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RECENT DEVELOPMENT

***ATTORNEY GRIEVANCE COMM'N OF MD. v. KINNANE:* DISBARMENT OF ATTORNEY BASED ON RULES 1.5(E) AND 8.4(B) & (C) OF THE MARYLAND RULES OF PROFESSIONAL CONDUCT HELD PROPER WHERE VIOLATIONS ARE ESTABLISHED AND NO MITIGATING OR COMPELLING EXTENUATING CIRCUMSTANCES EXIST**

By: Kellie Gombeski

The Court of Appeals of Maryland held that attorney disbarment is a proper sanction once intentionally dishonest conduct is established and there is an absence of mitigating or compelling extenuating circumstances. *Attorney Grievance Comm'n of Md. v. Kinnane*, 390 Md. 324, 888 A.2d 1178 (2005). In so holding, the Court adopted the Attorney Grievance Commission of Maryland's recommendation and disbarred Thomas Kinnane ("Kinnane") on the grounds that Kinnane violated Rules 1.5(e) and 8.4(b) and (c) of the Maryland Rules of Professional Conduct. *Id.* at 340, 888 A.2d at 1188.

While Kinnane was employed by Alexander & Cleaver he met Andrew Chau ("Chau"), the manager of regulatory affairs for Shell Energy Services ("Shell"), who represented himself to be an attorney. Kinnane continued to represent Shell after he left Alexander & Cleaver and also performed work for Chau's subsequent employer, Tractebel Power ("Tractebel"), after Chau left Shell Energy. During Kinnane's representation of Shell, his customary practice was to invoice Shell for work after it had been completed, rather than collect a retainer for future work. However, around July 2001, Chau contacted Kinnane and stated that he was authorized by the vice president of Shell to pay Kinnane a \$70,000 retainer for future work. On July 26, 2001, Kinnane prepared an invoice from his firm, Howes & Kinnane, P.C., to Shell for "Nevada regulatory and government relations activities, 2001 session and implementation." On August 8, 2001, Shell paid \$70,000 to Kinnane by electronic transfer and Kinnane held the money in the firm's escrow account. Kinnane had never received a retainer from Shell before this payment.

On or about August 22, 2001, Chau called Kinnane and directed him to take the entire retainer as a bonus for all the work he had completed in the past at a discounted rate, and further instructed Kinnane to issue a \$35,000 check to Chau to compensate him for referring future business from Shell and its affiliates, including Tractebel. That same day, Kinnane transferred \$70,000 into the firm's operating account, issued a \$35,000 check to Andrew Chau & Associates, P.C., indicating that it was for "professional fees: consulting," and drew himself a check for \$35,000 from the firm's operating account. After receiving Kinnane's invoice, the vice president and another member of Shell contacted Kinnane and informed him that the \$70,000 payment had not been authorized by Shell. Chau then called Kinnane and told him that the invoice "might not have been approved." Kinnane believed the issue was an internal dispute to be handled between Chau and the supervisors at Shell.

Subsequently, on April 30, 2003, Chau and Kinnane were charged with felony theft in Texas. On June 11, 2003, in the Harris County District Court, Kinnane entered a deferred adjudication of guilt. He also paid restitution in the amount of \$35,000, a fine of \$2,000, provided information in the prosecution of Chau, and cooperated fully with the Bar Counsel's investigation.

The hearing court found by clear and convincing evidence that Kinnane violated Rules 1.5(e) and 8.4(b) and (c) of the Maryland Rules of Professional Conduct. The hearing court noted Kinnane violated rule 1.5(e) by splitting his fee from Shell with Chau because Chau performed no services to earn that portion of the fee and Shell never authorized Kinnane to share the fee with Chau. The hearing court further held that the division of fees was not in proportion to the work performed since Chau was being compensated for making future referrals. The hearing court found that Kinnane's conviction for felony theft reflected adversely on his honesty, trustworthiness and fitness as a lawyer and his misrepresentations were in violation of Maryland Rule of Professional Conduct 8.4.

