

Matter of Hess
Del. Supr. No. 369, 2002 (7/24/02)
Board Case No. 23, 2001

Disciplinary Rules Involved: DLRPC 1.3, 1.4(a), 1.15(a), 1.15(b), 1.15(d),
8.4(c), 8.4(d)

Sanctions Imposed: Two-Year Probation; Public Reprimand

By order dated July 24, 2002, the Delaware Supreme Court ordered that Peter E. Hess, Esquire be publicly reprimanded, subject to a two-year probationary period. The Court approved a Report and Recommendation on Sanctions that was submitted by a panel of the Board on Professional Responsibility ("Board"). The Board's report concluded, in accordance with the stipulation and joint recommendation of sanction entered into by the Office of Disciplinary Counsel ("ODC") and Hess, that he had violated the Delaware Lawyers' Rules of Professional Conduct ("Rules"), and that he should be publicly reprimanded and placed on public probation for a period of two years.

The disciplinary violations arose out of Hess' handling of an admiralty matter involving personal injuries to his client, Ralph E. Smith, Jr., and a subsequent audit by the Lawyers' Fund for Client Protection ("LFCP"). The facts alleged by the ODC were admitted by Hess. Smith's personal injury matter was long and complicated, involving two trials and three appeals to the Third Circuit. Prior to a fourth appeal, there was a mediation before U.S. District Magistrate Mary Pat Thyngne that resulted in a settlement of all claims, including future medical bills. In connection with the settlement, Hess agreed (and confirmed in writing to Smith) that he would forgo \$5,000 in attorneys' fees to which he was entitled under his contingent fee agreement with Smith, and agreed to set aside \$20,000 in escrow for the payment of Smith's outstanding medical bills. Hess reserved the right to reimburse his substantial out-of-pocket litigation costs (to which he had been entitled under the original contingent agreement). Hess paid a portion (\$12,000) of an outstanding bill to Smith's treating physician (after negotiating a settlement of the bill from approximately \$18,900 down to \$15,000), but failed to take the necessary steps needed to make a final determination with respect to the disposition of the escrow funds and then improperly transferred a portion of the \$8,000 in remaining funds (i.e., \$5,000) to his operating account. He also failed to communicate with Smith about his handling of the outstanding bills or the funds, and failed to respond to the eventual telephone calls from Smith about these issues. As a result of the Smith matter, an audit by the LFCP was conducted of Hess' law firm books and records. From 1998 through 2001, there were various deficiencies in Hess' recordkeeping, including,

but not limited to, failures to prepare monthly reconciliations and monthly listings of client balances.

Hess also failed, until December 2001, to file or pay his Delaware income taxes for 1998. Finally, Hess filed Certificates of Compliance with the Court which incorrectly stated that he was in compliance with various recordkeeping requirements (Certificates filed in 1999, 2000, and 2001), and that he had timely filed and paid taxes (Certificates filed in 2000 and 2001).

Hess admitted that he had (1) violated Rule 1.3, by failing to take action on behalf of Smith to resolve outstanding medical bills by using escrow funds that were to have been used for that purpose; (2) violated Rule 1.4(a), by failing to keep Smith reasonably informed about the resolution of the medical bills; (3) violated Rule 1.15(a), by transferring a portion of the escrow funds from his escrow account to his operating account, without first having fully resolved the outstanding medical bills; (4) violated Rule 1.15(b), by failing (1) promptly to deliver the balance of funds owing to Smith's treating physician following the settlement of that debt negotiated by Hess, and (2) promptly to account to Smith for his use and handling of the escrow funds that were to have been used for resolving outstanding medical bills; (5) violated Rule 1.15(d), by failing properly to maintain his law practice books and records for his escrow account and his operating account from 1998 through 2001; (6) violated Rule 8.4(c) and Rule 8.4(d), by filing inaccurate Certificates of Compliance with the Court; and (7) violated Rule 8.4(d), by failing to file and pay his 1998 Delaware state income taxes in a timely manner.

In determining the appropriate recommendation of sanction, the Board considered the serious nature of the disciplinary matter, the injury and potential injury, and that Hess' conduct was negligent in his handling of the Smith escrow funds, and knowing with respect to his books and records. As aggravating factors, the Board considered (1) the pattern of Rules' violations over an extended period of time, involving Hess' obligations relating to lawyer recordkeeping and Certificates of Compliance; and (2) his substantial experience in the practice of law. As mitigating factors, the Board considered (1) the absence of a prior disciplinary record; (2) Hess' efforts to rectify the consequences of his misconduct; (3) his present cooperation with the ODC and in the proceedings before the Board; (4) his recognition of the wrongfulness of his conduct, as evidenced by his admissions to all of the allegations made and the violations charged in the Petition for Discipline; (5) the hardship experienced by Hess in his law practice relating to the litigation matter he had handled for Smith; and (6) his record of public service.

The Court approved the terms of probation recommended by the Board, which included (1) Hess' completion of any and all payments due to Smith's treating physician; (2) reporting to the ODC by a licensed certified public accountant (monthly for the first year and quarterly for the second year) as to Hess' compliance with law office recordkeeping requirements and tax obligations; (3) an ongoing relationship with a practice monitor, Joseph

M. Bernstein, Esquire, to consult with Hess on a monthly basis and report to the ODC on a quarterly basis as to Hess' compliance with the terms of his probation; and (4) Hess' cooperation with the ODC and the LFCP, including audits on at least an annual basis at Hess' expense. Finally, as conditions of the disciplinary sanction, Hess was required to pay the ODC's costs, pursuant to Procedural Rule 27, as well as the costs of the audits performed by the LFCP.