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Delaware Supreme Court Clarifies Standards for Enforcement of Legal Ethics and Attorney Conduct

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Ethics Column: *The Bench*--March/April 2013

By Francis G.X. Pileggi, Esquire



In my last ethics column, I discussed a trial court opinion that imposed penalties on a lawyer for not citing applicable authority in a brief, and for not accurately describing another case cited in a brief. See my November/December 2012 column in *The Bench* available at the following link: www.innsofcourt.org/ethicsND2012. This current column is about a review of that decision by the Delaware Supreme Court in an opinion that establishes new rules and standards that will now apply in Delaware when trial judges seek to penalize lawyers for "not following the rules" of legal ethics and civil procedure.

The Delaware Supreme Court opinion in *Crumplar v. The Superior Court of the State of Delaware*, 2012 WL 5194074 (Del. Supr. 2012), involves the appeal by an attorney of a penalty, or sanction, imposed by the trial judge for what the trial judge regarded as a violation of the rules applicable to lawyer conduct. In brief, the trial court imposed a penalty of \$25,000 on the attorney for: (i) citing to an incorrect case name and citation for an otherwise accurate statement; and (ii) failure to discuss or distinguish applicable trial court authority raised in an opponent's motion.

Highlights of Legal Principles Promulgated

This opinion by Delaware's High Court announces new guidance for the application of Rule 11. The Delaware Rules of Civil Procedure track the federal rules, and federal cases construing Delaware's version of Rule 11 are often persuasive.

Rule 11, in sum, prevents an attorney from filing papers with the court that are not supported by good faith arguments. This decision establishes that an objective test applies to a review of an attorney's conduct to determine compliance with this rule. That is, the judge should measure the reasonableness of an attorney's conduct based on objective criteria, as opposed to an attorney's subjective "internal belief".

The Supreme Court explained that because an objective standard must be used to determine sanctions under Rule 11: "Delaware demands more from attorneys than pure hearts and empty heads." *Id.* at *5. In other words, "innocent mistakes" in terms of the absence of ill-will, may still be subject to Rule 11 penalties. Delaware's High Court clarified that "the attorney's duty is one of reasonableness under the circumstances; an attorney's subjective good-faith belief in the propriety of his actions does not alone satisfy Rule 11." *Id.* So, even if the attorney did not intend any harm, she may not be free of culpability. However, "an attorney who fails to respond directly to an opponent's citation of contrary Superior Court cases does not *ipso facto* face Rule 11 sanctions."

Standing

Delaware has long held that non-client litigants should not be allowed to use the allegation of a legal ethics violation to "retaliate" against an opposing lawyer. This addresses non-clients who seek to use arguments about legal ethics in a manner akin to a terrorist's tool.

A non-client litigant, moreover, does not have standing to argue that opposing counsel should be disqualified because of a conflict of interest. See *In Re Infotechnology*, 582 A.2d 215, 218 (Del. 1990). This concept is well-settled in Delaware, but that concept is now extended. In order for disqualification to be appropriate, "the litigant must show that the conflict prejudiced the fairness of the proceeding, not merely that a violation of the Rules had occurred".

This protects against parties who are officious intermeddlers and are more concerned with attacking opposing counsel than enforcing proper attorney conduct. See *generally* footnote 43 (citing to case supporting prejudice when an attorney was both a witness and trial counsel).

In Delaware, trial judges have no independent authority to enforce the Rules of Professional Conduct absent conduct that "prejudicially disrupts the proceeding." This limits the ability of Delaware trial judges to penalize attorneys for violation of the Rule of Professional Conduct.

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Rule 11 violations in Delaware, henceforth, cannot be the basis for attorney sanctions if a trial judge believes an attorney has committed misconduct "in the absence of prejudicial disruption of the proceeding." In light of the Supreme Court's exclusive power to supervise the practice of law in Delaware and enforce the Rules of Professional Conduct, the trial judge's proper course of action is to refer the matter to the Office of Disciplinary Counsel, an arm of the Delaware Supreme Court.

For a comparison of a recent federal court in Delaware applying Rule 11, see *Grynberg v. Total Compagnie Francaise Des Petroles*, 2012 WL 4095186 (D. Del. 2012).

Due Process Requirement for Penalties Imposed on Lawyers by Trial Judge

The Delaware Supreme Court in this opinion also announces a new standard of fairness in Rule 11 matters in which a trial court seeks to impose sanctions on an attorney sua sponte. Trial judges must enter an order describing the specific conduct that appears to violate Rule 11. Moreover, trial judges who unilaterally seek to impose Rule 11 sanctions on an attorney pursuant to Rule 11(c)(1)(B) need to comply with the following standard: "A 'reasonable opportunity to respond' when a court invokes Rule 11 (c)(1)(B) should include an opportunity for the attorney to present evidence and respond orally before a court imposes sanctions," 2012 WL 5194074 at *8. Thus, a new dawn emerges in Delaware that clarifies the ground rules for trial judges who seek to penalize lawyers for violations of the rules and arms lawyers with due process rights to defend themselves.

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