) cited by the court, which require the attorney to promptly notify the client upon the receipt of funds³⁵ and to promptly pay or deliver to the client upon request any funds to which he is entitled.³⁶ Although it did not so state, the Court apparently felt that Boensch’s failure to communicate with the insurance company was in violation of Disciplinary Rule 6-101(A)(3),³⁷ which forbids an attorney to neglect a legal matter entrusted to him.³⁸ The court did not discuss the charge that Boensch also misrepresented facts to his client, a violation of Disciplinary Rule 1-102(A)(4).³⁹ However, a charge of misrepresentation may have been substantiated by reference to Boensch’s incomplete and misleading statements to the insurance company.

Obviously, each disciplinary action must be judged on its facts, but following this decision it is clear that a South Carolina attorney who withholds funds from a client and refuses to communicate with that client regarding the progress of the case and

33. ___ S.C. at ___, 283 S.E.2d at 444.

34. *Id.* at ___, 283 S.E.2d at 444.

35. S.C. SUP. CT. R. 32, DR 9-102(B)(1)(Supp. 1981).

36. S.C. SUP. CT. R. 32, DR 9-102(B)(4)(Supp. 1981). *See, e.g., In re Shuford*, 271 S.C. 304, 247 S.E.2d 323 (1978); *In re Houston*, 271 S.C. 259, 247 S.E.2d 315 (1978); *In re Burr*, 267 S.C. 419, 228 S.E.2d 678 (1976); *In re Benedict*, 254 S.C. 481, 175 S.E.2d 897 (1970).

37. S.C. SUP. CT. R. 32, DR 6-101(A)(3) (Supp. 1981). *See, e.g., In re Leppard*, 272 S.C. 414, 252 S.E.2d 143 (1979).

38. Boensch’s behavior constitutes neglect within the definition contained in ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1273 (1973), which provides in pertinent part:

Neglect involves indifference and a consistent failure to carry out the obligations which the lawyer has assumed to his client or a conscious disregard for the responsibility owed to the client. The concept of ordinary negligence is different. Neglect usually involves more than a single act or omission. Neglect cannot be found if the acts or omissions complained of were inadvertent or the result of an error of judgment made in good faith.

Id.

39. S.C. SUP. CT. R. 32, DR 1-102(A)(4)(Supp. 1981).

the receipt of funds will be subject to punishment at least as severe as a public reprimand. Whether such an attorney will be indefinitely suspended, a punishment alluded to but not imposed by the court in *In re Boensch*, remains to be seen.

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