

DOUGLAS' CASE: LAWYER'S DISBARMENT UNDERScores THE IMPORTANCE OF CLIENT TRUST ACCOUNTS

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In a recent New Hampshire Supreme Court decision disbaring Caroline Douglas from the practice of law, the Court held that the Rules of Professional Conduct absolutely prohibit using a client's funds for a lawyer's own purposes, including payment of a bill owed by the client, without the client's consent. See Douglas' Case, No. LD-2003-004 (N.H. Dec. 28, 2007). We provide this Advisory to emphasize the paramount importance placed by our Court on proper management of client funds in the possession of attorneys.

Factual Background

Ms. Douglas' disbarment stems from her representation of Marjorie VanderKruik in a divorce case. During the course of the VanderKruik matter, Ms. Douglas became involved in her own divorce from her husband and law partner in the former firm of Douglas & Douglas.

On June 23, 1997, the court entered the final decree in the VanderKruik divorce. Pursuant to this decree, the court awarded Ms. VanderKruik funds held by her ex-husband's attorney in an escrow account, which totaled \$49,790.44. Although Ms. VanderKruik intended to use these funds to pay remaining debts and financial obligations associated with the sale of her marital home, as required by the divorce decree, Ms. Douglas suggested that she forward the funds to Ms. Douglas' trust account "so that she could protect them and keep them safe from Mr. Douglas." On August 18, 1997, Ms. VanderKruik requested that the funds from the escrow account be wired to Ms. Douglas' trust account; the bank completed this transaction on August 25, 1997.

On September 15, 1997, Ms. Douglas withdrew \$49,000 of the VanderKruik wired funds from her trust account. She later claimed that she did this because she had a 'premonition' that if she did not do so, it might be accessed by her husband. She also testified that she took the money as her fee and justified taking it because she was "in a cash crunch" and "really needed [it]," in contrast to her client, who was living with a multi-millionaire boyfriend who had "taken care of her for years."

Attorney Conduct & Liability Practice Group

Peter Beeson, Co-Chair
603.695.8517
pbeeson@devinemillimet.com

**Mitch Simon, Of Counsel
and Co-Chair**
603.228.1541
msimon@devinemillimet.com

Andy Dunn
603.695.8503
adunn@devinemillimet.com

Bob Dewhirst
603.695.8646
rdewhirst@devinemillimet.com

Shelagh C.N. Michaud
603.695.8703
smichaud@devinemillimet.com

DEVINEMILLIMET.COM

Shortly after taking the funds, Ms. Douglas used the money to pay fees to new attorneys who were taking her clients, payroll, and her firm's operating expenses. She did not safeguard any of the funds pending the resolution of the disputes between Mrs. Douglas and her husband; or between Mrs. Douglas and her client. (As early as May of 1997, Ms. VanderKruik had disputed elements of Ms. Douglas' bills.)

Later, on September 15, 1997, her husband, after learning of Ms. Douglas' bank withdrawal, secured an ex parte attachment on Ms. Douglas' trust account. The order prohibited Ms. Douglas from cashing, negotiating or otherwise withdrawing "any funds that she held for VanderKruik until further court order."

On September 17, 1997, Ms. Douglas wrote to Ms. VanderKruik, informed her of this attachment and indicated that it included "the account in which I hold your trust funds." This letter neglected to inform Ms. VanderKruik that Ms. Douglas had withdrawn \$49,000 from the account prior to the issuance of the attachment. On September 22, 1997, Ms. Douglas again wrote to Ms. VanderKruik informing her that she was closing her practice and advising her to obtain a new attorney. She also stated that she would "work to obtain a release of the attachment of your funds if your funds have been improperly attached by Charles Douglas" and that she would forward a final accounting within two week and the balance of the retainer account. Ms. Douglas again neglected to inform Ms. VanderKruik that she had already withdrawn funds from the trust account. Finally, on September 23, 1997, Ms. Douglas wrote to Ms. VanderKruik to inform her that she was entitled to the funds from the escrow account and that she had a lien of approximately \$50,000 on the proceeds. For the third time, she did not inform Ms. VanderKruik that she had already withdrawn the funds.

Based on these letters, the referee and Court found that Ms. VanderKruik reasonably believed that the funds remained in Ms. Douglas' trust account. As further evidence of her subjective belief, on October 8, 1997, Ms. VanderKruik requested that the Superior Court not release any of the \$49,790.44 to either of the Douglasses "since it is not theirs to have."

