

IN THE SUPREME COURT
OF THE STATE OF OREGON

In re:)
)
Complaint as to the Conduct of) Case No. 19-110
)
ELAINE D. SMITH-KOOP,)
)
Respondent.)

Counsel for the Bar: Veronica R. Rodriguez

Counsel for the Respondent: Wayne Mackeson

Disciplinary Board: Mark A. Turner, Adjudicator
John T. Bagg
Paul Mark Gehlar, Public Member

Disposition: No violation of RPC 1.7(a)(2). Trial Panel Opinion.
Dismissal.

Effective Date of Opinion: August 31, 2021

TRIAL PANEL OPINION

The Oregon State Bar (Bar) charged respondent with violation of RPC 1.7(a)(2), alleging that she had a personal conflict of interest while representing a client in a dissolution matter. Respondent had represented Larisa Voytyuk in 2007, advising her regarding a prenuptial agreement that barred Voytyuk from receiving spousal support in the event of a divorce. Respondent signed a certification in the agreement that she had advised Voytyuk of its terms and legal significance, and that Voytyuk had acknowledged her understanding of the document.

In 2017, Voytyuk again engaged Respondent, this time to represent her in a divorce action seeking spousal support. Voytyuk's husband moved for partial summary judgment based on the prenuptial agreement. Respondent argued, and Voytyuk stated in a declaration, that Voytyuk had signed the prenuptial agreement under duress and had not fully understood it due to language difficulties. The judge handling the divorce decided that Respondent had a personal interest conflict in making these arguments in light of her 2007 certification. The judge told Respondent to withdraw or she would file a Bar complaint. Respondent withdrew. The Bar commenced this action, alleging that Respondent could not have represented Voytyuk in challenging the prenuptial agreement without obtaining informed consent, which Respondent had not done.

The case was tried over video conference on May 21, 2021, before a trial panel consisting of the Adjudicator, Mark A. Turner, attorney member John T. Bagg, and public member Paul Mark Gehlar. The Bar appeared through counsel, Veronica Rodriguez. Respondent appeared and was represented by counsel, Wayne Mackeson.

As explained below, after considering the evidence and argument, we find in a two-to-one decision that the Bar failed to prove the charge by clear and convincing evidence. The majority of the trial panel finds that the Bar, and the judge who accused Respondent of the conflict in the first place, fundamentally misread the certification signed by Respondent in 2007. The charge here was premised entirely on this misreading of the document and is unsupported once the certification is properly understood. The charges are dismissed.

Public member Paul Mark Gehlar separately dissents, finding that the charge was proved by clear and convincing evidence.

We address the question of sanction in light of the possibility this decision is reviewed and our decision on culpability is reversed. The Bar contended that the appropriate sanction for the alleged charge is a public reprimand. We unanimously agree that a public reprimand is the proper sanction if the charge were proved.

FACTS

Voytyuk lived in St. Petersburg, Russia. She met her future husband, Charles Lamb, through an internet service that matched men with Russian women. Lamb traveled to St. Petersburg where he stayed with Voytyuk for a period of time. He also went to Moscow on the trip and spent time with two other women there. Lamb returned to St. Petersburg and told Voytyuk that he wanted her to come to Oregon with him.

Voytyuk came to Oregon on a “fiancée visa,” planning to marry Lamb. She moved in with him and a wedding date was set in June of 2007. A few days before the wedding, Lamb told Voytyuk that she had to sign a prenuptial agreement (the “Agreement”) or else he would not marry her and she would be forced to return to Russia. Lamb presented her with the Agreement that had been drafted by his lawyer. He told Voytyuk that she needed to have the Agreement reviewed by a lawyer. Lamb randomly selected Respondent to advise Voytyuk, apparently picking Respondent’s name from the phone book. Lamb and Respondent had no prior relationship. Lamb made an appointment through Respondent’s office staff for Voytyuk to meet with Respondent at Respondent’s office.

Voytyuk is a native Russian speaker. She testified that she had some limited facility with English in 2007, but did not understand many of the words in the Agreement. There was no interpreter present when Voytyuk met with Respondent.

