

Per Curiam:

FILED

Committee on Legal Ethics of
the West Virginia State Bar

DEC 17 1987

No. 17679 v.

Douglas Scott Rockwell, an Active
Member of the West Virginia State Bar

David W. Kinnear
CLERK OF THE
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

In this disciplinary proceeding Douglas Scott Rockwell, a member of the West Virginia State Bar, has been charged with improper use of client confidences or secrets and involvement in a case in which he improperly represented differing legal interests in violation of DR 4-101 and in further violation of DR 5-105 of the Code of Professional Responsibility. The Committee on Legal Ethics of the West Virginia State Bar has recommended that the respondent's license to practice law be suspended for six months. After reviewing the record, this Court believes that the evidence fails to show, clearly and convincingly, that the respondent improperly used client confidences. However, the Court does believe that his conduct created the possibility that he would improperly use client confidences and that his conduct also created the appearance of impropriety.

In 1969 Darwin M. Henesey, the father of Billie Jean Henesey McGee, the complainant in this matter, was killed in an automobile accident. In his will he appointed the Blakeley Bank executor of his will and trustee of his estate. Billie Jean Henesey McGee was named as a beneficiary of the estate. At the time Ms. McGee was nineteen years of age, and the Bank of Charles Town was appointed her guardian.

In the years following Mr. Henesey's death, five law suits were filed in conjunction with the administration of his

estate. The Blakeley Bank, as executor and trustee of his estate, was a party to each of those actions. In each of the actions the respondent, Douglas Scott Rockwell, represented the Blakeley Bank. In two of the actions the interests of the Blakeley Bank and Billie Jean Henesey McGee were parallel. In the other three actions Billie Jean Henesey McGee and the Blakeley Bank were opponents. The actions involved the the ownership of certain bank stock, the construction of the will of Darwin Henesey, the right of Billie Jean Henesey McGee's mother to a portion of the estate, the right of the Blakeley Bank, as trustee, to recover certain asserts from the Jefferson Investors, and the right of Billie Jean Henesey McGee to obtain certain funds from the Blakeley Bank.

After Billie Jean Henesey McGee reached her majority, she established a separate trust with the Bank of Charles Town by instrument dated August 27, 1976. It is unclear who prepared the trust agreement, but there is evidence suggesting that it was prepared by Thomas W. Steptoe, who, at a later time, was the respondent's law partner. The following year, on August 13, 1977, Ms. McGee and her husband, Richard McGee, sold a parcel of property which they jointly owned in Jefferson County and which was described as the "Orchard Hills property". Five days later, on April 18, 1977, a parcel of property referred to as the "Old Cave Road property" was transferred to the trust which Billie Jean Henesey McGee had established with the Charles Town Bank. The deed transferring that property, which indicated that a consideration of \$48,500 had been paid, included a release of dower rights by Billie Jean Henesey McGee's husband.

In 1983 Billie Jean Henesey McGee instituted divorce proceedings against her husband, Richard McGee. Mr. McGee retained the respondent, Douglas Scott Rockwell, to represent

him. During the divorce proceeding, Mr. Rockwell sought an equitable distribution of marital property. The only marital property was the home of the parties located on Old Cave Road and its contents. ~~The Old Cave Road property was the same property~~ which had been transferred to the 1976 trust in 1977 and was property which, according to the trust agreement, belonged beneficially solely to Billie Jean Henesey McGee. In the divorce proceeding, the respondent alleged that monies used to acquire the Old Cave Road property were joint funds of the parties and had come from the sale of the Orchard Hills property which had previously belonged to the parties. He asserted that the property had been placed in the 1976 trust so that Mr. McGee's children by a prior marriage would have no claim against it. He claimed that to allow Billie Jean Henesey McGee to retain ownership of the Old Cave Road property would be inequitable and would create an unjust enrichment of her. He also averred that Billie Jean Henesey McGee had made misrepresentations leading to Mr. McGee's giving up his claim to the property.

