IN THE SUPREME COURT OF THE STATE OF NEVADA

IN RE: DISCIPLINE OF EDWARD G. MARSHALL

No. 41399

FILED

DEC 17 2004

ORDER DISAPPROVING PANEL RECOMMENDATION AND ASSESSING COSTS

Attorney Edward G. Marshall challenges a Southern Nevada Disciplinary Board hearing panel's recommendation that he be publicly reprimanded and assessed the disciplinary proceeding's costs for violating SCR 157 (conflict of interest) and SCR 164 (client under a disability). We conclude that clear and convincing evidence supports the panel's determination that Marshall violated SCR 157, but we are not persuaded that a violation of SCR 164 has been demonstrated. We further conclude that Marshall's conduct would have warranted a private reprimand. Accordingly, we disapprove the panel's recommendation that Marshall be publicly reprimanded. We agree, however, that Marshall is properly assessed costs.

Facts

Marshall was retained in 1992 by Armand "Tony" Massa to prepare a will, amendments to a trust, and related documents. Both Massa and his wife, Carmen, were present at the initial meeting. Marshall met with Massa several times in 1992, and twice in 1993; at times Carmen was present, and at times she was not. Marshall prepared the requested documents in 1992 and 1993. On two occasions, Marshall physically assisted Massa in signing them. In February 1993, Marshall

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helped Massa with his signature by physically steadying Massa's hand with his own. By April 1993, Massa could not sign his name even with Marshall's assistance, and Marshall helped Massa make an "X" as "his mark" by placing his own hand over Massa's and guiding it. In addition to the will and trust amendment, Marshall prepared documents invalidating a prenuptial agreement between Carmen, Massa's second wife, and Massa. The effect of the documents prepared by Marshall was to decrease amounts going to the children of Massa's first marriage, Jacques and Sally, in favor of giving Carmen a larger share of Massa's estate. Also, documents transferring certain assets from the trust to a joint account with Carmen were executed.

Jacques testified that he had noticed a decline in his father's mental state following a stroke in November 1990 and prostate surgery in November 1991. In February 1992, around the time Marshall was retained, Massa's treating physician found that certain areas of Massa's brain had atrophied, and he diagnosed Massa with "mild senility." Nothing in the documents before us indicates that Marshall was aware of this diagnosis at the time Massa retained him. But Marshall acknowledged that he was aware that Jacques and Sally would almost certainly contest the documents. Despite this knowledge, he did not obtain any medical opinions on Massa's capacity before preparing the documents or assisting Massa in signing them.

In 1993, Jacques was appointed as Massa's guardian. As guardian, Jacques then sued Carmen for fraud, undue influence and conspiracy and asked that the documents be declared invalid. He obtained expert testimony that Massa's signatures on the documents prepared by Marshall were forged. Later, Jacques added Marshall as a defendant based on the fact that Marshall notarized the allegedly forged signatures.

Marshall continued to represent Carmen in the lawsuit for approximately two years, until he was eventually disqualified. After Massa's death in 1995, the administrator of Massa's estate was substituted as the plaintiff. In addition, when Carmen sought to admit the will prepared by Marshall to probate, Jacques and Sally contested its validity. The fraud case was dismissed under NRCP 41(e) because it was not brought to trial within five years, but the will contest was successful.[1] The probate commissioner concluded that by February 1992, Massa was senile and no longer competent, and that any documents executed after that date, which included all documents prepared by Marshall, were invalid. Finally, Jacques complained about Marshall to the state bar, resulting in the instant discipline proceeding.

Marshall maintains that Massa understood and consented to the terms of all of the documents Marshall prepared, and that it was permissible for Marshall to help guide Massa's hand in signing the documents. Marshall recruited a group of five witnesses for the first set of documents in 1992; most of these witnesses could speak another language in addition to English. None of them knew Massa, and they were each paid $100 for their time. Massa could speak English, Spanish, Italian and French, and conversed with the witnesses in at least three of these languages. Marshall argues that Massa's ability to converse in several languages at the time he executed the first set of documents demonstrates his capacity. In addition, three of these witnesses (those still alive) testified at the disciplinary hearing that they did not notice anything untoward about Massa's behavior.

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[1]See Shafer v. Massa, Docket No. 33721 (Order of Affirmance, February 7, 2001).

Marshall recorded this meeting, and had the tape transcribed. The transcript indicates that at times Massa was confused and his speech was garbled. He also cried several times during the meeting. Marshall asserts that no inference of incompetence should be drawn from the fact that Massa cried, because he was a man who freely expressed his emotions. The execution meeting took about three hours.