Respondent initially met with Voytyuk to review the Agreement, and a second time to sign it. At trial, Voytyuk, who testified with the aid of an interpreter, was asked if she understood the legal significance and consequences of the Agreement at the time she signed it.

She said that Respondent had advised her that if Lamb died or they got divorced she would get nothing, but Voytyuk stated that the issue was not a concern of hers because “divorce was the furthest thing from my mind.” Tr. at 32-33. Voytyuk testified that prenuptial agreements were uncommon in Russia. Tr. at 52-53.

The RECITALS section of the Agreement provided, in relevant part:

“C. Each party has been fully informed of the nature and extent of the rights being determined, modified, or released by this Agreement. Each party has been advised by independent legal counsel regarding the legal effect of this Agreement and the waivers contained in it.”

* * *

“E. Each party acknowledges not only that he or she has read and fully comprehended this Agreement and all of its terms, but also that he or she has been afforded a full and complete explanation of all the rights waived, released, or relinquished by this writing.”

“F. Each party specifically acknowledges that he and she enters into the marriage relation in reliance on the validity of this Agreement, and would not enter into the marriage relation in the absence of this Agreement.” Ex. 2.

Voytyuk signed the Agreement with these representations on June 12, 2007.

Respondent and Voytyuk both confirmed at trial that Voytyuk told Respondent at the time that she understood her explanation of the Agreement. Voytyuk testified as follows

“Q. [By Ms. Rodriguez] So did you tell Ms. Smith-Koop at this March 2017 meeting that you had not understood it when you signed it in 2007?

“A. Yes, exactly. This is exactly what I explained to her, that basically when she asked me do you understand and I said yes, this was incorrect because in my mind this is what you need to say to sign it and I have to sign it.” Tr. at 35. She reiterated this later on re-direct: “I basically told her that I feel like I didn’t tell her the truth when I said back in 2007 that I understand the agreement...” Tr. at 65.

After receiving the express assurance from her client, Respondent signed the provision of the Agreement at issue here, entitled “CERTIFICATION OF LAWYER.” It stated, in relevant part:

“I have consulted with Larisa Voytyuk ... I have fully advised her of her property rights and of the legal significance of the foregoing Agreement; and ... **she has**

acknowledged her full and complete understanding of the legal consequences and of the terms and provisions of the foregoing Agreement and has freely and voluntarily executed the Agreement.” Ex. 2 (emphasis added).

Voytyuk and Lamb were married on June 15, 2007.

In 2017, Voytyuk decided to seek a divorce. She met with Respondent on March 1, 2017, to discuss the issue. At the initial meeting, Voytyuk told Respondent for the first time that she had felt pressured by her future husband into signing the Agreement. Ex. 5.

In order for Voytyuk to be eligible to claim any of Lamb’s social security benefits, the marriage had to last for at least ten years. Accordingly, Respondent and Voytyuk agreed to wait until after June 15, 2017, to file the dissolution petition.

The two met again on July 17, 2017, to discuss the matter and Voytyuk repeated her contention that Lamb had pressured her into signing the Agreement. Ex. 7. Respondent prepared the petition for dissolution on August 17, 2017, with input from her client, and filed it in Marion County Circuit Court on August 18, 2017. Ex. 10. At Voytyuk’s request, Respondent sought spousal support in the petition.

In response to the petition, Voytyuk’s husband filed a motion for partial summary judgment, arguing that the Agreement precluded an award of spousal support. Ex. 15. In October 2017, Voytyuk met with Respondent in order to prepare a response to the motion. Voytyuk again told Respondent that she had not understood the prenuptial agreement in 2007 and had not signed it voluntarily.

Respondent filed an opposition to the motion on October 13, 2017. The response stated that, “Petitioner did not sign the prenuptial agreement voluntarily ... Petitioner was under duress at the time she signed the agreement, and did not understand English well...” Ex. 17. Voytyuk also signed a declaration in which she stated, “I showed the prenuptial agreement to Ms. Smith-Koop, but I really did not understand it. I did not speak much English at that time because I had very little practice, and I did not understand listening to it. I signed the prenuptial agreement, but not voluntarily.” Ex. 17.

