Recent Developments: Attorney Grievance Commission v. Gilbert: Attorney Disbarred for Failure to Disclose Material Information on His Bar Application

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because of intoxication but nevertheless escorted the employee to a motor vehicle and allowed him to drive away could be negligent." The Texas Supreme Court allowed the suit because in their view the employer had "failed to exercise reasonable care to avoid injury to third persons." (Id. slip op. at 7).

The Court of Special Appeals of Maryland in their opinion initially noticed the similarity between the appellants' cause of action and Kelly v. Gwinnell, 96 N.J. 538, 476 A.2d 1219 (1984), a case decided by the Supreme Court of New Jersey. After stating the issue of whether an employer who negligently "promotes and permits the intoxication of an employee at the employer's premises during business hours and in the course of an employer's party, and knowingly allows the intoxicated employee to drive from his employment and negligently collides with and kill another" can be held liable, the court examined the line of cases preceding the Kelly holding. Kelly stood for the proposition in New Jersey that a host and that other jurisdictions shared the holding in Maryland, stating that Kelly did not suddenly appear, but "was the end product of a progression of decisions." (Id. slip op. at 3).

In Attorney Grievance Commission v. Gilbert: ATTORNEY DISBARRED FOR FAILURE TO DISCLOSE MATERIAL INFORMATION ON HIS BAR APPLICATION

In Attorney Grievance Commission v. Gilbert, 307 Md. 481, 515 A.2d 454 (1986), Gilbert was disbarred due to his failure to disclose, what the court considered, material information on his bar application. The court of appeals rendered this extreme sanction because of the seriousness of Gilbert's misconduct, which reflected on his fitness to practice law.

The nondisclosed item was Gilbert's answer to question ten on his 1980 application. Question ten required:

"a complete list of all suits in equity, actions at law, suits in bankruptcy or other statutory proceedings, matters in probate, lunacy, guardianship, and every other judicial or administrative proceedings of every nature and kind, except criminal proceedings to which I am or have ever been a party. (If 'NONE' so state)."

Gilbert at 457.

The answer given was "NONE." In reality, Gilbert had filed a civil suit in the Circuit Court of Baltimore County on June 4, 1970 to recover the benefits of two insurance policies on his wife's life, which he obtained three months prior to her murder. The problem with the nondisclosure, which made it material, was that Gilbert was found in the civil trial to have had a part in the murder, consequently he was denied recovery. Specifically, Judge Proctor, who heard the civil trial, commented in his opinion that "[T]he evidence is overwhelming that Gilbert intentionally caused the death of his wife in order to reap the

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harvest, namely the proceeds of these two life insurance policies . . ." Gilbert at 459.

Afterwards Judge Raymond G. Thieme, Jr. of the Circuit Court for Anne Arundel County held evidentiary hearings pursuant to Md Rule BV9 and used Judge Proctor's findings to conclude that Gilbert purposefully failed to disclose the civil suit and this nondisclosure was material so as to violate DR 1-101(a) and DR 1-102 & (4) of the ABA Model Code of Professional Responsibility. A judge's factual findings are prima facie correct and will not be changed unless clearly erroneous. *Attorney Grievance Comm. v. Kemp* 303 Md. 664, 674, 496 A.2d 672 (1985). The court of appeals indicated that a person with a law degree should be able to read question ten as clearly asking for any and all involvement in civil litigation and dismissed Gilbert's claim that he had misread the question.

Gilbert was not a novice with the court system as he had confrontations with the law on many occasions during a six month period in 1967. During this period, Gilbert "was charged with conspiracy to commit forgery, forgery and uttering, murder and accessory to murder, homicide and assault." *Gilbert* at 455. Out of these charges he was adjudicated guilty for forgery and uttering and he was imprisoned between November 1970 and August 1972. Shortly after these charges, Gilbert was arrested for the murder of his wife on June 4, 1967. On March 13, 1969, Gilbert and his sister were indicted for murder and conspiracy to commit murder. When Gilbert's sister was acquitted, his charges were nol prossed on June 24, 1974.

Gilbert finally graduated from law school in 1980 and completed the application in question on May 23, 1980. Shortly thereafter, Gilbert's petition "for expungement of all the records associated with the nol prossed indictment for his wife's murder" was granted on June 23, 1980. *Gilbert* at 455. He passed the July 1980 Bar Examination and the next step was the character investigation to determine a candidate's present moral fitness to practice law in Maryland.