The state bar argues that medical testimony established that Massa became incompetent sometime following a stroke and the November 1991 prostate surgery, and that Massa was incompetent by the time Marshall was retained in February 1992. In support of this contention, the state bar relies on testimony by Jacques and Jacques' lawyer concerning a report from Massa's physician stating that Massa had "mild senility" by February 1992. The report itself is not in the record and the doctor did not testify, even though he was included on the state bar's witness list. Also, the record does not explain what "mild senility" means in terms of Massa's testamentary capacity. The state bar further argues that Marshall's conduct in failing to investigate Massa's competency, especially since Jacques and Sally were likely to contest the new documents, was an ethical violation.

According to Marshall, however, he was retained by a fully competent Massa to prepare documents that would protect Carmen's interests when Massa realized that Jacques and Sally would not provide for Carmen if Massa's estate went solely to them. Marshall admits that by the time Jacques was appointed Massa's guardian later in 1993, Massa "needed help," but he asserts that Jacques was motivated solely by greed, not by a desire to help his father. Marshall also presented the testimony of another doctor, who had reviewed the records of Massa's treating physician, and concluded that the records did not show that Massa was

incompetent. Marshall argues that helping his client to affix his signature or mark is not an ethical violation when the client has expressed his assent to the documents.

The hearing panel found that Massa was incompetent by the time Marshall was retained. It further found that Marshall knew that Massa was incompetent, or at least he had enough reason to question Massa's competence and to have investigated Massa's mental state before completing estate-planning documents that he knew would be subject to challenge by Jacques and Sally. The panel concluded that Marshall's conduct violated SCR 164 (client under a disability).

The panel also found that Marshall had a conflict of interest in representing Carmen in the fraud lawsuit filed by Jacques. In particular, the panel determined that Carmen had defenses to the lawsuit that would have implicated Marshall, and Marshall had not demonstrated that Carmen consented to the conflict. They further concluded that no reasonable attorney would have deemed the conflict waivable. Accordingly, the panel found that Marshall violated SCR 157 (conflict of interest: general rule).

The panel found no aggravating or mitigating circumstances. Based on the two violations found, the panel recommended that Marshall be publicly reprimanded and assessed the costs of the disciplinary proceeding.

SCR 164

SCR 164 (client under a disability) involves a complex, unsettled area of ethics.[2]

SCR 164 provides:

> 1. When a client's ability to make adequately considered decisions in connection with the representation is impaired, whether because of minority, mental disability or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.
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> 2. A lawyer may seek the appointment of a guardian or take other protective action with respect to a client, only when the lawyer reasonably believes that the client cannot adequately act in the client's own interest.

By its terms, the only duty imposed by the rule is to treat an impaired client as normally as possible. The language in the second part of the rule is generally viewed as permissive, and provides flexibility to allow a

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[2]See, e.g., Stanley S. Herr, Representation of Clients with Disabilities: Issues of Ethics and Control, 17 N.Y.U. Rev. L. & Soc. Change 609, 615 (1991); Marilyn A. Mahusky, Joseph A. Reinert & Beth A. Danon, Ethical Considerations When Representing a Client Who Is "Under a Disability", Vt. Bar J., Jun. 2002, at 62; Peter Margulies, Access, Connection, and Voice: A Contextual Approach to Representing Senior Citizens of Questionable Capacity, 62 Fordham L. Rev. 1073, 1073 (1994); Paul R. Tremblay, On Persuasion and Paternalism: Lawyer Decisionmaking and the Questionably Competent Client, 1987 Utah L. Rev. 515, 515 (1987); see also Annotated Model Rules of Professional Conduct, Rule 1.14 cmt. 5 (4th ed. 1999) (concluding unhelpfully that a lawyer for a client with questionable capacity is in an "unavoidably difficult" position).

lawyer to take "protective action" when the lawyer has a reasonable belief that the client cannot act in his own interests.[3]

Section 24 of the Restatement (Third) of the Law Governing Lawyers discusses the duties of a lawyer representing a client with questionable capacity. To the extent that the client cannot make decisions, the Restatement follows the "substituted judgment" model, i.e., the lawyer should "pursue the lawyer's reasonable view of the client's objectives or interests as the client would define them if able to make adequately considered decisions on the matter, even if the client expresses no wishes or gives contrary instructions."[4] In addition, the lawyer may seek the appointment of a guardian "or take other protective action" if practical and consistent with the client's objectives and interests.[5] The comments state that "[t]his Section recognizes that a lawyer must often exercise an informed professional judgment in choosing among those imperfect alternatives. Accordingly, each Subsection applies based on the reasonable belief of the lawyer at the time the lawyer acts on behalf of a client described in Subsection (1)."[6] The comments further caution against taking any unnecessary action, and emphasize that the client should remain in control of the representation to the extent that he or she is able.[7] Another comment notes that "[a] lawyer's reasonable belief depends

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[3]See Herr, supra n. 2, at 619-20; Mahusky, supra n. 2, at 64; Margulies, supra n. 2, at 1093-94; Tremblay, supra n. 2, at 545.