While the divorce proceeding was in progress, the respondent contacted John Dorsey, who was trust officer at the Charles Town Bank, about the status of the Old Cave Road property. Shortly thereafter, Mr. Dorsey contacted Thomas W. Steptoe for advice. At the time, Mr. Steptoe was the respondent's law partner.

Subsequently, the respondent filed a third-party complaint against the Bank of Charles Town. Following the filing of the third-party complaint, the evidence suggests that Mr. Steptoe informed the bank of a possible conflict, and another attorney was retained to represent the bank.

At the conclusion of the divorce proceeding the Circuit Court of Jefferson County recognized that Mr. McGee had rights in

the Old Cave Road property and entered an order directing Billie Jean Henesey McGee to pay Mr. McGee \$25,000 in settlement of his claims, to be paid upon the sale of the Old Cave Road real estate, but no later than July 31, 1985.

On June 28, 1984, Billie Jean Henesey McGee filed the ethics complaint instituting the present proceeding. In it she took the position that the respondent, Douglas Scott Rockwell, had extensively represented the Blakeley Bank in conjunction with the litigation involving her trust with that bank. She also alleged that under the circumstances it was improper, and a conflict of interest, for the respondent to represent her husband in her divorce proceeding.

A hearing was held on the ethics complaint on November 26, 1985. At the conclusion of the proceedings the Committee on Legal Ethics concluded that the facts and circumstances supported a finding that the respondent, Douglas Scott Rockwell, had been guilty of unethical conduct. Specifically, the Committee found that the respondent's representation of Richard McGee involved the relative worth of the parties and a dispute over the parties' ownership interest in their residence. The Committee also found that the respondent had filed a third-party complaint against the Bank of Charles Town as trustee for Billie Jean Henesey McGee which sought to prove the August 27, 1976, trust fraudulent and that the respondent's law partner had rendered advice to the Bank of Charles Town, a fact which the respondent should reasonably have known before the filing of the third-party complaint. The Committee inferred that the decision rendered against Billie Jean Henesey McGee in the divorce proceeding was the result of the respondent's inside knowledge of her affairs resulting from his representation of her trust at the Blakeley Bank.

In attorney disciplinary proceedings this Court has recognized that the burden is upon the Committee of Legal Ethics to prove the charges against an attorney by full, clear and convincing evidence. Committee on Legal Ethics v. Tatterson, W.Va. ___, 319 S.E.2d 381 (1984); Committee on Legal Ethics v. Daniel, 160 W.Va. 388, 235 S.E.2d 369 (1977).

In the case presently under consideration the respondent is charged with violating Disciplinary Rules 4-101(B) (2) and (3) of the Code of Professional Responsibility. Those disciplinary rules provide:

Except as permitted under DR 4-101(C), a lawyer shall not knowingly:

. . .

(2) Use the confidence or secret of his client to the disadvantage of the client.

(3) Use the confidence or secret of his client for the advantage of himself or of a third person, unless the client consents after full discussion.

The respondent is also charged with violation of DR 5-105. That disciplinary rule requires that an attorney decline proffered employment if his independent professional judgment in behalf of the client will be or likely will be adversely affected by the proffered employment or if it will involve him in representing differing interests.

In reviewing the record of this case, this Court notes that there is no direct evidence that the respondent used any particular knowledge that he acquired from the representation of Ms. McGee's trust in the divorce proceeding against Ms. McGee. Ms. McGee was pressed during the hearings in the case to identify an instance in which Mr. Rockwell had used such knowledge. She was unable to do so. For example, when asked how he had used the information against her, she testified:

A. He had all the knowledge from my mother's case and from the many times he knew all about my father's assets. He knew everything. He knew it all.

Q. But when did he use it?

A. He used it because -- he was always better prepared because he knew more than my own attorneys knew. He used it all the time.

Q. Well, how did

A. I don't know how to explain it. It's just that he made complete use of what he knew. He was so well informed of every asset I had or had ever owned. He knew it. My attorney had to spend hours digging things up and he already knew it.

