

JAY P. CLARK

(Suspension)

On July 30, 2012, the Idaho Supreme Court issued its Remittitur that ordered that the Court's Opinion announced July 6, 2012 was final. On August 6, 2012, the Court entered an Order awarding the Idaho State Bar \$6,289.52 in costs. The Court's Opinion ordered that Mountain Home attorney Jay P. Clark be suspended from the practice of law in Idaho for three years, with eighteen months of the suspension withheld upon Mr. Clark being granted permission to transfer his license to active status under the applicable Idaho Bar Commission Rules.

The Idaho Supreme Court Opinion concluded the disciplinary case filed on May 20, 2009. In March 2010, Mr. Clark filed a Motion to Dismiss the Complaint, which was denied by a Hearing Committee of the Professional Conduct Board. A hearing was conducted before that Hearing Committee in December 2011. The Hearing Committee issued its Findings of Fact, Conclusions of Law and Recommendation in April 2011. Mr. Clark appealed that recommendation.

The Hearing Committee determined that there was clear and convincing evidence that Mr. Clark violated Idaho Rules of Professional Conduct 1.2, 1.3, 1.5(b) and 1.16(d). The Idaho Supreme Court held that the Hearing Committee's decisions were supported by clear and convincing evidence and were not clearly erroneous or arbitrary and capricious.

The case's factual and procedural background related to Mr. Clark's representation of an eighteen-year-old client, MV, who attended a graduation party where

alcohol was served. Upon leaving the party, RB, MV's friend, discovered that his truck was missing. Assuming that MV took his truck because he was the last person around it, RB and a friend drove to MV's parents' home. MV and his parents were on their front lawn, and RB inquired about his truck. MV stated that he did not know where RB's truck was and that he caught a ride home with some friends.

When the police arrived at the scene, they located RB's truck down the street. They then discovered that MV had RB's keys and duffel bag in his possession, both of which were in RB's truck when it was taken. MV's cell phone was also found in RB's truck. No one witnessed MV driving that night and he contended that he did not remember driving RB's truck home from the party. When questioned by the police, MV initially denied driving RB's truck and then later allegedly admitted to driving the truck while under the influence, but he did not remember making the admission.

After being arrested, MV refused to undergo a breathalyzer examination. MV was served with a citation and a Notice of Suspension for Failure of Evidentiary Testing ("Notice of Suspension"). The Notice of Suspension provided that MV's license would be suspended for refusal to submit to the breathalyzer examination, unless he showed cause why he refused to undergo evidentiary testing at a hearing no later than June 6, 2005, with the Elmore County Magistrate Court. Charges were filed against MV on May 31, 2005, the same day MV retained Mr. Clark to represent him. At their initial meeting, MV brought the citation and told Mr. Clark that he wanted a show cause hearing before the magistrate court because he did not want to lose his driver's license, which was a requirement for his job. Mr. Clark told MV that he may have sufficient grounds for a

show cause hearing because no one witnessed him driving RB's truck. Contrary to prior statements made on the record and admissions that he made in his Answer to the formal charge disciplinary Complaint, Mr. Clark later reversed course and testified that MV never told him at the meeting that he refused to take a breathalyzer examination because such a critical issue would have been reflected in his notes.

Mr. Clark filed MV's plea of not guilty, responses to discovery requests and a motion to continue, and was served with discovery on June 3, 2005 by the prosecutor. Mr. Clark never submitted a request for a show cause hearing to the Elmore County Magistrate Court. Instead, Mr. Clark mistakenly filed that request with the Idaho Transportation Department ("ITD"). When MV called the ITD to verify the status of his license, he was informed by the staff that his request for a show cause hearing had been sent to the ITD in error. MV then went to Mr. Clark's office and testified that at that meeting Mr. Clark informed him that the request was properly submitted and that, in any event, a hearing was irrelevant because his request had no merit. Mr. Clark testified that he called MV on June 3, 2005 to advise him that there were no grounds for the show cause hearing based on his review of the police report. MV denied that Mr. Clark called him that day and the call was not reflected on any billing statement. The Idaho Supreme Court noted in its Opinion that Mr. Clark's testimony contradicted his prior statements on the record and the admissions in his Answer, which generally asserted that Mr. Clark initially believed MV's claim had merit and that he knew that MV refused a breathalyzer examination.

Mr. Clark then sent the ITD letter to the prosecutor and indicated that the letter was sent in error to the ITD. He asked whether the prosecutor would object to a show

cause hearing with the Elmore County Magistrate Court even though that hearing had not been requested. The prosecutor responded that failure to properly present a request for a refusal hearing before the magistrate court resulted in the court losing jurisdiction over the matter. Mr. Clark agreed with MV to plea bargain with the prosecutor in order to withdraw MV's license suspension given his concerns with keeping his job. However, Mr. Clark never spoke with the prosecutor in order to pursue a plea bargain. MV then terminated Mr. Clark's representation and retained another attorney to represent him. That attorney filed a motion for a hearing regarding the license suspension, which was denied because it had not been timely requested. MV eventually entered a plea of guilty to the charge of minor in consumption. However, as a result of the license suspension, MV eventually lost his job.

