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Attorney Grievance Commission v. Santos:

An Attorney May Not Be Disbarred for Failing to Return Unearned Fees, Absent Fraud, Deceit or Misrepresentation

By: John A. Carpenter

The Court of Appeals of Maryland held an attorney may not be disbarred for failing to return unearned fees, absent fraud, deceit or misrepresentation. *Att’y Grievance Comm’n v. Santos*, 370 Md. 77, 803 A.2d 505 (2002). To disbar an attorney, the trial judge must find a misappropriation of funds by fraud, deceit or misrepresentation, pursuant to Rule 8.4(c) of the Maryland Rules of Professional Conduct (“MRPC”). *Id.* at 87-88, 803 A.2d at 511. In *Santos*, the attorney who failed to refund unearned fees absent the intent to commit fraud, deceit or misrepresentation received a ninety-day suspension with the possibility of reinstatement. *Id.* at 89, 803 A.2d at 512.

The Attorney Grievance Commission (“AGC”) filed a Petition For Disciplinary Action under MRPC Rule 16-709, on behalf of former clients of Mario Santos (“Santos”), alleging several violations of the MRPC rules pertaining to attorney competence, diligence, communication with clients, safekeeping of property, terminating representation, and trust account requirements. Santos allegedly failed to properly represent several clients in bankruptcy, divorce and other matters, and failed to return most of the clients’

fees paid in connection with his representation.

The trial judge ruled that Santos had “incompetently represent[ed] each of his clients by not demonstrating the necessary skill, thoroughness and preparation in the handling of their matters.” The judge also found Santos’ procrastination had prejudiced his clients’ interests by denying them the relief to which they were entitled. Further, Santos failed to communicate with his clients, failed to give proper notice to his clients of the abandonment of his representation, and deposited client funds in his operating account. The trial judge explained that Santos’ collective violations of the rules of professional conduct “erode public confidence in the legal profession and are conduct prejudicial to the administration of justice in violation of Rule 8.4(d).” The trial judge also noted that Santos was fully cooperative with the investigation, and had sought a more structured working environment by accepting employment with the Public Defender’s Office.

Neither Santos nor the AGC objected to the trial judge’s findings of law; however, both parties filed different recommendations for sanctions. The AGC recommended disbarment, while Santos requested

not more than a six-month suspension with reinstatement upon compliance with certain court-mandated conditions.

The court of appeals referred Santos’ initial hearing to the Circuit Court for Anne Arundel County under Maryland Rule 16-709(b), which allows the court of appeals to assign such cases to the trial courts for fact-finding purposes. The case was then transferred to the Circuit Court of Baltimore City. After the trial findings, both parties filed separate recommendations for sanctions to the court of appeals.

The court of appeals first addressed the AGC’s contention that by neglecting and abandoning five separate clients and failing to return unearned fees, Santos was unfit to practice law. *Id.* at 84-85, 803 A.2d at 509. The court explained that, in prior decisions, it had indefinitely suspended attorneys for neglecting client matters and failing to return unearned fees. *Id.* at 85, 803 A.2d at 509. As such, the court stated the AGC had misplaced its reliance on cases in which an attorney was disbarred for either repeatedly neglecting client matters or misappropriating client funds. *Id.* at 85, 803 A.2d at 509-10.

The court distinguished *Att’y Grievance Comm’n v. Manning*,

318 Md. 697, 569 A.2d 1250 (1990) from the case at hand explaining that Manning was previously suspended for similar conduct that led to his disbarment. *Id.* at 85, 803 A.2d at 510.

The court also distinguished *Att’y Grievance Comm’n v. Milliken*, 348 Md. 486, 704 A.2d 1225 (1998), stating that Milliken repeatedly neglected client matters and failed to return client fees, wrote checks to his wife against trust accounts and shared fees with a non-lawyer. *Id.* at 85-86, 803 A.2d at 510. Milliken also failed to answer client suits for return of fees, ignored the resulting default judgments, and when investigated by the AGC, was extremely uncooperative and refused to answer Bar Counsel’s letters. *Id.*

Similarly, the court explained that in *Att’y Grievance Comm’n v. Wallace*, 368 Md. 277, 293, 793 A.2d 535, 545 (2002), “the volume and severity of the complaints against respondent” led the court “to conclude that the appropriate sanction [was] disbarment.” *Id.* at 86-87, 803 A.2d at 510.

The court next turned to the appropriate sanction for Santos, noting the purpose of a disciplinary proceeding is to protect the public. *Id.* at 87, 803 A.2d at 510-11. The court explained that it considers all facts in each case, including the attorney’s prior record and remorseful and cooperative attitude. *Id.* at 87, 803 A.2d at 511.

Stating that the general rule of sanctions in cases of “unmitigated

misappropriation of client fees,” is disbarment, the court contemplated whether Santos’ conduct amounted to an unmitigated misappropriation. *Id.* The court held that because the trial judge did not rule on a violation of Rule 8.4 (c), by implication, Santos had not violated Rule 8.4 (c). *Id.* at 87-88, 803 A.2d at 511. Further, Santos’ failure to return unearned fees was neglectful but not fraudulent or deceitful; therefore the AGC’s recommendation of disbarment was not appropriate in this case. *Id.* at 88, 803 A.2d at 511.

As an additional guide, the court examined the American Bar Association Standards for Imposing Lawyer Sanctions (1986), Standard 5.11 (a) and (b), which states that disbarment is generally appropriate when “a lawyer engages in . . . intentional conduct involving . . . fraud [or] deceit.” *Id.*

Based on case precedent and the ABA Standards, the appropriate sanction for Santos was an indefinite suspension from the practice of law with application for reinstatement after ninety days. *Id.* at 89, 803 A.2d at 512. However, the court refused to delineate specific conditions of reinstatement except to return unearned fees or make appropriate arrangements to do so. *Id.* at 88-89, 803 A.2d at 511-12.

In *Att’y Grievance Comm’n v. Santos*, the court held that an attorney who failed to properly represent clients’ interests, and failed to return unearned fees, may not be disbarred unless he has misappropriated client funds by fraud, deceit or misrepresentation.

The impact to Maryland law is that in order to disbar an attorney, the AGC must prove the attorney misappropriated client funds through fraudulent or deceitful means, a much higher standard to achieve. This holding raises the possibility that future clients of incompetent attorneys may suffer similar harms as previous aggrieved clients, because the AGC was not able to prove the attorney committed misappropriation of funds by fraud, deceit or misrepresentation.