When questioned by a member of the Committee on Legal Ethics, Ms. McGee was again unable to identify specific instances in which the respondent used information obtained from his representation of the trusts against her. The testimony proceeded as follows:

Q. I think the question to you is, do you know of any specific instances in which Mr. Rockwell used information concerning your financial background in the divorce proceedings in which he represented your former husband?

A. Right now, I can't, because I'm nervous, but if I think about it a little while, I probably can.?

After examining this evidence this Court cannot conclude that it demonstrates fully, clearly, and in a preponderating manner that the respondent actually used information relating to Ms. McGee's trust against her in the divorce proceeding. Nevertheless, there is a body of ethics law which indicates that an attorney should avoid representation of a party in a suit against a former client even where there is the possibility of a violation of a confidence or where the representation will result in an appearance of impropriety. In Informal Opinion No. 885 (November 2, 1965), the ABA Committee on Ethics and Professional Responsibility indicated that where an attorney undertakes to

bring an action against a former client, irrespective of any actual detriment, the first client might naturally feel that he has been in some way wronged if a judgment is rendered against him. The Committee indicated that, to maintain public confidence in the bar, it is necessary not only to avoid actual wrongdoing, but to avoid an appearance of wrongdoing. The Committee concluded with the statement:

The thrust of the foregoing authorities is, a lawyer should not accept litigation against a former client, under any circumstances if such would result in conflict of interests or disclosure of confidences of the former client

Moreover, the lawyer should avoid representation of a party in a suit against a former client, where there may be the appearance of a conflict of interest or a possible violation of confidence, even though this may not be true in fact.

ABA Comm. on Ethics and Professional Responsibility, Informal Op. 885 (1965).

This Court has recognized that it is inappropriate and improper for an attorney to represent a client in a situation which gives rise to an apparent conflict of interest or appearance of impropriety based on the lawyer's relationship with an opposing party. State ex rel. Taylor Associates v. Nuzum, ___ W.Va. ___, 330 S.E.2d 677 (1985). In syllabus point 2 of that case the Court stated:

Under the Code of Professional Responsibility, a lawyer may be disqualified from participating in a pending case if his continued representation would give rise to an apparent conflict of interest or appearance of impropriety based upon that lawyer's confidential relationship with an opposing party.

In the body of the opinion the Court amplified upon this:

A lawyer who is the recipient of a potential client's confidence is thereafter disqualified from acting for any other person interested

adversely in the same general matter, however slight such adverse interest may be. Sinclair v. State, 278 Md. 243, 363 A.2d 468, at 474-75 (1978). Even when there are doubts about the existence of an asserted conflict of interest, these doubts should be resolved in favor of disqualifying the lawyer. Westinghouse Electric Corp. v. Gulf Oil Corp., 588 F.2d 221 (7th Cir. 1978). See also American Dredging Co. v. City of Philadelphia, 480 Pa. 177, 389 A.2d 568, 572 (1978).

State ex rel. Taylor Associates v. Nuzum, supra at 681.

In the case presently under consideration, Mr. Rockwell has taken the position that he technically did not represent Ms. McGee when he was representing her trust at the Blakeley Bank. In the Taylor case the Court recognized that where client confidences are potentially involved, it is not essential that a formal attorney-client relationship exist:

It is a nigh universal rule that:

"The disqualification of an attorney by reason of conflict of interest will not be denied solely because there is no actual attorney-client relationship between the parties. A 'fiduciary obligation or an implied professional relation' may exist in the absence of a formal attorney-client relationship It is clear that when an attorney receives confidential information from a person who, under the circumstances, has a right to believe that the attorney, as an attorney, will respect such confidences, the law will enforce the obligation of confidence irrespective of the absence of a formal attorney-client relationship. Nichols v. Village Voice, Inc., 99 Misc.2d 282, 417 N.Y.S.2d 415, 418 (1979)."