[4]Restatement, § 24(2) (2000).

[5]Id., § 24(4).

[6]Id., § 24 cmt. b.

[7]Id., § 24 cmt. c.

on the circumstances known to the lawyer and discoverable by reasonable investigation," and concludes that "[a] lawyer who acts reasonably and in good faith in perplexing circumstances is not subject to professional discipline."[8]

Most cases interpreting the rule address situations in which the client's lack of capacity is clearly established or when an advocacy role is clearly the best option because of the client's interest at stake, e.g., death penalty cases and civil commitment proceedings. We have found no case requiring an attorney who does not believe that a client is impaired to seek protective action. To the contrary, most courts require a lawyer to abide by the client's wishes, unless the client would be harmed or the client's position is absurd.[9]

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[8]Id., § 24 cmt. d.

[9]See Schult v. Schult, 699 A.2d 134 (Conn. 1997) (concluding that attorney for a child in a custody matter may advocate a position reflecting the child's wishes, different from the position of the child's guardian ad litem, if the court determines that it is in the child's best interests to permit such dual, conflicting advocacy); In re Georgette, 785 N.E.2d 356 (Mass. 2003) (holding that deviation from the normal attorney-client relationship is permitted only when the client cannot verbalize a preference or cannot make an adequately considered decision, and the client's expressed preference places the client at risk of substantial harm); Matter of M.R., 638 A.2d 1274 (N.J. 1994) (stating that the attorney's role is not to determine whether the client is competent to make a decision, but to advocate the decision the client makes, unless the decision is patently absurd or poses an undue risk of harm to the client); Clark v. Alexander, 953 P.2d 145 (Wyo. 1998) (noting that counsel for a child must maintain as near as possible a normal attorney-client relationship with the child and abide by the child's decision; counsel is not free to independently determine the child's best interests if contrary to the child's preferences, and holding that when lawyer serves in dual role as counsel and guardian ad litem, and lawyer's evaluation of the child's best interest conflicts with

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Here, Marshall testified that Massa wished to increase the amount his wife would receive upon his death, and decrease the amount his children from a previous marriage would receive. Massa did not completely eliminate his children from his estate plan; rather, it appears that they would have received a substantial portion of his estate even after the amendments Marshall prepared. It does not appear that Massa's expressed wishes were absurd or would harm him. Thus, even if under some circumstances a lawyer might be required to take some "protective action," clear and convincing evidence does not support a finding that Marshall had an affirmative duty to do so in this case. We acknowledge that some evidence indicated that Massa's mental condition and competency was questionable. And the task Marshall was asked to complete, preparation of testamentary documents, required that the client have testamentary capacity. But the state bar did not elicit testimony from Massa's physician to explain what "mild senility" means in terms of testamentary capacity, and did not even seek to admit the doctor's written

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. . . *continued*
the child's wishes, then the lawyer should communicate this to the court: both the child's wishes and why the lawyer disagrees).

report.[10] Under these circumstances, we are not persuaded that a violation of SCR 164 has been shown by clear and convincing evidence.[11]

We are troubled, however, by Marshall's conduct in physically assisting Massa to sign documents. Marshall cited no authority in support of his assertion that his conduct was permissible, and the state bar cited none specifically addressing this particular conduct. An Arizona case, Matter of Charles,[12] provides some guidance, however. In that case, a client had signed a power of attorney in favor of his lawyer, who kept the original in his office. When the lawyer went to visit the client in the hospital, the hospital demanded some evidence of the lawyer's relationship to the client. The client was ill and sleeping, so to avoid waking him, the lawyer signed the client's name to a power of attorney identical to the one the client had previously signed. The Arizona court nevertheless concluded that the lawyer acted improperly and imposed a censure for the lawyer's violation of Arizona's equivalent of SCR 203(3) (prohibiting conduct involving dishonesty, deceit, fraud or misrepresentation). Marshall's conduct in guiding Massa's hand may similarly have been

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[10]See, e.g., Matter of Estate of Kern, 716 P.2d 528, 534 (Kan. 1986) (stating that "[t]he test of a testamentary capacity is not whether a person has capacity to enter into a complex contract or to engage in intricate business transactions nor is absolute soundness of mind the real test of such capacity. The established rule is that one who is able to understand what property he has, how he wants it to go at his death and who are the natural objects of his bounty is competent to make a will even though he may be feeble in mind and decrepit in body") (internal quotation marks and citations omitted).