Oral argument on the motion was scheduled for November 27, 2017. At the direction of the judge hearing the motion, the Honorable Claudia Burton, the argument setting was converted into a status conference. The judge testified that after reviewing the submissions she had concluded that Respondent had a conflict of interest. At the conference, she told Respondent that she must either withdraw or Judge Burton would file a Bar complaint. The judge concluded that Respondent had a personal interest conflict because the arguments she was making about the enforceability of the Agreement put her certification at issue. Respondent disagreed because her certification only stated that the client had told her that she understood the agreement, which Voytyuk had done. Tr. at 90. The judge testified at trial that she told Respondent, “And I said the certification didn’t say your client told you she

understood. It says she understood.” Tr. at 109. Respondent notified Voytyuk and withdrew from representation on or about November 30, 2017.

Voytyuk was very upset about this turn of events and did not believe she and her lawyer had a conflict. Tr. at 40-41. She briefly hired another lawyer, but ultimately had to proceed pro se. The judge granted the motion for partial summary judgment, rejecting Voytyuk’s claim of duress and lack of understanding. In the end, however, Voytyuk was awarded spousal support on another basis argued by Respondent, ORS 108.725(2), which allows the court to award spousal support in spite of a prenuptial agreement barring such an award if denial of support would result in the spouse being eligible for public assistance.

ANALYSIS OF THE CHARGE

RPC 1.7(a)(2) states:

“Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a current conflict of interest. A current conflict of interest exists if ...

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.”

Conflict-of-interest rules are “based upon the concern that, when a lawyer undertakes the representation of a client with interests differing from the interests of the lawyer or the lawyer’s other clients, the lawyer’s judgment might become impaired or the lawyer’s loyalty might become divided.” *In re Knappenberger*, 337 Or 15, 27, 90 P3d 614 (2004) (quoting *In re Kluge II*, 335 Or 326, 335, 66 P3d 492 (2003)).

The Bar argues Respondent violated RPC 1.7(a)(2) when she was retained by Voytyuk to handle the dissolution proceeding and challenge the effect of the Agreement because Respondent had a personal interest conflict. The Bar’s argument, taken directly from its trial memorandum, is:

“Respondent violated RPC 1.7(a)(2) when she was retained by Voytyuk to represent her in her dissolution proceeding and seek spousal support because Respondent represented Voytyuk in the review of the prenuptial agreement that precluded spousal support and she certified that Voytyuk had understood the agreement. As the attorney advising Voytyuk in the review of the prenuptial agreement, Respondent had an obligation to ensure that, despite any language barriers, she explained and informed Voytyuk of the terms and consequences of the agreement before she signed it. When Respondent discovered that she failed to effectively communicate with Voytyuk about the terms and consequences of the agreement and that Voytyuk had lied to her about understanding the agreement, Respondent should have realized a conflict was created because

Respondent signed the certification in error and Voytyuk could assert a claim against her. There was a significant risk that Respondent's ability to effectively represent Voytyuk could be materially limited." OSB Trial Memorandum at p. 6.

The Bar's argument suffers from the same flaw that caused the judge to believe a conflict existed. The Bar states that "[Respondent] certified that Voytyuk had understood the agreement." Respondent did not certify that fact. Respondent certified that Voytyuk **acknowledged** she understood the agreement. There is no dispute that Voytyuk expressly told Respondent that she understood the agreement. Voytyuk later revealed that she lied to Respondent when she said this, but the Bar produced no evidence that Respondent should have been aware of this. Absent evidence to the contrary, an attorney is entitled to rely on a client's assurances that she understands what the attorney is explaining.

The Bar argues that "when Respondent discovered that she failed to effectively communicate" with her client and that her client had lied to her about understanding the agreement, a conflict arose because her client could sue her for signing the Lawyer's Certification in error. We disagree that this would create a claim by the client against the lawyer. By certifying that her client had "acknowledged" her understanding of the Agreement when, in fact, the client had done so, Respondent did nothing actionable. We are aware of no authority that would allow a client to sue a lawyer for relying on a client's assurances when the client was lying. The Bar certainly presented no evidence or authority to support the contention.