Additionally, between May, 1997 and September, 1997, Ms. VanderKruik disputed her bills from Ms. Douglas. Between September, 1997 and December, 1997, Ms. VanderKruik did not receive any itemized bills from Ms. Douglas. On January 7, 1998, Ms. VanderKruik reported her complaints to the fee dispute resolution committee alleging "many errors" in the billing and estimating that the law firm had received in excess of \$115,000.00 and were requesting a combined additional \$120,000.00. It was only after this complaint that Ms. Douglas finally informed Ms. VanderKruik that she had taken the \$49,000 as her fee.

The Court's Decision on Professional Conduct Issues

Based on these facts, the referee and the New Hampshire Supreme Court agreed with the Judicial Referee (Horton, J.) that Ms. Douglas violated

Office Locations:

111 Amherst Street
Manchester, NH 03101
T 603.669.1000
F 603.669.8547

300 Brickstone Square
Andover, MA 01810
T 978.475.9100
F 978.470.0618

49 North Main Street
Concord, NH 03301
T 603.226.1000
F 603.226.1001

Rule 1.15(a)(1), Rule 1.15(c), Rule 8.4(c) and Rule 8.4(a). The Supreme Court, however, decided that disbarment, not the recommended five-year suspension, was the proper sanction.

Rule 1.15(a)(1)

Rule 1.15(a)(1) requires that an attorney: (1) hold the property of clients or third persons separate from the lawyer's own property; (2) deposit funds in one or more clearly designated trust accounts in accordance with the provisions of the New Hampshire Supreme Court Rules; (3) identify all other property as property of the client; and (4) safeguard that property. Citing ABA/BNA Lawyers' Manual on Professional Conduct 45:505 (Jan. 24, 2007), the Court found that intentionally using a client's funds for the attorney's own purpose constituted "conversion," and a fundamental violation of Rule 1.15(a)(1). Ms. Douglas ran afoul of Rule 1.15(a)(1) by failing to safeguard her client's funds and instead using them for her own purposes.

Rule 1.15(c)

Pursuant to Rule 1.15(c), where the attorney is in possession of property to which the attorney and another person, including the client, claims an interest, the attorney must keep the property separate until the dispute is decided. The Court noted that the attorney may not "unilaterally seize the property, even if the lawyer believes that she has a valid retaining lien" and in the event of a fee dispute, as in the Douglas matter, the attorney may not "unilaterally withdraw her fees from the client funds." (quoting ABA/BNA Lawyers' Manual on Professional Conduct 45:1101 (July 25, 2007)). Ms. Douglas violated this rule when she took the money from the trust account prior to the resolution of a long-simmering dispute over billings with her client.

Rule 8.4(c)

Rule 8.4(c) states that it is professional malpractice for an attorney to "engage in conduct involving dishonesty, fraud, deceit or misrepresentation." The Court noted that "basic, premise (of this Rule) is that attorneys may not make misrepresentations to a client, tribunal or others." (Citing ABA/BNA Lawyer's Manual on Professional Conduct 101:402 (1/21/1998)). Based upon the misuse of funds, as well as the letters in which Ms. Douglas actively misled her client to believe that the funds remained in the account, the Court found that Ms. Douglas violated Rule 8.4(c).

Finally, the Court agreed that based upon the above described violations, Ms. Douglas also violated Rule 8.4(a) which prohibits an attorney from violating any of the rules.

The Court's Decision on Sanctions

In deciding to disbar Ms. Douglas, and not to accept the referee's recommendation of a five-year suspension from the practice of law, the

Court followed its traditional approach of applying the ABA Standards for Imposing Lawyer Sanctions (1992). The Court noted that the misconduct included numerous violations, that Ms. Douglas knowingly violated her duty to preserve her client's property, Ms. Douglas' prior disciplinary action for virtually the same misconduct, and Ms. Douglas' selfish motive. While it did note the delay in disciplinary proceedings and Ms. Douglas' personal or emotional problems as valid mitigating factors, it found that these did not outweigh the "several serious aggravating factors" at play in this case.

The Douglas decision underscores the lawyer's fundamental duty to protect client funds entrusted to his or her care; and the profound consequences that can occur when lawyers disregard this basic professional obligation.

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