[11]See SCR 105(2)(e); In re Stuhff, 108 Nev. 629, 635, 837 P.2d 853, 856 (1992).

[12]847 P.2d 592 (Ariz. 1993).

improper. But no violation of SCR 203(3) was charged in the disciplinary complaint or pursued during the disciplinary proceeding, and so likewise we do not consider this issue further.[13]

SCR 157

SCR 157(2) provides:

> A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:
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> (a) The lawyer reasonably believes the representation will not be adversely affected; and
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> (b) The client consents, preferably in writing, after consultation.
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> When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

Here, the panel concluded that Marshall violated SCR 157 by continuing to represent Carmen after Marshall had been added as a defendant. The panel relied heavily on the district court's order disqualifying Marshall, which stated:

> Marshall and Carmen have a direct conflict of interest. Carmen has defenses to the alleged fraud that involved her lack of knowledge of any such activities. That position would place her in direct conflict with Marshall especially in the event any fraud could be proven. . . . In this case, there is no consent from Carmen. Even if Carmen

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[13]See In re Discipline of Schaefer, 117 Nev. 496, 515-16, 25 P.3d 191, 204-05, as modified by 31 P.3d 365 (2001).

> did consent after consultation to the representation by Marshall, the court does not believe that Marshall could reasonably believe that the client will not be adversely affected. The Court finds that in no situation, no attorney could reasonably believe that the client would not be adversely affected.

The record reflects that Jacques Massa presented evidence in the fraud lawsuit that Massa's signature on the documents prepared by Marshall was forged; notably, Marshall also notarized the allegedly forged signature. A jury could have concluded that Marshall, in fact, forged the signature. By continuing to represent Carmen, Marshall deprived her of the possible defense that she was unaware of any forgery, thus placing the blame on Marshall. This situation presented an actual conflict of interest under SCR 157.

Marshall argues that he was the only lawyer in Clark County who could defend this case, because of his familiarity with it and because he speaks Spanish fluently and so could easily communicate with Carmen, a native Spanish-speaker. Marshall asserts that Carmen's only hope was to stand united with him. He attacks his successor's tactical decisions and maintains that he would have been more successful. Marshall asserts that Jacques and his counsel would have done anything to get Marshall disqualified, and tried for almost two years before they were finally successful.

We perceive flaws in Marshall's arguments. First, the district court specifically stated that it did not appreciate the conflict's gravity at first, and that was why disqualification was initially denied. The district court at first reviewed the matter under SCR 178, prohibiting an attorney from serving as counsel when he will be a necessary witness, and concluded that while Marshall could not represent Carmen at trial, he

could continue representing her during pre-trial proceedings. Only later did the court apply SCR 157 and disqualify Marshall.

Also, that Marshall would have employed different tactics, possibly but by no means certainly with better results, does not erase the conflict. Finally, the state bar does not dispute that Jacques' motives in bringing the disqualification motion were not meant to assist Carmen, and that such motions should be closely scrutinized for that reason. But Jacques' motives were not the issue: Carmen's loss of possible, viable defenses was the issue.

Clearly, Marshall had a conflict in representing Carmen. We thus conclude that the panel's finding of a violation of SCR 157 is supported by clear and convincing evidence.[14]

Propriety of recommended discipline

As discussed above, we agree that Marshall violated SCR 157, but we conclude that no SCR 164 violation was shown. We determine that no more than a private reprimand would have been appropriate discipline in this case. Since this matter is already public,[15] a private reprimand is no longer possible. We therefore conclude that no further discipline is warranted.

The panel also recommended that Marshall be assessed the costs of the disciplinary proceeding. We note that almost all of the state bar's claimed costs consist of transcript charges for the several hearings in this matter. Our review of the record indicates that the volume of the transcripts is attributable in large part to Marshall's improper attempts to

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[14]See SCR 105(2)(e); Stuhff, 108 Nev. at 635, 837 P.2d at 856.

[15]See SCR 121.

introduce irrelevant and cumulative evidence. We therefore agree with the panel that costs are properly assessed against Marshall.[16]

It is so ORDERED.[17]

Shearing, C.J.

Agosti, J.

Rose, J.

Douglas, J.

GIBBONS, J., with whom MAUPIN, J., agrees, concurring in part and dissenting in part:

I disagree that costs should be assessed against Marshall. In all other respects, I agree with the majority.

Gibbons, J.

I concur.

Maupin, J.

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[16]See SCR 120(1).

[17]The Honorable Nancy Becker, Justice, voluntarily recused herself from participation in the decision of this matter.

cc: Howard Miller, Chair, Southern Nevada Disciplinary Board
Rob W. Bare, Bar Counsel
Allen W. Kimbrough, Executive Director
Paul E. Wommer
Edward G. Marshall