The Court of Appeals of Maryland affirmed the hearing court's ruling and held there were sufficient facts present to support the hearing court's conclusion of law. *Id.* at 335, 888 A.2d at 1185. The Court held that Kinnane could not reasonably have believed that Chau had authorization from Shell to pay a bonus to Kinnane to be shared with Chau. *Id.* at 332, 888 A.2d at 1183. Further, Kinnane's invoicing of the \$70,000 fee, which was unearned, and his invoice

evidencing the \$35,000 paid to Chau as a professional fee for consulting services were dishonest misrepresentations. *Id.*

After the hearing court's ruling, Kinnane filed Exceptions to the Findings of Fact and Conclusions of Law based on two theories. *Id.* First, Kinnane argued there was no evidence supporting the contention that it was unreasonable for him to believe that Chau had authorization from Shell to pay him a bonus. *Id.* at 333, 888 A.2d at 1183-84. To the contrary, Kinnane argued his actions demonstrated he had a good faith belief that the bonus was properly paid. *Id.* He supported this contention by claiming he had no knowledge that Chau would later request he split the bonus in half. *Id.* The Court overruled Kinnane's exception and pointed to the facts upon which the hearing court relied. *Id.* at 334-35, 888 A.2d at 1184-85. These facts, which Kinnane took no exception to, included the course of dealings between the client and Kinnane, the failure on Kinnane's part to notify the client that the payment was not for services already performed, and the large amount of the requested payment. *Id.*

Kinnane's second exception was the hearing court's refusal to admit the Peer Review Panel's Report. *Id.* at 335, 888 A.2d at 1185. The Court of Appeals looked to Maryland Rule 16-473, which governs the peer review process and noted the limited role the panel performs. *Id.* The Court held that despite the common sense appeal of permitting the use of statements made during the peer review process to expose later inconsistencies or intentional misrepresentations, the better course was to adapt to the phrase "what happens in Peer Review stays in Peer Review." *Id.* at 338, 888 A.2d at 1186-87 (citing *Attorney Grievance Comm'n v. Lee*, 387 Md. 89, 108, 874 A.2d 897, 908 (2005)). The Court explained that the peer review process is an informal and nonadversarial meeting designed to allow Bar Counsel, the respondent attorney, and the complainant to meet and discuss issues presented in the complaint. *Kinnane*, 390 Md. at 336, 888 A.2d at 1186. The Court further noted that although the panel review process is not governed by any formal rules of evidence, it must respect lawful privileges and its principal purpose is not to make recommendations as to the appropriateness of formal charges. *Id.* The Court held that compelling reasons in this case warranted an insulation of peer review panel reports from subsequent disclosure at later stages of the attorney discipline, especially considering the reports are non-binding, non-dispositive and purely recommendatory in nature. *Id.* at 338, 888 A.2d at 1187.

Although Kinnane did not specifically recommend a sanction for his conduct, he did contest and urge a penalty short of disbarment. *Id.* The Court of Appeals took notice of the purpose of attorney disciplinary proceedings: to protect the public and not to punish the erring attorney. *Id.* at 339, 888 A.2d at 1187. See *Attorney Grievance Comm'n v. Davis*, 375 Md. 131, 167, 825 A.2d 430, 451 (2003). However, the Court of Appeals of Maryland previously established the general rule applicable for an attorney's intentionally dishonest conduct in *Attorney Grievance Comm'n of Md. v. Vanderlinde*, 364 Md. 376, 413-415, 773 A.2d 463, 485 (2001). *Kinnane*, 390 Md. at 339, 888 A.2d at 1187. According to precedent, in the absence of compelling extenuating circumstances, the usual sanction is disbarment. *Id.* In applying *Vanderlinde* to the case at bar, the Court of Appeals held that Kinnane's deliberate dishonesty and intentional acts for personal gain required the sanction of disbarment. *Id.* at 340, 888 A.2d at 1188.

In *Kinnane*, the Court of Appeals of Maryland affirmed the grounds for disbarment in Maryland for violations involving the Maryland Rules of Professional Conduct. However, in so holding, the Court fashioned a middle ground and held disbarment to be a proper sanction only when the attorney's conduct is intentionally dishonest and without mitigating or compelling extenuating circumstances.