State ex rel. Taylor Associates v. Nuzum, supra at 681. Rather clearly in the case presently under consideration the respondent did represent Ms. McGee's pecuniary interests and did gain knowledge of her financial affairs as a result of his representation of the Blakeley Bank, Ms. McGee's trustee. The Blakeley Bank was managing Ms. McGee's assets and was acting in her behalf in the course of the respondent's representation. This Court

believes that for all meaningful purposes the respondent was, at least, acting as counsel for Ms. McGee's interests. The later divorce proceeding in which Mr. Rockwell represented Ms. McGee's husband involved the question of the size of the parties' respective assets, incomes and financial contributions to the marriage.

This Court believes that a part of the subject matter involved in both representations was substantially related. Under the circumstances, this Court believes that there was a substantial possibility that Mr. Rockwell might have used confidences obtained in his first representation against Ms. McGee in the second representation. Certainly, the second representation created an appearance of impropriety. The Court believes that by engaging in the second representation Mr. Rockwell damaged Ms. McGee's confidence in the bar and engaged in an act which potentially would damage public confidence in the bar. Under the circumstances, the Court believes that Mr. Rockwell's action was improper.

The Court is also very concerned about the fact that the respondent and his law partner, Thomas Steptoe, were involved in giving advice to conflicting interests after the institution of the divorce. The respondent was clearly representing Mr. McGee in asserting a claim against the Old Cave Road property. In the development of the case he contacted Mr. Dorsey, a trust officer at the Bank of Charles Town, involved with the Old Cave Road property. After the contact, Mr. Dorsey, in turn, contacted Mr. Steptoe for advice. The trust officer, under his fiduciary obligation of loyalty, was under a duty of loyalty to Ms. McGee. There is evidence that Mr. Steptoe informed the respondent of his representation of the Bank of Charles Town in conjunction with Ms. McGee's affairs and requested that bank secure other counsel to handle the instant matter. This situation created the

possibility of the misuse of client confidences and created an appearance of impropriety. It also created a situation in which the respondent's firm was representing multiple interests, a situation in which the firm's professional judgment would likely be impaired. In situations of this type DR 5-105 requires that an attorney discontinue his association with his client.

Overall, this Court feels that the respondent was involved in a situation involving a high probability of misuse of client confidences and that his firm, at one juncture at least, was involved in representing differing legal interests. His actions certainly created an appearance of impropriety.

It is, therefore, Adjudged and Ordered that the respondent, Douglas Scott Rockwell, be disciplined by suspension of his license to practice law for the period of thirty days.

It is further Ordered that a copy of this order be certified to the Executive Director of the West Virginia State Bar and to all parties hereto.

STATE OF WEST VIRGINIA,

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County on the 13th day of January, 1988, the following order was made and entered.

Committee on Legal Ethics of
The West Virginia State Bar, Complainant

vs.) No. 17679

Douglas Scott Rockwell, a member of
The West Virginia State Bar, Respondent

On a former day, to-wit, December 17, 1987, came the complainant, the Committee on Legal Ethics of the West Virginia State Bar, by Jack M. Marden and Sherri Goodman Dusic, its attorneys, and presented to the Court its motion to clarify this Court's order of December 17, 1987, in the above referenced proceeding.

Upon consideration whereof, the Court is of opinion to grant said motion and doth hereby make the following clarifications of such order: (1) the effective date of suspension of respondent's license to practice law in the State of West Virginia is hereby ordered to be December 19, 1987; (2) respondent's license to practice law in the State of West Virginia is ordered to be automatically reinstated after the thirty-day suspension; and, (3) respondent is ordered to reimburse the Committee on Legal Ethics in the amount of \$1,145.15, for the actual and necessary expenses incurred in the investigation and hearing of this matter.

Service of a copy of this order upon the respondent shall constitute sufficient notice of the contents hereof.

A True Copy

Attest: 
Clark, Supreme Court of Appeals