Mr. Clark testified that MV signed a nonrefundable fee agreement and MV testified that he did not remember signing any fee agreement. However, Mr. Clark never produced a fee agreement. About a month after he terminated Mr. Clark, MV requested a refund of the retainer monies paid. In response, Mr. Clark claimed that the fee was nonrefundable. After MV filed a grievance with the Idaho State Bar ("ISB"), Mr. Clark sent MV a letter offering an itemized statement and a partial refund. The letter informed MV he could pick up the refund at Mr. Clark's office. Later, Mr. Clark sent another letter requesting MV make an appointment to pick up his refund. Mr. Clark did not send the refund to MV and did not send the check to his substitute attorney and testified that was because he did not trust that attorney.

When Mr. Clark responded to MV's grievance, the letter included a backdated billing statement and a copy of a backdated refund check and a proposed Affidavit for

MV. The letter stated that the Affidavit was to be presented to MV “for him to review and sign, which if he does sign, might prevent him from being sued for libel and slander.” It further asked the ISB to advise him if MV refused to sign the Affidavit so he could consider legal action. The Affidavit consisted of statements that were intended to suggest that Mr. Clark did not err in his representation of MV and that MV’s grievance was prepared by his substitute attorney. Mr. Clark admitted that the Affidavit was a threat in the sense that MV should tell the truth. Mr. Clark also claimed that he had a constitutional right to threaten to sue MV. MV refused to sign the Affidavit because he claimed the statements in it were not true. He also testified that he would not have filed a grievance with the ISB had he known he could get sued for libel or slander.

In May 2010, Mr. Clark sent MV a refund check in the amount of \$218.75. Mr. Clark discontinued his practice in 2006 and his license to practice law was placed on affiliate status and subsequently inactive status.

The Idaho Supreme Court determined that Mr. Clark’s due process rights were not violated by the ISB’s delay in filing the Complaint. The Court found there was no proof that the delay hindered Mr. Clark’s ability to defend himself, or was intended to gain an unfair tactical advantage. In fact, the Court found the delay was mostly attributable to Mr. Clark, not the ISB, since during the time when Mr. Clark filed his response to MV’s grievance and the filing of the Complaint, the ISB had the “daunting task of investigating five other grievances filed between October 2003 and January 2006 against Mr. Clark by his former clients. All of those grievances were investigated

separately, but also together as a group to determine if they presented a pattern of misconduct as per standard ISB procedure.”

The Court held that there was clear and convincing evidence that Mr. Clark violated I.R.P.C. 1.2 and 1.3 because he did not diligently pursue his client’s objectives by filing a request for a show cause hearing and plea bargain with the prosecutor. The Court found Mr. Clark did not abide by MV’s decisions concerning the objectives of representation and whether to settle the matter, and did not act with reasonable diligence. The Court found Mr. Clark’s claim that filing a show cause hearing was frivolous was preposterous given that he filed the request with the ITD on two separate occasions and later sent a fax to the prosecutor requesting a jurisdictional waiver.

The Court also found that the Hearing Committee’s decisions that Mr. Clark violated I.R.P.C. 1.5(b) and 1.16(d), were supported by clear and convincing evidence because Mr. Clark did not properly communicate the scope of his representation and the basis or rate of the fee to MV, did not enter into a written fee agreement with MV, failed to promptly refund any advance payment of the unearned portion of the fee, and failed to pay interest on the unearned portion of the fee.

The Court held the Hearing Committee’s decision that Mr. Clark violated I.R.P.C. 8.4(d) did not infringe on his First Amendment rights and was supported by clear and convincing evidence. The Hearing Committee held that Mr. Clark violated I.R.P.C. 8.4(d), by engaging in conduct that was prejudicial to the administration of justice because he made false statements to the ISB in response to MV’s grievance that were inconsistent with the admitted exhibits and testimony and because he threatened MV in

the Affidavit in order to persuade him to withdraw his grievance. The Court found that Mr. Clark had not provided any convincing argument or authority that he had a First Amendment right to threaten his former client with a lawsuit.

Based upon those findings, the Court held that Mr. Clark is suspended from the practice of law in Idaho for a period of three years, with eighteen months of his suspension withheld upon Mr. Clark being granted permission to transfer his license to active status under the applicable Idaho Bar Commission Rules. Prior to transfer to active status or reinstatement, Mr. Clark must demonstrate that he fully complied with the requirements of I.B.C.R. 516 and 517 and pass the Multistate Professional Responsibility Examination. The Court awarded costs to the ISB in the amount \$6,289.52, and held that Mr. Clark must pay MV \$109.37, which reflects the interest due with regard to the unearned portion of the fee. Upon any transfer or reinstatement to active status, the Court ordered Mr. Clark be placed on a period of probation for three years upon terms and conditions that include he maintain errors and omissions legal malpractice insurance during the probationary period.

Inquiries about this matter may be directed to: Bar Counsel, Idaho State Bar, P.O. Box 895, Boise, Idaho 83701, (208) 334-4500.