The initial committee (character committee of the third judicial circuit), on October 21, 1980, recommended unanimously not to grant admission. The State Board of Law Examiners, pursuant to Rule 4c, concluded by a 3-2 vote that Gilbert be admitted since he had the present moral character fitness to practice law. The weight used in these proceedings is clear and convincing evidence. *See In re Application of James G.*, 296 Md. 310, 462 A.2d 1198 (1983). In that case, the court looked at Gilbert's hardships through the years including "the birth of a Down's Syndrome child during his first marriage and the fact that his first wife [was murdered]." *Gilbert* at 485. In determining his present moral character, the court noted that the history of criminal action occurred 16 years ago and was within a six month period. Also, the murder charge was nol prossed, and since 1981 Gilbert had practiced in the District of Columbia without incident.

However, when the civil suit came to the attention of the Attorney Grievance Commission (AGC), they conducted evidentiary hearings and filed a petition for disciplinary action. Gilbert insisted his nondisclosure was neither purposeful or material. Judge Thieme thought otherwise for the following reasons: Gilbert's contention that the application was done in haste was discounted because by looking at the dates of his signatures it was determined that at least three days transpired before the application was submitted and the non disclosure of the civil suit was purposeful because Gilbert had many opportunities to provide this information, but did not.

The court of appeals found the context of the word "material" as used in DR 1-101(a) had never been previously defined in Maryland. The court used several analogies to other areas of law such as summary judgment—"whether the resolution of any material matter of fact may affect the outcome of the case," *King v. Bankered* 303 Md 98, 111, 492 A.2d 688 (1985); and insurance—an "omission" is material if it would affect the insurer's decision about providing insurance or evaluating the risk. *Maryland Indemnity v. Steers*, 221 Md. 380, 385, 157 A.2d 803 (1960). The court decided to adopt the definition that the Supreme Court of North Dakota applied in *In re Houe*, 257 N.W. 2d 420 (N.D. 1977), which dealt with the same rule as the case at bar. Their definition of a material omission is one that "has the effect of inhibiting the efforts of the bar to determine an applicant's fitness to practice law." *Id.* at 422. Overall, the various standards reflect on how the decision-making process is affected by a particular fact or representation.

The court held that the nondisclosure of the civil suit enabled Gilbert to use his ex-pungement in a self-serving manner that "plainly inhibited efforts to assess Gilbert's present moral character fitness to practice law." *Gilbert* at 460. Therefore, the omission was clearly material. Gilbert relied on *In re Application of G.L.S.*, 292 Md. 378, 439 A.2d 1107 (1982) where there was nondisclosure of a criminal conviction. However, that case is easily distinguishable because G.L.S. volunteered additional information during the admission process unlike Gilbert.

Gilbert's other contentions were also found to have no validity. Gilbert asserted that the civil suit had no bearing on the disciplinary proceedings, but the court ruled it was relevant in determining whether the omission was deliberate which has a direct bearing on one's present moral character. Gilbert also complained that his mother, father and a witness from his earlier trial should have been allowed to testify at the hearing. However, the witness' veracity was not at issue so his testimony was properly excluded. The only testimony allowed from Gilbert's parents was what state of mind Gilbert had as he worked on the application and at no other time. Furthermore, Gilbert contends that the disciplinary hearings had the effect of convicting him of his wife's murder thereby denying him due process of law. However, this is misplaced because the findings did not determine guilt or innocence, but only had a bearing on his fitness to practice law.

Thus, the court of appeals provided some guidelines as to what they consider a material omission on a bar application. If this omission reflects on a candidates truthfulness and candor, which is the most important character qualification, *AGC v. Levine*, 286 Md. 238, 406 A.2d 1296 (1979), then strong disciplinary action will be called for. To determine if a purposefully dishonest omission or misrepresentation requires disbarment as the proper sanction, the court will mainly look to the severity of the misconduct and any compelling extenuating circumstances.

—Robert Feldman

**Department of Natural Resources v. Welsh: Sovereign Immunity Did Not Bar Action to Quiet Title**

In a recent decision, the Court of Appeals of Maryland held that: (1) sovereign immunity did not bar action to quiet title based on the Department of Natural Resources' allegedly unconstitutional taking, and (2) that the department had not acquired interest in land belonging to plaintiff's predecessors, who had not been named as parties in earlier condemnation proceedings. *Dep't. of Natural Resources v. Welsh*, 308 Md. 54, 517 A.2d 722 (1986). As a result of this decision, the Rocky Gap State Park in Allegany County has lost a thirty three acre tract of land.

In 1983, W. Mitchell Welsh brought suit against the Department of Natural Resources to quiet title to land. Apparently, in 1986, the department obtained title to a 1,000 acre tract in Allegany County through a condemnation proceeding. The