Similarly, Respondent's certification that her client "has freely and voluntarily executed the Agreement" is not actionable error on her part. The Bar presented no evidence that Respondent was aware of, or should have been aware of, any duress influencing Voytyuk. Moreover, Judge Burton ultimately held that Voytyuk had not acted under duress.

To prove a charge of misconduct involving a lawyer's personal conflict arising from an alleged error on the lawyer's part, "the Bar must show by clear and convincing evidence that the lawyer's error, and the pending or potential liability arising from that error, will or reasonably may affect the lawyer's professional judgment. That conclusion will depend on the facts and circumstances of each case." *Knappenberger*, 337 Or at 29 (construing former DR 5-101(A)). "The mere possibility of subsequent harm' does not constitute a significant risk; there must be a 'likelihood that a difference in interests will eventuate.'" *In re Spencer*, 355 Or 679, 692, 330 P.3d 538 (2014); see also *In re Tonkon*, 292 Or 660, 666, 642 P2d 660 (1982) (under former DR 5-101(A), at a minimum, there must be a "significant risk" that the lawyer's personal interest would affect his or her advice).

In this case we find no actionable error on the part of Respondent that could have affected her judgment.

Even if one could claim that Respondent's certification was in error, the Oregon Supreme Court recognizes that, "[m]any errors by a lawyer may involve a low risk of harm to the client or low risk of ultimate liability for the lawyer, thereby vitiating the danger that the

lawyer's own interests will endanger his or her exercise of professional judgment on behalf of the client." *Knappenberger*, 337 Or at 28. Since Voytyuk intentionally misled Respondent into signing the certification, it is hard to imagine a scenario where she could make a viable claim against Respondent for relying on her assurances. Even if one could map out a tenuous claim based on these facts, the risk to Respondent from such a claim is virtually zero, thereby negating its ability to create a conflict of interest implicating the Rules of Professional Conduct.

Some mention was made at trial of the possibility that Respondent could be called as a witness in light of her client's declaration statement that she did not understand the Agreement. That possibility is not an issue here. First, Respondent is not charged with a violation of RPC 3.7, which governs a lawyer acting as a witness. A respondent may not be found guilty of a rule violation that was not pleaded. See *In re Ellis and Rosenbaum*, 356 Or 691, 738, 344 P3d 425 (2015). Second, any testimony Respondent would give would be on an uncontested issue, which is allowed under RPC 3.7(a)(1). Voytyuk admits that she told Respondent she understood the Agreement when she signed it, and that she was lying when she did so. Respondent's testimony would only confirm what Voytyuk admitted to her in the first place.

The Bar argues that this case is like *In re O'Neal*, 34 DB Rptr 176 (2020), where the trial panel found an attorney violated RPC 1.7(a)(2) when she represented a client in a dissolution proceeding after personally obtaining a Family Abuse Protective Act (FAPA) restraining order against him. The respondent attorney had a pre-existing romantic relationship with her client and then began representing him in the dissolution matter. She obtained the FAPA order based on her declaration that the client had become violent during an argument. Opposing counsel in the dissolution matter told the respondent that she intended to call her as a witness adverse to her client since her testimony about the client's violent actions would undercut his request for parenting time. The respondent did not withdraw and was ultimately disqualified by the court.

In *O'Neal*, the respondent attorney had a personal interest in confirming the truth of her sworn statements about her client's behavior, while her client would want to deny or minimize her claim that he had acted violently. The trial panel held that the attorney's judgment might have been impaired by that desire and her loyalty might have been divided. Here, however, Respondent had no interest in contesting her client's claim of duress or lack of understanding because her client's statements did not challenge the truth of Respondent's certification.

We conclude that Respondent did not violate RPC 1.7(a)(2). The charge is dismissed.

SANCTION

Although we dismiss the charge here, we agree with the Bar's analysis of the proper sanction if the charge had been proved. The appropriate sanction under the *ABA Standards for Imposing Lawyer Sanctions* (ABA Standards), and Oregon case law is the minimum the rules provide, a public reprimand.

