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RECENT DEVELOPMENT

ATTORNEY GRIEVANCE COMM'N v. PENNINGTON: AN ATTORNEY'S RELIANCE ON ADVICE OF COUNSEL IS NOT A DEFENSE TO A VIOLATION OF THE MARYLAND RULES OF PROFESSIONAL CONDUCT

By: Ian Bartman

The Court of Appeals of Maryland held an attorney's reliance on advice of counsel is not a defense to a violation of the Maryland Rules of Professional Conduct. *Attorney Grievance Comm'n v. Pennington*, 387 Md. 565, 589, 876 A.2d 642, 656 (2005). In a case of first impression, the Court concluded that an attorney is presumed to know the rules of professional conduct, and relying on another attorney's advice regarding application of the rules to a particular situation does not eliminate liability for misconduct. *Id.* at 589-90, 876 A.2d at 656.

Denise Haynes-Butler ("Butler") sustained injuries as a consequence of a motor vehicle accident. Jointly with her husband, she retained Jill Johnson Pennington ("Pennington"), a Maryland attorney, to pursue their claims against the other driver and his insurance company Amica Mutual Insurance Company ("Amica"). Two months before the statute of limitations tolled for the claim, Pennington filed a complaint in the Circuit Court for Prince George's County, but the clerk's office made a clerical mistake and had no record of the complaint having been properly filed and docketed. Pennington did not discover the error until she received a letter from Amica more than two months after she filed the complaint seeking verification of the filing date. Upon learning of the error, she contacted the clerk's office to determine how to correct the error and was advised to submit the file stamped copy of her complaint and cancelled check for the filing fee. It was at that time Pennington became aware that the check for the filing fees was never negotiated by the clerk's office. By then, the statute of limitations had expired on the claim. Without advising or consulting the Butlers, Pennington made an agreement with Amica's attorney to dismiss the action with prejudice.

Pennington chose to conceal the dismissal from the Butlers and pay them out of her own funds disguised as a settlement from the opposing parties. She then sought advice regarding the matter from a previous colleague and friend, N. Frank Wiggins, Esquire (“Wiggins”). Specifically, she sought reassurance that her payment to the Butlers and the nondisclosure of the facts would not violate the law or rules of ethical conduct in Maryland. After researching the matter, Wiggins incorrectly advised Pennington that disclosure to the clients was unnecessary. Pennington then presented payment to the Butlers in the form of a settlement agreement.

As a result of Pennington’s actions, Amica brought this matter before the Attorney Grievance Commission (“Commission”), who subsequently filed a petition with the Court of Appeals of Maryland alleging violations of the Maryland Rules of Professional Conduct. The Court of Appeals referred the matter to the Circuit Court for Prince George’s County for findings of fact and proposed conclusions of law.

The trial court concluded that Pennington violated seven separate rules of professional conduct. Having found no Maryland case law for which good faith reliance on advice of counsel was an affirmative defense in an attorney’s disciplinary action, the court ruled that Pennington was prevented from relying on that defense in this case. However, part of the court’s ruling permitted Pennington’s good faith reliance on the advice of counsel to be taken into account as a mitigating factor when fashioning a sanction. The trial court recommended suspending Pennington for 120 days and placing her on a probationary period under the guidance of a capable lawyer with strong administrative skills.

Both parties then filed exceptions with the Court of Appeals. Pennington excepted to all of the trial court’s findings. The Commission excepted to the court’s conclusion that Pennington’s reliance on Wiggins’ advice was in good faith and should be used as a mitigating factor when fashioning her sanction. On appeal, the Court of Appeals used the clearly erroneous standard of review to examine the hearing judge’s findings of fact and the *de novo* standard to review the hearing judge’s conclusions of law. *Id.* at 586, 876 A.2d at 654.

At the Court of Appeals, Pennington’s overarching defense was her reliance on the advice of counsel. *Id.* Recognizing this issue as one of first impression, the Court looked to the attorney grievance case of *Attorney Grievance Comm’n v. Gregory*, 311 Md. 522, 536 A.2d 646 (1988) for guidance. *Id.* In *Gregory*, an attorney relied upon a formal

ethics opinion of the Maryland State Bar Association, and although the Court found the Bar Association's opinion to be advisory and not binding, it may be a factor considered in the filing of a grievance. *Id.* at 586-87, 876 A.2d 654-55.

The Court also acknowledged that Maryland law recognizes the defense of reliance on counsel in some situations, such as fraud as it relates to scienter, tax cases, and specific intent crimes. *Id.* at 587, 876 A.2d at 655.

Next, the Court referred to a Colorado case analogous to *Pennington, People v. Katz*, 58 P.3d 1176 (Col. 2002). *Id.* at 589, 876 A.2d at 656. In *Katz*, a reliance-on-the-advice-of-counsel defense was raised by Katz, an attorney, in a disciplinary matter regarding a violation of the Colorado Rules of Professional Conduct. *Id.* Katz withdrew funds from a joint account without the knowledge or consent of a firm with whom he collaborated in reliance on advice of counsel who stated he could withdraw the funds in question. *Id.* As a result of Katz's actions, the Colorado Supreme Court disbarred him and rejected his defense because, presumably, Katz understood the rules of professional conduct and he could not delegate that responsibility to another by seeking the advice of counsel. *Id.* Furthermore, the facts of that case established that Katz withheld material information from the advising attorney during the discussion when the legal advice was provided. *Id.*

Adopting the *Katz* decision as a basis for its rationale in *Pennington*; the Court held that Pennington's reliance on advice from Wiggins was not a defense to her violations of the rules of professional conduct, or any of her conduct in this case. *Id.* at 589-90, 876 A.2d at 656. The Court stressed that Pennington was a member of the Bar of Maryland and took an oath to comply with the rules of professional conduct and to act in conformity with those standards. *Id.* The Court of Appeals also took into account the trial court's findings by clear and convincing evidence that Pennington did not disclose the dismissal or communicate the source of funds to the Butlers and presented a settlement sheet that could only have created an impression that the case had settled. *Id.* at 590, 876 A.2d at 656. The Court stated that "[e]very lawyer in this State should know that the misrepresentation to the client that occurred in this case [*Pennington*] was a violation of the Rules." *Id.*

The Court commented that even if the reliance-on-the-advice-of-counsel defense was applicable generally to attorney discipline matters, Pennington's attempt to raise that defense here would still fail

because she did not meet the requirements for asserting the defense. *Id.* at 590, 876 A.2d at 656-57. First, Pennington's misrepresentation to the Butlers and conduct prejudicial to the administration of justice did not require specific intent. *Id.* Second, given her deceitful conduct and that she consulted a lawyer not admitted to practice in Maryland; Pennington could not have believed in good faith that her conduct was proper. *Id.* Finally, she did not make a full and honest disclosure of all material facts within her knowledge to Wiggins. *Id.*

Ultimately, the Court, in ruling against Pennington, held that she clearly violated five out of the seven rules of conduct as alleged by the Commission. *Id.* at 596, 876 A.2d at 660. Guided by the interest of protecting the public and the public's confidence in the legal profession, the Court determined disbarment as an appropriate sanction, given Pennington's misrepresentations and deceitful conduct in conceding the truth. *Id.* at 595-96, 876 A.2d at 660.

The Court of Appeals' opinion in *Pennington* sends a message to attorneys in Maryland that every lawyer is presumed to know and abide by the Maryland Rules of Professional Conduct. Therefore, accountability is placed solely on the attorney for any violation of these rules. The decision to disbar Pennington was clearly an attempt to protect the public from the intentional dishonesty of an attorney and put other attorneys on notice of the type of misconduct that will not be tolerated by the Court.