CONCLUSION

We conclude in a two-to-one decision that the Bar did not prove the charge by clear and convincing evidence. The charge of violation of RPC 1.7(a)(2) is dismissed. Public member Paul Mark Gehlar has filed a separate dissenting opinion, attached hereto.

Respectfully submitted this 29th day of July 2021.

/s/ Mark A. Turner

Mark A. Turner, Adjudicator

/s/ John T. Bagg

John T. Bagg, Trial Panel Member

DISSENTING OPINION

I find the respondent violated the Oregon Rules of Professional Conduct 1.7(a)(2). I find that the Bar proved the violations alleged in its complaint. Therefore, I respectfully dissent from the trial panel opinion.

The respondent admits to knowing on October 12th 2017 her client's position on the prenuptial differed from the representation in 2007 when the client signed the prenuptial agreement and the respondent signed the certification. As the Bar contends, this presented a conflict of interest limiting the respondent's ability to advise and represent her client.

The respondent should have recognized the conflicts of interest reconciling her advice in 2007 with her statements in the 2017 dissolution and spousal support matter. The potential conflicts include: Exposure to claims from either party to the prenuptial agreement for an error in certification; Exposure to claims from her client for inadequately advising her in 2007; Or becoming a witness in the spousal support matter.

In the 2017 marriage dissolution and spousal support case the opposing counsel asserts, "...**Responsibility** for any language translations or lack of understanding **falls to Wife's attorney**, who's duty was to convey, explain and inform the client..." (OSB Exhibit 19, page 3, emphasis added) This assertion clearly and directly places the respondent's interest in conflict with her client's interest. In her deposition to the Bar respondent answers that this did not raise any concerns of conflict of interest for her (OSB Exhibit 32 line 2-16).

The respondent's understanding of what constitutes a conflict of interest seems unduly narrow. As an example, in her deposition, respondent describes her system for determining if a conflict of interest exists: "Well, all of my clients are recorded in my billing system, so we just punch in a name." (OSB Exhibit 32, page 36 lines 6-18.) Such a system does not consider all the associations and considerations included in RPC 1.7. While this doesn't establish a conflict, it does reveal the limitations of her efforts in determining if a conflict existed.

The respondent could be called as a witness to establish how she fulfilled her duties to convey, explain and inform her client in the 2007 prenuptial, as she certified having done. The respondent's deposition taken on behalf of the Oregon State Bar (OSB Exhibit 32) illustrates questions she might have encountered.

In signing the prenuptial agreement respondent's client acknowledged she understood the agreement and was acting voluntarily. The client's signature is notarized, also noting the signing was acknowledged as voluntary. The Certifications of Lawyers adds another assurance. Each of these certifications comes with differing scope and standards dictated by the responsibilities of their position. The respondent's come with an attorney's obligation to her client and as an officer of the court. The questions in the deposition (exhibit 32, pages 10–18) examine how these responsibilities were addressed by the respondent preparatory to her certification.

Not including violation of RPC 3.7 in the Bar complaint does not invalidate consideration of the potential for the respondent to be called as a witness in determining if a conflict of interest existed. Since the respondent did not serve as a witness (She withdrew. The ultimately unrepresented client's request for spousal support went in a different direction, resulting in less support than initially sought.) she cannot be charged with 3.7. However, the potential to be called as a witness leads to a conflict of interest as she would have had to comply with RPC 3.7.

The client's satisfaction with the respondent's representation is not meaningful because she was not advised of the conflict and how it might affect respondent's representation.

Clients deserve representation without conflicts of interest. RPC 1.7(a)(2) demands representation not be materially limited by responsibilities to another client, a former client or a third person or by a personal interest. If a lawyer reasonably believes the lawyer will be able to provide competent and diligent representation, notwithstanding a current conflict of interest, the lawyer may represent that client after obtaining informed consent. In this case respondent did not discuss the conflict of interest with her client, she did not seek informed consent. RPC 1.7 requires preemptive action, anticipating a conflict of interest's limitation on representation. Ideally the conflict is identified before representation commences. However, if it is not anticipated once it becomes evident, the lawyer cannot continue representing the client without obtaining informed consent.

/s/ Paul Mark Gehlar
Paul Mark Gehlar, Trial Panel Public Member